

BANNING GOD'S LAW IN THE NAME OF THE HOLY BODY - THE NORDIC POSITION ON RITUAL MALE CIRCUMCISION

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The article investigates the legal initiatives regarding ritual male circumcision in the Nordic states. National laws are discussed in relation to human rights according to the United Nations Convention on the Rights of the Child and in the European Convention on the Fundamental Rights and Freedoms, i.e. right to freedom of religion, the rights and best interests of the child, gender equality, and protection of national minorities in Europe. It is suggested that the principle of the best interests of the child is interpreted in the light of what is looked upon as a "normal" childhood. Normality in the Nordic states vis-à-vis religion and childhood is construed in the light of a long tradition of religious Protestant homogeneity that is presently being challenged due to immigration, in the wake of which a number of legal principles, religious rites, and religiously inspired traditions, including ritual male circumcision, are being re-negotiated at different levels in the civil society and by different actors, all claiming agency for the child.

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I. INTRODUCTION

The protection of the best interest of the child is the dual responsibility of parents and society. In heterogenic societies, different understandings of what constitutes the best interests of the child may exist. 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 three of the Nordic countries the issue of ritual male circumcision of minor boys has proved to be a difficult issue upon which to reach agreement.

Representatives of, foremost, the Protestant majority claim that ritual male circumcision, at least 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. Representatives of the Jewish and Muslim minorities argue that banning, or severely restricting, ritual circumcision would be an infringement limiting children's ability to partake in a religious tradition as important for religious identity as baptism is for Christianity.

Thus, the best interests of the child, as well as the rights of the child, are invoked as arguments for, as well as against, ritual circumcisions of boys. To ritually circumcise 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 religious community. This explains why Jews and Muslims have objected to the current Swedish act regulating the practice and why the World Jewish Congress has found it to be "the first legal restriction on Jewish religious practice in Europe since the Nazi era".¹

The article starts by outlining the legal and social background to the development of legislation and case law in the five Nordic countries in relation to ritual male circumcision. The Nordic position is analyzed in relation to the right to freedom of religion, children's rights and best interests under European Convention

1 *Jews Protest Swedish Circumcision Restriction*, REUTERS, June 7, 2001,

on Fundamental Rights and Freedoms (ECHR),² the United Nations Convention on the Rights of the Child (CRC),³ and the European Council's Convention for the Protection of National Minorities.⁴

II. THE LEGAL INITIATIVES IN THE NORDIC STATES

In three of the five Nordic states—Denmark, Finland, and Sweden—ritual male circumcision of boys has been the subject of debate and legal initiatives. The Icelandic and Norwegian legislators are currently not planning to pass legislation on ritual male circumcision; neither has case-law been published on the issue.

In Sweden a law on circumcision of boys was passed in 2001 (Sw. *Lag (2001:499) om omskärelse*). The law was prompted by a 1997 Swedish Supreme Court decision in which the Supreme Court held that ritual circumcision of a minor boy that was performed with parental consent was not punishable as assault.⁵ The case heard by the Supreme Court concerned the criminal liability of a person who in 1993 circumcised six asylum-seeking Bosnian boys between the ages of 18 months and 7 years with the consent of their parents. The circumcisions were performed under poor hygienic conditions in a camp for asylum-seekers and the boys became badly infected. They were reported to have been terrified.

The Swedish act of 2001 stipulates that male circumcision on minor boys may be performed only by a licensed doctor or on 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*). The law further states that the parents, provided they share joint parental responsibility, should be in agreement and, if possible, the boy himself should provide informed consent to be circumcised. The law states that regardless of age, a boy's wishes not to be circumcised should always be respected.⁶ This statement of the law has a different impact on ritual circumcision

2 European Convention on Fundamental Rights and Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

3 United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

4 Framework Convention for the Protection of National Minorities, ETS no. 157.

5 The Swedish Supreme Court, NJA 1997 at 636. *See also* Johanna Schiratzki, *Barnets bästa - I portalparagraf och praxis (Best Interests of the Child – in Legislation and Court Case)*, JURIDISK TIDSKRIFT 973 (1998-99).

6 Under Swedish and Finnish law the age of consent to general medical care, including surgery, is decided on a discretionary basis with regard to the impact of the treatment as well as the age of the minor.

in accordance with Muslim tradition as compared to Jewish law. Although the age for circumcision for Muslim boys varies, it is normally performed before the age of 13 years in accordance with the tradition of Ishmael.⁷ Jewish boys should be circumcised on the eighth day after birth.⁸ Thus, 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 his informed consent or even a verbal wish not to undergo ritual circumcision.

According to the Swedish act, ritual circumcision on minor boys outside the boundaries of the law is punishable as assault. To the best of the author's knowledge, no one has been held criminally responsible for having performed circumcisions on boys in Sweden. After the Swedish act had entered into force, a licensed doctor was acquitted of manslaughter—following the death of a boy he had circumcised—after the prosecution failed to prove beyond a doubt that he had administered too much anesthetic.⁹ A father, however, was found guilty of facilitating assault after he had his son circumcised outside the boundaries of law and against the wishes of the mother who held sole parental responsibility.¹⁰

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 that were estimated to be circumcised yearly were circumcised outside the boundaries of the Swedish law (as opposed to 40–50 circumcisions performed on Jewish boys). These circumcisions were performed either legally abroad or in Sweden in violation of the law by someone who was not a licensed doctor.¹¹ A few Muslim boys were

7 Although not discussed in the Qur'an, the primary source of Islamic law, circumcision is widely practiced in Islam and most often considered to be a *sunnah*, i.e., tradition. Ishmael, the ancestor of the Muslim people, was circumcised at the age of 13 years. Nonetheless, circumcision is also performed on younger boys.

8 Genesis 1:17:12. As opposed to Muslim circumcision, under Jewish law circumcision is not to be performed at alternative ages.

9 Svea Court of Appeal, judgment 27 Nov 2002, B 6899-01.

10 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.

11 MANLIG OMSKÄRELSE, EN RAPPORT FRÅN ETT REGERINGSUPPDRAG' (THE SWEDISH NATIONAL BOARD OF HEALTH AND WELFARE, CIRCUMCISION OF BOYS, A REPORT FROM A GOVERNMENTAL ASSIGNMENT (S2005/7490/SK) (Mar. 2007), available at www.socialstyrelsen.se.

circumcised, within the boundaries of the law, before the age of two months by a Jewish *mohel*.¹²

In Denmark no criminal case regarding male ritual circumcision has been reported. The national authority that assesses medical negligence decided not to criticize a medical doctor, who had circumcised a five month old boy. However, the Danish Parliament has been considering legislation that would regulate or ban circumcision on boys.¹³

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.¹⁴ The Finnish legislative plans were prompted by a 2008 Finnish Supreme Court decision that determined it was not a criminal act for parents to have their son circumcised for religious reasons, provided that the circumcision was performed by a person with medical knowledge.¹⁵ In accordance with the position of the Supreme Court, in April 2010 a Finnish lower court found a Muslim mother guilty of inciting assault after having had her six month old son circumcised by an individual who was not a medical doctor.¹⁶ A charge against Jewish parents is pending in the same court.¹⁷

The debate in Sweden and Finland was initiated by a single Supreme Court decision in each of the countries. Once the Swedish case¹⁸ reached the public's and policy-makers' knowledge the then newly appointed Children's Ombudsman and the Swedish Save the Children organization led a public effort to not only regulate, but also completely ban, ritual circumcision. The public debate includes harsh voices harboured by NGOs, such as Save the Children, urging Jews and Muslims to "change their religion".¹⁹ Professionals involved in the debate include the leading

12 John Gradowski, *Muslimer och Judar Delar Traditioner (Muslim and Jews Share Traditions)*, 6 JUDISK KRÖNIKA (2008).

13 See *Male Circumcision Should be Cut*, Nov. 17, 2008, at politiken.dk/newsinenglish/article598875.ece. So far legislation has not been passed. See also Vejledning om omskæring af drenge, (*Guidelines for Circumcision of Boys*), www.sst.dk. The national authority assessing medical negligence (Dn. *Sundhedsvæsenets Patienteklagenævn*) Dnr 0552018 30-05-2006.

14 Yle News, Published 31.07.2008. See also www.stm.fi.

15 The Finnish Supreme Court, KKO: 2008:93.

16 www.hbl.fi/text/inrikes/2010/4/13/w45651.php.

17 www.hbl.fi/text/helsingfors/2010/2/10/w42937.php.

18 The Swedish Supreme Court, NJA 1997 p. 636.

19 On the website of Swedish *Save the Children's* magazine "Barn" (*Child*) anonymous "Kamir" suggests that: "Jews, Americans [*sic!*] or other loonies should be whipped until

Swedish Medical Journal (Sw. *Läkartidningen*). The medical debate spanning the years 1997-2003 was characterized by beginning "with light criticism and ending in harsh condemnation with little understanding for minorities' need to define themselves and to follow religious laws".²⁰ The debate was 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".²¹ The later point appears important for understanding the Nordic position.

III. RITUAL MALE CIRCUMCISION AND HUMAN RIGHTS

In the Nordic debate, human rights and the best interests of the child have been quoted both to support and oppose ritual circumcision of minor boys. The specific human rights invoked are freedom of religion in relation to parents and children, the child's rights to bodily integrity, autonomy, and gender, as well as the best interests of the child under the CRC and the ECHR. The Finnish and Swedish positions on ritual male circumcision have also been examined in relation to the European Council's Convention for the Protection of National Minorities.

The problem of how to balance religious and private law with human rights standards is especially challenging in regard to children. This is in part explained by the very nature of childhood and what has been well captured by the notion of "evolving capacities".²² The notion of evolving capacities indicates that children are

they stop [practicing male ritual circumcision]" Published July 7, 2002. According to a Maria Wigander, having one's child ritually circumcised constitutes "torture". She suggests that men performing it have their "sick" sadism satisfied. Published Mar. 23, 2000, www.tidningenbarn.se/zino.aspx?articleID=5136. 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 it. *Contra* the international organization, Save the Children's report: SAVING BABIES 2003-2005: REPORT SOUTH AFRICA 2005, www.savethechildren.org/atf/cf/%7B9def2ebe-10ae-432c-9bd0-df91d2eba74a%7D/ar2005.pdf.

20 Mikael Hirshberg, Jonas Tovi & Staffan Bowald, *Öppen diskussion om manlig omskärkelse fick känslorna att svalla: Studie av en debatt i Läkartidningen åren 1997-2003 (Open Discussion on Male Ritual Circumcision Made Emotions Go High)*, 45 *LÄKARTIDNINGEN* 3520 (2004). Oddly, the non-medically trained invoked medical arguments for their positions and the medically trained invoked religious and legal arguments.

21 *Id.*

22 See the UNICEF report: GERISON LANSDOWN, *EVOLVING CAPACITIES OF THE CHILD* (2005).

to some extent dependent on parents or *in loci* parents for care and protection. It further underlines the central challenge of child law, namely whether (or to what extent) children's rights should promote autonomous rights of the child or secure the dependent child's need of protection.²³ Another explanation is the difficulties in interpreting the 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 United Nations to accept broad reservations from Member States,²⁴ which are both contradictory to the idea forwarded in Swedish legal history that the CRC has brought about a universal understanding of what constitutes the best interests of the child.²⁵ The multiple feasible interpretations of the best interests of the child (Article 3) is underlined in the preamble of the CRC that stresses 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.

In this section ritual male circumcision is discussed in relation to freedom of religion, children's rights and best interests in relation to normality and gender equality as well as protection of national minorities. Finally the question of proportionality when limiting a human right is looked into.

A. Right to Freedom of Religion – A Right of the Parent or the Child?

Children are a necessity for religion. No religion will survive if is not able to raise coming generations as believers (neither would, one might add, a democratic society based on secular principles). The vital importance of children to religions

23 Kathrin Hunt Federle, *Rights Flow Downhill*, 2 INT'L J. CHILDREN'S RTS. 343 (1994).

24 Abdullahi An-Na'im, *Cultural Transformation and Normative Consensus on the Best Interests of the Child*, in THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS 63 (Philip Alston ed., 1994).

25 The suggestion of the CRC offering a universal understanding of the best interests of the child was introduced in the Governmental Investigation SOU 1997:116 *Barnets bästa i främsta rummet (Governmental Investigation 1997:116 The Best interests of the Child – the Paramount Principle)* that has been influential in the Swedish, and to some extent the Nordic, child law debate. In Swedish this understanding of the best interests of the child has been challenged primarily by Johanna Schiratzki, *Barnkonventionen och Barnets Bästa – Globalisering med Reservation, (The CRC and the Best Interests of the Child— Globalisation with Reservation)* BARNETS BÄSTA – EN ANTOLOGI OM BARNDOMENS INNEBÖRDER OCH VÄLFÄRDENS ORGANISERING 25 (Gunilla Halldén & Bengt Sandin eds., 2003). See, e.g., Sonia Harris-Short, *Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child*, 25 HUM. RTS. Q. 130 (2003).

helps explain why religious rites of initiation—such as baptism and ritual male circumcision—are part of most religions. This further explains the strong protection of freedom of religion in the CRC as well as the close link in international law between children's rights to freedom of religion, including the right to manifest it, and between parents' right to guide children in religious matters. 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).

The interplay between children's and parents' rights is illuminated by 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.

The possibility to limit the right to manifest one's religion is covered by Article 14(3) CRC:

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.

Parents' rights to guide children in their own cultural identity, language and values are underlined in Article 29(1) CRC, which provides that 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".

The right of minorities to profess and practice their own religion is specified in Article 30 CRC on children and minorities which states that:

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.

In Europe, freedom of religion is generally protected, in a wording similar to Article 14(3) CRC, by Article 9(2) ECHR:

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.

The ECHR makes no explicit reference to the rights of the child. Parental rights, however, are underlined in Article 2 of Protocol no. 11 to the ECHR²⁶ on education which states that:

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.

In sum, even though both the CRC and the ECHR grant children the right to freedom of religion, both instruments underline parental rights in relation to children's right to freedom of religion. The question of how to solve potential conflicts between parents and children in relation to religion are left to be answered by the Member States.

B. Rights of the Child—Identity and Integrity

Although parental rights to guide the child in religious matters are emphasized in relation to State Parties of the CRC and the ECHR, this does not bar children of rights in relation to state agencies as well as parents. In the CRC, the child's rights in relation to State Parties are expressed in Article 14(1) and in relation to parents in Article 5, which underlines the developing capacities of the child, but foremost in Article 12(1) which states that:

- 1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

The CRC further grant the child a right to bodily integrity. 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 ...".

26 Paris Protocol, 20.III.1952.

It is apparent that a religious or other practice that amounts to violence is not protected by the CRC. A practice is categorized as "violence" if it implies long-lasting damage or pain. An example of a tradition considered inconsistent with Article 19 CRC is female gender mutilation (FGM). Contrary to male ritual circumcision, the lifelong harmful health effects of FGM are well documented²⁷ and explain why FGM is not defended by religious or other authorities in their official capacities, but on the contrary, condemned.²⁸ When correctly performed, ritual male circumcision has no long-lasting harmful effect, and therefore, cannot be taken to infringe the child's rights under Article 19 CRC.

Another argument raised in relation to ritual male circumcision on minors is the child's entitlement to autonomy and respect for its views (cf. Article 12 CRC). Opinions vary regarding from what age the views of the child should be given due importance. 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.

An aspect of autonomy and respect for the child's views is that of informed consent, a standard legal demand in medical practice.²⁹ The concept of the child's

27 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/.

28 MUHAMMAD LUTFI AL-SABBAGH, ISLAMIC RULING ON MALE AND FEMALE CIRCUMCISION, in 8 *The Right Path to Health: Health Education through Religion* (1996), available at www.emro.who.int/vip/PDF/female_male_circumcision_en.pdf. (Sadly, the condemnation and criminalization of FGM is not efficiently enforced, and it is still practiced in accordance with informal traditions. 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).

29 Regulations regarding the extent of informed consent of patients below the age of 18 years should be given by the holder, or holders, of parental responsibility or by the minor 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 upon a discretionary basis with regard to the impact of the treatment as well as the age of the minor.

informed consent has a weak tradition in freedom of religion. 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.³⁰ 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 less than two months old in accordance with, foremost, the Jewish law, but abandoned in regard to ritual male circumcision of children older than the age of two months in accordance with, for example, Islamic tradition.³¹

C. Best Interests of the Child—Normality and Exceptions

The challenge of how to define the best interests of the child (Article 3) has been left unfinished by drafters of the CRC. It has to some extent been clarified by the CRC Committee which has stated that the best interests may not be interpreted in a way that infringes 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. State Parties undertake to ensure for 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).

The lack of a closer interpretation of Article 3 explains why it has been invoked as an argument for, as well as against, ritual circumcision. On the one hand, to perform ritual circumcision on boys could be construed as infringing the best interests of the child, if this understood as the child's physical integrity. On the other hand, not to ritually circumcise boys could be seen as an infringement of the child's

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

31 See for a critical scrutiny of "cultural blindness", J. Steven Svoboda, Robert S. Van Howe & James G. Dwyer, *Informed Consent for Neonatal Circumcision: an Ethical and Legal Conundrum*, 17 J. CONTEMP. HEALTH L. & POL'Y 61 (2000-01).

best interests if the child is prevented from participation in a religious tradition as important for religious identity as baptism in Christianity.

Representatives for the majority society, including members of the parliament as well as health and sick care personnel, claim that the best interests of the child should be understood as: 1) non-therapeutic circumcision of boys is not in the best interests of the child; 2) ritual male circumcision is in accordance with the best interests of the child provided it is performed in accordance with medical knowledge, anesthetization, and with the boy's informed consent. Representatives of minorities practicing male ritual circumcision of boys argue that ritual male circumcision is in accordance with the best interests of the child regardless of whether the child has (legal) capacity to give an informed consent or not, provided it is properly performed.

The arguments against ritual male circumcision may be seen in light of the fact that there is a tendency to interpret the best interests of the child in the light of what is considered to be "normal". This trend appears particularly strong in regard to legal assessments in the intersection between medical science and the law as well as in regard to children in need of specific protection or what may be considered to be "abnormal conditions". Or as expressed by the former Norwegian Children's Ombudsman Grude Flekkoy:

Although no child is "average" in the sense of being exactly like any other child, most children in the world are alike in the standard kinds of care they need. Only on the basis of what children are normally like is it possible to consider the position of abnormal children or children in abnormal conditions.³²

This way of understanding the best interests of the child has been challenged as stereotyping children that do not meet the criteria of what has been labelled as "vision of normality that might not even exist".³³ All the same, the impact of normality—one of the arguments against ritual male circumcision is that the boy's body is unchangeably altered—when construing the best interests of the child, seems to have a bearing on the Nordic debate regarding ritual circumcision of boys as mirrors.³⁴

32 GRUDE FLEKKOY, *Psychology and the Rights of the Child*, in CHILDREN AS EQUALS: EXPLORING THE RIGHTS OF THE CHILD 74 (Kathleen Alaimo & Brian Klug eds., 2001).

33 TINE EGELUND, BESKYTTELSE AF BARNDOMMEN: SOCIALFORVALTNINGERS RISIKOVURDERING OG INDGREB (Protection of childhood) (1997).

34 Opinions differ as to whether this is detrimental to the boy or, quite on the contrary, beneficial. See Michael D.A. Friedman, *A Child's Right to Circumcision*, 83(1) BJU INT'L 74 (1999).

Therefore, two characteristics of what may be considered a "normal" childhood in the Nordic societies are: First, Nordic states are secular in that the general understanding of religion is that it should be limited to personal belief and be given limited scope in the public arena. The impact of religion in relation to childhood is often debated.³⁵ Currently, however, the Nordic secularism and fundamental rights are challenged by a return to religion: a renewed demand for multiculturalism and relativism.³⁶ Second, notwithstanding the secular basis of the public debate, the five Nordic states share a long history of religious homogeneity. All in all, Jews and Muslims together amount to less than three percent of the Nordic population, most of which are first or second generation immigrants.³⁷

Taken these numbers it seems clear that Christianity presents a form of Nordic normality. Children belonging to minorities practicing male ritual circumcision 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.

35 *See, however*, European Court of Human Rights, Folger *o* v. Norway App. No. 15472/02, on 29 June 2007.

36 *See* Socialvetenskaplig tidskrift Nr 3-4 2009. Ingrid Lomfors, *Religionen har återvänt till Sverige. Vad betyder det? (Religion has Returned to Sweden. What's the Impact?)*, 2 JUDISK KRÖNIKA 37 (2010).

37 Religious homogeneity was historically upheld by limiting settlement by followers of other religions. 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 the then jointly governed Sweden and Finland. Norway banned Jewish immigration until the 19th century. Muslim migration to the 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. 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 who arrived in the last decade. 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. 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 members of Jewish communities. *See* U.S. STATE DEPARTMENT, REPORT ON INTERNATIONAL RELIGIOUS FREEDOM (2008), www.state.gov/g/drl/rls/irf/2008/108474.htm. *See* Swedish Commission for Government Support to Religious Communities, www.sst.a.se.

D. Gender Equality

In relation to gender two separate issues have been brought up in the Nordic debate on ritual male circumcision: The first is discrimination against males. A frequent argument is that it is wrong to cut little boys when FGM is plainly forbidden.³⁸ Those debating seem to overlook the differences between FGM and ritual male circumcision in regard to medical effects as well as formal religious legitimacy.³⁹ The other issue is the gendered nature of the rites of initiation in Islam and Judaism that present a problem in relation to the right to freedom of religion. In the three monotheistic religions, the only gender-neutral rites of initiation in contemporary worship are baptism and communion in Christianity.

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 several Christian, as well as Jewish and Muslim administrations that is not gender neutral since women may not be candidates for several positions. Another feature in a number of religious traditions is the demand for appropriate dress and behavior that differs for men and women. Unlike baptism and male ritual circumcision, though, 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, is introduced to, "a life in connection with God".⁴⁰

It is obviously not an aim of human rights to uphold gender discrimination in religion.⁴¹ However, the traditionally weak position of women in the three monotheistic religions is not linked to the rite of male circumcision, but rather, to other mechanisms, as witnessed by the fact that the gender-neutral ritual of baptism for centuries did little to improve the historically weak position of women within

38 Peter Wahlgren, *Bra eller dålig lag? Att skära i barn (Bad or Good Law? To Cut in Children)*, DAGENS JURIDIK, Oct. 03, 2007, www.dagensjuridik.se/2007/10/bra-eller-dalig-lag-om-att-skara-i-barn.

39 Given some of the rhetoric of the Nordic debate it may be noted that is acceptable to offer different protection based on the various 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).

40 *Dopgudstjänsten – Så här går det till (Baptism - So is it Done)*, SVENSKA KYRKAN, www.svenskakyrkan.se/default.aspx?id=655382.

41 Frances Raday, *Culture, Religion, and Gender*, 1(4) INT'L J. CONST. L. 663 (2003).

Christianity. The position of women and girls will not improve if ritual male circumcision is banned.

E. Protection of National Minorities

Freedom of religion is further protected by Article 8 European Council's Framework Convention for the protection of National Minorities. The Jewish and the Tartar minorities are protected by the convention (unlike other Muslim communities). It is frequently argued that rights for minorities, as well as multiculturalism in general, tend to be harmful to the weak especially women and children.⁴² To avoid such a criticism the scope of protection under the Framework Convention according to its Article 3 is limited so that every person belonging to a national minority shall have the right to freely choose whether or not to be treated as such. The right of choice demands certain autonomy that small children lack. Therefore, particular responsibility rests with the Advisory Committee on the European Council's Convention for the protection of National Minorities in regard to small children and it has commented on the Swedish law regarding boys' circumcision as follows:

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 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.⁴³

In a similar vein, the Advisory Committee commented on the Finnish debate.⁴⁴

42 SUSAN MOLLER OKIN, *IS MULTICULTURALISM BAD FOR WOMEN?* (1999).

43 ACFC/INF/OP/I(2003)006, p. 30, # 40.

44 CM (2006) 47 28 April 2006. European Court of Human Rights: Leyla Şahin v. Turkey, 29 June 2004. European Court of Human Rights, Dahlab v. Switzerland Feb.25, 2001.

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 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.⁴⁵ It does not, however, encourage further restrictions, as do, for example, members of the Nordic parliaments⁴⁶ and NGO's, as well as members of the public, who advocate a complete ban on ritual male circumcision of boys.⁴⁷

IV. PROPORTIONALITY—REGULATING RELIGIOUS PRACTICES RATHER THAN BANNING

Freedom of religion could be restricted by 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 (Article 14(3) CRC, Article 9(2) ECHR). The latter ground 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.

See also Human Rights Committee, Communication no. 931/2000, *Hudoyberganova v. Uzbekistan*, views of 8 December 2004.

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

46 Cf. Parliamentary motion 2006/07:2o365. (Sw.).

47 www.tidningenbarn.se/zino.aspx?articleID=5136. (*See supra* note 19).

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.⁴⁸

Freedom to manifest one's religion can further 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, as well as the CRC and ECHR. 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 is medically detrimental, causes infections, or long-time medical impediments. In part, the argument seems to relate to FGM, not male ritual circumcision. Additionally, 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.⁴⁹ Other arguments against ritual male circumcision are that there is always a risk that the circumcision may go awry,⁵⁰ that it is painful, and that it is costly.⁵¹ Scientific evaluations strongly suggest that un-anesthetized circumcision elicits systemic stress responses in the vulnerable newborn that negatively affect major body systems, and thus, the child should receive anesthetics.⁵² This, however,

48 See, e.g., Howard Gilbert, *Time to Reconsider the Lawfulness of Ritual Male Circumcision*, 3 EUR. HUM. RTS. L. REV. 279, 285 (2007) (criticizing the position that consent could be given "by or on behalf" of the circumcised person). See British Medical Association, *The Law and Ethics of Male Circumcision: Guidance for Doctors* (2006), www.bma.org.uk/images/Circumcision_tcm41-147277.pdf.

49 See, however, Aaron A.R. Tobian et al., *Male Circumcision for the Prevention of HSV-2 and HPV Infections and Syphilis*, 360(13) NEW ENG. J. MEDICINE 1298 (2009), <http://content.nejm.org/cgi/content/full/360/13/1298>. The findings suggest that male circumcision reduces the risk of several sexual transmitted infectious diseases in both sexes and that these benefits should guide public health policies.

50 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.

51 www.rod.se/sjukv%C3%A5rd/laglig-r%C3%A4tt-till-omsk%C3%A4rrelse-stj%C3%A4ll-resurser-fr%C3%A5n-v%C3%A5rden.

52 B. Brady-Fryer & N. Wiebe, Ja. Lander, *Pain Relief for Neonatal Circumcision*, 4 COCHRANE DATABASE SYST. REV. (2007). See also www.nichd.nih.gov/cochrane/BradyFryer/BRADYFRYER.HTM.

hardly justifies banning ritual circumcision as a necessity for the protection of health or morals.

Freedom of religion could further be limited if such limitations are prescribed by law and are necessary to protect not only health or morals but public safety, order or the fundamental rights and freedoms of others as stated in Article 14(3) CRC and Article 9(2) ECHR. To the best of the author's knowledge, "public safety" and "protection of public order" arguments have not been invoked in relation to male ritual circumcision neither by the CRC Committee nor in the judgments the ECHR.⁵³

Such arguments have, however, been 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".⁵⁴ The scope for limiting freedom of religion is narrow according to the ECHR. 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 young pupils is difficult to assess and the restraint on freedom of religion therefore could be seen "as meeting a pressing social need".⁵⁵ 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.

Thus, the ECHR as well as the CRC allows for limitations of the child's right to freedom of religion. The CRC Committee, however, has clarified that the scope for limitations is narrow and that state parties should avoid measures that single out a particular religious group.⁵⁶

53 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* (57258/00), 19 December 2006.

regarding freedom of expression and due process (Articles 10-6). *See also* Application No. 19580/92 by the T. family against the United Kingdom (withdrawn).

54 *Leyla Şahin v. Turkey*, *supra* note 44.

55 *Dahlab v. Switzerland*, *supra* note 44. *See also* Human Rights Committee, Communication no. 931/2000, *Hudoyberganova v. Uzbekistan*, views of Dec. 8, 2004.

56 CRC Committee, Concluding Observations: Germany, paras. 30-31, U.N. Doc. CRC/C/15/Add.226, 2004.

V. THE WAY FORWARD

To sum up, a complete prohibition on ritual male circumcision, as opposed to regulation would infringe on children's, as well as parents' religious freedom under the CRC as well as the ECHR. This is the conclusion that Swedish and Finnish legislators have reached as opposed to organizations such as representatives of the Swedish Pediatric Surgery Association⁵⁷ and Swedish Save the Children.⁵⁸

The Swedish legislator bases its current position on a 2007 report commissioned by the Swedish government that found that an estimated two thirds of the approximate 3,000 Muslim boys circumcised yearly were circumcised either abroad or by someone who was not a licensed medical doctor. That fact that the boys were circumcised outside the boundaries 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 legally be performed in Sweden, and parents wanting information about legal male circumcision reported they had met with mistrust and contempt from health and care personnel.

These experiences bring us to the issue of 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 actually undergo ritual circumcision? If the first approach of social engineering is chosen, than a ban—notwithstanding its presumed inconsistency with human rights standards—is most likely to be effective. If, however, the second approach of child protection is selected, than it must be framed in rights terminology consistent with the CRC.

Currently, the first approach has been rejected in the Danish debate and the latter is being considered by the Finnish legislator. In Sweden, and maybe characteristic of Swedish society, a middle ground has been chosen. The act regulating boys' circumcision will not be amended—neither to ban it nor to make it a legal right—but it is recommended that public health and care for those who are ill should be available for non-therapeutic ritual circumcision boys.⁵⁹

57 www.dn.se/nyheter/manga-lakare-vagr-ar-utfora-omskarelse-av-unga-pojkar-1.918069.

58 Rädsla barnens ungdomsförbund, <http://rbuf.blogspot.com/2009/05/manlig-omskarelse.html>.

59 Sveriges kommuner och landsting (*Swedish Association of Local Authorities and Regions*) 17 April 2009. Dnr 09/1371, available at www.websesam.jll.se/diariet/files/70e5a526-8bc2-4c71-b670-78686169e8d8.pdf.

