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## The Hidden Scourge: Addressing the Female Genital Mutilation in India

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*The patriarchal society has always controlled the bodily autonomy of females, subjecting them to harmful cultural practices. The issue of Female Genital Mutilation/Khatna entails removing the external female genitalia through part or whole or causing excessive harm to the genital organs due to non-medical reasons. It exemplifies the struggle of females for their rights, as highlighted by the statement of Justice D.Y. Chandrachud 'One has supreme authority over genitalia'. The practice shrouded in secrecy, perpetuated by societal norms and fear of ostracisation in the Dawoodi Bohra community, violated the human rights of the female for decades. In the past, in the name of religious practice, such barbaric activity continues without any specific laws and preventive measures in India. This research paper tries to analyse the religious justification and the history of continuing the practice of female genital mutilation, which is not even mentioned in the Quran. This paper intends to highlight the magnitude of this problem in India. The researcher will try to outline and counter the overlooked factors while arguing against banning the act of female genital mutilation, which causes severe health consequences and infections and even leads to the death of innumerable girls in India. This research paper will also try to answer whether the practice of FGM/C comes under Articles 25 and 26 as an essential religious practice. Furthermore, this paper will advocate various interventions and strategies, including community-based awareness campaigns, legal advocacy, and the role of education in transforming societal attitudes. Drawing insights from multiple reports, data, and international measures, countries which have successfully banned FGM, like - Burkina Faso, Somalia, Egypt and the Gambia to bring out the scope and outline a comprehensive roadmap for an effective measure to eradicate this practice in India, ultimately safeguarding the life of females.*

**Keywords:** *bodily autonomy, genital mutilation, human rights, religious practice.*

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## INTRODUCTION

The United Nations has designated '**Her Voice. Her Future**' as the theme for the International Day of Zero Tolerance for Female Genital Mutilation for the current year.<sup>1</sup> This theme underscores the critical role of amplifying the voices of girls and women in ending this harmful practice. This paper aligns with this theme by analysing the concept of female genital mutilation, which is widely prevalent in the Dawood Bohra community in the guise of essential religious practice. The culture of patriarchy has been prevalent for decades in India, where women are subjected to men's autonomy and have always been the ones who faced challenges since their birth. Even after 77 years of Independence, the suppression of women and men's domination are widely prevalent in the country. In the name of essential religious practices, females are forced intentionally for their genital removal at the age of six and most of them are unaware of the same. However, this practice is witnessed in women too. They have been fighting for their rights since independence and in the name of religious practices, they have been acting as a scapegoat for so long. This ongoing struggle paints a picture of women as pawns manipulated by men to serve their agendas. The prevalent practice of Female Genital Mutilation has drawn the attention of different corners of the world. Till now, in India, it has remained invisible and largely a dark secret that has taken the lives of several females and even led to severe health consequences.

In the line of the same, this paper will try to examine the concept and the history of Female Genital Mutilation in India, its religious justification, and the reason for its existence. Furthermore, this paper will try to analyse how this practice leads to the violation of various fundamental rights involving health and privacy rights, which causes serious health consequences during menstruation and at the time of maternity. This barbaric concept violates

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<sup>1</sup> 'Her Voice. Her Future: Theme for the International Day of Zero Tolerance for Female Genital Mutilation 2024' (United Nations) <<https://www.un.org/en/observances/zero-tolerance-female-genital-mutilation-day>> accessed 30 May 2024

Article 21<sup>2</sup>, the right to life with dignity, which is a serious imposter on India's development. This practice not only hinders individual well-being but also poses a significant obstacle to India's progress towards achieving the Sustainable Development Goals. On the one hand, while India is dreaming of fulfilling the Sustainable Development Goals by 2030, on the other hand, such activity causes serious barriers and bleaks its dream towards its achievement. Despite various international uproars and voices for banning the practice by various countries, setting up conventions and laws, and campaigning for anti-FGM, India is still behind without any specific legal precedent or laws.

The whole idea of a research paper is centred on the protection of women and girls from this harsh cruelty while advocating for stringent laws and punishment against it. Exploring the potential application of existing legislation in India, like the Protection of Children from Sexual Offences (POSCO)<sup>3</sup>. Essentially, it will counter the idea of cruel practice by the Bohra community, considering it as essential religious practice under Article 25<sup>4</sup> and Article 26<sup>5</sup> by applying the doctrine of essential religious practice test. Furthermore, this paper will also try to examine the physical, psychological, sexual and mental consequences of FGM, considering both the criticism and counter-criticism for comprehensive analysis.

Finally, this lays down a groundwork for subsequent sections of the paper that will explore different legal frameworks, laws, campaigns and education aimed at eradicating Female genital mutilation. It will suggest a future roadmap for removing the societal barriers that ultimately aim to oppress women through such practices.

## THE CASE FOR FEMALE GENITAL MUTILATION

'Injustices and harmful practices must be opposed because they are wrong and not because of the number of people they affect.'<sup>6</sup> The practice of Female Genital Mutilation has a long and

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<sup>2</sup> Constitution of India 1950, art 21

<sup>3</sup> Protection of Children from Sexual Offences Act 2012

<sup>4</sup> Constitution of India 1950, art 25

<sup>5</sup> Constitution of India 1950, art 26

<sup>6</sup> Masood Fariwar, 'Activists See India as New Front in Fight Against Female Genital Mutilation' *VOA News* (08 March 2024) <<https://www.voanews.com/a/activists-see-india-as-new-front-in-fight-against-female-genital-mutilation/7519614.html>> accessed 30 May 2024

complex history, with its origin shrouded in secrecy, which is widely prevalent in different corners of the world. According to the World Health Organisation (hereafter 'WHO'), Female Genital Mutilation/cutting (hereafter, 'FGM' or 'FGM/C') is *any procedure that involves partial or total removal of the external female genitalia or other injury to the female genital organs for cultural or non-therapeutic reasons.*<sup>7</sup> The word mutilation underscores the severity of this practice, which has caused a serious violation of human rights since its existence. Within Islam's Shia sect, there is a community called Dawoodi Bohras; this practice is widely prevalent in this community. This is a serious violation of the dignity of women, which is mostly practised in the girl child, this issue is not restricted to the religious issue but is a serious call for human rights violation of both girl child and women. A nation's progress hinges on the well-being of its citizens, but when injustice has been done to them, they need serious attention from the government. Ironically, despite its existence for decades and documented cases of death and severe health issues, India has yet to enact legislation to protect women and girls from such cruelty. Furthermore, it offers no health benefits but causes a painful and traumatic situation for the women for a lifetime.

The practice of Female Genital Mutilation (FGM) reflects a deeply ingrained societal issue: gender inequality. This often results in damaging and causing unfair gender norms for women. This custom is upheld by both men and women, but any attempt to move away from participating in this practice may even result in exclusion from society. For women, this practice sounds like being caged in a prison.

**The practice is categorized into four main categories:**

- Partial or total removal of the clitoris and/or the prepuce (clitoridectomy);
- Partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (excision);
- narrowing of the vaginal orifice with the creation of a covering seal by cutting and positioning the labia minora and/or the labia majora (infibulation);

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<sup>7</sup> 'Eliminating female genital mutilation an interagency statement' (World Health Organization) <[https://iris.who.int/bitstream/handle/10665/43839/9789241596442\\_eng.pdf?sequence=1](https://iris.who.int/bitstream/handle/10665/43839/9789241596442_eng.pdf?sequence=1)> accessed 30 May 2024

- Other harmful procedures to the female genitalia for non-medical purposes, for example, pricking, piercing, incising, scraping and cauterization.<sup>8</sup>

The rationality behind this practice given by scholars posits a number of justifications for its continuance. So, the justifications include preservation of ethnic identity, femininity, female purity/virginity and family honour, maintenance of cleanliness and health, and assurance of women's marriageability.<sup>9</sup> This is a violation of the rights of the child as it is also carried out on minors, and a violation of the right to the 'highest attainable standard of health'<sup>10</sup> and 'bodily integrity of a female'.<sup>11</sup> It is an expression of gender inequality and discrimination *related to the historical suppression and subjugation of women*.<sup>12</sup>

The recent research investigation conducted on the prevalence of FGM/C in India yielded concerning results. It discloses that in the Bohra community, 75% of all pre-adolescent daughters within the sample had undergone FGM/C. Furthermore, 97% of those participants who remembered their FGM/C experience from childhood characterized it as a painful memory. The continuation of the female circumcision ritual, which is also known as FGM, in which they cut the external layer of genitalia, also known as the clitoral hood, often justified it for a good married life.<sup>13</sup> This notion of married life shows that women who have undergone the practice of FGM have more chances of a dead neonatal child than women who have not undergone such practice. The survivors of FGM/C are at high risk of experiencing long-term consequences and short-term consequences. This completely shows that this practice is a clear violation of human rights. Even thousands of women from this community come in front to oppose this practice as it has already flown much blood in the name of religious practice.

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<sup>8</sup> *Ibid*

<sup>9</sup> A J Gage and R Van Rossem, 'Attitudes toward the discontinuation of female genital cutting among men and women in Guinea' (2006) 92(1) *International Journal of Gynaecology and Obstetrics* <<https://doi.org/10.1016/j.ijgo.2005.09.019>> accessed 30 May 2024

<sup>10</sup> Convention on the Rights of the Child 1989

<sup>11</sup> 'Female genital mutilation : a joint WHO/UNICEF/UNFPA statement' (*World Health Organization*) <<https://iris.who.int/handle/10665/41903>> accessed 02 June 2024

<sup>12</sup> 'Policy on female genital mutilation (FGM)' (*Ontario Human Rights Code*, 25 June 2010) <<https://www3.ohrc.on.ca/sites/default/files/policy%20on%20female%20genital%20mutilation%20fgm.pdf>> accessed 02 June 2024

<sup>13</sup> Jyoti Shelar, 'Declare India country with FGM prevalence' *The Hindu* (09 December 2016) <<https://www.thehindu.com/news/cities/mumbai/%E2%80%98Declare-India-country-with-FGM-prevalence%E2%80%99/article16780276.ece>> accessed 02 June 2024

*'I remember my mum whispering with my granny and aunties that the time had come now. Then she mentioned to my dad, who said do what's needed. She told me we were going to buy a doll and took me to a woman's house in a Bohra community housing set-up. We were told to wait in the sitting area, another friend of mine was sitting with her mum. She was called in first, I heard screaming and then she came out supported by her mum. I was taken in next; the lady told my aunt to lay me on a table and remove my undies. My mum had left because she said she couldn't watch. My aunt held me down tightly, the lady removed a new razor blade in front of me and then bent down between my legs. I felt a sharp cut and heard myself scream and cry. The lady then gave me cotton wool and my aunt put it in my undies to absorb the blood. We were then led out of the room. For a week after, my mum washed my vagina with diluted Dettol and the matter was hushed up and never talked about.'*<sup>14</sup>

The above narrative details the experience of the young child who was entirely unaware of the impending procedure and subsequently endured immense physical and mental suffering. This harrowing incident compels us to confront three critical questions.

- Upon whom does the responsibility lie for safeguarding the bodily autonomy of minors?
- Can religious practices that inflict pain and demonstrably harm young girls ever be deemed justifiable?
- Should the tenets of religious belief be permitted to supersede fundamental human rights?

All these three questions are paramount to answering the persistence of FGM/C, which signifies a continuation of a harmful tradition that demonstrably violates the fundamental rights and well-being of girls and women. It is imperative to actively challenge these practices and prioritise the health and bodily autonomy of individuals.

The continuation of such practice leads to gender discrimination and inequality. India occupies the rank 108 out of 193 countries, with a score of 0.437, according to the Gender Inequality Index

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<sup>14</sup> Mariya Taher, 'Understanding Female Genital Cutting in Dawood Bohra Community: An Exploratory Survey' (Sahiyo) <[https://sahiyo.org/images/resource-pdf/sahiyo\\_report\\_final-5.21.19.pdf](https://sahiyo.org/images/resource-pdf/sahiyo_report_final-5.21.19.pdf)> accessed 02 June 2024

released by the United Nations Development Programme.<sup>15</sup> It demarcates the condition of women and girl child in India. A long history of male dominance has fostered a sense of dependence among women, perpetuating the cycle of oppression. An examination of the data reveals that four states in India, Gujarat, Madhya Pradesh, Rajasthan, and Maharashtra, have a high concentration of the Bohra community. These four states were included in the study, with a total of 94 participants. Among the participants, 83 were women and 11 were men. Disturbingly, the study also unearthed a case of an eight-year-old girl who had undergone FGM/C as recently as 2017. The procedure was botched, and the young girl was subsequently stitched up twelve hours later.<sup>16</sup> This shows that the condition of women and girl children is like an ‘Out of the frying pan into the wire’, which is getting worse day by day. Then again, a question arises: why only females are subjected to purity? Why are they the only ones who are forced to undergo such practices and not men? The irony is that in a country where, on the one hand, women are considered Goddess and on the other hand, they have to perform such cruel practices to show them they are pure otherwise, they will be ostracised by the community. The concept of ‘purity’ is itself a problematic social construct. The Indian Constitution guarantees that ‘No person shall be deprived of his life or personal liberty except according to procedure established by law.’<sup>17</sup> This explicitly protects individual autonomy. This practice is a violation of the rights of the women and girl child in the country. *Women’s right to dignity supersedes the right to freedom of religion. The law cannot and should not question the idea of divine, but the law can and must regulate human action that hurts others,*’ said Mr Tharoor.<sup>18</sup> This principle is crucial in the fight to eradicate FGM/C from the country.

Adding weight to the calls for ending FGM/C, the organization Speak Out on FGM has documented that at least 90,000 women from the Bohra Muslim community across all socioeconomic backgrounds have reported undergoing the procedure and desire its eradication.

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<sup>15</sup> ‘India jumps 14 ranks on Gender Inequality Index 2022, ranking 108 out of 193 countries’ *The Times of India* (14 March 2024) <<https://timesofindia.indiatimes.com/india/india-jumps-14-ranks-on-gender-inequality-index-2022-ranking-108-out-of-193-countries/articleshow/108492304.cms>> accessed 31 May 2024

<sup>16</sup> Shelar (n 13)

<sup>17</sup> Constitution of India 1950, art 21

<sup>18</sup> ‘Ban it as a human right and not a communal issue’ *The Hindu* (06 February 2018) <<https://www.thehindu.com/news/cities/Delhi/ban-it-as-a-human-right-and-not-a-communal-issue/article22663151.ece>> accessed 31 May 2024

Conversely, a countervailing perspective has emerged from a group claiming the support of 69,000 Dawoodi Bohra women under the banner of the Dawoodi Bohra Women's Association for Religious Freedom (DBWRF). This group has petitioned the Supreme Court to intervene and allow the continuation of the practice.<sup>19</sup> However, in response to a writ petition, the Union Ministry of Women and Child Development (WCD) stated that there is no official data or study that supports the practice of FGM/C in India. This raises a critical question: how can official records remain silent when thousands of women are coming forward and requesting protection from this practice?

The issue of FGM/C within the Bohra community in India is not new. In a previous effort to raise awareness, a group called Speak Out on FGM submitted a petition to the United Nations. This petition, filed in 2017, called for India to be recognized as a country where FGM/C is practised. The petition was a courageous act by the 30 women who signed it, highlighting the voices of those who want to see this practice end. They even rolled into a month-long campaign, 'Each One Reach One,' to spread awareness about FGM within the Bohra community. Unfortunately, their voices have yet to be addressed effectively. This practice is often justified as a means to suppress sexual urges in a woman.<sup>20</sup>

However, India's government stance has been contradictory. In 2017, Maneka Gandhi, the Minister for women and child development, said that she would write to respective state governments and Syedna, the Bohra high priest, shortly to issue an edict to community members to give up FGM voluntarily as it is a crime under the Indian Penal Code (IPC)<sup>21</sup> and the Protection of Children from Sexual Offences (POCSO) Act, 2012.<sup>22</sup> If Syedna does not respond, then we'll bring in a law to ban the practice in India. However, the government later retracted its claim of existing data on the practice.<sup>23</sup>

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<sup>19</sup> *Sunita Tiwari v Union of India* (2019) 18 SCC 71

<sup>20</sup> Shelar (n 13)

<sup>21</sup> Indian Penal Code 1860

<sup>22</sup> Protection of Children from Sexual Offences Act 2012

<sup>23</sup> Moushumi Das Gupta, 'Govt will end female genital mutilation if Bohras don't: Maneka Gandhi' *Hindustan Times* (29 May 2017) <<https://www.hindustantimes.com/india-news/practise-of-female-genital-mutilation-should-be-banned-in-india-maneka-gandhi/story-kOhNA4rIYOLOTurkN5zAAM.html>> accessed 31 May 2024



The whole purpose of the above discussion was to understand the concept and condition of women and the long-life consequences on their mental and physical health. It lays the foundation for further critical analysis of the practice of FGM/C in the country and the future roadmap for its eradication.

## CRITICISM AND COUNTER-CRITICISM

The critique supporting Female Genital Mutilation resolves around below arguments:

1. It does not violate any fundamental rights and human rights of females.
2. Bohra Muslims consider FGM/C as an essential religious practice under Article 25<sup>24</sup> and Article 26<sup>25</sup> in the Indian constitution.
3. This practice is also performed in males, known as Male Circumcision.

Let's engage with all the criticism one by one.

**First of all**, those who argued that it does not violate any fundamental and human rights of females. The whole practice of FGM/C is practice without consent, which violates the **right to privacy and bodily integrity of the females**<sup>26</sup>. Even the judgement of *K. S. Puttaswamy v Union of India* (2017)<sup>27</sup> enshrined that the right to privacy is a fundamental right. The Hon'ble court stated that - *The best decisions on how life should be lived are entrusted to the individual... The duty of the state is to safeguard the ability to make decisions – the autonomy of the individual – and not to dictate those decisions.*

This clearly emphasises one's right over one's bodily autonomy, which, by following this practice of FGM/C, violates it. Justice Chandrachud, in his leading judgment, emphasizes the multifaceted nature of privacy, highlighting the importance of individual decision-making. This

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<sup>24</sup> Constitution of India 1950, art 25

<sup>25</sup> Constitution of India 1950, art 26

<sup>26</sup> Constitution of India 1950, art 21

<sup>27</sup> *K. S. Puttaswamy v Union of India* (2017) 10 SCC 1

includes a person's right to make autonomous choices regarding their sexuality, reproduction, and intimate relationships.

Even in the persistent case of *Suchita Srivastava v Chandigarh Administration* (2009)<sup>28</sup> where Justice Balakrishnan, speaking for the Supreme Court bench, noted that *"There is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India... The crucial consideration is a woman's right to privacy and dignity, and bodily integrity should be respected."*

The practice of FGM/ is non-consensual, which lacks the consent of females and deprives them of the decisional autonomy as to whether they want to undergo such practice that involves high consequences. Therefore, it is imperative to understand that the practice of FGM/C violated the right to privacy and bodily integrity enshrined under Article 21 of the Constitution.

**Secondly**, it also violates the **Right to equality and causes gender discrimination** enshrined under Article 14<sup>29</sup> and Article 15<sup>30</sup> of the Indian Constitution. As this practice causes gender-based discrimination to control female sexuality, it puts an unequal burden on women regarding their sex. Article 15(3)<sup>31</sup> even allows for making special provisions for women and children. This practice, which has both short- and long-term consequences, hinders the overall development of females. The women are forced to perform this to prevent their sexual pleasure, and women who are refraining from doing so are not considered worthy of being married to.

**Thirdly**, it also violates the **right to health**<sup>32</sup>. It is inconsistent with public order, health and morality. According to WHO, this practice causes severe long and short-term consequences that create barriers to normal working of females' genitals.<sup>33</sup> The unhygienic circumstances under which FGM is performed, coupled with minimal training of circumcisers, pose a serious threat to the health. The use of tools like knives and blades without any medical training and without

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<sup>28</sup> *Suchita Srivastava v Chandigarh Administration* (2009) 14 SCR 989

<sup>29</sup> Constitution of India 1950, art 14

<sup>30</sup> Constitution of India 1950, art 15

<sup>31</sup> Constitution of India 1950, art 15(3)

<sup>32</sup> Constitution of India 1950, art 19

<sup>33</sup> Alba González-Timoneda et. al., 'Female Genital Mutilation Consequences and Healthcare Received among Migrant Women: A Phenomenological Qualitative Study' (2021) 18(3) *International Journal of Environmental Research and Public Health* <<https://doi.org/10.3390%2Fijerph18137195>> accessed 31 May 2024

anaesthesia caused severe implications for women even risk to life. This practice also causes serious health problems like severe bleeding and other health problems like urinating, later cysts, infections, and problems in childbirth. It causes the major harm due to the invasive surgical techniques. Such dreadful practice seems like torture and cause trauma to females which shows the suppression of women and their health which hinders the development of the country and even bleaks the goal 3 of 'good health and well-being' under the Sustainable Development Goal.<sup>34</sup> Moreover, maintaining a clean and healthy living environment is fundamental to the right to a healthy life. Without access to basic sanitation and hygiene, it becomes extremely difficult to live with dignity and well-being. This applies to everyone, regardless of background or circumstance. Here it shows that the duty of the state is not restricted to safeguarding the rights but also to taking positive steps towards securing the welfare of the people. Therefore, it becomes imperative to understand the long-term and short-term consequences of FGM/C on females.

### **Long Term Consequences:**

Long-term consequences of FGM/C include infections such as HIV or Hepatitis B, which even in young girls' leads to infertility and recurrent miscarriage. 'Depending on the type and severity of the procedure performed, women may experience long-term consequences such as chronic infections, tumours, abscesses, cysts, infertility, excessive growth of scar tissue, increased risk of HIV/AIDS infection, hepatitis, and other blood-borne diseases, damage to the urethra resulting in urinary incontinence, [fistula], painful menstruation, painful sexual intercourse, and other sexual dysfunctions.'<sup>35</sup>

According to the WHO, '*an increased risk for repeated UTIs is well documented in both girls and adult women who have been a victim of FGM/C*'. This shows the long-term consequences of FGM/C,

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<sup>34</sup> 'United Nations, 'Transforming our world: the 2030 Agenda for Sustainable Development' (adopted 25 September 2015) UNGA Res 70/1, Goal 3.' (United Nations) <<https://sdgs.un.org/2030agenda>> accessed 31 May 2024

<sup>35</sup> Deeksha Sharma and Kratik Indurkha, 'Female Genital Mutilation: How Islam and Fundamental Right to Religion Stamp out and confute it', (2019)8 (2) NLIU Law Review <<https://nliulawreview.nliu.ac.in/wp-content/uploads/2022/01/Volume-VIII-Issue-II-90-117.pdf>> accessed 31 May 2024

which caused a lifetime burden on females. Even it caused later surgeries depending upon the procedure it performed.<sup>36</sup>

### **Short Term Consequences:**

Short-term consequences cause hemorrhage and infection in females. However, immediate results include infections, which are generally only reported when women seek hospital treatment. Otherwise, it remains behind the bar. Therefore, the true extent of immediate complications is unknown.<sup>37</sup> Imagine enduring excruciating pain like nothing you've ever felt before. That's what nearly everyone who goes through female genital mutilation (FGM) has to experience. And for many of them, the pain doesn't even stop there. They're left with a constant dull ache and find it hard to move around normally. It's a terrible ordeal that no one should have to go through.

Female Genital Mutilation/Cutting (FGM/C) carries both immediate and long-term consequences that ultimately impact the mental health of the women who undergo it. A study identified a range of emotional responses associated with FGM/C, including anger, guilt, shame, feelings of inadequacy and incompleteness, helplessness, inferiority, and suppression. These emotions can have a lasting impact on the women's lives.<sup>38</sup> Furthermore, the study found that women who have undergone FGM/C often exhibit symptoms of post-traumatic stress disorder, such as persistent irritability, difficulty trusting others, nightmares, and a fear of reliving the experience. The psychological complications arising from FGM/C can be particularly severe, with some experts suggesting that the trauma may be submerged deep in the infant's subconscious and manifest as behavioural disturbances later in life.

**Secondly**, those who argued that FGM/C is an essential religious practice under Articles 25<sup>39</sup> and 26 of the constitution<sup>40</sup>. This is a wrong assumption, as Articles 24 & 26 don't provide any

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<sup>36</sup> Timoneda (n 33)

<sup>37</sup> Carla Makhoul Obermeyer, 'The consequences of female circumcision for health and sexuality: an update on the evidence' (2005) 7(5) <<https://doi.org/10.1080/14789940500181495>> accessed 31 May 2024

<sup>38</sup> Bo Mills and Gordon Turnbull, 'Broken hearts and mending bodies: The impact of trauma on intimacy' (2004) 19(3) <<http://dx.doi.org/10.1080/14681990410001715418>> accessed 31 May 2024

<sup>39</sup> Constitution of India 1950, art 25

<sup>40</sup> Constitution of India 1950, art 26

kind of immunity to such practice. This is the biggest misconception regarding the practice of FGM/C sanctioned in Islam. Islam contradicts it as the Quran says, '*Touch her not with harm, lest the penalty of a great day seize you.*'<sup>41</sup> It is practised secretly in the guise of essential religious practice. It can be understood through the statement of the Supreme Council of Al-Azhar, Cairo, that ruled that FGM had *no basis in core Islamic law or any of its partial provisions, it is harmful and should not be practiced* in the case where a teenage Egyptian girl died during the procedure.<sup>42</sup>

Besides this, Verse 3: 182 of the Quran mentions *Allah never harms those who serve Him*. FGM/C is just opposite to the teachings of Prophet Mohammad, which is majorly concerned about the welfare of the human body. Therefore, the practice of FGM is opposing the Quran and the teachings of Prophet Mohammad.

Those who claim that Female Genital Mutilation/Cutting (FGM/C) falls under the purview of Article 25's 'essential religious practice' and Article 26's protection against 'religious domination' are demonstrably flawed. As established in the landmark case of R.C. Cooper<sup>43</sup> and A.K. Gopalan<sup>44</sup>, fundamental rights in the Indian Constitution are not absolute but can be reasonably restricted for the sake of social welfare and reform. While Article 25(1) guarantees the right to freely practice one's religion, this right is subject to limitations outlined in clause (2)(b)<sup>45</sup> of the same article. This clause empowers the state to enact laws that promote social welfare and reform, even if they may incidentally restrict certain religious practices. Articles 25 and 26, therefore, do not grant unfettered religious freedom; the state retains the authority to enact legislation that curbs harmful practices under the guise of religion, promoting social good over such customs.

All this clearly shows that the practice of FGM/C is not protected under the Indian constitution even if it fails to pass the **Essential Religious Practice test (ERP)/ Doctrine of ERP**. The senior Bohra community leaders, such as Syedna Fakhruddin, declared the practice as "un-Islamic"; the practice being a religious imperative also comes under question. The Human rights

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<sup>41</sup> Population Council, *Delinking female genital mutilation/cutting from Islam* (2008)

<sup>42</sup> *Ibid*

<sup>43</sup> *R.C. Cooper v Union of India* (1970) 1 SCC 248

<sup>44</sup> *A.K. Gopalan v State of Madras* (1950) 1 SCR 88

<sup>45</sup> Constitution of India 1950, art 25(2)(b)

jurisprudence regarding the conflict between 'essential religious practices' and the right to dignity and right to one's own body was developed by the Hon'ble Supreme Court in the landmark Constitutional Bench judgment of *Indian Young Lawyers Assn. v State of Kerala*,<sup>46</sup> popularly known as the (Sabarimala Temple entry case). The question of whether the practice of excluding women from entering the religious place constitutes an 'essential religious practice' was contested.<sup>47</sup>

Justice Chandrachud, who wrote a separate concurring judgment while delivering the verdict, said: "*A practice claimed to be essential must be such that the nature of the religion would be altered in the absence of that practice. If there is a fundamental change in the character of the religion, only then can such a practice be claimed to be an 'essential' part of that religion.*"

The argument associating the practice of FGM/C with Islam is incorrect. An act/practice is only considered Islamic if it can be traced back to a clear foundation. The foundation comes from the sources - The Holy Quran (considered the direct word of God), Sunnah (It refers to the deeds, words, or statements of approval of Prophet Muhammad), Ijma (consensus of scholars), Qiyas (analogical deduction - a process of applying Islamic principles to new situations by drawing analogies to established rulings). However, there is no mention of female circumcision in the Quran and Sunnah.

Within Islamic tradition, the Prophet Muhammad's actions and approvals (Sunnah) serve as a guide for Muslims. Notably, there is no mention of female genital mutilation (FGM/C) in established accounts of the Prophet's deeds or endorsements. However, some traditions (Hadiths) refer to FGM/C. While Hadiths are part of Islamic scholarship, their validity depends on their content and the reliability of those who transmitted them. Scholarly scrutiny ensures that only well-founded traditions are used as guidance. This phrasing avoids technical terms and focuses on the concept of establishing reliable sources for Islamic practices. It highlights the following: The Prophet's actions (Sunnah) are a source of guidance, but FGM/C isn't mentioned

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<sup>46</sup> *Indian Young Lawyers Assn. (Sabarimala Temple-5J.) v State of Kerala* (2019) 11 SCC 1

<sup>47</sup> Timoneda (n 33)

there. Some Hadiths discuss FGM/C, but their authenticity requires careful evaluation. Islamic scholars use a rigorous process to ensure the validity of traditions.

Two prominent Islamic figures challenged the justification for FGM/C. Muhammad Sayyid Tantawi, the Grand Mufti of Egypt, a highly respected religious authority in Sunni Islam, argued that sayings attributed to the Prophet Muhammad (Hadiths) on FGM were unreliable. Similarly, Ash-Shaukany, a leading Islamic legal scholar, expressed a similar view in his book, *Nail-al-autwar*. These interventions by respected figures open the door for a reevaluation of the practice based on reason and human well-being.<sup>48</sup>

Secondly, when we talk about Ijmas, which is based on the consensus of scholars, it should not be in conflict with the Holy book of the Quran, but as FGM/C is not mentioned in the Quran, many scholars have different views related to the practice of FGM/C. So, it does not form a consensus and cannot be read with the source of Islam.

Lastly, when we talk about Qiyas (analogical deduction), Qiyas references ‘analogical reasoning as applied to the deduction of juridical principles from the Quran and the Sunnah’. Here, no analogy can be applied to this practice as both the Holy Book of Quran and Sunnah do not provide the same.

This shows that the practice of FGM/C doesn’t pass the ERP test, as removing such practice would neither change the nature of the religion nor the fundamental character. It is patriarchal dominance in society related to this practice where women are subjected to such practice, which causes long-term consequences and the reason for instability in life. Moreover, the Sabarimala case stated, ‘Nobody of practices can claim supremacy over the Constitution and its vision of ensuring the sanctity of dignity, liberty, and equality.’ It clearly shows that FGM/C cannot be superseded by the rights of the female. Through this, it can be observed that the essential religious practice has the power to alter the fundamental nature, but here, FGM/C cannot alter the fundamental nature. The practice that has continued for so long doesn’t infer it as essential religious practice. On the other hand, it is a major concern regarding the rights of the females,

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<sup>48</sup> Population Council (n 41)

which were deprived of them because of this practice. In the battle of religious practices versus rights, the rights need not be at stake. Therefore, no religious practice can be superior to the dignity of the women. The concept of Dignity of the individual is the cornerstone of the fundamental rights. Religious practices cannot supersede it. Individual autonomy strengthens dignity by empowering people to make their own choices about their well-being and freedoms. Any practice that undermines a person's dignity is incompatible with the core values enshrined in our constitution.

Now coming onto the **third and last argument**, Proponents of FGM/C sometimes argue that it should be allowed because male circumcision is already practiced. They believe banning FGM/C would violate the right to equality between genders. However, this argument deflects from the core issue. While both practices involve removing some tissue, male and female circumcision have vastly different consequences for physical and emotional well-being. Due to these distinct impacts, they cannot be considered equivalent for legal purposes.<sup>49</sup>

Legislators who support laws that advance gender equality frequently point to Gautam Buddha's distinction between laws that perpetuate prejudice and laws that correct historical injustices. For example, reserving seats in legislatures for women aims to encourage female involvement in political processes, something they have been denied for a long time, rather than perpetuating antiquated ideas of separate spheres for men and women. In the same vein, legislation that forbids female genital mutilation (FGM/C) does not support conventional gender norms. Rather, it recognizes the damaging societal reality that stems from gender prejudice and the false belief that female purity is only determined by chastity before marriage.

Concerns have been raised that FGM/C represents a form of gender-based violence intended to exert control over female sexuality. Research suggests a correlation between the practice and diminished sexual satisfaction, even heightened sensitivity in the clitoral region, among women who have undergone the procedure. This evidence implies that FGM/C serves not only as a

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<sup>49</sup> Dhruv Singhal, 'Examining the Constitutionality of Female Genital Mutilation in India' (*Law School Policy Review and Kautilya Society*, 21 December 2022) <<https://lawschoolpolicyreview.com/2022/12/21/examining-the-constitutionality-of-female-genital-mutilation-in-india/>> accessed 31 May 2024



physical deterrent to ‘unacceptable’ sexual behaviour but also as a means to suppress ‘impure’ thoughts and desires deemed undesirable in young girls.

By exclusively imposing this practice on females, FGM/C inherently violates Articles 14 and 15 of the Indian Constitution. These articles guarantee equality before the law and prohibit discrimination based on sex. The eradication of FGM/C is, therefore, crucial to uphold the fundamental rights enshrined in the Constitution and ensure gender equality in India.

## EXISTING LEGAL FRAMEWORKS

WHO has declared the practice OF FGM/C as a violation of human rights issue. Ironically, such practice, which has been prevalent for decades in India, has no specific legal provisions for criminalizing the practice and safeguarding the rights of females in the country. However, existing legal frameworks where FGM/C can be penalized are Sections 324<sup>50</sup> and 326<sup>51</sup> of the Indian Penal Code, which criminalize ‘voluntarily causing hurt’ and ‘voluntarily causing grievous hurt’, respectively. Additionally, penetration of any minor is prohibited by Section 3<sup>52</sup> of the Protection of Children from Sexual Offences Act, 2012 (POCSO). Any object inserted into a young girl's vagina would be considered a penetrating sexual assault.

While legal frameworks are undeniably crucial, they are not a standalone solution to eradicating FGM/C in India. A comprehensive strategy encompassing various stakeholders is necessary for lasting change. The Netherlands serves as a compelling example of the transformative power of collective action. Here, medical professionals, educators, law enforcement agencies, immigrant support groups, and child protection entities have formed a united front against FGM/C. This collaborative approach, coupled with the decentralization of efforts, has empowered communities and safeguarded countless girls.

Similarly, Burkina Faso's success story demonstrates the vital role of community engagement. Through the tireless efforts of community child protection groups, over 175,000 girls in 2019

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<sup>50</sup> Indian Penal Code 1860, s 324

<sup>51</sup> Indian Penal Code 1860, s 326

<sup>52</sup> Protection of Children from Sexual Offences Act 2012, s 3

were spared the trauma of FGM/C. These groups proactively identified girls at risk and provided safe havens through adolescent clubs. Their dedication exemplifies the transformative potential of community mobilization in eradicating this harmful practice.

Secondly, the Dar al-Ifta, an Egyptian governmental body dedicated to Islamic scholarship, called an international conference in 2006. The conference centred on Female Genital Mutilation (FGM), with great success, where participants reached a unanimous consensus. They declared that FGM has lost its relevance in the contemporary world. Historically, the practice persisted as a social custom, but its damaging effects are undeniable. Furthermore, the conference advocated for a complete ban on FGM. In recognition of the human rights implications, the Canadian Parliament enacted a legislative amendment to its Criminal Code in 1997. This amendment outlawed FGM in all its forms. Furthermore, the legislation prohibits any actions that facilitate or abet the practice. This includes taking a young girl abroad with the intention of subjecting her to FGM. This includes taking a young girl abroad with the intention of subjecting her to FGM. Essentially, the law safeguards the bodily integrity of females by criminalizing any non-medical intervention on their genitalia. This legal framework with an aim to eradicate the practice of FGM/C is highly needed in India, too.

Recognizing the cultural significance of this practice, it is equally crucial to cultivate trust and open dialogue with community leaders and members. Through a deliberative process, all stakeholders, particularly current and future mothers, must be comprehensively educated regarding the detrimental health consequences associated with this practice. To achieve this effectively, collaboration with educators, civil society organizations, and local healthcare personnel, such as Anganwadi and ASHA workers, is paramount. Ideally, these personnel should be recruited from within the practising communities themselves, as they will be best positioned to act as agents of positive change and promote the abandonment of this practice.

## **INTERNATIONAL RIGHTS AVAILABLE FOR VICTIMS**

The United Nations has a strong history of advocating for human rights, particularly for vulnerable groups like women and children. The Universal Declaration of Human Rights exemplifies this commitment, enshrining fundamental rights such as the right to life, bodily

integrity, and freedom from torture. Additional treaties, like the 1984 Convention against Torture, further solidify these protections. These rights, including the right to health as outlined in Article 12<sup>53</sup> of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), are directly violated by the practice of female genital mutilation (FGM). Recognizing this gross violation, the UN General Assembly adopted a resolution in 2012, with India among its signatories. This resolution signifies a strengthened global commitment to eliminate FGM. The international community now universally acknowledges FGM as a harmful practice that infringes on women's rights. Reflecting this commitment, the UN established February 6th as the International Day of Zero Tolerance for Female Genital Mutilation, with the ambitious goal of eradicating FGM entirely by 2030.

The Committee on the Elimination of Discrimination Against Women (CEDAW) has been instrumental in addressing gender-based violence. In its General Recommendations No. 14 and 19 (1979), CEDAW<sup>54</sup> explicitly linked practices like FGM to discrimination against women under Article 1 of the Convention<sup>55</sup>. This highlights the need for effective measures to eradicate FGM. Furthermore, India's ratification of the 2006 Convention on the Rights of Persons with Disabilities (UNCRPD) strengthens the case against FGM. Furthermore, India's ratification of the 2006 Convention on the Rights of Persons with Disabilities (UNCRPD) strengthens the case against FGM. The practice can be seen as causing a form of disability, as it permanently impairs a woman's ability to experience sexual pleasure on her terms. This constitutes a clear violation of sensory function.

The Committee on the Elimination of Discrimination Against Women (CEDAW) has been a powerful voice against harmful practices that violate women's rights. In its General Recommendations No. 14 and 19 (1979), CEDAW clearly stated<sup>56</sup> that any gender-based violence, including FGM, that hinders women from enjoying their human rights is a form of

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<sup>53</sup> International Covenant on Economic, Social and Cultural Rights 1966, art 12

<sup>54</sup> Convention on the Elimination of All Forms of Discrimination against Women 1979

<sup>55</sup> *Ibid*

<sup>56</sup> Constitution of India 1950, art 26

discrimination. This falls under Article 1 of the CEDAW Convention, highlighting the urgent need for effective measures to eradicate FGM entirely.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted in 1979, enshrines the fundamental right of women to be free from gender discrimination. Article 2 of the Convention<sup>57</sup> specifically defines violence against women as including physical, psychological, and sexual forms of harm. A broad definition implies that FGM/C falls under this scope. Building on this foundation, CEDAW's General Comment No. 25 of CEDAW<sup>58</sup>, it imposes duties upon its members of the convention to make sure that there is no direct or indirect bias being committed against women in their laws and they must be provided effective safeguards, not only from any physical harms but also mental and racial bodily injuries or exploitation.

All these existing legal frameworks support the eradication of any kind of oppression against women and discrimination, which leads to unbiasedness involving the practice of FGM/C.

## **FUTURE ROADMAP**

This paper advocates banning the practice of FGM/C with stringent legal mechanisms for the protection of females. It also advocates rigorous punishment for the violation. As this practice is deeply rooted, the laws are not sufficient enough to eradicate it. It requires the active participation of everyone in the society to remove this practice. This paper suggests international collaboration with different organisations and countries who are working to ban this practice. Drawing insights from Somalia where, with the support of the Japanese government (LEAP program), the United Nations is engaging elders, religious leaders, men, women, and youth in joint advocacy for removing this practice and end-gender-based discrimination. This community-based approach to eradicate harmful social norms and practices is required for India, too. Secondly, this practice is majorly carried out on girls between infancy and adolescence and reports suggest occasionally on adult women too, which is the critical age of

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<sup>57</sup> Convention on the Elimination of All Forms of Discrimination against Women 1979, art 2

<sup>58</sup> 'General comment No. 25 (2021) on children's rights in relation to the digital environment' (Office of the United Nations High Commissioner for Human Rights, 02 March 2021) <<https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-25-2021-childrens-rights-relation>> accessed 31 May 2024

development. This practice can be a significant impediment to the overall development of the human body. So, it requires major attention and rigorous implementation of laws here so that no females can be trapped in this practice. This required collaborative action in all sectors: health, education, finance, justice and women's affairs. Thirdly, as most people are unaware of the concept, it's paramount to educate them about this practice, and simultaneously, campaigns should be organised to stop this practice. Establishing a dedicated team with expertise in this area is crucial for generating timely reports in this practice, which will even help in gender development initiatives in the country.

## CONCLUSION

Navigating a country's diverse cultural landscape and longstanding practices, especially religious ones, requires a delicate balance. We must ensure these traditions are respected while safeguarding the well-being of all. While the nation has made progressive achievements toward women's empowerment, there is a continuing need to eradicate such practices, which have long-term effects and harm to their lives.

It requires a comprehensive strategy to effectively tackle this issue with robust legal frameworks to address such kind of practices and penalize them. Secondly, the establishment of healthcare workers is paramount to providing mental and physical support to the women who have undergone such practices. The Indian Constitution enshrines the principle of equality for all citizens. It's imperative to uphold the principle and create an environment where women are free from any kind of discrimination. The state has a fundamental responsibility to protect the rights of its citizens and foster a safe environment, ensuring the dignity and privacy rights of the individuals.

The notion of a truly equal society exists where there is no space for gender disparity and discrimination. By achieving this aim, women in India will enjoy equal privileges and opportunities and will be free from any kind of discrimination. This paper serves as a beacon of hope and advocates the eradication of cruel practice that lowers the dignity of the individual and violates the fundamental rights enshrined in the Constitution, with the United Nations' commitment to eliminate such practices by 2030.