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THE KIND OF UNTOUCHABILITY THAT NO ONE TALKS ABOUT: MENSTRUATION AND ISOLATION

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ABSTRACT

Justice Chandrachud, in the Sabarimala Temple case had held that untouchability is not just limited to inequalities pertaining to the caste system but also extends to certain forms of gender discrimination and that exclusion of women and designating them as impure due to menstruation is a form of untouchability. It has deprived them from enjoying their rights to the fullest and has also prevented them from living a dignified life. This belief is found is almost all the religions, except perhaps Sikhism and the Baha´'i faith. Even though our Constitution guarantees right to freedom of religion, it is subject to right to equality and right to life. When it comes to practicing untouchability against women in the name of religion, there has been utter disregard for their rights. There have been numerous incidents, one of which was deemed as "not grave" by the Gujarat High Court. This judgment is an example of how such injustices have been ignored so conveniently that ushering in change has become a difficult task. There is a need for legislations which criminalizes this form of untouchability and empowers women to speak up against these atrocities so as to emancipate women from conservative and regressive forces.

I. MENSTRUATION AND POLLUTION

Menstruation has always been and still is one of the biggest factors that enable discrimination against women. Throughout history, it has been used as an excuse to deny equal treatment to one half of the population, keeping them isolated from public participation and making them live an undignified life. Religion, which governs a major part of our lifestyle, has always been used as a tool to subjugate women which is manifest in the way it views menstruation. Following Emile Durkheim's categorization of sacred and profane, Mary Douglas, explains that menstrual blood is seen as impure since it transgresses bodily boundaries to become "matter out of place".[1] Even today, women are forced to barbaric practices like isolation because of a biological process without which ironically life would have been impossible. Women are, in other words, punished for their ability to give birth. Women, as young girls, from a tender age are brought up in these conditions and hence these notions of impurity become so internalized and ingrained that they accept the belief that there is something so inherently impure about them that they should not pollute the others by their presence.

Isolation entails not living amongst those who are pure (the non-menstruating crowd), not entering temples or any sacred space, and not entering kitchen and touching things meant for the pure. These practices are followed even today, even by those who have access to education. This form of untouchability practiced by the society found its way to the highest Court of the land when women challenged it with respect to their right to equality and right to worship which are guaranteed by the Indian Constitution.[2] The Supreme Court's judgment led to opening of doors of the Sabarimala Temple to women worshippers between the ages 10-50 for the first time in history, though this did not happen as smoothly as it sounds. The judgment was met with wide criticism and opposition from the trust managing the Temple and several other religiously orthodox people with a reactionary conduct.[3] With much struggle and adversity, women worshippers somehow finally managed to exercise this right of equality which was always enjoyed by men. The Sabrimala

[1] MARY DOUGLAS, Purity and Danger: An analysis of concepts of pollution and taboo (Routledge 1966).
[2] Indian young lawyers Association & Ors. (Sabarimala Temple, in re) v. State of Kerala & Ors. (2019) 11 Supreme Court Cases 1(Hereinafter Sabarimala).
[3] BBC, https://www.bbc.com/news/world-asia-india-46744142#:~:text=The%20Supreme%20Court%20decision%20to,banning%20them%20violated%20gender%20equality.&text=Protesters%20have%20consistently%20argued%20that,the%20temple's%20deity%2C%20Lord%20Ayyappa (last visited Dec. 26, 2020).

judgment starts with Susan B. Anthony's famous quote, '*Men, their rights and nothing more; Women, their rights and nothing less*.' [4] The judgment upholds dignity, respect and equality for women in accordance with articles 14 and 21 of the Constitution and condemns the kind of untouchability practiced under the garb of religion. Thus, it can be said that anything which deprives women of their basic rights, which reduces their status as less than human is a matter of grave concern for the society.

In this context, it is pertinent to bring into attention, a peculiar instant where there was gross violation of human rights and the offence was not seen as grave by the Court. *Ritaben Mansukhbhai Raninga v. State of Gujarat*[5] was one such case which grabbed a lot of attention due to the nature of the heinous and deplorable act involved.

II. FACTS

The incident took place at a college in Kachchh district of Gujarat run by the orthodox Swaminarayan sect. The rules of the college mandate that during menstruation, girls are not to live in the hostel rooms but are to isolate themselves in the basement of the building. They are not supposed to enter the kitchen or the Temple, are specifically made to sit at the back benches while attending the classes and are not supposed to mingle with the crowd at any point of time. The menstruating girls are required to enter their names in a register so that the college authorities can check for themselves if the names of those mentioned in the register are isolating themselves or not.[6] The college authorities came to know that one of the menstruating girls had broken the isolation rule. In order to find out who the 'culprit' was, the authorities interrupted a lecture mid-way and started asking the students to come forth and confess. When no one came forward, for their satisfaction, they took more than 60 students to the washroom and demanded that they remove their undergarments to see if they were lying about not having their menstrual cycle at the time. They were ordered to strip and prove the same.[7] One of the victims revealed that they were harassed on the issue on routine but this was the last straw. With great difficulty, at last they were

[4] Sabarimala *supra* note 2.
[5] Criminal Miscellaneous Application No. 12896/2020.
[6] BBC, https://www.bbc.com/news/world-asia-india-51504992 (last visited Dec 26, 2020).
[7] NDTV, https://www.ndtv.com/india-news/gujarat-college-principal-suspended-after-girls-made-to-strip-to-detect-menstruation-2181522 (last visited Dec. 26, 2020).

able to lodge an F.I.R. after the incident was put into spotlight by the media.[8] While the matter was pending before the District Court, the authorities sought to get the F.I.R. quashed by the High Court.

III. HIGH COURT'S RULING

The F.I.R. contained charges under sections 384, 355, 506, 509 and 114 of the Indian Penal Code which provides for punishment for extortion, assault or use of criminal force with the intent to dishonor, punishment for criminal intimidation, acts intended to insult the modesty of a woman, and commission of an offence in the presence of the abettor, respectively. The defence sought to get the F.I.R. quashed on the grounds that there had been a settlement between the students and the college authorities.

For offences not compoundable under Section 320 of the Criminal Procedure Code, 1973 (hereinafter "the Code"), the High Court can quash the F.I.R. under its inherent powers as per section 482 of the Code. However, even under the inherent powers, High Courts cannot quash F.I.Rs. where heinous offences like mental depravity, rape and murder are concerned. Such offences are so severe in nature that there is a strong and compelling interest of the society involved in it. The offence in this was non-compoundable in nature and so the only option was to ask the High Court to quash the F.I.R. under section 482. According to the Supreme Court, F.I.R. can be quashed by the High Court to secure ends of justice or to prevent abuse of process of Court. The decision to quash depends on the facts of each case and so there is no straitjacket formula that can be devised. The Court may quash F.I.Rs. involving criminal cases that are intertwined with civil disputes. However, if the offence involved is grave such as rape, murder or mental depravity, then even if there has been a settlement between the perpetrator and the victim, the F.I.R. cannot be quashed because it have a serious impact on the society. [9]

The High Court sought to quash the F.I.R. on the ground that the nature of offence committed by the accused was not grave in nature. What amounts to a grave offence while considering quashing

[8] AHMEDABAD MIRROR, https://ahmedabadmirror.indiatimes.com/ahmedabad/cover-story/68-girls-in-bhuj-college-forced-to-remove-undies-prove-they-werent-menstruating/articleshow/74125274.cms#:~:text=This%20horrifying%20incident%20allegedly%20took,norms%20specifically%20for%20menstruating%20females (last visited Dec. 26, 2020).
[9] Parbathbhai Aahir v. State of Gujarat 2017 SCC Online SC 1189.

of F.I.R. has not been defined with precision. The Court made references to a list of offences where an F.I.R. cannot be quashed but the words "such as" indicate that the list is not exhaustive.

IV. IMPLICATIONS

As mentioned before, whether F.I.R. should be quashed depends on facts of the case. To answer the question of whether stripping a woman with the intention to check if she is menstruating or not is a grave offence, we need to understand the implications of such an act on the victim and the society.

A. VIOLATION OF PRIVACY

J.S. Mill, in his essay *On Liberty* has rightly established that when it comes to mind and body, the individual is the sovereign.[10] Humans are free to do as they please. The only instance where interference is warranted is when it harms the other people in the society. It is required so that this harm can be prevented. Privacy, on the other hand, is the right to be left alone without any interference. Right to privacy is exercisable not just against the State but against non-state actors as well. It is a right recognized by the Indian Constitution[11] as well as by international law.[12] The State is obliged to protect the individuals against undue interference by others.[13] When it comes to exercising privacy against non-state actors, it is exercised in the nature of a common law right.[14] Autonomy of a woman, which is a facet of privacy, extends to matters concerning her body.[15] The entire notion of privacy empowers the concerned person to decide for themselves if they want to share a piece of information with others or retain it if they think fit. The use of one's body to extract information against their consent goes on to violate their privacy and dignity.[16] The decision of informing others whether one is menstruating is a matter of privacy as it concerns a decision involving one's body.[17] Menstrual status is an essential part of privacy.[18] Forcefully stripping

[10] J.S. MILL, ON LIBERTY (London: Longman, Roberts & Green, 1869).
[11] INDIA CONST. art. 21
[12] International Covenant on Civil and Political Rights, Mar. 23, 1976, art. 17(2), 999 UNTS 171.
[13] Inga T. Winkler & Virginia Roaf, *Taking the Bloody Linen out of the Closet: Menstrual Hygiene as a Priority for Achieving Gender Equality*, 21 CARDOZO J.L. & GENDER, 1, 1, (2014).
[14] K S Puttaswamy v. Union of India (2017) 10 SCC 1.
[15] Suchita srivastava v. Chandigarh Administration (2009) 9 SCC 1.
[16] Her Majesty, The Queen v. Brandon Roy Dyment (1988) 2 SCR 417.
[17] Neera Mathur (Mrs) v. LIC (1992) SCC 286.
[18] Sabarimala, *supra* note 2.

anyone amounts to humiliation and loss of dignity. It is especially humiliating for the person, when it takes place in the context of finding out a private matter about the person being stripped to which no one else is entitled to know. Moreover, when the act takes place within an environment of social hierarchy by the oppressor on the oppressed, it strengthens inequality and fosters reactionary attitude which ensures no development or upliftment of the sufferer. It reduces the body of the oppressed to a property owned by the oppressor, giving them a sense of entitlement over the bodies and allowing them to do as they please. Power structures and hierarchies deepen the sense of alienation and marginalization, leaving no room for remedies.

It also violates their right to bodily integrity, a facet of privacy, and includes a number of restraints and freedoms that are a part of human rights law. While this right has not been defined under either domestic or international law, the right is essential and fundamental to the security of people as it ensures freedom from treatment that is cruel, inhuman, torturous, and protection from infringing privacy and dignity of the concerned among other things.[19] Professor David Feldman, defines the right to bodily integrity as "a right to be free from physical interference".[20] The safety of students is entrusted to the institutional authorities, which includes respecting their right of bodily integrity, and if they are found to be in violation of the same then such a matter is of serious concern.

B. PROMOTES UNTOUCHABILITY

Isolation practice observed during menstruation, that the girls in this case were found to be in breach of, amounts to a form of untouchability. It stems from the notions of purity and impurity and so what is inferior in a society marred by inequality, is regarded as impure. In a patriarchal setup, women being the second sex as highlighted by Simone De Beauvoir, are naturally the impure beings. Beauvoir argued that menstruation is perceived as impure because it is associated with women and not the other way round.[21] Because women are inferior, anything which is linked with women becomes debased by virtue of it. Since women suffer from impurity, they are required to not pollute the other pure beings around them. For this reason, primarily, isolation is forced upon women which is a cruel and a degrading treatment. During menstruation, women are

[19] Rodriguez v. Attorney General of Canada (1994) 2 LRC 136.
[20] D. FELDMAN, CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES (OUP 2002).
[21] SIMONE DE BEAUVOIR, THE SECOND SEX (RHUK, 1949).

considered to be impure and are hence forced to seclusion which results in a form of untouchablity. As held in the Sabarimala judgment,[22] untouchability is not limited to only the social exclusion that arises out of the caste system but essentially includes anything which is based on notions of purity and pollution and the treatment meted out during menstruation falls within the practice of untouchability. Untouchability is equally applicable to the "*systemic humiliation, exclusion and subjugation faced by women*".[23] The prejudices based on these notions of purity and pollution is an example of exclusion and humiliation. It perpetuates stigma and reinforces inequality amongst the sexes, resulting in the treatment one of the sexes superior to the other. Such a practice of untouchability warrants interference from the Courts of law to prevent its application on any section of the population. Any offence linked to untouchability cannot be said to be "not grave in nature" as it trivializes the stigma and oppression that women have been facing since generations and is thus extremely reductive in approach.

V. ANALYSIS

As mentioned earlier, High Courts have the power to quash an F.I.R. under section 482 of the Code, even if it is a non compoundable offence in cases where the parties arrive at a settlement. However, this can be done only on limited grounds and where the offence is against the society and not merely personal in nature, it cannot be quashed. This is because quashing of an F.I.R. which contains a grave offence with a serious impact on the society fails to create deterrence. It fails to deter others from committing a similar crime. Where the offence is of such nature, the settlement between the parties cannot prevail for this very reason. [24] It is necessary that such offender is punished in the interest of public. Calling discrimination based out of menstruation that women have been subjected to since ancient times as "not a grave offence" throws light on the fact that concerns faced by women have never been taken seriously by the society. By quashing an F.I.R. which included an offence stemming from untouchability, the Court went against public interest. Instead of punishing the offenders and condemning the act, it let the accused walk free and did not even think about the kind of precedent it would be setting for such future issues. Such

[22] Sabarimala , *supra* note 2.

[23] *Id* at 357.
[24] Narinder Singh v. State of Punjab, Criminal Appeal No. 686/2014.

instances like this have been very common throughout the country. In the past, Uttar Pradesh[25] and Punjab[26] have also witnessed similar incidents where girls were forced stripped to check if they were menstruating. These incidents happened because the girls were not practicing isolation and were found to be mingling with the crowd, which amounted to polluting the other pure beings. In spite of such incidents having taken place in the past already, the Court, in this case, sought to quash the F.I.R. when it could have punished the offender to create deterrence and set a strong example in the society that such an offence would be taken seriously.

VI. A NEED FOR LAWS TO CRIMINALIZE DISCRIMINATION OWING TO MENSTRUATION

Articles 3 and 5 of Convention on Elimination of All forms of Discrimination Against Women (CEDAW) imposes a mandate on the State parties to the convention to take measures (including legislation) against those customs and practices that are based on the idea of superiority or inferiority of sexes. Though India had ratified CEDAW way back in 1993, there has been no such legislation on part of the State in order to deal with the stigma surrounding menstruation. Menstruation is still considered to be a taboo and such discrimination is justified in the name of religion. There is no legal remedy against the cruel practice of isolation.[27] The Government is well aware of these isolation practices but no steps have been taken to de-stigmatize the issue.[28] Such practices constitute a serious human rights violation of women and having no legal recourse against this fails to emancipate women from the clutches of orthodoxy. In 2018, neighbor country Nepal criminalized the practice of chaupdi, an isolation practice followed during menstruation after a series of debate that highlighted the plight of women in the shelter huts that they were forced to live in.[29] The first step towards such a change starts from criminalizing the act which India has

[25] HINDUSTAN TIMES, https://www.hindustantimes.com/india-news/up-girls-made-to-strip-to-check-for-menstrual-blood-at-muzaffarnagar-school/story-54jSjaSGvevtjASiXlgB2I.html (last visited, Dec. 26, 2020).
[26] LIVEWIRE, https://livewire.thewire.in/campus/students-at-punjab-college-made-to-strip-over-a-used-sanitary-pad/ (last visited, Dec. 26, 2020).
[27] THE GUARDIAN, https://www.theguardian.com/global-development/2015/dec/22/india-menstruation-periods-gaokor-women-isolated (last visited, Dec 26, 2020).
[28] NDTV, https://www.ndtv.com/india-news/end-gaokor-practice-rights-panel-tells-maharashtra-1217395 (last visited).
[29] HUMAN RIGHTS WATCH, https://www.hrw.org/news/2018/10/04/human-rights-watch-submission-cedaw-committee-nepals-periodic-report-71st-session (last visited, Dec. 26, 2020).

not done so far. Developing from Mill's "harm principle", Joel Feinberg proposed that a conduct which doesn't cause harm but which is offensive in nature and is shrouded in humiliation, embarrassment, disgust, shame, etc, cannot be criminalized on the basis of the harm principle but needs a separate recognition termed as the "offence principle".[30] Feinberg gives an example of a bus journey undertaken by the protagonist-passenger who is exposed to a host of hypothetical situations wherein the co-passengers are engaged in behaviors that are unpleasant to witness and the protagonist cannot leave the bus since doing that would make them reach late to their intended destination.[31] These acts, though not harmful to anyone, are so unpleasant to experience, that the witness can rightly ask the Government to protect them against it at the cost of liberty of the actor engaging in the unpleasant act. He categorizes these acts into six broad clusters depending on the emotion and feeling that it evokes in the passenger. The defence of liberty cannot be taken by the actor due to the magnitude of repulsion and abrasiveness entailed by it. This provides guidance as to what may be criminalized keeping in mind other relevant factors. The practice of isolation and the inferior treatment meted out to women owing to menstruation, even though doesn't always necessarily cause harm, is essentially offensive in nature and evokes humiliation, shame and embarrassment for which there cannot be any defence by those who impose it. This being a form of untouchability needs attention from the legislature and therefore such an act should be criminalized. The cause for advocating criminalization of isolation practice ideally should not be difficult since untouchability, per se, is recognized as a crime. The only difference is the reason behind untouchability; one stems from the caste system, and the other stems from biological differences between sexes. Whether it is based out of gender inequality or caste hierarchy, it is equally an impediment to progress and is antithetical to constitutional morality. As long as notions of purity and pollution are passed down from one generation to another, untouchability is likely to stay and so penalizing it is of utmost importance.

VII. CONCLUSION

Isolation during menstruation is a breach of human rights of women that needs attention from the legislature. In the absence of any such laws, such practices are bound to continue in the name of

[30] JOEL FEINBERG, OFFENCE TO OTHERS (OUP 1988).
[31] *Id.*

religion which acts as serious impediment towards the growth of women. Power structures in the society always work in favor of the oppressor and without criminalization of such actions, there can be no meaningful exercise of rights and freedom. Awareness campaigns have been going on since years but no substantial change can be brought in unless the law provides a remedy to those who face such stigma. The case of *Ritaben Mansukhbhai Raninga* is an example of how these violations remain unaccounted for and are passed down from one generation to other, validating notions of impurity and prejudice. Though untouchability faced by Dalits is still practiced, it is a punishable offence, which empowers those who are wronged to seek justice against such degrading and inhuman treatment. The Constitution of India committed itself to abolish untouchability in all its forms under article 17 but this is one such form which is widespread and uncontrolled. Though real change comes from a change of mind, penalizing the act is the first step towards removing the taboo and social stigma. This is the only tool that the marginalized has against those who foster and promote discrimination. The whole concept of legal empowerment is rooted in the idea that laws must be made to protect the marginalized as a way of empowering them. Though it still may not be enough, but it would be one of the best ways to break the hierarchy.