

## **Minima Moralia**

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*It is a done deal that the legislator wants to make the circumcision of underage boys exempt from prosecution. How this can be done in compliance with the law (lege artis) has not been concerted yet. For the government's bill subverts elemental requirements of moral and law.*

The government's draft for a law on the permission of the circumcision of male children, which is supposed to be added to the (German) Civil Code as paragraph 1631 d, is not going to be a glorious chapter in the history of the German art of law making. Most likely any other draft would not succeed at this either. For the aim of the bill, the expansion of parental custody by the possibility to consent to the circumcision of their children unable of consent, collides with foundations of the legal order.

But the legal fight has been decided. The Bundestag (German Federal Parliament) is going to pass such a law of permission. This is undoubtedly clear since July 19<sup>th</sup>, when the parliament asked the government to draft a respective bill. Who disapproves of the bill's aim is now confronted with the more modest question whether at least the suggested path there is acceptable. The answer is: no, it is not.

The bill makes the guarantee of the sufficient protection of the child the premise of any legitimate circumcision, as its statement of grounds teaches us. Thereby it offhandedly meets the requirements of the "guardian duty"<sup>1</sup> that article 6(2) of the constitution imposes on the state. For subparagraph 1 of the proposed paragraph subordinates the intervention to medical standard norms. Like this, not only the well-versed handling of the scalpel is warranted, but also, most importantly, the "appropriate and effective" treatment of pain.

This is, at most, half the truth. In the norm's following, second paragraph, the reader, to whom the formulation on the medical standard norms suggested that the appropriate action of a physician is stipulated, is disabused: if the child is not older than 6 months, it may also be circumcised by a non-physician if he has been "designated to perform circumcisions by a religious community" and is "equally capable" of adhering to medical standard norms. This might be acceptable regarding the cut itself. Its execution is first and foremost a question of technique, which a Jewish circumciser (mohel) might master just as well, or even better than a maybe young physician.

More skeptical, one wonders about the "comparable" conditions of clinical sterility in the living room of a Jewish or Muslim family. But even that might barely still be presumed. However, one remains clueless confronted with the question how a non-physician can provide the "effective treatment of pain" required by the bill if the minimal conditions of efficiency can only be ensured by anesthetic methods that a non-physician cannot and is not allowed to apply.

The bill says no physician is needed for the circumcision in early childhood. Is this also true for the ensuing pain treatment? Silence. The science of legal interpretation provides

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1 This term describes the federal institutions' obligation to protect the child's well-being against its parents or legal guardian.

the answer: no, no physician is needed either. For paragraph 2 permits the execution of the whole procedure “according to paragraph 1” also by non-physicians and thus does not distinguish between cut and anesthesia. In doing so it entrusts both to non-physicians. Of course paragraph 1 requires that the non-physicians’ capacity is comparable with that of a physician, also in regards to anesthesia. But does that exist? No, it does not. A non-physician cannot and is not permitted to acquire such capacities. The German Medicine Act prohibits him from handling the required means and methods of anesthetic procedures.

Here the first dark gap opens up in the bill’s child protection. It is certain that the authors were aware of the fact that anesthetic means of sufficient efficiency for substantial procedures are inaccessible to non-physicians, let alone their competent application. This would explain the casual remark in the bill’s statement of grounds that “general and local anesthetics through intravenous anesthetic agents” are “unusual in the Jewish circumcision on the 8<sup>th</sup> day after the birth”; but a lot of times “ointments or suppositories are administered”. Period. Nothing more.

No word on whether the not used is not needed, whether the often administered is sufficient and thus acceptable for the children’s protection. The message is obvious: “applied ointments” and “administered suppositories” will be considered sufficient anesthetic techniques in the future as well. The “comparable” medical capacities of the non-physician have to be and can be restricted in regards to anesthesia, as they are taken away from him, the layman, by other laws. What else?

This is the point where child protectors of any provenience should lose their patience with the all too clever legislator. The ointment, with which the draft contents itself (not to mention the insubstantial allusion to “suppositories”) is a local anesthetic compound with the active agents Lidocain and Prilocain. It is referred to worldwide by the acronym EMLA (Eutectic Mixture of Local Anesthetics) and serves the anesthetization of the skin surface in the context of bagatelle surgeries.

In May of this year the most current and comprehensive evaluation of all studies on the question of sufficient pain treatment in the context of the circumcision of newborns and infants was published in the magazine “Anesthesia and Intensive Care”. EMLA, according to the authors, two Australian anesthetists, does have certain pain-relieving effects and is better than nothing. It is “substantially inferior”, though, to efficient local anesthetic methods like a circular blockade of the nerves around the genital area. The anesthetic effects of EMLA during circumcisions in the early childhood is hopelessly insufficient. In a series of tests with older boys, 25% of all participants were not even able to stand the much lesser pain of the mere loosening of the foreskin from its adherence to the child’s glans despite their anesthetization with EMLA. This confirms the apprehension that EMLA is ineffectual as a painkiller in the context of circumcisions in the early childhood.

The authors of the German bill are far removed from such apprehensions. Maybe they didn’t know about the Australian science report. That would be regrettable enough. But [didn’t they know] any of the numerous single studies with the same results neither? The Australian meta-study had been cited by the press long before the presentation of the bill and had been mentioned in the German Ethics Council’s debate on circumcision. Apart from this knowledge gap the authors present themselves well-read, in a surprisingly large spectrum of types of text for a bill, in fact. Nelson Mandela’s memoirs, according to

which in his ethnic group only the circumcision makes a man, is included as well as a Bavarian police order from 1843 that ordered a stubborn Jewish father to get his son circumcised. With affinity and emphasis the most current paper of the “American Association of Pediatrics” (AAP) from last September is cited as well, which declares the health benefits of circumcision as more significant than its risks – and which dozens of pediatric organizations in the rest of the Western world have marked as what it is: a partisan, selectively citing and ignoring, with false codes deceiving, in short, a scientifically insubstantial document driven by the politics of professional interest.

In the beginning of the upcoming year professional circles will be able to read this<sup>2</sup> in that very magazine “Pediatrics” that earlier provided the AAP's paper with worldwide resonance. The legislator would be well-advised to wait for the publication of this statement before he passes a law that is based on a scientific chimera.

All of this is unpleasant. It becomes a frank annoyance, though, when one considers the consequences of this legislative project: the legislative release from a guarantee for sufficient pain prevention in the context of circumcisions of the most pain sensitive of all children, newborns. On a side note the report mentions that in Israel circumcisions of children older than 6 months are only conducted under anesthesia. General anesthetics are dangerous for newborns and without medical indications unlawful. But the obvious question why they are prescribed for circumcisions as soon as they are at all possible and justifiable does not occur to the authors of the bill.

One suspects, why. The response 'because this is about a bagatelle for which ointments and suppositories are sufficient for newborns' would have been out of question. But so should have been the draft's nonchalance with the treatment of the pain sensitivity of newborns.

The way this bill treats the topic of the procedure's risks and possible consequences is a negative lesson par excellence. The reader is filled in on a little less than half a page of a total of 25: complications are “very rare and mostly insignificant” and asides from that one couldn't know anything.

For science is utterly quarreled in these questions. No less than 4 times in 10 lines one reads that "there were differing statements", "even in science opinions" diverged, "there were no verified insights" and "the experts' opinions are divided". The message is explicit: as a legislator one cannot enter such volatile ground. Here one has to content oneself and has to allow the unresolved questions to rest.

This is a gross misunderstanding of the legislator's purpose. The parliament does not have to solve controversial questions of science, but has to define and prohibit unlawful risks. And for this purpose he certainly doesn't need a verification by a majority opinion in scientific controversies. What he needs for a regulating intervention in cases like this, namely medically unwarranted, irreversible physical procedures on [children] unable to consent, and what of course constitutionally obligates him, is not more than that: trustworthy indications for a not infinitesimal number of sufficiently grave consequential damages. Tens of thousands of consequences like this have been documented. One can only marvel at the shrugging "ignoramus" of the federal department of justice's jurists - and even more so at the subsequent dropping of the subject.

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2 It is not entirely clear to me what the author refers to here. I assume “this” (“das”) refers to the statement by “dozens of pediatric organizations in the rest of the Western world”.

Informed about Nelson Mandela's status of circumcision and about the Bavarian officer from 1843, who personally and resolutely oversaw Jewish circumcisions, the reader doesn't learn in a single word about the half dozen fatalities resulting from complications during or after a circumcision in England, America, Canada, Israel and Norway in the past years that have been covered by the media, the last one six months ago in Oslo. Neither does the reader learn about a large American study from the year 2010 that identified that in 4,7% of 9000 cases, that is in more than 400 cases, pediatric urological surgeries were necessary as a consequence of complications.

Nothing either about two extensive studies from Korea and the United States on possible psycho-sexual consequences of the removal of the foreskin. The participants had sexual experiences before and after their circumcision. Almost 40%, respectively, expressed their "discontent" with the new condition. Nothing either about a dozen more studies on a dozen more risks. Because for every study that documents a certain type of damage you can find another one whose author comes to the conclusion that just this damage did not or did occur much more rarely. And this, suggests the bill, doesn't leave any options to the legislator to rely on this or that result in his decision.

That is wrong. Of course it is not necessary to demonstrate their (additional!) potential for damage for the verdict that circumcisions in the early childhood are unlawful. On the contrary, the lack thereof has to be proven in order for it to be allowed. The in the draft stressed "divergence" of scientific opinions condemns all efforts for such prove to failure. This realization is so obvious that one wonders which intention obstructed it. Certainly nobody envied the authors for their task that was impossible to solve satisfyingly: They had to present a bill that would generally allow a procedure that would never be allowed if it wasn't for its specific religious background. However, one would have wished for a bill whose statement of grounds would have treated the difficulty of its subject with more honesty and courage instead of trivializing it in order to hide its real dimension behind legislative silence.

The next dark gap in the bill's child protection is the waiver for the child's "natural veto power". Here, too, the bill's statement of grounds suggests the exact opposite. On August 23rd, the Ethics Council had demanded the recognition of a "development based veto power of the affected boy". This of course does not only refer to verbal dissent. Any distinct, even only creaturely defense reaction is sufficient, the shivering and crying of the 8 year old child like the screaming of the 8 day old baby.

The postulate's ethical idea is obvious. Every circumcision injures the child's body with an act of violence. No second act of violence should be added to this injury in order to break the child's will. The authors of the draft cite the Ethics Council's demand for a development based veto power in an affirmative tone and then explain their own provision like this: The "seriously and unambiguously expressed" will of the child "is not irrelevant". Rather the parents "are obligated to deal with the opposing will of the child in such a situation".

The legislative link of this parental responsibility is the second sentence of subparagraph 1 in the proposed new paragraph. It denies the parents the right to consent to the circumcision of their son if it, although in principle permissible, by way of exception jeopardizes the child's well-being. If this is the case with a kicking or screaming child is to be sorted out by the parents by "dealing with it". But not by acknowledging the opposing child's will and foregoing the procedure - what the Ethic's Council meant.

The parents already "dealt with" the question whether they want to circumcise their son considering his well-being before their decision. All Jewish parents know that circumcisions hurt their newborns; and all Muslim [parents] know, the father most likely from his own memory, that a 7 or 8 year old becomes fearful before the procedure and would like to escape, even in a festive environment. Why should the emphatic confirmation of the already known by the reluctant child move the parents to a different opinion than their earlier considerations in a new "examination"?

The bill simply moves the child's "veto power", intended as a tool against the parents, into the parents' authority. Did they deal with the child's resistance, they fulfilled their responsibility. They probably expected some kind of resistance. That means, they will regularly stick with their decision: pro circumcision. Since [the circumcision] itself does not pose a risk to the well-being of the child, says the bill, and since the child's resistance has now been duly considered, everything can go according to plan. This is nothing less than the inversion of the bill's content<sup>3</sup> into its opposite – and as a legislative testimony of legal sophistry a curiosity.

Subparagraph 1(2) of the new paragraph says more. An effective approval by the parents will be barred even<sup>4</sup> when, by way of exception, the child's well-being is jeopardized, namely "under consideration of its purpose". This [formulation] aims at, as is explained by [the bill's] statement of grounds, objectionable motives of the parents such as "aesthetic reasons or to impede masturbation". This thought is factually misguided, the insinuation that comes with it that one would be able to sort out shabbily<sup>5</sup> motivated intentions for circumcisions as adverse to the child's well-being is deceptive.

Thus, the circumcision, insofar and because it hurts, has to be legitimized exclusively in front of the child. It is obvious that the level of injury and thus the level of need for legitimization depends solely on the objective characteristics of the procedure: depth, painfulness, duration, level of risk – short, on the total weight of all its burdens on the child. They aren't affected by the parents' intentions, let alone modified. This shows that the procedure as such, once it is permitted, is accepted by law and is judged as not jeopardizing the child's well-being.

For if it was [jeopardizing the child's well-being], even the most benevolent parental intentions could not change anything about it being prohibited. Take, for example, the pastor's pedagogical spanking in Michael Haneke's "The White Ribbon". Today it would not be one iota more permissible, but would remain illegal and penally.

This is of course true vice versa as well. As little as good motives make something objectively adverse to the child's well-being permissible, as little make objectionable [motives] something objectively agreeable with the child's well-being impermissible. A mother who sends her 6 year old against his will to piano lessons twice a week does not jeopardize the child's well-being, even if she only does it so she wins a few hours for living out an adulterous relationship. A father who brings his hated stepson to a much needed dental treatment does not hurt his well-being, even if he only does it so he can sit there and delight in the child's fear and pain.

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3 The German legal term "Normprogramm" or "Rechtsbefehl" refers to the actual, practical implications of a law or rule, i.e. its actual regulation of actions.

4 In my opinion, the use of "even" ("auch") in this sentence does not make sense in the overall context of the article and the context of the sentence itself – it implies that a contrasting statement or argument follows, which doesn't.

5 for base motives

Shabby motives affect the morality of the parental agents. They do not even touch the question of the legal permissibility of a procedure on the child's body. If the circumcision as such does not collide with the child's well-being, it does not [collide with it] neither if its approval is born from an aesthetic or sex-educational whim of the parents.

It is alienating that the bill's authors seem to have a different opinion and seem to think that they can regulate it differently. Maybe one can comfort oneself [with the thought] that they only (or maybe not even) believe it. And yet one doesn't [even] have to point out the confusion of dozens of combinations of motives in which goals constitutive of permission and prohibition would have to paralyze each other. What if the father wants to circumcise [the child] for religious, the mother for aesthetic motives, or the father [wants to circumcise the child] in order to impede masturbation, the mother for cultural reasons? Or both for both reasons, as is often the case in the United States? Or if the shabby motive is congruent with the approved one? The christian-fundamentalist conviction that masturbation is sin and its impediment through circumcision a godly deed may be as absurd as one wants. But it is of religious nature and thus legally just as sacrosanct as the conviction that God literally dictated Abraham the mission contained in Genesis 17 to circumcise all boys on the 8<sup>th</sup> day after their birth.

As a program for the resolution of a targeted, albeit only perceived problem all of this is hopeless. And if the problem really existed it would be an open carte blanche for judicial arbitrariness, i.e. the exact opposite of the "legal security" that the draft is supposed to create. Thus one wonders if the authors themselves believe in what they wrote. Or if they secretly acquiesced with the pragmatic consideration that it will never come to an oath in regards to appropriate or inappropriate parental motives anyway. Every parental couple with the darkest motives only needs to respond with "cultural" or "medically-preventive" or "hygienic" to the respective questions. None of these responses is verifiable, none of them correctable, everyone is sufficient.

The draft praises itself for avoiding religious privilege; this is why "it does not differentiate by the parents' motivation", although it is inconsistent enough to postulate the filtering of invalid motives anyway. But if one explicitly releases the inner cover of the parental decision, one would not shirk from the admission of the consequence: in the future, circumcisions will be permissible for any parental motive and, (if one doesn't want to believe this) anyway possible without any problems. The fundamentalist father who catches his 8 year old son masturbating and slaps him in the face in order to break him from the habit is liable to prosecution. However, if he decides to let his son circumcise for the same reason under the (true!) declaration of religious reasons the new law paves the way for him.

The list of shortcomings is irritating, it is longer than the law it refers to and it is by far not complete. Some of these deficiencies are most likely not longer remediable in the regular course of political things. But the most important of them are: the yawning gaps in the protection of the affected children. Considerably stricter and more detailed legal requirements on the problems of pain prevention, the child's veto and the education of the parents on unlikely dangers such as the death of the child would be necessary. Additionally, considering all the grave consequential complications, a reporting obligation would need to be imposed. And much more.

It is plausible that one didn't want to write such a specific regulation in the Civil Code<sup>6</sup>. But this doesn't change the fact that it won't work without it. Therefore, the legislator could add a third subparagraph to the new paragraph that empowers and obligates the federal government to dictate the mentioned minima of moral and law in an implementing decree for paragraph 1631 d of the Civil Code on circumcisions in the early childhood. It would be nothing more than the protection of the remains of children's rights on a just still bearable level in a hardly bearable process. The draft's authors released the two major religious communities from all impositions that were, on top of the already unquestionable cut, possible to impose on the children. The legislator should at least reverse this relation of a painful unfairness.

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6 "Bürgerliches Gesetzbuch" (BGB).