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### **Constitutional Consequences Up Against Hallowed Traditions**

#### **- The case of circumcision–**

Currently, the millennia-old rite of circumcision meets resistance in the fundamental right of the child to bodily integrity. Under governmental guardianship, the basic right seeks protection from a tradition that refers to parental rights and the right to freedom of religion. Yet, if tradition proves not to be consistent with the modern concept of individualistic fundamental rights, the question arises whether this concept will have the final say, or whether a search for a different concept is due.

#### **I. A punitive sentence as scandal**

For a long time, no punitive sentence has created as much sensation in Germany as the verdict by the LG Cologne in May of 2012, ruling that the circumcision of a Muslim boy, performed by a Muslim physician, constitutes a criminal physical injury and stating that the surgical procedure cannot be justified with parental consent. The irreparable and permanent altering of the child's body, however, is detrimental to his well-being. Parental custody rights only cover measures that serve the child's well-being and find their limits in the fundamental rights of the child to bodily integrity and religious self-determination. In any case, parental rights are not considered unreasonably restricted, if parents are obliged to wait until the boy decides later, after having reached the age majority, whether to be circumcised or not.<sup>1</sup>

This decision in an individual case impacts the ritual of the world religion Islam. The constantly growing minority of Muslims in Germany feels their religious honor is violated. The already difficult state task to integrate Muslim immigrants encounters a new obstacle, one of criminal law. Indirectly, the circumcision verdict also affects Jews and insults their feelings.<sup>2</sup> Yet, it also touches on a German taboo and it provokes the German consciousness of guilt. That's exactly why the ruling experiences such fierce, moral and political opposition criticism. A journalist stated that circumcision being labeled as physical injury, in the sense of the penal code, is perverse. It is "a product of sadism by language", if in the year 2012 "a millenia-old practice, like circumcision, is condemned by German courts and a debate in Germany ensues making a semantic connection between Judaism and physical injury that leaves one speechless, a connection, by which Jewish parents allegedly injure their own sons. It would have been enough, if justice would have felt responsible for just twelve years in those days, when Germans and their accomplices not only committed physical injuries against Jews, but murder and manslaughter."<sup>3</sup>

This is not the language jurists use to criticize court decisions. To the critic it is obviously not about the question of whether a norm has been interpreted correctly or has been consistently substantiated. He rather questions the juridical application of law in general, because it has overstepped its bounds of legitimate possibilities. Juridical logic comes up against a hallowed tradition that, according to its biblical sources, traces back to the covenant with God by the patriarch Abraham. From the Book of Genesis: "As for you, you must keep my covenant, you and your descendants after you for the generations to come. This is my covenant with you and your descendants after you, the covenant you are to keep: Every male among you shall be circumcised. You are to undergo circumcision, and it will be the sign of the covenant between me and you. For the generations to come

every male among you who is eight days old must be circumcised. Whether born in your household or bought with your money, those who are not your offspring, they must be circumcised. My covenant in your flesh is to be an everlasting covenant. Any uncircumcised male, who has not been circumcised in the flesh, will be cut off from his people; he has broken my covenant”<sup>4</sup>

And Abraham, as it says, immediately circumcised every male in his house; including himself, at 99 years of age.<sup>5</sup> To the present day Judaism views circumcision as a central component of its identity.<sup>6</sup>

The trouble is, if and how today's legal system can incorporate and accept this tradition. The position of the Cologne ruling that exposes a contradiction retains paradigmatic meaning, independent of the intervention of the legislature that, reacting quickly to the ruling, declared circumcision permissible under certain conditions.<sup>7</sup> It wants to speedily end the uncertainty and prevent, with an ad-hoc-ruling, the Cologne verdict from catching on. The uncertainty persists. *Berolina locuta causa non finita*. Once the awareness of the problem is awakened, the law cannot put it back to sleep. The juridical reflection continues, whereby the effects of legislative intervention can be neglected for now.

The dispute was sparked by the question, whether ritual circumcision of a child, unable to reason or discriminate, constitutes a punishable physical injury, or not.<sup>8</sup> The presence of legal prerequisite implies unlawfulness if no legal proposition permits the act. Consent by parents, under whose legal duty the custody of the under-age child falls, comes into consideration as grounds for justification. The criminal condemnation depends on the statutory provisions for custody under Civil Code. Hence Civil Code determines which parent to assign custody in case of a divorce. Accordingly, a divorced Muslim father who has no custody rights cannot decide to have his twelve year old son circumcised, if the mother, holding sole custody and not being Muslim, objects.<sup>9</sup>

Civil Code defines cause and purview of custody. Yet, whether it can cover such consent depends on the basic rights of those involved. In the end, the answer to the question of legality hinges on compatibility with fundamental rights.

## **II. Premises of the discourse on fundamental rights**

### **1. Perception and interpretation of circumcision**

In the eyes of the physician, ritual circumcision is an invasive surgical procedure. The absence of the foreskin is a *factum brutum*. It only gains immaterial meaning through interpretation in a certain social context. In Judaism and Islam it is regarded as a sign, pointing beyond itself. For Jews and Muslims it takes on the status of a symbol of Jewish or Muslim identity. Of course, this symbol is not suitable for public acknowledgement, because it remains modestly hidden under civilized conditions.<sup>10</sup> It also is hardly suitable as a distinguishing characteristic, because it does not stand exclusively for one single group nor specifically for one single thing. To deduce from it one specific religious motivation is impossible, because customs that are indifferent to religion, as well as medical, hygienic, esthetic and more factors can also play a role.<sup>11</sup> It is said that worldwide 30% of all men are circumcised today.<sup>12</sup>

Ritual circumcision has a physical as well as a spiritual nature. Constitutional law cannot restrict itself to the physical while taking no account of the spiritual, because the religious meaning would lie outside of its secular horizon of perception. As far as religious meaning is in evidence within society, it has to be respected and protected as expression of freedom guaranteed by basic rights, even if secular state law must withhold judgement about truth of religion and about correctness of the respective understanding of faith. Therefore it cannot override the Jewish-orthodox interpretation of circumcision simply because many Jews turn away from the traditional custom. The fact that

circumcision is not explicitly demanded in the Qur'an, does not mean that the Muslim's reference to his religion loses its plausibility that is based on his fundamental rights.<sup>13</sup> Religion on the other hand, cannot simply 'spiritualize away' the physical amputation. Wherever blood flows the secular state makes an appearance.

The foreskin's amputation is irreversible. This, however, is not so for its consequences under secular state law. If circumcision symbolizes the identification of the circumcised with his religious community, then state law guarantees his freedom to break away from the community and his faith.<sup>14</sup> This is part of religious freedom. The same right, however, guarantees the community to define the religious consequences and thus determine whether circumcision is reversible in the religious sense, whether the renunciation of faith is to be condemned as apostasy or to be tolerated. German state-church law allows the option of leaving a church for religious freedom's sake. At the same time, it does not affect the sacramental understanding of baptism as bestowing a *character indelebilis* upon the baptized and imprinting an inextinguishable seal.<sup>15</sup>

## **2. The governance system of fundamental rights.**

The question of balancing religious tradition with secular basic rights of the modern constitution is being asked and answered by the constitution according to its fundamental rights criteria. The order of fundamental rights is designed with the individual in mind. Its foundation is the dignity of the individual as a person and as possessor of original freedom. Restriction of individual freedom through state law requires justification. Therefore, parents who arrange for circumcision of their son, and the person who performs it, and who are accountable to state law refer to their basic rights, which become active in their defense function. Yet, against that defense stands the basic right of the child, who is the victim of the circumcision. Certainly, the child's right is not directed against the circumciser, nor the parents, but towards state authority, which in this case is not being repelled but demanded. State authority has to protect the child from the private invasion. The fundamental rights in their defense function, on the one hand, and in their protective function on the other, make up the triangle state – Parents (perpetrator) – child (victim).<sup>16</sup>

It will have to be examined if and, as the case may be, how the autonomy of the religious community, which is also a guaranteed basic right, fits in the individualistic concept. However, in the end the question arises if the individualistic concept is suited at all to measure up to a hallowed tradition and if here the limits of possibilities are being overstepped.

## **II. Fundamental rights of the parties**

### **1. The circumciser's legal defense position**

Circumcision must be measurable against the defense rights of the circumciser. In as far as he is German and acting as a professional (whether he is a physician or not) the basic right to freedom of occupation comes into consideration (Art. 12 Abs. 1 GG), if one of these qualifiers is lacking, the 'absorbing' basic right to general freedom of action applies (Art. 2 Abs. 1 GG); beyond that, the right to freedom of religious practice, if he acts in service to a religion (Art. 4 Abs. 1 and 2 GG). Yet, none of these basic rights allows him to circumcise on his own authority a child, who is unable to consent or reason, that is to interfere with the child's body, including a medical treatment *lege artis*. Freedom rights guarantee their bearer determination over self but not determination over third parties. Herein lies the limit to the possible freedom of the individual, thus the limitation of the realm that is protected by fundamental rights.<sup>17</sup> The circumciser cannot perform the surgery based on his individual

competence, backed by his basic rights. Legality of his action depends on the consent of the affected.<sup>18</sup> Yet, because the affected child cannot consent himself, it comes down to the parents (entitled to custody) to consent for their child. Thus, the legal justification shifts from the circumciser to the parents and leads to the question of whether the parents' legal status adjudicates them competency to give legal consent.

## 2. The parents' legal defense position

The right to religious freedom of the parents does not provide a basis for justification.<sup>19</sup> This freedom right, too, exists only within the limits of self-determination. For the parents the child is a third party, i.e. a person endowed from birth with own fundamental rights. The conventional view - that a child is without rights and somewhat like the parent's property at the mercy of parental power - can no longer be upheld with this insight. Freedom of religion cannot empower parents to determine over their child's body, not even if circumcision is of "central meaning to the parents' cultural-religious self-identity."<sup>20</sup> The self-conception of a bearer of fundamental rights cannot one-sidedly resolve a collision of fundamental rights, in order to manifest itself at the expense of the other party's objective position<sup>21</sup>

If at all, only parental right can come into consideration for a justification of the parents' decision to circumcise their son.<sup>22</sup> Parents assume the legal (basic rights-related) interests of their child on trust, including religious issues, as long as the child is under the age of consent. The statement of facts concerning basic rights corresponds with the Civil Code (§ 1627 S. 1 BGB). Parents care for the physical and emotional well-being of the child and determine of their own accord what this requires. Therewith, they also decide on the affiliation with a religion and determine the religious upbringing<sup>23</sup> and they are predominantly the ones who carry it out. With it they can have a formative influence on the child's mind; however, it will develop later on. The parents are destiny and they create destiny. From the point of view of fundamental rights, no necessity exists to postpone the decision about religious affiliation until the child is mature enough to decide for himself. Compulsory postponement would counter religious upbringing altogether. Yet, religious education belongs to the core of parental right.

This does not mean that the right to religiously educate one's child automatically covers consent to circumcision.<sup>42</sup> It covers the parental decision to join the religious community. But this is only the spiritual aspect of the initiation ritual. Against the physical dimension, the amputation of the foreskin, stands the fundamental right to bodily integrity. Parental right does not vest the same freedom over the child as adults can claim for themselves.<sup>25</sup> The child, however, needs in this regard protection from his parents. This protection is provided by the state community by watching over the exercise of parental right (Art. 6 Abs. 2 S. 2 GG).<sup>26</sup> The protector's purview does not include optimizing the child's well-being, but merely to prevent the child from getting harmed, not least physically injured. Parental right is rooted in the basic trust that parents want the best for their child, and normally do not endanger the child's well-being. But this trust carries only within the limits of the elements of an offense. It does not suspend such limits and does not override the bodily integrity of the child.

## 3. Protection of the child's bodily integrity

### a) Legal prerequisites of physical injury

The protection of bodily integrity is not a mere reflex of the state's guardianship, but subject of a particular fundamental right of the child. The child is bearer of the right to life and bodily integrity.

As such, it stands opposite the parents, even though they exercise the basic rights by proxy. The state's responsibility for protection is activated, if parents violate the bodily integrity of the boy, or if they order the injury without a valid justification.

The fact that circumcision is part of a religious ritual does not invalidate the statement of facts that trigger the state's protective duty.<sup>27</sup> The legal prerequisites for the protection of bodily integrity as per basic law correlate by and large with the criminal elements of the offense of physical injury.<sup>28</sup> Relevant for the statement of facts is the physical act, not the religious meaning. It is about the protection of physical interests, not about spirituality. Certainly, subtle physical contacts are to be seen as being outside the elements of the offense, like the pouring of water on the child during baptism and the gentle tap on the cheek by the bishop who administers the confirmation sacrament.<sup>29</sup> These are negligible, because they do not harm to the physical body, not because they are part of a religious ceremony. Seen from the view point of criminal law, the separation of the preputium is physical abuse in the sense of § 223 Abs. 1 StGB<sup>30</sup> as a permanent irreversible surgical procedure performed under risks and with the possibility of complications and ongoing impact on the memory of pain.<sup>31</sup> It provokes the state's guardianship all the more, if it is performed in traditional ways without anesthesia,<sup>32</sup> or if anesthesia does not satisfy *legem artis*. Outside the elements of offense lies a particular initiation ritual practiced in Israel where one single drop of blood is drawn.

An act of physical abuse cannot be justified by the assumption that it is socially adequate simply because it is practiced by millions all over the world. Statistical prevalence does not delete the elements of offense. The diffuse *topos* of social adequacy, which is used in criminal law doctrine in various ways, covers inconveniences of the personal well-being, which do not yet cross the threshold of violation of a protected legal interest, as well as restrictions of freedom, which have to be accepted as inevitable facts of life within society.<sup>33</sup> The category of social adequacy, if not altogether superfluous, is clearly not applicable to the amputation of the foreskin.<sup>34</sup>

The duty to protect refers to the protection from dangers. It does not matter whether the parents are at fault or not.<sup>35</sup> Therefore it is unimportant whether they acted with the "best intentions" or can be accused of "brute force".<sup>36</sup>

## **b) Justification of physical injury**

The surgical procedure alone, initiated by the parents, is not enough to prompt the protection duty. It rather has to present itself as an invasion, as an infringement of the fundamental rights of the child that is condemned by constitutional law. The unlawfulness has to be positively established, it does not result *ipso iure* from the presence of the procedure.<sup>37</sup> Circumcision is justified if it is medically necessary, as might be in the case of phimosis. In general, care for the health of the child rests on the parents. In case of sickness or danger to life it is them who consent to medical treatment, if consent is required. However, there is no sufficient reason to remove the foreskin during infancy out of worry that there might otherwise be hygienic defects or health risks during adult life. This preventive measure can wait until later, when the boy has become able to reason and decide for himself. Mere prevention of possible virtual later dangers does not justify *hic et nunc* the irreversible amputation, which itself is associated with risks and possible complications.<sup>38</sup> An appendectomy or prostatectomy for preventive reasons out of the blue would be judged the same way.<sup>39</sup> Cosmetic motivations are not justifiable either. Although a minor procedure, like piercing of an earlobe is considered harmless, it is not analog for an invasive procedure with considerable consequences.<sup>41</sup> A common argument of legal policy points towards the possibility that criminal prohibition of a medical procedure can make matters worse, because it might drive the potentially punishable action underground and thus pose uncontrollable risks

for the health of the child undergoing surgery in the illegal scene. The BVerfG (Federal Constitutional Court) has rejected similar arguments against culpability for abortion<sup>42</sup> – rightfully so<sup>43</sup>.

Social reasons have also been stated as justification. Circumcision initiates the boy into the Muslim or Jewish community, accomplishes acceptance and establishes identity<sup>44</sup>. There are doubts whether the argument withstands the weighing of interests according to the proportionality principle. In any case, it does not stand the test of the necessity principle. The pursued goal can be reached more gently, if the person concerned has reached majority and can decide for himself. Then all objections from basic law do not apply.

### c) The religious argument

The religious argument carries some weight. Legal literature justifies ritual circumcision for reasons of religious education, which falls under parental rights. Circumcision, at least the one following Jewish tradition, is being compared with the Christian ritual of baptism.<sup>45</sup> It is prevailing interpretation to view infants' baptism as covered by parental right.<sup>46</sup> The Federal Constitutional Court (BVerfG) does not view baptism as interfering with the child's freedom of religion. Since the will of the child (not even existent yet) cannot be expressed by himself, the decision falls to the parents who are entitled to his custody. BVerfG considers the fact that baptism in Christian doctrine establishes membership in the church as harmless. Harmless, because possibly burdening consequences would only become associated with baptism at a later time when the baptized has reached the age of religious majority and can at anytime end his membership by declaring his withdrawal with the state.<sup>47</sup>

*[ Steven: Since 1827 in Germany, churches are obliged to register baptised persons with the state. When a baptised child becomes older and starts working, a portion of his/her pay is taken by the government to support the churches (Kirchensteuer, or church tax). If one decides 'I'm no longer Catholic' s/he must report that to the government to get them to stop taking the tax from their pay. It doesn't apply to Jews, Muslims or other religious minorities in Germany who don't have baptism rituals.]*

This justification refers to the state law connection to baptism and its secular-legal consequences; it does not refer to the church act as such, nor to its sacramental character, which lies beyond the state's perception and ruling horizon. Even though baptism forms an inextinguishable seal in the eyes of the church, its secular-legal consequences are reversible at any time.<sup>48</sup> For the spiritual aspects of ritual circumcision, the same holds true. The state may not censor the religious, cultural and social meaning it holds for the concerned. It is not authorized to defend the religious freedom of the child under the age of religious majority against parental decisions. However, the state is authorized to defend body and life from impending detriment on the part of the parents.<sup>49</sup> In contrast with baptism, circumcision constitutes an interference with the physical body of the child. It is here where the state's guardianship comes into play.

The "radiating effect", which the BVerfG adjudicates to religious freedom<sup>50</sup> is no argument for deducing from the parental right to religious upbringing the right to interference with the physical body of the child.<sup>51</sup> The given set of facts does not give rise to such conclusion: After the birth of her fourth child a woman had died, after refusing hospitalization to undergo a blood transfusion, as medical advice recommended. The criminal court accused the husband of not having exercised his influence in accordance with the doctors' advice, and he was convicted for denial of assistance.<sup>52</sup> Husband and wife, both members of a Protestant sect, had declined the offered treatment for religious reasons, convinced that prayers to God were a "better way" than a medical treatment. The seriously ill wife had decided for

herself, and the husband, sharing his wife's religious beliefs, had respected her will.<sup>53</sup> Therefore, an infringement of the woman's legal sphere did not take place. An infringement would not have been condoned by the BVerfG. It states explicitly that the husband's obligations for his children would "naturally" have led to a different assessment, if, under the pretext of his own religious beliefs, he would have accepted his wife's death in order to rob the children of their mother.<sup>54</sup> Thus, this case is not comparable to the case of circumcision.

The religious end does not justify each and every means. Therefore, the fact that circumcision belongs within a religious ritual cannot suffice as reason for placing its practice beyond any criticism. There are, after all, rituals, which – not least from fundamental and human rights perspective – are in this country absolutely detested. This applies especially to the circumcision of female genitalia, as it is practiced in certain regions of Africa, but also in Latin-American and Asian countries, and, most recently, also on German soil.<sup>55</sup> Yet, one would take the easy way out by simply denying this practice its religious character (religious in the sense of fundamental rights), and by treating it merely as custom less worthy of protection. Religion and custom frequently form a unity that cannot be dissolved by external conceptualization. Furthermore, Jewish circumcision is not restricted to orthodox Jews; for "liberals" it can also mean a profession to their community of origin.

Surgery of the female, as well as the male, genitalia constitutes a violation of bodily integrity in the sense of criminal and basic law.<sup>56</sup> The quality of factual findings is the same. Entirely different, though, is their popular assessment.<sup>57</sup> Circumcision of women and girls is punishable as aggravated battery or even grievous bodily harm (§§ 224, 226 StGB), and as the case may be, also as physical abuse of wards (§ 225 StGB). As a severe violation of fundamental and human rights, parents are divested of consent to it.<sup>58</sup> Legal policy, and in part also juridical discussion, deal solely with its most severe form, the genital mutilation and does not distinguish its milder forms.<sup>59</sup> For the genders, double standards are being applied under violation of the equality principle without justification.<sup>60</sup> Beyond dispute is only that true genital mutilation falls under the verdict of criminal and constitutional law. It violates human dignity, that finds expression in the fundamental right to bodily integrity.<sup>61</sup> This severe abuse is incompatible with the German *ordre public* and could not even be integrated into German justice per law. This result, however, is not transferable to the practice of circumcision in Jewish and Muslim tradition.

Beyond that which is agreeable to the German *ordre public* would lie regression into the atavism of religious human sacrifice, following the patriarch Abraham. As the Bible tells, Abraham readied himself as per God's command to kill his firstborn Isaac. This being a test of Abraham's obedience and God himself stopping the execution<sup>62</sup>, marked an evolutionary stage in the history of mankind. One may view circumcision as replacement of such horrible rituals, just as in the next evolutionary stage the primitive Christian community replaced the carnal component of circumcision with baptism, with which the Jewish initiation ritual – now accessible to both genders – lives on in spiritualized form as "circumcision of the heart, according to the spirit, not the letter." The secular state, however, cannot lend its hand to the process of sublimation by dictating how one becomes a Jew or Muslim.

#### **IV. Special status before the fundamental law for religiously motivated actions?**

##### **1. The approach per rights of the individual**

A general principle of fundamental rights interpretation outlines that the person who shall be free has to decide ultimately what freedom is.<sup>64</sup> Accordingly, the bearer of religious freedom would have to decide what believing means with regard to fundamental rights and which act would have to

considered acts of religious practice. Such a subjective view on the part of the bearers of fundamental rights could serve the secular state in bailing it out from having to adjudge on its own accord over matters that are alien to its mandate.<sup>65</sup> This is the premise upon which the legal opinion is based, which advocates that ritual circumcision, as per parental self-conception, qualifies as a religious act (“meaningful integration and acknowledgement as person“<sup>66</sup>) and for this reason alone, cannot be considered physical injury.<sup>67</sup>

However, this premise is insupportable. Religious freedom and parental rights, as all other fundamental rights, are part and parcel of the state’s legal order. The right to religious freedom gives room for its bearer’s self-conception, yet, if and how far this room can be open for interpretation cannot be determined by the bearer, but by the fundamental right.

Its bearer attributes religious meaning to circumcision. Yet, whether the act is also regarded as religious, in the sense of fundamental rights in Art. 4 and Art. 6. Abs. 2 GG, is decided according to the secular criteria of the state’s constitution. The terms “faith”, “religious profession” and “religious practice” in Art. 4 are not religious, but secular terms, not subjective pretensions, but objective standards. Fundamental rights offer the individual legal spaces in order to develop subjectively, not, however, in order to dispose over type, range and limits of these spaces, because doing so would mean to decide on the legal spaces of others. Because others could reclaim that same right, fundamental freedom rights would turn into anarchy. Therefore, the parents’ fundamental right to decide upon religious upbringing does not cover empowerment to declare the amputation of the foreskin as an exclusively religious act, overriding the child’s fundamental right position. Exactly this type of conflict between basic rights brings home the failure of the subjective perspective, because it only allows for the articulation of the parents’ self-conception, while the child is dependent upon an objective guardian of his legally protected interests. The boundary dispute between parental right to religious upbringing and the bodily integrity of the child can only be decided using objective criteria that can be generalized and are defined as ultimately binding by the constitutional state, following its division of powers-based competency system.

## **2. Institutional approach**

Circumcision can not be justified by individual fundamental rights of the concerned. The question arises, whether justification can arise from the collective basic rights of the religious community, whose initiation ritual is being dealt with. The thought seems natural to seek the constitutional base for circumcision within the right to collective religious freedom (Art. 4 Abs. 1 and 2 i.V. with Art. 19 Abs. 3 GG) as well in the institutional right to self-determination (Art. 137 Abs. 3 S. 1 WRV i.V. with Art. 140 GG). If this hypothesis could be corroborated, the community would have a larger area of freedom than the individual, who, however, would gain more freedom for himself, as long as he acts within the community and according to its rules.

Legal literature classifies circumcision as an in-house matter of Jewish and Muslim communities, belonging to their tradition-based and identity-establishing practice: The constitutionally erected barrier of law that applies to everybody would have to yield to circumcision, because otherwise life in the religious community would be nearly impossible and religious practice would be considerably impeded. Criminal prohibition of physical injury would not stand up to this requirement. The physical component of circumcision would take a back seat behind the emotional-spiritual component. Punishment as physical injury would only satisfy one-sided secular interests, while missing the “lived culture of the constitution” Therefore, the modern state should relativize its legal entitlement to enforcement and punishment.<sup>68</sup> Constitutional law is being replaced by the bendable criterion of “lived culture of the constitution”, whatever this phrase means. This argumentation eludes

juridical verification and wafts away into the sky of cloudy terms.

From the constitutional point of view, it is implausible. The religious community regulates and administers its own affairs, i.e. its affairs as a community. However, it does not rule and administer the individual matters of its affiliates, not their freedom, their life, nor their bodily integrity. Only with their consent can the religious community effectuate its teachings and rituals. Its educational activity is legally protected, but requires consent by the parents. Thus, the religious community holds – by constitutional law – not a direct right to educate, but only a secondary one.<sup>69</sup> Where parental right ends there also ends a potential self-determination of the religious community with regard to the child.<sup>70</sup> That settles the discussion, whether § 223 StGB is a law applicable to everybody and restricting autonomy.<sup>71</sup> The penal provisions are a medium for the state's obligation to protect the bodily integrity of the child. The child's fundamental right and the religious community's right to self-determination are of equal rank. The first determines the limits of the latter. That is why bodily integrity of the child cannot be weighed against self-determination of the religious community. Where the constitution draws factual limits, there is absolutely nothing to be weighed by an interpreter. In the triangle relationship of state – parents – child there is no place for the religious community.<sup>72</sup>

In the discussion of ritual circumcision, those who plead for its legal permission, consistently apply exemption from generally applicable norms only to Judaism and Islam, but do not want to open the flood gates to unforeseeable religious practices that conflict with the German and European legal system.<sup>73</sup> The exemption forms a special right.<sup>74</sup> Yet this, as it says, would withstand the prohibition of arbitrariness, because Judaism and Islam would be considered “legally formed cultures of endowment (of life) with meaning”. They would be legal positions, which would be “located since centuries *in forum externum* of life practice.” These reasons are not good enough for the constitutional law requirement for rationality, generality and equality before the law. They point, however, to another level of justification: tradition.

## V. Tradition caveat

Discontent with the Cologne ruling is partially due to the fact that a legal system, which holds the value of religious freedom highly, criminalizes a religious ritual that has been in practice by Jews unchallenged under almost all kinds of tolerant and intolerant regimes throughout history. With this as background, the criminal verdict appears paradoxical.

The paradox would dissolve, if it could be proven that basic law has no intention to infringe upon religious tradition and its cultural derivatives and that in this respect its guarantees fall under a tradition caveat.<sup>76</sup> It is, indeed, hard to imagine that the historical constituent body of 1949 would have approvingly accepted that the fundamental rights that were drafted by them, eventually could be positioned against the Jewish ritual. This, of course, would not be the only consequence of constitutional law not imagined by the historical constituent body, simply because they could not have anticipated the future development of state and society, and with it the challenges and litmus tests in store for the constitution.

A general tradition caveat is foreign to the constitution, which is designed to newly found the state order according to rational principles in the progressive spirit of freedom. In the case of conflict, its normative validity claim overrides what has become the historical *status quo*. In essence and effect, the constitution is unhistorical.<sup>77</sup> Yet, even the most ambitious constituent cannot do otherwise but build on the encountered conditions, be it temporarily or permanently, explicitly or tacitly. Even if it intended to, it could not regulate everything. And what it can regulate is always less than what it

assumes to be in need of regulation.<sup>78</sup> Nevertheless, it strives to let what has been regulated not be relativized via fallback to conditions as they have always been and to seal off new norms from new inquiries and interpretative approaches.

This holds true to a high degree for the fundamental rights, which, adjusted to the universal, emancipatory idea of human rights, demand that all traditional regulation be justified and break up the status quo, even if it represents a venerable tradition. The fundamental rights grow according to their inherent legality of individualism, which does not accept established allegiances alone or reasons of tradition. The fundamental right of women to equal status has dissolved handed-down inherited structures of marriage and family, although the constitution promises these institutions its “special protection”.<sup>79</sup> The privileged position of marriage is being dismantled by upgrading of same sex partnerships. Even the BVerfG follows more the *Zeitgeist* than the letter of the constitution and the tradition manifesting in the letter.<sup>80</sup> The principle of “family unit” was neither able to stop emancipation, nor could it save the paternalistic traditions of family law.<sup>81</sup> Also, the family unit can no longer be founded on parental political authority since the child's own fundamental rights – sacrosanct to parents – are being acknowledged.

To these rights also belongs, according to international treaty law, the “right of the child to the highest possible degree of health”<sup>82</sup> – and this with a point toward traditions: “The undersigned undertake all effective and appropriate measures to abolish traditions and customs that are detrimental to children`s health.”<sup>83</sup> Of course, this declaration has no normative relevance for the solution of the fundamental rights conflict, not despite, but because 199 states of any and all human rights niveaus have agreed to this rhetorical text. Yet, the text is symptomatic of an emancipatory tendency that follows the development of human and fundamental rights. Along these lines, by the way, lie the arguments of German pediatricians against approval of circumcision: “We must be allowed, as guardians of the child's well-being in the 21<sup>st</sup> century, to question millenia-old rituals and customs that infringe on the bodily integrity of children who are under age and unable to consent on the basis of new insights; we encourage the reflection, whether it could not also be possible for boys to be raised in the religious tradition of their parents without having their foreskin removed.”<sup>84</sup>

Immigration from foreign cultural spheres leads to conflicts between the German *ordre public* and imported traditions, e.g., the father's absolute authority over the family, his assumption of children as “property”, rigid and violence-prone concepts of family and gender. Yet, circumcision does not belong into this case group. It is neither foreign to the common-European and German legal culture (which itself has Jewish roots), nor incompatible with it, *ergo* stands not outside of *ordre public*.<sup>85</sup> Certainly, with that the conflict with governing law, as it has become apparent, is not yet sorted out. But it can be resolved without changing the constitution. But even a change to the constitution would not overstep its boundaries of possibilities, because it does not infringe on human dignity. Hence, the legislature may allow circumcision, if the permission is tied to certain provisos, which satisfy the fundamental law's duty of protection for the child.

## **VI. Permission of circumcision under law**

### **1. Permission under provisos**

Examination of constitutional law finds that that parents (as well as religious communities) cannot justify the performance of a circumcision with their respective fundamental rights. Yet, where one's own right ends, the law can expand the space of action and give authorization to an act by reserving the fundamental right to bodily integrity to be protected by statutory power. Consequently, it

becomes flexible for a legal restriction, if the restriction abides by the directives given through the excess prohibition. Such is at hand in § 1631d BGB, newly introduced in 2012:

“(1) The custody includes the right to consent to a medically unnecessary circumcision of a male child who lacks ability to reason and power of judgement if it is executed *lege artis*. This does not apply if by circumcision the child's well-being is jeopardized.

(2) During the first six months after birth of the child individuals who are designated to do so by a religious community are allowed to perform circumcisions according to paragraph 1, if they are specifically trained for it and – without being medical doctors – comparably qualified to perform circumcisions.”

This law reacts to the ruling of LG Cologne and intends to prevent it from reaching prejudicial effect. It sticks to the ruling's subject matter and does not try to place the concrete problem in a systematic context and treat it according to general criteria.<sup>86</sup> As sanction law<sup>87</sup>, it wants to manage a specific political situation and smooth ruffled feelings of religious communities. Its goal is to provide an explicit legal basis for the current circumcision practice and thus legalize the Jewish and Muslim custom. Because such a basis is necessary and has been lacking until now, the law goes beyond a mere clarification and brings about a constitutive effect. In as far as it does not decide on a regulation itself, it leaves the present legal situation untouched, in so far as it creates an exclusive special right. For good reasons it is positioned in the Civil Code,<sup>88</sup> for the key to the problem's solution lies in the parental right to custody. Legality or illegality of circumcision depends on custody, and therewith also the decision whether or not it constitutes punishable physical injury. This makes criminal law out to be mere secondary law.

The law refers to the male child. Circumcision of the female is not in the cards. The inadmissibility of the latter is assumed, even if its extent, *mutatis mutandis*, is less severe than the extent of male circumcision - now permissible – and its reasoning is based on religious motivation. Consent by those entitled to custody is rejected from the outset.<sup>89</sup> The potential inconsistency with the equality principle is not being solved.<sup>90</sup>

Parental custody includes consent for the child who is not yet able to reason and decide. Yet the law does not specify the age by which the child must be heard, can exercise his own will, can oppose the parental decision and can decide on his own.<sup>91</sup> The civic law regulation regarding legal competency does not fit here. The legal regulations regarding religious majority that are valid for the religious aspect of the ceremony do not cover the physical component.<sup>92</sup> By contrast, the criteria for consent to medical procedures do apply. They refer to the emotional and moral maturity appropriate for making such decisions, thus, they refer to a “natural“ criterion.<sup>93</sup> If maturity applies, surgery may not be performed against the child's will. He can exercise his right of veto.<sup>94</sup> If he has reached majority, he decides on his own.<sup>95</sup> The child's development does know exact *cesuras*. Even when his ability to reason and decide is not fully developed, he can already form and express a will. During the period of transition his will deserves consideration in any case that concerns his well-being.<sup>96</sup>

The decision made by the parents for their child must come from free judiciousness, but not from irresistible pressure by the social environment. The parents' consent requires that they be provided with professional advice with regard to the consequences for health and health risks (informed consent). Parents decide for the well-being of the child, as understood by them. A religious reasoning is not required by the law. A verification of the motivation would indeed confront the constitutional state with a dilemma. Religious sincerity cannot be reliably confirmed and controlled.<sup>97</sup> Yet, it means that this legal approval of circumcision benefits the parents, no matter which motivation led them to the

decision.<sup>98</sup> Therefore the law approves circumcision generally.

Or so it seems. However, the consent of the person(s) entitled to custody shall not be valid, if the circumcision “also under consideration of its purpose” endangers the well-being of the child (§ 1631d Abs. 1 Satz 2 BGB). This is possible, according to the reasoning of the federal government, if circumcision is sought for esthetic reasons or to make masturbation more difficult, or if it contradicts the will of the child who is (not yet sufficiently) able to reason and decide.<sup>99</sup> The banned differentiation as to the motivation for circumcision has thus crept back in through the back door. With it the formal problem returns as to how these circumstances can be verified.

The law demands that circumcision must be performed *lege artis*. This (self-evident) clause secures the medical standard, which in turn has to be expanded by the necessary hygiene standard. The guarantee covers also potential follow-up treatments. The dynamic reference to *lege artis* is limited to the technical-medical performance of the surgery. It leaves open whether traditional techniques that pre-date today’s medical standards are to be respected or not. Problems of this kind arise when, on doctor’s advice, anesthesia is necessary, yet, the tradition, as referred to by the parents, sees the inflicting of pain as an integral part of the meaning of circumcision. In principle, the legislature can only approve circumcision up to the boundary that is drawn by the insufficiency prohibition attached to the obligation to protect.<sup>100</sup> In any case, respect for religious custom, as an end, does not justify the means, if they methodically accept, or even ritualize, the infliction of physical agony to a defenseless boy (“those who do not tolerate the pain do not belong”<sup>101</sup>). Painful rituals require full ability to reason and full power of judgement by those who undergo them and agree to voluntarily suffer the pain. From the fundamental rights point of view it is reasonable to expect from all concerned to wait with such measures, until the child can give his own consent. Only the law’s rationale (not its wording) demands an “effective pain management and requires – with reference to *lege artis* – “an effective anesthesia, tailored to the individual case.” However, this rationale, too, does not state whether the infliction of medically unnecessary pain is permitted or not.<sup>102</sup>

In general, legislators shy away from burning their fingers on concrete problems and settle for *salvatorius clause* that the authorization is invalid if the child's well-being would be threatened. The clause is too undefined, too broad, too soft to let content and extent of the caveat be recognized with the necessary clarity. It does not create legal certainty. In its role of guardianship, the state cannot guarantee the realization of this caveat, for the sole reason that it lacks the necessary legal powers. The law does not include any obligations to officially register or inform, no permit requirement, no counseling model or oversight powers. The regulation shortfall exists as well for the other provisos, like age limit, the lack of ability to reason and decide and medical *lege artis*. Government control would certainly interfere with the protected privacy of those concerned. Thus the provisos' practical enforcement remains pending. They are, in fact, not designed for practical enforcement. Their purpose is rather to show symbolic reverence to the rights of the child, but that is as far as it goes.

The legislature tries to justify its position by the statement that circumcisions, without special risks, performed expertly and to the well-being of the child ensure that the state is “not routinely called upon in its guardianship”.<sup>103</sup> Albeit, the state is always called upon, just not permanently required to intervene. Guardianship accompanies the exercise of parental rights from the beginning and without interruption. The state cannot divest itself of its charge, nor can the law suspend it thereof, be it temporarily or objectively restricted. Admittedly, only a potential to act is manifest in guardianship. As long as the primarily responsible parents do everything necessary and the child suffers no harm, state intervention is not needed.<sup>104</sup> The readiness to intervene if danger threatens, as well as provisions to prevent risks, are the state's ongoing absolute compulsory tasks.

## 2. Mohel-Clause

*Lege artis* apply as well for surgeries on children within their first six months, for which the law makes a special arrangement (§ 1631d Abs. 2 BGB). Yet, the law does not insist on the professional guarantor for these regulations, the licensed physician. During the first six months of life, circumcisions are allowed to be performed by a non-physician circumciser who does not need an official permit, if the religious community selects him in a certain process, and if he has completed a special training. This provision refers to the Jewish “mohel” and the “sünnetci“ in Turkish Islam.<sup>105</sup> According to the law's rationale (not to its wording, though) special legal caveats for physician and anesthetist, as well as caveats following narcotics regulation, shall remain untouched.<sup>106</sup> Anesthesia, which is subject to the caveat, is not required by law. Thus, it will either be omitted or lies in unauthorized hands.

Per statutory provision, the non-physician circumciser must be qualified in ways “comparable” to a physician.<sup>107</sup> The material provisos of *lex artis* and the child's well-being are unconditionally valid here, too. Yet, responsibility for compliance with the standards lies with the religious community that ordained the circumciser, naturally under the condition that it can count on the parents' consent. The religious community determines the rules and their implementation. The state does not see itself “called upon”.<sup>108</sup> The Hobbesian question “*quis iudicabit?*” contains, a coded but clear answer: It is the religious community who determines what the well-being of the child requires and what *leges artis* demand for circumcision.

With § 1631d Abs. 2 BGB, a protected reserve for religious custom has been created. It is tailored to the needs of the Jewish community that circumcises the child at an early age (as per orthodox command on the eighth day after birth). The mohel can perform the surgery without assistance of physician or nurse. The surgery by a physician is not recognized as ritual.<sup>109</sup> The Jewish community determines if and how the infant receives anesthesia.<sup>110</sup>

The abstract criterion of religious community covers also the Muslim community, which appoints the sünnetci; yet, it does not gain a practical benefit, when it performs circumcision on boys at a later age, as is the custom in Turkey (between the age of four and shortly before the onset of puberty). An extension of the exemption provision to a longer period than six months is ruled out, so that circumcision without the assistance of a physician is now out of the question. There is a further obstacle: The regulation of § 1631d Abs. 1 BGB is only applicable to boys who are not yet able to reason and decide. Most seven year olds (the average age of boys circumcised according to Muslim tradition in Germany<sup>110</sup>) do probably grasp and are able to form an opinion about what awaits them during the surgery. In as far as they do, they possess a veto right, so that parents can no longer claim their custody right for a one-sided order of their son's circumcision.

In the view of the federal government, the “mohel clause” accommodates protection of religious freedom, as guaranteed by fundamental right, as well as protection of self-determination of a religious community for the purpose of independent order and administration of internal affairs. Yet, with regard to the state's duty to protection of the child's bodily integrity, the clause remains restricted to the child's first six months of life.<sup>112</sup> Exclusion or reduction of the protective duty during these first months in life, during which the infant is entirely helpless, as well as the lesser weight given to religious freedom after this period, has not been plausibly substantiated. Plausible, however, is the (unspoken) reason, that the conflict between state law and the Jewish initiation ritual shall be avoided at any cost.

### 3. Result

The sanction law has not fulfilled its aim. It does not create legal certainty and it does not satisfy the basic requirement for the duty to protect the child as per basic law. The legislature stopped halfway in order to achieve balance between opposing interests. It would have been more prudent to not get involved in formulating the balance at all. Instead, accepting the reproach to be lacking determination, a succinct sentence would have sufficed, stating that custody includes consent to circumcision. Further detailing could have been left to praxis and doctrine, so that it could be integrated into the context of the civil code and be interpreted in conformity with provisions of constitutional law.

### VII. *Tabu caveat praeter constitutionem?*

Even though the law has failed constitutionally, in its intention there lies a piece of political wisdom. In the conflict between constitutional consequence and keeping religious as well as societal peace, it decides for peace.<sup>113</sup> No fight between cultures shall break out,<sup>114</sup> least of all a fight with Jewish culture. The legislature does not want to let the evil appearance arise that, in Germany, Jewish life (and indirectly Muslim life, as well) is being suppressed, and, of all things, in the name of fundamental rights, a religious ritual is being prohibited that has over thousands of years withstood all attacks. The legislature safeguards a national taboo, if it opposes an application of law that could insult the feelings of Jews. After all, the topic of circumcision lies in a taboo zone.

Lawmakers act in good political conscience. Nevertheless, should they suffer from constitutional qualms of conscience, they may seek solace in the hypothesis of an unwritten taboo caveat of constitutional quality. After all, German jurisprudence tends to restrain themselves, if not even withdraw, when a collision with Nazi-era traumata, especially with after-effects of the Shoah, is impending. The BVerfG avoids the taboo, at times in open contradiction to the constitution and under breach of juridical consequence. So too with regard to the fundamental right to freedom of speech, which, as it is, can only be restricted through a general law, suffers a special provision, as in the hate crime criminal directive (§ 130 Abs. 4 StGB), if it is about thwarting the propagandistic endorsement of the Nazi-era tyranny.<sup>115</sup> The court avoids the conflict with Islam and indirectly with orthodox Judaism in the question of halal or kosher slaughter: The action of a non-German Muslim butcher who slaughters animals without anesthesia, in order to serve his clients in accordance with their religious conviction, thus making their consumption of meat possible, is seen as justified by the right to freedom of action and religious practice in basic law, although the constitution explicitly acknowledges animal protection as the state's goal.<sup>116</sup> This decision, of course, is not automatically prejudicial for circumcision, for it is a substantial difference, whether the defense rights of the doer are opposed by the manifold relativized state's goal of animal protection, or by the bodily integrity of humans.<sup>117</sup> Anyway, precedents like these are not enough to verify the hypothesis of a *tabu caveat praeter constitutionem*.<sup>118</sup>

Yet, the legislature could, if it had a historical memory, refer *praeter constitutionem* to the lesson learned from history, and refer to its intention of avoiding a culture struggle, like the one unleashed in the late 19<sup>th</sup> century by a liberal fundamentalism against the Catholic church<sup>119</sup>, with the consequence that even that what was politically reasonable and constitutionally sensible had to compromise its goals due to stubbornness and impatience, hassled religious life and a split society, caused by authoritarian privilege. The legislature wants to avert such a danger. It may be unclear in content and constitutionally disputable – In this it takes a clear decision: There shall be no more culture struggle in Germany.