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## **1. Introduction**

The function of the criminal law "is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence"<sup>1</sup>.

'Circumcision is not an operation to be undertaken lightly and if it is to be performed in Great Britain it is probably best performed in a hospital environment, in an older child as a general anaesthetic day-case'<sup>2</sup>.

This paper intends to examine the issue of non-therapeutic male circumcision, in the light of the Law Commission's Consultation Paper No 139 ('The Consultation Paper'), and its lawfulness for ritual and non-therapeutic reasons. By 'non-therapeutic' is meant any circumcision which is not to treat an existing disease process or bodily abnormality; a circumcision is a form of proper procedure only where there is a disease process or abnormality and treatment by other conservative methods are, or on medical grounds are considered to be, medically inappropriate.

This paper does not seek to comment on the Consultation Paper generally; nor does the paper seek to comment on Appendix C of the Consultation Paper, which discusses certain philosophical issues, except that the continuing lack of a rigorously thought-through philosophical position is a clear defect in the Consultation Paper.

Further, it would be inappropriate for this paper to rehearse in any great detail the reasons why male circumcision medically cannot properly be regarded as harmless; that is dealt with fully by others elsewhere. This paper will simply and briefly describe the 3 areas where medical studies have demonstrated harm, give some sample references to medical papers by way of illustration only and will proceed on the basis that the contention in the paper that it is 'generally accepted that the removal of the foreskin of the penis has little, if any, effect on a man's ability to enjoy sexual intercourse, and this act is not, therefore, regarded as mutilation' is wholly false: and from that

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<sup>1</sup> Wolfenden Report on Homosexual Offences (1957) (Cmnd 247) Chapter 2, paragraph 13

<sup>2</sup> Editorial Comment in 1996 *British Journal of Urology*, **77**, page 925.

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position, to examine the legal consequences that flow therefrom.

It has been thought right to touch on the burden of proof which, it is suggested, lies on those who would continue this procedure; and, in view of dispute as to whether or not circumcision is a mutilation to give some illustrative definitions of that word. Equally, because of the antiquity of the practice, the religious and tribal overtones to it, and the myths that have grown up around it—not least from the 'masturbation-phobia' of the 19<sup>th</sup> century to the pseudo-science of more recent years -- it seems right to devote some space in this paper to an examination of this history of this procedure.

### **1.1 Burden of Proof**

The general rule is that he who avers, proves.

Circumcision involves the amputation of a body part; when done for ritual, cultural or social reasons, the part amputated is healthy flesh from the healthy organ of a healthy male and those who say that it is proper to do it, and would do it to another without that other's consent, are required to justify the alleged propriety and to justify this interference with the bodily integrity and functioning of that other.

The specific assertions usually made are that:

- The foreskin is without function and/or value.
- Circumcision is painless in infancy.
- Circumcision is a minor procedure of no, or minimal, risk.
- Circumcision is of no ill-effect.
- Circumcision has little, if any, effect on a man's sexual function and/or pleasure.
- Circumcision is not mutilating.
- Circumcision can offer prophylactic benefits.
- Non-therapeutic circumcision is lawful

It is not for those who would have children left intact and uncircumcised to demonstrate that circumcision is damaging (and unless required for clear therapeutic

reasons, unjustifiable); although, were it to be wrongly suggested that the burden were so laid on them, it is suggested that this paper has discharged that burden.

Rather it is clearly for the circumcisers, not least in the light of mainstream medical knowledge and current legal concepts, to make good their general and specific assertions, by careful and rigorous evidence, arguments and refutation of the medical and legal position. Mere repetition of these assertions, as in the Consultation Paper, particularly in paragraphs 9.1 and 2, are valueless. Mere assertion that ritual circumcision is seen as a religious duty is equally valueless in discharging the burden of proof: it may provide a reason but does not provide a justification, or in other words it may explain but does not excuse.

## **1.2 Mutilation**

The use of the word 'mutilate' or 'mutilation' to describe circumcision is hotly opposed by those who circumcise for non-therapeutic reasons; hence also the defensive, medically-refuted and incorrect assertion ('incorrect' since it takes no account of the facts nor of the definition of the word 'mutilate') at the end of the second sentence of paragraph 9.2 of the Consultation Paper.

"Language often reveals more about ourselves than we intend and our choice of words can show the way we humans idealise things that we might otherwise see in a different light. The stunted deformed feet that resulted from foot-binding of Chinese girls were called 'Golden Lotus' and were considered highly attractive and desirable. Their counterpart --normal feet -- were seen as gross and ugly. Similarly, *The Layman's Guide to the Covenant of Circumcision* [by Rabbi Jacob Schechet] calls circumcision the 'Golden Circle'." and "...a rabbi writing of his own struggle between protective parental instinct and the cultural mandate to circumcise his newborn son refers to the intact penis with its foreskin as a 'stopped-up dullness'." quoted by Boyd,<sup>3</sup>.

The use of the concept of mutilate/mutilation in connection with circumcision is resisted both by those who wish to continue the practice; and by many circumcised men, for whom the process of denial of their own damage is fragile, so as to cope with the destabilising effect on themselves and others of a

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<sup>3</sup> Boyd B R; *Circumcision; What It Does*. Taterhill Press

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description of such accuracy and directness. The resulting contortions to avoid such uncomfortable words and/or to re-define them in an attempt to exclude circumcision are worthy of Humpty Dumpty.

Yet the word 'mutilation' as defined in its ordinary sense, as well as by medical dictionaries, is wholly apt to describe the result of this procedure. Thus:

### **Mutilate**

'1. To deprive (a person or animal) of a limb or some principal organ of the body; to cut off or otherwise destroy the use of (a limb or organ)

'2. To render (a thing, esp. a record, book etc.) imperfect by cutting off or destroying a part. Oxford English Dictionary' OUP 1971.

'Injure, make imperfect or inefficient, by depriving of a part.' The Pocket Oxford Dictionary 4th Edition 1942, revised 1946

'Implies the cutting off or removal of a part essential to completeness, not only of a person but also of a thing, and to his or its perfection, beauty, entirety or fulfilment of function.' Webster's New Dictionary of Synonyms: a Dictionary of Discriminated Synonyms and Analogous and Contrasted Words (1968)

### **Mutilation**

'1. The action of depriving (a person or animal) of a limb or of the use of a limb; the excision or maiming (of a limb or bodily organ).

'2. The action of rendering (a thing) imperfect by excision or destruction of one or more of its parts.' Oxford English Dictionary OUP 1971.

'Disfigurement or injury by removal or destruction of any conspicuous or essential part of the body.' Stedman's Medical Dictionary (26th Edition) 1995

'The act of depriving an individual of a limb, member, or any other important part; deprivation of an organ; severe disfigurement.' Dorland's Illustrated Medical Dictionary (28th Edition) 1994

'**Maiming;** the act of removing or destroying a conspicuous or essential part or organ.' Taber's Cyclopedic Medical Dictionary (17th Edition) 1993

## **2. The Physical Effects of Circumcision**

Typically and incorrectly, male circumcision has been seen in the past by the lay public, as 'a minor snip', and so described by many especially in popular magazines; the foreskin is variously described as 'a vestigial piece of skin' or 'redundant'.

Whilst circumcision is not now routinely carried out in Britain for non-religious reasons, as it used to be from the 19<sup>th</sup> century until circa 1950, there are still those who wish to perform it on their children for non-ritual reasons and from time to time there are calls for its wider use: thus, Beth Raleigh in *Your Sex Organs, 40 Fascinating Facts* (August 1994 SHE) when she wrote that neonatal circumcision "can have health benefits".

Or it is seen a procedure conducted by Jews on the 8<sup>th</sup> day after birth or by Muslims and members of some other religions/ethnic groups as a slightly odd but essentially harmless ritual.

Whatever the reason for its being done, it is popularly seen (vide the populist and unsupported remark in paragraph 9.2 of the Consultation Paper) as having few risks or ill-effects for the male and, by some, as offering a range of medical benefits, the breadth of whose claims and whose persistence in the face of medical refutation is a demonstration that strong and hidden forces are at work. That in the neonate it is usually performed without anaesthesia raises no eyebrows, since the traditional thinking was, and still is, that the neonate does not feel pain.

Circumcision, as is now well recognised by doctors, has three main areas of physical harm, which, in brief are:

### **2.1 Pain:**

Circumcision is very painful and increasingly, despite the inherent risks of any anaesthesia, doctors performing neonatal circumcision now give some form of anaesthesia; however, the Jewish Bris Milah and, in most cases, Muslim circumcisions are carried out without anaesthesia.

For most of this century, the bulk of medical literature stated that newborn boys were insensitive to pain and would not, therefore, need risky anaesthesia for circumcision. This myth was based on the fact that much of the peripheral nervous system has still to develop the myelin that insulates the nerve fibres, hence the

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inability of newborns to co-ordinate muscle movement etc. Without myelin, the fibres concerned are unable to pass integrated or high level messages. It is extraordinary that medically trained professionals could not recall that all pain messages are carried by thin unmyelinated fibres of the pain and temperature tracts that are unrelated to the myelinated motor and discriminatory sensation pathways. Far from being incomplete in their development at birth, the pain pathways are probably the most developed peripheral neural tracts.

Remarks such as: 'He slept through the whole thing' are often used. What is seen as 'sleeping through' the procedure is however a form of shock or semi-coma from the trauma. Dr Justin Coll, infant psychologist and Professor in Chief of Child and Adolescent Psychology at the University of California, is quoted in Romberg *Circumcision: The Painful Dilemma*, as saying: that infants being circumcised 'can lapse into a semi-coma' which is an 'abnormal state in the newborn'.

Dalens<sup>4</sup> writes: "Pain in pædiatrics has long been underestimated. The numerous scientific studies carried out during the last decade show that its existence can no longer be doubted: in fact, pain already exists during the neonatal period, and probably throughout the last trimester of gestation as well. Pain pathways mature during the embryonic period and peripheral receptors develop between the 7th and 20th week [of gestation]. Spinal roots and nerves are completely differentiated before the second month [of gestation]. Assessing pain, already a difficult task in the adult, is all the more so in children because of lesser verbal communicative capabilities, difficulty in handling abstract concepts, lack of experience of painful stimuli to make comparisons, and ignorance of their body image. [In diagnosing pain] behavioural tests remain the mainstay until the prepubertal period".

Because of the danger of administering general anaesthesia to babies under 6 months of age, and the pain and risks of tissue damage of administering local anaesthetics to the penis, circumcisions in this age group are still mostly performed without any anaesthesia to this day. Parents are not usually told that their sons will go through this agony.

"There is no doubt that circumcisions are painful for the baby. Indeed, circumcision has become a model for the analysis of pain and stress responses in the

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<sup>4</sup>B. Dalens, *La douleur aigue de l'enfant et son traitement* [Acute pain in children and its treatment], Ann. Fr. Anesth. Reanim. 10:38-61, 1991.



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newborn. Not only does the unanesthetized newborn cry vigorously, tremble, and, in some cases, become mildly cyanotic because of prolonged crying, but other stress-related physiological reactions have also been demonstrated, including dramatic changes in heart and respiratory rates and in transcutaneous oxygen and plasma cortisol levels.”: H.J. Stang et al<sup>5</sup>.

Taddio et al.<sup>6</sup> studied the effects of neonatal circumcision pain on later sensitivity to pain. They found that the effects of this pain were detectable in later childhood; but then arrived at the incorrect conclusion that, instead of not circumcising, there should be pain-relief given for circumcisions.

Dr R Van Howe writes<sup>7</sup>:

“The work of Gunnar,<sup>8</sup> Marshall<sup>9</sup>, and others,<sup>10</sup> show that the behaviour and physiologic responses to neonatal circumcision have been well established. Although a few physicians such as Weiss<sup>11</sup> claim the newborn does not

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<sup>5</sup>H.J. Stang et al, *Local anesthesia for neonatal circumcision*, Journal of the American Medical Association 259: 1507-11, 1988.

<sup>6</sup> Taddio A, Goldbach M, Ipp M, Stevens B, Koren G. *Effect of neonatal circumcision on pain responses during vaccination in boys*. Lancet 1995; 345: 291-2.

<sup>7</sup> Private communication, annexed

<sup>8</sup>Gunnar MR, Connors J, Isensee J, Wall L. *Adrenocortical activity and behavioral distress in human newborns*. Dev Psychobiol 1988; 21: 297-310.

Gunnar MR, Fisch RO, Korsvik S, Donhowe JM. *The effects of circumcision on serum cortisol and behavior*. Psychoneuroendocrinology 1981; 6: 269-75.

Gunnar MR, Fisch RO, Malone S. *The effects of a pacifying stimulus on behavioral and adrenocortical responses to circumcision in the newborn*. J Am Acad Child Psychiatry 1984; 23: 34-8.

Gunnar MR, Malone S, Vance G, Fisch RO. *Coping with aversive stimulation in the neonatal period: quiet sleep and plasma cortisol levels during recovery from circumcision*. Child Dev 1985; 56: 824-34.

Malone SM, Gunnar MR, Fisch RO. *Adrenocortical and behavioral responses to limb restraint in human neonates*. Dev Psychobiol 1985; 18: 435-46.

<sup>9</sup> Marshall RE, Porter FL, Rogers AG, Moore J, Anderson B, Boxerman SB. *Circumcision: II. Effects upon mother-infant interaction*. Early Hum Dev 1982; 7: 367-74.

Marshall RE. *Neonatal pain associated with caregiving procedures*. Pediatr Clin North Am 1989; 36: 885-903.

Porter FL, Miller RH, Marshall RE. *Neonatal pain cries: effect of circumcision on acoustic features and perceived urgency*. Child Dev 1986; 57: 790-802.

<sup>10</sup> Rawlings DJ, Miller PA, Engel RR. *The effect of circumcision on transcutaneous PO<sub>2</sub> in term infants*. Am J Dis Child 1980; 134: 676-8.

<sup>11</sup> Weiss C. *Does circumcision of the newborn require an anesthetic?* Clin Pediatr Phila 1968; 7: 128-9. 353.

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experience pain, most informed physicians now agree that neonatal circumcision is painful and recommend local anesthetic for the procedure. Performing this extremely painful procedure without anesthetic has allowed researchers to study the parameters of extreme pain in experiments that would not have been allowed on laboratory animals.

"Using routine, unanesthetized circumcision as a model of stress, Porter et al. were able to examine the relation between cry acoustics and vagal tone in 49 (32 experimental; 17 control) 1 to 2-day-old, full-term normal, healthy newborns during the preoperative, surgical, and postoperative periods. Vagal tone was significantly reduced during the severe stress of circumcision. These reductions were paralleled by significant increases in the pitch of the infants' cries. In addition, individual differences in vagal tone measured prior to circumcision surgery were predictive of the physiological and acoustic reactivity to subsequent stress.<sup>12</sup>

"Two studies by Marchette's group looked at non-medical nursing interventions to alleviate the pain associated with circumcision. In the first, neonates were randomly assigned to one of three intervention groups: 18 infants received routine care, 15 infants had music played, and 15 infants had a tape of intrauterine sounds played. During circumcision, monitors measured cardiac rate, rhythm, blood pressure, and transcutaneous oxygen. Pain was measured by analysis of videotaped facial expressions. The mean heart rate was above normal limits during all steps of the circumcision for the control group and during some of the steps for the other two groups. Analysis of the facial expressions showed that all three groups expressed pain much more than any other emotion during the procedure. Unfortunately, the two interventions were unable to offset the effects of circumcision pain.<sup>13</sup>

"The second study assessed the effectiveness of some non-invasive pain reduction interventions in 121 neonates undergoing unanesthetized circumcision. Subjects were randomly assigned to one of six groups: classical music, intrauterine sounds, pacifier, music and pacifier, intrauterine sounds and pacifier, or no interventions used while heart rate, rhythm,

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Weiss GN. *Local anesthesia for neonatal circumcision* [letter] JAMA 1988; 260: 637-8.

<sup>12</sup> Porter FL, Porges SW, Marshall RE. *Newborn pain cries and vagal tone: parallel changes in response to circumcision*. Child Dev 1988; 59: 495-505.

<sup>13</sup> Marchette L, Main R, Redick E. *Pain reduction during neonatal circumcision*. Pediatr Nurs 1989; 15: 207-8, 210.

dysrhythmias, blood pressure, transcutaneous oxygen, rate pressure product, and behavioral state were measured during 14 circumcision steps. Over the 14 steps, 42% of the heart rates, 78% of the systolic blood pressures, 30% of the diastolic blood pressures, and 81% of the transcutaneous pO<sub>2</sub> pressures were abnormal. Again, few significant differences were found among any of the steps.<sup>14</sup>

## **2.2 Risks:**

Circumcision is a procedure which carries risks which have been described as high as some 50%; of course, if the inevitable diminution of sexual function is counted as a complication (as would seem to be wholly sensible a course), then the complication rate is 100%. It is far from easy to obtain definitive figures for the rate of complications as conventionally defined.

When the United Kingdom medical profession and the NHS decided to abolish routine circumcision after the publication of Gairdner's landmark paper in 1949 [op. cit. at n 78], one of the reasons cited was the high death rate: this ranged from 10-19 per annum nationally in circumcised boys under 5 years of age in a country that did not perform wholesale circumcision (e.g. during the same period as these death rate figures, one representative city had a circumcision rate of only 5.8%). Because most of the deaths following circumcision result from conditions secondary to the surgery (e.g. infection or hæmorrhage) the records kept have usually shown the actual mortal condition rather than the primary medical event that induced it. So it is not surprising that a number of reviews of the procedure have remarked on the difficulty in obtaining realistic mortality rates.

As Gellis<sup>15</sup> has more recently observed: "It is an incontestable fact at this point that there are more deaths each year from complications of circumcision than from cancer of the penis".

"Most practising pædiatricians have seen unfortunate consequences from the operation of circumcision, and seen or personally heard of death directly resulting from it.": Illingworth.<sup>16</sup>

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<sup>14</sup> Marchette L, Main R, Redick E, Bagg A, Leatherland J. Pain reduction interventions during neonatal circumcision. *Nurs Res* 1991; 40: 241-4.

<sup>15</sup> Gellis S S, Circumcision, *American Journal of Diseases of Childhood* 132: 1168, 1978.

<sup>16</sup> R.S. Illingworth, *The Normal Child: Some Problems of the Early Years and Their Treatment*, 8th ed., Churchill Livingstone, Edinburgh, 1983, p 98.

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The Journal of Urology (Baltimore) puts the figure for the risk of complications at 1.5% to 15%.<sup>17</sup>

Williams and Kapila<sup>18</sup> offer a 'realistic figure of 2% to 10%'. However, they also comment that the incidence of meatal ulceration following circumcision is from 8% to 20% which would seem to suggest that their rate of complications is on the low side. They write: "Meatal stenosis is generally a direct consequence of circumcision that is seldom encountered in uncircumcised men; meatal calibre is known to be greater in uncircumcised individuals. The incidence of meatal ulceration is from 8 to 20 per cent....Meatal stenosis following circumcision has been advanced as a cause of recurrent pyelonephritis and obstructive uropathy, for which meatotomy is curative."<sup>19</sup>

Patel reported a rate of 24% of serious complications<sup>20</sup>.

Apart from the problems of differing and varying diagnostic criteria employed, there are indications that complications and mishaps are being misreported or not reported at all. The Editorial comment<sup>21</sup> in 1996 British Journal of Urology, commenting on a case report by Neulander and others, which describes an amputation of the distal penile glands following ritual circumcision as a 'rare complication', observes: "The authors report what they describe as a rare complication....Fistula formation, lymphoedema and iatrogenic hypospadias have all been reported. Most amputations are almost certainly not reported. I have seen half a penis amputated in a 4-year-old boy during a ritual Muslim circumcision. The penis was left by the General Practitioner surgeon in the waste-paper basket of his surgery".

Dr Van Howe<sup>22</sup> summarises the following complications as having been reported in the medical literature: acute obstructive uropathy<sup>23</sup> and acute renal failure,<sup>24</sup> penile

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<sup>17</sup> Vol 153, No 3 part 1, pages 778-779

<sup>18</sup> Williams and Kapila, Complications of Circumcision. Br. J. Surg 1993, Vol 80, Oct, 1231-1236

<sup>19</sup> Williams and Kapila: op. cit. at note 13 at p 1233

<sup>20</sup> H. Patel, The problem of routine circumcision, Canadian Medical Association Journal 95: 576-81, 1966].

See also: G.W. Kaplan, Circumcision, an overview, Current Problems in Pediatrics 7: 1-33, 1977

<sup>21</sup> 1996 British Journal of Urology, **77**, page 925

<sup>22</sup> Private communication, op.cit. at n3

<sup>23</sup> Craig JC, Grigor WG, Knight JF. Acute obstructive uropathy--a rare complication of circumcision. Eur J Pediatr 1994; 153: 369-71.

<sup>24</sup> Eason JD, McDonnell M, Clark G. Male ritual circumcision resulting in acute renal failure. Br Med J 1994; 309: 660-1.

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ischemia,<sup>25</sup> [390] necrosis,<sup>26</sup> buried penis,<sup>27</sup> penile and glans amputation,<sup>28</sup> iatrogenic hypospadias,<sup>29</sup> severe

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<sup>25</sup> Smith DJ, Hamdy FC, Chapple CR. An uncommon complication of circumcision. *Br J Urol* 1994; 73: 459-60.

<sup>26</sup> Stefan H. Reconstruction of the penis after necrosis due to circumcision burn. *Eur J Pediatr Surg* 1994; 4: 40-3.

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<sup>27</sup>Bergeson PS, Hopkin RJ, Bailey RB Jr, McGill LC, Piatt JP. The inconspicuous penis. *Pediatrics* 1993; 92: 794-9.

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<sup>28</sup> Yilmaz AF, Sarikaya S, Yildiz S, Buyukalpelli R. Rare complication of circumcision: penile amputation and reattachment. *Eur Urol* 1993; 23: 423-4.

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hemorrhage,<sup>30</sup> total denudation of the penis,<sup>31</sup> infections including *Staphylococcus aureus*,<sup>32</sup> *Escherichia coli*,<sup>33</sup> meningitis,<sup>34</sup> staphylococcal scalded skin syndrome,<sup>35</sup> Group B b-hemolytic *Streptococcus sepsis*,<sup>36</sup> erysipelas,<sup>37</sup>

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<sup>33</sup> Procopis PG, Kewley GD. Complication of circumcision. *Med J Aust* 1982; 1: 15.

<sup>34</sup> Menahem S. Complications arising from ritual circumcision: pathogenesis and possible prevention. *Isr J Med Sci* 1981; 17: 45-8.

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impetigo,<sup>38</sup> neonatal septicemia,<sup>39</sup> tuberculosis,<sup>40</sup> scrotal abscess,<sup>41</sup> death,<sup>42</sup> meatal stenosis,<sup>43</sup> abdominal distention,<sup>44</sup> adhesions and preputial skin-bridging,<sup>45</sup> penile tourniquet syndrome,<sup>46</sup> methemoglobinemia,<sup>47</sup> gangrene of the penis<sup>48</sup> and scrotum (Fournier's syndrome),<sup>49</sup> pneumothorax,<sup>50</sup> Plastibell retention,<sup>51</sup> urethral fistula,<sup>52</sup> meatal ulceration,<sup>53</sup> keloid formation,<sup>54</sup>

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<sup>41</sup> Uwyed K, Korman SH, Bar Oz B, Vromen A. Scrotal abscess with bacteremia caused by Salmonella group D after ritual circumcision. *Pediatr Infect Dis J* 1990; 9: 65-6.

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<sup>51</sup> Owen ER, Kitson JL. Plastibell circumcision. *Br J Clin Pract* 1990; 44: 661.

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ruptured bladder,<sup>55</sup> gastric rupture,<sup>56</sup> urethral strictures and stenosis,<sup>57</sup> [472] tachycardia and heart failure,<sup>58</sup> myocardial injury,<sup>59</sup> acute urinary retention,<sup>60</sup> iatrogenic burns,<sup>61</sup> pulmonary embolism,<sup>62</sup> impotence (in adult men),<sup>63</sup> chilling,<sup>64</sup> phimosis,<sup>65</sup> unilateral leg cyanosis,<sup>66</sup> and cosmetic result not achieved and re-circumcision requested.<sup>67</sup>

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<sup>54</sup> Warwick DJ, Dickson WA. Keloid of the penis after circumcision. *Postgrad Med J* 1993; 69: 236-7.

<sup>55</sup> Jee LD, Millar AJ. Ruptured bladder following circumcision using the Plastibell device. *Br J Urol* 1990; 65: 216-7.

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<sup>57</sup> Frank, **op cit**

<sup>58</sup> Mor A, Eshel G, Aladjem M, Mundel G. Tachycardia and heart failure after ritual circumcision. *Arch Dis Child* 1987; 62: 80-1.

<sup>59</sup> Ruff ML, Clarke TA, Harris JP, Bartels EK, Rosenzweig M. Myocardial injury following immediate postnatal circumcision. *Am J Obstet Gynecol* 1982; 144: 850-1.

<sup>60</sup> Ochsner MG. Acute urinary retention: causes and treatment. *Postgrad Med* 1982; 71: 221-6.

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Eason *et al.*, Male Ritual Circumcision resulting in Acute Renal Failure; *BMJ*, 1994; 309: 660-1

<sup>61</sup> Pearlman CK. Caution advised on electrocautery circumcisions [letter] *Urology* 1982; 19: 453.

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<sup>62</sup> Curtis JE. Circumcision complicated by pulmonary embolism. *Nurs Mirror Midwives J* 1971; 132: 28-30. 480.

<sup>63</sup> Stinson JM. Impotence and adult circumcision. *J Natl Med Assoc* 1973; 65: 161.

Palmer JM, Link D. Impotence following anesthesia for elective circumcision. *JAMA* 1979; 241: 2635-6.

<sup>64</sup> Spence GR. Chilling of newborn infants: its relation to circumcision immediately following birth. *South Med J* 1970; 63: 309-11.

<sup>65</sup> Redman JF, Scriber LJ, Bissada NK. Postcircumcision phimosis and its management. *Clin Pediatr Phila* 1975; 14: 407-9.

Kaweblum YA, Press S, Kogan L, Levine M, Kaweblum M. Circumcision using the Mogen clamp. *Clin Pediatr Phila* 1984; 23: 679-82.

<sup>66</sup> Arnon R, Zecharia A, Mimouni M, Merlob P. Unilateral leg cyanosis: an unusual complication of circumcision [letter] *Eur J Pediatr* 1992; 151: 716.

<sup>67</sup> Breuer GS, Walfisch S. Circumcision complications and indications for ritual recircumcision--clinical experience and review of the literature. *Isr J Med Sci* 1987; 23: 252-6.



### 2.3 Dysfunction:

The victim (to use the Commission's own word, which here seems wholly apposite) will suffer from inevitable deficits, viz:

(a) removal of the prepuce removes specialised tissue and nerves designed for sexual pleasure. Taylor *et al.* <sup>68</sup> write: "clearly, the penis is a complex organ with many different parts, each specialized for a specific role. The prepuce provides a large and important platform for several nerves and nerve endings. The innervation of the outer skin of the prepuce is impressive <sup>69</sup>; its sensitivity to light touch and pain are similar to that of the skin of the penis as a whole. The glans, by contrast, is insensitive to light touch, heat, cold <sup>70</sup> and, as far as the authors are aware, to pin-prick. Le Gros Clark <sup>71</sup> noted that the glans penis is one of the few areas on the body that enjoys nothing beyond primitive sensory modalities."

This insensitivity elicited the comment<sup>72</sup> "that the glans penis has been documented to have unusually **low** (emphasis added) sensitivity (high threshold) to mechanical stimulation. Von Frey<sup>73</sup> found that the only the portion of human skin less sensitive to mechanical stimulation was a callus on the sole of the foot.

(b) the loss of some one-third (or an area in the adult of some 15 square inches) of penile skin, removes the skin within which the penis should move during intercourse and masturbation, producing a feeling of 'tightness' during an erection.

"Like many boys of my generation in Britain, I was circumcised in infancy by a doctor. I grew up knowing

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Redman JF. Circumcision revision in prepubertal boys: analysis of a 2-year experience and description of a technique. *J Urol* 1995; 153: 180-2.

<sup>68</sup> R.Taylor, A.P.Lockwood and A.J.Taylor: The prepuce: specialized mucosa of the penis and its loss to circumcision. *Br. J. Urol* (1996) **77**, 291-295.

<sup>69</sup> Modwing R, Valderrama E. Immunohistochemical analysis of nerve distribution patterns within preputial tissues. *J Urol* 1989: 141 (Suppl I): 489A (Abstract)

<sup>70</sup> Dym M. The male reproductive system. In Weiss L ed.. *Histology: Cell And Tissue Biology*.

5th edn. New York :Elsevier Biomedical. 1983: 1051

<sup>71</sup> Le Gros Clark WE. *The Tissues of the Body* 5th edn. Oxford:Clarendon Press. 1965: 329

<sup>72</sup> Halata and Munger *The neuroanatomical Basis for the protopathic sensitivity of the Human Glans Penis*. *Brain Research* (Amsterdam) Vol 371, No2, pp 205-230 and the references there cited.

<sup>73</sup>Frey, Von M, Beitrage zuer Physiologie des Schmerzsinnns. *Zweite Mitt, Akad. Wiss. Leipzig Math-Naturweiss Kl Ber*, 46 (1984) 283-296

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that something had been removed from my penis as my older brother was intact, but was told that this did not matter. The glans was always uncomfortable when rubbed by clothing throughout childhood and on into adult life, so that I always looked for tight supportive underwear to minimise friction. The discomfort was poorly localised, and it is only recently that I have realised that my intolerance of boxer shorts was the direct result of circumcision.

"The shaft skin was very tight during erection, though I never thought of this as abnormal as I had nothing to compare with. Masturbation was often accompanied by laceration of the skin, so that I learnt to masturbate wearing a condom. I married 25 years ago and at first there were problems of dyspareunia from time to time which we attributed to vaginal dryness, as I considered myself normal. We overcame this by use of artificial lubricants. As time went on we explored ways of maximising our sexual enjoyment. I observed that there was remarkably little sensitivity in the glans, the skin of which seemed to thicken with advancing years. I remarked on this to my wife, who thought it strange. It was when I observed that the most sensitive part of my penis was the skin between the circumcision scar and the glans, that I began to realise for the first time how much I had been harmed by circumcision. This skin was the remnant of the inner lining of the foreskin, the remainder of which had of course been amputated. I assumed there was nothing whatever to be done about this tragedy, and I resolved to make the most of what was left"<sup>74</sup>.

All too often, however, considerably more skin than that is removed; and losses of 60%+ of the total penile skin are far from uncommon.

(c) the glans is exposed to daily assaults and trauma from infections, urine and faeces in the nappies and to life-long abrasion from clothing; and becomes dry, wrinkled and covered with a layer of keratin (or, as some have described it, becomes 'cornified') and insensitive and able to tolerate touch which an intact man cannot. As such it is wholly unlike the glans of an intact man whose glans is smooth, glistening and sensitive to touch. Warren and Bigelow<sup>75</sup> write: "Bigelow [the Joy of Uncircumcising<sup>76</sup>] reports that the prepuce has four functions. Firstly, it is itself sensitive due to the nerve endings on its inner surface, which become exposed during sexual arousal. Secondly, it protects the glans. The protected glans remains

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<sup>74</sup> Warren, Personal View, in BMJ 1994 No 6955 Vol 309, p676

<sup>75</sup> Warren J, Bigelow J. The Case Against Circumcision, Br J Sex Med. Sept/Oct 1994:6-8

<sup>76</sup> Bigelow, Hourglass Book Publishing, Aptos CA 95001, USA

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soft, moist and sensitive throughout life, but the exposed glans of the circumcised male becomes increasingly thickened and desensitised. Were this not so it would be impossible for a circumcised man to tolerate the abrasion of clothing on the exposed glans. Thirdly, the mobile sheath of skin on the intact penis allows the prepuce to slide back and forth over the glans during foreplay and intercourse. Ritter calls this action 'the pleasure dynamic'. Fourthly, it provides slack skin on the shaft of the erect penis allowing it to glide within its own sheath of skin during intercourse. This provides for more enjoyable intercourse for both partners and avoids problems with vaginal dryness".

Others too have earlier described the prepuce as one of the most sensitive parts of the penis and its potential for enhancing sensation during sexual intercourse; and the development on the exposed glans of dermal layers up to 12 times the skin thickness, which has been described as the formation of a cornified layer—an additional outer covering of compressed dead cells which as a result of this 'scarification' process may render the penis less sensitive.<sup>77</sup>

All too often, one hears supporters of circumcision claiming that they have not been harmed, that their sexual life is unimpaired and, even, that they 'could not cope with any more sensitivity'. No one would claim that circumcision renders the man incapable of procreation. Rather the analogy is of a person blinded

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<sup>77</sup> Little, *Circumcision: pros and cons* Modern Medicine 1992, 37; Sorrells, *Still more Criticism* Paediatrics Vol 56 1979, 339; Black, *Circumcision Patient Management* 1992, 70.

See also: Winkelman RK The mucocutaneous end-organ: the primary organized sensory ending in human skin. *AMA Arch Dermatol* 1957, 76: 225-35;

Winkelman RK *Nerve Endings In Normal and Pathologic Skin* Springfield, Ill: CC Thomas. 1960. The prepuce is specially designed to protect the glans from infection and to preserve its sensitivity.

Jefferson G. The Peripenic muscle, Some observations on anatomy of phimosis, *Surgery, Gynecology and Obstetrics* 1916, 23: 177-181;

Lakshmanan S, Prakash S Human Prepuce - Some Aspects of Structure and function *Indian Journal of Surgery* 1980, 42: 134-137;

Woolsey G *Applied Surgical Anatomy* New York: Lea Brothers 1902. 405-407;

Halata Z, Munger BL. The neuroanatomical basis for the protopathic sensibility of the human glans penis. *Brain Research* 1986, 371: 205-230.

Prakash S, Rao R, Venkatesan K, Ramakrishnan S. Sub-preputial wetness - its nature. *Ann Natl Med Sci (India)* 1982; 18: 109-112. The negative impact circumcision has on sexual enjoyment is well established.

Money J, Davison J. Adult penile circumcision: erotosexual and cosmetic sequelae, *The Journal of Sex Research* 1983; 19. 289-292.

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at birth in one eye: he can still see and in most respects lead, with his remaining vision, a useful and functional life; but what he cannot know, and can never experience, is the function and quality of life with binocular vision ---- those of us with full vision can only feel pity, and sorrow, for his loss even whilst we might commend his ability to cope with his disability. Further, that some circumcised men, being unaware of the diminution of sexual pleasure which they have suffered, are content with the what remains of their sexual pleasure is neither convincing as to there being no losses, nor an argument for imposing those on another.

Douglas Gairdner,<sup>78</sup> wrote of the function of the prepuce:

"It is often stated that the prepuce is a vestigial structure devoid of function. However, it seems to be no accident that during the years when the child is incontinent the glans is completely clothed by the prepuce, for, deprived of this protection, the glans becomes susceptible to injury from contact with sodden clothes or napkin. Meatal ulcer is almost confined to circumcised male infants, and is only occasionally seen in the uncircumcised child when the prepuce happens to be unusually lax and the glans consequently exposed (Freud, 1947).

"There remain a number of more or less trivial factors which are sometimes mentioned as reasons why infant circumcision is desirable: difficulties in keeping the uncircumcised parts clean, or the supposed aesthetic or erotic superiority of the shorn member. In order to fulfil the intention of this paper an inquiry on these points should have been made amongst a group of uncircumcised men. This was not attempted, although with regard to the last two of the factors mentioned it should be stated that whenever the subject has been broached in male company those still in possession of their foreskin have been forward in their insistence that any differences which may exist in such matters operate emphatically to their own advantage.

"Moreover, if there were sensible disadvantages in being uncircumcised, one would expect that the fathers of candidates for circumcision would sometimes register their feelings in the matter. Yet in interviewing the parents of several hundred infants referred for circumcision I have met but one father who wished his son circumcised because of his disagreeable experience of the uncircumcised state. The rest of the fathers were equally indifferent about the matter whether they themselves had been circumcised or not. Indeed, so

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<sup>78</sup> The Fate Of The Foreskin, A Study Of Circumcision British Medical Journal, Dec. 24, 1949, Volume 2, 1433-1437

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little did the father's personal experience seem important that one-quarter of the mothers did not even know whether their husbands were or were not circumcised. These facts provide some evidence that few uncircumcised men have cause to regret their state.

See also, for another earlier view, The Widdicombe File<sup>79</sup>: "The glans belongs to the group of special sense organs. It is almost insensitive to light touch, has no appreciation of heat and cold, and interprets painful stimuli (such as a pinprick) only as a vaguely unpleasant contact; . . . . The preservation, undulled and undiminished, of this special sense [that the glans can receive some sexual sensations], and the guarding of the mucous membrane in which it resides from constant exposure and a dulling of its sensibility, is of paramount importance . . . . A second less important function is in the act of coitus itself. The erect uncircumcised penis enters the vagina without effort or at any rate without friction, the prepuce unfolding as the penis advances and each part of it remaining in contact with successive areas of the vaginal walls, till finally the uncovered glans lies at the cervix. The circumcised penis, deprived of this self-tracking mechanism, is introduced to the accompaniment of friction between penile skin and vaginal mucous membrane. it is the difference between slipping the foot into a sock that has been rolled up and one that is held open by the top. The human foreskin, then, is neither vestigial nor useless. It is part of the normal mechanism of reproduction, and without it sexual desire is to some extent blunted, and the performance of the sexual act -- at any rate the first act of coitus between the virgin male and the virgin female --- made more difficult. . . . . Apart from those evil results which are due to imperfect workmanship, there are the fairly common minor troubles that follow because a stupid and unnecessary operation has been done, a normal mechanism has been destroyed, and a delicate surface has been exposed to the air and to friction 4 or 5 years before it should be exposed. Eczema of the glans and meatus is not rare in the newly circumcised infant; it needs careful treatment with ointment and sometimes leads to scarring and narrowing of the meatus. These are the facts. . . . . the medicine of the jungle and the witch-doctor, the teaching of the Bible and the Koran, the traditional science of the midwife, the health visitor, and the Home Medical Dictionary, are all against us . Nonetheless, let us keep our own sanity. When we meet those who advocate this mutilation, let us ask them why they do it and again why: they have seldom asked themselves. When we meet a young mother whose mind is her own and not someone else's gramophone

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<sup>79</sup> The Widdicombe File, Lancet August 15, 1953, 337

record, let us ask her if she thinks it likely that Nature would bring 1000 English children into the world every day, well formed in all respects except this one; if it is not more likely that Nature is right and the folk-medicine that tries to improve on her is wrong.....let us not commit the sin against the Holy Ghost by concealing from ourselves that it is foolish... Daniel Whiddon”.

### **3. Claimed Benefits**

Even discounting the ‘anti-masturbatory’ reason, discussed below, for circumcision (and the so-called hygiene grounds, which for the Victorians carried the message of moral cleanliness) and which became disproved by circumcised boys who still masturbated, the claims for benefits for circumcision other than as a religious or ritual observance are as myriad as they are discredited. Thus, for example, the claim of hygiene in the sense that the word is understood to-day as referring to bodily cleanliness and cited by the Commission, is disproved even by the pro-circumcision biased Task Force on circumcision of the American Academy of Pediatrics in 1989<sup>80</sup>. The claims of a reduction, or even hints of the elimination, of cancers of the cervix and penis (a disease of a tiny number of elderly men) have been discredited.

In view of the continuation, despite clear refutation in the medical literature, as to these claims, it is worth quoting from a letter to Dr Peter Rappo, of the American Academy of Pediatrics, dated 16 Feb 1996 and from Drs Hugh Singleton and Clark Heath, the National Vice President and Vice President, of the American Cancer Society:

“...we would like to discourage the American Academy of Pediatrics from promoting routine circumcision as a preventative measure for penile and cervical cancer. Research suggesting a pattern in the circumcision status of partners of women with cervical cancer is methodologically flawed, outdated, and has not been taken seriously in the medical community for decades. Penile cancer rates in countries which do not practice circumcision are lower than those found in the United States. Fatalities caused by circumcision accidents may approximate the mortality rate from penile cancer.”

Now, perhaps a measure of the desperation of circumcision’s supporters to find a reason to continue, it is suggested as a preventive against UTIs, AIDS and

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<sup>80</sup> Report of the Task Force on Circumcision; Pediatrics Vol 84 No4 Aug 1989.

other sexually transmitted diseases (on the basis, according to some US doctors<sup>81</sup>, that the keratinised layer on the glans acted as a form of condom!). If that were indeed so then one would not expect to find rates of HIV infection in the USA, a mainly circumcised population, some 8 times that of Britain and the rest of mainly uncircumcised Europe, and on a level with Sub-Saharan Africa<sup>82</sup>. What is now clear, and is accepted even by the American Academy of Pediatrics (op.cit. at n 80), is that soap and water and safe sexual practices are the sources of the benefits hitherto tenuously ascribed to circumcision.

It is unnecessary here, given that the Commission do not offer it as a reason for proposing that ritual circumcision be regularised and given that the medical consensus in Britain is that there are no real benefits to routine neonatal circumcision, to refute those claims in detail; those who require further detail are directed to the work of Dr R Van Howe, attached, (op.cit.at note 3) and to the paper by Williams and Kapila (op.cit. at note 14) and the papers there cited.

#### **4. The sacrificial origin of circumcision**

Initiation rites, usually involving the infliction of pain and the scarifying of the body, or the deformation of body parts or the excision of flesh were, and remain, not uncommon in primitive societies. It would not be unreasonable to see them as a mark, and a test, both of the victim's ability to withstand pain (and thus prove himself as a staunch warrior) and/or as a method whereby the tribe asserted itself and its powers over the individual. It is inappropriate here to examine in detail the motivation for such practices; but it is wholly appropriate to bear the nature and history of such mutilations in mind when considering the legality of circumcision, especially in the last years of the 20<sup>th</sup> century.

J. Henry C. Simes<sup>83</sup> wrote in 1890: "The mutilation of the genitals among the various savage tribes of the world presents a strange and unaccountable practice of human ideas, which one is not able to reconcile with any reasoning power. Why such customs should be in vogue none can tell at the present time; but we must suppose that at some period they had their significance, which

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<sup>81</sup> Fink AJ: *Newborn circumcision: a strategy for AIDS Prevention*: Journal of the Royal Society of Medicine, Vol 82, Nov 1989, 695 (letter)

<sup>82</sup> World Health Organisation: *The Current Global Situation of the HIV/AIDS Pandemic*; 3 June 1995

<sup>83</sup> J. Henry C. Simes: "Circumcision" (1890), p. 375

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in the course of ages has been lost, and the practice has been handed down from generation to generation."

Warren and Bigelow write <sup>84</sup> today: "The origins of circumcision are lost in antiquity. Male circumcision is depicted in Egyptian tombs 5,000 years ago, while Gairdner (op. cit. at n 78) refers to evidence that it has its origins long before this in prehistory up to 15,000 years ago.

"We do not know with certainty why this procedure was carried out, but many writers have suggested that it was a sacrificial rite. No doubt human sacrifice was widespread, and it seems likely that substitutes for this practice included the sacrifice of domestic animals and mutilations of the human body, of which circumcision is just one example. Circumcision would usually have been carried out as an initiation ordeal at about the time of puberty, but there was a tendency for the age at which it was performed to shift earlier, so that Jewish ritual circumcision has been carried out on the eighth day of life since biblical times.

"Ritual circumcision is particularly popular and widespread geographically. An important aspect of sacrifice is the shedding of blood, and circumcision is a notoriously bloody operation, and even in modern surgical conditions haemorrhage can be a problem. A rate of up to 2% is reported by Denton <sup>85</sup>, sometimes requiring blood transfusion. Gellis <sup>86</sup> reported that there were more deaths in the USA from the complications of circumcision than from carcinoma of the penis. One can only guess what the mortality from haemorrhage and infections might be in primitive or ancient communities.

"Another aspect of sacrifice is that the object which is forfeited should be valuable. The greater the value of the object sacrificed, the more worthy the sacrifice. This should make us wonder what are the value and function of the prepuce. If it were just a useless flap of skin, it would not be much of a sacrifice, and one might just as well shave off one's beard or cut one's toenails. The prepuce plays a major role in ensuring the sensitivity of the penis during sexual acts and circumcision greatly reduces the possibilities of pleasurable sensations. This makes it an ideal sacrificial object, as the circumcised male is able to function normally in society and to procreate, but suffers permanent impairment of sexual enjoyment and bears a visible, life-long reminder of his sacrifice."

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<sup>84</sup> Op. cit. at n

<sup>85</sup> Denton J, Schreiner RL, Pearson J. Circumcision Complication. Clin Pediatr (Phila) 1978;17: 285-6.

<sup>86</sup> Gellis SS. Circumcision. Am J Dis Child 1978; 132: 1168-9.



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According to Philo circumcision was for "the excision of passions, which bind the mind. For since among all passions that of intercourse between man and woman is the greatest, the lawgivers have commended [sic] that the instrument, which serves this intercourse be mutilated, pointing out, that these powerful passions must be bridled, and thinking not only this, but all passions would be controlled through this one".

Indeed, after the passage in Genesis Chapter 17 as to circumcision, there is then the passage in Genesis Chapter 22 of the sacrifice demanded by God, even though then stayed, of Isaac; the connection between these two requests, and the value of that which was required to be sacrificed, is clear.

David L. Gollaher comments:<sup>87</sup>:

"The mutilation of the genitals among the various savage tribes of the world presents a strange and unaccountable practice of human ideas, which one is not able to reconcile with any reasoning power. Why such customs should be in vogue none can tell at the present time; but we must suppose that at some period they had their significance, which in the course of ages has been lost, and the practice has been handed down from generation to generation. J. Henry C. Simes, "Circumcision" (1890), p. 375.

Hosken <sup>88</sup> writes:

"Some anthropologists also speculate how or if the tradition of male circumcision, the removal of the prepuce, is related to the cutting off the entire penis which was offered as a sacrifice to the gods.....Circumcision of both boys and girls came into fashion long before Islam, and was practised in many different areas in Africa..... The Copts in Egypt and the Abyssians (Ethiopians) have practised circumcision of boys and girls (at a much younger age than the typical puberty rites of Sub-Saharan Africans) from pre-historic times.....It is stated that both the Jews and the Arabs learned circumcision in Egypt, rather than vice versa. The rule in the Middle East, as well as in Sub-Saharan Africa, is that a boy cannot get married unless he is .... circumcised..... excision [in females] ... is practised to affirm the sex of the individual because it is believed that the clitoris represents a male element in a female, and that the

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<sup>87</sup> From *Ritual To Science: The Medical Transformation Of Circumcision In America*; *Journal of Social History* Volume 28 Number 1, p. 5 - 36 Fall 1994

<sup>88</sup> *The Hosken Report: Genital and Sexual Mutilation of Females*

prepuce of the penis represents femininity in a boy. Hence, the girls are excised and the boys circumcised in order to establish their sex in society."

## **5. Jewish circumcision**

In Genesis Chapter 17, verses 10 to 14, God is said to have commanded Abraham to circumcise himself and all males in his household as a sign of the covenant between him and God. In Leviticus Chapter 12 verse 3, it is written: "And in the eighth day the flesh of his foreskin shall be circumcised." See also I Sam 18:25 for another, undeniably primitive, reason for circumcision, quoted by Szasz<sup>89</sup>.

Szasz also (op.cit.) observes: "The roots of both RNC ['Routine Neonatal Circumcision'] and anti-masturbatory measures lie in Jewish law, which recognises the legitimacy of erotic pleasure associated with sexual intercourse, provided that the act is marital-genital congress between a Jewish man and a Jewish woman. Every other sexual act is strictly prohibited. Masturbation is condemned unequivocally both in the Talmud and in extra-Talmudic literature. The *Zohar* (an authoritative commentary on the Pentateuch) calls masturbation 'a sin more serious than all the sins of the Torah' (Feldman D M: 1968: *Birth Control in Jewish Law: Marital Relations, Contraception, and Abortion as Set Forth in the Classical Texts of Jewish Law* p114) ..... Recognising the obvious connections between touching the penis and sexual arousal, Jewish law 'definitely prohibits touching one's genitals --the unmarried man never, and the married man only in connection with urination' (Epstein L M: 1967 *Sex Laws and Customs in Judaism* p137) When an Orthodox Jewish father bladder trains his son, he admonishes him: 'Without hands! Better a bad aim than a bad habit.'"

The form of the circumcision originally practised by Jews was a much less invasive procedure than the Bris (or Brit) Milah of to-day, which (in its radical excision of the penile skin) is the form also adopted by circumcisions performed by doctors: only the very tip of the prepuce was removed, thus preserving the frenulum and most of the prepuce with its nerves and its coverage of much of the glans; indeed it seems possible that in some instances only a token 'cut' or drawing of blood was deemed necessary. With such 'minor' excision it was not difficult for a man circumcised in this way to pull

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<sup>89</sup> Quoted by Szasz *Routine circumcision: Symbol of the Birth of the Therapeutic State* Journal of Medicine and Philosophy 21:137-148, 1996

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and retain the remnants of his prepuce over the glans so as to appear to be uncircumcised. Since the ancient Greeks (who were naked for sporting activities and exercise) found the sight of the uncovered glans to be offensive and obscene during exercise, Jews who wanted to take part in sports with uncircumcised Greeks adopted this method of 'un-circumcision'; and this method could be used in any situation where the Jewish man wished to conceal the physical mark of his Jewishness. It is a method adopted by Jews whenever they have wished to conceal their Jewishness, as for example during the Holocaust; and broadly speaking it is the foundation of the non-surgical method of foreskin restoration described by Bigelow in his book, *The Joy of Uncircumcising* (op. cit.). The need for many men today, some of whom are circumcised Jews, to follow the lengthy and often uncomfortable technique to restore just a tiny bit of the function of the foreskin lost in circumcision is evidence of their realisation of the damage caused by their circumcision.

In or about 140 C.E, the more radical form of circumcision, the pariah (or periah) was introduced: its radical tearing off the lining of the prepuce of the glans and, with a sharpened fingernail or thumbnail, the removal of all the mucous tissue that comprises the inner lining of the prepuce and amputation of the whole prepuce made it impossible for a man thus circumcised to re-cover his glans, since there was insufficient penile skin left. It is this form which has been used since then by Jews and is the model for the modern non-ritual circumcision which also involves radical amputation after the forcible breaking-down of the synechia between prepuce and glans penis.

The loss of sexual pleasure of the circumcised man and the measure of the sacrifice imposed on the ritually circumcised boy has been well-known for many centuries (albeit that the recent trend is for circumcisers to feel impelled to deny that loss in order to defend their behaviour).

Thus, Moses Maimonides (1135-1204 AD.), a noted Jewish rabbi, sage and doctor of his time, wrote <sup>90</sup>

"As regards circumcision, I think that one of its objects is to limit sexual intercourse, and to weaken the organ of generation as far as possible, and thus cause man to be moderate. Some people believe that circumcision is to remove a defect in man's formation; but every one can easily reply: How can products of nature be deficient so as to require external

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<sup>90</sup> *The Guide for the Perplexed* [translated by M. Friedlander, Dover Publications, 1956].

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completion, especially as the use of the fore-skin to that organ is evident? This commandment has not been enjoined as a complement to a deficient physical creation, but as a means for perfecting man's moral shortcomings. The bodily injury caused to that organ is exactly that which is desired; it does not interrupt any vital function, nor does it destroy the power of generation. Circumcision simply counteracts excessive lust; for there is no doubt that circumcision weakens the power of sexual excitement, and sometimes lessens the natural enjoyment; the organ necessarily becomes weak when it loses blood and is deprived of its covering from the beginning. Our Sages (Beresh. Rabba, c. 80) say distinctly: It is hard for a woman, with whom an uncircumcised had sexual intercourse, to separate from him. This is, as I believe, the best reason for the commandment concerning circumcision. And who was the first to perform this commandment? Abraham, our father! of whom it is well known how he feared sin; it is described by our Sages in reference to the words, "Behold, now I know that thou art a fair woman to look upon" (Gen. xii.II)....."This law can only be kept and perpetuated in its perfection, if circumcision is performed when the child is very young, and this for three good reasons. First, if the operation were postponed till the boy had grown up, he would perhaps not submit to it. Secondly, the young child has not much pain, because the skin is tender, and the imagination weak; for grown-up persons are in dread and fear of things which they imagine as coming, some time before these actually occur. Thirdly, when a child is very young, the parents do not think much of him; because the image of the child, that leads the parents to love him, has not yet taken a firm root in their minds. That image becomes stronger by the continual sight; it grows with the development of the child, and later on the image begins again to decrease and to vanish. The parents' love for a new-born child is not as great as it is when the child is one year old. The feeling and love of the father for the child would have led him to neglect the law if he were allowed to wait two or three years, whilst shortly after birth the image is very weak in the mind of the parent, especially of the father who is responsible for the execution of this commandment. The circumcision must take place on the eighth day (Lev. xii. 3), because all living beings are after birth, within the first seven days, very weak and exceedingly tender, as if they were still in the womb of their mother; not until the eighth day can they be counted among those that enjoy the light of the world. That this is also the case with beasts may be inferred from the words of Scripture: "Seven days shall it be under the dam" (Lev. xxii. 27), as if it had no vitality before the end of that period. In the same manner man is

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circumcised after the completion of seven days. The period has been fixed, and has not been left to everybody's judgement.

"The precepts of this class include also the lesson that we must not injure in any way the organs of generation in living beings (ibid. xxii. 24). The lesson is based on the principle of "righteous statutes and judgments" (Deut. iv. 8); we must keep in everything the golden mean; we must not be excessive in love, but must not suppress it entirely; for the Law commands, "Be fruitful, and multiply" (Gen. i. 22). The organ is weakened by circumcision, but not destroyed by the operation. The natural faculty is left in full force, but is guarded against excess. It is prohibited for an Israelite "that is wounded in the stones, or hath his privy member cut off" (Deut. xxiii. 2), to marry an Israelitish woman; because the sexual intercourse is of no use and of no purpose; and that marriage would be a source of ruin to her, and to him who would claim her. This is very clear."

By way of contrast, there are Jews for whom the Bris Milah is unacceptable:

"According to Jewish law, it is forbidden to cause tsa'ar ba'alei chaim, or pain of living things. Even the necessary causing of pain is considered cruel in Judaism. Jewish law even prohibits the pairing up of a small and a large animal for plowing in case the assymetry causes the littler one discomfort. Clearly, concern over the pain of others has strong Judaic roots. "What about the concern that circumcision involves the surgical alteration of a perfectly natural God-given part of the body? This concern, too, stems from Jewish thought. Westerners generally find the bodily mutilation practiced in other cultures to be deeply distasteful. This distaste is based on the Hebrew Bible's denouncement of pagan practices such as tattooing and cutting the flesh.

"There is also the risk of serious complications, and even death, from circumcision. No matter how small these risks are, they must be considered. Now, even this concern is an echo of Jewish law. Judaism regards life as infinitely sacred and gives it precedence over all else.

"Accordingly, Jewish law tells us that any medical procedure involving even the possibility of risk to life must be viewed as dangerous and is, therefore, strictly forbidden. Thus, the risk of circumcision is not just a medical concern, but a Jewish one.

"Thousands of Jews today are questioning circumcision. Some are deciding not to circumcise their infant sons. By my estimates, American Rabbis are getting at least

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3,000 calls each year from parents who are in conflict with the rite." Lisa Braver Moss ba<sup>91</sup>.

"Judaism is a tremendously rich pro-survival religion that, through persistent mistreatment and misinformation, is still widely misunderstood. However, the mistakes that it carries within it, such as the ritual of circumcision, called Brit Milah, should not be considered any differently than in society in general, no matter how essentially important to the Jewish culture it is seen. Circumcision is child abuse. It is medically unnecessary. It is nothing short of a traumatic way to introduce a newborn male into the world and into the Jewish community. The centuries of a covenant with God has produced great denial in viewing the very real pain of the newborn. From the start it relegates females as being less important than males as historically there has been no equivalent ceremony to welcome the newborn Jewish female baby.

"Make no mistake about it, young people do not ask for and react sharply to the imposition of adult values on them and their bodies. Expecting nothing short of a complete and exuberant welcome into their world, the pain of the tools used by the Mohel, or the doctor, is a rude shock not readily forgotten by the newborn with an already developed nervous system and a brilliant mind."<sup>92</sup> Moshe Rothenberg.

## **6. Muslim circumcision**

For Muslims, it is by no means clear that, as often asserted and cited by the Commission in footnote 3 to Part IX of the Consultation Paper, circumcision is regarded as a fundamental and required rite.

The reason for its performance seems to be that Abraham was revered and that if he circumcised himself then that was a reason for its performance by Muslims; it also seems that the requirement for cleanliness before prayer was a factor (though no reason seems to have been advanced for not using water, as with other body parts; and seemingly no difficulty is seen with the propriety of prayers from boys uncircumcised until late childhood/teenage years).

Dr S N Kahn states in *The Islamic Viewpoint*:<sup>93</sup>:

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<sup>91</sup> Lisa Braver Moss ba: The Jewish roots of anti-circumcision, arguments, Proceedings of the 2nd International Symposium on Circumcision 1: 39-45, 1991

<sup>92</sup> Moshe Rothenberg: Ending circumcision in the Jewish Community, Proceedings of the 2nd International Symposium on Circumcision 1: 46-9, 1991

<sup>93</sup> Australian Family Physician Vol No 15 No 2 Feb 1986 at 179

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"Circumcision, **encouraged** in Islam and **widely practised** by Muslims, is a tradition of the Prophet and an important ritual" (emphasis added).

Ritual circumcision has also been discussed by Dr Sami Aldeeb Abu-Sahlieh.<sup>94</sup> Although he deals rather more with female circumcision, his analysis of the mind-process behind both forms (i.e. male and female circumcision) is illuminating. He writes:

"Circumcision as a sign of alliance can only be found in two other passages of the Bible. Elsewhere, it is more narrative: King Saul demanded one hundred Philistine foreskins from David, before he gave his consent to David marrying his daughter Mikal: "David.... thought it was a good deal in order to become the king's son in law... He went to war...He killed 200 Philistine men, brought back their foreskins, counted them in front of the king....So Saul... had to admit that Jehovah was on David's side". This interpretation of the Koranic verses with reference to the Bible is considered abusive by Imam Mahmud Shaltut (israf fil-istidlal). What is more, this textual argument based on Jewish law concerns male circumcision only, not female circumcision that the Bible does not mention and that the Jews do not practice (Falachas excepted). Al-Sukkari answers that, according to Ibn Hagar, the Jews used to circumcise both sexes, which is why he rejects male and female circumcision on the 7<sup>th</sup> [sic] day, so as not to look like them. Even the authentic Bible - today's one is considered falsified - does not contain any text related to female circumcision. Nonetheless, the Muslims must practice it, if the Muslim law makes provision for it.

"The Sunnah: We will try here to glean, from the works of contemporary Arab authors, the different sayings of Mohammed related to male and female circumcision. - The most often mentioned narration reports a debate between Mohammed and Um Habibah (or Um TAtiyyah). This woman, known as an exciser of female slaves, was one of a group of women who had immigrated with Mohammed. Having seen her, Mohammed asked her if she kept practising her profession. She answered affirmatively adding: "unless it is forbidden and you order me to stop doing it". Mohammed replied: "Yes, it is allowed. Come closer so I can teach you: if you cut, do not overdo it (la tanhaki), because it brings more radiance to the face(ashraq) and it is more pleasant (ahza) for the husband". According to others, he said: "Cut slightly and do not overdo it (ashimmi wa-la tanhaki), because it is more pleasant (ahza) for the woman and better (ahab, from other sources abha) for the husband". We shall

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<sup>94</sup> 'To Mutilate in the name of Jehovah or Allah'

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hereinafter refer to this narration as the exciser's narration. - Mohammed said: "Circumcision is a sunnah for the men and makrumah for the women". The term sunnah here means that it is conform to the tradition of Mohammed himself, or simply a custom at the time of Mohammed. The term makrumah is far from clear but we can translate it into a honorable deed. - Speaking to the Ansars' wives, Mohammed said: "Cut slightly without exaggeration (ikhtafidna wa-la tanhikna), because it is more pleasant (ahza) for your husbands". - Someone came to Mohammed and became a convert before him. Mohammed told him: "Shave off your unbeliever's hair and be circumcised". - Mohammed said: "Let him who becomes a Muslim be circumcised, even if he is old". - One asked Mohammed if an uncircumcised man could go to pilgrimage. He answered: "Not as long as he is not circumcised". - Mohammed said: "Five norms define fitrah: shaving of the pubis, circumcision, moustache trimming, armpit depilation and nail clipping". Other narrations name ten norms amongst which circumcision is always mentioned. The norms of fitrah are believed to be those taught by God to His creation. The man in pursuit of perfection must conform to those norms. They are not compulsory, but simply advisable (mandubah), except for circumcision which is mandatory. Based on these premises, Al-Sukkari believes Adam to have been the first circumcised man. His descendants having neglected their obligation, it was reconfirmed to Abraham and his descendants. Thus circumcision would be the sign which would differentiate the believer from the non-believer.

"Motives for the difference between boy and girl: Male circumcision helps prevent many diseases, cancer among them, and reduces having to resort to masturbation. This opinion is also put forward by Imam Mahmud Shaltut for whom the boy's foreskin hides germs harmful to his health, which is not the case for the girls.

"Consequences of the qualification: Jurists have asked themselves if public authority can force a Muslim to submit to circumcision, especially if he is getting on years. The Zaydites and the Shafiites answer affirmatively. According to the Hanafite School, if a group rejects male circumcision, the Head of State must declare war (against this group). However, some say that a man may be spared circumcision if it endangers his health. Al-Sukkari, a modern author, is of the opinion that health nowadays is not a problem. The Muslim man who fears for his health can ask a doctor to carry out the operation under anaesthesia and with the help of modern equipment. The Hanbalites say that male and female circumcision is an Islamic ritual; the man can force his wife to be excised as well as to force her to



pray. The Ibadites consider as invalid the marriage of a non-circumcised Muslim even if it was consummated. The woman may ask for legal separation. If the husband gets circumcised after its consummation, the marriage remains invalid; he must go through another ceremony in order to get his wife back. For the Hanbalites, non-circumcision of the husband is a breach of contract giving the woman the choice of asking for divorce or continuing the marriage. For some, the non-circumcised man has no right of guardianship of a Muslim and no right to give his consent to the marriage of a Muslim relative. In this case, the marriage is dissolved, except if it was consummated. Al-Sukkari, a modern author, grants the woman the right to dissolve the marriage if the husband is not circumcised, because his foreskin can be a vector of diseases. It can also be a source of repulsion, thus preventing the realization of the objectives of marriage, *id est*: love and understanding between partners. The woman has a right to be married to someone handsome and clean, Islam being the religion of cleanness and purity. Ahmad Amin emphasizes the importance of circumcision in the Egyptian's mind by telling this anecdote: a Sudanese tribe wanted to join Islam. The chief wrote to a scholar of the Al-Azhar to ask him what was to be done. The scholar sent him a list of demands, putting circumcision in first place. The tribe then refused to become Muslim. "For the majority of believers, to belong to Islam implies *de facto* male circumcision. In Java, to circumcise a boy is translated by: to welcome someone in the bosom of Islam; in Algiers, during the colonial era, the printed invitation to the religious ceremony named it in French: *baptme* (baptism). In Muslim life, it is an important cause for family celebration, which is not the case for female circumcision, always carried out secretly. According to the Saudi religious authorities, a man who converts to Islam must get circumcised, but in case he refuses to join Islam for fear of the procedure, this demand maybe postponed until the faith is stronger in his heart."

### **6.1 Muslim circumcision procedures.**

Whilst the Jews circumcise, in accordance with their beliefs, on the 8<sup>th</sup> day of life, Muslims often delay circumcision until later in childhood: sometimes as late as the onset of puberty or even mid-teens or before marriage. The effect on such a boy of this amputation, without anaesthesia, particularly after the onset of puberty requires little imagination. Further, given that there is not a need, as with Judaism, to circumcise on a set day, there is no reason why the decision cannot be left to the boy himself when he is old enough to form his own independent view as to his belief-systems and

his own body, when the procedure can be performed under suitable conditions and on an adult organ when the amount to be amputated can be the more accurately assessed. It is hard to resist the thought that the reason that it is typically performed in early childhood is because the child is at that age very much in the power of the parents and unable to resist this mutilation.

The form of Muslim circumcision has been described by Wilfred Thesiger in his book 'Arabian Sands', first published by Longmans in 1959, and describing his travels in Arabia from 1945 onwards. He writes of meeting a Salim bin Turkia whose 15 year-old had 'a curious cock's-comb of hair, a sign that he was still uncircumcised'. Later, he writes of one his companions, bin Kabina aged about 16: although Thesiger says that circumcision is 'usually performed on a child about the age of seven', he describes the haggard appearance of bin Kabina who tells him of his recent circumcision 3 months earlier. Thesiger also describes some of the features of this procedure: often the flayed member was then 'kippered' for several days thereafter by being held in the smoke from a fire and sometimes mutilations such as 'the flaying circumcision' were carried out, in which the skin was removed from the navel down to the inside of the thighs.

Although the flaying circumcision in the sense described by Thesiger has been banned in Arab countries, very radical circumcision, involving the removal of much of the penile skin was practised in the southern parts of Oman as late as the 1970s.

## **7. Australian Aboriginal Circumcision**

Money et al <sup>95</sup> describes circumcision (or 'dhapi') at age 8 or 9:

"One of [the ceremonial initiates among the elders] lies on his back on the ground, the boy lying upward upon him and pinioned in a locked embrace. Another holds down the boy's legs. A third does the actual cutting. In ancient times a stone knife was used. Today the instrument is a razor blade. The cutting is more likely to be a series of dissection movements. The boy may cry out with the pain. Immediately the foreskin is removed, the men in charge carry the boy into the bush nearby where he is passed through the smoke of a fire for spiritual cleansing. The bleeding of his penis is

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<sup>95</sup> *Sex Training and Tradition in Arnhemland* British Journal Med. Psychol. Vol 43 1970 383

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stopped by cauterising with a piece of hot charcoal and the application of hot, wet leaves .....The meaning of the ceremony is, like the origin of circumcision itself, lost in the unrecorded annals of prehistory. My own theoretical guess is that it represents a substitute for, and an attenuation of, human sacrifice".

Meggit <sup>96</sup> writes of the circumcision, performed between the age of 11 and 13:

"The rite of circumcision and its attendant ceremonies firmly and unequivocally establish a youth's status in Walbiri society. Should he fail to pass through these rites, he may not enter into his father's lodge, he may not participate in religious ceremonies, he cannot acquire a marriage line, he cannot legitimately obtain a wife; in short, he cannot become a social person".

He notes, at page 253, that "The Walbiri explicitly equate circumcision with ritual killing"; and at page 261 describes the procedure as follows:

"A brother seizes the novice and places him face upward on the table, with his feet toward the fire. Another brother straddles him and presses his pubes against the lad's face to silent his cries, while a third grips his legs. a brother holds the shaft of the boy's penis, in order to protect 'the inside bone' from injury; one of the circumcisers stretches the foreskin several inches, and another cuts it off with two or three quick slices".

Subincision, although abandoned in a number of communities, is performed by the Walbiri at age 17 and is described by Meggit at page 265 as follows:

"To the accompaniment of loud chanting by the company, the man deftly slices open the youth's penis from the meatus to a point about an inch along the urethra".

Cawte,<sup>97</sup> in a remark which seems unacceptably insensitive, writes that "Subincision is another matter; this is going **a little too far for European tastes**; a subincised man **makes a mess** by spraying rather than squirting in toilets and urinals" (emphasis added). That this brutal further mutilation is described merely as "going a little too far for European tastes" and that the only disbenefit seemingly is that the victim makes a mess during urination is a telling demonstration of the

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<sup>96</sup> *Initiation among the Walbiri in Aboriginal Australia* 1986 at p 241

<sup>97</sup> *Social Medicine in Central Australia: The Opportunities of Pitjantjara Aborigines* in *The Medical Journal of Australia* Feb 3, 1977 at p277

mind-set towards genital mutilation as a whole and male circumcision and other male genital mutilations.

## **8. The origins of modern non-ritual circumcision**

It is important, in considering the whole issue of circumcision and its legality, to have firmly at the front of one's mind the primitive tribal origins and barbarity of the ritual and the abuse from it of the victim; despite attempts to sanitise the ritual, to divorce it from its origins in human sacrifice and to cloak it in 'acceptably' religious demands.

### **8.1 Masturbation cure**

It is commonly accepted that Victorian Britain was deeply troubled by sexual matters; and that the paterfamilias was seen as an all-powerful figure. Further, women and children were seen as the property of the man: to do what the man deemed right for himself and/or to serve the man's desires and purposes. The treatment of women and children in Victorian Britain was barbarous, cruel and beyond the comprehension of modern society; child labour and child prostitution were commonplace. Sexual hypocrisy was rife.

In particular, the unwillingness to face sexuality in women was seen in the denial/refusal to admit that women were capable of feeling sexual pleasure (or at least that one's wife was so 'unrefined' so to feel) or to experience orgasm; equally, the sexual pleasure from masturbation by boys was also seen as deeply unhealthy, unclean in the moral sense, and impure; it was often called the 'solitary vice'. Masturbation was seen as a cause of a wide variety of illnesses from mental ill-health, epilepsy, alcoholism and a host of other ailments; and if that were right then it seemed desirable to take any steps to curb this 'vice'. Thus, in the mid-1800s it was thought that circumcision would help stop boys masturbating.

Whether it was thought that the deprivation of sensation and also of the skin comfortably to erect into, and masturbate with, was the cure for masturbation, or that that it was that the mere act and intense pain of circumcision would be a sign of the 'inherent dangers' of sex and sexual pleasure (certainly the dangers of such expression outside the sanctity of marriage) is not clear.

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It seems that Money, writing in 1887 in *Treatment of Disease in Children*, considered that the pain, on-going if possible, was desirable:

"Whether masturbation is a cause of epilepsy is doubted. But there can be no doubt of its injurious effect . . . . *Circumcision should always be practiced.* It may be necessary to make the genital area so sore by blistering fluids that pain results from attempts to rub the part."

Probably, both strands of thinking were present at the same time. What does seem clear is that the effect of circumcision on the ability to enjoy sexual activities was recognised by the Victorians, as it had been by Maimonides.

The Victorians were well aware of the Jewish circumcision, (indeed, in the Christian calendar, there is the Feast of the Circumcision of Christ), as well as Muslim circumcision and circumcision carried out in other parts of the world such as Africa and the Australian aboriginals. Clearly, circumcision did not prevent these men from being able to procreate and it would appear that it was but a small step to conclude that circumcision would have no harmful effects if done on British boys. Thus, they espoused an amputation which whilst curbing sexual pleasure would not prevent procreation and would, it was thought, stop what was seen as the deeply damaging 'self-abuse' of masturbation and would thereby prevent the onset of dreadful illnesses.

The same masturbation-phobia also drove the introduction of routine neonatal circumcision in 19<sup>th</sup> century United States of America (a country where such circumcisions were some 85% in the 1970s and which, although the rates are now declining especially in the western states, still account for more than 50% of boys).

As Frederick Hodges has written, involuntary circumcision was introduced and enforced in America as a way of surgically desensitizing and denuding the penis in order to make masturbation theoretically impossible. The vast majority of original circumcisionists were, as they were in Victorian Britain, Christians who had of course never themselves, been circumcised. They knew exactly what the effects of circumcision would be. They could well imagine the destruction circumcision would cause to sexual sensation and function when it was forced on boys and men who had been caught masturbating. Adults who had been convicted of masturbation were regularly incarcerated in lunatic asylums and subjected to castration, circumcision and electric shock.

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The medical history of circumcision in the United States is discussed by David L. Gollaher<sup>98</sup> who writes: "The medical history of circumcision in the United States properly begins in 1870. Dr. Lewis A. Sayre published a paper in which he sought to show that a range of well-nigh miraculous cures were effected by circumcision.

Other important US doctors who promoted circumcision as an anti-masturbatory procedure in the 1870s were Abraham Jacobi and M.J. Moses. Dr Jacobi (1830-1919) was the president and founder of the American Pediatric Society, the first Chairman of the Section on Diseases of Children of the American Medical Association, President of the New York State Medical Society, President of the New York Academy of Medicine, and President of the Association of American Physicians. Both Jacobi and Moses claimed that Jews were immune to masturbation solely because they were circumcised. They were cited as authorities by medical writers for the next few decades. Both claimed that non-Jews were especially prone to masturbation and to the horrible diseases that resulted from masturbation solely because they had foreskins. Jacobi produced many "studies" to prove this, and to "prove" that the male foreskin caused epilepsy, paralysis, malnutrition, hysteria, and other nervous disorders.<sup>99</sup>

In 1871, Dr. Moses wrote<sup>100</sup>:

"As an Israelite, I desire to ventilate the subject, and, as a physician, have chosen the medium of a medical journal, that I may not be trammelled in my expressions, as I necessarily would be were I confined to the pages of an ordinary paper...I refer to masturbation as one of the effects of a long prepuce; not that this vice is entirely absent in those who have undergone circumcision, though I never saw an instance in a Jewish child of very tender years, except as the result of association with children whose covered glans have naturally impelled them to the habit."

It is quite clear from context that the title word 'Hygienic' had, in the United States of that time as with Victorian Britain, a different meaning than it does today. At this time, circumcisers used words such as hygiene to denote moral hygiene, not personal hygiene.

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<sup>98</sup> David L. Gollaher: *From Ritual To Science: The Medical Transformation Of Circumcision In America*: Journal of Social History, Volume 28 Number 1, p. 5 - 36, Fall 1994.

<sup>99</sup> Jacobi, On Masturbation and Hysteria in Young Children, American Journal of Obstetrics, vol. 8, no. 4 (February 1876): pp. 595-606

<sup>100</sup> Moses, M.J. The Value of Circumcision as a Hygienic and Therapeutic Measure, New York Medical Journal, vol. 14, no. 4 (October 1871): pp. 368-374.

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Circumcisers likewise used the term sanitary to denote moral purity, and not absence of germs or dirt. By manipulating the meaning of words in a fashion presaging the "New-Speak" of Orwell's classic, 1984, circumcisers pathologized normal functions: erotic sensitivity was redefined as "irritation."; orgasm was redefined as "convulsions."

Jonathan Hutchinson, who was President of the Royal College of Surgeons of England in 1889, wrote in 1891 a paper on circumcision as a preventive of masturbation, in which he not only advocated circumcision for the treatment and prevention of this "shameful habit", but also proposed that "---if public opinion permitted their adoption --- measures more radical than circumcision would be a true kindness."

In 1914, Dr. Abraham Wolbarst <sup>101</sup> wrote:

"It is generally accepted that irritation derived from a tight prepuce may be followed by nervous phenomena, among these being convulsions and outbreaks resembling epilepsy. It is therefore not at all improbable that in many infants who die in convulsions the real cause of death is a long or tight prepuce. In a case reported by A.H. Baker of Elmira, N.Y., repeated attacks of epileptiform convulsions occurred in a boy aged 5. It was found that there was an adherent prepuce with marked adhesions. After the child was circumcised the convulsions ceased and have not since recurred... We safely conclude that circumcision is to be regarded as a powerful prophylactic against masturbation and other reflex neuroses that result from preputial irritation."

### **8.2 'Hygiene and Prevention'**

That circumcision was of no effect in preventing masturbation became self-evident: circumcised boys have the same urge to masturbate as their intact brothers and will do so, notwithstanding that for them it will be, as with sexual intercourse, a pale shadow of the pleasure that should have been theirs by birthright. But the motivations to continue to circumcise required the invention by circumcisers of a variety of pseudo-medical 'rationales' for continuing to circumcise: first by claims of cleanliness, then the reduction/prevention of diseases such as cancers of the cervix and penis to claims that circumcision will reduce the incidence of UTIs, AIDS and other sexually transmitted diseases.

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<sup>101</sup> Wolbarst, Abraham L. Universal Circumcision as a Sanitary Measure, *Journal of the American Medical Association*, vol. 62, no. 2 (January 19, 1914): pp. 92-97

### **8.3 Modern circumcision - an eye-witness account**

Although, except for ritual circumcisions, neonatal circumcisions have been largely abandoned in Britain, in America, where neonatal circumcisions are a lucrative source of medical income and where from a peak of nearly 90% of all neonate boys to a current figure of some 59%, routine neonatal circumcisions are still, in the teeth of medical studies, a societal commonplace encouraged by those doctors who profit from the fees (typically \$200 per neonatal circumcision). Marilyn Fayre Milos, an American Registered Nurse, whose experiences of witnessing neonatal circumcision impelled her to abandon her nursing career and courageously to speak out against this barbarity, has written movingly<sup>102</sup>. Apart from minor differences of technique (the mohel does not employ a probe but uses a sharpened finger-nail to rip assunder and then to strip fully the glans-preputial adhesions and does not use a clamp to crush the foreskin so as to control bleeding before amputation) the result is much the same as at a Bris Milah.

"We students filed into the newborn nursery to find a baby strapped spread-eagle to a plastic board on a counter top across the room. he was struggling against his restraints -- tugging, whimpering, and then crying helplessly. no one was tending the infant, but when I asked my instructor if I could comfort him, she said 'Wait until the doctor gets here'. I wondered how a teacher of the healing arts could watch someone suffer and not offer assistance. I wondered about the doctor's power which could intimidate others from following protective instincts. When he did arrive, I immediately asked the doctor if I could help the baby. he told me to put my finger into the baby's mouth; I did, and the baby sucked. I stoked his little head and spoke softly to him. he began to relax, and was momentarily quiet.

"The silence was soon broken by a piercing scream --- the baby's reaction to having his penis pinched and crushed as the doctor attached the clamp to his penis. The shriek intensified when the doctor inserted an instrument between the foreskin and the glans, tearing the two structures apart.....The baby started shaking his head back and forth -- the only part of his body free to move -- as the doctor used another clamp to crush the foreskin length-wise, where he then cut. This made the opening of the foreskin large enough to insert a circumcision instrument, the device used to protect the glans from being severed during the surgery.

"The baby began to gasp and choke, breathless from his shrill, continuous screams. How could anyone say that

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<sup>102</sup> Quoted in *Circumcision, What It Does*, Billy Ray Boyd at p.91



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circumcision is painless when the suffering is so obvious? My bottom lip began to quiver, tears filled my eyes and spilled over, I found my own sobs difficult to contain. How much longer could this go on?

"During the next stage of surgery, the doctor crushed the foreskin against the circumcision instrument and finally amputated it. The baby was limp, exhausted, spent.

"I had not been prepared, nothing could have prepared me. for this experience. To see a part of this baby's penis being cut off -- without an anesthetic -- was devastating. But even more shocking was the doctor's comment, barely audible several octaves below the piercing screams of the baby: "There's no medical reason for doing this." I couldn't believe my own ears, my knees became weak, and I felt sick to my stomach. I couldn't believe that medical professionals, dedicated to helping and healing, could inflict such unnecessary pain and anguish on innocent babies".

### **8.4 Some quotes from 'War Cries: It's a Boy'**

In the autumn 1995, Channel 4 TV transmitted a film by Victor Schonfeld, which dealt with ritual circumcision. Some quotes from this film are interesting:

Rabbi David Singer: "The last but one [circumcision] that I did, the parents were telling me that before the circumcision the baby was very fractious and was always crying at night and very unsettled, and the night after the brit was done, the baby spent a quiet night, he's sticking to a three-, three-and-a-half, four-hour feeding routine, so they were quite delighted it could be done."

Jewish woman on street: "There's no pain. It's a baby, a week old."

Another Jewish women on street: "I've been at many and not one child has suffered."

Dr. Adrian Lloyd Thomas, Pediatrician (in response to being asked about circumcision without anesthesia): "You can see there a very definite response from the baby as soon the forceps are applied to the foreskin. The baby is holding his breath, shivering. Infants having an operation may actually experience more pain than adults do having the same procedure, and the reason for this is that the control mechanisms, particularly in the spinal cord, which are highly developed to damp down and suppress pain in a mature adult nervous system, are not so well developed in the small baby. So, the pain signals travel through uncontrolled, unsuppressed. . . .

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I think it would be unwise to draw that conclusion [that the baby stopped crying because the pain was over]. I'd more prefer to think that the experience had been so overwhelming that the baby can't . . . put up a fight anymore. . . . My personal feeling as a pediatric anesthetist is that it is not ethical to perform circumcisions without some form of topical anesthesia."

Narrator: ". . . the British medical consensus is that newborn circumcision is not medically warranted, that the baby has been made to give up a protective covering of erogenous tissue, and that the glans of his penis, an internal organ biologically, will now be exposed."

Woman pediatric surgeon: "Some other complications . . . occur later . . . when children have realized that they have been circumcised, they feel psychologically that something is grossly wrong with their sex life."

Man: "My penis, instead of . . . hanging straight up and down so that the top faces forwards and the underneath faces back . . . the underneath will face to the right or . . . will start facing forwards so it describes a sort of corkscrew twist to the left. . . . There is an interweaving of the physical mutilation which I've had to live with for nearly 50 years as well as the awareness that I have been deprived of one of life's basic pleasures."

Muslim man: "I can remember . . . blissfully . . . flowing along as a happy child when one day my father . . . took me over to the hair-dresser . . . I was thrust on the table and circumcised. . . . a big shock. . . . the psychological pain . . . lasted on, the betrayal of trust . . . I often have nightmares of a pound of flesh taken off a live horse. . . . I don't see in any way that my circumcision has contributed to my cultural identity or racial identity."

African mother: "He was taken to hospital . . . a few minutes later they [told us] that the child is dead."

Jewish woman: "I've never heard of anybody in our family or in our circle of acquaintances who's ever lost a child as a result of bris . . . and it's inconceivable that it didn't happen. And of course when you start to look at it and ask for the reasons for that silence, it's obvious. You simply can't coerce somebody into doing some- thing . . . to their children if [they] know that there is the risk that their child might die or suffer injury."

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James Hocksworth (at hospital where his eleven-day-old son, circumcised three days before by Rabbi Singer, had been taken because of a severe infection of his circumcision wound. [Rabbi Singer denied his procedure caused the illness.]): ". . . when we brought him in he needed oxygen so badly that they . . . gave him oxygen immediately and that brought back the color in him. Once he'd been put in the ward . . . he turned grayish again . . . looked like death warmed up and . . . they put him in an intensive care unit . . . I had thought it was a . . . a qualified doctor who was performing this. I hadn't been consulted by him at all . . . I believe he should have had my consent. I'm the boy's father and if you saw him, you would never, ever do this. Nobody could ever do this to their own child. He was in so much pain. He was struggling to breathe. . . . There's no need to go through that suffering. . . . he doesn't need to have his penis cut at the end so that it's rubbing around for days on end and he's in pain and screaming . . . I think it's disgraceful. He can't speak. He doesn't have the voice to say I don't like this and I don't want it. He didn't have the choice. He was eight days old and he gets thrown on a table and he has the end of his penis cut off. I think it's immoral and I think it's arrogant of the people who do it to presume that they have the right to cut up other people for the sake of religion."

Jewish mother: "I'm a Jewish mother. My son Max is five months old and I refuse to have him circumcised. [I told my mother,] "I would do anything not to hurt you, my parents, except hurt my child."

Dr. Majid Katme, President, Islamic Medical Assoc.: "Is she, the mother or the father, are they really listening and submitting to the teaching of their religion or are they using their mind and questioning things?"

Dr. Morris Sifman, Medical Officer, The Initiation Society (Assoc. Jewish Circumcisers): "They [mohels] don't want it filmed because, frankly, they distrust the media . . . we are up against, all the time, the possibility of this kind of thing happening which would damage the attitude of some parents who might be uncertain of what they want to do. . . . If it would be found that circumcision is positively harmful, perhaps we would think again. But I have no doubt -- I have not the slightest, slightest doubt -- that this will never happen, because a commandment given by God is a good commandment."

Dr. Jenny Goodman, Medical Doctor and Psycho-therapist: "None of us do it for medical reasons. We do

it because we fear being cast out from the tribe. But after having done it, we comfort ourselves with these medical myths. . . . If we could progress from sacrifice through castration to circumcision, then we can continue to progress all the way away from any kind of physical injury."

## **9. Psychological Mechanisms.**

It is hard not to wonder at the effect of childhood circumcision on the victim; and at the deep and hidden motives driving those who would perpetuate the practice of circumcision for other than the treatment of a disease process. Thus, Ritter <sup>103</sup> writes about the practice of routine neonatal circumcision in the USA by doctors, but whose words seem apt to describe all those who circumcise:

"The worst thing about circumcision is that it produces circumcisers. There is a segment of physicians who have the psychic compulsion to circumcise so they themselves do not feel genitally inferior or different."

### **9.1 The Perpetrators**

In looking at circumcision and the calls for it to continue into the 21<sup>st</sup> century, it is necessary to consider the mind-set of those who continue to perform this mutilating ritual, and to consider the extent that they suffer from some form of psychosexual sickness in their need to mutilate the sexual organ of a boy.

Woodmansey wrote in the British Medical Journal in 1965: "Something must be done to help the parents who show such an irrational need . . . . Consider asking a colleague whose job is to help people with their emotional problems to try to discover and alleviate the parents' underlying difficulties, which not only impel them to demand this operation but which, if not adequately dealt with, may perpetuate difficulties in the parent-child relationship with the risk of later psychiatric illness in the child... This important kind of work can and should be undertaken by the medical social workers in a general or children's hospital, provided that they receive suitable psychiatric support." <sup>104</sup>

"But the mohel with whom I had worked countless times suddenly handed me the knife. He pointed to my squirming son, whose hands and legs were tied to the board. The

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<sup>103</sup> Ritter, *Say No to Circumcision*, p19-1

<sup>104</sup> Woodmansey, A C. Circumcision. British Medical Journal, 1965; 2:419

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foreskin had been pulled up over the glans of the penis and was now protruding through a narrow slit of the small, stainless steel clamp. . . . 'It's the greatest honor a father can have,' he added. . . . There is no greater primal anger than that caused by seeing another male in carnal contact with your wife, in this case the physical intimacy of mother and son. And there is no greater primal envy than that caused by looking down at the person who was brought into the world specifically to be your survivor . . . . The breast provides, but the knife protects. It channels the father's natural anger and jealousy into one controlled cut. He takes off one small part in order to preserve -- and love -- the whole . . . . No father should be denied this experience, even vicariously, of inflicting upon his child a ritualized blow so intense as to make him both shake and recoil." [Birth Rite, by Joshua J. Hammerman, The New York Times Magazine, March 13, 1994.]

Ilene Gelbaum, an American midwife with certifications to permit her to perform circumcisions stated: "it really is a touching, moving, spine-tingling thing that I participate in as a service to the community"<sup>105</sup>; one can but speculate what Freud might have said about her motivation for, and the 'spine-tingling' devotion to, such as task.

The well-known psychological defence mechanisms of denial, of rationalisation and of cognitive dissonance would appear to be at work in the continuation of the behaviour-patterns of circumcisers. 'Denial' is the process whereby an individual distorts his/her perception of an event so as to avoid having to think about it; thus, despite the clear medical evidence of the pain of circumcision, many still deny that the circumcised infant has pain from, and following as a result of, the circumcision. Also of note is evidence that a surprising number of American men were unaware, at a conscious level, of being circumcised or that their penis carried a scar from the amputation. Lilienfeld<sup>106</sup> reported that in 1958 34.4% were unaware of their circumcision status; a figure which accorded with that found by Schlossberger<sup>107</sup>.

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<sup>105</sup> Gelbaum, *Male Newborn Circumcision: the Nurse-Midwifery Model*. 35<sup>th</sup> Annual Meeting of the American College of Nurse-Midwives, May 1990

<sup>106</sup> Lilienfeld, *Validity of Determining Circumcision Status by Questionnaire as Related to Epidemiological studies of Cancer of the Cervix*

<sup>107</sup> *Journal of Adolescent Health* [Schlossberger, *Early Adolescent Knowledge and Attitudes about Circumcision: Methods and Implications for Research*

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'Cognitive dissonance' is the process whereby individuals seek to maintain harmony between or among various aspects of an issue at the cognitive level: *Awakenings*<sup>108</sup> observes that circumcised men who have complained to doctors about being circumcised, have experienced anger from the doctor(s) to whom he has spoken.

As they observe: 'Why anger?' Given the very high rate of circumcision in the USA, they comment: "Is it perhaps that a doctor cannot allow himself to be sympathetic to a male who says that he has been harmed by an act which the doctor's own profession has performed for the man's own good? Such dissonance may well cause a doctor to lash out in anger."

This might well account for the seeming inability of some doctors to listen to the evidence from their own peers which undermines their existing prejudices and mind-set: thus an article in the New York Times,<sup>109</sup> dealing with circumcision, quotes Dr. Terry Hejsle, director of pediatric urology at Columbia College of Physicians and Surgeons, on the specialised pleasure receptors of the prepuce (as shown by Taylor et al in *The prepuce: specialized mucosa of the penis and its loss to circumcision* --op.cit) "How do they know that?" asks Hensle. "The neuroreceptors are in the glans, not in the hood".. This remark says much about Dr. Hejsle; and nothing about the structure and function of the prepuce and the mechanisms of male sexual pleasure.

The New York Times article also quotes from a Dr. Yehuda Nir (a psychoanalyst who was formerly head of child psychiatry at Memorial Sloan-Kettering Hospital in New York) that "he hasn't observed circumcision trauma. 'The only thing men are concerned about with regard to the penis is its size.'" Again, that says more about Dr Nir, his attitudes and his mental processes than about the reality of the harm of circumcision; even on his facile level, it is self-evident that men often have concerns about their penis and its functioning other than that of simple size.

As *Awakenings* (op. cit. at n 106) remarks:

"With enough coping mechanisms at his/her disposal, the typical circumcised survivor can be comfortably insulated from the painful facts and feelings about genital mutilation. After examination of the same coping mechanisms of the surrounding culture, one finds that the majority of those in societies that practice

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<sup>108</sup> *Awakenings, A Preliminary Poll of Circumcised Men*, NOHARMM, 1994

<sup>109</sup> Week in Review Section, Pg. 3, Sunday, May 19, 1996

childhood genital mutilation remain blind to this maltreatment of children.....Dr Ervin Staub, psychology professor at the University of Massachusetts, who has studied and written extensively on the behavior of bystanders, states: 'We downplay our own reactions and convince ourselves that what we initially thought was abusive behavior really wasn't that bad after all'. He calls this extremely common phenomenon 'pluralistic ignorance'".

## **9.2 The Victims**

It has, however, to be admitted that there is a paucity of studies of the psychological effects of male circumcision on the victim. Perhaps this is due in large part to an unwillingness by doctors who are themselves circumcised and/or who have grown up and received their medical education in a society, such as America, where routine neonatal circumcision has been common, to accept the possibility of damage from the procedure; and thus to carry out proper studies. Dr Nir's stance would lend weight to that stance; and the processes of 'denial' and/or 'cognitive dissonance' operate for all caught up in whatever capacity in this mutilation.

Such work as seems to exist is related to the more general effect of childhood experiences on the personality. But there has been some work done.

Cansever writes <sup>110</sup>:

**"Summary.** In order to evaluate the psychological effects of circumcision, a small study was arranged in which twelve children, from average and low socio-economic level, were given Goodenough and DAM test, CAT, Rorschach and two sets of stories, prior to the operation and following it. The results of the tests showed that circumcision, performed around the phallic stage is perceived by the child as an act of aggression and castration. It has detrimental effects on the child's functioning and adaptation, particularly on his ego strength. By weakening the controlling and defensive mechanisms of the ego, and initiating regression, it loosens the previously hidden fears, anxieties, and instinctual impulses, and renders a feeling of reality to them. What is expressed following the operation is primitive, archaic and unsocialized in character. As a defensive control and protection against the surge of the instinctual forces coming from within and the threats coming from outside, the ego of the child seeks safety in total withdrawal, this isolates and

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<sup>110</sup> Gocke Cansever, Psychological Effects of Circumcision, British Journal Of Medical Psychology, Vol 38: Page 321-31

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insulates itself from disturbing stimuli. The results of the study raised some questions concerning certain psychoanalytic formulations, for which further research was suggested."

Prescott remarks <sup>111</sup>:

"There is a well established body of scientific data that documents the role of sensory stimulation and deprivation upon brain development and emotional, social, psychological and mental development. From the perspective of the developmental neuropsychological sciences, there can be little question that the extraordinary pain experienced by new-borns, children and adolescents who are subjected to ritual genital mutilations has a profound effect upon the brain and later behaviors". He continues that this pain "limits and qualifies all subsequent experiences of pleasure which are experienced upon a background of genital pain that is now deeply buried in the subconscious/unconscious brain".

Prescott is also quoted in the New York Times article of 19 May 1996 <sup>112</sup>: "You're now encoding that primitive, immature, developing brain with pain when it was designed to be encoded with pleasure. This is one of the beginning stages of establishing the sadomasochistic personality."

So too, Anand and Hickey [op. cit.]: "In the long-term, painful experiences in neonates could possibly lead to psychological sequelae". This view is echoed by Dr. Rima Laibow <sup>113</sup>:

"When a child is subjected to over-whelming pain, he conceptualises mother as both participatory and responsible regardless of mother's intent. When, in fact, mother is truly complicit, as in giving permission for unanesthetised surgery (i.e. circumcision) the perception of the infant of her culpability and willingness to have him harmed is indelibly emplaced. The consequences for impaired bonding are significant".

"Neonatal bonding affects every male infant, while penile pathology affects few.": R. Dozor.<sup>114</sup>

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<sup>111</sup> Prescott; *Genital Pain vs. Genital Pleasure: Why the One and Not the Other?*

<sup>112</sup> op. cit: New York Times, Week in Review Section, Pg. 3, Sunday, May 19, 1996

<sup>113</sup> Laibow: *Circumcision and its Relationship to Attachment Impairment*; Syllabus of Abstracts, Second International Symposium on Circumcision, San Francisco. April 1991

<sup>114</sup> R. Dozor, Routine neonatal circumcision, American Family Physician 41: 820-2, 1990



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"Circumcision performed in the neonatal period is associated with marked behavioural changes that may last up to 24 hours. Allied to this is a change in sleep pattern with prolonged non-rapid eye movement sleep. This change has been interpreted as consistent with a theory of conservation-withdrawal to stressful stimulation.": Williams & Kapila, op. cit.

"Babies who have been subjected to pain may have difficulty quieting themselves. Following circumcision, the normal progression of sleep cycles is reversed with immediate and prolonged escape into non-REM sleep. After circumcision, babies withdraw, change their social interactions with their mothers, and modify their motor behaviour.": D.B. Chamberlain<sup>115</sup>.

The American Psychiatric Association<sup>116</sup> has the following:

"309.89 Post-traumatic Stress Disorder ['PSTD']  
"The essential feature of this disorder is the development of characteristic symptoms following a psychologically distressing event that is outside the range of usual human experience (i.e., outside the range of such common experience as simple bereavement, chronic illness, business losses, and marital conflict). The stressor producing this syndrome would be markedly stressing to almost anyone, and is usually experienced with intense fear, terror and helplessness. The characteristic symptoms involve re-experiencing the traumatic event, avoidance of stimuli associated with the event or numbing of general responsiveness, and increased arousal."

The trauma, both physical and mental, of non-therapeutic, but especially neonatal, circumcision would suggest that victims of circumcision might appropriately be followed up for signs of PTSD and other psychological sequelae. As Dr Frederick Leboyer has said <sup>117</sup>: "No-one is aware of the deep implications and life-lasting effect [of circumcision]. The torture is experienced in a state of total helplessness which makes it even more frightening and unbearable." Further, he writes: "All that takes place in the first days of life on the emotional level shapes the pattern of all future reactions. How could a being aggressed in this way,

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<sup>115</sup> D.B. Chamberlain, Babies don't feel pain: a century of denial in medicine, Proceedings of the 2nd International Symposium on Circumcision 1: 50-67, 1991.

<sup>116</sup> Diagnostic and Statistical Manual of Mental Disorders (Third Edition - Revised) DSM-III-R American Psychiatric Association Washington, DC1987

<sup>117</sup> Frederick Leboyer MD, Birth Without Violence, Knopf, New York, 1975.

while totally helpless, develop into a relaxed, trusting person?' [Dr Frederick Leboyer, op. cit.]

## **10. Female Circumcision**

Female circumcision has been specifically made an offence in Britain by the Prohibition of Female Circumcision Act 1985. Section 1 provides:

"Subject to section 2 below, it shall be an offence for any person-

(a) to excise, infibulate or otherwise mutilate the whole or any part of the labia majora or labia minora or clitoris".

In section 2, after exempting from the ambit of section 1 operations required for the physical or mental health of the girl, the Act in section 2(2) provides:

"(2) In determining for the purposes of this section whether an operation is necessary for the mental health of a person, no account shall be taken of the effect on that person of any belief on the part of that or any other person that the operation is required as a matter of custom or ritual."

Whilst such legislation might not, strictly, have been necessary, in view of the legislation in respect of offences against the person and child-protection legislation, it introduces a specific prohibition that any non-therapeutic interference with the female genitals was an offence, notwithstanding cultural/religious pressures.

In some respects (that is, in the extent of the anatomy mutilated), female circumcision differs from male circumcision: although it can take the form of the removal only of the clitoral hood (the analogue of the male prepuce), it typically involves more radical excision such as amputation of the clitoris, excision of the labia and infibulation. What it shares with its male counterpart is the alteration of the genitals and a resulting dysfunction.

What is instructive is to examine comments and rationalisations made to justify female circumcision, quoted by Hanny Lightfoot-Klein<sup>118</sup>; again, those comments find echo in remarks made by circumcised men, and those who would continue the practice of non-

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<sup>118</sup> Hanny Lightfoot-Klein: *Prisoners of Ritual: an Odyssey into Female Genital Circumcision in Africa*

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therapeutic male circumcision, to the point that all that is required is to change the gender in the remarks:

"With the older woman there is often the element of :  
"it was done to me, why should it not be done to the young girls? "They (parents) do not want her to suffer the stigma of being different from other girls. she goes through a stage of reappraisal of the situation, and comes to accept that what has been done to her is in her best interest".

"Of course, none of us is happy about it, but we can live with it, as long as there are no serious medical complications".

"She claims that there was no pain. The only pain she recalls was at attempting to pass urine after the operation. She says she has had 'no problems at all' because of her circumcision, and is very happy about it. She feels that circumcision is a good practice".

"She says that she thinks pharaonic circumcision is a good practice, and feels she has lost nothing by her own circumcision".

Equally revealing are remarks, in a tabular form, on female and male circumcision, also by Hanny Lightfoot Klein<sup>119</sup>

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<sup>119</sup> Similarities in Attitudes and Misconceptions toward Infant Male Circumcision in North America and Ritual Female Genital Mutilation in Africa.

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<b>Female Circumcision</b>	<b>Male Circumcision</b>
"She loses only a little piece of the clitoris, just the part that protrudes. The girl does not miss it. She can still feel, after all. There is hardly any pain. Women's pain thresholds are so much higher than men's."	"It's only a little piece of skin. The baby does not feel any pain because his nervous system is not developed yet
"The parts that are cut away are disgusting and hideous to look at. It is done for the beauty of the suture."	"An uncircumcised penis is a real turnoff. Its disgusting. It looks like the penis of an animal."
"Female circumcision protects the health of a woman. Infibulation prevents the uterus from falling out. It keeps her smelling so sweet that her husband will be pleased. If it is not done, she will stink and get worms in her vagina. "	"An uncircumcised penis causes urinary infections and penile cancer. It generates smegma and smegma stinks. A circumcised penis is more hygienic and oral sex with an uncircumcised penis is disgusting to women."
"An uncircumcised vulva is unclean and only the lowest prostitute would leave her daughter uncircumcised. No man would dream of marrying an unclean woman. He would be laughed at by everyone."	"An uncircumcised penis is dirty and only the lowest class of people with no concept of hygiene leave their boys uncircumcised."
"Leaving a girl uncircumcised endangers both her husband and her baby. If the baby's head touches the uncut clitoris during birth, the baby will be born hydrocephalic. The milk of the mother will become poisonous. If a man's penis touches a woman's clitoris he will become impotent."	"Men have an obligation to their wives to give up their foreskin. An uncircumcised penis will cause cervical cancer in women. It also spreads disease."
"A circumcised woman is sexually more pleasing to her husband. The tighter she is sewn, the more pleasure he has."	"Circumcised men make better lovers because they have more staying power than uncircumcised men."
"All the women in the world are circumcised. It is something that must be done. If there is pain, then that is part of a woman's lot in life."	"Men in all of the 'civilized' world are circumcised."

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<b>Female Circumcision</b>	<b>Male Circumcision</b>
"Doctors do it, so it must be a good thing."	"Doctors do it, so it must be a good thing."
Sudanese grandmother: "In some countries they only cut out the clitoris, but here we do it properly. We scrape our girls clean. If it is properly done, nothing is left, other than a scar. Everything has to be cut away."	My own father, a physician, speaking of ritual circumcision inflicted upon my son: "It is a good thing that I was here to preside. He had quite a long foreskin. I made sure that we gave him a good, tight circumcision."
35 year old Sudanese woman: "Yes, I have suffered from chronic pelvic infections and terrible pain for years now. You say that all if this is the result of my circumcision? But I was circumcised over 30 years ago! How can something that was done for me when I was four years old have anything to do with my health now?"	35 years old American male: "I have lost nearly all interest in sex. You might say that I'm becoming impotent. I don't seem to have much sensation in my penis anymore, and it is becoming more and more difficult for me to reach orgasm. You say that this is the result of my circumcision? That doesn't make any sense. I was circumcised 35 years ago, when I was a little baby. How can that affect me in any way now?"

Whilst the Act may not have entirely eliminated female circumcision from Britain, it has deprived it of any shred of acceptability in the population as a whole. But in so doing, it has done a grave disservice to boys, by permitting a distinction to be sought to be drawn between it and its male counterpart (with the suggestion that in the male the practice is, medical evidence to the contrary notwithstanding, somehow acceptable in a way that female circumcision is now not so regarded). The Act does however give an answer to those who would claim, as it was claimed for female circumcision, that male circumcision is so culturally-embedded that a ban would be ineffective and ignored; even if the Act has not wholly eliminated female circumcision in this country, it has provided a sign that such practices are no longer to be tolerated in a modern and civilised society.

## 11. Circumcision and the Common Law

In paragraph 9.1 of the Consultation Paper, the Commission says: "The leading cases refer only to tattooing, ear-piercing and ritual circumcision as exceptions to the general rule..... and because the law is clear, statute has introduced some controls designed to ensure that most of these practices are carried out safely and hygienically."

This is a wholly misleading statement: the only leading case which refers to ritual circumcision is Lord Templeman's, arguably *obiter*, remark in *Brown*<sup>120</sup>; *Adesayna* can hardly be described as a 'leading case (and its reference to ritual circumcision is clearly *obiter*). The law appears to have introduced no controls in respect of the performance of ritual circumcision, let alone any to control the safety and hygiene of the procedure.

The Commission's apparent reliance, for its proposition that ritual circumcision is lawful at common law, on the cases of *Coney*<sup>121</sup>, *Donovan*<sup>122</sup>, *Adesanya*<sup>123</sup>, *Attorney-General's Reference (No 6 of 80)*<sup>124</sup> and *Brown* (*op.cit.* at n 118) seems unconvincing. *Coney*, *Donovan* and *A-G's Reference (No 6 of 80)* are all silent as to male circumcision and simply refer to the existence of certain exceptions to the general prohibition on the consensual infliction of bodily injury; it is submitted that, on their own, they cannot be said to carry the Commission's proposition as to the lawfulness of ritual circumcision forward.

In *Adesayna*, a case at the Central Criminal Court, Judge King-Hamilton QC is reported as having said that the potential for serious injury, as part of the ritual scarification of the cheeks of two boys by their mother, was great because of the danger that the slightest move of the head might lead to injury to the eye, in distinction, he considered, from the 'accepted practices of ear-piercing and ritual circumcision'. That these remarks are ill-considered is clear, since there is an obvious difference between piercing an ear-lobe and amputating a prepuce; and even in 1974 there were enough indications in the medical literature of the harm from neonatal circumcision. If the risk of serious injury were indeed properly to be the criterion, then

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<sup>120</sup> R v Brown 1994 1 AC 212

<sup>121</sup> R v Coney (1882) 8 QBD 534

<sup>122</sup> R v Donovan [1934] 2 KB 498

<sup>123</sup> R v Adesanya. The Times 16-17 July 1974

<sup>124</sup> Attorney-General's Reference (No 6 of 80). [1981] QB 715

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the risks of circumcision ought to have been considered: since these can extend to loss of all or part of the penis, and even death. One has to doubt the extent that argument was adduced in respect of circumcision; and thus consider whether the remark, which certainly seems *obiter*, was also *per incuriam*. Indeed, there is an argument that, unattractive as the ritual scarification of the body of a child might appear (as it clearly did so appear to Judge King-Hamilton QC), it is in essence far less unacceptable than ritual circumcision: unlike circumcision, it amputates no flesh and causes no loss of function.

Whilst Lord Templeman, in *Brown*, does list ritual circumcision as one of the lawful inflictions of bodily harm, he is the only one to do so; although male circumcision was touched on in argument by Counsel for some of the Appellants, the report does not suggest that the issue of ritual male circumcision was fully or properly argued before the House; and further it seems appropriate to regard the listing of an number of activities which might be said to be lawful as unnecessary for the majority view on the question in the certificate, and thus *obiter*. The question concerned the issue of consent as a defence to charges arising out of sado-masochistic injuries and, as all were agreed, whether those injuries arising from that type of behaviour were, or were as a matter of policy, to be regarded as being within the permitted exceptions.

There has been a surprising paucity of thoughtful analysis of the practice of male circumcision by academic legal writers: such mention as there is tends to the brief and dogmatic, which is more often than not based on express or implicit views of the physical effects.

Typical of the 'brief and dogmatic' school of unsubstantiated assertion is Glanville Williams. Thus in *Consent and Public Policy*<sup>125</sup> he makes the proper objection to the passage in *R v. Donovan*:

" If an act is criminal in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whom detriment is done consents to it. No person can license another to commit a crime. So far as the criminal law is concerned, therefore, where the act charged is in itself unlawful, it can never be necessary to prove absence of consent on the part of the person wronged in order to obtain the conviction of the wrongdoer. There are, however, many acts in themselves harmless and lawful which become

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<sup>125</sup> *Consent and Public Policy* 1962 Crim LR 155, at 156

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unlawful only if they are done without the consent of the person affected."

Glanville Williams rightly says: " This passage is open to the obvious objection that it is nothing more than a tautology.....The Court then proceeded to say that, 'as a general rule.....it is unlawful to beat another person..... where the infliction of bodily harm is a probable consequence'. For this proposition no authority was offered ..... that [the issue before the court] was not well decided merely by an unsupported assertion that the act was unlawful."

One can but wholly agree with his comments.

It is thus regrettable that in the next passage, dealing with surgical operations, he falls into the very same trap of the unsupported assertion that he previously castigated:

"What is to be said of such operations as ritual circumcision, or cosmetic skin-grafting? They cause at least temporary pain and discomfort, and they are not necessary for reasons of health. It would be obviously absurd to conclude that they are illegal" (emphasis added). Even granting that he appeared to be in considerable ignorance of the medical facts which were available even in 1962 as to the risks and damage of male circumcision, and unaware of the potential health benefits of therapeutic cosmetic surgery, there is nothing which supports his conclusion, far less making it 'obviously absurd' to question the legality of ritually circumcising an unconsenting baby. The best that he can offer is that "Circumcision of Jewish infants might be upheld on grounds of religious toleration": note, however, the cautious 'might' which sits oddly with his previous bold and unsupported assertion. Further, Glanville Williams, as does the Law Commission, fails to draw the necessary and proper distinctions between acts where the victim consents for himself, and those where (as in circumcision) the assault is assented to by a person other than the victim particularly where there is no temporal benefit and considerable harm; nor (though here is not the place to examine cosmetic surgery) does he or the Commission consider the distinction between cosmetic surgery (at least on a child as opposed to an adult) for the correction of some defect or malfunction of birth and/or the alleviation of the effects of injury or previous treatment and the ablation/amputation of functional flesh from a healthy child.



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A more populist analysis is to be found in Brazier <sup>126</sup>; this manages to combine ignorance of the medical facts and literature with scant thought to the legal issues: "Medical opinion on male circumcision is divided. Until recently many doctors regarded it as rarely medically indicated. Now it seems circumcision provides some protection against venereal disease, at any rate for the circumcised man's partner! Male circumcision is a matter of medical debate. For Jewish and Muslim parents it is an article of faith. The child suffers momentary pain. Although medical opinion may not necessarily regard it as positively beneficial, it is in no way medically harmful if properly performed. The community as a whole regards it as a decision for the infant's parents."

Since, as has already been demonstrated, the benefits have been shown by medical studies not to exist (even ignoring that medical opinion used to believe that there were benefits but does not now consider that to be so; even ignoring the obvious conflict in her remark that 'circumcision provides some protection against venereal disease' with 'medical opinion may not necessarily regard it as positively beneficial) and given the error of her assertion, again as medically demonstrated, as to the lack of harm, her comments are unworthy of serious attention.

Mr Sebastian Poulter comes closest to a proper analysis of male circumcision in academic writing, albeit that his writing is flawed by a misunderstanding of the effect of the medical studies on pain, risks and inevitable losses and damage. He writes <sup>127</sup> that tattooing and scarification are not legal, citing for scarification *Adesanya*; and making for both practices the point that the child might come to regret the permanent body alteration (and the other reasons for the enactment of the Tattooing of Minors Act 1969). On policy considerations he observes that there might be two objections raised: first that "they may occasionally be dangerous when performed by an unqualified person, possibly resulting in serious injury... or leading to an infection. The second is that where the marks are designed to be permanent, they may later come to be resented by the child when he has grown up..... and if their original purpose later seems to him to be misguided or irrelevant." Indeed he quotes, with what seems approval, the remark in *Adesanya* that "You and others who come to this country must realise that our laws must be obeyed....[I]t cannot be stressed too strongly that any further offences...in pursuance of tribal traditions in Nigeria or other parts

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<sup>126</sup> *Medicine, Patients and the Law* 1992

<sup>127</sup> *English Law and Ethnic Minority Customs* [Butterworths, 1986]

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of Africa.... can only result in prosecution.....  
Others have been warned".

Neither the judge in those remarks, nor indeed Poulter, seem to have realised fully the incongruity of condemnation of tribal traditions of 'Nigeria or other parts of Africa' whilst not condemning the, essentially tribal, traditions of Judaism and Islam.

In relation to male circumcision, Poulter writes, at paragraph 6.26, "In this country the circumcision of young boys has been a legitimate and accepted surgical operation [emphasis added] for very many years. As a routine procedure (as opposed to a religious rite) it has admittedly declined considerably in popularity during the course of this century, from around a third of all boys in the 1930s to about 6% today. The current view of the medical profession here now generally seems to be that there is no rational justification for mass circumcision since the risks to health and hygiene of not being circumcised are minimal.... In England ritual circumcision of male infants is usually performed in the case of Jews by *mohlim*, who are primarily religious functionaries albeit highly trained..... Provided the proper standards of care are adhered to there is normally no danger of harm to the infant, apart from a short period of pain in cases where no anaesthetic is used. Complications can obviously arise occasionally both from the use of an anaesthetic on a very young child and from intense and prolonged crying followed by vomiting and loss of breathing where it is not used. However, long-term harmful consequences appear to be minimal and there are greater hazards in performing the operation on adult men. Few criticisms of the current situation are ever made."

Once again, remove the medical misunderstandings and the practice becomes starkly abusive in its pain, which *pace* Poulter and others, is not of a short period and not without long-term consequences, in its risks as shown by medical studies and in those studies' demonstration of deep, inevitable and irreparable loss and dysfunction. It is also of interest that he sees the practice of male circumcision as a surgical (i.e. a medical) procedure; and presumably its exemption from the general prohibition on infliction of harm as principally flowing from that.

Indeed, in paragraph 6.27, Poulter rightly observes, as a ground for opposing female circumcision, that "a major consequence of the operation is that the sexual enjoyment of the woman concerned is inevitably gravely impaired in an irreversible manner"; the same goes for circumcised males, even when the process of denial by

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the circumcised and the circumcisers will not allow them to face that demonstrated fact.

Poulter continues in paragraph 6.28: "The basic right to bodily integrity which everyone possesses under the English common law means that any interference with this right amounts to an assault or battery.....The question raised in cases of circumcision, excision or infibulation is whether the operation can be justified as constituting lawful as opposed to unlawful interference with this right...." Pausing there, it is noteworthy that Poulter groups male circumcision with the forms of female genital mutilation.

He continues: "Although there are no precedents in this field to rely on there would appear to be three possible grounds upon which a defence of lawfulness might succeed at common law. The first is that the procedure is therapeutic. If this can be established a parent can validly consent to it on behalf of a child who is too young to understand what is being done. It would appear unlikely that this line of defence could generally succeed other than in comparatively rare instances of physical defect or abnormality. Second, although the matter is not entirely free from doubt, it seems that a parent may equally validly authorise a non-therapeutic operation, provided it is not actively against his child's interests. This would appear to have been the basis upon which the vast majority of male infants have been circumcised in this country with impunity from time immemorial. There is no need under this heading for the parent to establish that the operation is positively beneficial for the child, merely that he was acting reasonably in authorising it. Third, , it has been tentatively suggested that a parent may even authorise something that is against his child's interests if it is compensated by sufficient advantage to others and is not seriously detrimental to the child. This exception is particularly apposite for establishing the legitimacy of transplant operations which directly benefit patients in pressing need (e.g. a brother or sister). It seems extremely unlikely that it could justify the more remote and controversial benefit of satisfying a deeply-felt community attachment to traditional customs. Moreover, to the extent that female circumcision, excision and infibulation are in fact mutilations and hence seriously detrimental to the child the defence would be ruled out in any case."

Poulter concludes that male circumcision is lawful; but this can only be so if he is correct both as to his analysis of the legal right of a parent to assent to an assault to the bodily integrity of his child for non-therapeutic grounds (i.e. his grounds 2 and 3) and on

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the correctness of his view that male circumcision is harmless and is not in medical terms and its consequences to the victim to be equated with female circumcision. The correctness of his view of parental consent seems open to doubt in view of *Gillick*<sup>128</sup>; but even if he were correct, the medical evidence of harm defeats his conclusion, on the grounds of his 'ground' 2, or even 'ground' 3 given his comment on the unavailability of the defence for the performance of 'traditional customs'.

It is also an interesting observation that Poulter quotes in footnote 6 to this paragraph, Granville Williams' observation<sup>129</sup> to the effect that for 'grounds' 2 and 3 parental consent would be insufficient if the child was old enough to understand what was involved and was either left uninformed or actually withheld his consent. Why should it be acceptable to perform circumcision on a new-born who is wholly vulnerable, but not on an unconsenting older child? Perhaps, the advice of Maimonides (op.cit. above) is apposite here: "This law can only be kept and perpetuated in its perfection, if circumcision is performed when the child is very young, and this for three good reasons. First, if the operation were postponed till the boy had grown up, he would perhaps not submit to it. Secondly, the young child has not much pain, because the skin is tender, and the imagination weak; for grown-up persons are in dread and fear of things which they imagine as coming, some time before these actually occur. Thirdly, when a child is very young, the parents do not think much of him; because the image of the child, that leads the parents to love him, has not yet taken a firm root in their minds."

The Commission's claim, and those academic and other writers who claim likewise, that male circumcision 'is lawful under English common law' (for which not one scrap of authority for this proposition is offered) is not supported by the Queensland Law Reform Commission ("QLRC"): a research paper of December 1993<sup>130</sup> on the circumcision of male infants made no such claim for the legality at common law for male infant circumcision, despite the majority of Australian males' being circumcised by the 1960s (and a current circumcised male population of between 25% and 35%, notwithstanding a decline in the numbers of neonatal circumcisions since the 1960s). The QLRC states that in Queensland a person

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<sup>128</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 at 420, [1986] AC

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<sup>129</sup> Textbook of Criminal Law, 2nd ed 1983 at p 576

<sup>130</sup> Research Paper: Circumcision of Male Infants [QLRC RP] December 1993.

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can consent to what would otherwise be a simple assault but consent does not remove criminal responsibility for more serious injuries such as wounding. They discuss the 'medical exemption' in the *Criminal Code* section 282 (which permits surgical operations on a person "...if the performance of the operation is reasonable having regard to the patient's state at the time and to all the circumstances of the case"); and the issue of 'real' consent as a defence. At page 14 they state that: "In the absence of 'real' consent, circumcision of male infants would fall within the definition of assault under section 245 of the Queensland Criminal Code. It might also be an offence endangering life or health. A number of criminal offences may be committed depending on the circumstances of the case, such as....." and the QLRC then discuss offences ranging from causing grievous bodily harm to unlawful wounding.

In concluding, page 17, that "Whether or not circumcision would be for the benefit of the particular child and whether or not it would be reasonable having regard to the child's state at the time and to all the circumstances of the case would need to be assessed on a case-by-case basis", it is clear that the QLRC regard the permissibility of male neonatal circumcision on the basis of the 'medical exemption' rather than some rule of common law and/or that it is a free-standing and independent exception to the general prohibition of the consensual infliction of injury. The limits on parental consent are discussed: at page 38 the QLRC states: "The common law operating in Queensland appears to be that if a young person is unable, through lack of maturity or other disability, to give effective consent to a proposed procedure and if the nature of the proposed treatment is invasive, irreversible and major surgery and for non-therapeutic purposes, then court approval is required before such treatment can proceed. The court will not approve the treatment unless it is necessary and in the young person's best interests [the QLRC cite the High Court of Australia in *Secretary, Dept. of Health and Community Services v. JWB and SMB*:<sup>131</sup> [Marion's Case]. They comment that "The basis of this attitude is the respect which must be paid to an individual's bodily integrity..... Unless there are immediate health benefits to a particular child from circumcision, it is unlikely that the procedure itself could be considered as therapeutic..... The circumcision is invasive, irreversible and major. It involves the removal of an otherwise healthy organ part. It has serious attendant risks..... On a strict interpretation of the assault provisions of the

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<sup>131</sup>*Secretary, Dept. of Health and Community Services v. JWB and SMB*: 1992 175 CLR 218 [Marion's Case]

Queensland Criminal Code, routine circumcision of a male infant could be regarded as a criminal act. Further, consent by parents to the procedure being performed may be invalid in the light of the common law's restrictions on the ability of parents to consent to the non-therapeutic treatment of children".

It is clear, however, that the QLRC have misunderstood the gravamen of the objection to circumcision by stating that it is based on 'human rights and preservation of bodily integrity grounds'. The objection is not one of 'human rights and preservation of bodily integrity grounds' *simpliciter*, but rather that the resulting severe dysfunction, and the associated pain and risks, make the invasion of bodily integrity and the breach of a range of the child's human rights particularly grave. In suggesting that tribal/cultural assimilation might offer a basis for concluding that the procedure might still be regarded as beneficial to the child, the QLRC make no mention of the inevitable dysfunction that results from any circumcision: thus their conclusion as to the possible outcome of the application of the principles of Marion's case to infant circumcision is defective. What is clear, however, is that the QLRC paper of some 41 pages and some 13 pages of appendices is, despite its flaws, a more serious attempt to examine the issue than the perfunctory treatment of the Consultation Paper; and gives no support to a claim of legitimacy of non-therapeutic circumcision at common law.

## **12. Offences Against the Person: the current view**

The Law Commission's difficulties with the law on offences against the person must find an echo with practitioners; and Lord Lowry, in *R v. Brown*, at p248C] adopts the Law Commission's words from the Commission's Consultation Paper No 122 (at paragraph 7.4) as to the untidy state of the law flowing from the Offences Against the Person Act 1861. Whilst, for much of the time, the unclarity of the law does not cause great practical difficulties, the lack of a coherent framework can, for example as with the activities the subject of *R v. Brown*, give rise to confusion.

In the Consultation Paper, the Law Commission deals with a range of behaviour where it might be said that consent renders, or might be said to render, the application of force to another as lawful: these range from activities which most would regard as wholly proper, such as medical treatment, through sports of various forms to the bizarre and often distasteful such as genital piercing and sado-masochistic behaviour.

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The current view is found expressed in *Collins v. Wilcock*<sup>132</sup> where Robert Goff LJ said:

"the fundamental principle, plain and incontestable, is that every person's body is inviolate. It has long been established that any touching of another person, however slight, may amount to a battery. So Holt CJ held in *Cole v. Turner* (1704) 6 Mod. 149 that 'the least touching of another in anger is a battery.' The breadth of the principle reflects the fundamental nature of the interest so protected. As Blackstone wrote in his *Commentaries*, 17<sup>th</sup> ed. (1830) vol. 3, p 120: 'the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner.' The effect is that everybody is protected not only against physical injury but against any form of physical molestation. But so widely drawn a principle must inevitably be subject to exceptions. For example, children may be subjected to reasonable punishment; people may be subjected to the lawful exercise of the power of arrest and reasonable force may be used in self-defence or for the prevention of crime. But, apart from these special instances where the control or constraint is lawful, a broader exception has been created to allow for the exigencies of everyday life. Generally speaking, consent is a defence to battery; and most of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact. So nobody can complain of the jostling which is inevitable from his presence in, for example, a supermarket, an underground station or a busy street ..... Although such cases are regarded as examples of implied consent, it is more common nowadays to treat them as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life. We observe that, although in the past it has sometimes been stated that a battery is only committed where the action is 'angry, revengeful, rude or insolent' (see *Hawkins, Pleas of the Crown*, 8<sup>th</sup> ed. (1824), vol 1, c15, section 2), we think that nowadays it is more realistic, and indeed more accurate, to state the broad underlying principle, subject to the broad exception."

Lord Lane CJ in *Attorney-General's Reference (No 6 of 80)* said at page 718 that:

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<sup>132</sup> *Collins v. Wilcock* (1984) 1 WLR 1172,1177

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"We think that it can be taken as a starting point that it is an essential element of an assault that the act is done contrary to the will and without the consent of the victim; and doubtless for this reason that the burden lies on the prosecution to negative consent. Ordinarily, then, if the victim consents, the assailant is not guilty."

But, at page 719, Lord Lane then spoke of a need for a "partly new approach":

"The answer to this question [at what point does the public interest require the court to hold otherwise?] in our judgment, is that it is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or public; it is an assault if actual bodily harm is intended and/or is caused. This means that most fights will be unlawful regardless of consent. Nothing which we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases." As Lord Lowry put it in *R v. Brown* at p254D, when commenting on this passage, Lord Lane's proposition was "that it was not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason and that it is an assault if actual bodily harm is caused (except for good reason)."

As Lord Lowry made it clear in *Brown*, at p255C, Lord Lane's words were intended, as Lord Lane himself made clear in the Court of Appeal in the *Brown* case [1992 QB 491, 500] to be of general application and not to some special factual situation.

There is nothing in these extracts to give any comfort to circumcisers: all assaults which inflict actual bodily harm are illegal unless they form one of the categories of exception which were and continue to be regarded as such.

### **12.1 R v. Brown**

Despite some earlier authority that consent could afford a defence to the infliction of injuries, the majority in *Brown* held that, certain exceptions aside, consent would not operate in law to excuse the infliction of injuries of actual bodily harm, or higher.



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In considering the certified question, the majority were clearly affected by their personal repulsion at the activities of the Appellants; thus it is difficult to find a rational basis for a decision which would, seemingly, permit genital piercing for reasons of vanity and perceived cosmetic reasons but not the self-same act when done to satisfy the sexual passions of the actor and the wholly-consenting and more than willing recipient. Some of the alleged ill-effects of sado-masochistic acts, see for example Lord Templeman at p. 236B-F are as applicable to cosmetic genital piercings and also to ritual circumcisions (especially those performed by laymen in ordinary premises or houses).

Lord Templeman in *Brown* at p231D says:

"In some circumstances violence is not punishable under the criminal law. When no actual bodily harm is caused, the consent of the person affected precludes him from complaining. There can be no conviction for the summary offence of common assault if the victim has consented to the assault. Even when violence is intentionally inflicted and results in actual bodily harm, wounding or serious bodily harm the accused is entitled to be acquitted if the injury was a foreseeable incident of a lawful activity in which the person injured was participating. Surgery involves intentional violence resulting in actual or sometimes serious bodily harm but surgery is a lawful activity. Other activities carried on with the consent by or on behalf of the injured person have been accepted as lawful notwithstanding that they involve actual bodily harm. Ritual circumcision, tattooing, ear-piercing and violent sports including boxing are lawful activities."

As Lord Templeman observed, at p231F, some activities which were once thought of as legal, ceased to be regarded as such: "In earlier days some other forms of violence were lawful and when they ceased to be lawful they were tolerated until well into the 19<sup>th</sup> century. Duelling and fighting were at first lawful and then tolerated provided the protagonists were voluntary participants".

Despite Lord Templeman's comments as to what he describes as 'lawful activities', which are in their enumeration arguably obiter, it is clear that the class of force which might be applied, notwithstanding the level of injury inflicted or risked, is not static: changes in society and its culture, appreciation of the consequences of an activity and/or of its resulting harm would all call for a re-examination of the

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appropriateness of the continuation of the exemption hitherto assumed to apply to a particular activity.

Lord Jauncey's list of permissible exceptions to the general rule prohibiting assaults which inflicted bodily harm was rather more limited than that of Lord Templeman: at p 242, Lord Jauncey, discussing *R v. Donovan* [1934] 2 KB 498, says that Swift J considered the exceptions to the general rule that an act likely or intended to cause bodily harm is an unlawful act: such exceptions included:

"friendly contests with cudgels, foils or wrestling which were capable of causing bodily harm, rough and undisciplined sports or play where there was no anger and no intention to cause bodily harm and reasonable chastisement by a parent or a person in loco parentis. He might also have added necessary surgery."

Later, Lord Jauncey, at p244H to 245A, said that the line to be drawn between those acts where the victim's consent would provide a defence and those where it would not lay between common assaults and assaults occasioning actual bodily harm within section 47 of the Offences Against the Person Act, or an offence under section 20 of that Act, "unless the circumstances fall within one of the well-known exceptions such as organised sporting contests and games, parental chastisement or reasonable surgery."

According to the majority view, circumcision would, notwithstanding consent, be unlawful unless it formed a current part of the group of exceptions to the general principle.

Lord Mustill, whilst dissenting on the answer to the certified question and adopting a somewhat different approach to the majority, found himself forced to look empirically at certain situations where injury was caused. He found himself unable to maintain the 'intellectually neat' method, as being too simple, at p258G to 259C, describing a spectrum of force at some point on which "consent ordinarily ceases to be an answer to a prosecution", and conducted an analysis of the activities where consent might operate to excuse the actor.

Non-therapeutic male circumcision is not raised by him as one of those categories; and in the course of that examination, at p 261C, Lord Mustill makes the point that:

"Nor has it been questioned on the argument of the present appeal that someone who inflicts serious harm,

because (for example) he is inspired by a belief in the efficacy of a pseudo-medical treatment, or acts in conformity with some extreme religious tenet, is guilty of an offence notwithstanding that he is inspired only by a desire to do the best he can for the recipient".

These words of Lord Mustill, in the light of the severe damage caused by male circumcision demonstrated by the medical literature, seem wholly apposite to, and supportive of a prosecution of, non-therapeutic circumcision

### **13. Child Protection**

Whatever might have been the position under common law and even if (which, in terms of an independent, free-standing exemption from the general rule is very far from clear) male circumcision was in earlier days lawful at common law, it is necessary to consider whether that position survives to-day, given that circumcision involves the application of force to the victim which would found an assault. Equally, since it involves the amputation of the prepuce, it encompasses a wound for section 20 of the Offences against the Person Act, 1861, and, it is suggested in the light of current medical knowledge, constitutes 'grievous bodily harm' for the purposes of that Act. The lawfulness of its continuation must, at the least as is confirmed by the Commission's wish to place the issue (as it is put) beyond doubt, be highly questionable.

Although the Commission has chosen to discuss circumcision, and in particular ritual circumcision, as part of the role of consent in the criminal law, the reality is that the victim of ritual or routine infant circumcision never gives his consent; indeed his consent is never sought since, *ex hypothesi*, he is too young even to speak. The procedure ought, thus, to be considered within the general framework of assent on behalf of another, and within the limits on that process of assent. The self-authorising 'assent' which is given is a far cry from consent in the strict sense; and is as rational a stance as allowing a person, in retaliation for some slight or other harm, to authorise himself to kill, or maim or seriously injure the person who has offended him.

In section 1(1) Children and Young Persons Act 1933, quoted in note 19 to paragraph 11.8 of the Consultation Paper, a person who 'wilfully assaults' a child or '**causes or procures** him to be assaulted..... in a manner likely to cause him unnecessary suffering or injury to health' (emphasis added) shall commit an offence.

It is difficult to see how this provision does not apply to any non-therapeutic male circumcision: the act is done intentionally and thus wilfully; it causes unnecessary suffering and injures the full and healthy sexual functioning of the penis.

It is accepted that there appears to be no reported case where a prosecution has been mounted under this section in relation to a circumcision, but that may owe more to an untutored perception of the reality of the harm caused and a reluctance by victims to complain at something done in early infancy, not least when its performance had religious overtones.

### **13.1 Paramourcy of welfare of child**

The origins of the protection of the child go back to early days; and its modern expression in this century reflects that tradition, as well as a more enlightened view as to children, their needs and vulnerabilities; and is given express protection by statute.

In *Re Z (a minor) (freedom of publication)*<sup>133</sup> the historical nature of the court's jurisdiction was discussed and the exercise of that jurisdiction considered. As the headnote has it:

"Held (1) Although the wardship or inherent jurisdiction of the court to protect minors whose interests were at risk of harm was in theory unlimited, in practice the court would decline to exercise those powers where for example the freedom of publication was the prevailing interest and the material to be published was only indirectly referable to the child. The court would however exercise that jurisdiction where the material to be published was directed at the child or to an aspect of the child's upbringing by his parents or others who cared for him in circumstances where that publicity was inimicable to his welfare. In that situation, the central issue before the court related to the manner of the child's upbringing and, in accordance with s 1(1)a of the Children Act 1989 [Section 1(1), so far as material, provides: When a court determines any question with respect to(a) the upbringing of a child, the child's welfare shall be the court's paramount consideration], the child's welfare was the court's paramount consideration and prevailed over the interest in the freedom of publication (see p 977 d to p 978 c, p 985 j and p 986 h j, post); *Re X (a minor) (wardship: restriction on publication)* [1975] 1 All ER 697, *R v Central Independent Television plc* [1994] 3 All ER 641,

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X CC v A [1985] 1 All ER 53 and Re W (a minor)  
(wardship: freedom of publication) [1992] 1 All ER 794  
applied.

"(2) The disclosure by a parent of confidential information relating to a child was an exercise of parental responsibility within the meaning of s 3(1)b of the 1989 Act which the court was empowered to restrain by means of a prohibited steps order under s 8 of the Act. In considering whether certain steps should be taken by a parent in meeting his parental responsibility the court was determining a question with respect to the upbringing of the child and, as such, s1(1) of the 1989 Act applied to make the welfare of the child the court's paramount consideration. The court was therefore under a duty to exercise its own judgment as to where the child's welfare lay and could refuse to permit a parent's exercise of parental responsibility even though it was bona fide and reasonable if it was contrary to the child's best interests (see p 979 j, p 980 d f, p 981 e, p 983 d, p 984 b, p 985 j and p 986 j to p 987 a, post).

"3) In the circumstances, the mother's placement of the child at the institute was a proper discharge of her parental responsibility to secure her child's medical and educational advancement and her decision to waive the confidentiality which the child would otherwise enjoy in respect of those matters and to permit her to appear in the documentary was clearly an exercise of that responsibility. In being asked to decide whether the child should take part in the programme the court was determining a question with respect to her upbringing and, accordingly, s1 of the 1989 Act applied to make the child's welfare the paramount consideration. On that approach, the judge was correct in his conclusion that, notwithstanding the fundamental importance of the freedom of publication of information, the welfare of the child would be harmed and not advanced by her participation in the making and publication of the programme and that she should continue to enjoy the protection against publicity which the injunctions gave her. It followed that the appeal would be dismissed (see p 980 e, p 981 d, p984 f g, p 985 g to j and p 987 a b, post)."

Ward LJ in his judgment has a helpful review of the protective jurisdiction of the courts in the course of which he gives what he describes as a test for the exercise of discretion. It is clear that he sees two situations: one where the upbringing of a child is concerned, where statute requires that the interests of the child are paramount; and situations concerning the welfare of the child where the child's interests might

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(but not 'must') have to be subordinated to over-riding interests.

*"2. When welfare dominates the decision  
The child's welfare shall be the court's paramount consideration when the court determines any question with respect to the upbringing of the child: s1(1) of the 1989 Act. That means:*

*" When all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare' (See J v C [1969] 1 All ER 788 at 821, [1970] AC 668 at 710-711 per Lord MacDermott.).....*

*".....It is not always not easy to decide when a question of upbringing is being determined...*

*".....In my judgment a question of upbringing is determined whenever the central issue before the court is one which relates to how the child is being reared. If the matter before the court requires the determination of any question which is to be characterised as one with respect to the upbringing of the child, then the child's welfare is the court's paramount consideration and welfare prevails over the freedom for publication."*

The question as to the culture, religion or ethos in which the child is to live and within which to grow, as well as the alteration of child's body, is clearly an issue of the 'upbringing' of that child and as such firmly within s. 1 of the Children Act, (and thus the child's interests are of paramount consideration); but even if these matters were to be regarded as simply 'welfare', there would still have to be a balancing of competing claims (and a balancing which would have to have regard to the requirements that expression of freedoms find proper limits when they harm or deprive others of their freedoms).

Lord Scarman says: *"The principle of the law, as I shall endeavour to show, is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child. "*

*"Giving consent to medical treatment of a child is a clear incident of parental responsibility arising from the duty to protect the child. Arranging for education*

commensurate with the child's intellectual needs and abilities is a further incident of the parental responsibility which arises from the duty of the parent to secure the child's education."

### **13.2 Children Act 1989**

The Children Act 1989 is the current statutory mechanism for, and expression of, the need to give full protection to the interests of this vulnerable group in society; and provides in section 1 that the welfare of the child is paramount.

"When a court determines any question with respect to - (a) the upbringing of a child; ..... the child's welfare shall be the court's paramount consideration."

### **13.3 Parental consent**

Although capacity to consent receives some attention in the Consultation Paper, and the circumstances when it might be invalid and/or vitiated discussed, the question of consent by a person with capacity to consent for a person under disability really only rises in the Consultation Paper in relation to medical treatment and, in paragraph 11.4 is touched on in respect of the issue of lawful correction. Yet the very nature of ritual circumcision is that it is performed on a child either shortly after birth, or at a time before puberty; and the 'consent' is given, since the victim will legally lack the capacity to give his own consent, by another person. It is submitted that Professor David Feldman, whose response to the first consultation paper is touched on at paragraph 3.25 of the Consultation Paper is correct when he is quoted as suggesting that 'a parent's consent to the ritual, non-therapeutic, circumcision of a child may amount to a form of inhuman treatment contained in Article 3 [of the European Convention on Human Rights]'. But it is submitted that he is wrong, both in domestic and international law, that "it was assumed that the parent's consent to the practice will generally be sufficient to prevent the circumcision from constituting a criminal act". (See also the discussion of the position in Queensland<sup>134</sup> and below).

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<sup>134</sup> QLRC RP (op.cit.) and QLRC Discussion Paper: Consent To Medical Treatment of Young People; QLRC, WP 44.

### **13.4 Medical treatment generally**

At paragraph 8.23, the Commission touches on the issue that the treatment be for the patient's benefit, remarking that 'this is a requirement that needs very careful consideration and citing Denning LJ as he then was in *Bravery v Bravery*<sup>135</sup> that the medical exemption did not extend to treatment carried out with 'consent but without just cause and excuse'.

The Commission's own stance is far from clear here but would appear to be that there should be no need to demonstrate that the operation was, in order to enjoy the 'medical exemption' from criminal liability, in the patient's best interest. In paragraphs 8.31 - 8.48, certain areas of medical intervention are discussed, such as abortion, sex reassignment and clinical trials, but the question is here and elsewhere ducked as to whether there might, or ought to, be circumstances when the clear lack of benefit to the patient vitiates any apparent consent given by a proxy and renders the treatment criminal.

There are clearly issues of public policy here which deserved, but do not receive, discussion in the context of the Consultation Paper. There can be little doubt that a doctor who performs an operation on a patient, particularly one involving significant risk and inevitable loss of function, without any therapeutic benefit rightly risks a civil claim for damages as well as stricture from his professional body.

Further, is it so unreasonable to demand that before he enjoys the protection of the exemption from the ordinary provisions of the criminal law, the doctor be able to show that there was at least an arguable claim that his procedure had some benefit? Certainly the lack of such a benefit, when the nature of the doctor-patient relationship of trust and the need for the consent to have some basis of prior information (as to the need for, the risks, and possible outcome, of the operation together with some discussion as appropriate of other treatments), might well be a factor when considering the legality of medical treatment.

Even if the Commission's view is appropriate in relation to the treatment of adults, whose maturity and ability to balance risks against perceived benefits (even benefits which are not medical in the strict use of that term) might justify it, it is far from being either

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<sup>135</sup> [1954] 1 WLR 116



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reasonable or indeed in line with current ideas of parental duties, the obligations of child-protection and child welfare.

Quite apart from the provisions of child-protection legislation touched on above, where consent is sought from a parent for the medical treatment of a child there is, quite apart from any requirement of medical ethics and good practice, a growing awareness of, and a body of statute and case law supporting the proposition that there is, a need to demonstrate that the treatment is in the child's best interest (or, at least, to put it at its lowest, that the treatment is not inimical to the child's interests and welfare).

Where the child is suffering from a disease process then the benefit for the child itself from appropriate medical treatment will not be difficult to find; where healthy and highly important flesh is amputated from the healthy organ (with resulting grave dysfunction) of a healthy child for no reason than ritual then the onus is on those who would conduct this mutilation to justify their action against the background of the general law, and to demonstrate that their actions are lawful, that the mutilation is in the best interests of the child and that it does not expose him to 'unnecessary suffering or injury to health'.

The proposals for medical treatment set out at paragraph 8.50 *et seq* of the Consultation Paper, and in particular paragraph 8.50(2), would appear to exclude doctors who perform male non-therapeutic circumcisions from enjoying the 'medical exemption': it would fit none of the categories of medical treatment set out in paragraph 8.50(2)(b). Thus the doctor who performed a non-therapeutic circumcision would appear to be as vulnerable to criminal charges as a mohel or other lay circumciser.

Even if there is no strict requirement in general terms for consent under English law for medical treatment to be on the basis of fully informed consent, as contrasted with the position in other jurisdictions, nor that there be a general need to demonstrate the benefit to the patient, the tendency **is** for consent to be more informed than in earlier days, and for benefit to be sought: it would be bizarre if medical treatment should, whether as a result of developments in the law or otherwise, be more protective than the protection afforded to a child who is seen as a candidate for ritual circumcision.

### **13.5 The Australian view**

In *Consent to Medical treatment of Young People*, (op.cit at note 119) the Queensland Law Reform Commission ('QLRC') discusses issues which are central to male child circumcision, but ignored wholly by the Commission in the Consultation Paper. They suggest that 'health-care' for an adult be:

"...any treatment, service or procedure-

(a) to maintain, diagnose or treat the adult's physical or mental condition; and

(b) carried out by, or under the supervision of, a health care provider"; and they suggest that such a definition be used for considering the treatment of children. The QLRC remark that in British Columbia, Canada, in section 16(1) *Infants Act* 1992 health care is defined as meaning 'anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health related purpose'.

It is clear that the Law Commission in the Consultation Paper have assumed that parents have a right under English law (purportedly unlimited, it would seem) to consent to the genital mutilation of their male children, particularly for ritual reasons; in so assuming, the Law Commission harks back to the standards of Victorian Britain and its erroneous view that a father enjoyed what were in effect almost unlimited rights over his children; and this view is depressingly familiar to those who read the contributions from lay American parents in the Internet discussions on neonatal circumcision where it is frequently stated that parents have the unfettered right to authorise circumcision of their neonate boys.

In those circumstances, a brief reminder of the correct legal position would appear to be apposite. As the QLRC states:

"The common law does not confer upon parents rights over their children....However, it does impose certain duties upon parents relating to the maintenance and support of their children.

"The position at common law is that parents are the natural guardians and custodians of their child and as such have various duties, powers and responsibilities in relation to the child, including the power to consent to medical treatment on behalf of the child.....In *Secretary, Dept. of Health and Community Services v. JWB and SMB: 1992 175 CLR 218 [Marion's case]* at 278,

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Justice Brennan has described the parental power as follows:

“‘The responsibilities and powers of parents extend to the physical, mental, moral, educational and general welfare of the child... They extend to every aspect of the child’s life. Limits on parental authority are imposed by the operation of the general law, by statutory limitations or by the independence which children are entitled to assert, without extra-familial pressure, as they mature. Within these limits, the parents’ responsibilities and powers may be exercised for what they see as the welfare of their children’.”

The QLRC continue with the observation by Justice McHugh in *Marion’s* case, that if as part of such parental obligations, “parents were under a specific duty to provide medical treatment for their children, then the necessary corollary would be a power of parents to consent to medical treatment as deriving from that duty; but in common law there appears to be no such duty on parents (perhaps because of the then nature of medical treatment, and the status of doctors, in previous centuries when the common law was developing)”. Despite legislation making it an offence, in certain circumstances, to neglect to provide medical treatment, Justice McHugh concluded that:

“[N]othing in the terms of this legislation nor in the implied duties which they impose give any ground for concluding that parents have a general power to consent to the medical treatment of their children. None of this legislation, for example, provides, even by implication, a duty to provide cosmetic surgery or treatment. At most, the legislation imposes a duty on parents not to neglect to provide necessary medical treatment for their child”.

The QLRC discusses the several limitations on a parent’s power to consent to the treatment of children, thus:

- **No right to absolute control.**

The perceived right of control, of the father, in the 19<sup>th</sup> and early 20<sup>th</sup> centuries has been severely diminished over the last 150 years. Thus, in addition to child protection legislation, there has been an increasing recognition of the child as an individual in its own right and, as noted in *Marion’s* case, “The over-riding criterion of the child’s best interest is itself a limit on parental power”; a view which finds support in *Gillick’s* case. Justice McHugh, in *Marion’s* case, concluded that:

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"Modern case law makes it impossible, therefore, to assert that parents have a natural right of almost absolute control over the person, education, conduct and property of their children. Consequently, the power of parents to consent to medical treatment and surgical procedures in respect of their children can no longer be regarded as existing as an incident or corollary of such a right."

- **The power must be exercised in the best interests of the child.**

"A parent has no authority to consent to the medical treatment of his or her child unless it is in the best interests of the child. This is because implicit in parental consent is understood to be the determination of what is best for the welfare of the child [*Marion's* case at p240]. If a parent purports to consent to a treatment which is not in the best interests of the child, the consent is of no effect and any person acting on such consent would be guilty of assault if any physical interference is involved. Notably, what is in the best interests of a child is a matter to be determined objectively" (emphasis added)

- **The power is exercised in the course of a fiduciary relationship.**

Fiduciary relationships have been described as those of trust and confidence. Justice Mason in *Hospital Products Ltd v. United States Surgical Corporation* [(1984) 156 CLR 41 at 96-97]:

"The fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his person".

Further:

"It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed...."

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Where there is, or might be, conflict between interests of the parent and those of the child, Justice McHugh observed, in *Marion's* case:

"No doubt in most cases of medical treatment or surgery, no conflict will arise between the interests of the parents and those of the child. In other cases, the risk of conflict may be so slight or theoretical that it can be disregarded. but in some cases—and claims that an abortion or sterilisation is in the best interests of a child are likely to be among them—a conflict between the interests of the parents and the child may arise. In such a case, the application of established and fundamental principle will deny the right of the parents to consent to the operation or treatment. If an operation or treatment is to be performed or carried out in such a case, only a court of general jurisdiction exercising the *parens patriae* jurisdiction.....can authorise the operation or treatment."

As the QLRC properly concludes: "It might be asserted that what is in the parents' or family's best interests would automatically be in the child's best interests. This does not always follow – in all cases the best interests of the young person must be considered and not merely assumed".

The position in Queensland (and thus, since *Marion's* case was a High Court decision, in Australia as a whole) is that the best interests of the child must be foundation for any decision in relation to that child; and that the test, it is suggested, an objective one. Health care treatment, that is an operation or treatment which is required for therapeutic reasons, will ordinarily be care to which parents can consent; as containing, having balanced the therapeutic benefit against the risks, clear and objective evidence of being in the child's best interests. Non-therapeutic procedures cannot contain such clear and objective evidence and/or the situation is one where there is a conflict or risk of conflict between the competing interests of parents and child; and thus the authority of the court must be sought if the procedure is to be carried out. Further, it is clear that each case must be considered on an individual basis and the position of each child decided on a case-by-case consideration, rather than any blanket condonation either generally or, more offensively, to a particular group, for a particular practice. The test to be applied, as to whether court authority is required is, as indicated by *Marion's* case, that the non-therapeutic procedure involves:

Invasive, irreversible and major surgery.

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Significant risk of making the wrong decision either as to a child's present or future capacity to consent or about what are the best interests of a child who cannot consent

Consequences of a wrong decision which are particularly grave.

As the QLRC made clear in its paper on infant male circumcision, non-therapeutic circumcision meets those criteria for referral to the court for approval.

### **13.6 The American view**

As regards the United States of America, which are common law jurisdictions, Dr R Van Howe, in a private communication, wrote in respect of the legal position as regards parental consent in the United States of America:

"In *Re Phillip B.*<sup>136</sup> The California Court of Appeal ruled that parental autonomy is not absolute. In *Little v Little* a 14 year old mentally incompetent but otherwise perfectly healthy, daughter applied (through a guardian ad litem) for an order authorizing her mother to consent to the removal of a kidney from the her body, for the purpose of transplanting the kidney into her brother who was suffering from endstage renal disease. A Texas Court of Appeal said 'No'. 'Significantly, however, for our purposes, this power of parents ... to consent to surgical intrusions upon the person of the minor ... is limited to the power to consent to medical treatment.'<sup>137</sup> Black's Law Dictionary defines medical treatment as 'a broad term covering all steps taken to effect a cure of any injury or disease: the word including examination and diagnosis as well as application of remedies.'<sup>138</sup> To date, all courts have held that surgical removal of any normal healthy, non-diseased, uninjured part of the body is not 'treatment.'

"In a similar transplantation case, a Louisiana Court of Appeal ruled that surgery could not take place and the Court owed 'protection to a minor's right to be free in his person from bodily intrusion to the extent of the loss of an organ unless such loss be in the best interest of the minor.'<sup>139</sup> Likewise, the ruling in *Wisconsin v Yoder* subjects parental duty and right to limitations 'if it appears that parental decisions will

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<sup>136</sup> *Re Phillip B.* 92. Cal App. 3d 796, 801.

<sup>137</sup> *Little v Little* 576. S. W. 2d 493-5.

<sup>138</sup> Black's Law Dictionary, (Rev. 4th Ed., St. Paul: West Publishing Co p. 1673, citing cases.

<sup>139</sup> *Re Richardson* 284. So 2d 185-7.

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jeopardize the health or safety of the child, or have potential for significant social burdens.'<sup>140</sup>

"Following in kind, *Kate's School v Department of Health* limited a parents' right to prescribe their treatment of choice for their mentally retarded children.<sup>141</sup>

"In *Valerie N. v Valerie N.* The California Supreme Court found that the parents as 'conservators, were not entitled to have conservatee, who was unable to consent to sterilization, sterilized inasmuch as there was neither evidence of necessity ... nor sufficient evidence that less intrusive means ... were not presently available to conservatee.' The Court further held ' ... as to those medical procedures permitted after court authorization the Legislature has required a judicial determination that the condition of the conservatee require the recommended course of medical treatment.' The Court also found it is necessary to 'preserve the right ... to be free of intrusive medical and surgical procedures.'<sup>142</sup>

"In *Prince v Massachusetts*, The United States Supreme Court ruled that 'parents may be free to become martyrs themselves. But it does not follow they are free ... to make martyrs of their children before that have reached the age of full and legal discretion when they can make that choice for themselves.'<sup>143</sup>"

Dr. Carson Strong,<sup>144</sup> writes:

"....The first view emphasizes the patient's status as a person. According to the first view, respect for persons requires that the lives and bodies of persons be inviolable. Decisions should be firmly guided by concerns such as respect for life, preservation of the physical integrity of the body, and respect for the reproductive capacities of people. Thus, it is central to this view that respect for persons be secured by adherence to certain rules designed to protect the inviolateness of persons. These rules include the following:....and the physical integrity of the body should be preserved. This view appropriately can be referred to as the 'inviolability-of-persons' view."

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<sup>140</sup> *Wisconsin v Yoder* (1972) 406. U.S. 205, 234.

<sup>141</sup> *Kate's School v Department of Health* (1979) 155. Cal. Rptr. 529.

<sup>142</sup> *Valerie N. v Valerie N.* (1985) 219. Cal. Rptr. 387.

<sup>143</sup> *Prince v Massachusetts* 321. U.S. 158. (1944).

<sup>144</sup> Professor of Human Values and Ethics, College of Medicine, University of Tennessee, *What is the "Inviolability of Persons?" in Medicine Unbound: the Human Body and the limits of Medical Intervention*

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And "By contrast, the second approach might be called a 'beneficence-centered' view. It follows the important ethical principle that when a patient's wishes are unknown, surrogate decision-making should be guided by the patient's well-being. In the beneficence-centered view, decisions should be individualized to the specific patient's needs, rather than based on firm rules".

"When a family member serving as surrogate decision maker is not acting on the basis of one of these 'legitimate' standards [substitute judgement standard or the best interests standard] (for example, when the surrogate weighs family interests against patient interests), any decision made on behalf of the patient may be questioned, and initiatives taken to replace the surrogate decision-maker....".

Ruth Macklin <sup>145</sup>, makes the point that:

"Despite the recent decline in the use of the best-interest standard for incompetent adult patients, that standard has prevailed in medical situations where the patients are children....The once simple picture of parents as the sole and proper decision maker for their children has been altered by a number of different developments. One is the rise of the children's-right and children's-liberation movements, leading to a call for increased decision-making autonomy for adolescents and even younger children. A related development is the idea that children need advocates to speak on their behalf when parents decide or act wrongly."

The American Academy of Pediatrics has considered <sup>146</sup>the ethical problem of consent by parents to the medical treatment of children. Whilst far from being without flaws, the statement does highlight (even if it then somewhat ducks) the central problem of tension between the parents' wishes and the best interests of the child. "Thus 'proxy consent' poses serious problems for pediatric health care providers. Such providers have legal and ethical duties to their child patients to render competent medical care based on what the patient needs, not what someone else expresses. Although impasses regarding the interests of minors and the expressed wishes of their parents or guardians are rare, the pediatrician's responsibilities to his or her

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<sup>145</sup> *Deciding for Others in Health Care Ethics in Canada*

<sup>146</sup> Committee on Bioethics: *Informed Consent, Parental Permission, and Assent in Pediatric Practice*: Pediatrics Vol. 95 No. 2 February 1995



patient exist independent of parental desires or proxy consent. [citing: Weir<sup>147</sup>].

## **13.7 Consent to Treatment of Children in English Law**

### **13.7.1 S v. S, W v. Official Solicitor**

In *S v. S, W v. Official Solicitor*<sup>148</sup> Lord MacDermott said, in a useful comment as to the paramouncy of the interests of the child:

"On the authorities that I have seen to date, one should look at what are the paramount interests of the child; other interests are subordinate, unless they either coincide with them or unless there is some exceptional reason for giving effect to them.

The conclusion was in that case that some procedures (there the taking of a blood sample to resolve a paternity question) could be permitted on the basis of a lower test than the best interests of the child, namely that it would be permitted if it caused no harm to the child.

### **13.7.2 Gillick**

In *Gillick v West Norfolk and Wisbech Area Health Authority*<sup>149</sup> Lord Fraser said:

"It was, I think, accepted both by Mrs Gillick and by the DHSS, and in any event I hold, that parental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child, and towards other children in the family. If necessary, this proposition can be supported by reference to Blackstone's Commentaries (1 Bl Com (17<sup>th</sup> edn, 1830) 452), where he wrote: 'The power of parents over their children is derived from their duty'; and

"Once the rule of the parents' absolute authority over minor children is abandoned, the solution to the problem in this appeal can no longer be found by referring to

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<sup>147</sup> Weir RF. *Selective Nontreatment of Handicapped Newborns: Moral Dilemmas in Neonatal Medicine*. New York, NY: Oxford University Press; 1984

<sup>148</sup> [1970] 3 All ER 107,

<sup>149</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All E R 402

rigid parental rights at any particular age. *The solution depends on a judgment of what is best for the welfare of the particular child.*" (emphasis added)

Lord Scarman also said:

"Parental rights clearly do exist, and they do not wholly disappear until the age of majority. Parental rights relate to both the person and the property of the child: custody, care and control of the person and guardianship of the property of the child. But the common law has never treated such rights as sovereign or beyond review and control. **Nor has our law ever treated the child as other than a person with capacities and rights recognised by law.** (emphasis added) The principle of the law, as I shall endeavour to show, is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child.....when a court has before it a question as to the care and upbringing of a child it must treat the welfare of the child as the paramount consideration in determining the order to be made. There is here a principle which limits and governs the exercise of parental rights of custody, care and control. It is a principle perfectly consistent with the law's recognition of the parent as the natural guardian of the child; but it is also a warning that parental right must be exercised in accordance with the welfare principle and can be challenged, even overridden, if it be not."

### **13.7.3 Discussion**

The approaches to medical interventions involving children are discussed by Ms Linda Delany,<sup>150</sup>. Those who would apply to all non-therapeutic circumcisions a different and/or lower level of protection of the child than either of those identified by Ms Delany must clearly articulate this: demonstrating why such a differing approach is necessary, proper and justified against general legal principles and civilised legal norms.

The factual situation being discussed by Ms Delaney is the practice of requiring a child to donate an organ or bodily material for the benefit of another, such as a transplant to a seriously-ill sibling; whilst these procedures may often involve the reduction in function (at least potentially, as where one of two kidneys is

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<sup>150</sup> British Medical Journal 1996; 312:240, in *Altruism by proxy: volunteering children for bone marrow donation*

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donated) they may also merely involve the loss of body fluids which the donor will restore naturally.

As Ms Delany observes, there is the approach, wholly consistent with the line of the Children's Act 1989, of the House of Lords in *Gillick (Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All E R 402, where a medical procedure is permitted **only** (my emphasis) if it serves the best interests of the child who undergoes it. The second, stemming from *S v. S, W v. Official Solicitor* ([1970] 3 All ER 107)<sup>151</sup> accepts that parents can give valid consent to treatments which are not "against the interests of the child"

Applying, however, either approach to non-therapeutic circumcision (where the loss and risks are significant, where there is no recipient to benefit and where, at best, the 'benefit' to the victim is an intangible and somewhat question-begging cultural identity) would lead to the conclusion that a parent is not able to give valid and effective consent to a non-therapeutic circumcision: since the medical literature makes it clear that such amputations are harmful of the victim, consent could not validly be given under the test in *S v. S*, nor, *a fortiori*, under the *Gillick* test where the procedure is allowed only if it is in the child's best interests.

Perhaps in looking at the limits now being laid on parental consent to operations on their children, and on the impact of religious views on the decision to inflict ritual circumcision on a child, it might be illuminating to consider the words of Lord Donaldson MR in *Re T*<sup>152</sup> dealing with the question whether a Jehovah's Witness had given a valid direction that she did not wish to receive a blood transfusion. Did she really mean what she said, or had her mind and will been over-borne by others? He said:

"In considering the effect of outside influences, two aspects can be of crucial importance. First, the strength of will of the patient.....Second, the relationship of the 'persuader' to the patient may be of crucial importance. The influence of parents on their children or of one spouse on the other can be, but is by no means necessarily, much stronger than would be the case in other relationships.

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<sup>151</sup> [See also Skegg, *Consent to medical procedures on minors* in 36 MLR 370-381, where he argues that this second approach is relevant to any medical intervention carried out on children purely for other people's benefit]

<sup>152</sup> New Law Journal, 7 August 1992, p 1125

"Persuasion based on religious beliefs can also be much more compelling and the fact that arguments are being deployed by someone in a very close relationship with the patient will give them added force and should alert the doctors to the possibility—no more—that the patient's capacity or will to decide has been overborne. In other words the patient may not mean what he says."

There are those, circumcised at birth for solely societal reasons, who find that their chosen conversion in adult life to religions, such as (it is understood) Hinduism and Buddhism, have been impeded by the tenets of those religions that the loss of body parts is wrong unless required for compelling medical reasons. The decision, taken for, and imposed upon, them in early life as to the cultural/religious identity they were to follow has deprived them of the fundamental right to decide for themselves in adult life whether to follow a religion, and if so which religion to follow.

#### **14. European Charter for Children in Hospital**

This provides that the right to the best possible medical treatment is a fundamental right, especially for children. In particular, it requires that children and their parents be informed in a manner appropriate to their age and understanding, and have a right to informed participation in all decisions involving their health care. That steps be taken to minimise physical and emotional stress. That every child be protected from unnecessary medical treatment and investigation. That children be treated with tact and understanding and their privacy be respected at all times.

Dr. Priscilla Alderson <sup>153</sup> comments:

"Aspects of the Charter were re-inforced by the 1989 United Nations Convention on the Rights of the Child...Basically the Convention advocates three kinds of rights for children. Adults are happy to discuss the first two kinds:

" rights to resources and care - good hospital care, food, warmth, safety, parent's loving care;

" rights to protection from harm - from neglect and abuse, fear, pain and loneliness, from too many medical interventions or the neglect of being denied necessary medical treatment. However, many are uneasy about the third kind:

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<sup>153</sup> Bull. Med. Eth. October 1993, at page 13

" rights to self-determination, dignity, respect, integrity, non-interference. the right to make informed personal decisions.....Yet the right to self-determination is the key to all rights. You can talk about resources, care and protection under the heading of children's welfare or interests, but do not need to use rights language to promote these benefits. The right to chose is a crucial part of being a right-holder. Alice Miller, the Swiss psychoanalyst, has shown<sup>154</sup> that centuries of harsh, even cruel, child-rearing illustrate differences between adults' ideas of 'care, 'protection', what is 'right for children', versus children's rights to chose how they would like to live."

The '*NHS: The Patient's Charter -- Services for Children*' (Apr 1996) follows these concepts; if (and experience with the Citizen's Charter to date generally does not inspire confidence) the guidelines are properly and fully applied, it would not be within the Charter for any non-therapeutic circumcision to be performed in an NHS hospital. The Charter makes it clear (page 2) that the care is owed to the child, who must (page 13) be given an explanation of the treatment proposed (including benefits, risks and alternatives) and the child's emotional and developmental needs will be taken into account. None of these admirable aims can be other than flouted if a boy is circumcised by a doctor (no matter whether he purports to be acting in a medical or religious capacity) at the request of the parents for a non-therapeutic reason.

## **15. European Convention on Human Rights**

Part III of the Consultation Paper discusses the European Convention on Human Rights ('ECHR'). In paragraph 3.12, Article 3 ECHR is quoted which provides that:

'No one shall be subjected to torture or to inhuman punishment or degrading treatment'

In *Tyrer v UK*<sup>155</sup> the Strasbourg Court adopted the disjunctive interpretation of Article 3 ECHR (see also paragraph 3.13 *et seq* of the Consultation Paper).

Article 8 ECHR provides that:

(1) everyone has the right to respect for his private and family life, his home and his correspondence.

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<sup>154</sup> Miller. *Du sollst nichts merken*. 1981 Frankfurt: Suhrkamp  
<sup>155</sup> (1978) ECHR 1

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(2) there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the preservation of health or morals, or for the protection of the rights and freedom of others.

In *Costello-Roberts v UK*<sup>156</sup> the court acknowledged that the concept of 'private life' covered a person's physical and moral integrity.

In paragraph 3.22, Article 9 ECHR is set out in full:

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom of others.

In Articles 8 and 9 there is a need for a balancing act between the individual's freedoms and the necessary restrictions on them as required for a number of public policy reasons, one of the more important of which is the need to ensure that another's freedoms are not thereby infringed. As is noted in paragraph 3.23, Article 9 ECHR thus draws a distinction between the right to *freedom of thought* etc **and** the right to *manifest one's religion or beliefs*.: as the Commission observes, it is necessary to consider not only whether a restriction of a particular religious practice infringes Article 9(1) but also whether such restriction can be justified under Article 9(2). See also Article 14 UN Convention on the Rights of the Child.

Given the individual's right, Article 8 ECHR, to bodily integrity and the limitation on the manifestation of a religious practice under Article 9(2), given also the loss of bodily integrity, the pain (which falls within the prohibition of inhuman treatment in Article 3 ECHR, the risks and inevitable dysfunction of male ritual circumcision, it hard to see how the practice of the

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<sup>156</sup> (1993) ECHRR 112

ritual can be permitted to continue given the medically demonstrated risks and dysfunction. The claim in the name of freedom of religion for the continuation of this ritual cannot be accepted: the restriction on this practice is justified, not only by Article 9(2) but also by Articles 3 and 8 ECHR.

## **16. The religious demands**

Inherent difficulties in the freedom of religious thought and the restrictions that might have to be placed as a matter of public policy on the practice of certain aspects of religion are touched on in Part III and also in Part IX.

It is clear that the Commission, in dealing with the question of ritual male circumcision has been heavily influenced by the fact that it is practised by Jews and Muslims: in paragraph 9.2, it is described as being insisted on by Islamic and Jewish law (see also n.2 to that paragraph); even if that be so (and it is far from certain that it is so), there is no reason (other than perhaps a wholly misplaced 'political correctness') for the difficulties both legally and morally in such a practice being ignored. Indeed, on the basis of the Commission's own proposals (see paragraph 9.27 and Part XVI paragraph 36) circumcision in the name of any other religion or by any other cultural group would not enjoy the proposed exemption. The proposed exemption would apply solely to Jewish and Muslim circumcisions, which prompts the question 'Why?': is it that the procedure is recognised as harmful and thus must be confined to these two religions only as a special exception, in which case where is the discussion of this, or is this an inadvertent omission based on a wholly inadequately thought-out position? Whichever the reason, the Commission's treatment is unacceptable both as it stands and as a matter of principle and public policy.

The Commission does discuss, in somewhat superficial terms, the issues of human rights in the context of other consensual assaults on a person; indeed the tension inherent in the freedom of religious thought and the restrictions that might have to be placed as a matter of public policy on the practice of certain aspects of religion are touched on in Part III and also in Part IX. That these discussions might have any bearing on the practice of a religious/ritual mutilation either seem never to have occurred to the Commission or, perhaps, the Commission felt that the practice would inevitably be seen as offending against the fundamental human rights of the non-consenting victim if it were discussed and decided to duck the issue. This omission

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of any discussion of the religious and cultural dimensions of ritual circumcision in a consultation paper such as this is not acceptable.

It would seem that the Commission's stance is driven by two factors: a wish to preserve what it sees as 'traditional' and a perceived need to placate (at any cost?) the Jews and Muslims (but not seemingly any other group who circumcise for ritual reasons). These factors appear to have produced a treatment of ritual male circumcision which is misleading to the point of dishonesty, which dismisses the matter in a scant few lines and which avoids any discussion of the real issues (perhaps because to discuss them would be clearly to demonstrate the unacceptability and unlawfulness of the practice).

As for the argument of tradition, the words of Oliver Wendell Holmes seem apposite: "[I]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule persists from blind imitation of the past"<sup>157</sup>. Further, in relation to ritual male circumcision at least, the Commission's philosophical position would seem to be one of 'Legal Moralism'; and the discussion of that stance, and the criticisms of it by Mr Roberts in Appendix C of the Consultation Paper are apt.

Professor Dwyer <sup>158</sup> convincingly argues that the view that parents have rights over their children is incorrect and untenable: the rights reside in the children with the parents acting as agents for the children to enforce those rights. Dwyer is writing from a culture and a constitution which sets great store on freedom from state interference and on religious freedom, to the point, he argues, that the correct position has been blurred. In suggesting as he does, Dwyer echoes English law as to the nature of the parent-child relationship.

He takes as his basis that the rights given by the American Constitution are granted to an individual for him to determine his own affairs; the right to determine the affairs of another is not a general right, even where decisions are taken for an incompetent adult, and he argues that dicta suggesting that this right to

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<sup>157</sup> Dwyer (op. cit): quoted by Justice Blackmun in *Bowers v Hardwick*, 478 US 186(1986) and taken from: *The Path of the Law*, 10 HARV LR 457

<sup>158</sup> *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights* [California Law Review, Vol 82, Dec 1994, No. 6, p 1371]



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determine the affairs of another exists, exceptionally, in relation to the parent and child is flawed. He sees similarities in the concept of the claimed rights of parents over their children (their claimed 'other-determining right') with slavery which is prohibited by virtue of the 13th Amendment to the American Constitution [Amendment XIII Section 1: 'Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction']. He cites Armer and Widawsky<sup>159</sup> defining slavery as a "power relation of domination, degradation, and subservience, in which human beings are treated as chattel, not persons".

Dwyer makes the point (in terms that also made by the Queensland Law Reform Commission, *supra*) that "it is not self-evident that a connection exists between parents' religious beliefs and children's interests"; it would be necessary to have to demonstrate this connection "in order, it would seem, to justify the Supreme Court's determination that parents should have greater rights of control over their children's lives when parental preferences regarding the upbringing of children arise from religious rather than secular beliefs. It is necessary to show that the very fact of adhering to a religion -- any religion -- whose tenets include preferred modes of parenting makes a parent better able or more disposed to further the temporal interests of the child "; and he makes the point that 'temporal' interests are all that the State can properly concern itself with.

Further, he observes that "it is very odd to tie one person's rights to another person's interests. In our legal culture, rights ordinarily protect the right-holders interests, not the interests of other persons. Thus, it is fitting to ask why, if what we are most concerned with is protecting children's interests, we do not grant children themselves the rights necessary to protect those interests. Why, instead, do we rely on the conceptually awkward notion of parent's rights?"

As Dwyer says: "...even if it does on the whole further parents' interests to possess rights to direct their children's lives in ways that are harmful to the children, the state should deem such interests illegitimate and refuse to give them precedence over the interests of children. The problem with such 'interests' is that they entail treating children instrumentally, using children in ways that sacrifice

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<sup>159</sup> 105 HARV. L. Rev. 1359, (1992)

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their welfare interests in order to further the ulterior interests of parents"; and "This is true whether the parents' motives are self-regarding or solely concerned with the well-being of the child (e.g. if the parents believe they are sacrificing the child's temporal interests in order to further the child's spiritual interests). If state decision-makers *themselves* believe certain parenting practices or decisions to be harmful for a child, then their advocating parental rights to undertake those practices or decisions necessarily means that *they* are willing to accept the sacrifice of the child's interest for the sake of satisfying the parents. The reluctance of liberals in particular to take a stand against religiously motivated parenting of which they personally disapprove is, I believe, due largely to their believing that liberal values of tolerance and respect for diverse ideological views require the state to defer to the viewpoint of the parents in determining whether particular parenting practices should be permissible. This might be a defensible position from which to determine the permissibility of what individuals do to themselves or what consenting adults do to each other. However, it is a mistake in the case of children, who are not the same persons as their parents, nor, in general, consenting participants in the religious practices of their parents. Liberals should instead view the child-rearing behaviors of parents the same way they view actions affecting any other non-consenting persons.....we do not simply give people rights to use other, non-consenting persons as instruments for the advancement of their own interests. Nor do we permit people to inflict what a majority of the community considers to be harm on other, non-consenting persons, regardless of their motivations for doing so."

Dwyer concludes that his analysis shows that "none of the interests that may be bound up in the conflict between parents and the State over the appropriate forms of child-rearing supports the perpetuation of parents' rights. Objections to state interventions that would be detrimental to the well-being of a child can stand entirely on an assertion of the child's rights. Parents' rights are necessary only to ward off state interventions that would on the whole enhance a child's well-being. That aim is illegitimate because it entails a willingness to sacrifice the welfare interests of children in order to advance uncertain (given the possible long-term harm to the parent/child relationship discussed above) and, in any event, non fundamental interests of parents or of other members of society. We do not allow adults to be treated as mere instruments for the achievement of others' ends, and we should not allow children to be treated in this way either".

Professor Brigman, some 10 years earlier, argued that circumcision was a form of child abuse<sup>160</sup>. He too argues that the US courts are entitled to intervene in family life and/or religious practice when, as it was put in *Wisconsin v. Yoder*, (op.cit at n.129) "... it appears that parental decisions will jeopardise the health or safety of the child, or have a potential for significant social burdens". In considering the religious basis of ritual circumcision he starts with the US Supreme Court decision of *Reynolds v. United States*<sup>161</sup> (involving the prosecution of a Mormon for bigamy) where the Court distinguished between religious beliefs and religious practices and ruled that while the government could not interfere with religious beliefs, it could limit practices performed in the name of religion that were harmful to society. To do otherwise, according to the Court, would be to "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself".

## **17. The cultural claim**

In paragraph 9.13 *et seq* religious and cultural practices are discussed and the case of *Adesayna* summarised. In (1975) 24 ICLQ 136 Mr Sebastian Poulter, in supporting the correctness of the *Adesayna* decision, suggested (see also the Consultation Paper (paragraph 9.15) that possible reasons in addition to the judge's were: the thinking behind the Tattooing of Minors Act 1969; the increasing inobservance of the ritual in Nigeria which made special treatment of the ritual in England and Wales less acceptable; and the need to apply the criminal law equally to everyone.

According to paragraph 9.16, Mr Poulter changed his mind some 12 years later, in "Ethnic Minority Customs, English Law and Human Rights"<sup>162</sup>. The discussion of Mr Poulter's views in paragraph 9.17 *et seq* gives a somewhat misleading impression of his views, however. What Mr Poulter suggests is that, whilst it might be appropriate to allow some tolerance to minorities, there are limits on that tolerance. These he suggests, *pace* note 48 to paragraph 9.18, are to be found in the need to recognise the freedoms of others. He writes that claims based on religious or cultural freedom which

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<sup>160</sup> William E Brigman. *Circumcision as Child Abuse: the Legal and Constitutional Issues*. Journal of Family Law (University of Louisville School of Law) Vol 23, 1984-85, No 3. 337-357

<sup>161</sup> 98 US 145 (1878)

<sup>162</sup> [(1987) 36 ICLQ 589]; see also op.cit at note 111.

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violate other's fundamental rights "must clearly fail.....any custom which denies another person the right to life (e.g. human sacrifice) or involves cruel, inhuman or degrading treatment or punishment (e.g. physical mutilation of wrongdoers or female circumcision) is bound to be denied recognition". Thus, contrary to the impression given by footnote 48, female circumcision is mentioned as but one example of practices which go beyond the proper limits.

Mr Poulter continues that the claim for religious freedom may be rejected on the basis of the various limited grounds, e.g public order or public safety." Similarly if it could be scientifically proved that the Jewish and Muslim methods of slaughter involved greater suffering than pre-stunning there might be a case for arguing that the special religious exemption (in s.36(2) Slaughterhouses Act 1974) should be repealed on the ground that causing unnecessary suffering offends against current notions of public morality".

There is nothing in Mr Poulter's article which would support the notion that he would place a higher value on the prevention of cruelty to animals than he would to the prevention of cruelty, risks and dysfunction to children. Mr Poulter is thus a great deal less permissive than the Consultation Paper would suggest: whilst there are some differences between male and female circumcision, the pain is broadly the same, the loss of sexual function exists in both (even though the loss may be greater in the female because of the greater excision of flesh typically performed) and both involve involuntary loss on the part of the victim of bodily integrity, cruel and inhuman treatment, and permanent disfigurement: all these are violations of the fundamental rights and freedoms of the unconsenting victim.

One can perhaps predict an argument from those who would circumcise as a matter of ritual or custom that the child 'benefits' from a procedure which marks him as a member of a race, group, tribe, sect or religion; and that continuing observance of the religious demands of ritual mutilation form an important bond both of the group itself and of the child to the group. An alternative argument might be advanced that in addition to 'group identity' from circumcision, there is the danger that if a infant is not circumcised in accordance with the dictats of the parental culture and/or religion that child might suffer rejection by the family and/or there might be tensions within the family arising from the child's intact status. The objections to these arguments include that a family or group which is so insecure and disturbed as to place no value on the child

as an individual and which regards the child as no more than a possession, apt to be subjected to genital mutilation, is likely already to be dysfunctional in the broadest sense.

Ritual circumcision is to ignore both the pain and harm of the procedure and that it is inflicted upon a child whose fundamental human rights are over-ridden, and whose freedom to choose in adult life his own belief-systems has been impaired; and they would trade an inevitable sexual dysfunction for the possible avoidance of damage stemming from their own inability to cope with the consequences of according their children full legal rights. Those who would try to argue for the continuation of this ritual mutilation do so as *parti pris* and can derive no support from the medical evidence nor from academics such as Mr Poulter and (seemingly) Professor Feldman<sup>163</sup>.

## **18. The reality of male circumcision and the Consultation Paper's proposals**

The Commission's view, in paragraph 9.1, as to the alleged clarity of the law concerning ritual circumcision, (echoed in paragraph 9.2: "Male circumcision is lawful under English common law") is undermined by the Consultation Paper itself. If the law were indeed as clear as the Commission would have us believe, then it is curious that ACPO saw a need, as reported in paragraph 9.2, to "make the position entirely clear"; it is also of note that reference is made to "formulating rules as to the nature of the consent given by the victim and the limits and the circumstances in which consent is legally effective". *Ex hypothesi*, the victim does not, and cannot consent, because he is an infant or young child; parents purport to assent on his behalf, but that is not the same. Further, the limits etc of consent, as suggested by ACPO, are not touched on in relation to ritual circumcision.

The Commission's proposition is further undermined by the last sentence of paragraph 9.2. The Commission's proposal (see paragraph 8.50) is that the 'medical exemption' be confined to a 'duly registered medical practitioner'. If the law were 'clear', as alleged by the Commission, and ritual circumcision were lawful at common law (and the inference that the reader of the Consultation Paper is invited to draw is that it is so lawful as an exception in its own right rather than as a

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<sup>163</sup> Quoted, without citation, by the Commission at n.37 to para 3.24.

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feature of a medical procedure), then the alleged lawfulness would continue and it would be irrelevant whether the operator was a duly registered medical practitioner, capable of benefiting from the 'medical exemption', or not. Further, it would not be necessary to "put the lawfulness of ritual male circumcision beyond any doubt" (as suggested in paragraph 9.27) if the legal position were in truth as stated by the Commission in paragraphs 9.1 and 9.2.

Ritual circumcision is (apart from medical treatment to a person unable to consent for himself, and lawful correction) a situation where the victim is not consenting for himself to the infliction of violence upon his person. The person purporting to consent on behalf of the circumcised victim is either the person inflicting the violence or the person who, in the words of the Children and Young Persons Act 1933, 'causes or procures him to be assaulted..... in a manner likely to cause him unnecessary suffering or injury to health'. It thus seems wholly inappropriate to deal with ritual circumcision in a paper dealing with situations where the victim has consented for himself to the infliction upon his own body of injury; the considerable confusion of thought in the Consultation Paper would have been avoided had the issues of medical treatment (particularly for those incompetent to consent), lawful correction and non-therapeutic circumcision been dealt with as quite different and separate questions. Indeed, it is hard to resist the suspicion that the inclusion of ritual circumcision in the Consultation Paper was an attempt slip through and/or pass off as legitimate a practice, which causes grave damage and is a breach of civilised legal norms, under cover of a liberalisation generally of the law on the infliction of relatively minor and essentially self-authorized injuries.

Medical treatment can be seen as having as its essential end-aim the cure and/or prevention of a disease process; and it is that purpose which justifies its being done even to the point of considerable mutilation. Sports (where the participants are, of course, volunteers) can, of course be the source of serious injuries, but the more usual cuts, scrapes and bruises are, typically, minor and quick to heal with no lasting long-term effects; and the benefits of exercise can be seen as justifying the risk of injury. Equally, parental correction tends inflict more pain than damage and, it is a commonplace to state (but see Lord Mustill in *Brown* at p267A), that it must not "go too far" and must be "for the purpose of correction and not the gratification of passion or rage...". If it goes too far then the courts can and do intervene. Indeed, it is ironic that the principle of physical correction of children is

increasingly coming under attack, both domestically and internationally; but the far graver, and irreparable damage of circumcision, attracts only a perfunctory mention by the Consultation Paper.

Even if (which is doubted) the Commission is correct in stating that circumcision has been lawful at common law (and that on the basis of only two cases where mention of it was probably *obiter*), it is perhaps not too fanciful to see the attitude to circumcision as stemming from its historical perspective. Originally it was practised in Britain only by Jews, who were historically seen in Britain as an alien group not wholly under the law and its protection (as with the laws against usury) and Muslims. Thus the Jewish and Muslim ritual mutilation of their infant boys could be seen as not having an impact on society as a whole. Further, given that there is no requirement for a professional qualification for the performing of a surgical intervention, might not the non-prosecution of ritual circumcision also have flowed from its quasi 'surgical and medical' connotations, particularly when wrongly it was seen as having few disadvantages, rather than from its being an exempted procedure in its own right.

Certainly, in the 19<sup>th</sup> century, circumcision acquired the pseudo-medical justification as being preventive of masturbation (and the illness thought to follow from masturbation); and, thus, any more recent general tolerance of circumcision can be seen as deriving from the latitude accorded medical treatment (be it the Victorian rationale or the equally medically-discredited claims of more recent years), rather than compelling evidence of its being one of the exemptions from the prohibition against violence. A medical 'justification' would also serve to give ritual circumcision a spurious respectability and justification.

### **18.1 Commission's proposals**

The Commission sums up its proposals in Part XVI. In paragraph 1, it proposes that the same principles should apply to all injuries inflicted with consent (so it says, but then draws a different treatment for ritual circumcision); that the infliction, paragraphs 2 and 3, of 'seriously disabling injury' should remain a criminal offence but that the infliction, paragraphs 5 and 6, of lesser injuries should not be a criminal offence.

'Seriously disabling injury' is defined in paragraph 7 as an injury which:

**(1) causes serious distress, and**

**(2) involves the loss of a body member or organ or permanent bodily injury or permanent functional impairment, or serious or permanent disfigurement, or severe and prolonged pain, or serious impairment of mental health, or prolonged unconsciousness; and in determining whether an effect is permanent, no account should be taken of the fact that it may be remediable by surgery.**

In paragraph 12, the Commission proposes that a valid consent may not be given by a person without capacity (and capacity is discussed in, *inter alia*, paragraphs 13 and 14). An exception is proposed for 'proper medical treatment, paragraph 31, which is defined in 31(2). In paragraph 38, the Commission proposes that no valid consent may be given by a person under the age of 18 to injuries inflicted for 'sexual, religious or spiritual purposes'.

It is remarkable that, against these proposals, male circumcision is dismissed with a few perfunctory lines in Part IX (see, by contrast, the length of Part XI on lawful correction), and with the occasional references elsewhere in the Consultation Paper. Even if the Commission's wholly erroneous assertion, unsupported in any way, that it is 'generally accepted that the removal of the foreskin of the penis has little, if any, effect on a man's ability to enjoy sexual intercourse' were right, one might have expected some discussion as to why ritual male circumcision should be excepted from the general principles and, in particular, from the general proposal in relation to consensual injuries for sexual, religious or spiritual purposes at paragraph 38 of Part XVI. Equally, it is very difficult to understand why, when it by definition requires the amputation of the healthy and functional flesh from a healthy penis, it is to be regarded as differing from any other amputation and is an act 'not, therefore, regarded as mutilation' (see in particular the definitions of 'mutilate' and 'mutilation' above) and accorded some special treatment. Further, as an somewhat technical aside, an exemption for certain ritual circumcisions for certain members of religious groups might (but I have not thought it worth pursuing this minor point) render any Bill containing such a proposal hybrid.

Again, the fact that the consent but not the sacrifice comes not from the victim but from a person on his behalf, might have indicated a need for a rather more thorough examination of this ritual infliction of painful, risky and gravely damaging injury.



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Further, though in paragraphs 3.22- 3.27 and 9.13 - 9.19 there is some discussion of religious and cultural issues, there is no mention there of ritual male circumcision; albeit that the very reason of ritual male circumcision is religious for Jews and Muslims and cultural for other groups.

The remark that 'it is generally accepted that the removal of the foreskin of the penis has little, if any, effect on a man's ability to enjoy sexual intercourse' is, in its adoption of forelore and myth and its woeful failure to make even a cursory search of the body of medical literature, unworthy of a body charged with the considerable responsibility of examining the body of English law. The medical evidence, but briefly discussed above, renders the thrust of paragraph 9.2 of the Consultation Paper quite untenable. Whilst the Editorial Comment in 1996 British Journal of Urology, **77**, page 925 was not available to the Commission when it produced the Consultation Paper, the material on which that comment is based was readily available.

The claim of legality of this mutilating procedure under common law is not only made wholly without any authority being cited in support, but is an assertion which is open to considerable doubt, even before the 20<sup>th</sup> century's more enlightened view of children. Further, it is clear that the Commission's view of ritual circumcision and thus of its alleged legality depends crucially on the assertion as to the lack of harm being correct: to the point that once harm can be objectively demonstrated, the assertion as to the legality of it fails.

It is against the medical studies of circumcision that the procedure must be looked at to see whether or not it is as harmless as the Consultation Paper would wish to suggest in para 9.2; or whether it is in reality not only harmful but that the harm is such that is readily fits inside either the existing definition of 'grievous bodily harm' or the Paper's new level of injury, namely 'seriously disabling injury'.

### **18.2 'Seriously disabling injury'**

In the Commission's proposals in the Consultation Paper, 'Seriously disabling injury' is to be defined as an injury which:

(1) causes serious distress; and

(2) involves the loss of a body member or organ **or** permanent bodily injury **or** permanent functional impairment, **or** serious or permanent disfigurement, **or** severe and prolonged pain, **or** serious impairment of

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mental health, **or** prolonged unconsciousness. (my emphasis).

The pain experienced as a inevitable consequence of the unanaesthetised circumcision, quite apart from the distress which might be caused by some or all of the range of complications and a realisation in later life of the inevitable losses, means that circumcision satisfies the first limb of the proposed definition.

Circumcision also clearly satisfies almost all of the various, disjunctive, heads of the second limb since circumcision involves :

- the loss of an organ or body member(the prepuce)
- and** it involves permanent bodily injury
- and** permanent functional impairment
- and** serious
- and** permanent disfigurement
- and** severe
- and** prolonged pain.

In other words where the second limb of the proposed definition would be satisfied if but one of the various categories of harm were established, circumcision (as my emphasis seeks to highlight) satisfies most of them (and there is support in the medical literature that it might also result in serious impairment of mental health, and, in some if not all cases in prolonged unconsciousness).

There is a major objection to the Commission's proposal at paragraph 36 of Part XVI that "We provisionally propose that the circumcision of male children, performed with their parent consent in accordance with the rites of the Jewish and Muslim religions, should continue to be lawful": that is that it would create a class of children who, solely by an accident of birth and as a result of being male infants who have Jewish or Muslim parents (but seemingly not, in the way that the proposed exemption is currently drafted children born to parents of other belief-systems who circumcise for religious/cultural reasons) are to be discriminated against as a result of sex, race and/or religion and to suffer the pain, risks and dysfunction of ritual circumcision which the majority of boys in Britain are spared. Quite apart from any prohibitions against discrimination on those grounds contained in international law, such a creation of a group of second-class citizens would seem to be both abhorrent and to fly in the face of domestic legislation prohibiting racial and sexual discrimination.

## **19. International Law**

It is not uncommon to see attempts by individuals and groups to treat international legal provisions, and to a lesser degree domestic laws, as if they were a sort of 'supermarket pick-and-mix' selection of sweets, from which those elements which the individual takes as granting him, or preserving, freedoms, rights and protections which he sees as important, whilst at the same time rejecting those other provisions which he regards as intrusive (even though they are aimed at ensuring that the freedoms of others are given proper effect) because and only because the parts which he regards as unacceptable contain proper (though he of course does not concede them as being proper) limits to his actions. Thus the common provision as to freedom of religion is seized upon with enthusiasm; and the balancing provision as to proper limits so as to protect others is rejected. It is as if a person seeks to rely on laws against violence to himself, whilst regarding himself as free to disregard those concerning his violence towards others.

This "pick-and-mix" approach becomes even less acceptable when it is clear that the performance of ritual circumcision is, at least for Jews and possibly also for Muslims, a method for the parent to be a more observant member of his religion rather than an act of grace between the child and god: the parent sacrifices something which is not his in order that he himself might gain favour with his god.

Despite Britain's failure to meet its international obligations and to incorporate the European Convention on Human Rights into domestic legislation (see Lord Mustill in *Brown* at p272C), that Convention is one to which, as Lord Mustill observed at p272F, Britain and its courts must have regard. Equally, other international instruments, signed and ratified by Britain cannot be ignored nor flouted. Even if it were otherwise, the fundamental human rights articulated there would demand, as a matter of public policy, to be respected.

The European Convention has been touched on above; in addition regard must be had to, but not exclusively to, the Universal Declaration on Human Rights, and, especially, the United Nations Convention on the Rights of the Child.

These make it clear that circumcision for non-therapeutic reasons is a denial to the circumcised boy of his fundamental human rights. In the premises it is suggested that the current policy of English law (of either, if the Commission are right as to the current

position of its legality, regarding circumcision as legal under domestic law; or at the least taking no firm position but allowing the practice to be conducted without interference) is open to challenge and could readily be challenged, under the European Convention, in the forum of the Court. In that event, it would be credible that the plaintiff would pray in aid in support of his case the provisions of other international instruments which re-state, albeit without such ready enforcement machinery, similar fundamental rights.

## **19.1 Universal Declaration of Human Rights**

### **Article 2**

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

### **Article 3**

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

### **Article 5**

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

### **Article 7**

All are equal before the law and are entitled without any discrimination to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

### **Article 18**

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

### **Article 29**

1 Everyone has duties to the community in which alone the free and full development of his personality is possible.  
2 In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.  
3 These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

**Article 30**

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

As with the European Convention on Human Rights, there is a balancing between conflicting rights: the individual's rights to be protected from "torture or to cruel, inhuman or degrading treatment or punishment", Article 5, is safeguarded by the general restrictive protection in Article 30 which prohibits the engaging in acts which are aimed at "the destruction of any of the rights and freedoms set forth herein", and the freedom of religion etc in Art. 18 must be seen in that light.

**19.2 International Covenant on Civil and Political Rights**

**Article 2**

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

**Article 5**

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

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in

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any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

### **Article 18**

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

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

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

### **19.3 UN Convention on the Rights of the Child 1989**

This, the most recent, and most child-centred, international instrument is clear.

In the Preamble, there is the following preambular paragraph 12:

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

There is, in the preambular paragraphs, an important distinction to be drawn between the language of most of them and that of preambular paragraph 12: namely between 'Recognizing.....' and 'Taking account.....'. The clear signal from the difference in language is that those matters in the 'recognising' paragraphs formed a basis or framework for the Articles which follow, whereas the 'Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child' was seen as not over-riding the protections and rights enunciated in the Convention [see, for example, also Art.3(3)]. This point is important in view of the provisions of Article 31(2): "States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity." What is clear from the structure of the Convention as a whole is that those activities which

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are damaging and/or inimical to the child and its health, development and best interests are not permitted and only to the extent that the family's cultural life are not in conflict are those cultural activities to be permitted. Thus, Article 31(2) does not over-ride the provisions of Article 24(3) "States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children"

### **Article 1**

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."

This, it will be noted, requires that the Convention be applied, without distinction as to sex, to all children.

### **Article 2**

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

This article requires State intervention to protect the child from all discrimination; and thus, limits, strictly, the rights of the parents or guardians of a minor. Here, as elsewhere, Article 18 of the Vienna Convention on the Law of Treaties 1969, which provides that a state, while a treaty is awaiting ratification after signature, may not "act to defeat the object and purpose of a treaty", might well be illuminating; even if failure fully to implement might not attract international condemnation, enactment, or even a proposal by a official body (formally charged by the State with law review) for such an enactment, might well be seen as both a grave breach and a provocative one and one so at odds with the Convention that such behaviour would not be permitted even before any decision as to ratification.

### **Article 3**

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the

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best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff as well as competent supervision."

Circumcision is not performed in the best interest of a minor, but is instead performed to relieve the anxieties of parents regarding normal human sexual anatomy and to fulfil parental expectations of religious, social and sexual conformity. Parental or cultural belief that genital mutilation to any degree is in the best interests of the minor is irrelevant. Parents cannot endanger the lives of their children or cause irreparable physical disfigurement simply to raise them within the confines of their culture. Furthermore the 'competent authorities' in this situation --the world-wide medical profession-- are opposed to circumcision without obvious pathology.

### **Article 4**

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Despite Britain's seeming failure to give effect to this provision, it remains an international obligation on this country; and in the context of the Consultation Paper, any step taken now to give legitimacy, particularly when in a highly discriminatory form, would be a grave breach.

### **Article 8**

1: States Parties undertake to respect the right of the child to preserve his or her identity.

A primary sense of identity resides in the integrity of the sexual organs. Young males are especially at risk of damage to this identity by mutilation or disfigurement of their penises.



**Article 14**

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

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

The freedom in Article 14(1) is impaired for a ritually circumcised child since that mutilation for other than pressing medical reasons constitutes a possible impediment to joining, or even it has been suggested, marrying into religions such as Buddhism and Hinduism; and the physical marking of the infant in the name of religion is itself, even without the possible effect on a later wish to change religious adherence, a denial of that child's freedom of choice

**Article 13**

1: The child shall have the right to freedom of expression.

Circumcision of a minor, either at an age when the child is unable to express his will or by force against his consent, violates the child's right of expression by its performance. It also violates the freedom of sexual expression by permanently and unnecessarily diminishing the sexual sensations and functions of the penis as intended by nature.

**Article 19**

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

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

Non-medical circumcision has been defined by many professional writers as all of the acts forbidden by

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Article 19(1). This Article also restricts the ability of guardians to consent to unnecessary and harmful procedures, and requires medical professionals who have care of minors to protect them from all these forms of abuse.

### **Article 24**

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. [not quoted]

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

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

In light of the appalling record of risk and dysfunction from circumcision which can only be described as prejudicial to the health of minors, Article 24(3), which is part of an Article providing a protective framework, requires that these practices must not be used to justify non-medical circumcision of minors. In the absence of pathology or injury, the right to consent to the amputation of healthy genital structures for traditional, cultural, or cosmetic reasons must rest solely with the affected individual on reaching the age of consent and then only when that consent is fully informed.

The prohibition in Article 24(3) covers, in view of Article 1, children of both sexes and thus circumcision of both sexes. The language, and thus the meaning is clear; and this is so notwithstanding that the evil that was in the forefront of minds may have been female circumcision. By virtue of Article 31 of the Vienna Convention on the Law of Treaties 1969, the words of treaty provisions must be given their ordinary meaning; and by Article 32, recourse may not be had to the *travaux preparatoire* unless the meaning of the treaty provisions is on the face of it unclear, or possibly, where all the parties are in agreement so to refer. To suggest that only female circumcision is to be regarded

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as in breach of the various conventions on Human Rights, and the Convention on the Rights of the Child in particular, is both to deny the medical evidence as to the pain, risks and sexual dysfunction from male circumcision and also to argue for the formalisation of discrimination against these male children on the grounds of their sex, race and the religious beliefs of the family into which they are born: those who would so suggest must produce compelling arguments that this is proper.

### **Article 37**

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment....."

Given the pain, risks, diminution of sexual function and loss of privacy, bodily integrity and freedom of choice in a number of important areas of life, non-therapeutic circumcision is a grave breach of this common provision of international instruments on human rights.

Bearing in mind the predictable cries that this paper will inevitably provoke and also bearing in mind the unacceptability of a "pick-and-mix" approach to legal protections, it would be apposite to cite part of **The Nuremberg Code (1947)** (which followed the unspeakably depraved behaviour of the Nazis) as to medical ethics:

**Principle I:** The voluntary consent of the human subject is absolutely essential. This means that the person involved should have the legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision.

Circumcision of minors violates the principle of informed consent because they do not have legal capacity to give consent, are unable to exercise free power of choice, and have no knowledge and comprehension of the amputation or its short- and long-term consequences. Parental consent to non-medically indicated circumcision is invalid because it steps outside their duty and right to consent to treatment on behalf of their children in life-threatening situations.

## **20. Conclusion**

Non-therapeutic circumcision is painful, risky and disabling; as such it is unlawful and offends against domestic and international laws: it gives rise to criminal and civil liability. It raises issues of individual human rights, moral issues, issues of discrimination, physical and psychological damage: it is an abuse (sexual, physical and emotional) of the child.

It does not involve the consent of the injured party in any way at all; indeed the victim's reactions clearly demonstrate, as clearly as the child is able, his pain, terror and lack of consent. The purported 'consent' (more appropriately to be seen as 'assent') by others to the infliction of this, typically unanaesthetised, amputation breaches legal obligations of parental duties, and thus breaches legal provisions for the protection of the weak and innocent child. The inclusion of this issue in the Consultation Paper, which deals with the questions of consent by a person for himself to the infliction on himself of injury by another, is misconceived and based on inadequate consideration of the legal position and a complete failure to consider the medical position.

Although existing laws are sufficient to sustain a prosecution and a civil claim, for the avoidance of any doubt (for the same reasons that the Prohibition of Female Circumcision Act 1985 was passed) and to avoid discrimination as between the sexes and/or between groups of male children, male non-therapeutic circumcision should be accorded the same legislative prohibition as female circumcision.

It might, however, in contrast to the 1985 Act, be acceptable to permit a man over the age of 18 (and in line with the current provision for tattooing) to consent to have himself circumcised for cultural or religious reasons, as an exception to the general rule proposed by the Law Commission in the Consultation Paper as to the continuing ban on the consensual infliction of seriously disabling injury.