



FEMALE GENITAL MUTILATION: A HUMAN RIGHTS PERSPECTIVE

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❖ Abstract

Gender discrimination and inequality is deeply rooted in our society in some or the other form. Women and children all over the world are prone to all kinds of exploitation. They are recognized as a vulnerable group and their right to health has been recognized as a human right by the United Nations. Despite of several efforts made on an international and national level to uplift women and children one can see blatant violations of their human rights throughout the globe and Female Genital Mutilation (FGM) is one such example. It is estimated by the World Health Organization that, more than 200 million girls and women alive today have been cut in 30 countries in Africa, the Middle East and Asia. As averse to the popular belief, FGM is also practiced in India by the Dawoodi Bohra community, which is a sect of the Shia Muslims. The Supreme Court on 24th September, 2018 referred a petition challenging the practice of Female Genital Mutilation among Dawoodi Bohra Muslims to a Constitution Bench.¹ In the light of this stepping stone, this article outlines the practice of Female Genital Mutilation in the Indian context.

¹ SC refers PIL against female genital mutilation to five-judge constitution bench, Times Of India (24/9/2018), available at <https://timesofindia.indiatimes.com/india/sc-refers-pil-against-female-genital-mutilation-to-five-judge-constitution-bench/articleshow/65930187.cms>, last seen on 25/9/2018.

❖ Introduction

“Girls are well created, and it is unnecessary and irrelevant to cut any part of their bodies”

-Joseph Osuigwe Chidiebere

According to World Health Organization, Female Genital Mutilation (FGM) is a practice which comprises all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons.² This practice is also known as Female Genital Circumcision (FGC), Cutting, Sunna, Tahor, Khatna, Khafz among many other terminologies. FGM is performed on women of different age groups such as five to eight, babies, teenagers or sometimes even on adult women depending upon the community practices. It is usually performed by elder or experienced women also known as Mullanis, who often play other important roles in the community and have a high religious standing. It is often performed using kitchen knives or razor blades without an anaesthetic or sterilizing them. In urban settings, it is many a times performed by healthcare professionals under the pretext of it being safer when performed by them. FGM is considered as an important culture and tradition in certain communities which is why it has been in practice for centuries. Many justifications are given for the prevalence of this practice such as cultural identity, to decrease a women's libido, to increase men's sexual pleasure, to follow a religious requirement, to ensure a girl's

² Female genital mutilation, News, World Health Organization, available at <http://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>, last seen on 23/9/2018.



virginity and many more.³ In reality, such justifications have no scientific or religious basis and no health benefits arise out of them; therefore they are internationally recognized as human rights violations. The World Health Organization has recognized four types of FGM practices which are given below:⁴

- **Type 1:** Often referred to as **clitoridectomy**, is the partial or total removal of the clitoris (a small, sensitive and erectile part of the female genitals), and in very rare cases, only the prepuce (the fold of skin surrounding the clitoris).
- **Type 2:** Often referred to as **excision**, is the partial or total removal of the clitoris and the labia minora (the inner folds of the vulva), with or without excision of the labia majora (the outer folds of skin of the vulva).
- **Type 3:** Often referred to as **infibulation**, is the narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the labia minora, or labia majora, sometimes through stitching, with or without removal of the clitoris (clitoridectomy).
- **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.

❖ **Impact on the health of women**

³ *Female Genital Mutilation: Frequently Asked Questions: A Campaigner's Guide for Young People*, Forward: Safeguarding Rights and Dignity, available at http://www.forwarduk.org.uk/wp-content/uploads/2014/12/Forward_-FGM-FAQ.pdf, last seen on 25/9/2018.

⁴ Supra 2.

FGM is not known to have any health benefits for women but on the other hand it may harm girls and women in many ways. The victims of this practice may suffer not only from physical and sexual problems but also psychological problems. Such problems may have immediate or long term consequences and may be temporary or permanent. Immediate complications in a woman can include severe pain, excessive bleeding (haemorrhage), genital tissue swelling, fever, infections like tetanus, urinary problems, wound healing problems, injury to surrounding genital tissue, shock and death.⁵ Long-term consequences can include urinary problems (painful urination, urinary tract infections); vaginal problems (discharge, itching, bacterial vaginosis and other infections); menstrual problems (painful menstruations, difficulty in passing menstrual blood, etc.); scar tissue and keloid; sexual problems (pain during intercourse, decreased satisfaction, etc.); increased risk of childbirth complications (difficult delivery, excessive bleeding, caesarean section, need to resuscitate the baby, etc.) and newborn deaths; need for later surgeries: for example, the FGM procedure that seals or narrows a vaginal opening (type 3) needs to be cut open later to allow for sexual intercourse and childbirth (deinfibulation). Sometimes genital tissue is stitched again several times, including after childbirth, hence the woman goes through repeated opening and closing procedures, further increasing both immediate and long-term risks and other health complications resulting from female genital mutilation.⁶ Apart from the physical problems various other psychological

⁵ Ibid.

⁶ Ibid.



consequences of FGM may include depression, anxiety, post-traumatic stress disorder, anger, low self-esteem, fear and feeling of helplessness, sexual phobia i.e. fear of indulging into sexual intercourse, feeling of not being a whole or a normal woman, etc. There have been reported cases of some women who have completely blocked out this traumatic incident from their minds and don't know what was done to their bodies. This is a similar kind of defense mechanism used by minor rape victims.⁷

❖ **Legal Framework pertaining to Female Genital Mutilation**

Since FGM in India has been kept as a secret until recently, it remained as a subject which was never discussed. This could be one of the reasons why India does not have a full-fledged law prohibiting FGM. Despite of this, a person can be brought in the purview of other existing provisions which are as follows:

- a) **The Indian Constitution** under Part III guarantees the fundamental rights like the freedom of equality, prohibition of discrimination based on sex and right to life and liberty (Article 14, 15 and Article 21 respectively) to every citizen of the country. This practice is violative of these rights; one can seek protection under these provisions.

⁷ Somya Abrol, *Yes, Female Genital Mutilation happens in India; here's everything you need to know*, India Today (6/2/2018), available at <https://www.indiatoday.in/lifestyle/people/story/female-genital-mutilation-india-clitoris-pleasure-muslim-bohra-community-1162510-2018-02-06>, last seen on 25/9/2018.

- b) **Section 320 of the Indian Penal Code** describes certain kinds of grievous hurt, i.e. if any person causes hurt to another person in any of the way specified in the said section is liable of causing grievous hurt which is a punishable offence.

- c) **Section 326 of the Indian Penal Code** states whoever, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance is liable for the offence under this section.

- d) **Section 3 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act)** addresses penetrative sexual assault by any person on any child, inter alia defines it as insertion of any object into the vagina of the girl. It is well established in law that penetration in sexual offences need not be complete penetration.

Apart from the above, India has ratified various international instruments which lay an obligation on India to ensure gender equality under its national laws. Due to the nature and consequences of Female Genital Mutilation, certain provisions under international law are clearly violated by the practice of Female Genital Mutilation:

- a) **Article 3, Universal Declaration of Human Rights (UDHR)** states that, everyone has the right to life, liberty and security of person.
- b) **Article 5, Universal Declaration of Human Rights (UDHR)** states that, no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- c) **Article 25, Universal Declaration of Human Rights (UDHR)** states the right to



the highest attainable standard of physical and mental health.

- d) **Article 6(1) of International Covenant on Civil and Political Rights (ICCPR)** states that, every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
- e) **Article 7 of International Covenant on Civil and Political Rights (ICCPR)** states that, no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
- f) **Article 12 of International Covenant on Economic, Social and Cultural Rights (ICESCR)** states that, the State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken by the State parties to the present Covenant to achieve the full realization of this right shall include those necessary for (a) The provision for the reduction of the still birth rate and of infant mortality and for the healthy development of the child, (b) The improvement of all aspects of environmental and industrial hygiene, (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases, (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.
- g) The right to be free from gender discrimination is guaranteed in numerous other international human rights instruments. For example, **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 a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field.

- h) **Article 2 of the Convention on the Elimination of all forms of Discrimination against Women, 1979 (CEDAW)** requires all State Parties to pursue by all appropriate means a policy of eliminating discrimination against women and, to this end, undertake all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.
- i) **Article 5(a) of the Convention on the Elimination of all forms of Discrimination against Women, 1979 (CEDAW)** requires State Parties to take "all appropriate measures" to "modify the social and cultural patterns of conduct of men and women" in an effort to eliminate practices that "are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women". The international community has generally regarded Female Genital Mutilation as a violation of the rights of the child. The United Nations Child Rights Commission (UNCRC) places on the government the ultimate responsibility for ensuring that the fundamental rights of children are recognized and protected. The guiding standard established by the



UNCRC under **Article 3** is “the best interests of the child”.

- j) **Article 24 of the United Nations Child Rights Commission (UNCRC)** specifically mentions traditional practices, saying that “States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children”.

India has ratified to the above mentioned International instruments and it is failing to carry out its obligations under the relevant provisions. The government therefore needs to ensure gender equality under its national laws by eradicating practices like Female Genital Mutilation.

❖ **Freedom of Religion v. Human Rights**

A provision on Freedom of Religion can be found in Article 18 of the Universal Declaration of Human Rights which states that “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance”.⁸ The Indian Constitution under Article 25-28 also guarantees this as a Fundamental Right. But very often, Freedom of Religion as a right finds itself in a conflicting position with basic human rights values such as gender equality, non discrimination and so on. However, one common ground between many world religions and human rights is that they are both founded on the principles of ‘Humanity’ and ‘Humanitarian Principles’. Certain

convictions formed by the proponents of a particular religion often results in the violation of human rights and create tension between the two set of principles. Freedom of Religion cannot prosper on its own and it requires a protection of collateral rights which is why these competing rights are to be reconciled.

In the modern world, the state assumes the responsibility of exercising its political power over its citizens in a manner which would curb discrimination and be fair to all. In this sense, the state can interfere in religious matters and regulate the practices of people which clearly affect public health, public order or public morality. This raises questions in the context of FGM, which right has a higher standing than the other or how to strike a balance between the two rights. A general notion says that all rights stand on an equal footing. However, a norm to be derived from all the international and national legal human rights instruments is that freedom of religion can never be exercised in a manner that would violate human dignity and that any form of discrimination based on religion or belief is unacceptable.⁹ A religious institution is meant for human development and can’t be separated from any human civilization. It should be practiced in a way which will ensure human rights of all people. Thus the right to Freedom of Religion should be restricted within the four walls of the Constitution.

❖ **Conclusion**

⁸ Article 18, Universal Declaration of Human Rights, 1948.

⁹ *Facilitating Freedom of Religion or Belief: A Deskbook*, 119 (Tore Lindholm, W. Cole Durham, Jr., Bahia G. Tahzib-Lie, 1st ed., 2004).



Not much has changed till date and this practice goes unchecked by the law authorities. Thus, a legal intervention is essential at the earliest. Laws should penalize the family members who are the primary perpetrators of this act and anyone else who incites, abets, aids or carries out this act such as the doctors, mullanis, etc. Also, voices are being raised against this practice and it is becoming apparent that the younger generation is getting involved in women empowerment and social justice. It is worthy to note here that the Bohra women are stepping up publicly against this age old barbaric custom. There is an urgent need to spread awareness of this practice and its ill effects on a woman's body. The hush-hush around this subject needs to be removed and it should be discussed rationally and scientifically. Men need to join the protest led by women against this practice. It is high time that the Bohra community realizes that no right to religion is absolute and eventually they will have to bow down to the constitutional restraints of this country. Given the current situation in India and having discussed the various provisions of law under which a person can be charged with FGM but with no mention of FGM anywhere, I strongly suggest that we need a specific law dealing with FGM to ensure prosecution of the perpetrators. Laws enacted by other countries on FGM such as Australia, United Kingdom and Egypt can be used as a model law for India subject to appropriate modifications suitable to our social structure. This law should also deal with other collateral issues such as building mechanisms which would help a minor girl child or the complainer on her behalf to effectively utilize her remedy, which will

ensure rehabilitation, protection and after care of the victims.

