

THE DANGERS OF CHILDREN'S RIGHTS' DISCOURSE IN THE POLITICAL AREA: THE ISSUE OF RELIGIOUS MALE CIRCUMCISION AS A TEST CASE

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The ever increasing use of children's rights discourse in national, regional and international political institutions can perhaps be seen as a sign of the success of the United Nations Convention on the Rights of the Child ("CRC"), and of the internalization of the concept that children are independent rights holders, the ideological basis of the doctrine of children's rights. Nevertheless, there is evidence that some advocates of children's rights in the political arena are taking an over-simplistic, uni-dimensional approach to children's rights which results in misrepresentation of the true interests of children. This risk is well illustrated by the recent resolution of the Parliamentary Assembly of the Council of Europe ("PACE") resolution entitled "Children's Right to Physical Integrity," which inter alia expressed concern about the violation of the right to the physical integrity of young boys circumcised for religious reasons and made recommendations that States should consider placing restrictions on this practice.

This Article uses the PACE resolution as a platform for examining the pitfalls inherent within the doctrine of children's rights, specifically as given effect to by the CRC, that make it susceptible to misuse in the political arena. The recent 25th anniversary of the signing of the CRC is a timely occasion for a discussion of some of its deficiencies that include definitional problems, selectivity and the indeterminacy of the best interests standard. In addition, the paper explains how these pitfalls were exacerbated by serious flaws in the PACE's decision-making mechanism and suggests changes which might be made at the institutional level to reduce the risks involved in children's rights discourse in the political arena.

Whilst the Article does in fact deconstruct the claims that religious male circumcision violates children's rights, the implications of the analysis are far

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wider than the ritual circumcision debate. This analysis is particularly pertinent to the children's rights implications of all types of decisions made by parents in relation to the rearing of their children, which do not conform to the norms prevalent in Western society. More broadly, the analysis demonstrates the need to rethink how the complex multi-layered doctrine of children's rights can be refined in such a way that it can practicably be used to inform decision-making in the political arena. In addition, many of the insights in relation to the problems associated with children's rights discourse in the political arena are also of relevance in relation to human rights discourse in general.

It is to be hoped that increased understanding of the pitfalls inherent in the CRC will lead to greater caution in the use of children's rights discourse in the political arena, inter alia by the introduction of appropriate safeguards, and provide an impetus for the search for solutions.

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I. INTRODUCTION

In October 2013, the Parliamentary Assembly of the Council of Europe (“PACE”) adopted a resolution entitled “Children’s Right to Physical Integrity,”¹ which inter alia expressed concern about the violation of the right to the physical integrity of young boys circumcised for religious reasons² and made recommendations that States should consider placing restrictions on this practice.³ Since then, the Committee of Ministers has expressed reservations about these documents⁴ and decided that no further action should be taken in relation thereto.⁵

Nonetheless, the Council of Europe resolution, together with attempts to ban or restrict religious neonatal circumcision in the name of children’s rights, in some European Countries,⁶ illustrate the potential dangers of children’s rights discourse in the political arena. In particular, the circumcision debate highlights the risks of self-proclaimed children’s rights advocates taking a monolithic, over-simplistic approach to rights analysis and raises questions as to which institutions should have the authority to make value judgments concerning children’s rights. Whilst it has been persuasively argued that there is benefit in the rhetoric of children’s rights as a method of promoting internalization of the fundamental concept that children have

¹ Parliamentary Assembly Council of Europe, *Resolution 1952, Children's Right to Physical Integrity* (2013), available at <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=20174&lang=EN&search=MTk1Mnx0eXBIX3N0cl9lbjpSZXNvbHV0aW9u#> [hereinafter “PACE Resolution].

² *Id.* (the Resolution also expressed concern about female genital mutilation, medical interventions during the early childhood of intersex children as well as the submission to or coercion of children into piercings, tattoos or plastic surgery).

³ *Id.*

⁴ Comm. of Ministers, “*Children's Right to Physical Integrity*” - *Parliamentary Assembly Recommendation 2023* (2013), U.N. Doc. CM/AS(2014)Rec2023 final (Mar. 21, 2014), <https://wcd.coe.int/ViewDoc.jsp?id=2173161&Site=CM&BackColorInterwnet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383> [hereinafter *Recommendation 2023*] (in particular, leveling criticism against the analogy made between male circumcision and female circumcision, widely treated as a form of female genital mutilation, even though they are in no way comparable practices).

⁵ *Id.*

⁶ See *infra* Part II.

independent interests which adults are obliged to protect,⁷ misuse of rights discourse⁸ might have a counter-productive effect.

Of course, it will be objected that children's rights can only be protected by political initiatives and decisions that lead to domestic and international legislation and to action by Governments and other organizations. Indeed, the United Nations Convention on the Rights of the Child ("the "CRC")⁹ itself was born in the political corridors of the UN. Thus, it is clearly essential to continue to work through political bodies in order to ensure that children's rights are not only recognized in theory but are realized in practice. Nevertheless, it is also necessary to ensure that the CRC is used in a way that truly protects children's interests, rather than as a method of promoting particular ideological agendas, whether well intentioned or otherwise.¹⁰

This Article will examine the pitfalls inherent within the doctrine of children's rights generally, and the CRC specifically, that create the danger of misuse in the political arena, as illustrated by the attack on ritual male circumcision in the name of children's rights. The recent 25th anniversary of the signing of the CRC is a timely occasion for a discussion of some of its deficiencies. In addition, the Article will explain how these pitfalls were exacerbated by serious flaws in the PACE's decision-making mechanism, in relation to the resolution on circumcision, and suggest changes that might be made at the institutional level to reduce the risks involved in children's rights discourse in the political arena.

Part II will set out the background to the discussion in the article in three stages. The first will discuss briefly the theoretical background to and framework of the doctrine of children's rights in general and the CRC in particular. The second will explain the religious and medical aspects of the practice of religious male circumcision and the third will examine the ways in which this practice has been attacked over the years. Part III will then utilize the claims that religious male circumcision violates children's rights, as a platform to analyze in detail inherent problems and tensions within the doctrine of children's rights, which make it susceptible to misunderstanding, misuse, and distortion.¹¹ Part IV will briefly

⁷ Michael Freeman, *Taking Children's Rights More Seriously*, 6 INT'L J. L. POL'Y & FAM. 52 (1992).

⁸ See generally Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1867 (1987) (referring to the vulnerability of children's rights to shifting interpretations); MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* (Harvard Univ. Press 2007).

⁹ Convention on the Rights of the Child, *Adopted and Opened for Signature, Ratification and Accession by G.A. Res. 44/25 of 20 November 1989*, U.N. Doc. A/RES/44/25 (Nov. 20, 1989), <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf> [hereinafter CRC 1989].

¹⁰ Comm. on the Rights of the Child, *General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, Para. 1)*, ¶¶ 1, 9, U.N. Doc. CRC/C/GC/14 (May 29, 2013), <http://www.crin.org/docs/GC.14.pdf> (recognizing that the concept of the best interests of the child may be manipulated and abused, for example to support racist policies) [hereinafter General Comment No.14].

¹¹ This article relates to the practice of ritual male circumcision, which was attacked by the Council of Europe decision as a violation of children's rights. The article does not discuss the question of the

consider institutional issues relating to the use of children's rights discourse in the political arena, in light of the process which led to the PACE resolution on circumcision, and suggest institutional changes which might help to reduce the dangers inherent in children's rights discourse in the political arena. Finally, Part V will summarize.

II. BACKGROUND

A. *The Doctrine of Rights of the Child*

1. The Concept of Children's Rights

The essence of the modern doctrine of children's rights¹² is that it recognizes that children are independent rights-holders and not merely the objects of the rights of others.¹³ They are the subject of fundamental rights and basic liberties and not merely the object of solicitude and care.¹⁴ The significance of this recognition is that the law determines the interests of the child and imposes on others the obligation to realize those rights—an obligation which is enforceable by the child himself or by others on his behalf.

The theoretical basis of the doctrine of children's rights is the "interest" theory of rights,¹⁵ which holds that a person has a right where his interests are protected "by the imposition of—legal or moral—normative constraints on the acts and activities of other people with respect to the object of one's interests."¹⁶ Accordingly, since children have interests that need protecting in this way, they are right-holders no less than adults are. These rights are not limited to autonomy rights;¹⁷ thus, even young children possess rights—although their ability to enforce their rights may be limited. Indeed, one of the rights of the child is that his parents or other suitable adults should assist him to realize his own rights.¹⁸

need for regulation to ensure that those carrying out such circumcisions are properly trained and do not engage in practices which are liable to endanger the health of the child. No opinion is expressed on what regulation is appropriate or on the tension between the duty of the State to regulate issues relating to health and freedom of religion.

¹² Martha Minnow, *What Ever Happened to Children's Rights*, 80 MINN. L. REV. 267 (1995) (discussing earlier approaches to children's rights, including the rejected liberation approach).

¹³ CRC 1989, *supra* note 9, at pmbl. (referring to "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family."). See also, Adam Lopatka, *Introduction to the United Nations Convention on the Rights of the Child*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 251, 254 (1996).

¹⁴ See Lopatka, *supra* note 13.

¹⁵ JANE FORTIN, CHILDREN'S RIGHTS AND THE DEVELOPING LAW 13 (3d ed. 2009).

¹⁶ NEIL MACCORMICK, *LEGAL RIGHT AND SOCIAL DEMOCRACY: ESSAY IN LEGAL AND POLITICAL PHILOSOPHY* 154 (Oxford Univ. Press 1982).

¹⁷ Minow, *supra* note 8, at 1870-71 (autonomy rights can only be exercised by those who are capable of exercising choice for personal ends and able to protect personal freedom from the pressure and power of others).

¹⁸ See Comm. on the Rights of the Child, *General Comment No. 13 (2011) The Right of the Child to Freedom From All Forms of Violence*, ¶ 3(b)(c), (e)(f), U.N. Doc. CRC/C/GC/13 (Apr. 18, 2011),

The United Nations Convention on the Rights of the Child (“the CRC”), which has been almost universally ratified,¹⁹ provides a relatively comprehensive list of the recognized rights of children. Four provisions in the CRC are widely considered to state general principles, and to be the most important:²⁰ freedom from discrimination;²¹ right to life;²² treating the child’s best interests as a primary consideration;²³ and right to participation.²⁴

The apparent simplicity, and even obviousness of these principles and many of the rights in the Convention, has led to it being misunderstood. Twenty years ago Alston claimed that the Convention “is sometimes presented—or more accurately misrepresented—as being a uni-dimensional document that reflects a single, unified philosophy of children’s rights and contains a specific and readily ascertainable recipe for resolving the inevitable tensions and conflicts that arise in a given situation among the different rights recognized.”²⁵ Rather, as Alston points out “[i]n fact, the Convention is far more complex and multi-dimensional than any of these characterizations would imply.”²⁶ As will be explained in detail below, the PACE resolution reflects the misconceived approach to the Convention mentioned by Alston and the circumcision debate illustrates the multi-dimensional nature of the CRC well.

Whilst the CRC should not be seen as the final word on children’s rights,²⁷ children’s rights discourse within the political arena invariably relies to a large extent on its provisions and so the discussion in this article will focus mainly on specific rights recognized in the CRC.

2. The Best Interests Principle in the CRC

Article 3(1) of the CRC provides that “[in] all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law,

http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf [hereinafter *General Comment No. 13*].

¹⁹ Ratification Status for CRC - Convention on the Rights of the Child, U.N. HUMAN RTS, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en (last visited Feb. 18, 2015) (all countries apart from the US, Somalia and South Sudan have ratified the CRC).

²⁰ Comm. on the Rights of the Child, *General Comment No. 3, HIV/AIDS and the Rights of the Child*, U.N. Doc. CRC/GC/2003/3 (Mar. 17, 2003), <http://www1.umn.edu/humanrts/crc/comment3.htm> [hereinafter *General Comment No. 3*]. See also SARA DILLON, INTERNATIONAL CHILDREN’S RIGHTS 3 (Carolina Academic Press 2010).

²¹ See *CRC 1989*, *supra* note 9, at art. 2.

²² *Id.* at art. 6.

²³ *Id.* at art. 3(1).

²⁴ *Id.* at art. 12.

²⁵ Philip Alston, *The Best Interests Principle: Towards A Reconciliation of Culture and Human Rights*, 8 INT’L J.L. & FAM. 1, 2 (1994).

²⁶ *Id.* at 3; see also MICHAEL FREEMAN, A COMMENTARY ON THE UNITED CONVENTION ON THE RIGHTS OF THE CHILD 39 (Martinus Nijhoff 2007) (“The practical meaning and application of children’s rights is contested more or less everywhere.”).

²⁷ Michael Freeman, *Children’s Rights Ten Years after Ratification*, in THE NEW HANDBOOK OF CHILDREN’S RIGHTS: COMPARATIVE POLICY AND PRACTICE (Bob Franklin ed., 2002).

administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”²⁸ At first sight, the inclusion of this as a central provision in the Convention is odd because the inherent paternalism in the best interests principle seems antithetical to the recognition that children are holders of rights,²⁹ which are defined in advance and which they are entitled to enforce, without being dependent on the discretion of a judge or other adult as to what is best for them. The current writer has argued that the response to this inconsistency is to treat the best interests standard as a right of the child.³⁰ Although Article 3 of the Convention is not expressed in terms of rights, such an interpretation is reasonable in light of the overall objectives of the Convention in setting out the rights to which every child is entitled and enables the best interests standard to be used to balance between conflicting rights. The Committee on the Rights of the Child has now adopted this approach,³¹ while simultaneously accepting the view that the best interests standard is a principle of interpretation, which has to be considered in relation to each of the rights in the Convention.³²

In the Western world, where the best interests standard has long been applied by courts in relation to particular children, the innovative element of Article 3(1) of the CRC is the obligation to treat children’s best interests as a primary consideration in decisions taken by legislatures and other institutions which relate to particular groups of children or to children in general. Relatively little attention has been paid to the implications of this wide-ranging extension of the best interests principle³³ and discussions of the best interest standard do not always distinguish between the individual and collective context.³⁴ Indeed, it is significant that “legislative bodies,” which invariably will be making collective decisions,³⁵ were only added to Article 3(1) of the CRC at second reading stage.³⁶ The difficulties in making collective best interests decisions in general and in relation to heterogeneous groups of children in particular, which are directly relevant to the

²⁸ CRC 1989, *supra* note 9, at art. 3(1).

²⁹ Alston, *supra* note 25, at 18.

³⁰ Rhona Schuz, *The Hague Child Abduction Convention and Children’s Rights*, 12 TRANSNAT’L L. & CONTEMP. PROBS. 393, 402 (2002) [hereinafter *Hague Child Abduction Convention*].

³¹ General Comment No.14, *supra* note 10, at ¶ 1 (it is the right of the child to have his or her interests taken as a primary consideration).

³² *Hague Child Abduction Convention*, *supra* note 30, at 437; see also GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD (Martinus Nijhoff 1995); see also FORTIN, *supra* note 15, at 40–1.

³³ Although, in fact, the literature on best interests in non-Western cultures does relate mainly to the collective context; see, e.g., Abdullahi An-Na’im, *Cultural Transformation and Normative Consensus on the Best Interests of the Child*, 8 INT’L J.L. & FAM. 62 (1994); see also Savitri Goonesekere, *The Best Interests of the Child: A South Asian Perspective*, 8 INT’L J.L. & FAM. 117 (1994).

³⁴ General Comment No.14, *supra* note 10 (whilst the difference between individual and collective best interests assessment is mentioned, the vast majority of the Comment does not distinguish between the two types of situations, although it appears to be directed mainly to individual assessments).

³⁵ Whereas the other bodies in the list—social welfare institutions, courts of law and administrative authorities—make mostly individual best interests assessments.

³⁶ Alston, *supra* note 25, at 14.

ritual circumcision debate, will be discussed below. Similarly, the implications of the fact that Article 3 does not mandate treating the child's best interests as the paramount consideration, but rather as "a primary consideration" will be considered.

B. Male Circumcision

1. The Origin of Religious Male Circumcision

The origin of the practice of neonatal circumcision in Judaism³⁷ is in the Divine command to Abraham in the following passage:

[You shall] keep My covenant, [you] and [your] seed after [you] throughout their generations. This is My covenant which [you] shall keep between Me and you and [your] seed after [you]; every male among you shall be circumcised. And [you] shall be circumcised in the flesh of your foreskin; and it shall be a token of the covenant [between] Me and you. And he that is eight days old shall be circumcised among you, every male throughout your generations, he that is born in the house or bought with money of any foreigner, that is not of [your] seed. He that is born in [your] house, and he that is bought with [your] money, must needs be circumcised: and My covenant shall be in your flesh for an everlasting covenant. And 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.³⁸

The duplication within these verses and in other places in the Old Testament³⁹ together with the severe implications of not being circumcised⁴⁰ perhaps explain the cardinal importance which has been attached to this commandment by Jews ever since biblical times,⁴¹ in Israel and in the Diaspora. Indeed, it is one of the few commandments that is widely observed by Jews who regard themselves as entirely secular.⁴² Another indication of the fundamental

³⁷ For evidence that male circumcision was also performed by other early civilizations, see Mesut Yavuz, Turkay Demir & Burak Dogangen, *The Effect of Circumcision on the Mental Health of Children: A Review*, 23 TURK. J. OF PSYCHIATRY 1 (2012) [hereinafter *Effects of Circumcision on Children*].

³⁸ 17 *Genesis* 9:14 (London, Soncino Press 1964).

³⁹ 12 *Leviticus* 3 (repeating the commandment of circumcision of male newborns on the eighth day).

⁴⁰ Whilst lack of circumcision does not prejudice the Jewish status of a male born to a Jewish mother, it remains an essential element of conversion to the Jewish faith.

⁴¹ 4 *Exodus* 24 (Moses himself was nearly punished with death for not circumcising his second son, Eliezer, even though he was at the time travelling to Egypt to free the Children of Israel from slavery, in accordance with the Divine command. He was saved when his wife performed the circumcision). See also *Yoreh Deah*, *Laws of Circumcision* 260:1 (the leading Rabbinical codex of Jewish law, the Shulhan Aurch, written by Rabbi Yosef Karo in the 16th century, stating that the commandment to circumcise one's son is greater than the other positive commandments) (Hebrew).

⁴² HCJ 8533/13 Plonit v. Ploni (Justice Neor ¶17, Justice Rubenstein ¶4) [June 29, 2014] (Isr.) (referring to Jewish tradition that the Jewish people will be redeemed in the merit of their having kept the commandment of circumcision).

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nature and importance of this commandment is that it overrides the laws of the Sabbath and thus where the eighth day after birth⁴³ falls on the Sabbath, the circumcision is performed even though cutting the skin is normally prohibited on the Sabbath.⁴⁴

As seen above, the Bible does not give any reason for the commandment other than that it is a sign of the covenant between the Creator of the world and the Jewish people. Rabbinical sources, developing this idea further, state that the purpose of the circumcision is to distinguish between Jews and other nations⁴⁵ and that the reproductive organ was chosen as the location of the sign of the covenant, since this is the source of the existence of the human race.⁴⁶ Another explanation offered is that the Creator made man with a redundant foreskin so that he could complete the creation of his own body and this would teach him that he must also strive to perfect his soul, the prime purpose of life, according to Jewish philosophy.⁴⁷

The approach to male circumcision in Islam is somewhat different. Circumcision is not mentioned in the Koran and is based on prophetic tradition. Whilst for Muslims circumcision is not an absolute command, it is strongly recommended and is of great symbolic significance, being seen as passage into manhood.⁴⁸ There is no prescribed age for circumcision in Islam, but it is usually carried out when a boy reaches the age of seven.⁴⁹ An expert opinion in one case claimed that lack of circumcision would render null and void prayer by a Muslim male, which is obligatory after the age of 10.⁵⁰ Due to the religious and social importance of the practice,⁵¹ nearly all Muslim boys are circumcised,⁵² even where their parents are not practicing Muslims.⁵³ Interestingly, in the prophetic traditions, male circumcision is mentioned under the heading of cleanliness,

⁴³ Assuming that the child is healthy. Where the child is underweight, has jaundice or any other illness, the circumcision is delayed until he is fit. ARYEH CARMELL, MASTERPLAN, JUDAISM: ITS PROGRAM, MEANINGS, GOALS 232 (Jerusalem Academy 1991).

⁴⁴ *Id.* By way of contrast, other positive commandments, such as blowing the ram's horn on the New Year or taking the Four Species on the Festival of Tabernacles, do not override the Sabbath, and so, are not performed when the festival falls on the Sabbath. ELIYAHU KITOV, THE BOOK OF OUR HERITAGE 41, 163 (Philipp Feldheim 1978).

⁴⁵ *Book of Education*, commandment 2.

⁴⁶ *Id.* See also CARMELL, *supra* note 43, at 229 (suggesting that the choice of the reproductive organ is to teach that the sexual urge should be used for Torah purposes – for founding and cementing a Jewish marriage and a Jewish family – and not purely for self-gratification).

⁴⁷ *Id.*

⁴⁸ *Effects of Circumcision on Children*, *supra* note 37, at 2.

⁴⁹ *Id.*

⁵⁰ *In Re S* (specific issue order: religion: circumcision) [2004] EWHC 1282, ¶ 24(3) (Fam).

⁵¹ *Id.* at ¶ 24(1), (4) (the expert claimed that lack of circumcision would cause the boy embarrassment). See also *Effects of Circumcision on Children*, *supra* note 37.

⁵² See *In Re S* [2004] EWHC 1282.

⁵³ *In Re J* [1992] 2 FCR 34 (an application by the non-practicing Muslim father for permission to circumcise his son against the wishes of non-practicing Christian mother).

together with the clipping of nails,⁵⁴ the use of toothpicks and the cutting of moustaches.⁵⁵

2. Medical Aspects of Male Circumcision

In the nineteenth century, some doctors started circumcising newborn boys for preventative-hygienic reasons⁵⁶ and the practice spread in some Western, largely Anglo-American countries.⁵⁷ However, the prevalence of non-ritual circumcision has decreased in the second half of the 20th century.⁵⁸ Nonetheless, in the US over one half of newborns were circumcised between 1999 and 2010.⁵⁹ Globally, it has been estimated that 13.3 million boys are circumcised each year.⁶⁰ Over the last few decades, there has emerged a divergence of medical opinion as to the desirability of performing circumcision, other than in cases where it is medically indicated.⁶¹ One of the most up-to-date and authoritative reports on the subject is that published in 2012 by the American Academy of Pediatrics ("AAP") following a thorough investigation of the subject by a taskforce set up for this purpose.⁶² They summarize their conclusions as follows:

Evaluation of current evidence indicates that the health benefits of newborn male circumcision outweigh the risks; furthermore, the benefits of newborn male circumcision justify access to this procedure for families who choose it. Specific benefits from male circumcision were identified for the prevention of urinary tract infections, acquisition of HIV,⁶³ transmission of some sexually transmitted infections, and penile cancer. Male circumcision does not appear to adversely affect penile sexual

⁵⁴ *Effects of Circumcision on Children*, *supra* note 37, at 3.

⁵⁵ Wim Dekkers, Cor Hoffer & Jean Pierre Wils, *Scientific Contribution, Bodily Integrity and Male and Female Circumcision*, 8 MED. HEALTH CARE PHIL 179, 181 (2005).

⁵⁶ Marie Fox & Michael Thompson, *Short Changed? The Law and Ethics of Male Circumcision*, 13 INT'L J. CHILD. RTS. 161, 162, 170-3 (2005) (providing a historical medical narrative).

⁵⁷ *Id.* at 162 (in continental Europe and Scandinavia, the rate of non-therapeutic male circumcision is very low). See also Heli Askola, *Cut-Off Point? Regulating Male Circumcision in Finland*, 25 INT J. POL'Y & FAM. 100 (2011).

⁵⁸ W.D. Dunsmuir & E.M. Gordon, *The History of Circumcision*, 83 BJU INT'L 1 (1999).

⁵⁹ AM. ACADEMY OF PEDIATRICS, MALE CIRCUMCISION e756 (2012). <http://pediatrics.aappublications.org/content/130/3/e756.full.html> [hereinafter AAP REPORT].

⁶⁰ Dekkers, Hoffer & Wils, *supra* note 55, at 180.

⁶¹ See Michael Benatar & David Benatar, *Between Prophylaxis and Child Abuse: The Ethics of Neonatal Male Circumcision*, 3 AM. J. OF BIOETHICS 35, 48 (2003) (discussing the medical evidence available a decade ago) [hereinafter Between Prophylaxis].

⁶² AAP REPORT, *supra* note 59, at e756.

⁶³ *Id.*; see also R. V. Short, *Male Circumcision: A Scientific Perspective*, 30 J. MED. ETHICS 241 (2004) (pointing out that the rates of HIV are much lower in third world countries, where Islam is the majority religion than in non-Islamic neighboring States). See also Catherine De Lange, *AIDS Prevention: Africa's Circumcision Challenge*, 503 NATURE 182 (2013), available at <http://www.nature.com/news/aids-prevention-africa-s-circumcision-challenge-1.14156> (in Africa around three million males have been circumcised as part of a program to combat HIV and there are plans to circumcise many more).

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function/sensitivity or sexual satisfaction . . . Significant acute complications are rare.⁶⁴

Similarly, an article published very recently in the prestigious US medical journal *Mayo Clinical Proceedings*, strongly supports neonatal circumcision.⁶⁵ In particular, this paper draws attention to the fact that whilst there has been a decrease in neonatal circumcision, there has been an increase in the incidence of circumcision in the male population as a whole.⁶⁶ In light of the considerable medical advantages of performing the procedure at a young age, the paper calls for newborn circumcisions to be funded by healthcare schemes and argues that this is cost-effective in the long term.⁶⁷

Opponents of circumcision dispute the scientific validity of the findings on which these and earlier pro-circumcision medical papers are based.⁶⁸ Consideration of the competing claims is clearly outside the scope of this article. For current purposes, it is sufficient to note that a considerable body of reputable medical opinion supports neonatal circumcision.

C. The Attack on Religious Male Circumcision

1. Historically

Historically, bans on religious male circumcision were part of spiritual and/or physical attacks on Jews. In the second century BCE, the Greek leader Antiochus IV, in his attempt to suppress Judaism and Hellenize Jews, prohibited circumcision on pain of death.⁶⁹ Two centuries later, the Roman emperor Hadrian also forbade circumcision.⁷⁰ There is evidence that during these periods some circumcised Jews underwent “uncircumcision,”⁷¹ in order to hide their Jewishness or avoid the sanctions imposed on those who were circumcised.⁷²

In contrast, the modern anti-circumcision lobby, which emerged towards the end of the twentieth century, is not expressly directed against Jews and indeed seems to be largely a response to the practice of routine medical neonatal

⁶⁴ AAP REPORT, *supra* note 59.

⁶⁵ Brian J. Morris, Stefan A. Bailis & Thomas E. Wiswell, *Circumcision Rates in the United States: Rising or Falling? What Effect Might the New Affirmative Pediatric Policy Statement Have?*, 89 MAYO CLINIC PROC. 677, 684 (2014) (“When considered together with ethical and human rights arguments, neonatal circumcision should logically be strongly supported and encouraged as an important evidence based intervention akin to childhood vaccination.”).

⁶⁶ *Id.* at 678.

⁶⁷ *Id.* at 684.

⁶⁸ Robert S. Van Howe, *Peer-Review Bias Regarding Circumcision in American Medical Publishing*, in MALE AND FEMALE CIRCUMCISION 357 (George C. Denniston, Frederick M. Hodges & Marilyn F. Milos eds., 1999).

⁶⁹ I Maccabees 1:63-64.

⁷⁰ Alfred Mordechai Rabello, *The Ban on Circumcision as a Cause of Bar Kochba's Rebellion*, 29 ISR. L. REV. 176 (1995).

⁷¹ Dirk Schultheiss, *The History of Foreskin*, in MALE AND FEMALE CIRCUMCISION 283, 285-86 (George C. Denniston, Frederick M. Hodges & Marilyn F. Milos eds., 1999).

⁷² *Id.*

circumcision in the US.⁷³ Indeed, one of the main motivations for this development seems to be the dissatisfaction of men who had been circumcised for non-religious reasons.⁷⁴ One of the leading anti-circumcision activists is the National Organization of Circumcision Information Resource Centers (“NOCIRC”), which was set up in 1989 and has organized 13 International Symposia,⁷⁵ at which opponents of female and male circumcision from various backgrounds and disciplines have presented papers covering various aspects of the campaign against circumcision.⁷⁶ Over the years, the titles of these symposia have changed⁷⁷ and the recent inclusion of the phrase “children’s rights”⁷⁸ seems to reflect recognition by the organizers that the concept of children’s rights, which is rapidly gaining acceptance, can be used as a powerful vehicle for promoting their agenda.⁷⁹

2. Developments in the Twenty-First Century

During the current century, legal steps aimed at restricting or banning religious male circumcision have been taken in some Scandinavian countries⁸⁰ and in Germany.⁸¹ In Sweden, a 2001 law provides that circumcisions on minor boys

⁷³ *Id.* at 291.

⁷⁴ Thus, a survey among men who belonged to an organization providing support for those interested in foreskin restoration revealed that 91% of them were Christians and that only 9% had been circumcised for religious reasons. R. Wayne Griffiths, *Current Practices in Foreskin Restoration*, in MALE AND FEMALE CIRCUMCISION 295 (George C. Denniston, Frederick M. Hodges & Marilyn F. Milos eds., 1999).

⁷⁵ *International Symposium on Circumcision*, NAT’L ORG. OF CIRCUMCISION INFO. RES. CTR., (July 19, 2014), <http://www.nocirc.org/symposia>.

⁷⁶ *Id.* The proceedings of many of these symposia have been published. See, e.g., GEORGE C. DENNISTON, FREDERICK M. HODGES & MARILYN F. MILOS, MALE AND FEMALE CIRCUMCISION (1999) (which contains papers from the first symposium).

⁷⁷ *International Symposium on Circumcision*, *supra* note 75.

⁷⁸ *Id.* (the full title since 2012 has been International Symposia on Law, Genital Autonomy, and Children’s Rights).

⁷⁹ Adrian Viens, *Value Judgment, Harm and Religious Liberty*, 31 J. MED. ETHICS 241, 245 (2004) (suggesting that anti-circumcision activists turned to human rights arguments since neither the medical evidence nor moral arguments could justify removing the decision about infant circumcision from parents).

⁸⁰ See, e.g., *Almost Three-Quarters of Danish People ‘Want to Ban Circumcision’*, THE INDEPENDENT (Oct. 25, 2014), <http://www.independent.co.uk/news/world/europe/almost-threequarters-of-danish-people-want-to-ban-circumcision-9818518.html> (Danish Parliament is currently debating a proposal to ban circumcision). See also JTA, *Party Wants to Ban Circumcision*, JEWISH DAILY FORWARD (Sept. 18, 2013), <http://forward.com/articles/184128/denmark-party-wants-to-ban-circumcision/> (call by left wing Danish political party, which is part of the coalition, to ban circumcision).

⁸¹ See discussion below. In relation to the Anglo-Saxo world, see Andrew Berhns, Note, *To Cut Or Not To Cut?: Addressing Proposals To Ban Circumcision Under Both A Parental Rights Theory And Child-Centered Perspective In The Specific Context Of Jewish And Muslim Infants*, 21 WM. & MARY BILL OF RTS. J. 925 (2013) (describing a 2011 attempt to hold a ballot to ban the practice in San Francisco. Whilst more than 12,000 signatures in favor of such a ballot were submitted before the measure could go before voters, a state judge ordered that it be struck from the ballot as a violation of state law); see also 2011 Cal. A.B. 768 (NS), <http://legiscan.com/CA/text/AB768/id/348729> (the California State Legislature subsequently outlawed any local bans on circumcision); see also TASMANIAN LAW REFORM INST., REPORT ON NON-THERAPEUTIC MALE CIRCUMCISION 71 (Aug. 2012),

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under two months must be performed by a person certified by the National Board of Health and Social Welfare, in the presence of a licensed doctor or anesthesiologist; and that circumcisions on boys over two months have to be performed by a licensed doctor.⁸² This law seems to have been the culmination of a public campaign against ritual circumcision, led by the Swedish Save the Children organization, calling for the banning of circumcision, which revealed little understanding of the religious imperatives involved for Jews and Muslims.⁸³ A 2007 review of this law revealed that two-thirds of the 3,000 Muslim boys who were estimated to be circumcised yearly were circumcised outside the boundaries of the law, either in Sweden in violation of the law or abroad.⁸⁴ The review suggests that one of the reasons for the ineffectiveness of the law is that many health districts do not offer circumcisions and thus—perhaps ironically—the review concludes that the right to circumcision should be recognized, so as to ensure that the procedure will be available in the public health sector.⁸⁵

Developments in Finland over the last decade also reflect divergence of opinions in relation to ritual male circumcision. In 2003, the Working Group of the Finnish Ministry of Social Affairs and Health recommended adoption of the Swedish model on the basis that it fulfills religious communities' beliefs, secures family connections, and promotes boys' belonging in their community.⁸⁶ The group took the view that as long as the standards of care that apply to medical circumcision are followed, the immediate risks of the procedure are minor and it involves few long-term disadvantages.⁸⁷ Nonetheless, evidence suggests that this approach did not reflect public opinion, or that of the Finnish Union of Medical Doctors, which is opposed to ritual male circumcision.⁸⁸

Indeed, in 2004, a Muslim woman was charged with criminal assault for having her four and half year old son circumcised. She was acquitted and the prosecutor's appeals to the Finnish Court of Appeal and then to the Finnish

http://www.utas.edu.au/__data/assets/pdf_file/0006/302829/Non-Therapeutic-Circ_Final-Report-August-2012.pdf [hereinafter *TLRI REPORT*] (recommendation by the Tasmanian Law Reform Institute to enact a new and separate offence generally prohibiting the circumcision of incapable minors in Tasmania, but with an exception for the performance of some well-established religious or ethnically motivated circumcisions); see Michael J. Bates et al., *Recommendation by a Law Body to Ban Infant Male Circumcision*, 13 BMC PEDIATRICS 136 (2013) (criticizing the TLRI Report); see also Julia Sloth-Nielsen, *A Foreskin Too Far? Religious, "Medical" and Customary Circumcision and the Children's Act 38 of 2005 in the Context of HIV/Aids*, 16 L. DEMOCRACY & DEV. 69 (2012) (§ 12(8) of the South African Children's Act prohibits circumcisions of boys under 16 other than religious or medical circumcisions. This legislation is designed inter alia to outlaw cultural and traditional circumcisions, which often failed to comply with minimal health standards).

⁸² Johanna Schiratzki, *Banning God's Law in the Name of the Holy Body – The Nordic Position on Ritual Male Circumcision*, 5 FAM. IN L. 35, 37 (2009).

⁸³ *Id.* at 39-40.

⁸⁴ *Id.* at 38.

⁸⁵ Askola, *supra* note 57, at 105.

⁸⁶ *Id.* at 103.

⁸⁷ *Id.*

⁸⁸ *Id.*

Supreme Court were dismissed.⁸⁹ The courts reasoned that circumcision was a “mostly harmless” procedure, which does not cause “health-related or other permanent damage” when properly performed and which confers benefits on the child in terms of the development of his identity and attachment to his religious and social community.⁹⁰ The Supreme Court expressly rejected the prosecutor’s claim that allowing male circumcision, whilst outlawing female genital cutting, is discriminatory, on the basis that the latter is a serious interference with bodily autonomy, which cannot be justified on religious or cultural grounds and that therefore no comparisons can legitimately be drawn between the two practices.⁹¹

The approach of the Finnish courts to male circumcisions can be contrasted to that of the German Cologne Regional court of May 7, 2012, which held that the performance of a circumcision on a child who is too young to give consent is a criminal assault.⁹² According to the court, the consent of the parents does not suffice, since the right of the parents to raise their child in their religious faith does not take precedence over the right of the child to bodily integrity and self-determination.⁹³ Whilst the Doctor in question was acquitted because his unavoidable lack of awareness of the law was a good defense,⁹⁴ the decision led to a heated public debate and the medical organizations advised doctors to stop performing circumcisions.⁹⁵ However, the decision was effectively overruled by the passage of a new law in December 2012 by the German Parliament, which provided that parents may give consent to non-therapeutic circumcisions, if conducted in accordance with medical practice or if carried out within six months of the birth of the child by persons appointed for such purpose by religious communities, who are comparably trained to carry out circumcisions.⁹⁶ It has been suggested that this is not the end of the debate, *inter alia* because a public opinion survey shows that 70% of the population do not support the new law.⁹⁷ Moreover, as will be seen below, the initiative of the PACE seems to be a direct result of the failure of opponents of circumcision in the German Parliament.⁹⁸

⁸⁹ Askola, *supra* note 57, at 108.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Jan F. Orth, *Explaining the Cologne Circumcision Decision*, 77 J. CRIM. L. 497, 505 (2013).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 507.

⁹⁶ *Id.* at 509 (citing the new § 1631(d) of the German Civil Code (BGB)).

⁹⁷ *Id.* at 509-10.

⁹⁸ Comm. on Soc. Affairs, Health and Sustainable Dev., *Children's Right to Physical Integrity*, ¶ 14, Doc. 13297 (Sept. 6, 2013), <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=20057&lang=en> [hereinafter *Children's Rights to Physical Integrity Explanatory Memorandum*] (the German Rapporteur expressly states, “Having explored this issue in detail during the recent legislative debate in my own country, Germany, I would like to show why circumcision applied to young boys clearly is a human rights violation against children, although it is so widely performed both in the medical and in the religious context.”).

3. The PACE Initiative

In November 2012, the Committee on Social Affairs, Health and Sustainable Development ("the Social Affairs Committee") of the PACE appointed one of its members, Ms. Marlene Rupprecht, an anti-circumcision activist from Germany,⁹⁹ to write a report on the child's right to physical integrity.¹⁰⁰ In June 2013, the Social Affairs Committee considered the Rapporteur's draft report and unanimously adopted a resolution and recommendation based on that report.¹⁰¹ The resolution and recommendation were adopted by the General Assembly of the PACE on October 1, 2013.¹⁰²

In order to facilitate understanding of the PACE initiative, it is helpful to set out the most relevant parts of the resolution in full:

1. Many legislative and policy measures have been taken by Council of Europe member States in recent decades to improve the well-being of children and their protection against any form of violence. Nevertheless, children continue to be harmed in many different contexts.
2. The Parliamentary Assembly is particularly worried about a category of violation of the physical integrity of children, which supporters of the procedures tend to present as beneficial to the children themselves despite clear evidence to the contrary. This includes, amongst others, female genital mutilation, the circumcision of young boys for religious reasons, early childhood medical interventions in the case of intersexual children and the submission to or coercion of children into piercings, tattoos, or plastic surgery.
-
6. The Assembly strongly recommends that member States promote further awareness in their societies of the potential risks that some of the above mentioned procedures may have on children's physical and mental health, and take legislative and policy measures that help reinforce child protection in this context.
7. The Assembly therefore calls on member States to:
 - 7.1. Examine the prevalence of different categories of non-medically justified operations and interventions impacting on the physical integrity of children in their respective countries, as well as the specific practices related to them, and to carefully consider them in light of the best interests of the child in order to define specific lines of action for each of them;
-

⁹⁹ *Id.* at ¶ 33 (during the debate about circumcision in the German Parliament, she had proposed a law under which circumcision could only be carried out on consenting boys who had reached the age of 14 by a pediatric surgeon or urologist).

¹⁰⁰ Comm. on Soc. Affairs, Health and Sustainable Dev., *Synopsis of the Meeting Held in Moscow on 19-20 November 2012*, AS/SOC (2012) CB 08 (July 2, 2013), (Nov. 27, 2012), <http://www.assembly.coe.int/Committee/SOC/2012/SOC008E.pdf>.

¹⁰¹ *PACE Resolution*, *supra* note 1.

¹⁰² *Id.*

7.4. Initiate a public debate, including intercultural and interreligious dialogue, aimed at reaching a large consensus on where the limits with regard to violations of the physical integrity of children are to be drawn according to human rights standards, and at striking a balance between the rights and the best interests of the child and the rights and religious freedoms of parents and families;

....

7.7. Raise awareness about the need to ensure the participation of children in decisions concerning their physical integrity wherever appropriate and possible, and to adopt specific legal provisions to ensure that certain operations and practices will not be carried out before a child is old enough to be consulted.¹⁰³

The operative part of the recommendation reads as follows:

4. With the purpose of reinforcing the protection of children's rights and well-being at the European level, the Assembly invites the Committee of Ministers to:

4.1. Fully take into account the issue of children's right to physical integrity when preparing and adopting its new Strategy for the Rights of the Child as of 2015, in particular as regards the fight against all forms of violence against children and the promotion of child participation in decisions concerning them;

4.2. Consider the explicit inclusion of children's right to physical integrity, as well as their right to participate in any decision concerning them, into relevant Council of Europe standards and, to this end, to examine in a comprehensive manner in which Council of Europe instruments such rights should be included.¹⁰⁴

The background to this resolution and recommendation can be found in the explanatory memorandum prepared by the Rapporteur.¹⁰⁵ This memorandum takes the view that neonatal male circumcision is a clear human rights violation against children¹⁰⁶ and that the child's right to physical integrity should take precedence over conflicting parental rights.¹⁰⁷ Furthermore, the Rapporteur concludes that since the practice is not as innocuous as often believed,¹⁰⁸ it should be questioned both in the medical and religious context, and that families should be given information on the alternatives, such as ritual naming ceremonies.¹⁰⁹

¹⁰³ PACE Resolution, *supra* note 1.

¹⁰⁴ *Id.*

¹⁰⁵ Children's Rights to Physical Integrity Explanatory Memorandum, *supra* note 98.

¹⁰⁶ *Id.* at ¶ 14.

¹⁰⁷ *Id.* at ¶ 66.

¹⁰⁸ *Id.* at ¶ 34.

¹⁰⁹ *Id.* at ¶ 31.

Not surprisingly, the resolution was strongly criticized as infringing freedom of religion inter alia by representatives of the Jewish community¹¹⁰ and the State of Israel.¹¹¹ A few months later, in what seems to be a direct response to these reactions, the Committee appointed a Rapporteur to prepare a report on freedom of religion and religious practices.¹¹² Furthermore, the Committee of Ministers of the Council of Europe, in its reply to the recommendation on the right to physical integrity, decided that no further standard-setting work is required and underlined that ritual male circumcision can in no way be compared to female circumcision—known also as female genital mutilation, hereinafter “FGM”.¹¹³ Finally, in April 2014, the human rights officer of the Council of Europe was reported by the press as “criticiz[ing] members of his organization who called the ritual circumcision of boys a violation of children’s rights.”¹¹⁴

III. PITFALLS OF CHILDREN’S RIGHTS’S DISCOURSE

In this section, the circumcision debate will be utilized as a platform to analyze a number of characteristics of the doctrine of children’s rights which make it susceptible to misunderstanding, misuse, and distortion by well-intentioned defenders of children’s interests or those seeking to promote a particular agenda. In the course of the discussion, the claims that ritual male circumcision violates children’s rights will be deconstructed.

A. Definitional Problems

Whilst one of the strengths of the CRC is that it provides a list of rights possessed by children, these rights are set out in rather general terms and their limits are not precisely demarcated. Thus, Contracting States are given a considerable degree of leeway in defining the scope of the rights.¹¹⁵ The assumptions of the Cologne judgment and the PACE resolution that male

¹¹⁰ Letter from President of the International Association of Jewish Lawyers and Jurists (Oct. 28, 2013) (on file with author); see also *European Groups Set Up “Proactive” Brit Milah Task Force*, JEWISH TELEGRAPH AGENCY (Oct. 30 2012), <http://www.jta.org/2013/10/30/news-opinion/world/european-groups-set-up-proactive-brit-milah-task-force#ixzz39YaSnnhS>.

¹¹¹ *Press Release from the Knesset*, KNESSET (Oct. 14, 2013), http://www.knesset.gov.il/spokesman/eng/Pr_eng.asp?PRID=10909. See also *Peres Calls on Council of Europe to Reconsider Anti-Circumcision Resolution*, JEWISH TELEGRAPH AGENCY (Oct. 7, 2013), <http://www.jta.org/2013/10/07/news-opinion/israel-middle-east/peres-calls-on-council-of-europe-to-reconsider-anti-circumcision-resolution> (“Israeli President Shimon Peres called on the Council of Europe to reconsider a resolution condemning male ritual circumcision.”).

¹¹² Comm. on Soc. Affairs, Health and Sustainable Dev., *Synopsis of the Meeting Held in Pairs on 14 March 2014*, AS/SOC (2014) CB 02 (Mar. 18, 2014), <http://www.assembly.coe.int/committee/SOC/2014/SOC002E.pdf>.

¹¹³ *Recommendation 2023*, *supra* note 4.

¹¹⁴ *Council of Europe Official Raps Group’s Resolution Against Ritual Circumcision*, JEWISH TELEGRAPHIC AGENCY (Apr. 30, 2014), <http://www.jta.org/2014/04/30/news-opinion/world/council-of-europe-official-criticizes-groups-resolution-against-circumcision#ixzz31QeH0TFW>.

¹¹⁵ Schiratzki, *supra* note 82, at 41 (suggesting that the vagueness of the rights together with acceptance of broad reservations are responsible for the nearly universal ratification of the CRC).

circumcision constitutes a violation of the child's right to physical integrity and his participation rights¹¹⁶ ignore the lack of clarity in the scope of these children's rights. Further, they fail to address the argument that religious circumcision does not violate these children's rights.

1. The Right to Physical Integrity

The child's right to physical integrity is derived *inter alia* from the obligation imposed on State Parties by Article 19 of the CRC to take all appropriate measures to “[p]rotect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”¹¹⁷

There is no official definition of physical integrity, which like its synonym bodily integrity, is an inherently ambiguous notion.¹¹⁸ Philosophers Dekkers et al., refer to two approaches to understand the concept. The first, called the ‘person approach’, focuses on the right of autonomy—that is, the right of a person to control his body and to be safeguarded against violations by others, without his consent.¹¹⁹ The second approach, called the ‘body approach’, is premised on the assumption that human beings do not own their bodies and have a religious or ethical duty to maintain bodily integrity.¹²⁰ Despite the fundamental difference between the two approaches, there are two definitional questions which are common to both: the degree of interference required to constitute violation of bodily integrity and the extent to which benefits can justify such interference. We will consider each of these issues in turn together with the inter-relationship between them.

(a) Degree of Interference

Under a broad approach, any procedure that involves interference with any part of the body, such as smacking,¹²¹ cutting nails, immunization, piercing or

¹¹⁶ See also Joseph Mazor, *The Child's Interests and the Case for the Permissibility of Male Infant Circumcision*, 39 J. MED. ETHICS 421 (2013) (“Appeals to these rights are also common in the advice parents receive on circumcision in many countries, especially in Europe.”).

¹¹⁷ General Comment No. 13, *supra* note 18, at ¶ 1; see also Comm. on the Rights of the Child, General Comment No. 8 (2006) *The Right of the Child to Protection from Corporal Punishment and other Cruel or Degrading Forms of Punishment* (arts. 19; 28, para. 2; and 37, *inter alia*), ¶ 1, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2007), <http://www.refworld.org/docid/460bc7772.html> [hereinafter General Comment No. 8].

¹¹⁸ Dekkers, Hoffer & Wils, *supra* note 55, at 189.

¹¹⁹ *Id.* at 179.

¹²⁰ *Id.* at 186-87 (citing Kant).

¹²¹ See General Comment No. 8, *supra* note 117, ¶¶ 11, 34 (admitting that there is no specific mention of moderate corporal punishment in the Convention or in the *travaux préparatoires*, but nonetheless taking the view that even minor forms of corporal punishment are infringements of the right to bodily integrity, *inter alia*, because they involve violation of the child's dignity); see also Comm. on the Rights of the Child, General Comment No. 11 (2009) *Indigenous Children and Their Rights Under*

tattooing is a violation of bodily integrity, whereas a narrower approach would differentiate between minor invasions and ones that are more serious.¹²² At first sight, adoption of the broad approach makes it unnecessary to differentiate between varying degrees of interference. However, as will be seen below, the degree of invasion is likely to be relevant in determining to what extent beneficial purpose may justify the interference and thus make it permissible. Moreover, even if we conclude that a particular procedure is a violation of the child's right to bodily integrity, the degree of interference may well be relevant where there exist conflicting rights, which have to be balanced against each other. Thus, under both approaches, it is necessary to consider how we might assess degree of interference.

Possible parameters for evaluating whether a procedure sufficiently interferes with bodily integrity include duration of the effect, degree of actual bodily invasion, functional impact, experiential impact, and risks involved.¹²³ The differences between these parameters can be seen from the example of routine immunization of infants against serious contagious diseases.¹²⁴ Whilst, on the one hand the injury to the skin caused by the injection appears minor and heals very quickly, the vaccine, which may contain a live, albeit weak, strain of the disease itself, permeates into the blood stream and is designed to have a long lasting effect. Moreover, relatively minor adverse reactions to vaccinations are common and they carry a small risk of serious disability and even death.¹²⁵

Similarly, in the case of male circumcision, the degree of interference depends on the parameter chosen. Viewed under the first two parameters, duration of the effect and degree of actual bodily invasion, circumcision would indeed seem to be a violation of bodily integrity. The effect of circumcision is permanent, and the degree of bodily invasion in the removal of the foreskin seems high. However, the other three parameters, functional impact, experiential impact and risks, do not provide support for this conclusion. Whilst there is no consensus as to whether the foreskin has any valuable use,¹²⁶ there is no clear evidence that circumcision has

the Convention, ¶ 17, U.N. Doc CRC/C/GC/11 (Feb. 12, 2009), <http://www2.ohchr.org/english/bodies/crc/docs/CRC.GC.C.11.pdf> [hereinafter *General Comment No. 11*]. But see Benjamin Shmueli, *The Influence Of The United Nations Convention On The Rights Of The Child On Corporal Punishment — A Comparative Study*, 10 Or. Rev. Int'l L. 189, 199-204, 209 (2008) (indicating that this view is not universally accepted, and that in most signatory States, moderate corporal punishment is still legal).

¹²² E.g., Askola, *supra* note 57, at 107-08 (view of Finnish Supreme Court that male circumcision constitutes a relatively minor interference with bodily autonomy, as long as it is performed in appropriate hygienic conditions and with the administration of appropriate pain relief).

¹²³ Pain has been rejected as a relevant parameter both because of the difficulty of measuring it and because of the availability of pain relief. David Benatar & Michael Benatar, *How Not to Argue About Circumcision*, 3 AM. J. OF BIOETHICS W1 (2003) [hereinafter *How Not to Argue About Circumcision*].

¹²⁴ The analogy between circumcision and vaccination is often used by supporters of circumcision. See, e.g., Morris et al., *supra* note 65, at 682; see also *How Not to Argue About Circumcision*, *supra* note 123, at W2 (refuting arguments that the analogy is not appropriate).

¹²⁵ *Between Prophylaxis*, *supra* note 61, at 37.

¹²⁶ *Id.* at 42.

any negative impact on bodily function.¹²⁷ In addition, it seems that the experiential impact may depend on the justification for the circumcision in the eyes of the man concerned. Thus, although there is literature documenting negative feelings towards bodily integrity among circumcised men,¹²⁸ a survey of Jewish and Muslim men reported that none of them reported feelings of lack of wholeness.¹²⁹ Finally, the weight of medical opinion seems to be that the risks involved in properly performed infant circumcision are minimal.¹³⁰

(b) Relevance of Benefit

It seems undisputed that medically indicated surgery and other forms of treatment performed on children with the consent of their parents are not considered to be violation of the child's bodily integrity, or are treated as a permissible violation, because the benefit to the child's health justifies the invasion.¹³¹ By analogy, procedures which are not medically necessary, but which benefit the child,¹³² should not be treated as a forbidden violation of bodily integrity,¹³³ at least where the degree of interference is proportional to the benefit.¹³⁴ Indeed, it seems that this is the basis upon which immunization of infants has been justified,¹³⁵ although it might be pointed out that in a society where there is herd immunity,¹³⁶ it may be doubted whether there is actually any real benefit to the individual child from being vaccinated.¹³⁷ Since there is evidence that circumcision has prophylactic medical benefits,¹³⁸ it is not clear how

¹²⁷ See AAP REPORT, *supra* note 59; see *Between Prophylaxis*, *supra* note 61, at 42-43.

¹²⁸ Dekkers, Hoffer & Wils, *supra* note 55, at 185; see also *International Symposium on Circumcision*, *supra* note 74.

¹²⁹ Dekkers, Hoffer & Wils, *supra* note 55, at 185.

¹³⁰ AAP REPORT, *supra* note 59, at e760.

¹³¹ *Between Prophylaxis*, *supra* note 61, at 36 (giving the example of amputation of a gangrenous leg).

¹³² Mazor, *supra* note 116, at 422; see R v. Brown, 1 A.C. 212 (1994) (supporting the analogy between surgery, such as to correct a cleft lip, and that of circumcision, and commenting *obiter dictum* that both are lawful even though they involve actual bodily harm).

¹³³ Mazor, *supra* note 116, at 422 (arguing that there can be no breach of bodily integrity where the action is performed for the benefit of the child, as distinct from situations where it is performed for the benefit of another).

¹³⁴ *Between Prophylaxis*, *supra* note 61, at 36 (arguing that the moral acceptability of a procedure can only be assessed by weighing the benefits against the harm). According to such an analysis, it is doubtful whether ear piercing of very young children should be allowed since whilst the degree of interference is very minor, a young child cannot appreciate the aesthetic benefit of wearing earrings.

¹³⁵ *Id.* (similarly parents may consent to other types of treatment which are not medically indicated, such as orthodontics and plastic surgery).

¹³⁶ *Community Immunity ("Herd" Immunity)*, NAT'L INST. OF ALLERGY AND INFECTIOUS DISEASES (2010), <http://www.niaid.nih.gov/topics/pages/communityimmunity.aspx> (herd immunity occurs when a critical portion of a community is immunized against a contagious disease and thus most members of the community (including those who have not been vaccinated) are protected against that disease because there is little opportunity for an outbreak).

¹³⁷ *Between Prophylaxis*, *supra* note 61, at 37.

¹³⁸ *Id.* at 35.

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it can be distinguished from immunization.¹³⁹ We saw above that the degree of bodily interference involved in immunization is by no means *de minimis* and in some ways not significantly less invasive than circumcision.

In addition, where ritual circumcision is concerned, there are likely to be emotional and social benefits¹⁴⁰ in addition to the medical ones.¹⁴¹ Indeed, it seems to be the religious aspect which forms the basis of the holding of an English court that “[w]here two parents, jointly exercising parental responsibility for a male child [cause] him to be ritually circumcised in accordance with the tenets of their religion, that exercise of parental responsibility [was] lawful.”¹⁴² In this respect, it might be noted that various aesthetic invasive procedures, which involve more risks than circumcision, are quite commonly carried out on children only on the basis of the emotional benefit. These include cosmetic orthodontic surgery, correction of a simple harelip, and administration of human growth hormone to short children.¹⁴³

The relevance of different types of benefit in determining legitimacy of interference with bodily integrity is supported by the philosophical claims that it is only “within a particular moral narrative that one can determine whether specific uses of the body are to be praised, condemned, or regarded as morally neutral.”¹⁴⁴ Accordingly, “every alteration or apparent violation of the human body must be considered in its own medical, religious, and cultural context.”¹⁴⁵ In this connection, it is pertinent to point out that both Judaism and Islam forbid violation of bodily integrity in general and that the only reason that circumcision is allowed is because, it is a divine command for Jews¹⁴⁶ and is considered to be beneficial in Islam.¹⁴⁷ This apparent paradox¹⁴⁸ surely means that careful consideration and analysis are required before branding ritual male circumcision, as performed within these religions, as a violation of the right to bodily integrity.

Finally, it should be remembered that the CRC, like all legislative instruments, has to be interpreted in the light of the intentions of those who framed and adopted the instrument. If the CRC had intended to outlaw ritual male

¹³⁹ See Bates et al., *supra* note 81, at 141.

¹⁴⁰ See, e.g., Berhns, *supra* note 81, at 949-54.

¹⁴¹ Between Prophylaxis, *supra* note 61, at 45 (explaining the relevance of non-medical benefits).

¹⁴² *In Re J* [1992] 4 All ER 614.

¹⁴³ Allan J. Jacobs, *The Ethics of Circumcision of Male Infants*, 15 ISR. MED. ASS'N J. 60, 63 (2013).

¹⁴⁴ Dekkers, Hoffer & Wils, *supra* note 55, at 179 (citing H. Tristram Englehardt, Jr. & Kevin W. Wildes, *Postmodernity and Limits on the Human Body: Libertarianism by Default*, in MEDICINE UNBOUND THE HUMAN BODY AND THE LIMITS OF MEDICAL INTERVENTION 61-71 (Robert H. Blank & Andrea L. Bonnicksen eds., 1994)).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 181 (also, in Judaism, the removal of the foreskin is seen as perfecting the body and not detracting from its integrity); see also Michael D.A. Freeman, *A Child's Right to Circumcision*, 83 BJU Int'l 74 (1999) (claiming that the ritual removal of the foreskin enhances the child's bodily integrity).

¹⁴⁷ *Effects of Circumcision on Children*, *supra* note 37, at 2.

¹⁴⁸ Dekkers, Hoffer & Wils , *supra* note 55, at 188.

circumcision as a violation of the right to bodily integrity,¹⁴⁹ neither Israel nor the many Muslim countries in the world would have signed and ratified it.

2. Autonomy and Participation Rights

It is claimed that circumcision of young children involves a breach of the child's autonomy, synonymously referred to as his right to self-determination, because he does not consent to the operation.¹⁵⁰ One problem with this claim is that the CRC does not recognize the right of the child to autonomy. Rather, in Article 12, it recognizes the child's right to participation which includes the right to have due weight attached to his views in accordance with his age and degree of maturity. Since babies are not able to express their views, carrying out a procedure without their consent does not involve a breach of their participation rights. Furthermore, even if a small child is old enough to demonstrate resistance during the course of a procedure, it is not clear that any real weight should be placed on his views, as he is not mature enough to understand the implications.¹⁵¹

Nevertheless, it might be argued that the child's participatory rights require delaying the making of important decisions that have irreversible consequences until he has the capacity to participate in the decision-making, unless such delay is likely to be prejudicial. Accordingly, the PACE Resolution and other opponents of religious male circumcision take the view that circumcision should be delayed until the child is old enough to make the decision for himself. However, their assumption that delay is not prejudicial can be refuted *inter alia* because circumcision of an older child or adult is a much more complex and risky procedure,¹⁵² both from a medical and psychological perspective. In addition, delay means that the child is deprived of the medical and other benefits of circumcision during his childhood¹⁵³ because a later decision by the child to undergo circumcision cannot bring back the years when he was not circumcised. Moreover, he is now placed in the unenviable situation of having to contend with the unpleasant physical, emotional, and psychological implications of undergoing

¹⁴⁹ Simon Baum, *Religious Circumcision: Free from Interference?*, 1999 UCL JURISPRUDENCE REV. 1, 18 (1999) (pointing out that the *travaux préparatoires* show that the article 24(3) requirement to abolish traditional practices prejudicial to the health of children, was directed to female circumcision).

¹⁵⁰ Reinhard Merkel & Holm Putzke, *After Cologne: Male Circumcision and the Law. Parental Right, Religious Liberty or Criminal Assault?*, 40 J. MED. ETHICS 1 (2013); see also TLRI REPORT, *supra* note 81.

¹⁵¹ Thus, for example, it seems legitimate to take blood for testing, vaccinate and provide dental treatment for young children despite their physical resistance

¹⁵² Morris et. al., *supra* note 65, at 683 (referring to the significantly higher costs of adult circumcision as compared to infant circumcision: “[d]elay may result in increased cost, a higher risk of complications, anesthesia risk if a general anesthetic is used (as is more likely), a longer healing time, a poorer cosmetic outcome should sutures be used, a requirement for temporary sexual abstinence, interference with education or employment”); see also, *Between Prophylaxis*, *supra* note 61, at 37; see also Jacobs, *supra* note 143, at 63 (“Adult circumcision simply is not a reasonable substitute for infant circumcision. An adult cannot consent to his own infant circumcision.”).

¹⁵³ *Between Prophylaxis*, *supra* note 61, at 37; see Morris et al., *supra* note 65.

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circumcision as an adolescent or adult. In the case of Jewish or Muslim young adults, the implications of this choice may give rise to considerable anxiety and even cause an identity crisis. Thus, Mazor argues that since “we cannot provide the child with—even roughly—the same choice facing the parents once he attains majority,” there can be no breach of his right to self-determination.¹⁵⁴

Accordingly, the best way to give effect to the child’s participatory rights in cases where delaying making a particular decision may be prejudicial, is to assess how the child would decide if he had the capacity to do so, in accordance with Rawls’ concept of “substitute judgment.”¹⁵⁵ This approach in turn involves considering what is likely to be the child’s view about the decision in the future.¹⁵⁶ In the current context, the question to be determined is whether when the child reaches adolescence or adulthood, he will wish that he had been circumcised as an infant or not.¹⁵⁷ The issue arises as to who makes this determination and who represents the child. The CRC’s recognition that parents are responsible for providing direction to their children in exercising their rights¹⁵⁸ can perhaps be seen as confirming the traditional assumption that parents are the natural spokespersons for their child. It is true that this assumption erodes in certain contexts where there are conflicts of interest—such as legal proceedings between the parents or between the parents and the State—and that in such cases children need independent representation. None of this, however, undermines the validity of the assumption in intact families when parenting ability is not being questioned.¹⁵⁹

In the context of circumcision, both logic and the limited available evidence¹⁶⁰ suggest that the vast majority of Jewish and Muslim males would, in

¹⁵⁴ Mazor, *supra* note 116, at 422-25 (pointing to reasons why a decision made about circumcision by a young adult is not fully autonomous).

¹⁵⁵ JOHN RAWLS, *A THEORY OF JUSTICE* 208 (2d ed. 1999).

¹⁵⁶ Gerald Dworkin, *Paternalism*, in *PATERNALISM* 19, 28 (Rolf Sartorius ed., 1984) (referring to this approach as “future-oriented consent”).

¹⁵⁷ *A Child’s Right to Circumcision*, *supra* note 146, at 76.

¹⁵⁸ CRC 1989, *supra* note 9, at art. 5.

¹⁵⁹ Indeed the Rapporteur suggests that parents should be the spokespersons for their children. *Children’s Rights to Physical Integrity Explanatory Memorandum*, *supra* note 98, at ¶ 67.

¹⁶⁰ James Badger, *Consent to Circumcision* (2014), <http://www.circlist.com/surveys/badger-03.html> (last visited Feb. 5, 2015) (in a large general survey published on the internet, conducted by James Badger, most of the men questioned did not express regret about being circumcised and indicated that they had or would circumcise their sons. There is no breakdown of the reasons for circumcision but clearly many were not ritual because in 32% of cases the doctor had made the decision to circumcise and in 26% of cases the interviewee did not know who had made the decision. As seen above (*International Symposium on Circumcision*, *supra* note 75), surveys of men who regretted having been circumcised included few who had been circumcised for religious. Indeed, one of common reasons given for dissatisfaction was that the circumcision made them different from most men and that the procedure had been unnecessary and useless. These reactions are unlikely among men who have been circumcised for religious reasons.).

fact, wish to be circumcised as children.¹⁶¹ Thus, the Rapporteur's unsubstantiated conclusion that children would decide not to undergo circumcision¹⁶² is untenable in relation to Jewish and Muslim children and indicates lack of understanding of the fundamental nature of male circumcision in these religious. On the contrary, if we take the view that the purpose of the child's right to self-determinism is to bring him "to the threshold of adulthood with the maximum opportunities to form and pursue life-goals which reflect as closely as possible an autonomous choice,"¹⁶³ we might conclude that not circumcising a Jewish or Muslim child is, in fact, a breach of that child's autonomy.¹⁶⁴

B. Scope for Selectivity

It is clear that in any given situation a number of the rights possessed by a child may be relevant and may even conflict with each other.¹⁶⁵ However, those purporting to defend children's rights may not necessarily think of all the relevant rights or may choose to ignore some of them. Selective reference to only some of a child's rights is inconsistent with the "the universal, indivisible, interdependent and interrelated nature of children's rights."¹⁶⁶ The far-reaching implications of such selectivity can be illustrated by considering three rights, which are highly relevant to the circumcision debate, but which were not mentioned in the Explanatory Memorandum on which the PACE Resolution was based¹⁶⁷ nor in the Cologne decision.¹⁶⁸

1. Child's Right to Freedom of Religion and Culture

Whilst the Rapporteur and the Cologne court make reference to the parents' freedom of religion, there seems to be no appreciation of the fact that the CRC recognizes that the child himself has a right to practice his religion.¹⁶⁹ Article 14

¹⁶¹ Mazor, *supra* note 116, at 426 (claiming that most Jewish males would chose to be circumcised as adults, if they had not been circumcised as infants). See also Baum, *supra* note 149; *A Child's Right to Circumcision*, *supra* note 146.

¹⁶² See *Children's Rights to Physical Integrity Explanatory Memorandum*, *supra* note 98, at ¶ 67.

¹⁶³ John Eekelaar, *The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism*, 8 INT'L J.L. & FAM. 42, 53 (1994).

¹⁶⁴ Circumcision does not prejudice the child's right to an 'open future' (in the sense used by Joel Feinberg). JOEL FEINBERG, *FREEDOM AND FULFILLMENT* 76–97 (Princeton Univ. Press 1992). Whilst there is always a chance that the child will later abandon his religion, he may still be satisfied with the medical benefits of the circumcision. In any event, the circumcision does not restrict the child's future religious freedom, as it does not in any way require him to practice his religion or preclude him from joining another religion. In particular, since many circumcisions are carried out for prophylactic non-religious reasons, the circumcision does not per se provide clear evidence of the circumcised child's birth religion and so cannot be accurately described as a permanent seal which can never be broken off. Compare with Merkel & Putzke, *supra* note 150, at 4.

¹⁶⁵ General Comment No.14, *supra* note 10, at ¶¶ 32-34.

¹⁶⁶ *Id.* at ¶ 16(a).

¹⁶⁷ *Children's Rights to Physical Integrity Explanatory Memorandum*, *supra* note 98.

¹⁶⁸ Landgericht Köln [LG] [Regional Court of Cologne] May 7, 2012, No. 151 Ns 169/11 (Ger.).

¹⁶⁹ In contrast, the Finnish Supreme Court does mention these rights. Askola, *supra* note 57, at 107.

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requires State Parties to “respect the right of the child to freedom of thought, conscience and religion” and to “respect the rights and duties of the parents . . . to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of child.”¹⁷⁰ The latter provision clearly recognizes that a child’s freedom of religion is dependent upon allowing his parents to teach and guide him in religious practice. It is important to emphasize that this provision is protecting the child’s rights and not only that of the parents. Article 14(3) strengthens the requirement to respect the child’s right to freedom of religion by providing that “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.”¹⁷¹ Moreover, Article 30 provides specific protection for a child belonging to an ethnic or religious minority, who should “not be denied the right . . . to enjoy his or her own culture¹⁷² and, to profess and practice his or her own religion. . . .”¹⁷³

It is abundantly clear that forbidding the circumcision of a Jewish or Muslim child violates his freedom of religion and denies him the right to practice his own religion and enjoy his own culture.¹⁷⁴ In particular, within Judaism, whilst the parent has the responsibility for circumcising his son, the circumcision has religious significance for the child as denoting the relationship between him and his Creator and a spiritual sanction is imposed on non-circumcised males. Accordingly, the parent’s act in arranging for the circumcision to be performed clearly comes within the meaning of providing direction to the child in the exercise of his religion in article 14(2).¹⁷⁵ Similarly, it seems that within Islam, lack of circumcision has religious repercussions.¹⁷⁶

Finally, the attack on religious male circumcision should be viewed in the context of a wider phenomenon of restriction of religious liberty in Europe in the name of human rights,¹⁷⁷ which is arguably based on a misconceived approach to liberalism.¹⁷⁸ Thus, a German commentator has alleged that “[t]he secular taboo of circumcision, as proposed by the Cologne Judgment, is in its consequences anti-

¹⁷⁰ CRC 1989, *supra* note 9, at art. 14(1)-(2).

¹⁷¹ *Id.* at art. 14(3).

¹⁷² For discussion of the meaning and implications of child’s right to culture, see Michael Freeman, *Culture, Childhood and Rights*, 5 THE FAM. IN L. 15, 21, 28-33 (2011).

¹⁷³ CRC 1989, *supra* note 9, at art. 30; *id.* at art. 24(3) (requiring State Parties to “take all effective and appropriate measures with a view to abolishing traditional practices. This was directed against FGM and does not refer to religious practices); A Child’s Right to Circumcision, *supra* note 146, at 76.

¹⁷⁴ Baum, *supra* note 149, at 17-18.

¹⁷⁵ See *id.*

¹⁷⁶ *In Re S* [2004] EWHC 1282 (Fam).

¹⁷⁷ See, e.g., Sahin v. Turkey, 2005-XI Eur. Ct. H.R. 173; S.A.S. v. France, App. No. 43835/11 (2014) (upholding of restrictions on Muslim women wearing religious veils).

¹⁷⁸ Menachem Mautner, *From “Honor” to “Dignity”: How Should a Liberal State Treat Non-Liberal Cultural Groups?*, 9 THEORETICAL INQUIRIES L. 609, 621-24 (2008) (criticizing the common assumption of liberal thinkers that liberal culture is superior to religion).

religious, anti-pluralistic and therefore all together anti-modern if one accepts the insight of political liberalism that the fact of pluralism is one of the permanent characteristics of modern democratic cultures. . . .”¹⁷⁹

2. Child’s Right to Identity

Under the CRC, States undertake to respect the right of the child to preserve his or her identity.¹⁸⁰ Ya’ir Ronen maintains that protection of identity “necessitates exploration of culture as a context of personal meaning and is founded on empathic understanding of an individual child’s experience.”¹⁸¹ It seems clear that identity must include religion, as well as culture, at least in so far as these have any meaning to the child. Bearing in mind that circumcision has historically and still is treated as a primordial sign of identification and of belonging to a religious group for both Jews¹⁸² and Muslims,¹⁸³ any attempt to outlaw the practice of circumcision of children cannot be consistent with respecting the right of the child to preserve his identity.¹⁸⁴ Indeed, the Finnish Supreme Court’s decision that ritual male circumcision is lawful relied *inter alia* on the benefits to the child in developing his identity and his attachment to his social and religious community.¹⁸⁵

3. Child’s Right to Health

Article 24 of the CRC provides that States “recognize the right of the child to the enjoyment of the highest attainable standard of health” and Article 24(2)(f) mandates States to develop preventative health care services.¹⁸⁶ The CRC has defined the child’s right to health as “the right to opportunities to survive, grow and develop, within the context of physical, emotional and social well-being, to each child’s full potential.”¹⁸⁷

On the basis of the medical evidence of the prophylactic effects of male circumcision, it can be argued that outlawing the practice prevents children from

¹⁷⁹ Bijan Fateh-Moghadam, *Criminalizing Male Circumcision? Case Note: Landgericht Cologne, Judgment of 7 May 2012 - No. 151 Ns 169/11*, 13 GERMAN L.J. 1131, 1142 (2012).

¹⁸⁰ CRC 1989, *supra* note 9, at art. 8.

¹⁸¹ Ya’ir Ronen, *Redefining the Child’s Right to Identity*, 18 INT’L J. L. POL’Y & FAM. 147, 148 (2004).

¹⁸² Book of Education, *supra* note 45 (stating that one of the purposes of circumcision is to distinguish between Jews and other nations).

¹⁸³ Effects of Circumcision on Children, *supra* note 37, at 6 (describing circumcision as a sign of social belonging in Turkey and citing a view that it results in culture being inscribed on the body).

¹⁸⁴ A Child’s Right to Circumcision, *supra* note 146, at 74.

¹⁸⁵ Askola, *supra* note 57, at 108.

¹⁸⁶ CRC 1989, *supra* note 9, at art. 24(2)(f).

¹⁸⁷ Comm. on the Rights of the Child, *General Comment No. 15 (2013) Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24)*, ¶ 1, U.N. Doc CRC/C/GC/15 (Apr 17, 2013), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2f5F0vHCIs1B9k1r3x0aA7FYrehlNUfw4dHmlOxmFtmhaiMOKH80ywS3uq6Q3bqZ3A3yQ0%2b4u6214CSatnrBIZT8nZmj> [hereinafter *General Comment No. 15*].

enjoying the highest standard of health.¹⁸⁸ Not only does such a ban increase the risk that children will suffer from certain illnesses, but it may also have a negative effect on emotional and social welfare of those children who belong to communities in which circumcision is a religious imperative and/or has great social significance. Accordingly, even though, in the light of the lack of consensus in relation to the medical benefits of circumcision, there would not seem to be any obligation upon States to make circumcision available to all children, any attempt to prevent those parents who wish to circumcise their children from doing so can be seen as a violation of children's right to health.

C. Indeterminacy of The Best Interests of the Child

Both the PACE Resolution¹⁸⁹ and the Cologne decision¹⁹⁰ assume that ritual male circumcision is not in the best interests of the child. Whilst the Rapporteur does indicate that there might be broader interpretations of the best interests principle,¹⁹¹ she does not discuss the various interests of the child, which are relevant to the issue of ritual circumcision, and seems to be unaware of the problems surrounding the best interests standard generally and in this context specifically. Accordingly, in this section, we will analyze the implications of the recognized indeterminacy of the best interests standard¹⁹² in attempts to determine whether a particular practice violates the child's right to have his best interests treated as a primary consideration under Article 3(1) of the CRC.

1. Subjective Nature of Best Interests Assessments

Perhaps the main cause of the indeterminacy of the best interests standard is the impossibility of neutralizing the influence of the subjective worldview of the person applying it because the choice of criteria is inherently value-laden.¹⁹³ This subjectivity has long been recognized as a major drawback of the use of best interests principle as an adjudicatory tool in the domestic context.¹⁹⁴ In some jurisdictions, attempts have been made to reduce the very broad discretion that it

¹⁸⁸ Jacobs, *supra* note 143, at 63.

¹⁸⁹ PACE Resolution, *supra* note 1, ¶7.4.

¹⁹⁰ Landgericht Köln [LG] [Regional Court of Cologne] May 7, 2012, No. 151 Ns 169/11 at 2 (Ger.) ("Consequently, the parental consent to the circumcision is considered to be inconsistent with the well-being of the child").

¹⁹¹ Children's Rights to Physical Integrity Explanatory Memorandum, *supra* note 98, at ¶ 21.

¹⁹² CLAIRE BREEN, THE STANDARD OF THE BEST INTERESTS OF THE CHILD: A WESTERN TRADITION IN INTERNATIONAL AND COMPARATIVE LAW 17 (2002); see Alston, *supra* note 25, at 18 (the best interests principle has been said to be located "at the most indeterminate outer margins" of human rights principles, which are inherently indeterminate); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 255-56 (1975); Stephen Parker, *The Best Interests of the Child—Principles and Problems*, 8 INT'L J.L. & FAM. 26 (1994).

¹⁹³ See BREEN, *supra* note 192, at 60 (discussing Jon Elster's criticism of the best interests standard); see Alston, *supra* note 25, at 18-19; Mnookin, *supra* note 192, at 260-61.

¹⁹⁴ Alston, *supra* note 25, at 11 (suggesting that the drafters of art. 3(1) of the CRC were unaware of the controversy over the best interests principle in many jurisdictions).

accords to judges by means of checklists¹⁹⁵ or even presumptions,¹⁹⁶ but there does not seem to be any clear evidence that these methods have significantly increased consistency or certainty.

The Committee on the Rights of the Child's recognition that Article 3(1) confers on a child a right to have his or her best interests treated as a primary consideration does not per se inject any degree of objectivity into the principle.¹⁹⁷ Similarly, that committee's attempt to define the purpose of the best interests standard, as being "to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity,"¹⁹⁸ does not provide a great deal of assistance¹⁹⁹ both because there can be no objective test of each of these types of integrity and because they may not necessarily go hand in hand. Thus, for example, in the current context, even if it is assumed that circumcision is a violation of physical integrity, it might well be necessary for the psychological and spiritual integrity of Jews and Muslims.²⁰⁰

Similarly, the definition of the Committee on the Rights of the Child does not shed any light on the extent to which the best interests assessment should focus on the short-term interests of the child or on his long-term interests. This is pertinent to the religious circumcision debate because even if the circumcision does not serve the child's interests at the time of its performance, it might certainly do so in the long-term, since it would prevent him from having to undergo the procedure later on in life when it would be more risky and more complicated.²⁰¹

In the domestic context, judges who have to determine the best interests of a particular child are commonly assisted by reports from social workers or psychologists. Such expert opinions appear to reduce the element of subjectivity by providing an apparently scientific basis to the determination. Whilst experts

¹⁹⁵ E.g., Children Act 1989, ch. 41, § 1(3) (Eng.); *General Comment No.14*, *supra* note 10, at ¶¶ 46-51 (recommending drawing up a non-exhaustive and non-hierarchical list of factors to be considered in determining best interests).

¹⁹⁶ E.g., Family Law Act 1975 § 61DA (Austl.) (requiring courts to presume that it is in the best interests of children for their parents to split responsibility over them evenly); THE AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 178 (2002) (suggesting parental responsibility be allocated in a way which roughly approximates to the proportion of time each parent spent caring for the child prior to the breakdown of their relationship); see generally Katharine T. Bartlett, *Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution Project*, 36 FAM. L.Q. 11 (2002) (explaining and promoting the American Family Institute's system of presumption in child custody).

¹⁹⁷ CRC 1989, *supra* note 9, at art. 3(1).

¹⁹⁸ *General Comment No.14*, *supra* note 10, at ¶ 5 (this formulation is very similar to that in the first version of the draft Convention); see Alston, *supra* note 25, at 10.

¹⁹⁹ Schiratzki, *supra* note 82, at 45 (noting that the lack of a closer interpretation of art. 3 explains why it has been invoked both as an argument for and against ritual circumcision).

²⁰⁰ Askola, *supra* note 57, at 107-08 (this conflict was addressed by the Finnish Supreme Court, which held that in assessing best interests, the court must take into account the seriousness of the physical interference and the weight of the reasons put forward to justify the interference. Its conclusion was that in the light of the benefits accruing to the child from ritual male circumcision, it is "a defensible (and minor) interference.").

²⁰¹ Berhns, *supra* note 81, 948; see Mazor, *supra* note 116, at 422.

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clearly have at their disposal tools that can help in assessing the potential impact of various scenarios on the child, their opinions cannot be considered to be completely objective. In particular, within the social sciences there are different schools of thought in relation to many aspects of diagnosis—with some methods of diagnosis being subjectively based or uncorroborated²⁰²—and in relation to the impact of particular factors on the well-being of children.²⁰³ In addition, experts are also invariably influenced to some extent by their own personal values and perspectives. Whilst medicine would seem to be a more precise discipline than psychology or social work, there may well still be difficulty in obtaining a definitive objective expert opinion, as is well illustrated by the differing views about circumcision within the medical profession.²⁰⁴

Moreover, it has been recognized that even in relation to health care issues, in some situations the best interests of the child can best be determined by his parents and not by doctors or a court. In the case of *In re T*, the English Court of Appeal refused to authorize a potentially life-saving liver transplant for an eighteen month-old boy in light of the opposition of his mother, who was the child's sole guardian, on the basis that, as a caring and devoted parent, she was best placed to determine what was in the child's best interests.²⁰⁵ This particular decision may well be taking the concept that a young child's best interests require that important decisions be made by his parents rather too far,²⁰⁶ in light of the unchallenged clinical support for the operation²⁰⁷ and the inevitable fatal consequences of not operating.²⁰⁸ Nonetheless, there is much to be said for this approach in cases where medical opinion is divided and the potential risks involved in deferring to the parents' views are not so far-reaching. Since in such a situation the best-interests assessment is largely subjective, it is reasonable to assume that a decision that

²⁰² Ruth Zafran, *Haksha'im Hachruchim Be'chavot-Ha'dat Hamik'tzoyot — Tam Nusaf L'iytzuv Me'Chadash Shel Ha'Din B'She'elat Chalukatah Shel Ha'Achrayut Ha'Hora'it* [The Difficulties Involved in Expert Opinions — An Additional Reason to Redesign the Law in Relation to the Allocation of Parental Responsibility], 36 IYUNEI MISHPAT 277-80 (2013) (Hebrew); see Steven K. Erickson, Scott O. Lilienfeld & Michael J. Vitacco, *A Critical Examination of the Suitability and Limitations of Psychological Tests in Family Court*, 45 FAM. CT. REV. 157, 158 (2007); see also Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting it Wrong in Child Custody Cases*, 35 FAM. L. Q. 527 (2001).

²⁰³ Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L. Q. 305, 309-10, 315 (1996) (discussing different views in relation to the impact of relocation); see BREEN, *supra* note 192, at 50-3 (for criticism of the work of influential psychologists Goldstein, Freud, and Solnit).

²⁰⁴ See Short, *supra* note 63, at 241; Jacobs, *supra* note 143, at 60.

²⁰⁵ *In Re T* [1997] 1 All ER 906.

²⁰⁶ Andrew Bainham, *Do Babies Have Rights?*, 56 CAMBRIDGE L.J. 48 (2009) (criticizing the decision in *In Re T*).

²⁰⁷ Although a doctor, who gave evidence on behalf of the mother, took the view that the mother's opposition to the operation would have a negative impact on the after-care, in the view of the essential role which she would have to play therein. *In Re T* [1997] 1 All ER 906.

²⁰⁸ Bainham, *supra* note 206 at 50 (Waite L.J. in *In Re T* expressly held that "in the last analysis the best interests of every child include an expectation that difficult decisions affecting the length and quality of its life will be taken for it by the parent to whom its care has been entrusted by nature.").

reflects the values and perspectives of the parents²⁰⁹ will best serve the child. Indeed, infant circumcision would seem to be exactly such a situation.

Of course, where the parents disagree, particularly where they are of different religions, the question of whether the child's best interests require that he be circumcised is much more complex. It is noteworthy that in two such mixed faith cases in England,²¹⁰ the decision not to order performance of circumcision was not based so much on concerns about the procedure itself, but largely on the negative impact that it might have on the child's sense of belonging to the community of the other parent²¹¹ and the opposition of the child in question.²¹² From perusal of the reasoning in these cases, it seems highly probable that in a case where both parties are Jewish or Muslim, an English court would order circumcision, despite the opposition of one parent.²¹³

The subjectivity of the best interests standard becomes more problematic once that standard is adopted as a universal human rights standard to be applied not only by courts in relation to individual children, but also by legislators and by other bodies that make decisions affecting groups of children. These difficulties are exacerbated even further when those assessing best interests do not share a common cultural background with the children whose best interests are being considered. Both of these issues are highly relevant to the use of children's rights discourse in the political arena in general and to the circumcision debate in particular, and so it is appropriate to consider them in some detail.

2. Collective Best Interests Assessments

As already mentioned,²¹⁴ relatively little attention has been paid to the implications of extending the best interests principle to decisions taken by legislatures and other institutions which relate to particular groups of children or to children in general. Whilst, as noted above, a judge has broad discretion in determining the best interests of a particular child, the scope of this discretion is usually limited to a significant extent by the specific evidence brought by the

²⁰⁹ General Comment No.14, *supra* note 10, at ¶¶ 22, 25 (whilst CRC article 3's obligation to treat the best interests of the child as a primary consideration does not seem to apply to parents, article 18 provides that the best interests of the child should be their basic concern).

²¹⁰ *In Re J*, [1992] 2 FCR 34; *In Re S*, [2004] EWHC 1282 (Fam).

²¹¹ *In Re S*, [2004] EWHC 1282, ¶ 83 (Fam) (the court was concerned that circumcision, which would allow the boy to integrate fully into the Muslim religion of his mother, would in fact be a denial of his connection to the Hindu religion of his father, in which he had been brought up prior to the parents' separation).

²¹² *In Re J* [1992], 2 FCR at 37 (the court also gave weight to the fact that the non-Muslim mother, who was the residential parent, was opposed to the circumcision, and that the father was not a practicing Muslim).

²¹³ See, e.g., Caroline Bridge, *Religion, Culture, and the Body of the Child*, in BODY LORE AND LAWS 265, 281-82 (Andrew Bainham et al. eds., 2002) (suggesting that in the case of Jewish and Muslim children" [a]rguably the long term protective benefits of circumcision, coupled with its religious significance, contribute to the child's overall welfare and is in his best interests" and that a close connection to friends and family will trump one parent's opposition to circumcision).

²¹⁴ See *supra* note 34 and accompanying text.

parties or commissioned by the court. Even though there is certainly a considerable degree of speculation in the determination, the specific circumstances of each case²¹⁵ and the evidence in relation to the background, as well as the characteristics,²¹⁶ and, where appropriate, wishes of the particular child do usually provide a relatively solid base on which to draw inferences as to the implications of the various possible options.

In contrast, where a legislative or other institution has to decide whether a certain course of action is in the best interests of a particular group of children or of children in general, it can only base its decision on general information, or, at best, research relating to a sample of the children concerned. Even expert opinions are unlikely to be able to take into account the implications for all, or even most, children; this is likely to increase the subjective element in such opinions. Moreover, whilst the Committee has stated that for collective decisions the specific circumstances of the relevant group of children should be taken into account,²¹⁷ the circumstances of the children within the relevant group may well differ widely, unless the group in question happens to be homogenous. Thus, in the case of child male circumcision, it is difficult to see how a collective decision can be made when the circumstances of Jewish and Muslim children cannot possibly be compared to those of other children.²¹⁸

A further difficulty in making collective best interests decisions is that it will not be possible to hear the views of every child who will be affected by the decision, although the Committee does state that “when the interests of a large number of children are at stake, Government institutions must find ways to hear the views of a representative sample of children and give due consideration to their opinions when planning measures or making legislative decisions which directly or indirectly concern the group.” Again, even if such a procedure is followed, there are likely to be differences of opinion between different children or between different sub-groups. Indeed, it is to be expected that the vast majority of Jewish and Muslim adolescents would support allowing infant circumcision,²¹⁹ whereas this might not be the case among the general population.

The Committee does recognize the possibility that there may be conflicts between the interests of different children and advocates finding a suitable compromise on a case-by-case basis by balancing the various interests concerned.²²⁰ In weighing these interests, we are enjoined to bear in mind “that the

²¹⁵ General Comment No.14, *supra* note 10, at ¶ 32 (emphasizing the need, in individual (e.g. court) cases, to determine best interests in the context of the specific circumstances of each child).

²¹⁶ *Id.* at ¶ 48 (emphasizing focusing on each child's personal characteristics such as age, sex, and disabilities).

²¹⁷ *Id.* at ¶¶ 32, 48.

²¹⁸ Mazor, *supra* note 116, at 422-27 (distinguishing between these two groups when assessing the interests of children).

²¹⁹ *Id.* at 426.

²²⁰ General Comment No.14, *supra* note 10, at ¶ 39.

purpose of assessing and determining the best interests of the child is to ensure the full and effective enjoyment of the rights recognized in the Convention and its Optional Protocols, and the holistic development of the child.”²²¹ With respect, there is a logical flaw here: an apparent “catch 22” or “chicken and egg” situation. On the one hand, the rights in the Convention are to inform the best interests analysis. Yet, on the other hand, the ‘best interests of the child’ standard is to serve as a principle of interpretation in cases where the scope of the rights in the Convention is not clear or there are conflicts between different rights.²²² In other words, we are supposed to determine best interests in the light of a rights analysis, and yet in order to carry out such an analysis we need to interpret those rights in the lights of best interests. Thus, for example, in the circumcision context, the best-interests assessment will be influenced by the view taken as to the scope of the right to physical integrity and, yet, that right has to be interpreted in the light of the best-interests principle. Similarly, even assuming that there is a breach of the right to physical integrity, as we saw above, circumcision promotes other rights of Jewish and Muslim children. The best-interests principle is supposed to resolve the conflict between different rights and yet we are told that the purpose of best interests is to give effect to rights. Yet, how can we know which right(s), without resolving the conflict between them?

We may conclude that in any case where the best interests of the child and the relevant Convention rights are not clear-cut, there is lack of coherence in the CRC framework and there remains considerable room for subjectivity and fluidity in weighing up the various interests, in order to make a collective decision as to the best interests of children in general. This difficulty is compounded where it is clear at the outset that different children will have different interests. Accordingly, in such a situation, it is preferable to admit that it is simply not possible to make a collective best interests assessment and so to allow parents or, where they cannot agree, courts to determine the best interests of each individual child.

3. Best Interests and Cultural Diversity

The Committee on the Rights of the Child has recognized that since children are not a homogeneous group, diversity must be taken into account when assessing their best interests.²²³ Thus, it states, “although children and young people share basic universal needs, the expression of those needs depends on a wide range of personal, physical, social and cultural aspects, including their evolving capacities.” In particular, the Committee states that the right of the child to preserve his or her identity²²⁴ “must be respected and taken into consideration in the assessment of the

²²¹ *Id.* at ¶ 82.

²²² *Id.* at ¶ 33; see also Alston, *supra* note 25, at 15-16.

²²³ General Comment No.14, *supra* note 10, at ¶ 55.

²²⁴ See also CRC 1989, *supra* note 9, at art. 8(1).

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child's best interests"²²⁵ and that "[t]he identity of the child includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality".²²⁶

As seen above, the Finnish Supreme Court, adopting this approach, held that ritual male circumcision did promote the best interests of the Muslim child in question because it "can be considered to be positive for the boy child, the development of his identity, and his attachment to his religious and social community."²²⁷ Conversely, in the English case of *Re J*,²²⁸ the fact that the child was not being brought up as a practicing Muslim and would have little contact with Muslims was an important consideration in the court's conclusion that it was not in the best interests of the child to be circumcised against the wishes of the non-Muslim mother, as requested by the non-practicing Muslim father. However, the court made clear that every case depends upon its own facts and indicated that there would be circumstances in which it would order circumcision against the wishes of one parent, even where the latter parent was not Jewish or Muslim.

By way of contrast, the Cologne court did not take into account the specific circumstances of the child in question, when holding that the parental consent to circumcision was inconsistent with the welfare of the child.²²⁹ Schiratzki suggests that other decision-makers, such as legislators and medical personnel, tend to interpret best interests of the child in the light of what is considered to be "normal."²³⁰ She claims that in the Nordic States the practice of ritual circumcision by a tiny minority is considered not normal, because of the long history of religious homogeneity in this region and the prevalent understanding that religion should be limited to personal belief.²³¹ This approach seems inconsistent with that advocated by the Committee on the Rights of the Child, which mandates taking into account cultural factors in determining best interests.

Much has been written about the difficulty of reconciling universal children's rights norms in general, and the best interests principle in particular, with respect to cultural diversity. It has been noted that this difficulty has increased over the years as the West becomes more tolerant to cultural diversity²³² and more aware that there are different conceptions of good that inevitably impact an assessment of the best interests of the child.²³³ On the one hand, it seems to be widely recognized

²²⁵ General Comment No.14, *supra* note 10, at ¶ 55.

²²⁶ *Id.*; see also General Comment No. 13, *supra* note 18, at ¶ 12 (educational needs and social and family background are also to be taken into account).

²²⁷ Askola, *supra* note 57, at 108.

²²⁸ *In Re J*, [1992] 2 FCR 34.

²²⁹ Landgericht Cologne, Judgment, Docket no. 151 Ns 169/11, 1, 2 (May 7, 2012), <https://www.dur.ac.uk/law/news/?itemno=15002&rehref=%2Flaw%2Fnews%2Farchive%2F&resubj=%20Headlines>.

²³⁰ Schiratzki, *supra* note 82, at 46.

²³¹ *Id.* at 47.

²³² *Culture, Childhood and Rights*, *supra* note 172, at 21.

²³³ *Id.*

that culture should not be “accorded the status of a metanorm which trumps rights”²³⁴ and that to use the best interest principle in Article 3 to support unadulterated cultural relativism would undermine the whole concept of human rights.²³⁵ On the other hand, it is not easy to find a formulation that will determine the extent to which culture can be taken into account in assessing the best interests of children individually or in general.

Alston has suggested adopting the doctrine of margin of appreciation developed by the European Court of Human Rights, according to which national authorities are accorded a degree of discretion in applying the provisions of the European Convention on Human Rights, which *inter alia* allows them to take into account cultural factors.²³⁶

Freeman has developed theories that are more sophisticated. Nearly two decades ago, he advocated the use of cultural pluralism as a means of defining the limits of acceptable cultural practices.²³⁷ This approach holds that while there are many reasonable conceptions of good and rights, which are all valid from a moral perspective, there are also overriding primary values according to which it is possible to assess the reasonability and moral validity of cultural practices.²³⁸ Cultural pluralism does not ignore the cultural context of the practices but assesses the implication of the inconsistency with the primary value in light of that context.²³⁹ Using FGM as an illustration, he assesses the importance of the value of physical integrity to women in countries where FGM is practiced and concludes that the various social justifications of the practice are outweighed by the significant adverse physical and psychological effects.²⁴⁰

A similar analysis of ritual male circumcision would clearly produce a different result.²⁴¹ First, as seen above, it is not clear that this practice involves violation of physical integrity and the available evidence shows that men who have been ritually circumcised do not feel any lack of wholeness. Second, there is no real evidence of any significant adverse physical and psychological effects. On the contrary, there is evidence of medical benefits. Finally, as seen above, the justifications for the practice are not purely social, but also religious, emotional and psychological. Indeed, Freeman concludes that if there is a clash of values over

²³⁴ Alston, *supra* note 25, at 20.

²³⁵ VAN BUEREN, *supra* note 32, at 47.

²³⁶ Alston, *supra* note 25, at 20.

²³⁷ Michael Freeman, *The Morality of Cultural Pluralism*, 3 INT'L J. CHILD. RIGHTS 1, 10-12 (1995).

²³⁸ *Id.*

²³⁹ *Id.* at 12. Similarly, the approach called “An Internal Cultural Critique” requires analyzing cultural practices in the light of the arguments proffered by that culture and not by reference to foreign criteria. *Id.* at 16; see also Baum, *supra* note 149, at 13-14.

²⁴⁰ *Culture, Childhood and Rights*, *supra* note 172, at 16. See also BREEN, *supra* note 192, at 136-38 (arguing *inter alia* that FGM cannot be seen as being in the best interests of the child because the long-term aim of the practice is subjugation and oppression).

²⁴¹ Baum, *supra* note 149, at 13-14 (showing how male ritual circumcision can be justified under the “Internal Cultural Critique” approach).

ritual male circumcision, the value of cultural—religious—identity would prevail over that of physical integrity.²⁴²

Later in 2007, Freeman analyzed the tension between best interests and culture as a conflict between competing communities claiming that they provide the appropriate framework for making value judgments. He pointed to the difficulty in assessing the value judgments of other communities “because we are intrusive outsiders, and because we must understand before we can judge.”²⁴³ Thus, he asks with reference to which community is the judgments about abuse of rights to be made? This question is complicated by the fact that many communities are not homogenous and overlap.²⁴⁴ The current discussion would seem to illustrate this point well. The Cologne Court and the PACE judged religious male circumcision from a European secular perspective, demonstrating little understanding of the point of view of the religions concerned.²⁴⁵ Moreover, Europe, or even a specific country within Europe, cannot be seen as a homogenous community. Indeed, many of the Jews and Muslims in Europe who perform ritual circumcision can be seen as belonging to the majority modern Western culture in the countries where they live, in the sense that they lead a very similar way of life and share common liberal values with their Christian, agnostic and atheist neighbors.

Freeman’s solution to the conflict between competing communities, however they might be defined, is to engage in dialogue in order to form links between the competing frameworks and to secure an enlargement of a shared common sense. Freeman emphasizes that such dialogue must seriously engage local—i.e. cultural—perspectives and must be conducted without adopting positions of superiority. Whilst this vision may seem Utopian in the context of communities in the developing world who seem to have little in common with Western perceptions of human rights, this is certainly not the case in relation to Judaism, which shares those perceptions and to a large extent provided the basis for modern Western moral norms. Whilst, as seen above, the Rapporteur also recommends inter-faith dialogue,²⁴⁶ this is premised on the assumption that ritual male circumcision is a human rights’ violation and thus the purpose of the dialogue seems to be to persuade members of the religions involved that this is the case. This is surely an example of adopting a position of superiority. Rather, Freeman’s approach requires engaging in genuine dialogue and trying to understand before forming judgmental opinions about the practices of others.

²⁴² *Culture, Childhood and Rights*, *supra* note 172, at 16.

²⁴³ MICHAEL FREEMAN, ARTICLE 3, THE BEST INTERESTS OF THE CHILD, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 39 (A. Alen et al. eds., 2007).

²⁴⁴ *Culture, Childhood and Rights*, *supra* note 172, at 26.

²⁴⁵ *Children's Rights to Physical Integrity Explanatory Memorandum*, *supra* note 98, at ¶ 31 (Rapporteur’s assumption that alternatives such as a naming ceremony exist within Judaism.).

²⁴⁶ *Id.* ¶ 28; see *PACE Resolution*, *supra* note 1, at ¶ 7.4.

4. Non-Exclusivity of Best Interests of Child

The phrase “primary consideration” in Article 3 is preceded by the indefinite and not the definite article. In other words, there is no requirement that the best interests of the child are the sole or even the principle consideration as long as it is one of the main considerations.²⁴⁷ This formulation gives considerable discretion to courts and other decision-makers to determine what weight to give to the best interests of the child vis-à-vis other considerations. Thus, the Article 3 standard allows the court to give less weight to the interests of the child than does the traditional “paramountcy” principle.

The Committee on the Rights of the Child clarifies that it is permissible to take into account interests that clash with the best interests of the child, such as those of other children, parents and the public.²⁴⁸ Nonetheless, in the view of the Committee, treating the child’s best interests as a primary consideration requires a willingness to give priority to those interests. This formulation is of little assistance. If priority is always to be given to children’s interests, then in fact they become the sole consideration. Indeed, it seems that this was not the intention of the members of the Committee because they refer to willingness to give priority, and therefore do not envisage that priority will be given in every case. However, they do not give us any indication as to the type of situations in which other interests may take precedence over those of the children and those in which it may not.

Two general guidelines seem fairly obvious. The first relates to the strength of the child’s interests. The more doubt there is in relation to the child’s best interests, the more room there will be for other considerations to override those interests. Conversely, the clearer the best interests of the child, the greater the weight that should be given to them. The second guideline relates to the strength of the competing interest, as judged by the extent of the harm that will be caused by violation of that interest.

A third guideline may also be suggested, which relates to the inter-relationship between children’s interests and those of others. Interests that are expressed to belong to others may in fact serve the child and thus challenge the best interests assessment. For example, parental autonomy is clearly an interest of the parents. However, this same autonomy, which is virtually synonymous with the autonomy of the family unit, may also be beneficial to the child, to the extent that it limits external interference which might destabilize the family unit and perhaps threaten the security of the child within that unit,²⁴⁹ which is so important to his

²⁴⁷ Alston, *supra* note 25, at 12–13; see Parker, *supra* note 192, at 28.

²⁴⁸ General Comment No.14, *supra* note 10, at ¶ 39.

²⁴⁹ Joseph Goldstein, Anna Freud & Albert Solnit, BEFORE THE BEST INTERESTS OF THE CHILD 9 (New York: The Free Press 1979) (“The child’s need for safety within the confines of the family must be met by law through its recognition of family privacy as the barrier to state intrusion upon parental autonomy in child-rearing.”).

proper development.²⁵⁰ Moreover, Article 5 of the CRC expressly recognizes the right of parents to provide the child with guidance in exercising his rights, which in relation to very young children effectively means making decisions for them. This recognition can also be seen as supporting the claim that the child has an interest in the autonomy of the family unit.²⁵¹ Thus, in determining the weight to be given to the interests of others, it is necessary to consider to what extent those interests actually affect the real interests of the child.

In order to analyze how these guidelines would apply in the current context, we will assume that a particular decision maker comes to the conclusion that ritual male circumcision is not in the best interests of Jewish and Muslim children, despite the arguments presented above. Under the first guideline, the fact that the best interests assessment is not clear-cut means that there is room to give real weight to countervailing interests, in particular parents' right to freedom of religion and parental autonomy.²⁵² Under the second guideline, outlawing ritual male circumcision constitutes a serious violation of these parental interests because the practice is so fundamental to both Judaism and Islam and because both religions impose a duty on the parent to ensure that the child is circumcised. In this respect, there is a clear distinction with a ban on corporal punishment. Whilst some religions may encourage this form of punishment in the belief that it is the most effective method of educating children, there is no religious duty to use this particular method of discipline. Rather, it is simply a means to carry out the duty of education, which can be fulfilled in other ways. Finally, under the third guideline, as explained above, the parental right to autonomy can be seen as indirectly benefitting the child and so should also impact on the original best interests assessment. Thus, all the guidelines support a conclusion that considerable weight should be given to the parents' interest in this context.

5. Summary in Relation to Best Interests Standard

From the above discussion, it can be seen that there is inherent difficulty in determining that a decision made by both parents of a child is inconsistent with the best interests of the child. This difficulty is compounded where such determination is collective and where it concerns a cultural or religious practice. Furthermore, it has to be borne in mind that the best interests standard in Article 3(1) of the CRC does allow for other interests to be considered, including those of parents, and that children themselves have an interest in parental autonomy.

²⁵⁰ See CRC 1989, *supra* note 9, at pmb. (the preamble to the CRC refers to the family as “[t]he fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children.”).

²⁵¹ See, e.g., Bartlett, *supra* note 196, at 16.

²⁵² Viens, *supra* note 79, at 246 (concluding that these interests must be protected because it has not been proven that male circumcision is harmful).

Accordingly, state interference in parental decision-making cannot be justified on the basis of the amorphous best interests standard.²⁵³ Rather, a higher threshold such as proof of actual harm or likely significant harm to the child should be, and commonly is, required.²⁵⁴ Moreover, in assessing whether a particular religious or cultural practice does in fact cause such harm, it is necessary to examine carefully all aspects of the practice, including its long-term benefits for the child, from the perspective of the community concerned.

IV. THE PACE RESOLUTION AND INSTITUTIONAL ISSUES

The saga of the PACE resolution raises questions as to how children's rights discourse can be used in the political arena in a way which is consistent with the multi-dimensional nature of the CRC. In particular, we might ask whether it is appropriate for politicians without any expertise in children's rights to be making allegations about rights' violations without consulting with lawyers or other children's rights experts. As a precursor to discussing possible safeguards, it is helpful to summarize briefly some of the aspects of the procedure leading to the passing of the PACE Resolution which exacerbated the inherent pitfalls in the children's rights discourse.

A. The Flaws in the Passing of the PACE Resolution

1. Lack of Objectivity of Explanatory Memorandum

A Rapporteur was appointed to report on the child's right to physical integrity to the Social Affairs Committee. Since this report formed the basis of a Parliamentary resolution,²⁵⁵ it should have cited the opposing arguments objectively and provided accurate information on the basis of which the Committee could form a view. However, the explanatory memorandum produced by the Rapporteur is written in a subjective, rhetorical, and unbalanced manner. Many of her claims are not substantiated or are based on inaccurate or misleading information. A few examples will suffice to illustrate.

No support is brought for the Rapporteur's claims that the arguments in favor of circumcision "ignore both current medical knowledge about the lack of necessity

²⁵³ Pamela Laufer-Ukeles, *The Case against Separating the Care from the Caregiver: Reuniting Caregiver Rights and Children's Rights* (forthcoming 2014) (draft on file with author).

²⁵⁴ Pamela Laufer-Ukeles, *Children's Relational Rights* (draft on file with author); see Shelley Kierstead, *A Special Focus On Court-Affiliated Parent Education Programs: Parent Education Programs In Family Courts: Balancing Autonomy And State Intervention*, 49 FAM. CT. REV. 140, 150 (2011) (generally, in relation to the need for a higher threshold in child protection cases than in child custody decisions). See Mnookin, *supra* note 192, at 260-61; see also Bernd Walter, Janine A. Isenegger & Nicholas Bala, "Best Interests" in Child Protection Proceedings: Implications and Alternatives, 12 CAN.J.FAM.L.367, 384 (1995).

²⁵⁵ Parliamentary Assembly, AS (2013) CR 31 (Oct. 1, 2013), available at <http://assembly.coe.int/Main.asp?link=/Documents/Records/2013/E/1310011500E.htm> [hereinafter *Protocol of PACE Debate*] (showing the influence of the Report, which was praised profusely by most speakers).

and the consequences of circumcision”²⁵⁶ and that “both medical professionals and religious communities are increasingly aware of the considerable harm inflicted on children through circumcision procedures, especially if performed in a routine, traditional manner.”²⁵⁷ On the contrary, she refers to the 2012 report of AAP that concludes that the benefits of circumcision outweigh the risks.²⁵⁸ The fact that some doctors take a different view does not justify her statements.

Similarly, she refers to a group of Jews who have concerns about circumcision without any indication of the affiliation of these Jews or the numbers involved.²⁵⁹ In addition, her suggestion that a naming ceremony can be an alternative to circumcision²⁶⁰ displays complete ignorance as to the nature of the religious duty in Judaism.²⁶¹ Such a ceremony does not in any way fulfill the clear and express religious command in the Bible. Thus, it cannot in any possible sense be considered to be an alternative and the fact that some non-traditional Jews may think otherwise does not change this undisputable fact.

Moreover, her conviction that “children, if they were given a choice, would not decide to be harmed by a medical operation, which is not entirely beneficial to them” is purely subjective conjecture and, as shown above,²⁶² inconsistent with the available evidence and logic. Likewise, her comment that the arguments put forward in favor of circumcision are “purely serving the adults who wish to avoid a confrontation with the ‘dark side’ of their own religion, traditions and identity”²⁶³ reveals not only prejudice, but also lack of understanding in relation to children’s own right to freedom of religion and preservation of identity.

2. Lack of Consultation

During the process leading to the passing of the Resolution, there was no consultation with any expert in the law relating to children’s rights. Indeed, it seems that the human rights officer of the PACE was not in any way involved in the passing of the resolution and only after the Council of Ministers decided to take no action in relation to the resolution did he voice his opinion that ritual circumcision was not a violation of children’s rights. This failure seems to reflect a feeling that any self-proclaimed children’s rights activist is qualified to decide what constitutes violation of a child’s human rights.

²⁵⁶ *Children's Rights to Physical Integrity Explanatory Memorandum*, *supra* note 98, at ¶ 21.

²⁵⁷ *Id.* at ¶ 28.

²⁵⁸ *Id.* at ¶ 18.

²⁵⁹ *Id.* at ¶ 26. Likewise, she provides no basis for her suggestion that “many Jews circumcise their sons with great emotional conflict, reluctance, and regret.” *Id.* at ¶ 31.

²⁶⁰ *Id.* at ¶ 31.

²⁶¹ See *Protocol of PACE Debate*, *supra* note 255 (comment of Turkish representative, Ms. Memecan that “it is ridiculous to suggest alternatives or the elimination of the practice, which would be unthinkable and socially and culturally unacceptable for Jews and Muslims alike”).

²⁶² *Children's Rights to Physical Integrity Explanatory Memorandum*, *supra* note 98, at ¶ 67.

²⁶³ *Id.* at ¶ 21.

Moreover, it should be noted that there does not appear to have been any consultation with Jewish or Muslim religious authorities²⁶⁴ to obtain an authoritative religious viewpoint. Rather, as already noted, the Rapporteur relied on views expressed by Jews opposed to circumcision. Four experts appeared before the committee, two of whom were known opponents of ritual male circumcision²⁶⁵ and one who was an activist against FGM.²⁶⁶

B. Safeguarding Children's Rights in the Political Arena

Harm may be caused to children's interests where institutional decisions relating to children's rights are based on a misconceived, "half-baked" approach to children's rights, without any guidance from a body with expertise in relation to the CRC and in reliance on partial and biased information. Such decisions may have far-reaching implications, even when they are not binding. For example, the PACE Resolution is likely to influence not only legislators and other decision-makers within Europe, but also public opinion. Furthermore, it can be used by opponents of ritual male circumcision to give legitimacy to their campaign. The fact that the Council of Ministers decided not to adopt the recommendations of the Social Affairs Committee does not in fact undo the impact of the Resolution, which received wide press coverage throughout the world. Thus, it is important to ensure that any form of official decision or resolution made by political institutions in the name of children's rights is based on an informed understanding of the complexity and multi-dimensional nature of the CRC and on objective scientific or other relevant data.

In the search for methods to achieve this goal, it should be appreciated that the need to assess the children's rights implications of a particular course of action may arise in a variety of contexts, other than proposals to outlaw or regulate a particular practice. For example, in some countries there is a legal requirement to consider the impact of new legislation on children's rights.²⁶⁷ Thus, it is worth considering a number of mechanisms for improving the quality of decision-making within the political arena in relation to issues concerning violation and promotion

²⁶⁴ *Id.* at ¶ 9 (Dr. İlhan İlklıç, associate professor at the Department of History of Medicine and Ethics, Istanbul University, Faculty of Medicine appeared before the committee, but he did not represent any official Muslim authority).

²⁶⁵ *Id.* at ¶ 9 (also appeared, Mr Victor Schonfeld, producer of documentary films, London (United Kingdom) and Dr. Matthias Schreiber, child surgeon, Department of Child Surgery, Clinic of Esslingen (Germany)). See also Comm. on Soc. Affairs, Health and Sustainable Dev., *Addendum to the Synopsis of the Meeting Held in Strasbourg from 21 to 24 January 2013*, AS/SOC (2013) CB 01 (Jan. 30, 2013), <http://www.assembly.coe.int/Committee/SOC/2013/SOC001addE.pdf> [hereinafter *Protocol of Meeting of Jan. 24, 2013*].

²⁶⁶ See Comm. on Soc. Affairs, Health and Sustainable Dev., *Synopsis of the Meeting Held in Berlin on 14-15 March 2013*, AS/SOC (2013) CB 05 (Mar. 19, 2013), <http://www.assembly.coe.int/Committee/SOC/2013/SOC002E.pdf> [hereinafter *Protocol of Meeting of Mar. 15, 2013*].

²⁶⁷ See, e.g., Law on Information about the Influence of the Legislation on Children's Rights, 2002, SH No. 1859 p. 48 (Isr.).

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of children's rights, which may be adopted as appropriate to the context in question.

1. Reference to the Committee on the Rights of the Child

Political and other institutions could refer questions relating to children's rights to the Committee on the Rights of the Child, set up under Article 43 of the CRC.²⁶⁸ This Committee, which consists of 18 experts from different countries,²⁶⁹ is the most authoritative interpreter of the CRC. It considers and makes observations²⁷⁰ on the periodical reports that each Member State must submit to it²⁷¹ and also publishes general comments,²⁷² which give guidance in relation to the interpretation of the most important provisions of the Convention or particular practices. Its heterogeneous composition, combined with the experience acquired from examining reports on the implementation of the CRC in different countries, means that it is more likely to be able to analyze the children's rights implications of a particular practice or situation objectively and from all relevant perspectives and to be able to take a more holistic and universal approach to children's rights than other international, regional or national bodies. In particular, the General Comments published by the Committee ought to inform any children's rights analysis. A clear advantage of reference to this Committee is that it will result in uniform interpretation of the CRC. Thus, where questions of global relevance arise as to whether a particular practice violates children's rights, reference to the committee on the Rights of the Child would seem to be the optimal approach.

However, a caveat should be added. Even the Committee on the Rights of the Child is susceptible to being misled by inaccurate and biased information submitted to it by partisan organizations and pressure groups. For example, the origin of the comment in its concluding observations in relation to Israel in 2013, expressing concern about complications arising from traditional male circumcision

²⁶⁸ There is currently no official mechanism under which States can refer questions to the Committee on the Rights of the Child. The Optional Protocol to the Convention on the Rights of a Child on a Communications Procedure allows individuals to submit communications by claiming to be a victim of a violation of the Convention by a State party. G.A. Res., *Optional Protocol to the Convention on the Rights of a Child on a Communications Procedure*, U.N. Doc. A/RES/66/138 (Jan. 27, 2012), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A/RES/66/138&Lang=en. This protocol came into force on April 14, 2014 and has been ratified by 15 States, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en (last visited, February 19, 2015).

²⁶⁹ See U.N. Human Rights, Office of the High Comm'r for Human Rights, *Comm. on the Rights of the Child: Membership*, <http://www.ohchr.org/EN/HRBodies/CRC/Pages/Membership.aspx> (last visited Nov. 2, 2014) (these experts are elected by a period of four years by the Member States. The current Committee includes experts from Saudi Arabia, Egypt, Russian Federation, Norway, Monaco, Brazil and Australia).

²⁷⁰ See U.N. Human Rights, Office of the High Comm'r for Human Rights, *Human Rights Bodies*, <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx>.

²⁷¹ *Id.*

²⁷² *Id.* See, e.g., *General Comment No. 13*, *supra* note 18 (referring to FGM as a harmful practice, but not mentioning male circumcision).

practices,²⁷³ appears to be a document submitted by an Israeli anti-circumcision association.²⁷⁴ Accordingly, it is essential that the Committee take steps to obtain objective information²⁷⁵ and give appropriate weight to it before expressing a view about the children's rights implications of a particular practice.

2. Consultation with Other Bodies

Another alternative is to require consultation with independent human rights bodies. Indeed, where the issue of the children's rights implications of a particular practice or proposed course of action arises in the national context, reference to a local organization is likely to be a more attractive option. However, there is a need for caution. First, not all human rights bodies have expertise in relation to children's rights.²⁷⁶ Second, even where there do exist bodies that specialize in children's rights, there is a danger that their approach may be influenced by the worldview and value judgments of the staff. For example, the children's ombudsman in a few Scandinavian countries condemned circumcision as a violation of children's rights.²⁷⁷ Thus, there seems to be a need for better training of staff and perhaps more guidance from the Committee on the Rights of the Child.

3. Education, Training and Information

There is a need to ensure that politicians or other office-holders who are involved in making decisions concerning children's rights have a better understanding of the complexity of the CRC and the delicate balances involved in assessing the children's rights implications of practices, decisions and proposed courses of action or legislation. In particular, they need to be aware of all of the provisions of the CRC, and not only the most well known ones, and to be familiar with the main principles contained in the General Comments issued by the Committee on the Rights of the Child.

²⁷³ Comm. on the Rights of the Child, *Concluding Observations on the Second to Fourth Periodic Reports of Israel, Adopted by the Committee at its Sixty-third Session* (27 May – 14 June 2013), ¶ 41-42, U.N. Doc. CRC/C ISR/CO/2-4 (July 4, 2013), available at http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ISR/INT_CRC_COC_ISR_13827_E.pdf.

²⁷⁴ Ben Shalem, *Male Circumcision in Israel*, INT_CRC_NGO_ISR_13815, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRC%2fNGO%2fISR%2f13815&Lang=en (claiming high incidence of complications after circumcision).

²⁷⁵ See Comm. on the Rights of the Child Reviews Report of Israel (June 3, 2013), available at <http://unispal.un.org/UNISPAL.NSF/0/4A4C4F00968B263585257B81004F5876> (explanation by the Israeli Government representative, in response to a question by the Committee on the Rights of the Child, that out of around 75,000 boys circumcised per year there were only 2 or 3 cases where there were serious complications and that this was no higher than would be expected in relation to any surgical procedure).

²⁷⁶ See generally, Comm. on the Rights of the Child, *General Comment No. 2 (2002) The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child*, U.N. Doc CRC/GC/2002/2 (Nov. 15, 2002), <http://www.refworld.org/docid/4538834e4.html>.

²⁷⁷ See JTA, *Denmark Party Wants To Ban Circumcision. Leftist Social Liberals Cite Children's Rights*, JEWISH DAILY FORWARD (Sept. 18, 2013), <http://forward.com/articles/184128/denmark-party-wants-to-ban-circumcision/>.

In addition, it is essential that any information on which those making decisions about children's rights base their decision is objective and impartial. Where the decision relates to a practice or custom of a particular religious or ethnic group, they should receive information from representatives of that group. Where there is a lack of consensus within that group or among medical or other experts, they should receive opinions reflecting the various views. Indeed, it can be argued that such decision-makers are not fulfilling their duty to treat the best interests of the child as a primary consideration, as mandated by Article 3(1), if they make decisions on the basis of partial or biased information.

V. SUMMARY

This Article has provided concrete evidence of the dangers of taking a uni-dimensional, over simplistic approach to children's rights. In particular, we have seen that some of the rights protected by the CRC are not closely defined and are open to widely different interpretations. Moreover, there is considerable scope for selective reference to some rights whilst ignoring others and there is no satisfactory method of resolving conflicts between different rights of the child. The Committee's instruction to use "best interests" as the arbiter leads to circular reasoning, since we are also enjoined to interpret best interests in the light of the child's rights. In addition, the inherent indeterminacy of the best interest standard is exacerbated in the context of collective decisions and in relation to issues involving culture. Suggesting solutions to these fundamental problems, which are inherent in the doctrine of children's rights generally and the CRC in particular, is outside the scope of this article. However, we can conclude from our analysis that decisions of both parents should only be interfered with in cases of clear-cut significant harm to the child and not purely on the basis of a best interests assessment.

Moreover, we should remember that the impact of the CRC is wider than the specific rights enacted therein. The Convention's recognition of the concept that children have rights contains a fundamental message about the centrality of children and their perspectives in matters affecting them. Thus, issues affecting the child have to be viewed through the child's eyes and not from the viewpoint of adults. Where the child is not old enough to express an opinion at the moment, account has to be taken of how he is likely to view the situation when he will be old enough to understand. Indeed, the ritual circumcision debate illustrates the dangers of viewing issues concerning children from a particular adult stance without considering carefully the future implications from the perspective of the child in question. In particular we have to be careful not to define and interpret children's rights in a way that imposes restrictions on children that they would not, as adults, wish to have had imposed upon them. In other words, we must not lose sight of the original rationale of treating children as independent rights holders. Whilst we should clearly not be abandoning children to their rights and we need to protect

them from exercising their autonomy or other rights in a way which is liable to cause them real harm and prejudice in adult life,²⁷⁸ there is no need to protect them from actions which do not cause them such harm and of which they are likely to approve when they grow up. Indeed, such paternalistic protection is in itself a breach of their rights.

The implications of the analysis in this paper are far wider than the ritual circumcision debate. It is particularly, although not exclusively, pertinent to the children's rights implications of decisions made by parents in relation to the rearing of their children that do not conform to the norms prevalent in Western society. For example, a claim that provision of only religious tuition, or any other deviation from standard educational practice including home-schooling, violates the child's right to education²⁷⁹ raises *inter alia* issues as to the definition and scope of this right as well as of the child's autonomy rights, his right to freedom of religion and his best interests.²⁸⁰ Moreover, many of the pitfalls inherent in children's rights discourse will also apply to other human rights, including definitional problems and selectivity.

The purpose of this Article is not to attack the concept of children's rights²⁸¹ or to argue that political institutions are not appropriate vehicles for promoting children's rights. Rather the article, in highlighting pitfalls inherent within the doctrine of children's rights—which make it susceptible to misuse—exposes the need to refine that doctrine and in the meantime urges caution in the use of children's rights discourse in the political arena. In particular, attention needs to be paid to the complex, multi-faceted nature of the CRC and the influence of the worldview of the analyst on the way in which the rights are defined and weighed against each other. Moreover, there needs to be awareness of the impact on the child of the violation of the rights of other family members.

²⁷⁸ See Eekelaar, *supra* note 163.

²⁷⁹ The Israeli High Court of Justice recently rejected a claim that The Unique Cultural Educational Institutions Law, which allows exemption of ultra-orthodox high schools from teaching core secular subjects, violates the right to dignity and to freedom of occupation of the pupils. Rubinstein v. The Ministry of Education, HCJ 3752/10 (Sept. 17, 2014). The Belgian Constitutional Court held that an Education Decree which required all schools to participate in central examinations and to be subject to supervision applied also to ultra-Orthodox Jewish schools (referred to in Lotem Perry-Hazan, *Court-led educational reforms in political third rails: Lessons from the litigation over ultra-religious Jewish schools in Israel* (forthcoming in J.L. EDUC. POL.'Y, 2015)).

²⁸⁰ Wisconsin v. Yoder, 406 U.S. 205 (1972) (seminal decision of U.S. Supreme Court, upholding the right of Amish parents to give their children a shorter period of education *inter alia* because of the difficulty of objectively determining what is in the child's best interests).

²⁸¹ Indeed, the current author supports the use of the doctrine of children's rights as a method of protecting children's interests and has argued that legal regimes affecting children have to be consistent with their rights. See, e.g., *Hague Child Abduction Convention*, *supra* note 30; Rhona Schuz, *The Right of the Child to be Raised by his Biological Parents - Lessons from the Israeli "Baby of Strife" Case*, 27 CHILDREN'S LEGAL RIGHTS J. 85 (2007); Rhona Schuz, *Thirty Years of the Hague Abduction Convention: A Children's Rights' Perspective*, in LAW IN SOCIETY: REFLECTIONS ON CHILDREN, FAMILY, CULTURE AND PHILOSOPHY: ESSAYS IN HONOUR OF MICHAEL FREEMAN (A. Dudick, H. Reece & N. Peleg eds., 2014) (forthcoming Nijhoff 2015).

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Clearly, this caution also requires that any debate in the public arena be informed by full and reliable information including presentation of divergent expert views. In addition, it has to be appreciated that not every self-proclaimed children's rights activist is an authentic spokesman for the rights of the child. Thus, it is suggested that the opinion of the Committee on Children's Rights be sought on any political initiatives involving allegations that particular practices involve a violation of children's rights. In relation to other issues concerning children's rights, especially involving national issues, it may suffice to consult with local independent experts. In any event, there is a need to put into place mechanisms to ensure that politicians and others who are promoting children's rights receive appropriate training and are made aware of the complex and multi-dimensional nature of the CRC and of the need to ensure that any analysis of children's rights reflects this complexity and is based on complete and objectively reliable information. The need for training and education applies similarly in relation to other types of human rights.

It is to be hoped that the insights expressed in this article will contribute to a better understanding of the doctrine of children's rights in general, and the CRC in particular, and to ensuring that they are used to protect the interests of children and are not misused and distorted in a way which in fact causes harm to the legitimate interests of children and their families.

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