

ARTICLE

Balancing Rights on a Knife Edge: The Legality of Non-Therapeutic Male Circumcision

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In 2012, a German court held that circumcision of a male infant may constitute child abuse. Given the worldwide religious and cultural importance of this practice, the court's decision caused substantial controversy and led many jurisdictions to question the procedure's legality. This article considers how the German court reached its decision, then moves to look at the New Zealand legal and social context. It examines relevant criminal, health and human rights law, including a focus on the New Zealand Bill of Rights Act 1990. It also compares the differences between infant male circumcision and its widely condemned counterpart, female genital mutilation. This article concludes that given the finely balanced rights, competing interests and relative medical neutrality of infant male circumcision, any change to the law in New Zealand is likely to come from Parliament, not the courts.

I Introduction

And ye shall circumcise the flesh of your foreskin; and it shall be a token of the covenant betwixt me and you.

—Genesis 17:11¹

Since circumcision is not medically warranted ... it would seem that as a nonaccidental physical injury, is properly included in the definition of child abuse.

—William E Brigman²

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1 *King James Bible* (eBook ed, Chadwyck-Healey, Cambridge, 1996) at Genesis 17:11.

2 William E Brigman "Circumcision as Child Abuse: The Legal and Constitutional Issues" (1985) 23 J Fam Law 337 at 338.

Male circumcision³ is the world's oldest known surgical procedure.⁴ Its practice forms an integral part of Jewish and Muslim tradition. It is still widely performed today, for a variety of religious and cultural reasons. But is it lawful?

A 2012 decision of the Landgericht Köln (Cologne Regional Court) called into question the legality of circumcision of male children, sparking a storm of controversy in Europe and beyond.⁵ Although the decision concerned a Muslim family, Germany's most-feared allegation was writ large: anti-Semitism. German Chancellor Angela Merkel herself was compelled to comment on the ruling. She reassured Germany's Jewish and Muslim communities that their right to religious freedom would prevail.⁶

The decision gave many countries pause for thought. Could circumcision be considered child abuse, as William E Brigman suggested? Does it warrant legal sanction? Should the practice of circumcision at least be regulated, something presently done only by Sweden?⁷ Do the rights to bodily integrity of a male minor outweigh the rights of his parents to express their religious or cultural freedom?

This article hopes to address those questions with regard to the New Zealand context. It will first consider the elements and impact of the German decision. The article then examines the place circumcision holds in New Zealand culture and discusses the relevant domestic law. It will then compare male circumcision to its controversial counterpart, female genital mutilation. In conclusion, it submits that any change in the legal status of elective male circumcision in New Zealand is unlikely to occur in the near future.

II Controversial Cutting: the Landgericht Köln Decision

A *The facts*

On 4 November 2010, Ali al-Akbar, the four-year-old son of a Tunisian national, was circumcised by Dr Omar Kezze in Cologne (Köln), Germany. Dr Kezze had performed this procedure at parents' requests many times before. Following the surgery, Ali's wound continued to bleed, allegedly because his mother removed his wound dressing too soon. The following day, Ali was taken to hospital where the wound was opened, the sutures replaced, and the bleeding stopped, all under general anaesthesia.⁸ Ali required no further medical attention.

In 2011, Dr Kezze was charged with aggravated battery. On the 21st of September that year, the Amtsgericht Köln⁹ refused to pursue the case. But on appeal, the Landgericht allowed the case to be tried.

3 The Royal Australian College of Physicians *Circumcision of Infant Males* (Paediatrics & Child Health Division, The Royal Australian College of Physicians, September 2010) at 6 [RACP statement].

4 CF Heyns and JN Krieger "Circumcision" in WB Schill, FH Comhaire and TB Hargreave (eds) *Andrology for the Clinician* (Springer, Berlin, 2006) 203 at 203.

5 Landgericht Köln 151 Ns 169/11, 7 May 2012.

6 "Angela Merkel backs circumcision right after German ruling" (13 July 2012) BBC News <www.bbc.com>.

7 "Circumcision Debate Has Berlin Searching for Answers" (25 July 2012) Spiegel Online International <www.spiegel.de/international>.

8 "Circumcision Debate Has Berlin Searching for Answers", above n 7.

9 The German equivalent of the New Zealand District Court.

B *The judgment*

The Court's judgment weighed up the rights of Ali, a minor unable to consent to the circumcision, with his parents' right to inaugurate him into their religious tradition. It held that the parental right to make decisions about the care of their children contained in the German Civil Code only extends to educational matters. This parental right must also be exercised in light of their child's best interests.

Ali was obviously too young to consent to the procedure himself. Although his mother gave consent, the Court held that such proxy consent was not sufficient to justify what it judged to be a serious invasion of Ali's bodily integrity. In attempting to balance the competing rights of the child and his parents, the Court found that the fundamental right of the child to bodily integrity and self-determination outweighed the parents' right to exercise their religious freedom.

In short, the Court held that parents may not have their minor male children circumcised for ritual or non-therapeutic purposes. Any such procedure must wait until the child himself can consent, having reached sufficient maturity to fully understand the proposed treatment.¹⁰

C *The verdict and its impact*

Despite its conclusion that parental consent does not justify performing non-therapeutic circumcision, the Court acquitted Dr Kezze. It said the law and literature surrounding circumcision of this kind was so unsettled, a mistake of law on his part was unavoidable.

Following publication and publicity of the court's decision, several hospitals in Austria and Switzerland suspended their circumcision services, citing alleged legal uncertainty.¹¹ The ensuing legal debate had been brewing for some time, according to Martin Killias of the University of Zurich. He said the German decision was simply a "point of ignition" that further fired up the debate.¹²

The decision also sparked sharp criticism from the Jewish community. Pinchas Goldschmidt, the President of the Conference of European Rabbis, called the decision "one of the gravest attacks on Jewish life in the post-[Holocaust] world".¹³ The Chief Rabbi of Britain, Jonathan Sacks, similarly stated:¹⁴

It is hard to think of a more appalling decision. Did the court know that circumcision is the most ancient ritual in the history of Judaism, dating back almost 4,000 years to the days of Abraham?

10 RACP statement, above n 3, at 16. For a discussion of when minors can consent to medical procedures, see *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 (HL) at 200. The Landgericht Köln decision would not apply in a situation where circumcision is medically indicated (for example, where an infant has phimosis), but rather concerns circumcision performed for non-therapeutic reasons. Subsequent references to "circumcision" in this article are to be understood as such.

11 Michael Cook "Debate over circumcision in Germany continues" (28 July 2012) BioEdge <www.bioedge.org>.

12 Sophie Douez "Swiss legal experts divided over circumcision" (16 July 2012) SWI Swissinfo.ch <www.swissinfo.ch/eng>.

13 Shari Ryness "Danish Jews fear domino circumcision ban following Germany ruling" (22 August 2012) European Jewish Press <www.ejpress.org>.

14 Jonathan Sacks "The Europeans' Skewed View of Circumcision" *The Jerusalem Post* (online ed, Jerusalem, 5 July 2012).

In Germany itself, a complaint was lodged in August 2012 against a Rabbi from the city of Hof for practising circumcision, citing the June decision.¹⁵ However, Deutsche Ethikrat (the German Ethics Council) has recommended that circumcision be allowed so long as its practice is regulated.

Whether or not the decision is ultimately reversed, it has provoked interesting comment from all corners. What does it mean for New Zealand? What, indeed, is New Zealand's current position on male circumcision?

III New Zealand's Circumcision Culture: Under the Knife and Under the Radar

A *Cultural and religious perspectives*

Ritual circumcision is practised by several minority religious groups in New Zealand who consider it integral to the observance of their beliefs: namely, members of the Jewish and Islamic faiths. These groups consider the performance of male circumcision an integral component of Abraham's covenant with God.¹⁶ While Islam does not specify an exact age at which the procedure should occur, Judaism dictates that the circumcision shall occur on the eighth day of life.¹⁷

However, infant circumcision in New Zealand has not always been the exclusive domain of religious minorities. In the late 19th century, circumcision was common practice among the middle and upper classes of Western countries such as the United States of America, Canada, the United Kingdom and Australia.¹⁸ As well as being considered hygienic, circumcision was employed to discourage masturbation, which was believed to lead to cause madness, epilepsy, and various other maladies.¹⁹ Circumcised males were also thought to be at less risk of penile cancer, and less likely to spread venereal disease.²⁰

Circumcision regained popularity in New Zealand during World War II. Faced with the prospect of hot climates and desert deployments, soldiers were encouraged to be circumcised in an effort to reduce sand-related infection and promote general cleanliness.²¹

Circumcision rates peaked in New Zealand in the 1950s,²² and subsequently declined.²³ The Royal Australasian College of Physicians estimates that between 10 and 20 per cent of male infants born in New Zealand and Australia are currently circumcised.²⁴ However,

15 Chris Cottrell "Charges filed against rabbi in Germany over circumcision" (23 August 2012) Reuters <www.reuters.com>.

16 Les Haberfield "The Law and Male Circumcision in Australia: Medical, Legal and Cultural Issues" (1997) 23 Mon LR 92 at 94.

17 At 94.

18 At 95.

19 Brigman, above n 2, at 339; and Haberfield, above n 16, at 95.

20 Haberfield, above n 16, at 95.

21 Hugh Young and Kenneth A McGrath "A Review of Circumcision in New Zealand: 'I never liked doing them and I was pleased to give it up'" (paper presented to the Sixth International Symposium on Genital Integrity, Sydney, 8 December 2000).

22 RACP statement, above n 3, at 6.

23 RA Lawrenson "Current practice of neonatal circumcision in the Waikato" (1991) 104(911) N Z Med J 184.

24 RACP statement, above n 3, at 5.

other statistics suggest that while the Australian rate may be around 25 per cent, the New Zealand rate may be as low as two per cent.²⁵

Despite circumcision's decline in popularity among the majority of New Zealanders, minority groups continue to observe the practice. Some Pacific Island cultures, including pre-European Maori, practised super-incision—the slitting of the dorsal prepuce—as a manhood ritual.²⁶ Missionaries to the Pacific Islands in the 19th and 20th centuries assimilated this custom of childhood super-incision with infant circumcision—something more in line with colonial culture. When immigrants from Tonga and Samoa arrived in New Zealand in the 1960s, they brought with them a tradition of male circumcision.²⁷ Reportedly, this tradition remains alive and well among these communities in New Zealand.²⁸

In an article in the *New Zealand Listener*, Alistair Bone cited the New Zealand Medical Council's statistic that while only one per cent of Caucasian boys were currently circumcised at birth, nearly 100 per cent of Tongan, Samoan and Jewish male infants underwent the procedure.²⁹ In the same article Dr Sitaleki Finau, a senior lecturer at Auckland Medical School and Professor of Public Health at the Fiji School of Medicine, said the tradition carried such importance within his culture that “[i]f you're not circumcised, you are not a man, you haven't gone through the rites of passage and you are considered dirty.”³⁰

New Zealand has had a strong tradition of infant male circumcision across various cultural and religious groups. However, that tradition has waned among the majority of New Zealanders. What standpoint does the public health system take on non-therapeutic male circumcision?

B *Health policy and practice*

There has been a great deal of recent research into the risks and benefits of circumcision, particularly because it seems that circumcised males carry a reduced risk of human immunodeficiency virus (HIV) infection.³¹ Routine circumcision has been identified by the World Health Organization as a possible weapon against the spread of heterosexually transmitted HIV, as well as offering other benefits, such as a reduced risk of genital cancer and urinary tract infection.³²

On the other hand, infant circumcision—like any surgical procedure—carries risks of complications and, potentially, ongoing psychological resentment by the individual.³³

Where circumcision is not indicated by other factors, it constitutes the removal of healthy tissue from an otherwise healthy child.

25 GL Williams “Newborn Circumcision: An Enigma of Health” (paper presented to the Second International Childbirth Conference, Sydney, 7 October 1992) at 3 as cited in Haberfield, above n 16, at 96.

26 RACP statement, above n 3, at 6.

27 Young and McGrath, above n 21.

28 See, for example, the discussion in Lindsay Watson “Pacific Circumcision of Boys” *Pacific Health Dialogue* (2007) 14(2) 157.

29 Alistair Bone “The First Cut” *New Zealand Listener* (Auckland, 17 November 2001) at 31–32.

30 At 32.

31 Heyns and Krieger, above n 4, at 203.

32 “WHO and UNAIDS announce recommendations from expert consultation on male circumcision for HIV prevention” (press release, 28 March 2007).

33 RACP statement, above n 3, at 9.

Weighing up these considerations, and taking into account Australasia's low HIV rates, the Royal Australasian College of Physicians concluded in its 2010 statement on male circumcision:³⁴

After reviewing the currently available evidence, the RACP believes that the frequency of diseases modifiable by circumcision, the level of protection offered by circumcision and the complication rates of circumcision do not warrant routine infant circumcision in Australia and New Zealand.

In practice, infant male circumcision is currently far from widespread in New Zealand.

Should parents decide to, how easy is it to have their newborn son circumcised here? According to Nicola Austin, Clinical Director of the Neonatal Service at Christchurch Women's Hospital, circumcisions are not performed in the newborn period in New Zealand's public health system.³⁵ The general advice given by clinicians in the public system is against routine circumcision.³⁶ Parents may opt to have the procedure performed privately by a paediatric urologist, and some obstetricians and general practitioners also offer to carry out the procedure on a fee-for-service basis.³⁷

C Conclusion

Clearly, non-therapeutic male circumcisions are performed in New Zealand. However, the practice seems to fly under the radar; it is not performed as a matter of course in the public health system, and seems to be the preserve of private clinicians and specialists who choose to offer the service. Might this status quo shift in light of the German court's decision?

IV New Zealand's Legal Position: Walking the Rights-Balancing Knife-Edge

The German judgment was a rights-balancing exercise, and any move to legislate against infant male circumcision in New Zealand would require the same balancing act. First, does New Zealand's current criminal law prevent circumcisions on non-consenting minors? Secondly, what legal instruments—domestic and international—bear on the rights of the child to his bodily integrity and the rights of his parents to express their beliefs?

A The criminal law

Dr Kezze, the defendant in the German case, was charged with criminal battery. Could New Zealand's criminal law similarly be used to convict a defendant doctor or practitioner who performs non-therapeutic circumcision on a male minor?

Common assault, s 196 of the Crimes Act 1961, encompasses the common law concepts of both assault (the threat of applied force) and battery (the actual application of force).³⁸ Despite use of the word "force", it is clear that even mere touching can amount

34 At 5.

35 Email from Nicola Austin (Neonatal Paediatrician, Canterbury District Health Board) to Phoebe Harrop regarding neonatal circumcision in the New Zealand public health system (29 July 2012).

36 Austin, above n 35.

37 Austin, above n 35.

38 Bruce Robertson and Jeremy Finn (eds) *Adams on Criminal Law 2014 Student Edition* (Brookers, Wellington, 2014) at [CA196.04].

to a battery.³⁹ Section 2 of the same Act defines assault as “the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly”. Surgical removal of healthy penile tissue—that is, circumcision—would amount to common assault on a plain reading of ss 196 and 2.

However, s 61A of the Crimes Act protects from criminal responsibility everyone who performs, with reasonable care and skill, any surgical operation, if done so with the consent of the person operated on and for a lawful purpose.

Similarly, s 20 of the Act preserves the common law defence of consent. Where the victim has consented to the defendant’s actions, or the defendant has a genuine belief that there is consent, the defendant may raise a defence to common assault. Since the child in this context cannot himself consent, our concern here is with the parent or guardian’s ability to consent on his behalf.

Section 204A(6) of the Crimes Act makes an exception to this defence in the context of female genital mutilation; consent, whether actual or perceived, is no defence to female genital mutilation. No similar provision is made for male circumcision.

As such, any possible liability turns on:

- (1) whether the performance of non-therapeutic circumcision on a male minor is a “lawful purpose” per s 61A; and
- (2) whether a parent’s proxy consent for circumcision of their child is valid.

B *Lawful purpose?*

In an obiter statement from his speech in *R v Brown*, Lord Templeman suggested that ritual male circumcision is a lawful activity.⁴⁰ However, his Lordship did recognise that what society considers lawful can change over time. If medical opinion reaches the point that circumcision’s risks seriously outweigh any benefits, the law may then respond by making the performance of non-therapeutic circumcision unlawful.

Given that no other statutory prohibition against male circumcision exists, and there is no New Zealand case law on this point, it seems that the “lawful purpose” element of s 61A does not present a barrier. Performing non-therapeutic circumcision is almost certainly a lawful purpose.

Therefore, in terms of criminal liability, as in the German case, the key legal issue is whether parents can consent to circumcision of their baby boys. Should parents be able to consent to such an invasive, irreversible and non-indicated treatment? The German court did not think so. How might a New Zealand court respond?

C *Is consent from a parent or guardian sufficient?*

A guardian of a child may consent on their behalf to any medical, surgical or dental procedure for which such consent is “necessary or sufficient”.⁴¹ In this context, a “child” encompasses a minor from birth to 15 years of age.⁴² On the assumption that circumcision is a procedure for which a guardian’s consent is sufficient, there will be no problems where a parent consents to the procedure, and a practitioner may circumcise a child at a parent’s request under the protection of s 61A of the Crimes Act.

39 See, for example *Police v Raponi* (1989) 5 CRNZ 291 at 296 per Wylie J.

40 *R v Brown* [1994] 1 AC 212 at 231.

41 Care of Children Act 2004, s 36(3).

42 PDG Skegg “Capacity to Consent to Treatment” in PDG Skegg and Ron Paterson (eds) *Medical Law in New Zealand* (Brookers, Wellington, 2006) 171 at 199.

However, there are some limits to the kinds of procedure parents can give proxy consent for.⁴³ Medical law authority Professor PDG Skegg cites as an example removing a healthy kidney from a healthy child, for transplantation to an unrelated adult, where there is no prospective benefit to the child.⁴⁴ Is the removal of healthy foreskin tissue from a newborn baby sufficiently distinct as to make parental consent valid?

The underlying assumption behind parents' or guardians' ability to consent to the medical treatment of dependent children arises from an assumption that they have the child's best interests in mind.⁴⁵ Consideration of whether a medical treatment is in a child's best interests may have a bearing on whether their parent can lawfully consent to that treatment. From a medical point of view,⁴⁶ it seems that the risks and benefits of non-therapeutic circumcision are roughly balanced. In a 2007 policy statement, the World Health Organization stated circumcision is safe when performed by well-trained health professionals.⁴⁷ As such, it is difficult to argue that non-therapeutic circumcision is strongly against a child's best interests, at least medically.

It may be argued that it is in a child's best interests to have the procedure done when they are in a position to consent themselves, probably in early adolescence. In terms of Jewish belief, however, "[the] timing is non-negotiable" and cannot wait until the child is able to consent himself.⁴⁸ Furthermore, "circumcision beyond early infancy is an extremely painful and probably traumatic procedure".⁴⁹

Les Haberfield suggests that when considering what is in a child's best interests, that child's spiritual well-being must be evaluated.⁵⁰ A child left uncircumcised in a Jewish, Muslim or Pacific Island community that values male circumcision may feel physically, spiritually and psychologically estranged from his religion and culture.⁵¹

It may be that the decision to circumcise or not should rightfully be left to parents and guardians to make. New Zealand law leaves many such decisions in parents' hands. It does not, for example, compel parents to have their children vaccinated or undergo metabolic screening at birth. However, circumcision is arguably distinct in that it involves a positive decision to submit a child to unindicated surgery, rather than a refusal to undergo minimally-invasive, recommended procedures.⁵² While they are more trivial, and more reversible in nature, tattoos or piercings performed on a child at a parent's request would probably not attract sanction.

There are many factors to consider when asking whether parents can lawfully consent to their child's circumcision. Given that cultural imperatives make it difficult to wait until the child himself can consent, the parental autonomy already provided by New Zealand law and the balance between medical risks and benefits, it seems reasonable to say that parental or guardian proxy consent is valid for male circumcision.

43 At 198.

44 At 198.

45 *Department of Health and Community Services v JWB and SMB [Marion's case]* (1992) 175 CLR 218 at 312 as cited in Haberfield, above n 16, at 106.

46 As discussed more fully above.

47 World Health Organization *New Data on Male Circumcision and HIV Prevention: Policy and Programme Implications: Conclusions and Recommendations* (March 2007) at 4.

48 "Circumcision in Germany: Incisive Arguments" *The Economist* (online ed, London, 7 July 2012).

49 Haberfield, above n 16, at 107.

50 At 107-108.

51 At 107-108.

52 For example, the Newborn Metabolic Screening heel prick test: "Newborn Metabolic Screening Programme" (3 December 2014) National Screening Unit <www.nsu.govt.nz>.

In his chapter on consent to treatment in *Medical Law in New Zealand*, Professor PDG Skegg suggests that “any decision about whether to outlaw the practice of male circumcision is best left to Parliament” and is unlikely to be adjudicated upon by a court.⁵³ As such, without an official law change, medical practitioners should not hesitate about the legality of non-therapeutic male circumcision as the Swiss and Austrian hospitals are doing.

D The United Nations Convention on the Rights of the Child

New Zealand’s international obligations may also have a bearing on the legality of non-therapeutic male circumcision. New Zealand signed the United Nations Convention on the Rights of the Child (CRC)⁵⁴ on 1 October 1990, and ratified the convention on 6 April 1993. Article 3(1) of the CRC highlights the importance of a child’s best interests as the primary consideration in any decision-making by States Parties. However, art 3(2) also mentions that the interests of parents should also be taken into account. As already discussed, there are many competing factors to consider when asking what acting in a child’s best interests means. On one hand, from an autonomy point of view, allowing non-therapeutic male circumcision of minors may go against affected children’s best interests. On the other hand, from a cultural or religious acceptance point of view, such circumcision may be in their best interests. As such, while it is important to keep in mind this imperative from the CRC, it is not overly helpful in adjudicating what is, objectively, in a child’s best interests.

Article 24(3) of the CRC is more specific. It says that “States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.” There is no doubt that ritual male circumcision is a “traditional practice”. But is it one that is “prejudicial to the health of children”? Given the earlier conclusion that such circumcision is probably medically neutral—in the sense that risks associated with it are roughly balanced by benefits (such as a reduced spread of HIV)—it is hard to maintain that ritual circumcision is “prejudicial” to a child’s health. Furthermore, the CRC was written at a time when ritual female genital mutilation was the human rights outrage du jour.⁵⁵ It seems likely that art 24(3) was written with the condemnation of this particular practice in mind, and was not intended to limit the practice of male circumcision.

Article 24(3) of the CRC has not sparked any changes to the domestic law of other States Parties with regard to ritual male circumcision, and is unlikely to impact New Zealand law significantly. However, New Zealand’s ratification of, and obligations to, the CRC does flavour the rights-balancing process, underlining the importance of children’s best interests and the obligation to protect children from harm.

E The New Zealand Bill of Rights Act 1990

The German court focused on finding a proportionate balance between what it saw as competing and conflicting rights: that of the child to his bodily integrity and personal autonomy, and that of his parent to inaugurate him in their religious tradition through the

53 PDG Skegg “Consent to Treatment: Introduction” in PDG Skegg and Ron Paterson (eds) *Medical Law in New Zealand* (Brookers, Wellington, 2006) 145 at 168.

54 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

55 Kirsten Bell “Genital Cutting and Western Discourses on Sexuality” (2005) 19 *Med Anthropol Q* 125 at 128.

ritual of circumcision. A similar rights-balancing exercise would need to be undertaken in New Zealand if a court or Parliament were to outlaw non-therapeutic male circumcision.

Two particular sections of the New Zealand Bill of Rights Act 1990 (NZBORA) may be in conflict here. These are s 11, the right to refuse medical treatment, and s 15, the right to manifestation of religion and belief. The freedoms expressed in these sections are not absolute: s 5 of the NZBORA says that they are subject to “such reasonable limits ... as can be demonstrably justified in a free and democratic society”.⁵⁶ Section 4 may also influence these rights, making it clear that other enactments are not impliedly repealed or revoked simply because they are inconsistent with NZBORA rights. As such, if a law banning ritual male circumcision was passed, it could not be struck down solely because of an inconsistency with, for example, s 15 of NZBORA.

(1) Section 11 of the NZBORA

Section 11 protects the right of a person to refuse medical treatment. This section recognises the right of autonomy over one’s own body, including both an internal sense of physical integrity, and external protection against violation of one’s body by others. New Zealand as a country appears to particularly value this protection of the human body; it is the only country to have enshrined the right to refuse medical treatment in a constitutional document.⁵⁷

That a child has the right to choose what happens to his or her own body seems beyond contention. But as already mentioned, s 11 is not an absolute right. From a practical point of view, a four-week-old baby whose parents wish him to be circumcised cannot make an informed choice on the matter. Someone else must make a proxy decision for that child, until he is sufficiently mature to decide for himself. In the NZBORA context, parental consent may operate as a s 5 justified and reasonable limit on a child’s right to complete bodily autonomy.⁵⁸ However it seems that such a limit would only be justified if the treatment proposed were judged to be in the child’s best interests.⁵⁹ In this context, there may be scope for seeking a medical opinion—rather than simply a parental one—about whether a treatment is in a child’s best interests.

Ultimately though, s 11 is unlikely to preclude parents from having their minor sons circumcised. As already discussed, the procedure is not sufficiently harmful to make it clearly against a child’s best interests, especially given the cultural and religious significance with which it may be associated. It follows that a parent’s proxy consent is probably valid as a s 5 limit on the child’s right under s 11.

(2) Section 15 of the NZBORA

The conclusion reached above is also supported by s 15, which enshrines a parent or guardian’s right to manifest their religion or belief. The performance of ritual circumcision on their son could constitute the “practice” or “observance” of a religion, for example Abraham’s command, or of a cultural belief, such as that shared by some Pacific Island groups.

56 New Zealand Bill of Rights Act 1990, s 5.

57 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at 248.

58 At 279.

59 *Secretary, Department of Health and Community Services v JMB and SMB* (1992) 15 Fam LR 392 at 12–13.

The right to manifest one's religion or belief is not absolute and is, like s 11, subject to the limiting provision of s 5 NZBORA. If, for example, a parent's belief system dictated that a female child should be circumcised, both ss 5 and 4 would operate to limit that parent's s 15 right.

One consideration may be whether the practice presenting conflict with another right (here, s 11) is an "integral part" of the religion or belief or whether the practice is a mere byproduct.⁶⁰ For the belief systems discussed—Judaism, Islam, Pacific Island groups—male circumcision appears to be an important rite of passage rather than a mere byproduct of each tradition. This factor would weigh in favour of a parent's s 15 rights being vindicated, even when in competition with a child's s 11 right.

F Conclusion

The key rights to be balanced here are the child's right to autonomy and his parents' right to express their beliefs. New Zealand's NZBORA may go further than the equivalent German Constitutional document in recognising parental rights to expression of religion and belief. While NZBORA specifically protects the right to refuse medical treatment, all of its rights are subject to reasonable limitations. One such limitation is probably the ability of parents to consent to the children's medical treatment, provided the treatment is in the child's best interests. Ritual male circumcision does not appear to be so harmful that allowing parents to consent to it would be an unjustified limit on a child's s 11 rights. Regardless of medical factors, it may be in a child's best interests to be circumcised if it means they are accepted into a faith or belief-system in which ritual circumcision is a central tradition. Ultimately, it seems unlikely that s 11 can justify a complete ban on ritual circumcision.

V The Male or Female Circumcision Distinction: A Conceptual Fallacy?

Although the legality of male circumcision in New Zealand remains up for debate, without a clear judicial or legislative indication to the contrary, its practice is probably legal. By contrast, there is no question that female genital mutilation is illegal in New Zealand.⁶¹ Why does it attract specific criminal sanction, while male circumcision remains legal?

As discussed above, it seems likely that art 24(3) of the CRC was written specifically to condemn female genital mutilation, a cultural practice abhorrent to Western ideals. Politically, male circumcision and female genital mutilation have always been kept well separate. Both involve the removal of healthy tissue from an otherwise healthy child, but the latter has been put on a completely different political plane—indicated, even, in the use of the word "mutilation" to describe the practice. While male circumcision could also be described as "male genital mutilation", it is not, probably because of its entrenchment in Jewish, Islamic and 20th Century Western culture. As RS Van Howe puts it, "[t]he notion that female circumcision is more damaging than male circumcision may be more the product of cultural blindness than any actual difference in severity."⁶²

60 Butler and Butler, above n 57, at 410. This test has been adopted by the European Court of Human Rights and the European Committee on Human Rights.

61 Crimes Act 1961, s 204A.

62 RS Van Howe and others "Involuntary circumcision: the legal issues" (1999) 83 BJUI Suppl 1 at 68.

Similarly, Kristen Bell contends:⁶³

Ultimately, the message is clear: genital mutilation is gendered. These male and female genital operations are not merely seen to differ in *degree*, they are seen to differ in *kind*. Thus, despite the heterogeneous voices speaking out against female circumcision, a common thread unites many: all forms of female genital cutting are seen to constitute a sexual mutilation and violation of bodily integrity, and male genital operations are dismissed as benign.

Are male and female circumcision sufficiently different that only the latter deserves international condemnation and specific criminal sanction?⁶⁴ Or is our cultural priming such that the former seems an acceptable, innocuous tradition, while the latter is just plain savagery? From a cultural and religious point of view, the reasons for ritual male and female circumcisions are often the same.⁶⁵ Distinguishing one procedure from the other may make sense to Western culture, but does not to many Africans, “who consider these operations to be fundamentally related in both their functions and effects”.⁶⁶ However, female genital cutting arouses greater passion in human rights policy than does male circumcision. While female circumcision is perceived as a vicious mutilation and invasion of bodily integrity, male circumcision connotes a health-promoting procedure in the eyes of many.⁶⁷ As already mentioned, the World Health Organization actually promotes male circumcision as a tool in the war against HIV transmission, while declaring female circumcision “universally unacceptable because it is an infringement on the physical and psychosexual integrity of women and girls and is a form of violence against them”.⁶⁸

The distinction may be justified. While female genital mutilation removes erogenous tissue such that the woman in question may never be able to reach orgasm, claims that male circumcision reduces sexual pleasure have never been substantiated. Furthermore, possible medical benefits of male circumcision may be weighed against the procedure’s invasiveness. In contrast, no medical benefits exist for female genital mutilation.

VI Stitching it Together: a New Zealand Conclusion

A New Zealand court is unlikely to make the same decision as the Landegericht Köln. New Zealand’s criminal law, health law and NZBORA all impact on the issue of non-therapeutic male circumcision, but do not give a definitive answer against its practice, unlike the clear illegality of female genital mutilation. While on one view the two practices are comparable in their infringement on individuals’ rights to bodily integrity, it seems unlikely that the legal status of elective male circumcision will be aligned with that of female genital mutilation anytime soon. While the latter will continue to attract Western condemnation, the former is likely to be practised widely across the globe, continuing long-standing religious and cultural traditions.

63 Bell, above n 55, at 131.

64 Crimes Act, s 204A.

65 Bell, above n 55, at 128.

66 At 128.

67 At 129–130.

68 *Female genital mutilation: A Joint WHO/UNICEF/UNFPA Statement* (World Health Organization, 1997) at 1.

Minority groups in New Zealand will likely continue to practice ritual male circumcisions, even if the procedure has fallen out of favour in mainstream culture. Any move to outlaw male circumcision would likely come from Parliament, not the courts. Given the finely balanced rights, competing interests and relative medical neutrality of the procedure, such a move is unlikely to occur in the near future.