"The Agony between Cultural Accommodation and Zero tolerance"

Female Genital Mutilation (FGM) and Male Circumcision (MC)

A Comparison.

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ABSTRACT

Female Genital Mutilation (FGM) is for a long time already subject of different worldwide international campaigns. Male Circumcision (MC) is even much more widespread but is on the contrary a much more accepted practice. However recently a debate started over the tolerance of MC and whether FGM and MC are comparable. Can we put both practices on the same footing or do they rely on a different base not only from a social (healthcare) or cultural/religious point of view but also from a legal one? Chapter I and II will discuss in general what FGM and MC entail. Chapter III will make a comparison between both practices on basis of their health consequences. Chapter IV will make a comparison on basis of their general human rights considerations. Chapter V will discuss how western society deals with MC and FGM. In the last chapter the rights of the child will be balanced against the rights of the parents with regard to MC and this with the focus on freedom of religion for children and their right to an open future.

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Introduction

Female Genital Mutilation (FGM) has been the subject of different worldwide international campaigns already for a long time. Male Circumcision (MC) is even much more widespread but is on the contrary a much more accepted practice. However recently a debate was ignited on the tolerance regarding MC and whether FGM and MC are comparable practices. Can we put both practices on the same footing or do they rely on a different base not only from a social (healthcare) or cultural/religious point of view but also from a legal one? This is exactly what this thesis seeks to investigate.

The first two general chapters will explain what FGM and MC entail, who is subject to these practices, where they are being practised and the reasons why.

Subsequently a comparison will be made between both practices on the basis of their health consequences. Where the consensus prevails that FGM only results in negative health consequences this is not the case with MC to which various health benefits - however not undisputed – are being attributed. In this context medicalization of FGM as a possible justification will also be briefly discussed.

Chapter IV will again make a comparison between FGM and MC but this time on the basis of the general human rights considerations. The possible human rights violation of both practices will be referred to such as the right to life, protection of physical integrity, freedom of torture, cruel inhuman and degrading treatments, right of the child, violence and discrimination against women.

Thereafter the tolerance towards both practices in the western world will be examined. Nowadays many western countries are being confronted with non-western cultures and religions entering their society. The main issue here will be if liberal societies should tolerate or reject FGM and MC and if so on which basis. The principal difference between both practices is however that FGM is as it were imported in our western society through immigration whereas MC has its own tradition vested in (some) western cultures. The difference in reaction in the western world to both practices will be illustrated with reference to both the Seattle compromise case and the German

circumcision case exploring the deeper grounds of this different reaction and its justification.

In the final chapter the rights of the child will be balanced against the rights of the parents only with regard to circumcision - FGM being regarded as unjustifiable in any context - and this with the focus on freedom of religion for children and their right to an open future. Possible justifications will be given for parental rights and their limits based on the child's right to an open future. The primary question will be whether (religious) MC closes certain options for the child and thus by consequence violates their right to an open future.

Chapter I: Female Genital mutilation

A. Definition

1. The World Health Organisation (WHO) defines Female genital mutilation (FGM) as "*compromising all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons*".

Before the use of the term Female genital mutilation, the term "female circumcision" was generally used but due to the parallel it draws with male circumcision, "circumcision" was changed into "mutilation" to make a clear linguistic distinction between both practices as FGM is much more invasive and physically damaging than male circumcision, which in general is not seen as a human rights violation[1]. Other terms being used are "female genital surgery", "ritual genital surgery" and "sexual mutilation". The term surgery could create the expectation that the practice is being performed in a clinical setting which is unfortunately most often not the case.[2]

FGM is the term most often used by different women's health and human rights activists such as the WHO, the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children (IAC) and UNICEF. The term is also used by the United Nations.[3]

However the term FGM is not without discussion, that is why lately the term "female genital cutting" or "female genital alteration" is often proposed, as being more cultural neutral whereas the word mutilation could bear a negative connotation. Mutilation is often perceived as judgemental for the practising communities and may stand in the way of the process of social change.[4]

In this thesis I will use the word FGM as it is most often used in the literature.

[1] Lewis, 1995, p. 6.
[2] Davis, 2001, pp. 486-487.
[3] Rahman &Toubia, 2000, p. 4.
[4] WHO, *Eliminating female genital mutilation: an interagency statement*, Geneva, 2008, p. 3.

B. Classification

2. The WHO makes a classification of FGM into 4 types.

- **Type I**: Partial or total removal of the clitoris and/or the prepuce (clitoridectomy). This Type, also called Sunna (which means tradition or duty) is most commonly compared to male circumcision as it only contains the removal of the prepuce, or hood of the clitoris.[5] However also this type is seen as a violation against human rights. According to UNICEF this type is the most widely practised globally.[6]

- **Type II**: Partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (excision). This form of FGM is most prevalent in Burkina Faso.

- **Type III**: Narrowing of the vaginal orifice with creation of a covering seal by cutting and appositioning the labia minora and/or the labia majora, with or without excision of the clitoris (infibulation). The cut edges are stitched together so as to cover the urethra and vaginal opening, leaving only a minimal opening for the passage of urine and menstrual blood. A Small stick is commonly inserted to maintain the opening, and the legs of the girl are often bound together to promote healing. The minimal opening that remains must be opened for intercourse and childbirth, and for some women, opening is followed by re-infibulation after each birth.[7] This is seen as the most harmful and severe form of FGM. South Sudan has the highest rate of infibulation (74%) followed by Eritrea (39%).

- **Type IV**: All other harmful procedures to the female genitalia for non-medical purposes, for example: pricking, piercing, incising, scraping and cauterization. This type does not permanently remove any part of the genitalia.[8]

[5] Wood, 2001, p. 353.
[6] Delaet, 2009, p. 413.
[7] Shell-Duncan, 2001, p. 1016.
[8] Delaet, 2009, p. 413.

3. All the different types of FGM always result in irreversible damage to the clitoris and the consequent loss of tactile sensation and ability to achieve orgasms.[9] No single operation can restore the complete damage caused by FGM.

C. Who is victim?

4. Between 100 and 140 million of girls and women worldwide have undergone FGM and 3 million young girls still undergo it each year. According to UNICEF the global prevalence rates of FGM in Africa can be classified in three different groups. Group 1 is made up of countries where almost all women have undergone FGM (between 80 and 100%). Mali (92%), Guinea (99%), Egypt (97%), North Sudan (90%), Eritrea (89%), Ethiopia (80%) can be found in this group. Group 2 exists out of countries that have a prevalence rate between 25 percent and 79 percent. Mauritania (71%), Senegal (28%), Cote d'Ivoire (45%), Burkina Faso (77%), Central African Republic (36%), Chad (45%), Kenya (32%) are part of this group. Group 3 consists out of countries where only some ethnic groups within the country practice FGM. The prevalence rate is between 1 percent and 24 percent. Niger (5%), Ghana (5%), Benin (17%), Nigeria (19%), United Republic of Tanzania (18%), Yemen (23%) are among these states.[10]

5. According to a progress report of the WHO there is an indication that the practice of FGM is declining. Statistics have shown that women between the age of 15-49 years are less likely to have been subjected to FGM than women in older age groups.[11] This is due the fact that the support of the practice among younger women is much lower. This increase of opposition has various reasons such as the higher educational attainment among women, who then see alternatives to the traditional roles of wife and mother. So they diminish the importance of preserving the woman's status as a marriageable virgin. These educated women also understand much better the

[9] Tarpley, 1997, p. 309.
[10] UNICEF, *Female genital mutilation/cutting: A statistical exploration*, pp. 1-53, New York, 2005, pp. 4-6.
[11] WHO, *An update on WHO's work on Female Genital Mutilation (FGM), progress report*, Geneva, 2011, p. 1.

aspects of physical and mental harm caused by the practice. Also many countries have now specific laws that prohibit FGM which are coupled with different awareness-raising programmes and social support. [12]

6. However FGM it is not only an African problem, it is a worldwide practice, which can be found back in 28 African countries, South East Asia and the Middle East. Also in Europe, USA, Canada and Australia it is a problem where different ethnic groups have migrated to and brought the practice with them.[13] The exact number of girls living with FGM in Europe is unknown but it is estimated that it is about 500.000 girls and still 180.000 girls are at risk to be subjected to the practice.[14] African communities who are living in Europe also often sent their girls on "holiday" to the home land in order to be circumcised.[15]

7. Most of the girls on whom FGM is being performed are between 0-15 years old[16], but there is a regrettable upcoming trend of circumcising girls at the youngest age feasible to avoid as much as possible both trauma and government interference as more and more (African) countries are adopting legislation against FGM. As a result of lowering the average age at which the girls are subject to the procedure parents also avoid the upcoming resistance from their children.[17]

[12] UNICEF, *Female genital mutilation/cutting: a statistical exploration,* New York, 2005, p. 28; Maher, 1996, p. 13.
[13] British Medical Association, July 2011, p. 3.
[14] WHO, *An update on WHO's work on Female Genital Mutilation (FGM), progress report*, Geneva, 2011, p. 2.
[15]Leye, Powell, Nienhuis, Claeys, & Temmerman, 2006, p. 364.
[16] Amnesty International, *Ending Female Genital Mutilation: a strategy for the European institutions*, p. 13.
[17]Trueblood, 2000, p. 442; WHO, *An update on WHO's work on Female Genital Mutilation (FGM)*, progress report, Geneva, 2011, p. 2.

D. Reasons why it is being practiced

8. Because of the dreadfulness of this practice, one can wonder what the incentives are of this horrible intervention. Why has the family of the girl chosen to subject her to FGM, even if they know she will suffer the rest of her life with health consequences and which even can lead to her death? Why are women, often if not always victims their selves of FGM, practising it on other girls, yet well knowing what an enormous physical and psychological pain they will have to go through? Different reasons can be referred to.

About the origin of FGM, there is no certainty. Various publications and researchers contradict each other. According to some it finds its origin in ancient Egypt, but according to others it first made its appearance in some parts of Africa along with the rise of the Islam.[18]

a) Tradition and cultural reasons

9. The most common motivation for FGM is based on tradition and culture, not religion. In many communities the event is being considered as a rite of passage from childhood to adulthood. During this event the girl becomes a woman who is deemed to receive the necessary skills for handling marriage, husband and children. Through this practice the girl becomes associated with the lifestyle and roles played by the other women in the community, consequently contributing to the maintenance of customs and traditions and the preservation of cultural identity. Hence social pressure also plays a major role in the conservation of FGM. It becomes an important component of social conformity determining who is part of 'community' and who is not.[19]

10. FGM is also a way to control the sexuality of the women, which is in a lot of communities necessary to maintain the family honour and marriage mostly depending on the virginity of the girl. FGM is considered to reduce women's sexual desire.

[18] Leye, Deblonde & Temmerman, 2005, p. 56.
[19] Amnesty International, *ENDFGM European Campaign*, at http://www.endfgm.eu/en/female-genital-mutilation/what-is-fgm/why-is-it-practised/ (consulted on 1 March 2013); Rahman & Toubia, 2000, p. 5.

Without FGM the women are considered promiscuous and no longer under the control of her husband. The clitoris is regarded as the pre-eminent exponent of sexual desire and the excision supposedly protects women against their over-sexed nature and tendency to temptation. A striking example of this inordinate proposition is infibulation, the woman being sealed until the man makes his claim on her sex and cuts her open. FGM works here thus as a "chastity belt".[20] The infibulated vaginal opening is also considered to offer greater friction for the husband during the sexual intercourse and is believed to be an enhancement to male sexual response.[21]

11. If a woman is not circumcised and by consequence not being "pure", her chances of getting married are much lower or almost *nihil*. FGM is seen as a sign of virginity of the girl, which makes her marriageable. In some traditional communities not being married harms the family honour and women remaining unmarried are considered a social outcast. Under these social conditions FGM is thus absolutely necessary to preserve a woman's future as the main task of a women in such communities is the performance of the duties as a wife and mother and not being married would have as a consequence her exclusion from a vital source of socio-economic support.[22] FGM is thus considered as a part of a larger system of discrimination, domination and control of women.[23]

12. Finally, the practitioners of FGM can also generate a significant income by performing these operations, which is not unimportant in countries where the economic activity of women is scarce. The impact of this occupation may thus not be underestimated.[24]

[20] Kool, 2010, p. 53; Maher, 1996, pp. 12-13; Comfort Momoh, 2005, p. 10.
[21] Lane & Rubinstein, 1996, p. 33.
[22] Maher, 1996, pp. 13-14; Wood, 2001, p. 358; Lewis, 1995, p. 23.
[23] Wood, 2001, p. 372.
[24] Leye, Deblonde & Temmerman, 2005, p. 58.

b) Religious reasons

13. Religion is another motivation for FGM and this primarily amongst the Muslim population. It is held that according to Islam FGM is obligatory for girls and women. However this belief is not supported by every Muslim, as there is no basis for FGM in the Koran. Therefore the practice should be assessed pursuant to the general Islamic consensus, which forbids hurting anyone, unless the advantages outweigh the disadvantages.[25] On the contrary arguments against FGM can be found in the Koran. Verse 4:119 so states that it is not allowed, " *to change God's creature*" and verse 32:7 that "*He perfected everything He created*", which would thus mean that a perfect God cannot make an imperfect creature.[26] Taking these verses into consideration, it seems to be that indeed Islam as such cannot be seen as a legitimate motivation for FGM. In some (at times extreme) Muslim countries like Saudi Arabia, Iran and Turkey FGM is not even being practised at all.[27]

14. One of the major issues appears to be the considerable influence in the Muslim community of religious leaders, who are not unanimous on the subject and may tend to interpretations in favour of FGM, rather than that FGM is really based on mandatory provisions of authoritative texts.[28]

Also, from a religious point of view FGM is not to be seen as an exclusive Islamic practise as it also occurs in other formal religions such as Christianity (e.g. In the Egyptian Coptic minority), Judaism (but less dominant than in the Islam).[29] In Christianity there is also no basis to be found in the Bible for FGM.

[25] the only basis that there could be for FGM (and MC) in the Koran is an extensive interpretation of verse 2:124, which states "*when Abraham was put to the test by his Lord, through certain commandments, he carried them out. God then said: I am appointing you a guide for the people*". One of the commands given to Abraham, as a test, was circumcision. As Abraham is model for the Muslim, Muslims must do what he did.

[26] Abu-Sahlieh, 1994-1995, pp. 77, 80-81, 86; Dorcas, 2010, p. 198.

[27] Rizvi, Naqvi, Hussain & Hasan, 1999, p. 13.

[28] WHO, *Fact sheet no. 241*, February 2013; Lewis, 1995, p. 22.

[29] Maher, 1996, p. 13; Kool, 2010, p. 53.

c) Hygienic and aesthetic reasons

15. Another belief is that in many communities female genitalia are seen as unclean and dangerous, justifying the removal for hygienic reasons. This reason is completely unfounded as FGM has exactly the opposite effects, especially in the case of infibulation where urine and menstrual blood often cannot escape through the tinny opening, causing pain, infections and odours.[30]

Popular denominations for FGM also refer to this hygienic reasoning. In Egypt and Sudan, FGM is being referred to as *tahara* and *tahur* which both means purification. Women genitals are often considered to be ugly and bulky, and it is often believed that female genitals could grow and become unwieldy hanging down between women's legs. Also it is sometimes believed that the clitoris can be dangerous if the man's penis comes into contact with it or that the baby during childbirth will die if the baby's head touches the clitoris. In this sense clitoridectomy is thus upgraded to a childbirth saver and is often seen as a sign of fertility.[31] It is also considered a way to maintain the physical and mental health of the women.[32]

[30] Wood, 2001, p. 358; Amnesty International, *ENDFGM European Campaign*, at http://www.endfgm.eu/en/female-genital-mutilation/what-is-fgm/why-is-it-practised/ (consulted on March 2013).

[31] Amnesty International, *What is female genital mutilation*, 1997, at http://www.amnesty.org/en/library/asset/ACT77/006/1997/en/373c3381-e984-11dd-8224-a709898295f2/act770061997en.pd (consulted on 23 April 2013).

[32] Momoh, 2005, p. 10.

Chapter II: Male Circumcision

A. Definition

16. Male circumcision (MC) is the surgical removal of all or part of the foreskin of the penis (the tissue covering the head of the penis).[33]
The expression 'circumcision' is generally accepted however there is an increasing demand of groups advocating for the abandonment of this term and to refer to it as 'male cutting' or 'male genital mutilation'.[34]

17. Worldwide about 30% of the male population, which represents 665 million men, are circumcised (global estimates in 2006). Male circumcision is practised in many African countries, most commonly in North and West Africa. In Eastern Africa circumcision varies from 15% in Burundi and Rwanda to over 70% in Ethiopia, Kenya and the United Republic of Tanzania. In the Middle East, Central Asia, Bangladesh, Indonesia and Pakistan, male circumcision is almost universal. Also in Europe, North America and New Zealand male circumcision is being practised and this up to 80% in the USA. In Central and South America male circumcision is uncommon (less than 20%).[35]

B. Classification

18. As opposed to FGM no classifications of different types of male circumcision are being provided by the WHO. Dr. SAMI ALDEEB ABU-SAHLIEH has made an attempt to classify different forms of MC.[36]

- **Type 1**: This type consists of cutting away in part or in totality the skin of the penis that extends beyond the glans. This skin is called foreskin or prepuce.

[33] WHO, *Information package on male circumcision and HIV prevention insert 1*, at http://www.who.int/hiv/pub/malecircumcision/infopack/en/ (consulted on March 2013).
[34] Van Den Brink & Tigchelaar, 2012, p. 422.
[35] WHO, *Information package on male circumcision and HIV prevention insert 2*, at http://www.who.int/hiv/pub/malecircumcision/infopack/en/ (consulted on March 2013).
[36] Darby & Svoboda, 2007, pp. 306-307.

- **Type 2**: This type is practiced mainly by Jews. The circumciser takes a firm grip of the foreskin with his left hand. Having determined the amount to be removed, he clamps a shield on it to protect the glans from injury. The knife is then taken in the right hand and the foreskin is amputated with one sweep along the shield. This part of the operation is called the *milah*. It reveals the mucous membrane (inner lining of the foreskin), the edge of which is then grasped firmly between the thumbnail and index finger of each hand, and is torn down the centre as far as the corona. This second part of the operation is called *periah*. It is traditionally performed by the circumciser with his sharpened fingernails.

- **Type 3**: This type involves completely peeling the skin of the penis and sometimes the skin of the scrotum and pubis. It existed (and probably continues to exist) among some tribes of South Arabia.

- **Type 4**: This type consists in a slitting open of the urinary tube from the scrotum to the glans, creating in this way an opening that looks like the female vagina. Called sub incision, this type of MC is still performed by the Australian aborigines.

19. Nowadays most MC operations fall within the scope of type 2. Type 1 is very uncommon, type 3 and 4 are also very rare but are part of a few traditional societies. The main difference between this classification of MC and the WHO classification of FGM is that the different types of FGM are being divided to the extent of the removal of more parts of the genitals as with MC it only concerns on how much of one single element of the genitals is amputated.[37]

[37] Darby & Stevens, 2007, pp. 307-309.

C. Reasons for male circumcision

As in the case of FGM there are several reasons why MC is being practised. Three main reasons can be referred to: religious, cultural/traditional reasons and health benefits. The health benefits will be discussed under chapter III.

a) Religious reasons

20. The two main religions where MC is being practised are Islam and Judaism. The largest numbers of men being circumcised are Muslims (70% of circumcised males globally).[38] Circumcision is not written down in the Koran but the practice is attributed to the Prophet of Islam, which makes that circumcision has the status of *Sunnah*, which means Prophet's tradition. MC is mostly seen as recommended for Muslims but not as an obligatory condition. You can be a Muslim or want to convert to Islam without being circumcised. Being circumcised is just considered to be an external symbol of being Muslim.[39] However this point of view is disputed and some Islamic schools consider circumcision as obligatory for Muslims.[40] The age when circumcision should be carried out differs within Islam. Sometimes it is done on the 7th day after birth but this can go up to 40 days after birth, or even until the age of 7 years. It also depends on the health of the child at the time. It depends from country to country if the circumcision is being performed by doctors or by traditional circumcisers such as barbers and drummers.[41]

21. In Judaism it is clearly written down in the book of Genesis[42] that men should be circumcised. It is an obligatory duty, a command of God (a *mitzvah*). It's a vital component that determines that the child is Jewish. Even the more unobservant Jews will make sure that their son is being circumcised, because circumcision is an essential feature of Judaism. The circumcision has to be performed on the eight day after birth, however also here it depends on the health of the child at that time. If the boy is

[38] Morris et al, 2012, p. 1.
[39] Rizvi, Naqvi, Hussain & Hasan, 1999, p. 13.
[40] De Blois, 2010, pp. 80-82.
[41] Rizvi, Naqvi, Hussain & Hasan, 1999. p. 14; In Pakistan 90-95% is performed by traditional circumcisers whereas in Saudi Arabia and Iran 85% is performed by doctors.
[42] Genesis 17: 10-14; Genesis 21:4.

suffering from an illness the circumcision will be postponed until 7 days after the recovery from the illness. The father himself has to perform the procedure or when he is not trained to do so he has to appoint a *mohel*, who got special training to perform the circumcision. When the boy is not circumcised by his family, he has the responsibility himself when he turns 13 years old, the age of the Bar Mitzvah. Then he becomes personally obliged to comply to all the Jewish laws himself. Mostly it is done at home and attended by close family. Anaesthesia is normally not used but there is no religious objection against it. The complication rate is small because of the specific training of the *mohel*.[43]

b) Traditional reasons

22. Traditional circumcision occurs mostly in East and Southern Africa, but it also occurs in the Philippines, Indonesia and Australia. Traditional circumcision is done for cultural reasons; it is a sing of the passage into manhood. The practice is being executed by a traditional circumciser who didn't receive any medical training. The age on which it is performed varies widely from community to community. Mostly it is done between the age of 12 and 22 years. As in the case of FGM, this traditional rite cannot be seen as a complete free choice for men. In the communities concerned it is the only way of attaining manhood, the prepuce is after all seen as a sign of femininity. If boys are not circumcised they run the risk of being excluded from the community, MC often being considered a necessity to become a full member of society. In some communities men will only be entitled to property, marriage and other social events once they are circumcised. Also women often play an important role in the decision of being circumcised, many girls will not have sexual relations with or marry men that are not being circumcised.[44]

23. In general the disadvantages of traditional circumcision compared to medicalized MC consist in the higher cost of the intervention, which is also much more

[43] Glass, 1999, pp. 17-19.
[44] WHO, *Traditonal male circumcision among young people, a public health perspective in the context of HIV prevention*, 2009, p. 13-14; Bottoman, Mavundla & Toth, 2009, p. 29.

painful. Also the fatigue experienced during the long period of ceremonies and the distraction from school – with a resulting lack of concentration on education over longer periods – are to be mentioned. Finally there is the high risk of HIV infection through sharing of the circumcision-gear. The disadvantages of medicalized circumcision are mainly social, i.e. the practice is considered as going against community norms, the boy and his parents risking stigmatization and being ridiculed for lacking a sense of community and solidarity with peers not undergoing the traditional rites, seen as an important part of becoming an adult and adhering to the norms of society.[45]

[45] Bailey & Egesah, 2006, pp. 27-28.

Chapter III: Health issues related to FGM and MC: a comparison

A. Right to Health

24. The WHO defines the right to health (the right to the enjoyment of the highest attainable standard of physical and mental health) as "*a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity*". It also states "*the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic, social condition*". The right to health is thus a fundamental part of our human rights and of our understanding of a life in dignity.[46]

25. The right to health entails different aspects. First of all it is an inclusive right, it includes a wide range of factors that leads to a healthy life such as safe food, gender equality… . A second aspect is that the right to health contains freedoms. It includes the right to be free from non-consensual medical treatment and to be free from torture and other cruel, inhuman or degrading treatment. The right to health also contains certain entitlements such as access to essential medicines, the right to a system of health protection providing equality of opportunity for everyone to enjoy the highest attainable level of health, maternal, child and reproductive health. Non-discrimination is also a central aspect, which encompasses that health services, goods and facilities must be provided to all without any discrimination. Lastly all services, goods and facilities must be available, accessible, acceptable and of a good quality.[47]

The right to health is being proclaimed in different international human rights documents. According to article 12 of the covenant of economic social and cultural rights[48] (ICESCR) "*everyone has the right to the enjoyment of the highest attainable standard of physical and mental health*". Article 12 (2) deals with the life of the baby

[46] WHO, *Fact sheet no. 31*, 2008.
[47] WHO, *Fact sheet no. 31*, 2008, pp. 3-4; United Nations, General Comment no. 14, E/C.12/2000/4, The right to the highest attainable standard of health, 11 August 2000.
[48] International Covenant on Economic, Social, and Cultural Rights (ICESCR), 19 December 1966.

during labour.[49] Right to health is also mentioned in art. 25 UDHR[50], art. 16 of the African charter on Human and Peoples' Rights (also known as the "Banjul charter")[51], art.14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[52], arts. 11 (1) (f), 12 and 14 (2) (b) of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)[53], art. 24 of the Convention on the Rights of the Child (CRC)[54].

26. MC and FGM are both very related to the issue of health. However in completely contradictory ways. Health issues have been for many years the focal point for combating FGM, whereas the health benefits of MC are one of the driving forces behind the practice MC.

B. Health issues related to FGM

a) Health complications

27. In most of the cases FGM is being performed by female 'traditional circumcisers' although there is an upcoming trend of medicalizing FGM (see further under E). It is astonishing to see that the most ardent supporters of FGM are actually women who have been circumcised themselves. The practice is being performed without any form of anaesthesia and under severe unhygienic conditions. The instruments being used are knives, razor blades, pieces of glass or scissors. The medical consequences and complications depend largely on the type of FGM performed, the age of the girl, the ability of the circumciser, the hygienic conditions, the instruments used and the presence of antiseptics.[55]

[49] Wood, 2001, p. 381-382.
[50] Universal Declaration of Human Rights (UDHR), 10 December 1948.
[51] African (Banjul) Charter on Human and Peoples Rights, 27 June 1981.
[52] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003.
[53] Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), 18 December 1979.
[54] Convention on the Rights of the Child (CRC), 20 November 1989.
[55] Reyners, 2004, p. 244.

28. The consequences of FGM are severe physical damage on the long and short term in combination with psychological trauma.[56] The girls are not only experiencing a lot of blood loss or severe pains but also the intervention *an sich* is very traumatic as the girls are physically held down during the practice. Complications in the short term are immediate and severe pain. The amputation of the clitoris cuts across the clitoral artery in which blood flows at high pressure. Cutting of the labia also damages arteries and veins. Not surprisingly, severe bleeding (hemorrhage) is one of the most common immediate complications of excision. When it is not possible to stop this bleeding this may lead to death. The intense bleeding and unexpected pain can also have as a consequence that the girls enter into a state of shock. This shock can also be fatal for the girl. Infections are also a common consequence of FGM, these can eventually lead to potentially fatal blood poisoning.[57]

On the long term FGM can lead to recurrent bladder and urinary tract infections, cysts, infertility and an increased risk of childbirth complications and new-born deaths. Women may also experience painful intercourse and infibulated women often have to be cut open for penetration to occur at all.[58] Sometimes it can take up to 15 minutes to empty the bladder by tightly infibulated women as they can only urinate drop by drop. Immediate complications are pain, shock, haemorrhage, infection, damage to the urethra or anus, scarring and tetanus.[59]

FGM also involves a lot of obstetric complications, especially in cases of more extensive FGM such as infibulation. Deliveries are more likely to be complicated with caesarean section, postpartum haemorrhage, episiotomy, extended maternal stay, resuscitation of the infant and inpatient perinatal death. The death rates for infants from mothers who were subjected to FGM are increasingly higher than among infants from mothers who didn't undergo FGM. The increase amounts to 15 % for type I FGM, 32%

[56] Kool, 2010, p. 52; Tarpley, 1997, pp. 310, 324.
[57] WHO Department of Gender and Women's Health, *Female Genital Mutilation: a handbook for frontline workers*, 2000, pp. 23-24, at http://whqlibdoc.who.int/hq/2000/WHO_FCH_WMH_00.5_eng.pdf (consulted on 29 May 2013).
[58] WHO, *Fact sheet no.241*, February 2013; Shell-Duncan, 2001, p. 1016.
[59] Davis, 2001, pp. 492-493.

or type II FGM and 55% for type III FGM.[60]

29. The psychological effects caused by FGM are comparable to incest situations. Both situations happen in a family context. The mother and grandmother of the girl often play a key role in the performance of the practice. Those persons are normally supposed to protect the child instead of providing support for this objectionable practice, girls often feel thus betrayed by their closest family members.[61] If the girls are old enough to comprehend what will happen to them during the practice they often experience severe anxiety in anticipation of the event. Emotional trauma can also occur as a result of the painful memories, where they are constantly being reminded of by the permanent scars and persistent physical pain.[62] A study that investigated the mental health state of girls who where subjected to FGM, demonstrated a significant higher prevalence of the post traumatic stress disorders (30,4%) and other psychiatric disorders (47,9%) in comparison to uncircumcised women. It also showed that the posttraumatic stress disorder is often accompanied with memory problems.[63]

30. On the other hand unexcised or non-infibulated girls can also clearly produce anxiety or mental conflict. Mutilation is a particular event, which makes that the girls become part of the community getting in line with her peers. Not being circumcised can make her target of ridicule. No man will marry her. So in communities where FGM is the rule, 'untreated' girls could become object of disapproval, which could lead then to psychological consequences. In communities where there is strong social pressure in favour of FGM it is probable that the psychological and emotional effects of FGM are less severe. The psychological effects will indeed often be buried in layers of denial and acceptance of social norms.[64] In communities however where FGM is not the norm (most especially among immigrants in western countries), the psychological

[60] WHO, *An update on WHO's work on Female Genital Mutilation (FGM), progress report*, Geneva, 2011, pp. 3-7.
[61] Reyners, 2004, p. 2445.
[62] Slack, 1988, p. 454-455.
[63] Behrendt & Moritz, 2005, pp. 1000-1002.
[64] Dorkenoo & Elworthy, 1992. p. 398 at http://history.hyde.wikispaces.net/file/view/1011+HIS12+U1+CM10+Handout+Female+Genital+Mutilation+by+Dorkenoo+and+Elworthy.pdf (consulted on 15 April 2013) ; Black & Debelle, 1995, p. 1590.

consequences will differ and those women will often have serious problems in developing their sexual identity.[65]

31. Finally FGM also frequently results in severe psychological consequences regarding the attitude towards sexual intercourse. A lot of women are afraid of having sex because of the extreme pain and the loss or serious degradation of sexual sensation and pleasure.[66] However not everyone agrees on this last statement. According to FUAMBAI AHMADU, many women including herself who had sexual experiences prior to excision perceive no difference or decreased sexual satisfaction. ELLEN GRUENBAUM also argues that women still can have orgasms after FGM.[67] An explanation for this alleged preservation of sexual pleasure can be due to the fact that the clitoris stretches far into the body past the vaginal canal. The visible tip, which is usually to be considered as the clitoris, is just a fraction of the whole clitoris. Only the external clitoris is cut while the inner structure remains intact and can thus still maintain sexual sensation.[68] Some studies also suggest that other erotic zones of the body, such as the breasts, may become more sensitized in women with genital mutilation, particularly when the overall sexual experience is pleasurable with a caring partner.[69]

b) Health benefits

32. Nevertheless as a conclusion and considering the aforementioned psychological and physical health complications it is in addition indisputable that not one single health benefit can be invoked to justify the practice of FGM leading to the tragic conclusion that girls will suffer irreversible physical and psychological damage for the rest of their life caused by FGM.

[65] Toubia, 1994, p. 714.
[66] Slack, 1988, p. 454-455.
[67] Bell, 2005, p. 138-139.
[68] Johnsdotter & Essen, 2010, pp. 32, 34.
[69] WHO Department of Gender and Women's Health, *Female Genital Mutilation: a handbook for frontline workers*, 2000, p. 29 at http://whqlibdoc.who.int/hq/2000/WHO_FCH_WMH_00.5_eng.pdf (consulted on 29 May 2013).

C. Health issues related to MC

a) Health benefits

33. On the contrary different health benefits[70] linked to male circumcision are being proclaimed. Being circumcised is more hygienic as it is easier to keep the penis clean. Urinary tract infections are less common in childhood when circumcised. Circumcision prevents inflammation of the glans and the foreskin. It protects against the potential development of scar tissue on the foreskin, which can lead to phimosis (inability to retract the foreskin) and parahimosis (swelling of the retracted foreskin resulting in inability to return the foreskin to its normal position). There is also a reduced risk to penile cancer and reduced risk of cancer of the cervix in female sex partners. Circumcised men also have a lower prevalence of some sexually transmitted infection.[71]

34. The health benefit that gets the most attention lately tough is the preventive function against HIV. Male circumcision reduces the risk of HIV infection for men. However it is not a complete protection against HIV. Research has shown that circumcised men are two to three times less likely to be infected by HIV than uncircumcised men. The reasons why circumcision can prevent against HIV are diverse.[72]

• By removing foreskin, circumcision reduces the ability of HIV to penetrate the skin of the penis due to keratinization or toughening of the inner aspect of the remaining foreskin.

• The inner part of the foreskin contains many special immunological cells, such as Langherhans cells, that are prime targets for HIV. Some of these are removed with the foreskin, while the remaining cells become less accessible to the HIV virus due to the keratinization described above.

• Ulcers, which are characteristic of some sexually transmitted infections and which can

[70] Especially in the USA (60%), Canada (25%), South Korea and Australia (15%) neonatal circumcision has been performed for health reasons in Bonner, November 2001, p. 145

[71] WHO, *Manual for Male Circumcision under Local Anaesthesia*, 2009, pp. 1-2.

[72] WHO, *Information package on male circumcision and hiv prevention*, insert 4 at http://www.who.int/hiv/pub/malecircumcision/infopack/en/ (consulted on 5 March 2013).

facilitate HIV transmission, often occur on the foreskin. By removing the foreskin, the likelihood of acquiring these infections is reduced.

• The foreskin may suffer abrasions or inflammation during sex that could facilitate the passage of HIV.

35. MC is thus seen as a global response to HIV/AIDS, especially in African countries where it is part of the public health response to fight HIV/AIDS. However whereas it is true that studies[73] have shown that indeed MC can reduce the risk of HIV infection, those studies are not without critique and caution is in place. By promoting MC against HIV/AIDS one could engender a false sense of security that MC could offer 100% protection against HIV. MC though can only reduce the risk and will not make men immune against HIV. There is a risk that men could start to believe that other precautions, like condoms, are not necessary anymore, which then could lead to the opposite effect of the increase of HIV instead of the decrease.[74]

The WHO, a big supporter of MC, is often criticized for the fact that it contributes to this false sense of security by promoting mass circumcision programmes throughout sub-Saharan Africa. Furthermore, circumcision offers also no protection against HIV for men having sexual intercourse with other men. In Africa this is maybe not seen as a crucial factor, as homophobia is still a controversial issue there, but this knowledge is particularly important for the recommendation of circumcision programmes in Western countries like USA, Australia, Canada where HIV is predominantly transmitted through male-to-male sex.[75]

36. Effective prevention against HIV is also only true when there is a complete removal of the foreskin. This is important to mention especially in the case of traditional circumcision where it depends from community to community how much amount of the foreskin is being removed. Another problem related to traditional

[73] Three trials in South Africa, Kenya and Uganda between 2005-2007 see herefore: Auvert et al, 2005 at http://www.mrc.ac.za/cochrane/auvert.pdf (consulted on 23 March 2013).; Gray et al, 2007, pp. 657-666; Bailey, C. et al, 2007, pp. 643-656.

[74] Miller, 2001-2002, p. 561; Van Den Brink & Tigchelaar, 2012, p. 418.

[75] Fox & Thomson, 2012, pp. 260-266.

circumcision is that MC is often performed en mass and this with one single blade to cut all the boys. If one of them is already HIV positive, it is very likely that the other boys will be infected with HIV as well. It is also required that the wound is completely healed before sexually activity.[76]

Therefore it is utterly important that men, especially in African countries where MC is being used to fight HIV and were circumcision is mostly performed in a traditional way, are being informed in a proper way about the effect MC can have on HIV so that no false representations would arise about the effectiveness of circumcision.

b) Heath complications

37. Besides these health benefits there are also down sides to MC. Like every surgery, MC can also lead to complications. It can lead to excessive bleeding, haematoma (formation of blood clot under the skin), meatitis (inflammation of the opening of the urethra), and increased sensitivity of the glans penis for the initial months after the procedure and complications of anaesthesia.[77] In extreme cases it can even lead to death, this is mostly because of complications related to infection.[78]

These complications occur especially when a non-expert performs it in a non-clinical environment, which is mostly the case with traditional circumcision. Traditional circumcision does not make use of anaesthesia, because MC stands for courage and bravery, preparing the boy for his social responsibilities. In certain communities strong social pressure exists to do it the traditional way and not to switch to medical circumcision (done in a medical setting by professionals).[79]

38. Psychological effects of MC are quite difficult to establish because the nature of the early trauma renders it difficult to recognize. Circumcised adult men experience sometimes emotional and psychological harm both from the fact that their bodily integrity was violated as infant and the belief that it had affected their sexual enjoyment

[76] WHO, *Traditional male circumcision among young people: a public health perspective in the context of HIV prevention*, 2009, p. 31-32.

[77] WHO, *Information package on male circumcision and HIV prevention,* insert 3, p. 1 at http://www.who.int/hiv/pub/malecircumcision/infopack/en/ (consulted on 5 March 2013).

[78] DeLaet, 2009, p. 412.

[79] Wilcken, Keil & Dick, 2010, p. 907; WHO, *Traditional male circumcision among young people: a public health perspective in the context of HIV prevention*, 2009, pp. 13-14.

adversely. They often experience feelings of anger, resentment towards parents, feeling of betrayal by their parents, sadness, inferiority and embarrassment. Psychological effects due to MC are likely to be more present when a child grows up in a community with children who have not been circumcised.[80]

D. Comparison FGM and MC

39. Where there is no doubt that FGM has no health benefits whatsoever, this is not the case with MC. The opposite seems to be rather true. The main reasons for practicing MC in the US are predominantly related to health benefits. So if there are indeed health benefits related to MC one could argue that it is apparently healthier to be circumcised than not, actually implying that there cannot exist a violation of the right to health as it apparently could provide you the highest standard of physical health which is obviously not the case with FGM.[81]

40. Yet those health benefits are not entirely accepted in the medical world. Historically in the western world, FGM and MC both were originally practiced for 'medical benefits'. Around the mid nineteen century FGM was used as a cure for sexual deviations (excess of masturbation, hysteria, epilepsy, …)[82] and MC was seen as a treatment against masturbation. Whereas those medical justifications for these diseases obviously could no longer be justified for both practices it seems that the medical benefits theory completely disappeared for the justification of FGM, whereas for MC the medical rationales have been evolving over time.[83]

41. Whereas there are indeed medical benefits of MC (see under chapter a) those benefits should however be placed in perspective for (i) they are mainly linked to diseases that only appear very rarely. For example, this is the case with penile cancer

[80] Bensley & Boyle, 2000, pp. 8-9 at http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1016&context=greg_boyle (consulted on 17 March 2013).
[81] art. 12 ICESCR
[82] Magoha & Magoha, 2000, p. 268; Hellsten, 2004, p. 252.
[83] DeLaet, 2009, p. 416.

and carcinoma of the penis with only a chance of respectively 1 and 0,5 out of 100.000 to get the disease.[84] (ii) Other diseases that appear more often like urinary tract infection can also be treated in other ways trough modern healthcare, questioning the need for MC. (iii) The preventive effect of HIV trough MC is also disputed as was explained before. Therefore it is it is often stated that MC is 'a procedure in need of a justification' instead of MC being really very helpful for medical goals.[85] To justify the practice of MC on basis of the difference in medical benefits between FGM and MC, which both in their own way can lead to the endangering of the right to health, therefore seems unconvincing Finally, and besides the questionable merit of medical benefits attributed to MC, (iv) there is the fact that MC, like every other surgery, can always give rise to complications (see chapter b), which in the worst case even could lead to death.[86] It is sufficient to refer to the various reports on traditional and medical MC in Africa to be aware to which serious complications inaccurate MC can lead.[87] From this point of view MC may well lead to a potential interference with the right of life, leaving in that respect little or no difference between FGM and MC.

42. Even when it is true that those catastrophic effects most probably will only occur in the most extreme types of MC, which are less practiced in common, this also applies to FGM. In this regard it seems as if public opinion is comparing apples and oranges. Indeed on the one side infibulation is the least practiced form of FGM, however there is a tendency to give it the most attention, as on the contrary it seems to be very uncommon to talk about the extreme forms of MC. On the other side, whereas even the mildest form of FGM or medicalized FGM is considered as a violation of human rights, the most extreme forms of MC, which at least are to be considered as worse than the milder forms of FGM, are regarded as tolerable. From a medical point of view however, it is established that there exist almost no difference between the removal of the foreskin and type I of FGM.[88] And, from a psychological point of view

[84] DeLaet, 2009, p. 416; Johnson, 2010, p. 189.
[85] KNMG, 2010, pp. 7-8; De Laet, 2009, p. 418.
[86] According to the AAFP (American Academy of Family Physicians) the number of deaths result in 1 on 500.000, what would mean that each year two children in the US die of MC.
[87] Caldwell, Orubuloye & Caldwell, 1997, pp. 1181-1193; Bailey, Plummer & Moses, 2001, pp. 223–231.
[88] Johnson, 2010, p. 195; DeLaet, 2009, p. 413-414.

both MC and FGM have to a certain extent the same potential psychological consequences. When practised during childhood both girls and boys can feel betrayed by their closest family members and more important by their parents. Both practices can also have severe influence on their sexual identity.

43. Noting that the medical benefits of MC are not for everyone that convincing and that complications still occur (especially in non-clinical environments) with potentially devastating effects, many people including a lot of medical associations[89] continue to share the opinion that the medical benefits of MC cannot outweigh the possible risks of complications, which could thus lead to a violation of the right to health.[90]

44. Interim conclusion: justification through medicalization. This allows for the drafting of a preliminary conclusion. The justification of the practice of MC compared to the practice of FGM seems to be based on the potential health benefits ascribed to the first and the total absence of any benefit to the latter. In the case of FGM it is clear that there is a violation of the enjoyment of the highest attainable standard of health and it clearly infringes the right to freedom from torture and other cruel inhuman or degrading treatment. Not only the health of the girl is being affected but potentially also the health of the baby, as circumcision gives rise to an increased risk to complications during pregnancy and labour. Meanwhile, where both a number of medical benefits and complications can be attributed to MC, the practice of MC seeks to justify her rationale in the balance between these health benefits and the complications. However to make sure that those (allegedly justifying) health benefits have the highest chance of occurring, keeping the complications of MC as low as possible (otherwise potentially causing a violation of the right to health) it is important that MC should be carried out in the proper medical environment. This reduces the complication risk increasingly and for the same reasons the WHO also strongly encourages medical circumcision against

[89] The American Medical Association, The British Medical Association, Canadian Paediatric Society, Australian Medical Association, however the American Academy of Paediatrics made in 2012 a policy statement on circumcision stating that "the health benefits of new-born male circumcision outweigh the risks and that the procedure's benefits justify access to this procedure for families who choose it".
[90] DeLaet, 2009, p. 417.

traditional circumcision. In this respect it is not only important that MC is being practiced in a medical setting but this also requires the clinician to receive a specific medical training and the proper surgical instruments and expandable supplies to be at hand.[91] This upcoming trend can also be found in the case of FGM, as explained hereunder (littera E).

E. Is medicalization of FGM justified?

45. There is an upcoming trend to medicalize FGM. The WHO defines medicalization as " *situations in which FGM is practised by any category of health-care provider, whether in a public or a private clinic, at home or elsewhere. It also includes the procedure of reinfibulation at any point in time in a woman's life."* In Egypt, Guinea, Kenya, Nigeria, northern Sudan and Yemen this medicalization of FGM has dramatically increased the recent years. In Egypt, 94% of FGM is being exercised trough health personnel. The reasons for this trend lay in the fact that for many years it was thought that the best approach to conquer FGM was by solely concentrating on the health risk due to FGM and this because of the universality health risks. By choosing this approach cultural judgment would be avoided.[92] However this strategy is not without risk as Karen Engle points out that it is dangerous to frame the opposition to female circumcision exclusively as a health issue. The risk is that, "[*i]f the practice could be done without negative health consequences, international law might actually become complicit in the practice, obligating states to ensure that it is performed under better health conditions.*"[93]

[91] Bailey, Egesah & Rosenborg, 2008, pp. 670, 673-674; WHO, *Information package on male circumcision and HIV prevention*, insert 3 at http://www.who.int/hiv/pub/malecircumcision/infopack/en/ (consulted on 5 May 2013). However it is important to notice that in the case of traditional circumcision the pain and suffering are the way to demonstrate manhood and fitness for the respect and communal privileges that go along with that approbation. The endurance of physical brutality, are a central part of the practice and typical in many different cultural settings. Medical circumcision will thus not always be seen as a solution; Vincent, 2008, pp. 81-82.
[92] Davis, 2001, p. 497.
[93] X., 1993, p. 1956.

The growing awareness of the health consequences is also a reason why more people are turning to health care providers to perform the procedure.[94]

46. The WHO stresses however that even if health professionals in hospitals or other health establishments are performing FGM under sterile conditions with anaesthesia it cannot accept such practices.[95] It would be unethical for a health professional to damage a healthy body in order to prevent a more destructive behaviour, it would thus be a violation of the medical code of ethics (Oath of Hippocrates: *'primum nil nocere'*) which specifically requires that physicians and nurses and midwives 'do not harm'.[96] Some proponents of medicalization believe that this may reduce the risk of the procedure, limit the extent of mutilation and reduce the pain. Some doctors consider it also their duty to support the patient's socio-cultural motivated request for FGM or just see it as an opportunity for financial gain. Many[97] also believe that it could be the first step towards a full abandonment of the practice. However medicalization is not necessarily safer or less extensive as it ignores the long-term complications. It also held that medicalization contains the risk to lead to the legitimization of FGM, which reinforces the continuation of the practice and even institutionalize the procedure.[98] Such an approach would overlook the physical, emotional, and psychological pain that FGM inflicts on women, and would ignore the fact that the sexual myths and gender-based inequalities from which the practice derives its primary justifications are outdated and patently incorrect.[99]

Also the position of UNICEF is tilted against medicalization as it obscures the human rights issues surrounding FGM and prevents the development of effective and long-term solutions. The constant focus on the health risks went thus at the expense of framing the

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[94] WHO, *Global strategy to stop health-care providers from performing female genital mutilation*, Geneva, 2010, p. 3.
[95] WHO, *Eliminating female genital mutilation: an interagency statement*, Geneva, 2008, p. 12.
[96] Shell-Duncan, 2001, pp. 1013-1014; WHO, *Global Strategy to stop health- care providers from performing genital mutilation*, 2010, p. 1.
[97] such as Shell-Duncan, Obiero & Muruli; Shell-Duncan, Obiero, Muruli, 2000, p. 111.
[98] WHO, *Global Strategy to stop health- care providers from performing genital mutilation*, Geneva, 2010, pp. 8-9; WHO, *Eliminating female genital mutilation: an interagency statement*, 2008, p. 12; WHO, *Global Strategy to stop health-care providers from performing genital mutilation*, Geneva 2010, p. 7.
[99] X., 1993, p. 1956.

practice in the context of a larger human right violation.[100]

47. As FGM is deservedly regarded a form of discrimination against women and girls aimed at the suppression of women[101], medicalization of FGM can never be the answer or justification for it. As it could contribute to this discrimination, the issue of reinfibulation appropriately demonstrates this. Reinfibulation is the resuturing after delivery or gynaecological interventions of the incised scar tissue resulting from infibulation. It is thus mostly performed on adult women, which are consenting with the practice (as opposed to FGM which is mainly performed on underage girls who don't have the free choice). But also here medicalization of reinfibulation cannot be accepted as justification because - as is the case for FGM - this procedure has not one single medical benefit. It is mostly performed solely to enhance (mainly male) sexual pleasure and it violates women's right to the enjoyment of the highest attainable standard of health and to protection.[102]

So unlike MC, medicalization of FGM can never be considered as an option to justify under the pretext to protect the right to health. Health complications on the long term will remain to occur and no single benefit can be retrieved from FGM. Besides, health issues are also not the only reasons why FGM cannot be accepted as will be demonstrated in the next chapter.

[100] UNICEF, *Female genital mutilation/cutting: a statistical exploration*, New York, 2005, p. 13.
[101] Van Den Brink & Tigchelaar, 2012, p. 436.
[102] Serour, 2010, pp. 94-95.

Chapter IV: International legal frame work - General Human rights considerations on FGM and MC

48. In the international community there is absolute consensus that FGM is a human rights violation. The cultural relativist[103] doctrine, a concept that refers to the fact that what is regarded as true, valued, or expected in one social system may not be so in another, has in the case of FGM no place, which was confirmed trough the adoption of a Resolution by the UN on 20 December 2012 for the worldwide ban of FGM.[104] It is based on the idea that Human rights are universal and that they should be applicable on every human being, everywhere in the world. The widest scope ratione loci is combined with the widest possible scope ratione personae. The universality principle implies the absence of any criteria of time, place, nationality, race, gender, age , language, religion, political opinion, origin, wealth, ….[105] Even when women would decide themselves out of free choice to undergo FGM this is not regarded as a ground for justification. A free choice for FGM is simply seen as impossible.[106] Therefore all forms of FGM (Type I to Type IV) are considered to be human rights violations.

A. Human Rights considerations of FGM

Conventionally the following human rights are considered to be violated by the practice of FGM.

a. Right to life

49. At worst FGM can lead to the death of the girl or women either during the procedure or as a consequence of the practice. Not only the life of the circumcised women is in danger but also that of her baby. Many complications can occur during

[103] Cultural relativism means that cultural behaviour should be judged only trough culturally specific norms and values in Lewis, 1995, p. 17.
[104] NPWJ's Female Genital Mutilation Program History at http://npwj.org/FGM/NPWJs-Female-Genital-Mutilation-Program-History.html; http://npwj.org/sites/default/files/documents/FINAL_brochure27Feb_en.pdf (consulted on 24 April 2013).
[105] Brems, 2003, p. 142.
[106] Braun, 2009, p. 235.

labour. The small opening and scar tissue create many difficulties during childbirth. Obstructed labor may result in hemorrhaging, tearing of perineal tissue, and eventually a prolapsed uterus. For the baby, such a prolonged and difficult delivery is life-threatening; the infant may be stillborn, or if it survives, it may suffer brain damage from a lack of oxygen during the difficult delivery.[107]

The right to life is protected under article 6 of the Universal Declaration of Human Rights (UDHR), article 2 of the European Convention of Human Rights (ECHR)[108], Article 6.1 of the International Covenant on Civil and Political Rights (ICCPR)[109] and article 4 of the African Charter on Human and Peoples' Rights together with Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

b) Protection of physical integrity

50. Physical integrity can be defined as the right to make independent decisions in matters affecting one's own body. It is often associated with the right to be free from torture and encompasses a number of broader human rights principles such as inherent dignity of the person, the right to liberty and security of the person and the right to privacy.[110]

Physical integrity entails two different approaches, a body oriented and a person-oriented approach. The person-orientated approach has been generally accepted in health law. This approach puts the focus on the individual's right to a personal life and to self-determination over the body. The body-oriented approach puts the focus on the duties towards one's own body rather than toward those of others. It implies that the human body cannot entirely be owned or controlled because it has a moral value of its own, which means that people are not allowed to do everything with their bodies that they might want to.[111] It is based on the theory of naturalism, which finds it wrong to

[107] X, 1993, p. 1948.
[108] European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950.
[109] International Covenant of Civil and Political Rights (ICCPR), 19 December 1966.
Female Genital Mutilation, A Matter of Human Rights, An Advocate's Guide to Action, Center for Reproductive Rights, New York, 2006, p. 14 at http://reproductiverights.org/sites/default/files/documents/FGM_final.pdf (consulted on 30 May 2013).
[111] Dekkers, 2009, pp. 133-134.

alter the natural human body other than for a salient natural reason, such as medical therapy.[112]

The person-orientated approach focuses primarily on the consent of the person, which would entail that procedures such as FGM could be possible when given consent. According to the body-oriented approach consent is not possible because of the moral value of the body, so this approach is helpful in showing why FGM on adult women is controversial.[113]

The right to physical integrity is not as such formulated in binding human rights instruments but is considered to be connected with several specific human rights. So is it accepted that a persona's physical and psychological integrity is included in article 8 ECHR that protect the private life. A person's body is an intimate aspect of his or her private life and a sound mental state is an important factor for the possibility to enjoy the right to private life. Measures which affect the physical integrity or mental health have to reach a certain degree of severity to qualify as an interference with the right to private life under Article 8. However, the ECtHR has also held that even minor interferences with a person's physical integrity may fall within the scope of article 8 if they are against the person's will.[114]

As far as the physical integrity is concerned, the scope of article 8 overlaps with the ambit of article 3 ECHR. As pointed out above, the Court distinguishes the fields of application of these two provisions according to the gravity of the interference. While it considers article 3 *lex specialis* if grave interferences with a person's well-being are in question, the right to private life comes into play when the interference does not reach the threshold required to qualify it as torture or inhuman treatment.

Administering medicine against the will of the patient or performing medical treatment interferes with the right to private life. Therefore it has to be based on a law and necessary in a democratic society to be justified[115]. It is indisputable that FGM fall within the scope of this Article.

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[112] Brusa & Barilan, 2009, p. 474.
[113] Dekkers, 2009, pp. 133-134.
[114] Protection of physical and psychological integrity under article 8 ECHR at http://echr-online.com/art-8-echr/private-life/physical-integrity (consulted at 5 May 2013).
[115] Protection of physical and psychological integrity under article 8 ECHR at http://echr-online.com/art-8-echr/private-life/physical-integrity (consulted at 5 May 2013).

Article 12 UDHR and article 17 ICCPR also prescribes that: "*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."* Also article 3 of the UDHR makes reference to the right of physical integrity: "*Everyone has the right to life, liberty and security of person."*. Furthermore article 4 of the Banjul Charter provides a basis for physical integrity.

c) Freedom of Torture, cruel, inhuman and degrading treatments

51. According to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[116] torture is defined as any physical or mental act that is intentionally inflicted for any discriminatory reason (art.1 & art. 16 CAT).[117] Following this definition it is clear that FGM falls under torture. A resolution of the Council of Europe in 2001 confirms this position as it states that "*FGM should be regarded as inhuman and degrading treatment within the meaning of article 3 ECHR*". The UN Special Rapporteur on Violence against women also clearly stated that indeed FGM amounts to torture.[118] Torture is also mentioned in article 7 ICCPR, article 4 UDHR, article 5 Banjul Charter and article 4 Charter on the Fundamental Rights of the European Union. Torture is also part of customary international law.

d) Right of the Child

52. As FGM is very often practiced on children, the Convention on the rights of the child which is signed by almost all countries (except US, Somalia and South Sudan who have not ratified it) is applicable. Following articles are important: article 2 (free from discrimination), art. 6§1§2, art. 12, art. Art.16§1, 19§1 (protected from mental and physical violence and maltreatment), art.24 (right to health, abolishment of traditional

[116] Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), 10 December 1984.
[117] Wood, 2001, pp. 379-380.
[118] Amnesty International, *Ending Female Genital Mutilation, A strategy for the European Union institutions*, pp. 11-12 at http://www.endfgm.eu/content/assets/END_FGM_Final_Strategy.pdf, (consulted on 1 March 2013).

practices prejudicial for children), art.37 (torture), General Comment no.13 by the Committee on the Rights of the Child on art. 19 of the Convention on the Rights of the Child: §29, which classifies FGM as a *harmful practice.*[119] It is also mentioned in art. 4 §1, art.5§2, art.10, art. 14§1, art. 21§ 1(a) and (b) of the African Charter on the Rights and the Welfare of the Child.

e) Violence and Discrimination against women

53. A considerable range of international rules considers FGM as a form of discrimination against women and girls by reason of their gender. It is a practice based on the assertion of inferiority of the women and superiority of the men.[120] According to the international community, FGM has to be considered not only as a form of discrimination but also as an act of violence against women. Violence against women needs to be considered as a universal problem that needs to be universal condemned.

54. ***Discrimination***

(1) According to article 1 CEDAW discrimination entails "*any distinction, exclusion or restriction made on the basis of sex*". So if FGM is to fall under this definition, it has to fulfil two criteria. First FGM has to make a distinction based on sex and secondly it needs to have the effect or purpose of impairing equal enjoyment of rights by women. It is obvious that FGM meets both criteria as obviously the practise is solely reserved for girls and as it has the goal to control their sexuality, contributing to the subordination of women by reinforcing the perception that women can only have a role as wife and mother. The Committee on the Elimination of Discrimination Against Women (CEDAW) indeed supports the fact that FGM is a discrimination against women as it formulated a general recommendation[121] on the issue.[122]

(2) Article 12 CEDAW specifically deals with the discrimination against women in the

[119] UN, General Comment no. 13, CRC/C/GC/13, 2011.
[120] Van Den Brink & Tigchelaar, 2012, p. 436. This is also the reason why pricking of the clitoris is seen as a human rights violations even when it has no medical consequences.
[121] The Committee on the Elimination of Discrimination against Women, *General Recommendation no.14*, 1990.
[122] Rahman & Toubia, 2000, p. 21.

field of health care. It also obliges states to ensure appropriate services in connection with pregnancy and the postnatal period.

(3) According to article 5 CEDAW States Parties shall take all appropriate measures: To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

(4) The CEDAW general recommendation 19, which deals with violence against women regards gender-based violence as a form of discrimination that constitutes a serious obstacle in the enjoyment of human rights and fundamental freedoms by women. According to the CEDAW gender based violence is " *violence directed against a women because she is a women or which affects a women disproportionately*."[123]

(5) According to paragraph 11 of this same general recommendation the Committee also rejects customary or religious justifications for gender-based violence. It is important to notice that FGM is a deeply rooted custom. Governments who enact legislation to prohibit the practice must be aware of the fact that by prohibiting FGM this may also subject women to further discrimination as they are ostracized or not able to marry.[124]

(6) For the right not to be subjected to discrimination on basis of gender, following instruments are applicable: art. 2 & 7 UDHR, art. 2 ICCPR, art. 2 ICESCR, art. 14 ECHR, art. 2 and 5 CEDAW, art. 18(3) and 28 Banjul charter. The CEDAW Committee also stated that it cannot accept that culture, religion or tradition will have the upper hand above women human rights. The protection of women human rights exceeds thus the right of culture.[125]

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[123] The Committee on the Elimination of Discrimination against Women, *General Recommendation* No. 19, 1992; United Nations Special Rapporteur on Violence against Women, its causes and consequences, p.4 at http://www2.ohchr.org/english/issues/women/rapporteur/docs/15YearReviewofVAWMandate.pdf (consulted on. 6 May 2013).

[124] Cheryl & others, *Developing legislation on violence against women and girls*, 2001, p. 412, at http://www.endvawnow.org/uploads/modules/pdf/1355776748.pdf (consulted on 3 May 2013).

[125] Holtmaat & Naber, 2011, pp. 12-13, 42-43, 89.

55. ***Violence***

(7) One of the most important events related to violence against women was the Vienna World Conference on Human Rights from 1993. Here it was recognized that women's rights are human rights, a position that has been reaffirmed at all subsequent world summits. Since the Vienna conference, violence against women has left the private domain and became an established issue within public debates. Multiple initiatives around the world have raised awareness and contributed to legal reforms that support the survivors of abuse and punish the perpetrators.[126]

(8) Regarding the Platform for Action (core document for the Beijing conference 1995, see §107(d), 118, and 232(h)) violence against women constitutes a violation of women's basic human rights and is one of the biggest obstacles to the achievement of gender equality.[127] Paragraph 113 defines violence against women as followed "*any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life."* Violence against women leads to domination and discrimination against women by men and prevents the full advancement of women. Violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.[128] Governments are required to take action against this violence and to respect, protect and fulfil women's human rights on an equal basis with those of men. According to paragraph 124 a) states have to "*Condemn violence against women and refrain from invoking any custom, tradition or religious consideration to avoid their obligations with respect to its elimination as set out in the Declaration on the Elimination of Violence against Women*". They have the obligation to prevent, protect against and punish violence against women, regardless of whether the perpetrator is a public or private party. FGM is officially considered to form violence against women as it is explicitly mentioned in paragraph 113 a).

[126] Strengthening Women's Rights, Ending Violence against Women and Girls-protecting Human Rights, 2005 at http://baer.rewi.hu-berlin.de/w/files/lsbpdf/enendingviolenceagainstwomenandgirls.pdf (consulted on 31 May 2013).
[127] Godpower, 2006, p. 2.
[128] Preambule of the Declaration on the Elimination of Violence against Women, paragraph 6.

(9) The Declaration on the Elimination of Violence against Women (DEVAW)[129] defines violence as "*any act of gender based violence that results in or is likely to result in, physical, sexual or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life*". This definition does not require that there is intent to harm, which is important in the case of FGM because most parents or practitioners lack this intent to harm as they are convinced that the benefits of the practice will outweigh the possible negative effects.[130]

(10) According to art. 2a DEVAW, FGM has to be understood as violence against women.

(11) Other instruments are art. 1 and 3 UDHR, art. 9 §1 ICCPR, article 8 ECHR, article 1 &3 Charter on the Fundamental Rights of the European Union and Platform for Action of the Fourth World Conference on Women (Beijing 1995) paragraphs 107(d), 118, and 232(h).

(12) A European instrument specifically devoted to violence against women is the Istanbul Convention. It covers various forms of gender-based violence, which is defined as "*violence that is directed against a woman because she is a woman or that affects women disproportionately*" (Article 3 d). FGM falls thus under this definition and it is being defined as "*excising, infibulating or performing any other mutilation on the whole or any part of a woman's labia majora, labia minora or clitoris*" (Article 38 a). However most Council of Europe member states do not have specific legislation on FGM. Yet the Convention requires all states parties to introduce FGM as a criminal offence when such an act is committed intentionally, whether or not it is performed by medical professionals. This includes the act of pressuring or coercing a girl or a woman to undergo the procedure "voluntarily".[131]

[129] Declaration on the Elimination of Violence against Women, 20 December 1993.
[130] Rahman & Toubia, 2000, pp. 25-26.
[131] Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), 11 May 2011.

B. Human Rights Consideration of MC on the basis of a comparison with FGM

56. As opposed to FGM, there is no consensus in the human rights community about the status of non-therapeutic circumcision (circumcision for medical purposes is not controversial and generally accepted). Lately there is more and more discussion about the fact that MC could possibly lead to human right violations. This discussion and non-consensus about the status exist mainly due to two reasons. The first reason relates to the fact that MC is often performed on children who cannot give their consent and secondly the fact that the health benefits of MC are seriously disputed.
Because there is no consensus about the existence of a human right violation, no well-defined set of international rules as compared to FGM is available. Therefore, one could by means of a comparison with FGM examine approximately what human rights on which FGM is commonly considered to be a violation could also be denoted as being violated by MC and for what reasons.

a) Medical benefits

57. As opposed to FGM, which does not hold any medical benefit, there are compelling medical reasons to circumcise a person during infancy. Evidence has shown that the risk for postoperative complications is much lower when circumcised during infancy. Other advantages are surgical ease, the speed of the operation as well as the cosmetic outcome. For adult men there are more barriers that can prevent them from getting circumcised. They are often afraid of the complications that can occur, of the postoperative pain, of the long healing process that generally results in a long period of having no sexual relations and of the costs for the operation that can add up.[132] Many advocates of MC see the period of infancy then also as the perfect timing as else all "the benefits" of MC might be lost because adult men just are too afraid to proceed with MC. Whereas however this reasoning justifies the 'timing' of the intervention, it does not justify the intervention as such.

[132] Morris et al, 2012, pp. 2-15; Benatar & Benatar, 2003, p. 37.

b) Tradition

58. According to the Preambule of the CRC "*the importance of the traditions and cultural values of each people for the protection and harmonious development of the child*" should be taking into account. This paragraph is often used by advocates of MC to state that the international community should accept and respect traditional cultural practices even on children.[133] Whereas in the case of FGM this reasoning is universally rejected, as FGM leaves no space for cultural relativism, this exposes the debate on the interaction between MC and cultural relativism. In this context reference can be made to article 24 of the CRC that prescribes that the parties should take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. What such a harmful practice can contain is explained in General Comment no.13 §29 where reference is made only to FGM and not MC however. Also Article 19 of the CRC stating that the State should adopt measures to protect the child from all forms of physical or mental violence, does not seem to give a satisfactory remedy for MC as violence for purposes of this convention means that there should be long lasting damage or pain for the child, which is obviously the case with FGM but which is disputed in the case of MC.[134]

c) Religion

59. One of the incentives behind MC are religious motives, which are much less present nor accepted in case of FGM, where the driving force is identified as the culturally defined gender roles. So freedom of religion is then often cited as a justification to practice MC on children. The difficulty is that the best interest of the child should always prevail (article 3 CRC), which unfortunately is a quite vague concept. In the case of MC a balance should be found between the right of freedom of religion and between the bodily integrity of the child.

The Right to bodily integrity is worded in article 3 UDHR and is connected to several other human rights such as the right to privacy (Art. 8 EVRM). Bodily integrity

[133] DeLaet, 2009, p. 418.
[134] Schiratzki, 2011, p. 44.

consists out of two aspects. On the one side it protects against external interference of the body, which contains that no unnecessary or violent interventions should be practiced. This view is far stronger present in the case of FGM than with MC as it is considered not possible for an adult woman to undergo FGM out of her free will. The right of self-determination doesn't play in the case of FGM. On the other side it includes the right of self-determination over one's own body, which means that it should always be the own decision of the person himself to have his body altered.[135]

As children cannot always decide for themselves, this task is readily given to the parents to make decisions in the best interest of the child.[136] This is also the case with regard to the choice of the religion of the child. They have important parental rights in relation to the religion of their child (art. 14.2 CRC and Article 2 of Protocol no. 11 to the ECHR article 18 §4 ICCPR). The right of freedom of religion entails thus that parents can raise their children in a religion or philosophy of their own choosing.[137] However children themselves also have the right to form their own views and express those freely (article 12.1 CRC). So when they become of age and capable of forming their own views and beliefs the child should have a free choice of religion.[138]

It is precisely here that the core of the problem on MC can be situated. The balancing between the two rights reveals the insoluble tension between them. MC is an irreversible intervention. So once it is carried out there is no way back for the child; if it decides on a later age not to join the religion or philosophy of the parents the performance cannot be reversed. For this reason the principle that the best interest of the child should always prevail is an argument that is open to dual interpretation, which can be, used both in favour as against MC. So if on the one side religious leaders e.g. from Muslim and Jewish communities sincerely believe that it is in the best interest of the child to get circumcised in order to become a member of a religious community, not being circumcised indicating exactly the opposite, on the other side the argument of the right of bodily integrity of the child gives preference to the idea that the child in time

[135] Van Den Brink & Tigchelaar, 2012, p. 432.
[136] Van Howe, Svoboda, Dwyer & Price,1999, p. 63.
[137] KNMG, 2010, pp. 14-16.
[138] United Nations, General comment no. 12, CRC/C/GC/12, 2009.

should have the freedom to relate to a particular religious community or not opposing the irreversible practice of MC.[139]

d) Cultural and Social

60. Where FGM is a form of sexual oppression, which has severe sexual physical consequences for women, MC also can diminish the sexual sensation of men and in the worst cases can reduce the sexual desire strongly or even eliminate it. The foreskin is very often regarded as having no function in male sexuality. However according to some opponents of MC and sexologists, sexual pleasure comes not only from the glans but also from the foreskin, which is a complex erotogenic structure that plays an important role during sexual acts such as penetration and masturbation.[140] The foreskin has also a protective and moisturizing function of the glans, without this the glans will become dull, insensitive and will feel leathery. All those effects are not dependent on the successfulness of the circumcision it itself.[141]

Just as culture and social pressure are one of the main reasons of practicing FGM this can also be the case of traditional male circumcision (see Chapter II). But also men living in (western) countries where circumcision is seen as the standard like in the US and South Korea, are dealing with social pressure. Uncircumcised boys could be teased and harassed because they look different from the rest. Women in these countries find it unattractive and dirty and would reject those men.[142] So not being circumcised can also have far reaching effect for men in their social life depending on their cultural environment.

Often is stated that neonates don't feel the pain associated with MC. However pain like in the case of FGM is also a central aspect of MC. The prepuce in newborn babies is adherent to the glans, circumcision involves tearing those layers apart which leaves the

[139] Schiratzki, 2011, pp. 36,43-46; KNMG, 2010, pp. 14-15.
[140] Abu-Sahlieh, 2006, pp. 47-74; KNMG, 2010, p. 14.
[141] Johnson, 2010, pp. 192, 185-188; Darby & Svoboda, 2007, pp. 309-310. It is not for nothing that the main reasons for male circumcision during the 19th century was to stop and discourage masturbation, like clitoridectomy with girls.
[142] Johnson, 2010, pp. 194-195.

glans raw and bleeding, which amounts in a considerable amount of pain during the procedure as well as after the procedure.[143]

[143] Johnson, 2010, p. 192; The pain is of course also dependant on the use of analgesio or not.

Chapter V: Tolerance towards MC and FGM in the Western World

A. Introduction

61. Nowadays many western countries are being confronted with different non-western cultures and religions entering their society. Those cultural communities cherish their identities and wish to preserve these.[144] Western societies have different methods of dealing with those 'new' cultures: they have the option to make cultural minorities assimilate into the cultural majorities or to accept cultural differences and offer them a certain degree of cultural-accommodation.[145] Cultural-accommodation means that the state will allow different communities to live according their own traditions and institutions[146], therefore the government will provide differentiated group rights for cultural minorities.[147]

62. This "cultural-accommodation" which shows the good intention of the state to work towards a participative and inclusionary policy for minority groups, can contain serious risks especially for the more vulnerable minority group members such as women and could lead to the reinforcement of the most hierarchical elements of a culture.[148] This is what SHACHAR calls "*the paradox of multiculturalism*".[149] To find a good balance between the demands of unity of the state and diversity is a necessary prerequisite. If the state only privileges unity and ignores diversity, it provokes resistance and endangers the very unity it seeks. If it tolerates all diversity and doesn't limit it, it lacks the capacity to reconcile the conflicting demands of different groups and wont be able to hold the society together and again risks disintegration.[150] It is thus very important that the state outweighs the positive aspects of cultural accommodation

[144] Parekh, 1997, p. 523.
[145] Okin, 1999, p. 9.
[146] Shachar, 2001(a), p. 65-65.
[147] Okin, 1999, p. 12.
[148] Shachar, 2005, p. 57.
[149] Shachar, 2000, p. 65.
[150] Parekh, 1997, p. 526.

against the negative points and decides where the limits of tolerance are located. Minorities may pose thus very big challenges on the majority regarding what is considered to be 'acceptable', normal' or 'deviant' behavior. Many of the minority groups have different worldviews, different religious beliefs and different conceptions of gender relations, family and community. The challenges for the western society to deal with all this can thus be considered to be very big.[151]

B. How to deal with new cultures/ethnicities in western liberal democracies

a) Importance of culture and diversity

63. Culture often plays a very important role in minority groups. According to CHARLES TAYLOR it "*designates something like a person's understanding of who they are, of their fundamental defining characteristics as a human being*". The identity of those minorities is often partly shaped by the recognition or misrecognition by others (here the majority culture). Misrecognition can inflict serious harm and can amount into a form of oppression, which would imprison someone in a false, distorted and reduced mode of being. According to TAYLOR recognition is a vital human need and culture is a fundamental part of us (e.g. the minority cultures).[152]

64. Also the Committee on the Elimination of Discrimination against Women (CEDAW) notes that culture is a positive vehicle for influencing the advancement of women, and suggested that cultural art forms be used as a vehicle to promote respect for women.[153] According to HOLTMAAT & NABER "*culture is essential for human life because it forms the basis for individual identity formation and may empower individuals to become full human beings*".[154] WILL KYMLICA also agrees that culture can provide individuals with "*an intelligible context of choice and a secure sense of*

[151] Triandafyllidou, 2012, p. 14 at http://www.coe.int/t/dg4/cultureheritage/culture/cities/newsletter/newsletter21/HandbookTol_en.pdf (consulted on 22 May 2013).
[152] Taylor, 1994, pp. 25-31.
[153] UN, Report of the Committee on the Elimination of Discrimination against Women, A/52/38, 1997, para. 270.
[154] Holtmaat & Naber, 2011, p. 33.

identity and belonging".[155]

Another proponent of culture is BHIKHU PAREKH. According to him culture fulfils both a shaping and nourishing function of an individual's sense of identity and well-being.[156] Not only culture but also cultural diversity and social pluralism have an intrinsic value precisely because they challenge people to evaluate the strengths and weaknesses of their own cultures and ways of life. Cultural diversity is a necessary value in itself. Different cultures have the potential to complement and correct each other, expand each other's horizon of thought and alert each other to new forms of human fulfilment.[157] RAWLES and MILL also agree that plurality is "inescapable" and "desirable". Diversity and pluralism is good for society as it created and stimulated creativity and curiosity.[158]

65. However despite those positive and necessary implications that culture entails, it is not possible for a multicultural society to tolerate indiscriminately all kinds of minority practices. But on the other side it is also not an option to just ban all practices that do not convergent with the western culture or standard.[159] The question is thus for what practices should the state foresee in cultural accommodation and which practices cannot be tolerated and on which basis?

b) Is multiculturalism viable in a liberal democratic society?

66. It is often stated that liberal societies, where the emphasis is located on the individual, are not capable of coping with communal interest and cultural communities. This would entail that a liberal state cannot deal with the question of status and rights for ethnic communities because the focus in a liberal democratic society is based solely on individual rights. It would thus not be possible to have a balance between the claims of those individuals and those of cultural minority groups as they have possible

[155] Shachar, 2001(a), p. 66.
[156] Shachar, 2001(b), p. 263.
[157] Meer & Modood, 2012, pp. 184-185.
[158] Reynolds, 'To what extent is there tension between liberalism and multiculturalism?' in *the new political centre*, 2012 at http://newpoliticalcentre.files.wordpress.com/2012/02/to_what_extent_is_there_tension_between_liberalism_and_multiculturalism1.pdf (consulted on 24 May 2013).
[159] Parekh, 1996, p. 251.

potential to restrict the individual autonomy and freedom of their members.[160] Culture may never dominate the autonomy of the individual.[161]

67. However not everyone agrees on this matter. Different theories have been proclaimed to make this individualistic approach and group rights work together. KYMLICKA is proponent of what is called a weak form of multiculturalism. This form of multiculturalism is aware of the fact that there exists a potential tension between the accommodation of cultural minority rights and the protection of individual citizenship rights. This weak multiculturalism has the goal to find a possible coexistence between on the one hand the protection of the individual citizen's rights and on the other hand the accommodation of cultural minority groups.[162] KYMLICKA articulates it this way "*A comprehensive theory of justice in a multicultural state will include both universal rights, assigned to individuals regardless of group membership, and certain group-differentiated rights or "special status" for minority cultures*".[163]
KYMLICA sees a limitation to the minority rights in the principles of individual liberty, democracy and social justice. A group right may never entail the suppression of an individual right or liberty. Minority rights can thus only be given to cultural groups that are in themselves liberal and accept the liberal principles. KYMLICKA's multiculturalism goes thus only so far as to the extent that this culture would not violate the freedom of the individual. The minority groups have thus to liberalise their practises and then the minority can be accepted.[164]

68. The critique on this theory is that it does not give sufficient autonomy to cultural minorities and insufficient attention to cultural difference.[165] BRIAN BARRY also shares

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[160] Vernon Van Dyke: "*the liberal emphasis on the individual precludes a proper theory of the state, which suggest in principle that liberalism cannot be trusted to deal adequately with the question of status and rights for ethnic communities*." Frances Svensson: "*Liberal democratic theory, in its almost exclusive emphasis on individual rights and its neglect of communal interests, has created context in which no balance has been possible between the claims of individuals and multidimensional communities* " in Kukathas, 1992, pp. 105-107; Shachar, 2005, p. 78.
[161] Sala & Manara, 2001, p. 251.
[162] Shachar, 2000, pp. 68-69; Shachar, 1998, pp. 93-94.
[163] Shachar, 2000, pp. 68-69; Shachar, 1998, pp. 93-94.
[164] Kalev, 2004, pp. 341-342.
[165] Kalev, 2004, pp. 340-341.

the opinion that cultural minority groups should always respect the basic liberal values however he also imposes an obligation on the government to liberalize cultural minorities, as there ought not to be given any particular encouragement to maintain their separate (illiberal) forms of association. KYMLICKA prefers that the state takes stronger measures to ensure that minorities can be secure in their effort to maintain cultural independence (however still with the condition of respecting liberal values).[166]
Also KUKATHAS agrees that culture and minority rights are possible in a liberal state however on a different basis as KYMLICKA. He also places the emphasis on the individual subject and sees them as the building blocks of society. He starts from the point that all individuals should be free. This means that they are also free to decide to live in any cultural association and live according the terms of this group.[167]

69. The State should respect those cultural groups and not interfere in those because those individuals who are now part of that group had the free choice and liberty to join. The freedom of choice of the individuals must be respected by the state and as a consequence the community should too. The state should adopt a laissez-fair attitude towards this community. Two conditions have to be fulfilled to achieve this non-interference status by the state. First of all the entrance of the individual in the community needs to be voluntary and secondly individuals should always have the free choice to leave this community whenever they wish to. KUKATHAS accepts thus in contrary to KYMLICKA that illiberal practices in communities also have to be respected as the only fundamental right of individuals has to be the right to be free to leave.[168]

70. Those illiberal policies however may only affect the members of the community but not others in society.[169] The problem however is that cultural communities most of the time cannot be considered to be 'voluntary associations'. Membership of those communities is mostly determined by birth, the freedom to leave is thus not as easy as it

[166] Kukathas, Theoretical Foundations of Multiculturalism, George Mason University, Virginia, 2004 at http://econfaculty.gmu.edu/pboettke/workshop/fall04/theoretical_foundations.pdf, pp. 15-18 (consulted on 24 May 2013).
[167] Kalev, 2004, pp. 341-342; Kukathas, 1992, p. 116.
[168] Kalev, 2004, pp. 341-342; Kukathas, 1992, p. 116.
[169] Kalev, 2004, pp. 341-342.

may appear. Another problem could however be that also here like in the case of KYLMICKA's weak multiculturalism, the cultural minority group has not a very firm position. On the one side indeed liberal society shall not require that those communities assimilate or integrate into the mainstream liberal society but on the other hand it has no fundamental rights. The community is solely based on the acquiescence of its members. When they decide to leave this community, the community will stop to exist and cannot claim any right to self-preservation or perpetuation.[170]

C. Can FGM and MC then be accepted under those liberal theories?

a) The Seattle Compromise Case and the German Circumcision Case

71. So as shown culture has its importance in human life and liberal societies have certain methods to deal with multiculturalism. The question here is however if they should tolerate or reject FGM and MC and on which basis. The main difference between the two practices lays in the fact that FGM is being imported by immigrants in our western society whereas MC has its own tradition in (some) western cultures.

As immigrant population continues to increase and diversify, more cases of FGM are being reported in the Western world. The uncertainty of arriving in a society which is almost all built upon an unfamiliar value system creates a lot of psychological stress for the immigrants and emphasizes the need to preserve traditional customs. FGM is thus a way to prevent complete assimilation with their new country and adhere to their homeland traditions.[171]

As a starting point I will first give an illustration that shows clearly how the western world reacts very differently to both practices. To illustrate this I will discuss the famous Seattle comprise case and the more recent German circumcision case.

72. The Harborview Medical Centre in Seattle, where many Somali immigrants live was confronted by the request of many immigrant mothers who asked that not only their

[170] Kukathas, 1992, p. 116-117.
[171] Baron & Denmark, 2006, pp. 349-350.

sons but also their daughters would be circumcised. After many meetings and discussions with those immigrants, the hospital decided to perform a simple symbolic cut amounting to a mere nick (prepotomy), just enough to draw blood but with no tissue removal or subsequent scarring. By doing this the hospital wanted to meet both cultural and religious needs of the Somali community without crossing the legal and ethical obligations of the hospital. The immigrant community accepted this "form of FGM". From a technical or clinical point of view the suggested procedure cannot even be considered to fall under circumcision and it is definitely a less severe form than male circumcision practices trough the USA. This procedure would have made it possible for many Somali girls to avoid a more radical procedure performed in Somalia or by one of the midwives living in the Seattle area. The reactions on this compromise were overall extremely negative. A United States Representative PATRICIA SCHROEDER who worked before on legalisation to prohibit FGM was baffled and horrified by the idea and also stated that the proposal of the hospital would contravene federal law. RAMSEY of the anti-FGM groups Forward USA and International and many others were also concerned that even talking about cutting female genitals legitimizes the barbaric practice. The hospital received hundreds of letters and calls protesting the proposal. At the end Harborview withdrew the proposal stating that it found the effort too controversial and the procedure was never performed in the hospital.[172]

73. The German circumcision case[173] dealt not with FGM but with MC. In 2012 the Regional court of Cologne (Germany) decided on a religiously motivated circumcision of a Muslim boy. In 2010 a four-year-old boy was circumcised on the request of the boy's parents. The motivation for this circumcision was solely based on religious beliefs. The operation was performed *leges artis* but still complications occurred. The court of first instance acquitted the physician. The court of appeal also acquitted the physician but decided that religious circumcisions on boys who were unable to give their medical consent constituted bodily harm according to the German penal code. This decision was the first decision in Germany that decided that a circumcision although

[172] Coleman, 1997-1998, pp. 738-749.
[173] Landgericht Köln (District Court of Cologne), Judgment of 7 May 2012, no 151 Ns 169/11.

performed *leges artis* and with the consent of both parents is illegal. The court attached the highest ranking to the right of physical integrity of the boy and reducing the concept of the best interest of the child to purely physical well-being. It came thus to the decision that a religious circumcision was not in the best interest of the child.[174]

74. Both cases occurred in the western world and are more are less comparable. Both are dealing with circumcision. The Seattle case dealt with circumcision on girls whereas the German case dealt with male circumcision. Both practices were supposed to be performed by doctors, so under proper hygienic circumstances and according *leges artis* rules. Both practices also were asked at the request of the parents for religious or cultural reasons. However despite those similarities the reactions to the outcome of both cases are completely different.

75. The Seattle compromise was never executed due to the negative reactions to the proposal. The doctors in the Harborview hospital wanted to offer a procedure that reconciled on the one hand the traditions of the Somali immigrants and on the other hand a capability of adaptation to the US culture. By choosing for this compromise they were convinced that after a time the practice of cutting would be completely abolished.[175] They applied the harm reduction theory, which means that although they want to achieve eventually the elimination of FGM, they are willing to promote intermediate steps that offer safer solutions in the process of change.[176] They shared the opinion that culture could have a dynamic dimension. A dynamic model is a model that takes for granted that cultures have the ability to change and thus are never perfectly authentic or entirely unredeemable. The proposal that the hospital thus offered allowed for cultural evolution of FGM.[177]

[174] Günzel, 2013, pp. 1-2.
[175] Wade, 2011, pp. 521-522, 527-528, 532-533.
[176] Shell-Duncan, 2001, p. 1021.
[177] Wade, 2011, pp. 521-522, 527-528, 532-533.

76. The opponents of the proposal had exactly the opposite idea and followed the reified[178] model. This model presumes that the cultural content is unchangeable. It is independent of historical change and thus they believed that the proposal would contribute to the perpetuation of FGM. For them all forms of genital cutting were unacceptable, also a prepotomy as it involved cutting of the genitals. The proposal was thus not considered to be a possibility for cultural change but on the contrary for cultural persistence.[179]

77. The response to the German circumcision case was also a shock and not without astonishment however exactly for opposite reasons. The critique laid in the fact that the concept of best interest of the child was completely based on the purely physical well-being of the child. According to many critics the best interest of the child encompasses not only its physical well-being but also its religious up bringing and identity. The court should thus have taken into account the freedom of religion as according to the Islam and Judaism circumcision makes the child full member of the religious community. The judgment was considered to constitute thus a significant infringement upon religious

[178] To reify: to consider a situation independent of the actions of the organization members. The situation is regarded as something that leads a life of its own. It is kept away from the influence of the individual members of the organization. Therefore it seems as if it is separate from the people who have created in the first place (Isolde van Roekel-Kolkhuis Tanke: *Competent blijven werken in latere loopbaanfasen* – 2008, p. 254).

[179] Wade, 2011, pp. 529-530, 532-533; The Seattle hospital was not the only one who shared the opinion that a nick could be allowed. In 2010 the American Academy of paediatrics (the AAP) released an official statement that was in favour of a similar procedure. According to them "*the ritual nick is not physically harmful and is much less extensive than routine new-born male genital cutting*". They also saw it as a first step towards the eradication of FGM. (Policy Statement on Ritual Genital Cutting of Female Minors, 2010, p. 1092). On this proposal came also a lot of critique. The WHO, UNFPA, UNICEF and UNIFEM released a joint press release condemning the AAP recommendation with the result that one month after the statement the AAP revoked it. Academy of Paediatrics withdraws Policy Statement on Female Genital Cutting, 27 may 2010 at http://www2.aap.org/advocacy/releases/fgc-may27-2010.htm. There was also a proposal in the Netherlands where a Welfare, Health and Culture Ministry report recommended a comparable accommodation which would allow to perform an anaesthetized incision or pricing of the clitoral covering. Ultimately, the Dutch proposal drew a storm of protests and was eventually superseded. Obiora,1997, p. 285; Ruderman, 2013, p. 99; The European parliament also adopted a resolution where it is explicitly stated in paragraph 25 that it '*Urges firm rejection of pricking of the clitoris and medicalisation in any form, which are being proposed as a halfway house between circumcision and respect for traditions serving to define identity and which would merely lead to the practice of FGM being justified and accepted on EU territory; reiterates the absolute and strong condemnation of FGM, as there is no reason—social, economic, ethnic, health-related or other—that could justify it.* (Resolution of 24 March 2009, (2008/2071(INI)).

freedom and the parents' right to educate and care for their children. The German government apparently agreed with this critique as it amended in December 2012 the Civil Code to clarify that ritual circumcision continues to be legal in Germany. The conditions for this ritual circumcision are that it is should be performed *leges artis* and it may not endanger the best interest of the child.[180] During the first six months after birth this circumcision may also be performed by persons mandated by a religious community, if they are trained for this intervention without being a medical doctor but are just as capable.[181]

b) Is tolerance towards FGM and MC conceivable and is a different approach to FGM and MC at issue?

78. Why is it then that the western world is much more tolerable towards MC and even willing to adapt the law for MC while it is not willing to make any compromise for FGM - which from a point of view - would benefit girls subjected to FGM?

79. On first sight it seems that FGM can be accepted on the basis of KUKATHAS theory as minority groups are allowed to practice illiberal practices without any interference of the state. However the two conditions that need to be fulfilled namely (i) a voluntary entrance in the community and (ii) the possibility of voluntary exit are not met in the case of FGM.

FGM is a highly cultural tradition in those groups. The entrance in these groups is solely based on the principle of birth. Girls do not have the right to join this community freely; they are simply born into it. Neither is the fundamental right to leave that. The women who want to avoid FGM by leaving their community will indeed be subjected to several disadvantages. Many of them are economically dependent on the group and share a great affinity with the community. These communities are also often characterized by a lack of education and women are subject to different processes of persuasion and indoctrination about the role they have to fulfil. It is thus clear that they do not have a realistic and free option to leave. Moreover FGM is mostly being

[180] Günzel, 2013, pp. 1-4.
[181] Heimbach-Steins, 2013, pp. 4-5.

practiced on children who are dependent on their parents not having much of a choice to enter or leave their.[182]

80. According to KYMLICKA's weak model of multiculturalism it is very clear that FMG cannot be accepted in western society as it clearly violates the individual rights of women. Also according to KYMLICKA it can never be tolerated that a minority group would proceed with illiberal practices. FGM could then not be allowed as a group right cannot entail suppression of an individual right or liberty, which is clearly the case with FGM.[183]

81. However sometimes illiberal practices can be allowed but only in exceptional cases when culture is in danger of extinction. This can only be allowed under certain circumstances: "*if certain liberties would undermine the very existence of the community, then we should allow what would otherwise be illiberal measures. But these measures would only be justified as temporary measures, easing the shock which can result from too rapid change in the character of the culture .... helping the culture to mover carefully towards a fully liberal society*".[184] This is exactly what the Seattle doctors had in mind while giving the option of a prepotomy to the Somali immigrants. They wanted to ease the shock of a full abolishment of the practice (which would also not have been accepted by the immigrant population). However the doctors also saw this compromise only as a temporary measure, which would eventually lead to the elimination of the practice and thus contribute to the liberalisation of the community group.

82. MC would probably give fewer to no problems to KYMLICKA's theory as he gives different statuses to certain groups.[185] Practices can never be abstracted from the wider way of life. It should always be placed in the society at large and thus not be

[182] Kalev, 2004, pp. 341-343; Kukathas, 1992, pp. 116-117.
[183] Kalev, 2004, p. 341.
[184] Kalev, 2004, p. 341.
[185] He makes a division between indigenous peoples, 'sub-state' national minorities and immigrant groups, where national and indigenous minorities were entitled to territorial autonomy and separate political representation.

abstracted from its place in society. Different cultural communities have different structures, stand in different historical relations with the wider society, and make different and unequal claims on it. Immigrants have a rather weak status as they are not the original inhabitants of the country nor were they conquered. For this reason their minority claims on the wider society are less strong than e.g. the claims of indigenous people.[186] If they thus want to succeed in a new country, they must integrate into the wider society and should not hold on their way of life too much.[187]

83. This could also explain why MC is more accepted than FGM and why there are certain double standards despite the comparisons between the two practices.[188] Practices from other cultures like FGM are more easily considered to be unjust and senseless than practices of one's own or familiar culture.[189] FGM is a practice, which has been imported by immigrants to the western world. This is not the case of MC, which has a long tradition in many western countries and especially in the US.

The acceptance of this practice may also find its origin in certain historical reasons and ties with the western world. Those historical reasons can be considered to be one of the incentives why the German government was quick to foresee in legislation that would allow religious circumcision as they have a difficult relationship between non Jewish and Jewish Germans after the Shoa.[190] This is also what REINHARD MERKEL argued. According to him the German government was particularly committed to the Jewish community in Germany because of the historical debt of the Holocaust it had towards the Jewish community.[191] One Rabbi indeed also argued the court's decision was "*perhaps the most serious attack on Jewish life in Europe since the Holocaust*".[192]

[186] Parekh, 1996, pp. 252-253.
[187] Parekh, 1995, p. 432.
[188] Darby & Svoboda, 2007, p. 313; DeLaet, 2009, p. 422.
[189] Van Den Brink & Tigchelaar, 2012, p. 440. Same basis can be taken to accept female genital cosmetic surgery and other forms of cosmetic surgery.
[190] Günzel, 2013, p.1.
[191] Reinhard Merkel in Heimbach-Steins, 2013, pp. 4-5.
[192] X, 2012, pp. 2-3. This is can also be one of the reasons why Jehovah witnesses have fewer rights than the Jewish community in Germany. Jehovah witnesses are obliged to adapt their religious practices to German law (according to Jehovah witnesses it is not allowed to receive blood transfusion, however the German state does not accept that they prevent their off-spring from receiving blood transfusions.

c) The intercultural dialogue approach

84. The intercultural dialogue has as starting point that it treats cultural diversity as a welcome feature of human nature. It tries to find a balance between the justifiable claims of minority cultures and the protection of their individual members' well being by creating a dialogical consensus, which is an abstract discussion of cultural practices between representatives of the majority and minority cultures. The condition to make this approach work is that there exists a willingness to compromise on both sides in order to reach a suitable agreement. There should be a willingness in both groups to compromise their values.[193] The main focus is thus communication, which facilitates then the dialogue, exchange and reciprocal understanding between people of different backgrounds.[194]

85. On the one hand the representatives of the minority culture must present their reasons for carrying out the practice. They have to explain why it is an essential aspect of their culture and why they are reluctant to abandon it. On the other hand the majority should elucidate why this practice offends the society's core moral values.
Every society has at least a minimum set of common. These values become part of the society's moral structure and remain more authoritative than their competitors until such time as they are changed. Those values are so essential to its survival and self-conception that it imposes them on all its members.[195] PAREKH calls this set of values the 'operative public values'. They are *public* because they are embodied in its constitution and legal practices and define the principles of its public life to which all its members are collectively committed. They are *values* because the society cherishes them, accepts to live by them, judges everyone's behaviour on basis of them and condemns their lapses. They are *operative* because they do not represent a vision of society's ideal or perfect society but it governs its practices and are a social reality. You can say that the operative public values constitute the primary moral structure of society

[193] Shachar, 2001(b), pp. 264-265; Long, 2004, pp. 178-179.
[194] Meer & Modood, 2012, p. 182.
[195] Those values are mostly enshrined in the constitution, which lays down the basic design of the polity, including the fundamental rights and sometimes the obligations of the citizens, and in its laws.

and they provide the only valid moral starting point from which minority practices can be evaluated. However the minority practices also deserve respect and those values are not static. They may contain biases and because they are grown out of society's historical experiences they are more likely to discriminate against those who are new in society. That is why it is important that the society reassess periodically those values and that a dialogue should be opened between the two groups.[196]

86. Those operative public values are the basis on which FGM cannot be accepted in Western society as FGM inflicts physical harm, is a form of sexual oppression and gender discrimination, violates the physical integrity of the women and amounts to irreversible physiological and physical harm. However it is not useless to have the dialogue as both groups can come to useful insights regarding their values, which could also trigger a debate in the minority community itself about FGM and the acceptability of it.[197] In this dialogue the representatives of the minority group will argue that FGM is dictated by tradition or religion and fulfils a strong social role which forms an central part of their way of life (it preserves girls sexuality, prerequisite for marriage, …). A certain way of life can never be a conclusive reason to accept a practice especially in this case as FGM has no believable basis in any religion. It plays indeed a social role but besides several other objections those social benefits which the girl supposedly would gain from FGM are definitely not applicable in western societies. Virginity, marriage, honour don't play the same role in western world as it does in the countries where the immigrants come from, besides there are many different other harmless ways to perceive a girls virginity.[198] Accepting FGM would strongly violate the public core values of western society, coming to a compromise is not possible, as this would cause considerable moral and social disorientation as was proven by the Seattle compromise.

87. There is a possibility that the community would argue that those values are discriminatory and biased towards their practice in comparison with the accepted and

[196] Parekh, 1995, pp. 436-438.
[197] Parekh, 1995, pp. 439-440, 444-446.
[198] Parekh, 1995, pp. 444-446; Parekh, 1996, pp. 269-270.

comparable MC in western countries.[199] The difference here again is that many western countries have a tradition of MC or at least a link with it. The immigrants who practice FGM are not just part of their cultural group but become also part of the broader western society. This requires adherence to standards of conduct that its members consider to be irreducible.[200] A society simply has its own traditions and values and MC is often part of those operative public values (especially in the US). According to POULTER it is indeed the right of every country to determine its own cultural norms, and to determine which practices are reasonable and which are abhorrent according to the country's tradition. Therefore FGM cannot be accepted and MC can potentially be accepted, as the western majority cannot see any problems with this practice. [201] The problem with this theory of POULTER is that FGM should then still be allowed in other mainly African countries, as there the majority shares the view that it is an acceptable practice.

88. However whereas it is all well and good and accepted that every state has its own values and habits but a widespread acceptance of those values and habits this does not imply that those are either beneficial or moral.[202] There exists the risk that in upholding the liberal values of western society, they may miss their own blind spots. That is why they need to reach beyond their own accepted standards and look for normative standards capable of checking the way of life of their own society as well.[203] This is also what PAREKH meant when he said that it is necessary for the society to reassess its own operative public values. This normative standard against which those habits and values could be measured can be the concept of human dignity. So although every society has the right to determine its own values, human dignity should always prevail before any cultural or religious claim of any state.[204] According to KANT human

[199] Parekh, 1995, p. 440.
[200] Webber, 1996, pp. 275-276.
[201] Kalev, 2004, p. 344.
[202] Brusa & Barilan, 2009, pp. 473-474.
[203] Mautner, 2008, p. 612.
[204] Sala & Manara, 2001, p. 249.

dignity is an 'end in itself'[205]. It is an absolutely inner value that all human beings possess and it constitutes the basis for human rights. It entails respect of autonomous wills, rejects humiliating constraints on freedom and refers to rights rather than duties.[206] It is generally accepted that FGM is against the constant of human nature and contrary to human dignity as it clearly violates different human rights and therefore cannot be accepted anywhere. Human dignity is also the basis why FGM cannot be allowed for adult women under the guise of consent as it involves extensive removal of critical sexual organs and healthy tissue and equals mutilation both on a physical as social level. It defines the role of a women and girls in society, a role that is subordinate to that of men and has as a goal to control women's sexuality.[207] The concept of human dignity can be found back in different international human rights instruments such as UDHR, ICCPR, ICESCR.[208] All those three documents start within their preamble that "*human rights derive from the inherent dignity of the human person*". It is thus because humans have dignity that they have human rights. The concept and the origin of the term human dignity is not that clear but according to GLENN HUGHES this can be seen more as strength than as a weakness as the heuristic character of the concept can serve as a symbolic evocation of the majesty and mystery of the human being. We have some understanding of the concept but at the same time it remains to some degree open-ended which makes its possible to further fill up its meaning.[209] Human dignity is to be considered as universal as it is attached to every human being. It transcended the boundaries between countries and cultures. But this does not mean that cultural diversity and human dignity are not compatible. According to ROBERTO ANDORNO "*human dignity and cultural diversity are not only compatible but that dignity is the necessary precondition for the prima facie moral duty to respect the cultural specificities of each society*". However it is clear that when certain cultural practices

[205] Susan M. Shell, Chapter 13: Kant's Concept of Human Dignity as a Resource for Bioethics at http://bioethics.georgetown.edu/pcbe/reports/human_dignity/chapter13.html (consulted on 25 May 2013).
[206] Misztal, 2013, pp. 107-108.
[207] Rahman & Toubia, 2000, p. 21.
[208] Beylevel & Brownsword, 1998, p. 663.
[209] Hughes, 2011, pp. 2-9.

such as FGM are in conflict with the concept of human dignity and they cannot be tolerated on the ground that they reflect the cultural specificities of a certain society.[210]

89. The case of MC is more controversial. MC is indeed a stable and uniform practice in the West but this does not make it moral or dignified.[211] It has indeed common features to FGM, however it differs in the severity of most forms, the social message and the religious motives behind it.[212] KANT'S doctrine of the dignity of the person proclaims that the body is not at the disposal of the person, since the body is not a mere thing. Violating the integrity of the body means violating the dignity of the person. Respect for the integrity of the body is part of the respect owed to others and ourselves as rational creatures. KANT'S main prescriptions are to maintain the integrity of the body as a purposive organism and to respect the humanity of the person.[213] The question is thus however if there is a violation of the physical integrity in the case of MC. Under Chapter IV B c) it was explained that there is no clear cut answer on this as there should be made a balance between freedom of religion, parental choice and the right to physical integrity. It is also important to notice that both Judaism and the Islam (the two religions according to which MC is obliged) stress the importance of the inviolability of the body and that bodily integrity is a central notion in both religions. Human dignity constitutes a significant part of human's moral existence.[214] The reason why they consider MC not be a violation of the body and of human dignity is that it is dictated by God's law. Not being circumcised would affect the Jewish and Muslim identity in the deepest sense. For them the foreskin is considered an imperfection whose removal is necessary to reveal the body's ideal form. It is thus necessary to contribute to the integrity of the body. The principle of bodily integrity is something natural and instinctive, a correlation between MC and the violation of the body does just not exist in both religions. [215] According to DEKKERS et al. bodily integrity is thus not an objective principle but a principle that is prima facie binding. It can thus be overridden by

[210] Andorno, 2013, pp. 137-138.
[211] Brusa & Barilan, 2009, p. 473-474.
[212] Rahman & Toubia, 2000, p. 21.
[213] Dekkers, Hoffer & Wils, 2005, pp. 186-187.
[214] Alahmad & Dekkers, 2012, p. 3; Dekkers, Hoffer & Wils, 2005, pp. 186-187.
[215] Alahmad & Dekkers, 2012, p. 4; Dekkers, Hoffer & Wils, 2005, pp. 186-187.

competing moral obligations, such as obeying God's law. It also entails that it is not generally recognized as a principle that is relevant in a particular situation, i.e. male circumcision for religious reasons.[216]

90. Another reason why MC is more accepted in western society is probably the fact that western societies see themselves more as cultureless or only lightly cultural. Others, like immigrants are culture bound.[217] Western Society presumes that immigrants are under the influence of their cultural traditions, in contrast to the alleged rational actors of the West.[218] The western world sees women subjected to FGM as victims who need to be saved from their culture whereas MC in the western world is framed more as a responsible health and hygienic choice. This is also the case of female genital surgery (FGS) on western women. Western women are seen as autonomous and as being able to make free, empowered and authentic choices to undergo FGS. Apparently they are, in contradiction to e.g. African adult women considered more capable and independent to make a free choice about their genitals. It is not a cultural thing but it is taking consciously responsibility for their psychological responses to unacceptable embodiment as FGS is couched in terms of therapeutic psychological benefit.[219] The transition from FGM to FGS which to a certain extent basically entails the same intervention is apparently explained on basis of the disappearance of any cultural accountability. Opposed to FGM, FGS is immersed in an atmosphere of self determination whereas however one can question this 'voluntariness'. Because 'modern' western women surrender to FGS under the influence of a particular social pressure.[220]

[216] Dekkers, Hoffer & Wils, 2005, pp. 186-188.
[217] Wade, 2011, pp. 521-522.
[218] Volpp, 2000, p. 113.
[219] Kennedy, 2009, pp. 211, 223-224.
[220] Even if this particular social pressure is not similar to the social pressure on "traditional" women at the mercy of FGM, one cannot deny that a certain social influence is at stake.

D. Interim Conclusion

91. Universalism of human rights means that human rights belong to all human beings regardless of their sex, race, religion, …[221] This means that same standards should be applied to same practices.[222] Many advocates against MC, who see similarities between FGM and MC, base their reasoning on the principle of universalism of Human Rights. So if FGM and MC would be considered comparable or even similar why is it exactly that FGM is seen as a Human Right violation and MC not?

Should the similarity between the two practices not lead to the consequence that MC should be abolished in the same way as FGM ought to be abolished, or on the contrary that FGM should be tolerated like MC is? This last position is of course completely outrageous and can never be an option.

92. Conversely the abolishment of MC on the basis that it is comparable with FGM lately gains more and more advocates. Even if one accepts that both practices are comparable are even similar yet these practices show significant differences, namely:

- Whereas a number of health benefits can be attributed to MC, this is certainly not the case with FGM, which only endangers the right to life/health of women and girls.
- Whereas MC is often practiced on the basis of religion, FGM mainly is on a cultural basis, the first always being considered a much more acceptable fundamental than culture.
- Whereas MC has nothing to do with suppression/discrimination of men, this seems to be one of the main motivations for FGM.

93. But as demonstrated before those three reasons are in themselves disputed and non equivocal. If it is then so that there is not enough clarity about the potential harmful effects of MC comparable to FGM, why is it than that even the most harmful types of MC are being tolerated whereas the mildest forms of FGM are being prohibited and

[221] Holtmaat & Naber, 2011, pp. 12-13, 42-43, 89.
[222] Van Den Brink & Tigchelaar, 2012, p. 437.

rejected by the western world. Even a prick or nick in the clitoris in the context of FGM is considered in the Western world as a barbaric tradition.
For what reason, western society makes an issue of just pricking or nicking female genitals but has no major objection against MC even in the mostly grossly forms? Moreover, they are not just fine with MC but western society even seems to have accepted female genital cosmetic surgery, which apparently makes his entry in western society without any major social or legal protest. Evidently western women, in contradiction to e.g. African adult women are considered to be more capable and independent to make a free choice about their genitals. What is the justification that means that western society has the right to different perceptions about their own practices in contrast with foreign practices? What are the foundations of this difference in the freedom of choice?

94. This brings us close to the comprehensive conclusion of this dissertation, which is that circumcision, both female and male can only be approached and explained from a cultural point of view. Both traditional and western societies seem to consider MC as cultural justifiable. Western society categorically rejecting FGM, considering women victims of their traditional cultural background, seems to be lenient toward FGS under the argument that western societies see themselves more as cultureless or only lightly cultural. However on the one side this seems to be a circular reasoning this cultureless status of western society being exactly a characteristic of this society and thus an exponent of culture. On the other side this status does not seem as cultureless as alleged for there is much so be said that modern western women are in a certain way also

Chapter VI: Parent's rights vs. children rights in the case of (religious) MC: A right to an open future?

95. In this final chapter I will balance the parent's rights against those of their children with regard to circumcision and this with the focus on freedom of religion for children and their right to an open future.

Whereas this reasoning is applicable both to MC as FGM, this approach is made from the MC angle only for FGM is in every way to be considered as a mutilation and never justifiable.

A. General

96. Previous dominant historical approaches where children were seen as objects of charity or as property belonging to the families cannot be considered as worthy anymore. Nowadays children have to be considered as being full and complete persons, equal in value and deserving of as much respect as adults.[223] The child becomes an active subject of rights and the parental rights should be understood as parental responsibilities towards the child.[224]

According to article 1 CRC *"a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier."* The convention defines a child thus as a person under the age of 18 unless the laws of a particular country set the legal age for adulthood lower. However the Committee on the Rights of the child has encouraged states to review the age of majority if it is set below the age of 18.[225]

However it is also widely accepted that children lack adequate reason to make many important decisions. According to AMY GUTMANN "*children cannot be considered to be rational beings, that is people whose present values and preferences demand respect or whose future values can provide a discernible, independent standard for justifying our*

[223] Best interest of the child meaning and application in Canada, 2009, p. 5 at http://rightsofchildren.ca/wp-content/uploads/bic-report-eng-web.pdf (consulted on 17 June 2013).
[224] United Nations Children's Fund, *Implementation Handbook for the Convention on the Rights of the Child*, Geneva, 2007, pp. 77, 232.
[225] Fact sheet: A summary of the rights under the Convention on the Rights of the Child at http://www.unicef.org/crc/files/Rights_overview.pdf (consulted on 1 July 2013).

present actions toward them." Children are thus not able to make rational decisions themselves, which however does not entail that they have no rights themselves. It is necessary that they are enabled by someone to become adults who are capable of living a free future.[226] This right to take decisions becomes gradually weaker as children's decision-making capacities will increase as they become older.[227] In this context reference can be made to article 12 CRC (right to be heard), children have the right to express their views and have them taken seriously in accordance with their age and maturity. It is a fundamental right of the child and it is an aspect of human dignity, as it is important to be involved in decisions that affect them, consistent with our levels of competence.[228]

97. It is traditionally held that parents are thought to be best placed to educate their children and make decisions for them for various reasons. This is also stated in article 5 of the CRC: article 5 *"State Parties shall respect the responsibilities, rights and duties of parents , ……., to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."* Also the preamble to the CRC emphasizes the importance of a family structure and parental guidance: *"... the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community"* and *"... the child or the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding".*

The question is however whether parents possess parental rights to subject their children to (religious) MC? Obtaining a balanced consent from the child itself not being possible, the question remains whether parents have the right to give permission for the procedure?

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[226] Gutmann, 1980, pp. 338-339; O'Neill, 1988, p. 445.
[227] Brock, 2005, p. 382.
[228] Unicef, *Every Child's Right To Be Heard: a Resource guide on the UN Committee on the Rights of the Child General Comment no.12*, save the children UK, London, 2011, pp. vi, 1-2.

B. Justifications for parent's rights

98. The most simple justification of parental rights is what J.S. MILL would describe with the term (i) '*dead dogma'*, which describes a belief that has gone unquestioned for so long and to such a degree that persons have little idea why they accept it or why they continue to believe it.[229] Parents have always traditionally held such rights, so it is simply not questioned anymore that they possess those rights.[230]

One of the oldest basic justifications of parent's rights is to see the child as (ii) the property of the parent. The child is the product of material and labour supplied prenatally by the mother. As it is a product of their parents it is seen as the natural possession of the parents.[231] However one is not dealing with a simple product but with a person and the fact that the child is "theirs" does not imply that is should be viewed as their property. This "theory of property" was abandoned around the late nineteenth century and it is now generally accepted that children should be respected as distinct persons with their own rights.[232]

It is mostly agreed that parents know what is in the (iii) best interest of the child as it is very likely that they care more than any other adult about their children's well being. Children being considered incapable of making rational, informed decisions about important aspects of their lives, the parents have to step up and make those decisions in the best interest of their child.[233] Parents will also generally know best their children's needs and interest, so that they can decide what is best for them.[234] It is also agreed upon by many psychologist that parental upbringing satisfies the children's needs best, especially the need for affection.[235]

99. In the CRC reference is also being made to the parent's responsibility and best interest of the child. Art 18(1) CRC states, *"Both parents have primary responsibility for the upbringing of their child and "the best interests of the child will be their basic*

[229] Van Howe, 2013, p. 1.
[230] Dwyer, 1994, p. 1424.
[231] Schoeman, 1980, p. 12.
[232] Brock, 2005, p. 384; Prusak, 2008, p. 274; Dwyer, 1994, p. 1426.
[233] Dwyer, 1994, pp. 1427-1428.
[234] Brock, 2005, p. 384.
[235] Gutmann, 1980, p. 344.

concern". What exactly has to be understood as the 'best interest of the child' is not clear-cut. This will vary from child to child and parents may have different views on what are particular child's best interests. The articles in the CRC can therefore help and make the concept less subjective.[236] Any given interpretation of the best interests must always be consistent with the spirit of the entire Convention and with its emphasis on the child as an individual with views and feelings of his or her. The wording of the article 3 first paragraph which states that "*the best interests of the child shall be a primary consideration*" indicates that the best interests of the child will not always be the single, overriding factor to be considered. It is possible that there are competing or conflicting human rights interests, for example between children and adults (parents). However it should always be demonstrated that children's interests have been explored and taken into account as a primary consideration.[237]

100. Another justification, which is less common, is that parents have child-rearing rights in order (iv) to protect their own interests. It is a way of achieving a form of human fulfillment for the parents as raising children is for many parents their greatest good, their highest accomplishment, their most important emotional experience and a concretion of their most important beliefs and values.[238] The relationship that arises between a child and its parents is one of intimacy. The establishment of this relationship is often one of the primary reasons why adults want to have children. This relationship is solely possible if the parents have privacy and autonomy over the relationship they have with their children. It is a way of finding meaning in life. Parental rights give the possibility to have this intimate relationship, which is free from scrutiny and control and contributes to the fulfillment of the parents as a person.[239]

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[236] United Nations Children's Fund, *Implementation Handbook for the Convention on the Rights of the Child*, Geneva, 2007, pp. 77, 233.
[237] United Nations Children's Fund, *Implementation Handbook for the Convention on the Rights of the Child*, Geneva, 2007, pp. 36-38; CRC on best interest of the child at http://www.kinderrechte.gv.at/home/upload/crc_on_best_interest_of_the_child.pdf. (consulted on 18 June 2013).
[238] Dwyer, 1994, pp. 1439.
[239] Schoeman, 1980, pp. 14-19.

C. Limitations on Parental Rights: the Right to an Open Future

a) What is the Right to an Open Future?

101. Every person has right to autonomy and the right to make significant decisions about their lives for themselves according to their conception of the good life. They need to have the possibility to carry out those choices without interference of others.[240] It is illegitimate to exercise extensive control over another (non-consenting) person.[241] Is it then allowed that parents have far reaching rights over their children, which have the possibility to affect their further lives especially after childhood?
According to FEINBERG the answer is clearly no. He is the originator of the right to an open future theory, which means that children possess "anticipatory autonomy rights". Those rights are violated when children's future options are being prematurely closed. It is necessary that the child is sent into the adult life with as many open opportunities as possible, which will maximize his chances for self-fulfilment.[242] According to this theory parents are thus not allowed to make decisions in name of their children that will affect their further life and therefore thus close different possibilities.
FEINBERG claims that there exists four kinds of rights. Firstly there are rights that both adults and children have (e.g. right not to be killed). Secondly there are rights that are only belonging to children, which he calls 'dependency rights'. These are rights such as right to food, protection, shelter and in respect of which the child is thus dependent on others. Thirdly there are rights, which only belong to adults such as the free exercise of religion. Lastly there are the rights-in-trust, which need to be saved for the child until he is an adult as the child is not yet capable to exercise these rights. If these rights-in-trust are being violated it would mean that when the child is an autonomous adult, certain options will already be closed to him.[243]

102. The key point for FEINBERG is that parents offer their children as many options and opportunities as possible so that the child can make up its own mind from this

[240] Brock, 2005, p. 382.
[241] Dwyer, 1994, pp. 1405.
[242] Mills, 2003, p. 499.
[243] Davis, 1996-199, pp. 562-563; Lotz, 2006, pp. 538-539.

widest array of options and define what entails for him the concept of the good life.[244] As FEINBERG says: " *let all influences ... work equally on the child, to open up all possibilities to him, without itself influencing him toward one or another of these. In that way, it can be hoped that the chief determining factor in the grown child's choice of a vocation and life-style will be his own governing values, talents and propensities*."[245]

Hereby FEINBERG doesn't mean that parents are not able to exercise any rights over their children. Paternalism in raising children will always be necessary and inevitable as there are times that children cannot evaluate their long-term interests. They must thus also be protected from their own immature and unformed judgment. The main reason for the acceptance of the interference of the parents is precisely to preserve children's future options and prevent them for making irreversible decisions.[246] The parental rights are thus always limited by the child's right to an open future.

b) Right to an Open Future applicable to (religious) MC?

103. Question is if it is acceptable that parental rights are able to justify MC on boys who are too young to give consent to the procedure?[247] The issue is thus whether (religious) MC is to be abolished on the basis of a right to an Open Future and if this abolishment would be justified? Has MC the potential of prematurely closing certain options or opportunities for the child when it enters adulthood? Will it determine the child's concept of the good life in such a way that it is not able anymore to find its own life-style independently from the parent's values?

More especially I will look at the balance between the parent's rights to raise their child within a particular religion and thus apply MC in name of this religion and the child's right to an Open Future.

Religious freedom of the parents

104. Parents have important parental rights in relation to the religion of their child (art. 14.2 CRC and Article 2 of Protocol no. 11 to the ECHR). The parent's right of

[244] Davis, 1997, pp. 95-96.
[245] Feinberg in Davis, 1997, p. 97.
[246] Darby, 2013, p. 2.
[247] Merkel & Putzke, 2013, p. 1.

religious freedom entails also that parents have the right to raise their children in a religion or philosophy of their own choosing.[248] Article 18 ICCPR requires respect for the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions.

Interfering with parents' religious thoughts for their children could lead to disruption of familial harmony and the relationship between the parent and child can be endangered. Religious groups also have to offer a variety of benefits for their members and to deny the liberty of the parents to introduce the child into their religion would deny them those benefits. Religion can be experienced as a source of moral strength and could give life meaning and structure.[249] Parents should thus be permitted to raise their children according to their religion and transmit this religion to them.[250] They have a right to autonomy and privacy, which entitles them to take important decisions and exclude others from scrutinizing those decisions.[251]

However parents are not the only ones who have the right to freedom of religion. Children themselves also have this right as is stated in article 14 CRC. Parents have the right to provide direction but this direction needs to be consistent with the child's evolving capacities. It is also necessary that the child's view is taken seriously.[252]

Is MC then a procedure, which determines the religion of a child in a too explicit way, by not leaving the option open for the child to refrain from it as an adult and by not taking into account his evolving capacities? Does MC thus conflict with the future

[248] KNMG, 2010, pp. 14-16.
[249] Morgan, 2005, p. 376.
[250] Van Howe, 2013, p. 3.
[251] Schoeman, 1980, p. 11.
[252] United Nations Children's Fund, *Implementation Handbook for the Convention on the Rights of the Child*, Geneva, 2007, p. 188; so recommended the Committee of the rights of the child on a reservation made by the Holy See, which stated that "*it interprets the articles of the Convention in a way which safeguards the primary an inalienable rights of parents, in particular in so far as these rights, concern education, religion, association with others and privacy*", that "*…. The rights and prerogatives of the parents may not undermine the rights of the child as recognized by the Convention, especially the right of the child to express his or her own views and that his or her views be given due weight*".
Committee on the Rights of the Child, Concluding observations on Rights of the Child: Holy See, CRC/C/15/Add.46, paras 7 &13.

autonomy of the child to implement their own life plans (religion) when they reach adulthood? [253]

Which options would be closed when MC is being performed on the child?

105. MC has the possibility of limiting certain opportunities, which may have been available for the adult when he was not circumcised. I will discuss the two main opportunities that may be lost, namely the right to determine ones own religion without being irreversibly marked for the rest of their life and the possible decrease of sexual pleasure.

106. I will start with the reduction of (i) sexual pleasure. This argument is applying equally to religious and non-religious circumcision. As already explained under chapter IV B e), there is a possibility that MC can diminish sexual sensation as MC removes 33 to 50% of the penile skin, and nearly all of the penile fine-touch neural receptors. Circumcision can thus adversely affect sexual function mainly because of a loss of nerve endings and complications of the surgery.[254] However there is no consensus about the possible negative effects of MC on sexual pleasure as some believe that the sensitivity of the penis differs only little between circumcised and uncircumcised men. Some research[255] has also found no association between circumcision status and failure to enjoy sex.[256] According to these studies circumcision does not appear to have adverse, clinically important effects on male sexual function in sexually active adults who undergo the procedure. It can thus not be said with any certainty that MC has any adverse effect on sexual arousal nor can it be excluded.

Does MC then limit the right to an open future of the child in the case of sexual pleasure? Is the non consensus on the issue sufficient to limit the parental rights? It might seen appropriate to decide that as long as MC influences in some way sexual pleasure the decision has to be left to the subject of the procedure. Especially

[253] Darby, 2013, p. 2.
[254] Kim and Pang, 2007, p. 619; Lang, 2013, pp. 1-2.
[255] Collins, Upshaw, Rutchik, Ohannessian, Ortenberg & Albertsen, 2002, pp. 2111-2112; Fink, Carson & DeVellis, 2002, pp. 2113-2116.
[256] Johnson, 2013, p. 2; Morris, 2007, pp. 1147, 1154-1155.

considering the traumatic experience apparently associated with this surgery and the not excludable option of influencing sexual pleasure by the intervention one could be inclined to say that there is good reason to postpone the moment of decision until the subject has reached the age of reason, leaving the motives (religious not to say the least) to be fulfilled in order to go ahead with the operation to him. However taking into account the social impact of religion this is not as obvious as it seems (cfr. n°. 107).

107. MC has also as a possible effect that the child does not have the option or opportunity anymore to (ii) change his religion when entering adulthood without being irreversibly marked for the rest of their life. MC changes the body permanently and irreparable[257] and will probably always be linked to the religion of his parents and has thus as a consequence that it allegedly complicates the child's interest in deciding his religious affiliation independently later in life. The option has been removed because his parents wished to determine his religion.[258] The adult's right to freedom of religion might thus be violated by the religious upbringing he received. The religious parents introduce the child into a form of belief that cannot be modified in adulthood as MC is an irreversible practice. According to the right to an open future the parents must promote and protect the interest of the child whose identity is unknown.[259] By subjecting the child to MC they determine a big part of the identity of the child for the rest of his life.

108. However is it at all possible to postpone a religious decision until the child is mature enough, to make his own decision in this regard? According to the right to an open future, as many opportunities as possible should be available for the child. How can this work in the case of freedom of religion in general? According to MILLS this is

[257] Restoration of the foreskin is however possible, where the remaining shaft skin can be stretched to form a pseudo-prepuce. However this restoration can never bring back the unique features of the double-layered foreskin. It is thus not possible to actually restore a lost foreskin. A natural foreskin contains specialized nerve endings, muscles and blood vessels that are While to some degree these functions can be recreated, once the original tissue is cut off and thrown away, it can never be fully recovered. Johnson, 2013, p.2; Circumcision in formation and research pages (CRIP), Foreskin restoration at http://www.cirp.org/pages/restore.html (consulted on 21 June 2013).
[258] Darby, 2013, p. 4; Dwyer, 1994, p. 1434.
[259] Morgan, 2005, pp. 367-371.

simply not possible. She gave the example of a family that introduces his child to a full range of religions by visiting different religious services each week and reading about the various beliefs held by each religious group. However much MILLS agrees that this is a very admirable thing to do, it is not what is religion is about. The child will not experience how it feels to belong to a certain religion. As MILLS puts it " *The experience of belonging to a religion is simply not something you get in hour-long stretches of reading, or by attending a single session of worship, for several reasons*".[260] In both Islam and Judaism MC plays an important role and is often seen as a mark of belonging to the religious community; especially for Judaism[261] is it is seen as a necessary constituent of belonging to the religion. For the parents who adhere to the Jewish belief it would be very difficult, if not say impossible to postpone this practice. For them, MC is a way of religious belonging and the practice is closely linked to Jewish identity. It can be considered as one of the most important religious practices. Postponing this would mean for the parents that they cannot educate their children in accordance with their own beliefs and convictions. They are not able to transmit their conception of the good-life.[262]

109. Moreover an inverted risk has to be recognized. If parents would decide to leave the religious option open for the child by not practising MC, the chance might exist that they - by precisely doing so - would close the option of adhering to this religion as an adult. I will elaborate on this further with the interesting example of the famous *Wisconsin vs. Yoder* case.[263] This case dealt with the objection of the Amish community to formal education of their children beyond the eight grade. According to Wisconsin law formal school was mandatory for all children until they reached the age of sixteen. The Amish claimed that the values taught at high school were marked in variance with the Amish values and the Amish way of life. In their view secondary school education would be an impermissible exposure to a 'worldly' influence in conflict with their

[260] Mills, 2003, pp. 501-502.
[261] Where there is not a fixed age for circumcision with respect to the Islam, the same cannot be said in Judaism where it is absolutely an obligatory requirement that the child is being circumcised on the 8th day after birth.
[262] Heimbach-Steins, 2013, pp. 7, 10-11.
[263] Wisconsin v. Yoder, 406 U.S, 1972.

beliefs.[264] In the end, the Supreme Court concluded that the additional two years of schooling that would be required of Amish children would interfere with their "*religious development ... and ... integration into the way of life of the Amish faith community*."[265] One of the main reasons for the court to decide in favor of the Amish community was the fact that sending their children to school after the 8th grade would potentially destroy their community, as it was situated in a crucial and formative adolescent period of life.[266]

The same reasoning also applies in the case of religious education if the right to a specific religious upbringing would no longer be accepted under the invocation of the right to an Open Future. Just as it would be more or less impossible for a child who has received regular high school education to choose to remain or become Amish and thus foreclose this possible future to become a content member of the Amish community, it would also be more unlikely not to say impossible for children in general to adhere to a religion when becoming an adult without being reared in that specific religious way.[267]

110. It is not without reason that many religions obligate different rites of initiation such as baptism and MC on children, as children are of vital importance to religion. No religion will survive if it is not able to raise coming generations as believers.[268] Agreed that most forms of religious upbringing will limit the choices that children are likely to consider as adults but a neutral upbringing that is open to all religions and where no values specific to a certain religion will be passed on will also close the children's mind to some potentially desirable conceptions of the good life.[269] Religion can form a positive aspect in children's lives; it gives them the possibility to experience religious belonging and to become acquainted with religious expression at an early age. It can be considered to be an element to be integrated in the conception of the well-being of the child.[270]

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[264] Gutmann, 1980, p. 347; Winconsin v. Yoder, 406 U.S., 210-211.
[265] Bybee, 1996, p. 922; Winconsin v. Yoder, 406 U.S., 218.
[266] Davis, 1996-1997, p. 564; Winconsin v. Yoder, 406 U.S., 211-212.
[267] Davis, 1997, p. 96.
[268] Schiratzki, 2011, p. 42.
[269] Gutmann, 1980, p. 352.
[270] Heimbach-Steins, 2013, p. 9.

111. After considering all of this, the main question remains thus if MC could be restricted on basis of the right to an open future of the child. The main problem with MC in this aspect is that it is an irreversible act; it alters the body of the child permanently. It eliminates possible functional tissue and it is a physical intrusion into someone's body without consent (I will return to this point later).[271] The parents deprive the child of having an intact penis, but does this also mean that they also do limit the options of the child to adhere to another religion or no religion at all at a later mature age or in adulthood? MC is not only common in religious communities but is also performed for non-religious reasons (most importantly for medical and hygienic reasons), which would mean that even if the boy on a later age doesn't want to belong to the same religion as his parents, he still can decide to apostate from his faith. How considerable the importance of MC is for the Jewish and Islamic religion yet it is not exclusive to these religions. This allows the conclusion that MC, despite the irreversible physical intervention it stands for, does not compromise the child possibilities unequivocally on a later age to change this religion.[272]

112. Another important issue as I already stated is that the chances that a child reared without any clear religion will adhere later to that religion is probably even more plausible in religions that require MC. As already described under chapter IV B a) there are compelling medical reasons to circumcise a person during infancy. Following benefits occurs: postoperative complications are lower, surgical ease, the speed of the operation, long healing process that generally results in a long period of having no sexual relations and the costs for the operation that can add up. Being circumcised during infancy would avoid the additional cost associated with adult circumcision.[273]

[271] Merkel & Putzke, 2013, p. 2.
[272] Fateh-Moghadam, 2012, p. 1140.
[273] MAZOR, 2013, pp. 2-3; an other argument that is made by MAZOR is the fact that the chance that a child from religious Jewish parents would himself choose to be circumcised are extremely high. He assumes thus that these children are very likely to choose for circumcision in adulthood, so that it is in their best interest to circumcise them as infant as this would avoid all the additional costs of adult circumcision. (p.6)

Adult men have thus more barriers that can prevent them from getting circumcised.[274] It is fair to state that the choice the parents face is markedly different from the choice the child would face if he would wait until adulthood. This fear for circumcision that can exist during adulthood could thus entail that it would be very unlikely for men to show interest in a religion, which requires MC. By choosing to keep one option open (no MC on basis of freedom of religion), the chance exists that you close another option for the child (considerably diminishing the option to adhere to Judaism, Islam).

113. It is thus simply impossible to keep all options open for the child, as it will always close automatically other options.[275] A life where all encumbering beliefs and values must be revocable all the way down and where unencumbered choice among the multiple conceptions of the good life is the requirement is not possible or even recommendable.[276] As PRUSAK and SANDEL say "*whether a person who is so unencumbered is not an ideally free and rational agent, but instead a person wholly without character, without moral depth, all too free from the claims of conscience*".[277] And PRUSAK again "A *child fundamental interest is to have a future worth living, not just principally open*".[278]

Lack of consent of the child

114. However as it is my personal opinion that the right to an open future is not a solid basis on which to abolish MC, this does not, in my estimation equate to a belief that MC is a justified practice *per se*. According to the AAP Committee on Bioethics "*only patients who have appropriate decisional capacity and legal empowerment can give their informed consent to medical care. In all other situations, parents ... provide informed permission for diagnosis and treatment of children with the assent of the child whenever appropriate*."[279] MC does not entail any necessary medical treatment so according to this committee it is better to wait with this practice until the child is fully

[274] Morris et al, 2012. pp. 2-15; Benatar & Benatar, 2003, p. 37.
[275] Mills, 2003, p. 499; Lotz, 2006, p. 540.
[276] Prusak, 2008, pp. 277-279.
[277] Sandel, 2005, p.167 in Prusak, 2008, pp. 277-279.
[278] Prusak, 2008, p. 288.
[279] American Academy of Paediatrics Committee on Bioethics, 1995, p. 314-317.

able to provide his own consent. The consent of the individual himself can thus only permit MC, as no infant is able to provide this consent it is necessary to wait until he is mature enough to give informed consent.[280] Also according to the AAP Committee on Bioethics "*only patients who have appropriate decisional capacity and legal empowerment can give their informed consent to medical care. In all other situations, parents … provide informed permission for diagnosis and treatment of children with the assent of the child whenever appropriate*."[281] MC does not entail any necessary medical treatment so according to the committee it is better to wait with this practice until the child is fully able to provide his own consent. The consent of the individual himself can thus only permit MC, as no infant is able to provide this consent it is necessary to wait until he is mature enough to give informed consent.[282]

115. MC is still a medical procedure, which normally requires the consent of the person. Every person has the right to be fee from non-consensual invasion of his bodily integrity.[283] Infants however do not have the capacity to give full informed consent, that is why they parents have the right to give a proxy consent in the name of their children. Save on mandatory grounds of a medical nature MC as approached in the present context of this dissertation has not the function of treating any present disease, deformity or injury.[284] It is solely based on religious reasons or (disputable) future medical benefits.

Parent's rights do not enable them to demand physical procedures against their child's best interest. However in determining this best interest one has to look at the child's social and cultural circumstances. When a child lives in a community where MC is generally practiced and is seriously at risk to be socially excluded because of not being circumcised this can be considered to be against the best interest of the child. More especially, in complicating the individual's search for identity and sense of belonging.[285] Parents are always required to proceed in accordance with their child's

[280] Svoboda, 2013, p. 3.
[281] American Academy of Paediatrics Committee on Bioethics, 1995, p. 314-317.
[282] Svoboda, 2013, p. 3.
[283] Svoboda, Van Howe & Dwyer, 2000-2001, p. 63.
[284] Svoboda, 2013, p. 2.
[285] British Medical Association, 2004, p. 261.

best interest. So it was decided by the Supreme Court of the United States that "*Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves*."[286]

Therefore a balanced consideration of the best interests of the child embedded in the social context in which it will grow to adulthood seems to be the solution to this delicate matter.

[286] Svoboda, Van Howe & Dwyer, 2000-2001, p. 84-85; Prince v. Massachusetts, 321, U.S. 158 (1944). the Supreme Court rejected a parent's challenge to a state statute forbidding children from soliciting for religious purposes in public place. The Court found that protecting children from the dangers inherent in preaching and soliciting for religious purposes on the street was an appropriate goal for the state at http://berkleycenter.georgetown.edu/resources/cases/prince-v-massachusetts?q= (consulted on 22 June 2013).

CONCLUSION

116. Universalism of human rights means that human rights belong to all human beings regardless of their sex, race, religion, …[287] This means that same standards should be applied to same practices.[288] Many advocates against MC, who see similarities between FGM and MC, base their reasoning on this principle of universalism of Human Rights.

On closer examination however these practises are not to be considered entirely similar. The justification of the practice of MC compared to the practice of FGM seems to be based on the potential although at times disputed health benefits ascribed to the first and the total absence of any benefit to the latter. In the case of FGM it is clear that this practice represents a flagrant violation of the enjoyment of the highest attainable standard of health and it clearly infringes the right to be free from torture and other cruel inhuman or degrading treatment.

Meanwhile, where both a number of medical benefits and complications can be attributed to MC, the practice of MC seeks to justify her rationale in the balance between these health benefits and the complications. Consequently to make sure that those (allegedly justifying) health benefits have the highest chance to occur, keeping the complications of MC as low as possible (for otherwise potentially causing a violation of the right to health), it is important that MC should be carried out in the proper medical environment. This reduces the health complication risk increasingly which is why the WHO also strongly encourages medical circumcision against traditional circumcision.

Whereas this upcoming trend of medicalization can also be found in the case of FGM, this however can never be considered as an option to justify under the pretext to protect the right to health, as there still not only will occur health complications as it ignores the long-term complications overlooking the physical, emotional, and psychological pain that FGM inflicts on women but it also risks to lead to the legitimization and institutionalizing of the procedure ignoring the gender-based inequalities from which

[287] Holtmaat & Naber, 2011, pp. 12-13, 42-43, 89.
[288] Van Den Brink & Tigchelaar, 2012, p. 437.

the practice derives. There is simply no single benefit that can be retrieved from the practice.

The health issue is not the only difference between both practices. Both practises also stem from a different background. MC is often practiced on the basis of religion pursuant to which it takes its justification whereas FGM mainly is culturally inspired which is considered a much less justificatory basis. Further, MC has nothing to do with suppression/discrimination of men, whereas this seems to be one of the main motivations for FGM.

Apparently however these three issues related to circumcision (health, religion and discrimination) remain in themselves disputed and non-equivocal.

If it is then so that there is not enough clarity about the potential harmful effects of MC comparable to FGM, why is it than that even the most harmful types of MC are being tolerated whereas the mildest forms of FGM are being prohibited and rejected by the western world?

The main difference between both practices lays in the fact that MC has its own tradition in western society whereas FGM is being introduced in western society trough immigration. The comprehensive conclusion is that both FGM and MC can only be approached and explained from a cultural perspective. Practices can never be abstracted form the wider society and make different unequal claims on it. As immigrants have a rather weak status in western society so have their minority claims. They must thus integrate into the wider society and should not hold on their way of life. MC is a practice from within the western society and thus considered to be more just and acceptable, for it is already part of the society's core values whereas FGM will be assessed against those core values.

However those core values are not *per se* in it self moral. That is why they need to be measured against the concept of human dignity. It is generally accepted that FGM is against the concept of human dignity as it violates different human rights. To the contrary MC is more controversial as placed in his religious context it has an important symbolic value of involvement in a community as part of the child's identity and consequently precisely an exponent of human dignity.

Finally the question whether MC should be restricted on basis of the right to an open future of the child on basis of the physical irreversible character of the intervention, deserves a blunt answer. If a circumcised child having reached maturity will be hesitant to change his faith, this will not find its cause in the formerly removal of his foreskin despite the irreversible nature of this intervention, but due to his religious and educational upbringing during his childhood until manhood. It is not because he as not an intact penis that he should not be able decide to apostate from his faith and it is to be concluded that MC as a principle does not compromise the child possibilities unequivocally on a later age to change this religion.

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