

Legal Reform to Combat Sexual and Gender-Based Violence

PART III

Female Genital Mutilation

CENTRE FOR POLICY ALTERNATIVES

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Introduction

This report explores areas for legal reform relating to Female Genital Mutilation (FGM) in Sri Lanka. It is a non-exhaustive analysis of the practice of FGM in Sri Lanka with the particular aim of identifying lacunae in the criminal law. The report recommends legal reforms to address FGM and policy recommendations to supplement successful legal reform.

This report is Part III of a series of papers providing recommendations for law reform to combat sexual violence. Part I examines existing laws that need reform, and why law reform in this area has been slow. Parts II and IV examine the need to introduce specific laws for the criminalisation of online sexual violence and vitriolage respectively.

Female Genital Mutilation

FGM, also known as Female Genital Cutting (FGC), comprises “*all procedures that involve partial or total removal of the external female genitalia, or other injuries to the female genital organs for non-medical reasons*”.¹ FGM is recognised internationally as a violation of the human rights of girls and women, and the World Health Organisation (WHO) classifies it into four categories:²

- Type I: Clitoridectomy – partial or total removal of the clitoris and/or the prepuce
- Type II: Excision – partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora
- Type III: Infibulation – narrowing of the vaginal opening through the creation of a covering seal by cutting and reposition the labia minora/majora
- Type IV: Other – all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping and cauterising

Women and girls subjected to FGM suffer from physical and psychological health complications which may lead to long-term consequences, including but not limited to chronic pain and higher risks of danger during childbirth.³ There are no known medical benefits of FGM and the practice is attributed by some to religious and cultural reasons deeply rooted in

¹ World Health Organisation, 'Fact Sheet: Female genital mutilation', WHO Publications Geneva, January 2018, available at: <https://www.who.int/en/news-room/fact-sheets/detail/female-genital-mutilation>

² Ibid.

³ World Health Organisation, 'Eliminating female genital mutilation: an interagency statement', 2008, pp. 1-39, available at: <https://www.who.int/reproductivehealth/publications/fgm/9789241596442/en/>

society for centuries.⁴ Proponents put forward various justifications for this practice, including the claim that it is a rite of passage into womanhood or that circumcised women are unlikely to engage in acts of infidelity as they are not controlled by their sexual desires.⁵ Though some communities attempt to justify FGM on the basis that it is a religious requirement, research shows that FGM predates most of these religions.⁶

Neither religious text nor observance thus provide basis for the continuance of the practice.⁷ It appears rather to be focused on the social control of girls' and women's bodies and their sexual autonomy.⁸ The practice of FGM is a manifestation of deep-rooted inequality between the genders and is directed towards women and girls with the effect of interfering with the enjoyment of their fundamental rights and their quality of life.⁹

FGM in Sri Lanka

The practice of FGM has culturally specific references;¹⁰ the terms '*Khatna*' and '*Sunnat*' are used within the Sri Lankan context.¹¹ FGM in Sri Lanka is practised in secret,¹² as a discreet and private event in a woman's life which is also intertwined with social convention.¹³ Coupled with the secrecy surrounding the practice, there is an absence of legislation directly addressing FGM in Sri Lanka. While various women's rights groups have consistently raised the need for the introduction and implementation of law and policy to address FGM,¹⁴ effective action has not been taken to prohibit the practice.

⁴ Ibid.

⁵ Ben Mathews, 'Female genital mutilation: Australian law, policy and practical challenges for doctors' *Med J Aust* 2011; 194 (3), available at: <https://www.mja.com.au/journal/2011/194/3/female-genital-mutilation-australian-law-policy-and-practical-challenges-doctors>

⁶ 'The Law and FGM', Thomson Reuters Foundation, September 2018, 12, available at: [https://www.28toomany.org/static/media/uploads/Law%20Reports/the law and fgm v1 \(september 2018\).pdf](https://www.28toomany.org/static/media/uploads/Law%20Reports/the%20law%20and%20fgm%20v1%20(september%202018).pdf)

⁷ Ibid, Ben Mathews, 'Female genital mutilation: Australian law, policy and practical challenges for doctors'.

⁸ Ibid.

⁹ 'Sources of international human rights law on Female Genital Mutilation' (UN Women), available at: <https://www.who.int/reproductivehealth/publications/fgm/9789241596442/en/>

¹⁰ Hope Lewis, 'Between Irua and 'Female Genital Mutilation: Feminist Human Rights Discourse and the Cultural Divide' *Harvard Human Rights Journal* Volume 1, 1995, p. 5, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1080248

¹¹ Zainab Ibrahim & Ermiza Tegal, *Towards Understanding Female Genital Cutting in Sri Lanka*, Family Planning Association of Sri Lanka, 2019, p. 7, available at:

http://www.fpasrilanka.org/sites/default/files/towards_understanding_female_genital_cutting_in_sri_lanka.pdf

¹² Kris Thomas, 'Conversations with a Circumciser: Female Genital Mutilation in Sri Lanka', *Roar Media*, February 27, 2020, <https://roar.media/english/life/in-the-know/conversations-with-a-circumciser-female-genital-mutilation-sri-lanka>

¹³ Savitri Goonesekere, 'Harmful Traditional Practices in Three Countries of South Asia: culture, human rights and violence against women', *UNESCAP Gender and Development, 2012, Discussion Paper Series No. 21* available at: <https://www.unescap.org/resources/harmful-traditional-practices-three-countries-south-asia-culture-human-rights-and-violence>

¹⁴ In 2017, activist Shreen Saroor asked the Committee on Economic, Social and Cultural Rights to recommend that the state should criminalise FGM. See 'Sri Lanka should criminalize the practice of female genital cut, activist tells

In the absence of publicly available national estimates,¹⁵ various anecdotal accounts¹⁶ have been used to support the view that FGM has been practiced¹⁷ in Sri Lanka for decades.¹⁸ These reports suggest that it is practised within the Moor, Malay and Dawoodi Bohra ethnic communities in Sri Lanka.¹⁹ FGM was also considered to be a mandatory and recommended practice by a fatwa issued in 2008 by the All Ceylon Jamiyathul Ulema (ACJU).²⁰ Religious justifications as well as cleanliness were among the reasons for this ruling.²¹ However, diverse opinions are expressed about FGM within communities across regions in Sri Lanka, and while some clerics promote the practice, there are also those who oppose it.²²

A majority of FGM procedures in Sri Lanka are performed as a ritual, practiced through generations by an '*Osthi Maami*' (barber woman) who do not have any medical training,²³ while few procedures are performed by registered or unregistered medical practitioners.²⁴ FGM in Sri Lanka belongs to Type I and IV categories as defined by the World Health Organisation (clitoridectomy and other harmful procedures to the female genitalia, respectively).²⁵ Based on testimonials, infants²⁶ four to five weeks after birth,²⁷ as well as teenage girls²⁸ are subjected to the practice. These testimonies also recount the pain and

CESCR 61', : *Sri Lanka Brief*, July 9, 2017, available at: <https://srilankabrief.org/2017/06/govt-should-criminalise-the-practice-of-female-genital-cut-in-sri-lanka-activists-tell-cescr-61/>

¹⁵ "Parliament MP and Public Health Specialist Sudarshani Fernandopulle was surprised that the practice occurred in Sri Lanka, and stated that there was a "dearth of studies and no public data" on its prevalence, as it is unregulated by law." See Aisha Nazim, "'Minor' snips: The long Lasting Effects Of Female Genital Cutting In Sri Lanka", *Roar Media*, January 10, 2018), available at: <https://roar.media/english/life/in-the-know/minor-snips-the-long-lasting-effects-of-female-genital-cutting-in-sri-lanka>

¹⁶ Ibid, Thomas, 'Conversations with a Circumciser', *Roar Media*.

¹⁷ Ibid, World Health Organisation, 'Eliminating female genital mutilation', p. 42.

¹⁸ Zainab Ibrahim & Ermiza Tegal, 'FGM in Sri Lanka: it's never 'just a nick'', *Al Jazeera*, December 25, 2017, available at: <https://www.aljazeera.com/indepth/opinion/fgm-sri-lanka-nick-171218122855118.html>

¹⁹ Ibid.

²⁰ Ibid. See also: Aanish Cuttilan, 'Female Circumcision, Genital Mutilation and the reality of an outdated Sri Lankan practice', *Pulse.lk*, September 26, 2018, available at: <http://www.pulse.lk/everythingelse/female-circumcision-genital-mutilation-an-outdated-sri-lankan-practice/>

²¹ Ibrahim & Tegal, *Towards Understanding Female Genital Cutting in Sri Lanka*, p. 7.

²² Ibrahim & Tegal, 'FGM in Sri Lanka', *Al Jazeera*.

²² R Senanayake, 'Sri Lanka-Culture: Mothers Watch as Daughters are Circumcised', *Inter Press Service*, August 19, 1996, available at: <http://www.ipsnews.net/1996/08/sri-lanka-culture-mothers-watch-as-daughters-are-circumcised/>

²³ Vimukthi Fernando, 'Female Genital Mutilation: A lifetime of scarred agony', *Sunday Observer*, October 21, 2018, available at:

<http://www.sundayobserver.lk/2018/10/21/news-features/female-genital-mutilation-lifetime-scarred-agony>

²⁴ Shreen Saroor, *Report of the Mannar Women's Development Federation for the Examination of the Fifth and Sixth Combined Periodic Reports of Sri Lanka*, 77th Session of the Committee on the Rights of the Child, December 2017, p. 4, available at:

https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/LKA/INT_CRC_NGO_LKA_29835_E.pdf

²⁵ Ibid.

²⁶ Ibid, R Senanayake, 'Sri Lanka-', *Inter Press Service*.

²⁷ ibid, Savitri Goonesekere, 'Harmful Traditional Practices in Three Countries of South Asia: culture, human rights and violence against women'.

²⁸ Ibid

trauma of the experience of being subjected to FGM, and long-term consequences such as encountering relationship difficulties and reduced sexual pleasure as adults.²⁹

The practice of FGM is archaic. As a practice that is imposed upon infants and children who neither understand nor are able to give informed consent for such practices, it amounts to child abuse. Therefore, it is of vital importance that the law responds appropriately to ensure that the practice is brought to an end.

Can FGM be punished under the existing law in Sri Lanka?

Provisions within the local legal system have limited application to the practice of FGM. Under the Penal Code of Sri Lanka, sections related to cruelty to children³⁰ and grievous hurt³¹ can be interpreted to include instances of FGM. FGM may also be interpreted to be included within the meaning of “child abuse” under Section 39 of the National Child Protection Authority Act No. 50 of 1998.³² The functions of the National Child Protection Authority (NCPA) with regard to monitoring, advising, consulting and making recommendations on issues involving the protection of children can be utilised against the practice of FGM.³³

In fact, in 2017 a report on FGM compiled by several women activists and survivors was submitted to the NPCA, the Human Rights Commission (HRC) and several Parliamentary Committees.³⁴ This report included 15 personal testimonials on the practice of FGM in Sri Lanka.³⁵ It also noted the importance of introducing and implementing legislation prohibiting FGM, and was intended to influence the expression of contrary views and collective decision-making within communities about the practice of FGM.³⁶

Subsequent to the submission, a confidential hearing was held at the Parliamentary Sectoral Oversight Committee on Women and Gender (PSOCWG) with the participation of women who had gone through FGM and human rights activists in early 2018. The findings of the Committee resulted in the Director-General of Health Services issuing a circular to medical

²⁹ Submission on the Practice of Female Genital Cutting (FGC) in Sri Lanka (October, 2017) 5

³⁰ “Whoever, having the custody, charge or care of any person under eighteen years of age, wilfully assaults, ill-treated, neglects, or abandons such person or causes or procures such person to be assaulted, ill-treated, neglected, or abandoned in a manner likely to cause him suffering or injury to health (including injury to, or loss of, sight of hearing, or limb or organ of the body or any mental derangement), commits the offence of cruelty to children.” See section 308 A(1), Penal Code of Sri Lanka

³¹ Ibid, section 311.

³² Interpretation includes acts or omissions in contravention to the Penal Code provision on cruelty to children.

³³ National Child Protection Authority Act, No. 50 of 1998, section 14.

³⁴ Ibid, Fernando, ‘Female Genital Mutilation’, *Sunday Observer*.

³⁵ Ibid, Cutilan, ‘Female Circumcision’, *Pulse.lk*.

³⁶ Ibid, Saroor, *Report of the Mannar Women’s Development Federation*, p. 13.

practitioners, advising them to refrain from any involvement with the practice of FGM or FGC.³⁷ The circular stated that “*Any involvement in the procedure, be it conducting the procedure or encouraging it, is considered highly unethical and that all medical professionals are instructed to refrain from any involvement in female genital mutilation*”³⁸ adding further that “*Disciplinary action shall be taken against any medical professional practising or promoting female genital mutilation, and not adhering to the stipulated instructions.*”³⁹

This circular, however, was met with opposition from certain conservative Muslim groups⁴⁰ but was welcomed as a progressive reform by the Muslim women and rights activists.⁴¹ The introduction of the circular is a progressive step towards the recognition of this practice in Sri Lanka.⁴²

However, the Penal Code provisions of general application may prove to be insufficient in addressing instances of FGM. Moreover, the medically untrained ‘*Osthi Maami*’ who usually perform the procedure in Sri Lanka fall outside the scope the circular issued by the Ministry of Health,⁴³ as the circular is limited to FGM procedures performed by medical professionals. Hence, there is a need for effective legal and institutional measures to address the particularities of the practice of FGM in Sri Lanka.

The practice of FGM is a violation of the right to equality and non-discrimination guaranteed under Article 12 of the Constitution of Sri Lanka. The state has also ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on Rights of the Child (CRC) in 1981 and 1990 respectively, and is subjected to periodic review by the Committees on the implementation of the provisions of these Conventions. These international instruments place the onus on state parties, not individuals or communities

³⁷ Ibid, Fernando, ‘Female Genital Mutilation’, *Sunday Observer*.

³⁸ ‘Health Ministry Circular against female circumcision comes under flack’, *DailyFT*, July 11, 2018, available at: <http://www.ft.lk/Healthcare/Health-Ministry-Circular-against-female-circumcision-comes-under-flack/45-658798>

³⁹ Ibid.

⁴⁰ ‘Sri Lankan Islamic center condemns ban on female circumcision as ‘affront’’, *Reuters*, 2018, available at: <https://www.reuters.com/article/us-sri-lanka-women-fgm/sri-lankan-islamic-center-condemns-ban-on-female-circumcision-as-affront-idUSKBN1K120Z>

⁴¹ A.H Sheriffdeen and Dr Ruvaiz Haniffa ‘Right of Reply: female genital mutilation’, *Daily Mirror*, 28th September 2018, available at: <http://www.dailymirror.lk/article/Right-of-Reply-female-genital-mutilation-156101.html>, Response to Female Circumcision: An Islamic practice brings untold benefits to women Ban FGM in Sri Lanka, *Daily Mirror*, 26 September 2018, available at: <http://www.dailymirror.lk/article/Response-to-Female-Circumcision-An-Islamic-practice-brings-untold-benefits-to-women-Ban-FGM-in-Sri-Lanka-155992.html>

⁴² ibid, Ibrahim & Tegal, *Towards Understanding Female Genital Cutting in Sri Lanka*, p. 8.

⁴³ See: Medical Practitioners, Pharmacists, Midwives and Nurses Ordinance, No. 26 of 1927, section 34.

within states, to comply with binding obligations.⁴⁴ For instance, Article 2(f)⁴⁵ of the CEDAW and Article 24(3)⁴⁶ of the CRC impose obligations on state parties to modify or abolish customs and traditions which discriminate against women and are prejudicial to the health of children. Accordingly, the state is tasked with introducing and enforcing enabling legislation and policy in order to uphold its commitment to human rights.

In 2012, the United Nations General Assembly unanimously passed a milestone Resolution calling on the international community to intensify efforts to end the practice of FGM.⁴⁷ In 2015 the global community further agreed on a set of 'Sustainable Development Goals' which includes a target under Goal 5 related to the elimination of harmful practices, including FGM, in order to achieve gender equality.⁴⁸ Sri Lanka has since established the statutory and institutional framework in pursuance of achieving the SDGs.⁴⁹

Therefore, in recognition of the domestic and international rights obligations undertaken by Sri Lanka, there is a need for the enactment of new legislation making FGM a punishable offence,⁵⁰ by introducing a statute detailing the offence and the accompanying punishment.

⁴⁴ Anika Rahman and Nahid Toubia, *Female Genital Mutilation: A guide to laws and policies worldwide*, London: Zed Books, 2000, p. 44.

⁴⁵ State parties undertake "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."

⁴⁶ State parties undertake "to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children."

⁴⁷ UN Women, 'United Nations bans female genital mutilation', 2012, available at:

<https://www.unwomen.org/en/news/stories/2012/12/united-nations-bans-female-genital-mutilation>

⁴⁸ United Nations, 'Goal 5: Achieve gender equality and empower all women and girls, available at:

<https://www.un.org/sustainabledevelopment/gender-equality/>

⁴⁹ Ministry of Sustainable Development, Wildlife and Regional Development, 'Voluntary National Review on the Status of Implementing the Sustainable Development Goals', June 2018, available at:

https://sustainabledevelopment.un.org/content/documents/19677FINAL_SriLankaVNR_Report_30Jun2018.pdf

⁵⁰ Ibid, Ibrahim & Tegal, 'FGM in Sri Lanka', *Al Jazeera*.

Laws on FGM in Comparative Jurisdictions

Many countries around the world have specific legislation on FGM. These countries are also increasingly motivated to successfully prosecute the offence. This section examines a number of these jurisdictions and their legal settings in detail.

United Kingdom

In the United Kingdom (UK), FGM is made illegal by specific legislation. The practice has been a criminal offence since the introduction of the Prohibition of Female Circumcision Act of 1985⁵¹. Presently, the practise is banned under the Female Genital Mutilation Act of 2003 (FGM Act).⁵² The Serious Crimes Act 2015⁵³ later amended the FGM Act and inserted new provisions to extend jurisdiction extra-territorially for FGM. The Amendment also includes provisions regarding the anonymity for victims of FGM, a new offence related to the failure to protect a girl from FGM, FGM Protection Orders, and a mandatory reporting duty requiring health and social care professionals to report known cases of FGM performed on girls under age of 18 to the Police.⁵⁴

Section 1(1) of the FGM Act details the offence of 'Female Genital Mutilation' as "[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".⁵⁵

It is notable that the definition includes the phrase "a person" with the implication that the provisions therein are not limited to FGM procedures performed by medical professionals. Exceptions to the offence include necessary procedures performed on physical and mental health grounds; or for purposes connected with labour or birth, by a registered medical practitioner, a midwife, or a person undergoing training to become a medical practitioner or a midwife.⁵⁶ In determining whether an operation is necessary for the mental health of a girl, "it is immaterial whether she or any other person believes the operation is required as a matter of custom or ritual."⁵⁷ Assisting a girl to perform FGM on herself is also considered illegal.⁵⁸

⁵¹ Female Circumcision Act of 1985, available at:

http://www.legislation.gov.uk/ukpga/1985/38/pdfs/ukpga_19850038_en.pdf

⁵² Female Genital Mutilation Act of 2003, available at: <http://www.legislation.gov.uk/ukpga/2003/31/contents>

⁵³ Amended by section 70 of the Serious Crimes Act of 2015, available at:

<http://www.legislation.gov.uk/ukpga/2015/9/part/5/crossheading/female-genital-mutilation/enacted>

⁵⁴ Serious Crimes Act of 2015., sections 70-75,

⁵⁵ FGM Act, section 1(1), available at: <http://www.legislation.gov.uk/ukpga/2003/31/section/1>

⁵⁶ Ibid., section 1(2) and 1(3).

⁵⁷ Ibid., section 1(5).

⁵⁸ Ibid., section 2.

The penalty for FGM in the UK can be a prison sentence, a fine or both.⁵⁹ Under the Female Circumcision Act 1985, the maximum penalty for performing FGM was five years. This has been extended to 14 years under the FGM Act 2003 for England, Wales and Northern Ireland.⁶⁰

The Serious Crimes Act introduced a new Schedule 2 into the 2003 Act, which provides for FGM Protection Orders to protect victims and those at risk of FGM.⁶¹ A Protection Order may contain prohibitions, restrictions, requirements and such other terms as the court considers appropriate to protect those at risk. A person who has had or is at risk of FGM, a local authority, or any other person can apply for a Protection Order with the permission of the Court, and the terms of an Order may address conduct outside the UK.⁶² The breach of a Protection Order is an indictable criminal offence which carries five years imprisonment upon conviction, a fine or both.

Though the UK has had comprehensive laws on FGM since 1985, its first successful prosecution of FGM came only in 2019.⁶³ In the case of *R v N (Female Genital Mutilation)*⁶⁴ a mother was convicted for mutilating her 3-year-old daughter and sentenced to 13 years of imprisonment. The Court stated that FGM has long been against UK law as a form of child abuse and in addition to the physical consequences, the psychological effects of FGM are likely to remain with the victim for a long time.⁶⁵ This landmark case was welcomed by campaigners worldwide.⁶⁶

A major reason as to why there are a limited number of convictions is the difficulty faced by investigators and prosecutors in finding sufficient evidence to secure a conviction. Many girls are reluctant to report cases of FGM as they do not want their parents to be prosecuted.⁶⁷ Further, a recent report revealed that healthcare professionals and teachers are reluctant to report cases of FGM due to the fear of being accused of racism and disrespecting cultural

⁵⁹ Ibid., section 5(1) (a) & (b).

⁶⁰ Ibid., section 5,

⁶¹ Serious Crimes Act, section 73.

⁶² FGM Act, section 4.

⁶³ 'FGM: Mother guilty of genital mutilation of daughter', *BBC*, February 1, 2019, available at: <https://www.bbc.com/news/uk-england-47094707>

⁶⁴ *R v N (Female Genital Mutilation)*, available at: <https://www.judiciary.uk/wp-content/uploads/2019/03/r-v-n-female-genital-mutilation-sentencing-remarks-whipple-j.pdf>

⁶⁵ Ibid.

⁶⁶ 'Mother of three- year-old is first person convicted of FGM in UK', *Guardian* February 1, 2019, available at: <https://www.theguardian.com/society/2019/feb/01/fgm-mother-of-three-year-old-first-person-convicted-in-uk>

⁶⁷ Lucy Millburn, 'Why are the UK's Law Against FGM Not Working?', *Right Info*, available at: <https://rightsinfo.org/why-uk-laws-fgm-not-working/>

practices.⁶⁸ Witnesses are also unlikely to come forward as they are often family or friends and are part of a community which sanctions the practice and may ostracise those who refused to submit to FGM.⁶⁹ Therefore, legislation in isolation cannot eradicate FGM and there needs to be a number of measures taken to assist the implementation and prosecution of the practice.

India

Legislation has not been introduced to address FGM In India. FGM is referred to as '*Khatna*' or '*Khafz*' in India and commonly occurs among the Bohra community.⁷⁰ Similar to Sri Lanka, the rates of prevalence of FGM in India is unknown as it occurs in secret. In the past, the Indian Government had maintained that there is no official data to show that FGM exists in the country.⁷¹ The procedure is usually carried out by medically untrained midwives and older women in the community.⁷²

In May 2017, a Public Interest Litigation case was filed in the Indian Supreme Court seeking a ban on FGM.⁷³ The petition⁷⁴ submitted that the practice of FGM performed on girls in the Dawoodi Bohra community has no reference in the Quran and is performed without a medical reason.⁷⁵ The petition further contended that the practice violated Article 14, the right to equality before the law, and Article 21, the right to life and personal liberty, in the Constitution of India. Several intervention petitions filed in the case either supported the ban or defended the practice on the basis that it is an important religious practice for the Dawoodi Bohra community.⁷⁶ A three-judge bench, during a hearing in July 2018, observed that the "*bodily*

⁶⁸ Anna Davis, 'Doctors, nurses and teachers 'still dear raising alarm over FGM', *Evening Standard*, April 27, 2018, available at: <https://www.standard.co.uk/news/health/doctors-nurses-and-teachers-still-fear-raising-alarm-over-fgm-a3825156.html>

⁶⁹ Northern Ireland Human Rights Commission, 'Female Genital Mutilation in the United Kingdom, August 2016, available at: <https://www.nihrc.org/uploads/publications/FGMinUK-15.08.2016.pdf>

⁷⁰ Amnesty International, 'Female Genital Mutilation in India', available at: <https://amnesty.org.in/female-genital-mutilation-in-india/>

⁷¹ Rina Chandran, 'No evidence of FGM, India government tells court, appalling activists', *Reuters*, December 29, 2017, available at: <https://www.reuters.com/article/us-india-women-religion/no-evidence-of-fgm-india-government-tells-court-appalling-activists-idUSKBN1EN00B>

⁷² Somya Abrol, 'Yes, Female Genital Mutilation happens in India: here's everything you need to know', *India Today*, February 6, 2018, available at: <https://www.indiatoday.in/lifestyle/people/story/female-genital-mutilation-india-clitoris-pleasure-muslim-bohra-community-1162510-2018-02-06>

⁷³ *Sunita Tiwari vs. Union of India* [Writ Petition (Civil) No.286 of 2017]

⁷⁴ Petition available at: https://scobserver-production.s3.amazonaws.com/uploads/case_document/document_upload/411/FGM.pdf

⁷⁵ Ibid.

⁷⁶ 'Understanding the Supreme Court's latest judgement mentioning female genital cutting in India', *Sahiyo*, available at: <https://sahiyo.com/2019/11/17/understanding-the-supreme-courts-latest-judgement-mentioning-female-genital-cutting-in-india/>

integrity of women” cannot be violated. However, in September 2018, the case was referred to a five-judge Constitutional bench.⁷⁷ During the proceedings, the Chief Justice orally observed that the Constitution does not allow a person to cause injury to another, and Justice Chandrachud further observed that FGM leaves a permanent, emotional and mental scar on young girls.⁷⁸

The case was referred to in 2019 during the hearing of review petitions in the case concerning Kerala’s Sabarimala temple.⁷⁹ A five-judge bench of the Supreme Court ruled that the debate on women’s entry into the temple overlapped with other cases about gender and religious rights that are pending before the Court, including the practice of FGM within the Dawoodi Bohra community.⁸⁰ The Court stated that a larger bench first needs to rule on the interpretation of the principles governing the fundamental right to the freedom of religion in the Constitution, before passing judgement on cases from various communities.⁸¹ Hearings for the case have been delayed several times, and as of November 2020, have yet to be heard.

Other Jurisdictions

In Australia, all states and territories have passed criminal legislation prohibiting FGM.⁸² The High Court of Australia prosecuted a case involving FGM for the first time in 2019 which led to three convictions and reaffirmed that the practice was banned in all forms.⁸³

⁷⁷ Krishnadas Rajagopal, ‘SC refers plea against female genital mutilation to Constitutional Bench’, *The Hindu*, September 24, 2018, available at: <https://www.thehindu.com/news/national/sc-refers-pil-against-female-genital-mutilation-to-constitution-bench/article25026340.ece>

⁷⁸ *Ibid.*

⁷⁹ ‘Three other cases mentioned in Sabarimala Review’, *Live Law*, November 15, 2019, available at:

<https://www.livelaw.in/top-stories/three-other-cases-mentioned-in-sabarimala-review-order-149785>

⁸⁰ ‘Supreme Court refers Sabarimala temple issue to larger bench, no stay on women’s entry’, *India Today*, November 14, 2019, available at: <https://www.indiatoday.in/india/story/sabarimala-verdict-supreme-court-refers-case-to-7-judge-bench-1618772-2019-11-14>

⁸¹ ‘Female genital mutilation petition pending before Supreme Court’, *Hindustan Times*, November 15, 2019, available at: <https://www.hindustantimes.com/india-news/female-genital-mutilation-petition-pending-before-supreme-court/story-rsHGOLu0z5eEg3aZjHYEIL.html> See also: Samanwaya Rautray, ‘SC refers Sabarimala case to 7 judge bench, no stay on entry of women’, *Economics Times*, November 14, 2019, available at: <https://economictimes.indiatimes.com/news/politics-and-nation/sc-refers-sabarimala-case-to-a-larger-seven-judge-bench/articleshow/72049884.cms>

⁸² Attorney-General’s Department, *Review of Australia’s female genital mutilation legal framework: Final report*, Canberra: Attorney General’s Department, 2013, available at

<http://www.ag.gov.au/Publications/Pages/ReviewofAustraliasFemaleGenitalMutilationlegalframework-FinalReportPublicationandforms.aspx>

⁸³ Elizabeth Byrne, ‘High Court rules female genital mutilation illegal in all forms, NSW court erred in quashing convictions’, *ABC News*, October 16, 2019, available at: <https://www.abc.net.au/news/2019-10-16/high-court-rules-female-genital-mutilation-illegal-in-all-forms/11606396>

In the United States, the Congress enacted legislation criminalising FGM in 1996.⁸⁴ Charges were brought for the first time nearly 21 years later in 2017 against a doctor under this law.⁸⁵ The Department of Justice dismissed this case and asserted that the Congress did not have the authority to pass the Federal FGM law,⁸⁶ eliciting debate and criticism.⁸⁷ At present, the “Stop FGM” Bill⁸⁸ is before the House Judicial Committee awaiting approval to be sent to the House of Representatives for a vote.⁸⁹ As of 2020, 38 out of 50 federal states have specifically criminalised FGM through legislation.⁹⁰

France has been a leading example of successful prosecution of offences related to FGM,⁹¹ with around 50 cases since 1979.⁹² However, there is no specific law against FGM in France and the accused are prosecuted under general provisions of the Penal Code, such as causing bodily harm, causing permanent infirmity or mutilation.⁹³ French law also criminalises omission or failure to assist a person in danger, which can result in a hefty fine or imprisonment. This has proven to be effective for the prosecution to obtain necessary evidence of where FGM has taken place.⁹⁴

It is evident that FGM in international jurisdictions are addressed using two distinct legal approaches: the introduction of specific legislation or the utilisation of existing general provisions already in operation. However, the example of US shows that the introduction of a separate Act may not by itself guarantee enforcement. It is also equally evident that the usage of existing provisions in prosecuting FGM would be insufficient in achieving the end goal of

⁸⁴18 U.S. Code § 116. Female genital mutilation, available at: <https://www.law.cornell.edu/uscode/text/18/116>

⁸⁵ *United States v. Jumana Nagarwala et al.*, No. 17-cr-20274 (E.D. Mich. Nov. 20, 2018), available at:

https://www.justice.gov/oip/foia-library/osg-530d-letters/4_10_2019/download

⁸⁶ *Ibid.*

⁸⁷ Kate Ryan, ‘U.S. government backs off case of female genital mutilation’, *Reuters*, April 13, 2019,

<https://www.reuters.com/article/us-usa-womensrights-fgm/us-government-backs-off-case-of-female-genital-mutilation-idUSKCN1R02LA>. See also: ‘US is moving backwards’: female genital mutilation ruling a blow to girls at risk’, *Guardian*, November 21, 2018, available at: <https://www.theguardian.com/law/2018/nov/20/us-female-genital-mutilation-detroit-michigan-unconstitutional>

⁸⁸ H.R. 6100: STOP FGM Act of 2020, available at: <https://www.govtrack.us/congress/bills/116/hr6100/text>

⁸⁹ Equality Now, ‘FGM in the US’, available at: <https://www.equalitynow.org/fgm>

⁹⁰ AHA Foundation, ‘FGM Legislation by State’, available at: <https://www.theahafoundation.org/female-genital-mutilation/fgm-legislation-by-state/>

⁹¹ Kim Willsher, ‘France’s tough stance on female genital mutilation is working, say campaigners’, *Guardian*, February 10, 2014, available at: <https://www.theguardian.com/society/2014/feb/10/france-tough-stance-female-genital-mutilation-fgm>

⁹² Equipop Excision, parlons-en! & End FGM European Network, *Joint Shadow Report – France (END FGM)*, available at: <https://rm.coe.int/equipop-excision-parlons-en-end-fgm-eu-joint-shadow-report-france/16807b41ab>

⁹³ House of Commons Home Affairs Committee, ‘Female genital mutilation: the case for a national action plan’ Second report of session 2014-15, available at:

<https://publications.parliament.uk/pa/cm201415/cmselect/cmhaff/201/201.pdf>

⁹⁴ John Lichfield, ‘The French way: a better approach to fighting FGM?’, *Independent*, December 15, 2013, available at: <https://www.independent.co.uk/news/world/europe/the-french-way-a-better-approach-to-fighting-fgm-9006369.html>

eradicating the practice. The second approach may have to rely on a wide interpretation by the courts in order to include the practice of FGM into existing law. In light of the above comparative analysis, new legislation in the form of a statute and an accompanying policy framework are needed in order to prohibit and eradicate the practice FGM in places where it has not been substantially addressed.

Recommendations

There is a global trend towards acknowledging the practice of FGM as an offence committed against children and women. Letters issued by Bohra community leaders in several other jurisdictions have asserted that FGM should not be practiced if it is against the law of the particular jurisdiction.⁹⁵ Appropriate criminalising legislation, if passed, in parallel to raising awareness, could lead to cessation of the practice in Sri Lanka. It is imperative that Sri Lanka follow suit and prohibit the practice of FGM, supported by a strong and coordinated approach implemented at local, regional, national and international levels.

To completely eradicate FGM, however, the support of communities affected by the practice is essential. Legislation and policy should supplement community-based efforts geared towards addressing FGM and facilitate open discussion and empowerment of stakeholders. Apart from introducing legislation for criminalisation, it is vital that the constituents affected by FGM are given the opportunity to challenge the cultural and social roots of this practice. Discussions and awareness programmes about FGM should also be conducted in a respectful, non-judgmental and non-paternalistic manner.⁹⁶

The following recommendations are intended to achieve all these outcomes.

Legal Reforms

- Introduce comprehensive legislation in the form of a statute prohibiting the offence of FGM, which:
 - a. Includes a comprehensive definition of FGM.
 - b. Criminalises FGM practiced by anyone, from medical professionals to medically untrained persons such as *'Osthi Maami'*.
 - c. Includes an exhaustive list of exceptions, including surgical procedures performed for valid medical reasons by registered medical practitioners.

⁹⁵ Saroor, Report of the Mannar Women's Development Federation, p. 21.

⁹⁶ Ibrahim & Tegal, Towards Understanding Female Genital Cutting in Sri Lanka, p. 41.

- d. Specifies the medical professionals who are authorised to perform medically necessary procedures relating to female genitalia.
 - e. Provides for Protection Orders for FGM⁹⁷ which includes victims as well as those at risk of FGM.
- Issue guidelines for the prosecution of the offence of FGM and sentencing guidelines to judges on convicting FGM-related offences
 - a. Include measures to ensure the anonymity of the victim in the guidelines

Policy Reforms

- Implement the Policy Framework and National Plan of Action to address Sexual and Gender-based Violence (2016-2020)⁹⁸ which encompasses '*female genital mutilation and other traditional practices harmful to women*' in its definition of violence against women
- Conduct public discussions and awareness programmes in communities affected by FGM to address the stigma surrounding the practice which:
 - a. Allow for FGM to be discussed in a culturally sensitive, non-judgmental and safe manner
 - b. Are conducted in collaboration with community representatives as well as health, social care, education and law enforcement officials
 - c. Make available medically accurate and reader-friendly information about the medical consequences of FGM to attendees
- Enhance the role and independence of the National Child Protection Authority (NCPA) in combating the practice of FGM
- Include FGM as a component in teaching about the impact of violence against and women and girls in the school curriculum, in addition to sex education.
- Provide more support and funding to individual and groups campaigning to prevent FGM, particularly after criminalising legal provisions have been passed
- Educate and create awareness about FGM among medical professionals, community healthcare providers, lawyers and law enforcement authorities in order to ensure FGM is detected and prosecuted successfully
- Creating a robust monitoring system to track FGM in the country
- Conduct periodic research on the practice and publish findings, while ensuring the anonymity of victims.

⁹⁷ Similar to the Domestic Violence Act of Sri Lanka and as practised in the UK.

⁹⁸ Ministry of Women and Child Affairs, 'Policy Framework and National Plan of Action to address Sexual and Gender-based Violence (SGBV) in Sri Lanka 2016-2020' June 2016, p. 16, available at: <http://gbvforum.lk/r-library/document/SGBV%20National%20Action%20Plan.pdf>