

Circumcision of boys who are too young to give informed consent

Criminal penalties also for circumcision on religious grounds

Without medical necessity, the surgery should be rejected by the physician.

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Not medically indicated circumcisions are performed in Germany on boys, especially for religious reasons. For example, if parents as custodians want this surgery, doctors - especially (children's) surgeons and (child) urologists – find themselves in a dilemma: On the one hand, German Law grants the parents the right to make decisions regarding the life and development of the child in their care without any interference care, especially when it comes to religious matters. On the other hand, the physician is asked to perform a surgery for which there exists no medical necessity. However, such a necessity is often claimed, e.g. in the form of phimosis, yet even with a positive phimosis diagnosis, in most cases there is no need to circumcise the boy, because other promising and successful alternative treatment methods and means are available.

The way a doctor should react depends significantly on whether a non-medically indicated circumcision is to be classified as a criminal assault as defined in § 223 paragraph 1 of the Criminal Code (StGB). Doctors have long been critical of non-medically indicated circumcision of minors (1, 2). Jurisdiction on the problem has not yet been achieved (apart from malpractice cases or cases of circumcisions performed despite missing consent). In short, the status is unsatisfactory, because no legal certainty exists(3).

Unjustified violation of physical integrity
Physical abuse according § 223 paragraph 1 StGB exists in the event of inadequate and ill treatment by which the physical well-being or physical safety is more than just negligibly impaired. The partial or complete removal of the foreskin during a circumcision represents a not insignificant loss of substance. It is, therefore, a violation of physical integrity.

Religious circumcisions are sometimes portrayed as socially adequate, and therefore cannot be called inappropriate and evil (4). This is not convincing, in part because it would be inconsistent to classify a medical therapeutic surgery as bodily injury - as does the law - legal criteria to be classified as assault, whereas negating bodily injury in a non-medically indicated circumcision due to social adequacy. Consequently, in every circumcision a personal injury is to be seen within the meaning of § 223, paragraph StGB. In general, the following applies: Without any justification, no one may interfere with the bodily integrity of another.

A personal injury is not unlawful if the violation is justified. This is to be affirmed in the presence of an effective consent of the patient, whereby it is essentially not important if the procedure is medically indicated or not.

Is the capacity to consent not present, as in a minor, consent can be given primarily by the holders of custody - usually the parents. However, their consent must be in accordance with § 1627 sentence 1 BGB ensuring that the child's care and custody is exercised "for the wellbeing of the child". If not, the legal guardian is not authorized to make the decision. Thus, a decision in the "interests of the child" must serve the child's interests, or in simple terms: must be advantageous. If a measure is also associated with disadvantages they must be outweighed by the benefits. Ultimately, it all comes down to a balancing of legally protected interests.

The damage caused by circumcision is an irreversible loss of body substance. Some consider the loss of the foreskin, however, as insignificant, because the foreskin serves no function (5). Such a view is not persuasive because there are in fact functions that belong to the natural foreskin (1). If it is missing, the glans not kept moist, and becomes constantly exposed to a dry external environment - which is why its sensibility decreases (6).

In addition, the potential risks of a circumcision must be considered. Severe complications (e.g., urethra fistula) are certainly rare, but do occur, especially with circumcisions performed by others than licensed physicians.. Complications that arise through no fault of the surgeon, occur much more frequently and must be looked at: After up to 32 % of newborn circumcisions, meatus stenosis has been observed (1). Finally, the possible psychological effects deserve consideration: There is evidence that older children perceive the surgery as an attack that does damage to their body (7). Even fetuses sensation of pain exists, at least since the 22nd week of pregnancy, not to mention "pain memory" after birth (8).

Surely, there are also medical indications for circumcision, e.g. in the case of phimosis manifestation. But also chronic or recurrent urinary tract infection, or inflammation of the glans in rare cases, can be indication for surgical removal of the foreskin (1). Of these, but a maximum of 1-4% of boys affected. In addition, these are usually chronically ill children, who suffer for instance from congenital meningomyelocele with neurogenic bladder dysfunction.

In cases of phimosis the surgery is usually not indicated
It often happens that parents who want a religiously motivated circumcision, first assert the existence of a phimosis, sometimes in order to have their health insurance cover the cost. But even if such a disease can actually be diagnosed, physicians often unnecessarily reach for the scalpel. Because treatment with steroid ointments promises in up to 95 % of cases the same success (9). Who still circumcises in such cases, without taking advantage of conservative alternative treatment, has to face the accusation of having performed an unnecessary and therefore not medically indicated surgery.

A surgery is medically indicated not only for fighting a disease, but also if it contributes to the prevention of disease. Claims exist that circumcision prevents the development of various carcinoma (penile cancer, uterine cancer), HIV infection, also other venereal diseases such as syphilis or gonorrhea, and - as mentioned above - urinary tract infections, phimosis or paraphimosis (7).

However, the benefits outweigh the disadvantage only, if reduction of the risk of future disease is significant and not irrelevant. The risk of disease in those cases is, however, very small: For urinary tract infections, the incidence is 1.12 % (10). For penile cancer, the American Cancer Society indicates that while the current mortality rate is expected to be smaller than the mortality rate from the damage caused by circumcisions (7). The likelihood of later developing phimosis, paraphimosis or balanoposthitis is small, between 2 and 4 % (11). Not much different are the numbers for syphilis or gonorrhea.

In 2007, the World Health Organization (WHO) has recommended circumcision as a preventive measure against HIV infection (12). The recommendation was based on studies from Kenya and Uganda, the results of which indicate that the risk of HIV infection in circumcised heterosexual men is about 50 percent lower than in uncircumcised (13). Whether these results are transferable to other countries, however, is highly questionable (14). In addition, the demands for routine and widespread circumcision ignore that the WHO had issued its recommendation with the caveat contagion risk. For Germany, the probability of new infections in the age group of interest (minors between birth and 14 years of age) is so low that circumcision as a preventive measure against HIV is out of the question, therefore, is not medically indicated.

Circumcision as purely preventative measure is thus essentially not a medical treatment and thus not medically indicated. A surgery with such motivation has no significant benefits, does therefore not serve the wellbeing of children, which is why the legal guardian are not authorized to decide, their consent is ineffective and thus cannot act as justification

To justify the circumcision, hygiene is often named as benefit. Regular personal hygiene is certainly a much less drastic means than circumcision. If a surgery can be avoided while the intended effect can be achieved otherwise and with less severe measures, the surgery does not serve the child's wellbeing. The same applies if the intervention is to be made solely for aesthetic reasons. A minor has no benefit from it, and it is not unlikely that his aesthetic sense as an adult will be different.

The harm outweighs the benefits. While hygienic or aesthetic reasons play a rather minor role, in many cases religious reasons are used to justify circumcision. Here, too, one has to ask, whether it serves the interests of the child, whether there are advantages that outweigh the disadvantages.

Circumcision is a very important means of identification. It is undeniable that the waiver of a means of identification may have far-reaching consequences, it usually is stigmatizing to not be circumcised in social communities that routinely practice circumcision. However, his fact alone can not justify religious circumcisions. For a matter of law can not be resolved by moving the problem to a level of legal vacuum. Yet, this is exactly what would happen, would an act be allowed merely because it is a tradition. All the more, certainly the milieu of a child must not be taken as sole criterion when it comes to the prevention of detriments to the child,. Otherwise, it would depend on the attitudes and preferences of the community, whether bodily injury may be inflicted upon its underage members. This applies even more so if in compliance with the prohibition the milieu would automatically change. The more boys are not circumcised, the less will their status be reason for stigmatization.

If one is prepared to move away from the idea of making the child's wellbeing exclusively dependent of the circumstances that are attributable solely to a faith community, then we must ask whether the benefits of circumcision are sufficient as means of identification in order to outweigh the damage. What weight of circumcision as a means of identification belongs, to result in a systematic point of evidence law, § 24 of the United Nations Convention on the Rights of the Child (CRC). It reads that the contracting countries have to take "all effective and appropriate measures to abolish traditional practices that are harmful to the health of children". Religious circumcision is such a custom. As bodily injury within the meaning of § 223 paragraph 1 Alt. 2 StGB it is also harmful to the health of children.

Other aspects can be listed that have relevance in balancing legally protected interests. When it comes to the welfare of the child one always has to ask for possible alternatives. One such alternative would be to postpone the religious circumcision until the child reaches the age of capability to give consent, i.e. to let him the decide for himself. While there is no universally mandatory time for circumcision in Islam, Judaism is based on the words of the Bible, which mentions the eighth day after birth. Exceptions are allowed, such as in case illness or physical weakness. In such cases the uncircumcised is not stigmatized and not viewed as second class Jew. Why not extend such exceptions a postpone the circumcision - especially since constitutionally protected legal interest is concerned.

But how is it with the right of parents to self-directed education of their child to which the undisturbed practice of religion -to a particular extent- belongs (Article 4, 2 GG)? The answer is simple: As long as objectively a significant injury to the child can be determined (which is the case with massive and unnecessary interference with the physical integrity), priority has to be given to the child's best interests compared to parental interests.

Against the child's wellbeing

There are no compelling arguments, which can be justify religious circumcision of minors. What remains are the disadvantages (mainly the irreversible loss of the foreskin), which is why the religious circumcision is not serving the interests of the child, why the

legal guardians lack of authority to give consent, and why, therefore, he surgical procedure constitutes an unlawful assault.

If a physician performs a non-medically indicated circumcision on a boy under the age of consent, the consent given by legal guardians has no justifying effect, even if religious arguments are made. Without the effective consent circumcision constitutes criminal assault. As long as the legal situation is not brought before the courts, physicians should refuse to perform non-medically indicated circumcision. Otherwise they risk liability he for assault under § 223 StGB.

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