

**INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES**
[ISSN 2581-5369]

Volume 3 | Issue 5

2020

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Menstrual Leave – Regressive or Progressive?

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ABSTRACT

It is unfortunate that even in the 21st century the knowledge about menstruation is quite little. The people in the society still consider it to be dirty, unholy and unclean. Today, unfortunately it is only a very small percentage of the society that discusses about periods openly. Women from the past few decades have entered the workforce and many young women are still entering and building up their carrier. After struggling for centuries, women are now getting opportunities in various fields of their interest. But even today, a concept like period leave has not been implemented through the laws. It is important for the people to understand the need of period leave. The period leave would benefit the women health wise. Now, the common mistaken fact is that, the period leave would affect the development of the organization and the country economically. Here it is important to understand that developed countries like Japan, have already implemented period leaves through its labor laws few decades ago and it has not affected the development or economy of the country. The Indian Constitution also guarantees that the state can make necessary provisions for the benefit and upliftment of women.

There are some misconceptions about the period leaves that, it would stigmatize periods. Implementation of period leaves would rather remove the taboo on Periods. Women who because of painful periods are taking leave under sick leave can now openly and confidently take leave for periods. Menstruation is not a sickness. Although the policy has certain loopholes like, whether the period leave taken is genuine or not or is being missed by the employee. Definitely, the employer would require to find out solution regarding the same. The legislature in the year 2017 had introduced Menstrual Benefit Act, 2017, however it is still pending in the legislature. Such statutes should be drafted in a way that it fills all the loopholes and turns out to be beneficial for women and transgender as well as the employers.

I. INTRODUCTION

It was/is during the 6th or 7th standard in the school when girls are told to assemble to a different class and are told about what menstruation is. In many schools, the chapters related to reproduction are not taught properly or sometimes even skipped. Menstruation that are more

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commonly known as Periods, have always been a taboo and the reason because of which women face a lot of prejudice. Surprisingly many girls do not even know about periods even after their first menstruation. A natural biological process that every woman goes through, at least half of her life, a process on which the reproduction is dependent, is considered to be “impure”. It is unfortunate that even in the 21st century the knowledge about menstruation is quiet little. The people in the society still consider it to be dirty, unholy and unclean. Women consider their periods to be embarrassing, something to be shy off, shameful and disgusting and this is because of the stigma attached. This social stigma or taboo affects women physically as well as mentally. Today, unfortunately it is only a very small percentage of the society that discusses about periods openly. A girl, cannot speak openly about her periods or tell about the pain she is going through, just because there are male members at home and they shouldn’t come to know about this.

Recently female students in an institute in Bhuj, Gujarat were checked by the teachers if they were on their periods. This was done after the hostel warden complained to the principal that some of these students had broken the rule or norm and that being entering the kitchen, touching the fellow hostellers and entering the temple³. Today, we are in the 21st century and yet such norms are still being practiced stringently. Ironically, older women in the houses impose such restrictions on the younger ones. Strangely, such incident happened in an educational institution. An educational institution is expected to give required and accurate knowledge about such an important topic and not practice such norms which cause discrimination. It is because of such incidents that girls get disturbed, feel humiliated and lose confidence.

In the earlier days, women when on periods were made to sit in a different room or sometimes outside the house for the first few days of the periods. Scientifically, this practice was very helpful for the women as they were given rest. In those days, women had to heavy physical work compared to today like washing clothes, cooking for 10-15 people, washing utensils, work at the farms and take care of every individual in the family. But somehow it became a discriminatory process and many wrong beliefs and myths got associated with it. Until recent times, rather even today belief’s like, if a woman who is on her periods touches some family member, that member becomes “impure” and will have to take a bath to become “pure” are predominant.

In 2017, several private schools in Kerala gave 12-day paid period leave for the teachers. This leave was an optional leave on the part of the employee. This decision was welcomed by these

³ Saumya Rastogi, It’s 2020 and Menstruation still remains a huge taboo in india, She the People (Oct. 5,2020, 10:30 AM), <https://www.shethepeople.tv/top-stories/opinion/menstruation-taboo-india-gender-issues/>

teachers and even the government had thought of considering it. Recently, Zomato, a food delivery firm, announced 10 day paid leaves for their female and transgender employees and the discussion about period leaves whether or not to be provided has again started.

II. WHY DO WE NEED PERIOD LEAVE?

The world has become faster. Women from the past few decades have entered the workforce and many young women are still entering and building up their carrier. After struggling for centuries, women are now getting opportunities in various fields of their interest. Balancing between home and work, women have achieved a lot. The contribution from the female workforce in the economy is as good as the male workforce. It is important to create an environment where menstruation ceases to be a taboo and women can comfortably take a period leave when they face discomfort and not state that they are sick. Sick leave and period leave aren't the same. Menstruation is not a sickness.

Today, at workplaces conditions remain unhygienic. The availability of the sanitary napkin at workplaces is almost nil. Keeping aside the workplace, when it comes to the public places, there are no provisions made for sanitary napkins or its disposal. Women need to go whispering from one women to other to find the same. Not all women do desk job, there are many women who need to Field work. It becomes very difficult for such women to manage during their periods.

Because of the unhygienic conditions of the restrooms, many women are prone to and often get Urinary tract infections and other diseases. Many areas be it urban or rural, face the problem of water shortage. Water is an essential. When it comes to the disposal of sanitary napkins it is also important to understand that waste management is done adequately.

Menstrual hygiene is a constitutional issue. Article 21 of the Indian Constitution guarantees Right to sanitation. However, it is not expressly mentioned under Article 21. It is the duty of the government to make policies related to sanitation and implement them effectively. Sanitation at workplaces, educational institutions and public places must be taken care of. Article 21 also guarantees Right to Health. Right to Health and Right to Sanitation are related to each other. Abridging of Right to Sanitation is abridging Right to Sanitation. ⁴

Right to Sanitation includes access to **clean water, personal hygiene, waste disposal and management.**

⁴ Raju Majhi, Right to sanitation-a human right, Vol.6 Issue 6, FRCIJ,1 (2018)
<https://medcraveonline.com/FRCIJ/FRCIJ-06-00255.pdf>

Men and women have biological different. It is important to accept it, embrace it and be comfortable with it. Many women face painful periods i.e. Dysmenorrhea, some of them have Endometritis, some of them are on medications for the hormonal imbalance, some face problems like PCO. The percentage of women suffering from this is high. And unfortunately many consider such women to be “weak” or “inefficient” and so are overlooked and made to feel ashamed of it. In the era of women empowerment biology cannot be made a point of bias. As of Today, are there women who can confidently and comfortably ask for leave for the unbearable pain during their periods to their boss? The only answer to this question is very few. The reason behind this is nothing else then the stigma and thought that a women shall not mentally prepared that they will have to go through this and hence should not “glorify their pain” or make it a big deal. Here it is important to understand that even though not all women experience painful periods, but the women who experience a painful one need rest and proper hygiene. Other than painful periods, many women experience other problems like nausea, vomiting, menstrual migraine, fatigue, fever, hot flashes etc. It is not easy for all women to pop a pill and get back to work, some need extra care and rest. This is another important reason why women need period leave.

III. IS PERIOD LEAVE CONSTITUTIONALLY VALID?

For any Bill to stand a chance of approval in Legislature, it has to be Legally Sanctioned and Constitutionally Valid. The Menstruation Benefit Bill, 2017 was introduced in Lok Sabha (Lower House of Parliament).

Throughout the nation an opinion was wandered if such a bill is legally valid, or if it's discriminatory in nature or the impugned bill being Constitutionally Invalid.

Part III of the Constitution of India, talks about the Fundamental Rights provided to people and that they are sacrosanct in nature, to put a light over the impugned bill being discriminatory or hampering equality, Article 15 of the Constitution directs state to not discriminate against a citizen on grounds only of religion, race, caste, sex, or place of birth or any of them. The Exception to the said law has been provided in the Clause 3 of Article 15 (Article 15(3)), which explicitly states that anything mentioned in Article 15 shall not prevent the state from making any special law or provision for protection and upbringing of Women and Children in the society. The rationale behind the said law is that women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence and her physical wellbeing becomes an object of public interest and care in order to preserve

the strength and vigour⁵.

As aforementioned the State has Right to make and amend laws for uplifting and protecting women and children as there are considered to be the most vulnerable section of the society and hence any laws made that are for the abovementioned reason are not deemed to be discriminatory and form equity as a base for equality. Hence, the Menstruation Benefit Bill, 2017 is just in order to empower women in the society by providing certain benefits and adequate working conditions to women.

As per a research done by University College London published earlier this year, period pain can be as “bad as having a heart attack.” Also that in addition, most women face a hard time, especially on the first and second days of the menstruation cycle due to obvious discomforts.⁶

Article 21 of the Constitution of India promises Right to Life and Personal liberty except according to procedure established by law.”

Prior to Maneka Gandhi case⁷ the ambit of the term personal liberty was highly constrained and the first time Honourable Supreme Court took the term ‘personal liberty’ and its ambit into consideration in the case of A.K. Gopalan v. Union of India⁸ where the court took a very strict interpretation of the term.

As per the research aforementioned the Period pain is as bad as having as an ‘heart attack’ and the Article 21 provides right to life to all the citizens and Non-Citizens of the Nation, but one cannot expect a women to attend an office when she is going through her Menstrual Pain and hence also that it would wrong to make the leaves in account to the nominal paid sick leaves entitled to all the employees.

Also to the matter of fact as prior mentioned women contribute 50% of workforce in the country and these jobs are not only white collar jobs or desk job or jobs at managerial level but there are women who contribute largely in labour force too, They are paid wages that are necessary for them to meet their daily needs and necessity and hence during period also, when not provided with paid leave, they have to work which causes them physical strain and affects their health, whereas Article 21 of the constitution also includes right to Health under the ambit of personal liberty, where Healthy working conditions and such rules necessary to ensure health

⁵ Muller v. Oregon, 52 L.Ed. 551

⁶ Ninong Ering and abhishek Ranjan, Menstruation bill is necessary for gender equality in workplace, striking balance between health and career, firstpost, (Jan 10, 2018, 05:04 PM), <https://www.firstpost.com/india/menstruation-bill-is-necessary-for-gender-equality-in-workplace-striking-balance-between-health-and-career-4296599.html>

⁷ Maneka Gandhi v. Union of India, AIR 1978 SC 597

⁸ A.K. Gopalan v. Union of India, AIR 1950 SC 27

of the workers shall be made, and hence Article 21 also ratifies the Menstruation Benefit Bill, 2017.

Part IV of the constitution of India provides us with the Directive Principle of State Policy, which are commonly known as those objectives that the state has to achieve, in other words to be mentioned, any policy that is formed shall be formulated keeping in mind the Directive Principle of State Policy, though these are not fundamental in nature and also not enforceable, but they play a very crucial role into formation of laws and policy structuring.

As per article 37 of the Constitution of India:-

The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.⁹

Hence it can be truly inferred that it is the duty of the state to apply these principles while making laws or formulating policies.

In *Kesvananda Bharti v. State of Kerala*, the court has taken a view that there is no conflict between Directive Principle and Fundamental Rights and that they work hand-in-hand while having a common goal to achieve which is Social Revolution and establishing of a welfare state that has been envisaged in the Preamble of the Constitution.¹⁰

In view of the court, it is the responsibility of the court to interpret the provisions of the constitution in such a way so as to ensure the implementation of the Directive Principles and to harmonize the social objectives underlying the directives with the individual rights. This is the mandate of the constitution not only to the Legislature and Executive but also to the court.¹¹

Granville Austin had said that Directive Principles and the Fundamental Rights are the conscience of our Indian Constitution

Hence as per Article 42 of the Constitution:-

The State shall make provision for securing just and humane conditions of work and for maternity relief.¹²

And as aforementioned that Directive Principles are to be kept into consideration while forming laws and they are as important as Fundamental rights and Article 42 explicitly states that it shall be the aim of the lawmakers to make law which aims at maternity relief, and therefore the

⁹INDIA CONSTI. Art. 32

¹⁰ *Kesvananda Bharti v. State of Kerala* AIR 1973 SC 1461

¹¹ J.N. Pandey, *Constitutional Law of India* 474 (55th ed. 2018)

¹²INDIA CONSTI. Art. 42

impugned bill is not only constitutionally valid but also concurs to one of the Objective of the constitution enshrined under Article 42.

It can be said that the Standing Bill in Lok Sabha (The Lower House) has Legal sanction and Constitutional validity and can't be debarred on basis of being unlawful or illegal in nature.

IV. GLOBAL PERSPECTIVE ON PERIOD LEAVE

Period leave or leave due to Menstrual pains have been followed since World War two by various nations and that there are explicit laws made and mandatory for not only government sector but also the Private sector of those nations have to implement these laws .

Nations such as Japan, Taiwan, Indonesia and South Korea have already been far-sighted in terms of legally and mandatorily providing 2 day leave to the Women suffering through Period Pains.

In Japan Under their labour law, have explicitly stated under Article 68 that –

Article 68. When a woman for whom work during menstrual periods would be especially difficult has requested leave, the employer shall not employ such woman on days of the menstrual period.¹³

When this law was written in 1947, women were employed in high numbers in labour driven workforce, mines, Bus Stand and also Sanitary Facilities and hence also that the law aimed of providing physiological leave to women. The law has nowhere mentioned about the women who have taken up administrative Role.

Taiwan being another country that too has a law that is in favour of Menstrual leave, but in relation to the laws in japan, this is a very recent law, implemented in 2013. Which guarantees women workers basic three days of menstrual leave a year, in addition to the statutory 30 days of Half-Paid Sick leave allowed to all the workers.\

In Indonesia 2003 law brought together much of basic regulations of labour force, replacing or overriding many existing laws and regulations. It retained clauses providing special protection for women, in spite of demands to exclude them. Article 81(1) states that: 'Female Workers/labourers who feel pain during their menstruation period and notify the entrepreneurs are not obliged to come to work on the first and second day of menstruation.'¹⁴

The aforementioned laws explicitly mention 2 basic and fundamental factors of the law, firstly

¹³ Labour Standards Law (Law No. 49 of 7 April 1947)

<https://www.ilo.org/dyn/natlex/docs/WEBTEXT/27776/64846/E95JPN01.htm#a064>

¹⁴ Kuntala lahiri-dutt and Kathryn robinson, 'period problems' at the coal face, 89 FR 108 (2008)

https://crawford.anu.edu.au/pdf/staff/rmap/lahiridutt/JA3_KLD_Robinson_Period_Problems.pdf

that leave shall only be asked in case of severe pains and other being that such a leave is granted only on the First and Second days of her periods.

Though India does not have a proper legislation for the menstrual leave as of now and yet the bill is in the lower house of the parliament, there are few states in India, that are practicing the aspect of Period leave.

The state of Bihar, has been practicing period leave since 1992, though there is no explicit law or policy under the title of Menstrual leave or Benefit, but it has been into practice not only in the private sector but also the public sector (Government Bodies). Prior the women faced few difficulties asking for the leave, but after few years there was a normalcy established and people were quiet supportive of this act and also there has been no fall in recruiting women in the state and moreover these leaves are asked with responsibility.

About the aspect being that the bill has a part stating that Girls in and onwards class VIII (8th) would be also subjected to Period leave, but this has been followed in Kerala since as long as 1912.

V. CONCLUSION

Hence, it can be concluded stating that though the said bill is discriminatory in nature, but it is a positive discrimination, which is permissible under Article 14 and Article 15 of the Constitution of India, as it empowers legislature to make and amend laws on basis of principle of positive discrimination and make such laws which would uplift women in the society such as Menstrual Benefit Act, 2017.

When the aforementioned articles are read along with Article 42 of the Part IV of the Constitution, it makes it a duty of the state to make laws which provides Just and Humane working Conditions which also means providing Women with Maternity Relief and hence also Menstrual Leave is also permissible legislature that can be formulated and sanctioned by the parliament.

The relationship of an employer with their employee is as fiduciary relationship. This policy has been criticized by stating that the period leaves can be misused by women. In order to avoid this the organization may come up with Fine or Penalty if found that the said leave was misused.

The period leave would be able to remove the stigma attached to the conversation on menstruation and women won't need to take leave for period under provision of some other leave. It is unfair to say that period leaves disadvantage women to men at the workplace, Nations such as Taiwan, Japan, have implemented from the past few decades and it has benefited

employees and also hasn't hampered the economy of their country.

In India though there are states where there are period leaves are already present such as in Bihar and Kerala but there is no such strong legislation that supports the same, even under the Central Labor Laws and State Labor laws, there are provisions that are made for better working conditions for women, such as clean and separate washroom for women, permissible limit of manual labor by women is also less than that of her male co-workers, in case of women with children, the employer has to provide a special, clean and well ventilated room for children which would act as a nursery, But a central Legislation would make it mandatory for not only public sector to enforce such laws but also a private sector to implement such laws and regulations and not only for women into labor intensive jobs, but to women who are a managerial positions and into "White Collar Jobs".

"Now is the time that India should adopt this policy"
