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# **ABSTRACT**

The purpose of this paper was to outline the gravity of the health professional’s role while dealing with excised women. Through this paper, we get acknowledgment of traumatic experience that frequently occurs in childhood requires a challenging type of care so that to accomplice an improved childbirth outcome. Most importantly the safeguards of women who have been affected due to lack of education and their families somehow make them believe that this practice is necessary for them and this is the only phase if they don’t follow which will make them stray out of their marriages. In many instances, FGM is also perceived as a way to cleanse a girl from impure thoughts and desires. Sexual desire in girls and women is viewed as something from which they need protection or it is a source of sin, this practice predates Islam but thrives amongst Bohras. Some women also referred to the clitoral hood as ‘haram Ki Boti’ or an immoral lump of flesh.

# **INTRODUCTION**

FGM has short-term and long-term ill effects on the health and psychological well-being of the victims. The severity of the cutting directly corresponds to the harm suffered. There is extreme pain since anesthesia is rarely used on the victim during the procedure.

***“Imagine being taken to a room in a dark worn outbuilding.***

***Imagine being pinned down on the floor.***

***Imagine your underwear being taken off.***

***Imagine seeing a knife being heated on the gas stove.***

***Imagine the same hot knife slicing your clitoris.***

***Imagine young girls shrieking in pain.”[[1]](#footnote-1)***

The cruel practice of female genital mutilation (FGM) is not happening only in faraway Africa. It’s not just being practiced in tribal societies. A young girl aged six and seven is regularly being cut right here, in India. Mumbai abounds with unprofessional midwives who continue to scar young girls from the Bohras community, a Shia subsect. For long FGM or khatna as the Bohras call it remained as a well-kept secret, a taboo, and a subject never to be discussed. Female genital mutilation (FGM), comprises procedures involving partial or total removal of the external female genitalia or another injury to the female genital organs for non–medical reasons. While it is mainly carried out on girls between the ages of 1 to 15 years, occasionally, adult and married women are also subjected to this procedure. Despite the global and national efforts to promote the abandonment of the practice, FGM remains widespread in different parts of the world. Over 200 million girls and women have undergone FGM. The practice is most common in 30 countries across Africa and some countries in Asia and Latin America and among migrants from these areas

In India, this practice is common amongst the Bohra community, where the ritual is referred to as “Khatna” or “Khafz/Khafd”. Khatna essentially involves cutting the tip of a girl’s clitoris when she is 6-7 years old. It is performed by Mullanis- women who have a semi-religious standing, by traditional cutter, or by any woman with some experience. An online survey carried out amongst Bohra women by Sahiyo, an NGO, suggests that 80% of the 400 respondents have been through the process of khatna[[2]](#footnote-2).

## INTERNATIONAL VIEW OF FEMALE GENITAL MUTILATION

Due to the nature of FGM, it is a violation of the human rights of women and children, in infringes on the right to life and physical integrity[[3]](#footnote-3), the right to health[[4]](#footnote-4), and the right to freedom from torture, cruel and unusual treatment, and violence[[5]](#footnote-5). Since FGM is mostly on girls below the age of 18 years, it is also a violation of rights enshrined in the United Nations Convention on the Rights of the Child, 1989[[6]](#footnote-6)(UNCRC) and violates the guarantee of non-discrimination.

The right to be free from gender discrimination is guaranteed in numerous international human rights instruments. Article 1 of the Convention on the Elimination of all Forms of Discrimination against Women, 1979 (CEDAW) defines ‘discrimination’ as:

“Any distinction, exclusion or restriction made based on sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”[[7]](#footnote-7)

Unlike male circumcision which has beneficial health consequences, FGM adversely affects the health of females and is a practice aimed primarily at controlling women’s sexuality and subordinating their role in society. When a woman undergoes FGM, she is a victim of discrimination based on sex that compromises the recognition and enjoyment of her fundamental rights and liberties.[[8]](#footnote-8)

The right to life is considered a basic human right and is protected by several international instruments, including Article 3 of the UDHR, Article 6(1) of the ICCPR, and Article 6 of the UNCRC[[9]](#footnote-9). In extreme cases of FGM, the procedure also sometimes leads to death or may also contribute to maternal and neonatal deaths.

The right to physical integrity, while often associated with the right to freedom from torture, encompasses several broader human rights principles, including the inherent dignity of the person, the right to liberty and security of the person, and the right to privacy. Acts of violence threatening a person’s safety such as FGM also violate a person’s right to physical integrity.

**IMPACT OF FGM**

To date, more than 20 countries across Africa and 13 countries elsewhere have laws criminalizing FGM. Legal provisions that apply to FGM vary in scope and approach. In countries such as Egypt, Ghana, Belgium, Austria, Cyprus, Denmark, Norway, Italy, Portugal, Sweden, and Spain, it has been specifically incorporated in provisions of the penal code or under specific Acts. In the United States, Germany, France, the Netherlands, Mali, and Switzerland, existing penal code provisions have been applied to FGM. In other countries such as the United Kingdom and Togo, special laws have been enacted to address FGM.

It is pertinent to note that while FGM has a definite adverse health impact, male circumcision has no such adverse impact and indeed it can be argued that it has a positive effect on health in avoiding certain kinds of infections. Hence, in FGM there are not only violations of the right to life and dignity but also a clear violation of the right to non-discrimination based on sex. The object and purpose and impact on male and female circumcision are different and result in gross discrimination against women.

**Indian legal framework**

In India, various forms of violence against women are dealt with within the Indian Penal Code, 1860 (IPC). According to the WHO, the immediate complication of FGM can include excessive bleeding (hemorrhage), genital tissue swelling, wound healing problems, injury to surrounding genital tissue, shock, and death while the long term consequences include urinary problems, vaginal problems, menstrual problems, sexual problems, etc. and thus persons undertaking FGM may be prosecuted under the IPC. Section 319 to 326, IPC address varying degrees of hurt and grievous hurt.

Particularly, Sections 324 and 326, IPC provide penalties of imprisonment and fines for ‘voluntarily causing hurt’ and ‘voluntarily causing grievous hurt[[10]](#footnote-10). Former Director of the Central Bureau of Investigation (CBI), R.K. Raghavan, has noted that though FGM is not explicitly an offense under the IPC, on a complaint, the police are obligated to register a case under Section 326 of the IPC.[[11]](#footnote-11)

Section 3 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) that addresses penetrative sexual assault by any person on any child, inter alia defines it as insertion of any object into the vagina of the girl.[[12]](#footnote-12) It is established precedence that penetration in sexual offenses need not be complete penetration. Explanation 1 of Section 375, IPC categorically states that the term vagina includes labia majora. FGM, which requires insertion of a sharp object into the vagina of a child, maybe covered under Section 3, POCSO Act read with Explanation 1 of section 375 IPC.

The National Policy for Children, 2013 (NPC) affirms that: ”the State is committed to taking affirmative measures – legislative, policy or otherwise – to promote and safeguard the right of all children to live and grow with equity, dignity, security and freedom, especially those marginalized or disadvantaged; to ensure that all children have equal opportunities; and that no custom, tradition, cultural or religious practice is allowed to violate or restrict or prevent children from enjoying their rights.” The NPC recognizes and priorities the right to health, survival, development and protection as inalienable rights of children. With regard to protection, the NPC recognizes that “a safe, secure and protective environment is a precondition for the realization of all other rights of children.” It commits to creating ”a caring, protective and safe environment for all children, to reduce their vulnerability in all situations and to keep them safe at all places, especially public spaces”, and protecting children from all forms of violence, abuse, exploitation and discrimination, or any activity that harms their personhood or impedes their development.

The centrally sponsored Integrated Child Protection Scheme (ICPS), launched in 2009 by the Ministry of Women and Child Development, aims to create and establish an efficient protective system for vulnerable children. Its objectives include institutionalizing and integrating essential services and strengthening structures for emergency outreach, institutional care, family and community-based care, counseling and support services; strengthening child protection at the family and community level, and promoting preventive measures to protect children from situations of vulnerability, risk, and abuse. The scheme aims to integrate service provision into a range of existing services to cater to the multiple needs of children in difficult circumstances, through an interface with various sectors, including health, education, judiciary, police, and labor, among others. Systems under ICPS promote the right to privacy and confidentiality of the child and institutionalization of the child is seen as a measure of last resort.

While the practice of carrying out FGM may qualify as a form of “hurt or grievous hurt” under the IPC and a crime under Section 3 of the POCSO Act is carried out with an instrument used for cutting and may be addressed under the existing laws of sexual assault, child sexual abuse, and domestic violence, addressing this practice requires a more holistic approach. Such an approach needs to address the various other aspects of FGM including abetting or aiding the practice, propagating the practice, prevention of FGM, regulations on medical/health professionals who carry out this practice, the duty to report, support and rehabilitative provisions, and awareness generation.

As mentioned earlier, khatna is either carried out by Mullanis, women who have a semireligious standing, or by traditional cutters or by doctors. According to a 2008 UNFPA report titled ‘A Qualitative Study on FGM among the Dawoodi Bohra Community’, it was observed that religious beliefs regarding FGM were not changing in the community but very minor changes in approach regarding the appropriate age of the girls (when they should be operated upon), increasing dependence on private doctors and nurses instead of traditional FGM performers, was silently creeping in the society.[[13]](#footnote-13) This report suggests that those who perform or abet the performance of and propagate FGM should all be held guilty of the offense.

On the issue of reporting cases of FGM, most countries target health professionals, social workers, and teachers. The Protection of Children from Sexual Offences Act, 2012 under Section 19 makes it mandatory for any person who has any information of the offense to report to the police. Young girls are usually taken by a female relative for the Khatna and very often are themselves not aware of what is happening to them. In such a case, thus, it is recommended that whoever, including teachers, doctors, etc., come upon any information of the commission of such an offense, they are duty-bound to inform the police for necessary action

## FGM cannot be justified as a religious practice?

FGM In many places, the practice of FGM is often linked to a ritual marking the coming of age and initiation to womanhood.[[14]](#footnote-14) In a study conducted among women of the Dawoodi Bohra community[[15]](#footnote-15), it was found that religious requirements, tradition, custom, and they wish to curb the girl’s sexuality were the main reasons for the practice.

Articles 25 and 26 of the Indian Constitution guarantee the right to freedom of religion and freedom to manage religious affairs. The individual right to religious freedom is guaranteed under Article 25. However, such freedom is subject to provisions of Part III of the Indian Constitution i.e., to fundamental rights including the fundamental right to equality and non-discrimination based on sex as guaranteed under Articles 14 and 15 of the Indian Constitution. Such freedom is also subject to public order, morality and health.

The practice of FGM is an act that targets women to curb girls’ and women’s sexual desires and leads to ill health effects. Women and girls are seen as objects with sexual desires that need to be curbed to protect women and girls from being violated by other men. Such practice is unconstitutional as it genders stereotypes women and girls and thus is violative of their fundamental rights under Articles 14 and 15 of the Indian Constitution. Such practice, in the garb of religion and the object to protect girls and women, victimizes women and violates their rights to physical autonomy, to be in control of their bodies, and to be protected from physical violence and mental trauma and thus is violative of their right to life guaranteed under Article 21 of the Indian Constitution. Gender stereotyping is contrary to the principles of equality as enshrined in the Indian Constitution.

The Supreme Court in Anuj Garg v. Hotel Association[[16]](#footnote-16) while adjudicating a challenge to Section 30 of the Punjab Excise Act, which prohibited the employment of any man under the age of 25, and any woman, in any part of an establishment in which liquor or another intoxicating drug was being consumed, rejected the gender stereotypical arguments that the said legislation was essential to ensure the “security” of women.

The Court observed that:

 “The present law ends up victimizing its subject in the name of protection. In that regard, the interference prescribed by the state for pursuing the ends of protection should be proportionate to the legitimate aims…Gender equality today is recognized by the European Court as one of the key principles underlying the Convention and a goal to be achieved by Member states of the Council of Europe…It is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy. This is the backdrop of deeper judicial scrutiny of such legislation the world over…Therefore; one issue of immediate relevance in such cases is the effect of the traditional cultural norms as also the state of general ambiance in the society which women have to face while opting for employment that is otherwise completely innocuous for the male counterpart.

The Supreme Court in the said case held that:

“The Court’s task is to determine whether the measures furthered by the State in form of legislative mandate, to augment the legitimate aim of protecting the interests of women are proportionate to the other bulk of well-settled gender norms such as autonomy, equality of opportunity, right to privacy et al. The bottom-line in this behalf would a functioning modern democratic society which ensures freedom to pursue varied opportunities and options without discriminating based on sex, race, caste or any other like basis.”

The group/denomination’s right to religious freedom to manage one’s religious affairs is guaranteed under Article 26.[[17]](#footnote-17) However, such freedom is also subject to public order, morality and health.

The Supreme Court, in Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi v. State of Uttar Pradesh while upholding the constitutional validity of Uttar Pradesh Sri Kashi Vishwanath Temple, 1983 governing the management and administration of the Vishwanath Temple that overrode customs and usages, laws, and decrees to the contrary, held that:

“The denomination sect is also bound by the constitutional goals and they too are required to abide by the law; they are not above law. Law aims at the removal of the social ills and evils for social peace, order, stability, and progress in an egalitarian society. … For instance, untouchability was believed to be a part of Hindu religious belief. But human rights denounce it and Article 17 of the Constitution of India abolished it and its practice in any form is a constitutional crime punishable under the civil Rights Protection Act. Article 15(2) and other allied provisions achieve the purpose of Article 17.”

The practice of FGM regardless of being a religious practice of the Bohra community or not is subject to constitutional morality and the Bohra community will have to bow to the constitutional norms of equality and non-discrimination. Such practice will not be protected under Article 26. Gender justice, that is non-discrimination at the very least, is part of the constitutional morality of India. As explained earlier, the practice of FGM is violative of Articles 14 and 15 to the extent it runs counter to gender justice. It also offends Articles 25 and 26 of the Indian Constitution as it runs counter to constitutional morality.

# **Conclusion**

While it has been demonstrated above that some provisions exist in Indian law for criminal action against any form of hurt, there is no specific mention of FGM in our laws and the practice largely goes unnoticed. It has also been seen, internationally, that it has proved necessary to have a specific law dealing with the subject, which addresses not only prosecution but also prevention, education, awareness building, relief, and rehabilitation. Thus, the discussion here is conclusive that a separate law on FGM is necessitated for similar reasons, that is, to expose the problem and address it as a harmful criminal practice and not as an acceptable religious practice.

1. https://www.hindustantimes.com/static/fgm-indias-dark-secret/ [↑](#footnote-ref-1)
2. See https://sahiyo.com/2016/01 dated April 13, 2016. [↑](#footnote-ref-2)
3. 3 Article 3, UDHR: “Everyone has the right to life, liberty and security of person.” Full text of UDHR available at: http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng. Also Article 6(1), ICCPR: [↑](#footnote-ref-3)
4. Article 12, ICESCR: “1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.  [↑](#footnote-ref-4)
5. Article 5, UDHR: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” [↑](#footnote-ref-5)
6. Full text of UNCRC available at: http://www.ohchr.org/en/professionalinterest/pages/crc.aspx [↑](#footnote-ref-6)
7. Article 1, CEDAW. Full text of CEDAW available at: http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article1 [↑](#footnote-ref-7)
8. ‘Female Genital Mutilation: A Matter of Human Rights’, Centre for Reproductive Rights (New York, 2006) at p. 14 [↑](#footnote-ref-8)
9. Article 6, UNCRC: “1. States Parties recognize that every child has the inherent right to life. [↑](#footnote-ref-9)
10. Section 324 of IPC: “Voluntarily causing hurt by dangerous weapons or means.– Whoever, except in the case provided for by section 334, voluntarily causes 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, [↑](#footnote-ref-10)
11. Rasheed Bhagat, ‘Ban this barbarous practice!’, Hindu Business Line, July 29, 2014. Available at: http://www.stopfgmmideast.org/india-ban-this-barbarous-practice/ [↑](#footnote-ref-11)
12. Section 3(b) of POCSO: “Penetrative sexual assault.- A person is said to commit “penetrative sexual assault” if- (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 [↑](#footnote-ref-12)
13. Dr. Farida Shah, ‘A Qualitative study on FGM/FGC among Dawoodi Bohra Community’, at p. 19 [↑](#footnote-ref-13)
14. UNFPA, ‘Implementation of the International and Regional Human Rights Framework for the Elimination of Female Genital Mutilation’, November 2014, at p. 16 [↑](#footnote-ref-14)
15. R. Ghadially, ‘All for ‘Izzat’: The Practice of Female Circumcision among Bohra Muslims’, Manushi, No.66, September – October 1991 [↑](#footnote-ref-15)
16. 2008 (3) SCC 1 [↑](#footnote-ref-16)
17. “Article 26 – Freedom to manage religious affairs: Subject to public order, morality and health, every religious denomination or any section thereof shall have the right: (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law.” [↑](#footnote-ref-17)