

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

I.A. NO. 43032 of 2017

IN

WRIT PETITION (CIVIL) NO. 286 OF 2017

(PUBLIC INTEREST LITIGATION)

IN THE MATTER OF:

MS. SUNITA TIWARI

Petitioner-in-person

Versus

UNION OF INDIA AND ORS.

Respondent

IN THE MATTER OF:

MS. MASOOMA RANALVI

Intervenor

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENOR

Sr. Adv. Indira Jaising

It is most respectfully submitted that:

Introduction

1. That the intervenor is a survivor of Female Genital Mutilation/Khafz/Katna, having been subjected to the practice of FGM/Khafz, when she was aged seven. All the women in her family, at least 28 of them, have been subject to FGM/Khafz. The intervenor has founded an organization of women, most of whom are survivors of FGM/Khafz called WeSpeakOut which is actively involved in creating awareness on this secret practice.
2. That intervenor and her family have been socially boycotted by the Head of the Dawoodi Bohra Community. That her father was excommunicated in the late seventies for having joined the Reform movement. That her family has had to sever ties with all their extended family members and are not allowed to attend any social or religious functions as a result of being excommunicated. That the intervenors father,

when he passed away in 2010 was not allowed to be buried in the community burial ground.

What is Female Genital Mutilation

3. Female Genital Mutilation/Cutting (hereinafter FGM/C) also known as Khatna/Khafz/Khafz, comprises all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non medical reasons. While it is mainly carried out on girls between the ages of 1 and 15 years, occasionally, adult and married women are also subjected to this procedure.

4. Despite the global efforts to promote abandonment of the practice, FGM/C remains widespread in different parts of the world. Over 200 million girls and women have undergone FGM/C. The practice is most common in 30 countries across Africa and in some countries in Asia (particularly the Middle East) and Latin America and among migrants from these areas, though it is also practised in parts of North America and Europe.

5. That most comprehensive definition of FGM/C is given by World Health Organization (WHO), as stated below:

Female Genital Mutilation comprises all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non medical reason.

Further it is classified into 4 types

Type I — Partial or total removal of the clitoris and/or the prepuce (clitoridectomy). When it is important to distinguish between the major variations of Type I mutilation, the following subdivisions are proposed:

- a. Type Ia, removal of the clitoral hood or prepuce only;
- b. Type Ib, removal of the clitoris with the prepuce.

Type II — Partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (excision). When it is important to distinguish between the major variations that have been documented, the following subdivisions are proposed:

- c. Type IIa, removal of the labia minora only;
- d. Type IIb, partial or total removal of the clitoris and the labia minora;
- e. Type IIc, partial or total removal of the clitoris, the labia minora and the labia majora.

Type III — Narrowing of the vaginal orifice with creation of a covering seal by cutting and appositioning the labia minora and/or the labia majora, with or without excision of the clitoris (infibulation). When it is important to distinguish between variations in infibulations, the following subdivisions are proposed:

- f. Type IIIa, removal and apposition of the labia minora;
- g. Type IIIb, removal and apposition of the labia majora.

Type IV — All other harmful procedures to the female genitalia for non-medical purposes, for example: pricking, piercing, incising, scraping and cauterization

This definition should be adopted in the Indian legal framework, in order to combat the harmful practice of FGM/C carried out under different names like Khafz/khafd /khatna.

6. That it is established that the practice of khafz within the Bohra community involves at the very least, the cutting of the prepuce or the clitoral hood, which clearly falls under Type 1(a) of the definition of FGM/C as set out by the WHO.

7. That 'Clitoris' is defined in the Blacks Medical Dictionary 41st edition, A & C Black Publishers Limited (2005) as: **'A small, sensitive organ comprising erectile tissue at the top of the female genitalia where the labial folds meet below the pubic bone. Clitoral tissue extends into the anterior roof of the vagina. During sexual excitement the clitoris enlarges and hardens and may be the focus of orgasm.'** And that the 'Prepuce of clitoris' is defined in Stedman's Medical Dictionary for the Health Professions and Nursing, Australia and New Zealand Edition, 6th edition as: **The external fold of the labia minora, forming a cap over the clitoris.** That the biological function of the clitoral hood is simply to protect the clitoral glans from friction and other external forces, since the clitoris is an extremely sensitive part with over 8000 nerve endings and provides a vital protection to the clitoris. By advocating for a cutting of the clitoral hood, means exposing 8000 nerve endings of the clitoris.

Health Effects of FGM

8. Is it submitted that the practice of Khafz/Khatna is a dehumanising practice resulting in the diminution of

the human body of the female sex and is intended to reduce or eliminate her sexual pleasure in adult life. It is submitted that the practice mutilates the women body of the female in a very essential manner, namely the ability to enjoy sex and indeed results in experiencing pain during sexual intercourse. It thus makes women, who have undergone FGM/Khafz less than human in that they suffer a loss of human dignity. That any alteration, nicking, pricking, excision, cutting of the clitoral hood or the clitoris amounts to violation of the bodily integrity of a girl and woman.

9. That according to a most recent study on the practice of FGM/Khafz in India titled **“THE CLITORAL HOOD A CONTESTED SITE”**, COMMISSIONED BY WESPEAKOUT AND Nari Samita Manch, in 2018 : **75% of all daughters of the study sample were subjected to FGM/C**, which means it continues to be practiced on little girls. **97% of women who remembered their FGM/C experience from childhood recalled it as painful.** While most women said they suffered immediate pain from the procedure only 2 women said they did not have any immediate or long-term impact from FGM/C. Despite sex being a taboo topic, approximately 33% of women subjected to FGM/C in the study believe it has negatively impacted their sexual life. **Low sex drive, inability to feel**

sexual pleasure, difficulty trusting sexual partners, and over sensitivity in the clitoral area were some of the problems identified by several women. **Close to 10% of the women who had undergone the procedure in the current study specifically mentioned urinary problems, recurring UTIs, burning and incontinence.** In addition, one of the study participants reported bleeding of the clitoral hood area due to irritation. Many respondents in the study reported feeling **fear, anxiety, shame, anger, depression, low-self-esteem, and/or betrayal of trust** as some of the fallouts that they associated with their FGM/Khafz.

10. That FGM/C has short term and long term ill effects on the health and psychological well-being of the victims. The severity of the cutting/mutilation directly corresponds to the harm suffered. Since anaesthesia is rarely used on the victim during the procedure, there is extreme pain. The other short term health risks are excessive bleeding, swelling and inflammation in the genital area, infection, urinary problems and in some extreme cases, even death. The long term consequences include chronic genital infections, recurring urinary tract infections, painful sexual intercourse, complications during pregnancy, labour and delivery of the child, perinatal risks and debilitating psychological consequences like Post

traumatic Stress Disorder (PTSD) and depression. FGM/C thus affects the health and social development of girls and women. That FGM/C does not have any beneficial health effects whatsoever.

11. That despite the potential danger and risk of the harmful traditional practice of FGM/Khafz on bodies and minds of women and girls being very real, the practice remains a secret and underground. Since many Bohra women fear backlash from the community if they openly discuss their FGM/C experiences, and because the experiences of harm are so private, many women often choose not to speak in public about the harms. This silence combined with the secrecy around the practice has made it virtually an invisible practice in the eyes of the society and the government. The research scholars of the study “THE CLITORAL HOOD A CONTESTED SITE” have narrated one such recent case in which a young seven year old child almost bled to death due to this procedure of FGM/Khafz. The above mentioned case has also been stated in an affidavit filed in this court by Ms Lakshmi Anantnarayan and Ms Shabana Diler.

12. The other ill effects of this practice have been documented in the report titled, **“A GUIDE TO ELIMINATING THE PRACTICE OF FGM IN INDIA”**, published by Lawyers Collective and WeSpeakOut, in 2017, which are stated here: *FGM is widely perceived*

as a way of controlling female sexuality. Sexual desire in girls and women is viewed as something that needs protection and it is perceived to be a family's duty to circumcise their daughters to provide this protection. Not only can FGM/C provide physical protection by creating a barrier to intercourse but it is also perceived as a way to cleanse a girl from impure thoughts and desires. Female circumcision or FGM/C seeks to protect a woman's virginity before marriage by reducing her enjoyment of intercourse, and on marriage it is seen to dissuade her from being unfaithful to her husband." The report has also documented some of the experiences of women who have undergone FGM/Khafz. The narratives of these women goes on to show that the abuse leaves them physically, psychologically and sexually damaged and disabled. Further it is stated that, *'In a rare controlled comparison, two researchers recently demonstrated the connected possibility of PTSD symptoms and FGM/C. The study compared 23 Senegalese women who had undergone FGM/C with 24 Senegalese women who had not undergone FGM/C along dimensions of traumatic stress symptoms and other mental health problems. The two groups were comparable on age and socio--demographic variables and, importantly, experiences of non--FGM/C traumatic events. This study provides clear evidence for the association between FGM/C and mental health problems in general and traumatic symptoms in*

particular. Whilst traumatic events do not always lead to PTSD symptoms, symptoms are more likely to develop following events that involve threat of death or serious injury to the person or another person, with the sufferer's response being marked by intense fear, helplessness or horror. Women may experience few traumatic symptoms but report other difficulties such as problems of anxiety or low mood. Chronic illness is associated with reduced psychological well-being and overall quality of life, and some women may suffer chronic health problems (e.g. chronic pain) left behind by FGM/C. A number of psychological therapies have been shown to be effective in reducing distress and disabilities associated with chronic ill health and these have the potential to benefit women and girls whose health has been adversely affected by FGM/C. It is clear that FGM/C in any format is a form of child abuse as it is done on minors, in secret. There can be, and will be, no excuse to legitimise such an abhorrent practice in any way. Further, there have been cases where it has caused deep emotional damage between the daughter and the mother as it comes to signify a deep breach of trust.'

13. That the Norwegian Knowledge Centre for Health Services issued a report in 2014 title "Immediate health consequences of female genital mutilation/cutting"

which conducted a systematic review of 56 observational studies conducted over fifty years that documented the immediate complications of FGM/C across various types of FGM. The study found that the most common immediate FGM/C complications were pain, excessive bleeding, swelling, problems with wound healing and urinal retention. It concluded that ‘nicking’, classified as FGM/C type IV in the WHO typology, does not appear to involve any substantially smaller risk of immediate complications than types I-II

“..... [o]ur findings indicate that there is no evidence to support a shifting from FGM/C types I-II to nicking on the rationalization that it involves no immediate harm. Further, as UNICEF emphasizes, such harm-reduction FGM/C neither addresses the gender-based inequality underpinning the practice nor makes it more acceptable from a human rights perspective.”

14. That a study by the World Health Organization (WHO) title “**Female Genital Mutilation and obstetric outcome: WHO Collaborative prospective study in six African countries**” published in 2006, targeted 30,000 women at 28 obstetric centres and compared obstetric outcomes for women who had not undergone FGM to those who had undergone different types of FGM. The study outcomes are classified by type of

FGM, with type I as per the WHO classification being defined to include removal of the prepuce or clitoris, or both. The findings of the study revealed that women who have undergone FGM are significantly more likely than those without FGM to have adverse obstetric outcomes. Though it found that that the risks seem to be greater with more extensive FGM, even Type I FGM was found to result in higher risk of postpartum haemorrhage, prolonged labour, difficult delivery, obstetric tears/lacerations, longer maternal hospital stay, and higher still birth rates.

15. That the Inter-agency statement issued in 2008 by relevant United Nations agencies including the Office of the High Commissioner for Human Rights (UN-OHCHR), United Nations Children's Fund (UNICEF), United Nations Population Fund (UNFPA) and World Health Organization (WHO), amongst others, has explicitly recognized that female genital mutilation is associated with a series of health risks and consequences, and that the intervention itself is traumatic since girls are usually physically held down during the procedure. It also noted that FGM Types I, II and III had associated health risks and complications, including pain, infections, complications during childbirth, quality of sexual life and psychological consequences.

Is Female Genital Mutilation the same as Khafz/Khatna

16. That the Bohra community leaders have admitted that the practice of Khafz/Khatna, which involves the cutting of the prepuce of the clitoris or the clitoral hood, comes under the WHO definition of FGM type 1a, which has been adopted in several countries with specific and special laws on FGM. That in the year 2016, many edicts were issued by local Dawoodi Bohra Trusts which administer and manage the affairs of the community. These edicts were issued specifically and only in Western Countries having significant Dawoodi Bohra populations and having special laws against FGM. These edicts, made authoritative statements, in no uncertain terms, forbidding the practice of khatna/khafz in those communities. And stated that the community's practice of Khatna/khafz fell under the definition of FGM and directed the community members living in those countries not to perform khatna/khafz. Further, and very importantly, these resolutions were publicised internationally with major prominence in India, where the centre of the Dawoodi Bohra community is based. Quoting from the

Resolution passed by the Anjuman-e-Burhani Sydney dated 9th February 2016 stating: 1. *It is well known hadith of the Prophet Mohammed Rasullah (SAW) that Hubul Watan Minal Imaan which means Love for the land of abode is part of faith, the Hudaat Kiraam, (AS) have therefore taught us and made it our tradition to remain loyal to the country of abode and to be law abiding and contributory citizens.* 2. *Khafd (also known as Khatna and female circumcision) has recently been interpreted by the Supreme Court of NSW to be within the **meaning of Female Genital Mutilation as defined in Section 45 of the Crimes Act of NSW. It is likely that the practice will be interpreted to fall within the specific laws in relation to FGM in other states or territories of the Commonwealth of Australia. Consequently, Khafd is illegal, whether it is carried out within any of the States of Australia or Overseas,*** 3. *All parents and guardians are hereby directed in the strictest terms not to carry out Khafd under any circumstances.* 4. *You are further instructed not to take any person out of Australia for the purpose of Khafd.* 5. *Parents and guardians are advised that should you engage in this illegal act, you will be doing so against the specific warning of Anjuman _ e –Burhani , Sydney and the consequences of breaking the law will be solely yours. Signed by all Jamaat Members.*

17. That in many cases, the practice of Khafz/Khatna goes even beyond cutting the prepuce or clitoral hood, and can involve the cutting of the clitoris as well, which falls under Type 1(b) of the WHO definition. Since there was a need to understand the nature of the practice in the Bohra community and the physical and physiological implications of FGM/Khafz on the female body, and that since there was an urgent need for a systematic medical analysis to understand what Type of FGM/C is practiced by the Bohras, Dr Shujaat Vali, a well known Gynaecologist from the Bohra community, observed the FGM/khafz status of over 20 female Bohra patients (mostly from small towns like Godhra), his findings were that the clitoris is very small and there is a very small region between the skin and the clitoris. Only a specialist with a lot of experience can maybe separate the two and be able to cut only the skin/hood/ prepuce. So, in most cases the clitoris gets cut /affected. He has stated the same in his affidavit which is filed in this court.

18. That recently, in the matter ***R v. A2; R v. KM; R v. Vaziri (No. 2) ([2015] NSWSC 1221)***, the New South Wales Supreme Court had the opportunity to consider whether the practice of “khatna” by members of the Bohra community in Australia was covered under the definition of female genital mutilation as set out in

section 45 of the Crimes Act, 1900. The Court noted that “[a]t the forefront of resolution of this issue is the fact that any FGM procedure will be directed, as a matter of course, to the sensitive and intimate female genital area, usually of young girls. To attempt to prescribe what conduct fell inside or outside the terms of s.45(1) would be fraught with difficulty, when it has been recognized that substantial margin for error may well surround the performance of FGM procedures generally”. The Court took into account the intention of the legislature in this case, which was to prohibit or eradicate FGM procedures generally, and found that the practice of ‘khatna’ in this case fell within the scope of the term “otherwise mutilates” set out in section 45 of the Crimes Act, 1900.

Does Female Genital Mutilation Exist in India.

19. That in India, that the practice is carried under different names such as **“Khatna”** or **“Khafz/Khafd”**. It is mostly prevalent in Dawoodi Bohra, Alvi Bohra, Suleimani Bohra and a few other Sunni sub-sects of Kerala where the practice is referred to as **“Khatna”** or **“Khafz/Khafd”** and essentially involves cutting the tip of a girl's clitoris and/or prepuce when she is a minor. The practice of Khafz/Khatna/Khafz is not a religious practice and has no mention in the Holy Quran. In India, the majority of muslims do not practice

FGM/Khafz/Khatna. The practice in the Bohra community is linked to its origins in Africa, namely Egypt and Yemen. It is largely performed by traditional cutters. As some families become more interested in a safe cutting, they prefer to go to doctors. Members of the family are usually involved in the decision-making about FGM/C, although the elder women of the family are usually responsible for the practical arrangements for the procedure. It is to be noted that this practice is purely customary/ traditional practice that has no medical benefits whatsoever nor any religious sanctions and is performed for non medical and non therapeutic reasons. A detailed report on the practice of FGM/C in India with the holistic legal and social perspective titled **“A GUIDE TO ELIMINATING THE PRACTICE OF FEMALE GENITAL MUTILATION (FGM) IN INDIA”**, published by Lawyers Collective and WeSpeakOut, in 2017, which conforms the above mentioned facts about the practice of FGM/C.

Legislative Framework

20. That because of FGM/C must be considered as an offence under the Indian Legal framework. That there have been studies carried out in the community which clearly point out to the prevalence of this practice, there have been several media reports narrating the stories of girls and women who have been subject to this practice and that there have been cases

in courts of law in countries like Australia involving the Dawoodi Bohra community members are ample proof of the existence of FGM/Khafz. Lack of data with NCRB does not and cannot be read as the practice does not exist in India.

21. That recently, in an opinion based poll taken by Thomson Reuters, India was stated to be the most unsafe country in the world for women. The Ministry of Women and Child Development gave a press release post this poll on 27th July, 2018, where the below mentioned is stated: *“The cases of acid attack are only incidental in the country and as mentioned earlier the practice of stoning, **female genital mutilation etc. are not seen here. India thus** can not possibly be the worst in the world in terms of violence”* (emphasis supplied).

22. That the above mentioned statement of the ministry establishes that it is considered a crime under Indian Penal Code, 1860 (IPC hereinafter) and Prevention of Children from Sexual Offences Act, 2012 (POCSO hereinafter). The intervention petition filed by the Dawoodi Bohra Women’s Association for Religious Freedom also clearly accepts and acknowledges that Khafz is practiced by the Bohra community in India. It

is of utmost importance to that data be collected for this crime by the NCRB.

23. In India, various forms of violence against women are dealt within the Indian Penal Code, 1860 (IPC). Being a criminal law, the focus is on penalising the accused/perpetrator of the crime. Section 319 to 326, IPC address varying degrees of hurt and grievous hurt. According to the World Health Organisation, the immediate complication of FGM/C can include excessive bleeding (hemorrhage), genital tissue swelling, wound healing problems, injury to surrounding genital tissue, shock and death while the long term consequences include urinary problems, vaginal problems, menstrual problems, sexual problems etc.³⁹ and thus persons undertaking FGM/C may be prosecuted under the IPC. Particularly, Sections 324 and 326, IPC provide penalties of imprisonment and fines for 'voluntarily causing hurt' and 'voluntarily causing grievous hurt'. Section 3 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) that addresses penetrative sexual assault by any person on any child, inter alia defines it as insertion of any object into the vagina of the girl. It is established precedence that penetration in sexual offences need not be complete penetration. In fact, Explanation 1 of Section 375, IPC categorically states that the term vagina includes labia majora. FGM/C,

which requires insertion of a sharp object into the vagina of a child, may be covered under Section 3, POCSO Act read with Explanation 1 of section 375 IPC. Provisions of POCSO, after the 2013 Criminal Law Amendment Act, has to be read in addition to the existing provisions as per Section 42A.

POCSO Section 42A. *The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.*

24. It is humbly submitted that under none of the below mentioned provision, there us a specific mention of the offence of FGM/C despite it being referred to as a “crime” by the Ministry of Women and Child Development. Hence there is a need to define the offence clearly under IPC as well as POCSO.

The relevant sections of I.P.C and POCSO are stated below:

Section 319, IPC: Hurt.—*Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.*

Section 320, IPC :Grievous hurt.—*The following kinds of hurt only are designated as “grievous”:*—
(first)- Emasculation

(secondly)- Permanent privation of the sight of either eye.

(thirdly)- Permanent privation of the hearing of either ear

(forthly)- Privation of any member or joint.

(Fifthly)-Destruction or permanent impairing of the powers of any member or joint.

(Sixthly)-Permanent disfiguration of the head or face.

(Seventhly)-Fracture or dislocation of a bone or tooth.

(Eighthly)-Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

Section 321, IPC: Voluntarily causing hurt.—

Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said “voluntarily to cause hurt”.

Section 322, IPC. Voluntarily causing grievous

hurt.—*Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said “voluntarily to cause grievous hurt.” Explanation.—A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to*

be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt, if intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.

Section 323, IPC. Punishment for voluntarily causing hurt.—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.

Section 324, IPC: Voluntarily causing hurt by dangerous weapons or means.—Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as 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 of either description for a term which may extend to three years, or with fine, or with both.

Section 325, IPC. Punishment for voluntarily causing grievous hurt.—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.

Section 326 IPC. Voluntarily causing grievous hurt by dangerous weapons or means—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 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.

Section 375 A man is said to commit “rape” if he—

1. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or

*makes her to do so with him or any other person;
or*

- 2. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*
- 3. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or*
- 4. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:*

- 1. Against her will.*
- 2. Without her consent.*
- 3. With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.*
- 4. With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*
- 5. With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or*

unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent

6. *With or without her consent, when she is under eighteen years of age*
7. *When she is unable to communicate consent.*

Explanations

1. For the purposes of this section, “vagina” shall also include labia majora.

2. *Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act;*

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity. Exceptions

1. *A medical procedure or intervention shall not constitute rape*
2. *Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.*

POCSO Section 3. Penetrative sexual assault.-

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.*

POCSO Section 4. Punishment for penetrative sexual assault.-

Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

POCSO Section 5. Aggravated penetrative sexual assault.-

- a. *Whoever, being a police officer, commits penetrative sexual assault on a child-*
- i. *within the limits of the police station or premises at which he is appointed; or*
 - ii. *in the premises of any station house, whether or not situated in the police station, to which he is appointed; or*
 - iii. *in the course of his duties or otherwise;*
or
 - iv. *where he is known as, or identified as, a police officer; or*
- b. *whoever being a member of the armed forces or security forces commits penetrative sexual assault on a child-*
- i. *within the limits of the area to which the person is deployed; or*
 - ii. *in any areas under the command of the forces or armed forces; or*
 - iii. *in the course of his duties or otherwise;*
or
 - iv. *where the said person is known or identified as a member of the security or armed forces; or*

- c. *whoever being a public servant commits penetrative sexual assault on a child; or*
- d. *whoever being on the management or on the staff of a jail, remand home, protection home, observation home, or other place of custody or care and protection established by or under any law for the time being in force, commits penetrative sexual assault on a child, being inmate of such jail, remand home, protection home, observation home, or other place of custody or care and protection; or*
- e. *whoever being on the management or staff of a hospital, whether Government or private, commits penetrative sexual assault on a child in that hospital; or*
- f. *whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; or*
- g. *whoever commits gang penetrative sexual assault on a child.*

Explanation.- When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for that

*act in the same manner as if it were done by him alone;
or*

h. whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or

i. whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

j. whoever commits penetrative sexual assault on a child, which-

i. physically incapacitates the child or causes the child to become mentally ill as defined under clause (l) of section 2 of the Mental Health Act, 1987 or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; or

ii. in the case of female child, makes the child pregnant as a consequence of sexual assault;

iii. inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; or

- k. *whoever, taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child; or*
- l. *whoever commits penetrative sexual assault on the child more than once or repeatedly; or*
- m. *whoever commits penetrative sexual assault on a child below twelve years; or*
- n. *whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or*
- o. *whoever being, in the ownership, or management, or staff, of any institution providing services to the child, commits penetrative sexual assault on the child; or*
- p. *whoever being in a position of trust or authority of a child commits penetrative sexual assault on the child in an institution or home of the child or anywhere else; or*
- q. *whoever commits penetrative sexual assault on a child knowing the child is pregnant; or*
- r. *whoever commits penetrative sexual assault on a child and attempts to murder the child; or*

- s. *whoever commits penetrative sexual assault on a child in the course of communal or sectarian violence; or*
- t. *whoever commits penetrative sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or*
- u. *whoever commits penetrative sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated penetrative sexual assault.*

POCSO Section 6. Punishment for aggravated penetrative sexual assault.-

Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.

POCSO Section 7. Sexual assault.-

Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent

which involves physical contact without penetration is said to commit sexual assault.

POCSO Section 8. Punishment for sexual assault .-

Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.

POCSO Section 9. Aggravated sexual assault.-

- a. *Whoever, being a police officer, commits sexual assault on a child-*
 - i. *within the limits of the police station or premises where he is appointed; or*
 - ii. *in the premises of any station house whether or not situated in the police station to which he is appointed; or*
 - iii. *in the course of his duties or otherwise; or*
 - iv. *where he is known as, or identified as a police officer; or*
- b. *whoever, being a member of the armed forces or security forces, commits sexual assault on a child-*
 - i. *within the limits of the area to which the person is deployed; or*

- ii. *in any areas under the command of the security or armed forces; or*
 - iii. *in the course of his duties or otherwise; or*
 - iv. *where he is known or identified as a member of the security or armed forces; or*
- c. *whoever being a public servant commits sexual assault on a child; or*
- d. *whoever being on the management or on the staff of a jail, or remand home or protection home or observation home, or other place of custody or care and protection established by or under any law for the time being in force commits sexual assault on a child being inmate of such jail or remand home or protection home or observation home or other place of custody or care and protection; or*
- e. *whoever being on the management or staff of a hospital, whether Government or private, commits sexual assault on a child in that hospital; or*
- f. *whoever being on the management or staff of an educational institution or religious institution, commits sexual assault on a child in that institution; or*
- g. *whoever commits gang sexual assault on a child.*

Explanation.- when a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

h. whoever commits sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or

i. whoever commits sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

j. whoever commits sexual assault on a child, which-

i. physically incapacitates the child or causes the child to become mentally ill as defined under clause (l) of section 2 of the Mental Health Act, 1987 or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; or

ii. inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the

child by rendering him physically incapacitated, or mentally ill to perform regular tasks; or

- k. whoever, taking advantage of a child's mental or physical disability, commits sexual assault on the child; or*
- l. whoever commits sexual assault on the child more than once or repeatedly; or*
- m. whoever commits sexual assault on a child below twelve years; or*
- n. whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on such child; or*
- o. whoever, being in the ownership or management or staff, of any institution providing services to the child, commits sexual assault on the child in such institution; or*
- p. whoever, being in a position of trust or authority of a child, commits sexual assault on the child in an institution or home of the child or anywhere else; or*
- q. whoever commits sexual assault on a child knowing the child is pregnant; or*

- r. *whoever commits sexual assault on a child and attempts to murder the child; or*
- s. *whoever commits sexual assault on a child in the course of communal or sectarian violence; or*
- t. *whoever commits sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or*
- u. *whoever commits sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated sexual assault.*

POCSO Section 10. Punishment for aggravated sexual assault.-

Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

25. It is humbly submitted that due to the unclear definition of what would construe “vagina” in any of the legal statute, covering the offence of FGM/C under POCSO and IPC becomes difficult. It must be noted that while FGM/Khafz should ideally be covered under the provisions of IPC and POCSO, unambiguously. The

practice should be covered under section 3 and section 7 of POCSO and Section 319 to Section 326 of IPC. It is submitted that the practice should qualify as “emasculated” under grievous hurt in IPC. The object behind this practice carried out on minor children which involves touching and cutting of genitalia of such minor children for non medical purposes is far more sinister. It is done to control a woman’s sexuality, therefore the need for defining the offence of FGM/C also known as Khatna/Khaz/Khafd also arises.

26. Addressing this practice requires a more holistic approach. Such an approach needs to address the various other aspects of FGM/C including abetting or aiding the practice, propagating the practice, prevention of FGM/C, regulations on medical/health professionals who carry out this practice, duty to report, support and rehabilitative provisions and awareness generation.

International Legislative Framework and Conventions

27. That several countries world over have special laws dealing with this practice and its prevention and elimination. **FGM/C is a crime in Nigeria under Section 6 of the Violence against Persons (Prohibition) Act, 2015:** “(1) The Circumcision or

genital mutilation of the girl child or women is hereby prohibited. (2) A person who performs female circumcision or genital mutilation or engages another to carry out such circumcision or mutilation commits an offence and is liable on conviction to a term of imprisonment not exceeding 4 years or to a fine not exceeding N 200,000.00 or both (3) A person who attempts to commit the offence provided for in subsection (2) of this section commits an offence and is liable on conviction to a term of imprisonment not exceeding 2 years or to a fine not exceeding N 100,000.00 or both (4) A person who incites, aids, abets or counsels another person to commit the offence provided for in sub section (2) of this section commits an offence and is liable on conviction to a term of imprisonment not exceeding 2 years or to a fine not exceeding N 100,000.00 or both.” **Under the United Kingdom Female Genital Mutilation Act, 2003, (hereinafter UK FGM Act) not only female genital mutilation is a crime, but anyone who abets it is also to be held liable.** Below are the relevant provisions. Section 1 of UK FGM Act, 2003: “Offence of female genital mutilation - (1) A person is guilty of an offence if he excises, infibulates or otherwise mutilates the whole or any part of a girl’s labia majora, labia minora or clitoris.” Section 2 of UK FGM Act, 2003: “Offence of assisting a girl to mutilate her own genitalia - A person is guilty of an offence if he aids,

abets, counsels or procures a girl to excise, infibulate or otherwise mutilate the whole or any part of her own labia majora, labia minora or clitoris.” **Section 3 of UK FGM Act, 2003:** “Offence of assisting a non-UK person to mutilate overseas a girl’s genitalia - (1) A person is guilty of an offence if he aids, abets, counsels or procures a person who is not a United Kingdom national or permanent United Kingdom resident to do a relevant act of female genital mutilation outside the United Kingdom.” **In Australia the Crimes (Female Genital Mutilation) Act 1996, makes FGM/C a crime.** The relevant section is produced below: "Section 32. Offence to perform female genital mutilation (1) A person must not perform female genital mutilation on a child. Penalty: Level 4 imprisonment. (2) A person must not perform on a person other than a child any type of female genital mutilation referred to in paragraphs (a) to (e) of the definition of female genital mutilation. Penalty: Level 4 imprisonment. (Penalty level 4 is maximum imprisonment for 15 years as per section 32 of the Crimes Act, 1958). **In Ireland, FGM/C is a crime under Criminal Justice (Female Genital Mutilation) Act 2012, Sec 2.**— “(1) A person is guilty of an offence if the person does or attempts to do an act of female genital mutilation.” Sec 5.— “A person who is guilty of an offence under section 2 , 3 or 4 is liable— (a) on summary conviction to a class A fine or to

imprisonment for a term not exceeding 12 months or to both, and (b) on conviction on indictment to a fine or imprisonment for a term not exceeding 14 years or to both.” **Section 45 of the Crimes Act, 1900, Australia prohibits FGM.** Section 45 Prohibition of female genital mutilation (1) A person who: (a) excises, infibulates or otherwise mutilates the whole or any part of the labia majora or labia minora or clitoris of another person, or (b) aids, abets, counsels or procures a person to perform any of those acts on another person, is liable to imprisonment for 21 years. (2) (Repealed) (3) It is not an offence against this section to perform a surgical operation if that operation: (a) is necessary for the health of the person on whom it is performed and is performed by a medical practitioner, Or (b) is performed on a person in labour or who has just given birth, and for medical purposes connected with that labour or birth, by a medical practitioner or authorised professional, or (c) is a sexual reassignment procedure and is performed by a medical practitioner. (4) In determining whether an operation is necessary for the health of a person only matters relevant to the medical welfare of the person are to be taken into account. (5) It is not a defence to a charge under this section that the person mutilated by or because of the acts alleged to have been committed consented to the acts.(6) `This section applies only to acts occurring after the commencement of the section.

Section 45A “Removing person from State for female genital mutilation (1) A person is guilty of an offence if the person takes another person from the State, or arranges for another person to be taken from the State, with the intention of having female genital mutilation performed on the other person. Maximum penalty: imprisonment for 21 years.”

28. Due to the nature and consequences of FGM/C, it is a violation of the human rights of women and children. It infringes on the right to life and physical integrity, the right to health and the right to freedom from torture, cruel and unusual treatment, and violence. There has been a worldwide movement to ban this practice and classify this practice as an offence. Various countries have adopted special statutes to curb this social evil of FGM/C/Khafz/Khatna/Khafd. That practice of FGM/C/Khafz is in violation of international legal framework which India is a signatory to. Such as **Article 3, Universal Declaration of Human Rights (hereinafter UDHR):** “*Everyone has the right to life, liberty and security of person*”. Since FGM/Khafz is mostly practiced on girls below the age of 18 years, it is also a violation of rights enshrined in the United Nations Convention on the Rights of the Child, 1989 (hereinafter UNCRC) and violates the guarantee of non discrimination. **Article 6, United Nations Convention on the Rights of the Child (hereinafter UNCRC):** “1. *States Parties*

recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.”

Article 6(1), International Covenant on Civil and Political Rights (hereinafter ICCPR): “1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” **Article 12, International**

Covenant on Economic, Social and Cultural Rights (hereinafter **ICESCR**): “1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” **Article 5, UDHR:** “No one

shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” **Article 7, ICCPR:** “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

Article 1 of the Convention on the Elimination of all forms of Discrimination against Women, 1979 (CEDAW) defines ‘discrimination’ as: “any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil,

or any other field.” **Article 2, CEDAW** states that States Parties undertake “*(f) to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.*” **General Recommendation No. 19 of the CEDAW Committee** explicitly states that gender based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of Article 1 thereby bringing it under the scope of the Convention and, thus, under international human rights law. In 1990, the **CEDAW Committee adopted General Recommendation No. 14 on Female Circumcision**, which calls upon States to take appropriate and effective measures with a view to eradicating the practice and requests them to provide information about measures being taken to eliminate FGM/C in their reports to the Committee. **The General Recommendation No. 24 of the CEDAW Committee on Women and Health**, issued in 1999, indicates that States should ensure the enactment and effective enforcement of laws that prohibit female genital mutilation. **The Joint General Recommendation / General Comment No. 31 of the Committee on the Elimination of Discrimination against Women** and **No. 18 of the Committee on the Rights of the Child**

on harmful practices has indicated the duty of States to undertake diligence to ensure, protect and fulfill the rights of its citizens. Article 51 of the Indian Constitution makes it an obligation on the state to endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another. Hence it is an obligation to recognise FGM/C as an offence and introduce it under the penal law. That in 2015, all United Nations member States, including India, adopted the Sustainable Development Goals which includes a global target 5.3. *“Eliminate all harmful practices, such as child, early and forced marriage and female genital mutilation”*

29. That FGM/Khafz practice is ending in countries where it originated: The percentage of FGM/Khafz has been decreasing in many countries where it was prevalent. It is important to note, that the percentage of FGM/C practiced on girls between the age of 15 and 19, in countries where the practice is common, has gradually decreased. Communities in countries where the practice is predominant have been calling for an end to it. Since the middle of the last century many international and national organizations and agencies, both governmental and nongovernmental, have set up programmes to halt or reduce the prevalence of FGM. Thanks largely to their efforts, clauses prohibiting the practice have been incorporated into a large number of

international legal instruments and into the legislation of a growing number of countries. Half of the 28 countries where the practice is “endemic” have introduced legislation forbidding it. A further seven countries have incorporated anti-FGM legislation into their constitutions or criminal laws. Laws prohibiting FGM have also been introduced in several countries with immigrant communities continuing the practice: these countries include Australia, Canada, New Zealand, USA and at least 13 countries in Western Europe.

Is Female Genital Mutilation/Khafz/Khatna/Khafd Lawful and Constitutional

30. It is submitted that the practice of Khafz/*Khtna* violates the right to life of women under Article 21, in that it mutilates a part of the human body and makes it less than human. The State as part of its duty of due diligence is duty bound to protect every individual's right to life and personal liberty, The said duty extends to protecting individuals against violence from both the state and non state actors. That is the sum and substance of the rule of law. **S. Krishna Sradha v. State of A.P., (2017) 4 SCC 516, para 27** observed that *“A right is conferred on a person by the rule of law and if he seeks a remedy through the process meant for establishing the rule of law and it is denied to him, it would never subserve the cause of real*

justice.” In another matter of **Cardamom Mktg. Corpn. v. State of Kerala, (2017) 5 SCC 255, para 13** observed that *“When we talk of sound and stable system of administration of justice, all the stakeholders in the said legal system need to be taken care of.The Rule of Law reflects man’s sense of order and justice...”*

31. That the practice has been so deep rooted in the Dawoodi Bohra community and has been normalized to an extent where if any woman speaks out about the ill effects of FGM/C/Khatna/Khafd/Khafz, she fears being ex-communicated, there a taboo attached with those who does not submit themselves to this customary practice whereby they are opposed by the community as a whole and are socially boycotted. The Dai has complete control over the lives of the Bohras, including in secular matters. Several Bohras and their families are victims of social boycott. The reason behind it is that they questioned various religious and administrative practices within the community. The threat and fear of social boycott, or excommunication, for any form of protest or disobedience is so deep and so real that not many have the stomach to be booted out of the confines of the close--knit community. Any stepping out of line immediately attracts ostracism from near and dear ones, disallows one from participating in social and religious gatherings and

meetings, prevents the marriage of their children into the community, and prohibits the burial of their body from being buried in the community burial ground. This fear has prevented women from raising their voice against the practice of khatna or FGM/C, which continues to flourish in the community in an extremely secretive manner. It is interesting to note that in 1949, the **Bombay Prevention of Excommunication Act** was enacted as a redressal sought by some boycotted members of the Dawoodi Bohra community. The Act prohibited the expulsion of any person from his or her religious creed, caste or sub- caste and held any such excommunication to be invalid. Under the law, no community could deprive a person of their right to property, to worship in religious places, to perform funeral rites or other rituals. In 1951, however, the 51st Dai, Syedna Taher Saifuddin, challenged the Act in the Bombay High Court. After a prolonged legal battle that culminated in a decision of the Supreme Court in **Sardar Syedna Taher Saifuddin Saheb v. The State of Bombay AIR 1962 SC 853**, a majority judgment regarded excommunication as a legitimate practice of a community protected under Article 26 of the Indian Constitution. Article 26 grants every religious denomination or any section thereof the freedom to manage their religious affairs. The matter is still pending before this Honourable Court as reformist Bohras filed a review petition against the said

judgement asking for a reconsideration of the decision. In the meantime, on April 14, 2016, the Maharashtra legislature passed the **Maharashtra Prohibition of People from Social Boycott (Prevention, Prohibition and Redressal) Act, 2016** to prohibit the social boycott of individuals or families by caste panchayats (local caste councils) or any community and defines such behavior as an offense punishable with imprisonment, which may be up to seven years, or with a fine that may be as much as five lakh rupees (about US\$ 7,522) or both. Although this law was not specifically targeted at any one community, it applies to all communities including the Dawoodi Bohras and it remains to be seen how the community will react to this law when it is invoked against them. As of now, it seems clear that few people would risk excommunication by going against the norms set by the community. Voices against the practice of FGM/C are also muzzled because of an inherent fear of social boycott that prevails in the community. There are no signs of FGM/C being done away with by the community itself, and hence, the need to consider the available legal options. There is no doubt about the fact that the fear of excommunication and religious sanctions act as a compulsion to Bohra parents to perform FGM on their daughters, and in that sense, there is also no doubt that the Syedna Muffadal Saifuddin is actively advocating and propagating FGM.

32. It is submitted that the power to excommunicate may or may not be constitutional but this petition is confined to power of excommunicating an individual for his/her refusal to undergo, do or follow an act which is described as an offence under the legislative framework.

33. It is submitted that those who do not choose to undergo Khafz/Khatna/FGM face tremendous social pressure and are virtually socially boycotted, a power which the head of the Bohra Community claims to possess.

34. It is submitted that the head of the Dawoodi Bohra Community asserts the right to excommunicate persons who fail to follow the dictates of the Syedena/Dai/Head of community. It is submitted that the fear of excommunication is what makes parents perform FGM/C/Khafz/khatna and thereby violate the Fundamental Rights of women in the Bohra community. It may be noted that Justice N.P. Nathwani was appointed by Citizens for democracy to inquire into persecution of reformist Dawoodi Bohra's by the head priest Seyedna Sahib. The Nathwani Commission found that there is a large scale infringement of civil liberties and human rights of reformist Bohras at the hands of the priestly class and

that those who fail to obey the orders of the Seyedna and his Amils, even purely secular matters are subjected to 'Barat' resulting in complete social boycott, mental torture and frequent physical assaults.

35. It is therefore submitted that this court may be pleased to declare that no person shall be excommunicated by virtue of not performing FGM/C/Khafz/Khatna.

36. It is submitted that the practice of FGM/C/Khafz/Khatna, is a dehumanising practice which is specifically done on minor female children to curb their sexual desires under the garb of protecting them. The decision to perform FGM/C is usually taken by the elder women of the household and hence does not respect the dignity and personal autonomy of the individual child. This is violative of the Fundamental Rights under Article 14, 15 and 21 of the Indian Constitution.

37. It is submitted that no person has a right to invade the bodily integrity of another, even if a minor and a guardian has no authority in law to invade the

bodily autonomy of a minor ward. It is submitted that on the contrary, a guardian is to act in the best interest of the child and FGM/C is far from being in the best interest of the child.

38. It is to be noted that the religious text Daimul Islam Volume 1, Pages 212,214 talks about female circumcision in the chapter of Cleanliness and Purity of Nature. However in the book Al Taharah on Page 61 and 62, the very same chapter on Cleanliness and Purity suggests the circumcision of females “ for better Complexion (lit face) and more favourable for the Husband” . In the book Al –Muntakhabah fi –al Fiqh pages 11-12, it is mentioned that girls should be circumcised at the age of seven as “ for that is more preserving of her color and a favoured position vis a vis husband...” In the book Al –Hawashi Vol VI, pages 46-48, 50-51, 54 talks about female circumcision where it is stated that the circumcisions should be done for it is “better for the husbands desire towards her”. In book Al- Wadiyyah, pages 168, the reason for circumcision is stated “ for their Complexion and results in favourable position near their husbands.” Translation from the 9th sermon from the 2nd Volume of the same book defines Khafd as “ cutting of what protrudes from the vulva”. It is the cutting of the part that protrudes from the lips of the vulva, which is not just the

prepuce as claimed by the proponents of Khafz/FGM. Maulana Ali SA's saying " O congregation of Women, when you circumcise your daughters, retain part of it, for it is more preserving for their color and more pleasurable for their husbands". It is humbly submitted as per the abovementioned quotes from the Religious texts , that the practice seems to be carried out not so much for the claimed purity and cleanliness but for making a woman more desirable to her husband and enhancing her complexion. This practice suggests that contrary to the "scientific benefits" which are claimed by the advocates of the practice , the role of a woman is narrowed down to woo her husband, to provide pleasure to her husband and to enhance her complexion , hence objectifying her and making her a mere object of pleasure for her husband. That such practice is violative of a woman's right to her dignity.

39. Dignity is the core principle which unites the fundamental rights of the Constitution. The right to dignity includes the right of the individual to develop to the full extent of their potential and the right to autonomy over fundamental personal choices. [See **K.S. Puttawswamy v. Union of India**, (2017) 10 SCC 1 at paras 119, 525]. In a poignant observation, this Hon'ble Court in **KS Puttuswamy v Union of India** (2017) 10 SCC 1, at **para 118** noted:- "*Life is precious*

in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the state is to safeguard the ability to take decisions – the autonomy of the individual – and not to dictate those decisions. Life’ within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one’s being in its fullest sense. That which facilitates the fulfilment of life is as much within the protection of the guarantee of life.”

40. The Preamble to the Constitution incorporates certain core and abiding values that pervade all other provisions in the document. The Preamble also lays down the vision and goal of the Constitution, which is, the *“realisation of a social order founded in justice, equality and the dignity of the individual.”* The Preamble sets the humane tone and temper of the founding document. [**Prem Shankar Shukla v. Delhi Administration**, (1980) 3 SCC 526 at paras 1 and 21]. It aspires to secure:- *“Justice”, “Liberty”, “Equality” and “Fraternity assuring the dignity of the individual and the unity of the nation.”*

41. In **K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, para 146**, this Hon'ble Court noticed the chilling effect of section 377 in the following words:-
“The reason why such acts of hostile discrimination are constitutionally impermissible is because of the chilling effect which they have on the exercise of the fundamental right in the first place.... The chilling effect on the exercise of the right poses a grave danger to the unhindered fulfilment of one’s sexual orientation, as an element of privacy and dignity. The chilling effect is due to the danger of a human being subjected to social opprobrium or disapproval, as reflected in the punishment of crime.”

42. This Hon'ble Court in **Shafin Jahan v. Asokan K.M. and Ors., 2018 SCC Online SCC 343@ para 95** has emphasized:-, *“Interference by the State in such matters has a seriously chilling effect on the exercise of freedoms. Others are dissuaded to exercise their liberties for fear of thereprisals which may result upon the free exercise of choice. The chilling effect on others has a pernicious tendency to prevent them from asserting their liberty. Public spectacles involving a harsh exercise of State power prevent the exercise of freedom, by others in the same milieu. Nothing can be as destructive of freedom and liberty. Fear silences freedom.”*

43. That Inhuman practice of FGM/Khafz is violative of fundamental rights including Article 14, 15 and 21 of the Indian Constitution. That FGM/C/Khafz is widely perceived as a way of controlling a female's sexuality and sexual desires and women are viewed as someone who needs protection. It is perceived family's duty to cut their daughters to provide them the protection. This is deepened in the patriarchal roots of society where women are viewed as objects, which is an infringement of their right to dignity and equality.

44. That the comparison to male circumcision and the contention that banning FGM/khafz would violate article 14 of the Constitution of India is entirely misplaced and has been brought in for the sole purpose of obfuscating the issue. The legitimacy or consequences of male circumcision are not at issue in this case. Introducing a ban on FGM/khafz which violates the bodily integrity of the woman or girl on which it is performed could never violate Article 14 of the Constitution since the ban is being imposed on a human rights violation and is in fact, required by the Indian Constitution. It is the practice of FGM/Khafz itself that violates the right to equality under Article 14 since it is a form of gender-based violence that aims to

control the sexual behavior of women and girls" That in fact is well established fact that FGM/C is widely perceived as a way of controlling female sexuality. Sexual desire in girls and women is viewed as something that needs protection and it is perceived to be a family's duty to circumcise their daughters to provide this protection. Not only can FGM/C provide physical protection by creating a barrier to intercourse but it is also perceived as a way to cleanse a girl from impure thoughts and desires. Female circumcision or FGM/C seeks to protect a woman's virginity before marriage by reducing her enjoyment of intercourse, and on marriage it is seen to dissuade her from being unfaithful to her husband. That even the religious texts quoted by the proponents of this practice consistently reiterate that : Book Al Taharah on Page 61 and 62, the chapter on Cleanliness and Purity suggests the circumcision of females " for better Complexion (lit face) and more favourable for the Husband"

Whether the Prcatice of FGM/C/Khafz/Khatna can be protected under Article 25 and Article 26.

45. It is submitted that the State has enacted legalisation to prevent bodily injury to all children as defined in POCSO and in the IPC regardless of race,

case or religion to which they belong. The said laws apply equally to the Bohra community. Considering that the acts that constitute FGM/C/Khatna/Khafz/Khafd are criminal in nature, they cannot be protected by Article 25. And the state cannot give recognition to the practice of excommunication of the community for failure to perform FGM/C/Khatna/Khafz.

46. Article 25 reads: *(1) 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, practice and propagate religion. (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law - (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes 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 (2), the 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.

47. It is submitted that FGM/C/Khafz/Khatna/khafd Is not part of religion not part of Islam nor is it mentioned anywhere in the Holy Quran. In any event, assuming it is , it is submitted that FGM is against Public order, morality and health and hence can never be protected by the right to practice relation

48. It is submitted that FGM constitutes a serious invasion of the bodily invasion of the female sex and is thus a pre se invasion of the right under Article 21 of Indian Constitution and hence it cannot be protected by Article 25

49. In this regard attention is invited to the judgment of this court in the matter of **Charu Khurrana v. Union OF India (2015) 1 SCC 192**, wherein it was held that no state recognition can be given to any organization which discriminates against women or violated their Fundamental Rights.

50. It is submitted that the right to life includes the right to the enjoyment of all faculties including the faculty to enjoy sex and any invitation of that faculty amounts to a violation of the right to life.

51. It is submitted that in any event, the said invasion is a diminution of the human body and not permitted by law.
52. It is submitted that in fact that said acts constituting FGM/C/Khafz violate several provisions of criminal law as shown below and can never be protected by Article 25 or Article 26 of the Indian Constitution
53. That this Hon'ble Court has established through a long line of cases that it is not each and every practice that is claimed as a religious practice which merits constitutional protection under Articles 25 and 26. It is only if a practice is considered as "essential religious practice" that it can be covered within the scope of Articles 25 and 26.
54. That the practice of Khafz/Khatna is not an essential practice of the religion as it is not sanctioned by Islam and hence should not be guaranteed protection under Article 25 and Article 26 of the Indian Constitution. It is to be noted that the religious leaders of the Dawoodi Bohra community have advised Bohras living in the Western countries in strictest terms to **NOT PRACTICE KHAFZ** in various other parts of the worlds such as Sydney, Washington, Tampa, New York, Bakersfield, London, Melbourne, Toronto, San Jose, Mississauga, Canada, Orange County, San

Diego, Vancouver, Los Angeles, Boston, Miami and Detroit , as it falls under the definition of FGM under the laws in these countries/states, as demonstrated by the declaration of the Anjuman-e-Burhani Sydney which has been reproduced above. It is humbly submitted that the test of essential practice is that the practice is followed throughout the world amongst the people following the same religious diaspora, however these resolutions have excused some people of this very religious diaspora to follow this practice of Khafd/Khafz/Khatna, which concludes that the religious leaders of the Bohra community itself do not view this as an essential practice. That this honorable court in the matter of Vishwa Lochan Mandan vs Union Of India (2014)7SCC 707 stated that “*No religion including Islam punishes the innocent. Religion cannot be allowed to be merciless to the victims. Faith cannot be used as a dehumansing force.*” It is humbly submitted that the resolutions passed by the religious leaders of the Bohra community banning the practice of FGM/Khafz/Khafd/Khatna in Western Countries proves that FGM/Khafz can never be an essential practice as it has been abandoned by Dawoodi Bohras in other countries who still remain within the religious fold and practice their religion.

55. It is also submitted that the practice of Khafz/Khatna is not sanctioned by Islam in the Holy

Quran much less it is an essential practice of the religion and hence is not guaranteed protection under Article 25 of the Indian Constitution. That the Inter-agency statement issued in 2008 by relevant United Nations agencies including the Office of the High Commissioner for Human Rights (UN-OHCHR), United Nations Children's Fund (UNICEF), United Nations Population Fund (UNFPA) and World Health Organization (WHO), amongst others, notes that even though the practice of FGM can be found among Christians, Jews and Muslims, *"none of the holy texts of any of these religions prescribes female genital mutilation and the practice pre-dates both Christianity and Islam"*.

56. That the Family Law Council in Australia issued a report on "Female Genital Mutilation" that was relied on by the New South Wales Supreme Court in the R v. A2; R v. KM; R v. Vaziri (No. 2) ([2015] NSWSC 1221). The report of the Family Law Council notes that *"[t]here is little doubt that female genital mutilation preceded Islam in Africa and it is likely that when Islam entered Africa the practice became linked with the new religion. It is also interesting to note that when Islam entered Asian countries through Arabia or Iran, it did not bring female genital mutilation with it, but when it was imported to Asia through Nile Valley cultures,*

female genital mutilation was a part of it. An example is the Daudi Bohra of India, a group which practises female genital mutilation and which was established by an Egyptian-based sect of Islam”.

57. Even assuming that FGM/khafz is considered as an essential religious practice for the sake of this argument, the right to freedom of religion and the freedom to manage religious affairs guaranteed in Articles 25 and 26 of the Constitution are subject to provisions of Part III of the Indian Constitution i.e., to fundamental rights including the fundamental right to equality and non-discrimination based on sex as guaranteed under Articles 14 and 15 of the Indian Constitution. Such freedom is also subject to public order, morality and health.

58. Even if one assumes for the sake of argument that FGM/C is a religious practice, such practice is not protected under Article 25 as it violates Articles 14, 15 and 21 of the Indian Constitution. The practice of FGM/C is an act that targets women with the objective of curbing girls’ and women’s sexual desires and leads to ill health effects. Women and girls are seen as objects with sexual desires that need to be curbed to protect women and girls from being violated by other men. Such practice is unconstitutional as it gender stereotypes women and girls and thus is violative of

their fundamental rights under Articles 14 and 15 of the Indian Constitution. Such practice, in the garb of religion and the object to protect girls and women, victimizes women and violates their rights to physical autonomy, to be in control of their own bodies and to be protected from physical violence and mental trauma and thus is violative of their right to life guaranteed under Article 21 of the Indian Constitution. Gender stereotyping is contrary to the principles of equality as enshrined in the Indian Constitution and India's international obligations under CEDAW as have elaborated earlier.

59. The Supreme Court in **Anuj Garg v. Hotel Association (2008) 3 SCC 1** while adjudicating a challenge to Section 30 of the Punjab Excise Act, which prohibited the employment of any man under the age of 25, and any woman, in any part of an establishment in which liquor or another intoxicating drug was being consumed, rejected the gender stereotypical arguments that the said legislation was essential to ensure the "security" of women. The Court observed that: ***"The present law ends up victimizing its subject in the name of protection. In that regard the interference prescribed by state for pursuing the ends of protection should be proportionate to the legitimate aims...Gender equality today is recognized by the European Court as***

one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe...**It is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy.** This is the backdrop of deeper judicial scrutiny of such legislations world over...Therefore, one issue of immediate relevance in such cases is the **effect of the traditional cultural norms** as also the state of general ambience in the society which women have to face while opting for an employment which is otherwise completely innocuous for the male counterpart. In such circumstances the question revolves around the approach of state...In another similar case wherein there was an effective bar on females for the position of guards or correctional counselors in the Alabama state penitentiary system. The prison facility housed sexual offenders and the majority opinion on this basis inter alia upheld the bar. Justice Marshall's dissent captures the ranges of issues within a progressive paradigm. Dissent in *Dothard v. Rawlinson* 433 U.S. 321 : 97 S.Ct. 2720 serves as useful advice in the following terms: **"It appears that the real disqualifying factor in the Court's view is "the employee's very womanhood."** The Court refers to the large number of sex offenders in Alabama prisons, and to **"the likelihood that inmates would assault a woman because she was a woman."** In short, the fundamental justification

for the decision is that women as guards will generate sexual assaults. With all respect, this rationale regrettably perpetuates one of the most insidious of the old myths about women that **women, wittingly or not, are seductive sexual objects.** The effect of the decision, made I am sure with the best of intentions, is **to punish women because their very presence might provoke sexual assaults.** “To deprive women of job opportunities because of the threatened behavior of convicted criminals is to turn our social priorities upside down.” The Supreme Court in the said case held that: “The Court’s task is to determine whether the measures furthered by the State in form of legislative mandate, to augment the legitimate aim of protecting the interests of women are proportionate to the other bulk of well-settled **gender norms** such as autonomy, equality of opportunity, right to privacy et al. The bottom-line in this behalf **would a functioning modern democratic society which ensures freedom to pursue varied opportunities and options without discriminating on the basis of sex, race, caste or any other like basis.**” The group/denomination right to religious freedom to manage one’s own religious affairs is guaranteed under Article 26. However, such freedom is also subject to public order, morality and health. Article 26 read as: **“Article 26-Freedom to manage religious affairs: Subject to public order, morality and health,** every

religious denomination or any section thereof shall have the right: (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law.” “Morality” in both Articles 25 and 26 refers to “constitutional morality”.

60. The Supreme Court in **Manoj Narula v. Union of India (2014) 9 SCC 1**, has interpreted “constitutional morality” as follows: *“The Constitution of India is a living instrument with capabilities of enormous dynamism. It is a Constitution made for a progressive society...**Constitutional morality** is not a natural sentiment. It has to be cultivated. We must realize that our people are yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic...**The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner.** It actually works at the fulcrum and guides as a laser beam in institution building. **The traditions and conventions have to grow to sustain the value of such a morality...Commitment to the Constitution is a facet of constitutional morality.”***

61. The Supreme Court, in **Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi v. State of Uttar Pradesh**, 1997 (4) SCC 606, while upholding the constitutional validity of Uttar Pradesh Sri Kashi Vishwanath Temple, 1983 governing the management and administration of the Vishwanath Temple that overrode customs and usages, laws, and decrees to the contrary, held that: “**The denomination sect is also bound by the constitutional goals and they too are required to abide by law; they are not above law.** *Law aims at removal of the social ills and evils for social peace, order, stability and progress in an egalitarian society. ... For instance, untouchability was believed to be a part of Hindu religious belief. But human rights denounce it and Article 17 of the Constitution of India abolished it and its practice in any form is a constitutional crime punishable under civil Rights Protection Act. Article 15(2) and other allied provisions achieve the purpose of Article 17.*”

62. Further, the Supreme Court in **A S Naryana Deekshitulu v. State of Andhra Pradesh, 1996 (9) SCC 548** while adjudicating upon the issue of hereditary appointment rights of Archakas, held that: “*Though Agamas prescribed class discriminatory placement for worship in the temples, it became obsolete*

after the advent of the Constitution of India which, by Articles 14 15 17 25 and 26, that prohibit discrimination on grounds only of caste, class, sect etc.” The practice of FGM/C regardless of being a religious practice of the Bohra community or not, is subject to constitutional morality and the Bohra community will have to bow to the constitutional norms of equality and non--- -discrimination. Such practice will not be protected under Article 26. Gender justice, that is non-discrimination at the very least, is part of the constitutional morality of India. As explained earlier, the practice of FGM/C is violative of Articles 14 and 15 to the extent it runs counter to gender justice. It also offends Articles 25 and 26 of the Indian Constitution as it runs counter to constitutional morality.

63. That the meaning of religion — the term as employed in Article 25 and the nature of protection conferred by Article 25 stands settled by the pronouncement of the Constitution Bench decision in **M. Ismail Faruqui (Dr) v. Union of India [(1994) 6 SCC 360]** The protection under Articles 25 and 26 of the Constitution is with respect to religious practice which forms an essential and integral part of the religion. *“A practice may be a religious practice but not an essential and integral part of practice of that religion. The latter is not protected by Article 25.”*

64. That in Malaysia, a similar type of FGM is practiced which involves cutting or nicking the prepuce of a baby girl. The Committee on Elimination of Discrimination Against Women, in its concluding observations to the government of Malaysia issued in 2018 specifically took note of the practice in Malaysia, and concluded that FGM or female circumcision “cannot be justified on religious grounds and constitutes a harmful practice to exert control over the bodies and sexuality of women and girls in violation of the Convention, irrespective of the extent of removal or cutting of female genital organs..” (emphasis added). It recommended that the Malaysian government prohibit all forms of female genital mutilation in its criminal code, and ensure that the prohibition could not be overruled by any fatwas or rulings issued by religious authorities.

65. It is submitted that as per the Ministry of Women and Child Development, FGM/C is considered a crime in India under sections 319 to 326 of IPC and Section 3,4,5,9 of POCSO which also includes the practice of Khafz/Khatna. Following the principle of Hubul Watan Minal Imaan (“Love for the land of abode is part of faith”), which has been relied on by the Bohra religious

leaders to advise abandoning the practice in other countries, the practice of FGM/Khafz should be an offence and should not be protected under Article 25 or Article 26 of the Indian Constitution.

Addressing FGM/C/Khafz/Khatna

66. That if India is to eliminate, eradicate and root out the outdated practice of FGM/Khafz from the country it has to be done in a systematic multipronged manner with the complete coordination and cooperation of the government agencies and the community, the police and health professionals with an urgent need to educate, create awareness and training front end professionals such as doctors , medical professionals, teachers, nurses, in dealing with the issue and practice of FGM/Khafz. That it has also been seen, internationally, that it has proved necessary to have a specific directions/guidelines dealing with the subject, which addresses not only prosecution but also prevention, education, awareness building, relief and rehabilitation. There is a need to tackle the issue of propagation and promotion of the practice such that no one is compelled to perform the procedure. There is a need to provide for clear mechanisms for holding perpetrators accountable,

laws are powerful tools for prevention and can be accelerators for social change and social reform.

Prayer

On the basis of the above submissions, It is most humbly submitted that this Honourable Court may grant-

- a) That the definition of Female Genital Mutilation , katna or khafz by whatever name called, given by World Health Organization should be adopted in the Indian Law as a form of hurt, grievous hurt and rape and sexual assault within the meaning of sections 319,320,321,322,323,324,325,375 of Indian Penal code, 1860 and Sections 3,4,5,6,7,8,9 of Prevention of Children from Sexual Offences Act, 2012.
- b) That practices which are flourishing under names of “khatna/khafd/khafz” or any other practice, involving similar procedure should be covered by the definition under the above sections Female Genital Mutilation/ Cutting.
- c) Frame appropriate law/guidelines for prevention of Female Genital Mutilation/Cutting, Procedure of complaining about Female Genital Mutilation/ Cutting and protection of the survivors of Female Genital Mutilation/Cutting including but not limited to:

- i. Any person should be able to provide information of a proposed FGM/C, or of an undertaken incident of FGM/C before a recognised agency.
 - ii. Any person who aids, abets, counsels or procures any girl/woman to carry out such procedure should also be penalised. This would also include persons who promote and permit the practice within the community as well.
 - iii. Strict penalty should be provided for those who propagate or glorify this practice on any grounds whatsoever.
 - iv. Specific amendments may be made in the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation, 2002 stating that carrying out FGM/C as a form of misconduct making him/her liable for disciplinary proceedings
 - v. That adequate the Government be directed to take adequate steps towards prevention and awareness generation.
 - vi. That the Government be directed to undertake a survey nationally to record data on FGM/Khafz in India under NCRB
- d) Issue any other orders/guidelines which this Honourable court deems fit.

e) Declare that the refusal to perform FGM or khafz or Khatna by whatever name called, will not result in excommunication by the head of the Bohra community.

Drafted By:

Adv. Aanchal Singh

Adv. Masooma Ranalvi

Filed By:

Adv. Purushottam Tripathi