

Circumcision and German Law **Historical, medical, psychological and juridical aspects**

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I. Historical aspects

1. Circumcision in the Old Testament and in Judaism

[Summary: Narrative of references to circumcision in the Bible. (Genesis 24-26 , Genesis 11, Genesis 17, Genesis 34, Genesis 12). Differentiation between the original less severe form of circumcision „Milah“ and the radical version „Periah“ , introduced in the 2nd century B.C. by rabbis, to prevent „epispasm“ surgery, an attempt to reverse the milah circumcision by stretching the remaining foreskin remnants until they covered the glans of the penis again.]

2. Circumcision, Judeo-Christians and early Christianity

[Summary: Circumcision as a salvation requirement was questioned by Judeo-Christians. At the Jerusalem Council around the middle of the 1st century A.D. the position of Paul to renounce circumcision prevailed and cleared the path for early Christianity to gain independence from Jewish orthodoxy. In Judaism, the uncircumcised penis is still today viewed as a defacing physical blemish, which means that circumcision represents a cosmetic surgery as well. However, it does not intrinsically constitute membership in the Jewish community. Uncircumcised male offspring of a Jewish mother remain Jews, even if viewed as “second class Jews”.]

3. Circumcision in Islam

[Summary: Male circumcision is one of the keystones of Muslim identity, performed usually between 3 and 14 years of age. The question of whether the founder Mohammed himself was circumcised is unclear. Circumcision is not explicitly mentioned in the Koran. Female circumcision in Muslim culture is the exception, but is practiced in some areas of Africa and Asia. Reports of female circumcision in areas where it is not common are viewed as anti-Islamic propaganda. The uncircumcised penis is viewed as flawed, Muslim women are entitled to a circumcised husband.]

4. Secular, medically indicated circumcision

[Summary: The practice of circumcision in the US, where 50% of males are circumcised, is little known in Europe. The U.S. circumcision lobby keeps changing reasons and justifications for the practice from the late 19th century until today.

II. Circumcision practice

1. The Jewish ritual

[Summary: Description of how a mohel performs circumcision (including using sharpened fingernail to tear off the foreskin and orally sucking the blood of the circumcised penis).]

2. Circumcision in Islam

[Summary: Emotional recollection of an Iranian physician's own circumcision as a boy.]

3. Medically indicated circumcision

[Summary: Use of Plastibell and Gomco-clamp, Marilyn Milos' wake-up call experience as nurse and mother, witnessing her son's agony while being circumcised.]

III. Medical and psycho-traumatic aspects

[Summary: The myth of babies not feeling pain / from childhood physical trauma to adult sexual trauma.]

IV. Legal aspects of circumcision

1. Circumcision in German courts: Malpractice

In 2004, a Muslim circumciser of boys was held liable for aggravated battery (according to § 224/1.2 StGB) after having circumcised boys on behalf of their parents in at least seven cases. The 77 year old had been previously active as a circumciser in Turkey and in Germany, where he resided for more than 30 years. He was sentenced to a punitive fine of 2,100 Euros. However, the court had no objections about the circumcision itself. Far from it! In principle, the court took the line that the surgery would have been justified by the parental consent given (§ 228 StGB). Also the lack of an official permit was not viewed as harmful. These aspects did not matter in the end as they were made obiter dicta. What the court did object to was merely the unhygienic condition of the circumciser's "tool kit", where he kept miscellaneous items unrelated to his circumcising task, like his travel documents. The court deduced casually and matter-of-factly that, had the parents known of these unsterile conditions, they would have refrained from choosing the defendant. In other words, had the circumciser cleaned his tool kit and kept his travel documents in a different place, the court would not have objected to the circumcisions. This judgment can only be read as a warning to circumcisers to pay better attention to hygiene.

More differentiated deliberations can be found in records of civil court rulings, whereby it was almost always malpractice allegations that caused circumcision to end up before the courts. In one case, the circumcised son sued the circumciser after the circumcision had made two skin transplants and hospitalisation necessary. In this case, the court had declared the consent of the boy (9 years of age at the time of circumcision) as negligible, because „a nine year-old cannot be considered possessing the necessary maturity to assess the meaning and consequences of the procedure and its permission". On the other hand, parental consent to this non-medically indicated circumcision, being performed by a person not licensed as a medical professional and under unsterile conditions, was seen as running contrary to the wellbeing of the child and, therefore, is not covered by the parents' right of care and custody (§§ 1626, 1629 BGB)

According to custody law, parents do not have the authority to make irrational decisions to the detriment of their children, which is why their decision-making power is limited in most cases to medically indicated surgeries. An interpretation in the light of

Article 4 and Article 6 GG does not lead to different results, because the parents, without difficulty, could have appointed a physician equipped with religious authority who respected minimum medical standards, or they could have chosen a hospital.

2. Circumcision and personal rights

On 21 August 2007, the Frankfurt Higher Regional Court accepted a motion to grant a request of legal aid in a case involving the prosecution of the circumciser who, at the behest of the boy's father, circumcised the boy who was of such a young age that he lacked insight and ability to consent. The divorced mother of the child, not the father, was holder of custody, which is why the Senate left the question unanswered as to whether, and up to what age, consent by Muslim parents can be considered being within parental care and custody rights. In this ruling, circumcision, even if it results in no health disadvantages, was seen as being of significant importance to the cultural-religious and physical self-perception of the person concerned, and therefore, the decision about it – being part of the personal rights to self-determination about one's own life – does indeed require the consent of the circumcised. This ruling adds for consideration that it still is an open question whether non-medically indicated circumcisions could ever be covered by parental care and custody rights. Without effective consent, the court ruled this circumcision as a violation of personal rights and as unlawful bodily injury, which justifies damages for pain and suffering.

3. Circumcision and bodily injury

As to the existence of facts constituting criminal assault when performing circumcision, sometimes the attempt is made to declare them not subsumable for their social adequacy, and their irrelevance. – mind you, not so in cases of female circumcision, where one does not hesitate to call it mutilation. Irrespective of whether or not a milder light is shone onto the male version of circumcision, it still qualifies for the legal prerequisites of aggravated battery (§§ 223, 224 StGB). This also means that the necessity to file a demand for a prosecution in accordance with §§ 230, 229, 223 StGB does not apply and prosecution of the authority's motion is warranted. Unlike with cases of corporal punishment through parents - the practice of which does not necessarily have to imply physical damage - here certainly, a "pathological condition" is caused and thus fulfills the legal prerequisites of impairment of health. Therefore, any threshold of relevance no longer matters.

In Germany, for circumcision one cannot claim social adequacy to be empirically understood. Socially adequate behavior as a fundamental idea of the legal system to enable human coexistence, can have as a consequence the exclusion of statements of facts of offense per § 223 StGB, only if the probability of occurrence of detrimental effects is considered to be so low that the created risk is negligible or even permitted by law.

In the context of scrutiny for unlawfulness one would be redirected to the justifying consent. The first-mentioned criminal judgment recognizes, that adult circumcision is justified, given effective consent, because it is not evident that religiously

motivated bodily injury violates moral code. (§ 228 StGB), as long as no special circumstances come up. In particular, constitutionally guaranteed freedom of religion. (Article 4.2 GG) would tip the scales in favor of circumcision. However, the situation is different with circumcision of minors. Common ground is that the consent of the legal representative of the underage child cannot simply justify easily, because (among other reasons) violation of moral principles draws a boundary here. As to the consent of the minor, it is lacking entirely. Even during puberty and adolescence, the scope of discretion regarding the consequences of such a decision can hardly be expected, not to mention the fact that the circumcised are not even asked in most cases. Considering these facts, it is prudent to not look at the age of religious majority being age 14, but at the age of majority being 18 for effective consent.

4. Circumcision and basic rights

With regard to circumcision of underage boys on the basis of parental consent various constitutionally relevant legal positions conflict:

The ban on assault of (§§ 223, 224 StGB) and protection of fundamental rights of the child to physical integrity (Article 2.II-1 Var 2 GG; Article 2.I GG) in connection with the right to preserve one's personality (Article 1.I GG) collide with parenting rights (§§ 1626, 1629 BGB) as resulting from Article 6.II GG, the right of parents to religious education of children (Article 4.I GG) in connection with Article 6.II-1 GG, placing the child's interest in the center of parental care and custody duty, and of course the right to freedom in practice of religion under Article 4.I, II GG.

As in the latter judgement the court specifically points out, that the lack of official permission in itself would not lead to unlawfulness, it gives the impression that this judgement may owe this passage to another ruling by the Federal Constitutional Court, called "Muslim Halal slaughter verdict" from 1/15/2002. Here, the Constitutional Court granted legal exemption from the animal welfare law to a Turkish butcher and allowed him to slaughter warm-blooded animals without prior anaesthesia, which, according to §§ 4a-II-2.2; 4a-I TierSchG, is principally forbidden without permit. The court considered the rights granted in Articles 2-I, 4-I, 4-II GG warrant such exemption. Perhaps the court was of the opinion that, if circumcisions by religious specialists such as mohels or religiously authorized Muslim circumcisers are constitutionally not objectionable, an official permit might not be all that important. However, transferability of policy of law needs serious questioning, because the welfare-adverse killing of animals by way of ritual slaughter and bodily injuries which affect the core Article 2 –II GG represent, even prima facie, hardly comparable circumstances and because the animal welfare law banning slaughter without anaesthesia is already subject to breaches, such as in hunting.

The underlying dynamic causing tension is in fact the same in both cases: the requirements of federal law that prohibit the killing of warm-blooded animals without stunning (according to the Animal Welfare Act) and that prohibit bodily injuries (according to §§ 223, 224 StGB) are in conflict with religious resentments about these very prohibitions by civil and criminal law. In the case of

circumcision the government ban on assault (§§ 223, 224 StGB) interferes with Jews' and Muslims' religious commandment to circumcise. The "Muslim Halal slaughter verdict" is remarkable in as far as the Constitutional Court has not considered it necessary that the religious commandment be binding for all members of the religious community. Applying such logic in the case of Jewish circumcision, would mean that it's sufficient that only a small group would need to consider infant circumcision imperative in order to claim exemption from federal law.

Such tensions are certainly not uncommon, and case law finds itself confronted with them again and again. Just think of cases such as: failure to render assistance for religious reasons (up to and including refusal of lifesaving surgeries), violations of compulsory schooling, wearing of confessional garb (like the headscarf) by teachers in the classroom.

It dawned early on the Baden-Württemberg Ministry of Justice that a sovereign prerogative of religious freedom - especially in view of the excellent valuation which human life receives in the German Constitution - would lead to turmoil and rejections: "It is unimaginable that religious communities might exist, whose rites include the maiming or sacrificial killing of people. Yet, it is hard to imagine that even here the fundamental right of freedom of belief and freedom of religion should take precedence" (Fn 62) It is true, the protection zones of Articles 4 and 6 GG grant an intensively protected realm of freedoms with boundaries only immanent in the Constitution. Yet, § 1666 BGB stipulates in particular that the exercise of parental rights under Article 6-II GG is overseen by the community.

Can freedom of religion and parental rights of care and custody justify bodily injury to male infants, boys and adolescents? Do parental religious freedom and family law take precedence over the right to self determination and the right to physical integrity of a person? In answering this question we should be quite mindful that circumcision of infant male children has been justified since ages exactly, and not least, by fact that they cannot fight it, while at older ages, the risk increases that the men refuse the ritual. Forced circumcision in childhood is comparable to "branding", and represents a lifelong belonging to the respective religious community, even if the membership does not necessarily follow from it. Insofar – as stigmatisation – it also affects the human dignity of the child as protected under Article 1-I GG.

There is no doubt that the minor child has the right to self-determination and bodily integrity, nor is it questioned that circumcision is part of the practice of religion among Jews and Muslims. But is that enough to condone infliction of bodily harm to a not inconsiderable extent on infants, toddlers, boys and young men? In my assessment, Articles 2-I, and 1-I GG clearly take precedence over parental freedom of religion and parents' right of custody, so that non-medically indicated circumcision up to 18 years of age clearly meets the legal prerequisites of §§ 223, 224 StGB, thus being punishable as criminal assault.

One should especially keep in mind that the Constitutional Court has emphasized since his epoch-making decision on criminal abortion in continuous case law the protection of life based on respect for human dignity: "This responsibility to protect requires the state and its institutions, to shield and safeguard the life of the individual from unlawful interference by a third party" (see BVerfGE year 39 pp. 1,42, 49; BVerfGE year 46 pp.160, 164; BVerfGE year 56 pp. 54, 73). This duty of protection has its grounded in Article 1-I/2 GG, which compels the state explicitly to respect and protect human dignity (cf. BVerfGE year 46 pp. 160, 164; BVerfGE year 49 pp.89, 142; BVerfGE Year 88 pp.203, 251) This also applies to the right to physical integrity, in as far as it touches, like here, on human dignity.

Under the umbrella of the Constitution it is not comprehensible that one cannot postpone this intervention upon physical integrity until the onset of maturity and then let the mature individual decide himself, whether and in what way he wants to undergo the surgery, or not. Pious adults may have a hard time accepting such a delay by several years, because they are accustomed to circumcising their children as infants, young children or teenagers. However, under the purview of the German Constitution, human dignity and the right to physical integrity outweigh the right of parents to harm their children for religious reasons. To expect from parents the acceptance of such a delay seems to me to be the more tolerable as there is no mandatory age requirements for performing the circumcision in Islam. Therefore an adult circumcision is of course Koran-compliant. Jews, too, do not fall out of their religion if they have not been circumcised as infants. That the perspective advocated here may result in some kind of "circumcision tourism" - as was the case with "abortion tourism" under the regime of the old § 218 StGB - is a possibility that must be dealt with on its own.