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"Labour Welfare and Recognition of Menstrual Rights"

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Abstract

The concept of menstrual rights cannot be concretized without reference to socio-economic parameters requiring transformation of entitlements into legal rights as ensued by addressing issues of privacy, gendered inequality, power of social norms categorically, amounting to violence against women and girls. The research paper shall elaborate on the issue of menstrual rights of women and girls in light of the incident of enforced yet opted practice of mass removal of uterus by the migrant women, labour employed on contractual basis (seasonally) in the sugarcane fields in the Beed District of Maharashtra and the role of medical practitioners, nature of obtaining informed consent of the women for the surgery and whether the consequent failure/ inaction of the State to protect women against discrimination and violence adversely affects women's right to health- dignity and work both within public-private sphere. The recognition to violation of menstrual rights of women as violation of sexual and reproductive health and rights requires institutional and policy intervention coupled with raising awareness for realization of reproductive justice. The research paper will highlight the need for ascertaining the nature of employment not only from 'contract' but also 'status' based parameters since, the oral contract for sugarcane cutting in the unorganized sector is fundamentally flawed owing to lack of 'free consent' or 'undue influence' or 'involves unlawful consideration and object' consequentially not enforceable in the courts of law. In toto the operative sphere of menstrual violence extends to anti-feminized labour practices coupled with medicalization of women's bodies reflecting tolerance towards gender inequality resulting in denial of right to development of women and girls.

Introduction

The development women's rights through conceptual framework, international jurisprudence and regulation is traceable to two distinct histories, firstly, "*gender specific- sexual violence- human rights violations- freedoms- social functions of reproduction and procreation*" and secondly, "*establishing reproductive health*

rights of women and sexual rights as women's human rights.'¹

Thus, the interaction between women-health-sexuality has varied ethical and legal dimensions namely, extent of state regulation, classifying incidences of violence against women, prohibiting virginity testing and strip search for detecting menstruating girls,² legalizing prostitution/ sex work, implementing population control strategies, ensuring public health agenda, non-discrimination based on gender - sexual orientation, enlisting guidelines for examination of sexual assault victims *et al.* however, enforcing and realizing Constitutional fundamentals of equality and Directive Principles of State policy are contingent on the prevailing economic situation of the subjects and of the State.

Further, the domain of equality as envisaged under the social welfare state and an egalitarian society is not limited to formal or substantive equality but extends to sexual equality and the protection of right to privacy through the guarantee of minimum intervention by the state instrumentalities.

The research paper shall elaborate on the issue of menstrual rights of women and girls in light of the incident or enforced yet opted practice of mass removal of uterus by the migrant, women- labour employed seasonally on contractual basis in the sugarcane fields in the Beed District of Maharashtra.

The research shall demonstrate firstly, the consequent failure of the State in preventing discrimination against menstruating women and girls thereby, facilitates perpetuation of systemic forms of violence by denying the freedoms, human rights in general and specifically, right to sexual and reproductive health and secondly, barring a menstruating woman from work affects free consent to the contract of employment on the parameters of 'undue influence- unlawful object or consideration and agreement in restraint of trade.'

Inter-linkages between Reproductive- Sexual and Menstrual Rights

The realization of sexual, menstrual and reproductive rights is needed to ensure the rights of 44% of human population currently, below the age of 25 in addition to advancing the '*life cycle approach*'³ adopted by UN requiring institutionalized and national efforts. Moreover statistics highlight the disadvantaged position wherein only 24% of young women and 36% of young men in developing countries are

¹ Fried Susanna T., Landsberg-Lewis Ilana. Sexual Rights: From Concept to Strategy. Women and International Human Rights law, 93 – 107, 1998; Correa Sonia & Petchesky Rosaline, *Reproductive and Sexual Rights: A feminist Perspective*, G. Sen, A. Germain & L.C. Chen (eds.) Population Policies Reconsidered: Health, Empowerment And Rights pp. 107 – 126, 1994; Rhonda Copelon & Rosalind Petchesky, *Toward an Interdependent Approach to Reproductive and Sexual Rights as Human Rights: Reflections on the ICPD and Beyond*, Margaret A. Schuller (eds.) From Basic Needs to Basic Rights: Women's Claim To Human Rights pp 343-68, 1995

² Vaibhav Tiwari, Gujarat College Girls Made To Strip To Detect Menstruation: Report, Feb. 14 2020 available at: <https://www.ndtv.com/india-news/gujarat-college-girls-made-to-strip-to-detect-menstruation-report-2180435> last seen 12/08/2020

³ Policy Recommendations for the ICPD Beyond 2014: Sexual and Reproductive Health & Rights for All, High-Level Task Force for the International Conference on Population and Development (ICPD) Rights Dignity & Health for All, available at: <https://www.icpdtaskforce.org/resources/policy-recommendations-for-the-ICPD-beyond-2014.pdf> last seen 03/12/2020

aware of consequences of HIV/ AIDS and effects of sterilization⁴ and whereas the rate of hysterectomies in Maharashtra is 2.6%, while the national average is 3.2%.⁵

The regulation of sexual, menstrual and reproductive rights of women is governed both by statues and contracts primarily on the pretext of ‘public interest’ or ‘harm prevention’ or preventing perpetuation of discriminatory practices against women⁶ including the customary- morally infused menstrual exiles. Menstrual regulation stems from the taboos⁷ associated with medicalization of women’s bodies and women’s sexuality thereby the consequent traditionally restrictive practices affect human dignity- right to life, right privacy and right to sexual- reproductive autonomy and justice.

Thus, Reproductive rights are one aspect of sexual rights, just as sexual rights are one part of reproductive rights⁸ and interdependent on right to health - human rights.⁹

Factual Incident – Mass Removal of Uterus by Women involved in Sugarcane Produce

Historically, the seasonal workers are employed on consolidated basis for cutting of sugarcane by entering into oral agreements¹⁰ with the contractor/ Mukkadum.

⁴ United Nations, Commission on Population and Development, Resolution on *Adolescents and Youth, 2012/1*, paragraph 26, 2012; UNFPA, *Comprehensive Sexuality Education: Advancing Human Rights, Gender Equality and Improved Sexual and Reproductive Health: A Report on an International Consultation to Review Current Evidence and Experience, 2010*

⁵ National Family Health Survey, <http://rchiips.org/nfhs/NFHS-4Reports/India.pdf> last seen 04/11/2020

⁶United Nations Human Rights Commission, Special Rapporteur on Violence against Women, its causes and consequences A/HRC/11/6 2009; United Nations Human Rights Commission, Special Rapporteur on Violence against Women, its causes and consequences E/ CN.4/2005/72, 2005

⁷ Kulsum Yusuf, Comments on Menstruating Women ‘We stand by Swami’, wherein Bhuj Mandir Swaminarayan Sect supported the statement of Swami Krishnaswarupdas “*Menstruating women who cook food for the husband even once are reborn as ‘kutri’ (bitches) while men who consume food cooked by women in periods are reborn as ‘balad’ (Ox)*” Times of India, Pune Mirror, 20/02/2020 pg. 9; See also *Principal held for Strip Search*, incident involving strip search of 68 girls enrolled in an educational institute to prove menstruation and consequent filing of molestation case against the principal and 4 employees, Times of India 18/02/2020 pg. 1; see also Beed women labour compulsory hysterectomy

⁸ Convention on the Elimination of All Forms of Discrimination against Women(1979), article 12; Convention on the Rights of the Child(1989), articles 17, 23~25 and 27; and Convention on the Rights of Persons with Disabilities(2006), Articles 23 and 25; See also the Committee on the Elimination of Discrimination Against Women (CEDAW) General Recommendation No. 24: Women and Health (1999), paras 11, 14, 18, 23, 26, 29, 31(b); and the Committee on the Rights of the Child (CRC), General Comment No. 15: The right of the child to the enjoyment of the highest attainable standard of health (2013); ‘*Transforming Health Systems: Gender and Rights in Reproductive Health. A Training Curriculum for Health Program Managers,*’ A sexual and reproductive rights training curriculum for health programmers, World Health Organization (2001), www.who.int/reproductive-health/publications/transforming_healthsystems_gender/m3.pdf last seen 20/07/2021

⁹ Report of the Special Rapporteur on the right to education, Vernor Munoz, (A/65/162), 23 July 2010; Reproductive Rights are human rights: A Handbook for National Human Rights Institutions, UNFPA and OCHCR HR/PUB/14/6, 2014

¹⁰ Radheshyam Jadhav, Why many women in Maharashtra’s Beed district have no wombs, The Hindu Business Line 2019, available at: <https://www.thehindubusinessline.com/economy/agri->

The husband and wife constitute a single 'working unit' earning an annual income of Rs. 1 to 1.5 Lakh for 300-400 tonnes of sugarcane produce within a span of 3-4 months in the Beed District of Maharashtra. Moreover, the agreement has a rider clause stipulating, on failure to work for any reason by any member shall result in fine amounting to Rs. 500 per day.

However, even seasonal employment is subjected to the taboos associated with menstruation, namely, menstruation during harvest season/ sugar cane cutting season will reduce the farm produce or menstruation will pollute the produce thereby leading to imposing absolute bar to work.

The inevitable loss of work owing to monthly menstruation, adversely affects employment prospects during the harvesting season from October to March. To curtail the losses the women undergo hysterectomy though with choice and informed consent of the woman and other family members.

A panel set up to investigate the extent of menstrual violence against women and its co-relation with labour and women's right to health observed as follows,

*"Information on 82,309 women in Beed district was collected by grassroots workers. It was found that 13,861 of the women surveyed had had their wombs removed in the past decade. Most of them are in the age group of 35-40 while a small section under 25 too has undergone hysterectomy. Personal interviews, group discussions and in-camera testimonies were also collected from a group of about 400 women... We found that due to early marriage and repetitive child births women in the area face several health issues including infections etc. and instead of getting right treatment for such health issues, the women tend to go for hysterectomy to end the health issues once and for all. - Dr Neelam Gorhe"*¹¹

Moreover, the expenses for the surgery are paid from the advance issued by the contractor and subsequently deducted from the wages. The core issue is the nature of obtaining informed consent from the migrant women for the hysterectomy and the role of medical practitioners,

*"There could be a nexus between profit-driven doctors and the mukadams. This definitely needs to be investigated, among other things...-Dr. Neelam Gorhe"*¹²

The above mentioned incident establishes an inter-relationship between gender, labour practices and reproductive health *vis a vis* the role of State forms the basis for the strategy to eliminate violence against women.

Menstrual Exile as Gender Based Violence: Conceptual Perspective

The socio-welfare ideology of the State coupled with the role of law and rule of law in ensuring standard of living reflects the prevailing patterns of gender based violence and abuses at individual, inter-generational, societal and community level

business/why-half-the-women-in-maharashtras-beed-district-have-no-wombs/article26773974.ece# last seen 26/03/2020

¹¹ The New Indian Express, *Over 13,000 female sugarcane workers in Beed have undergone uterus removal surgery, says probe panel*, <https://www.newindianexpress.com/nation/2019/aug/29/over-13000-female-sugarcane-labourers-in-beed-have-undergone-uterus-removal-surgery-says-probe-pan-2026166.html> last seen 18/09/2020

¹² Jyoti Shelar, *A harvest of crushed hopes: Why number of hysterectomies are high in Maharashtra's Beed district*, AUGUST 10, 2019, available at: <https://www.thehindu.com/news/national/other-states/in-beed-a-harvest-of-crushed-hopes/article28969404.ece> last seen 26/3/2020

irrespective of established international human rights principles¹³ mandating freedom from discrimination against women based on gender, *“any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”*¹⁴

To further elaborate, discrimination and elimination of all forms of violence against women has been construed as follows,

*“the definition of discrimination includes gender based violence, that is, violence directed against a women because she is a women or that affects women disproportionately. It includes acts that inflict physical mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender based violence may breach specific provisions of the convention, regardless of whether those provisions expressly mention violence.”*¹⁵

*“Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life, and including domestic violence, crimes committed in the name of honour, crimes committed in the name of passion, trafficking in women and girls, traditional practices harmful to women, including female genital mutilation, early and forced marriages, female infanticide, dowry-related violence and deaths, acid attacks and violence related to commercial sexual exploitation as well as economic exploitation.”*¹⁶

The application human rights principles for the regulation and realization of the right health, right to sexual and reproductive health, including menstrual rights of women are circumscribed by the public-private contours as envisaged below,

*“Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”*¹⁷

Thus the concept of menstrual rights cannot be concretized without reference to

¹³ General Comment No. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc. E/C.12/GC/22. 2016 ; General Comment No. 14 on the right to the highest attainable standard of health (2000)

¹⁴ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <https://www.refworld.org/docid/3ae6b3970.html> last seen 18/02/2019

¹⁵ General recommendation number 19 committee on the elimination of discrimination against women, UNDoc A/47/38 (1992) at para 4

¹⁶ UN Commission on Human Rights, *Commission on Human Rights Resolution 2004/46: Elimination of Violence Against Women*, 20 April 2004, E/CN.4/RES/2004/46, available at: <https://www.refworld.org/docid/43f313730.html> last seen 18/02/2019

¹⁷ European Court of Human Rights Article 8; See also Article 9-11

socio-economic parameters, feministic theoretical concerns and historical references since the transformation of entitlements into legal rights is ensued by addressing issues of privacy, gendered inequality, power of social norms, moral policing, relativity in permissible and impermissible customary practices.

Additionally, the legal rights in context of labour welfare includes, prohibition of menstrual exiles, anti-discrimination, access to affordable menstrual hygiene products, non-imposition of exorbitant taxes, autonomy, privacy and availability of menstrual leave for working women.

Invoking Contract Law in the Beed Incident

The contractual seasonal employment of the migrant women requires application of contract law in following circumstances,

a. Free Consent

The presumption of undue influence¹⁸ as incorporated due to lack of free agency and free consent in relation to the working unit being vulnerable. To elaborate the aspect of persuasion by the contractor by advancing the money ensures women undergo hysterectomy and the acts of the Mukkadum convinces and persuades the women for the surgery though done by volition, but inherently being prejudicial-disadvantageous- perilous. The depiction of economic gain is coercion and not mere commercial pressure and vitiates the consent to the agreement to harvest the sugarcane. Additionally, the condition of barring the menstruating women from right to work is illegitimate and the unit lacks an option, but to surrender to the demands of the Mukkadum. The contract of employment is contract of exploitation for the working unit, wherein the need for liberation from performance of the terms of the contract is required owing to age, poverty, illiteracy and vulnerability.¹⁹ The Mukkadum/ contractor and the working unit have unequal bargaining power and *per se* the employment is provided by the contractor. In the legal parlance unreasonableness owing to dominating capacity of the Mukkadum over the will of the working unit encapsulates the lack of *consensus ad idem* mandating release from the bonded form of labour in the interest of natural justice.

b. Unlawful Object

The money advanced by the Mukkadum is not 'consideration' but means and includes the 'purpose or design' to undergo hysterectomy process though injurious or implying to cause injury to the reproductive system of the women on the pretext of medical requirement while the contract of employment may be termed as contract of slavery prohibited by law.²⁰

The illegality of the agreement includes being contrary to public policy, lack of public good, causing harm to the woman, being in effect perpetuating harmful tendencies in contestable violations requiring judicial intervention.

c. Agreement in restraint of Profession

The absolute restraint imposed on the women during menstruation is unreasonable

¹⁸ Section 16 Contract Act, 1872

¹⁹ Irrigation Department v. Progressive Engg. Co. (1997) 4 ALD 489 AP

²⁰ Ram Sarup Bhagat v. Bansi Mandar, ILR (1915) 42 Cal 72

and is an agreement in restraint of profession.²¹ The restraint though temporary – partial is of such nature and effect denying the women the right not to be discriminated, right to privacy, right to individual physical integrity, right to sexual autonomy and human dignity as enshrined in the Constitution²² and under the vertical application of human rights standards.

Conclusion

The phallo-centric culture has resulted in conceptualizing female sexuality as devoid of autonomy and equality in the puritanical Indian ethos coupled with commodification of labour mandating emphasis on the materialistic gains to the male/ family after marriage as a duty of the woman resulting in tolerance of anti-feminized practices like menstrual exiles for women both in private and public as reflected below,

“Sexual and reproductive health and rights are a matter of social justice, equality and equity: the gravest costs and consequences fall disproportionately on women and adolescent girls, and communities living in poverty. These problems perpetuate cycles of poverty and exacerbate social and economic inequalities, representing a significant share of the global burden of disease for women.”²³

Thus the contractual employment barring women from work during menstruation is a concern of reproductive justice, human rights mechanism, constitutional fundamentals requiring a revamped approach of regulating the work culture both in ‘status’ and contract based parlance. The labour welfare is all encompassing having politico-legal implications requiring the legal framework to be on an evolutionary mode to accommodate the needs of the vulnerable and marginalized section of the society for ensuring an all inclusive accommodative, just humane conditions of work.

²¹ Section 27 Contract Act, 1872

²² Puttaswamy v. Union of India (2017) 10 SCC 1

²³ Policy Recommendations for the ICPD Beyond 2014: Sexual and Reproductive Health & Rights for All, High-Level Task Force for the International Conference on Population and Development (ICPD) Rights Dignity & Health for All, at: <https://www.icpdtaskforce.org/resources/policy-recommendations-for-the-ICPD-beyond-2014.pdf> last seen 16/07/2021