THE LAWFULNESS OF CIRCUMCISION
Analysis of the conformity of Congolese legislation and practice with international law
(Text of the conference held on August 23, 2019 at the Discutons droit forum)

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Ladies and gentlemen, lawyers of this forum,
Honourable judges of this forum,
Ladies and gentlemen, diplomats of this forum,
Dear Legal Advisors of this forum,
Ladies and gentlemen, teachers of this forum,
Dear political actors (FCC, CASH, LAMUKA, Independent) of this forum,
Ladies and gentlemen in your respective titles and qualities,

It is a great honour and joy to meet again on the occasion of the conference-debate on "The Legality of Circumcision: Analysis of the conformity of Congolese legislation and practice with international law". Indeed, how can we think of doing this analysis without thinking about the thought of DESCARTES when he said: "I think, therefore I am? » A thought is as a bottle in the sea. After centuries in the depths of the ocean, tossed by waves through the ages, from shore, against all obstacles and against all hope, it falls into the hands of an unexpected destiner, for a new life to eternity. Thus, since we had agreed on this theme with Me Dolorès Sonia (DSK) and Mrs Christiane Kasoro, "I have not given any sleep to my eyes, nor rest to my eyelids". On the contrary, since Zhongnan University of Economics and Law, I, like Professor Basue Babu Kazadi, have let my mind run the waves of reflection. But where do you start?

So here I am standing at the crossroads of my doubts like a fetish at the entrance to the village. Because, a thought is rarely first in the sense that it is complementary to previous thoughts and heralds new thoughts, future thoughts. A thought is what remains when the letter has been silent, when the library has burned. Thus, our thinking on the reflection on the lawfulness of circumcision, apart from the introduction and conclusion, will be spread around the analysis of the normative framework of Congolese and international legislation on circumcision (I) as well as the conformity of Congolese practice with these norms (II)

Introduction
« Laisser les garçons décider par eux-mêmes s’ils veulent ou non se faire circoncire »

Ombudsmen in the Nordic countries

Law No. 09/001 on the protection of children in the Democratic Republic of Congo has been in force since 10 January 2009. Although lacking in some respects, it gains in force as soon as it translates into national law the international minimum standard on the protection and promotion of the rights of the child. In addition, it enshrines several children's rights, including the prohibition of torture or cruel, inhuman and
Circumcision is a practice shared by many communities both over time and on all continents, from Egypt to the present day, from Africa to Asia and Europe. It is difficult to indicate a precise date fixing the origin of the circumcision. Because a piece of bone or a fragment of a molar does not make it possible to determine whether circumcision was already practiced at the time of the Neanderthal man. Indeed, circumcision is not regulated or prohibited by Congolese law, let alone international law. While these two rights condemn FGM by protecting children from sexual violence and promoting the right to physical integrity. Thus, under Congolese law, it follows that sexual mutilation is one of the forms of sexual violence.

Currently, there is a controversy between the defenders of circumcision and its detractors. This controversy surrounding circumcision is partly due to the advent of human rights, the main intention of which is "to protect human dignity and the intrinsic value of a human being, whatever his social, religious or economic origin (...) and we can only welcome the rise of such convictions", and subsequently children's rights, rights "specifically adapted to the child because they take into account his or her fragility, specificities and age-specific needs" which have contributed to reconsidering the vision we had of the child.

Circumcision is an important practice for Jewish and Muslim communities, which is why it raises lively debates between different fundamental rights such as religious freedom guaranteed by the Convention on the Rights of the Child and the right to the physical integrity of the child guaranteed by the same Convention. This conflict between various human rights arises because they "are today victims of their success, several generations of rights having successively enriched their ranks".

The first to ban circumcision was Ahab, king of Israel from 875 to 853 B.C. and his wife Jezebel. Neither the Bible nor any other document of the time gives an explanation for this prohibition. The second prohibition occurred under the authority of the Greek king of Syria, Antiochus Epiphanes, who ruled from 175 to 164 B.C. and promulgated an edict that stipulated not to circumcise boys; for those who did not obey, death was assured as quoted in the book of Maccabees: "The women who had circumcised their sons were cut", "the children were hanged by the neck in all their houses, and those who had circumcised them were imprisoned if the child's death has been the result of torture."
The anti-circumcision movement was reportedly initiated by the Jews themselves and the king's intervention would have strengthened their position. It would therefore be a conflict between the Jewish community and political power on the one hand and the rabbis on the other. Indeed, the latter wanted at all costs to maintain circumcision, as illustrated by the following words from the book of the Maccabees: "And Mathathias went everywhere with his friends, and they destroyed the altars, and circumcised the uncircumcised children, as much as they found in the territory of Israel; and they acted with strength". For the Roman emperor Hadrian, who ruled from 117 to 138, he prohibited both castration and excision. Anyone who did not comply with this provision was liable to capital punishment and confiscation of his property.

While for some people the argument of the child's right to physical integrity is raised with a view to a possible prohibition of circumcision, others believe that it is a way of masking a certain intolerance of current society towards practices associated with their community. Is all this controversy justified? Isn't it a storm in a glass of water? In the DRC, would considering a ban on this practice put out the fire? The purpose of this conference is not to take a position in favour or against circumcision, but rather to explore the lawfulness of this practice by analysing the conformity of Congolese legislation and practice with international law from a child rights perspective.

I. Normative framework for circumcision in Congolese and international law

In the various international conventions and Congolese legal texts, there is never any formal mention of circumcision. The Convention on the Rights of the Child, ratified by the DRC, for example, does not contain any article formally stating this act, but several of them make implicit reference to it: non-discrimination, best interests of the child, parental guidance and development of the child's capacities, right to life, survival and development, respect for the views of the child, freedom of thought, conscience and religion, parental responsibilities, protection against all forms of violence and health and health care. The issue of arguments against or in favour of circumcision is vast, as it touches on many areas: the right to physical integrity, freedom of belief and religion, parental rights and the rights of the child.

a. The child's right to physical integrity

The Convention on the Rights of the Child states that "States Parties shall take all appropriate and effective measures to abolish traditional practices harmful to the health of children". The first step is to define what is meant by harmful traditional practices, since there is no definition in international or Congolese instruments. Secondly, to know if circumcision can be considered as such. We can retain that the harmful traditional practice is:

- following a rule of action on a moral or social level, which is a legacy from the past and which causes damage to the child's moral and/or physical health and/or endangers his or her development.

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20 The holy bible. I Maccabees 1 : 64.
21 The holy bible. I Maccabees 2:45-46.
22 Jewish researchers interpreted the Latin term excidere as referring to circumcision, so the ban was directed against Jews. But for Aldeeb Abu-Sahlieh (2001) "it is excessive and unfair to see in it a desire to exterminate Jews instead of an application of the humanitarian principles of this emperor". For, in fact, the Jews of Rome never stopped circumcising their boys, even under Hadrian's reign. Aldeeb Abu-Sahlieh, S. A. (2001). Circoncision masculine, circoncision féminine. Débat religieux, médical, social et juridique. Paris, France : L'Harmattan, p. 396.
• reflect the values and beliefs of a community, often shared by its members for many generations. Each social group has its own traditional practices and beliefs. Some of these are beneficial to all members, while others are detrimental.  

• they are based on tradition, culture, religion or superstition and are perpetrated and openly tolerated by the child's parents and significant adults in the child's community. Indeed, these practices often enjoy majority support within communities or even entire states.

Some criticize the position of international bodies on this issue. He criticizes them for not fighting male circumcision because, for them, "Circumcision, both male and female, is an attack on physical integrity that reduces natural functions and leads to physical, psychological and sexual complications and sometimes to death. As a result, it is a violation of the right to physical integrity and the right to life."  

In its General Comment No. 13 of 2011 on the right of the child to be protected from all forms of violence, which refers to the Convention on the Rights of the Child, the Committee on the Rights of the Child proposes a non-exhaustive list of forms of violence that includes harmful practices. It is interesting to note that circumcision is not mentioned, unlike female genital mutilation, scarification, violent initiation rites, forced marriage and early marriage, among others.

It is interesting to note that the International Council of NGOs on Violence against Children, in its report The Violation of Children's Rights: Harmful practices based on tradition, culture, religion or superstition, includes circumcision in the list of these types of practices. Indeed, the Council recognizes that circumcision performed for non-medical reasons and without the consent of children "constitutes a flagrant violation of their rights, including the right to physical integrity, freedom of thought and religion and protection from physical and mental violence." The Council notes that "Male circumcision has been highly neglected in traditional debates on harmful practices because of its strong religious links, particularly with Judaism and Islam, and because it is widely accepted in many societies." The fact that it is "one of the oldest and most common surgical procedures" is another reason that could explain this lack of interest in considering circumcision as a harmful practice. Similarly, in its resolution The right of children to physical integrity, the Parliamentary Assembly of the Council of Europe draws up a list of violations which includes "the circumcision of young boys for religious reasons."  

In the various texts we have just examined, it appears that circumcision is not always formally mentioned as a harmful traditional practice, unlike female genital mutilation, with the exception of the report of the International Council of NGOs on Violence against Children and the text of the Parliamentary Assembly of the Council of Europe. However, the Convention on the Rights of the Child states that the State party must "protect the child from all forms of physical violence, injury or abuse (...) while in the care of the child's parents or one of them, his or her legal representative(s) or any other person to whom the child is entrusted." If it is considered that circumcision represents an attack on the physical integrity of the child, the term any form allows it to be included in the previous definition.

39 Idem, p. 34.  
40 Ibidem, p. 33.  
41 Ibid, p. 34.  
43 Idem, §2.  
b. Religious freedom

Another area of controversy surrounding circumcision is that of freedom of belief and religion, guaranteed by various Congolese texts, such as the Constitution, and international instruments such as the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the CRC. First of all, what do we mean by religious freedom? Indeed, religious freedom refers to a set of constitutional and conventional guarantees relating to religion and its free exercise. These norms tend to leave it to each individual to decide freely on matters relating to religion. Everyone must be able to think, want and act in accordance with their belief in the existence or non-existence of a transcendent being. The notion of religion is necessarily broad, as there are an infinite number of religious teachings and religious communities. To what extent can parents decide for their children which religion and beliefs to follow? During the debates on circumcision, there was a conflict between the right to physical integrity and the right to religious freedom guaranteed by many international instruments: the ECHR, Covenant II, the CRC and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. As mentioned in the introduction to this conference, religion is one of the main justifications for circumcision in the communities where it is practiced. It is logical that an opposition between the right of the child to his or her physical integrity and the right to freedom of belief and religion should be expressed in the various international human rights instruments.

It is important to note that, more often than not, it is the parents who make the decision to have their boy circumcised, guided by their religion, their custom. This idea is in line with the International Covenant on Civil and Political Rights, which states that "The States Parties to the present Covenant undertake to respect the freedom of parents and, where applicable, legal guardians to ensure the religious and moral education of their children in accordance with their own convictions" and the Convention on the Rights of the Child, in which States parties are required to respect "the right and duty of parents or, where applicable, legal representatives of the child, to guide the child in the exercise of the above-mentioned right in a manner consistent with the development of his/her capacities." However, parents' choice may run counter to some of the rights of the child recognized by the Convention on the Rights of the Child, which requires States to "respect the child's right to freedom of thought, conscience and religion." Unlike other texts, the Convention on the Rights of the Child considers the child as a subject of law since he or she has the possibility of freely choosing his or her religion. In this sense, the Convention seeks a balance between the child's interest and the evolution of his or her ability to express wishes; that is, in certain circumstances, the child may choose a religion different from that of his or her parents.

c. Parental and child rights

As we have seen in the previous section on religious freedom, there is an opposition between the rights of parents and the rights of the child. Do parents have the right to decide instead of the child to have him circumcised? How can the interests of the child be reconciled with those of the parents? First of all, it must be acknowledged that conflicts between the interests of the child and those of the parents may arise, either latently or manifestly. Some people believe that "what is good for the family is, by definition, good for the child and that only parents are in a position to know what is good for the family". Although the Convention on the Rights of the Child is not against decisions taken by the family, this view does not reflect the spirit of the Convention, as it places the right of the child in the background, which can be problematic when parents are abused or neglected, for example.

47 Article 18 of the Covenant II.
49 Article 5 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.
52 Article 14 para. 2 of the Convention on the Rights of the Child.
The best interests of the child as set out in the Convention on the Rights of the Child states that "in all decisions concerning children, whether taken by public or private social welfare institutions, courts, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"\(^{54}\). The concept of the best interests of the child is complex, flexible and adaptable from case to case, allowing it to be sensitive to the situation of each child. However, it may also give way to interpretations that are counterproductive\(^{55}\). Governments, parents, professionals can also manipulate this notion in their own interest. With regard to circumcision, it can also be considered to be in the best interests of the child. Indeed, for the one practiced for medical reasons, not doing it can put the child's life in danger, which is against his or her interest. With regard to circumcisions carried out for religious or cultural reasons, the interest of the child mentioned by the parents is certainly in the boy's acceptance within his community. It is important to note that art. 3 para. 1 of the Convention on the Rights of the Child does not mention the parental sphere. Is this omission voluntary? Are parental decisions not therefore concerned by the best interests of the child? We assume that this omission is voluntary, as the legislator does not want to interfere in the parental sphere and thus ratify this notion. The application of the principle of the best interests of the child must be included in this sphere, as it makes no sense for the various institutions and authorities to be obliged to respect this principle and not the parents. The answer to the question raised above is given in Art. 18 para. 1 of the Convention on the Rights of the Child. "The primary responsibility for the upbringing and development of the child rests with the parents or, where applicable, their legal representatives. They must be guided first and foremost by the best interests of the child."

So we've just touched on the family estate. The protection of the private and family sphere is regulated by numerous international texts. The ECHR guarantees everyone the "right to respect for their private and family life, their home and their correspondence"\(^{56}\). Similarly, Covenant II notes that no one should be "subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, or unlawful attacks on his or her honour and reputation"\(^{57}\). As for the Convention on the Rights of the Child, it stresses that no child should be subjected to "arbitrary or unlawful interventions in his or her private life, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation"\(^{58}\).

II. The conformity of the Congolese practice of circumcision with international law

In the DRC, circumcision is obedient and either medical, i.e. performed by medical experts in appropriate medical facilities, or by religious authorities, or in a hospital or religious centre, and artisanal, performed by an elder of the community: in the open air, in the forest or by a river. Let us analyze each practice to determine its compliance with international law

a. Judaism and circumcision

In Judaism, circumcision marks the covenant between Yahweh and the Jews\(^{59}\). The latter is said to have taken place in the 19th century BC when Yahweh addressed Abraham with these words: "You shall circumcise your flesh, and this shall be a sign of the covenant between me and you. From generation to generation, every male among you shall be circumcised at the age of eight days... The uncircumcised, the male who has not received circumcision in his flesh, shall be cut off from his people for violating my covenant"\(^{60}\). It was therefore at the age of ninety-nine that Abraham was circumcised\(^{61}\).

\(^{54}\) Article 3 para. 1 of the Convention on the Rights of the Child.


\(^{56}\) Article 8 para. 1 ECHR.

\(^{57}\) Article 17, paragraph 1, of the Covenant II.

\(^{58}\) Article 16 para. 1 of the Convention on the Rights of the Child.

\(^{59}\) "Rabbinical commentary on the Bible intended to clarify various legal points or to provide moral instruction using various literary genres: narratives, parables and legends" (Wigoder, 1996, p. 672).

\(^{60}\) The Holy Bible, book of Genesis 17:11-14.

\(^{61}\) Idem, Genesis 17 :24.
Great importance is given to the choice of the eighth day to perform circumcision. This precision of the date is a specificity of the Jewish religion. Circumcision is performed by a mohel (the one who cuts). The latter does not necessarily have to be a rabbi or a doctor, but must be of Jewish faith. The operation takes place either at the child's home or in a synagogue not far from home. Nowadays, it is most often performed in hospitals or clinics designed for this purpose for hygiene reasons and to avoid post-operative complications such as bleeding. On the day of circumcision, the child is abducted from his mother and then entrusted by his godmother to his godfather (sandaq), who takes him with him to the place where the ceremony is to take place. He in turn entrusts it to the one who will briefly place it on Elijah's seat.

Circumcision is a fundamental condition for conversion to Judaism, but every uncircumcised man must do so, "if the convert is already circumcised, only a drop of blood is taken ritually as circumcision". Circumcision "is a Hebrew sacrament whose meaning and impact are socially and spiritually determined". It allows access to a number of ceremonies, but forbids others: "When a stranger, staying with you, wishes to keep the Passover of the Lord, every male belonging to him will be circumcised; he will then be allowed to keep it, and he will be treated as one born in the land; but no uncircumcised person will eat the Passover".

"It is a thing that we cannot do, to give our sister to an uncircumcised man: it would be a disgrace to us. We will consent at your request on the condition that you become similar to us, by having all the males among you circumcised."

b. Islam and circumcision

Circumcision was probably a common practice in early Arabia, so it is well before the arrival of Islam, which only repeated it in the same form and content. It was only much later, probably on the occasion of the first major pilgrimages to Mecca, when non-Arab Muslims met their Arab counterparts, that circumcision became an act of piety. Unlike the Old and New Testaments, the Koran does not mention circumcision. This silence of the sacred book in this matter has not convinced some of the classical and modern Muslim authors, since in a Sura (Koranic chapter) it is said: "We have omitted nothing from writing in the Book." If everything is written in the Koran, why is there nothing concrete about circumcision? To achieve this, the authors relied on the notion of equivocal verses: "It is He who sent the Book down to you: there are unambiguous verses, which are the basis of the Book, and other verses which can be interpreted in various ways... Based on this verse, the defenders of this practice referred to other verses in the Qur'an to justify their position:"

As already mentioned, circumcision is not mentioned in the Koran, however, it is attested by ancient poetry and hadith (Bosworh et al., 1986). The latter is "the set of narratives that recount Muhammad's words or actions, constituting what is also called the Tradition or basis of the Prophet's Sunna, itself considered as one of the fundamental sources of Muslim law or fiqh.”

a. Christianity and circumcision

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62 According to Jewish ritual circumcision, the mohel proceeds to "the removal of the entire foreskin (orlah), the complete exposure of the glans (attarah), and the removal of a minimum quantity of blood (dam berit milah)" (Widder, 1996, p. 225).
64 Idem, p. 226.
66 The Bible, Book of Genesis 34:14,15.
69 Koran 6:38.
70 Koran 3:7.

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Christians substituted Jewish circumcision with baptism and naming. It is interesting to note that Jesus was baptized in the waters of the Jordan by John the Baptist before he was designated as the son of God. "Circumcision of the heart as a metaphor for circumcision of the body is then advanced as a possible argument for Christian identity". But before this happened, circumcision was subject to strong controversy between supporters and opponents. The Gospels do not give a precise idea of Jesus' opinion of this practice, but after his death, several positions were expressed among his disciples: "(1) circumcision is necessary (it is that of James the Righteous); (2) circumcision is not necessary (it is that of Paul); (3) circumcision is necessary for Judeans, but not for those who are from other nations (it is that of Luke); (4) circumcision is abolished²²; (5) circumcision is positive⁷³,⁷⁴.

Nowadays, Christians no longer practice circumcision for religious reasons; "spiritual circumcision" has therefore replaced "carnal circumcision", with the exception of the Coptic community, which continues to practice this operation on its children.

a. Animism and circumcision

While today circumcision is most often associated with Judaism and Islam, it is still a practice that predates these religions, as is the case in Africa and Oceania. African circumcision can be explained on three levels: cosmological, ethnographic, medical-hygienic and sexual.

Ethnographically, circumcision marks the transition from adolescence to adulthood, so the young person becomes a man. To make this transition a success, he is subjected to initiation rites that vary according to ethnic groups, but it can be observed that in most cases, these are endurance tests, collective or individual, performed before or after the operation. "Circumcision thus proves to be a true school of courage"⁷⁵. As for the medical-hygienic and sexual aspects, African circumcision is in line with the explanations given by other religions. It is intimately linked to hygiene. "Cleanliness of the body is a sure sign of respect for others and for oneself. And that's why we have our young boys circumcised. Nowadays, circumcision is still practiced as much in Africa. However, with the changes, there are more and more families who have their boys circumcised by medical services.

III. What to conclude?

In this presentation, we wanted to describe the lawfulness of circumcision by analysing the conformity of Congolese legislation and practice with international law. This allowed us to study the various arguments put forward by both supporters and opponents of a possible ban on circumcision for non-medical reasons. It is surprising to note that this age-old and widespread practice suddenly triggered a strong controversy. In light of all the above, let us conclude that advocates of a ban on circumcision must take into account the specific socio-legal contexts of each country⁷⁶. Parents are essential actors in determining whether or not to ban circumcision, so it is important to avoid making them feel guilty, as this would be counterproductive. Indeed, parents who circumcise their children for cultural or religious reasons argue that they are fulfilling a religious mandate or adopting the values of their community. For those who do it for medical reasons, they think they are protecting their children's health. "In the case of circumcision, the balance in most countries is almost entirely in favour of parental rights. Congolese legislation is in conformity with international law, which does not condemn or regulate circumcision. On the contrary, it does not consider it as an attack on the physical integrity of the child. But as far as practice is concerned, we believe that only medical circumcision performed in a medical facility should be recommended in the DRC for the best interests of the child. This would limit the risks we have observed through the religious or artisanal practice of circumcision.

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²² It is the one from Paul's epistle to the Ephesians. 2,11-22 and the authors of the Gospel according to Thomas 53, the Epistle of Barnabas 9,1-9 and the Epistle to Diognetus 4,1-4.

²³ It is that of the authors of the Odes of Solomon 11:1-5 and the Gospel according to Philip 82:26-29.


⁷⁶ In Great Britain, for example, this act is legal provided it is approved by both parents. On the contrary, the State of Oregon considers that the decision of the custodial parent alone is sufficient.
Bibliography


ii. Law No. 09/001 on the Protection of Children in the Democratic Republic of Congo of 10 January 2009.


xxiii. The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

xxiv. The reading of Act No. 06/018 of 20 July 2006 amending and supplementing the Decree of 30 January 1940 on the Congolese Criminal Code, on the one hand.

xxv. Act No. 09/001 of 10 January 2009 on the protection of children, on the other.


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