CRIMINALISATION OF FEMALE GENITAL MUTILATION/CUTTING IN THE DESERTS: DEFICIENCIES IN THE EXECUTION OF CEDAW IN INDIA AND CORRESPONDING SUGGESTIONS

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ABSTRACT

The historic international treaty known as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was created with the intention of putting an end to all types of discrimination: Direct and Indirect that were directed against women.

The CEDAW has been ratified by India, which has resulted in considerable advancements in many areas of gender equality. Nevertheless, the purpose of this research paper is to shed light on the variation and obstacles in the implementation of CEDAW in India and propose solutions to overcome these concerns. FGM/C is a grave infringement of human rights, constituting a kind of torment and an exceptionally severe manifestation of violence and prejudice directed against girls and women.

The research paper analyses the historical backdrop, India's commitments under CEDAW, and the present imbalances in several sectors, including law, education, employment, and violence against women.
Introduction

The CEDAW was adopted by the United Nations in 1979 and came into force in 1981. India ratified CEDAW in 1993, thereby committing to promoting and protecting women's rights and ensuring gender equality in the country. What is noteworthy is that India took almost a decade to ratify and recognise the need. While India may have made a significant progress in various aspects of gender equality, there remain substantial variation in the implementation of CEDAW.

The discrimination extends to women, transgenders, and queer individuals from all walks of life which are recently highlighted by a panel of five judges in the Supreme Court delivering a 3:2 ruling on petitions advocating for the marriage and family rights of LGBTQ individuals. The Court refused to legalise same-sex marriage, deferring the decision to the Parliament and State governments to determine the legal recognition of non-heterosexual relationships.

The intentional omission of marital rape from the Indian Penal Code (IPC) in the *RIT Foundation vs Union of India (2022 SCC Online Del 1404)* can be considered discriminatory according to the definition provided by the CEDAW General Recommendation No. 19: Violence against women. This is because the act of rape committed by a spouse against their partner's body is often justified solely based on the victim's marital status, thereby denying them the legal protection that is afforded to unmarried women. Marital rape should be subject to the same penalties as rape committed against an unmarried woman.

Failure to come to a positive conclusion in above two cases, has impacted India’s feminist regime. Yet, hope lies in criminalising the FGM/C with an effective implementation of international laws for Women’s Rights. Goal 5 of the United Nations sustainable development agenda is to attain gender equality and empower women and girls. One specific focus is to eradicate detrimental practises, including child, early, and forced marriages, as well as female genital mutilation.

This research paper aims to identify and analyse the challenges and variation in the implementation of CEDAW in India, with a focus on legal, social, and cultural aspects. It also provides recommendations to address these variation and further advance women's rights in India.
Historical Context

To comprehend the difficulties associated with the implementation of CEDAW in India, it is necessary to analyse the historical backdrop. India has a multifaceted and intricate history of gender dynamics, which have been significantly shaped by society conventions, religious beliefs, and the lasting impact of colonialism.

Although India's constitution ensures legal equality and outlaws’ discrimination, old patriarchal norms and rituals frequently endure. India's responsibilities as outlined in the CEDAW. India's endorsement of CEDAW demonstrates its commitment to eradicating gender discrimination across all domains.

FGM/C is often seen as a breach of human rights and a kind of gender-based violence, constituting a grave infringement upon bodily autonomy and dignity since the beginning of time emphasising its historical barbaric nature. It often satisfies the precise legal criteria for "torture" in the legal frameworks, as it is universally denounced as a detrimental act that causes physical and psychological suffering to girls and women. It is regarded as a flagrant infringement of their fundamental human rights, such as the right to life, freedom, and personal security. International organisations and human rights activists collaborate to enhance public awareness about FGM/C and eradicate this practise in order to safeguard the rights and welfare of those impacted.

This encompasses the cessation of gender-based violence, the promotion of women's involvement in political and public spheres, and the assurance of equitable access to education, healthcare, and economic prospects. Nevertheless, despite this dedication, there are still some deficiencies in the execution.

CASE STUDY: Why is it necessary to criminalise FGM/C in India?

Delving into the complex intersectional identity of Bohra women considering Crenshaw’s traffic light analogy and how it contributes to the sustenance of the practice of FGM/C. Furthermore, exploring the critical role played by older women in the Bohra community in perpetuating this practice. Additionally, oscillating a discussion on other practices that similarly afflict women, posing a challenge to their elimination due to intersecting identities.
Section 1: The Intersectional Identity of Bohra Women and FGM/C

Bohra women's intersectional identity, shaped by their religious affiliation, cultural heritage, and gender, plays a pivotal role in sustaining the practice of FGM/C within their community. This multifaceted identity intertwines various factors:

Religion and Culture: Bohra women often find themselves at the nexus of religious and cultural pressures. While FGM/C is not a requirement in Islam and there has been no reiterations of the women undergoing FGM/C in the scriptures. Some Bohra leaders and communities justify it as a cultural and religious tradition whereas the same is barbaric and extremely patriarchal.

In international law, the terms "Erga omnes" and "jus cogens" are legal ideas that may be used to a variety of topics, including FGM/C:
This is a Latin phrase that may be translated as "towards all" or "in relation to all." It is a term that is used in international law to describe duties and rights that are due to the international community as a whole and that are enforceable by the international community. In its dealings with other nations, each nation-state is required to act in accordance with these standards, norms, and principles. As FGM/C is seen as a kind of human rights abuse, it might be interpreted as a matter that gives rise to Erga omnes responsibilities. To live up to their commitments to the global community, states are obligated to take measures to eliminate and criminalise FGM/C inside their own borders.

This is another Latin phrase that translates to "compelling law." Jus Cogens means "compelling law." Peremptory norms of international law are essential principles that are acknowledged and recognised by the international community as a whole and are regarded non-derogable. This term refers to these peremptory norms of international law in the context of international law. Acts that contravene the principles established by jus cogens are unanimously regarded as being criminal. The practise of FGM/C is one that may be considered a breach of jus cogens standards due to the fact that it is generally denounced by the international community and includes grave violations of human rights, including both bodily and psychological suffering.

Both the Erga omnes and jus cogens standards suggest that FGM/C is a serious breach of international law and human rights. It is anticipated that states would take steps to prevent and eradicate FGM/C, and both international organisations and the global community have a strong interest in ensuring that practises like these are eradicated.

**Social Conformity:** The intersection of gender and community identity creates immense social pressure for Bohra women to conform to cultural norms and expectations. Those who question or resist FGM/C may fear ostracization, social exclusion, or even retribution from their tightly knit community of traders. This conformity is further complicated by the fact that Bohra women often serve as the primary bearers of cultural heritage within their families and thereby types of FGM/C maybe performed to control the sexual pleasures of the women.

**Section 2: The Role of Older Women in Perpetuating FGM/C**

Older women from the Bohra community hold a significant role in the continuation of FGM/C.
They are the carriers of tradition, tasked with ensuring that younger generations adhere to established customs. And doctors from the community may provide ‘certificate’ of FGM/C. Several aspects of their involvement are notable:

**Custodians of Tradition:** Older women often serve as the guardians of traditional beliefs and practices in Muslims, Christians, tribals and many more communities. They may transmit these customs to younger generations, including the perpetuation of FGM/C, viewing it as an essential rite of passage for girls.

**Enforcers of Norms:** Through their status as matriarchs and influential community members, older women wield significant authority in Bohra society. Their approval or disapproval can shape the decisions of younger women, reinforcing the continuation of FGM/C, even holding double standards of not performing FGM/C to their daughters and saying otherwise in the society may change the future! The fact that they did not discuss about the same or talked about it for as long as 40 years is alarming!

**Section 3: Intersectional Challenges Beyond FGM/C**

While FGM/C within the Bohra community is a glaring example of how intersectional identity can perpetuate harmful practices, it is not the sole instance. There are other practices, detrimental to women, where intersecting identities pose substantial challenges to eradication:

**Child Marriage:** In many communities, the intersection of gender, poverty, and cultural or religious identity fosters the persistence of child marriage. Young girls from marginalized backgrounds may be married off early due to economic pressures or cultural norms, making it difficult to break this cycle.

**Honor Killings:** The intersection of gender, family, and cultural identity often leads to honour killings in societies where traditional norms hold strong. Women who defy established gender roles or engage in relationships deemed unacceptable may fall victim to violence in the name of "honour."

**Dowry Practices:** Gender and economic factors intersect in communities where dowry practices
persist. Women from less privileged backgrounds may face dowry demands, resulting in financial burdens and exploitation.

**Section 4: What laws does FGM/C infringe upon?**

Criminalisation of FGM/C is the need of the hour. India is rich with cultural heritage and thousands of tribes survive in India. Targeting one of the most backward states especially Rajasthan as an underdeveloped state, which is impacted by its desert scenery, tribal practises, traditional attitudes, and low understanding of laws, might indirectly contribute to the occurrence of FGM/C. FGM/C is often strongly rooted in the culture and customs of certain groups in Rajasthan. The legal framework remains expensive and is often out of the reach of public.

Within these locations, it is widely acknowledged as a customary practise or a cultural expectation that is thought to preserve a girl's virtue and sexual integrity. The desert region is characterised by its significant underdevelopment, with elevated poverty rates and limited healthcare accessibility. Consequently, families have challenges in providing enough medical attention for issues resulting from FGM/C.

The practise is often conducted in unsanitary settings, which heightens the likelihood of diseases. FGM/C has been recognised by the United Nations as a violation of human rights, but there is currently no prohibition against it in India. Following legislations have tried to cover up the same yet, been failing to do so due to poor outreach, awareness, and implementation:

1. **The Prohibition of Child Marriage Act, 2006:** FGM/C is often linked to child marriages, which are prohibited under this law.

2. **The Protection of Children from Sexual Offences (POCSO) Act, 2012:** FGM/C can involve acts of sexual assault on minors, and the POCSO Act provides protection against such offenses.

3. **The Indian Penal Code (IPC):** Specific sections of the IPC may be used to prosecute individuals involved in FGM/C, such as Section 319 (hurt) and Section 324 (voluntarily causing hurt).
4. The Juvenile Justice (Care and Protection of Children) Act, 2015: FGM/C is considered a violation of the rights of children and can lead to prosecution under this act.

Formulating legislation to criminalize FGM/C is a crucial step in eradicating this harmful practice and protecting the rights and well-being of girls and women but the legislation does not cover the aspect of adult women being cut. The provisions of CEDAW that pertain to addressing practices such as FGM/C are as follows:

1. **Article 2:** This provision mandates that nations must implement all necessary actions to eradicate any type of gender-based discrimination against women, including practices that inflict damage upon their bodily or mental well-being.

2. **Article 5:** mandates that countries to alter socioeconomic and cultural norms that sustain gender-based discrimination against women, which includes harmful traditional customs.

3. **Article 12:** This article requires that women be provided with healthcare services, especially those pertaining to reproductive health. FGM/C may result in substantial health repercussions, making it imperative to have access to healthcare in order to effectively address these concerns.

4. **Article 16:** Mandates that nations to implement measures to eradicate gender-based discrimination in the context of marriage and family relations. FGM/C is often linked to cultural or religious traditions pertaining to marriage and family, and CEDAW may be used to contest these conventions.

FGM in the desert regions of Rajasthan is deemed a violation of several international laws and agreements concerning women's rights because to its discriminatory and detrimental characteristics. FGM/C violates many important international treaties and agreements, such as:

1. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is an international convention with the goal of eliminating all forms of discrimination against women based on their gender. The practise of female genital
mutilation and cutting (FGM/C), which is regarded a form of gender-based discrimination and violence against women, goes directly against the principles of gender parity and absence of bias established in CEDAW.

2. According to the Convention on the Rights of the Child (CRC), conducting female genital mutilation (FGM) on girls is a violation of their rights as children. These rights include the right to life, the right to survive, the right to grow, and the right to be protected from being harmed.

3. The practise of female genital mutilation or cutting (FGM/C) has the potential to breach the rights that are protected by the International Covenant on Civil and Political Rights (ICCPR). These rights include the right to be free from torture as well as cruel, inhumane, or humiliating treatment.

4. The Maputo treaty, which is a treaty to the African Charter on Human and Peoples' Rights, expressly condemns female genital mutilation and cutting and places its primary emphasis on the protection of the rights of African women.

5. The United Nations Declaration on the Elimination of Violence Against Women recognises FGM/C as a form of violence against women, which violates their right to live a life free from violence and infringes on their right to bodily integrity.

6. The Sustainable Development Goals (SDGs) of the United Nations contain a Target 5.3 that aims to eliminate all harmful practises, such as female genital mutilation and cutting (FGM/C), while also advancing gender equality and the empowerment of women.

**Variation in Implementation**

**Legal Framework**: India has enacted laws to address various aspects of gender discrimination and violence, including the **Protection of Women from Domestic Violence Act and the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act**. However, variation remain in the enforcement and effectiveness
of these laws. Challenges include inadequate reporting mechanisms, delays in legal proceedings, and social stigmatization of victims and complex political situations as observed in the Brij Bhushan

_Bharatiya Janata Party (BJP) which is the ruling party and the president of the Wrestling Federation of India (WFI), was accused of engaging in sexual harassment, assault, as well as stalking of six female wrestlers and was booked under the Protection of Children from Sexual Offences (POCSO) Act. As per Section 6(c) of the Hindu Minority and Guardianship Act, 1956, a husband serves as the legal guardian of a minor wife, in accordance with CEDAW Article 16 this is a direct violation, yet it persists as a void.

1. **Education:** While there has been significant progress in women's education in India, disparities still exist. Barriers to girls' education include early marriage, limited access to schools, and social norms that prioritize boys' education. The government must work to improve access to quality education for all, particularly in rural areas. Poor health and gender digital divide are a direct discrimination highlighting violation of Article 14 and 15 of CEDAW. According to Article 16 (2) of CEDAW, weddings that do not follow the specified minimum age for marriage shall be deemed unlawful, yet brides as children are unaware. The Matru Vandana Yojana, implemented in 2017, aims to provide financial compensation to breastfeeding mothers and pregnant women for the income they lose during their pregnancy. However, the programme has only reached fewer than one-third of the eligible recipients.

Moreover, the advantage is limited only to the first offspring, thereby eliminating most expectant women in the nation in reference to CEDAW Article 12(2).

2. **Employment:** Women in India continue to face significant gender-based discrimination in the workforce. They often receive lower wages for the same work and have limited representation in leadership roles. India must strengthen its anti-discrimination policies and promote gender-sensitive workplaces. Creches in India remain an obscure business, cultural and societal obligations don’t allow women to work and leave their children behind in the creche infringing upon Article 3 of CEDAW. Discrimination in the pay and homophobia is a violation of Article
13 of CEDAW. In the case of *Vishakha v. State of Rajasthan (AIR 1997 SC 3011)*, the Supreme Court dealt with the matter of workplace sexual harassment and ruled that the right to employment encompasses the right to work in a dignified and respectful environment, yet it has failed to safeguard the other genders and the implementation of

**Transgender Persons Act, 2019** remains a matter of criticism due to its arbitrariness.

3. **Violence Against Women:** Violence against women remains a significant concern in India. This includes domestic violence, sexual assault, and honour killings. The legal system must ensure that perpetrators face strict consequences, and social norms that perpetuate violence must be challenged. In the case of *Devika Biswas v. Union of India [Writ Petition (C) No. 95 of 2012]*, the Court emphasized the necessity to allocate additional financial and human resources to enhance the National Rural Health Mission. Hence, right to health is a way to Right to life. In the case of *Laxmi Mandal v. Deen Dayal Harinagar Hospital [W.P. (C) No. 8853/2008]*, the Delhi High Court affirmed that the right to health encompasses the entitlement to avail and obtain a basic level of medical treatment and attention in public healthcare institutions.

**Suggestions**

To address the variation in the implementation of CEDAW in India, the following recommendations should be considered:

1. **Strengthen Legal Framework:** Ensure the effective implementation and enforcement of existing laws on women's rights and protection. Establish a system of fast-track courts for cases of gender-based violence to expedite justice. Raise public awareness about women's legal rights and avenues for redress. *Neeraja Chaudhary v. State Of M.P [AIR 1984 SC 1099]* and *Bandhua Mukti Morcha vs Union of India & Others [1984 AIR 802]* are both significant legal cases that highlight important rulings regarding the issue of bonded labour. In the first case, it was emphasized that simply identifying and freeing bonded laborers is insufficient; they must also be provided with rehabilitation. The second case upheld the right to live with human dignity as outlined in **Article 21** and condemned the exploitation associated with bonded labour.

2. **Education:** Implement policies to promote and incentivize the education of girls,
especially in rural and marginalized communities. Develop gender sensitive curriculum and teacher training to challenge gender stereotypes and biases in education. Provide scholarships and financial incentives for girls to pursue higher education. *Gaurav Jain v. Union of India [(1997) 8 SCC 114]* was a Public Interest Litigation (PIL) that focused on the establishment of educational institutions for the offspring of sex workers. This case provided extensive guidelines for the rescue and social reintegration of both sex workers and their children.

3. **Employment**: Promote gender equality in the workplace through affirmative action policies, such as quotas for women in leadership positions. Ensure equal pay for equal work and take measures to close the gender wage gap. Create awareness campaigns and training programs to combat workplace harassment. *Ashwini Kumar Upadhyaya's Public Interest Litigation* (PIL) in the Delhi High Court and Abdul Mannan's PIL in the Rajasthan High Court are currently pending. These petitions contend that the differential minimum age requirement for men and women is discriminatory against women and goes against the fundamental principles of gender equality, gender justice, and the dignity of women. This is seen as a violation of Articles 14, 15, and 21 of the Constitution. Both the Delhi High Court and the Rajasthan High Court have requested a response from the Central Government regarding the petitions filed by Ashwini Kumar and Abdul Mannan, respectively.

4. **Violence Against Women**: Strengthen law enforcement and legal mechanisms to ensure prompt and effective action against perpetrators of violence. Develop comprehensive support systems for survivors of violence, including counselling and shelter services. Promote gender sensitivity and awareness through community education programs. India has distinct legal provisions concerning marriage for various religious communities. The legal age for marriage is set at 18 years for brides and 21 years for bridegrooms under *The Special Marriage Act, 1954*. This disparity in age requirements for marriage exists because the uniformity of age standards has not been established across all legislations, as per CEDAW Article 16(2).

**Conclusion**

While India has made strides in promoting gender equality and protecting women's rights, significant variation persists in the implementation of CEDAW. This research paper has
highlighted this variation in the legal framework, education, employment, and violence against women. To address these challenges, India must take concrete steps to strengthen its legal system, improve educational opportunities, promote gender equality in the workplace, and combat violence against women. These recommendations, if implemented effectively, can help India fulfil its obligations under CEDAW and advance the cause of gender equality in the country.

The Constitution of India guarantees Fundamental Rights and provisions to safeguard women's rights, such as Article 15, which forbids gender-based discrimination, Article 39(a), which promotes equal access to livelihood, and many other articles that secure women's equality and liberty. Nevertheless, despite the presence of these fundamental guarantees, there are still obstacles in properly achieving women's rights. Discrimination and gender-based violence persist, and the enforcement of these rights differs across various jurisdictions. Efforts to enhance women's rights in India continue via amendments to laws, policies, and awareness programmes. However, achieving full gender equality is a continuing and complex endeavour.

Human rights legislation and philosophy advocate for safeguarding the rights of the most susceptible and marginalised persons in society. Regarding FGM/C, this entails protecting the rights of women and girls who are most vulnerable to this detrimental tradition. Hence, it is crucial for nations, including India, to promptly address these shortcomings by enacting specific laws, increasing public knowledge, improving healthcare and support services, involving communities, collecting data, offering legal assistance and protection, and promoting international cooperation.

In essence, the shortcomings in implementing CEDAW with regards to FGM/C in India highlight the persistent difficulty of achieving human rights in practical terms. Although legislation and international treaties such as CEDAW provide a solid basis, the real measure of human rights theory's effectiveness is determined by how well these standards are implemented, particularly when addressing deeply rooted practises that infringe upon people's basic rights. The endeavour to achieve justice, equality, and the preservation of human rights should be a flexible and progressive undertaking that adjusts to the specific conditions of each society. It should also maintain cultural variety while ensuring the rights and dignity of all individuals.