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# A Look into the Notion of Custom as a Crime Concerning Female Genital Mutilation in India: A Critical Analysis

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## ABSTRACT

*This paper would educate the readers about what exactly is Female Genital Mutilation as one common problem which could be recognized was that this custom (FGM) lacks awareness, and not everyone knows its meaning. The paper would highlight what a custom is and how many customs are there which are prevalent and which are not prevalent or which are valid and not valid depending on various case laws; then, the invalid customs would be discussed as to why they were invalid and what the court says and then what the court said regarding the invalid customs would be related to the concept of FGM. The paper will discuss how many provisions of the IPC and the fundamental rights the practice violate. Then FGM would be discussed as readers would only know a type of FGM when there are 4 types of (FGM) in reality. The paper would clarify to the reader why FGM should be banned and considered invalid as a custom as it serves no purpose. There are very few people who have studied the topic in-depth, and people do not realize that it is still prevalent. The paper would also educate the readers about why it is a crime and what type of a crime it is per various organizations' views like WHO, UNICEF, etc. The readers would also learn that, at present, there isn't any law in India that bans the practice of FGM, so gradually, as they read through the paper, they will be able to understand various case laws pointing towards criteria of invalid customs through which the FGM can be included as there were customs which were declared void by the courts due to their lack of reasonability as well as purpose. The readers would also be able to compare various customs which were declared void by the court and, at the same time, realize that FGM is also one such custom that needs to be banned by the law because it does not have any health benefits for girls and women and is mostly carried out on young or infant girls till the age of 15. The readers will also read about how many articles or human rights or fundamental rights it violates and not only that, but how hard it is for the girls to get treatment because of immediate health complications from the procedure of FGM. The readers would also read about all the countries in which the practice is still prevalent, as well as info and statistics regarding various NGOs taking initiatives to get this custom banned.*

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**Keywords:** (FGM) female genital mutilation, (WHO) World Health Organization, United Nations International Children's Emergency Fund (UNICEF).

## I. INTRODUCTION

The paper would highlight an issue commonly known as FGM which is called Female Genital Mutilation. It can be described as a procedure done in females where their female genitals are cut, altered, or injured deliberately without a medical reason. It is usually done to girls between the age group of 15 and below the age of 15 years of age, Also this procedure goes through various other names like Sunna, tahir, khitan, Megrez, etc. It has no medical benefits and is treated as a custom and does cause severe harm to the girls when done. It can cause long-term problems as well as immediate problems for the girl who undergoes this procedure. The event itself is so scary and painful that while this is done on a girl, the girl would be held down during the procedure. Such a kind of procedure destroys the girl physically as well as emotionally. India, a very cultural nation where customs are glorified and held in such reference, has yet been able to ban or criminalize FGM. It is said that there isn't any particular record that shows the data of no girls who have undergone the FGM Procedure but the Bohra community is well known for this particular custom of FGM. There are numerous notions why FGM is conducted it is said that for girls to be beautiful and clean all their unclean parts should be removed or that certain religious scripts prescribe the practice or the. One more notion is that since the Bohra community used to always migrate in the past they felt that in order for their wives to not feel any kind of sexual urges while on the journey their sexual parts should be cut.

## II. PROVISIONS, SECTIONS, AND TREATIES THAT ARE VIOLATED BECAUSE OF THE PRACTICE OF FGM

This so-called practice of FGM violates multiple provisions of IPC like section 320, 322, 334 335, 336, 337, 338, and 340<sup>2</sup> which talks about the FGM being in the domain of causing hurt, voluntary grievous hurt, or girl being forced to marry against her will or the girl being seduced towards illicit intercourse and moreover it even talks about the person being wrongfully confined and restrained and moreover due to the nature of FGM, it infringes on the rights to life and physical integrity, to health, and to be free from torture, cruel and unusual punishment, and violence. It also violates the human rights of women and children. FGM violates both the provision of non-discrimination and the rights entrenched in the United Nations Convention on

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<sup>2</sup> Indian Penal Code 1860 S. 320 – 340

the Rights of the Child, 1989 (UNCRC)<sup>3</sup>, as it primarily affects girls under the age of 18. A variety of international agreements, notably Article 3 of the UDHR<sup>4</sup>, Article 6(1) of the ICCPR, and Article 6 of the UNCRC<sup>5</sup>, safeguard the right to life, which is regarded as a fundamental human right. Extreme incidences of FGM can also result in death or may even be a factor in maternal and neonatal fatalities.

The Indian Constitution's Articles 25<sup>6</sup> and 26<sup>7</sup> protect the freedom to practice any religion and to conduct religious matters, an individual's freedom of religion is protected by Article 25. However, these rights—in particular, the fundamental freedoms from sex-based discrimination and equality guaranteed by Articles 14 and 15—are constrained by Part III of the Indian Constitution. Such freedom is also constrained by public law, morality, and good health. FGM is a practice that targets women with the intention of stifling women's and girls' sexual appetites and has detrimental health implications. In order to prevent them from being abused by other males, women and girls are treated as objects with strong sexual needs that need to be restrained. Such a practice violates Articles 14 and 15 of the Indian Constitution since it perpetuates gender stereotypes against women and girls, which is unconstitutional. This practise targets women and infringes on their rights to bodily autonomy, self-determination, protection from physical harm, and freedom from psychological trauma. It also violates their right to life, which is protected by Article 21 of the Indian Constitution. It does this under the guise of religion and with the intention of protecting girls and women. The equality values outlined in the Indian Constitution are incompatible with this kind of gender stereotyping.

### **III. CONCERNING THE INDIAN LEGAL FRAMEWORK**

There isn't a law in India that bans the custom of FGM yet The Indian Penal Code 1860 addresses several types of violence against women in India (IPC). The WHO states that excessive bleeding (haemorrhage), swelling of the genital tissues, problems with wound healing, damage to the surrounding genital tissue, shock, and death are some of the immediate complications of FGM, whereas urinary issues, vaginal issues, menstrual issues, sexual issues, etc. are some of the long-term effects. As such, those who perform FGM may be charged under the IPC. IPC sections 319 through 326 deal with varying degrees of hurt and grievous hurt. Particularly, intentional hurt and intentional serious harm are punishable by prison time and fines under Sections 324 and 326 of the IPC, respectively. Even though FGM is not officially

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<sup>3</sup> The United Nations Convention On Child Rights. 1989

<sup>4</sup> Universal Declaration of Human Rights. Art 3. 1948

<sup>5</sup> The United Nations Convention On Child Rights. Art 6 cl. 3. 1989

<sup>6</sup> INDIA CONST. art. 25

<sup>7</sup> INDIA CONST. art. 26

mentioned as a crime under the IPC, the police are compelled to register a case under Section 326 of the IPC in response to a complaint, according to R.K. Raghavan, a former director of the Central Bureau of Investigation (CBI).

It is unclear whether there is a specific law against FGM in India because the Protection of Children from Sexual Offences Act, 2012 (POCSO Act), which only lists provisions from various treaties, acts, and the constitution, mentions penetrative sexual assault on the vagina in Section 3 of that law. FGM involves the insertion of a sharp substance into the vagina. The National Policy for Children, 2013 acknowledges and prioritizes children's fundamental rights to health, survival, growth, and protection. The NPC acknowledges that "a safe, secure, and protective environment is a precondition for the realization of the other rights of children concerning protection". It promises to create an environment that is kind, protective, and safe for all children. It asserts that no cultural, traditional, religious, or custom may violate, limit, or prevent children from exercising their legal rights.

#### **IV. CASES THROUGH WHICH FGM AS A CUSTOM CAN BE ABOLISHED**

- In *Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi v. State of Uttar Pradesh*, the Supreme Court upheld the constitutional validity of Uttar Pradesh Sri Kashi Vishwanath Temple, 1983, which superseded customs and usages, laws, and decrees to the contrary and governed the management and administration of the Vishwanath Temple. The Supreme court held that "The denomination sect is likewise required to uphold the law and also states that they are not exempt from it. They are also constrained by constitutional ideals. In a culture that values equality, the law works to eradicate social inequities and vices in order to promote social harmony, stability, and advancement.

- <sup>8</sup>*Surajmani Kujur vs Durga Charan Vs Hamsdah (2001) 3 SCC 13*:- The issue was concerning Bigamy followed by a Tribal Community. The court in this case stated that for a custom to be held as valid or to get the color of law, the party pleading should be able to prove that the custom is ancient, certain, and reasonable.

- <sup>9</sup>*Baluswami Reddiar Vs Balakrishna Reddiar (AIR 1957)*:- The custom here was the Grandfather marrying the Granddaughter and the court, in this case, held that it was invalid as it is unreasonable and was opposed to morality and public policy.

- <sup>10</sup>*N.Adithyan Vs Travancore Devason Board (2002) 8 SCC106*:- The issue was

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<sup>8</sup> *Surajmani Kujur vs Durga Charan Vs Hamsdah (2001) 3 SCC 13*

<sup>9</sup> *Baluswami Reddiar Vs Balakrishna Reddiar (AIR 1957)*

<sup>10</sup> *N.Adithyan Vs Travancore Devason Board (2002) 8 SCC106*

regarding a Non-Brahmin becoming the Poojari of the temple. The court here held that even if a custom is proved that it existed in pre-constitutional period. It can't be accepted as a custom or a source of law if it violated human rights, dignity, or social equality.

Through these cases, we can understand how a custom can be made invalid. It can be made invalid on the grounds of custom being unreasonable or opposed to morality or against public policy or is uncertain or if it is human rights or dignity or social equality.

## **V. THE CURRENT POSITION OF FGM IN INDIA**

Through the data, we can understand these are just mediums or places which say what FGM violates or what qualifies as a form of violation for FGM. It just clarifies how FGM relates to current laws against sexual assault, child sexual abuse, and domestic violence; combating this practise calls for a more comprehensive strategy. Such a strategy needs to be adopted such as addressing several additional FGM-related issues, such as encouraging the practice, preventing it, regulating physicians and other health professionals who engage in it, the obligation to report, support, and rehabilitation options, and raising awareness. FGM must adhere to constitutional morals, and the Bohra community must adhere to the non-discrimination and equality principles in the constitution, regardless of whether FGM is a religious practice for them. Article 26 will not protect such a practice. The Indian constitution includes gender justice, or at the very least, non-discrimination. As previously stated, the practice of FGM is against gender justice and so violates Articles 14 and 15. Additionally, it violates Articles 25 and 26 of the Indian Constitution because it goes against the principles of the constitution. Untouchability, for instance, was seen to be a component of Hinduism. However, it is condemned by human rights, was outlawed by Article 17<sup>11</sup> of the Indian Constitution, and its practice in any form is a constitutional offense punished by the Civil Rights Protection Act. The goal of Article 17 is accomplished by Article 15(2)<sup>12</sup> and related regulations.” So similarly there should be a law created specifically for FGM.

## **VI. CONCLUSION**

FGM is not specifically prohibited by law in India; rather, it is only considered illegal due to provisions in the Indian Penal Code (IPC) that protect women's rights and sections relating to causing harm and grievous harm. As a result, a coded criminal code is urgently needed, and if there is a coded criminal code for FGM, then there can be a fair system of justice and a uniform law that is available to the entire nation. The frequency of FGM-related cases hasn't decreased

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<sup>11</sup> INDIA CONST. art. 17

<sup>12</sup> INDIA CONST. art. 15 cl . 2

noticeably even after the passage of legislation like POCSO and several related sections in the IPC. Due to the fact that FGM is both a crime and a complicated socio-cultural issue, it has not yet been made a crime. This can be compared to the Sati tradition, where a wife would commit suicide on her husband's funeral pyre to protect the sanctity of the marriage (Which was abolished). Both of these customs are ancient and follow the logic of social conventions, placing restrictions on women's independence and autonomy about their own bodies. It has been normalized as a practice as well as it has been prevalent for 5 centuries. While such behaviours are camouflaged in the guise of culture or religion to appear acceptable or even encouraged, it is important to address this. They ultimately amount to the act of murder or infliction of injury accompanied by malice on the part of the perpetrators. Criminal activity violates society's common morals in some way. However, when society as a whole does not consider such activities to be wrong according to cultural logic, the laws intended to govern such transgressions need to be more stringent. Therefore, the only way to address these issues is through passing detailed law that is all-inclusive.

India is a party to various treaties like the convention on the rights of the Child (CRC) and the convention on the elimination of all forms of discrimination against Women (CEDAW) which would compel them to implement laws for the protection of women and children, it becomes more important for India to fulfill its duty in this sphere now of declaring whether FGM can be declared as a crime or not, as this question cannot be asked now as FGM is masked in the name of religion and customary practices. For the sake of a more egalitarian society, it is past time to abolish such customs that oppress women. It is disappointing that women still have to fight and fight for their rights even though it appears evident that they share the same status and privileges as males.

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