

Rolf Dietrich Herzberg

# Ethical and legal aspects of genital cutting

in

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**Circumcision of Boys**

A sad legacy

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## Introduction

A conservative and devout Catholic father, firmly cleaving to the Church's teaching on sin since childhood, has a four-year-old son and thinks back to the sin of his own infantile masturbation and the guilt feelings that were associated with it. He wants to protect his child from both. He turns to a retired clergyman who thinks even more strictly about these things and asks for advice on how to keep his boy from sin, and how to spare him the moral dilemma and to prevent Divine wrath. The priest tells him about the effective means of circumcision.

This advice is based on experiences that millions have had “first hand” and in which the declining but still widespread use of early childhood circumcision in the U.S. has its historical roots. In the 1870s Lewis Sayre and John Harvey Kellogg, doctors and moralists of the Victorian era, fought the fight against childhood “unchastity” with missionary zeal. More and more parents followed the gruesome treatment recommendation to impede their sons’ masturbation as the best possible way to turn him off it by cutting away the foreskin. With this procedure they took away or diminished the pleasurable sensations - without the guilt! The child Thomas Mann (1922/1990, p 312) in his “Confessions of Felix Krull” summarized these sensations - in the absence of “a proper name for it” - “under the name of ‘the best’ or ‘the great joy’ and “as a delicious guarded secret” Kellogg did not want to avoid pain, but make pain serve the goal. “A remedy for masturbation,” he said, “which is almost always successful in small boys is circumcision. The operation should be performed by a physician without anesthesia, because the short pain has a salutary effect, especially when it is associated with the idea of punishment. In girls, the treatment with undiluted carbolic acid is ideally suited to reduce the unnatural excitement” (Kellogg, cit. according to Schmidt-Salomon, 2012). Tonio Walter recently illuminated the historical context of the fight against the sin of sexuality: “That circumcision may be directed against sexuality *can* also be true for boys. Objectively, they are desensitized by the procedure because the glans is now constantly exposed and rubs against clothing. Subjectively, since the 19th century, circumcision has had millions of times the purpose of making masturbation difficult for boys. While widely denied today, this actually is the reason why infant

circumcision was so widespread in the puritanical United States – and is declining today” (2013, p.13).

Let us imagine the outlined case in its progress such that father and mother agree, according to the priest’s advice, to see a befriended urologist to ask him to circumcise their son for religious reasons. The urologist determines that the surgery is not medically necessary and is faced with the question of whether he can still perform it on the boy. Under the given circumstances, does the parents’ custody give them the right to consent to their son’s circumcision, as long as it is to be performed *lege artis*?

These formulations are aligned with the text of the new § 1631d of the Civil Code, which reads in full as follows:

*“Circumcision of the male child*

*( 1) The custody includes the right to consent to a medically unnecessary circumcision of a male child who is not capable consent , if it is to be carried out lege artis. This does not apply if the child's welfare is endangered by circumcision, also taking into account its purpose.*

*( 2) In the first six months after the birth of the child a person designated by a religious community to perform circumcisions under paragraph 1 is allowed to circumcise without being a medical doctor, as long as the person has received special training and is comparably capable to perform the circumcision. ”*

Would the bodily injury (§223 StGB), which the urologist would commit by amputating the foreskin be justified by effective consent?

By the way, there was recently a second provision concerning genital injuries inserted as § 226a into the Criminal Code, but one does not grant permission, but threatens with harsh punishment. It is directed against female genital mutilation and reads as follows:

*“Female genital mutilation*

*Whoever mutilates the external genitalia of a female person is to be punished with imprisonment of not less than one year. ”*

### **§ 1631d - all for the sake of the child?**

I have deliberately chosen the side entrance, although a different approach is more common. Looking at circumcision of the penis, what immediately comes to mind are those intended every day by Jewish and Muslim parents in accordance with their religious tradition. But he who starts out with those thoughts must know that many ears are already closed when *any doubts* are expressed about the right of parents to have their sons circumcised. And if he even explicitly *denies* this right, then he faces outrage, is frequently even hurled insults, regardless of how fair, factual, prudent and consistent the reasoning of his arguments may be. “Mental arsonists who poison against Jews” without “empathy and sensitivity,” insulted Charlotte Knobloch (2013 ), among others, a “criminal law professor, his master and a loud voice from the Ethics Council” by which she means Putzke, Herzberg and Reinhard Merkel.

These authors are most likely the targets towards which the invective was directed, alleging they had confronted Jewish citizens with an open and unrestrained anti-Semitism of unimagined dimension” (Knobloch, 2013).

Many circumcision proponents assume resentment against Jews and Muslims among circumcision critics, yet these address only the Jewish-Muslim circumcision rite. Such an assumption is the reason why they think it to be the appropriate response to indignantly dismiss all arguments lock, stock and barrel. An eccentric example like the one shown at the beginning can, however, open the eyes of the prejudiced to the fact that it is not at all about criticism of the religious rites of minorities; i.e. that Heribert Prantl (2012) misses the problem's mark when he “believes he must protect the Jews” and when he rejects the prosecution of medically unnecessary circumcisions because the German criminal law “is not an instrument of the mission to the Jews” and punishment “is not a means of spiritual enlightenment”. No sensible person would fight a ceremony around the infant's penis, if it were ensured that the child is spared injuries and hazards, even if it may appear strange and exotic to him, This is not about “Jews” and “Muslims” who would have to be religiously converted, but about defenseless boys and girls that need to be protected from medically pointless personal injury, no matter where they exist and for what motive they are committed . And it is not the circumcision critic who is lacking in “empathy and sensitivity” but the accusing Charlotte Knobloch (2013) if she wants to deny little boys protection against physical abuse in the name of “protection of the free exercise of religion”.

There are parents - or there might be - who beat their children, for example recklessly, just to vent their anger; or because they believe physical punishment matching the child's misdeeds are adequate educationally valuable measures; or because they want to break the will of their daughter, who has fallen in love with a classmate, and refuses to marry the cousin; or because they belong to a sect that on Good Friday prescribes as a religious ritual, a moderately painful flagellation of children. Other parents require or allow that someone inflicts cuts and stab wounds to their teenage daughter's genitals, be it because they obey a religious commandment of their religious community, or be it to influence the future sexual life of their daughter. And there are parents - or one can at least imagine they exist – who let the healthy foreskin of their little son's healthy penis be cut off, for example because the father is circumcised himself and finds that this prolongs sexual pleasure during sexual intercourse; or because they hope to gain from it an easier cleaning of the glans and reliable prevention of subsequent disease; or because they find circumcised phalluses aesthetic; or because they want to spare their son the ridicule of his play- and teammates who are expected to be circumcised; or because they feel themselves called upon by God to do something against their six-year-old's sinful, excessive masturbating; or because they refer to the Bible and the command given by God and actually believe it gives their child a beneficial covenant with God by the amputation of the foreskin; or because they give in to social pressure their religious community exerts on them; or because they abhor the act, but fear for their son considerable disadvantages if he had to show later in the military an uncircumcised penis; or because the circumcision, without religious meaning, simply is family tradition; or because as young doctors they follow the view of the pediatric surgeon Karl Becker (2013, p 146) that “circumcision is a good introduction to the subtle surgical techniques of pediatric surgery and thus well-suited for the training, that is recommended for learning the careful dealing with the infant tissue, to learn sewing and dissecting”. There is no reason to let

motivation play a role in the legal assessment of the act – be it beating, female genital mutilation, or circumcision – there is no reason to consider that maybe some of these motives give parents a right to beat, mutilate, circumcise, which they would not have in other instances.

This was also the approach of the legislature when § 1631d of the Civil Code was added in late 2012, avowedly primarily to deal with ritual circumcisions of Jewish and Muslim provenience, on one of which the Cologne Regional Court had ruled and found to be unlawful. Therefore, the permission of bodily injury will from the outset be limited to the "male" child; nobody in Germany had campaigned for female circumcision in the heated debate of the judgment, although it is practiced with a religious motivation by millions of parents and although it has, if Muhammad's stipulation is observed, a much lower impact than the male circumcision. The fact that the text of § 1631d BGB and the draft justification reserve the euphemistic term "circumcision" for foreskin amputation of boys, while comparable and even less severe injury to the female genitals are referred to as "mutilation" reveals the tendentious policy of the legislature, marked by political pressure. Tonio Walter, looking at the two new provisions in the Civil Code and the Penal Code, has now given this to a broad audience to consider: "If one reads what the press writes, the term "mutilation" refers to the excision of the clitoris, possibly followed by sewing up of the vagina. Yet, the actual facts go indeed much further. They include all changes to the female genitalia, even only partial removal of the clitoral hood, even mere "nicks" into it. This is the more remarkable, because this clitoral hood is the counterpart to the foreskin of the male penis - whose circumcision not only meets no particular offense, but has even been recently expressly legalized by §1631d BGB. The law requires only that the rules of medical science be adhered to, especially that an anesthetic is given and a sterile scalpel is used. Yet this does not make it legal if performed on a girl - even if it only affects the clitoral hood and the parents wish the cutting on religious or ethnic grounds"(Walter, 2013, p 13).

As for this violation of girls, let it be incidentally noted that Islam as a whole is far from the moral condemnation that are always emphasized by its spokesmen in Germany. According to the Hadith, Mohammed has expressly approved the female genital mutilation ("But yes, it is allowed.") However, the female circumciser should be doing this so gently that the woman keeps her sexual pleasure ("If you cut, do not exaggerate. Thus it is better for the woman and the man is more pleased" quoted by Kelek, 2012a, pp. 103 f). That is why many Muslim religious parents allow only a "small" circumcision as the scoring or puncturing of the outer labia (stage IV of the WHO classification) and /or the removal of the clitoral prepuce; The latter is required by the Schafi'ite procedure, and they reject the word "mutilation". In fact, it fits less for this genital injury than for cutting the whole prepuce.

But in its legalizing attempt the legislature has made sure not to limit the "right" which is to be covered by custody to consent to religious-ritual circumcisions. "The regulation does not differentiate by the motivation of the parents in particular it does not contain any special arrangements for religiously motivated circumcisions, although, in practice, these are likely to form the largest group of cases of non-medically indicated circumcisions in Germany. A 'special right', exclusively for religiously motivated male circumcision of children, would not do justice to the possible different purpose of circumcision" (German Bundestag, 2012, p 16). One has to keep in mind that the law tries to legalize bodily injury as an act relating to custody, whereby making it subject to §1627 BGB, under which the parents are obliged to execute all acts of

custody to the benefit of the child”. Should therefore indeed all amputations of the foreskin that are carried out *lege artis*, even when not medically necessary, be viewed as being in the child’s best interest? This would have gone too far, even in the eyes of the lawmakers; that is why they installed limits to tolerance towards acts that violate the child's right to physical integrity, by the following restriction: no effective parental consent, “if by circumcision also considering its purpose, the child's welfare is at risk” (§ 1631d para 1 sentence 2 BGB). A certain degree of differentiation according to the motivation of the parents has now to be made after all. The reasoning states: One must “take the purpose of circumcision into consideration”; no effective consent of the parents in the circumcision, if “it is clear from the particular circumstances of the individual case that a threat to the child's welfare exists,” which, for example, would be “a circumcision for purely aesthetic reasons or with the goal of hindering masturbation” (German Bundestag, 2012, p 18). Here is how Isensee (2013) puts it: “The banned differentiation by motivation for circumcision [...] returns through the back door of the child's welfare. Therewith also returns the formal problem of how to determine these circumstances reliably.”

The truth is that they cannot be observed at all, not even unreliably. If one just thinks a little, one has to recognize the demand “to take the purpose of circumcision into consideration” as downright nonsensical. Firstly, if indeed the rare physician asks for the intended purpose, the parents will conceal a purpose that might meet disapproval and instead name a harmless one. Also Christian parents who in truth might pursue an unusual purpose, such as the prevention of masturbation may refer irrefutably to the Old Testament. The legal restriction has practically no effect. Secondly, it is also matter-of-factly wrong to question a given permission, if the objective conditions are met, in cases where the permission holder pursues purposes that lie beyond the act itself and are disapproved by some or many. For example, the victim may still commit in self defense personal injury as a necessity, even if he intended maliciously to inflict permanent damage to the attacker; he just has to stay within the limits of the objectively necessity to defend himself. The same stance should have been taken here by the legislature. If, as an act of “custody” parental consent should be allowed in the circumcision of a “male child”, then it should not play any role what they have in mind beyond circumcision.

Let us imagine that Turkish parents consult a urologist with the request to circumcise their six year old son. § 1631d para 1 sentence 1 BGB declares it to be the "right" of parents to (effectively) consent to this assault as an execution of their custodial right (and to provide a justification for the doctor committing the actual bodily injury). Indirectly therein lies at the same time the value judgment that the parents are arranging for the circumcision “for the good of the child.” An “endangerment of the child's the welfare” shall supposedly *not* be associated with *the circumcision itself* regardless of the pain, risk of complications and life-long consequences. If this is so, does it then also mean that endangerment of the child's welfare has to be assumed, if parents reveal that they are irreligious and have no connection to other Muslims, yet still want to have their son circumcised, because they only know circumcised penises, and consider uncircumcised penises ugly and therefore, with total religious indifference, they want to hold on to the “culture” of the Muslim circumcision?

And even among circumcisions with a religious purpose it seems absurd to me, to regard the “welfare of the child” furthered in one case and at risk in the other. Two babies, two sets of parents and two circumcisions, each on the eighth day after birth. All parents act to please God;

for one set it is about fulfillment of the biblical commandment (1st book of Genesis, chapter 17), and for the other it is about avoiding sinful childhood immorality. The physical torture and permanent consequences are completely equal and a match is also found in the minds of the parents. In all four the pious faith prevails to pursue a worthy cause for the benefit of the child; namely to establish a covenant with God for the child here, and to keep the child from sin, guilt and divine retribution there. Who shall take it upon himself here to ethically distinguish, that is, to respect, the first intended purpose as religiously dignified, and to despise and condemn the second? Who could ever be able to present a legal-rational justification that the same injury is here a crime, a shameful abuse of the child, yet there an act, justifiable as serving the child's welfare?

### **Motive Research? Examination of Hörnle and Huster**

Hoernle and Huster (2013) decidedly champion the opposite opinion. They legitimize the BGB § 1631d constitutionally exclusively with Article 6 § 2 of the Basic Law. Therefore, according to them, it depends on whether "the invasion of bodily integrity can be assessed as covered by the parental right of education" (Hoernle and Huster, 2013, p 335, p 338). The rigorous criterion of medical necessity has, of course, been ruled out by the authors. They must admittedly call on a "soft criterion". This they define with the requirement that, for the parents, the circumcision of their child must be an "essential part of an overall concept of the (child's) good life". Accordingly, it would be quite relevant to question justification of the act, *why* parents want to circumcise their child, and it would "not be objectionable" that the legislative intent calls for the "exclusion" of such motives as aesthetics and impeding of masturbation. In my two examples the physician performing the desired circumcision, would thus objectively commit at least serious bodily injury because parental consent does not justify his action. The authors find that given the parents' "personal preferences" (aesthetics) or "religious educational objectives" (masturbation prevention) circumcision would not be part of an overall package of ideas about a "good life for the child". Consequentially, the parents would have to be *punished* for personal injury, be it as an indirect perpetrator or instigator.

Hoernle and Huster (2013) are facing the objection that their doctrine logically should emphasize a research obligation for the circumciser that is highly problematic and of questionable motivation. "A review of the motives" says Isensee, "would lead to a dilemma. The religious sincerity cannot be reliably determined and not reasonably procedurally controlled" (2013, p 325). Tonio Walter paints a very dark picture: "If it is to depend on the motives of the parents whether their child is circumcised, it will in practice come down to solely the declared motives; to what the parents give for the record as a motive. As it once was the case for refusing military service, there will be sites on the Internet, which can provide parents with those formulations that the doctor accepts. The result will be that male children will experience open season for unlimited circumcision" (Walter, 2012, p 114).

Hoernle and Huster do not address such accusations, they tacitly postulate detectability. Yet, on this basis they have to show their colors! In their view, not even the religious motivation of facilitating a sinless life for the child justifies circumcision, not to mention the motivation of helping their son to a more beautiful penis according to parental judgment. How then must the

justification read that meets the authors' requirements? Here now, their soft criterion experiences a clarification and specification, which amazes the reader because there is practically nothing left of the circumcision permission under § 1631d BGB: Circumcision is only "covered by the parents' right of education" when it is "indispensable for belonging to the religious community". This huge restriction confirms the last paragraph on page 338 with its judgment to the second major circumcision tradition, which - in the broadest sense - refers to health reasons. Although hesitantly, Hoernle and Huster here deny the parents a circumcision "for the sake of prophylaxis (to improve hygiene and the prevention of sexually transmitted diseases)" - contrary to the legislative intent of § 1631d BGB, which wants acknowledgment of this religiously-indifferent motivation and therefore stresses that the provision does not make a distinction according to the motivation of the parents and "does not contain any special arrangements for religiously motivated circumcisions."

Hoernle and Huster see it differently. They allege an example: "An American couple living in Germany wishes their son's circumcision according to the customs of their home country" (2013, p 339). Because the authors are full of good intentions, willing to attest the legislature in the end an "essentially" acceptable regulation, they call the American circumcision merely "problematic" and almost apologize for our legal culture. To reject these parents' motivation "because under German law parental consent could not justify it would not be an undue burden". What the authors do not see or do not want to see is that their opposition strikes at the core of the legal regulation. The critics derive from clause of purpose and child welfare in § 1631d para 1 sentence 2 BGB a radical reduction of parental consent competence, by only accepting consent of an "education-conceptual" nature, whereby they end up with the criterion, that the circumcision must be "indispensable for membership in the religious community." Given the clarity and precision of the authors' reasoning, one is inclined to take them at their word. This would mean parental consent would *always* be ineffective, even in the cases of ritual circumcision of Jewish and Muslim boys and even if the rules of medical science are respected, because the religious communities, to which the parents belong, accept their children at birth. "Membership" does not require the circumcision act, certainly not "indispensably". The authors cannot avoid this consequence by resorting to their "soft" more abstract criterion. Parents may certainly pass on their religion to their child within the framework of a responsible "overall concept of good life of the child." And they are certainly entitled within this framework to initiate that their religious community influences and shapes the child. But this process of religious education is neither in Judaism nor in Islam dependant on the condition that the child's foreskin be cut off. Millions of professing and practicing Muslims and Jews who remained uncircumcised, prove it, and every interviewed cleric confirms it. Given the undeniable dispensability of the ritual for the religious affiliation and religious education based thereon, Hoernle and Huster can hardly make a serious claim that circumcision is an *indispensable part* of the parents' overall concept of the good (religious) life of their child.

Of course, I realize that the authors view the traditional religious-ritual circumcisions as they relate to boys, as all being allowed pursuant to § 1631d BGB. But I find it highly instructive to note that in truth they cannot reconcile this position with their well-considered criterion. Even the attempt to defend and justify the regulation shows that the legislature has failed.

## Reasons for the Failure of the Regulation

It is clear why it was bound to fail: The federal government had designed the regulation as it was their mission, to be *politically correct*. This is why the authors of the draft were not allowed, when addressing the question of child's welfare, to bring the center of the matter, i.e. circumcision itself, into focus. Instead, the "purpose" of the circumcision pursued by the parents was to be "taken into view". One suspects that it is about motivations for circumcisions that are "not so common" and whose recognition has no lobby. But because rarity and lack of lobby do not play the slightest role for the issue of child endangerment, it is quite impossible to give a lucid explanation for the purpose clause. The rationale of the bill brushes this point aside with a single sentence: "In the context of assessment of child welfare, the purpose of circumcision must also be considered (e.g., in a circumcision for purely aesthetic reasons or with the goal to make it difficult to masturbate)." These two examples were, of course, meant to make one thing particularly clear; namely that some purposes are reprehensible. But the authors do not even commit themselves to even these. Apparently, they do feel that it is probably the circumcision itself and the external circumstances of its performance that do the child harm and inflict suffering, and not the purpose of ideas in the minds of parents.

It is hardly arguable that the two new rules "circumcision of the male child" in the Civil Code and "female genital mutilation" in the Criminal Code, are rooted in an equally popular and coarsely wrong distinction. Tonio Walter has described this vividly in five points. "Firstly, circumcision of girls is, in all forms "mutilation" while that of boys is always just circumcision. Secondly, the circumcision of girls in Africa is seen as hacking at the clitoris with a razor blade or piece of broken glass, the circumcision of boys is viewed by most people as a proper medical surgery. Thirdly, for religious and ethnic motivations it holds true that one must have great respect for them in cases of male circumcision, while in cases of female circumcision they count as mere pseudo-legitimization of sadistic barbarism, which is why, fourthly, the mildest forms of female circumcision are always considered something "entirely different" than even the most radical circumcision of a boy. Fifthly, all forms of female circumcision lead to the worst physical and psychological damage; all circumcisions of boys go well without complications and have no significant consequences." "All this," Walter concludes, "has little to do with reality" (2013, p.13).

### May a child be forced to be circumcised? - A look at the relevant provisions

Differently from the "purpose of circumcision" is the point viewed that provision's reasoning names only in second place: "Likewise, the opposing will of a child who is incapable to reason and discriminate may be taken into account" (German Bundestag, 2012, p 18, here it is probably not meaning the ordinary event by which the child-like instinctive rejection of a painful amputation has been transformed a considerable time earlier into a fearful consent by propitious downplaying and promising of gifts). A child who does not want the surgical procedure, who perhaps fearfully and tearfully resists must, however, be *coerced*, either by brute force or by the threat of susceptible disadvantages, for example by pointing out that during physical resistance, the pain would only increase. His confidence that the parents love and protect him from all evil is shaken or destroyed. In addition to the current and ongoing deterioration of his physical well-being in such a case, there exists undoubtedly painful psychological stress and a palpable threat



to the (future) mental welfare of the child. Cases of the use of force against children, who already know what awaits them, are by no means rare. In Germany it is pretty much always either a medically necessary circumcision or a ritual circumcision, by which the child is forced to participate in a religious exercise. Therewith, a legal prohibition of constitutional status comes into play, namely Article 140 of the Basic Law Article 136, paragraph 4 of the Weimar Constitution (WRV): "No person shall be forced into a religious act or ceremony or to participate in religious exercises". From this follows the value judgment of the *reprehensibility* of coercion (cf. § 240 para 2 of the Criminal Code). The child's coercion by force or threat of appreciable harm, thus forcing him to tolerate participation in the circumcision ceremony is an illegal and criminal coercion within the meaning of § 240 of the Criminal Code, so that in this case the circumcision's bodily injury (§ 223 StGB) cannot be justified by virtue of parental consent.

The authors of the statement of reasons have obviously very well considered the case of medically unnecessary circumcision against the will of the victim, but have not seen that the child is then *forced* to participate in a religious practice, if it is a ritual circumcision, which is almost always the case. Thus, Article 140 GG and 136 para 4 of the WRV are completely ignored – a scandalous omission, considering that these laws *clearly* dictate the decision for many cases, that is the cases in which the planned circumcision represents a religious practice and the will of the child opposes it, such that his participation in the religious practice would have to be forced, if the parents insist.

Why this aversion to highlight a prohibition that sets significant barriers for parents in the religious upbringing of their children? This question belongs in a wider context: How is it that religiously motivated harassment of children by their parents hardly ever matters to the youth welfare office or even gets criminally persecuted? The reason I see is that in Eastern and Western cultures religious, pious, godly action is considered a good, ethically correct, morally imperative action, almost by definition. Therefore acts of religious practice enjoy principally a bonus. However *in our culture* they are no longer tolerated if they do too terrible things to a human. As such, we no longer accept the sacrificial killing, as Isaac had almost suffered, or the so-called foundation sacrifices (immuring of a newborn into the building foundation) or the crassest form of circumcision called castration that sacrifices to God the virility of male concerned (a modern example of religious delusion that in the minds of millions changes crimes into praiseworthy service: parents who let their children commit suicide bombings in a "holy war" whereby they become "martyrs", confident to receive the divine reward in the Hereafter). But if parents are guilty of smaller, traditional, inconspicuous crossings of the line drawn by the law in the religious education of their child, they meet dignified benevolent tolerance and understanding. Here is an everyday example: Strict Catholic parents coerce their ten-year-old son, who refuses to attend the monthly confession and communion, by threatening that, if he does not fulfill his religious duty, he could no longer play soccer in his team. Used as leverage to prevent truancy there would be no objection to the threat. But here the parents use it to force "participation in religious practice" something that *no one* may be forced to, including any child by his parents. Such coercion is by constitutional assessment "reprehensible" (§ 240 para 2 of the Criminal Code) and therefore unlawful and punishable. Now just imagine, the boy complains to his uncle about his suffering, and both complain to the prosecutor about the coercion! Most likely the prosecutor will easily dismiss it and not consider that parents may take an *illegal* action in the religious upbringing of their child thereby committing an *offense*.

Such tolerance and overreach of parental rights in religious matters have ensured for decades that parents in the Federal Republic could express their piety unchallenged, including through circumcision - which robs the person concerned of an important and irreplaceable body part - especially in a religious worship ceremony, which should be ethically required to be beneficial. In July, 2012, in a televised debate about the Cologne judgment, the ultra-Orthodox rabbi in Berlin, Yitshak Ehrenberg spoke out in this spirit. With a bewildering naivety, he brought forward a single argument: Circumcision bestows a covenant with God, therefore, with it the baby is given a gift; to gift something to someone is always allowed, there is no need for justification. But in another interview with the "Tageszeitung" he was asked if one should not prefer to wait with the gift until the person himself can decide whether or not to accept? No, replied the man of God, postponing circumcision of boys is "worse than physical destruction" (Kramer, 2012). Better dead than uncircumcised!

*"Those who pretend to battle for God are always the least peaceful on earth; because they believe they hear heavenly messages, their ears remain deaf to every word of humanity." (Stefan Zweig)*

### **Influence of religion on § 1631d of the Civil Code**

Let us imagine the religious concerns and thus the political pressure were nonexistent! On this hypothetical basis, let us ask what prospect the federal government would have had to write the text of § 1631d BGB into law! Imagine that it had based its proposal for legislation exclusively on the other arguments and reassurances of those who now only play a flanking role! To illustrate this in religio-historical terms: If Jews had for a long time handled the command to circumcise their sons in the same way as they handled the command to circumcise their servants and the command to kill sodomites caught in the act, they would have over time ceased to obey the command, and gradually overcome the old custom in terms of civilization. Let us further assume Mohammed would have strictly forbidden circumcision as a crime against God's gift of the human body. Modern medicine would have, against massive protest particularly by Muslim leaders, introduced and frequently performed the sacrilegious circumcision as a treatment for phimosis, and sometimes only for ease of hygiene and some evidence would have arisen, showing that certain diseases in circumcised men are less common, comparable to the health benefits that come with tonsillectomy. And still further, some young men with sexual contacts would chose, with a look at the statistics, to get circumcised as a precaution. Who in their right mind would promote the idea to give the right to parents, as part of their "custody", to circumcise their baby boys for hygienic, aesthetic, preventive medical, or any other (non-religious) reasons, although there is not one reason that makes this grave and momentous personal injury really necessary? We would all agree that it should be left to the bearer of the normally constituted foreskin, if he as a judicious man gives one of the reasons so much weight for his person and his life that he is willing to have a valuable piece of his body cut off. Never ever would the law's draft have found a majority in the Bundestag, had the federal government presented it at all - absent any political pressure.

As for the pressure, it had to be exerted by traditional and socially strong religious communities. For a small group, not a finger would have been lifted. Imagine the circumcision custom would have - as described - long since gone and were frowned upon by religion, yet it

would have experienced a modest revival in the 21st century. An old man would have said “he had received the command from God that in order to seal a covenant with Him he should cut off the foreskin” (an example by Scheinfeld, 2013, p 279). After his statement a few dozen people would flock around him and follow suit, do the same and also circumcise their male children; citing the Old Testament, the new enlightenment, engaging in spiritual battle with all of the major religious groups that compare the act with the African female circumcision and teach that one must understand God's Abrahamic command, just like the killing of sodomites, “out of its archaic context” and should follow it today only in the form of a symbolic gesture. As small and isolated as such a group would be, they would still be a “religious community” with rights, protected by Article 140 GG, 137 WRV and entitled, just as Catholics and Muslims, to the freedoms of Article 4 of the Basic Law.

But let`s not fool ourselves! If this community would have been affected by a criminal judgment that would have ruled one of its ritual infant circumcisions as unlawful assault, the outraged faithful would have been “left out in the rain.” The “ideologically neutral” state embodied in parliament and government would not at all have created a law, in which it made clear that the custody of the parents includes the right to consent [...] to the circumcision of their [...] male child” (German Bundestag, 2012 , p 16). How can the right to cut off the foreskin of one`s child without medical necessity depend on whether a large or a small religious community claims it? And does this mental experiment not show that Scheinfeld (2013, p 279) is right when he says: “My remark does not deny religious people the right to believe in such demands from God. However, state law cannot accept a motivation based on these grounds as final reason for intrusion into the fundamental right to physical integrity of third parties, which outside of the parent- child relationship state law does indeed not accept in a single instance - and which, does not even come to mind in regard to female children.”

### **Compatibility of § 1631d BGB with fundamental rights**

Now, however, § 1631d of the Civil Code has been decided and rendered, thanks to the religious concern and political pressure. Has this not created clarity within its limits? Article 2, Paragraph 2 GG guarantees everybody “the right to life and physical integrity,” but at the same time it states that a “law may justifiably intervene in these rights”. The new Civil Code Section constitutes such a law! And even before, weren't parents already allowed, due to an even higher-ranking law, to give effective consent to many medically unnecessary circumcisions (and thus provide the circumciser a justification for the violation of the child's body), because Article 4 § 2 GG (freedom of religion of the parents) and Article 6 § 2 GG (custody and parental rights) do already grant enforcement powers? “Thus, the question of legality,” as Issensee aptly says (2013, p 318), “ultimately comes down to the compatibility with fundamental rights” and this has not changed with the new law. For the third sentence in Article 2, Paragraph 2 of the GG (the so-called reservation of statutory powers) does not give the legislature free rein, of course. The fundamental right to physical integrity carries such heavy weight that a legal intervention permission bounces off, so to speak, if its reasons carry too low a weight (principle of proportionality). A fictional example: If in one state the legislature would grant the teaching staff at public schools the right to “physically chastise pupils in view of the occasion to maintain discipline”, one can be sure that the Federal Constitutional Court, if called upon, would say that in the spirit of the time the law was incompatible with both physical Article 2 Section 2 Sentence

1 GG (“Everyone has the right to [...] integrity”) as with Article 1, paragraph 1, sentence 1 GG (“Human dignity is inviolable”). Sixty years ago it would probably not have stated the same. Isensee’s question of the “compatibility with fundamental rights,” must therefore consider the *unconstitutionality* of § 1631d BGB, i.e., its incompatibility with the fundamental right to physical integrity.

To assess genital circumcision constitutionally rests in this book on Jörg Scheinfeld, to whose contribution I refer. My main concern is the question as to whether the personal injuries requested by parents and committed by the circumciser without medical necessity, are ethically and legally allowed and can therefore go unpunished. For its answer the fundamental law plays a crucial role, as has just been shown. Therefore, with the reservation of correction and more accurate clarification, I present my own point of view in the following.

### **The ritual circumcision as legitimate exercise of religion (Article 4 GG) - Germann, Steinbach, Bielefeldt**

It is beyond doubt that Article 4 of the Constitution has never legitimized physical injury, not even religious-ritual circumcision of boys. Nevertheless, this has to be emphasized, because in the current discussion many point even foremost to the freedom to practice religion, when rejecting the Cologne judgment (from May 7/2012, file number: 151 NS 169/11, NJW 2012.2128) as obviously wrong, or ridiculing it as “provincial farce” or “spat-out snot” and “utter nonsense”. In order to identify clearly the irrelevance of Article 4 GG for our question, one must isolate the practice of religion in such a way to that this action alone can qualify as justification. For here an omission can be detected that clouds the insight and leads many to misjudge Article 4 GG’s relevance to our problem. Penile circumcision as the practice of parental religious activity is always only seen as an act of parental provision for the child and is believed to be legitimized by the right to freedom of religion, which actually could possibly only be legitimized with a kind of “educational freedom” (more on this in the following sections).

So let us leave the parental education and personal care out of it for now, as in the well-known case of Christian sects, whose faithful members primarily practice their religion in such a way that they visit people in their homes and seek to proselytize. What if such a person being visited declines with thanks and wants to close the door, but the pious missionary has squeezed into the hall to continue delivering God’s message? It goes without saying that she commits trespassing. Despite her fundamental right to “undisturbed practice of religion” (Article 4 paragraph 2 GG) the landlord must massively “interfere in this very activity” and forcibly push her out the door in practicing self-defense. Not even for a two-minute interference with domestic peace can one rely on the right to free exercise of religion! The civic duty to *refrain from* trespasses (§ 123 StGB) has higher rank. Also a civic *duty* to act always overrules the right to practice; for example, must someone who is called when an accident happens provide assistance according to § 323c StGB, and may he not ignore this because it interrupts his praying of the rosary. Instead he must stop the exercise of his religion to help the victim.

Thus, exercise of religion can be free and “remain undisturbed” only within the limits that are drawn by the state law. “There is no doubt,” says Fischer (2013 para. 45a, 48), “that individual

and collective freedom of religion have to take place *within* the state's legal system. [...] From Article 4 of the Constitution no claim can be deduced to practice religious beliefs by medically pointless, and in individual cases risky, mutilations of other people." But it is not even a matter of severity of the interference. Hoernle and Huster say it in general: It is "impossible [...] to acquire legal power to encroach on the rights of third parties on the grounds of religious freedom rights. No one needs to put up with a personal injury because of the violator who thinks he fulfills a religious obligation by it" (2013, p 331). Article 4 GG itself does not clarify this, but it is made clear constitutionally elsewhere. Article 140 GG, namely, can continue to apply (as part of the Basic Law) Article 136 WRV, where in its first paragraph it reads: "The civil and political rights and obligations are neither conditioned nor limited by the exercise of religious freedom." Thus, the Basic Law determines that no one in exercising his religion is permitted to violate foreign rights, such as in domiciliary rights, property, honor, bodily integrity, and that religious freedom does not absolve anyone of any legal obligation, such as the duty to adhere to criminal prohibitions and requirements or vehicular traffic rules. For all these rights and obligations are of the citizen. They also do not suffer the slightest restriction when they collide with one's own or other's interests in the "free exercise of religion."

Intent can certainly endanger such insight. Those prejudiced by piety who unconditionally aim to justify circumcision of boys will have a hard time from the outset to admit the irrelevancy of religious freedom in the exchange of arguments. Conversely, a considerable relevance has recently again been claimed by Michael Germann. He denies that the judge is forbidden "to take religious motivation into consideration in the application of state law" Such "blindness" he says, "would eliminate the freedom of religion as a fundamental right". Ignoring religious motivation would take away any legislative effect of religious freedom. "Certainly, the state is obliged to religious neutrality, yet exactly this obligation commands to accept religious motives as freedom of expression without an assessment of their accuracy or reasonableness and to take this into account in accordance with the specific protection granted in Article 4 I-II GG" (2013, S. 417). In my examples then, judged legally, the missionary, forcing herself into the home and the one praying the rosary would stand good chances. In pursuing a criminal offense, it should be of benefit to the offender that he has a *religious motivation* in a violating a foreign right or at the expense of another failed to fulfill a legal obligation to act. "The simple statutory purpose of an 'optimal' enforcement" of the respective interest - that the domestic peace is maintained, the victim is rescued - "is to be weighed against the freedom of religion" (Germann, 2013 , p 418).

I dispute that and stand by my thesis that there is nothing to weigh. The reason why I have said this five years ago (Herzberg, 2009, pp. 335 ff), however, I do not see that I "carve my contributions to the circumcision debate more coarsely," than Germann does. Rather, our divergence is explained by the fact that I consider myself adhering strictly to the law. Germann (2013, p 418) concedes half-heartedly what he cannot deny: Article 136 para 1 WRV decrees as a valid provision of our Constitution something regarding the "exercise of religious freedom". However, it is mere wishful thinking and gross misinterpretation to understand this arrangement in a way that demands in the case of religious foreskin amputation in babies or little boys one has to weigh the "physical integrity right" of the child against the "right of religious freedom." The law *prohibits* the assessment. It clearly states this: The limits which the laws (eg, §§ 123, 223,

323 c StGB) draw for the protection of rights and obligations do not shift one single millimeter if I present the reasons for my action and omission as religious. Or, limited to my civic obligations: the extent of the obligations that follow from the valid (constitutional) laws cannot be diminished at all by the fact that the religious action desired by me is incompatible with the duty; I have always to comply with the *legal duty* by staying outside the home, by honoring the foreign body, by providing aid and thereby denying myself the incompatible religious exercise, that is, the missionary, circumcision, praying the rosary.

It does not surprise me here that Germann does himself that which he accuses the Cologne Regional Court of, a “miscarriage of justice” and even “a legal malpractice”. Because it means to oversimplify the problem and to miss all differentiations, if one considers just one single case with regard to Article 4 GG, namely the case in which both parents, who hold joined custody agree to consent with a religious motivation to the circumcision of her son. The tendency to a blurred view of facts presents the great danger of contaminating two fundamental rights and deducing a permission that *might* follow from Article 6 GG, at the same time from Article 4 GG. I may *wish* that the father and mother are allowed to ritually circumcise their child by virtue of their religious freedom. But before I *claim* it, I must consider whether the legal system has not denied me the fulfillment of my desire. To find out, I must *test* my wishful thinking, and that is only possible on the basis of case facts where parental harmony - Germann constantly presupposes - is *missing* and where not only the child, but also one or the only custodial person becomes a victim of circumcision. Such a case shows immediately that even the most devout and fervent worship does not carry the slightest importance in the question whether the assault is justified by foreskin amputation.

I point out the same to Armin Steinbach. With him it ultimately comes to simply preferring the religious interest in the circumcision over the need of the boy to remain physically intact, without any connection to the parental rights. “The disposable legal interests include the physical integrity, which is a restrictable interest. Whether and to what extent the procedure [...] has to be accepted in the exercise of religion - granted in principle without limitations - must be determined by weighing”. – Steinbach overlooks Article 136 para 1 WRV – “It depends on how deeply the body is being invaded and how important the religious practice is to individual self-understanding.” The greater the importance (for which, according to Steinbach, also the “self-understanding of the religious community” plays a role), “the more likely it must be able to perform its exercise while limiting any other legal interests.” It follows the usual trivialization: “With the circumcision of boys impairments do not occur to an extent and frequency to speak of far-reaching, long term impairment of health. Despite sporadically occurring adverse effects, these do not justify a criminal offense or a ban on the circumcision as a cornerstone of religious self-understanding in the Jewish and Muslim faith, provided, of course, that circumcision is performed as skillfully as possible and painlessly” (Steinbach, 2013 , pp. 9 f.).

Let us imagine that a Jewish father, not the “holder of custody”, sincerely wants his son's circumcision. Johannes Friedrich (2012), Bishop A.D. and member of the Council of the Evangelical Church in Germany, claims in such a case that the assumed *right* of the father becomes almost his *duty* to exercise his religion. The father would be guilty of “the refusal of a life ritual”, if he withholds from his Jewish son “an important tradition for his religious identity”.

This supposedly damages his "moral integrity", "if he finds out that his father had not complied with a central religious obligation, and thereby deprived him of his religious home". I'll leave aside the fact that Friedrich could not find a single one among the millions of Jews whose fathers have responsibly ruled against circumcision who would confirm the hypothesis of an adventurous soul damage. On the contrary, almost all will be grateful to their fathers. At most, and in extremely rare cases, a boy with intact penis will, in his emerging religious consciousness, ask his parents to let him be circumcised, and he might be angry, if they do not let his will apply.

What matters to me is the following: let alone the father's *duty* that would come with his right to practice his religion, in my example his freedoms do not even include any *right* to perform the circumcision. This is not the result of a problematic consideration, but an obviousness, confirmed by the Basic Law. Just think of the case in this way: the Jewish couple divorced before the birth of the child and the mother is entitled to custody with sole responsibility under § 1626a para 2 BGB. Out of love for her child and knowing what it would suffer, she is strongly opposed to circumcision. The father and a doctor friend now take advantage of the absence of the mother, and they jointly and perform the ritual in a medically correct manner. It may well be that, like Abraham regarding servants' circumcision, the father, according to his "individual self-understanding" (Steinbach, 2013, p.9) fulfills a "central religious duty" (Friedrich, 2012). But with regard to the *legal situation* we must be sincerely indifferent to this. The religious duty was *legally forbidden*, and so both he and the doctor, as an accomplice, are liable to prosecution because of a bodily injury (§§ 224 paragraph 1 No. 2, 4, 25, Section 2 StGB ). I believe that nobody will contest this, not even Friedrich, which I also hope to be able to insinuate, neither will Germann nor Steinbach. In all religion friendliness, our rule of law cannot allow or even accept that someone behind the backs of the child's only legal guardian amputates the foreskin because he considers it his indispensable religious obligation, or that his religious community states it was dogmatically mandatory.

In his attempt at an assessment of the right under Article 4 para 2 GG, Bielefeldt also has blundered (2012, p 71) by not paying attention to Articles 140 GG, and Section 136 1 WRV. Without looking for the obvious, he gets stuck in perplexity. While giving religious freedom this - he does after all see – “no carte blanche for the unhinging of other human rights or other important legal interests. But concrete restrictions on the freedom of religion [...] must be done with care and in strict compliance with the predetermined criteria. A criminal armored general prohibition of the circumcision of boys would certainly be too drastic an action.” The arbitrariness of such statements is reflected in its perfect reversibility. One might oppose Bielefeldt by saying: ‘The right to physical integrity does not guarantee the sparing of all impairments that are essential for the sake of third-party rights. But concrete restrictions on the fundamental right under Article 2 Section 2 Sentence 1 GG must be done with care and in strict compliance with the predetermined criteria. The law allowing the use of ritual circumcision of boys would certainly be too drastic an action.’ One only gets beyond mere talk by taking an additional step, namely to look more closely at the quoted “predetermined criterion” which is the constitutional one, and apply it. Then we get the following: Because, according to the Basic Law, religion may freely be exercised only within the law, freedom of religion must indeed suffer the “drastic intervention” that the general prohibition of the circumcision of the penis poses. The fundamental right under Article 4, paragraph 2 GG does not limit the child's fundamental right to

physical integrity nor the civic duty of religious people to respect that right even if it means the non-fulfillment of their religious duty.

### **Circumcision as parental child care (Article 6 GG)**

But how does Article 6, Section 2 Sentence 1 GG relate to our question of the legal basis? It reads, “The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them.” Has this not for a long time included parents' basic and fundamental legal authority to let their male children's foreskins be severed without medical necessity? Lawmakers want to see it like that. In the grounds of § 1631d BGB they refer expressly to Article 6, paragraph 2 sentence 1 GG and consider power re-established with his novella but only “clarified” that parents in the child's care and education under certain conditions may initiate the amputation; more precisely, “that the custody of the parents also includes the right to consent in circumcision of their male child who is neither capable of reason nor a judicious male, subject to certain requirements” (German Bundestag, 2012, p 16).

In fact, contrary to Article 4 GG, Article 6 GG has always opened a significant gap of power to realize also offenses among the actions of parents direct towards their children. For example, a trespass, § 123 StGB: When a fifteen year old inhabits his own apartment outside of the parental home, parents usually have the right, out of concern for the son, to enter the apartment (§ 123 StGB) against his will. Of course, this act can also be religiously motivated, e.g., by the parents' desire to appeal to the son's conscience that he attend Sunday mass with them. However, in this case, the right to trespass has nothing to do with Article 4 GG. Parents are permitted to influence their children in many ways, nursing or educational, in religious as well as in health, aesthetic, school-related, sporting, artistic, and musical ways. The right of parents to shape their children religiously by fulfilling religious obligations in activities of religious practice is part of the fundamental right under Article 6, paragraph 2 sentence 1 GG, but there are no *special* powers connected to this partial right.

And what results from the constitutional standard for the child's protected interests of liberty and physical integrity? Are parents arguably allowed “for the good of the child” to fulfill the requirements for the offenses of §§ 239, 240 StGB and § 223 StGB, by imprisoning the child, coercing or even physically hurting the child? That this has to be *affirmed* (!) shows the comparison of the powers in dealing with their own children on the one hand and children of others on the other hand. One's own ten year-old son may be educationally acted upon in an appropriate manner by the imposition of house arrest. However, one would never be allowed to lock up his playmate his if his parents do not agree. To compel school attendance of a pubescent daughter by taking away her Smartphone is the right of the parents. To take the same action against her girlfriend would be criminally wrong. As for their own son, the parents may (at the occasion of his school enrollment) cut the long girl-curls against his protest and even initiate serious interventions, for example, if medically necessary (!) a circumcision or perhaps, to avoid psychological suffering, a cosmetic surgery of the ears (cf. Scheinfeld in this book, p 384). Not so with a child of friends who has been entrusted to one's care for a summer month. In such case one could not commit such injury and not initiate any intervention that would compromise the child's physical integrity, even if one could find, with good reason, that the interventions were



serving the child's wellbeing.

But even with one's own children narrow limits are placed on the powers to the realization of offenses, so that even quite innocuous injury may be unlawful. The best known example is supplied by § 1631 para 2 BGB, which grants children a “right to violence-free upbringing” and prohibits “corporal punishment,” declaring it to be injustice, e.g., a slap or a spanking on the buttocks. It does not absolve the parents that they do not even remotely compromise the welfare of the child in the context of a loving and responsible education with as a single injury and are even confident to *serve* the child's welfare by moderate chastisement, which many would agree to. Wrong is wrong and should not be committed. That is why I disagree with Hoernle and Huster who, with the goal of legitimizing ritual circumcisions in mind, derive too much parental freedom from Article 6, paragraph 2 GG: “Government intervention is only permitted in extreme cases of parental failure. [...] Only that behavior of parents towards their children, which may not be comprehensibly construed as nursing and education, but must be described as abuse of their obligation or as neglect of children, as it exceeds the limits of parental rights, thus calling upon the state in its guardian role” (2013, p 331). This is not far from the self-contradictory statement that parents have the *right* to inflict slight *injustice* to their children. And it is also not true that the state is only entering the stage to execute its official guardian obligation in cases of blatant offenses that endanger the child's welfare. Thus, the youth welfare office or the prosecutor's office, for example, learned thanks to the report of a neighbor, that well-meaning strict parents often went a little overboard with the imposition of house arrest (§ 239 StGB) and also do not always refrain from painful chastisement (§ 223 StGB). It would be absurd if the officers were not entitled to do something against these small offenses committed here by the parents, in spite of their good will, against the children, not even admonish and warn the parents simply because no “extreme case of parental failure” is present.

So we record: The child's fundamental right to bodily integrity (Article 2, Paragraph 2 Sentence 1 GG), which is reinforced by threat of criminal punishment in cases of intentional and negligent bodily injury (§§ 223 ff, 229 StGB), is a strong bastion that stands firm, not always in fact but at least legally, when parents, by force of their parental rights (Article 6, paragraph 2 sentence 1 GG), want to act physically upon the child. Of course, here it is ultimately always a matter of balance. Fundamental right stands against fundamental right, and there exist conflict situations where the guideline “welfare of the child,” does not clearly dictate the decision, perhaps the father is rather convinced that a “proper beating” would serve this welfare better (which, according to the vernacular, “has never hurt for anyone”) while the mother resorts to extortion. Here, the legislature has some latitude within the Article 6 § 2 GG, within which it may make a decision. This was also done with § 1631 para 2 BGB, certainly following the zeitgeist: The unwritten, but in principle recognized right of parents to beat their child for educational reasons, that is the criminal justification “parental right to corporal punishment” was repealed and “corporal punishment” expressly prohibited. But there are also other impacts on the child's body, for which the express prohibition is required, because it is evident that they cannot be allowed to parents. No one would find it acceptable that a doctor surgically removes a perfectly healthy infant's appendix to prevent appendicitis, although the risk of acute and life-threatening appendicitis exists at any age and is much greater than the risk of developing penile cancer. And it seems unacceptable to all of us that during Ramadan some parents force their

diabetic child to fast to such an extent as to suffer health damage; or that parents follow the recommendations of a Christian religious sect, when these go to the lengths of abusing their children physically or disfiguring them. Examples: agonizingly long holding under water at baptism; moderate female circumcision to honor Mary, following the example of some Coptic Christians; flagellation and pressing a crown of thorns on the head on Good Friday; Christian religious stamping by applying the tattoo of a cross on the back, upper arm or penis. The parents may justify each of these offenses as acting prophylactically to the best interests of their child or to give him valuable benefits before God and for his salvation. They certainly have the freedom to believe this and confess the faith (Art. 4 para 1GG), but a power at the expense of the child's fundamental right cannot be derived from it.

### **Discussion of Michael Germann**

Michael Germann (2013, pp. 412 ff) does not penetrate to such general statements and exemplary inferences, to which almost everyone will probably agree. He limits his view of Article 6 paragraph 2 sentence 1 GG to the question of whether parents have the right to have their boys' foreskins cut off. With that he leads himself and perhaps also the one and the other reader astray right at the outset by a sort of legal perversion. For he looks at our discussion as a "criminalization debate on the circumcision of boys" (p. 412); he views his opponents as those "who demand a ban on circumcision" and challenges them with what he considers as the crucial question whether "the Basic Law calls for a ban on circumcision" which in turn would imply "that a ban on circumcision would be compatible with the fundamental rights" (p. 413). This, however, misrepresents the legalities, puts them almost upside down and prepares the ground for false case assessments. Nobody is asking for a "criminalization" of cutting off the penile foreskin. This already is criminal, that is, it is a criminal offense, and the debate concerns only the question of the conditions under which these agonizing and dangerous assaults could exceptionally be considered *justified* and *not* a crime. Accordingly, noting that some "continue to demand a ban on circumcision" and the question of whether "the Basic Law calls for a ban on circumcision," twists the current legal situation. The Basic Law, in the form of § 223 StGB established a ban on circumcision, like for example a ban on cutting off hair braids, a tooth-extraction-ban or a kick-ban and its creators have not thought for a second to lift the ban. It is absurd to portray the "circumcision ban", repeatedly and defensively invoked by Germann, as perhaps not "compatible" with the fundamental rights. In my example, was the father and the doctor-friend by any chance *not* legally prohibited from circumcising his son, without the knowledge, against the will and behind the backs of the custodial parent? Or would by any chance the pious Muslims who lure children into Turkish camps and cut off their foreskin *lege artis* without consultation with the parents, not act in disregard of a prohibition of German criminal law, and not disregard a "ban on circumcision" (§ 223 StGB)?

Germann only considers the cases where parental agreement exists and finds in this narrowed framework as a result of the Cologne "misjudgment" the "hitherto existing legal certainty shattered" (2013, p. 413). The context reveals how this is meant: One could rely on a criminal justice system, which assumed - and rightly so - that the Jewish-Muslim rite was not opposed by a "ban on circumcision." It is true that "up to then" ritual circumcisions, as far as apparent, have not been prosecuted in any case. But this cannot be attributed to the lack of a legal ban on

circumcision. The judiciary *has looked the other way* for universally known reasons, they wanted to leave the vague presumption of “it will be all right” unverified until the Cologne prosecutor and district court had disturbed the peace. According to § 152 para 2 StPO (code of criminal procedure) prosecution was required, given cognizance, even before that, at least in most cases because circumcision violated the ban on circumcision, it was an unlawful assault and a criminal offense if, for example as part of a family circumcision celebration, a befriended Sünneci used his knife against the fearful weeping child, as he had learned it in Anatolia (sünnec cocugu), without knowledge of risk, without instruction of parents, without hygienic precaution. Or if in the synagogue the mohel celebrates an Orthodox-Jewish Brit Milah as a non-doctor, without anesthesia, without sterile scalpel and with oral blood suction. Certainly there were religiously motivated circumcisions performed *lege artis* by a doctor, be it in his own practice, or in the hospital. Maybe they were presented as medically necessary against their better judgment, and thus the criminal access was virtually withdrawn. But in cases of undisguised ritual circumcisions prosecutors had every reason to investigate. For the prohibition of medically unnecessary ritual circumcision can legally only be overridden under the condition of an *effective consent*, and the consent of the person concerned or his parents is only effective when it is given in full knowledge of the direct and indirect consequences of the operation; in particular, the parents must be informed of the pain that lie ahead for the victim, the complication risks and the duration of impact on his sex life. Because a medically unnecessary surgery is in no hurry, a very special care in terms of education is warranted and the consent is “only effective if the consenting person has been able to accurately assess and weigh the pros and cons against each other.” This assumes “that a doctor explains the arguments and counterarguments in detail to the consenting person and offers opportunity for further questions and time for quiet reflection.” (BGHSt 23, 379, 383).

Recently, the regional appeals court in Hamm (v. decision 08/30/2013, file number 3 UF133/13) had to decide on the request of a Kenyan mother who held sole custody and who spared no effort to have her six year old son circumcised against the will of the father of the child. The Senate for family matters spared the son from this for various reasons, of which only the following are of interest in our context: can “The Senate cannot determine with reasonable certainty [...] adherence to another - unwritten - factual precondition. The effectiveness of the consent of the [...] legal guardian to the circumcision depends on proper and comprehensive elucidation [...] about the opportunities and risks of the surgery. The child's mother did not explain, let alone substantiate that she was elucidated by a doctor in this way”(para. 32).

According to my information, such a “proper and comprehensive” elucidation and the subsequent *effective* consent was missing nine times out of ten. Worse, the physicians who were specialized in circumcisions, and most often religiously affiliated with the parents, tended to trivialize the procedure. Thus appeared in the ARD television program “People at Maischberger” on August 14, 2012 a Dr. Sebastian Isik, who had professionally circumcised hundreds of children and wanted to continue to do so. One could see how he used to “educate” parents: No harm was ever connected to a circumcision performed *lege artis*. “The child does not notice anything other than the numbing prick, healing proceeds wonderfully.” The act would be health-promoting and comparable with vaccination or the use of braces. No a single word on the effects on the sexual life, which he had apparently banished from his sight; not a single word

even on the Cologne case of a healthy four-year old, where the circumcision, performed *lege artis*, according to the district court, was associated with ghastly and dangerous complications that made follow up treatment of ten days - in the ICU! - and several secondary surgeries necessary.

Whatever one may think about the justifiability of medically unnecessary, especially religiously motivated circumcisions, they were across-the-board committed *unlawfully* before the advent of a general awareness of the problem. Unlawfully, because the circumciser did not abide by the *lex artis* and/or he acted without effective consent because he insufficiently enlightened the parents, if not even misled them. I am referring to an uncontested understanding in criminal law that considers the necessary legal protection of both the child as well as his parents from serious encroachment on the child's body. Michael Germann will also, which I assume, not be willing to undercut this level of protection. It's bad enough that apparently the parents hardly ever file charges, even though they recognize often afterwards with horror that they were ignorant and should not have complied (just think of the desperate mother in the Cologne case!). But no responsible jurist can afford to attest to legitimacy of the circumcisers' activities, which are by German standards irresponsible, just because they can rely on religion.

A penologically gained knowledge that an act is lawful or unlawful must be measurable by constitutional law. But that does not mean that one can stipulate what physical actions parents are allowed to do to their children, as Germann does by armchair decision, based on highly abstract legal articles on basic law, without looking at statutory offense limits and penologically acquired justifications. Parents are not only holders of fundamental rights, but also potential perpetrators of crimes against their children, to be watched closely. For example, if they arrange for a mohel to perform surgery that is adverse to a child's welfare (e.g., to an excruciating circumcision according to Jewish-Orthodox Rite), then it is not just a matter - as Germann (2013, p. 421) seems to think - of the assessment that the act of the mohel "despite the consent is one against good morals" (§ 228 StGB). No, the parents themselves commit an offense, namely an incitement to bodily injury (§§ 223, 26 StGB) - subject to a mistake of law that would excuse them (§ 17 sentence 1 StGB).

Germann (2013, pp. 414 f) defends something that, as he admits, "is considered offensive by many advocates of a circumcision ban": A "relativization of physical integrity of children for parental rights' and religious freedom's sake" owing to the "proportionality imperative". Although the state would have to ensure the child a minimum level of protection, "the prerogative of parents to the child welfare" would provide a leeway "also with regard as to which physical condition most serves the child's welfare." Because Germann is completely fixated on the circumcision of boys, the reader learns nothing about the consequences outside of this case. It only says that the parents may decide "whether circumcision corresponds to the child's welfare", and that they thus may at any rate cause him serious injury, even if it is not medically necessary. It also remains unclear which motivations according to Germann's ideas exclude permission. Masturbation prevention? Penis beautification? Hygiene facilitation? Penile cancer risk reduction? Germann's tendency appears to also allow such motivated circumcisions, because somehow these parents, too, want indeed "only the best" for their child. "Eliminated from the scope of parental rights" should only be those motivations "that are not in any way based on the

child's welfare.”

Those who want to expand Germann’s thoughts to a general theory of parental right to physically hurting one’s own children, will certainly think of a conclusion a maiore ad minus: If the parents are allowed such a serious and life-long impacting injury as the amputation of the foreskin even without medical need, then they are certainly free to inflict injuries of lesser severity and weaker effect - on the condition that the parents hurt the child *according to their views about his or her best interests*. One might think of all the above-mentioned physical abuse, of which I believe I can say appear to be “unacceptable to all of us” that parents could be permitted such things. Here I have to correct myself: Germann would - or consequently would have to – say that “the prerogative of parents to the child's welfare [ ... ] encompasses also the decision about” whether a lower injury is “in the child's best interests”; for example, the spiritual wellbeing, if the intensely relived Jesus' suffering due to a crown of thorns pressed onto his head on Good Friday; or the physical wellbeing, if the father lets the child suffer in ice-cold water for a while in order to toughen up or the character 's wellbeing - or if he inflicts cuts during a “Red-Indians” game.

It does not make sense to me. It's a matter of personal injury fulfilling a criminal offense (§ 223 StGB). No justification for any of these actions can be found in the criminal law; especially the parents cannot, as in malicious attacks, claim “self-defense” or, as with disease-related surgical procedures claim the aspect of "healing intervention." To derive a justification from Article 6 GG appears misguided to me. This provision did not intend to suspend the general prohibition of physical abuse of children, not even for the parents. If the abuse is objectively bad and harmful to the child, then the parents must refrain, even if they think subjectively to serve the interests of the child.

There is a classic act of violation of one’s own child, the lawfulness of which even criminal law, of course within limits, had recognized until a few years ago: the punitive chastising by painful hits. This “parental right to punish” actually used to be lead back to “the prerogative of parents to child welfare under Article 6III1 GG” , and the law until then had resisted the better knowledge of objectively judging psychologists, educationalists or informed lawyers. Let us imagine that, according to a criminal complaint, the prosecutor accuses a father who "tries hard, but fair" to educate his ten year old son and bring him onto to the right path by repeated punishing beatings. In the 1950s, defenders would have had an easy job to fend off the accusation. He would have to rely on the “right to parental corporal punishment” and could have refined it as it were with Michael Germann's words, claiming that the “state's guardian obligation” does not authorize the state to define “an optimum for physical integrity of children and to enforce it against the parents' ideas of the physical integrity of their children” (2013, p. 414).

If parents would not overdo the abuse, their “prerogative and a corresponding determination of latitude regarding the question which physical condition is in the child's best interest” would remain; for example, a highly painful condition after the necessary punishment for masturbating, truancy of Sunday mass or sinful blasphemy. But all that belongs to the past. Since Nov. 6, 2000, § 1631 para 2 BGB prescribes that “children [...] have a right to violence-

free education” and among other things, “corporal punishment [...] is inadmissible.” Not even relatively harmless intervention in the physical integrity of the child such as a few slaps or blows on the buttocks are permitted by parents any more, yet they still may, like so many people, be convinced that the child is best served with such punishment and at the same time religious obligations are met, as shown in the examples. In such a legal situation, it is not convincing that Germann reads into the Basic Law, a “relativization of physical integrity of children” on the grounds that it would be owed the proportionality imperative “for parental rights' and religious freedom 's sake” (2013, p. 415). Consider the following: If, in the example, the father tries to keep the son from the sin of unchastity and "self-abuse" by administering him a slap or a spanking, he commits an unlawful assault and finds himself threatened with punishment. If he, however, with the same religious-educational motivation, has his son's foreskin cut off, then he should be allowed do so, according to Germann. It does not match.

### **Balancing of interests and involvement with Carsten Schütz**

Let's stick to the core issue of the topic: Are parents allowed, due to their right to "care and upbringing of children", to perform a circumcision of their male child under certain conditions, even if it is not medically necessary? The legislature of 2012, believing itself to be able to answer in the affirmative; views the power as not re-created, but as long since given, following from Article 6 GG and only “clarified” and limited by § 1631d BGB. That would be correct, if the assumption of circumcision permission were based on the proper balance. This in turn would in any case have to be *denied* if one would have to say: The interest of the male child in an intact penis, i.e. to keep his foreskin, weighs much heavier than the interest of his parents' permission to circumcise the child without medical necessity.

I do not need to explain here that the child's interest in preserving his foreskin that protects the glans and is extremely important for sexual satisfaction is important. The child's interest to be spared from surgical and wound healing pain of complication risks, the risk of trauma and prolonged impairment of his sex life, is a very, very weighty interest. The medical profession can do this better and do it more impressively. What they say is sadly confirmed in hundreds of public statements in recent times, made by young people and adults who were circumcised as a child and bitterly bemoan this loss.

Those who do not appropriately weight here out of ignorance of the physical and psychological effects of circumcision of the male penis can only weight wrongly. This is what happens, for example, to Robert Spaemann, who characterizes circumcision as a trivial matter comparable to a measles vaccination, and then adjudges: “If you ever want to boost the issue to a fundamental rights conflict, that consideration can only result in favoring the liberty of parents” (2012, p. 50). Or Alice Schwarzer, who in an internet post from July 2, 2012 recognizes circumcision as a “violation of the physical integrity of a child”, but only as “a very, very low one”; it were “a very small surgery, which [...] heals within a few days.” Given this unforgivably reckless misjudgment, it is then only adequate to accept as justification for the procedure, already “hygienic reasons [...] regardless of religion and culture,” Against which, however, German

parents should be told to kindly use soap and water, instead of cutting off the foreskin.

Social Judge Carsten Schütz (2012) blunders even further. It is always worth a closer look. For his polemic against any criticism of the circumcision right of parents is typical of many discussions. Limitations and biases allow Schütz to push aside even the most thorough essay with one silly footnote and ignore its constitutional deliberations, because they do not fit into his I-know-everything-better concept. On this basis, he then renders his verdicts.

It's crucial that in his first verdict he accuses the Cologne Regional Court of "disregard of the Constitution by selective perception" with the novel reasoning that the principle here is one of "nulla poena sine lege Parliamentaria" ("no punishment without law passed by parliament"). Nobody else had thought of that. Schütz thinks the severe and complicated penis injury in the Cologne case is so far removed from all paragraphs of StGB, that the Regional Court Cologne maintained the unlawful realization of a criminal offense by the accused doctor just out of the blue, without any statutory basis. Schütz writes, "An acquittal should have followed, already for violating the principle of legality" which probably meant that the Trial Chamber should have said that they cannot find any legal provision which qualify as a penal basis for ritual circumcision of boys. This is an absurd comment.

The statutory provision is § 223 StGB, and on this basis alone the question is whether the act of assault committed by the accused was lawful or unlawful. Schütz thinks he has to insist on the principle of legality, because the religiously motivated circumcision validity "has never been determined in well over 100 years, as punishable according to applied criminal provisions." Here I miss the quality craftsmanship of a judgment criticism that claims to be scientific. Schütz ought to have seen - and overlooked it! - that in ritual circumcisions of the past, the conditions of *legality* that apply to bodily injuring and risky operations (see discussion of Michael Germann) were almost never met. And I want to insinuate that he too would have seen, for example, an orthodox-Jewish circumcision performed by a non-physician without anesthesia, without sterile scalpel and with oral blood suction, as an unlawful assault, regardless of whether it was committed in 2012, 1960 or anno 1900. But even if all the traditionally tolerated circumcisions had been carried out as skillful medical surgeries and the parents had been fully informed of all the risks, the judiciary would have at any time a "statutory provision" at hand, precisely § 223 StGB, on the basis of which judges could have considered whether ritual foreskin amputations are indeed justified. For comparison, once again, let's assume that in 1955, a progressive state attorney would try to file charges of assault according to a criminal complaint. Let us further imagine that it comes in the end to the judicial acquittal like in the Cologne case, with the grounds that the defendant had indeed committed an unlawful assault by the educational beating of his son, but he was excused because of a mistake of law. It may be that there would have followed unanimous outrage on the grounds that in the eyes of this injury the prosecutor and judge had wronged the parents by denying their "right to punish". This "right" was a several thousand-year tradition and even the Bible sees it as God-given. Prosecutor and judge had only to read the Proverbs of Solomon, and the book of Hebrews (12:5-7), and show these words of God "reverence" (13, 1.24 19:18). As foolish as this criticism would be, to reproach two jurists with a contempt of Article 103 § 2 GG would certainly not come to anyone's mind. One would just have said: A justification applies here, which you have unfairly denied.

What Schütz ignores entirely is something elemental and self-evident to any lawyer who is at home in his field: prosecutors and courts can change their views. Certain acts that for decades they perhaps considered as socially acceptable or justified and therefore did not prosecute, they can at any time assess otherwise and determine that the conduct in question is in fact an illegal one (though not necessarily punishable). Schütz also ignores the fact that a judge may indeed for the *first time* be faced with a particular question of law (such as judge Beenken in Cologne) and that he then is *independent* in his judgment, even in the “consolidated” view of the highest court.

Schütz criticizes the Cologne judgment at the end by calling it “technically miserable because it was argumentatively totally inadequate.” As a self-criticism with regard to his own essay, this criticism would be more appropriate. The district court and the authors whom it follows (especially Putzke and Herzberg) begin with an assessment, which of course is self-evident to lawyers who understand their craft: Cutting off the foreskin meets the elements of § 223 of the Criminal Code, as it has always been recognized for cutting off a braid (which grows back!). But Schütz makes it out to be that the jurists using this assessment “have trampled on religious practice and degraded it as abuse. He should know that cutting off the foreskin of an infant *is* a terrible physical abuse” defined in § 223 of the Criminal Code, which means that there does not even exist the possibility to “degrade” and “trample on” circumcision as a religious act by calling it abuse, if it is perfectly subsumed under a statutory offense.

Schütz accuses his opponents of violating constitutional law: Putzke’s “[A] criminal judgment politely disregarding the primacy of the Constitution”; Herzberg’s “not a word to the collision between fundamental rights and none about the constitutional tool to its resolution.” This is a serious charge among jurists. I counter with the words of Harald Stein Mart (2013, p. 6) “But the weight of the allegation does not exempt the accuser from the task to prove it.” In the words of Harald Stein Mart (2013, p. 6), whose paper “About the difference between criticism and insult” I recommend for reading to every polemicist. It is Schütz himself who does not see what it is about constitutionally and what his opponents, with the Basic Law in mind, have long identified as the crucial question: Is it really more important to be able to cut one's child foreskin for religious reason than to respect the child's right to physical integrity? Schütz should have given a reasoned response. But instead, he holds the “top educational goals” of the Free State of Bavaria against his opponent, the Bavarian official Holm Putzke: Bavaria's Constitution commands the “fear of God” and the “respect for religious conviction.” Before writing down such a thing one should think about it: Having to honor religious beliefs can not include the duty to approve injuries that are committed in the name of religion. And the imperative for reverence would be irrelevant if Putzke were an atheist. If he does believe in God, he could for that very reason fight more resolutely to ensure that one does not physically mistreat defenseless children, but rather honor their eminently important right to be protected from pain, threat of complications and lifelong body loss. I, too, cannot recognize my God, whom I owe reverence, in that archaic desert-God who commands that you kill sodomites and cut off the foreskins of children.

### **The welfare of the child as parental interest**

If one now considers and reflects, after weighing the child's interest in physical integrity,



upon the opposite interests of parents who choose circumcision and let it be "performed" (cf. § 1631d BGB), it is important to emphasize the following: Article 6 Section 2 Sentence 1 GG grants and protects this freedom from the outset only to the extent that circumcision, as an act of "care" or "education" of the child, *promotes the child's welfare*. This has also been accepted by legislators in BGB § 1631d. This provision, based on Article 6 GG, accepts the parental consent as justified only as a "caretaker" (= "giving care to the person of the child" § 1626 § 1 sentence 2 BGB), and all "parental authority" is to be exercised under § 1627 S. 1 BGB "for the good of the child." Therefore, it is a case of comparison of the two fundamental rights in the case of circumcision, basically the balance of interests of one and the same person. After all, the parents are faced with the question whether they may *hurt* their child *physically*, although they are not attacked by him, so are not in any self-defense situation. In this situation, they may only be committed to the "care", "education" and the "welfare of the child" and may decide only for the sole or predominant interest *of the child*. Here lies the difference to the decision-making authority of the parents in situations where it is not about the question of permitted or prohibited assault, but about the choice of school or professional decisions. As being compatible with the "welfare of the child", we consider there also decisions of parental rights, which serve primarily a parental interest, such as the concern that the son take over the parental bakery.

A clear case where "care" of the child is provided by his circumcision, and where consent given "for the good of the child" is certainly at hand, if the surgery is acutely indicated for the child's health's sake. In such a case a leeway can be conceded to the medical assessment, and the basic parental right gives the freedom to decide against circumcision, but also - at the expense of the fundamental right to physical integrity! - to opt for circumcision. All other cases, i.e., outside the medical necessity or reasonableness, are problematic. They are to be assessed according to the following rule: the parents may by virtue of their fundamental right arrange for the circumcision if, firstly, the child has an interest that is being served by the circumcision, and secondly, it is justifiable to give this interest priority over the child's other huge interest that no harm is done to him and that this important body part remains intact.

The first condition can perhaps, with some effort, generally be considered fulfilled with regard to one aspect, which the circumcision advocates never neglect to point out: keeping the glans of a circumcised penis clean, especially in the early years of childhood is slightly easier thus somewhat better guaranteed, and statistics suggest that certain diseases in uncircumcised males occur somewhat more frequently than in circumcised males (which incidentally does not apply to AIDS: the U.S. has a particularly high AIDS rate, although here especially many men are circumcised. The reason: many abhor condoms because their sexual sensation is diminished and almost completely disappears in condom use thereby eliminating the most important protective factor against infection with AIDS). One may recognize here, also in Germany, a "health gain", in the broadest sense, which is beneficial for the child, but many doctors say that this would be more than offset by the "health loss", which the child suffers by the very serious injury as such and by the removal of the glans' protective cover; because the glans undergoes unpleasant changes that it is spared if remaining uncircumcised..

Anyway, in the end it depends on the second condition, which is not fulfilled if the child's interests to be spared and to remain intact substantially outweigh the interest of the child to be

circumcised. In light of this question the arguments of circumcision proponents are lacking an aspect that until now had not received any attention. One would expect that these people will argue with the suffering and disadvantages of those children to whom circumcision was *denied*. For inversely, their opponents do just that with views of the *performed* circumcision. But as far as I can see, no one whose penis is left intact appears to suffer from his foreskin, not a Jew nor a Muslim, and nobody names or quotes others who, having a healthy penis, complain about not being circumcised or not to be circumcised in time.

Pretty much never, not even as an abstract proposition alleged in discussion, is it argued that those parents, be they Jewish or Muslim, who decide *against* circumcision are causing their child any health or mental disadvantages. I leave aside here the expressions of metaphysical speculation, which one gets to read or hear here and there; like the notion that the child, if it does not masturbate thanks to his circumcision, is not threatened with divine punishment; or the gift-theory of Rabbi Yitshak Ehrenberg, who considers the withholding of God's covenant, that only circumcision can provide, worse than the “physical destruction” of the child. Such justifications are not even worth dealing with. Where then should *real* disadvantages be found, given that soap and water are available anywhere, that religious education has certainly not suffered because of a foreskin and that no religious community makes the acceptance of a child dependent on it? And even if religious communities would make circumcision a condition for membership or if they would make the uncircumcised feel painfully like a kind of outsider or second-class member, these disadvantages cannot justify circumcision. Thomas Fischer states very rightly (2013, para 5), “The mere rigidity, with which a social group enforces their rules against members, does not result in a legally sound justification for infringing acts that are to be enforced this way.”

I have only come across one single contribution, whose author appears to sense what he must maintain in order to provide the desired balancing result. This is the already mentioned essay (under “The ritual circumcision as legitimate exercise of religion”) of the retired regional bishop Johannes Friedrich. It actually states that the son of Jewish parents supposedly suffers damage to his “emotional integrity” and feels bereft of “his religious home” when he looks at his intact penis and “discovers that his father failed to comply with a central religious obligation.” Yes, psychological harm that only circumcision can prevent would do. It would provide a counterweight that could be held against circumcision critics who argue with the suffering of circumcision victims. But Frederick cannot prove his assertion with anything and cannot provide any witness. Everyone recognizes that the only realistic assumption is that the young Jew who touches his foreskin will be grateful to his father; he still has this highly erogenous body part, he has the choice, he can still decide for himself, while many others who have been circumcised, even if they suffer no physical ailments, accuse their parents of a disregard for their dignity and of having taken away from them a decision about a most intimate personal matter and of having irreversibly robbed them of an important part of their body.

No, the argumentation of the proponents of circumcision is quite different. In favor of a parental right to initiate the circumcision without medical necessity, they invoke purely *parental* interests. To put it bluntly: Circumcision being justified not as an act of care for the child, but as an act of care for tradition and religion. Here lies the reason why the critics of the Cologne judgment have spontaneously and mainly referred to the religious freedom of parents (and not to

their care and custody). They never argue that the *child* would suffer if it were not circumcised, but they always refer only to the fact that it would be bitter and painful but for *others*, especially for parents and committed religious leaders, if a sacred traditional ritual of their religion would not be allowed to take place. I do not intend to despise this pain, but it cannot carry any weight in decisive consideration. Circumcision does not serve “care” and the “welfare” of the child and therefore is not “care of the person of the child”, because the implementation of rituals make other people happy and satisfy their religious needs. “If the parents,” says Tonio Walter, “categorically want circumcision, for whatever reason, it may serve their inner wellbeing. But that is not the wellbeing of the child” (2012, p. 1114). In fact, even more decisively, one can say that circumcision is the *opposite* of “care” and it does not *promote* the “welfare of the child”, but *reduces* it to a very considerable extent.

The already mentioned case, assessed by a family division of the Higher Regional Court in Hamm (order in v. 30/08/2013, file number 3 UF 133/13) makes this clear in a depressing way. The case was about the welfare and protection of the six- year-old G. His parents, both Kenyans, were married and are divorced. G. lives with his mother, who holds sole custody after the divorce. The parents argued in court in "provisional order proceedings" over the mother's right to the son's circumcision. The father seeks to prevent the recognition of this right, because he is against circumcision, while the mother wants to regain it after the district court in Dortmund has revoked it and transferred it to the child protective services, acting as “complementary custodian.” The mother refers - according to the representation in the Senate resolution - to § 1631d BGB and justifies her intention as follows: “Together with G. she regularly visits their home country. He should be circumcised according to the customary Kenyan cultural rite, as otherwise during his visits there he would not be regarded as a full man by his relatives. In Africa, all the boys would have to do that. During every phone call with her relatives in Kenya, to whom she was closely connected, she is being asked if her son G. was finally circumcised” (No. 8, 35).

One may well say that with this case the reality of life has given the legislature and the law a practical test. The legislative intent can be interpreted such that it is the spirit and meaning of § 1631d BGB to help enforce the mother's consent and power to achieve her demand of circumcision. Sole custody has been assigned to the mother after the divorce, and therefore gives her the right to consent to circumcision, according to § 1631d , Section 1S. 1 BGB if performed *lege artis*, as is sought here. The law, as the rationale emphasizes, “does not differentiate [...] by the motivation of the parents.” Not only religious reasons, but also ethnic-cultural or familial-traditional reasons may motivate the custodial person. According to everything that the legislature has presented in terms of ideas and arguments, in this case, the mother, holding sole custody, should be able to give effective consent after sufficient medical education and questioning and considering the will of the child. This means that the provisionally revoked right to effective consent to a circumcision of G., performed *lege artis*, should be awarded again. A circumcision, carried out on this basis, would then be a legitimate injury and can be assessed as compatible with the interests of the child. So far, this paints the fiction of the law. In truth, however, the circumcision of the boy would be severely detrimental to his welfare, because such an operation is painful, it irreversibly removes a protective, sexually important body part and is associated with a significant risk of complications. What the mother

also puts forward are - on closer consideration - no arguments for circumcision to the benefit of *her child's* wellbeing, but it just says that it would please and satisfy *herself* and her *relatives* if the native custom would finally be observed.

Ethnically and culturally motivated circumcision desires will probably be mostly as trivial and narrow-minded as the example above. But § 1631d BGB also gives them its blessing and suggests that with such a normal subject as that of the applicant, the child's welfare would not be jeopardized by the circumcision. Now let us consider the entire family proceedings with the preliminary conclusion of incontestable decision of the higher regional court! Except for the mother, everyone else involved, the father, the district court, the youth welfare office, the assessor, and now the Senate see the welfare of the child threatened, if it were up to the will of the mother, and if her right to consent would actually be awarded again after the earlier judicial revocation.

It was expected that the Senate would accept this provision as constitutional and valid. But it overrides its intention by emphasizing normal conditions and possibilities and, with regard to them, assumes the exceptional case, that “the child's welfare is endangered by the circumcision”(§ 1631d, Section 1S. 2 BGB). For example, it points to the risk that it will result in consent and circumcision without comprehensive medical education and without serious exploration and appreciation of the child's will (para 32, 29). To avert this danger, the Senate would only need to ensure that in an oral hearing the mother would receive sufficient information about the self-will of the child and about the effects and risks of circumcision. Apparently the Senate did not want an argument against the re-awarding of the custodial right to disappear - because it knew that even the most informed consent of the mother would be unreasonable and would not actually serve the child's wellbeing but endanger it. Furthermore, the Senate stressed that the mother did not want to attend the surgery and that this could have an “extremely negative impact on the psyche of the child” (para. 41). The Senate also makes the explanations of an expert to its own, by reasoning that the boy G., baptized Protestant, predominantly lives in Germany and his everyday life is mainly influenced by German culture, where being circumcised would mean being treated differently than the majority of his peers and that he “cannot be expected to understand the meaning of irreversible surgery” and that G. after all “can make his own decisions in a few years” (para. 40). That's all true, but does not cover the main reason why the child should be spared the surgery, because the Senate avoids justifying its refusal decision with the most serious damages and hazards of the child's well-being, i.e., with pain, loss of body part and risk of complications. It is aware that this justification would be a severe blow to the legislature and would openly disregard § 1631d BGB. But the tenor of the provision also disregards the selected justification, because everything that the Senate brings forth is completely normal for any circumcision of a child living in Germany, which is seriously intended by the guardians.

In the Appeals Court decision, the need for protection that was perceived by everyone (but the applicant) has prevailed against a ruling that does not want the protection of the child in order to protect the custodial person instead, namely her interest in ritual abuse of the child's body. I see in the decision an indication that the legislature has not managed to produce a convincing provision and that practice will seek to get around it again and again by affirming the presence

of child endangerment (§ 1631d para 1 sentence 2 BGB).

With the enactment of § 1631d BGB, “a piece of enlightened civil society comes to end.” says Necla Kelek. It was “unthinkable before [...] that the fundamental right to integrity of the person is sacrificed in favor of a religious ritual, howsoever justified. Religion is no longer a part of the rights guaranteed by the constitutional freedoms, but [...] henceforth stands above them. The child's welfare is defined as the right of disposition” (2012b, p. 74). In the same spirit (which is the spirit of our Constitution!) Thomas Fischer protested: “It's not about achieving the self-determination of custody, but about the *child's welfare*. [...] But this is not a mixture of parental self-realization, faith and belief [...] but an independent position, oriented towards the physical and psychological integrity of the child's individuality. We should not fall back behind this principle” (2013, para. 48).

### **Wolfram Höfling and his “criteriological operationalization”**

The situation is seen differently by constitutional law expert Wolfram Höfling. The problem lies in a “pentagonal field of conflict”, the solution requires a “criteriological operationalization”. He identifies three criteria: the “intensity”, the “modality” and the “communicability criterion”. In their application, Höfling makes - in turn - the following observations: “The intervention in the physical and psychological integrity is only of relative severity and generally manageable. The “evidence of normal life paths” of several hundred million circumcised men can only be “refuted” by real valid data on serious trauma. “Circumcision causes usually no discrimination or humiliation effect, because it is embedded in a cultural and religious context” (whereby the “female genital mutilation” represents a counterexample). “As a deep-rooted custom for centuries or millennia, religiously motivated circumcision makes the especially credible impression of a serious existential conviction” (Höfling, 2013).

Höfling wants to make evident in the course of his “criteriological operationalization” that “sweeping constitutional objections against the new rules” do not exist in § 1631d BGB, i.e., that parents, in any case, are allowed to let the foreskin of their son be amputated with religious motivation, even without medical indication. To this end he attests circumcision to be only relatively serious, “basically under control” (which probably means the preventability of complications), non-discriminatory and not humiliating, for a long time a “deep-rooted practice” and supported by “serious existential conviction”. This is in line with the religious leaders who have made public statements in defense of the custom in question and tend to ignore any serious consequence of the injury. Höfling, as well, does “not account for himself for the severity of the procedure [...]. Neither is the loss of an erogenous zone taken into account, nor the desensitization of the glans following the surgery” (Scheinfeld, in this book, p. 378). But to me this is about something else. My criticism of the religious-political claim of religious leaders and of the provision that they have achieved, has neglected a point that remains to be considered and that I point out to Höfling: the imperative of equality and in particular, not to discriminate against anyone because of gender or faith (Article 3 GG). What religious spokesmen have demanded and enforced in the form of § 1631d BGB is only a very narrowly restricted permission to physically abuse and harm children's health (as § 223 StGB puts it) for a religious reason. By force of parental consent only the physical abuse and damage to health caused by the

“circumcision of the [...] male child” (§ 1631d of the Civil Code) may be permitted, which means only the total or partial amputation of the penile foreskin. Yet, for no other religiously motivated assault was the same requested and approved by legislative bodies. Even directly related female circumcision remained undisputed, also as a religious act intended by parents, and even if its impact is less severe than that of male circumcision. In other words, female genital mutilation in all forms remained taboo as a shameful “mutilation” of “external genitalia” (see § 226a StGB). In itself, maintenance of this prohibition and legal protection is certainly to be welcomed, but equally of course, it must cause offense, that a serious breach of the male sexual organ is permitted while in female children even significantly lighter genital injuries (e.g., the scoring or puncturing of the labia or the removal of the clitoral hood) have remained banned and are punishable under the new §226a StGB. What this means, Scheinfeld shows (with literary references) in this book (p. 367 with an example of Schafi'ite parents who want to circumcise their opposite-sex twins): “The Schafi'ites form a school of law in Islam who circumcises for religious reasons, both the boy's penile foreskin and the girl's clitoral hood [ ... ]. The two interferences with the child's body weigh at least as equally severe [...]. Nevertheless, the present simple law tells the Schafi'ite parents: You may cut off the foreskin of the penis and you must not cut off the clitoral hood. There is no objective reason for this discrimination.”

Is there a satisfactory way out? Armin Steinbach believes to have found one. With arguments that are similar to Höfling's, he shares his view that the ritual circumcision of boys should be allowed within limits and that “the legislature has created a constitutional regulation.” But under the pressure of the constitutional prohibition of discrimination against boys because of their gender (via suspension of criminal protection limited to boys) and by some parents because of their particular belief (by maintaining the criminal protection of girls) he differs from Höfling in regard to female circumcision. He looks for the solution by taking the bull by the horns, as it were, and demanding the analogous application of § 1631d BGB in cases “of religiously motivated circumcision of the clitoris, which is comparable in terms of its impact with the circumcision of the foreskin” (Steinbach, 2013, pp. 9 f.) This is a consequent step in the “permission”-direction and avoids Höfling's mistake, who claims, in order to escape the consequence with regard to “female genital mutilation”, generally “humiliating and discriminatory side effects, respectively motivations of parental behavior” (2013, p. 465). Steinbach sees this differently and has the courage to face the consequence. But consider the price to pay! Apart from a few Schafi'ite immigrants, everybody in Germany is against allowing the practice of female circumcision, also as a religiously motivated and technically correct performed act, and the necessity of stricter punishment (§ 226a StGB) is beyond dispute . I would venture to say that even Steinbach would rather not assume even the justification that he accepts logically and that it would disgust him as an on-looking witness if parents would actually make use of their mutilation permission.

And it is not even done with the fact that in view of the equal treatment principle the integrity of the female genitals is compromised. If the permission of ritual circumcision of boys is premise and starting point, then one has to extend the permission to all religiously stipulated injuries of children that do not outweigh circumcision in terms of pain, risks and permanent consequences. Let us imagine, for example, that a Christian sect interprets the circumcision command of the Old Testament unconventionally “in the spirit of the New Testament.” The “sign of the

covenant” worn in the flesh, is to seal a covenant with Jesus and be inscribed as a scar on the back in the shape of a cross. A physician, belonging to the community, will cut the infant accordingly during the baptismal ceremony. Höfling, in favor of the penile circumcision, refers among other things to the fact that we are dealing with a “centuries-old deeply rooted practice”. This did not apply to the Christian back-cutting. But the fundamental law is neutral with respect to religious practice. It does not judge differently depending on whether a “religion” is ancient and widespread or new and locally limited. If parents, by force of parental rights, can religiously influence their child according through the ancient tradition of penis circumcision then they must also be allowed to do it in a new spirit by cutting into another part of the body, with the only condition that the one abuse does not outweigh the other in its severity.

In public discussions, Höfling challenges the comparative case study by pushing aside the comparative cases as unrealistic; they may be presented in jurisprudential seminars and entertain the students, but for political and legislative decisions and for the constitutional review of § 1631d BGB, they would have no relevance. I take this reply as admission that the ritual abuse devised by the opponent (here: cutting a cross into the back), if actually committed, of course, could not go unpunished. But that concession has as a consequence a legal insight: As the case may be, the parents whose faith commands an abuse, different from that of penis circumcision, would be “disadvantaged” as in reverse compared to the circumcisers of penises who would be “preferred”. That, however, would be incompatible with Article 3, paragraph 3 sentence 1 GG. This finding compels legal assessments that avoid the legal inequality, even if the pious personal injuries, which, in a real case, Höfling would rightfully like to see punished by law, have not yet been committed. In short, the fictionality of cases that are brought forth to be assessed does not refute the argument that arises from the undoubted solution of cases; here: from the criminality of ritual injury to the child's body, which does *not* exist in the cutting of the prepuce.

Höfling argues in support of his point of view that “millions of circumcised men run by all appearances normal courses of life” and to rebut this “evidence” he demands that he be shown proof in the form of “valid data, evidencing grave trauma” – leaving open to question the degree of traumatization that he would consider enough to declare himself impressed. But it is, in any case, completely irrelevant to the question of whether the ritual cutting of the foreskin is an illegal assault after which “more than a hundred million circumcised men” live their lives without “severe trauma”. Just the same is true for the millions of people who have suffered a different one-time abuse. Examples: because their father got carried away once and slapped them in the face, or someone has recklessly inflicted a stab wound, which soon healed and no longer hurts. Many can also live a “normal” life after undergoing technically correct appendectomy surgery by a doctor who acted out of greed rather than medical necessity. Yes, even a child whose parents have sacrificed one of his toes, a phalanx of a finger or a piece of labia to their God can “cope with” the loss and will not suffer constantly under the procedure. But they were certainly all victims of unlawful bodily injury! What Höfling argues is in our dispute obviously no argument. The illegality of an injury does not require that the victim receive “serious trauma” by it. Moreover, the absence of such consequences of injury means absolutely nothing for our question. It does not even provide us with a tiny indication that parents were right when they single-handedly slapped their child in the face, or abused him or her, for example in the form of handing the child over to someone else who performs a genital circumcision.

## Pro or Contra - what convinces?

I am going to try to outline the problem and the dispute - in its core area - in layman's terms with a question and two contrasting responses.

Should parents have the right to have their child's foreskin cut off at least for *religious* reasons but without medical necessity and without the autonomous consent of the child?

Yes. Circumcision is God's command, a long-held tradition spread throughout the world that makes sense for both parental religion and the child. It endows a Covenant blessing from God to the child; the body is indelibly imprinted with the sign of belonging to Judaism or Islam and provides the child with the strengthening support of parental involvement in the religious community.

No. Parents may certainly decide into which religious community the child will grow. But as is generally assured, neither Jewish nor Muslim communities make the admission of the child dependent upon circumcision. This is an interference with the fundamental right of the child to physical integrity, unnecessary in every way, pain-inflicting, creates complication risks and robs him irretrievably of a significant part of the body that has an important protective and sexual function, and a loss with life-long consequences. It is completely unclear whether the circumcised will later approve of or curse his physical impairment and religious marking. By destroying his foreskin the child is disregarded as a legal entity and in his human dignity. He can no longer decide for himself, when he is mature enough to do so, whether he wants to live with or without foreskin. Those who nevertheless believe the ritual circumcision of an underage child was God's will, must by law deny this God their obedience.

Can anyone doubt at all which of the answers is ethically superior, which one will convince the *unprejudiced* inquirer, and which is the one living up to the image of humanity of the Basic Law? In any case, I consider the second answer is correct because I come to the following conclusion: Neither Article 4, nor Article 6 GG give the parents the right to arrange for the circumcision of their male child outside of cases of medical necessity. To see this freedom of decision in one of the Articles is certainly incompatible with the fundamental right of the child to physical integrity, Article 2, Paragraph 2 Sentence 1 GG (to the rationale of other incompatibilities see Jörg Scheinfeld's contributions in this book.) § 1631d BGB, the creator of which believes to merely have given a "clarification to the right of parents ", actually grants this freedom as something new, yet stands in direct contradiction to the child's fundamental right. It is therefore incompatible with the Basic Law and void. This in turn means: An assault based on § 1631d BGB would be based on an invalid license and therefore be unlawful.

This finding cannot be countered with Article 2 paragraph 2 sentence 2 GG. As I said, the legislature has no free hand to restrict the fundamental right to bodily integrity by ordinary legislation, even if religious communities demand it. That becomes clear immediately if one imagines provisions that allow parents *other* injuries with a religious intent to the detriment of their children. Examples: a moderate circumcision of the female genitalia, as demanded by Schafi'ites, a crown of thorns pressed onto a child's head, or decorating a child's body with a



tattoo of religious symbolism. These might be more harmless than the amputation of the prepuce, and yet we are sure that a Civil Code section that would allow these abuses would have no standing before the Federal Constitutional Court. Injury of children by parents outside of self-defense must, in order to be constitutionally permissible, bring the victim a rationally recognized advantage, such as vaccinations or corrective surgery of prominent ears or perhaps even - but here, the legislature has decided against - the moderate chastisement as guidance and deterrence of a child in need thereof .

### **Critical voices to BGB § 1631d**

My assessment of § 1631d BGB is shared by Scheinfeld (in this book), Eschelbach (2013, para. 9 ff, 35 ff) and Paeffgen (2013, para. 103a-103d), all of whom base their "unconstitutional" judgment, not only on Article 2 GG, but cite other incompatibilities. Fischer (2013, para. 50b), however, despite sharp criticism, apparently wants to accept the new BGB-provision. "But the practice," he says at the end, "has to respect the decision and *intention of the legislature*." In a certain way, a court would of course "respect" § 1631d BGB, even if it would consider it to be unconstitutional. For it would prove, whether the formal existence of the provision would result in an unavoidable mistake of law for circumcision perpetrators and circumcision participants who act within the limits of § 1631d BGB. But I doubt that Fischer wants to be understood that way.

Isensee on the other hand (2013, p. 327 ) should, in my opinion, have drawn the consistent conclusion, as he states at the end: "The regulatory law has not reached its goal. It [...] does not meet the fundamental rights obligation to protect the child" it has "constitutionally failed". But under the last subtitle "taboo caveat praeter constitutionem", the author is still considering the "hypothesis of an unwritten taboo reservation of constitutional quality". If I understand Isensee correctly, he himself has not yet decided, but takes into consideration "in the conflict between the constitutional consequence and preservation of the religious and the social peace" precisely this consequence, which he would have to draw from the constitutional point of view, but is *constitutionally* not allowed to draw; or also: to evaluate medically unnecessary foreskin amputations, which are allowed under an *unconstitutional* law, as permitted, thanks to unwritten *constitutional rule*. This hypothesis of a constitutionally compliant negation of a given unconstitutionality seems not yet to be verified to me (as to Isensee). Yes, I am inclined to judge it as untenable.

Tonio Walter occupies a special position among those who view the legislators as having "constitutionally failed". His topic was - in November 2012 – "The bill to circumcision - Criticism and Criminal Alternative" (the unchanged draft has become law), and it says right in the first sentence of this contribution, the draft was "unconstitutional because it disadvantages boys simply because of their gender." Nothing about other violations of the Basic Law is mentioned anywhere, wherefore one has to understand Walter such that he declares the law in question unconstitutional solely because of incompatibility with Article 3 paragraph 3 sentence 1 GG. This explains Walter's proposal of a new § 223 paragraph 3 StGB, which is to take the place of § 1631d BGB. The proposed text is generally addressing the 'circumcision of [...] children' not like the text of § 1631d BGB, for the "circumcision of the [...] male child". I quote Tonio

Walters ' proposal for a new paragraph 3 of § 223 StGB completely:

*"Paragraph 1 shall not apply to the circumcision of a child who is unable to reason and incapable of judgment, when his religious community and the guardians command circumcision. The rules of medical science must be observed.*

*If the child is able to articulate his or her will, and refuses circumcision and exhibits a sustained refusal, the family court decides. [Optional addition: Circumcision is called the removal of the foreskin in whole or in part.] "*

It should be noted that in the "optional supplement" the author wants to see his definition understood "gender-neutral". In other words, adoption of this definition into the law is - under its conditions! - means that girls' circumcision goes unpunished, but only in so far as it consists of the circumcision of the prepuce. If, however, this definition is not law, then - as I understand Walter - also other cuts to the female genitalia can be performed with impunity, provided they are - equality under the law! - no worse in effect than the classic penis circumcision. However, it seems to me that Walter is not wanting real equality here. Also on the basis of his § 223 paragraph 3 StGB "the practice" should manage somehow to punish religiously motivated female circumcision itself, and be it the on the basis "that it was not disputed in the legislative process at any time to let the absolute prohibition of female circumcision continue" (Walter, 2012, p III ff.).

Tonio Walter openly says that his proposed solution is a compromise yielding to political pressure. The question of "whether circumcision of small boys should be legalized at all," he answered in the negative "in principle" and because of the principle he wants to limit the period of validity of his law for five years. But at the same time he considers it (permanently?) as "ruled out to pursue in Germany, of all places, people of Jewish faith and Muslims with criminal penalties if they fulfill commandments, which, from their perspective, are imposed by their faith. The legislature should act minimally invasive and extinguish the fire only where it actually burns. This is done in criminal law not in custody law of the Civil Code. The solution offered in Walter's view, is the "value-neutral" exclusion of facts of offense, because it blocks criminality, but leaves open the question whether the non-punishable behavior will thereby also become *permissible* or remains *illegal* and is merely tolerated (Walter, 2012 p. 1116).

One objection immediately comes to mind. It also then remains open whether the surgeon or mohel circumcising the child commits the offense of "unlawful attack" as defined under self defense law (cf. § 32 StGB) and whether he is therefore exposed to actions against him, for example, on the part of a relative of the victim, fighting circumcision as a barbaric act. Should this question be left open?

From my point of view, the answer is clear, because I would have to consider the new § 223 para 3 of the Criminal Code as unconstitutional as the new BGB-provision. The one like the other "action law" allow in the parents' interest interference with the fundamental right of the child to physical integrity, and the assessment results - to speak with Isensee - in that "the action

law [...] does not meet the fundamental rights obligation to protect the child” (2013, p. 327) or in my own words: The interest of the child to remain uninjured in his/her genitalia weighs much heavier than the interest of others to perform the circumcision of the child with impunity. The attack on the child undertaken by the circumciser as he proceeds to action is an *unlawful* attack.

This shows, I think, a failure by Tonio Walters. Constitutionally, he should first have asked if the permission of the circumcision of boys is compatible with Article 2 GG instead of immediately pointing out the “disadvantage” of the boys (Art. 3 GG). For if circumcision is not compatible with Article 2 GG, which it is *not*, as established here, then the allegation that the law infringes the principle of equal treatment does not apply. Then it is rather a true blessing that the legislature has at least left the girls alone. For comparison: If male students suffer wrongly because a state law allowed their corporal punishment under certain circumstances, then the law would not become any better by its extension to female students. Wrong actions are not worse, but less bad if they are limited to an “unfair” selection of victims, that is, only certain people are affected, but others are spared.

And a final objection: Tonio Walter should have considered whether his concern that the religiously motivated and lege artis performed circumcisions of boys go unpunished would not solve itself, as it were, and also on the basis of his (true) assessment that § 1631d BGB was unconstitutional and void. The question is to be answered in the affirmative. Strictly followed and applied consistently, applicable law already gives a great degree of impunity. Because in our cases the perpetrators and participants probably almost always consider § 1631d BGB valid, they always have to be awarded an unavoidable mistake of law (p. 17 § 1 StGB); so also with Eschelbach: “The law is obviously unconstitutional. [ ... ] With the legal assertion of the legislature there will initially be an unavoidable mistake of law omnipresent” (2013, para. 9). And even in the exceptional case where the circumcision offender recognizes the invalidity of the BGB-provision and, accordingly, the illegality of circumcision itself, the solution fits. Because then there is no reason why the court, although it assesses the legal situation in the same way as well, should the court acquit the accused who has knowingly committed the injustice of causing serious damage to health. Yet, Tonio Walter's proposal has exactly this acquittal consequence. And the legal issue of female circumcision, which causes Walter so much trouble, disappears, in as far as no mistakes of the law prevent the insight of injustice. Walter could spare himself the self-contradiction if he would leave all paragraphs in the Civil Code and in the Criminal Code as they stand now.

One can argue about whether the provisional impunity, limited to male circumcision that Walter seeks, is desirable. But if one accepts it, then one can safely leave the matter to § 17 of the Criminal Code. It states for circumcision deeds what it states elsewhere: Those who could not avoid the error that the act was not unjust act without guilt and punishment. There is no reason to artificially provide for exclusion of certain circumcisions from the elements of § 223 StGB as a loophole.

## **Conclusion**

Finally, a personal word: Like so many circumcision critics, I have also seen things

differently in the past and did not doubt the legal admissibility of the Jewish- Muslim tradition of circumcision of boys. But triggered by Necla Kelek's book "The Lost Sons" (2006), I hesitated and started thinking. I had to admit I was wrong. My path to better knowledge, also taken by the Cologne Regional Court, was one of a strict legal assessment. Not everyone who thinks will embark on this path and find a new position Yes, some even feel superior to the question that is obviously crucial in our democracy whether a purely religiously motivated circumcision is compatible with the legal order or not. One only needs to read Alfred Bodenheimer (2012), who in the 54 pages of his own text does not take up a position in this question, yet, anyway decidedly disapproves on the basis of truly adventurous considerations "that an always practiced Jewish custom was declared an offense" (p. 13). But do the apologists of religious ritual circumcision not at least give rise to any doubt when they hear of the human suffering of so many patients who now, after they have long been silent out of shame, speak out in public? About the parents who blame themselves? About the serious complications that occur so often? About the more than one hundred deaths annually in the U.S. alone (cf. Merkel, 2012 , p.12)? About the Muslims who voted in the Bundestag for the counter-proposal of the child protection officer? About counter-movements such as "Protect the Child" in Israel and "Jews Against Circumcision" in English-speaking countries? About the protective and sexual function of the prepuce? The sensory tissue of the penis can be found to almost 70 % in the foreskin, it is of great importance for sexual pleasure. It cannot be right to irretrievably cut off this part of a child's body without medical necessity. A law that allows the harming of children is a foreign body in the organism of our legal system and may not stand and must be rejected by the Federal Constitutional Court.