

FEMALE GENITAL MUTILATION & LAW OF INDIA

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INTRODUCTION

Female Genital Mutilation, also known as *khatna* or *Khafd* in cultural language, is a religious practice in Daudi Bohra community people, found mainly in Saudi Arabia, South Africa, and Asia, including some parts of India like Kerala, Maharashtra, etc. There is no specific legislation that bans this practice therefore we look into the existing legislations in this paper.

Female Genital Mutilation, hereinafter referred to as FGM, has not been defined but for our sake, we will refer to the definition given by WHO, UNFPA, and UNICEF in their joint statement as “All procedures that involve partial or total removal of the external female genitalia or any other injury to the female genital organs for non-medical purposes”. It must necessarily exclude any surgical procedure for the purpose of a girl's mental or physical health or any postpartum procedure performed by a registered medical practitioner.

This practice is still prevalent in India because the government denies its existence. It is practiced discreetly such that only the mothers and grandmothers of the community are at its core to ensure that the practice is performed year after year, generations after generations on girls, from the age of infancy to adolescence. FGM leads to extreme pain, infections, excessive bleeding, wound healing problems, fever, urinary infections, mental trauma, shock, vaginal problems, menstrual problems, scar tissue formation, sexual problems, even death in some cases.

There exist 4 types of FGM:

Type 1: Partial or total removal of the clitoris.

Type 2: Partial or total removal of clitoris along with labia minora.

Type 3: Narrowing down the vaginal opening by covering through a seal by positioning the labia minora or labia majora, with or without the removal of clitoris.

Type 4: Includes all other harmful procedures like cutting, piercing, scraping, etc.

WHY IS FGM PERFORMED?

1. There exist various social norms which consider FGM as an integral part of the culture. It is often considered a necessary part of raising a girl and preparing her for adulthood and marriage.
2. It is often motivated by beliefs about what is considered acceptable behavior i.e. to ensure premarital virginity and marital fidelity.
3. To resist extramarital sexual acts by decreasing a woman's libido by restricting their sexual behavior.
4. It is associated with cultural ideals of femininity and modesty.
5. It is favorable to the husband and gets a lit face to the woman.

There should be a balance between the laws of the land and culture. **Article 6 of the UNESCO Universal Declaration on Cultural Diversity**¹ states that cultural rights are an integral part of Human Rights and all people should be able to participate in cultural practices of their choice but that is subject to respect for Human Rights and Fundamental Freedom.

The paper talks about FGM through the angle a cultural practice as well as through the perspective of law of the country, namely, Human Rights, Constitution of India, Protection of Children against Sexual Offences Act and Indian Penal Code. The paper cites news articles, domestic legislations and various judgments as authorities to support both for and against the motion.

DOMESTIC LEGISLATIONS OF THE COUNTRY

FGM is violative of **Article 14² and 15³ of the Constitution** of India because circumcision in men is good for their health but FGM serves no such benefit. FGM is done to prevent women from having pre-marital coitus but nothing is done with men in this regard. The community wants to keep the premarital virginity and marital fidelity of females intact. The inhumane practice of FGM is widely perceived as a way to control a female's sexuality and

¹ Article 6 - Towards access for all to cultural diversity: While ensuring the free flow of ideas by word and image care should be exercised so that all cultures can express themselves and make themselves known. Freedom of expression, media pluralism, multilingualism, equal access to art and to scientific and technological knowledge, including in digital form, and the possibility for all cultures to have access to the means of expression and dissemination are the guarantees of cultural diversity.

² Article 14 of the Constitution of India – Equality before law.

³ Article 15 of the Constitution of India - Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

sexual desires. This is deep into the patriarchal roots of the society where women are viewed as objects, which also infringes their Right to Dignity enshrined under Article 21 as well as their Right to Equality.

However, the cultural practice opiates Equality by saying FGM is a way to attain religious spirituality just like Male circumcision. If FGM is prohibited, there would be deprivation of women from attaining spirituality.

FGM also violates **Article 21 of the constitution**⁴, KS Puttaswamy J., talks about how dignity is the core principle which unites the Fundamental Rights of the constitution. Right to Dignity includes the Right of individuals to develop the full extent of their potential and the Right to Autonomy over fundamental personal choices. The chilling effects of social disapproval are a result as reflected as the punishment of crime. FGM is performed on girls below 15 years of age without their consent and is not even for medical purposes; therefore it is discriminatory in nature and violates Right to Dignity. Dipak Misra J., in the case of *Sunita Tiwari v. UOI*⁵ asks why do women have to go through such a practice only to be favored by men. The practice of FGM lacks gender sensitivity. In another case of *Shafinjan v. Ashokan KM and ors.*⁶, the case of non-compliance with cultural norms was established as resulting in excommunication. In another case of *Prem Shukla v. Delhi Administration*⁷, the Supreme Court talks about humane part of the Preamble of the constitution. The realization of social order is found in Justice, Equality, and Dignity of the individual. In another case of *Francis Mullin v. NCT of Delhi*⁸, the court held that it is a violation of Article 21 of the constitution which basically talks about the Right to Life and Personal Liberty. Female Genital Mutilation is a violation of bodily integrity.

There is a risk of being boycotted by the community if such practices are not performed or if a person stands against this practice. **Bombay Prevention of Excommunication Act, 1949** was enacted as a redressal sought by boycotted members of the Daudi Bohra community. It prohibited boycotting of any member of the community. This leads to forced coercion and therefore infringes upon the right to personal liberty under Article 21 of the Constitution of

⁴ Article 21 of the Constitution of India – Protection of life and personal liberty.

⁵ (2016) 2 SCC 725.

⁶ Shafinjan v. Ashokan KM and ors, AIR 2018 SC 357.

⁷ Prem Shukla v. Delhi Administration, 1980 AIR 1535.

⁸ Francis Mullin v. NCT of Delhi, 1981 AIR 746.

India. This act was challenged in the Bombay High Court in the case of *Sardar Syedna Taher Saifuddin Saheb v. The State of Bombay*⁹, the majority judgment in this case regarded excommunication as legitimate under Article 26 of the constitution of India by the Supreme Court. It is a process of managing the religious affairs of the community.

Coming to **Article 25¹⁰ and 26¹¹ of the Constitution of India**, even before Islam was recognized as a religion, the practice of FGM was there but the Quran doesn't talk about it. Therefore, FGM even precedes Islam. It is not an essential practice since it is not prescribed in Quran. These Articles are subject to public order and the health of the individuals. Here, constitutional morality also comes into question since even Sati practices, child marriage, and Dowry practices are eliminated. Religious Freedoms enshrined under Section 25 and 26 should pass the test of other Fundamental Rights provided. While the supporters of the practice say that FGM has been prevalent since the 10th century.

The **Protection of Children from Sexual Offences Act (POCSO)** is a gender-neutral act that is its specialty. **Section 2(1)(f)**¹² talks about Penetrative Sexual Assault as referred in **Section 3(b)**¹³ of the Act which further uses the term "object" which would include blades, the section does not talk about sexual intent but actus reus is enough to constitute an offence. **Section 9**¹⁴ talks about aggravated sexual assault, on a narrow look sub-clause (h) as well as (n), would come into play when it comes to FGM. Section 9 uses the word "person" while the pronoun used is "he". If we refer to Section 8¹⁵ of the Indian Penal Code, the pronoun "he" would include both males and females. Therefore, if looked upon, the POCSO would also consider FGM as an offense when performed on minor girls.

In Section 375¹⁶ of the Indian Penal Code, "penetration" need not be complete, the term *labia majora* is also included in vagina. Section 375 explanation 1 read with Section 3 of the POCSO Act would cover FGM to be an offence. Since Section 375 explanation 1 clearly

⁹ Sardar Syedna Taher Saifuddin Saheb v. The State of Bombay, 1962 AIR 853.

¹⁰ Article 25 of the Constitution of India - Freedom of conscience and free profession, practice and propagation of religion.

¹¹ Article 26 of the Constitution of India - Freedom to manage religious affairs.

¹² Section 2(1)(f) of POCSO Act – Definition of Penetrative Sexual Assault.

¹³ Section 3(b) of POCSO Act - Penetrative Sexual Assault.

¹⁴ Section 9: Aggravated Sexual Assault.

¹⁵ Gender: The pronoun "he" and its derivatives are used of any person, whether male or female.

¹⁶ Section 375 of IPC- Rape.

states that even slight insertion is insertion in the eyes of law. Here, the intention of sexual assault does not play any role but the actus reus does.

Section 324¹⁷ and 325¹⁸ of the Indian Penal Code talks about grievous hurt through the use of dangerous weapons and prescribes punishment of imprisonment extending to seven years and fine. It is to be noted here that the intent here may not be sexual but it is to cause hurt. FGM leads to extreme bodily pain, mental trauma, menstrual problems, extreme blood loss and even death in some cases.

In 2016, the **Maharashtra Prohibition of People from Social Boycott (Prevention, Prohibition and Redressal) Act** was passed which defines the boycott by panchayats, local bodies and any community as an offense. The punishment for such is imprisonment up to 7 years or fine which may extend to 5 lakh rupees or both. This act is applicable to every community in Maharashtra and therefore is applicable to Daudi Bohra.

In the case of *Sunita Tiwari v. UOI*¹⁹, it was contended that FGM is an essential religious practice and is therefore, protected under Article 25 and 26 of the Constitution but has no mention in Quran. The Hon'ble Supreme Court issued a notice seeking complete ban on it to the Centre, while also demanding it to be held as a cognizable, non-compoundable, non-bailable offence.

IS FGM AGAINST HUMAN RIGHTS?

There have been a number of occasions where people have contented against the practice of FGM and supported to put a full stop on this practice. Due to its anti- human right nature, Congress MP Shashi Tharoor has supported the ban on the practice of FGM. He stated that, "Women's right to dignity supersedes right to freedom of religion. Law cannot question the idea of divine, but must regulate human action that hurts others"²⁰

The then Union Women and Child Development Minister, Maneka Gandhi, also held her view against the inhuman practice of FGM. She promised that her ministry will write to

¹⁷ Section 324 of IPC- Voluntarily causing hurt by dangerous weapons or means.

¹⁸ Section 325 of IPC- Punishment for voluntarily causing grievous hurt.

¹⁹ (2016) 2 SCC 725.

²⁰ The Hindu (2018). FGM a human rights issue: Tharoor.

Syedna (the high priest of Bohra community) and make them give up the practice of FGM as it is against human rights and violates provisions of the IPC and the POCSO Act.²¹

It is safe to say that FGM is an abuse of basic human rights like the right to life, the right to be free from gender discrimination, the right to physical integrity that is associated with the right to freedom from torture and the right to the highest possible standard of physical and mental health. It is also reflected as a form of child abuse. As per Indian legal perspective, people undertaking FGM may be prosecuted under the IPC, however, since it is "not explicitly an offence under the IPC", a complaint under Section 326 which covers causing grievous hurt can be registered. It is also to be noted that FGM may be covered under the POCSO Act, 2012.²²

CONCLUSION

This paper discussed about Female Genital Mutilation and the law of the country which makes it an unlawful practice while also accounting for the cultural phenomenon. Additionally, it violates the basic Human Rights of women in a cruel way by targeting their mental alongwith physical state. The issue is a taboo in the society, such that most of the population doesn't even know about it, it makes it even difficult for the legislature to pass a legislation on the subject. Daudi Bohra's have continued to live in countries where FGM is outlawed like UK and Australia. Various Muslim scholars have refuted FGM's association with Quran. Some rationale could be found in male circumcision but none in Female Genital Mutilation.

Majority of the women who undergo FGM have not even consented for it. The need of the hour is to spread awareness about the practice to unnormalize going through such pain for no apparent reason. The UNFPA estimated in 2019 that about 59 countries have already banned the practice by passing law against FGM, these include Spain, Norway, Sweden, New Zealand, United Kingdom, Canada, etc. 26 out of 29 African countries have banned FGM by imposing penalties including imprisonment, or fine, or both.²³

²¹ Das Gupta, M. (2017). Govt will end female genital mutilation if Bohras don't: Maneka Gandhi. Hindustan Times.

²² First Post (2017). Female Genital Mutilation: Report recommends separate law, sensitisation to eradicate practice in India.

²³ *FGM And The Law Around The World*, Equality Now, June 19, 2019.

The need of the hour is a special law relating to the cultural practices which violate the basic human rights without an apparent reason. FGM is a practice which is not heard of on a regular basis but it definitely exists in our society. If not for a special law, existing laws are feasible to punish the practitioners and to empower women who have been subjugated for generations in the name of culture and for their own benefit which cannot be seen.



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