

Constitutional Aspects of Religious Circumcision

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Religious practices constitute a challenge to the legal system. The enforcement of the constitution allows, however, sufficient leeway for specific religious practices as long as these are not opposed to the basic assumptions of the legal system.

I. Introduction

At a time when the *BVerfG* emphasized the right of children to care and upbringing, when the legislature passed a “law for the facilitation of family-law arrangements for cases of endangerment of the well-being of children,” it’s no surprise that an issue like the circumcision of minors would become the subject of juridical scrutiny. It should also be considered that it’s not a matter of merely theoretical interest in the content and extent of fundamental rights; on the contrary, recent legal decisions fully demonstrate the difficulty, whereby the evaluation oscillates between condemning a cruel and serious procedure that causes lasting physical and psychological harm and condoning a socially acceptable behavior. To further emphasize the wide spectrum of ideas, some even argue that the parents of religiously circumcised children are entitled to coverage for the operation through the social welfare system. In addition – and this will be of interest with regard to the question of indicated medical operations and, therewith, the penal benchmark – the World Health Organization recommends circumcision amongst other things for the prevention of HIV.

Notwithstanding some occasionally biased depictions, the constitutional problem should subsequently be emphasized more than the penal aspects, insofar as the religiously motivated circumcision of boys, which differs with regard to fundamental rights from the genital mutilation of women (this can hardly be denied), is also constitutionally legitimized through the freedom of religion. In this regard, the question will follow, whether a circumcision, as it is practiced both in Judaism and, with a few differences, in Islam, is to be considered a religiously motivated behavior (see section II). In a further step, the constitutional distinctiveness of religious self-conception for the evaluation of circumcision is to be considered (see section III). Also in this context, the question has recently been posed, whether the penal evaluation, according to which the consent of the parents to the bodily injury should be void since it is allegedly not given in accordance with the “well-being of the child” (§ 1627 Clause 1 BGB), is appropriate.

II. Circumcision as a religious ceremony

Though the lineage of the mother (*mater semper certa est*) is the deciding criteria for Jewish affiliation, circumcision (*Brit milah*) is also assigned particular meaning as a central ritual act. The act of circumcision – the partial amputation of the foreskin of the male member – is believed to be the accession into the covenant with God. It is at the same time also a sign of compulsory fellowship of the individual Jew

with his people. In connection with the biblical tradition, this covenant is also designated as the “Abrahamic covenant.” Trained Jewish circumcisers (Mohels) perform specific benedictions along with the circumcision and it is only valid when these are performed. Likewise, during the ceremony the boy attains his Jewish name, by the invocation of which he will later come of age and be bound to the Torah. Thus, circumcision is also a crucial precondition for participation in religious life and, therewith, for the opportunity to practice Judaism. A Jewish adult, who is uncircumcised without a compelling reason (for example, medical contraindication), is thus not a full-fledged member of the Jewish community.

After the preceding remarks, it is indubitable that circumcision bears not only on bodily integrity, but also on religion; it is relevant to the entire religious life and activity and thus relevant to the fundamental right – of the *forum externum* – to practice religion.

III. The central constitutional problem

When one turns on this basis to the actual problem, it is *prima facie* obvious that the constitutional law can’t easily give a simple answer to the question that is posed. If one considers the composition of the case – especially with a view to the parent-child relationship in the case of religiously motivated circumcision – two premises in the jurisprudence of the *BVerfG* can be assumed. On the one hand one must consider the assertion that an appeal to civil rights – in this case the right to practice religion – does not provide a warrant to encroach upon the rights of others. On the other hand, the court has adopted an – admittedly problematic with regard to the general validity claim of criminal law – stance on fundamental rights, according to which a penalization due to a religious omission is problematic if it is characterized as a social reaction that is undue and, thus, injurious to human dignity.

1. Circumcision as an exercise of religion?

The preceding remarks necessitate examination of the question of whether circumcision falls under the effective protection of the freedom of religion. While freedom of religion indisputably guarantees the freedom to have a belief or worldview, and to acknowledge, express, and disseminate it, it is disputable whether actions in accordance with one’s beliefs are also encompassed within the sphere of protection.

According to the jurisprudence of the *BVerfG*, the sphere of protection includes the right to align one’s entire conduct with the doctrines of one’s faith and thereby to act according to one’s inner conviction. *Prima facie*, this means that every religiously motivated action is protected by Art. 4 Par. 1 and 2 GG and that the question of which actions are to be considered religiously motivated is only to be answered by the respective bearer of fundamental rights. The constitution thus grants believers the self-determination of what they consider to be beliefs, creeds, or exercises of religion, and of what they want to practice as their religious obligation.

However, there are an increasing number of voices in the literature against this extensive interpretation. So a stringent definition of the sphere of protection is needed – one which only places under the protection of fundamental rights those behaviors that are emanations of religion in the proper sense; that is, the behavior must be required for compelling religious reasons. Besides, there are also to be found in the cultural acceptability formula of the *BVerfG* rudiments that postulate a narrowing of the sphere of protection such that the relevant behaviors must be consistent with the fundamental moral views of today's civilized peoples. However, one then comes across the objection that the court has explicitly abandoned this language in later decisions. In addition, the court has emphasized that the constitution posits no set "ethical standard" based on the status quo; it distinguishes itself rather through its openness vis-à-vis ideological and religious views. Also, when the aforementioned theorem questions whether every human behavior needs to be a protected fundamental right, it overlooks the central concern of the freedom of religion, namely, to *prevent* assessment of the worthiness of protection in terms of compatibility with fundamental moral views.

2. Interpretational sovereignty regarding the freedom of religion

As is seen in the literature, standing problems are introduced at the center of the analysis, and ultimately the question of the jurisdiction of religious behaviors arises. Precisely because notions like belief, religion, and worldview have an extralegal origin and reference a limited normative domain, they are hardly amenable to definition as constitutional topoi. It should also be considered that the guarantee of individual religious freedom is, like hardly any other fundamental right, characterized by the highest possible degree of personal content.

For the crucial question as to whether an action is to be considered a practice of religion, the *BVerfG* bases its argument essentially on the self-conception of the concerned community – to some extent even on the perspective of individual bearer of fundamental rights. In the words of the court

[...] by the evaluation of that which in particular cases is to be considered practice of religion and ideology, [...] the self-determination of the religious and ideological communities cannot be disregarded. Indeed the religion-neutral state must, as a matter of principle, interpret constitutional terms according to neutral, universal, nonsectarian, non-ideologically-committed standpoints [...]. If, however, in a pluralistic society, the legal system requires precisely the religious or ideological self-conception as by the freedom of worship, then the state would infringe on the constitutionally granted sovereignty of the the churches and the religious and ideological communities and on their autonomy in their own domains, if it would not consider their self-conception in the interpretation of a religious practice resulting from a particular creed or ideology [...].

Precisely the contentual definition of the fundamental rights from the perspective of the bearer of these rights and the concomitant prohibition against the state's setting definitions for the content and practice of faith – at least on this level

of the scope of protection – facilitates the necessary protection in a ideologically neutral state, which is properly not permitted to determine which statements are binding for a religion and which obligations follow therefrom. Precisely because the state must here take up phenomena that are preexisting and cannot be determined by the legal system, it must use the fundamental right to the freedom of religion as “... an expression of the legal answer to the plurality of ideas of man, the world, and God in a constitutional state ...” and it must always take autonomously determined self-conception as the starting point. Art. 4 GG grants the respective bearers of fundamental rights the self-determination of what they understand as belief, conscience, creed, or religious practice and, consequently, what they want to practice as their religious obligation. It is not to be overlooked that this precise fact leads to a significant problem for the state, which on the one hand must determine in concreto the scope of protection of the freedom of religion, but which is also prohibited by the imperative of religious, sectarian, and ideological neutrality from assessing the beliefs or unbeliefs of its citizens.

From this wide interpretive approach the court has – perhaps because of the idea that with this construction the prerogative of interpretation can unilaterally be assigned to a particular religious community – only recently distanced itself. Subsequently,

[...] the mere assertion of religiosity and self-conception of a community as a religious community cannot justify an appeal to the guarantee of freedom of Art. 4 Par. 1 and 2 GG for it and its members; on the contrary it must also actually deal with the spiritual content and outward appearance of a religion and a religious community. The consideration and judgment of this behooves – as the application of a provision of the public legal system – the governmental institutions, ultimately the courts, which, thereby, however, exercise not a free power of determination, but rather that which is specifically intended and provided for though the constitution, to take the appropriate notion of religion as a basis for the sense and purpose of the guarantee of fundamental rights.

Indeed, the jurisprudence must consider that the courts and authorities can hardly be suitable wardens of content for purposes of rational justification.

3. The legal assessment in consideration of constitutional criteria

With due regard to the aforementioned standards, it is indubitable that the act of circumcision as such is included under the guarantee of fundamental rights in Art. 4 GG. For the question of (simple) legal assessment, it nevertheless requires a differentiating approach. To be sure, one can take the view that either religious circumcision should not factually constitute an offence or, alternately, it should, in the prevailing interest of religious freedom, be justified; however, these approaches fall short.

In the case of circumcision of a minor, if one bases one’s argument on the parents’ right to the care of the person of the child as the central ground of justification, one runs into the fact that the right to the care of the person of the child

does not include the authority of the parents to make unreasonable decisions to the detriment of the child. But with a view to the specifically religious character of the procedure, it should be considered that the internal determination of a religious community only fails the obligation within the state's legal system if this contracts the basic tenets of the legal system, as is expressly to be found in the universal ban on arbitrary decisions in Art. 3 Par. 1 GG, in the notion of "bonos mores" in § 138 BGB, or in the *ordre public* of Art. 6 EGBGB. Despite all casuistic differentiations surrounding this issue, one can be certain of the fact that circumcision is of central importance for the cultural-religious self-conception of the persons concerned. Accordingly, it appears questionable to qualify the act of circumcision as an infringement or as *contra legem* because of alleged conflicting interests of the child.

The validity of the aforementioned considerations can also be seen from another angle: Can the state take juridical action in the case of endangerment of the well-being of the child due to an "impending" circumcision? If one regards religiously motivated circumcision as a case of conflict between the parental right, for which the well-being of the child is the supreme guideline, and the fundamental rights of the child himself, one must keep in mind that the parental right is inherently a right in the interest of the child. Likewise – and this is found in the discussion of state custodianship in Art. 6 Par. 2 GG – the state has to make sure the parents do in fact care for the children, that is that they exercise their parental responsibility; and only in exceptional cases need it safeguard a child, who cannot yet protect himself, from damage to his development through the abuse of parental rights (§ 1666 BGB). Encroachments into the parental right are only justified when the well-being of the child is endangered by the parents' actions. In this respect, it corresponds with the doctrine of the protection of fundamental rights, that the child is, in the case of an ongoing endangerment to his well-being, entitled to state protection from the irresponsible discharge of the parental right. That said, an examination of the requirements of § 1666 BGB makes clear that there is no endangerment to the well-being of the child in the case of circumcision since it establishes affiliation to a particular religion and is a precondition for an enduring fellowship. This follows from the fact that an endangerment to the well-being of a child requires a current, substantial risk; a considerable impairment to the bodily well-being of the child must be foreseeable with almost absolute certainty. What's more, the parental conduct must have reached such a magnitude that an endangerment to the well-being of the child is immanent. By general consensus, a considerable physical abuse, as which a circumcision that is performed *lege artis* does not qualify, is necessary. Moreover – and this is the second element of the offense – it must concern an abusive exercise of parental custody, that is, a behavior that is aimed directly at an injury to the child. Also, a "brutal attitude" rarely corresponds with the character of a religiously motivated circumcision; if and when circumcisions are not performed appropriately, this is not a valid objection, inasmuch as instances of medical malpractice do not represent a challenge to iatric procedures in toto.

IV. Conclusion and prospects

It cannot be overlooked that the intercultural tension and the existence of particular religious customs present significant challenges to the legal system – and this holds for constitutional law as well as basic law. This pertains even with a view to the unfettered primacy in application of the valid rights with respect to differing or competing legal concepts; precisely this legal multiculturalism necessitates stable parameters through the regulative power of the constitution. Overall, there is a need for less prejudiced legal strategies; one must recognize the specific religious aspects of circumcision so that one can, on this basis, attain a proper appreciation, which is also an expression of a public understanding that freedom of religion is of pivotal importance and that the state always forbids the contentual evaluation of the beliefs and behaviors of a religious community provided that the legal system is not fundamentally challenged by them – and it certainly isn't in the case of religious circumcision. In conclusion, the religious ground of norms can be placed within the confines of the law.