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# The Religious Practice to Circumcise Boys – Who's Right Will Prevail?

Balancing Child and Parental Rights Under the  
ECHR.

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## Summary

The religious practice to circumcise boys is widely debated. One group is siding with the parental right to freedom of religion. The other is siding with boys' right to bodily autonomy and freedom of religion, that is, not to be circumcised. In this thesis, these interests will be considered from the perspective of the ECHR. The ECtHR is yet to try a case regarding boys' right or lack thereof not to be circumcised in the name of religion. In contrast, girls are protected from circumcision under article 3 of the ECHR.

Several of the articles in the ECHR could be invoked on an issue of this matter; this thesis focuses on articles 8 and 9 primarily and article 3 subsidiarily. Article 8 provides protection for both parent(s) and their child's private and family life. Hence, depending on how you review the ECtHR's practice, this article can either protect the right for parent(s) to decide to circumcise their son or give the child a right not to be circumcised due to their bodily autonomy.

The freedom of religion is protected under article 9 and is applicable on both parents and children. The article also protects the right to abstain from religion. Therefore, the circumcision of a boy could be seen as a violation of his future freedom to choose a religion or as a violation of the parent(s) right to manifest their religion.

The thesis finds that the ECtHR likely would grant an issue like this a wide margin of appreciation on behalf of the State Parties. This is a common tendency when the Court rules on matters related to both articles 8 and 9, especially when more ethically sensitive issues, like the circumcision of boys, are present.

# Sammanfattning

Den religiösa seden att omskära pojkar är mycket omdiskuterad. Den ena gruppen ställer sig bakom föräldrarnas rätt till religionsfrihet, den andra ställer sig bakom pojkars rätt till kroppslig autonomi och religionsfrihet, det vill säga rätten att inte bli omskuren. I denna uppsats kommer dessa intressen att beaktas ur ett EKMR-perspektiv. Europadomstolen har ännu inte prövat ett fall om pojkars rätt, eller brist på sådan, att inte bli omskurna på grund av en religion. Däremot skyddas flickor från omskärelse enligt artikel 3 i EKMR.

Flera artiklar i EKMR kan åberopas gällande religiös omskärelse av pojkar; denna avhandling fokuserar på artiklarna 8 och 9 i första hand och artikel 3 i andra hand. Artikel 8 skyddar både föräldrars samt deras barns privat- och familjeliv. Beroende på hur man tolkar Europadomstolens praxis kan artikeln antingen anses skydda föräldrars rättighet att besluta om att omskära sin son, eller ge barnet en rätt att inte bli omskuren på grund av sin rätt till kroppslig autonomi.

Religionsfriheten skyddas enligt artikel 9 och är tillämplig på både föräldrar och barn. Artikeln skyddar också rätten att avstå från religion. Därför kan omskärelse av en pojke både ses som en kränkning av hans framtida frihet att välja religion, eller som en kränkning av förälderns/föräldrarnas rätt att manifesteras sin religion.

Uppsatsen konstaterar att Europadomstolen sannolikt skulle ge konventionsstaterna en bred bedömningsmarginal (margin of appreciation) för att hantera en fråga som denna. Detta är en vanlig tendens när domstolen avgör frågor rörande både artikel 8 och 9, särskilt när etiskt känsliga frågor så som omskärelse av pojkar, är aktuella.

# 1 Introduction

## 1.1 Background

Male circumcision is one of the oldest and most common surgeries globally.<sup>1</sup> It is estimated that around 30 % of the world's male population is circumcised.<sup>2</sup> The male circumcision procedure predominantly includes total or partial removal of the foreskin from the penis.<sup>3</sup> There are also more invasive forms which are much less common.<sup>4</sup>

There are several different reasons for performing male circumcision, such as cultural, religious, and as non-medical routine procedures.<sup>5</sup> Most religions have a neutral stance towards it, apart from Judaism and Islam, where the practice can be found in their religious texts Genesis and Sunnah.<sup>6</sup> Boys born into the Jewish faith are, if following the religious commandment, circumcised on the 8<sup>th</sup> day after birth.<sup>7</sup> The age of boys being circumcised in the name of Islam differs.<sup>8</sup> Most are circumcised at an early age but at the latest before puberty.<sup>9</sup>

The debate surrounding the circumcision of boys unable to consent to the procedure has been present for several hundred years.<sup>10</sup> In Europe, the question of banning male circumcision has recently sparked again after being silent for several decades.<sup>11</sup> In Sweden, the debate rose in 2019 when the Center Party wanted to prohibit boy circumcision.<sup>12</sup> Arguments against this proposition were, and are still, mainly rooted in Jewish and Muslim people's right to practice their religion.<sup>13</sup> This idea is supported by the State Church of

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<sup>1</sup> WHO, UNAIDS (2010) p. 5.

<sup>2</sup> WHO, UNAIDS (2010) p. 5 and Janson (2016) p. 111–112.

<sup>3</sup> WHO, UNAIDS (2010) p. 9 and D. Earp & Darby (2019) p. 64.

<sup>4</sup> Van den Brink & Tigchelaar (2012) p. 424.

<sup>5</sup> Janson (2016) p. 112.

<sup>6</sup> WHO, UNAIDS (2010) p. 7.

<sup>7</sup> WHO, UNAIDS (2010) p. 22 and Janson (2016) p. 114.

<sup>8</sup> WHO, UNAIDS (2010) p. 27.

<sup>9</sup> Janson (2016) p. 114.

<sup>10</sup> Janson (2016) p.112.

<sup>11</sup> Porat (2021) p. 30.

<sup>12</sup> TT (2019).

<sup>13</sup> Hedner Zetterholm & Zetterholm (2019) and Verständig & Reichel (2019).

Sweden, which is Protestant.<sup>14</sup> Some arguments favouring the prohibition of boy circumcision are that children have a right to bodily autonomy and that the practise constitutes an abuse of innocent children.<sup>15</sup>

No European nor any other countries have established a ban on male circumcision. However, in Iceland, a bill was proposed in 2018 that would outlaw male circumcision. Sweden and Norway have restricted the practice through law. Major medical committees and associations, among other actors, have in Sweden, Denmark, Netherlands, Belgium, and Germany made public declarations calling for a ban on or raising concerns about male circumcision.<sup>16</sup>

## 1.2 Purpose and Research Question

The purpose of this study is to investigate the relationship between the parental right to freedom of religion versus children's rights to freedom of religion and autonomy. This will be based on the European Convention on Human Rights (ECHR, the Convention) and interpretations made by the European Court of Human Rights (ECtHR, the Court). The main focus will be on the religious practice of circumcision of boys since this is a practice that clearly pits these two rights against each other. The questions I aim to answer to fulfil this purpose is:

*How is the ECHR to be understood in relation to a child's interest not to be circumcised?*

*How would the ECtHR balance the parental rights, specifically the freedom of religion, versus their child's right to freedom of religion and autonomy, within the context of boy circumcision?*

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<sup>14</sup> Svenska kyrkan (2021).

<sup>15</sup> Björklund (2019).

<sup>16</sup> Porat (2021) p. 33–34.

### **1.3 Delimitations and Definitions**

As partly shown in the previous section, several delimitations have been made when writing this thesis. This is mainly due to the limitations posed on a thesis of this nature and the deficiency of scholarly literature regarding this thesis's subject.

ECHR constitutes the legal framework of this essay. The Convention on the Rights of the Child (CRC) and are left outside of the thesis. Nevertheless, the CRC will be mentioned to the extent where it potentially is subject to consideration by the ECtHR.

One distinction is to focus on religious circumcision, with Judaism and Islam being the religions of primary concern. Another distinction is to focus on boy circumcision and not female circumcision or female genital mutilation. Still, it will be mentioned since it is often brought up in arguments regarding religious male circumcision. Circumcision of adult males will not be considered since it is not of significance for the research question. Therefore, the word circumcision in this thesis will always refer to the circumcision of boys, meaning minors that were born with male genitalia.

Arguments regarding boy circumcision based on medical studies or health ethics will not be considered in this essay since these arguments do not touch upon rights given under the ECHR. Many other arguments will not be considered, even though they might be interesting or relevant to this issue and the ECHR. This delimitation is made since an essay of this calibre cannot possibly consider all different aspects regarding this subject. The reason for choosing the arguments highlighted in this thesis is to present varying views directly relevant to the research questions and the rights selected.

Articles 8 and 9 of the ECHR are considered in this thesis and chosen since they protect the rights that are in direct relevance to the research question. Article 3 is not as relevant to the research question, but since it is connected to the right to bodily autonomy and often referred to by legal scholars on the matter, it is included. Other articles such as 2 and 14 of the ECHR could also be seen as closely linked to the issue but are not as relevant and got overlooked in favour of a deeper immersion of articles 8, 9 and 3.

This essay assumes that the reader has a basic understanding of European Human Rights Law and its concepts. An in-depth explanation of these concepts, such as autonomy and the margin of appreciation, are therefore left outside the scope of this thesis.

## **1.4 Methodology and Theoretical Framework**

The relationship between parental freedom and children's rights will be studied from a legal European human rights perspective, focusing on case law of the ECtHR. A critical perspective will also be applied to understand how the law might fail to protect individuals when many rights are in conflict.

The current legal discipline regarding the matter will be reviewed *de lege lata* using the dogmatic legal method. The main scope of this method is to analyse and interpret current law in an effort to answer the research question posed.<sup>17</sup>

## **1.5 Material**

Case law from the ECtHR is the backbone of this thesis, along with a book written by a collection of scholars with PhD's in law – The Law of the European Convention. This book was chosen since it explains the practices of the ECtHR extensively and neutrally, and presents the articles of ECHR in detail. The Article Guides provided by the ECtHR were used in conjunction with this book to assure that the thesis would meet the required level of scientific calibre. Case law is the primary guide for how the ECHR shall be interpreted and is central to understanding the rights it protects. The selection of cases has been made to suit the purpose of the thesis, with recent and key rulings being prioritised.

The material provided by the ECtHR and comprehensive legal works concerning children's rights under the ECHR, are scarce. Thus, in section 3, available articles published in academic journals and older literature were used to describe children's rights within the ECHR.

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<sup>17</sup> Kleineman (2018) p. 21–24.



The material used in section 4 deviates from the neutral perspective in previous sources. This is justified since this section aims to provide arguments made by scholars on both sides of the debate surrounding the circumcision of boys. Thus, there is an awareness that one source in particular, written by Prodger, is angled through a Christian lens focusing on canon law. This awareness is also present regarding the other sources in section 4. Although the articles are written by respectable academic scholars, they are undoubtedly angled and should be regarded as such. Articles angled from different, opponent perspectives are presented to make the final output of the essay neutral and unbiased.

## **1.6 Previous Research**

Although circumcision of boys has been debated for a long period of time, academic sources regarding the subject from a legal ECHR perspective, are scarce. A lot of articles and material can be found in daily magazines. These, although thought-provoking, does not comment on the topic in relation to the ECHR and lack academic credibility.

When researching the topic of circumcision concerning the human rights provided under ECHR, most material found does not discuss boy circumcision, merely the circumcision or mutilation of girls.

The sources found debating the subject have primarily been written with an angle in favour of one or the other side to this debate. Finding articles and books presenting both sides of the discussion in a neutral way has proven difficult. A recent, comprehensive, and unbiased academic source discussing boy circumcision is yet to be found. My hope is that this essay will contribute with a fresh perspective to the discourse.

## **1.7 Outline**

To answer the research question systematically, the presentation will be as follows. A descriptive explanation of the relevant ECHR articles will be provided first. Then, the justifiable interferences with said articles will be presented, and an attempt to understand when an individual can be subject to

such interferences will be made. Next, a deeper insight into children's rights under the ECHR will be provided, followed by a presentation on the different perspectives of boy circumcision by legal and human rights scholars. Lastly, a conclusion will be presented based on the former parts of the thesis.

## 2 Applicable Articles in ECHR

### 2.1 The right to freedom from torture or inhuman or degrading treatment

The right to freedom from torture or inhuman or degrading treatment or punishment in article 3 is an absolute right that cannot be derogated from or interfered with.<sup>18</sup> A minimum level of severity of ill-treatment must be reached to activate the protection awarded by this article. The level of severity is relative, and multiple factors play a role in the assessment, such as the nature and context of the ill-treatment, the execution, duration, effects, and sometimes the sex, age, and health of the exposed person. It should be noted that derogation from the ECHR is a rare occurrence, and few States have resorted to article 15 in the past.<sup>19</sup>

Hence, it is relevant if the person exposed to the ill-treatment was a minor at the time.<sup>20</sup> Certain acts of violence committed against a child can therefore be seen as torture or ill-treatment even if it would not be classified as such if committed against an adult.<sup>21</sup> Both bodily integrity and a child's mental health are protected under article 3.<sup>22</sup> However, this right to physical and psychological integrity is not constantly maintained by the ECtHR and seems to depend on the type of ill-treatment.<sup>23</sup> Child abuse is one example of inhuman treatment, as is female genital mutilation.<sup>24</sup> The fact that female genital mutilation is considered a violation of article 3 raises the question of whether all or some forms of male circumcision could be as well.

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<sup>18</sup> Harris *et al.* (2018) p. 237.

<sup>19</sup> Harris *et al.* (2018) p. 832–833.

<sup>20</sup> Harris *et al.* (2018) p. 238–239.

<sup>21</sup> Grans (2017) p. 154.

<sup>22</sup> Grans (2017) p. 147.

<sup>23</sup> Grans (2017) p. 151.

<sup>24</sup> *Giusto, Bornacin and V v. Italy and Collins and Akaziebie v. Sweden.*

## 2.2 The right to respect for private and family life

The right to respect for private and family life, home, and correspondence in article 8 is characterised by its unruly and undefined meaning. The Court tends to interpret the four protected rights in the article in a generous matter.<sup>25</sup> This thesis concerns the first two. The primary obligation is negative, meaning that the State Party's primary responsibility is not to interfere in people's private and family lives.<sup>26</sup> However, the Court has recognised that the article formulation "to respect for" means it also constitutes some positive obligations. This recognition establishes that the State Parties have a duty to provide some particular rights and protect people against other private individuals.<sup>27</sup> The right can be interfered with under certain conditions, which will be addressed below.

The right to private life covers many areas, which creates difficulty when deciding what rights fit under this concept and where the lines of the extensive width come to a halt.<sup>28</sup> Physical and psychological integrity both fall under the term private life.<sup>29</sup> In the case of *Evans v. The United Kingdom*, it is made clear that personal autonomy falls under the term private life.<sup>30</sup>

One issue that falls into the right to private life is the situation where a person is given medical treatment without consent. Medical treatment of this kind needs to be justified by paragraph 2 of the article.<sup>31</sup> To save a person's life is one ground for justification, as can be seen in *Bogumil v. Portugal*.<sup>32</sup> In contrast, a violation of the article was found when blood tests were conducted without parental consent on a nine-year-old girl since the procedure was not urgent and against the parents' previous request to give

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<sup>25</sup> Harris *et al.* (2018) p. 501.

<sup>26</sup> ECtHR Guide Article 8 p. 8.

<sup>27</sup> Harris *et al.* (2018) p. 502.

<sup>28</sup> Harris *et al.* (2018) p. 503.

<sup>29</sup> ECtHR Guide Article 8 p. 23.

<sup>30</sup> *Evans v. The United Kingdom* para 71.

<sup>31</sup> Harris *et al.* (2018) p. 522.

<sup>32</sup> *Bogumil v. Portugal*.

consent before any tests were conducted.<sup>33</sup> In general, consent needs to meet specific requirements to be valid; it should be both free and informed.<sup>34</sup>

The principal interest is to keep the State out when it comes to the relationship between the parent(s) and the child. The scope of the State to act has broadened due to the development of positive obligations as part of a State's duty under the ECHR. Hence, the State should protect people from harm inflicted by others, including harm and neglect by parent(s) towards their children.<sup>35</sup> This shift in who might be protected by the article is interesting for the future of the practice of boy circumcision and how to assess if the procedure can be seen as a parental right or a breach of the child's right.

### **2.3 The right to freedom of thought, conscience and religion**

The right to freedom of thought, conscience, and religion in article 9 has caused a lot of controversy. The Court's interpretation and understanding of the article strongly influence how conflicts should be resolved and what standards should be set regarding religion in Europe.<sup>36</sup> This right is negative and positive, meaning it covers both people's rights to and from religious beliefs.<sup>37</sup> If faced with a question regarding the circumcision of a young boy, the Court would have to weigh two separate rights given from article 9 against each other if religious freedom was the main issue: The freedom to belong to a religion and the freedom not to belong to a religion.

The Court tends to apply the article in a very comprehensive manner. Apart from the more known religions such as Judaism and Islam, other philosophical beliefs and religions such as secularism and Mormonism have been protected by the right to freedom of religion. In more recent rulings, the Court indicates that even some controversial philosophies such as neo-Nazism and communism may be protected.<sup>38</sup> However, the Court has set a

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<sup>33</sup> *M.A.K. and R.K. v. the United Kingdom*.

<sup>34</sup> *Trocellier v France*.

<sup>35</sup> Harris *et al.* (2018) p. 569.

<sup>36</sup> Harris *et al.* (2018) p. 571.

<sup>37</sup> *Kokkinakis v. Greece*.

<sup>38</sup> Harris *et al.* (2018) p. 572.

few guidelines for what type of beliefs can be protected by the article. The belief should “attain a certain level of cogency, seriousness, cohesion, and importance”.<sup>39</sup> As long as these requirements are met, the State may not invalidate the belief.<sup>40</sup> The right can be interfered with under certain conditions, which will be addressed below.

According to the article, the right constitutes both an internal and external right to exercise one’s religion. The external right can be manifested through worship, teaching, practice, and observance.<sup>41</sup> State Parties are to ensure that people have the right to continue in their beliefs whilst simultaneously having the choice not to display them.<sup>42</sup> The manifestation of beliefs has some limits; for example, the word practice does not include a pharmacist refusing to sell contraceptive pills due to religious beliefs. Wearing a headscarf at university is an example of manifestation through practice.<sup>43</sup> This raises the question of whether the circumcision of one’s minor son could be considered a parent manifesting their religion through practice.

## **2.4 Justifiable interferences to articles 8 and 9**

According to the second paragraph of the articles, the rights presented in articles 8 and 9 can be interfered with and respectively limited on a similar basis.<sup>44</sup> The interference of the exercise of the right to private and family life is only permitted when made “in accordance with the law and [...] necessary in a democratic society in the interest of national security, public safety, or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of other”.<sup>45</sup> Limitations regarding the manifestation of one’s religion or beliefs are allowed if “prescribed by law and [...] necessary in a democratic society in the interests of public safety, for the protection of public

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<sup>39</sup> *Campbell and Cosans v. The United Kingdom* para 36.

<sup>40</sup> *Harris et al.* (2018) p. 572.

<sup>41</sup> *Harris et al.* (2018) p. 574.

<sup>42</sup> ECtHR Guide Article 9 p. 12.

<sup>43</sup> *Harris et al.* (2018) p. 582.

<sup>44</sup> *Harris et al.* (2018) p. 584.

<sup>45</sup> ECHR article 8.

order, health or morals, or for the protection of the rights and freedoms of other”.<sup>46</sup> Note that although they are similar, the grounds for justifying interferences with these articles differ in some ways.

Two of the doctrines used by the Court to assess cases such as these are the margin of appreciation and the principle of proportionality. The margin of appreciation doctrine is an interpretive instrument introduced by the Court to give member States some leeway in interpreting and executing the Convention’s rights.<sup>47</sup> The principle of proportionality’s purpose is to balance the community’s overall interests and preserve the individual’s fundamental rights.<sup>48</sup>

### 2.4.1 Article 8

Article 8(2) states that all interferences by the State should be done in accordance with law.<sup>49</sup> According to the article, there should also be sufficient safeguards to protect individuals’ rights.<sup>50</sup> An example of where a Member State failed to do so is when the Court found a violation of article 8 since the State did not have clear legal provisions that criminalised filming a naked child in secret.<sup>51</sup>

The interference must have a legitimate aim, as mentioned, to be justifiable.<sup>52</sup> Thus, the aims listed in the article are exhaustive, being: the interests of national security, public safety, or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>53</sup> In a recent case, the Court stated that the State Party must prove they had the legitimate aim in mind when penalising the applicant.<sup>54</sup> An example of a legitimate aim is other people’s right to socialisation, which led the Court not to find a violation of article 8 when France banned full-face veils in public

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<sup>46</sup> ECHR article 9.

<sup>47</sup> Ita & Hicks (2021) p. 41.

<sup>48</sup> Eirik (2015) p. 155.

<sup>49</sup> ECtHR Guide Article 8 p. 10.

<sup>50</sup> *Bykov v. Russia* para 81.

<sup>51</sup> *Söderman v. Sweden* para 117.

<sup>52</sup> ECtHR Guide Article 8 p. 12.

<sup>53</sup> ECHR Article 8.

<sup>54</sup> *Kilin v. Russia* para 62.

spaces.<sup>55</sup> A legitimate aim may also be the preservation of the State's economic wellbeing through measures concerning immigration.<sup>56</sup> Allowing journalists to publish pictures of detained people before trial without any public safety reason is an example where a legitimate aim did not exist.<sup>57</sup>

The third demand needed for a justifiable interference with the article is that the interference should be necessary in a democratic society.<sup>58</sup> The word necessary means that there is a pressing social need for interference in the specific case, and there is no room for flexibility in the interpretation of the word.<sup>59</sup> The States have an obligation to make evident that there is a pressing social need behind an interference.<sup>60</sup> The necessary interference should also be subject to a proportionality assessment to be justified, in which the measures taken should be proportionate to the legitimate aim. The assessment of whether the measures were necessary or not is somewhat left to the States' margin of appreciation.<sup>61</sup> The width of the margin of appreciation given to States varies depending on the seriousness of the interests at stake and the nature of the issues.<sup>62</sup> When dealing with more sensitive matters concerning morals and ethics, the ECtHR typically gives States a wide margin of appreciation since there is no consensus in these matters at a European level.<sup>63</sup>

Given the Court's former practice, it would not be surprising if a case regarding the circumcision of young boys would remain unresolved by the Court since it evidently is an ethically sensitive subject. Thus, a wide margin of appreciation would probably be given to the State Parties.

## 2.4.2 Article 9

Article 9(2) states that all justifiable interferences must be "prescribed by law". The absence of a law or an obscure law has led the Court to find

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<sup>55</sup> *S.A.S. v. France* para 122.

<sup>56</sup> *Berrehab v. The Netherlands* para 26.

<sup>57</sup> *Toma v. Romania* para 92.

<sup>58</sup> ECHR Article 8.

<sup>59</sup> ECtHR Guide Article 8 p. 13.

<sup>60</sup> *Piechowicz v. Poland* para 212.

<sup>61</sup> ECtHR Guide Article 8 p. 13.

<sup>62</sup> *Strand Llobben and others v. Norway* para 211.

<sup>63</sup> *Paradiso and Campanelli v. Italy* para 184.



violations of article 9.<sup>64</sup> The different interests for justifiable interferences are public safety, protection of public order, health or morals, or to protect the rights and freedoms of others, as mentioned. These constitute legitimate aims and are strictly exhaustive. Any interference with article 9 must be in pursuance of one of these aims; otherwise, it would violate the article.<sup>65</sup>

In article 8(2), a legitimate aim is the interest of national security, which is missing in article 9. This is motivated by the importance of religious pluralism and the hindrance of States dictating or convincing people to change their beliefs.<sup>66</sup> One example of a legitimate aim under article 9 is to require a Christian nurse to remove her cross at work for the protection of health and safety.<sup>67</sup> Another example is to require a Sikh to wear a helmet instead of his turban whilst driving a motorcycle to protect public safety.<sup>68</sup> A prohibition against wearing a cross as an airline employee due to the employer's desire to have a particular corporate image is an example of a violation of article 9 since the employees' desire to manifest her religious belief was above the employers aim to have a particular image, even though the aim was legitimate.<sup>69</sup> Thus a legitimate aim needs to be proportionate to the individual's interest.<sup>70</sup> This means that there "must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned", and it is up to the State to prove that there were not any other less interfering means.<sup>71</sup>

The interference must also be necessary in a democratic society, according to article 9(2). The restriction of religion or belief should also be proportionate to this demand. Here, the word necessary means the same as in article 8. Any interference must be due to a "pressing social need" to be considered necessary in a democratic society.<sup>72</sup> Another similarity with the interpretation of article 8 is that the evaluation regarding the proportionality

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<sup>64</sup> Harris *et al.* (2018) p. 584–585.

<sup>65</sup> *Svyato-Mykhayliva Parafiya v. Ukraine* para 132, para 137 and *S.A.S. v. France* para 113.

<sup>66</sup> *Nolan and K v. Russia* para 73.

<sup>67</sup> *Eweida and Others v. The United Kingdom* para 99.

<sup>68</sup> *X v. The United Kingdom*.

<sup>69</sup> *Eweida and Others v. The United Kingdom* para 95.

<sup>70</sup> Harris *et al.* (2018) p. 586.

<sup>71</sup> *Biblical Centre of the Chuvash Republic v. Russia* para 58.

<sup>72</sup> *Svyato-Mykhayliva Parafiya v. Ukraine* para 116.

of the interference is widely left to the State Party's margin of appreciation. When defining the limits for the margin of appreciation, the Court takes both the specific and the general issue of preservation of religious pluralism into account.<sup>73</sup> Issues regarding the interference of article 9 have often resulted in controversy.<sup>74</sup>

As seen above, issues concerning articles 8 and 9 are often given a wide margin of appreciation. This raises the question of whether the legitimate aim to protect the rights and freedoms of others could mean that the parent's religious freedom would have to give way in favour of their child's rights and freedoms. This could be the result either if the ECtHR so concludes or if the State Party does, using a wide margin of appreciation provided by the ECtHR.

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<sup>73</sup> ECtHR Guide Article 9 p. 19.

<sup>74</sup> Harris *et al.* (2018) p. 586.

### 3 The Rights of Children under the ECHR

The basic principle is that the State should protect children from ill-treatment that is in violation of the ECHR.<sup>75</sup> However, the Court has faced very few cases addressing children's right to autonomy. The explanation for this is that children oftentimes do not have the money, stamina, or time to bring forth a case to the Court.<sup>76</sup>

In *Sahin v. Germany*, the Court recognised that all States must aspire to realise children's rights present in the CRC.<sup>77</sup> This is logical since the CRC is next to universally ratified globally.<sup>78</sup> The ECtHR has made clear that the ECHR should be interpreted dynamically and in compliance with the CRC; it remains unclear how far-reaching this obligation is.<sup>79</sup> It can be seen that the ECtHR's interpretation of the ECHR in cases regarding children is being increasingly influenced by the CRC.<sup>80</sup> Still, unlike the CRC, ECHR case law has not yet compelled State Parties to criminalise less severe breaches of personal integrity, such as mild corporal punishment, that are not covered by Article 3 of the Convention. Nonetheless, recent rulings are going in that direction.<sup>81</sup> The acknowledgement of the CRC's importance might be an inevitable development since the ECHR was written with adults and not children in mind.<sup>82</sup>

The right to privacy under article 8 of the ECHR is one area where children's rights differ from the rights enjoyed by adults.<sup>83</sup> Nonetheless, children's private life is protected by article 8, including protection of the child's physical and psychological integrity, which includes mental health.<sup>84</sup> The Court has been reluctant to grant children the right to autonomy. Instead,

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<sup>75</sup> O'Mahony (2019) p. 663.

<sup>76</sup> Choudhry & Herring (2010) p. 121.

<sup>77</sup> *Sahin v. Germany* para 39.

<sup>78</sup> OHCHR (2021).

<sup>79</sup> Mustasaari & Koulu (2016) p. 59.

<sup>80</sup> O'Mahony (2019) p. 663.

<sup>81</sup> O'Mahony (2019) p. 664.

<sup>82</sup> Choudhry & Herring (2010) p. 222 and p. 225.

<sup>83</sup> Choudhry & Herring (2010) p. 222.

<sup>84</sup> Van Bueren (2007) p. 74 and Grans (2017) p. 147.

rights have been given to the child's parent(s) to act or decide on the child's behalf.<sup>85</sup>

A leading case on children's right to autonomy is *Nielsen v. Denmark*.<sup>86</sup> The case was brought forward by a 12-year-old boy who tried to get out of detention at a psych ward. The placement was approved by his mother even though there was no evidence of him suffering from any psychiatric disorder. His application failed in the ECtHR.<sup>87</sup> Still, the case led to some significant statements by the Court. The Court stated that parents' authority and responsibility for their child is protected by the ECHR in general and by article 8 in particular.<sup>88</sup> It should be noted that State Parties have a responsibility to effectively protect children from violence that falls within the scope of article 8.<sup>89</sup>

In the case of *Vavříča and others v. The Czech Republic*, the ECtHR accepted the view of the applicants and concluded that forced vaccination of children does violate the child's right to body autonomy under article 8.<sup>90</sup> The Court noted that an individual's right to bodily integrity is superior to the community's interest in widespread vaccination.<sup>91</sup> Still, in this case, the ECtHR found the infringements of article 8 justified.<sup>92</sup>

When it comes to children's religious freedom under article 9 of the ECHR, the religious right of the child is mostly regarded through the lens of the family.<sup>93</sup> On the contrary, there are no limitations in the ECHR on the child's right to choose or change their religion, as it is not a justifiable interference according to the second paragraph of article 9. However, some State Parties to the ECHR do not grant children the right to choose their religion. Unless the concerned State has made reservations to the ECHR or later treaties, the Court would presumably follow the approach taken by the

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<sup>85</sup> Choudhry & Herring (2010) p. 223 and Van Bueren (2017) p. 74–76.

<sup>86</sup> Choudhry & Herring (2010) p. 223.

<sup>87</sup> *Nielsen v. Denmark*.

<sup>88</sup> Choudhry & Herring (2010) p.223.

<sup>89</sup> ECtHR Guide Article 8 p. 31.

<sup>90</sup> *Vavříča and others v. The Czech Republic* para 261.

<sup>91</sup> *Vavříča and others v. The Czech Republic* para 293.

<sup>92</sup> Goudsmit (2021) p. 338.

<sup>93</sup> Van Bueren (2007) p. 77.

UN Human Rights Committee, which is that children have the right to choose a religion of their own, if faced with a case on the matter.<sup>94</sup>

The protection of children's rights under the ECHR is incomplete and unclear. However, the general acceptance is that children and adults benefit from the same rights. Still, there have not been many cases concerning children's rights under the ECHR, and questions related to children's right to autonomy and its scope, remains unanswered.<sup>95</sup>

The lack of case law on children's rights under the ECHR might be an aggravating circumstance when judging cases regarding children since there is little guidance to be found. Recognising that the CRC should be considered by State Parties and the ECtHR could be pivotal if a case regarding boy circumcision arose in the Court.

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<sup>94</sup> Van Bueren (2007) p.78.

<sup>95</sup> Choudhry & Herring (2010) p. 225.

## 4 Different Perspectives on the Circumcision of Boys

Legal and human rights scholars have brought forth different views on boy circumcision in relation to the ECHR.

Doctoral candidate Grans addresses that the ECtHR recognises that children have both physical and psychological integrity, including a right to protection of bodily integrity and mental health, among others. These rights fall under articles 8 and 3 of the ECHR.<sup>96</sup> Grans argues that this notion is not upheld as the circumcision of non-consenting boys is still not seen as a violation of neither article 3 nor 8, which it would be if the circumcision were performed on a non-consenting adult male.<sup>97</sup>

Another argument, presented by Prodger, is that circumcision of a boy could violate his right to freedom from religion, as granted in article 9 of the ECHR, since the procedure would force the child into a religion, violating the child's freedom to make his own future decisions. Granting children the right to autonomy and freedom of religion encourages self-determination, which is necessary in a democratic society.<sup>98</sup> An opposite opinion is that delaying the circumcision ritual until the child can consent would be harmful since it is a rite of passage into cultural acceptance into the faith. Waiting to circumcise would delay the acceptance of the child into the culture in which it would grow up.<sup>99</sup> Therefore, granting children the right to choose in the future could be seen as a non-justifiable approach in a democratic society since it does not consider broader social issues.<sup>100</sup>

Building on this approach is the reasoning that waiting to circumcise a boy until he reaches adulthood, is to violate the right to freedom of religion. This perspective is brought forth by Associate Law Professor Porat.<sup>101</sup> In

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<sup>96</sup> Grans (2017) p. 147.

<sup>97</sup> Grans (2017) p. 151.

<sup>98</sup> Prodger (2021) p. 25–26.

<sup>99</sup> Prodger (2021) p. 27–28.

<sup>100</sup> Prodger (2021) p. 26.

<sup>101</sup> Porat (2021) p. 41.

Judaism, circumcision shall be performed when the child is eight days, and the punishment for not following the commandment is death by man or God.<sup>102</sup> A ban on circumcision would therefore harm and infringe the freedom of religion of practicing Jews. In Islam, circumcision is also prescribed in childhood; however, this command is not present in all Islamic teachings. But for the vast majority waiting to be circumcised would be a violation of their faith as well.<sup>103</sup>

A different aspect is that parents have a right to be involved in decisions regarding their infant child. This is a right under article 8 of the ECHR. Everyone has the right to family life, and there is a presumption that parents act in their child's best interest within the family. For a boy, not being circumcised might negatively affect his relationship with his family and, in some cases, even result in rejection. The harm rejection causes a child motivates the act of circumcision as it is in the child's best interest and triumphs the child's interest of future religious freedom. Postponing the circumcision would, therefore, neither protect the child's right to bodily integrity. The opposite view is that article 8 should be limited if exercising the right would infringe on another person's right, which means that parents' autonomy should give way to the child's bodily autonomy to guarantee the best interest of the child.<sup>104</sup>

A lot of the reasonings and arguments also have their roots in the differences between the acceptance and attitude of female versus male circumcision. Abu-Salieh, a Doctor of Law, claims that to be against female circumcision and in favour of male circumcision is saying that your belief and culture is superior and better than others. It also suggests that girls should be protected and not boys.<sup>105</sup> Assistant Law Professors Van den Brink and Tigchelaar argue that one explanation as to why female circumcision is condemned and male circumcision is not, is due to what religion or culture practices which procedure. For Westerners, it is easier to downplay the value or a rule of a "strange" religion than that of one that is more familiar. Female

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<sup>102</sup> Van den Brink & Tigchelaar (2012) p. 425 and Porat (2021) p. 41.

<sup>103</sup> Porat (2021) p. 41.

<sup>104</sup> Prodger (2021) p. 29–30.

<sup>105</sup> Janson (2016) p. 115.

circumcision carried out as a ritual in the name of traditional African religions is, therefore, easier to criticise and illegitimatised than male circumcision carried out as a ritual in Judaism, as it is an Abrahamic religion.<sup>106</sup>

A different argument linked to gender is that since female circumcision is labelled a violation of article 3 in the ECHR, which is absolute, male circumcision should be seen as a violation of article 3 as well, as both female and male circumcision constitutes some form of cutting of genital tissue.<sup>107</sup> However, most people argue that female and male circumcision is vastly different procedures and cannot and should not be compared.<sup>108</sup> Female circumcision is banned in most western countries.<sup>109</sup>

The arguments presented above give insight into the complexity and the divide prevailing on this subject. Granted that a case concerning the circumcision of boys would be subject to a decision by the ECtHR, the legal papers written on the subject would surely increase in number, adding more perspectives and ideas to an already inflamed discussion.

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<sup>106</sup> Van den Brink & Tigchelaar (2012) p. 441.

<sup>107</sup> Prodger (2021) p. 34.

<sup>108</sup> Prodger (2021) p. 35, Van den Brink & Tigchelaar (2012) p. 422.

<sup>109</sup> Paakkanen (2019) p. 1504.



## **5 Analysis**

### **5.1 Balancing Child and Parental Rights Under the ECHR**

Assuming that people on both the religious side of the argument and those siding with children's right to autonomy have the child's best interest at heart, the complexity and the difficulty of this issue is apparent. In this disagreement, with the many rights of both parent(s) and child standing against each other, balancing them and finding answers has proven difficult. How the Court would assess a case regarding religious boy circumcision is hard to say and would depend on the rights considered. Still, an attempt to understand how the Court would reason, and what to consider, will now follow.

Since article 3 is an absolute right, recognising that not only female but also male circumcision is protected under it would undoubtedly lead to a right for boys not to be circumcised. At present, it is not likely that the Court would reach that conclusion, considering that female and male circumcision are seen as separate matters by the State Parties.

Both children and their parent(s) are protected under article 8. However, the rights granted to children are often exercised through their parent(s). This points towards an outcome that circumcision would not violate the boy's right under article 8, if consent were given by the parent(s). On the other hand, the increased influence of the CRC might shift this conclusion, in favour of the boy, as strengthening children's rights seems to be a growing trend. The recent vaccination case, which stated that forced vaccination violates a child's personal autonomy, could also be seen as pointing toward a more extensive protection of children's rights under article 8. I find it hard to believe that circumcision would not be considered a violation of a child's personal autonomy, if a minor procedure as vaccination, albeit with long-lasting results, can be seen as one. In the vaccination case, the interference was justified. Similarly, the interference of a circumcised child's right to

autonomy might be justified to protect the parent's right to freedom of religion. The parent(s) right to freedom of religion could constitute a legitimate aim. Protecting the State's religious pluralism could be seen as necessary in a democratic society since such pluralism is a guiding principle for ECHR.

The rights given to children under article 9 are similarly to article 8, often intertwined with the child's family. Still, children have a right to freedom of religion. At the young age of 8 days or a few years, when many boys are circumcised, it is unlikely that they practice a religion themselves. When a circumcised boy grows up and is able to actively choose to participate in a religion, him being circumcised could either be in accordance with his faith, if he chooses the religion of his parent(s), or a mark on his body in conformity with a religion to which he does not belong. One outcome of circumcision could be in compliance with the child's future faith, whilst another could be in opposition to the child's future faith. To predict what religion a boy would choose in the future is impossible, but according to article 9, they have a right to choose. It is uncertain if a circumcised penis could be seen as a violation of a child's religious freedom since it does not hinder their future choice of faith. In contrast, it could be seen as a violation of a child's right to personal autonomy in article 8 to circumcise them, especially since their future religion is not certain. As mentioned earlier, the child's autonomy might be subject to that of the parent(s), and they could possibly make this choice for their child.

As mentioned in section 2.3, circumcision of one's son might be a manifestation of the parent's religion. If it is, an interference with this practice can be justified if pursued with a legitimate aim with a measure necessary in a democratic society. A legitimate aim applicable to this situation might be to protect the rights and freedom of others, in this case, the son's right to freedom of religion and bodily autonomy protected by articles 8 and 9. If we assume the boy have these rights, which is not certain as seen above – could they motivate a ban on parents practicing their religion and circumcising their minor sons? It depends on two things. First, if the legitimate aim can be seen as proportionate, which would require an assessment balancing the parental

rights versus that of the child, which could result in different outcomes as discussed previously. Second, it would have to be necessary in a democratic society, meaning there needs to be a pressing social need. Considering the public divide on the subject, such a need might be hard to find. However, the protection of children's rights could constitute such a need.

The Courts judgements in cases regarding both articles 8 and 9 often refer to the margin of appreciation. This leads to the conclusion that if the ECtHR were faced with a question on whether or not circumcision of boys is a breach of articles 8, 9, or both, it would probably award the State Parties a wide margin of appreciation. Thus, the question would remain unanswered and left to the State Parties' discretion. However, if a State Party banned religious circumcision of boys, there would probably be an opposite question raised in the Court regarding the parental rights under the ECHR and the ban's possible breach of articles 8, 9 or both.

Due to the lack of case law on children's rights within the ECtHR, any issue regarding the rights of children would give much-needed insight and a better comprehension of how religious boy circumcision is to be understood within the framework of ECHR.

## **5.2 Closing Remarks**

In conclusion, there is no clear answer to the question about who's right is more worthy of protection: that of the child or that of the parent(s). In this situation, articles 8 and 9 are intertwined, but they must also be balanced against each other. The different views are based on strong beliefs in direct opposition to each other, which would make it hard for the Court to strike a balance between the interests at stake. As mentioned, article 3 will not be considered applicable on the issue of boy circumcision in a Court of law any time soon, even though there are scholars pushing that idea.

Cases concerning freedom of religion have often stirred up a lot of controversies, and I do not think this issue would be an exception. Recognising previous judgements, one is led to believe that, ultimately, the State Parties would enjoy a wide margin of appreciation on this matter.

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