A Close Look at the German and Australian Anti-FGM Framework-Concerns
About Equal Protection and Equal Application

By Dr. **Kerstin Braun**, Brisbane, Prof. Dr. **Martin Böse**, Bonn

I. Introduction

Estimates suggest that on a global scale more than 200 million females are living with Female Genital Mutilation ('FGM').[1] During FGM, female genital organs are altered or injured to varying degrees without a medical purpose.[2] While the practice mostly affects girls and women in some African, Asian and Middle-Eastern countries, cases of FGM have also been reported in Western states, including Germany and Australia. Both are states which have recently seen an increase in immigration,[3] including from countries where FGM is traditionally practiced.[4] In the international context, the issue is consistently discussed as a human rights violation and states are called upon to ensure that the relevant practices are criminalised. Over past decades, an increasing number of Western and African countries,[5] including Germany and Australia,[6] have responded to this phenomenon by enacting additional criminal laws specifically addressing the act of FGM.

This article first provides a brief introduction to the issue including how the World Health Organisation ('WHO') defines FGM and how the debate on FGM is framed in the international context. It subsequently analyses the anti-FGM laws introduced in Germany and Australia identifying similarities and differences. The analysis informs subsequent debate on whether the laws could be discriminatory in nature or applied arbitrarily based on two considerations. Firstly, the laws aim to protect migrant girls from harmful traditional practices and therefore exclusively focus on female genitals. This could be discrimination based on sex if male circumcision of infants and boys is a comparable practice and male and female procedures are treated differently without legitimate justification. Secondly, while the wording of the criminal laws suggests that they apply to all alterations of female genitals without a medical purpose, in practice, in both countries, they have been interpreted to only relate to traditional procedures excluding female genital cosmetic surgeries and genital piercings, performed with increasing popularity in the West. The article concludes that the legitimacy of the anti-FGM framework is doubtful in Germany and Australia based on these considerations and analyses avenues suggested to overcome these inconsistencies. It concludes that while some of the suggested approaches result in less protection for children too young to consent and are therefore undesirable, others are unlikely to find support in practice in Germany and Australia due to 'pragmatic' and political reasons as well as international pressure. This creates the problematic situation that the current anti-FGM framework will continue to operate in the two countries. The article closes by questioning whether governments can expect compliance with arbitrary criminal laws and relatedly whether these laws can have the desired impact on those who they are trying to protect in practice – girls with migrant backgrounds.

II. Background

The below provides background to subsequent analysis of anti-FGM laws in Germany and Australia by first outlining how FGM is understood including how the WHO defines the

[1] *Varol et al.*, Reproductive Health 2017 Vol. 14 Supplement 63, 1 (2). This article uses the term Female Genital Mutilation to refer to the practice as used in the criminal legislation it examines while recognising the associated negative connotations in regards to the term.

[2] World Health Organisation ('WHO'), Female Genital Mutilation – Fact Sheet (2019), p. 1, https://apps.who.int/iris/bitstream/handle/10665/112328/WHO_RHR_14.12_eng.pdf?ua=1 (1.12.2020).

[3] In Australia in 2019, 29,7 % of the population was born overseas, see: Australian Bureau of Statistics, Australia's Population by Country of Birth, https://www.abs.gov.au/statistics/people/population/migration-australia/latest-release (9.12.2020). In addition, in 2016, 21 % of the population were second generation Australians (born in Australia, but had one or both parents born overseas) see Australian Bureau of Statistics, Cultural Diversity in Australia, 2016 Census Article, https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Cultural%20Diversity%20Article~60 (1.12.2020). In Germany, in 2018, approximately 20.8 million people had a migrant background meaning the individual or at least one parent did not acquire German citizenship by birth. See: Statistisches Bundesamt, Migration and integration, https://www.destatis.de/EN/Themes/Society-Environment/Population/Migration-Integration/_node.html (1.12.2020).

[4] See, for example, Australian Institute of Health and Welfare, Discussion of Female Genital Mutilation/Cutting Data in Australia, 2019, p. 3, https://www.aihw.gov.au/getmedia/c11f1392-8343-4672-bee3-c296eaa019e4/aihw-phe-253.pdf.aspx?inline=true (1.12.2020).

[5] On European countries with anti-FGM laws see: *Banasik*, Progress in Health Science 2015 Vol. 5 No. 2, 216 (220). On African countries with anti-FGM laws see *Aberese Ako/Akweongo*, Reproductive Health Matters 17 (2009) Issue 34, 47.

[6] Strafgesetzbuch (Penal Code, Germany) § 226a ('StGB'); Crimes Act 1900 (ACT) sections 73–77; Crimes Act 1900 (NSW) sections 45, 45A; Criminal Code Act (NT) sections 186A–186D; Criminal Code 1899 (Qld) sections 323A–323B; Criminal Law Consolidation Act 1935 (SA) sections 33–33B; Crimes Act 1958 (Vic) sections 32–34A; Criminal Code Act 1924 (Tas) sections 178A, 178B, 389; Criminal Code (WA) section 306.

practice prior to analysing how the international debate on FGM is framed.

1. What is FGM?

FGM is traditionally practiced in a number of African, Middle-Eastern and Asian countries.[7] Types of FGM vary. As per the definition of the WHO, FGM is the 'partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons'.[8] On this basis, the WHO developed a classification system grouping the procedure into four main types: type 1 relates to the partial or total removal of the clitoris (clitoridectomy), type 2 to the partial or total removal of the clitoris and the labia (excision) and type 3 to the narrowing of the vaginal orifice (infibulation). Type 4 is the widest category and concerns all other interventions on female genitalia for non-medical purposes, including pricking, piercing, incisions and scraping.[9] It has been estimated that around 85–90 % of all FGM cases fall under types 1, 2 and 4,[10] with the most extreme form of FGM, type 3, occurring in around 10 % of cases in African countries.[11] The timing of the procedure also varies greatly between cultural groups. While some females are cut as infants, many undergo the procedure when they are aged between five and eight.[12] FGM can also be performed on older girls and women.[13]

While no evidence suggests that physical health benefits are associated with FGM, numerous health risks have been attributed to certain types including haemorrhage, pain, bleeding, infections, sexual and gynaecological problems as well as psychological trauma including post-traumatic stress disorder, anxiety and depression.[14] Yet, some point out that a high percentage of women in Africa who have undergone the procedure have fulfilling sexual activity[15] and that the frequently described health complications relating to FGM procedures are exaggerated.[16]

Explanations provided in the literature for the reasons behind the practice include: marking the commencement of womanhood (rite of passage); safeguarding women's chastity prior to marriage; perceived hygiene and aesthetics reasons; religious motivations and supressing sexuality in order to prevent unfaithfulness of the female spouse.[17] Frequently, FGM appears to be undertaken to comply with cultural and social norms. In some cultural groups, females are unable to marry if the procedure has not been performed leaving them economically vulnerable and socially excluded. *Shahid* and *Rane* explain that 'women from more patriarchal societies like Sub-Saharan Africa gain recognition through marriage and childbirth'.[18] In scholarship, the inability to marry without having FGM performed is often considered one of the main reasons for the continuance of the practice on girls and young women.[19]

Some scholars point out, however, that contrary to the above explanations males and females in many practicing communities do not associate FGM with male domination or controlling women's sexuality but merely see it as a tradition which must be followed.[20] Others note that females also undergo FGM because they perceive it as a fundamental part of their cultural identity[21] and may even consider it a stance against colonialism.[22]

In light of the above, women organising the procedure for female family members will often believe to be acting in the best interest of the child in the context of the particular cultural setting.[23] The above reasons may also provide an explanation as to why some adult women elect to undergo FGM.

2. The International Debate on FGM

In the international human rights context, the debate on female circumcision, later redefined as FGM, is unanimously framed and condemned as a practice violating the human rights of girls and women. As such a wide range of practices

[7] *Shahid/Rane*, Journal of Obstetrics and Gynaecology 37 (2017), 1053.
[8] *WHO et al.*, Eliminating Female Genital Mutilation – An Interagency Statement – OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO, 2008, p. 1.
[9] *WHO et al.* (fn. 8), p. 4.
[10] *Krasa*, Medical Health Care and Philosophy 13 (2010), 269 (270); *WHO*, Sexual and Reproductive Health – Female Genital Mutilation (FGM) Prevalence of FGM, https://www.who.int/reproductivehealth/topics/fgm/prevalence/en/ (1.12.2020).
[11] *Stanley Yoder/Khan*, DHS Working Papers 2008 No. 39 (United States Agency for International Development), p. 14; *WHO* (fn. 10).
[12] *Gaffney-Rhys*, The International Journal of Human Rights 24 (2020), 457 (458).
[13] *WHO*, Female Genital Mutilation: Fact Sheet (WHO, 2018), https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation (1.12.2020).
[14] *Zurynski et al.*, Archive of Diseases in Childhood 102 (2017), 509; *Matthews*, Medical Journal Australia 2011 Vol. 194 No. 3, 139 (140).
[15] See, for example: *The Hastings Centre*, Report: Seven Things to Know about Female Genital Surgeries in Africa, 2012, p. 22; *Ahmadu/Shweder*, Anthropology Today 2009 Vol. 25 Issue 6, 14.
[16] See, for example: *The Hastings Centre* (fn. 15), p. 22, 23.
[17] *Shahid/Rane*, Journal of Obstetrics and Gynaecology 37 (2017), 1053. See also *WHO et al.* (fn. 8), p. 5–7; *Matthews*, Medical Journal Australia 2011 Vol. 194 No. 3, 139 (140).
[18] *Shahid/Rane*, Journal of Obstetrics and Gynaecology 37 (2017), 1053 (1057).
[19] See also discussion in *Gaffney-Rhys*, The International Journal of Human Rights 24 (2020), 457 (458 et seq.).
[20] *Kalev*, Sex Roles 2004 Vol. 51 Issue 5, 339 (347); *The Hastings Centre* (fn. 15), p. 23.
[21] *Green/Lim*, Social & Legal Studies 7 (1998), 365 (369).
[22] See discussion in *Ngarũiya Njambi*, Critical Sociology 33 (2007), 689.
[23] *Gaffney-Rhys*, The International Journal of Human Rights 24 (2020), 457 (459).

from different locations are, without differentiation, collapsed into the single term 'FGM' underpinning the international debate.[24]

Commencing in the 1990s, the UN Committee on the Elimination of Discrimination Against Women ('CEDAW') encouraged parties to take steps to eliminate female circumcision – as the practice was referred to at the time.[25] In 1992, the Committee issued General Recommendation 19 calling upon Member States 'to take measures to overcome' female circumcision due to it being considered discriminatory to women.[26] One year later, the UN General Assembly in Resolution 48/104 set out that violence against women included FGM.[27] International calls to eradicate the practice were reiterated in 1997 through a joint statement by the WHO, UNICEF and the UN Population Fund.[28] In the mid-1990s, the procedure was redefined in international debate as female genital mutilation in order to account for the severity of the injury and to differentiate it from male circumcision.[29] Subsequently, in 1999, the UN General Assembly called upon Member States to implement national laws to prohibit traditional or customary practices harmful to women including FGM.[30] Further resolutions by the General Assembly to intensify global efforts for the elimination of female genital mutilations and to ban FGM worldwide followed in 2012 and 2014.[31] Likewise, the Council of Europe in 2014 adopted the Convention on Preventing and Combating Violence against Women and Domestic Violence (the 'Istanbul Convention'). The Istanbul Convention addresses FGM in Article 38 and calls upon parties to ensure that FGM is criminalised in the respective state.

In the human rights context, performing FGM is seen as a violation of the right to health and life, the right to private and family life and the right of children to be protected from violence, abuse, neglect and mistreatment. Some have classified FGM as torture.[32] These rights are internationally protected by, *inter alia*, the International Covenant on Civil and Political Rights 1966,[33] the International Covenant on Economic, Social and Cultural Rights 1966, [34] the UN Convention on the Rights of the Child 1989,[35] the UN Convention on the Elimination of all forms of Discrimination Against Women 1979,[36] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987.[37] The WHO, for example, emphasises that

> 'FGM is recognized internationally as a violation of the human rights of girls and women. It reflects deep-rooted inequality between the sexes, and constitutes an extreme form of discrimination against women. It is nearly always carried out on minors and is a violation of the rights of children. The practice also violates a person's rights to health, security and physical integrity, the right to be free from torture and cruel, inhuman or degrading treatment, and the right to life when the procedure results in death.'[38]

Bronitt notes that by presenting FGM as a human rights issue, it has mostly been 'depoliticised' and in many countries

[24] See also discussion in *Green/Lim*, Social & Legal Studies 7 (1998), 365 (371–373).

[25] CEDAW, General Recommendation No 14: Female Circumcision, 1990, contained in document A/45/38.

[26] CDEAW, General Recommendation No 19: Violence Against Women, 1992, contained in document A/47/38, https://oursplatform.org/wp-content/uploads/CEDAW-Committee-General-Recommendation-19-Violence-against-Women.pdf (1.12.2020).

[27] UN General Assembly, Resolution 48/104, Declaration on the Elimination of Violence Against Women (20 December 1993).

[28] *WHO et al.*, Female Genital Mutilation – A Joint WHO/ UNICEF/UNFPA Statement, 1997.

[29] *WHO et al.* (fn. 8), p. 3.

[30] General Assembly, Resolution 53/117: Traditional or Customary Practices Affecting the Health of Women and Girls (1999) UN Doc A/RES/53/117, p. 3.

[31] General Assembly, Resolution 67/147: Intensifying Global Efforts for the Elimination of Female Genital Mutilations (2012) UN Doc A/RES/67/146; General Assembly, Resolution 69/150: Intensifying Global Efforts for the Elimination of FGM (2014) UN Doc A/Res/69/150.

[32] Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, A/HRC/7/3 of 15 January 2008, paras. 53, 54; Confirmed Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, A/HRC/31/57 of 5 January 2016, para. 62.

[33] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess, Supp No. 16, U.N. Doc A/6316 (entered into force Mar. 23, 1976) [hereinafter ICCPR] Art. 3 (non-discrimination), 24 (child protection).

[34] See International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp No. 16, U.N. Doc A/6316 (entered into force Jan. 3, 1976) Article 12 (enjoyment of the highest attainable standard of health).

[35] Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc A/441736 (1989, hereafter Convention on Rights of the Child) Article 19 (protection from violence).

[36] See Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Mar. 1, 1980, 1249 U.N.T.S. 14 (entered into force Sept. 3, 1981) Articles 2 (discrimination), 15 (equality with men), 16 (discrimination in health care).

[37] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984, entered into force 26 June 1987) Articles 2 (preventing acts of torture), 16 (acts of cruel, inhuman or degrading treatment).

[38] *WHO et al.* (fn. 13).

'outlawed without the need to participate in broader debates over feminism and multiculturalism'.[39]

Perhaps to be more in line with these international obligations and similar to the developments in many other Western and African countries, Germany and Australia have introduced specific laws criminalising FGM. The below analyses the criminal law response to FGM in the two countries. In doing so, it first considers the introductory history of FGM laws before assessing the respective statutory provisions ultimately illuminating similarities and differences between the two states.

III. Criminal Law Response in Germany and Australia

1. Germany

As FGM is a traditional practice originating in non-European countries, it had not been addressed by a specific offence under German criminal law for decades. In the past, the debate around FGM in the German context revolved more around the question of whether the procedure can be considered a human rights violation triggering a right to asylum in Germany to prevent the female from having to undergo the surgery in her home country.[40] However, given the strong influence of cultural traditions, there were reasons to believe that FGM had not only been performed on women before they immigrated to Germany, but also on girls born in Germany. According to recent estimates by *Terre Des Femmes*, about 65,000 women living in Germany have had FGM performed on them, and almost 15,000 girls are at risk of either having the procedure secretly carried out in Germany or being taken abroad for this purpose.[41] The rising awareness for FGM triggered a political debate on criminal law reform (as discussed under a), which resulted in the adoption of a new criminal offence in 2014 (as discussed under b).

a) Legal Background

As pointed out above, German law did not provide for a criminal offence specifically addressing FGM until 2013. The lack of specific legislation, however, did not mean that FGM was not at all punishable under German law as the general criminal offences on inflicting bodily harm applied (§§ 223 et seq. German Penal Code). In 2001, this assumption was confirmed by a judgment of the District Court Münster.[42] In this case, the stepfather of the 15-year-old victim cut her labia minora after he talked her into believing that this would enhance her sexual enjoyment. The perpetrator was convicted of causing bodily harm by dangerous means (§ 224 [1] No 1 Penal Code, use of a scalpel without being a surgeon) and sentenced to three years and three months. Interestingly, the case, Germany's first and only reported FGM conviction, is entirely unconnected to cultural traditions.

Nevertheless, the lack of specific FGM law, and relatedly the necessity to rely on the general criminal provisions concerning causing bodily harm, raised concerns whether criminal liability could be avoided by grounds of justification (consent) or excuse (religious belief).[43] Thus, in 2009, a first legislative proposal for a criminal law reform was tabled in Parliament.[44] The initiators of the proposal argued that, even though FGM was punishable under German criminal law, a reform was necessary to provide for an adequate penalty reflecting the gravity of the crime and the harm suffered by the victim, and to protect other potential victims by amending the statute of limitations and extraterritorial jurisdiction where FGM is performed abroad.[45] The proposal did not pass the legislative process but paved the way for law reform in the following parliamentary term, where three reform proposals were presented, namely an amendment to § 224 Penal Code (causing bodily harm by dangerous means)[46], an amendment to § 226 Penal Code (causing grievous bodily harm)[47], and the introduction of a new criminal offence of FGM (§ 226a Penal Code)[48]. The first option was rejected because the gravity of the offence resulted from the serious harm inflicted on the victim rather than the mere risks of the procedure.[49] The second proposal (amendment to § 226 Penal Code) placed FGM in an adequate systematic context (grievous bodily harm), but incorporated the conduct in an offence that first and foremost applies to serious consequences that have been caused by negligence ('erfolgsqualifizierte Delikte', § 18 Penal Code). Where the offender has caused such consequences on purpose or knowingly (i.e. with direct in-

[39] *Bronitt*, Health Care Analysis 6 (1998), 39.

[40] Verwaltungsgericht Magdeburg (Magdeburg Administrative Court), Judgment of 20.6.1996 – 1 A 185/95 (ECLI:DE:VGMAGDE:1996:0620.1A185.95.0A); more recently Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court of Northrhine-Westfalia), Judgment of 14.2.2014 – V 1 A 1139/13.A, paras. 44 ff.; Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria), Judgement of 22.2.2017 – 9 ZB 17.30027, paras. 4 f. (ECLI:DE:BAYVGH:2017:0222.9ZB17.30027.0A).

[41] *Terre des Femmes*, Dunkelzifferstatistik zu weiblicher Genitalverstümmelung in Deutschland 2018, https://www.frauenrechte.de/images/downloads/fgm/TDF-Dunkelzifferstatistik-2018-Bundeslaender.pdf (1.12.2020).

[42] Landgericht Münster (Münster District Court), Judgment of 11.3.2002 – 16 Ns 122/00, 16 Ns 55 Js 1669/99.

[43] *Rosenke*, Zeitschrift für Rechtspolitik 2001, 377 (378–379).

[44] Deutscher Bundestag (Parliament of the Federal Republic of Germany), Drucksache 16/12910, 6.5.2009.

[45] Deutscher Bundestag (Parliament of the Federal Republic of Germany), Drucksache 16/12910, 6.5.2009, p. 6.

[46] Deutscher Bundestag (Parliament of the Federal Republic of Germany), Drucksache 17/12374, 19.2.2013.

[47] Deutscher Bundestag (Parliament of the Federal Republic of Germany), Drucksache 17/4759, 9.2.2011; see also the proposal of 2009, Drucksache 16/12910, 6.5.2009.

[48] Deutscher Bundestag (Parliament of the Federal Republic of Germany), Drucksache 17/1217, 24.3.2010, and Drucksache 17/13707, 4.6.2013.

[49] Deutscher Bundestag (Parliament of the Federal Republic of Germany), Drucksache 17/13707, 4.6.2013, p. 4; *Schramm*, in: Heger/Kelker/Schramm (eds.), Festschrift für Kristian Kühl zum 70. Geburtstag, 2014, p. 603 (626).

tent), as would be the case in FGM proceedings, § 226 (2) Penal Code provides a minimum sentence of imprisonment of no less than three years. As a consequence, a conviction under this section for FGM would automatically result in the deportation of those perpetrators from Germany who are refugees, including close family members of the victim.[50] In order to avoid this consequence, the legislator finally adopted a new provision on FGM (§ 226a Penal Code), which entered into force on 28 September 2013.[51]

b) Criminal Law

According to § 226a (1) German Penal Code, the mutilation of the external genitalia of a female shall be punished by imprisonment of no less than one year. In less serious cases, the penalty shall be imprisonment from six months to five years (§ 226a [2] Penal Code).

The material scope of the new offence is defined by the term 'mutilation'. According to the legislative materials, this concept refers to the WHO classification and covers all four types of FGM.[52] On the other hand, the new offence shall not apply to less serious interventions (cosmetic surgery, genital piercing) which, so the explanatory memorandum argued, do not substantially affect the physical integrity of the victim.[53] This understanding, however, is not compatible with the classification of the WHO defining FGM as 'all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons'.[54] Due to the significant minimum penalty (imprisonment of no less than one year), the prevailing opinion in German legal scholarship has resolved this inherent contradiction by a strict interpretation of the term 'mutilation', requiring serious bodily harm and, thereby, excluding less severe interventions (i.e. certain forms of type I and type IV, e.g. the removal or piercing of the clitoral hood) from the scope of the new offence.[55]

The new provision does not explicitly address the question of whether a victim can legally consent to the procedure. Thus, the general rules on consent as a justification under German criminal law apply.[56] According to these rules, consent given by minors or obtained by means of force or compulsion is invalid and, thus, cannot justify the prohibited conduct.[57] In addition, consent is invalid where the conduct violates public morals (§ 228 Penal Code). The broad and vague term of public morals notwithstanding, the underlying rationale of § 228 is to rule out any justification of serious crimes inflicting bodily harm even if the affected person has given his/her consent. Accordingly, a violation of public morals referred to in § 228 requires grievous bodily harm (or at least a corresponding risk).[58] While the explanatory memorandum assumes that FGM generally constitutes GBH and thus renders consent invalid *per se*,[59] it remains doubtful whether § 228 applies to all forms of FGM, especially those where little or no harm occurs. In this regard, it is quite remarkable that the explanatory report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence states that legally valid consent to less severe forms of FGM may take away criminal liability.[60] Similarly, parental consent generally may exclude criminal liability, but is subject to the requirement that parental custody and consent to medical (and non-medical) treatment must not jeopardise the best interests of the child (§§ 1626, 1627 German Civil Code). Accordingly, (serious) cases of FGM covered by § 226a ('mutilation') cannot be justified by parental consent.[61] Since consent is not given by the person concerned (the girl), parental consent is subject to stricter requirements (best interests) than the threshold laid down in § 228 Penal Code. This higher threshold is based upon the reasoning that children are particularly vulnerable

[50] Deutscher Bundestag (Parliament of the Federal Republic of Germany), Drucksache 17/1217, 24.3.2010, p. 2; *Hahn*, Zeitschrift für Rechtspolitik 2010, 37 (39); for a critical view on this argument: *Schramm* (fn. 49), p. 618–621.

[51] Gesetz zur Änderung des Strafgesetzbuches (Act on Female Genital Mutilation, Germany) from 24.9.2013, BGBl. I, 2013, p. 3671.

[52] Deutscher Bundestag (Parliament of the Federal Republic of Germany), Drucksache 17/13707, 4.6.2013, p. 6.

[53] Deutscher Bundestag (Parliament of the Federal Republic of Germany), Drucksache 17/13707, 4.6.2013, p. 6; see also Drucksache 12/1217, 24.3.2010, p. 7.

[54] *Böse*, in: Kindhäuser/Neumann/Paeffgen (eds.), Nomos Kommentar, Strafgesetzbuch, Vol. 2, 5th ed. 2017, § 226a para. 9; *Hardtung*, in: Joecks/Miebach (eds.), Münchener Kommentar zum Strafgesetzbuch, Vol. 4, 3rd ed. 2017, § 226a para. 40.

[55] *Böse* (fn. 54), § 226a para. 13; *Grünewald*, in: Laufhütte/Rissing-van Saan/Tiedemann (eds.), Strafgesetzbuch, Leipziger Kommentar, Vol. 7/1, 12th ed. 2019, § 226a para. 27–28; *Hardtung* (fn. 54), § 226a para. 86–88, 99; *Schramm* (fn. 49), p. 628; *Sternberg-Lieben*, in: Schönke/Schröder, Strafgesetzbuch, Kommentar, 30th ed. 2019, § 226a para. 3; *Wolters*, in: Wolter (ed.), Systematischer Kommentar zum Strafgesetzbuch, Vol. 4, 9th ed. 2017, § 226a para. 13; for the contrary view (all types of FGM covered): *Eschelbach*, in: v. Heintschel-Heinegg (ed.), Beck'scher Online-Kommentar zum Strafgesetzbuch, 43rd ed., 1.8.2019, § 226a para. 9; *Fischer*, Strafgesetzbuch mit Nebengesetzen, 66th ed. 2019, § 226a para. 11.

[56] *Hardtung* (fn. 54), § 226a para. 102.

[57] *Sotiriadis*, Zeitschrift für Internationale Strafrechtdogmatik 2014, 320 (328); Sternberg-Lieben (fn. 55), § 226a para. 5.

[58] Bundesgerichtshof (German Federal Court of Justice), Judgment of 26.5.2004 – 2 StR 505/03 = BGHSt 49, 166 (171–172).

[59] Deutscher Bundestag (Parliament of the Federal Republic of Germany), Drucksache 17/13707, 4.6.2013, p. 6.

[60] Council of Europe, Explanatory report, para. 156, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d383a (1.12.2020).

[61] Bundesgerichtshof (German Federal Court of Justice), Judgment of 15.12.2004 – XII ZB 166/03 = Neue Juristische Wochenschrift 2005, 672 (673); *Böse* (fn. 54), § 226a para. 17; *Grünewald* (fn. 55), § 226a para. 32.

and therefore should be protected against any kind of physical harm which is not objectively justified by their best interests. As a consequence, even less severe cases of FGM, in particular those procedures outside the scope of § 226a Penal Code, may not be justified by parental consent, either.[62] There is, however, an exception for male circumcision (§ 1631d German Civil Code), which can hardly be reconciled with the assumption that parental consent to any type of FGM is strictly prohibited (see IV. 1.).

The introduction of the new offence has been supplemented by provisions on the statute of limitations and extraterritorial jurisdiction that should ensure an effective prosecution of the criminalised conduct. According to the general rules, prosecution of FGM is time-barred after expiry of 20 years following the commission of the crime (s 78 [3] No 2 Penal Code). Since FGM is usually performed on girls who are not capable of reporting the crime to the competent authorities, the limitation period shall be stayed until the victim has reached the age of 30 years (s 78b [1] No 1 Penal Code). The provision postpones the beginning of the limitation period in order to enable victims to report the crime to the police and to trigger a criminal investigation when they have reached the age of majority (see also Art. 58 of the Council of Europe Convention on Preventing and Combatting Violence against Women).[63]

In addition to the reform of 2013, the legislator established extraterritorial jurisdiction over criminal offences under § 226a FGM committed abroad if the offender is German or the victim has her permanent residence in Germany (§ 5 No. 9a lit. b Penal Code).[64] Thereby, the legislator addressed the constellation that girls were removed from German territory in order to carry out the mutilation abroad and, thereby, to circumvent the domestic prohibition of FGM.[65] In particular, the new provision should enable the law enforcement authorities to prosecute so-called 'holiday circumcisions' ('Ferienbeschneidungen'), where the mutilation could not have been prevented by a court order prohibiting the parents from removing their daughter from German territory.[66] By extending criminal jurisdiction to crimes committed abroad, the German legislator followed a recommendation of the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child.[67]

In contrast to the estimated dark figure of 65,000 women living with FGM in Germany and nearly 15,000 at risk, no criminal trial concerning FGM has taken place and it has taken five years for the first cases of FGM to be reported to the police.[68]

2. Australia

Australia is often referred to as a 'traditional country of immigration' as it historically encouraged immigration for development purposes.[69] Between 1999 and 2009 alone, around 40,000 persons immigrated to Australia from Sudan, Somalia, Egypt and Ethiopia.[70] All of these states have high FGM rates.[71] Exact numbers of females with FGM living in Australia, however, are unavailable. This is to do with the fact that detected cases are not 'routinely coded in paediatric medical records'[72] in Australia and a formal FGM registry does not exist.[73] A 2018 report by 'No FGM Australia' based on UNICEF data, Australian migration figures and birth rates estimates, however, states that 209,099 women are likely either survivors or at high risk of FGM and that 3,876 girls born in Australia are at high risk of FGM each year.[74] The Australian Institute of Health and Welfare estimates that 53,000 girls and women born outside of Australia but living in Australia in 2017 had FGM performed on them (0.4 % of

[62] Bundesgerichtshof (German Federal Court of Justice), Judgment of 15.12.2004 – XII ZB 166/03 = Neue Juristische Wochenschrift 2005, 672 (673).

[63] Deutscher Bundestag (Parliament of the Federal Republic of Germany), Drucksache 17/13707, 4.6.2013, p. 5.

[64] Gesetz zur Änderung des Strafgesetzbuches (Act on the Implementation of European law on Sex Offences, Germany), 21.1.2015, BGBl. I, 2015, p. 10.

[65] Deutscher Bundestag (Parliament of the Federal Republic of Germany), Drucksache 18/2601, 23.9.2014, p. 21–22.

[66] Bundesgerichtshof (German Federal Court of Justice), Judgment of 15.12.2004 – XII ZB 166/03 = Neue Juristische Wochenschrift 2005, 672, confirming a court order prohibiting a Gambian woman to remove her 5-year-old daughter to Gambia in order to protect the girl against FGM.

[67] Joint general recommendations No. 31 of the CEDAW and the Committee on the Rights of the Child (CRC) on harmful practices CEDAW/C/GC/31-CRC/C/GC/18, No. 55 lit. l.

[68] In 2018, four cases have been reported and half of them have been solved; three suspects (1 male, 2 females) were identified: Polizeiliche Kriminalstatistik 2018 (Police Crime Statistic of 2008 of the German Federal Criminal Police Office), Grundtabelle V 1.0, Schlüssel 222040. Apparently, the official statistics listed 5 convictions of FGM (and 4 acquittals) in the preceding years (2014–2017): Statistisches Bundesamt (German Federal Statistical Office), Fachserie 10 Reihe 3, Rechtspflege – Strafverfolgung 2014–2017, sub 2.1. However, further inquiry has established that these data have been due to errors in compilation (email from the German Federal Statistical Office of 7 October 2019).

[69] Migration Policy Institute, The Top Sending Countries of Immigrants in Australia, Canada, and the United States, https://www.migrationpolicy.org/programs/data-hub/top-sending-countries-immigrants-australia-canada-and-united-states (1.12.2020).

[70] *Varol et al.*, Reproductive Health 2017 Vol. 14 Supplement 63, 1 (2).

[71] *Varol et al.*, Reproductive Health 2017 Vol. 14 Supplement 63, 1 (2). These rates range between 74–98 %.

[72] *Zurynski et al.*, Archive of Diseases in Childhood 102 (2017), 509 (510).

[73] *Zurynski et al.*, Archive of Diseases in Childhood 102 (2017), 509 (510). This is different in the UK, where such a register exists.

[74] No FGM Australia, Report FGM Prevalence in Australia, 2018.

Australia's female population). The number of females with FGM living in Australia increased by 17 % between 2011 and 2017 due to the increased immigration of women from countries with high FGM rates including Egypt, Ethiopia, Somalia, Sudan and Iraq.[75]

a) Legal Background

FGM attracted much public attention in Australia for the first time in November 1993. At the time, a case concerned with two sisters (18 months and 3 years) and questions of protection from their physically abusive father was heard in the Children's Court in Melbourne, Victoria.[76] During the proceedings the infibulation of the girls was discovered.[77] The case subsequently received a large amount of media coverage, much of which was sensationalised reporting.[78] The sensationalism may be related to the climate in Australia at the time, which scholars describe as one of 'political and social unease' with the approaching First Gulf War and related fears of a 'Muslim invasion'.[79] In addition, it has been said that a migration wave of women from the Horn of Africa in the early 1990s and their presence in Australian cities on the East coast created uncomfortable awareness of 'racial and religious differences' in the majority population.[80]

From late 1993, calls were made in Australia to condemn FGM by especially criminalising it and immediately enacting relevant legislation. Public discourse was significantly influenced by the Family Law Council, which was tasked with preparing a report for the Attorney-General,[81] lobby groups of female lawyers, newspapers and both state and federal politicians. The arguments at the time in favour of introducing specific laws mirror the above-described German debate and were mainly based on two considerations: 1. excluding consent as a justification and 2. addressing FGM procedures performed abroad on females usually residing in Australia.

It should be noted that the act of mutilating another person was already criminalised in Australian jurisdictions as assault, wounding or causing grievous bodily harm depending on the type of harm inflicted. Yet, concerns were raised as to whether the possibility to consent to some forms of assault could possibly take away the perpetrator's criminal responsibility or whether the person performing the procedure could rely on a defence available to persons performing medical treatment.[82] Case law in the Anglo-Australian context suggests that a person can provide valid consent to bodily harm where this is seen to be in the 'public interest'. Such an interest has been affirmed for cases relating to a 'reasonable surgical interference'.[83] It was unclear whether FGM could be understood as such a reasonable surgical interference.[84] Furthermore, it was pointed out that taking the victim abroad with the intention of having the procedure performed on the child overseas might not be against the law.[85] Statutory law was thus deemed necessary to close the identified gaps.

The consultation conducted by the Family Law Council leading up to its report has been criticised not the least on the basis that it did not provide sufficient opportunities for practicing communities to participate due to its short consultation period and publication in English only.[86] As a consequence, *Iribarne* and *Seuffert* point out that the 'law reform process and most of the subsequent policy development in Australia has proceeded without sufficient attention to the voices of all of the women in the practicing communities, who should make decisions about, lead and implement any changes that may be appropriate in the practicing cultures'.[87]

After the release of the report recommending the introduction of specific anti-FGM laws, the following legal landscape developed in Australia in relation to FGM.

b) Criminal Law

In comparison to Germany, criminal law and procedure generally fall into the jurisdiction of Australian states and territories. After the above-described public debate and the recommendations by the Family Law Council, each state and territory specifically criminalised FGM starting with the introduction of legislation in New South Wales in 1995 and ending in

[75] Australian Institute of Health and Welfare, Towards Estimating the Prevalence of Female Genital Mutilation/Cutting in Australia (February 2019) Australian Government, p. 10–12.

[76] See *Ierodiaconou*, Melbourne University Law Review 1995 Vol. 20 Issue 2, 562 (568).

[77] See *Ierodiaconou*, Melbourne University Law Review 1995 Vol. 20 Issue 2, 562 (568).

[78] For an overview of the headlines reported in the media at the time see, *Ierodiaconou*, Melbourne University Law Review 1995 Vol. 20 Issue 2, 562 (568–569).

[79] *Pardy/Rogers/Seuffert*, Social & Legal Studies 29 (2020), 273 (276), DOI: 10.1177/0964663919856681.

[80] *Rogers*, Current Sexual Health Reports 11 (2019), 442.

[81] *Family Law Council*, Female Genital Mutilation, A Report to the Attorney-General Prepared by the Family Law Council, 1994, https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Female%20genital%20mutilation.pdf (1.12.2020). See Recommendation 2 on the need to introduce legislation immediately.

[82] For example, consent to plastic surgery carried out by a medical professional takes away criminal responsibility of the surgeon for an assault-based offence. See discussion of this issue in *Queensland Law Reform Commission*, Female Genital Mutilation, Report Nr. 47, Queensland Law Reform Commission, 1994, p. 68, https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0019/372511/r47.pdf (1.12.2020); *Family Law Council* (fn. 81), p. 50–51.

[83] See, for example, *R v Brown* [1994] 1 AC 212 in the UK context.

[84] See discussion in *Bronitt*, Health Care Analysis 6 (1998) 39 (41).

[85] *Family Law Council* (fn. 81), p. 56.

[86] *Iribarne/Seuffert*, Australian Feminist Law Journal 2018 Vol. 44 Issue 2, 175 (183).

[87] *Iribarne/Seuffert*, Australian Feminist Law Journal 2018 Vol. 44 Issue 2, 175 (184).

2003 with the introduction of laws in Western Australia.[88] While all criminal laws set out that performing FGM is against the law, the exact wording used to describe the criminal conduct varies between jurisdictions. While most Australian states introduced laws following a model statute prepared by the Family Law Council in the late 1990s, New South Wales introduced their anti-FGM laws prior to this and modelled their laws according to US anti-FGM legislation.[89]

In comparison to the situation in Germany, where the general rules on criminal consent apply to the FGM offence, all Australian jurisdictions have explicitly excluded consent as a justification for the procedure including parental consent where FGM is to be performed on a child. Yet, medical exceptions exist if the procedure is performed for a legitimate medical purpose including child birth and sex reassignment surgery or, depending on the jurisdiction, if the procedure is to be performed to alleviate 'physiological disability, physical abnormality, psychological disorder or pathological condition'.[90]

The introduced laws also vary in relation to their extraterritorial application. All states and territories have criminalised removing an individual from their jurisdiction with the intention of having FGM performed on them abroad. While the majority of laws used to refer to removing a child under the age of 18, some states have now amended this to removing a person regardless of their age.[91] In addition, the law in some Australian states, for example, the Northern Territory, explicitly criminalises performing the practice on another outside the jurisdiction.[92] Moreover, the penalties vary greatly between states ranging from 7 years to 21 years.

In 2013, the Australian Government Attorney-General's Office conducted a review of the laws pointing out some of the differences identified above as shortfalls.[93] Since publication, some jurisdictions have taken steps to bring their FGM legislation more in line with the recommendations contained in the report, for example, by increasing the maximum sentence length.[94]

The laws have rarely found application in practice. Until today, only two full trials have reportedly taken place in New South Wales and Queensland. The first Australian case dealing with FGM in New South Wales, *R v A2*; *R v KM*; *R v Vaziri*, will be analysed in detail below in the context of sex discrimination through anti-FGM laws.

3. Similarities and Differences between German and Australian FGM Frameworks

The introduction of specific anti-FGM laws in both Germany and Australia is closely entwined with the legislative desire to offer greater protection to girls with migrant backgrounds from harmful traditional practices by closing perceived protection gaps in criminal law. This includes the ability to consent to the infliction of certain types of harm and thus the risk of negating criminal responsibility for certain types of FGM. While Australian jurisdictions have explicitly excluded consent as a defence to FGM for any person (under and over the age of 18) as well as consent of guardians and parents on behalf of minors the situation is less clear in Germany. The German FGM provision was introduced without reference to criminal consent. Recourse must therefore be taken to the general rules relating to consent. Under German law, the question of whether a person can consent to a criminal act depends on whether such consent violates 'public morals'. This is assessed in relation to the gravity of the offence. Whether all forms of FGM are severe enough to prevent consent remains uncertain under German law and, so far, has not been tested in the court system. The situation appears even more intransparent where parental consent for minor female children is concerned. In this case the procedure, in addition to not contravening public morals, must also be undertaken in the best interest of the child. Whether parental consent may be obtained for certain types of FGM is heavily debated in Germany and has not been subject to any court rulings.

The wording of the anti-FGM framework is very similar in Germany and Australia as it is in most Western countries. *Rogers* therefore describes Western FGM laws as a 'franchise'.[95] Most Australian laws refer to performing 'female genital mutilation' or 'mutilation' to female genitalia. Similarly, the heading of the German statute is 'mutilation of female genitalia' ('Verstümmelung weiblicher Genitalien') and the section criminalises a person who 'mutilates' the external genitalia of a female person. Lastly, it is important to note that, as per the wording, the anti-FGM laws in both Germany and Australia apply to all females regardless of age or ethnic background.

Concerns about the respective laws from an equal protection and equal application standpoint are discussed below.

IV. Equal Protection and Equal Application

In both Germany and Australia, it is unlawful to discriminate on the basis of a number of attributes, including sex. Furthermore, laws must be applied equally and fairly to everyone. This means that criminal laws must be phrased and ap-

[88] Crimes Act 1900 (ACT) sections 73–77; Crimes Act 1900 (NSW) sections 45, 45A; Criminal Code Act 1983 (NT) sections 186A–186D; Criminal Code 1899 (Qld) sections 323A–323B; Criminal Law Consolidation Act 1935 (SA) sections 33–33B; Crimes Act 1958 (Vic) sections 32–34A; Criminal Code Act 1924 (Tas) sections 178A, 178B, 389; Criminal *Code* (WA) section 306.

[89] *Rogers*, Current Sexual Health Reports 11 (2019), 442.

[90] See Criminal Code 1899 (Qld) section 323A (3).

[91] See, for example: Crimes Act 1900 (NSW) section 45A; Criminal Code Act 1983 (NT) section 186C; Crimes Act 1958 (Vic) section 33.

[92] Criminal Code Act 1983 (NT) section 186B (2).

[93] Attorney-General's Department, Review of Australia's Female Genital Mutilation Legal Framework, Final Report, 2013, p. 10–11.

[94] For example, NSW has increased the maximum 7 year penalty to 21 years.

[95] *Rogers*, Current Sexual Health Reports 11 (2019), 442 (442).

plied in a non-discriminatory or arbitrary fashion. Problems arising in this context with anti-FGM laws are discussed below.

1. Discrimination Based on Sex

The wording of the laws in both Germany and Australia exclusively refers to females and mutilating female genitals. As such males and male genitalia are excluded from the scope of the introduced criminal laws. This gives rise to questions of equal protection of males, especially infants and boys, in the context of male circumcision. In Germany, introducing laws which aim to protect females while excluding males may be unconstitutional as they may violate Article 3 of the German Basic Law concerned with equality before the law. The article states among others that 'no person shall be favoured or disfavoured because of sex'. The Australian anti-FGM framework may violate anti-discrimination laws and human rights obligations setting out that no one may be discriminated based on sex.[96] The below first considers whether (certain forms of) FGM and male circumcision of infants and boys are comparable before analysing whether the criminal law in Germany and Australia treats them differently. It lastly ponders if any legitimate reasons can be identified to justify the difference in treatment.

a) Comparable practices: minor forms of FGM on girls and circumcision of boys

In order to identify whether the anti-FGM framework treats similar cases differently without valid justification, the question needs to be addressed whether FGM procedures and male circumcision are generally comparable. This is not the case in relation to the more intrusive forms of FGM which result in severe and lasting injuries and health complications including, for example, infibulation. Yet, less severe forms of FGM, which cause little or no harm or scarring, may be comparable in nature to male circumcision or may be even less intrusive depending on the circumstances. Thus, the question arises as to whether such minor forms of FGM fall within the scope of German and Australian anti-FGM laws and whether the law treats them differently than male circumcision.

aa) Minor forms of FGM covered by German FGM laws

No trial has taken place in Germany and thus no case law on how 'mutilation' in the context of the criminal law should be defined is available. However, according to the German explanatory memorandum to the FGM law, mutilation as per the section, refers to the WHO classification and covers all four types of FGM including type 4.[97] Therefore, as per the legislator's intention, which has been subject to severe criticism by legal scholars (III. 1. b), also minor forms of FGM, including pricking and piercing, are criminalised under the German FGM law.

bb) Minor forms of FGM covered by Australian FGM laws

While all Australian anti-FGM laws speak of mutilation of the female genitalia or female genital mutilation, none provides a precise definition as to how 'mutilation' is to be understood. In 2019, the High Court of Australia handed down its first decision in relation to FGM in *R v A2*; *R v KM*; *R v Vaziri*. The Court held that any type of FGM procedure, even a minor one not causing any visible harm, falls within the meaning of 'mutilation' in the context of the New South Wales anti-FGM law.[98]

The case initially took place in the New South Wales Supreme Court in 2015.[99] The three defendants, all members of the Dawoodi Bohra community, a subsect of Shia Islam, were convicted under section 45 of the Crimes Act 1900 (NSW),[100] which criminalises the excision, infibulation or otherwise mutilation of the whole or any part of the labia or clitoris of another person. In the case, a mother (A2) was charged with having hired a retired midwife (KM) to carry out circumcision, referred to as 'Khatna', on her two female children (C1 and C2) in 2009 and 2012 when each of the girls was around seven years of age. The third defendant, Mr Vaziri, a religious leader of the community, was accused of being an accessory after the fact.

The case inter alia revolved around the question of whether any injury to the female genitalia (here the clitoral hood) to any extent could qualify as a 'mutilation' within the meaning of section 45 of the Crimes Act 1900 (NSW). The defence defined to mutilate as 'to cut off, destroy, or alter radically a part of the body, in the present case (given the terms of the Indictment), the clitoris'.[101] No medical evidence introduced during the trial positively supported that this degree of harm, or in fact any degree of injury, had occurred in this case. The prosecution, on the other hand, argued that 'at the very least, the procedure performed by KM on C1 and C2 was a cutting or nicking (including pricking or piercing)'[102] even if this did not leave any visible injury. They submitted that 'otherwise mutilates' includes 'any physical injury to any extent to the female genital organs, which is done for non-medical reasons' and that 'a nick or cut to the genitalia for the purposes of FGM is capable of falling within the concept of mutilation in s.45'. [103]

The trial judge, Jonson J, undertook a statutory interpretation of the term 'mutilates' finding that if 'the enquiry con-

[96] See, for example, Sex Discrimination Act 1984 (Cth); ICCPR Art. 3; Convention on Rights of the Child Art. 2 (equal application of rights irrespective of sex).

[97] Deutscher Bundestag (Parliament of the Federal Republic of Germany), Drucksache 17/13707, p. 6.

[98] *R v A2*; *R v Magennis; R v Vaziri* [2019] HCA 35 16 October 2019 [56].

[99] *R v A2*; *R v KM*; *R v Vaziri (No. 2)* [2015] NSWSC 1221.

[100] *R v A2*; *R v KM*; *R v Vaziri (No. 23)* [2016] NSWSC 282 (18 March 2016).

[101] *R v A2*; *R v KM*; *R v Vaziri* (No. 2) [2015] NSWSC 1221 [111].

[102] *A2*; *R v KM*; *R v Vaziri* (No. 2) [2015] NSWSC 1221 [110].

[103] *R v A2*; *R v KM*; *R v Vaziri (No. 2)* [2015] NSWSC 1221 [110].

cerning the meaning of the word 'mutilates' is confined to its bare dictionary meaning (unassisted by context or statutory purpose), the better view may be that more is required than the causing of injury'.[104] Yet, after relying on other extrinsic materials,[105] he accepted the Crown's submission. He found that the jury should be directed that 'any injury to any extent for non-medical reasons falls within the meaning of 'mutilation' for the purpose of section 45 Crimes Act 1900'.[106] Some commentators have subsequently pointed out that it appears counter-intuitive to find that what had occurred was not 'mutilation' but nevertheless deemed to be 'female genital mutilation'.[107] The jury returned a guilty verdict for all three defendants.

Upon appeal in 2018, all three convictions for FGM were quashed and a verdict of acquittal entered on all counts by the New South Wales Court of Criminal Appeal.[108] Regarding the interpretation of 'otherwise mutilates' the Court stated at [521]–[522] that:

> 'For the reasons set out above, we have concluded, on balance, that the extrinsic materials relied on by his Honour do not permit a construction of 'mutilates' that departs from its ordinary meaning and we consider that its ordinary meaning connotes injury or damage that is more than superficial and which renders the body part in question imperfect or irreparably damaged in some fashion. It follows that we have concluded, with the greatest of respect for his Honour's careful analysis of the legislation, that his Honour misconstrued the meaning of 'mutilates' and hence misdirected the jury as to an essential element of the offence.
>
> We accept that a cut or nick could, in a particular case, amount to mutilation of the clitoris. The error we see in the direction given was that it included the words 'to any extent' insofar as it suggested that a *de minimis* injury would suffice.'

After prosecutorial appeal, the High Court of Australia in October 2019, set aside the orders of the Court of Appeal and remitted the matter to the Court for redetermination of whether the verdicts were unreasonable. In relation to the meaning of 'mutilates', the majority of the High Court rejected the narrow interpretation of the appeal court and emphasised that the term mutilation 'is to be taken to refer to female genital mutilation in all its injurious forms'. Kiefel CJ and Keane J highlighted that a

> 'construction which gives a broader scope to s 45 is consistent with its wider purpose, to prohibit completely female genital mutilation practices injurious to female children. That purpose is consistent with Australia's obligations under the Convention on the Rights of the Child, to which the FLC Report drew attention.'[109]

The majority of the High Court concluded that 'mutilates' in section 45 (1) (a) needs to be 'understood as a term of condemnation of any of the practices referred to in the FLC Report injurious to a female child' which is why 'an injury such as cutting or nicking the clitoris of a female child cannot be said to be de minimis'.[110]

Having identified that *de minimis* forms of FGM are meant to be covered by the anti-FGM framework in both Germany and Australia, the below analyses whether male circumcision of infants and boys is comparable to these female procedures.

cc) Comparability of male circumcision

Male circumcision is a common practice in Western societies and often carried out on male infants with parental consent.[111] As per the WHO, male circumcision is 'practised for social, cultural and medical reasons'.[112] Estimates suggest that worldwide around 30 % of males are circumcised.[113] During the procedure, the penile foreskin, designed to protect the underlying genitals, is (partially) removed. The procedure is traditionally performed in Muslim and Jewish communities for a number of reasons including religious and cultural beliefs and for secular reasons in countries such as the US.[114] Who performs the procedure varies depending on tradition and geographical location. In some countries this is done by a traditional circumciser while in others medically trained individuals carry out the procedure.[115] Depending on the setting, the operation can be performed in non-sterile environments without anaesthesia. Thus, certain forms of FGM and male circumcision are comparable in that they require the cutting of 'healthy, erogenous tissue'[116] of genitals which is neither necessary to treat a medical condition nor to correct

[104] *R v A2*; *R v KM*; *R v Vaziri (No. 2)* [2015] NSWSC 1221 [156].
[105] *R v A2*; *R v KM*; *R v Vaziri (No. 2)* [2015] NSWSC 1221 from [175].
[106] *R v A2*; *R v KM*; *R v Vaziri (No. 2)* [2015] NSWSC 1221 [110] and [258].
[107] *Rogers*, Alternative Law Journal 2016 Vol. 41 Issue 4, 235 (236).
[108] *A2 v R*; *Magennis v R*; *Vaziri v R* [2018] NSWCCA 174.
[109] *R v A2*; *R v Magennis*; *R v Vaziri* [2019] HCA 35 16 October 2019 [56].
[110] *R v A2*; *R v Magennis*; *R v Vaziri* [2019] HCA 35 16 October 2019 [58].
[111] *WHO*, Neonatal and Child Male Circumcision: A Global Review, 2010, p. 5 https://www.who.int/hiv/pub/malecircumcision/neonatal_child_MC_UNAIDS.pdf (1.12.2020); *Paakkanen*, The International Journal of Human Rights 2019 Vol. 23 Issue 9, 1494 (1495).
[112] *WHO* (fn. 111), p. 5.
[113] *WHO* (fn. 111), p. 5.
[114] *Paakkanen*, The International Journal of Human Rights 2019 Vol. 23 Issue 9, 1494 (1496).
[115] *Wahedi*, Nottingham Law Journal 2019 Vol. 28 Issue 1, 1 (8).
[116] *Earp*, Medicolegal and Bioethics 5 (2015), 89 (90).

'an acknowledged deformity'[117] and can be undertaken by non-medically trained professionals in non-sterile settings.

Given the comparability of the examined procedures, the below analyses whether the law in Germany and Australia treats male circumcision and minor forms of FGM differently.

b) Difference in treatment of FGM on girls and male circumcision of boys

All forms of FGM, including less severe forms, are explicitly criminalised in Australia and Germany and consent by parents or guardians on behalf of female minors is generally no justification.

In comparison, male circumcision is not explicitly penalised in Australia. While the procedure may be subject to the general criminal laws dealing with assaults and causing bodily harm, parental consent on behalf of minors is not explicitly excluded and can render male circumcision lawful. The Queensland Law Reform Commission has taken the view in relation to male circumcision that 'consent by parents […] may be invalid in light of the common law's restrictions on the ability of parents to consent to the non-therapeutic treatment of children'.[118] However, there seems to be no case law in Australia bringing into question the lawfulness of male circumcision with parental consent. Rather, the *obiter dicta* of common law cases suggest that male circumcision is generally approved by society as lawful.[119] This may be the reason why male circumcisions are routinely not subject to prosecutions in Australia. As a consequence, where parents consent to non-medically indicated circumcisions on behalf of their male children no criminal responsibility will likely arise.

In Germany, the law specifically differentiates between male and female circumcision when it comes to parental consent for minors. In cases of FGM, the procedure is considered not to be in the best interest of the female child and consent is therefore excluded (III. 1. b).[120] Yet, in case of male children German law explicitly enshrines a parent's right to consent to non-medically indicated male circumcision.[121] While the law generally requires that a medical practitioner performs the male circumcision, it allows traditional circumcisers from religious groups to circumcise infants within the first six months after the child is born.[122] By expressly permitting male circumcision based on religious motives, the German legislator responded to a judgement of the District Court Cologne, according to which male circumcision was a criminal offence under German law that could not be justified by parental consent,[123] and expressly established the parents' right to consent to the circumcision of their male children for religious motives.[124] The reform was driven by concerns that criminalising male circumcision would significantly impact the religious life of Jewish and Muslim people living in Germany.[125]

German and Australian criminal laws therefore treat less invasive forms of FGM and male circumcision differently. Routinely, male circumcision can be legally carried out while any form of FGM, even those causing no harm, are criminalised. Whether reasons exist to justify the difference in treatment is discussed below.

c) Justification for the difference in treatment

The below analyses three justifications frequently advanced for the difference in treatment between FGM and male circumcision including risks, health benefits and underlying motives.

aa) Greater risks and harm during female procedures?

It is a well-rehearsed argument in the West that FGM and male circumcision are justifiably treated differently because there are greater risks associated with the female procedure. While this may well be the case for severe forms of FGM such as infibulation, it is less clear whether this argument holds true for more minor forms, such as 'Kathna', discussed above, during which the clitoral hood is pricked or pierced. While the procedure may inflict direct pain during the process, there may be no remaining injuries or visible harm to the female genital organs. On the other hand, during male circumcision, the foreskin is permanently removed and the male genitalia therefore permanently altered. In addition, negative health consequences have also been attributed to male circumcision. These include bleeding and haemorrhage as well as erectile dysfunction.[126] A blanket assumption that all types of FGM contain far greater risks than male circumcision does not appear sufficiently nuanced and is inapt to justify the different treatment.

bb) Health and other benefits of male circumcision?

Another argument frequently advanced as to why the two procedures need to be treated differently is that male circumcision holds health benefits while female circumcision does not. Yet, whether male circumcision has health benefits is not

[117] *Earp*, Medicolegal and Bioethics 5 (2015), 89 (90).
[118] Queensland Law Reform Commission, Circumcision of Male Infants: Research Paper, 1993, p. 39.
[119] See *R v Brown* [1994] 1 AC 212, 231; *Re J* (Specific Issue Orders: Muslim Upbringing & Circumcision) [1999] 2 FLR, p. 678 (688).
[120] Deutscher Bundestag (Parliament of the Federal Republic of Germany), Drucksache 17/13707, 4.6.2013, p. 6.
[121] Bürgerliches Gesetzbuch (Civil Code, Germany) § 1631d ('BGB').
[122] Bürgerliches Gesetzbuch § 1631d (2).
[123] Landgericht Köln (Cologne District Court), Judgment of 7.5.2012 – 151 Ns 169/11 = Neue Juristische Wochenschrift 2012, 2128 (2129). The defendant, however, was acquitted for mistake of law.
[124] Deutscher Bundestag (Parliament of the Federal Republic of Germany), Drucksache 17/11295, 5.11.2012, p. 6.
[125] Deutscher Bundestag (Parliament of the Federal Republic of Germany), Drucksache 17/11295, 5.11.2012, p. 6.
[126] *Earp*, Medicolegal and Bioethics 5 (2015), 89 (93); *Paakkanen*, The International Journal of Human Rights 2019 Vol. 23 Issue 9, 1494 (1496).

uncontested. Health benefits attributed to the procedure in the past included the reduction of syphilis, epilepsy, alcoholism, asthma, indigestion, excessive masturbation and reducing HIV risks.[127] Many of these assumptions have not proven accurate. *Bossio, Pukall* and *Steele* point out that there is a lack of research on aspects of male circumcision and a related need to empirically address questions surrounding 'sexual functioning, penile sensitivity, the effect of circumcision on men's sexual partners' as well as the effects of age at the time of male circumcision.[128]

Nevertheless, studies have shown that the risk of HIV transmission can be reduced through male circumcision.[129] Yet, most of these studies have focused on adult circumcision and not on circumcision of boys before they become sexually active.[130] In addition, many of these studies concern Sub-Saharan countries with high HIV infection rates. Their translatability to Western countries such as Germany and Australia with low HIV rates is therefore unclear.[131] The only health benefit identified regarding infant circumcision is a small reduction in the risk of urinary tract infections. [132] Such infections, however, are generally very rare in infants and can be easily and effectively treated with antibiotics.[133] Thus, the health benefits of male circumcision in the German and Australian context appear relatively minor. For this reason, the Royal Australasian College of Physicians has taken the stance that 'routine infant circumcision in Australia' is not warranted.[134]

cc) Different motivations behind the practices

Another point raised in an attempt to justify the criminalisation of FGM but not male circumcision is the difference in motivations behind the practices. Some religions, including Judaism and Islam, consider male circumcision religiously binding.[135] Scholars point out that this is not the case for FGM, because it is not explicitly required by the Koran.[136] Interpreting different religious texts goes beyond the scope of the article. However, it should be noted that how the Koran is interpreted in this context, also in light of other religious texts, and whether and to what degree FGM is required by Islam is controversially discussed amongst Muslim scholars.[137] It has therefore been suggested that FGM can have a religious element even if it is not explicitly required by the Koran.[138] Moreover, the reasons behind male circumcision vary and not all procedures are religiously motivated. Many are carried out for aesthetic, cultural or traditional reasons. In the Australian context, *Xu* and *Goldman* found that the majority of parents who elected to have male circumcisions performed on their children at a Victorian hospital did so for hygiene reasons and to carry on a family tradition.[139] This shows that the motivations behind male circumcision are not exclusively religious and FGM may also be religiously motivated in some cases. Thus, the argument based on the different motivations falls short of providing a legitimate reason justifying the complete ban of one procedure but not the other.

d) Conclusion

Certain less invasive types of FGM and male circumcision are treated differently under German and Australian criminal law without valid justification. The introduced laws do not offer equal protection to male infants and boys and thus appear discriminatory in nature. In Germany, this inconsistent approach regarding the protection of male and female genitalia has been seriously criticised for discrimination against boys and men. Referring to the principle of equal treatment of men and women (Art. 3 [2] 1, [3] 2 Basic Law – 'Grundgesetz'), several scholars have argued that § 226a Penal Code is in breach of the constitution.[140] This view finds further support in the explanatory report to the Istanbul Convention, which calls upon State Parties to present criminal offences in a gender-neutral manner without relying on the sex of the victim as a constitutive element of the crime.[141] A corresponding reform has been discussed since 2014, i.e. just one year after § 226a Penal Code entered into force.[142]

[127] *Paakkanen*, The International Journal of Human Rights 2019 Vol. 23 Issue 9, 1494 (1496).
[128] *Bossio/Pukall/Steele*, The Journal of Sexual Medicine 2014 Vol. 11 Issue 12, 2847.
[129] See, for example, *WHO*, WHO Progress Brief – Voluntary Medical Male Circumcision for HIV Prevention, 2018; *WHO*, New Data on Male Circumcision and HIV Prevention: Policy and Programme Implications, 2007, p. 4.
[130] *Earp*, Medicolegal and Bioethics 5 (2015), 89 (94–95).
[131] *Putzke*, in: Putzke/Hardtung/Hörnle/Merkel/Scheinfeld/Schlehofer/Seier (eds.), Strafrecht zwischen System und Telos, Festschrift für Rolf-Dietrich Herzberg zum siebzigsten Geburtstag am 14. Februar 2008, 2008, p. 669 (689–690).
[132] See *Frisch*, Pediatrics 2012 Vol. 131 Issue 4, 796.
[133] *Earp*, Medicolegal and Bioethics 5 (2015), 89 (95).
[134] *The Royal Australasian College of Physicians*, Circumcision of Infant Males, September 2010, p. 5, https://www.racp.edu.au/docs/default-source/advocacy-library/circumcision-of-infant-males.pdf (1.12.2020).
[135] See discussion in *Davis*, Health Matrix: Journal of Law-Medicine 2001 Vol. 11 Issue 2, 487 (511, 530).
[136] The procedure predates Bible and Koran. For example, mummies in Egypt show that FGM occurred as early as 200 BC. See *Inungo/Tou*, Journal of Public Health and Epidemiology 2013 Vol. 5 Issue 1, 20.
[137] See detailed analysis in *Davis*, Health Matrix: Journal of Law-Medicine 2001 Vol. 11 Issue 2, 487 (534).
[138] See analysis in *Davis*, Health Matrix: Journal of Law-Medicine 2001 Vol. 11 Issue 2, 487 (532–540).
[139] *Xu/Goldman*, ANZ Journal of Surgery 2008 Vol. 78 Issue 11, 1019.
[140] *Eschelbach* (fn. 55), § 226a paras. 1, 4; *Fischer* (fn. 55), § 226a paras. 4, 6; *Grünewald* (fn. 55), § 226a para. 18; *Hardtung* (fn. 54), § 226a para. 31; *Wolters* (fn. 55), § 226a para. 6.
[141] Explanatory report (fn. 60), para. 153.
[142] Deutscher Juristentag (70th German Lawyers' Forum), 16.–19. September 2014, Abteilung Strafrecht – Kultur, Reli-

While scholars have noted that the 'application of seemingly different legal regimes' relating to male and female circumcision is a 'double standard'[143] this is not the only criticism the anti-FGM framework attracts. The other problematic area, namely the application of the laws to cultural and traditional practices only, is discussed below.

2. Equal Application of Criminal Laws

Anti-FGM laws in Germany and Australia were introduced to protect female infants and girls with migrant backgrounds from injurious traditional practices. The framework in both countries, however, does not only apply to girls but expands to adult women with the consequence that genital modifications for non-medical purposes cannot be performed on any female of any age without attracting criminal responsibility. The wording of the anti-FGM laws in both Germany and Australia does not differentiate between procedures based on custom or ritual and those based on other reasons including cosmetic reasons. That means that as per their wording, anti-FGM laws also apply to Western cosmetic genital surgeries or genital piercings. The below first considers whether (certain forms of) FGM and genital cosmetic surgeries for non-medical reasons are comparable before analysing whether they are treated differently under German and Australian criminal law. Lastly, the question is addressed whether any legitimate reason exists to justify the different treatment.

a) Comparable practices: minor forms of FGM and genital plastic surgeries on adult women

Over the past decades, plastic genital surgeries for non-medical reasons have increased in their popularity and frequency in the West.[144] Said surgeries are defined as a 'group of non-medically indicated cosmetic surgical procedures that change the structure and appearance of the healthy external genitalia of women, or internally in the case of vaginal tightening'.[145] The operations include the removal of parts of the labia majora or minora (referred to as labiaplasty); the reduction of the clitoral hood, the reconstruction of the hymen (hymenoplasty),[146] and the tightening of the vagina (referred to as vaginoplasty).[147] In addition, genital piercings, a procedure in which the clitoral hood or labia are pierced, are offered in non-hospital settings, for example, by tattoo studios.

In Australia, between 2003 and 2013 the number of labiaplasties increased threefold in the public sector alone.[148] In addition, Australian government statistics show a 140 % increase in requests for rebatable cosmetic genital surgeries between 2001 and 2013 (from 640 to more than 1500).[149] It is likely that most cosmetic genital surgeries are carried out in the private sector in Australia.[150] Yet, no data for the private sector is available.[151] Therefore, the actual numbers of genital cosmetic surgeries undertaken each year in Australia may be significantly greater than available figures suggest.

Many of these surgeries, as well as genital piercings, are identical to those procedures discussed in the context of FGM as they are concerned with cutting away the labia minora and reducing or piercing the clitoris. The question therefore arises as to whether FGM and cosmetic surgeries are treated differently under German and Australian criminal law.

b) Difference in treatment

The definition of 'mutilation' in Germany and Australia in the context of the anti-FGM framework suggests that genital piercings and genital cosmetic surgeries concerned with the removal, reduction or piercing of parts of the external female genitalia for non-medical reasons are criminalised by anti-FGM laws. Surgeons and tattoo artists performing these procedures for non-medical purposes may therefore be criminally liable.[152] Anti-FGM laws in Germany and Australia, however, have been interpreted in a way that excludes genital surgeries and piercings as the below outlines.

aa) Germany

In Germany, as per the explanatory memorandum, less serious interventions including cosmetic surgery and genital piercing are considered to not substantially affect the physical integrity of the victim and thus do not fall under the criminal provision.[153] If the legislator's intention is taken seriously, German law is therefore to be interpreted in a way that criminalises FGM while excluding comparable genital cosmetic surgeries from criminal responsibility. It must, however, be noted that this interpretation has been criticised for its inconsistency (III. 1. b).

gion, Strafrecht – Neue Herausforderungen in einer pluralistischen Gesellschaft, Resolution no. 8.

143 See discussion in *Wahedi*, Nottingham Law Journal 2019 Vol. 28 Issue 1, 1 (3).

144 *Paakkanen*, The International Journal of Human Rights 2019 Vol. 23 Issue 9, 1494 (1506).

145 *Simonis/Manocha/Ong*, BMJ Open 2016, 1, DOI: 10. 1136/bmjopen-2016-013010.

146 *Avalos*, Vanderbilt Journal of Transnational Law 48 (2015), 621 (688).

147 *Paakkanen*, The International Journal of Human Rights 2019 Vol. 23 Issue 9, 1494 (1506).

148 *Simonis/Manocha/Ong*, BMJ Open 2016, 1, DOI: 10. 1136/bmjopen-2016-013010.

149 *Simonis/Manocha/Ong*, BMJ Open 2016, 1, DOI: 10. 1136/bmjopen-2016-013010.

150 See for the UK context, *Avalos*, Vanderbilt Journal of Transnational Law 48 (2015), 621 (689).

151 *Simonis/Manocha/Ong*, BMJ Open 2016, 1, DOI: 10. 1136/bmjopen-2016-013010.

152 For a similar conclusion in the Scandinavian context see *Essen/Johnsdotter*, Acta Obstetricia et Gynecologica Scandinavica 2004 Vol. 23 Issue 7, 611 (613).

153 Deutscher Bundestag (Parliament of the Federal Republic of Germany), Drucksache 17/13707, 4.6.2013, p. 6; see also Drucksache 12/1217, 27.9.1991, p. 7.

bb) Australia

In Australia, the judgment of the High Court has dealt with the question of whether plastic surgeries fall within the scope of the anti-FGM laws in *R v A2*; *R v KM*; *R v Vaziri*[154] in a single sentence. It states that the term 'otherwise mutilates' should be 'taken to refer to practices to which female genital mutilation refers'.[155] In other words, the criminal law shall only apply to and punish procedures based on culture and tradition but not plastic surgery based on Western aesthetics. Put simply, an identical procedure can be legally performed on white women for aesthetic or sexual reasons but not on women of colour for traditional or customary reasons.

In addition to the narrow High Court interpretation of the section, most Australian anti-FGM laws exclude the performance of female genital surgeries (for example, labiaplasty) from the scope of the criminal law, where this is carried out by a medical practitioner for a 'genuine therapeutic purpose', for example, to alleviate a psychological disorder.[156] It may be suggested that anti-FGM laws are not being applied in an arbitrary fashion targeting only cultural procedures but that the thousands of genital cosmetic surgeries occurring in Australia each year are all based on medical grounds and thus not subject to criminal liability. While no data exists in this context, it seems highly unlikely that the large number of procedures are all based on medical grounds. [157] In addition, it is unclear on what medical grounds genital piercings could be performed.

The way the criminal law is interpreted in Germany and Australia leads to the different treatment of comparable procedures depending on the motivation behind them.

c) Justification for the difference in treatment

This begs the question of how the difference in treatment can be justified. The German legislator attempted to explain the differentiation by referring to cosmetic surgery as 'positive treatment' and ritualised procedures as 'negative treatment'. As per the German explanatory memorandum the new criminal offence, § 226a Penal Code, was meant to apply to 'negative' treatment only.[158] Such a distinction is founded in aesthetic criteria which are wholly inappropriate for defining the elements of crime.[159] Moreover, the implicit reference to Western, European or German standards would inevitably result in a discrimination against migrants and their cultural traditions or aesthetic ideals.[160]

A justification for the difference in treatment of the two procedures is also seen in the assumption that FGM is a patriarch practice designed to suppress women and female sexuality while this does not apply to female genital surgeries. Yet, this overlooks that FGM is performed for a multitude of reasons which vary greatly between cultural groups and locations. Safeguarding virginity at the time of and chastity during marriage may be the primary motives for performing FGM in some cultural groups. Yet, considering this the only reason behind *every* FGM procedure *anywhere* fails to take into account geographical variations.

The last argument frequently advanced to justify the difference in treatment is that Western women freely choose to undergo plastic surgeries while migrant women in Western countries are seen as forever oppressed, even as adults, and forced into FGM procedures by societal pressure.[161] In order to protect migrant women from these customs, it is necessary, so the argument goes, to take away the potential choice to consent to FGM through a complete ban. *Dustin* refers to this view as the 'arrogant perception'.[162] In this narrative, women are seen as 'victims of Islam',[163] as well as 'lacking in agency, and certainly not in a position to authorise their own law'.[164] While some have suggested that a more appropriate approach may be to put safeguards in place to ensure that the consent given is valid and not based on direct pressure by family or the community,[165] this notion appears to attract little support in practice where a complete ban is favoured. German and Australian laws therefore treat women of colour the same way they treat female children. The assumption that German and Australian criminal law must make the decision on behalf of women is based on cultural stereotypes regarding the enslaved migrant woman who requires protection

[154] *R v A2*; *R v Magennis*; *R v Vaziri* [2019] HCA 35 16 October 2019 [56].

[155] *R v A2*; *R v Magennis*; *R v Vaziri* [2019] HCA 35 16 October 2019 [49].

[156] Criminal Code 1899 (Qld) section 323A (3).

[157] Concerns have been raised in Australia that vulvoplasty services are being accessed inappropriately for cosmetic reasons rather than clinically relevant indications. See *Australian Government Department of Health*, MBS Reviews: Vulvoplasty Report, 2014, p. 5, http://www.health.gov.au/internet/main/publishing.nsf/Content/vulvoplasty (1.12.2020).

[158] Deutscher Bundestag (Parliament of the Federal Republic of Germany), Drucksache 17/1217, 24.3.2010, p. 6.

[159] *Zöller*, in: Hefendehl/Hörnle/Greco (eds.), Streitbare Strafrechtswissenschaft, Festschrift für Bernd Schünemann zum 70. Geburtstag am 1. November 2014, 2014, p. 729 (734); *Walter*, Juristenzeitung 2012, 1110 (1114).

[160] Bernhard Hardtung in Hearing before the Committee for Legal Affairs, Deutscher Bundestag, 17. Wahlperiode, Rechtsausschuss, Protokoll der 129. Sitzung, 24.4.2013, p. 10 et seq.; *Sotiriadis*, Zeitschrift für Internationale Strafrechtsdogmatik 2014, 320 (327).

[161] See also discussion in *Kelly/Foster*, An International Journal of Obstetrics and Gynaecology 119 (2012), 389–392; *Dustin*, European Journal of Women's Studies 2010 Vol. 17 Issue 1, 7 (11).

[162] *Dustin*, European Journal of Women's Studies 2010 Vol. 17 Issue 1, 7 (11).

[163] *Pardy/Rogers/Seuffert*, Social & Legal Studies 29 (2020), 273 (283), DOI: 10.1177/0964663919856681.

[164] *Pardy/Rogers/Seuffert*, Social & Legal Studies 29 (2020), 273 (286), DOI: 10.1177/0964663919856681.

[165] *Sheldon/Wilkinson*, Bioethics 1998 Vol. 12 Issue 4, 263 (271).

through the Western legislature. Assuming that migrant women, in comparison to Western women, cannot make autonomous choices and need to be treated like children, even as adults, is in itself discriminatory and does not amount to a legitimate justification for the difference in treatment of FGM and genital cosmetic surgeries.

d) Conclusion

Many forms of FGM and Western cosmetic genital surgeries or genital piercings are identical procedures. Nevertheless, German and Australian anti-FGM laws are meant to criminalise only the former and thus deny adult women the right to consent to them. As a consequence, and contrary to the wording of the criminal laws, in Germany and Australia, criminal responsibility is associated with the motives behind the procedure. For example, piercing the vagina for cultural reasons or non-Western beauty standards is considered criminal behaviour while piercing the vagina to comply more with Western aesthetics is not criminalised. No legitimate reason can be identified justifying the different treatment of the same act. Especially the generalised assumption that all Western women are empowered to make free decisions regarding surgeries while all women of colour are disenfranchised, oppressed and unable to make free choices is exactly that – a generalised and discriminatory assumption, but not a valid justification.

3. Final Remarks on the Legitimacy of the FGM Framework

The anti-FGM framework in Germany and Australia appears discriminatory on the basis of sex as it does not specifically criminalise male circumcision including circumcision of infant boys. It is also not being applied equally as it does not practically affect genital cosmetic surgeries or genital piercings. Due to the wording and application of German and Australian FGM laws, a small prick in the clitoral hood of an adult woman for ritualised purposes may attract a lengthy prison sentence while the removal of the foreskin of a male infant, possibly without anaesthetic, will likely not be subject to any criminal responsibility. Explicitly criminalising some procedures, namely cultural or traditional procedures performed on females with non-Western backgrounds, while failing to address other comparable procedures, including male infant circumcision and cosmetic surgeries, results in problems with the legitimacy of anti-FGM laws.[166] Similarly, *Shavisi* remarks in the UK context that 'either by ignorance or design, [the laws'] supposedly good intentions are ultimately marred with sexism and racism, since the legislation devalues the consent capacities of racialised adult women, whilst the lack of legislation around male circumcision amounts to a failure to protect the bodies of male children'.[167]

The concern of discrimination also featured heavily in the French debate on penalising FGM and is considered one of the main reasons why France continues to prosecute the conduct under general criminal law relating to bodily injury – a law applicable to anyone without distinction.[168] Yet, some have pointed out that while the law in France formally applies to everyone this is not the case in practice. Neither male circumcision nor female genital plastic surgery are considered bodily injuries for prosecution purposes.[169]

V. Amending the Anti-FGM Framework

While anti-FGM laws have a legitimate core, namely to protect female children from being subject to potentially severe harm, the legal framework in both Germany and Australia appears discriminatory in nature or arbitrarily applied. The below discusses suggested avenues to overcome these inconsistencies first in the context of circumcision of boys and subsequently in relation to genital cosmetic surgery in case of adult women.

1. Inconsistencies Regarding Male Circumcision

Two avenues have been suggested to overcome the inconsistent treatment of FGM and male circumcision under criminal law. The first relates to expanding the laws to male circumcision while the second promotes removing certain types of FGM comparable in nature to male circumcision from the FGM provision.

a) Expanding the scope of the law to male circumcision

One way of ensuring that the anti-FGM framework is not discriminatory in nature is to omit any reference to *female* genitals in the section and instead use a gender-neutral wording. As a consequence, the criminal law would apply equally to both male and female children and prohibit procedures on their genitals for non-medical reasons.[170]

While this approach could offer broader protection for both male and female children, it does not follow that states will pursue it. In fact, it is likely to face serious opposition in both countries. In this context, some raise an 'anti-alienation' argument, meaning that male circumcision should not be banned to avoid alienating certain minority groups which consider the practice binding for cultural or religious reasons.[171] Other concerns with banning male circumcision revolve around international relations and the risk of sending the wrong message about multiculturalism, religious freedom and human rights.[172] Fears of sending the wrong message

[166] See discussion in *Townley/Bewly*, The Conversation, 2.11.2017, https://theconversation.com/why-the-law-against-female-genital-mutilation-should-be-scrapped-79851 (1.12.2020).
[167] *Shahvisi*, Clinical Ethics 2017 Vol. 12 Issue 2, 102.
[168] *La Barbera*, Global Jurist 2017 Vol. 17 Issue 2, para. 4.1.
[169] *La Barbera*, Global Jurist 2017 Vol. 17 Issue 2, para. 4.1.
[170] See suggestion in *Earp*, Journal of Medical Ethics 2016 Vol. 42 Issue 3, 158–163; *Shahvisi*, Clinical Ethics 2017 Vol. 12 Issue 2, 102 (106); *Bond*, The John Marshall Law Review 32 (1999), 353 (378–380).
[171] See discussion in *Wahedi*, Nottingham Law Journal 2019 Vol. 12 Issue 1, 1 (14).
[172] See discussion in *Wahedi*, Nottingham Law Journal 2019 Vol. 28 Issue 1, 1 (14).

through banning male circumcision may be especially prevalent in the German context. A total ban would significantly impact Jewish religious practices and prove politically difficult in light of Germany's anti-Semitic history. Indeed, *Merkel* and *Putzke* remark that the non-criminalisation of male circumcision is 'decisive for German politics for an obvious reason, namely for its link with the darkest part of German history: the genocidal mass murder of Jews in the Nazi era'.[173] They conclude that the 'act of circumcising an infant would not be tolerable, and would hardly be tolerated, under German law, were it not for this peculiar religious background that refers to grave historical guilt'.[174]

While these concerns do not take away from the problematic nature of anti-FGM laws in Germany and Australia, they have been called 'pragmatic arguments' equipped to explain the '"double standard" regime' relating to female and male circumcision.[175] It should not be overlooked, however, that similar 'pragmatic arguments', could also be advanced in the context of FGM – but rarely are.

b) Excluding minor forms of FGM comparable to male circumcision

The other avenue discussed in scholarship to prevent the application of double standards in the treatment of male and female children through FGM laws is to specifically exclude '"minor" forms of sterilised FGM'[176] from the scope of the law.[177] If this approach were followed, the FGM framework would only relate to more severe procedures which fall within the literal interpretation of the term 'mutilation'. Less severe forms of FGM, including, for example, a nick to the genitals, would be subject to the general criminal laws on assaults and acts causing bodily harm.

In the Australian context, this would mean revisiting the question of whether performing specific minor forms of FGM can be in the 'public interest' and in Germany whether these forms do not contravene 'public morals' in which case consent would negate criminal responsibility. This has to be decided in relation to the nature of the harm and the purpose of the procedure. Parental consent on behalf of female children would additionally require that the procedure is in the 'best interest' of the child. In both countries, this is not in question for male circumcision. German law even expressly allows for parental consent to male circumcision. *Arora* and *Jacobs* argue in the US context that where FGM is culturally understood as 'a means to moral or ritual purity', parents may be acting in the best interest of their daughters 'by partaking in procedures that uphold these beliefs but do not cause long-term harm'.[178] They explain that 'parents should be granted wide authority for determining whether or not to perform Categories 1 and 2 of FGA insofar as the state's or society's interest of ensuring that no long-term harm is committed is met'.[179] The researchers conclude that 'a liberal society that tolerates expression of culture and/or religion in the manner of male circumcision should also permit certain de minimis procedures'[180] in relation to female genitals. Pursuing this avenue would likely mean that certain forms of FGM, depending on how they are performed and what consequences they have, would have to be tolerated in Germany and Australia.

While this approach may resolve contradictions in the law, it overall affords less protection for both male and female children too young to make a decision on whether to undergo a procedure which removes healthy genital tissue. This may be particularly so when considering that the procedure is likely irreversible and will impact the children all throughout their adult lives. This makes pursuing this avenue undesirable.

It is also highly unlikely that such law reform will occur in Germany or Australia as similar suggestions – be it for female adults only or for both women and children – have been met by a public outcry and subsequently speedily rejected. In 2010, the Royal Australian and New Zealand College of Obstetricians and Gynaecologists (RANZCOG) reportedly suggested that by allowing 'ritual nicks', cultural needs of women could be met and potentially more severe procedures prevented. Yet, politicians and the general public immediately opposed this suggestion.[181] The social and political outrage may have contributed to RANZCOG's prompt press release clarifying that they were not in favour of this approach.[182] *Shavisi* and *Earp* explain that because the political motivation behind Western FGM laws is more to do with wanting to ensure the public that the 'perceived "civilizational threat"' of FGM is being dealt with; the focus of the laws is generally on preventing 'barbaric' rituals in Western societies and not on 'violations of bodily autonomy *per se*'.[183] Excluding cer-

[173] *Merkel/Putzke*, Journal of Medical Ethics 2013 Vol. 23 Issue 7, 444 (448).
[174] *Merkel/Putzke*, Journal of Medical Ethics 2013 Vol. 23 Issue 7, 444 (448).
[175] See discussion in *Wahedi*, Nottingham Law Journal 2019 Vol. 28 Issue 1, 1 (15).
[176] *Earp*, The Conversation, 11.1.2019, https://theconversation.com/unconstitutional-us-anti-fgm-law-exposes-hypocrisy-in-child-protection-109305 (1.12.2020).
[177] Advocated by *Arora/Jacobs*, Journal of Medical Ethics 42 (2016), 148 (152); *Jacobs/Arora*, Developing World Bioethics 2017 Vol. 17 Issue 2, 134; for Australian discussion see: *Bronitt*, Health Care Analysis 6 (1998), 39 (42).
[178] *Arora/Jacobs*, Journal of Medical Ethics 42 (2016), 148 (152).
[179] *Arora/Jacobs*, Journal of Medical Ethics 42 (2016), 148 (152).
[180] *Arora/Jacobs*, Journal of Medical Ethics 42 (2016), 148 (149).
[181] *Tatnell*, The Sydney Morning Herald. 28.5.2010, https://www.smh.com.au/lifestyle/health-and-wellness/circumcising-young-girls-is-child-abuse-goward-20100528-wjhc.html (1.12.2020).
[182] *Matthews*, Medical Journal Australia 2011 Vol. 194 Issue 3, 139.
[183] *Shahvisi/Earp*, in: Creighton/Liao (eds.), Female Genital Cosmetic Surgery: Solution to What Problem?, 2019, p. 58 (67).

tain procedures from anti-FGM laws would contravene the political narrative behind their introduction and is therefore unlikely to occur in either country. This is further supported by the recent High Court decision in Australia defining mutilation as encompassing all forms of FGM, even those causing no visible harm, as well as the international debate urging all states to eradicate all forms of FGM.

2. Inconsistencies with Female Cosmetic Surgeries

Anti-FGM laws are also interpreted to apply only to traditional, cultural or ritualised procedures but not to female genital cosmetic surgeries or genital piercings. On how to overcome this inconsistency, *Berer* remarks in the British context that FGM laws 'should be invoked to stop anyone carrying out labia reduction surgery and possibly other forms of genital cosmetic surgery for non-therapeutic reasons, if the evidence warrants that step, or the laws against FGM in Britain should be reconsidered in the light of these practices.'[184]

a) Applying FGM laws to Female Genital Surgery

Inconsistencies in anti-FGM laws could be resolved by applying the laws to all surgeries during which female genitals are altered for non-medical purposes regardless of the underlying motivation. As a consequence, adult women could not elect to have cosmetic surgeries performed on their genitals for aesthetic reasons or to have their genitals pierced. While this may eliminate contradictions in the law it does not provide a convincing argument for depriving women of their right to decide themselves whether to have their genitals pierced or altered by plastic surgery. A general ban on genital piercing or cosmetic surgery would be hardly consistent with the general rules on consent to physical interventions and, thus, is unlikely to take place.

b) Allowing certain types of FGM for Adult Women

The alternative would be to allow procedures associated with FGM comparable to genital cosmetic surgeries by excluding women over the age of 18 from the scope of the anti-FGM framework.[185] This is the case, for example, in Canada, where the anti-FGM law does not apply where a 'person is at least eighteen years old and where there is no resulting harm'.[186] Similarly, the US federal anti-FGM law which was struck down in 2018 only applied to females under the age of 18.[187] As a consequence, depending on whether the respective FGM procedure is considered in the public interest (Australia) and not in contravention of public morals (Germany) women over 18 could consent to the procedure thereby negating criminal responsibility. Although this approach would apply to adult women only and not to female children, law reform in this area is unlikely to take place in Germany and Australia. In both countries, the legislative approach is based on the reasons discussed above including that women of colour are considered victims of an oppressive system requiring protection through a complete ban of FGM by the Western criminal justice system.

Despite the identified arbitrary inconsistencies of the German and Australian FGM framework, the above has shown that law reform addressing these issues is unlikely to occur for 'pragmatic' and political reasons as well as due to international pressure to eradicate all forms of FGM. As a consequence, a problematic anti-FGM framework will continue to operate in the two countries.

VI. Conclusion

In 2018, a US District Court held that a federal anti-FGM law applying to females under the age of 18 was unconstitutional.[188] The court found that Congress did not have jurisdiction to enact said law and thus did not have to base its decision on whether the law was discriminatory in nature.[189] Nevertheless, the judge remarked in the context of the FGM law and international anti-discrimination obligations that as 'laudable as the prohibition of a particular type of abuse of girls may be, it does not logically further the goal of protecting children on a nondiscriminatory basis'.[190] This suggests that in the court's opinion the law may be discriminatory in nature as it fails to offer equal protection from harm for male children.

Similar concerns can be raised in relation to the anti-FGM framework in Germany and Australia. The law affords protection to girls only. Yet, where it is believed that the criminal law needs to offer greater protection to children to prevent their genitals from being harmed this needs to occur in a legitimate and holistic fashion and be applicable to both boys and girls alike. Furthermore, simply limiting the application of a criminal law to traditional or cultural practices and excluding comparable genital plastic surgeries available to consenting adult women results is an arbitrary application of the law. While anti-FGM laws may have a legitimate core – namely to protect young female children from physical harm to their genitals – they currently apply a double standard in relation to comparable practices.

The anti-FGM framework in both Germany and Australia requires legislative amendment to address and overcome these contradictions and inconsistencies. However, this article has argued that such law reform is unlikely to happen in the near future not the least due to 'pragmatic' and political reasons. As a result, arguably discriminatory anti-FGM laws will continue to operate in both countries. Criminal law, although coercive in nature, can only have significant impact if most people comply with its obligations voluntarily. Vol-

[184] *Berer*, Reproductive Health Matters 2010 Vol. 18 Issue 35, 106 (110).
[185] See suggestion in *Shahvisi*, Clinical Ethics 2017 Vol. 12 Issue 2, 102 (106).
[186] Criminal Code (R.S.C., 1985, c. C-46, Canada) section 268 (3) (b).
[187] For further discussion on the US federal anti FGM law see VI.
[188] United States of America vs. Jumana Nagarwala et al., No. 17-cr-20274 (E.D. Mich. Nov., 20, 2018).
[189] United States of America vs. Jumana Nagarwala et al., No. 17-cr-20274 (E.D. Mich. Nov., 20, 2018), p. 10.
[190] United States of America vs. Jumana Nagarwala et al., No. 17-cr-20274 (E.D. Mich. Nov., 20, 2018), p. 6.

untary compliance requires acceptance of specific laws which, in turn, depends on whether the laws are perceived as legitimate and enacted in a legitimate fashion.[191] It is doubtful that anti-FGM laws which fail to treat comparable cases alike will be considered legitimate. Rather, their operation is likely to attract the question by members of practicing communities why male infants can be legally circumcised as a family tradition and genital piercings can be legally obtained in tattoo studios while a different standard is applied to females of colour in cases of culture or tradition.[192] Expecting compliance with criminal laws which appear discriminatory or are applied arbitrarily for the reasons discussed in this article seems unrealistic. It is therefore questionable whether the anti-FGM framework in Germany and Australia has the potential to positively impact the lives of those it wishes to protect – female children with migrant backgrounds.

[191] See, for example, *Habermas*, Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (translation *Rehg*), 1988, p. 29, concluding that 'although legal claims are coupled with authorized coercion, they must always be such that subjects can comply on account of their normative validity as well, hence out of "respect for the law". [reference omitted]'.

[192] See *Darby/Svoboda*, Medical Anthropology Quarterly 2007 Vol. 21 Issue 3, 301 (313).