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Female Genital Mutilation - A Fundamental Right violation

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This Article examines the constitutionality of the practice of Female Genital Mutilation prevalent among the Dawoodi Bohras in India. The history of this practice has been discussed along with the position of the UN and other countries on this extreme form of human rights violation. The following paper gets its resources from laws, judgements of cases, articles, and news reports. It discusses the existing laws applicable to this issue along with prospective new legislation that may be enacted to ban this practice. Additionally, this paper examines the ongoing Supreme Court case regarding the same issue, i.e., Sunita Tiwari v Union of India, and the arguments put forward by both sides, along with a brief discussion of whether Female Genital Mutilation would constitute an Essential Religious Practice. It is the duty of the State is to protect its citizens from harmful practices such as the present case and the implications of delaying a judgement on such a crucial human rights issue are unpleasant. The paper concludes with an opinion that there is an immediate need to pay attention to this issue of Female Genital Mutilation as it affects the rights of multiple women and young girls.

Keywords: *fundamental right, fgm, female genital mutilation.*

INTRODUCTION

Fundamental rights are basic human rights that are present in Part III of the Constitution of India. They are available to all citizens and in some cases, foreigners too, and are enforceable by the courts, but of course, subject to conditions. Female Genital Mutilation is a religious practice

prevalent among the Dawoodi Bohras community which is a grave human rights violation. Although a Public Interest Litigation was filed in the interest of all women and little girls suffering due to this practice, there has been no judgement or legislation making this practice illegal so far. The right to religion is a fundamental right provided to all citizens of the country which empowers them to practice their religion freely without any intervention by the state. However, can this be allowed to the extent that it violates other fundamental rights such as the right to life? This is the issue with the present case.

BACKGROUND OF FEMALE GENITAL MUTILATION

The Dawoodi Bohras are a religious denomination within Shia Islam. They perform a practice called "*khatna*" or "*khafd*", i.e., Female Genital Mutilation or Female Circumcision on seven-year-old females in an attempt to curb sexual desire. Any female wishing to marry into the community is also subject to this practice which involves the complete or partial removal of the clitoral hood. The belief behind this is that the clitoral hood is seen as an unwanted skin and a source of sin which would make women commit adultery.[1] Female Genital Mutilation is a traumatic practice that affects its victims not just in the short run but also in the long run. This practice has wide-ranging complications such as sepsis, tetanus, urinary infections, and even problems during childbirth which leave women, physically, sexually, and psychologically damaged. But it is so deeply ingrained in the culture, people do it to prevent being ostracized by the community.

Historically, the priesthood of the community has been known to be oppressive. In fact, in 1991 a commission was created at the All-World Dawoodi Bohra Conference in Bombay to investigate this.[2]Their findings held that the Bohras feared persecution and harassment from the priesthood. Therefore they never questioned it and would choose to submit to the leaders instead of being shunned from the community.[3] Many families are known to have been excommunicated for

[1] Harinder Baweja, 'FGM: India's Dark Secret' (*Hindustan Times*) <https://www.hindustantimes.com/static/fgm-indias-dark-secret/> accessed 01 September 2022
[2]Asghar Ali, 'Human Rights and Dawoodi Bohras' (1994) 29(31) Economic and Political Weekly 2001
[3] *Ibid*

challenging the orders of the Syedna[4], i.e., the leader of the community. The community's obligation to engage in this activity could be removed if Syedna would interfere. In fact, Syedna has in a statement mentioned that although every Muslim is obligated to uphold their Islamic values, "abiding by the laws of the countries in which they reside" is essential. But there is no such law in India that bans the practice. Hence, the practice still prevails.

FUNDAMENTAL RIGHTS IN QUESTION

The right to Life provided by Article 21 holds that "*No person shall be deprived of his life or personal liberty except according to procedure established by law*."[5] This right isn't just about survival but about being able to live a full and meaningful life. The right to Privacy was incorporated into Article 21 by the Supreme Court in *K.S. Puttaswamy v Union of India*[6] and is protected as an inherent fundamental right and personal liberty.

Articles 14 and 15 are about equality rights. While 14 provides for equal treatment before the law, 15 prohibits any kind of discrimination on any grounds. 15(3) even allows the State to make special provisions for women and children.[7] Articles 25 and 26 on the other hand are fundamental rights enshrined to protect religious freedom. These are the provisions that make it tougher for legislation to be made in order to ban this practice. Article 25 permits the freedom of practice, profession, and propagation of religion[8] whereas Article 26 gives every religious denomination the freedom to manage its own religious affairs.[9] Hence, the state refrains from interfering in religious matters. The problem arises when these articles grant constitutional immunity to religious practices, especially harmful ones.

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[4] Jaymee Poisson, 'Women In Small Muslim Sect Say They Have Had FGM In Canada' (*thestar.com*, 2017) <https://www.thestar.com/news/fgm/2017/08/21/women-in-small-muslim-sect-said-they-had-fgm-in-canada.html> accessed 25 September 2022

[5] Constitution of India, art 21

[6] *Justice K S Puttaswamy (Retd) & Anr v Union Of India & Ors* (2017) 10 SCC 1

[7] Constitution of India, art 15(3)

[8] Constitution of India, art 25

[9] Constitution of India, art 26

INDIA'S STAND ON THIS ISSUE

A ban on this practice was sought through a PIL before the Supreme Court in the case of *Sunita Tiwari v Union of India.*[10] While there isn't any independent law specifically banning this, the act itself falls under multiple offences relating to causing *hurt* under the Indian Penal Code, such as sections 323, 324, 325, and 326[11]. Even in the POCSO Act[12], touching the genitalia of a minor for non-medical reasons is a violation. Additionally, this practice goes against the UN Convention on the Rights of the Child, and the UN Universal Declaration of Human Rights. The plea sought to make this act a non-bailable, non-compoundable offence under the IPC, with directions issued to the State Police to prevent this practice.

The defence claimed that this practice, being almost 1400 years old, is an integral part of the Dawoodi Bohra Community and is protected under Article 26 and they should be allowed to manage their own affairs. Article 21 isn't applicable in the instant case because the practice is voluntary, and done out of people's own faith without any kind of societal imposition. Additionally, the defence strictly held that Female Genital Mutilation is practiced in a safe and non-mutilating manner which makes it a mere circumcision. Hence, equating circumcision with mutilation is culturally insensitive. The Supreme Court concluded by referring this case to a larger bench as this is a "*seminal issue*" that would be integral in the determination of an Essential Religious Practise.[13] As a result, this issue, which affects thousands of young girls and restricts their fundamental rights, is still pending indefinitely.

ESSENTIAL RELIGIOUS PRACTICE

An Essential Religious Practise is a practise which is inherent for the survival of the religion and courts generally don't interfere in these matters. These are protected by Article 25 of the Constitution, which basically immunises them. In the landmark case of *The State Of Bombay vs*

[10] *Sunita Tiwari v Union of India* (2019) 18 SCC 719
[11] Indian Penal Code 1860
[12] Protection of Children from Sexual Offences Act 2012
[13] 'Female Genital Mutilation Petition Pending Before Supreme Court' (*Hindustan Times*, 2019) <https://www.hindustantimes.com/india-news/female-genital-mutilation-petition-pending-before-supreme-court/story-rsHGOLu0z5eEg3aZjHYEIL.html> accessed 01 September 2022

Narasu Appa Mali, the Bombay High Court had held that personal laws are not law for the purpose of Article 13. Only "laws in force" within the territory of India are subject to this article 13.[14] Hence, religious practises cannot be made void for violating any of the fundamental rights as it goes beyond the scope of Article 13. However, any practise which goes against public morality cannot be termed to be an Essential Religious Practise. In the famous *Sabrimala* case, DY Chandrachud in his judgement held that the High court judgement of 1951[15] was based on flawed reasoning. Religious activities directly connected with the civil status of individuals cannot be granted constitutional immunity because this would deny the primacy of the constitution.[16] Even Articles 25 and 26 have clearly mentioned that freedom is subject to "public order, morality, and health".[17] K. K. Venugopal, the attorney-general of India, also supported that public health and morality cannot be overlooked in the name of freedom of religion in the Sunita Tiwari case.[18]

Recently, the Triple Talaq case faced a lot of controversy due to its ruling which banned divorce by way of "*talaq-e-biddat*", i.e., saying the word "talaq" three times consecutively. The majority verdict held this practise arbitrary and unconstitutional.[19] Later on, the Parliament enacted an act to make this a punishable offence.[20] Female Genital Mutilation isn't absolutely necessary to preserve the sanctity of the religion. In fact, it is a grave violation of the health of the women subjected to this. Hence, terming this as an Essential Religious Practise would be ethically wrong as it would grant the practise immunity, and the petition to ban it would inherently fail.

THE POSITION OF THE UN AND OTHER COUNTRIES

Female Genital Mutilation is illegal in the US, Canada, Australia, and many African and European countries. United Nations recognizes this practise as a global human rights violation. In 2012, a resolution eliminating Female Genital Mutilation was passed by the UN general

[14] *State of Bombay v Narasu Appa Mali* 1951 SCC OnLine Bom 72
[15] *Ibid*
[16] *Indian Young Lawyers Assn (Sabarimala Temple-5J.) v State of Kerala* (2019) 11 SCC 1
[17] Constitution of India, art 25
[18] Constitution of India, art 26
[19] *Shayara Bano v Union of India* (2017) 9 SCC 1
[20] Muslim Women (Protection of Rights on Marriage) Act 2019

assembly.[21] The WHO explains Female Genital Mutilation of any type to be a violation of the human rights of girls. This includes the right against discrimination on the grounds of sex, the right to life which includes protection from this deadly process, and the right to freedom and protection from cruelty and abuse.[22] In a case in Australia, the NSW Supreme Court passed a judgement to eradicate Female Genital Mutilation.[23] Although the conviction was quashed in the Criminal Appeal Court, the High Court of Australia overturned this by ruling that Female Genital Mutilation in every form is illegal. The majority judgement held that "*This broader construction ... would best promote the purpose or object of prohibiting such procedures generally,*"[24]

The Dar al-Ifta, which is an Egyptian governmental body created to continue research on Islam, convened an international conference in 2006. The topic of discussion was Female Genital Mutilation and the participants unanimously agreed that Female Genital Mutilation is no longer relevant in the modern world. Up until now, it has been practised as a social custom but it is obvious that it has a lot of negative side effects. Hence, the practise must be forbidden.[25] In 1997, the Parliament of Canada, through an amendment to its Criminal Code, banned Female Genital Mutilation in all its forms.[26] This includes a ban on aiding or abetting in the conduct of this practise as well. Additionally, taking a girl child outside the country to carry out this practise is also prohibited. Basically, any interference with the female genitalia for non-medical reasons is strictly forbidden and is a punishable offence.

CONCLUSION

So far, it has been clearly established that Female Genital Mutilation is a grave form of abuse on the mind and bodies of young girls who are a victim of this horrible religious practice. In India, although the issue has reached the Supreme Court, there is no decision made so far. The case

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[21] World Health Organization, 'Female Genital Mutilation' [2019] World Health Organization 4
[22] Mohammed Zakir, 'WHO's stance and the criminalization of female circumcision: The protection of or violation of human rights?' (2017) 4(116) DBWRF 610
[23] *Ibid*
[24] Hannah Higgins, 'NSW Genital Mutilation Convictions Stand' (*Canberra Times*, 2019) <https://www.canberratimes.com.au/story/6442030/nsw-genital-mutilation-convictions-stand/?cs=14231> accessed 03 September 2022
[25] Ali Gomaa, 'The Islamic view on female circumcision' (2013) 19(3) African Journal of Urology 125
[26] Canada Criminal Code 1985, s 268

has only been referred to a larger bench, but there is no specific date set for it. The future of this offence remains unresolved. The State has a duty of protecting the fundamental rights of its citizens even if it is from unhealthy religious practices. Religious practices cannot be granted constitutional immunity as it would leave the people helpless at the hands of their customs and community. Even if there are people who do not wish to or are against Female Genital Mutilation, they are forced to do it to their children as they fear they'll face backlash and social boycott from their community. It is the state's job to make its citizens feel safe and protect them from being coerced into any sort of harmful practice and also to safeguard the futures of these girls who fall prey to such a religious custom. As this practice has already been banned by multiple countries, including multiple Islamic countries, and has also been termed a human rights violation by the United Nations, the Indian government can consider these facts and plan a solution accordingly.