

Legal Problems of Ritual Circumcision

Is the amputation of the foreskin (circumcision) that is not medically indicated, but purely religiously motivated, a punishable personal injury, even if the parents have given consent? Intense discussion of this question has persisted since 2008. The author answers in the affirmative.

I. Circumcision as bodily injury

Schwarz has recently addressed the topic in this journal in a pointedly one-sided way¹. He wants to “go less into the criminal aspects” but rather more into the question he considers as “primary” and the “central problem”, namely: “How far the religiously motivated circumcision of boys [...] is constitutionally legitimized by religious freedom”. (p. 1125sq.) Indeed, this may be a crucial question, yet *Schwarz*’s approach skews the perspective, because his question is not primary but secondary². One can ask meaningfully for legitimization only if there is something that needs legitimization. The impact on the human body of some forms of ritual do not need it because they fall outside of any legal relevance – like splashing holy water on the head of the child during baptism, or a pat on the cheek, which is part of the Catholic sacrament of confirmation, something I personally felt quite palpably in 1947 when administered by Archbishop Joseph Cardinal Frings. To ask for “constitutional legitimization” for such actions is going too far, like shooting sparrows with a canon. The legal question, if it has to be asked, is settled by the recognition that those bodily impacts do not “abuse” (§233 StGB), nor do they “injure” (§823 BGB). In actual fact they remain below the threshold of relevance, and thus do not require “legitimization”.

The question is whether it is the same in the case of the impact on the body when ritually cutting off the foreskin of the penis, which is the question preceding the constitutional one and which has to be asked of criminal and civil legislation. *Schwarz* never states this question clearly. In order not to negate the very constitutional legitimization he seeks, throughout his entire text he never names a single law which circumcision would contravene. Only in the final quarter of his article does he touch on the problem of “ordinary-law assessment” by noting that “one could also take the view that religiously motivated circumcision already doesn’t fulfill the criteria to constitute any criminal offence” (p. 1128).³

Schwarz does not commit himself to it, but I already object to his assessment that this would be a defensible point of view. *Putzke*, who has penetrated the topic at hand most deeply, has convincingly substantiated on ten pages that “the facts constituting the criteria of the offence of aggravated battery, according to §§224.1 No. 2 Alt. 2 and 223.1 StGB, are met if a person performs a circumcision on another person”⁴. And *Jerouschek* is of the same mind: “Concerning the statements of facts regarding circumcision, sometimes the approach is taken to consider circumcision not subsumable because of its social adequacy and insignificance - however, not with female circumcision, where no hesitation exists to call it mutilation. Irrespective of whether or not male circumcision is viewed in a milder light, it

certainly falls under the criteria of aggravated battery (§§223, 224).”⁵ That this evaluation is accurate becomes immediately clear if the circumcision does not respect the binding will, but instead disregards it. Example: The Turkish physician V., divorced from M., is father to a seven year old, for whom the mother M. is solely entitled to custody. She opposes circumcision. V. takes advantage of the child’s visit and circumcises the son, even while knowing the mother’s position.⁶ In such a case it appears nothing less than absurd to doubt the injustice of bodily injury and the corresponding criminal liability of the perpetrator. *Schwarz* does not consider this type of case – although he mentions the decision of the OLG Frankfurt. One can see how careless it is to stake everything on the one “freedom-to-practice-religion” card. He will presumably revise his view, but for now his unrestricted thesis states that “the act of circumcision as such falls under the guarantees of freedoms under the German constitution, Art 4 GG,” and that “it is not convincing to qualify the procedure as praeter or even contra legem, because of any interests of the child”(p. 1128). This, indeed, is the stand taken by regional court in Hanau in an order from 2/2/2007 (Az. 1 O822/06). With reference to the above mentioned case of a circumcision against the will of the boy’s mother, it reads: The circumcision is “fulfilling the criteria of bodily injury [...] but as a good tradition, following the example of the prophet, and as a rite to be understood as the first step into manhood, it lacks the taint of unlawfulness”. This is not tenable⁷. A procedure that violates the natural interest of a child to not suffer the irreversible loss of bodily integrity, and which inflicts exactly this loss, may be based on centuries old tradition, on paternal love and on highly pious attitudes, but such a procedure must be condemned in our country as unlawful battery.

II. Parental will as justification?

Let us remember the following: male circumcision does undoubtedly meet the characteristics of bodily injury (§223 StGB) and is in any case unlawful and punishable when it goes directly against the binding will, be it the will of the victim himself, or as in most cases, the will of the parent who legally decides for the child.

But, of course, a bodily injury suffered by a child cannot be considered justified simply because the parents want it. An example of the most common bodily injury that is ruled unlawful, in spite of the parents’ desire, is beating. Such a punishment was once considered permissible and within the limits of the parents’ “right to chastise”. Today it is prohibited by law. §1531 BGB, decrees: “Children have a right to non-violent upbringing [...] corporal punishment is impermissible.” However, many parents are to this day convinced that there are situations they find that warrant a “good beating” or a “hefty slap on the face”, not to the child’s detriment, but for his wellbeing (§1627 BGB). Is such a punishment a justified bodily injury, because both parents want it and because they believe they do the child good by inflicting pain as an educational measure? Of course not. The legislature has the power to uphold its conviction that corporal punishment is degrading and never in service of the child’s wellbeing, and to confront those who think otherwise by implementing a legal prohibition, thus breaking with an ancient, worldwide, and heretofore permitted parenting tradition.

III. Circumcision and §1631 BGB

Parents or their agents are only allowed to deliberately injure a child, when the intended injury is consistent with statute and law. Is that the case when the injury consists of a non-medically indicated, purely religiously motivated circumcision? As obscure as the reader may find *Schwarz's* phrasing of his conclusion ("As a result, the religious rationale of norms can be positioned within governing law"), it becomes clear enough that *Schwarz* answers the question in the affirmative. He is for a "concept of the state" that awards a central importance to religious freedom and on principle forbids the state to evaluate the substance of a religious community's faith and faith-guided behaviors, as long as the legal order is not fundamentally compromised." And in parentheses, he decides the latter "is to be negated with regard to religious circumcision" (p.1129). My interpretation of that statement is: religious circumcision, although having the characteristics of punishable bodily injury, must be seen as justified bodily injury, because of its religious motivation according to Art. 4.2 GG.

One could try to support the author by pointing out that §1631 BGB prohibits only corporal *punishment*; thus with regard to physical violence, the law negates only the parental right to chastise, which suggests by implication that a parental right to circumcise exists. But this argument obviously goes astray, and *Schwarz* himself would reject it, because otherwise the threat of legal culpability, which he wants to categorically direct towards circumcision of the clitoris and labia, vanishes. Mind you, he calls *Jerouschek's* argument – that ritual male circumcision is also indictable – biased and prejudiced and lacking "the proper scientific distance" (p. 1125, Fn.8). The point, however, is that *Schwarz's* own scientific integrity should have opened his eyes to the fact that the partial amputation of the male sexual organ must equally be classified as genital mutilation. He uses this honest terminology only for female circumcision, casually remarking in a footnote that "in this respect a justification for reasons of tradition or religion is inadmissible"(p. 1125, Fn. 4). According to *Schwarz*, it should "hardly be deniable" that "religiously motivated circumcision of boys [...] differs fundamentally from genital mutilation of women" (p. 1126). They certainly differ from each other, on the face of it and in their consequences, but do they differ fundamentally? In my opinion, one can very well argue that they are fundamentally the same. I know from several Turkish students whom I have interviewed that they consider their own circumcision a mutilation, which they would under no circumstances inflict on their own boy.

There is nothing that can be deduced from §1631 BGB in support of *Schwarz*. Does this statutory provision even speak against him? Yes, it does. The redefined subparagraph 2 explicitly prohibits such acts of "care and custody" that inflict "emotional harm" on the child. The Muslim circumcision, typically performed on boys four to nine years of age, is almost always accompanied by emotional harm. Those who accept circumcision of male boys and do not consider it a breach of law, yet are open to looking at the opposing view's arguments, should read *Neda Kelek's* account of her nephew's "circumcision celebration" (sünnet düğünü), which she experienced at her sister's house in Anatolia⁸. She asserts that one must know that the "proper" circumcision includes an aspect of agony. Heavy sedation, common in German hospitals, devalues the ritual, because it is matter of initiation, which the circumcised boy (sünnetcogugu) should experience in a conscious and masculinely brave manner. "Circumcision belongs unconditionally to being Muslim and to male identity, which can only be acquired by those who can endure pain. He who cannot tolerate the pain and therefore does not seem

ready to sacrifice a piece of himself to Allah, cannot belong“, writes *Kelek*, who describes her four year old nephew’s circumcision thusly: “Then came the men to fetch the boy. As they took him away from me, he began to cry softly. Once on the table, they had to tear his arm violently from his godfather’s neck, for he would not let go. Four men held him down. A four-year-old child, a rag in his mouth, arms and legs pinned down by four adult men, so that the circumciser could place the knife. This image I could not bear and ran out of the house.”

Circumcision causes, as *Kelek* quotes psychiatrist *Janet Menage*, “a lasting traumatization [...] The feeling of comfort, security, and trust that children of that age generally have in their parents is being replaced by a different life pattern – they feel powerless and betrayed.”⁹

IV. The “child’s wellbeing” as grounds for justification?

1. Unproblematic cases

Schwarz could defend his standpoint by referring to the fact that children are subjected to other bodily-invasive procedures that take a heavy toll on them, and of which they may be fearful, and from which they might beg their parents to be spared. Think of tooth extraction, excision of appendix and tonsils, chemotherapy, and amputation. Parents are even allowed to subject their child to surgeries to prevent future emotional disturbance, such as the correction of protruding ears, which is not at all harmless. Isn’t the full integration of a boy into his and his parents’ religious community also an important goal, comparable to ensuring health or the ideal ear position for reasons of beauty?

In this respect, too, *Putzke* looks for the answer in application of the term “wellbeing of the child”, which is what should matter as well when answering the question “whether the bodily injury of circumcision of a child can be justified with the consent given by the parent or the person entitled to custody”¹⁰. “Pros and cons have to be balanced, whereby the benefit must outweigh the detriment – always with regard to the best interests of the child”¹¹. This is at least a plausible hypothesis, because initially, there is good reason to examine each parental decision affecting the child for its resultant consistency with the child’s wellbeing. Let’s assume a child undergoes a treatment involving fear and pain, let’s say a tonsillectomy, appendectomy, circumcision, or ear re-positioning plastic surgery. This constitutes a severe invasion of the child’s bodily integrity that requires justification. However, justification cannot be based upon the request for the surgery being presented as an act of “parental care and custody”. §1627/1 BGB limits custody by requiring that parents exercise care and custody only in service of the “child’s wellbeing”. For that reason the last mentioned surgery would not be justified if the parents somehow disliked ‘normal’ ears that adjoin the skull and found a profit-motivated surgeon to create jug ears, or if a surgeon enlarges a normal, healthy 15-year old girl’s breasts at the parents’ urging. Likewise, tonsillectomy and appendectomy would not be justified if the tonsils and appendix showed no clinical signs of disease.

2. Ritual circumcision as benefit

a) The argument of subservience to health

Hygiene and health arguments put forth by German urologists and surgeons who upon request cut off the healthy and smoothly retractable foreskin of a child must be rejected. Extracting teeth and amputating toes also facilitates hygiene of the respective body parts. And an excised body part surely does not become the cause of illness later on. This holds true for the appendix, the tonsils, the spleen, the gall bladder, the prostate and of course the foreskin. Prevention by amputation, as *Christopher Fletcher*, surgeon and pediatrician, points out, is as stupid as removing the olfactory organ to cure an inflammation of the nose. The well-known arguments do not stand if reason is brought to bear. They render it irresponsible to irreversibly cut off a child's healthy body part that was given by nature and confirmed by evolution.

This is also the view of *Putzke* whose particularly thorough examination also includes the readily invoked infection risks. "The detriments (loss of foreskin, intrusion of bodily integrity, surgery risk) outweigh the (dubious) benefits. A circumcision that serves purely as prevention is therefore, in principle, not a medical treatment. Such a surgery does not serve the wellbeing of the child, which is why consent given by a person entitled to custody is void and therefore does not have a justifying effect."¹²

b) The argument of social benefit and the problem of evaluation

Putzke's hypothesis – that the child's wellbeing is the deciding factor - demands that we search further. In the process of weighing pros and cons, could there not be *social* reasons that come into play and in the end tip the balance in favor of ritual circumcision? *Putzke* sees clearly that within his approach he has to ask this question. He looks for the "benefit" of religious circumcision and finds it in the fact that in Islam and Judaism circumcision plays a role that is "affirming religion" and "identity-establishing". "Un-circumcised boys", he quotes *Kelek* "are not accepted in Turkish society. Circumcision belongs unconditionally to being Muslim and to male identity". He continues in his own words: "It is undeniable that forgoing an identifying procedure can have far-reaching consequences. It can even have a stigmatizing effect not to be circumcised in societies where circumcision is practised."¹³ He has of course good arguments as to not let this benefit tip the scales against detrimental effects. The strongest and most impressive reference is a hidden aspect of governing law that was by-passed by *Schwarz*. It is §24 of the Convention on the Rights of the Child¹⁴, which states that the signatory countries agree "to take all effective and necessary measures to abolish traditional customs and practices that are detrimental to children's health". "Religious circumcision is such a practice," *Putzke* adds laconically,¹⁵ and thus rightfully deduces the judgement that preservation of the child's bodily integrity takes priority over adherence to a religious custom that orders a healthy body part of a child to be cut off.

This entire line of thought sounds precise and appealing because the author seeks a fair assessment that considers all pros and cons and therefore makes an effort to find something positive in circumcision, something beneficial to the child's wellbeing. However, I think it's exactly that which leaves some readers as dubious and uneasy as I am. After some hard thinking I now see clearly what it is that makes *Putzke's* reasoning problematic, even contestable. After all, it concedes a "benefit" to

circumcision for the child's wellbeing. His concession says: Ritual circumcision serves the child's wellbeing in so far as it protects the boy from marginalization, from stigmatization for being uncircumcised, and, by the same token, affirms identity and membership in the Muslim community. A defender of the ritual will certainly seize on this. He will gladly confirm the thesis that the child's wellbeing is crucial, and will - with sufficient prudence - even concede that the procedure of circumcision, constituting a massive bodily injury, may be initially detrimental for the child. He, too, will say that circumcision has, for better or for worse, great significance for the child's wellbeing, and will concur with *Putzke* in that it's a matter of evaluation and deciding whether advantages or disadvantages predominate. However, his answer to this question would be diametrically opposed to *Putzke's* answer. The injury, he will argue, will have healed after a few days, after which the circumcised male won't have any pain or discomfort, and he will then enjoy the known hygienic and health benefits. Empirically, he will in most cases be proud of his masculine dignity, of the mark of being Muslim, and of his belonging to the Umma, which will offer him help and security for all his life. In light of this, one cannot seriously argue which is more beneficial for the wellbeing of the child: being spared or being subjected to circumcision. What's more, §24 of the Convention on the Rights of the Child would not make an impression on him. His dismissal could well be: if this section at all frowns upon male circumcision, which I challenge because of its many health-protecting effects, then the underlying values are simply wrong. And besides, they are not binding for parents, circumcisers and physicians. Unlike §1631 BGB it does not contain a prohibition addressed to everybody; it merely obligates the contracting states to take certain measures. If it would come to an explicit prohibition of circumcision in Germany - as it has in Sweden - he would consider the law unconstitutional.

c) My own way of looking at things

So far, the defender of ritual circumcision concurs with *Putzke*. However, I have to object to their shared thesis that the child's wellbeing benefits even in limited ways from circumcision. I counter that decisions of parental care with respect to the child's religion, being covered by Article 2.1/2 and Article 4.2/3 GG, i.e. making them a parental choice, have to be viewed, from a legal perspective, to be *neutral to the child's wellbeing*. Therefore, in my assessment, *Putzke* should not have granted circumcision a bonus point over non-circumcision, thus exposing himself to such tricky "weighing". The asset of religious inclusion and stigma-prevention, which he includes in his weighing, is null and void.

My assessment will not only be contested by pious Jews and Muslims, but also by many religious Christians. Even today, most clergymen claim that their respective religion or denomination represents the true faith and teachings and that it actually would be best for the welfare of everybody to confess faith in their community. With that is the tendency to view the "heretics", "infidels" or "misbelievers" with pity or contempt, if not even hostility. In the Muslim point of view they are even brazenly called "unclean". A strictly Catholic grandmother, for instance, will consider the child's wellbeing in terrible danger if the parents hesitate to baptize their newborn; and her worries would be understandable if the child will likely grow up in a Bavarian village where everybody is baptized and Catholic. Yet our Constitution categorically prohibits measuring decisions made by parents about their sons' and daughters' religious status against the criterion of the "wellbeing of the child", a family law

term (Domestic Relations Law) – by approving one and disapproving the other of two contrary decisions. It would thus be untenable, in the mentioned example, to assume a violation of §1627 BGB (i.e. an unlawful behaviour!), if the parents refuse to make the child a member of the Catholic church through baptism. And this holds true even for entirely subjective reasons. The decision not to baptize may stem from a superficial annoyance, be it the upset over a decree by the Pope, or the constant meddling by the grandmother. Nevertheless, the decision would be legally indisputable. Indeed, even if the disgruntled parents *themselves* thought that it would actually be better for the child to be baptized, the baptism could not be legally enforced.

The irrelevance of the question of “the child’s wellbeing” finds its distinct expression in the Constitution. Article 7 subparagraph 2 constitutes: “The legal guardians have the right to decide over the child’s participation in religious education.“ This right is given without restriction. The legal guardians’ decision is not being scrutinized whether and how it serves the child’s wellbeing. This is a wise regulation, because whatever the vague term “the child’s wellbeing” exactly means, within the realm of religion, one cannot predict from any childhood course what will accrue to the child’s wellbeing in future spiritual, emotional, moral and societal matters. For the child in the Bavarian Catholic village it would possibly be best if he were to grow up within the Catholic tradition, closely connected to his baptized playmates and schoolmates. Yet, maybe it would be best for him if he stayed away from the church and had to find his own way for himself later.

V. From child’s wellbeing to parents’ wellbeing: Parental religious practice as grounds for justification?

At this time circumcision is not a matter of a bloodless symbolic ritual, which, of course, parents would be free to choose, but a matter of severe bodily injury associated with a loss of body substance that is irreversible. As outlined above, this procedure cannot be justified as an act beneficial to the child’s wellbeing. What is left for the defender of this practice is their argument of a powerful religious tradition that makes it intolerable to many parents to imagine their child keeping a penis from which nothing has been cut off, or who would even ultimately decide later at a mature age against circumcision. This reasoning lets the mask slip, as it were, by defending circumcision not with the child’s interests, but the parents’ interests. This is honest, because on closer consideration it is evident what would be best for a not yet circumcised boy – to spare him fear, despair, loss of trust, mutilation and weeks of physical pain – and instead let him decide later *for himself*, maybe at age 16, for – *or against* – the ritualistic, medically unnecessary amputation of his foreskin. To allow infants to be circumcised disregards the interests of the child, yet honors tradition, religion and parental piety. What does one make of this attempt to legitimize the practice?

Julius Chaim Soussan agrees with *Schwarz* and opposes the essay by *Putzke, Stehr and Dietz*¹⁷, by saying: “Notwithstanding our own religious characteristic, we Jews in Germany should fight this year at Chanukkah against those who want to dictate how we have to live our Jewish faith. What represents

our Jewishness has been determined by ourselves for millennia. We object to supposed guardians of the law, who want to alienate us from our identity for the benefit of mainstream society!”¹⁸ Yet, one does not have to be directly affected by the affirmation of circumcision as an offence, in order to argue this way. The writer *Michael Zeller* asked me in a private discussion forum “Do you really want to set our narrow, time-conditioned and time-bound German law against a centuries-old tradition practised a thousand times daily all over the world that has a deep religious meaning for Jews and Muslims?” This rhetorical question can be interpreted in two ways. On the one hand, there is the assertion that such an ancient and holy custom stands above our national temporal law and cannot be measured against it – just like a force of nature. I concede that such a thing exists. Parents can do horrible things to their offspring, even killing them, without any law paying attention to it. If a mother bear eats her cub, which can happen, such an act of killing cannot be measured against any norm. It is neither unlawful nor legal, neither forbidden nor allowed. Yet, this value-free point of view cannot be transferred to *human* actions. Not even to those which we spontaneously tend to call “legally irrelevant”. Even the harmless singing of Christmas carols already constitutes a juridical and justifiable action, because the singer – contrary to the singing bird in a tree – practises his “right to free development of personality”, according to Art. 2.2 GG. There is always the question of whether his singing might be illegal, be it as unlawful noise in disturbance of the peace, or because of an opposing clause in his lease agreement with the landlord.

On the other hand, one can interpret the above question as such: If you jurists really have to make judgments, then kindly show respect and interpret your regulations in a way that does not collide with the centuries-old religious custom of male circumcision, but instead acknowledges this devout ritual as legal. If this is meant, *Zeller* finds what he demands in *Schwarz*’s arguments, who answers in the affirmative the question of whether “religiously motivated circumcision is constitutionally legitimized by religious freedom” (p. 1126). Once again: Legitimization not because circumcision would benefit the wellbeing of the child, but because it is part of the parents’ religious practice, which to forego it would be too much of a sacrifice for the parents! This sounds disconcerting, yet a glance into GG confirms *Schwarz*’s reasoning. Article 4 makes no limitation. The first two subparagraphs state: “Freedom of religion, freedom of conscience and freedom of religious and ideological creed is guaranteed.” – “Unimpeded practice of religion is guaranteed.” Let us compare this to Art. 2.1 GG, which states that everyone has the “right to free development of personality”, yet only, “as far as it does not violate the rights of others and does not contravene constitutional order or moral law”. However, the special development of personality in the form of “religious practice”, apparently must remain *in any and all cases*, unimpeded and unchallenged.

Does this therefore also apply in cases where the rights of others are violated? How about the right to life of a firstborn child, who is sacrificed by exotic immigrant parents to their god according to their ancient devout custom?¹⁹ Of course that cannot be right. The police would have to strongly “impede” this kind of religious practice; they would have to *stop* it. Even if there were nothing more to be found in the Constitution with regard to religious freedom than what Art. 4 states, in truth it would not be guaranteed without limits, but only within the boundaries intrinsic to the Constitution.

One caveat is also made by *Schwarz*, but it is so unclear that all, or nothing, can be deduced from it. “Faith-guided behavior” that hurts another person is then no longer legitimized as a religious practice when “the legal order is fundamentally challenged” (p1129). With regard to medically non-indicated and purely religiously motivated circumcision, *Schwarz* specifically draws the line, in pursuance of his criterion, between male and female. Because in either case it is matter of a mutilative bodily injury (§§ 223, 224 StGB), I can only take it that, although seeing the “legal order challenged” in both cases, *Schwarz* considers this challenge being “fundamental” only through genital mutilation of the female body. This implies, in the abstract, that one can negate “fundamental” challenge of the law for all kinds of realized elements of offence, as long as they are to be acknowledged as religious practice. One can thus claim justification according to Art 4 GG for bodily injury, false imprisonment, coercion, criminal damage, trespass, insult etc. and incidentally, also for genital mutilation inflicted on little girls! It, too, has religious reasons, because those who demand or execute it view it as a service agreeable to God. The assumption of fundamental challenge of the law – which is not the perpetrators’ intention anyhow – is at the discretion of the one who judges.

This whole issue does not make sense to me. Such violations of the rights of others can be permissible in emergencies and based on valid consent of the other, but never because the perpetrator practices his religion through them! Let’s assume that within a sect, unnoticed from the outside, the Christian tradition of flagellation subsists, and the parents force the children to flagellate themselves for the atonement of their sins until they bleed. Or think of a Muslim father who, during Ramadan, and against medical advice, withholds food and drink from his child who suffers from diabetes and consequently a deterioration of health. Whoever benefits from protection of the German law is also subject to it, i.e. he is under the direct duty to observe – among others – the prohibition of bodily injury. It cannot be consistent with the Constitution to interpret Art.4 GG such that it restricts this duty and converts it, as it were, into permission to bodily injury, as long as the injurious act comes in the guise of a religious practice. However, it is expressed in written law – what *Schwarz* might have overlooked – that we are to the same degree obliged to abide by the law and respect the rights of others (here: the right of children to bodily integrity) while practicing our religion, as we are while practicing anything else, e.g. our profession. Namely, Art 140 GG incorporates Art. 136 of the German Constitution of 8/11/1919, of which subparagraph 1 decrees: “The civil and civic rights and duties are neither defined nor restricted by the practicing of religious freedom.” In other words, the extent of obligations resulting from established law is not at all diminished by the fact that we act in the exercise of our religious freedom. Or, to say it differently, the boundaries drawn by such laws on our discretionary acts cannot be shifted one iota through practicing religion.²⁰ Here are two examples: the uninvited visitor at the doorstep is asked by the landlord to leave the property immediately, or in an almost empty church someone witnesses an old man calling for help as he suffers a stroke. If the visitor refuses to leave, and if the witness in the church neglects to help the old man, they realize the elements of the offences of trespass (§ 123 StGB) and failure to render assistance (§ 323c StGB). With Art 4 GG taken as grounds of justification, the following instances would result in absurd unequal treatment: The salesman on the doorstep would be liable to prosecution, but carolers and Jehovah’s Witnesses would be justified because they are practicing their religion with pious persistence. The cleaning woman in the church, who remains unaffected and continues dusting would be committing the offence of denying assistance, while the pious lady who says her rosary could claim “I am

justified to remain kneeling and continue my prayers because I must not be disturbed by anything and anyone in the practice my religion and I'm sorry for the old gentleman!"

That this is nonsense is evident even without Art. 136 of the Weimar Constitution. But now we even have it in black and white: Civic duties can not mitigated through the exercise of religious freedom. Even though the mentioned persons practice their religion – proselytizing or praying – they must cease their religious practice in order to comply with their civic duties according to §§ 123, 323c StGB.

Article 136, as adopted into the Constitution from the Weimar Constitution states exactly that, which common sense would assume anyway: religious practice does not alter the boundaries of one's rights and responsibilities. It provides the necessary limitations on religious freedom, without which the basic right to religious freedom would practically be unthinkable.

VI. Prevalence, age and everyday occurrence of circumcision custom as grounds for justification?

The question of whether “religiously motivated circumcision of boys is constitutionally legitimized by the right to religious freedom “ (p. 1126) cannot be affirmed, but has to be negated, contrary to *Schwarz's* view. Article 4 GG does not entitle anyone to commit criminal offences. The accuracy of this statement in cases other than male circumcision is clearly shown in the examples of female circumcision, or the failure to render assistance during prayer in church. To claim an exemption for the ritual cutting of the foreskin of little boys is purely arbitrary.

My opponents - at least those who subscribe to rational reasoning – will, for better or worse, have to admit this and give up their religious reasoning as futile. Yet, they are nowhere near quitting the field because of that. What remains is, simply put, the *cultural* argument that always accompanies the religious one. For instance, *Soussan* demands of “Jews in Germany, notwithstanding their individual religious characteristic (...) to defend against others who want to dictate how we have to live our Judaism.” *Zeller* includes the Islamic world and points out that, after all, “male circumcision is being practiced globally for centuries and performed thousands of times every day.” Finally, there is *Simon Spiegel* who recently raised the question “No right to circumcision?”²¹. As far as I can tell, he holds the personal view that “children should be able to decide over their bodies themselves”, but regarding other peoples' attitudes, his opinion is that “in the Jewish view there is little to be discussed.” “The Brit Mila is an essential component of the ritual and even for secular Jews it's usually not open for debate”.

The cultural argument invokes, to use a vague catch phrase, “the normative power of the factual.” In the face of such tradition, prevalence and frequency, German prosecutors should lay down arms and declare male circumcision “somehow” consistent with criminal law. *Putzke* too, who discusses the factual issue as a problem of “social adequacy“, though negating in the end this consistency, concedes that it has to be considered, if only because – in so far as is apparent – there has not yet been a prosecutor in Germany launching criminal investigation proceedings against a person who *lege artis* has performed a non-medically indicated circumcision.”²² Indeed, this reasoning appears to make sense at

first glance, yet upon closer inspection it must be identified as invalid, because it is based on the “naturalistic fallacy.” It extrapolates from the status quo to the way it should be, from the fact that circumcisions are everyday occurrences and not prosecuted to the decree that they must be validated as permissible.

That’s the way things are in our culture from time immemorial, and millions of men and boys are circumcised! That this statement does not contribute anything significant to the *legal issue* becomes clear by looking at legal prerequisites of neighbouring offences. In the case of a boy’s circumcision, the strong family member inflicts harm on the weak one, which is the same dynamic of a power imbalance that plays out between husbands and wives, and between parents and daughters. There are demographic groups who view it as part of their culture and – in pious contempt of society’s majority – as ordained by God to consider the wife subservient to the husband, and parents wielding far more power over their children than our family law grants them. Whatever the stronger one inflicts onto the weaker one in terms of aggravated assault, false imprisonment, abduction, and coercion, almost never leads to criminal prosecution, unless it ends fatally for the victim. Think of a girl, forced into marriage in Anatolia and kept prisoner in the husband’s house in Germany in servitude to his family. Such power and oppression is exerted – just like circumcision – with a clear conscience. For the perpetrators it is part of their culture that is grounded in religion, which is partly why the German justice system tends not to get involved. But no one can say that such connivance as a show of respect for culture and centuries-old customs is correct, and that the assaults, imprisonments, coercions etc. have to be accepted as permitted actions. Rather, they are a matter of criminal acts and must be prosecuted by law.

VII. The medical surgery as the lesser evil?

Some physicians argue that the threat of prosecution would force those willing to circumcise their sons into illegality and under the knife of untrained charlatans, which undoubtedly runs contrary to the wellbeing of the child. This argument does not hold, or else it would be true for all kinds of prohibitions. It is after all prohibited to consume heroin, to abort a normal pregnancy after the twelfth week, to mutilate girls’ genitalia, etc. Everybody who is affected by such prohibition and wants to disregard it is driven into illegality. It certainly would be better for the junkie were he supplied with drugs and would administer them under medical supervision, instead of committing crimes to get them and shooting up with contaminated needles. It would certainly benefit the wellbeing of a pregnant woman if the illegal abortion were not performed somewhere dubious abroad, but in a reputable German facility. But of course, these actions, which legislators deliberately prohibit to *everyone*, cannot be allowed in clinics and hospitals. The same is true for ritual circumcision. The fact that health risks are greater if performed elsewhere, can neither justify, nor excuse the surgeon. However, simply alleging that a legal prohibition would not reach its intended target is not a valid argument.

Through education in a compassionate manner, many Muslim and Jewish parents will accept the ban on cutting the foreskin of their son, because it is not hard to see that there is a reasonable solution

for their religious conundrum. Parents leave their son intact, and they then try later to convince him of the advantages of circumcision and let him decide for himself in the end. Some sons hold it against their parents as long as they live that this right of self-determination was taken away from them.

After all this, I will answer *Michael Zeller's* rhetorical question:

Yes, I really want to set our narrow, time-conditioned and time-bound German law against the centuries-old tradition of circumcision, and I deem it right to prosecute medically unnecessary circumcision done to little boys as criminal assault, according to §§ 223, 224 StGB.