

Religiously motivated circumcision of boys in the light of the Criminal Code

at the same time a contribution to
potentiality and limits of parental consent

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F. Conclusion

I. The results in summary

1. Background of religiously motivated circumcision of boys

Circumcision has a long history as religious ritual and is deeply rooted in Judaism and Islam.

From the medical point of view, circumcision is a relatively simple surgical procedure, the benefits of which are controversial.

If and to which degree circumcision can be considered medically beneficial depends on how the individual medical studies are assessed that arrive in part at different results.

2. Legal relevance of religiously motivated circumcision of boys

A religiously motivated circumcision, performed without effective consent, fulfills the prerequisites of actual

bodily harm, as per § 223 I StGB, but not of aggravated battery, as per § 224 I, Nr. 1, Nr. 2 Alt.2 StGB, as long as the instruments are used *lege artis*.

Religiously motivated circumcision, as a socially adequate act, is not excluded from the elements of offence constituting bodily injury. Furthermore, in modern criminal law, an autonomous relevance of the theory of social adequacy has to be negated, because it is not assigned an independent dogmatic meaning. Instead, more precise results can be achieved by applying the rules of objective attribution as well as those of illiberal offence interpretation oriented to the legally protected interests.

On this basis, circumcision certainly cannot not be excluded from the offence of bodily injury, neither for the purpose of the permitted or legally irrelevant risk as attribution criterion, nor for the purpose of illiberal offence interpretation.

As a rule, religiously motivated circumcision does not constitute a curative medical intervention by a physician, because it lacks medical indication. Therefore, this problem remains irrelevant for the assessment of culpability of circumcision of boys.

3. Consent to religiously motivated circumcision

An individual's legally protected interests are based on a liberal rights- and consent-model, in which the individual protected interest and the respective freedom of disposition form a unity. According to this model, the legally protected interests regarding bodily injury offences have to be understood as body-related self-determination that has its basis in the individual's autonomy of personality, granted by the Constitution to every human being solely by his existence and dignity, according to Art. 2 II GG.

According to this understanding of legally protected interests, confirmation of violation of an interest, as per § 223 I StGB, does not depend on proof of violation of the will or freedom of decision, but solely on violation of the above mentioned body-related self-determination. However, a mere encroachment of the right to self-determination without the aspect of the physical body does not suffice.

Based on this, the traditional differentiation between offence-excluding assent and effective consent has to be rejected. Instead, consent has to qualify as an offence-excluding reason, which is also proven to be true under penal-systematic criteria.

The requirements for effectiveness of criminal consent serve to safeguard the self-determination of the decision.

In this respect, the protected interest-holder's capacity to consent is a condition for the consent's effectiveness. The concrete assessment of the capacity to consent in minors, with regard to the respective intervention, is an individual case-by-case issue, to be decided by the physician. Hereby, the problem arises that the general scope of capacity to consent, understood as capacity to reason and decide, is very undefined. However, this problem can hardly be completely solved.

Medical criteria, such as lacking reasonableness, as well as severity, complexity and consequences of the intervention, can influence the concrete actual filling in of the consent form, but not the general legal framework of the capacity to consent. Hereby, the age of the minor can be adduced as an indicator if necessary.

With regard to the performance of a religiously motivated circumcision, the provision of § 5 KerzG has no bearing on the presence or absence of the minor's capacity to consent.

As a rule of thumb – which by no means replaces the individual case assessment – the ability to consent to circumcision can be assumed in a 14 to 16-year-old.

In order to ensure self-determined decisions, errors regarding legally protected interests exclude the effectiveness of given consent, regardless of whether or not the errors arise from deception. Errors related to legally protected interests are, according to the liberal interpretation of such interests, not only those which refer to type, extent, severity or risks of the intervention, but all errors that from the interest-holder's standpoint affect his interest of body-oriented self-determination and were part of the decision to give consent. The existing error regulations sufficiently protect the intervening person.

To allow for a patient's self-determined decision, the physician is obliged to inform the patient, due to the existing difference in knowledge. The extent of such information cannot be determined by the (missing) indication or the (missing) urgency of the surgery. It rather depends on which conditions are of importance for the individual patient in the specific situation. It is possible to waive comprehensive information/education.

The non-physician circumciser is also obliged to give such information to the consenting person. However, as a rule, his is not as extensive as the physician's obligation.

The limit of § 228 StGB does not apply in the case of circumcision. This is also true if the interest-holder consents to circumcision without anaesthesia, under unsterile conditions (e.g. at home), or by a non-medically standard method. Cases of female genital mutilation are different, because they cross the line of § 228 StGB, even with prior given consent.

4. Parental consent by proxy to religiously motivated circumcision

Not only consent by the interest-holder himself, but also proxy consent by the minor's parents is based on the liberal interest- and consent-model. In this respect, the body-related right of self-determination of the person incapable to consent is the foundation of proxy consent in criminal law, and like consent, constitutes a reason for offence-exclusion.

Parental consent by proxy leads back in general to the rights of the child and in particular to Article 6 II GG, governing the child-parent relationship – and in the religious realm in conjunction with Article 4 I, II GG.

In the sense of this constitutional character of proxy consent, the limits of parental decision-making authority are drawn relative to the child's well-being. This cannot be defined abstractly and universally, but is to be determined first and foremost by the parents, whereby the limits of parental decision-making is again to be found in the child's well-being.

The child's well-being as a limit to parental decision-making authority can be substantiated through the basic rights of the child, insofar as these can be sufficiently objectified. However, especially Article 2 II 1 GG is not sufficiently objectifiable in the sense that the basic right by itself could serve as ascertainment of the child's well-being as a limit to parental decision-making power. In comparison, although Article 1 I GG is sufficiently objectifiable in that sense, in the case of religiously motivated circumcision, however, a limitation to parental decision-making power does not apply because a violation of the child's human dignity is not present.

Substantiation of the limits of the child's well-being arise also from the simple legal design of parental education law.

The limit of emotional harm resulting from § 1631 II BGB is crossed if circumcision is performed without prior anaesthesia where the child is intentionally exposed to easily avoidable pain. As for circumcision performed *lege artis* and under anaesthesia, the limits to the child's well-being resulting from § 1631 II BGB do not apply.

The most important and most general limit to parental decision-making power is the one of endangerment of the child's welfare resulting from § 1666 II BGB. Its presence has to be assessed by way of a comprehensive benefit-risk analysis. This balance requires that – taking into account the constitutional background of parental consent by proxy – only

then can endangerment of the child's welfare be assumed, if the existing risk to the well-being is of such high significance in comparison to the benefits that it can no longer be considered responsible.

All medical risks belong in this comprehensive assessment and, in addition, all further detriments and risks that are rationally justifiable. On the side of benefits, not only medical ones count, but also all other acceptable benefits, especially religious benefits have to be considered. The latter are to be given extra weight because of the additional guarantee resulting from Article 4 I II GG in the realm of religious education of children.

Furthermore, the considered disadvantages and advantages must relate to the child's well-being, which means that those benefits and detriments that do not affect the child but affect third parties must be excluded from consideration. Moreover, no benefit may be taken into account that only takes effect at the child's reaching the age of consenting capacity or later.

With regard to circumcision of boys, this means that not all controversial medical benefits can be taken into account in the assessment of the benefit/detriment balance, due to the lack of connection to the child's well-being of some of the claimed benefits. Religious benefit, however, may be taken into account as a justifiable advantage.

For now, if one disregards the will of the child, religiously motivated circumcision does not present itself as endangerment of the child's well being based on a comprehensive risk-benefit analysis. Taking into account the relatively minor risk on the one hand, and on the other hand the heavily weighted religious significance of the circumcision intervention, as well as its potential medical benefits, the risks associated with circumcision, with respect to the intended benefit, cannot be considered irresponsible in the sense of crossing a certain threshold of significance. Therefore, parents remain within the limits of their parental decision-making power if they consent to circumcision performed *lege artis* and with anaesthesia, which means that their consent by proxy is effective. The same holds true if the circumcision is performed by a traditional circumciser who is *de facto* competent to perform circumcision, comparable to a physician.

The case has to be viewed differently if the circumciser is *de facto* of lesser competency to perform circumcision. Here the child is exposed to a readily avoidable risk so that in the overall balance the risk is increased to such a degree that it can no longer be considered responsible in the sense of posing an endangerment to the child's well-being. In such a case, parents cannot give effective consent to circumcision of their son by a traditional circumciser who is less competent than a licensed physician.

Although no general fixed veto power exists against consent by proxy to bodily interventions on minors who are incapable of giving consent, the will of the child however has to be taken into account in assessing the endangerment of the child's well-being.

According to this criterion, a *de facto* right of veto against parental consent to religiously motivated circumcision exists for the minor, beginning with his 12th year of age. His opposing will always leads to ineffectiveness of parental consent. This is owed to the fact that the circumcision is religiously motivated. Regulation of § 5 KerzG standardizes a fixed age of 12 years for religious self-determination of minors, which influences the overall assessment of benefits and detriments. This *de facto* right to veto cannot be transferred to other bodily interventions that are not religiously motivated.

Other requirements for consent by proxy are the parents' ability to consent, usually the joint consent of both parents, the announcement of the consent by proxy and the knowledge of the announcement on the part of the person executing the intervention.

Furthermore, the parents must consent free of any relevant failure of intent, whereby threat and pressure reach the limit of coercion as per § 240 I, II StGB.

In the context of consent by proxy, an obligation indeed also exists for the physician to give information/disclosure to the consenting parents because of the discrepancy in knowledge in order to enable them to come to an informed and responsible decision on the child's behalf. The information given must be oriented toward the child's well-being and is not

restrictable in its extent, with the exception of already informed parents.

In this light, it becomes problematic if the circumciser is a non-physician and as such not capable of the required comprehensive information/disclosure. The child's subsequent exposure to avoidable risks leads to endangerment of his well-being and thus to ineffectiveness of the parental consent.

The intervening physician also has an obligation of appropriately informing the minor who is not capable of consent, as long as the latter has partial intellectual faculties to understand certain aspects of the anticipated procedure. For the aspect of self-determination, this follows from the thought that the child would otherwise be degraded to a mere object of a medical procedure and parental action. Without the age- and developmentally-appropriate discussion of the planned circumcision, the parents would overreach their decision-making power as per Article 11 GG, and their consent by proxy would be ineffective.

The same principle applies to the non-physician circumciser, insofar as he is as competent as a licensed physician to inform/disclose. If he is not as competent, the parent's consent by proxy is ineffective.

The legal consequence of inappropriate or missing consideration of the partially judicious minor is the ineffectiveness of parental consent by proxy due to overstepping the limits of their decision-making authority.

II. Outlook

The judgement of the regional court in Cologne has caused the problem of potential culpability of religiously motivated circumcision of boys to be raised to a societal and political level, which previously had only been discussed in criminal, medical and religious literature. This has led to hasty activity on the part of the legislature and ultimately to the new § 131 d BGB, which is maybe correct regarding its basic idea, but in the end is only partially successful. With respect to the critique of this regulation, it is not unlikely that one day the Federal Constitutional Court will have to deal with § 131 d BGB.

However, the discussion of culpability of circumcision of boys is only one aspect in a complex realm of topics. The question of extent and limit of parental consent must be raised in the context of all bodily interventions upon a child incapable of consent. There will doubtlessly be more scientific debates in this field, some of which will reach the political level and trigger lively discussions in society.