

FEMALE GENITAL MUTILATION: A FACET OF PATRIARCHAL SOCIETY*Stency Mariya Mark****ABSTRACT**

Although women are gradually gaining parity with men in terms of respect and dignity, for decades, women have been objectified and subjugated to male authority. Female circumcision, a centuries-old practise, reaffirms and is a marker of existential patriarchy. Over the course of history, more than 200 million girls have been subjected to female genital mutilation. Female genital mutilation is a barbaric cultural practise that is quintessential to patriarchy. This procedure entails the removal of the external female genitalia or other damage to the female genital organs. Women are traumatised and subjected to excruciating pain at such a young age. This paper highlights how, over the years, the procedure of female genital circumcision has been medicalised, which has become an added peril. Furthermore, from a holistic view, the article explains the ramifications of this horrific cut, its consequent psychological damage, and deeply-rooted inequality. Some people who favour this derogatory practise of *khatna* might argue that it is an ancient societal norm and standard that needs to be adhered to. However, the article concludes with the finding that the arguments in favour of FGM are too weak as rituals and traditions cannot override human and child rights. The practise of female circumcision screams the need for an adequate law to prevent the sexuality of women. Moral relativism must be incorporated into the law, especially when the traditions are ruthless and abusive. Society needs to become progressive, not retrogressive.

Keywords: *Female Circumcision, Patriarchy, Medicalisation, Human Rights and Moral Relativism.*

I. Introduction**II. Medicalisation of Female Genital Mutilation****III. Gross Violation of Right to Health****IV. The Fear of Social Shunning****V. Defeating the Social Stigma of *Khafd* in India****VI. Conclusion and Suggestions****I. Introduction**

THE WORLD Health Organization has described the process of female genital mutilation (FGM) as the complete or partial removal of the female genital organs or any kind of injury to the female

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external genitalia for non-medical reasons.¹ This practice of mutilation is also referred to as Female Circumcision or Female *Khatna* and is widely practiced all over the globe. This evil custom and tradition in India will be passed on from generation to generation until a law tries to break this chain of repetition. The custom of Female Genital Mutilation, or FGM, is a quintessential of existential patriarchy. Female genital mutilation is religiously practiced by an Islamic sect called Shia. Shia and Sunni are two denominations of Islam that came into existence after the death of Prophet Muhammad.

There are four major kinds of female genital mutilation. The first is the prominent one, wherein the clitoral glans and the clitoral hood are removed totally or partially.² In the second type, the procedure involves cutting the clitoral glans and labia minora are partially or totally removed. The third type is called infibulations. The vaginal opening is completely narrowed by making a covering seal. The last process is the unequivocal proof of human rights violations because it includes incising, pricking, piercing, etc., the female genitalia.³

The age at which this procedure is performed varies from region to region. In some cases, FGM is carried out on infants or adolescents, while in others, it is done when the female has matured. This barbaric ritual has severe long-term and short-term health consequences that the people have conveniently ignored for years. It includes pain, hemorrhage, bleeding, nervous shock, infections, urination problems, depression, and sometimes infant death.⁴ It is a problem of heightened magnitude because over forty four million girls who are below fifteen years old are subjected to this inhumane treatment, and over two hundred million girls are annually cut across the globe from Africa, Asia, the Middle-East and other parts of the world, maximum being from among immigrant populations of USA, Europe, Australia, and UK.⁵ The history of female genital mutilation is not known yet and the origin is ambiguous. Evidence from Egyptian mummies suggests that a form of female circumcision has been uninterruptedly practiced there for the past

¹ Satang Nabaneh and Adamson S. Muula, "Female genital mutilation/cutting in Africa: A complex legal and ethical landscape", *International Federation of Gynecology and Obstetrics*, 253 (2019).

² World Health Organization, "Female Genital Mutilation", *World Health Organization*, February 3, 2020, available at: <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation> (last visited on May 25, 2021).

³ *Ibid.*

⁴ Liette Perron, Vyta Senikas, et. al, "Female genital Cutting" 35 *JOGC* 1028 (2013).

⁵ United Nations Children's Fund, *Female Genital Mutilation/Cutting: A global concern*, UNICEF, New York, available at: https://www.unicef.org/media/files/FGMC_2016_brochure_final_UNICEF_SPREAD.pdf (last visited on May 25, 2021).

5000 years. Historians such as Herodotus claim that, in the fifth century BC, the Phoenicians, the Hittites and the Ethiopians practiced circumcision.⁶ Later, it was practiced in the tropical zones of Africa, in the Philippines, by certain tribes in the Upper Amazon, by women of the Arunta tribe in Australia, and by certain early Romans and Arabs.⁷ As late as the 1960s, American obstetricians performed clitoridectomies to treat erotomania, lesbianism, hysteria, and clitoral enlargement.⁸

The preconceived notion that female genital mutilation is limited to Islam is a fallacy. Many other religions, like Christians and Jews, also swear by this procedure.⁹ A woman in the USA who came from a strict Christian family was coerced by her parents to undergo female circumcision. She launched a campaign and called the press to tell her story. She claimed that "I remember my arms and legs being held down and somebody covered my eyes. It was awful. I think I blacked out and when I came to senses they had tied my legs together".¹⁰ In India, it is prevalent in the community of 'Dawoodi Bohra' in the Shia Sect of the Islam denomination. They came from Yemen in the 12th century and reside in India and other countries as well including Pakistan, Sri Lanka, *etc.*¹¹ Female circumcision is a "cultural practice" and not a religious practice. It is because this practice of FGM practice predates Christianity and Islam. Hence, it is erroneously linked with the religion. A "cultural practice" is a common perception of how "people routinely behave in a culture"¹² whereas "religious practices" are rituals, ceremonies, festivals, *etc.* done towards a God/ deities of a particular religion. What helps to differentiate a cultural practice from religious is that a religious practice will never promote infliction of harm psychologically or physically.¹³ Therefore, FGM is a cultural practice as religion never encourages its followers to advocate harm.¹⁴ FGM is frequently connected with Islam, despite the fact that there is no mention of female circumcision in the Quran.

⁶ UNFPA, Female genital mutilation (FGM) frequently asked questions, July 2020, *available at*: <https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions> (last visited on 7 October, 2021).

⁷ *Ibid.*

⁸ Nawal M Nour, "Female Genital Cutting: A Persisting Practice" 1 *Reviews in Obstetrics and Gynecology* 137 (2008).

⁹ R. H. Belmaker, "Successful cultural change: the example of female circumcision among Israeli Bedouins and Israeli Jews from Ethiopia" 49 *Isr J Psychiatry Relat Sci* 178 (2012).

¹⁰ Emma Batha, "U.S. woman says strict Christian parents subjected her to FGM", *Thomson Reuters*, April 01, 2019, *available at*: <https://news.trust.org/item/20190401142012-hf8eu/> (last visited on May 26, 2021).

¹¹ Dilshad Tavawalla, "The Practice of Khatna or Female Genital Mutilation amongst the Dawoodi (Daudi) Bohra Shia Muslim Community – Part 1", *Sahiyo*, January 19, 2016, *available at*: <https://sahiyo.com/2016/01/19/the-practice-of-khatna-or-female-genital-mutilation-amongst-the-dawoodi-daudi-bohra-shia-muslim-community-part-1/> (last visited May 26, 2021).

¹² Michael Frese, "Cultural Practises, Norms and Values" 46 *Journal of Cross-Cultural Psychology* 1327 (2015).

¹³ Richard Bonney, "Reflections on the Differences Between Religion and Culture" 6 *Diversity in Medicine* 26 (2004).

¹⁴ *Id.*, at 27.

The disparities in religious systems in nations where genital mutilation is prevalent demonstrate that circumcision arises as a cultural phenomenon in non-Islamic countries.¹⁵

Supporters of FGM believe that female genital mutilation helps to subdue sex urges in women, enhances the pleasure of husband and even fertility. Apart from that, it is done to preserve women's purity, morality, and chastity.¹⁶ There is no evidence to support that this practice has medical benefits. But rather than that, it is torturing and tormenting women both, physically and mentally. It is done predominately because a woman's virginity becomes a matter of family dignity but man's virginity has never been questioned. For years women have been considered a property of men and objectified. The adultery law¹⁷ was struck down in India because it was discriminatory towards women. It was held that a married woman was not husband's property in *Joseph Shine v. Union of India*.¹⁸

The Rig Veda is a sacred ancient Hindu text containing hymns. In the Rig Veda, one of the verses states, "[t]he mind of woman cannot be disciplined; she has very little intelligence".¹⁹ Another verse states "[t]here are no friendships with women; they have the hearts of jackals".²⁰ The Hindus consider *Manusmriti* a divine law and code of conduct. It consists of many derogatory comments, which evidently state that women are lesser than men. The verses of *manusmriti* state that "[i]n childhood a female must be subjected to her father, in youth to her husband, when her lord is dead to her sons; a woman must never be independent."²¹ Another verse states: "[n]o sacrifice, no vow, no fast must be performed by women apart (from their husbands); if a wife obeys her husband, she will for that (reason alone) be exalted in heaven."²²

¹⁵ Özer Birge and Aliye Nigar Serin, "The Relationship between Female Circumcision and the Religion", *IntechOpen*, November 23, 2019, available at: <https://www.intechopen.com/chapters/70185> (last visited on December 08, 2021).

¹⁶ Eva Ontiveros, "What is FGM, where does it happen and why?", *BBC*, February 06, 2019, available at: <https://www.bbc.com/news/world-47131052> (last visited on December 08, 2021).

¹⁷ The Indian Penal Code, s. 497 -

It stated that whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

¹⁸ AIR 2018 SC 1676.

¹⁹ Rig Veda 8.33.17.

²⁰ Rig Veda 10.95.15.

²¹ Manusmriti v.5.148.

²² Manusmriti v.5.155.

Such patriarchal ideologies and ideas of male dominance are outdated and hold no relevance today. Women need to be treated on par with men and deserve respect. There is a need to shift from a patriarchal society to an egalitarian society.

II. Medicalisation of Female Genital Mutilation

Initially, FGM procedures were done by midwives and other females who, although were aware of the procedure but lacked medical proficiency. They were ill-equipped and had half-baked knowledge, yet they performed FGM on young girls in the name of tradition and culture. The tools that they used to cut were sharp blades or razors and they were extremely dangerous if not handled prudently, and, if the girl resisted it would just be an added peril.²³ However, as the generations passed, the Bohra community's women stopped operating on young girls but rather sought for medical practitioner's help. The upper caste and influential families asked the doctors to perform on their daughters. When a healthcare provider performs the procedure of female circumcision it is termed as the 'medicalisation of female genital mutilation'. It does not matter whether the operation takes place at a house or private clinic or even hospitals.²⁴

This definition of medicalization of FGM was first adopted by the United Nations in a joint policy statement issued in 1997 and then again affirmed in the year 2008.²⁵ There are various reasons why people have opted for hospitals to perform FGM on their children. Cutting of the clitoris or narrowing the vagina requires a person to be meticulous and only specialized surgeons can perform FGM. It requires absolute perfection and precision or else inevitable complications may arise. For years, FGM has been criticized on the ground of health risk associated with it. This was an attempt to reduce the risk from infections, bleeding, and repetition of blades/knives, etc.²⁶ A lot of people do not have access to good hospitals due to the paucity of money. So, they opt for the traditional method of performing FGM using sharp equipment. A medical professional is bound by certain

²³ The World Health Organization, *WHO guidelines on the management of health complications from female genital mutilation* 8 (World Health Organization, 2016).

²⁴ *Ibid.*

²⁵ Bettina Shell-Duncan, Carolyne Njue, *et. al.*, "The Medicalisation of Female Genital Mutilation /Cutting: What do the Data Reveal?", *Evidence to End FGM/C: Research to Help Women Thrive*. New York: Population Council 2 (2017), available at: https://www.popcouncil.org/uploads/pdfs/2017RH_MedicalizationFGMC.pdf (last visited on May 25, 2021).

²⁶ Els Leye *et. al.*, "Debating medicalization of Female Genital Mutilation/Cutting (FGM/C): learning from (policy) experiences across countries" 16 *Reproductive Health* 4 (2019).

ethical principles and ‘do no harm’ is one of them.²⁷ Over the years, there has been a gross violation of the medical ethics by the medical professionals.

Medicalisation in recent years has shown a tremendous increase in the countries like Kenya, Egypt, Yemen, *etc.*²⁸ There were reports of fatalities even while the procedure was being performed by medical professionals. As a result, it created an uproar in many countries across the globe. The retired doctor and the parents of the twelve-year-old girl will stand trial in Egypt. The young girl died after undergoing female genital mutilation surgery.²⁹ Even in facilities with highly skilled and trained surgeons, incidences of mortality have been documented. The odds of midwives performing on young girls making a mistake are substantially higher. A father lost his daughter for the sake of society conventions and reputation, and the hospital had blood on their hands. The author believes that the medicalization of circumcision cannot eliminate the medical problems that each surgery entails. Each human being is different and anticipating that every surgery performed would be a success is impossible. Going to a hospital lowers the mortality rate, however, it is impossible to eliminate the possibility of mistakes in FGM.

However, in the opinion of the author, the medicalisation of female genital mutilation is not a solution. Although, the medical risks associated can be abated by improving sanitization, using sterilized equipment and not re-using the equipment. This will be utilitarian for those who have not given up on the practice. The only way to combat such evil customs that take the lives of your own girls, is to give up the practice. Another issue with medicalisation is that, in a sense, it confers legitimacy on this ritual, which anatomically more is damaging because an attempt to abandon FGM would be undermined if the health care providers themselves indulge in the medical operations. Rights like child protection, the right to integrity, the right to the body and consent need to be acknowledged. In fact, this could trigger an increase in the practice of FGM as now it can be done safely by doctors who are trained. Instead of abandoning the customs, the parents and the members of the community would be motivated to practice FGM.

²⁷ *Id.*, at 3.

²⁸ G.I. Serour, “Medicalisation of female genital mutilation/cutting”, *African Journal of Urology* 147 (2013).

²⁹ Aanchal Nigam, “Egypt: Doctor, Parents Of Minor Girl Who Died Of Genetial Mutilation To Stand Trial”, *Republic World*, February 24, 2020, *available at*: <https://www.republicworld.com/world-news/rest-of-the-world-news/egypt-parents-of-minor-girl-who-died-of-fgm-doctor-to-stand-trial.html> (last visited on May 27, 2021).

III. Gross Violation of Right to Health

The process of female genital cutting is not medically beneficial for women but instead serves as a prominent threat hanging above their head. Even if the procedure gave rise to absolutely no complications, she would be traumatized for life. The women who went through this physical change have to bear this burden.³⁰ Leyla Hussain, a psychotherapist who works with survivors of *Khafd* narrated her personal story. She did not realize the brutality of this procedure until she herself was pregnant. She was traumatized and depressed during her pregnancy. Moreover, she got panic attacks because female genital mutilation follows up with immense trauma which can be triggered at any phase of life.³¹

Circumcision is sometimes considered gender-neutral because it is performed on both men and women at a young age. However, it is discriminatory towards women because it is not beneficial for them like it is for men. It protects men from sexually transmitted diseases, HIV infections, *etc.*³² It is traumatizing for women to live with such pain and misery. Instead, it makes them more vulnerable to diseases. The societal norms demand that women should be virgins prior to marriage. Men, on the other hand, are never treated the same way. It is against the norms and principles of equality which is a fundamental right in the Indian Constitution³³ as this implies women are considered inferior to men. Sometimes, during the procedure of FGM the girls die due to complications. The article 21 guarantees that no one could be deprived of their life and personal liberty.³⁴ It is a callous violation of the basic fundamental rights of an individual.

³⁰ Brian D Earp, “Does Female Genital Mutilation Have Health Benefits?”, *The Problem with Medicalizing Morality*, *Journal of Medical Ethics*, August 15, 2017, available at: <https://blogs.bmj.com/medical-ethics/2017/08/15/does-female-genital-mutilation-have-health-benefits-the-problem-with-medicalizing-morality/> (last visited on May 26, 2021).

³¹ Girl Effect Team, “The invisible scars of FGM”, available at: <http://www.girleffect.org/what-girls-need/articles/2015/02/the-invisible-scars-of-fgm/> (last visited on May 28, 2021).

³² Stephen Moses *et.al*, “Male circumcision: assessment of health benefits and risks”, 74 *Sexually Transmitted Infections* 371 (1998).

³³ The Constitution of India, art. 14 -

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. Equality between equals is the objective of this article and not unequal's. The idea behind it is to uphold substantive equality rather than formal equality.

³⁴ The Constitution of India. art. 21 -

No person shall be deprived of his life or personal liberty except according to procedure established by law, nor shall any person be denied equality before the law or the equal protection of the laws within the territory of India.

Many international treaties and conventions have condemned this ritual of ‘*Khatna*’ or ‘*Khafd*’.³⁵ The Convention on the Elimination of All Forms of Discrimination Against Women, 1979, defines in its article 1 what constitutes discrimination against women. It is any distinction or exclusion which is primarily based on gender and the practice of Female Genital Mutilation fits it perfectly. Furthermore, article 19 of the Convention on the Rights of the Child safeguards the child from being mistreated mentally or physically. Every human being is born free and is equal in dignity and rights. Each person has the right to live in dignity and peace without being subjected to torture.³⁶ From a human rights standpoint, the practice indicates “deep-rooted gender inequality” and is an egregious type of discrimination targeting women. Female genital mutilation is entrenched in “gender disparities and power dynamics” between men and women, which prevent women from completely and equitably exercising their bodily rights and autonomy. It promotes the inherently prejudiced idea of women's and girls' subordination.

Usually, these procedures are performed on young girls. At the age of 4-12 years, the mind of a child is considered extremely fragile.³⁷ Witnessing such cruelty to their bodies can have an adverse psychological impact on their health. The severe pain that follows on cutting the clitoris is unfathomable, because in the earlier times, there was not any anesthesia to ease the pain. World Health Organization has defined ‘child abuse’ as any form of emotional ill-treatment or physical abuse or sexual abuse or negligent treatment that would impact a child’s survival, health and overall development.³⁸

FGM is both physical and mental abuse of a child’s health and development. The law always keeps the child’s welfare paramount. Quite often, in the opinion of the author, the lines between law and culture become blurred. Cultures cannot, and should not be blindly followed. If it is immoral and unethical, it must be questioned. The laws should not adhere to cultural relativism instead of moral relativism. The law must keep the child’s welfare paramount. Moral relativism must be

³⁵ OHCHR, UNAIDS, et. al ‘*Eliminating Female Genital Mutilation: An interagency statement*’ 8 (World Health Organization, 2008).

³⁶ The Universal Declaration of Human Rights, art. 1 -

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

³⁷ Saadye Ali, “Exploring young people’s interpretations of female genital mutilation in the UK using a community-based participatory research approach” 20 *BMC Public Health* 1132 (2020).

³⁸ Krug EG et al., eds., *World report on violence and health* 59 (World Health Organization, 2002), available at: https://www.who.int/violence_injury_prevention/violence/world_report/en/full_en.pdf?ua=1 (last visited on May 26, 2021).

incorporated into the law, especially when the traditions are ruthless and abusive.³⁹ Good health is not limited to the absence of any infirmity or disease. It is having the absolute physical, mental, and social well-being of a person.⁴⁰ The healthy tissues which do not require medical necessity are worked upon which causes immense and intolerable pain to young girls. At such a tender age they are traumatized and are victimized to excruciation. Their mental health is impaired beyond repair and they have to face the repercussion. Any person who would be impaired for life in terms of mental health, physical health, *etc.* which hinders and impedes their full participation in the society would make them a person with disabilities.⁴¹ Women who underwent the FGM fit in the definition of disabled person. Even in India, The Rights of Persons with Disabilities Act, 2016, supports the same.⁴² A woman has to deal with sensory impairment due to this procedure and will also be disabled for life to enjoy sexual pleasure. In *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi* it was held:⁴³

Every act which offends against or impairs human dignity would constitute deprivation portents of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights.

Now obviously, any form of torture or cruel, inhuman or degrading treatment would

³⁹ Limor Ezioni, "Contemporary Aspects of Female Genital Mutilation Prohibitions in the United States" 28 *Am. U. J. Gender & Soc. Pol'y & L.* 44 (2019).

⁴⁰ Constitution of World Health Organization, 1946. The State Parties to this Constitution declare, in conformity with the Charter of the United Nations, that the following principles are basic to the happiness, harmonious relations and security of all peoples: Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition. The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States. The achievement of any State in the promotion and protection of health is of value to all. Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger. Healthy development of the child is of basic importance; the ability to live harmoniously in a changing total environment is essential to such development. The extension to all peoples of the benefits of medical, psychological and related knowledge is essential to the fullest attainment of health. Informed opinion and active co-operation on the part of the public are of the utmost importance in the improvement of the health of the people. Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures

⁴¹ United Nations Convention on the Rights of Persons with Disabilities, 2006, art 1. The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

⁴² The Rights of Persons with Disabilities Act, 2016, s. 2 (s). It states "person with disability" means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others.

⁴³ 1981 AIR 746.

be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by article 21 unless it is in accordance with procedure prescribed by law, but no law which authorizes and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violative of articles 14 and 21.

The practice of female genital mutilation is an inhumane and cruel culture that impairs a woman's dignity and right to health. It was held in *Consumer Education & Research Centre v. Union of India* that the right to health is a fundamental right under article 21. The right to life includes the protection of one's health as well.⁴⁴ The Committee on Economic Social and Cultural Rights has explained the ambit of right to health as:⁴⁵

The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

The right to health cannot be compromised or sacrificed in the name of religion or culture. While some people practice FGM under the guise of religious practice, claiming that it protects women from sexual diseases, they should not do so because FGM violates the right to health. In *Rajesh Kumar Srivastava v. A.P. Verma* it was held:⁴⁶

The fundamental right to profess practice and propagate religion, guaranteed under article 25 of Constitution of India is subject to public order, morality and health. Where health of the citizens is involved the right of such practice to profess, practice and propagate religion gets controlled and is subservient to the powers of the State to

⁴⁴ 1995 AIR 922.

⁴⁵ The Committee on Economic, Social and Cultural Rights, *The right to the highest attainable standard of health*, UN ESCOR, U.N. Doc. E/C.12/2000/4 (2000) (August 11, 2000).

⁴⁶ AIR 2005 All 175.

regulate such practice. No person has a right to make a claim of curing the ailments and to improve health on the basis of his right to freedom of religion. Every form and method of curing and healing must have established procedures, which must be proved by known and accepted methods, and verified and approved by experts in the field of medicines. It is only when a particular form, method or pathy is accepted by the experts in the field of medicine that it can be permitted to be practiced in public. The right to health included in article 21 of Constitution of India does not come in conflict or overlap with the right to propagate and profess religion. These two are separate and distinct rights. Where the right to health is regulated by validly enacted legislation the right to cure the ailment through religious practices including 'Faith Healing', cannot be claimed as a fundamental right. The freedom of conscience supplemented by freedom of unhampered expression of free conviction to practice rituals and ceremonies are part of religion or subject to public order, morality and health. There is no conflict between the two. The faith in any religion to practice rituals and observance of such religion is not to be confused with right to conscience and to practice and propagate the religion. The claim to cure ailments falls in the domain of right to health. A person has no right to induce others to believe in his faith in religion to cure others from ailments.

Ironically, it is a practice to curb the sexual desire of women in order to increase the sexual desire of men. It is pertinent to note that female circumcision has no medical benefits but male circumcision has. Hence, male circumcision is justified on those grounds, but it is not the same for the other genders. Therefore, the guiding principle of the Convention of Child Rights, 1989, best interest⁴⁷ is horrendously infringed.

IV. The Fear of Social Shunning

⁴⁷ The Convention of Child Rights, art. 3. It emphasizes that all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

The ancient and theological scriptures do not advocate female genital mutilation. The Islamic sect, who fervently practices FGM, regards the "Holy Quran" as a divine law. There is no mention of it in the Holy Quran, and as a matter of fact, it is not in Christian or Jewish scriptures either.⁴⁸ Religion mostly promotes equality, fairness and dignity amongst men and women. Female circumcision divests you from all these rights. The socio-cultural practice pressurizes mothers to force their daughters to undergo *khafd*. Even when the parents of the young girls are aware of the repercussions that follow the cutting, they still choose to continue the tradition. It is working like a self-enforcing social norm or a convention. Families compel their daughters to undergo FGM because they think they are expected to do so.⁴⁹

A young girl's agony and pain are regarded less when compared to the fear of stigmatization. The other women in the community take the initiative and pressure the girls to undergo this procedure or to be ostracized. In dread of the marginalization and stigmatization that will follow on refusal, they consent to go through it. The reward for such horrific cutting is a mere appraisal and social acceptance. They will become socially more acceptable.⁵⁰ Fear of social boycott and discrimination exerts undue pressure on females to participate more actively in this. They will not be getting proper burials, will be considered socially unacceptable for marriages, gatherings, and this fear is fed upon by the other community members.⁵¹

Despite many voices being raised in various countries all over the world to stop this painful and barbaric practice, a large section of girls and women are also coming in support and asking for the continuation of FGM.⁵² Dawoodi Bohra Women for Religious Freedom (DBWRF) are in support of female genital mutilation. They strongly believe it is a part of their religion and custom which offers them reasons for its continuation. Supreme Court of India introduced "essential religious practice test" in *The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmidar*

⁴⁸ I. El-Damanhoury, "The Jewish and Christian view on female genital Mutilation" 19 *Afr. J. Urol.* 127 (2013).

⁴⁹ Costello S, "Female genital mutilation/cutting: risk management and strategies for social workers and health care professionals", 2015 *Risk management and Healthcare Policy* 225 (2015).

⁵⁰ OHCHR, UNAIDS, *et. al.*, *supra* note 35, at 6.

⁵¹ Amelia Ngozi Odo, "Towards characterization of Female Genital Mutilation (FGM) in rural Nigeria", 20 *Afr. Health Sci.* 1973 (2020).

⁵² Samanwaya Rautray, "Genital mutilation case goes to 5-judge SC bench", *The Economic Times*, September 25, 2018, *available at*: <https://economictimes.indiatimes.com/news/politics-and-nation/genital-mutilation-case-goes-to-5-judge-sc-bench/articleshow/65942631.cms?from=mdr> (last visited on May 26, 2021).

Thirtha Swamiyar of Shri Shirur Mutt to determine whether a practice is essential or not for a religion.⁵³ In this case, the court held:⁵⁴

In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or ablutions to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of article 26(b).

This doctrine was applied recently in *The Indian Young Lawyers Association v. The State of Kerala* (famously known as ‘Sabarimala Case’).⁵⁵ It was held by the Supreme Court that the exclusion of women and barring them from entering Sabarimala Temple doesn’t constitute an essential religious practice.⁵⁶ However, in the opinion of the author, the test shouldn’t be whether a practice is essential or not, but rather whether the constitution permits such practices.

The Bohra community want both men and women to be circumcised. The fact that the men would be circumcised in public whereas the women would be circumcised in discreet was protested by the Bohra leader.⁵⁷ Male circumcision up to a certain extent can be justified on the ground that it protects men from human immunodeficiency virus, urinary infection, hygiene, *etc.* Women are

⁵³ Barkha Dutt, “Sabarimala: With its ‘essentiality doctrine’, has SC walked into a trap?”, *The Hindustan Times*, January 25, 2021, available at: <https://www.hindustantimes.com/columns/sabarimala-with-its-essentiality-doctrine-has-sc-walked-into-a-trap/story-3kRDDFAbA8rD76zJwgaZwM.html>. (last visited on May 26, 2021).

⁵⁴ AIR 1954 SC 282.

⁵⁵ 2017 (9) SCJ 739.

⁵⁶ Barkha Dutt, *supra* note 53.

⁵⁷ Mohua Das, “Bohra cleric urges female genital mutilation?”, *The Times of India*, April 29, 2016, available at: <https://timesofindia.indiatimes.com/city/mumbai/Bohra-cleric-urges-female-genital-mutilation/articleshow/52031699.cms> (last visited on May 26, 2021).

circumcised in the name of ‘purity’. The DBWRF stated that they do not believe it to be mutilation and is a harmless process.⁵⁸

On December 20, 2012 the United Nations General Assembly adopted a resolution to observe February 6 as the International Day of Zero tolerance towards Female Genital Cutting.⁵⁹ The resolution was passed unanimously and India was part of this unanimous decision.⁶⁰ Moreover, Sustainable Development Goal (SDG) target 5.3.2 focuses on the elimination of all harmful practices including female genital mutilation (FGM).⁶¹ Even though, the United Nations adopted a resolution [A/RES/67/146] to ban FGM worldwide in the year 2012, it is still routinely practiced in India after 9 years of the ban. It is considered as a necessary and valuable ritual that binds the individual child to the community upholding patriarchy over women.⁶²

V. Defeating the Social Stigma of *Khafd* in India

In India, the Bohra community is not the only one that practices female genital mutilation. A survey done by ‘WeSpeakOut’ revealed that the Sunni sect of the Islamic denomination in Kerala also routinely practices it.⁶³ To redress the needs of the people who were socially boycotted in the community of Bohra, an Act came to the rescue. The Bombay Prevention of Excommunication Act, 1949, was enacted to protect the rights of the people. It primarily prohibited the removal and expulsion of a person from their caste and held it was invalid to excommunicate them. They cannot be divested of their worship rights, property rights, funeral rites, *etc.* by their own community. The Dawoodi Bohra community challenged the Prevention of Excommunication Act stating that it is a violation of their fundamental rights guaranteed by the Indian Constitution. It was the community’s right to expel the members who were not following their customs and rituals. The head of Bohra

⁵⁸ Mohua Das, “2 women doctors promote female genital mutilation, may face action”, *Times of India*, June 2, 2017, available at: <https://timesofindia.indiatimes.com/city/mumbai/defying-dissent-2-women-docs-promote-fgm-may-face-action/articleshow/58952494.cms> (last visited on May 25, 2021).

⁵⁹ UN General Assembly, *Intensifying global efforts for the elimination of female genital mutilations*, GA Res 67/146, GAOR, UN Doc A/RES/67/146 (December 12, 2012).

⁶⁰ Suraiya Nazeer, “Female Genital Mutilation: Secret Practice in India”, 7 *International Journal of Scientific and Research Publications* 342 (2017).

⁶¹ Angela Dawson, “Addressing female genital mutilation in the Asia Pacific: the neglected sustainable development target”, 44 *Australian and New Zealand Journal of Public Health* 8 (2019).

⁶² Kathleen Monahan DSW, LCSW *et.al.*, “Cultural Beliefs, Human Rights Violations, and Female Genital Cutting, *Journal of Immigrant & Refugee Studies*” 5 *Journal of immigrant & refugee studies* 27 (2007).

⁶³ Manoj N Nair, “In India, female genital mutilation is not just restricted to Bohras, says study”, *Hindustan Times*, February 04, 2018, available at: <https://www.hindustantimes.com/mumbai-news/in-india-female-genital-mutilation-is-not-just-restricted-to-bohras-says-study/story-xvSpJinigWyCzH94R37MoN.html> (last visited on May 25, 2021).

community is entitled to this right and it cannot be curtailed. Thus, in the case, *Sardar Syedna Taher Saifuddin Saheb v. The State of Bombay*⁶⁴ it was held by a 4:1 majority that the right and power is bestowed upon the head of Bohra to excommunicate and it is an essential practice.

A survey titled ‘The Clitoral Hood a Contested Site: *Khafd* or Female Genital Mutilation/Cutting in India’ found that that 75% of the preteens were subjected to the cruelties of cutting.⁶⁵ They even recall the unbearable pain each one of them went through. An NGO came into limelight called ‘Sahiyo’ that stood in opposition to prejudice against women and female circumcision. Another group called ‘WeSpeakOut’ is voicing their opinion to bring an end to Female Genital Mutilation.⁶⁶ These organizations are helping women to recognize their rights like bodily autonomy and bodily integrity.

Congress MP, Shashi Tharoor, has supported the ban on the FMG. He has written to the religious Sects’ head to reject such practices⁶⁷ as they lead to gross violation of human rights. Human rights, equality, the dignity of women cannot be compromised in the name of culture. The practices, rituals, and traditions that are derogatory to women should not exist in any part of the country. It should be condemned and brought to an end like ‘Sati’. Sati was an obsolete and traditional ritual practiced in India. The widow was compelled to jump into the husband’s pyre. The Bengal Sati Regulation, 1829 banned the ‘Sati Pratha’. This was banned by the British government and is no more in practice. Since the beginning of time, women have been subjected to numerous torture and brutality in the name of culture and religion. The rituals and traditions, all follow a pattern of male dominance. The ideology that without men, there is no existence for women should be uprooted. Their lives are pointless and meaningless in the absence of men, which is a common retrogressive belief that should be removed.

The former Union Minister for Women and Child Development, Maneka Gandhi said that if the tradition of FGM in India does not halt, then the government will bring laws to put an end to this

⁶⁴ AIR 1962 SC 853.

⁶⁵ Garima Trivedi and Jahanvi Mongia, “Female Genital Mutilation: A Dark Practice of Violating Women’s Human Right”, 2 *Journal of Human Rights Law and Practise* 11 (2019).

⁶⁶ Mihir Garg and Rashi Jain, “Female Genital Mutilation: A Socio-Legal Perspective In Indian Context”, 4 *International Journal of Law and Legal Jurisprudence Studies* 285 (2017).

⁶⁷ Ambika Pandit, “No new law for now, it is POCSO and IPC to curb female genital mutilation”, *The Times of India*, July 30, 2018, available at: <https://timesofindia.indiatimes.com/india/no-new-law-for-now-it-is-pocso-and-ipc-to-curb-female-genital-mutilation/articleshow/65203182.cms> (last visited on May 25, 2021).

custom as it is a criminal offence under the Indian Penal Code. Maneka Gandhi further stated that they will write to the Bohra priest to issue an order asking the members of their community to stop practicing this.⁶⁸ As of now there are no specific laws that make genital mutilation an offence but there are certain laws prevailing in India like the Indian Penal Code, Criminal Procedure Code, and Protection of Children from Sexual Offences Act that provide redressal.⁶⁹ The Indian Penal Code punishes voluntarily causing hurt⁷⁰ and voluntarily causing grievous Hurt⁷¹. Female cutting is not explicitly punished under the sections of the Code so a complaint can be registered under these sections for the case to move forward. There are certain provisions in the Protection of Children from Sexual offences Act that make Female genital mutilation a crime. The penetration of any object not being male reproductive part is considered a penetrative sexual assault on the child.⁷² The offences under this Act like penetrative sexual assault, sexual assault, and aggravated sexual assault are all reportable under this Act.⁷³ The Code of Criminal Procedure, 1973,

⁶⁸ Moushumi Das Gupta, "Govt will end female genital mutilation if Bohras don't: Maneka Gandhi", *The Hindustan Times*, May 29, 2017, available at: <https://www.hindustantimes.com/india-news/practise-of-female-genital-mutilation-should-be-banned-in-india-maneka-gandhi/story-kQhNA4rIYOLQTurkN5zAAM.html> (last visited on May 25, 2021).

⁶⁹ Dr. Ambalika Sinha, Jyotsna Tiwari, *et. al.*, "PREVALENCE OF FGM IN INDIA: A HUGE VIOLATION OF HUMAN RIGHTS IN THIS ERA", International Conference on Research Development in Arts, Social Science and Humanities, The Indian Council of Social Science Research, March 18, 2018, available at: <http://data.conferenceworld.in/ASH-2018/67.pdf> (last visited on May 26, 2021).

⁷⁰ The Indian Penal code, 1860, s. 323 –

Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

⁷¹ The Indian Penal Code, 1860, s. 325 -

Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

⁷² The Protection of Children from Sexual Offences Act, 2012, s. 3 -

A person is said to commit "penetrative sexual assault" if— (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person

⁷³ The Protection of Children from Sexual Offences Act, 2012, s. 19 –

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) any person(including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,— (a) the Special Juvenile Police Unit; or (b) the local police.

(2) Every report given under sub-section (1) shall be— (a) ascribed an entry number and recorded in writing; (b) be read over to the informant; (c) shall be entered in a book to be kept by the Police Unit.

recognizes the right to remedy a victim in its section 357A. It deals with victim compensation scheme wherein the State government would be coordinating with the Central Government would prepare a scheme in order to compensate the victims who have suffered any loss and require rehabilitation.⁷⁴ The Juvenile Justice (Care and Protection of Children) Act, 2015, adjudicate matters in child-friendly manner, protected and rehabilitated them, and catered to basic needs like care and treatment of children without family support, children of armed conflicts, children who are trafficked, children who have been abused, *etc.* Girls who have undergone circumcision come under the category of ‘children who were abused’.

(3) Where the report under sub-section (1) is given by a child, the same shall be recorded under sub-section (2) in a simple language so that the child understands contents being recorded.

(4) In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection including admitting the child into shelter home or to the nearest hospital within twenty-four hours of the report, as may be prescribed.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.

(7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1).

⁷⁴ The Code of Criminal Procedure, 1973, s. 357A -

1. Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who, require rehabilitation.

2. Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1)

3. If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

4. Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

5. On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

6. The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer incharge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.

Many Muslim majority countries are against this practice, namely Sudan, which has not only banned but also criminalized the custom of Female Circumcision.⁷⁵ The decision on whether there should be a ban on female genital mutilation in India is pending in the Apex Court *i.e.*, Supreme Court of India. In 2017, a Public Interest Litigation was filed under the case name *Sunita Tiwari v. Union of India*⁷⁶ which had the Justice Ajay Manikrao Khanwilkar, Justice Dipak Misra and Justice D.Y. Chandrachud as judges. The Supreme Court has issued a notice to the Centre stating that this is an important and sensitive matter. This case is still pending in the Supreme Court. The court has to decide between two fundamental rights that the Constitution of India upholds. The tussle between article 21 which guarantees right to life along with various rights and article 25 which protects the right to religion. The right to religion is subject to health, public order, and morality.⁷⁷

In the opinion of the author, whenever there is a conflict between article 25 of the Indian Constitution and article 21, the latter must at all times supersede the former. The right to religion cannot be given a priority over the right to life. Lawmakers and policymakers should implement laws that penalize religious practices which are abusive, life-threatening and unethical. Professor HLA Hart has accepted that laws should have a minimum content of morality.⁷⁸ Morals perfect the law.⁷⁹ In the opinion of the author, if laws are immoral and unjust, they must be struck down. Over the years, many laws have been declared unconstitutional and immoral. For instance, section

⁷⁵ Pia Krishnakutty, "Sudan criminalises female genital mutilation, allows non-Muslims to drink alcohol", *The Print* July 13, 2020, available at: <https://theprint.in/world/sudan-criminalises-female-genital-mutilation-allows-non-muslims-to-drink-alcohol/459655/> (last visited on December 08, 2021).

⁷⁶ WP (C) 286/ 2017.

⁷⁷ The Constitution of India, 1949, art. 25 -

Freedom of conscience and free profession, practice and propagation of religion. It will be 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. Nothing in this article shall affect the operation of any existing law or prevent the State from making any law; regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus Explanation I The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion Explanation II In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

⁷⁸ V.D. Mahajan, *Jurisprudence & Legal Theory* 94 (Eastern Book Company, Lucknow, 5th ed., 2020).

⁷⁹ *Ibid.*

377 which were recently struck⁸⁰ down in *Navtej Singh Johar v. Union of India*.⁸¹ If laws can be struck down for being prejudicial then so can intolerable practices like female cutting. Every custom, culture and ritual should be reasonable.

FGM is a prime example of gender stereotyping. Gender stereotyping is against the principles in the article 14 of the Indian Constitution. It states that there can be no discrimination on the basis of sex. The freedom of religion is subject to morality. Constitutional morality has to be uplifted and not the popular morality. The Supreme Court has interpreted the definition of 'Constitutional Morality' in the *Manoj Narula v. Union of India*⁸² as the principles to which everyone has to bow down to. The rule of law and norms imbibed in the Constitution are to be upheld and one should not act contrary to it. The traditions and conventions have to ingrain and sustain these constitutional values. The practice of female genital mutilation is subject to norms of equality and constitutional morality.

VI. Suggestions and Conclusion

India is a country with diverse languages, cultures, religions, and customs. Every custom has to be socially accepted, uniform and time immemorial. Female genital mutilation is one such deeply-entrenched culture that is religiously practiced worldwide. It is a regressive practice, and in today's society there is no room for it. Parents and medical professionals must be held accountable for the cruelty to the bodies of young girls. Regardless of how the procedure is performed, the survivors are left with an irreversible psychological and physical impact.

There are not any proper laws dedicated solely for female genital mutilation but the upcoming law should be deterrent. Legislation is the most powerful tool that will help to eradicate and curb FGM. The social and cultural values should work in sync with the legislative initiatives. Human rights-based legislative norms help to make a society progressive rather than retrogressive. But again, the extent of these reforms is directly proportionate to how much a society is willing to adapt. The gap between a legislation and society needs to be bridged with co-operation and acknowledgment. The

⁸⁰ The Indian Penal Code, s. 377 -

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

⁸¹ AIR 2018 SC 4321.

⁸² 2014 (9) SCC 1.

word 'acknowledgement' here refers to acceptance that the past rituals and traditions were based on obsolete beliefs. In the process of legislative reform, the ideas and participation of such communities (all the communities that religiously practice FGM) are crucial. It will help them to see a broader image, and the implementation will be way easier.

This practice needs to halt because it is considered barbaric and derogatory to women. A lot of countries have banned and criminalized this practice. The cases in India are still pending and the legislature has not shed much light in respect to this. There are existing laws to punish like the Indian Penal Code and POCSO. There should be provisions inserted in the Indian Penal Code to criminalise FGM, which instils fear in the minds of families, doctors, and everyone who participates.

Child protection and welfare should be paramount and not religious practices. For children, there is a Child line number (1098) which should be answerable at all hours and the personnel should be trained well to handle young girls. Most of the children are not aware about this. An attempt to make them familiar with such helpline through schools, posters and other mediums would be wise. Any person who persuades, abets, or manipulates someone to participate more in this ritual should be penalized. This manifestation of gender disparity needs to be addressed promptly. To conclude, female Genital Mutilation is indeed a facet of patriarchal society which needs to be eradicated. A woman should be the sole owner of her body. Nobody has a right to her body, and she should not be tortured in the name of chastity and morality. Society's norms should not circumscribe women's lives.