

ISSN: 2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

IJLRA

EDITORIAL TEAM

EDITORS

Megha Middha



Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can

bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board



Dr. Namita Jain



14th, 2019

Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC - NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted 1Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



methodology and teaching and learning.

Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

Unveiling The Legitimacy Of Female Genital Mutilation In Indian Dawoodi Bohra Community: An Analysis Of Constitutional Framework

Authored By - Apoorva N R

Abstract

Female genital mutilation is a lesser-known issue of human right violation in a country like India, where a discussion about such topics is frowned upon. The world has witnessed such an atrocious act for ages, and is still prevalent. In India, this practice is mainly found in Dawoodi Bohra Community and is also known as khatna/khafd. It is deemed an integral and essential part of Islam by the community. However, it is a gross violation of the Right to life protected under Article 21 of the Indian Constitution. The practice aims to regulate female sexuality and moderate the sexual desires of women as it is believed to be a way of controlling women from having sexual intercourse. It is also believed by many that, FGM protects the health of women and their foetuses. The procedure of FGM is conducted on a women's body without her consent and with no proper medical treatment. Therefore, the researcher contends that the practice of FGM/C is violative of Article 21, and it cannot seek shelter under 25 of the Indian Constitution, which enshrines the right to freedom of practising and professing religion. In this paper, the researcher will analyse Article 21 to establish the violation of the right to life and bodily autonomy, and the right to privacy of women by using various judicial precedents. Furthermore, the researcher shall also interpret if the practice is an essential religious practice and if it can seek protection under Articles 25 and 26 of the Indian Constitution.

Keywords: Dawoodi Bohra Community, Essential religious practice, Female Genital Mutilation, Human Right.

INTRODUCTION

Female Genital Mutilation/Cutting (FGM/C) is a worldwide concern and a heavily debated women's rights issue. FGM/C refers to the procedures involving partial or total removal of the female external genitalia or other injury to the female genital organs for non-medical reasons.¹ The number of women undergone FGM remains unknown, however according to the UNICEF global databases at least 200 million girls and women have been cut in 31 countries. In their recent survey, around 34% of girls aged 15 to 19 have undergone FGM in the year 2021.²

A joint report on Female Genital Mutilation released by the World Health Organization (WHO), the United Nations International Children's Emergency Fund (UNICEF), and the United Nations Population Fund (UNFPA) categorised Female Genital Mutilation/Cutting into four categories depending on the severity and degree of cutting. Type 1 involves the removal of the prepuce (clitoral hood), with or without the removal of a part or the complete clitoris. Type 2 is clitoris removal with partial or entire excision of the labia minora. Type 3 includes the removal of a portion or all of the labia minora and/or majora, as well as stitching and narrowing of the vaginal aperture. This is commonly referred to as infibulations. Type 4 involves all other sorts of damaging non-medical techniques to the female genitalia, such as clitoris pricking and piercing, cauterisation, clitoris/labia stretching, scraping, and administration of noxious chemicals into the vagina. Despite global and national attempts to end the practice, Female Genital Mutilation is still prevalent in many regions of the world.

In India, this practise is widely prevalent within the Dawoodi Bohra community, where FGM/C is also known as 'khatna' or 'khafd.' It involves the removal of skin from young girls and women's clitoral hoods. The major reasons for engaging in this practice are to reduce a girl's sexual urge and to purify her of impure thoughts. This practice has a significant influence on the human rights of women and girls. Nonetheless, the practise has been around for a long time and is a closely guarded secret. However, in 2017, Advocate Sunita Tiwari filed a PIL (Public Interest Litigation) before the Supreme Court on behalf of over 70,000 Dawoodi Bohra women. The petitioners wanted to abolish female genital mutilation (FGM), while the respondents

¹ World Health Organization, *Eliminating Female Genital Mutilation: An interagency statement*, WHO, UNFPA, UNICEF, UNIFEM, OHCHR, UNHCR, UNECA, UNESCO, UNDP, UNAIDS, WHO, Geneva, 2008, p. 4.

² United Nations International Children's Fund (UNICEF), *Female Genital Mutilation/Cutting: A statistical overview and exploration of the dynamics of change*, New York, 2013.

argued that it is an essential element of their religion. As a result, the Supreme Court directed that this case be heard by a larger bench, which is currently pending.

RESEARCH QUESTIONS

1. To what extent Article 21 of the Indian Constitution protects the Right of privacy and Right to life and bodily autonomy with respect to the matters concerning FGM/C?
2. To what extent the practice of FGM/C can be protected under the ambit of Article 25 of the Constitution?

RESEARCH METHODOLOGY

The author seeks to adapt doctrinal research in analysing the statement of the problem in depth. The paper seeks to understand and determine the scope of Article 21 and 25 pertaining to the practice of FGM/C prevalent in the Dawoodi Bohra Community. The researcher aims to conduct a qualitative study in analysing the research objective and assert the author's contention that the practice of FGM/C infringes the Constitutional provisions. The data collected by the researcher are taken from secondary sources and also involve the use of texts. The method of data collection for the present research entirely relies on qualitative methods. The author being a passive observer, relied on the 'existing data' in the form of statutes, case laws and other research articles. The author sourced her data from prominent data bases which include the official government websites for statutes, SCC Online and West law for case laws, and Jstor, Hein Online, Springer and other reputed database of journals for research articles.

AMBIT OF ARTICLE 21

Article 21 of the Indian Constitution protects the life and personal liberty of individuals according to the procedure established by law. The Supreme Court has described this right as the 'heart of fundamental rights.' It imposes a duty on the state to protect this right. Every phrase used in Article 21 enhances human dignity and value.³ Furthermore, to any civilised society, there can be no attributes more important than the life and personal liberty of its members.⁴ The primary object of Article 21 is to prevent encroachment of personal liberty in

³ Kartar Singh v. State of Punjab, (1994)3 SCC 569.

⁴ Kehar Singh v. Union of India, (1989)1 SCC 204.

any manner. A fruitful and meaningful life presupposes life full of dignity, honour, health and welfare. In the modern “Welfare Philosophy”, it is for the State to ensure these essentials of life to all its citizens.⁵

The practice of female genital mutilation is violative of the right to life of women under Article 21 as it involves mutilation of a part of the human body. The State is duty bound to protect every individual’s right to life and personal liberty. Any right that is conferred by the rule of law and if a person seeks for a remedy that is meant for establishing the rule of law, it should not be denied to that individual, else it would never subserve the cause of real justice.⁶

The right to health was interpreted as a fundamental right under Article 21 of the Indian Constitution in the case of *Bandhua Mukti Morcha v. Union of India*.⁷ The victims of FGM have had adverse health effects due to the removal of female genital tissue. It is very harmful in nature and causes problems like haemorrhage, urinary issues, vaginal tissue damage, infections, painful urination, extreme discomfort, pain during intercourse, increased risk of childbirth etc. Therefore, it is a blatant violation of human rights of women.

RIGHT TO PRIVACY

According to the Black Law’s Dictionary, privacy has been defined as “right to be let alone, the right of a person to be free from any unwarranted publicity; the right to live without any unwarranted interference by the public in matters with which the public is not necessarily concerned.”⁸

Individuals have the right to privacy, which is defined as the safeguarding of private space for them. The ability to make choices is at the essence of human nature. Individuals may establish and regulate their human nature, which is inextricably linked to their personality, through the concept of privacy. The sacrosanct character of human individuality is demonstrated in the ability to make judgments on subjects of personal importance. Individual autonomy is related with issues that can be kept private.

⁵ *Siddharam Satlingappa Mhetre v. State of Maharashtra*, (2011)1 SCC 694.

⁶ *S. Krishna Sradha v. State of Andhra Pradesh*, (2017)4 SCC 516.

⁷ *Bandhua Mukti Morcha v. Union of India & Ors.*, (1997)10 SCC 549.

⁸ *Brian A. Garner, editor-in-chief. Black's Law Dictionary. St. Paul, MN: Thomson Reuters, 2014.*

FGM/C is performed mostly on girls below the age of fifteen, who have not consented to being circumcised. Furthermore, it should be noted that the procedure is not conducted for medical purposes. It is indeed discriminatory against women and girls, noting that it violates their right to dignity. The practice lacks gender sensitivity as it is performed to make women or girls favourable to their husbands.

SCOPE OF ARTICLES 25 AND 26

The Preamble of the Indian Constitution is the loadstar and guides those who find themselves in a grey area while dealing with its provisions.⁹ Therefore, preamble is a part of the basic structure.^{10, 11, 12, 13} The 42nd Amendment of the Constitution of India (1976) asserted that India is a “secular” nation by adding the term in the preamble. The meaning of a secular state is that the state does not have a religion of its own. In other words, it does not prioritise one particular religion for the country and its people. Furthermore, secularism is considered to be the basic feature of the Constitution.¹⁴

Article 25 of the Indian Constitution enshrines the Right to freedom of religion. Every individual is entitled to the freedom of professing, practicing and propagating their religious beliefs unless it harms the public order, morality and health, and the other provisions listed in Part III. Article 26 provides that every religious denomination has the freedom to manage their religious affairs and to form religious institutions. The word “religion” is not susceptible to any rigid definition. However, “religious denomination” must satisfy the following conditions: a) it must be a collection of individuals who have a system of beliefs or doctrines which they regard as conducive to their spiritual well-being, i.e., a common faith, b) a common organisation, and c) designation by a distinctive name.¹⁵

⁹ Steel Authority of India Ltd. v. National Union Waterfront Workers, (2001)7 SCC 1.

¹⁰ State of Uttar Pradesh v. Dina Nath, AIR 1997 SC 1095.

¹¹ Union of India v. Madhav, (1997)2 SCC 332.

¹² Keshavananda Bharati v. State of Kerala, (1973)4 SCC 225.

¹³ S.R. Bommai v. Union of India, (1994)3 SCC 1.

¹⁴ *Ibid*

¹⁵ S.P. Mittal v. Union of India, (1983)1 SCC 51.

Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. Restrictions by the State upon free exercise of religion are permitted both under Articles 25 and 26 on grounds of public order, morality and health.¹⁶

In *Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra*,¹⁷ the Court held that “a secular state, rising above all differences of religion, attempts to secure the good of all its citizens irrespective of their religious beliefs and practices”¹⁸ In *T.M.A. Pai Foundation*, it was held that the State is not prevented from making any law in relation to religious practice and the same is permissible under Article 25(2)(a) of the Constitution of India. The limited jurisdiction granted by Article 25(2) relates to the making of a law related to the secular activities associated with the religious practice.¹⁹ Article 25(2)(b) makes it clear that the main part of the provisions contained in Article 25 will not come in the way of the operation of any existing law or prevent the State from making any law which provides for social welfare and reform or for throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Similarly, Article 26 while conferring the right on every religious denomination to manage its own affairs makes it clear that the right to manage the affairs of any religious denomination is restricted to matters of religion only.²⁰ Part III of the Constitution will not prevent the State from acting in an appropriate manner to protect the interests of the larger public, as mandated by the main part of both Articles 25 and 26, and these provisions have to be harmoniously construed with the other provisions contained in Part III.²¹

DOCTRINE OF ESSENTIAL RELIGIOUS PRACTICE

FGM is considered a traditional practice in the Dawoodi Bohra Community. In Islam, it is essential to look at all schools of Islam. Within the sect of Sunni, FGM is obligatory for men and women.²² In *State of West Bengal v. Ashutosh Lahiri*, the Supreme Court held that the sacrifice of any animal by Muslims for the religious purpose does not include slaughtering of

¹⁶ *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282.

¹⁷ *Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra*, (1976)2 SCC 17.

¹⁸ *Aishat Shifa v. The State of Karnataka*, 2022 SCC OnLine SC 1394.

¹⁹ *T.M.A Pai Foundation v. State of Karnataka*, (2002) 8 SCC 481.

²⁰ *Adi Saiva Sivachariyargal Nala Sangam v. State of Tamil Nadu*, (2016)2 SCC 725.

²¹ *Ibid*

²² 20 Ghadially R, Manushi A., All for izzat' the practice of female circumcision among Bohra Muslims, JOURNAL ABOUT WOMEN AND SOCIETY. 1991, 66, p 17–20.

cows as the only way of carrying out these sacrifices as part of the religious ceremony. An optional religious practice is not covered under Article 25.^{23,24}

The Supreme Court articulated the doctrine of essential religious practice in the case of *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*. It was observed that the Courts were charged to decide whether a practice was religious in character based on the evidence adduced and tenets of the religion so concerned.²⁵ On such determination it can be ascertained if a practice is an essential and integral part of the religion. The Supreme Court placed a greater degree of reliance on religious texts as evidence of essentiality. However, this view was reformed in the *Durgah Committee, Ajmer v. Syed Hussain Ali*.²⁶ In this case, the *Dargah Khwaja Saheb Act's vires, 1955*, was challenged, arguing that the Act took away the fundamental rights of Muslims belonging to the *Soofi Christian Order*, as they were the sole custodians and caretakers of the shrine at Ajmer.²⁷ The Court rejected this argument, stating that religious activities based on speculation are not safeguarded by Article 26 since they are neither "essential" nor "integral" to the faith. As a result, the study of texts gave way to the study of behaviours, and the Court's opinion surpassed that of the religious group. In *Shayara Bano v. Union of India*, the Court declared triple talaq as legally invalid. The majority decision of the Court held that the longevity of practice does not express essentiality and hence, the abolition of triple talaq does not change Islam's fundamental nature.²⁸

FGM/C/Khafz/Khatna/khafd is not a part of Islam, as it is not mentioned in the Holy Quran. In any case, FGM violates public order, morality, and health, and therefore cannot be protected by the right to practise religion. FGM is a major physical violation of the female sex and hence an infringement of the right under Article 21 of the Indian Constitution, thereby, it cannot be safeguarded by Article 25. In this respect, emphasis is drawn to the Supreme Court's decision in the case of *Charu Khurrana v. Union of India*, which stated that no organisation may be granted state recognition if it discriminates against women or violates their Fundamental

²³ *State of West Bengal v. Ashutosh Lahiri*, (1995)1 SCC 189.

²⁴ *State of Gujarat v. Mirzapur Moti K.K. Jamat*, (2005)8 SCC 534.

²⁵ *Supra* note 16 at page 6.

²⁶ *Durgah Committee, Ajmer v. Syed Hussain Ali*, (1962) 1 SCR 383.

²⁷ *Ibid*

²⁸ *Shayara Bano v. Union of India*, (2017)9 SCC 1.

Rights.²⁹ It can be interpreted by these precedents that Right to life includes the right to the enjoyment of all facilities including the right to enjoy sex. Invading a person's body in the name of religion is indeed not permitted by law and is a gross violation of fundamental rights. It should be noted that the religious leaders of the Dawoodi Bohra community have strongly advised Bohras living in Western countries, including Sydney, Washington, Tampa, New York, Bakersfield, London, Melbourne, Toronto, San Jose, Mississauga, Canada, Orange County, San Diego, and other countries, not to practise FGM/C. As a result, it is inferred that many religious leaders in the Dawoodi Bohra community do not regard it as a necessary religious practice.

CONCLUSION

The practice of Khafz infringes Article 21, i.e., the right to life. Besides that, the practice is so deeply ingrained in the Dawoodi Bohra Community that if any woman speaks out about the negative impacts of FGM/C, she risks being excommunicated. Thus, those who refuse to submit to this customary practice face backlash from the community as a whole and are socially boycotted. Several Bohras and their families have been targeted by a social boycott. The risk and dread of social boycott, for any kind of opposition or disobedience is so great and serious that few people have the courage to be expelled out of the relatively close community. Any deviation from the norm soon results in social banishment from near friends and family, prohibits participation in social and religious gatherings and meetings, stops their children from marrying into the community, and prevents their body from being placed in the communal burial site. This fear has kept women from speaking out against the practise of FGM/C, which continues to thrive in the community in a highly hidden manner.

Furthermore, numerous landmark judicial decisions, such as the Sabrimala case, triple talaq case, and others, have found some religious practices to be unconstitutional as they violate fundamental rights. Similarly, FGM has been a long-standing practice that is yet to be addressed in any way. As a result, it is critical that the legislature and the judiciary take adequate steps to regulate the procedure.

²⁹ Charu Khurrana v. Union of India, (2015) 1 SCC 192.