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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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FEMALE GENITAL MUTILATION: AN ESSENTIAL RELIGIOUS PRACTICE?

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ABSTRACT:

Religious practices have always been more discriminatory and unreasonable for women. Even with a change in time and society, people still follow these religious practices, no matter how educated and forward they are. Female Genital Mutilation is one such practice that affects the health of women and can even cause death. This issue was clubbed with the Sabarimala Case as the court felt that this issue should be dealt with by a larger bench. This paper aims to discuss whether FGM, as a religious practice, is an essential practice under Articles 25 and 26 of the Indian Constitution and also focuses on the genital mutilation of women, violating Articles 14 and 15, even though men also undergo such practices at a very young age

KEYWORDS: Female, Religion, Dangerous, Banned, Unreasonable, FGM, practice

I. INTRODUCTION:

Religious practice and beliefs are a very sensitive topic in India, for people in India nothing comes ahead their belief no matter what the outcome of such belief is. Women are often been the ones chained with millions of traditions from sati to genital mutation, women have always been forced to follow traditions which are not reasonable. Women are forced to follow such traditions to become better versions of themselves for men or become more desirable for men or prove that they are devoted wives. These kinds of traditions have taken a toll on women's mental health and become very dangerous for their physical health as well, such traditions which are still being functional and are not banned violates the fundamental rights which are given under the constitution of India one of such practice is Female Genital mutation.

FGM/C is cutting of genitalia of women fully or partially so that she can be more attractive or presentable for marriage.¹ FGM/C in India is followed by the Bohra community in India.² FGM/C is done on girls between 1 to 15 years. The world organization has stated that there are four types of FGM and from those 4 types two types of FGM is followed in India which are - the partial or total removal of the clitoris; other harmful procedures such as pricking, piercing, incising, scraping and cauterizing the genital area. It is also known as khatna.³

Such type of religious practices is against constitutional morality, In India people have many religions and many practices they follow in the name of religion which is against the constitutional morality, for figuring out if the practice which is being followed is against the constitutional morality or not Dr B.R Ambedkar came up with ERP test during a speech he was giving in constitutional assembly. ⁴ This doctrine talks about if a certain practice is essential and integral part of the religion or not. Also There is total 30 countries where FGM is followed but 26 countries have laws which prohibit this practice in their country.⁵ Under the name of religious practice girls under the age of 14 are tortured, these girls are minor and cannot even give their consent, they are forced to undergo this practice which is not even carried out by medical professionals. This paper talks about why Female Genital Mutation should be banned in India because it violates article 25, 26 and article 21 of Constitution of India.

The part II of this paper talks about the practice of FGM in India and Part III of the paper substantiates and focusses solely on whether FGM/C is an Essential religious practice under the constitution. Part IV discusses the arguments in favour and against of banning FGM in India. ⁶

¹ WHO, Female Genital Mutilation, WORLD HEALTH ORGANISATION (Feb 3, 2020), <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>.

² About the Dawoodi Bohra, The DAWOODI BOHRAS, <https://www.thedawoodibohras.com/about-the-bohras/>

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

⁴ Constituent Assembly Debates, Vol. ii 781, Thursday, 2nd December 1948, available at <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C02121948.html>.

⁵ Equality Now, FGM and The Law Around the World, EQUALITY NOW (June 19, 2019), https://www.equalitynow.org/the_law_and_fgm.

⁶ Constitutionality of Female Genital Mutilation in India, Rishika Radhakrishnan, 2021, <https://www.ijlmh.com/constitutionality-of-female-genital-mutilation-in-india/>.

II. DOCTRINE OF RELIGIOUS PRACTICE AND FGM/C:

FGM/C has been considered an essential practise followed by the Dawoodi Bohra Community in India and it can be assumed that it is protected under article 25 and 26 of the Indian constitution. If we look at the history of FGM to identify if it's essential or integral practice or not, an international conference which was held in Egypt stated that misapprehension of Islam is the reason for people promoting baleful practices such as FGM. It was also stated that FGM is carried on to control the sexuality of a woman.⁷ It can be said that FGM being an essential practice is not perspicuous, non-Muslim communities which are living in countries such as Africa and Yemen or Egypt and sudan have promoted and practiced FGM.⁸

The constitutional validity of FGM was challenged in *Sunita Tiwari v. Union of India and Ors*⁹, Later this case was clubbed with *Young Lawyers Association v. State of Kerala (Sabrimala Temple Case)*¹⁰ because the court thought that it is better for a large constitutional bench to decide on this matter.¹¹ In this case one of the issues was “Whether the practice is protected as a religious practice under Articles 25 and 26 of the Constitution?”¹²

Article 25 of the Indian constitution talks about freedom to practice religion but this freedom should be subjected to public order, health and morality¹³. The Procedure of FGM is done by some female family member who is not a medical professional which can result into many health issues, also this procedure can lead a woman with mental health issues as going through such procedure at a very young age can be very traumatising on the other hand this procedure can lead a sexually disabled.¹⁴ Also women can have long term complications and also have childbirth issues on the other hand there can be immediate complications to which can also lead to death of a women.¹⁵ It can be said that the

⁷ United Nations Population fund, Female genital mutilation (FGM) frequently asked questions, <https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions>.

⁸ Yasmin Bootwala, “A Review of Female Genital Cutting in the Dawoodi Bohra Community: Part 3—the Historical, Anthropological and Religious Underpinnings of FGC in the Dawoodi Bohras”, 11 *Current Sexual Health Reports* 228 (2019).

⁹ *Sunita Tiwari v Union of India*, W.P. (C) No.286/2017.

¹⁰ *Young Lawyers Association v. State of Kerala*, (2019) 11 SCC 1; 2018 (8) SCJ 609.

¹¹ *Sunita Tiwari v. Union of India* WP(C)No.286/17.

¹² *Supra* at 11.

¹³ The Constitution of India, article 25.

¹⁴ FEMALE GENITAL MUTILATION GUIDE TO ELIMINATING THE FGM PRACTICE IN INDIA, Lawyerscollective.org/wp-content/uploads/2012/07/Female-Genital-Mutilation-A-guide-to-eliminating-the-FGM-practice-in-India.pdf.

¹⁵ WHO, Female Genital Mutilation, WORLD HEALTH ORGANISATION (Feb 3, 2020), <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>.

procedure of FGM can impact on a women's life in a negative way where she can have health and mental issues, which clearly violates Article 25 as this practice affects health of a women and can also make them disabled. Also, the reason to carry out such practice is controlling a women's sexuality as a woman who has undergone this procedure does not get sexually aroused. FGM is also promoted because people think that It can increase marriageability, as it is a belief that girls become clean and beautiful after the procedure is carried out.¹⁶

According to Justice Chandrachud “a practice claimed to be essential has been carried on since time immemorial or is grounded in religious texts, does not lend to it constitutional protection unless it passes the test of essentiality”¹⁷ The practice of FGM does not pass the test as there is no reference or religious text which are present neither there is any mention of such practice in Quran. This practice is generally followed by the Dawoodi Bohra religious community and there is not further information which is given in any religious texts about this procedure.

The Supreme Court considers religious texts as evidence to prove if a practice is essential or integral part of a religion or not, In *Durgah Committee, Ajmer v. Syed Hussain Ali*¹⁸ Supreme Court observed that religious practices that arose from superstition did not enjoy the protection under Article 26, as these are not ‘essential’ or ‘integral’ to the religion. Hence, analysis of scriptures changed to the study of the practices itself, and the view of the Court superseded that of the religious denomination.¹⁹

The essentiality of religious practice may be proved to be wrong if there is disagreement regarding a religious practice among the same community²⁰, FGM/C is also followed by two communities Aga Khani Ismailis and Dawoodi Bohras, and they also have same traditions and practices, they also follow the same book *Da'a'im al-Islam* where FGM has been practiced or a period of 10th to 20th century.²¹ The practice of FGM is banned in among the Aga Khani Ismailis²² and still followed by

¹⁶ WHO, Female Genital Mutilation, WORLD HEALTH ORGANISATION (Feb 3, 2020), <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>.

¹⁷ *Young Lawyers Association v. State of Kerala*, (2019) 11 SCC 1; 2018 (8) SCJ 609.

¹⁸ *Durgah Committee, Ajmer v. Syed Hussain Ali*, (1962) 1 SCR 383(India), p 33.

¹⁹ H.M.Seervai, CONSTITUTIONAL LAW OF INDIA, (Universal Law Publishing, 4th ed., 1993), p 1269.

²⁰ *Tilkayat Shri Govindlalji Maharajv. State of Rajasthan and Ors.*, AIR 1963 SC 1638(India), p 57.

²¹ Kassamali N. Genital cutting. [ed.] Suad Joseph. *Encyclopedia of Women & Islamic Cultures*. Brill-Leiden, 2006, Vol. III, p 129–134.

²² Kassamali N. Genital cutting. [ed.] Suad Joseph. *Encyclopedia of Women & Islamic Cultures*. Brill-Leiden, 2006, Vol. III, p 129–134.

the Dawoodi Bohras who follow the same Islamic law.

Article 25 and 26 also talks about constitutional morality which means that constitutional norms are supreme, and no citizen should go against as it will violate the rule of law.²³ People in India follow religious practice without applying their minds that's where constitutional morality comes in, as the goal of law is to remove ill social practices and traditions to maintain stability and peace in the society.²⁴ Even if FGM/C is an essential religious practice of the Bohra community it is against the constitutional morality because it is against Article 26 and article 25.

Women and girls being forced to go under such procedure where they can get physically disabled and can lead to them having mental trauma as well is against the fundamental right to right to life and personal liberty. FGM/C takes away right to life as women and girls who have not even attained the age of 18 are forced to undergo a procedure for which their permission is not even taken, which means they are deprived of the right to have control on their own bodies. Such practice is violative of article 25 and 26 and it cannot be protected under article 26 of the constitution.

Article 39(f) of the constitution which is given under Part IV (Directive Principles of the State Policy) states that “children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.”²⁵ Girls who are aged between 4 to 15 years²⁶ going through this procedure where don't even have say against it, which can also lead to mental trauma and immediate or lifelong physical effect is clearly opposite of the aim of Article 39(f).

The practice is violation of article 14 and 15 even though male and women both have to undergo this procedure but it is very different for both the gender as Male circumcision is very different from FGM/C as male circumcision has health benefits and does give any permanent disability to men but it is not the same for female as given under WHO women can have long term effects. On the other

²³ Manoj Narula v. Union of India 2014 (9) SCC 1.

²⁴ Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi v. State of Uttar Pradesh, 1997 (4) SCC 606.

²⁵ The Constitution of India, 1950, Article 39(f).

²⁶ World Health Organization, Female Genital Mutilation, World Health Organisation (Mar. 30, 2020, 8:00 P.M.), <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>.

hand, the main aim to carry out such practice for women is control their sexuality. Controlling sexuality of women by cutting their body part is very discriminatory and also shows how such practice is being carried out just for controlling female. Male circumcision is very different as it has a very different ideology behind it and does not affect them physically. FGM/C leads to women losing their ability of sensation which is permanent.²⁷

III. ARGUMENTS FOR AND AGAINST BANNING

FGM/C IN INDIA:

In *Sunita v. Union of India*²⁸, in this case arguments which were against the ban were that circumcision is a practice which has been followed since a very long time and is protected under Article 25 and 26. This practice does not violate Article 14 and 15 because this practice is for both men and women, both the genders are circumcised when they are very young in the community. On the other hand, the arguments in favour of the ban were that WHO has stated that FGM is an inhuman practice and causes serious health concerns and often lead to death.²⁹

The respondent also argued that the practice of FGM/C is essential practice of not just Dawoodi bohras but for other Islam schools as well and he emphasized on the point that for men it is essential to get circumcised in other schools. In response to his statements the bench gave an observation that constitutional morality also plays a huge roll when it comes to essential religious practices Justice Chandrachud stated that women have fundamental right of right to dignity.³⁰

The respondent also stated that there is no evidence or record that the practice of FGM/C exists in India. He also stated that constitutional morality is a foreign concept taken from USA which cannot be applied to a case of religious practice which is protected under Article 25 and 26.³¹

²⁷ Brian D. Earp, 2014, Female genital mutilation (FGM) and male circumcision: should there be a separate ethical discourse?.

²⁸ *Sunita Tiwari v Union of India*, W.P. (C) No.286/2017.

²⁹ World Health Organization, Female Genital Mutilation, World Health Organisation (Mar. 30, 2020, 8:00 P.M.), <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>.

³⁰ *Sunita Tiwari v Union of India*, W.P. (C) No.286/2017.

³¹ Ban on Female Genital Mutation, <https://www.scobserver.in/reports/day-5-arguments-2/>

Global Perspectives on Female Genital Mutilation (FGM)

Various organisations in different countries have been conducting research regarding this issue, Many is an organization operating in Africa, focusing on 28 countries in the subcontinent to raise awareness about the harmful impacts of this practice. The African Women's Organisation is an NGO that works actively in African nations to reduce the practice. Global efforts to combat FGM are mostly focused on the US and UK. The European Union has launched the "END FGM European Campaign" to reduce the practice in European areas, with Amnesty International's full backing.³² United nations has taken initiative to end this practice in the world by the end of year 2030, under its foal of sustainable development goal 5, The United Nations hopes for FGMS complete elimination by 2030. Since 2008, UNFPA has carried on the initiative to remove female genital mutilation with UNICEF. The Joint Programme focuses on 17 African and Middle Eastern nations. This cooperation has made great progress over time. Over 6 million girls and women got FGM prevention, protection, and care services thanks to the joint programme's assistance.³³

IV. SUGGESTIONS:

1. As stated under Article 15(3)³⁴that special laws should be made for upliftment of women and children. The court should make a separate law for FGM/C and not just simply ban the practice. Many countries have banned FGM/C but they have not made any laws regarding it or imposed any fine or punishment which has had no effect on the practicing FGM/C so taking note from this if court bans the practice, they should impose punishment and make a separate law as well.
2. Also, statue should include punishments for parents, health professionals or any person who is involved in this practice.
3. Government should have campaign through which people can get educated regarding this practice being harmful, the main audience of this should be the parents who need proper education regarding this issue that how can this practice affect the victim in long run.
4. Schools and colleges should have special classes that educate young students about these issues.

³² Aakriti Sharma and Anmol Chitranshi, Female Genital Mutilation: Evils Of Bygone Era, (2020) Indraprastha Law Review.

³³ International Day of Zero Tolerance for Female Genital Mutilation, 6 February, <https://www.un.org/en/observances/female-genital-mutilation-day>

³⁴ The Constitution of India, 1950, Art. 15(3)

5. Providing free medical aid for victims of FGM, they should be provided with medical support and therapy for the victims.

V. CONCLUSION:

The practice of Female Genital Mutilation/Cutting (FGM/C) is rooted in the control of women and their sexual desires. This harmful practice not only results in a permanent loss of sensation for women but also leads to long-term health issues. What is particularly concerning is that FGM/C is often inflicted upon girls at a very young age, which can have profound implications on their mental well-being.

Throughout history, women have endured the chains of such practices, which are not only morally reprehensible but also lack constitutional justification. In the present day, it is disheartening to observe the absence of laws addressing FGM/C, especially when countries like Sudan have taken a decisive stand by banning the practice and implementing punitive measures. This raises serious questions about the effectiveness of the judicial system in India.

It is crucial to recognize that FGM/C violates fundamental constitutional rights, including Article 14, 21, and 15. Furthermore, this practice is not protected under Article 25 and 26 of the constitution. The need for stringent legal measures to prohibit and penalize FGM/C is evident, as it is imperative to safeguard the rights and well-being of women in our society. By addressing this issue through legislative means, India can align itself with the global movement against FGM/C and contribute to the protection of women's rights.