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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated 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

FEMALE GENITAL MUTILATION: A DAYLIGHT HUMAN RIGHT VIOLATION

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“FGM is a violation of girls’ and women’s fundamental human rights”.

Abstract

Female genital mutilation (FGM) is a non-medical practise that involves removing or injuring a woman's or girl's genitalia. In most cases, her external genitalia are partially or totally removed. This act is considered to be a violation of girls and women’s fundamental human rights. For girls and women's health, the practise provides no benefits. FGM may lead to severe bleeding, urination issues, cysts, infections, difficult labours, and a higher incidence of stillbirths in the neonatal period. In the thirty countries in Africa, the Middle East, and Asia where FGM is performed, more than 200 million girls and women alive today have experienced FGM. This act is primarily performed on young females, from birth age to the age of fifteen. Based on the severity and extent of the cutting, there are four different forms of FGM according to a joint statement from the WHO, UNICEF, and UNFPA. This inhumane act is primarily practiced in over thirty countries in Africa, the Middle East, and Asia. FGM has negative short- and long-term impacts on the victims' physical and mental health. The degree of the mutilation or cutting directly relates to the damage done. There is a huge amount of discomfort because the recipient is rarely given anesthesia during the process. Other immediate health hazards include excessive bleeding, vaginal soreness and inflammation, infection, urinary issues, and in very severe circumstances, even death, are the impacts which can happen to a woman.

As mentioned earlier FGM is seen as a violation of girls' and women's human rights on a global scale. It is a severe kind of discrimination against girls and women and shows entrenched gender inequality. It violates children's rights since it almost always involves minors. The technique also infringes upon a person's rights to life, in cases when it results in death, as well as their rights to health, safety, and bodily integrity, as well as their right to be free from torture and cruel, barbaric, or degrading treatment.

Introduction

Female genital mutilation (FGM) refers to all non-medical practises that include cutting or mutilating the female genitalia, including partial or complete removal of the external genitalia. This practice is mostly performed on girls between the ages of 1 and 15 years, it does also happen on occasion on married and adult women. Based on the severity and extent of the cutting, there are four different forms of FGM according to a joint statement from the WHO, UNICEF, and UNFPA. Type 1 means separating the prepuce (clitoral hood), either alone or in combination with partial or complete excision of the clitoris. Type 2 involves clitoris removal together with partial or full excision of the labia minora. In type 3 the vaginal opening is narrowed and the labia minora and/or majora are partially or completely removed. The practice of type 3 is sometimes referred to as infibulation. The dangerous non-medical practises classified as Type 4 include all other forms of clitoris poking and piercing, cauterization, stretching of the clitoris/labia, scraping, and introducing corrosive materials into the vagina¹. This act is primarily performed on young females, from birth age to the age of fifteen².

FGM in India

This custom is prevalent among the Bohra group in India, where it is known as "Khatna" or "Khafz/Khafd." When a girl is 6-7 years old, the practise of khatna essentially includes cutting the tip of her clitoris³. Mullanis, or women with a sense of religion, traditional cutters, or any woman with some skill can conduct it. Some families prefer to see doctors as their interest in a secure circumcision grows. Although the family's elder women are often in charge of preparing the actual arrangements for the ceremony, family members typically participate in decision-making regarding FGM⁴. According to a study of 400 Bohra women conducted online by the NGO Sahiyo, 80% of the respondents had undergone the procedure of FGM. As mentioned earlier, in India, the Bohra group is mostly where FGM is practised. It is well-known that there are two main Muslim sects: Sunnis and Shias. The Shia sect comprises the Bohras. They are found in many parts across India, but are particularly prevalent in Gujarat, Rajasthan, Maharashtra, and Madhya Pradesh. Additionally, they reside in a large number of other countries throughout the globe, including Pakistan, Sri Lanka, Singapore, East African nations, the United Kingdom, Canada, Australia, and the United States of America.

¹ World Health Organization

² UNFPA, implementation of the International and regional Human Rights framework for the elimination of Female Genital Mutilation

³ Harinder Baweja, India's Dark Secret, Hindustan Times

⁴ R. Ghadially, 'All for 'Izzat': The Practice of Female Circumcision among Bohra Muslims'

The women in the community are well educated. However, it is believed to be the only Muslim community in India that perform khatna, or clitoral unhooding, on girls as young as seven. This practise is supposed to have originated from the community's roots in Egypt and Yemen. Although the Dawoodi Bohras are the largest Bohra community, FGM is practised by all other Bohra sects, including the Sulemani and Alvi Bohras. Although the Quran forbids female circumcision (also known as khatna or khafz), the Bohras' preferred theological source, Daimul Islam, supports the procedure on females beyond the age of 7 for hygiene reasons. Additionally, according to some Bohras, it improves a woman's complexion, restrains her sexual desires, and increases her devotion. FGM is frequently considered as a technique to rid a girl of unclean ideas and desires. It is believed that a girl who has had her clitoris cut does not become as excited as one who is in 'qalfa,' which refers to wearing a clitoral hood or who has an intact clitoris. Girls and women are perceived as needing "protection" from their sexual desires. This apparent defence goes beyond only the girl's own safety to include the reputation of the entire family. The fundamental justification for a practise that predates Islam but is still prevalent among Bohras is the belief that the clitoral head is "unwanted skin" or a "source of sin" that causes people to "stray" from their marriages. The term "haraam ki boti," or "immoral lump of flesh," was used by certain women to describe the clitoral hood.

FGM has negative short- and long-term impacts on the victims' physical and mental health. The degree of the mutilation or cutting directly relates to the damage done. There is a huge amount of discomfort because the recipient is rarely given anesthesia during the process. Other immediate health hazards include excessive bleeding, vaginal soreness and inflammation, infection, urinary issues, and in very severe circumstances, even death. Chronic vaginal infections, recurrent UTIs, uncomfortable sex, problems during pregnancy, difficult labour and delivery, neonatal hazards, and disabling psychological effects including post-traumatic stress disorder (PTSD) and depression are some of the long-term effects⁵. Girls' and women's health and social development are impacted by FGM as a result. Contrary to male circumcision, FGM does not have any health benefits.

International law

FGM infringes the human rights of women and children because of how it functions and the impact it has. As FGM is typically performed on girls under the age of 18, it also violates the

⁵ WHO, Health risks of female genital mutilation (FGM)

rights stated in the United Nations Convention on the Rights of the Child, (UNCRC), as well as the prohibition against discrimination. It also violates the rights to life and physical integrity⁶, to health, and to freedom from torture, cruel and unusual treatment, and violence⁷.

A person shall not be discriminated on the basis of gender, this right has been mentioned in many international human rights bodies. The term 'discrimination' is defined in Article 1 of Convention on the elimination of all forms of discrimination against women, 1979 (CEDAW). FGM negatively impacts women's health and is predominantly used to control women's sexuality and marginalize their place in society, in contrast to male circumcision, which has positive health effects. A woman who has FGM is a victim of sexual harassment, which jeopardizes the recognition and enjoyment of her fundamental rights and liberties⁸. The restriction of gender discrimination is advocated in several international and regional human rights conventions, including as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the Universal Declaration of Human Rights (UDHR), were enacted.

The right to life is considered as the most important human right and it is preserved and backed up by several international bodies, such as, Article 3 of UDHR, Article 6(1) of ICCPR, and Article 6 of UNCRC. In some cases of FGM, it also results in death or leads to neonatal or maternal deaths.

The inherent dignity of every person constitutes one of the broader human rights concepts that the right to physical integrity incorporates, even though it is frequently connected with the right to be free from torture. the right to privacy, as well as the rights to one's freedom and security. The right to physical integrity is also violated by violent acts that put someone's safety in danger, such as FGM.

Several international and regional agreements, most notably Article 25 of the UDHR, guarantee the right to the best degree of physical and mental health that is reasonably attainable. As stated in Article 12 of the ICECSR, every State party to the Covenant acknowledges that everyone has a right to the enjoyment of the best degree of physical and mental health that is within their reach. FGM is often carried out on girls between the ages of one and fifteen. As a result, the international

⁶ Article 3, UDHR

⁷ Article 5, UDHR

⁸ 'Female Genital Mutilation: A Matter of Human Rights', Centre for Reproductive Rights (New York, 2006)

community usually considers FGM to be a violation of children's rights. According to the UNCRC, it is the government's duty to ensure that children's fundamental rights are acknowledged and upheld. "The best interests of the child" is the guiding principle established by the UNCRC in Article 3, and traditional practises are specifically mentioned in Article 24 of the UNCRC, which states that "States Parties shall take all necessary and appropriate initiatives with a perspective to abolishing traditional practises prejudicial to the health of children."

In an attempt to eradicate FGM, the WHO declared in 1996 that the practise was wrong and that it violated people's rights. A UN resolution supporting the use of the word "FGM" to refer to clitoridectomy, infibulations, and other FGM-related procedures was enacted in 1993. Several of the established rights for women and girls in this regard are listed below:

- The right to be free from all types of gender-based discrimination
- The right to bodily integrity and violence-free enjoyment of life
- The children's right
- Religious liberty and rights of minorities

FGM and Sexual Intercourse

One of the primary reasons for FGM's widespread practice is the idea that it suppresses young girls' and women's sexual urges. For example, in some African nations like Mali, Kenya, Sudan, and Nigeria, there is an assumption that women who have undergone FGM are more likely to be truly devoted to their future husbands. When the clitoris is in contact with the baby's head, it might kill the baby, since it is hazardous to the newborn during birth if not cut. According to study, there is a concept that a woman's clitoris should be cut because, if it is not, it may develop and resemble a man's penis. Cutting consequently slows the growth rate and maintains the woman's femininity. In a study on women and sex, it was revealed that FGM is torture for the majority of the mutilated women since it could be extremely painful and threaten their lives⁹. An infibulated women's risk of having painful sex for the rest of their lives is high, if they don't get medical help, it will still continue and is life threatening. In situations when there is no suffering, there is no sexual fulfilment. Women's clitoris is a crucial organ for feeling orgasm and sexual pleasure; damaging clitoris mutilation affecting how sexually successful and satisfied women who have had FGM¹⁰.

In comparison to males, the women that have not undergone the procedure of FGM are more sexually active. The people who believe in FGM consequently assume that by mutilating them,

⁹ Study by Amnesty International

¹⁰ Hanny Lightfoot Klein on FGM

their sexual urge may be restrained, but doing so also has social, psychological, and psychosexual impacts for the person.

Article 25 and 26

Female circumcision was first practiced on women in Egypt and Yemen, and it then spread to India when Dawoodi Bohra Muslims migrated to Gujarat in the 1500s. Although the practice of female circumcision isn't stated anywhere in the Quran, some Hadiths can be read in a specific way to support the practice. Quran prohibits the any kind of infliction of harm on family. Those who support the practice, however, believe that FGM is essential for maintaining family stability and reining in women's sexuality. Thus, according to certain Islamic scholars, FGM is required of women in order to protect her own family members¹¹.

The fact that it is unclear whether FGM is a cultural or religious practice is important to highlight, since this customary practice is not followed by not all Islamic sects. Since it is also practiced by non-Muslim groups in nations like Yemen and in African nations like Egypt and Sudan¹².

The right to profess, practice, and spread one's religion is guaranteed by Article 25 of the Indian Constitution. This liberty is, however, "subject to public order, health, and morality." Female circumcision is a procedure that has a significant effect on a person's physical, sexual, and mental health. The health of the women who must have FGM is clearly at risk, as is the practice itself. In light of the harm, it does to a woman's health, the practice cannot be justifiable under Article 25.

According to section 15(3) of the Indian constitution, the state may adopt "special legislation" to improve the status of women. More crucially, the freedom of religion guaranteed by Articles 25 and 26 of the Indian Constitution is also regulated by other rules included in Part III, which is devoted to the Constitution's basic rights. FGM violates article 21 of the Indian Constitution, which protects the right to life and the right to personal freedom.

In the case of *K.S Puttaswamy vs Union of India*, it was held that, according to Article 21 of the Indian Constitution, "the right to life and personal liberty are inherently tied to the right to privacy."

¹¹ Harinder Baweja, India's Dark Secret, Hindustan Times

¹² 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

The same judgement clarified that this right to privacy includes the freedom of sex and reproduction. A child's right to sexual and reproductive freedom is forcibly removed from her when she is exposed to FGM since she is unable to comprehend the long-term effects of the procedure¹³.

Therefore, considering the following points, it is clearly evident that the practice of Female Genital Mutilation does not come under the scope of Article 25 and 26 of the Constitution of India.

Religious aspects- is it mentioned in the religion?

The practice of FGM is carried out by various religious communities in several nations. FGM is practiced by Islam, Protestants, Catholic, the Seventh Day Adventist Church, and Animism are among the religious groups that practice this. The practice of FGM is more prevalent in Muslim communities than in any other community. For instance, 80% of Muslim women are mutilated in Somalia and Sudan, two countries with large Muslim populations. Many Muslim practitioners allegedly connected FGM by linking it to "Sunna" in the Holy Quran. But the truth is that neither the Holy Bible nor the Holy Quran has mentioned anything about the practise of FGM¹⁴. Changing these misunderstandings among the practitioners can help to curtail this form of "torture".

Legal framework in India

The Indian Penal Code, 1860 regulates several types of violence against women in India (IPC). Being a criminal law, the priority is on punishing the accused or offender. IPC sections 319 through 326 deal with different types of hurt and grievous hurt. According to the WHO, excessive bleeding, genital tissue swelling, wound healing issues, injury to surrounding genital tissue, shock, and death are some of the immediate complications of arising out of FGM, while urinary problems, vaginal problems, menstrual problems, sexual problems, etc. are some of the long-term effects. As such, therefore, those who perform FGM shall be charged under the IPC.

Also, section 324 and 326 of IPC deals with the punishment and fines for "grievously causing hurt" and "voluntarily causing grievous hurt". R.K Raghavan, the former Director of CBI has stated that, though FGM is not mentioned as an offence in IPC, but on a complaint, the police are obliged to register it under section 326 of IPC¹⁵.

¹³ Justice K. S. Puttaswamy (Retd.) and Anr. v. Union Of India And Ors., (2017) 10 SCC 1

¹⁴ Waris (2005)

¹⁵ Rasheeda Bhagat, 'Ban this barbarous practice!', Hindu Business Line

In the definition of penetrative sexual assault in Section 3 of the Protection of Children from Sexual Offences Act of 2012 (POCSO Act), any item inserted into a girl's vagina is included as one example of this type of offense. In sexual offences, penetration need not be absolute, according to recognized precedent. The term "vagina" really incorporates the labia majora, according to Explanation 1 of Section 375 of the IPC. FGM, which requires for the insertion of a sharp object into a child's vagina, can be governed by Section 3 of the POCSO Act when read with Explanation 1 of Section 375 of the IPC.

The Ministry of Women and Child Development developed the centrally funded Integrated Child Protection Scheme (ICPS) in 2009 with the goal of establishing an effective defense system for young children who are at risk. Its goals encompass enhancing structures for emergency outreach, institutional care, family and community-based care, counselling, and support services; institutionalizing and integrating essential services; strengthening child protection at the family and community levels; and encouraging preventive measures to shield children from vulnerable, risky, and abusive situations. The program intends to interact with several sectors, including health, education, the court, the police, and labour, among others, to provide service provision into a variety of already-existing services to meet the diverse requirements of children in challenging situations.

FGM laws in foreign countries

Sudan

FGM was prohibited in Sudan in 1946 as the first African nation to do so by an addition to the criminal code. In 1957, when Sudan got independence, the first legislation was enacted. The maximum term was decreased to five years in 1974, however the current sentence is a fine/prison for seven years¹⁶. FGM is a crime in South Sudan, where the Child Act of 2008 and the Penal Code Act of 2008, both of which are still in effect in compliance with the Transitional Constitution, all of which criminalize the practice. The penalty for performing FGM is outlined in the Penal Code. The Penal Code does not define FGM directly, but anybody who "makes or induces a Female Genital Mutilation to be performed" is punished under Section 259 of the act.

¹⁶ SOAT 1999

Nigeria

Section 6(2) of the Violence Against Persons (Prohibition) Act, 2015 in Nigeria aims to punish anybody who performs FGM/C or hires someone else to do FGM/C. According to sections 6(2) and 6(3), there is a criminal punishment for anybody who promotes, helps, or counsels another person to undergo FGM/C, or even just makes a minimal attempt to do so.

Kenya

According to the Kenya Demographic and Health Survey, 1998, almost 32% of Kenyan women have undergone female genital mutilation¹⁷. Female genital mutilation is seen as risky in Kenya, where regulations have been put in place to outlaw the practice. The Children's Act, which was passed in Kenya in 2001, made female genital mutilation of girls under the age of 18 illegal. Any conviction for FGM-related offences attracts a punishment of 12 months in jail or a fine of KSH 50,000 or both, according to section 18 of this law. The same year, FGM became prohibited in all medical institutions according to a policy directive sent by the ministry of health, which also backed the punishment. The nation joined the Maputo Protocol in 2003, and its article 5 mandates that FGM should be prohibited.

Ethiopia

FGM was abolished in Ethiopia in 2004, yet the practice remains widespread and deeply embedded there. About 74% of girls and women have undergone the customary practice, according to a 2005 official health study of the nation. The punishments imposed on the practitioners vary from three months to life imprisonment or monetary fines¹⁸. Even if some girls and women would prefer not to have the surgery done, the practice will persist because of societal pressure.

Somalia

FGM is not officially prohibited by any legal provisions in Somalia. But in 1999, the government put up legislation that abolished FGM. When the dictatorship toppled in 1991, the awareness campaign against FGM came to an end. Following the civil war, international and local groups, such as the National Committee against FGM and SSWC¹⁹, began their operations in other regions

¹⁷ Kenya Demographic and Health Survey

¹⁸ Population Media Centre, 2009

¹⁹ Save Somalia Women and Children

of the nation, but as Somalia lacks a parliament, there are no legislation against the practice²⁰.

In some circumstances, even educated people who are aware of the practice struggle with the idea that women may live with uncut clitoral regions and that the law shouldn't be used to fundamentally change generations and families. Instead, it should serve as a guide to what is ethically acceptable or unacceptable. The percentage of mutilation has declined in several nations since the regulations have been put into place. The lack of a centralized government prevents this from happening in other nations like Somalia and Sudan²¹. Because they provide women and girls the power to reject mutilation, laws can be used as a weapon to put a stop to the practice.

Need for new legislation on FGM

The number of instances involving FGM hasn't decreased at all, even after the introduction of legislation like POCSO and several related sections in the IPC. pointing out the areas where the current criminal law is deficient and this offence is not covered. FGM is not only a crime, but also a serious socio-cultural issue, which is one of the reasons it has not yet been made a crime.

For more than 500 years, FGM has been a common practice among Dawood Bohras and has become accepted as a kind of worship. For example, the practice of Sati, in which a woman would self-immolate on her husband's funeral pyre until she died in order to preserve the integrity of the marriage, can be compared to this. Both of these customs are obsolete and follow societal standards in a way that restricts women's independence and control over their bodies.

Additionally, the national conversation in feminist legal theories frequently emphasizes how problems that women encounter is maintained inside the private sphere of existence. FGM is carried out in secret, and the older women of the household frequently decide whether or not to carry it out²². The issue of FGM would be addressed and raised in public if legislation against this procedure were to be passed. It will mark the beginning of the Dawood Bohra women claiming their political rights.

In addition, state parties are required by international agreements like the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination

²⁰ World Bank & UNFPA, 2004

²¹ Afrol News, 2006

²² Shreyashi Ghosh, "Beyond spaces: debunking public/private divide in understanding violence against women in India" 1 Indian Journal of Gender Studies

Against Women (CEDAW) to enact legislation that prohibits violence against women and young girls. requiring government agencies to enact safeguarding legislation to protect their welfare. Being a signatory to both of these conventions, India has an added obligation to uphold its responsibility.

Sunita Tiwari Petition on FGM

Human rights activist Sunita Tiwari²³ filed a case in the public interest so that the practice of FGM will be considered illegal. She contends that there is a connection between the practice and female genital mutilation (FGM)²⁴. She contends that the practice violates the rights of Dawoodi Bohra women to equality, privacy, and personal liberty since it is discriminatory in nature. The Dawoodi Bohra Community was against this petition for a number of reasons. They argued that as it was a fundamental aspect of religion, the court had no authority to interfere with that community's religious practices²⁵. The United Nations Convention on the Rights of the Child's Articles 19 and 24 are also violated by this practice. FGM is a procedure that results from patriarchal thinking and a complicated sociocultural issue. On a worldwide scale, a number of resolutions and treaties have been established to entirely abolish this practice. The IPC and the POSCO Act both forbid sexual assault against minors, but unlike other nations, India lacks a separate law specifically prohibiting this activity.

According to the judgment in *K.S. Puttuswamy v. Union of India*, 2017, the right to physical integrity is protected under Article 21 of the Indian Constitution. In accordance with the POSCO Act of 2012, anybody who touches the female genitalia of a minor for any cause other than medical necessity can be sentenced to jail. The POSCO Act also contains restrictions against sexual assault with any kind of weapon. Additionally, under Section 326 of the IPC, 1860, a person may be held accountable if they intentionally inflict someone else great bodily harm. Therefore, reading all this together, the government must prohibit FGM and prosecute those guilty. The POSCO Act, in contrast to IPC, has several measures aimed at protecting children from sexual abuse. Even though, Female genital mutilation is not specifically defined in the POSCO Act or the IPC, but those who engage in it may still be held accountable for sexual assault and breaching a child's fundamental rights.

²³ Sunita Tiwari vs Union of India

²⁴ HT Correspondent, 'Female Genital Mutilation violates fundamental rights, says Supreme Court

²⁵ Simantini Dey, 'Women from the Bohra Community Are Fighting Against Female Genital Mutilation to Win Back Their Freedom

Conclusion

FGM is a practice that has societal repercussions that impact many young girls and women socially, physically, and psychologically. Education and awareness initiatives are required in the areas where FGM is performed in order to end the custom. Although the majority of African nations have made the practice illegal, this does not go far enough because it is rooted in their cultural and traditional norms. The campaigns must cover issues including FGM's negative impacts and abuses of human rights. Culture-related issues are difficult; thus, the first step is to eradicate these traditional and cultural views by educating people sufficiently about them.

Due to the lack of awareness about FGM amongst Westerners, it is crucial to bring up this topic. The practice of FGM is terrifying. Regardless of a person's race, ethnicity, country, or age, human rights are supposed to protect them. FGM has established itself as one of those cultural or traditional practices that need examination in light of human rights considerations. Investigations on a national and worldwide scale revealed that the practice violates the rights of women and girl children in the cultures where it is practiced. Because FGM has a long-lasting negative impact on health, it is cruel, damaging, painful, and unnecessary. Currently in many African nations, the practice of FGM is considered as criminal offence.

First, by empowering those who are already aware about the practice of FGM the capacity to teach others, this will be the first step towards its elimination. In order for women and girls to educate those in their cultures who are still performing FGM, it is important to support them by giving them the knowledge they need about the practice. Second, the organisations and authorities working to end the practice should be urged to receive reports from community development experts in any instances where they think that a girl has been mutilated or is in danger of being exposed to mutilation. These are some of the ways by which this issue can be tackled.

Even though fortunately this practice has not acquired much popularity in India, by understanding other people's cultures, community development professionals will be able to spot any risky cultural practices that exist among minority groups and thus be able to save those who are unknowingly subject to them. But, by empowering and educating people about the implications, will help to curtail this issue.

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