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# **UNCUT STORIES: A STUDY ON THE PRACTICE OF FEMALE GENITAL MUTILATION**

AUTHORED BY - FASEEHA KHATOON<sup>1</sup>

## ***Abstract***

*The term “Female Circumcision” is often used in the societies where genital surgeries are performed, and by certain anthropologists. “Female Genital Mutilation” is used by feminists and people who work for the abolishment of the practice.*

*This paper is an attempt to study what the author considers a barbaric practice, that of female genital mutilation (hereinafter, FGM). As surprising as it may be to hear, the practice does persist even today, not just in the poor remote lands as those of Africa, but also many others, India itself not being untouched by it.*

*In course of this study, the author will attempt to focus on understanding the basis of the present day practice of FGM, what could be the religious or socio-cultural reasons for the observance of it, who all are the victims, as well as the supporters, what are the different social and legal as well as psychological approaches of the global human rights organisations, and other important organisations working for women empowerment, and gender equality in different jurisdictions, and what can be done to ensure that the elimination of the practice of FGM. The opinions of sociologists will be seen, with regards to the social implications of favoring or disfavoring the practice of FGM.*

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## I. Introduction

We are Human Beings; we make the traditions so we should have the right to change those traditions.

-Malala Yousafzai (Youngest Nobel Prize Laureate)

Those of us who are maimed can tell you it is possible to go on. To flourish. To grow. To love and be loved, which is the most important thing. To feel pleasure and to know joy. We can also tell you that mutilation of any part of the body is unnecessary and causes suffering almost beyond imagining.

-Alice Walker (African Poet, Novelist, Pulitzer Prize Winner)

## II. Female Genital Mutilation: Definition and Types

At the outset, the Female Genital Mutilation (hereinafter FGM), is defined as, “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.”<sup>2</sup>

It is therefore, a complex issue which has been practiced by populations at large and is so deeply rooted in the cultures, that prima facie it seems difficult to forgo the practice all at once. However, broadly we can see that this practice leads to a four-fold discussion<sup>3</sup>:

- Human Rights of Women
- Human Right of Children
- Right to Health of these women and children
- Right to an all-around development

It is under these broad terms that the author will focus upon, in the coming chapters of the article.

The term “Female Circumcision” is often used in the societies where genital surgeries are performed, and by certain anthropologists. “Female Genital Mutilation” is the term used by feminists and people who work for the abolishment of the practice.

The UN has initiated conversations and discussions on the practice of FGM.

It is now widely acknowledged that [FGM] functions as a self-enforcing social convention or social norm. In societies where it is practiced it is a socially

<sup>2</sup> World Health Organisation, “Female Genital Mutilation” Feb. 3<sup>rd</sup>, 2020, available at: <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>.

<sup>3</sup> Efua Dorkenno and Scilla Elworthy, “Report of the Minority Rights Group on Female Genital Mutilation: Proposals for Change” (April, 1992).

upheld behavioral rule. Families and individuals uphold the practice because they believe that their group or society expects them to do so. Abandonment of the practice requires a process of social change that results in new expectations on families.<sup>4</sup>

Further, as per the World Health Organization, it has been classified into various types, depending on the methods employed, and the health severity caused by those methods. They are usually divided into four broad types, one, which is a ritualistic circumcision, where the clitoris is “nicked”.<sup>5</sup> Second is the type where the clitoral hood is removed is often practiced in following what is known as *Sunnah* circumcision.<sup>6</sup> Third form, known as “Clitoridectomy” requires removal of the clitoris and partial or full removal of the *labia majora*.<sup>7</sup> The most severe type is called “Infibulation”.<sup>8</sup> This is a laborious process involving severing the clitoris, both *labia minora* and *majora*<sup>9</sup>, which is then stitched together, leaving only a very small opening for passing of urine and menstrual flow.<sup>10</sup> After the procedure is complete, the legs of the girl are tied together.<sup>11</sup>

The FGM is more often than not carried out using unhygienic and sharp implements like blades, pieces of glass, hot rocks or some other tool modified to do the job.<sup>12</sup> Quite clearly these methods are far from being humane or hygienic.

On a woman having undergone infibulation, a practice of de-infibulation is usually done, to facilitate child birth and to allow health and well-being, or to facilitate sexual intercourse.

This type of FGM is commonly practiced in Somalia, Sudan and in parts of Egypt, Ethiopia, Kenya, Mali, Mauritania, Niger, Nigeria and Senegal<sup>13</sup>.

According to WHO, Infibulation is the extremely severe, because the mutilated young women’s legs are bound for approximately a month in order to allow for the formation of scar tissue across the genital area.<sup>14</sup> This causes a severe lack of movement and may result in other

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<sup>4</sup> The UN General Assembly *The Girl Child: Report of the Secretary-General*, GA Res 62/140, GAOR, UN Doc A/64/315 (August 21<sup>st</sup>, 2009) available at: <https://www.refworld.org/docid/4ac9ac552.html>.

<sup>5</sup> Helen Signy, “Australia: The Unkindest Cut”, *Sydney Morning Herald*, Feb. 26<sup>th</sup>, 1994.

<sup>6</sup> *Sunna* in Muslims is a word for “tradition”, See Efua Dorkenoo, Scilla Elworthy, “Report of Minority Group on Female Genital Mutilation: Proposals for Change” (April 1992).

<sup>7</sup> G.H Sayed et. al., “The Practice of Female Genital Mutilation in Upper Egypt” 55 *Intl. J. Gynecology & Obstetrics* 285 (1996).

<sup>8</sup> Maggie Garb, “US Doctors Seeing “Circumcised” Female Immigrants” 33 *Am. Med. News* 3 (1990).

<sup>9</sup> *Supra* note 4.

<sup>10</sup> *Ibid.*

<sup>11</sup> “What’s Culture Got to do with it? Excising the Harmful Tradition of Female Circumcision”, 106 *Harv. L. Rev.* 1944,1946 (1993).

<sup>12</sup> *Ibid.*

<sup>13</sup> World Health Organization (Geneva), *Supra* note 1.

<sup>14</sup> World Health Organisation, *Supra* note 3.

physical problems, apart from immense pain in general.

On 20 December 2012, the UN General Assembly adopted a first-ever resolution against FGC<sup>15</sup>, defining it as “an irreparable, irreversible abuse that impacts negatively on the human rights of women and girls” and reaffirmed “that female genital mutilations are a harmful practice that constitutes a serious threat to the health of women and girls [...] and that the abandonment of this harmful practice can be achieved as a result of a comprehensive movement that involves all public and private stakeholders in society.”

### III. History and Development

It is the practices like the aforementioned, which have served as a mirror between the law and society. It is not recent that women have had to go through practices which cannot be said to be meted out to a ‘fair sex’, in-fact these practices have been known to give the women an ‘identity’ unique to their gender. The struggles have been an indispensable part of our history, to rid our society of practices that affect women and little girls, like those of female infanticide, child marriage, *sati* etc. to name a few.

It is no fiction that history is replete with examples where in order to impress upon the patriarchal setup, societies have tried to control women’s’ sexuality and reproduction, by using various means.<sup>16</sup> One of these methods has been found to be circumcision, which has been in practice for long, and serves as a medium to orchestrate this control further, and it is further supported on the belief that women are unable to control their own sexuality.<sup>17</sup>

Female Genital Mutilation, as per reports finds its roots in ancient Egypt, now present-day Egypt and Sudan<sup>18</sup> sometime around the fifth century BC<sup>19</sup>. Women in Egypt could not enter mosque, possess property till they were circumcised.<sup>20</sup> Apart from these, the practice was also ongoing among the women slaves in the Ancient Rome, with the intention to avoid coitus and pregnancies that could follow.<sup>21</sup> As time passed, the practice persisted, with its followers

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<sup>15</sup> UN General Assembly 69<sup>th</sup> Session, New York, 18<sup>th</sup> December 2014, see also: UN General Assembly, *intensifying global efforts for the elimination of female genital mutilation: resolution / adopted by the General Assembly*, 2 February 2017, A/RES/71/168, available at: <https://www.refworld.org/docid/589c75f44.html> (accessed 3 March 2022).

<sup>16</sup> Stanley G. French, Teays Wanda *et. al.* (eds.), *Violence Against Women: Philosophical Perspectives* (Cornell University Press, London, 1998).

<sup>17</sup> *Ibid.*

<sup>18</sup> Jewel Llamas, “Female Circumcision: The History, the Current Prevalence and the Approach to a Patient” *University of Virginia, School of Medicine* (2017).

<sup>19</sup> *Ibid.*

<sup>20</sup> Mona Eltahawy, “Report on FGM in Egypt, 28 Too Many: FGM...let’s end it” (April, 2017). *available at:* <https://www.refworld.org/pdfid/5a17ef454.pdf>.

<sup>21</sup> Armelle Andro, Marie Lesclingand, Translated by Madeleine Grieve, Paul Reeve, “Female Genital Mutilation. Overview and Current Knowledge” 71 *Population* 217-296 (2016).

providing various theoretical justifications for practicing it.

In Greece, the girls used to be circumcised at the time of receiving their dowries, as has been revealed by a Greek papyrus which dates back to 163 B.C, found in a British Museum.<sup>22</sup> Greek geographer Strabo also reported that the custom persisted in 25<sup>th</sup> Century B.C in Egypt, on women as a premarital rite.<sup>23</sup>

### 3.1 Contemporary State of Affairs

As of today, FGM is carried out in more than thirty African and Middle Eastern Countries.<sup>24</sup> The most prevalence of this practice is found in the eastern, western and north-eastern regions of Africa, certain parts of Asia and Middle East and certain communities in Europe and North America.<sup>25</sup>

Initially, the term used in this regard was circumcision, which also pertains to the male circumcision, a relatively more common and a lesser brutal practice. However, later on, the UN organisations used the term ‘mutilation’ or ‘cutting’ instead of ‘circumcision’.<sup>26</sup> This is done with a view so as to comprise everything from the partial/total removal of the female genitalia, or excision, or any of the types mentioned above, like Clitoridectomy, or Infibulation, which involves the partial or complete removal of the parts of the vagina.<sup>27</sup>

It is also found, that this practice is also seen as a ‘celebration’ in some cultures, as it is believed, that this practice is in-fact, a great moment in a girl’s life, and a cause for celebration.<sup>28</sup> Some cultures also practice it on girls in their formative years, so that the memory of the incident is repressed.<sup>29</sup>

The change in perspectives regarding the practices is due to the different schools of thoughts that view it differently, due to factors like religion, cultural relativism, or just legal and human rights perspective.

The theological approach leads people to believe that the practice is a means of purification of

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<sup>22</sup> Hanny Lightfoot-Klein, *Prisoner of Ritual: An Odyssey into Female Genital Circumcision in Africa* 27 (Harrington Park Press, New York, 1989).

<sup>23</sup> Mahomed Nabih EL-Gharib, “Female Genital Cutting: A Persistent African Health Challenge” 1 *Gynecology and Obstetrics Open Access Open Journal* 1-6 (2019).

<sup>24</sup> United Nations Children’s Fund, *Female Genital Mutilation/Cutting: A Global Concern*, UNICEF, New York, (2016).

<sup>25</sup> World Health Organisation, *Supra* note 1.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> Radhika Coomaraswamy, “Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women” 34 *Geo. Wash. Intl. L. Rev.* 483-492 (2002).

<sup>29</sup> Nawal M. Nour, “Female Genital Cutting: A Persisting Practice” 1(3) *Reviews in Obstetrics & Gynecology* 135-139 (2008).

the woman's body.<sup>30</sup> The cultural approach believes that the woman's body in this way is made more attractive, and more suited to the standards that are culturally deemed more acceptable.<sup>31</sup> When it comes to the legal point of view, the practice of FGC is considered to be a gross violation of human rights of women and children, who suffer major health problems that have long lasting consequences, and in some unfortunate cases, can even be fatal. Further, the practice is a glaring example of discrimination against women, leading to a multiplicity of reproductive health problems.

In considering all these, the instruments of human rights protection at national and international level have been in opposition of this practice. There are several physical and psychological implications of FGM, some to the extent of being life threatening.

Despite it being a painful one, why is it still practiced? The answer can be found in the reasoning of the ones who practice it: in order to protect a woman's honor. It goes on to stiffen the trend of laws set for women by men, and years of internalized misogyny harbored by women privy to it.

While going into the sociological debate would be an arduous process, it is quite evident that the methods and tools used to cut the genitalia of the women and girls are more often than not unhygienic and unsafe, and the practice often is carried out by inexperienced midwives or barbers at best.

The gruesome accounts of the incidents as recounted by the subjected girls themselves go on to elucidate how they were lured, under some pretext or the other, taken to a dark alley where a person, not remotely resembling a doctor or a nurse used tools like blades, knives and sometimes even nails to sever the clitoral hood of the girls, while they just screamed in excruciating pain. Some were brave enough to spearhead the crusade to end this ordeal, so their children don't suffer like they did, in more ways than one.<sup>32</sup>

One of the major questions could be- why do women put their daughters through the same pain they have been through? There could be multiple answers to that, one being, them becoming the forced victims of their conditions.

While talking about this aspect, the one where women not only expect, but encourage the younger generation of women to follow a certain norm, no matter how unjustified or barbaric

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<sup>30</sup> Shweta Mishra, Amit Kumar Pandey, "Female Genital Mutilation Violation of Fundamental Rights" 2 *Indian Journal of Health and Medical Law* 10 (2019); The clitoris is often referred to as 'haraam ki boti' or 'source of sin' in the Dawoodi Bohra community, practicing FGC.

<sup>31</sup> Nancy Ehrenreich and Mark Barr, "Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of "Cultural Practices" 40 *Harvard Civil Rights-Civil Liberties Law Review* 71 (2005).

<sup>32</sup> Masooma Ranalvi, belonging to the community of *Dawoodi Bohra* herself, spearheads campaigns against Female Genital Mutilation in India.

it may be, one goes on to realize how deeply it is ingrained within us, that a woman has to conform to certain well chalked out roles meant for her, that of a modest wife, a good homemaker, and majorly, of a woman who does all it takes to please her husband and the patriarch of the family. We can't overlook the cultural norms that still believe that a girl fulfills her responsibilities towards her parents when she is married. From then on, she embarks on another journey, that of pleasing her husband, a major part of which also depends upon the girl's 'virginity', being a deal maker or breaker. Now, this is where FGM enters, in the cultures that practice it. To break down the process in simpler terms, a girl's genitals are cut off, mostly severing the clitoris, and vulva, which is then followed by stitching the aperture, leaving a space as tiny as the end of a matchstick, to let the passage of urine and menstrual flow. It is believed, the smaller this opening, the better it is, because the smaller opening would mean a virtuous girl.

While researching for her book, Alice Walker discovered that "their genitalia are considered unclean, it is said. Monstrous. The activity of un-mutilated female vulva frightens men and destroys crops. When erect, the clitoris challenges male authority. It must be destroyed".<sup>33</sup>

One community leader in Kenya explained, "Circumcision makes women clean, promotes virginity and chastity and guards young girls from sexual frustration by deadening their sexual appetite."<sup>34</sup>

While it is preposterous to even doubt how fundamentally flawed this whole procedure is, the clear factors like the girl's screams, or later complications that the girl might develop also do little to curb this practice. In India, even a wider acknowledgement of the existence of this practice needs to see the light of the day, though the situation has improved lately, with people having initiated an actual debate on it.<sup>35</sup> However, we still have miles to go.

### **3.2. Reasons behind the Practice of FGM**

Among those who follow it, the FGM is proposed by the scholars to have some functions, ranging from the "marriageability" of the woman, thereby focusing on the "virginity, purity and sexual abstinence". These views are very deeply rooted in the population that practices it,

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<sup>33</sup> Alice Walker, Pratibha Parmar, *Warrior Marks: Female Genital Mutilation and the Sexual Blinding of Women* (Harcourt Brace, 1993).

<sup>34</sup> Katumba, R., "Kenyan Elders Defend Circumcision" *Development Forum* 17 (1990); (citing Mrs. Njeri, a defender of female genital mutilation in Kenya), available at: <https://www.amnesty.org/download/Documents/156000/act770061997en.pdf> (last visited on July 04, 2022).

<sup>35</sup> Masooma Ranalvi, "On Human Rights Day, Can We At least Accept That FGM Exists?", *The Quint*, Dec. 10<sup>th</sup>, 2019, available at: [https://www.thequint.com/voices/women/on-human-rights-day-let-us-acknowledge-the-fact-that-female-genital-mutilation-exists-practice-shrouded-in-secrecy\\_](https://www.thequint.com/voices/women/on-human-rights-day-let-us-acknowledge-the-fact-that-female-genital-mutilation-exists-practice-shrouded-in-secrecy_)

majority of which is a religious society. The purpose of preserving a young girl's or woman's modesty is to ensure her "morality" and "respect required in a marriage".<sup>36</sup>

What may also be interesting to note is that there are cultures that permit premarital intercourse and the argument they give is that FGM is done to fulfill another purpose: one to solidify one's "cultural identity" and step into being an "adult member of the society".<sup>37</sup> Known as "Kipsigis"<sup>38</sup>, women are considered to be "reborn" after circumcision.<sup>39</sup>

In some communities, those who do not practice FGM run the risk of being outcast by the rest of the society.<sup>40</sup>

Next reasoning given is regarding the protection of health of women and their foetus. Some consider it potentially fatal if the foetus comes in contact with the clitoris, which is considered to be "toxic".<sup>41</sup>

There are certain beliefs embedded in the cultures that practice FGM, and these beliefs stem from the deeply rooted traditions that give validity to the practices followed in those cultures for a long period of time.

Certain societal, theological and other factors come into play while observing any tradition and there is no reason for them to treat FGM as any different. To a lot of people, the barbarism or fallacy in a particular practice is overlooked simply because it has been going on for so long, and is practiced by the majority that the followers often forget that "an evil does not simple become good because the majority is following it."

#### IV. Indian Scenario

In India, it is the *Dawoodi Bohras* who are known to practice FGM within their community, majorly. There are some Sunni communities as well, in Kerala.<sup>42</sup> For the longest time, there wasn't any reporting of the incident in the country.

In India, among the Shias, the *Dawoodi Bohras* specifically, as well as certain Sunni sub-sects belonging to state of Kerala also practice it in the form of *khafd*, as it is culturally called, and is being practiced for what seem to be generations now. Around 2017, there came a report

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<sup>36</sup> C.T. Ross, P. Strimling, K.P. Ericksen, *et. al.*, "The Origins and maintenance of female genital mutilation across Africa" 27:2 *Human Nature* 73-200 (2016).

<sup>37</sup> Jewel Llamas, *Supra* note 29.

<sup>38</sup> Meaning "We the circumcised" in Kenya.

<sup>39</sup> Jewel Llamas, *Supra* note 29.

<sup>40</sup> For instance, Masooma Ranalvi, who faced excommunication from her community for raising voice against FGM

<sup>41</sup> Jewel Llamas, *Supra* note 29.

<sup>42</sup> Aarefa Johari, Aysha Mahmood, "Female Genital Cutting is being practiced in Kerala too: Sahiyo investigation" *Sahiyo*, available at: <https://sahiyo.org/sahiyo-blog/kerala.html>.

where the officials told the Supreme Court about the non-existence of FGM in India.<sup>43</sup> Pursuant to this, in a study taken up by Masooma Ranalvi, around 75-80% of the women belonging to the Bohra community were found to have undergone the practice of FGM in India.<sup>44</sup>

Moreover, it is important to note here that the communities practicing it in India do not seem to believe that what they practice qualifies as FGC or FGM, because “it is just a nick on the clitoral hood, which is just useless skin anyway”.<sup>45</sup>

The ritualistic circumcision, where the clitoris is just “nicked”, though the “least severe” form is severe nonetheless.<sup>46</sup> It is rather appalling that a majority of *Dawoodi Bohra* women support the practice, citing it to be “completely different”.<sup>47</sup>

In 2016, it was reported that the *Syedna* Muffadal Saifuddin clarified that it is a religious obligation for all the *Bohras* to practice FGM. The statement issued by his office stated that:

Male and female circumcision (called *khatna* and *khafd* respectively) are religious rites that have been practiced by *Dawood Bohras* throughout their history...Religious books, written over a thousand years ago, specify the requirements for both males and females as acts of religious purity.<sup>48</sup>

#### **4.1. Recognition of FGM in India**

The practice of FGM was not known to a lot of people in India, except for the ones that actually belonged to the community practicing it. This changed when seventeen women decided it was time for the practice to stop. What followed was the exposure of a cruel obscure practice, happening in secrecy for a very long time. The decision to take this stand wasn't an easy one. The women ran the risk of being ostracized, harassed, being subjected to character assassination, and traitors to their faith who have the hell guards awaiting. The change came perhaps when many nations of the world started banning the practice, and the efforts of the UN to put a stop on the practice.

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<sup>43</sup> Rina Chandran, “No evidence of FGM, India government tells court, appalling activists” *Reuters* December 29<sup>th</sup>, 2017, available at: <https://www.reuters.com/article/us-india-women-religion/no-evidence-of-fgm-india-government-tells-court-appalling-activists-idUSKBN1EN0QB>.

<sup>44</sup> Masooma Ranalvi, “If Sudan can ban female genital mutilation, why can't India?” *Scroll.in* May 21<sup>st</sup>, 2020, available at: <https://scroll.in/article/962307/if-sudan-can-ban-female-genital-mutilation-why-cant-india>.

<sup>45</sup> Amanat Khullar, “With Data, an Attempt to Lift the Veil of Secrecy Around Female Genital Mutilation” *The Wire* 07<sup>th</sup> Feb, 2018, available at: <https://thewire.in/gender/data-attempt-lift-veil-secrecy-around-female-genital-mutilation>.

<sup>46</sup> Helen Signy, *Supra* note 5.

<sup>47</sup> Huzefa Ahmadi, “Female Genital Mutilation in India- A Legal Overview” *XLII The Indian Advocate: Journal of the Bar Association of India* 63 (2018).

<sup>48</sup> Mridula Chari “Bohra leader upholds female circumcision in countries where it is not banned” *Scroll.in* Jun 7<sup>th</sup>, 2016, available at: <https://scroll.in/article/809463/bohra-leader-upholds-female-genital-mutilation-in-countries-where-it-is-not-banned>.

Upon a study published by WeSpeakOut, it was revealed that 75% of the daughters in the sample of the respondents (aged seven or above) were subjected to FGM.<sup>49</sup> Further, as per other secondary sources, it was also reported that 70% mothers did not question the practice and followed the practice. Out of the rest, 20% debated the practice, and only 10% did actually observe its non-performance.<sup>50</sup>

As per Masooma Ranalvi, the woman who spearheaded the petition to end the practice in India, “nobody talked about it at all. It was never a part of conversation, ever. It was such a secret, such a top secret.”<sup>51</sup> She also elaborates on her experience of undergoing the vicious practice herself:

Sexuality is not anything you talk about with anyone. What happened to me as a child, what part of me was cut or why was it cut, was never something I talked about with my mother or my sisters. My elder sisters had both been through it in a similar way- exactly the same procedure, my grandmother took them as well. We never communicated with each other, then or as adults. It remained between you and the grandmother that took you for it.

In India, the community consisting of *Dawoodi Bohra* Muslims in *Ismaili Shia* sect practice Female Genital Mutilation. The practice is known as *khatna*,<sup>52</sup> dating back to 1400 years, and is therefore considered to be as old as the faith that stipulates it. The *Dawoodi Bohras* constitutes about a million followers globally, with the majority living in India, and Pakistan. They also have a small population spread globally, in different parts of the world.

The practice was brought to light in 2011 by a woman, who used a *nom de plume* to start a petition, aiming at the eradication of the practice. The petition was addressed to the religious head of the community.<sup>53</sup> The petition, though a commendable effort was not a very successful attempt at reaching its desired goal.

Later on, in 2015, three *Bohra* Muslims were convicted for practicing FGM in Australia, by a local Australian court.<sup>54</sup> It followed the parishes in Canada and UK releasing statements stipulating the supersession of law of the land over the religious laws.

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<sup>49</sup> “Female Genital Mutilation in India” *Amnesty International India*, September 11<sup>th</sup>, 2018, available at: <https://amnesty.org.in/female-genital-mutilation-in-india/>.

<sup>50</sup> R. Ghadially, “All for “Izzat” 38 *Newsl Womens Glob Netw Reprod Rights* 7-8 (1992), available at: <https://pubmed.ncbi.nlm.nih.gov/12285436/>.

<sup>51</sup> Chhavi Sachdev, “Petition Against Female Genital Mutilation Provokes an Angry Backlash” NPR, *Goats and Soda* August 02, 2016, available at: <https://www.npr.org/sections/goatsandsoda/2016/08/02/486927642/petition-against-female-genital-mutilation-evokes-an-angry-backlash> (last visited on July 06, 2020).

<sup>52</sup> Harinder Baweja, “India’s Dark Secret” *Hindustan Times*, February 29, 2016.

<sup>53</sup> Chhavi Sachdev, *Supra* note 51.

<sup>54</sup> *Ibid.*

In India, we do not have a specific law just for addressing the issue of FGM. We, however have signed the CEDAW<sup>55</sup>, and the Sustainable Development Goals<sup>56</sup>, which mention the elimination of gender inequalities.

The *Dawoodi Bohra* Muslim Community<sup>57</sup> seeks protection of the practice because they claim it to be “integral part of the religion” under the Constitution.<sup>58</sup>

As per the vice-President of the Central Board of the *Dawoodi Bohra* Community, Irfan A. Engineer, “*Khafd* isn’t mentioned in any religious text, particularly in the Qur’an. But some devotees blindly follow the *Syedna* while others are too scared to disobey because they fear they will be ostracized.”<sup>59</sup>

#### 4.2. Inception

In India, the inception of speaking against the practice started around 2015, with the initiatives of Masooma Ranalvi, who initiated a conversation with other women who had been through the same experience. Describing the experience of sharing as “cathartic”, she mentions, “through this group, we have learned so much about ourselves, our bodies, our religion, the practice, the international movement against FGM-it became a space to talk, learn, discuss, debate.” It was this conversation that served as a foundation of the much-discussed petition.

In the beginning of 2016, NGOs, “We Speak Out” and “*Sahiyo*” took it upon themselves to publicize the matter of FGM, by addressing it to the government of India. This gathered a lot of criticism, especially because the head of religious order in Mumbai, Syedna Muffadal Saifuddin<sup>60</sup> had already declined the request of Masooma to take steps to stop the practice. On the contrary, he delivered a sermon where he mandated the observance of the act, mentioning, “the act must be done”. He gave the practice a religious sanction.<sup>61</sup>

So, the backlash was not unforeseeable, because this petition was violating the so-called laid

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<sup>55</sup> Chhavi Sachdev, *Supra* note 422.

<sup>56</sup> Goal 5: Gender Equality. (“at least 200 million girls have been subjected to female genital mutilation, based on data from 30 countries where the practice is concentrated and where nationally representative prevalence data is available.”), available at: <https://sustainabledevelopment.un.org/sdg5>.

<sup>57</sup> Dawoodi Bohra Women’s Association for Religious Freedom (DBWRF).

<sup>58</sup> Yesha Kotak, “Mumbai’s Dawoodi Bohra women to SC: Khatna is essential to our faith” *Hindustan Times* July 10<sup>th</sup>, 2018.

<sup>59</sup> Angel L. Martínez Cantera, “‘I was crying with unbearable pain’: study reveals extent of FGM in India” *The Guardian* March 6<sup>th</sup>, 2018.

<sup>60</sup> Mridula Chari, “Bohra leader upholds female circumcision in countries where it is not banned” *Scroll.in* June 07, 2016, available at: <https://scroll.in/article/809463/bohra-leader-upholds-female-genital-mutilation-in-countries-where-it-is-not-banned>.

<sup>61</sup> Rina Chandran, “Muslim leader in India under fire from activists for supporting FGM” *Reuters* April 29, 2016, available at: <https://in.reuters.com/article/india-fgm-bohra-speech/muslim-leader-in-india-under-fire-from-activists-for-supporting-fgm-idINKCN0XQ1FE> (last visited on July 07, 2020).

down rules of religious conduct. Apart from the religious backlash, there are also social repercussions in speaking against the practice, like Masooma says:

The reason people don't speak out, the reason the first petition was anonymous, is a real and valid fear of ostracism. We're a small close-knit community. It's tough to be cut off. People go to the mosques and social gatherings, marriages, birthdays-you will not be part of it. Burial is sometimes not allowed in the community burial ground.

The women who don't observe the practice are presumed to be promiscuous and infidel. Another privy to the practice is the film maker and founder of *Sahiyo*<sup>62</sup>, the organization that speaks out against FGM. Insia Dariwala, founder of *Sahiyo* who narrowly escaped being cut, because her mother saw how it affected her elder daughter. "when a *Bohra* girl is not cut, she is not considered clean, she is not considered a good girl," she says.<sup>63</sup>

#### 4.3. Reports on the subject

The ongoing Sunita Tiwari petition<sup>64</sup> mentions a report by the Lawyers Collective and WeSpeakOut, which mentions in great details the reasons for the practice of FGM, problems faced by the girls and women subjected to the practice of FGM. The report also mentions some studies that were conducted on a group of women which demonstrated the symptoms of trauma and other psychological problems. The group on which the study was conducted took factors like age and other sociological factors into consideration.<sup>65</sup> The purpose of the study was to show the clear relation between FGM and psychological problems. It also goes on to show that the practice is a form of child abuse, as it is done secretly on children.<sup>66</sup>

Another report that is talked about in the petition is the one issued by the Norwegian Knowledge Centre for Health Services in 2014.<sup>67</sup> This report specifically focused on refuting the argument that most practitioners of the FGM practice started resorting from Type-I-II of FGM to simply 'nicking'. It was consequently held that complications in both the cases remain more or less the same, and there is no proof that could conclude that this shift is less harmful or less painful to the subjects in any manner. Moreover, to quote the report:

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<sup>62</sup> Sahiyo, "Our Campaign will continue: Sahiyo's statement in response to Syedna's official stand on *khatna*" June 07, 2016, available at: <https://sahiyo.com/tag/syedna/>.

<sup>63</sup> Chhavi Sachdev, *Supra* note 422.

<sup>64</sup> *Sunita Tiwari v. Union of India*, WP (Civil) 286 of 2017 (FB).

<sup>65</sup> *Id.*, para. 12.

<sup>66</sup> *Ibid.*

<sup>67</sup> Rigmor C. Berg, Vigdis Underland, "Immediate Health Consequences of Female Genital Mutilation/Cutting" *Norwegian Knowledge Centre for the Health Services* (2014).

As UNICEF emphasizes, such harm-reduction FGM/C neither addresses the gender-based inequality underpinning the practice nor makes it more acceptable from a human rights perspective.<sup>68</sup> The petition also mentions the study of WHO<sup>69</sup>. It has already been discussed by the author that WHO has classified the FGM into different types, and that none of the type can be said to be any less harmful than the other in any way whatsoever.<sup>70</sup>

In addition to these reports, a systematic analysis was also done by a well-known gynecologist, Dr. Shujaat Vali, to determine the actual types of FGM carried out by the *Bohras*, and consequently found that since there is hardly any space left between the clitoris and the skin, it can be concluded that only a specialist can be able to cut only the hood (as claimed by most practitioners of FGM, also keeping in mind the fact that it is often carried out by midwives).<sup>71</sup>

#### **4.4. The petition to ban FGM**

The petition seeking ban on Female Genital Mutilation was filed in 2017.<sup>72</sup> The purpose of this was to evaluate whether female circumcision, as practiced by the *Dawoodi Bohras* should be banned or not. The petition was clubbed with the Sabarimala review petition.<sup>73</sup>

The petition was filed by the human rights advocate Sunita Tiwari, who filed a PIL seeking a ban on the practice of FGM.

The petitions that were clubbed with the Sabarimala review petition<sup>74</sup> were all connected to the issue of women in religious matters.<sup>75</sup> The issues involved included questions of Muslim Women in Durgah/Mosque<sup>76</sup>, Parsi women married to a non-Parsi in the Agyari<sup>77</sup> and finally the practice of FGM by the women in *Dawoodi Bohra* community.<sup>78</sup>

The petition went before the court a total of twenty-five times, with the last hearing on 16<sup>th</sup> of March, 2020. Initially, in May 2017, the matter was listed before the three-judge bench, which

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<sup>68</sup> *Ibid.*

<sup>69</sup> Emily Banks “Female Genital Mutilation and Obstetric Outcome: WHO Collaborative Prospective Study in Six African Countries” 367 *The Lancet* 1835-1841 (2006).

<sup>70</sup> *Sunita Tiwari v. Union of India*, WP (Civil) 286 of 2017, citing WHO Report, “Female Genital Mutilation and Obstetric Outcome: WHO Collaborative Prospective Study in Six African Countries”.

<sup>71</sup> *Sunita Tiwari v. Union of India*, WP (Civil) 286 of 2017 (FB).

<sup>72</sup> *Ibid.*

<sup>73</sup> Explained Desk, “Explained: The three cases SC wants clubbed with Sabarimala review” *Indian Express* November 16<sup>th</sup>, 2019.

<sup>74</sup> *Indian Young Lawyer’s Association v. The State of Kerala*, (2019) 11 SCC 1 (CB).

<sup>75</sup> Explained Desk, “Explained: The three cases SC wants clubbed with Sabarimala review” *Indian Express* November 16<sup>th</sup>, 2019.

<sup>76</sup> WP (Civil) No, 472 of 2019.

<sup>77</sup> SLP (Civil) No. 18889 of 2012.

<sup>78</sup> WP (Civil) No 286 of 2017.

was later referred to a nine-judge bench.

#### 4.5. Arguments- for and against

##### 4.5.1. For the ban

The petitioners argued that the practice should be banned because it is discriminatory against the rights of women, including the rights to equality, privacy, and personal liberty.<sup>79</sup>

The petitioners also drew attention towards the WHO report on the FGM.<sup>80</sup> As per the report, as already been established, FGM is classified as a practice that violates the human rights of girls and women.<sup>81</sup> In addition to this, the practice is also violative of guarantees in the UDHR. The practice is also violative of POCSO, as will be discussed in the proceeding parts of the chapter.<sup>82</sup> The problem is persisting among the children because the practice is carried out on girls below the age of fifteen.<sup>83</sup>

In addition to these concerns, the practice also raises serious health concerns, causing life threatening problems, and other serious ailments.<sup>84</sup>

In 2012, the United Nations General Assembly recognized FGM as a human-rights violation and voted unanimously to end the practice worldwide by imposing stricter laws and educating stakeholders.<sup>85</sup> Therefore, the relief sought from the court includes a ban on the practice completely, and this is to be done by making it a cognizable, non-compoundable, non-bailable criminal offence.<sup>86</sup> The practice should also be declared as illegal and unconstitutional.<sup>87</sup>

The petition mentions that the practice is done, not because it is stipulated in religion, but is a way of controlling female sexuality, which is a taboo, and is also seen as something that needs to be protected.<sup>88</sup> It is required to be 'protected' in this manner in order to make sure that the women remain faithful to only their husbands.<sup>89</sup>

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<sup>79</sup> The Constitution of India, art. 14, 21.

<sup>80</sup> *Supra* note 1.

<sup>81</sup> *Ibid.*

<sup>82</sup> Protection of Children from Sexual Offences Act, 2012, s. 3 (b).

<sup>83</sup> *Sunita Tiwari v. Union of India*, WP (Civil), 286 of 2017 (FB), para. 3

<sup>84</sup> Adriana Kaplan, Suiberto Hechavarria, *et. al.*, "Health consequences of female genital mutilation/cutting in Gambia, evidence into action" 8 *Reproductive Health* (2011).

<sup>85</sup> UN General Assembly, International Day of Zero Tolerance for Female Genital Mutilation, 6 February, "Ending Female Genital Mutilation by 2030", available at: <https://www.un.org/en/observances/female-genital-mutilation-day>.

<sup>86</sup> Outlook Web Bureau, "Why Should Only A Lady Have Obligation to Please Her Husband: SC On Female Genital Mutilation" *Outlook* July 30<sup>th</sup>, 2018.

<sup>87</sup> Scroll Staff, "Female Genital Cutting: SC refers plea seeking ban of practice to five-judge Constitution Bench" *Scroll.in* September 24<sup>th</sup>, 2018, available at: <https://scroll.in/latest/895592/female-genital-cutting-sc-refers-plea-seeking-ban-of-practice-to-five-judge-constitution-bench>.

<sup>88</sup> *Sunita Tiwari v. Union of India* W.P (Civil) No. 286 of 2017 (FB), para. 12.

<sup>89</sup> *Ibid.*

#### 4.5.2. Against the ban

The contentions of the respondents were primarily based upon the different sets of rights enshrined under articles 25 and 26 of the Indian Constitution.<sup>90</sup> One of the primary contentions is against the practice violating the right to equality of women, because the community subjects both males and females to circumcision.

On September 24<sup>th</sup> 2018, the case was referred to the Constitutional bench by the division bench, which held that the question before the bench was to determine whether the practice falls under ‘essential religious practice’ of the community, as it is practiced for the past 1400 years.

It has been made clear to us by the Courts and the legislative framework that we respect the international conventions of which India is a signatory. In case of international conventions, there are many provisions which talk about the quality of treatment that women and humans in general deserve. The debates surrounding these instruments is usually focused on whether the provisions of these can be incorporated in a country’s municipal law. The efforts are made to make the municipal provisions in consonance with the international human rights instruments as far as possible, because these provisions are so basic and fundamental in nature that they become a basis for the foundation of a well-run nation.

The international conventions, as also mentioned earlier, give specific provisions for the treatment of women which is can be called just, equal and humane. In case of *Vishakha v. State of Rajasthan*,<sup>91</sup> where the important *Vishakha* guidelines were laid down by the Apex court, the court discussed that considering “International conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in articles 14, 15, 19 (1) (g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein.”<sup>92</sup>

Let us now look at the issues by breaking them down one by one:

#### **I. Is the practice of FGM violative of the right to life and bodily autonomy of women, thereby violating the Constitutional provision guaranteeing it?<sup>93</sup>**

Right of bodily autonomy of women means that they are able to make their own decisions with respect to their bodies. When it comes to making decision about one’s body, especially in case of women, there is an interplay of various factors, societal, cultural and others that come to the

<sup>90</sup> The Constitution of India, art. 25, 26.

<sup>91</sup> (1997) 6 SCC 241 (DB).

<sup>92</sup> *Vishakha v. State of Rajasthan*, (1997) 6 SCC 241 (FB).

<sup>93</sup> The Constitution of India, art. 21.

fore. It is true that to ensure a societal harmony it is important for every member to subscribe to certain norms, and this has been no different in case of women. However, what is also true is that women have always had society, making decisions for them, and such thresholds were duly sanctified by laws, religion and other customs.<sup>94</sup>

It has also been seen that many a times under the veil of customs, many practice that have been going on for so long have been nothing but discriminatory, and really violative of women's bodies, their dignity and some of the most basic of their rights in general.<sup>95</sup>

The researcher is of the opinion that FGM too, is an example of such practices, which is just being carried on blindly in the name of culture and religion. The reason to believe so is also because there seems to be no logical and scientific basis behind this practice, or a proof which could validate this practice as beneficial in any manner. In such cases, we can apply the decisions of the courts to see how in a lot of judgements, courts have discouraged the practices which are harmful to the body.

We know that the Constitution provides for the equality of all individuals, so women have an equal place in the society.<sup>96</sup> India has been witnessing a new dawn, and we have had some ground breaking judgments, that have shattered the 'regressive' customs. The courts have taken up "socio-legal engineering"<sup>97</sup> in the recent times and have upheld human rights of women.

The landmark case of nine-judge bench in the case of *Puttaswamy* held that the bodily autonomy of women is a fundamental right.<sup>98</sup> The judgement, which also pronounced privacy as a fundamental right, mentioned the fact that privacy is rooted in the right to life and liberty<sup>99</sup>, as well as right to equality<sup>100</sup>, and other personal freedoms.<sup>101</sup> In this landmark decision, it is pertinent to note that the Court goes about right to privacy by stressing upon the right to live with dignity as well.

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<sup>94</sup> Bharat H. Desai, Kumari Nitu, *et. al.*, "Quest for Women's Right to Bodily Integrity: Reflections on Recent Judicial inroads in India" 53 *Economic and Political Weekly* (December 29<sup>th</sup>, 2018).

<sup>95</sup> Ping Wang *Aching for Beauty: Footbinding in China* NED-New Edn. University of Minnesota Press, 2000. Jstor, <http://www.jstor.org/stable/10.5749/j.ctttv93r>.

<sup>96</sup> The Constitution of India, art. 14.

<sup>97</sup> In the words of Dean Roscoe Pound, "Law is social engineering which means a balance between the competing interests in the society", in which applied sciences are used for resolving problems of society; *see also*, Sai Abhipsa Gochhayat, "'Social Engineering by Roscoe Pound': Issues in Legal and Political Philosophy" November 15<sup>th</sup>, 2010, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1742165](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1742165).

<sup>98</sup> *Justice K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1 (CB).

<sup>99</sup> *Murli S. Deora v. Union of India* (2001) 8 SCC 765 (DB); ("no one shall be deprived of his life without due process of law").

<sup>100</sup> The Constitution of India, art. 14.

<sup>101</sup> Jayna Kothari, "The Indian Supreme Court Declares the Constitutional Right to Privacy" Oxford Human Rights Club Blog, Oct 4<sup>th</sup>, 2017, available at: <https://ohrh.law.ox.ac.uk/the-indian-supreme-court-declares-the-constitutional-right-to-privacy/#:~:text=The%20Court%20referred%20to%20several,the%20right%20against%20forced%20sterilization>.

The Court has also specifically pointed out to the instances which talked about the women's decisions and rights over their bodies and sexuality,<sup>102</sup> and how it happens to be an indispensable part of the right to privacy. These include a plethora of rights ranging from the right of women to take up jobs that require them to work during night,<sup>103</sup> the protection of their reproductive rights,<sup>104</sup> rights of women who are unmarried and are mothers, the rights against coerced sterilization and so on.

The women are also held to have a right to make choices when it comes to procreation, and in choosing the kind of family and personal life they desire, and their right to marriage. With regard to all these matters, the court cleared that these matters are compounded as being of utmost personal nature, and these are the personal choices of women, which happen to be essential in the pursuit of happiness, which seeks foundation from autonomy and a life of dignity.<sup>105</sup>

The same would also apply to the practice of Female Genital Mutilation, because it is the author's belief that it is a choice of a very personal nature, that can and should only be understood from the perspective of a person who is faced with making that choice.

The WHO has classified the FGM into various types, and as per the admission of the Bohra community leaders themselves, the practice falls under the FGM Type-I.<sup>106</sup>

That being said, it cannot be denied that the practice remains a violation to the womanhood of a girl and would more often than not be met with opposition.

We see that the women from the comparatively minor sectors are also coming forward and raising a voice for their rights. There have been quite recently, a string of welcome judgments by the Supreme Court, for example the case of *Shayara Bano v. Union of India*<sup>107</sup> where the practice of *Talaq-e-bidat* was declared illegal by a majority of 3:2.<sup>108</sup>

This judgment, though gathering mixed responses from all walks of Muslim community, was majorly celebrated as a "victory against misogyny, patriarchy".<sup>109</sup>

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<sup>102</sup> *Navtej Singh Jauhar v. Union of India* AIR 2018 SC 4321 (CB).

<sup>103</sup> *Smt. R. Vasantha v. Union of India*, (2001) 2 LLJ 843 (Mad.).

<sup>104</sup> *Suchita Srivastava v. Chandigarh Administration*, 2009 11 SCC 409 (DB).

<sup>105</sup> Department of Economic and Social Affairs, *Achieving Gender Equality, Women's Empowerment and Strengthening Development Cooperation* (United Nations, New York, 2010).

<sup>106</sup> *Sunita Tiwari v. Union of India* W.P (Civil) No. 286 of 2017.

<sup>107</sup> (2017) 9 SCC 1 (CB).

<sup>108</sup> Triple Talaq, available at: <https://www.scobserver.in/court-case/triple-talaq-case>.

<sup>109</sup> Shrutika Ganapatye, "Mixed Reactions for Triple Talaq Act" July 31<sup>st</sup>, 2019 available at: <https://mumbaimirror.indiatimes.com/mumbai/other/mixed-reactions-for-triple-talaq-act/articleshow/70458097.cms#:~:text=Victory%20against%20misogyny%2C%20patriarchy%20say%20activists.&text=As%20per%20the%20new%20Muslim,three%20years%20for%20the%20husband>.

Whether or not is the punishment for triple *talaq* over-criminalized<sup>110</sup>, is not being discussed here. Rather, what we can take home from this is the fact that the women are understanding that the approach to endure and be silent will no longer work, and once they see how empowering it is, to raise their voices for an important issue, there is no looking back.

It is not an attempt to over-sing the praises, but to laud the grit to fight for what should have been rightfully theirs.

Besides, the petition also relies upon the UDHR, as per which the practice is a violation of art. 21.<sup>111</sup>

## **II. Does the practice of female circumcision violate the right to privacy of the girls on whom the procedure is performed without their consent?**

The concept of privacy is important in India. In fact, it is important to the extent of being a part of the fundamental rights which are guaranteed by the Constitution, to all people.<sup>112</sup> It is clear to us that right to privacy is of very wide amplitude, which includes within its ambit rights like the right to be left alone, to the right of people to take decisions about their sexuality and reproductive choices.

In the landmark case of Justice *K.S Puttawamy v. Union of India*, the nine-judge bench of Supreme Court declared that:

The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.<sup>113</sup>

As per Justice Chandrachud's plurality opinion:

...Privacy postulates the reservation of a private space for the individual, described as the right to be left alone. Privacy lies across the spectrum of protected freedoms. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation.<sup>114</sup>

Justice Chelameshwar also demonstrated what privacy means:

Gary Bostwick suggested three aspects of privacy- 'repose', 'sanctuary' and

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<sup>110</sup> The Wire Stuff, "'Complete Charade': Activists, Civil Society Groups Condemn Triple Talaq Bill" *The Wire* July 31<sup>st</sup>, 2019, available at: <https://thewire.in/communalism/triple-talaq-bill-muslim-women>.

<sup>111</sup> Universal Declaration of Human Rights, 1948; The Constitution of India, art. 21.

<sup>112</sup> The Constitution of India, art. 21.

<sup>113</sup> *Supra* note 470.

<sup>114</sup> Rohan Venkatramakrishnan, "What does privacy actually mean? Excerpts from the Supreme Court judgement" *Scroll.in* August 24<sup>th</sup>, 2017.

‘intimate decision’. Each of these facets is so essential for the liberty of human beings that I see no reason to doubt that the right to privacy is a part of the liberty guaranteed by our Constitution.<sup>115</sup>

On similar lines, Justice Rohinton Fali Nariman succinctly elucidated the privacy in Indian context:

In the Indian context, a fundamental right to privacy would cover at least the following three aspects:

- Privacy that involves the person i.e. when there is some invasion by the State of a person’s rights relating to his physical body, such as the right to move freely;
- Informational privacy which does not deal with a person’s body but deals with a person’s mind, and therefore recognizes that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right; and
- The privacy of choice, which protects an individual’s autonomy over fundamental personal choices.<sup>116</sup>

From the above judgment, we can take home that privacy is an inalienable, essential part of right to life and personal liberty guaranteed under the Constitution.<sup>117</sup>

The debate surrounding privacy is not new. It has been in question, right from the *MP Sharma*<sup>118</sup> in 1954 to the *Kharak Singh* in 1962<sup>119</sup>, wherein the court had refused to accept that right to privacy can come under article 21 of the Constitution.<sup>120</sup> We have indeed come a long way since fundamental right to privacy were considered to be self-contained.

Justice Chandrachud had also asked in the present case, “why should the bodily integrity of women be subject to some external authority? One’s genitals is an extremely private affair.”<sup>121</sup> We can also have a look at the tests that were given by the court in the *Puttaswamy* case<sup>122</sup>, and see if they are applicable in the present context of FGM. Initially, after the *MP Sharma*<sup>123</sup> and *Kharak Singh*<sup>124</sup> cases, the test applied was based on the parameters of being “just, fair and reasonable”.

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<sup>115</sup> *Supra* note 470.

<sup>116</sup> *Justice K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1 (CB).

<sup>117</sup> The Constitution of India, art. 21.

<sup>118</sup> *M.P Sharma v. Satish Chandra* 1954 SCR 1077 (CB).

<sup>119</sup> *Kharak Singh v. State of U.P.* 1964 SCR (1) 332 (CB).

<sup>120</sup> Pranav Tomar, Law Audience’s Blog, available at: <https://www.lawaudience.com/k-s-puttaswamy-ret-d-v-union-of-india-aadhaar-judgement/>.

<sup>121</sup> *Sunita Tiwari v. Union of India*, WP (Civil) No.

<sup>122</sup> *Supra* note 470.

<sup>123</sup> *Supra* note 490.

<sup>124</sup> *Supra* note 491.

In the *Puttaswamy* case<sup>125</sup>, the opinion of Chelameshwar J. gives an insight into how the “reasonability” parameter and how it can be differently applicable for different fundamental rights.<sup>126</sup>

In the petition of Sunita Tiwari, there is a mention of a seven-year-old who almost bled to death due to FGM. The problem with this practice in India is that it is shrouded in secrecy and many women of the Bohra community itself refrained from talking about it for the longest time. Though certain diktats have been passed by the *Dawoodi Bohra* community against the practice, they have mostly been in Western countries, and have laws made specifically forbidding FGM. This is also because their methods of circumcision also fall under the FGM. The point that is all the more important for us is the fact that these resolutions were made public in India as well, and India, as we know, happens to be at the center of the *Dawoodi Bohra* population.<sup>127</sup>

The provisions of POCSO<sup>128</sup> talk about sexual assault<sup>129</sup> and aggravated sexual assault<sup>130</sup>. It also classifies the touching of the genitalia of a girl below 18 years of age for purposes that are non-medical, a punishable offence.<sup>131</sup> The Act classifies the injury to genitalia of a child as an “aggravated sexual assault”.<sup>132</sup> Additionally, any assault on the child below the age of 12 years is also termed as “aggravated sexual assault”. This “aggravated sexual assault” is so termed because it includes people who ideally have an added responsibility to protect the child.<sup>133</sup>

There is also the provision for “penetrative sexual assault”<sup>134</sup> where it qualifies as an act of assault if a person inserts (or makes any other person insert) any object into the vagina, the urethra or anus of the child.<sup>135</sup>

This also covers the relatives and family members of the child. Thus, if we consider the act of FGM to see if the provision of POCSO apply to it or not, we can see that the Act provides for punishment in case of an assault on children with a weapon, and if it is committed by the guardians. Both the situations can apply in case of FGM, where the ‘tools’ used include majorly comprise of unhygienic blades and sometimes as brutal as glass. The act is aided, if not

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<sup>125</sup> *Supra* note 470.

<sup>126</sup> Vrinda Bhandari, Amba Kak, *et. al.*, “An Analysis of Puttaswamy: The Supreme Court’s Privacy Verdict” *IndraStra* November 18<sup>th</sup>, 2017.

<sup>127</sup> Resolution passed by the *Anjuman-e-Burhani*, Sydney, February 9<sup>th</sup>, 2016; see also: *Sunita Tiwari v. Union of India*, W.P (Civil) No. 286 of 2017, para. 16.

<sup>128</sup> The Protection of Children from Sexual Offences Act, 2012.

<sup>129</sup> *Id.*, ss. 3, 7.

<sup>130</sup> *Id.*, s. 9.

<sup>131</sup> *Id.*, s. 41.

<sup>132</sup> *Id.*, s. 5.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Id.*, s. 3.

<sup>135</sup> *Ibid.*

committed by the close relatives and family of the children.

The erstwhile minister of women and child welfare, Maneka Gandhi has said, “Necessary safeguards are available under the POCSO, IPC and Cr.PC which can be invoked for prosecution of people indulging in the practice of FGM.”<sup>136</sup>

However, the problem is that the provisions talk about “sexual intent” and the practice of FGM is a more cultural one, so maybe the POCSO provisions read with provisions of IPC<sup>137</sup> can be construed in a manner so as to apply them to FGM, it is still pertinent to bring about a new provision specifically mentioning the FGM.

The government has also notified the POCSO Rules, 2020 which make the punishments more stringent.<sup>138</sup>

The IPC also provides for the offence of grievous hurt<sup>139</sup> and make the acts punishable for up to seven years<sup>140</sup>. As has already been seen, the amount of bloodshed that happens in FGM makes it a violent practice. It can also be covered under the provision that talks about voluntarily causing grievous hurt<sup>141</sup> because the adults willingly take the girls to get cut.

Moreover, it has also been said by the former director of CBI, R.K. Raghavan, that despite FGM/C not being mentioned explicitly under IPC, on a complaint about the same, the police are obligated to register a case under s. 326 of IPC.<sup>142</sup>

In the same way, IPC also lays down provisions covering abetment, and its punishment<sup>143</sup> and under s. 114 it provides that if the abettor is present when the crime is committed, he shall be deemed to have committed such an act and will be punishable for the same,<sup>144</sup> the ‘abettor’ here can be an adult who accompanies the child and is present when FGM is being committed. Raghavan also noted that “a major movement against FGM is required in India and pressure should be built on the Government to bring a special legislation. Of course, there are certain religious implications.”<sup>145</sup>

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<sup>136</sup> PTI, “IPC, POCSO enough to deal with female genital mutilation: Govt” Outlook August 04<sup>th</sup>, 2017, available at: <https://www.outlookindia.com/newscroll/ipc-pocso-enough-to-deal-with-female-genital-mutilation-govt/1116486>.

<sup>137</sup> Indian Penal Code, 1860, s. 375 (explanation 1, mentions that the term vagina includes *labia majora*).

<sup>138</sup> PTI, “Center notifies new POCSO rules making law for sexual offences against children more stringent” *The Hindu* March 13, 2020; also see, Ministry of Women Child Development, Notification, “Protection of Children from Sexual Offences Act, 2012” March 9<sup>th</sup>, 2020.

<sup>139</sup> Indian Penal Code, 1860, s. 320.

<sup>140</sup> *Id.*, s. 325.

<sup>141</sup> *Id.*, s. 322.

<sup>142</sup> *Id.*, s. 326.

<sup>143</sup> *Id.*, ss. 107, 109.

<sup>144</sup> *Id.*, s. 114.

<sup>145</sup> Rasheeda Bhagat, “India: Ban this barbarous practice!” *Hindu Businessline* July 29<sup>th</sup>, 2014, available at: <http://www.stopfgmmideast.org/india-ban-this-barbarous-practice/>.

In addition to this, the National Child Policy, 2013<sup>146</sup> also aims at the protection of children, and identifies that every child is special and is a national asset. It specifically prohibits customs and religious practices in restricting the enjoyment of rights of children.

The researcher is of the opinion that while the above-mentioned provisions may apply to the cases of FGM, still, due to the sheer brutality of the practice, and the fact that it is enabled by the family members of the child, the very people upon whom it is to protect the child, calls for a specific provision to stop the act. The parents and relatives, on whom the child places their trust aid in the commission of the brutal practice, that too, under false pretexts as deceitful as “buying a chocolate” should be held accountable.<sup>147</sup>

Upon considering all the events leading up to the violent practice, it becomes a duty of the State to prevent the practice, where the above provisions can apply, reading them together, in cases of FGM, till a new law is made.

Thus, on the perusal of the court decisions on the right to privacy<sup>148</sup>, and certain others which talk about how privacy and bodily integrity are closely related we find that these are matters very personal to each individual. The International instruments also recognize the right to life as a fundamental right, and it includes within its ambit the right to have a life of dignity.<sup>149</sup>

Similarly, when it comes to children, their safeguard provisions are enshrined under the Constitution<sup>150</sup> as well as certain specific legislations.

Thus, the practice of FGM is a clear violation of the right to privacy of the girls, even more so when it is performed on them without their consent.

### **III. Another issue that arose in the petition<sup>151</sup> was with respect to right of equality guaranteed under the articles 14 and 15 of the Constitution, and whether the same was against the spirit of the said articles?**

We know that article 14 of the Constitution provides for equality, which is divided as equality before law and equal protection before law, and this right prohibits discrimination on the basis of religion, race, caste, sex or place of birth.<sup>152</sup>

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<sup>146</sup> Government of India, Ministry of Women and Child Development, “National Policy for Children, 2013” Res. No. 16-1/2012-CW-I (April 26<sup>th</sup>, 2013).

<sup>147</sup> Somya Abrol, “Yes, Female Genital Mutilation happens in India; here’s everything you need to know” *India Today* February 6<sup>th</sup>, 2018, available at: <https://www.indiatoday.in/lifestyle/people/story/female-genital-mutilation-india-clitoris-pleasure-muslim-bohra-community-1162510-2018-02-06>.

<sup>148</sup> *Justice K.S. Puttawamy v. Union of India* (2017) 10 SCC 1 (CB).

<sup>149</sup> UDHR, 1948, art. 3, ICESCR, 1976, art. 12, ICCPR, 1966, art. 7.

<sup>150</sup> The Constitution of India, art. 14,15,21,39 (e).

<sup>151</sup> *Sunita Tiwari v. Union of India*, W.P (Civil) No. 286 of 2017.

<sup>152</sup> The Constitution of India, art. 14.

In the old case of *Miss CB Muthamma IFS v. Union of India*<sup>153</sup>, it was pointed out that “the case bespeaks a story which makes one wonder whether Articles 14 and 16 belong to myth or reality”.

The situation has changed a lot since then, and yet hasn't changed a lot. In case of *Babita Puniya v. Secretary*<sup>154</sup> also, the court had observed, “nature gave women too much power, the law gives them too little.”

In the landmark *Maneka Gandhi* case<sup>155</sup>, it was said:

...what is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning for, to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits....<sup>156</sup>

While considering the present case<sup>157</sup>, CJI Deepak Misra, while heading the bench asked, “why should a lady make such an effort that she is available to her husband as cattle. Why should only a lady have obligation to please her husband.” While saying this, he also said that the practice of FGM is not in favour of gender sensitivity and is hazardous to health.<sup>158</sup>

Similarly, Chandrachud J. also said, “genital is central to identity. So, this is against one's identity.”<sup>159</sup>

We know that the practice of FGM is violative of the rights granted under art. 14,<sup>160</sup> due to obvious reasons. We know that the practice is done on women to ‘curb their sexual desire’ and to prevent them from going ‘astray’. Now, the proponents of the practice among the *Bohras* claim that this practice is not violative of the right to equality of women, because even the men undergo circumcision in their community.<sup>161</sup>

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<sup>153</sup> (1979) 4 SCC 260.

<sup>154</sup> 168 (DLT) 115 (DB).

<sup>155</sup> *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Sunita Tiwari v. Union of India*, W.P (Civil) No. 286 of 2017.

<sup>158</sup> ANI, “SC questions practice of female genital mutilation, says why lady be obliged to please her husband” *Outlook* July 30<sup>th</sup>, 2018, available at: <https://www.outlookindia.com/newsscroll/accountability-court-to-hear-sharifs-graft-cases-on-aug-1/1360144?scroll>.

<sup>159</sup> *Ibid.*

<sup>160</sup> The Constitution of India, art. 14.

<sup>161</sup> Sahiyo, “Respected Syedna, we are all disappointed by your views on female circumcision” *Bohra Resolution Letters Against Khatna/FGC* April 29<sup>th</sup>, 2016, available at: <https://sahiyo.com/2016/04/29/respected-syedna-we-are-all-disappointed-by-your-views-on-female-circumcision/>.

It is the submission of the researcher, that though the topic of male circumcision is outside the scope of this study, we can be sure of one thing: there may be ‘potential benefits’ of the practice of male circumcision,<sup>162</sup> but the practice of FGM has proven only to be harmful. We have already discussed at length the plethora of harmful effects of FGM on health, both physical, emotional and mental of the women who undergo it. Besides, there is no scientific proof the practice being beneficial, on the contrary, it causes immense pain and trauma. Thus, the practice is clearly against the letter and spirit of articles 14 and 15.<sup>163</sup> Everyone is simply entitled to these rights.

#### **IV. Is the practice protected as a religious practice under Articles 25 and 26 of the Constitution?**

When it comes to article 25, the very first lines of this article ensure that the fundamental right granted under this article is subject to public order, morality and health. The protection under articles 25 and 26 are given to practices which form an essential and integral part of the religion.<sup>164</sup> Thus, it becomes imperative for us to examine what ‘essential religious practice’ (hereinafter, ERP) means and whether FGM falls under the same. It has to be also kept in mind that a practice may be religious, but it may not be an ‘essential’ part of practice in that religion.<sup>165</sup>

Further, a religious practice whether or not is to be qualified as “essential” is also debated by the court in many cases.

##### ***IV.I. Supreme Court’s doctrine of essentiality***

The “essentiality” doctrine was first coined by a seven-judge bench of the Supreme Court in the ‘Shirur Mutt’ case in 1954<sup>166</sup>. The bench here had held that the term “religion” encompasses all rituals and practices “integral” to a religion, and then took upon itself the responsibility of determining the essential and non-essential practices of a religion.

Over the years, the court has developed the test of essential religious practices in different

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<sup>162</sup> World Health Organisation, “Male circumcision: global trends and determinants of prevalence, safety and acceptability”, Department of Reproductive Health and research, WHO. *See also*, Rinchen Norbu Wangchuk, “Female Genital mutilation Violates Fundamental Rights, Says Supreme Court” *The Better India* July 31<sup>st</sup>, 2018, available at: <https://www.thebetterindia.com/153833/female-genital-mutilation-fundamental-rights-supreme-court/>.

<sup>163</sup> The Constitution of India, art. 14, 15.

<sup>164</sup> *Dr. M. Ismail Faruqui v. Union of India* AIR 1995 SC 605 A (DB).

<sup>165</sup> *Ibid.*

<sup>166</sup> *The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindar Tirth Swamiyar of Shri Shirur Mutt*, 1954 SCR 1005 (CB).

cases, and where it felt it was necessary with respect to the protection of fundamental rights of the followers of a particular religion.

In 1962, the ERP was applied in *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay*<sup>167</sup> to see if the Bombay Prevention of Ex-communication Act<sup>168</sup> violated the fundamental rights<sup>169</sup> of the *Dawoodi Bohras*. In this case, it was again held that “what constitutes an essential practice is to be gathered from the texts and tenets of the religion.”<sup>170</sup>

In 2018, the Supreme Court bench comprising of Deepak Misra CJI, Ashok Bhushan and S. Abdul Nazeer JJ. ruled that the *Babri masjid* matter<sup>171</sup> need not be referred to a larger bench. The Supreme Court in the 1994 case<sup>172</sup> had held that: “A mosque is not an essential part of the practice of the religion of Islam and *Namaz* (prayer) by Muslims can be offered anywhere, even in open.” Therefore, “its acquisition by the state is not prohibited by the provisions in the Constitution of India.”<sup>173</sup>

The court in this case also quoted Jonathan Swift- “We have just enough religion to make us hate, but not enough to make us love one another.” Swami Vivekananda was also quoted as, “Religion is not in doctrines, in dogmas, nor in intellectual augmentation; it is being and becoming, it is realization.”<sup>174</sup>

Recently also, in the triple *Talaq* verdict the Supreme Court referred to the ERP test. The court in doing so, rejected the contention that triple talaq is an essential practice in Islam, on the contrary it happens to be against the basic tenets of Islam, and is violative of *Sharia*.

The author of this research is of the opinion that the reasoning of the triple *talaq* judgment is also applicable to FGM, that a practice that is not prohibited by a religion cannot be an essential practice of that religion. The triple *talaq* is only a form of divorce that is permissible, but is still considered to be a sin by the Sunni school, consequently, the practice of FGM is considered to be *sunnah* only by a single school of *Ismaili* Shias. So, the fundamental nature of Islamic religion will not change even if the practice is discontinued.

#### ***IV.II. Essential Religious Practice***

The meaning of essential religious practices was debated at length by the Courts in a number

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<sup>167</sup> 1962 SCR Supl. (2) 496 (CB).

<sup>168</sup> Bombay Prevention of Ex-communication Act, 1949.

<sup>169</sup> The Constitution of India, art. 25, 26.

<sup>170</sup> *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay*, 1962 SCR Supl. (2) 496 (CB).

<sup>171</sup> *Dr. M. Ismail Faruqui v. Union of India* AIR 1995 SC 605 A.

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

of cases. The conflict between the individual and the group, both pitted against each other, for the sake of religion has not been new, as it was seen in the *Sabrimala* judgement.<sup>175</sup> This conflict is seen mostly because we have articles in the Constitution<sup>176</sup> that make sure that religion is a private as well as a communitarian affair.<sup>177</sup> In these situations we see that the conflict happens mostly between the community or individual being on one side and the State being on the other, when such laws are passed that seek to regulate the basic nature of religious practices in any manner.<sup>178</sup>

In exceptional situations we also see that the individuals are against their own community, due to many reasons like the former having reasons to believe that her/his rights are being violated by the community. We know that the Constitution grants the religious rights to all, individuals and communities alike, without distinguishing much between them.

The problem is because of the clashes occurring between “group supremacy” and “individual supremacy”. The former holds that there are certain set of rules and regulations which are there to be followed by all. This view advocates the “community-sanctioned” version of the things required by the religion or a religious practice. This version is supposedly expected to be followed by all the individuals belonging to that community. And individual cannot, and should not force his own interpretations into it.

Second is the approach of “individual supremacy” which stipulates that there can be no such right claimed by the religious-community which can over-ride the rights of an individual as enshrined in the Constitution. (For e.g.: the equality rights in the Constitution).<sup>179</sup>

The issue with the “group supremacy” approach, as per Prof. Madhavi Sunder is that it does not take into consideration the “cultural dissent”: meaning that it overlooks how within groups also there might exist challenges and questions with regards to certain practices.<sup>180</sup> If for instance there is a practice in a community which is violative of basic human rights (even FGM is not divorced from the classification of this sort), it can be also said that this approach is contrary to the fundamental spirit of our Constitution.<sup>181</sup>

However, it is not to say that individual supremacy is any less, or better, in so much as it believes that no belief which violates the individual’s constitutional rights can be challenged

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<sup>175</sup> *Indian Young Lawyer’s Association v. The State of Kerala*, (2019) 11 SCC 1 (CB).

<sup>176</sup> The Constitution of India, art. 25, 26.

<sup>177</sup> Gautam Bhatia, “Nine Judges, Seven Questions” February 16<sup>th</sup>, 2020, available at: <https://indconlawphil.wordpress.com/category/freedom-of-religion/essential-religious-practices/>.

<sup>178</sup> *Ibid.*

<sup>179</sup> The Constitution of India, 1950, art. 14.

<sup>180</sup> *Supra* note 176.

<sup>181</sup> *Ibid.*

by a group of a community.<sup>182</sup>

This gives us a valid conclusion that none of the above classified groups is better than the other one. However, to find out a better way to determine the schemes of articles 25 and 26, we might have to look back at the Constituent Assembly, where Dr. Ambedkar made a point: that the individual remains the fundamental unit of the Constitution.<sup>183</sup> The rights of a group exist because the Constitution framers felt the need of a community for an individual to fully grow and flourish. However, with this there also comes a caveat for the groups, that none of their norms can be seen as causing harm to the dignity of their basic building units, i.e; the individuals.

It is important to think about it because religion is an important issue in India, and many people also associate with it sentimentally.

The issue of religion finds its roots socially and culturally in our country, and therefore, is an imperative one. In these situations, when a religious practice is socially or culturally opposing to the public spirit, or is oppressive, the Courts have to step in.

Usually in cases of conflicts between individuals and community belonging to a religion, the courts follow the “anti-exclusion principle”.<sup>184</sup> This is so, because in such cases, a reasonable balance has to be struck carefully. This balance is achieved, by seeing the practice and judging whether it abridges upon the rights of a party, or places them on a pedestal lower than the other in any way, if it violates their rights guaranteed to be safeguarded under the Indian constitution.<sup>185</sup>

Additionally, in dealing with the question of ERP, the courts also decided upon the question that arose about the ‘constitutional morality’.

The courts have also had to deal with questions of “constitutional morality” which is the kind of morality mention in the article 25 and 26.<sup>186</sup> In *Manoj Narula v. Union of India*<sup>187</sup> this constitutional morality was described by the Supreme Court as:

Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people are yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic...The principle of

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<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid.*

<sup>184</sup> Lucy Vickers, “A Common Denominator: The Role of the Anti-Exclusion Principle in Freedom of Religion Cases” 3 (2) *University of Oxford Human Rights Hub Journal* 2020.

<sup>185</sup> Gautam Bhatia, “Freedom from Community: Individual Rights, group life, state authority and religious freedom under the Indian Constitution” 5 (3) *Global Constitutionalism*, 2016, 351-382.

<sup>186</sup> The Constitution of India, art. 25, 26.

<sup>187</sup> (2014) 9 SCC 1 (CB).

constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflective of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality...Commitment to the Constitution is a facet of constitutional morality.<sup>188</sup>

In their dissenting minority judgment, RF Nariman J. and Chandrachud J. pointed out to the meaning of “constitutional morality” given in several previous judgments, thus re-iterating that it is “nothing but the values inculcated by the Constitution, contained in the Preamble, read with various other parts. This specially includes the fundamental rights, and therefore it follows that the fundamental right to equality<sup>189</sup> is a part and parcel of what comprises of “constitutional morality”, thereby subjecting articles 25 and 26<sup>190</sup> to the “constitutional morality”.

In conclusion, it is noteworthy to glance at the quote by the famous physicist, Steven Weinberg: “Religion is an insult to human dignity. With or without it, you would have good people doing good things and evil people doing evil things. But for good people to do evil things, that takes religion.”

Good people doing evil things (believing that they are good) seem to be a recurring phenomenon in such cases.<sup>191</sup>

## V. Conclusion

By the above discussion, it is now clear that FGM is a practice that though has a lot of implications, has them only in negative. Encapsulating all the above information, some effects of the practice are enumerated below:

### *India*

We know that we don't have to worry about the practice as much as the Africans, but to let even one girl or a woman suffer would be a travesty of justice, because ours is a country truly cherishing its people, their fundamental rights.

In India, as has already been discussed in the above chapters, we have the provisions in IPC

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<sup>188</sup> *Ibid.*

<sup>189</sup> The Constitution of India, art. 14.

<sup>190</sup> *Id.*, art. 25, 26.

<sup>191</sup> Fahad Zuberi, “Cannot defend the indefensible: The unconstitutional case of female genital mutilation” *The Leaflet* November 28<sup>th</sup>, 2018, available at: <https://www.theleaflet.in/cannot-defend-the-indefensible-the-unconstitutional-case-of-female-genital-mutilation/#>.

under grievous hurt to safeguard the victims, and some provisions under the POCSO, to take care of the victims who are children, though there isn't a specific provision, just to curb FGM. We know that this practice of FGM cannot be regarded as a 'religious practice'. The major reasons, sadly for the practice of FGM are to curb the sexuality of the girl, as per the diktats of the customs and traditions.

The Supreme Court has also held in *Sri Adil Visheshwara of Kashi Vishwanath Temple, Varanasi v. State of Uttar Pradesh*<sup>192</sup> that, "the denomination sect is bound by the constitutional goals and they too are required to abide by the law; they are not above the law."<sup>193</sup>

Moreover, its proven ill effects on the health of the women have been shown. Besides, women should have the right to bodily autonomy.

Now the fact that in India it is followed by only a small population of people can be both advantageous and disadvantageous in addressing the problem.

The fact is disadvantageous because the limited population that follows it does so in secrecy and therefore it took us so long to learn about this practice. However, on the brighter side, it will be advantageous because to control the practice, when there are lesser people who do it would make it easier to address the problem and solve it.

### **Recommendations**

In the dearth of any specific legislation to put a stop at the practice of FGM, there can be certain steps that can be taken, to put a check on the community that practices it.

When it comes to putting a ban on practices that have an adverse effect on the well-being of a person, India has always been very progressive. We've had legislations in the past that punish for even the propagation of a certain act. For example, we have the Commission of Sati (Prevention) Act, 1987, which penalizes the propagation of Sati, and seeks to prevent commission and glorification of Sati, including "supporting, justifying and propagating the practice."<sup>194</sup>

Similarly, in situations where the woman is socially not accepted because she is uncircumcised, it becomes a kind of compulsion that makes the parents of the girl make her go through circumcision. This way, the propagation of practice increases, because more and more people conform to the norms laid down by the society. So, this propagation should be penalized.

In case it is found that FGM is conducted, the people who carry out, as well as those who abet

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<sup>192</sup> 1997 (4) SCC 606.

<sup>193</sup> *Ibid.*

<sup>194</sup> The Commission of Sati (Prevention) Act, 1987, ss. 2 (b), 4, 5.

the practice, and encourage it, should all be penalized.

It goes without saying, that if any such procedure is required medically for the good health of the girl, it should be allowed, but only after due medical practitioner's recommendations. For this purpose, any specific amendment, if need be, can be made in the Indian Medical Council (Professional Conduct, Etiquettes and Ethics) Regulation, 2002 stating that carrying out FGM/C as a form of misconduct will make such professional liable to proceedings.

Most countries, when it comes to reporting to health issues put a lot of responsibility upon the health workers. Even in India, the provisions of POCSO provide that if a person knows of an act of an abusive and sexual nature being committed on a child, he has a duty to report the same to police.<sup>195</sup> In case of FGM, when young, unaware girls are taken by a female relative for the *khatna*, they are not in the capacity to decide to speak against it, and are often unaware of what is happening to them. In such situations, it should be on the doctor, or any other adult who has the knowledge of the incident, to report it to the police.

Besides, in India the supreme law of the land is our Constitution, which clearly ensure the right to equality, and a respect for the human right, and right of children. Taking all this into consideration, it becomes pertinent that the community that observes a practice violative of the Constitution in any manner should discontinue and abandon the practice.

In addition to providing the preventive measures, we should also not forget that there remain a large number of girls and women who have been already subjected to the barbaric practice, and there it is imperative that something is done to provide relief to the ones who have already suffered. This is especially important in case of young girls.

There should be a helpline to listen to the emergency complains of the children and a facility to assist or rescue them, if possible.

With the combined effort of the government authorities and the religious leaders, it may be possible that a stop may be put to the practice. The law should be such that it is approachable by all, and is friendly for all, children and women alike.

The law should be made available in the language that is readily understood by the local community.

Additionally, a thought can be given to the sensitization and awareness of the community following the practice of FGM, in India, and for this purpose, the *Syedna* can be approached to spread the message in a better way in the community against the practice.

Thus, with the combined effort of the community people, the religious leader, and the support

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<sup>195</sup> The Protection of Children from Sexual Offences Act, 2012, s. 19.

of suitable laws, we can wipe out the problem, though slowly, but surely.

### ***Concluding Remarks***

The practice of FGM/C, as we see, is a result of deeply rooted cultural and traditional set of beliefs that have been going on for a long time now. To think and say that they will be wiped out in a span of a relatively shorter time would be to undermine the attachment and regard people place in cultures, and even religion.

However, to completely ignore the existence of the practice would also mean that we are in denial, that a small chunk of the population is still subjecting an even smaller, the supposedly submissive population to a very cruel practice, simply in the name of certain traditions which leave nothing but scars- in every possible way. Therefore, specifically with regards to India, the pending petition would be a deciding factor with regards to the preservation and upholding of many fundamental rights of the women and children that are in question. The Supreme Court, in considering the rights at stake, and the fact that we as a society should strive to move forward than backwards, and to ensure that everyone in this country has a right to live, and that with dignity, should rule in the favor of those brave women who have had the valour to stand up to something they went through, and who won't wish any girl to go through the trauma that they went through. And thus, Supreme Court should ban the practice of FGM in India, and direct the legislature to make certain amendments in law.

Lastly, since the amount of research in the field is not as much as it should ideally have been, to put the issue in sufficient light, endeavors should be taken to talk about the practice, and to aim for a specific legislation, if the need arises.

It is important to reflect on the words of Theresa May, when she said, "One girl subjected to FGM or forced to marry is one girl too many".