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Ethico-medical Aspects of Ritual Circumcision of Boys Unable to Give Consent

in

Matthias Franz (ed.)

Circumcision of Boys

A sad legacy

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The judgment of the Cologne Regional Court in May 2012 (Court of Cologne in NJW 2012 , 2128) has attracted a lot of attention at home and abroad and triggered a rather emotional debate about whether a medically indicated circumcision and thus each ritual circumcision constitutes a bodily injury as per § 223 StGB, perhaps even dangerous as per § 224 StGB or severe as per § 226 StGB. Medically indicated actions are only not considered bodily injury if the patient has consented after being informed, or in children whose guardians have given their informed consent. If the procedure is not medically indicated, the question arises whether custodians giving their consent violate their custodial duty (§ 1660 BGB) to act in the interest of the child's well-being (not a precisely defined term). With regard to the professional legal discussion I refer to the contributions of H. Putzke , R.D. Herzberg and J. Scheinfeld in this book and the literature cited therein.

In December 2012, § 1631d of the Civil Code came into force. In it, a custodian is granted the right to consent to a non-medically indicated circumcision of a boy if it is carried out according to the rules of medical science and as long as it does not endanger the child's welfare. Thus, de facto the procedure's performance is reserved to the domain of medical doctors. However, the following paragraph changes this perspective: During the first six months of life non- physicians may also circumcise, if a religious community intends them to do so and if they have received specific training to perform the procedure. Since it is one of the rules of medical science to ensure freedom from pain during any surgery, yet non-doctors are not permitted to administer anesthesia, this law is contradictory. It is also illogical inasmuch as the ritual circumcision of girls is strictly forbidden by law and is punishable, not only in its severe mutilating form, but also in its minimal form (superficial nicks of the clitoris) This last version is thus less harmful than male circumcision, during which functionally significant body substance is being removed thereby constituting a mutilation.

Why did the clear parliamentary majority decide on this law in this form that grants certain religious minorities a special right? To the Cologne judgement there were few and moderate reactions among Muslims, and among Christian minorities that ritually circumcise (e.g.

Coptic) there was no reaction at all, but religiously oriented Jews reacted very energetically (usually fact-bound and moderate in tone, more rarely polemical). It is hardly surprising that the majority of the parliamentarians rubber stamped this bill of the Federal Ministry to become law. Richard Wagner formulated it probably correctly in the »Frankfurter Allgemeine Zeitung« from September 22, 2012: »The interest of the policy is too small and too great the fear of the majority of politicians of entering this mine field« (Wagner, 2012).

Medical Aspects

Especially in the USA, health benefits of general circumcision of young infants have been stated. There, in certain Christian denominations, extreme moral aspects (aggravation of masturbation) also play or played a role that is not to be underestimated. Although medical benefits were claimed, they could never be convincingly proven scientifically, despite a large amount of favorable publications. Finally, it is not to be overlooked that endorsements of general circumcisions are partly oriented to special group interests. For details see the articles by M. Stehr, M. Schäfer and Chr. Kupferschmid in this book.

Again and again, proponents of infant circumcision maintain that it is a harmless procedure. Statements made by circumcisers, claiming that never or hardly ever have complications occurred with infants they circumcised, are without any logical value because circumcisers who are not medical doctors do not have any therapeutic possibilities and therefore won't see a circumcised child with complications, as do pediatric surgeons and urologists. There are disagreements about the complication rate, ranging from 0.2% to 6%! Only in August 2013 a study from Copenhagen was published (Thorup, Thorup and Ifaoui, 2013), in which 315 boys in the age range from three months to 16 years (average 5 years) were tracked after undergoing circumcision. 5.1% of circumcised boys required treatment due to complications, which in some cases only manifested after some years. It has to be noted that this study relates solely to physical consequences, not to those of psychological and mental nature.

Medical Ethical Aspects

With this proviso: Medicine does not have its own ethics. Medical ethics is the application of general ethics to ethical and moral issues in medicine. It is significant that in our culture a controversy does not exist on the following principles, which derive from our Judeo-Hellenistic-Christian traditions: to add good, to not harm, to respect the dignity of patients and therefore their autonomy, to be fair, to act caringly (after Beauchamp and Childress).

If one takes these principles seriously, one cannot be in favor of a non-medically indicated circumcision at all. The procedure is not free of complications, and repeatedly claimed advantages have never been proven. The surgery is mutilating, because it permanently removes a healthy functionally significant body part. There are functions missing in the circumcised penis, and the boy or man is permanently physically marked. As a newborn or as a boy he could not decide whether he agrees with this change to his body or not.

Circumcision causes significant pain, not only in the procedure itself, which could be performed under anesthesia, but still later on, with a maximum lasting up to around the third

postoperative day. One can read about that already in the Old Testament (first book of Moses [Greek Genesis, Bereshit Hebrew]; Gen. 34.24-25).

Until the early 1970s it had been speculated that young infants are not sensitive to pain. We now know that the opposite is true. Amazingly, this old misconception is still used sometimes in trivializing ritual circumcisions of newborns. In the last two decades, several published articles on the psychological consequences of circumcision have appeared. Yet, already in 1945 the »American Journal of Diseases of Children« published an impressive report by David M. Levy about the mental trauma of circumcision. The fact that a percentage of men who were circumcised as a child are suffering as adults under this mutilation can be found in many articles on the internet. It might well be that other psychological difficulties come into play, as not everybody shows the same level of vulnerability. However, it has to be acknowledged that men circumcised as children may have difficulty with their physical change in adulthood and therefore even organize around the issue. The penis is a body part with central psychological importance, which occupies psychoanalytical thought since Freud's time. In the archaeological museum in La Valletta (Malta), one can find a number of penis sculptures from the local Neolithic temples. Apparently this part of the body was of high spiritual significance at these times. If you respect all these observations, then one must necessarily conclude that a medically unnecessary circumcision violates the ethical principle of »do no harm« and the dignity of the person concerned, including his autonomy. Some circumcised men are so much at odds with their condition that they have established a working group within the organization MOGiS e.V.

It is easier to argue against a medically indicated circumcision, which is performed on the basis of any secular ideas than to question ritual circumcision. (see also the article in the journal »Medical Law« by Protestant theologian Hartmut Kress, 2012) .

In Islam, circumcision, usually performed at school age, is not mandatory, which means it is not prescribed in the Quran. It is instead a so-called Sunna, a religious recommendation, one that is generally strictly observed, even demanded, by certain theological schools.

The commandments are much stricter in Judaism. In the Torah's first book of Genesis (Gen 17:10-14), God asks Abraham to circumcise all newborn boys on the eighth day of life as a sign of God's covenant with the chosen people, incidentally also all males born in the house and all male servants. Males with uncircumcised foreskins, shall be expelled from the people, because they have broken the covenant with God. According to Gerhard von Rad (1969), former professor of Old Testament Faculty of Theology at the University of Heidelberg, circumcision was introduced towards the end of the Babylonian captivity in the 6th century BC and has since become »the preeminent identity and classification criterion and a question of commitment to the so called Status Confessiones« (von Rad, cit. according to Kress, 2012).

It is therefore not surprising that the German Jewish community responded hypersensitively to the above-mentioned Cologne judgment, since in it an essential aspect of their religious beliefs and ethnic identity was questioned. These reactions, apart from a few very polemical ones, deserve tactful attention and respect. In the 19th century, Rabbi Samuel Hodheim (1844) among others, already argued against a religious obligation to circumcise (Hodheim, cit. According Hödl, 2007), and still today there are Jewish voices against circumcision (JAC, 2003). However, none of them have reached the journalistic force that emanated from the Cologne judgment, striking the Jewish community from their perspective so

violently and unexpectedly.

However, this does not mean that the ritual circumcision can be approved of from an ethical perspective. As already mentioned, according to the new § 1631d, paragraph 2 the Mosaic circumcision, Brit Mila, can be legally carried out, and de facto - though not according to the wording of the law - under neglect of *lege artis*, because the MD requirement has been omitted and thus also the possibility of effective anesthesia, which in itself can be problematic in newborns. Therefore, the consent of the parents can not be considered compatible with the child's welfare, as the child suffers significant discomfort and is also threatened by complications.

Thus, a violation against the above-formulated medico-ethical principles is at hand. Such principles are not being challenged by the Jewish community as long as they are not applied to the circumcision practice. With strict interpretation of Genesis 17:14 it could possibly be argued that by not circumcising, the child's well-being is affected, because it ostracizes the child from the religious community. However, such reasoning is neither supported philosophically nor by our medico-ethical principles. For example, the religious community of Jehovah's Witnesses rejects any use of blood. Parents forbid transfusions or administration of blood products to their children, even if this would mean the death of their child. But there is no debate at all about court orders issued to medical doctors requesting to revoke parents' custodial right to medical decisions on behalf of their child for the duration of the child's treatment. Because accepting the risk of damage in the interest of beliefs is not allowed and neither justified in law nor ethically.

I admit, it is politically problematic (but only politically) to take action that applies criminal law against customs that are in practice since thousands of years, but are no longer justifiable by our current ethical concepts. However, the political opportunism practiced in §1631d BGB remains ethically questionable. The fact that male circumcision is practised in Judaism for more than two and a half thousand years is no grounds for justification any more than is the sometimes used argument »We have always done it«. One can also have done something wrong for several thousand years. The CRC of the United Nations of 1990, ratified by Germany in 1992, states in Article 24, paragraph 3: »The undersigned parties shall take all effective and appropriate measures to abolish any traditional practices that are harmful to the health of children«. It therefore remains an ethical postulate to keep reminding our Mosaic and Muslim fellow citizens of this sentence and to tactfully promote the ending of ritual circumcisions via statements (see DAKJ, 2012) but also in the individual medical interview.

Furthermore, it is to be viewed as highly problematic, if by law, ethnic or religious groups are granted rights that violate any applicable laws. Among others, Reinhard Merkel (2012) and Jörg Scheinfeld (2013) have pointed this out, with good reason.