Male and Female Genital Cutting: Between the Best Interest of the Child and Genital Mutilation

Abstract: In the U.K., male genital cutting is in principle legal and may even be ordered by a court, whereas female genital cutting is a criminal offence. The coherence of this approach was recently questioned by Munby P in Re B and G (children) (No. 2)*; the present article continues this inquiry and demonstrates that the justifications that the courts have provided for the differential treatment of male and female cutting – relating to the harm involved in the respective practices, possible medical benefits of male cutting, the absence of a religious motivation with regard to female cutting, and patriarchal power structures enabling female but not male cutting – are insufficient. It proposes a different foundation for the categorical rejection of female genital cutting and argues that such practices are wrong* as a matter of principle*. This provides a convincing basis for the rejection of* all *forms of female genital cutting, including comparatively mild ones such as ritual nicks, and furthermore leads to the conclusion that male cutting, too, must be regarded as categorically impermissible.*

I. Introduction

The law of the U.K. treats male and female genital cutting of children differently: male genital cutting, often referred to as 'male circumcision'[1], is legally permissible if the parents or those with parental authority are in agreement or if a court considers it to be in the best interest of the child, whereas female genital cutting, usually referred to as 'female genital mutilation' or 'FGM', is illegal and punishable. A recent and important judgment by the family court raised the question of the coherence of this approach:

[1] In this essay I will usually use the more neutral term 'genital cutting'; the terms 'circumcision' and 'genital mutilation' will be avoided as far as practicable and, when used, will be placed in inverted commas in order to create a neutral distance from their controversial connotations. Furthermore, the term 'genital cutting' will be used in the sense of 'non-consensual, medically unnecessary genital cutting of children'.

in *Re B and G (children) (No. 2)*,[2] Munby P observed that male genital cutting is more invasive and harmful than some forms of female genital cutting and explored some of the implications of this fact for the law relating to care proceedings. The present article continues this work by examining the current legal situation with regard to the permissibility of genital cutting more systematically and proposing a way to reinterpret the existing law in a way that is justifiable and coherent.

The following section provides an account of the ways in which the law currently conceptualises male and female genital cutting. As will be shown, the permissibility of male cutting depends on the outcome of a fact-specific analysis that takes all relevant considerations into account; this approach is labelled the 'balancing approach'. By way of contrast, female genital cutting is prohibited in all cases and the courts consistently use strong and unambiguous language to condemn it; correspondingly, the article labels the approach that governs the legal treatment of female genital cutting the 'categorical approach'. Section III examines the reasons that the judiciary has put forward to justify this differential treatment; these relate to the severity of the harm caused by the respective procedures, possible medical benefits of male genital cutting, the presence and relevance of religious motivations, and patriarchal power structures seen as underlying female but not male cutting. It demonstrates that these reasons cannot justify the current legal approach and that there are two structural possibilities to address this weakness, namely either to allow female genital cutting under certain circumstances or to consider male *and* female genital cutting as categorically prohibited. Section IV proposes an argument in favour of the latter route by showing that cutting children's genitals is wrong *as a matter of principle*. Contrary to the arguments employed in the current legal discourse, its wrongness does not, in the first instance, flow from the extent of the physical or emotional harm caused by it, the context within which it occurs, or other contingent empirical features (even though these factors are relevant for determining the severity of the wrong inflicted on the child), but rather from the child's right to respect for and protection of the integrity of his or her body in general and its most private and intimate part in particular. This conclusion is relevant, albeit in different ways, for our understanding of the legality of

[2] *Re B and G (Children) (No. 2)*, (2015) EWFC 3.

both male and female genital cutting. With regard to male cutting it follows that in order to adequately protect the human rights of male infants and boys, the practice must be considered categorically impermissible; this can be achieved through a reinterpretation of the best interest of the child test and the existing provisions of the criminal law. In relation to female cutting, the argument offers a foundation for the categorical approach expressed in the law which captures better than the conventional arguments what's really wrong about the genital cutting of girls and furthermore demonstrates why even the least invasive versions of female cutting, such as ritual nicks, are rightly considered categorically impermissible and a violation of the human rights of girls.

As a preliminary note, there is the problem of how to adequately address questions relating to religious or cultural minorities' practices such as genital cutting, Islamic dress, religious slaughter, or turban wearing. One danger is that critical discussions of such issues may be distorted by a lack of understanding or by dislike, bias, or prejudice.[3] This is not just a theoretical possibility but also a practical reality specifically with regard to debates about genital cutting, as we will see below in the context of the discussion of female cutting, where a nuanced understanding and debate about the point of such practices has begun to emerge only recently.[4] Another problem is that in such discussions even legitimate criticisms may be perceived as discriminatory attacks on vulnerable groups. It may be tempting, in the face of such complications, to abstain from judgment and to let the respective groups regulate their own affairs; such a position may even be regarded as paying adequate respect to minorities, for example by refraining from imposing 'Western' or secular values on them. While there may be contexts where this route is preferable, genital cutting of children is, however, not among them. The reason for this is that a permissive attitude towards genital cutting limits the rights of children to physical integrity (and arguably a number of other rights). Given that it is morally and legally obligatory

[3] For an acknowledgment of this problem and a subtle discussion in the context of bans on religious dress, see Ronan McCrea, 'The Ban on the Veil and European Law', (2013) *Human Rights Law Review* 57, 58 and *passim*.

[4] See section III.4. below.

for the U.K. to uphold human rights, abstaining from judgment about what human rights have to say about genital cutting is simply not an option. Rather, the adequate way to respond to the difficult nature of the topic is with intellectual and academic rigour, which includes approaching the issue with an awareness that one's perception of the moral or legal situation may be distorted by conscious or unconscious factors, and to search one's views for indicators of such distortions.[5] Scholars are in a particularly good position for this work, partly because of their training and methods, and partly because they are protected by academic freedom properly conceptualised as 'the critical reflective domain in which social knowledge is rigorously scrutinised and contested'[6].

II. Male and female genital cutting, and the law

1. Male genital cutting

The practice known as 'male circumcision' involves the removal from the penis of (all or a part of) the foreskin, that is, the double layer of nerve-laden, protective tissue covering the glans (head) of the penis; this involves about 30-50% of the penile skin.[7] A 'circumcised' penis looks different from an intact one in that its glans is always exposed and there is typically a visible scar around the circumference of the

[5] In the context of human rights law, one way to identify and isolate such impermissible considerations lies in separating the various possible goals pursued by a policy and determining the legitimacy of each goal individually. Goals that are connected to ethical disapproval of certain lifestyles are impermissible and accordingly discounted; in other words, they do not contribute to the justification of a policy. See Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012), 183-193 for a discussion of this issue and for further references.

[6] Liora Lazarus, 'Secrecy as a Meta-paradigmatic Challenge', in Goold and Lazarus (eds), *Security and Human Rights* (2nd ed, Hart Publishing 2019), 149, 153.

[7] J. R. Taylor, A. P. Lockwood, and A. J. Taylor, 'The prepuce: specialized mucosa of the penis and its loss to circumcision', (1996) 77 *British Journal of Urology* 291.

penis which marks the point where the two 'loose' ends of the remaining penile skin were attached to each other.

The precise effects of male cutting on sexual pleasure are controversial among researchers. What is clear is that the foreskin is richly enervated, erogenous material, which is permanently lost with 'circumcision'.[8] Furthermore, 'circumcision' alters the mechanics of sexual stimulation during masturbation and sexual intercourse; the way by which stimulation occurs in an unmodified penis, namely the foreskin gliding up and down, alternately covering and uncovering the sensitive penile glans, is usually no longer possible because of a lack of tissue.[9] Finally, 'circumcision' turns the glans from an internal to an external organ which, by virtue of its chronic rubbing against clothing, goes through a process of keratinisation.[10] Some researchers – in particular those based outside the United States – believe that in light of this, it is self-evident that male genital cutting negatively affects sexual pleasure.[11] Others – primarily some of those based in the United States, where routine cutting of infants is wide-spread and the practice has deep cultural roots – claim there is no conclusive evidence that the removal of some erogenous tissue leads to a reduction in sexual pleasure.[12]

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[8] *Ibid*.

[9] John Warren and Jim Bigelow, 'The Case Against Circumcision', 1994 *British Journal of Sexual Medicine* 6.

[10] C. J. Cold and J. R. Taylor, 'The Prepuce', (1999) 83 *BJU International*, Suppl. 1, 34, 41.

[11] Mattias Schäfer and Maximilian Stehr, 'Zur medizinischen Tragweite einer Beschneidung', in Matthias Franz, *Die Beschneidung von Jungen: Ein trauriges Vermächtnis* (Vandenhoeck & Ruprecht, 2014), 117: 'Pathophysiologically it would be even harder to explain why the loss of such a sensitive body part should *not* lead to a change in sensitivity' (my translation, emphasis in the original).

[12] David Benatar and Michael Benatar, 'Between Prophylaxis and Child Abuse: The Ethics of Neonatal Male Circumcision', (2003) 3 *American Journal of Bioethics*, 35, 42-3: '[R]emoval of erogenous tissue does not necessarily entail diminished sexual pleasure if sufficient erogenous tissue remains.'

Male genital cutting is practised for religious reasons in Judaism (*brit milah*: 'circumcision' of newborn boys on the 8th day)[13] and in Islam (*khitan*).[14] As mentioned above, it is also often routinely performed in the U.S.[15] It is furthermore widely practised in different parts of Africa, where it is often part of a ritual for boys that symbolises the transition from childhood to adulthood.[16] In the United Kingdom, the NHS stopped funding the practice except in the rare case of medical necessity after the publication of a critical study in 1949.[17] A study from 2000 estimated that 15.8% of men aged 16-44 were 'circumcised'.[18]

The U.K. Parliament has never legislated on male genital cutting, but the practice has always been assumed to be lawful in the U.K.[19] as well as in other countries.[20] The leading case in the U.K. is

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[13] J. M. Glass, 'Religious Circumcision: A Jewish View', (1999) 83 *BJU International*, Suppl. 1, 17. (CH)

[14] S. A. H. Rizvi, S. A. A. Naqvi, M. Hussain, and A. S. Hasan, 'Religious Circumcision: A Muslim View', (1999) 83 *BJU International*, Suppl. 1, 13.

[15] On the history of 'circumcision' in general and with regard to the United States in particular see David L. Gollaher, *Circumcision: A History of the World's Most Controversial Surgery* (Basic Books, 2000), ch. 4 and *passim*.

[16] See below III.4.a.

[17] Gollaher (above n 15), 114-117; Robert Darby, *A Surgical Temptation: The Demonization of the Foreskin and the Rise of Circumcision in Britain* (University of Chicago Press, 2005), ch. 14.

[18] S. S. Dave, A. M. Johnson, K. A. Fenton *et al,* 'Male circumcision in Britain: findings from a national probability sample survey', (2003) 79 *Sexually Transmitted Infections* 499-500.

[19] Law Commission Consultation Paper no. 139, *Consent in the Criminal Law* (HMSO, 1995), para. 9.2 ('Male circumcision is lawful under English common law.').

[20] While there have been critical voices with regard to male 'circumcision' for a long time, a 2012 judgment by a lower court in Cologne, Germany, which held that the practice violates the constitutional rights of the boy on whom it is imposed, sparked a wide-ranging discussion about its moral and legal acceptability in Germany and globally; it did not, however, lead to any country changing its legal position on male genital cutting. On the

Re J, where the parents of a young boy disagreed about whether he ought to be genitally cut, and the father, a Muslim, applied for a court order for his son to be ritually 'circumcised'. Wall J confirmed that male genital cutting is lawful where the parents, jointly exercising parental responsibility, cause a child to be ritually 'circumcised'.[21] Where agreement cannot be reached, an order to have the child genitally cut can be given by the court, which has to be guided by the welfare principle. He therefore analysed the question from various angles in order to reach a balanced conclusion on what was in the best interest of J and concluded that in this particular case, it was not in J's best interest to be genitally cut. This was because J was raised by his secular mother and would not have much contact with Muslims except his father; the mother was strongly opposed to his being genitally cut and would have difficulty presenting it to J in a positive light; J was a vulnerable child in the middle of a hostile battle between his father and his mother. These considerations outweighed the chief benefits claimed to be associated with genital cutting in this case, namely strengthening J's identification as a Muslim as well as the bond with his father.

What clearly emerges from this case is that under the current approach, the question of whether a court should order a male child to be genitally cut depends on a number of fact-specific considerations relating to the child's welfare, which have to be balanced against each other. I therefore refer to this way of approaching the issue of genital cutting as the *balancing approach*.

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judgment and the debate following the German decision, see Bijan Fateh-Moghadam, 'Criminalising male circumcision? Case Note: Landgericht Cologne, Judgment of 7 May 2012 – No. 151 Ns 169/11', 2012 (13) *German Law Journal* 1131; Kai Möller, 'Ritual Male Circumcision and Parental Authority', 2017 (8) *Jurisprudence* 461; see also the various contributions to Matthew Johnson and Megan O'Branski (eds.), *Circumcision, Public Health, Genital Autonomy and Cultural Rights* (Routledge 2014), originally published in (2013) 3 (2) *Global Discourse* and the special issue on 'circumcision' by the *Journal of Medical Ethics*, 2013 (39) *J Med Ethics*.

[21] *Re J (child's religious upbringing and circumcision)*, 1999 (2) Family Law Review 678 (690).

2. Female genital cutting

The legal situation is different with regard to female genital cutting, which is usually referred to as 'female genital mutilation', or 'FGM'. According to the widely used WHO classification, there are four types of 'FGM':

'Type I: Partial or total removal of the clitoris and/or the prepuce (clitoridectomy).

Type II: Partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (excision).

Type III: Narrowing of the vaginal orifice with creation of a covering seal by cutting and appositioning the labia minora and/or the labia majora, with or without excision of the clitoris (infibulation).

Type IV: All other harmful procedures to the female genitalia for non-medical purposes, for example: pricking, piercing, incising, scraping and cauterization.'[22]

Female genital cutting is practised, in particular, in parts of Africa, the Middle East and Southeast Asia. A wide range of physical and psychological harms has been reported in the literature as being caused by the practice, ranging from the comparatively mild to extremely serious and from short term to lifelong.[23] There is usually no attempt to distinguish between the various forms of genital cutting; consequently, while there is some, though maybe not enough, understanding of the consequences of infibulation (Type III), there is a lack of knowledge with regard to, in particular, the physical and psychological consequences of the less intrusive forms of the practice (such as a ritual nick [Type IV) or the removal of the clitoral prepuce as practised, for example, in Malaysia [Type I]). This is usually not seen as an urgent problem from a moral perspective because of the near-consensus in the

[22] World Health Organisation, *Eliminating Female Genital Mutilation: An Interagency Statement* (2008), p. 4.

[23] See Hilary Burrage, *Eradicating Female Genital Mutilation: A UK Perspective* (Routledge 2015), 114-116.

Western world that all kinds of female genital cutting are absolutely unacceptable. Some of these issues will be discussed further below.

In the U.K., female genital cutting is prohibited by the Female Genital Mutilation Act 2003, which has superseded the earlier Prohibition of Female Circumcision Act 1985. The Act's central provision, section 1 (1), stipulates that '[a] person is guilty of an offence if he excises, infibulates or otherwise mutilates the whole or any part of a girl's labia majora, labia minora or clitoris.' This covers Types I to III of the WHO classifications but creates some uncertainty about Type IV, which falls under the prohibition of the Act only if considered as 'otherwise mutilat[ing]'; the issue has not yet been decided by a criminal court. However, while there is an element of uncertainty with regard to the criminalisation of some forms of Type IV, it is clear that that any kind of female cutting, including the least severe forms of Type IV, will cross the threshold set out by section 31 (2) of the Children Act 1989.[24]

An examination of the ways in which female cutting is characterised in the case law shows that the language that judges in the UK use to describe 'FGM' is of a strikingly different character than the language used for male 'circumcision'. 'FGM' is described as 'a "barbarous" practice which is "beyond the pale"',[25] 'evil'[26] and 'repulsive',[27] 'a gross abuse of human rights'[28] 'a form of domestic violence

[24] *Re B and G (Children) (No. 2)* (above n 2), paras 54-73 (Munby P).

[25] *Singh v. Entry Clearance Officer, New Delhi* (2004) EWCA Civ 1075, para. 68.

[26] *Fornah v SSHD*, 2005 EWCA Civ 680, para. 1 (Auld LJ).

[27] *Ibid*., para. 58 (Arden LJ).

[28] *Re B and G (Children) (No. 2)* (above n 2), para. 57 (Munby P).

that dehumanises people',[29] 'an appalling practice',[30] 'intolerable',[31] 'an abomination',[32] a practice which requires that 'the court must bend all its powers to preventing it happening'; the court 'must not hesitate to use every weapon in its protective arsenal'.[33] These are not words that one uses for a question which needs a subtle, fact-specific, finely-balanced treatment; rather, it is clear that this language indicates that female cutting is considered to be categorically impermissible and that any considerations relating to contingent and fact-specific features are simply irrelevant. I therefore refer to the approach that underlies the prohibition of female cutting as the *categorical approach*, which contrasts with the *balancing approach* employed in the case of male cutting.

III. Justification

The differential treatment of male and female cutting in terms of the outcomes (legality of male cutting in the case of parental consent or court order; illegality of female cutting) and the underlying reasoning (balancing approach in the case of male cutting; categorical approach in the case of female cutting) requires justification. This section will collect and analyse the reasons given in the case law as well as the wider literature on genital cutting.

1. Harm

Maybe the most widely used argument in the debates about genital cutting is that male and female cutting cannot properly be compared because female cutting is substantially more harmful. For

[29] *Ibid*.

[30] *Ibid*.

[31] *Ibid*.

[32] *Ibid*.

[33] *Ibid*.

example, Moore-Bick LJ argued in *SS (Malaysia) v SSHD* that '[circumcision] cannot be compared to other cultural or religious practices, such as female genital mutilation, which involve a far more serious violation of the physical integrity of the body'.[34] In an important and more recent case, Munby P correctly pointed out that this view rests on an oversimplification. *Re B and G (children) (No. 2)* concerned care proceedings in relation to two children, B and G, after the suspicion had arisen that the girl, G, had been subjected to 'FGM'. G had possibly been subjected to genital cutting of Type IV of the WHO classification, evidence of which was the controversial existence of a small scar to the left side of her clitoris, which, if it indeed was a scar, could have resulted from cutting with a sharp instrument or a fingernail, without any removal of flesh. It turned out that there was not enough evidence to confirm the existence of the scar, and the case could have ended here. However, because of the importance of the issue, Munby P also examined the question of whether, if the existence of a scar had been proven, this would have justified care proceedings. In this context he pointed out that there was a curious discrepancy between the law's treatment of male 'circumcision' and 'FGM' Type IV:

'It can readily be seen that although FGM of WHO Types I, II and III are all very much more invasive than male circumcision, [footnote] at least some forms of Type IV, for example, pricking, piercing and incising, are on any view much less invasive than male circumcision.'[35]

In the footnote that accompanies this statement, he added the following:

'There is a possible qualification in relation to FGM Type Ia, which, although apparently very rare, is physiologically somewhat analogous to male circumcision.'[36]

Munby P is certainly correct when he observes that practices such as pricking, piercing and incising will usually be much less invasive than male 'circumcision', which, as has been explained, involves the removal of 30-50 percent of the skin of the penis, which is highly enervated, erogenous material and of functional importance for protecting the head of the penis from chafing and for sexual stimulation. The additional clarification made in the footnote is also highly relevant. The clitoral prepuce and the male

[34] *SS (Malaysia) v SSHD*, (2013) EWCA Civ 888, para. 14 (Moore-Blick LJ).

[35] *Re B and G (Children) (No. 2)* (above n 2), para. 60 (Munby P).

[36] *Ibid*., fn 1.

foreskin share the same embryonic origin; they are therefore analogous structures.[37] This would seem to indicate that 'FGM' Type Ia (removal of the clitoral prepuce) is analogous to male genital cutting. The analogy may not fit perfectly because the male foreskin seems to be not only substantially larger than the clitoral prepuce but also to have a more important function by facilitating the 'gliding action'[38] during sexual intercourse. But it can be said that the removal of the male foreskin is at least as harmful, and possibly more harmful, than 'FGM' Type Ia.

Munby P pushed his point further and observed that since the family in the case were Muslim, it seemed likely that B, G's little brother, had already been 'circumcised' or was going to be 'circumcised' in the future; this implied that:

'… [W]e are in this curious situation. G's FGM Type IV (had it been proved) would have been relied upon by the local authority … as justifying the adoption of *both* children, even though on any objective view it might be thought that G would have subjected *[sic]* to a process much less invasive, no more traumatic (if, indeed, as traumatic) and with no greater long-term consequences, whether physical, emotional or psychological, than the process to which B has been or will be subjected.'[39]

It must be considered courageous of Munby P to point out this apparent inconsistency in the law. The solution which he then offers is, however, unconvincing. He argues that male cutting should not be regarded as crossing the threshold set out by section 31 (2) of the Children Act 1989 because, while it involves 'significant harm' to the boy (as required by section 31 (2) (a)), it can be considered as a form of 'reasonable parenting' under section 31 (2) (b) given that, first, according to Munby P, male 'circumcision' has a basis in religion whereas 'FGM' does not, and, second, male 'circumcision' is seen by some as providing health benefits. It will be demonstrated below that these arguments do not withstand scrutiny. For the purposes of the present discussion, it can be concluded that the current legal

[37] Cold and Taylor (above n 10).

[38] This mechanism was described by S. Lakshmanan and S. Prakash, 'Human prepuce: some aspects of structure and function', 44 (1980) *Indian Journal of Surgery* 134: 'The outer layer of the prepuce in common with the skin of the shaft of the penis glides freely in a to and fro fashion …'.

[39] *Re B and G (Children) (No. 2)* (above n 2), para. 63 (Munby P).

treatment of male and female genital cutting cannot be justified by pointing to the harm involved. Female genital cutting refers to a number of different practices that range from physically comparatively mild procedures such as a ritual nick to extremely invasive and harmful acts such as infibulation. *All* of these practices are referred to as 'female genital mutilation' and considered categorically impermissible,[40] including those that are clearly less harmful than male cutting. To put it differently, female genital cutting is certainly often extremely harmful, but harm that is greater than the harm involved in male cutting is not a necessary condition of a practice being labelled 'FGM' and considered categorically impermissible. Therefore, we cannot justify the current differential treatment by the law of male and female cutting by pointing to the harm caused by the respective procedures.

2. Medical benefits

A further argument which is often employed in discussions about male versus female genital cutting is that female cutting has no medical benefits, whereas male cutting arguably does. In *Re B and G*, Munby P relied on this point as one of two relevant distinctions between male and female cutting (the other being the basis in religion, an argument that I examine below): 'FGM has no medical justification and confers no health benefits; male circumcision is seen by some (although opinions are divided) as providing hygienic or prophylactic benefits.'[41]

This argument is correct to the extent that there seems to exist no medical discussion about whether (some forms of) non-consensual female genital cutting of girls might have health benefits; and there exists an extensive discussion in the American medical literature about whether male cutting has

[40] As mentioned above, there is an ambiguity in the Female Genital Mutilation Act in this regard which has not been addressed by the criminal courts; in the context of care proceedings, Munby P made it clear, however, that any act of female genital cutting, including comparatively mild ones under Type IV of the WHO classification, crosses the threshold set out by section 31 (2) of the Children Act 1989.

[41] *Re B and G (Children) (No. 2)* (above n 2), para. 72 (Munby P).

health benefits. With regard to the latter, the most relevant health benefit currently associated with male 'circumcision' of infants is a reduction in the likelihood of urinary tract infections during the first year of life.[42] By 'circumcising' one hundred infants, approximately one case of a urinary tract infection in a male infant of under one year of age can be prevented, which, if it occurs, is easily diagnosable and treatable with antibiotics.[43] Furthermore, male genital cutting reduces the likelihood of developing penile cancer, which is an extremely rare disease (with an annual incidence of about 1 in 100.000 men).[44] Finally, there is a discussion about whether 'circumcised', heterosexual men might have a lower risk of HIV infections than their genitally intact counterparts. Some studies carried out in Africa suggest this, but their relevance in a Western context is unclear and controversial. On the assumption that the results are applicable, in the U.S. it would require hundreds of instances of genital cutting to prevent one HIV infection much later in life,[45] which could, of course, be prevented much more effectively and less invasively through other measures such as condom use. In the eyes of the mainstream American medical establishment, these medical benefits justify the genital cutting of male infants as a medical measure.

There are two ways to engage with the American argument regarding health benefits of male genital cutting. One is to point out the rather obvious disproportionality between harms and benefits: an operation on a non-consenting baby which involves the removal of a body part, extreme physical pain, and lifelong consequences for the patient's embodied sexuality and sexual experience surely requires

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[42] Benatar and Benatar (above n 12), 39-40.

[43] *Ibid.*

[44] *Ibid.*, 38-39.

[45] 'The number of circumcisions needed to prevent one HIV infection was 298 for all males, and ranged from 65 for black males to 1,231 for white males.' See Stephanie Sansom *et al*, 'Cost-Effectiveness of Newborn Circumcision in Reducing Lifetime HIV Risk Among U.S. Males', 5 (2010) *PloS One*, available at: doi:10.1371/journal.pone.0008723. These numbers would be considerably higher in Europe because of the much lower HIV incidence in Europe compared to the U.S.

much more pressing medical reasons than the reduction in risk of harmless and/or extremely unlikely infections or illnesses as described above. Thus, the argument that male genital cutting can be meaningfully distinguished from female cutting by regarding it as medically justifiable collapses.[46]

The other approach would be to take the American argument seriously and examine its implications for the permissibility of female genital cutting. Remember that the argument under consideration is that the relevant distinction between male and female genital cutting is the existence of a plausible medical claim that male cutting confers certain health benefits. It follows that if a similar claim could be made for female genital cutting, the distinction that is supposed to justify the different treatment of the two practices would disappear, leading to the conclusion that (some forms of) female cutting would have to be considered as acceptable. It seems clear, however, that few would be prepared to accept this conclusion. The whole judicial and societal discourse about female cutting makes it clear that female genital cutting is considered to be *inherently* wrong, that is, its wrongness does not depend

[46] One of the anonymous reviewers for this Journal raised the question of whether, even if the American argument regarding health benefits is ultimately unconvincing and therefore the best interest of the child is not furthered by 'circumcision', parents should be entitled to choose 'circumcision' because the scope of parental authority might be wider than the best interest of the child. The relationship between parental authority and the best interest of the child is indeed not entirely clear. Fateh-Moghadam has argued that 'the well-being of the child is no objectively defined essentialist entity, but at least partly open to different subjective interpretations by the parents' and suggested that parental authority is exceeded only where the parental decision 'amounts to an abuse of the right to care and custody of the child' (Fateh-Moghadam (above n 20), 1137). In my earlier work I have suggested that the scope of parental authority covers what can *reasonably be regarded* as being in the child's best interest (see [removed for review]). While my view is that whatever the exact specification of the scope of parental authority may be, the medical case for routine 'circumcision' is plainly indefensible and therefore outside *any* conceptualisation of parental authority that is adequately linked to the child's best interest, my argument in this essay does not depend on the correctness of this view, as the following paragraphs show.

on certain contingent empirical claims about, for example, minor health benefits. This is why words such as 'evil', 'repulsive', 'appalling' etc. are used to characterise female cutting.[47]

One might think that it is absurd to speculate that female genital cutting could confer any health benefits at all. But as we saw above in the context of the claimed health benefits associated with male cutting, the bar is not high: all that would have to be shown is that a procedure broadly equivalent to male cutting, for example the amputation of the clitoral foreskin, has some tiny health benefits comparable, for example, to the 1% risk of developing an easily curable urinary tract infection that is supposed to justify the procedure in the case of boys.

Brian Earp has asked provocatively:

'The vulva has all sorts of warm, moist places where bacteria or viruses could get trapped, such as underneath the clitoral hood, or among the folds of the labia; so who is to say that removing some of that tissue (with a sterile surgical tool) might not reduce the risk of various diseases?'[48]

The point is obviously not to advocate such practices, but rather to point out that if we base our commitment against female cutting on the absence of even minor medical benefits, then this would be a very shaky foundation indeed – it could collapse at any given moment, as soon as some minor statistical benefit of performing a comparatively mild form of female cutting can be identified.[49] Quite clearly, the strong and unequivocal condemnation that female genital cutting receives by the law of the UK and its judiciary make it clear that much more is at stake than the absence of a tiny health benefit in the case of (some of the milder forms of) female genital cutting. Thus, the current categorical rejection

[47] See Matthew Johnson, 'Male Genital Mutilation: Beyond the Tolerable?', 10 (2010) *Ethnicities* 181, 191-193 for a similar argument.

[48] Brian D. Earp, 'Female Genital Mutilation and Male Circumcision: Towards an Autonomy-Based Framework', (2015) 5 *Medicolegal and Bioethics* 89, 95.

[49] In fact, as Earp has pointed out, some proponents of female genital cutting use exactly this strategy and claim that there are health benefits associated with the practice; see Earp (*ibid*.), 95.

of female genital cutting cannot convincingly be explained or justified by pointing to the existence of some, at most minor, health benefits associated with male genital cutting.

3. Religious importance

The second 'important distinction' between male and female genital cutting that Munby P identified in *Re B and G* is that 'FGM has no basis in any religion; male circumcision is often performed for religious reasons.'[50]

This is, however, unconvincing, both empirically and normatively. Without going into the details of the multi-faceted relationship between female genital cutting and Islam,[51] it can be said that the practice is in many contexts seen as a religious duty[52] or as associated with Islam.[53] In light of this, it is difficult to make sense of Munby's remarks. Maybe he has in mind the absence of an *explicit* requirement for female cutting in the Quran. However, there is no such requirement for male cutting, either; nevertheless, Western societies unquestioningly regard it as an Islamic religious practice, and

[50] *Re B and G (Children) (No. 2)* (above n 2), para. 72 (Munby P).

[51] Cf. Dena S. Davis, 'Male and Female Genital Alteration: A Collision Course with the Law', 11 (2001) *Health Matrix* 487, 531-540 for an insightful discussion of this issue.

[52] As, for example, in the case of the Mandigas in Guinea-Bissau; see Michelle C. Johnson, 'Becoming a Muslim, Becoming a Person: Female "Circumcision", Religious Identity, and Personhood in Guinea-Bissau', in Shell-Duncan and Hernlund, *Female 'Circumcision' in Africa: Culture, Controversy, and Change* (Lynne Rienner, 2000), 215.

[53] Cf. Bettina Shell-Duncan and Ylva Hernlund, 'Female "Circumcision" in Africa: Dimensions of the Practice and the Debates' in *Shell-Duncan and Hernlund, Female 'Circumcision' in Africa: Culture, Controversy, and Change* (Lynne Rienner, 2000), 1, 23: 'In between these two extremes lie many specific contexts in which Islam is to various degrees invoked as associated with the continuance of the practice, and several chapters in this volume discuss local theological debates surrounding the practice.'

rightly so: freedom of religion protects every individual's religious conviction, independently of whether it has an explicit basis in a sacred text.

Another possible interpretation of Munby's remarks would refer to the fact that Muslim leaders and organisations in the U.K. condemn female genital cutting.[54] But these people and bodies cannot speak for every single Muslim in the U.K. or for Islam in general; freedom of religion goes beyond protecting the right to follow the religious leaders of the country in which one resides and, again, protects every individual person's religious conviction.

Thus, if Munby were correct in claiming that 'a basis in religion' was the crucial factor that determined whether an act of genital cutting could be permissible, then we would have to allow some forms of female cutting under certain circumstances. But the whole discourse around FGM and the language used by judges ('evil', 'barbarous', etc.) shows that this practice is considered *inherently* unacceptable, and therefore unacceptable *even when* advocated by religion.[55] Therefore, it cannot be true that the U.K.'s categorical rejection of female cutting rests on the absence of a religious motivation.

4. Patriarchal Power Structures

An influential, and maybe the most promising and interesting, argument to distinguish male from female cutting claims that female cutting is done in a patriarchal context which assigns a lower status to

[54] See the following article in the *Guardian*: 'Muslim Council of Britain says female genital mutilation is "un-Islamic"', available at: https://www.theguardian.com/society/2014/jun/23/female-genital-mutilation-muslim-council-britain-unislamic-condemn.

[55] This is no problem from a freedom of religion perspective because the *prima facie* right to manifest one's religion can, in some scenarios *must*, be limited when this is necessary to protect the rights of others.

women.[56] Lade Hale subscribed to this view in *Fornah v. SSHD*, and the relevant passage bears quoting in full:

'Nor can the context be compared with male circumcision. As the UNICEF Innocenti Digest, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting* (2005) observes:

"In the case of girls and women, the phenomenon is a manifestation of deep-rooted gender inequality that assigns them an inferior position in society and has profound physical and social consequences. This is not the case for male circumcision, which may help to prevent the transmission of HIV/AIDS."

As can be seen, almost all FGM involves the removal of part or all of the clitoris, the main female sexual organ, equivalent in anatomy and physiology to the male penis. The underlying purposes of doing this are to lessen the woman's sexual desire, maintain her chastity and virginity before marriage and her fidelity within it, and possibly to increase male sexual pleasure. But these have been translated into powerful social purposes, to initiate girls into full womanhood, to maintain cultural heritage, social integration and social cohesion. Women who have not been cut therefore face social exclusion and be denied the possibility of marriage and family life. Women themselves are brought up to believe in this as strongly as men. Sometimes, and not surprisingly, women themselves perform the operation as part of an elaborate initiation ceremony. This does not, of course, in any way detract from its purpose in serving and preserving the inferior position of women in the society. Patriarchal societies have often recruited women to be the instruments of the continued subjection of their sex.'[57]

I will examine the claim about female cutting as an expression of oppressive patriarchy from two angles. First, I will question its empirical basis and show that in the scholarly literature on female genital cutting, this claim is highly controversial; it is also strongly disputed by, in particular, many African women who have undergone the practice. Second, I will examine the normative force of the argument and show that even to the extent that the empirical assumptions are correct, they do not justify the current treatment of genital cutting by the law.

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[56] Take as a paradigmatic expression of this view Hilary Burrage, *Eradicating Female Genital Mutilation: A UK Perspective* (Routledge, 2015), 98: 'The underpinnings of FGM are fundamentally patriarchal … [T]he rationale behind the act is gendered oppression, suppression and limitation of autonomy. The tradition of FGM has as its basis the reduction of a woman's individuality and the requirement that the community come first. She is, as some who have experienced FGM remark, above else a bearer of babies.' For an insightful discussion of this question, see Brian D. Earp (above n 48), 96-98.

[57] *Fornah v SSHD*, 2006 UKHL 46, para. 93 (Hale).

a) Female genital cutting as patriarchal oppression

Western feminist literature is divided on the question of whether and to what extent female genital cutting is best explained in terms of the sexual subordination of women by men; in fact, this question has been described as 'the most controversial segment' of the discourse.[58] Some support the claim and point out that in many communities women who have not undergone genital cutting are considered unclean and unfit for marriage.[59] There are also stated reasons for engaging in the practice that straightforwardly refer to maintaining male control over women and their sexuality, such as making rape more difficult, or eliminating promiscuity and enabling fidelity control.[60] However, a number of voices in the scholarly literature on female genital cutting argue that the view that the practice is best explained in terms of patriarchal oppression 'grossly oversimplifies [its] social, cultural, and economic functions'.[61]

Before considering their arguments, a clarification is needed. One basis on which the argument about controlling women's sexuality rests is the widely used claim that those practices which involve the partial or complete cutting of the clitoris destroy or at least severely limit the possibility of sexual pleasure for the affected women; this argument is also reflected in Lady Hale's comments above insofar

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[58] Hope Lewis, 'Between *Irua* and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide', 8 (1995) *Harvard Human Rights Journal* 1, 23.

[59] Gerry Mackie, 'Female Genital Cutting: The Beginning of the End', in Shell-Duncan and Hernlund, *Female 'Circumcision' in Africa: Culture, Controversy, and Change* (Lynne Rienner, 2000), 253, 264.

[60] Lewis (above n 58).

[61] Lisa Wade, 'Learning from "Female Genital Mutilation": Lessons From 30 Years of Academic Discourse', 2011 (12) *Ethnicities* 26, 28. See also Bettina Shell-Duncan and Ylva Hernlund, 'Female "Circumcision" in Africa: Dimensions of the Practice and the Debates' in *Shell-Duncan and Hernlund, Female 'Circumcision' in Africa: Culture, Controversy, and Change* (Lynne Rienner, 2000), 1, 2: 'Critics have argued that the discussion of female "circumcision" by Westerners has been excessive, essentialising, and paternalistic. We agree…'.

as she claims that the clitoris is equivalent to the penis (because the amputation of the penis would obviously destroy the possibility of sexual pleasure for men)[62]. This view is however rejected by many 'circumcised' women[63] as well as shown to be overstated by the available research, which has demonstrated that 'a high percentage of women who have had genital surgery have rich sexual lives, including desire, arousal, orgasm, and satisfaction, and their frequency of sexual activity is not reduced'.[64] One medical explanation seems to be that most erogenous tissue, as well as a large part of the clitoris, are located beneath the vaginal surface and will therefore not be removed by genital cutting.[65] This fact obviously does not even begin to justify the practice but is necessary to bear in mind in the context of the discussion about possible alternative rationales for the practice which do not rely on the oppression of female sexuality.

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[62] See, for example, Martha Nussbaum, *Sex and Social Justice* (Oxford University Press, 2000), 119: 'The male equivalent of the clitoridectomy would be the amputation of most of the penis.'

[63] See, for example, Fuambai Ahmadu's account of her own excision in Ahmadu, 'Rites and Wrongs: An Insider / Outsider Reflects on Power and Excision', in Shell-Duncan and Hernlund, *Female 'Circumcision' in Africa: Culture, Controversy, and Change* (Lynne Rienner, 2000), 283, 305, where she claims that 'many women who had sexual experiences prior to excision, *the author included*, perceive either no difference or increased sexual satisfaction following the operation.' (emphasis added). See also Rogaia Mustafa Abusharaf, 'Revisiting Feminist Discourses on Infibulation: Responses from Sudanese Feminists', in Shell-Duncan and Hernlund, *Female 'Circumcision' in Africa: Culture, Controversy, and Change* (Lynne Rienner, 2000), 151, 161.

[64] The Public Policy Advisory Network on Female Genital Surgeries in Africa, 'Seven Things to Know about Female Genital Surgeries in Africa', 2012 (46) *Hastings Center Report* 19, 22. Bettina Shell-Duncan and Ylva Hernlund (above n 61, 17) report that there is a range of findings in the medical literature, ranging from up to 90 percent of infibulated women reporting pleasurable sex with frequent orgasms to 50 percent of women experiencing diminished sexual pleasure; thus, there seems to be considerable empirical uncertainty in this area. For a discussion of these issues and further references, see Brian D. Earp (above n 48), 92-93.

[65] See Bettina Shell-Duncan and Ylva Hernlund (above n 61), 17, with further references.

Maybe the most important counter-argument to the claim about patriarchal oppression is the little known fact that societies that engage in female genital cutting in almost all cases also engage in male genital cutting;[66] the two forms are seen as complementary practices and sacrifices that are about achieving and promoting wholeness.[67] The clitoris is seen as a 'male' part of the female genitals which needs to be removed to 'perfect' the female genitals, achieve a proper separation of female and male parts, and enable genuine womanhood;[68] conversely, the male foreskin is seen as soft and therefore 'feminine' and needs to be cut in order for the penis to look more masculine and the boy to achieve manhood.[69] Thus, one interpretation of the point of the practice of genital cutting at least in some contexts is that, rather than oppressing women and suppressing female sexuality, it is intended to promote the achievement of fully developed femininity and female sexuality by removing 'masculine' parts from her genitals.

Another argument that has been mentioned in the literature on female genital cutting and that challenges the wide-spread view that the point of female genital cutting is to control female sexuality relates to the pain experienced as part of the procedure. The idea is that the experience of pain associated with genital cutting prepares a girl or young woman for childbirth and maturity; the argument being that 'after the excruciating pain of clitoridectomy, "no pain will overwhelm a person"'[70]. There is a clear parallel to male genital cutting, the extreme pain of which is to be borne stoically in Muslim rituals

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[66] The Public Policy Advisory Network on Female Genital Surgeries in Africa (above n 64), 23.

[67] Cf. Brian D. Earp (above n 48), 97: 'In most other African contexts … both FGA [Female Genital Alteration] and MGA [Male Genital Alteration] are at least superficially egalitarian: they are carried out regardless of the sex or gender of the child, and are intended as a means of conferring adult status within the group.' See also Dustin M. Wax, 'Female Genital Cutting, Sexuality, and Anti-FGC Advocacy', online at http://dwax.org/2006/06/06/female-genital-cutting-sexuality-and-antifgc-advocacy.

[68] Ahmadu (above n 63), 308.

[69] Lewis (above n 58), 22.

[70] Shell-Duncan and Hernlund (above n 61), 16.

as well as African settings in order to achieve manhood.[71] Whatever one may think of the wisdom and/or ethics of such practices, these observations do not point to patriarchal oppression but rather to a perceived necessity of preparing both boys and girls for the challenges that they are likely to face during adulthood.

The above remarks are not meant to deal comprehensively with the correct interpretation of the meaning of female genital cutting; nor should they be read as a denial of the existence of patriarchal oppression in the context of genital cutting in some, or possibly many or even most, contexts. Rather, they are intended to show that there is considerable empirical uncertainty and disagreement by scholars about what the purposes of female genital cutting actually are. In light of this, it is unfortunate for judges in the UK to commit themselves to one particular, and controversial, theory of the purposes of female genital cutting. Furthermore, if we rest our categorical rejection of female genital cutting in the UK on the existence of patriarchal oppressive structures with regard to female sexuality in Africa, then this is an unstable foundation which, depending on one's viewpoint, either has already been proven to be inaccurate or which, in any case, runs the risk of being shown to be inaccurate by future research. It seems implausible to assume, however, that the West in general or the UK in particular would reconsider their categorical rejection of female genital cutting and would proceed to allow the practice under certain circumstances if it became the dominant view among scholars that female genital cutting in Africa was in many cases done for reasons unrelated to patriarchal oppression. This shows that the current approach with regard to female genital cutting in the UK and elsewhere, namely to categorically reject it, cannot find sufficient support in the argument from patriarchal oppression.

b) The normative argument

[71] Nelson Mandela wrote in his autobiography about his 'circumcision': 'Flinching or crying out was a sign of weakness and stigmatised one's manhood ... Circumcision is a trial of bravery and stoicism; no anaesthetic is used; a man must suffer in silence.' (Nelson Mandela, *Long Walk to Freedom* (Abacus, 1995), 32).

While the previous section threw some doubt on the widely held view that patriarchal oppression necessarily underlies female cutting, this section will show that even to the extent that that view is correct, it cannot justify the current legal situation. In a nutshell, my argument will be that the existence of patriarchal power structures may be relevant in so far as such structures may make a violation of rights *even worse than it would otherwise be*; but there still needs to be a violation of rights in the first place. Thus, we may say that an instance of female cutting is worse than an otherwise comparable instance of male cutting if it occurs within oppressive patriarchal power structures; but it cannot be the case that female cutting is a violation of rights whereas male cutting is not.

To develop this argument, let us consider the situation in Malaysia, where among the Muslim population, both boys and girls are usually 'circumcised' for religious reasons, and where the form of cutting imposed on girls is either a ritual nick (which is less invasive than male 'circumcision') or the amputation of the clitoral foreskin (which, as explained above, shares the same embryonic origin and is the female equivalent to the male foreskin). Let us focus on the latter procedure and assume for the sake of the argument that it is an equally invasive procedure as male 'circumcision'.

Malaysia is routinely criticised for tolerating this form of female genital cutting, but it is not criticised for allowing male 'circumcision'. Under Lady Hale's argument, this would be justifiable because female cutting 'serv[es] and preserv[es] the inferior position of women in the society.' I discussed in the previous section some of the problems in making such empirically controversial, sweeping generalisations about the point of female genital cutting; but let us assume for the sake of the argument that this is empirically correct in the case of Malaysia.

Under Lady Hale's argument, this difference – or more broadly, the existence of patriarchal oppression of women – justifies regarding male cutting as permissible but female cutting as categorically unacceptable. This is, however, unconvincing. Oppressive power structures pose a moral problem precisely *because they oppress*, that is, they prevent those who are disadvantaged by them from developing their personality and living their lives as free and equal members of society. Therefore, if within an oppressive power structure an act occurs which in itself is morally unproblematic in that it does not violate people's status as free and equal, then this act *does not oppress*, and therefore cannot

be considered morally wrong simply by virtue of occurring within an *otherwise* oppressive structure. Applied to the case of genital cutting: if it were the case, as Lady Hale implies, that there is nothing wrong with male genital cutting, then it follows that male cutting *in itself* does not oppress boys but rather respects their status as free and equal citizens. Coherence then demands that we accept that an equally invasive act of female cutting, such as the amputation of the clitoral hood as widely practised in Malaysia, does not oppress girls, either, but rather must be seen as respecting their status as free and equal. But then, the mere fact that the morally unproblematic act of genital cutting occurs within a patriarchal structure does not turn an act which respects girls' freedom and equality into one which does not. The correct logic is the other way round: it is not the case that oppressive structures turn morally acceptable acts into moral wrongs. Rather, oppressive structures enable acts which, in and outside such structures, are morally wrong but which can more easily and frequently happen within such structures.

To this conclusion, one might object that it is not always possible to separate the morality of an act such as genital cutting from the surrounding social structure. In the case of genital cutting, it might be the case that in the respective social context (for example in Malaysia), male cutting is seen as an 'upgrade' for boys and female cutting as a 'downgrade' for girls which reminds them of their subordinate role. Thus, one might argue, it is plausible to take on the fight against female cutting because of the meaning that this practice has taken on in a specific social context, despite the fact that the act of female cutting itself is (by stipulation) considered to be morally unproblematic (because the parallel act for boys is seen as unproblematic). This reasoning is, however, deficient. In the example, the 'real' problem is not the practice of genital cutting but the gender roles assigned to men and women in the respective society: female genital cutting is problematic only because of its social meaning which points to the lower status of women compared to men. This structural inequality between men and women will inevitably manifest itself in a variety of ways, of which the social meaning of genital cutting is only one; for example, women might have fewer and less promising economic opportunities, less access to education, and fewer opportunities to realise their potential generally. However, this raises the question of why genital cutting, but not the other manifestations of gender inequality, is considered categorically unacceptable and referred to as 'evil, 'appalling', etc. The near-consensus against female

genital cutting in the Western world, to be defensible, must be more than just a proxy for a commitment to gender equality. Properly understood, it must also reflect the conviction that there is something wrong with the genital cutting of girls independently of the patriarchal structures within which it occurs.

In light of this conclusion, the argument from patriarchal oppression must be reinterpreted. It cannot plausibly be taken to mean that female cutting is wrong *because* it occurs within patriarchal power structures. Rather, we have to maintain that female genital cutting is wrong *independently of such structures*, but that if it occurs within such structures, that may make its wrong *more severe*. Thus, it is worse to become the victim of genital cutting in a society that engages in this practice in order to oppress women than it is to have the same experience in a society that engages in this practice for more benign reasons. Or, to put the same point differently, it is an injustice, possibly a terrible injustice, to have genital cutting imposed on one, but it is an even worse injustice if this happens as part of an attempt to oppress and deny one's status as an equal.

A parallel can be found in the idea of hate crimes. In the law of many countries including the U.K., the presence of 'hate', that is, hostility or prejudice towards the victim (usually) on the grounds of protected characteristics such as race, religion, gender, or sexual orientation, will (under certain circumstances) count as an aggravating factor in the sentencing of the offender. For example, in the U.K., someone who commits an act of grievous bodily harm will receive a higher sentence if this is racially or religiously motivated.[72] What is important in the current context is that for a hate crime to come into existence there has to be an 'ordinary' crime *plus* the presence of the hateful mind-set on the part of the offender. The parallel that I want to draw is that we can account for the wrong inherent in genital cutting in the same way: we need, first, the wrong of the violation of the child's right, and second, this wrong may be exacerbated if the act of genital cutting was motivated by ideas relating to patriarchal oppression. But importantly, there is no 'hate crime' without there being a 'crime' in the first instance. In a parallel way, we cannot regard female genital cutting as an outrageous rights violation

[72] Section 29 (1) (a) of the Crime and Disorder Act 1998.

because of the context of patriarchal oppression without also acknowledging that the act of genital cutting, independently of the power structures within which it occurs, also violates the rights of children.

It follows that the current legal situation in the UK and elsewhere, according to which female genital cutting is considered to be categorically impermissible whereas male cutting is in principle acceptable, cannot be justified by pointing to the existence of patriarchal oppression, even to the extent that such oppression really underlies the practice of female cutting. Thus, in the case of the Malaysian practice, we cannot conclude that the removal of the clitoral prepuce of girls is a violation, let alone an outrageous ('barbarous', etc.) violation, of their human rights whereas the equally intrusive removal of the male foreskin of boys is morally acceptable, even if it were the case that the former but not the latter is motivated by patriarchal oppression. Patriarchal oppression may make an otherwise rights-violating act even worse, but it cannot ground its wrongness. Therefore, any argument that relies on the idea of patriarchal oppression works only if we accept that there is something wrong with male *and* female genital cutting in the first place.

5. Conclusion

This section presented us with a moral and legal puzzle: it turned out that the current approach to female genital mutilation, according to which every interference with the female genitals is categorically impermissible and indeed constitutes a moral outrage, cannot be reconciled with the balancing approach that the law takes towards male genital cutting, which is considered to be acceptable if those with parental authority consent, and which a court will order if it considers it to be in the child's best interest. Female genital cutting is not necessarily more harmful than male genital cutting; and the categorical dismissal of female cutting indicates that more is at stake than certain contingent empirical claims about speculative and trivial health benefits or the presence of a religious motivation. Finally, the claim that female cutting is undertaken in a context of patriarchal dominance over female sexuality is highly controversial, and even to the extent that it is true could at most be considered an aggravating factor.

In light of this, we are left with two structural possibilities. Either we have to accept that the categorical rejection of female genital cutting is indefensible and that therefore female cutting can be justifiable under certain circumstances – that is, we extend the application of the best interest of the child test that currently governs the permissibility of male cutting to girls –, or we apply the categorical rejection of female genital cutting that is characteristic of UK law to male cutting as well. The next section will develop an argumentative foundation for the latter route.

IV. Genital cutting as inherently wrong

1. The argument

This section provides a new basis for the (largely uncontroversial) categorical rejection of female genital mutilation and also shows why this categorical rejection should be extended to male cutting. I will present an argument for the impermissibility of genital cutting *as a matter of principle*, that is, independently of contingent empirical features such as the existence of minor health benefits, the precise extent of physical or emotional harm, the presence of a religious motivation, or the existence of patriarchal power structures; these arguments, by virtue of their contingent nature, cannot provide a solid basis for the rejection of genital cutting as *intrinsically* wrong. Their proper place is at a later stage of the analysis: once we know that genital cutting is intrinsically wrong, the exact extent of the wrong inflicted on the child will depend on precisely those factors. Thus, obviously it is worse, from a moral perspective, to impose extremely grave physical harm on a girl, to irreparably damage or even destroy any possibility for enjoyable sex, to create various significant, further health risks, and to do all this as part of a structure that oppresses female sexuality, than to impose, say, a ritual nick with (arguably) no long-term damage, no further health risks, and no negative effects on sexual pleasure. But while these two examples are very different in terms of the extent of the specific harms inflicted on the victims, they share a common basis or 'core', namely the intrinsic wrong that lies in the fact that someone acts on a claimed entitlement to apply a sharp object to a child's genitals. It is this 'core' that I want to identify in this section.

As far as I can see, the only existing, but ultimately incomplete, approach that attempts to demonstrate the wrongness of genital cutting as a matter of principle is 'the right to an open future'[73], originally developed by the philosopher Joel Feinberg in a different context.[74] The idea is that children have a right, flowing from the value of autonomy, not to have their future options permanently foreclosed by their parents. This approach has been used to criticise routine (that is, non-religious) male 'circumcision' as practised in the United States,[75] and in this context the argument has considerable force: it is plausible (and, to my mind, indeed correct) to argue that routine 'circumcision' is clearly immoral because it limits the future options of the child for no valid reason. As has been pointed out above, the American argument relating to the health benefits associated with genital cutting is so weak that its value can be considered 'zero' for practical purposes, and it can therefore be concluded that routine 'circumcision' limits an infant's future options for no valid reason and therefore violates his 'right to an open future'.

However, the problem with the 'open future' approach is that it does not fit in those cases of genital cutting where those advocating it make a more plausible claim that it brings about considerable advantages for the child's development which outweigh the limitation of the child's future options. Thus, in the case of ritual genital cutting, it is often claimed that it is not acceptable to wait until the

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[73] Robert Darby, 'The Child's Right to an Open Future: Is the Principle Applicable to Non-Therapeutic Circumcision?', (2013) 39 *Journal of Medical Ethics* 463. Marie Fox and Michael Thomson, 'Bodily Integrity, Embodiment, and the Regulation of Parental Choice', 2017 (44) *Journal of Law and Society* 501,527-530 invoke Darby's 'open future' principle in developing their own framework, which they call 'embodied integrity'. Clare Chambers, 'Reasonable Disagreement and the Neutralist Dilemma: Abortion and circumcision in Matthew Kramer's *Liberalism with Excellence*, 2018 (63) *American Journal of Jurisprudence* 9, 28 in substance relies on Darby's idea as well when she states with reference to 'circumcision' that 'some sorts of parental action … close future options: they prevent future choices, they remove capabilities, or they undermine autonomy'.

[74] Joel Feinberg, 'The Child's Right to an Open Future', in Feinberg, *Freedom and Fulfilment: Philosophical Essays* (Princeton University Press, 1992), 76.

[75] Darby, above n 73.

child reaches maturity because it is important for the child to properly integrate into his community during childhood, which genital cutting is said to facilitate.[76] Some of the justifications of genital cutting that we have encountered in the previous section have a similar structure. One of the arguments used to justify male and female genital cutting in parts of Africa is that it is necessary to facilitate the proper development of a male or female identity (by removing 'male' parts from the female genitals and 'female' parts from the male genitals);[77] this, too, must be done during the critical stage of identity-formation and cannot be postponed until adulthood. Another argument, previously mentioned, is that (male and female) genital cutting prepares boys and girls for the challenges of adult life, for example by forcing them to bear extreme pain and learn the lesson that once they have experienced this, no amount of suffering will overwhelm them in the future.[78]

Thus, those who advocate genital cutting do not regard the practice as a gratuitous infliction of harm or suffering; rather their point is that the child has to make a sacrifice which is outweighed by a corresponding benefit. There are two ways to show the wrongness of this approach. The first is to show for each case that the gain is not worth the sacrifice; but under this route the success of the critic's argument will again turn on contingent empirical questions such as the gravity of the harm, the effect on sexual pleasure, and so on. The second and more promising approach is to demonstrate that genital cutting is an act that parents may not inflict on their child even if a plausible case could be made that some benefits for the child's well-being might flow from it.

I wish to propose that such an argument flows from the value of personal freedom. A society committed to personal freedom must insist that there are certain decisions in a person's life that the

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[76] Cf Michael Freeman, 'A Child's Right to Circumcision', (1999) 83 *BJU International*, Suppl. 1, 74, 77: 'To deny a Jewish or Muslim child a circumcision removes from him the ability to participate in the religious life of his community'.

[77] See above n 67 and accompanying text.

[78] See above n 70 and accompanying text.

person must make him- or herself and that cannot be made by others, including his or her parents.[79] Let me give a few examples. The reason that forced marriage is seen as unacceptable is not primarily that the parents would necessarily make a bad choice for their son or daughter; rather it is that forcing a person to marry someone against his or her will is incompatible with the idea of personal freedom: while the agent may seek advice and may even defer to someone else's judgment (as in the case of an arranged marriage), he must ultimately make his own decision about whether or not to marry the other person.[80] A similar consideration applies to the choice of sexual partners. It would be an outrageous act for parents to choose a sexual partner for their teenage son or daughter. But the reason for this is not that they would necessarily make a bad choice (many people make very poor choices for themselves in this regard). Rather, it is that the value of personal freedom requires that people decide for themselves with whom to engage in the intimate act of sexual relations.

Our attitudes towards decisions affecting the child's body reflect this line of thinking as well. In the U.K., it is illegal to tattoo a person under the age of eighteen[81] and therefore it would be impermissible for parents to authorise the tattooing of their child (and even more so against the child's will), even if a plausible case could be made that they would choose a beautiful tattoo or one that would somehow benefit the child in the future. The example may seem almost preposterous, but note that it is not far removed from an act of genital cutting, which, like a tattoo, is a permanent body modification.

The point is that we do not usually allow parents to modify the bodies of their children in the absence of medical necessity. A further example is cosmetic treatment. While not explicitly outlawed, it is unthinkable that parents could authorise, say, a breast enlargement of their daughter against her will (and even in the case of a consent by the child, it would be highly problematic to allow such treatment);

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[79] I have begun to develop this argument in an earlier article; see [removed for review].

[80] On the idea that deference to another person's judgment is compatible with the exercise of one's personal responsibility, see Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, 2006),10.

[81] Tattooing of Minors Act 1969, section 1.

again, the underlying reason is not that the parents will necessarily be unaware of what's good for the child or what the child will want in the future, but rather that the principle of personal freedom requires that in the absence of a medical necessity, cosmetic treatment be authorised by the person whose body it is.

Two arguable exceptions to this line of reasoning are orthodontic treatment and ear-pinning, but they can be distinguished from genital cutting.[82] Children undergoing orthodontic treatment are involved in the decision-making and by and large able to understand its main implications, whereas infants and pre-pubescent children cannot adequately grasp the meaning and implications of genital cutting. Furthermore, orthodontic treatment improves not only the appearance but also the function of the mouth and teeth.[83] Ear-pinning is a more complex case. The main reason given for it is to reduce the likelihood of the child being teased or bullied by peers;[84] this is an argument that could also be put forward to justify genital cutting in certain contexts. In response, it has been argued that teasing or bullying behaviour should never be a reason to modify a child's body: what needs to change in such a situation is the bullying behaviour, not the child's body.[85] While I have considerable sympathy for this view, it is understandable and maybe even justifiable from the perspective of *parents* to take steps to protect their children from becoming the target of abuse; thus, as I have argued elsewhere, it may under certain circumstances be morally permissible for parents to 'circumcise' their son if this is the only way

[82] For a discussion of orthodontic treatment in relation to male genital cutting, see Brian D. Earp and Robert Darby, 'Circumcision, Autonomy and Public Health', 2019 (12) *Public Health Ethics* 64, 68-9.

[83] See the information on the website of the British Orthodontic Society: https://www.bos.org.uk/Public-Patients/Orthodontics-for-Adults/Why-Orthodontics.

[84] See https://www.royalfree.nhs.uk/services/services-a-z/childrens-services/childrens-surgery/ear-pinning-pinnaplasty/.

[85] Nuffield Council on Bioethics, *Cosmetic Procedures: Ethical Issues* (2017), available at: http://nuffieldbioethics.org/wp-content/uploads/Cosmetic-procedures-full-report.pdf, para 7.8, p. 128.

to protect him from considerable harm.[86] But the situation is different from the perspective of *society*: here, the correct approach must be to stop the practice of genital cutting; this will also ensure that any bullying related to having intact genitals will disappear over time. This is certainly the approach that British society takes towards female cutting: it would be unthinkable to allow some form of female cutting in order to ensure that genitally intact girls are not teased or bullied by their genitally cut (female) peers. This line of reasoning does not, however, apply in the case of ear-pinning because there will always be a small minority of children with prominent ears. So it may be justifiable from the perspective of society to allow ear-pinning in order to protect these children from being teased or bullied and to facilitate their healthy psychological development, whereas in the case of genital cutting the general principle applies, according to which society should fight the bullying or teasing behaviour, and the preferable long-term solution to prevent such abuse is to protect all children's genitals.

To conclude, the law recognises a variety of personal decisions that cannot be made for a child by his or her parents, and the underlying principle is that the authority of parents over their children is limited by the principle of personal freedom which requires that certain intimate decisions, including decisions about sexual and romantic relationships and the integrity of the body, cannot be made by parents; thus, 'trading' a part of the child's body against a benefit supposed to flow from its removal or infringement is usually impermissible. Rather, the role that the law by and large assigns the parents with regard to their child's body is to protect its integrity.

Applied to genital cutting, it follows that in the absence of a medical necessity, parents have to respect and protect the integrity of their child's genitals, even if a plausible claim could be made that the child would benefit from being genitally cut: it is wrong as a matter of principle to 'trade' a part of the child's genitals for another supposed benefit. Thus, the wrong of genital cutting flows *not* (in the first instance) from contingent empirical factors relating, for example, to harm or social structures, but from the child's right to have his or her physical integrity respected and protected.

[86] [Removed for review].

2. Implications

The above argument has implications for our understanding of the law relating to both female and male genital cutting. With regard to the former, no reinterpretation or change of the current law is required, but the argument offers a firm basis for the rejection of *all* forms of female genital cutting that characterises the U.K.'s approach to this issue. Rather than grounding this stance in contingent empirical features relating to the harm of the procedure or the structures within which it occurs, we should acknowledge that the reason why all forms of female cutting are wrong lies in a girl's right to the integrity of her genitals; and only this approach demonstrates why even a procedure such as a ritual nick, performed for reasons that have nothing to do with patriarchy, constitutes a violation of the human rights of girls.

With regard to male cutting, the approach outlined above should lead to a reinterpretation of the best interest of the child test in cases involving male cutting: given that genital cutting violates a boy's human right to the integrity of his genitals, it cannot be regarded to be in his best interest. This is surely the result that the courts would rightly reach for girls if the Female Genital Mutilation Act did not exist; and therefore, as has been shown, coherence requires that this result be reached for boys as well. Furthermore, in the absence of a statutory prohibition analogous to the Female Genital Mutilation Act, male genital cutting must be treated as a criminal act under the ordinary provisions of the criminal law; the currently dominant view, according to which the common law creates an exception for the case of male genital cutting, has been shown to be arbitrary and indefensible.

V. Conclusion

This essay reaches two conclusions with regard to genital cutting. With regard to female genital cutting, it has shown that the current discourse around female genital cutting has not provided a convincing foundation for the view that any interference with the female genitals is considered categorically impermissible. The reasons that are usually advanced to defend this approach – pointing to the harm,

lack of religious motivation, absence of medical benefits, and existence of patriarchal power structures – are valid considerations, but they do not apply to all kinds of genital cutting and in particular not the less intrusive forms. Thus, this essay has proposed a different basis for the rejection of all forms of female genital cutting, namely girls' right to physical integrity. It has shown that a girl's body is not a 'resource' that the parents are free to 'trade in' for some other benefit, such as a strengthening of her female identity or the bringing about of a conviction that no pain will overwhelm her; rather, the parents are obligated to respect and protect the integrity of their daughter's body and in particular her genitals. A further advantage of this approach is that it justifies convincingly why *all* kinds of female genital cutting are wrong, including those that are considerably less invasive and harmful than male cutting, and it cuts off any discussion of whether some, milder, forms of genital cutting should be considered acceptable.

The second conclusion that this essay reaches is that the current approach of the law, according to which male genital cutting is in principle permissible and can even be ordered by a court, is indefensible and must be changed. As has been demonstrated, the reasons commonly relied on to justify the differential treatment by the law of male and female genital cutting are unconvincing. We cannot, therefore, maintain that female genital cutting is categorically unacceptable while endorsing a balancing approach to male cutting. Furthermore, the correct way to think about the wrongness of genital cutting is to regard it as intrinsically wrong because it violates the right to physical integrity of the child; thus, the view that genital cutting is wrong as a matter of principle applies equally to boys and girls.