Religious circumcision, invasive rites, neutrality and equality: bearing the burdens and consequences of belief

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ABSTRACT
The decision of the German regional court in Cologne on 26 June 2012 to prohibit the circumcision of minors is important insofar as it recognises the qualitative similarities between the practice and other prohibited invasive rites, such as female genital cutting. However, recognition of similarity poses serious questions with regard to liberal public policy, specifically with regard to the exceptionalist treatment demanded by certain circumcising groups. In this paper, I seek to advance egalitarian means of dealing with invasive rites which take seriously cultural diversity, minimise harm and place responsibility for the burdens and consequences of beliefs upon those who promote practices.

The importance of the decision of the German regional court in Cologne on 26 June 2012 to prohibit the non-medical circumcision of minors cannot be underestimated. In considering the evident harm done to a 4-year-old boy by a botched circumcision performed in fulfilment of a perceived religious obligation, the court decided that, in the absence of medical necessity, the rite constituted bodily harm. The court did not seek to proscribe circumcision categorically, but to prevent its infliction on minors incapable of consent.[1] Believing that the precedents of proscriptions on other physically invasive acts or rites, such as female genital cutting, should be applied equally to male children, the court decided that a child's 'fundamental right to bodily integrity' should take precedence over the right of parents to alter their children's bodies in accordance with their beliefs.[2]

The nature of the decision and the response of particular interested parties open up a series of issues with regard to the treatment of faith which need urgently to be addressed for liberal societies to deal consistently with such rites. The issue with which I engage is the treatment of physically invasive rites inflicted on minors by different groups. In what follows, I attempt to advance a means of upholding equality and neutrality between groups, while seeking to minimise harm to children and costs to society. Noting the harms associated with prohibition of practices, I consider Aziz Sheikh's call to provide circumcision free for Muslims through Britain's National Health Service (NHS).[3] Arguing that Sheikh's proposal creates inequalities in the treatment of practices, I examine Peter Jones' discussion of the burdens and consequences of belief to identify the particular categories of, and the potential bearers of responsibility for, costs associated with circumcision.[4] This leads into engagement with Chandran Kukathas' political liberalism and endorsement of a form of regulated medicalisation patronised by religious groups, freedom of speech to criticise practices and an established means of redressing grievances among those who bear the burdens of (their parents' and community's) belief—the circumcised.[5] To begin, I shall outline the political philosophical problem that circumcision poses to political liberalism.

POLITICAL LIBERALISM AND THE PROBLEM OF CIRCUMCISION

Political liberalism of the sort advanced by John Rawls,[6] among others, holds that public bodies should be guided by a set of core principles upon which all reasonable citizens can agree. Such bodies should not promote particular, comprehensive conceptions of the good, such as those of the decadent bon viveur or the ascetic Buddhist, but remain neutral between, and treat equally, different doctrines. This is intended to ensure that people are not disadvantaged publicly for their pursuing a particular reasonable comprehensive doctrine. In recent decades, multiculturalists such as Will Kymlicka[7] have argued that pieces of legislation applying to all citizens, such as those defending the right to bodily integrity in Germany, have failed to uphold neutrality and equality, de facto disadvantaging particular groups and creating grounds for group exemption from particular laws. Perhaps the most famous example has been the request of Sikhs for exemption from legislation mandating the wearing of crash helmets on the grounds that such protective equipment prevents the wearing of turbans and that, as not wearing a crash helmet endangers only the rider, there is no reason for compulsion. The German court ruling, by upholding a blanket ban on physically invasive rites, is the first to place circumcising groups in such a position (albeit with regard to a practice which directly affects a minor rather than the believer). In 2004, Viens argued that opponents of circumcision need either to prioritise the right of the child to bodily integrity over the right of parents to religious practice or to argue that the decision to circumcise stems from an unreasonable doctrine.[8] Controversially, the German court ruling seems to imply and endorse both.

This stance is especially controversial given the wide array of reasons for which circumcision is performed, including: (i) as therapy, as in the case of paraphimosis and balanitis obliterans; (ii) as prophylaxis, as is common in the USA among both

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religious and secular groups and, increasingly, in sub-Saharan Africa as a means of combating HIV transmission; (iii) as a theologically ordained rite for Abrahamic monotheistic groups, as in the case of Jews and Muslims; and (iv) as a cultural rite of passage in a wide range of societies, many of which are or were polytheistic, as in the case of certain Aboriginal Australian groups. As Brusa and Barilan have argued,[9] the distinction between (iii) and (iv) is 'tenuous', with similar motivations underpinning Abrahamic and non-Abrahamic circumcising groups. For those who perform the practice for reasons (iii) and (iv), such as mainstream Jews and Muslims, the practice has little motivation in medical thinking.[9] Even if circumcision were demonstrated conclusively to be bereft of medical benefit, the reasons for some groups to circumcise would remain: fulfilling a perceived religious obligation, constituting identity and perpetuating group membership. Although the decision potentially affects many different groups, the most vehement responses were provided by those from the Abrahamic tradition: some Jewish groups regarded the decision as a continuation of age-old German anti-Semitism; some Muslim groups argued that the decision smacked of Islamophobia; some Protestant groups, which do not regard circumcision as a divine obligation, claimed that the restriction on religious practice constituted an unjustifiable constraint on religious toleration.[1 10] In the wake of the decision, the German government announced, in support of religious freedom, that 'Circumcision carried out in a responsible manner must be possible without punishment'.[11]

Previously, while liberal states have proscribed a range of physically invasive rites such as female genital cutting, or acts such as corporal punishment, circumcision has escaped attention by virtue of popular perception that it is (a) harmless or benign or (b) that proscription would prevent Muslims and Jews, in particular, fulfilling a religious obligation. As I have argued in depth elsewhere, with regard to (a),[12] I think that there is good reason to treat critically the belief that circumcision is benign and female genital cutting incomparable. While Andrew Koppelman has convincingly argued[13] that the account of harm upon which criticism of female genital cutting is based must be drawn from a more substantive conception of well-being than that provided by Rawls, once such an account is adopted, for example, in the form of Martha Nussbaum's view of capability and flourishing,[14] it is possible to identify qualitative similarities between male and female forms of cutting, even though female forms often inflict more significant injuries.

The reasons to regard the non-therapeutic circumcision of minors as troubling are significant. Since it is inflicted on minors, it is involuntary. While parents, qua parents, must make decisions in the interests of their children on the basis of the information available to them, non-therapeutic circumcision is particularly contentious because it is irreversible and, as Wim Dekkers argues, removes a healthy part of an otherwise whole body.[15] While the remaining shaft skin can be stretched to form a pseudo-prepuce, the unique features of the double-layered foreskin, such as the highly innervated outer layer and highly sensitive inner layer, with its ridged band and suggested role in the ejaculatory reflex,[16] are lost. Without the protective, moisturising prepuce, the glans can become keratinised, decreasing sensitivity.[17] While the literature on the sexual role, costs and benefits of the foreskin is divided, with some anecdotal support for circumcision and some indicating no effect on sexual health,[18] there are also data which suggest that men experience decreased sexual functioning as a result of being circumcised.[19] Some people clearly think that circumcision has imposed a disadvantage on their sexual lives. Moreover, there are many cases in which circumcision is traumatic (sometimes deliberately so in the case of rites of passage into adulthood),[20] leaving people affected psychologically. Finally, there are cases in which the operation is botched or in which complications arise. This is a significant risk where the practice is conducted in traditional, non-hospital settings which are apparent both in circumcising regions and circumcising migrant communities in Western countries.[21]

Contra Brusa and Barilan,[9] in addition to physical harm, invasive rites such as circumcision seem designed specifically to undermine the ability of people to leave particular groups. Gatrad and colleagues offer the following appraisal of childhood circumcision:

> To leave this operation for a few years could result in the youth becoming noncompliant—because of fear of the procedure—resulting in dilution of Islamic values. A further advantage of early circumcision is that the child is able to immediately identify with his culture, which gives him a sense of belonging.[22]

Statements such as this suggest that circumcision is not simply identity constitutive—it is crude, coercive and constrictive, seeking irreversibly to tie people to a particular group, often in return for social recognition or other goods.[23] This may explain why fewer of those circumcised for religious reasons regard the practice as having induced harm than those circumcised for non-religious reasons, who may lack certain socio-cultural benefits of circumcision. Indeed, according to the authors, it is one to which a person may not wish to subject themselves in adulthood. While we all develop and are shaped socially, physically invasive rites attempt to tie a person's body to a religion or way of life in a way that non-physically invasive social acculturation cannot. Invasive rites make social goods contingent upon subjection to injury, adapting the preferences of subjects to endorse otherwise unnecessary harm.[24 25] This is not to deny the value of the goods afforded people following circumcision—these may be very real indeed. However, making those goods contingent upon the infliction of a physically invasive rite may fail fully to respect persons, treating them instrumentally.

Female genital cutting, even in its most minimal forms, has been challenged firmly for reasons such as these.[14] Both practices appear, in uneven ways (both within and between male and female forms), to be: involuntary by virtue of being practised on minors;[26 27] irreversible; associated with sexual control, sexual diminution or sexual change;[28–30 i] painful, traumatic and posing inevitable risks of injury or complications (see below); driven by belief and social coercion, and gender and group constitutive.[31 32] The German court decision is, in this sense, important in challenging one element of the cultural oversight with regard to harm: the notion that circumcision is intrinsically benign and incomparable with female forms of genital cutting. However, the more general problem which the decision highlights, which I wish to examine in this paper, lies in relation to (b): that of equality, neutrality and consistency with regard to the treatment of physically invasive rites among different groups.

Now, various opponents of circumcision and, indeed, the regional court in Cologne, have sought, on the same grounds of bodily harm, to proscribe circumcision. The belief of many supporters of the decision is that, if a practice is banned and practitioners penalised, the practice will cease and children will be safe. While prohibition may cause a practice to cease, there are

[i] See the discussion of sexual diminution in the work of circumcision proponents, such as Weiss GN *et al*.[29]

numerous cases in which enforcement of law fails adequately to address the problem and, indeed, causes others.

Many different people have had religious or cultural rites or activities proscribed by liberal states. Most clearly, the right to bodily integrity may be interpreted to prevent certain polytheists and atheists from practising forms of body scarification. Interestingly, the right has been invoked, without widespread objection, to penalise certain Abrahamic monotheists for their sincere belief that they have an obligation, as Christians or Muslims, to cut the genitals of girls.[33] If our concern is to enable people to fulfil perceived religious or cultural obligations and to enable the perpetuation of groups, the reasons for not prohibiting circumcision may apply similarly to forms of female genital cutting or 'crocodile scarring'.[34] This is because, in a secular, liberal state, such as Germany (which has no established church), the criteria by which we assess practices should neither be religious or theological truth nor membership of a particular faith or set of faiths. It is simply unfair, in a political liberal approach, to endorse the rites of mainstream Abrahamic faith groups, while penalising the fulfilment of polytheistic rites on account of the latter beliefs being 'wrong' or 'false'. This sometimes seems to have been lost in the melee surrounding the topic of male and female genital cutting, with theological arguments often sliding into legislative contexts. There have, for example, been many attempts to discredit female genital cutting and to justify prohibition on the grounds that it has no justification in Christian or Islamic scripture.[35] While that may be one reason for Christians or Muslims to end the practice, it is no reason for a secular, neutral state to legislate. What are dealt with here should only be seen as practices of belief derived from conceptions of the good. The decision of the court is important, in this respect, since it sustains equality and neutrality between conceptions by proscribing all invasive rites. However, despite this, prohibition and criminalisation is an extremely problematic approach to adopt.

HARM, PROHIBITION AND STATE PROVISION

The consumption of narcotics is one example in which a moral crusade, pursued through criminalisation, has not only failed to eradicate drug consumption but actually appears to have perpetuated it in an extremely dangerous, unregulated and criminal form. As in the era of alcohol prohibition in the 1920s, proscription of drugs has stimulated incredible creativity in terms of production, distribution and consumption, while inducing serious social harms through the creation of a violent black market and the prosecution and punishment of people who may otherwise have lived fairly harmless lives. While the voluntary consumption of narcotics can be seen to be self-regarding, in a different context, there have been instances of 'creativity' with regard to female genital cutting—a clearly other-regarding practice. Setting aside the practical difficulties of criminalising the large numbers of parents and practitioners noted by Hernlund and Shell-Duncan,[25] members of particular communities have sought out and facilitated backstreet practitioners, taken children on 'holidays' and found various means of hiding the damage once it has been done.[36] Given the strength of feeling with regard to circumcision among various communities, it is likely that opposition to prohibition will be strong and that similar creativity with regard to avoiding the law will emerge.[8 22] The people who suffer most from this are the children themselves who, in addition to being subject to the will of their communities, also face inferior practise and care. While I stress, again, that there are good reasons to do away with non-therapeutic circumcision, prohibition is an imperfect answer.

As Chandran Kukathas has argued, there is little substance to the notion that criminalisation or state-led intervention serves the cause of reason. Intolerance of practices perceived to be harmful has inflicted serious injuries, particularly on minority communities, as in the case the 'lost generation' in Australia and the persecution of the Baha'i in postrevolutionary Iran.[5] If circumcision were prohibited and penalised, the parents, relatives and community members of all those circumcised would face prosecution, even if the circumcised themselves were content with their having been circumcised. Ultimately, the circumcised may suffer, both for the prosecution of loved ones and, potentially, for the stigmatisation that criminalisation inflicts. Toleration of circumcision in all of its forms, however, leaves open the possibility of avoidable harm by way of complications through untrained practitioners and unsterilised environments, and fails to deal with those who feel seriously to have been harmed.

One suggestion, in the UK, has been state provision of circumcision for Muslims and Jews. Aziz Sheikh has highlighted the relative health deficits of Muslims in the UK. Defending a faith-based approach to healthcare provision, Sheikh argues that the NHS has failed seriously to acknowledge and accommodate the specific health needs of faith groups. For Sheikh, the NHS needs to recognise that, 'For many British Muslims, religious identity is the essential defining characteristic as it represents the prism through which they see and interpret the world'.[3] The failure to provide circumcision means that Muslims have to rely on poorly regulated private sector or community services, increasing the potential for harm through complications. This inflicts a particular social disadvantage on Muslims that non-religious or non-circumcising religious groups do not face as they pursue lives in accordance with their beliefs. In Sheikh's account, therefore, maintaining equality in society means providing different services to different people. By providing circumcision free on the NHS, Muslims would be able to observe their religious obligations and minimise the possibility of harm through poor practise.

Those opposed to circumcision may regard such a strategy as akin to that of 'nicking' proposed by the likes of the American Academy of Pediatrics in the case of female genital cutting.[14] Such approaches seek to bring that group of practices into a medical environment, minimise the extent of damage to the sexual organs and the level of trauma to girls. In effect, by 'nicking'[37] the clitoris or, in other approaches, excising the clitoral prepuce, little harm is done and much harm avoided. This has been opposed by the likes of Martha Nussbaum on the grounds that it condones or accepts the sexual diminution of women and that any impingement on bodily integrity constitutes an intolerable injury to the dignity of the person. Again, I have strong sympathies with this position—all forms of genital cutting of minors seem deeply troubling. If, though, our concern is for harm done to actual people, rather than to categorical political principle, some form of regulation and sanitisation seems pragmatically valuable in contrast to the potential harm associated with prohibition. If circumcisions for religious or cultural reasons were done in hospitals, then the serious harms associated with complications could be minimised.

In order to be egalitarian and to avoid favouring particular monotheists, this should stand for all invasive cultural rites, including various forms of scarification, ear piercing and tattooing and, importantly, forms of female genital cutting. Calls for equality and neutrality find some support in Brusa and Barilan, who argue that there should be no reason to prioritise particular beliefs or conceptions of the good in public health services

traditionally grounded in egalitarian access to healthcare.[34] However, they dismiss claims of practical similarities between circumcision and female genital cutting on the basis that women are more vulnerable to gender oppression and that circumcision has been adopted in 'democratic countries', 'signifying that only male circumcision is a tolerable practice, even if it is errant and harmful'.[9] The ethnocentricity of the second claim has been challenged by those who draw parallels between male and female forms of genital cutting both to oppose the former and to minimise sensationalism regarding the latter.[34] Even if certain alien practices are seen, conventionally, as odd, they should be granted no more and no less credence, independent of intrinsic features of harm, than the practices of, say, Abrahamic monotheists. Again, I emphasise that I object to all such practices—recognising qualitative differences between each—but think that blanket criminalisation is unhelpful. What might be helpful, though, is proscription of rites performed outside medical settings by untrained practitioners, as it would punish the unscrupulous and remove financial incentives for exploitative community figures without endangering or injuring children.

There are, though, two key issues with regard to this approach, both associated with costs. First, sanitisation does not deal with the potential harm done by 'successful' circumcisions, since there are clearly people who feel that their circumcision has been of serious cost or disadvantage to them. Second, sanitisation comes with serious financial costs by way of practitioners, equipment, postoperative care and treatment for complications which, though minimised, can never be eradicated completely. Who should bear the costs of physically invasive rites?

BEARING THE BURDENS AND CONSEQUENCES OF BELIEF

Peter Jones[4] argues that people should bear the burdens and consequences of their belief. Jones takes as his starting point the case of Mr Ahmed, a teacher employed full-time at a state school in London. A devout Muslim, Mr Ahmed believed that he was obliged to attend Friday prayers. As these occurred during school hours, Mr Ahmed requested that he be excused from teaching on Friday afternoons and that teaching cover be procured without his losing pay. Despite the educational authority refusing the request, Mr Ahmed continued to absent himself, leading the authority to offer to re-employ him as a part-time teacher for four–and-a-half days per week with pro-rata salary. Mr Ahmed rejected the offer, resigned his position and appealed to an employment tribunal on the grounds of unfair dismissal. The appeal was rejected in each instance up to the European Commission. The point of contention was that the British working week disadvantaged observant Muslims because, while Jews and Christians could observe their Sabbaths without facing conflicting work demands, Muslims faced a clear choice between perceived religious obligations and monetary reward. Mr Ahmed argued that Muslims were, in effect, socially disadvantaged by their needing to pray on a Friday in a country with Christian working weeks.

Jones' neutralist response is to draw upon Rawls to argue that, while there may be very good reasons to disavow inequalities based on natural abilities, there is good reason to demand that people bear the burdens of their beliefs (by, for example, joining with others to pool resources)[14] and no general reason for people to bear the consequences of the beliefs or conceptions of the good held by others. Mr Ahmed's burden was his need to pray; the consequences of his belief were that he was unable, in a particular liberal society with a particular working week, to perform the role of a full-time teacher. Circumcision, unlike prayer, is directly other-regarding, with burdens and consequences at two generational levels.

In the first instance, parents are burdened to circumcise their sons. For Sheikh, the injustice lies in the consequence of bearing that burden in a liberal country with partial public health arrangements. Although the NHS does not generally provide elective circumcision, it does, for example, bear the costs of the consequences of binge drinking,[9] smoking and sexual activity by non-Muslims which Muslims may not wish to support through their taxes. Muslims not only support the burdens of others' beliefs, they are also forced to pay to use the private sector as a consequence of exercising their own burdens. There seems some merit in thinking this unfair. However, the notion of bearing the burdens and consequences of belief suggests that the injustice of circumstance can be dealt with by, in accordance with a form of luck egalitarianism, apportioning financial responsibility to those who binge drink, smoke and have unprotected sex as well as the circumcisers, rather than burdening tax payers further, particularly in a time of austerity.

A system which minimises harm and apportions responsibility is supported by the Royal Dutch Medical Association (KNMG) in the Netherlands.[38] Echoing the system envisioned by Brusa and Barilan, non-therapeutic circumcision is officially opposed, but tolerated and regulated, with circumcisions performed only by qualified practitioners using anaesthetic for a set fee. Contra Brusa and Barilan, however, the notion that the NHS, for example, should cover the cost of any complications associated with the practise of rites is troubling. There is reason, by way of equality, to ask that such costs be borne by those who practise circumcision or other rites or who are injured through reckless activity. One objection is to say that some parents cannot afford to pay for the full cost of surgery meaning that, with cheaper, traditional excisions proscribed, Muslims will be further disadvantaged by being forced to use regulated services to fulfil a burden. However, given that it is the group which has served so clearly to promote the practice as a necessity among parents, it should be the group which covers such costs. If group membership is to mean anything, it should extend to covering the costs of fulfilling a burden that they believe to be obligatory and which many other contributors to the health service believe to be harmful.

In the second instance, as an involuntary act, the physical and psychological burden of circumcision is borne by the circumcised rather than the original believer. If people do feel themselves to have been harmed or disadvantaged by their being circumcised, then it is not their beliefs which induced the costs, but those of their parents and the broader community who deemed the rite obligatory. The involuntary burden that these people face will only be minimised, rather than removed, by their being circumcised under regulated conditions. Jones' account recognises grounds for limiting the autonomy of religious groups in such cases.[4] Given, though, that only some people claim to have been harmed by the burden, and given that there are good reasons to regulate rather than to proscribe, there seems better reason to find means of dealing with the costs of the burden therapeutically and enabling the practice to be challenged inter- and trans-generationally. This requires that believers take responsibility for their beliefs within a context of criticism and recourse.

CONCLUSIONS: RESPONSIBILITY, TOLERATION AND LIBERTY

The debate on circumcision rests on apportioning responsibility to particular individuals, groups and bodies for the practice and

its consequences. At present, opponents of circumcision wish the government and courts to take responsibility for prohibition and penalisation, while proponents such as Sheikh wish the government and health service to take responsibility for provision. Since non-therapeutic circumcision is driven by group faith, it is only fair that groups take responsibility for funding the practice, dealing with criticism and offering recourse for men who feel harmed by the burdens inflicted upon them. Although the Jewish tradition of mohalim is an example of a system in which the cost of the practice is covered by parents, there are few means by which groups, having inflicted social pressure on parents to circumcise, are held responsible or accountable for their actions. Not only does this prevent people seeking redress of grievances, it inhibits meaningful public discourse on invasive rites.

For Chandran Kukathas, in order to respect persons, we need to create modus vivendi guided by an ethic of toleration and governed by two principles: freedom of conscience, such that people are entitled to live according to their belief, and freedom of association, such that people are free to move between the various associations they inhabit. Kukathas envisages an archipelago of institutions and societies, each with different doctrines and spheres of authority, but guided by those two foundational principles. Discussing the treatment of harmful practices which conform to these principles, he calls for the toleration—permitting practices with which people disagree—on the grounds that it upholds or honours reason, forswearing 'the use of force in favour of persuasion (whether by argument or by example)'.[5] In an almost market-like environment, people can move from one group to another according to their conscience. Freedom of speech, derived from the right to exit particular associations or institutions, means that practices can be criticised, even if from the outside.

Although inflicting physically invasive rites may inhibit movement between groups, in an environment marked by toleration, those groups which avoid harmful invasive rites may either attract people from, say, circumcising groups or persuade those groups not to circumcise. Moreover, people who sincerely feel harmed by their having been circumcised can express their views towards, and hopefully engage with, identifiable bodies which promoted the practice among their parents. In this sense, those who inflict invasive rites can be confronted with responsibility for the consequences of *their* beliefs. Asking religious groups to form identifiable bodies to pay for rites, explain belief and face criticism and recourse under conditions of freedom of conscience and association may serve the cause of eradication much more effectively than simple prohibition. As Hernlund and Shell-Duncan note with regard to female genital cutting in West Africa, practices may be much more contested and people much more ambivalent and open to change than they may appear.[25]

If we are to deal effectively with circumcision, we have to look past blanket prohibition towards a pragmatic means of minimising harm and a broader, social approach to challenging the practice across generations. This needs to be part of a more consistent approach to invasive practices which overcomes ethnocentric preferences for certain groups and treats forms of belief equally and neutrally, whether they be atheist, antitheist, monotheist or polytheist. While the German court decision may not hold all the answers, it raises serious questions which need to be asked of religious groups. For this reason, it is an invaluable stimulus to debate.

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