

# FEMALE GENITAL MUTILATION AND THE NECESSITY OF A LEGISLATION TO COMBAT THIS BRUTAL PRACTICE IN INDIA

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## INTRODUCTION

Gender equality and non-discrimination on the basis of sex are part of the most frequently recognised norms of international human rights law and this is considered the cornerstone of every democratic society, which aspires to hold in its roots, social justice and human rights.<sup>1</sup> Yet still occurring, is the atrocious act of Khafz or Female Genital Mutilation/Cutting (herein referred to as FGM) happening across nations. In India there exists no special law that criminalizes this act but we see it being an offence under the Indian Penal Code, 1860 and the Protection of Children from Sexual Offences Act, 2012. On April 20, 2018, the Central Government of India requested the Supreme Court for directions on how to address the menace of FGM. Simultaneously Public Interest Litigations were filed by those seeking a ban on the practice, the young girls of the Dawoodi Bohra community in India, are presently subjected to. The Dawoodi Bohra Women's Association for Religious Freedom (DBWRF), who are in favour of the practice, countered by saying that this act is circumcision, not mutilation and is a harmless cultural and religious practice unique to their community. This has sparked a debate throughout the country over the practice of FGM and is now a very important issue that needs to be addressed. This is especially so, as conflicting opinions are seen where the direct and harsh consequences are seen in suffering children and women. In 1993, the Vienna declaration of the World Conference on Human Rights had to explicitly dictate that FGM is a violation of human rights due to how grave of an act it was.

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<sup>1</sup> NIAZ A. SHAH, WOMEN, THE KORAN AND INTERNATIONAL HUMAN RIGHTS, 167 (Martinus Nijhoff Publishers, 2006)

## THE GRUESOME PRACTICE OF FEMALE GENITAL MUTILATION/CUTTING

Violence against women and gender-based violence are common and are a universal phenomenon.<sup>2</sup> Violence against women is defined broadly as any act of gender-based violence that results in or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life and this cuts across race, religion, caste, culture and other factors.<sup>3</sup> This act as part of violence against women is defined by the World Health Organization as any procedure that involves partial or total removal of the external genitalia or other injury to the female genital organs for non-medical reasons. Worldwide, 100-140 million girls and women are estimated to live with the consequences of such practices.<sup>4</sup> Parts of the genitalia that are cut, are sewed up with threads or thorns with just a minuscule opening for passage of urine and menstrual blood and the victim's legs are bound together for up to 40 days from hips to ankle to ensure the formation of scar tissue.<sup>5</sup> FGM, is also falsely thought of as female circumcision but there is a clear distinction between cutting or mutilation of genitalia and circumcision and the two are not the same. FGM has seen to have no medical reasons supporting it and is done mainly for beautification purposes and to essentially protect the virginity of a girl, whereas circumcision has certain medical purposes also attached to it apart from being a religious practice. FGM is a ritual performed on young female children in more than thirty countries, from Muslim, Christian and indigenous African cultures and is a tradition widely seen in the Muslim Bohra community which is spread over India, Pakistan, Yemen, East Africa, and some parts of America and Australia. Where practiced, FGM reflects cultural standards of femininity, the socialization of girls and a physical sign of a girl's marriageability and is perpetuated by all members of society. It is a public event symbolizing the onset or approach of menstruation and is usually performed on girls aged between six and twelve years and is done by midwives, mothers, aunts and sometimes even male members of the family.<sup>6</sup> 42

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<sup>2</sup> MARJORIE AGOSIN, *WOMEN, GENDER AND HUMAN RIGHTS A GLOBAL PERSPECTIVE*, 135 (Rawat Publications, 2001)

<sup>3</sup> *Id.* at 88.

<sup>4</sup> WHO., *Female genital mutilation and other harmful traditional practices.*, [www.who.int/reproductivehealth/topics/fgm/en/](http://www.who.int/reproductivehealth/topics/fgm/en/) (Last visited on Oct 31, 2018)

<sup>5</sup> CLAIRE M. RENZETTI, JEFFREY L. EDLESON, RAQUEL KENEDY BERGEN, *SOURCEBOOK ON VIOLENCE AGAINST WOMEN* 161 (Sage Publications Inc., 2<sup>nd</sup> ed. 2000)

<sup>6</sup> See *supra* note 2 at 140.

countries including the United States of America, United Kingdom, Australia and around 27 African countries have criminalized this act, making it a punishable offence.

## **RIGHTS OF CHILDREN AND WOMEN AND THE NEED FOR THEIR PROTECTION**

The status of women in society, be it social, political, legal or economical, has been fundamentally the same across history and it is clear that human rights of women have been severely curtailed in most of the world during most of human history.<sup>7</sup> International instruments and conventions such as the Universal Declaration of Human Rights (UDHR), the Convention on the Elimination of All Forms of Discrimination Against Women (herein referred to as CEDAW) and the Convention on the Rights of the Child (herein referred to as CRC) provide for the protection of rights of women and children and India is a signatory to these international treaties. Article 3 of the CRC states that ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration,’ Article 19 gives that state parties are to protect children from ‘all forms of physical or mental violence, injury or abuse, neglect or negligent treatment’ and Article 24 specifies that ‘state parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children’. CEDAW holds its focal point on discrimination against women that lead to human rights violation and entrusts authority on governments to ensure eradication of any and all kinds of crimes against a woman in her daily life. This also implies discrimination and abuse based on cultural, traditional or religious practices that may be harmful to a woman and a girl child and that the government is responsible to take steps to undertake the safety and human rights of a woman.<sup>8</sup>

Articles 14, 15 and 21 of the Constitution of India also particularly protects the rights of women and children. Article 21 of the Constitution of India provides us with a right to life with human dignity. This right also includes the right to proper healthcare, a comfortable livelihood and bodily integrity. The most crucial consequences of violence against women and girls is the

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<sup>7</sup> See *supra* note 2 at 235.

<sup>8</sup> See *supra* note 2 at 67

denial of fundamental human rights to women and girls.<sup>9</sup> When a girl child is subjected to FGM, it robs her of her right to her physical, mental, psychological and sexual health. Hemorrhages, severe pain, shock and death contribute to immediate common complications. Recurring urinary and pelvic infections, cysts, obstruction of flow of urine and menstrual blood, infertility and risks with child birth, depression and anxiety contribute to physical and mental health problems. A girl child and subsequently a woman has no control of her body and her bodily integrity, reproductive life and right to choose are heavily violated and abused. In 2018, 'WeSpeakOut', the largest survivor-led movement to end Female Genital Mutilation/Cutting in India, released a study titled "The Clitoral Hood A Contested Site", which gave for more statistics of this cruel act and includes data that shows that, 75% of all daughters of the study sample were subjected to FGM and that 97% of women who remembered their FGM/C experience from childhood recalled it as extremely painful.

A Bench comprising of Chief Justice Dipak Misra, justice A.M. Khanwilkar and Justice D.Y. Chandrachud, on hearing pleas seeking to ban FGM, referring to fundamental rights, mentioned that a person has the right to have control over her body, without the negative influence or force of any external authority and that the principle of gender sensitivity is entrenched in the Constitution making a practice which is engaged in solely making a woman more appealing to her husband as unconstitutional.

In India, there is no Special Act that condemns FGM, instead the practice amounts to an offence under the Protection of Children from Sexual Offences Act, 2012, as well as under the Indian Penal Code, 1860. This has also been taken as a defence as to why there is no specific laws enacted to curb this act making it specifically punishable. India being treaty to international conventions and under the provisions of the Constitution of India, undertakes to protect women and children yet the question is whether a new and special Act should be in place for guidelines, regulation and punishment of this grave act. This can be compared to how there exists a Special Legislation such as The Protection of Women from Domestic Violence Act, 2005, even though Section 498A and other provisions of the Indian Penal Code give for cruelty and violence against women.

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<sup>9</sup> DR. SURUCHI SHUKLA & DR. ANJNA FELLOWS & DR. NEELMA KUNWAR, VIOLENCE ON WOMEN 16 (Discovery Publishing House Pvt. Ltd., 1<sup>st</sup> ed. 2012).

## A RELIGIOUS AND CULTURAL PRACTICE THAT NEEDS TO END

The main defence by members of the community is that it is just a harmless cultural and religious practice and that criminalizing it is violative of their right to religion as it is considered an essential rite of passage into womanhood. The Koran gives a woman equal role in the family and provides her with a strong protection within the family. However, in practice, women's rights are greatly violated within this protected circle, which is the most vulnerable area for them.<sup>10</sup>

It can be understood that Muslim women who strive for recognition of their rights are not oblivious to history. They do realize that cultures and religious acts do not change uniformly and are interpreted differently in different countries. This nonetheless does not give way for a justification to acts that violate their human rights and abuse their bodily integrity and there is a strong belief that no act should force violence in religious beliefs and that their identity, privacy, freedom and integrity as human individuals are respected. The basic universal principle, is that "I" as a human being have the right to choose, irrespective of any factor including religion. The moment a religious act is violative of human rights and morality no defence can be taken for its happening.<sup>11</sup> Senior Counsel A. M. Singhvi representing the Dawoodi Bohra community defending FGM submitted that the tests of 'essentiality' and 'integrality' of the act for the purpose of Articles 25 and 26 are satisfied. Yet this is criticised, as, on the basis of religion, basic rights of children and women cannot be abridged and the negative aspects of FGM are far more extensive. And so conceptualizing violence against women as human rights violation typically demands for changes in local cultural and religious practices which also concerns sexuality, marriage and family. Violence contained within sociocultural practices, which includes religion and customs, strips a girl child of her essential right to a comfortable life with dignity and personal autonomy over her body.<sup>12</sup> Also, the many cultural justifications for FGM are associated with morality and family honours, encompassing preservation of virginity and protection against promiscuity. The roots of these beliefs are deep and include religious customs, distinctions of gender roles and superstition all which can be seen as manifestation of years of patriarchy and oppression of women.<sup>13</sup> An example of a

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<sup>10</sup> See *supra* note 1 at 151.

<sup>11</sup> See *supra* note 2 at 242.

<sup>12</sup> See *supra* note 2 at 90.

<sup>13</sup> See *supra* note 2 at 140.

country having a regulation in place particularly against FGM that relies on religious and customary backing, is that of the Female Genital Mutilation Act, 2003, in the United Kingdom. In India, we also see that acts like Sati and Dowry that held its backing on religion and customs and have particularly been around for a long time, have also been criminalized, as they no longer fulfil the present conditions of public order and morality but instead violates human rights. This can also be used as justification of legally banning and punishing FGM with proper guidelines, as it is against present conditions of public morality apart from being a gross human rights violation.

### **FAMILY BEING THE PERPETRATORS**

The family is often equated with sanctuary, a place where individuals seek love, safety, security and shelter. But evidence as seen in its manifestation of various crimes against women, shows that it is also a place that imperils lives and breeds some of the most drastic forms of atrocities and violence perpetrated against women. FGM is an act that usually takes place during girlhood and is a serious crime against female children.<sup>14</sup> FGM is usually done on a girl child by her own family members or on the command of them. Girls and women have little knowledge of the anatomy and function of their reproductive organs and are taught that their genitals are the property of their husbands. This and the aspect that very few of these women are warned about the impending procedure before its happening leads to the relationship between limiting women's sexual pleasure and the medical and psychological consequences of the act as extremely complex and difficult in terms of understanding. So, in actuality a girl's own family takes away the essentiality of her comfort in survival, growth and development. The family strongly believes that subjecting their girl child to FGM, helps protect her virginity and has purifying, aesthetic and hygienic benefits all which are needed prerequisites of her marriage and wifehood as it leads to her economic and social survival. So, the defence of the family is that the act is done only to protect their child's future but what they don't understand is that personal autonomy, good health, bodily integrity and right of choice of a child is of utmost importance and cannot be infringed upon. Apart from that, the horrible medical consequences the girl has to live with her whole life, is also very tremendously strenuous. Further it is

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<sup>14</sup> DR. KANIKA PANWAR, VIOLENCE AGAINST WOMEN 13 (Ritu Publications, 2011)

understood that a parent or guardian must act only in the best interest of a child, since she is not mentally or physically fully capable of making decisions for herself and FGM is far from that, as, a child's rights, including that of good life and health are harshly violated. Since close relatives and persons of trust or authority such as family members and community members commit this violent act, it also becomes difficult to report the act and so punishing the perpetrators. So, there is a strong need of regulations and guidelines in place as that could be the only way to curb FGM.<sup>15</sup>

## CONCLUSION

It is contended that a human relation is based on equality between women and men and it is the foundation of all human rights and justice in each family and community within each nation, and finally among all nations.<sup>16</sup> A victim of FGM is no longer considered equal to her counterpart as she is subjected to violence and oppression solely based on her gender, in the understanding that she is being prepared to be presented to her future husband and his likings, soon being his property and under his care, no longer burdening her family. She is being subjected to something that curtails her fundamental rights. Sati and Dowry were also largely religious and customary practices and condemning them was with respect to human rights violation and the evolution of what the citizens of India thought were right or wrong, especially since as an objectionable practice it was against bodily integrity and morality. In today's context far from the ancient approval and need for FGM, it can be understood that it is time to criminalize it and put in place strong regulations and guidelines to define, control, prevent and punish it. The state according to Article 15(3) of the Constitution gives itself the right to make special provisions for the protection of women and children in the country. Like how Sati was criminalized, a Female Genital Mutilation/Cutting Prevention Act is to be enacted in India. The defence that it is already a criminal offence and is punishable under various legislations in India is clearly not effective or enough, as no sign of decrease of FGM is seen and especially as it is done by close family and friends of the victim. Utmost importance of rehabilitation of the victim is also to be addressed and taken up by the state. Understandably, customary, religious and traditional practices are difficult to contain and immediately eradicate by a legislation in

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<sup>15</sup> SUBHASH CHANDRA SINGH, FAMILY VIOLENCE IN WOMEN 15 (Serials Publications, 2010).

<sup>16</sup> See *supra* note 1 at 167.

place and so this gives importance to widespread, interdisciplinary educational and awareness programmes that should be conducted to engage all dimensions of a society and the support of NGOs, which engage in woman's and children's rights should be taken, to potentially contain and end the vile act of FGM. Children are the future of this country and deprivation of their vital human rights is to be harshly condemned and strongly protected. In a country like India that has strong patriarchal attachments in its ideology, oppression and abuse of woman and her rights should be eliminated as much as possible, especially since the Constitution of India strives to protect woman's rights and treat woman as equals without discrimination.

