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Constitutionality of Female Genital Mutilation in India

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ABSTRACT

Female Genital Mutilation involves the partial or total removal of external female genitalia or other injuries to the female genital organs for non-medical reasons. It is a traditional practice carried out on young girls, who are usually under the age of 15. This practice has been shown to have severe health complications for women, and thus, is a violation of the human rights of girls and women. In India, the practice is reported to have been performed in the Dawoodi Bohra community. Khafd, as it is identified in the community, is said to be a religious rite that has been in practice for hundreds of years. This paper aims to analyse the practice of FGM from the jurisprudence of Article 25 and 26 of the Constitution through a catena of judgments from the 1950s to the latest case of the Indian Young Lawyers' Association and Ors. v. State of Kerala (Sabarimala Case) and examine the essentiality of FGM as a religious practice.

Keywords: *Female Genital Mutilation, Article 25, Health, Essential Religious Practice, Human Rights.*

I. INTRODUCTION

Female Genital Mutilation involves the partial or total removal of external female genitalia or other injuries to the female genital organs for non-medical reasons.² According to a study conducted by UNICEF, approximately 200 million girls and women are subjected to this practice, 44 million of them being girls below the age of 15.³ While the practice of FGM does not provide any health benefits, it is justified along the lines of custom and tradition. In fact, FGM negatively affects the physical, mental, and social health of a girl/woman's life.

WHO classifies Female Genital Mutilation into four broad categories⁴:

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² WHO, *Female Genital Mutilation*, WORLD HEALTH ORGANISATION (Feb 3, 2020), <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>

³ United Nations Children's Fund, *Female Genital Mutilation/Cutting: A Global Concern*, UNICEF (2016), https://www.unicef.org/media/files/FGMC_2016_brochure_final_UNICEF_SPREAD.pdf

⁴ *Supra* at note 1.

- **TYPE 1:** The partial or total removal of the clitoral glans (the external and visible part of the clitoris, which is a sensitive part of the female genitals) and/or the prepuce/clitoral hood (the fold of skin surrounding the clitoral glans).
- **TYPE 2:** The partial or total removal of the clitoral glans and the labia minora (the inner folds of the vulva), with or without removal of the labia majora (the outer folds of skin of the vulva).
- **TYPE 3:** Also known as infibulation, this is the narrowing of the vaginal opening by creating a covering seal. The seal is formed by cutting and repositioning the labia minora, or labia majora, sometimes through stitching, with or without removing the clitoral prepuce/clitoral hood and glans (Type I FGM).
- **TYPE 4:** This includes all other harmful procedures to the female genitalia for non-medical purposes, e.g., pricking, piercing, incising, scraping, and cauterizing the genital area.

FGM is practiced in 30 countries worldwide, mainly concentrated in the Western, Eastern, and North-Eastern regions of Africa, some countries of the Middle East, and Asia.⁵ More than half the total FGM subjects live in just three countries: Indonesia, Egypt, and Ethiopia.⁶

FGM is practiced for a plethora of reasons. At the same time, some believe it to be a rite of passage into womanhood; others believe that the practice is intended to ensure a woman's chastity before marriage. Some communities also thought that FGM could improve fertility, hence making a woman more desirable for matrimony. In some communities, the clitoris is considered impure (haram ki boti). So, removal of the same ensures the women's cleanliness and purity, enhancing their desirability and respectability in society.

Female Genital Mutilation/Cutting can have serious health effects on women and girls. These range from immediate complications such as severe pain, haemorrhage, fever, infections, shock, and death to long term complications like UTIs, menstrual problems, scar tissue, sexual problems, later surgeries (like deinfibulation), and a myriad of psychological issues. Hence, it is a severe violation of the human rights of girls and women.

Of the 30 countries where FGM is practiced, 26 of them have laws that prohibit FGM practice.⁷ Despite these legislations, the practice has continued in secrecy. This is mainly due to improper

⁵ *Supra* at note 1.

⁶ *Ibid.*

⁷ Equality Now, *FGM and The Law Around the World*, EQUALITY NOW (June 19, 2019), https://www.equalitynow.org/the_law_and_fgm

enforcement, vague legislation, and lack of protection offered to girls at risk of undergoing FGM. The international community has joined hands to fulfil the Sustainable Development Goal (SDG) to end FGM before 2030 by increased advocacy, shared values, activism, and knowledge dissemination and counselling.

II. THE PRACTICE OF FEMALE GENITAL MUTILATION/CUTTING IN INDIA

Female Genital Mutilation is practiced prevalently among the Dawoodi Bohra community in India. Dawoodi Bohras trace their heritage to the Fatimi Imams, the Prophet Mohammed's direct descendants in Egypt.⁸ They are a peace-loving community with an unwavering commitment to faith, love for their country, belief in society's value, education, women's empowerment, engagement with other faiths, physical health and well-being, and care for the environment.⁹ The Dawoodi Bohra faith is based on peace, love, and humanity.¹⁰

While members of the community can be found around the globe, a large majority of the population lives in India. They have their own language called Lisan al-Da'wa, derived from Arabic, Persian, Urdu, and Gujarati. Dawoodi Bohras follow the Fatimi Ismaili Tayyibi school of thought.¹¹

The D'ai al-mutlaq ["Dai" or "Syedna"] is the religious and spiritual leader of the Dawoodi Bohra sect. He is considered to be the representative of the Imam. His role consists of leading the community, guiding their followers to a good life, and administering the community's religious and secular affairs.

While no record exists with the Ministry of Women and Child Development about the practice of Female Genital Mutilation in India, certain members of the Bohra community have come forward, sharing their experiences, and creating awareness about the persistence of FGM [Known as "Khatna" "Khafd"] in India, despite the lack of data presented by UN-based research endeavours.

One such member was Masooma Ranalvi, who, in 2015, wrote a blog describing her experience. Her blog garnered a lot of responses, including the formation of a group, "SpeakOutonFGM."¹² This drew the nation's attention to the practice of FGM in India. Consequently, a Public Interest Litigation (PIL) was filed by Sunita Tiwari, a human rights

⁸ About the Dawoodi Bohra, The DAWOODI BOHRAS, <https://www.thedawoodibohras.com/about-the-bohras/>

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Jyoti Punwani, *It was a memory I had blocked out, says activist Masooma Ranalvi*, THE HINDU (October 21, 2017), <https://www.thehindu.com/society/it-was-a-memory-i-had-blocked-out-masooma-ranalvi/article19895413.ece>

advocate, in the Supreme Court calling for a ban on “Khatna” as the practice was gender-discriminatory, meant to regulate female sexuality and desires. The PIL was tagged with the ongoing Sabarimala issue and currently stands referred to a seven-judge bench before the Supreme Court.

A report published by WeSpeakOut¹³ in 2018 highlights the severity of the situation. The data revealed 75% of daughters (aged seven years and above) of all respondents in the sample were subjected to FGM/C. Girls are usually subjected to Khafd when they are about seven years old.¹⁴

It was also found that the majority of the Bohras practice **TYPE 1** FGM/C (partial or total removal of the clitoris and/or clitoral hood/prepuce). Though supporters of Khafd in India claim Bohras only practice Type 1a (removal of clitoral hood only) and **TYPE 4** FGM/C (pricking, piercing, cauterization), participants in the study (including a medical doctor (OBGYN) who observed Khafd in his Bohra patients) reported that both Types 1a and 1b (partial or total removal of the clitoris and/or clitoral hood) are commonly practiced with very few cases of Type 4 FGM/C.¹⁵

Among the Bohras, FGM earns its religious sanctions from the book Da’a’im al-Islam, which is the binding sacred text for Dawoodi Bohras. Written by Al-Qadi al-Nu’man, the text says that the Prophet is ‘believed’ to advise for a simple cut of the women’s clitoral skin as it assigns purity on women and may make them more “beloved to their husbands.”¹⁶

In June 2016, the spiritual leader, Syedna Mufaddal Saifuddin issued a press statement implying that female ‘circumcision’ should continue in countries where it is not expressly illegal, such as India.¹⁷ The statement also said, “Male and female circumcision are religious rites that have been practiced by Dawoodi Bohras throughout their history. Religious books, written over a thousand years ago, specify the requirements for both males and females as acts of religious purity.”¹⁸

¹³ Laksmi Anantnarayan, Shabana Diler, Natasha Menon, *The Clitoral Hood A Contested Site: Khafd or Female Genital Mutilation/Cutting (FGM/C)*, WESPEAKOUT (2018).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Debangana Chatterjee, *Why female Genital Cutting Still Continues: Exploring the Reasons Behind its Sustainance*, SAHIYO (February 5, 2019), <https://sahiyo.com/2019/02/05/why-female-genital-cutting-still-continues-exploring-the-reasons-behind-its-sustenance/>

¹⁷ Mridula Chari, *Bohra leader upholds female circumcision in countries where it is not banned*, SCROLL (June 07, 2016), <https://scroll.in/article/809463/bohra-leader-upholds-female-genital-mutilation-in-countries-where-it-is-not-banned>

¹⁸ *Id.*

Earlier that year, during the campaigning against Female Genital Mutilation, a recording started circulating on social media. Upon authentication, it was reported that the audio was a recording of Syedna's sermon in Mumbai. In the audio clip, the Syedna says, "The act must be done. It needs to be done discreetly when it is a woman, but it needs to be done."¹⁹

III. CONSTITUTION AND FGM/C: THE 'ESSENTIAL RELIGIOUS PRACTICE' TEST

As mentioned above, Female Genital Mutilation is considered a traditional practice in the Dawoodi Bohra community. When looking at FGC in Islam, it is essential to look at all schools of Islam. Within the Sunni subsets of Hanafi and Maliki, FGC is obligatory for men and recommended for women. Within the Sunni Shafi'i school, it is obligatory for both men and women. Within the Sunni Hanbali sect, some consider it obligatory for both men and women; others think it mandatory for men and honourable for women.²⁰ While religious confirmation for FGM cannot be attested to anyone's Islamic school of thought, one must explore the diverse arguments presented in the Islamic jurisprudence.²¹ The International Conference on Population and Reproductive Health in The Muslim World, Egypt 1998 conceded that misunderstanding of Islamic provisions has led to the preponderance of harmful practices, such as FGM.

Article 25 and 26, enshrined within Part III of the Indian Constitution,²² guarantee religious freedom to the people. These articles stand proof of the constitution-makers intention to promote secularism in the country. However, the idea of secularism in India is subject to State intervention. Such intervention was intended to bridge the gap between religious and social behaviour.

Accordingly, the Supreme Court developed the doctrine to define the relationship between religion and the Constitution. It was determined that a practice deemed 'essential' to any religion could not be regulated by the State. The Supreme Court in *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* ["Shirur Mutt"]²³ articulated the essential religious practices (ERP) test. It was observed that

¹⁹ Rina Chandran, *Muslim leader in India under fire from activists for supporting FGM*, THOMAS REUTERS FOUNDATION (April 29, 2016), <https://www.reuters.com/article/india-fgm-bohra-speech-idINKCN0XQ1FE?editon-redirect=in>

²⁰ Ghadially R, Manushi A., *All for izzat' the practice of female circumcision among Bohra Muslims*, JOURNAL ABOUT WOMEN AND SOCIETY. 1991, 66, p 17–20.

²¹ Yasmin Bootwala, "A Review of Female Genital Cutting in the Dawoodi Bohra Community: Part 3—the Historical, Anthropological and Religious Underpinnings of FGC in the Dawoodi Bohras", CURRENT SEXUAL HEALTH REPORTS (August 9, 2019), <https://doi.org/10.1007/s11930-019-00214-x>

²² Constitution of India; art 25, 26.

²³ *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Shri Shirur Mutt*, (1954) SCR 1005(India), p 20.

the Courts were charged to decide whether a practice was 'religious' in character based on the evidence adduced and tenets of the religion so concerned.²⁴ On such determination, it can be questioned whether the practice is an 'essential' and 'integral' part of the religion.²⁵ The Court upheld that freedom of religion entailed both the freedom of religious belief and practice. The Court must regard the religion itself whilst analysing the essentiality of any practice.²⁶

What constitutes 'essentiality'? This was the question the Supreme Court sought to explore following the Shirur Mutt judgment. There were two plausible alternatives: essentiality could be determined by the religious tenets, or the Court could determine what constituted an 'essential' religious practice. In *Sri Venkataramana Devaru v. State of Mysore*²⁷, a question arose whether the exclusion of Dalits from a temple founded by Gowda Saraswath Brahmins constituted essential practice in the religious denomination. The Court opined that the religious rights of a denomination to manage its affairs under Article 26(b) were subject to the protections guaranteed under Article 25(2)(b). This set the precedent that courts can determine essentiality without asserting a higher degree of determinacy to the views of the religious community for Courts to resolve the essentiality of any religious practice.

The Supreme Court placed a greater degree of reliance on religious texts as evidence of essentiality. However, this view was reformed in the *Durgah Committee, Ajmer v. Syed Hussain Ali*²⁸. In this case, the Dargah Khwaja Saheb Act's vires, 1955, was challenged, arguing that the Act took away the fundamental rights of Muslims belonging to the Soofi Chistia Order, as they were the sole custodians and caretakers of the shrine at Ajmer.²⁹ The Court rejected this contention, observing that religious practices that arose from superstition did not enjoy the protection under Article 26, as these are not 'essential' or 'integral' to the religion. Hence, analysis of scriptures changed to the study of the practices itself, and the view of the Court superseded that of the religious denomination.³⁰

Similarly, the Supreme Court in *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan & Ors.*³¹ opined that the question of essentiality would be determined by the Court itself, thus doing away with the religion's ability to concur. The Court reasoned that relying on

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Sri Venkataramana Devaru v. State of Mysore*, (1958) SCR 895(India), p 17.

²⁸ *Durgah Committee, Ajmer v. Syed Hussain Ali*, (1962) 1 SCR 383(India), p 33.

²⁹ *Id.*

³⁰ H.M.Seervai, *CONSTITUTIONAL LAW OF INDIA*, (Universal Law Publishing, 4th ed., 1993), p 1269.

³¹ *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan and Ors.*, AIR 1963 SC 1638(India), p 57.

communities to assess essentiality may prove to be erroneous if rival contentions exist with the same community regarding such practice.

To illustrate, the Aga Khani Ismailis follow the same jurisprudence as Dawoodi Bohras, precisely the same book *Da'a'im al-Islam*, and trace their religious heritage to the Fatimid Caliphate where FGM was prevalent from the tenth to the twelfth century.³² The Aga Khani Ismaili Muslims were based in Persia for 600 years before migrating towards India, as opposed to Dawoodi Bohras, who emigrated from Yemen. Both these groups are guided by a supreme leader who dictates how the religion must be practiced within the community. Currently, the practice of FGM has been abandoned by the Aga Khani Ismailis.³³ Despite shared Islamic Law, fiqh between the groups, their practices differ.

A significant development in the Essential Religious Practice test was observed in *Commissioner of Police & Ors. v. Acharya Jagdisharananda Avadhuta & Anr*["Avadhuta"]³⁴, where the Tandava dance was held not to be an essential religious practice of the Ananda Marga Faith. In its majority opinion, the Court observed that the essential part of religion is the core beliefs on which the religion is founded and those practices that are fundamental to the followers of the religion.³⁵ In order to determine whether a particular practice is an essential part of religion, the test must be whether the absence of the practice itself fundamentally alters the religion.³⁶

The differing opinions on the Essential Practices Test have shrouded the concept in a veil of contradictions. This can be clearly observed in *Shayara Bano v. Union of India*,³⁷ where triple talaq was declared legally invalid by a close majority of 3:2. Justice Kurien Joseph noted that the longevity of practice doesn't express essentiality (contrary to Avadhuta). Justice Nariman found that abolition of triple talaq did not change Islam's fundamental nature (similar to Avadhuta). In their dissenting opinion, Justices Khehar and Nazeer observe that triple talaq was an essential religious practice, simply because it was sanctioned by Islam.³⁸ This was vastly different from all previous applications of the test, which required the religion to have mandated the practice under consideration and not to have simply sanctioned it.³⁹

³² Kassamali N. Genital cutting. [ed.] Suad Joseph. *Encyclopedia of Women & Islamic Cultures*. Brill-Leiden, 2006, Vol. III, p 129–134.

³³ *Id.*

³⁴ *Acharya Jagdishwaranand Avadhuta and Ors. v. Comm of Police Calcutta and Anr.*, (1983) 4 SCC 522(India), p 533.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Shayara Bano v. Union of India*, (2017) 9 SCC 1(India).

³⁸ *Id.*

³⁹ *Acharya Jagdishwaranand Avadhuta and Ors. v. Comm of Police Calcutta and Ors.*, (1983) 4 SCC 522(India);

Culminating in *Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors.* [“Sabarimala” Case]⁴⁰, the ERP test was applied to determine the essentiality of barring entry of women between the ages of 10-50 into the Sabarimala temple dedicated to Lord Ayyappa. Justice Chandrachud proposed that the essential religious practices test instilled certain limitations in order to balance competing rights and interests.⁴¹ The only dissenting judge, Justice Indu Malhotra, opined that essentiality must be determined by the religious denomination itself.⁴²

In a review petition filed before the Supreme Court in 2018, the Court reserved judgment. It referred the matter of entry into Sabarimala, the practice of Female Genital Mutilation, and the exact scope of rights under Articles 25 and 26 with respect to the ERP test to a larger, seven-judge bench in *Kantaru Rajeevaru v. Indian Young Lawyers Association*.⁴³

IV. CONCLUSION

Female Genital Mutilation/Cutting is a barbaric practice aimed to vilify and restrain female sexual expression under the garb of “purity” and “cleanliness.” Despite its religious and traditional connotations, the act of mutilation abuses the human rights of girls and women, who, at the time of such event are minors, and therefore cannot give informed consent.

FGM is a harrowing incident for its subjects, and it can have a lasting effect on a person’s mind and body. Subjecting women to this traumatising experience in the name of custom, religious, or cultural tradition, social pressure, or merely aesthetic reasons is a blatant disregard for the life and value of girls and women in society.

While respect and acknowledgment of religious and cultural expression are undoubtedly crucial, especially in a diverse nation like India, one must ponder upon the question of whether such expression infringes upon the fundamental human rights of a particular group. Religious freedom is the cornerstone of a secular nation, but such freedom must not intrude upon a person’s right to life and equality. Where such a polarising issue arises, the Courts must approach it with sensitivity and pronounce judgment without alienating the community or its practices.

Shayara Bano v. Union of India, (2017) 9 SCC 1(India).

⁴⁰ Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1(India), p 7.

⁴¹ *Id* at p 49.

⁴² *Id* at p 10.

⁴³ Kantaru Rajeevaru v. Indian Young Lawyers Association and Ors. (2020) 3 SCC 52(India).