

## India - Sunita Tiwari v. Union of India (pending)

### Reactive strategy: How India's FGM movement engaged with unforeseen litigation

This case provides a study of how movements have responded when litigation occurs in circumstances beyond their control, requiring anti-FGM activists and organisations to respond rather than lead the litigation process. This case study from India provides an excellent example of how to effectively engage in and support litigation despite not being the original litigant.

#### Case origins

In 2017, an independent Indian lawyer specialising in children's rights was shocked to learn through media stories that FGM was taking place in India. Appalled that girls in India were still routinely being subjected to such a grave human rights abuse in the Bohra community, she drafted and filed a Public Interest Litigation (PIL) before the Indian Supreme Court, driven by her concern for the girls harmed in this way.<sup>1</sup>

The petition asked the Court to:

- ◆ Declare the practice of FGM (known as khatna/khafz by the Bohra community) as a violation of the fundamental rights of women and girls;
- ◆ Direct the Indian Government to comply with its international human rights obligations by framing anti-FGM laws and policies;
- ◆ Prosecute cases of FGM under existing criminal laws.

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*“At the time this case was filed, we were just beginning to grow our community outreach. We were engaging with survivors of FGM from our community and trying to understand various obstacles they faced in speaking out. We were survivors ourselves, not trained social workers or serial litigators. So the decision to intervene in the Supreme Court Public Interest Litigation (PIL) was not an easy one, especially with regard to bearing the financial costs. But we also viewed this as an opportunity to make our voices heard. Our lived experiences legitimized the prayers in the PIL. Attempts to reach out to the religious head of the Bohra community were also in vain. Joining the case implied we were serious about our demands for change.”* - **Masooma Ranalvi, founder of WeSpeakOut and survivor activist**

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1 Sunita Tiwari v. Union of India W.P. (C) No. 286/2017

## Landmark petition

This landmark petition was the first time that a case about FGM had been heard in Asia when it was taken up by the Indian Supreme Court in 2017. In 2018, the three-judge bench hearing the issue made oral remarks<sup>2</sup> during the hearing that were supportive of the PIL, stating that:

- ◆ FGM appears to be a violation of the right to privacy (guaranteed by the Indian Constitution) and the bodily integrity of the child<sup>3</sup>;
- ◆ There seems to be no scientific or medical basis for FGM, a practice likely to cause significant trauma, pain, and bleeding<sup>4</sup>.

However, the surprise filing of the petition had unintended consequences for the existing anti-FGM movement, with organisations working with the community being caught off guard and facing barriers to continuing their community outreach work.

## Collaboration

The anti-FGM movement in India was caught off guard by the filing of the PIL, as they were neither consulted nor informed that it would be lodged. Because the original PIL had been drafted without the expert input of survivors, people from the Bohra community, or India's anti-FGM movement, it was wide open to criticism by opponents for being reductive and inaccurate about survivors, their communities, and the nature of the practice of FGM in India. Understanding the need to ensure that the perspective of survivors and members of the Bohra community was included in the case, anti-FGM organisation WeSpeakOut supported their founder and activist survivor, Masooma Ranalvi, in filing an intervention petition to the PIL, bringing authentic lived experience through the inclusion of survivor voices. Equality Now provided back-end support to Masooma's intervention petition. It aimed to strengthen the PIL by bringing in comparative legal experiences from other countries to address the lack of jurisprudence in India that the judges could draw upon, as well as addressing the 'right to religion' arguments raised by the opposition. Another intervention petition in this case was filed by Dilshad Tavawalla and Shaheeda Kirtane, a mother-daughter pair from the Bohra community, who flew down from Canada to file their intervention petition.

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*"...We read the contents of her original petition, and it was shockingly reductive. A lot of sweeping statements about the community and about survivors and about the nature of the practice. With a case filed before the Supreme Court, there is only one chance to get it right (since there is no appeal available). That's why we were relieved when Masooma filed her intervention petition, to bring a survivor's perspective and strong legal arguments to bolster the case. Then we knew that the PIL was in good hands" - Aarefa Johari, Co-founder, Sahiyo India*

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<sup>2</sup> SC Observer, *Ban on Female Genital Mutilation: Sunita Tiwari v. Union of India*, <https://www.scobserver.in/cases/sunita-tiwari-union-of-india-ban-on-female-genital-mutilation-case-background/>

<sup>3</sup> New Indian Express, *Female Genital Mutilation Violative of Constitutional Rights: Supreme Court*, <https://www.newindianexpress.com/nation/2018/Jul/30/female-genital-mutilation-violative-of-constitutional-rights-supreme-court-1850779.html>

<sup>4</sup> First Post, *SC Questions Rationale Behind Female Genital Mutilation*, 31 July 2018, <https://www.firstpost.com/india/sc-questions-rationale-behind-female-genital-mutilation-says-it-cant-direct-doctors-to-perform-procedure-4862561.html>

These two intervention petitions filed by women from the Dawoodi Bohra community provided evidence on the continued high prevalence of the practice in the community, the medical harms of FGM, and the impact of undergoing FGM on their physical and mental health as survivors of the practice.

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*“It was definitely a landmark petition because it was the first time that any case on FGM in Asia had been introduced. So we thought it was really important [to be involved] especially if the Supreme Court gave a favourable decision and declared [FGM] as a violation of constitutional rights.”* - **Divya Srinivasan, Global Lead End Harmful Practices, Equality Now**

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## Challenges

The opposition framed the PIL as an attack on religious freedom, stoking community perceptions of religious persecution, and weakening the human rights focus of the PIL. One of the key results of this was the establishment of the Dawoodi Bohra Women’s Association for Religious Freedom (DBWRF), which vocally opposed the PIL and intervened before the Supreme Court. The DBWRF was formed with the explicit purpose of opposing the PIL and supporting the practice of FGM in the Dawoodi Bohra community. The DBWRF claimed to represent 69,000 women from the Bohra community, a figure that is thought to be greatly inflated and the result of misleading sign-up procedures for the organisation.

Related to this were the deeply entrenched social mores surrounding discussions of sex and one’s body for women and girls in the community. DBWRF sought to position khatna/khafz as a traditional religious practice and took a stance before the Supreme Court that khafz, as practised by the Bohra community, could not be equated to FGM, and was an essential religious practice that should be protected by the Court.

They also used the fact that the original petitioner (Sunita Tiwari) was from outside the community to claim that her views on khafz were misinformed, and linked this supposed attack to community experiences of Islamophobia. It is important to note, however, that a similar position would likely have been taken irrespective of who filed the petition. Additionally, misleading and incorrect arguments were used to support the opposition to the petition, including an affidavit by a doctor claiming that circumcision helps to avert cancer.

## Missing data and delays

In a surprising turn of events, in its written submissions before the Court, the Government stated that, “...there was no official data or study (by the National Crime Records Bureau, etc) which supports the existence of female genital mutilation in India.”<sup>5</sup>

This was a baffling and illogical statement, given that there is no specific offence of FGM in Indian criminal law, making it an impossibility for the National Crime Records Bureau to collect specific data on something not yet criminalised.

With the support of the Government, lawyers opposing the PIL on behalf of DBWRF successfully pushed for the case to be referred to a nine-judge constitutional bench to consider whether any directions addressing FGM would violate the right to religious freedom protected by Article 25 of the Indian Constitution.<sup>6</sup> Following this action, the Supreme Court decided that the PIL should be considered alongside other cases under review that concern the scope of the right to religious freedom and the balancing of this right with other fundamental rights. This case on FGM was therefore tagged with a number of other cases related to very different aspects of the right to religion, including the rights of Hindu and Parsi women to enter places of worship, as well as issues of social boycott. The only link between the cases was the opposing argument focusing on the right to religion.

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*“The defendants of the practice succeeded in delaying the proceedings. We were quite advanced in our hearings, and we were very, very hopeful that the Supreme Court might give a judgment on the matter... given the progressive comments made by some judges during the hearings. But the defence, by putting this whole freedom of religion issue, and the right of the religious leadership to determine its tenets in the arguments, they managed to obfuscate the issue of criminality and bodily harm and successfully delayed it. The case has been in abeyance since the last 7 years, and it seems indefinite. An immediate resolution to the case is extremely urgent given that young girls continue to be subjected to FGM today in India, with impunity.”*

**Masooma Ranalvi, founder of WeSpeakOut and survivor activist**

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## Building awareness and movements

Despite the many challenges faced during the litigation process of this PIL, it arguably made some critical contributions in the fight against FGM in India. Most importantly, it brought the issue of FGM into the national consciousness and onto the national agenda. The court hearings and the subsequent media coverage of the hearings brought recognition that FGM was not something that happened elsewhere, but something that was happening to Indian girls in modern India. Whilst not all of the coverage was supportive of the elimination of FGM in India, or handled discussion of it sensitively, FGM was nonetheless brought to the attention of a much wider cohort of Indian citizens than had previously been the case.

5 Reuters, *No Evidence of FGM: India government tells Court*, 29 December 2017, <https://www.reuters.com/article/world/no-evidence-of-fgm-india-government-tells-court-appalling-activists-idUSKB-N1EN0QA/>

6 Supreme Court of India, Order dated 24 September 2018 in W.onto,P. (C) No. 286/2017

Perhaps most importantly the litigation caused the anti-FGM movement to come together more cohesively, coalescing around the need to strengthen the PIL and subsequently to work collaboratively as they sought to repair relations with the practicing community in order to raise awareness of FGM as a human rights abuse against women and girls and in doing so find allies from within the community to challenge its continued practice.

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*“Litigation is important because seeks to hold the Government responsible and accountable for any kind of violence, crime and denial of basic human rights.. It asserts the importance of rule of law in protecting girls. Significantly, it is not just a community issue. Working within the community, particularly at the grassroots level, is one approach. But when you go to a court of law, then you’re talking about rights, legal provisions, criminal action, policies for prevention and rehabilitation, so it’s important...I am glad to be part of this petition. And I think it will have a very, very significant impact on the global movement to end FGM.” - Masooma Ranalvi, founder of WeSpeakOut and survivor activist*

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## Eight years on and still no outcome

Over eight years after the litigation began, the original petition remains pending before the Supreme Court, entangled with cases that address vastly different issues and caught up in a political maelstrom. During this time, the UN Human Rights Council shone a spotlight on FGM in India through the Universal Periodic Review process in 2022. It highlighted India’s failure to comply with its obligation under international human rights law (including CEDAW) on FGM, and recommended that India pass laws prohibiting FGM that adopt the definition of FGM issued by the World Health Organization, as well as adopt a national action plan to eradicate FGM. The Indian Government has only made a note of these recommendations, but it remains unclear whether the Government will act on any of them.<sup>7</sup>

Currently, there is still no formal definition of FGM in Indian law, no mechanisms to report FGM, and no formal recognition from the Government that FGM is happening in India and that FGM needs to be addressed legislatively to protect women and girls. The result is that girls in the Bohra community are still being subjected to FGM.

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*“I think it would be really nice to see the Court take this practice into account and actually offer some guidance...Because there is no formal definition of the practice that exists in the legislative sphere as of now...and there’s no mechanism to report it.” - Radhika Saxena, Lawyer*

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<sup>7</sup> Report of the Working Group on the Universal Periodic Review - India; and Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/52/11/Add.1, 27th February 2023



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Read the full report, **“Towards justice: Global challenges and opportunities in litigating cases of female genital mutilation”**

