



## **CIRCUMCISION, AN ETHICAL AND LEGAL APPROACH TO A THREATENED RELIGIOUS PRECEPTION**

Anouck Barba

*Research Fellow*

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### **INTRODUCTION**

At the heart of a Western society which puts human rights and individual freedoms at the centre of concerns, male circumcision has become the subject of numerous cultural, legal, health and religious controversy. The debate is vast to say the least. Because if this practice, which consists in the removal of the foreskin –a fold of skin located at the end of the penis– is in itself an ancient ritual, it is none the less the illustration and the expression of a claim more broadly related to freedom of religion and the place of religious precepts and rituals in society.

While Iceland considers banning and penalizing circumcision for non-medical purposes,<sup>1</sup> it seems appropriate to come back more deeply to this ancestral practice whose framework has now gone beyond religious considerations.

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<sup>1</sup> See in French <https://www.la-croix.com/Religion/Catholicisme/Monde/LIslande-veut-interdire-circoncision-lEglise-catholique-sinsurge-2018-02-08-1200912339> ; <http://www.lefigaro.fr/international/2018/02/19/01003-20180219ARTFIG00234-l-islande-pourrait-interdire-la-circoncision-a-but-non-medical.php>.

Circumcision is of particular interest to lawyers, many of whom postulate that such a practice is detrimental to the child's interest and integrity. It has also attracted for several years now the attention of the medical profession which has found some advantages to it in terms of health prevention.

Thus, far from being limited to the national Chambers, the debate around this practice is rising today in the academic and medical fields; and the main one concerned by the debate here evoked, namely the child and the circumcised man, are curiously far from being the main actor. However, it is their freedom of religion and rights that are at stake, as well as those of their parents.

After an overview of the current practice of circumcision for religious and medical purposes (I), this report will examine this practice with regard to the rights of children and religious freedom (II).

## **I. Ritual circumcision and medical circumcision, two sides of the same practice**

The World Health Organization estimated in 2007<sup>2</sup> that about one third (30%) of the world's male population is circumcised. Of these 30%, two thirds would be Muslim.

Circumcision is originally a religious ritual practice, instituted first by Judaism and then applied by Islam (A). In contemporary times, it is also practiced in some countries, outside the purely religious sphere, for medical reasons and hygiene, especially regarding disease prevention (B).

### **A. The religious origin of circumcision, a ritual practice in Judaism and Islam**

#### **1. Circumcision in the Jewish religion**

The origin of circumcision in Judaism dates back to chapter 17<sup>3</sup> of the first book of the Torah,<sup>4</sup> book of Genesis (Bereshit or בְּרֵאשִׁית in Hebrew). In this passage, God makes a covenant with Abraham and his descendants and establishes circumcision as a sign of this covenant. According to the text, God said to Abraham, "*You shall be circumcised in the flesh of your*

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<sup>2</sup> World Health Organization, *Male circumcision: global trends and determinants of prevalence, safety and acceptability*, Department of Reproductive Health and Research and Joint United Nations Program on HIV/AIDS (UNAIDS), 2007, p. 1.

<sup>3</sup> Genesis 17, verse 9 to 11, King James Bible: "*And God said unto Abraham, Thou shalt keep my covenant therefore, thou, and thy seed after thee in their generations. This is my covenant, which ye shall keep, between me and you and thy seed after thee; Every man child among you shall be circumcised. And ye shall circumcise the flesh of your foreskin; and it shall be a token of the covenant betwixt me and you. And he that is eight days old shall be circumcised among you, every man child in your generations, he that is born in the house, or bought with money of any stranger, which is not of thy seed. He that is born in thy house, and he that is bought with thy money, must needs be circumcised: and my covenant shall be in your flesh for an everlasting covenant. And the uncircumcised man child whose flesh of his foreskin is not circumcised, that soul shall be cut off from his people; he hath broken my covenant.*"

<sup>4</sup> A Hebrew word for the first five books of the Holy Scriptures of Judaism attributed to Moses (Genesis, Exodus, Leviticus, Numbers, Deuteronomy). Called in the Christian religion the "Pentateuch".

*foreskin. It will be a token of the covenant between me and you. He who is eight days old will be circumcised among you (...) The uncircumcised male who is not circumcised in the flesh of his foreskin, that soul shall be cut off from his people. He has broken my covenant". As Rabbi Yeshaya Dalsace explains, "this is not just a rite of passage or initiation, but a necessary mark of belonging to be part of the people and to participate in certain rites".<sup>5</sup> Thus, according to him, "Judaism gives no justification to this act, it obeys a divine command and considers the uncircumcised man as incomplete. (...) The fact is that [circumcision] places the individual in the memory of a people".*

Judaism's approach to circumcision comes from the divine right, which is a third source of law, alongside classically recognized legal positivism and natural law.<sup>6</sup> Thus, the particular approach of Jewish circumcision cannot be part of an ordinary positivist debate, since by nature it escapes purely rational considerations to endeavour to those transcending the purely human reality.

Circumcision is usually performed on the eighth day after the birth of the baby by a *mohel*, "ritual circumciser", who is not necessarily a rabbi or a doctor but who must be a pious Jew specially trained to perform this operation. It consists of two obligatory practices which are the ablation of the foreskin (*mila*) and the removal of the mucous membrane surrounding the glans (*priya*).<sup>7</sup>

## 2. Circumcision in islam

In Islam, circumcision is not prescribed even within the Quran, but it is treated in his comments as well as in some *hadiths*.<sup>8</sup> Circumcision is widely apprehended by Muslim law and jurists consider it either as a recommendation or as an obligation. Just like in Judaism, many Muslim religious groups view this practice as "*the execution of a divine order*"<sup>9</sup> and date it back to the time of Abraham.

The modalities of circumcision are generally debated within classical and contemporary<sup>10</sup> Islam since its application and interpretation differ according to legal and religious trends. These divergences first of all concern the obligatory or unconditional nature of circumcision (especially with regard to new Muslim converts), the determination of the age at which it must be practiced, but also the religious origin of the practice. Thus, as Professor Moussa Abu Ramadan<sup>11</sup> notes: "*the arguments for and against circumcision, existing because of the silence*

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<sup>5</sup> *La circoncision dans le judaïsme*, Yeshaya Dalsace, in *La circoncision rituelle - Enjeux de droit, Enjeux de vérité*, directed by Vincent Fortier, Presses Universitaires de Strasbourg, 2016, "It is by no means a vague custom or ancillary practice, let alone a hygienic measure, but rather a founding rite that the Jews have tried to preserve even under dramatic circumstances." (free translation)

<sup>6</sup> Rémi Brague, *Sur la religion*, Flammarion, 2018, chapter 5 : « Droit et religion ».

<sup>7</sup> <http://www.leprogres.fr/sante/2012/06/07/un-rituel-juif-de-circoncision-a-l-origine-de-la-mort-de-deux-bebes-aux-etats-unis> ; see also: <https://fr.timesofisrael.com/un-bebe-a-contracte-un-herpes-apres-une-forme-de-circoncision-controversee-a-new-york/>

<sup>8</sup> *Hadith* in Islam are the record of the words, actions, and the silent approval, of the Islamic prophet Muhammad

<sup>9</sup> See more generally *Les débats sur la circoncision en droit musulman classique et contemporain*, Moussa Abou Ramadan, in *La circoncision rituelle - Enjeux de droit, Enjeux de vérité*, op. cit.

<sup>10</sup> *Ibid.*

<sup>11</sup> Moussa Abou Ramadan is a Professor of Muslim Law and islamology and member of the Mixt Unity of Research (UMR) 7354 Droit Religion Entreprise et Société (DRES) at the University of Strasbourg.

of the Qur'an and the problem of authenticity, lead us to conclude with Abdelwahab Bouhdiba<sup>12</sup> that "Circumcision, just as excision, is more a practice of Muslims than a practice of Islam, that sociological aspect and collective meanings clearly outweigh the sacral aspect, which is clearly secondary here. It is a question of marking the belonging to the group"<sup>13</sup>. In practice, all Muslim men are circumcised at a different age according to the traditions and currents practiced, and new converts are generally not obliged to be circumcised. The practice is similar to a traditional religious ritual.

Circumcision has now a wider interest in contemporary society, going beyond its original religious framework. Certain medical benefits related in particular to hygiene were discovered, allowing to develop, outside the ritual frame, circumcision for medical purpose.

## **B. Circumcision for medical purposes, the health benefits of an ancestral practice**

Several scientific studies and medical research have found advantages to the practice of male neonatal circumcision, to the point that in some countries like the United States and Canada a real practice of circumcision for medical purposes has developed. This form of circumcision is not linked to endorsement to a religious precept, but to a medical convenience, a preventive health measure.

According to a 2015 study of the Canadian Paediatric Society, "*Circumcision has potential health benefits, especially among high-risk populations*"<sup>14</sup> Indeed, it reduces the incidence of urinary tract infections in young boys and avoids certain functional problems that can affect the male genital organ during childhood. The Society of Paediatrics generally notes that "*circumcised men have a lower risk of penile cancer, while women who are their sexual partners also have a lower incidence of trichomoniasis, bacterial vaginosis, and cervical cancer.*" Finally, circumcision can reduce the risk of sexually transmitted infections in adult men, particularly HIV (Human Immunodeficiency Virus). Noting that circumcision can cause minor complications, the report further states that major complications "*are rare*" and that, interestingly, "*the risk of complications is lower in infants than in older children.*"<sup>15</sup>

In a 2007 report,<sup>16</sup> WHO found, in three randomized controlled trials in Kenya, South Africa and Uganda, that circumcised men have a 48-60% reduced risk of becoming infected by HIV. WHO believes that male circumcision could be included in the current package of HIV prevention measures and expects a rapid increase in the demand for safe and affordable male circumcision services in these areas.

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<sup>12</sup> Author of *La sexualité en Islam*, Paris, Quadrige/PUF, 4<sup>th</sup> ed., 1986.

<sup>13</sup> *Ibid*, p. 222.

<sup>14</sup> *La circoncision néonatale*, S. Todd Sorokan, Jane C. Finlay, Ann L. Jefferies, Société canadienne de pédiatrie, Comité d'étude du fœtus et du nouveau-né, Comité des maladies infectieuses et d'immunisation, 2015.

<sup>15</sup> See the statistics and results of medical studies on the report by the Société canadienne de pédiatrie, <https://www.cps.ca/fr/documents/position/circoncision>

<sup>16</sup> World Health Organization, *Male circumcision: global trends and determinants of prevalence, safety and acceptability*, p. 22, *op.cit.*

The American Academy of Paediatrics (AAP) reached the same conclusions in a 2012 report, which showed that the benefits of circumcision, in its ordinary forms, outweigh the risks and costs of such a practice.

If the practice of circumcision has developed for its medically recognized beneficial effects, it is mainly circumcision for religious purposes that is under debate. Though it is part of people's freedom of religion, the practice raises discussion when it comes to children.

## **II. Circumcision in view of the rights of the child and freedom of religion**

The main criticisms concerning male circumcision consider that this operation, affecting the body of the child, constitutes an attack on his physical integrity, unacceptable when he has not consented to it. It is therefore important to examine circumcision in view of the respect for the physical integrity of the child (A) and the freedom of religion of parents and children (B).

### **A. A violation to the physical integrity of the child?**

*"A ritual, common to both Jews and Muslims, circumcision is challenging as it is a marker for life inscribed in the flesh of a minor child at a young age without his consent being, nor being possible to be, required".<sup>17</sup>*

The legal debate regarding circumcision essentially focuses primarily on the protection of the child's interest, especially his or her physical integrity. Circumcision is thus all the more questioned as it is practiced on the body of babies (particularly for the Jewish rite) who cannot give their consent. Detractors of this practice allege that circumcision constitutes an irreversible damage to the physical integrity of children, especially infants, and should in fact be prohibited or more strictly regulated.

Circumcision of children had sparked a major media debate in 2012 following the decision of the Cologne District Court, which found the practice to be contrary to the rights of the child as an irreversible bodily injury to his body without his consent. This judgment followed a complaint by the German public prosecutor against a doctor who performed a circumcision on the 4-year-old child of a Muslim family, resulting in a haemorrhage. The court found that the intervention could not be justified by the exercise of parental authority since *"the right of a child to his physical integrity takes precedence over the parents' right"*.<sup>18</sup> It also decided to

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<sup>17</sup> *La circoncision en droit international, un rite religieux au filtre de l'intérêt supérieur de l'enfant*, Gérard Gonzalez and François Curtit, in *La circoncision rituelle - Enjeux de droit, Enjeux de vérité*, directed by Vincent Fortier, Presses Universitaires de Strasbourg, 2016.

<sup>18</sup> According to the decision, the judge ruled that *"the body of a child was permanently and irreparably changed by circumcision"* and that *"this change is contrary to the best interests of the child who must decide later on of his religious affiliation"*.

acquit the doctor, considering that the latter had acted according to the instructions of the parents and in the presence of an uncertain situation of right at the time in Germany.

In front of the controversy aroused by this decision, particularly in the Jewish and Muslim communities, the German legislator quickly clarified the state of the law and the German Civil Law was amended in December 2012 to expressly authorize the circumcision of infants as soon as it does not jeopardize the well-being of the child and when it is practiced “*by the medical book*”. It also allows circumcision to be practiced by qualified but non-medical religious representatives for the first six months of the boy’s life.

Beyond this case, it is clear that the legal litigation relating to the practice of circumcision is rare, if not non-existent. The decision of the Cologne court related to a medical complication (haemorrhage) of the operation, calling into question the conditions of the operation more than the operation itself. The Committee on the Rights of the Child recommended that “*effective measures be taken, including the training of practitioners and raising the public awareness, to ensure the health of boys and to prevent circumcision be practiced under conditions presenting a health risk.*”<sup>19</sup>

### **Circumcision and voluntary genital mutilation**

From the point of view of international law, children, as vulnerable and fragile beings, enjoy specific protection against any damage to their physical integrity.<sup>20</sup> The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief states in its article 5-5 that “*Practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development*”. The question is thus whether circumcision constitutes an attack on the physical health of the child and would be contrary to his best interests.

According to former UN Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, “*If it is carried out under appropriate conditions and with the consent of parents, male circumcision is not part of detrimental [to children] practices. In particular, boys’ circumcision must be clearly differentiated from female genital mutilation.*”<sup>21</sup>

In France, Article 222-9 of the Criminal Code condemns “*violence resulting in mutilation or permanent disability*” and provides for an aggravating circumstance in respect of the minority of the child. However, “*the characterization of mutilation concerning the removal of the foreskin must be evoked with caution, insofar as the latter is not strictly speaking a member; except to hear this term in a very extensive sense. Moreover, the case law has not yet had the*

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<sup>19</sup> CRC / C / 15 / Add.122, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention*, Committee on the Rights of the Child, 23rd session, 22 February 2000, para. 33; Cit. in *Elimination of all forms of intolerance based on religion: report of the Special Rapporteur on freedom of religion or belief*, United Nations General Assembly, 70<sup>th</sup> session, 5 August 2015, A / 70/286.

<sup>20</sup> See in particular the International Convention on the Rights of the Child, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

<sup>21</sup> Heiner Bielefeldt, Nazila Ghanea, Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary*, Oxford University Press, October 2015, p. 435-436.

*opportunity, apparently, to qualify circumcision in the language of criminal law.”*<sup>22</sup> This absence of litigation reveals the weak questioning of the practice by the interested parties.

## **Circumcision and excision**

The Council of Ministers of the Council of Europe rejected a comparison between excision and circumcision explicitly emphasizing that the practices mentioned in Resolution 1952 of 2013, including, inter alia, the circumcision of young boys for reasons religious,<sup>23</sup> “*are by no means comparable*” with female genital mutilation, “*as female genital mutilation is clearly prohibited by international law*”,<sup>24</sup> which is not the case with circumcision. Similarly, in its 2007 report cited above, the WHO refused to associate circumcision and excision, which, although rooted in different cultures and traditions, have “*substantially different*” medical consequences for people.<sup>25</sup>

### **B. Circumcision, a component of the child’s freedom of religion**

Considered as a religious precept, circumcision is apprehended by international law as being a part in the freedom of religion of individuals, including parents in the exercise of their rights to educate their children and to transmit to them the values and identity elements attached to their families and their culture. International texts give parents the right to education of their child, which includes transmitting to their children their religious and philosophical convictions.<sup>26</sup>

Article 5 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief provides, in addition, that “*The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.*” The same article also affirms the right of every child “*to have access to education in the matter of religion or belief in accordance with the*

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<sup>22</sup> Journal du Droit Administratif (JDA), 2017 ; chronique administrative 09 ; Art. 224.

<sup>23</sup> See Resolution 1952 (2013), *The right of children to physical integrity*, Parliamentary Assembly of the Council of Europe, 1 October 2013.

<sup>24</sup> See Doc 13463, Reply to Recommendation 2023 (2013) *Children’s right to physical integrity*, Committee of Ministers of the Council of Europe, 24 March 2014, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=20583&lang=en>

<sup>25</sup> “*While both male circumcision and female genital mutilation (FGM) are steeped in culture and tradition, the health consequences of each are drastically different. Male circumcision may seem similar as far as definition is concerned – “partial ... removal of the external genitalia” – but in practice is substantially different. FGM, also referred to as “female circumcision”, comprises surgical procedures involving partial or total removal of the external female genitalia. It is the manifestation of deep-rooted gender inequality that assigns women an inferior position in societies and is unambiguously linked to a reduction in women’s sexual desire and an irreversible loss of capability for a type of sexual functioning that many women value highly.*”, in *Male circumcision: global trends and determinants of prevalence, safety and acceptability*, op. cit., p. 27.

<sup>26</sup> Article 2 of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20.III.1952.

“*Article 2 – Right to education*

*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.”*

wishes of his parents” and precises that he cannot be compelled to “*receive teaching on religion or belief against the wishes of his parents*”. This article generally lays down the freedom of religion or belief of children, recognizing the primary role of parents in transmitting the principles attached to this freedom, namely “*a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion or belief of others*”<sup>27</sup> the guiding principle being the interest of the child.

Article 14 of the International Convention on the Rights of the Child (CRC) enjoins States parties to 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.*”

### **Regulate rather than prohibit**

The freedom of religion of the parents is limited and the practices in which a child is raised must not affect “*his physical or mental health or to his full development*”,<sup>28</sup> subject to the restrictions provided by law and related to the protection of public order, health, morals or the fundamental rights and freedoms of others.

Former UN Special Rapporteur on Freedom of Religion or Belief considered that circumcision as part of religious practices within which a child can evolve. In particular, he recalled that “*being part of the process of religious socialization, [circumcision], if it takes place with the free consent of the parents, is part of the right to manifest one’s religion or belief, as protected by Article 18 of the International Covenant on Civil and Political Rights, Article 5 (1) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and other relevant provisions*”.<sup>29</sup> Yet, the sanitary conditions of circumcision can and must be supervised, in order to protect the child. Article 24 (3) of the CRC states, inter alia, that “*States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children*”.

Regarding European law, the issue of circumcision has never been directly addressed by the European Court of Human Rights. On the other hand, in a case concerning the dissolution of the Jehovah’s Witnesses’ Association of Moscow, in which the Russian Government disputed the practice of refusing blood transfusions of Jehovah’s Witnesses as constituting a danger to the health of citizens, the Court could observe that:

***“on a general note, the rites and rituals of many religions may harm believers’ well-being, such as, for example, the practice of fasting, which is particularly long and strict in Orthodox Christianity, or circumcision practised on Jewish or Muslim***

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<sup>27</sup> Article 5 § 3 of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, “the Declaration”, proclaimed by the General Assembly of the United Nations on 25 November 1981 (resolution 36 / 55).

<sup>28</sup> Article 5 § 5 of the Declaration, *op. cit.*

<sup>29</sup> Heiner Bielefeldt, NazilaGhanea, Michael Wiener, *op. cit.*, p. 424-425.

*male babies. It does not appear that the teachings of Jehovah's Witnesses include any such contentious practices. (...)”<sup>30</sup>*

The Court clearly identifies circumcision as a religious rite, which “*may harm*” the well-being of believers just like the practice of fasting. It thus implicitly accepts the compatibility of circumcision with the exercise of freedom of religion as guaranteed by the European Convention on Human Rights.

## CONCLUSION

If the general ban on male circumcision for non-medical purposes were to be adopted by Iceland, it would be an ancestral religious practice deeply rooted in the traditions of entire communities that would be prohibited. The reasoning behind such a prohibition is that circumcision undermines the best interests of the child by violating his physical integrity. Such a finding, if validated, would itself lead to a violation of the fundamental rights guaranteed to individuals, namely, inter alia, the freedom of religion of parents and their children. Similarly, wouldn't depriving parents of their parental authority, of their freedom of religion in the education of their children and interfering in their private life as well as that of their children, result in imposing one ideology among the others, to assert the superiority of one conception over the others?

Moreover, if, as Rabbi Dalsace considers, circumcision is more of a sign of identity in Jewish culture than of a mere religious conviction, would it not be an infringement of the rights of the child to forbid him to belong to a culture, to a people, to a history? Under article 8 of the CRC, States Parties undertake “*to respect the right of the child to preserve his or her identity, (...) without unlawful interference*”. Thus, “*Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.*” To deprive the child of a strong identity sign such that circumcision would undeniably lead to a violation of the aforementioned provisions.

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<sup>30</sup> ECHR, *Case of Jehovah's Witnesses of Moscow and others v. Russia*, no. 302/02, 10 June 2010.