THE FIRST CASE ADDRESSING FEMALE GENITAL MUTILATION IN AUSTRALIA

Where is the harm?

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What is the difference between circumcision, nicking, mutilating or touching the genitals of a child? Does it matter if that child is a girl or a boy? Does it matter if the person performing the procedure is a man or a woman? A doctor or a midwife? A parent or a friend? These are the questions that underpin any consideration that the courts must undertake when they apply the laws against what is termed, in the laws of all western countries, 'Female Genital Mutilation'. The defining of an act as a 'mutilation' is not clear and it is loaded with politics and prejudice. These prejudices relate to the gender, the skin colour and the religion of the person. Judges and juries should not, of course, in Australia today employ such prejudices, but when it comes to the issue of what has been termed 'female genital mutilation' many of the considerations that usually make judges and juries hesitate before they pass sentence, might not apply. And this was the situation in Sydney in 2015, in the first case of its kind in a superior court in Australia.[1]

Over four months in the latter parts of 2015 the New South Wales Supreme Court considered the question of whether two young girls had experienced 'mutilation' as prohibited by s 45 of the *Crimes Act 1900* NSW. Following a guilty verdict and conviction, the court considered the sentence that should be applied to a local Imam, the mother and the midwife who performed *a* practice — although the nature of that practice is contested — on two young girls. That something had happened, that a procedure of some sort had occurred, and that the parents knew something happened was not in dispute. The Prosecution argued that a midwife had been employed to perform a ritual 'excision', that the mother had consented to this and that she was present during the act. The Imam associated with the family's community was found to be an accessory after the fact. The defence argued that only a touch of the genitals had occurred and that no trauma to the skin — no incision in the flesh — had occurred. Therefore, what was specifically in dispute was whether what had happened involved any damage or any cutting at all, and whether, if any of this happened, could it be considered 'mutilation'.

The question of whether what occurred was a mutilation, as opposed to an incision for medical reasons, a cut for the purposes of (male) circumcision or an acceptable cosmetic alteration, was the founding concern of this case. Injury or harm are the perceptions that relocate an act toward a body from acceptable to criminal, but what underpins this relocation are perceptions of health, of aesthetics, and of the legitimacy of culture. That is, as with all interpretations of law, and judgments which apply interpretations, an imagination of the significance of the event is recruited long before the evidence is presented in a courtroom. Female genital mutilation, so called, performs powerful work on western imaginations of what Muslim people do to their women and their children. This case was no exception to the work of imagination, and, as I argue in this article, the imagination of the cultural significance of the practices overshadowed the capacity of the judge and jury to consider that what happened to two young girls was perhaps neither a crime nor a harm.

The question of injury and mutilation

The trial proceeded in relation to two concerns: what happened to the girls and was it mutilation. The Prosecution's cultural expert witness on the practices of the Dawoodi Bohra Muslim community stated that the practice of the community was to remove a piece of flesh 'the size of a lentil' from the prepuce that covers the clitoris. The Prosecution's medical expert, however, could not identify any injury or scarring. The lack of identification of any injury obviously contradicted any idea that a lentil sized piece of flesh had been removed and offered the possibility that nothing at all had happened, or if it had it was so minor as to not even leave an indication that something had occurred. The Prosecution, however, having initially argued that the act had been anything up to an 'excision', withdrew the argument during sentencing when the defence presented a medical report by doctors Grover and Smith of Melbourne's Royal Children's Hospital that documented a detailed colposcopic examination, and concluded that they could find no evidence of any incision, cut or injury at all.[2] After this the Prosecution concurred with Johnson J's allowance in the arguments that what may have occurred was a 'nick' or a 'cut' that had healed. This was, in fact, his instruction to the jury which then meant that if they regarded either a 'nick' or a 'cut' to have been done to the girls, then they had to return a guilty verdict. Johnson J contended in his judgment that:

> any physical injury to any extent to the female genital organs, which is done for non-medical reasons, can amount to mutilation for the purposes of s 45. … that a nick or cut to the genitalia for the purposes of FGM is capable of falling within the concept of mutilation in s 45.[3]

The jury accepted this and so 'something' was judged to have happened — and this 'something' was a crime

REFERENCES

1. *R v A2 [No 2]* (2015) 1221 NSWSC 22 (Johnson J); Bridie Jabour, 'FGM Trial: Accused Developed Technique that Would Leave no Scarring, Court Told', *The Guardian* (Australia), 29 October 2015, 1; Bridie Jabour, 'Australia's first Female Genital Mutilation Trial: How a Bright Young Girl Convinced a Jury', *The Guardian* (Australia), 13 November 2015, 1.

2. In earlier evidence the Prosecution's medical expert tried to suggest in a statement that an incision would cause skin cells to be removed thus the offence could be classed as an 'excision'. This argument, though seemingly counterintuitive in its implication that even the smallest amount of *possible* cell removal (remembering that there was no scarring or evidence of a nick or a cut having occurred) was not run with much vigour by the Prosecution.

3. (2015) 1221 NSWSC 22.

under the NSW *Crimes Act*'s s 45 prohibition of female genital mutilation.

The legislation applied to this case is vague however. The Act states that what is prohibited is to excise, infibulate or otherwise mutilate 'the whole or any part of the labia majora or labia minora or clitoris.[4] And the trial thus rested on whether, even if a 'nick' had occurred, could it be considered any of the above. Certainly 'excise or infibulate' did not apply, but what of 'otherwise mutilate'? Johnson J, in his judgment, concluded that, while the term 'mutilation' was in debate — indeed many dictionary definitions had been offered by both parties in order to argue one way or another — he would rely, not on the substantive words of the legislation, and not on case law definition of mutilation, but on the title of the statute itself and its accompanying explications in health, legal research and dictionary pronouncements.[5] Johnson J found no specific indication that what had occurred was a 'mutilation' but stated that while what occurred was not deemed to be a 'mutilation', it was somewhat counter-intuitively deemed to be 'female genital mutilation'. On this basis the mother, the midwife and the Imam were found guilty.[6]

The conviction is an unusual and puzzling finding, accompanied by a judgment from Johnson J that draws heavily on the imagination that generally accompanies any evocation of the practices which have come to be termed 'female genital mutilation'. Johnson J specifically drew on World Health Organization ('WHO') findings and the 1994 *Report to the Attorney-General* by the Family Law Council ('FLC'),[7] to illustrate in his judgment that what had occurred was 'female genital mutilation'. But to say that female genital mutilation had occurred, while at the same time acknowledging that a 'mutilation' had *not* occurred, is to contort and comport information, imagination and sentiment to the judgments of the law. Such a contortion is not new in the arena of 'fgm'. Obviously, anything which happened to the girls was far less of an invasion into the flesh than the practice of male circumcision,[8] which is, of course, legal in NSW, all other states and territories of Australia and in most western countries.[9] Similarly, labiaplasty is alive and flourishing, as is clitoral piercing and vaginal tightening, and even if these can only be performed on consenting adults, or parents who provide their consent — which certainly does occur — the legislation on 'Female Genital Mutilation' in Australia has no age limit and would logically find these acts criminal also.[10] Indeed as Gans notes in his recent discussions of modern criminal law:

> A motivated *police officer* will have little difficulty arresting a NSW genetic cosmetic surgeon for an offence against s45 under New South Wales's power to arrest without warrant.[11]

But to date, they have not been motivated. In this case involving Vaziri and Magennis, however, the investment in resources to catch the parents, midwife and Imam were little short of extreme. Cars, phones and houses were tapped. Conversations were recorded. The parents were followed. Community members were interviewed repeatedly. Why doesn't such motivation accompany practices of labiaplasty?

The anti-FGM Acts (as we can call them) in all states and territories have a clause which is that the practice of genital alteration can occur if there is a 'medical reason' for such things, as deemed by a medical expert. That there are any medical reasons for labiaplasty requires an imaginative collapse of the relation between health and aesthetics.[12] The aesthetic alteration of the labia minora, the tightening of vaginas, or the trimming of the labia majora 'to enable the wearing of tight jeans' — as the President of the Royal Australian College of Obstetricians and Gynaecologists (RACOG, now RANZCOG) described in 1994[13] — might classify as aspects of increased social and interpersonal desirability, thus helpful to one's feelings of social inclusion, thus helpful to mental health, but this is — to put it mildly — a reach on the part of any health professional. Certainly the need to *feel part of a society*, or to *be loved or sexually appreciated by one's partner,* can be defined as mental health needs in this way, but then they would also be similarly applicable to people for whom practices of nicking, pricking, circumcision, clitoridectomy and infibulation would be necessary for social inclusion and interpersonal desirability. And yet these practices are not considered to fall under the clause of 'medical necessity' in the way that labiaplasty does. The logic in this area does not stand up to sensible scrutiny, let alone legal scrutiny. So why did Johnson J work so hard to find the mother, the Imam and the midwife guilty?

The answer may be found in some of the history of the making of the legislation in Australia, which varies only minutely to the histories of the making of such legislation in other western countries.[14] The history itself is plagued with the kind of prejudicial lack of curiosity that seems to accompany most conversations on what is called 'female genital mutilation'. When people think of the practices called 'female genital mutilation' they tend to recruit images of little girls being held down, screaming in mud huts in Africa somewhere, with a brutal, traditional practitioner, and often with the blood of animals in the vicinity (all images attached to the popular anti-fgm works of Kim Manresa, Waris Dirie, Alice Walker). Many people in the West believe the practices are done for the purposes of men's desire and women's pain, that they are about a disregard for the female body, for feminine sexual enjoyment and that they are simply backward, savage, and above all, patriarchal.[15] It is not difficult to feel anger when thinking of such things, but it is this pre-emptive anger — as Carla Obermeyer notes of the 'evidence' of FGM — that is often gleaned from a singular anecdote, a singular image,[16] which clouds, if not destroys, curiosity when any forms of the practice are placed under scrutiny. The destruction in curiosity, accompanied by the sense of an emergency that a child is being hurt, then allows for leaps in logic to be made by people who would otherwise regard themselves as complex and thinking people. Further, the anecdotes and images that people tend to employ with the phrase 'female genital mutilation' tend to be from singular

4. *Crimes Act 1900* (NSW) s 45 (a).

5. R v A2; R v KM; R v Vaziri (No. 2) [2015] NSWSC 1221 <https://www.caselaw.nsw.gov.au/decision/55de4544e4b0a95dbff9e300>.

6. They were sentenced in February 2016 – R v A2; R v Magennis; R v Vaziri [No 23] (2016) 282 NSWSC and the judgment is currently being appealed.

7. Family Law Council, 'Female Genital Mutilation: A Report to the Attorney-General' (June 1994) <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Female%20genital%20mutilation.pdf>.

8. I have elaborated the contradictions between attitudes to male circumcision and 'female genital mutilation' at length in Chapter 3 of *Law's Cut*; see Juliet Rogers, *Law's Cut on the Body of Human Rights: Female Circumcision, Torture and Sacred Flesh* (Routledge, 2013). A discussion of the imaginative representation of the significance of male flesh cut from the body is beyond the scope of this article.

9. The exception to this being the case in 2012 of the prosecution of a family in Cologne Germany for circumcising their male child. See Nicholas Kulish, 'German Ruling Against Circumcising Boys Draws Criticism', *The New York Times* (New York), 26 June 2012, 1.

10. See Nikki Sullivan, 'Transmotechnics and the Matter of Genital Modifications' (2009) 24 (60) *Australian Feminist Studies*, for a discussion of the confusions over the criminalisation of cosmetic genital surgeries.

11. See Jeremy Gans' recent discussion of the confusions and contingencies of the applications of this law in these cases in *Modern Criminal Law of Australia* (Cambridge University Press, 2nd ed, 2016). He is referring to the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 99.

12. Such confusions are carefully discussed in Aileen Kennedy, 'Mutilation and Beautification' (2009) 24 (60) *Australian Feminist Studies* 211—31; and Sullivan, above n 10.

13. Kerry Graham, 'Like a Virgin: Intimate Plastic Surgery', *Cosmopolitan Magazine* (Australia), 05/1994, 124.

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examples of infibulation, such as that told by Waris Dirie in *Desert Flower.* There is yet another discussion to be had on the sensationalising of the practices of 'infibulation' (which themselves are not mono-dimensional). But, more crucially in this example, the two girls were clearly not infibulated.

In his judgment Johnson J specifically recruited documents which collate the images and practices usually associated with infibulation and rendered them associated with any nick, cut or ritual under the label 'female genital mutilation'. Specifically Johnson J referred to the work of the FLC's Report to the Attorney General from 1994,[17] which recommended legislation in Australia. The Report was hasty in its consultation and in its research efforts, responding to a moral panic on FGM in Australia at the time. The Report itself had therefore relied on very dubious information to present its research — the fictional work of Alice Walker is cited at one point, as are several opinion pieces from outraged Australians. In the Report the practices are certainly articulated through information from WHO which suggests there are at least four types of the practices, and within each category there can be several forms, but then the Report speaks of the practices — including ceremonial anointing, nicking, clitoridectomy, circumcision and infibulation — as if they are all the same, and describes the women who have experienced any form of these practices as 'mutilated women' throughout the Report. In the final sections of this Report the mono-dimensional representation of the practices and the experience of them, is recruited to recommend legislation; legislation which the 'affected communities' in Australia had reported in other studies, would be detrimental to discontinuing the practices.[18] But commentaries by community representatives, or indeed by scholars from the communities already working in this area, are not taken up, by the FLC or indeed by Johnson J. The overarching idea of the practice of 'female genital mutilation' as mono-dimensional, equally harmful and painful, equally damaging to sexuality, to health and to wellbeing are recruited in the Report in the same manner as they are in Johnson J's judgment, and neither consider the possibility that a nick, a cut, a ritual may be more or less than a 'mutilation'. The term 'female genital mutilation' retroactively collates the images and the hasty research and applies them to the present case.

This is the work of the term 'female genital mutilation'. The FLC had in fact entitled the first discussion paper as 'Female Genital Mutilation: Discussion Paper'.[19] Employing the term 'female genital mutilation' to open the consultation, as Richard Schweder suggests, is akin to starting a conversation on abortion by using the term 'murder'.[20] The Discussion Paper was published only in English, and, of the 64 responses by community groups, medical practitioners and interested parties, only two came from community groups which were associated with the practices; what the FLC refers to as 'affected communities'. Only one of these comments was noted in the Report.[21] This, from the Eritrean Community of Australia, said 'because of the report being published only in English and because of the limited time frames *effective community consultation could not take place'*. Nevertheless this lack of consultation in a supposedly democratic multicultural country did not prevent Johnson J from mobilising the FLC's report stating:

> It is apparent from the documentary material before the Court on this application (Exhibits PTP and PT7) that there was widespread community discussion in Australia by early 1994 concerning FGM.[22]

There was 'community discussion', in one sense. The issue was a very hot topic in 1993–94; many people wrote to newspapers and to the FLC. Many people were outraged over the idea of screaming children, and many people were against 'female genital mutilation'. Few of them, indeed only a handful, were from the affected communities, and few knew more than what was represented in 'airport shelf' biographies. Almost of all of these, including Alice Walker's fictional account, the reference was to infibulation, not nicking, not cutting and not the ritual touch that the defence presented in this case.

After the 'consultation' in 1994 the law in NSW was passed in 1996, as it was in most states in Australia. While Victoria's *Crimes (Female Genital Mutilation) Act 1996* uses WHO definitions, the NSW legislation does not, and remains ambiguous as to what is meant by 'otherwise mutilates'. Johnson J notes the ambiguity, he notes the deferral to dictionary meanings, and he even acknowledges that the definition of mutilates does not cover what took place. As he says:

> If the enquiry concerning the meaning of the word 'mutilates' is confined to its bare dictionary meaning (unassisted by context or statutory purpose), the better view may be that more is required than the causing of injury.[23]

More is required than the causing of injury in order to define something as a 'mutilation'. Indeed. The question of whether an 'injury' occurred at all — in respect

14. I have documented much of this history and offered some comparisons in other western contexts in *Law's Cut*, above n 8.

15. The underlying assumptions on 'fgm' are well documented, for an excellent example see Janice Boddy, 'Violence Embodied? Circumcision, Gender Politics, and Cultural Aesthetics' in Emerson Dobash and Russell Dobash (eds) *Rethinking Violence Against Women* (Sage Publications, 1998); 'Gender Crusades: The Female Circumcision Controversy in Cultural Perspective' in Ylva Hernlund and Bettina Shell-Duncan (eds), *Transcultural Bodies: Female Genital Cutting in Global Context (*Rutgers, 2007); and for a summation of these logics see The Public Policy Advisory Group on Female Genital Cutting, 'Seven Things to Know about Female Genital Cutting Surgeries in Africa', *Hastings Centre Report* (2012) 42(6), 19–27. For a history of this in the Australian context, see Juliet Rogers, 'Managing Cultural Diversity in Australia: Legislating Female Circumcision, Legislating Communities' in Hernlund and Shell-Duncan (eds).

16. Carla Obermeyer, 'Female Genital Surgeries: The Known, the Unknown and the Unknowable' (1999) 13 (1) *Medical Anthropology Quarterly* 79–106.

17. Family Law Council, above n 7.

18. In 1994 the Eritrean Women's Group *was* commissioned by the Office of Women's Affairs to evaluate whether legislation would be appropriate as a tool to eradicate the practices. The Group consulted with the Eritrean, Somali and Ethiopian communities and stated the legislation would be detrimental to this project. The OWA published a 'summary' of the Report which stated the opposite and refused to publish the report. Their account of the Report is published as Office of Women's Affairs, *Report on Community Legal Information Project on Female Circumcision* (Unpublished, 1996). I have discussed this event in Ibid 36.

19. Family Law Council, *Female Genital Mutilation,* Discussion Paper (31 January1994) 4.

20. Richard A Shweder, 'The Goose and the Gander: The Genital Wars' (2013) 3 (2) *Global Discourse* 348–66.

to any harm to the girls needs also to be in debate to justify not only a prosecution, but the existence of a particular statute in criminal law. It is important to recall here that the history of the legislating of FGM was also odd in this respect. In Australia, at the time of consultation, there was, according to the FLC, no evidence that any of the practices had occurred. Any accounts of the practices at the time were anecdotal, secondhand and undocumented. They were speculation. The making of legislation in this context not only contravenes principles of the rule of law, but, not unrelatedly, places legislators at a disadvantage because they have nothing to consider. Again this was the disadvantage that confronted the FLC, which, in the Report, substituted actual events for a conflation of stories and anecdotes from Egypt, from two personal accounts of an experience at a location undisclosed. These were then mobilised to suggest the practices — all the practices — were experienced as painful, as traumatic, as abusive, as violent.

There is no discussion in the Report of any evidence of a 'nicking' or 'pricking' as painful, traumatic or as violent. That such an experience might be violent is to collate the other images about the other practices, and these too are uncertain; for each claim about any of the practices, which fall under the heading female genital mutilation, there is a counter claim. For each claim that a woman's sexual health is impacted, there is a study which suggests it is not, and others which suggest it is enhanced. For each claim of trauma, there is another which claims empowerment. However, it is the violent images which are played and replayed, on airport shelves, in documentaries and in fiction that form opinion. These, 'through repetition' have come in Obermeyer's terms again 'to gain authority as truth'. Similarly, in the FLC's Report the image of violence is only presented and then repeated, with the name 'female genital mutilation' always attached. There is no discussion of the benefits of the practices, the increases in sexual enjoyment that women report, the cultural empowerment that women experience, the desires of many to undergo the practices or the rage that many women have at being called 'mutilated' when so many clearly feel that they are not.[24] Such information might have clouded the images of the practices as being anything other than violent and, in the case in Sydney, this information might have clouded the certainty of Johnson J.

Neither that a practice occurred that does not reach the standards of dictionary definitions of 'mutilation', nor that what is believed to be a 'nicking' or 'pricking' might not constitute an injury, was noted by Johnson J. He reached for a judgment with the use of the title of the legislation — 'female genital mutilation', and thus with the use of the images, the confidence of Australian community support and with a desire, as he notes in the sentencing statements to send a 'message'.[25] With the unproblematised imagination of the practices and the confidence in the support of the western community in hand he presents a one-sided circular argument — it is not 'mutilation' but it is 'female genital mutilation'. A title, a sentiment, a history of non-consultation, an image that provides what he calls 'context or statutory purpose'. That the law exists as female genital mutilation law is to say that it means to speak to 'female genital mutilation' as a practice. He can then proceed as if the WHO definition of 'female genital mutilation' as well as the FLC's research can be included. And thus what happened to the girls can be construed as a crime.

It would take great courage and a determination to move beyond the overwhelming imagery of 'female genital mutilation' for Johnson J to be criticised for such a reach. It will take careful attention to the contradictions and slippages of the judgment to overturn a conviction against people even loosely implicated in such a practice as 'female genital mutilation'; Muslim people, an Imam who supposedly tried to conceal the act, that is often recruited as an icon for the patriarchy of Muslim culture. More than that, the title itself, the name itself, is so dominating and evocative of the images mentioned above, that it is likely this image will be imported when many people think of this case. When we imagine a child screaming, it is hard to think, to question, to interrogate our own assumptions. But a 'nick', if we accept the judgment that it did, in fact, occur, is far less an 'injury' or a 'harm' than the many things that are alive and flourishing in Australia. This is not an argument for cultural relativism, it is an argument for curiosity, for consultation, for fair minded judgments and it is an argument for justice for a midwife, an Imam, for two parents and for two young girls who have been subjected to the weight of a word — three words in fact — and the unproblematised passions they evoke.

Postscript

On 13 September 2016, Garling J granted bail to the Shabbir Vaziri — the Imam who was convicted and sentenced to full time imprisonment — pending the appeal. He did this on the grounds outlined by Hamill J (with whom Simpson and Davies JJ agreed), in El-Hilli and Melville v R [2015] NSWCCA 146, at 22 that bail can be granted where an appeal has a reasonable chance of success. The appeal documents, as presented to Garling J were on the question of utilising the definition of the legislation and the use of the term 'mutilation'. In his judgment Garling J said:

> It is my assessment that the ground identified with respect to the correct statutory interpretation of s 45(1)(a) of the Crimes Act is not only arguable, but appears to enjoy a reasonable prospect of success. If the ground does succeed, I am also persuaded that the convictions of the applicant would need to be set aside, and perhaps, depending on the reasoning of the Court of Criminal Appeal, an acquittal may be directed.

We can only hope that this is the case, for the family, for the Imam, for the midwife and to prevent any harm coming to the young girls who have been subjected to the pain that this legislation and judgment have caused.

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21. Family Law Council, above n 19.

22. (2015) 1221 NSWSC 35, 177.

23. Ibid 30.

24. For complex discussions of the experiences, and research on the experiences, see Fuambai Ahmadu, 'Rites and Wrongs: An Insider/Outsider Reflects on Power and Excision' in Shell-Duncan and Hernlund (eds), *Female 'Circumcision' in Africa: Culture, Controversy and Change* (Lynne Rienner Publishers, 2000); Mansura Dopico, 'Infibulation and the Orgasm Puzzle: Sexual Experiences of Infibulated Eritrean Women in Rural Eritrea and Melbourne Australia' in Hernlund and Shell-Duncan (eds), above n 15; Public Policy Advisory Group on Female Genital Surgeries in Africa, above n 15, 19–27; Ellen Gruenbaum,'Sexuality Issues in the Movement to Abolish Female Genital Cutting in Sudan' (2006) 20 (1) *Medical Anthropology Quarterly* 121–38.

25. *R v A2; R v Magennis; R v Vaziri [No 23]* (2016) 282 NSWSC 29, 31.