

**FEMALE GENITAL MUTILATION IN INDIA: NEED FOR A SUI GENERIS LAW****\*ARYA SABHYATA RAY<sup>1</sup>****Introduction**

“No woman should be told she can’t make decisions about her own body. When women’s rights are under attack, we fight back.” This statement given by Kamala D. Harris, the first woman to serve as the Attorney General of California and currently, the U.S senator is reflective of the sentiments of all those odd 200 million girls and women alive today who have undergone the barbaric female genital mutilation, the world over.<sup>2</sup> Female genital mutilation or circumcision (FGM/C) is a deeply rooted traditional practice which comprises all the 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>3</sup> It is considered a rite of passage from childhood to adulthood and is undertaken in most of the communities at the tender age of four to fourteen. According to the joint statement issued by WHO, UNICEF and UNFPA in 1997, FGM has been classified into following four types:

- Type I: Excision of the prepuce, with or without excision of part or all of the clitoris.
- Type II: Excision of the clitoris with partial or total excision of the labia minora.
- Type III: Excision of part or all of the external genitalia and stitching/narrowing of the vaginal opening (infibulation).
- Type IV: Unclassified: includes pricking, piercing or incising of the clitoris and/or labia; stretching of the clitoris and/or labia; cauterization by burning of the clitoris and surrounding tissue; scraping of tissue surrounding the vaginal orifice (angurya cuts) or cutting of the vagina (gishri cuts); introduction of corrosive substances or herbs into the vagina to cause bleeding or for the purposes of tightening or narrowing it; and any other procedure that falls under the definition of female genital mutilation given above.<sup>4</sup>

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<sup>2</sup> WHO, Female Genital Mutilation (FGM), Prevalence of FGM. Available at: <http://www.who.int/reproductivehealth/topics/fgm/prevalence/en/>, last visited on: 4/07/2017.

<sup>3</sup> WHO, Female genital mutilation, Fact sheet. Available at: <http://www.who.int/mediacentre/factsheets/fs241/en/>, last visited on: 4/07/2017.

<sup>4</sup> *Female genital mutilation, A Joint WHO/UNICEF/UNFPA Statement, 1997.* Available at: <http://apps.who.int/iris/bitstream/10665/41903/1/9241561866.pdf>, last visited on: 4/07/2017.

In India, only Type 1 and Type 4 FGM are practised and is known by the name *khatna*.<sup>5</sup>

### **Understanding FGM in the Indian backdrop**

The practice of FGM in India is mainly concentrated to the Dawoodi Bohra community. They are a Shia Muslim sect that migrated to India from Yemen in the 12<sup>th</sup> Century. The prevalence of this custom owes its origin to Yemen. According to a survey carried out by an NGO called Sahiyo (a platform for FGM survivors), this procedure is carried out at the age of 7 or between 6 to 12 years of age in India.<sup>6</sup> The Bohras are approximately one million in size, with most of them settled in western India, and smaller communities in other countries. But what's appalling is the fact that despite being regarded as the most progressive, prosperous and well-educated of the lot, they maintain that *khatna* is their religious right.<sup>7</sup>

Usually performed by the traditional practitioners, mostly the elder women of the community, birth attendants or untrained midwives, the procedure exposes the victim to a number of health hazards. Since the entire process is carried out in the most secretive way possible and without any use of anaesthesia and with crude instruments, the process is often both painful and a traumatic experience for the victim. The process has both long-term and short-term health implications. The victim may experience severe pain, infection, genital tissue swelling, fever, shock to name a few, in the short run. Long term complications involve urinary problems, vaginal problems, sexual problems, increased risk of child birth complications and psychological problems as well.<sup>8</sup> Sometimes, the procedure results in death also.

Even after medicalization (professionals performing FGM), the victim suffers as much. It has no known health benefits.<sup>9</sup> FGM is not only a blow to the health of the victim, but a fatal intrusion into the bodily integrity, privacy and psychosocial well-being of the victim. It impinges upon the bodily autonomy of the victim and violates her right to a dignified life. It

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<sup>5</sup> The Indian Express, *Understanding female genital mutilation: The practice and the issues*. Available at: <http://indianexpress.com/article/explained/understanding-female-genital-mutilation-the-practice-and-the-issues-fgm-4659216/>, last visited on: 4/07/2017.

<sup>6</sup> Hindustan Times, *Bohra women against female genital mutilation: Survey in Mumbai*. Available at: <http://www.hindustantimes.com/mumbai-news/bohra-women-against-female-genital-mutilation-survey-in-mumbai/story-2uxLn0UtIFhYPPEEV5QG8PL.html>, last visited on: 4/07/2017.

<sup>7</sup> Los Angeles Times, *A rebellion inside a small Indian sect seeks to end a brutal custom: female genital mutilation*. Available at: <http://www.latimes.com/world/asia/la-fg-india-genital-mutilation-20160612-snap-story.html>, last visited on: 4/07/2017.

<sup>8</sup> *Supra*, note 3.

<sup>9</sup> *Eliminating Female genital mutilation, An interagency statement, 2008*. Available at: [http://www.un.org/womenwatch/daw/csw/csw52/statements\\_missions/Interagency\\_Statement\\_on\\_Eliminating\\_FGM.pdf](http://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf), last visited on: 5/07/2017.

is an attack upon her right to a healthy life. It is an extreme form of gender discrimination.<sup>10</sup> Above all, it is a violent infringement of human rights of women and children.

So, the question that arises for consideration is, “Why the practice of FGM still continues?”

The reasons can be noted as below:

- **Psychosexual reasons:** It is believed that the procedure attenuates the sexual desire in female, helps maintain the chastity and virginity before marriage and fidelity during marriage. It is also believed to increase the male sexual pleasure. This is primarily one of the reasons the Bohra community believes in.<sup>11</sup>
- **Sociological reasons:** The Bohras are extremely well knit and close community. The people have a desire to hold on to the culture and the traditions of the community.<sup>12</sup> Additionally, the Bohras feel that they will be ostracized from the community if they fail to maintain this culture, so they just accept this social conditioning.<sup>13</sup>
- **Hygiene reasons:** The external genitalia is considered unhygienic and should be removed to appear aesthetic and to improve hygiene.
- **Religious reasons:** While the Koran, the Muslim holy book, does not sanction female circumcision, Daimul Islam, a religious text followed by Bohras, endorses the practice for hygienic reasons.

But according to the recent survey carried out by Sahiyo, 81% were opposed to this practice.<sup>14</sup> Thus, the majority wants this inhumane tradition to terminate.

### **Existing legal framework in India**

The premier document that ensures the fundamental rights to life and personal liberty, equality before law and prohibition of discrimination, is the Constitution of India. It also directs the states to provide for early childhood care and improvement of public health but, there is no specific provision in our Constitution or any other legislation, directly addressing the issue of FGM. Still there are number of provisions in various acts under whose gamut

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<sup>10</sup> *Supra*, note 3.

<sup>11</sup> *Supra*, note 7.

<sup>12</sup> BBC Newshour, *Bohra activist against female genital mutilation says veil of secrecy keeps women from speaking out*. Available at: <http://michiganradio.org/post/bohra-activist-against-female-genital-mutilation-says-veil-secrecy-keeps-women-speaking-out>, last visited on: 4/07/2017.

<sup>13</sup> Detroit Free Press, *Genital mutilation victims break their silence: 'This is demonic'*. Available at: <http://www.freep.com/story/news/local/michigan/2017/04/22/female-genital-mutilation-victims-michigan/100690792/>, last visited on: 4/07/2017.

<sup>14</sup> *Supra*, note 6.

those practicing FGM can be booked. The primary document being the Indian Penal Code, 1860. The chapter dealing with the offences affecting the human body covers this aspect from section 319 to section 326. Section 319 defines hurt and 320 defines grievous hurt.<sup>15</sup> FGM is covered within these definitions. So, anybody voluntarily causing hurt or grievous hurt to a person by performing FGM is liable for punishment with either imprisonment or fine or both.<sup>16</sup> The perpetrators are liable for a more stringent punishment if FGM is carried out with crude instruments.<sup>17</sup>

Since FGM is primarily carried on children below the age of 18,<sup>18</sup> the culprits are also liable to be punished under Protection of Children from Sexual Offences Act, 2012 (POCSO). Section 3 of the act makes the act of insertion of any object into the vagina of the child as an offense thereunder.<sup>19</sup> Section 4 prescribes the minimum punishment of seven years for the same, along with fine.<sup>20</sup> The victim can also file a case under Protection of Women from Domestic Violence Act, 2005 (PWDVA). Since the apex court has recently

<sup>15</sup> **Section 319, IPC, 1860: Hurt** – “Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.”

**Section 320, IPC, 1860: Grievous hurt** – “The following kinds of hurt only are designated as “grievous”:

1. Emasculation.
2. Permanent privation of the sight of either eye.
3. Permanent privation of the hearing of either ear.
4. Privation of any member or joint.
5. Destruction or permanent impairing of the powers of any member or joint.
6. Permanent disfiguration of the head or face.
7. Fracture or dislocation of a bone or tooth.
8. Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.”

<sup>16</sup> **Section 323, IPC, 1860: Punishment for voluntarily causing hurt** – “Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.”

**Section 325, IPC, 1860: Punishment for voluntarily causing grievous hurt** – “Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

<sup>17</sup> **Section 326, IPC, 1860: Voluntarily causing grievous hurt by dangerous weapons or means** – “Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

<sup>18</sup> *Supra*, note 6.

<sup>19</sup> **Section 3, POCSO, 2012: Penetrative sexual assault** – “A person is said to commit “penetrative sexual assault” if—  
(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or  
(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or  
(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person or  
(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”

<sup>20</sup> **Section 4, POCSO, 2012: Punishment for penetrative sexual assault** – “Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.”

widened the scope of section 2(q), any woman who is in a domestic relationship with the offender and has been subjected to domestic violence by the same, can avail the benefits of this legislation.<sup>21</sup> Since FGM constitutes danger to health, safety and well-being of the aggrieved, it is an act of domestic violence.<sup>22</sup>

Further, the Commissions for Protection of Child Rights Act, 2005(CPCRA), provides that the function of the National commission (established under this act) is to inquire into any violation of child rights, examine all factors that inhibit the enjoyment of rights of children affected by torture and exploitation and take suo moto cognizance of matters relating to deprivation and violation of child rights.<sup>23</sup>

Along with the existent legislations, the Govt. of India has also adopted other policies and schemes reiterating its commitment to the protection of child rights. The adoption of National Charter for Children, 2003 is a significant step in this direction. It clearly states that in particular, the state and community will undertake all appropriate measures to address the problems that deprive the girl child of her right to survive with dignity. The state shall also ensure that all children enjoy the highest attainable standards of health. Under the head 'Protection of a girl child', it is mentioned that the state and community shall ensure that the crimes and atrocities committed against the girl child including discriminatory practices are speedily eradicated.<sup>24</sup> In addition to this, the Ministry of Women and Child Development have launched the Integrated Child Protection Scheme (ICPS) in 2009 as well as the National Policy for Children in 2013. The ICPS is based on the cardinal principles of "protection of child rights" and the "best interests of the child"<sup>25</sup>. In the latter, the Government of India retells its commitment to ensure that no custom, tradition, culture or religious practice is allowed to violate or restrict or prevent children from enjoying their rights.<sup>26</sup>

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<sup>21</sup> The Indian Express, *Any person can now be tried under Domestic Violence Act: Supreme Court*. Available at: <http://indianexpress.com/article/india/india-news-india/any-person-can-now-be-tried-under-domestic-violence-act-supreme-court-3073359/>, last visited on: 9/07/2017.

<sup>22</sup> **Section 3, PWDVA, 2005: Definition of domestic violence-** "For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it –  
(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse."

<sup>23</sup> Commissions for Protection of Child Rights Act, 2005.

<sup>24</sup> National Charter for Children, 2003. Available at: [http://www.childlineindia.org.in/CP-CR-Downloads/national\\_charter.pdf](http://www.childlineindia.org.in/CP-CR-Downloads/national_charter.pdf), last visited on: 6/07/2017.

<sup>25</sup> Integrated Child Protection Scheme, 2009. Available at: [http://icds-wcd.nic.in/icpsmon/st\\_abouticps.aspx](http://icds-wcd.nic.in/icpsmon/st_abouticps.aspx), last visited on: 5/07/2017.

<sup>26</sup> Available at: [http://wcd.nic.in/sites/default/files/npcenglish08072013\\_0.pdf](http://wcd.nic.in/sites/default/files/npcenglish08072013_0.pdf), last visited on: 5/07/2017.

Even with the presence of the above mentioned schemes, the evil of FGM needs to be particularly addressed. The focus should not be on a punitive legislation, rather upon a sui generis welfare legislation. The new statute should be a wholesome enactment encompassing the entire perspective of FGM with special focus on prevention and protection of the possible victims.

### **Recommendations for the new framework**

Following aspects need to be taken care of while enacting the new law-

- **Blanket definition**: It is seen in a number of cases that in countries where FGM is criminalized, the lack of a comprehensive definition has led to the offenders breaking free of their charges. When there is no blanket definition, the law is open to interpretation which provides a golden chance to defend the offenders. A staggering instance of this can clearly be seen as reported by The Wire; Syedna Fakhruddin, the Bohra sect leader, sought to distinguish between FGM and *khatna*, justifying the latter while categorically condemning the former as un-Islamic and horrific.<sup>27</sup>

Thus, it is recommended that the definition of FGM as provided by the WHO, UNICEF and UNFPA in their joint statement be accepted. Moreover, the definition should also provide exception for medical practitioners in case of necessity of health or in case of childbirth complications as well as in cases of sexual reassignment procedure.<sup>28</sup>

The FGM being carried out by the medical professional as a part of custom or ritual should not be included within the definition of therapeutic purposes.

- **Consent not a defence**: Consent means an unequivocal voluntary agreement to do something. Even if there was an unambiguous willingness to perform FGM, that should not act as a defence to this brutish custom. Consent either express or implied, either by the person herself (upon whom the FGM is to be performed) or by the parents or legal guardian, should not obliterate the offenders of the charges.

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<sup>27</sup> The Wire, *Syedna Fakhruddin, a Dawoodi Bohra Sect Leader, Condemns FGM as 'Un-Islamic'*. Available at: <https://thewire.in/106134/fakhruddin-fgm-khafz-dawoodi/>, last visited on: 7/07/2017.

<sup>28</sup> Crimes (Female Genital Mutilation) Act 1996. Available at: <https://www.hsph.harvard.edu/population/fgm/victoria.fgm.96.pdf>, last visited on: 7/07/2017.

Under this provision, the person upon whom FGM has been conducted should be excluded from the purview of punishment as that will lead to a secondary victimization.

- **Offence on taking the person outside the country for FGM:** In most of the countries where FGM is criminalized, the families of such girls take them outside the country for performing the same. So, many of the countries have criminalized such acts.<sup>29</sup> A similar provision should be in place in our statute so that, on discovering of any evidence of any such activity, the perpetrators can be penalized. This will act as a deterrent.
- **Provision for mandatory reporting:** Perhaps, the most important and forward looking provision is the provision of mandatory reporting. This point has already been incorporated in POCSO.<sup>30</sup> So, a provision on similar lines can be included here. Anyone who has the knowledge of FGM being carried out including hospital authorities, other family members, neighbours, etc. should mandatorily report the same. Anyone having the special knowledge and not reporting the same shall be made liable to a higher penalty.
- **Higher penalty for professionals performing FGM:** To curb the medicalization of FGM, this provision should find a place in the statute book. Any registered medical practitioner or any authorised professional who performs FGM without the reasons falling in the bracket of permissible FGM, should face liability for the same. The punishment can either be in form of imprisonment or fine or both. In fact, in some countries, their licence to practice is suspended for some years.<sup>31</sup> Such stringent measures should be appended for such a heinous act.
- **Higher penalty in Death cases:** Whenever after performing FGM, the procedure leads to any permanent impairment or disability, the punishment should be severe. If

<sup>29</sup> **S.3, Female Genital Mutilation Act 2003:** “Offence of assisting a non-UK person to mutilate overseas a girl’s genitalia.” Available at: <https://www.hsph.harvard.edu/population/fgm/uk.fgm.03.htm>, last visited on: 8/07/2017.

<sup>30</sup> **S. 21, POCSO, 2012: Punishment for failure to report or record a case-**“(1) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

(2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

(3) The provisions of sub-section (1) shall not apply to a child under this Act.”

<sup>31</sup> **Article 381, Law No. 043/96 / ADP of 13 November 1996 on the Penal Code:** “The penalties are doors to the maximum if the culprit is the medical profession or paramedical. The court seized may in addition pronounce against him the ban deferrer his profession for a hard who do can exceed five years.” Available at:

<https://www.hsph.harvard.edu/population/fgm/Burkina.fgm.htm>, last visited on: 8/07/2017.

the same procedure leads to death, then the maximum punishment possible should be awarded. This is because even though there was no criminal intent to do so, the knowledge of the possible consequences imposes the uncompromising liability. A number of countries where FGM has been criminalized, have provision for the same.<sup>32</sup>

- **Inducing the minor to perform FGM:** A provision incorporating this possibility should also be taken care of. If any person induces, coerces, threatens, assists, abets or does any such activity so that the minor will perform FGM on herself, he or she should be held liable for the same.
- **No religious argument:** It is a matter of grave concern that often in a pluralistic country like India, whenever there is any effort to revamp the existing unjust and unfair milieu, the minority always lashes out on the same using the religious argument as a weapon. Since the constitution of India nurtures the idea of religious freedom, often the draconian frameworks are difficult to set aside. Taking the freedom to freely embrace any religion, the minority always opposes any developmental idea as an infringement of their bigoted practices. So, the legislation should stand undisputed on this point. As already pointed out, *khatna* is a crude violation of right to life and dignity and no Islamic text propagates this idea. The *khatna* has just been ingrained in the culture, there is no religious background to it. And as far as Daimul Islam is concerned, there was only once a mention of *khatna* and that too not as a tradition to be continued later on. So, this practice should be strongly condemned.
- **Parties who can be penalized:** Throughout this paper, there have been a number of mentions about the parties at fault, the offenders, the perpetrators. Now the main issue is to identify this group. The parties who need to be covered in the bracket are firstly, the parents or the legal guardian of the victim with whom the victim stays. Secondly, the untrained professionals or the authorised professionals, to whomsoever the parents take the victims to and who carries out the FGM have to be included. Next, any person who had the special knowledge or apprehension of such brutality and did not report the same is also to be held responsible. This category may include people like

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<sup>32</sup> Law No. 74 of 15 December 1995 prohibiting female genital mutilation, as Amended through 2004, § 1. “The deliberate performs an operation on a female genitalia that damages the genitalia or permanently changes liable to FGM. The penalty is imprisonment up to three years, but up to 6 years if the operation has resulted in sickness or incapacity to work over two weeks, or an incurable defect, failure or damage has been caused, and up to 8 years if the procedure results in death or serious injury to body or health. Complicity is punishable in the same way.” Available at: <https://www.hsph.harvard.edu/population/fgm/norway.fgm.htm>, last visited on: 8/07/2017.

neighbours, teachers, relatives, etc. The fourth category should envisage people who incite, induce, threaten, coerce or propagate FGM to be carried out. This will encompass all the stakeholders like community leaders (example: the Bohra sect. leader in India, Syedna Fakhruddin), elders of the community and so on. The legislature can add any other stakeholders that it feels necessary required to be booked under the law. The list should be inclusive.

So, the aforementioned recommendations are some of the key areas of which the legislature should take note of.

### **Conclusion**

In the prevalent conditions, simply a new enactment or a policy statement is not enough. What is actually required is the implementation of the same on a ground level. Many a times, even after the law is formulated, it has no practical application. This happens due to a variety of reasons like people being unaware about the existence of the law, not understanding the language of the same, sometimes remaining unaware of the problem itself and not knowing upon whom the law applies. Even after having the knowledge of a crime, people abstain to report due to legal hassles. These problems can be solved in a number of ways, main means being the mass media. Since people are lot more connected today through social networks, the spreading of awareness can start from there. Moreover media and TV houses can also help by telecasting information about the same. Apart from these, there are other stakeholders like the schools, NGOs which can help create awareness among the mass. The executives at the district level can also take up the responsibility to educate people about the laws and consequences of not following the same. Moreover, the judiciary of the country has also levelled up its stand by introducing the concept of paralegal volunteers. These are the people who act as the connecting link between the civil society and the legal system. They are trained professionals who voluntarily provide solutions to the marginalized people who cannot directly access the justice system. They are the ones through whom the issues if small, can be settled and if the parties want to litigate, they can show them way to the advocates. So, there are number of methods of implementation, but for now, the country is in a dire need for a sui generis law to address the issue of FGM. Additionally, the apex court has taken up the issue of FGM recently and has demanded reports from the concerned states for the same. The entire country awaits an action on this.