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Robert Schuman Centre for Advanced Studies
RELIGIOWEST

Religious Freedom and the German Circumcision
Debate

Marianne Heimbach-Steins

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ReligioWest

ReligioWest is a four year research project funded by the European Research Council and based at the European University Institute, Florence, Italy. It aims at studying how different western states in Europe and North America are redefining their relationship to religions, under the challenge of an increasing religious activism in the public sphere, associated with new religious movements and with Islam.

Abstract

In May 2012, a German court in Cologne ruled that circumcising young boys represents grievous bodily harm. This decision, which touched upon the questions of freedom of religious practice, identity and children's rights, was condemned by Jewish and Muslim representatives in Germany, but it was also widely and controversially debated by civil society and politicians. The German Parliament recently passed legislation protecting circumcision as a religious practice, but the debate is likely to continue. In this paper, Marianne Heimbach-Steins, director of the department of Christian Social Ethics at the University of Münster (Germany), discuss this case and its implications for the definition of religious freedom.

Keywords

Circumcision – Germany – Islam – Judaism – human rights – religious freedom

1. Introduction*

On the 7th of May 2012, the Cologne *Landgericht* (Court of Appeal) made a decision on a case concerning male circumcision for religious reasons. The judgment said “that male circumcision in children amounts to criminal battery even if performed *lege artis* and with the consent of the parents unless there is a medical indication for the procedure” (Fateh-Moghadam 2012: 1131). When it became publicly known – which was only on the 26th of June 2012 – the decision immediately instigated an excited and highly controversial debate in public and academic circles. Lawyers, medical doctors, philosophers, theologians, activists for children’s rights, religious representatives from the Muslim and the Jewish communities, but also from the Christian churches, politicians, artists and other citizens articulated themselves publicly, and expressed differing interests and perspectives with contradictory ways of understanding the problem at stake.

The German Parliament dealt with the issue on Thursday 19th of July – just before the beginning of the parliamentary summer holidays – and made a resolution for a quick new legislation in order to guarantee that “Jewish and Muslim religious life will be further possible in Germany”¹ (Deutscher Bundestag: Drucksache 17/10331) – a fact which was considered an “extraordinary political action in defense of religious freedom” (Fateh-Moghadam 2012, 1131). The proposition for a new legislation was prepared during the following months. After the first reading in Parliament on 22nd of November 2012, the legislative decision was made on 12th of December 2012.²

The Cologne judgment provoked a huge wave of reactions on different levels of society. The ongoing debate shows that the issue is not a marginal one. The judgment seems to put a questionmark over the right to religious freedom as it criminalises a ritual practice considered to be a vital element of Jewish and Muslim religious identity. The problem set up by the judgment is rooted in a competition between three different basic individual rights simultaneously guaranteed by the German constitution (*Grundgesetz*), namely: the right to corporal integrity (Art. 2); the parental right to educate one’s children in accordance with one’s religious beliefs and convictions (Art. 4); and, the right to parental care and custody (Art. 6). A solution has to be found within a socio-cultural context characterised by a plurality of religious beliefs and worldviews and, at the same time, by a growing attentiveness towards children’s rights in general, especially to the autonomy or self-determination of children and youth.

The discussion clearly refers to a legal matter, but at the same time it reveals ethical issues and challenges going beyond what can be regulated by law. As a theologian working in the area of social ethics and human rights issues, I have examined the case and the public reactions from a Christian perspective and with the interest of an ethicist.³ In my contribution I shall therefore deal with the following questions:

First: What is the case? – I will shortly sketch the legal case and the major arguments that have been used to justify the court’s decision.

* This paper was presented as ReligioWest-Lecture at the European University Institute on December 7th, 2012. The manuscript was finished in December 2012 and therefore does not take into account literature relevant to the ongoing debate after this date.

¹ The German Bundestag addressed the German Government, „unter Berücksichtigung der grundgesetzlich geschützten Rechtsgüter des Kindeswohls, der körperlichen Unversehrtheit, der Religionsfreiheit und des Rechts der Eltern auf Erziehung einen Gesetzentwurf vorzulegen, der sicherstellt, dass eine medizinisch fachgerechte Beschneidung von Jungen ohne unnötige Schmerzen grundsätzlich zulässig ist.“ (Deutscher Bundestag Drucksache 17/10331).

² “Gesetz über den Umfang der Personensorge bei einer Beschneidung des männlichen Kindes” (Deutscher Bundestag Drucksache 17/11295).

³ I am grateful for inspiring discussions on the topic with my colleague Daniel Bogner. And I thank my colleague Felicity Jensz for correcting the English.

Second: How has the case been discussed in the broader public, in academia, in politics, and in religious communities? I will outline some major aspects highlighted in the debate and the different relevant discourses, and try to identify different types of arguments.

Third: What does the debate tell us about the right to religious freedom and the necessary conditions to safeguard it? – I will ask this question in the context of present-day Germany as a secular state with its pluralist society in terms of worldviews and religious beliefs.

Following this outline. I will have to leave aside other aspects of the issue. To mention but a few related topics of interest: an empirical inquiry into the wide-spread practice of male circumcision (WHO/UNAIDS 2007), the varying non-religious (cultural, social, aesthetic, health care) motives or the medical necessities for male circumcision in babies, children, youth, or in adult men, or the comparison between male circumcision and female genital mutilation connected with the gender-implications of the issue in general.

2. The legal case

a. A brief report of the facts

For a brief report of the legal case I refer to the excellent study written by my colleague Bijan Fateh-Moghadam, researcher at the Cluster of Excellence “Religion and Politics” at the University of Muenster:

“The defendant, a physician, performed a circumcision on a then four-year-old boy in his medical practice in Cologne on 4 November 2010. The circumcision was requested by the Muslim parents of the child, without there being a curative medical indication for the procedure. The surgery was performed *lege artis* and under local anaesthesia. ... Two days later the boy was brought to the children’s emergency department of the University Hospital Cologne because of a secondary bleeding, which was treated successfully. Reportedly due to communication problems with the mother of the child the medical team at the University Hospital developed doubts about whether there had been valid consent of both parents, which is why the prosecution service got notice of the case. Although the investigation of the prosecution service brought about that the surgery was performed in accordance with medical standards and with the consent of both parents, the physician was accused of causing bodily harm ...” (Fateh-Moghadam 2012: 1132-1133).

The case came before the *Amtsgericht* (Trial Court) in Cologne whose judgment acquitted the defendant: “In balancing the rights of the parents concerning education and the care and custody of the child ... against the right of bodily integrity of the child ... the court considers firstly that male circumcision is a traditional ritual practice, documenting the religious and cultural belonging to the Muslim community. For this reason it would, secondly, counteract an imminent stigmatization of the child. And thirdly, with regard to the right of bodily integrity of the child, the court emphasises the importance of circumcision as a preventive medical measure, because of its positive hygiene effects, which had been proven by scientific medical service.” (Fateh-Moghadam 2012: 1133).

Through the prosecution’s appeal the case was then brought to the *Landgericht* (Court of Appeal) in Cologne which came to a totally different decision. Whereas the acquittance of the physician was confirmed⁴, as the court assumed that he had acted in good faith, the practice of male circumcision in children was generally criminalised with the only exception of strict medical necessity. “For the first time in history a German court ruled, that male circumcision, if not medically necessary, is punishable

⁴ The reasoning of the court for this part of the decision refers to the fact that the physician performed the surgery *lege artis*, that therefore the surgical instrument used does not aggravate the bodily harm and that he could not be aware of performing a potentially criminal act. This is critically commented by Putzke (2012: 622).

as criminal battery [...], even if performed *lege artis* and with the consent of both parents [...].” (Fateh-Moghadam 2012: 1133).

b. The reasoning of the court

Like any other surgical intervention male circumcision has to be considered as criminal battery if practised without a justifiable reason (Fateh-Moghadam 2012: 1133). This was the starting point for the court’s reasoning. It had to be found out if there were factors that would balance the physical intervention and justify the treatment of the boy.

The court argues that bodily harm must not be justified for religious reasons, since bodily harm as such is considered unconstitutional.⁵ Religious freedom provides no grounds for exception. Once this is accepted, the main question turns out to be whether or not the parents’ consent (following Article 6 of the German Constitution) justifies the circumcision of the boy. The court denied this by not accepting the idea that the parental decision could be in accordance with the well-being of the child (Landgericht Köln 2012).

Instead it was assumed that the well-being of the child had to be measured by exclusively referring to the best *medical* interest of the child (Landgericht Köln 2012). Thereby the *Landgericht* follows the most restrictive position within the German juridical debate (Putzke 2008) about the criminal relevance of male circumcision in children (as persons not able to give their informed consent) (Fateh-Moghadam 2010). It reveals an extremely narrow interpretation of the ‘best interest’ of the child: It was read as a norm directly defining what is acceptable and what is not. Thus, the court “follows a doctrine that may be characterized as positive standard of the well-being of the child – as limitation of the proxy consent – by way of an objective ‘best medical interest-test’” (Fateh-Moghadam 2012: 1135). This is in contrast to a liminal understanding of ‘best interests’ that avoids positively defining the content, yet restricts itself to a minimal norm which cannot be violated.

The court does not really balance the competing goods – the bodily integrity of the child and the parental right to care and custody (and, as the third aspect, the religious freedom of both parents and children) – and their impact on the well-being of the child. By simply stating that the ‘best interest’ of the child has to be defined exclusively by medical criteria the court concludes that the circumcision of male infants for reasons other than medical necessity is to be strictly forbidden. According to this opinion, parents clearly must not decide otherwise; even the likeliness of a medical advantage of circumcision, which is assumed in many other countries, would not justify the decision.⁶ As a consequence, any degree of parental discretion is excluded (Fateh-Moghadam 2012: 1135; Walter 2012). If this reading was followed generally, parents would “mysteriously lose their right to the care

⁵ This argument is again stressed by Putzke (2008) and Putzke (2012: 624), who may be considered to be the opinion leaders in the background of the court’s decision.

⁶ Defenders of the court’s decision usually ignore the controversial meanings of the medical and healthcare aspects of male circumcision or come to the conclusion that these aspects do not balance the evil imposed on the child by performing circumcision (Putzke 2008: 688-691). The fact that there are different aspects to be weighed, even on the level of medical and healthcare interests, has to be taken into consideration before simply denying the parent’s responsibility to decide in favour of what they assume to be the best interest of their child. As to this challenge the suggestion made by Fox & Thomson (who are, in fact, critical towards the appropriateness of male circumcision performed on babies) seems reasonable and shows that less emotionalised attitudes to deal with this delicate question may turn out to be more helpful than the polemic voices heard in the German debate: “We suggest that a process of dialogue and education, rather than calling for criminal prohibitions and sanctions, is the appropriate strategy to counter male circumcisions and our common sense assumptions that it is a trivial procedure. In addition to, and as a part of, this process of changing parental attitudes education must be targeted at healthcare providers and the professional bodies that promulgate guidance on this issue. However, in the meantime, civil courts faced with a request to authorize circumcision on a child too young to consent should hold parents to a standard of decision-making that is informed about harms, sensitive to needs, and demonstrably reasonable.” (Fox & Thomson 2009: 28).

and custody of the child” whenever entering a hospital or medical practice for having their child cured (ibid. 1136).⁷

The marginalisation of the parents’ consent affirms that religious freedom is rejected as a valuable argument in favour of the parents’ decision to have their child circumcised. The right to religious freedom of the parents is not considered a valid argument to justify the parents’ decision whereas the court refers to the child’s right to (religious) self-determination as restricted by the circumcision at an early age.

By generally rejecting the legitimacy of religiously motivated circumcision in children and by thus criminalising those who practise it, the court-decision has provoked a new situation in Germany as to religious freedom and politics of religion: The two most important religious minorities – the Jewish and the Muslim communities in Germany – found themselves respectively their members criminalised as circumcision is considered to be an essential element of their religious identity.

3. The new legislation – a short overview

As mentioned in the introduction, the Cologne judgment provoked deep bewilderment among the Jewish and Muslim communities in Germany and legal uncertainty among medical doctors and hospitals practising this corporal intervention.⁸ A few weeks after the publication of the judgment the German Parliament therefore urgently asked the Government to quickly prepare a new legislation in order to clarify the situation and restore legal certainty. The explicit political interest was to safeguard the possibility of legally practising Jewish and Muslim religion in Germany, which would have been seriously questioned if the male circumcision in children for other reasons than medical necessity had generally been considered as a criminal act. At the same time, the Government obviously intended not to provoke a discussion about potential limits of legitimate religious practice. Meanwhile the legal rule to regulate the issue, entitled “Gesetz über den Umfang der Personensorge bei einer Beschneidung des männlichen Kindes” (Deutscher Bundestag: Drucksache 17/11295), has been discussed and decided on in Parliament.⁹ In short it says:

First: Circumcision for non-medical reasons is treated as a matter of the right to parental care and custody – i.e. as a matter of civil law and not as a topic of penal legislation.¹⁰ This has to be read as an indicator that the legislative power considers religion and religious practice as legitimate dimension of human existence and social life. Or – to approach the issue from the opposite direction – that it is not a matter to be generally suspected or even criminalised as a number of voices in the recent German public debates insinuated.

Second: Parental care and custody includes the right to agree to circumcise a male child who is not yet able to agree and to decide himself – for reasons other than strict medical necessity, but under the

⁷ According to this reasoning all kinds of interventions in the bodily integrity of a child – like ear-piercing, correcting the position of the ears or other interventions in the bodily integrity of the child for aesthetic reasons – had to be forbidden and prosecuted by law (this does not mean to trivialise circumcision as a marginal corporal intervention; it only shows that the way of reasoning is not without problems).

⁸ As Alfred Bodenheimer reports, a number of physicians and children’s hospitals (not only in Germany but also in Switzerland) stopped performing circumcisions after the judgment had been published. In August 2012 for first time in Germany a Rabbi was accused of having performed circumcision in children (Bodenheimer 2012: 13).

⁹ The decision in the *Bundestag* on the 12th of December 2012 was taken with 434 members of Parliament voting for, 100 against, and 46 abstaining. A concurring legislative draft had been presented by 66 members of Parliament belonging to the three opposition parties. For details see http://www.bundestag.de/dokumente/textarchiv/2012/42036947_kw50_angenommen_abgelehnt/index.html (13/12/12)

¹⁰ The legislation adds a new paragraph (§ 1631d) to the rules concerning the right to parental care and custody treated in the German Civil Law §§ 1626ss. (Deutscher Bundestag: Drucksache 17/11295)

condition that the intervention is done *lege artis*.¹¹ Along with this affirmation the right to circumcise is conditional on the well-being of the child. The rule intends to reconcile the potential competition between the medically measured well-being of the child and the religious freedom right of both parents and the child. At the first glance this formula seems clear and simple. Nevertheless I expect this condition to come out as a source of ongoing discussion. At least it means that the legitimacy of the circumcision of male infants and young children is principally acknowledged as long as the concordance with the criterion of the well-being of the child is assumed. But since there seems to exist a fundamental dissent on what the well-being of the child requires and how it is to be defined materially this will most likely come out to be the starting point of new legal controversies. As soon as one questions the legitimacy of the practice in a particular case, it will have to be proved with regard to the child's well-being.

Third: In the first six months after birth, circumcision under the mentioned conditions may be practised by persons mandated by a religious community, if they are trained for this intervention without being a medical doctor but are just as capable.¹² This additional rule in fact refers to the Jewish practice of circumcising male infants on the eighth day after birth, which is mostly practised by a religious expert (*mohel*) who is specifically trained but not necessarily a physician (Deusel 2012). It is to make sure that the surgical intervention will be practised *lege artis* in each and every case. The rule does not mention the necessity to monitor the qualification of the authorised religious experts who are not medical doctors by an external (governmental?) authority as was eventually the case in 19th century Germany (Jütte 2012: 179 – 180; Brämer 2012: 39).

No specific rule is formulated concerning the religious practice as such. This is at first glance due to the context (the right to parental care and custody). Moreover, this rule seems to be reasonable with regard to the suspicion that the new legislation would establish a privilege for religious minorities. This suspicion had been publicly raised in the debate, namely by legal philosopher Reinhard Merkel. With reference to the historical debt of the Holocaust he argued that for historical reasons the German State was particularly committed to the Jewish community in Germany and therefore had to establish an exception from what would be otherwise illegal (Merkel 2012). If the legitimacy of circumcision of children was built on a mere privilege this would not only be beyond what is covered by the basic (constitutional) rights including the right to religious freedom. Strictly speaking, it would in fact delegitimise the practice from a human rights or basic rights perspective. The UN-Special Rapporteur on Freedom of Religion or Belief, German philosopher Heiner Bielefeldt, states: The demand to further safeguard the legal practise of male circumcision in children in Germany does not mean to postulate a privilege. Instead this demand can with good reasons rely on the right to freedom of religion. Its specific content becomes obvious only in particular societal contexts and with regard to specific religious belief systems or world views. It needs to be precisely found out in communication with the believers whose religious convictions or practices are under pressure (Bielefeldt 2012a: 77).

4. Reviewing the public debate – arguments and tendencies

The Cologne judgment initiated a huge and highly emotional debate. It is not by chance that it was soon characterised as a new “Kulturkampf” by serious observers (Bielefeldt). Far from a balanced argumentation, a discussion “storm” came over the German public. Strong weapons were used: It

¹¹ „Die Personensorge umfasst auch das Recht, in eine medizinisch nicht erforderliche Beschneidung des nicht einsichts- und urteilsfähigen männlichen Kindes einzuwilligen, wenn diese nach den Regeln der ärztlichen Kunst durchgeführt werden soll. Dies gilt nicht, wenn durch die Beschneidung auch unter Berücksichtigung ihres Zwecks das Kindeswohl gefährdet wird.“ (Deutscher Bundestag: Drucksache 17/11295: 5)

¹² „In den ersten sechs Monaten nach der Geburt des Kindes dürfen auch von einer Religionsgesellschaft dazu vorgesehene Personen Beschneidungen gemäß Absatz 1 durchführen, wenn sie dafür besonders ausgebildet und, ohne Arzt zu sein, für die Durchführung der Beschneidung vergleichbar befähigt sind.“ (Deutscher Bundestag: Drucksache 17/11295: 5)

seemed as if children had to be protected against religiously motivated violence¹³ and as if the values of enlightenment had to be restored against the destructive, archaic and unconstitutional powers performed by the religious traditions.¹⁴ There continues to be a vivid, controversial and highly emotional debate on this topic, mainly now confined to the internet. Some voices sound explicitly aggressive against any religious claims and seem to dismiss any readiness to differentiate. Some others show the same narrow-mindedness in the opposite direction. They do not accept that religious claims have to be balanced with other constitutional rights and that therefore the justification of a practice like male circumcision in children is not *tabu* for public discussion. Fundamentalist attitudes were shown from either side of the debate – fundamentalism not being restricted to religious but also to anti-religious worldviews (Heimbach-Steins 2012: 34 – 41).

The religious communities of Jews and Muslims, who after the Cologne judgment found themselves collectively in the role of the defendant, expressed fear of a new wave of anti-Judaism, anti-Semitism and Islamophobia, and publicly expressed doubts if they were still wanted in Germany and if they could further live in accordance with their religious identity in the country.

The conflictive climate made it hard to seriously discuss the issue. The new legislation will probably not stop the public discussion. There are remaining tensions inherent to the legal rule itself in particular to the normative categories to which it refers. Whereas it clearly intends to defuse the question of religious freedom, the ongoing debate causes doubts as to whether this will be successful in the long run.

It therefore seems necessary to deepen a balanced debate. It needs a solid base of argumentation and has to take distance from polemic and antireligious affects.¹⁵ I will try to systematically sketch at least some major lines of the debate as it has developed so far in order to clarify the normative impact of the issue.

4.1 A discourse on competing basic rights

The summary of the court's decision and reasoning not only illuminates the starting point of the debate, but also mirrors important juridical and ethical dimensions of the related discussion. On the legal level it is a discourse on competing basic rights, the main lines of which already have been sketched. Three basic rights guaranteed in the German Constitution are involved:

(1) The child's right to corporal integrity and self determination is clearly identified as the benchmark not to be undermined by any other rights claims. It is indeed obvious: Male circumcision is a corporal intervention which needs to be justified with arguments that prove to be in line with the well-being of the child. Whether this can be approved will at large depend on the way the intervention is performed and on the hygienic conditions provided (WHO/UNAIDS 2007). For serious reasons it is a matter of constant controversial discussion. It cannot be superseded by competing rights claims from other positions without safeguarding the genuine right of the child. But at the same time, it has to be admitted that the "brute fact" of the corporal intervention seems to be an abstract construction. In fact,

¹³ To give but one example: An open letter addressed to the German chancellor and the German Government and signed by more than 700 people (many of them physicians) which was published on July 21, 2012 postulates that "religious freedom must not function as *carte blanche* to perform (sexual) violence against boys not yet able to consent," Matthias Franz, Open letter, <http://www.faz.net/aktuell/politik/inland/offener-brief-zur-beschneidung-religionsfreiheit-kann-kein-freibrief-fuer-gewalt-sein-11827590.html>.

¹⁴ Some voices hold that the initial rites of all "abrahamitic traditions" fall under this verdict insofar they impose their rites – circumcision or baptism – on children not yet able to informed consent; so explicitly written by Joachim Kahl, a spokesman of the laicist socialist movement within the Social Democratic Party (Kahl 2012).

¹⁵ Apart from the nervous and emotional debate, informative and helpful contributions have been published by legal scholars, philosophers, ethicists, medicine and religious experts – not least from the Jewish community in Germany (Heil/Kramer 2012).

it is a practice which has to be evaluated within a *context* that makes it meaningful – be it a medical or healthcare context or a religious one or whatever other determining factors are at stake – and within this context its legitimacy has to be proved or renounced.¹⁶

(2) For the case in question, the religious context must not be ignored as a source of meaning. It is protected by the constitutional right to religious freedom. The right to religious freedom, including the parental right to educate their children in accordance with their own beliefs and convictions (Walter 2012), is at the core of those interventions that criticise the judgment as unbalanced. The main point of critique then is that, in conceptions of well-being and good life, the value of religious belief and belonging is neglected (Bielefeldt 2012a; Walter 2012). Other voices totally deny that there is any positive relationship between the parental right to care and custody and the right to religious freedom of the parents (Röhl 2012). Some commentators interpret the religious freedom of the child as an exclusively negative right which claims to leave children free from parental pre-decisions on religious belonging (Kahl 2012; Röhl 2012). This is not, however, in line with international human rights standards.

(3) The right to parental care and custody is at stake as the conflict deals with a treatment of male infants and children too young to decide what they would allow to be done with their bodies. No doubt it has to be balanced with the genuine rights of the child. To insist on the child's proper rights is a very important point indeed. Only in very recent years has this point been highlighted in various debates. In the debate which we are looking at this point has often been made: The proper rights of the child – not as future adult, but in its present situation as a very young person – need to be emphasised. This means that the child has to be acknowledged as a person not yet ready to claim and defend his (or her) own rights in the legal sense, yet is nevertheless a subject in the full moral sense of the word. However, there is no good reason to assume a strict (abstract) opposition between the parental right and the child's future right. Those who do so intend to maximally restrict the right to religious education or deny it completely. On the contrary, the legal norms – namely the UN-Convention on Children's Rights – hold that parents are not only allowed but obliged to guide their children on their path to autonomy and self-determination (Art. 5; Bielefeldt 2012b).

Thus, the competition between the three different basic rights refers to corporal integrity, self-determination, and religious identity. For many of the anti-religious voices heard in the discussion the outcome of this confrontation seems to be clear, for them the right to religious freedom has to be subordinate to the child's well-being and "best interests". They deny any positive correlation between the competing legal claims. This opinion has been expressed in the reasoning of the court that failed to balance the competing rights (Fateh-Moghadam 2012: 1135-1136) as well as in interventions of legal scholars, pediatricians, activists for children's rights and journalists. Not surprisingly, this conclusion – or rather prejudice (?) – has also been criticised, not only by the religious communities involved, but also by the Christian churches¹⁷, by philosophers and legal scholars, and other voices. They demonstrate the ethical necessity to more precisely reflect on the relationships and the tensions between the competing goods and values.

¹⁶ Bodenheimer 2012: 30 argues that attempts to de-legitimise circumcision by using medical arguments against the practise would remind one of other tendencies to impose programmes of perfection on people in a paternalist manner, going far beyond of what is the task of a state. German legal scholar Christian Walter (2012) sharply criticises any attempt to compare male circumcision in children with corporal punishment which has been the case under the headline of violence.

¹⁷ Representatives of both, the Catholic and the Protestant Churches in Germany commented on the Cologne judgment, on the debate and on the new legislation: <http://www.ekd.de/international/islam/index.html> and <http://www.dbk.de/nc/presse/aktuelle-meldungen/>.

4.2 Ethical implications of the debate

The juridical discussion concerning the competing constitutional rights has shown several problems which probably cannot be solved by legal means alone. Some of these questions challenge the moral insight which directs our judgments in politics, law, and in public debates.

4.2.1 The child as a person and as a moral subject

Only a few voices in the German debate have highlighted the well-being of the child in a more differentiated way (Wiesemann 2012) than those who simply focused upon it *as opposed to* the competing religious freedom right.¹⁸ Basically, the child has to be considered and treated as a subject in the moral sense of the term. He (or she) must not be treated as if he or she is an object or property of anyone else. At the same time it has to be taken into consideration that the child is in need of care, and that the people in charge – normally the parents – take responsibility for the child, and that this responsibility requires the freedom to decide on what is in favour of the child's well-being. One fundamental criterion – but not the only one – is the previously mentioned claim to respect and to protect the corporal integrity of the child. Interventions in the corporal integrity need to be seriously justified. A justification must prove to be in line with, and to serve the well-being of the child, which is required as an expression of the acknowledged status of the child as a moral subject.

Defenders of the child's well-being and best interests often argue that parents may not claim to act in favour of the child's well-being when deciding to have their child circumcised for religious reasons (it would be interesting to see if they use the same argument in case of, let us say, medical procedures for aesthetic reasons).¹⁹ The assumption then is that the parents' decision goes beyond their legitimate subsidiary duty. Even without expressing an anti-religious attitude, religiously motivated parental decisions are sometimes rejected as illegitimate. The focus then seems to be on the right of the child to self-determination. The argument says: Once he will be adult the boy will himself decide whether or not he wants to be circumcised / live as a religious person. Circumcision at early age would impede a free decision. But by so arguing the child is addressed *not as child* but as the adult he is expected to become (Wiesemann 2012).

As to the material decision of religious belonging, the argument does not seem to be really strong. The corporal intervention does not in itself constitute a Jewish identity – the basic criterion, rather, is having been born by a Jewish mother (Deusel 2012: 181). Amongst the 30 per cent of the world's male population who has been circumcised, there are many who do not connect this corporal intervention with any religious identity. And to be circumcised for religious reasons does not hinder the circumcised from changing his religious conviction and belief as an adult (Fateh-Moghadam 2012: 1140). Even though circumcision itself cannot be extinguished, the fact of being circumcised does not constitute a religious meaning in and of itself. The religious ascription can be accepted or rejected.

As to the point of stressing the autonomy of the person, the argument seems to express a certain one-sided image of the adult as an autonomous person. It is exclusively based on the ideal of individual independence without, however, assuming to what extent social, cultural, and religious belonging can be constitutive for the development and the shape of a personal identity. In my view this is too narrow an understanding of autonomy. It neglects the fundamental role of human relationships and the social involvement each individual life is based on, including those relationships established later in life.

¹⁸ Following Fox & Thomson (2009) the Anglo-Saxon discussion deals with the issue in a much broader perspective.

¹⁹ Putzke (2008: 696-697) explicitly discusses the legitimacy of surgical interventions like ear-piercing or ear- and nose-corrections. He argues that those interventions are (or at least can be) so much in favour of the child's well-being that they seem to be justifiable although not medically indicated. This shows clearly: Judgments on those issues are always based on certain pre-decisions on what is evaluated as desirable or not.

In this context an interesting aspect may be added to the discussion by examining another issue relating to human rights and to the well-being of the child. I refer here to the debate on inclusion and the right to inclusive education stressed by the UN-Convention on the Rights of Persons with Disabilities (CRPD, 2006). Most interesting in this context is the idea that “belonging” is enforced as a normative criterion for the inclusive treatment of people with disabilities (Bielefeldt 2006; Heimbach-Steins 2013). In relation to the interpretation of human rights claims this innovative aspect of inclusion seems to form a sharp contrast to the hostile way some voices argue against any claims to initiate children into the religious communities their parents willingly belong to.

4.2.2 Acknowledging religious belief and belonging?

The above criticised way of conceptualising autonomy seems to limit religion to a totally private matter. Whether the single adult individual chooses or rejects religion as something relevant for his or her life is interpreted as a mere matter of cognitive choice. If it is assumed to be so, parental decisions concerning the religious belonging of their child seem principally an illegitimate pre-decision – be it with or without corporal intervention.

As far as I can gauge, this opinion has recently become more apparent and vocal in Germany. It coincides with an increasingly influential tendency in current public debates on religious issues to downplay the sense of the proper value of religion, religious belief, and belonging. Many critical voices articulate a disrespectful attitude towards religion and religious self-expression. Many critics no longer admit the possibility that religion might be a positive aspect in people’s lives – both on the personal and private level, and on the level of social cohesion and commitment to the rules and ritual practice of a religious community. Although not the *opinio communis*, there seems to be a growing tendency in this direction. In my opinion, this is an alarming signal not only because it makes social life in a pluralistic society more difficult and more conflictive, but also because it fails to recognise the social and cultural potential of religious sources at all. The ongoing public, political and scholarly debate not only indicates but also clearly enforces the described tendency.

4.2.3 Religious freedom and the well-being of the child

Since it seems to be the main focus of the debate we should have a closer look at the way the right to religious freedom is, or can be, related to the well-being and “best interests” of the child. In my opinion, a standpoint which generally denies any positive relationship is remote from real life. Imagine, for example, that a specific language was deemed inappropriate for educating children as the language one learns as “mother-tongue” deeply influences one’s way of thinking and communicating with others. Thus, in order to leave children free in their decision which language they will prefer as means of communication and reflection once they are grown up, one would decide not to introduce children to their parents’ language. Obviously this would not be a good idea, and reasonable people would claim that it was against the well-being of the child to follow such a path.

Religious belief it is, of course, not the same, yet it is analogous. It is linked with the cultural relevance of both language and religion. The possibility to experience religious belonging and to become acquainted with religious expression at an early age should be considered as a relevant element within an integrative conception of the well-being and best interests of the child. To accept this general approach does, of course, not automatically mean to justify the practice of circumcision in little boys. But it gives a hint of how to think positively about religion as a potential factor in belonging to a community of communication, social, and cultural life, and thus as an element to be integrated in a conception of the well-being of the child. At least even critics of religion may admit that there are legitimate alternatives apart from the strict opposition to constructing the relationship between the best interests of the child and the claim of religious freedom of both the parents and the child.

Admittedly this argument does not as such neutralise the critical arguments against circumcision in children. It may, however, change attitudes towards the interests and claims of parents asking for, or agreeing with, the circumcision of their little boys. They presumably decide and act in favour of their children's well-being. Many religious people feel offended, both in their role as parents as well as in their role as believers, if their good intention is generally neglected and they are furthermore offended, if, through exercising their basic right to parental care and custody, they are subjected to penal law (Engin 2012; Walter 2012). The basic idea is to conceptualise a positive impact of religious belonging on the child's well-being. Once this is accepted – as potential or as normative impact – it might be easier to discuss the best ways to continue religious traditions of fundamental importance, such as circumcision, so that the corporal practice proves to be in line with the well-being of the child (and how this category has to be adequately understood).

5. The impact of the German debate on Religion and the right to freedom of religion in the pluralist society

5.1 Religious identity

The circumcision debate was initiated by a judgment that obviously did not at all estimate the religious importance and value that the Muslim (and the Jewish) community attribute to the practice of circumcision. In neglecting this factor the court did not look for a solution to balance the values in question, that is, the religious identity of both communities and the medical aspects of the child's well-being.

Therefore it is not surprising that at least some Jewish and Muslim voices took efforts to publically explain the religious meaning of male circumcision within their traditions.²⁰ Namely within the Jewish tradition it is a basic ritual practice closely linked to Jewish identity all over the world throughout history. There have been circumcision debates within the Jewish community concerning the question of when a boy should be circumcised. Several scholars refer to a remarkable nineteenth century debate in the German Jewish community which questioned whether or not the ritual was to be continued in modern times (Bodenheimer 2012: 36 - 43; Brämer 2012; Jütte 2012). And, no doubt, there are contemporary Jewish voices, mostly in Israel and in the USA, that question the practice of circumcising infants (Denniston et al. [Ed.]: 2009). But the huge majority of Jews (not only ultra-orthodox and orthodox, but also reform and liberal) worldwide follow the norm of circumcising male infants eight days after birth as an elementary practice of initiation and religious belonging – the abolition of which is not to be discussed under any circumstance. I cannot go into details of the Jewish and Muslim religious history and tradition concerning circumcision practices. I can only give some very short notes as to the scope of meaning ascribed to circumcision in Judaism.²¹

Following the biblical narration, circumcision is essentially linked to the foundational act of Judaism: the Covenant between God and Israel (as narrated in Genesis 17). Nevertheless, the essential

²⁰ Bodenheimer explicitly criticises the rather weak reactions of the Jewish community in Germany on the level of argumentation and intellectual discussion. From his Jewish standpoint he clearly states that it is not enough to point to the biblical norm without explaining the historically developed religious rules of Jewish life according to the experiences forming and challenging the identity of the Jewish people (Bodenheimer 2012: 25 - 36). The necessity to more clearly explain the Jewish commitment to male circumcision from different scholarly and practical perspectives is also the focus of a volume, edited by Johannes Heil and Stephan Kramer, which documents a conference at the Hochschule für Jüdische Studien in Heidelberg in September 2012 (Heil/Kramer Eds. 2012).

²¹ Due to the different histories of Jewish and Muslim life in Germany there is a tradition of discussing circumcision and of arguing in its favour (and against it) within the German-Jewish community whereas up to the present day there have been very few contributions concerning the issue from the Muslim community in Germany. To refer to the Jewish sources does not, of course, mean that the Muslim experience can be subsumed or substituted by the Jewish experience.

importance of circumcision for Jewish identity cannot be exclusively derived from a biblical text. It is closely linked to the historical experience of the Jewish people from antiquity onwards. This historical experience has repeatedly been characterised by the pressure to defend their own specificity and difference against deadly threats by the ruling powers, and, moreover, without the condition of being a nation with its own territory and legal order. It is under such conditions that the fact of being circumcised gained its particular importance as marker of difference, which has been reflected at large in the rabbinic literature (Bodenheimer 2012: 25 – 48). Even in modern debates within the Jewish community about the necessity of the circumcision practice it has found resonance (Brämer 2012).²² What can be learned from the historical sources, namely within the context of the nineteenth-century Jewish debate in Germany, is that it is not *the act of circumcision* as such (the rite) but *the fact of being circumcised* (the institution) which makes the difference for Jews (Bodenheimer 2012: 37; Brämer 2012; both with reference to Zunz 1844). By having their male infants circumcised Jewish parents introduce them into the covenant with God and continue the history of the covenant. Thus, the practice is far more than an initiation rite concerning the individual child and his religious biography. The corporal sign opens and signalises the Covenant of God with His people continued throughout history (Lentes 2012).

Even from an outside perspective it should be evident that this particular meaning of circumcision cannot be weighted as marginal. It is not only a single ritual norm, but an element of religious belonging considered as constitutional by the vast majority of the interpreters of Jewish tradition. It can be described as corporally expressed tradition of Jewish identity. Therefore, circumcision is one of the most important religious practices within Judaism.²³

5.2 Freedom of religion and citizenship

The majority of voices in the German circumcision debate have basically ignored the religious meaning of the practice, which has now been criminalised by the court's decision. The conflict goes far beyond the question of the legal status of a single religiously motivated practice. It is fundamentally about the status of religion in our society: The basic question raised with new furore in this debate (which is not the first time as former legal and public debates also showed similar tendencies) is: Is religion – in the plurality of denominations, beliefs and practices – an accepted part of social life? To say 'yes' (not empirically but normatively) does, of course, not mean that religion and religious issues should be kept beyond discussion and conflict. What seems to be necessary is a

²² In the meaningful context of religion the corporal intervention may be interpreted not as a mutilation, but as an act of bodily perfection (Lentes 2012). It might be fruitful to further follow this path and open a discussion on bodily symbols comparing the critical attitude towards religiously motivated circumcision with other practises of bodily intervention and perfection – like serial vaccination of new born babies and small children – which deeply intervene into the bodily integrity (Lentes). This issue cannot be discussed here. However, it is too simple a solution to merely refer to the healthcare advantages of serial vaccination imposed on children while neglecting the discussion on the problematic implications, and at the same time argue in the opposite way against the circumcision practise, as Holm Putzke in his comment on the Cologne judgment does (Putzke 2012: 622 – 624); although Putzke (2008: 692) shortly refers to pros and cons of serial vaccination, he explicitly rejects a parallel between the decisive role of the parents' in this case and in the circumcision case.

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culture of respect and acknowledgement of religious believers, if not of religious beliefs and convictions themselves. This is nothing but the consequence of accepting the right to religious freedom as both a positive as well as a negative right. Thus, the basic question is whether the right to religious freedom – as a basic personal right – is to be taken serious with all its consequences.

Those who vehemently claim the values of the enlightenment for themselves and their position in the debate – these are namely the most rigorous critics of religious practices (far beyond the single case discussed here) – often seem to stick to a very narrow understanding of what they claim. Some commentators criticise this attitude as ‘vulgarised rationalism’ (Kermani 2012; Bielefeldt 2012a) or – as it was the case in a previous debate on Islam in Europe – ‘enlightenment-fundamentalism’ (Chervel/Seeliger [Ed.] 2007).

The claim that religious practices had to be measurable and rationally explicable in terms of social utility (Putzke 2008: 701), seems to follow such a tendency. This shows a deep misunderstanding of what religious freedom is about. The right protects the free exercise of religious belief and practice (or, indeed the right to abstain from it) as long as it is compatible with the legal order as a whole (Bielefeldt 2012a: 80). No one is forced to reduce one’s belief to the level at which everybody will be able to rationally agree to.

A second point has to be added²⁴: The debate has clearly shown that parts of our society dismiss a social ethos which would be necessary to stabilise the basic rights guaranteed by the German constitution. What we urgently need is an ethos of mutual respect and tolerance that builds a solid ground on which unavoidable conflicts may be discussed and hopefully solved. Religious people as well as the ‘secular’ citizens are challenged by this claim. The first group needs to be ready to plausibly explain what practices they claim as part of their religious self-conception and why they apply for protection under the rights of religious freedom (Bielefeldt 2012a). They need to be aware of the possibility that as the state is responsible for the whole ensemble of constitutional rights it may formulate conditions under which religious practices will be allowed or restricted. In short, they need to correlate their religious identity with being citizens of a secular state and a pluralist society. This seems to be no problem as long as the legitimacy of religious identities is not placed into question by non-religious or anti-religious co-citizens or institutions.

The ‘secular’ citizens are challenged as well. They have to respect and at least tolerate their religious co-citizens. They may feel provoked by the legitimate expression of religious belief in the public. Critique of religion is allowed as a right under freedom of expression-laws and does not pose a threat to the religious freedom right. It does not threaten peaceful coexistence as long as it is not offensive or humiliating to the religious people whose convictions and practices are criticised (Baumgartner 2007). The debate we have analysed shows that the way critique has been articulated did not always keep to these basic standards. This is a question which cannot be solved primarily by law. Within the limits of the constitution it is an issue of culture and of education – a task for the society as a whole. And it is, of course, an issue of the political treatment of such conflicts. At least the outcome of the case discussed here shows that it is not a legitimate claim to have the state enforce religious communities to “enlighten” themselves by means of the penal law.

A third point requires attention (I can mention it here only very briefly): Different factors may help or hinder in the development of respect and attentiveness in the public and the political realm. In the recent debate, political attentiveness obviously was influenced by the historical dimension of the German-Jewish relationship. The pressure to quickly prepare a new legislation and the Government’s anxiety to not provoke a principal debate on the limits and status of legitimate religious practice was clearly nourished by this source. If the Jewish community had not been so deeply touched by the consequences of the (Muslim) case the official reactions and the political attentiveness might have

²⁴ The following paragraph is based on a broader elaborated reflection in my recent book on the right to religious freedom: Heimbach-Steins 2012: 139-178.

been significantly weaker. The case would have been discussed under the single focus of a migrant religion without the high priority it has found in the particular German situation.²⁵

6. Conclusion

To conclude I will briefly summarise the main aspects of the issue as far as religious freedom is concerned:

- Circumcision as a ‘brute fact’ is a corporal intervention which needs to be justified by serious reasons. Otherwise it has to be considered as criminal battery.
- Since in reality a practice never appears as a ‘brute fact’ without a context that gives meaning to it, the different factors by which meaning is ascribed – be it in a positive or in a negative way – have to be evaluated in their conflictive mutual relationship.
- The legal conflict is about the competition between three constitutional rights – the right to corporal integrity (of the child), the right to religious freedom (of both the parents and the child), and the right to parental care and custody.
- The Cologne judgment failed to balance the competing basic rights. The judgment does not take into consideration the meaning of the practice as fundamental within Muslim (and Jewish) religious identity and does not even look for a solution which would be able to save the religious good at stake.
- One of the main ethical aspects remaining from the legal conflict is the question of how to conceptualise the well-being of the child: What does it exactly mean and require? Is it a category to be used as a limit to be set up by the state authorities within which parents are free to seek the best for their offspring in line with their personal insight and convictions – including religious belief? This is the interpretation offered by the international human rights documents. Or, is it a category to be positively filled by the legal authorities by weighting exclusively medical best interests of the child (this is the way it has been referred to by the Cologne court). The consequence of the latter alternative is that parents would not have any freedom in how they practised their right and duty to care and custody. This would have a serious impact on the right to religious freedom.
- The public debate has been highly emotional and in parts led by people voicing anti-religious polemic arguments. It shows a diminishing degree of a basic understanding as well as a decreasing sense of respect and tolerance towards religion and religious practice in the German society. In my opinion, this is a problem as to the ethos of a pluralistic society which needs to rely on a fundament of mutual respect, recognition, and tolerance. Without these resources being cultivated the constitutional right to religious freedom loses its necessary chamber of resonance and the breeding ground of its acceptance even in the area of jurisdiction.
- The conflict has deeply affected and injured the sense of belonging and citizenship of the Muslim and the Jewish communities in Germany. As to the Jews the conflict has been contextualised within the perspective of the post-Holocaust-history. Whereas this must not influence the legal solution (it is not a question of privilege for particular groups, but of the broader right to religious freedom) on the level of political reactions it has turned out to be a matter of the reason of the state. This could be seen in the urgency in which efforts were made to create a new and clarifying legislation.
- The new legislation may at first have served to quiet down the anxieties of the affected religious communities and provide legal security. Yet there may be doubts whether it will end the debate and help avoid new – even jurisdictional – conflicts. On the one hand this is due to a lack of

²⁵ Bodenheimer describes a development which he calls “restrangement” of the Jews in Germany (Bodenheimer 2012: 12)

clarity as to the criteria of the well-being and best interests of the child. On the other hand it is a matter of cultivating religious and worldview-related plurality in our society.

- In general, the German circumcision debate turns out to be an exemplary case. It reveals the present situation in our society as to the religious and anti-religious dynamics. It seems to be full of tensions and conflict potential. The religious communities and the churches need to face this situation and to prepare themselves to explain what and for what reasons they consider certain practices constitutive for religious identity. They need to be ready to provide arguments for what they expect to be protected by their right to religious freedom.

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