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Criminalizing FGM/C practice in India

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ABSTRACT

Ensuring access to quality of life, right to life and a freedom to live to the citizen is one of the fundamental responsibilities of a welfare state. The purpose of this paper to outline the unspoken truth of the Country, highlight how a girl must sacrifice their fundamentals rights just for some crueller cultural activity like Female Genital Mutilation although it is not mentioned in any of the major religious book like Quran and Bible. Further the paper will analyze how a country should criminalize this FGM/C practice which is only a sign of Myth. Female Genital Mutilation violates the several human rights mentioned under the Universal Declaration of Human Rights, the Convention on the Elimination of all Forms of Discrimination against Women, and the Convention on the Rights of the Child. Country like India where number of rules are implemented for preventing and protecting the rights of women and child this issue also should be rise and criminalize this practice.

Keywords: *Female Genital Mutilation, violation, Human Rights, Criminalizing.*

I. INTRODUCTION

“Imagine bring taken to a room in a dark decrepit building. Imagine being pinned down on the floor. Imagine your underwear being taken off. Imagine seeing a knife being heated on the gas stove. Imagine the same hot knife slicing your clitoris. Imagine young girl shrieking in the pain.”²

Violence against a one girl or women affect female throughout the world and effect the cultural and economic boundaries. Female Genital Mutilation is also a part of such violence which is still in a dark secret. According to the online survey it was estimated that over 200 million girls and women worldwide have suffered the effect of this practice and approximately 3.6 million girls and women are at the risk each year.

FGM/C is the practice which basically performed in the communities like animists, Catholics, Jews, Muslims, and those without religious beliefs. It includes all procedures that involve the partial or total removal of external genital or other injury to the female genital organ for non-

¹ Author is a student at Amity University, Lucknow, India.

² Hindustantimes.com. 2021. *FGM: India's Dark Secret*. [online] Available at: <<https://www.hindustantimes.com /static/fgm-indias-dark-secret/>> [Accessed 24 July 2021].

medical reasons. In India, this practice is common amongst the *Bohra Community*, where the rite is referred to as “Khatna” or “Khafz/khafd”. In a study held amongst women of the *Dawoodi Bohra community*,³ it was founded that religious requirement, traditions, customs, and the wish to curb the girl’s sexuality were the main reasons for flourishing.

Is it okay to perform such practice which carry the risk of adverse health consequences including death, disability, miscarriage, stillbirth, problem during urination, etc. just for the religious requirements, although it is not mentioned in any major religious book like Quran and Bible?

II. DEFINITION

According to the joint statement of the WHO / UNICEF / UNFPA, “Female Genital Mutilation/Cutting (FGM/C) comprises all procedure involving partial or total removal of the external female genitalia or other injury to the female genital organ for non-medical reason. It is mainly carried out on girls between ages of 1 and 15 years, adult and married women are also subjected to this procedure.”⁴

A joint Statement of the WHO/UNICEF/UNFPA on Female Genital Mutilation classified FGM/C into Four types based on the severity and extent of cutting: -

Type 1- Removal of the prepuce (clitoral hood), with or without the removal of part or all the clitoris

Type 2- Removal of clitoris with the partial or total excision of the *labia minora*.

Type 3- Removal of the part or all the labia minora and/or and stitching and narrowing of the vaginal orifice. This is also known as *infibulation*.

Type 4- contains all other types of harmful non-medical procedure to the female genitalia, including pricking and piercing of the clitoris, cauterisation, stretching, of the clitoris/labia, scraping and introduction of corrosive substance into vagina.

III. HISTORY OF FGM/C IN INDIA

FGM/C in India practiced mainly in the Bohra community. It is commonly known that the Muslims are divided into two sects: Sunnis and Shias. The Bohra belongs to the Shia sect. They are found in many parts of India, especially in Gujrat, Rajasthan, Maharashtra and Madhya Pradesh.

³ R. Ghadijally, ‘All for ‘Izzat’: The Practice of Female Circumcision among Bohra Muslims,’ *Manushi*, No. 66, September- October 1991.

⁴ Eliminating ‘Female Genital Mutilation A joint WHO/ UNICEF/UNFPA statement’ 1997. Available at <http://apps.who.int/iris/bitstream/10665/41903/1/9241561866.pdf>

The Sunnis, believe that there is one God, and that Mohammed is his Prophet to whom he revealed the Holy book (*Quran*), this is where the agreements end. But the Shias hold the belief that Ali succeeded Mohammed by ‘*Nasse-e-Jali*,’ which may be loosely translated as ‘declaration.’ Ali, according to the Shias belief, was succeeded by line of Imams each of whom in turn was appointed by ‘*Nasse-e-Jali*’ by his immediate predecessor. At the later date, the Shia sector itself divided into two sects known respectively as *Ismailia* and *Isna-Asharia*. This division arose out of a dispute on the death of the 5th Imam *Jafer-as-Sadiq* in about the year 765 A.D. Dawoodi Bohras belongs to *Ismailia* sect.

The word ‘Bohra’ is a Gujarati word meaning traders. The sect of power of the High priest of the Bohra shifted from Yemen to Gujrat hundreds of years ago. In Gujrat, it was shifted from place to place until it become established at Surat where it remained for more than 150 years. It is now located in Mumbai. The High Priest of Dawoodi Bohras is called *Syedna Saheb* or *Maulana*.⁵

Bohras have a reputation for being successful businessmen with a strong focus on education. However, it is thought to be the only Muslims sect in India that practices khatna, or clitoral unhooding (women in Bohras referred this as ‘*haram ki boti*’), on girl at the age of 6 or 7, which is thought to have stemmed from the community’s roots in Egypt and Yemen. While Quran does not sanction female circumcision / khatna / khafz.

IV. BATTLE AGAINST SOCIAL BOYCOTT

Many girls and women of the Bohras family are victims of social boycott. The reason behind it is that they questioned various religious and administrative practice within the community. Any stepping out of line immediately attract rejection from near and dear once, threat and fear of social boycott, disallow once for marriage of their children into the community and prohibits the burial of their body in the community burial ground.

Bombay Prevention of Excommunication Act, 1949 was enacted as a redressal sought by some boycotted members of the Dawoodi Bohra community. Under the law, no community could deprive a person of their right to property, to worship in religious place, to perform funeral rites or any other rituals. But in 1951, the 51st Dai challenged the act in Bombay High Court. After a lengthy legal battle that decided in the decision of Supreme Court, in *Sardar Syedna Taher Saifuddin Saheb v. The State of Bombay*⁶ a majority judgement regarded excommunication as a legitimate practice of a community protected under Article 26 of

⁵ *Varnika Chauhan_Female Genital Mutilation*, <https://www.scribd.com/document/403795311/Varnika-Chauhan-Female-Genital-Mutilation>

⁶ AIR 1962 SC 853

Indian Constitution. **Article 26**, “grants every religious denomination or any section thereof the freedom to manage their religious affairs.”⁷ The matter still pending before the Supreme Court as reformist Bohras filed a review petition against the said judgement asking for reconsideration of decision.

On April 14, 2016, the Maharashtra legislature passed the Maharashtra Prohibition of People from Social Boycott (Prevention, Prohibition and Redressal) Act, 2016, to prohibit social boycott of individual or families by caste panchayat or any community and define such behaviour as an offence punishable with, imprisonment up to 7 years or with fine of 5 lakh rupees, or both.

Voice against FGM/C are also muzzled because of an inherent fear of social boycott that prevails in the community. There are no sign of FGM/C being done away by the community itself, hence, the need to consider the available legal option is important.

V. FEMALE GENITAL MUTILATION A HUMAN RIGHTS VIOLATION

Considering the nature and consequences of FGM/C practice, it is a violation of Human Rights of Women and Children. According to UDHR, it infringes on the right to life and physical integrity⁸, the right to health⁹, and the right to freedom from torture, cruel, and unusual treatment, and violence.¹⁰ FGM/C is mostly practiced on girls below the age of 18 years, it is also a violation of rights entrenched in the United Nation Convention on the Rights of the Child, 1989 (UNHCR) and violates the guarantee of non-discrimination.

FGM/C violates the Human Rights in various ways: -

International Laws:

(i) **Right to be free from gender discrimination**, Article 1 of the Convention on the Elimination of all forms of Discrimination against Women, 1979 (CEDAW) defines ‘discrimination’ as:

“Any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human

⁷ The Constitution of India, Article 26

⁸ Article 3, UDHR: “Everyone has the right to life, liberty and security of person.” Available at: <http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng>

⁹ Article 12, ICESCR: “The States Parties to the present convention recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”., <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

¹⁰ Article 5, UDHR: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

rights and fundamental freedom in the political, economic, social, cultural, or any other field".¹¹

FGM/C not only affects the health of females but is also a practice aimed at controlling women's sexuality and subordinating their role in society. Whenever a girl or a woman undergoes FGM/C, she is a victim of discrimination based on sex that not only compromises her recognition but also her enjoyment of fundamental rights and liabilities.

(ii) **The right to life**, is considered as a basic human right and is protected by several international instruments, including Article 3 of the UDHR (Universal Declaration of Human Rights, 1948), Article 6(1) of the ICCPR (International Convention on Civil and Political Rights, 1966), and Article 6 of the UNCRC (United Nation Convention on the Rights of Child, 1989). In cases of FGM/C, the procedure sometimes leads to death or may also contribute to neo-natal deaths.

(iii) **The Rights of the Child**, FGM/C is commonly performed upon girls in the age range of 1 to 15 years. The international community has regarded FGM/C as a violation of the rights of the child. Under Article 3 of the UNCRC it was established that "*the best interest of the child.*".

According to, Article 24 of UNCRC, specifically mention "*State Parties shall take all effective and appropriate measures with a view to abolishing traditional practice prejudicial to the health of children.*"

VI. FGM/C AS A SIGN OF DISABILITY

The United Nation Convention on the Rights of Person with Disabilities, 2006, under Article 1, defines 'Person with disabilities' to include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on equal basis with each other.

In India, under The Rights of Person with Disabilities Act, 2016 (Section 2(s)) depending on fact and extent of FGM/C, a girl or a women may fall under the legal definition of a 'person(s) with disability'.

Section 29(s) of The Right of Person with Disabilities Act, 2016: a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others.¹²

¹¹ Article 1, CEDAW. Available at: <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article1>

¹² The Right of Person with Disabilities Act, 2016, Section 2(s)

There can be no denying that FGM/C disable a woman permanently from being able to enjoy sexual pleasure, it had also often led to inability to give birth or difficulties to giving birth. UN Convention on which India's disability law is based on look at it form a human right perspective and as impairing the full enjoyment of life and affecting the dignity of the individual.

VII. CRIMINALIZING FGM/C PRACTICE IN INDIA

(A) Why we need to criminalize FGM/C practice In India?

The major reasons behind the criminalization of FGM/C practice are:

(i) Health Complications for girls and women: FGM/C is performed mainly on child and adolescents and has a ritual origin. The procedure is so painful and traumatic, and there are no health benefits. It violates a series of Human Right principles, including the principle of equality and non-discrimination based on sex, the right of life (when the procedure result in death), the right to freedom from torture and cruel, inhuman, or degrading treatment or punishment, and right of child.

Almost all girls and women who have undergone the procedure experiences adverse pain and bleeding. Some immediate health complications include shock, infection, miscarriage, bacterial infection during and after pregnancy, disability and many more. Some long-term health complication includes chronic pain, infection, primary infertility, keloids, etc.

(ii) FGM/C cannot be justified as a 'Religious Practice': The practice of FGM/C date back thousands of years, with mummies in Egypt showing that it was a routine practice. Some communities believe that FGM/C is a religious requirement, although it is not mentioned in major religious texts such as Quran or Bible. According to UNFPA, FGM/C is often linked to a ritual marking the coming of age and initiation to womanhood.¹³ It is very clear that FGM is not a religious practice because the practices is not prevalent across all Islamic sect and it is also practiced by non-Muslim communities in countries like Yemen, African, Egypt, Sudan. In a study conducted among women of the Dawoodi Bohra community, it was found that religious requirements, tradition, custom and wish to curb the girl's sexuality were the main reason for the practice. In an online survey of Dawoodi Bohra women, 56% said that they had to undergo FGM/C for religious purposes and 45% said it was to decrease sexual arousal. The practice of FGM/c is often sought to justified on grounds of protecting women from sexual desires and on ground of religious freedom of communities.

¹³ UNFPA, 'Implementation of the International and Regional Human Rights Framework for the Elimination of Female Genital Mutilation,' November 2014, at p. 16

(B) Need of Specific Legislation on FGM/C

In India, various form of violence against women and children are dealt within the Indian Penal Code,1860 (IPC) and the POCSO Act (The Protection of Children from Sexual Offence Act, 2012) but there has not been any noticeable decline in the number of cases related to FGM/C. To criminalize or penalize the FGM/C practice the one should know the comprehensive definition of FGM/C, because it has been seen that in countries where FGM/C has been criminalised, the lack of definition for FGM/C has impeded efforts for eradicating and successfully prosecuting or preventing such offence.

In a Joint Statement issued by the WHO / UNFPA / UNICEF in 1997, Female Genital Mutilation has been defined as “all procedure that involve partial or total removal of the external female genitalia, or other injury to female genital organs for non-medical reasons”¹⁴ FGM/C in India, as carried out by Bohra community, falls into the Type I and IV category (mentioned above in the paper) as identified by WHO / UNICEF / UNFPA. That is, the removal of the prepuce (clitoral hood), with or without the removal of part or whole of the clitoris, and all other harmful procedures to the female genitalia for non-medical purpose, for example: pricking, piercing, incising, scraping and cauterization.

As per the category of FGM/C performed in India and as mentioned above that FGM/C cannot be Justified as ‘Religious Practice’, it violates Human Rights as well as Fundamental Rights of girls and women.

Fundamental rights that are violated by practicing FGM/C

1. Article 14(Equality before the Law) and 15(Prohibition of discrimination on ground of religion, race, caste, sex, or place of birth) of Indian Constitution

The practice of FGM/C is an act that targets women with the objective of curbing girl’s and women’s sexual desire and leads to ill health effect. Women and girls are seen as objects with sexual desire that need to be curbed to protect women and girls from being violated by other men. Such practice is unconstitutional as it genders stereotypes women and girls and thus is violative of their fundamental rights under Article 14 and 15 of the Indian Constitution.

2. Article 21(Protection of life and Personal liberty) of Indian Constitution

Practice like FGM/C, in the grab of religion and the object to protect girls and women, victimizes women and violate their rights to physical autonomy, to be in control of their own bodies and to be protected from physical violence and mental trauma and thus is violative of

¹⁴ A Joint WHO/UNICEF/ UNFPA Statement on FGM, 1997. Available at: <http://apps.who.int/iris/bitstream/10665/41903/1/9241561866.pdf>

their Rights to life guaranteed under Article 21.

3. Article 25(Right to Freedom of Religion) and Article 26 (Freedom to manage religious affairs)

Article 25 of the Indian Constitution guarantees ‘freedom of conscience and free profession, practice and propagation of religion’ and this freedom is ‘subject to public order, health and morality’.¹⁵ The practice of FGM/C has a far-reaching impact on the physical, sexual, and mental health of an individual. So evidently the practice of FGM is a threat to the health of the women who must undergo the procedure. **Thus, if evaluated keeping in mind the damage it does to a woman’s health, the practice cannot be justified under Article 25 and Article 26 of the Indian Constitution.**

(C) Parties who need to Penalise for FGM/C practice

FGM/C is either carried out by Dai, women who have semi-religious standing, or by traditional cutter or by doctors.¹⁶ According to a 2008 UNFPA (United Nation Population Fund) report titled ‘*A qualitative study on FGM/C among the Dawoodi Bohra Community*’, it was observed that religious belief regarding FGM/C were not changing in the community but very minor changes in approach regarding the appropriate age of the girls (when they should be operated upon), and also increasing dependence on private doctors and nurses instead of traditional FGM/C performers, were silently creeping in the society.¹⁷

The above report suggests that those who perform or abet the performance of FGM/C should all be held guilty of the offence. And for every person who involved in practicing FGM/C should be penalise. Support on this can be found in the legislation of India in relation to other offences against women and children.

1. Existing Provisions in Criminal Law

Though FGM/C practice is not banned in India under any specific law, certain general provision present in our criminal law could protect the interest and fundamental rights of the girls or women. Some of these may be applicable in this practice, are:

- i. Section 319 to 326 of Indian Penal Code, 1860:** Section 319 to 326 address varying degree of ‘Hurt’ and ‘Grievous Hurt’ on an individual. ‘Hurt’ constitute the elements of causing bodily pain, infirmity, or disease to another person,¹⁸ and there are seven types of ‘Grievous Hurt,’ including: “Any hurt which risk life or which cause victim

¹⁵ The Constitution of India, Article 25

¹⁶ Supra Note 3

¹⁷ Dr. Farida Shah, ‘*A qualitative study on FGM/C among Dawoodi Bohra Community*,’ at p.19

¹⁸ Indian Penal Code, 1860 (Act 45 of 1860), s. 319

to be during the time of 20 days in severe bodily pain, or unable to follow the ordinary pursuits”.¹⁹

As mentioned above, FGM/C cause various health complication to girls and women including severe pain, bleeding, disability, problems during pregnancy, death, etc. Thus, FGM/C can be construed as a form of hurt and grievous hurt. Which may amount to seven years of imprisonment, with or without fine to the person who perform this practice.

ii. Section 3 of Protection of Children from Sexual Offences Act, 2021: Section 3 of POCSO Act, address penetrative sexual assault by any person on any child, *inter alia* defines it as insertion of any object into the vagina of the girl.²⁰ In fact, Section 375 of IPC categorially state that the term ‘vagina’ includes ‘labia majora’. So, Female Genital Mutilation / Cutting, which requires insertion of sharp object into the vagina of child, may be covered under Section 3 of POCSO Act read with Section 375 of IPC.

iii. Section 2(y)(i) of Goa Children’s Act, 2003: Section 2(y)(i) defines ‘Sexual assault’ as “*different types of intercourse in vaginal, oral or anal use of object with children*”, and “*deliberately causing injury to sexual organs of children.*”

FGM/C depending on facts and circumstances may fall to be prosecuted under and of these provisions.

2. Existing Policies regarding Offences against Women

i. National Policy for Children, 2013(NPC): This policy affirms that “the state is committed to taking affirmative measures- legislative, policy or otherwise- to promote and safeguard the right of all children to live and grow with equity, dignity, security and freedom, especially those marginalised or disadvantaged to ensure that all children have equal opportunities, and that no custom, tradition, cultural or religious practice is allowed to violate or restrict the rights or children.

So, as per the policy of NPC, FGM/C is not justified, and legislation must ban this practice.

ii. Integrated Children Protection Scheme, 2009(ICPS): The centrally sponsored scheme by the Ministry of Women and Child Development, aims to create and establish protective system for vulnerable children. Its objective to institutionalising and integrating essential service and strengthening structure of emergency outreach,

¹⁹ Indian Penal Code, 1860 (Act 45 of 1860), s. 320

²⁰ Section 3(b) of POCSO Act

institutional care, family and community-based care, counselling, and support services. Strengthening child protection at family and community level and promoting preventive measures to protect children from situation of vulnerability, risk, and abuse.

So as per the ICPS, FGM practice must be criminalise and preventive measures for children must be implemented to protect them from this practice.

- iii. The Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulation, 2002:** Under Section 7.6 list out carrying sex determination tests as a form of professional misconduct making him/her liable for disciplinary action. Hence, as per the regulation those who engage another to perform, those who perform and those who abet the performance of an act of FGM/C should be held accountable and be punished by law.

“So, the practice of carrying out FGM/C may qualify as a form of ‘hurt and grievous hurt’ under the IPC and a crime under Section 3 of POCSO being carried out with an instrument used for cutting and may be addressed under the existing laws of sexual assault, child abuse and domestic violence, addressing this practice require a more holistic approach. Such an approach needs to address the various other aspects of FGM/C, National policy for children who affirms that the state committed to taking affirmative measures for the violation of children, regulation on medical/health professionals who carry out this practice, duty to report, support and awareness generation.

(D) Prevention of FGM/C

If a girl or a woman is suspected to be at a risk of FGM/C, protection system that help with identification, reporting, referral, and support should work together to prevent her for being cut.

1. Measures in other countries for preventing the practice of FGM/C

Number of countries have declared the applicability of child protection laws to FGM/C, while other have enacted and applied specific provision for the elimination of harmful practice, including FGM/C. Specific laws enacted to address domestic violence can be used to prevent and provide necessary support to women or children who are at the risk of facing FGM/C.

In United Kingdom, the **Female Genital Mutilation Act, 2003** was enacted by Section 73 of the **Serious Crime Act, 2015** to include FGM/C protection orders.

In 2008, **the Egyptian Parliament** criminalised FGM/C by amending the country’s Penal Code (through Article 24bis) to ensure that existing articles that address deliberate bodily

injury (Article 241 and 242) be applied to FGM/C.

In **France**, general child protection law could be applied in case of FGM/C. Social protection measures for person under the age of 18 years old are listed in Article No. 375 of the Civil Code.

2. Measures that need to prevent practice of FGM/C in India: Although we already know that there are some measures that may prevent the practice of FGM/C, including **Integrated Child protection Scheme**, that targeted towards providing preventive and rehabilitative services to 'Children in need of care and protection and children in conflicts' as defined under the **Juvenile Justice Act, 2015**. But having a law or measures to prevent the FGM/C practice it is important to have a legal provision that will enable person/informants to provide information regarding the commission of an act of FGM /C without fear of prosecution, provisions that penalise the person who propagate or perform this practice, provisions that must have a legal remedy that available up to a reasonable time period after the commission of the act of the FGM/C.

Some measures that need to prevent the practice are:

(i) Bona fide Informants: It is important to have a legal provision that will enable the person/informants to provide information regarding the commission of an act of FGM/C without fear of prosecution and backlash from the community and provision that states that information of an incident of FGM/C which is likely to be performed or has been performed to designated authorised person to receive such information provided in good faith will not make the informant liable in any manner.

(ii) Provision for the person who propagate or perform the practice: It is important to have a provision for the person who propagate or perform the practice must be held guilty of the offence of committing FGM/C and they will be liable under the criminal offences.

(iii) Time period for reporting: In the case of FGM/C, the process is generally carried out when the girls are minor, the average age being 7, and they are not able to understand what is being done to them. So, it is important to have a legal remedy available up to a reasonable time period after the commission of the act of FGM/C.

(iv) Duty to Report: It is important to have a provision that make it mandatory to report the practice if any person who have any information of the offence to the police for necessary action.

(v) Support and Rehabilitation Measures: It is important to have a provision such as one-

time cash assistance and education scholarship for a girl's victims subjected to FGM/C, monitoring and supervising committees can be set up and a periodic survey to assess the implementation of the law preventing FGM/C.

VIII. CONCLUSION

In this paper it is already demonstrated that some provisions exist in Indian law for criminal action against any form of hurt, violation against girls and women but there is no specific provision mention in our law and that is why practice is called as "*Unspoken Truth.*" It has also been seen, internationally, that it has proved necessary to have a specific law dealing with the subject of prosecution, prevention, and redressal for the FGM/C practice.

The author wants to suggest that if India has an existing law for the violation against the girls and women, for 'hurt' and 'grievous hurt', violation of fundamental rights then why our legislation is not taking a good step toward criminalizing this cruel activity and empowering the girls and women of Bohra community to speak out freely without any fear against prosecution or backlash from the community. Religious practice and norms are outdated which impose restriction on the rights of the individual, then legal changes are needed to induce the religious changes.

Thus, the discussion here is that a separate law on FGM/C is necessitated for similar reason, that is to expose the problem and address it as a harmful criminal practice and not as an acceptable religious practice.
