Current Sexual Health Reports (2019) 11:442–446
https://doi.org/10.1007/s11930-019-00233-8

SOCIOCULTURAL ISSUES AND EPIDEMIOLOGY (J ABDULCADIR AND C JOHNSON-AGBAKWU, SECTION EDITORS)

What Constitutes Mutilation? A Concern With Anti-Female Genital Mutilation Laws in Australia and the Question of Natural Function

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Published online: 3 December 2019

Abstract

Purpose of Review In 2019, the highest court in Australia is deliberating on the question of what constitutes mutilation. This paper examines the arguments in the first case prosecuted using Female Genital Mutilation law in Australia and considers how the arguments have drawn on ideas of function and desire of women's genitals as well as of women themselves. The brief writings on this case and on FGM law in Australia are discussed, particularly the work of Kennedy, Sullivan, Seuffert and Iribanes, and Gans.

Recent Findings The paper finds that the ideas of genital function in the deliberations and judgments of this case rely on a problematic idea of the natural function of a woman and a presumption of the harm of female genital mutilation irrespective of alternative research, and rely on a singular document published in Australia in 1994 that did not include any engagement or opinions of people from the communities who practice circumcision or genital cutting in Australia.

Summary The partial information relied on in Australian law about the practices of female genital cutting and the immediate presumption of harm in respect to any form of the practices means that future research and indeed legal opinion already presume that the practices are a mutilation.

Keywords Female genital cutting · Vaziri and Magennis · Australian law · Female Genital Mutilation Act NSW · Clitoral function

In 1994, the topic, known in Australian media and later in Australian law, as Female Genital Mutilation (FGM) came to the attention of a broad Australian public. Migration from Horn of Africa countries was becoming increasingly visible in the urban cities of the East coast of Australia, and this presence made a majority population, who largely (and unreasonably) believed itself to be living in a "white nation" [1] uncomfortably aware of racial and religious difference. This difference had been managed in Australia through what was colloquially known as the "White Australia Policy" as a collection of policies implemented in the century before, but [2–5], in reality, difference was and has always been present in the "colonial encounter called Australia." [6] The idea of FGM and what would be described in law as the practices of circumcision, sunna, clitoridectomy, and infibulation gave particular and visceral names to that presence and would, very quickly, evoke laws to "eradicate," [7, 8] "domesticate," [9] or "manage" that form of difference [10].

By 1996 in Australia, each state and territory had its own laws described as *Female Genital Mutilation Act(s)*. These were a kind of "franchise" of the legislations [11] that were appearing in most western countries [5]. The legislations were adopted from a model statute developed after a brief consultation performed by the Family Law Council (1994a) [12], who in 1994 had produced a *Report* for the Australian Attorney-General and recommended education and legislation (1994b). However, the state of New South Wales (NSW) in Australia had been more enthusiastic about responding to public concerns about the topic in 1994 and adopted their own statute modeled on US legislation [13]. It would be over 20 years later, however, that the first prosecution in any state in Australia would occur. This would be under the NSW *Act.*

The case of *R v A2; R v KM; R v Vaziri* [14] known as *Vaziri and Magennis* was prosecuted in NSW in 2015 and resulted in criminal convictions for three members of the Dawoodi Bohra Muslim community living in NSW, specifically a mother of

This article is part of the Topical Collection on *Sociocultural Issues and Epidemiology*

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two girls, who was said to have experienced "mutilation," a religious community leader (incorrectly described as an Iman in the media) who was said to have aided and abetted the crime, and a midwife who performed the practices. The accused were convicted under the NSW statute, which had a particularly vague definition of what was being prohibited.

This vagueness coupled with some unusual efforts by the trial judge Justice Peter Johnson, meant that the prosecution was problematic, to say the least [15]. Justice Johnson articulated instructions to the jury about what was to be considered a "mutilation" in the context of the legislation which used the term "… otherwise mutilates" and labored, or arguably contorted, his explanation to enable a "nick" to be considered a mutilation. A nick, which, by the prosecution's own independent medical examiner's testimony left no trace of injury or any evidence that it had occurred at all, and was emphatically denied by the defendants. The only statement suggesting that there might have been an injury at all was implied when the medical expert said it "could have healed." Justice Johnson had particular difficulty applying the legislation to a "nick" because of the language of s.45 of the *Crimes Act* (NSW), which only describes the prohibition applying to a person who:

(a) Excises, infibulates, or *otherwise mutilates* the whole or any part of the labia majora or labia minora or clitoris [16]

The term "otherwise mutilates" being applied to a "nick" which leaves no injury or evidence of having been performed at all, seems, on the surface, extremely problematic. And in the upcoming years of juridical debate, it has certainly proved to be a difficult concept.

At the time of the initial case even Justice Johnson stated:

> 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 [17].

However, it was his instruction to the jury on what constitutes a "mutilation" that became, and continues to be, contentious. As he stated:

> 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.

In 2016, the jury returned a "guilty" verdict against all three defendants who were all sentenced to varying degrees of detention. An appeal was immediately filed, and in August 2018, the NSW Court of Criminal Appeal overturned these verdicts, with the opinion that the conviction was a "potential miscarriage of justice." [18]

The issue in the *Vaziri and Magennis* case points directly to the question of "what constitutes a 'mutilation'?" Indeed, despite the strength of the NSW Court of Criminal Appeal decision which acquitted the three defendants, the prosecution in the case was recently granted "Leave to Appeal" the decision (15 February 2019), taking the question to the High Court of Australia (heard 19 June 2019). This latest installment in the case is founded on the importance of establishing the definition of "otherwise mutilates," and relatedly, to establishing what constitutes the clitoris. The particular concern being whether, if a "nick" occurs to the prepuce of the clitoris, is it therefore an injury "to any extent"? Thus, might it be considered a "mutilation"—to the clitoris itself?

Justice Johnson's broad sweep across the term "genitalia" or "female genital organ" above indicates the breadth of the problem, at least in part. If we consider the term "genitalia" to refer to all parts of the vulva, the question of the *damage* of a *nick* relies on issues like the *sensitivity* or *vulnerability* of parts of the vulva in its capacity to incur injury, and particularly injury which inhibits function. Or, in short, it is likely that a cut to the labia majora, as opposed to the same cut to the clitoral glans, may have different effects and those effects relate to whether "mutilation" has occurred as opposed to a nick, cut, or even incision.[1] These three terms were debated in arguments put to the High Court in June 2019. The detail of these arguments relied on deliberation on whether a shaving cut might be considered a nick, with the accompanying query being a question of whether blood was required. In common parlance, we might see the question pertaining to whether a scar on the arm and a scar on the face might have different effects. I want to be clear that I do not mean to suggest a hierarchy to these effects, despite the implied hierarchy offered in law in relation to the significance of body parts. The hierarchy in law pertains to the question of injury. That is, as the High Court considered, the question is one of "sensitivity" and the as yet implied distinction between a cut on the face while shaving and a cut to the clitoral hood during a ceremony. This distinction, as I'll discuss shortly, however, is one that relies on normative categories which are themselves mutable and often political. The effects of cuts may be a question of desirability and sociability, both in relation to health and aesthetics [19–21], but also, as a corollary, to culturally contingent applications of what can broadly be understood as the *teleology* of the body. That is, the question of mutilation, or not, can only be framed in terms of questions such as "does the cut, nick, or incision impact on the body's *natural purpose?*"

[1] In the same vein, under Australian Criminal law, an assault to different parts of the body will incur different charges and, in effect, constitute different crimes. A blow to the head may constitute grievous bodily harm while a blow to other parts of the body is simply assault (my thanks to John Sutton for illuminating the comparison).

To elaborate, if we understand teleology in Costas Douzinas' articulation of ideas of the ancient Greeks, teleology is the "natural purpose" of a being (tree, human, dog, earth). In the case at hand, it is the natural purpose of the part of the body, not separate from the natural purpose of the body overall [22]. As per Johnson J's comments above, the definition of mutilation is more than simply a cut to parts of the skin that can heal, or even the removal of flesh that can regrow (such as with finger nails), or that will not inhibit "health" (tonsils). Thus, the question of the definition of mutilation necessarily hovers on the question of functionality. Functionality, however, draws upon particular and culturally contingent notions of teleology that themselves presume, or, at best entertain, different iterations of the purpose of the body. We can better understand the weight of functionality in its relation to ideas of mutilation with the distinction between an arm and a head. A blow to an arm does not necessarily incur the charge of Grievous Bodily Harm under Australian Criminal statutes because it does not inhibit the natural purpose of the body bearing that harm. A blow to the head may have effects which inhibit the supposed natural purpose of the person, but this purpose is weighted in terms of what the body is *supposed* to be able to do. Just as a cut to the eye as opposed to the skin on most parts of the body draws this parallel, with the presumption that natural function requires being able to see. While this might seem like commonsense (for some), if the blow was to the ear and caused deafness then the depth of work on the specific culture and validity of *being deaf*, or the deaf community, would clearly undermine any idea that the injury caused a person to function as less. Drawing on this logic, the question of mutilation engages with the question of functionality of the clitoris, and arguably female "genitalia" more broadly, but also gestures to the racist positioning of women who have experienced genital cutting as *simply less of a woman*. As the Family Law Council quoted in its original *Report*, one woman stated "I'd like to be a complete woman but I'm not. That's a great problem for me." [7] While some women may feel this many do not. Indeed many feel that the legal terrain in Australia, coupled with misplaced health focus on their genitals, makes them feel as if they are reduced to only their genitals. As one responded to Lenore Manderson's study of circumcised woman in Australia noted "you walk in the door and its like you have a vulva on your face." [23]

The positioning of circumcised women in this way contributes to the focus on them as needing to be corrected to be "complete women," and this is related specifically to sexual function. The background and always present presumption in discussions of the female genital cutting—particularly when it incurs the moniker Female Genital Mutilation or FGM—is that the natural function of the vulva is to enable sexual pleasure for the women and that FGM inhibits this. While this is clearly reductive, impositions to functions such as birthing children, micturition, or menstrual flow are only mentioned as background concerns in popular narratives of FGM. Sexual function rules the day, as it did in the Magennis and Vaziri case [24], unsurprisingly in a contemporary western world so focused on sexuality and sexual pleasure as the lightning rod of agency [25]. The reduction of sexual pleasure, however, is clearly debatable for many cultures (and indeed for many women) [5, 26–29]. The weight of this function, as well as its presumptive tie—at least in many cultural constructions, to the natural function of the woman to engage in heterosexual intercourse (which may or may not produce children)—means that woman cannot be functional as woman[2] if she is thus mutilated.

With the presumption of the function of the vulva being weighted with the industries of cultural hegemony, and the function of woman being perhaps more so—added to this the much deliberated effects of cutting at all—what the High Court in Australia must now ask is "what part of the 'female genital organ' will inhibit this function?" For this to be answered, the example of female genital cosmetic surgery is likely to be crucial to the deliberation because these practices fall squarely under the clause in all FGM legislation in Australia (and in most parts of the western world) of "medical necessity" [13, 30–32]; a clause which sanctions surgical alterations for the purposes of achieving functionality of the vulva, as well as of the woman or girl. A functionality which is decided upon by medical practitioners on the basis of aesthetics, sociality, and in some cases politics.

Medical Necessity

In all statutes in English-speaking countries, the anti-FGM legislations sport a clause of "medical necessity" which, when considering issues of aesthetics of vulva, is directly a concern of mental health. It is this clause which allows female genital cosmetic surgeries to be acceptable or legal because they are deemed necessary to support the mental health of women who otherwise experience some form of body or specifically gender dysphoria through the inconsistency of their genital representation with their bodily image [30, 31, 33], or through some form of injury.[3] That is, they require alteration to

[2] My reference here is to the unifying idea of what a woman is or should be, as if there is one dominant understanding of woman that symbolizes and stands in for all women. Lacan J. Encore: the seminar of Jacques Lacan, book xx: on feminine sexuality: the limits of love and knowledge, 1972–1973. Alain Miller J. (ed). Fink B. (trans 1975) W.W. Norton & Company. 1998.

[3] The complexities of the articulations of identity with body has been well articulated by Judith Butler in 1997 and Elizabeth Grosz who both captured the porous confusions of performativity as both inside and outside the body, one neither more *natural* than the other, thus helping with the understandings of culture in shaping the sense of identity through the many marks on and in the body. Kirby V. On the cutting edge: feminism and clitoridectomy. Australian Feminist Studies. 1987; 5(2):35–55.

It is this marked body from which one can become dysmorphic from, and it is that dysmorphia which messes with a sense of what we call "mental health."

[0] This is, of course, the same argument that enables the exclusion of genital alterations for the purposes of gender modification in transgender people. Kelly F. Treating the transgendered child: the full court's decision in re Jamie. Australian Journal of Family Law. 2014; 28(1):83–94.

experience their identity as articulating with their body.[4] But again, this identity is not separate from social and indeed political presentations of a *natural* functioning female body. Such cultural contingency to natural as it underpins imperatives for "medical necessity" is transparent in comments from medical practitioners, such as when, in 1994, the President of the Royal Australian College of Obstetricians and Gynecologists (RACOG) was asked, in a popular women's magazine, to explain what constituted "medical necessity"; he said that it might be the "trimming of the labia…to enable the wearing of tight jeans." [34]

There is an important inflection to the comparisons between FGCS and FGM, and the use of the idea of "medical necessity" to enable *mental* health. FGM is not simply not required for mental health but is commonly understood to cause mental harm [35, 36], or in the idiom of law, mental impairment. The weight of this inflection toward mental impairment can be seen in examples of when women who have experienced the practices attempt to assert agency over either their bodies or their experiences. In the medical field, the reduction of a women's capacity to know or assert agency over her own body is conspicuously undermined in some examples of the interactions between women and medical practitioners. In Australia, there have been multiple examples where women, who were infibulated prior to child birth, ask to be re-infibulated after childbirth. In several cases, women who have been de-infibulated after childbirth ask the surgeons to re-infibulate them but are refused this request. Surgeons claim that this is FGM and "re-sew" the women after childbirth as de-infibulated, directly undermining the woman's *right to choose*, which underpins so much of anti-FGM rhetoric.

This undermining of the women's choice articulates with the statue in Victoria in which there is no age limit on the prohibition of FGM. That is, even adult women cannot ask to have any form of genital alteration.[5] Obviously this is not the case for women *not* from practicing communities, and it is here that we see a kind of pre-emptive form of presenting women from migrant communities as always already "mentally mutilated," an issue which is so obviously now a matter of racial discrimination in Australia, such that the Attorney-general has now called for a renewed discussion of the legislation.

While the comments of the President of the RACOG might be seen as trite, what this example, the ignoring of the choices of women who want to be re-infibulated and the obvious contradiction between the practices of female genital cosmetic surgery, gender modification surgeries on the one hand and female genital cutting (called "mutilation" in the legal context) on the other, is the hierarchialization of the body that remains after the practices. That is, the bodies that remain are either perceived as "mutilated" or not and this is a distinction based on supposed *natural function*. It is the way the body that remains is perceived that will dictate whether the practices are a mutilation or a medical necessity. The former renders the body and the women as damaged remnants, and the latter upholds their teleological purpose and, as a corollary, their political, legal, social, and most obviously sexual significance.

Conclusion

Mutilation has no more fixed meaning than many concepts applied to bodies. What constitutes health or mental health, is similarly contentious, arbitrary, and of course culturally contingent, as is the distinction between lawful practice and cultural practice. The application of these terms is the concerns of power, or specifically the power to authorize the significance of a term. That is, who is able to apply, and have accepted, the meaning of a symbol. Even in the *Vaziri and Magennis* case, the question of mutilation required attention to dictionary meanings, and these, as can be seen by the revolving door of judgments and appeal, are contestable themselves.

The contentiousness of these terms does not render them innocuous, however. The imagination and production of bodies as having a natural function which requires they conform to particular cultural ideas of a body, can render those who do not conform as mutilated. This has very real effects, and, when coupled with judgment, political, legal, or social, these ideas can produce women as politically socially mutilated, even when everything they say is to the contrary. To understand this, the law would have to listen to what these women say, and not only to those who agree that genital cutting is always a mutilation.

Acknowledgments My thanks are due to Sahar Ghumkhor and John Sutton for comments and assistance with this work.

Compliance with Ethical Standards

Conflict of Interest The author declares that she has no conflicts of interest.

Human and Animal Rights and Informed Consent This article does not contain any studies with human or animal subjects performed by any of the authors.

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[5] The only exception is Victoria, where an adult woman may have her clitoral head removed. *Crimes Act* 1958 (Vic) ss 15. 32(2).

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