

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 1

2023

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Female Genital Mutilation in India and the Developing World: A Cultural and Legal Perspective

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ABSTRACT

Civilization is wrought with examples of how women have been treated poorly. No sooner have we turned to our morning coffee than we see headlines regarding the rape of a woman. While these problems are indeed grave, they are a reflection of the callous nature of our society, especially with regards to the rights of women. In light of this, I would like to talk about an extremely controversial but significant issue. Female Genital Mutilation, as the name suggests, is a procedure that is done to ensure, among other things, a prohibition of premarital sex and relationships. The world health organization defines it as an act that involves the removal of the external female genitalia, partially or wholly, for non-medical reasons. Female genital mutilation is an extremely serious issue and reports from the world Health Organization state that over 200 million women from Africa and Asia have undergone this procedure. According to the same report, it would cost over 1.4 billion dollars a year to actually treat the complications that arise as a result of this practice in the top 27 nations that practice it. While Female Genital Mutilation has been expressly looked upon as a human rights violation by the world and the UN in particular. India is yet to examine this procedure from a criminal perspective. Female Genital mutilation is extensively practiced in India, namely in the Shia community of Dawoodi Bohra. This sect has over 1 million adherents in India and is the most notorious when it comes to the practice. In the Bohra community, the clitoral hood is mutilated or hacked off when the child is barely 6 or 7 years of age. This is done primarily to ensure that the woman does not “dishonour” the family by committing adultery. The logic behind this practice is rooted deeply in patriarchy and has no scientific backing whatsoever. The people who support this barbarous practice claim that a woman’s clitoris is the only organ that can feel nothing but pleasure and that this organ, as a result of it, is inherently evil. They state that if a woman leaves her clitoris unharmed, she will become a disloyal wife as she would be swept away by any stimulation of the clitoris done by any other man. Their idea being that women are mere slaves to their sexual desires and that the addiction for this stimulation would destroy marriages and relationships. As ludicrous as this reasoning may seem, it is sad to see that India is quickly becoming the international FGM capital of the world. This is primarily due

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to the patriarchal society that we live in and the lack of legislation restricting this repulsive practice. This article would look into this horrendous practice and criticize it extensively while also citing reasons as to why it occurs and why it ought to be banned in both India and other developing nations while providing a legal and cultural perspective to the same. A woman's voice must be heard, no matter her age and maturity. We must all, parents and guardians included, understand that a NO means NO and calling FGM anything short of sexual assault is a flawed judgement.

Keywords: FGM, Bohra, patriarchy, Islam, Africa, India.

I. INTRODUCTION

Female genital mutilation is a process wherein the genitalia of a woman is altered or mutilated for non-medical reasons. The practice, according to UNICEF, is most prevalent in countries wherein women's rights have been curtailed as a result of tradition and culture. Many people associate the practice with religion but there has been no proof presented for the same. The United Nations estimates that over 200 million girls, aged 15 to 49, have experienced FGM at some point in their lives. UNICEF estimates that many countries even offer the resources for the populace to get the procedure done via a trained professional and this goes against the hypocritical oath that a doctor takes ²i.e., the promise to not cause harm to any person. The practice, according to the British NHS³, FGM is an extremely painful practice that is done by traditional circumcisers with little to no experience. This circumcision, as they call it, is done with no anaesthesia and is extremely painful and completely unnecessary. The UNFPA estimates that 1 in 5 girls is subjected to FGM by a trained practitioners and in countries like Indonesia, 49% of the girls born undergo FGM prematurely under the guise of a standard healthcare package after birth. This abhorrent practice offers nothing but pain to the person undergoing it and this process directly impacts the health of the women. The UN estimates that the high maternal mortality rate in countries like Sudan is due to the prevalence of FGM in the country. FGM leads to several complications during childbirth in a majority of cases and the high maternal mortality rate in the countries wherein FGM is most prevalent is proof of this fact.

² UNICEF.org, UN, *what is female genital mutilation? 7 questions answered*. [Accessed 22nd December 2022].

³ nhs.uk. n.d. *Female genital mutilation (FGM)*. [online] Available at: <<https://www.nhs.uk/conditions/female-genital-mutilation-fgm/>> [Accessed 22nd December 2022].

II. REASONS FOR FGM, A CULTURAL AND SOCIOLOGICAL AND SOCIO-POLITICAL PERSPECTIVE

The practice of FGM is prevalent in a number of countries with a poor woman's rights record. The middle east and north African nations are suspected to indulge in this practice the most. In the book, global perspectives of violence against women and girls, we get to know that there are different cultural reasons for different communities to support FGM all over the world. In multiple regions, both men and women cite cultural reasons for the sustenance of FGM and this is something that has not been looked into by nay action against FGM. To combat FGM, there must be movements that sway the lower strata of society and ensure that the people who would indulge in this practice are convinced to not engage in the same. The cultural and sociological reasons for FGM can vary wildly from one country to another. For example: take Sierra Leone and Sudan. In Sierra Leone, FGM is a practice that is supported as it ensures that the women are initiated into the "bondo". This "bondo" can be described as a secret society for women as the activities of these people are shared between themselves only. As a result of this, it becomes extremely hard to combat FGM in a country like Sierra Leone as the population widely regards FGM as a right to passage and an important custom. If we contrast this to Sudan, we can see a stark difference as to the reason given to commit FGM. In Sudan, FGM is committed to ensure that the wife is "pure" and that the undesirable parts are hacked off before the wife can be married to a person. In Sudan, a great emphasis is placed on virginity and the honour of the bride and this is something that matters a lot during marriage. Many people ion Sudan would not marry a woman who is not a virgin and FGM is a way of assuring the husband that the wife is "untouched". These motivations are different from those of the Bohra community that I spoke of earlier and this is something that must be noted. Different cultures have different reasons for the promulgation of FGM. A uniform effort to Ban FGM without understanding the various social contexts of the matter is bound to fail as this issue requires nuance to approach and solve.⁴

Many women undergo FGM willingly as they believe that their stature would increase as a result of it. Being young, they are often manipulated into thinking that this is their duty and that they are responsible for the sustenance of their traditions via this procedure. FGM is often seen as a practice that is not only cultural but also an important right to passage or womanhood. There are multiple instances wherein women undergo the practice voluntarily to ensure that they could be respected as adult women who fit the patriarchal definition of a woman in the

⁴ El Guindi, Fadwa (2007). "Had This Been Your Face, Would You Leave It as Is?". In Abusharaf, Rogaia Mustafa (ed.). *Female Circumcision: Multicultural Perspectives*. Philadelphia: University of Pennsylvania Press. ISBN 978-0812201024. Archived from the original on 10 March 2021. [Accessed 22nd December 2022].

society concerned. Women who commit FGM are also often looked up to as women of high stature and in many cultures, it is often desirable for women to become the ones who operate upon other women. In Gambia, for instance, only women of the coveted blacksmith's caste perform FGM. In addition to this, professionals who perform FGM such as in Indonesia are looked up to as respectable members of society and many women aspire to emulate them.

The sociological reasons for the persistence of FGM are both structural and functional. Structuralism states that FGM persists as an expression of a larger problem, i.e., the poor treatment of women in most of these communities. Many communities look to women as caregivers and physically inferior beings whose role must be restricted to the provision of love to her husband and care to her children. Many notions of women in these traditional societies are based on outdated traditions that have no place in our modern world. In addition to this, we must look at the functional aspect of FGM as well. Functionalism is a sociological theory that states that every social structure is interrelated to another and that they are interdependent. The interdependence in this case includes many social structures. Social structures in charge of education such as universities etc are said to be centres of knowledge. However, when they too are made to impart cultural values as a result of societal values that are prevalent at the time, these centres of knowledge become the worst outlets for the dissemination of propaganda and misinformation. Many of the countries wherein FGM is practiced are known for grave human rights violations and constant violations of press freedom as a result of the conservative society that they preach. In addition to this, these countries also have a lack of female education and many people in these countries often look down upon people who educate the women of their family.

Many scholars trust that there exists a socio-political reason for the continuance of female genital mutilation. FGM is often seen as a mechanism to curb a woman from acting out her lustful thoughts and this is something that has no scientific basis whatsoever. The main perpetrators of this practice, be it from the middle east, North Africa or India, all believe that FGM is a necessary procedure to ensure that a woman's or her family's honour is protected. In many parts of Africa, FGM is practiced via the use of knives and heated coal. This extremely painful process is said to be the formal initiation of the woman into adulthood and is something that must be frowned upon. Many African countries believe that the clitoral hood is a sign of promiscuity and actively promote the cutting of the clitoral hood. They believe, just like the aforementioned Bohra community, that the clitoris is the only organ that is capable of feeling only pleasure and not pain. In light of this, they cut off the clitoris in hopes that the wife stays

loyal.⁵

III. FACTORS AFFECTING THE PREVALENCE OF FGM

1) Education:

Women who are educated are less likely to undergo the process of FGM. An example of this can be the sharp contrast between the prevalence of FGM amongst the educated and uneducated population of Kenya. (Being 58% and 9% respectively).

2) Residence:

The place of residence of the woman also plays a role when it comes to determining the prevalence of FGM. It is quite clear that women who reside in cities, being more educated and liberal, often undergo the procedure to a far lower degree than their uneducated rural counterparts. An example of this can be seen from the data in Egypt wherein 90 percent of rural women have undergone FGM as opposed to 77% of women in urban cities.

3) The wealth quintile:

The wealth quintile or the GDP per capita disparity between the peoples of a country does indeed play quite a role when it comes to the rates of FGM amongst the populace. Take for instance the country of Mauritania. In this country, 90% of all women have undergone FGM in some form or another as opposed to 37% of women from the richest households.

IV. FGM IN DEVELOPED COUNTRIES

Many studies tend to indicate that the support for FGM amongst a given populace of immigrants does not simply disappear as they are now living in the west. If anything, they feel strongly about their cultural practices and would prefer to carve out their own unique identity with the aid of their culture. In addition to this, western countries lack the expertise to actually understand the complexity involved with the procedure of FGM and the cultural context surrounding the same. The position of law enforcement in this matter can be questioned as they do not have the adequate understanding of the problem and its scale to make arrests and hold the perpetrators accountable. Many NGOs and other organizations have however held demonstrations for the same and drives to educate the people about the problem of FGM. FGM is often construed as a matter that is specifically dealing with the family of the victim and a cultural difference between the people of the west and the immigrants. This can be combatted

⁵ Gibeau, A., 2022. *Female Genital Mutilation: When a Cultural Practice Generates Clinical and Ethical Dilemmas*. [online] Jognn.org. Available at: <[https://www.jognn.org/article/S0884-2175\(15\)33521-8/pdf](https://www.jognn.org/article/S0884-2175(15)33521-8/pdf)> [Accessed 22nd December 2022].

through awareness campaigns and de-stigmatization drives.

(A) FGM in India and the conflict with personal laws:

FGM is specifically practiced by the Dawoodi Bohra community of the Shia sect of Islam. To understand the relation between the enforceability of laws in this context, we must firstly understand the relationship between personal laws and the enforcement of fundamental rights.

Article 13 of the Indian constitution states that:⁶

13. Laws inconsistent with or in derogation of the fundamental rights.

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires, —

(a) “law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) “Laws in force” includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.¹

[(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.]

A study of this article makes clear, the aspirations of its framers. We understand that the main point of article 13 is to ensure that the fundamental rights, guaranteed to every citizen, are protected. This article states that all the laws that were in force prior to the commencement of the constitution of India are void to the extent of contravention of the fundamental rights, enshrined in the constitution. The second clause of this article prohibits the state from making a law which revokes the fundamental rights or abrogates a part of a fundamental right. The definition of “state” is the same definition that is given in article 12 of the Indian constitution. The “laws” that this section deals with are defined under article 13(3)(a). these laws include:

⁶ India Const. art. 13.

- 1) Temporary sources of law such as ordinances, acts as well as permanent laws.
- 2) Subordinate statutory bodies.
- 3) non legislative sources of law such as customs.

Clause (4) seeks to ensure that any constitutional amendment does not fall within the purview of law in article 13. This was done to ensure that the amendment made to any fundamental rights is of these rights to begin with. Fundamental rights are not exempted from amendments. In *Keshavanada Bharathi vs state of Kerala*, AIR 1973 SC 1461: (1973) 4 SCC 255, a certain basic structure was laid down and it was decided that amendments could not amend the basic structure of the constitution.

(B) Relationship between article 13 and personal laws:

a. Case laws:

1) Krishna Singh v. Mathura Ahir⁷

In this case, it was stated that a Sudra could not become a sanyasi. While giving this judgement, the high court stated that this rule went in contravention to the provisions of article 14 and 15 of the constitution. And so, the high court stated that the rule was discriminatory.

The supreme court however, believed that the judgement given was wrong. The two-judge bench of the supreme court overruled the high court's judgement by stating that this law that prohibit shudras from becoming sanyasis was a personal law. according to the supreme court, a personal law does not fall within the ambit of article 13 and so, the question of the violation of fundamental rights does not arise.

2) Maharshi Avdhesh v. Union of India (1994 Supp (1) SCC 713):⁸

In this case, a petition was filed under article 32 of the Indian constitution. They sought the following:

- a. The enactment of the uniform civil code.
- b. For a declaration that Muslim Women (Protection of Rights on Divorce) Act, 1986 was void as being in violation of Articles 14 and 15 of the Constitution.
- c. For a hearing to challenge the respondents from applying the provisions of the Shariat act.

The court held that, the imposition of the uniform civil code would be impossible as the nascent

⁷ Krishna Singh v. Mathura Ahir, AIR 1980 SC 707

⁸ Maharshi Avdhesh v. Union of India, 1994 Supp (1) SCC 713

population of India cannot adapt to the implementation of the uniform civil code in such a short span of time. In addition to this court held that these matters are for the legislature to decide and not for the judiciary as they could not deem that a law was violative of article 13 if it was a personal law. the judgment of this case stated the following:

"This is a petition by party in person under Article 32 of the Constitution. The prayers are two-fold. The first prayer is to issue a writ of mandamus to the respondents to consider the question of enacting a common Civil Code for all citizens of India. The second prayer is to declare Muslim Women Protection of Right on Divorce) Act, 1986 as void being arbitrary and discriminatory and in violation of Articles 14 and 15 Fundamental Rights and Articles 44. 38, 39 and 39-A of the Constitution of India. The third prayer is to direct the respondents not to enact Shariat Act in respect of those adversely affecting the dignity and right of Muslim Women and against their protection. These are all matters for legislature. The writ petition is dismissed.

3)Ahmedabad Women Action Group & Ors. v. Union of India (1997 3 SCC 573):⁹

In this case, The Ahmedabad Women's Action Group (AWAG), under the ambit of Public Interest Litigation, challenged the following:

- a. The practice of polygamy that was allowed in the Islamic faith
- b. The existence of Triple Talaq
- c. certain Shia laws that were discriminatory to women.

They approached the court with an aim to challenge the constitutional validity of these provisions.

However, the judgment that was given in *Maharshi Avdhesh v. Union of India* was held as the supreme court deemed that personal laws were not included within the ambit of article 13.

4)Narasu Appa Mali vs state of Bombay:

In the *Narasu Appa* case, it was deemed decisively by the supreme court that the personal laws do not come within the ambit of article 13.

5)Indian young Lawyers association v/s state of Kerala;

In this case, it was held that essential and non-essential practices of religion must be distinguished and it was held that the tradition held by the Ayyappans had to be preserved and it was also held that not letting females inside the inner sanctum of the temple was a non-essential practice and so the relevant law was struck down. This test is yet to be used in any

⁹ Ahmedabad Women Action Group & Ors. v. Union of India, 1997 3 SCC 573

other case.

Recently, the legislature introduced the triple talaq bill and this was the remedy the court sought that the people use for the amendments to their personal laws. The court believes that the amending of personal laws could prove detrimental to the sentiments of communities and so, it does not indulge in it. and so, personal laws, as of now, fall outside the ambit of article 13's interpretation.

In light of the above judgements, it could quite easily be inferred that the personal laws are not enforceable in the present context. This would mean that the judgement given in the Ahmedabad action group case would be held as in this case, the court specifically referred to an alternative method to handle the cases of religious persecution in India. While I do believe that any personal law cannot be held as contradictory to fundamental rights as per article 13, the court can still reply upon article 25 to strike down practices that can be deemed as draconian or harmful.

Article 25 explicitly states that:¹⁰

25. Freedom of conscience and free profession, practice and propagation of religion

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus Explanation I The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion Explanation II In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Sub section 2 of this section explicitly states that the state is not restricted by this section when it comes to the application of laws or the making of new laws to deal with socio-religious issues. In light of this, many judgements have been made as a result of the need to define the applicability of this section when it comes to many socio-religious issues. The most famous

¹⁰ India Const. art. 25,

judgement with regards to this is seen in the case of the 1957 judgement with regards to Bigamy in the Hindu religion. In this case, the Allahabad high court held that bigamy was not an essential part of the Hindu religion and that it must be abolished as it went contradictory to the rights bestowed upon both men and women. This was again held in a 2016 case wherein the Bombay high court held that women were allowed into the sanctum sanctorum of the Haji Ali Dargah as the exclusion of women from places of worship was not an essential practice of Islam. The same logic even extended to the banning of the triple talaq and this can be repeated once again to ensure that the Bohra community is not forced to undergo FGM.¹¹

V. REQUIREMENTS TO BAN FGM IN INDIA

India does not, at the moment, have any laws to ban FGM or to ensure that the practice of FGM is discouraged at the very least. In light of this, it would be excellent if the parliament could take cognizance of the offence of FGM and actively make a law with regards to the same. In addition to this, the court can actively rule, if a case is brought forth by a victim, that the practice of FGM is not an essential practice in Islam. This is a fact as FGM finds no mention in the Quran. However, many Shias and Sunni Muslims argue that the practice of FGM is not explicitly forbidden in the Hadiths. While these hadiths may not explicitly ban Female Genital mutilation, they do not support the practice either. This can be backed by the following Hadith:¹²

“Do not cause harm or return harm.”

Source: Sunan ibn Majah 2340, Grade: Hasan

Hasan indicates that the Hadith is authentic and true. In the current context, since we know that the practice of FGM is indeed harmful to the woman, it must not be encouraged and as per the hadith presented above, it must be frowned upon.

Many Islamic scholars tend to justify the prevalence of FGM by citing the following hadith:

“Do not cut severely, as it is better for the woman and more desirable for the husband.”

Source: Sunan Abu Dawud 5271, Grade: Da'eef

This hadith is qualified as “Da'eef” meaning weak and cannot hold precedence over the previous hadith as it is classified as Hasan. In light of this and the numerous pieces of evidence that seem to indicate that Islam does not support FGM, the practice must be outlawed by the

¹¹ The Print. 2022. *What is an 'essential religious practice', and why hijab didn't make the cut for Karnataka HC.* [online] Available at: <<https://theprint.in/theprint-essential/what-is-an-essential-religious-practice-and-why-hijab-didnt-make-the-cut-for-karnataka-hc/880827/>> [Accessed 22nd December 2022].

¹² Faith in Allah الإيمان بالله "Female circumcision is merely a cultural practice," n.d. Does Islam support female genital mutilation (FGM)? [online] Available at: <<https://www.abuaminaelias.com/islam-female-genital-mutilation/>> [Accessed 22nd December 2022].

parliament of India as the supreme court had specifically stated in the Ahmedabad action group case, that waiting for a remedy from the court is not the ideal course of action. Pressure, by activists and other people concerned must instead be directed at the government and to ensure that the government makes laws to forbid discriminatory religious practices like triple talak.

VI. CONCLUSION

The process of FGM must not be looked upon lightly as it is a deeply traumatizing experience for all the people who have fallen victim to the practice. Many women who are forced into undergoing this procedure suffer serious complications as a result of the procedure and these side effects can haunt them for years to come. To ensure that the practice is stopped. The common citizens must stand in solidarity with the victims and ensure that speedy justice is delivered. The cultural contexts with regards to the matter, though sensitive, cannot really be held as a reason to stop rallying for the banning of this barbarous practice. The trauma that a girl may undergo as a result of this procedure is something that we cannot comprehend and to have a person touch her so privately is something that builds severe trust in her. The practice of FGM is brutal and is often carried out with little to no anaesthesia and medical expertise, the practice can not only be extremely painful but also life threatening as well. In light of this, I suggest that we stand with the organizations and people concerned to ensure that the horror stories of women who have undergone FGM are unearthed and also to ensure that this barbaric practice comes to an end. FGM is nothing but sexual abuse and this must be made clear via a law banning the same.
