

FEMALE GENITAL MUTILATION: AN UNKNOWN CRIME BEHIND THE CURTAIN IN INDIA?

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Abstract

Female Genital Mutilation or “Khatna” is a child of patriarchal mindset and social prejudice toward women’s dignity. The justification behind the prevalence of such practice canvassing man’s proprietary right on their woman’s sexuality. Considering the inhumanity behind such practice, International conventions and resolutions have been passed requesting the countries to abolish FGM by passing legislation. However, unlike U.K, U.S., some African countries, India have neither any specific legislation nor any other legislation “expressly” criminalizing nor abolishing this practice. Nevertheless, it does not make the continuance of such practice in Dawoodi Bohra Community legal because the very nature of such practice has been criminalized by IPC and POCSO. Since the issue of the legality of this Practice has already reached Supreme Court of India via PIL, this article will highlight the arguments raised in favour and in against of practicing FGM in India along with Supreme Court’s attitude toward the existence of such religious practice, which allows the mutilation of minor girls, leaving behind a traumatic childhood experience. Furthermore, this article will also anticipate the legitimate reasons on the basis of which the Supreme Court might declare this barbaric practice unconstitutional in the upcoming year.

Keywords: Female Genital Mutilation, Supreme Court, Constitutional Morality, Essential religious practice, Freedom of religion, Fundamental rights, Woman’s rights, right to equality, Constitution of India

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INTRODUCTION

India is a home of diverse religious communities and cherishing their customs, and ideologies for centuries. That is why the Indian Constitution recognizes freedom of religion as a Fundamental Right and in pursuance to that, Article 25 gives every Indian citizen right to practice their customary norms and promote their religion with no hesitation. However, it is still evident that some religious practices can be an absurd, immoral and inhuman (e.g., Sati, Devadasi) and if someone questions such practices, advocates of such religion become skeptical and obnoxious. Our Constitution makers had foreseen such issue that is why Article 25 does not permit absolute freedom of religion as they subjected it to public order, morality and health. Framing the law itself is not enough in de-rooting long-lasting barbaric practices until and unless there is a strict implementation of law through judicial activism.

2017-2018 have been a revolutionary year for Indian feminists. India witnessed the true power of the Hon'ble Supreme Court who adopted a progressive approach when a woman's right to live with dignity and Right to religion clashed together; it is worth mentioning here the Triple talaq and Sabarimala judgment. Now another

monstrous practice of Female Genital Mutilation (hereinafter referred as "FGM") has come in news and feminists are again knocking the Apex court's door to deal with it.

FGM or *Khatna* is a customary practice in which there is partial or total removal of the external female genitalia (clitoris, labia minora or labia majora) of a 7 or 9 years old girl, using a razor or blade, with or more often without using anesthesia by untrained midwives.² This practice is carrying on in Dawoodi Bohra Community for centuries but unlike Triple Talaq, people are not aware of it because *firstly*, "sexuality" is attached to it and talking about it is still considered as taboo in India and *secondly*, girl's own family is involving in exercising such practice. In, 2017 this issue caught fire when several Muslim women came forward and shared their horrific experience of going through mutilation when they were just a child and this led to filing a PIL in Supreme Court demanding a complete ban on FGM by a Delhi based advocate Ms. Sunita Tiwari.

CONTENTIONS RAISED BY PETITIONER IN SUNITA TIWARI v. UNION OF INDIA

- In the petition learned advocate contended that FGM is being

² Ravali Reddy, *India's Dark Secret - Female Genital Mutilation*, available at [https:// www.vidhikarya.com/](https://www.vidhikarya.com/)

legal-blog/indias-dark-secret-female-genital-mutilation, last seen at 22/03/2019.

performed illegally upon girls (between five years and before she attains puberty) belonging to a particular section/ community amongst Shia Muslims known as Dawoodi Bohras, resulting into serious violations of basic Fundamental Rights of the victims who in these cases are minors, and Article 39 of the Constitution of India being directive principles of state policy and the chapters and clauses of UN Convention on the Rights of the Child, UN Universal Declaration of Human Rights of which is India is a signatory, and against the abuse of girls and women of this community, and also against the serious violation of the female body causing permanent deformity/ disfiguration to the body of a girl child and later when she becomes an adult woman.³

- It was further contended that, the Holy Quran (they consider which as supreme law) has none reference as to the justification behind the practice, and the only reason for exercising such practice is controls woman's sexuality and ensures marital fidelity, which is violative to woman's identity, dignity and her

privacy Apart from that, there is no medical reason for carrying such a practice.⁴

- It was contended that the practice must be ban as it is violative of Article 14 and 21 of the Constitution of India, and the same encompasses the right of every child and woman to live with dignity, honor and with no deformity caused upon them by the others.
- PIL also highlighted that there is no law, which expressly punishes FGM, but those who exercise such practice can still be punishable under Section U/s 320, 322, 334, 335, 336, 337,338 and 340 of Indian Penal Code, 1860 and POSCO Act.⁵

ARGUMENTS FROM DAWOODI BOHRA COMMUNITY

Senior Council Abhishek Manu Singhvi, Representative of Dawoodi Bohra Community defended this practice by arguing that the practice which community exercises in India is Khafz or female circumcision (hereinafter referred as "FC") and it cannot be equated as FGM which is banned by several countries. While differentiating between both procedures he argued that what FC makes up is a slight nick

³ Ms. Sunita Tiwari v. Union of India, WRIT PETITION (CIVIL) NO.286 of 2017(Supreme Court, 24/09/2018).

⁴ *Id.*

⁵ *Id.*

on prepuce, which is not as invasive as male circumcision is.⁶ They further argued that the customary practice is an ancient and an essential and integral part insofar as practicing their religion freely in the country and the ban will violate the Bohra Community's fundamental right under Article 25 of Indian Constitution.

SUPREME COURT'S OBSERVATION SO FAR

Three judge's bench of Supreme Court comprising Chief Justice Dipak Misra, Justice A. M. Khanwilkar and Justice D. Y. Chandrachud heard the PIL briefly and so far orally agreed with the issues and contentions raised in PIL. During the hearing, honorable judges observed that, such practice not only infringes the privacy of a woman but also snatch their right to live with dignity, which they enjoy under article 21 of Indian Constitution. Justice D.Y Chandrachud said, "*(FC) may not be life-threatening but there is a permanent mental, emotional and physical scarring of a woman*".⁷

⁶ Mehal Jain, *Female Genital Mutilation (FGM): Even sati was abolished by an act of Parliament, not at the behest of judiciary: Dr. A.M Singhvi*, LiveLaw.in(20/08/2018), available at <https://www.livelaw.in/female-genital-mutilation-fgm-even-sati-was-abolished-by-an-act-of-parliament-not-at-the-behest-of-judiciary-dr-am-singhvi/>, Last accessed 22/03/2019.

⁷ Mehal Jain, *Female Genital Mutilation [FGM] May Not Be Life Threatening, But A Permanent Mental, Emotional And Physical Scarring At A Woman: Chandrachud.J*, LiveLaw.in(27/08/2018), available at <https://www.livelaw.in/female-genital-mutilation->

Court also refused to issue any directions to the doctors to perform the genital mutilation when the senior counsel of Defense suggested it as it would ensure the proper safety while exercising the procedure.⁸ Hon'ble Judges were of the view that there is no scientific justification behind this process as it forces a girl child to undergo such trauma due to non-medical reasons.

At last, Supreme Court decided that the issue at hand involves brief discussion from all perspective and shall be decided by a larger bench, when opposite party submitted that they should refer the matter to Constitutional bench (5 judge's bench) because the issue in the PIL involves a substantial question of law inasmuch as the contended practice is an essential and integral practice of the religious section under Article 25⁹.

SPECULATIONS IN ANOTHER UPCOMING LANDMARK JUDGMENT

The main issue before the Constitutional bench will be to decide the legal sanctity of the FC. Considering the veracity of

fgm-may-not-be-life-threatening-but-a-permanent-mental-emotional-and-physical-scarring-at-a-womanchandrachud-j/, Last accessed 22/03/2019.

⁸ *Can't direct doctors to perform genital mutilation on small girls, says SC*, Hindustan Times(31/07/2018), available at, <https://www.hindustantimes.com/india-news/can-t-direct-doctors-to-perform-genital-mutilation-on-small-girls-says-sc/story-63ZzLAHOMUoqlM9bB3hsBM.html>, last seen on 23/03/2019.

⁹ Supra at 3.

precedents on religious issues, defense needs to prove by adducing evidences that such customary practice was not extraneously added to the religion and behold the essentiality and integrity of the religious faith and belief. If cessation of any practice would likely to jolt the edifice of the religion itself then it will constitute as integral part of that religion. The superstructure of Islam is built upon Holy Quran¹⁰ and the irony is that the practice of FC does not find any recognition in it. Apart from that, only one out of six authentic books of traditions in Islam i.e. ‘Sunnan Abu Dawud’ mentions the practice but again reliance cannot be placed on this document because Abu Dawud, author of the book stated that report related to this tradition is “substandard”¹¹. Thus, absence of any concrete documentary evidences seriously questions the essentiality and the integrity of the practice in the name of Islam.

Another sub issue in front of Constitutional Bench will arise i.e., “Whether Female Circumcision is an “*essential religious practice*” as per Article 25(1) of Indian Constitution?” One cliché argument, which learned councils of defence will likely to take, is that *Khatna* is being practiced in Dowdi Bohra community

from immemorial, thus acquired the status of essential religious practice. In order to tackle this issue, both Triple Talaq and Sabarimala judgment would likely to save the day. In Triple Talaq case it has been held, “*merely because a practice has continued for long, that by itself cannot make it valid if it has been expressly declared to be impermissible.*”¹² Both IPC and POSCO, though not expressly, do criminalize the nature of the practice. Globally also this practice has been criminalized in many developed countries like U.S., U.K, France, and 27 African Countries. So, a practice, which constitutes a criminal offence both nationally and internationally, cannot be considered as an “essential religious practice.”

Defense will also seek protection under Article 26(b) of Indian Constitution by arguing that since Dawoodi Bohra Community is a religious denomination¹³ within Article 26¹⁴ thus they have fundamental right to manage their religious matter. Again, this right is not absolute and it is also subjected to the restrictions of Public order, health and morality.

At last, we might also speculate that, about to be establish Constitutional Bench would

¹⁰ Holy Quran is also the fundamental source of Sharia Law.

¹¹FGM – *Not in the Name of Islam*, The review of Religion, available at <http://www.reviewofreligions.org/11450/fgm-not-in-the-name-of-islam/>, last seen on 23/3/2019.

¹² Shayara Bano and Ors vs. Union of India (UOI) and Ors., AIR 2017 SC 4609.

¹³ Term “Religious Denomination” is not defined in Indian Constitution. But judicial precedents have defined it as a sub-sect in parent religious community (here Muslim community) who acquired distinct characteristic because of their faith and belief.

¹⁴ Sardar Syedna Taher Saifuddin Sahib vs. State of Bombay, AIR 1962 SC 853.

likely to use its controversial yet most powerful weapon i.e. Constitutional Morality in order to declare the practice unconstitutional. Supreme Court has already established the supremacy of constitutional morality in Sabarimala judgment in order to make the society free from oppressive and unequal religious practices. To understand the Constitutional Morality in simple language then it is a screening test to determine whether any religious practice (essential or not) should be declared unconstitutional or not. It constitutes four stages i.e. the preamble of Indian constitution, Liberty, Equality, and Individual's Dignity. Any legislation, executive action or religious practice will be declared unconstitutional if failed to clear any of these stages.

It is important to understand here that the abovementioned stages are inter-dependent to each other meaning thereby "Social and Liberal Justice" as guaranteed in the Preamble cannot be achieved without ensuring the gender equality and protection of individual's dignity. Partial circumcision of clitoris of girls for non-medical purpose, touching their private part without their consent, control on women's sexual desire, continuance of practice just to give more pleasure to their husband, disastrous physical and psychological effect on girls in consequence of the circumcision, all these facets directly infringe the women's dignity

and their liberty of full development of their personality and mind. Furthermore, no evidence was placed at the time of hearing the PIL that boys belonging to Bohra community also go through circumcision thus there is clear-cut violation of Article 14 and 15 of Indian Constitution.

From the above discussion and understanding the inhuman nature of the contended practice along with its severe effect on minor girls (both physically and psychologically) belonging to the Bohra community, one can infer without a hitch that Practice of Khafz/Female Circumcision does not pass the test of constitutional morality, thus should be declared unconstitutional.

There are long odds that legislature will pass a separate law criminalizing FGM/Khafz or FC until and unless Supreme Court declares the practice unconstitutional and expressly direct the Government to take some legislative action. However, keeping in mind the spirit of Triple Talaq and Sabarimala judgment along with the Court's reaction while hearing the PIL, one can hope for the positive outcome.