

## **From Custom to Crime: Examining the Judicial Trends with Special Reference to Female Genital Mutilation in India**

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### **ABSTRACT**

*The practice of Female Genital Mutilation (FGM) had remained an under-litigated but profound concern human rights issue in India, by intersecting the questions of gender based justice, bodily autonomy and constitutional morality. Although FGM had erupted under the pretext of religious norms and now has turned into serious criminal offence and thus leads to violation of rights of women and children under both Domestic and International law. FGM is deeply Rooted in patriarchal customs and is misinterpreted and wrongly interlinked with religious norms, the practice causes irreversible physical and psychological injury and falling squarely within the scope of Indian criminal law under grievous hurt, assault and cruelty. Judicial scrutiny upon practice was stimulated in case of Sunita Tiwari vs. Union of India (2017)<sup>1</sup>, wherein Hon'ble Apex Court has examined, whether the practice of FGM could be justified as an essential religious practice? The Court's interpretation, though it was indecisive due to subsequent reference of matter to larger Bench. The observation of Hon'ble Supreme Court emphasized that religious practices cannot contravene constitutional morality or endanger health and dignity of women. Comparative International jurisprudence from Kenya, United Kingdom and United States, strengthened FGM which comprises of gender-based violence and violation of International human rights norms enshrined under CEDAW and CRC. This article concludes that Judiciary is gradually stepping toward Human rights-based interpretation which marks FGM as unconstitutional and seeking for prohibition and further lays Judicial intervention towards harmonizing religious freedoms with inherent right of females to bodily integrity and dignity.*

<sup>1</sup> W.P. (CrI.) No. 286/2017

**Keywords:** Women, Female genital mutilation, Human rights, Gender, Community.

## **1. Introduction**

The FGM is not merely a cultural or religious practice rather it contains the element of a criminal act badly violating the basic human rights to bodily integrity, dignity and security. As FGM defined by the WHO that it is the partial or total removal of external female genitalia or other injury to the female genital organs for non-medical reasons, FGM causes permanent physical and psychological damage<sup>2</sup>. Its classification as a brutal crime is therefore can be traced under both Indian criminal law as well as under International human rights jurisprudence. The practice of FGM constitute one of the most tenacious violations of the human rights particularly the rights of females of every age group across the societies. Despite of the fact that the practice of FGM today is being widely criticized and condemned as one of the form of Gender based violation and the violation of bodily integrity, the Judicial indulgence in this ruthless and ferocious practice of FGM has historically been recognized. However, in recent times, the Judicial courts around the globe including India have progressively recognized the impertinent and incompatibility of the practice FGM with guarantees entrusted by constitution, human rights instruments and certainly the Principles of Natural Justice. This chapter will examine the evolving judicial trends on the practice of FGM, by analyzing the key judgments, interpretative statutory clauses and the role of Judicial and constitutional courts in approaching the goal of Gender equality and justice and with bodily autonomy.

## **2. Indian Judiciary and FGM**

Judicial engagement with the cruel practice FGM in India has been seems to be gradual but increasingly affirmatively, further reflecting a rising consciousness about the gender justice and constitutional morality. The issue attained national attention in *Sunita Tiwari v. Union of India* (2017), wherein the petitioner prayed for the complete prohibition of the practice of FGM, by advancing argument that it violates the rights to equality, freedom from discrimination and lastly life and personal liberty. The elaborate work in the said petition further draws attention upon the fact that the practice of FGM attracts an offence under the Indian Penal Code, 1860 and the Protection of Children from Sexual Offences Act, 2012. Hon'ble Supreme Court of India, in its preliminary observation, pin pointed upon the fact that the right to religious freedom under Article 25 does not covers the acts which are highly inhuman, harmful or in violation of dignity. Hon'ble Justice D.Y. Chandrachud opined that religious practices *must be tested against the touchstone of constitutional morality, reiterating principles articulated in Indian Young Lawyers Association and Ors. vs. The State of Kerala and ors commonly known as Sabrimala case* and

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<sup>2</sup> <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>.

Shayara Bano v. Union of India. Although the Sunita Tiwari case was later on referred to a larger Bench however the proceeding catalyzed around the country which discourse and administrative introspection on entrusting the legal status of FGM. Apart from this the National Human Rights Commission (NHRC) in its 2018 Advisory on Ending Female Genital Mutilation highly recommended that the practice of FGM be categorically criminalized, reflecting an alignment between the judicial and the quasi-judicial bodies in interpreting the expression of FGM as a form of gender-based violence. The judiciary thus functions as both an adjudicator and also as the moral compass, directing legislature to fill the lacuna in the penal framework.

### **3. Judicial Trends in Comparative Jurisdictions**

It is evident that today zero-tolerance approach to FGM has been adopted worldwide, strongly emphasizing that cultural or religious defences cannot mitigate criminal liability. In *R v. Dharmasena* (United Kingdom), the court observed that 'even medical procedures that could be construed as FGM under the *Female Genital Mutilation Act, 2003* must be strictly scrutinized, establishing that consent cannot validate the offence'. Similarly, the Kenyan High Court in *Tatu Kamau v. Attorney General* upheld 'the constitutional validity of the *Prohibition of Female Genital Mutilation Act, 2011*, and further affirmed that cultural rights cannot be invoked to justify a practice that inflicts physical and psychological harm'. In the United States, the landmark case of *United States v. Nagarwala*, marked a turning point. This case is the first federal prosecution under 18 United States Code, Section 116(a), which prohibits FGM. 'Section 116(a) makes it a criminal offense to "knowingly circumcise, excise, or infibulate the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years." The district court dismissed the FGM charges, holding that Section 116(a) is beyond Congress's power. Having reviewed Section 116 (a) with the greatest possible deference, the Court concludes that it is unconstitutional. Congress had no authority to pass this statute under either the Necessary and Proper Clause or the Commerce Clause'.

### **4. Doctrinal Trends and Constitutional Morality**

The doctrine of *constitutional morality* has been seen to be emerged as one of the most transformative interpretative tools in Indian constitutional. Deeply embedded in the vision of Dr. B.R. Ambedkar vis-à-vis to constitutional order lead by liberty, equality and the fraternity, it provides as a counterbalance to the social morality which is often shaped by patriarchal system, religious and customary practices. Hon'ble Supreme Court, through significant judgments viz. *Navtej Singh Johar v. Union of India*, *Indian Young Lawyers Association v. State of Kerala*<sup>3</sup>

(*Sabarimala*), and *Joseph Shine v. Union of India*<sup>4</sup>, has affirmed that ‘constitutional morality must prevail when societal customs violate fundamental rights or human dignity’. The judicial trend within India as well as in abroad, indicates a gradual but decisive move from Cultural relativism to Universal human rights protection. The Indian judiciary growingly aligns with International principles and doctrines that demonstrate the practice of FGM as a gross violation of the *right to life and dignity*, thus engaging the constitutional morality as a tool for better transformative justice. Hon’ble Supreme Court in the case of *Navtej Singh Johar v. Union of India*<sup>5</sup>, held that ‘autonomy over one’s body and sexual choices is intrinsic to liberty and dignity. The same doctrinal foundation renders FGM unconstitutional, as it denies women agency over their bodies’. The judicial courts have notably begun to recognize the *affirmative obligations* of the State under Article 21 of the constitution to prevent harm and protect citizens from violence. This co-ordination with the jurisprudence of the European Court of Human Rights. In the case of *Izevbekhai v. Ireland*, where the Court recognized that ‘permitting FGM within cultural contexts constitutes a failure of State protection under Article 3 of the European Convention on Human Rights ECHR’.

## **5. Tussle between the Constitutional and Social Morality**

FGM epitomizes the conflict between constitutional and social morality. If we talk about the social morality within certain communities particularly the Dawoodi Bohra section, it is seen that the supporters of this community justifies the practice of FGM as a religious obligation i.se. *khafz*, whereas on the other hand the constitutional morality mandates that no cultural traditions or religious practice can weaken the dignity or bodily integrity of females. In *Sabarimala case*, the Hon’ble Supreme Court opined that ‘the practices excluding women on religious grounds violate Articles 14 and 15, affirming that faith cannot justify inequality’. Similarly, in *Navtej Singh Johar case*, Justice Chandrachud observed that “constitutional morality requires that this Court must act as a counter-majoritarian institution to protect individual rights against the social consensus.” Now applying the above said pronouncement to the practice of FGM, it implies that the judiciary shall step forward in order to protect females from oppressive traditions, even if such practice is endorsed by their own communities. Thus, the practice of FGM stands in direct conflict with the constitutional mandate of the equality and protection of bodily autonomy under Article 21. The adoption of principle of *bodily autonomy* by the Indian Judiciary marks a doctrinal shift towards new phase of feminist constitutionalism. Hon’ble Supreme Court in the case of *Justice K.S. Puttaswamy v. Union of India*, recognized ‘privacy as intrinsic to dignity and liberty, explicitly including decisional autonomy in matters of sexual and reproductive choice’. The reasoning of this decision directly applies over the practice of FGM, which deprives the

females to safeguarding their own bodies. Similarly in the matter of *Suchita Srivastava v. Chandigarh Administration* the Court has observed that ‘a woman’s right to make reproductive choices is an inseparable part of personal liberty under Article 21’. Therefore, the doctrinal structure of bodily integrity or autonomy along with equality and non-discrimination renders the practice of FGM incompatible with the Constitution. In line with International human rights criteria, the interpretive development of the Judiciary reflects a strong move from the community-centric approach to Individual-centric rights. These pronouncements marks the readiness of the Judiciary to reinterpret religious freedom in consonance with gender justice.

## **6. The Doctrine of Essential Practices and its Limits**

The proponents of the practice of FGM within some religious communities, strongly claims the protection as provided under Article 25 of the Indian Constitution, on the basis this strong belief it forms an Essential Religious Practice. However, the doctrine of *Essential Practices*, first evolved in *The Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Shirur Mutt*, which has undergone significant and drastic evolution. It was observed by Court that ‘not all practices labeled as religious are constitutionally protected; only those integral to the faith’s core are’. Whereas in *Shayara Bano v. Union of India*, the Hon’ble Supreme Court has struck down *talaq-e-biddat* (triple talaq), by holding that ‘practices violating gender justice and equality cannot qualify as essential practice’. Similarly, in *Sabarimala* case, the Court had vehemently rejected the religious exemptions that establishes the exclusion or gender discrimination. Therefore the criminalization of this practice would not infringe Article 25 of the Indian Constitution but would certainly affirm the constitutional vision of the equality and dignity. The practice of FGM, which victimize females of every age group to irreversible physical harm and further psychological trauma, directly dissipates the Indian Constitutional ideals. By invoking the doctrine of *constitutional morality*, courts can transform the discourse from religious practice to human dignity. This approach aligns with the International human rights obligations under the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* and the *Convention on the Rights of the Child (CRC)*, both of these conventions call upon party States to abolish the harmful traditional practices like FGM.

## **7. FGM and Indian Law**

### *A. Indian Penal Code (Now Bharatiya Nyaya Sanhita)*

The practice of FGM though primarily prevalent within the community of Dawoodi Bohra in India, which remained suppressed legal issue as it is being performed within private zone and cultural confidentiality. Despite the non-availability of a **specific statutory legislation for prohibition of FGM**, *multiple other provisions are available under Indian criminal law and*

*child protection law which renders the practice of FGM punishable. The Parliament of India has enacted new Criminal law viz. Bharatiya Nyaya Sanhita (BNS) by replacing the Indian Penal Code, Bharatiya Nagarik Suraksha Sanhita (BNSS) replaces the Code of Criminal Procedure, and Bharatiya Sakshya Adhinyam (BSA) replaces the Indian Evidence Act. However as old criminal law, the existing new law is also lack direct and specific provision vis-à-vis to the punitive action of the FGM. Provisions dealing indirectly with FGM is herein under mentioned in Comparative study form between IPC, 1860 and Bharatiya Nyaya Sanhita (BNS),2023*

- I. Section 319 of IPC is now replaced by Section 114 of BNS which provides the definition of Hurt, legislature has not made any change in new provision.
- II. Section 320 of IPC is now replaced by Section 116 of BNS which has reduced the sufferer time period from 20 days to 15 days in severe bodily pain, or unable to follow his ordinary pursuits.
- III. Section 323 of IPC is incorporated as Section 115 (2) of BNS with increase in fine from one thousand to ten thousand rupees.
- IV. New sub-section added as Section 117 (3) of BNS ‘Whoever commits an offence under sub-section (1) and in the course of such commission causes any hurt to a person which causes that person to be in permanent disability or in persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life’.
- V. New sub-section added as Section 117 (4) of BNS ‘When a group of five or more persons acting in concert, causes grievous hurt to a person on the ground of his race, caste or community, sex, place of birth, language, personal belief or any other similar ground, each member of such group shall be guilty of the offence of causing grievous hurt, and shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine’.
- VI. Changes in Section 324 of IPC is now read as Section 118 (1) of BNS where specific fine is mentioned of Rs 20,000/-.
- VII. Changes in Section 326 of IPC is now read as Section 118 (2) of BNS where Mandatory minimum imprisonment for one year is added. Section 319 to 326 or now Section 114 to 118 of BNS encompass causing hurt and grievous hurt, including mutilation or permanent damage to any limb or organ, which categorically covers and includes the partial or total removal of the clitoral hood or labia as involved in FGM or *khafz*.

- VIII. Section 312 & Section 313 is numbered as Section 88 & Section 89 of BNS with no relevant changes which deals with Causing miscarriage and Causing miscarriage without woman's consent respectively. Section 88 & Section 89 of BNS deals with unlawful operations on minors clearly covers the illegal procedure of FGM being performed on minor girls.
- IX. Section 339-348 of IPC is now replaced with Section 126 & 127 of BNS which deals with wrongful restraint or confinement and provisions addressing criminal conspiracy can be invoked against the practitioners and facilitators. Fine is increased from five hundred rupees to five thousand rupees in Section 126 (2) of BNS, further in Section 127 (2) Fine is increased from one thousand to five thousand rupees. In Section 127 (3) of BNS Imprisonment is increased from two years to three years and the fine is extended up to ten thousand rupees. Similarly in section 127 (4) of BNS, imprisonment is increased from three to five years with a minimum fine of ten thousand rupees. Further fine is added in Section 127 (5) of BNS whereas under section 345 of IPC there was no provision of fine. Under section 127 (6) of BNS, imprisonment is increased from two to three years and provision of fine is added.

**B. Protection of Children from Sexual Offences Act (POCSO), 2012**

- i. **Section 3. 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; or"*
- ii. **Section 5. Aggravated penetrative sexual assault.**-
- e. *".....whoever being on the management or staff of a hospital, whether Government or private, commits penetrative sexual assault on a child in that hospital; or*
- f. *"whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; or*
- g. *"whoever commits gang penetrative sexual assault on a child".*
- h. *"whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or"*

- i. *“whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or”*
- p. *“whoever being in a position of trust or authority of a child commits penetrative sexual assault on the child in an institution or home of the child or anywhere else”.*

**iii. Section 7. Sexual assault.-**

*Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent 33 which involves physical contact without penetration is said to commit sexual assault.*

**iii. Section 8. Punishment for sexual assault .-**

*Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.*

**8. FGM and International Law and Conventions**

- a. Nigeria : The practice of FGM/C is an offence in Nigeria.

**Section 6** of the Violence against Persons (Prohibition) Act, 2015:

*“(1) The Circumcision or 39 genital mutilation of the girl child or women is hereby prohibited.*

*(2) A person who performs female circumcision or genital mutilation or engages another to carry out such circumcision or mutilation commits an offence and is liable on conviction to a term of imprisonment not exceeding 4 years or to a fine not exceeding N 200,000.00 or both*

*(3) A person who attempts to commit the offence provided for in subsection (2) of this section commits an offence and is liable on conviction to a term of imprisonment not exceeding 2 years or to a fine not exceeding N 100,000.00 or both*

*(4) A person who incites, aids, abets or counsels another person to commit the offence provided for in sub section (2) of this section commits an offence and is liable on conviction to a term of imprisonment not exceeding 2 years or to a fine not exceeding N 100,000.00 or both”.*

- b. United Kingdom:

**Section 1** of United Kingdom Female Genital Mutilation Act, 2003: —Offence of female genital mutilation –

(1) *“A person is guilty of an offence if he excises, infibulates or otherwise mutilates the whole or any part of a girl’s labia majora, labia minora or clitoris”.*

**Section 2** of United Kingdom Female Genital Mutilation Act, 2003: — *“Offence of assisting a girl to mutilate her own genitalia - A person is guilty of an offence if he aids, abets, counsels or procures a girl to excise, infibulate or otherwise mutilate the whole or any part of her own labia majora, labia minora or clitoris”.*

**Section 3** of United Kingdom Female Genital Mutilation Act, 2003—Offence of assisting a non-UK person to mutilate overseas a girl’s genitalia –

(1) *“A person is guilty of an offence if he aids, abets, counsels or procures a person who is not a United Kingdom national or permanent United Kingdom resident to do a relevant act of female genital mutilation outside the United Kingdom.”*

c. Australia:

Section 32 of the Crimes (Female Genital Mutilation) Act 1996. Offence to perform female genital mutilation:

(1) *“A person must not perform female genital mutilation on a child. Penalty: Level 4 imprisonment.*

(2) *(2) A person must not perform on a person other than a child any type of female genital mutilation referred to in paragraphs (a) to (e) of the definition of female genital mutilation. Penalty: Level 4 imprisonment”.*

(Penalty level 4 is maximum imprisonment for 15 years as per section 32 of the Crimes Act, 1958).

d. Ireland :

*“Sec 2 Criminal Justice (Female Genital Mutilation) Act 2012— (1) A person is guilty of an offence if the person does or attempts to do an act of female genital mutilation.*

*Sec 5: A person who is guilty of an offence under section 2 , 3 or 4 is liable*

*(a) on summary conviction to a class A fine or to imprisonment for a term not exceeding 12 months or to both, and*

*(b) on conviction on indictment to a fine or imprisonment for a term not exceeding 14 years or to both”.*

## **9. Recommendations to Promote the FGM Abolishment**

In order to abolish the practice of FGM, we have to make our stand in categorical manner towards unacceptability of this practice. Community leaders or other respectable of the society has the prime obligation upon their shoulders to be responsive against any social evils like FGM so these leaders or representatives should step forward and make a public statement for abandonment of FGM as their words has high value in the society. Further the initiatives should not only be from outer world but it should be also start from the family itself, elder members of the family should protect their females minor or major. The practice of cutting should be replaced by some other cultural alternatives like for instance if the particular community performs khatna or FGM as a rite of passage, such ceremony should be performed without causing bodily harm. It is further suggested to celebrate girlhood with education, exchange of gifts and mentorship. Lastly there should be strictly complete ban upon medicalization, the licenses of the medical practitioners who are found to be involved in performing the FGM should be cancelled forthwith. There should be specific legislation including definition of FGM and further clear protocols should be framed for the hospitals to report the cases without delay. The school syllabus should comprise of drawbacks for performing the FGM. Boys and girls both should be educated vis-à-vis to their fundamental rights to health, bodily integrity and liberty.

## **10. Conclusion**

Responses of the Judiciary to the practice of FGM reveal a growing identity that the practice is fundamentally incompatible with constitutional values of dignity, equality and the bodily autonomy. Courts around the globe treated the practice of FGM not as a private traditional ritual but as a violation of basic human rights that the state is under obligation to prevent its citizens. FGM in International jurisprudence and conventions particularly under CEDAW, CRC and the Maputo Protocol has shaped the concept of FGM towards firm legal consensus that obtaining consent of the minor girl is legally meaningless and has no lawful purpose to serve. Judicial trends further show an ideal and progressive shift from the reactive punitive action to proactive protection of the survivor. Many nations now added a mandatory reporting, regulate medical professionals and recognizes obligation of the state machinery to provide survivor rehabilitation.. The world wide legal framework is stepping toward zero tolerance and India is also stepping to align fully with this evolution. Certainly the Judicial courts are affirming and adopting a simple principle that no cultural practice can legally justify physical or psychological harm to children under the guise of fundamental rights. By upholding the rights of the females to autonomy, equality and health, Judicial pillar are thus not attacking the cultural identity of any community or region. They are only safeguarding the core constitutional guarantees that every citizens, regardless of any gender, has right to live with dignity.

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