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FROM TRADITION TO TRANSFORMATION: CHARTING A RIGHTS-BASED PATH TO END FEMALE GENITAL CUTTING IN INDIA

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ABSTRACT

The World Health Organisation (WHO) defines 'female genital mutilation (FGM)' as any procedure involving the partial or complete removal of the external female genitalia, including injuries sustained for non-medical reasons. The study explores the prevalence and impact of female genital cutting (FGC) in India, considering the clitoris' role in sexual arousal and its medical structure. The authors emphasise the need for a modified terminology due to evolving ethical and political undertones associated with certain terms. The paper then delves into the consequences faced by women who undergo FGC, using the lens of intersectionality proposed by Professor Kimberlé Crenshaw and the theory of incorporationism by Professor Ann Scales. These frameworks aim to understand how various intersecting factors, such as gender, class, caste, and religion, contribute to the practice of FGC in India. Next, the study juxtaposes FGC with Part III of the Constitution of India and the country's obligations under International Human Rights Law, employing Professor Ronald Dworkin's jurisprudential interpretation of rights in the 'strong sense.' This analysis highlights potential conflicts and alignments between FGC and fundamental rights. Furthermore, the authors critically analyse the policy measures undertaken in African nations, the United Kingdom, and Middle Eastern countries to regulate FGC. Drawing insights from these jurisdictions, the paper proposes suggestions for the Indian legal framework on FGC, aiming to address the issue comprehensively while respecting cultural sensitivities and promoting gender equality. In conclusion, the paper advocates for a rights-based approach to combat FGC in India, considering the prevalence, implications, and legal obligations. The proposed suggestions seek to protect women's well-being and autonomy while respecting cultural nuances and human rights standards.

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I. INTRODUCTION

The World Health Organisation (WHO) characterises ‘female genital mutilation (FGM)’ as constitutive of any and every procedure of partly or entirely removing the external female genitalia.¹ In the event of the female genital organs sustaining injuries out of non-medical reasons, the same shall also fall within the ambit of FGM as defined by the WHO.² Here, it is pertinent to take note of broad categories that FGM is said to embody:

- i. **Type 1:** *Type 1 covers cases involving the partial or complete removal of the clitoral glans (the external and visible part of the clitoris, which is a sensitive portion of the female genitals), and/ or the prepuce/ clitoral hood (the fold of skin enveloping the clitoral glans).*³
- ii. **Type 2:** *The second type pertains to the partial or complete removal of the clitoral glans, in addition to the labia minora (the inner folds of the vulva), with or without the removal of the labia majora (the outer folds of the skin of the vulva).*⁴
- iii. **Type 3:** *Also known as ‘infibulation’, Type 3 comprises the narrowing down of the vaginal opening via the formation of a covering seal. The seal is created as a consequence of cutting and repositioning the labia minora, or labia majora, at times via stitching, with or without the removal of the clitoral prepuce/ clitoral hood as well as glans.*⁵
- iv. **Type 4:** *Type 4 is a residual category for all other harmful processes that the female genitalia is exposed to in furtherance of non-medical aims. Illustrations of such processes include but are not limited to pricking, piercing, incising, scraping, cauterising the genital area, etc.*⁶

For the sake of greater context, it is to be noted that then prepuce refers to the outer fold of the labia minora, which appears as a hood engulfing the clitoris.⁷ In general parlance, the clitoris is

¹ Pan American Health Organisation, Understanding and addressing violence against women Female genital mutilation, WHO (2012), 1, https://apps.who.int/iris/bitstream/handle/10665/77428/WHO_RHR_12.41_eng.pdf?sequence=1, (last visited Jul. 15, 2023); *See also*, World Health Organisation, Female Genital Mutilation: Key Facts, WHO (January 31, 2023), <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>, (last visited Jul. 15, 2023).

² Pan American Health Organisation, *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Department of Reproductive Health and Research, WHO guidelines on the management of health complications from female genital mutilation, World Health Organisation (2016), 2, https://apps.who.int/iris/bitstream/handle/10665/206437/9789241549646_eng.pdf;jsessionid=A755642D549BC26CECF07FA985BF3217?sequence=1, (last visited Jul. 15, 2023) (‘Department of Reproductive Health and Research’).

understood to be the focal point of orgasms in females during the process of sexual arousal.⁸ Medically speaking, the clitoris is understood as a “*multiplanar structure positioned deep to the labia minora, labial fat and vasculature, bulbospongiosus and ischiocavernosus muscles, inferior to the pubic arch and symphysis with a broad attachment to it, and via extensive supporting tissue to the mons pubis and labia.*”⁹

Before proceeding further, the authors would like to clarify that they will be utilising a slightly modified terminology while alluding to the procedure in question. Despite different terms appearing *prima facie* neutral or free of biases, particularly in medical language, it is not undisputed that with the progression of time, words acquire certain ethical or political undertones. Albeit the literary guidance produced by authorities like the WHO primarily make use of female genital ‘mutilation’ to describe the process,¹⁰ there are reliable alternative sources that characterise it as female genital ‘cutting’.¹¹

The significance of substituting mutilation with cutting is made clearer if we peruse definitions of cutting¹² and mutilation¹³ respectively, with the former being a reference to an opening or break in the skin and the latter indicating the destruction of or causation of injury to a relatively prominent or indispensable part of the body. Undoubtedly, while the definition of mutilation carries negative connotations with it, the manner in which cutting is defined and understood is comparatively devoid of such undertones.

⁸ Kim Wallen and Elisabeth A Floyd, *Female Sexual Arousal: Genital Anatomy and Orgasm in Intercourse*, 59(5) HORMONAL BEHAVIOUR 2-4 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3894744/pdf/nihms541140.pdf>, (last visited Jul. 15, 2023).

⁹ Helen E. O’Connell, Kalavampara V. Sanjeevan and John M. Hutson, *The Anatomy of the Clitoris*, 174(1) THE J. OF UROLOGY BY THE AMERICAN UROLOGICAL ASSOCIATION 2 (2005) <[https://edisciplinas.usp.br/pluginfile.php/4507814/mod_resource/content/1/O%E2%80%99Connell%20et%20al.%20\(2005\)%20-%20%20Anatomia%20do%20clit%C3%B3ris.pdf](https://edisciplinas.usp.br/pluginfile.php/4507814/mod_resource/content/1/O%E2%80%99Connell%20et%20al.%20(2005)%20-%20%20Anatomia%20do%20clit%C3%B3ris.pdf), last visited 15 May 2023 (‘O’Connell, Sanjeevan and Hutson’); *See also*, HARVEY MARCOVITCH (ED), BLACKS MEDICAL DICTIONARY (41st edn, A & C Black Publishers Limited, 2005).

¹⁰ World Health Organisation, *Female Genital Mutilation: Fact Sheet*, WHO (2014), 1–4, https://apps.who.int/iris/bitstream/handle/10665/112328/WHO_RHR_14.12_eng.pdf, (last visited Jul. 15, 2023).

¹¹ P. STANLEY YODER NOUREDDINE ABDERRAHIM ARLINDA ZHUZHUNI, DHS COMPARATIVE REPORTS NO. 7 - FEMALE GENITAL CUTTING IN THE DEMOGRAPHIC AND HEALTH SURVEYS: A CRITICAL AND COMPARATIVE ANALYSIS, CALVERTON, MARYLAND: ORC MACRO 1-54 (2004), <https://dhsprogram.com/pubs/pdf/cr7/cr7.pdf>, (last visited Jul. 15, 2023).

¹² National Library of Medicine, *Cuts and Puncture Wounds*, US Department of Health & Human Services (2023), <https://medlineplus.gov/ency/article/000043.htm#:~:text=A%20cut%20is%20a%20break,%2C%20blood%20ves sels%2C%20or%20bone.>, (last visited Jul. 15, 2023).

¹³ THOMAS LATHROP STEDMAN, *STEDMAN’S MEDICAL DICTIONARY FOR THE HEALTH PROFESSIONS AND NURSING: AUSTRALIA AND NEW ZEALAND EDITION* 647 (6th edn, Lippincott Williams & Wilkins, 2007).

Through the course of this paper, the authors will attempt to *firstly*, capture the prevalence and pervasiveness of female genital cutting (FGC) in India.¹⁴ In this section, the authors will examine the consequences faced by women that have undergone this process, through the Lens of ‘Intersectionality’ as posited by Professor Kimberle Crenshaw¹⁵ and the Theory of ‘Incorporationism’ as expounded by Professor Ann Scales¹⁶ in their respective seminal pieces. *Secondly*, the paper shall progress towards the juxtaposition of FGC with Part III of the Constitution of India and the country’s obligations under International Human Rights Law. This juxtaposition will be undertaken via the invocation of Professor Ronald Dworkin’s jurisprudential interpretation of rights in the ‘strong sense’.¹⁷ *Thirdly*, the authors shall critically analyse at the policy measures that have been undertaken in jurisdictions like the African nations, the United Kingdom and the Middle Eastern countries to regulate the occurrence of FGC. Finally, the paper shall conclude with a set of suggestions for the Indian legal framework on FGC, in accordance with the authors’ opinion on the best way forward.

II. FEMALE GENITAL CUTTING IN INDIA: PREVALENCE & REPORTED CONSEQUENCES

Has female genital cutting been reported to occur in India?

While the existing data indicates that FGC is practiced in India at the hands of some Islamic sects, it is the Dawoodi Bohra Community that is known to be extensively undertaking this procedure amongst their members, which comprises almost a million followers of the Shia denomination.¹⁸ FGC in this community is said to involve the partial or complete removal of the clitoral hood or the prepuce,¹⁹ when the female child reaches the age of 7 years and above. Apart from the Dawoodi

¹⁴ Stency Mariya Mark, *Female Genital Mutilation: A Facet of Patriarchal Society*, Winter Issue INDIAN LAW INSTITUTE L. REV. 1-20 (2021), https://ili.ac.in/pdf/win21_1.pdf, (last visited Jul. 15, 2023).

¹⁵ Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989(1) THE U. OF CHICAGO LEGAL FORUM (1989), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1052&context=uclf>, (last visited Jul. 15, 2023) (“Crenshaw”).

¹⁶ Ann C. Scales, *The Emergence of Feminist Jurisprudence*, 95(1373) THE YALE L. J. 1385 (1986) https://openyls.law.yale.edu/bitstream/handle/20.500.13051/16418/68_95YaleLJ1373_1985_1986_.pdf?sequence=2&isAllowed=y, (last visited Jul. 15, 2023).

¹⁷ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184-205 (Harvard University Press, 1977).

¹⁸ Avanti Deshpande, *Female Genital Mutilation/Cutting in India: An Urgent Need for Intervention*, LSE Human Rights Blog (May 6, 2022), <https://blogs.lse.ac.uk/humanrights/2022/05/06/female-genital-mutilation-cutting-in-india-an-urgent-need-for-intervention/>, (last visited Jul. 15, 2023).

¹⁹ Elliot Klein, Elizabeth Helzner, Michelle Shayowitz, Stephan Kohlhoff, and Tamar A. Smith-Norowitz, *Female Genital Mutilation: Health Consequences and Complications — A Short Literature Review*, OBSTETRICS & GYNECOLOGY INTL.

Bohra Community, certain Sunni groups in the state of Kerala have also been reported to be engaged in FGC amongst their members.

While there exists a plethora of literature, largely curated by researchers outside the Bohras, on how the practices of ‘khafd/khafz/khatna’²⁰ categorically satiate the elements of WHO’s definition of Type 1 FGC, it is important to take into account the perspectives from members of the community itself, that possess first-hand experience of what khafz constitutes and the precise manner in which it is effectuated. In this regard, leaders of the Dawoodi Bohras have themselves acknowledged the parallels between khafz and WHO’s definition of Type 1 FGC.²¹

Additionally, a prominent spiritual leader of the Dawoodi Bohras clarified that even though their community’s religious texts mandate khafz as a rite of passage towards the achievement of religious immaculacy for both males and females, the procedure shouldn’t be practiced in nations that specifically outlaw the same.²² In essence, the leader urged members of the community to pay due regard to the legal system of the nations where they were residing as citizens.

To further solidify their stance of revering the laws of nations over their personal religious beliefs, convenors of Dawoodi Bohra Trusts in jurisdictions like Australia critiqued the undertaking of khafz at the hands of parents/guardians on their minor children, particularly young girls, in direct contravention to legislations prohibiting FGC under all circumstances.²³ This critique was

3 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6079349/pdf/OGI2018-7365715.pdf>, (last visited Aug. 20, 2023).

²⁰ India’s Dark Secret; *See also*, Harinder Baweja, India’s Dark Secret, HINDUSTAN TIMES (Mumbai, February 29, 2016), <https://www.hindustantimes.com/static/fgm-indias-dark-secret/>, (last visited Jul. 15, 2023).

²¹ Abantika Ghosh, Bring legislation to ban female genital mutilation, religious leader writes to PM Modi, THE WIRE (January 30, 2023), <https://theprint.in/india/bring-legislation-to-ban-female-genital-mutilation-bohra-muslim-leader-writes-to-pm-modi/1342955/>, (last visited Jul. 15, 2023).

²² Mridula Chari, Bohra leader upholds female circumcision in countries where it is not banned, SCROLL (June 7, 2016), <https://scroll.in/article/809463/bohra-leader-upholds-female-genital-mutilation-in-countries-where-it-is-not-banned>, (last visited Jul. 15, 2023); *See also*, Outlook Web Desk, Muslim Leader of Dawoodi Bohra Calls for Ban on Female Genital Mutilation, Writes Letter to PM Modi, OUTLOOK (New Delhi, February 1, 2023), <https://www.outlookindia.com/national/muslim-leader-of-dawood-bohra-calls-for-ban-on-female-genital-mutilation-writes-letter-to-pm-modi-news-258169#:~:text=According%20to%20a%20report%20by,condemn%20the%20practice%20of%20FGM,> (last visited Jul. 15, 2023).

²³ Aarefa Johari, Stop female circumcision, Dawoodi Bohra authorities tell community members in Australia, SCROLL (February 11, 2016), <https://scroll.in/article/803391/stop-female-circumcision-dawoodi-bohra-authorities-tell-community-members-in-australia>, (last visited Jul. 15, 2023).

conducted via the issuance of certain edicts, which were subsequently subjected to considerable circulation and publication throughout the world, including countries like India.²⁴

Reported Consequences of Female Genital Cutting vis-a-vis the Frameworks of Intersectionality & Incorporationism

(A) DETRIMENTS TO MENTAL HEALTH

The procedure of FGC has often been linked with the perpetration of violent acts against Muslim women, particularly those in communities like the Dawoodi Bohras.²⁵ A multitude of reports prepared by reputed medical organisations and women's/child rights organisations elaborately chart out both the short and long-term impacts of undergoing FGC, particularly in one's childhood and without informed consent.

Multiple survivors of FGC have reported suffering from mental health illnesses like depression, low self-esteem and severe anxiety as a ramification of being subjected to the practice.²⁶ Most of these instances appear to have occurred in their childhood, when they vested their utmost trust and confidence in their parents/guardians to take decisions in furtherance of their welfare.²⁷ However, getting coerced or tricked into khafz through the very parents they held in high regards culminates in a devastating feeling of getting betrayed.²⁸

Even when FGC survivors and their allies gather the courage to share their lived experiences and their opinions on the detriments of the procedure amongst members of the public, they are shamed and threatened by orthodox individuals, which often tend to be male members of communities like that of the Dawoodi Bohras.²⁹ The apprehension of potential ostracisation and

²⁴ Anjuman-e-Burhani, Resolution on FGM, SAHIYO (February 9, 2016), [¶5], https://sahiyo.files.wordpress.com/2016/01/anjuman_e_burhani_sydney_resolution_letter-1.pdf, (last visited Jul. 15, 2023).

²⁵ Amy Gee, Elena Kraus, and Amy Bilyeu, *Female Genital Cutting: Considerations for the Western Physician*, 116(1) MISSOURI MEDICINE 32-34 (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6390784/pdf/ms116_p0032.pdf, (last visited Jul. 15, 2023).

²⁶ Milken Institute School of Public Health, What are the mental health effects of FGM/C?, GEORGE WASHINGTON UNIVERSITY (2023), <https://fgmtoolkit.gwu.edu/are-you-health-care-provider/what-are-mental-health-effects-fgmc#:~:text=Women%20who%20are%20aware%20of,do%20to%20improve%20their%20symptoms.&text=Women%20who%20have%20undergone%20FGM,who%20have%20violated%20their%20trust.>, (last visited Jul. 15, 2023).

²⁷ *Id.*

²⁸ Harinder Baweja, 'India's Dark Secret', HINDUSTAN TIMES, <https://www.hindustantimes.com/static/fgm-indias-dark-secret/>, (last visited Jul. 15, 2023).

²⁹ Priya Goswami, Breaking the silence on female genital mutilation in today's India, DOWN TO EARTH (February 6, 2021), <https://www.downtoearth.org.in/blog/health/breaking-the-silence-on-female-genital-mutilation-in-today-s-india-75414>, (last visited Jul. 15, 2023).

resentment from their own community members often compels survivors to go into hiding and refrain from voicing their beliefs publicly.

(B) DETRIMENTS TO BODILY HEALTH

As studies on the practice of FGC in conspicuous settings in India and other nations have emerged, it has become evident that FGC survivors recall the process as one involving immense pain and discomfort.³⁰ Apart from the immediate physical ramifications, health complications along the lines of incontinence, urinary tract infections, hypersensitivity in the clitoris and surrounding areas, incapacitation in terms of being able to feel sexual pleasure, and an overall reduced sex drive have also been reported by FGC survivors.³¹

(C) THE FRAMEWORK OF INTERSECTIONALITY

In her seminal article on intersectionality, Professor Crenshaw describes the concept as an amalgamation of various interconnected markers of identity, that significantly inform the lived experiences of individuals in the society.³² She highlights how the intersection of these markers subjects certain people to discrimination and prejudice, while placing others in a position of power and privilege.³³ The oppression which people falling within this intersection, face is a form of double or triple oppression. This would be greater than the sum of the oppression associated with belonging to each of the different markers.³⁴ While Professor Crenshaw elaborates upon the markers of race, gender, class and sexuality in her piece, the foundational expanses of intersectionality are squarely applicable to scenarios like the one FGC survivors find themselves in, particularly in the context of nations such as India.

The first identity marker of an FGC survivor is that of gender, since all of them were subjected to khafz as minor girls or young adult women. The second marker of identity is their religious faith, as they almost exclusively belong to Islamic sects like the Dawoodi Bohras. The final identity

³⁰ Rigmor C Berg, Vigdis Underland, Jan Odgaard-Jensen, Atle Fretheim and Gunn E Vist, Effects of female genital cutting on physical health outcomes: a systematic review and meta-analysis, 4(11) NATIONAL LIBRARY OF MEDICINE 6-8 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4244458/pdf/bmjopen-2014-006316.pdf>, (last visited Jul. 15, 2023).

³¹ United Nations Children's Fund, 2021 Annual Report to the US Department of State: Eliminating Female Genital Mutilation, UNICEF (June 2022), 8, <https://www.unicef.org/media/122636/file/FGM-Annual-report-2021-USG.pdf>, (last visited Jul. 15, 2023).

³² Crenshaw, *supra* note 15, at 140.

³³ *Id.* at 151.

³⁴ Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour, 43(6) STAN. L. REV. (1991), <https://blogs.law.columbia.edu/critique1313/files/2020/02/1229039.pdf>, (last visited Jul. 15, 2023).

marker is that of class, as parents often coerce their daughters into khafz so as to gain greater social acceptance amongst the members of their community. Further, it has been reported that members in lower economic stratas, lacking resources to procure education and thus awareness vis-à-vis the detriments of FGC, are more likely to partake in khafz when compared to their more financially stable peers.

For a Muslim woman with a weak financial background in a country life with communal violence and heading towards right wing, Hindu majoritarianism,³⁵ one can clearly observe that the intersection of these markers of identity place her in a far worse off position than an affluent, upper caste, Hindu male in India. The Indian society is known to be heavily patriarchal, with women being relegated to the status of second-class citizens and being actively prevented from partaking in their upliftment.

When the factor of religion is accounted for, a woman from minority religious faiths will be positioned in a further disadvantaged place in comparison to an upper caste, Hindu woman. Even when the former as an FGC survivor voices her opinions, the same will be misappropriated by Hindu zealots to spread hate against Muslims at large, instead of supporting her in addressing her concerns and introducing reforms in her community practices.³⁶

Furthermore, if the FGC survivor hails from a financially underprivileged background and thus lacks resources to protect her in the event of backlash and exclusion from her community members, she will likely be coerced into silence. Even if she bolstered the courage to stand up to such threats, her credibility will be negatively impacted by her lack of finances and connections with those in power and resources. So, in effect, she faces a form of triple oppression due to the combined identity which is greater than the individual oppressions arising from each identity markers.

(D) THE LENS OF INCORPORATIONISM

If we view the predicament of an FGC survivor in India through the lens of ‘incorporationism’, it becomes evident that her identity markers subject her to tripartite oppression, at the hands of

³⁵ Adrija Roychowdhury, Most damaging effect of majoritarianism on India’s polarised democracy is undermining of the rule of law, *THE INDIAN EXPRESS* (New Delhi, May 9, 2019), <https://indianexpress.com/article/research/most-damaging-effect-of-majoritarianism-on-indias-polarised-democracy-is-undermining-of-the-rule-of-law-5719297/>, (last visited Jul. 15, 2023).

³⁶ Hannah Ellis-Petersen, Inside Delhi: beaten, lynched and burnt alive, *THE GUARDIAN* (New Delhi, March 1, 2020), <https://www.theguardian.com/world/2020/mar/01/india-delhi-after-hindu-mob-riot-religious-hatred-nationalists>, (last visited Jul. 15, 2023).

“people who must co-opt the voices of the powerless, who can’t let them speak for themselves because, by definition, “the other” is mute.”³⁷ The current Indian society, which stands on the shoulders of patriarchy,³⁸ Hindutva³⁹ and crony capitalism,⁴⁰ views women as different from men, with the latter being perceived as a superior human being to the former.

When an FGC survivor shares or decides to share her trauma publicly, she is either discredited or not taken seriously. Her voice is incorporated by the male members of her community and upper-caste Hindu males into their own talking points, which leads to the perpetration of further male chauvinism and the invigoration of the patriarchal set up in the society, which is India’s case is a family being headed by a male ‘leader’, with his wife and children dependant on him.⁴¹

So, it can be stated that FGC remains a practice which is still visible in different parts of India, most prominently within the Dawoodi Bohra Community. But this practice is not something which is forced upon everyone within the community while entirely disregarding any existing societal and legal rules. There is considerable evidence to show that the leaders of the Dawoodi Bohra Community still give due regard to the societal and legal rules and are more than willing to compromise their FGC practices in tune with the scope granted to them by these rules. This, however, does not mean that the practice of FGC has no other repercussions on the women undergoing the procedure.

Along with mental, emotional and psychological pains, women undergoing such procedures, either willingly or forcefully, face societal oppression which is much greater than Muslim men, women or lower class people. Using Professor Crenshaw’s scheme of intersectionality, it can be seen that the societal oppression which the women who undergo FGC, is much greater than that faced by those mentioned above. In the following section, the contested practice of FGC will be analysed on the touchstone of India’s Constitutional provisions and its human rights obligations.

³⁷ Scales, *supra* note 16, at 1385.

³⁸ S Venkatanarayanan, Power of Patriarchy, *The Hindu: Frontline* (New Delhi, February 26, 2020), <https://frontline.thehindu.com/cover-story/power-of-patriarchy/article30911470.ece>, (last visited Jul. 15, 2023).

³⁹ Lal Dena, Hindutva and the Question of Who Owns India, *The Wire*, (February 19, 2022), <https://thewire.in/communalism/hindutva-and-the-question-of-who-owns-india>, (last visited Jul. 15, 2023).

⁴⁰ Kapil S. Kamble, *The Anatomy of Crony Capitalism in India*, 58(2) *ECONOMIC & POLITICAL WEEKLY* 23-27 (2023), https://www.epw.in/journal/2023/20/commentary/anatomy-crony-capitalism-india.html?0=ip_login_no_cache%3De7d0aeb9b5c9d679ccf8a26cd96bff28, (last visited Jul. 15, 2023).

⁴¹ Jonathan Evans, Neha Sahgal, Ariana Monique Salazar, Kelsey Jo Starr and Manolo Corichi, Gender Roles in the Family, Pew Research Center (March 2, 2022), <https://www.pewresearch.org/religion/2022/03/02/gender-roles-in-the-family/>, (last visited Jul. 15, 2023).

III. FEMALE GENITAL CUTTING VIS-A-VIS INDIA'S CONSTITUTION & ITS INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

(A) CONSTITUTIONAL CHALLENGES TO FGC

At the outset, it is important to take note of the Indian Government's domestic obligations to its citizens under Part III of the Constitution of India. The first set of provisions relevant to the discussion of FGC would be Articles 14, 15 and 21.

Article 14 envisages that "*the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.*"

Article 15 provides that "*the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.*"

Article 21 along similar lines posits that "*no person shall be deprived of his life or personal liberty except according to procedure established by law.*"

The second set of provisions under the constitution, which are often invoked by community members justifying the undertaking of khafz as an 'essential religious practice' (ERP),⁴² are as follows:

- i. Article 25: "*(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.*"
- ii. Article 26: "*Subject to public order, morality and health, every religious denomination or any section thereof shall have the right —*
 - (a) *to establish and maintain institutions for religious and charitable purposes;*

⁴² Dhruv Singhal, Examining the Constitutionality of Female Genital Mutilation in India, LAW SCHOOL POLICY REVIEW, (December 21, 2022), <https://lawschoolpolicyreview.com/2022/12/21/examining-the-constitutionality-of-female-genital-mutilation-in-india/>, (last visited Jul. 15, 2023).

- (b) to manage its own affairs in matters of religion; Prohibition of employment of children in factories, etc. Freedom of conscience and free profession, practice and propagation of religion. Prohibition of traffic in human beings and forced labour. Freedom to manage religious affairs.
- (c) to own and acquire movable and immovable property; and
- (d) to administer such property in accordance with law.”

(B) FGC AS ESSENTIAL RELIGIOUS PRACTICE

These constitutional provisions and their jurisprudence giving rise to the Essential Religious Practices (“ERP”) Test, are relied upon by the leaders of the Dawoodi Bohra Community to justify the practice of FGC.⁴³ The ERP Test has been a tumultuous history since India’s independence. While the early Supreme Court cases,⁴⁴ relied on the Constituent Assembly debates and interpreted Section 25, to permit practices which are “essentially religious”. The Court was attempting to alienate religious and secular practices, and in doing so, it was subjecting the latter to state regulation while shielding the former from such intervention.⁴⁵ This interpretation slowly underwent an evolution in subsequent cases of the Supreme Court.⁴⁶

From the “essentially religious”, the Court to determining whether the practice was “essential to the religion”.⁴⁷ So, instead of the nature of the practice, the importance of the practice within the said religion, was being qualified.⁴⁸ This inquiry required the courts to essentially become theologians and interpret the holy books of different religions to ascertain essentiality of the practice.⁴⁹ This version of the ERP Test was further elaborated upon in recent times, where the Supreme Court has held that a practice that is merely permitted/allowed or not prohibited by a

⁴³ Rishika Radhakrishnan, *Constitutionality of Female Genital Mutilation in India*, 4(1) INTL J. OF L. MANAGEMENT & HUMANITIES 2068-2075 (2021), <https://www.ijlmh.com/wp-content/uploads/Constitutionality-of-Female-Genital-Mutilation-in-India.pdf>, (last visited Jul. 15, 2023).

⁴⁴ *Essential Religious Practices: Court in Review*, SUPREME COURT OBSERVER (September 4, 2017), <https://www.scobserver.in/journal/essential-religious-practices-court-in-review/>, (last visited Jul. 15, 2023).

⁴⁵ *Commissioner, Hindu Religious Endowments, Madras v Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282.

⁴⁶ Ambarish B. & Muthi-ur-Rahman Siddiqui, *What is the essential religious practices test?*, DECCAN HERALD (March 16, 2022), <https://www.deccanherald.com/india/karnataka/dh-deciphers-what-is-the-essential-religious-practices-test-1091713.html>, (last visited Jul. 15, 2023).

⁴⁷ Mary Kavita Dominic, *Essential Religious Practices' Doctrine as a Cautionary Tale: Adopting Efficient Modalities of Socio-Cultural Fact-Finding*, 16(1) SOCIO-LEGAL REV. (2022), <https://repository.nls.ac.in/cgi/viewcontent.cgi?article=1082&context=slr>, (last visited Jul. 15, 2023).

⁴⁸ *Id.*

⁴⁹ Elizabeth Seshadri, *The Sabarimala Judgment: Reformatory and Disruptive*, THE HINDU CENTRE FOR POLITICS AND PUBLIC POLICY (Oct. 05, 2018), <https://www.thehinducentre.com/thearena/current-issues/article25120778.ece>, (last visited Jul. 15, 2023).

religion and religious practices, cannot be considered as essential religious practices within the tenets of the said religion.⁵⁰

In the case of FGC, it wouldn't be incorrect to rely on the opinions of the leaders of the Dawoodi Bohra Community to judge if the practice is essential to the faith of the community members. Instead, as done in previous cases of excommunication,⁵¹ Tandava dance,⁵² cow slaughter,⁵³ Triple Talaq,⁵⁴ Sabrimala entry issue,⁵⁵ etc., reliance should be placed on the religious texts of Islam. In India, the texts which Courts have mainly looked at to ascertain whether a practice form an essential religious practice is Islam, are The Holy Quran⁵⁶ and The Hadith.⁵⁷ Within the former, there is not a single text or phrase which approves the practice of FGC.⁵⁸ Rather, there are several verses in the holy book which condemn any form of mutilation of the human body as interfering with the creation of Allah.⁵⁹

On the other hand, the Hadith does mention FGC at several places. However, they have been termed as weak Hadith, in the sense that they have to be interpreted in a certain manner to infer that it promotes FGC. Moreover, Islamic scholars and theologians have repeatedly stated that not everything written in the Hadith, which can be attributable to the Prophet, should be taken at face value. Rather, they should be verified for establishing their legitimacy and authenticity. Additionally, such scholars have also held that weak Hadiths, by themselves, can never be a justification for any practice in Islam, particularly when it affects or mutilates the human body.

As a consequence of this, FGC, which barely finds itself some presence in a weak Hadith and none in the Quran, cannot be considered as an essential religious practice.⁶⁰ Moreover, even religious leaders of Islam across the world and even across India, have adopted contradictory stances with

⁵⁰ Shayara Bano v. Union of India, (2017) 9 SCC 1.

⁵¹ Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, AIR 1962 SC 853.

⁵² Acharya Jagdishwaranand v. Commissioner of Police, Calcutta, AIR 1984 SC 512.

⁵³ Mohd. Hanif Quereshi v. State of Bihar, AIR 1958 SC 731.

⁵⁴ Shayara Bano v. Union of India, (2017) 9 SCC 1.

⁵⁵ Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1.

⁵⁶ Sarah R. Hayford & Jenny Trinitapoli, *Religious Differences in Female Genital Cutting: A Case Study from Burkina Faso*, 50(2) J. OF SCIENTIFIC STUDY OF RELIGION (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4064295/>, (last visited Jul. 15, 2023).

⁵⁷ *Id.*

⁵⁸ Ali Gomaa, *The Islamic view on female circumcision*, 19(3) AFRICAN J. OF UROLOGY (2013), <https://www.sciencedirect.com/science/article/pii/S1110570413000313>, (last visited Jul. 15, 2023)

⁵⁹ *Id.*

⁶⁰ Al-Shawkani, *Nayl al-Awtar*, vol.1, at 185.

respect to its essentiality in Islam.⁶¹ Additionally, several Islamic sects do not even practice it,⁶² but rather condemn it.⁶³ Therefore, in any constitutional question to the essentiality of FGC within Islam, the answer is bound to state that it is not an essential religious practice. Therefore, FGC will be subject to state-intervention and would not be shielded by religious immunity.

Nevertheless, even if we were to characterise khafz as an ERP within the religious rights under Articles 25 and 26, the language of these provisions is indicative of the restrictions of public order, morality as well as health being placed on them, in addition to the fetters imposed by the Rights under Articles 14, 15 and 21. Given that khafz has no known health benefits and has been widely reported by survivors as traumatic and detrimental to their well-being,⁶⁴ it wouldn't survive the constitutional thrust of the aforementioned restrictions and the three Articles.

(A) FGC vs India's International Human Rights Law Obligations

There exists a plethora of international law documents that have been ratified by India, which indirectly recognise the practice of female genital cutting as a form of violence against girls and women, and thereby advocate for its discontinuance.

- i. The Universal Declaration of Human Rights (UDHR), 1948 – The UDHR acknowledges the Right to Life as a fundamental and inalienable human right, which is under threat when individuals are subjected to FGC without their consent.⁶⁵ Furthermore, the Declaration urges for member states of the United Nations (UN) to take steps towards curbing and eventually eradicating gender-based discrimination.⁶⁶ The UDHR also recognises the right of an individual to the greatest amount of physical and psychological well-being possible,⁶⁷ which has been reported to be infringed upon in the process of khafz.

⁶¹ *Id.*

⁶² *United Nations Population Fund, Female Genital Mutilation (FGM): Frequently Asked Questions*, UNFPA (February 2022), <https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions>, (last visited Jul. 15, 2023).

⁶³ Sayan Mukherjee, *Discarding or Limiting the Essential Religious Practices Test: Why the Supreme Court Must Be Cautious?*, 58(30) *ECONOMIC & POLITICAL WEEKLY* (Jul. 29, 2023), https://www.epw.in/journal/2023/30/special-articles/discarding-or-limiting-essential-religious.html?0=ip_login_no_cache%3De7d466891d7bc939c898b5cfa1d9ab93, (last visited Jul. 15, 2023).

⁶⁴ Ankita Kumar Gupta, In the hunt for 'Taharat' practicing the darkest secret of 'Khafd': *Female Genital Circumcision a violation of Human Rights in India*, 10(2) *INTL. J. OF GENDER & WOMEN'S STUDIES* 24 (2022), http://ijgws.com/journals/ijgws/Vol_10_No_2_December_2022/3.pdf, (last visited Aug. 20, 2023).

⁶⁵ The Universal Declaration of Human Rights (UDHR), 1948, art 3.

⁶⁶ *Id.* at art 2.

⁶⁷ *Id.* at art 25.

- ii. The International Covenant on Civil and Political Rights (ICCPR), 1966 – The ICCPR resonates with the UDHR’s advocacy of eliminating all forms of gender discrimination.⁶⁸ The Convention also recognises the Right to Life as intrinsic and non-deprivable via the employment of arbitrary means.⁶⁹ It also prohibits the meting out of degrading treatment to individuals without their free consent, which would indirectly assault the validity of non-consensual FGC.⁷⁰
- iii. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979 – Much like the UDHR and the ICCPR, the CEDAW upholds the Right of an individual to not be subjected to gender discrimination.⁷¹ The Convention also obligates member states to eliminate all forms of violence against women and to frame domestic policies in furtherance of this goal.⁷² The legal regulation of non-consensual FGC by the Indian Government would undoubtedly be in conformity with the aforementioned CEDAW provision.
- iv. The Convention on the Rights of the Child (CRC), 1989 – The CRC recognises the inalienability of the Right to Life⁷³ and envisages for the interests of children to be accorded primacy while undertaking any action towards them.⁷⁴ It obligates member states to take “*legislative, administrative and other measures*”⁷⁵ to ensure the implementation of the Rights of children under the Convention. Given that FGC is often performed on minor girls who are incapable of consenting, the CRC directly prohibits such a practice.

Even though the practice of khafz appears to be in direct contravention to India’s Constitution and its various obligations under International Human Rights Law, merely banning the same would simply push the practice underground and would also be a direct incursion on the Rights to Life, Personal Liberty, and Freedom of Religion of adult women that are members of the practicing community and are willing to be subjected to khafz, through informed consent.⁷⁶ To further

⁶⁸ The International Covenant on Civil and Political Rights (ICCPR) 1966, art 2, 3, and 26.

⁶⁹ *Id.* at art 6.

⁷⁰ *Id.* at art 7.

⁷¹ The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, art 1.

⁷² *Id.* at art 2 r/w art 5(a); *See also*, CEDAW Committee, General Recommendations 14, 19, & 25.

⁷³ The Convention on the Rights of the Child (CRC), 1989, art 1.

⁷⁴ *Id.* at art 3.

⁷⁵ *Id.* at art 4.

⁷⁶ PTI, ‘Khafz’ is okay, it isn’t female genital mutilation, says Dawoodi Bohra women’s group, *The Print* (August 25, 2018), <https://theprint.in/features/khafz-is-okay-it-isnt-female-genital-mutilation-says-dawoodi-bohra-womens-group/105244/>, (last visited Jul. 15, 2023); *See also*, Richard A Shweder, *The Prosecution of Dawoodi Bohra Women: Some Reasonable Doubts*, 12(1) BRISTOL U. PRESS 9-27 (2022), <https://bristoluniversitypressdigital.com/view/journals/gd/12/1/article-p9.xml>, (last visited Jul. 15, 2023).

understand and resolve this dilemma, it would be useful to invoke Professor Dworkin's Theory of Competing Rights.

(C) THE DWORKINIAN FRAMEWORK OF COMPETING RIGHTS

As per Professor Dworkin, Rights such as those to Life and Religious Freedom are held in the 'strong sense', and they cannot be disregarded in favour of orthodox beliefs or mere administrative convenience.⁷⁷ Both these set of Rights comprise a fusion of moral and legal elements, which places them beyond the reaches of a curtailing government, in response to majoritarian demand or other reasons.⁷⁸ The rights are moral on account of their subjective values to different individuals or groups, in accordance with their own views and beliefs.⁷⁹ The rights are also legal owing to their categorical recognition under Part III of the Indian Constitution.⁸⁰

The state can curtail rights held in the strong sense in certain exceptional circumstances. *Firstly*, if the right itself is not involved, but manifests in a modified form.⁸¹ The state is not obligated to respect that right and can accordingly limit its scope. For example, if an individual has the right to publish certain material, but they also claim that they have a right to advertise it in government newspapers. This is an attenuated right, and the state can refuse the use of its instrumentalities for the publishing. *Secondly*, if the right recognised in a particular situation is a strong right and some competing right (*also a strong right*) gets involved, then the original right can be restricted, subject to a balance being struck between the two.⁸² *Thirdly*, in a marginal case, if it can be established that the cost of recognising the right in the particular case is going to be a cost of a different degree and not just a marginal cost, then such right might be restricted.⁸³

The second exception posited under the Dworkinian Framework of a clash between two rights held in the strong sense would be squarely applicable to the conundrum of the Right to Life/Health and the Right to Religious Freedom, as evident in the procedure of khafz. A balance can be struck between the two if khafz is allowed only for adult women that make an informed decision to undergo the procedure, so as to facilitate the exercise of their Right to Religious

⁷⁷ Dworkin, *supra* note 17, at 190-193.

⁷⁸ *Id.* at 185.

⁷⁹ Kenneth W. Simons, *Dworkin's Two Principles of Dignity: An Unsatisfactory Non-Consequentialist Account of Interpersonal Moral Duties*, 90 BOSTON U. L. REV. 715 (2010), <https://www.bu.edu/law/journals-archive/bult/documents/simons.pdf>, (last visited Jul. 15, 2023).

⁸⁰ The Constitution of India, 1950, art 21, 25-26.

⁸¹ DWORKIN, *supra* note 17, at 198.

⁸² *Id.* at 199.

⁸³ *Id.*

Freedom. If khafz is banned for minors owing to their inability to consent, as well as adult woman that are against undergoing the procedure, their Right to Life/Health will be safeguarded.

Therefore, when tested against the touchstone of India's Constitution, it can be seen that the practice of FGC violates the equality provisions of the Constitution as well as Article 21. Additionally, when seen in the backdrop of Article 25 and Article 26, along with the doctrine of Essential Religious Practice, it can be clearly stated that this practice of FGC does not form an essential religious practice of Islam. Moreover, India's human rights obligations are also violated if it endorses or even does nothing in relation to the practice of FGC. However, a middle ground can be found if reference is made to Dworkin's conception of contesting rights. In this, FGC can be allowed in certain exceptional cases, wherein adult women who can make thought-out choices, could be allowed to undergo the procedure as long as they can provide unaltered consent. However, this conceptual is primarily theoretical. The following section illustrates few instances where this practice has been dealt with practically.

IV. LESSONS FROM OTHER JURISDICTIONS: AFRICA, THE UNITED KINGDOM & THE MIDDLE EAST

Several countries in Africa have joined forces with the United Nations Children's Fund (UNICEF) and the United Nation's Population Fund (UNFPA) under the aegis of the 'Joint Programme on the Elimination of Female Genital Mutilation'.⁸⁴ With exception of Mali, Nigeria and Burkina Faso, countries in Central and West Africa fall within the ambit of the Joint Programme, owing to which they have enacted explicit laws to regulate the practice of FGC.⁸⁵ Even in Nigeria and Burkina Faso, steps are being taken to tackle FGC.⁸⁶

⁸⁴ United Nations Children's Fund, UNFPA-UNICEF Joint Programme on the Elimination of Female Genital Mutilation, *UNICEF* (January 2023), <https://www.unicef.org/protection/unfpa-unicef-joint-programme-eliminating-fgm>, (last visited Jul. 15, 2023).

⁸⁵ United Nations Children's Fund, Female Genital Mutilation in Mali: Insights from a statistical analysis, UNICEF (New York, 2022), 24, file:///C:/Users/Darth%20Vader/Downloads/FGM-Mali_EN%20(2).pdf, (last visited Jul. 15, 2023).

⁸⁶ The Violence Against Persons Prohibition Act of Nigeria, 2015; UNFPA-UNICEF Joint Programme on FGM/C: Accelerating Change, Burkina Faso has a strong law against FGM/C, but winning hearts and minds remains crucial, UNFPA (2022), <https://www.unfpa.org/sites/default/files/resource-pdf/burkinafaso.pdf>, (last visited Jul. 15, 2023).

As far as Southern and East Africa is concerned, the nations of Uganda, Kenya, Eritrea and Ethiopia have introduced laws to prohibit FGC and criminalise those perpetrating the practice.⁸⁷ Awareness campaigns have also been observed across these nations to educate the general public about the detriments of FGC.⁸⁸ In Kenya, FGC is being medicalised, with a considerable chunk of the procedure being performed at the hands of trained medical professionals.⁸⁹

In the United Kingdom, FGC is seen as a criminal offence of duality. When performed on adult women, it is viewed as aggravated gender-based violence.⁹⁰ When young girls are subjected to the same, it is seen as child abuse of a high degree.⁹¹ Apart from the formation of a national plan to eliminate FGC and a nation-wide FGC awareness campaign, legislative alterations were about to the primary law regulating FGC in the UK in 2015,⁹² to cover survivors that are habitual residents there. Additionally, there is a provision for the issuance of FGC Protection Orders,⁹³ as a preventive measure to cease the process before its materialisation.

In Middle Eastern countries like Iraq and Oman, there exist laws that can be utilised to regulate FGC.⁹⁴ In Oman, the practice was prohibited in government hospitals and the Health Ministry aimed to undertake a comprehensive study to gauge the prevalence of FGC across the nation, which is yet to be published.⁹⁵ In Iran, no explicit laws have been enacted to prohibit FGC,⁹⁶ the

⁸⁷ UNFPA-UNICEF Joint Programme on the Elimination of Female Genital Mutilation, *Accelerating Change: UNFPA Response to Eliminate Cross-Border Female Genital Mutilation in East and Southern Africa*, UNFPA (2022), https://esaro.unfpa.org/sites/default/files/pub-pdf/unfpa_response_to_cb_fgm_web.pdf, (last visited Jul. 15, 2023).

⁸⁸ *Id.* at 13.

⁸⁹ UNFPA-UNICEF JOINT PROGRAMME TO ELIMINATE FEMALE GENITAL MUTILATION, THE MEDICALIZATION OF FGM IN KENYA, SOMALIA, ETHIOPIA AND ERITREA, UNICEF (February 2021), <https://www.unicef.org/esa/media/8866/file/The-Medicalization-of-FGM-2021.pdf>, (last visited Jul. 15, 2023).

⁹⁰ HOUSE OF COMMONS – HOME AFFAIRS COMMITTEE, FEMALE GENITAL MUTILATION: THE CASE FOR A NATIONAL ACTION PLAN 7 (Report No. 2, Session 2014-15), <https://publications.parliament.uk/pa/cm201415/cmselect/cmhaff/201/201.pdf>, (last visited Jul. 15, 2023).

⁹¹ *Id.*

⁹² Home Office, *Female Genital Mutilation: Resource Pack*, The Government of United Kingdom (February 6, 2023), <https://www.gov.uk/government/publications/female-genital-mutilation-resource-pack/female-genital-mutilation-resource-pack#legislation>, (last visited Jul. 15, 2023).

⁹³ *Id.*

⁹⁴ FGM in the Middle East, Equality Now (2021), https://www.equalitynow.org/fgmc_in_middle_east/, (last visited Jul. 15, 2023).

⁹⁵ Habiba Al Hinai, *Female Genital Mutilation in the Sultanate of Oman*, Stop FGM in the Middle East (January 2014), 2, <http://www.stopfgmmideast.org/wp-content/uploads/2014/01/habiba-al-hinai-female-genital-mutilation-in-the-sultanate-of-oman1.pdf>, (last visited Jul. 15, 2023).

⁹⁶ Osman Mahmoudi and Elham Hosseini, *The Attitudes toward Female Genital Mutilation: A Survey among the Residents of Uramanat Region, Iran*, 7(1) INTL. J. OF HEALTH & LIFE SCIENCES 2 (2021), <https://brieflands.com/articles/jhrt-94463.pdf>, (last visited Jul. 15, 2023).

Islamic Penal Code, 1991, will cover the procedure under the crimes of bodily mutilation⁹⁷ and the elimination of the sexual abilities of a male or female respectively.⁹⁸

V. THE WAY FORWARD

In continuance of the aforementioned analysis of FGC, the authors venture to make certain recommendations as the way forward.

- i. Firstly, the authors recommend that the practice of FGC be criminalised in all cases except where the woman wanting to undergo the procedure be a fully consenting adult who is made aware of all the repercussions that may arise after undergoing the procedure. Thereafter, the procedure can be mandated to be conducted by certified professionals in certified medical facilities. This entire procedure and permit can be given in a manner similar to that given in the cases of abortion under the Medical Termination of Pregnancy Act, 1971.
- ii. However, in the case of legalised FGC, the certifying authority could be the Indian Association of Aesthetic Plastic Surgeons (“IAAPS”).⁹⁹ In this way, the procedure of FGC can be categorised under the broader umbrella of cosmetic surgery in the same manner as gender reorientation surgery.
- iii. In addition to this, campaigns should also be undertaken to raise awareness amongst members of the public regarding the repercussions that may arise if individuals undergo FGC. Similar to the United Kingdom, African and Middle Eastern countries, a grassroots approach to educate the citizens about the risks posed by FGC would be most ideal in India.
- iv. Till the time a study is undertaken to ascertain the extent of FGC’s prevalence across India and a specific law is enacted, non-consensual FGC should be regulated under the Indian Penal Code¹⁰⁰ and the Protection of Children from Sexual Offences Act,¹⁰¹

⁹⁷ The Islamic Penal Code of Iran, 1991, art 386, 664.

⁹⁸ *Id.* at art 706.

⁹⁹ Stanley A. Klatsky, *ASJ Welcomes Our Newest Partner: Indian Association of Aesthetic Plastic Surgeons*, 28(4) AESTHETIC SURGERY J. (2008), <https://academic.oup.com/asj/article/28/4/379/232890>, (last visited Aug. 20, 2023).

¹⁰⁰ The Indian Penal Code, 1860, s 319-326, s 375: Explanation I.

¹⁰¹ The Protection of Children from Sexual Offences Act, 2012, s 3 r/w s 7.

under provisions that prohibit the infliction of injury to individuals, particularly children in the case of the latter legislation. For adult women that wish to be subjected to FGC, the same should be allowed as an exercise of their Right to Religious Freedom under Articles 25 and 26 of the Indian Constitution.

VI. CONCLUSION

The authors commenced the article by taking stock of how FGC is characterised by the World Health Organisation. Herein, the authors clarified the reasons as to why they will be utilizing the terminology of FGC over that of FGM to assume a neutral position towards this practice and proceed with no prejudices.

Firstly, the authors examined the existence of FGC in India, primarily among members of the Dawoodi Bohra Community. Placing reliance on existing medical literature on FGC, the authors concluded that there are no known scientific benefits to this practice. On the contrary, minors and adult women that have been compelled to undergo FGC have reported long-term detriments to their mental and physical health. We concluded Section I by juxtaposing the discrimination meted out to Dawoodi Bohra women via the feminist lenses of ‘intersectionality’ and ‘incorporationism’ respectively.

Secondly, the authors scrutinised FGC against India’s domestic and international law obligations. An invocation of the ‘Essential Religious Practice’ Test within the ambit of the Right to Religious Freedom under the Indian Constitution did not appear to safeguard FGC against the rigours of Articles 14, 15 and 21 of the Constitution. Likewise, India’s human rights obligations under instruments like the UDHR, ICCPR, CEDAW and the CRC seemingly impugned the practice of FGC. To resolve this predicament, the authors employed the ‘Dworkinian Framework of Competing Rights’ to suggest the treading of a middle path for the advocates and critiques of the practice.

Thereafter, the authors looked at the prevalence of FGC in the United Kingdom, Africa and the Middle East. Section 3 highlighted real-life instances of how the risks associated with FGC may be minimized with the use of medicalization, similar to the Kenyan approach. Further, this Section demonstrated the utility of public awareness campaigns to educate people about the practice of FGC and thus facilitate further risk mitigation.

Lastly, we adduced certain policy recommendations, which advocated for the prohibition of FGC for minors and non-consenting adult women. For adult women that were willing to partake in the practice in furtherance of their religious rights, we suggested for the conduction of FGC only at the hands of medical professionals certified by the Indian Association of Aesthetic Plastic Surgeons, within the broad framework of the Medical Termination of Pregnancy Act, 1971. We also flagged the inalienability of public awareness campaigns to educate the Indian populace about what the FGC truly entails.