

Legal Positions on Religious Circumcision*

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I. Introduction

In Germany, children are circumcised primarily on religious grounds. For this intervention, known in medicine as circumcision,¹ there may be other underlying motives, such as medical, hygienic, cultural, or aesthetic. Yet quite apart from the reason why a minor who is unable to consent should be circumcised, one always must ask if it is legally admissible. This question has not been considered legally (in Germany, in any case)² to date. Presently a clarification of this matter is pressing: above all, doctors need legal certainty so that they will not become, as surgeons for a day, recipients of demands for compensation or accused in a criminal case.

II. Professional literature

In German-speaking professional literature, one finds only isolated voices that comment on religious circumcisions. Thus Fischer explains, in his commentary on the Criminal Code, the one “predominant” opinion that religious circumcision should be outside the scope [of the code]. Kühl writes with regard to the feature of the injury to health, in Section 223 of the Criminal Code: “Circumcision of children on religious grounds, in particular of girls, also may be covered.” Both commentators rely on the textbook by Gropp, who indeed subsumes circumcision, “in particular of children on religious grounds” under the *corpus delicti* of Section 224 of the Criminal Code, yet accepts “a justification in the overriding interest of religious practice”. Other textbooks on criminal law are silent on this theme. In other legal literature, next to nothing is found.

III. Jurisdiction

In the case law there is no clear consensus. Until now, however, there have been only a few decisions that will be briefly outlined as follows:

* Review of the Higher Regional Court Frankfurt am Main, Decision from August 21st 2007 (4 W 12/07), published in: *Neue Juristische Wochenschrift* (NJW) 2007, 3580. This article was first published in: *Neue Juristische Wochenschrift* (NJW) 2008, p. 1568–1570. The original title reads as follows: *Juristische Positionen zur religiösen Beschneidung. Zugleich eine Besprechung von OLG Frankfurt, Beschluss vom 21. 8. 2007 – 4 W 12/07, NJW 2007, 3580 ff.* — The original notes 2–8, 10–11, 13–21 are all citations.

¹ *Id est Zirkumzision* rather than *Beschneidung*.

² Unlike, for example, in the USA, Canada, and England, where for a long time children have been routinely circumcised. There was and is a controversial discussion there about both the ethical acceptability and the legal admissibility.

To the *Amtsgericht*³ Erlangen there was at hand a case for decision, in which the district youth office had requested that the biological parents withdraw the right of parental care in health decisions, as well as proxy in matters regarding to passage [i.e. travel, presumably], from the biological parents, because the Muslim father had the intention to let the three-and-a-half-year-old child, living with foster parents, be circumcised. The AG deprived the parents according to section 1666 of the Civil Code of the right to undertake religiously motivated surgical procedures on the child, and explained this with the harm done to physical integrity and the risks of surgery (anesthetic, wound healing, scarring). At the same time the court took to prevent the father's departure to his homeland, which would involve a circumcision,⁴ deprived the parents of the right to represent the child in matters of passage [as before]. The appeal to the Court of appeals was without success. For circumcisions means the following: the AG sees in a religious circumcision no socially adequate action, but rather an affirmative constituent of the elements of the offense of causing bodily harm, which is not justified despite parental consent (at least in a situation such as the present case).

2. In 2002, the Higher Administrative Court of Lüneburg granted a right of compensation against the social assistance agency on recovery of costs for circumcision surgery to the parents of a boy circumcised on religious grounds. As explanation, the Senate referred to its own case from the year 1993. At the time they were to decide if the social assistance agency has to take over the costs for a "circumcision party" (analogous to the grant of aid for a Christian baptism). The Senate has affirmed the general ability to reimburse such costs,⁵ with the following substantiation: "The baptism and circumcision ... are ... comparable in their religious significance." – At the same time the court takes its decision to express its holding that religious circumcisions are in any case justified, either as socially appropriate or on ground of parental consent. Otherwise — if a religious circumcision would be illegal — the social assistance agency should not have committed to taking the cost.

3. In 2004, the Frankenthal *Landgericht*⁶ had to judge a situation in which the operator, not a doctor, had performed a religious circumcision erroneously because minimum medical standards were not met. The court awarded the plaintiffs for pain and suffering, because "... in religious circumcisions ... at least the standard applicable in Germany should be met". – Thus the court took no position explicitly on the question of whether parents may be justified⁷ to consent to a religious, i.e. not medically indicated, circumcision for minors who are unable to consent. One could certainly conclude, however, that the district court considered religious circumcisions to be permissible in principle, namely when the medical standard is met.

4. The facts just presented show one thing clearly: The legal issues for religious circumcision, to some extent, have not been clarified. In particular the court to date has not explicitly addressed the question as to whether a correctly (i.e. *lege artis*) carried out religious circumcision on children who are unable to consent (in whose place the legal guardians have consented) is an

³ Amtsgericht = Local Court.

⁴ Literally "with a circumcision to follow."

⁵ In this specific case, however, the claim was denied, because the necessary temporal connection between the religious circumcision and the celebration was lacking.

⁶ Landgericht = District Court.

⁷ Literally "take a justified action."

illegal act, namely bodily harm within the meaning of Section 223 of the Criminal Code. In any case, it would not be concerned with alleged parallels with baptism or about the compliance with medical standards.

IV. Legal system

In connection with the question of criminal liability it is to clarify whether a religious circumcision represents physical abuse. Ultimately, this is in the affirmative, because, due to the loss of substance, bodily integrity is violated, and this is not only irrelevant. At the same time it is said that the behavior is not socially acceptable. This raises the further question as to whether the person who holds custody for a child who is unable to consent can effectively consent to a religious circumcision. That depends on whether the parents are dispositionally authorized power, which is based solely on the child's welfare. Elsewhere I have extensively explained why religious circumcisions do not serve the child's welfare.⁸

While the law leaves hardly any doubt about the illegality of religious circumcisions, there has been no opportunity as of yet to clarify the question in court. Until now it was not necessary to take the position as to whether the legal guardians effectively can give consent in a religious circumcision for a child who is unwilling to consent.

V. The ruling OLG⁹ Frankfurt a.M. (August 21st 2007)

Also, the Frankfurt *Oberlandesgericht* (Higher Regional Court) has left open the question. The ruling also may be unproductive insofar as the decision contains relevant things in another respect about the issue of religious circumcision and at the same time problematic statements — namely the capability to consent.

1. The ruling — confined to the essentials — had the following facts: A boy born in 1993 had, represented by his mother, legal aid for a lawsuit for claims of pain and suffering. It was directed against the father, who was divorced from the mother. As a devout Muslim, he had procured a circumcision for the child when he was twelve years old — despite the lack of a medical indication, without the knowledge of the non-Muslim mother, and not holding the right of custody. The boy, suffering from the chronic disease of epilepsy, declared his agreement “under force”. — The *Landgericht* Hanau refused the request. A religious circumcision lacked “the taint of illegality” because on the one hand it represents a “good tradition” to follow “the example of the Prophet.” On the other hand, circumcision was a “rite, as the first step of a boy into the manly adult world.” Unlawful conduct also therefore does not exist, because for the twelve-year-old the ability to consent was present, “which is required to decide whether a religious rite should be performed or not”. The appeal against the refusal of the *Landgericht* was successful.

2. The Frankfurt Higher Regional Court has made a decision that, as a result, deserves approval. It should be without question that a circumcision carried out on a minor then represents a serious breach of his general person rights, if the surgical operation takes place without consent

⁸ In general terms also Kern, NJW 1994, 753 (756): “Parents may only assent to indexed [i.e. enumerated] operations...”

⁹ OLG = Oberlandesgericht = Higher Regional Court (Court of Appeal).

of the authorized party. Otherwise the matter would be that the minor him- or herself or legal guardian effectively declared the consent. Concerning the last described constellation, the judges of the fourth Civil Decision needed not to worry: the boy's father was undisputedly not the legal guardian, and the custodial mother was [too] far away to give consent to a circumcision.

The court concerned itself above all with the legal question of whether a 12-year-old is given the ability to consent with regard to circumcision. In this respect the court arrived at the correct result, in that it denied the capability to consent. But the reasoning is largely missing the power of persuasion.

a) Still, there is nothing to criticize in the chosen approach: it was to clarify when a minor has the necessary maturity to grasp the meaning and significance of circumcision for his life. The first Civil Chamber of the *Landgericht* Hanau had affirmed and expected the question of the capability of consent for a circumcision, short and sweet: "A 12-year-old boy ... normally knows of this tradition of Muslims and in this respect can alone make a responsible decision." This type of determination is not right in this matter. Taking the chamber at their word, so must it already be aware that circumcision is a matter of established religious practice in Islam, sufficient to affirm the capability of consent. But that would mean that the ability to consent would have to be assigned also to far younger children. There would be nothing to criticize thereto, if the conclusion were correct. It is not consistent, however, with established case law and certainly not to the law. Thus, the legal system leaves no doubt that it takes the meaning and consequences of the intervention as the starting point as criteria for the assessing the capability to consent. The results are especially clear in Section 40 IV No. 3 page 4 of the Medicines Act, which ties the ability to consent for minors to the ability "to realize the nature, significance, and scope (of the legal protection procedure) and align his or her will hereafter."

The Higher Regional Court has recognized this (although without systematic legislative attachment) and correctly assumes that there is "no fixed age limit" for "the ability to consent to surgical operations". Therefore, it is consistently and correctly, if the court searches for clues for the evaluation of the ability of consent, this could result in a declaration of maturity. It was also thus in the case, about which the Higher Regional Court had to decide concretely: the affected boy was — as we learn from the reasoning of the Senate — unstable and suffered from seizures. Strictly speaking, therefore, the Higher Regional Court even so did not have to take a position on the question as to at what age the ability to consent to circumcision is given in principle. The Senate has also seen, as it is found in the reasoning of the following sentence: "It can be left open ... up to what age can consent to a circumcision ... can be considered as included in education and legal custody." Despite this (correct) knowledge, the Senate remarks on another point of the decision that (as far as evidence is lacking for delayed maturity) the ability to consent should be affirmative after the completion of his twelfth year. Thus, the Higher Regional Court determines what could be left open and what it even wanted to leave open *expressis verbis*. Now this oddity was mentioned only in passing; rather it should be of interest to know what reasoning the court gives for the named age limit.

b) Insofar as it is based on Section 5 page 2 of the act about religious parenting (RelKEG), then a child after the completion of his or her twelfth year of life may no longer be raised against his

will in another creed than the existing one [i.e. the creed in which the child has been raised up until that point]. And from this the Higher Regional Court concludes in view of religious circumcisions that “a twelve-year-old has the ability to understand in such a decision”. This argument is not convincing. Section 5 page 2 of the RelKEG protects a twelve-year-old from an unwanted change of faith, because it arises only from will of the guardians’ change of change of faith. The law thereby ensures a status quo, but without allowing the minor to have an active disposal authority. In other words, a twelve-year-old maintains the right to retain existing beliefs/practices, but not to choose something new. Section 5 page 2 of the RelKEG gives the minor a veto at hand — no less, but also no more. The reasoning that the Higher Regional Court professes is therefore also on shaky feet because the reverse is much closer: on the one hand the law grants a twelve-year-old the right to speak out against another creed; on the other it denies him the implied authority to take on another creed independently. Transferring [this logic] to religious circumcision means this: A 12-year-old may object to a religious circumcision planned by the parents, on the other hand he himself cannot effectively consent to such.

c) The right effectively to consent oneself to a self-religious circumcision could follow for a minor from Section 1 Page 1 of the RelKEG: it allows from the completion of the fourteenth year of life freely to choose a creed. It is questionable, however, whether one can say with reference to the wording of Section 5 Page 1 of the RelKEG that religious maturity exists without exception from the completion of the fourteenth year of life. This question would be answered in the negative, if there are reasons to limit religious maturity of a minor despite the completion of the fourteenth year of life. To allow a circumcision to be decided [literally “to be decisive”] at this age, on the other hand one may argue that a circumcision is an irreversible intervention in bodily integrity, and so the legal right of waiver is of a completely different quality; it of course consists of the choice of creed and bodily intervention. On the one hand, whom the law declared ready to freely choose a profession, on the other hand must not be able to estimate the scope and importance of a bodily intervention and align his will accordingly.

One also can make the history fertile for this view:

When the law on the religious education of children was handed down in 1921, while it was borne from the “spirit of tolerance”, it should have been “with respect to any one-sidedness, any one confession or worldview”, but for the representatives it was in essence a matter of creating a law that ought to provide structure for the actuality that the conditions in Germany had fallen into disarray from the war. At that time the population was for the most part composed of Protestants and Catholics. Other creeds in actuality played no role in real life. Therefore, the legislature had in mind, above all, creeds that were characterized by baptism, communion, and confirmation; namely, Christian faiths. No one thought of the Muslim religion at that time in Germany.

The historic legislature thus did not have in mind creeds that bind members through bodily interventions. So it is with the current legislature, which likewise has not yet been concerned with such a matter. Therefore, it cannot be determined whether the legislature wanted to see such cases covered.

Now Islam does not make belonging to the religion depend on being circumcised, which is why a minor who has attained the age of fourteen can become a Muslim without problems. It is another matter if circumcision is a necessary condition for religious conversion, such as in many

movements of Judaism. One would deny this step to any minor who has attained the age of fourteen years and wishes to convert to Judaism, in this respect thus denying him religious maturity, at least until the achievement of the ability to consent with respect to the intervention in bodily integrity. That would contradict – at first glance – the wording of Section 5 Page 1 of the RelKEG. Another look, however, reveals that the age limit in Section 5 Page 1 of the RelKEG does not apply absolutely. If there were such a religious community in which membership depended on a visit of an entire day to a parochial school for a six-month period, this duty would collide with the present obligation of schooling in Germany (Article 7 of the Basic Law), to which a 15-year-old is subject. This example shows that the free choice of creed certainly has limits. As it specifically pertains to bodily integrity, the legislature by no means allows any religious act (for example, in the case of violation of morality).

Not differently, it is not indeed unethical, but at least not merely insignificant interventions in physical integrity. To that extent there is an objective reason that makes it necessary and thus permits one to modify Section 5 Page 1 of the RelKEG: to view it [as] in violation of the right of physical integrity. Therefore, after the age of 14 years [literally at the completion of the age of 14 years] there is no automation that makes the question meaningless as to whether the claimant is able “to recognize the nature, significance, and scope (the legal protection of intervention) and align it with his will hereafter.” The answer to this question depends on the individual case. With regard to the case law relating to the capacity to consent to interventions in one’s physical integrity, the age to accept the requisite maturity for assessment in the law should be between 16 and 18 years.

VI. Conclusion

If children unwilling to give consent are circumcised, it is to be seen if this is an unlawful act of bodily injury within the meaning of Section 223 of the Penal code, even when the person who has legal custody previously has agreed to the surgical operation. Sooner or later the case law will have to take a position as to the question of whether the consent of a legal guardian acts as justification for a child who is unable to consent. It would be desirable on the grounds of legal certainty, above all for doctors, for this case to be argued soon.

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