

DRAFT NOT TO BE QUOTED WITHOUT PERMISSION

Banning God’s law in the name of the Holy Body - The Nordic position on ritual male
circumcision

Abstract

The protection of the best interest of the child is the dual responsibility of parents and society. In societies consisting of a majority and minorities, there may exist different understandings of what constitutes the best interests of the child. Often such differences of opinion are handled by compromise and respectful dialogue based on the needs of the child as well as respect for conflicting human rights and legal principles such as non-discrimination, freedom of religion and proportionality.

Sometimes, however, it is difficult to find a satisfactory solution. In the Nordic countries ritual male circumcision of minor boys has proved to be a difficult issue to reach agreement on. Representatives of the Protestant majority claim that ritual male circumcision without informed consent by the boy is inconsistent with the best interests of the child. They hold that it is a harmful practice that should be outlawed. Legislation has been passed to regulate it. Representatives of the Jewish and Muslim minorities have argued, nationally as well as globally, that ritual male circumcision is a vital aspect of the best interests of the child, and that banning it would be inconsistent with the right to freedom of religion, as ritual male circumcision enables the child to be a member of a religious community and tradition.

There is no other contemporary issue in which it has been as hard to reconcile the interpretation of the best interests of the child of the majority Nordic society, with that of minority communities. Recently, however, there seems to be a change in the position of official representatives of the Swedish majority society, in part explained by an improved dialogue with children and young people from communities practicing ritual male circumcision.

1. Legislation, criminal cases and family law

In three of the five Nordic states ritual male circumcision of boys is currently the subject for debate and legal initiatives. The Danish Parliament is considering legislation that would ban circumcision on boys.¹ Using quite a different wording the Finnish government is reported to be planning to legalize ritual male circumcision provided it is performed by a licensed doctor in accordance with the parents' wishes and with the child's consent.² In Sweden a law on circumcision of boys was passed in 2001 (Sw. *Lag (2001:499) om omskärelse*). The Swedish law stipulates that male circumcision on minor boys may be performed only by a licensed doctor, or, for boys under the age of two months, in the presence of a licensed doctor or anesthesiologist responsible for the administration of anesthetics, but by a person certified by the National Board of Health and Welfare (Sw. *Socialstyrelsen*).³ The law further states that the parents, provided they share joint parental responsibility, should be in agreement and, if possible, that the boy should give an informed consent to be circumcised. The law states that a boy's wishes not to be circumcised should always be respected. The Swedish act is currently being re-examined.

In all the Nordic states a parent with parental responsibility has the right to veto ritual circumcision of the child as well as other religious actions on behalf of the child, such as baptism and membership in religious community.⁴

According to the Swedish act, it is punishable as assault to perform ritual circumcisions on minor boys outside the bounds of the law. As to the knowledge of the author, no one has been held criminally responsible for having circumcised boys. The Swedish Supreme Court held, in 1997, before the law was initiated, that ritual circumcisions on minor boys performed with

¹ See politiken.dk/newsinenglish/article598875.ece. 17.11.2008. See further Vejledning om omskæring af drenge, (En. *Guidlines for circumcision of boys*). www.sst.dk.

² YleNews Published 31.07.2008. See also www.stm.fi

³ The legal requirement of the presence of a licensed doctor or nurse when boys under the age of two months are circumcised is the result of parliamentary activity after the ordinary legislative procedure characterised by dialogue in the form of the remit procedure between the government and various interests groups such as religious communities. That a governmental proposition for legislation is not accepted by the parliament but subject to last minute change is rare.

⁴ Danish law, Lov 2007-06-06 nr 499 Forældreansvarslov 2-3§§. (En. *Act on Parental Responsibility*), Bet 1475/2006, p. 28, 162. See also www.statsforvaltning.dk/site.aspx?p=1371. Norwegian law, Barnelova 1981-04-08 nr 07, § 37 (En. *Children's Act*). Swedish law, Föräldrabalken 6 Ch. 11 § (En. *Parental Code*). Given that joint parental responsibility can be order against the wishes of a parent, provided s/he fails to show that joint parental responsibility would be inconsistent with the best interests of the child due e.g. to parental disagreement, arguments on religious affiliation, including ritual male circumcision, are occasionally brought up in cases on parental responsibility.

parental consent were not punishable as assault.⁵ The case heard by the Supreme Court concerned criminal liability for a person who in 1993 had circumcised six Bosnian boys between the ages of 18 months and 7 years with the consent of the parents. The circumcisions were performed under poor hygienic conditions in a camp for asylum seekers and the boys got badly infected. They were reported to have been terrified. The Supreme Court found the circumciser, given the parental consent, not guilty of assault. In 2008, the Finnish Supreme Court took a similar stand; it was not considered a criminal action for a parent to have her son circumcised for religious reasons, provided that the circumcision was properly performed.⁶ After the Swedish act had entered into force a licensed doctor was found not guilty of manslaughter following the death of a boy he had circumcised. The grounds for acquittal were that it was not proven beyond doubt that he had administered too much anesthesia to the boy.⁷ A father, however, has been found guilty of facilitating assault after having had his son circumcised outside the bounds of law and against the wishes of the mother who had sole parental responsibility.⁸

The Swedish law on ritual circumcision of boys was reviewed in 2005 and 2007 by the Swedish National Board of Health and Welfare. The second review disclosed that, notwithstanding the law, more than two thirds of the 3,000 Muslim boys estimated to be circumcised yearly were circumcised outside the bounds of the Swedish law (as opposed to the 40–50 circumcisions performed on Jewish boys), either abroad or by someone who was not a licensed doctor.⁹ A few Muslim boys were circumcised, within the bounds of the law, before the age of two months by a Jewish *mohel*.¹⁰

2. Freedom or religion and best interests of the child

The problems of how to balance religious and private law with human rights standards, are especially challenging in regard to children. This is to a certain extent explained by the

⁵ The Swedish Supreme Court, NJA 1997 p. 636. See also Johanna Schiratzki, *Barnets bästa - i portalparagraf och praxis*, Juridisk Tidskrift 1998-99 p. 973-977 (En. *Best interests of the child – in legislation and court case*).

⁶ The Finnish Supreme Court, KKO:2008:93. In Denmark no criminal case regarding male ritual circumcision is reported. The national authority which assesses medical negligence (Dn. *Sundhedsvæsenets Patientklagenævn*) has not criticized a medical doctor in regard to circumcision of five month old boy. Nr. 0552018 30-05-2006.

⁷ Svea Court of Appeal, judgement 27 Nov 2002, B 6899-01.

⁸ The Court of Appeal for Western Sweden, judgement 17 March 2002, B 3091-01. See also *Re J (Specific Issue Orders: Muslim upbringing and circumcision)* [2000] 1 F.C.R. 307, CA.

⁹ Manlig omskärelse. En rapport från ett regeringsuppdrag. (En. *Circumcision of boys. A report from a governmental assignment*) (S2005/7490/SK). The Swedish National Board of Health and Welfare. 2007. www.socialstyrelsen.se. Mars 2007.

¹⁰ John Gradowski, *Muslimar och judar delar traditioner* (En. *Muslim and Jews Share traditions*), Judisk Krönika nr 6 Dec 2008.

difficulties in interpreting the United Nations Convention on the Rights of the Child (CRC). The close to universal success of the CRC is explained partly by the vague and sometimes conflicting nature of the rights of the convention, and partly by the willingness of the UN to accept broad reservations from member states.¹¹ The reservations are contradictory to the idea, forward in Swedish legal history, that the CRC have brought about a universal understanding of what constitutes the best interests of the child.¹² On the contrary the multiple feasible interpretations of the best interests of the child (article 3) is underlined in the preamble of the CRC, which stresses that due account should be taken of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child.

Another challenge with a bearing on male ritual circumcision in regard to the human rights of children is the very nature of childhood and what has been well captured by the notion of “evolving capacities”.¹³ Opinions vary as to from what age the views of the child should be given due importance (cf. article 12 CRC). It is clear, however, that infants lack the capacities to express a view on whether or not they should be initiated into a religion by, e.g. baptism or male ritual circumcision. Although the age for circumcision of Muslim boys varies, it is normally performed before the age of 10 years in accordance with the tradition of Muhammad.¹⁴ According to Genesis, a new-born Jewish boy should be circumcised on the eighth day after birth, as was Isaac, the ancestor of the Jewish people marking his entrance into the covenant with God.¹⁵ In regard to male ritual circumcision in accordance with Jewish law the infant boy’s yet-to-be-evolved capacities make it impossible to expect informed consent from the child. The need to adopt human rights standards to the developing capacities of the child is recognized by the acknowledgement of parental guiding in matters such as religion (articles 5, 14, 30 CRC). (See below 3.)

The challenge of how to define the best interests of the child was left unanswered by the drafters of the CRC. It has to some extent been clarified by the CRC Committee, which has

¹¹ Abdullahi An-Naim, *Cultural Transformation and Normative Consensus on the Best Interests of the Child*, (in Philip Alston (ed.), *The Best Interests of the Child*), Clarendon Press 1994.

¹² SOU 1997:116 Barnets bästa i främsta rummet (En. *Governmental Investigation 1997:116 The best interests of the child – the paramount principle*).

¹³ Gerison Lansdown, *Evolving Capacities of the Child*, Unicef 2005.

¹⁴ In Islam, though not discussed in the Qur’an, circumcision is widely practiced and most often considered to be a sunnah, i.e. tradition of the Prophet. Ishmael, the ancestor of the Muslim people, was circumcised at the age of 13 years.

¹⁵ Genesis 1:17:12.

stated that the best interests may not be interpreted in a way that is inconsistent with the rights granted to the child by the CRC. Notwithstanding the lack of a closer interpretation of the best interests of the child, article 3 CRC states that the best interests of the child shall be a primary consideration. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of the child as well as the child's parents. These rights include traditional human rights, such as freedom of religion and protection against cruel and inhuman treatment, as well as more innovative and child-oriented concepts, such as the principle of the best interests of the child (article 3) and the right of the child to express her/his views freely (article 12).

An example of a tradition not considered consistent with the best interests of the child is female gender mutilation (FGM). Contrary to male ritual circumcision the lifelong harmful health effects of FGM are well documented.¹⁶ This explains why FGM is not defended by religious or other authorities in their official capacities, but on the contrary condemned.¹⁷ (Sadly, the condemnation and criminalization of FGM is not efficiently enforced, and it is still practiced in accordance with informal traditions.)¹⁸ When correctly performed ritual male circumcision has no long-lasting harmful effect. On the contrary, it is sometimes claimed to be beneficial.¹⁹ Ritual male circumcision, as oppose of FGM, has strong legitimacy as a rite of initiation for boys in the religious law of Judaism and Islam. Well in accordance with the original patriarchal nature of the three monotheistic religions, but as oppose of the Christian gender-neutral tradition of baptism, no rite of initiation is encoded for girls.

¹⁶ Or as stated by the World Health Organisation (WHO): "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." www.who.int/mediacentre/factsheets/fs241/en/

¹⁷ Lati al Sabbagh M. Islamic Ruling on Male and Female Circumcision. The Right Path to Health, Health Education through Religion, No 8 EMRO Non Serial Publication 1996. www.who.int/bookorders/anglais/detart1.jsp?sesslan=1&codlan=1&codcol=46&codcch=8014.

¹⁸ Consistent with the international condemnation of FGM (e.g. the European Parliament resolution 2001/2035(INI) it is a ground for asylum under Swedish law. The Migration Court of Appeal UM 7731-08, 18 Feb 2009.

¹⁹ For example, the WHO points to male circumcision as a tool to combat HIV and other STI. It appears that HIV prevalence is generally lower in populations that practise male circumcision than in populations where most men are uncircumcised. This has been observed over the years of the epidemic and has been confirmed by three randomized controlled trials concluded in 2005-2006. The results have led the WHO to the conclusion that male circumcision is an effective risk-reduction measure for men and should be used in addition to other known strategies for the prevention of heterosexually acquired infection. Safe, Voluntary, Informed Male Circumcision and Comprehensive HIV Prevention Programming. Guidance for Decision-makers on Human Rights, Ethical and Legal Considerations. 2008. UNAIDS Publication. www.who.int/hiv/pub/malecircumcision/guide_decision/en/print.html.

2.1 Ritual male circumcision and the CRC

The legislative initiatives to ban or limit ritual male circumcision have been driven by the ambitions to promote the best interests of the child in accordance with the CRC.²⁰ Article 3 CRC on the best interests of the child may, however, be seen as an argument for, as well as against, ritual circumcision. To perform ritual circumcisions on boys could, on the one hand, be construed as an infringement of the best interests of the child if the best interests of the child are understood as physical integrity. On the other hand, not to ritually circumcise boys could be seen as inconsistent with the best interests of the child, if the best interests are understood as being part of a religion. Banning ritual circumcision could then be seen as an infringement preventing children to be part of a religious tradition as important for religious identity as baptism is in Christianity. This explains why Jews and Muslims have objected to the Swedish act and why the World Jewish Congress found it to be “the first legal restriction on Jewish religious practice in Europe since the Nazi era”.²¹

The strong reactions of the minorities should be seen in light of the fact that children are a necessity for religion. No religion survives if it is not able to raise coming generations as believers (neither does, one might add, a democratic society based on secularist principles). The vital importance of children to religions explains why religious rites of initiation such as baptism and ritual male circumcision are part of most religions. This further explain not only the strong protection of freedom of religion in the CRC but also the close link in international law between children’s rights to freedom of religion, including the right to manifest it, to parents’ right to guide children in religious matters. An example, is article 14(1-2) CRC which states that:

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

²⁰ See e.g. Proposition 2000/01:81 Omskärelse av pojkar (En. Circumcision of boys).

²¹ Jews protest Swedish circumcision restriction. Reuters, 7.06.2001.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

The CRC thus allows for limitations of the right of the child to freedom of religion. The CRC Committee has, however, clarified that the scope of limitations is narrow and that state parties should, particularly in the area of freedom of religion, avoid measures which single out a particular religious group.²² The grounds for limitation of freedom of religion raise the issue of the position of a child too young to consent to religious matters: is a child who partakes in a religious tradition a subject or could the child be regarded as a representative of “others”, the object of parental manifestation of religion? The view of the child as an “other” is an interpretation hard to reconcile with the rising awareness of children’s autonomy. All the same, it seems difficult to construe an infant being initiated into a religion by, for example ritual male circumcision or baptism, as an active subject.²³

Regardless of how the position of the child is construed, article 19 CRC, states that: “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence...” It is clear that a religious practice that amounts to violence, e.g. FGM, is not protected by the CRC. A condition for categorizing a practice as “violence” appears to be long-lasting damage or pain. Practices of religious and other minorities that do not amount to violence are, in principle, protected by the CRC and should be respected by its Member States in accordance with articles 29 and 30.

According to article 29 (1) the education of a child shall be directed to:

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own.

In the same line, article 30 specifies that:

²² CRC Committee, *Concluding Observations: Germany* (UN Doc. CRC/C/15/Add.226, 2004), paras. 30-31.

²³ See further Howard Gilbert, “Time to reconsider the lawfulness of ritual male circumcision”, *European human rights law review*, issue 3 (2007), p. 279-294, p. 285. The author criticizes the position of the British Law Commission position that consent could be given “by or on behalf” of the circumcised person.

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

The CRC committee has neither commented on the Swedish law on male ritual circumcision nor on other Swedish actions with a bearing on children's freedom of religion.²⁴

2.2 Ritual male circumcision and the European Court on Human Rights

In Europe freedom of religion is protected, in a wording similar to article 14(3) CRC, by article 9(2) of the Council of Europe's European Convention on Fundamental Rights and Freedoms:

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

Parental rights are underlined in Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms Paris, 20.III.1952, article 2 which states that:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

As to the knowledge of the author the arguments of "public safety" and "for the protection of public order" have not been invoked in relation to male ritual circumcision in the judgments of the European Court of Human Rights (ECHR).²⁵ Such arguments have, however, been

²⁴ UN Doc. CRC/C/15/Add.248, UN Doc. CRC/C/15/Add.101, UN Doc. CRC/C/15/Add.1. The lack of attention is explained by the fact the Swedish Government has not reported on the law on ritual circumcision on boys or other issues with a bearing on freedom of religion.

²⁵ It appears that the ECHR has not passed judgement on article 9 in relation to ritual male circumcision. The Court has touched upon the issue in *Yarar v. Turkey* 19 Dec 2006 regarding freedom of expression and due

heard in relation to children and the banning of other religious symbols, such as the veil. The ECHR concluded in the *Şahin* case that there is no uniform European conception of the requirements of “the protection of the rights of others” and of “public order”.²⁶ The scope for limiting freedom of religion is narrow according to the ECHR (as well as to the CRC, as noted above). In a few cases the ECHR has been in favor of limiting religious practices, notably the wearing of religious symbols in schools, provided that the symbol could be characterized as “a powerful external symbol”. The court has then argued that the impact of the symbol on pupils is difficult to assess and the restraint on freedom of religion therefore could be seen “as meeting a pressing social need”.²⁷ The result of male ritual circumcision can, hardly be seen as “a powerful external symbol”, the banning of which would meet a pressing social need. Public safety and the protection of public order do not seem to amount to legitimate reasons for forbidding male ritual circumcision

2.3 Protection of National Minorities

Freedom of religion is further protected by the European Council’s Convention for the protection of National Minorities, article 8. The Jewish minorities are protected by the convention (unlike Muslim communities). The Advisory Committee on the European Council’s Convention for the protection of National Minorities has commented on the Swedish law on circumcision of boys, as follows:²⁸

The Advisory Committee notes that Sweden introduced in 2001 a new law on the circumcision of boys (2001:499), which requires that ritual circumcision be performed by a licensed doctor or, on boys under the age of 2 months, by a person certified by the National Board of Health. This law has prompted criticism from Jews, including arguments that it unduly interferes with their religious traditions. The Advisory Committee recognizes that the law affects the right of persons belonging to the Jewish minorities to practice their religion but considers that the conditions on circumcision

process (articles 10-6). In *Dzeladinov and others v. The Former Yugoslav Republic of Macedonia* 10 April 2008 the fact that the applicants had just left a circumcision party had no bearing on the violations of their rights by the State party. See also Application No. 19580/92 by the T. family against the United Kingdom (withdrawn). www.echr.coe.int. See also The European Commission for Democracy through law (Venice Commission) Draft law of the Kyrgyz Republic.

²⁶ European Court of Human Rights, *Leyla Şahin v. Turkey*, 29 June 2004, www.echr.coe.int

²⁷ European Court of Human Rights, *Dahlab v. Switzerland*, 15 February 2001. www.echr.coe.int. See also Human Rights Committee, Communication nr. 931/2000, *Hudoyberganova v. Uzbekistan*, views of 8 December 2004.

²⁸ ACFC/INF/OP/I(2003)006, p. 30, # 40. www.coe.int.

contained therein pursue a legitimate aim as they have been introduced in the interest of the health of children, and that they appear proportionate in relation to this aim. The Advisory Committee encourages the authorities and persons belonging to the Jewish minority to continue to search pragmatic solutions in the implementation of this legislation in order to ensure that it does not unduly inconvenience the practicing of religious traditions at issue.

In a similar vein, the Advisory Committee commented on the Finnish debate.²⁹

The Advisory Committee notes that there has been a wide debate in Finland on the circumcision of boys, including as to whether it can be performed in the public health care facilities and whether there is a need to adopt specific legislation on the issue. The Advisory Committee notes that that the outcome of the debate is likely to affect the right of persons belonging to certain national minorities, notably the Jews and the Tatars, to practice their religion. At the same time, the Committee agrees that certain conditions on the practice of circumcision of boys can be legitimately imposed by law in the interest of the health of children as long as they are proportionate in relation to this aim. (...) The Advisory Committee encourages the authorities, together with minorities and others concerned, to continue to search for pragmatic solutions to this issue, taking the health of children fully into account, while ensuring that the outcome does not unduly inconvenience the practice of religious traditions at issue.

The Advisory Committee on the European Council's Convention for the protection of National Minorities thus finds the existing law legitimate.³⁰ It does not, however, encourage further restrictions, as do, for example, members of the Nordic parliaments³¹ and NGO's, as well as members of the public who advocate a complete ban on ritual male circumcision on boys.³²

2.4 Religious law and gender

How to understand and balance conflicting human rights is eloquently developed by Professor Frances Raday, who stresses the importance of a gender perspective when deconstructing

²⁹ CM(2006)47 28 April 2006. www.coe.int.

³⁰ The recommendations as to finding pragmatic solutions have been reported as satisfactory by the Jewish minority. ACFC/OP/II(2007)006.

³¹ Cf. Parliamentary motion 2006/07:20365. (Swedish).

³² www.tidningenbarn.se/zino.aspx?articleID=5136. Visited 28 Dec 2008. (See below not 55)

freedom of religion.³³ The gendered aspect is important in the Nordic debate on male ritual circumcision given that a frequent argument against it is that it is wrong to “cut on” little boys when FGM is plainly forbidden.³⁴ The debaters seem to over-look the differences of FGM as compared to ritual male circumcision in regard to medical effects as well as formal religious legitimacy.³⁵ Another issue is the gendered nature of the rites of initiation in Islam and Judaism which presents a problem in relation to the right to freedom of religion. In the three monotheistic religions, the only gender-neutral rite of initiation in contemporary worship is the baptism of Christianity.

All the same, gendered forms of worship as well as religious administration are common in Christianity as well as in Islam and Judaism. An example is eligibility for office in Christian as well as Jewish and Muslim administration which is not gender neutral, since women may not be candidates for several positions.³⁶ Another example feature in some Muslim and Jewish traditions is the demand for appropriate dress which differs for men and women. Unlike baptism and male ritual circumcision, these traditions are not rites of initiation deciding whether or not a child is a member of the religion, or, to quote from the Christian baptism ritual, “a life in connection with God”.³⁷

It is obviously not an aim of human rights to uphold gender discrimination in religion. However, the traditionally weak position of women in the three monotheistic religions is not linked to the rite of male circumcision but to other mechanisms, as witnessed by the development towards gender neutrality within progressive Judaism with gender-neutral rites of coming of age and education, as well as the fact that the gender-neutral ritual of baptism

³³ Frances Raday, *Culture, religion, and gender*. International Journal of Constitutional Law, Oct 2003; 1: 663-715.

³⁴ Peter Wahlgren, ”Bra eller dålig lag. Att skära i barn”, Dagens Juridik, Blendow Group, 2007-10-03 www.dagensjuridik.se/. (En. *Bad or good law? To cut in children*).

³⁵ See, supra notes 3-6. Given some of the rhetoric of the Nordic debate it may be noted that it is accepted to offer different protection based on the different parts played by men and women in reproduction, notwithstanding the principle of non-discrimination. See e.g. Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, preamble and article 4(2).

³⁶ Raday, supra. Ritual male circumcision is regarded as a morally debatable issue among progressive Jews, notwithstanding the strong religious justification. See Ilan Katz, “Is male circumcision morally defensible?” (in Michael King (ed.), *Moral Agendas for Children*), Routledge, 1999. Physical as well as gendered aspects have been cases for concern. All the same in an informal survey aiming at understanding Jewishness in Sweden, 85 % of the respondents answered in favor of having their sons circumcised, (as a comparison, 20 % kept kosher, 50 % celebrated shabbat). Limmudenkäten 2008. http://www.limmud.se/UserFiles/enkatsvar_08.pdf.

³⁷ Svenska kyrkan, ”Dopgudstjänst - så går den till”, (En. *Baptism – so is it done*) www.svenskakyrkan.se/default.aspx?di=154715&refdi=154724

for centuries did little to improve the historically weak position of women within Christianity. The position of women and girls will not improve if ritual male circumcision is banned.

3. Health and informed consent

The freedom to manifest one's religion can be limited if it is necessary for the protection of health or morals, as recognizes the Advisory Committee on the European Council's Convention for the protection of National Minorities.³⁸ This is an important argument given that circumcision, unlike rites of initiation such as baptism, involves surgical measures. Voices from the majority society argue that male ritual circumcision is detrimental to the health of boys; representatives of minorities say it is not. When looking into the medical argument it seems clear that there is no evidence backing up the argument that correctly performed male circumcisions would be medically detrimental, causing infections or long-time medical impediments. In part, the argument seems to relate to FGM, not male ritual circumcision.³⁹ Another thing is that medical opinions vary as to whether male circumcisions should be recommended on a routine basis as was previously the case in non-Nordic Western states such as the U.S. Some argue that there are health benefits such as a lower risk for infections, others claim that the health benefits are not verified. Other arguments against ritual male circumcision are that there is always a risk that the circumcision goes wrong,⁴⁰ that it hurts and that it is costly.⁴¹ As to scientific evaluations it is strongly suggested that anaesthetized circumcision elicits systemic stress responses in the vulnerable newborn which negatively affect major body systems and that the child should be given anesthetics.⁴²

Another argument by representatives of the majority society is that the boy's body is unchangeably altered. Representatives of the minorities agree, the circumcised boy's sex

³⁸ See supra.

³⁹ Or as it has been vividly expressed in the Danish debate: "It's completely ridiculous to compare the circumcision of girls - which is a barbaric mutilation - with that of boys, where it's just the removal of a skin flap". Jasper Lineball of the national conservative and social conservative Danish People's Party. However The Copenhagen Post reports that the party's own health spokesperson, Liselott Brixt, says she supports the circumcision ban, stating "a lot of parents want it done to their children because they themselves had it done. But we're living in the present and it isn't fair to expose healthy children to religious circumcision. <http://www.cphpost.dk/get/109897.html>. Publ 18.11.2008 Visited 28 Dec 2008.

⁴⁰ It is suggested that harm arises from healthcare in 10 % of cases. See *Proposal for a Directive of the European Parliament and of the council on the application of patients' rights in cross-border healthcare*, Brussels, 2.7.2008 COM(2008) 414 final 2008/0142 (COD) p. 12.

⁴¹ www.rod.se/politikomraden/halsa_och_sjukvard/Laglig-ratt-till-omskarelse-stjal-resurser-fran-varden/

⁴² Brady-Fryer B, Wiebe N, Lander JA. Pain relief for neonatal circumcision. *Cochrane Database of Systematic Reviews* 2007, Issue 4. Art. No.: CD004217. DOI: 10.1002/14651858.CD004217.pub2.

www.who.int/rhl/newborn/reviews/cd004217/en/. See also www.nichd.nih.gov/cochrane/BradyFryer/BRADYFRYER.HTM

organ will look more like those of males in the minority groups, and less like those of males in the majority society. Opinions vary as to whether this is detrimental to the boy or not.

A medically inspired argument is that of informed consent, which is a standard legal demand in medical practice. The regulations on to what extent informed consent in regard to patients below the age of 18 years should be given by the holder, or holders, of parental responsibility or by the child vary in the Nordic states. In Denmark, Iceland and Norway a set age of 15 years is given, in Sweden and Finland the issue is decided on a discretionary basis with regard to the impact of the treatment as well as the age of the minor. The concept of informed consent has a weak tradition in relation to freedom of religion, however. It is not an issue normally brought up in regard to small children's memberships in religious communities, which are covered by the decision power of the parents. Neither is it a demand traditionally invoked in regard to rites of religious initiation, nor upheld in regard to the wearing of religious symbols such as veils in schools in the Nordic states.⁴³ Under current Swedish law the tradition of not requiring the child's informed consent is upheld in regard to baptism and ritual male circumcision on infants in accordance with, foremost, the Jewish tradition, but abandoned in regard to ritual male circumcision of children above the age of two months in accordance with the tradition of Islam etc.

To sum up, a complete prohibition on ritual male circumcision would infringe on religious freedom under the CRC as well as the ECHR. This is a conclusion that Swedish and Finnish legislators have reached, as opposed of organizations such as the Swedish Save the Children.

4. Why the Nordic position?

So far the attempt to ban ritual male circumcision is unique to the Nordic states of Sweden, Denmark and Finland. What prompted it? And why did the debate arise at a point in time when individualizing your body by tattoos, piercing and beauty operations increasingly seems to be part of the general Western (youth) culture?

⁴³ The Swedish National Agency for Education. 23 Jan 2007 Dnr 52-2006:2792. A school may not prohibit hijab on a 7-year old girl. The wishes of the child is not discussed, neither is fact that she is below the age of veiling according to most schools of Sharia.

Some issues recognizable from other societies are the perceived similarities with FGM and a lack of understanding of the very different health implications of male circumcision and FGM. Other issues seem more specific for the Nordic states. In contrast with, for example, North America, the Nordic states lack a tradition of male circumcision for medical reasons.⁴⁴

The Nordic countries do have long-standing, valuable traditions of child protection. An often referred to example is that Sweden was first to ban smacking. All the same, children fare badly in the Nordic states as well as in other countries, and several important child issues do demand attention. One such issue is the wearing of ritual veils in public schools. They are permitted, notwithstanding the warnings of the ECHR, pointing to the fact that veils are “powerful external symbols”, the impact of which on young people – and, one might add, one xenophobic movements – is hard to assess. Thus, little girls as young as seven years old, are left to fight a patriarchal system with no support from the majority society.⁴⁵

4.1 Normality in Norden

A way to understand the Nordic position is to look into the problematic notion of “normality”. The best interests of the child tend to be interpreted in the light of what is considered to be “normal”.⁴⁶ Although this way of understanding the best interests of the child has been challenged,⁴⁷ some characteristics of what may be considered a “normal” childhood in the Nordic societies may be outlined.

Although the five Nordic states differ in some aspects, they do share a long history of religious homogeneity. The homogeneity was upheld by limiting the possibilities for followers of other religions to settle.⁴⁸ With the conclusion of the Danish Reformation in 1536, Jews were in principle prohibited entry until the end of the 17th century. A hundred years later they were allowed to settle in certain towns in then jointly governed Sweden and Finland. Norway banned Jewish immigration until the 19th century. Muslim migration to the

⁴⁴ Approximately 1.2 million newborn males are circumcised in the United States annually (AAP 1999). It is estimated that 48% of male neonates born in Canada are circumcised (CPS 1996). <http://www.nichd.nih.gov/cochrane/BradyFryer/BRADYFRYER.HTM>. Supra. Ritual male circumcision is not a subject dealt with in Nordic popular culture.

⁴⁵ See supra not 38. See also Kirsten Ketscher, “Cultural Rights and Religious Rights” (in *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?*), Loenen & Goldschmidt (ed.), Intersentia, 2007.

⁴⁶ Grude Flekkoy, “Psychology and the Rights of the Child” (i Alaimo Kathleen, Klug Brian, *Children as Equals*) University Press of America 2001 p. 74.

⁴⁷ Tine Egelund, *Beskyttelse af barndommen : socialforvaltningers risikovurdering og indgreb* (En. Protection of childhood), Hans Reitzels forlag 1997.

⁴⁸ Cf. The 1686 Swedish Church Act. (Swedish).

Nordic states is basically a late 20th century phenomenon. Currently, 82 percent of the Danish population of 5,4 million belongs to the official Evangelical Lutheran Church. The second largest religious community is the Muslim community (210,000). The Jewish Community amounts to 7,000.⁴⁹ An estimated 83 percent of the Finnish population belongs to the Evangelical Lutheran Church. There are approximately 1,500 members of the Jewish communities and 30,000 Muslims in Finland, most of whom have arrived in the last decade.⁵⁰ Approximately 82 percent of the Norwegian population of 4.75 million belongs to the Evangelical Lutheran Church, Muslims number 80,000, and Jews 1,500.⁵¹ An estimated 75 percent of the Swedish population of 9.1 million is members of the Lutheran Church of Sweden. Approximately 5 percent (450,000-500,000) are Muslims although the officially sanctioned Muslim Council of Sweden, for Swedish government funding purposes, only reports 100,000 active participants. The number of Jews is estimated at 18,500 to 20,000, half of whom are practicing members of Jewish communities.⁵²

Taken these numbers it seems clear that Christianity presents a form of Nordic normality. All the same, the Nordic states are secular in that the general understanding of religion is that its importance is limited to personal belief and that religion is given limited scope in the public arena. The impact of religion in the raising of children is quite seldom debated.⁵³ All in all, Jews and Muslims together amount to less than 3 percent of the Nordic population. Children belonging to minorities practicing male ritual circumcision thus constitute a tiny minority and male ritual circumcision is an aspect of childhood and the best interests of the child that is clearly not “normal” in Nordic societies. This may help explain not only the legislative steps taken to regulate ritual male circumcision, but also the harsh voices in the public debate,

⁴⁹ U.S. State Department 2008 Report on International Religious Freedom. www.state.gov/g/drl/rls/irf/2008/108443.htm

⁵⁰ U.S. State Department 2008 Report on International Religious Freedom. www.state.gov/g/drl/rls/irf/2008/108445.htm 81 percent of the Icelandic population of 320,000 are members of the state Evangelical Lutheran Church. The Association of Muslims in Iceland, founded in 1997, has 371 members out of approximately 800 to 1,000 Muslims living in the country. Less than 60 persons attend occasional Jewish events. U.S. State Department 2008 Report on International Religious Freedom. www.state.gov/g/drl/rls/irf/2008/108451.htm

⁵¹ U.S. State Department 2008 Report on International Religious Freedom. www.state.gov/g/drl/rls/irf/2008/108464.htm

⁵² U.S. State Department 2008 Report on International Religious Freedom. www.state.gov/g/drl/rls/irf/2008/108474.htm. See Swedish Commission for Government Support to Religious Communities. <http://www.sst.a.se/>.

⁵³ See, however, European Court of Human Rights, *Folgero vs. Norway* 29 June 2007.

including Members of the Parliament and those harbored by NGO's such as Save the Children, urging Jews and Muslims to "change their religion".⁵⁴

From another angle, the debate in Sweden and Finland, as well as the enactment of the law on ritual circumcision of boys in Sweden, was initiated by a single case in each of the countries. Once the Swedish case had reached the knowledge of the public and policy-makers, the newly appointed Children's ombudsman and the Swedish Save the Children led on initiated a debate in which they argued that ritual circumcision should be completely banned.

The debate on ritual male circumcision takes place in several fora, including the Parliament, leading newspapers, the website of the Swedish Save the Children and the leading Swedish Medical Journal (Sw. *Läkartidningen*). The medical debate over the years 1997-2003 has been characterized as starting "with light criticism and ending in harsh condemnation with little understanding for minorities' need to define themselves and to follow religious laws".⁵⁵ The debate has been summed up as showing that: "theological argument to defend the praxis of male ritual circumcision (...) lacked all argumentative power in our country where religion and everyday life is not intimately interwoven".⁵⁶ The later point appears important for the understanding of the Nordic position.

5. The way forward

Interestingly, a change in attitudes seems to be about to take place in Sweden. The National Board of Health and Welfare in a 2007 report, commissioned by the Swedish government, found that an estimated two thirds of the approximated 3,000 Muslim boys circumcised yearly were circumcised either abroad or by someone who was not a licensed doctor. That boys are circumcised outside the bonds of the law was explained by a lack of knowledge and negative attitudes of the health and care personnel. Some parents thought circumcision could not

⁵⁴ On the website of Swedish Save the Children's magazine "Barn" (En. *Child*) anonymous "Kamir" suggests that: "Jews, Americans [sic!] or other loonies should be whipped until they stop [practicing male ritual circumcision]" Published 7 July 2002. According to a Maria Wigander to have one's child ritually circumcised constitutes "torture". She suggests that men performing it thereby get their sick sadism satisfied. Published 23 Mar 2000. www.tidningenbarn.se/zino.aspx?articleID=5136. Visited 28 Dec 2008. The editor-in-chief has been given the opportunity to comment on the content of the website and the quoted comments have subsequently been removed from the website. See for another position the international Save the Children Saving Babies Report South Africa 2005 <http://www.savethechildren.org/publications/technical-resources/saving-newborn-lives/country-documents/Saving-Babies-Report-2005.pdf>

⁵⁵ Mikael Hirshberg, Jonas Tovi, Staffan Bowald, "Öppen diskussion om manlig omskärelse fick känslorna att svalla", (En. *Open discussion on male ritual circumcision made emotions go high*), *Läkartidningen* 45 2004 p. 3520-3523. Oddly, the non-medically trained invoked medical arguments for their positions and the medically trained argued religiously and legally.

⁵⁶ Hirschberg et al.

legally be performed in Sweden, and parents wanting information about legal male circumcision reported they had been met with mistrust and contempt from health and care personnel. The Swedish National Board of Health and Welfare suggests that the law should clarify that male circumcision under safe medical conditions is a right of the child.⁵⁷ Why the change in attitude?

One way to explain it is by looking into the overall purpose of the legislation, is it as suggested in the debate, to “change the religion” of Jews and Muslims, or is it to ensure safe medical conditions when boys are actually being ritually circumcised? If the first approach of social engineering is chosen then a ban is most likely to be effective, notwithstanding its presumed inconsistency with human rights standards. If, however, the second approach of child protection is selected then it must be framed in a rights terminology consistent with the CRC.

Another explanation is the rising awareness of religious and cultural facts and realities in child protection which has led to the conclusion that a strong child protection perspective must be based on the reality of the involved children, not on presumptions. Contrary to the current evaluation, the original enactment went through without face-to-face dialogue with children and young people with experiences of circumcision. It appears that the adult members of the majority society understood themselves to be better representatives of the children of minorities than the children themselves and their kin. Quite contrary to the intentions of the CRC.

⁵⁷ The Swedish Associations of Local Authorities and Regions suggest that it should be mandatory for the Regions to provide for ritual circumcisions.