

Criminal Relevance of Circumcising Boys^{*}

A Contribution to the Limitation of Consent in Cases of Care for the Person of the Child

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(translated by Katharina McLarren)

I. Introduction

“Thoughts are free” is the title of a traditional German folk song, found in collections such as “Des Knaben Wunderhorn” by Achim von Arnim and Clemens Brentano. Nowadays this quotation is primarily an expression of intellectual independence, which one maintains despite external constraints. Upon taking a closer look, one will realize that such constraints have become the rule rather than the exception. There are many reasons not to express thoughts. Some of them are good ones. They are frequently reasons of convention, morals or religion. In such a case it is particularly important to allow for a healthy degree of skepticism; since there is no eternal guarantee for conventions, morals and religion. No one who claims to possess common sense would even think of taking each word of the Bible literally and to completely orientate their behavior accordingly. There is a time for everything and times are continuously changing. One must differentiate between the “permanently binding content and the temporary form of expression”.¹ Thus there are very good reasons to question conventional, ethical or religious barriers. This can provoke objections and even fierce opposition. It took a long time until homosexuality between men was no longer a punishable offense (§ 175 Criminal Code, old version, *Strafgesetzbuch StGB*²) or until it was enforced not to chastise children (§ 1631 par. 2 Code of Federal Regulations, *Bundesgesetzbuch, BGB*). To discuss these or other topics before the time is right affords, above all, independence, but also courage. Science is called upon to openly express criticism, in order to live up to its own high standards.

Some will consider the issue at hand to be highly delicate and might be reminded of the Mohammad caricatures which were printed in a Danish newspaper and which led to a

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¹ *Kamphaus*, F.A.Z. Feb.2, 2007 (No. 28), p. 9 (regarding the historical-critical analysis of the Bible and the Quran).

² [note by translator: the official English version of both the Criminal Code as well as the Code of Federal Regulations (Civil Code) may be found on the internet: http://www.gesetze-im-internet.de/englisch_stgb/ and http://www.gesetze-im-internet.de/englisch_bgb/ respectively.]

vehement debate regarding the appropriate degree of criticism of religion. Without wanting to reveal the conclusion, the academic examination of the topic of circumcision which includes the religiously motivated circumcision, will in itself provoke and may not be to everyone's liking. But the search for truth does not need to be to everyone's liking. Or to use Christoph Lichtenberg's words, "It is almost impossible to carry the torch of truth through a crowd without scorching someone's beard." Things turn foul once the beard-wearers (to stick to the image) try to prevent the torch from being seized and carried. And the situation becomes ominous once the fear of the beard-wearers leads to no one wanting to seize that torch, i.e. fear of repression leads to self-censorship rather than sensible reasoning. Yet the issue at hand is not a question of a criticism of religion, for circumcision is not exclusively a religious phenomenon, though in Germany most circumcisions are religiously motivated. Overall the question of ethical approval of such a surgical procedure has not been audibly posed either in the past or today. And that applies in particular to the question of its relevance in criminal law. The situation on the other side of the Atlantic is completely different, particularly in Canada and the USA: medically not necessary circumcisions are discussed extensively.

II. Determining the Issue

There are different types of so-called genital cutting. It can mean the partial or complete removal of the outer female genitalia of girls or women (Female Genital Mutilation/Cutting). The term also refers to the partial or complete surgical removal of the foreskin (prepuce) of the male penis. The latter type is (medically) referred to as circumcision. It is the focus of this paper, though several different scenarios are addressed, such as circumcision...

- with consent by a person with the ability to reason without medical indication,
- with consent by the person who has custody for the boy with medical indication,
- with consent by the person who has custody for the boy without medical indication,

As the list indicates, the main focus is on constellations in which people are circumcised whose ability to reason is not (yet) given. This is usually the case regarding so-called religious circumcisions. What is meant are circumcisions without medical indication, which are justified primarily based upon religious reasons. Other cases are analyzed as well, such as hygienically or aesthetically motivated circumcisions.

III. Circumcision as Serious Bodily Injury

Circumcision is only relevant for criminal law, when the surgical procedure fulfils the elements of an offense and when there are no reasons which can justify the procedure. §§223, 224 StGB³ may be taken into account as norms in criminal law here.

1. First of all it is necessary to clarify whether circumcision is deemed a physical maltreatment. According to the common definition this element of the crime shall be

³ §223 Bodily Injury, §224 Dangerous Bodily Injury

affirmed as inappropriate and objectionable treatment, due to which the physical integrity is seriously impaired. Upon closer inspection it becomes apparent that this definition has methodological flaws. For a start, aspects which objectively may be regarded as criteria of a permissible risk, are already included in the definition of physical abuse. It is possible to argue this way, if one recognizes that by affirming the “inappropriate and objectionable treatment” one simultaneously answers the question regarding the transgression of a permissible risk. If, however, one seeks to allow for a certain independent objective causation (be it for reasons of dogmatic clarification), it is necessary to liberate the definition of physical maltreatment from the question whether a treatment is objectionable and inappropriate. It therefore stands to reason to rid oneself of the traditional definition and to define “physical maltreatment” as “a not entirely insignificant injury of physical integrity”.

a) As mentioned above, the foreskin of the penis is usually removed completely during a circumcision. There are several different surgical methods which are applied. If the surgery is performed *lege artis*, i.e. if for example all current and approved medical standards in Germany are adhered to, the surgery is carried out using a scalpel. Upon stretching the foreskin with clamps, the first incision is performed starting right behind the *sulcus coronarius* (the so-called glans penis), over the ring-shaped indentation behind the glans and continued in a curved line to the *frenulum praeputii* (frenulum). Once the *preputial epithelium* (inner lining of the foreskin) is separated from the glans, the inner and outer lining of the foreskin can be severed, although 3-4 millimeters of the inner lining remains. The foreskin is then folded back, the inner lining is held by clamps and the foreskin is severed 3-4 millimeters proximally to the glans. Finally, the skin of the penis shaft, where the foreskin used to be, is sewed up under the glans and the frenulum is reconstructed. An anesthetist provides the anesthesia throughout the entire surgical procedure, usually as a general anesthesia in combination with a local anesthetic of the penis root.

The abovementioned technique is not the only method of performing a circumcision. Another technique is the use of the Gomco-Clamp, which is a surgical instrument created specifically for circumcisions. The Plastibell is another method which is occasionally applied, whereby a small plastic bell is placed under the stretched foreskin and over the glans. The foreskin is then tied firmly to the ring of the bell and will die off due to a lack of blood circulation.

It is highly questionable whether a circumcision is always performed under ideal hygienic conditions, ensuring a thorough disinfection and a sterile environment in the operating room. This should be a rare problem in Germany, as many religious circumcisions are now also performed as ambulant surgeries by doctors.

b) The complete removal of the foreskin therefore injures bodily integrity. Whether or not the affected person experiences pain during the procedure is not relevant (for example because the surgery might take place using anesthesia and the healing may not cause additional pain). Regarding the intensity of the procedure (hardly comparable with tearing out a single hair), the object of legal protection is by no means merely inconsequentially impaired.

c) The question whether this disagreeable impairment is also “inappropriate and objectionable“ only arises – as mentioned above – once the aspect of objective causation is discussed, namely in the case of creating an unlawful risk; however this point shall be discussed here already. In order to be able to speak of a severe and inappropriate intervention, the surgeon would have to create a legally disapproved risk through his legally disapproved behavior. As the description of a circumcision indicates, the surgeon creates a risk to the physical integrity. It is questionable whether when creating it, he is allowed to or prohibited from doing so. As Article 2 (2) of the Basic Law (*Grundgesetz*, GG) shows, the law condemns any violation of bodily integrity, unless a particular procedure is specifically permitted. Our legal system does not explicitly allow the performance of circumcisions, at least not as long as there is no medical necessity. Regarding the topic at hand, however, the decisive cases are precisely those in which no medical indication is given. Therefore the debate as to the dogmatic categorization of a medical curative treatment may be disregarded, for there are those who would argue that due to consent the *actus reus* of bodily injury is not fulfilled. Others might recognize the *actus reus*, but would grant effectiveness on the level of justificatory defense of justification.

It remains to be clarified whether the *actus reus* of bodily injury can be negated in the case of a medically non-indicated procedure performed by a physician. An effective consent could make the created risk a permitted one. For in exactly this constellation the argument that is used to establish the *actus reus* through the medically curative treatment does not apply. It is argued that one must exclude autonomous procedures which violate the patients’ right to self-determination, which is why a particular category of justification is required. Should the indication be missing, such a “healing terror” would not be a danger.

How then shall one answer the question whether the person (physician or not) performing the circumcision is creating a permitted or a prohibited risk? Whether such behavior should be approved or condemned by criminal law is a decision which can only be based on moral judgment. In the end one must weigh-off the pros and cons of permitting a circumcision. The benefits of a circumcision will be placed in the one scale pan, while the damage it causes is placed in the other. Those are exactly the categories which play an equally significant role in justifying the consent. The consequences of such a consent, which some are prone to use as substantial reasons to eliminate the facts of a case, shall not be discussed here. This debate shall not play a role in the question at hand regarding the criminal liability of a medically unnecessary circumcision. This only reveals that the distinction between *actus reus* and *mens rea* on the one hand and justification on the other is merely a formal one.

In the case consent, the decisive question will be whether the legal representative, be it the parent or a guardian, has the discretionary power to give consent to an injury of the physical integrity. This is only the case if the injury is in the interest of the child’s well-being (§§ 1627 sent. 1, 1666 par. 1 BGB). This franchise compels us to focus on the potential danger of the procedure in so far as we are looking at the question of whether the danger was created in compliance with the law or illegally. At the level of unlawfulness, one must then clarify whether first of all there are reasons which speak in favor of a circumcision and secondly, whether these reasons are significant enough to outweigh possible disadvantages.

The damage is easily identified, namely the loss of the foreskin and concomitantly an obvious injury of physical integrity. Why obvious? Is the foreskin more than “a few millimeters of skin”? Some will answer yes, others say no. Upon shifting the focus away from the foreskin and towards the entire male sexual organ, then even lay people must realize that the removal of the foreskin leads to changes. Without the foreskin the glans is no longer kept moist, it is constantly exposed to a dry environment. Indisputably this leads the glans adapting to its new environmental conditions, the outer skin becoming more resistant. In a study conducted by *Sorrells* et al the authors conclude, “The glans of the circumcised penis is less sensitive to fine touch than the glans of the uncircumcised penis. [...] Circumcision ablates the most sensitive parts of the penis”⁴. The circumcision thus weakens the sensitivity. For an organ which (must) react extremely sensitively to stimuli this may not necessarily be beneficial.

In addition, one must consider the risks of a circumcision. Every physical procedure involves risks, including circumcision, ranging from (rather seldom) severe complications to malpractice. In total complications are not common; purportedly they only occur in 0,2 to approximately 6% of cases. In the case of an experienced (e.g. Jewish or Turkish) circumcisor (“mohel” or “sünnetçi” respectively) short-term health risks will be rather low. This can also be affirmed when an experienced physician performs the circumcision in a clinic. The above stated however only applies to the circumcision of newborns under certain conditions – in 32% of cases long-term complications in the form of urethral stricture (narrowing of the urinary meatus) have been recorded.

Additionally, the psychological consequences are not to be neglected. For a long time there was a common belief in medicine that infants could not experience pain consciously, i.e. could not feel suffering. A statement made by Nesbit/King in the 1980s is exemplary of this approach, “During the newborn phase anesthesia is not necessary for circumcision”⁵. The authors reasoned that “children hardly feel any pain [...] up until the 2nd or 3rd month of life.” Today such a view is regarded as outdated and wrong. The ability to perceive and transmit pain is already given as early as the 22nd week of pregnancy and an infant’s threshold of pain is significantly lower than that of older children or adults. One may therefore also assume that an infant’s pain can change the biometric structures of bone marrow and the brain, i.e. there is such a thing as a memory of pain. And so in the case of an infant circumcision local anesthesia is recommended. For circumcised boys verifiably have a significantly higher experience of pain compared to boys who are not circumcised or who were circumcised with a local anesthesia. The effects of anesthetics on infants (such as an increased cell death with significant neurological consequences) are hardly known. There are however more findings on the effects of circumcisions performed on older children. Studies show that children perceive the procedure as an attack which harms the body.

While the risk of a circumcision surgery is not of particular consequence when it comes to determining the damages, another aspect is of greater importance: the irreversibility of the

⁴ *Sorrells/Snyder/Reiss/Eden/Milos/Wilcox/van Howe* (eds.), Fine-touch pressure thresholds in the adult penis, in: *British Journal of Urology International* No. 99 (2007), p. 864.

⁵ *Hohenfellner/Thüroff/Schulte-Wissermann* (eds.), *Kinderurologie in Klinik und Praxis*, 1986, p. 522.

procedure. Once the foreskin is removed it is “lost” forever; reconstructing it is extremely difficult. There have been attempts to elongate the skin of the penis shaft using weights or other means so that the glans is covered with skin again. Yet this can merely lead to an optical similarity with the foreskin, it does not lead to a functional equivalence.

The disadvantages and dangers just mentioned are by no means undisputed. There are sufficient reports and studies in which the benefits of a circumcision are praised and the disadvantages are either withheld or weakened. This may be one of the reasons why circumcisions are partly classified as “socially adequate acts”, and do therefore not fulfill the *actus reus* requirements of the offense. Supposedly this is even the “prevailing opinion”. Both positions must provoke objection. First of all it is hardly obvious, even highly questionable, that there are valid reasons to regard the position which views a medically non-indicated circumcision as not fulfilling the *actus reus* requirements as the “prevailing” opinion. One reads this statement and asks oneself (as so often) what qualifies an opinion as the prevailing one. Secondly, the reasoning why a circumcision should not fulfill the facts of a case of physical injury is hardly plausible. When is certain behavior considered as socially adequate? Behavior might be considered socially adequate because so far there have been no evident preliminary investigations by the public prosecution in Germany have been undertaken against a surgeon, who has performed a medically non-indicated circumcision *lege artis*. Perhaps a lack of information is the reason for this, as no one in the living environment of a circumcised boy will immediately notify the public prosecution about the situation. But such aspects do not play a role in determining the unlawfulness. The question at hand is whether a certain behavior, despite the danger it has for an object of legal protection, is generally accepted. According to the regional appeal court of Hamm these are acts “which occur completely within the framework of the historically evolved social-ethical order of a community and are permitted by such”.⁶ A classic example for this is when someone who has got a common cold takes the bus and knowingly infects those passengers who are crowded around. This may lead to several unpleasant colds, nevertheless this is accepted as it would be disproportionate to inhibit the liberty of action of people infected with a cold, bearing the normal risk of contagion in mind.

Are the facts of the case such that they “occur completely within the framework of the historically evolved social-ethical order of a community”? Hardly. No one truly addresses the subject, as religious circumcision in particular is afflicted with so many taboos and negative critique is all too readily misunderstood as an embellished criticism of contemporaries who regularly practice that type of circumcision. But it is inconsequent and contradictory to speak of a social acceptance of circumcision on the one hand and to exclude a medical curative procedure from what is socially adequate and demand a “special justification” on the other hand. In fact the criminal risk exists to the same extent in the case of both physicians and circumcisors: no one may interfere with the physical integrity of another without justification.

A general approval could – if at all – only be accepted if it was based upon the approval or consent of the circumcision by the legal guardians. Whoever understands social adequacy in

⁶ Court Ruling July 13, 2001 (9 U 141/00)

this sense would consequently have to affirm every consent as social adequacy. One could proceed in this way, since social adequacy is nothing more than one of the categories of determining a permitted risk. This would however lead to a dilution of the category of social adequacy. Even formally it is not convincing that circumcision (including religious circumcision) should be deemed to be socially adequate behavior.

In the end there is no option but to undertake an evaluation regarding the permitted or prohibited creation of danger (taking the accepted premise of distinguishing between *actus reus* and *mens rea* and unlawfulness into account.) Those who approach the issue impartially cannot but realize that the evaluation of dis-/advantages of a circumcision greatly depend upon which study one believes. This is highly unsatisfying as it seems to lead to a *non liquet*. What does remain beyond all (actual and alleged) dis-/advantages however, is an interference of physical integrity. The bottom line is that there are good reasons to assume a circumcision to be an unlawful risk, in other words the created risk of injury is unlawful. At the same time a disagreeable treatment of the body can be determined, which is inappropriate and objectionable. It is therefore a case of physical maltreatment.

2. As described above the skin of the penis shaft is completely severed during circumcision. As a rule this is healthy tissue well-supplied with blood. There will be wound edges (the size of which of course depends upon the age of the afflicted). The circumcisor therefore causes a pathological condition which deviates unfavorably from the normal condition of the bodily functions. And so a health impairment can be affirmed.

3. Since objectively circumcision fulfills the requirements of the *actus reus* (and ordinarily the assumption of the *mens rea* will thereby be indicated), the use of cutting instruments, usually a scalpel (see III 1a), could qualify a simple bodily injury as a dangerous one. According to the common definition a dangerous instrument is an object whose objective properties and whose use in a concrete case is capable of causing serious injuries. Since dangerousness is not *a priori* a property of the instrument, but rather depends upon its use, it is appropriate to focus on the dangerousness of its use. But what is important here is the seriousness of the injury which the offender caused or wanted to cause.

As a rule, the instruments used during a circumcision (scalpel, “bell” for the Plastibell Method, etc) are employed in order to completely remove the foreskin. This leads to a serious injury, which the operator causes and also wants to cause. The case therefore seems clear – the instruments used are dangerous instruments and the simple bodily injury is therefore qualified as a dangerous one. However, one sometimes distinguishes whether an instrument, which is abstractly dangerous and caused the injury, was employed “not-dangerously”. Thus some negate treatment or surgical instruments as “dangerous instruments” which are used by accredited physicians according to regulations (i.e. not as a means of attack or defense). But that does not make sense. Why should a doctor who performs a medically indicated surgery *lege artis* on an inflamed thigh abscess be exempt from the risk of using a dangerous instrument, if the person concerned explicitly opposed the procedure which was not acutely necessary? There is no factual reason. And one will search for one in vain, if on the one hand scalpels and other objects which are used by accredited physicians supposedly are not dangerous instruments, however when used for

example by an experienced Jewish or Turkish circumcisor (“mohel” or “sünneci” respectively) are understood to be dangerous instruments. Of course one could for example not limit the exception to accredited doctors, but expand it to include “qualified healers”. But then one would also have to include circumcisors. And that the latter should be considered a “healer” is hardly justifiable, particularly not in the case of a lacking medical indication.

The criminal risk therefore equally applies to physicians as well as non-licensed individuals. And so the following applies: no one may interfere with the physical integrity of another person without justification – this also applies to the use of an object whose use causes serious injuries, even if these perhaps serve a good cause. Instruments used during a circumcision are therefore “dangerous” as in § 224 par. 1 no. 2 altern. 2 StGB.⁷

IV. Justification by Consent?

As just demonstrated, those who perform a circumcision on another person act in breach of their duty and fulfill the facts of a case of dangerous bodily injury in accordance with §§ 224 par. 1 No. 2 altern. 2, 223 par. 1 StGB.⁸ Whether such behavior is contrary to duty as a whole, i.e. whether it is unlawful or in other words constitutes a criminal wrong, is not yet clear and shall be examined here. A consent can have the effect of justification, if the consenting party has the natural ability to reason, has discretionary power and is in agreement, gives the consent voluntarily, i.e. without coercion or deception and (which is disputable) expresses the consent prior to the act. Additionally, the act for which consent is given may not be unmoral (see § 228 StGB⁹) and the addressee of the consent must know of the objectively justifying circumstances. If all these prerequisites are fulfilled, an effective consent to a circumcision is given. The motives upon which the consent is based are irrelevant: the surgeon is justified in the case of a medically indicated procedure as well as in the case of a procedure which is performed for other reasons, whether these are religious, hygienic, aesthetic, etc. They could even be objectively irrational reasons. Such is the consequence of the general freedom of action – everyone (put simply) may pursue happiness in their own way.

A circumcision could therefore be justified based upon an effective consent given by the person concerned. In the case of a religious circumcision however, this consent by the person concerned only rarely plays a role. For the surgical procedure is usually performed at a point in time, when the natural ability to reason of the person concerned is not yet given. In such a case the surgeon may be justified due to an effective consent given by the person having the care and custody of the child. In the following only the ability to reason and the discretionary power shall be examined, as the other prerequisites can usually be affirmed and do not pose any problems.

⁷ “2. by means of a weapon or other dangerous tool;”

⁸ see 6; “(1) Whoever physically maltreats or harms the health of another person, shall be punished with imprisonment for not more than five years or a fine.”

⁹ “Whoever commits bodily injury with the consent of the injured person only acts unlawfully if the act is, despite the consent, contrary to good morals.”

1. The natural ability to reason of the person concerned must be given (and it goes without saying this also applies to the legal guardians). What is meant here can systematically be derived from § 40 par. 4 no. 3 sentence 4 of the German Pharmaceutical Act: the ability (mental and ethical maturity) to both recognize the significance of the object of legal protection as well as developing one's own will accordingly must be given. The object of legal protection concerned is the bodily integrity. The extent, the risks and the chances of recovery play a decisive role in such a procedure. The person concerned must be able to review these sensibly.

The Federal Supreme Court denies this ability, if "the decision can be postponed even if it is not unimportant" and the concerned person is 16 years of age. This particular decision concerned the removal of four "malicious warts" on the left hand. Now one cannot directly compare the removal of warts with the removal of the foreskin. A circumcision may be considered one of the easiest urological surgeries. Yet warts are not an original part of the body, while the foreskin is part of the male sexual organ and its irreversible removal is the topic of discussion. So that in the case of circumcision in particular there are considerable arguments in favor of not falling below the age limit of 16 years.

§ 5 of the Law on the Religious Education of Children (RelKERzG) could nevertheless argue in favor of doing so. Sentence 1 grants the child the free choice of religious confession after completion of the 14th year of age; after completion of the 12th year of age Sentence 2 grants a minor the right to veto any changes to the previous confession planned by the person with the care and custody of the child. So that regarding a religious circumcision one could definitely affirm the ability to reason as of the 15th year of age. Whoever views it in this way, would disregard the fact that a circumcision encompasses far more than a confession of faith. A circumcision is by no means merely an inner attitude or way of life, but an interference with physical integrity. And this cannot be understood as an element of the free choice of expressing one's faith. An injury of physical integrity also demonstrates the difference to a Christian baptism, confirmation, or the general participation in religion class. They do not harm physical integrity, while a circumcision entails the facts of a case of a dangerous physical injury.

So when is a person capable of grasping the significance of the object of legal protection and the consequences of expressing a waiver of the protection of this right? In view of court rulings one would have to equate the ability to reason with full-age in the case of a medically non-indicated circumcision. Even in the case of a medical curative treatment the regional appeal court of Hamm only accepts the consent of the person concerned as effective upon entering full age. Regarding a medically non-indicated circumcision this would have to be just as valid, especially (despite the relatively harmless procedure) since the consequences are irreversible. This view is supported by a ruling from 1959 in which the 5th criminal division of the Federal Supreme Court stated an opinion on the faculty of judgment of minors. A minor may be presumed to sufficiently understand the consequences of consent to a physician's curative procedure at least in a case "when the immediate necessity of a lifesaving procedure is given." As a rule such a medical indication is not given in the case of a

religious circumcision, not to mention an immediate danger for the health or the life of the minor.

Furthermore there is the consideration which the Federal Supreme Court presented in the above mentioned “wart ruling”: “the reluctance [of a 16 year old girl] to submit to a treatment which is painless and purportedly without consequences is not sufficiently based upon critical reservations.” Experience has shown that at this age one tends to “rather uncritically agree to a procedure which promises a cosmetic improvement.” Religious circumcisions in particular surely have nothing to do with a cosmetic improvement. What can be applied however, is the thought that minors are more easily swayed by supposed benefits and are more susceptible to extraneous considerations. Particularly the influence of family, friends and not to mention the congregation of the faithful is not to be underestimated when it comes to religious circumcisions. Only very few minors are capable of defying such influences. This by no means implies that such influences must be negative. But they can influence the decisions of minors in such a way that the reluctance to consent to a circumcision will not be “sufficiently based upon critical reservations.” And this could then have the effect that the ethical and mental maturity would not suffice to be able to judge the significance and the magnitude of the procedure and giving the consent.

This is not to say that adulthood automatically implies the ability to reason. The aforesaid refers chiefly to (supreme) court rulings, if one may transfer the standards set here to comparable standards regarding religious circumcisions. So far there has been no concrete ruling in which the ability to reason was on the borderline and therefore problematic. It would be misguided to view the coming of age as a static determinant. § 1626 par. 2 BGB in particular speaks against a schematic view. This regulation recommends that a minor should be granted legal majority in stages. Overall it might be the rule that the ability to reason in the case of a medically non-indicated circumcision is only given with majority, however there can be exceptions in which the ethical and mental maturity is given at an earlier point in time, so that the significance and magnitude of the procedure and the connected consent could be judged rationally.

2. As long as the ability to reason is not given, those who have the custody of the person are asked to give the consent. As legal representatives these are usually the parents. They can only effectively give consent, if they may dispose of the object of legal protection – regarding a circumcision it would be the bodily integrity – in other words if they have the discretionary power.

This legal power is granted by law, more precisely by § 1626 par. 1 BGB.¹⁰ At the same time the legislator has limited the legal power. The latter may not be exercised at random and without limit. For the object of legal protection is not one’s own, but that of another person. Custody and care of a person means to uphold the interests of the represented person, not to harm them.

¹⁰ “(1)The parents have the duty and the right to care for the minor child (parental custody). The parental custody includes the care for the person of the child (care for the person of the child) and the property of the child (care for the property of the child).”

a) § 1627 sentence 1 BGB determines how personal custody should be executed, namely in pursuit of the “best interests of the child”. It goes without saying that this phrase is vague and “difficult to concretize”. But it is not constructive to flagellate the term as an “empty formula” or as a “manipulation mass for the various interests of adults.” A lack of precision is quickly and readily claimed, it does not however automatically mean an absence of determinability. In order to concretize aspects which afford an evaluation, one must expound these, i.e. make use of juridical methodology.

Regarding the literal sense then “well-being” can be explained as a “condition in which someone is feeling well.” The origin of the word [both in English and German] leads to the Adverb “wohl” (wished for) and the substantive form “Wohl”, which etymologically means a “happy condition”. Not much is achieved with this insight. On the one hand many a minor might feel happy, have a sense of well-being, spending all day lounging about on a park bench, “whiling the time away”; on the other hand hardly anyone doubts the fact that compulsory education serves the “well-being of the child” – even if the latter may feel unhappy at school. Determining the well-being of the child therefore does not solely depend upon the subjective view, but the well-being should also and above all be determined objectively. The term can be narrowed down, upon taking the historical interpretation into account, i.e. looks at the linguistic development: in the past the legislator used the phrase “well understood interests” before it (without wanting to modify the regulatory content of the issue) changed the words.

Therefore something which harms a child’s interests cannot be in accordance with the “well-being of the child”. An “interest” is something which is “important, advantageous”, whereby the word etymologically means “profit, gain, advantage”.¹¹ This goes hand in hand with the criterion of a weighing of interests, which does not only play an important role in a justifying consent, but in every behavioral norm, namely the cost-benefit-analysis. As mentioned above both subjective as well as objective aspects must be taken into account. From an objective point, the rank of the affected objects of legal protection as well as the risks and consequences carry particular weight in this balancing of interests.

b) The weighing of interests principally leans in favor of the benefits of a so-called medical curative procedure. The Federal Supreme Court affirms this in the case of a surgery which is “medically indicated and the physician knows this.” If the procedure is performed *lege artis* with success and with consent of the patient, then the infliction of bodily harm is justified. § 161 of the draft of a Criminal Code (E 1962) provides information as to when a medical indication is given. According to the former a circumcision can be classified as a curative treatment, if the surgical procedure is “indicated to prevent, recognize, heal or relieve illnesses, ailments, physical injuries, physical ailments or mental disorders based on the findings and experiences of medicine and the principles of a conscientious physician.”¹²

Based upon this definition a circumcision would be a justified curative treatment for example in the case of a phimosis (constriction of the foreskin) or a balanitis (inflammation

¹¹ Duden, Herkunftswörterbuch, p. 366 (entry: “Interesse”).

¹² For a definition of a medically curative treatment based on § 161 E 1962 see Lackner/Kühl, StGB.

of the glans penis). Chronic or relapsing inflammations of the urinary tract can also justify the necessity of a surgical removal of the foreskin.

It remains questionable to what extent an unnecessary, solely preventive procedure may count as a justified curative treatment. Especially in the case of a circumcision, where there is no connection to any acute symptoms or ailments, prevention is frequently used as a justification for the procedure. A circumcision supposedly has a preventive effect against penis cancer, venereal diseases (e.g. syphilis, gonorrhea), urinary tract infections, phimosis, paraphimosis and also reduces the risk of women contracting uterine cancer.

Regarding the last point it should be mentioned that women act on their own responsibility by taking this risk during sexual intercourse. It is untenable to impose such a risk upon minors, by interfering with their bodily integrity so severely. Concerning penis cancer or sexually transmitted diseases, the benefits only outweigh the disadvantages, if the circumcision reduces the risk of a later infection significantly. This however requires determining the risk. The latter is decidedly low (apart from contradictory facts): there is an incidence of 1,12 % for urinary tract infections. The American Cancer Society indicated that circumcision would not have an impact on the existing death rate due to penile cancer. The likeliness of developing problems with phimosis, paraphimosis, or an inflammation of the glans penis at some point in life lies between 2 and 4 %. Pretty much the same applies to syphilis and gonorrhea. The results of studies vary greatly here; some even claim a higher risk of contracting venereal diseases for those who are circumcised.

Recent studies (conducted in Kenya and Uganda) hit the headlines, indicating that the risk of HIV infection of heterosexual circumcised men was 50% lower than that of those who were not circumcised. Does this allow for the conclusion that a circumcision is an effective preventive measure against an HIV infection, i.e. a curative treatment? In March 2007 the World Health Organization (WHO) stated: "Based on the evidence presented, which was considered to be compelling, experts attending the consultation recommended that male circumcision now be recognized as an additional important intervention to reduce the risk of heterosexually acquired HIV infection in men".¹³

One should consider, however, that the claimed correlation between cause and effect is not obvious. Even the authors of the above mentioned study themselves point out that there are no definite explanations for the empirical effects. The study for example does not include any statements regarding the sexual behavior of either the circumcised men or the group of comparison. Furthermore the risk of infection is an important factor for the question of whether a medical intervention may be viewed as an effective preventive measure. The WHO does not see it any differently: "A significant public health impact is likely to occur most rapidly if male circumcision services are first provided where the incidence of heterosexually acquired HIV infection is high".¹⁴ This statement implies that the WHO gives this recommendation only subject to the risk of infection. Viewed from this point a circumcision may considerably lessen HIV infections in Uganda and Kenya so that it might be

¹³ WHO and UNAIDS announce recommendations from expert consultation on male circumcision for HIV prevention, <http://www.who.int/hiv/mediacentre/news68/en> (Oct. 3, 2007).

¹⁴ Ibid.

sensible as a precautionary measure there. In order to determine whether this equally applies to Germany, the outcome would have to be based on local conditions.

A look at the relevant affected group in Germany shows that in 2006 the 2611 new infections which were registered were mainly men who have sex with men (52%), followed by heterosexually oriented men (14.6%). The group of people interesting here is of course limited to the minors who lack the ability to reason regarding the waiver of the right to bodily integrity in connection with a circumcision. As a rule this then concerns male persons who have not completed the 18th year of age (see IV 1). Overall the number of new infections in this age group (i.e. in all groups mentioned above) is infinitesimal. The objection that the risk of infection verifiably increases for age groups older than 18 and that therefore everyone will at one point belong to a risk group is not convincing. Though this fact cannot be denied, it does not lead to a necessity to perform a circumcision on minors. Whoever has the ability to reason concerning such a waiver of rights, is legally able to decide for himself, based on a weighing of the pros and cons of a circumcision. Waiting does not entail any disadvantages: for a start the risk of an HIV infection does increase significantly. Furthermore, a circumcision without a risk increase is possible, as soon as the ability to reason of the person concerned is given. For the surgical risk of infants and children is not less than that of a person who has just come of age.

In any case the recommendation issued by the WHO currently cannot claim validity in the case of the risk group of minors in Germany. For the risk of infection for the age group of interest here is conceivably low, much lower for example than the risk of contracting appendicitis (i.e. the inflammation of the appendix) And yet no one would ever seriously consider removing the appendix as a preventive procedure, simply to escape the remote possibility of the fatal consequences of an inflammation. One may term such a preventive and at the same time not harmless surgical procedure as unreasonable (especially since the risk of contracting appendicitis during a lifetime is a mere 7 to 8%), but can nevertheless grant validity to the justifying consent given by an adult.

The issue is a different one however when it comes to the wellbeing of the child. A medically unnecessary, i.e. a purely preventive, intervention in the bodily integrity can only be justified if the benefits of the procedure outweigh the risks and the concomitant disadvantages. Let us once more use the surgical removal of the appendix as an example: the surgery is not harmless and the benefits are uncertain. Even if the appendix should one day be inflamed, the medical possibilities in Germany regarding both the detection as well as the surgical treatment are decidedly good. The situation would be different, if for example a scientist couple, together with their child, planned to embark on a longer stay in the rough terrain of the Amazon. In the tropical rainforest, away from civilization, an inflammation of the appendix would most likely end fatally. In this case the weighing off of risks and benefits could lead to the realization that a preventive surgery would be in the interest of the wellbeing of the child.

The Federal Supreme Court seems to have applied a different criterion when it faced the facts of a case regarding the removal of an un-inflamed appendix of a 17 year old. She died as a result of the surgery. The Federal Supreme Court stated obiter (as the physician had

grossly neglected his duty to inform) that the parents could have effectively consented had “the reasons for and against been presented in detail”. This is hardly convincing, for in the case of unnecessary interventions, the well-being of a child may not solely depend upon an even detailed information. The result of a weighing of benefits and disadvantages of an intervention should be the decisive criterion.

In the case of an active intervention there must be substantial reasons which would affirm the well-being of the child, unlike in the case of refraining from acting. An example for the latter are early childhood vaccinations. If the persons with the care and custody decides in favor of them, then hardly anyone doubts that this decision is in accordance with the well-being of the child. The reason for this is that according to findings and experience of medicine such vaccinations have a high likeliness of preventing severe illnesses (smallpox, diphtheria, measles, whooping cough, polio, etc.). If such protective vaccinations serve the well-being of the child, would one not consequently have to regard a rejection as a threat to a child’s well-being? The issue is not quite as simple as that. By deciding against a general compulsory vaccination, the legislator placed the decision at the discretion of the parents. It is up to them to weigh off the pros and cons. Some parents object to protective vaccinations, based to a great extent upon the reactions and complications which might be connected with the vaccinations. Both the decision in favor of as well as the decision against is in accordance with the well-being of the child. This seemingly contradictory point is also closely connected to the differing requirements actions and the failure to act must fulfill: whoever wishes to expose their child to active interventions must provide substantial reasons; in the case of omission it is sufficient to present reasons, which could lead to justifiable doubts regarding the performance of a particular action.

It does not suffice to place the question of permissibility of a circumcision as a preventive measure at the discretion of the parents. In the case of vaccinations the disadvantages are not quite obvious. Possible side effects (anaphylactic shock etc.) or long-term consequences (allergies, asthma, etc.) are clearly not implausible. One can indeed have doubts regarding the tenability of vaccinations. On the other hand the benefits cannot be overlooked: the effective prevention of infections. Accordingly, statistics show that in 90% of those who contracted measles in Germany in 2005 had not been vaccinated. Thus there are strong reasons which speak in favor of vaccinations.

The case is different when it comes to circumcisions: medical benefits are empirically hardly verifiable and should they be confirmed, the available data is usually contradictory. Furthermore there is a lack of reliable data on the negative consequences which could develop, which might not result in the case of an intact foreskin (growth of warts and especially diaper rash of infants, etc.). And then there is the disadvantage of the loss of the foreskin, i.e. the grave injury of physical integrity.

If one therefore bases the question of whether a circumcision may be seen as a preventive measure against an HIV infection, on a weighing-off of the benefits and the disadvantages, then this would have to be negated, at least in Germany: due to the fact that there is such a small risk group, there are no substantial reasons which speak in favor of classifying the procedure as an appropriate preventive measure. The same applies to other illnesses and

ailments (phimosis, balanitis, etc.) which are supposedly prevented: the harm caused (loss of the foreskin, injury of bodily integrity as well as the surgical risk) outweigh the (questionable, mostly contested) benefits. A circumcision which solely serves a preventive cause is therefore principally not a curative treatment. Such an intervention is not in accordance with the well-being of a child, which is why the consent by a person with care and custody is ineffective, i.e. is not a justification. Whereas a necessary treatment justifies a circumcision.

Naturally there are also such bodily interventions which can serve the well-being of a child, regardless of the fact that the medical necessity is deniable. One might think of ear piercing, the regular trimming of hair or cutting of fingernails. The following shall examine whether a medically not necessary circumcision might be in accordance with a child's well-being for other reasons, and where the line is to be drawn.

c) While curative treatments by a physician are in accordance with a child's well-being (because the benefits outweigh the disadvantages), there are cases in which this is clearly not the case.

aa) The legislator has provided some specifications according to which the disadvantages are greater than the benefits. One may consider for example § 1631c BGB¹⁵ in order to systematically determine the well-being of a child (i.e. its interests): giving consent to the sterilization of the child would not be in accordance. The same applies to castration and a removal of organs. § 1631 par. 2 BGB provides further limitations: "physical punishment, psychological harm, and other degrading measure" equally threaten a child's well-being. So far this does not provide reference points as to when a medically not necessary circumcision is in accordance with the child's well-being or runs contrary to it.

bb) A further limitation of the parental discretion might be provided in view of a violation of moral principles. A reference to § 228 StGB¹⁶ is hardly necessary, as "good morals" is a term inherent in civil law. Insofar as a bodily injury would be in violation of good morals as stated in § 228 StGB, such an intervention would not be in accordance with the "child's well-being". The parents, due to a lack of legal power under civil law, would not have the authority to dispose of the bodily integrity of the child – a consent would therefore be ineffective due to the violation of moral principles of the intervention itself.

Although the Austrian legislator provided a more concrete definition of "good morals" in § 90 par. 3 of the Austrian Civil Code StGB (öStGB)¹⁷ in 2001, the German Criminal Code does not include comparable regulations. When an injury of the genitals violates good morals must therefore be determined in another way. Both civil as well as criminal divisions of the Federal Supreme Court affirm the violation of moral principles in the case of a violation of the "sense of decency of all those who are just and fair-minded". Now one can neither grasp who the "just and fair-minded" are nor what "sense of decency" they have. It is therefore

¹⁵ "The parents may not consent to a sterilisation of the child. Nor can the child itself consent to the sterilisation. Section 1909 does not apply."

¹⁶ "Whosoever causes bodily harm with the consent of the victim shall be deemed to act lawfully unless the act violates public policy, the consent notwithstanding."

¹⁷ "(3) One may not consent to the mutilation or other form of injury of the genitals, which is capable of inflicting a lasting impairment of sexual sensation."

easy to dismiss the criterion of the judiciary as hardly helpful. One must replace it with objective criteria. In his commentary of § 228 StGB *Hardtung* convincingly demonstrates that the threat of a severe damage of health must be given as a disadvantage for the bodily integrity.¹⁸ Genital mutilation of girls or women (Female Genital Mutilation/Cutting) can be subsumed here, even without such a legal regulation as there is in Austria.

However the health damages of a circumcision are not as severe. Though the procedure does have an effect on sexual sensation, it is by no means to such an extent that one might speak of a drastic and sustainable impairment of health. Therefore a medically non-indicated circumcision definitely does not violate moral principles.

d) But this still does not answer the question whether such a procedure is in accordance with the well-being of a child. For a violation of moral principles is merely a negative requirement to determine a child's well-being, negating morality, does not automatically mean that behaving in adherence to moral principles is also in accordance with a child's well-being. One should rather seek reasons which are substantial enough to outweigh the disadvantages of a circumcision (mainly seen in the intervention of physical integrity).

aa) Hygienic reasons are often mentioned. Various types of germs can in fact gather between foreskin and the glans penis. This is facilitated by a secretion of the skin, so-called smegma. Results of a lack of hygiene can range from unpleasant smells, over formation of skin irritating products of decomposition, to penile cancer. Legitimizing a circumcision based on these aspects has a long history. In 1902 a physician from Wroclaw underlined the, "public hygienic value of a circumcision"¹⁹. And if nothing else, circumcisions for hygienic reasons were *en vogue* and routine concerning infants in North America and the USA in particular over a long period of time. The numbers have been declining, perhaps also because overall the medical gain of a circumcision (as long as there are no other symptoms) has been seriously questioned. It is questionable whether hygienic reasons are strong enough to legitimize an intervention of the physical integrity. No one would come with the idea of pulling a child's teeth and replacing them with a prosthesis because it would be easier to clean and caries could not develop. But tooth decay is best prevented by cleaning and caring for one's teeth. *Mutatis mutandi* is what one should recommend to those who support a circumcision for hygienic reasons. A hygienic condition (at least in Germany) may be reached with other means which are equally as suitable and do not afford a serious injury of the physical integrity. Consequently, a circumcision which is justified by hygienic reasons is disproportionate and is not in accordance with the well-being of the child.

bb) Can a circumcision be justified as a cosmetic procedure? Measures which serve an aesthetic purpose are not rarity amongst minors – often affording a physical intervention. Thus in order to be able to wear certain types of earrings it is necessary to pierce the ears. Unlike plucking one hair, the former is not a completely insignificant injury of bodily integrity, i.e. a physical injury. Concerning minors, it is only justified if it serves the well-being of a child. As a rule this can be affirmed: the procedure is minimal, low risk and hardly painful.

¹⁸ In: MüKo-StGB, § 228 comm.24

¹⁹ *Alexander*, Die hygienische Bedeutung der Beschneidung, p.16.

Additionally there are the aspects of social adequacy: wearing ear jewelry is socially accepted, is seen as aesthetic and also as a sign of individuality – also in the case of minors. The weighing-off clearly results in favor of the benefits. What are the facts of a case in which parents wish to have their child tattooed? The response to this question depends on several aspects. If the tattoo have an objective benefit (for example if the child has a rare blood type and this is tattooed on the sole of his foot), then this serves the well-being of the child and the consent given by the parents justifies the injury. If the benefit is seen in the fact that the minor finds this “body painting” aesthetic, then both the age of the child and the quantity of the tattoo are also criteria. It might serve the well-being of a 17-year-old to have a delicate rose tattooed on the neck (in case the ability to reason would not be affirmed anyway). But the situation would be different if the minor was younger or the “picture” was much larger (such as a cross on the back).

The cases mentioned demonstrate that it is always a matter of weighing off the pros and cons. The greater the impact of a procedure, the more substantial the benefits should be. This becomes particularly clear when it comes to grave bodily interventions, such as surgically affixing prominent ears. An ear correction is usually done by reforming the cartilage, which is why the procedure cannot be viewed as risk-free. This procedure serves the well-being of the child because prominent ears are often the reason for teasing and can therefore be linked to negative psychological consequences. In such cases the procedure can be classified as a curative treatment based on good reasons. A similar reasoning applies in the case of a “hooked nose”, facial hair of a woman [a so-called “lady’s beard” in German], or a large mole in the face.

Such medical-aesthetic aspects hardly play a role when it come to circumcisions, which is why as a rule one cannot regard circumcisions as a cosmetically indicated curative treatment. Should aesthetic reasons dominate (claiming that a circumcised penis looks better) then this is usually based upon a highly subjective opinion of the person with custody and a lot speaks in favor of the fact that the aesthetic perception of the minor concerned may be very different later in life. A procedure based solely on aesthetic reasons therefore is not in accordance with his well-being.

cc) Aside from medical, hygienic, and aesthetic reasons, in many cases performing a circumcision is religiously motivated. This ritual is mainly practiced in Judaism and Islam. The origins of the ritual are not known. Concerning the Jewish religion, the Bible contains numerous points of reference. Chapter 17, verses 10 to 14 of the 1st Book of Moses (Genesis) is significant, according to which circumcision symbolized the covenant between Abraham and God and that circumcision should be performed on the eighth day after birth. In contrast to the Bible the Koran does not contain a reference to the necessity of circumcision. Its roots are rather found in several reports about the Islamic Prophet Mohammed which were passed on (so-called *hadiths*). From this circumcision is derived as a custom which is to be imitated (so-called *sunna*). It is not possible to determine one particular point in time when a boy should be circumcised. The guidelines provided by the different legal schools of thought vary from seven days after birth up until puberty.

(1) The discussion about the lawfulness of a religiously justified circumcision has one particular characteristic: it is emotional. Perhaps that is also the reason why there is such a wide spectrum of opinions. A sense of uncertainty prevails especially amongst physicians. Some of them tend to view religious circumcisions as unlawful, but refrain from voicing a clear judgment. Others explicitly use the term “religious indications” as reason for a circumcision.

Religious circumcision, not to mention the question of its unlawfulness, is hardly mentioned in German-language legal literature²⁰. One will usually search in vain for keywords such as “circumcision” or even “genital mutilation” in commentaries of criminal law. Only Lackner/Kühl and Tröndle/Fischer comment. Kühl for example writes, “... the circumcision of children for religious reasons, especially girls, can be seen to fulfill [the *actus reus* of bodily injury]”.²¹ And Fischer declares that opinion to be prevalent which views religious circumcision as non-fulfillment of the *actus reus*. Both commentators cite the textbook by Gropp who assumes the circumcision “in particular of children for religious reasons”, to fulfill the *actus reus* and *mens rea* of § 224, but who sees “a justification in the overwhelming interest of the freedom of expression of religion”²². Other criminal law textbooks remain silent on the subject. Hardly anything else can be found in the rest of legal literature.

A look at court rulings does not reveal a clear-cut course. Neither a civil nor a criminal court has so far dealt with the question whether a *lege artis* conducted religious circumcision is an act which is non-justified and unlawful (§ 823 BGB) or liable to prosecution (§§ 223, 224 StGB). The district court Frankenthal ruled on a case in which a religious circumcision had been performed incorrectly by a non-medical surgeon, as medical minimum standards had not been maintained. Thus, the court did not have to discuss whether the religious circumcision as a whole serves the well-being of a child, since it could already deny this in view of the violation of minimum medical standards. According to the courts’ opinion, “the valid standard in Germany must be maintained during religious circumcisions.”²³ The court does not explicitly state an opinion as to whether parents can give consent with a justifying effect in the case of a religious circumcision of a minor. The question is however indirectly answered in the affirmative, namely in case the medical standards are maintained.

This point of view must be criticized regardless of whether the result the court achieved was right or not. For the statement is unnecessary and frivolous. Either the court should have clarified that beyond the deficient treatment the general question of the consent to religious circumcisions of minors is not relevant to the issue or it should have dealt intensively with the question of whether a religious circumcision is in favor of the well-being of the child, by weighing off the pros and cons.

²⁰ Unlike in the English-speaking area, see for example *Freeman*, who propagates circumcision as “a child’s right” (A child’s right to circumcision, *British Journal of Urology International* 83 [1999], pp. 74, with further references).

²¹ In: StGB, § 223 comm.5

²² See *Gropp*, *Strafrecht AT*.

²³ See LG Frankenthal MedR 2005, pp. 243

This criticism equally applies to the Higher Administrative Court of Lüneburg. In 2002 an appeal was granted and the claim to assumption of costs, which had arisen due to a religious circumcision performed by a physician, was also affirmed. In its decision, the senate refers to one of its own rulings in 1993. Back then the question at hand was whether the social welfare authority (analogous to the granting of financial assistance for a Christian baptism) should have to pay for the costs of a “circumcision festivity”. In the end the senate denied the claim (because the time which had elapsed between circumcision and the celebration no longer provided the necessary causal connection), however the question of a general possibility of reimbursement was affirmed. In this context it examined religious actions in Christian and Islamic cultural circles and came to the conclusion, “Baptism...and circumcision...are comparable in their religious significance.” Yet the result is not supported by the reasoning which the senate seeks to provide. It was correct to ascertain that baptism is constitutive of being admitted to the Christian community of faith and that circumcision is a custom with a long tradition as well as a religious duty in Islam. But the court did not see the underlying difference: while the Christian baptism establishes the belonging to the faith community, the circumcision merely confirms belonging to Islam. And even if there should be a certain similarity of religious rituals, the Higher Administrative Court should have primarily or at least subsequently followed up on the question whether the bodily injury of a minor connected to a religious circumcision is justified. Yet the court neither addresses the well-being of the child nor the injury of its physical integrity.

The district court of Erlangen came to a different conclusion: a Muslim father had the intention of having his 3 ½ year-old child which was living with a foster family circumcised because circumcision was a “faith issue” for him. The county youth office therefore requested that the biological parents’ right to medical care as well as the representation in passport matters be revoked. Based on § 1666 BGB the district court accordingly revoked the parents’ right to “carry out religiously motivated surgical procedures on the child.” The reasons given were the injury of the physical integrity and the risks of the procedure (anesthesia, healing of the wound, formation of scars). At the same time the biological parents were divested of the right to represent the child in passport matters, in order to prevent a trip to the home country of the father and a subsequent circumcision. The appeal to the Higher Regional Court was unsuccessful.

(2) As one can see there is a great legal uncertainty – which is an unpleasant situation, not only in a (recently) so-called country of integration. The question whether the consent of a person with custody to a solely religiously motivated circumcision of a child suffices to justify a bodily injury, must be determined based on the criterion of the child’s well-being. Hence, benefits and disadvantages must be weighed off and the benefits must outweigh the disadvantages – always exclusively based on the interests of the child. The disadvantages have so far been discussed extensively: they are the serious injury of the physical integrity, the risks during and after surgery, the psychological strain (including the so far insufficiently researched later consequences) and last but not least the irreversibility of the procedure.

What benefit does a religious circumcision promise? It has to be measurable and rationally explained, otherwise religious actions could be justified with salvation after death and any

weighing off would become arbitrary. An attaining of membership is not given in either Judaism or Islam: according to the rules of both religions circumcision confirms a religion, it does not establish it. Yet the role of circumcision as a means of identification is particularly important. *Necla Kelek* for example writes, “Uncircumcised boys are not accepted in Turkish society, circumcision indissolubly belongs to being Muslim and to the male identity.”²⁴ It is undeniable that relinquishing a means of identification can have far-reaching consequences. As a rule this can even lead to a stigmatization in a social community which practices circumcision. In light of this aspect, one might think that parents are doing exactly the right thing, by consenting to a circumcision. For § 1627 sentence 1 BGB,²⁵ which includes the criterion of the “best interests of the child” for the custody of a child, obliges the parents to do exactly that which (to use a phrase used by *Schwab*), “presumably serves the integrity and the development of a child in the best way”²⁶. If however the child, as a member of a faith community, is threatened by considerable detriments within the community due to the fact that it did not partake in certain rituals, then the participation must certainly be in his interest.

Nonetheless such an argumentation is not convincing. On the one hand it would entail the rule of interpretation “*in dubio pro ecclesia*”, which does not exist as such. On the other hand one would make a standard out of that which one is attempting to verify, in other words one would argue in a circle. The legal issue which is to be clarified is not solved in this way, but rather shifted to a more or less law-free level. That can neither be in the interest of our legal order, nor in the interest of a faith community which is part of this society. It must be possible to query religious traditions which a child is – as it were fatefully – exposed to. These traditions must be evaluated by the current national and international law. Anything else would have unacceptable consequences. One might consider genital mutilation of girls and women. Usually these are traditions deeply rooted in many ethnic groups, and which mainly pose an unalterable prerequisite to become a part of the respective community and to be socially respected. Yet this tradition is not compatible with our legislation, a consent would violate the moral principles. A further example: if there was a faith community which had a centuries-old tradition which entailed the spiritual leader forcefully striking a boy thirty times with a cane on his buttocks (highly painful, but not dangerous) on the occasion of his fifth birthday in order to teach him reverence for God, then no one would hesitate to recognize this as a violation of § 1631 par. 2 BGB and therefore as an abuse of parental care (§ 1666 BGB). The objection seems likely that this is a degrading measure, whereas a circumcision is a “good cause”, which makes the boy proud and turns him into a man. But I can adapt my fictitious case by claiming that the blows do not represent a punishment, but an important ritual which confirms one’s religion, accompanied by great festivities where all guests congratulate the boy, are happy and give him generous presents. Would one then tolerate such a ritual because given the alternative the boy might face disadvantages within the faith community?

²⁴ Die verlorenen Söhne, p.118.

²⁵ “The parents must exercise the parental custody on their own responsibility and in mutual agreement for the best interests of the child. In the case of differences of opinion, they must attempt to agree.”

²⁶ Familienrecht, 14th edition., 2006.

The answer is solely to be found in the law and may not depend upon whether the faith community refuses to recognize the result. Not only a society must arrange itself with religious customs (this obligation is determined by Art. 4 par. 2 GG²⁷), but faith and religious communities - if they wish to be a part of a society and ideally also accepted by it – must also be prepared to adapt certain traditions according to the national and international law in place or seek alternatives. Regarding religious circumcisions, one may not simply accept the fact that uncircumcised boys might suffer disadvantages in their faith communities; and one should also not make the mistake of concluding from what is the case to what is desirable.

This does not imply that the circumstances specific to the respective communities should not play a role, on the contrary: the environment of a child should definitely be taken into account as an important factor. But it may not be turned into the exclusive criterion, especially not if the protection from harm of the child is concerned. This is all the more valid if the environment automatically changes, should the legal prohibition be observed. For the more frequently boys are not circumcised, the less this condition will give reason for stigmatization.

(3) If one is prepared to part from the idea of making a child's well-being exclusively dependent on circumstances which are solely determined by a faith community, then the question arises whether the benefit of a circumcision as a means of identification suffices to outweigh the damage. Some will affirm this. *Freeman* for example argues that first of all belonging to a religious group poses a human right and secondly the procedure is routine. If at all it might therefore cause slight uneasiness and if required could be reversed by restoring the foreskin. In response to *Freeman*, one might point out that circumcision (as mentioned above) is a religion confirming, not a religion constituting act, which is why belonging to a faith community does not actually depend upon it in that sense. And the claim of a possibility of restoration completely ignores which results can be achieved and with which discomforts the process as a whole is connected. Furthermore *Freeman* belittles the disadvantages of a circumcision. Such an approach of diminution does not do the issue justice. Using Goethe's words, one might say, "One senses intent and feels displeased." This impression is confirmed in the statement, "The relative harms and benefits of ritual male circumcision are such that a parent's decision to circumcise in the name of religion should not be questioned".²⁸ Whoever proceeds in this way is attempting to suppress a discussion, by assigning the issue to a law-free level. The concluding sentence in *Freeman's* article is revealing, "So far as is known, only Antiochus IV Epiphanes ..., Hadrian, Stalin and Hitler have outlawed ritual male circumcision. Is this the company with which today's opponents of circumcision would feel happy?"²⁹ Drawing such parallels harms a factual debate – this is not honest scholarship.

Whoever can break away from such irrelevant comparisons, can return to the sensible weighing-off of pros and cons. The legal system of classification may offer points of reference. Accordingly Art.18.1, sentence2 of the International Covenant on Civil and

²⁷ "(2) The undisturbed practice of religion shall be guaranteed."

²⁸ *Freeman*, BJU 1999, p.74.

²⁹ *Ibid.*

Political Rights (ICCPR) grants everyone (at the rank of non-exclusive rights) the “right...either individually or in community with others...to manifest his religion...in...practice.” And in Article 4 of the same covenant the states party to the contract commit themselves, “to undertake to have respect for the liberty of parents...to ensure the religious and moral education of their children in conformity with their own convictions.” The above stated is not however unconditional. The freedom to manifest one’s religion is subjected to those laws which according to Article 18.3 ICCPR, “are necessary to protect public...health or...the fundamental rights and freedoms of others.” Similar norms can be found in §§ 223, 224 StGB and also § 1627 sent. 1 BGB. Of course this does not provide more insight than that gained so far.

The Convention on the Rights of the Child (CRC) is more promising. Art.18.1. sentence 3 includes the criterion of the “interests of the child” and Art.19.1 commits the states party to the convention to take all the appropriate measures to, “protect the child from all forms of physical... violence, injury or abuse...or...maltreatment.” This naturally does not only include the *actus reus* and *mens rea* but also unlawful behavior – which is the focus of the analysis. Nothing may be deduced from this norm. But one might approach the subject by examining Article 24 of the CRC according to which, states party to the convention “shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.” And circumcision is such a practice. Whether it is prejudicial to the health, depends upon how one defines “health”. The preamble of the WHO Constitution describes health as a “state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”.³⁰ This definition of goals is quite broad and does not help much. A certain behavior would certainly be harmful to health if its consequence if a health damage in the sense of § 223 Abs. 1 alt. 2 StGB. This can be affirmed in the case of a circumcision. It is irrelevant whether a state of pain or a severe change of sensitivity occurred.

The fact that a circumcision is harmful to health (severely, as a not insignificant mass of bodily substance is irreversibly lost) relativizes the benefit of it as a religious means of identification. For the agreement clearly positions itself against the recognition of such rituals. The legal system of classification therefore argues in favor of classifying the traditional custom of a religious circumcision as a measure which does not serve the well-being of the child.

(4) It is questionable whether this result is compatible in view of Art. 4 par. 2 [freedom of faith] in connection with Art. 6 par. 2 sent. 1 GG [upbringing of children]. Principally it is the exclusive responsibility of the parents in what way they raise their children. This prerogative also applies to religious education. The legislator formulated the relations between the rights of the parents according to Art. 6 par. 2 sent. 1 GG and the state task of supervision as stated in Art. 6 par. 2 sent 2 GG more clearly based on the regulation in § 1627 sent. 1 BGB among others. As soon as a behavior harms the well-being of a child, the question whether an intervention against such behavior interferes with the parental right to education no

³⁰ See Constitution of the World Health Organization July 22, 1947: http://www.who.int/governance/eb/who_constitution_en.pdf (last viewed: Oct. 3, 2007).

longer arises. One could say that the decision as to what serves the well-being of the child in religious matters is left up to the parents – their behavior defines the child’s well-being. Such a view would have the consequence that certain areas of education would be completely withdrawn from state supervision. In the end this is also why the well-being should be determined objectively. Whenever parental behavior pertains to legal positions, which are determined objectively, these decisions must be assessed, even in matters of religious education. Apart from life, physical integrity is also one of these legal positions. In order to forestall a possible objection: even small children have an own personality, which must be protected. An injury of such an object of legal protection as stated in Art. 2 par. 2 sent. 1 alt. 2 GG³¹ speaks in favor of granting physical integrity great importance when regarding the question of a weighing-off of interests. This also indicates a protection of physical integrity by criminal law. No other conclusion is possible if one affirms a violation of Art. 6 par. 2 sentence 1 in connection with Art. 4 par. 2 GG because Art. 2 par. 1 sentence 1 alt. 2 GG prevails over the parents’ right to the upbringing of their children. The right of the parents is by no means an end in itself: the child’s well-being always takes priority even in relation to the interests of the parents.

There are further aspects worth mentioning when weighing off pros and cons. When the well-being of the child is at stake, one should always explore possible alternatives. One such alternative would be to postpone a religious circumcision to the point in time when the ability to reason is given, i.e. to allow him to make the decision. While in Islam no binding point in time for the circumcision is declared, Judaism follows the words of the Bible which mentions the eighth day after birth. But there are also exceptions, for example in the case of illness or physical weakness. A religion must allow for the possibility to broaden such exceptions and to postpone the circumcision, if a constitutionally protected right is affected. The following statement fits perfectly, though it was originally formulated in regard to female genital mutilation it is just as applicable to the religious circumcision of boys, “Regardless of the fact that cultural practices may be viewed as pointless or harmful according to the opinion of others, they have a meaning and fulfill a function for those who practice them. However a culture is not static. It is in a constant state of change, it adapts and reforms itself. Humans will change their behavior once they realize the dangers and indignity of harmful traditions and that it is possible to give up harmful traditions without giving up meaningful aspects of their culture.”³²

Thus there are good reasons in favor of granting physical integrity precedence over religious practices based on religious parental up-bringing. This also indicates that Art. 4 par. 2 in connection with Art. 6 par. 2 sent 1 GG does not contradict the attained result.

(5) Concerning religiously motivated circumcisions one can therefore state: a weighing-off of benefits and disadvantages leads to the conclusion that the benefits do not outweigh the disadvantages.

³¹ “(2) Every person shall have the right to life and physical integrity.”

³² Joint declaration by WHO/UNICEF/UNFPA, 1997, <http://www.unicef.at/fileadmin/medien/pdf/fgm.pdf> (Stand: 3.10.2007), p. 2.

e) This also leads to a conclusion of the analysis as to when/in which cases a circumcision serves the “well-being of the child”. This is to be affirmed in the case of a medical curative treatment, i.e. if there is a medical necessity for the circumcision. In such a case one must take into account that the necessity would have to be examined carefully and is not simply given when a circumcision is intended to prevent highly questionable circumstances. A circumcision does not serve the “well-being of a child” if it is medically not necessary. This includes for example hygienically or aesthetically motivated circumcisions as well as religious circumcisions.

3. If the custody of a child according to § 1627 sent. 1 BGB is not executed in favor of the “well-being of the child”, the legal guardian lacks the discretionary power over the object of legal protection protected by §§ 223, 224 StGB. Should a circumcision be approved of in such a case, this consent does not have a justifying effect on the assumption of it a circumcision fulfilling the *actus reus* and *mens rea* of physical injury– it is in breach of duty and unlawful.

V. Culpability and Criminal Prosecution

1. Whoever performs a circumcision on a child (regardless whether a physician, mohel or *sünnetçi*), requires an effective consent provided by the legal guardian in order for the procedure to be a justified physical injury. If the legal guardians provide such a declaration even though the circumcision is medically not necessary (i.e. for hygienic, aesthetic or religious reasons), the discretionary power is missing so that the given consent does not serve to justify the procedure. Whoever believes in its effectiveness, despite an objectively lacking effective consent, “knows what he is doing, but mistakenly assumes it is permitted.” If someone mistakenly assumes an effectively given consent, he therefore acts without fault in case of an unavoidability of the error. Currently one will have to affirm this unavoidability. For so far – as far as is known – no preliminary investigation by the public prosecutor has been initiated against a surgeon who circumcised a boy without a medical necessity. This might on the one hand be linked to the fact that the benefits and damages of such surgical procedures are being discussed contentiously in the field of medicine. On the other hand, it may be due to the partly reluctant and partly contradictory legal opinions. Criminal culpability is therefore not to be sought in the past. In the future, however, one will have to assume an avoidable mistake of law - at least as soon as the insight provided by this article has spread.

2. In the case of an ongoing threat to the child’s well-being, a child, as a subject of basic rights, is entitled to protection by the state from an irresponsible execution of parental rights. The state may therefore not simply look away when boys’ bodies and health are injured. How then should a public prosecutor behave in light of these findings, if he or she is officially informed of a medically not necessary circumcision? It is simple, really: according to § 152 par. 2 StPO (Code of Criminal Procedure) “reasonable factual grounds” are provided for an “indictable offense,” namely correctly a serious bodily injury according to § 224 par. 1 no. 2 alt. 2 StGB or (if one does not want to view the surgical instruments as a dangerous weapon) at least an offense as in § 223 par. 1 StGB. The principle of legality according to

which the prosecution of an offense is mandatory for the public prosecutor obliges the latter to intervene. Due to the number of circumcisions which are performed without a medical necessity, the public interest is to be affirmed, which is why proceeding according to § 153 StPO³³ may be ruled out. The same applies to § 153a StPO. For in addition to the public interest of a criminal prosecution, there is also an interest to have the criminal law relevance of a medically not necessary circumcision legally clarified. § 153a sStPo would not be suited for this purpose, as the public is generally not aware of such decisions. And reasons for a general prevention therefore speak against applying § 153a StPO. As a consequence (at least up until the first legally binding judgment) a criminal prosecution would be the right way to end preliminary investigations.

VI. Conclusion

Not everyone will endorse the findings presented here – some perhaps out of concern for religious peace. It remains to be seen whether this article will create a “climate of poisonous debates of outrage”³⁴. This would not however do the issue justice, for only when arguments can be rationally verified, do they have the capability of persuasion. *Popper* expresses it with the words, “Where there is no argument, there is no choice but to either completely accept or totally dismiss.”³⁵ And to conclude with *Popper*, “I may be wrong and you may be right, but together we could perhaps track down the truth.”³⁶ – If one were to always proceed in such a manner, there would be no reason to become anxious about purportedly breaching taboos.

³³ “(1) If a misdemeanour is the subject of the proceedings, the public prosecution office may dispense with prosecution with the approval of the court competent to open the main proceedings if the perpetrator’s guilt is considered to be of a minor nature and there is no public interest in the prosecution. The approval of the court shall not be required in the case of a misdemeanour which is not subject to an increased minimum penalty and where the consequences ensuing from the offence are minimal.

(2) If charges have already been preferred, the court, with the consent of the public prosecution office and the indicted accused, may terminate the proceedings at any stage thereof under the conditions in subsection (1). The consent of the indicted accused shall not be required if the main hearing cannot be conducted for the reasons stated in Section 205, or is conducted in his absence in the cases referred to in Section 231 subsection (2) and Sections 232 and 233. The decision shall be given in a ruling. The ruling shall not be contestable.”

³⁴ *Mönch*, Die wahre Empirie, in: F.A.Z. Feb.2, 2009 (No. 34), p. 39.

³⁵ The Open Society and its Enemies, Vol.II, 7th edition, 1992, Chapter 24:III.

³⁶ Ibid.