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The right to believe anything you want - but not to do anything you want

On the difficult relationship between children's rights and religious freedom

in

Matthias Franz (ed.)

Circumcision of Boys

A sad legacy

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Introduction

On 12/12/2012 the German Bundestag regulated male circumcision after serious debate. Proper medically performed circumcisions up to the sixth month of the child's life are generally permitted. In a roll call, 434 of the 580 Bundestag deputies present voted for the government bill.

Ninety-one deputies voted for the alternative draft that I initiated together with politicians of the Green party and the Left party, and which intended to allow circumcision only of boys aged 14 and older with their consent and only by pediatric surgeons and urologists.

I had pointed out again before the vote that the rights of parents as well as the right to freedom of religion is not an unlimited "right of disposal", but is limited by the human rights and the fundamental right to physical integrity. To recognize the right to freedom of religion explicitly, our alternative draft adopted the age of religious maturity, which uses the age of 14.

In order to assess the previous political debate properly and draw the right conclusions for the further treatment of the problem, it is necessary to review the genesis of this law.

Occasion and context of the parliamentary debate

At the beginning of the entire debate there was the decision of the Regional Court of Cologne that declared in its judgment of May 7, 2012 that circumcision of underage boys for religious reasons was unlawful assault. Through this, the federal government stated in the problem description of their later provisional draft, that "considerable legal uncertainty, was originated because, until the disclosure of the Regional Court decision at the end of June 2012, it was undisputed legal practice that parents basically give legally effective consent to circumcision even in non-medically indicated cases such as religiously motivated circumcision"(German

Bundestag, 2012a, p.1).

A few weeks later, I noticed related press releases, which stood out prominently, I thought, recalling the intense discussions about children's rights and welfare of the child that I have led for many years in the German Parliament and the Parliamentary Assembly of the Council, and also in symposia and conferences: It's great that in Germany there are judges who are with us in respecting the rights of the child and take this into account in their daily work.

In the following days, I spoke with many people and also with representatives of organizations that also deal with children's rights. Most of them had not yet taken notice of the published judgment.

I noticed early on that relevant experts had not framed the question in relation to children's rights and I therefore decided for the moment to not deliver public statements so as not to occupy the subject confrontationally. In general, however, I have seen the shift in consciousness documented in this judgment as positive.

The first, very fierce public reactions from religious communities did, however, already make clear that the proponents of religiously motivated circumcision of boys were massively offended. This was followed by the first politicians who throughout engaged in scolding the judgment and in part denigrated the court as incompetent. Thereupon I have tried to describe the situation from the perspective of a child's advocate politician in an initial statement from July 2, 2012.

“The judgment of the Cologne judges, according to which religiously motivated circumcision of boys is to be seen as assault, clarifies that the religiously motivated circumcision of boys at the request of the parents goes far beyond the exercise of parental rights and is not covered by the basic right to freedom of religion. It is an offense against the constitutionally guaranteed right of the child to physical integrity.

However, a circumcision that is performed without the consent of a child and without medical necessity is not only a violation of constitutional protection law, but it disregards fundamental objectives of the UN Children's Rights Convention such as the right to health and protection from violence.

A general amnesty for intervention in the physical integrity of wards for religious reasons would almost be equal to the demand to justify other methods of physical influence and punishment with religious justifications. The UN-rights of the child clearly oppose this” (Rupprecht, 2012).

I have deliberately not called for a quick, fairly secure control set up, but stimulated a discourse as to carefully and differentiated work out the disparity between case law and practice that had become obvious. However it has not come to that.

The beginning of the parliamentary discussions

External cause was a special session on the euro-bailout during the parliamentary summer recess within which a cross-party resolution to the federal government should be adopted for circumcision.

The tenor of this call to the federal government and the entire political debate was as follows. As a legal contradiction was revealed by the Cologne Regional Court, one must make the law such that Jewish life must remain possible in Germany.

Thus, it was from the outset not an open discourse, but a confession of which the clear objective was to allow circumcision or to provide impunity for it.

During this first phase of the public debate it was also obvious that the main argument of the proponents of circumcision consisted solely of the formulation that Jewish life should remain possible in Germany.

While apart from the Federation of Alevi youth in Germany (BDAJ), many Muslim organizations – presumably to avoid Islamophobic reactions as in the Halal debate in France – initially did not at all express very pronounced objections, Jewish organizations, on the other hand, as well as circumcision advocates in the German Bundestag worked subliminally or openly with all the connotations of the thought process of further enabling Jewish life in Germany.

Neither in the SPD parliamentary group, to which I belong, nor in the other groups, had more than a handful of parliamentarians given any thought to the non-medically indicated circumcision of boys without the capacity to consent. This means that almost all of the 620 members of parliament were literally “caught off guard”.

I would therefore have expected and have advocated that Parliament would first make itself knowledgeable on the subject before making such a far-reaching principle-decision within just four weeks. This has, however, not happened.

Instead, under the title “Legal Regulation of circumcision of underage boys” an application of the outlined objectives followed, introduced by the group leaders of the CDU/CSU, FDP and SPD and dated July 19, 2012 (German Bundestag, 2012b). It calls for “the federal government to submit a bill in the fall of 2012 under consideration of constitutionally protected legal interests of the child welfare, physical integrity, freedom of religion and the right of parents to education, which ensures that a medically professional male circumcision without unnecessary pain is generally permitted” (German Bundestag, 2012b, p.1).

On the first application draft the Green party representatives were still included as applicants, but then virtually “at the last moment,” after a controversial group meeting, they jumped off the wagon.

In a personal conversation with Frank-Walter Steinmeier, and despite great time constraints, I was able to achieve that within the SPD parliamentary group at least, the circumcision issue was discussed for half an hour as part of our group meeting on the Euro rescue.

I took the word as one of the last representatives and explained my basic arguments. Many colleagues conceded afterwards that previously they did not have pertinent information about the issues available and would have acted differently in any polls after my argumentation.

In a written statement to be decided upon from July 19, 2012 I explained, together with eight other SPD deputies, the reasons for our opposition to the resolution: “We do not deny that the decision of the Cologne Regional Court can be connected with considerable irritation and social upheavals, particularly with members of the Jewish or Muslim community. They can only with difficulty or not at all understand why a custom of their faith practiced through many generations should now be banned in Germany and should be punishable by law. Nevertheless, in our view, questions of fundamental rights cannot be answered with reference to traditional action alone, nor by the fact that one shifts a legal problem into a seemingly lawless area. [...] By voting for the application, the majority of the German Bundestag has declared to provide in the near future a statutory provision to justify the non-medically indicated religiously motivated circumcision of boys, which is something we reject. In our view, such a law would also stand contrary to the Basic Law. This is mainly because the Basic Law states neither a primacy of parental right to religious education of children over the child’s rights to physical integrity and self-determination and because the Basic Law and the civil rights of a child cannot be limited by the rights of religious communities under Article 140 of the Basic Law in conjunction with Article 136, paragraph 1 WRV. This is another reason why we reject the suggestion of the application” (German Bundestag, 2012c, p 22854f.).

Fourteen colleagues from the Alliance 90/The Greens pointed to the intention of those who could not sponsor the resolution for child rights reasons: “The German Bundestag should strive for a culturally sensitive solution in dialogue with religious communities, the medical associations, and child protection associations on the sensitive issue of religiously motivated circumcision of boys, a dialogue that places children as subjects of their own rights at the center. The submitted application does not do justice to this claim.”(German Bundestag, 2012c, p. 22855)

The fact that MPs from other political groups - regardless of the substantive issues - called the followed procedure “taking-by-surprise tactics” is shown by the personal statement by Burkhardt Müller-Sönksen (FDP) as quoted from the minutes: “The submitted cross-party developed application is not agreeable. [...] The necessity of this fundamental issue to come in the form of an ad hoc procedure for a timely legal regulation, in my view is not appropriate, given the complexity of the issue. The debate over religious circumcisions should take place without prejudice, yet the application contains the predetermination to continue allowing religious circumcision” (German Bundestag, 2012c, p. 22852).

The plenary session of July 19, 2012

In the plenary session on July 19, 2012 the CDU deputy Dr. Günter Krings first formulated his contribution as a “clear signal to the Jewish and Muslim communities in Germany [...] that Jewish and Muslim life in Germany in particular is still not only possible, but not unreasonably difficult”(German Bundestag, 2012c, p. 22829).

Christine Lamprecht (SPD) added that “it is unacceptable to have this uncertainty persist”, especially since this harbors also the danger that circumcision “would be performed in

back rooms or would trigger circumcision tourism.” Although one wants to weigh the different legal interests, at the same time however, one has to send a signal “that Muslim and Jewish religious practice in this country must be possible” (German Bundestag, 2012c, p. 22830 et seq.).

As the first to expose the problems, Jens Petermann (The Left) stated that the resolution is hurried and appears to be "waved through actually without debate", and brought the dilemma to the point: “Of course, respect for religion and the freedom of religious observance are granted. The real problem is on a different level, which has already been addressed here. What about the protection of fundamental rights of the minor, religiously under-age child to physical integrity and self-determination against the fundamental rights of parents to religious freedom and the rights of parents?”(German Bundestag, 2012c, p. 22832)

In his contribution, there are two other important aspects: “A decision by the parents to avoid religious marginalization cannot replace the consent of the little patient, as no medical indication exists and the surgery does not serve the child’s welfare. By a circumcision the child’s body is changed permanently and irreparably. This change is contrary to the interest of being able to decide later in free self-determination for a religious affiliation (German Bundestag, 2012c, p 22833).

My first intervention in the debate itself - highly acclaimed by the public as evidenced by the hundreds of letters - took place when Volker Beck, Parliamentary Secretary of the Alliance 90/The Greens, instead referring to took off in a remarkable argumentative volte, stating that the parents’ legal consent to circumcision was covered by the “right of the child to grow up as an equal and full-fledged member of a religious community, to which the family belongs.” In addition, the intervention “was in fact irreversible, but still relatively minor”(German Bundestag, 2012c, p. 22833 et seq.)

I then brought by way of an intermediate question the following aspects into the discussion:

“Mr. Beck, you know that the Federal Constitutional Court found in 1968 that children are holders of fundamental rights, without limitation; this is not dependant on the age. In addition, we have implemented into national law the UN Children’s Convention last year in this Bundestag with a large majority. In article 24, paragraph 3 of the UN Children’s Convention is clearly stated that the undersigned States make every attempt to eliminate customs and practices that violate children.

We have decided in 2000 in this Bundestag after a long discussion with a large majority that parents must educate their children without violence. Thus, we have included for the first time children as legal subjects into law. This means that children have a right to violence-free education. This also applies to religious education.

Nobody is taking away anyone’s right to educate children religiously. On the contrary: It is the responsibility of parents to raise value-oriented children and prepare them for life in this society. But we have the principle of nonviolence. I wonder how you want to make this resolution agree with the UN Children’s Convention and fundamental rights.

I believe that an honest discussion needs to take place. My plea to my colleagues is that if we deal with this issue during summer recess, we should not be too hastily looking at just the people in our country who express their opinion loud enough. One should also look at those who

cannot speak, but for whom we sit here in parliament, namely the children. We need to clearly stand on their side and give a voice when it comes to such social developments.

I hope you will agree with me that everything we do here must be based on the Basic Law. This is the basis of everything we do. I ask the Government to submit a bill that indeed does just that.

Therefore, my question to you is: How do you want to help shape this law, if you specify already in advance that the law has to be one that provides impunity?" (German Bundestag, 2012c, p. 22834)

The colleague questioned by me then said that he saw his legal position in full compliance with the UN Children's Convention; he repeated again that a circumcision in his opinion does not pose any health hazard, but is just an impairment without pathological findings.

Therefore, so Beck, "as part of the fundamental right balance it has to be discussed which value circumcision has as a command for this religion."

"And here we come to the conclusion: This is the first commandment of God that applies to this religion, and it is the foundation of faith of all Abrahamic religions." Beck had previously already said, "One must not overlook the fact that the circumcision command in the Jewish religion and the Islamic faith is fundamental. The justification of God's covenant with the people of Israel and Abraham in Genesis 17 begins with the command to Abraham to circumcise the children of Israel, when they are eight days old" (German Bundestag, 2012c, p. 22834).

How much Volker Beck tried to influence the debate at an early stage by predominantly aiming at Judaism's religious reasoning and by innuendos to latent anti-Semitic references in the circumcision debate, shows precisely his concluding remark: "Does it not appear to you as odd that Germany of all countries should be the first and only in the world where circumcision of Jews and Muslims should be a criminal offense?" (German Bundestag, 2012c, p 22835).

Legal and medical differentiation

To widen this one-sided and flat-rate argument towards a differentiated perspective on the whole complex of problems, immediately after the meeting on July 19, 2012, as children's representative of the SPD parliamentary group, I had shared my level of information in a letter.

In it I first described the legal situation and pointed to the relevant decision of the Federal Constitutional Court and the Basic Law. Following the decision of the Federal Constitutional Court of July 29, 1968 (see, among others, Benassi, 2012) children are bearers of fundamental rights. Thus the basic rights apply fully to them. Thus, this also refers to Article 2, Paragraph 2 GG: "Everyone has the right to life and physical integrity. Personal liberty is inviolable. These rights may only be encroached by virtue of a law".

Then I explained that international legislation is also relevant for the circumcision debate. Since April 5, 1992, the UN Children's Convention is in fact valid for Germany: On July 15, 2010 it is even by the German Bundestag's withdrawal of reservations to be fully in force as German domestic law. With this the following articles apply:

Article 24, Section 3

“States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.”

Article 3, paragraph 1

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Article 3, Paragraph 2

“States Parties shall undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.”

After all, it reads in § 1631 BGB (the content and limits of custody), para 2: “Children have a right to violence-free education. [This includes religious education.] Corporal punishment, psychological injuries and other degrading measures are inadmissible.” This source of law is in force since November 11, 2000 and at the same time the initial naming of children as legal subjects in the Civil Code.

I further explained that the criminal justice activist, Dr. Grisha Merkel, pointed out that an exemption would only apply to one or two religious communities, in turn massively violating the principle of equality: “If we were to understand the right to freedom of religion such that it limits the right to physical integrity of children, as you require it, then this must obviously also apply to other religions and their rituals, for no rule of law may act arbitrarily.”

This applies even more so, since for neither the Jewish nor the Muslim ritual of circumcision can a medical inconsequence be assumed, as is falsely but repeatedly claimed.

With regard to the medical aspects, to which I may refer to the other contributions in this book, in particular with regard to anatomy, anesthesia, complications and consequences, I quoted the opinion of the Professional Association of Child and Adolescent Physicians (BVKJ eV) from July 17, 2012 according to which “the child’s welfare and right to physical integrity are paramount”. This opinion counters the trivialization of circumcision as it is a “form of assault, which can also lead to lifelong physical and [...] psychological harm” (BVKJ, 2012a).

Furthermore, I have also quoted the German Academy of Child and Adolescent Medicine eV – an umbrella organization of child and adolescent medical societies – who asked the question “whether a ritual that is perceived as archaic to follow by some Jews and Muslims should be rethought” (German Academy of Child and Adolescent Medicine, 2012).

The religious argument: A rite without alternative?

First reactions to the verdict – interestingly enough, almost exclusively from the environment of Jewish organizations – claimed that a ruling to the contrary would make Jewish life in Germany impossible, whereby they, consciously or not, created a reference to the Shoah.

In an interview with the “Jewish General” I have shown that adverse effects on the practice of religion are absolutely avoidable if the members of the religious communities are

willing to take medical evidence into account to the effect that a change in the rites into the symbolic occurs (for example, analogous to Christian baptism, etc.) to allow a conscious decision for or against circumcision only upon the occurrence of religious maturity and taking into account the decreasing rate of complications with age.

It should also be noted that there are religious movements among Jewish communities (Initiative “Ben Shalem - Intact Son” in Israel and “Jews Against Circumcision”) as well as among Muslims (especially in England) that reject the circumcision of children and thus take these same criticisms into account.

Among the Muslim organizations in Germany, Serdar Akin, Chairman of the Federation of Alevi Youth in Germany (BDAJ), in particular, had taken a clear position to take account of children’s rights (Akin, not dated).

Therefore, prevention of the practice of religion is thus not at all seen in Jewish and Muslim reform movements, the sole objective of their activities is an adaptation of archaic rites to the modern times, based on human rights.

The international initiative “Jews Against Circumcision” (JAC, www.jewsagainstcircumcision.org) shows, among other things, which religious prohibitions of the Torah (e.g., homosexuality, blasphemy, fornication with women, etc.) carried the death penalty but, due to the development of civilization, will no longer be punished today, and what practices are no longer used or banned (e.g., slavery, human and animal sacrifices, wife obedience, etc.). JAC argues with circumcision critical publications by the medieval reform rabbi Moses Maimonides and is convinced that “the barbaric and primitive torture and mutilating practice of circumcision has no place in modern Judaism.” This is even more true as the circumcision commandment of the Torah is not listed in the first two versions of Genesis. Furthermore, JAC refers to the ten most important values of Judaism, noting that nine of them would be violated by the circumcision. According to the commandment of the “love of learning” it is necessary to adapt the religious practice to the medical and psychological findings. As an alternative, JAC offers the Brit Shalom, a ceremony that is practiced in Jewish communities for girls. A similar proposal comes from “Ben Shalem” (Intact Son), an initiative in Israel.

As a member of the Parliamentary Assembly of the Council of Europe and an internationally active children’s politician, I cannot at all confirm the claim that Germany is the only country in which the permission of the infant circumcision is put in doubt. Instead, the National Coalition lists in their newsletter (National Coalition 2012) that among others there are institutions in Israel, The Netherlands, Norway, Canada, France and the USA who have initiated debates as to how appropriate infant circumcision is in our time.

For the Muslim side, “Quranic Path” (undated) lists the reasons for speaking out from a Muslim point of view against circumcision: “Allah is the One who made the Earth a habitat for you, and the sky as a structure, He designed you and has perfected your design”(Qur to 40:64).

I have therefore repeatedly pointed out during the debates in the Bundestag that it is incorrect to state that Germany holds an internationally isolated position in the discussion.

Important aspects that did not play any role

Justification contexts in relation to circumcision of both boys and men outside of these two religious communities were not at all taken into account. The wide-spread acceptance of circumcision that is observable mainly in the U.S. and England had evolved to prevent masturbation in the prudish social climate of Victorian England and spread throughout the New England States and the British colonies.

The assessment of this argument, however, may have led to the irritating conclusion that the permission for non-medically indicated circumcisions would not be an act of religious tolerance, but rather in considerable intensity, a relic of outdated morality concepts from a monarchist time.

Not insignificant – and yet equally neglected – were also topical aspects such as beauty ideals, which provide cosmetically motivated operations in the genital area in both men and women, and especially among homosexuals (in Germany) widespread sexual practices, from which a preference for circumcision follows.

For the purposes of a misunderstood “political correctness”, the latter aspects were taboo, as the religious rights angle had already emerged early in the debate as the safest.

The draft of the Federal Government and the influence of lobbyists

In early November 2012, when the draft by the Federal Government was presented and went to the committees for deliberation, I noticed in many colleagues – independent of faction membership – the discomfort that accompanied the ongoing ignorance of all of these objective findings. In many cases the counsel behavior, as well as the subsequent decision, was not determined by inner conviction, but by a great fear of getting vilified as an anti-Semite or Islamophobe.

Efforts then centered around the question how circumcision as an operational, hygienic and, above all, pain treatment-wise acceptable procedure may be regulated by law, that accepts the ritual practiced by a medically qualified circumciser.

Accordingly, the Federal Government chose in its bill the approach “to clarify in the right of parental authority (§§ 1626 et seq. BGB) that the custody of the parents basically includes the right to consent to a non-medically indicated circumcision of their son who is under age and not judicious, as long as a number of requirements are met. This shall not apply only if by circumcision the child’s welfare is at risk in individual cases, taking into account the circumcision’s purpose. During the first six months after birth, persons who are designated by a religious community may perform circumcisions if they are specially trained and adequately competent for the implementation of the circumcision without a medical doctor.”(German Bundestag, 2012a, pp. 1)

The bill proposed to insert § 1631d into the Civil Code:

“Circumcision of the male child:

(1) Custody includes the right to consent to medically unnecessary circumcision of a male child who is not capable to reason and is not judicious, if it is carried out according to the rules of medical science. This does not apply if the child's welfare is endangered by circumcision, also taking into account its purpose.

(2) In the first six months after the birth of the child, persons designated by a religious community are allowed to carry out circumcisions under paragraph 1, if they are specially trained and without being a doctor are comparably capable of the implementation of circumcision” (German Bundestag, 2012a, p.5)

In subsequent hearings and committee deliberations, I again shared my experience from talking to many pediatricians and doctors, according to which anesthesia is very problematic in an eight-day-old baby, because the danger posed by general anesthesia is exorbitantly high and only local anesthetic can be considered. However, in this context the repeatedly mentioned ELMA® anesthetic ointment is clearly unsuitable, according to package inserts, as an effective means, even if it is referenced again and again, including in the explanatory memorandum to the bill of the Federal Government (German Bundestag, 2012a, Appendix 1; see also Kupferschmid in this book).

I offered my colleagues in the Bundestag, who had declared the anesthetic or numbing problem to be sufficiently managed by ELMA®-anesthetic ointment, for done to administer a self-test by a small cut into the tip of a finger – negligible compared to circumcision – after numbing it using ELMA®-anesthetic ointment, which I had brought for this purpose. Nobody volunteered!

As scandalous as proposing EMLA® ointment application against better knowledge as the solution for the anesthesia problem was the absence of a circumcision-critical contribution in an American journal that had already been submitted and provided new statistical evaluations. As “Der Tagesspiegel” revealed in March 2013, “the U.S. Pediatricians Association (AAP) reported in 2012 – in the heart of the German debate – on a positive evaluation of neonatal circumcision in the journal *Pediatrics* and was frequently quoted. Now European pediatricians in the same journal excoriate their American counterparts. In the opinion of 38 authors from 17 countries, including the chairmen of the 19 European pediatricians associations, the conclusions of the AAP were not scientifically backed up and were shaped by cultural bias” (Kirchner, 2013).

From religious communities to the State of Israel, which had intervened in various ways, and especially by Jewish rabbis, quite massive pressure to adopt the draft law of the Federal Government was exerted, mainly on the management levels of the factions.

On the opposite side, neither the Professional Association of Child and Adolescent Physicians Association (BVKJ, 2012b) nor other initiatives were able to adequately illustrate with factual information the relevance of the dangers and consequences of circumcision in male infants or boys during childhood or to urge a differentiated discourse. Even the movie “It’s a Boy!” (Schonfeld, 2012), in which the Jewish documentary filmmaker Victor Schonfeld illustrates the dangers of circumcision with extremely violent images, failed to find enough resonance in the media to make it clear that the interference with the physical self-determination of children is not just a matter simple legal considerations.

Many child protection organizations and psychotherapeutic associations found themselves unable to take a firm position, so that they too could not count as reference points for the controversy.

The alternative draft

After the Federal Government had presented its draft carried by the four factions CDU/CSU, SPD, FDP, Greens, numerous members who could not support the resolution had already deliberated in July 2012 how one could present to the German Bundestag that an alternative approach would be possible.

The result was a so-called “group application”, undersigned by 67 deputies, which I submitted across party lines on November 8, 2012, together with my group colleague Rolf Schwanitz (SPD) and my fellow Diana Golze (The Left) and Katja Dörner (Alliance 90/The Greens), also children’s political spokespeople of their factions, under the title “draft law on the scope of custody and the rights of the male child regarding circumcision” (German Bundestag, 2012D). It pursued the goal of protecting the rights of children from being subjected to negotiations by neither religiously motivated nor other considerations.

After careful consideration of the constitutionally protected interests, in particular the child’s right to physical integrity, the right of parents to parental education, religious freedom of the child and the protection of the child’s best interests, we determined in our bill that circumcision of boys, meeting certain requirements of the right of parental authority (§§ 1626 et seq. BGB) should, in principle, be allowed. Since it is our opinion, however, that circumcision is a very serious interference with the physical integrity of the child, this should only be done with express consent, which is why we wanted to presuppose the completion of the 14th year of life of the child concerned who then has the capacity to reason and judge (German Bundestag, 2012D, p.2).

Unlike the proponents of the now applicable circumcision ruling, we always had in view that circumcision is a painful surgical intervention associated with risks. The irreversible removal of the highly sensitive erogenous and functionally important body part has long term physical, psychological and sexual implications. We were and are fully aware of this. For this reason, we introduced a second condition into our draft, which differs from the government’s draft: Circumcision must not only be performed according to the rules of medical science, but invariably by a doctor who is qualified as a specialist in pediatric surgery/urology.

Therefore, our draft was as follows (German Bundestag, 2012D, p. 4):

“§ 1631d

Circumcision of the male child:

Custody also includes the right to consent to medically unnecessary circumcision of the male child when he attains the age of 14, is capable to examine and decide, and has agreed that circumcision be performed according to the rules of medical science by a doctor who is qualified as a specialist in pediatric surgery or urology. This does not apply if the child’s welfare is endangered by circumcision, also taking into account its purpose.”

The debate on December 12, 2012 and final vote

On December 12, 2012, during the 2nd and 3rd reading to vote on the bill, explained the Federal Government and the alternative draft, undersigned by me and 66 other MPs, as well as some amendments that mainly concerned the deadline for a possible intervention, any regulations for the evaluation of the law, especially in regard to documenting and recording the number of interventions, etc.

The FDP MP Stephan Thomae, as the first speaker, immediately moved the subject into a historical context. For him “the circumcision of boys [...] touches on three delicate taboo subjects” – which are the welfare of children, the protection of religious minorities, as well as the fact that “people of the Jewish faith were at the heart of the debate” – “and thus it is also about a piece of German history” (German Bundestag, 2012e, p. 26073).

How heavy, however, not only the historical point of view weighed, but as a matter of course, especially subjective religious feelings in the way of value-rational prioritization were weighted as an objective decision argument shows another statement Thomae’s, in which he criticized the decision coercion, derived from the alternative. He defends the claim of a mandatory religious command by saying “this decision, which is after all not a negligible intervention, [has to be made] or rejected with the consequence that the boy is excluded from the religion of his parents, from his family or in any event cannot fully partake in the cultural identity of his own people” (German Bundestag, 2012e, p. 26074). Here the term “people” is therefore, without reflection, no longer used in a parliamentary debate as a synonym for the totality of citizens, but for members of a religious community.

The fact that the government draft is only to serve the mentioned objectives for the solution of the conflict – triggered by the court verdict – to provide a permanent legal certainty for the corresponding religious custom (“to clear the way for parents of the Jewish faith for maintaining their millenia-old custom of circumcising their newborn sons without making themselves liable to prosecution” [German Bundestag, 2012e, p. 26074]) and therefore has not been subjected to any impartial legal, political or even medical examination, also shows in the reason given for rejection of an amendment that intended an evaluation of the Act after five years: “We should have the courage today to find a final settlement” (German Bundestag, 2012e, p. 26074).

The “press-on-regardless” mentality in the debate, especially by the CDU/CSU/FDP government coalition, is illustrated by the reactions to an inquiry regarding the necessary regulation of circumcisers’ qualifications. Thomae (FDP) only answered succinctly, that this desire speaks to “a certain mistrust that faith communities themselves could not take care of the criteria to what extent the circumciser can perform this medical procedure” (German Bundestag, 2012e, p 26074).

Conversely, this would mean that wherever the legislature would have confidence in the purposefulness and fairness of actions, a legal regime for the protection of third parties could be suspended or omitted. This would lead to many lawless areas.

SPD parliamentary leader Frank-Walter Steinmeier, as the next speaker, elaborated on the atmosphere in which the conflict has now arrived, especially at the level of statements in e-mails and internet forums: “Advocates for a legislative measure are being abused as child molesters; opponents of circumcision are exposed to the suspicion of being anti-Semitic. Both accusations are totally inadequate” (German Bundestag, 2012e, p. 26076). Steinmeier called for

a differentiated approach: “In Basic Law the child’s welfare is defined rightly as a high value. But the whole truth is it does not just exist alone, but is on the same level with parental custody, freedom of religion and freedom of worship. These are legal interests of the same constitutional rank. Child’s welfare also covers physical integrity. Yet, it is not just exhausted in it, but it is also about values, security and identity. Child welfare also means belonging. Therefore, I refuse to stamp a rite that, as it stands, belongs for a part of our fellow citizens to their core identity, to the core of their membership in a community, as child-hostile.” (German Bundestag, 2012e, p. 26076). Finally, the SPD parliamentary leader expressed in one sentence, what made it so difficult to argue purely factually: “I feel very uncomfortable with the idea that we Germans, of all people, teach our Jewish fellow citizens what the content of the protection of life and welfare of the child is” (German Bundestag, 2012e, p. 26076).

His SPD colleague, Aydan Özoguz, took this up and pointed out the contradiction that considerably more Muslim children than Jewish are affected by a possible circumcision regulation, yet the public debate almost exclusively revolved around the latter religious community: “It appears to be almost a little absurd that Muslims had to be somewhat relieved during these last weeks and months, about the fact that the judgment also relates to Jews in Germany. They have repeatedly expressed that they do not want to know how this debate would have run otherwise” (German Bundestag, 2012e, p. 26093).

Andrea Astrid Voßhoff, for the CDU/CSU parliamentary group, initially emphasized that the legislature “had to take a view, as unobstructed as possible, at what our Constitution and what our legal system allows.” At the same time, however, she defined a strongly parent-based relationship between state responsibility and parental determination of children’s welfare: “It is essential for the concept of a child’s well-being, according to our current family law, that the parents determine its specific content and that they decide, according to their understanding, what best serves the child’s welfare. A constitutional duty by the state to protect the child arises only where the decisions made by the parents are clearly no longer compatible with the welfare of the child, that is, if the child’s welfare is at risk. This line is not automatically overstepped in a medically non-indicated invasion of bodily integrity, i.e., in the case of intervention in the rights referred to in Article 2, Paragraph 2 GG” (German Bundestag, 2012e , p. 26077).

The CSU deputy, Johannes Singhammer, supported this argument: “Children may decide against the religion of their parents when they are old enough. That parents make decisions for children and - also because of their religious experiences - want the best for them, is nothing peculiar creatures, but simply a matter of course”(German Bundestag, 2012e, p. 26085).

In the view of his CDU colleague, Norbert Geis, parental rights go even further. He believes “that parents have the right conferred on them by the Constitution to decide what is right and what is wrong, what corresponds with the welfare of the child and what doesn’t. No state has this right of interpretation, no doctor, no company or anyone else, but initially the parents alone have the interpretation right to decide what is in the interests of the child” (German Bundestag, 2012e, p. 26088).

The alternative draft, allowing circumcision only at the consent of those over 14 years, was refused by Voßhoff: “This would be a government ban, which would be – as I have already stated earlier –an unjustified interference with parental custody. Dear colleagues, who support this draft, it would force parents to go abroad who want to continue to bestow religious

affiliation upon their child. You run the risk of criminalizing parents” (German Bundestag, 2012e, p. 26078).

Diana Golze (The Left), however, exposed problems, in particular those of the non-child-friendly treatment of pain, in a continuation of the ritual circumcision without adequate anesthesia: “In my opinion it has become very clear at the hearing that the application of the so-called EMLA® ointment, even if it is supplemented by pain suppositories, is absolutely insufficient from the perspective of medical experts. [...] It is not even efficient enough to make taking a blood sample from the heel a pain-free procedure” (German Bundestag, 2012e, p. 26079). Golze also shed light on the relationship between effective pain treatment and medical qualifications: “A non-physician does not have the same opportunities as a doctor, because he is not allowed to perform any really effective anesthesia; which is regulated in the Medicines Act. The justification that “We also want circumcision to be performed according to the rules of medical science” is therefore untenable, since non-physicians may not act like a doctor” (German Bundestag, 2012e, p. 26079). The German Ethics Council, said Diana Golze, has called for qualified pain management. “At this point, the bill of the Federal Government (2012e, p. 26079 German Bundestag) remains well below the requirements of the German Ethics Council. Her conclusion was that children’s rights have clearly been upgraded in recent decades, “But I cannot credibly stand for the child’s right to protection, promotion and participation as well as for the creation of child-friendly living conditions, if I at the same time say that the rights of the child end where religion begins” (German Bundestag, 2012e, p. 26079).

For a minority in the Left Group who supported the government’s draft, Lucretia Jochimsen generalized: “Life for the Jewish and Muslim minority in our country is still not self-evident and free from fears. I consider it our task as parliamentarians, to create, especially in the majority-minority relationship in this country, legal certainty and protection rather than to impose bans” (German Bundestag, 2012e, p. 26086).

For the Alliance 90/The Greens, Renate Künast began by stating again: “Circumcision fulfills the offense of assault. Now the question is whether there is justification - as in the case of self-defense and emergency - for which criminal prosecution is suspended. But she would not want “that as a norm after a circumcision the police, prosecutors and court await” (German Bundestag, 2012e, p. 26080). Künast explained her approval of the government's draft order with the notion that “in front of against the background of parental authority and membership in a religious community, parents can responsibly arrive at the conclusion to agree to a circumcision in healthy children and in compliance with hygiene requirements. I would hope that religion would renew itself. But it’s not I that decides that, but religions from within” (German Bundestag, 2012e, p. 26081).

Marie Luise Beck (Alliance 90/The Greens) pointed in an intermediate question out words of Berlin justice Senator Thomas Heilmann. He emphasized “With this bill, a mark should be set, showing that Jewish and Muslim life is wanted and is desired in our country” – Beck referenced the connection to the debate on integration and then asked to expand this statement to read: “...showing that Jewish and Muslim life is desired also to the conditions of the Jews and Muslims and not only on our own terms” (German Bundestag, 2012e, p. 26091).

On the other hand, her fellow group member, Katja Keul, stressed: “No one wants to send the public prosecutor into the homes of Muslim or Jewish parents. The bill presented by the

majority of the House, however, is simply not capable of producing the necessary legal clarity targeted by it” (German Bundestag, 2012e, p. 26087).

For the proponents and advocates of the alternative draft, I took the floor and pointed out that the parents are first and foremost responsible for the upbringing of children “In accordance with Article 6 § 2 GG, it is their right and a duty primarily incumbent on them to educate children. That is also to educate in values, and that includes religious education as well. Therefore, it is their duty to prepare children for life and to help them to become independent personalities and responsible members of our society. This is no realm for the state to interfere; but this right of parents is a responsibility law and not an entitlement to disposal. The state has to respect children as legal subjects, as holders of fundamental rights.” I pointed out that the German Bundestag has set limits to parental rights by adopting the child’s right to a non-violent education (German Bundestag, 2012e, p 26083).

In the Children’s Commission of the German Bundestag, on the subject of “child health”, we have repeatedly grappled with the findings of medicine of the last thirty years. I have made this clear again in this debate and reminded everyone that there exist unequivocal findings of both significant pain for the affected infants and young children and the consequences and risks of circumcision: “These have been the professional associations’ expert opinions. They have clearly and unambiguously expressed that circumcision is a very risky, irreversible intervention, afflicted with lifelong consequences. [...] If you come to this realization, you must make sure that we need the consent of the person concerned, because the procedure is so serious. This we have done with our alternative bill. Based on the findings of medical research, we based it on the assumption that the interference is so serious that the capacity for discernment must be required. This must be generally applicable. The legislature cannot decide individually. Therefore, we want to wait until the age of 14 and then ask children whether they agree with the surgery (German Bundestag, 2012e, p. 26083). My contribution was interrupted by an intermediate question from Volker Beck (Alliance 90/The Greens), who, referring to a statement from the Federal Ministry of Justice, suspected that in accordance with the alternative draft “the entire range of judicial family intervention” would be conceivable, and asked me the question if one could at all “leave this child with their parents who expose him to the risk of a circumcision?” I replied that the consequences would be the same as in the government’s draft: “If the deadlines are not met –per the government’s draft it is six months – and someone performs the surgery without proper medical training, such surgery is punishable under criminal law. It is also punishable under criminal law if someone performs a circumcision and injures a child in the course of it because with that he has committed an assault, even if he has actually acted legally” (German Bundestag, 2012e, p. 26084). I also made clear that I want circumcision to be performed by pediatric surgeons – according to the inter-factional application “Children’s Health” from 2002 –in which children should be treated by pediatricians and not by other doctors. This must also apply to a substantial surgical intervention in infants and very young children such as circumcision regardless of whatever reason it is performed.

In the final vote, the cross-party alternative draft received 91 votes in favor and 461 votes against with 31 abstentions After the proposed amendments had also been rejected by the majority, is 434 MPs voted in favor of the Federal Government’s bill, 100 MPs rejected it and 46 abstained.

Challenges for policy and science: Unbiased monitoring and accompanying research

The proponents and advocates of the provision decided on December 12, 2012 claim that the solution now found was the result of an assessment of the following fundamental rights and rights, and that this –almost as expected and desired – allows admissibility of non-medical male circumcision for religious reasons.

Even after intense discussion, I think this position is not tenable because:

- a) parental rights under Article 6 of the Basic Law, in conjunction with § 1626 and § 1631 BGB, therein already finds its limits where the child's welfare is affected. It follows that a physical injury to a child is not allowed,
- b) freedom of religion under Article 4 and 140 GG finds its limits in the guardian role of the state in accordance with Articles 2 and 6 GG and Article 24, paragraph 3 UNCRC,
- c) the UN Children's Convention has been adopted as fully valid national law. It does not allow any interference with the physical integrity of children.

Even though the vote has illustrated that a clear majority of members of parliament, in a weighting of legally protected interests, gives less weight to a stringent implementation of children's rights and more weight to religious and parental rights, the very deliberate attitude of the cross-party minority should now lead to a very attentively monitored implementation and impact of the provision.

I expect nothing less than monitoring the quality of medical circumcisions in Germany, about complication rates, side effects and late effects should take place. Only with such monitoring, which must be supplemented by medical reporting requirements, can it be ensured that, ultimately, the appropriateness of the arrangements now made are reviewed. There is no mandatory provision for this in the current law, and it should be the task of science, in the context of the continuing public debate, to keep a watchful eye and to consider the topic in the current research. Of especially great importance are reports from the victims themselves on complications, psychological or sexual impairments suffered.

Only with further findings will it be possible to assess, beyond all generalizations, whether the new law is useful or if it has to be reworked. The 18th German Bundestag, to be elected in the fall of 2013, will stand before the enormous task of finding a way back to a proper and systematically clear analysis of the circumcision issue, after the excitement and generalizations of 2012. They will also have to clarify the aspect of increasing numbers of applications from almost all factions for more severe punishment of female genital mutilation, while interventions in the genital area of boys should, however, be exempt from punishment without regard to neurological and medical findings as to the meaning of the amputated tissue. Initiative for a correction of the law by way of a judicial review before the Federal Constitutional Court in the near future appears to be unlikely, because the required number of signatories – a quarter of the members of the Bundestag – with a view to voting relationships with regard to legislative projects will hardly come together. In my opinion, a lawsuit by a person concerned seems to be a more realistic, especially since the active child protection association "MOGiS eV - A voice for victims" has also taken on the subject, as well as aspects of circumcision practice after the adoption of the new law.

Several recent criminal comments see good reasons for this. Dr. Ralf Eschelbach, Judge of the Federal High Court (BGH) in Karlsruhe, states, for example: “The legislature itself has violated constitutional law by interfering with legal positions (Art 1 para. 1 GG), including the right to sexual self-determination and the undisturbed sexual and overall childhood development, (Art 79 para. 3 GG), which is why § 1631d BGB, which in addition also disregards Article 3 paragraph 2 GG, is clearly unconstitutional” (Eschelbach, 2013).

The criminal law professor Dr. Hans-Ullrich Paeffgen from Bonn justifies this assessment, among other things, by stating that massive, largely irreversible invasions in the physical integrity cannot be legitimated by the simple consent of their legal guardian: “It seems more than doubtful whether the right to religious ‘heteronomy’ may go so far against one’s own child that the child is exposed to an albeit very small but undeniable risk of sustaining further damage in order to introduce him into one’s own religious community. [...] That is why even the minimal consensus, to which the German Ethics Council has agreed, is far from being a proper solution. In short, objectively, a non-medically indicated circumcision is a physical injury that is unjustifiable” (Paeffgen, 2013).

Also, at the international level the debate will continue. In the Council of Europe’s Committee for Social Affairs, Health and Sustainable Development there is currently a report and a draft resolution about the physical health of children in counseling.

In general, to ensure that existing laws and international conventions are implemented and respected, that this basis of our rule of law should be made known to all persons entrusted with children, so as to initiate and carry on society-wide discussion and awareness-raising on human rights, the rule of law and democracy (they are the fundamental principles of our society).

Finally, it is important to have this discussion with all social and religious groups in mutual respect. It would certainly help to expand our horizons to the question of how the physical integrity and self-determination of children, for example, with regard to the determination of gender, may be taken without the consent of children. If it can be achieved that the law on these matters includes careful and respectful handling of the parents with their children, much individual suffering in the children’s later years of life could be avoided.