In the Supreme Court of India

Original Civil Writ Jurisdiction

Under Article 32 of the Constitution of India

Writ Petition (Civil) No. 286 of 2017

Ms. Sunita Tiwari ... Petitioner

Versus

Union of India & Ors. ... Respondents

NOTE I

FEW LESSER KNOWN FACTS ABOUT THE DAWOODI BOHRA COMMUNITY

1. Dawoodi Bohras are known to be one of most gender egalitarian and 'women empowered' communities in the world.

2. Even in the religious texts and scriptures followed by the Dawoodi Bohra community, reference is made to the 'children of Ibrahim (Abraham)' unlike other Semitic texts which use the expression 'sons of Ibrahim (Abraham)', which shows that even in religious aspects, the men and women of the community are placed on an equal footing.

3. Women pray in the same mosque as the men which indicates equal status of men and women in the Community.

4. The community has set up centralized 'Community Kitchens' in all cities with substantial population of Dawoodi Bohras, which deliver food sufficient for a day's requirement to all Dawoodi Bohra households in those cities every day, giving time/ opportunity to women to pursue their career or vocation instead of being bound to the kitchen.

5. There is almost 100% literacy among the men and the women of the Dawoodi Bohra community. Often women are more educated and qualified than men, since men mostly pursue business and a large number of women pursue higher education with a significant number being practicing doctors, lawyers, academicians, fashion designers, engineers, chefs etc.

6. The Community has set up schools and vocational training institutes specifically for women and organizes export of the finished hand made products produced by these women. Further, workshops are organized for women to promote understanding of issues like education, vocation, religion etc.

7. Upliftment drives are organized where women from Tier 1 cities travel to Dawoodi Bohra household in smaller towns and villages to educate women in these households in matters of health and hygiene to help improve their standard of living.

8. The practice of instantaneous triple *talaq* or *talaq-e-bidat* struck down by this Hon'ble court in *Shayara Bano* v. *Union of India*, (2017) 9 SCC 1 was never

practiced by the Dawoodi Bohra Community. The only forms of *talaq* recognized by the Dawoodi Bohra community were the Quranic forms upheld by the Hon'ble Supreme Court as being consistent with Part III.

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(GENERAL SUBMISSIONS AND PROPOSITIONS)

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NOTE II

(GENERAL SUBMISSIONS AND PROPOSITIONS)

1. An essential / core practice is protected under the Constitution:

a. Female circumcision ("FC") is an essential and integral part of the religion and religious practices followed by the Dawoodi Bohra religious denomination of the Fatimid School of thought in Islam.

(i) See consistency of theological assertions from 10th Century A.D. to this effect in various writings by jurists (**See Annexure A @ Pgs.1 - 74**)

b. Once a practice is shown to be part of, integral to and a tenet of a religion and it is considered an essential part of that religion, it is entitled to protection under Articles 25, 26 and 29 of the Indian Constitution.

See:

(i). *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt 1954 SCR 1005* @ Para 17 (7 Judges)

(ii). *Ratilal Panachand Gandhi* v. *State of Bombay & Ors. 1954 SCR 1055* @ Para 13 (CB)

(iii). *Sardar Syedna Taher Saifuddin Saheb* v. *State of Bombay AIR 1962 SC 853* @ Para 33 (CB)

(iv). *Tilkayat Shri Govindlalji Maharaj etc.* v. *State of Rajasthan AIR 1963 SC 1638* @ Paras 55 - 60 (CB)

(v). *Bijoe Emanuel* v. *State of Kerala (1986) 3 SCC 615* @ Para 20 *(DB)*

(vi). *A.S. Narayana Deekshitulu* v. *State of A.P. & Ors. (1996) 9 SCC 548* @ Paras 90, 118 and 125 *(DB)*

c. What is an essential and integral part of the religion is not to be decided by objective tests or on the basis of the beliefs of those in the society who are not part of the religion. It must be decided on the basis of the understanding and beliefs in that religion *"as regarded as such by the community"* practicing that religion. Hence, both Judges and the rest of society must accept what the community of a religion regards as an

essential part of that religion, even though the society at large may not do so.

See:-

(i). *Jamshed ji* v. *Soonabai 33 Bom. 122 (1909)* (Davar, J.)

(ii). *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt 1954 SCR 1005* @ Para 17 (7 Judges)

(iii). *Ratilal Panachand Gandhi* v. *State of Bombay & Ors. 1954 SCR 1055* @ Para 13 (approves *Jamshed ji' judgment*) (CB)

(iv). *Sardar Syedna Taher Saifuddin Saheb* v. *State of Bombay AIR 1962 SC 853* @ Para 33 (CB)

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(vii). *A.S. Narayana Deekshitulu* v. *State of A.P. & Ors. (1996) 9 SCC 548* @ Paras 90, 118 and 125 (DB)

d. In the case of the Dawoodi Bohra Community, both the aforesaid essentiality tests as also its largely subjective application within the boundaries of the community which practices the religion, is *a fortiori* and significantly reinforced for a *sui generis* reason, clearly peculiar to the Dawoodi Bohra religious denomination. That unique feature is the existence of a living human representative of the Imam (*viz. Da'i al-Mutlaq*). The following conclusions in regard to this community now have judicial approbation and are no longer *res integra* and have binding and irrefutable presence to the present case *viz*:-

(i) The Dai is a living human representative of the Imam nominated in succession and sequence to carry on the Dawat (mission) of the Imam so long as the Imam remains in seclusion (See *Sardar Syedna'* @ Paras 2 and 37).

(ii) The Dai is, therefore, "*the vicegerent of the Imam in seclusion*" and "*has not only civil powers as head of the sect and trustee of the property but also ecclesiastical powers as religious leader of the community*" (See *Sardar Syedna'* @ Paras 2 and 37).

(iii) Most crucially, the Constitution Bench of the Hon'ble Supreme Court has already held (and this is a principle that has stood the test of time for 60 years out of the 71 years history of independent India) that "*it does appear to be an effect that unquestioning faith*

in the Dai as the head of the community is part of the creed of Dawoodi Bohra". (See ***Sardar Syedna'*** @ Para 37).

(iv) Every Dawoodi Bohra "*...at the time of the initiation takes an oath of unquestioned faith in and loyalty to the Dai.*" (See ***Sardar Syedna'*** @ Para 38).

(v) The Dai is also recognized "*as the supreme head of the religion*" and "*as the head of the religious denomination and the medium through which spiritual grace is brought to the community and that this is the central part of the religion as well as one of the principle articles of that faith*" (See ***Sardar Syedna'*** @ Para 56).

(vi) "*...the position of the Dai-ul-Mutlaq, is an essential part of the creed of the Dawoodi Bohra sect. Faith in his spiritual mission and in the efficacy of his ministration is one of the bonds that hold the community together as a unit.*" (See ***Sardar Syedna'*** @ Para 62)

2. **Scope of Review plus Essentiality Test:**

a. The consequence of the acceptance of the aforesaid principles by no less than a Constitution Bench of the Apex Court for the last more than 60 years is that the essentiality test as summarized above must be applied in the case of the Dawoodi Bohra religious denomination with the additional nuance that once the vicegerent of the Imam "Dai" and/or all his successors for over 900 years have consistently professed, practiced, propagated *inter alia* that FC as a part of the faith and religion of the Dawoodi Bohra religious denomination, it is a *fortiori*, and even more than all the cases cited above, beyond the competence of non-Dawoodi Bohras or external adjudicators to second guess, review, doubt, substitute or replace the validity of this belief in FC as an integral part of the religion. In other words, what has been for several decades under established law cited in 'b' above, in any case liable to extremely limited judicial review and conditioned by the beliefs of the community which practices that religion, is significantly enhanced in the case of the Dawoodi Bohra community by the mere existence of the acknowledged supreme head of the Dai whose declaration of that belief renders it even less reviewable or indeed reduces the scope of review of that belief to a vanishing point.

3. <u>This matter must be referred to a Constitution Bench:</u>

a. This matter clearly raises "a substantial question of law" as to the interpretation of the Constitution, especially in relation to Articles 25, 26 and 29 as also to the whole gamut of Part III of the Indian Constitution and therefore should be heard by at least 5 judges in terms of Article 145(3) of the Indian Constitution, read with the rules of the Supreme Court in that regard.

b. The previous judgment dealing with the Dawoodi Bohra religious denomination as a whole and the status and power of the 'Dai' in particular, have already been decided by a Constitution Bench in the ***Sardar Syedna judgment*** of 1962 and therefore, the present matter should also be decided by a bench of at least 5, if not more judges.

c. The so-called Sabarimala case of 2017 (***Indian Young Lawyers Association & Ors. v. State of Kerala & Ors.* (2017) 11 SCC 577) (3 Judges)** has also been referred to a Constitution Bench. The Sabarimala case raises several issues of importance of a similar nature (although factually unconnected) which include:-

(i) Sabarimala case involves alleged discriminatory practices against women and raises the issue of gender discrimination; and

(ii) It raises direct issues of Articles 25, 26 and 29 in the context of Hindu religion.

d. Indeed, in a sense, a much weaker assertion of Articles 25 and 26 in that case was nevertheless referred to a Constitution Bench. It is a weaker assertion for the reason that while all Hindus are allowed access to Sabarimala temple, all male Hindus are allowed access without exception and even the vast majority of female Hindus are allowed access, a narrow exclusionory class is carved out by excluding menstruating women from access to the temple. This exclusion was justified by the temple management and the State of Kerala on the ground that those who have faith in the Sabarimala temple as an essential creed of their faith believe that menstruating women deserved to be excluded on grounds of alleged impurity. Such exclusion was further justified by the temple management and the State of Kerala by direct reliance on Articles 25 and 26. Although, there are several judgments on the scope of these Articles, the three judge' bench dealing with the matter, despite passing a detailed order in 2017, thought it fit to refer the matter to a Constitution Bench.

e. Since matters of the present nature involving Articles 25 and 26 in particular raises sensitive and delicate issues of religion, with high emotive content, it would be appropriate and apposite to refer them to a larger bench of minimum 5 judges.

f. Wholly without prejudice and in the alternative, Respondent No.11 (i.e. DBWRF) submits that *dehors* Articles 25 and 26 of the Constitution, a limitation / restriction upon FC is violative of Article 29(1) of the Indian Constitution, as impinging upon the rights of the Dawoodi Bohra Community to conserve the "culture of its own". Without going into the merits of this contention, it is noteworthy that similar issues of Article 29(1) have been recently referred to the Constitution Bench vide ***Assam Sanmilita Mahasangha*** v. ***Union of India (2015) 3 SCC 1***, where the entire gamut of issues relating to the meaning and scope of the word 'culture' have been raised. One of the important questions discussed on the merits of this wholly alternative argument is that a suppression of an established practice like FC amounts, wholly independent of Articles 25 and 26, also to a violation of a cultural practice of the Dawoodi Bohra community. Consequently, the present case should also be tagged with the aforesaid.

g. Indeed, a survey of almost all the major religious issues arising in Articles 25 and 26, including the more recent ***Triple Talaq case*** (***Shayara Bano*** **v. Union of India & Ors.** ***(2017) 9 SCC 1***), reveals that they have been decided by a 5 judge' bench.

4. **The Dawoodi Bohra Community is a religious denomination:**

The Dawoodi Bohra Community is a religious denomination whose religious practices, provided they satisfy the *essentiality* and *integrality* test, are entitled to the protection of Articles 25 and/or 26.

a. This is no longer *res integra* since protection of the religious rights of Dawoodi Bohra as a religious denomination has been accepted and applied by the Constitution Bench in Saydna case in 1962 (**See *Sardar Syedna'* @ Paras 8, 17, 47**).

5. **Frame of the present proceedings:**

The frame of the present proceedings is anomalous, paradoxical and causative of mischief and confusion and issues raised herein should not be decided in the present frame of proceedings.

a. Most of the cases discussed above, including:-

(i). *Shirur Mutt case* (1954) (7 Judges),

(ii). *Sardar Syedna case* (1962) (CB),

(iii). *Ratilal Panachand case* (1954) (CB),

(iv). *Mohd. Qureshi case* (*Mohd. Hanif Qureshi & Ors.* v. *State of Bihar & Ors. AIR 1958 SC 731* (CB)),

(v). *Tilkayat Govindlalji Maharaj case* (1963) (CB),

(vi). *Narayana Deekshitulu case* (1996) (DB),

(vii). *Sabarimala case* (2017) (3 Judges) *and*

(viii). *Triple Talaq case* (2017) (CB)

have consistently, continuously, invariably and without fail involved a targeted, focused, specific and specified intrusion by a statute into religious rights claimed to be protected by Articles 25 and 26. None of the plethora of the abovementioned cases was a PIL and none involved vague subjective assertions of law without the context of a specific statute, like the present case. Indeed, none of them involved even a delegated legislation.

b. The present case is unique for being a PIL, unlike any of the cases above. It is based on the subjective assertions of a self-appointed PIL Petitioner who claims, in a blanket manner, cruelty on women, indiscriminately and arbitrarily lumping African examples of Female Genital Mutilation ("**FGM**") with the thousand years' old religious practice of FC amongst the Bohras.

c. Consequently, in view of this frame of the present proceedings, there is no factual and contextual substratum to evaluate the assertions of the Petitioner and that too directly before the Apex Court in an Article 32 Petition. Such issues, if at all and assuming without conceding that any reviewable issues arise, can be determined only on the basis of evidence recorded in properly constituted suit proceedings and invariably involving a statutory context.

d. In view of the conceptually flawed frame of the proceedings, the assertions and evidence are anecdotal, subjective, hearsay, *ipse dixit* and completely incapable of verification. Apart from the non-admissibility of newspapers and other kinds of media reports, no scientific evidence is even filed; but even if it had been filed, it would have been necessary to

subject it to rigorous tests of the Evidence Act, 1872 which is, if at all, possible only in suit proceedings as aforesaid.

e. To illustrate the forgoing by a few examples, the following is noteworthy:-

(i) Firstly, Respondent No.4 i.e. Ministry of Women and Child Development have accepted in their Counter Affidavit dated 10.08.2017 (@ Para 6), that there is no official data or study for existence of so called FGM in India, a phrase, which according to the Respondent No.11 is deliberately and falsely used in the present proceedings to confuse and confound the issue;

(ii) Secondly, the giving of a few stray examples of Bohra women allegedly complaining of cruelty and unfair treatment during circumcision, in fact, proves the point that the overwhelming majority of approximately 1.6 Lakh adult Bohra women in India do not find FC objectionable and treat it as a minor physical inconvenience sanctified by positive, consistent and continuous belief by the adherents of this belief for over 1000 years; and

(iii) Thirdly, the phrase FGM is deliberately used to create a penumbra of association by using provocative phraseology. FGM is associated with brutal mutilation of genital organs of women, including full excision of the visible part of the clitoris and the process is carried out by crude, unhygienic and barbaric methods.

(iv) As against this, FC is being carried out:-

- amongst Bohra girls;
- under supervision of the mother of the girl;
- at the age of 7 or soon thereafter;
- for over 1000 years;
- by making a tiny nick on the prepuce (foreskin/hood) of the clitoris without touching the clitoris, to signify purity;
- by properly trained and experienced personnel; and
- with present proceedings having no adverse evidence from the overwhelming 99.99% female population of the Dawoodi Bohra community.

6. **Restriction intended to be placed is violative of Article 29:**

a. Wholly without prejudice and in the alternative, without diminishing or diluting the rights under Articles 25, 26 and Part III of the Indian Constitution in any manner, it is also the case of Respondent No.11 (i.e. DBWRF) that the prohibition of FC in Bohra women as sought by the Petitioner, violates the rights of the Dawoodi Bohra Community to have "a culture of its own" and "the right to conserve the same" in violation of Article 29(1) of the Indian Constitution.

b. From **Gopalan case (*A.K. Gopalan* v. *State of Madras (1950) SCR 88*) (6 Judges)** in early 1950s till the ***Maneka Gandhi case* (*Maneka Gandhi v. Union of India 1978 SCR (2) 621* in 1978) (7 Judges)**, it was believed that rights under Part III of the Constitution were isolated and not inter-connected. In other words, if an activity was held not to infringe a particular Article of the Constitution, it was not required to meet the test of non-infringement of other Articles.

c. From *Maneka Gandhi case* onwards and now in innumerable cases, not only has the ratio in *Golapan case* been overruled but it is well established that any activity allegedly infringing legislative or executive action must meet cumulatively the test of Part III of the Constitution.

See:-

- *Delhi Transport Corporation v. D.T.C. mazdoor Congress & Ors. 1991 Supp (1) SCC 600* @ Paras 297-298
- *M. Nagraj & Ors. v. Union of India & Ors. (2006) 8 SCC 212* @ Para 20
- ***I.R. Coelho (Dead) by L.Rs. v. State of Tamil Nadu & Ors. (2007) 2 SCC 1* @ Para 60**.

d. Consequently, it is submitted that largely, the religious right under Articles 25 and 26 can and does have cultural facets, especially when it arises in the context of an admitted minority community like the Bohras. It is, therefore, necessary for an infringing / limiting action to independently satisfy the requirement of Article 29 of the Constitution, even where assuming without conceding, Articles 25 and 26 are held not to be infringed.

7. Reliance on WHO Resolutions / definition of Female Genital Mutilation is misplaced:

a. The two treaties (UN Universal Declaration of Human Rights & UN Convention on the Rights of Child) and the WHO Resolution (Resolution No. A/RES/64/146 dated 20.12.2012) relied upon by the Petitioner are not implementable as sought by the Petitioner in the present proceedings for the following reasons:-

(i) The entire case of the Respondent No.11 (i.e. DBWRF) is based upon Articles 25 and 26 and in the alternative and wholly without prejudice, on Article 29(1), as these are not merely provisions of Indian law, but the provisions of the Indian Constitution *viz.* the supreme law of the land.

(ii) International conventions and declarations are obviously not enforceable, binding or implementable where they are in conflict with domestic laws, much less with the Indian Constitution (**See *inter alia Triple Talaq case* @ Paras 377 to 382 / Pages 287 to 293**). Though this comprises the minority view of Justice Kehar, J., concurred by Nazeer J., this position of the law is unexceptionable and has not been disputed even in this Triple Talaq judgment by the majority.

See also:-

- ***Jolly George Verghese* v. *Bank of Cochin AIR 1980 SC 470* @ Para 6**
- ***National Legal Services Authority v. Union of India (2014) 5 SCC 438* @ Para 58**
- ***Justice K.S. Puttaswamy v. Union of India (2017) 10 SCC 1* @ Para 154**

b. It is, therefore, inconceivable that the Hon'ble Court will grant the prayer of the Petitioner in the PIL in the teeth of Constitutional provision relied upon by Respondent No.11. If the Hon'ble Court holds against Respondent No.11 on the interpretation of Articles 25, 26 and 29, in any event, Respondent No.11 would lose and other contentions including those with respect to International treaties would be unnecessary. Alternatively, if Respondent No.11 were to succeed on its contentions based upon Articles 25, 26 and 29, it would succeed and equally, reference to and reliance upon treaties would be irrelevant. Consequently, these treaties and international statements would be irrelevant either way.

c. Apart from the foregoing analysis and response of law, Respondent No.11's submissions factually are equally important *viz.* that FGM as asserted by the Petitioner is an unsuitable and inapplicable example from Africa and FC as part of the Bohra religious beliefs is a sacred concept and as different from FGM as chalk is from cheese. The bullet points made in para 5(e)(iv) above are reiterated in that regard.

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(PROPOSITIONS AND JUDGMENTS ON ARTICLES 25 & 26 OF THE CONSTITUTION)

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NOTE III

(PROPOSITIONS AND JUDGMENTS ON ARTICLES 25 & 26 OF THE CONSTITUTION)

A Female Circumcision ("FC") is an essential and integral part of the religion of Dawoodi Bohras and consequently fully protected under Articles 25 and 26 of the Indian Constitution

A.1 To avail of the Constitutional protective umbrella of Articles 25 and 26, the practice in question must satisfy the ***'essentiality test'***, *viz.* the practice must be shown, theologically, to be an integral and essential part of the religion in question.

A.2 Article 25 is couched in the widest terminology:-

a) It is put under the specific sub-head of *"Right to Freedom of Religion"*;

b) Its marginal note uses the widest words viz. *"Freedom of conscience and free profession, practice and propagation of religion"*;

c) Article 25(1) contains the widest declaration by saying *"All persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion"*;

d) Unlike most other Articles in Part III, but like Article 14, Article 25 is citizenship neutral i.e. it affords constitutional protection to Indian citizens and non-citizens alike;

e) the words *'profess'*, *'practice and propagate religion'* are *ex facie* words of the widest amplitude and absent the specific restrictions available against them in law, cannot be artificially circumscribed.

A.3. The forgoing proposition is a hallowed proposition of law sanctified by a catena of judicial precedents:-

A.3.1 *Commissioner, Hindu Religious Endowments, Madras* v. *Lakshmindra Tirtha Swamiar of Shri Shirur Mutt* (The Shirur Mutt Case) *1954 SCR 1005 (SCC Online) (7 JJ)*

a. Seven Judges unanimously struck down that part of the Madras Hindu Religious Endowments Act (Act 2 of 1927) which purported to settle the scheme regarding temple administration and

especially the rights of the Muthadi / Mahant **(Paras 31, 32, 34 and 35)**.

b. **Paras 17 and 18 note:-**

> *"17....A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.*
>
> *18. The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression "practice of religion" in Article 25..."*

c. In **Para 20**, the AG's contention that all secular activities associated with religion do not constitute an essential part of a religion (noted in **para 19**) was rejected as overbroad. The Court noted:-

> "20. *The contention formulated in such broad terms cannot, we think, be supported. In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(b)...".*

d. **Para 23** clarifies the notion that not only religious beliefs but religious practices are equally protected. The Supreme Court words in this regard are evocative:-

> *"23. ...As we have already indicated, freedom of religion in our Constitution is not confined to religious beliefs only; it extends to religious practices as well subject to the restrictions which the Constitution itself has laid down. Under Article 26(b), therefore, a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters...".*

A.3.2 *Ratilal Panachand Gandhi* v. *State of Bombay 1954 SCR 1055 (SCC Online) (CB)*

a. The Constitution Bench struck down, *inter alia*, the appointment of the Charity Commissioner as a Trustee under the Bombay Public Trusts Act, 1950, principally on the ground that it violated the Jain religious belief that monies collected for religious purposes (Divyadravya) cannot be diverted or utilized for non-Jain / non-religious purposes, and hence the appointment of the Charity Commissioner, which could lead to such diversion, was set aside. **(See Para 19)**

b. The case, decided two days after the Shirur Mutt judgment, refers to Shirur Mutt **(See Para 9).**

c. The principle summarized above in para A.2. of this note, is similarly reiterated in **Para 10** of *Ratilal Panachand*.

d. **Para 12** emphasizes that what is protected is not merely a system of beliefs and doctrines but all outward expressions/ manifestations of the same. The court said in para 12:

> "12. ...*A religion undoubtedly has its basis in a system of beliefs and doctrines which are regarded by those who profess that religion to be conducive to their spiritual well being, but it would not be correct to say, as seems to have been suggested by one of the learned judges of the Bombay High Court, that matters of religion are nothing but matters of religious faith and religious belief. A religion is not merely an opinion, doctrine or belief. It has its outward expression in acts as well...*"

e. **Para 13** applies the essentiality test to rights and ceremonies, even though they may seem to be secular activities, so long as they are a part of faith. The court said:-

> *"13....Thus if the tenets of the Jain or the Parsi religion lay down that certain rites and ceremonies are to be performed at certain times and in a particular manner, it cannot be said that these are secular activities partaking of commercial or economic character simply because they involve expenditure of money or employment of priests or the use of marketable commodities. No outside authority has any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate..."*

f. *Ratilal Panachand* was a judgment which actually decided two cases, one in relation to a member of the Jain samaj and a second case relating to a member of the Parsi religious community.

g. **Para 13** applies the principle quoted above in para A.3.1(c) of this note to the Parsi religion as well. In particular, it upholds the single Judge (Davar J.) of Bombay High Court in *Jamshed Ji* v. *Soonabai 33 Bomb. 122 (1909)*. In that case, the single judge had upheld (and the Supreme Court upheld the Single Judge in turn) the bequest of property by a Parsi testator for the purpose of perpetual celebration of ceremonies like Muktad Baj, Vyezashni etc., on the basis that they are sanctioned by the Zoroastrian religion and hence this was a valid charitable gift.

h. The words of the single Judge Davar J. quoted with approbation by the Supreme Court in **para 13** are noteworthy:-

> *"13... "If this is the belief of the community" thus observed that learned Judge, "and it is proved undoubtedly to be the belief of the Zoroastrian community, - a secular Judge is bound to accept that belief - it is not for him to sit in judgment on that belief, he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be the advancement of his religion and the welfare of his community or mankind". These observations do, in our opinion, afford an indication of the measure of protection that is given by Article 26(b) of our Constitution."*

A.3.3 *Mohd. Hanif Qureshi & Ors. v. State of Bihar & Ors. (CB) 1959 SCR 629 (CB)*

a. The judgment upheld the State enactments passed by Bihar, U.P. and M.P. prohibiting cow slaughter; it upheld the same principles of freedom of religion under Articles 25 and 26 as summarized above and as culled out from the judgments preceding *Hanif Quareshi*.

b. **Para 13** of this judgment quoted from and relied upon *Ratilal Panachand* with approval.

c. Most importantly, the second part of **Para 13** provides the core reason why the State enactments were upheld *viz.* because the petitioners were unable to rely upon any part of the Holy Quran or any other religious material mandating sacrifice of the cow and the cow alone. On the contrary, as the para notes, diverse animals could legitimately be offered for sacrifice and the only essential part of the religion, culled out from these materials by the Apex Court, was that the sacrifice is necessary but not the sacrifice of a cow alone.

d. The additional contention that the legislations discriminated against members of the Muslim community was rejected, *inter alia*, on the basis that the enactments were not motivated by inclusory or exclusory focus regarding any religious community; that they were, if at all, in implementation of Article 48 of the Directive Principles of State Policy; that the enactments made valid distinctions between old cattle and useful cattle; and that there would be a presumption of validity regarding these enactments. **(Paras 15 and 16)**

e. For similar reasons, the challenges made on the basis of Article 19(1)(g) were rejected. **(Paras 17 and 18)**

f. *Mohd. Hanif* is therefore a judgment upholding legislation on the acceptance and application of the same parameters of the essentiality test as discussed earlier.

A.3.4 *Sri Venkataramana Devaru v. State of Mysore 1958 SCR 895 (CB)*

a. This is an interesting judgment because, while rejecting the right of a religious denomination to manage its own affairs by excluding all classes and sections of Hindus from access to a Hindu public temple, it notes that in the absence of a specific constitutional provision prohibiting such denial of access, the stand of the temple management might well be upheld as being an essential part of the Hindu religion. **(Para 17)**

b. The community involved in this case was Gowda Saraswath Brahmins who had moved from Kashmir to the South and involved an ancient temple near Mysore dedicated to Shri Venkataramana **(Para 2)**. The Act in question was the Madras Temple Entry Authorisation Act, 1947 **(Para 4)**. The principal contention of the managers of the temple was that it was a temple dedicated to the benefit of Gowda Saraswath Brahmins and access, therefore, could not be open to all **(Para 5)**.

c. Paras 17 and 18 present a classic and graphic statement of the rigor of the law of Article 25 and in particular Article 26(b). Both the paras read fully repay study. In **Para 18**, the Court says:

> *"18....Thus, under the ceremonial law pertaining to temples, who are entitled to enter into them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion. The conclusion is also implicit in Article 25 which*

after declaring that all persons are entitled freely to profess, practice and propagate religion, enacts that this should not affect the operation of any law throwing open Hindu religions institutions of a public character to all classes and sections of Hindus. We have dealt with this question at some length in view of the argument of the learned Solicitor General that exclusion of persons from temple hs not been shown to be a matter of religion with reference to the tenets of Hinduism. We must, accordingly hold that if the rights of the appellants have to be determined solely with reference to Article 26(b), then Section 3 of Act 5 of 1947, should be held to be bad as infringing it."

d. That, despite the foregoing categorical finding, the statute mandating unhindered universal access to temples was upheld is for a totally different reason *viz.* the existence of the specific Article 25(2)(b) read with Article 17, which constitutionally prohibits exclusion of classes and sub-classes of Hindus from access to temples **(Para 20)**.

e. That issue is irrelevant to the present case. What is crucial and relevant to the present case is the clear and unequivocal finding in Para 18 of the Constitution Bench that but for the existence of Articles like 25(2)(b), even as drastic a measure as exclusion of all Hindus save and except Saraswath Gowda Brahmins, from a temple, would have been upheld as a protected part of Articles 25 and 26 of the Indian Constitution.

A.3.5 ***Durgah Committee, Ajmer v. Syed Hussain Ali (1962) 1 SCR 383 (CB).***

a. The Supreme Court reversed a High Court Order which had struck down several parts of the Durgah Khwaja Saheb Act of 1935 on the ground that it violated several Constitutional rights of the Khadims, who were the Petitioners before the High Court, including their rights under Articles 25 and 26.

b. The Constitution Bench relies on most of the preceding judgments including *Shirur Mutt, Devaru* etc. and should not be read as an attempt to divert or differ with the preceding jurisprudence summarized above in this note. However, the judgment does suffer from over-breadth or the using of language which may be susceptible to misinterpretation and which may not be consistent

with the prior or subsequent jurisprudence on this subject. For example, at the end of **para 33**, the Court states:

> *"33. ...Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26. Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Article 26 may have to be carefully scrutinized; in other words, the protection must be confined to such religious practices as are an essential and integral part of it and no other."*

c. The aforesaid is borne out by the fact that no prior or subsequent judgment has approbated the above quoted passage. Indeed, the above quoted passage came in for severe criticism in Para 12.18, Page 1267-68 of Volume II, Fourth Edition of Seervai *'Constitutional Law of India'*. Seervai makes the following significant points:-

(i) That the aforesaid passage of *Durgah Committee* directly violates *Shirur Mutt*.

(ii) Reference to superstitious practices is highly variable and subject to judicial test, incapable of judicial management, because 'what is superstition to one section of the public may be a matter of fundamental religious belief of another'.

(iii) Seervai also points out that the passage violates the *Ratilal Panachand* judgment.

(iv) Indeed, the approach of the *Durgah Committee* court is also inconsistent with the shortly later delivered judgment of *Sardar Syedna* which, in fact, carried the principles in respect to Articles 25 and 26 much farther, as has also been discussed separately in the present submissions.

(v) According to Seervai, for the forgoing reasons, the above quoted passage of Gajendragadkar J. in *Durgah Committee* should be regarded as *obiter*.

d. Indeed, in *Commissioner of Police* v. *Acharya Avadhuta 2004 12 SCC 770* (so called Anand Margi second case), Lakshmanan J., albeit dissenting, in Paras 43, 68 and 69 cites the aforesaid passage by Gajendragadkar J. and treats it as an obiter being contrary to preceding decision of larger benches. He also notes Seervai's criticism and characterization of Gajendragadkar J. as vital.

e. Though a dissent, this issue has not been addressed in contrary terms by the majority judgment and can therefore be rightly relied upon as a reflection of the true position in law.

A.3.6 *Sardar Syedna v. State of Bombay, 1962 Supp (2) SCR 496 (CB)*

a. Das Gupta J. spoke for the Constitution Bench; Ayyangar J. concurred and Sinha C.J. dissented.

b. A seemingly drastic, invasive and intrusive power of ex-communication by the Dai of any member of the community, sought to be prohibited by statute, was upheld in this case and the statute declared unconstitutional being violative, *inter alia*, of Articles 25 and 26.

c. All the previous judgments were reiterated (e.g. see Para 33).

d. In the case of the Dawoodi Bohra community, both the aforesaid essentiality tests as also its largely subjected application within the boundaries of the community which practices the religion, is *a fortiori* and significantly reinforced for a *sui generis* reason, clearly peculiar to the Dawoodi Bohra religious denomination. That unique feature is the existence of a living human representative of the Imam (*viz. Da'i al-Mutlaq*). The following conclusions in regard to this community now have judicial approbation and are no longer *res integra* and have binding and irrefutable application to the present case *viz*:-

(i) The Dai is a living human representative of the Imam nominated in succession and sequence to carry on the Dawat (mission) of the Imam so long as the Imam remains in seclusion (**Paras 2 and 37**).

(ii) The Dai is, therefore, "*the vicegerent of the Imam in seclusion*" and "*has not only civil powers as head of the sect and trustee of the property but also ecclesiastical powers as religious leader of the community*" (**Paras 2 and 37**).

(iii) Most *crucially*, the Constitution Bench of the Hon'ble Supreme Court has already held (and this is a principle that has stood the test of time for 60 years out of the 71 year' history of independent India) that "*it does appear to be an effect that unquestioning faith in the Dai as the head of the community is part of the creed of Dawoodi Bohra*". **(Para 37)**.

(iv) Every Dawoodi *Bohra* "*...at the time of the initiation takes an oath of unquestioned faith in and loyalty to the Dai.*" **(Para 38)**.

(v) The Dai is also *recognized* "*as the supreme head of the religion*" and "*as the head of the religious denomination and the medium through which spiritual grace is brought to the community and that this is the central part of the religion as well as one of the principle articles of that faith*" **(Para 56)**.

(vi) "*...the position of the Dai-ul-Mutlaq, is an essential part of the creed of the Dawoodi Bohra sect. Faith in his spiritual mission and in the efficacy of his ministration is one of the bonds that hold the community together as a unit.*" **(Para 62)**

e. Para 61 is significant. In that, Ayyangar J. in his concurring judgment categorically holds that the social welfare and reform aspect of legislation relatable to Article 25(2)(a) does not and cannot mean that in the name of social welfare and reform, a religion is changed out of existence or its identity is changed. It also categorically holds that such social welfare and reform activity as contemplated in 25(2)(b) is not intended to relate to the essence of the religion and not "intended to cover the basic essentials of the creed of a religion" **(Para 61)**

f. The consequence of the acceptance of the aforesaid principles by no less than a Constitution Bench of the Apex Court for the last more than 60 years is that the essentiality test as summarized above must be applied in the case of the Dawoodi Bohra religious denomination with the additional nuance that once the vicegerent of the Imam "Dai" and/or all his successors for over 900 years have consistently professed, practiced, propagated *inter alia* FC as a part of the faith and religion of the Dawoodi Bohra religious denomination, it is a *fortiori*, and even more than all the

cases cited above, beyond the competence of non-Dawoodi Bohras or external adjudicators to second guess, review, doubt, substitute or replace the validity of this belief in FC as an integral part of the religion. In other words, what has been for several decades under established law cited above in para 4, in any case liable to extremely limited judicial review and conditioned by the beliefs of the community which practices that religion, is significantly enhanced in the case of the Dawoodi Bohra community by the mere existence of the acknowledged supreme head of the Dai whose declaration of that belief renders it even less reviewable or indeed reduces the scope of review of that belief to a vanishing point.

A.3.7 ***Tilkayat Shri Govindlalji Maharaj etc.*** v. ***State of Rajasthan & Ors. 1964 1 SCR 561 (CB)***

a. Though the validity of the Nathdwara was upheld, the basic principles adumbrated by the Supreme Court prior to this judgment cannot be said to have been intended to be changed by this judgment.

b. The principal reason for upholding the Act appears to be as stated in **Paras 30, 31** and **37** *viz.* the temple was not consecrated as a private temple nor ever closed to the public and hence, could not be considered to be a private temple.

c. The fact that essentiality of the religion is to be seen in terms of what is regarded by the community as essential and integral is reiterated in **Paras 57 to 60.**

d. Last but not the least, it appears that what was considered highly relevant, perhaps even dispositive by the Constitution Bench were the details summarized in **Para 13** showing serious misappropriation of property as the immediate provocation for the passing of the Act.

A.3.8. ***Bijoe Emmanuel*** v. ***State of Kerala (1986) 3 SCC 615 (DB)***

a. *Bijoe Emmanuel* is significant and remains to be a good law for the following reasons:-

(i) It upheld the right of 'Jehovah's witness' to refuse to sing the National Anthem provided that they stood respectfully when it was playing.

(ii) It reiterates the consistent line of decisions discussed above, in **Paras 19 and 20.**

(iii) In **Para 20**, after citing the entire corpus of law, it not only singles out *Ratilal Panachand* case but quotes with approval Davar J. in *Jamshed Ji's* case. This part of the judgment is significant since it emphasizes the largely subjective test and subjective approach of adjudication qua religions rights under Article 25 (unless such subjectivity is perverse). The following words in this regard are significant:-

> *"20...we also notice that Mukherjea, J. quoted as appropriate Davar, J.'s following observations in Jamshed Ji v. Soonabai ((1909) 33 Bom 122):*
>
> > *"If this is the belief of the community and it is proved undoubtedly to be the belief of the Zoroastrian community, — a secular Judge is bound to accept that belief — it is not for him to sit in judgment on that belief, he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be the advancement of his religion and the welfare of his community or mankind."*
>
> *We do endorse the view suggested by Davar, J.'s observation that the question is not whether a particular religious belief or practice appeals to our reason or sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. Our personal views and reactions are irrelevant. If the belief is genuinely and conscientiously held it attracts the protection of Article 25 but subject, of course, to the inhibitions contained therein".*

b. Indeed, *Bijoe Emannuel* underlines the larger aspect of creating entrenched rights in a Constitutional document *viz.* to provide reassurance to the minorities and to ensure additional safeguards against non-derogation despite majority rule being the core of democracy itself. The Supreme Court puts it in solicitous words:

> *"18...Article 25 is an article of faith in the Constitution, incorporated in recognition of the principle that the real test of a true democracy is the ability of even an insignificant minority to find its identity under the country's Constitution. This has to be borne in mind in interpreting Article 25."*

c. *Bijoe* also effectively puts to rest the slight confusion created by Anand Margi decision number one (*Acharya Jagdishwaranand* v. *Commissioner of Police* (1983) 4 SCC 522). That decision had suggested that an admitted religious denomination may not qualify for protection under these articles if it was not shown to be a separate religion. That would be *ex facie* contrary to a number of judgments cited above which have imparted protection to religious denominations and, indeed, ignores the specific

reference to religious denomination in Article 26. Consequently, the *Bijoe* Court rightly said:-

> *"26....In the course of the discussion, at one place, there is found the following sentence: (SCC p. 530, para 9)*
>
> *"Mr. Tarkunde for the petitioner had claimed protection of Article 25 of the Constitution but in view of our finding that Ananda Marga was not a separate religion, application of Article 25 is not attracted."*
>
> *This sentence appears to have crept into the judgment by some slip. It is not a sequitur to the reasoning of the court on any of the issues. In fact, in the subsequent paragraphs, the Court has expressly proceeded to consider the claim of the Ananda Marga to perform Tandava dance in public streets pursuant to the right claimed by them under Article 25(1)."*

d. In so doing, they rejected the argument in *Bijoe Emannuel* also that Jehovah's witness being merely a religious denomination and not a religion by themselves, could not claim the protective umbrella of Articles 25 and 26.

A.3.8. ***A.S. Narayana Deekshitulu v. State of A.P. & Ors. (1996) 9 SCC 548 (DB)***

a. *Deekshitulu* judgment upheld the validity of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1987 on the short ground that hereditary archakas (chief priests) cannot be considered to be an essential part of the Hindu religion.

b. The judgment does not intend to depart from the established line of precedents before it, both because they are of much larger strength and because this was only a Division Bench.

c. It is wrong to regard this as propounding an objective determination by the Court on what is essential in a religion or not.

d. There is no indication and no use of language to show that the court intends to depart from the established jurisprudence on the subject. Indeed, in para 86, it is stated:

> *"86. A religion undoubtedly has its basis in a system of beliefs and doctrine which are regarded by those who profess religion to be conducive to their spiritual well-being. A religion is not merely an opinion, doctrine or belief. It has outward expression in acts as well..."*

A.3.9 ***Sri Adi Visheshwara of Kashi v. State of U.P. & Ors. 1997 4 SCC 606 (3JJ)***

a. This should be seen in the light of the specific exception in Articles 25 and 26 regarding management of properties according to secular laws and in line with the *Tilkayat Govindlalji* judgment.

b. Para 28 from placitum (g) to (h) notes not only the essentiality test but the need to determine it according to the "tenets, historical background and change in evolved process over time. It also treats it largely as a subjective test by saying that *"It must be decided whether the practices or matters are considered integral by the community itself."* **(Para 28)**

A.3.10 The second Anand Margi case (*Commissioner of Police* v. *Acharya Avadhuta 2004 12 SCC 770*) has already been dealt with above.

A.4 To summarise these conclusions from a survey of the jurisprudence above, the following principles emerge:-

a. Articles 25 and 26 are of the widest amplitude. This is not only *ex facie* evident from the text of the articles but is a principle also accepted in the judgments above.

b. One of the important tests to decide whether the protection of the Articles is available or not is to see if the practice involved is an essential part of that religion.

c. Crucially and significantly, the application of this test by an external adjudicator like a Court of law is not based on an objective approach. No doubt, the Court must decide since self-decision by parties is the only other non-alternative. But the Court decides such issues by fairly (and in that sense subjectively) deciding whether the community in question considers the practice as essential and/or integral. It is this bonafide albeit subjective belief of the community which is vital, crucial and dispositive for the courts adjudication.

d. Consequently, loose language to the contrary would either be violative of larger benches or must be interpreted and understood to mean that the test remains an examination of the subjective beliefs of the community, but from the view point of an external, fair and objective adjudicator.

e. It is completely fallacious to suggest that once a practice is found to be a part of religion, it would be denied protection under Articles 25 or 26 only on the basis that the person claiming it belongs to a religious denomination of that religion but cannot claim to be a representative of the entirety of that religion.

f. The subjective approach elaborated above (albeit tested by a fair, external and objective adjudicator) is further reinforced by the larger ethos of the Indian Constitution where the overarching and fundamental underpinning is of an inclusive approach exhibiting mutual respect and

accommodation of pluralism and diversity. This is self-evident from the glowing words of preamble, where, interestingly, 'liberty', 'equality' and 'fraternity' were given equal weightage. The essence of equality and fraternity exemplifies this mutual accommodation. That was further reinforced by the 42nd Amendment of 1976 which inserted specifically what in any event was omnipresent in the Constitution, namely the word 'secular'. A comprehensive and teleological application of these grand words lies at the heart of the Constitution.

B. <u>Applying the forgoing principles, the compilation marked as Annexure A in I.A. No.94731 of 2018 (@ Pgs.1 – 74) shows incontrovertibly that FC has clear and unequivocal recognition as a creed and belief of the religion practiced by the Dawoodi Bohra Community as exemplified in texts going back to the inception of this Community.</u>

B.1 The index of these materials is reproduced herein with relevant pages which demonstrates:-

a. That the recognition of FC as an invariable and mandatory belief and practice of the religion practiced by the Dawoodi Bohra Community is ancient and relates back to the inception of this community.

b. The earliest text found in this index is of the 10th Century AD.

c. All the other items in the index establish the consistency and continuity of this recognition.

d. As far as texts respected and followed by the community are concerned, there is no divergent or discordant material produced or available.

e. Overriding all of the above, is the point made in paras above which show that, unlike several other religions denominations, the presence of a living representative of the Imam (*viz.* Dai) imparts conclusivity, finality and binding force to the belief in FC as an essential and integral part of the religion followed by the Dawoodi Bohra community.

f. As these materials show, the origin of this religious belief is based on the principles of purity which, are subsumed within the concept of Taharath (viz. purity), which, in turn, is one of the Seven Pillars believed in and practiced by Dawoodi Bohra Community.

g. The other six pillars may be listed as below:-

(i) *al-walayah* (love and allegiance), which is superior to all, and by it and by the *wali* (the master; the Imam or Dai to whom allegiance is obligatory) the knowledge of others is to be attained.

(ii) *al-salaah* (ritual prayers)

(iii) *al-zakaah* (ritual monetary dues)

(iv) *al-sawm* (ritual fasting)

(v) *al-hajj*

(vi) *al-jihaad* (to strive within oneself and without)

h. It is interesting that of the above 7 pillars, only 5 pillars have usually been followed by non-Bohra adherents of Islam whereas the Bohras treat each of the 7 pillars above as integral part of their religion and consequently as the *sine quo non* for achieving true salvation (*Najaat*).

32.

In the Supreme Court of India

Original Civil Writ Jurisdiction

Under Article 32 of the Constitution of India

Writ Petition (Civil) No. 286 of 2017

Ms. Sunita Tiwari ... Petitioner

Versus

Union of India & Ors. ... Respondents

(EXTRACTS OF RELEVANT ARTICLES / LITERATURE AND ARTICLE 14 SUBMISSION)

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NOTE IV

(EXTRACTS OF RELEVANT ARTICLES / LITERATURE

AND ARTICLE 14 SUBMISSION)

1. EXTRACTING THE ESSENTIAL ELEMENTS OF ARTICLES

a. **Dr. Kavita Shah Arora (Department of Obstetrics & Gynecology & Allan J. Jacobs, *Female genital alteration: a compromise solution*, JME Online First, published on 22.02.2016 as 10.1136/medethics-2014-102375. (@ Annexure B in I.A. No.94731 of 2018 (For Additional Documents) / Pgs. 1 – 8)**

(i) Makes the telling point that "*the majority of male children in America are circumscribed*". Shows that circumcision is neither bizarre per se nor irreversibly prejudicial per se nor restricted to Muslims or Bohras. Indeed, this lesser known and seemingly surprising conclusion makes the significant point that Male Circumcision ("**MC**") appears to be religion neutral, at least in USA. This conclusion is not casual but based upon a research study of no less than American academic of Pediatrics (AAP) published in 2012. This is only to show that circumcision in general need not be viewed as a barbaric custom unknown to the civilized world / per se liable to be stigmatized. (**@ Pg. No.1**)

(ii) Outlawing, banning and prohibiting Female Circumcision ("**FC**") has the larger danger of driving the entire activity underground and posing a far bigger threat to health and wellbeing through illegal and surreptitious means. (**@ Pg. No.1**)

(iii) A desirable compromise solution therefore would be to allow the minimalistic/ *de minimis* FC procedure to prevent the inevitable illegal industry which flushes upon banning (e.g. abortions, and liquor prohibition). (**@ Pg. No.1**)

(iv) FGM (Female Genital Mutilation) is a wholly inapposite phrase to apply to such *de minimis* procedure; indeed, the latter is far less invasive than a wide number of plastic and cosmetic surgery procedures in vogue currently. (**@ Pg. No.3**)

(v) Such *de minimis* procedure cannot be characterized as human rights violation, despite lack of consent. (@ Pg. No.1)

(vi) The Article 14 part – it is a clear violation of equal protection clause to acknowledge, recognize and permit MC (in USA) and yet mischaracterizes a significantly less radical procedure as misogynistic and human rights' violation. (@ Pg. Nos.4-5)

(vii) Blanket, subjective, press induced, general and simple condemnation is not an answer. (@ Pg. No.6)

b. **Doriane Lambelet Coleman, *The Seattle Compromise: Multicultural Sensitivity and Americanization*, published by Duke Law Journal, Volume 47, No.4 (Feb., 1998), pp. 717-783 (@ Annexure B in I.A. No.94731 of 2018 (For Additional Documents) / Pgs. 109 – 176)**

(i) At several places makes a strong Article 14 argument in the context of the equal protection clause in USA e.g., at pages. (@ Pg. Nos.110; 117; 128 - 129; 132; 155- 156; 163 -164)

(ii) Propounds the doctrine of ordered liberty which recognizes, respects and absorbs cultural pluralism. (@ Pg. No.111)

(iii) Concludes that the Seattle compromise was the best balance between such mutual respect on the one hand and obedience to USA and local laws on the other, but it informs that the resulting public outcry ultimately destroyed the compromise. (@ Pg. No.172)

(iv) The heart of this compromise according to the Author is symbolic circumcision which balances diverse and seemingly contradictory concerns of religion, local law, customs, hygiene, medicine etc. (@ Pg. Nos.116; 150; 163; 167-168)

(v) Notes at page 731 that "*FC does appear in the Sunna, where according to Prof. Annemarie, a barely known Hadith addresses the practice directly*", this is quoted at foot note 41 of page 731. (@ Pg. No.124)

(vi) Symbolic circumcision would also eliminate or minimize emotional suffering; indeed, it is equally possible that the girl would believe that her parents had saved her from a worse fate than without FC. (@ Pg. Nos.116; 150; 163; 167-168)

(vii) Symbolic circumcision is not physically harmful; indeed, it is clearly the better of the two options of FGM and the far lesser activity / practice of a symbolic cut. **(@ Pg. Nos.116; 150; 163; 167-168)**

c. **Brian D. Earp, *Female genital Mutilation (FGM) and male circumcision: should there be a separate ethical discourse? Published February 18, 2014* (@ Annexure B in I.A. No.94731 of 2018 (For Additional Documents) / Pgs. 221 - 245)**

(i) This 10 page' and especially the first seven pages are the clearest exposition of the Article 14 stand.

(ii) It is also focused and argumentative, like a legal argument, stating the argument against FGM and then answering it categorically.

(iii) Makes the clear point that Type-I and Type-IV are poles apart and cannot even be clubbed in mere discussions.

(iv) MC is far larger and wider and more inclusive than FC and to ignore it, to condone it, to recognize it, to promote it etc., while FC is stigmatized and castigated, is hypocrisy and unfair - The article 14 argument. **(@ Pg. Nos. 223-224)**

(v) FC does not diminish or eliminate sexual pleasure for women; if at all it allegedly does, then on a parity of reasoning its adverse effect on sexual pleasure of men would be far higher. **(@ Pg. Nos. 229)**

d. **Lucrezia Catania MD, Omar Abdulcadir MD, Vicenzo Puppo, MD, Jole Baldaro Verde PhD, Jasmine Abdulcadir and Dalmar Abdulcadir, *Pleasure and Orgasm in Women with Female Genital Mutilation/ Cutting (FGM/C)*, J Sex Med 2007;4: 1666-1678 (@ Annexure B in I.A. No.94731 of 2018 (For Additional Documents) / Pgs. 250 - 262)**

(i) Whole article is largely an attempt to repel the writings and the notion that FC diminishes female sexual desire.

(ii) It is an empirical and partly a medical empirical study.

e. **Expert Evidence of Dr. Sonia Grover in the Australian Case of (R v. A2 and R v. Vaziri) @ Pg. 89 of Annexure B in I.A. No. 94731 of 2018 (For Additional Documents)**

(i) Dr. Sonia Grover from the Department of Gynecology at the Royal Children's Hospital, Melbourne was requested to undertake a genital examination of the two girl children who were stated to

have undergone female circumcision and to clarify and define the presence or absence of evidence of any genital trauma or scarring. The two girls were from families that were part of the Dawoodi Bohra Community that had migrated to Australia and the procedure performed on the two girls was consistent with the procedure in question in the present case. **(@ Pgs. 89 & 90)**

(ii) Genital examination revealed normal external genitalia. The tip of the clitoral glans was clearly visible. The examination findings did not demonstrate any evidence of scarring or previous trauma to the central, visible aspect of the clitoral glans, or to the clitoral hood. **(@ Pgs. 91 & 96)**

f. **Expert Evidence of Dr. Jennifer Anne Sutherland Smith in the Australian Case of (R v. A2 and R v. Vaziri) @ Pg. 99 of Annexure B in I.A. No. 94731 of 2018 (For Additional Documents)**

(i) Dr. Smith from the Victorian Forensic Paediatric Medical Services at the Royal Children's Hospital, Melbourne was requested to provide a second opinion on undertaking a genital examination of the two girl children after Dr. Grover. **(@ Pgs. 100 & 105)**

(ii) Genital examination revealed essentially normal genitalia. The skin of the clitoral hood was normal. No additional tethering of the skin of the clitoral hood was noted. The clitoral glans and tip was visualized. No scarring or alteration in pigmentation was noted in the region of the clitoris or the clitoral hood. Therefore, it was concluded that no injury or scar was detected. **(@ Pgs. 101 & 106)**

2. THE ARTICLE 14 ANTI-DISCRIMINATION FACETS:

a. Admittedly, as a theological precept, the entire Muslim community recognizes, endorses and seeks to practice MC.

b. The universality of MC cuts across denominations, sex and other divisions within the Islamic fold.

c. Indeed, MC is mandatorily followed in large diasporas like Jews. It is interesting that the very origin of circumcision is attributable to the Judaic religion and traces itself to the command received by Ibrahim from God to circumscribe himself as a mark of purity, even if was in his 80's when he received revelation.

d. Beyond the larger Islamic and Judaic communities, it is interesting that an even larger number of males across the world practice MC as a practice which for them is completely religion neutral (***See Kavita Shah***).

e. It is also noteworthy that as far as the male sex is concerned, MC is theologically required to be implemented at an even earlier and tender age (at birth or within a few days thereafter) whereas FC is prescribed in the scriptures to be done at or after the age of 7 years.

f. The foregoing throws up a startling reality that while MC is practiced for religious and non-religious reasons by almost 30% of planet earth's male population and cannot be, *ipso facto and ipso jure* be treated as *per se* noxious.

g. Despite the aforesaid widespread nature of the practice, it is ironical and anomalous that all criticism on health, medicine, law & order and cultural grounds is reserved, in a patently gender biased manner, only against girls who practice FC.

h. The above illustrates the heart of the Article 14 / anti-discrimination arguments. Similar arguments would arise in different jurisdictions having similarly protective regimes (e.g. the equal protection clause of US constitution and/or the anti-gender discrimination clauses of the human rights convention which for example govern several European nations).

i. The elements of this Article 14 syllogism are as follows: -

(i) Article 14 prohibits equals being treated unequally and unequals being treated equally.

(ii) Article 14 permits classification but the classification, firstly, has to be fair and reasonable and secondly it has to have a reasonable nexus to the object sought to be achieved by such classification.

(iii) Article 14, where found violated, voids both under inclusion and over inclusion.

(iv) For purposes of circumcision, no valid factual or legal differentiation exists between minor males and minor females. Consequently, a result which classifies all MC as benign and attempts to stigmatize and void all FC as unconstitutional is inherently and *per se* an invalid classification.

(v) For the Bohra community, the scriptural and theological sanction of mandatory FC is exactly the same as the mandatory sanction of Islam for MC for males. In this regard, there is no difference either in the sanction of religion or in its mandatoriness.

(vi) The fact that in the case of FC it arises for the Bohras and not for all Muslims, is irrelevant since the entire case law analyzed on Articles 25 & 26 establishes irrefutably that religious beliefs held *bona fide* and validly by any religious denomination are entitled to the same degree and scope of protection as available to the religion itself, of which the denomination is a part.

(vii) Minority of age and consequent deemed lack of consent are again non-differentiating factors and apply equally to minor males as to minor females.

(viii) As shown in the other section, the highest form of FC practiced by the Bohra community is not even Type-IV since it is not harmful. Ample literature exists to show that medically and health wise, MC involves a far higher degree of intrusion and invasion than the FC practiced by Bohras.

(ix) If we shift from the classification to the object, it is again clear that the object of mandatory MC and mandatory FC is the fulfilment of a purity criterion, mandated by religion. Again, this cannot be even remotely a differentiating factor.

(x) Most importantly, the present case does not involve the present Respondent No.11 seeking the nullification of legislative initiative to prohibit/ regulate FC. Instead, it involves a PIL which de facto and de jure seeks the Supreme Court's sanction to do exactly the same viz; nullification of FC without legislation. Apart from the fact that the Apex Court does not lend itself to such naked legislative

invitation, thereby usurping legislative power and violating Article 50 of the Indian constitution, the more important point which arises is that the Court will not venture into territory where *ex-facie* (and certainly *prima facie*) the prohibitory diktat invited from the Apex Court would inevitably violate Article 14 in the manner and form explained above.

(xi) All of the above is significantly enhanced and reinforced by other highly supportive provisions of the Indian constitution, in particular Article 15 (which prohibits discrimination on grounds, *inter alia*, on religion or sex) and Article 16 (which, though limited to public employment issue, again prohibits religious or gender-based discrimination).

(xii) It is well established that though Article 14 is highly potent and all encompassing, a comprehensive constitutional arc against all forms of discrimination and especially religious and gender-based discrimination, is created by the trinity of Articles 14, 15 & 16. Needles to add, while Article 15 & 16 are limited to Indian citizens, Article 14 strikes at the heart of not only discrimination but also arbitrariness in respect of all persons irrespective of Indian citizenship.

3. AN ANALYSIS OF THE AUSTRALIAN COURT'S JUDGMENT R v. A2:

a. The Judgment is of the Supreme Court of New South Wales, which, though is supreme within that state, is of limited value where federal issues are involved.

b. Admittedly, the matter has gone to the High Court of Australia, which is the Apex Federal Court of that country and is pending there. Consequently, this is not the final Judgment of the highest court of Australia.

c. Apart from the admitted position that there is no precedential value in India of such a Judgment, its persuasive value is also significantly diminished. Since it is not the final court of a foreign country which has laid down this rule and an Appeal before such final court is in fact pending, the entire conspectus of the case changes from the Indian context since parliament in Australia enacted a Crimes Act, 1900 (Section 45) to prohibit FGM.

d. The Judgment is in the context of a factual trial of a person involving recording of factual findings. The Judgment is completely distinguishable since it was hearing a criminal trial and dealing with purely merit and facts in a criminal matter.

e. The fact that those convicted, are members of the Bohra community cannot be used in a blanket manner to characterize the entire community's practice as mutilation as opposed to the much more benign religious practice of Type-I FC.

f. The Judgment is also focused on sentencing guidelines and sentencing issues.

g. All the above factors make it a radically different context than the present PIL where the principal defense is the existence of Articles 25 & 26 giving constitutional protection to religious rights. No such issue arose or is even discussed.

In the Supreme Court of India
Original Civil Writ Jurisdiction
Under Article 32 of the Constitution of India
Writ Petition (Civil) No. 286 of 2017

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Ms. Sunita Tiwari ... Petitioner

Versus

Union of India & Ors. ... Respondents

NOTE V

WORLD HEALTH ORGANISATION

1.1. The Practice of Khafz/Female Circumcision "**FC**" as practiced by the Dawoodi Bohra Community is vastly different from the practice of Female Genital Mutilation "**FGM**" or Female Genital Cutting "**FGC**" that has been described and discussed in the Petition.

1.2. This Note seeks to establish that the World Health Organisation ("WHO"), while defining the term FGM and classifying the same into various types, has adopted a broad brush approach so as to encompass circumcision as if it is a form of mutilation. It is submitted that this approach is, from a bare perusal of the WHO's own reports/statements, unscientific.

1.3. For the purposes of this Note IV, it is assumed without conceding that, the practice of the Dawoodi Bohra Community (i.e a nick on the prepuce) would fall under the type IV classification of WHO. It is clarified that the stand of Respondent No. 11 is that the practice of Khafz/ FC is (a) not FGM under any classification or definition of WHO and (b) not a harmful procedure.

1.4. The widespread prevalence of extreme forms of FGM/ FGC across several African nations prompted an extensive study by a Technical Working Group constituted by the WHO in the context of Africa. The practice of Khafz finds a passing reference in the statement without any extensive investigation into the practice, its benefits or its risks. **(Annexure – C, Sr. No. 1 Paragraph 1. 3, Page 6).**

1.5. The Technical Working Group met in Geneva in 1995 with the objective of developing standards and norms and a classification of the types of FGM/FGC. The relevant part of the report reads "*The terminology used to describe the different forms of female genital mutilation varies widely among the population groups where they are practised and among researchers, health personnel, health advocates and others. Removal of the prepuce has been called "true circumcision", in that it is equivalent to male circumcision*". **(Annexure- C, Sr. No. 1, Paragraph 2. 1, Page 7).** The above observations in the study group report does not cover the practice of FC.

1.6. The Technical Working Group even considered using the term FC, however decided that the use of the term FGM was all encompassing. The deliberation of

the Technical Working Group on the use of the word FC has been set out below: **(Annexure – C, Sr. No. 1, Paragraph 1. 3, Page 6)**

"...The participants stressed that the definition of female genital mutilation should encompass the physical, psychological ***and human rights aspects*** *of the practice.*

There was an extensive discussion on the use of the term "female circumcision". The term is used in different ways. Some people consider it to be equivalent to the term "male circumcision". This would be a rather narrow definition, covering only the removal of the prepuce. Others consider that it refers to more extensive removal of the external genitalia and therefore cannot be likened to male circumcision. The use of the term might also indicate that there is a case for medicalization (involvement of health professionals) in some types of procedure, which is not desirable. ***It was agreed that the term "female genital mutilation" is preferable****...*

It was also agreed that, in addition to the three main forms of female genital mutilation (clitoridectomy, excision of the clitoris and labia, and infibulation), other practices involving the stretching, pricking, piercing, cauterization, scraping or cutting of any part of the external genitalia or the insertion of herbs or any other substances into the vagina for the purpose of tightening should also be included in the classification.." (Emphasis supplied)

1.7. A conspectus of the WHO reports and materials would reveal that there has not been any study or investigation in India to ascertain the extent of the prevalence or the adverse consequences, if any, of FGM/FGC in general or the practice of Khafz/FC amongst the Dawoodi Bohra Community in particular. The reports also reveal that the Technical Working Group in terms recognised that the three main forms of mutilation was restricted to clitoridectomy, excision of the clitoris and labia, and infibulation. The practice of Khafz/ FC among the Dawoodi Bohra Community cannot be considered as any of these three forms of mutilation.**(Annexure- C, Sr. No.3, Page 55)**

1.8. Apart from a stray reference made in a WHO Report of 1998 to two papers authored by Srinivasan (1968) and Ghadially (1969) both written only from a sociological perspective, WHO has not considered the Indian scenario in the context of the Dawoodi Bohra Community. Ghadially in fact records that "unlike the more severe forms of circumcision the least drastic form has neither serious health nor reproductive repercussions" **(Annexure- B, Sr. No.13, Page 246)**.

1.9. After considering various classifications given to the expression 'Female Genital Mutilation', the publication notes that in April 1997 WHO, UNICEF and UNFPA in a joint statement gave the following definition to the expression 'Female Genital Mutilation' (FGM): **Annexure- C, Sr. No.2, Pages 32-54)**.

"Female genital mutilation comprises all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs, whether for cultural or other non-therapeutic reasons". The publication further notes that the 3 agencies classified the different types of FGM as follows:-

(i) Type I - Excision of the prepuce, with or without excision of part or all of the clitoris.

(ii) Type II - Excision of the clitoris with partial or total excision of the labia minora.

(iii) Type III - Excision of part or all of the external genitalia and stitching/narrowing of the vaginal opening (infibulation).

(iv) Type IV - Unclassified includes pricking, piercing or incising of the clitoris and/or labia; stretching of the clitoris and/or labia; cauterization by burning of the clitoris and surrounding tissue; scraping of tissue surrounding the vaginal orifice (angurya cuts) or cutting of the vagina (gishiri cuts); introduction of corrosive substances or herbs into the vagina to cause bleeding or for the purposes of tightening or narrowing it; and any other procedure that falls under the definition of female genital mutilation given above. "

1.10. It is pertinent to note that while WHO included the word "prepuce" within the definition of FGM, the traditional practice of FGM as discussed in this publication relates to more extreme forms of mutilation of the clitoris and other part of the female genitalia.

1.11. It is also evident from that the primary concern of these 3 agencies at the time of conceiving this definition was in relation to serious physical harm caused and medical issues faced by the women who are made to undergo this procedure.

1.12. Thereafter In 2007 WHO, UNICEF & UNFPA revised the four types of female genital mutilation as follows:-

- Type I: Partial or total removal of the clitoris and/or the prepuce (clitoridectomy).
- Type II: Partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (excision).
- 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).
- Type IV: All other harmful procedures to the female genitalia for non-medical purposes, for example: pricking, piercing, incising, scraping and cauterization.

1.13. The aforesaid definition forms part of a 2008 inter-agency statement on "Eliminating Female Genital Mutilation" which was published by WHO after collaborating with (i) Office of the High Commissioner for Human Rights (OHCHR), (ii) United Nations Programme on HIV/Aids (UNAIDS), (iii) United Nations Development Programme (UNDP), (iv) United Nations Economic Commission for Africa (UNECA), (v) The United

Nations Educational, Scientific and Cultural Organisation (UNESCO), (vi) The United Nations Population Fund (UNFPA), (vii) United Nations High Commissioner for Refugees (UNHCR), (viii) The United Nations Children's Emergency Fund (UNICEF) and (ix) The United Nations Development Fund For Women (UNIFEM). **Annexure- C, Sr. No.2, Pages 83**).

1.14. The 2008 statement went to the extent of stating that the definition of TYPE 1 FGM from 1995 was changed to add the word "prepuce"at the end of the sentence since mere removal of the prepuce has not been documented as a traditional form of FGM. The statement notes that almost all known forms of female genital mutilation that remove tissue from the clitoris also cut all or part of the clitoral glans itself. **(Annexure – C, Sr. No. 3, Page 87)** The practice of Khafz/FC on the other hand involves a nick to the prepuce and does not involve the removal of any portion of the clitoris / clitoral glans. To do so is forbidden. Clearly, the WHO has not studied or investigated the practice of Khafz/ FC while determining the classification of the types of FGM.

1.15. The 2008 statement even records: **(Annexure – C, Sr. No. 3, Paragraph 1. 3, Page 87)**

*"it is not always clear, however, what harmful genital practices should be defined as Type IV. Generally the natural female genitalia when not diseased, do not require surgical intervention or manipulation. The guiding principles for considering genital practices as female genital mutilation should be those of human rights, including the right to health, the rights of children and the right to non-discrimination on the basis of sex. Practices such as genital cosmetic surgery and hymen repair, which are legally accepted in many countries and not generally considered to constitute female genital mutilation, actually fall under the definition used here. **It has been considered important, however to maintain a broad definition of female genital mutilation in order to avoid loopholes that might allow the practice to continue**. The lack of clarity concerning Type IV should not curb the urgent need to eliminate the types of female genital mutilation that are most prominent and known-Types I-III which have been performed on 100-140 million girls and women and risk being performed on more than 3 million girls every year. "*
(Emphasis supplied)

In the 2008 statement the (i) WHO has conceded that genital cosmetic surgery (i.e. hoodectomy) which is more invasive than the practice undertaken by the Dawoodi Bohra Community (being nothing more than a nick on the prepuce) has been categorized into the definition of FGM only with a view to maintain a broad definition and (ii) that the lack of clarity with respect to Type IV should not curb the need to eliminate Types1-III FGM.

Further, the WHO specifically recognizes that there is limited data on practices included in type IV FGM and accordingly the 2008 statement records only the immediate risks and health complications of only Types I, II and III. **(Annexure – C, Sr. No. 3, Page 92)**

In light of the above, and for the reasons below, the definition as given by WHO cannot be adopted to prohibit the practice of Khafz/ FC.

1.16. The WHO has not analysed and studied FC or Type IV from a medical perspective. The WHO specifically recognizes that the various short term and long-term risks associated with FGM are in fact those associated with the traditional forms of FGM which form a part of the type I, II and III classifications. There is no scientific material available to demonstrate that medical harm amongst type IV classification, particularly the practice of Khafz/FC, i.e. a nick on the prepuce.

1.17. There are no reports or studies of the WHO that would conclude that Khafz/FC as practiced by the Dawoodi Bohra Community would result in any physical or psychological harm.

1.18. Several of these reports of WHO clearly indicate that they are not in the Indian context at all and particularly in the context of the Dawoodi Bohra community.

1.19. All these reports on FGM/FGC are to be kept in mind in relation to the atrocities prevalent in Africa. FC is completely different from FGM/FGC contextually and in reality.

1.20. WHO reports are general, inclusive and broad based with a view to prevent the practice as prevalent in Africa and other nations similarly situated.

1.21. There is no detailed discussion on the fourth Type whilst on Types 1, 2 and 3 there are detailed discussions

1.22. WHO has conceded that genital cosmetic surgery (i.e. hoodectomy) which is more invasive than the practice undertaken by the Dawoodi Bohra Community (being nothing more than a nick on the prepuce) has been unfairly categorized into the definition of FGM for the purpose of maintaining a broad definition.

In the Supreme Court of India

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NOTE VI

PRINCIPLES EMERGING FROM THE RELIGIOUS TEXTS (HADITHS)

1. The first person to be circumcised was Ibrahim at the onset of his 80th year of age. He was told to purify, thus giving rise to the following elements of *al-taharah* (ritual purity) which are mandatory:
   i) Trim moustache
   ii) Pare nails
   iii) Remove hair from armpits
   iv) Shave pubes
   v) Circumcision
   vi) Shave head (this element is only found in Al-Taharah)
   - Sr. No. 1 @ Pg. 3 (Book: Da'aim al-Islam Vol. 1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
   - Sr. No. 2 @ Pg. 6 (Book: Al-Taharah / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
   - Sr. No. 4 @ Pg. 12 (Book: Al-Akhbaar fi al-Fiqh / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
   - Sr. No. 8 @ Pg. 27 (Book: al-Wadiyyah / Author: Syedna Ahmed Hamiduddin al-Kirmani / Year: Circa 11th Century)
   - Sr. No. 9 @ Pg. 36 to 40 (Book: Taweel al-Da'aim Vol. 1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)

2. Circumcision in Nature
   - Sr. No. 1 @ Pg. 3 (Book: Da'aim al-Islam Vol. 1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
   - Sr. No. 2 @ Pg. 6 (Book: Al-Taharah / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
   - Sr. No. 9 @ Pg. 36 to 40 (Book: Taweel al-Da'aim Vol. 1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)

3. Exoterically, *khitaan* is the cutting of the covering of the glans of the penis and what protrudes from the vulva i.e. the prepuce of the clitoris. The cutting of what protrudes from the vulva is also called *khafd*.
   - Sr. No. 9 @ Pg. 36 to 40 (Book: Taweel al-Da'aim Vol. 1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)

4. The statement of the Prophet "*Al-khitaan al-fitrah*" in its exoteric sense is from among those which inform that this is how, at the outset of a foetus' development in its mother's womb, the glans of the baby's penis is visible. Then as it (his stay in the mother's womb) continues, the foreskin of the glans loosens and covers it (the glans).
   - Sr. No. 9 @ Pg. 36 to 40 (Book: Taweel al-Da'aim Vol. 1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)

5. The penis, esoterically, symbolises the tongue; its actions symbolize words; the vagina, esoterically, symbolizes the ear, and its receptor symbolizes hearing. Likewise, esoterically, the interaction of knowledge between the tutor and the

disciple is symbolized by the intercourse between man, who symbolizes the tutor, and woman, who symbolizes the disciple. Circumcision, which is the cutting and unsheathing of the foreskin that covers the glans, esoterically symbolizes the disclosure of esoteric meaning from exoteric knowledge by verbal communication to/for someone who deserves it. And as esoteric knowledge came into existence first, then exoteric knowledge was created later as a veil to conceal it, similarly the symbolism of a young boy, who as long as he is uncircumcised, symbolizes one who has not been imparted with esoteric knowledge. When his tutelage/instruction is mandated, and esoteric knowledge is imparted to him, it is also symbolized by circumcision. That is why exoterically it is said of someone who is circumcised that he has become purified. The esoteric meaning of this applies to the tutor and disciple, as per what we have mentioned. As for the circumcision of girls, it is the cutting of the part that protrudes from the lips of the vulva. Esoterically, it symbolizes the suspension of what the disciple, who symbolises the woman, may disclose of the esoteric knowledge that is imparted to him before being permitted to do so, after which he would enter the level of men, and their likeness in the esoteric sense.

- **Sr. No. 9 @ Pg. 36 to 40 (Book: Taweel al-Da'aim Vol. 1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)**

6. An uncircumcised person should not be left in that state in Islam (i.e. after he becomes a Muslim) until he is circumcised even if he has reached the age of 80
   - Sr. No. 1 @ Pg. 3 (Book: Da'aim al-Islam Vol. 1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
   - Sr. No. 2 @ Pg. 6 (Book: Al-Taharah / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
   - Sr. No. 3 @ Pg. 9 (Book: al-Muntakhabah fi al-Fiqh V1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
   - Sr. No. 4 @ Pg. 12 (Book: Al-Akhbaar fi al-Fiqh / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
   - Sr. No. 6 @ Pg. 23 (Book: Al-Hawashi V1 / Questions Answered by the Duat of Yemen / Year: Circa 14th Century)
   - Sr. No. 9 @ Pg. 36 to 40 (Book: Taweel al-Da'aim Vol. 1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)

7. Esoterically, the above principle (at point 6), refers to someone who has submitted himself to the Companions of Allah, and answered their calls; such a person should not be left with only exoteric knowledge of his religion, but rather, esoteric knowledge should be revealed to him, and wisdom be imparted to him, even if he has reached an elderly age - where people like him would not still be in the learning stage, which is normally known to be the case in the outwardly affairs of the people. Therefore, he has no option but to learn such knowledge, the ignorance of which does not behove him. That is why The Prophet stated *"To seek knowledge is obligatory upon every Muslim man and woman."* .
   - **Sr. No. 9 @ Pg. 36 to 40 (Book: Taweel al-Da'aim Vol. 1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)**

8. When you circumcise your daughters, retain part of it, for it is purer for their colour, and more favourable for them near their husbands and for their husbands and it is safer
   - Sr. No. 1 @ Pg. 3 (Book: Da'aim al-Islam Vol. 1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
   - Sr. No. 2 @ Pg. 6 (Book: Al-Taharah / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
   - Sr. No. 3 @ Pg. 9 (Book: al-Muntakhabah fi al-Fiqh V1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
   - Sr. No. 4 @ Pg. 12 (Book: Al-Akhbaar fi al-Fiqh / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)

- Sr. No. 6 @ Pg. 23 (Book: Al-Hawashi V1 / Questions Answered by the Duat of Yemen / Year: Circa 14th Century)
- Sr. No. 8 @ Pg. 27 (Book: al-Wadiyyah / Author: Syedna Ahmed Hamiduddin al-Kirmani / Year: Circa 11th Century)
- Sr. No. 9 @ Pg. 36 to 40 (Book: Taweel al-Da'aim Vol. 1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)

9. The esoteric meaning of the above principle (at point 8) is that it does not behove the *muhrim* (one unauthorised to divulge esoteric knowledge) that he be prohibited from disclosing or speaking of anything that he has heard to the extent of not uttering a word of it. However, he should be sworn to conceal the esoteric knowledge that he learns of, and not disclose it to those who do not share a common group of instruction with him, nor with those who do, by way of instruction and teaching, until he is authorised and permitted to do so. However, should his tutor, or someone superior to him ask him, to test whether he has retained and remembered what he has acquired, he is allowed to reply with what he has learnt and remembered of esoteric knowledge; this would be more preserving for his knowledge, for when he would be asked, he would reply, and hence remember it. This is symbolized by his words, "more preserving for their colour". It is also more favourable for him near his tutor, for when the tutor learns that his disciple has remembered what he has taught, and that he has upheld it, the disciple becomes more favourable towards him, as it is narrated that this is "more favourable for them near their husbands." As we have mentioned earlier, the esoteric meaning of husbands is the tutors. Similarly, exoterically, a woman whom part of her prepuce is retained and not entirely excised, is more pleasurable for husbands and more favourable near them.
   - Sr. No. 9 @ Pg. 36 to 40 (Book: Taweel al-Da'aim Vol. 1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)

10. Expedite your children's circumcision, for it is purer for them. A girl should not be circumcised before she reaches the age of 7 years
    - Sr. No. 1 @ Pg. 3 (Book: Da'aim al-Islam Vol. 1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
    - Sr. No. 2 @ Pg. 6 (Book: Al-Taharah / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
    - Sr. No. 3 @ Pg. 9 (Book: al-Muntakhabah fi al-Fiqh V1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
    - Sr. No. 4 @ Pg. 12 (Book: Al-Akhbaar fi al-Fiqh / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
    - Sr. No. 5 @ Pg. 14 (Book: al-Iqtisar V1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
    - Sr. No. 8 @ Pg. 27 (Book: al-Wadiyyah / Author: Syedna Ahmed Hamiduddin al-Kirmani / Year: Circa 11th Century)
    - Sr. No. 9 @ Pg. 36 to 40 (Book: Taweel al-Da'aim Vol. 1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
    - Sr. No. 13 @ Pg. 53 (Book: al-Iqtibasat al-Nooraniyah / Author: 52nd Dai, Syedna Mohammed Burhanuddin / Year: May 1998 CE)

11. The esoteric meaning of the principle stated above (at point 10) is the dai's (a rank in the Dawat hierarchy) hastening to impart esoteric knowledge to those he calls unto; for they are his children in the esoteric sense by religious birth, he does this by disclosing esoteric knowledge after he has taken their oath. He should not leave them confused and without enlightenment; thirsty and unsatiated. His words, "for it is purer for them" refers to purity of faith and belief. Exoterically as well, when a boy remains uncircumcised, he smells foul, and smegma accumulates between his glans and foreskin. Hence, to expedite his circumcision is purer for him, and the same is mandated exoterically and considered preferable to be carried out. Next are his words "Do not circumcise your daughters until they reach the age of seven years of age." Its esoteric meaning is

that the initiated believer should not be prevented from disclosing esoteric knowledge until he passes the seven stages, after which esoteric knowledge should be imparted to him, from which he should be prevented and prohibited to disclose. It has been mentioned earlier that the part that exceeds from the vulva symbolizes the disclosure of esoteric knowledge.

- Sr. No. 9 @ Pg. 36 to 40 (Book: Taweel al-Da'aim Vol. 1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)

12. If he was born circumcised i.e. the glans or most of it is visible, he should not be forced to circumcise
    - Sr. No. 6 @ Pg. 23 (Book: Al-Hawashi V1 / Questions Answered by the Duat of Yemen / Year: Circa 14th Century)
    - Sr. No. 9 @ Pg. 36 to 40 (Book: Taweel al-Da'aim Vol. 1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
    - Sr. No. 13 @ Pg. 53 (Book: al-Iqtibasat al-Nooraniyah / Author: 52nd Dai, Syedna Mohammed Burhanuddin / Year: May 1998 CE)

13. Circumcision is called *i'zaar* because the foreskin that covers the glans is a defect, because it is not part of the original creation. When one is circumcised, that defect is removed from him.
    - Sr. No. 7 @ Pg. 25 (Book: Al-Najaah fi Ma'refat Ahkaam al-Nikaah / Author: Al-Shaikh al-Fadil Syedi Ibrahimji al-Saifee / Year: Circa early 19th Century)

14. The preferred *Sunnah* (Prophetic tradition) is that a person be circumcised after his death if he was a child
    - Sr. No. 6 @ Pg. 23 (Book: Al-Hawashi V1 / Questions Answered by the Duat of Yemen / Year: Circa 14th Century)

15. An uncircumcised person may engage in sexual intercourse and one may eat the food cooked by an uncircumcised woman. However, the *Sunnah* (Prophetic tradition) is to expedite circumcision
    - Sr. No. 6 @ Pg. 23 (Book: Al-Hawashi V1 / Questions Answered by the Duat of Yemen / Year: Circa 14th Century)

16. A circumciser is liable to pay blood money if the glans of a boy are cut or the area of the prescribed cut is exceeded for girls
    - Sr. No. 10 @ Pg. 43 (Book: Da'aim al-Islam Vol. 2 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
    - Sr. No. 11 @ Pg. 46 (Book: Mukhtasar al-Athaar Vol. 2 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
    - Sr. No. 12 @ Pg. 49 (Book: al-Muntakhabah fi al-Fiqh V2 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)

17. Where there is intercourse, irrespective of whether he has ejaculated or not, if the two circumcised parts have come together i.e. the disappearance of the glans i.e. the head of the penis in the vulva, a ritual bath is mandated
    - Sr. No. 14 @ Pg. 55 (Book: Da'aim al-Islam Vol. 1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
    - Sr. No. 15 @ Pg. 57 (Book: Mukhtasar al-Athaar Vol. 1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
    - Sr. No. 16 @ Pg. 59 (Book: al-Iqtisaar V1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
    - Sr. No. 17 @ Pg. 61 (Book: Al-Akhbaar fi al-Fiqh / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)
    - Sr. No. 18 @ Pg. 63 (Book: Al-Taharah / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)

18. Abu Ja'far Mohammed b. Ali (4th Imam) said the edifice of Islam has been built on seven pillars:
    i) al-walayah (love and allegiance), which is superior to all, and by it and by the wali (the master; the imam or dai to whom allegiance is obligatory) the knowledge of others is to be attained
    ii) al-taharah (ritual purity)
    iii) al-salaah (ritual prayers)
    iv) al-zakaah (ritual monetary dues)
    v) al-sawm (ritual fasting)
    vi) al-hajj
    vii) al-jihaad (to strive within oneself and without)
    - **Sr. No. 9 @ Pg. 36 to 40 (Book: Taweel al-Da'aim Vol. 1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)**
    - **Sr. No. 19 @ Pg. 65 (Book: Da'aim al-Islam Vol. 1 / Author: Syedna al-Qadi al-Nu'man / Year: Circa 10th Century)**
    - **Sr. No. 20 @ Pg. 71 (Book: Uyoon al-Akhbaar Vol. 6 / Author: 19th Dai al-Mutlaq, Syedna Idris Imaduddin / Year: Circa 15th Century)**

19. The 14th Imam al-Mui'zz le-Deenillah turned to al-Qadi al-Nu'man and said "You, O' Nu'man are the one intended by that statement in these times." He then commissioned him to compose the book Da'aim al-Islam, and he laid down the principles of jurisprudence, defined its branches, and related to him the authentic traditions of the Prophet on the authority of his forefathers from the Messenger of Allah sans the false traditions which the narrators did not agree upon and had been fabricated and collected. ... Al-Qadi al-Nu'man b. Mohammed completed the composition of this book, called Da'aim al-Islam according to what the Commander of the Faithful, al-Mu'izz le-Deenillah (14th Imam) had specified and laid down. Al-Qadi al-Nu'man used to present the book part by part and chapter by chapter and he (14th Imam) would affirm what was to be affirmed, correct whatever needed to be corrected and fill the gaps. Until he eventually completed it, and it turned out to be a comprehensive yet succinct book of the greatest exactitude.
    - **Sr. No. 20 @ Pg. 71 & 72 (Book: Uyoon al-Akhbaar Vol. 6 / Author: 19th Dai al-Mutlaq, Syedna Idris Imaduddin / Year: Circa 15th Century)**

20. Allah has ranked the words of his own, then the words of Prophet, then Ali, then Imams from their progeny, then words of the established scholars, the wise leaders, from among the 'young men' who are their Duat, the guardians of the secrets of their knowledge, the ones who strive in raising their standards, and who are the leaders of the community of their Dawat's followers.
    - **Sr. No. 21 @ Pg. 74 (Book: Tasbeeh Zahab al-Quds / Author: 51st Dai, Syedna Taher Saifuddin / Year: 1962-63)**

In the Supreme Court of India

Original Civil Writ Jurisdiction

Under Article 32 of the Constitution of India

Writ Petition (Civil) No. 286 of 2017

Ms. Sunita Tiwari ... Petitioner

Versus

Union of India & Ors. ... Respondents

NOTE VII

NOTE ON HEALTH ARTICLES

(a) **Dr. Emily Banks et al – Female Genital Mutilation and Obstetric Outcome: WHO Collaborative Prospective Study in Six African Countries (The Lancet 2006 – Vol. 367 June 3, 2006) @ Pg. 9 of Annexure B in I.A. No. 94731 of 2018 (For Additional Documents)**

i) A WHO Study Group was commissioned to ascertain whether obstetric outcomes differ between women who have and those who have not had FGM. The aim of this study was to investigate the effects of different types of FGM on a range of maternal and neonatal outcomes during and immediately after delivery. **(@ Pgs. 9 & 15)**

ii) Data from 28,393 women was assimilated, analyzed against various obstetric parameters and compared, on each parameter, with results from women with no FGM which constituted the reference group. The study concluded that women with FGM are significantly more likely than those without FGM to have adverse obstetric outcomes. Risks seem to be greater with more extensive FGM. **(@ Pgs. 9 & 11)**

iii) The study did not consider any women who had undergone what is classified as Type IV FGM by the WHO. Furthermore, with reference to the group of women who had undergone Type I FGM, it was observed that there were minimal deviations from the reference group of women who had not undergone FGM. **(@ Pgs. 9, 10 & 13)**

(b) **Sara Johnsdotter and Birgitta Essen – Genitals and Ethnicity: The Politics of Genital Modifications (Published in the Reproductive Health Matters Journal 2010) @ Pg. 17 of Annexure B in I.A. No. 94731 of 2018 (For Additional Documents)**

i) The authors make a strong argument on the juxtaposition of FGM with genital cosmetic surgery and the discrepancies in the attitudes towards them. While even pricking is prohibited according to the WHO, genital cosmetic surgeries which involve labia and clitoral tissue reduction are common. **(@ Pg. 17)**

(c) Carla Obermeyer – Female Genital Surgeries: The Known, the Unknown and the Unknowable (Published in the Medical Anthropology Quarterly 1999) and The Consequences of Female Circumcision for Health and Sexuality: An Update on the Evidence (Published in Culture, Health & Sexuality, September – October 2005 7(5) 443-461: Routledge) @ Pgs. 26 & 55 of Annexure B in I.A. No. 94731 of 2018 (For Additional Documents)

i) Carla Obermeyer formerly of the Department of Population and International Health, Harvard University and a scientist associated with the Department of Gender, Women and Health at the WHO, has presented several papers on the issue of FGM/FGC. It is her well-known position that the health effects of FGM need to be reviewed through more rigorous

research, as the current beliefs propagated by WHO and the anti-FGM activists, and which have unfortunately become the accepted public narrative, do not stand up to even the most cursory of scientific enquiry. **(@ Pg. 27)**

ii) In the paper titled "*Female Genital Surgeries*" (1999), she conducted an in-depth review of the existing medical literature on ritual female genital cuttings and its associated health risks. On the review of 435 articles spanning the years 1966 to 1996, written in the context of FGM/FGC as practiced in Africa, she concluded that there was no medical evidence that would suggest that a woman who had undergone FGM/FGC had any detrimental health issues a result of such procedure. **(@ Pgs. 29 & 45)**

iii) This was followed by an update in 2005 titled "*The Consequences of Female Circumcision for Health and Sexuality: An Update on the Evidence*" where she concluded that although there is a growing body of evidence on health that indicated that female circumcision is associated with some health conditions, no statistically significant associations were documented. This paper entailed a scrutiny of the various studies and publications from 1997 to 2005. In particular, this paper concluded that the available evidence does not support the notion that circumcision precludes sexual activity or the enjoyment of sexual relations. **(@ Pgs. 71 & 72)**

(d) **Bettina Shell-Duncan – The Medicalization of Female "Circumcision": Harm Reduction or Promotion of a Dangerous Practice? (Published in Social Science & Medicine Journal 2001) @ Pg. 75 of Annexure B in I.A. No. 94731 of 2018 (For Additional Documents)**

i) Bettina Shell-Duncan from the Department of Anthropology, University of Washington, sought to conceptualize the medicalization of female circumcision as a harm-reduction strategy, which would aim to minimize the health hazards associated with risky behavior. Her article would reveal that there is not sufficient evidence to support staunch opposition to medicalization. **(@ Pg. 75)**

ii) A study conducted by Shell-Duncan et al (2000) had revealed that where the procedure was carried out by traditional circumcisers, even with minimal medical interventions, it resulted in a nearly 70% lower risk of immediate complications i.e. a marked reduced health risk. **(@ Pg. 79)**

iii) Several other papers and publications would reveal that the available information on long-term and obstetrical complications is quite sparse and many reported conditions may arise from factors other than genital cutting, and without further information, it was impossible to determine whether the reported conditions were circumcision related. **(@ Pg. 78)**

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In the Supreme Court of India

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Writ Petition (Civil) No. 286 of 2017

Ms. Sunita Tiwari ... Petitioner

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NOTE VIII

NOTE ON INTERNATIONAL TREATIES AND CONVENTIONS

1. The Petitioners have placed reliance on the following materials of international law to support their stand for the abolition of the practice of Khafz / FC.

i) Universal Declaration of Human Rights ("**UDHR**");

ii) United Nations Convention on the Rights of the Child ("**UN-CRC**");

iii) United Nations General Assembly Resolution No. 67/146 '**Intensifying Global Efforts for the Elimination of Female Genital Mutilation**' ("**G.A.R. No. 67/146**")

2. The Universal Declaration of Human Rights

i) The UDHR was adopted by the United Nations General Assembly on 10th December 1948 without any dissent. The applicants rely on the following Articles.

ii) Article 2 of the UDHR provides that:

"*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.*" (Emphasis supplied)

iii) Article 18 of the UDHR provides that:

"*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.*" (Emphasis supplied)

3. United Nations Convention on the Rights of the Child

i) The UN-CRC was adopted by the General Assembly and opened for signature on 20th November 1989. India ratified the UN-CRC in 1992.The applicants rely on the following articles.

ii) Article 14 of the UN-CRC provides as follows:

"*1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.*

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.*" (Emphasis supplied)

iii) Article 30 of the UN-CRC provides as follows:

"*In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.*" (Emphasis supplied)

4. **United Nations General Assembly Resolution No. 67/146**

i) G.A.R. No. 67/146 was adopted on 20th December 2012, without a vote.

ii) General Assembly Resolutions are not binding on its members. It is not a legislature in that sense, and its resolutions are purely recommendatory. The Assembly is essentially a debating chamber, a forum for the exchange of ideas and the discussion of a wide-ranging category of problems. (*Malcom M. Shaw, International Law, Cambridge: 6th edn., at pg. 1212*)

iii) The G.A.R. No. 67/146 is therefore not a binding document or treatise. An analysis of G.A.R. No. 67/146 and the several conventions, treaties and materials referred to / discussed therein, clearly demonstrates that the practice of Female Genital Mutilation (as defined by the WHO) does not consider the practice of Khafz / FC and the religious mandate / basis thereof amongst the Dawoodi Bohra Community.

5. Sections 2(1)(d) and (f) of the Protection of Human Rights Act, 1993 read as follows:

"*2. **Definitions** – (1) In this Act, unless the context otherwise requires –*
(a) – (c)
*(d) "**human rights**" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India;*
(e) ..
*(f) "**International Covenants**" means the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on 16-12-1966 and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification specify;"*

From a reading of the above definitions, it is clear that apart from the rights conferred by the Constitution of India, it is only the rights embodied in International Covenants that would constitute human rights. International Covenants as defined in the Protection of Human Rights Act, 1993 does not include General Assembly Resolutions which, as stated above, are merely recommendatory in nature.

6. The relevant case law dealing with the enforceability of International Treatise and Conventions are summarized herein below.

i) International conventions must go through the process of municipal law before the international treaty can become internal law.
- *Jolly George Verghese* v. *Bank of Cochin* AIR 1980 SC 470 (para 6)

(In this case, there was an inconsistency between the provisions of the CPC which permitted the imprisonment of a person for failing to discharge

contractual obligations and the International Covenant on Civil and Political Rights which specifically prohibited imprisonment on this ground)

ii) The remedy for breaches of International Law is not to be found in law courts of the country because international law per se or *proprio vigore* has not the force of authority of civil law until under the inspiration of international law, actual legislation is undertaken.
   - *Jolly George Verghese* v. *Bank of Cochin* AIR 1980 SC 470 (para 6) following *Xavier* v. *Canara Bank Ltd.* (1969 Ker LT 927)

iii) Whilst the Constitution of India supports all conventions and declarations which call for gender equality, the Constitution preserves "Personal Law" through which religious communities and denominations have governed themselves as an exception. International conventions and declarations are of no avail because practice of talaq-e-biddat is a component of personal law and has the protection of Article 25.
   - *Shayara Bano* v. *Union of India* (2017) 9 SCC 1 (para 376 and 377) (Dissenting Opinion)

iv) In the absence of domestic laws, the contents of international conventions and norms attain significance. Any international convention, not inconsistent with the fundamental rights guaranteed by the Constitution of India, and which are in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.
   - *Vishaka* v. *State of Rajasthan* (1997) 6 SCC 241 (paras 7 and 14)
   - *National Legal Services Authority* v. *Union of India & Ors.* (2014) 5 SCC 438 (para 58)

v) The actions of Governments can only be lawful when exercised within the four corners of constitutional permissibility. No treaty can be entered into, or interpreted, such that constitutional fealty is derogated from.
   - *Ram Jethmalani* v. *Union of India* (2011) 8 SCC 1 (para 81)

vi) Where there is a contradiction between international law and a domestic statute, the Court would give effect to the latter.
   - *Justice K. S. Puttaswamy* v. *Union of India* (2017) 10 SCC 1 (para 154)
   - *National Legal Services Authority* v. *Union of India & Ors.* (2014) 5 SCC 438 (para 58)

vii) Observations of several judgments make it clear that in the absence of any specific prohibition in municipal law, international law forms part of Indian law and consequently must be read into or as part of our fundamental rights.
   - *Justice K. S. Puttaswamy* v. *Union of India* (2017) 10 SCC 1 (para 462)
   - *Safai karamchari Andolan* v. *Union of India & Ors.* (2014) 11 SCC 224 (para 16)
   - *Apparel Export Promotion Council* v. *A.K Chopra* (1999) 1 SCC 759 (para 26)
   - *People's Union for Civil Liberties* v. *Union of India & Anr.* (1997) 3 SCC 433 (para 13)

viii) In cases involving violation of human rights, the courts must forever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field.
   - *Apparel Export Promotion Council* v. *A.K Chopra* (1999) 1 SCC 759 (para 27)

ix) Human Rights are the basic, inherent, immutable and inalienable rights to which a person is entitled simply by virtue of his being born a human. Possibly

considering the wide sweep of such basic rights, the definition of "human rights" in the 1993 Act has been designedly kept very broad to encompass within it all the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India. Thus, if a person has been guaranteed certain rights either under the Constitution or under an International Covenant or under a law, and he is denied access to such right, then it amounts to a clear violation of his human rights and NHRC has the jurisdiction to intervene for protecting it.

- *Ram Deo Chauhan* v. *Bani Kanta Das* (2010) 14 SCC 209 (Paras 47 and 49)

In the Supreme Court of India

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NOTE IX

NOTE ON MALE CIRCUMCISION

(a) S. Bcier, et. al., "At What Age Range Should Children Be Circumcised?", (Iran Red Crescent Med J., 17(3), March 2015, DOI: 10.5812/ircmj.26258) at Pg. 1 of Annx. D in I.A. No. 94731 of 2018

i. The practice of male circumcision has been performed for thousands of years. It is the most frequently implemented surgical intervention in children, and one third of all the men in the world are circumcised. (@ Pg. 1)

ii. Circumcision is routinely performed in Muslim and Jewish cultures, however Muslims perform circumcision at age 6, whereas Jews perform it immediately after birth. (@ Pg. 1)

iii. Male Circumcision is a painful surgical procedure involving hospitalisation and with the possibility of surgical complications. It requires the use of appropriate anaesthesia and postoperative analgesia. Use of general anaesthesia on children less than one year in age increases respiratory problems after the circumcision. It is not clear whether neo-natal circumcision (as opposed to circumcision performed on older children) results in fewer or larger complications. However, performing neo-natal circumcision requires a more experienced surgeon. (@ Pgs. 2 – 3)

(b) World Health Organisation / UNAIDS: "Manual for Male Circumcision under Local Anaesthesia", (Version 3.1, Dec 2009) at Pg. 11 of Annx. D in I.A. No. 94731 of 2018

i. Male circumcision has been performed on boys and young men for many years, primarily for religious and cultural reasons or as a rite of passage to mark the transition to adulthood. Data from cross-sectional epidemiological studies conducted since the mid-1980s showed that circumcised men have a lower prevalence of HIV infection than uncircumcised men. (@ Pg. 11)

ii. Some of the known health risks to performing male circumcision include – pain, bleeding, haematoma, infection at the site of the circumcision, increased sensitivity of the glans penis for the first few months after the procedure, irritation of the glans, meatitis, injury to the penis, adverse reaction to the anaesthetic used. (@ Pgs. 17 – 18)

iii. Circumcision of infants and pre-pubertal boys is simpler than circumcision of older boys and adults, because the penis is relatively underdeveloped and the foreskin less vascular. Healing is quick and complication rates are low. A major disadvantage is that the child cannot give consent for the procedure. (@ Pg. 113)

iv. Injecting anaesthesia in infants / pre-pubertal boys involves using a fine needle at the 10 and 12 o'clock positions at the base of the penis. Before injecting any local anaesthetic the surgeon should gently aspirate to make sure no blood enters the syringe. This is to ensure that anaesthetic is not injected into a blood vessel. This is a safety precaution is required to be repeated each time the needle is moved and before any additional local anaesthetic is injected. (@ Pg. 115)

v. It is necessary to hold the infants during the procedure to ensure that they do not wriggle. (@ Page 116)

vi. In infants and children the foreskin is commonly fused to the glans by fine adhesions. These adhesions are normal. Before circumcision is performed, it is necessary to separate them. Before the foreskin can be retracted it may be necessary to stretch the opening with artery forceps. Care must be taken to avoid putting the tips of the forceps into the urethral meatus in order to avoid injury. Once the opening has been dilated, the foreskin is slowly retracted and adhesions separated by running a blunt probe around the glans or using gauze to separate the glans from the foreskin, until the corona is exposed. (@ Pg. 118)

vii. There are four techniques for circumcision of children, viz., Dorsal Slit method, Plasitbell method, Mogen clamp method and the Gomco clamp method. (@ Pg. 119)

viii. Each of the four methods carries risks, including that of urethral and other injuries and possible partial glans amputation or laceration. (See table @ Pg. 120)

(c) **B.J. Morris, et. al., Estimation of country-specific and global prevalence of male circumcision, (Population Health Metrics, 2016, DOI: 10.1186/s12963-016-0073-5) at Pg. 186 of Annx. D**

i. This paper estimates that a total of 13.5% of India's male population is circumcised. (@ Pg. 189)

ii. It is also evident from the paper that countries with higher Muslim populations have a higher rate of male circumcision thereby indicating that the same is performed primarily for religious reasons. (@ Pgs. 189 – 192)

(d) **A. Abdulwahab-Ahmed, "Techniques of Male Circumcision", (Journal of Surgical Technique and Case Report, Vol. 5, Issue 1, Jan-Jun 2013) at Pg. 199 of Annx. D**

i. About 25-33% of the total world male population is circumcised. Circumcision is arguably the oldest surgical procedure in history. Religious circumcision is practised by the Jews; religious and cultural circumcision is

also practised by Muslims, Black Africans, Australians aborigines, and other ethnic groups in different parts of the world. In Western societies, circumcision is mostly performed for medical reasons. (@ Pg. 199)

ii. Currently, the public health benefits of male circumcision are topic of interest particularly as regards human immunodeficiency virus (HIV) prevention. It is shown to reduce the risk of transmission of HIV infection in heterosexuals. Its benefits in reducing the risk of urinary tract infection in boys and reduction in transmission of other sexually transmitted infections are well documented. (@ Pg. 199)

iii. The paper discusses various methods to perform the circumcision, including Plastibell, Gomco, Zhenxi Rings, Tara Klamp, Smart Klamp, Shang Ring, PrePex, the Forceps Guided technique, Dorsal slit technique and Excision (@ Pgs. 200 - 202)

iv. The paper notes the possibility of the following complications of circumcision - excessive bleeding, concealed penis, phimosis, the formation of a skin bridge, possibility of infection, urinary retention, formation of urethrocutaneous fistulas, necrosis, latrogenic hypospadias and epispadias.