

## CASE COMMENTARY

# LESSONS FROM GERMANY: SHOULD UK LEGISLATION CIRCUMNAVIGATE OR CIRCUMVENT THE ISSUE OF MALE CIRCUMCISION?

*Judgment of the Landgericht Cologne May 7<sup>th</sup> 2012,<sup>1</sup> and its Aftermath*

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## ABSTRACT

A recent Court decision in Cologne Germany concerning circumcision has resulted in a rapid response from the German Government. The German Parliament has passed new legislation confirming the lawfulness of ritual circumcision. However there are questions as to whether the German Parliament has done enough. This note looks at the background to the case in question and considers its ethical implications whilst also considering the analogous position in the UK.

The author makes recommendations to change the current English law in this area.

## 1. INTRODUCTION

For a number of years activists worldwide have campaigned to put an end to Female Genital Mutilation (FGM), with a modicum of success. The Female Genital Mutilation Act (FGM) 2003 attempted to end such practice in England, Wales and Northern Ireland.<sup>2</sup> Further, section 3 of this Act makes it

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<sup>1</sup> Docket no 151 Ns 169/11. The case can be read in German at [www.justiz.nrw.de/nrwe/lgs/koeln/lg\\_koeln/j2012/151\\_Ns\\_169\\_11\\_Urteil\\_20120507.html](http://www.justiz.nrw.de/nrwe/lgs/koeln/lg_koeln/j2012/151_Ns_169_11_Urteil_20120507.html). An English translation, by Mr Alexander Aumüller can be read on Durham University's website: <https://www.dur.ac.uk/ilm/news/?itemno=14984>.

<sup>2</sup> By virtue of the Female Genital Mutilation Act 2003, s 1(1), such procedures that might be described as FGM are illegal unless they meet the justifying criteria of s 1(2).

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illegal to take a British national or permanent resident abroad for FGM,<sup>3</sup> with a penalty of up to 14 years in prison for those found guilty of the offence.<sup>4</sup> Despite this, it has been reported that as many as 100,000 women and girls from the UK have been victims of FGM, with British-based doctors willing to carry out such procedures on girls as young as 10.<sup>5</sup> These figures indicate just how ingrained FGM is into specific cultures.<sup>6</sup>

Supporters of FGM argue that the practice is ‘good tradition’ or even a religious requirement. In reality, these are nothing but excuses for procedures which involve nothing less than “maiming [...] often without anaesthetic.”<sup>7</sup> Unsurprisingly, FGM is now recognised globally as violating the human rights of girls and women.<sup>8</sup>

By contrast, the issue of *male* circumcision, also a potentially dangerous procedure, has received comparatively little attention. This paper attempts, to a modest degree, to redress this.

## 2. MALE CIRCUMCISION - THE FACTS

Derived from the Latin word ‘circumcido’ meaning ‘cutting around,’ male circumcision involves the removal of the foreskin (prepuce), which covers the glans (head) of the penis. Circumcisions can take place at any point in life. In a review carried out by the World Health Organisation (WHO) in 2009, it was noted that the safest time for this procedure to take place is within the first two months of birth.<sup>9</sup> There are several different techniques utilised.

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<sup>3</sup> Female Genital Mutilation Act s 3(1): A person is guilty of an offence if he aids, abets, counsels or procures a person who is not a United Kingdom national or permanent United Kingdom resident to do a relevant act of female genital mutilation outside the United Kingdom.

<sup>4</sup> Female Genital Mutilation Act 2003, s 5.

<sup>5</sup> Andrew Hough, ‘Pair held by police investigating female genital mutilation in the UK’, *The Telegraph* (London, 4<sup>th</sup> May 2012).

<sup>6</sup> Scotland has its own legislation on such issues, the Prohibition of Female Genital Mutilation (Scotland) Act 2005.

<sup>7</sup> Susan Edwards, ‘Female Genital Mutilation- Violence against Girls and Women as a Particular Social Group *Fornah v Secretary of State for the Home Department*, House of Lords [2006] UKHL 46, [2006] 3 FCR 381, [2007] 1 ALL ER 671 2007’ [2007] *Denning Law Journal* 271, 271.

<sup>8</sup> A number of potential victims of FGM have successfully sought asylum in the UK and in other countries in the European Union. See *Fornah v Secretary of State for the Home Department* [2006] UKHL 46. In this case it was decided that women from Sierra Leone were a particular social group for the purposes of Article 1 A (2) of the ECHR. See commentary from Susan Edwards, *ibid*.

<sup>9</sup> World Health Organisation, *Manual for Early Male Circumcision under Local Anaesthesia* (1st, WHO Press, Geneva Switzerland 2010) 5.

In a typical ‘medical’ procedure, the first step is to administer anaesthesia. In young children a local anaesthetic is administered to the base of the penis, although for older children and adults general anaesthetic can be used. When the anaesthetic has taken effect, the foreskin is clamped open by artery forceps. In infants and some older children, the foreskin is often fused to the glans of the penis. In order to separate the glans from the foreskin, a probe will be pushed gently down inside the foreskin to the base of the glans. The foreskin is then cut vertically one side, to reach the base of the glans, where after it is cut in circle just under the glans. This ‘dorsal slit method’ requires significant surgical skill, as one slip can lead to damage to either the urethral meatus, or to the whole of the glans itself.

In the US and Africa, some doctors prefer to use a Plastibell, a piece of disposal equipment which caps the glans.<sup>10</sup> After the Plastibell, has been put on top of the glans, the foreskin is stretched back over the Plastibell, and the doctor cuts around the cap thereby ensuring that the penis itself does not get cut in the process. The potential downside with this technique is that if the device is too tight, or remains in place for too long, it can lead to glandular necrosis.<sup>11</sup>

Although it is obvious that the extent of these procedures are (usually) significantly less evasive than in FGM, none-the-less the process can lead to the same drastic results including severe loss of sexual sensitivity, castration or even death. Such deaths can and do occur, not just in countries renowned for poor hygiene as one might expect, they also occur in Western Europe, the US and the UK. Although prosecution is unusual, a recent American study indicates that something in the region of 117 neonatal circumcision-related deaths occur annually in the United States- approximately 1.3% of all neonatal deaths per annum.<sup>12</sup> With the reduction of the number of routine circumcisions being performed, (partly as a response to an increasing awareness of these statistics), recent debates have shifted to consider the use of ritual circumcisions. It is now possible to discern a growing disquiet amongst many who want to see ritual circumcision outlawed in a similar fashion to that of female circumcision.<sup>13</sup>

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<sup>10</sup> The Plastibell device is manufacture by Hollister Inc in Illinois USA, see *ibid* at 47.

<sup>11</sup> *Ibid* at 48.

<sup>12</sup> Dan Bollinger, ‘Lost Boys: An Estimate of U.S Circumcision-Related Infant Deaths’ *THYMOS: Journal of Boyhood Studies*, Vol. 4, No. 1, Spring 2010, 78-90.

<sup>13</sup> eg NORM The National Organisation for Restoring men. [www.norm.org](http://www.norm.org).

### 3. RITUAL MALE CIRCUMCISION, A “TOKEN OF THE COVENANT”<sup>14</sup> OR THE “ANGEL OF DEATH?”<sup>15</sup>

Male circumcisions have been carried out for religious reasons for centuries, and currently remain legal in the UK. During the 19<sup>th</sup> Century circumcisions were recommended as a method of promoting health, and boys of all faiths were routinely circumcised. These days, medical opinion has changed and in the UK routine circumcision is a thing of the past.<sup>16</sup>

In the current economic climate, NHS trusts have had to make savings wherever possible, and most trusts have economised by stopping *any* non-medically attested procedures. Consequently, NHS Trusts will now usually only provide circumcision in cases of phimosis,<sup>17</sup> or a similar ‘medical necessity’. However, despite the reduction of NHS funding, the numbers undergoing such ritual circumcision appear to be in the region of 30,000 annually.<sup>18</sup> This is unsurprising as in this ever-increasing multi-ethnic country a number of faiths, notably Judaism and Islam, require circumcision, and some parents desire their son’s circumcision, within hours of birth, in order for their child to obtain membership of their faith.<sup>19</sup> What is not known to most parents, is that there *are no specific legal training requirements* to perform circumcisions in the UK, and currently a significant number of operations are carried out annually, without either professional assistance or

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<sup>14</sup> “And ye shall circumcise the flesh of your foreskin; and it shall be a ‘token of the covenant’ betwixt me and you.” Genesis 17: 11. *The Holy Bible* (Oxford University Press, Oxford ) 1866, (King James Authorised Bible)

<sup>15</sup> “Then the angel of the LORD went forth, and smote in the camp of the Assyrians a hundred and fourscore and five thousand: and when they arose early in the morning, behold, they *were* all dead corpses.” Isaiah 37: 36 *ibid*.

<sup>16</sup> It should be noted that some recent medical studies have considered whether circumcision helps prevent transmission of HIV. As yet results are inconclusive on the matter and therefore have not been investigated further in this paper.

<sup>17</sup> This is when the foreskin is very tightly joined at the top of the penis, so that the glans of the penis cannot be seen. Phimosis is a common occurrence in boys under the age of three years, as it is only after 24 months that the skin starts to detach from the glans. At this stage the condition is harmless, but if the phimosis, remains at puberty it can lead to the life-threatening condition of balanitis.

<sup>18</sup> GK Atkin, C Butler, J Broadhurst et al, 'Ritual circumcision: No Longer a Problem for Health Services in the British Isles' [2009] *Ann R Coll Surg Engl* 91(8) 693-6.

<sup>19</sup> Their assertions are often based on a Genesis Chapter 17 verse 14, “And the uncircumcised man child whose flesh of his foreskin is not circumcised, that soul shall be cut off from his people; he hath broken my covenant” Genesis 17:14 *The Holy Bible* (Oxford University Press, Oxford) 1866, (King James Authorised Bible). It is important to note that there is no corresponding verse in Genesis for female circumcision.

legal protection. The absence of NHS funding has led parents to risk their sons' lives at the hands of non-qualified practitioners. This lack of training has increased the feeling of anger towards such enforced operations on children.

Despite this, currently in the UK, only currently relatively low-key protests to male circumcision are taking place. However, in certain countries, for example Australia, where it is possible to witness the "increasing anger aroused by circumcision of young males,"<sup>20</sup> there are constant challenges to the lawfulness of the procedure. Elsewhere, campaigners have presented draft bills in an attempt to regulate such activity,<sup>21</sup> whilst in other countries, courts have initiated Parliamentary action by taking on the role of lawmaker in this respect. One such court, Landgericht Cologne, (the Cologne Court of Appeal), recorded for the first time in Germany in May 2012, that circumcision "for the purpose of religious upbringing constitutes a violation of physical integrity."<sup>22</sup>

#### 4. THE BACKGROUND TO THE CASE

The defendant, Dr K, performed a circumcision on a 4 year old boy 'J' on 4<sup>th</sup> November 2010, in his medical practice in Cologne. The procedure was carried out at the request of the boy's parents in order to symbolise their adherence to the Islamic faith, rather than for medical necessity. The defendant used a scalpel to perform the procedure, which was conducted under local anaesthetic. After the foreskin had been removed, Dr K sutured the wound with four stitches. To ensure that his patient was well, Dr K visited the patient and family at home that evening.

Two days later, on the 6<sup>th</sup> of November, the mother brought 'J' into the Accident & Emergency section of the University Hospital Cologne, as he had started to bleed profusely from the wound. 'J' was treated successfully at the hospital, but because of "communication problems with the mother,"<sup>23</sup> medics were not convinced that adequate consent had been obtained for the circumcision. As a result the prosecution service was informed of the operation and an investigation was undertaken.

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<sup>20</sup> Vickers L & Board J 'Circumcision - the Unkindest Cut of All?' *NLJ* Nov 17 2000. For a full account of this anger see G Boyle et al 'Circumcision of Healthy Boys: Criminal Assault?' 7 *Journal of Law and Medicine* (Australia) 301-310.

<sup>21</sup> See for example the MGM Bill from San Francisco which was presented to congress in January 2013. [www.MGMbill.org](http://www.MGMbill.org) accessed 12<sup>th</sup> July 2013.

<sup>22</sup> Judgment of the Landgericht Cologne 7<sup>th</sup> May 2012-Docket no 151 Ns 169/11 as reported by Stephen Evans, 'German Circumcision Ban: Is it a Parent's Right to Choose?' BBC newsonline 13 July 2012. Accessed 12<sup>th</sup> July 2013.

<sup>23</sup> *Ibid.*

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Although a report compiled by an expert witness, Dr L, verified that there was no aspect of medical negligence, the same report also concluded that in general, circumcisions are not necessary to promote health care. Consequently, the Cologne prosecution service charged the defendant with ‘Causing bodily harm to another using a dangerous instrument,’ by virtue of section 224(1) of the German Criminal Code, the *Strafgesetzbuch* (StGB) and, in the alternative, with the lesser charge under section 223(1) StGB ‘Causing bodily harm’.<sup>24</sup>

### 5. THE DECISION OF THE AMTSGERICHT COLOGNE

The case was initially heard by the court of first instance, the Amtsgericht Cologne, which pronounced its judgment on September 21<sup>st</sup> 2011.<sup>25</sup> Although the Court did not find that the objective criteria were met with regard to the more severe charge under Section 224(1) StGB,<sup>26</sup> the Court concluded that techniques used during circumcision met that the criteria for the *actus reus* of battery as stipulated under Section 223(1) StGB. However, the Court further pronounced that the parental consent, which had been given in accordance with *Kinderswohl*, (the ‘well-being of the child’), which in German law is specified under section 1627 of the *Bürgerliches Gesetzbuch* (BGB) the German Civilian Code, was valid and justified the defendant’s actions.<sup>27</sup>

In reaching its decision, the Court considered the relationship between the right to religious freedom and the bodily integrity of the child. The Court found that circumcision was an important aspect of the Muslim faith, and without the procedure ‘J’ would have been more isolated from his community. Interestingly, contrary to Dr L’s expert opinion, the Court also found that circumcision had important beneficial effects on the future health of the child.<sup>28</sup> The *Amtsgericht* Cologne duly acquitted the defendant. The Cologne prosecution service appealed against this decision. This appeal went to the *Landgericht* Cologne.

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<sup>24</sup> Section 223 Causing Bodily Harm (1) Whoever physically assaults or damages the health of another person, shall be liable to imprisonment of not more than five years or a fine.

<sup>25</sup> No 528 Ds 30/11; 34Js 468/10.

<sup>26</sup> The Court decided that a scalpel used with special skill as employed in this situation, was not a ‘dangerous instrument’ for the purposes of the section.

<sup>27</sup> No 528 Ds 30/11; 34Js 468/10, paragraph 5.

<sup>28</sup> No 528 Ds 30/11; 34Js 468/10, paragraph 8.

## 6. THE DECISION ON APPEAL

The decision issued by the *Landgericht* Cologne caused an overnight sensation, not just in Germany but internationally.<sup>29</sup> Rather than considering the events from the ‘token of covenant’ viewpoint, the Court reconsidered the aspect of circumcision from a medical perspective. In an astonishingly novel judgment, the Court ruled that non-medical male circumcision meets the criteria of criminal law battery as specified by section 223(1) StGB, *even if* performed with the consent of both parents.

In reaching its verdict, the Court considered the procedure from three separate angles. Firstly as an aspect of parental rights to consent to medical procedures on behalf of their child, secondly as an issue of freedom of religious practice, and thirdly, and most significantly, the right of the child to physical integrity.

The Court decided that taking all of these considerations into account, that Dr K’s actions were unlawful. The operation was unlawful since valid informed consent had *not* been given to the doctor prior to the circumcision. Although the doctor had obtained parental consent, the Court found that this was not sufficient to legitimise the operation, which was not a medical emergency. The Court found that the only person who could give valid consent was the boy himself, and as he was only four years old at the time, the Court deemed that he did not have the intellectual capacity to do so.

The Court further found that the principle of proportionality needed to be considered in relation to freedom of religious practice, and noted that contrary to the view of many, the act of circumcision inhibits religious freedom, as its permanency prevents a young child from being able to choose his religion, in this case Islam, at a later date. By contrast, the Court noted that waiting for the child’s informed consent in such matters, did not infringe the religious freedom of parents themselves. The Court concluded that:

“The circumcision of a boy unable to consent to the operation is not in accordance with the best interests of the child neither from the perspective of avoiding a possible exclusion from their religious community, nor in the light of the parental rights in education.”<sup>30</sup>

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<sup>29</sup> LG Koln judgment Monday 7 May 2012 No 151 Ns 169/11.  
[www.justiz.nrw.de/nrwe/lgs/koeln/lg\\_koeln/j2012/151\\_Ns\\_169\\_11\\_Urteil\\_20120507.html](http://www.justiz.nrw.de/nrwe/lgs/koeln/lg_koeln/j2012/151_Ns_169_11_Urteil_20120507.html)

<sup>30</sup> LG Koln, at III, 14 see Bijan Fateh-Moghadam, ‘Criminalizing Male Circumcisions? Case Note: Landgericht Cogne, Judgment of 7 May 2012-No 151 ns 169/11’ [2012 vol 13 No 09] *German Law Journal* 1131, 1134.

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In coming to the decision, the Appeal Court considered the opinions of Dr Holm Putzke, a professor of criminal law at the University of Passau in Bavaria. Putzke's 2008 publication, *The Criminal Relevance of Circumcision of Boys*, was co-written with two Munich doctors, Maximilian Stehr and Hans Georg Dietz. As well as relying on academic articles, the Court in Cologne, used a decision handed down from the Helsinki District Court in 2010, to assist in formulating its judgment.

In April 2008, a baby had been rushed to hospital in Helsinki with extensive bleeding after a circumcision had been carried out by Rabbi Yossi Simon, of Golders Green London. The Rabbi was flown to Helsinki specifically to perform the circumcision. The day following the procedure, after having checked the baby was well, the Rabbi returned to London. Unfortunately the boy bled excessively later that day.<sup>31</sup> The hospital authorities reported the event and in response to protests over a number of years previously by Finnish activists the Helsinki prosecutors decided to take up the case to ensure that there would be a legal precedent to prevent circumcision in the future, except when performed by a doctor, and not by a lay mohel.<sup>32</sup>

In deciding this case, the Helsinki District Court based its judgment on the Convention on Human Rights and Biomedicine of the Council of Europe, and significantly, on a previous decision by the Finnish Supreme Court of August 2008, which had similar facts. In this case, the Finnish Supreme Court issued basic guidance regarding the lawfulness or otherwise of circumcision for religious identity. The guidance informed that this would not be considered a crime, provided that it was carried out in a 'medically sound manner.' This has been interpreted as meaning to be carried out by registered doctors, and with the use of anaesthetics.

The Helsinki District Court ruled that every person should understand the nature of circumcision before undergoing it and the parents in question were found guilty of conspiracy to commit bodily harm, and ordered to pay their son compensation of 1500 Euros. The judgment did not restrict the practice to medical practitioners, but focussed on the lack of anaesthesia used during the procedure. Consequently, the Court ruled that ability to carry out such a

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<sup>31</sup> Jessica Elgot, 'Couple Fined for Son's Circumcision by British Rabbi' [February 25, 2010] The JC.com.

<http://www.google.co.uk/url?sa=t&rct=j&q=finland%20%26%20circumcision%20%26%20supreme%20court&source=web&cd=21&cad=rja&ved=0CC8QFjAAOBQ&url=http%3A%2F%2Fwww.thejc.com%2Fnews%2Fworld-news%2F28605%2Fcouple-fined-sons-circumcision-british-rabbi&ei=yCGMUb2tEoWiO6TagNgB&usq=AFQjCNEjaiCn3VyiNUNHsuYDq2sHvHI5Og> accessed 9<sup>th</sup> May 2013.

<sup>32</sup> Ibid.

procedure on neonates and young children was unlawful. This decision was later reversed on appeal, but as with the German decision that followed it, it led to some hotly contested debates as to whether circumcision should be made illegal where there is no consent from the 'victim.'

Ultimately the *Landgericht* Cologne acquitted Dr. K, noting that he had made an "unavoidable mistake of law,"<sup>33</sup> which had occurred because there was no clear jurisprudence to follow. In an attempt to redress this situation, the Cologne Court concluded for the benefit of such future cases, the circumcision of minors for religious reasons alone was unlawful and added that in future doctors who carried out ritual circumcision should be punished.

## 7. THE AFTERMATH

The Court was accurate in its statement that the doctor did not know the 'unlawfulness of his actions,' nor was the doctor alone in his ignorance. The extensive news coverage of the case, both in Germany and internationally, (enhanced by a significant number of declarations from doctors, religious leaders and high-profile politicians), indicates that the concept that circumcision for religious purposes alone is an unlawful procedure, came as a shock to the majority of the population of Germany. This is unsurprising as no such edict had been pronounced either by the German Parliament or from any other German Court before.

The President of the German Medical association was extremely concerned that the Cologne ruling would lead to an increase in physical harm rather than a decrease, as it is obvious that it is safer for a child to be circumcised in a hospital rather than in a 'back-street' establishment. Professor Kristof Graf, medical director at the Jewish Hospital in Berlin, which treats Muslim as well as Jewish boys, was reported as saying after the ruling: "We have had to stop planned surgeries in five cases already where they were scheduled for circumcision and the families were completely destroyed and upset about this."<sup>34</sup> Previously the hospital had been performing such procedures for 250 years. The voice of protest, both from those of the Jewish faith as well as Muslims, likened this judgment to the acts that took place under the Nazi regime.

In an effort to calm the waters the German Government quickly announced that the circumcision of minors for religious, as opposed to medical, reasons would still be lawful and rushed to push through legislation to that effect. Consequently, on Thursday July 19<sup>th</sup> 2012, just before the commencement of the Summer break, the German Parliament (Deutscher Bundestag) passed a resolution which aimed to guarantee the right of Jewish

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<sup>33</sup> Above n 29.

<sup>34</sup> Above n 21.

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and Muslim communities to uphold their traditions in regards to circumcision.<sup>35</sup>

During the parliamentary recess, work took place behind the scenes. In August, Germany's ethics council unanimously recommended establishing legal minimums for these operations to be performed. It was stipulated that in future, circumcisions would have to take place in professional settings, informed consent would have to be obtained and pain relief would have to be used for such procedures. Meanwhile a draft bill was prepared, which was presented to the German parliament in October, by Justice Minister Sabine Leutheusser-Schnarrenberger. This bill gave parents the right to have their sons circumcised by a trained practitioner, but stipulated that once the boy reached six months of age, then the procedure needed to be performed by a doctor.

The draft bill was challenged. Another bill was submitted to parliament by left-wing lobbyists who wanted a provision for boys not to be operated on before the age of 14, when they would be able to give valid informed consent for themselves. In mid-November, the Bundesrat<sup>36</sup> passed the draft bill. The final vote on the 12<sup>th</sup> December 2012 in the *Deutscher Bundestag*, saw the bill being passed by 434 to 100 votes (with 46 abstentions).<sup>37</sup> However, as will be discussed later, it is now apparent that this rushed legislation, rather than pouring oil onto troubled waters, has instead left them somewhat muddled.

### **8. METZITZAH B'PEH- THE 'KISS OF DEATH'?**

Of all the rituals connected with circumcision, the Jewish ritual *metzitzah b'peh*, often shortened to MBP, practised by some ultra-Orthodox mohels, is undoubtedly the most controversial, as it takes issues regarding a child's bodily integrity to new levels of concern. As part of standard Judaic practice, boys are circumcised on the eighth day, as demanded by the Torah. However in addition to the removal of the foreskin, MBP requires the mohel to suck the blood away from the boy's genitals after the circumcision has taken place. This process, which alone may appear unacceptable by standards of today's society, also has significant health implications for any young child.

It has now been identified that in performing MBP the mohel can infect newborns with Herpes Simplex Virus Type 1 (HSV1). This virus, whilst having relatively mild effects in adults, can cause death or brain damage in

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<sup>35</sup> Deutscher Bundestag Drucksache 17/10332 see above n 30.

<sup>36</sup> German Upper House of Parliament.

<sup>37</sup> The right of parents to consent to a non-medical circumcision of a minor has been inserted into the family law section of the Civil Code, section 1631d. The new law (in German) is available through at:  
<http://dipbt.bundestag.de/dip21/btd/17/112/1711295.pdf>.

neonates.<sup>38</sup> In September 2011, there was considerable distress in New York when a two-week old baby died as a result of a herpes infection after undergoing a MBP. This outrage continued when it was reported by Centers for Disease Control and Prevention,<sup>39</sup> that there were reported cases of neonatal herpes simplex type 1 (HSV-1) infection following MBP in the United States, Canada, and Israel. In New York, at least 11 infants contracted genital herpes following ritual circumcision between 2000 and 2011. Of these 11, two deaths occurred and two more children suffered from brain damage.<sup>40</sup> By 2012, the figures have risen to 13 known cases.<sup>41</sup> Conscious of health implications, most mohels use a pipette to remove the blood, but it has been reported, that many ultra-orthodox mohels consider “direct suction of the genital area by mouth to be mandated by the Talmud.”<sup>42</sup>

In April 2013, several complaints were lodged with the the office of public prosecutors in Berlin, regarding this very issue. The complaints apparently relate to the circumcision of the infant son of Berlin Chabad Rabbi Yehudah Teichtal and his wife, Leah. Gideon Joffe, head of Berlin’s Jewish community, issued a statement saying:

“We were hoping that the new circumcision law would finally restore legal security and that the recent debates, which were very stressful to the Jewish community, were finally over.[...] The Jewish Community of Berlin is a unified community, and members of every denomination should be able to live out their Judaism as they learned it from their parents and grandparents.”<sup>43</sup>

It is clear that in the rush to pass legislation allowing circumcision, ministers in Germany had overlooked the small print in the new Act. To all intents and purposes, it appears that metzitzah b’peh is still legal in Germany, as indeed it is in other countries. However, in order to appease the situation The Conference of European Rabbis confirmed its previous recommendations

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<sup>38</sup> <http://forward.com/articles/174081/are-new-york-hospitals-hiding-herpes-from-metzitza/#ixzz2SixJg2Q0> accessed 20<sup>th</sup> June 2013.

<sup>39</sup> Based in Atlanta, Georgia. [www.cdc.gov](http://www.cdc.gov).

<sup>40</sup> [http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6122a2.htm?s\\_cid=mm6122a2\\_w](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6122a2.htm?s_cid=mm6122a2_w) accessed 30<sup>th</sup> June 2013.

<sup>41</sup> Above n 38.

<sup>42</sup> Ibid.

<sup>43</sup> Circumcision ritual under investigation in Berlin April 12, [www.jta.org/news/](http://www.jta.org/news/) <http://www.jta.org/2013/04/12/news-opinion/world/circumcision-ritual-under-investigation-in-berlin> accessed 10<sup>th</sup> July 2013.

that it is “halachically permissible and medically advisable to carry out metzitzah b’peh through a pipette or tube.”<sup>44</sup>

## 9. THE UK POSITION

By way of comparison, the English legal position regarding male circumcision is unsatisfactory. According to the sensationalist case of *R v Brown*,<sup>45</sup> circumcision is lawful. This furnishes the right to perform a religious procedure. Here an ethical conflict arises between Article 24.3 of the UN Convention on the Rights of the Child and Article 9.2 of the European Convention on Human Rights, which protects the rights of individuals to practise their religion. Where there are two opposing views from those with parental responsibility, a precedent has now been set in England and Wales in *Re J (child’s religious upbringing and circumcision)*<sup>46</sup> which considered the conflicting parental wishes over the non-therapeutic circumcision of their son. This decision was relatively easy for the Court, as the son was against the procedure himself! Therefore the mother’s request to prohibit the operation was approved by the Court.

Due to the specific facts in this case, it has not created a precedent as such, albeit that current BMA guidelines reflect this ruling by requiring both parents to agree to circumcision. However, there are concerns as to whether those with ‘pressing medical needs’ really do need circumcision, particularly in the light of both global and national reports of unnecessary deaths.

## 10. CIRCUMCISION ON TRIAL

In recent years there have been a number of cases reported to the Coroner’s Office in the UK, regarding infant mortality after circumcision, however, it is very rare for there to be any follow-up criminal, or civil, proceedings. It is difficult to identify the rationale behind the lack of prosecutions, but it is likely that a significant stumbling block, is the inability to establish a clear causal link between the circumcision and the later death. This appears to be the *leitmotif* in the majority of these cases.

In order to establish a claim of medical negligence under English *civil* law, the claimant must prove that there was a breach of a pre-existing duty of care which caused the damage. Should the breach of damage be ‘so bad’<sup>47</sup> that it leads to death, the person responsible may find their actions “beyond a

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<sup>44</sup> Ibid.

<sup>45</sup> *R v Brown* [1993] 2 All ER 75. This case involved homosexual sadomasochistic behaviour.

<sup>46</sup> *Re J (child’s Religious Upbringing and Circumcision)* [2000] 1 FCR 307.

<sup>47</sup> *R v Adomako* [1994] 3 WLR 288.

matter of mere compensation<sup>48</sup> and consequently facing a criminal charge of gross negligence manslaughter. No operation is risk-free and, on occasions, the circumcision procedure will go drastically wrong. However, as with a number of deaths that occur after medical treatment, the fatalities often appear to be the result of a string of incidents- beyond the control of the person who initially performed the procedure. For example, in 2007, a seven-day-old boy died hours after his circumcision in London. It was specified that there was no causal connection established between the circumcision and the boy's death.<sup>49</sup> Just one month later, nine week old Celian Noubiwe from Slough, bled to death after his circumcision.<sup>50</sup> Giving a narrative verdict,<sup>51</sup> the Coroner criticised a number of factors in this case, including insufficient postoperative care advice - the parents were only given a leaflet. Further, neither of the parents met the doctors before or after the procedure and when the parents suspected that something had gone wrong, the emergency number given to them had been cut off so they were unable to seek advice. However, despite these unsatisfactory clinical arrangements, no charges were brought against the doctors.

In February 2012, Angelo Ofori-Mintah, a one month old boy, bled to death after a circumcision carried out by a Rabbi in Queen's Park London. It was reported that the cause of death was "bleeding, exsanguination and heart failure"; the child having lost three-quarters of his total blood volume.<sup>52</sup> On reporting a verdict of accidental death, the Deputy Coroner Shirley Radcliffe noted that this was a "tragic break-down in communication" between mother and rabbi, which left him unaware of the true level of the problem and therefore unable to act.<sup>53</sup> Once again, no prosecution followed.

One rare instance of a successful prosecution occurred in 2012. In April, midwife Grace Adeleye was charged with the manslaughter by gross negligence, of Goodluck Caubergs after Adeleye circumcised the boy in 2010.<sup>54</sup> Adeleye was paid £100 for performing the operation without anaesthetic, using only a pair of scissors, forceps and olive oil for the

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<sup>48</sup> *R v Bateman* (1925) 19 Cr App R 8.

<sup>49</sup> Martin Beckford, 'Police Investigate Baby's Death after Circumcision' *The Daily Telegraph* (London, 16 February 2007).

<sup>50</sup> Lucy Bannerman, 'Baby Bled to Death after Circumcision, Inquest told' *The Times* (London, 13 February 2009).

<sup>51</sup> This sets out the facts surrounding the death in a narrative form without necessarily indicating any responsibility.

<sup>52</sup> Circumcision Deaths, [www.cirp.org/library/death/](http://www.cirp.org/library/death/) accessed 8<sup>th</sup> May 2013.

<sup>53</sup> 'Queen's Park Baby Bled to Death Two Days After Being Circumcised' *Brent & Kilburn Times*, (22 June 2012).

<sup>54</sup> 'Midwife on Baby Death Charge' [www.oldham-chronicle.co.uk](http://www.oldham-chronicle.co.uk) > News > News Headlines 16<sup>th</sup> April 2012.

procedure.<sup>55</sup> Caubergs died hours after the procedure had been carried out. In 2012, Adeleye was found guilty of gross negligence manslaughter, by a majority verdict of ten to two, from the jury who had deliberated for eight hours.<sup>56</sup> She was given a 21 month suspended sentence.<sup>57</sup>

## 11. DISCUSSION

It is important to consider the recent legal activity regarding male circumcision in Germany and consider whether it is time to reassess corresponding legal provisions in the UK. There are several lessons that can be learned from the German experience.

It is clearly unsatisfactory for courts to pass judgments that appear to amount to the creation of a new criminal offence. Although English Courts have in the past made decisions which have seemingly authorised a retrospective development in criminal law,<sup>58</sup> it is clear that to do so runs the risk of creating legal uncertainty, potentially instigating a series of appeals to higher courts. Moreover, such decisions, passed by a small number of judges but affecting a significant number of people, have the potential to create social and legal chaos generally, and political unrest, (as was witnessed in Germany).

Supposing that English Parliament finds itself in a parallel situation to its German counterpart, how should it react? It is demonstrably clear that Parliament should not rush into passing legislation on such a matter.

With regard to circumcision, an ethical concern is the lack of informed consent. Clearly an infant is unable to consent for himself so the parents will act as his proxy. This, opponents of circumcision argue, is unfair and that the right to select a non-reversible procedure should not be left to parents, but to the child when he is mature enough to understand all the implications of the procedure. As children mature at different ages, should English law require a minimum age for lawful circumcision? This, it is submitted, would be the only way to reduce tensions should society deem that a child's consent must be obtained.

Perhaps the aspect of safety is of more concern. Is it ever ethically acceptable to perform *any* unnecessary operation on a child, or indeed an adult? If the answer to this is in the affirmative, the next question must be

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<sup>55</sup> Ibid.

<sup>56</sup> <http://www.mirror.co.uk/news/uk-news/circumcision-death-nurse-guilty-of-manslaughter-1490796#ixzz2SirU23c5>.

<sup>57</sup> <http://www.dailymail.co.uk/news/article-2276006/Nurse-Grace-Adeleye-caused-baby-boy-bleed-death-botched-home-circumcision-walks-free-court.html#ixzz2Sipom6ZX>.

<sup>58</sup> See for example the marital rape case *R v R* [1991] 3 WLR 767.

asked, is it ever ethically acceptable to perform any unnecessary operation on a child when the potential injury is severe? I would argue that it is not. However activists in favour of circumcision for religious reasons would argue that to outlaw ritual circumcision completely is an equally unsatisfactory suggestion, and does appear to be disproportionate to Article 9 of the European Convention of Human Rights.<sup>59</sup> Even if Parliament passed an Act banning all ritual circumcision, it is extremely likely the procedure would not stop, but take place in less sterile environments, ultimately leading to further fatalities.

## 12. RECOMMENDATIONS

By reducing NHS funding vulnerable children are at risk of injury and death when their parents seek back-street circumcision. Therefore, as a *minimum* requirement, it is recommended that legislation be passed requiring any would-be practitioner to undergo training and testing, to acquire a license to perform circumcision.<sup>60</sup> Further, it is submitted that all procedures must be performed in an pre-inspected and registered building which is within easy reach of emergency medical care. Finally the ritual of *metzitzah b'peh* needs to be considered carefully. It is submitted, as an absolute minimum legal requirement, that no unprotected oral contact is applied directly to the child in question

These modest recommendations to reform English Law, by drawing on the experiences surrounding the new German law which attempts to balance patient safety with religious observance, would assist in promoting intra-family Human Rights, without jeopardizing the life of its most vulnerable member.

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<sup>59</sup> Article 9 – Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, and to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

<sup>60</sup> Incorporating all the good practice specified by the Royal College of Surgeons. The Royal College of Surgeons England, 'Male Circumcision Guidance for Healthcare Practitioners'(2000)

[www.rcseng.ac.uk/publications/docs/male\\_circumcision.html/@@download/pdf/@@download/pdf/Circumcision.pdf](http://www.rcseng.ac.uk/publications/docs/male_circumcision.html/@@download/pdf/@@download/pdf/Circumcision.pdf).