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Is Culture Really the Culprit Understanding Female Genital Mutilation Legally

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ABSTRACT

Injustice anywhere is a threat to justice everywhere said Martin Luther King. The recent sabarimala case has reminded us of a yet another grievous non-criminalised offence that has been in practice in the society for ages – Female Genital Mutilation. Female Genital Mutilation comprises all procedures that involve partial or total removal of the external female genitalia or other injuries to the female genital organs for non- medical reasons. While the exact number of girls and women being subjected to FGM still remains unclear it has been estimated that at least 200 million girls and women in 30 countries, including India, have been subjected to the practice out of which 44 million are girls below the age of 15, who are considered as juveniles. In India this practice is prevalent among the Dawoodi Bohra Muslim Community who preserve it as a matter of customary tradition. In spite of the Supreme Court’s insistence on criminalising FGM it still hasn’t found its way into the Indian statute books. The law and criminal justice system generally don’t recognise sexual violence occurring within the family as a separate crime, hence cases are rarely filed and a juvenile has no option but to suffer in silence. By following the Gandhian principle that “every practice inconsistent with the morals of the age is fit to be abolished”, we as legal luminaries of today and tomorrow ought to have the judicial activism to be instrumental in criminalising the atrocities of this barbaric practice.

One “O Lord!! Why have you not given woman the right to conquer her destiny?

Why does she have to wait head bowed,

By the roadside, waiting with dire patience,

Hoping for a miracle in the morrow?”

- **Rabindranath Tagore**

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I. INTRODUCTION

The contours of statute books is broadening day by day with new forms and types of violence against women being included in it. Yet it fails to take into cognisance a form of violence against girls that has been in practise in the society for ages- Female Genital Mutilation. Female Genital Mutilation comprises all procedures that involve partial or total removal of the external female genitalia or other injuries to the female genital organs for non-medical reasons³. This so called cultural practice is mainly prevalent among a few Shia sects including the Dawoodi, Suleimani and Alvi Bohras and a few Sunni sub-sects in Kerala, Rajasthan, Gujarat, Maharashtra. It is mainly performed on juveniles.

Young girls incapable of understanding their surroundings are taken to a dark house by luring them with false promises of getting them chocolates or sweets. They are forced to lie down and without anaesthesia using crude weapons like hot knife, blade etc. their clitoris is removed while they are shrieking in pain.

In the past five years, various organisations like WeSpeakOut and Sahiyo have broken the glass ceiling and exposed the plight of young Bohra girls who have been subjected to this horror. According to WHO, FGM/C can be classified into four types viz:

Type 1/Clitoridectomy- Partial or total removal of the clitoris and/or clitoris hood/ prepuce

Type 2/ Excision- Partial or total removal of the clitoris and labia minora, with or without the labia majora

Type 3/Infibulation- Removal of the labia minora, labia majora and sewing of the vaginal opening with or without removal of the clitoris.

Type 4- All other medically unnecessary procedure like nicking, pricking, piercing and cauterization of the female genitalia⁴.

II. REASONS FOR PRACTICING FEMALE GENITAL MUTILATION

Proponents of female genital mutilation take refuge by citing Daim-ul-islam and sahifa as sources for the practise of FGM/C. However, the exact Hadith⁵ on which the Daim-ul-islam and sahifa are based on or quote to promote FGM/C is unclear. Moreover, there is no mention of FGM/C in Quran which is regarded as the sacred book for muslims. However, the Syedna, the spiritual leader of Bohras, has declared Daim-ul-islam as the binding text on the Bohras.

³ Female Genital Mutilation/cutting: A Global Concern, UNICEF, New York,2016

⁴WHO website: <http://www.who.int/reproductivehealth/topics/fgm/overview/en/>

⁵ Hadith is a record of oral accounts of the sayings of the Prophet. Hadith is considered as the main source of Sunnah

Thus, the Syedna endorses Daim-ul-islam which advocates FGM/C and therefore people blindly follow it as they have unquestioning faith in their religious leader.

Traditional belief includes the ideal that FGM/C is the rite of passage to womanhood and this in turn is connected to the marriageability of the circumcised women. Girls who have not undergone FGM/C are considered to have not completed the initiation ceremonies of entering into Bohra community and are viewed with a lot of suspicion and distrust pertinent to their chastity.

Traditional cutters who predominantly perform this ritual depend on this for their daily bread. As a result, they insist in the continuance of FGM/C for their own sustenance. This can also be inferred from their maintaining of close relationship with the local religious leader.

It is mainly argued that FGM/C is performed to effectively curtail sexual instincts and pleasure as FGM/C involves the removal of clitoris which is the sole part that provides sexual pleasure. Furthermore, there are certain beliefs within the community that a woman will go astray if FGM/C is not performed. Women's ability to curb their sexual urge or "control" was constantly seen as a virtuous trait associated with maturity, responsibility and morally correct behaviour by the community⁶. The heavy moral expectations of Bohra women to not be sexually active outside marriage, is also seen as the core identity trait of women from the community, making them distinct and in some ways morally superior⁷. As a result, supporters of FGM/C claim that this risky ritual helps a woman to control her sexual urges towards men other than her husband.

In order to reside peacefully in a society, it is expected from an individual to be a conformist and not a rebel. Hence, the individuals belonging to the Bohra community are expected to conform to the ideals of FGM/C notwithstanding their choice. Families which do not subject their girls to FGM/C are looked down by the community with hatred and malignity. These families are socially isolated from the community with the result that they are completely deprived of community benefits. Furthermore, the misaaq⁸ done by the girls who have not been subjected to FGM/C is regarded null and void, thus depriving them the right to follow religious practises. Reasons to this deprivation can be traced to the belief that the clitoris is a sinful appendage and on its removal the girl attains physical purity leading to spiritual purity thus enabling her to fulfil her religious vows.

⁶ Lakshmi Anantnarayan, Shabana Diler, Natasha Menon, The clitoral hood a contested site, [2018],p 74.

⁷ Ibid, p 74

⁸ Misaaq means a ceremony meant for boys and girls among the Bohras when they come of age wherein religious vows are taken.

III. IMPACT OF FEMALE GENITAL MUTILATION

Although it has been claimed by many that FGM/C has health benefits, none is scientifically proven. On the other hand, it affects a girl in many ways. These impacts include physical, psychological and sexual. Two main types of physical impact can be discerned from the narrative-immediate and long term. Immediate impact includes excruciating pain during and after the procedure, bleeding, difficulty in walking, burning during urination. Sometimes, if the procedure involves the removal of labia minora and labia majora along with the clitoris, it may cause excessive bleeding even leading to death. In the long term, it has been observed that about 10% of girls suffer from recurring Urinary Tract Infection(UTI) and sometimes even incontinence. Further, girls who have undergone FGM find it very difficult and uncomfortable to wear sanitary napkins. Furthermore, they experience crushing pain during menstruation. Sometimes, the circumcised woman faces serious complications during delivery of her child.

Psychological impacts as a result of FGM/C differ from person to person. But it has been commonly observed that girls have a sense of anger, betrayal, fear and helplessness. More than these they feel punished by the society. FGM/C represents a violation of someone's physical intactness and can be classified as a psychological trauma and a potential cause of post-traumatic stress disorder(PTSD)⁹. Some girls also experience horrendous nightmares of their trauma of FGM/C. Thus it is evident that this wound created in their childhood is so grievous that its scar remains permanently.

Although the process is aimed at controlling adulterous relationship, it impacts a woman's ability to enjoy a good sexual life with her husband as well. These difficulties begin with the process of initiating sex. The circumcised woman has an extremely low sex drive. Thus, it is always the male who has to initiate the act. Furthermore, these women turn disinterested in the middle of the sex owing to their lack of trust in their partners as a result of their bad memories of FGM/C. Sometimes, they experience severe pain in their genitalia during sex which may lead to bleeding and burning. This may result in the abandonment of the whole act abruptly thus inhibiting the fulfilment of the sexual instincts of both the partners. This inhibition leads to psychological disturbances thus hampering the institution of family.

IV. MARCHING FORWARD

Although the origin of FGM/C still remains a contested issue, the prevalence of FGM/C as a practise in Africa and Egypt and not in predominately Islamic countries like Saudi Arabia

⁹Behrendt&Morris(2005), Posttraumatic stress disorder and memory problems after female genital mutilation, *American journal of psychiatry*,16(5):1000-1002.

suggests that FGM/C in the Bohra community traces its origin in Africa and Egypt. However the supporters of FGM/C argue that this practise has its roots in mainstream Saudi Arabia. A deeper insight into this argument reveals that in Saudi Arabia, FGM/C is practised only by a very small fraction of people, the Suleimani Ismails whose ancestry can be traced to Egypt and Africa. However, owing to its cruel nature and a number of human rights violation, FGM/C has been banned in Egypt and Africa decades ago. But in India FGM/C is still dreaded in silence. “FGM/C constitutes violence against women and is a form of gender-based discrimination. FGM/C violates numerous rights that are enshrined in several international human rights treaties that India is party to and therefore has an obligation to protect”¹⁰. These treaties include:

- Convention on the **E**limination of All forms of **D**iscrimination Against **W**omen
- International Covenant on **E**conomic, **S**ocial and **C**ultural **R**ights
- United Nations **D**eclaration of **H**uman **R**ights.

For instance, *Article 2* of the CEDAW urges the state parties to condemn discrimination against women in all forms and to eradicate such discriminations without delay. Supporting this framework, *Article 5(a)* stresses the parties to modify the social and cultural pattern with a view to eliminate the prejudicing and customary practises based on gender hierarchy.

This practise is also a gross violation of several fundamental rights guaranteed by the Indian Constitution.

Article 14: Equality before law

Article 15: Prohibition of discrimination on the grounds of sex

Article 21: Protection of life and personal liberty.

The proponents of FGM/C seek refuge under *Article 25* and *26* of the Indian Constitution by claiming that the practise is followed in the exercise of the right to religious freedom. However, a broader understanding of the Indian Constitution will reveal that such freedom is also subject to reasonable limitations including public order, morality and health depriving them of the benefit of *Article 25* and *26* of the Indian Constitution.

Coming to the issue of criminalising FGM/C in India, it would be desirable to look at the existing legal frameworks which indirectly address the issue of FGM/C. Till now, FGM/C is not explicitly an offence under the IPC and on a complaint the police are obligated to register a case *U/S 326* of the IPC. However, *Section 3* of the POCSO¹¹ Act penalises penetrative sexual

¹⁰ http://nhrc.nic.in/documents/india_ratification_status.pdf

¹¹ Protection of Children From Sexual Offences Act, 2012

assault. Furthermore, *Explanation 1 of Section 375 of IPC* categorically states that the term “vagina” includes labia majora. On a deeper analysis of both these provisions, it can be inferred that FGM can be covered U/S 3 of the POCSO Act r/w Explanation 1 of S.375 of the IPC. *While the practice of carrying out FGM/C may qualify as a form of “hurt or grievous hurt” under the IPC and a crime under Section 3 of the POCSO Act being 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/C including abetting or aiding the practice, propagating the practice, prevention of FGM/C, regulations on medical/health professionals who carry out this practice, duty to report, support and rehabilitative provisions and awareness generation*¹². A panacea for all these issues would be the enactment of a separate legislation criminalising this barbaric practise as a whole and specifically targeting the traditional circumcisers and medical practitioners. Unless legislation is accompanied by measures to influence cultural traditions and expectations, it tends to be ineffective since it fails to address the practise within its broader social context¹³. One effective way of aiding legal framework in eliminating this practise would be petitioning the Syedna to ban FGM/C as his words are considered to be final among the Bohras. “HIS ONE WORD CAN SAVE MILLIONS OF LITTLE YOUNG GIRLS”

V. CONCLUSION

Thus it has been demonstrated that the issue of FGM/C still remains an open secret, with girls writhing in pain every second throughout their lifetime both mentally and physically. Thus in this extant era of women emancipation this barbaric practise holds no reason to be kept alive. Hence, it is humbly submitted that this practise demands active legislation at the earliest accompanied by community awareness about the horrors of this practise and the need to eradicate it. Therefore, now may be a very good time for us to reimagine ritual purification ceremonies that celebrate Bohra girls, their identities, health and well-being, devoid of FGM/C¹⁴. It would be pertinent to conclude by referring to the observations made by Hon’ble Justice D.Y.Chandrachud of Supreme court of India, during the hearing in the case seeking abolition of this practice of FGM/C.

“Control over one’s genitalia is vital to privacy, autonomy, dignity.”

¹²<http://www.lawyerscollective.org/wp-content/uploads/2012/07/Female-Genital-Mutilation-A-guide-to-eliminating-the-FGM-practice-in-India.pdf>

¹³ <http://www.tandfonline.com/doi/full/10.1016/j.rhm.2015.10.001>

¹⁴ Lakshmi Anantanaryanan ,Supra 4, p.88