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## **The circumcision of boys in the light of the Basic Law**

Preliminary remarks

At the end of 2012, § 1631d BGB came into effect. The standard allows the legal guardian to circumcise the foreskin of a male child who is incapable of consent without medical indication. In legal-practical terms it is of particular interest whether § 1631d BGB may have a standing. This will be decided primarily by the provisions of the German constitution. This article therefore assesses the legal permission of the circumcision of boys in relation to the Basic Law. In this it deals only with the fundamental question of whether the consent permission can at all be constitutional. This article does not deal with other constitutional doubt and questions of interpretation of § 1631d BGB.

In the political as well as in the legal debate, the constitutional and legal-ethical issues were obscured in part by bringing in some aspects that are more suited to distract from the relevant issues. In order not to be unconsciously irritated by these aspects in the following, they shall be mentioned at the outset and marked as irrelevant.

We can begin with the questions about the motives of the debate leaders. The opinion of an American pediatricians association, the American Academy of Pediatrics (AAP, 2012) can serve as an example. AAP had chimed in at the height of the debate with the recommendation that circumcision of boys should be left to the discretion of the parents because of its (alleged) benefits for public health. The opponents of circumcision felt compelled to point out that firstly, AAP is the only pediatricians association in the world to pronounce such a recommendation for a hygienic-medically advanced country such as the United States, and that secondly, nationwide these doctors have enormous financial interest in boys' circumcisions (the annual financial volume of boys circumcision in the U.S. is estimated at 1.25 billion U.S. dollars). Looked at in the light of day, one finds both points – suggesting the opponent's lack of objectivity – meaningless. The AAP could very well be the only medical association and still be right with the recommendation, and despite the associated enormous financial interests. Especially if someone has a strong interest, he can track down points that others do not (want to) see. Just think of the accused in a criminal trial. For those who are interested in an objective assessment of what is right and what is wrong, it does not matter what motivated a particular argument. In short, even if someone is the only one calling for something and does so out of financial self-interest, he may still be right in his claim. Therefore, the evaluation of the AAP statement depends solely on the arguments it puts forward. These are not many - and especially not viable ones (see Frisch et al, 2013, Svoboda and Van Howe, 2013).

The line of argument of the AAP is also not one that would have to be considered constitutionally. The recommendation of the AAP refers primarily to the AIDS prophylaxis, but this is not based on the benefit to the individual child, but on a "utilitarian cover-all calculation [...] for all of the citizens" (Hoernle and Huster, 2013, p 336). This (monetary) cost-benefit calculus is incompatible with the attribution of individual core fundamental rights (Article 2, Paragraph 2 S. 1GG). How strange the utilitarian point of view seems to us today is also shown in the "compromise" of the AAP from 2010 that was unsuccessfully proposed and reasoned. It

suggested “to allow girls’ ritual nick”, i.e. the slight notching of the clitoris or its foreskin (see MacReady, 2010; Walter 2012a, p 1112).

Obfuscating contributions are also found among circumcision advocates - and among neutral representatives of the press. Thus, the following questions are frequently asked: Why is it that in Germany, of all places, such fierce arguments against circumcision of boys are made? Can there be anti-Jewish or anti-Muslim sentiment behind it? What holds true for the opinion of the AAP, must of course apply for the motives of circumcision critics. In sociological and psychological terms, it may be worthwhile to thoroughly answer the two questions. However, ethically, constitutionally and politically they are meaningless. Such prejudices may be useful for a convenient blanket defamation of the opponent. Along these lines, the support that representatives of Christian churches, Jews and Muslims offer can probably be explained by the fact that they fear restrictions of their own religious practices, as it manifests for example in the refreshingly open statement by Wolfgang Huber (2012): “With the circumcision debate there is something at stake for Christians too, namely freedom of faith and religious activity.”

But all this questioning based on motives is irrelevant in its entirety. Those who want to clarify whether circumcision of boys can be legitimized legally-ethically or constitutionally should not dwell on exploring motives for certain positions. Rather, they have to assess sustainability of these viewpoints and thus evaluate the respective arguments presented. To say it pointedly: Even if the Cologne judgment would have been xenophobic, with its constitutional assessment of the circumcision of boys it still could have been correct; just as well as the Imam can be right when he insists on the primacy of religious education rights of parents. This is precisely what needs to be clarified, irrespective of any motives.

On top of it, the insinuation of anti-Semitic and Islamophobic motives is only plausible on the basis of the admissibility of the circumcision of boys, because one cannot derive the disapproval from a *legitimate* rejection. Those who reject some Muslims’ practice of a mild form of female circumcision are not being called Islamophobic by anyone. Even those advocating an “effective pain treatment” and especially in infant circumcision (Deusel, 2012, p. 7), are hardly categorized as anti-Semites. The reason for this is the widely recognized validity of demands aiming at the welfare of the child. The circumcision debate is precisely about the admissibility of circumcision of boys. If the demand to prohibit the violating interference into the private parts of minors is justified in the matter, then the accusation of xenophobia is not derivable. The accusations of anti-Semitism and Islamophobia therefore only obscure what needs to be illuminated, which is the question of the permission to circumcise.

However, one would like to ask the polemicist Klein (2012) the question: How could a critique of early childhood circumcision of boys be formulated and put forward without the critics being regarded as anti-Semitic?

Particularly questionable is the often imposed demand that the state should show tolerance towards parents who want their sons circumcised (Bongardt, 2012, pp. 193f; Central Council of Jews, 2013). Nobody wants to be regarded as intolerant, which is why the appeal is not chosen clumsily. But the contrast of tolerance/intolerance does not fit from the outset, if the dispute is over the admissibility of a practice that consists of a bodily injury. Whether the state may be tolerant or is forced to legally intervene by its duty to protect and guard, that is precisely the question that must be answered. It cannot be answered meaningfully with the appeal that the

state should not intervene prohibitively. One may well demand tolerance with regard to merely bagatelle-like affairs, such as the tolerable ringing of church bells, or with a view to behavior that does not cause any damage, such as the wearing of headscarves. But if the interference affects the body and the core rights of third parties, that is, if the tolerance goes “at the expense of third parties, at the expense of children”, the demand loses any argumentative weight (Herzberg, 2012, p. 498).

The debate contribution by Habermas (2012) also falls into this category. He scolds the Cologne judges who have forgotten that Islam is part of Germany. He then concludes the point with the following consideration: “The universalist concern of political enlightenment is fulfilled only in the fair recognition of particularistic self-assertion claims of religious and cultural minorities”. More cannot be found in terms of justification. The fact that the Cologne judgment is “unfair” is only suggested.

Also included among the obfuscating contributions to the debate is the indignation over certain concepts. Critics of circumcision of boys called the circumcision act “abuse”, “violence”, “(sexual) violence” or “mutilation”. The circumcision advocates complain and point out that such terms would deeply offend the religious and parents desiring circumcision. As it shows under closer inspection, this objection also already assumes the admissibility of the circumcision of boys. No one would be outraged, if an *illegal* removal of an erogenous zone of the genital of a child would be labelled as “ill-treatment” (§ 223 Section 1 StGB), as “sexual violence” and as “mutilation”. The objection targeting the terms used would be null and void even if the circumcision of boys should prove to be declared *lawful* in the end. This would then be a permitted “mutilation”, just as a required and medically indicated amputation of a necrotic foot remains a mutilation of the body. In exactly this sense, the circumcision of the woman or girl in all practiced degrees of severity is regarded as “genital mutilation” (WHO, 2013, BGH NJW 2005, 672, 673). A deviation from this language usage is not mandatory if, for example, an adult woman herself is responsible for removal or reduction of her prepuce for the purpose of better sexual stimulation. The legality of the procedure does not change the fact that her genitals “have been mutilated.”

In religious circumcision as well, this fact cannot be “spirited away” even if it is, from the parents’ point of view, performed in the best interest of the child (Isensee, 2013, p 318). Insofar are the statements of Stephan Kramer irritating. On the one hand he writes in his expert opinion for the Bundestag: “We do not intentionally hurt our children, circumcision is not a punitive measure or an act of violence, but a rite of passage for inclusion in the religious community” (2012, p. 1f.). On the other hand, he says in an interview (Lau, 2012): “It’s also idiotic to dismiss criticism [...] with the argument that it did not hurt. It *hurts*. It is also nonsense, to make light of the matter by claiming that one does not need these few centimeters of skin.”

It is important for the debate about circumcision permission that the terms used for the procedure do not prejudice anything. Even the designation of mutilation leaves room for circumcision of boys to be classified as legitimate. Conversely, a departure from this term, customarily used for female circumcisions, does not make the circumcision of boys factually less serious – in this Stephan Kramer is right. The controversy over these words is therefore totally irrelevant to the legal-ethical and constitutional evaluation of circumcision of boys (see Bielefeldt 2012, p. 71; Franz, 2012b; Herzberg, 2012, p. 503; Walter, 2012a, pp. 1113).

## **Circumcision permission in the light of the Constitution**

### **The constitutional starting position**

The circumcision permission in regard to constitutionality is at all only in need of a more detailed discussion, if and insofar as the parents of underage boys (or otherwise legal guardians) agree to the circumcision. If, for example, a doctor acts on his own authority and circumcises the boy, because he thinks it is hygienic or to provide the boy with prophylactic benefits at the onset of sexual maturity (a lower risk of becoming infected with certain diseases), he would commit at the very least an unlawful bodily injury (§ 223 Section 1 StGB). This would be the same as if he – again arbitrarily – undertakes vaccination against measles or for prophylactic removal of healthy tonsils. Third parties have no discretionary power relative to the child.

The legal situation changes and makes closer inspection necessary, if the parents consent to circumcision after prior full information. Article 6, paragraph 2 S. 1 GG gives them basically the power to dispose of their own child. “Care and upbringing of children is the natural right of parents” but also “a duty primarily incumbent upon them” This “parental responsibility”, as the Federal Constitutional Court designates the legal position (BVerfGE 24,119,144), devolves extensive decision-making powers to the parents.

But there are limits to their discretionary power. Article 6, paragraph 2 GG does not completely surrender the child to his parents’ decision-making power. The child is “not the subject of parental exercise of rights, it is a legal entity and is holder of fundamental rights, to whom the parents owe an alignment of actions to the child’s welfare.” (BVerfGE 121, 69, 93) Parents do not have, for example, the right to subject their five year old to a tonsillectomy as a preventative measure, because the surgery is not in his or her interests (Fischer, 2013, § 223 Rz. 49). The pertinent consent would be ineffective; the doctor in turn would commit an illegal assault, with the parents at least as an incitement to it (§§ 223.26 StGB). The state is required in such cases to act in its capacity as guardian (Article 6, paragraph 2 sentence 2 GG). The child has a right to legal protection by the state, i.e. a right to protection even against encroachments by parents. This right follows from Article 6 paragraph 2 sentence 2 GG, in conjunction with the threatened fundamental rights of the child. The provision gives parents the right to decide *in the interest of the child*; in the exercise of parental rights “the child’s welfare must ultimately be the decisive factor and take precedence over the interests of parents” (Robbers 2010, para. 149).

Constitutionally, therefore, a “parent-child-state” triangle results, which is characterized by a not very transparent mesh: In their relationship with the state, parents have a right of defense, the state must, in principle, remain out of the parent child relationship. For determining what is in the best interests of the child, the parents’ primacy applies. Parents must be certain to serve the child’s welfare, not only to *think they do*. Instead, their actions must objective and, from an ethically neutral point of view, reasonable. As guardian, the state may intervene only when parents endanger the child’s welfare. But then there is always the state’s duty to protect the child’s rights, which, in his relationship with the state, the boy can legally claim, as I said, under Article 6 paragraph 2 sentence 2 GG, in conjunction with his relevant fundamental rights. The legislature may not fall short of a certain minimal level of protection (BVerfGE 121, 69, 92; Fateh - Moghadam, 2010, p. 131 ff; Germann, 2012, pp. 83; Germann, 2013, p. 413 ff; Höfling,

2012; Höfling, 2013, pp. 463 ff; Hoernle and Huster, 2013, pp. 328 ff; Isensee, 2013, pp. 318 f; Rixen, 2013, pp. 258 f).

In assessing the permission provision of § 1631d BGB, it must therefore be determined whether the parental consent to circumcision is still covered by parental rights, or whether it already endangers the child's welfare (and the subsequent circumcision violates it). Asked more precisely: Is circumcision closer to vaccination and other comparable procedures that parents are free to carry out, or is it closer to the prophylactic removal of the tonsils, which already violates the child's welfare and is therefore no longer available for parental disposition?

### **The violated Fundamental Rights of the Child**

With the express legal permission of the bodily injury act of circumcision, the state actively violates its duty to protect and interferes indirectly with the fundamental rights of the child. Invasion quality and illegality of the law each result from the well-recognized circumstances of *each* circumcision of boys. The removed foreskin is an erogenous zone, a highly sensitive part of the penis; it has about 20,000 nerve endings, plays an important role in the sexual sense and protects the glans from dryness and keratinization and thus maintains its sensitivity (Hartmann, 2012; Jaermann 2010). Therefore, the question that Hoernle and Huster regard as crucial with regard to the limit of parental rights already comes too late: "How to deal with the immediate surgery *risks* and the suspicious facts that are related to the *long term effects* of circumcision" (2013, S. 337; similarly Pekarek, 2013, p. 515). The violating surgery of the intimate area and its immediate consequence, the loss of the erogenous and functional penile foreskin tissue, is itself already serious enough. Therefore, the circumcision act and the permission provision both violate the child's right to physical integrity (Article 2, Section 2 Sentence 1 GG), the right to privacy of the child (Article 2, Paragraph 1 of Article 1, paragraph 1 GG), and because of the permission, also religious circumcisions - the right to negative freedom of religion - freedom *from* religion (Article 4 paragraph 1 GG).

The personality right of the child is concerned, because the removal of the foreskin interferes with the sexual sensation of the boy in his private life and affects the sexual experience for life. Article 2, Paragraph 1 GG with Article 1, Section 1 GG protects the intimate and sexual sphere under the unwritten law of the right to freedom, in the specific expression of the general right to self-determination in the sexual sense (BVerfGE 47, 73; 60.134; 121.175; Hofmann, 2011, para. 31). In conjunction with the principle of human dignity in Article 1 paragraph 1 GG in relation to the general freedom of action and particularly for injury of the genital area an "enhancement of protection" arises (Murswieck, 2011, para. 62).

From this, the following can be deduced: Even if the empirical situation regarding the consequences of circumcision are considered uncertain (being circumcised is widely regretted by those affected, but mostly welcomed, see Frisch, Lindholm and Gronbsek, 2011, p 1367 ff), so there is no question that the physical intervention *affects* the sexual life. For many Jews, this is precisely viewed as a benefit of circumcision: "Circumcision curbs sexual desire, which in turn allows the man to use more energy at the right time and for the right purposes and to stay away from inappropriate sexual activity" (Citron, 2013). And here something becomes significant, which is pushed aside or not sufficiently seen clearly, especially in the political debate: The

decision to have the most sensitive and erogenous part of his sex organ cut off (whether for reasons of aesthetics, hygiene, prophylaxis or for a covenant with his God), pertains to the *privacy sphere* of the person concerned and is a *highly personal* decision that may *not be arrived at by substitution*. Since it is completely unclear whether the adult later, when he is capable of making such a decision, would choose circumcision and the sacrifice of this body part to any interest, the presumption of a substitute decision expresses only that the decision maker does *not respect the personality of the child*, who is still maturing (similar Eschelbach, 2013 para. 35.2; Grams, 2013, p 334; re. topos of the highly personal decision cf. Mayr, 2010, pp. 57 ff).

The negative freedom of religion is concerned, because by a religious circumcision the boy will be scarred for life with a religious identification feature, which *impedes* this ability to later choose another religion or simply decide the parental religion. The Chief Rabbi Metzger (2012) made this clear aspect for Judaism in the federal press conference: “The Brit Milah, the circumcision, is a covenant, an agreement, which every Jew has with his God. It is a ‘stamp’, a seal on the body of a Jew. A seal, from which one can never depart.” With it the Jewish man shall be reminded that he is a Jew, even in the most forlorn place in the world”. Herzberg (2012, S.505) states it correctly that “You can hardly express it more clearly: It should be made difficult for the marked male to ever shed his Jewishness in life.” as a walking symbol of man’s duty to complete God’s world and of being purified, precisely because the foreskin is not naturally lacking, but must be removed” (2012, p 35). Similarly Citron (2013): “It borders on a stigmatization, a branding, with which in former times the lords marked their slaves. It serves as a reminder that we are in God’s services, and shall walk His paths.” It is quite possible that the adult wants to break away from that duty to God and not be constantly reminded of it - and thus wants to be precisely no “walking symbol” of godliness.

Thus, it is not argued that circumcision makes the withdrawal or change of religion impossible; it is only being pointed out that, according to the statements of religious leaders, circumcision can make it difficult for the circumcised to shed or change his religious affiliation. This view finds confirmation in a look at the circumcision history in Judaism. Initially, it had been performed in a much milder form; only the tip of the foreskin had been removed. Only around the year 150 AD, a more radical form had been introduced by rabbis, because successful foreskin restoration was undertaken by some circumcised men, the likes of which rabbis wanted to make impossible (Stücker, 2012a).

The interference with the child’s right to physical integrity (Article 2, Paragraph 1 S. 1 GG), is obvious. To assess the degree of interference properly, one has to be aware that the foreskin is not just a “piece of skin,” but is a functional body part. Apart from the function to increase sexual pleasure, it has other, even health-promoting functions (Hartmann, 2012). Cancelling these other functions by amputation of the foreskin means causing damage that is independent from the interference with the right to *sexual* self-determination. The boy is protected from this damage by his right under Article 2, paragraph 1, sentence 1 GG.

All this always follows from the physical consequences of a foreskin amputation alone. In order to recognize that the child's fundamental rights are illegitimately violated, one does therefore not even have to include the other scruples associated with the circumcision procedure - they certainly confirm the verdict “unconstitutional”: The often occurring surgical pain, the always occurring wound healing pain, the risks to health and life of the child (Scheinfeld, 2013,

p. 277), the fears and the threat of traumatising of older children (Franz, 2012a, p.7) and the possible (and frequently occurring and often significant) impairment of sexual life. Bronselaer et al. (2013, p. 820) summarize the results of their study this way: "This study confirms the importance of the foreskin for penile sensitivity, overall sexual satisfaction, and penile functioning."

### **A look at Article 3 para 1 GG**

Without a significant medical indication, parents may not allow an erogenous zone be removed from the sexual organ of their child. This sentence says something so self-evident that one wonders how it could be overridden in the circumcision debate. With regard to one gender, namely girls, it still remains strictly observed by law without pre-condition. However, in female circumcision cases, *not only* the criminal forms of circumcision are forbidden (especially infibulation) , but also the mildest forms, such as the scoring of the labia majora or the piercing of the labia. These lighter forms - usually based on tradition or religion - fall into the stage IV category of female circumcision which is outlawed by the WHO without exception. In Germany, under the new § 226a StGB, they constitute a punishable crime, and so are certainly not positively permitted. In contrast to this legal position, § 1631d BGB now permits the comparatively more severe violation of the male sexual organ.

The inequality becomes particularly evident if one takes the example of Shafi'ite parents who want to circumcise their opposite-sex twins. The Shafi'ites form a school of law in Islam and circumcise for religious reasons, both the boys' penile foreskin and the girls' clitoral hood (Von der Osten-Sacken and Piecha, 2012). The two injuries to the child's body weigh at least equally severe (Hardtung, 2013, pp. 10 ff; Karim and Hage, 2008; Darby and Svoboda, 2009, pp. 301 ff.) Nevertheless, the current simplistic law tells the Shafi'ite parents: You have permission to cut off the penis foreskin and you are forbidden to cut off the clitoral hood. There are no objective reasons for this discrimination.

In general, the comparison with female circumcision can greatly illuminate matters. It helps to weigh the arguments appropriately that are brought forth in favor of allowing the practice of circumcision of boys. It is advisable to ask: What weight would be given to each argument if someone argues for permission of a mild (!) form of female circumcision (such as the circumcision of the clitoral hood)? Let's take an example of the permission-argument that circumcision of boys is not to be carried out illegally by unqualified persons and therein with greater risks. This underground practice has to be prevented, of course. But this is just the same for girls' circumcision. There however, the argument is vehemently rejected as the American Academy of Pediatrics has already experienced. Why should it be any different with the circumcision of boys?

And in this way, one can question each argument: Do we allow the lightest forms of female circumcision because they are covered (as a non-negotiable religious ritual) by parental right, because they are tradition, because we should be tolerant, because the change must come from within the religious community, because they promise certain health prophylactic benefits? And so on. With regard to female circumcision, the answer to these questions is always: no. There is no objective reason to respond differently to these questions when they refer to the circumcision of boys.

If one considers the fact that it is forbidden under penalty of law to perform forms of female circumcision, which are significantly less severe than the removal of the penile foreskin, then in comparison, circumcision of boys has to be forbidden even *more so*. Against the background of this derivation it is understandable that the defenders of the circumcision of boys always reject (in outrage) the comparison with girls' (see Beck, 2012; Rixen, 2013, p 259). The rejection is consistent, insofar as it relates to the criminal forms of female circumcision, for example, the pharaonic total-circumcision. In Germany, however, all forms of female circumcision are banned - as I said - even the mildest forms. After all, these light forms remain in severity behind the amputation of the "penis foreskin" erogenous zone. Therefore, the popular reference to the "lack of comparability," of boys' and girls' circumcision has its origin either in the lack of information or the dishonesty of the person who puts it forward.

In general it can be said: If circumcision of boys is allowed for religious reasons or because of parental education law, then the law may not prohibit lesser or equally severe and religiously motivated circumcision in girls. As the Federal Constitutional Court states, religious communities must be strictly treated equally, regardless of their power or social relevance (BVerfGE 108, 282, 298; decision also v. 22.02.2006 - Az 2 BvR 1657/ 05 Rz 21, BVerfGE 32, 98.106). One would therefore have to explore which interferences with the genitalia of girls do not outweigh the interference with boys' genitalia that § 1631d of the Civil Code allows. And then one would have to decide whether one also wants to allow this, because the Basic Law and the Federal Constitutional Court force the legislature to be consistent in one direction (Art. 3 GG). Hardtung said in a statement before the Committee on Legal Affairs: "§ 1631d BGB, which was explicitly designed only for the circumcision of boys, must [...] analogously be applied to those forms of female circumcision that are equal in severity to boy's circumcision or even less severe. Article 3 of the Basic Law does not allow discrimination, something that it clearly states twice: "Men and women are equal" (Section 2 Sentence 1); "No one shall be prejudiced or favored because of his sex [...]" (paragraph 3 sentence 1). With the permission rule of § 1631d BGB, the state violates this discrimination ban. As Walter emphasizes: "the state deprives the most vulnerable people in a highly sensitive area of the right to physical integrity solely on the basis of their sex. This is new"(2012b, p 12).

In addition to the unequal treatment of boys and girls, there are other points that also make it clear that circumcision permission cannot be integrated into the German legal system without contradiction. The following prohibited (and sometimes criminal) acts should be looked at in relation to the cutting of the erogenous and intimate zone of the penile foreskin permitted under § 1631d BGB: (1) The piercing of the six-year-old (§ 223 StGB), (2) the sublimation of the circumcision ceremony by only tattooing a religious symbol on the penis foreskin or the labia (§ 223 StGB); (3) slapping a five year old, to prevent him from repeatedly running carelessly into the street running (§ 1631 para 2 BGB, § 223 StGB); (4) taking a minor into the publicly available tanning studio (§ 4 NiSG, Notice of Merkel, 2013); (5) the donation of 500 euros from the child's assets, which the parents hold in trust, thereby fulfilling the religious obligation to the community of faith to which the child belongs (§ 1641S 1 BGB, § 266 StGB; Example by Herzberg, 2012, S. 494); (6) executing as a Good Friday ritual the painful pressing of a crown of thorns onto the head of the child or the moderate flagellation of the child (§ 223 StGB); (7) the harvesting of bone marrow from the child's body in order to rescue a neighbor child with leukemia (§§ 8, 8a, 19 para 1TPG).

Against the background of these punishable prohibitions, the consent permission granted by §

1631d proves not only to be a special right, but again to be evidently violating equality law.

### **Justification Attempts**

#### **Religious freedom of the parents (Article 4 GG)**

“Every active unfolding of one’s own freedom, be it religion, art, conscience, or the freedom to swing one’s own arm, ends at the nose of the other (not to mention the foreskin),” as Merkel says (2012a) to attest to the finding, recognized by legal theory, that *civil liberties* are never allowed to intentionally and significantly hurt the body of another (as a result also Fischer, 2013, § Rz 223. 48). Having the *right to freedom* means having the right to perform certain actions *because one wants to*; and how implausible would this justification of an injury ultimately sound to the victim: I may hurt your body, because I want to do it (Merkel, 2012b, minute 13:45).

This view cannot be challenged on the ground that the believers “have no other choice”, but are determined by their obligations to their religion. Because this would overlook the fact that the believers decide freely in the legal sense, to which community they belong and what they believe. This applies to the fundamental choice of a particular religion as well as for certain beliefs. The latter is made obvious precisely by circumcision. From the relevant Bible text the believing parents and circumcision proponents choose as a religious content just the passage that refers to the circumcision of their own child. Yet the very next sentence, which calls for circumcision of the “servants” (today one would perhaps speak of domestic workers) nobody considers any longer as their faith content. This makes the choice of individual freedom in religious matters very clear. Against this background, it is then understandable that the reasoning “I simply believe in the religious correctness of my actions” cannot legitimize any intentional interference with the legal interests of others. Isensee expresses it this way: “The fundamental rights provide the individual with legal spaces to unfold in his subjectivity, but not to dispose of the nature, scope and limits of these spaces. Otherwise he could determine the freedom space of the other. Since the other could claim the same fundamental right to freedom, all would turn into anarchy” (2013, p 322). The constitutional idea of equality and freedom of all citizens is inextricably linked to the prohibition of an arbitrary violation of other citizens. Whoever takes the freedom to hurt the other without consent, excluding in self defense, denies himself the right to equality.

Consequently, *Civil Liberties* (of parents) cannot, in principle, justify interference with the bodies of other holders of fundamental rights. This is quite clear if one looks at the circumcision complex with a theoretical exclusion of its parent-child relationship aspect. If an orthodox rabbi and mohel uses an opportunity to arbitrarily circumcise a boy (which by religious law may be seen as his duty) against the wishes of the parents, then no one would ever think of engaging in a weighting of his fundamental religious rights against the rights of the child and the rights of the parents. But if this is undoubtedly correct, then the child’s fundamental right to bodily integrity must also clearly prevail over the religious freedom rights of parents – even in this relationship weighting does not matter. Therefore, taking this fundamental right aspect into account, it is wrong to assume a direct collision of parents’ religious rights with the child’s and, in the end, to even give the religious rights of his parents’ precedence (Bielefeldt, 2012; Schwarz, 2010).

If however, the range of actions protected by religious freedom rights is understood to even cover intentional acts of physical injury, then a reasonable legal limit to this freedom can after all be found under Article 140 GG in conjunction with Article 136 WRV. There it says that “Civil and civic rights and responsibilities [...] are neither dependent upon nor restricted through the exercise of religion” (Art. 136 para 1 WRV). And not to harm the health of others is a civic duty, which cannot be not “limited” by the exercise of religion (Herzberg, 2010, p 337, and in this book; Ehlers, 201, Article 140 with Article 136 Rz. 2 et seq., 4).

The prevailing opinion, however, does not adopt the unbiased interpretation of Article 140 GG in conjunction with Article 136, paragraph 1 WRV. It prefers a balancing approach (BVerfGE 33.23, 30 f; 93.1, 21). Based on this approach, however, it has to be considered that the conflicting fundamental rights must be brought into balance by way of *practical concordance to*. What is needed is “a regulation which takes the affected fundamental rights into account in a balanced way” (Federal Constitutional Court, New Legal Journal, 2012, p 665). The Berlin prosecutors Brocke and Weidling rewrite it this way: “A balance with the objective of maximum optimization of the conflicting legal positions must be established. This requires a balancing of the conflicting interests and prohibits giving general priority to a particular legal interest” (2012, p 455). As explained, on the side of the child stand the right to physical integrity, the child’s negative religious freedom right and the child’s personality right. On the other hand, there is first - in the main application case of religious circumcision - the interest of parents to *fully* integrate the child into a religious community. This interest is hardly affected when postponing circumcision until the child reaches age of consent. In any religious community, there are no significant disadvantages for the uncircumcised associated with the fact that his foreskin is still present and intact (Herzberg, 2012, p 489). In this sense, Kramer, from the Central Council of Jews, confirms (Lau, 2012) that he had “never seen that at the entrance of the synagogue the genitals were checked”. Particularly in Islam it is not rare that the boys are not circumcised before they reach the age of ten or even 13 years (Engin, 2012, p 256); therefore, it does not seem to be asking too much of Muslim parents to wait until their boy has the capacity to consent - a small limitation of the exercise of religion which, by the way, is imposed without question on the Shafi’ite parents of a girl. In contrast, permission for the circumcision of the boy (§ 1631d BGB) completely pushes his rights aside: He has to let himself be hurt and receive the religious “stamp”, having his still-maturing personality be ignored. This irreversible violation of fundamental rights of the child prohibits precludes?? the idea of “practical concordance” (Czerner, 2012, p 434). Or, can the boy’s rights, within the meaning of Brocke and Weidling, be considered *optimized* with the permission of circumcision?

At this point, another aspect has to be considered: A religious community that demands for the full value membership of minors that they first have to be injured in a most intimate body part and have to sacrifice an erogenous zone is exerting illegitimate coercion pressure (Eschelbach, 2013, § 223 Rz. 35.6). For comparison: How would we classify the behavior of a fencing club, which would allow ten year-old children to compete for the club at official competitions, but only under the condition that before being granted membership in the club the candidate must suffer a blow and resulting scar on the upper arm? There is no doubt that this behavior of club officials would be unlawful. For religious communities nothing different can apply; religion gives no right to commit acts of coercion. Before the parents satisfy their integration interest by an injury of her child, it would be the task of the religious communities to take the unlawful pressure of coercion off the parents (Fischer, 2013, § 223 Rz. 50). “Would it not be bizarre,” asks Reinhard Merkel (Käfer, 2012), “if religious communities were allowed to

decide autonomously when they may invade other people's bodies?"

For the integration interests of the parents, the creation of practical concordance can only mean to postpone circumcision until the boy's personality has matured into one who is capable of making decisions and who will not ignored, and who can then autonomously modify and irreversibly mark his body, if necessary.

In addition to the integration interest, religious Jewish fathers of sons have the weighty concerns to fulfill a religious duty imposed upon them, namely to circumcise their son by their own hand or to let him be circumcised by others (for more details see Gotzmann in this book). With this interest in duty performance, the interests of the child can certainly not be brought into a practical concordance. A waiting period until the decision stage of the son must mean that the father violated his religious duty. In this constellation, one interest must yield to the other. Religious freedom being the aspect under consideration, the yielding interest can only be the father's, just as the interests would have to yield to a Jewish employer who might see it as a religious duty to circumcise his employees (see Genesis 17).

### **Religious Right of the Child (Article 4 GG)**

The opinion exists that the child's religious right by itself speaks for and legitimizes circumcision; they think the child exercises religion himself, although the object of circumcision (and only eight days old), and the parents decide only as a proxy *for* the child (Bartsch, 2012, p 607; Beulke and Dießner, 2012 S. 343 ff; Brocke and Weidling, 2012, p 456). Because, of course, according to this approach, the child (represented by the parents) must not do just anything possible to his body, there must be limits to proxyship. However, the limits cannot be derived from the religious right of the child, because this right does not provide any criterion for this purpose. Although Beulke and Dießner (2012) find that the presumed will of the child wants to have carried out each ritual that the religion commands, which was chosen by the parents. This interest attribution is arbitrary: "Freedom of religion [of the child] is completely insubstantial and therefore directionless, because a child does not yet hold any religious beliefs" (Hoernle and Huster, 2013, p 329; similar to Fischer, 2013, § 223 Rz. 45a). Therefore, using this approach also leads ultimately only back to the interests of the parents. It is therefore not different from the usual approach and the questions of child endangerment. It is not that the representatives of this approach want to infer that circumcision of a Shafi'ite girl would be allowed as the child's exercise of religion, represented by her parents. The inadmissibility of this act is simply reasoned differently, it does not follow from the Shafi'ite parents' overstepping their immediate right of education, but from the fact that they overstep their right to representation of the child in religious matters. Factually, nothing of the applied criteria changes (more on this: Herzberg, 2012, p 492 ff).

### **Care and parental rights (Article 6, paragraph 2 sentence 1 GG)**

Because evidently no circumcision permission can be derived directly from fundamental religious rights, the debate has shifted towards parental rights under Article 6, paragraph 2 sentence 1 GG. This, as particularly some constitutional scholars view it, gives parents the right to circumcision of boys. The wording of Article 6, paragraph 2 sentence 1 GG gives the right to "care" and "education". Taking the Basic Law articles at their word, circumcision should be understood as an act of care or education. However, it is common practice to take the rights of

parents as comprehensive determination rights, as an “overall responsibility” (Robbers, 2010, para. 143). This may be true in the end because there are acts of parents, which are not literally applied to the “care” or “education”, yet still fall under the parents’ rights (e.g., the determination of location of residence). This is not a decisive factor, however. The following correlation of justification attempts for parental care and education is to be taken purely phenomenologically.

### **Care right of parents - Guardian Role of the State**

Fateh-Moghadam (2010, pp. 136 ff) had tried to justify a right of parents to circumcise their own child as a preventive medical act of “Care”: “Circumcision” was always “associated with significant health advantages, in particular *preventive medical and hygienic ones*” and parental consent should therefore not be classified as (gross) ill-treatment and transgression of parental rights. This cannot be accepted. The *hygienic* benefits do not count, because in Germany soap and water are sufficiently available (Walter, 2012a, p 1113; Deusel, 2012, p 188). The *preventive medical* benefits are all controversial (Frisch et al, 2013, p 796 ff; German Bundestag, 2012, p.8). The expert, whom the Cologne Regional Court has heard in its decision about circumcision of boys sees “at least in Central Europe, no need to perform circumcisions as a preventive health measure” (LG Köln, New Legal Journal 2012, p 2128). Above all, the alleged prophylactic benefits are realized only later in life, when the boy engages in sexual intercourse, which means that their benefits are available to him, without the need to ignore the personality of the boy and force him to undergo the infringing circumcision act; he can choose at a time once he has reached the maturity to make the decision himself (Putzke, 2008, p 690; Herzberg, 2010, p 473). In addition to these legal requirements of the child's personality rights, there is the factual circumstance that circumcision - because of the sensitivity loss caused by it - makes it difficult to use condoms and in some cases impossible; in those cases, the resulting lower level of protection against sexually transmitted diseases can therefore be attributed to precisely the same act of circumcision that claims to prevent sexually transmitted diseases (Hartmann, 2012, sheet 2).

True to the insight obtained above, there is still the control question to be asked and the comparison with the mild forms of female circumcision to be drawn. Would we declare the reduction of the clitoral hood to be legitimate if and because some medical studies based on evidence suggested certain prophylactic benefits to the health of affected girls? Nobody has the audacity to suggest such a consequence. The control question confirmed that the mere preventive circumcision of the foreskin is not recognized as “care” within the meaning of Article 6 § 2 p 1 GG.

The comparison with female circumcision seems to illuminate another dispute as well. In cases of boys with diagnosed phimosis there are de facto two treatment method options. On the one hand, circumcision, which safely eliminates phimosis (risk of secondary phimosis aside); on the other hand the multi-week treatment with cortisone-containing ointment, which in approximately 95 % of applications leads to successful elimination of phimosis (Putzke, Stehr and Dietz, 2008, p 786). Some authors give the parents, in cases of diagnosed phimosis, a “right to choose” whether they use ointment or surgery (Fateh-Moghadam, 2010, p 136; Herzberg, 2010, 472). The question is, however, if one were to stretch the parental decision power even so far if this was an atypical case of a clitoral hood, prone to inflammation, for 95% of which an ointment treatment would provide remedy. Nobody would. One would rather recall that before such a massive and irreversible invasion into the private parts of the child, the highly likely effective and less hurtful treatment alternative should be tried. This view I also compellingly

deem proper when it comes to the intimate area of the penis and to preservation of the erogenous zone of the penile foreskin (Article 2, Paragraph 2 Sentence 1 GG, Article 2, Paragraph 1 GG with Article 1, Section 1 GG).

### **Parental rights - Guardian Role of the State**

The constitutional lawyer Wolfram Höfling (2012) had already argued in the Ethics Council that the decision to circumcise one's own underage son was covered by parental education law. He has now affirmed this view in an article (2013). The problem here is whether the removal of an (intimate) body part can be religious "education" in the legal sense. The subsumption under this concept lies a little closer in the case of circumcision of an 8 year old Muslim boy than in the case of circumcision of an infant. To the eight year old one can explain what is involved in the ritual and one can then convey to him the parental belief that it is important to make a sacrifice to his God and his faith. There are, however, voices that generally reject any subsumption under the concept of education. "A violation, moreover, in the "core area" of the right to physical integrity [...] and of the intimate sphere with considerable influence on the overall sexual development of the child is absolutely no means of education, because education is expressed in the exchange of knowledge and rules of behavior or even of beliefs in matters of faith (BVerfGE 93.1, 17), but not in an injury of the substance the body" (Eschelbach 2013, § 223 Rz. 35.3). This view has a certain persuasiveness, at least for infant circumcision. On the other hand, according to § 1 of the law, within the parental rights to religious *childrearing*, exists also the right "of parents to define the religion of their children" (Schramm, 2011, p 250). The Jewish infant circumcision is then perhaps indeed to be classified as an act of parental "education". Let us suppose for the purposes of testing Höfling's thesis that the religious circumcision is such an act of "education"!

Höfling (2013, pp. 465 f) first makes the reader realize that circumcision is an "encroachment upon the physical integrity of the child." But even against such interference the state should - in the exercise of its guardian duties under Article 6 paragraph 2 sentence 2 GG - intervene only under three conditions: *Firstly*, in cases where the "intensity of curtailment of the child's legal interests is beyond acceptable" (examples: withholding of medically indicated treatment; female genital mutilation). This intensity criterion would not be considered satisfied in the case of the circumcision of boys because the interference would only be of relative severity and in principle manageable". "The 'evidence of normal life paths' of several hundred million circumcised men would only be 'refutable' by really valid data on serious trauma in circumcised men." *Secondly*, physical interventions by the parents would be inadmissible if they are associated with "certain modal factors," such as "humiliating and discriminatory concomitant effects or motivations" (e.g., female genital cutting). And *thirdly*, parents would not have permission to engage in physical invasion procedures if they lack "authenticity" of their decision (example: "Today tongue piercings for the eight-year-old, tomorrow subdermal implants for the nine-year-old").

With regard to Höfling's application of his intensity criterion, one must criticize that the author does not give differentiated account to himself of the severity of the interference. Neither the loss of an erogenous zone is taken into account, nor the desensitization of the glans following surgery. Therefore, the concern about the child's right to privacy is not acknowledged, nor is the negative right to freedom from religion (see above, pp. 365 f.) These key items that are significant for an "intensity criterion" are missing. Mandla (2013) has accurately countered

Höfling's reference to the "evidence of normal life paths". "If this were a suitable argument then even pain treatment could be omitted, because nothing is known about 'abnormal' ways of life of rural Turkish men, nor about traumata through the millennia, during which circumcision procedures did not meet the present standards of medical science. But neither need people with postoperative circumcision problems inevitably lead an abnormal life, nor is it self-evident that men publicly discuss their sexual problems. Men who do not know the healthy alternative, who cannot change anything, but would have to turn against religion or tradition, for which this sacrifice had been imposed on them." To this there is only to add that millions of circumcised women follow "normal" life paths too.

Also Hoernle and Huster (2013) offer in their comprehensive contribution reasons for considering parental consent to circumcision as being covered by the right to education under Article 6, paragraph 2 sentence 1 GG. Following their approach, the parents may consent to the surgery - classified as an invasive procedure - when and because it is an important measure of their overall educational concept; the act then enables these parents to pass on to their son their own conviction about the "good life". The ethically neutral state would have to respect this idea. Accordingly, circumcision should be allowed in the main cases of Jewish and Muslim circumcision rituals, however, not in cases of purely aesthetic, hygienic or prophylactic health motives of the parents.

If Hoernle and Huster were serious, they would have to own up to the consequence that the Shafi'ite parents of our example (cf. pp. 367 f) would have every right not only to circumcise their son but also to circumcise their daughter. Yet, they do not deduct this step. Like all other advocates of the education law, they are guilty of a contradiction in classifying an invasive procedure in girls' genitalia that is comparable to male circumcision (or less severe) as child endangerment and criminal offense. The reasons given by the authors for the inequality are unsustainable. They let the intention shine through - for whatever reason - that one must allow the one (circumcision of boys), and necessarily prohibit the other (mild female genital mutilation).

According to Hoernle and Huster (2013, pp. 332 f) the right of education reaches a "firm limit" at considerable humiliation of the child (see § 1631 para 2 BGB) and increased health or psychological endangerment. These criteria the authors would claim against the moderate and severe forms of female circumcision. As another firm limit the authors recognize the child's right to physical integrity (Article 2, Section 2 Sentence 1 GG), in as far as circumcision inflicts upon the child serious physical pain. From this they derive the 'sine qua non' of an effective pain treatment.

As another "soft" criterion, which would have to be taken into account in an overall consideration, they view the "social message" associated with the act. This criterion they want to incorporate in order to legitimize the different treatment of boys' circumcision versus mild forms of female circumcision. For the latter it would have to be clarified "whether or not the symbolic message differs much, which is to be expected, because the idea of a necessary cleansing ritual or attempts to control (only) female sexuality is based on negative valuation of properties that are supposedly attributed to girls and women."

This attempt of justification is not convincing. Firstly, this view does not extend to Shafi'ite parents who have the identical motivation of religious duty for boys' and girls'

circumcision. With some reason, they would reject the charge that the circumcision of their daughter had anything to do with a degradation of the girl or suppression of her sexuality. Secondly, it would apply to some circumcision of boys just the same (Kelek, 2012, p 75 Jerouscheck, 2008, p 314). Among Muslims, the uncircumcised male is, in part, considered “unclean.” And the Israeli mohel Menachem Fleischmann says in a radio interview: “*The foreskin is something detestable, therefore we cut them off*” (Engelbrecht, 2012). The *social message* here is no better than the supposedly necessary cleansing of the girl. It reads: You have something dirty about you that has to go. Without the (infringing) act of circumcision you are not “wholesome”, but unclean (like the uncircumcised).

And finally, one has to look at what the mutilated girl will accuse her parents of when she is mature enough. Surely not: How could you ever consider me only as unclean! (which would, now that she is “clean”, hardly burden her). Rather: How could you arrogate the right to cut off a piece of my body, of my genitals! This reproach is now being raised by many men who were circumcised as a child. Therefore, the unsolicited circumcision can also be subsequently understood by the person concerned as arrogance and humiliation (Czerner, 2012, p. 379).

Furthermore, Hoernle and Huster refer to the “important aspect of the repression of female sexuality as being ignored as the purpose of female circumcision [...]”. Let us look at this, apart from the fact that this is a cross-border interpretive transfer of role concept from outside of the religious realm into a religious belief system and thus a cultural dispossession that wants to explain away to those concerned their own normative conceptual view. Nevertheless, with it nothing is put forward that could justify a prohibition against Shafi'ite circumcision practice. The Shafi'ite parents, in their own view, do not suppress the sexuality of their daughter. The purpose of circumcision of their daughter is the same as that of their son's. There are even some adult women who let their clitoral foreskin be circumcised in the belief to then be better able to be sexually stimulated (Borken Hagen, 2008, p. 25). Still less applicable is the idea of suppression of female sexuality against the mildest forms of female “circumcision”. The piercing of the labia with a needle cannot weigh heavier than the application of genital piercings; or for that matter, the scoring of the labia majora or “ritual nick” (“a small cut to the clitoris [hood]”). The authors finally neglect the fact that circumcision of boys is valued by some groups precisely because of the attenuation of male sexuality (Citron, 2013). The aspect of the suppression of sexuality does not carry weight in all forms of female circumcision, yet it does with some circumcisions of boys.

In Hoernle's and Huster's argumentation, everything hinges on the notion that the legislature should “and standardize” the view that many or most of the circumcisions of girls have a negative “social message” (“taming of female sexuality”), and therefore the legislature must *totally* prohibit all circumcisions (similar Germann, 2013, p 423). At this point it is important to be aware that the argument implies that some mild forms of female circumcision are not considered reprehensible per se and would be legally unobjectionable as such. (Otherwise, recourse to the standardizing argument would be unnecessary.) Yet, to concede to the state the right to also to legally prohibit technically acceptable forms of circumcision is doubly implausible. *Firstly*, there is a problem of attribution in the context of the circumcision ban's enforcement by penalty. The Shafi'ite parents would, according to this view, only be punished because *other* parents make their daughters undergo circumcisions that are sinister and deserving of punishment. However, there is an attributive link missing between the acts of those parents and the Shafi'ite act. For such crimes the Shafi'ites are not responsible (Hoernle, 2005, pp. 185

ff.). It also does not make sense that the standardizing just ends with gender. Who wants to let his daughter's clitoris be circumcised, can say, and justifiably so, that since in Germany we are allowed to cut off male children's erogenous zones, why not female ones? *Secondly*, Hoernle and Huster must be asked: What about the education right of Shafi'ite parents of daughters? What kind of right would be a right of education that had to be revoked because *other* parents do bad things? No, if the mild forms of female circumcision by themselves are covered by the parental rights, they are covered against standardized prohibitions against these practices. If the right of education is so strong that it allows the removal of an erogenous zone in the boy, then it must be enforceable a fortiori against such standardized prohibitions and against liability for acts of others.

This aspect is reinforced by the mandatory constitutional requirement to treat all religions strictly equally. The Federal Constitutional Court has made clear that freedom of religion does not depend on the strength or social relevance of a religious association (BVerfGE 32, 98, 106). The fundamental right of religious freedom is understood as a protection of minorities (BVerfGE 91, 1, 24; see also Eschelbach, 201, § 223 Rz 35.2.). These strict principles will have to be taken into account in the assessment of *religious education* in the context of Article 6 § 2 GG. But even if one did not want to accept this, the state would have to practice strict equal treatment of faiths in the direct determination of parental rights, because the Federal Constitutional Court derives this obligation precisely from the commitment to ethical neutrality of the state on which Hoernle and Huster base their permission plea (BVerfGE 32, 98, 106). The world view of Shafi'ites, for example, must be respected just as highly as those of other Muslims. The same applies to decisions of conscience, such as removal of bone marrow in the ten year old son to save the neighbor child suffering from leukemia. If parents want to pass on their view of the "good life", to their son ("One has to help people in distress, if giving help is reasonable.") then this carries the same weight as the religious motivation for circumcision (Art. 6 § 2 p 1 GG with Article 4, Section 1 GG). Because circumcision and bone marrow harvesting correspond in severity, the solutions must also be the same. Yet, the law under §§ 8, 8a, 19 para 1 TPG (transplantation law) bans the harvesting of bone marrow from a 10-year-old, even if he wants to save his friend from death from leukemia and himself from the loss of his friend (see also Fischer, 2013, § 223 Rz 48).

Also, the thesis that legislature has the right to ban all standardized types of girls' circumcisions, does not stand another examination either. On the one hand, the proposition implies that the legislature should allow, for example, circumcision of the clitoral hood and that such permission would not be contrary to its constitutional obligation to protect the affected girls. On the other hand, the standardizing thesis is based on the assumption that in Germany (or at least elsewhere) severe forms of female circumcision are being practiced. What that means is that if the fight against serious forms of female circumcision would have nationwide success sometime in the future, then – based on the above theory – the reason and obligation to protect by banning the mild forms of female circumcision would no longer apply. Do Hoernle and Huster really want to look at it like this? I suspect that they would rather follow the assessment that intuitively is recognized as just: The invasion in the intimate sphere of girls in the form of the clitoral hood reduction, whether it be religiously or culturally motivated, demands intervention by the state as a guardian of the child's fundamental rights (Article 2 Section 2 Sentence 1 GG, Article 2, Paragraph 1 GG with Article 1, Section 1 GG).

On closer inspection, therefore, the legal differentiation between boys' circumcision and

female circumcision proves to be constitutionally unsustainable. In fact, from the consensus that all forms of female circumcision, even the mildest ones, are prohibited, the following can be derived: The very fact that parents violate the sexually intimate area of their minor child without medical reasons enforces the ban on circumcision. The children's rights to physical integrity and to respect for their still maturing personality preclude circumcision permission - even from the perspective of parental education rights.

Hoernle and Huster (2013, p. 333) confirm this result indirectly, if they declare adding considerable pain to a "firm limit" of the circumcision of boys. Circumcision without anesthesia is due to the unreasonableness of the associated significant pains incompatible with the child's right to physical integrity (Article 2, paragraph 1, sentence 1 GG). This view seems at present to establish a consensus among jurists (see Hoernle and Huster, 2013, p 334, p 339; Isensee, 2013, pp. 324 ff; Scheinfeld, 2013, pp. 275 f; Yalcin, 2012, pp. 385). The same incompatibility with the rights of the child must, however, also arise for the circumcision act as such, if the interest in retaining the erogenous zone of the penile foreskin in boys is at least as large as the interest not to suffer significantly during circumcision. Such a weighty conservation interest may be confidently attributed to the boy. Most uncircumcised adults would probably rather suffer torments elsewhere on their bodies to the degree a circumcision without anesthesia inflicts than accept a painless loss of the penis foreskin - if one or the other would be inevitable. If this assessment is correct or one cannot exclude its accuracy, the interest in preserving the penis foreskin as an erogenous zone must carry more weight than the interest not to suffer pain. But then the integrity interest must also prevail over the interests of parents as does the child's interest to be spared from pain.

Against all approaches that want to make the right of education fruitful for the benefit of parents ultimately attention has to be called to a contradiction in the value-judgment. As determined by § 1631 paragraph 2 sentence 1 BGB, "Children have a right to violence-free education". This includes *religious* education (Schlehofer, 2011 before §§ 32 et seq Rz. 143). Even if § 1631 paragraph 2 sentence 1 BGB should only be seen as "a general programmatic appeal" (Hoernle and Huster, 2013, p 333), § 1631d BGB clearly violates the standard program of the § 1631 paragraph 2 sentence 1 BGB: "The fundamentalist father who catches his eight year old masturbating and gives him a violent slap in the face to break him loose of it, is liable to prosecution. If he decides instead to let him be circumcised for the same purpose and under the (true!) indication of religious reasons, the new law paves the way for him" (Merkel, 2012a). If educational spanking is a "degrading action" and as such prohibited by Clause 2 of § 1631 BGB, then circumcision of the foreskin of the penis – as much of a sacred tradition as it may be – must be prohibited even more so. Whoever denies this should consider what we should rather be allowed to inflict on a child, a beating or the amputation of the foreskin (be it that of the penis or the clitoris).

### **The general principle of equal treatment (Article 3 para 1 GG)**

Ünal Yalcin (2012, p. 384 ) in his contribution has attempted to claim Article 3 para 1 GG *in favor* of parental circumcision permission. He has thereby pointed out an aspect that needs to be considered in more detail. This is the aspect of an alleged "criterion injustice" between circumcision and comparable, albeit permitted acts of parental physical interventions. Surgeries, such as "correcting protruding ears" or "removal of a hump nose" were "significantly more risky and serious" than circumcision. In these (ultimately) "aesthetic surgeries" the

primacy of parents is accepted - even by circumcision opponents. With circumcision surgery, however, parental primacy is “not being discussed properly, but purposefully eroded”. There is no other explanation for the fact “that at least the risk of stigmatization and the resulting social exclusion of uncircumcised boys in the religious or cultural (minority) group is not allowed as a justification for circumcision, but the danger of teasing by society’s majority, e.g., because of protruding ears, should be sufficient.”

Yalcin disregards that some critics of circumcision of boys do indeed consider the corrective surgeries of protruding ears and hump noses. Holm Putzke, for example, differentiates things: “Cosmetic surgery is medically unnecessary and therefore is not in the child’s best interests. This changes only if, for example, protruding ears lead to a serious psychological distress in the child. Then the correction is indicated medically and psychologically. When weighing the pros and cons, of course, it must not be forgotten that corrective surgery of protruding ears is not equal to an irreversible amputation of a body part”(2012, p.22). In Putzke’s statements, a “criterion injustice” is not visible.

One can certainly think about whether parents are prohibited by law to correct protruding ears of their children; this is especially true if the child is (still) mentally unburdened and does not suffer from being special. Even in the case of already occurring teasing and a corresponding suffering of the child, one would possibly think it to be more appropriate to “pull the ears of the teasing children” rather than to impose surgery upon the bullied child – however, even the mildest ear-pulling is prohibited by law (§§ 1631 para 2 BGB, 223 StGB). The surgery of the ears must humiliate the child concerned, because he is not accepted for who he is, but instead is forced to undergo surgery. In that regard, there is indeed a parallel to the (formerly stigmatized) circumcised child. Therefore, I am inclined to the view that corrective ear surgery does not fall under parental rights, at least in principle.

If, on the other hand, one affirms in the case of protruding ears of children that a medical-psychological indication exists, the difference of treatment in comparison with circumcision of boys can well be justified, because there are only very few similarities between these two interventions. Unlike the setting back of ears, circumcision interferes with the genital area of the child (Article 2, Paragraph 1 GG with Article 1, Section 1 GG), which is surely the reason why also Yalcin wants to see that his analogy does not extend to the clitoral foreskin! In addition, the circumcision act always causes the boy a loss of sensation of his genitals and robs the body of the foreskin with its natural biological functions (Hartmann, 2012). Finally, it should be noted that a ban on circumcision of boys would increase the number of uncircumcised boys within circumcision favoring groups. Therefore, over time the ban on circumcision would take the ground from under stigmatization. (Putzke, 2008, pp. 702 f.)

Yalcin’s argument that parents would have to be allowed the ability to prevent social exclusion, also assumes that the circumcised boy remains among his peers. Yet, in Germany it is likely that most of the other boys with whom he gets together, are not circumcised. Then circumcision could lead precisely to exclusion. Circumcision is therefore not suitable to avoid exclusion.

### **Culture war over the law?**

Isensee (2013) shares the outlined view of the constitutional issues and largely declares the

permissive law of § 1631d BGB to be “constitutionally failed.” He claims in the end to have found a way to accept a narrow circumcision permission: the legislature should allow circumcision to prevent a “culture war” in Germany (2013, p. 327). As understandable as this is politically, it is empirically and by constitutional law implausible that even the circumcision law that is now in force limits the culture of some Muslims and Jews, as, for example, the obligation imposed on Jews to have circumcision take place under application of effective pain treatment (§ 1631d, Section 1 BGB), which many devout Jews refuse for religious reasons (Metzger, 2012; Spiegel, 2010, p. 40); and to Muslims imposes a responsibility to pay attention to a veto of the child (§ 1631d, Section 1 S. 2 BGB). The legislature, neither empirically nor constitutionally, did not have to back off from legal regulation of those impositions. “Culture warfare” already exists with parts of the Muslim community, namely Shafi’ites, who (as described earlier) are prohibited from performing female circumcisions on girls. Finally, it is expected neither from the majority of Muslims nor from the majority of Jews that they will assume an ultimately fundamentalist understanding of the relationship between religion and state in the case of a prohibition of the circumcision of boys (Gotzmann, 2012).

Isensee’s idea also includes the strange sentence, “in the conflict between constitutional consequence and conservation of religious as well as social peace” the legislature permissibly decided for peace (2013, p. 327). With this he implies that lawmakers should sacrifice fundamental rights of children in utilitarian calculation, in order to preserve social peace. But it is precisely the intention of a core fundamental right, such as Article 2, Paragraph 2 S. 1 GG, to prevent such utilitarianism. Does by any chance, before this background, perhaps exist also from the other side the threat of a culture war, because the circumcision law surrenders the constitution culture of anti-utilitarian core fundamental rights?

### **Consideration for Jewish interests of importance**

Here and there we find the idea expressed that Germany of all countries should not be the first country that prohibits Jews an important and previously generally tolerated tradition (Isensee, 2013, p. 32: “taboo“). The historical guilt of the Germans and the responsibility still associated with it are likely to have been the major driver for the circumcision law (Merkel, 2012c). And indeed, one would have desired another country in the pioneer role. However, this aspect does not result in a justification, constitutionally. The moral duty of the German authorities - derived from history - to especially take all Jewish concerns of weight into consideration does not relieve the legislature from its obligation to protect all affected children in Germany! Especially towards Jewish children the thesis seems a paradox. Their integrity in the genital area is a matter of extraordinary weight (Article 2, Paragraph 1 GG with Article 1, Section 1 GG). In this sense, the Jewish filmmaker Victor Schonfeld says (2012): “Jewish and Muslim children deserve to be protected from a painful, dangerous [...] custom” (cf. Stücker, 2012c).

### **Prohibition or criminal penalty ban?**

Those who shy away from a punishment of circumcision of boys and its instigation labor under a similar misapprehension. Tonio Walter can serve here as an example of circumcision critics (2012a, pp. 1115 et seq.) On the one hand, he takes the view that circumcision of young boys without a medical indication should “not be legalized”, while on the other hand, he considers it out of the question “that in Germany, of all places, people of the

Jewish and Muslim faith should be pursued with criminal penalties if they fulfill commandments that they believe are necessarily imposed” (as well Spieckhoff, 2013, p. 338).

The author, like many others who think similarly, overlooks three aspects: *Firstly*, Jews and Muslims in any case must even now be prosecuted with criminal penalties if they disregard, for religious reasons, the applicable circumcision law - especially if they disregard the requirement of effective pain treatment or the respect for a child’s right to veto (§§ 223 para 1.225, Section 1 StGB, § 1631d BGB). Walter’s sentence, by contrast, also calls for the withdrawal of criminal law for such endangerment of the child’s, because if the faithful believe they indeed fulfill a “mandatory religious command,” punishment should be excluded. Thus, his thesis says more than the author himself admits. *Secondly*, Muslims were already always threatened with criminal penalties, although their acts are of fulfillment of mandatory religious commands: To Muslim Shafi’ites, female circumcision was always forbidden under penalty, despite the existing religious duty to cut the clitoral hood. Because Walter’s view is that gender does not allow differentiation, his demand to avoid a prosecution would have to extend to the Shafi’ites’ practice of circumcision of the clitoral hood. However, he does not want to see the mild forms of female circumcision permitted (2012a, p 1117). As a matter of fact, Walter does exactly what he otherwise accuses the legislature of: With regard to the parents, he is discriminating against the Shafi’ites just because their victims are girls; and with regard to the children, he is discriminating against the boys, because he deprives them of protection under criminal law, which he intends to grant the girls in the application of law. *Thirdly*, according to the author, the followers of a less prominent faith should by no means benefit from his exceptional and transitional provision, but only the “two world religions” that are primarily involved (Walter, 2012a p. 1116). This constitutes a considerable difference in treatment. Moreover, it is one that the Federal Constitutional Court would eliminate immediately because it has stressed that all religions should be strictly treated equally.

Lastly, there remains the question about the way in which the legislature must fulfill its duty to protect. Of course, circumcision must remain illegal, so that the child does not lose his self-defense and rights, which would exclude civil liability claims in cases of severe consequences (e.g., if a penis amputation becomes necessary due to circumcision) solely because of the *lege artis* implementation of circumcision (Eschelbach, 2013 § 223 Rz. 4). But must the prohibition also be enforced by penalty? Or may the legislature at least avoid this consequence for the parents? The Federal Constitutional Court traditionally grants the legislature a wide discretionary range for fulfilling its protection obligations, and, a fortiori, as to what behavior it places a penalty upon (see Federal Constitutional Court only NJW1999, 3399). Looking at the circumcision of boys in isolation, the Federal Constitutional Court would possibly concede to the legislature the exclusion of criminal liability - especially in the case of religious motivation. This generosity of the Court would not be appropriate, however, at least in any case where such intervention interferes with the genital area of the child and affects sexual sensation (clitoral hood circumcision, penile foreskin) since the legislature must fulfill its duty to protect (Art. 2 Abs. 1S. 1GG with Art. 1 Abs. 1 S. 1GG). Because education campaigns alone do not promise a complete success, the legislature has no other means available than the threat of punishment.

If the criminal prohibition of female genital mutilation is included in the consideration, then Article 3, Section 1, paragraph 3 GG demands equality anyway: There is no objective reason to withhold from boys the criminal protection that girls are granted. At least indirectly, the legislature has a constitutional duty to punish genital circumcision of children overall.

“Because the legislature” states the Federal Constitutional Court, “decided within its appropriate scope on a specific assessment of the potential hazard, assessed on this basis the interests involved, and selected a regulatory approach, it shall also logically pursue the decision’s consequences” (BVerfGE 121, 317, 362). As well, invasion of the child’s genital area, as now assessed by the legislature with § 226a SGB, is significant and a punishable injustice. The legislature is barred constitutionally from differentiating between male and female genitalia (Article 3 , Section 1, paragraph 3 sentence 1 GG).

### **Does circumcision violate the human dignity of the child?**

Some authors consider the human dignity of the child violated through circumcision, and even if the parents have desired it (for religious reasons) and it has been carried out *lege artis* (Eschelbach, 2013, § 223 para 35; Grams, 2013 S. 334; Jerouscheck, 2008, p 319). This result can be confirmed, because, according to the view presented here, circumcision unlawfully injures personality rights of the child, and that in his intimate sphere. This can suffice as violation of human dignity and it would probably do without hesitation in regard to female clitoris circumcision. But it seems important to me to note that the result of “human dignity violation” - outside of clear cases such as governmental torture or enslavement - remains dependent on the prior assessment of the legal situation. That dignity is violated, however, derives from the scrutiny of the aforementioned fundamental rights of the child. Only after a thorough assessment of the conflicting interests may the label “adverse to human dignity” be used (generally to the whole Herzberg, 2008). The topos of human dignity has therefore, at least in our case, no deduction help. But it confirms the government’s obligation to intervene against the violation of the child: Article 1, Section 1 S. 2 GG.

### **Outlook**

Circumcision permission, as federal judge Ralf Eschelbach rightly says (2013, § 223 Rz. 35), is “obviously unconstitutional.” In order for the Federal Constitutional Court to say so and to explain the law as being null and void, the question of unconstitutionality of the law must be submitted to the court. Several approaches are possible: One legitimate complainant institution (federal government, a state government or a quarter of the members of the Bundestag) could bring about an abstract norm control cause (Article 93 No. 2 GG). The application claimants have - even from their perspective - every reason to become active. Because in the legislative process there were two key factors influencing the adoption of the permit law: firstly, the circumcision practice - endorsing report of the “American Academy of Pediatrics,” and secondly, the opinions of some experts that the EMLA® ointment could guarantee adequate anesthesia in infant circumcision. Both have now proved to be unfounded. In any case, in Germany, the EMLA® ointment never had a specific approval for pain control in the context of circumcision. It remains to be seen whether the bodies referred to now do justice to their obligation towards the vulnerable infants and other children in the light of these findings.

More likely, however, is the case, that the Federal Constitutional Court has to consider the question in the form of a constitutional complaint (Art. 93 GG No. 4b). This legitimate complaint could come especially from an affected person, who, however, would first have to exploit the civil law of appeal. In the case of civil law action of an interested party - against circumciser or parents - the civil court can of course also instigate a concrete norm control cause (Article 100 paragraph 1 sentence 1 GG), if it by itself holds § 1631d BGB to be unconstitutional. This is

conceivable in the event that a surgeon employed in the hospital holds § 1631d BGB to be unconstitutional and refuses to perform these surgeries in the spirit of the medical oath *primum non nocere*. In case of dispute, it could then lead to a labor complaint for declaratory judgment, during which the Labour Court would be seeking such judicial review before the Federal Constitutional Court.

There has already been an attempt to proceed with an application for a provisional order before the Federal Constitutional Court against a circumcision of boys. A father, living separately from wife and son, wanted to prevent the mother from letting the boy be circumcised for religious reasons. His urgent appeal was directed against the transfer of sole custody to the mother (see the Constitutional Court under document number 1 BvQ 2/13). The decision of the civil court that preceded the father's urgent application impressively reveals what absurd consequences that § 1631d BGB can cause. Because the parents got into a dispute over religious education, in particular whether the boy was to be circumcised, the civil judge declared the joint custody as detrimental to the child's welfare and transferred sole custody to the mother as the primary caregiver. One has to realize how far it has come. If it were about the religiously motivated clitoral hood circumcision or the "ritual nick" on a girl, presumably the custody right of the mother who favored circumcision would have been revoked; yet here, where it is about the injury of a boy's intimate sphere, and one of equal or even greater severity, custody is revoked from the person who is trying to prevent injury to the child.

The Federal Constitutional Court has rejected the application of the father. However, it has not yet approved BGB § 1631d constitutionally, and not even shown a tendency in this direction. Misleading therefore is how Wolfram Höfling reflects the decision in order to support his thesis of constitutionality: "The Constitutional Court decided that it was not appropriate to prevent, by way of a provisional order, a child's mother from deciding for circumcision of her son in the exercise of her sole custody. The chamber's decision states tersely that, after the introduction of § 1631d BGB, the mother can now, in the exercise of health care according to § 1631d para 1 sentence 1 BGB, generally instigate the circumcision of the child". Looking at the short decision more closely, it reads quite differently. The chamber rejected the urgent application solely on the basis that the father must first "seek legal protection in judicial proceedings" and that he could "reach the desired goal [...] by calling on other courts"; to refer him to this path is reasonable because the circumcision of the two and a half year old boy was not imminent. The decision would probably not have been different, if the father would have wanted to prevent the (not imminent) clitoral hood circumcision of his daughter.

In order to see the falsifying manner in which Höfling has represented the Court's decision, he is quoted here with the passage, which shows a rather skeptical attitude of the Constitutional Court towards circumcision (emphasis added): "With the [...] law on the scope of custody in case of a circumcision of the male child (Federal Law Gazette 12012 S. 2749), [...] the question of the legality of circumcision of male children has explicitly received a statutory provision. Accordingly, the mother could now, as the person holding sole custody, generally instigate the circumcision of the child in her exercise of health care in accordance with § 1631d para 1 sentence 1 BGB. With it, the probability has risen that it comes to a circumcision of the child concerned. Against this background, *a specialist court decision on an injunction preventing the circumcision of the child is not unattainable*. Thus the applicant could apply for a preliminary modification of the custody decision in accordance with FamFG §§ 166, 1696, 1671 BGB - at least in the relevant part of the circumcision area of health care. He could also apply for a review

at the specialty courts in accordance with § 1666 BGB with the aim of provisionally preventing the mother from instigating the circumcision of the child. *The specialized courts must first decide about the success of such applications after the current applicable legal situation.*” The Court therefore provides spite of § 1631d BGB, the chance for the father to prevent the damage to his son. The statement to § 1631d BGB is not a “terse” endorsement of the standard, but is embedded in deliberations that remain at a distance to BGB § 1631d. The subjunctive (“the mother *could* now”) confirms this.

Therefore, even after the appeal decision of the Federal Constitutional Court, BGB § 1631d is threatened to be declared unconstitutional. No one who instigates or performs circumcisions can be sure that the permissive provision keeps him free from civil claims by circumcised victims. It is desirable that the Federal Constitutional Court shall decide as early as possible on the validity of § 1631d BGB and with it at the same time decide on the fate of the boys who are threatened by bodily injury of their intimate sphere. The impartial consideration of the constitutional situation results in the unconstitutionality of § 1631d BGB. We must trust that the Constitutional Court judges take the fundamental rights of affected boys more seriously than has been done the majority of the Bundestag deputies, and that they will fulfill their legal obligation to protect.