

THE LEGAL FRAMEWORK OF CIRCUMCISION IN TURKISH LAW

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Abstract

The circumcision of a male child has not been a concept discussed in Turkish law before today. However, recently, particularly based upon the decision rendered by the German criminal court, the jurists have started to focus on the evaluation of circumcision from a legal point of view and the criminal law dimension of the topic has been discussed¹ in particular. On the other hand, female circumcision is a practice which is not accepted either in the traditional or legal sense.

Keywords: *circumcision, corporal integrity, religious rule, law provisions.*

Introduction

Circumcision is a practice which is characterized as a religious rule particularly in Muslim and Jewish societies. Therefore, even if it is accepted as a reflection of freedom of religion and conscience, the scope of the topic is extensive. Particularly in cases where such a practice, which indeed interferes with corporeal integrity, is performed on a male child whose permission is not bound with legal results due to his age, the discussion concentrates on the rights of the person upon his corporeal and spiritual presence. Considering also that the limit of this is specified as medical necessity, it is seen that there is a legal dilemma. Within this respect in order for the topic to be clarified and for the purposes of determination of the legal nature of

circumcision, it is of importance to firstly explain a person's right to protect his/her corporeal integrity and limits thereof in Turkish law.

It is clearly established under Turkish law that the corporeal integrity of a person cannot be violated and that a person has right to life and is entitled to protect and improve his/her corporeal and spiritual existence. Likewise, it is also provided for that the interference to corporeal integrity of a person can only be possible under medical necessity² and in cases prescribed by law and that a person can only be subjected to scientific or medical experiments with his/her consent. In our study, first of all the state in Turkish law will be set out, and the practice will be reflected afterwards³.

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¹ NUHOĞLU Ayşe, Sünnet ve Ceza Hukuku, in: Prof.Dr. Nur Centel'e Armağan, T.C. Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, Özel Sayı, Yıl:2013, Cilt: 19, Sayı:2, sh. 211-219; YERDELEN Erdal, Sünneti Kasten Yaralama Suçu Olarak Kabul Eden Köln Eyalet Mahkemesi Kararı ve Alman Kanun Koyucunun Karara Tepkisi, in: Kamu Hukuku Arşivi Dergisi, Y: 16, S:1-32, 2013-1, sh. 1-8.

² BAYRAKTAR Köksal, Hekimin Tedavi Nedeniyle Cezai Sorumluluğu, Sermet Matbaası, İstanbul, 1972, sh. 23.

³ ÖZBEK Veli Özer/KANBUR Mehmet Nihat/ DOĞAN Koray/ BACAĞSIZ Pınar/ TEPE İlker, Türk Ceza Hukuku Genel Hükümler, 5.Baskı, Seçkin, Ankara 2014, sh.90-91.

1. Turkish Constitutional Provisions On Fundamental Rights and Liberties

Fundamental rights and liberties are provided in the 1982 Turkish Republic Constitution in detail. Turkey has also become party to various international agreements for the purposes of the protection of fundamental rights and liberties and adopted these as an integral part of the domestic law by ratifying the same by way of codes. Moreover, the last paragraph of Article 90, with the heading of Ratification of International Treaties, of the Constitution reads as follows: *“International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No. 5170/art. 7) In the case of a conflict between international agreements which are duly put into effect, concerning fundamental rights and freedoms, and the laws due to differences in provisions on the same matter, the provisions of the international agreements shall prevail.”* By this provision, the preferential application of the international agreements regulating the fundamental rights and liberties, in case of their conflict with the laws, has been regularized in a constitutional level and granted a state almost above the law. Within this respect, Turkey has set forth various regulations in its domestic law also pursuant to the liabilities introduced especially due to being a party to the European Human Rights Convention. In this context, in Turkish law there are not only the rights granted at a constitutional level, but also the direct application of the provisions, providing for fundamental rights and liberties, of the international agreements to which Turkey is

a party and their important reflections upon Turkish practice.

In order for the circumcision to be evaluated in Turkish law, first of all the constitutional framework of the fundamental rights and liberties to which the circumcision is related must be specified. Within this respect, firstly the constitutional basis of the rights such as fundamental rights and liberties⁴, personal inviolability, child rights, and rights to health will be expressed below.

A. Circumcision Within the Scope of Fundamental Rights and Duties

In examining the provisions of the Constitution of the Republic of Turkey to be evaluated in connection with circumcision, Articles 12, 13 and 14 which are qualified as fundamental rights must be taken into account in particular.

Article 12 of the Constitution, which sets forth *“Everyone possesses inherent fundamental rights and freedoms, which are inviolable and inalienable.”*

The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, his/her family and other individuals”, the nature of the fundamental rights and liberties is expressed.

Article 13 of the Constitution provides for the *“Limitation of fundamental rights and liberties”*. Accordingly; *“Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the statements in and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality.”*

⁴ ERMAN Barış, *Tıbbi Müdahalelerin Hukuka Uygunluğu*, Seçkin, Ankara 2003, sh.134 vd.

Article 14 of the Constitution provides for “Prohibition of the abuse of fundamental rights and liberties”. Accordingly: *“None of the rights and freedoms embodied in the Constitution shall be exercised in the form of activities aiming at violating the indivisible integrity of the State within its territory and nation, and endangering the existence of the democratic and secular order of the Republic based on human rights.*

No provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms recognized by the Constitution or to enable the performance of an activity with the aim of restricting them more extensively than stated in the Constitution.

The sanctions to be applied against those who perpetrate activities contrary to these provisions shall be determined by law.”

Under these provisions of the Constitution, it is expressed that the essence of the fundamental rights and liberties cannot be interfered with, the exception thereof being the limitation thereof only by law under the principles of necessity and proportionality⁵.

B. Circumcision Within the Scope of Rights and Duties of a Person

It is very difficult to outline according to the current practice the circumcision framework in terms of the positive and negative liabilities of the State in the protection of self-improvement and the corporeal and spiritual existence of the individual. Due to the fact that circumcision is an act having an impact on the corporeal and spiritual existence of the individual as a

religious and traditional ritual, it is important to state the constitutional regulation with respect to the topic. Habeas Corpus, as a concept expressing the personal inviolability, is the expression of the concept of protection of the person as a subject⁶.

Article 17 of the Constitution, with its nature that presents the subject directly, holds the heading of “Personal inviolability, corporeal and spiritual existence of the individual” and includes a clear provision with respect to the corporeal integrity of the person. Accordingly:

“Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.

The corporeal integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law; and shall not be subjected to scientific or medical experiments without his/her consent.

No one shall be subjected to torture or mal-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity.

(As amended on May 7, 2004; Act No. 5170) The act of killing in case of self-defense and, when permitted by law as a compelling measure to use a weapon, during the execution of warrants of capture and arrest, the prevention of the escape of lawfully arrested or convicted persons, the quelling of riot or insurrection, or carrying out the orders of authorized bodies during martial law or a state of emergency, do not fall within the scope of the provision of the first paragraph”.

When giving particular consideration to circumcision in view of the mandatory provision with respect to the fact that the

⁵ TANÖR Bülent/ YÜZBAŞIOĞLU Necmi, 1982 Anayasasına Göre Türk Anayasa Hukuku, 13. Bası, Beta, Eylül 2013, sh. 134-156; ÖZBUDUN Ergun, Türk Anayasa Hukuku, 14. Baskı, Yetkin, Ankara 2013, sh.109-113.

⁶ KILIÇ Muharrem, İnsan Haklarında Beden Bütünlüğünün Korunması, in: İğdiş, Sünnet, Bedene Şiddet Kitabı, Editörler: Emine Gürsoy-Naskali/ Aylin Koç, KİTABEVİ, İstanbul 2009, sh. 396-397 (sh. 393-410).

corporeal integrity of the individual can only be restricted under medical necessity and in cases prescribed by law, it is concluded that this procedure can be referred to where the mentioned conditions are met⁷.

Another constitutional provision that may constitute the legal basis for the acceptance of circumcision in Turkish law is Article 24, set out under the section with the heading of Personal Rights and Duties, providing for the freedom of religion and conscience. Accordingly: *“Everyone has the freedom of conscience, religious belief and conviction.*

Acts of worship, religious rites and ceremonies shall be conducted freely, as long as they do not violate the provisions of Article 14.

No one shall be compelled to worship, or to participate in religious rites and ceremonies, or to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions.

Religious and moral education and instruction shall be conducted under state supervision and control. Education regarding religious culture and morals shall be one of the compulsory lessons in the curricula of primary and secondary schools. Other religious education and training shall be subject to the individual’s own desire, and in the case of minors, to the request of their legal representatives.

No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political interest or influence, or for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets”.

The evaluation of freedom of religion and conscience is left to the free will of individuals based upon the principle of necessity and proportionality in a democratic society⁸. With the adaption of the principle that nobody will be blamed for his religious belief and his free performance of religious ceremonies, it is observed that a system is adapted where the religious education of children is left to the request of the family. It is possible to see that the concepts of religious culture and moral education and religious education are respectively provided in the article. Within this respect, it is observed that the State has authority upon general culture lessons, to be limited with religion and moral education, with the religious education being left to the preference of the family. However these provisions are both open to interpretation and have the nature of enabling arbitrary practices. Establishing of the limits has great importance. When the provision is considered focusing on the circumcision, the disposal of the family upon the circumcision of the male child is characterized as an appearance of religious belief.

C. Constitutional Framework of Child Rights

In Turkish law we see the validity of the obligations arising out of the international agreements regarding children, in addition to the obligations imposed as a result of being a party to the UN Convention of the Rights of the Child, Lanzarote

⁷ ÜNVER Yener, Psikiyatride Hasta Hakları, in Sağlık Hakkı Özel Sayı: Hasta Hakları, Sayı:3, Kasım 2007, (sh.20-44), sh. 25.

⁸ TANÖR/ YÜZBAŞIOĞLU, 1982 Anayasasına Göre Türk Anayasa Hukuku, sh.170-173.

Convention⁹, and İstanbul Convention¹⁰, the constitution also takes into account the child rights in addition to personal inviolability and protection of corporeal and spiritual existence of the individual. Within this respect, pursuant to the Constitution's Article 41 with the heading of protection of the family, and children's rights provided in the third part with the heading of social and economic rights and duties; *"The family is the foundation of the Turkish society and is based on the equality between the spouses.*

The State shall take the necessary measures and establish the necessary organizations to protect the peace and welfare of the family, especially the mother and children, and to ensure the education for family planning and its practice.

Every child has the right to protection and care and the right to have and maintain a personal and direct relationship with his/her mother and father unless it is contrary to his/her higher interests.

The State shall take measures for the protection of the children against all kinds of abuse and violence".

By this provision the constitutional framework of the positive obligation of the State as regards the protection of every child, not acting in contradiction with their high benefits and their not being subject to abuse, is set out. In the same regulation the relationship of the parent with the child is also expressed, provided that it is not in contradiction with the higher benefits of the

child. Considering the social acceptance of the circumcision both as a religious and customary practice, the legality of the practice prevents it from being evaluated in contradiction with the discipline and education right of the parent. In fact, the opinions considering the topic within the framework of the act's social compliance expresses that the act is not in contradiction with the law¹¹.

2. Evaluation of Circumcision Under Civil Law

It is seen that in Turkish civil law, the legal status of the child is determined according to the provisions of the Turkish Civil Code No. 4721 (TCC). When the provisions regarding the topic are examined in order to make evaluation in relation to circumcision, first of all the rights and duties of the parent upon the child must be determined. Article 322 of the Turkish Civil Code expresses the mutual obligation of family members as *"Mother, father and child are obliged to help each other in a manner necessitated by the peace and integrity of the family, respect and show understanding and observe the family honor"*. The equitable approach of the mutual obligations of the mother, father and children to each other within the family must be taken into account together with the care and custody obligations on the child.

⁹ Avrupa Konseyi Çocukların Cinsel Suistimale ve Cinsel İstismara Karşı Korunmasına Dair Sözleşmesi için bkz., http://www.coe.int/t/dghl/standardsetting/children/Source/LanzaroteConvention_tur.pdf, erişim tarihi: 03.10.2013, saat: 11.35.

¹⁰ YENİSEY Feridun, Uluslar arası Sözleşmede Kadına Yönelik Şiddet Riskinin Değerlendirilmesi ve Türk Hukuku, in: Yoncalı Platformu Sempozyum Günleri Kütahya-Türkiye'de Aile İçi Şiddetle Mücadele Hukuk Sempozyumu, Bahçeşehir Üniversitesi Hukuk Fakültesi Kazancı Hakemli Hukuk Dergisi, Yıl: 2012, Cilt: 8, Sayı:97-98, sh.11 (sh. 10-13); ŞAHİN Cumhur, İstanbul Sözleşmesi'nin Ailenin Korunması ve Kadına Karşı Şiddetin Önlenmesine Dair Kanun Üzerindeki Etkisi, in: Yoncalı Platformu Sempozyum Günleri Kütahya-Türkiye'de Aile İçi Şiddetle Mücadele Hukuk Sempozyumu, Bahçeşehir Üniversitesi Hukuk Fakültesi Kazancı Hakemli Hukuk Dergisi, Yıl: 2012, Cilt: 8, Sayı:97-98, sh. 17 (sh. 17-19).

¹¹ NUHOĞLU, sh. 218.

The minor child is under the guardianship of its parents; the guardianship of the child cannot be taken from its parents without legal grounds¹². The scope of the guardianship is also determined in the Civil Code and accordingly; the mother and father shall take the necessary decisions upon the care and education of the child by considering its benefit, and apply these decisions. The child is obliged to follow its mother and father's advices. The mother and father give the child the opportunity of regulating its own life in proportion to its maturity; upon important issues, they take its opinion into account as much as possible. A child cannot leave the house without the consent of its mother and father and cannot be taken from them without a legal reason. A child is named by its mother and father. (Turkish Civil Code, Article 339).

The education, one of the subjects within the scope of guardianship, is respectively specified as education and religious education. Within this respect, the mother and father educate the child according to their resources and provide and maintain its physical, mental, spiritual, moral and social development. The mother and father provide a general and occupational education to the child, particularly those with physical and mental disabilities, according to their ability and tendencies (Turkish Civil Code, Article 340). However religious education is expressed in Article 341 of the Turkish Civil Code. In the provision it is expressed that the right to determine the religious education of the child belongs to the mother and father; that any and all contracts that will restrict their rights upon this topic will be invalid and that an adult person is free to select his religion. There is no clear regulation in these provisions that may explain the circumcision. Again when the provisions

regarding protection of child in Turkish Civil Code are observed, in case where the benefit and development of the child are jeopardized and the mother and father cannot remedy or are able to do this, a judge will take the appropriate precautions for the protection of the child (Turkish Civil Code, Article 346). In Article 368 of the Turkish Civil Code Article 368, where it is expressed that the persons living together are subject to the house order and benefits of each of the family members will be justly regarded, it is also provided that each of the household will benefit from the freedom required for his education, religious beliefs, occupation and art. The necessary liberty will also be evaluated within the scope of the Constitution.

Circumcision is not clearly set out under the Civil Code. However, for the purposes of the limits of religious education within the scope of guardianship, a broad regulation is to be interpreted according to usage and customs, taking circumcision into consideration within this respect will not be a contradicting interpretation.

In a decision rendered by the Court of Cassation with respect to the delivery of guardianship, the evaluation of the court regarding the circumcision partially reflects the approach to this act in Turkish law. In the decision "*it is seen that the mother has her joint child born on 1979, named Göktuğ, circumcised secretly from claimant father, without informing him by any means, the claimant father, who has a male child, has learned this fact from third persons, the defendant newly wedded and therefore had to go abroad with her husband has taken the child with her, without giving information to the school administration and the father; the situation has been informed to the father by the school administration, the legal meeting rights granted to the father with the court*

¹² Article 335 of the Turkish Civil Code No. 4271.

decision have been restricted all along. In fact, it is seen that the defendant mother, by hiding the circumcision ceremony that can occur once in a lifetime and deemed as the happiness and pride of a parent according to Turkish custom and usage and particularly going abroad hide her address from the father and clearly tried to prevent the meeting rights established between the child and the father pursuant to the provisions of the code and the satisfaction of the paternity feeling.¹³ As it is to be determined from the decision, circumcision is qualified as a kind of right and deemed as a part of Turkish usage and custom.

3. Circumcision in Turkish Criminal Law

There is also no clear regulation upon circumcision in Turkish Criminal Code No. 5271 (TCC). However, it has not been discussed until today whether circumcision can be evaluated as a reason of compliance with laws due to its attribution as a kind of medical intervention. In fact whether the medical intervention determined as the limit of the inviolability in the Constitution under personal inviolability can be interpreted in a way including circumcision has now started to be discussed. It is beyond doubt that the act is an injury despite the fact that

circumcision is not legally accepted. Injury is an offense committed against the corporeal integrity provided in Article 86 and continuous articles of TCC No. 5237 as deliberately, involuntarily and aggravated due to conclusion.

The fact that circumcision is performed mostly as a customary and religious ritual, the medical intervention's being exceptional makes the evaluation of this practice under medical intervention difficult. One of the criteria determining the legal compliance of medical intervention is whether the intervention is necessary as regards health or not¹⁴. However this discussion has been exceeded due to aesthetic surgeries and by referring to the fact that the consent of the person makes this intervention in compliance with law, the consent of the injured is classified as a reason for compliance with laws.

However the state of consent is controversial when the topic is child circumcision¹⁵. Thus, in a field where the consent of the child cannot be possible, in cases of a lack of medical intervention, the legal nature of circumcision will continue to remain disputable¹⁶. Nevertheless, the discussion of the subject by jurists does not go beyond the theoretical level¹⁷. There is no decision questioning the legal framework of circumcision or discussing whether the act is in compliance with law or not.

¹³ Yargıtay Hukuk Genel Kurulu E. 1992/2-140, K. 1992/248, T. 15.4.1992, bkz. <http://66.221.165.115/cgi-bin/highlight/ibb/highlight.cgi?file=ibb/files/hgk-1992-2-140.htm&query=sünnet#fm>. (Court of Cassation, General Board of Law Department with file number 1992/2-140 and decision number 1992/248, dated 04/15/1992, see. <http://66.221.165.115/cgi-bin/highlight/ibb/highlight.cgi?file=ibb/files/hgk-1992-2-140.htm&query=sünnet#fm>.)

¹⁴ ÇAKMUT YENERER Özlem, Tıbbi Müdahalelerin Rızanın Ceza Hukuku Açısından İncelenmesi, Legal, İstanbul, Ocak 2003, sh. 81-101; SEVÜK YOKUŞ Handan, Sağlık Hakkı Kapsamında Yapılan Müdahalelerin Türk Ceza Hukukunda Hukuka Uygunluğu, in: Marmara Üniversitesi Hukuk Fakültesi Sempozyum Özel Sayısı, Sağlık Hukuku ve Yeni Türk Ceza Kanunu'ndaki Düzenlemeler Sempozyum no:1, Ocak 2007, (sh. 221-243); sh. 228-230; HAKERİ Hakan, Tıbbi Müdahalenin Hukuka Uygunluğunun Koşulları ve Hekimin Yükümlülüğü, in: Tıbbi Uygulama Hataları (Malpraktis) Komplikasyon ve Sağlık Mensuplarının Sorumluluğu, Yayına Hazırlayan: Yener Ünver, Yeditepe Üniversitesi Yayınları, İstanbul 2008, sh. 13-52.

¹⁵ ERMAN, Tıbbi Müdahalelerin Hukuka Uygunluğu, sh. 80.

¹⁶ ÇAKMUT YENERER, Tıbbi Müdahalelerin Rızanın Ceza Hukuku Açısından İncelenmesi, sh. 81 vd.

¹⁷ YERDELEN Erdal; Hukuki Açısından Sünnet, in: Tıp Hukuku Dergisi, Nisan 2013, C:2, S:3;sh.48, (sh. 43-75).

A. Circumcision As Medical Intervention

As circumcision is evaluated within the scope of a medical intervention, for the conditions of medical intervention and acceptance thereof as a ground for compliance with law in Turkish law, the medical intervention must be compulsory¹⁸. This necessity is the illustration of a state expressing that medical intervention is based on justifiable causes¹⁹. However, in Article 17 of the Constitution of the Republic of Turkey, medical intervention is provided as one of the limits of personal inviolability. The compliance of the medical intervention with the law is explained with the exercise of the right²⁰ and consent of the concerned; grounds for compliance with the law²¹ expressed in Article 24 of TCC. The condition sought here for the purposes of grounds for compliance of law for the consent of the concerned who will make the medical intervention legal, is the capability of the person declaring the consent to dispose upon the legal value, subject of the consent of that person²². When the topic is taken into account within this context, even if the circumcision is accepted as a medical intervention, the validity of the consent will be disputable for the purposes of the procedure performed on a legal value upon which the child is not capable to dispose legally. There is no legal problem in taking the consent of the parent arising out of guardianship in cases necessitating medical

intervention. However in this case, where there is no medical necessity it is legally difficult to try to explain the validity of consent as regards the act violating the corporeal integrity, wished to be performed by parents upon the child. There is not always a medical intervention enabling the acceptance of the medical intervention in circumcision as in compliance with law; the opinions with respect to the fact that circumcision is medically useful cannot be adequately justified²³.

B. Circumcision Under Social Compliance of the Act

The act of circumcision is not explained with medical conclusions. Circumcision is as a social matter of fact performed with the consent of the parents of a child, both customary and religious practice. The circumcision is accepted in society as the transition ceremony from childhood to manhood, its being a kind of pride occasion for mother and father as it is expressed in the previously mentioned Court of Cassation decision means that this practice is in contradiction with the law for social purposes. Thus, the acceptance of this practice accepted as socially, that may give rise to the exclusion of the child from certain social environments in cases where it is not performed, as injury becomes difficult. In fact, the reason for the non-punishment of the act originally provided for in Article 86 of the TCC as an intentionally injury offense

¹⁸ HAKERİ Hakan, Tıp Hukuku El Kitabı, Seçkin, 8. Baskı, Ankara 2014, sh. 117-196.

¹⁹ YERDELEN, Hukuki Açından Sünnet, sh.48.

²⁰ DÖNMEZER Sulhi/ERMAN Sahir, Nazari ve Tatbiki Ceza Hukuku, Genel Kısım Cıl:II, Yeniden Gözden Geçirilmiş Onikinci Bası, Beta, Ekim 1999, sh.51; İÇEL Kayhan, Ceza Hukukunda Taksirden Doğan Söbjektif Sorumluluk, İstanbul 1967, sh. 207-208.

²¹ ÜNVER Yener, İzin Verilen Risk, Beta, Mart 1998, İstanbul, sh. 188 vd.; HAKERİ, Tıp Hukuku El Kitabı, sh. 153.

²² ÜNVER Yener, Ceza Hukukuyla Korunması Amaçlanan Hukuksal Değer, Seçkin, Ankara 2003, sh. 977; SEVÜK YOKUŞ, Sağlık Hakkı Kapsamında Yapılan Müdahalelerin Türk Ceza Hukukunda Hukuka Uygunluğu, sh. 228-230.

²³ YERDELEN, Hukuki Açından Sünnet, sh. 47.

is nothing other than the social compliance of the act²⁴.

It is possible in Turkish law to determine that the circumcision is also legally accepted. The legal framework of the person and institutions authorized to execute the circumcision performed without criminal necessity²⁵, Article 3 of the Law Upon Mode of Execution of Medicine and Medical Sciences No. 1219 provides the surgical procedure and expresses that circumcision is such a procedure. Legally it is stated that the person authorized to perform this must be a medical doctor and that only doctors can perform the circumcision and only at the institutions authorized to intervene medically²⁶.

An event, despite not being related to the legal validity of circumcision, where the person performing the circumcision caused the injury of the child with negligence has become the subject of the Court of Cassation decision and sentence is served upon the health officer qualified as a circumciser for negligence injury²⁷. The circumcision has also been performed by the legally authorized health officer, other than doctors, at the period of decision.

Conclusion

As a conclusion, a discussion of the legal validity of circumcision is quite new in Turkish Law. Despite this innovation, the social legality of the circumcision makes the qualification of the act as an act of willful injury, difficult. Even if the circumcision is

considered within the respect of fundamental rights and liberties, the determination of the place thereof within the rights such as personal inviolability, freedom of religion and conscience, the child's rights and the parent's right to educate, develop and the medical care of child has great difficulty.

Child inviolability is undoubtedly a part of the personal inviolability. Within the personal inviolability, the person is entitled to protect and develop his/her corporeal and spiritual existence and there are religious belief especially within spiritual existence. Although the circumcision is assessed within all of these rights, it is difficult to express that it is totally a part of these rights. The fact is that the circumcision is a ritual taking place within the customary and religious rules of society. In cases where this practice is not performed, the child questions, being himself at the first place, his personality and existence.

The social compliance of the action accepted as a ceremony of traditionally transition from childhood to manhood both for the child, waiting the performance of circumcision ceremony excitedly and the family, is beyond dispute.

Therefore, the circumcision has never been seen as an act constituting a crime. However the superficial characterization of the topic in this manner, the act's being tried to be explained with the social compliance, are insufficient to explain the circumcision legally. For this reason that is required to be made is the legalization of the topic with a clear regulation exactly as in German Law.

²⁴ NUHOĞLU, Sünnet ve Ceza Hukuku, sh. 218-219; HAKERİ, Tıp Hukuku El Kitabı, sh. 195.

²⁵ ÜNVER Yener, Tıbbi Malpraktis ve Ceza Hukuku, in Tıbbi Uygulama Hataları (Malpraktis) Komplikasyon ve Sağlık Mensuplarının Sorumluluğu, Yayına Hazırlayan: Yener Ünver, Yeditepe Üniversitesi Yayınları, İstanbul 2008, (sh. 53-116).

²⁶ Law Upon Mode of Execution of Medicine and Medical Sciences No. 1219; Official Gazette: 04/14/1928 – 863.

²⁷ Yargıtay Ceza Genel Kurulu, E.2002/2-188, K.2002/317, T.24.9.2002; karar için bkz. <http://www.kazanci.com.tr>, erişim: 12.04.2015. (Court of Cassation General Board of Criminal Department with file number 2002/2-188 and decision number 2002/317, dated 09/24/2002; see <http://www.kazanci.com.tr> for the decision, access: 04/12/2015).

Against the incapacity of the current regulation, the clear expression of the compliance of the circumcision with the law should be made. Despite the fact that circumcision is considered as a medical activity within the health legislation, it does not always bear the validity conditions of medical activity. It is difficult for an act performed on a child to be resolved with an invalid consent. In our opinion, the

application of criminal law rules with an explanation of the lack of legal basis such as the social conformation of the act can only be excluded for a while.

As we mentioned within this context, due to the fact that the circumcision is an essential ritual for the purposes of Turkish society, reaching a clear regulation will be appropriate.

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