

The Cutting Edge: Making Sense of European Legal Developments Amidst Growing Recognition of Children's Legal, Ethical, and Human Rights to Bodily Integrity

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Abstract The 2012 Cologne and 2013 Hamm court cases from Germany upheld a child's human and legal rights to bodily integrity. Previous decisions along similar lines were handed down in Dusseldorf in 2004, in Frankfurt in 2007, and in Austria in 2007. These cases—particularly the Hamm one—were decided in a context of increasing acknowledgement of children's right to bodily integrity from the United Nations, the Council of Europe, and numerous influential medical, ethical, legal, and political bodies.

The legislation passed to reverse the Cologne decision suffers from four core problems. The contention that the Cologne and Hamm decisions violate religious rights is erroneous. Germany lacks a church-state separation and accords parents a level of religious control that is not available in the United States. Also, Germany lacks the precedent-based legal system of US common law. Accordingly, while these favorable cases retain their validity, they must be used with care.

Thanks to Bernd Vey, our team of translators, Martin Novoa, Jonathan Bernaerts, Paula Brinkley, Eran Sadeh, and my co-author Holm Putzke. Welcome to the new life on the cutting edge. We are in an age of ferment and fervent discussion of children's human rights. Not every single event goes our way, but the overall trend is clear: we are winning.

These are heady times marked by a number of heartening events, including the Council of Europe resolution and recommendation, positive legal developments in Germany, Finland and Sweden each moving toward passing a law banning circumcision, Ron Goldman at the Council of Europe Discussion, John Geisheker on Al Jazeera, and even the debate last October in Charleston, South Carolina where the American Academy of Pediatrics unofficially conceded us victory, unable to respond to any of our arguments.

Twelve years after the issue was first raised by ARC at the United Nations, the UN Committee on the Rights of the Child has asked Israel to report regarding circumcision. The not so good news includes the recent Finnish legal case in which religious circumcision was found to be legal, the German statute, the Obama administration's recent suggestion--in concert with some US legislators' attempt to pass a "European Union Religious Freedom Act"--that it will defend "circumcision in Europe," Norway's new law and Denmark's new guidelines protecting circumcision and regulating it, in analogy with the 2001 Swedish law.

In this new age of ferment, several civil precedents around the world have safeguarded the child's right to bodily integrity, not always squarely addressing the issue in those terms. My co-author Holm Putzke rightly cautions that you can't necessarily draw a

straight causal line between the cases. Still they tell a story of increasing respect for children's rights.

In 2002, the Erlangen, Germany Local Court barred foster parents from consenting to any surgical procedure for religious reasons, emphasizing that any type of circumcision entails bodily harm. The Nuremberg Higher Regional Court confirmed this decision on appeal.

In July that same year, the Frankenthal, Germany District Court addressed a civil case in which a circumcision led to two skin transplants and hospitalization. The court held, "The consent of parents to a medically non-indicated surgical procedure performed by a non-physician under non-sterile medical conditions is contrary to the best interests of the child and therefore constitutes a violation of the parents' right of care and custody."

In October 2006, in the other known German criminal case, a 77-year-old Muslim circumciser of boys was held liable for aggravated battery after having circumcised boys on behalf of their parents in at least seven cases.

In September 2007, a Frankfurt am Main civil appeals court found that the circumcision of an 11-year-old boy without his approval but at the father's request was an unlawful personal injury for which the father may be liable to pay damages. The boy was found to be too young to be able to meaningfully consent. That same year, a Dutch court also disallowed a circumcision for "hygienic" reasons as not in the child's best interests.

In *Boldt v. Boldt*, the Oregon Supreme Court in January 2008 reversed the trial court's and the court of appeals' previous decisions in favor of the converted Jewish father seeking a circumcision for his then 13-year-old son. The Oregon Supreme Court remanded (returned) the case to the trial court for further proceedings including a determination of the boy's wishes in the matter.

In October 2008, the Finnish Supreme Court ruled that a circumcision performed on a boy for religious reasons does not constitute an offence. The religious reasons were held to justify the circumcision even if the boy can't express his own opinion. The decision is partly explained by some apparently bad lawyering citing a European convention that was held to only apply to organ transplants, the Convention on Human Rights and Biomedicine.

German developments including the subsequent law protecting the procedure have replicated many phenomena well known to those of us opposing neonatal circumcision in the US and elsewhere. Familiar issues include distinguishing male genital cutting as "nothing like" female genital cutting, the desperate rush to protect so-called religious circumcision that led to the statute, and the dialectic between an appropriately foregrounded child patient and other mistakenly foregrounded entities such as parents and society. As we will see, these issues manifest themselves as four central, fatal problems with the statute.

Many of the legal cases protecting intact rights emanate from Germany so it's relevant for us to overview the German legal system. The modern German constitution (known

as the Grundgesetz (**GG**) or Basic Law) was adopted in 1949, and introducing a new constitutional order in Germany. Seeking distance from the horrors of Naziism, the Basic Law drew deeply upon German tradition to found the legal order on moral and rational idealism, particularly that of Immanuel Kant. Thus, the Basic Law is a value-oriented constitution that obligates the state to realize a set of objectively ordered principles, rooted in justice and equality, which are designed to restore the centrality of humanity to the social order, and thereby secure a stable democratic society on this basis. Clause 3 of Article 79 of the Grundgesetz (called the “Eternity Clause”) prohibits amendments that violate Article 1, which protects human dignity.

The Basic Law bears striking similarities with the United States Constitution. Both charters contain a catalog of basic, fundamental rights. In contrast to the centering of the American constitutional vision around human liberty, the German constitution emphasizes human dignity, consciously referencing Kant's maxim to treat people "always as an end and never as merely a means." A central focus of German rights is preservation of the integrity and security of a person.

Amendment of the German Constitution is by design difficult, requiring a two-thirds “supermajority” vote of both houses of Parliament. Barring such a constitutional amendment, no right to practice religion can justify the smallest infringement of another person’s rights, including a child’s rights.

The June 2012 Cologne appellate court case declared that male circumcision for religious reasons causes bodily harm and constitutes criminal assault. The decision marked the first generally applicable legal declaration that male circumcision, if not medically necessary, and even if performed properly and with the permission of both parents, is punishable as criminal battery.

The court held that doctors doing so are liable for a criminal offense under the Non-Medical Practitioners Act where the physical well-being and physical integrity of a person is seriously impaired. The court noted that circumcisions performed for religious reasons are not medically necessary, and that circumcision is harmful, permanently and irreparably changing a child's body. It is also marking him with a religion that he may not choose for himself, impeding his freedom of religion. *Re S (Children)* (2004) in the UK agreed with this. Although not addressing the legality of circumcision on the merits, the UK court noted, “Circumcision once done cannot be undone.” As the child has not yet chosen a religion, “It is not in his best interest to be circumcised at present.”

Franz provides a nuanced view of religion’s role in culture: Religious traditions are an archive of a collective story of adaptation spanning thousands of years. In past times they were adaptive social rules in the shape of normative myths and rituals. Their adaptation to new social realities and developing world views only happens slowly.

Properly foregrounding the child patient, and emphasizing the procedure’s irreversibility, the Cologne court stressed that the boy had a right to make his own decision about his body and about his religious affiliation. The court held that children’s rights to bodily integrity, self-determination, and freedom from harm supersede any interests their

parents may have as caretakers and based on their religious beliefs. The court reasoned that it would not be an unacceptable compromise for the parents to wait until the child himself could decide whether he wanted to be circumcised to mark himself as an adherent of Islam.

The Cologne court disposed of the religious and parents' "rights" issues without much difficulty, fundamentally saying that your right to freedom of religion terminates at the boundary of another person's body, even if that other person is your child. As Herzberg explains it, you can practice your religion as you choose but if a homeowner denies you entry, you can hardly legally force entry to share your beliefs—however deeply held--without committing a trespass.

UK case law also supports this decision. *Re A (Conjoined Twins)*) [2000]:

"Every human being's right to life carries with it, as an intrinsic part of it, rights of bodily integrity and autonomy - the right to have one's own body whole and intact and (upon reaching an age of understanding) to take decisions about one's body."

In what only be described as a response to a perceived crisis, the German legislature passed a statute purporting to overturn the decision.

"Section 1631d: Circumcision of the male child.

(1) The care for the person [Basically the guardianship-G.] also encompasses the right to consent to a medically unnecessary circumcision of the male child incapable of insight and decision, if it is to be performed according to the rules of medical art. This doesn't apply if the circumcision endangers the child's welfare even in view of its purpose.

(2) In the first six months after the birth of the child, persons delegated for that purpose by a religious body too may perform circumcisions according to paragraph 1, if they are especially trained for that purpose and, without being physicians, are comparatively qualified for performing circumcisions."

As Ralf Eschelbach of the Federal High Court notes in his remarkable statutory commentary, the bill unconstitutionally contravenes the Basic Law by violating Article 2's protection of physical integrity and also Article 1's protection of human dignity. Jerouschek also stressed human dignity. The German Parliament can only amend its own laws, not the Basic Law -- and the Cologne court was careful to emphasize it was basing its ruling on the Basic Law. Herzberg provocatively argues that the law "stands in direct contradiction to the child's fundamental right. It is therefore incompatible with the Basic Law and void. This in turn means: An assault based on § 1631d BGB would be based on an invalid license and therefore be unlawful."

Besides this, the bill has four core problems—violates equal protection, placed in custody not criminal law, legally and logically contradictory attempt to incorporate a legal evaluation of the reason for the procedure, contradictions appear in the discussion

of anesthetic and authorizing medical (and non-medical) practice of non-therapeutic medicine.

The first serious problem with the new statute, as Eschelbach notes, is the requirement of equal protection of genders enshrined in Article 14 of the European Convention on Human Rights, Article 3 of the Basic Law, Article 2 of the International Covenant on Civil and Political Rights, and Article 1 of the Convention on the Rights of the Child, as well as case law from the Federal Constitutional Court.

Walter distills the problem: “the state deprives the most vulnerable people in a highly sensitive area of the right to physical integrity solely on the basis of their sex. This is new.” The violation is even more intractable than it was when we met last year in Keele with the September 24, 2013 passage of the German law, § 226a of the Criminal Code, explicitly outlawing all forms of female genital cutting including ritual nicks that don’t remove tissue (similar to those briefly allowed by the AAP in 2010). These two laws are strictly inconsistent. As we will see, a second fatal contradiction exists with Germany’s 2000 law against corporal punishment.

Article 24(3) of the UN Convention on the Rights of the Child (UNCRC) commits states parties to “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children”. According to the explanations on health impairment in article 223 of the German Penal Code, and as pointed out in 2011 by Zöller, by Schlehofer in 2011, and by Paeffgen, male circumcision is a traditional practice that is harmful to the health of children. The Article applies to children of both sexes and thus protects boys as well as girls from genital cutting.

A second central problem with the legislation pointed to by Eschelbach, Herzberg, and Isensee is that it is not a criminal law—as was of course done with the law making female genital cutting explicitly illegal—but rather purports to allow circumcision via an extension of the scope of parental custody.

An attempt is made to draft a new statute that in fact is an exemption to penal law not as a straightforward penal exception as in several US states but by instead transposing it into civil law. As with laws in US states that circumcision is NOT criminal assault or child abuse, it begs inconvenient questions of why an exception to penal law is needed and why it is being made. The impulse is understandable—no one wants to criminalize parents or ritual circumcisers; a feeling lurks that their behavior belongs to the friendlier realms of civil law. The problem is that under civil law, the parents have the right of consent only to protect the child. Allowing consent to a medically non-indicated operation under custody law is legally, ethically, and logically incoherent. Mandla makes an interesting point: the Bundestag’s selection of consent law logically implies that circumcision violates physical integrity.

“There is no doubt,” says Fischer’s statutory commentary, “that individual and collective freedom of religion have to take place *within* the state’s legal system. [...] From Article 4 of the Constitution no claim can be deduced to practice religious beliefs by medically

pointless, and in individual cases risky, mutilations of other people.” As Beulke and Diessner affirm, there is also a right to negative freedom of religion that is violated by religious circumcision or arguably by any circumcision. There are no 7-day-old Jews.

Robbers: Constitution Article 6 paragraph 2 and UNCRC Article 14(2) allow parents the right to act *in the interest of the child*; in the exercise of parental rights “the child’s welfare must ultimately be the decisive factor and take precedence over the interests of parents.” The State is obliged to protect the interests of children even against their own parents. Since 2000’s law against corporal punishment (the right of children to a violence-free education per § 1631 paragraph 2 sentence 1 BGB), notes Herzberg, a “relativization of physical integrity of children” “for parental rights’ (actually parents’ duties’ per Van Howe and Dwyer) and religious freedom ‘s sake” is not convincing. This is circumcision being justified not as an act of care for the child, but as an act of care for tradition and religion.

Two landmark cases have long held that U.S. law protects religious *belief*, but will not condone potentially harmful religious *practice*. In 1878, in [Reynolds v. U.S.](#), the Supreme Court held that “laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.” To exempt (assertedly) religious acts from civil law “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.”

Likewise, in 1944 in [Prince v Massachusetts](#), the Court ruled: “The right to practice religion freely does not include liberty to expose the ... child to ill health or death. ... Parents may be free to become martyrs themselves. But they may not make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”

Your rights stop at the boundary of your child’s body. No right of freedom can authorize a holder of such rights to infringe the freedoms and rights of another. Grams writes, freedom of religion “does not justify the religiously motivated surgical removal of body parts of others, including one’s child.” To rule otherwise is to set what Herzberg aptly terms “the normative power of the factual” against law, truth, and justice.

The third central problem is the law’s incoherent attempt to build into the definition of best interests an evaluation of the purpose of the procedure. According to the new law, circumcision is forbidden if it endangers the best interests of the child, even taking its well-intended purpose into account. The purposes that are OK are not set forth! While it is true the boy has the theoretical opportunity to follow a different religion, the pro-circumcision authors Fateh-Moghadam and Germann concede that this is an untenable argument when chief rabbi Metzger, for example, has made it clear that this is one of the main *intentions* of the practice.

The motivation for the action of the parents, which remains largely unverifiable, is

irrelevant for the legal assessment of the child's well-being, since the wellbeing of the child is to be judged exclusively from the viewpoint of the child. Herzberg: "There is no reason to let motivation play a role in the legal assessment of the act – be it beating, female genital mutilation, or circumcision – there is no reason to consider that maybe some of these motives give parents a right to beat, mutilate, circumcise, which they would not have in other instances."

Scheinfeld and Merkel astutely point out yet another striking logical problem (number four) in the new statute—the apparent permission of anesthetic administration by a mohel. Fischer: Pain control is required or else the procedure is illegal. During the first six months of life, circumcisions are allowed by a non-physician circumciser who does not need an official permit, if the religious community selects him in a certain process, and if he has completed a special training. Merkel points out that no physician is required for pain treatment because paragraph 2 permits the execution of the whole procedure "according to paragraph 1" and also by non-physicians and thus entrusts the whole to non-physicians.

Merkel and Putzke ask if it is possible for non-doctors to provide anesthesia. Their conclusion: "No, it is not. A non-physician cannot and must not acquire such skills or the respective pharmaceutical substances, let alone apply them to a patient. The German Pharmaceutical Act of 1976 strictly forbids him from doing so." EMLA cream—the precise ointment referenced in the statutory explanatory statement as potentially saving this problem--has been found to be insufficient for circumcisions.

There is a deeper problem applicable also to physician-performed circumcisions. Eschelbach: The combination of a medically non-indicated operation with the requirement that it be implemented according to the rules of the medical profession contains a contradiction." Why? "By medico-ethical standards, a non-indicated operation is fundamentally out of keeping with the rules of the medical profession and the mandate to do no harm. This applies even to physicians. Mandla agrees: Under the statute, "The physician is allowed to act in a way that a good physician should actually not act," as long as he performs his medically improper act according to medial propriety. These four contradictions are inevitable results of attempting to legislatively authorize a cultural and religious procedure masquerading as a medical procedure that is in fact, as the Cologne court correctly held, a criminal offense.

It is often suggested that the current worldwide debate on circumcision is an expression of growing anti-Semitism, anti-Islamic sentiment, or xenophobia. The truth, pointed out by Gert van Dijk, is that since the atrocities of World War II, there has been an increasing emphasis on human rights, combined with a growing awareness that children have the same fundamental human rights as adults. Jews and Muslims have to conform their behavior with the law. There is no question of Germany permitting other practices that have thousands of years of tradition in the history of religion, such as rituals of human sacrifice or the flagellation of a child on Good Friday. The child must be foregrounded—not parents, not society--with respect to a decision affecting that child's body.

The legislation may be open to challenge in the Federal Constitutional Court (most likely through a specific case in which the result hangs on the law's constitutionality, or else through an abstract review requested by ¼ of the Bundestag or of the federal government—unlikely). Statutory reversal is the other theoretically possible but unlikely avenue. To take the most likely scenario, the legislation is potentially vulnerable in a specific case in Federal Constitutional Court for violating the same articles that the Cologne court cited in declaring non-therapeutic male circumcision unlawful. If the law were nevertheless to be declared constitutional by the Constitutional Court, an appeal would be likely to be made to the European Court of Human Rights claiming that it violates the European Convention on Human Rights.

Of course, Cologne did not mark the end of German legal decisions regarding circumcision. The October 2013 decision in Hamm, Germany was literally handed down while I was on a plane home from the Keele conference. The Hamm court forbade a mother from having her six-year old son circumcised because of a risk of psychological damage. (Other relevant factors were the mother's intention not to be present for the procedure, and the fact the boy had been christened.) Hygienic benefits vaguely claimed by the mother were rejected by the court. The court found the statute inapplicable because in this case the circumcision would lead to endangerment of the child's well-being, thus the decisionmaking had to be transferred to a neutral party, the court.

The Hamm court fails to point to pain, loss of body part, risk of complications, as this would challenge the statute. (Similar to Cologne) But everything it says is potentially applicable to any circumcision in Germany, as Herzberg points out! This phenomenon may recur of what may be loosely described as judicial reversal of the statute in specific cases.

The current German law is an act of desperation flying in the face of the court's courageous holding. The legal principles enumerated in the Cologne appellate decision are sound.

Putzke finds the law "a constitutionally adverse alien element in our legal system." Herzberg uses similar terms: A law that allows the harming of children is a foreign body in the organism of our legal system and may not stand and must be rejected by the Federal Constitutional Court. "Isn't it high time in the 21st century that the – I say it outright – scandalous violation of children's basic rights finally ends?" Franz: "It is remarkable that the meticulousness and creativity invested in the discovery of alleged medical benefits of an early circumcision by far surpass the efforts to empathize with the fears and risks of the child."

To quote Franz, circumcision is "in the end... a traditional, religiously motivated demand, which serves to satisfy the needs of adults at the expense of the child."

Against these recent successes, the ferment has also produced some recent setbacks. On December 19, 2013, a Finnish Court of Appeal held that, contrary to a 2011 Helsinki Court decision, circumcision of Islamic boys does not constitute an assault under Finnish law. The court also acquitted the boys' parents of incitement to assault. This of course is contrary to the reasoning and holdings of both the Cologne and Hamm courts. However, one dissenting Finnish judge out of three did find the father (though not the circumciser) guilty of assault.

In June 2014, the Israeli High Court of Justice issued a decision reversing an order for a son to be circumcised against her mother's wishes. The holding was not based on the right to bodily integrity but rather on the fact that such an order is not a proper part of a divorce proceeding as it is irrelevant to the pertinent issues in a divorce. Unfortunately, as Eran Sadeh will discuss in more detail, due in part to imperfect lawyering, the court more or less went out of its way to make an explicit statement that a court can force a circumcision over the objection of one parent (and, it goes without saying, the child).

Our few opponents have problems: There aren't many of them. They are following a dying meme. The Internet exists. Blind respect for authority is waning as people think for themselves. Time to seize the opportunity. Lay political groundwork, change public views, then change law. Circumcision is outlier. Outliers don't last indefinitely. Marital rape is another such outlier that James Chegwidden pointed to in Keele last year. It was OK for decades and then "all of a sudden," actually after considerable activism laid the foundation, it wasn't OK any more. This will happen with intact rights as well. Momentary setbacks represent the death throes of an old mentality whose days are numbered. We have to be sure to have our groundwork laid so we can make good law. Save as many babies as possible in next ten to twenty years.

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In October 2013, Steven successfully debated two members of the American Academy of Pediatrics (AAP) Task Force at the Medical University of South Carolina; a paper from that conference is forthcoming in the *Journal of Law, Medicine, and Ethics*. Steven has published three articles in the *Journal of Medical Ethics* and has also published in the *Journal of the Royal Society of Medicine*, *Medical Anthropology Quarterly*, and all eight Springer books containing circumcision symposium proceedings. Berkeley, California, USA.