

Naked Law, Lost Traditions. A Comment on Reut Paz and Legal Pluralism

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Alexandra Kemmerer Sa 18 Aug 2012

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Some days ago, Reut Yael Paz published a [critical comment](#) on the Cologne Court's circumcision decision on this blog. Reut rightly criticized the ignorant stance the Court took towards the challenges of legal pluralism and the conflict of diverging normative orders at the core of the concrete case – and she rightly criticized the widespread silence on these matters that shaped the debate so far.

However, her own distinction between the Public and the Private remains unclear and therefore problematic. Does religion exclusively belong to the private sphere? The Cologne courts did not explicitly problematize that differentiation, and Reut Paz leaves in the dark how precisely the public / private distinction comes into play in conflicts of normative orders. Furthermore: Is, from the perspective of a state court, the relation between the constitution and orders of religious law not necessarily an asymmetrical one? (What, as goes without saying, does not imply that non-state legal orders could simply be ignored.)

Alas, these questions have meanwhile been discussed by various commentators. What prompts my intervention, though, despite other pressing issues of the day both public and private, is a statement made by the author that I find utterly unjustified. Reut Paz opens her blog posting with a flamboyant postcolonial overture that sets the tone for a subsequent paragraph where she addresses what – to her – is obviously one of the central questions of the issue: “Does this judgement reflect remnants of

the European colonial/civilizing project in its full glory because it is linked to racial discrimination and a strong Christian (strike out the Judeo-) religious bias?”

The question is answered in the affirmative: “Although this situation is a classic example of the need to resolve conflicts between normative orders that need to coexist in the same social field (...) the court – without the necessary reflections in the court but also beyond – exclusively based its reasoning (on) the German legal system, a system which in this case also coincides with the Christian understanding of the physical body.”

At this point and regarding that question (which is obviously fairly relevant to the author), Reut Paz is to be criticized for a non-differentiated, vague and hence somewhat superficial analysis of the Cologne decision. This is deplorable, and even more so as she offers in her contribution an excellent explanation and interpretation of the Israeli Supreme Court's decision on the *Brith Milah* and its context in religious law. Yet, here she is simply wrong. The Cologne judges argued with a remarkable “religious blindness”, with the same historical and socio-cultural forgetfulness that is to be found among the leading criminal law protagonists of the debate. They did not base their decision on a (sublime) “Christian understanding of the physical body”, but expressed in their judgement the same “anti-religious *Zeitgeist*” that Patrick Bahners [has observed](#) throughout the recent “circumcision debate”, in particular on the internet.

Yet, why can the Cologne judges' take, anti-religious and laicist at first glance, not be classified as Christian

bias, as subservient assimilation to a Christian “*Leitkultur*”? Is there not something clandestine-Christian to be read in between the lines? Are we not living in a “still” deeply Christian society? Is not such a biased society the social context of the Cologne judges, in the traditionally Catholic Rhineland?

To respond adequately to such questions, cultural, historical and theological knowledge is required. A Knowledge that in our debates involving constitutional law and religion figures, at least since the Karlsruhe’s Kruzifix decision, only as a *lacuna*, a void. The representatives of the Christian churches translate edgy theological arguments into rather general civil society talk and position themselves (as Christoph Möllers has just rightly [deplored](#)) with mixed qualities as constitutional law scholars – or delegate issues that could potentially prompt socio-political conflict straight away to experts of church/state law.

That is very much to the catholic’s disappointment, shameful and regrettable. But for the lawyer and citizen of the *civitas terrena*, it is a catastrophe. To cope adequately with the challenges and problems of legal pluralism requires preconditions that the law and legal scholarship can neither provide nor guarantee. “Legal pluralism is the great challenge to the unity of public law, here lie the future challenges and tasks for legal science – problems that can only be resolved through contextualization, and that hence are linked to the fundamentals of the law“, [states](#) Dieter Grimm, pointing to the core of the dilemma. Where the competitive, at the same time complementary co-existence of a variety of legal systems and normative orders has become part of social reality, contextual knowledge is needed – and can only be translated from outside into the sphere of the law. Such contextual knowledge is translated from the adjacent disciplines into legal scholarship by legal sub-fields such as legal history, legal sociology, legal anthropology etc., but also brought into the spheres of the law by protagonists and representatives of religious and non-religious normative orders. Today’s societies are in need, Charles Taylor and Jocelyn Maclure have recently [emphasized](#), of the development of ethical and political knowledge facilitating tolerance and solidarity.

In the current circumcision debate, such contextual knowledge is only scarcely offered. While one could read about the smallest medical details of the act, theological and historical comments were rarely provided, both from Christian perspectives or else. One would have wished for some remarks by an expert of Jewish history and culture reminding of 19th century debates on the use and practice of Jewish Law in Germany. With her reference to Israeli jurisprudence and the Israeli Supreme Court’s take on arguments of religious law, Reut Paz fills another significant void that has not received sufficient attention in the preceding debate.

But why is she wrong with her presumption of a “strong Christian (...) religious bias”?

Reut Paz is wrong because also the Christian understanding of the human body and its physical integrity is shaped by traditions that must be unbearable, unreasonable demands to the laicist humanist. The human body is not understood as perfect, as complete and therefore untouchable from the moment of birth. The conditioning of the body through asceticism, the *imitatio Christi* through abstinence and physical exercise is, historically, a central aspect of Christianity – and we find strong ascetic traditions in most religions. In the history of Christianity, the variety of practices leading to a “completion” of the body ranges from moderate fasting to bloody interventions in the body’s physical integrity that seem to us children of modernity rather strange – I think of the stigmatized body of Saint Francis or of the medieval mystic [Henry Suso \(Heinrich Seuse\)](#). Suso pierced into the skin over his heart the monogram of the name of Jesus (IHS), as a symbol for the eternal bond between God and man (a “precedent of the modern tattoo”, as researchers at Heidelberg University have recently [characterized](#) that passionate and bloody practice.

The *Minnezeichen* (sign of passionate love) on Suso’s skin ist, as the Cologne theologian Alex Stock’s rich [theological, historical and cultural interpretations](#) imply, as a name sign subtly intertwined with the [Feast of The Circumcision of Christ](#), a feast still celebrated by the church in the extraordinary form or its rite als as a celebration of the name (and naming) of Jesus. One is reminded of the “circumcision of the heart” that has been emphasized by Moses, Jeremiah and Paul. Obviously, Christianity’s story with circumcision does not end with Paul (even though one could think so, after having read the exclusively [biblical account](#) provided by the protestant bavarian “Sonntagsblatt”), and later strands of tradition are not to be limited to a story of anti-semitic resentment. To the contrary: For Christians, there are sound theological reasons to support and protect a practice of religious circumcision that is not imposed upon themselves by their own religious norms.

At this point, I leave it to theologians, historians, anthropologists and experts from the cultural studies field to go into further detail. And, even better, to historically and culturally informed theologians. Currently, at least in Catholicism, deep explorations and interest in Christian religious traditions are often paralleled by anti-modernism and anti-intellectual resentment. This is much to my regret. For a lawyer interested in contexts of normative orders while dealing with the challenges of legal pluralism, that situation does not prompt much optimism. But I continue to hope for more rational voices exploring new sources of (sometimes old) knowledge, illuminating the Christian heritage that coined our society and its normative orders.

And yet: The challenges of legal pluralism can only be dealt with adequately on the basis of solid knowledge about religious and cultural traditions. If these traditions are simply discarded as outfashioned, if we forget about history and culture and place our hope only on the naked law – then a *clash of cultures* is not to be avoided. With light-handed presumptions of religious or cultural bias, we are indeed at risk to be faced with a scenario that is [already deplored](#) as a reality by some commentators: a true *Kulturkampf*.

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Our picture shows a sculpture of Heinrich Seuse in the former Dominican church ([Predigerkirche](#)) Rottweil.

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