

Chapter 3

Multiculturalism, Rights and Religion: The Individual's Human Right to Participate and Belong

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Abstract The discourse of multicultural and multi-religious recognition in contemporary societies seemingly advances in inverse proportion to oppositional campaigns designed to limit the rights of religious and cultural minorities. In this chapter I intend to explain this apparent paradox and suggest possible remedies for future deliberation and discussion. The case study for this analysis will be the recent legal, political and popular interventions over infant male, ritual circumcision that began in Germany. I understand this case to be part of wider political and legal debates, in Europe and beyond, over dress codes, butchering, different ritual calendars and practices; debates that seek to define—and restrict—the acceptable levels of religious and cultural difference in post-Christian, ostensibly secular, democracies.

Keywords Religious recognition • Cultural rights • Human rights • Multiculturalism • Circumcision • Secularism

All contemporary nation-states are multicultural and multi-religious in having citizens that identify with a range of cultures and religions. The very process of modern nation-state formation entails developing institutions and policies that create homogenous national cultures fostering a moral and values consensus (see Chap. 2), which in turn provides the foundation for cooperative, political and social life. The inevitable tensions between the constructed, national cultural consensus and the unprecedented diversities of contemporary multicultural realities within nation-states has led to multicultural political and social theories, legislation and policies that recognise cultural and religious rights, in particular those of minorities.

Will Kymlicka's (1995) *Multicultural Citizenship: A Liberal Theory of Minority Rights* offers one such influential and sophisticated response. Beginning with the citizen, Kymlicka acknowledges that we are “cultural creatures”, formed as autonomous

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individuals—a necessity for the “good life”—within specific cultural contexts and that these creates for us our sense of identity, of belonging to a community, and of cogent life choices and narratives (1995: 76). Cultures are significant only in their necessary support for the identity and community of liberal individuals in the liberal state (1995: 76). Kymlicka subscribes to a concept of “culture” that focuses on national and ethnic cultures, privileging the liberal forms of these, arguing that the state should intervene to oppose illiberal cultural beliefs and practices (1995: 101) (Chap. 4 explores this aspect of liberal multiculturalism in more depth). His novel rationale for the state’s responsibility to rectify the “unchosen inequalities” that arise from being part of a minority culture is that they did not elect to be part of the nation-state in question (1995: 109). Migrants, however, are for him in a different category and must accept the legitimacy of the “state enforcement of liberal principles” and should assimilate to the “national culture” as part of their immigration contract (1995: 170).

For Kymlicka, the majority religious culture simply forms part of the national culture (“societal culture”)—an argument that is examined in Chap. 2 of this volume—and minority religions are aspects of their respective ethnic cultures and he has little to say specifically about religious diversity or religions. Religious affiliations and identifications are often more deeply foundational than Kymlicka’s notion of culture and are understood in terms of sacred legacy or inheritance, and of a loyalty that is equally significant to an individual as their autonomy. This privileging of culture over religion requires further consideration and many scholars claim for religion the same functional and conceptual space as Kymlicka’s notion of culture: identity, community; life purpose and existential meaning.

Multiculturalism as a pluralistic political theory is developed by Bhikhu Parekh in his *Rethinking Multiculturalism* (2000, see also 1997). He seeks to acknowledge the contributions of theorists such as Kymlicka (1995) and Raz (1998) but argues that they too easily dismiss cultural diversity in favour of their “absolutised” liberal viewpoint. Parekh, also a liberal, recognises that there really are differences between cultures with different values, moralities, meanings and visions of the good life. While he understands each culture as specific he considers cultures to be both dynamic and to reflect human universals. Every culture thus reflects a dialectic between universal humanness and very particular historical experiences. Although he still subsumes religion in culture, his concept of culture is broader than most liberal theorists and acknowledges a profound embeddedness (Parekh 2000: 275–89, 295–335). Further, he sees every culture as characterised by “internal plurality”; and contends that interactions between cultures are opportunities for a new openness to diverse cultural discourses in the public realm. Parekh (2000) writes that “since multicultural societies represent an interplay of different cultures, they cannot be theorised or managed from within any one of them”. Committed to both liberalism and multiculturalism and understanding them to be “moderated” by “the logic of one by the other”, he moves beyond liberalism to the multicultural “community of citizens” that is simultaneously a “community of communities” (Parekh 2000: 275–89, 295–335).

It is interesting that many of the illustrations selected for analysis in Parekh's study are religious concerns, including free speech and religious defamation; the role of religion in public life; and an extended discussion of female circumcision. His multicultural analysis draws on historical, textual and religious contexts to clearly set up the need to balance citizenship with cultural/religious rights. Tensions between these two cannot be settled by the imposition of any single logic, he insists, but can be addressed pragmatically by discussion, negotiation and agreement and he considers that the very discussion itself will broaden, "moderate" and ultimately transform and extend public discourse (Parekh 2000: 340–44).

Charles Taylor has directly addressed religion and multiculturalism in his writing on the nature of the secular and acknowledges that migration necessitates a re-examination of the range of "spiritual families" that must be heard. He envisages that by becoming seen as legitimate "interlocutors" in public debates about "the exact regime of rights and privileges", these communities will be changed and deepen their political participation in democracies. That this will entail conflicts between competing goods or goals that will have to be balanced, he acknowledges, but he considers that we "we have the wrong model" of secularism, in that, "we think that secularism (or *laïcité*) has to do with the relation of the state and religion, whereas in fact it has to do with the (correct) response of the democratic state to diversity" (Taylor 2010).

Multicultural theory has indeed generated a more inclusive and enhanced level of public discourse that is less "overwhelmingly monological" and that acknowledges the need to balance individual democratic rights with religious and cultural rights. Yet whether the public sphere has been permanently broadened or is more hospitable to religious claims is debateable (Taylor 1994: 32).

The discourse of multicultural and multi-religious recognition in contemporary societies seemingly advances in inverse proportion to oppositional campaigns designed to limit the rights of religious and cultural minorities. In this chapter I intend to explain this apparent paradox and suggest possible remedies for future deliberation and discussion. The case study for this analysis will be the recent legal, political and popular interventions over infant male, ritual circumcision that began in Germany. As will become clear I understand this case to be part of wider political and legal debates, in Europe and beyond, over dress codes, butchering, different ritual calendars and practices; debates that seek to define—and restrict—the acceptable levels of religious and cultural difference in post-Christian, ostensibly secular, democracies.

These discussions of religious difference usually commence with legislative or policy changes, or court cases, and via populist media reporting inform public discourse on multiculturalism and religion (for examples, see Chaps. 6 and 9). For instance, recently, Mr Justice Baker, tacitly acknowledged a rabbinic court (Beth Din) by incorporating the religious court's ongoing involvement in a divorce settlement into his High Court judgement. This perfectly sensible and relatively minor issue was reported in *The Times* (1 Feb 2013) as a "landmark decision" under the front page banner headline, "High Court opens way to Sharia divorces", although the case did not deal with Islam or Muslims. Or, the recent report in a Dutch

newspaper that Geert Wilders, leader of the 15 seat Dutch Freedom Party (PVV), has revived his campaign for a total ban in Holland on Jewish and Muslim butchery as part of the electoral promotion of the party. In my own country, New Zealand, there was an attempt to remove the “ministerial exemption” that allowed Jews to follow religious directives on animal slaughter in 2010. Religious rights, framed within the discourse of a benign and enlightened multiculturalism and on the surface protected under existing human rights legislation—both in terms of the acknowledgment of religious rights and the prohibition of discrimination on religious grounds—turn out to be extremely vulnerable whenever concerns do arise; under the weight of widespread public opposition and calls to greatly restrict religions from legal and other so-called experts. Human rights law generally proceeds from universal rights, making subsequent exemptions for particular designated groups. This, like the ministerial exemption to pre-slaughter stunning in New Zealand for Jews, all too often proves to be fragile. And like all exemptions, this can be vulnerable to the pressure for universal policy applications, political change, and conformist populism.

3.1 The Cologne Decision and Its Aftermath

Recent tensions over ritual male circumcision that began in Germany with a court decision in May 2012 have led to, and fed into, debates across the globe about this particular practice and the human rights of the children and families involved. In our globalised juridical world the impact of this comparatively minor court decision reverberated around Europe and beyond, raising concerns about how deeply embedded multicultural protections of religious and cultural rights really are and what level of assimilation is currently being proposed for minorities in order to ensure recognition, emancipation and equality.

In November 2010 a Muslim surgeon, Dr Omar Kezze, performed a ritual circumcision on a 4-year-old boy, Ali al-Akbar, at the request of his parents. This was performed using a local anaesthetic in a Cologne hospital. Two days afterwards the boy was taken to the University hospital as the wound was bleeding. Staff informed police who reported the incident to the local prosecutor’s office. Press reports indicated that the mother had complications with her residency papers and was hospitalised in a psychiatric unit after jumping from a third floor window. The prosecution service charged Dr Kezze with a breach of the criminal law, namely, of causing assault and bodily harm (German Criminal Code 2013: §223.1, §224.1). The Cologne District Court¹ refused the case² and acquitted Kezze on the grounds that

¹ Amtsgericht, or trial court.

² Docket no. 528 Ds 30/11.

there had been no medical error and there was uncertainty at the time over the legality of circumcision.³

That would have been the end of it except the public prosecutor appealed and the case was referred to the Cologne Regional Court.⁴ The higher court unequivocally acquitted Kezze: noting that a physician using a scalpel in a hospital did not constitute the use of a dangerous weapon nor was there any wilful wrongdoing. The Regional Court, however, went on to consider the necessity to balance what it viewed as competing human rights; namely, the fundamental rights of the parents of freedom of faith and conscience (Basic Law for the Federal Republic of Germany 2012: Art 4.1) and *the natural right and duty of parents to bring up their child* (Basic Law for the Federal Republic of Germany 2012: Art 6.2) *versus the* rights of the child (Günzel 2013) to “*physical integrity*” (Basic Law for the Federal Republic of Germany 2012: Art 2.1, Art 2.2). The court concluded that in this case the latter outweighed the former; “circumcision for the purpose of religious upbringing constitutes a violation of physical integrity and self-determination” (Landerricht Judgement 2012). The judgement further decided that a “child’s body is permanently and irreparably changed by the circumcision” and that there was an absence of consent, as he did not have the “intellectual maturity to give it” (German Criminal Code 2013: §288). The child therefore could not decide his religious affiliation at a later date, as a non-circumcised person, and that his parents’ right of education had not been “unacceptably diminished by requiring them to wait until their son is able to make the decision himself whether to have a circumcision as a visible sign of his affiliation to Islam” (Landerricht Judgement 2012).

This decision removed the earlier uncertainty about circumcision, effectively criminalising it on males under the age of consent—currently 18—for religious reasons, and as inconsistent with the “best interests of the child” (German Civil Code BGB 2014: §1627). The judges contended that restricting male circumcision to informed adolescents was not a restriction of their freedom of religion, but rather the upholding of the child’s right to this very freedom. It is this last point that I will return to and challenge below. The decision, even if not technically a legal precedent, had huge implications for Germany’s more than 4 million Muslims and more than 100,000 Jews (Fateh-Moghadam 2012).

The fallout has been extensive and global. The Knesset Diaspora affairs committee had an emergency session in Jerusalem. There were press statements from German Chancellor Angela Merkel and her ministers and protests from Jewish and Muslim representative organisations in Germany, Europe and beyond. The Central Council of Muslims in Germany described the decision as “blatant and inadmissible interference” in the rights of parents, while the Zentralrat der Juden in Deutschland called the decision, “a dramatic and unprecedented intervention in the right of religious communities to self-determination”. The issue was raised at the European Parliament in Brussels where Muslim and Jewish leaders lodged an official complaint in terms of the “affront to their basic religious and human rights”. The Secular

³ Specifically, under Section 17, Mistake of Law, akin in English law, to there being no *mens rea*.

⁴ Landgericht, a higher court, with a professional judge and two lay judges.

Medical Forum, an atheist lobby group responded by advocating a universal ban on “non-consensual circumcision”, endorsed by celebrity atheist, Richard Dawkins. Twenty members of the US Congress wrote an outraged public letter to the German ambassador in Washington and there were editorials and commentary in leading media outlets worldwide. Two Swiss hospitals suspended all circumcisions, the governor of Austria’s Vorarlberg province advised the same, and Norway’s Ombudsman for Children’s Rights proposed that Jews and Muslims replace circumcision with a symbolic non-surgical ritual. The German court decision was linked to the proposed ballot referendum to ban circumcisions in San Francisco⁵ and Russell Crowe, the New Zealand Oscar winning actor, is reported to have tweeted filmmaker Eli Roth, “I love my Jewish friends, I love the apples and the honey and the funny little hats but stop cutting your babies”. An article in *The Guardian* asking whether it was time to ban circumcision prompted hundreds of responses, and on 20 August 2012 criminal charges of committing bodily harm were filed against Rabbi David Goldberg in Northern Bavaria for performing a circumcision.

The debate filled the blogosphere, legal and other columnists and commentators brought to the fore obscure legal scholarship and the very worst of anti-Semitism, Islamophobia and racist prejudices. A poll showed 60 % of Germans equated circumcision with genital mutilation, a comparison, however, that the Cologne court refused to draw. By a 56–35 margin, Germans told the *Focus* magazine poll that they supported a ban on circumcision. The country’s Child Protection Agency hailed the decision as a landmark for children’s rights. Media commentary in Germany and elsewhere in Europe for the most part supported the decision of the Cologne court. The online claims that the practices are barbaric and non-European and that “foreigners” must give them up if they want to be accepted by their co-citizens were rampant and make for sobering reading and viewing.

3.2 Religion and Consenting Adults

In this second section I return to, and focus on the issue of consent. The Cologne judges insisted that for circumcision to be lawful it must be the personal choice of a male over the age of 18 and, even if this is extended with a version of the Gillick competency test to include younger aware teenagers—this requirement for consent was pivotal to the judgement. The Court insisted that “the religious freedom of the parents and their right to educate their child would not be unacceptably compromised if they were obliged to wait until the child could himself [sic] decide to be circumcised”. This is also reflected in the recommendations of the Royal Dutch Medical Association and advocates of law change in Scandinavia and elsewhere. While there is clearly an inconsistency in that both the Lutheran and Catholic churches in Germany offer public religious rituals that include children long before they are of age to make binding legal commitments under German law, the law’s

⁵ 28 July 2011, Superior Court Judge Loretta Giorgi ruled that the proposed ban (November 2012 California ballot) violated the US constitution’s guarantee of religious freedom.

inconsistent application is beyond the scope of this chapter. My contention is that this view—that religion can be taken up as an adult by free choice and that this is the ideal of religious identification and commitment—betrays a lack of understanding of the actual nature of religion and the ways in which it functions.

Religious formation, to use the more technical and useful term, within a given community, is not something held off until the age of majority—religion does not function like that. Part of the difficulty in grasping this is simply the levels of secularisation, in the sense of the lessening of the public knowledge and influence of religious institutions, reflected in legislation and public discourse. We can have some idea of this by looking at the English, or New Zealand, courts, where increasingly there is a general recognition that religion is a migrant, marginal or minority concern that deviates from secular norms; and that on balance with other rights, particularly those of the child or minor, religious rights come off as secondary and deemed less significant than 'real' rights—such as the sacrality of all choices except religious ones and that of the sovereign, secular, self-determining individual.

An idea of how far we have travelled can be seen from the judgment of Justice Farwell at the Chancery Division in London in 1902, "one of the first and most sacred duties of parents is to imbue the mind of children with some religious belief, and this is done not merely by precept and instruction but by unconscious influence of everyday life and conduct" (Hall 1966: 290). This contrasts dramatically with recent debates about the traumatic effects of coerced infant baptism (Deseret News 1996; Daily Mail Reporter 2010; Satterfield 2012). These are not new issues and resonate with the sixteenth century debates about adult baptism and consent. Christian parents believe that baptism removes the stain of original sin but it is equally the marking of the entry into a community undertaken in the parents' view in the very best interests of the child. It allows the child to participate and belong to their community. The meaning of the ritual is as much religious/theological as it is sociological. It is an ongoing marker of community. Recently at the christening of a friend's child, the Greek Patriarch began, "let all those who are not baptised leave". The very boundaries of religious community (ecclesia) that the infant was to join were publicly articulated—should I stay or should I go? It might also be debated whether baptism is more or less traumatic than circumcision carried out with an anaesthetic.

The evidence on religious formation is very clear and it is an issue well understood by scholars of religious studies. Children brought up outside of religious communities do not, and cannot, as their liberal parents so often insist, make free religious choices as adults. Brought up without religion and community the chances of taking up religion are very significantly reduced. There is a tiny minority of adults who do take up religion as a result of their own choice but they are a very small in number and an exception. To deprive a child of being part of a religious community is most likely to deprive that person of that religion, and an increased likelihood all religion, for life: since religion is about formation within a community. The fact that this is so can be seen as a very good thing, as did the late Christopher Hitchens, or it can be seen as a tragedy, depending on your perspective. I refer to this phenomenon

as the “half-life of religion”. Each generation of non-practice and affiliation allows a fading glow that while it persists does so ever more dimly.

My research in New Zealand on this subject is revealing.⁶ Among students who received no religious background—defined as no instruction, observance, or membership—more than four out of five of them currently have “no religion” and do not consider themselves as part of any religious community. There is a statistically small minority of those who did not have a religious formation of any discernible kind who do find their way to religious communities via potential or actual friends, lovers or idealism or naivety, but they are statistically small. Of those who did grow up within a religious community more than half continue at the same perceived and reported levels of religiosity as their parents, with another 20 % declaring themselves as open to religion but not actively involved—believers without belonging—that is, religiously deinstitutionalised. For some this includes religious cultural and ethno-religious identities and solidarities. Just over 18 % of those who did have religious formations become “more religious than their parents” and these in our study included Christians, Muslims and Jews. It is interesting to note that many of these described their parents as “nominally religious”, or their families as “Christian in name”, or as not very religious Muslims, or “watery Anglicans”, or Jewish but not really observant, or as not active in the community. But what is significant is that these backgrounds, albeit later appreciated to be insufficient or inadequate, point to providing the necessary foundation for increased religious identification and practice. The scholarly literature on conversion bears this out. The growth by conversion of the newer Evangelical and Pentecostal Protestant churches in Latin America, Sub-Saharan Africa, Asia and the Pacific islands is from other denominations rather than the non-affiliated and the figures for “no religion” in Europe and North America show explicit generational decline.

And, of course, religion is not the only irreversible choice that parents make: educational, locality, religious, social and recreational activities and so on. It might well be considered that to be part of a community, to have a religious identity, is in the best interests of the child—in terms of the welfare principle—and that this should only be thwarted by the state if the child’s health or safety is threatened seriously and there is a risk of suffering if they don’t intervene.

Religious formation in this sense is akin to a language, and not being part of a community is like not having a mother tongue and just as you can indeed learn a language as an adult and even learn it well it cannot be a mother tongue but only ever a second language. This issue is also reflected in debates amongst indigenous communities where not having the right to live and grow as part of a community, learning language, customary practices and spiritual traditions is a denial of identity and community. In summary, liberalism in the sense interpreted by the Cologne judges is corrosive of religion and a choice for later turns out to be no choice at all.

⁶A study of 100 level religious studies students, conducted each year since 2000.

To give the judges and the majority in agreement with them the benefit of the doubt, understanding them to be well-meaning and benign, it is still the case that they misunderstand religion and evidence an advanced secularity that blinds them to the nature of faith and formation within a religious community. It is hard not to see this gap having further consequences in Europe and beyond (see, Pollack et al. 2012; Niemelä 2006; Davie 1994, 2000; Pickel and Müller 2009; Fuller 2002; Hervieu-Léger 2000; Voas and Crockett 2005).

3.3 Human Rights

Let us briefly examine the human rights issues, including the limits and extent of parental consent regarding children, the power of the state to intervene in parental decision-making in the treatment of minors, bodily integrity, and what might actually be in the best interests of the child. For example, the UN Convention on the Rights of the Child (UNCROC), 1989, Article 19, states that parties are to take “all appropriate legislative, administrative, social, and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse” (OHCHR 1989). I do not consider ritual male circumcision to be an act of violence, nor to cause injury, it is not abuse, and certainly not sexual abuse as usually understood in the Convention. There are those that do not agree and consider male, infant, ritual circumcision as all of these and more (Benatar and Benatar 2003). For example, Professor Neville Turner from Monash University, in an article, “Circumcised boys can sue” (Turner 1996) likens male circumcision to gender reassignment in terms of being “major, severe and irreversible”; this is rhetorically and polemically incendiary, male circumcision is actually routine and not major, takes only a few minutes, causes discomfort and clearly some pain, although anaesthetics are often utilised, and there is, of course, a growing business in reversal of the loss of part of the foreskin. I neither consider infant ritual male circumcision to be the criminal mutilation of a minor, nor do I consider this even to be the issue at all. It is also important to clearly distinguish between female genital mutilation and infant male ritual circumcision as these are increasingly conflated in the legal and advocacy literature.⁷ Even the Cologne judges referred to the effects on Ali as “minor” bodily harm.

This is a legally complex issue with parallels to infant piercings, prophylactic tonsillectomies, cosmetic orthodontics, even vaccinations. I had 4 perfectly healthy wisdom teeth removed at 13 so I would not have protruding front teeth like most of

⁷Although many commentators conflate female and infant male circumcision (for example, MacDonald 2004) there are significant differences including purpose and medical implications. See, Webber and Schonfeld (2003) who argue that female circumcision is undertaken for quite different reasons and that it is vital that these form part of the discussion.

my father's family. All the above are routinely undertaken in the judged best interests of the child.

UNCROC 1989 is understood to mark a turning point in children's rights. Article 24, Section 3 states "[...] parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children" (OHCHR 1989). This was directly formulated to combat female genital mutilation but has been utilized in relation to traditional tattoos and piercings and there is a growing tide of opinion and advocacy that seeks to formally include male ritual circumcision under this article (Langlaude 2007). Two immediate questions arise from Article 24. Is circumcision traditional? And, is it prejudicial?

It is certainly traditional, found in Genesis 17:9–11 and Leviticus 12:3 for Jews.⁸ It is deemed unnecessary for "Christians" in Galatians 5:3–4⁹ and the Roman Catholic Church declared circumcision a mortal sin in the fifteenth century, a decision later overturned. It became a fashion for Protestants in Victorian Britain and the US under the new hygiene regimes as a cure for just about anything and everything. There is an extensive Jewish and Muslim legal literature on circumcision and the rationale for particular laws and commandments but these too are not the central issue here although they make for fascinating reading, particularly in relation to the understood benefits of male ritual circumcision. Whatever reasons Jews adduce for the practice, it is important to note that circumcision has been for Jews a marker of the boundary lines of the community, a marker of identity in relation to St Paul and his new community; a sign of the covenant; and still a custom near universally practiced among both religious and secular Jews (Thiessen 2011). It is a link of continuity through countless generations of Jews; an official entry into a religious and cultural community. For Muslims too, the practice is near universal and marks membership of a community as mandated by the Sunnah of the Prophet Muhammad: "law for men and a preservation of honour for women" and has purity associations (Sahih Muslim n.d.; Kueny 2004; Alahmad and Dekkers 2012; Barkat 2009). Circumcision for Muslims and Jews is a sign of belonging, traced back to the patriarch Abraham/Ibrahim. As with all rituals there are a wide variety of practices across Muslim communities. The Jewish and Islamic traditions both see circumcision as a communal boundary marker and in the Bible the 43 references in 39 verses to the uncircumcised are mostly negative. Circumcision is a marker of a child's membership of a community and of a child's participation in a community. It became a significant element in the identity debate for the early churches (see Acts 15) in a Hellenistic world most unsympathetic to it. Some Jews even went to lengths

⁸"And God said unto Abraham: And as for you, you shall keep My covenant, you, and your seed after you throughout their generations. This is My covenant, which you shall keep, between Me and you and your seed after you: every male among you shall be circumcised. And you shall be circumcised in the flesh of your foreskin; and it shall be a sign of a covenant between Me and you" (Genesis 17:9–11); "And in the eighth day the flesh of his foreskin shall be circumcised" (Leviticus 12:3).

⁹"For I testify again to every man that is circumcised, that he is a debtor to do the whole law. Christ is become of no effect unto you, whosoever of you are justified by the law; you are fallen from grace" (Galatians 5:3–4).

to disguise it.¹⁰ The Talmud records that the consul Titus Flavius Clemens was condemned to death by the Roman Senate in 95 CE for circumcising himself and converting to Judaism, and the emperor Hadrian (117–138) forbade circumcision (see Hoffman 1996; Silverman 2006; Cohen 2005). Since 1843 there has been a debate within Judaism about it (Judd 2007).

Covenantal for Jews (see Deutsch 2012, especially Chap. 3), significant for Muslims, circumcision is also found among other communities, mostly desert communities, for example, indigenous Australians. There are anthropological explanations (Weiss 1966; Paige 1978), evolutionary accounts and psychological explanations like Freud's (Remondino [1891] 2003).

Is circumcision prejudicial? Some boys die as with all medical procedures performed on infants, maximal care must be taken to minimise risks. So, arguably traditional but not prejudicial, but I want to further argue that it can be highly prejudicial to deny a child this traditional practice. These rights are acute in relation to children or minors. Children's rights are usually discussed in terms of the '3 Ps': provision (health, education, sustenance and shelter); protection (from abuse, neglect, bullying, discrimination, safety within a justice system) and participation (freedom of expression, to take part in public life). It is this last P, participation, which I want to extend to include the right to participate in communal life as a full member. So often, the contrast is between the child's best interest and the parental right to the free expression of religion but here I want to emphasise that the right to be part of a religious or cultural group might well be in a child's interests, perhaps best interest. UNICEF does emphasise a child's right to participation in terms of evolving capacity, adoption, separation, name changes, health and education, but has nothing to say about cultural or religious participation (Denniston et al. 2001).

3.4 A New Individual Human Right: The Right to Belong to, and Participate in, a Religious or Cultural Community

In this third section I suggest an individual human rights way of looking at cultural and religious rights. In a landmark 1994 article, Avishai Margalit and Moshe Halbertal argue for a liberal "right to culture" understood as an "individual's right" not to culture per se but to "their own" culture (1994). They note that "protecting cultures out of the human right to culture may take the form of an obligation to support cultures that flout the rights of the individual in a liberal society" and that this can entail the recognition of a "group right" to maintain a culture, that is presupposed by the individual's right to their culture (Margalit and Halbertal 1994:

¹⁰"They built a Gentile-style gymnasium in Jerusalem. They also pulled forward their prepuces, thereby repudiating the holy covenant" (1 Maccabees 1:15).

491–95). They understand this to be limited only by the “harm principle”.¹¹ This is a suggestive way to explore individual and group religious rights.

Cultural rights as group rights historically have been exceptions to universal codes in relation to specific communities, that is, they were tolerated as deviations from universal human rights norms; special arrangements to accommodate minorities. These exceptions have proven and are proving to be extremely fragile. Like kosher butchering in Scandinavia and more recently in New Zealand exceptions can be ended, not renewed, or simply cancelled. The current situation in Europe where kosher butchering has been outlawed in Switzerland, Sweden, Norway and Iceland; religious calendar exemptions for public examinations have ended recently in France along with the possible ending of elective funding for religious communities and their religious education; the banning of minarets in Switzerland; and of course, the *burqa* and other religious restrictions in France; the global backlash against multiculturalism is ever more evident. We are entering a new era of forced assimilation and the rejections and de-legitimization of religious and cultural differences. Also evident is our post Protestant bias, reflecting philosophical dualism, of according less constitutional protection to religious practices rather than beliefs.

The principle of democracy is the right to participate in the political process however attenuated that might be. I am suggesting an extension of this basic right for all to participate in their cultural or religious communities. This right would include the individual right of every child to be part of a community and be formed by belonging to that community. This would be the child’s right rather than simply a parental one. This has a particular resonance in the discussions and debates over indigenous communities, indigenous languages and customs, and a right to be part of a community. Two asides follow: a brief discussion on the medical literature; and a comparison between the European and American contexts concerning circumcision; followed by concluding comments.

It is important to note that the medical evidence, much of it technical, uses standard medical frameworks to evaluate what is essentially a religious practice rather than as a medical procedure or intervention. Without religious and cultural reference these evaluations greatly distort matters, and, of course, circumcision fares poorly from a purely medical point of view. While circumcision was near universal in the US (Glick 2005) and UK (see, Darby 2005) numbers have dropped dramatically over the last two decades and continue to do so.¹² This departure from the recent past has been accompanied by steady decline in medical support for universal infant male circumcision. The long awaited report of the American Academy of

¹¹ The test case for the limits of parental choice is that of Jehovah’s Witness parents who refuse “a necessary for life” blood transfusion for their child. Here there is no ambiguity regarding harm to the child, if they do not receive the blood transfusion they will die. This is the justification for intervention. It is important to note that for some Jehovah’s Witnesses the harm as a result of the blood transfusion (denied eternal life) not because of death.

¹² In the US down from 80 % two decades ago to approximately 25 %, in UK 8 or 9 %; 10–20 % for NZ and Australia; 90 % in Nigeria and Philippines, 60 % in Korea, 100 % in Saudi, Jordan, Afghanistan and Israel and Palestine, and 30 % globally (WHO and UNAIDS 2007).

Paediatrics, Circumcision Taskforce (2012), argued that while there should be parental choice for cultural or religious reasons, circumcision should not be universally recommended (American Academy of Pediatrics 2012). It also reported that there were some “minimal medical benefits in terms of infections and cancer rates”. They concluded that the health benefits outweighed the risks although they did recommend the use of anaesthesia.¹³ The Australian College of Physicians’ report (2010) is more negative: it too withholds support for universal circumcision but, further, fails to identify any real health benefits to the practice, although it leaves open the possibility of parental choice on religious grounds. This report has generated a series of direct and indirect responses, such as Sydney University’s Brian Morris in the *Mayo Clinic Proceedings* who along with his co-authors argues that the life-long protection from infection and disease afforded by infant circumcision justifies what they describe as an “equivalent to childhood vaccination” that should be a “routine procedure” for all boys (Morris et al. 2014). Recently, circumcision has been taken up by the World Health Organisation as central to its HIV-Aids campaign in sub-Saharan Africa (See Tobian and Gray 2011).¹⁴ At least ten Zimbabwean MPs have been circumcised as part of a campaign to reduce HIV and Aids cases. In summary, the current debates within the mainstream US, UK, Australia and UN expert medical opinion acknowledges the potential medical benefits of circumcision for the control of the spread of HIV-AIDS, particularly in Africa, and tends towards parental choice for religious minorities. On the other hand European medics and jurists are often vehemently opposed to all forms of circumcision, including infant male ritual circumcision, and view it as a gross violation of the rights of children who society should protect from bodily harm and unnecessary torture.

The differences in European and American responses to the issue of circumcision from the courts, officials, commentators, and public opinion, requires an explanation. It is clear that while Western Europeans generally understand governments to be benign and supportive of citizens in the pursuit of the lives, Americans have a stronger sense of keeping government out of personal, community and family lives. Reading the literature on the debates about circumcision, the European medics, academics and professional medical associations are nearly universally opposed to the practice, a view supported by public opinion. In sharp contrast there is public

¹³“Systematic evaluation of English-language peer-reviewed literature from 1995 through 2010 indicates that preventive health benefits of elective circumcision of male newborns outweigh the risks of the procedure. Benefits include significant reductions in the risk of urinary tract infection in the first year of life and, subsequently, in the risk of heterosexual acquisition of HIV and the transmission of other sexually transmitted infections” (American Academy of Pediatrics 2012).

¹⁴This is the largest meta-study to date: “adult male circumcision decreases human immunodeficiency virus (HIV) acquisition in men by 51–60 %, and the long-term follow-up of these study participants has shown that the protective efficacy of male circumcision increases with time from surgery. These findings are consistent with a large number of observational studies in Africa and in the United States that found male circumcision reduces the risk of HIV infection in men. There appears to be substantial evidence that removal of the foreskin reduces the risk of male heterosexual HIV acquisition”. They also report that there is “no significant differences in male sexual satisfaction or dysfunction” among those circumcised.

and professional support in the US for the practice being a legitimate issue of parental choice. The dominant American view seems to be that it really is none of the government's business—consistent with the view that state and religion should be separate and that the state should be neutral concerning religion. José Casanova (2009) adds to this the considerably lower socioeconomic demographic of Muslim immigrants to Europe compared to the better situation of Muslim migrants to the US and their position as migrants in a nation of migrants. Further, he argues that there are marked differences between American and European understandings of “the role of religion and religious group identities in public life and in the organisation of civil society” and that “Western European societies are deeply secular, shaped by the hegemonic knowledge regime of secularism” (2009). Casanova contrasts “Christian/secular Europe” with “Judeo-Christian/secular America” contending that migrants, particularly Muslims, are more alien and less able to readily integrate in the European context than in the more religious American context (Casanova 2009).

There is a very different situation in the State of Israel (Medinat Yisrael). In 1998 Ben Shalem, an Israeli NGO, “opposed to the cutting of infant genitals”, petitioned the Israeli Supreme Court to issue conditional orders against several ministries with broadly similar argumentation to that of the court in Cologne. The appeal was first answered in 1998 by the Israeli Attorney's Office. Based on this answer, the Israeli Supreme Court delivered its two-sentence rejection of issuing conditional orders on May 30, 1999. The Attorney's Office reply begins by placing significant emphasis on the importance of circumcision as a religious tradition. It goes on to explain that according to Jewish sources,¹⁵ the circumcised penis symbolizes the brit (bond or covenant) between God and Abraham's descendants. It explains furthermore that circumcising 8-day-old boys is a religious commandment (*mitzvah*) that is “higher in importance than the entire commandments of the Torah put together and that the act itself represents the completion of the human body by human deeds”.¹⁶ Their main contention is that circumcision cannot be considered in terms of medical malpractice because it is not a medical procedure at all,¹⁷ this they understood “reflects the common understanding of the brit in Israeli society”, and of course circumcision is carried out by a *mohel* (a specially trained circumciser) rather than a physician.

I consider that every child has the right to participate in a religious or cultural community and that the state should only intervene when there is serious risk of

¹⁵ In the Bible and beyond, “uncircumcised” (*arelim*) has been a derogatory euphemism for gentiles (See, for examples, Joshua 5:9, I Samuel 14:6 and 31:4, and Isaiah 52:1). *Pirkei Avot* 3:15, “One who breaks the Covenant of Abraham, even if he has Torah and good deeds, has no portion in the World To Come”. In Kabbalistic traditions, it is regarded as essential to opening the body and soul to the Divine.

¹⁶ Here the Attorney's Office quotes Rabbi Aaron Levi from his *Sefer ha-Chinuch* (Book on Education), “the completion is handmade and is not complete in birth. The hint being, that physical and spiritual completion follows only by human actions”.

¹⁷ According to the laws regulating a medical procedure defined in Article 1 of Israel's Medical Directives (1976, cited in Paz 2012).

injury or harm. This is a universal, individual human right—the right of a child to be part of a community, and not just any community but the specific community in which they live. This right is the context for the debates about circumcision.

3.5 Conclusions

The secular context of modern states is most significant for our explications of multiculturalism. The secularity of public institutions, increasingly including those that are formally Faith-Based Organisations or have religious origins, leads to the incomprehension of religious claims or sensibilities, particularly as they relate to the religiously inscribed body or physical rituals. This incomprehension leads multicultural policy in the wrong directions and consistently makes false conclusions about the religious life of citizens and residents: religion is something that you will overcome *en route* to becoming a fully rational, mature, secular citizen who can make archetypal Protestant moves to spiritualise and symbolically reduce ritual and physical custom to poesis and the metaphorical.

Of course, as with other human rights, the right to belong and participate will sometimes need to be balanced against other rights but a full recognition of this human right and a more accurate and sophisticated and less banal view of religion would generate a more balanced contest.

At the time of the controversy, Chancellor Angela Merkel, a renowned opponent and very public critic of multiculturalism insisted that circumcisions could continue in Germany, and in December 2012 the Bundestag adopted a law, an amendment to the Civil Code that explicitly permits non-therapeutic circumcision to be performed under certain conditions,¹⁸ by a vote of 434–100, with 46 abstentions. Her reason was that “Germany was not to be a laughing stock” (Jones 2012). Here the Nazi past ran up against contemporary events and not to be a “laughing stock” is not a particularly good reason to allow such practices (see Judd 2007).¹⁹ This was reported as an unpopular decision according to polls conducted at that time indicating that the majority of Germans oppose circumcision (TNS-Emnid, *Focus* magazine, 56 %), and that levels of anti-Muslim and anti-Jewish feeling were at around 20 % and increasing.²⁰

¹⁸The new law, which introduces restrictions on the practice for the first time, requires that the procedure be carried out by a medically trained and certified practitioner such as a *mohel*, or ritual circumciser, or by a medical professional, and that anaesthetic be used if needed. For a child over 6 months old, the procedure must be done in a hospital.

¹⁹The Nazis claimed that “circumcision had a metamorphosing effect. Supposedly the removal of the foreskin transformed the individual, a claim they emphasized in their use of the terms deform or disfigure when describing the rite”. It is interesting and important to note that the Nazis never sought to ban circumcision. The Catholic Church in the 1930s could not accept that the Son of God, a circumcised Jew, was “deformed” or “degraded”.

²⁰For example, the “expert” opinion included: Germany’s Child Protection Society (*Kinderhilfe*) denounced the ritual as “a blank check for religiously motivated child abuse”; Wolfram Hartmann,

What is evidenced by the circumcision case is the continuing fragility of cultural rights, the levels of hostility and the bending of expert legal and medical advice to oppress minority religious communities. This is exacerbated by the failure on the part of secular authorities to grasp religion or religious formation at all. The value in considering a universal right to belong and participate in a particular community on parallel with language, culture and family would also seem to be worthy of further discussion. The ever more secular religious half-life of Europeans is increasingly mutating into a specific form of intolerance, and the professional, legal and scientific endorsement of prejudice.

There is both a considerable reduction in religious affiliation across the West and increasing numbers of “nones” that parallels the equally dramatic decline in circumcisions together with the rise of organised opposition to both religion and circumcision. The pressures generated by our current financial crisis and the attendant austerity measures increase racist, anti-multicultural sentiments. We are at a critical point where there is growing incomprehension at religion and religious rituals and increasing secularisation necessitating the rethinking of religious rights lest they be lost.

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director of the German Academy for Paediatric Medicine, warned on 17 July, in response to Merkel's statement, that circumcision causes “lifelong bodily and above spiritual injury”; 2 days later, a spokesman for Germany's Humanist Association dismissed circumcision as “a relic of times long gone” and demanded that Muslims and Jews stop it; 613 German doctors and lawyers signed an open letter to Merkel published July 21 2012, proclaiming that “religious freedom cannot be a charter for violence”, and that circumcision violates the “right of children to bodily integrity and sexual self-determination”.

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