

Legal Limits of Circumcision in the Case of Minors

On the question of criminal liability of the surgeon under §223 of the Criminal Code

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While in North America the legal and ethical permissibility of circumcision of boys is being actively discussed, in Germany only (children's) surgeons and (children's) urologists, at best, are sensitized to the topic. These occupational groups find themselves in a state of legal uncertainty. Although German courts have now and then dealt with circumcision, no ruling exists at all to the following question: Does §223 of the Criminal Code apply to a surgeon who performs a correctly executed but medically unnecessary circumcision on an underage boy who cannot give his consent, yet with the consent given by the persons entitled to custody? The author of this essay asserts that this is so, and explains when a circumcision is medically indicated, and why – in cases lacking medical indication – hygienic, esthetic, ritual, cultural or religious reasons do not justify the violation of bodily integrity.

I. Introduction

Circumcision of boys is not a mass phenomenon in Germany, unlike in North America where in the 1980s the majority of infant males were routinely circumcised¹. While the ethical justifiability is under highly controversial discussion there, hardly no one deals with this topic in this country – neither ethically nor legally. This holds less true for physicians, for whom it is not uncommon to be confronted with such surgeries that are often not medically indicated². Among jurists, however, circumcision and questions that come with it hardly attract interest. It's not easy to come up with an explanation for these findings, even though increasing numbers of cases where circumcision has given cause to lawsuits end up in (civil) courts³. Conceivably, this reluctance by scholars has its roots not only in lack of interest, but also in apprehension of offending religious feelings. Those who think along these lines may be superficially concerned about harmony ('not rocking the boat'), yet they overlook that a scholarly dispute is not fueled by the intention to criticize religion, but by the search for answers to the question of whether circumcision of boys is consistent with our legislation. It is essential and therefore indispensable for an open society to allow and withstand such provocative conflicts⁴.

An examination of the problem is also important, because physicians especially need legal certainty, or else risk becoming liable for claims of damages for pain and suffering or even become defendants in a criminal proceeding. Therefore, this paper clarifies the question of whether a surgeon is criminally liable, according to §223 of the Criminal Code, if he performs a correctly executed, but not medically indicated circumcision on an underage boy who cannot give his consent, yet with the consent given by the persons entitled to custody.

II. Statement of Facts of §223/1 StGB

A person who circumcises another person fulfills the elements of the offense of inflicting bodily injury according to §223/1 StGB, if the surgery constitutes physical abuse or detriment to the health of the circumcised.

Physical abuse by common definition exists in the case of inappropriate and severe treatment that significantly affects physical wellbeing or bodily integrity⁵. During a circumcision the foreskin (prepuce) of the penis is partially or completely surgically removed. This procedure violates therefore bodily integrity. It makes no difference whether the circumcised experiences the procedure as painful or not (perhaps as a result of being anesthetized during the surgery and the healing process does not result in additional pain)⁶. Its intensity is not inconsequential (as would be the pulling of a single hair) not least because of the subsequent wound healing. Hence, the impairment associated with circumcision is significant.

For the invasion of bodily integrity to be called “inappropriate and severe” the surgeon must act against socially acceptable principles, i.e. create a legally condemned danger through legally condemned action. Only an evaluative decision can determine if the action is legally condoned or condemned. The ultimate point is to weigh the pros and cons of permitting circumcision. The benefits of circumcision, on the one hand, must be balanced against the harm it does on the other hand⁷.

The damage exists in the loss of the foreskin. Removal of the foreskin renders it “lost” forever and reconstruction is extremely difficult. While there are efforts to extend the remaining skin of the penis - using weights and other means - to the degree that the glans is covered again, at best the results bear only a visual resemblance to the foreskin. Some consider the loss of the foreskin as insignificant because they view the foreskin as nothing more than “a few millimeters of skin”⁸. This view ignores the irrefutable changes caused by circumcision. Without the foreskin the glans is no longer kept moist, but stays permanently exposed to a dry environment. As a result, the skin of the glans becomes tougher causing a decrease in sensitivity⁹.

In addition, the risks associated with circumcision are to be considered. Severe complications, like a urethral fistula¹⁰, are certainly rare, but do occur especially with circumcisions not performed by a physician¹¹. There are also known medical malpractice cases of complications occurring after physician-conducted circumcisions¹². Far more common are complications occurring without the surgeon’s culpability. They have to be acknowledged accordingly. Meatal stenosis is diagnosed in up to 32% of circumcisions of baby boys¹³. Finally, the possible psychological, mental and emotional consequences are to be taken into account. There are indications that older children experience the procedure as an assault that causes harm to their body¹⁴. With infants it was assumed for a long time that their ability to experience pain was non-existent or undeveloped¹⁵. This view has been proven wrong. Even fetuses experience pain from at least the 22nd week of pregnancy, not to mention infants’ “pain memory” after birth¹⁶, which is why local

anesthesia is recommended¹⁷. However, the effects that neurological anesthetics, in particular, may have on an infant are practically unknown¹⁸.

The above mentioned detriments and dangers are not without dispute. There are enough reports and studies that praise the benefits of circumcision and suppress or understate the fact of its disadvantages. This may be the reason for classifying circumcision as a “socially adequate act”¹⁹. However, it is contradictory to speak on one side of social acceptance of circumcision, yet on the other side place the medical therapeutic procedure outside the bounds of social adequacy by demanding a “special justification”²⁰. A criminal liability exists equally for physicians and circumcisers. Without justification, nobody is permitted to interfere with another person’s bodily integrity²¹. Therefore one cannot conclusively designate circumcision as socially adequate behavior (this is also true for religious circumcision)²².

What remains (beyond the more or less controversial disadvantages) is an interference with bodily integrity that is not socially adequate. On balance, it can be stated that there is a good case to be made that circumcision is an impermissible risk. It constitutes a severe and unreasonable treatment of the body; in other words, physical abuse²³. In this respect it does not matter whether the circumcision is performed by a licensed physician or by other individuals (like a Jewish mohel or a Turkish *sünnetçi*).

III. Unlawfulness of Circumcision

The legal prerequisite of physical abuse according to §223 StGB²⁴ would not be met, if justifiable grounds were present. As such, consent has to be considered in the case of interference with bodily integrity. If valid consent is given, the surgery is justified in case of a medically indicated circumcision, as well as in the case of a procedure performed for other reasons (i.e. religious, hygienic, esthetic etc.) The consent is effective only if the consenting individual possesses the natural ability to reason, as well as discretionary power²⁵.

1. In minors, as a general rule, the natural ability to reason is not present. Natural ability to reason is defined as the ability (mental and ethical maturity) to recognize the meaning of the legally protected right and the consequences of abandoning it, as well as the ability to express one’s will accordingly²⁶. Jurisdiction is rather constrained. In principle, it grants the natural ability to reason, even in case of medical therapeutic treatment, only upon onset of the age of legal majority²⁷. The question as to when the natural ability to reason can be assumed with regard to circumcision has been addressed so far only by the Higher Regional Court (OLG - *OberLandesGericht*) Frankfurt. According to the ruling by the OLG Frankfurt, the natural ability to reason is assumed with completion of the 12th year of age, unless there are indications of retardation in development²⁸. With regard to the indication of that specific age, the court refers to §5/2 of the law governing religious child education (RelKEG - *Religioese Kindes Erziehungs Gesetz*). Accordingly, after completion of twelve years of age, a child may not be educated against his/her will in a religion other than the one s/he grew up with heretofore. To therefore extrapolate from this that in the case of circumcision “a twelve year old is equipped with the ability to reason in such a decision”

is not a convincing argument. §5 RelKEG protects a twelve-year old from involuntary change of religion – a change being based solely on the will of another individual entitled to custody. Therewith, the law secures the status quo, without conceding the 12-year old's active decision-making capacity. This right is bestowed only on the 14-year old by §5/1 RelKEG. Because of interference with the bodily integrity in the present case, the natural ability to reason does not occur automatically. Instead, it has to be examined if the person affected is able to recognize the nature, the meaning and the consequences (of the intrusion of his legally protected interest) and to express his will accordingly (cf. §40/4-3,4 AMG). Looking at the jurisdiction regarding the ability to consent to intrusion of bodily integrity, one finds the necessary ability to reason assessed to be between 16 and 18 years of age²⁹.

2. As long as the ability to reason does not exist, the person entitled to custody can give consent. Legally, consent can only be given when the consent-giving individual possesses discretionary power over the legally protected interest which, in the case of circumcision, is bodily integrity. This can be affirmed if custody, according to § 1627/1 BGB (*BundesGesetzBuch*), is carried out for the “wellbeing of the child”. A decision does not serve the “wellbeing of the child” when his interests are being violated³⁰. The point is to weigh within the framework of a cost-benefit analysis all pro and con aspects of circumcision³¹.

a) In principle, this weighing falls toward benefits in cases when, under a physician's care, the surgery is “medically indicated and the physician is aware of it”³². When these prerequisites are met and the surgery is performed *lege artis* with the patient's consent, the elements of offense to bodily injury are justified.

The surgery is only medically indicated if it aims to “...prevent, detect, heal or alleviate illness, suffering, bodily harm, physical afflictions or emotional disturbances...”³³. This, for instance, would be the case of a manifested phimosis. But also chronic or recurring balanoposthitis or infections of the urinary tract can, in rare cases, justify the surgical removal of the foreskin³⁴.

It is questionable to what extent a rather purely preventive yet unnecessary procedure can be considered a justifiable treatment. Especially in cases of circumcisions without an acute disorder present, prevention is often invoked as justification for the surgery. Allegedly, circumcision prevents various carcinomas (penile, cervical cancer), HIV-infection, different venereal diseases (like syphilis and gonorrhoea) and last but not least, urinary tract infections, phimosis and paraphimosis³⁵.

To burden male minors with a violation of their bodily integrity to prevent cervical cancer is unjustifiable. Women assume their own responsibility of risk when taking part in sexual intercourse. With regard to penile cancer and venereal diseases, the benefits outweigh the harm only if the circumcision decreases the risk of future diseases more than just insignificantly. This, however, requires determining that future risk. It is distinctly low. With urinary tract infection the incidence rate is 1.12%³⁶. For penile cancer, the American Cancer Society points to the fact that the mortality rate is

superseded by the mortality rate of circumcision³⁷. The probability of encountering complications due to phimosis, paraphimosis or balanoposthitis in the course of a lifetime lies between 2% and 4%³⁸. It appears no different for syphilis and gonorrhoea. Here, too, highly divergent studies exist, some even stating an increased risk for venereal diseases among the circumcised³⁹.

Recent studies conducted in Kenya and Uganda made the headlines. Their findings indicated that the risk of HIV-infection in heterosexual men is 50% lower among circumcised versus intact men⁴⁰. But does this conclusively make circumcision an effective preventive measure against HIV-infection, in other words, a treatment? After all, the WHO recommended circumcision as a preventive measure⁴¹.

On the one hand, it has to be considered that the alleged connection between cause and effect is by no means clear and without ambiguity⁴². The authors of the above-mentioned study themselves refer to the fact that there are no straightforward explanations for the empiric effects. The studies do not include any statements about the sexual behavior of the circumcised men nor of the control group's. On the other hand, the infection risk is an important factor in determining whether a medical procedure can be validated as a preventive measure. The WHO also emphasizes that the recommendation for circumcision be issued with the caveat of the infection risk. Given the circumstances, circumcision may have decreased the number of HIV-infections in Uganda and Kenya and may therefore be an effective preventive measure there. However, for an assessment of whether this can be equally said for Germany, the local circumstances have to be taken into account. In this respect, the number of new infections among the age group of interest, i.e. minors, is extremely low⁴³. The argument cannot be denied that the infection risk increases demonstrably in those beyond 18 years of age - as sooner or later everybody becomes a member of the at-risk group. Although this fact cannot be denied, it does not convincingly imply the necessity for circumcision of boys of minor age. Once a male has reached maturity and possesses the natural ability to reason concerning his legally protected rights, he can comfortably make the decision for or against circumcision himself. There are no disadvantages arising out of waiting. On the one hand, the risk of HIV-infection does not increase significantly. On the other hand, a circumcision without increased surgical risk is still possible once the concerned person possesses the ability to reason.

Certainly, for the risk group of minors restricted to Germany, no validity can be given to the WHO's recommendation. Given the small risk group, substantial grounds are lacking to support the classification of circumcision as a preventive measure with regard to AIDS⁴⁴.

The same holds true for other diseases and conditions for which prevention is claimed (phimosis etc.). The detriments (loss of foreskin, intrusion of bodily integrity, surgery risk) outweigh the (dubious) benefits. A circumcision that serves purely as prevention is therefore, in principle, not a medical treatment. Such a surgery does not serve the wellbeing of the child, which is why consent given by a person entitled to custody is void and therefore does not have a justifying effect.

b) As circumcision is no adequate measure to prevent the above mentioned diseases, and thus does not constitute a medical treatment, it has to be examined if there are valid reasons beyond medical indications that are critical enough to outweigh the detriments of a circumcision (seen as an intrusion into bodily integrity).

aa) Hygienic⁴⁵ reasons are often quoted, sometimes also esthetic reasons. It is questionable that these can justify an intrusion into bodily integrity. To ensure hygiene, regular personal body care is certainly a milder means than circumcision⁴⁶. If surgery can be avoided, because other less radical measures can achieve the intended result, then the more radical surgery does not serve the wellbeing of the child. The same holds true when the reasons are purely cosmetic. A minor does not gain any benefit from it, and it is not unlikely that as an adult his esthetic sense may be entirely different.

bb) Besides medical, hygienic and esthetic reasons, in many cases motivations for circumcision are found to be religious⁴⁷. The discussion about the legitimacy of religiously motivated circumcision is primarily an emotional one. Maybe this is the reason for the numerous opinions to be found⁴⁸.

Concerning the question whether, in the case of a child's circumcision motivated solely by religion, consent given by a person entitled to custody can justify the bodily injury, one has to look again at the wellbeing of the child. Pros and cons of a religious circumcision must be pondered, whereby the benefit must outweigh the detriment. I already discussed above the damaging aspects. They comprise the significant violation of bodily integrity, the risks during and after surgery, psychic strain (with the scarcely examined long term effects), and not least, the irreversibility of the procedure.

What are the benefits claimed by a religious circumcision? Neither in Judaism nor in Islam can the benefit be seen as an acquisition of membership in the religious community. According to the rules of both religions, circumcision does not constitute, but rather affirms, religious membership⁴⁹. However, as means of identification, circumcision is important⁵⁰. It is undeniable that forgoing an identifying procedure can have far-reaching consequences. It can even have a stigmatizing effect not to be circumcised in societies where circumcision is practiced. However, this factor alone cannot justify religious circumcision, because a legal question cannot be resolved by shifting it onto an extralegal level. This would be exactly the case if an action would be permitted solely because it has a tradition. Religious traditions to which a child is exposed through birth must be permitted to be examined for their compatibility with national and international law. This is not to say that society-specific circumstances should not play a role; indeed just the opposite. The social milieu of the child is an important factor to be considered. Yet, it should not be alleged to be the only criterion, especially when the concern is to avert danger for the child⁵¹. This applies to a higher degree if the milieu would automatically change with a legal prohibition that were respected. As more boys remain intact, the less their status will become reason for stigmatization.

If one is willing to break away from the notion that the child's wellbeing is solely dependent on conditions that are attributed to a religious community, one has to ask the question whether circumcision as a means of membership identification is benefit enough to outweigh its detriments. Indications for the weight that can be assigned to circumcision as identifying means can be found in §24 of the Convention on the Rights of the Child (ÜRK) (*Übereinkommen über die Rechte des Kindes*)⁵². According to this, the signatory countries agree "to take all effective and necessary measures to abolish traditional customs and practices that are detrimental to children's health"⁵². Religious circumcision constitutes such a custom⁵³. In addition, it is within the meaning of §223/1-2StGB that circumcision constitutes a detriment to children's health, regardless of whether or not its performance is associated with pain or severe changes in sensitivities⁵⁴.

The fact that circumcision is a detriment to health (primarily for the irreversible loss of a body part to a significant degree) relativizes its benefit as a religious means of identification. The ÜRK agreement explicitly takes a position against acknowledging such rites. Thus the law must be interpreted in regard to the traditional custom of religious circumcision as a measure that does not serve the wellbeing of the child⁵⁵.

There are also other aspects relevant to this assessment. Where the wellbeing of the child is at stake, possible alternatives must be explored⁵⁶. Such an alternative exists in postponing the circumcision until the boy reaches the age of his natural ability to reason, thus leaving the decision to himself. Whereas in Islam there is no universally mandatory point in time at which a circumcision must occur, there is one in Judaism, being guided by the Bible wherein the 8th day is mentioned. Yet there are exceptions allowed in cases of sickness or frailty⁵⁶. It must be possible in a religion to expand such exceptions and to postpone the ritual circumcision, when a superior constitutionally protected right is concerned.

Consequently, with good reason, bodily integrity must be given priority over practices based on religious education⁵⁸.

IV. CONCLUSION

In order to have a valid justification for inflicting bodily injury, whoever performs a circumcision on a child (regardless of whether it is a physician, a mohel or a *sünnecti*) needs an effective consent from the person entitled to custody. This consent is effective only if the consenting party has the power to dispose of the legally protected right concerned, whereby the wellbeing of the child is the crucial criterion. Whenever a circumcision is not medically necessary, it does not serve the wellbeing of the child. In addition to circumcisions motivated by hygiene and esthetics, religious circumcisions also belong in this category. If a circumciser erroneously assumes that the consent given by another person entitled to custody is a valid justification, at least he acts without culpability - given the "unavoidability of error" clause. Until now, it is doubtful that surgeons could avoid this error. (*) Therefore prosecution is not to be sought retroactively. In the future, however, circumcisers will have to assume avoidability, at least once the insight gained in this essay has spread.

Thus the initial question has to be answered in the affirmative. Anyone who circumcises a minor without medical indication, but for hygienic, esthetic or religious reasons, is criminally liable according to §223 StGB.

() Translator comment: The foregoing statement was made prior to the May 2012 ruling by OLG Köln.*

FOOTNOTES

1. cf.: *Gollaher*, History of Circumcision, (original edition New York 2002) German edition Das verletzte Geschlecht. Die Geschichte der Beschneidung p.173
2. p. only *Suhr/Schuster/Dietz/Joppich*, Klinische Pädiatrie = Clinical Pediatrics 2001, 50sq.; same direction, yet far less critical Ärzteblatt = Physicians Journal Sachsen 3/2006, pp 104/105; more reserved as well *Scheiber/Rösch*, in: *Steffens/Langen* (ed), Komplikationen in der Urologie = Complications in Urology 2,2005 pp. 345/346.
3. Among others OVG OberVerwaltungsGericht = administrative appeals tribunal. Beschluss = order from 7/23/2002 – 4ME (text file) 336/02 – NJW Neue Juristische Wochenschrift = juridical weekly journal 2003, 3290; AG ArbeitsGericht = labor court Erlangen, order from 7/30/2002 – 4 F 1092/01; LG LandGericht = regional court Frankenthal, judgment from 9/14/2004 – 4 o-11/12-, MedR MedizinRecht = medical law, juridical journal 2005, 243sq.; OLG OberLandesGericht = higher regional court Frankfurt, order from 8/21/2007- 4 W 12/07 – NJW 2007, 3580sq. [Vorinstanz: LG = lower court: regional court Hanau, order from 2/2/2007 – 1 O 822/06 -]
4. On this *Putzke*, Die Strafrechtliche Relevanz der Beschneidung bei Knaben. Zugleich ein Beitrag über die Grenzen der Einwilligung in Fällen der Personensorge = The legal relevance of circumcision of boys. Also an article on the limits of consent in cases of custody in: *Putzke et.al.*(eds.), Strafrecht zwischen System und Telos = Criminal law between system and goal FS FachSchrift = professional journal Rolf Dietrich Herzberg 2008, pp.669-709.
5. cf.: among others *Joecks*, MüKo/StGB Münchner Kommentar zum Strafgesetzbuch = Munich commentary to the criminal code, vol.3, 2003, §233 Rdnr Randnummer = margin number 4; *Luckner/Kühl*, Strafgesetzbuch = Criminal code ed. 26 §233 Rdnr. 4; *Fischer* Strafgesetzbuch und Nebengesetze = Criminal code and supplementary laws, ed. 55 2008, §233 Rdnr. 3a; *Wessels/Hettinger*, Strafrecht Besonderer Teil = Criminal law special part /1, ed. 31, 2007, Rdnr. 255.
6. cf.: BGHSt Entscheidungssammlung des BundesGerichtsHofes in Strafsachen = Law reports of criminal cases of the High Supreme Court 25, 277, 278 BGH, NJW 1995, 2643; *Eiser*, in: *Schönke/Schröder*, Strafgesetzbuch, ed. 27, 2006, §233 Rdnr 3.
7. On the necessity of such approach: *Frisch*, Vorsatz und Risiko = Intent and risk , 1983, p.139sq.; *Hardtung*, in: MüKo/StGB (Fn 5), §233 Rdnr. 15; also *Herzberg*, in: Empirische und dogmatische Fundamente, kriminalpolitischer Impetus = Empirical and dogmatic foundations, Criminal political impetus, Symposium for Bernd Schünemann's 60th birthday, 2005, pp.31, 44. – At the level of factual findings, merely the damage aspects shall be addressed in order to make sense of the formal separation into different degrees of offense. (on this *Putzke* [Fn. 4], pp. 669, 676). At the level of unlawfulness, it will have to be clarified, whether a) reasons exist that support arguing for circumcision and if these reasons are b) important enough to outweigh possible detriments.
8. cf.: *Gollaher* (Fn. 1), p 151, who echoes in his quote the succinct words of a physician. In detail to the function of the foreskin *Stehr/Schuster/Dietz/Joppich*, Klinische Pädiatrie 2001 (no.213), 50, 51. Some do not attribute any crucial function to the foreskin after the age of five. cf.: *Ehreth/ King*, in *Thüroff/Schulte-Wissermann*

- (eds.) *Kinderurologie in Klinik und Praxis = Children's urology in hospital and doctor's office*, ed.2, 2000, pp. 506, 507.
9. p. *Sorells/Snyder/Reiss/Eden/Milos/Wilcox/van Howe*, in: *British Journal of Urology International* 99 (2007), 864.
 10. cf.: *Stark*, *Komplikationen in der Urologie (Complications in urology)* (Fn. 2) pp. 343sq.
 11. p. LG Frankenthal (Fn. 3), *MedR* 2005. 243sq.
 12. On this in general *Gollaher* (Fn. 1), pp. 179sq. On balance, however, complications are not common: they occur in 0.2 to ca. 6% of cases (cf. *Riccabona*, in: *Komplikationen in der Urologie = Complications in urology* [Fn. 2], p. 318; others figure the rate of complications at about 2%: *Stehr/Schuster/Dietz/Joppich*, *Klinische Pädiatrie* 2001 [no. 213], pp. 50sq.))
 13. more specifically *Stehr/Schuster/Dietz/Joppich* *Klinische Pädiatrie* 2001 [no. 213], pp. 50, 53 m.w.N. mit weiteren Nachweisen = with further proof; at any rate relativizing the immediate risk of complications *Ehreth/ King* (Fn. 8) pp. 506, 511.
 14. On this *Gollaher* (Fn. 1), p. 99; referring to "trauma" *Stehr/Schuster/Dietz/Joppich*, *Klinische Pädiatrie* 2001 (no. 213), pp. 50, 54. A description of the emotional stress, especially with religious circumcision can be found at *Kelek* *Die verlorenen Söhne = The lost sons. Plädoyer für die Befreiung des türkisch-muslimischen Mannes = Plea for the liberation of the Turkish Muslim man*, ed. 2 2006, pp. 114 sq., 122
 15. As does *Nesbit/King*, in: *Hohenfellener/Thüroff/Schulte-Wissermann* (eds.) *Kinderneurologie in Klinik und Praxis = Children's neurology in hospital and doctor's office*, 1986, pp. 522, 524.
 16. cf. *Kropp* *Monatszeitschrift Kinderheilkunde = Children's medicine monthly* 10/2003, 1075, 1077; cf. also the report „Schmerzen im Kindesalter vergißt man nicht“ = “Childhood pain is not forgotten” by the German congress on pain 1998, <http://www.medizininfo.de/schmerz/richter.htm> (status: 1/25/2008).
 17. Circumcised boys have demonstrably and significantly higher sensitivity to pain compared to boys who were either not circumcised or circumcised under anesthesia. (on this *Reimann/Kretz*, in: *Kretz/Becke* [eds.], *Anästhesie und Intensivmedizin bei Kindern = Anesthesia and intensive-care medicine of children*, ed.2 2007, pp. 14, 17 m.w.N.).
 18. On current insights report *Reimann/Kretz* (Fn. 17) pp. 14, 22sq.
 19. *Fischer* (Fn. 5), §233 Rdnr. 6b, even speaks of it as being “prevailing opinion“ – inexplicable.
 20. cf. *Fischer* (Fn. 5), §233 Rdnr. 9
 21. In this sense and with an eye towards medical procedure *Hardtung*, *Lehrskript = Lecture notes Strafrecht Besonderer Teil = Criminal law special part*, 17. Paragraph: *Straftaten gegen die körperliche Unversehrtheit = Criminal acts against physical integrity* §§233sq. StGB) status: 7/23/2007, <http://www.jura.uni-rostock.de/Hardtung/index.htm> (last access: 1/5/2008), Rdnr. 43.
 22. Also (i.e. to class the risk as illegally precarious) OLG frankfurt (Fn. 3), *NJW* 2007, 3590 sq.; LG Frankenthal (Fn. 3) *MedR* 2005, 243, 244; *Copp*, *Strafrecht Allgemeiner Teil = Criminal law general part*, ed. 2 2001 6/231; also *Lackner/Kühl* (Fn. 5) §233 Rdnr. 5 a.E. am Ende = at the end.

23. Because usually a condition is being caused that differs adversely from the normal bodily functions (therefore pathological), damage to health must also be affirmed. (cf. *Lackner/Kühl* [Fn. 5] §233 Rdnr. 5 a.E.)
24. If the surgical instruments are regarded as hazardous tools, it is a matter of aggravated battery within the meaning of] §224/1-2 StGB. However, jurisdiction and some literature voices reject his conclusion (BGH, NJW 1978, 1206, NstZ Neue Zeitschrift für Strafrecht = New journal of criminal law 1987, 174; *Krey/Heinrich*, Strafrecht Besonderer Teil = Criminal law special part vol. 1, ed. 13 2005, Rdnr. 221; *Wessels/Hettinger* [Fn. 5], Rdnr. 276. In contrast *Putzke* (Fn. 4) pp. 669, 681sq.
25. To all legal prerequisites that must be present for a consent to be valid: *Hardtung* (Fn. 21) Rdnrn. 377sqq.; *Wessels/Beulke* Strafrecht Allgemeiner Teil = Criminal law general part, ed. 37 2007, Rdnrn. 371sqq.
26. Similar BGHZ BundesGerichtsHofZivilsachen = law reports of civil cases of the Federal Supreme Court 29, 33, 36; *Robbers* DVBl Deutsches Verwaltungsblatt = German administration newspaper 1987, 709, 717; in detail *Eiser* (Fn. 6) §233 Rdnr. 38 with further proof; cf. *Lüderitz-Dethloff*, Familienrecht = domestic relations law Course record book, ed. 28 2007, §13 Rdnr. 61.
27. As in OLG Hamm, NJW 1998, 3424, 2425.
28. OLG Frankfurt, NJW 2007, 3580, 3581. Earlier, the consent to a religious circumcision by a 9year old was declared invalid by the regional court Frankenthal. (MedR, 2005, 243,244).
29. In this sense also *Putzke* (Fn. 4) pp. 669, 683sqq.
30. This would have to be affirmed, if the consent to circumcision would be unethical, which in the results has to be negated. (In detail to this aspect *Putzke* [Fn. 4], pp. 669, 693sqq.
31. In detail with regard to capability to consent *Amelung*, Vetorechte beschränkt Einwilligungsfähiger in Grenzbereichen medizinischer Intervention = Veto power of patients with limited capability to consent in cases of medical intervention within a legal gray area, 1995, pp. 10sq.; to behavioral norms in general *Hardtung* (Fn. 5) §228 Rdnr. 18.
32. BGH, NJW 1978, 1206
33. To this definition of medical treatment guided by §161 E 1962 cf. *Lackner/Kühl* (Fn. 5) §233 Rdnr. 18.
34. Maximal 1-4% of boys are affected by this, who in most cases chronically ill, such as congenital meningomyelocele (MMC) with neurogenic bladder voidance dysfunction, to further indications and contra-indications cf. *Stein/Steinbach/hohenfellner*, Die Zirkumzision = Circumcision, in: *Hohenfellner/Nagel/Zingg* (eds.) Operative Techniken = Surgical techniques, vol. 25, 1994 paragraph 5.16., II; also *Stehr/Schuster/Dietz/Joppich* Klinische Pädiatrie 2001 [no. 213], pp. 50, 52 sq.
35. On this *Gollaher* (Fn. 1), pp. 191sqq. (cervical cancer), 194sqq. (penile cancer), 197sqq. (venereal diseases, specifically to AIDS: 201sqq.)
36. cf. *Stehr/Schuster/Dietz* pädiatrie hautnah = pediatrics up close 9'2001, 320.
37. Quoted after *Gollaher* (Fn. 1), pp. 191sqq.
38. cf. *Dietz/Schuster/Stehr*, Operative Eingriffe in der Kinderurologie = Surgery in child urology. Compendium 2001, pp. 522, 526. Furthermore, there is substantial doubt about the necessity of circumcision in cases of phimosis. – treatment with ointment

- promises a 95% success rate; cf. *Golubovic/Milanovic/ Vokadinovic/Rakic/Perovic*, *British Journal of Urology International* 78 (1996) pp. 786sqq.; cf. also *Stehr/Schuster/Dietz*, *pädiatrie hautnah* 1/2004 pp. 21sq, 25; explicit LG Osnabrück, judgm. of 8/21/2002 – O 3002/00-.
39. In detail *Gollaher* (Fn. 1), p. 201 (in particular Fn. 54), pp. 129sqq.
 40. pp. *Bailey/Moses/Parker et. al.*, *Lancet* 2007 (369), 657sqq.
 41. WHO and UNAIDs announce recommendation from expert consultation on male circumcision for HIV prevention, <http://www.who.int/hiv/mediacentre/news/en> (status 2/6/2008)
 42. on critique cf. *Müller et. al.*, *Circumcision Status and HIV Infection Among Black and Latino Men Who have Sex With Men in 3 US Cities*, in: *Journal of Acquired Immune Deficiency Syndromes* 46/2007, 648sqq. On identical critique of older studies already *Gollaher* (Fn. 1), pp. 203sq.
 43. cf. plate 4 (p.9) in *Epidemiologischen Bulletin des Robert Koch-Instituts = Epidemiological bulletin of the Robert Koch-Institute from 5/29/2007 (special edition A/2007) age-dependant distribution of HIV-Initial diagnoses within the four leading concernment groups.*
 44. Also *Stehr/Dietz*, *Hauner Journal* 07-08/2007, 41, 43
 45. In detail *Gollaher* (Fn. 1), pp. 119sqq.; cf. also *Kelek* (Fn. 14), p 117; *Nesbit/King* (Fn. 15) pp. 522, 523
 46. Also *Nesbit/King* (Fn. 15) pp. 522, 526: “A good genital hygiene with daily retraction of the foreskin and washing are as effective” Hygiene cannot always be guaranteed. For those living in arid climate zones water may not readily be available. In such cases hygienic considerations may offer good reasons for circumcision. However, in Germany this is not the case.
 47. The remarks on religious circumcision are valid also for ritual and cultural circumcision, because of their similarity.
 48. In detail on this *Putzke* (Fn. 4), pp. 669, 698sqq.
 49. cf. *Raack/Doffing/Raack*, *Recht der religiösen Kindererziehung = Right of religious parenting*, 2003, pp. 59, 131.
 50. In this sense also *Stehr/Schuster/Dietz/Joppich* *Klinische Pädiatrie* 2001 [no. 213], pp. 50, 54. Who therefore consider even a child’s right to circumcision, refering to *Freeman*, *British Journal of Urology International* 83 (1999), pp. 47sq.
 51. cf. *BverfG Bundesverfassungsgericht = Federal Constitutional Court*, *FamRZ = Journal for family law* 1982, 567, 569; *Ziegler* in: *Prütting/Wegen/Weinreich* (eds.), *commentary on BGB Bürgerliches Gesetzbuch = Civil Code*, ed. 2 2007, §1666 Rdnr. 3 a.E.
 52. in the version from 11/20/1989, taken effect in Germany 4/5/1992 (*BGBI. BundesGesetzblatt = Federal Law Gazette* II pp. 990sqq.)
 53. which is contested by some with the objection that only genital mutilation of girls and women can be meant by it. (as does *van Bueren*, *The International Law on the Rights of the Child*, Dordrecht 1995 pp. 307sqq.: *Freeman*, *British Journal of Urology* 1999 (Fn. 50), 74, 77. However, this viewpoint is neither supported by the wording nor by the genesis of the text.
 54. On this *BGH*, *NJW* 2005, 2614, 1615 with further proof; also *Sprau*, in: *Palandt*, *Bürgerliches Gesetzbuch = Civil Code*, ed. 66 2007, §823, Rdnr. 4.

55. This also answers the question whether this result is consistent with the right of the parent (pursuant to section 4 subparagraph 2 in comparison to section 6 subparagraph 2 sentence 1 of the German constitution) to determine the modality of the child's (religious) education: As soon as the conduct harms the wellbeing of the child, the question whether an intervention against such conduct interferes with the parental right to educate is no longer a valid one. (also *Epping*, Grundrechte = Civil rights, ed. 2 2005, Rdnr.480)
56. On this aspect of the question regarding decision criteria for the "child's wellbeing" *Hinz*, in: MüKo/BGB, vol. 8, ed. 3, 1992, §1666, Rdnr. 24.
57. cf. only *Ehne/King* (Fn. 8), p. 506.
58. To that effect also *Starck*, in: *Mangold/Klein/Starck* (eds.) Kommentar zum Grundgesetz = Commentary on the Constitution, vol. 1, ed.5 2005, section 4, Rdnr. 141; *Smitt/Kammler* in: *Sachs* (ed.) Grundgesetz, Kommentar, ed. 4 2007, section 6 Rdnr. 61; different and with a strangely obtrusive reasoning (for a German court that is) LG Hanau (fn. 3): Circumcision lacks the "stigma of unlawfulness", because it not only is a ritual matter marking the first step of a boy into male adulthood, but also a matter of a "good tradition that follows the example of the prophet".
59. On aspects of criminal prosecution *Putzke* (Fn. 4), pp. 669, 707sq.