INFANT MALE CIRCUMCISION

A Violation of the Canadian Charter of Rights and Freedoms

ARIF BHIMJI, M.D.

January 1, 2000

Acknowledgement

The author wishes to thank those who have helped in the writing of this paper: Dennis Harrison and John Antonopoulos for their suggestions and editorial work, and Christopher Price for his contributions both generally and on international law.

CONTENTS

INTRODUCTION

The origins of male circumcision lie in the dim past. The earliest Egyptian mummies (2300 B.C.) bear the marks of circumcision, and wall paintings in Egypt show that it was customary several thousand years earlier still. Many reasons for this practice have been proffered, ranging from obeying the law of God to promoting public health.

Understanding circumcision is a formidable task. Religious requirements, ethical arguments, legal rulings, human rights issues, and medical study upon medical study threaten to overwhelm all but the most diligent researcher. The unwary are soon bogged down in a quagmire of myth and misinformation. Controversy has swirled around this practice, it seems, from the earliest times.

Why all the fuss over a mere "piece of skin"?

The answer is that fundamental principles are at stake—principles that form the very foundation of ethics, law, and human rights. These basic precepts are not receiving due attention in the current debate over circumcision. Instead, circumcision is being looked at almost exclusively from the standpoints of public health and theology, as though these two frames of reference were the only ones that mattered. This paper, however, puts ethics, law, and human rights at the centre of the debate over male circumcision.

GENITAL MUTILATION

Mutilation Defined

Stedman's Medical Dictionary defines "mutilation" as "disfigurement or injury by removal or destruction of any conspicuous or essential part of the body." [1]

Classification of FGM

The American Academy of Pediatrics Committee on Bioethics recognizes four types of female genital mutilation:[2]

> Type I — often termed clitorectomy, involves excision of the skin surrounding the clitoris with or without excision of part or the entire clitoris.
>
> Type II — referred to as excision, is the removal of the entire clitoris and part or all of the labia minora.
>
> Type III — known as infibulation, is the most severe form in which the entire clitoris and some or all of the labia minora are excised, and incisions are made in the labia majora to create raw surfaces. The labial raw surfaces are stitched together to cover the urethra and vaginal introitus, leaving a small posterior opening for urinary and menstrual flow.
>
> Type IV — includes different practices of variable severity including pricking, piercing or incision of the clitoris and/or labia; stretching of the clitoris and/or labia; cauterization of the clitoris; and scraping or introduction of corrosive substances into the vagina.

Since the penis and clitoris arise from the same embryonic tissue,[3] removal of the male prepuce is comparable to removal of the female prepuce. Therefore Type I female genital mutilation and male circumcision are comparable practices. The prepuce of a newborn adheres firmly to the glans—these two structures normally take several years to separate. Consequently circumcision of a newborn male requires tearing apart what is essentially still a single structure, and in that respect resembles a partial clitorectomy.

CIRCUMCISION: MEDICAL ASPECTS

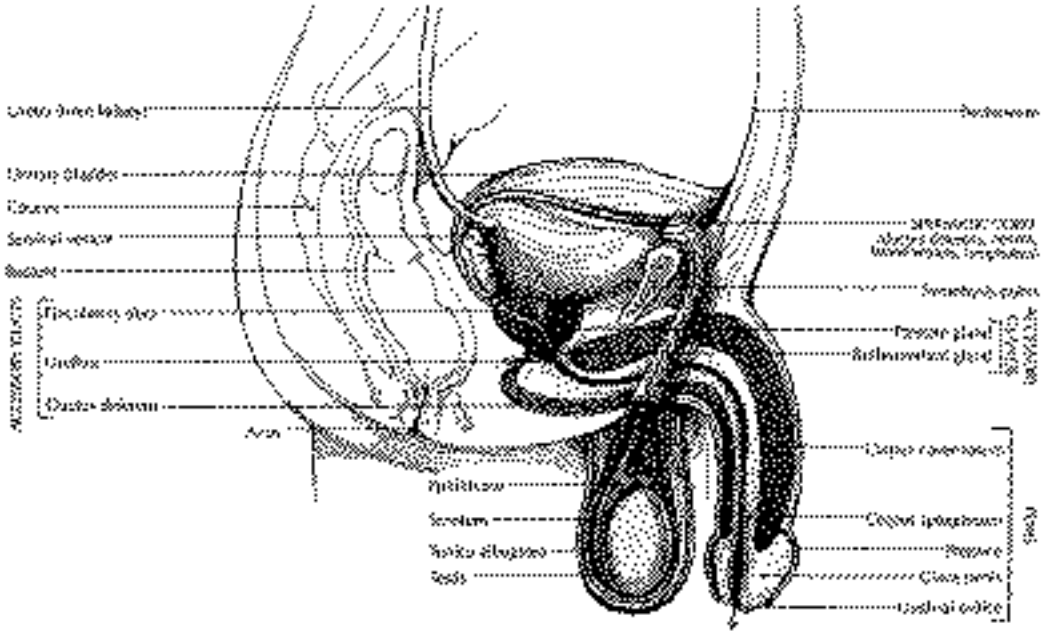
Anatomy of the Penis and Foreskin

Embryological Development of the Sex Organs

The external sex organs of both sexes originate from the genital tubercle of the fetus. Structures having the same origin are said to be homologous. The male and female foreskin, or prepuce, are homologous structures that develop similarly.[4] Differentiation of these tissues occurs prior to birth, and is dependent on the sex of the fetus. The prepuce in the male fetus appears at eight weeks as a ring of thickened epidermis, which grows forward over the base of the glans.[5] By 16 weeks the prepuce has advanced to the tip of the glans. At this stage, the epidermis of the prepuce is contiguous with the epidermis of the glans—that is, these two structures are fused together. The process of separation then begins, but this process is rarely complete by the time the child is born. In some cases, the prepuce does not become fully retractable until puberty.

Gross Anatomy of the Penis

The penis consists of three main areas: the shaft, the glans and the prepuce. The penile shaft extends from the abdominal wall to the sulcus of the glans. The glans, or head of the penis, is attached to the shaft at the sulcus. The prepuce, or foreskin, is an extension of tissue that begins at the sulcus, proceeds forward to the level of the tip of the glans or beyond, then folds back on itself and becomes contiguous with the true skin of the penile shaft. Thus, the prepuce actually consists of two layers: an outer layer similar to the shaft skin, and an inner layer that is not skin at all, but mucosa similar to that found on the lips, female genital mucosa, and perianal mucosa.



Adapted from: Human Anatomy, Carola R., Harley J., Noback C. 1992

Histology of the Penis

The inner layer of the prepuce consists of mucosa, which differs histologically from true skin in several important respects. For instance, mucosa lacks the dense collagenous zone

normally associated with true skin. It also lacks the hair follicles, sweat glands, and sebaceous glands often seen in histological preparations of true skin.[6] The mucosal surface of the prepuce is lined with variably keratinized squamous epithelium similar to that of the mouth, vagina, and esophagus.

The prepuce possesses a richer variety and greater concentration of nerve endings than any other part of the penis.[7] The inner layer of the prepuce is made up of two distinct zones of mucosa. The first zone, situated nearest the tip of the penis, displays a prominent band of ridged mucosa ("ridged band"). This band merges with the frenulum of the penis and when the prepuce is fully retracted, it lies across the upper surface and sides of the shaft of the mid-third of the penis. Histologically, the ridged band has a tremendously rich vascular supply, explaining its deep red colour. It is densely packed with Meissner's, Pacinian, and Ruffini corpuscles. Even the least damaging forms of circumcision remove nearly all of these specialized sensory receptors.

The second zone, located adjacent to the sulcus of the glans, is smooth mucosa with shallower papillae and no ridging. It contains fewer end organs than the ridged mucosa.

Taylor *et al*. found that circumcision results in a mean loss of 3.4 cm of preputial skin and mucosa, or 51 percent of the length of the mean adult penile shaft. Taylor *et al*. also note that:

> Clearly, the penis is a complex organ with many different parts, each specialized for a specific function. The prepuce provides a large and important platform for several nerves and nerve endings. The innervation of the outer skin of the prepuce is impressive; its sensitivity to light touch and pain are similar to that of the skin of the penis as a whole. The glans, by contrast, is insensitive to light touch, heat, cold, and as far as the authors are aware, to pinprick. Le Gros Clark noted that the glans penis is one of the few areas on the body that enjoys nothing beyond primitive sensory modalities.[8]

Functions of the Penis

Though the penis and clitoris arise from the same embryonic tissue, they serve different purposes. In the female, the clitoris acts as a focal point for sexual stimulation. The penis, on the other hand, is primarily an organ of copulation and a conduit for urination. As noted previously, recent anatomical evidence suggests the prepuce in the male is structured for a specialized sexual function. The prepuce contains the densest concentrations of fine-touch neuroreceptors to be found on the penisRecent evidence suggests that the focal point of sexual stimulation in the male is neither the glans nor the shaft, but the prepuce, since the latter structure contains the greatest concentration of fine-touch neuroreceptors. As noted previously, anatomical evidence suggests the "ridged band" of the prepuce performs a specialized sensory function.[9] The prepuce and glans are complementary structures designed to work together to provide optimal sexual stimulation.

In most newborn males, the prepuce adheres tightly to the glans. Physical separation of these two tissues normally takes several years to complete. In 90 percent of cases, separation is complete by the age of three years.[10] In a small number of cases, total separation may not occur until puberty.

Medical Arguments Against Circumcision

The pros and cons of circumcision have been the subject of intense debate in the medical community for decades. Proponents have focused on marginal benefits, while opponents have focused on pain and surgical risk. It is interesting to note that the value of normal anatomy has been almost totally excluded from consideration. The consensus of medical opinion today is that neonatal circumcision cannot be justified as a routine procedure.

Following are the most recent recommendations of medical organizations in four English-speaking countries:

Statements of Medical Organizations

- **Canadian Paediatric Society** (1996): "Circumcision of newborns should not be routinely performed." [11]

- **American Academy of Pediatrics** (1999): "Existing scientific evidence demonstrates potential medical benefits of newborn male circumcision; however, these data are not sufficient to recommend routine neonatal circumcision." [12]

- **British Medical Association** (1996): "It is rarely necessary to circumcise an infant for medical reasons." [13]

- **Australasian Association of Paediatric Surgeons**: "The Australasian Association of Paediatric Surgeons does not support the routine circumcision of male neonates, infants or children in Australia." [14]

The Australian College of Paediatrics notes: "The possibility that routine circumcision may contravene human rights has been raised because circumcision is performed on a minor and is without proven medical benefit." [15]

In summary, medical organizations around the world are in agreement that there is no medical justification for removing the healthy prepuce.

Changes in Sexual Practice

Laumann *et al*. report that circumcised men tend to exhibit a "more elaborated set of sexual practices than do men who are not circumcised." [16] This finding has been interpreted by some to mean that circumcised men have more fun. Van Howe and Cold, however, suggest that circumcised men may require more intense stimulation to make up for the loss of fine-touch receptors in the prepuce.[17]

LEGAL CONCERNS

Genital Mutilation and Canadian Criminal Law

The Purpose of Criminal Law

According to the Canadian Department of Justice, "laws are not only designed to govern our conduct: they are also intended to give effect to social policies... Another goal of the law is fairness. This means that the law should recognize and protect certain basic individual rights and freedoms, such as liberty and equality. The law also serves to ensure that strong groups and individuals do not use their powerful positions in society to take unfair advantage of weaker individuals... In a democratic society like Canada, laws are not carved in stone, but must reflect the changing needs of society. In a democracy, anyone who feels that a particular law is flawed has the right to speak out publicly and to seek to change the law by lawful means." [18]

Criminal law helps safeguard lives and property. Canadians need criminal law to ensure a safe and peaceful society in which the rights of individuals are respected. The Canadian legal system guarantees the rights of each individual while at the same time ensuring that society

functions in an orderly manner. Canadians also believe in the Rule of Law, which means that the law applies to every person, including members of the police force and public officials.

Criminalization of Genital Mutilation

In 1997 the Canadian Parliament passed an amendment to the Criminal Code of Canada expressly prohibiting all forms of female genital mutilation (FGM). This legislation was enacted in response to increasing flows of immigrants from countries where FGM is commonly practised. Genital mutilation is recognized as a human rights violation under the provisions of treaties and conventions to which Canada is a State party. There have been no prosecutions for FGM in Canada prior to or after the introduction of this amendment.

The prohibition of FGM was added to Section 268 of the Criminal Code,[19] which deals with aggravated assault. This section now reads as follows:

> **AGGRAVATED ASSAULT**
>
> 268. (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.
>
> Punishment
>
> (2) Every one who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.
>
> Excision
>
> (3) For greater certainty, in this section, "wounds" or "maims" includes to excise, infibulate or mutilate, in whole or in part, the labia majora, labia minora or clitoris of a person, except where:
>
> (a) a surgical procedure is performed, by a person duly qualified by provincial law to practise medicine, for the benefit of the physical health of the person or for the purpose of that person having normal reproductive functions or normal sexual appearance or function; or
>
> (b) the person is at least eighteen years of age and there is no resulting bodily harm.
>
> Consent
>
> (4) For the purposes of this section and section 265, no consent to the excision, infibulation or mutilation, in whole or in part, of the labia majora, labia minora or clitoris of a person is valid, except in the cases described in paragraphs (3)(a) and (b).
>
> R.S., 1985, c. C-46, s. 268; 1997, c. 16, s. 5.

Section 268 prohibits interference with genitalia for non-medical reasons, but only in the case of female genitalia. Male anatomy is not mentioned. While it has been argued that non-therapeutic male circumcision is covered under this section even though it is not specifically mentioned, the question arises as to why female body parts are expressly referred to and what degree of protection is afforded to males. Sections 15 and 28 of the Canadian Charter of Rights and Freedoms (Charter)[20] stipulate that rights are guaranteed equally to both sexes.

The Constitution and Canadian Criminal Law

The Charter of Rights and Freedoms identifies the many forms of protection Canadians enjoy under the law. Sections 7, 15, and 28 of the Charter are particularly germane to any discussion about genital mutilation, whether female or male:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

When performed without a specific medical indication, circumcision of newborns, infants and children clearly violates the right to physical integrity guaranteed under Section 7. Non-therapeutic circumcision of newborns and children is a superfluous, invasive surgical intervention performed without consent. It limits the future choices of the patient with respect to sexual behaviour, aesthetics, and perhaps even religious affiliation.

Section 268 of the Criminal Code prohibits genital mutilation of females, but by failing to extend the same protection to males, this section now contravenes Sections 15 and 28 of the Charter of Rights and Freedoms. Section 268 of the Criminal Code discriminates against males as a group solely on the basis of their sex. It is important to note that offering equal protection to men under the law would in no way diminish the protection offered to women.

Legal Arguments against Circumcision

The basic moral principles of justice require that all parents and caregivers be treated equally by legislation enacted to protect children.[21] This means that a uniform standard should be applied to those entrusted with the care of children.

Under Canadian law, the onus falls on physicians and parents to show that a child will derive a clear and compelling benefit from a proposed surgical intervention. The consensus of medical opinion today is that neonatal circumcision confers no such benefit. Neonatal circumcision is a traumatic intervention that involves amputation of a normal body part without patient consent. It has a realistic complication rate of between 2 percent and 10 percent,[22] although published rates vary from 0.06 percent to 55 percent.[23] Scientific studies have shown that neonatal circumcision has long-term adverse effects on pain response,[24] and puts both males and their female partners at greater risk for disease.[25, 26, 27, 28, 29, 30, 31] Early work suggests that circumcision impacts adversely on female enjoyment as well.[32]

Those who perform neonatal circumcision for ritual, cultural, or social reasons must show justification for interfering with the normal development of a child's body. The onus of proof is upon the proponents of circumcision to furnish clear and convincing evidence that a child will benefit from circumcision. It is not upon those opposed to the practice to prove that harm results to the child. Dr. Margaret Somerville, one of Canada's leading lawyers and ethicists and Founding Director of the McGill Centre for Medicine, Ethics and Law has put it this way:

> All wounding of one person by another person is *prima facie* criminal assault (indeed, aggravated criminal assault), but it can become justified—that is, not illegal, not a crime—on certain conditions. The most common and important situation in which wounding is not a criminal assault, is when it is indicated as medically required surgery and it is undertaken with the informed consent of the person on whom it is carried out or, if this person is incompetent, of their legal representative (in the case of children, the parents). The difficulty with infant male circumcision is that when it is **not** medically indicated—the Canadian Paediatric Society, for instance, has stated it is not medically indicated as a routine procedure—medical justification is not present and, although adults can consent to have a non-therapeutic intervention carried out on themselves provided the intervention is not considered to be contrary to public policy, in general, they may not consent to having such interventions carried out on their children. The exception to this is if the intervention is

> considered to be what the law calls *de minimis*, that is, a trifle of which the law will not take notice. Arguably, ear piercing, especially as it is reversible, falls within this category. However, even the rabbis with whom I talked agreed that male infant circumcision is not *de minimis.* [33]

Dr. Somerville has also written:

> All woundings are criminal assault unless they can be justified. The burden of proof of justification is on the person who causes the wounding. A therapeutic aim is the justification for almost all medical wounding and is an essential justification for those unable to consent to the wounding for themselves. Consequently, a physician would need to show that infant male circumcision was medically necessary before it would be justified. If there is equal doubt as to whether or not it is medically necessary (which seems to me to be the most favourable position that, at present, could be taken in favour of infant male circumcision), then the procedure must not be carried out.[34]

Insofar as both male circumcision and female circumcision are surgical interventions that remove normal erogenous tissue without therapeutic aim, they cannot fail to have the same legal status. Thus far, however, the legal system is protecting only females. Males are being discriminated against on account of their gender, and because of a perception that male genitals are somehow less worthy of protection. This is a clear violation of Sections 15 and 28 of the Charter.

Limitations on Religious Practice

A free and democratic society recognizes that there are limitations to the way in which religious beliefs can be exercised. Canadian case law includes many examples of these limitations. In the following case, the presiding judge held that legislation enacted to protect child welfare and public health does not violate the Charter rights of Jehovah's Witnesses:

RE D.,
CCH DRS 1983 P21-881, A.
(1982) 22 Alta. L.R. (2d) 228
ALBERTA
(Prov. Ct.)
1982

> Immediately following its birth the child developed a severe respiratory illness. Medical specialists agreed that its life was in danger and that a blood transfusion was immediately required. The parents, who were Jehovah's Witnesses, refused to consent to the blood transfusion. On the day following its birth the child was apprehended pursuant to s. 6 of the Child Welfare Act and a blood transfusion was administered under the authority of s. 9(1)(b) of the Act. The Director of Child Welfare applied to the Court for a declaration that the child was a neglected child. It was contended for the parents that ss. 6 and 9 of the Child Welfare Act contravened s. 2(a) of the Canadian Charter of Rights and Freedoms which guaranteed freedom of conscience and religion.
>
> **HELD:** Sections 6 and 9 of the Child Welfare Act constituted legislation in relation to child welfare and public health, not legislation in relation to religion. Since the pith and substance of the legislation was not religion, it did not contravene the guarantee of religious freedom enshrined in the Canadian Charter of Rights and Freedoms, notwithstanding that it might affect Jehovah's Witnesses in the exercise of their religious beliefs.

Many cases can be cited to illustrate the limits placed on the exercise of religious beliefs when those beliefs may result in harm to an individual. The Government of Canada has made FGM a crime, though millions of people around the world believe this practice has a religious basis. The judgment in the following case makes specific reference to the limits that a free and democratic society may impose on the freedom of religion enjoyed under the Charter:

Children's Aid Society of Metropolitan Toronto v. S.H.
[1996] O.J. No. 2578
DRS 96-15720
Court File No. RE1/95 and Prov. Div. File No. C783/95
Ontario Court of Justice (General Division)
Wilson J.
July 15, 1996.
(53 pp.)

This was an application for a declaration that the constitutional rights of TH had been infringed by the manner in which a court hearing was conducted. TH was a 13-year-old Jehovah's Witness. Her mother was also a Jehovah's Witness. TH suffered from aplastic anaemia. TH and her mother refused to allow treatment of TH involving blood products. The judge made a temporary order under the Child and Family Services Act, making TH a temporary ward of the Children's Aid Society for a two-week period, to ensure that she was treated with blood products. TH claimed that her rights under sections 7 and 2(a) of the Canadian Charter of Rights and Freedoms had been violated.

HELD: TH's rights were not violated. TH's freedom of religion was infringed but the infringement was justified under section 1 of the Charter, as TH was not capable of making decisions and her mother would not consent to treatment. The ability of the state to protect a child requiring medical treatment, who was not capable of making a treatment decision, was a reasonable limit to TH's freedom of religion, that was demonstrably justified in a free and democratic society.

In *O'Sullivan v. The Queen* (1991), the issue of religious freedom under the Charter is addressed in the context of taxation. The presiding judge, Muldoon J. speaks specifically to the limitations of Section 2 of the Charter. The relevant parts of the case are set out below:

O'Sullivan v. The Queen
84 D.L.R. (4th) 124
Federal Court, Trial Division
Muldoon J.
August 12, 1991

A taxpayer remitted his taxes payable under the Income Tax Act, S.C. 1970-71-72, c. 63, less a sum of $50, which he withheld to protest government funding of abortions, claiming that payment of the sum would violate his right to freedom of conscience and religion contrary to s. 2(a) of the Canadian Charter of Rights and Freedoms. The Tax Court dismissed his appeal, and the prothonotary granted a motion by the Crown to strike out his statement of claim, which was his means of appeal from the Tax Court decision.

HELD: The taxpayer has standing to raise the constitutional issue. The preamble to the Charter, recognizing the supremacy of God, only prevents the Canadian state from becoming officially atheistic. It does not prevent Canada from being a secular state.

The taxpayer here is lawfully pursuing the resort to law as administered by the court. His counsel invokes s. 2(a) of the Charter, the constitutionally entrenched "freedom of conscience and religion." He argues that the taxpayer's freedom of conscience and religion is infringed by being compelled by the government to pay over that portion of his taxes which proportionately represents financial support for abortions. It is correctly argued that the constitutional guaranty of that freedom means not only that the state must not infringe it, but also that the state must positively defend it from all infringement, or else there is no such guaranty. So, subject to the secular strictures expressed in s. 1 of the Charter, everyone is free to entertain, openly to declare, and to practise through worship or outward manifestation freely accepted or chosen religious beliefs without hindrance or reprisal: and the [page137] state is bound to defend this freedom along with the other rights and freedoms guaranteed by and in the Charter.

Does legal compulsion to pay taxes some of which support abortions mean state coercion which infringes freedom of religion and conscience? It probably does, but in any event, given the rights of legal opposition in a free and democratic society it is no doubt justified in terms of s. 1, which, as noted above imposes secular limitations on the freedom. After all, there are

religions and religions. Some exact not only beliefs, but also manifestations or practices which are inimical to Canada's constitutional values and imperatives; for example, religions or sects which exact suppression of the equal rights of women, or which exact the taking of stupefying drugs as a "sacrament," or which exact the involuntary servitude of some of their adherents, or which condone and incite their believers to the murder of an alleged blasphemer.

There are certain vociferous believers in Canada who believe that their Creator has done such a lamentably poor job in forming female humans that they arrogate to themselves the right to improve on their God's allegedly fumbled handiwork. The improvement under the euphemistically misleading appellation of "female circumcision" is nothing less than the mutilation of their dependant daughters by cutting off the clitoris and outer and inner labia of the vulva. Whether called a manifestation of religion, ethnicity or culture this cruel mutilation is practised presumably because God bungled and to leave these girls and women as they were created would be to pander to sexual immorality. The adherents of this belief say it is a parent's right to inflict such mutilation upon their daughters, and moreover, they ought to have access to the health care system to do it.

The court emphasizes the constitutional plane of approach, invoked by the taxpayer here, even although the practice of mutilation of daughters, which is nothing akin to the harmless male circumcision, causes irreversible bodily harm and should excite the attention of children's aid societies. The taxpayers counsel would not concede that this practice should be immunized and permitted by operation of s. 2(a) of the Charter. Indeed, he is correct, for if the state were to support that practice at the expense of the taxpaying public it would surely be infringing those unfortunate daughters' guaranteed rights to "security of the person" enunciated in s. 7 of the Charter. Section 28 emphasizes female persons' equal standing in all matters of rights and freedoms.

In R. v. Morgentaler, supra, a majority judgment of the Supreme Court of Canada held that s. 251 of the Criminal Code which criminalized abortions, but also permitted them to be authorized by therapeutic abortion committees violated the pregnant woman's right to the security of her person guaranteed by s. 7, and that such infringement was not justified pursuant to s. 1 of the Charter. Thus does the well-known tenet of the taxpayer's religion collide with another right. It is on the same constitutional footing as the less well-known tenet of those parents who have their daughters mutilated, for such daughters are surely guaranteed the right to security of their persons as much as pregnant women who seek to abort their pregnancies.

The court holds that this secular state of Canada simply leaves conscience and religion quite alone, with one exception, founded on pure reason. The exception requires the state to intervene to prevent the practice or expression of conscience and religion from causing harm to others physically or mentally, or from violating the constitutionally guaranteed rights of others.

When it comes to practices which harm others, obviously the state not only must not foster or promote them, but is justified pursuant to the Charter's s. 1, to enact reasonable limits in law in order to prevent or to eradicate such harm, despite the guaranty of freedom of conscience and religion. Since those perceptions depend upon whose "ox is gored", the court must strive for fastidious objectivity. Here is how the taxpayer's counsel put the distinction between Mr. O'Sullivan and the daughter-mutilators: And in one case [the surgical procedure] destroys, terminates that particular young person, the child in utero and the case is what Mr. O'Sullivan wishes to prevent and not contribute towards. Whereas in the other case, I would imagine that female circumcision can in fact be harmful to the health and could even possibly be an assault on the child. It mutilates the child and that is what the religion is [standing] for and therefore I don't see why that should not be forbidden. In one case it's the harm that Mr. O'Sullivan is opposed to, in the other case in fact there is in fact there may be harm if the religious belief is fostered. I think that's the central distinction. So it is that sincere, conscientious religious beliefs can so often blind one to the sincerity of other conscientious religious beliefs. Thus, while the secular state is bound to defend, that is to guarantee, everyone's freedom of conscience and religion, it is not bound or even permitted, to promote every expression or manifestation of conscience and religion, just as it is not bound to promote every manifestation of freedom of opinion and expression, some of which are defamatory. Indeed, it is the constitutional entrenchment of these very disparate freedoms which demonstrates the inherent secularity of the Canadian state. The sorry story of human

> strife and savagery in the Name of God amply shows that the resolutely secular state is the sure foundation of everyone's security, even if it leaves something, or much, for sincere believers to desire.

Though freedom of religion is guaranteed under the Charter, this guarantee is by no means unconditional. At times, the right to practise religion comes into conflict with the need to protect children. The state's obligation to protect children is most evident when parental religious practices threaten minor children with possible risk of harm or potential loss of life. The constitutional guarantee of freedom of religion does not give parents the unfettered right to harm children through religious practices, nor can these constitutional guarantees be used to defend wilful neglect or wilful harm.[35] There is no room for harm in the Name of God, even in a country that grants freedom of religion.

Limitations on Consent

The opportunity to grow and develop safe from physical harm is a fundamental right of every child in a free and democratic society. In Canada, respect for individual rights requires that children be involved in decisions regarding their own bodies whenever possible.

Informed consent requires that physicians provide all the relevant information patients need to exercise their decision-making rights,[36] including:

1. Accurate information regarding the patient's condition, the nature of the investigations and treatment, and the probability of success; the risks and benefits of each intervention and the alternatives available (including the choice of no treatment or intervention).

2. Assessment of the patient's understanding of the information provided.

3. Assessment of the patient's or surrogate's ability or authority to make the decision.

4. Assurance that the patient has the freedom to choose among the medical alternatives without coercion or manipulation.

Most parents seek to protect their children and to act in their children's best interests in matters of health care. Therefore the notion of proxy ("substitute") consent is appropriate, practical and necessary in the vast majority of circumstances. In a pluralistic society, one can find many religious, social, cultural, and philosophic positions on what constitutes acceptable child rearing and child welfare. The law generally provides parents with wide discretionary authority in raising their children. However, the existence of child protection and child neglect/abuse laws is testimony to the fact that, on occasion, parents fail to live up to their responsibilities toward their children. Hence proxy consent is limited in scope.

The courts have imposed limits on parental consent with respect to both medical treatment and religious practice. These limitations are clearly illustrated in *Pentland v. Pentland et al.* [1979]:

PENTLAND v. PENTLAND ET AL.,
CCH DRS 1979 P22-083, O.
20 O.R. (2d) 27, 86 D.L.R. (3d) 585, 5 R.F.L.
ONTARIO
(H.C.J.)
1979

The decree nisi of divorce granted in 1969 gave custody of the child of the marriage, a boy, to the mother. The mother subsequently remarried and embraced the faith of her second husband, a Jehovah's Witness. In April 1978 the boy, then seventeen years old, was involved in a motor vehicle accident and suffered head injuries, eye damage, bruising of the heart and other injuries. He was admitted to the intensive care unit of Victoria Hospital where medical experts struggled to save his life.

A severe drop in his blood count convinced the doctors that blood transfusions were necessary. The mother and her husband refused their consent to the giving of blood transfusions or any blood substitutes to the boy. Their refusal was dictated by their religious faith. The boy, who was unable to speak but could write some notes, also refused to give his consent to the transfusions. His natural father and Victoria Hospital Corporation applied for a variation of the custody provision of the decree nisi. The boy's maternal grandmother gave evidence that she was prepared to accept custody of the boy and to give her consent to all necessary medical treatment, including blood transfusions.

HELD: The decree nisi was varied and custody of the infant granted to his maternal grandmother. The Court accepted the medical evidence that it might be absolutely necessary to transfuse in order to attempt to save the boy's life. The concerns of the mother were real, genuine and honest beliefs. Her love for the boy was obvious and her decision attested to the strength of the faith in the Jehovah's Witnesses. However, the paramount consideration in the determination of custody was the best interests of the child. Every child had the right to the continuation of life so long as was humanly possible, as well as the fundamental right to the best medical care available in his community. If the boy had been under the age of sixteen years he could - in the circumstances of this case, have been made a ward of the Court by virtue of subparagraph 20(1) (b) (x) of the Child Welfare Act. It was the duty of the Court to give custody of the boy to a person who would not deny him his fundamental rights. The boy's refusal of treatment was not, in the opinion of the Court, based on a rational, reasoned thought process: Of this he was incapable because of his condition.

In *Re S.E.M.* [1986], a case similar to the one above, the presiding judge took an even stronger position. The strength of this case lies in the fact that the decision was passed at the Queen's Bench level on appeal of a lower court decision.

RE S.E.M.; M. AND M. v. DIRECTOR OF CHILD WELFARE AND CHILDREN'S GUARDIAN,
CCH DRS 1987 P21-799, A.
1987] 1 W.W.R. 327, 74 A.R. 23, 4 R.F.L. (3d) 363, 32 D.L.R. (4th) 394
ALBERTA
(Q.B.)
October 16, 1986

Fourteen weeks premature, the child S weighed less than one pound at birth. In the opinion of the specialists at the neonatal intensive care unit to which she was transferred, blood transfusions were essential, if the child was to have any chance of survival. The parents, who were Jehovah's Witnesses, refused to consent to transfusions. Following apprehension of the child, blood transfusions were authorized by the Provincial Court on a series of applications made pursuant to s. 20(2) of the Child Welfare Act. Finally, an order was made appointing the Children's Guardian temporary guardian of S for a period of 6 weeks. The parents appealed from all the court orders, relying on several grounds of appeal. They challenged the sufficiency of the evidence and legality of the relevant provision of the Child Welfare Act, and relied on several provisions of the Canadian Charter of Rights and Freedoms.

HELD: The appeal was dismissed. Section 83 of the Child Welfare Act did not give the court an independent discretion to review the evidence and make whatever order it deemed

> appropriate. The evidence supported the conclusions reached by the Provincial Court judge who made the temporary guardianship order. He acted properly in proceeding on the principle that the welfare of the child was paramount. Nor did any provision infringe rights guaranteed by the Canadian Charter of Rights and Freedoms. With regard to s. 7 of the Charter, the Act did not deprive the child S of the right to life: it protected that right. Assuming that the parents had a right under the same Charter provision to be free from state intervention, there had to be a balancing of protected but competing rights. The child's right to life took precedence over any competing right of the parents. The right to freedom of religion guaranteed by s. 2 of the Charter was not without qualification, despite its fundamental nature. It would be contrary to the purpose of the Charter if religious freedom were allowed to be exercised in such a way as to deprive an infant of a realistic chance to live.

What stands out in this last case is that the Section 7 rights of the child take precedence over the Section 2 rights of the parents. It is abundantly clear that the courts limit the rights of parents to provide or withhold consent when the safety or well being of the child is at stake. This holds true whether the parental motivation is religious or otherwise. If circumcision is of no net medical benefit to a child, and has the potential for causing serious harm, then the authority of the parents to consent to such a procedure is doubtful. Thus circumcision of a newborn for non-therapeutic purposes is a clear violation of the infant's rights even when religion is the motivating factor behind the procedure.

Proxy consent is problematic for physicians since they have a primary duty of care to their patients. The American Academy of Pediatrics Committee on Bioethics states:

> In attempting to adapt the concept of informed consent to pediatrics, many believe that the child's parents or guardians have the authority or "right" to give consent by proxy. Most parents seek to safeguard the welfare and best interests of their children with regard to health care, and as a result proxy consent has seemed to work reasonably well.
>
> However, the concept encompasses many ambiguities. Consent embodies judgments about proposed interventions and, more importantly, consent (literally "to feel or sense with") expresses something for one's self: a person who consents responds based on unique personal beliefs, values, and goals.
>
> Thus "proxy consent" poses serious problems for pediatric health care providers. Such providers have legal and ethical duties to their child patients to render competent medical care based on what the patient needs, not what someone else expresses. Although impasses regarding the interests of minors and the expressed wishes of their parents or guardians are rare, the pediatrician's responsibilities to his or her patient exist independent of parental desires or proxy consent.[37]

This view of proxy consent is mirrored in Canadian case law. For example in *K. v. K.*, Justice Craig J.A. states of Justice Wood's decision:

> [para21] He commenced his discussion on this aspect of his judgement with a statement that "the history of the non-therapeutic sterilization of the mentally handicapped is chequered with evidence of much abuse." He stated that "generally speaking a parent's decision to give a substituted consent for the performance of a therapeutic medical or surgical procedure" on a child "would not be the subject of review" by a court in the exercise of its parens patriae jurisdiction and that probably a court would not interfere with a parent's substituted consent in the case of a non-therapeutic procedure where the benefits obviously far outweigh the risks. He then said: "But what of those cases where the risks and benefits are closely divided, or where the risks outweigh the benefits? In such cases, and I believe this to be one, the court, in my view, must exercise its inherent jurisdiction to review and regulate the decision of the parents in order to ensure that the best interests of the child are met with the decision which has been made.

Patients today have a strong desire to be involved in decision-making with respect to their health needs. This trend is evidenced by the introduction and legal recognition of "living wills," "advance directives," and "powers of attorney for personal care." The foregoing are forms of proxy that a patient leaves and fully expects to be followed in the event that he or

she becomes severely incapacitated. A comparable moral principle exists for children in the matter of non-therapeutic procedures.

Parents do not have a right to permanently surgically alter their children when there is no opportunity for the child to participate in the decision-making and the decision can reasonably be delayed. In the case of non-therapeutic circumcision, children should have the right to be involved in the decision. The courts have recognized that minor children have the capacity to make decisions regarding their own lives. This is best illustrated in the following custody case:

Stevenson v. Florant

[1925] S.C.R. 532
[1925] 4 D.L.R. 530
affirming
(1924), 38 Que. K.B. 314
[1925] 3 D.L.R. 1189
Can. Abr. (2nd) R17C.20310

S.C.C.
affirmed
[1927] A.C. 211
46 C.C.C. 362
[1926] 4 D.L.R. 897
June 18, 1925

> In cases involving the custody of children the judges of the common law courts have exercised a larger jurisdiction in granting writs of habeas corpus than in other cases. They have exercised powers somewhat analogous to those which the Court of Chancery has always exercised in its character of parens patriae.
>
> If an infant, brought before the Court on habeas corpus, is old enough to exercise a choice as to where he wishes to live, the Court will not constrain him, but will leave him to select. If, however, he is too young to make this choice, the Court will then look to the principles of law [in Quebec, to the Civil Code] to see who is entitled to custody, because there is a presumption that where the child is in legal custody, there is no restraint. The capacity to choose must be determined on the basis of the child's age, rather than of its mental capacity. The age at which a child should be deemed to have sufficient discretion was fourteen in the case of a boy, and sixteen in the case of a girl.

In yet another case involving consent, it was held that physicians and others are not free to decide what is in the best interest of a patient when the patient has left advance directives. While the court recognized that the treatment had significant therapeutic value, it could not deny the patient's will to invoke Section 7 of the Charter and maintain the sanctity of their own person. The judgment indicates that therapies, which have side effects and/or irreversible consequences, are intrusive and violate patient rights when performed without consent.

Fleming v. Reid by his litigation guardian, the Public Trustee; Fleming v. Gallagher (a.k.a. Gallacher) by his litigation guardian, the Public Trustee

Indexed as: Fleming v. Reid (C.A.)

4 O.R. (3d) 74
[1991] O.J. No. 1083
Action Nos. 357/90 and 356/90

ONTARIO
Court of Appeal for Ontario
Robins, Grange and Carthy JJ.A.
June 28, 1991

The appellants were involuntary psychiatric patients who suffered from schizophrenia. The respondent, their attending physician, determined that they were not competent to consent to psychiatric treatment and proposed to treat them with neuroleptic drugs (which control or minimize psychotic episodes or symptoms associated with schizophrenia for many, but not all, patients and which have significant and unpredictable harmful side effects). While competent, the appellants had expressed the desire not to take the drugs. The Official Guardian was appointed pursuant to s. 1a(1) of the Mental Health Act as the appellants' substitute decision-maker. An incompetent patient's substitute decision-maker is obliged by s. 1a(6) of the Act to give or refuse consent to psychiatric treatment in accordance with the wishes of the patient where those wishes have been expressed while the patient was competent. The Official Guardian, pursuant to s. 1a(6), refused to consent to the proposed treatment. The respondent applied under s. 35a(1) of the Act to the review board for an order authorizing the treatment (only the decisions of substitutes of involuntary incompetent patients were subject to such review; voluntary incompetent patients could never be ordered to take drugs contrary to the their previously expressed wishes). The review board granted orders authorizing the administration of neuroleptic drugs to the appellants on the basis that such treatment was in the appellants' best interests. (A patient's prior competent wish is not one of the factors listed in s. 35(5) of the Act as governing the determination of what is in the patient's best interests.) The orders were affirmed on appeal. Although the statutory scheme was found to deprive the appellants of their security of the person contrary to s. 7 of the Canadian Charter of Rights and Freedoms, the deprivation was held not to violate the principles of fundamental justice since the scheme was in accord with the common law principles that underlie the parens patriae jurisdiction of the court. The appellants appealed.

HELD: the appeal should be allowed.

At common law, every competent adult has the right to be free from unwanted medical treatment. A patient, in anticipation of circumstances wherein he or she may be unconscious or otherwise incapacitated and thus unable to contemporaneously express his or her wishes about a particular form of medical treatment, may specify in advance his or her refusal to consent to treatment. A doctor is not free to disregard such advance instructions, even in an emergency.

The common law right to determine what shall be done with one's own body and the constitutional right to security of the person can be treated as co-extensive.

The impugned provisions of the Act manifestly operated so as to deprive the appellants of their right to security of the person as guaranteed by s. 7 of the Charter. Few medical procedures are more intrusive than the forcible injection of powerful mind-altering drugs which are often accompanied by severe and sometimes irreversible adverse side effects.

The impugned legislative scheme was not saved by s. 1 of the Charter. The violation of the principles of fundamental justice worked by the scheme could be neither "reasonable" nor "demonstrably justified in a free and democratic society." The fundamental right to personal security should not be infringed any more than is clearly necessary. Although the right to be free from non-consensual psychiatric treatment is not an absolute one, the state had not demonstrated any compelling reason for entirely eliminating the right, without any hearing or review, in order to further the best interests of involuntary incompetent psychiatric patients in contravention of their competent wishes. To completely strip those patients of the

> freedom to determine for themselves what shall be done with their bodies could not be considered a minimal impairment of their Charter right.
>
> Section 7 guarantees everyone the right to life, liberty and security of the person and the right not to be deprived of that right except in accordance with the principles of fundamental justice. In determining whether the legislation is in breach of this section of the Charter, I adopt the approach set out by the Supreme Court of Canada in R. v. Beare; R. v. Higgins, [1988] 2 S.C.R. 387, 45 C.C.C. (3d) 57, at p. 401 S.C.R., p. 69 C.C.C.:
>
> The analysis of s. 7 of the Charter involves two steps. To trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly, that that deprivation is contrary to the principles of fundamental justice.
>
> On the first branch of the analysis, it is manifest that the impugned provisions of the Act operate so as to deprive the appellants of their right to "security of the person" as guaranteed by s. 7. The common law right to bodily integrity and personal autonomy is so entrenched in the traditions of our law as to be order of protection. This right forms an essential part of an individual's security of the person and must be included in the liberty interests protected by s. 7. Indeed, in my view, the common law right to determine what shall be done with one's own body and the constitutional right to security of the person, both of which are founded on the belief in the dignity and autonomy of each individual, can be treated as co-extensive.

In *Adan v. Davis*, [1998] O.J. No. 3030, the issue was whether the plaintiff, Fahmo Adan, had consented to a tubal ligation performed by the defendant, Bernard Davis, on May 7, 1992. The court found that apart from emergency situations, undertaking a surgical procedure without consent clearly constitutes ~~a~~ battery.

In *Reibl v. Hughes*, [1980] 2 S.C.R. 880, the issue under consideration was the scope of a physician's duty of disclosure. The court discussed the distinction between battery and negligence and defined the tort of battery at p. 890 as "...intentional...consisting of an unprivileged and unconsented to invasion of one's bodily security" and one which is "...confined to cases where there has been no consent at all or where, emergency situations aside, surgery or treatment has been performed or given beyond that to which there was consent." The court concluded that, absent fraud or misrepresentation to secure consent to treatment, a failure to disclose the attendant risks goes to negligence and not battery.

As the Supreme Court of Canada observed in *Eldridge v. B.C. (A.G.)*, [1997] 3 S.C.R. 624 at 676-7:

> The centrality of communication to the delivery of medical services is particularly evident in the context of negligence law. The duty of disclosure commands physicians to inform patients fully of the risks involved in treatment and answer their questions regarding such risks; see Reibl v. Hughes, [1980] 2 S.C.R. 880, at p. 884, and Hopp v. Lepp, [1980] 2 S.C.R. 192, at p. 210. Physicians cannot discharge this obligation without being able to communicate effectively with their patients. [para41]

Consent Powers of the Court

The courts have set limits to proxy decision-making, or "substitute consent." In *Re "Eve,"* a mother applied for the legal authority to have her mentally disabled daughter sterilized. This case became a test of the degree to which the fundamental rights of an incompetent individual could be overridden by paternalistic instincts. The Supreme Court denied the mother's request, ruling that a procedure which the court saw as being both "a serious intrusion" and "irreversible" could not be authorized for non-therapeutic purposes under the parens patriae jurisdiction.

RE "EVE"

31 D.L.R. (4th) 1
Reversing 115 D.L.R. (3d) 283

Supreme Court of Canada
Dickson C.J.C., Beetz, Estey, McIntyre, Chouinard, Lamer, Wilson, Le Dain and La Forest JJ.
October 23, 1986

APPEAL by the guardian ad litem of a mentally retarded woman from a judgment of the Prince Edward Island Supreme Court, in [page3] banco, 115 D.L.R. (3d) 283, 27 Nfld. & P.E.I.R. 97 and 28 Nfld. & P.E.I.R. 359 (addendum), allowing an appeal by the mother of the incompetent from a judgment of C.R. McQuaid J., dismissing her application for authorization to consent to a sterilization operation being performed on her daughter.

The judgment of the court was delivered by LA FOREST J.:— These proceedings began with an application by a mother for permission to consent to the sterilization of her mentally retarded daughter who also suffered from a condition that makes it extremely difficult for her to communicate with others. The application was heard by McQuaid (C.R.) J. of the Supreme Court of Prince Edward Island, Family Division. In the interests of privacy, he called the daughter "Eve," and her mother "Mrs. E."

From the evidence, he further concluded that Eve is not capable of informed consent, that her moderate retardation is generally stable, that her condition is probably non-inheritable, that she is incapable of effective alternative means of contraception, that the psychological or emotional effect of the proposed operation would probably be minimal, and that the probable incidence of pregnancy is impossible to predict.

The courts below Mrs. E. wanted to be sure she had a right to consent to the sterilization of Eve, so she applied to McQuaid J. for the following remedies:

> that Eve be declared a mentally incompetent pursuant to the provisions of the Mental Health Act;
>
> that Mrs. E. be appointed the committee of the person of Eve;
>
> that Mrs. E. be authorized to consent to a tubal ligation operation being performed on Eve.

McQuaid J. saw no problem regarding the first two remedies. These, in his view, were simply a prelude to the third, on which he concentrated, i.e., the authorization to consent to a tubal ligation operation on Eve. He noted that every surgical procedure requires the prior consent of the patient or someone lawfully [page5] authorized on her behalf; otherwise it constitutes battery. Though he thought a parent or a committee could give a valid consent for any strictly therapeutic procedure on behalf of a retarded person, in his view deeper issues arose where the procedure was only marginally therapeutic or, as in the present case, strictly contraceptive and specifically one of sterilization. For it would deprive Eve of the possible fulfilment of the great privilege of giving birth, a result that should cause a court to act with scrupulous caution even though Eve might not be able to understand or fully appreciate this.

Having reviewed the Canadian and English case-law and found no governing authorities, McQuaid J. considered whether the court should, in the exercise of its parens patriae jurisdiction, intervene on behalf of Eve. He had no doubt that the court could authorize a surgical procedure necessary to health even though a side-effect might be sterilization, and he postulated that it could also do so where the public interest clearly required it, though he found it difficult to come up with an example. However, McQuaid J. was of the view that Eve, like other individuals, was entitled to the inviolability of her person, a right that superseded her right to be protected from pregnancy. That this might result in inconvenience and even hardship to others was irrelevant. The law must protect those who are unable to protect themselves; it must ensure the protection of the higher right. He, therefore, concluded that the court had no authority or jurisdiction to authorize a surgical procedure on a mentally retarded person, the intent and purpose of which was solely contraceptive. It followed that, except for clinically therapeutic reasons, parents or others similarly situated

could not give a valid consent to such a surgical procedure either, at least in the absence of clear and unequivocal statutory authority. He, therefore, denied the application.

In its decision the Supreme Court [La Forest] stated the following:

The parens patriae jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare."

The situations under which it can be exercised are legion; the jurisdiction cannot be defined in that sense. As Lord MacDermott put it in J. v. C., [1970] A.C. 668 at p. 703, the authorities are not consistent and there are many twists and turns, but they have inexorably "moved towards a broader discretion, under the impact of changing social conditions and the weight of opinion." In other words, the categories under which the jurisdiction can be exercised are never closed. Thus I agree with Latey J. in Re X, supra, at p. 699, that the jurisdiction is of a very broad nature, and that it can be invoked in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations. This list, as he notes, is not exhaustive.

But I can find nothing in the authorities to which I have been referred by counsel or in my own researches to suggest that there is any limitation in the theoretical scope of this jurisdiction; or, to put it another way, that the jurisdiction can only be invoked in the categories of cases in which it has hitherto been invoked, such as custody, care and control, protection of property, health problems, religious upbringing, and protection against harmful associations. That list is not exhaustive. On the contrary, the powers of the court in this particular jurisdiction have always been described as being of the widest nature. That the courts are available to protect children from injury whenever they properly can is no modern development.

The court's discretion under its parens patriae jurisdiction must be exercised for the benefit of the retarded person, not for the benefit of others. Thus courts should never authorize a non-therapeutic sterilization of a mentally retarded person under its parens patriae jurisdiction. The grave intrusion on the retarded person's rights and the certain physical damage that ensues from non-therapeutic sterilization without consent, when compared to the highly questionable advantages that can result from it, lead to the conclusion that it can never safely be determined that such a procedure is for the benefit of that person. Judges are generally ill-informed about many of the factors relevant to a wise decision in this difficult area. They generally know little of mental illness, of techniques of contraception or their efficacy. And, however well presented a case may be, it can only partially inform. If sterilization of the mentally incompetent is to be adopted as desirable for general social purposes, the legislature is the appropriate body to do so. It is in a position to inform itself and is attuned to the feelings of the public in making policy in this sensitive area. The actions of the legislature will then be subject to the scrutiny of the courts under the Canadian Charter of Rights and Freedoms and otherwise.

Though the scope or sphere of operation of the parens patriae jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised: see the passages from the reasons of Sir John Pennycuick in Re X, at pp. 706-7, and Heilbron J. in Re D, at p. 332, cited earlier. The discretion is to be exercised for the benefit of that person, not for that of others. It is discretion, too, that must at all times be exercised with great caution, a caution that must be redoubled as the seriousness of the matter increases. This is particularly so in cases where a court might be tempted to act because failure to do so would risk imposing an obviously heavy burden on some other individual.

Moreover, the implications of sterilization are always serious. As we have been reminded, it removes from a person the great privilege of giving birth, and is for practical purposes irreversible. If achieved by means of a hysterectomy, the procedure approved by the Appeal Division, it is not only irreversible; it is major [page30] surgery. Here, it is well to recall Lord Eldon's admonition in Wellesley's case, supra, at 2 Russ p. 18, 38 E.R.p. 242, that "it has always been the principle of this Court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done." Though this comment was

addressed to children, who were the subject matter of the application, it aptly describes the attitude that should always be present in exercising a right on behalf of a person who is unable to do so.

One may sympathize with Mrs. E. To use Heilbron J.'s phrase, it is easy to understand the natural feelings of a parent's heart. But the parens patriae jurisdiction cannot be used for her benefit. Its exercise is confined to doing what is necessary for the benefit and protection of persons under disability like Eve. And a court, as I previously mentioned, must exercise great caution to avoid being misled by this all too human mixture of emotions and motives. So we are left to consider whether the purposes underlying the operation are necessarily for Eve's benefit and protection.

In *Strong (Re)* [1993], the court allowed an application for authorization of surgery on a mentally incompetent 88 year old woman. Citing *"Eve,"* the presiding justice emphasised that the parens patriae jurisdiction of the court must be exercised for the benefit of the protected person.

Strong (Re)

IN THE MATTER OF an Application of the Registrar of the Supreme Court of Newfoundland as Guardian ad litem of Annie Mae Strong, a mentally disabled person,

AND IN THE MATTER OF the Parens patriae Jurisdiction of the Supreme Court of Newfoundland pursuant to the Judicature Act, R.S.N., 1990, c. J-4, s. 3(1) [1993] N.J. No. 83 DRS 93-12580 1993 G.B. No. 42

Newfoundland Supreme Court - Trial Division Green J. Heard: March 18, 1993.
Judgment: filed March 19, 1993.

APPLICATION by a guardian ad litem for an order authorizing certain surgery and medical treatment on a mentally disabled adult. The applicant was the Registrar of the Supreme Court who by virtue of his position and in the absence of a public trustee or official guardian was appointed as guardian of the Estate and Effects of S, an 88-year-old woman who suffered from chronic organic brain syndrome with marked impairment in her cognition and judgment.

HELD: Application allowed. The Registrar of the court, as officer of the court was to execute such consents and authorizations in writing as were required by the physicians to facilitate and ensure the provision of the treatment of the incompetent.

In Re "Eve," LaForest, J., described the parens patriae jurisdiction of the court in general terms as follows at p. 295: "The parens patriae jurisdiction is, as I have said, founded on necessity namely, the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the 'best interest' of the protected person, or again, for his or her 'benefit' or 'welfare.'"

The jurisdiction is of a very broad nature, and it can be invoked in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations. This list is not exhaustive. A court may act not only on the ground that injury to person or property has occurred, but also on the ground that such injury is apprehended.

In *K. v. K.* (1985), the court allowed an appeal by a mother for the authority to have a hysterectomy carried out on her mentally disabled daughter. The judgment affirmed that the onus falls on parents to establish that a proposed surgical intervention is in the best interests of the child. The judgment also drew attention to the need to protect the basic human rights of incompetent persons.

K. v. K. (Guardian ad litem of)

Between
Mrs. K, appellant, petitioner, and
The Public Trustee, Guardian ad litem of infant K., respondent, respondent, and
The Honourable the Attorney General for the Province of British Columbia, intervenor, respondent

[1985] B.C.J. No. 2285
Vancouver Registry No. CA003640

British Columbia Court of Appeal
Vancouver, British Columbia
Craig, Aikins and Anderson JJ.A.
Heard: April 18 & 19, 1985.
Judgment: April 26, 1985. Filed: May 16, 1985.

Separate reasons for judgment were delivered by Craig, Aikins and Anderson JJ.A.

[para1] CRAIG J.A.:— On April 26th, we allowed the appeal of the appellant, the mother of Infant "K" ordering that a surgeon could perform a hysterectomy on Infant "K" (who is, physically, ten and a half years of age, but is, mentally, only two years or so old and will never achieve a greater mental age than three and a half) with the consent of her parents and stating that, subsequently, we would deliver reasons for our decision.

[para14] At the outset of his judgment, Mr. Justice Wood said there were two substantial issues to be resolved, stating:

"While there are a number of social, ethical and legal questions that must be addressed before the ultimate answer to this petition can be determined, there are really two substantial issues to be resolved. The first is raised by the question: who can legally consent to the sterilization of one who, through age and/or disability, is incapable of providing the required personal consent? The second concerns the standards to be met before such substituted consent can be given."

[para15] Mr. Justice Wood rejected the submission by counsel for the petitioner that the parents "have the absolute right to decide what is best for their children" stating that the rights of parents "... must yield to the parens patriae jurisdiction of the court ..." to determine what would be in the best interests of the child but stating, also, that the exercise of such jurisdiction against the will of "wise and caring parents" was "an exceptional step" and should be taken only "where the well-being of the infant was clearly at issue or the need for such interference was clearly demonstrated." He concluded that the exercise of the parens patriae jurisdiction involved three questions: (1) the legal rights of "K", (2) the nature of the proposed surgery, (3) the social and policy questions which surround the sterilization of the mentally handicapped.

[para16] I will summarize his views on each of these issues and comment on them.

Legal Rights of "K"

[para17] He said that the mentally disabled, regardless of age, have (1) the right to personal security under s. 7 of the Charter of Rights, (2) the right to equal protection under the law (now guaranteed by s. 15 of the Charter), and (3) the right of a woman to reproduce. He asked if the fact that "K" would "probably never enjoy" the right to reproduce made the right any less important to her and concluded that it did not. Relying on the evidence of Dr. Carter, he stated that "K's" uterus was of "no more or less significance to her" than it was to any normal woman of child bearing age "who has made the conscious decision not to have any, or any more, children", and that while the right to reproduce may not be exercised "... it nonetheless remains as an important part of her identity as a woman" (her "gender identity").

[para18] He went on to say:

"Thus any utilitarian approach to the question of consent in this case, which assumes that the operation will be of less significance to K than to a normal woman, and that consent should therefore be more readily given, must of necessity be founded on the belief that the mentally handicapped in our society are not entitled to the same rights of either sexual identity or childbearing that those of us, who are not so disabled, enjoy. I do not accept such a proposition as having any place in our law."

[para21] He commenced his discussion on this aspect of his judgment with a statement that "the history of the non-therapeutic sterilization of the mentally handicapped is chequered with evidence of much abuse." He stated that "generally speaking a parent's decision to give a substituted consent for the performance of a therapeutic medical or surgical procedure" on a child "would not be the subject of review" by a court in the exercise of its parens patriae jurisdiction and that probably a court would not interfere with a parent's substituted consent in the case of a non-therapeutic procedure where the benefits obviously far outweigh the risks. He then said: "But what of those cases where the risks and benefits are closely divided, or where the risks outweigh the benefits? In such cases, and I believe this to be one, the court, in my view, must exercise its inherent jurisdiction to review and regulate the decision of the parents in order to ensure that the best interests of the child are met with the decision which has been made.

The best interests of K will be met by a decision which, inter alia, takes into account and preserves the full panoply of her legal rights. The surgery proposed in this case puts at risk important personal rights which she enjoys equally with all others in this community, notwithstanding either her age or her mental disability. The benefits to her of the non-therapeutic surgery which threatens those rights are at best anticipatory and perhaps non-existent. In such a case, the exclusive judgement of the parents, even loving, caring, exemplary parents such as K is privileged to have, cannot be presumed to be free from subjective considerations which may be at odds with the legal rights of the child."

[para22] I infer that when he speaks of the cases where "the risks and benefits are closely divided, or where the risks outweigh the benefits" he does not mean the physical risks which may be incidental to the surgical procedure, but the risk of interference with what he terms her "important personal rights." In stating that this procedure would result in a non-therapeutic sterilization of "K" and that the benefits did not far outweigh the risks, the judge concluded that the court could review the decision of the parents to ensure that the parents' decision was in the best interests of the child, and that in reviewing the parents' decision, the court must consider three factors: (a) who should bear the onus of establishing that "K" will benefit from the proposed hysterectomy, (b) what standard of proof must be met, and (c) what factors must be considered by a court when reviewing such decisions.

[para23] He concluded that a person seeking to give "substituted" consent to a non-therapeutic sterilization has the onus of demonstrating that the procedure is "in the best interests of the incompetent" because society "regards the right to security of the person to be of such fundamental importance to the well-being of all its members that the law must necessarily raise it as a presumption against anyone who would seek to give substituted authority for non-therapeutic medical treatment or surgery."

[para24] Pointing out that our law recognized only two standards of proof - proof beyond a reasonable doubt in criminal matters and a preponderance of evidence in civil matters—Wood, J. opined that neither test was satisfactory in cases "where the imposition of involuntary measures for remedial, as opposed to punitive, purposes, clashes with the important personal rights described in s. 7 of the Charter of Rights and Freedoms" and concluded that the court should adopt a third or "middle" standard of proof in such cases, relying on the decision of the Supreme Court of the United States in Addington v. The State of Texas (1979) 441, U.S. 418, which requires a parent not only to demonstrate that his decision is in the best interests of the child, but to demonstrate this conclusion "by clear and convincing evidence."

I do, however, think that he erred in concluding that if the decision of the parents related to a non-therapeutic matter they had the onus of establishing to the satisfaction of the court that their decision was in the best interests of the child and that they only could discharge this onus by establishing this fact by "clear and convincing evidence." In setting this test, he

rejected the views of Cartwright, J. in Smith v. Smith and Smedman, [1952] 2 S.C.R. 312 at 331 that in a civil proceeding the tribunal must be "reasonably satisfied" of the proof of the fact in issue and whether it will be so satisfied "must depend on the totality of the circumstances on which its judgment is formed including the gravity of the consequences of the finding." This Court has referred to this judgment on other occasions, e.g. see Adolph v. Adolph (1964), 51 W.W.R. 42; Warnock v. Garrigan (1978), 8 B.C.L.R. 26. In Smith v. Smith and Smedman, Cartwright, J. said at page 331-2:

"It is usual to say that civil cases may be proved by a preponderance of evidence or that a finding in such cases may be made upon the basis of a preponderance of probability and I do not propose to attempt a more precise statement of the rule. I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend upon the totality of the circumstances on which its judgment is formed including the gravity of the consequences of the finding."

[para34] After hearing submissions from all counsel, we pointed out that members of this Court on previous occasions had expressed doubts about the power of the Court to grant a stay pending an appeal to the Supreme Court of Canada but stated that, even assuming that we had the power, we would not grant a stay because having concluded that it was in the best interests of the child to allow the parents to have the operation done we could not justify any further delay. We expressed the view that any further delay would be tantamount to dismissing the appeal.

[para35] AIKINS J.A.:— I have read the reasons for judgment prepared by Mr. Justice Craig and those prepared by Mr. Justice Anderson. I, like Mr. Justice Anderson, am in full agreement with Mr. Justice Craig's reasons for allowing the appeal. I agree generally with the reasons prepared by Mr. Justice Anderson.

[para38] ANDERSON J.A.:— I am in full agreement with the reasons for judgment of Craig J.A. but I wish to give additional reasons of my own. As the facts have been fully set out by Craig J.A. it is not necessary to repeat them here.

[para73] I wish to emphasize that the rights of children under our constitution include the right to be protected against unnecessary pain and suffering and the right to forego other constitutional rights in order to avoid unnecessary pain and suffering.

Malette v. Shulman (1990) illustrates the importance attached by the courts to the principle of autonomy and respect for persons. Damages were awarded to a Jehovah's Witness who received a blood transfusion against her express wishes. The court held that the plaintiff's right to protection against unwanted infringement of her bodily integrity was more important than life itself.

MALETTE v. SHULMAN,
CCH DRS 1990 P91-175, O.
72 O.R. (2d) 417
2 C.C.L.T. (2d) 1
ONTARIO
(C.A. -- Robins, Catzman, Carthy JJ.A.)
March 30, 1990

In Malette v. Shulman (1990), 67 D.L.R. (4th) 321 (Ont. C.A.), Robins, J.A. stated at p. 327: "The doctrine [of informed consent] presupposes the patient's capacity to make a subjective treatment decision based on her understanding of the necessary medical facts provided by the doctor and on her assessment of her own personal circumstances."

The Test for Determining How the Jurisdiction Should be Exercised. In Re Eve, LaForest, J. commented at p. 295:

"Though the scope or sphere of operation of the parens patriae jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary

for the protection of the person for whose benefit it is exercised ... The discretion is to be exercised for the benefit of that person, not for that of others. It is a discretion, too, that must at all times be exercised with great caution, a caution that must be redoubled as the seriousness of the matter increases."

and again at p. 301 he emphasized that because of the importance of maintaining the physical integrity of a human being, the person advocating that the court should authorize a consent to medical treatment would have to justify that approach:

"Since, barring emergency situations, a surgical procedure without consent ordinary constitutes battery, it would be obvious that the onus of proving the need for the procedure is on those who seek to have it performed. And that burden, though a civil one, must be commensurate with the seriousness of the measure proposed. In conducting these procedures, it is obvious that a court must proceed with extreme caution..."

International Law

Canada has ratified numerous international instruments in the field of human rights. These agreements are binding on Canada even though they may not constitute Canadian law. Canadian courts are obliged to interpret cases with due respect to international law except in cases where an agreement has expressly been denied standing in Canada through legislation. This obligation is well documented in the following court case:

Hogarth et al. v. Hall et al.
Hogarth et al. v. Perry
Hogarth et al. v. Perry et al.
Grail v. Ordon et al.; Attorney General of Quebec, Intervener

166 D.L.R. (4th) 193

Supreme Court of Canada
Court File No. 25702.
L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major and Bastarache JJ.
Heard: June 22, 1998. Judgment rendered: November 26, 1998

Claims for personal injury and wrongful death arising out of boating accident in inland waters.

Although international law is not binding upon Parliament or the provincial legislatures, a court must presume that legislation is intended to comply with Canada's obligations under international instruments and as a member of the international community. In choosing among possible interpretations of a statute, the court should avoid interpretations that would put Canada in breach of such obligations: See Driedger on the Construction of Statutes, 3rd ed. (1994), at p. 330.

Perhaps the strongest statement of Canada's obligations with respect to international agreements is found in the following court case. This case clearly illustrates the lengths to which governments must go to honour their international obligations.

Re Corporation of the Canadian Civil Liberties Association et al. and Minister of Education et al.

50 D.L.R. (4th) 193
Reversed 65 D.L.R. (4th) 1

Ontario High Court of Justice, Divisional Court
Watt, Austin and McKeown JJ.
March 28, 1988

> In considering s. 2 of the Charter one must keep in mind that the fundamental freedoms therein guaranteed have been somewhat more elaborately expressed than were the corresponding freedoms in the Canadian Bill of Rights. Both a textual comparison and a review of the evidence before the Special Joint Committee of the Senate and House of Commons on the Constitution, 1981-82, confirm that the International Covenant on Civil and Political Rights was an important source of the terms chosen. Since Canada ratified that covenant in 1976, with the unanimous consent of the federal and provincial governments, the covenant constitutes an obligation upon Canada under international law, by art. 2 thereof, to implement its provisions within this country. Although our constitutional tradition is not that a ratified treaty is self-executing within our territory, but must be implemented by the domestic constitutional process (A.-G. Can. v. A.-G. Ont., [1937] 1 D.L.R. 673, [1937] A.C. 326, [1937] 1 W.W.R. 299 (Labour Conventions Case), nevertheless, unless the domestic law is clearly to the contrary, it should be interpreted in conformity with our international obligations.

Clearly, Canadian law is subject to interpretation under the obligations agreed to under such international instruments. Canada is a signatory to the following international instruments:

UN Convention on the Rights of the Child

In December 1991, Canada ratified the United Nations Convention on the Rights of the Child (UNCRC).[38] The Preamble of the UNCRC recognizes that children are particularly vulnerable, and thus in need of extra protection:

> Recognizing that the United Nations has, in the Universal declaration of Human Rights proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, recalling that in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance.

Preambular paragraph 12 of the UNCRC states:

> Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child...

Some proponents of infant male circumcision have argued that paragraph 12 supports their perspective and cite the importance of the child's cultural background as supporting their view. However, cultural values, like religious beliefs, cannot be put into practice in such a way that they infringe on the rights of others. Thus FGM, though it is a cultural practice, is prohibited in Art. 24(3) UNCRC. Moreover, the female genital mutilation practised by some groups as a tradition or cultural value must have equal status to the mutilation involved in male circumcision. Paragraph 12 cannot be arbitrarily or prejudicially applied; it applies either to all forms of genital mutilation or to none at all.[39] It is clear from the structure of the UNCRC as a whole, as well as from the general body of the law, that cultural practices which harm children are not permitted.

Within the main text of the UNCRC Art. 1 defines a child, Art. 2 prohibits discrimination, and Art. 3 requires States Parties to protect children and their rights and re-iterates the test of the child's best interests which is familiar in common law jurisdictions.

Art. 14 contains provisions as to religion; however there is no provision within the article that endorses or permits the infliction of harm or disfiguring marks on a child. Religion has its limitations in any society and is not a shield behind which to hide. Just as we would not accept Art. 14 to apply in the case of a religion that demands we cut off a child's finger or ear, we cannot accept that it advocates genital mutilation.

Art. 19 requires the child to be protected from abuse at the hands of parents, and Art. 24(3) provides that "States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children." Insofar as non-therapeutic circumcision is a painful, invasive, irreversible surgical intervention to which the child has not given consent, and whose alleged benefits are uncertain and remote, it is clearly prejudicial to the health of children. Furthermore, it is not a recommended medical practice by any credible medical body in the world. The prohibition in Art. 24(3) UNCRC covers, in view of Art. 1., children of both sexes and thus genital mutilation of both sexes.

It is illogical to argue that the prohibition in Art. 24(3) applies only to FGM. First, if female circumcision were the only traditional practice to be prohibited then the provision could have been drafted accordingly and it was not. More importantly, by virtue of Article 31 of the Vienna Convention on the Law of Treaties 1969, the words of treaty provisions must be given their ordinary meaning; and by Article 32, recourse may not be had to the *travaux préparatoires* unless the meaning of the treaty provisions is on the face of it unclear, or possibly, where all the parties are in agreement so to refer. The wording of Article 24(3) is clear and unambiguous, and the parties have not agreed to have recourse to the *travaux préparatoires* to limit its ambit.

Further, the UNCRC cannot be viewed in isolation. It must be read and applied against the backdrop of other international law provisions as to the fundamental human rights of every person, be they man, woman or child. It is a moot point whether these general principles have attained the status of *ius cogens*, though it is difficult to argue that they are not now customary international law. What the UNCRC does is to focus on the particular issues that pertain to childhood; but, as Art. 41 expressly states, nothing in it can derogate from the more general protections offered by international law.

CONVENTION ON THE RIGHTS OF THE CHILD (1989)

Article 6(1)

States Parties recognize that every child has the inherent right to life.

Article 6(2)

States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 16(1)

No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

Article 16(2)

The child has the right to the protection of the law against such interference or attacks.

Article 19(1)

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Article 19(2)

Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 24(3)

States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

Article 41
Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.

DECLARATION OF THE RIGHTS OF THE CHILD (1959)

Principle 2

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

Principle 8

The child shall in all circumstances be among the first to receive protection and relief.

Principle 9

The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.

Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) prohibits discrimination (Arts. 2 and 7), cruel and inhuman treatment (Art. 5); and protects life, liberty and the security of person (Art. 3). Above all, it provides in Art. 30 that "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

Regard must be given, but not exclusively to, the Universal Declaration on Human Rights, and, especially, the United Nations Convention on the Rights of the Child. These international instruments, and others, make it clear that circumcision for non-therapeutic reasons is a denial to the circumcised infant of his fundamental human rights.

UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948)

Article 2

> Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as: race colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3

> Everyone has the right to life, liberty and security of person.

Article 5

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 25(2)

> Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

International Covenant on Civil and Political Rights

The provisions within the UDHR find echo in the International Covenant on Civil and Political Rights (ICCPR) whose Art. 5 provides:

> Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant;

and in relation to the freedom of religion Art. 18 provides that

> Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

The effect of the general and oft-repeated provision of Arts. 30 UDHR and the ICCPR, and of Art. 18 in the ICCPR is that a sharp distinction is drawn between the right to freedom of thought and the right to manifest one's religion or beliefs.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1966)

Article 7

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 9(1)

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Article 24(1)

> Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

ETHICAL CONSIDERATIONS

Infant male circumcision is morally indefensible because it amputates a normal body part without patient consent. In general, medical ethics forbid treating any patient who has not provided informed consent. In rare circumstances, where life and limb are threatened and the patient is incapable of providing informed consent, physicians can proceed provided the anticipated benefits clearly outweigh the potential risks and harms. The problem with infant male circumcision is that the procedure is not medically required, and there is no clear benefit to the child.

Medical ethics also requires that extra protection be extended to vulnerable persons. That is, the range of procedures to which competent adults can consent on behalf of someone in their care or custody is narrower than the range of procedures to which competent adults can consent on their own behalf. In the former case, extreme caution must be exercised to ensure that vulnerable persons are not subject to unnecessary medical or surgical interventions.

The best interests of the individual child are of paramount importance when making decisions regarding that child's medical treatment. This principle is clearly articulated by the Canadian Paediatric Society:

> The primary concern of physicians caring for children must be the best interests of the individual child. All infants and children have intrinsic value and deserve our respect and protection. No other interests can override those of the child, whether they be family stability or well being, or the well being of other caretakers.[40]

Clearly it is not in the best interest of a healthy child to undergo an intrusive irreversible surgical intervention such as infant circumcision, whose alleged benefits are remote and uncertain.

Dr. Eike-Henner Kluge, Chair of the Philosophy Department at the University of Victoria and a former Director of Ethics and Legal Affairs at the Canadian Medical Association, prepared an ethical analysis of female circumcision published in the *Canadian Medical Association Journal* 1993. Dr. Kluge argues that circumcision of girls is unethical because it is potentially harmful, has no therapeutic value, and puts the interests of others ahead of the best interests of the child. Dr. Kluge adds:

> With due alteration of detail, the same ethical reasoning holds for male circumcision. There rarely are medical reasons for performing the procedure; personal preference or religious values of the parents usually underlie the request. If these are insufficient to justify the circumcision of girls, they are also insufficient to justify circumcision of boys. To argue differently is to be guilty of discrimination on the basis of sex. The fact that female circumcision is a more serious intervention does not alter the situation. Both involve what in other contexts would be called non-consensual mutilation of a minor for non-medical reasons.[41]

CIRCUMCISION AS AN ABUSE OF HUMAN RIGHTS

Human Rights and the Court

In *Chan v. Canada* (1995), the appellant sought refugee status in Canada because he feared he would be forcibly sterilized if he returned to China. Justice Mahoney characterized non-therapeutic sterilization without consent as a serious violation of a person's rights. He found no distinction between the sexes that would alter this characterization. It should be noted that vasectomy can be reversed, whereas circumcision is permanent in its effects.

Chan v. Canada (Minister of Employment and Immigration)

Kwong Hung Chan, appellant;
The Minister of Employment and Immigration, respondent, and
Immigration and Refugee Board and Canadian Council for Refugees, interveners.

[1995] 3 S.C.R. 593
[1995] S.C.J. No. 78
File No.: 23813.

Supreme Court of Canada
1995: January 31 / 1995: October 19.
Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier,
Cory, Iacobucci and Major JJ.
ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Appellant sought Convention refugee status because of his fear of being forcibly sterilized for a violation of China's one-child birth control laws. To be classified a Convention refugee, the appellant had to establish that he had a well-founded fear of persecution for reasons of membership in a particular social group (his family) or political opinion.

Held: appeal should be dismissed.

Per La Forest, l'Heureux-Dube, and Gonthier (Dissenting):

Basic human rights transcend subjective and parochial perspectives and extend beyond national boundaries. Recourse can be had to the municipal law of the admitting nation, nevertheless, because that law may well animate a consideration of whether the alleged feared conduct fundamentally violates basic human rights. Forced sterilization constitutes a gross infringement of the security of the person and readily qualifies as the type of fundamental violation of basic human rights that constitutes persecution. Notwithstanding the technique, forced sterilization is in essence an inhuman, degrading and irreversible treatment.

Federal Court of Appeal (1993)– Mahoney (Dissenting):

The forced sterilization of a woman is a fundamental violation of basic human rights. It violates Articles 3 [life, liberty and security of the person] and 5 [cruel, inhuman or degrading treatment or punishment] of the United Nations Universal Declaration of Human Rights. [para35] Mahoney J.A. then referred, at p. 704, to E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388, in which this Court found, in the case of a female incompetent, that non-therapeutic sterilization without consent was a "grave intrusion on a person's rights" and an "irreversible and serious intrusion on the basic rights of the individual." He found no distinction between the sexes that would alter this characterization. Mahoney J.A. stated, at p. 704, that "[w]hatever view may be taken of the other sanctions by which the population control policy is enforced, involuntary sterilization—physical abuse that is an irreversible and serious intrusion on the basic rights of the individual—is persecution."

[para72] In Eve, at pp. 431 and 432, this Court affirmed that forced sterilization constitutes a "grave intrusion on a person's rights" and as an "irreversible and serious intrusion on the basic rights of the individual." Certainly this is true in this kind of context. Two of the justices below followed this reasoning, citing Eve directly, while the other acknowledged that he found this particular penalty abhorrent. In my opinion, the sanction of forced sterilization

against the appellant in the present case would constitute a gross infringement of the security of the person and readily qualify as the type of fundamental violation of basic human rights that constitutes persecution as discussed in the mentioned authorities and the UNHCR Handbook.

OHRC and Genital Mutilation

Koppelman[42] suggests four main reasons for the practice of FGM:

1. Preservation of group identity.
2. Hygienic reasons including maintenance of cleanliness and health.
3. Preservation of virginity, family honour, and prevention of immorality.
4. Furtherance of social and economic security for women by assuring marriage goals are attained.

These reasons have been echoed in the Ontario Human Rights Commission (OHRC) policy on FGM. The OHRC policy also refers to the Ontario Female Genital Mutilation Prevention Task Force, which cited a number of reasons for FGM including preservation of virginity, control over women's sexuality, good appearance, class distinction, and cultural identity.

The OHRC identified several international agreements infringed on by the practice of FGM, including the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, the African Charter of Human and People's Rights, and the International Covenant on Economic, Social and Cultural Rights (Art.12).

The OHRC specifically states that "international conventions and covenants to which Canada is a signatory recognize that human beings have the inherent right to life, equality, freedom and security, the right not to suffer discrimination, the right to the best possible state of physical and mental health, and a right not to be subjected to torture or to cruel and degrading punishment or treatment."

It is worthy of note that non-therapeutic circumcision of male infants and children is performed for the same reasons as FGM—namely, cleanliness, potential health benefits, good appearance, conformity to societal values, and preservation of cultural identity.

A desire to control sexuality figures prominently in the history of circumcision. Indeed, routine circumcision as a medical procedure owes its very existence to an anti-masturbation hysteria that swept English-speaking countries in the 19th century. As recently as 1935, a physician wrote as follows in the *British Medical Journal*:

> I suggest that all male children should be circumcised. This is 'against nature,' but that is exactly the reason why it should be done. Nature intends that the adolescent male shall copulate as often and as promiscuously as possible, and to that end covers the sensitive glans so that it shall be ever ready to receive stimuli. Civilization, on the contrary, requires chastity, and the glans of the circumcised rapidly assumes a leathery texture less sensitive than skin. Thus the adolescent has his attention drawn to his penis much less often. I am convinced that masturbation is much less common in the circumcised. With these considerations in view it does not seem apt to argue that 'God knows best how to make little boys.' [43]

Dr. Thomas Szasz observes:

> The significance of the idea of masturbatory insanity lies in the fact that sexual self-stimulation was the first a long line of religious transgressions that were converted into medical diseases. The roots of both R.N.C. [routine neonatal circumcision] and anti-masturbatory measures lie in Jewish law, which recognizes the legitimacy of carotid pleasure associated with sexual intercourse, provided that the act is marital-genital congress between

> the Jewish man and a Jewish woman. Every other sexual act is strictly prohibited. Masturbation is condemned unequivocally both in the Talmud and in extra-Talmudic literature.
>
> Recognizing the obvious connections between touching the penis and sexual arousal, Jewish law "definitely prohibits touching one's genitals—the unmarried man never, and the married man only in connection with urination" (Epstein, 1967., p.137). When an Orthodox Jewish father bladder trains his son, he admonishes him: "Without hands! Better a bad aim than a bad habit."[44]

Circumcision advocates cite the alleged health benefits of circumcision as justification for performing the procedure. Among these alleged benefits are reductions in the incidence of urinary tract infections (UTI) and cancer of the penis. Other purported advantages include improved cleanliness because there is no foreskin to care for and a reduced risk of cervical cancer for partners of circumcised males. These health benefits have repeatedly been proven to be overstated or non-existent. For example, a recent Ontario study[45] found that less than one percent of intact newborn boys were hospitalized for UTI in the first year of life, and that nearly 200 circumcisions would be required to prevent one infection. Moreover, urinary tract infections are treatable with antibiotics and have a very low morbidity.

The Canadian Pediatric Society exhaustively reviewed this topic in 1975, 1982, and 1996. Each time it has concluded that circumcision of newborns should not be routinely performed.[46]

Circumcision also continues to serve as a group marker for both Moslems and Jews. It is so compelling as a group marker that during the Second World War, Jews throughout occupied Europe stopped circumcising male infants to conceal their Jewish identity. Circumcision also serves as a form of social control, for males cannot be considered for inclusion in the Moslem and Jewish faiths unless they comply with this requirement. Lastly, as clearly evidenced within a religious context, circumcision has and continues to be used as a form of sexual control of males.

Infant male circumcision clearly meets all the criteria set out by the Ontario Human Rights Commission (OHRC) as grounds for condemning FGM. Yet the policy on FGM attempts to legitimize infant male circumcision by making reference to outdated information and ignoring the recommendations of Canadian authorities such as the Canadian Paediatric Society. Furthermore, the OHRC undermines its own credibility by quoting well-known circumcision advocates who defend circumcision on religious as well as medical grounds.

Circumcision of boys is gender-specific discrimination. Healthy, erogenous tissue that is functioning normally can, apparently, be removed from the genitals of boys without raising the eyebrows of human rights organizations or Canadian authorities. Such intrusions on girls, however, are expressly prohibited by the Criminal Code. Both FGM and MGM share the same irrational motives and myths, as Hanny Lightfoot-Klein[47] and others have shown. By failing to extend equal protection to males and females, the OHRC has committed the greatest transgression of human rights. The OHRC has protected females and summarily denied that same protection to males, even though protecting males would not diminish in any way the protection extended to females.

CONCLUSION

Circumcision of male infants is a clear violation of the rights guaranteed to all persons by the Canadian Charter of Rights and Freedoms. Furthermore, the practice contravenes human rights legislation on provincial and international levels.

It is a fundamental principle of international law, as well as the mark of every civilized community, that discrimination is unlawful. Interpretations of human rights law that recognize FGM but not MGM as violations infringe on equal protection principles enshrined in national and international law. Female circumcision is, rightly, a criminal offence in almost every country even when "religious duty" is claimed; there can be no

justification for not extending the same protection to boys. All forms of sexual cutting of children are profoundly damaging, whether male or female. To suggest that only female circumcision be regarded as in breach of the various conventions on human rights denies the medical evidence as to the pain, risks and sexual dysfunction from infant male circumcision. It argues for the formalization of discrimination against these male children on the grounds of their sex, race and the religious beliefs of the family into which they are born. Human rights principles are absolute, not subject to balancing in the scales of international justice relative to other violations.

The presence of and tolerance for infant male circumcision in our societies harms us all. Male infants need our protection from unnecessary surgery. To contemplate a ban on non-ritual, non-therapeutic circumcision, while allowing ritual circumcision, would be a prohibited discrimination against a group of boys on the grounds of their parents' religion. These infants will always have the choice to be circumcised later in life, if they so choose to do as a sign of their faith. At that point, at least, it is their own decision and not one that has been imposed irreversibly upon them.

Male genital mutilation (MGM), including circumcision, is much more of an issue in Canada than FGM, whose proponents and victims are found mostly abroad. For that reason, MGM deserves at least as much attention as FGM from Canadian authorities. It is difficult to conceive that the amputation of healthy, fully functional erogenous tissue without consent does not violate the most basic of human rights.

Canadians proudly point to the Charter of Rights and Freedoms as the primary instrument for protecting their rights. The evidence is clear: infant male circumcision for anything other than real medical necessity violates both the Charter and the Criminal Code. As Canadians we have an obligation to rectify this injustice.

REFERENCES

[1] Stedman's Medical Dictionary (26th Edition). Baltimore: Williams & Wilkins; 1995.
[2] Committee on Bioethics, American Academy of Pediatrics. Female Genital Mutilation. *Pediatrics* 1998;**102(1):**153-6.
[3] Cold CJ, Taylor JR. The prepuce. *Br J Urol* 1999;**83** Suppl 1:34-44.
[4] Cold CJ, Taylor JR. The prepuce. *Br J Urol* 1999;**83** Suppl 1:34-44.
[5] Gairdner D. The fate of the foreskin. *Br Med J* 1949;**2:**1433-7.
[6] Taylor JR, *et al.* The prepuce: specialized mucosa of the penis and its loss to circumcision. *Br J Urol* 1996;**77:**291-5.
[7] Taylor JR, *et al.* The prepuce: specialized mucosa of the penis and its loss to circumcision. *Br J Urol* 1996;**77:**291-5.
[8] Taylor JR, *et al.* The prepuce: specialized mucosa of the penis and its loss to circumcision. *Br J Urol* 1996;**77:**291-5.
[9] Taylor JR, *et al.* The prepuce: specialized mucosa of the penis and its loss to circumcision. *Br J Urol* 1996;**77:**291-5.
[10] Gairdner D. The fate of the foreskin. *Br Med J* 1949;**2:**1433-7.
[11] Fetus and Newborn Committee, Canadian Paediatric Society. Neonatal Circumcision Revisited. *Canadian Medical Association Journal* 1996;**154(6):**769-80.
[12] Task Force on Circumcision, American Academy of Pediatrics. Circumcision Policy Statement. *Pediatrics* 1999;**103(3):**686-693.
[13] British Medical Association. Circumcision of Male Infants. September, 1996.
[14] Australasian Association of Paediatric Surgeons. Guidelines for Circumcision. Hersion, Queensland: 1996.
[15] Australian College of Paediatrics. Position Statement: Routine Circumcision of Normal Male Infants and Boys. Parkville, Victoria: 1996.
[16] Laumann EO, Masi CM, Zuckerman EW. Circumcision in the United States:prevalence, prophylactic effects, and sexual practice. *JAMA* 1997;**277:**1052-7.
[17] Letters. *JAMA* 1997;**278:**201-203.
[18] Department of Justice. What is the Law? December 9, 1997. http://canada.justice.gc.ca/Publications/Info_education/CSJ/CSJ_page3_en.html (August 13, 1999)
[19] *Chapter C-46—An Act Respecting the Criminal Law*.
[20] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.
[21] Committee on Bioethics, American Academy of Pediatrics. Religious exemptions from child abuse statutes. *Pediatrics* 1988;**81(1):**169-171.
[22] Williams N, Kapila L. Complications of circumcision. *Br J Surg* 1993;**80:**1231-6.
[23] Fetus and Newborn Committee, Canadian Pediatric Society. Neonatal circumcision revisited. *CMAJ* 1996;**154(6):**769-80.
[24] Taddio A, Goldbach M, Ipp M, *et al.* Effect of neonatal circumcision on pain responses during vaccination in boys. *Lancet* 1995;**345:**291-2.
[25] Smith GL, *et al.* Circumcision as a Risk Factor for Urethritis in Racial Groups. *Amer J Pub Hlth* 1987;**77(4)**:452-4.
[26] Cook LS, Koutsky LA, Holmes KK. Clinical presentation of genital warts among circumcised and uncircumcised heterosexual men attending an urban STD clinic. *Genitourin Med* 1993;**69:**262-4.
[27] Van Howe RS. Variability in penile appearance and penile findings: a prospective study. *Br J Urol* 1997;**80:**776-82.
[28] Laumann EO, Masi CM, Zuckerman EW. Circumcision in the United States:prevalence, prophylactic effects, and sexual practice. *JAMA* 1997;**277:**1052-7.
[29] Donovan B, Bassett I, Bodsworth NJ. Male circumcision and common sexually transmissible diseases in a developed nation setting. *Genitourin Med* 1994;**70:**317-20.
[30] Van Howe RS. Circumcision and HIV infection: review of the literature and meta-analysis. *Int J STD & AIDS* 1999;**10:**8-16.
[31] Chao A, *et al.* Risk factors associated with prevalent HIV-1 infection among pregnant women in Rwanda. National University of Rwanda—Johns Hopkins University AIDS Research Team. *Int J Epidemiol* 1994;**23:**371-80.
[32] O'Hara K and O'Hara J. The effect of male circumcision on the sexual enjoyment of the female partner. *Br J Urol International* **83**, Suppl. 1, 79-84, 1999
[33] Correspondence dated November 10, 1997 from Dr. Margaret A. Somerville to Dr. C. Robin Walker.
[34] Correspondence dated January 28, 1998 from Dr. Margaret A. Somerville to Dr. C. Robin Walker.
[35] Committee on Bioethics, American Academy of Pediatrics. Religious objections to medical care. *Pediatrics* 1997;**99(2):**279-81.

[36] Appelbaum PS, Lidz CW, Meisel A. Informed Consent: Legal Theory and Clinical Practice. New York, NY: Oxford University Press; 1987.

[37] Committee on Bioethics, American Academy of Pediatrics. Informed consent, parental permission, and assent in pediatric practice. *Pediatrics* 1995;**95(2)**:314-317.

[38] UN General Assembly, Convention on the rights of the child. December 12, 1989 Document A/res/44/25 with Annex.

[39] Price C, There is an important distinction to be drawn between the language of most paragraphs and that of preambular paragraph 12: namely between paragraphs starting with "Recognizing..." and those with "Taking account...". The clear signal from the difference in language is that those matters in the "recognizing" paragraphs formed a basis or framework for the Articles which follow, whereas the "Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child" is seen as not overriding the protections and rights enunciated in the Convention.

[40] Bioethics Committee, Canadian Paediatric Society. Treatment Decisions for Infants and Children. CPS Statement: B 86-01.

[41] Kluge EH. Female circumcision: When medical ethics confronts cultural values. *CMAJ* 1993;**148(2):**288-9.

[42] Koppelman LM, Female circumcision/genital mutilation and ethical relativism. Second Opinion 1994;**20:**5-71.

[43] R.W. Cockshut. Circumcision. *British Medical Journal* 1935;**2:**764.

[44] Szasz T. Routine circumcision: Symbol of the Birth of the Therapeutic State. *Journal of Medicine and Philosophy* 1996:**21:**137-48.

[45] To T, Agha M, Dick PT, *et al*. Cohort study on circumcision of newborn boys and subsequent risk of urinary-tract infection. Lancet 1998;352:1813-16.

[46] Fetus and Newborn Committee, Canadian Paediatric Society. Neonatal Circumcision Revisited. *Canadian Medical Association Journal* 1996;**154(6):**769-80.

[47] Lightfoot-Klein H. Erroneous Belief Systems Underlying Female Genital Mutilation in Sub-Saharan Africa and Male Neonatal Circumcision in the United States: a Brief Report Updated. (*Presented at the Third International Symposium on Circumcision, University of Maryland, College Park, May 22-25, 1994.*)