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Ritual Circumcisions of Minors: Civil and Criminal Perspectives *

SUMMARY: 1. Introduction - 2. Parental authority and the inherent rights of the minor. The best interests of the minor - 2.1. Conflicting rights. The current understanding of parental authority - 2.2. Limits to parental authority. Personality rights - 2.3. The minor's consent in surgical procedures - 2.4. Circumcision and the best interests of the minor. An act which falls within parental authority? - 3. Criminal responsibility in acts of circumcision for religious motives - 3.1. The criminal approximation to female genital mutilation - 3.2. Circumcision in criminal jurisprudence - 4. Concluding remarks. *De iure condendo* contributions.

1 - Introduction

The circumcision of minors for non-therapeutic reasons has become a subject of controversy in society and it has inevitably transcended to the field of law. Scientific doctrine and jurisprudence of the courts are considering whether this practice, age-old in certain cultures and traditions, violates the rights of unemancipated minors, particularly their physical integrity and their ideological and religious freedom.

The fundamental rights and freedom of individuals has become a cornerstone of political and social order in pluralist democratic regimes. By the same token, the protection and welfare of minors is a constitutional obligation of public authorities. The deliberation and further study of the rights of individuals under parental authority or guardianship in doctrine and jurisprudence has cast doubt on an act which is an age-old ritual in some cultures.

In this paper, the scope of the study will be limited to the significance of the circumcision of minors in two religious traditions: Judaism and Islamism. In particular, for the religion of the Jewish people, where, as we shall now see, this act constitutes a religious requirement core to the belonging to Yahweh's chosen people.

The Old Testament¹ orders ritual circumcision on the eighth day of a newborn son's life: using a sharp knife, a protective shield and an article to



retain the foreskin. The ceremony, called *Brit Milah*, is performed by the *Mohel* (a religious specialist affiliated to the Synagogue) while the child is held in the godfather's lap (Felix Ballesta 2000, 189-192). After this, he receives his Jewish name. This description conveys the importance of this act for Hebrews, prescribed by Mosaic Law. It is a symbol of the covenant between God and the chosen people, and an identifying sign of belonging to the faith of Israel, thus separating believers from Gentiles or the uncircumcised.

In Islam (López Sidro 2012, 1 ss.; Torres Fernández 2014, 160 ss.), circumcision of minors is not so much a religious requirement as a tradition of Arabic or pre-Islamic origin. It is not mentioned in the Koran, although it is recommended in some of the *haddí* of the Prophet as an act of purification (Alshboul 2012, 13). Hence, the schools of Islam are divided between those who consider it obligatory (in Sunnism, Hanbali, Shafii and with Shiite Muslims) and those who consider it to be only a recommendation. Be that as it may, circumcision is widely practiced in the Islamic community. There is no specific age for it to be performed. It is usually carried out between the boy's birth until he is seven or eight, and always before puberty.

This age-old practice in two of the most widespread and long-standing religious traditions has been condemned by some as brutal and cruel. Doubts, which are stated in international human rights texts and adopted by legislations of pluralist democratic States, exist over the compatibility of circumcision with the principle of safeguarding the interests of minors. This principle must prevail above the powers inherent in parental authority. All this has been brought to light in contemporary doctrine, thus opening a fascinating and controversial debate highlighting the confrontation of the inherent rights of minors and of parents or guardians with ideological and religious freedom.

Nowadays, the circumcision of minors is a matter of public interest where multiple fundamental rights come into play. Parental rights in the religious and moral upbringing of their children, minors' rights both to physical integrity and to ideological freedom and freedom of conscience. These rights need to be deliberated and well balanced, addressing the following issues: the powers inherent in parental authority and the significance given to the superior principle of safeguarding the interests of minors, where public authorities play an important role in the

* Article peer evaluated.

¹ Genesis, 17, 9-14; Leviticus, 12, 3.



comprehensive protection of children. This, in turn, is conditioned by the medical assessment of this surgical procedure which naturally determines its performance by medical professionals and in the public hospital network. Then, the criminal transcendence of the act must be added to this kaleidoscope of conflicting factors, since our legislator introduced the crime of female genital mutilation in 2003 adding a subparagraph to Article 149 of the Penal Code.

We will try to organize this paper firstly by tackling the conflicting fundamental rights and notably, those linked to the exercise of parental authority and its limits, in conformity with the provisions in the Spanish Constitution, the Civil Code and legislation on the legal status of minors. Particular attention will be paid to the significance of the expression “the minor’s best interests” in our jurisprudence, which is a key factor to clarifying the timing and mechanisms of public authority intervention. Secondly, we will go on to address the potential criminalization of male circumcision as an act punishable in Article 149.2 of the Penal Code and to pay attention to the factual circumstances of cases settled by the Spanish courts. The paper will be concluded with some remarks *de lege ferenda* around the potential legal regulation of the circumcision of unemancipated minors in Spain.

2 - Parental authority and the inherent rights of the minor. The best interests of the minor

2.1 - Conflicting rights. The current understanding of parental authority

As pointed out in the last section, the rite of circumcision of minors constitutes a so-called ceremony or act of worship, which is essential for Jewish beliefs and traditional in the Islamic community. Its practice is covered as such in the right to ideological and religious freedom established in Articles 16.1 of the Spanish Constitution and 2.1.b of the Organic law 7/1980 of 5 July on religious freedom. Singularly, the Agreements with the Federation of Jewish Communities of Spain and the Islamic Commission of Spain in their respective Articles 6, establish duties derived from their tradition, their law and particularly their worship as functions pertaining to their religion. From the minors’ perspective, and in accordance with Article 27.3 of the Spanish Constitution, public authorities shall ensure the right which helps parents so that their children may receive the religious and moral education which is in accordance with their own convictions. In this sense, it can be said that those parents who decide to have their son circumcised, just like those Christians who choose to have their child



baptized, are exercising their right to religious education by including him in a community of beliefs on the basis of which his character might aim to be forged.

In any case, it must also be taken into account that the scope and the current content of parental authority is fundamentally different from the Roman view of the absolute right of *pater familias* of the life and death of a child. The modern concept of underage status, especially on the basis of the Convention on the Rights of the Child, is characterized by the following criteria:

1st The minor naturally has certain fundamental rights, which he/she shall exercise through representatives while he/she is not capable of understanding them, or directly, when he/she is sufficiently mature. ; 2nd It can be deduced that there is an evolutionary development to underage status, where in the latter stages, the minor shall be able to exercise his/her right, and so reinforce his/her freedom of choice, for the sake of the strengthening of personality development; 3rd The protection offered to him/her by parents or legal guardians, or public authorities² must serve to promote the progressive acquisition of control of his/her life and decision-making and, at all times, under the preemptive principle of acting in the best interests of the minor.

These criteria have taken legal form in the Law which regulates *par excellence* the statute of minors: The Organic Law 1/1996, of 15 January, on the Legal Protection of Minors. Its explanatory memorandum reflects, in accordance with international texts, the desire to give greater prominence to minors in line with the important role they play in society: "The social and cultural transformations taking place in our society have brought about a change in the social *status* of the child". Consequently, the full "entitlement of minors to their rights and a progressive capacity to exercise them" is recognized, depending on the minor's different stages of maturity. This memorandum concludes that the Law aims to promote the autonomy of minors as individuals, which demands the need to balance protective systems with the minors' growing ability to participate in the decisions that affect them.

One reflection of these propositions is that the Organic Law, apart from recognizing a series of fundamental rights for minors (ideological and religious freedom and freedom of conscience are among them (Article 6)), it prescribes their right to be heard within the family or in legal proceedings,

² Article 39 of the Spanish Constitution determines the comprehensive protection of children by public authorities, as well as the duty of parents to provide assistance while they are minors.



in their own right or through a representative chosen by them “when they possess sufficient capacity of judgment” (Article 9.2)³

2.2 - Limits to parental authority: Personality rights

There can be no doubt that the change in the understanding of the rights of minors, in the special guardianship set out in the regulation and in the development of their personality, substantially modifies the powers inherent in the exercise of parental authority, as was previously stated.

Article 162 of the Civil Code excludes legal representation of parents who have parental authority over their unemancipated minor children in “acts concerning personality rights”. Although the precise delineation of what should be considered “personality rights” is tentative and open to interpretation from doctrine and jurisprudence, it is possible to define them as “those subjective rights whereby the holder’s faculties of enjoyment and protection of the essential attributes and interests inherent in their person are recognized” (García Garnica 2004, 76). Nowadays, doctrine tends to assimilate them to those fundamental laws, included in our Constitution, which recognize enjoyment, and the corresponding public protection of interests inherent in the development of personality. These may be in their physical, tangible dimension (such as rights to life, to health or to physical integrity) or moral and spiritual (rights of personal portrayal, to honor, to privacy or to ideological and religious freedom).

Can the precept of the Civil Code be interpreted in the sense that at no time and under no circumstances will parents be able to represent the minor in cases of acts of an extremely personal nature as these actions are reserved to him/her? Obviously, the exercise of his/her rights will depend on whether the minor is mature enough. That is to say, whether he/she has the capacity to understand and want to fulfill those fundamental rights, regarding the carrying out of the intended specific act. If he/she possesses the critical skills and volitional aptitudes required, the parents’ role is subject to the minor freely granting his/her consent. If the intended act could harm the minor’s interests, the parents or the prosecution service will be able to take the case before a judge so that the minor be removed from danger or to avoid him/her coming to harm (Article 158.3° of the Civil Code).

³ In the same vein, Article 154 of the Civil Code mandates that “if children possess sufficient capacity of judgment, they will always be heard before decisions affecting them are taken”.



That said, if the minor were not capable (it is assumed that there is an absence of discernment in children twelve years and under) the parents will have full exercise of rights on behalf of the minor, including personality rights, providing the intervention is beneficial for the minor, or at least not harmful. However, whenever possible and within those rights, the decision should be deferred until the minor (the holder of those rights) can give his/her consent.

2.3 - The minor's consent in surgical procedures

Submitting a minor to surgical procedures offers us a practical example of this theoretical approximation to parent-child relationships and the limits of parental authority. This area includes the topic of this paper, male circumcision. Spanish legislation admits the general principle, established in the documents and agreements which refer to the rights of minors stemming from the international arena, of the patient's informed consent in any act in the field of health. Law 41/2002, of 14 November, which regulates patient autonomy, embodies this principle in its Article 3. Freedom over the choice of treatment is based on the right to respect for human personality, dignity and privacy. Only in emergency or life threatening cases where the patient's prior consent cannot be given and the family is not present can the doctor provide the necessary care according to his conscience and professional expertise. In the case of minor children, Law 41/2002 states that those who have reached the age of sixteen have full autonomy in decision making. The minor decides, although the parents must be heard. Below this age, and providing the minor is sufficiently mature, treatments should not be imposed against his/her will, except on the physician's discretion in situations where the minor is at risk of loss of life or suffering irreparable damage. In these situations, the minor's representative will provide consent, once the patient has been heard (Article 9.4)⁴. In this case, and in others where there is serious discordance between parents and child, the judge can intervene, deciding on the appropriate course of action based on the circumstances and always putting the minor's best interests first.

If the minor does not have the intellectual and volitional capabilities to take appropriate decisions or to comprehend the consequences of his/her acts, the parents or legal representatives will be the ones to grant consent for the surgical procedure, under certain conditions. It must be done in the minor's best interests⁵ and the minor must be heard if he/she possesses

⁴ Article drawn up in accordance with the reformed law of 22 September 2015.

⁵ *Ex.* Article 154 of the Civil Code, as general criteria for the exercise of parental



sufficient capacity of judgment⁶ and always allowing for the possibility that the judge, at the behest of the doctor or the prosecution service, may authorize the surgical procedure should there be any doubt about the safeguarding of the minor's interests.

Why subject a minor to non-therapeutic surgical procedures? There is no doubt that being subjected to cosmetic surgery or organ donation can jeopardize one's health or even put one's life at undue risk. Whereby, parental consent will not be valid in these cases. Public authorities can exercise special protection of minors, subject to special guardianship, and they will intervene to prevent minors from being put in situations where they can come to physical harm. That said, in certain and only exceptional cases, other legitimate interests can justify non-therapeutic interventions. One example is bone marrow harvest in favor of a relative, as long as the health or life of the minor is not seriously jeopardized.

2.4 - Circumcision and the best interests of the minor. An act which falls within parental authority?

Under these premises, can circumcision be legitimized as a religious act in the interest of the minor?

As previously highlighted, the regulation of this matter in international agreements and Spanish Law is guided by the overriding principle of the best interests of the minor. *Favor filii* is built around the basis and the substantial purpose of parent-child relationships, present in every sentence handed down in court⁷. If the concept of the best interests of the minor is undetermined, it will therefore have to be set case by case depending on the specific circumstances⁸. According to our jurisprudence, its definition must seek comprehensive protection, in such a way that it must "reject anything which might contribute - or contributes - to causing the child emotional harm, injury or any kind of mental or emotional instability"⁹. Ultimately, establishing what is good for the minor is in the hands of the judges. They make use of their discretionary powers to choose

authority.

⁶ "If children possess sufficient capacity of judgment, they must always be heard before decisions that affect them are taken" (Article 154.3°); the child may also recur to a judge in the event that they believe the measures could harm them (*ex* Article 158.3° of the Civil Code). In health matters, Law 41/2002 imposes that a child who is above the age of 12 should give their opinion (Article 9.3.c).

⁷ As per the judgment handed down by Murcia Provincial Court on 27 May 2004.

⁸ In this way, the Supreme Court judgments of 5 March 1998 and of 23 February 1999.

⁹ Judgment of the Burgos Provincial Court of 26 February 1999



the solution they consider fair among several potential options (Rivero Hernández 2000, 272 ss.).

The best interests of the minor also shape the content of parental authority, which is regarded as a function, consisting of a set of rights and obligations which must be applied in the best interests of children and for the full development of their personality¹⁰.

At this point, the question must be asked whether the carrying out of male circumcision as a surgical procedure negatively affects the minor, putting his health at risk. The answer to this question will be found in medical studies (Brusa 2004, 273 ss.; López-Sidro 2012, 8-9; Torres Fernández 2014, 158-159).

In the past, the circumcision of male newborns became common in England and the United States as a preventative measure. Nowadays, and despite certain benefits of this surgery having been recognized¹¹, its risks are also being emphasized (pain, trauma, psychological impact, post-operative complications). To such an extent that reports from the WHO and pediatric associations do not recommend that circumcisions become standard practice unless they have a direct therapeutic purpose. In any case, it is acknowledged that in the case of newborns, the ease and simplicity of the operation means that there is almost no risk, when correctly carried out. This is not so in the case of young boys and adolescents, where it is recommended that the operation be carried out by a medical professional with appropriate instruments (Bioethics Committee, Italy, 1998). Our jurisprudence shares the view that circumcision in newborns is relatively harmless. The ruling by Castellón Provincial Court of 21 September 2006¹² specifies that this outpatient surgical procedure “when correctly carried out, does not affect the sensory-motor functionality as regards sexual intercourse or urination”.

Summarising the doctrinal stances on the matter, it could be said that the reasons cited by some authors to advocate in favor of the proscription of circumcision of minors for ritual purposes are based on two types of conclusions:

1. Circumcision is an irreversible act, which affects the physical integrity of the minor. In this sense, it should be avoided as it undermines

¹⁰ See, in this sense, the sentences of the Supreme Court of 24 April 2000 and of Las Palmas Provincial Court of 21 April 2003.

¹¹ It has been described as an effective way to check the transmission of AIDS, to prevent cervical cancer in women (caused by a virus, which nestles under the foreskin) or certain urinary infections.

¹² N° 355/2006.



a fundamental right. As a personality right, it falls outside the exercise of parental authority. It will be the minor who makes the decision, when he is sufficiently mature (Márquez-García – García-Carvajal 2013, 38-41; De Lora 2015, 76). In my opinion, this argument aims to dramatize an operation which, even if it does affect physical integrity, can only be described as low risk and not harmful in itself from a medical point of view (Briones Martínez 2016, 21 ss.; Moreno 2011, 111), especially when carried out on newborns.

2. Circumcision on religious grounds is an act by which the parents integrate their child into a community of believers of a specific religion, which is particularly significant in the case of Judaism. Therefore, a decision that is only up to the minor is being made, in this case which religion to belong to. The minor has the right to exercise the right of religious freedom, which is a personality right which goes beyond the representative powers of the parents. The inherent powers of parental authority do not give them the right to take such a decision. Consequently, they will have to wait until the minor is mature enough and can decide whether or not to undergo this operation of religious significance (Rivero Hernández 2000, 284 ss.). Clearly, this “Rousseauian” take on the minor’s upbringing would prevent parents from transmitting any type of value to their offspring. Let it not be forgotten that countless values originate from and are spread through religion. Furthermore, disallowing parents from deciding which specific faith their children will belong to does not provide a balance between the offspring’s rights and the parents’ rights to religious freedom and to education in keeping with their convictions (Article 27 of the Spanish Constitution). In a general sense, these convictions are not only confined to the choice of school but also to all aspects of the human and personal development of the minor (cultural, religious, moral, social) (Romero Coloma 2006, 51 ss.; Moreno 2011, 111 ss.; Torres Fernández 2014, 169). That is to say, everything that plays a part in the development and personal identity of offspring. This is because, from the parents’ point of view, the decision to circumcise integrates their son in a cultural community whose values seek to guide the minor throughout their whole life. Therefore, as a doctrinal sector indicates (Angeluci 2016, 10 ss.; Robbers 2013, 69-70; Silva Sánchez 2013, 4-5; Torres Fernández 2014, 169), the integration of a child in the religious community is an important factor through which the act of belonging, canonically regulated in each faith, definitively plays in favor of the interests of the minor and justifies its appropriateness from the perspective of the rightful exercise of the powers of parental authority.

Despite concluding that the act of circumcision is decidedly harmless in nature, in the end, criminal jurisprudence has had to deal with alleged



criminal cases on the matter. Nonetheless, other circumstantial factors of the operation (such as the knowledge and training of the person who carries out the procedure, the method, the instruments used, the aseptic conditions) which inflict harm and injury on the minor due to reckless behavior result in criminal responsibility.

3 - Criminal responsibility in acts of circumcision for religious motives

3.1 - The criminal approximation to female genital mutilation

The criminal consequences of male circumcision were discussed following the international outcry against acts of female genital mutilation, which evidently had a repercussion in the decisions and recommendations made by supranational organizations for the protection of human rights. Equating the former with the latter, a sector of the doctrine called out for the punishment of circumcision as an irreversible form of genital mutilation carried out for non-therapeutic reasons. As with the feminine version, the mildest forms of which can resemble male circumcision, it involves the amputation of part of the male sexual organ with negative physical and psychological effects. In both cases, it should be punished as an offence of infliction of injury, although there should be a balance between the sentence and the extent of the injuries resulting from the operation when it is carried out on religious grounds (De Maglie 2012, 81-84; Silva Sánchez 2013, 1 ss.; Facchi 2014, 157; Torres Fernández 2014, 141; De Lora 2015, 72 ss.). Other scholars argue that the differences between female genital mutilation in its most common forms and circumcision are qualitative, if we pay attention to the effects and harm of the two. So, the criminal consequences should only extend to female mutilation which is indeed truly invasive (López Sidro 2012, 11; Angelucci 2016, 1 ss.).

Broadly speaking, the legislations of the European States follow the guidelines of international human rights organizations. The criminalization of female genital mutilation, be it through the modification of criminal laws to create an *ad hoc* offence or via the application of a type of criminal offence of the kind of injuries¹³, has not been extended to cases of male circumcision.

In Spain, Organic Law 11/2003, which covers specific measures in the domains of public safety, domestic violence and the social integration

¹³ While in countries such as Germany, Austria, Belgium, Denmark, Spain, Italy, Portugal, the United Kingdom, Romania and Sweden a specific offence of genital mutilation has been introduced, in others such as Finland, France, Holland, Hungary, Ireland, Lithuania and Luxembourg the general offence of the infliction of injury applies.



of foreigners, introduces a subparagraph to Article 149. In the first paragraph, “the loss of or inability to use an organ or main limb or a sense, impotence, sterility, serious deformity, or a serious somatic or mental illness” are punishable by imprisonment for a term of between six and twelve years. In the subparagraph “whoever causes genital mutilation in any of its forms” are subject to the same penalty ... “if the victim is a minor or incapacitated, a sentence of between four and ten years of special disqualification from the exercise of parental authority, tutorship, guardianship, custody or sheltering will be imposed, if the judge considers that this is in the best interests of the minor or incapacitated individual”. The explanatory memorandum of the law makes it clear that the precept addresses the suppression of female ablation. “This is because the genital mutilation of women and girls is a practice which must be confronted with the utmost firmness, without allowing any kind of justification on alleged religious or cultural grounds”. If the new paragraph of Article 149 refers, in general, to any genital mutilation, the extraterritorial prosecution of the constituent elements of the offence are restricted to ablations of female sexual organs¹⁴, under the Organic Law of Judicial Power.

3.2 - Circumcision in criminal jurisprudence

The analysis of criminal court decisions confirms the differing relevance of circumcision and genital mutilation in criminal law. At least in principle, jurisprudence maintains the lack of criminal content in the acts of circumcision on infants. This act is to be understood as the outpatient surgical procedure which consists of the excision of the distal portion of the foreskin or skin which covers the glans (it is part of the ritual of Jewish and Islamic religions).

“When correctly carried out, as can be read in the ruling by Castellón Provincial Court of 21 September 2006, citing the medical examiner’s report, it does not affect sensory-motor functionality as regards sexual intercourse or urination”.

So, the facts are not included in Article 149.2 of the criminal code. What is more, they lack criminal content. This difference in treatment with female genital mutilation is also extended to the potential extraterritorial

¹⁴ The Organic Law of Judicial Power was modified by the Organic Law 3/2005 in the sense that it allows Spanish judges the knowledge of the facts susceptible to qualify under the penal type of genital ablation, which occurs outside national territory. A paragraph is added to Article 23.4 of the Organic Law of Judicial Power stating that Spanish judges will be able to have knowledge of the facts “g) relating to female genital mutilation, as long as those responsible are in Spain” (own underlining).



prosecution of circumcision operations. By the ruling of 6 June 2008¹⁵, Barcelona Provincial Court imposed the dismissal of the preliminary proceedings opened before the lawsuit filed by the mother against the father for having hospitalized their son in Casablanca (Morocco) where he was surgically circumcised. Furthermore, in the court's opinion, the facts did not constitute an offence, in so far as the operation was carried out in a diagnosed case of phimosis, and the procedure was performed in accordance with *Lex Artis* by a doctor of the Moroccan hospital, outside national territory. The Court concludes that the Spanish courts lack jurisdiction, because the circumcision "is not within the extraterritorial offences of Article 23.4 of the Organic Law of Judicial Power".

However, the matter of the criminal transcendence of circumcision has been raised when the minor suffers harm as a result of *mala praxis* in its execution. That is to say, when the procedure is carried out by a person without experience or medical knowledge who does not use the appropriate instruments or where there is not even a minimum guarantee of asepsis. This leads to court convictions for the parents and the practitioner for the injuries caused to the child as a consequence of the negligence of the accused. The general nature of these cases indicates the clandestine nature of the act of circumcision (the operations take place in private homes and are carried out by immigrants).

In the judgment of Almería Provincial Court of 3 November 2004¹⁶ the parents and the practitioner who carried out the circumcision were convicted of an offence of infliction of injury committed through negligence. The proven facts are the following. The Senegalese parents went to a compatriot's home to have their six-year old son ritually circumcised. He was forced to sit on a log and his penis was cut with a penknife in such a way that part of the glans was severed. The minor was taken to hospital and he was administered medical, sanitary and surgical treatment. It took forty-five days for him to make a complete recovery. His records state anatomical loss in the glans, although reproductive and urinary functions are preserved. In order to justify the sentence imposed in the first instance by the judge, the court emphasized the lack of medical knowledge of the person who carried out the circumcision, and also the lack of material resources, as a result of which serious harm was caused to the minor. A similar case is the judgment of Lérida Provincial Court of 1 October 2014. The circumcision of a baby in a private home carried out by a person without medical knowledge and chosen by the parents, resulting in a

¹⁵ N° 598/2008.

¹⁶ N° 203/2004.



hemorrhage that required surgery and hospital care. The court reasoned that the parents should be convicted for an offence of serious negligence. In the hypothesis, all the constituent elements are there: They knew the risk of a person without references or qualifications carrying out the circumcision; they were aware of the lack of minimum conditions of hygiene; they were aware of the lack of appropriate instruments (the cut was made using a razor blade). The reason to have the circumcision of the baby carried out in conditions such as these, lacking material and personal resources, was purely an economic one. They did not want to spend the money necessary to have the operation done in a private hospital. The hemorrhage and the subsequent anemia suffered by the child put the life of their son at serious risk.

Evidence that these considerations are not theoretical but real is the case, dramatic in its outcome, judged and ruled by the judgment of Zaragoza Provincial Court of 5 February 2010¹⁷. A person of Nigerian nationality carried out a circumcision on a six-month old baby with the consent of his parents. The method reflects the incompetence and the crudeness of the operation. It was carried out with a *Bic* razor blade making a jagged cut of considerable depth around the circumference of the penis, the result of which was a wound which would not stop bleeding. Startled by the hemorrhage, the mother called the person who performed the operation, who reassured her by telling her that it was normal and that she should treat the wound with *Betadine*. The next morning, on seeing that the child's condition had deteriorated, the mother took him to the health center where he arrived unconscious and no longer breathing. At eight o'clock in the morning, the baby died as a result of hypovolemic shock caused by the hemorrhage. The Court of first instance first remanded in custody the person who performed the circumcision¹⁸, then convicted both this individual and the parents for a crime of negligent homicide of Article 142 of the criminal code, sentencing them to a term of eighteen months. The hearing confirmed the sentence. These events recounted demonstrate neglect of duty of care constituting negligence, concurring with the guilt of the parents, be it conscious or unconscious. They decided to circumcise their child without consulting a doctor or having it done in an appropriate establishment; the operation was performed by a non-expert in lamentable

¹⁷ N° 8/2010.

¹⁸ The ruling of Zaragoza Provincial Court 122/2009, of 25 January, considers that due to the seriousness of the offence and the fact that the defendant, who works in a rabbit slaughterhouse, frequently performed circumcisions and this activity being a danger, recommended imprisonment without bail be confirmed.



conditions; they did not take their child to the health Centre until the following morning, thus prolonging the hemorrhage for hours, which represents a resounding failure to provide assistance. What followed was the death of the child, establishing a causal link between the actions recounted and the death¹⁹.

4 - Concluding remarks. *De iure condendo* contributions

At this point, I think it is appropriate to organize all that has been presented and to offer a series of proposals on the legal situation, current and future, of the circumcision of unemancipated minors in Spain. To this effect, I believe the handling of the issue by our criminal jurisprudence is very helpful. The realism that has been shown when addressing *speciefacti* keeps us away from preconceived concepts or ideas which, to my understanding, approach problems in a somewhat obscure way. Let us summarize the ideas put forward throughout the paper in a series of numerated statements:

1. For Judaism, circumcision is an essential act of worship in the life of a believer. It symbolizes the union between Yahvé and the chosen people. Derivatively, it is a widespread tradition in Islam, sometimes even obligatory in some schools or schisms within Islam.

2. The risk of this practice is very low in the case of newborns, when performed in accordance with medical *Lex Artis*, and it increases with age. In the case of children and adolescents, the operation must be performed meeting minimum conditions of asepsis and hygiene, as far as possible avoiding pain via the use of anesthesia. Thus, it is always recommendable to have the operation performed in an authorized clinic and by medical personnel.

3. The overriding principle which instructs parent-child relationships to work in the best interests of the minor does not exclude the act of circumcision *per se*. Despite its definitive nature as regards the alteration it causes to the minor's physique, it also finds justification in the need of all people to be brought up with a series of moral values which contribute in a positive way to the development of our personality. It is perfectly natural that, within the evolutionary process of human beings and while we do not have sufficient capacity of critical judgment, our parents should be the ones to guide and direct us in accordance with their own

¹⁹ In any case, if the result of the defective circumcision had been impotence, sterility or serious deformity, this would constitute an offence of mutilation of Article 149.1 of the Criminal Code (Jericó Ojer 2013, 3).



beliefs. Such a right is recognized in international conventions and in Article 27.3 of the Spanish Constitution. In this sense, circumcision (just like the case of baptism for Christians) has a beneficial effect on the integration of the child in the complex value systems of age-old religions, as well as in a community united by the profession of a common faith. In any case, nobody is preventing the minor, once he reaches maturity, from setting his/her own course which might part or drift from those instilled by his/her parents in his/her infancy. It does not seem to be that the fact of circumcision of minors who do not have sufficient understanding goes against their future volitional autonomy. They will always be able to exercise this autonomy when they reach mental maturity.

4. Therefore, as an act protected by the freedom of worship and by the right of parents to the religious and moral upbringing of their children, and as it has not been shown that circumcision in itself has a directly adverse affect on the minor, the legality of circumcision in our Law seems to be beyond doubt. Given that the exercise of parental authority is shared by both progenitors and that circumcision is, besides being a surgical procedure, a relevant act in the comprehensive development of the minor, it should be decided on by both spouses, or by one with the explicit consent of the other²⁰. If the minor has capacity of judgment, he must be heard²¹. He can also refer to a judge who can decide on what is appropriate in the case that the minor considers he is at harm.

5. In view of all this, the problem lies not in the fact of the circumcision of minors (legal *per se* or at least not prohibited) but in its practice. That is to say, when it is performed without knowledge, with deficient instruments or without the adequate conditions of health and hygiene. In line with the recommendations of international organizations and most doctrine and in light of the dramatic cases which our criminal courts have had to judge and rule (which highlight cases which provoke severe injury to minors, or even death) the need to ensure minimum medical and sanitary guarantees must be concluded. Thus, in my opinion, a series of conditions must be imposed for the performance of this operation to the benefit of the minor.

a. Circumcision should be carried out, with no exceptions, by a doctor, capable, in turn, of correctly following the evolution of the surgical procedure. The reading of the *speciefacti* of the decisions recommends that a

²⁰ See, in this sense, rulings of Castellón Provincial Court 355/2006 of 21 September and of Barcelona Provincial Court 598/2008 of 6 June.

²¹ *Ex* Articles 154.3 and 158.3 of the Civil Code. And Article 9.3.c. of Law 41/2002 of 14 November, on the autonomy of the patient.



trained medical professional perform the operation in the case of newborns as well (Moreno 2011, 112). This does not exclude the possibility that, through the channels of special Law, it might be determined that in the case of Judaism, the State might empower specific members of the community who have successfully undergone the corresponding training courses to allow them to be responsible for carrying out circumcisions (Bioethics report Italy, 1998; Angeluci 2016, 25; Briones Martínez 2016, 54).

b. Circumcision should be carried out in establishments or clinics where there is a guarantee of asepsis, the use of appropriate instruments and adequate means of anesthesia to incur the minimum possible suffering. Could such operations take place within the framework of the public health system? At least in principle, the fact of the non-therapeutic nature of ritual circumcision and the thrift in the public system resources exclude the carrying out of this surgical procedure in health centers or public hospitals. Arguments in favor of its inclusion would be looking out for the welfare of minors, guaranteeing medical and sanitary conditions thus avoiding clandestine operations and contributing to the integration of religious and cultural minorities. This might be one of the reasons why this practice has been admitted in certain public hospitals in countries such as the United Kingdom (De Lora 2015, 74, n. 37). In Spain, although it cannot be demanded from the State as a social right inherent to the exercise of religious freedom, it would in fact be useful to adjudicate co-payment methods for the surgical procedure with maximum guarantees, in the interest of the health of the minor. This recommendation is *de iure condendo* and has not come to fruition in practice.

Finally, the question remains to be asked whether the fact of ritual circumcision in itself and the conditions in which it is performed should be the object of some *ad hoc* regulation through a law or rules to develop a law. The hypothetical law, through the jurisprudence of the courts, will establish the framework on such aspects as the professional qualifications of the person who performs the circumcision, the place, the instruments to be used, the way the operation is carried out (which will have to include the use of anesthesia), prior consent of the two progenitors or of the mature minor (who will have to be heard in any case if he has critical judgment), or the potential inclusion as a surgical procedure to be carried out in a centre pertaining to the social security system²². The obvious positive effect of legal regulation is that it would provide certainty and legal security to male circumcisions, to the benefit of the people involved (the parents, the person

²² A list of subjects which are a possible object for the future law, Torres Fernández 2014, 173-175.



who performs the circumcision, leaders of religious communities, doctors and medical staff, the minor). However, it must also be recognized that in Spain, the debate and social consensus needed to move towards a regulation which adequately balances the conflicting rights is a long way off.

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