

Limits of Enlightenment and the Law - On the Legality of Ritual Male Circumcision in Europe today

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Circumcision, Human Rights Law, Criminal Law, Legal History, Germany

Abstract

The legality of ritual circumcision of male infants is a subject not regularly discussed under European or international Human Rights Law, let alone national law. In Germany, this changed dramatically in 2012, when a regional court declared ritual circumcision of a male infant illegal, even if performed at the parents' request and according to current medical standards. After a fierce public discussion, the German parliament voted towards the end of the year in favour of a bill that explicitly permits male infant circumcision. The discussion on whether this new law is in line with European human rights law and international law is expected to continue.

This paper takes no position on whether infant male circumcision should be legal and takes no position on the medical questions attached to the subject. It argues for the legality of infant male circumcision in Western democracies like Germany for historic reasons: Jewish emancipation in the 18th and 19th century throughout Europe meant an incorporation of Jewish laws and customs into the legal fabric of European countries. Taking into account the relatively wide acceptance of the practice of infant male circumcision in communities worldwide, the paper suggests that arguments from international human rights law make simple equations difficult to sustain. Gender and children's rights-based approaches may be utilized to develop a deeper sensibility for the issues related to circumcision, but must not obscure the fact that minority rights sometimes rightfully allow a minority to do things the majority does not understand.

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I. Introduction

The circumcision of male infants is a ritual that is associated with a diversity of cultures, from Australian Aboriginal traditions to Judaism and Islam, and it has been known for centuries.¹ In Judaism in particular, the practice has changed with the times and at the same time retained its significance.² In the United States of America and South Korea, it remains a standard medical procedure. In recent years, however, the medical value of this routine has come increasingly under scrutiny. In Europe, the practice, though still described in 1949 as “one of the operations most commonly performed” in Great Britain³, has mostly disappeared since the end of World War II. Since then, circumcision rates have dropped in Britain and in the rest of Europe, where it is now a practice confined to minority groups and often performed on new-borns in the privacy of the family.

The decision to have their son circumcised is usually made by consenting parents and consequently this decision and the resulting circumcision is rarely examined in a court of law. In Germany, this changed in 2012, when a regional court in the city of Cologne ruled that non-therapeutic male circumcision of a little boy constituted causing bodily harm and was punishable under German criminal law.⁴ In the following article, I will describe this judgement and its context, both from a German criminal law perspective, and the wider European and international human rights law perspective. The judgement led to a lively discussion in Germany and abroad during the summer of 2012, but international norms were rarely considered. For this reason, I will begin this article by giving an overview of the international debate on the legality of (ritual) male circumcision under international human rights treaties. I will then address the question of different rules that exist for male and female circumcision. Against this background, I then turn to describe the judgement itself and the law it led to, a law recently passed by the German parliament explicitly allowing ritual male circumcision. I review this development in the larger historical and legal context of Germany as a European state. In the final section, I place the findings of the preceding sections into the wider context of contemporary Europe and European Human Rights Law.

II. Human Rights and Circumcision – the International Background

In 1987, the Special Rapporteur of the United Nations Human Rights Commission heard complaints from Muslims in Bulgaria that their freedom of religion was restricted and their tradition of ritual male circumcision was being criminalised.⁵ In response, the Special Rapporteur travelled to Bulgaria and subsequently released a report criticising the negative attitude towards male circumcision in Bulgaria.⁶ The underlying implication of the report was that such practices are covered by Art. 6 (h) of the 25 November 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (henceforth: “the Declaration”). The Declaration seems to have only played a very small role in discussions on the legal standing of ritual male circumcision since. In the absence of specific provisions, any opinions on the legality of the practice have to be derived from the wider framework of the (potentially) applicable law, e.g. the United Nations Convention on the Rights of the Child, or guarantees of religious freedom under the International Covenant on Civil and Political Rights (Article 18) and Article 18 of the Universal Declaration of Human Rights insofar as it may be a statement of customary international law. On the European level, the European Convention on Human Rights (henceforth, “the Convention”) could present itself as a likely tool to determine the legal standing of this practice, or the more recent Charter of Fundamental Rights of the European Union. While these two legal instruments operate at very different levels in the European landscape, they might be considered to represent the substantive values and ideals of Europe.⁷

If it is accepted, as the fact of the debate alone seems to imply, that ritual male circumcision of infant boys presents a “problem” from a legal point of view, then it is because different values and rights have to be considered. On the one hand, there is the traditional approach of a guarantee of religious freedom and this specific practice can be considered one of the most traditional religious practices. On the other, there is the more recent (legal) trend of “emancipation” of children and

1 For a history of circumcision from a North American perspective, see: LB Glick, *Marked in Your Flesh* (Oxford University Press 2005). See also: D Gollaher, *Circumcision: A History of the World's Most Controversial Surgery* (Basic Books 2001).

2 See M Konner, *The Jewish Body* (Schocken 2009), for an exploration of the relation between Jewish physiology and Jewish thought. See also R Judd, *Contested Rituals: Circumcision, Kosher Butchering, and Jewish Political Life in Germany between 1843-1992* (Cornell University Press 2007).

3 D Gairdner, “The Fate of the Foreskin” (1949) 2 *British Medical Journal* 1433-1437 at 1433.

4 LandgerichtCologne, Judgment of 7 May 2012 (151 Ns 169/11), available in German at http://www.justiz.nrw.de/nrwe/lgs/koeln/lg_koeln/j2012/151_Ns_169_11_Urteil_20120507.html. A translation of the decision is available at <http://www.dur.ac.uk/resources/ilm/CircumcisionJudgmentLGCologne7May20121.pdf>, accessed 14 March, 2013. The quotes from the judgment used herein are from this translation.

5 UN Doc. E/CN.4/1988/45, 4.

6 P Taylor, *Freedom of Religion* (Cambridge University Press 2005) 282.

7 For a similar argument regarding the institutional treaty of the European Union and the Charter of Fundamental Rights, see: L Zucca, *A Secular Europe* (Oxford University Press 2012), 71.

their rights – the widespread acceptance that children hold rights of their own and that their parents have to respect these rights. The first question, then, would be whether parental rights, in particular the right of religious childrearing, might authorise a parental decision to have a son circumcised even in light of the child's individual rights. For example, the situation in Great Britain is commonly explained by reference to Art. 9 of the European Convention on Human Rights, which is held to include the parental right to have a male infant circumcised as part of the parental right of religious childrearing.⁸ In Finland, the Supreme Court ruled in 2008 that male circumcision on social and religious grounds, when 'appropriately performed', is not illegal and covered by the right to personal autonomy (as part of the right to privacy) under Article 8 of the Convention, the right to family life (also under Article 8 of the Convention), and the freedom of religion and conscience (Article 9 of the Convention).⁹

Just how far these rights reach, however, is far from clear. What happens if the parents are not in agreement on whether their son should be circumcised? This issue came before an English court, when a non-practising Muslim father sought a specific issue order that his son, aged five years, should be circumcised, while the mother, a non-practising Christian, disagreed. The court concluded that "where two parents, jointly exercising parental responsibility for a male child cause him to be ritually circumcised in accordance with the tenets of their religion, that exercise of parental responsibility is lawful". But because the parents were not in agreement the court did not grant the order sought by the father.¹⁰ Legally speaking, the court saw the father's right under Article 9 (1) of the Convention to manifest his religion limited by Art. 9 (2) of the Convention, including the rights and freedoms of others, in particular the boy's mother and the child himself.¹¹ While the Convention guarantees an unlimited right of internal religious freedom, the right to observe traditions and rites according to a personally held religious belief may be limited. The European Court of Human Rights has already held that observance of strict religious rules and essentials aspects of Jewish religious practice fall under Art. 9 of the Convention, deciding that local laws on such practices do not constitute a violation of Art. 9 of the Convention when they do not make it impossible to observe the respective rules.¹² Laws declaring ritual male circumcision illegal might therefore be considered incompatible with the Convention.

But some argue that non-therapeutic circumcision of male infants and young boys violates the child's right to bodily integrity under Article 8 of the Convention, whilst not necessarily promoting his health or morals under article 8 (2) of the Convention.¹³ Consequently, it can be argued that it also violates the child's rights under Article 3 of the Convention and could therefore not possibly be covered by Article 9 (1) of the Convention, or rather, is necessarily restricted by the limitations of Article 9 (2) of the Convention.¹⁴ Others argue that the United Nations Convention on the Rights of the Child (henceforth, UNCRC) prohibits neonatal male circumcision, in particular through Art. 24 (3) UNCRC, which urges "abolishing traditional practices prejudicial to the health of children" and Art. 19 UNCRC, providing that states shall take all appropriate 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, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child".¹⁵

Such readings of European and international human rights instruments depend, in part, on a negative medical evaluation of the procedure, which is contested among medical professionals.¹⁶ They leave aside the possibility that medical concerns, based on a different evaluation of the procedure, may not be the deciding factors for parents and that such factors – as guaranteed by the Declaration or Art. 9 (1) of the Convention – may enjoy legal privileges. Instead, such readings implicitly follow those "rumours about Jews" and Muslims that suggest that Jewish and Muslim parents wilfully subject their children to dangerous practices, making decisions against their child's best interests. They also presume that a practice like ritual circumcision of male infants, when performed at the request of the boy's parents and in accordance with medical standards, can *implicitly*

8 R Ahdar/ I Leigh, *Religious Freedom in the Liberal State* (Oxford University Press 2005) 290.

9 H Askola, "Cut-Off Point? Regulating Male Circumcision in Finland" (2011) 25 *International Journal of Law, Policy and the Family* 100-119.

10 Re "J" (child's religious upbringing and circumcision) [1999] 2 FLR 678. The case is described in more detail in J Bridgeman, *Parental Responsibility, Young Children and Healthcare Law* (Cambridge University Press 2007) 118-120. See also the discussion of the case in: D Herman, *An Unfortunate Coincidence* (Oxford University Press 2011) 78-85. The court decision is available at http://www.cirp.org/library/legal/Re_J/, accessed 14 March 2013.

11 Bridgeman (n 10) 120.

12 ECHR, *Cha'are Shalom Ve Tsedek v. France* (App. 27417/95) Judgment of 27 June 2000.

13 J Fortin, *Children's Rights and the Developing Law* (3rd edition, Cambridge University Press 2009) 395.

14 Fortin (n 13) 395 with Fn 275.

15 G J Boyle, J S Svoboda, C P Price, J N Turner, "Circumcision of Healthy Boys: Criminal Assault?" (2000) 7 *Journal of Law and Medicine* 301-310. H Putzke "Die strafrechtliche Relevanz der Beschneidung von Knaben", in: H Putzke, B Hardtung, T Hörnle et al (Eds.), *Strafrecht zwischen System und Telos – Festschrift für Rolf Dietrich Herzberg zum siebzigsten Geburtstag* (Mohr Siebeck 2008) 669-709, 704, makes a similar argument, but considers only Art. 24 (3) UNCRC to support it.

16 In the United States, the American Academy of Paediatrics has, over the decades, issued a series of policy statements regarding circumcision, sometimes positive and sometimes negative, see for details: Gollaher (n 1).

become illegal.

In the absence of any clear legislation on male circumcision, this can be seen most clearly in the way the United Nations Convention on the Rights of the Child is used as the basis for a negative legal judgement on circumcision. This argument is widespread in the popular discussion over the legality of ritual male circumcision, but it is also used in the academic field, e.g. with such bold statements that ritual male circumcision is a traditional practice prejudicial to the health of a child in the sense of Art. 24 (3) UNCRC.¹⁷ According to Art. 31 (1) of the 1969 Vienna Convention on the Law of Treaties, however, a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,” taking into account the agreements between and subsequent practices of the parties (Art. 31 [2] and [3] of the Vienna Convention on the Law of Treaties). In other words, an international treaty cannot be interpreted in a way that contradicts the objectives of a treaty as understood by the parties to that particular treaty. The UNCRC is famously the most widely supported international treaty, ratified by every member state of the United Nations, with the exception of Somalia, South Sudan and the United States of America. This means that the treaty has been ratified by numerous states with a long tradition of male circumcision, namely South Korea and all Muslim states, as well as Israel. Concluding that non-therapeutic male circumcision is prohibited under the UNCRC therefore equals the declaration that these states habitually and intentionally violate their obligations under this treaty. Whether or not this is a convincing point of view effectively depends on the medical evaluation of the practice, a question that is not a legal question and as such beyond the scope of this article. In fact, it may make more sense to accept that an instrument such as the UNCRC must provide for the “best interests of the child” (Art. 3 UNCRC) with a broad approach to the meaning of these interests: As Michael Freeman has correctly pointed out, “When a Christian parent confronts a Muslim or Jewish one over whether their son should be circumcised, both parents may have the boy’s best interests at heart, though differ on their interpretation of what this requires.”¹⁸ Given the widespread acceptance of male circumcision in some states, there is no compelling *legal* reason under international law to extend the meaning of a provision like Art. 24 (3) UNCRC to male circumcision, though it does clearly cover female circumcision.¹⁹

III. Gender and Circumcision

Discussions of the legal position of male circumcision inevitably point to the allegedly comparable phenomenon of female genital mutilation, or female circumcision. In fact, the different choice of words, circumcision on the one hand, mutilation on the other, has been criticised as misleading. Some argue that the polarisation of analysis between female and male circumcision has served to mask proper analysis in medical, ethical and legal debate of the risks and harm involved in ritual (non-medical) male circumcision.²⁰ Marie Fox and Michael Thomson ask why circumcision, “the excision of healthy tissue from a child unable to express his consent for no demonstrable medical benefit” should be a private matter of parental choice, especially in light of the unquestionable ban on female circumcision.²¹ Others argue that it is impossible to persuade mothers not to mutilate their daughters through female genital mutilation when male circumcision is so widely tolerated.²² Heli Askola even argues that “it may not be amiss” even to suggest that the Finnish Supreme Court seems to have assumed that male children are more able to cope with physical harm and pain, maybe even *supposed* to endure them, than females.²³ Another argument claims that different rules for male and female circumcision violate the prohibition of discrimination based on sex (e.g. Art. 14 of the Convention, Art. 23 of the Charter of the Fundamental Rights of the European Union).²⁴

The glaring differences between the two procedures and their long-term effects on physical and sexual health weaken the credibility of such claims and comparisons.²⁵ No one denies that male circumcision *can* be medically beneficial and therefore legal,²⁶ a claim I have not seen made for female circumcision. Most importantly, male circumcision, even when practiced

17 Putzke (n 15).

18 M Freeman, “Article 3. The Best Interests of the Child”, in: A Alen, J Vande Lanotte, E Verhellen, F Ang, E Berghmans and M Verheyde (Eds.), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 2007) 2.

19 see Putzke (n 15) 704 with Fn 189.

20 see Bridgeman (n 10) 117.

21 M Fox, M Thomson, “Short Changed? The Law and Ethics of Male Circumcision” (2005) 13 *International Journal of Children’s Rights* 161-81, quote at 170.

22 Fortin (n 13) 393.

23 Askola (n 9) 113.

24 T Walter, “Die (Zwischen-)Lösung muss ins Strafrecht – Zum Entwurf eines Beschneidungsgesetzes” (2012) 65 *Neue Juristische Wochenschrift, NJW-Aktuell* 45/2012, 12, makes this argument with reference to the prohibition of discrimination based on sex in the German constitution, Art. 3 of the “Basic Law”. It obviously applies equally on the level of human rights.

25 Fortin (n 13) concedes this point.

26 Putzke (n 15) 688 concedes this point.

for religious reasons, has been debated and practiced in Europe (though not necessarily in European *law*) for centuries – and it used to be widely practiced in societies, in particular in the United Kingdom, in which (only) the mainstream has now abandoned the tradition.²⁷ It is therefore part of the social history of Europe, whereas female circumcision, though not unknown in European societies, was never as widespread.²⁸ Moreover, if the current legal status of the one procedure is to be examined in the absence of specific provisions, the existence of specific rules on the other procedure might be helpful in understanding what the law *should* be, but less so in understanding what the law *is*. Understanding the different approaches of those traditions that practice male circumcision but not female circumcision may help to explain the cultural traditions,²⁹ but says nothing about the relation of those traditions to “the law”. If international human rights treaties cannot be read to implicitly prohibit male circumcision as too many states explicitly allowing the procedure have joined the treaty without any intention of passing judgement on their own traditions, the question is whether the same holds true for the Convention, even though the number of member states with a sizeable tradition of ritual male circumcision seems to be smaller.

IV. Human Rights in Europe and Circumcision – the Case of Germany

In 2012, a German regional court in Cologne handed down a spectacular judgement, declaring the practice of non-therapeutic male circumcision, though appropriately performed according to medical standards, an illegal procedure causing bodily harm. According to the court, parental consent could not justify the procedure as parental rights could not cover a procedure that was not in the child’s best interest, which circumcision clearly was not, not “even for the purposes of avoiding a possible exclusion from their religious community and the parental right of education.” Circumcision, the court argues, is “unreasonable in the sense of proportionality, even if necessary” for religious purposes and “changes the child’s body permanently and irreparably. This change runs contrary to the interests of the child in deciding his religious affiliation independently later in life.” However, the court acquitted the defendant on account of an unavoidable mistake of law as to the wrongful nature of the circumcision he had performed, deciding he had acted without criminal liability under section 17 of the German criminal code.³⁰ This mistake was unavoidable, the court said, because even if the defendant had sought legal advice, he would not have received a clear statement on the question of legality, as the legal position on the question of circumcision was unclear.³¹

The case concerned a Muslim boy, but in the public discussion that ensued in the summer of 2012, both in academia and the general public, the focus soon turned to Jewish circumcision rites, not least because some of the most outspoken critics of the judgement were Jewish community leaders. As the decision itself was not appealed and could therefore be considered a precedent for other cases,³² it quickly led to a new law, clarifying that the parents’ decision to have their son undergo ritual male circumcision as practiced by Muslims and Jews was covered by their parental rights.³³ The materials for the new law explicitly state that ritual male circumcision had always been legal in Germany and continues to be so, the contrary decision of the German regional court notwithstanding.³⁴ The expressed aim of the new law was to reinstate predictability of legal decisions (*Rechtssicherheit*), as the Cologne court had created a situation of uncertainty as to what the law actually was.³⁵ Heli Askola has pointed out that the decision by the Finnish Supreme Court discussed earlier in this article was in many ways unavoidable: “In the absence of legislation, it would have been radical to rule that a tradition that has been largely ignored and tacitly tolerated possibly for as long as two centuries, in fact constitutes a relatively serious criminal offence (and that

27 Early documents of this discussion have become more easily accessible through the internet. For example, archive.org offers works from 1653 (The Infant’s Advocate by Thomas Fuller), 1891 (History of Circumcision by P. C. Remondino) and 1896 (Die Beschneidung in ihrer geschichtlichen, ethnographischen, religiösen und medicinischen Bedeutung, edited by Abraham Glassberg).

28 DB Chamberlain, “Delusional Psychologies of Circumcision and Civilisation”, in GC Denniston, FM Hodges, MF Milos, Circumcision and Human Rights (Springer 2009) 1-14 at 7 implicitly acknowledges this point.

29 S Cohen, Why aren’t Jewish Women circumcised? (University of California Press 2005).

30 Section 17 of the German criminal code reads, insofar as is relevant here: “Mistake of law - If at the time of the commission of the offence the offender lacks the awareness that he is acting unlawfully, he shall be deemed to have acted without guilt if the mistake was unavoidable.”, quoted according to the full translation of the German criminal code available at http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html, accessed 17 July 2013.

31 Landgericht Cologne, Judgment of 7 May 2012 - 151 Ns 169/11 (n 4).

32 Under German law, there is no formal rule of precedent, but courts may turn to other decisions to back up the arguments they use in their decisions. The Cologne judgment was not appealed, arguably because the defendant was acquitted and therefore had no interest to continue the proceedings, whereas the prosecution got what it wanted, the statement of criminality. Under the German Code of Criminal Procedure, it would have been an extraordinary step for the defendant to appeal the decision, as all formal appeals would be considered inadmissible on account of his acquittal, see for details: H Radtke, Commentary on Section 296 of the German Code of Criminal Procedure, in: H Radtke/O Hohmann (Eds.), StPO Kommentar (Verlag Franz Vahlen 2011) 1617-1620.

33 The law entered into force in December 2012, Bundesgesetzblatt 2012, Teil I, Nr. 61, 2749.

34 BT-Drucksache (materials from the German parliament) 17/11295, 10, available at <http://dipbt.bundestag.de/dip21/btd/17/112/1711295.pdf>, accessed 14 March 2013.

35 BT-Drucksache 17/11295 (n 34) 6.

doctors and parents involved have been subjecting children to child abuse)”³⁶ The Cologne court took that radical step and, in doing so, not only (nearly?) violated the principle of legality (*NULLA POENA NULLUM CRIMEN SINE LEGE* – Art. 7 of the Convention, Art. 49 of the Charter of the Fundamental Rights of the European Union, section 1 of the German criminal code and Art. 103 (2) of the German constitution – a general principle of law within the European Union),³⁷ but quite possibly made it also more difficult to discuss the desirability of laws regulating cultural practices of minorities in general and of laws on ritual male circumcision in particular.³⁸ The genesis and fate of the court’s decision is therefore of relevance on the international level as well.

The judgement of the Cologne court is clearly influenced by the legal activism of the German professor for criminal law at the University of Passau, Holm Putzke. The judgement cites other writers as well (and more frequently), but the prevailing view in German media is that Professor Putzke made this decision possible.³⁹ Putzke has discussed the (il)legality of ritual male circumcision under German (criminal) law in a number of articles since 2008,⁴⁰ and he is an outspoken critic of the new law, even considering it “unconstitutional”.⁴¹ He arrives at his position through a very specific reading of German legal history, which will be outlined here briefly. While this requires stepping into territory unfamiliar to the international reader, it illustrates the historic and legal context of the German situation, making it easier to understand its broader meaning.

Germany’s current constitution, the “Basic Law” (“Grundgesetz”) came into effect in 1949 and incorporated certain provisions of its predecessor, the Weimar Constitution of 1919, in particular the rules on religious communities and their right to organise “their affairs” (“ihre Angelegenheiten”) within the law. One of these provisions is cited by both the Cologne court and German scholars arguing for the illegality of ritual male circumcision under German (constitutional) law.⁴² It is Art. 136 (1) of the Weimar Constitution stating that civil and political rights shall not be restricted by the exercise of religious freedom. To understand the relevance of this provision in the present context, it must be read in conjunction with another law established during the times of the Weimar Republic, which is still in force today – the Law on the Religious Upbringing of Children of 1921 (*Gesetz über die religiöse Kindererziehung*). This law provides, inter alia, that parents are to jointly decide about the religious upbringing of their children insofar as it is their right and their duty to care for them (Section 1 of the Law on the Religious Upbringing of Children). The law further stipulated that the state would not take any action in matters covered by the law, unless the child’s safety or financial assets were at risk (Section 7 of the Law on the Religious Upbringing of Children). At the time, the motivation for the law was found in the desire to regulate religious upbringing for children in the growing number of “intermarriages”, that is marriages where the parents belonged to different religions, which in those days usually referred to marriages between Protestants and Catholics.⁴³ In a sense, the legal state of affairs prior to this law was similar to the situation that existed in England until the rule that children had to be brought up in the religion of their father was abolished by section 1 of the Guardianship of Minors Act 1925. However, it is clear that the law, together with the constitutional guarantees of religious freedom, provided parents with a space in which they were free to decide in religious matters for their children. For Putzke, it is clear that this law, for example, covers the decision to have their children baptised, but *not* to have their sons circumcised, because the German lawmakers of these times were “not concerned with religious faiths that included ‘physical interventions’”.⁴⁴ This statement, however, is historically inaccurate.

During the Weimar Republic, German laws were made by a parliament that *included* representatives of a religious tradition that practised ‘physical interventions’. About half a million Jews were living in Germany at the beginning of the Weimar Republic when the Law on the Religious Upbringing of Children entered into force. The law was part of the wider effort

36 Askola (n 9) 109.

37 C Kress, *Nulla poena nullum crimen sine lege*, Max Planck Encyclopedia of Public International Law - www.mpepil.com, also available at <http://www.uni-koeln.de/jur-fak/kress/NullumCrimen24082010.pdf>, accessed 14 March 2013. Arguably, the Cologne court’s decision does not violate the *NULLUM CRIMEN*-principle under European Human Rights Law, as it specifically stopped short of proclaiming the defendant guilty.

38 Sweden is a country with legal restrictions on male circumcision, though it seems questionable whether the legislation reached its desired outcomes, see J Schiratzki, “Banning God’s Law in the Name of the Holy Body – The Nordic Position on Ritual Male Circumcision” (2011) 5 *The Family in Law* 35-53.

39 J Müller-Neuhof, “Chronik einer beispiellosen Debatte”, *Der Tagesspiegel*, 20.08.12, <http://www.tagesspiegel.de/politik/religioese-beschneidung-chronik-einer-beispiellosen-debatte/7018904.html>, accessed 20 March 13.

40 Prof. Putzke provides a chronological list of (German) publications, including his own, on the question of the legality of ritual male circumcision at http://www.holmputzke.de/index.php?option=com_content&view=article&id=23&Itemid=29, accessed 14 March 2013.

41 Interview with Prof. Putzke, „Den Gesetzgeber hat der Teufel geritten“, <http://hpd.de/node/14709?page=0,1>, accessed 14 March 2013.

42 In addition to Putzke, this especially refers to the works of his teacher Rolf Herzberg, e.g. R Herzberg “Rechtliche Probleme der rituellen Beschneidung” (2009) 64 *Juristenzeitung* 332-339.

43 S Kammerloher-Lis, *Die Entstehung des Gesetzes über die religiöse Kindererziehung vom 15. Juli 1921* (Verlag Peter Lang 1999).

44 H Putzke, “Juristische Positionen zur religiösen Beschneidung” (2008) 61 *Neue Juristische Wochenschrift* 1568-1570 at 1570: “Der historische Gesetzgeber hatte also nicht Bekenntnisse im Blick, die sich mit körperlichen Eingriffen verbinden.” Putzke is only thinking of Muslim traditions here, which may explain the mistake as oversight.

to ensure equal treatment for all religions, at a time when Germany, while predominantly Christian, had a sizeable Jewish minority population that was looking forward to the Weimar Republic as a “consolidation of more than a century of progress toward legal equality and social acceptance in a country and a culture in which they felt no less at home than French Jews did in France”.⁴⁵ Jewish emancipation had come later in Germany than it did in the Western democracies of Europe,⁴⁶ where in the 19th century decrees were still being passed that put restrictions on Jewish traditions and rituals, circumcision in particular.⁴⁷ Such restrictions, however, were abolished when Jewish emancipation was successful and equal rights were granted to all religious denominations in the newly formed German Empire in 1871.

The Weimar Republic saw wide participation of Jews in the social, cultural and political life in Germany,⁴⁸ but also a growing anti-Semitism that denounced the Republic as the “Judenrepublik” (the Jew’s republic), not least because Hugo Preuss, the leading architect of the Weimar constitution, was Jewish.⁴⁹ The parliamentary committee that debated the Law on Religious Upbringing between March and June 1921 consisted of 28 members (including three women), and at least three members were of Jewish origin. These Jewish men may have considered themselves atheists and represented left-wing parties,⁵⁰ but there is no reason to believe that these three would have knowingly contributed to a law that did not allow Jewish parents to do what Jewish parents have always done, have their sons circumcised. The ritual is one of the most fundamental expressions of Jewish identity, and even though the leaders of Reform Judaism in Germany in the early 19th century at first rejected the practice, it survived the “Jewish circumcision wars of modern times”, as Shaye Cohen calls the discussion over the role of the ritual within Judaism in Germany in the 19th century.⁵¹ At a time when Hugo Preuss rejected calls for assimilation of German Jews as “anti-Semitic”, as German Jews were no lesser Germans than any other,⁵² there is very little reason to believe that the legislators were not aware of the ritual and its central place in Jewish tradition. This was a time when German international law theory held that while there may not have been any explicit obligation on states to treat all religious denominations of *foreigners* living on their territory equally, it could not be doubted that the principle of religious freedom established in international law implied such an obligation.⁵³ For a state’s *own* nationals such an obligation would exist with even less doubt. In a polity like the Weimar Republic, comprised at the very least of Christians and Jews⁵⁴, a legal rule on religious upbringing that does not allow for male circumcision would treat all religions equally from a formal, but not from a substantive, standpoint, because it denies Jewish (and Muslim) parents a right Christian parents would have no interest in exercising.⁵⁵ The historical context therefore gives every reason to conclude that the Law on the Religious Upbringing of Children does cover the decision to have a male infant circumcised for religious reasons. As everybody knows, in the next years, German-Jewish relations remained fragile until they broke down in a storm of violence and murder.

In many ways it may seem in retrospect as if the perceived German-Jewish symbiosis of the Weimar times was in fact a very one-sided love-affair, never reciprocated by the Germans.⁵⁶ But the law of 1921 remains in effect and the current German constitution explicitly builds on a continuity of the guarantees on religious freedom of the Weimar constitution.⁵⁷ In fact, the current constitution is in implicit (its emphasis on the protection of human dignity in Art. 1 of the “Basic Law”) and explicit ways (its offer of German citizenship to all those denaturalised between 30 January 1933 and 8 May 1945 in Art.

45 B Wasserstein, *On the Eve – The Jews of Europe before the Second World War* (Profile Books 2012) 3.

46 Wasserstein (n 44) 1.

47 Judd (n 2).

48 see, e.g., A Barkai, “Wehr Dich!” – Der Centralverein deutscher Staatsbürger jüdischen Glaubens 1893-1938 (Verlag C.H. Beck 2002).

49 e.g. U Kluge, *Die Weimarer Republik* (UTB 2006) 233.

50 http://www.reichstagsprotokolle.de/Blatt2_w1_bsb00000052_00158.html, accessed 14 March 2013. – They were Joseph Herzfeld (USPD/KPD), Paul Levi (SPD/USPD/KPD) and Kurt Rosenfeld (SPD/USPD). See: Weber, “Rosenfeld, Kurt”, *Neue Deutsche Biographie* 22 (2005), 66-67 [Onlineversion]; URL: <http://www.deutsche-biographie.de/pnd116623411.html>, stating that Rosenfeld was “jüdisch, später konfessionslos”. Paul Levi also reportedly was “israelitisch, dann konfessionslos”, see: Weber, “Levi, Paul”, *Neue Deutsche Biographie* 14 (1985), 397-398 [Onlineversion]; URL: <http://www.deutsche-biographie.de/pnd118572318.html>.

51 Cohen (n 29) 208.

52 H Preuss “Die heutige politische Lage des Reiches und das deutsche Judentum“, in Preuss, *Gesammelte Schriften*, (Vol. IV, Mohr Siebeck Verlag 2008) 291-300.

53 A v Kirchenheim, “Religiöse Interessen”, in: K Strupp (Ed.), *Wörterbuch des Völkerrechts und der Diplomatie*, Vol. 2 (Walter de Gruyter Verlag 1925) 347, emphasis added.

54 In addition, some Muslims did live in Germany at this time: In Berlin, there was already a Mosque, and a regular publication, the “Moslemische Revue”, but Putzke is probably correct in suggesting that these were given no consideration, see: Putzke (n 43) 1570.

55 S Mancini, M Rosenfeld, “Unveiling the Limits of Tolerance”, in: L Zucca, C Ungureanu, *Law, State and Religion in the New Europe* (Cambridge University Press 2012), 160-191 at 184 with Fn 89.

56 G Scholem, “Jews and Germans” (1966) 38 *Commentary*, 31-38 at 36. See also W Benz, *Bilder vom Juden* (Verlag C.H. Beck 2001) 44-56.

57 The provisions of the Weimar Constitution incorporated into the current German constitution are to be interpreted in light of the other provisions of the current constitution, so they may have only limited substantial value with regard to their guarantees of individual religious freedom, which is now guaranteed by Art. 4 of the German “Basic Law” (“Grundgesetz”). For details, see: U Mager, *Commentary on Art. 140 Grundgesetz*, in: I von Münch/P Kunig (Eds.), *Grundgesetz Kommentar* (Vol. 2, 6th Ed, Verlag C. H. Beck 2012) 1697-1708.

116 [2] of the “Basic Law”) a reaction to the policies of Nazi Germany, so that there is every reason to believe that what was legal under the Weimar constitution is also legal under the current “Grundgesetz” – unless the lawmakers explicitly decide otherwise, as has been done in countless other cases.⁵⁸ In other words, the historical development does not mean that ritual male circumcision *ought* to be legal in current German law, but that it *is* until the legislators decide otherwise. As a result of the decision by the Cologne court, the German legislators decided to reinforce the view that ritual male circumcision *should* be legal in current German law, by clarifying that (and how) it *is*.

V. Children’s Rights, Minority Rights, Religious Freedom and the Law in Europe

The legal framework for any opinion on the legality of ritual male circumcision is provided not by a subjective reading of applicable legal provisions, no matter how “objective” such an interpretation may claim to be, but it is the result of a specific legal tradition. In the case of Europe, the recent discussion on whether or not to include a reference to God in the preamble of the Charter of Fundamental Rights of the European Union, shows that the relationship between religious foundations and legal institutions is far from over.⁵⁹ While the Charter only makes reference to the “spiritual and moral heritage” of the European Union,⁶⁰ it is clear that Europe (and with it, European law) today is based on a predominantly Christian European (religious) experience and development. Guarantees of religious freedom for other denominations therefore always contain aspects of minority protection. As shown for the case of Germany, ritual male circumcision, while never widespread in predominantly Christian Germany, evolved *within* the state’s legal tradition. The guarantee of religious freedom here returns to its origin in human rights as minority rights: For in the Jewish and Muslim traditions, membership to the respective groups (or religions) is not the result of a faith-based choice, as the Cologne court implied in its reasoning based on a Christian understanding of religion, but of heritage. Born to a Jewish mother, any male infant is considered Jewish and as circumcision is considered a requirement by most readings of Judaism,⁶¹ it may make sense to speak of a “right to be circumcised”, that is, to be welcomed into the Jewish tradition as this tradition requires. The situation in Islam is similar. Claims of an implicit incompatibility of this right with European (human rights) rules construct a dichotomy between the substance of the European legal system and, in particular, Judaism, which given the recent re-affirmation of Europe’s “spiritual and moral heritage” and “the diversity of the cultures and traditions of the peoples of Europe” in the preamble of the Charter of Fundamental Rights of the European Union, hardly represents a step forward. Instead, such claims re-affirm the construction of the Jews (and the Muslims) as Europe’s “Other”.

Statements on the freedom of religion in its legal dimension often come with certain limitations. For example, according to Art. 18 of the International Covenant on Civil and Political Rights (ICCPR), the freedom to “manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”. In similar fashion, as described above, Article 9 of the Convention contains an almost identical limitation. In this context, the re-evaluation of the (legal) relationship between children and their parents of the recent decades becomes relevant. Children are no longer the “property” of their parents, but individual bearers of rights. The “best interests” of the child, rather than the wishes of the parents, have become the legal focus (see Art. 3 UNCRC and Art. 24 (2) and (3) of the Charter of Fundamental Rights of the European Union). From this perspective, it might make sense to question whether “the excision of healthy tissue from a child unable to express his consent for no demonstrable medical benefit” *should* be a private matter of parental choice. But the increased emphasis on children’s rights alone does not allow for excluding such a decision from the realm of valid (legal) parental choices. Pretending to interpret children’s rights according to one “objective” definition of the “best interests” of the child and deciding against circumcision for its lack of medical benefit is akin to devaluing traditions which decide in favour of circumcision for other reasons. It also separates children and their rights from their “natural” environment, that is to say, it strengthens children’s rights at the expense of the protection of the family as an organic unit. Thus this arguably runs counter to the aim of the United Nations Convention on the Rights of the Child, which is to provide the best protection for the child that, as the preamble

58 Obviously, law and society evolves, but sometimes society evolves quicker than the law, so that provisions make remain in force that have become obsolete. One may cite the example of corporal punishment of children, which in Weimar times was the sole but explicit right of the father. By the 1950s, the provision that guaranteed the father this right was held to be in violation of the principle of non-discrimination, so the right to corporal punishment, now extended to the mother, continued as a customary law, until it was formally abolished at the end of the 20th century. For details, see the materials on Section 1631, para. 2 of the German Civil Code (BGB) in BT-Drucksache 14/1247, available at <http://dip21.bundestag.de/dip21/btd/14/012/1401247.pdf>, accessed 18 July 2013.

59 For an extensive discussion, see: H Schambeck, Commentary on the Preamble of the Charter of Fundamental Rights, in: P Tettinger/K Sterb (Eds.), *Europäische Grundrechte-Charta Kommentar* (Verlag C. H. Beck 2006) 241-248.

60 Quoted from the English version of the Charter, the German version talks of a “geistig-religiösen und sittlichen Erbe”.

61 This is not to deny that there are voices within Judaism that are very critical of the practice and tradition. However, this is a minority view and attempts to “convince” Jews of the lack of necessity of the ritual because of criticism from Jews and others, as envisaged, for example, by Putzke – see interview with Prof. Putzke <http://hpd.de/node/14709?page=0,2>, accessed 18 March 2013 – are not likely to have much impact.

clearly states, “should grow up in a family environment”. In other words, the UNCRC seeks to balance the rights of children and parents to preserve a strong pro-family ethic.⁶² While it cannot be denied that there can be situations within the family that require state intervention, it must be asked whether the practice of ritual male circumcision, which has been known in Europe for centuries, can by default be considered such a situation, as critics of the ritual seem to suggest. As long as it can be demonstrated that legal regimes of Europe and international human rights law have developed with the *inclusion* of such traditions, using these regimes to pass judgement on those traditions decontextualizes the law from its social origins. As Didi Herman has shown, reducing these traditions to “purely religious” traditions – implicitly defining “the hegemonic Christianness” of most of Europe as secular – negates their origin in cultural traditions and their importance for questions of identity, and is informed by an implicit Christian normativity: “In the case of circumcision, a secularised, modern ‘healthcare’ argument can thus be read as racialising, orientalist and Christian, as can the related argument that circumcision is, at root, a barbaric ritual having no place in a civilised society, made by European enlightenment rationalists over 200 years ago.”⁶³

If chronology is everything and cannot be reversed, then ritual male circumcision is, in principle, legal under current European Human Rights law. That does not mean that the practice *needs* to remain legal, but it does mean that it is not for the courts to decide whether or not the legal situation should or will change. The Cologne court’s decision may not have violated the European NULLUM CRIMEN-principle as defined by Art. 7 of the Convention, since no “penalty” was imposed on the defendant, who was acquitted.⁶⁴ But the retroactive destruction of a defence violates any principle of legality less narrowly defined, even if no penalty is imposed. Under international criminal law, it is not only the rule of non-retroactivity of *crime creation* that has reached customary international law status. There is an equally well-established rule of non-retroactivity in *eliminating defences to crimes*. The latter rule prohibits elimination of defences concerning what acts the law deems as non-criminal (unless the defence – though formally in place – can be considered unjust and where, stripped of the defence, the act in question was squarely criminal at the time.).⁶⁵ It cannot be said that parental consent to ritual male circumcision as a defence to the act in question can be considered unjust, or that male circumcision as such is squarely criminal under current criminal law in Europe. As stated before, it is clear that circumcision *can* be medically beneficial, even if such benefits are not motivating factors in the practice of ritual male circumcision.

If children’s rights are indeed seriously impaired by allowing ritual male circumcision, as some judges and academics believe, the way forward is not to claim that the practice *is* illegal, only that it *should* be illegal. Such claims will then have to deal with the medical ambiguity related to the subject, just as much as they will have to respond to the claims of religious freedom properly understood. If Europe is to remain a place of diversity, then a dialogue about the desirability/necessity of ritual male circumcision outside the constraints of the discourse about its legality is likely to find more open ears than the accusation that some of the contributors to Europe’s legal STATUS QUO are habitually violating this very same STATUS QUO.⁶⁶ ■

62 DS Browning, J Witte, “Christianity’s mixed contribution to children’s rights: traditional teachings, modern doubts”, in: M Bunge (Ed.), *Children, Adults, and Shared Responsibilities* (Cambridge University Press 2012) 280.

63 Herman (n 10) 82-85, quote at 84.

64 Applying the guidelines developed by the ECHR in *Adamson v. United Kingdom* (App. 42293/98), it would appear that the statement that the defendant had performed a criminal act is not a penalty under the Convention.

65 KS Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2009) 375-376.

66 A recent study of the use of language and anti-Semitism in Germany based its findings on material produced before the “great circumcision debate of 2012” hit the country, but it did conclude that some clearly anti-Semitic overtones came to the fore during this discussion, especially in discussions on the internet, see M Schwarz-Friesel, J Reinharz, *Die Sprache der Judenfeindschaft im 21. Jahrhundert* (De Gruyter 2013) 128 with Fn 30.