

The Significance of Natural Will Relating to Interventions in Sexual Integrity*

Cinsel Bütünlüğe Müdahalelere İlişkin Doğal İradenin Önemi

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Abstract: *In this paper, the procedure of decision-making on behalf of mentally incapable persons within medical interventions is discussed with a critical approach. The legal system generally authorizes the legal representative to take medical decisions on behalf of persons who lack the mental capacity. When deciding whether the intervention is necessary in non-emergency medical interventions, reasons beyond the medical indication may also render the intervention legal. In this context, especially the expected benefits of the intervention are compared with the risks. However, the irreversibility of the intervention, which is not medically necessary, and the purpose for which it is performed become important criteria in determining whether the decision can be left to someone else. Medical interventions related to sexual integrity have significant psychosocial effects upon the person involved. Despite the person involved does not have legal capacity because of minority or disability, her/his natural will cannot be denied. As a consequence of the right to autonomy, even if the involved person is too young or unable to express herself/himself or unable to discern things properly, her/his feelings and ideas are essential just because s/he is alive. In interventions like circumcision, abortion, sterilization or sex/gender assignment surgeries, it is doubtful that there is a prevailing personal interest requiring such interventions. Even, such interventions can be carried out with heteronormative or/and discriminative motives. For this reason, if medical intervention is not necessary and urgent for the person involved, her/his natural will should be the deciding factor for her/his legal representative. Forcing the termination of pregnancy or sterilization, as well as forcing the continuation of pregnancy, is considered a form of gender-based violence. So there is no justifiable reason to deny the pregnant person the opportunity to decide to terminate the pregnancy just voluntarily on the grounds that she is mentally disabled or a child. Therefore, the further the medical intervention becomes from necessity and urgency for the person concerned, the more the natural will of the person concerned should become decisive for the decision of the legal representative or the judge.*

Keywords: *Abortion; autonomy; circumcision; intersex; natural will; proxy consent*

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Özet: *Bu çalışmada ayırt etme gücünden yoksun kişiler adına tıbbi müdahalelere ilişkin karar alma süreci eleştirel bir yaklaşımla tartışılmıştır. Ayırt etme gücünden yoksun kişiler adına tıbbi kararları alma konusunda hukuk düzeni genellikle yasal temsilciyi yetkilendirmektedir. Acil olmayan tıbbi müdahalelerde müdahalenin gerekli olup olmadığına karar verilirken tıbbi endikasyonu aşan gerekçeler de müdahaleyi hukuka uygun kılabilir. Bu bağlamda özellikle müdahaleden beklenen yararlar ile riskler karşılaştırılır. Tıbbi açıdan gerekli olmayan müdahalenin geri dönüşünün olup olmaması, hangi amaçla yapıldığı kararın bir başkasına bırakılıp bırakılmayacağı hususunda önemli kriterler haline gelir. Cinsel bütünlüğe ilişkin tıbbi müdahalelerin ilgili kişinin yaşamında ciddi nitelikte psikososyal etkileri bulunmaktadır. İlgili kişinin yaş küçüklüğü*

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veya engellilik sebebiyle ayırt etme gücünden yoksun olmasına karşın onun doğal iradesi göz ardı edilemez. Özerklik hakkının bir sonucu olarak, ilgili kişi kendini ifade edebilmekte veya muhakeme edebilmekte yeterli olmasa veya bunun için yaşı çok küçük olsa bile duyguları ve düşünceleri salt canlı bir varlık olduğu için önem taşır. Sünnet, kürtaj, sterilizasyon ya da cinsiyet atama veya geçiş operasyonları gibi müdahalelerde böyle müdahaleleri zorunlu kılan nitelikte üstün özel yararın bulunduğu şüphelidir. Dahası böyle müdahaleler heteronormatif veya ayrımcı saiklerle gerçekleştirilebilmektedir. Gebeliği sona erdirmeye veya sterilizasyona zorlamak kadar gebeliği sürdürmeye zorlama toplumsal cinsiyete dayalı bir şiddet biçimi sayılmaktadır, bu halde gebeliği salt isteğe bağlı olarak sona erdirmeye karar verme olanağının salt zihinsel engelli veya çocuk olduğu gerekçesiyle gebe olan kişiden esirgenmesinin haklı bir sebebi bulunmamaktadır. Bu nedenle tıbbi müdahale ilgili kişi için gereklilikten ve ivedilikten uzaklaştıkça ilgili kişinin doğal iradesi yasal temsilcinin veya hâkimin kararı yönünden daha belirleyici hale gelmelidir.

Anahtar Kelimeler: Kürtaj; özerklik; sünnet; interseks; doğal irade; varsayımsal rıza;

LEGAL STATUS OF MENTALLY INCAPABLE PERSONS AND THE DECISION-MAKING PROCEDURE ON THEIR BEHALF WITHIN MEDICAL ISSUES

As mentally incapable persons are legally incompetent, their declarations of intent are invalid. Because of that, an incapable person is represented by her/his parents, or a legal representative appointed by the judge. On the other hand, personal rights which are inalienable and inviolable cannot be principally exercised by another person (1). Relative personal rights can only be used by legal representatives to protect the interests of incompetent persons (1, 2). On the other hand, absolute personal rights can never be exercised by legal representatives (2). The right to consent to a medical treatment is a personal right, but whether it is an absolute right or not depends on the nature and consequence of the treatment (1).

a. Minors

Minors who are too young to comprehend and make reasoning are to mentally incapable persons. However, minors have been expected to gain legal capacity. If the medical treatment is postponed and if the involved person gains legal capacity during this period, she or he will be able to decide to consent or refuse. For this reason, mental incapacity due to nonage can be expressed as “expected autonomy” (3, p270). Minors are referred as “pre-autonomous individuals” with regard to expected autonomy (4, p159). From another viewpoint, it is called the “right to an open future” (5, p270).

Decisions on behalf of minors should be taken deliberately because they are expected to gain legal capacity soon (6, 7). Just as persons who are temporarily incapable are not represented in every matter, the right to self-determination should be respected in the case of minors as well. Therefore, as the treatment becomes less urgent and vital, the (expected) autonomy should be more respectfully protected. On that note, the Parliamentary Assembly of the Council of Europe adopted a resolution numbered 1952 entitled “Children’s right to physical integrity” in October 2012, which includes non-urgent medical interventions such as circumcision, surgeries on intersex infants and cosmetic surgeries (6, 8). It states that, the Assembly “... has never looked into the category of non-medically justified violations of children’s physical integrity which may have a long-lasting impact on their lives. The Assembly strongly recommends that member States promote further awareness in their societies of the potential risks that some of the above-mentioned procedures may have on children’s physical and mental health and take legislative and policy measures that help reinforce child protection in this context.” (8).

b. Disabled Persons

Disabled persons form another group among mentally incapable persons. Mental disability can be congenital or occur later. Persons who are mentally weak or ill to such a degree that mental capacity is affected are called

disabled. Individuals who are in a coma, vegetative state, or those who are diagnosed with mental disorder and mental retardation are included in this group.

Since incompetent persons with mental disability are not expected to gain legal capacity soon, legal representatives take initiative in deciding on behalf of them. This initiative is more extensive compared to those taken on behalf of minors. This actual and legal statement leaves such a discretionary area that the status of being subject is jeopardized. Because of that, the scope of power of attorney widens or narrows depending on the legitimate interests of the involved person. However, the legal representative can probably impose her preferences arguing that she is protecting the welfare of the disabled person. For instance, exposing a child with Down syndrome to cosmetic surgery to make her/him look like a child without it or exposing a woman with mental disability to sterilization is a very subjective and discriminative attitude (3, 9, 10). As another example, exposing people with mental disorder to heavy psychiatric medication, isolating them from the society, depriving their freedom just because of their mental disorder can also be classified as forms of discrimination against persons with disability. In this case, it cannot be argued that the dignity and welfare of the person involved is respected.

Mentally disabled persons do not have discernment but still have emotions and senses. Interventions in genital and sexual integrity have the potential to cause dissatisfaction for persons with disabilities (4). Because of that, proxy consent to interventions related to sexual integrity is justifiable if only there is a medical necessity (5, 11).

MEANING AND ROLE OF NATURAL WILL WITHIN MENTALLY INCAPABLE PERSONS

Mentally incapable persons have the right to autonomy like others. If there is incapacity because of minority or congenital mental disability, the sole remedy to respect mentally incapable patient's wishes is taking natural will into consideration (3, 12, 13). The natural will is determined by emotional or intellectual responses (3, 14, 15). Even if the involved person is too young or unable to express herself/himself or unable to discern things properly, her/his feelings, fear, anxiety, excitement, tendencies are essential just because s/he is alive (3, 16). Whether the involved person has the capacity or not, s/he has an inalienable right to exercise control over her own body (3). It is a requirement of the principle of human dignity (17).

Considering that natural will, which is not always rational, can damage health, natural will is not regarded as binding. In this respect, natural will is considered as one of the criteria to determine the best interests (i.e., the objectively hypothetical will) of the person involved (3, 12, 13, 18, 19). According to article 12 of the Convention on the Rights of the Child, "*States Parties shall assure... the views of the child being given due weight in accordance with the age and maturity of the child*". Similarly, article 6 of the European Convention on Human Rights and Biomedicine prescribes that "*The opinion of the minor shall be taken into consideration as an increasingly determining factor in proportion to his or her age and degree of maturity. ... The individual concerned (with a mental disability) shall as far as possible take part in the authorization procedure.*" Also, the article 12/4 of the Convention on the Rights of Persons with Disabilities provides that "*States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person...*" On the other hand, it is not theoretically regulated to what extent the natural volition should be taken into consideration. In this regard, natural will should be given importance pursuant to requisites and characteristics of concrete case. Any involuntary treatment despite the refusal of the incapable person can be undertaken just to prevent her/him or third parties from a serious risk of harm and it can be considered as a last remedy (20, 21).

According to the paragraph 1906/3 of the German Civil Code, when an incapable person refuses a treatment, which is necessary to prevent serious damages to her/his health, some conditions are required to regard the informed consent of the legal representative valid. There should not be any other reasonable measure to prevent

possible serious damages to health and expected benefits from treatment should explicitly prevail expected complications and adverse effects (3, 20, 22). According to the rules of the Convention on the Rights of Persons with Disabilities, a treatment can be deemed as proportional if it neither dangers a person's life nor has the risk of a non-recoverable severe damage (23). Hereby, in case of conflict between natural will and best interests, the right to participate is respected and some criteria are required to keep the delicate balance between autonomy and utility (3, 22). In order to assure this, The Committee on the Rights of Persons with Disabilities remarks that the "best interpretation of will and preferences" must replace the determination of "best interests" to ensure that persons with disabilities enjoy their rights to legal capacity on an equal basis with others (24).

CHARACTERISTICS OF THE MEDICAL TREATMENTS RELATED TO SEXUAL BODILY INTEGRITY

a. Introduction

A medical treatment can only be justified if it is given valid consent as it violates bodily integrity. All surgical treatments do not lead to similar consequences as some of them more specifically infringe personality. Foremost among them are interventions to tissues and organs related to gender identity or sexual orientation (4). Decisions about such interventions originate not only upon medical necessity, but also upon psychological factors, personality, and identity (6). Interventions related to sexual integrity are more prone to cause spiritual effects compared to other interventions. Sexual integrity has a unique psychosexual significance in this regard (4). For this reason, interventions related to sexual organs, or their reproduction can be specified as core privacy. Interventions related to core privacy can be exemplified as circumcision, genital surgeries on intersex infants, gender/sex- assignment surgery, abortion, and sterilization. Among them, sterilization without medical necessity which is motivated by stereotypes related to disabilities causes disability-based discrimination and violates the Convention on the Rights of Persons with Disabilities (3, 9, 10) and leads to gender-based discrimination as it mainly addresses girls and women depending on gender stereotyping norms. The others will be discussed in detail because they are more commonly exercised than sterilization.

b. Sex-Assignment Surgeries

Non-voluntary sex-assignment surgeries are sexist as individuals are imposed to select a single sex and live heteronormatively (6, 11). Intersex infants are subject to irreversible genital surgeries before they develop gender identity and mental capacity. In at least 21 European states sex 'normalizing' surgery is carried out on intersex children (25). Health professionals consider atypical sex characteristics as an emergent psychosocial problem because of gender stereotypes (26, 27). Actually, the Resolution 1952 of the Council of Europe (7.5.3) opposes unnecessary medical or surgical treatments, which are cosmetic rather than vital for health, referring to genital surgeries on intersex infants (6). Legal representatives give consent to such surgeries as they think these normalize their children and that they are in the best interest of them. However, the truth and objectivity of such arguments is dubious because sex characteristics do not determine gender identity (6, 18, 28) which has been understood in the last century considering scientific, medical, and social developments (6, 11, 28, 29). The Federal Constitutional Court of Germany decided that the right of personality of persons who do not permanently identify as male, or female are violated if the civil status law requires that the gender be registered but does not allow for a further positive entry other than male or female (30). It is stated that many intersex people who have been surgically operated rejected the reassigned sex/gender and experienced reconstruction surgeries and hormonal treatments (11). Such cases indicate that being intersex is not a psychosocial problem, on the contrary it has been argued that irreversible sex operations are the processes that lead to actual psychosocial problems (11). Moreover, mental incapacity because of minority is relatively

temporary. Irreversible genital surgery without the consent of the infant does not conform to dignity and autonomy (18, 28, 31, 32). The infant will grow up, develop his/her gender identity and ultimately his/her decision will be definite (6, 11).

According to the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, children who are born with atypical sex characteristics are often subject to irreversible sex assignments and involuntary genital normalizing surgeries performed without their informed consent leaving them with permanent and irreversible infertility causing severe mental suffering (33, p18-19). Hence, the Human Rights Council of the United Nations considers these genital surgeries as a degrading treatment. Moreover, in the related line of literature, normalizing surgeries on intersex infants are interpreted within the context of mental and physical violence (6). Actually, unnecessary surgeries on intersex infants lead to various medical and psychological damages (11). It is stated that those children can lose their fertility or sexual sensation after the removal of gonads (34). Moreover, it causes ongoing pain and lifelong need for hormone therapy (34). Stigmatism and discrimination against intersex infant continue even after so called normalization surgeries. Ultimately, exposing a child to such types of surgeries is a type of discrimination on the ground of sex (6, 11).

c. Circumcision

Female circumcision is regarded as genital mutilation for whatever reason, whereas male circumcision is justified with customs, religion etc. (3, 4, 35, 36) From this viewpoint, male circumcision constitutes a type of discrimination on the ground of sex (5) but in the reality both are based on sexism. The argument that male circumcision does not lead to damages is just an unproven assumption (4). Both female and male circumcision involves the removal of healthy and functional parts of body (7).

According to the article 24/3 of the Convention on the Rights of the Child, “*States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children*”. International Coalition for Genital Integrity, which is a member of Child Rights Information Network (CRIN), considers male circumcision as genital mutilation like female circumcision (37, 38). It is argued that male circumcision leads to physical and psychological harm rather than providing benefits for health. (5, 7, 38). On the other hand, Mazor does not agree this argument (39). As stated in the literature, both female and male circumcision is a violent act against infants (4-5, 17, 40). According to the World Health Organization, violence is the use of force resulting in or having a high likelihood of resulting harm (41). It is stated that until the organ (penis) has reached its full size, it is very difficult to determine where the foreskin ends and where the penis begins (4, p159-160). On the other hand, circumcision is used as an instrument to emphasize masculinity, to uphold heteronormativity and patriarchal norms, and to standardize sexual activities of others (4, 11). Even, parents who are not willing to consent circumcision, argue that they face social pressure from group members (4, 7, 38).

Exposing very young, incapable infants to an irreversible genital surgery for the sake of parental beliefs violates the freedom of belief and religion (5) as well as the right to bodily integrity and autonomy (3, 5, 36, 42-45). Schinkele does not agree this argument. (46, p194-196) Postponing the circumcision until the time when the infant can decide himself would be an approach complying with the right to self-determination (3, 4, 5, 38, 42, 45). In fact, a regional court in Germany decided that consent of the legal representatives cannot be sufficient to legalize circumcision in the criminal case because of bleeding (3, 44-45, 47-48). Then an article was added to German Civil Code to legalize circumcision. The motivation of circumcision is not considered according to this regulation. The parents can give consent for religious reasons or just for hygiene (44, 48). According to the paragraph 1631d of the German Civil Code, “(1) *The care for the person of the child includes the right to give consent to the medically unnecessary circumcision of a male child who is not capable of reasoning and forming a judgment, if this is to be carried out in accordance with the rules of medical*

practice. This does not apply if the circumcision, even considering its purpose, jeopardizes the best interests of the child. (2) In the first six months after the child is born, circumcision may also be performed pursuant to subsection (1) by persons designated by a religious group to perform this procedure if these persons are specially trained to do so and, without being a physician, are comparably qualified to perform circumcisions.” In fact, circumcision is not a life-threatening treatment, unlike refusal of transfusion. However, circumcision may have an adverse effect on sexual satisfaction, because sexual pleasure is a very subjective matter (4). Apart from that, circumcision is seen as an instrument of social engineering to standardize sexual activities of others. (Similarly, 4)

The consent to an irreversible surgical treatment without any medical necessity is given by the legal representatives without paying any attention to the expected autonomy of the child (5). It rather constitutes an excessive intervention in the right to self-determination of the child (5, 36, 38, 42, 45, 49-50). For this reason, in Jewish society, there is a recommendation stating that circumcision can be without blood. In other words, it can be done just as a ceremony letting the knife touching skin (46, p196). Circumcision without medical necessity like sterilization without medical necessity and gender-addressing genital surgeries are not urgent and can be done at any time. In other words, when they are not carried out at a definite time no irreparable harm or no irreversible result arises. (38)

d. Abortion

Abortion is a relatively urgent intervention inherently, because the pregnant must take a decision until a specific phase of pregnancy to have it or not. It involves only girls and women by its nature, and because of that it can become an instrument of gender-based violence and discrimination. Considering living conditions and best interest of the fetus, abortion may be a reasonable surgery. However, bodily autonomy cannot be disregarded even if the pregnant has no mental capacity (3, 21, 51). In other words, an incapable person can refuse to stay pregnant and wish for abortion even if her legal representatives are against it. Since tolerating problems during pregnancy and giving birth at last is a clinical situation, terminating the pregnancy is a subject of a medical decision like continuing it. The decision of the incapable pregnant should be respected. Because of this conflict, Jaccard argues that an incapable person can exercise personal rights on her/his own. The author states that there is no contradicting rule generally. However, in respect to such rights as marrying, engagement, mental capacity is specifically required to exercise (52, p32-33). In this regard, bodily integrity cannot be violated forcibly or the pregnant cannot be forced to continue to bear the child (3, 48).

In such extremely personal issues, forcing or dominating the pregnant person even if she has no mental capacity is neither legitimate nor sensible (9, 10, 21, 48, 52, 53). A competent woman can exercise the right to an abortion even if there is no reasonable ground. Therefore, it can be argued that there is no reason to justify the deprivation of an incapable women of this right just because they have no capacity. Taupitz argues that there is a difference between intervening forcibly and not intervening against natural will (19, p73-74). Normally, this approach conforms to the best interests of the incapable person. However, there is no justifiable ground to deprive the involved person of a right upon an other's will with regarding treatments related to core privacy like abortion (34, 52, 53). In fact, according to the General Recommendation No. 35, adopted by the Committee on the Elimination of Discrimination against Women, forced continuation of pregnancy is a form of gender-based violence such as forced abortion or sterilization and may amount to torture, cruel, inhumane, or degrading treatment (54, p7).

PROTECTING AUTONOMY IN CONFLICT OF PREFERENCES

All the treatments related to sexual integrity are irreversible or hardly reversible. In this regard, such treatments intervene in the privacy of the individuals and can be justified only by reasonable grounds (4). Sex, gender, and sexuality are such matters that only the involved person can and should decide for herself/himself (4). In

this regard, it cannot be asserted that a decision taken on behalf of another is justifiable. Indeed, according to an act within continuing power of attorney in California, the attorneys are prohibited to take decision on abortion and sterilization (55).

Motivations which lead the legal representative to give consent to unnecessary and non-emergency interventions are extremely subjective and irrational, like customs, beliefs, or gender stereotypes (6). Because of that, the natural will of the incompetent person shall be preferred to judgments on behalf of herself/himself. The right to autonomy and dignity requires that subjective thoughts of the involved person should be prevailed rather than subjective thoughts of others. Indeed, according to an act within continuing power of attorney in California, the attorneys are prohibited to take decision on abortion and sterilization (56). Also, a distinction is made between the body-oriented approach and the person-oriented approach to bodily integrity in the literature. According to the body-oriented approach no one, even the involved person does not have the right to consent to such violations of bodily integrity that are not vital for health. On the other hand, according to the person-oriented approach, only the involved person can give consent to those violations (6, 38).

Lack of capacity does not mean that the competency to decide on such matters has been lost and transferred to the legal representative (4). The only aim of requiring mental capacity to validate declarations of will is to prevent the incompetent person from abuse. However, in interventions related to sexual integrity, imposing a lifestyle upon worldviews and beliefs of the legal representative becomes prominent rather than preventing abuse.

Regarding abortion, if the incompetent refuses, abortion should not be carried out. Refusal of the legal representative should not prevent abortion if the involved person wishes it. However, in order to get informed consent for abortion, guardian ad litem should be appointed because the justification of violation of bodily integrity by the physician requires a valid declaration of will (3). The function of such guardian ad litem is to support and strengthen the natural will of a mentally incapable person. The natural will is the most important determinant factor of objectively hypothetical will determined by the guardian *ad litem* with respect to extremely personal matters like abortion (3). Link does not agree this argument (57, p356).

Brückner and Hamdan consider consent to male circumcision as a relative personal right even if there is no medical necessity (48, Rn598, 58, §1626 Rn16). Indeed, according to the paragraph 1905/1 of the German Civil Code, the custodian may give consent only if the sterilization is not inconsistent with the intents of the person under custody (3, 20). Apart from the interventions related to sexual integrity, the right to consent to just aesthetic surgeries, clinical experiments, and irreversible organ and tissue donations is also an absolute personal right (6, 11, 59). Ganner states that abortion, sterilization, living organ and tissue donation cannot be done against the intent of the involved person, even s/he has no mental capacity (60, p151). There is no prevailing personal interest of the involved person in any of them. Even if such medical interventions are not carried out, the incompetent person does not have any risk of harm (11).

CONCLUSION

In interventions related to sexual integrity, the right to consent or refuse is such an absolute personal right that those interventions cannot be undertaken unless the involved person does not request so.

Furthermore, deciding on behalf of someone in respect to genital surgeries and circumcision, which are instruments of social control of gender, cannot be justified because the incapacity and incompetency of the child is just temporary. The involved person will be able to make her/his decisions on her/his own soon. Just as a woman who has been operated for an abortion or a birth shall not be sterilized, an incompetent child should not be subjected to an irreversible, unnecessary intervention related to sexual integrity, by removing healthy parts of her/his intimate genital organs. Removal of healthy parts of body should not be harmful to

conclude that parental consent is not justified. In this regard, the child's sense of bodily integrity should be taken into consideration.

As the benefit and urgency of a medical intervention diminishes, the natural will's force and effect will strengthen and become the deciding factor. In this case, the power of attorney should exist only to promote carrying wishes of the involved person into effect as stated in the article 12/4 of the Convention on the Right of the Persons with Disabilities.

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