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How far does the parents' right of education[1] go?
Looking at the example of the circumcision of boys

The permission to circumcise boys, as regulated now by § 1631d BGB (German code of law), cannot be justified by the right to the freedom of religion, but at best by the parents' right of education. It cannot be overlooked, though, that there are empiric uncertainties about the risks and consequences of circumcision, which make the constitutional situation less clear than frequently assumed.

I. Introduction

Following the ruling of the LG (state court) of Cologne from May 7th 2012, which classified the circumcision of a boy unable of consent (a 4 year old) as criminal assault, and the following, intense public debate, the Bundestag (German federal parliament) passed the law on "the extent of parental care in regards to the circumcision of the male child", which is based on a draft by the federal government. The 4th book of the BGB is being enhanced in its Title on Parental Care[2] as follows:

"§ 1631d BGB Circumcision of the male child

(1) The right to parental care includes the right to consent to a medically unnecessary circumcision of a child unable to reason or to consent if the circumcision is being conducted according to medical standard norms. This shall not apply if the circumcision risks the child's wellbeing, even under consideration of its purpose.

(2) In the first 6 months after the birth of a child, persons who are designated to perform circumcisions according to paragraph (1) by a religious community are permitted to do so if they have received specific training and are, without being a physician, equally capable of performing circumcisions.

An alternative brought in by members of the Bundestag that wanted to acknowledge the parents' consent only if the child has completed its 14th year of life and was able to reason and to consent and has agreed to the circumcision did not prevail. Amendments that wanted to strengthen the child's veto power, limit the time frame of a circumcision not conducted by a physician and clarify the requirements for the execution of a circumcision remained unsuccessful as well.
The JuristenZeitung[3] published comments on the ruling of the LG of Cologne and on the bill and one can't register a lack of statements of opinion neither in juridicial literature nor

[1] In the following, I will translate the German word "Erziehungrecht" with the English expression "parents' right of education", following the official English website of the Bundesverfassungsgericht (German Federal Constitutional Court) *bundesverfassungsgericht.net*, although the German term "education" should also be understood as "upbringing", "raising" or "parenting".

[2] Can also be understood as "custody".

[3] "Jurist's Newspaper", bi-weekly professional journal.

in the feuilletons. Why, then, another contribution on the topic? The background is our assessment that *both* "large camps", critics and supporters of the legitimacy of circumcisions, often assume unconvincing premises in decisive aspects, namely the constitutional dimension. The critics, who can be found predominantly in the science of criminal law, misrepresent the relevant standards of evaluation, because they assume primarily based on § 1627(1) BGB (Civil Code) that from the perspective of an objective observer the child's well-being needs to be recognized and implemented. Thereby they misjudge the parental right to education that comprises extensive room to maneuver. Supporters of impunity of the circumcision of boys on the other hand, who dominate constitutional literature, tend to overemphasize the right to religious freedom from article 4, paragraph 1, 2 GG (Basic Law, constitution). Our premise is that the new law has to be judged against the backdrop of [the question] whether it pays justice to and is justified by the scope of the parental right to education, which is guaranteed in article 2 paragraph 1 GG. The decisive question is under which circumstances federal intervention is permissible and required as a barrier for the parental right to education for the protection of the child. For an answer to this question we suggest criteria on the basis of which one can judge when a case is on hand that activates the in article 6, paragraph 2(2) GG the federal guardian duty (Wächteramt[4]). It is on this basis that §1631d BGB has to be judged.
Beforehand, a clarification is worth mentioning that this new legal situation means for a penological question. §1631d BGB regulates the permissibility of an approval by a custodial person, i.e. the requirements for justification in the context of the penological science of crime. It clearly follows from the explanatory memorandum, that §1631d BGB is supposed to work exculpatorily. Thus the legislator does not follow the notion that circumcisions are not to be conceived as an element of assault, as occasionally voiced in the literature, because it is socially adequate behavior. The reference to social adequacy was indefensible. An exclusion of assault based on social adequacy only comes into consideration under unusual, tightly limited circumstances, namely when a limiting interpretation becomes necessary because the offense contains regular as well as bagatelle elements (the classical example is a small Christmas gift for a mail person who has the status of a civil servant). Assault as an offense already contains a level of materiality based on the usual definition of physical abuse (vicious, inappropriate treatment that affects the physical well-being more than insignificantly). In regards to procedures of circumcision the judgment that we look at malicious injury is unavoidable – which is, de lege lata, if the requirements of §1631d BGB are met, justified.

II. Constitutional Guidlines

1. The child's rights

Circumcision touches on the guarantee of article 2 paragraph 2(1) GG: It is an interference in the child's physical integrity and requires justification if the state shall not have the right or obligation to protect this legal interest. Furthermore, considering the by the circumcision affected organ, the child's general right to personality[5], which protects

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[4] This term describes the federal institutions' obligation to protect the child's well-being against its parents or legal guardian.

[5] I follow the official website of the German constitutional court (Bundesverfassungsgericht),

“the intimate and sexual regions of the human as part of his privacy”, can also be of importance.
On the contrary, the child's right to religious freedom according to article 4, paragraph 1, 2 GG is insignificant – in both directions. Thus, it cannot be argued against a religiously motivated circumcision that it is an impermissible religious-ideological influence on the child; this argument does not hold because the renunciation of a religious upbringing has defining influence on the [child's] personality as well. As long as the possibility exists that the child is able to reflect on and possibly abandon the inherited forms of life and conviction, even an especially emphatic religious-ideological education of the child has to be accepted – more precisely: it does not even constitute an impediment of its right according to article 4, paragraph 1, 2 GG, because every education inadvertently performs an imprinting. Inversely, one cannot argue with the child's religious freedom for the circumcision neither: For the later decision to not belong to a religious community is without doubt protected by article 4, paragraph 1, 2 GG as well. The consideration that the parents recognize the child's religious freedom does not help, since the objective is to delimit the parental authority over the child. Religious freedom remains completely insubstantial and thus without direction since the child does not yet have any substantial religious convictions.

2. The Religious Freedom of the Parents

In the public debate on the circumcision of boys the religious freedom of the parents and the respective religious communities was and is to the fore: That Jewish and Muslim life in Germany would not be possible if circumcisions were prohibited is a powerful political objection against the ruling of the LG Cologne. Now one may indeed view it as a reductio ad absurdum if a legal interpretation leads to recognized world religions suddenly no longer being able to exercise a ritualized practice with central importance to their self-understanding and century long tradition. Or put more cautiously, since tradition as such cannot be a decisive argument: this serious consequence should be a stimulus to check again with more precision if this interpretation can be correct.
These arguments cannot be translated into an argumentation about the constitution or [an argumentation] that is dogmatic about the fundamental law, though – not directly through the basic right to religious freedom, anyway. This is not based on the fact that the new legal regulation does not have a religious background; it is obvious that the matter is about certain religious communities. It is also not decisive that these religious communities can hardly refer to this fundamental law in regards to the procedure of circumcision, and that it is questionable in regards to the parents if all educational measures are being protected by the right to religious freedom based solely on their religious motivation; these difficulties could be swept out of the way by defining circumcisions – also – as a religious ritual that consequently as a cultic act constitutes without doubt an act of religious practice in the sense of article 4, paragraph 2 GG. The actual problem is a completely different one: Even if article 4, paragraph 1, 2 GG is applicable here, as a result it does not help, because religious freedom cannot legitimize to compromise the rights of others – here: the child’s physical integrity – from the outset.

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bundesverfassungsgericht.de, in its translation of the term “Persönlichkeitsrecht”. Other sources translate the term as “right to privacy”.

Religious special needs may sometimes justify or even enforce an exemption from the general legal requirements of behavior if it only concerns the selective impairment of more or less vague community assets; e.g. the exemption from certain school events can be acceptable. It is impossible, by contrast, to gain the legal power to invade the rights of third parties through the right to religious freedom: Nobody has to put up with an assault because the intruder believes to fulfill a religious commandment. If such incursions are excluded from the constitution's scope of protection from the outset or if they become worthy of prohibition as a consequence of a balancing of legally protected interests might be an interesting question of the construction[6] [that is] dogmatic about the constitution. The result cannot be doubted, though, as the reference to imaginable relevant cases – such as the burning of widows and the genital mutilation of girls – might show. Religious communities and religious forms of life that are not compatible with the basic rights of others and that are thus not realizable, thus do not have any reason to complain. It is, on the contrary, their responsibility to modify their commandments in such a way that they stay within this frame. No objection can be derived simply from the circumstance that a legal order that protects the equal rights of all has limiting effects on certain forms of life; above all else these consequences cannot be used as evidence for the anti-religious, non-neutral character of the legal order.

3. The parental right of education

a) The applicability of the fundamental right

[The right to] religious freedom does not help parents who want to get their children circumcised because it cannot generally justify bodily injury at the expense of third parties. But the (isolated) consultation of this fundamental right is inappropriate for another reason as well: children are not arbitrary third parties to their parents. This is easily recognizable by the parents' right to take measures towards their children that would be out of question towards others – the determination of their whereabouts, their clothing, with age-dependent nuances basically their whole lifestyle. The socially exceptional relationship of parents and [their] children cannot be come to grips with [by applying] the general basic rights.

The right starting point for the constitutional consideration is thus the parental right of education (article 6 paragraph 2 GG) that speaks to this familial special relationship and is solely capable of processing its specific structure. That certain educational measures – like e.g. circumcisions – have a religious-ideological background can be considered by the enhancing consultation of [the right to] religious freedom – article 6 paragraph 2 in conjunction with article 4 GG – but in regards to the dogma of the fundamental law it is a secondary phenomenon.

b) The parental right of education and the child's well-being

Simply the assumption that its well-being is served best if the child grows up with its parents allows a reasonable justification of the parents' "natural right"and the thus acknowledged decision-making power over another person: the parental right of education "ensures most likely that the child grows to be a self-reliant personality and is capable of living in a society." The parental right and the child's well-being thus enter a

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6 Other sources translate the German word "Konstruktion" in the legal context as "interpretation".

differentiated relationship: On the one hand it follows from this approach that “the child's well-being must be the most important guideline for parental care and education.” For a

“constitution that highlights human dignity as the center of its value system, can in its regulation of interpersonal relationships principally not grant any rights over another person to anybody that are not at the same time tied to responsibilities and respect the human dignity of the other. The acknowledgment of the parental responsibility and the associated rights finds its justification on the child's need for protection and help in order to develop to a self-reliant personality within the social community.”

On the other hand the parental right and the child's well-being may not be put into a principal opposition. For the concretization of the child's well-being rests on the parents, they decide the educational content and methods according to their own concepts of a good life and a successful personality. If article 6 paragraph 2 GG “primarily” grants them an educational right and responsibility, it can't be any different since an education without educational goals is unthinkable. In a pluralistic society these goals will be quite different. Because of its obligation to remain neutral towards the different ideals of life and personality of [its] citizens the liberal state has to principally accept this plurality; it is not its task to replace the parents' educational efforts with its own – actually or allegedly – “better” educational concepts. Thereby parental educational goals with a decidedly religious-ideological background have to be included amongst the acceptable [goals]. It is not exactly the case that the legal acceptance of educational concepts characterized by religious beliefs - as sometimes asserted in the discussion on circumcisions - compromise the secularity of the state or the separation of state and religious communities. The opposite is true: Precisely because the state does not identify with one particular religion or ideology it respects the different religiously impregnated living and educational concepts of its citizens and abstains from an evaluation. Contributions pertaining to the science of criminal law that comment critically on circumcisions misjudge this constitutional point of departure regularly. They usually highlight the child's well-being and approach the question what parents are permitted to from the perspective of family law, i.e. with reference to § 1627(1) BGB ("The parents have to exercise the parental care according to their own responsibility and in mutual agreement for the well-being of the child.") At the same time they regularly explicitly or implicitly draw another conclusion: The opinion of an objective, external expert is decisive. E.g. *Tonio Walter* points to the "perspective of a reasonable third party external to groups inclined towards circumcisions." This position, with the reference to § 1627(1) BGB as the central standard and by basing its argument on the objective observer who has to recognize the child's well-being, is setting the direction [for the argumentation] - and is a mistake that even the LG Cologne succumbed to. The family law model regulates which norms of behavior should apply within the dipolar relationship of parents and child. If the formulation of these kinds of norms of behavior is at stake it is of course reasonable to prescribe the orientation: the child's well-being prevails. But already in the context of family law it would be deceiving to assume that a prefigured well-being of the child exists that can be recognized by an objective third party. As an instigation for the parents the following interpretation immediately suggests itself: Try to capture the child's well-being as neutral as possible, i.e. possibly deviating from your own interest, and act

adequately altruistically. The demand to recognize the child as an autonomous person and to try to pay justice to it is something else, though, than the concept of the child's well-being as an object of recognition, a product of a mathematical-objective calculation of costs and benefits.
And: the norm of behavior of family law is precisely not decisive, but the constitutional perspective. It is one question what the guidelines for parents are on how they have to behave in the dipolar relationship with the child. It is another question *when the state is permitted to intervene*. The guidelines contained in article 6 paragraph 2 GG can only be outlined as a triangle with the corner points parents, child and state, whereby there is a complex net of rights and responsibilities between these corner points. From this net the following points are relevant for our topic: Under which circumstances does an obligation for protection of the state towards the child, and accordingly a barrier for the right to resistance against state interventions that is generally due to the parents exist? Because the child's well-being is not simply an object of recognition but an object of creation, an extensive parental right to education has to be recognized. At first glace an objectifying understanding of the child's well-being might seem more advanced than the reference to the extensive right of education. But as long as the constitution grants the parents the right of education and [as long as] the education goals, without which no educational process works, are not objectifiable and remain controversial, one has to acknowledge the parents' creative rights.
Unfortunately this circumstance is being overlaid by ambiguous formulations in the ruling of the Bundesverfassungsgericht (Federal Constitutional Court). In decisions regarding article 6 paragraph 2 GG there are terms that can be interpreted to say that the court assumes a prefigured well-being of the child that is not being created but recognized: "fiduciary freedom entrusted in the real sense", fiduciary right, serving basic right. Similarly out of focus are the statements that the parents' right is not a "freedom in the sense of the self-determination of the parents", but is guaranteed "for the protection of the child" and that it "is already limited in and of itself by the child's well-being". Formulations of this sort might have added to the misconception that it has to be judged from an "objective, reasonable perspective" if a measure is conducive to the child's well-being. "Fiduciary" means that something has to be administrated in the spirit of another person. "In the spirit of another person" is being concretized in the contractual context by an agreement between the truster and the fiduciary.In family law the assignment can be that the fiduciary has to preserve *invariable and identifiable interested of the other person*. It is comprehensible that in support relationships in the sense of §§ 1896n BGB (when an adult is partially or fully unable to manage their affairs due to a physical illness or a physical, mental or psychological impairment) that the term "fiduciary" is being used. But there are major differences between typical support relationships and the eduction of children. On the one hand children lack a sufficiently stable preference for their lifestyle as long as they are not close to the limit of majority[7]. On the other hand the development perspective is of different importance in regards to a child's well-being than it is for patients with dementia. In regards to children it is about creating an open future, whereas typical support relationships build on life forms and preferences shaped in the past. Although it is imaginable to formulate very general guidelines (e.g.: sound what kind of characteristics and talents the child brings with, or: keep as many paths for

[7] (refers to the year a child becomes of age, following bundesverfassungsgericht.de)

development open). However, the reference to the "objective well-being of the child" itself does not always help. The commandment to keep as many paths of development open as possible alone can be a matter of argument: this means to not really commit to any goal, which can be problematic in case of a special musical or athletic gift. As soon as it is a question of concrete decisions an epistemic problem remains. This is true for trivial decisions (Is soccer better than tennis?) as it is for the bigger life plan (Is the life of an academic preferable to that of a farmer? Does the stricter adherence to religious guidelines of behavior foster happiness?). Only by the way of extensive creative rights of the parents epistemic insecurities like these can be overcome.

III. Limits of the right of education

1. Principles

The parents' right thus refers to the child's well-being, but also serves, on the other hand, to define the child's well-being in the first place. It can therefore of course not be concluded that there aren't any limits for the parental rights of creation. The constitution itself implies this with a pointer to the "federal guardian duty" in article 6 paragraph 2(2) GG; in addition these limits also arise as a result from the federal protection obligation for the constitutionally protected rights of the child. The essential question is now where these limits are. Against the backdrop of the guarantee of the parental right of education in article 6 paragraph 2 GG and the public neutrality towards differing educational visions, state interventions can only be permissible when a parental measure can no longer be conceived under any imaginable aspect as a concretization of the child's well-being in this sense. Only that kind of parental behavior towards the child that cannot reasonably be conceived as care or education, but that has to be declared abuse of this assignment or negligence of the children transgresses the limits of the parental right and thus initiates the exercise of the federal guardian duty. The parental right's reference to the child's well-being does not mean "that it is part of the exercise of the federal guardian duty according to article 6 paragraph 2 GG to cater for the best possible facilitation of the child's capabilities against the parents' will". Even the possibility that "the child suffers from actual or perceived disadvantages as a result of the parents' decision" is thereby accepted. The state's role is thus limited to "active defense in the case of exception" if the familial situation becomes "unbearable for the child according to general perception"; the state has to respect the parental right of education until the limit of threat to the child's well-being.

Respective limits have to be respected in civil law in the application of §1666 subparagraph 1 BGB that also regulates the triangle relationship. Here, too, [the rule] applies that not *every* mistake that has to be objectively disapproved of and not *every* threat to the child's well-being suffices for an intervention by the state. It rather requires an ongoing, grave hazard. This applies all the more if actions have to be punished that trace back to a conscious educational decision by the parents. An *asymmetrical situation of weighing legal goods against each other* results, since a priority of the parental rights of education as a right to resistance against the state has to be assumed. The LG Cologne, which assumed a symmetrical situation of weighing legal goods against each other (on the one hand: the child's well-being, on the other hand: the parents' right of education and religious freedom), failed to recognize this.

How can these extreme cases now be identified? In order to define the limit whose crossing triggers an obligation to protection or at least a permission to intervene for the state a catalog of criteria that encompasses different dimensions of evaluation is required. At *this* point the external perspective of an "objective third party" is decisive, although behind the reference to such a fictive figure stand deliberations on [the question] what exactly is normatively unambiguously prescribed or at least socially recognized as a criterion of evaluation in a particular social and legal system *beyond particular life concepts*. Criteria of that kind are highly dependent on time period and culture – what can be asked of children cannot generally be determined for all cultures and all ages. Nevertheless such limits need to be determined if one does not want to end up with a multicultural dissolution of the legal and constitutional order.

2. Hard Criteria

It is possible to name several criteria in the case of whose existence one should *always* recognize the state's right to intervene. One can speak of *hard criteria* since under such circumstances any other deliberations and differentiations become superfluous. One has to refer to the behavioral norm of family law in §1631 paragraph 2(2) BGB ("Physical punishment, emotional injuries and other degrading measures are prohibited.") that uses "degrading measures" as an umbrella term. In contrast to § 1627(1) BGB, § 1631 paragraph 2(2) is suitable for the definition of objectively determined, absolute limits because a parallel to article 1 paragraph 1 GG arises, the obligation of the state to protect human dignity. However, in order for human dignity to be affected, it must be a case of a *substantially* degrading measure. Is this requirement met, the limit has been transgressed. Parents cannot appeal to their right to resistance against state intervention e.g. in the case of abuse according to § 225 StGB (German criminal code) (prohibited acts are: torture and gross ill-treatment), but also in the case of other substantially degrading measures. Who puts his child on public display with a sign "I am a shop lifter" or who reacts to misconduct by the child with spanking transgresses the limits of the capacity of educational creation. Additional deliberations on the parents' pedagogical concepts or possible religious justifications are then superfluous.
The same applies if a measure causes substantial physical pain (except for very unusual cases of emergency medical services, such as a site of the accident with only provisional conditions). This as well is a culturally conditioned consideration. Attitudes towards the tolerability of physical pain come off very differently in historical and cultural comparison. But in our society a strong aversion against pain is that common that the demand: "never inflict strong physical pain on children" is plausible. The same, i.e. a rigid barrier, applies if parents subjected their children to procedures that would lead to a substantial impairment or a high risk of death – e.g. when parents who are deaf or mute themselves want to bring their children to a comparable state with a surgical procedure, or with extremely risky behavior, like trapeze exercises without a net.
For the context "circumcisions of boys" it is a central question whether one has to go one step further and note: "*Every* intervention into the physical integrity that is not medically intended transgresses the parental right of educational creation *per se*?"[8] The *LG Cologne*

[8] The grammatical structure of the German original is no less confusing and inaccurate than that of its translation.

thought it could refer to § 1631 paragraph 2(1) BGB ("Children have a right to violence free education.") in order to strengthen this thesis. This is not convincing, though: the first sentence is a general programmatic plea – only sentence 2 defines what is concretely prohibited. Rigid barriers have to be limited to extreme cases. There are imaginable interventions into the physical integrity and health damages that have to be tolerated although an external expert might doubt that this is conducive to the child's well-being. Educational mistakes with health damaging outcomes are probably relatively numerous – just think of parents who as opponents to the so-called conventional medicine do not administer antibiotics prescribed by a physician or who reject vaccinations and thus cause the exacerbation of a bronchitis or the measles, or who smoke in the presence of their children, who don't encourage physical exercise or who aren't mindful of the healthy nutrition of their children. Such health damages due to neglect have to be tolerated as a consequence of their right to self-determination (despite the parents' guarantor role!). Now one could certainly distinguish between neglect and active assault and demand an absolute ban on all active interventions into the physical integrity of a child unable to consent beyond medical indications. This was how the with the government's bill competing proposal saw it: The right to physical integrity has priority over the parental right of education.
A from all other circumstances independent prohibition would only be justifiable, though, if one holds the view that it was possible to reach consensus on a certain attitude towards the human body. This attitude would be that the naturally given state of the human body has to be respected. Without a doubt there are social movements that consciously or unconsciously assume such "sanctity" and a "priority of the natural". These become visible in discussions on bio[9] ethics or plastic surgery for example in which sometimes the "natural" human body is attributed a sacred state. It would not be convincing, though, to say that it would be possible to reach consensus on such concepts. Opponents of circumcisions usually do not content themselves with the argument: "Infringements of the physical integrity of a child unable to consent are per se, always and unconditionally, illegitimate." either, but support their criticism with additional criteria. A prohibition of all procedures, even those that are *indeed harmless* in regards to consequences and risks, would hardly be justifiable especially considering the fact that parents by no means always endeavor the optimization of their child's well-being. Many educational relationships, many decisions regarding media consumption, nutritional and exercising behavior and so forth merit criticism in the public discourse without the state being allowed to intervene. Adverse influences on the child have to be accepted to a certain degree – against this background a fixation on infringements of the physical integrity would be a disproportionate overreaction.

3. Soft Criteria
In most cases this is decisive: what are the concomitants? An overall evaluation is necessary in order to determine if the decision for an educational measure is still covered by the parents' right of educational creation. Such circumstances are:
- *reversibility*: an infringement of the physical integrity can be justified more easily if the related change is not permanent, i.e. reversible (which is why lobe piercing is to be

[9] "Bio" in German refers to the English term "biological" as well as "organic" (as in organic food e.g.)

judged differently than a tattoo). On the contrary, that which can only potentially be rectified with difficult or contingently suitable operations must be regarded as irreversible.
- *openness to the future*: One has to differentiate between the question if a physical procedure is permanent and the question if the educational concept provides the child with the possibility to develop and implement its own concepts. It must be the goal of parental education that the child becomes a "self-reliant personality"; it should develop to a "independent, self-reliantly acting mature person". An example for an educational measure that is open to the future is the Christian baptism. The meaning as a sacrament is only relevant from a perspective internal to the religion, but not if the baptized person leaves this perspective later on – we are looking at a measure that is open to the future. The counterexamples are sex changes and sterilizations that are not only physical irreversible, but also do not leave the child an open future.
- *social stigma*: Another circumstance is if a stigmatization occurs in the social everyday life. Physical changes that are regularly exposed to the views of others, such as a tattoo or other distinctive features visible during everyday activities, are problematic.
- *integration into a comprehensive educational concept*: A crucial criterion for judgment should be if the measure is first part of a comprehensive, solid, educational concept based on [preferences] beyond personal, self-involved preferences, and second how important it is within this educational concept. Because the parental decision for a certain concept of "the good life" for their child has to be respected, this has to be applied to single decisions derived from it as well. At this point, religious life concepts and educational concepts based thereon can be relevant, as can be ideological concepts (article 4 paragraph 1 GG), if it is plausible that a religious or otherwise grounded educational concept *as a comprehensive package* is not evidently damaging to the child's happiness-in-life and capability to live. In the case of long established religions strong in members a supposition is indicative that an overall harmless educational concept is at hand – which does not mean that it cannot be socially disputed. It is not decisive if a single educational measure is "objectively" necessary – it is sufficient that the customs of the religious or ideological community create a connection between the overall context and the single measure. – On the contrary, parental decisions that the parents themselves cannot justify as part of a comprehensive package, have to be judged differently. If the response to the "why" only was that a decision conforms to personal taste or personal preferences, but could not be justified as an element on the way to "the *child's* good life", the decision would have to be viewed more critically. This would be the case, for example, if parents cited their preference for flowers as their reason to decorate their toddler's body with respective tattoos.
- *negative statements about the affected child*: also educational measures below the precipice of substantial humiliation can be problematic if they are tied to explicitly or implicitly negative, derogatory statements that refer to the child's characteristics.
- *other important factors* for the evaluation of a measure refer to the consequences for the child's future life. On the one hand one has to determine with which probability significant unintended complications and side effects occur immediately following a procedure. On the other hand one has to consider if physical or mental long-term effects occurring during teenagehood or adulthood can be expected.

IV. Application on circumcisions
1. Are there absolute barriers?

If circumcisions are being conducted in a clinical environment, the boy is not being substantially humiliated by the exercise of the procedure. Equally one has to assume that the way [the procedure] is performed in Jewish or Muslim cultural circles outside a hospital and the meanings associated with the ceremony do not entail a personal humiliation of the affected boy. Substantial disabilities or a a high risk of a deadly outcome are also not to be expected – even the critics of circumcisions that highlight the risks would not speak of *substantial* disabilities or a *high* risk of death.
Of importance is the aspect of "no substantial pain", though. During and after the abscission of tissue that contains particularly many nerve cells occurs substantial pain. This applies also to an early implementation on newborn boys: Today there is consensus that newborns have a distinctive sensibility to pain (in the past this has been viewed differently). Therefore, there mustn't be any circumcisions without effective anesthesia independent from the boy's age. If one starts from the assumption that in our society substantial pain is considered intolerable, this is an absolute limit for the right of education. In *this* constellation, the incorporation into a comprehensive educational concept is *irrelevant*.

2. Evaluation based on soft criteria
a) reversibility – openness to the future – social significance – educational concept

The *LG Cologne* decisively based its argument on the "irreversible infringement on the physical integrity". This is an *indication* that could be cited for the inadmissibility of the removal of the foreskin. But it cannot be the only criterion. If one adds the two criteria "openness to the future" and "social stigma", the consequences of a circumcision present themselves as relatively harmless. This applies also if the affected choose later to leave the religious community or other life concepts than that preferred by the parents or if they do not want to disclose their religious affiliation in their professional or social environment. Openness to the future is being met: there is no background for a change of lifestyle – this would only be problematic if other communities made not being circumcised their constitutive characteristic. Just as unlikely are stigmatizing consequences of a circumcision in societies where professional and social interactions usually take place dressed.
The constellations that form the background of the current debate, namely the circumcision wished for by Jewish and Muslim parents, also meet the criterion of being a "indispensable part of a comprehensive concepts of the good life". The question for the "why" of a circumcision is relevant for the judgment if it may be approved by parents of a child unable to consent. Admittedly this is being denied in the literature, e.g. by *R. Merkel*, who is of the opinion that the parents' motivation is irrelevant. Indeed one has to agree with him in the point that a *moral evaluation of the parents' motivation* cannot be a criterion for state laws. But this is not about moral-contentual evaluations. Instead one has to differentiate between those cases in which the decision is based on a greater comprehensive concept of education, in which the parents' concepts of the child's "good life" is reflected, and those where this is not the case. Moreover, it is not only relevant for

the evaluation if the circumcision is part of a comprehensive packet of guidelines, but also what importance the single measure has for the establishment and facilitation of the educational master plan. Essential is here solely the parents' self-understanding. It is therefore inappropriate for state institutions to develop alternative methods of interpretation for religious pivotal texts or to engage in debates internal to religion in the context of definition of the limits of the parental right of education. When considering the parental right of education in the context of religious-ideological questions it is also principally misguided to deny the reasons put forth by the parents any importance because they are religious reasons: Precisely because the legal order accepts that parents regard a certain ritual for the initiation into a religious community as beneficial for the child's well-being it proves its [protection of] freedom. The – by the way very quickly raised – accusation of the "vulgar rationalism" of the debate on circumcisions is justified insofar as the religious motivations of the parents have been deemed insignificant.
It is also not unimportant is, what social message the procedure of circumcision conveys in regards to the affected children. Even beneath the precipice of "*substantial* humiliation", which has to be regarded as an absolute barrier, this aspect is of importance. In regards to the circumcision of boys there are no clues that an expression of inferiority is associated with it. But if one includes the circumcision of girls beyond the here narrowly defined topic, this becomes an important criterion of evaluation. The usual approach is to define *all* circumcisions of girls as impermissible, namely because the severe forms of such mutilations lead to substantial health issues and the loss of sexual sensitivity. However, next to the grave amputations there are, as has been indicated in the current discussion, less radical forms of the circumcision of girls. Insofar as the health and sexual consequences of these are indeed no different from those of the circumcision of boys, one would have to raise the question if their symbolic message is not significantly different – which has to be assumed, since the concept of a necessary purification ritual or attempt of control of (only) female sexuality is based on a negative assessment of characteristics that are allegedly specifically female. If the legislator seizes this difference in a standardizing manner by only permitting the circumcision of boys, the associated gender based discrimination lasts in front of article 3 paragraph 3(1) GG – especially since the strict prohibition of the circumcision of girls serves the purpose to avoid a severe disadvantage of women in certain cultural contexts according to article 3 paragraph 2 GG.

b) physical and mental consequences

One argument for the circumcision of boys is the considerably reduced risk of HIV infections and other STDs. The American Academy of Pediatrics thus concludes that the health benefits exceed the risks of the procedure. From a German perspective the suspicion has been voiced that a "circumcision lobby" wants to save its source of income. Beyond such speculations (which do not pay justice to the serious examination of empirical data by the "Task Force on Circumcision" that has been appointed by the American professional association) the conclusions of the American Academy of Pediatrics are irrelevant for another reason. They are based on a culturally different understanding of the applicable evaluation method, i.e. a utalitarian overall calculation[10] of costs and benefits (not: benefits for the billing physicians but benefits for the entirety

[10] In the sense of "weighing against each other"

of all citizens!). From a utalitarian perspective the decision to prevent an increase of HIV infections with routine circumcisions of newborns is comprehensible (if one calculates the high costs of medical treatment of HIV patients). But: the in our constitutional framework necessary decision on questions of fundamental rights has to be based on a different perspective than that of utalitarian calculation. It has to be judged if the *well-being of the individual affected child* is facilitated significantly. Thus it is the *ex-ante* perspective that counts, i.e. the probability that *this* child is going to contract HIV or is going to be exposed to a higher, with no other means avertable risk of infection by the lack of removal of the foreskin. In countries where the base rates of infections a relatively low and where there are good hygienic conditions the individual benefit of a circumcision for the affected child is minor – it can thus not be decisive.

The counter argument refers to the risks of severe complications. Very grave complications are possible, from substantial damages to the genitalia to the death of the child. R. Merkel calls to mind the more than 100 cases of death a year in the USA that can be traced back to complications after a surgical removal of the foreskin on newborns. But who refers to aggregated data walks right into the utalitarianism trap. These have to be put into relation with the total number of procedures, and decisive is in this case as well the *ex ante risk for the individual case*. Correlated to every single planned circumcision the likelihood of serious after-effects like death penis amputation is minimal, at least if it is exercised according to medical standard norms. One has to evaluate the relevance of such ex ante very minimal risks. The consideration that many educational decisions are associated with the small, but existing risk of severe injury or death suggests itself (the accumulated number of riding accidents or severe injuries in soccer should be stately). It has been argued against such comparisons that a circumcision is an immediate intervention in the physical integrity, the other cases, on the other hand, are the acceptance of risks without a previous, immediately infringing procedure. This has only limited relevance for the constitutional attribution of children's rights and parents' rights, though: that the risk of assault in the sense of criminal law results should be considered in constitutional contexts as well and should suggest a special sensibility, but in and of itself it does not lead to a definite judgment. Even if one should grant parents a higher openness to risk in regards to possible side effects of e.g. sport activities it does not mean by implication that *any* risk that results from an immediate intervention into the physical integrity has to be adverse to a justification – this is not even imperative if the ex ante existing risk of complications is very low.

What remains, next to the immediate risks of the procedure, as a serious problem is the possibility of not rarely occurring after-effects in the form of *mental and psychosocial changes* or, *after the commencement of sexual activity, negatively evaluated impairments of sexual contact.* Critics of circumcisions justifiedly point out that the blanket statement "completely without consequences" is inappropriate. The simple disregard of evidence in medical and social-scientific literature bears witness to naivety or intellectual dishonesty. Also the popular argument that the worldwide large amount of circumcised men testifies against the occurrence of afflictions and impairments is only partially convincing. The numbers are indeed a strong indication against the occurrence of *severe, obvious* impairments *in great numbers*. But even before the debate started in Germany in 2012 there were experience reports and publications on negative psychological and sexual consequences of circumcisions. If a topic attracts a lot of attention depends amongst other

things from the internal conditions of its social capability as a subject of discussion. It can be assumed that the affected [persons] have high inhibition thresholds to discuss familial, religious and culturally far-reaching and the genital area concerning physical procedures that could have influence on their sexual life.
The decisive questions are if a thought out before-after-comparison would reveal noticeable decline of sexual life quality (loss of sensitivity) *for some affected [persons]*, if they would be capable of drawing such a comparison at all, and if psychological consequences have to be apprehended if the procedure was perceived as a traumatic experience (e.g. if somewhat older boys already understand genitalia as a “taboo zone” and thus experience the procedure as an infringement). The state of evidence is not really certain. Personal reports of negative experiences exist, but so do contrary assessments of circumcised men. Beyond such individual communications one can find a number of scientific studies, but they do not paint a clear image either. There are already diverging results in examinations that test with measuring methods if the removal of the foreskin leads to sensory losses, i.e. to reduced sensitivity to touch (and thus potentially to an impairment of the sensation of sexual pleasure). Equally diverging result became apparent in surveys on the occurrence of sexual problems. There are examinations with a large number of participants according to which circumcised men do not report a decline in their sexual satisfaction, while other studies detect a small but statistically measurable correlation between circumcisions and increasingly occurring sexual problems or limited subjective satisfaction. Psychologists and psychotherapists have doubts regarding psychological consequences of incurred, possibly traumatic circumcision procedures (which are hard to measure in quantitative studies), and German pediatrics associations warn of circumcisions as well. One has to state that there are suspicions that must not be neglected, but without the need to regard the counter thesis of the relative harmlessness as definitely falsified.

V. Evaluation of § 1631d BGB

1. No unconstitutionality

The ultimately decisive question is: How should the procedure's immediate risks and the indications regarding the after-effects of circumcisions be handled? Our summation advises to avoid a blurring between the social discourse on the one hand and the constitutional consequences on the other hand. In personal communication with the parents and in a public social debate the advice to think about the circumcision's role in one's own concept of the “good life” in the light of more current studies that hint at risks is reasonable, maybe even imperative. But for the *state* the question poses itself differently, namely, if indeed the threshold is being met that makes it permissible or even obligatory to restrict parents based on the [state's] protective duty towards the child. It is crucial how the legislator should deal with the conditions of empirical uncertainty and with the difficulties of a precise determination of the safety limit of risk. The view is being held that the lack of risks has to be proven. But this requirement is very unlikely to ever be realized in a legislative procedure. From a constitutional perspective, the opposite view is being held: Only, if (long-term) damages are verifiable or at least extremely probable, the guardian duty, which permits the circumvention of the parental right of education, intervenes.

Instead of formulating such unrealistic, rigid burdens of proof, it should be recognized that there are in-between zones where *neither* the lack of risks *nor* the high probability of the occurrence of a damage can be determined. Only based on the limited possibilities for security of recognition in a legislative process it is often unavoidable to make decisions based on suspicious facts. The limited time frame and the large number of decision makers entail that the processing of empirical findings has to turn out more superficial than in a scientific publication. Remaining uncertainties can only be resolved by a political majority decision. It is thus in hard to delimit border zones imaginable that the indications can carry the decision for the activation of the federal guardian duty as well as the decision against it and that both are acceptable as political decisions and have to be accepted regarding their constitutionality. Thus are things in the debate on circumcisions: the recognition of an effective consent by the parents according to § 1631d BGB is not unconstitutional – but also the assumption of the alternatively presented bill would not have been. The reason for that is that the circumcision of boys in regards to the child's well-being is according to all reasonable opinions an *ambivalent* process. Even if one – as is constitutionally imperative – acknowledges that is is according to the parents' opinion an important aspect of the child's religious-ideological development that is conducive to its well-being, one cannot deny that circumcisions are also considering the possible immediate and long-term consequences associated with risks for the child's well-being, which may be considered as well. Therefore one may have to deal with a constellation that falls into the narrow border zone where the federal guardian duty *may* be mobilized, but the state *does not have to* intervene yet. In this sense the regulation of circumcisions is an original political question within whose scope the legislator can also acknowledge the special historical responsibility towards the Jewish community and the integration political consequences for Muslims living in Germany. Against this background it is also reasonable to explicitly regulate this question legally, so that criminal courts given the unclear constitutional legal situation will not find themselves in a situation where they have to put their own judgments in the place of political decisions. In other words: the the debate instigating ruling of the LG Cologne is not objectionable because its result is unjustifiable regarding the matter, but because it was achieved without sufficient legal basis and without unambiguous constitutional statement.

2. On the interpretation of § 1631d paragraph 1(2) BGB

The law demands in § 1631d paragraph 1(1) BGB as a positive requirement for the permission of the circumcision of a male child only that it is exercised according to medical standard norms. The inclusion in a specific educational concept is not explicitly required. The second sentence of the same paragraph, though, formulates an exception that is not explained any further in the legal text, “if the circumcision risks the child’s well-being, even under consideration of its purpose”. Imaginable would be exceptions for medical reasons, e.g. because the child suffers from bleeding disorder (although the conclusion immediately suggests itself that is is part of the “medical standard norms” mentioned in the first sentence to conduct preoperative examinations and, where applicable, to postpone or cancel the procedure). Furthermore, circumcisions of boys during which skin and tissue is being removed to an exceptionally large extent and which therefore lead to extensive wounds with a heightened risk of after-effects have to be

classified as irreconcilable with the child's well-being and as not justifiable.
The legal materials cite two examples. One concerns the factually opposing will of the child. This is a crucial aspect, especially when children are capable of cognitively conceiving the invasive nature of the procedure and is especially important when there is already a certain understanding of the concept “sphere of privacy” regarding genitalia. An infringement of the privacy of a child that understands its meaning and resists is a substantial humiliation. Under such circumstances, e.g. when a boy is forcefully being held and supposed to be circumcised, an entitlement to protection is in place due to the humiliating impact. However, it is not necessary to classify unspecific reactions that can be found in newborns like kicking or screaming as “factually opposing will” - for this purpose a certain understanding of the nature of the procedure needs to be assumed that is probably lacking in children under one year of age.
Furthermore the law's statement of grounds lists examples for purposes of circumcisions that raised doubts in regards to their compatibility with the child's well-being: “purely aesthetical reasons” or “complication of masturbation”. The exclusion of such reasons cannot be objected. If parents only refer to their personal preferences (the “pure aesthetical reasons”) that are not part of the comprehensive packet of conceptions on the “good life” for the child, an essential building block of the argumentation, which is necessary in order for the intervention in the physical integrity to be acknowledged as covered by “the parents' right of education”, is missing. The situation would be a little harder to judge if members of a religious group argued that the regulation of sexuality including a strict ban on masturbation is part of the for them and their children mandatory religious commandments. One would then have to point out the difference between “support educational goals” and “indispensable for the affiliation with a religious community”.The distinctiveness of the constellations for which § 1631d BGB was introduced lies in [the recognition] that a prohibition of circumcisions would make it impossible for the parents to implement their basic concepts of the “good life” for the child. Provided that the reasoning was simply that the circumcision fosters the child's religious educational goals, but without being a condition for being part of the religious community, a justification with reference to § 1631d paragraph 1(2) BGB would have to be negated.
The decision is problematic for circumcisions for prophylactic reasons (for the improvement of hygiene and for the prevention of STDs). The law's statement of grounds assumes the parents cannot be denied it. But this result is questionable. Why should “purely aesthetic reasons” not be sufficient, but “prophylactic” should? The materials explicitly state that “at least in Germany a prophylactic routine circumcision is not indicated”. It cannot be sufficient to point out that this is being seen differently in other medical cultures – for the reason for a diverging evaluation does not lie in a different evaluation of facts, but in the fact that U.S.-American recommendations pro circumcisions are based on a utalitarian calculation of the costs and benefits for society as a whole and not on a calculation of the personal benefits for the individually affected child. If e.g. an American couple living in Germany wants the circumcision according to the customs of their home country, the reference that according to German law this reason cannot carry a representative consent by the parents would not be an unreasonable burden.

3. The anesthetics issue

§ 1631d paragraph 1 BGB contains the important regulation that the circumcision has to be conducted according to medical standard norms. The law's statement of grounds points out explicitly that this includes a professional and efficient pain treatment. However, it is not specified what the effective pain treatment has to look like. In the relevant place only a previous description of the praxis is referenced, which consists next to general anesthetics or local anesthetics by use of injection also of the application of a skin numbing ointment. But there is serious doubt regarding the efficiency of the latter method, the application of an ointment, according to recent scientific results that have to be taken into consideration regarding the interpretation of the characteristic "medical standard norms", especially since they have been presented by representatives of respective professional associations.
The legal regulation (§ 1631d paragraph 2 BGB) is insofar problematic as it permits the circumcision by a by a religious community appointed person that is not a physician for the first 6 months after the birth. This could be interpreted as a renunciation of the requirement of effective anesthesia because the required invasive procedures are not permitted for non-physicians and they also do not have access to the required narcotics. The law's statement of grounds obviously shies away from clearly stating the problem. Admittedly it is communicated descriptively that "the old, orthodox tradition (amongst other things the renunciation of pain alleviation) … had always been looked at critically even by Jewish physicians and rabbis." But in the passages on § 1631 paragraph 2 BGB there are no explicit statements on the important aspect "anesthetization". Mentioned are insights into hygiene and disinfection, but not into the realm of anesthesia. However at the same time that procedures according to paragraph 2 have to be exercised according to medical standard norms as well, and "iatric reservations regarding special laws (e.g. the German narcotics act or the German medicinal products act)" that remained untouched are being mentioned. In this situation an interpretation compliant to the constitution is needed: a consent by the parents is also in regards to procedures according to § 1631d paragraph 2 BGB only justified if the circumcision is conducted under anesthesia that effectively prevents the incurrence of severe the pain according to the current level of medical knowledge (not according to the self-understanding of a religious community).

VI. Conclusion

Circumcisions as a not insignificant infringement of the physical integrity that is associated with risks can only be permitted, if, one the hand, it is conducted according to the medical standard norms and with effective pain treatment, and, on the other hand, if it is not done frivolously, but can be shown as part of an educational concept that is not necessarily religiously grounded but comprehensive and principally reasonable. The legal justification now undertaken by the legislator generally fulfills these requirements, although a constitutionally conforming interpretation of § 1631d paragraph 2 BGB is needed in regards to effective anesthesia. However, constitutionally it was not mandatory to establish this regulation: in the face of the difficulties regarding empirical evidence concerning the probability of damage and in the face of the difficulties concerning specification of acceptable risk thresholds the legislator may have also come to the

conclusion, that the protection of the child's physical integrity has to be prioritized. Anyhow, with the introduction of § 1631d BGB it is now clarified that circumcisions under the listed conditions are exempt from punishment. The legislator thus did not only justify circumcisions, but also defined their culpability – depending on the perspective on the legal situation before the change in the law: declaratory or constitutively – if the legal guidelines are not observed.

If one steps one step back, the regulation of circumcision presents itself as a paradigmatic case of cultural conflicts in a pluralistic or multicultural society, as they can be observed everywhere. The mutual rejections of religious or secular demands are understandable against this background, but they don't lead anywhere. An objectification of the discussion would be desirable, that should include a sober analysis of the ratio and and the limits of parental rights of education as well as a deepening of empirical knowledge about the risks and consequences of circumcisions and an unagitated examination of respective studies that neither aims at repression nor fearmongering.