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Case Comment: Sunita Tiwari vs Union of India (Understanding Female Genital Mutilation)

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INTRODUCTION

Supreme Court of India started hearing the writ petition for the ban of FGM (Female Genital Mutilation) on 9th July'2018. It was against the Dawoodi Bohra community. This writ petition showed us that FGM which people thought to be practiced only on the continent of Africa was practiced in India too. This writ petition was linked with Art 21¹ of the grundnorm of India. This petition was opposed by Dawoodi Bohra Community on many grounds. According to them, it was an essential religious practice, and the court had no right to interfere in the religious practice of that community. This practice is also against Art 19² and 24³ of the United

¹ Art 21 of the Constitution of India states that no person shall be deprived of his life or personal liberty except according to procedures established by law

² Art 19 of United Nations Convention on the Rights of the Child states parties shall take all appropriate legislative, administrative, social, and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child

³ Art 24 of United Nations Convention on the Rights of the Child tells that - (i) States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of

Nations Convention on the Rights of the Child. The practice of FGM is the result of masculine mentality and a complex socio-cultural issue. To completely ban this practice various resolutions and conventions have been passed on a global level. Unlike other countries, in India, we do not have a specific law against this practice in our legislation, but we do have laws that prohibit sexual violence against children in the IPC and the POSCO Act.

In the practice of Female Genital Mutilation, the clitoral hood is removed either partially or entirely as a religious practice.⁴ The practice of FGM consists of every procedure which includes damaging female genitalia for non-medical reasons.⁵ Within the Dawoodi Bohra Community, the customary practice is done of a child with blades or razors by midwives who are not trained without using anesthesia. In the year 2016, leaders of the Dawoodi Bohra Community explicitly said that the practice of FGM should remain to continue in every place where is allowed by law.⁶ In this paper, I will be discussing how the practice of FGM continues in India with reference to the case of Sunita Tiwari vs. Union of India⁷.

LAWS AGAINST THE PRACTICE OF FEMALE GENITAL MUTILATION

In 2006 the UNGA (United Nations General Assembly) explicitly rejected religious beliefs as justifications for violence towards women.⁸ The UNGA expressly endorsed a resolution in 2012⁹ and again in 2014¹⁰ to establish a ban on the practice of FGM on a global scale. Commission on the Status of Women has also expressly endorsed a resolution for concluding the practice of FGM. Even after all these resolutions approximately 75% of women

access to such health care services (ii) States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures

⁴ 'Female Genital Mutilation, Guide to Eliminating the FGM practice in India' (*Lawyer's Collective*)

<<http://www.lawyerscollective.org/wp-content/uploads/2012/07/Female-Genital-Mutilation-A-guide-to-eliminating-the-FGM-practice-in-India.pdf>> accessed 01 June 2021

⁵ Sheila Mckinnon, 'International Day of Zero Tolerance for Female Genital Mutilation, 6 February' (*Africa Renewal, United Nations*) <<https://www.un.org/africarenewal/international-day-zero-tolerance-female-genital-mutilation-6-february>> accessed 01 June 2021

⁶ Mohua Das, 'Circumcision a religious rite, but abide by law of country, clarifies: Syedna' (*Times of India*, 7 June 2016)

⁷ *Sunita Tiwari v Union of India* WP (C) No 286/2017

⁸ GA Res 61/143, UN Doc A/61/438 (December 19, 2006)

⁹ GA Res 67/146, UN Doc A/67/450 (December 20, 2012)

¹⁰ GA Res 69/150, UN Doc A/69/481 (December 18, 2014)

approximately put their daughters to the barbaric practice of FGM in the Dawoodi Bohra Community.¹¹ Rights that safeguard against barbaric practice with humans concerning their physical integrity are protected by UNHR¹² and the International Covenant on Economic Social and Cultural Rights.¹³ United Nations Convention on Rights of Child which was introduced in 1990 makes countries responsible for safeguarding kids from any kind of hostility against them.

The case of **K.S. Puttuswamy v. Union of India, 2017**¹⁴ held that the right to physical integrity has been included under Art 21¹⁵ of the Constitution of India. According to POSCO Act, 2012 if someone touches the genitalia of a female who is a minor for any reasons which are not related to medical reasons then the person touching it can be punished with imprisonment.¹⁶ In POSCO Act also includes laws against sexual violence done by any weapons.¹⁷ Also, if someone causes grievous hurt to anyone by his or her voluntary act then the person can be held liable under Section 326¹⁸ of IPC, 1860. According to National Policy for Children which was introduced in 2013, reasons for religious practice should not be used to stop children from using their fundamental rights. If we read this together, the government must stop the practice of FGM and punish whosoever doing it. Unlike IPC there are a lot of provisions in the POSCO Act for safeguarding children against sexual violence. Although there is no specific term within the POSCO Act or IPC as “female genital mutilation”, people practicing this can be held liable for sexual violence and violating the fundamental rights of children.

¹¹ Shalini Nair, ‘At least 75% Bohra women admit female genital mutilation, says study’ (*Indian Express*, 6 February 2018) <<https://indianexpress.com/article/india/75-bohra-women-admit-female-genital-mutilation-study-5052869/>> accessed 03 June 2021

¹² Universal Declaration of Human Rights 1948

¹³ International Covenant on Civil and Political Rights 1976

¹⁴ *KS Puttuswamy v Union of India* (2017) 10 SCC 1

¹⁵ Article 21 (n 1)

¹⁶ Protection of Children from Sexual Offences Act 2012, cl 3-13

¹⁷ *Ibid* cl 5(h) & cl 9(h)

¹⁸ Sec 326 of IPC states that Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with 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

COMPARATIVE ANALYSIS

According to Art 25¹⁹ of the Constitution of India, every citizen in India has the fundamental right to practice, profess, and propagate their religion. Even though it is not explicitly stated in the Constitution of India, the Supreme Court has removed the exception for "essential religious practices" that are exempted from constitutional protection.²⁰ Based on this theory, judges have the power to decide what comes under the "essential" practice and what does not come and to ultimately exclude such practices from fundamental rights scrutiny. The Supreme Court has held that even the practice of an individual ex-communication (which is specifically prohibited by Bombay statute), could thus be considered 'essential religious practice in the specific situation of the Dawoodi Bohra Community and its religious rights, immunizing it from legal scrutiny.²¹ Even after at present time many women in the Dawoodi Bohra community are against the practice of FGM²², DBWRF considers it as "essential religious practices". In the writ petition filed by Ms. Sunita Tiwari, the Supreme Court of India said that it is about both women's and child's rights.²³ There has been no discernible decrease in the cases related to the practice of FGM since the enactment of legislation such as the POCSO Act or provisions in the IPC. Bringing attention to the flaws in the current criminal legal system of India fails to address the offense of FGM.

The practice of FGM is considered a religious practice in the Dawoodi Bohra community before more than 500 years ago. This practice can be considered similar to Sati, in which a woman was burned after the death of her husband. Both traditions are against the autonomy of rights and freedom of women's bodies. The Dawoodi Bohra Community understands the effect of the brutal practice which stays with a woman throughout their life. The brutal

¹⁹ Art 25 of Constitution of India guarantees the freedom of conscience, the freedom to profess, practice and propagate religion to all citizens

²⁰ *Durgah Committee v Syed Hussain Ali* 1961 AIR 1042

²¹ *Sardar Syedna Taher Saifuddin v State of Bombay* 1962 AIR 853

²² Simantini Dey, 'Women from the Bohra Community Are Fighting Against Female Genital Mutilation to Win Back Their Freedom' (*News 18*, 15 August 2018) <<https://www.news18.com/news/buzz/women-from-the-bohra-community-are-fighting-against-female-genital-mutilation-to-win-back-their-freedom-1844119.html>> accessed 05 June 2021

²³ HT Correspondent, 'Female Genital Mutilation violates fundamental rights, says Supreme Court' (*Hindustan Times*, 31 July 2018) <<https://www.hindustantimes.com/india-news/female-genital-mutilation-violates-fundamental-rights-says-supreme-court/story-2NEarAry6tAMsHIIbXojDM.html>> accessed 05 June 2021

practice of FGM adds up intentional harm against the woman which is against the moral's society at large. When people within the community do not perceive that these practices are detrimental to their family members, new and strict provisions in the law need to be drafted which will help us to stop this practice.

CONCLUSION

Although there are many provisions in POSCO Act and IPC for sexual violence against women, FGM is still frequently performed in the Dawoodi Bohra community in India. There is a need for a special clause for FGM in IPC, precisely addressing practice, including education organizations who are practicing it and specifying preventative and rehabilitative procedures. It is quite important. The practice of FGM is simply a ruthless habit, which causes its victims to experience misery, sorrow, and emotional harm throughout their lives. In a society where the women are driven by will and the whims of ignorant males, such customary practice can become more frequent. The community must recognize the rights of women over their bodies, and women should realize this from childhood onwards. Even if FGM is to be forbidden, the practice can be seen to be very private to deter penalization. It is high time that India should have specific laws against the practice of FGM so that the brutal practice can end completely.