

Review article

*What adds flavor to life
is here shortened with a knife
But do not cry little fellow:
For the bliss of love
Will be left enough.
Schwapp – ab [2] (Translation of the German rhyme)*

The above-mentioned rhyme commonly used among pediatric surgeons and urologists reflects the casual attitude with which they perform circumcisions in the German-speaking realm, regardless of whether the procedure is performed for medical or ritualistic reasons. So far, male circumcision is hardly considered to be a legal problem. This is different with female circumcision. Here, clear legal limitations have been provided, it is outlawed on an international scale. Because of the parallels to male circumcision, it is essential for legal classification to consider the surgical procedure and legal position of female circumcision.

Female circumcision

It is estimated that currently on a worldwide scale 100 to 140 million genital mutilations of girls and women take place (amounting to between 3.0 and 4.2% of the world's female population. A total of 30,000 of these women live in Germany. Throughout the world, approximately 8,888 girls are circumcised every day. In particular, female genital mutilation is practiced in 28 African lands. It is also practiced on the Arabian Peninsula (United Arab Emirates, Oman, Yemen) and in Asia (India, Malaysia, Indonesia, etc.) [34].

A classification of the World Health Organization (WHO), first prepared in 1995 and modified in 2007, lists four types of female genital mutilation: I) partial or complete removal of the clitoris and/or the hood; II) partial or complete removal of the clitoris and the inner labia with or without excision of the outer labia; III) narrowing the vaginal opening, forming a covering fold by circumcising and joining together the inner labia and/or the outer labia, with or without excision of the clitoris (infibulations, pharaonic circumcision); IV) all other measures injuring the female genitals for non-medical reasons, for example, pricking, piercing, cutting, scraping cauterizing [34].

It is often pointed out that female circumcision cannot be compared with circumcising the male foreskin. Therefore, for the purpose of clarification, the WHO substituted in 1997 the previously used term "female circumcision" with the term 'female genital mutilation' (FGM) [35]. It is beyond question that compared with male circumcision the female genital mutilation of type III clearly results more frequently in serious harm: pain during micturition, during sexual intercourse and menstruation, urinary incontinence, infertility. Because of the scarring, labor could come to a stop, resulting in the death of mother and child. The risk of infection and of bleeding to death is considerably higher after female genital mutilation than after male circumcision [32].

International legislation has outlawed female genital mutilation. Each procedure of female genital mutilation is a serious violation of human rights in the sense of article 3 of the European Convention on Human Rights (*Europäische Menschenrechtskonvention* EMRK) [9]. The threat of circumcision in the home country is therefore a reason for asylum. In its intensity, the removal of the clitoris is a surgical procedure that is considered in no way to be inferior to the most serious manifestations of persecution relevant for an asylum decision [33]. Under German law the simultaneously occurring bodily harm results in claims for damages based on civil law and punishability of the medical treatment. This applies not only to each circumcision of girls with the consent of the parents. It applies also to circumcision of an adult woman, even if she gives her consent. In both cases the consent is in principle void because it is a violation of good morals – prevailing in Germany - according to article 138, paragraph 1, of the German Civil Code (*Bürgerliches Gesetzbuch* BGB). This general principle applies especially to the penal law in article 228 of the German Penal Code (*Strafgesetzbuch* StGB). Accordingly, bodily harm is punishable even when it is inflicted with the consent of the injured person, if the action violates good morals. It should be noted that the authors are of the opinion that based on a change in values intimate piercings (by definition group IV of the female genital mutilation) performed on adults should not be considered as genital mutilation. More complicated is an assessment of the effectiveness of consent when it comes to the currently fashionable cosmetic genital operations [15], i.e., narrowing the inner and/or outer labia often performed in conjunction with cutting back the clitoris prepuce (by definition group I and II of the female genital mutilation).

Bodily harm, punishable according to article 223 of the German Penal Code, becomes serious bodily harm resulting in doubling the range of sentences to up to ten years when the female genital mutilation is performed with a “dangerous instrument” in the sense of article 224, paragraph 1, no. 2 of the German Penal Code. According to the German Federal Supreme Court (*Bundesgerichtshof* BGH), surgical instruments are not to be considered as dangerous instruments only when they are used by a physician for their intended purpose [6]. If female genital mutilation violates good morals, a surgical instrument is not used for its intended purpose. Therefore, such cases will always result in increased punishment.

The Federal Ministry for Families, Senior Citizens, Women and Youths (*Bundesministerium für Familie, Senioren, Frauen und Jugend* BMFSF) prepared an information paper [8] which is addressed to physicians and counselors in Germany that can be confronted with the problem of genital mutilation of girls and women. This booklet unmistakably emphasizes that under German law ‘each genital mutilation of girls and women’ is liable to prosecution. It clearly shows that the constitutional rights of freedom of religion and undisturbed practice of religion are subordinate to the basic right of physical integrity. In principle, consent to bodily harm (for example, on the part of the parents) violates good morals.

Furthermore, according to article 225 of the German Penal Code, the parents are also liable to prosecution on the grounds of mistreating a person in their care. It would amount even to a punishable offense if they have their daughter circumcised in a foreign country. On page 23 of the information paper, it states: “When parents take their daughter out of Germany into a foreign country for the purpose of genital mutilation, they become liable to prosecution already for the act of preparation because of becoming an accomplice to one of the offenses involving bodily harm.”

Moreover, based on article 2, paragraph 1, of the German Model Code of Conduct (*Muster-Berufsordnung* MBO), female genital mutilation is an offense against the general professional duties of a German doctor. Accordingly, in 1996, the 99th German Medical Assembly determined [4]: The 99th German Medical Assembly condemns participation of physicians in the performance of any type of circumcision of the female genitals and emphasizes that according to the general duty clause of the Code of Conduct for German doctors, any involvement in such practices is punishable under professional law”. Merely one year later, in 1997, the 100th German Medical Assembly confirmed its decision and amended it with the following statement [5]: “According to the general duty clause of the Code of Conduct for German Doctors, the performance of such practices is a violation of professional law. Genital mutilations deprive girls and women of fundamental human rights, for example, the right of life and development, as well as the right of physical and mental integrity.” Accordingly, the Medical Associations are obligated to introduce professional court proceedings when they learn of a case of female circumcision performed by a physician. In addition, the appropriate regional authorities will always introduce proceedings to withdraw the license to practice medicine.

Male circumcision

Despite the obvious differences, there are pathophysiological parallels between female and male circumcision, or genital mutilation: both cases involve the surgical irreversible removal of healthy and functional tissue. Since not much is known about the function of the male foreskin, or it is usually underestimated, we will address this subject first.

Function of the foreskin and pathophysiological consequences of circumcision

The erectile tissue of the penis is covered with an extremely flexible layer of skin which forms an extra fold over the glans: the foreskin (prepuce). It consists of an outer layer forming a continuation of the penile skin and an inner layer of mucous membrane – an anatomical structure comparable to that of the eyelid. The inner foreskin is fixed in the circular groove of the glans (neck of glans). In newborn babies, the inner surface of the foreskin adheres physiologically to the glans and will later loosen on its own. At the age of 6 months, the foreskin can be pulled back in 20% of the boys. At the age of 3 years, it can be pulled back in 90% of the cases. In infants, the foreskin protects the glans and opening of the urethra against stools and the irritating effect of the alkaline urine [12].

By means of an oily waxy secretion, the prepuce keeps the glans moist. Circumcision results in dehydration and callus formation (in part due to the frictional effect of clothing). When the penis is erected, the foreskin makes sure that the skin of the penis can slide widely back and forth over the penis. When a person is circumcised this extra skin is missing, resulting in considerably higher frictional forces during intercourse, which, depending on other factors, can be more or less desirable. In an experiment it was demonstrated that the lack of foreskin was able to increase by factor 10 the frictional forces during the process of inserting the erected penis [31]. This observation is supported by a survey made with women that have sexual experiences with circumcised and uncircumcised men. A total of 85% of the women interviewed stated that they prefer sexual intercourse with an uncircumcised partner [20].

In a study performed at a military hospital in median 22.3-year-old men were questioned before and at least 12 weeks after their circumcision [27]. Postoperatively the period from coitus start to ejaculation was prolonged by 59%. This change was interpreted more as an advantage than as a complication. It should be noted that in this particular age group orgasm delaying drugs are often desirable. However, with increasing age, the opposite holds true, which is supported by the tremendous demand of sildenafil (for example, VIAGRA®).

Complications of circumcision

Despite the provision of maximum medical care and application of the greatest medical diligence, each surgical procedure could involve complications [36]: In the case of male circumcision they are rare and rather insignificant. However, in individual cases circumcision can have disastrous effects. For example, (temporary) oxygen deficiency during anesthesia can result in permanent brain damage along with blindness, physical and mental retardation. Cerebral complications can occur because of an infection resulting from the circumcision. Local infection can result in the total loss of the penis.

Sad notoriety was gained by the case involving a pair of male twins that were circumcised as newborns. One of the boys suffered the loss of the penis and a sex change was performed. Only during puberty the affected boy (who at this point appeared outwardly to be a girl) learned about his true identity. A penis reconstruction was performed and the mammary glands on both sides were removed [11]. His tragic life story ended in May 2004 when he committed suicide at the age of 38 [37].

In reality, the number of cases which describe especially serious and permanent complications following male circumcisions and which are published in specialized literature and even in the general press is by far larger because surgeons rarely expose their errors (as a warning for others) and affected patients are very reluctant to reveal that they are genital cripples. We also deal with several unpublicized patients with 'total genital damage' after they underwent circumcision in a foreign country. Other pediatric urological centers have similar experiences.

Lawfulness of circumcision

Medical indication and professional performance

The lawfulness of a medical procedure is based on two pillars: medical indication and informed consent. In the case of a medical contraindication, the circumcision is unlawful. In particular, this involves circumcision with (undetected) hypospadias. In these cases the foreskin is no longer available for required plastic surgery of urethral extension and more complicated surgical techniques have to be used, often involving several surgeries which frequently have disastrous results. The same applies when there is evidence that the physician gave a wrong indication for circumcision. For example, the Osnabrück District Court (*Landgericht*) awarded a 6-year-old child compensation in the amount of EUR 7,500 for the optically unfavorable appearance of his penis" because in the court proceedings the physician was not able to provide evidence for his indication of a phimosis [19].

Naturally, the physician is also liable for medical malpractice in the context of the medically indicated circumcision. In this context, the decision of the Naumburg Higher Regional Court (*Oberlandesgericht OLG*) can be used as an example [22]. In the course of an outpatient circumcision procedure under general anesthesia performed with the indication of a phimosis, the 5-year-old boy experienced in the recovery room a respiratory and circulatory arrest resulting from an overdose of Rapifen and failure of appropriate supervision. Because of the serious permanent brain damage, the court awarded the boy compensation in the amount of EUR 150,000. At the same time, the physician was sentenced to pay a life-long monthly compensation pension in the amount of EUR 255.64.

Ritual circumcision considered as bodily harm

In Fischer's standard comment on criminal law, with regard to article 223 of the German Penal Code, the "circumcision of boys for religious reasons" is classified as late as 2008 to be an action "without elements of criminal offense" which should go unpunished because it is a "socially acceptable action". Supposedly, this reflects the "opinion prevalent" in criminal law [13]. A July 23, 2002 civil law decision by the Lüneburg Higher Administrative Court (*Oberverwaltungsgericht*) requesting the social welfare authorities to carry the cost for circumcision points in the same direction [23]. The principle statement of the decision reads: "A Muslim child in need of assistance is entitled to receive from the social welfare authorities a one-time benefit for special reasons so as to be able to pay a surgeon for his circumcision". The court based the decision in the preliminary legal proceedings even on the circumstance that "guests have been invited for a family celebration on July 25, 2002 and the circumcision has to be performed prior to the celebration, and that it would cause the entire family considerable social disadvantages to uninvited the guests."

However, because of the demonstrated pathophysiological consequences and potential complications, circumcision is not an action without elements of criminal offense but, instead, causes bodily harm. Otherwise, a physician would be able to perform circumcision without first having to obtain consent, without being able to protect the affected person from the elements that constitute the crime of bodily harm: this would be an unbearable consequence. The opinion that circumcision is not a crime resulting in bodily harm cannot be harmonized with 1991 the court ruling of the German Federal Administrative Court (*Bundesverwaltungsgericht*), according to which forced circumcision of Christian Turkish conscripts performed under anesthesia even in pretended medical examinations is considered to be a "considerable attack" on the "physical and mental integrity" resulting in a reason for asylum [10]. Therefore, the legal opinion reflected in the August 21, 2007 decision of the Higher Regional Court of Frankfurt am Main and the July 30, 2002 [1] decision of the Erlangen Local Court (*Amtsgericht AG*) is appropriate according to which circumcision constitutes bodily harm. In the legal dispute before the Erlangen Local Court, in which the author (MS) was involved as an expert, the Muslim father of a 31/2-year-old boy wanted to obtain consent for a ritual circumcision. The foreskin of the boy could be completely retracted without problems from his first year of life. The youth welfare office and the foster parents where the child lives continuously since he is 4 weeks old strictly refused the circumcision. The local court withdrew the right from the parents "to have any surgical procedures for religious reasons performed on the child". The reasons for the decision emphasized that any type of circumcision involves bodily harm. The possible occurrence of

complications together with any potentially permanent damages played an important part in this decision. In the court of second instance, the Nuremburg Higher Regional Court, the biological father of the boy was also not able to enforce his demands. In the meantime, based on the works of Putzke [24.25.28], the opinion prevails even in literature on criminal law that ritual circumcision cannot be considered to be an action without elements of criminal offense [17].

In contrast to female genital mutilation, male circumcision does not violate good morals, which makes consent to male circumcision not ineffective merely based on article 228 of the German Penal Code. This results in the fact that circumcision performed by a physician is punishable only for bodily harm according to article 223 of the German Penal Code. It is not punishable on the grounds of serious bodily harm according to article 224, paragraph 1, no. 2 of the German Penal Code, because in male circumcision the surgical instrument is used for its intended purpose and not as a “dangerous instrument” (different opinion: [17, 24]).

Effective consent to ritual circumcision

Consequently, the crucial question is whether in the respective individual case the presented consent is effective according to the general principles of medical law. If parents want their son to be circumcised their consent is legitimate by the law on parental rights only when circumcision is in the best interest of the child (articles 1626, 1627 of the German Civil Code). Consent to circumcision by a “non-medical circumciser” is not in the best interest of a child. In this regard, in 2004, the Frankenthal District Court made the statement [18]: “The consent of parents to a medically not indicated surgical procedure performed by a non-physician under non-sterile medical conditions constitutes a violation of custody which cannot be justified.” In the cited case, a self-appointed “scientific circumciser” performed a ritual circumcision for a fee of DM 500.00 in the parental home of the 9-year-old boy. During the surgery, part of the penile skin was removed, which required two corrective surgeries at the hospital.

Evidence for the apparently large number of ritual circumcisions performed by physicians is the fact that special diomed and proCompliance patient information sheets are available for circumcision for religious reasons [7, 16]. In addition, “Germany [has] a number of trained physicians, which also have religious authority and perform ritual circumcision in the homes of the young patients” [18]. Already the term “patient” is wrong because ritual circumcision does not involve the treatment of a sick person. When deciding whether circumcision is acceptable from the perspective of being in the best interest of the child, the above-mentioned pathophysiological consequences and possible complications have to be evaluated against the advantages circumcision would have for the child. This evaluation should take into consideration not only the currently presumed interest of the child but also future interests. It is well known that in the highly industrialized states in the context of increasing secularization in many families religious values lose more and more importance [29]. On the other hand, it also has to be taken into consideration that it can be stigmatizing for a child (and his parents) not to be circumcised in a “circumcised society” and, as a result, to be excluded from that society. In the past, several studies emphasized the health benefits of circumcision. For example, supposedly circumcision has prophylactic advantages. However, in 1999, the American Academy of Pediatrics declared that the data currently available is not sufficient to generally recommend circumcision for a newborn [30]. On occasion, prophylactic circumcision is

compared to vaccination. However, in the case of vaccination, not only the person vaccinated is protected but the risk of infection is blocked for the entire social environment. Only a high level of immunization of the population can eliminate specific diseases. Male circumcision cannot raise such a claim: at best it could result in a personal health benefit. However, in the highly industrialized states it does not play any part for individual prevention.

In the context of evaluation, the demonstrated vague benefit of male circumcision is not weightier than its risks. Therefore, from a medical point of view, circumcision is not in the best interest of the child. An evaluation could produce different results only when the basic right of religious freedom described in article 4, paragraph 1, of the German Constitution (*Grundgesetz* GG) is also taken into consideration. The basic right of religious freedom leaves parents ample room for religious education. However, the issue of circumcision does not merely involve an educational measure or the area of family life. It rather involves a decision that the child makes directly in his interest of integrity [3]. Moreover, non-compliance with circumcision does not restrict the religious freedom of the parents. Instead, it involves the rights of a third party, even if it is one's own child. In this situation, the religious freedom of the parents cannot prevail. In this context, it is important to understand that circumcision is (merely) an outward sign for a religious conviction and not a constitutive act of religious affiliation. Contrary to some views [14, 26], the parents cannot actively give consent to ritual circumcision (see also: [17, 25, 28]). Consequently, male circumcision, the same as female genital mutilation, is a violation of the general professional duties of a physician described in article 2, paragraph 1 of the German Model Code of Conduct (MBO) even if the parents have given their consent.

This means that under German Law ritual circumcision is acceptable only with the consent of the minor. Consent to circumcision is not a legal transaction. It is permission for performing an actual act which interferes with the physical integrity. This does not require a minor to be of age for the consent to be effective. It is sufficient, but also required, that the minor can properly assess the importance and scope of the surgical procedure, and that he understands what his approval means in the concrete situation. In the consultation, the physician has to ascertain these things, as well as the seriousness of the religious conviction. There is no defined age limit. In the opinion of the Frankenthal District Court, the consent to circumcision of a 9-year-old is ineffective [18]. With reference to religious maturity which, according to article 5 of the Law on the Religious Education of Children (*Gesetz über die religiöse Kindererziehung* RKEG), is reached when completing the twelfth year of life, the Higher Regional Court of Frankfurt am Main stated that a 12-year-old boy is able to effectively agree to his circumcision, provided there are no "special reasons for a delay of his maturity" [21]. This concurrency between decision-making competence and religious maturity has to be rejected because it is a completely different matter to choose (temporarily) a different religion or to give consent to a circumcision that is irreversible. With regard to the medically not indicated surgical procedure of ritual circumcision, it can be presumed that a person is not capable of giving consent to circumcision before completing his 16th year of life. However, there is no reason to principally accept the capacity of consent only when a child reaches legal age (different opinion: [17]). When it comes to the issue of giving consent to ritual circumcision, there is the danger that a mature minor presents the religious *wishes of his* parents only formulistically. Therefore, it is important that the physician conducts the consultation with the minor in the absence of the parents.

Carrying the costs of ritual circumcision

Ritual circumcision does not have the objective of treating a disease which is defined only as an abnormal physical or mental condition deviating from the model of a healthy person. Therefore, the costs for circumcision are not to be carried by the statutory health insurance (*gesetzliche Krankenversicherung GKV*) or by any private health insurance (*private Krankenversicherung PKV*). The medical service of ritual circumcision has to be paid by the person to be circumcised or his parents, if and insofar as a physician is willing to permit circumcision of a minor.

Conclusion

Ritual circumcision is legally acceptable only with the consent of the person to be circumcised. In the future, it is to be expected that at least in individual cases even decades later circumcised persons will claim compensation for damages from their parents or physicians, a phenomenon well known in the United States. The August 21, 2007 decision by the Higher Regional Court of Frankfurt am Main already points in this direction [21]. In the facts underlying the case, the father had his 12-year-old son circumcised without first requesting the consent of the mother who had sole custody of the child. The higher regional court granted the boy legal aid for filing a lawsuit for compensation in the amount of EUR 10,000 against the father, because he was principally entitled to compensation.

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