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A CONTROVERSIAL CUT

A comparative analysis of Australia and Denmark on the debate surrounding infant male circumcision

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ABSTRACT

The global infant male circumcision (IMC) debate can be emotive, sensitive and polarising. With its long presence in human history, IMC has been practiced for a range of different medical, cultural and religious reasons. There is a lack of global medical consensus as to the risks or benefits of IMC. Despite opposition to the practice, IMC is currently not banned in any country. From an international human rights law perspective, IMC is both consistent and inconsistent with certain rights that are protected in some of the major international human rights treaties (ICCPR, ICESCR, CAT and CRC). This thesis aims to investigate the rights that IMC is seemingly inconsistent with: the right to physical integrity, bodily autonomy, the consent of the child, protection from harmful traditions and physical violence, while on the other hand, rights that IMC is seemingly consistent with: freedom of religion or belief, and the cultural and religious rights of parents and children. Some of these aforementioned rights are also used to satisfy the child's best interests being taken as a primary consideration. This thesis investigates the IMC debates of two countries, Australia and Denmark, and analyses the similarities and differences between them. This thesis ultimately intends to use these similarities and difference to exemplify the difficulties in balancing the conflicting rights. As depicted in the Australian and Danish IMC debates, the uncompromisable religious and cultural importance of the practice to minority communities, the neutral stance taken by medical boards towards the practice, along with the potential for undesirable outcomes from the practice being performed 'underground' if banned, are the persuasive factors in the balancing of these rights on IMC and ultimately why no country in the world has banned IMC.

1. INTRODUCTION

Infant male circumcision (IMC) is a practice that sits at a crossroad between religion, culture, tradition, health, harm, ethics and human rights. When performed non-therapeutically, the restriction of IMC has caused significant debate around the world. IMC comes into contact with a number of different rights within international human rights law. Australia and Denmark are two geographically, historically, culturally, religiously, politically and legally different states, with different relationships to IMC respective to these backgrounds. However, the similarities in the debates within these two states are most

intriguing. This thesis aims to investigate the rights in relation to IMC within international human rights law and analyse the similarities and differences in the IMC debates in Australia and Denmark. Ultimately, it aims to determine why it is that both countries, despite their backgrounds and different social-cultural contexts, effectively have the same stance of neither condemning nor recommending IMC.

Research Questions

This thesis intends to investigate the following:

1. In international human rights law, with which rights is infant male circumcision (IMC) consistent and inconsistent?

2. In the comparison between Australia and Denmark, how does the IMC debate differ or relate?

3. To what degree do the similarities and differences in these IMC debates reflect a human rights discussion based on what was discussed in question 1 per the respective social-cultural contexts in Australia and Denmark?

For this investigation, this thesis is a desk study using a number of primary and secondary text sources. To establish definitions and the medical standpoint on IMC, it will examine national medical reports from medical boards, along with secondary medical literature. For the legal analysis, this thesis will look at legal material from sources of international law (the major international human rights law treaties, along with general comments) along with secondary materials and other literature which discuss the rights within these treaties. This thesis will also analyse legal material from regional law sources (Council of Europe and European Union) along with legal material from national sources within Australia and Denmark; constitutions, national legislation, legal journals, legal reports and reviews, and case law. When investigating public debates, this thesis utilises news articles, opinion pieces, editorials, other online materials, secondary sources from scholars, along with statements from community leaders and community boards.

1.1 DEFINITIONS

Male circumcision is the removal of the foreskin or prepuce, a piece of skin which covers the head of the penis (World Health Organization, 2018, p. 7). The procedure can be performed on neonates in the days or weeks after birth, through childhood and adolescence or in adulthood (World Health Organization, 2018, p. 7). This thesis will be focussing specifically on infant male circumcision ('IMC') and therefore not when the procedure is performed on males 18 years or older. With 'circumcision' being the well-known term for the procedure (from the Latin '*circumcidre'* meaning to 'cut around') some claim that this name for the procedure is euphemistic, with opponents proposing that it should be referred to as male genital mutilation in line with the transition from female circumcision to female genital mutilation ('FGM') (Davis, 2001, p. 489). Davis, an American professor of bioethics and religion, instead uses the terms male genital alteration ('MGA') and female genital alteration ('FGA') as these both carry less bias (Davis, 2001, p. 489). Despite there being some weight in this position, IMC will still be used as the terminology for this thesis, as this is what the procedure is most commonly known as and referred to.

With the background of therapeutic and non-therapeutic IMC explained in Chapter 1.3, this thesis will only be investigating non-therapeutic IMC, where there is no immediate medical need to perform the procedure. IMC is generally considered to be the full removal of the foreskin. However, there is precedent of foreskin removal, and then also subincision where the foreskin is removed along with an incision made from the urethra to open up the penis along the base (Cawte et al., 1966, p. 245; Jones, 1969, p. 183). This thesis will consider all types of male genital alterations within the definition of IMC, so long as it refers to the alteration of the penis, performed under the age of 18, for non-therapeutic reasons.

As this thesis intends on analysing both cultural and religious IMC, it is important to address the relationship between the two in order to develop a framework to use throughout the investigation. Lincoln, a prominent religious historian, attempts to define the 'enormously supple and elusive concept' of culture as; 'the prime instrument through which groups mobilise themselves, construct their collective identity, and effect their solidarity by excluding those whom they identify as outsiders' (Lincoln, 2000, p. 409). When discussing the role religion plays within culture, he states that, unlike ethics and aesthetics, religion is not a core component of culture. Although religion often dictates ethics and aesthetics, the defining characteristic of religion, 'is to invest specific human preferences with transcendent status by misrepresenting them as revealed truths, primordial traditions, divine commandments and so forth. In this way, it insulates them against most forms of debate and critique, assisting their transmission from one generation to another as part of a sacred canon' (Lincoln, 2000, p. 415). British cultural anthropologist Talal Asad critiques the idea of a singular concept of religion set apart from the non-

religious and secular, as being a 'Judeo-Christian idea' and not a distinction used elsewhere but imposed by Western scholars on ideologies, practices and belief systems of the rest of the world (Asad, 2009 in Rawan Abdulla, 2018, p. 105). Mariam Rawan Abdulla, a British human rights researcher, who treats culture and religion as separate categories for human rights purposes and as they exist separately in human rights treaties, while recognising the close relationship and overlap between the two (Rawan Abdulla, 2018, p. 105). The political science professor, Tahir Abbas, despite discussing the impact of religious and cultural norms on education, Abbas does not consider the effects of culture and religion as warranting a separate discussion and therefore uses the term 'religio-cultural' throughout (Abbas, 2003, p. 411). This thesis will use the framework proposed by Lincoln in that religion claims to 'transcend the human, temporal and contingent' which includes a set of practices that are informed by this discourse (Lincoln, 2000, p. 416), while culture is the prime instrument through which people construct their collective identity, and effect their solidarity by excluding those whom they identify as outsiders (Lincoln, 2000, p. 411). In situations where there is significant cultural and religious overlap, 'religio-cultural' will be used (Abbas, 2003, p. 411).

1.2 RELIGIO-CULTURAL BACKGROUND

IMC has been practiced around the world throughout history for different medical, cultural and religious reasons. There is a lack of consensus on how old circumcision is, but it is ancient with archaeological evidence in Israel dating the procedure to Neolithic times approximately 6000 years ago (Wallerstein, 1985, p. 123). Using the definitions of religion and culture in Chapter 1.1, this thesis acknowledges the relationship and overlap between religion and culture. IMC is practiced with reference to a superhuman power and to sacred scriptures, while at the same time being a cultural practice in the sense that it constructs their collective identity and effect their solidarity by excluding those whom they identify as outsiders.

1.2.1 Cultural

As the oldest continuing culture on earth, with some conservative estimates placing their culture at 40,000 years old, it is difficult to accurately determine the actual age of the IMC in Australian Aboriginal communities but the ritual is said to have been passed down for many generations and is presumed to

be a well-established tradition (Williams, 1993, p. 8). A number of Australian Aboriginal communities practice IMC, particularly in Western and Southern Australia as well as in Arnhem Land in Northern Territory. There are varying levels of IMC practiced, with conventional removal of the foreskin, but also some forms of subincisions, whereby the foreskin is removed, along with an incision made from the opening of the urethra all the way along the base of the penis down to the base of the penis to open out the organ (Jones, 1969, p. 183). Both IMC and subincision are still performed to today in certain indigenous communities (Williams, 1993, p. 10). Circumcision is also recorded in indigenous cultures throughout Oceania and the Americas. In a number of African ethnic groups, circumcision has been practiced at adolescence for millennia to signify a rite of passage (Dunsmuir & Gordon, 1999, p. 1). These practices of IMC performed at adolescence are said to have been passed down through generations as a rite of passage into manhood, a blood sacrifice, or as a test of bravery (Silverman, 2004, p. 423). Despite prevalence in some Indigenous cultures globally, along with both Jewish and Muslim communities throughout the Middle East, IMC was uncommon culturally up until the mid 19th century (Aggleton, 2007, p. 15).

In the middle of the 19th century, British doctors started recommending circumcision be performed routinely on infant boys to prevent almost every sexual dysfunction imaginable, and particularly masturbation, which at the time considered a terrible social issue causing many health problems (Aggleton, 2007, p. 19). Some advised circumcision be performed on small boys without antiesthetic, ‘as the brief pain attending the portion will have a salutary effect upon the mind, especially if it be connected with the idea of punishment’ (Aggleton, 2007, p. 19). This attitude for circumcision spread throughout the English speaking world to Australia, Canada, the US, New Zealand, and spiked around the time of the 1940s, where circumcision became routinely performed, up until the 1960s, where IMC rates started to decrease (Na et al., 2015, p. 850).

In the 1970s, statements from medical bodies in the UK advised that the procedure’s contended benefits be weighed against the contended risks, therefore withdrawing previous statements saying that it should be performed routinely and instead be left up to the decision of the child’s parents (British Medical Association, 1979, p. 1163). These statements were echoed by similar bodies in Australia, Canada and New Zealand (Australian College of Paediatrics Policy, 1983; Canadian Paediatric Society, 1982 p. 1399). However the medical bodies in the US maintain their endorsement of IMC saying that the medical benefits outweigh risks, but still would not recommend universal newborn circumcision (American Pediatrics Society, 2012, p. 355). After the 1960s, the countries who saw a revival of IMC began to see a decrease in circumcision rates from 80% in Australia in 1960s, to down to 20% in the 1990s (Circinfo, 2013), the US has seen a far slower decrease in the rate, and still to this day has the highest circumcision rate in the western world (Owings et al., 2019, p. 1).

1.2.2 Religious

In Judaism, IMC is seen as an integral and fundamental practice. Circumcision, or *brit milah* (*milah* meaning covenant) is performed to represent the covenant made between Abraham and God per the Torah (Genesis 17:10-14). The Torah states that the procedure shall happen 8 days after the boy's birth (Leviticus 12:3). Per Chapter 1.1, this connection to the superhuman power is what makes this practice religious. Within the Jewish community, IMC is seen as a fundamental part of their religion and seen as one of the core indicators of 'Jewish identity' (Niehoff, 2003, p. 89). Circumcision is seen as the Jewish male's quintessential sign of ethnic belonging and biological lineage, 'though only a small percentage of Jews today consider themselves believers in any traditional sense, nearly every Jewish male undergoes circumcision' (Korn, 2011). Goldman, an American psychology professor, discusses the changing attitudes towards circumcision in the Jewish community from a Jewish perspective, particularly the shift in Jews worldwide circumcising their children for cultural reasons rather than religious (Goldman, 2004, p. 172). When applying the definitions of religion and culture from Chapter 1.1 here, it seems that religious Jewish IMC involves a connection with a supernatural power while at the same time, cultural Jewish IMC is also practice, when it is performed to the conforming to collective identity and excluding those considered as outsiders. Some selected liberal synagogues and Jewish communities have diverted from the practice choosing instead a symbolic naming ceremony without the actual procedure, but these communities are by far the minority within the Jewish population (Oryszczuk, 2018).

Christianity has a differing relationship with IMC in comparison to Judaism and Islam. Christianity's Old Testament includes the same story of Abraham, in Genesis as discussed above. Jesus was circumcised after birth in Jewish tradition (Luke 2:21, Collosians 1:11-12). In Genesis in the Old Testament, as in Genesis in the Torah, God orders Abraham to circumcise himself and his son, and all the males continuing. Historically, Christian theologians identified circumcision as exemplary evidence that Judaism was an anachronistic religion preoccupied with physical concerns (Glick, 2001, p. 19). The Roman Catholic Church outlawed the procedure in the 11th Council of Florence in the 15th century, warning the loss of salvation for those who observe this ritual as baptism has superseded the need for IMC (Jones, 2018, p. 59). Apart from a small number of Christian orthodox churches (Coptic, Eritrean, Ethiopian) IMC is not mandated in Christianity and nowadays retains a fairly neutral stance on the procedure (Slosar & O'Brien, 2003, p. 63).

In Islam, there is reference to Abraham and the circumcision of himself and his sons, as with other Abrahamic religions like Christianity and Judaism explained above. Although it does not mention anything specifically in the Qur'an about circumcision, there is reference to the practice in the sunnah (Arabic for 'practices') of the Prophet Muhammad, as the prophet himself was circumcised, as was the cultural practice among the inhabitants of the Arabian peninsula during the time of the Prophet (Alahmad & Dekkers, 2012, p. 2). Circumcision is mentioned in the hadith, in that circumcision or *khitan* is one of the 5 practices of the characteristic of *fitra* or purity (Alahmad & Dekkers, 2012, p. 2). Unlike Judaism, where IMC is mandated to be performed 8 days after birth, age is not specified, so it generally depends on family, region and country (Marshall, 2012, p. 38; Williams, 1993, p. 6). Fiqh (Islamic jurisprudence) and Islamic scholars differ in their interpretation of scripture and their stance on IMC. Some consider circumcision to be compulsory, some consider circumcision to be recommended during childhood but obligatory only after puberty, while others consider circumcision recommended but not obligatory (i.e. the person performing the circumcision will be rewarded by God, but if not done there is no punishment or reward) (Alahmad & Dekkers, 2012, pp. 4-9). Some propose that IMC is in violation of the Qur'an; 'Our Lord, You did not create all this in vain' (3:191), and '[He] perfected everything he created' (32:7) (Abu-Sahlieh, 1994, part III s. 4). Regardless of the interpretations of religious law, IMC is widespread in the Muslim world, and they are the single largest religious group to practice IMC with an estimated circumcision rate around 90% in predominantly Muslim countries (Anwar et al., 2010, p. 59).

1.2.3 Conclusion

IMC has ancient roots in human history, from a religio-cultural perspective. IMC has been practiced by many cultures around the world for reasons including but not limited to; initiation into the community, rite of passage to manhood, preparedness for marriage, test of bravery or a blood sacrifice. Some Indigenous Australians communities practice IMC as a ceremonial initiation to manhood. Judaism considers the practice absolutely integral to Jewish identity, even in reform synagogues. For Muslims, circumcision is nearly universal among communities, however, the age of when the procedure occurs along with the direct connection of the practice with Islam is not as clear cut as in Judaism (Gatrad et al., 2002, p. 76). Christianity (apart from some orthodox churches as mentioned above) has a neutral stance on IMC. It must be determined whether Indigenous IMC would be considered a cultural or religious practice. This requires an anthropological investigation as to whether important traditions, rituals, ceremonies and practices of Indigenous Australians like IMC would come under the definition of religious or cultural, per the framework established in Chapter 1.1. Mariam Rawan Abdulla discusses the relationship between culture and religion, stating that they cannot be separated. 'The distinction

between culture and religion is not so distinct, with cultural practices becoming 'religionized' and religious ideas and spaces becoming part of the culture' (Rawan Abdulla, 2018, p. 102). She references Maddox to suggest that, 'the indigenous spiritual traditions in Australia show that the distinctions between culture and religion are problematic, since indigenous traditions see less distinction between religious and other dimensions of existence and spiritual traditions' (Maddox, 2000 in Rawan Abdulla, 2018, p. 105). It seems that the very attempt to distinguish between religion and culture and superimpose this on the untranslatable and unique Indigenous Australian culture, is in itself inherently colonialist. However, within this human rights framework, Indigenous Australian circumcision and subincision practices would likely come under the definition of a cultural practice, as it is performed to construct their collective identity and a transition into manhood, rather than to have a connection with the superhuman.

1.3 MEDICAL BACKGROUND

Despite being so widely debated all around the world, there is still no clear medical consensus on medical benefits and risks associated with IMC. On one end, there are proponents of the procedure who say IMC must be performed routinely as a public health measure with negligible risk involved, whereas others see no medical need for the operation entirely and can cause serious harm. There are also many medical opinions lying somewhere along this spectrum. The World Health Organization and UNAIDS recommendations emphasise male circumcision be considered as an additional intervention for HIV prevention in countries and regions with high rates of heterosexual HIV and low male circumcision prevalence (World Health Organization, 2007, p. 26). Circumcision has been described as the 'surgery in search for a disease' as it was commonly thought to initially cure masturbation in the 19th century, to a range of different sexually transmitted diseases in the 20th century (Reis, 2013, p. 137). Nowadays, both proponents and opponents still dispute the many contended benefits and risks of the procedure, often to support their cultural or religious stance on the procedure.

1.3.1 Proposed Medical Benefits

Some proponents of IMC claim that the benefits of the procedure significantly outweigh the risks (Morris, 2019) in that IMC can be an effective public health measure to combat penile cancer, HIV and

STDs. Generally, if cleaned as per normal bodily hygiene standards, cleanliness is not considered to be an issue (The Royal Australasian College of Physicians, 2010, p. 7; Williams, 1993, p. 22).

Appropriate analgesics for IMC are considered to be general anaesthesia, nerve block, topical anaesthetic and sucrose, as the procedure is painful for the child (Sundhedsstyrelsen, 2020, p. 42; The Royal Australasian College of Physicians, 2010, p. 7).

IMC can be performed therapeutically and non-therapeutically. The two main conditions that generally call for therapeutic IMC are balanitis, being the swelling of the foreskin and phimosis, being the inability to retract the foreskin (Richardson Gill, 2018). Phimosis and balanitis are considered therapeutic reasons for circumcision, yet are not common or severe enough to implement routinely, as they can be treated with anti-biotics, stretching of the foreskin, steroid cream, or small incisions to stretch the foreskin as opposed to a full circumcision (Shahid, 2012, p. 3).

After promising results in a randomised survey in Africa, IMC is proposed as an addition to treatments in the fight against the HIV epidemic in Africa (World Health Organization, 2007, p. 28). The trials in Africa showed a reduction in the risk of heterosexual, female-to-male HIV transmission (from 2.49% to 1.18%) in high-risk areas with a low baseline circumcision prevalence (Frisch & Earp, 2018, p. 5). Although these trials may be considered scientifically valid, they still cannot be superimposed elsewhere in the world, as countries like USA with high circumcision rates still have similar or higher HIV rates in comparison to Europe where circumcision is less prevalent, and generally more frequently transmitted among male-to-male intercourse (Frisch & Earp, 2018, p. 6).

Medical consensus is not entirely clear on circumcision reducing the risk of sexually transmitted diseases. As with the case of HIV, despite studies in Africa indicating a reduction in transmission rates for HPV and chlamydia, it is not possible to superimpose these results onto non-African countries (Styrelsen for Patient Sikkerhed, 2020; The Royal Australasian College of Physicians, 2010 p. 12).. Although urinary tract infections (UTIs) are slightly more common for uncircumcised males, it is still significantly lower than the rate of UTIs in young females, which can be easily treated with anti-biotics. Studies linking IMC with penile and prostate cancer have been inconclusive, with the former cancer being very rare, and having shown much higher correlation to lifestyle choices such as smoking or multiple sexual partners rather than circumcision (The Royal Australasian College of Physicians, 2010, p. 13).

For HIV, STD, UTIs and penile or prostate cancer claims, there is not enough medical evidence to support any clear prophylactic nature against these conditions unlike vaccines, anti-biotics and condoms (Shahvisi, 2016, p. 156). Therefore, in most western countries it's considered that IMC need not be performed routinely for therapeutical reasons. Some claim that the best age of when circumcision

is performed is contended with some proposing that when performed on young children (preferably neonates) the skin rejuvenates quicker, the child will not remember the procedure, and risk increases as the child gets older (Morris et al., 2012, pp. 10, 11). There is a consensus among most Western states that the current studies on IMC and medical benefits do not warrant the routine practice of the procedure and to instead leave it up to parents.

1.3.2 Proposed Medical Disadvantages

As per the proposed medical advantages, there is a lack of medical consensus as to whether there are significant disadvantages to IMC to warrant its restriction or ban (Styrelsen for Patientsikkerhed, 2020, pp. 77-78; The Royal Australasian College of Physicians, 2010, p. 5). In terms of potential complications, these are dramatically reduced if the procedure is performed by a doctor or a person who is medically trained, in the appropriate medical setting with sterile environment and with the appropriate anaesthesia However, in spite of this, complications can still arise from the procedure, such as; bleeding, infections, haemorrhaging, or damage to the urethral structure, however the risk of these complications is low (Styrelsen for Patientsikkerhed, 2020 pp. 77-78; The Royal Australasian College of Physicians, 2010, p. 8).

The foreskin is a highly erogenous zone with a dense number of nerve endings which some say therefore has links to a reduction of sensitivity and sexual pleasure if removed by being circumcised (Bronselaer et al., 2013, p. 6; Svoboda, 2013, p. 265). There is a lack of medical consensus on this topic and more research is needed in this area (Morris et al., 2013, p. 2653; The Royal Australasian College of Physicians, 2010, p. 7).

1.3.3 Conclusion

There is a medical consensus that the proposed benefits do not warrant the recommendation of routine IMC in countries western countries. It is also clear that medical bodies in western countries recommend the procedure be performed in the appropriate medical conditions, with appropriate anaesthetics, by the appropriately medically trained person to ensure the most desirable outcomes. However, there is no clear medical consensus on risks and benefits of the procedure as to whether this would affect the recommending or condemning of the procedure. This ultimately has human rights implications, in so far as banning of harmful practices and physical violence are concerned.

2. IMC IN INTERNATIONAL LAW

The practice of IMC comes into contact with different protections within different international human rights treaties; Universal Declaration on Human Rights (1948) ('UDHR'), the International Convention on Civil and Political Rights (1966) ('ICCPR'), International Convention on Economic Cultural and Social Rights (1966) (ICESCR), Convention Against Torture, and All Forms of Cruel or Inhumane Treatment (1986) ('CAT') and the Convention on the Rights of the Child (1989) ('CRC'). As the UDHR is non-binding and most of its core principles have been adopted into following international treaties, I will focus mainly on ICCPR, ICESCR, CAT and CRC. Within these treaties, IMC is both protected by, and in conflict with, certain Articles that can be categorised into themes. IMC could be arguably protected through rights such as the right to freedom of religion, right to culture, rights of parents and right to health. IMC could arguably violate Articles of international law treaties surrounding physical integrity and bodily autonomy, consent of the child, right to life, protection from physical violence and harmful traditions, and cruel degrading treatment. The best interests of the child as a primary consideration is addressed by both opponents and proponents of IMC, with either of the aforementioned rights used to justify this best interests consideration.

2.1 CONSISTENCIES WITH INTERNATIONAL LAW RIGHTS AND IMC

Right to Freedom of Religion or Belief

As non-therapeutic IMC is often performed for religious reasons, the procedure would therefore be consistent with a number of Articles in international human rights treaties that are concerned with protecting religious practices, namely Art 2, 18, 24(1), 27, 30 within the ICCPR and Arts 14 and 30 in the CRC.

Regarding religious freedoms, as Chapter 1.2 discusses the historical religious background of the ritual within religious communities, meaning that prohibiting or restricting IMC could therefore constitute a human rights violation as it is discriminatory in preventing specific religious groups from practicing their faith (Article 2 of ICCPR). Based on the majority of religious texts and commentaries in Chapter 1.2, there is a consensus among the majority of Muslims and particularly Jews that this ritual is

an integral part of their faith. IMC could therefore also be protected by human rights treaties in order for the child to be religious (Article 18(1) in ICCPR and Article 14(1) in CRC) along with the right of the child to be a part of a religious community (Article 27 and in ICCPR and Article 30 in CRC). The Human Rights Committee elaborates on the right to freedom of thought, conscience and religion in Article 18 of the ICCPR in the non-binding General Comment No. 22 to acknowledge the notion of worship to extend to ritual and ceremonial acts associated with different stages of life (UN Human Rights Committee, 1993, para. 4). In his country visit to Denmark, the Special Rapporteur on Religion explicitly expressed concern over the hostility towards the Danish Jewish community over a ban on IMC (Bielefeldt, 2016a, para. 26). As discussed in the Chapter 1.2 regarding the religious importance of the procedure, along with the comments of the Special Rapporteur, religious IMC would likely fall within the scope of the rights within Article 18 of ICCPR.

Right to Culture

As IMC is often practiced for cultural reasons, there are protections in international law for this practice – namely within the CRC and ICESCR. The ICESCR explicitly protects the freedom of all peoples to self-determination and to pursue their 'cultural development' (Article 1 of ICECSR). The CRC also more specifically protects the rights of the child to not be denied the right to enjoy his or her culture (Article 30 in CRC). Due to the importance of IMC to a child's cultural upbringing is integral to their acceptance into their cultural community, to adulthood, or their cultural identity (per Chapter 1.2.), that therefore IMC could therefore be protected under this Article. Regarding the protection of cultural traditions particularly in indigenous communities, General Comment No. 11 (2009) emphasises the need for states to ensure indigenous cultural practices are continued and protected, however makes the clear exclusion of practices deemed 'harmful' to the child's dignity, health and development, yet only lists female genital mutilation as an example (UN CRC Committee, 2009, para. 21-22). CRC protects the right of all people to take part in cultural life (Article 15(1) of ICESCR), for which IMC would be considered an important part of cultural life per the discussion in Chapter 1.2. The UN elaborates on the importance of a child's right to cultural life within General Comment No. 17 (UN CRC Committee, 2013b, para. 11). The ICESCR contains general clauses stating that none of the rights they recognise should be interpreted to 'destroy' any other right (Article 5(1) of ICESCR). This right effectively does not allow any practice to be performed, supported or continued if it contradicts any other right, with the example of FGM used – regardless of the practice having cultural significance, it still destroys other fundamental rights (Fisaha, 2016, p. 3). The position that this same logic applies to male circumcision could also be

proposed, in that IMC for non-therapeutic cultural reasons cannot be protected as it destroys other fundamental rights (such as those discussed below; bodily integrity, right to life, right to self-determination, right to be free from cruel degrading treatment) per Article 5(1) of ICECSR. As circumcision is both a cultural and a religious practice, there are concerns that cultural practices do not receive as robust protections from rights within human rights law treaties compared to religious practices, as described by Israeli bioethics professors Brusa and Barilan:

> 'The distinction between 'cultural' and 'religious' motivations, is common in the literature. It is implied that 'religious' circumcision deserves protection and even assistance on the grounds of respect for people's faiths and own perception of divine commandments, whereas 'cultural' circumcision is more like a habit that deserves less tolerance' (Brusa & Barilan, 2008, p. 471)

Abdulla elaborates on this by using the example of IMC and FGM and how the two practices are dealt with in the UK, referencing a case where a young girl was subject to FGM, whereby the judge found one distinction between FGM and IMC being that 'FGM has no basis in any religious whereas male circumcision is often performed for religious reasons' (Rawan Abdulla, 2018, p. 104).

This thesis would maintain although there is distinction between cultural and religious practices within human rights law, it would be likely that, in practice, a cultural practice would receive similar protections from cultural rights compared with a religious practice being protected by religious rights.

Best Interests of the Child

One of the key principles of the CRC is the necessity of States Parties to always have the best interests of the child as a primary consideration in all decision making concerning the child (Article 3). Therefore, when considering IMC, States Parties must always have the best interests of the child as the primary consideration. General Comment No. 14 elaborates on both 'best interests of the child' and 'primary consideration', whereby legislators must consider the best interests of children 'in light of the circumstances of the particular group and/or children in general' (UN CRC Committee, 2013, para. 32-40). The General Comment interprets 'primary consideration' to mean that the child's interests may not be considered on the same level as all other considerations. Parents who wish to have their child circumcised consider this practice to be in the best interests of their child, as they wish for their child to become a part of their religious or cultural community and begin their religious or cultural life though this procedure (per Chapter 1.2). The 'best interests' consideration is be used by those in favour of the procedure (considering the child's religious upbringing as primary consideration) and those against the

procedure (considering the child's physical integrity, bodily autonomy, consent and protection from physical violence and harmful traditions as primary consideration).

Rights of Parents

International human rights law protects the rights of parents (or legal guardians) to raise their child with the religious education in conformity with their own convictions (Article 18(3) of ICCPR) as well as protecting the rights of parents to provide direction to their child in the exercise of his or her right in a manner consistent with the evolving capacities of the child (Article 14(2) of CRC). As IMC involves a religious practice performed on children, this could come under the definition of 'providing direction', however due to the physical nature of the procedure, rather than something like baptism, IMC could be considered more than education per Article 18(3) of ICCPR. Since parents make many decisions on behalf of their child like orthodontics or schooling, there is a claims that protecting this right of parents to have such a culturally or religiously significant procedure like IMC performed on their child is within their rights under Article 14(2) of CRC (Foblet, 2016, p. 131). In her article on Children and Religion under Article 14 of the CRC, the Irish legal professor Dr. Sylvie Langlaude Doné criticises the CRC Committee as being inconsistent over the years with their approach towards parents directing their child in a religious upbringing, along with having a very broad understanding of the rights of the concept of evolving capacities, as it has not developed a body of coherent material (Langlaude Doné, 2012, pp. 16-18).

Right to Health

The ICESCR and CRC protect the right to health in Articles 12 and 24 respectively. These treaties codify the right of the child to the highest attainable standard of health. Proponents of IMC propose that because of the medical evidence supporting IMC as prophylaxis for a number of conditions, this therefore qualifies as a procedure that warrants protection under these Articles as IMC meets the standard of health (*American Academy of Pediatrics*, 2007, p. 585; Morris et al., 2012, pp. 3-4). However as addressed in the above Chapter 1.3 regarding medical benefits of IMC, there is no clear medical consensus regarding IMC, and it being used as a prophylaxis. Considering many of the claimed prophylactic protections offered by the procedure are for sexual diseases, it could also be said that this

procedure could therefore wait until the child is sexually active and therefore more able to have informed consent on the procedure (Janson, 2016, p. 120).

2.2 INCONSISTENCIES WITH INTERNATIONAL LAW RIGHTS AND IMC

Right to Physical Integrity and Bodily Autonomy

The ICCPR protects the right to life, liberty and security of person (Article 9(1)) which expands upon the Article 3 of the UDHR. This 'security of person' is interpreted by the UN in General Comment no. 35 to mean bodily integrity (UN Human Rights Committee, 2014, para. 9). Therefore, there is a potential conflict between bodily integrity protections under Article 9(1) and IMC, if the foreskin is considered an essential part of the body such that removing it constitutes an anatomical deficiency or causes physical dysfunction (Alahmad & Dekkers, 2012, p. 6). Some argue that the foreskin is merely an extra piece of skin that lacks value and function bearing no significance, whilst others argue that it is highly important for protection and sexuality and that IMC is a major operation leading to permanent, irreparable, anatomical, structural and functional change in the penis (Williams, 1993, p. 38). Regardless of the lack of consensus on whether there is any value in a certain part of the human body, there would be countless operations in the human body that could remove potentially 'valueless' parts of the anatomy, yet this would usually only be done when there are therapeutic driving factors with concrete medical consensus behind the operation.

The view that the 'individual person should have the final say about what happens to his or her body is consistent with classical liberal legal thinking' (Foblet, 2016, p. 144). In her Journal Article on IMC caught between contrasting views on the best interests of the child, Foblet, a Belgian lawyer and professor in social anthropology, investigates the importance of IMC as a body marker, and discusses the reasoning and validity of body modifications. She describes 'the new relationship between the human being and the body, which leaves it exclusively to the individual to make decision about his or her body' (Foblet, 2016, p. 145). On the topic of tattoos and body modifications, the differentiating factor between these practices and IMC is the religio-cultural importance of IMC to certain communities worldwide. Foblet, however, suggests a shift in social norms in recent years, away from prioritising religious and cultural rights of children and parents towards the child's physical integrity, bodily autonomy and consent, stating that:

> The tide is turning, it seems, and the social norm is gradually changing, to the point that mainstream opinion in different countries – and this is certainly true for Europe – is increasingly vehement in opposing the physical subjection of young children to surgery that does not meet the definition of medical treatment but is practised for the sake of a group (*in casu* religious) norm (Foblet, 2016, p. 143).

Intersex 'normalisation' surgery acts as an interesting point of comparison with IMC, as the procedure involves similar rights to IMC. In his article on Intersex Gender Autonomy, Paul Mason, the Commissioner for Children in Tasmania, states that intersex children (children born with atypical sex development) should have the right to decide on non-therapeutic 'normalisation' surgery on their bodies and that 'children are children first and girls and boys second'. He continues that this decision should occur when they are of 'an appropriate age' and not be taken by 'doctors, frightened parents, or dictated by culture or religion' (Mason, 2013, p. 149). Mason draws parallels to IMC with intersex normalisation surgery, and strongly favours the rights of child to autonomy, physical integrity and the child's consent. A parent choosing to have a 'normalisation' surgery performed on their intersex child would undoubtably make this decision with the child's best interests as the primary consideration. They would be concerned with the child conforming into their community, with societal norms on typical sexual development and therefore assimilation into cultural or religious communities, not unlike IMC. Elizabeth Reis, an American professor of paediatric ethics and religion, looks at the 'making of normal' by directly comparing 'normalisation' surgery of intersex children and IMC. She proposes that 'the non-therapeutic removal of healthy body parts from nonconsenting children is a human rights violation and medically unethical, just as it is medically unethical to surgically modify intersex bodies in order to make them conform to typical male and female bodies' (Reis, 2013, p. 145).

Ultimately, there are some strong arguments in favour for IMC being inconsistent with rights like physical integrity and bodily autonomy. The comparisons between IMC and body modifications, tattoos, piercings along with intersex 'normalisation' surgeries offer some interesting perspectives when considering whether IMC is inconsistent with these rights.

Consent of the Child

The CRC protects the right of a child to have a say in matters concerning them per Article 12(1). IMC could therefore violate the right of the child to have say in matters concerning them as they are not

old enough to have fully informed consent over an irreversible and permanent procedure that effects the child's bodily integrity. However, the article does include the condition that the views of the child are given due weight in 'accordance with age and maturity', therefore since the child is too young to give fully informed consent, the parents of the child are therefore able to give consent (Article 12(1) of CRC) and that children are often undergoing procedures that are consented for by their parents such as vaccinations or other surgeries. However, the distinction can be made between IMC and other vaccinations and surgeries by the clear medical consensus on the benefits it holds for the child (Janson, 2016, pp. 119-120) unlike the lack of clear medical prophylactic consensus with IMC as discussed in Chapter 1.3. Foblet makes a similar claim that many decisions are frequently made by parents on behalf of their children, in their best interests, which impact the child's development such as vaccinations or education (Foblet, 2016, p. 131). The comparison between non-therapeutic IMC and vaccinations is not, in my view, a productive exercise, as the latter does not require anaesthesia, has medical consensus on benefits to both the child and the greater public, and does not to any noticeable way effect the child in such an intimate and irreversible way. Regarding education, in the opinion of the author of this thesis, states like Australia and Denmark already go to lengths to regulate and standardise education for children. Regardless of religious schooling or parental influence, there is still a minimum level of education required for all children, regardless of the parents' wishes and how that reflects what they consider to be their child's best interests. The comparison in the end comes down to whether the harm caused warrants legal intervention until the child can consent – this is where some would argue yes and others no. Either way, this comparison with education of children does, in the opinion of the author of this thesis, hold some weight.

It would be likely that IMC could still be inconsistent with the right of the child to have a say in matters concerning them, as the procedure holds no clear overriding medical benefit for specifically being performed at a young age and therefore can wait until the child is old enough to have informed consent (Svoboda, 2013, p. 276). If performed for prophylactic reasons regarding STDs, some propose that it can instead be performed when the child is older and becomes sexually active, therefore also able to give informed consent (Janson, 2016, p. 120). If IMC is considered inconsistent with the right of the consent of the child, but then is also considered consistent with the right of freedom of religion or belief, there is a particular conflict here in relation to Judaism, where IMC must be performed on the 8th day (Chapter 1.2).

Best Interests of the Child

Per Article 3 of the CRC, states must take the best interests of the child as a primary consideration in matters concerning them. As outlined in Chapter 2.1, there is contention in determining what the 'best interests' actually are within the context of IMC. Some consider cultural or religious community belonging to be in the best interests of the child, while others consider bodily integrity, autonomy, the child's consent or protection from physical violence and harmful traditions as having more weight when taking best interests of the child as the primary consideration. It could also be argued that the 'normalisation' non-therapeutic surgery performed on intersex children may very well be performed with the parents taking what they think to be the best interest of their child as primary consideration, yet this only aligns with societal, cultural and sometimes religious norms. This practice is now considered a violation of the right of the child to bodily integrity and autonomy, whereby the same logic could be applied to cases with IMC (Reis, 2013, p. 137). The child's best interests is a complex discussion, as it is used in conjunction with both categories of rights discussed in both this Chapter and the Chapter before.

Right to Life

The UDHR (Article 3), ICCPR (Article 6) and CRC (Article 6) all have explicit protect for the inherent right to life. There is a lack of certainty as to the exact mortality rate of circumcision and, but studies estimate that more than 100 deaths occur annually in the US, which are extremely low considering the high rate of IMC in the US (Bollinger, 2010, p. 87). This figure has been refuted as unscientific in that it is only an estimate and this logic cannot be applied to other countries as different environments where IMC is performed must be considered (Gräs, 2014). In a fact-checking article from the Danish news broadcaster DR on IMC mortality rates, Morten Frisch, a Danish epidemiologist still commented that the exact rate is not entirely relevant, because the fact is that, 'children die as a result of this unnecessary operation' (Gräs, 2014). In countries where IMC must be performed in medical environments, IMC deaths are rare but have happened, like an infant death from an anaesthesia overdose from a circumcision procedure in Australia in 1993 (Williams, 1993, p. 32), or the death of a Norwegian infant from complications following a circumcision, or similar death in English the following month of a one-month old baby (Gräs, 2014). All of these deaths, despite very rare, are also avoidable because of the non-therapeutic nature of the procedure. It would be unlikely that IMC would be

inconsistent with the inherent right to life articles in the UDHR, ICCPR and CRC because of the rarity, especially if performed in the appropriate medical environment.

Right to Self-Determination

IMC comes into contact with the right for self-determination which is protected in Articles 18(1) and 24(1) of the ICCPR and Article 14(3) in the CRC. The general right to freedom of religion for children in these articles is absolute, but the right of the parents to manifest their religion is not. The right of freedom of religion of the child could be violated as the parents opting for a procedure for religious reasons could affect the child's ability to freely choose their religion or belief. On the other hand, being circumcised does not stop the child from renouncing religion later in life, nor joining another religion. However, it could still be argued that because of the permanent and irreversible nature of the procedure, it could act as a lifelong marker on the body, forcibly connecting the child to a religious community or identity (Foblet, 2016, p. 148). The author of this thesis is of the opinion that IMC would not be inconsistent with the right to self-determination, as IMC is not exclusive to a single culture or religion, with many being circumcised for secular non-cultural reasons as outlined in Chapter 1.2 and 1.3.

Universality of Children's Rights

Due to the vulnerability of children, human rights instruments give special protections to children and enshrine the universality of these rights to all children (Articles 3, 25, 30 of UDHR, Article 24(1) in the ICCPR, Articles 2(1), 19(1), 24(3) of CRC). All treaties make the clear protection against discrimination of all children regardless of gender. Some propose that the willingness of States Parties to legislate against FGM (no matter how minor the procedure or the conditions in which it's performed) but not IMC is potentially inconsistent with the rights in the aforementioned articles (Aktor, 2020; Davis, 2001 p. 487).

This thesis does in no way aim to make a direct comparison between IMC and FGM. There is no denying that FGM significantly and seriously harms girls and women and can have fatal consequences (Schiratzki, 2011 p. 44; World Health Organization, 2020). FGM is the umbrella term for many types of female genital alterations that occur, involving the partial or total removal of external female genital organs for non-medical reasons (World Health Organization, 2020). FGM can range from:

clitoridectomy (Type I) the partial or full removal of the clitoris, *excision* (Type II) the partial or full removal of the clitoris along with the removal of the labia minora and/or majora, *infibulation* (Type III) the narrowing of the vaginal opening through the creation of a covering seal, which is formed by cutting and repositioning the inner, or outer, labia, with or without removal of the clitoris, or *other* (Type IV) being the symbolic 'nick', prick, pierce of the clitoris or clitoral hood or scraping of the genital area – all of which are most often performed in unsterile environments and without anaesthesia, therefore painful and can result in serious complications (World Health Organization, 2020). FGM has detrimental impacts on sexual intercourse and increases the likelihood of complications during pregnancy. FGM is widely considered to be an oppressive cultural ritual to make women conform, more 'marriageable', reduce libido, prepare the child for adulthood and in some communities, to make them more 'clean', 'beautiful' or 'feminine' per community standards (World Health Organization, 2020).

The absolute 'zero tolerance' approach to FGM in all forms, yet in comparison, the hesitance and lack of consensus when debating IMC is interesting. Once again, the two are not directly comparable, however both are umbrella terms for a range of procedures varying in severity and likelihood of complications. Take for example Type IV of FGM that was considered a less extreme 'compromise' practice instead of full removal of the clitoridectomy, excision or infibulation (Moore, 2010). Type I, II and III are more common to communities in Africa and some areas in the Middle East, whereas Type IV is common to Asia or as a compromise practice (Coleman, 1998, p. 723). If performed 'properly' and within sterile environments, it is considered 'a minimal procedure' that either 'does not have a lasting effect on morphology or function' or 'one that results in minor morphological changes which do not adversely affect sexual satisfaction or reproduction' (Arora & Jacobs, 2016, p. 150). The procedure is considered culturally significant and important as an initiation for girls into society and although the practice is not religious, it is mostly practiced by some Muslim communities in Africa, the Middle East but predominantly in Asia, along with some diaspora communities in the West (Batha, 2016). Therefore, if this is a culturally significant practice that is performed in a medically appropriate environment with no medically detrimental side-effects and is mostly symbolic (Type IV) then how is it that this practice is considered absolutely inconsistent with international human rights, yet IMC is considered differently? It has also been proposed that the allowance for symbolic FGM practices like Type IV, that so long as it is performed in medically safe environments with no permanent 'change' or without any effect on sexual or reproduction, (in line with reasoning on IMC) could therefore help substitute for other harmful forms of FGM (Arora & Jacobs, 2016, p. 153). In her investigation into both male and female genital alteration practices, the US bioethics professor, Deena Davis comments on this same overlap:

> When one begins to question the normative status of male newborn alteration in the West, and when one thinks of female alteration as including even a hygienically administered "nick," one

> sees that these two practices, dramatically separated in the public imagination, actually have significant areas of overlap (Davis, 2001, p. 488).

As suggested by anthropologist Zachary Androus on an Italian case regarding the genital mutilation of a female Somalian immigrant, 'Europeans seemed to care more about the clitoris of African women than they cared about the women themselves' (Androus, 2009, p. 36).

The overlap, albeit small, between some practices of FGM (Type IV) and IMC, raises some interesting questions when considering rights set out to prevent gender discrimination, if the legal approaches to traditional genital alteration practices are differentiated by gender. The inconsistency with IMC and rights concerning gender discrimination based on the comparison between some of these less severe FGM practices is also dependent on the inconsistency of IMC with other rights; namely Article 24(3) of the CRC concerning protection of children from harmful traditions.

Abolition of Harmful Traditions

Article 24(3) of the CRC states that States 'shall take all effective and appropriate measures with a view to abolishing all harmful traditions', with the use of 'shall' to denote an ongoing obligation from States. In General Comment no. 15, the Committee on the Rights of the Child discusses the need for protection against 'harmful gender-based practices and norms of behaviour that are ingrained in traditions and customers that undermine the health of girls and boys' (UN CRC Committee, 2013b, para. 9). The Article does not specify any specific traditional practice (neither FGM nor IMC) as this wording was adopted to prevent any practices from being unintentionally excluded (Van Bueren, 1998, p. 307). The Concluding Observations of the Committee on the Rights of the Child from Ethiopia (UN CRC Committee, 1997, para. 19), Sudan (UN CRC Committee, 1993, para. 13) and Togo (UN CRC Committee, 1997, para. 24) all recognise FGM as a harmful traditional practice that is against the best interests of the child, however there is no mention of whether IMC is considered as a harmful traditional practice in concluding observations or general comments. As IMC is clearly traditional (Chapter 1.2), the matter would be whether IMC would meet the standard of harm required to fall within the scope of Article 24(3). In the previous section, the overlap between IMC and some less severe FGM practices (Type IV) was analysed, it is interesting to note that FGM in all forms is considered to fall under this definition harmful practices, yet it is less clear with IMC. When determining what is considered as 'harmful', an interagency statement from the WHO on FGM refers to harmful tradition as something that

is prejudicial to the child's health and life (World Health Organization, 2008, p. 6). Those opposing IMC claim that IMC falls within the definition of harmful as it is a permanent modification to the child's body without the child's consent, and also that it is often performed without appropriate anaesthetic, is without clear medical benefit and can have consequences in terms of potential, albeit rare, risks and inconclusive consensus about sensation (Hinchley, 2007, p. 1180). Those who support IMC consider this right irrelevant to IMC, as they focus on the medical benefits of the practice (despite the lack of clear consensus as discussed in Chapter 1.3), along with the procedure satisfying the definition of harm if performed in the appropriate medical environment (Bates et al., 2013, p. 3). This is a core aspect of the IMC human rights debate, and it is unclear as to whether IMC would satisfy 'harmful' per Article 24(3).

Protection from Physical Violence

The CRC states that State Parties must take appropriate measures to protect children from physical or mental violence, injury or abuse, negligent treatment, maltreatment or exploitation while in the care of parents of guardians per Article 19(1). General Comment No. 13 from 2011 on Article 19 defines 'violence' as injury, abuse, neglect or negligent treatment, maltreatment and exploitation, with all carrying equal weight (UN CRC Committee, 2011, para. 4). The General Comment lists FGM within their definition of violence but makes no reference to whether IMC could potentially fall within this definition. Some claim that IMC is inconsistent with Article 19, in that this is a preventable risk to children because it causes harm with (Hinchley, 2007, p. 1180). Those opposing IMC would state that this procedure would most likely be considered violence, maltreatment or injury, because of the lack of medical necessity or justification behind the procedure (Svoboda, 1997, para. 3.1.1.2). Those in favour of IMC conversely propose that if performed in the appropriate medical environment, there is no real risk of injury or harm (Morris et al., 2019, pp. 266-270). Furthermore, in with this reasoning, it would not then constitute violence per the definition in the General Comment No. 13 and would not be inconsistent with Article 19(1). Whether IMC would constitute physical violence and therefore inconsistent with Article 19(1) of the CRC if not banned by States Parties is a core element of the IMC human rights debate. This thesis proposes that there is a potential that IMC could be considered as an injury or maltreatment because of the potential for complications (albeit very small if performed in the appropriate environment) and also the lack of medical justification for the procedure, and therefore per the interpretation from the General Comment no. 13, considered to be violence. On the other hand, so long as the procedure is performed with effective pain management in the appropriate medical conditions, this thesis could understand how, because of the significant religious or cultural importance of the practice, the practice

would not be considered as an injury or maltreatment. Ultimately, when considering the inconsistency of IMC with this right, this thesis considers the permanent, irreversible and preventable nature of the practice to be likely to satisfy the definition of violence, and therefore be an inconsistency with Article 19(1).

Right to be free from Cruel or Degrading Treatment

As non-therapeutic IMC removes healthy tissue causing pain therefore requiring anaesthesia (Chapter 1.3) it could possible violate human rights law per Article 5 of UDHR, Article 7 of ICCPR, Articles 37(a) and 39 of CRC, or Article 22 in CAT. FGM is considered to fall within the scope of cruel and degrading treatment (Fisaha, 2016, pp. 3-4; World Health Organization, 2020). Due to the more severe nature of FGM and its oppressive nature (Schiratzki, 2011, p. 44), it would unlikely that IMC would be inconsistent with this right to be free from cruel or degrading treatment in the same way as FGM.

2.3 CONCLUSION

IMC comes into contact with different rights within international human rights law. With no explicit mention of IMC in international human rights law treaties, it adds to the complexity of determining the relationship between human rights law and IMC. Although there are claims that IMC is consistent with rights such as the right to health or the right to be free from cruel or inhuman treatment, the author of this thesis is of the opinion that these claims are not strong due to the reasons discussed in this chapter. From this chapter, this thesis concludes that there are two core categories of rights that seem to emerge when discussing IMC; on the one hand, there are rights protecting the child's physical integrity, bodily autonomy, consent and protection from physical violence and harmful practices, while on the other hand; the freedom of religion or belief and the child's and parents' rights to cultural and religious freedom. These conflicting rights are highlighted in the debates on IMC in Australia and Denmark which will be explored in the next Chapter.

3. IMC IN AUSTRALIA AND DENMARK

3.1. AUSTRALIA

3.1.1. History

Per Chapter 1.2 on the historical background of IMC, religio-cultural IMC is practiced by indigenous and non-indigenous Australians. Certain indigenous cultures have practiced forms of IMC (both foreskin removal and subincision) in pre-colonial Australia (Elkin, 1994, p. 28), whereas non-indigenous circumcision began with English and American influence in the post-war era (The Royal Australasian College of Physicians, 2010, p. 6).

Indigenous

Genomic studies consider Indigenous Australians, both Australian Aboriginal people and Torres Strait Islander people together, to have the longest continuous culture on Earth (Malaspinas et al., 2016, p. 207). Indigenous nations in Australia have diverse languages, cultures and traditions, and only certain communities practice IMC, namely those in Arnhem Land in the north, along with some Western Australian and South Australian communities (Elkin, 1994, p. 28). It is difficult to determine how old exactly the tradition of IMC is within Indigenous Australian communities, as most indigenous communities pass down religio-cultural traditions through storytelling, however it is considered to be an immemorial tradition (Marshall, 2012, p. 1). Indigenous male genital alteration practices depend on the community, being either IMC or subincision (Cawte et al., 1966, p. 245). The Queensland Law Reform Commission on IMC discusses IMC in Aboriginal communities in Australia, namely the different foreskin-removal techniques and selected communities in Australia who practice it, along with documentation of subincision being performed by the Walbiri community in Northern Australia (Williams, 1993, p. 8-10). Foreskin-removal circumcision and subincision are performed by Indigenous Australian communities as a ritual to denote the transition from boyhood to manhood (Silverman, 2004, p. 423). '[Circumcision] detaches Aboriginal boys from their motherhood, [and] also attaches them to potent paternal symbols' (Silverman, 2004, p. 423). Today, IMC is still performed by many communities, especially in Northern Territory as an initiation ceremony into manhood, however with some modern adaptations like the involvement of a trained professional, medical equipment or anaesthetic (Hermant & McClymont, 2014). Many Indigenous communities maintain secrecy around many religio-cultural rituals and circumcision is

seen as ‘secret men’s business’ meaning that communities take extreme offensive if women hear about the ritual (Hermant & McClymont, 2014). This has created tensions between Indigenous and non-indigenous Australians in instances where the procedure has been discussed in the media (Belsham, 2014).

Non-indigenous

Today in Australia, circumcision is still practiced for non-religious non-therapeutic reasons after the introduction of the procedure in post-war Australia from British and American influence. As discussed in Chapter 1.2 on the cultural historical background of the procedure, IMC was practiced routinely after World War II because of assumed health benefits at the time. As medical evidence supporting the procedure became more ambiguous and the IMC rate in Australia started decreasing, there are still a proportion of the Australian population who are circumcised today and wish for their child to be circumcised for that reason. One of the most common reasons from parents for non-therapeutic circumcision in Australia is so their ‘son looked like his father’ (Brown & Brown, 1987, p. 215; Hutson, 2004, p. 238). The circumcision rate in Australia has decreased, from above 80% in the 1950s to now around 10% (The Royal Australasian College of Physicians, 2012, p. 5). Per the definition in Chapter 1.1, whereby a framework to define culture and religion was set out, this form of IMC could possibly fall within the definition of a cultural practice, as it is used to construct cultural identity when performed to look like a parent, however this argument is not particularly strong in my opinion, as IMC is not necessarily a part of cultural identity (the majority of the non-indigenous Australian community does not practice circumcision nowadays) as it is in Indigenous IMC or religio-cultural Jewish or Muslim IMC. Australia has a Jewish and Muslim community who are against any ban of the procedure and reiterate the importance of the procedure to their religio-cultural expression (Hutson, 2004, p. 238).

3.1.2. Public Debate

Recent public debate on IMC in Australia has stemmed from two key events; a statement on circumcision from the Royal Australasian College of Physicians (‘RACP’) (2010) and an incident in the Northern Territory when an Indigenous circumcision ceremony (IMC not subincision) went wrong (Hermant & McClymont, 2014). Despite this, there still seems to be little traction on having any ban or

age limit on the procedure, despite the 2007 ban on non-therapeutic IMC in public hospitals in Australia (Pirani, 2007).

2012 Royal Australasian College of Physicians (RACP) Statement

With routine IMC being practiced post WWII in Australia in the 1950s as discussed in Chapter 3.1.1, this practice was largely uncontested until the Australian Paediatric Association made a statement in 1971 recommending that, 'newborn male infants should not, as routine, be circumcised' (Belmaine, 1971) then followed by a similar statement in 1983 which further discouraged the practice (Australian College of Paediatrics Policy, 1983). The College then followed with another statement in 2002 elaborating on previous statements saying that there is 'no medical indication for routine male circumcision' (Australian College of Paediatrics Policy, 2002). The current statement from the RACP continues from previous statements saying that there is no medical need for routine circumcision, and the medical evidence supporting is not 'clear-cut'. This gradual decrease in encouragement of IMC from the RACP over the years correlates with the declining circumcision rate in Australia. Currently in Australia, the procedure is not performed in the public healthcare system as non-therapeutic IMC has been removed from the list of procedures provided by the government (The Australian, 2007). This means that cultural IMC in Australia is a personal out-of-pocket cost for parents, and acts as another hurdle to having the procedure done.

2014 Northern Land Council statement on Indigenous IMC

In a small remote community of Borroloola in Northern Territory three indigenous teenage boys were airlifted to Darwin hospital after complications from an Aboriginal initiation circumcision (foreskin removal not subincision) ceremony (Hermant & McClymont, 2014). The Attorney-General of Northern Territory followed up with an investigation into child abuse, but this was not found to have occurred as 'in the absence of criminality… it's a parental decision on how to bring up the kids.' (Hermant & McClymont, 2014). The local doctor in the town said that similar complications had occurred in the past from these IMC ceremonies, but local elders responded saying that, 'the ceremony is very, very important to indigenous communities' and that, '[there's] no point talking about our ceremony because that's not going to stop us from carrying that culture' (Hermant & McClymont, 2014). After fairly significant coverage by Australian media and in particular the national broadcaster, the ABC, the

Northern Land Council (NLC) responded to a specific ABC article on the matter, saying that it was culturally insensitive, and that it 'smacked of value judgment and cultural superiority' (McLaughlin, 2014). The NLC also stated that the complications from the sacred practice occurred because of reduced medical funding to the area where they cannot have appropriate medical supervision for the procedure. This situation not only highlights the sensitivities between cultural circumcision and protection of bodily integrity of children, but also a deeper painful tension between Australia and its indigenous communities.

3.1.3 Legal Discussion

Australia's legal system follows the common law system inherited by the England meaning judgments handed down in higher Australian courts are legally binding, and lower courts and overseas common law courts (UK, New Zealand, Canada etc.) have persuasive decisions. Australia does not have a Bill of Rights encoding human rights law, however protections for human rights may be found in the Australian Commonwealth Constitution ('the Constitution') Constitution, along with legislation passed by Parliament, both federal level or state or territory level (Belmaine, 1971).

International Human Rights Law

Australia is a party to the seven of the nine core international treaties, having ratified those related to IMC, namely ICCPR, ICESCR, CAT and CRC (Attorney-General's Department, 2020). The Constitution gives the Commonwealth the power to make laws with respect to, *inter alia*, 'external affairs' per Section 51(xxix) of the Constitution, which include international treaties like the United Nations' human rights conventions. The Australian Human Rights Commission Act 1986 was passed to set up the Australian Human Rights Commission as an independent human rights body monitoring Australia's commitment to the key human rights treaties also offering an avenue for human rights complaints (Australian Human Rights Commission, 2012). As outlined by the Tasmanian Law Reform Institute Report on Non-Therapeutic Male Circumcision, 'the relevant law does not provide clear authoritative guidance on when or whether the practice and regulation of circumcision [in Australia] is in accordance with human rights' (Marshall, 2012, p. 22).

Commonwealth Law

Commonwealth law derives its power from the Constitution and will override state or territory law if state or territory law passes as similar law per Section 109 (The Australian Constitution, 1901). Currently in Australia, state and territory law has legislation in place that concerns IMC directly and will be addressed in the following section.

Within Commonwealth Law, the only explicit right relevant to IMC in the Constitution is the right to religious freedom and the exercise of that religion per Section 116 (The Australian Constitution, 1901). The most superior court and the constitutional court of Australia, the High Court, has handed down three key judgments in relation to prohibiting the free exercise of any religion per Section 116. The Court firstly considered Section 116 regarding the Court determined that religious belief did not exempt citizens from legal obligations which was compulsory military service in this instance (*Krygger v Williams* (1912) *HCA 65; 15 CLR, p. 366*). The Court narrowed its approach to the exercise of religion further to then allow for the limitations to this freedom to protect 'national interests' and to permit the Commonwealth to legislate in respect to its 'external affairs' (*Adelaide Co of Jehovah's Witnesses Inc v Commonwealth [1943] HCA 12,* (1943) *67 CLR 116*). As there are certain obligations per international human rights treaties that are in conflict to IMC, this could give power for the Commonwealth to legislate a limitation to IMC as these obligations could be considered as 'external affairs' and therefore able to limit freedom of religion per the aforementioned cases. However, international human rights instruments do not condone or condemn IMC explicitly (Marshall, 2012, p. 22) and this approach towards this freedom could be considered too narrow. In a case regarding the Stolen Generation, a point in Australian history where Aboriginal children were forcibly removed for their families and 'integrated' into white society, the Court considered whether freedom to exercise religion was violated by separating them from their indigenous culture and beliefs. The Court considered the law from 1918 that allowed for the separation of the children from their families and ultimately determined that the principle purpose of the law was not to restrict the practice of religion, even though the law may have had that effect (*Kruger v Commonwealth [1997] HCA 271*, 190 CLR 1.). Taking into account these key decisions and applying them to the case of IMC, there is a reasonable amount of precedent which narrowly interprets the right to freedom of religion in Section 116 of the Constitution and therefore, any restriction on IMC could potentially bypass the right to exercise religion freely if its direct purpose is to protect other rights (bodily integrity, autonomy, best interests of the child etc.). The case involving the Stolen Generation shows the Australia's willingness to overlook indigenous cultural traditions that don't fall within the western

framework of religion and could act as supporting precedent for any limitation non-religious non-therapeutic IMC as not unconstitutional.

State and Territory Law

Within all Australian states and territories, there is a ban on non-religious and non-therapeutic IMC in public hospitals, it will not be covered by Medicare, the Australian publicly funded universal healthcare system (Ngai, 2019).

On an Australian state level, there has not been a large amount of legal discussion on the matter of IMC, more so just some state law reform commission reports, along with some cases that deal with the issue. The Law Reform Commission of Queensland released a report in 1993, that despite being non-binding, outlined the legal context surrounding IMC and Australian law at the time. The report discusses the legality of IMC, particularly looking at the consent of children, and claim that in the absence of 'real' consent, circumcision of male infants could fall 'within the definition of assault' or could also be seen as intention 'to cause grievous bodily harm' by means of disfiguring a person or 'endangering their life' under the Queensland *Criminal Code* (Williams, 1993, p. 13). The report leans on a High Court judgment whereby the Court intervened and stopped the sterilisation of a child with severe disabilities to avoid mensuration per the wishes of her parents. The Court found that the parents in this case did not have the authority to consent on behalf of their child because of the irreversible non-therapeutic nature of the medical procedure was not in the best interests of their child (*Secretary of the Department of Health and Community Services v JWB* (1992) *HCA 15*). The Court found that the parent's intentions were not completely relevant as the surgery in itself was invasive and required the child's consent if it is to be performed. The report, concluded that:

> If the young person is unable, through lack of maturity of disability, to give effective consent to a proposed procedure and if the nature of the proposed treatment is invasive, irreversible and major surgery and for non-therapeutic purposes, then the court approval is required before such treatment can proceed. The court will not approve the treatment unless it is necessary and in the young person's best interests (Williams, 1993, p. 38).

Although unintended, the report ended up remaining the most often cited legal commentary in the area of IMC and until the Tasmanian Law Reform Institute Report in 2012 (Marshall, 2012, p. 16). The comprehensive Tasmanian report on Non-Therapeutic Male Circumcision addresses, among many other topics relating the IMC in Australia, the current Australian law relevant to IMC (criminal

responsibility, family law, private law, use and sale of excised foreskins, limitation of actions, human rights), legislation in foreign jurisdictions and perspectives and desirability of a reform to limit IMC. The report indicated that the Tasmanian Law Reform Institute supports the enactment of legislation to reform the law governing circumcision, specifically that enactment of a new and separate offence generally prohibiting the circumcision of incapable minors in Tasmania (Marshall, 2012, pp. 61-83). However, the report makes the exemption for the performance of some well-established religious or ethnicity motivated circumcision on incapable minors (Marshall, 2012, p. 54). The Report also recommended the enactment of legislation to require joint parental authorisation for IMC along with court authorisation for performing IMC on a child when there is parental disagreement about the desirability of performing a circumcision (Marshall, 2012, p. 19).

Although only a persuasive judgment within Australia, an English case called *Re J*, where a disagreement between a child's circumcision brought the case to Court – the father, a 'non-practicing Muslim' was insisting on having his 5 year old child circumcised, while the 'non-practicing Christian' mother did not want the procedure performed. The Court found that circumcision would be 'more the exception than the rule in the circles in which the boy was likely to move' and instead chose to look at the context of where and how the child was being raised. Because of the 'non-practicing' nature of the parent's religion, the relatively secular upbringing of the child and the irreversible nature of the procedure, the Court found that the procedure would not be in the child's best interests (*Re J.* (2000) *Fam Law 246*). A similar case addressed in Australia also involved a father who was charged with causing grievous bodily harm to his two children aged five and nine, after having them circumcised whilst in his custody on a weekend, against the wishes of the children's mother. The father in this case was Muslim and insisted that it was in his 'sincere religious beliefs' while the mother, indigenous Australian, instead brought the matter before a Family Law Court, claiming that she wanted her children to have the 'right to grow into adult men with intact bodies and choose their own religious and other beliefs'. Despite the case being dismissed because of administrational issues, the mother responded stating that, 'if I had been in this situation with two daughters who were circumcised… the Australian public would be outraged. Being of indigenous Australian descent, I understand the importance of freedom of personal beliefs in a multicultural society' (Lawrence, 2002).

FGM is explicitly criminalised in all states and territories in Australia, with inclusions of the practice within all Criminal Codes, along the criminalisation of the procedure being performed outside of Australia (Keck, 2019). In 2019, the first person was imprisoned for the new FGM prohibition

legislation in Australia, where the Court affirmed that 'simply cutting or nicking a girl's clitoris', regardless of its severity, does indeed come under the definition of mutilation, along with the clitoral hood or prepuce coming under the definition of 'clitoris' (*The Queen v A2* (2019) *HCA 35,* para. 11).

3.2 DENMARK

3.2.1 Historical

Circumcision is considered to be a foreign custom in Denmark but has been practiced by the established yet relatively small Danish-Jewish community for 400 years (Det Jødiske Samfund i Danmark, 2020a). The Jewish Community of Denmark has voiced their concerns on an IMC ban in Denmark and stressed that the ritual is integral to their faith (per discussion in Chapter 1.2), meaning that if IMC ban is implemented Jewish Danes with a strong Jewish identity would have to move elsewhere (Det Jødiske Samfund i Danmark, 2020a). The Jewish community have proposed that a ban on IMC would mean the end of the Jewish community in Denmark (Det Jødiske Samfund i Danmark, 2016).

Although IMC not seen as absolutely integral as it is in Judaism, IMC is still practiced by Muslims nearly universally (per the discussion in Chapter 1.2). Circumcision in the Danish Muslim community makes up the vast majority of circumcision procedures in Denmark as there are 306,000 Muslims living in Denmark – approximately 5% of the total population (Jacobsen, 2018). After 2017, the National Health Data Board now requires all circumcision procedures performed to be registered to keep track of the exact rate in Denmark (Skoffer, 2018).

3.2.2 Public Debate

Public Debate on IMC in Denmark for the past 10 years has mostly been centred around the first report by *Styrelsen for Patientsikkerhed* (the Danish Authority for Patient Safety) in 2012 on IMC, and then the Citizens' Proposal proposing an age limit on circumcision and the updated report by the STPS that is still being considered by Parliament. Public debate in Denmark around IMC is generally, on one

side, a debate about religious freedoms of minorities in Denmark (Jews and Muslims) and then on the other side, the protection of a child's right to bodily autonomy, physical integrity, consent and protection from physical violence and harmful traditions. This echoes the conflicting rights in the international human rights discourse surrounding IMC per Chapter 2.

Currently in Denmark, as in every other country around the world, IMC can be legally performed. The Danish Authority for Patient Safety delivered a report for the Citizens' Proposal which allows for religious IMC, so long as it is performed by a doctor (or with a doctor present) and in an appropriate medical environment (Styrelsen for Patientsikkerhed, 2020, p. 58). Taking into account the report from the Danish Authority for Patient Safety, the parliamentary debate on the Citizens' Proposal has sparked significant public debate on IMC in Denmark, and the effects it will have on religious groups.

The Jewish community has strongly expressed concern about the ban, stating that it would 'threaten the very existence of Jewish life in Denmark because of the centrality of this ritual for Jewish identity' (Lassen, 2020, p. 147). Religious minority communities in Denmark have voiced their concerns, with some saying that, 'Danish scepticism against religion has become the normal in Denmark now [and] threatens constitutional rights of religious minorities to exist in equal footing with other citizens' (Det Jødiske Samfund i Danmark, 2020a). The Jewish Community of Denmark has expressed their strong opposition of any substitute procedures for IMC, such as a Brit Shalom (a welcoming, naming ceremony) instead of a Brit Milah (a circumcision ceremony) claiming that this is a ceremony that has been created by opponents of IMC not Jewish communities (Det Jødiske Samfund i Danmark, 2016). Former leader of the Jewish community of Denmark, Finn Rudaizky, proposed that 'many others use the situation to show that they are against Jews, Muslims, and they can express anti-Semitism and xenophobia without admitting to it' (Lipshiz, 2018). Imam Naveed Baig of the Danish Islamic Centre voiced his understanding for arguments allowing the child to decide for themselves regarding IMC and reiterated the importance of autonomy and personal freedom in Danish society. However, he also stated, 'I also do not think this is an expression of lack of tolerance on the part of the Danes. It is more an expression of lack of information and dialogue' (Hybel & Benner, 2016). In another interview with Imam Baig, he spoke of circumcision forming a child's spiritual identity, bringing them into the family and starting their religious life (Hviid, 2018). This aligns with arguments of IMC allowing a child to have their own right to religion.

On a country visit to Denmark, the Special Rapporteur Heiner Bielefeldt voiced concerns by Muslim and Jewish communities in Denmark who were feeling ostracised and were exposed to hostility, especially the Jewish community which had traditionally felt very at home in Denmark but not after the proposal for a ban on IMC (Bielefeldt, 2016c, para. 22). Interestingly it has been the Jewish community

in Denmark who have been very vocal about their opposition to the ban (despite its relatively small size in comparison to the Muslim community), presumably not only because of the centrality of the ritual to their identity, but also because of their established and integrated position in Danish society, unlike the arguably more sensitive position the Danish Muslim community has in Denmark (Bielefeldt, 2016c, para. 11). Regarding the limitation of freedom of religion or belief in Denmark, the implementation of legal measures in recent years (i.e. the 'Burka Ban' law, prohibition of ritual slaughter, the handshake as a precondition to citizenship, along with several others) together with the consideration of a ban on IMC by Parliament could, when taken in their entirety, have individuals and groups belonging to religious minorities seeing, 'their freedom seriously limited or attacked because of the accumulation of possible limitations on their religious freedom' (Lassen, 2020, p. 149). An Advisory Committee on the Framework Convention for the protection of national minorities urged Denmark to proceed sensitively when considering an IMC ban (Lassen, 2020, p. 147) encouraging 'the authorities to continue, together with the groups concerned, to search for pragmatic solutions to the issue of circumcision of boys, taking the health of children fully into account, while ensuring that the outcome does not unduly interfere with the practice of religious traditions at issue'(Council of Europe, 2019, para. 70). Denmark's public debate on IMC is complex. The debate against a ban on IMC mostly surrounds arguments on freedom of religion – mainly the Jewish community – due to the mutual exclusivity of the ritual and Jewish identity.

Public debate from those against IMC in Denmark mostly surround arguments for protecting consent and bodily autonomy of the child. Mikael Aktor is a prominent speaker on the topic as well as the vice chairman of Intact Denmark. He was raised in a liberal secular Jewish family and was circumcised at birth (Intact Denmark, 2020). Aktor offers an interesting perspective on the topic, whilst also simultaneously highlighting the complexities on the topic, in that he is culturally Jewish, but not religiously Jewish, but still has firsthand personal experience of the practice. He is a co-author for the Citizens' Proposal for an age limit on IMC (Aktor, 2019). When discussing the argument of whether the age limit essentially forcing Danish Jews to leave Denmark, Aktor responds that, 'the great majority of Jews in Denmark are firmly entrenched in Denmark through many generations and have no intention of leaving jobs, school, friends, associations, etc. alone in order to continue to have their boys circumcised,' and that, 'religious freedom is restricted is many ways by current legislation' (my own translation)(Aktor, 2019). He stresses the necessity of the age limit to ensure no child be, 'subjected to the operation of any healthy part of his body before he is able to give his own consent regardless of family background' (Aktor, 2020). Within Denmark, the combination of a relatively ethnically, culturally and religiously homogenous society (Holtug, 2013, p. 3), together with an intrinsic cultural virtue of individual self-

determination and independence (Jenkins, 2012, pp. 83-85), the inclusion of 'regardless of family background' in the Proposal most likely resonated with many Danes.

Borgerforslag

In 2018, a *Borgerforslag* (Citizens' Proposal) to introduce an age limit of 18 on male circumcision, received 50,000 signatures meaning it must therefore be considered by members of parliament (Borgerforslag, 2018). The Citizens' Proposal claims that non-therapeutic (ritual) IMC constitutes a violation of the provisions in the *Criminal Code*, namely § 245, stk. 2, along with § 2, stk. 2 of the *Parental Responsibility Act*. It also claims that the practice violates the EU Charter of Fundamental rights, specifically Article 3(1), that protects the right to respect for physical and mental integrity, along with Articles 19(1) and 24(3) of the CRC that protects the child from all forms of physical or mental violence, injury or abuse and protects the child from harmful traditions respectively (Borgerforslag, 2018). The Proposal aims to repeal and remove any Articles in Danish law that allow IMC to be performed under the age of 18 and establish the same protection from IMC that already applies with FGM (Borgerforslag, 2018).

In April 2018, the government stated it would not support the ban and was debated in Parliament later that year where it lacked widespread parliamentary support, then referred to a Parliamentary Committee where it is awaiting final consideration (Lassen, 2020, p. 148). The Citizens' Proposal indirectly suggests that FGM be made legal to those over 18, which has, in the opinion of the author of this thesis, clouded the real intentions and debate on the case of IMC.

This thesis also recognises the weight of not wanting to be the first country to legislate a ban on IMC, and fear of international repercussions had a role to play in this discussion. In the parliamentary debate of the Citizens' Proposal, two Members of Parliament, Jane Heitmann (Folketinget, 2018, at 13:00) and Flemming Møller Mortensen (Folketinget, 2018, at 12:37) both expressed concerns for international implications from being the first country to implement a ban on IMC. They expressed concern not only for international relations with IMC practicing countries, but also the potential retaliations on Danish nationals living abroad. Due to, what this thesis considers failures in the legal construction of the Citizens' Proposal, it is unlikely for the Citizens' Proposal to pass through Parliament to ban IMC. The Citizens' Proposal should have instead focused more on the precedent of Danish government in limiting the exercise of religious freedom in the case of public safety, and instead focussed more on how the child's right to consent, bodily autonomy and physical integrity. The Citizens'

Proposal should have been much clearer in its distinction between FGM and IMC and explicitly state that the proposal intended to only deal with IMC, as this detracted the debate from meaningful discussion on core rights involved. This instead fuelled claims that the Citizens' Proposal was indirectly supporting FGM, despite the Ministry of Justice agreeing that the gender-neutral proposal of an age limit on circumcision would not open the possibility for the legalisation of FGM after 18 years of age (Intact Denmark, 2018).

3.2.3 Legal Discussion

Denmark has signed and ratified all human rights treaties, with the ICCPR, ICESCR, CAT and CRC all regarded as valid sources of law (DIHR, 2020). They may be invoked and applied in Danish Courts (DIHR, 2020). Therefore, regarding IMC in Denmark, consistencies and inconsistencies with the rights as discussed in Chapter 2 apply in Denmark.

Council of Europe

As a State Party to the European Convention of Human Rights (ECHR), Denmark is a bound to the certain rights that relate to the issue of IMC, namely Articles 2(1), 3, 8, 9(1) of the ECHR along with Articles 11 and 13 of the ESC. The Articles of the ECHR and the judgments from the European Court of Human Rights (ECtHR) are binding in Denmark per Article 46 ECHR. The Articles in the ECHR offer similar protections to the ICCPR, protecting the right to life (Article 2(1)), prohibition of inhuman or degrading treatment (Article 3), the right to physical integrity (Article 8), the right to freedom of religion (Article 9), but does not have child-specific protections like the CRC.

Right to Life

The European Court of Human Rights (ECtHR) has interpreted the right to life within Article 2 to include cases of medical negligence, however has normally only included exceptional circumstances concerning either; a specific situation where an individual patent's life is knowingly put in danger by denying access to life-saving emergency treatment, or if there has been a systematic or structural

dysfunction in hospital services where a patent has been denying life-saving circumstances (*Lopes de Sousa Fernandes v Portugal (Application no. 56080/13)*, 2017). The threshold for falling within the scope of Article 2 requires consideration of the entire domestic system and whether adequate and timely response to medical negligence was provided. It would therefore be unlikely for the Court to consider IMC as an overall procedure as a deprivation of life per Article 2 if complications arise, and instead steer these cases towards conventional medical negligence avenues (*Lopes de Sousa Fernandes v Portugal (Application no. 56080/13)*, 2017).

Right to Private Life

The ECHR protects the right to private and family life (Article 8), which in the *Pretty Case*, the Court found that this right to private life can include the personal autonomy by refusing treatment and therefore arguably protect a child's right to refuse a treatment which compromises their personal autonomy (*Pretty v The United Kingdom, Application no. 2346/02*, 2002). In the *Y.F. Case*, the Court established the connection between personal autonomy over one's own body and right to private life. The Court found that regardless of how minor an interference with a person's physical or psychological integrity, so long it was carried out against a person's will, it will still constitute an interference with their right to private life (*Y.F. v Turkey, Application no. 24209/94*, 2003). It was also interesting to note the Court addressed the lack of medical necessity for the breach of physical autonomy and therefore Article 8 (*Y.F. v Turkey Application no. 24209/94*, 2003). This same reasoning could also potentially be applied in a situation involving IMC.

Prohibition of Inhuman Treatment

Like Article 7 of the ICCPR, the ECHR prohibits inhuman or degrading treatment (Article 3) the discussion as to whether IMC constitutes inhuman or degrading treatment echoes the earlier discussion on Article 7. The ECtHR defines 'inhuman treatment' as, *inter alia*, being either premeditated, causing actual bodily injury, or intense physical and mental suffering, ultimately depending on attaining a 'minimum level of severity' and therefore being relevant to the context of the conduct (*Jalloh v. Germany DFR (EGMR 54810/00)*, 2006). As the context of IMC is normally made by parent(s) with the genuine best interests of the child taken into account, it may be difficult to meet the 'minimum level of severity'.

Right to Freedom of Religion or Belief

The right to freedom of religion or belief is protected in Article 9 of the ECHR, to both be free to believe what you want and change your religion (Article 9(1)) while also protecting the right to manifest religion through worship, teaching, practice and observance (Article 9(2)). The ECtHR has interpreted this freedom in Article 9 by firstly emphasising the importance of the link between the practice and the religion or belief as in the *Eweida Case*, concerning the wearing of a Christian cross (*Eweida and Others v The United Kingdom (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10)*, 2013). Per earlier discussions on the importance of IMC in Judaism and Islam, the test of whether a manifestation of religion is intimately linked with the religion would easily be met. The Court found that in the case of *Cha'are Shalom Ve Tsedak v France*, strict Jewish religious rules fall within the scope of Article 9, and domestic laws that concern these practices are not in violation of Article 9 so long as they not make it impossible for Jewish people to observe these rules (*Cha'are Shalom Ve Tsedek v France, (App 27417/95),* 2000). This would mean that a complete ban on IMC within a country would most likely constitute a violation of Article 9 of ECHR.

Right to Health

The right to health is also protected in ESC Articles 11, protecting the right to highest attainable standard of health. Because of the lack of medical consensus as discussed in Chapter 2.1, IMC would unlikely be able to fall under the scope of highest attainable standard of health.

Parliamentary Assembly

The Council of Europe's Parliamentary Assembly (PACE) adopted Resolution 1952 on the child's right to physical integrity, which specifically urged member States to promote awareness of potential risks and to make legislative and policy measures that give primary consideration to the best interest of the child in the context of FGM, IMC, intersex surgery, piercings, tattoos or plastic surgery all performed on children (*PACE - Resolution 1952* (2013) - *Children's Right to Physical Integrity*, para. 2). Although not legally binding, Resolution 1952 urged member States to introduce age limits on IMC to regulate the practice up until the age where the child can have informed consent. The Resolution seemed to focus

primarily on the 'child's right to physical integrity' but did not address the Article 9 religious rights argument behind the practice (*PACE - Resolution 1952* (2013) - *Children's Right to Physical Integrity,* para. 7). Resolution 2067 on 'Freedom of religion and living together in a democratic society' was then adopted two years later after criticism from religious communities and rescinds the earlier position on introducing age limits to regulate IMC. The Resolution acknowledges the lack of consensus among member States, and therefore invites States to take 'reasonable accommodations with a view to guaranteeing equality that is effective, and not merely formal, in the right to freedom of religion.' The Resolution urges States to ensure that IMC is 'practised by a person with the requisite training and skill in appropriate medical and health conditions' and parents are 'duly informed of potential risks' (*PACE - Resolution 2076 (2015) - Freedom of Religion and Living Together in a Democratic Society*, para. 9).

European Union

The European Union (EU) was founded on the respect of human rights and dignity (EU, 2020). The Charter of Fundamental Rights (2000) sets out fundamental rights of the EU and is consistent with ECHR and as such does not establish any new rights but rather aims to gather together existing rights between different sources. It was annexed into the Treaty of the Functioning of the European Union (TFEU) in 2009 therefore making it legally binding on EU institutions and national governments when implementing EU law (EU, 2020). As a Member State of the EU, Denmark is only bound to the extent there is EU law adopted by Denmark. Another consideration is the freedom of movement and services under Article 21 of the TFEU, which would therefore allow Danish citizens the opportunity to have their child circumcised in another EU country if a Danish ban was implemented.

National Law

Currently in Denmark, it is legal to perform IMC so long as the operation meets a number of requirements (Styrelsen for Patientsikkerhed, 2020, p. 58) per Section 74, Art, 2(102) of the *Authorisation Act.* Although the operation can be delegated to a medical assistant by a doctor, a doctor must be present at the procedure and provide the appropriate standard of care and contentiousness required on any medical procedure (Styrelsen for Patientsikkerhed, 2020, pp. 58-59). If the child is 15 or older, they are to be provided with information and can consent to the procedure themselves (Styrelsen for Patient Sikkerhed, 2020, p. 59). If younger than 15, both parents are to receive information

on how the procedure is performed, pain during and after the surgery, the risks and complications that can arise, and then both give their consent. It is the doctor's responsibility to provide necessary information and ensure that full consent is received (Styrelsen for Patient Sikkerhed, 2020, p. 59).

4. SIMILARITIES AND DIFFERENCES

When comparing the debates surrounding IMC in Australia and Denmark, there are a number of key similarities and differences with the debates in these countries. This chapter intends to analyse and explain these similarities and differences to determine how, despite completely different legal, historical, political, religious and cultural contexts, the current stance on IMC in both countries is essentially the same.

4.1 SIMILARITIES

The core similarities with the Australian and Danish debates on IMC are; the core clash between physical integrity, bodily autonomy, consent of the child and protection from physical violence and harmful traditions versus the parents' and child's right to freedom of religion or belief, along with the relationship between IMC and FGM. In this section, I aim to analyse why it is that certain rights are prioritised over others. When making a comparison between the IMC debate in the two very different countries, despite there being similarities, it is worth noting that similarity does not mean 'identity'. There are however areas of noteworthy overlap, which is what this thesis intends on analysing. This implies that even if the discussion is about similarities, we must also pay attention to the differences included in the very same areas or aspects.

4.1.1 Freedom of Religion or Belief

Australia and Denmark have both Jewish and Muslim communities, as discussed in Chapter 3.1.1 and 3.2.1. Chapter 1.2 establishes the clear significance and religious importance of IMC to Islam and particularly Judaism. In both countries, the majority of those who are proponents of IMC, do so for religio-cultural reasons, and therefore limiting the practice could be a direct limit on religious freedoms. Per the discussions in Chapter 3.1.2 and 3.2.2, religious leaders and communities may recognise some or all of the rights of the child to bodily autonomy, physical integrity and the child's right to consent but prioritise the parents' and child's right to practice their religion or belief.

Religious communities in Australia and Denmark claim that if IMC is banned, or even an age limit imposed, it significantly impacts their right to practice their religion. The Jewish communities in Australia and Denmark are relatively small (DellaPergola, 2016; Det Jødiske Samfund i Danmark, 2020b). With the extreme hardships and suffering experienced by Jewish communities around the world particularly in recent history, it is understandable that great sensitivity must be taken when approaching situations that could limit their religious freedoms, marginalise them or even eradicate them. Danish senior researcher in history and religion, Eva Maria Lassen, comments on the difficulty in limiting religious practices, as if the limitation of practices are, 'taken separately, then a restriction of religious manifestation is not necessarily invasive or expansive' (Lassen, 2020, p. 148). She continues, that 'taken in their entirety, however, individuals and groups belonging to religious minorities may see their freedom seriously limited or attacked because of the accumulation of possible limitations on their religious freedom' (Lassen, 2020, p. 149). Danish Jews are highly opposed to the limitation or ban of IMC, as it would mean the end of the already small Jewish community in Denmark. In the Danish public debate per Chapter 3.2.2, Aktor addresses a remark similar to this, stating as a Dane who has undergone this procedure growing up in a secular Jewish family, he feels that this argument is reductive in that, 'the majority of Jews in Denmark are firmly rooted in Denmark for many generations and have no intentions of leaving jobs, schools, friends, associations, etc. just to be able to continue to have their boys circumcised' (my own translation)(Aktor, 2019). He continues that 'Jewish identity is based on Jewish descent through the mother, and being a Jew can be expressed in many other ways that are not circumcision depending on the individual family's own choices' (my own translation)(Aktor, 2019). Aktor, however, does not identify as a Jew, and his comments do not speak for the Danish Jewish community, who have vehemently reiterated the integral importance of this practice to Judaism (Det Jødiske Samfund i Danmark, 2016).

These perspectives offer an interesting contrast to the opinions of both Jewish and Muslim communities in both Australia and Denmark. As there has been no Australian proposal of a limitation or ban on IMC to the same extent as the Citizens' Proposal in Denmark, the religious freedom debate in Australia is not as pronounced as in Denmark. However, there is still strong opposition from Jewish and Muslim communities who state that a ban would impact religious freedoms per the discussion in Chapter 2.1. The 2012 Tasmanian Law Reform Institute Report on non-therapeutic IMC (the most recent Australian legal report on the topic but only offering non-binding recommendations) said that IMC should be banned unless parents can demonstrate 'well-established religious or ethnic motives' (Marshall, 2012, p. 54). The report, however, does not however elaborate on how something like this would be implemented, with many foreseeable problems arising surrounding how it would be determined whether parents could effectively prove they have 'well-established' religious or ethnic motives.

On the other hand, a similarity in this argument on freedom of religion or belief is that both states already have many examples of legislation which directly interferes with religious freedom. In Denmark, there are examples of *inter alia*, the 'Burka Ban', blasphemy laws, handshake precondition for citizenship (Lassen, 2020, pp. 142-146). The question that then arises is: to what extent can those outside of a religious community categorise which religious practices are more important than the others? This thesis concludes that the Jewish and Muslim communities of both countries have expressed their concern over a ban on IMC because of its importance (Chapter 1.2) and that therefore these religious communities must have the deciding say in order to ascertain which practices are completely non-negotiable, uncompromisable and of highest importance, and which are not.

The impact on freedom of religion or belief of both children and parents is a serious concern that is consistent in the Australian and Danish discourse on IMC. Religious communities have significant concerns about their freedoms being restricted if a full ban were implemented against IMC, like what is being proposed with the Danish Citizens' Proposal. However, there are opponents of IMC who claim that, although these concerns may be valid, they do not outweigh rights such as bodily autonomy, physical integrity, consent of the child or protection from physical violence and harmful traditions.

4.1.2 Physical integrity, Bodily Autonomy and Consent of the Child

In both countries, those in opposition to IMC have the same consistent core line of reasoning – that the practice is in violation of the child's rights to bodily autonomy, physical integrity, consent over their body and the protection of the child from harmful traditional practices. These core arguments follow the human rights protections that IMC conflicts with as discussed in Chapter 2. It cannot be said that these arguments by opponents of IMC similar to both Australia and Denmark make up a child-centric approach, as IMC proponents also claim the procedure to be in the best interests of the child and to protect a child's religious and cultural rights per the discussion in Chapter 2. Interestingly, Australian and Danish opponents of IMC share the same focus on bodily autonomy, physical integrity, child's consent over their body and protection from physical violence and harmful practices. Why is it that opponents of IMC in both countries favour these rights over the child's right to religion, culture or the parent's right to decide for their child?

Firstly, when looking at the balancing these rights, it is important to re-establish that both state medical authority reports conclude that there is a lack of consensus on whether IMC is medically beneficial or detrimental, and therefore do not explicitly condemn or condone the practice (Styrelsen for Patient Sikkerhed, 2020 p. 76; The Royal Australasian College of Physicians, 2010 p. 5).

As addressed in Chapter 2.2, there are claims that propose IMC is inconsistent with rights such as physical integrity and bodily autonomy, which are claims that feature in both the Australian and Danish IMC debates. The debates in both countries have proposed that there is inconsistency with practices like tattooing, genital piercings or other body modifications on children, yet not with IMC (Narulla, 2007, p. 106; Nyhus, 2013). Both Australia and Denmark have legal protections against body modification procedures like tattooing, branding, piercing or others being performed on children. Although specific laws for specific practices vary between Australian states, you cannot get a tattoo under the age of 18 (or without written parental consent between the ages of 16-18), cannot get a body piercing without written parental consent if under 18, and cannot get a piercing in a private place (nipple, genitals) under the age of 18 (Youth Law Australia, 2018). In Denmark there are similar laws prohibiting the tattooing of anyone under the age of 18 per § 10 of *the Tatoveringslov* '*Tattooing Law*' (2018, LOV Nr 695 Af 08/06/2018). The Parliamentary Assembly of the Council of Europe combined IMC with piercings, tattoos, plastic surgery and other body modifications on children in their contentious Children's Right to Physical Integrity resolution, using the summary line of reasoning in prioritising a child's consent, bodily integrity, physical autonomy over religious and cultural rights of parents and children (PACE - Resolution 1952 (2013) - Children's Right to Physical Integrity, 2013, para 2).

In Denmark, there is a ban on cosmetic surgery for those under the age of 18 per Article 3 of the statute on cosmetic treatments (Heje, 2019). Yet, Part 2 of the Article makes an exception for cosmetic orthodontics for patients under the age of 18 (Bekendtgørelse om kosmetisk behandling [Statute on Cosmetic Treatments], 2014). In Australia, the Public Health Act (1999) contains a 2008 amendment which establishes two requirements when performing cosmetic surgery on children; (1) the child must be sufficiently mentally competent enough to fully comprehend any risks associated with undergoing a cosmetic surgery procedure (through mental health assessment), and (2) if the child is found to be incompetent to make decisions, a parent may act on the behalf of their child, providing they're acting in the child's best interests. Both examples of legislation show how both Australia and Denmark have scenarios where to the physical integrity and bodily autonomy of the child is overlooked in non-therapeutic procedures – however, the Australian legislation makes specific recommendations to considering the child's consent and if the decision is made by the parents, that the best interests of the child is taken into account. The Royal Australasian College of Surgeons ('RACP') released a report on

the ambiguity around legal considerations regarding the child's consent to cosmetic surgeries – using the case study of a 5 year old boy whose parents wanted him to receive a otoplasty (ear pinning) as he had protruding ears and did not want him to be bullied because of this, despite the child having not yet experienced bullying about his ears (Kitipornchai & Then, 2011, pp. 13-15). The RACP discusses that because of the pre-emptive nature of the otoplasty, and despite the undoubted best interests in consideration by the parents, it becomes difficult to legally justify. When superimposing this reasoning on situations involving IMC, it raises some interesting inconsistencies. In the opinion the author of this thesis, if making a comparison between orthodontics or otoplasties to IMC, the level of invasiveness of IMC must not be overlooked, as this procedure is a removal (rather than an adjustment) performed on a more private and intimate area of the body. Ultimately, the point of differentiation between the RACP example of an otoplasty with IMC is not the medical indifference (as there is are no risks or benefits with otoplasties) but rather the cultural or religious importance of IMC.

As discussed in chapter 2.2, there are correlations between the practices of IMC and intersex 'normalisation' surgery, with claims that both are inconsistent with rights such as the right to the child's physical integrity, bodily autonomy and consent. The debates in Australia and Denmark on IMC feature this comparison (Madsen, 2015, p. 88; SBS News, 2018; Thorup, 2015). In the opinion of the author of this thesis, it seems that there is significant overlap with these practices, in the sense that they are non-therapeutic, permanent, irreversible and have complications (despite how small the risk is). It is also interesting to note, that despite parents prioritising the best interests when making the decision to have the 'normalisation' procedure performed, or the religious or cultural pressures for conforming, this still does not detract from the inconsistency between the practice and rights like physical integrity, bodily autonomy, or children's consent. On the other hand, it is clear that IMC has significant cultural and religious importance (Chapter 1.2) unlike intersex 'normalisation' surgery, therefore banning this specific practice would not encroach on freedom of religion or culture. Regardless of this, from a normative perspective, from the debates in both countries, it seems likely that both IMC, like intersex 'normalisation' surgery, would be inconsistent with the child's right to physical integrity, bodily autonomy, and consent.

There are many sensitivities and complexities on this topic of the prioritisation of certain rights. I think that the comparison between IMC with procedures like intersex 'normalisation' surgery, tattoos, piercings, body modifications or cosmetic surgery all show how both Australia and Denmark have shown a shift in their approach on prioritisation of rights depending on the cultural or religious significance of the practice. However, both countries do tend to allow some exceptions to this, vis-à-vis the case of cosmetic orthodontics in Denmark and the 'best interests of the child' consideration prioritised over autonomy, integrity and child's consent when regarding cosmetic surgery on children.

4.1.3 Best Interests of the Child

Another similarity in the debate on IMC in Australia and Denmark is the use of the best interests of the child consideration in the balancing of the core rights. From one perspective, IMC practicing cultural and religious groups claim that they are prioritising the best interests of their child, as in their eyes, raising them within a religious or cultural community and allowing them to be a part of their faith or culture is most important (Hviid, 2018). From a religious and cultural perspective, the use of the consideration of the best interests of the child does not provide immunity from other rights nor trump all other rights. The test to ascertain the best interests of the child must align with some form of objectively considered interests and not just what the parents think best. An example of this would be with forms of FGM – not this thesis attempts to make any comparison to this procedure other than being a genital alteration procedure – but rather the thought process that parents go through when having this procedure performed; in that they do so for reasons which they genuinely consider to be the prioritisation of the best interests of their child such as marriageability, cultural acceptance, societal conformity, perceived cleanliness, perceived aesthetics etc. However, once again, the main differentiating factor between the practices is the clear medical consensus pertaining to the harm of all forms of FGM. Conversely medical reports by both Australian and Danish medical associations state that if performed in the appropriate conditions, there is no clear medical consensus as to whether sensitivity is effected or any serious long term detrimental effects come from IMC (Styrelsen for Patient Sikkerhed, 2020, p. 33; The Royal Australasian College of Physicians, 2010, p. 7).

Per Chapter 1.2, the importance of the IMC, particularly at the early infant stages for Jews, is clear. Both debates in Australia and Denmark have similarly raised concerns that because of the importance of this ritual to religious and cultural minorities, that if a ban were implemented, it would drive this practice ‘underground’ (Forbes, 2015 p. 264). As suggested in Chapter 1.3, along with the reports from the Australian and Danish Medical Associations discussed in Chapter 3.1.2 and 3.2.2, to ensure minimal complications from the procedure, and to manage pain from the procedure, it is integral that the procedure is performed by a medically trained person, in the medically appropriate environment and with the appropriate pain control. Therefore, despite the best interests of the child being prioritised by those proposing a ban on IMC (in this case prioritising physical integrity, bodily autonomy, child’s right to consent and protection of harmful traditions) this could conversely lead to an undesirable outcome for children. This concern is raised in both Australia (Forbes, 2015, p. 264; Haberfield, 1997, pp. 120-121; Marshall, 2012, p. 71) and in Denmark per the comments in the parliamentary debate on the Citizens’ Proposal introduced by the minister Flemming Møller Mortensen (Folketinget, 2018, at 12:37).

From the perspective of those who are opposed to IMC, the prohibition of the practice is ultimately and pragmatically not going to bring about the end of the practice, but on the contrary create a potentially uncontrolled and unregulated practice. Despite the completely different socio-cultural, political, legal and historical backgrounds of the two countries, they still both come to the same conclusion on this particular topic – that a ban may not be in the best interests of the child if implemented. When considered with the current legislation and recommendations of both Australia and Denmark on the appropriate and medically safe environment per the medical boards of both countries (Styrelsen for Patient Sikkerhed, 2020, p. 58-59; The Royal Australasian College of Physicians, 2010, p. 8-9), it seems that this therefore has a more desirable outcome that prioritises the safety of the child.

4.1.4 Protection from Physical Violence and Harmful Traditional Practices

Both the Australia and Danish IMC debates consider whether IMC is considered harmful and whether IMC would be considered as violence, and therefore inconsistent the right of children to be protected from physical violence and harmful traditional practices. In Australia, the Queensland Law Reform Commission discussed in detail the 'harm' aspect of IMC, and namely looked into whether IMC would come under the Criminal Code definition of bodily harm being the interfering with health or comfort (Williams, 1993, p. 15). The report also considers whether someone performing IMC could satisfy the criminal definition of grievous bodily harm if performed by in an unskilled manner, as IMC could result in disfigurement (detracting from personal appearance), disablement (creating a permanent disability), maiming (permanent injury) or wounding (an obvious result of IMC) (Williams, 1993, pp. 14-15). The Citizens' Proposal focuses on the protection from physical violence and harmful traditions as the main reasons behind the ban on IMC (Borgerforslag, 2018). On the other hand, both medical boards from Australia and Denmark have stated that so long as the procedure is performed in medically safe environment, with a doctor performing the procedure or present at the procedure, with the appropriate medical environment, this mitigates any significant risks associated with the practice (Styrelsen for Patient Sikkerhed, 2020, pp. 77-78; The Royal Australasian College of Physicians, 2010, p. 5). Both medical boards stated that they will continue to review evidence on potential harm risks, prophylactic benefits or long-term effects to sensitivity, however as it stands, they do not consider the harm inflicted during IMC, if performed appropriately, to be enough to ban the procedure. The debate over whether IMC satisfies the definition of 'harmful' and therefore a traditional practice, and whether it constitutes physical violence, that children should be protected from is difficult. In the opinion of the author of this thesis, it must be considered in context with the other rights discussed above. Ultimately, as the medical boards of both Australia and Denmark do not consider the procedure to be 'harmful' or considered as

'physical violence' if performed in the appropriate medical environment, this thesis then would follow this line of reasoning.

4.1.5 IMC and FGM

Another similarity between the IMC debates in both countries is the references made to FGM within these debates. The grounds for these references is generally; that if an age limit is placed on IMC, this could then lead the way for a repeal on a full ban of FGM and allow it over a certain age, that the inconsistency in the debate between the two practices is discriminatory of gender if different protections are offered to different gendered children. As with the discussion in Chapter 2.2, IMC and some less severe forms of FGM (Type IV) do have some overlap, yet are seen very different in the public eye (Folketinget, 2018, at 12:21 in comments by Ellen Trane Nørby; Fox & Thomson, 2009, pp. 195-197; Knudsen, 2012). The reason for this difference in public imagination is presumably the following factors; claims of gender discrimination, the complete global trend in intolerance towards FGM, and a cultural relativist view of FGM.

In the Australian Feminist Studies text, legal professors Marie Fox and Michael Thompson discuss the 'dangers which accompany attempts to highlight similarities between Western and non-Western cultural practices, and the real risk of collapsing important distinctions in such a process' (Fox & Thomson, 2009, p. 205). They continue to claim that their contention:

> Important links between different forms of genital cutting, and their roles in producing sexed bodies, have been obscured by academic work, which for various political ends has sought to deny these similarities. The notable discursive overlaps between male and female genital cutting practices render the differential responses of global civil society to the practices particularly striking (Fox & Thomson, 2009, p. 205).

As stated in Chapter 2.2, thesis merely aims to highlight these areas of overlap, and compare not the procedures of IMC and FGM, but rather question the dramatic separation in public imagination in practices like Type IV FGM and IMC in Australia and Denmark. In Australia, a Muslim man who performed a symbolic 'nick' procedure on a girl was imprisoned per criminal prohibitions of FGM (*The Queen v A2* (2019) *HCA 35,* para. 58), yet when an indigenous circumcision ceremony involving the removal of the foreskin in the Northern Territory went wrong and three young boys suffered severe complications, the Attorney General found no criminal wrongdoing here and no need for investigation (Hermant, 2014). It begs the question, why is there a hierarchy of cultural practices whereby the former

scenario left the girl with an impermanent symbolic 'nick', yet the latter left the boys in a pool of their own blood requiring urgent hospitalisation. In the instance of the Australian case involving the man imprisoned for clitoral 'nicking', it most likely reflects Australia's willingness to follow the global consensus among banning all forms of FGM, regardless of how extreme.

Both Australia and Denmark have different approaches when they deal with IMC compared to Type IV FGM; prioritising cultural and religious rights of parents and children for the former, but conversely prioritising the protection of the child from harmful traditions for the latter. It must also be considered that the number of cases involving Type IV FGM is only 5% of the global number of FGM performed (Trolle, 2019; Zurynski et al., 2017, p. 511). In the opinion of the author of this thesis, this 'zero tolerance' approach to all forms of FGM predominantly comes the global human rights consensus aiming to abolish all forms of FGM – loosening regulations on one type may come across as showing tolerance on some other intolerable types of the practice.

Ultimately, the debates in the two countries include, in some form, mention of FGM when discussing IMC, be it for reasons pertaining to proposed gender discrimination or cultural colonialism or moral relativism. This topic is sensitive, and I do not claim to have any definitive or nuanced solutions to this complex discussion. Moving forward, I think it requires a rational, academic and evidence-based discussion on both procedures, and a removal of emotional biases that often encroach on any discussion about the overlap between these practices. There is, in the opinion of the author of this thesis, some, albeit small, areas of overlap with the two procedures that should not be excluded from analysis, just because of global human rights trends of complete intolerance on all forms of FGM.

Conclusion

On the topic of similarities between the IMC debate in Australia and Denmark, both countries seem to weigh up the same rights; the child's rights to physical integrity, bodily autonomy, consent over their body, and protection from physical violence and harmful traditions, against freedom of religion or belief and the child's and parent's rights to religion and culture. This thesis concludes that one of the key factors in the debate is the fundamental, non-negotiable and uncompromisable status IMC has in religious and cultural communities (like Judaism in particular). Although the procedure may arguably be in conflict with rights such as; physical integrity, bodily autonomy, the child's consent and protection from harmful traditions and physical violence, both Australia and Denmark have made exceptions to these

rights, so long as the best interests of the child are prioritised. The IMC debates in both countries make reference to FGM within these debates. The grounds for these references is generally; that if an age limit is placed on IMC, this could then lead the way for a repeal on a full ban of FGM and allow it over a certain age, along with the inconsistency in the debate between the two practices being gender discriminatory. Despite the necessity to address these references made to FGM as they feature in the debates, the only area where this comparison may be of use is only within Type IV FGM and IMC, where a small area of overlap exists. In the bigger picture, although it is interesting to note the differences in public imagination on these two practices and what explains these differences, mention of this comparison often then detracts the IMC debate from meaningful discussion.

In the opinion of the author of this thesis, IMC should, from a normative perspective, be postponed until the child is of the appropriate age to have full comprehension of the procedure, as with procedures such as intersex 'normalisation' surgery, piercings, tattoos or cosmetic surgery (like otoplasty). However, regardless of this normative conclusion, it is clear that a ban on IMC directly impacts the religious and cultural rights of communities who see this procedure as an integral part of practicing their religion or culture. Therefore, when reconciled with medical reports from both countries on the low risks associated with the procedure if performed in the medically appropriate environment, it is clear that these factors are what have rightfully tipped the scales when balancing these rights in ultimately allowing IMC within Australia and Denmark.

4.2 DIFFERENCES

When looking at IMC in Australia and Denmark, there are key differences, as these are two entirely different countries with different historical, political, legal, cultural and religious environments. The debate on IMC in Australia has elements of colonialism as the practice is performed by indigenous communities, along with a deeper focus on cultural circumcision due to the residual English and American influence in the 20th century on IMC. The debate in Denmark, on the other hand, has a deeper focus on religious IMC as it hasn't been practiced culturally. The Danish debate highlights some issues in Denmark on freedom of religion and equality of religion, along with an us-them approach to IMC.

4.2.1 Australia

Colonialist mentality against Indigenous IMC

As discussed in Chapter 1.2.1 and Chapter 3.1.1, IMC is practiced by certain indigenous communities, and like many other religious and cultural minorities who practice circumcision, they fear further marginalisation if the practice is limited or banned. Although similar to the dilemmas faced by the Muslim and Jewish communities of both Australia and Denmark, the situation of the Australian Indigenous communities is differently complex. As a colonised country, the relationship with indigenous and non-indigenous Australians is delicate. European colonialism had a 'devastating impact on Aboriginal communities and cultures' where Aboriginal people were 'subjected to a range of injustices, such as mass killings and displacement, along with many cultural practices being denied and subsequently lost (Victorian Public Sector Commission, 2020). Indigenous Australians are increasingly ostracised from urban areas, meaning practices like IMC are often performed in rural areas, in secrecy, without medical assistance or supervision and outside of appropriate medical environments. Like in the Northern Territory case of 2014, it then creates tensions when critiques are made on these ancient practices as these communities already feel ostracised and marginalised, and they feel they have less protection over their customs and traditions (Belsham, 2014). The importance of IMC to Indigenous Australian communities who practice it is undoubted and uncontentious (Chapter 1.2), however does this cultural procedure gain the same level of protection as religious IMC would for Judaism or Islam? As outlined in Chapter 1.1, the definition of culture and religion, and the overlap between them, is complex. A religious practice can be cultural, but a cultural practice is not always religious. If the Indigenous Australian practice is considered cultural and not religious, does it still gain the same level of protection through the rights in international human rights law treaties, as discussed in Chapter 2.1?

As discussed in Chapter 2.1, it could be said that religious practices have better protection from rights in human rights law treaties than cultural practices do. Within Article 5(1) of the ICECSR states that because a practice is cultural, does not mean it therefore has immunity from or 'destroy' other rights – therefore, in this regard, the individual practice would need to be examined, and the effects it would have on the community affected. As reiterated throughout the thesis (Chapters 1.2, 3.1.1, 3.1.2, 3.2.1 and 3.2.2) the even the secular Jewish and Muslim communities along with the IMC-practicing Indigenous communities consider IMC to be an integral and fundamental part of their cultural identity. The majority of these communities would consider a ban on IMC as a direct impediment to their cultural rights, which in the opinion of the author of this thesis, would most likely be considered with equally

weighted importance, as the claims of religious communities with their religious rights. The Tasmanian Law Reform Report recommends reform of circumcision law to prohibit the circumcision of incapable minors, but recommends an exception for the performance of some well-established religious or ethnically motivated circumcision on the incapable minor (Marshall, 2012, p. 54). It would be likely that Indigenous Australian IMC, both circumcision and subincision, would be considered within this definition of 'ethnic' tradition.

It is interesting to note that subincision, a more extreme cultural genital alteration practice, performed in some indigenous Australian communities (per Chapter 1.2) and still practiced by some select indigenous communities (Williams, 1993, pp. 9-10), is not as present in public debate. Although there is a lack of updated literature on the procedure, which could presumably be because of the less common nature of the procedure in comparison to the removal of the foreskin practiced by other communities, it would be interesting to know how public reaction would sit with subincision, in comparison to procedures like FGM and IMC.

The classification of Indigenous Australian IMC as either cultural or religious, and their respective protections from rights in international human rights law is, in the opinion of the author of this thesis, not entirely necessary due to the adequate protections from respective rights in practice.

Anglo-Western traditions influencing cultural IMC

Unlike Denmark, IMC is still considered by some to be a cultural practice, due to the remnants of the English and American pro-circumcision influence in the 20th century (Chapter 3.1.1). When many Australian parents go through the decision process of whether to have their child circumcised, they often consider whether they should circumcise their child 'in order for him to look like his father' (Hutson, 2004, p. 238; Malone, 2011). In Australia due to the significant decrease in the circumcision rate, the desire for the child to look like their circumcised parent must now also be balanced with the desire for the child to look like the majority of their friends who will be uncircumcised (Na et al., 2015, p. 581). Although a rare and unlikely hypothetical, it would be interesting to note what would be the case of a child born in Denmark, to an Australian parent who was circumcised and also wanted their child circumcised, purely for cultural reasons being that they wanted their child to look like them. In this scenario, although abstract, what would the difference be compared to a non-religious but culturally Jewish of Muslim parent who wanted IMC performed for cultural reasons? This phenomenon of non-religious, non-

indigenous IMC in Australia adds to the difficulty when discussing the complex relationship with cultural and religious practices as discussed above and in Chapter 1.1. Per the attempt to distinguish between cultural and religious practices, it would be an interesting exercise to determine whether the Anglo-American cultural influenced circumcision in Australia would be considered a cultural practice and therefore protected in the same manner as indigenous IMC. Unlike Judaism, Islam or Indigenous IMC in Australia, where the procedure is deeply connected to identity, initiation and acceptance within these communities, these forms of IMC would be considered cultural as discussed in the previous section and in Chapter 1.1. However, it would be unlikely that the non-indigenous non-religious IMC still performed in Australia would be considered cultural in this same way as there is nothing that deeply connects this with the respective culture, or nothing that mandates that the procedure be performed at a young age (Chapter 3.1.1). As suggested in the Tasmanian Law Reform report on IMC, 'the law ought to accommodate established religious and ethnic circumcising traditions. It should also support measures to encourage individuals associated with these traditions to move away from loosely entrenched and particularly contentious practices' and continues to conclude that 'the law ought to condemn the waning tradition of circumcising incapable boys for secular non-ethnicity related social reasons' (Marshall, 2012, p 54). The author of this thesis agrees with this position and concludes that it is reasonable that States differentiate these religiously and culturally significant practices from non-indigenous secular Australian IMC practices in the IMC debate.

4.2.2 Denmark

Freedom of Religion vs. Equality of Religion

Denmark is an ethnically, culturally and religiously homogenous country with IMC not traditionally practiced by Danes (Chapter 3.2). The Danish debate on IMC focuses mostly on religious minorities; Muslims and Jews. The IMC debate in Denmark highlights issues with freedom of religion and equality of religion, which is not a conversation had in Australia that is seen as a more multicultural ethnically and religiously diverse society in comparison. The Danish Constitution or *Grundlov* establishes the Evangelical-Lutheran Church of Denmark or *Folkekirke* as the state supported church per Article 4, thereby excluding Denmark from being considered secular. Article 67 of the Danish Constitution states that 'citizens shall be at liberty to form congregations for the worship of God in a manner which is in accordance with their convictions, provided that nothing contrary to good morals or public order shall be

taught or done'. Although this Article protects freedom of religion or belief in the Constitution, this view of religion is through a very Danish Lutheran prism, especially with the choice of wording; 'form congregations', 'for the worship of God' and 'convictions' – all having strong Lutheran Christian undertones. In the Preliminary findings of his Country Visit to Denmark, the Special Rapporteur on freedom of religion or belief commented on the unchanged wording from 1849 of Article 67, requiring a broad interpretation on the scope of protection but a cautious interpretation on the limitation clause (Bielefeldt, 2016c, para. 35). Bielefeldt comments further on the non-egalitarian treatment of other religions and the frustration that religious communities feel.

Although freedom of religion is enshrined into the Constitution, equality of religion is not (T. Jensen, 2011, p. 342). From an assessment of the Constitution in his investigation of religion in Denmark, the Danish Professor in the Study of Religions, Tim Jensen states that 'nothing else in the Constitution supports an understanding of the Danish state as multicultural (including multireligious)' (T. Jensen, 2011, p. 344; Storm, 2011, p. 81). Jensen quotes Marx on Luther, stating that the shift to Lutheranism, 'liberated man from exterior religiosity by making man's inner conscience religious' and said that Luther 'emancipated the body from chains by enchaining the heart'. This understanding of religion is applied to other religions and therefore results in a cultural relativist approach to religious practices like IMC, as the hegemonic discourse struggles to see outside of what it considers appropriate practices of religion. It is this shift of religion from the exterior to the interior that Lutheranism takes is what, in my opinion, clouds the debate in Denmark on IMC; a ritual performed on the exterior not the inner conscience, a ritual performed on the body not the heart. It is in this way, that Danes blur the lines between what is actually religious and what is cultural, as the Danish 'civil religion' of their self-professed irreligiousness seems to be a marker of nationality or national identity (T. Jensen, 2011, pp. 345-346). Storm refers to Tina Gudrun Jensen, saying that 'people from other religions are likely to be seen as 'not Danish' with Danes retaining a Christian identity to signal cultural heritage rather than belief (Storm, 2011, p. 81).

Us and Them

Another differentiating element of the Danish debate from the Australian debate is that the Citizens' Proposal for the ban on IMC reflects a Danish cultural 'us and them' mentality, in that Danes find the practice odd, alien, strange and ultimately non-Danish. Denmark is a very homogenous society, both culturally and religiously as discussed in the previous section regarding Christian secularism.

Denmark has an inherent cultural value of conformity (Chapter 3.2.2) and since IMC is not a Danish cultural tradition (Chapter 3.2.1).

As commented by Bielefeldt, it is clear that Danish Muslims and Jews do feel and experience marginalisation within Danish society (Bielefeldt, 2016c, para. 10). Following on from the above discussion, Danish cultural and national identity is closely tied with religion (T. Jensen, 2011, p. 346; T. G. Jensen, 2008, p. 389; Storm, 2011, p. 76). As discussed in Chapter 3.2.2, in recent years the Danish Parliament has passed a number of laws that target religious practices; ritual slaughter, religious preaching that undermines Danish law and values, the 'Burka Ban', the handshake as a precondition for citizenship and abolishing the ban on blasphemy (Lassen, 2020, p. 142-146). When looked at collectively, these limitations on religious freedoms do share a strikingly similar consistency – they all target the Muslim minority community in Denmark. The question as to whether the discussion of a ban on IMC in Denmark (per the Citizens' Proposal) is a form of masked anti-immigration, islamophobia or anti-Semitism is not possible to ascertain with any certainty and is also not the aim of this discussion within the limitations of this thesis. The right-wing populist Danish People's Party (*DF*), the same party who expressed the need to 'restrict or ban' Muslim immigration into Denmark in order to 'preserve Denmark and Danish Culture' since 'Islamic ideology is at its core diametrically opposed to the Christian faith' (Krarup, 2014), actually voted against the Citizens' Proposal for a ban on IMC being debated in Parliament as seen in the comments from the Spokesperson for DF in the debate on the Citizens' Proposal, Liselott Blixt who commented that, 'in the Danish People's Party, we fully understand the opposition to circumcising children. Therefore, I would also like to state that we are against cutting into healthy children. However, as the proposal has been put forward, it will not only prevent circumcision of children, but will also make it legal to circumcise women after the age of 18, which is illegal today' (my own translation of the parliamentary debate) (Folketinget, 2018, at 12:56). In the parliamentary debate, however, Jane Heitmann of *Venstre*, a liberal-conservative party, proposed:

> I basically think that a lot of Danes have an incredibly hard time understanding why some parents choose ritual infant male circumcision, and why the ritual circumcision that takes place e.g. among Danish Jews, is such an important marker in a religious community. It is truly a cultural clash. To me, it is a completely natural reaction to distance oneself from what is seen through the Christian glasses, which a majority of us Danes view the world through, because for the vast majority of Danes it is inconceivable that we should let some cut in our children without a medical justification. (my own translation of parliamentary debate) (Folketinget, 2018, at 13:00)

In her investigation into IMC in the Nordic countries, the Swedish law professor Schiratzki discusses this idea of a long-held history of cultural and religious homogeneity, with Jews and Muslims making up a small minority, as also discussed in Chapter 3.2.1 (Schiratzki, 2011, p. 47). She proposes that with the

small number of minority communities, it is Christianity that constitutes the Nordic form of 'normality', and that the tiny minority who perform IMC as an aspect of childhood and in the best interests of the child is 'clearly not 'normal' in Nordic societies' (Schiratzki, 2011, p. 47). Mahama Tawat, a Swedish research associate in migration, diversity and welfare at the Malmö University, claims that whilst Sweden has stayed true to its policy of multiculturalism, Denmark has not (Tawat, 2018). He states that Denmark has a clear 'preference for the majority culture' and successive Danish governments have 'favoured the national culture in the public sphere, emphasising the Danish language and Christianity as its pillar' thereby perpetuating this us-them approach to outsider cultures in Denmark. (Tawat, 2018). This thesis intends to highlight the connections between the issue of equality of religion in Denmark, as discussed in the previous section, and how this maintains the cultural religious majority in Denmark and further perpetuates the us-them mentality towards minorities and their rituals. In his preliminary findings, the Special Rapporteur on Religion comments that 'the special constitutional status of the *Folkekirke*, in conjunction with other privileges, creates feelings of inequality among non-believers and religious minorities and thus should be reconsidered' (Bielefeldt, 2016b).

This us-them approach to IMC features in the Danish debate and not the Australian. Danes perceive IMC to be foreign, alien and non-Danish, as it does not conform with the majority Lutheran Christian consensus of what is 'normal'. Conversely in Australia, as there is a tradition of IMC due to English and American cultural influence in the 20th century in Australian culture, the debate does not feature this discussion.

Conclusion

As these are two different countries, there are expected differences in the IMC debates in Australia and Denmark. In Australia, the IMC debate features the colonialist and culturally relativist view of Indigenous IMC, along with the lingering non-Indigenous Anglo-Western influence of IMC from the 20th century, both of which do not feature in Denmark. The author of this thesis concludes that Australia's approach towards indigenous IMC must be cautious of cultural relativism and colonialism. Australia must approach the Indigenous IMC practice with similar sensitivity as with Jewish or Muslim IMC. It would be unlikely that religious Jewish or Muslim IMC would have a higher level of protection than Indigenous cultural IMC. This thesis concludes, however, that the non-Indigenous Australian practice of IMC would not likely be given the same protection of a core 'cultural' practice. It is in the opinion of the author of this thesis, that this form of IMC should be regulated further with a potential age limit considered. Conversely the Danish debate highlights the lack of equality of religion, along with the 'us-them'

approach to IMC. This thesis concludes that multiculturalism is an underlying issue, whereby the Danish Constitution's protection of the Danish National Church (*Folkekirke*) perpetuates and institutionalises the Danish mentality of 'us-them' with regard to non-Lutheran cultural traditions.

5. CONCLUSION

The debate on IMC is, as this thesis hopes to show, complex. One clear conclusion is that IMC is not clear cut. As the similarities show in both countries, the IMC debate at its core comes down to the balancing of rights. What is it that tips the scales in the end? In the opinion of the author of this thesis, that the key deciding factors are; medical reports, the importance and uncompromisable nature of the practice to certain religions and cultures, and the best interest of the child as primary consideration.

Medical reports from the main medical boards in both countries indicate that the practice has no immediate health benefits, but also no immediate risks if it is performed in the appropriate environment. As discussed in Chapter 3 and 4, this thesis concludes that the medically neutral stance on IMC has a strong influence when balancing the core rights in the IMC debate. As discussed in Chapter 1 and 3, both the Jewish, Muslim and Indigenous communities of both countries have repeatedly expressed how important IMC is to their religion, particularly in Judaism, where it must be performed at a specific age and indicates the child's initiation into religious and cultural Jewish life. As discussed in Chapter 3, religious and cultural groups who practice IMC claim that there is no equivalent or compromise on this practice. Continuing on from the importance of this practice to religious and cultural communities, the practice is so important to these communities, that it is predicted that if the practice is banned, these communities would take IMC 'underground' which could ultimately result in undesirable outcomes if unregulated. As discussed in Chapter 2 and 4, regardless of whether this ban is intended to be implemented with the best interests of the child as primary consideration, the outcome would not be in the best interests of the child. Finally, as discussed in Chapter 3 and 4, and mostly addressed in the Danish debate, from a pragmatic and international relations perspective, both states would likely not want to be the first state in the world to ban IMC. It could have the potential for international relations repercussions. In the opinion of the author of this thesis, it is these factors that tip the scales in favour of religious and cultural freedoms over the child's rights to autonomy, integrity, consent and protection from physical violence and harmful traditions.

Non-therapeutic IMC has deep roots in cultural and religious human history, and has been performed for reasons such as initiation, transition to manhood, warriorhood or test of bravery within many indigenous communities, and particularly in some Indigenous Australian communities where circumcision (both subincision in one community, but foreskin removal in a number of other communities) is still performed (Chapter 1.2). IMC is performed in both Judaism and Islam but is an

especially fundamental and non-negotiable part of Judaism, where it must be performed on the 8th day after birth (Chapter 1.2). It is still considered an important part of Islam but is performed at varying ages depending on the family, region or country (Chapter 1.2). Outside of indigenous, Jewish and Islamic IMC practices, IMC became medicalised during the 19th century in Britain, as medical knowledge at the time considered IMC to cure a range of ailments. So long as IMC is performed by a trained person in the appropriate environment with anaesthesia, there is no clear medical consensus of long-term risks. There is also no clear medical consensus of benefits to the western world where the prevalence of HIV or other STDs are low and the general health standard is high, as in Australia and Denmark.

Within the main international human rights treaties, IMC comes into contact with UDHR, ICCPR, ICECSR, CAT, CRC. There are two main categories of rights that IMC comes into contact with; on the one hand, IMC is seemingly consistent with the freedom of religion or belief and the child's and parent's rights to cultural and religious freedom, while on the other hand being seemingly inconsistent with right of the child to physical integrity, bodily autonomy, consent and protection from physical violence or harmful practices.

The debates in Australia and Denmark have developed over the recent years and converged in a similar stance; the practice can be legally performed under the appropriate medical conditions but is neither recommended nor condemned. Australia has a history of indigenous and non-indigenous IMC. Although not practiced by all Indigenous Australia communities, those who do practice IMC consider it to be extremely important initiation into adulthood and a long-held tradition in their culture. Non-indigenous IMC came to Australia through Anglo-western influence in the early 20th century, peaked in the 1950s but then began to decline steadily over years. Regarding the public debate on IMC in Australia, this thesis concludes that the core debates surround the RACP statement not recommending IMC but allowing parents to choose along with the Northern Land Council's response to the botched IMC ceremony in Northern Territory in 2014. In terms of legal discourse on IMC in Australia, there is precedent for the Commonwealth to make laws which could impact the exercise of religion in certain situations, however it is not clear as to whether IMC would amount to this, but this thesis would propose that it would not likely be constitutionally valid for the Commonwealth to limit the exercise of religion in the case of IMC. The current Australian legal debate on a state level centres around two non-binding reports; one from Queensland which mostly discusses the conflict between IMC and the child's consent, and the other from the Tasmanian Law Reform Institute which recommends IMC only be performed for religious or ethnic reasons.

In Denmark, as IMC has not been practiced historically among the culturally and religiously heterogenous majority in Denmark, and therefore IMC is a tradition practiced by the Muslim community, along with the more established Jewish community. The Danish public debate in recent years centres around the Citizens' Proposal to ban IMC; which has been debated by Parliament with an intended outcome expected at the beginning of this year but is still yet to be decided on. Due to, what this thesis considers failures in the legal construction of the Citizens' Proposal, it is unlikely for the Citizens' Proposal to pass through Parliament to ban IMC. The Citizens' Proposal indirectly suggests that FGM be made legal to those over 18, which has, in the opinion of the author of this thesis, clouded the real intentions and debate on IMC. This thesis also recognises the weight of not wanting to be the first country to legislate a ban on IMC, and fear of international repercussions had a role to play in this discussion. The Citizens' Proposal should have instead focussed more on the precedent of the Danish government in limiting the exercise of religious freedom in the case of public safety, and instead focussed more on how the child's right to consent, bodily autonomy and physical integrity could amount to a violation to public safety perhaps.

This thesis suggests that the similarities and differences of the IMC debates in Australia and Denmark can be explained per the analysis in Chapter 4. The similarities in the debates are the weighing up of the core rights; the child's rights to physical integrity, bodily autonomy, consent over their body, and protection from physical violence or harmful traditions, against the freedom of religion or belief, and the child's and parent's rights to religion and culture. This thesis concludes that one of the key factors in the debate is the fundamental, non-negotiable and uncompromisable status IMC has in religious and cultural communities, like Judaism in particular. Although the procedure is arguably in conflict with rights such as; physical integrity, bodily autonomy, the child's consent and protection from physical violence or harmful traditions, both Australia and Denmark have made prior exceptions to these rights, and in this scenario, could ensure that the best interests of the child are the primary consideration. With the possibility for undesirable outcomes if the practice is banned and goes underground, this thesis concludes that Australia and Denmark have taken the best interests of the child as primary consideration by regulating the practice and having it performed in the appropriate medical conditions.

Regarding the differences in the debates, this thesis concludes that Australia's approach towards indigenous IMC must be cautious of cultural relativism and colonialism, but it would be unlikely that religious Jewish or Muslim IMC would have a higher level of protection than Indigenous cultural IMC. Non-Indigenous Australian IMC would not likely be given the same protection of a core 'cultural' practice like indigenous or religio-cultural Jewish or Muslim IMC, and therefore an age limit could be considered.

From the Danish debate, multiculturalism is an underlying issue, whereby the Danish Constitution's protection of the Danish National Church (*Folkekirke*) perpetuates inequality of religion and institutionalises the Danish mentality of 'us-them' with regard to non-Lutheran cultural traditions.

Looking forward, I agree with the sentiment of Foblet as discussed in Chapter 4.1, who addresses the shift in mainstream opinion, towards opposing the physical subjection of young children to surgery that does not meet the definition of medical treatment (Foblet, 2016, p. 143). I predict that there may be countries that may be more likely in the future to pass a ban on IMC, but not Australia and Denmark. Regardless of how far this shift of the mainstream opinion goes, there is no changing an ancient religio-cultural practice like IMC within Indigenous Australian communities along with Jewish and Muslim communities around the world. Although I could perhaps predict some compromise from Muslim and Indigenous communities, as IMC performed at neonate stage is not as integral, I see no compromise from the Jewish community in Australia and Denmark. With the collective trauma from the events of the 20th century still present in the minds of Jewish communities around the world, Jewish communities are still sceptical of even registering as Jewish, let alone conforming to government regulation on IMC. Any ban will push the practice underground, potentially harming children, and ultimately in the long-term result in the eventual eradication of already marginalised Jewish communities in Australia and Denmark.

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