

LEAVE TO BLEED: A JURISPRUDENTIAL STUDY OF THE POLICY OF MENSTRUAL LEAVES

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Menstrual Benefit Bill, 2017 was introduced allowing woman the right to avail a four-day menstrual leave. Having been rejected by the Ministry of Woman and Child Affairs, the Bill sheds light on gender equality as a contested constitutional value. The benefit of menstrual leaves, when couched in the language of a legitimate legal entitlement, does invoke some furor. The most vehement critics worry about a possible dent to the feminist project, believing that the said policy inevitably bases itself on an assumption which concedes to the women's physical incapacity to work 'at par' with men.

This article aims to extend a robust defence in favour of this policy, specifically from the lens of identity, dignity and privacy; which is a fitting paradigm to tackle a lot of the cynicism that surrounds this policy. The article would do so by illustrating parallel comparators of the said policy in other jurisdictions. Next, it traces the idea of feminine identity in a world where objectivity is a standard constructed by men. Third, it argues that the said policy is in complete tandem with the idea of dignity. In doing so, the article extends a two dimensional approach – communitarian dignity and substantive dignity– to observe how the said policy interacts with each of these. Last, the article would address underlined privacy concerns with the Bill and hints at a framework for its protection which is based upon existing models.

I. INTRODUCTION

To commence with the discussion, a brief outline of the Menstruation Benefits Bill (2017)¹ (**Bill**) would be appropriate. The Bill was introduced by Ninong Ering as a Private Member's Bill to legitimize the right to menstrual leaves.

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¹ Menstruation Benefits Bill, 2017, Bill No. 249 of 2017.

The rationale behind this was hinged upon the presumption of uniformity in women's experiences during the course of menstruation.² However, such a presumption is fairly rebuttable. WHO concluded that there is regional parity in the collection of data on the 'neglected topic' of period cramps, which has led to starkly contrasting results.³ Supporting the same, an Oxford study, which compiles all prominent scientific reports on menstrual disorders and pains, indicates that there is a serious paucity of information on the subject.⁴ Therefore, there exists scientific uncertainty to unequivocally conclude that all women necessarily undergo pain and discomfort which makes them ill equipped to function economically (*See below*, Biological Determinism). However, to ease theorization and analysis, the article presumes the same.

The Bill aims at providing certain facilities to female employees during menstruation at work place and for matters connected therewith or incidental thereto. As per S. 2 & S. 3, the applicability of the Bill is limited to those women who are working in 'establishments' such as mines, factories, plantations, shops (where ten or more people have been employed) or for exhibition of equestrian, acrobatic or other performances.⁵ Further, it also extends to students from class 8th onwards.⁶ Under S. 4, the Bill allows a menstruating woman a four-day paid leave, if she is working in an 'establishment' or is a student.⁷ According to S. 5, those women who decline to take the benefit are to be given a half an hour break, twice a day.⁸ At its liberal best, the Bill gives the women the right of 'self-perception' implying that the factum of menstruation, needs only to be self-attested, by those seeking the leave themselves.⁹ Lastly, the Bill stipulates a punishment for employers who deprive the employee-women of their right to menstrual benefits under the Bill.¹⁰

An overview of the Bill indicates that the policy aims at a sectoral application rather than a universal one. Further, it provides a four day leave, more than what most countries allow. Some may also argue that the right of self-perception, opens up a Pandora's box which allows possible misuse at the hands of women,

² *Id.* (The Statement of Objects and Reasons Reads, "According to a research conducted at University College London, and published earlier this year revealed that period pain can be 'as bad as having a heart attack'. Given the biological complexity of females and the intense pain they have to suffer, they shall have the right to be entitled with leave during menstruation.").

³ Pallavi Latthe et al., *WHO systematic review of prevalence of chronic pelvic pain: A neglected reproductive health morbidity*, 6(177) BMC PUBLIC HEALTH (2006).

⁴ Hong Ju et al., *The Prevalence and Risk Factors of Dysmenorrhea*, 36(1) EPIDEMIOLOGICAL REV. 104 (2014).

⁵ Menstruation Benefits Bill, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ S. 8 Menstruation Benefits Bill, *supra* note 1.

¹⁰ S. 10 Menstruation Benefits Bill, *supra* note 1.

despite the fact that such a right protects a woman from harassment. Nothing in the Bill troubleshoots this obvious lacuna in the law.

Yet the most troubling aspect is that the Bill does not consider the possibility of a counterproductive reaction i.e. a possible disincentivization among employers from engaging female labour at positions of responsibility.¹¹

These observations only allude towards the infancy of this Bill as a nascent policy document which explores very little nuance. However, at the same time, it acts as a good primer to strike any conversation on such a benefit which has the potential of revolutionizing labour laws in India. The article, therefore, does not support the Bill as is, but rather provides a theoretical backing for the broad policy.

II. COMPARATIVE REVIEW OF THE POLICY

The right to leave on the first two days of menstruation is not new to labour movements in many Asian and European countries like Taiwan¹², South Korea¹³ and some provinces of China¹⁴. Only recently, Italy became the first European country to formally accept the same.¹⁵

The aim of this section is to intimate the readers of the trajectory that the policy tends to take in numerous jurisdictions. Indonesia illustrates the need for consensus building among all stakeholders, i.e. the government, employers, academia, female labouring class etc, in order to ensure proper implementation of menstrual leaves as a policy. The Russian example stresses on the necessity for the political empowerment of labour to ensure that the policy remains largely protected from the bane of sexism. A study of the law in Japan indicates that owing to traditional practices imbued with patriarchy, subjective need of female labour

¹¹ Quartz, Italy's Paid Menstrual-Leave Bill Would Come with a Big Cost to Italian Women, March 29, 2017, available at <https://qz.com/944210/italys-paid-menstrual-leave-bill-would-come-with-a-big-cost-to-italian-women/> (Last visited on January 18, 2019) (The article explains how the introduction of menstrual leaves in Italy could discourage their employment, "female-friendly work benefits also have a cost for women". Therefore, proposals such as these ought to be met with active incentivisation for female employment. These could involve tax benefits for hiring a woman above a certain threshold of a unit's labour force.)

¹² Aneri Pattani, *In Some Countries, Women get off for period pain*, July 24, 2017 available at <https://www.nytimes.com/2017/07/24/health/period-pain-paid-time-off-policy.html> (Last Visited April 4, 2019).

¹³ *Id.*

¹⁴ Shen Lu & Elain Yu, *Chinese Province Grants Women Leave for Menstruation*, February 16, 2016 available at <https://edition.cnn.com/2016/02/16/asia/china-menstruation-leave/index.html> (Last Visited April 4, 2019).

¹⁵ Anna Momigliano, Italy set to offer 'Menstrual Leave' for female workers, March 25, 2017 available at <https://www.independent.co.uk/news/world/europe/italy-menstrual-leave-reproductive-health-women-employment-a7649636.html> (Last Visited December 26, 2019).

for menstrual leaves is often eclipsed by the 'objective' social and cultural discourse that surrounds it.

Based upon these three metrics – 1) stakeholder commitment, 2) empowerment of female labour force and 3) existing cultural and social discourse surrounding menstruation – the conduciveness of Indian political and social environment, for the policy to be brought into force, would be judged.

A. Indonesia

Before the advent of the Dutch Rule, Indonesian women contributed to the labour force in large numbers. However, during the course of colonialism, the society adopted Dutch sensibilities on gender equality. This diluted the diverse traditions which governed numerous tribes including matrilineal cultures of Minangkabau.¹⁶

Despite the advent of 'New Deal' in the 20th century, Indonesia retained most of its Labour Laws from the colonial times, which were far from being gender neutral. Art. 7 of the UU Kerja Act provided that '*women could not work in the evening except where the work, because of its nature, place and condition, should be performed by women*'.¹⁷ The term evening was defined as '5 pm to 5 am'. Art. 8 prohibited women from working in any mine, underground places or any other place where minerals were extracted.¹⁸ According to Art. 9, "*women could not perform work which presented a danger to their health and safety, or work because of its nature ...presented a danger to morality*"¹⁹

In the midst of these potentially reprehensible laws was Art 13, which provided women the right to menstrual leaves allowing women the right to rest in the first two days of periods. Vide a notification, employers were disallowed to cut wages during the said leave.²⁰ Therefore, women's economic citizenship was made conditional to health, morality and safety, thereby limiting their economic independence to a great extent. Even the law on menstruation was viewed not as one which could create egalitarian working conditions among men and women but one which could keep women within their rightful confines.

With the advent of globalisation, women's economic citizenship came to be redefined. These 'protectionist' laws were to be liberalised. According to Art. 81 of the new Indonesian Labour Law 2003, menstrual leaves were made conditional to the existence of pain. This made the said right open for negotiation,²¹ thereby

¹⁶ SUSAN BLACKBURN, *WOMEN AND THE STATE IN MODERN INDONESIA* 9 (2004).

¹⁷ Jan Elliott, *Labour Legislation and Gender in Indonesia*, 17(3) *ASIAN STUDIES REV.* 33 (1994).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Lahiri-Dutt et al., '*Period Problems*' at the Coalface, 89 *FEMINIST REV.*, 102 (2008) at p. 108.

rendering it to a position of paper law. None of the stake holders showed any inclination to protect female labour rights.

The Women's Movement in Indonesia, which could be the harbinger of such rights, assumed silence. This was because the so called feminist movement was punctured and did not represent the interests of female labouring class.²² Upon joining the ILO, Indonesia incorporated numerous women centric policies within its national legislations, which were manipulated by numerous MNCs which flooded the Indonesian markets. Women were actively discouraged from taking leaves during menstruation by way of an allowance. The said allowance would often be the wage difference between men and women. A case study indicates that on availing a leave, women would be paid lesser than their male counterparts.²³ Women also faced excessive humiliation for exercising the right. For instance, even though Nike and Adidas were lauded for adopting the Indonesian law on menstrual leaves in all their sweatshops,²⁴ the story at the ground was starkly different as women were made to face excessive humiliation, such as being asking them to pull their pants down to confirm if they were truly menstruating.²⁵

Therefore, the said policy was not backed by any of the stakeholders – the government, the women rights activists, international players or the employers. In the absence of stakeholder support, inattentiveness of human rights movements and problematic economic theories, the right to menstrual leaves in Indonesia has died a slow death.

B. Soviet Union

Soviet women have historically assumed a subordinate position in society, however this structure was radically changed by the October Revolution, which established the USSR. The Bolshevik forces rallied under the banner of gender equality in labour force, which indeed gave impetus to woman to join the work force in overwhelming numbers.²⁶

The Soviet Union promised its women equality in its truest sense.²⁷ In furtherance of the same, female unions sought for themselves the right to

²² SUSAN BLACKBURN, *supra* note 16.

²³ *Supra* note 21 at p. 115.

²⁴ Dian Shipley, *Period Leave: Why Companies Should Follow Nike's Lead and "Just Do It"* available at <http://monthlygift.com/blog/in-the-news/understanding-period-leave-feminist/> (Last Visited January 18, 2019).

²⁵ Timothy Connor, *We are not Machines*, January 3, 2001 available at <https://cleanclothes.org/resources/publications/we-are-not-machines.pdf> (Last visited January 18, 2019).

²⁶ Joan Scott, *Role and Status of Working Women in the Soviet Union*, 14 INDUS. & LAB. REL. F. 67 (1980)

²⁷ Berman, *Soviet Family Law in the Light of Russian History*, 56 YALE L. J. 26, 49 (1946); Aleta Wallach, *Comparative Legal Status of American and Soviet Women*, 5(2) Valparaiso University L.

menstrual leaves, which in their minds enshrined the ideal of 'equality of opportunity'.²⁸ Several studies and surveys concerning female health and hygiene were conducted for its efficient implementation across the country.²⁹ They argued that law ought to account for women's special needs.³⁰ However, this dream was short lived. Sexism, which slowly began to resurface, was evident in the discourse surrounding menstrual leaves. The Second World War led to decimation of the Soviet population, which was already slumping in its growth. The popular rhetoric required women to rear children and big families began to be incentivised. An ideal woman was projected as one who was willing to mother children, pass on communist ideals across the generations along with being committed labourers.

Once the USSR broke down, the policy of menstrual leaves has not seen the light of the day. In 2013, a Bill for the same was proposed in the Russian parliament,³¹ which was faced with immense criticism.

The Soviet illustration indicates that a successful menstrual leaves policy requires commitment towards ideals of equality devoid of sexism. The same could be achieved by empowering female labour by way of recognising female trade unions and structurally revamping the idea of a family. However, this too comes with its own set of challenges owing to deep seated patriarchy. Holding on to beliefs based on gender equality becomes tricky specifically in times of changing political sensibilities since such beliefs do not run in the substratum of society. Principles concerning gender equality remain deeply vulnerable despite the presence of laws which intend to protect it.

C. Japan

Japanese tales and cultural traditions revolve around the theme of menstruation. For instance, KitsebanKyo (Blood Bowl Sutra), a tale of Buddha, reveals the Japanese belief that hell comprises of a pond of menstrual blood, where 'impure' women are condemned to suffer.³² Following such beliefs, some men refuse women from entering certain spaces, construed as sacred.³³ Therefore, by attributing pollution to reproductive cycles of women, menstruation is perceived

Rev. 439 (1971).

²⁸ Melanie J. Ilić, *Soviet Women Workers and Menstruation: A Research Note on Labour Protection in the 1920s and 1930s*, 46(8) EUROPE-ASIA STUDIES, 1409 (1994).

²⁹ MELANIE J. ILIĆ, WOMEN WORKERS IN THE SOVIET INTERWAR ECONOMY: FROM 'PROTECTION' TO 'EQUALITY' 8 (1999).

³⁰ C.L. BACCHI, SAME DIFFERENCE: FEMINISM AND SEXUAL DIFFERENCE (1990).

³¹ Emily Matchar, *Should 'Paid Menstrual Leave' Be a Thing?*, May 16, 2014 available at <https://www.theatlantic.com/health/archive/2014/05/should-women-get-paid-menstrual-leave-days/370789/> (Last Visited January 18, 2019).

³² Takemi, Momoko, 'Menstruation Sutra' Belief in Japan, 10(23) JAPANESE JOURNAL OF RELIGIOUS STUDIES 229 (1983) at pp. 232-237.

³³ Alice J. Dan, *The law and women's bodies: The case of menstruation leave in Japan*, 7(1-2) HEALTH CARE FOR WOMEN INTERNATIONAL 1 (1986).

antithetical to religion. Despite such taboos, Japan had granted menstruating woman the right to leave (in limited sectors) even before the second World War.³⁴ In the aftermath of the War, Japan implemented the Japanese Labour Standards Law. Article 68 of the Labour Standards reads; “*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.*”³⁵ The said benefit was made available in two circumstances – if the women is working in an inherently hazardous condition or if she is facing extreme discomfort.³⁶

A brief historical review of the policy alludes towards interesting reasons for its early incorporation. In the post Second World War Japan, women below the age of 21 formed majority of its female labouring class.³⁷ Therefore, there was a greater appeal for menstrual leaves instead for maternity leaves.³⁸ However, sociological evidence indicates that this demand was rationalised as being necessary to guarantee safety and health during the course of her pregnancy.³⁹ In fact, regular periods were viewed as a ‘*barometer*’ for good reproductive health of women, thereby making them good prospective wives.⁴⁰ This forced women into availing the leave irrespective of their subjective need.

In the recent past, there has been a palpable decline in the number of women seeking the said benefit, specifically in organised service sectors. Studies have indicated that in order to better their job prospects, women prefer to forgo the said benefit by relying on medications.⁴¹ However, at the same time, female labour in construction and mining sectors are increasingly availing this benefit with a sense of empowerment.

The Japanese illustration indicates that the volatility in the availing the right is governed by external factors which require a women to project herself in a manner which suits the societal demands of the time. Subjective and biological needs seldom become operative while exercising the right to menstrual leaves. Therefore, fluctuation in availing the right need not represent biological needs of the women but what ‘objective discourse’ requires women to do.

³⁴ Molony, *Equality Versus Difference: The Japanese Debate over ‘Motherhood Protection,’ 1915-1950*, In JAPANESE WOMEN WORKING, ED. JA NET HUNTER 122 (1993).

³⁵ Art. 68, Labour Standards Law, 1947 (Japan).

³⁶ Alice J. Dan, *supra* note 33.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

D. India

The advent of puberty is a moment for celebration in rural India. In South India, women adorn a red '*pottu*' on their forehead to mark the aftermath of her first menstruation.⁴² The absence of a '*pottu*' on post-pubescent women is ominous, signifying that either she is menstruating or at best has been widowed.⁴³ However, in the midst of all the frolic, menstruation remains the panacea of the purity-impurity dichotomy which forms the bedrock of the Hindu society.

As per the Rig Veda, menstruation signifies every woman's guilt for killing Brahmanas in their previous births, which comes to haunt them every month.⁴⁴ Therefore during 'that time of the month', a woman is required to exclude herself from society and observe complete isolation. She is banished from the kitchen, temples or even her own resting space into a dingy and potentially secluded corner of the house, where she could remain invisible.⁴⁵

A question emerges - if the traditional division of labor requires women to perform domestic and religious functions, then would it be too bizarre to argue that Indian culture traditionally recognizes menstrual leaves in the form of social seclusion? If this notoriety is to be bought, then its 'secular' avatar runs into the fear of being marred by vulgar sexism. Firstly, the nature of social exclusion, as practiced in India, can hardly be referred to as a 'right'. The said practice affords no choice to the women in deciding her need for said rest. Instead, it is posed as some sort of a curse or burden. Secondly, the practice barely concerns itself with the physiological needs of a woman but rather only with that the said impurity ought not to spread through food, prayers or even by way of physical presence. The state of seclusion devoids women of comfort, nutrition, and hygiene. Therefore, the said practice is antithetical to the promotion of menstrual leaves in India.

As was noted earlier, the Russian example indicates that unionization among female labor gives impetus to women sensitive laws such as the menstrual leaves. In view of this, the Indian Labour law lends little voice to female labour as a collective, even though the law establishes formal equality between the two genders.⁴⁶ In fact, sociologists have indicated tendencies among unions led by men to subjugate their fellow female colleagues by denying them equal opportunities,

⁴² Vijaya Nagarajan, *Threshold Designs, Forehead Dots, and Menstruation Rituals: Exploring Time and Space in Tamil Kolams*, in TRACY PITCHMAN, *WOMEN'S LIVES, WOMEN'S RITUALS IN THE HINDU TRADITION* 91 (2007).

⁴³ *Id.* at 92.

⁴⁴ Nikita Arora, *Menstruation in India: Ideology, Politics and Capitalism*, 23(4) *ASIAN J. OF WOMEN'S STUD.* 528 (2017).

⁴⁵ Suneela Garg, *Menstruation Relation Myths in India*, 4(2) *J. FAM. MED. PRIM. CARE* (2014), at p. 184.

⁴⁶ Article 39(d) Constitution of India; Equal Remuneration Act, 1976 (Act No. 25 of 1976).

such as working in night shifts.⁴⁷ Women are seldom able to voice their subjective demands to shape conditions of work which are most suitable for them. Sarkar and Bhaumik note that even in sectors such as plantation work where women form majority of the labour force, their representation in the trade unions remains reprehensible.⁴⁸ The issue of menstruation affects the labouring classes the most and therefore a demand for the same could be voiced most enduringly by women who face the brunt of working during menstruation.

The application of the existing Maternity (Benefit) Bill, 1961 along with its subsequent amendments throws light on the counterintuitive nature of any provision which aims at achieving welfare for women in her workspace – they render female labour more expensive as compared with other forms of labour thereby discouraging employers from hiring women. In order to counter this, numerous countries within the European Union allow for tax benefits for hiring women.⁴⁹ Such ‘hiring benefits’ aim at shifting the economic burden of hiring socially disadvantaged groups from the employer to the state.⁵⁰ Replication of this fiscal strategy may prove prudent in tackling the negative externalities associated with such welfare policies.

The policy of menstrual leaves is not entirely new to India. Bihar state government recognised the right to Menstrual Leaves for teachers in government schools by way of a notification.⁵¹ Certain companies too have introduced the policy on an individual basis, indicating support for the same.⁵² Despite, the said mushrooming, there is negligible consensus on the question. It is hard to say that the country is ready to nationalise the policy of menstrual leaves as a matter of a legitimate right.

III. MENSTRUAL LEAVES AND THE QUESTION OF IDENTITY

This field of policy research is teeming with contradictions, which brings feminist jurisprudence to the cusp of debilitation. In a fascinating piece of writing, Gloria Steinem pictures a scenario ‘If Men Were To Menstruate’.⁵³ She writes,

⁴⁷ Venkata Ratnam et al., *Women in Trade Unions in India*, 23(3) INT. J. OF MANPOWER 277 (2002).

⁴⁸ K. Sarkar et al., *Trade Union and Women Workers in Tea Plantations*, 33(52) Econ. & Pol. Wkly L 50 (1998).

⁴⁹ European Commission, *Stimulating Demand, The Design of Effective Hiring Subsidies in Europe*, E.U. POL. OBSERVER REV. (2014).

⁵⁰ *Id.*

⁵¹ Bihar Rural Livelihoods Promotion Society Manual, HRD Ministry, Government of Bihar, January 17 (dated 17.1.2013).

⁵² First Post, *After Culture Machine, Media Company Mathrubhumi Offers ‘First Day of Period’ Leave to Women Employees*, July 2017 <https://www.firstpost.com/india/after-culture-machine-media-company-mathrubhumi-offers-first-day-of-period-leave-to-women-employees-3831017.html> (Last Visited March 3, 2019).

⁵³ Steinem Gloria, *If Men Could Menstruate*, October 1978 available at http://www.mylittleredbook.net/imcm_orig.pdf (Last Visited January 18, 2019).

“Military men, ...would cite ‘MEN’struation as proof that only men could serve in the Army (you have to give blood to take blood)”, and she continues, “Men would convince women that intercourse was more pleasurable at ‘that time of the month.’” She predicts, that various feminists would respond differently – ‘cultural feminists would develop a bloodless imagery, radical feminists would add that the oppression of the non-menstrual was the pattern for all other oppressions and socialist feminists would insist that only under capitalism would men be able to monopolize menstrual blood’.

The discourse surrounding menstruation is often constructed from a ‘male point of view’. There is always an attempt to capture women’s experiences in a manner which conforms to male normativity. For instance, women’s need for pregnancy leave was often regarded as a ‘handicap’.⁵⁴ Mackinnon rationalises this incapacity of law itself to capture living realities of women to their exclusion from law making - *“The Law that is applied to ...women was not written by women, white or Black, rich or poor. It has not been based on women’s interests as women in creating it, and few have considered women’s interests as women in applying it.”*⁵⁵ This section would view Menstrual policy from three jurisprudential creeds in order to challenge masculine normativity as a vantage for judging female identity under the garb of ‘objectivity’, Masculine Bias in scientific research and Marxist Feminism.

A. Menstruation Through Similarity and Difference Feminism

Feminists through the ages have adopted a policy of silence on the ‘blood’ question. Even today, there is a continuous attempt to reject the formulation of menstruation as an issue in need of help. Barkha Dutt wrote *“I am a Feminist. Giving Women a Day Off for their Period is a Stupid Idea”*.⁵⁶ Blunt Moms posted *“Paid Menstrual Leaves puts a real cramp in Feminism”*.⁵⁷ The Medium also wrote *“Period Leave and the Death of Feminism”*.⁵⁸ At the same time there are equal number of feminists who have stood up in support of menstrual leaves – In direct response to Barkha Dutt’s article, Somaya Gupta declared, *I am a Feminist and*

⁵⁴ Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANCE 325(1984-85) at p. 369.

⁵⁵ CATHERINE MACKINNON, WOMEN’S LIVES, MEN’S LAWS 33 (2005).

⁵⁶ Barkha Dutt, *I am a Feminist. Giving Women a Day Off for their Period is a Stupid Idea*, August 2017 available at https://www.washingtonpost.com/news/global-opinions/wp/2017/08/03/im-a-feminist-but-giving-women-a-day-off-for-their-period-is-a-stupid-idea/?utm_term=.a0fo672e076d (Last Visited March 3, 2019).

⁵⁷ Alison Huff, *Paid Menstrual Leaves Puts a Real Cramp in Feminism* available at <https://blunt-moms.com/paid-menstrual-leave-feminism/> (Last Visited March 3, 2019).

⁵⁸ Apoorva Vishnoi, *Period Leave and the Death of Feminism*, August 2017 available at <https://medium.com/indian-thoughts/period-leave-and-the-death-of-feminism-a56fe1ba10fi> (Last Visited March 3, 2019).

*I support one day period leave*⁵⁹. Further, the Quint questioned “*Dear Naysayers, Why would menstrual leaves defeat feminism?*”⁶⁰. This ongoing debate concerning menstrual leaves is ominous of the historic strife between liberal and radical feminism over the conception of equality.

Among most feminist legal theorists, there is a firm belief that the genders are symmetrically located on all questions of law and policy.⁶¹ In fact, Williams, a liberal feminist, argues that “*we can’t have it both ways, we need to think carefully about which way we want to have it*”.⁶² On the other hand, the Radicals argue that such a conception of equality is based upon similarity rather than justice, which requires the world to become gender neutral thereby proscribing recognition of gender itself. Mackinnon explains that such a definition could cause a slow death of feminism as ‘*neutrality enforces a non-neutral status quo*’.⁶³ Accepting status quo as neutrality renders privileged men to be the benchmark leaving women as the exceptions.⁶⁴

This acerbic debate became most palpable during the case of *California Federal Savings and Loan Assn. v. Guerra*, which concerned the validity of the Pregnancy Discrimination Act that provided for paid maternity leaves.⁶⁵ Interestingly, the American Civil Liberties Union, the Amicus in the said case argued against the Californian Law on the grounds that leaves should be provided either for all ‘disabilities’ including pregnancy or for none.⁶⁶ Many other Feminist organisations such as League of Women Voters followed the parity model and argued against the Act. On the contrary, other groups such as Equal Rights Advocates⁶⁷ and California Women Lawyers argued that the said law was in furtherance of equality of opportunity.⁶⁸

⁵⁹ Somaya Gupta, *I am a Feminist and I Support One Day Period Leave*, August 2017 available at <https://www.firstpost.com/india/i-am-a-feminist-i-support-one-day-period-leave-menstruation-is-healthy-debate-ghetoises-women-3903571.html> (Last Visited March 3, 2019).

⁶⁰ Akanksha, *Dear Naysayers, Why would Menstrual Leaves Defeat Feminism?*, July 2017 available at <https://fit.thequint.com/health-news/why-is-someone-wanting-period-leave-a-sign-of-disrespect-to-feminist-movements-3> (Last Visited March 3, 2019).

⁶¹ Cristine A. Littleton, *Reconstructing Sexual Equality* in KATHERINE T. BARLETT & ROSANNE KENNEDY, *FEMINIST LEGAL THEORIES READINGS IN LAW & GENDER* 35 (1991).

⁶² Williams, *The Equality Crisis: Some Reflections on Culture Court, Feminism*, 7 WOMEN’S RTS. L. REP. 175, 196 (1982).

⁶³ Catherine A. MacKinnon, *Sexology and Antifeminism* in DORCHEN LEIDHOLDT & JANICE G. RAYMOND, *SEXUAL LIBERALS AND THE ATTACK ON FEMINISM* (1990) at p. 12.

⁶⁴ Carol Bachhi, *Do Women Need Equal Treatment or Different Treatment*, 8 AUST. J. OF LAW & SOC 80 (1992) at p. 82.

⁶⁵ *California Federal Savings and Loan Assn. v. Guerra*, 1987 SCC OnLine US SC 2 : 93 L Ed 2d 613 : 107 S Ct 863 : 479 US 272 (1987).

⁶⁶ *Id.* at ¶7.

⁶⁷ Susan Spalter Berman, *California Federal Savings and Loan Association v. Guerra: The State of California has Determined that Pregnancy May be Hazardous to Your Job*, 16 GOLDEN GATE U. L. REV. 515 (1986) at p. 517.

⁶⁸ Lisa A. Rodensky, *California Federal Savings & Loan Association v. Guerra: Preferential Treatment and the Pregnancy Discrimination Act*, 10 HARVARD WOMEN’S L. J. 10 225 (1987) at p. 242.

The question of menstrual leaves, tests this dialogue most stringently. Many who could have been in favour of maternity leave may wish to switch sides and liberal feminism might indeed die a slow death. This policy presumes the asymmetry between the two sexes. This presumption is neither based upon the abdication of the feminist principle of equality nor is it a reflection of feminine weakness, as many would like to propose. It is merely a recognition of a difference which needs accommodation in policy sphere. It also resounds with the ultimate feminist victory to liberate women from being subjected to male benchmarks under the garb of neutrality. In the same spirit, Bacchi notes “...menstruation does not normally incapacitate a woman, and that work will not normally make menstruation more painful or uncomfortable provided work is organised with women’s comfort in mind.”⁶⁹ In the Indian Constitutional Framework, the principle of dignity plays an elemental role in recognising differences based upon identities of individuals. This debate would thus be carried forward in the segment ‘substantive dignity’.

B. Scientific Enquiry and Biological Determinism

Since menstruation is exclusionary to woman, its imagery is plagued with biological determinism and elements of sexism. Biological determination is a tactic that utilises scientific enquiry as a tool to explain roles of people in the society. For instance, during Victorian era, scientists explained women’s lack of intellectual and physical capacity as a consequence of the size of their brains and general physique.⁷⁰ A blow to this came in the 19th century, when feminists began critiquing the neutrality, which any scientific enquiry claimed to adorn. One of them indicated a lack of scientific interest in understanding woman’s issues such as menstrual discomfort.⁷¹ Eventually a more serious question came to be posed; how much of “sex” (in the biological sense) is constructed?⁷² Drawing from the ideas of Herbert Spenser and Charles Darwin, they argued that centuries of suppression have lead woman to develop biological traits, which ought not to be treated as ‘natural’.⁷³

It has also been argued that the scientific enquiry surrounding menstruation is often based on predetermined gender roles. Koeski explains how biological determinism in scientific techniques has shaped perceptions about menstrual health and an understanding of female psychology.⁷⁴ She illustrates that there

⁶⁹ C.L. BACCHI, SAME DIFFERENCE, FEMINISM AND SEXUAL DIFFERENCE 150 (1990).

⁷⁰ Scott Schneider, *Is Our Biology to Blame?*, 39(7) THE AMERICAN BIOLOGY TEACHER 432 (1977); Janet Shibley, *Meta-Analysis and the Psychology of Gender Differences*, 16(1) SIGN 55 (1990) at 56.

⁷¹ Evelyn Fox, *Feminism and Science*, 7(3) SIGNS 589 (1982) at 590.

⁷² Cynthia Kraus, *Naked Sex in Exile: On the Paradox of the ‘Sex Question’ in Feminism and in Science*, 12(3) NWSA J. 151 (2000).

⁷³ ELIZA BURT, THE EVOLUTION OF WOMAN: AN INQUIRY INTO THE DOGMA OF HER INFERIORITY TO MAN 92 (1893); ANTOINETTE BROWN BLACKWELL, THE SEXES THROUGHOUT NATURE 75 (1875).

⁷⁴ Randi Diamon Koesky, *Lifting the Curse of Menstruation: Towards a Feminist Perspective over Menstrual Cycles*, 8 (2-3) WOMEN AND HEALTH 1 (1983).

is a greater focus on 'context free factors, which exists within an organism'. Therefore experimentations miss finer nuances of individual physiology, genes and psychology, which majorly affect menstrual patterns. Scientific presumptions homogenise identities of woman thereby claiming universality. Therefore the definitional 'natural', which is based upon a socially perceived ideal of womanhood, is far from reality.

In this view, a case can be made against universal application of menstrual leaves to the entire class of woman. Since, experiences of woman during menstruation are far from uniform, such a right ought to be granted on need basis and not on the basis of sex. Feminists have therefore critiqued attempts to universalise this provision by calling it a 'patronising act'. For instance Clair Cohen, a journalist writes, '*Let's be clear: periods are rotten. But they are a natural process... We don't need 'thoughtful' male bosses to patronise us into resting up*'.⁷⁵ In another one, Sanjukta Bose writes "*Period Leave reinforces damaging stereotypes about women*".⁷⁶ Therefore, the implementation of the said policy calls for an impetus in research on female physiology from a gender neutral perspective. The next segment aims to capture the intersectionality between female biology and labour to see where menstrual leaves falls within the framework.

C. Marxist Feminism and Positioning of Menstrual Benefit

An economic critique of the right to Menstrual Leave rings a bell that it is antithetical to capitalistic 'virtues' of efficiency and productivity. Marx evaluates this capitalistic fetish for productivity. By claiming it to be 'bourgeois narrow-mindedness', he explains that it is a labourer's contribution to the surplus value of a product, which renders it productive.⁷⁷ This surplus value itself constitutes the divide between the *proletariat* and the *bourgeoisie*, and creates the basis for exploitation of the former in the hands of the later. Marx explains that the divide between a productive labour and an unproductive labour is a farce, '*designation of labour as productive labour has absolutely nothing to do with the determinate content of that labour, its special utility, or the particular use-value in which it manifests itself*'.⁷⁸ The Marxist response to any arguments of economic efficiency questions its commitment towards welfare and reveals its notoriousness in favouring a society which is exploitative and discriminatory. Therefore, the capitalistic response to menstrual leaves which argues that implementation of the said policy could render female labour to a disadvantageous position, requires a deeper

⁷⁵ Cohen Clair, *What Working Women Don't Want: Menstrual Leave Period*, December 4, 2014, available at <https://www.telegraph.co.uk/women/womens-life/11273189/Working-women-dont-want-menstrual-leave-Period.html> (Last Visited January 18, 2019).

⁷⁶ Basu, Sanjukta, '*Period Leave' Reinforces Damaging Stereotypes About Women* August 9, 2017, available at https://www.huffingtonpost.in/sanjukta-basu/period-leave-reinforces-damaging-stereotypes-about-women_a_23064388/ (Last Visited January 18, 2019).

⁷⁷ KARL MARX, THEORIES OF SURPLUS VALUE PART I (1863) at 393.

⁷⁸ *Id.* at 401.

enquiry. However, Marxism itself is inadequate to answer this serious dilemma which the market forces cast on the viability of menstrual leaves and it being counter-productive to the welfare of women. Hence, there is a need to delve deeper into the treatment of women by Marxist ideology and understand the interaction between women, labour and market forces.

Interestingly, Marx viewed woman's reproductive and household labour as 'independent' [from the labour in capitalistic set up].⁷⁹ However, Marxist feminists critique such a characterization and explain that woman's role in child bearing and rearing perpetuates patriarchy just as the labour of the workers lends fodder to capitalism. They explain that a woman stepping out for work is doubly oppressed, both by her patriarchal and capitalistic 'masters' (i.e. husband and the entrepreneur).⁸⁰ The consequence is that power of both the masters tends to tug, making each insecure of his role over her.⁸¹ Therefore, identity of a woman as a vehicle of procreation and as an economic force ought not to be seen as distinct spheres. These identities do not work independent of each other. They are immensely fluid and have a pervading impact on each other.

There seems to be a traceable pattern in stigmatisation of menstruation and simultaneous ritualization of reproduction, which remains consistent through numerous cultures.⁸² In this sense it could be concluded that menstruation is rather antithetical to reproduction, a mere externality.

In other words, it is a missed chance of procreation. Consequently, leaves for menstruation questions the productivity of woman in both contexts, in the capitalist and patriarchal sense. Keeping this in mind, it makes perfect sense when a society readily accepts maternity leaves as a welfare project while rejects menstrual leaves as a policy. Well, in the former, women are productive at least in one sense (re-productive sense) while in the later; they are unproductive in both the senses.

IV. MENSTRUAL LEAVES AND THE QUESTION OF DIGNITY

Dignity finds no mention in Part 3 of the Constitution. Therefore, a question emerges, why should menstrual leaves even stand the test of dignity at all? A straightforward answer to this would be that dignity acts as a linchpin for all existing rights. Baxi explains that, *'the remarkable aspect of dignity is that it rises*

⁷⁹ Jacquilyn Weeks, *Un-/Re-Productive Maternal Labor: Marxist Feminism and Chapter Fifteen of Marx's Capital*, 23(1) RETHINKING MARXISM: A JOURNAL OF ECONOMICS, CULTURE & SOCIETY 31 (2011).

⁸⁰ Hartmann H., *The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union*, 3(2) CAPITAL AND CLASS I (1979) at 15.

⁸¹ *Id.* at 15.

⁸² THOMAS BUCKLEY ET. AL., BLOOD MAGIC: THE ANTHROPOLOGY OF MENSTRUATION 9, 12 (1988).

*above the indictment of human rights as constructs of domination.*⁸³ Dignity runs in the substratum of all human rights. Many theorists also believe, in essence, that even if all existing rights wither away, dignity is what would be remain.⁸⁴ McCrudden indicates how dignity became the basis of the UDHR while the countries were conflicted on any other value.⁸⁵ Dignity as a concept can therefore be considered elemental to ‘rule of law’, which can fit into any mold to define the basic, inviolable essence of personhood.

Deep cynicism has also been shown in accepting such a formulation of dignity since it runs into the fear of creating a slippery slope.⁸⁶ Over-invocation of dignity robs it of its true content and blurs its threshold.⁸⁷ They argue that dignity ought to be given its own identity with its set of limitations each time it is invoked.

The article takes an intermediary approach. While I find some merit in the argument that dignity is elemental to all rights and each right ought to be interpreted while keeping personal dignity in mind, I also recognize the need for dignity to have a stable identity of its own. Therefore, it would be appropriate to check whether the policy menstrual leaves stand the test of dignity. This review would be hinged upon a two-dimensional review of dignity.⁸⁸

A. Substantive Dignity

Dignity in its substantive sense forms the basis for equality.⁸⁹ The Canadian Supreme Court puts this nexus most eloquently, ‘*equality means that our society cannot tolerate legislative distinctions that treat certain people as second class citizens, that demean them, that treat them less capable for no good reason, or that otherwise offend the fundamental human dignity.*’⁹⁰ It is often argued that equality may exist as a stand-alone principle, independent of dignity.⁹¹ However, if only rationality is to rule equality, then there will be no basis to determine the legitimacy of

⁸³ Upendra Baxi, *The Place of Dignity in the Indian Constitution*, in MARCUS DÜWELL ET AL., *THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES* 434 (2014).

⁸⁴ M Du’well, *Human Dignity: Concepts, Discussions, Philosophical Perspectives* in MARCUS DÜWELL ET AL., *THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES* 33 (2014).

⁸⁵ Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19(4) E.J.I.L. 655 (2018).

⁸⁶ Id. at pp. 722-723.

⁸⁷ Laura Valentini, *Dignity and Human Rights: A Reconceptualisation*, 37(4) OX. J. L. STUD. 862 (2017).

⁸⁸ Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011).

⁸⁹ Evadne Grant, *Dignity and Equality*, 7 HUM. RTS. L. REV. 299 (2007).

⁹⁰ *Egan v. Canada*, (1995) 2 SCR 513 L’Heureux-Dube, J. stated at para 36.

⁹¹ Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

classification itself, even if it is 'reasonable'. For instance, in the *Air India* case⁹², the court upheld the validity of the state's contractual terms which required air hostesses to resign after marriage. Misapplying the principle of reasonable classification, the court held that the difference in contractual terms between air hostesses and stewards was based upon an intelligible classification since the recruitment procedures for both were different. However, such differentiation cannot be termed as 'legitimate' since it resulted in discrimination among workmen who were employed for the same work.

The Supreme Court by blinding itself to the concept of dignity, has on several instances misapplied the law on equality. For instance, in the case of *Yusuf Abdul Azeez*, the court held that since adultery can only be committed by a man, and not by a woman, it is to be considered a 'special provision' for women under Art. 15(2) of the constitution.⁹³ Observing the absurdity in the law, the court heavily relied upon dignity and overruled its previous judgment holding that the law on adultery treats '*women as chattel*', devoid of all sexual agencies.⁹⁴ Therefore, the court disgraced the principle of dignity and placed all its bets on 'rationality' while deliberating over equality, thereby leading to absurd results. Dignity forms the basis of equality, which espouses both, the protection from discrimination and equality of opportunity.⁹⁵ The courts are now more comfortable in employing dignity alongside equality.

The policy of menstrual leaves has been criticized on the grounds that it legitimizes the very same gender inequality, which it seems to be fighting against.⁹⁶ It re-opens the debate on equality of men and women which was settled by the first wave of feminism thereby undermining a lifetime of work by numerous feminists who bannered under the slogan of 'Equal Pay for Equal Work'. The movement had argued that the inherent worth of a woman is same as that of a man and therefore, equal work done by them should account for an equal pay. This movement was also rooted in the belief of dignity, self-worth, and formal equality.⁹⁷ Contrary to this understanding, as many would like to believe, the Bill

⁹² *Air India v. Nergesh Meerza*, (1981) 4 SCC 335 : AIR 1981 SC 1829.

⁹³ *Yusuf Abdul Aziz v. State of Bombay*, AIR 1954 SC 321.

⁹⁴ *Joseph Shine v. Union of India*, (2019) 3 SCC 39 : 2018 SCC OnLine SC 1676.

⁹⁵ Sandra Fredman, *Introduction To Discrimination Law* (2002); Denise Reaume, *Discrimination and Dignity*, 63 L.A. L. REV. 645 (2003).

⁹⁶ Clair Zilman, *Why Italy's Proposed 'Menstrual Leave' Might Hurt more than Help*, March 28, 2017 <http://fortune.com/2017/03/28/italy-menstrual-period-leave/> (Last Visited January 18, 2019) (Reads, But asking employers to specifically accommodate women's most mundane biological attribute—while helpful to those who suffer severe pain—seems overall like a retrograde request, especially considering how far women have come without it. Plus, these kinds of policies threaten to undermine women's long-standing battle to discourage the notion that their natural cycle makes them weak or in any way less able.)

⁹⁷ Roslyn Baxndall & Linda Gorodon, *Second Wave Feminism* in NANCY A. HEWITT, *A COMPANION TO AMERICAN WOMEN'S HISTORY* (2005).

seems to accept the physical incapacity of the women to work during the time of menstruation thereby denigrating their identity.

However, such a conclusion would be highly misplaced, since dignity is invariably linked with the identity of an individual. In a South African Supreme Court judgment, the court was faced with a similar dilemma – whether a Presidential pardon to female prisoners who have children below the age of three was discriminatory to their male counterparts. The court rejected the contention and held that “[t]he Presidential Act may have denied them an opportunity it afforded women, but it cannot be said that it fundamentally impaired their rights of dignity or sense of equal worth”.⁹⁸ Formal equality on the contrary, refuses to engage with such ideals of identity which associate with dignity.

Habermas explains that the principle of equality functions differently in different zones of recognition. According to him, “[people] *should receive equal protection and equal respect in their integrity as irreplaceable individuals, as members of ethnic or cultural groups, and as citizens, that is, as members of the political community*”⁹⁹ He postulates that while recognition of people in the zone of humanity calls for application of ‘*politics of universalism*’ which is based upon inherent dignity of people, the recognition of people as members of a class or community commands the application of ‘*politics of difference*’ which is based upon individual dignity (which is closely connected to the principle of identity).¹⁰⁰ The nexus between identity and dignity brings us back to our discussion on universalisation of the ‘*male point of view*’. Sandra Fredman gives a convenient example – the inability of a few legal systems to recognise the nature of maternity leaves thereby mischaracterising it as sick leaves.¹⁰¹ Special provisions for women come as an extension of already existing structures and procedures which were created to cater only the men and therefore the model of equality gets eclipsed by the ‘sameness’ principle.

Contrary, to the sameness principle, the policy of menstrual leaves has an equalizing force as it creates a parity in work conditions between men and women, while recognizing the identity and special needs of women. It therefore does not nullify the effect of ‘*Equal pay for Equal work*’ doctrine. Hence, the policy of menstrual leaves is in complete tandem with the principle of substantive dignity, which lies at the cusp of the principle of equality as espoused in Art. 15(2) of the Indian Constitution.

⁹⁸ *President of the Republic of South Africa v. Hugo*, 1997 SCC OnLine ZACC 4 : 1997 ZACC 4 at ¶47.

⁹⁹ JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 496 (1996).

¹⁰⁰ *Id.*

¹⁰¹ Sandra Fredman, *Substantive Equality Revisited*, 14 (3) INT J CONST LAW 719 (2016).

B. Communitarian Dignity

Communitarian dignity resonates with the oldest form of dignity as ‘*dignitas*’, which means status or rank in society.¹⁰² In the recent Puttaswamy judgment, Sikri J. while speaking for the majority, referred to the existence of ‘community dignity’ in India.¹⁰³ He explained that ‘*community dignity relates to the social dimension of dignity*’.¹⁰⁴ He further observes that ‘*personal autonomy is constrained by the values, rights, and morals of people who are just as free and equal as him, as well as by coercive regulation*’.¹⁰⁵

In this regard a communitarian form of dignity espouses a socially constructed ideal of life which is believed to be dignified. For instance, communitarian dignity would govern clothing habits of women in public spaces. In most cultures sex work would be considered undignified while house work would not be. Therefore, community dignity often finds itself to be antithetical to autonomy as it imposes restrictions on ‘*individual freedom and rights on behalf of a certain idea of the good life*’.¹⁰⁶

The state tends to act in a paternalistic fashion to ensure that such a standard is met, for instance, by banning beggary, prostitution. In an absolute form, this leads to a gradation of individuals on the basis of their conformance to this standard of dignity created by the society.¹⁰⁷ Therefore, dignity no longer represents the inherent value of personhood but rather a *de-minimis* threshold of life, which if attained would attach dignity to a human being. The onus therefore lies upon the state to punish actions which fall below this *de-minimis* standard spun up by the society. Dworkin, in his exposition explains that ‘*good government consists in fostering or at least recognizing good lives; treatment as an equal consists in treating each person as if he were desirous of leading the life that is in fact good*’.¹⁰⁸ Laws concerning criminalisation prostitution, public nudity, obscenity etc. bring home this point. However, the socially constructed meaning of what constitutes a dignified life is constantly evolving. This is because of the transitional and subjective nature of morality itself. When this happens, individual dignity as intrinsic worth supersedes community dignity, thereby liberating the individual.

While opening the gates of the Sabarimala Temple for female devotees, the Supreme Court for the first time recognized the nexus between menstruation,

¹⁰² Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1118 (2011).

¹⁰³ K.S. Puttaswamy v. *Union of India*, (2019) 1 SCC 1 at ¶145.4.

¹⁰⁴ *Id.* at ¶145.4.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at ¶145.5.

¹⁰⁷ Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. (2011); Stéphanie Hennette-Vauchez, *A Human Dignitas? Remnants of the Ancient Legal Concept in Contemporary Dignity Jurisprudence*, 9 INT’L J. CONST. L. 32 (2011).

¹⁰⁸ Ronald Dworkin, *Liberalism*, in PUBLIC PRIVATE MORALITY 127 (1978).

pollution, and dignity. Citing Ayurvedic practices, the Respondents had submitted that menstruation was a period of bodily uncleanness when women needed rest, which made them ill-suited to perform 41 days of spiritualism. Based upon this understanding, the state government had classified the women entrants on the basis of menstruation. Rejecting the said argument, the court held that “*the subversion and repression of women under the garb of biological or physiological factors cannot be given the seal of legitimacy.*”¹⁰⁹ It further recognized that “*popular notions about what is or is not moral may in fact be deeply offensive to individual dignity and human rights. Individual dignity cannot be allowed to be subordinate to the morality of the mob.*”¹¹⁰

This context is pertinent in understanding the discourse which surrounds menstruation in India. In most parts of the country, menstruation is considered impure. Social construction of menstruation requires it to be shoved in the deepest private corners of a women’s life. Community dignity requires that respect be paid to such a social construction and frowns upon any discussion over the said matter in the public sphere. However, contrary to such standards of morality, the policy on menstrual leaves necessitates women to communicate their menstrual status along with details of fertility cycle, to their superiors in a work setting. Therefore, the policy flies in the face of communitarian dignity which surrounds the discourse on menstruation in India.

Despite the existence of such moral standards surrounding menstruation, the Indian state has indicated its willingness to make a shift over to substantive forms of dignity specifically in the context of menstruation. Numerous policies now cater to a woman’s needs during menstruation. This involves easy availability of sanitary napkins¹¹¹, construction of toilets¹¹² etc. Socially, the urban working class has witnessed what could be characterized as a ‘menstrual revolution’ with tampons, menstrual cups and reusable sanitary napkins flooding the pharmaceutical sector.¹¹³ This is matched with simmering interest in spreading this awareness within the rural sector. Therefore, the time may seem ripe to finally shift from this communitarian understanding of menstruation to a liberal one.

¹⁰⁹ *Indian Young Lawyers Assn. v. State of Kerala*, 2018 SCC OnLine SC 1690 at ¶3.

¹¹⁰ *Id.* at ¶118.

¹¹¹ Ministry of Health and Family Welfare, *National Health Mission*, December 2, 2013 available at <http://nhm.gov.in/nrhmcomponnets/reproductive-child-health/adolescent-health/mhs/311-schemes.html> (Last Visited January 18, 2019).

¹¹² Ministry of Urban Development, *Guidelines for Swaccha Bharat Mission*, December 2, 2013 available at http://swachhbharaturban.gov.in/writereaddata/SBM_Guideline.pdf (Last Visited January 18, 2019).

¹¹³ Down To Earth, *India’s Sustainable ‘Blood Revolution’*, January 24, 2019. <https://www.downtoearth.org.in/blog/health/india-s-sustainable-blood-revolution--62957> (Last Visited January 18, 2019).

V. PRIVACY AND THE POLICY OF MENSTRUAL LEAVES

Adequate safeguards for the protection of privacy are necessary in any policy proposing menstrual leaves. This is because, in an age of data generation and its compilation, the exercise of right to menstrual leaves would invariably give employers a peep into a woman's fertility cycles and other reproductive health issues. Sharing such information can take a heavy blow on a women's reputation, interpersonal relationships, and most importantly her privacy to her reproductive information. The amicus in the Sabarimala Decision had submitted that "*involuntary disclosure by women of both their menstrual status and age which amounts to forced disclosure that consequently violates the right to dignity and privacy embedded in Article 21 of the Constitution of India.*"¹¹⁴ Examples of gross violations of human rights in availing such a right in parallel jurisdiction (see for instance Indonesia) indicates the necessity for mechanisms to protect privacy. A lack of such a mechanism, could demotivate women from availing the right.

This segment will focus on the 'object and form' of the legislation while judging derogations rather than its 'pith and substance', as observed by the previous two segments.¹¹⁵ Therefore the said policy is judged upon a consequentialist approach i.e. violations while the policy is 'in action' or is 'under implementation'.

A. Dignity and Informational Privacy

Before I suggest a possible framework for the protection of privacy, it is imperative to first delve into its substantive content, which is in danger of getting compromised. Thompson argues that any attempt to define privacy as a stand-alone principle would be futile as it is an impossible endeavour.¹¹⁶ He explains '*nobody seems to have any very clear idea what the right to privacy is. We are confronted with a cluster of rights—a cluster with disputed boundaries—such that most people think that to violate at least any of the rights in the core of the cluster is to violate the right to privacy.*'¹¹⁷ If such an understanding is to influence our understanding of privacy, then there is a need to identify the substance of both – the core as well as the peripheral right which seems to be getting violated. I would place my bets on 'informational privacy' and 'communitarian dignity' as the core and peripheral values which may be under contestation, respectively.

This nexus between privacy and dignity, specifically in the context of reproductive rights, was first recognised in the case of *Suchita Srivastava*¹¹⁸, where the two found themselves in a thorny zone. The question before the court concerned the constitutionality of an administrative decision to terminate the pregnancy of

¹¹⁴ *Indian Young Lawyers Assn. v. State of Kerala*, 2018 SCC OnLine SC 1690 at ¶72.

¹¹⁵ *Bennett Coleman & Co. v. Union of India*, (1972) 2 SCC 788.

¹¹⁶ Judith Jarvis Thompson, *The Right to Privacy*, 4(4) PHIL. & PUB. AFF. 295 (1975).

¹¹⁷ *Id.* at p. 312.

¹¹⁸ *Suchita Srivastava v. Chandigarh Admn.*, (2009) 9 SCC 1.

a woman who had conceived the baby by way of a forced sexual encounter. The complicity of the situation was that the concerned mother-to-be was in the eyes of law unfit to make her own decisions since she had been medically declared “mentally ill”. The court trod carefully, identifying contesting values. But it found its respite in the principles of privacy and dignity as it held that the decisions surrounding reproduction falls within the zonal limits of privacy and bodily integrity. It concluded that the decision of termination was contrary to the constitution.

This partnership between the two unstated fundamental rights of our Constitution was further honed by Justice Chandrachud, in the Puttaswamy judgment who unequivocally observes that privacy is a necessary function of dignity and without privacy there can be no dignity. Privacy, therefore, is merely a vehicle for the achievement of a greater purpose, i.e. dignity.¹¹⁹ Intuitively, a deliberate attempt to leak or publish personal medical data of employees is a violation of their dignity since such data falls within the zonal limits of privacy. It would therefore be appropriate to conclude that protection of dignity is dependent upon respect for privacy.

However, dignity is a flimsy base, since its apparent violation draws weight from communitarian values of what entails privacy. In other words it is hinged upon the feminist ‘public-private’ debate, which questions the legality of marital rape or denounces domestic violence. This same understanding also challenges visions of women friendly laws. For instance, UK’s law that espouses protection of rape victims from cross examination by way of pre-recorded evidence.¹²⁰ However, the sensibilities which surrounded this law seems to be getting diluted in view of the #MeToo movement, where women have started seeking liberation in publishing personal experiences of violation. Therefore, to clarify the contours for violation of privacy, it may be appropriate to presume that protection of data on fertility cycle is socially linked to the concept of a women’s inviolable personal space.

Our discussion until here, has defined only the blurred peripherals of the right which appears to be under contestation. However, the substantive core is yet to be laid out. This becomes more pertinent when liberals would reject my assumptions on the ground that protection of medical data need not only be necessarily linked to dignity, but rather be limited to only the protection of personhood. Therefore, there is a need to delve deeper into understanding the core of value of privacy itself which seems to be getting compromised – informational privacy.

¹¹⁹ Pritam Baruah, *Justifying Privacy: The Indian Supreme Court’s Comparative Analysis*, IND. YRBK COM. L. (2018).

¹²⁰ Venessa Munro, *The impact of the use of pre-recorded evidence on juror decision-making: An evidence review*, Government of Scotland, Edinburgh (2018) at p. 20.

In this age of data, informational privacy is an uncompromisable facet of human rights. Chandrachud J. explains the same most eloquently:

*‘The age of information has resulted in complex issues for informational privacy ... Information has three facets: it is non-rivalrous, invisible and recombinant. Information is non-rivalrous in the sense that there can be simultaneous users of the good - use of a piece of information by one person does not make it less available to another. Secondly, invasions of data privacy are difficult to detect because they can be invisible. Information can be accessed, stored and disseminated without notice ... Thirdly, information is recombinant in the sense that data output can be used as an input to generate more data output.’*¹²¹.

For the same reason he recognised that ‘data such as medical information would be a category to which a reasonable expectation of privacy attaches’.¹²²

From this discussion, I have observed that firstly, violation of privacy may ‘tag along’ another right while under contestation. Secondly, the implementation of the said policy has a potential to violate informational privacy and such a violation may also undermine dignity at its peripheral.

B. Horizontal Application of Privacy

The next question which emerges is, whether our constitution recognises a horizontal application for the right to privacy. The *Puttaswamy* judgment, which recognises the right to privacy as a fundamental right, is contested on this question.¹²³ Chandrachud J. refers to protection of privacy against ‘non-state’ actors only with regards to data protection.¹²⁴ Chelameswar J. conceded that right to privacy ought to exist against state as well as non-state actors.¹²⁵ While, Bobde J. completely rejected horizontality of application¹²⁶, Kaul J. held, ‘*the right of privacy is a fundamental right. It is a right which protects the inner sphere of the individual from interference from both State, and non-State actors and allows the individuals to make autonomous life choices.*’¹²⁷

A brief look at other jurisdictions indicate that horizontality of the right to privacy has been incorporated by way of statutes or common law principles. For instance in the U.K., the ‘*misuse of private information*’ doctrine helps translate the

¹²¹ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 at ¶303.

¹²² *Id.* at ¶307.

¹²³ Mariyam Kamil, *Puttaswamy: Jury still out on some privacy concerns?*, 1(2) I. L. REV. 190-204.(2017) at pp. 191-197.

¹²⁴ *Puttaswamy*, *supra* note 121 at ¶328.

¹²⁵ *Id.* at ¶367.

¹²⁶ *Id.* at ¶397.

¹²⁷ *Id.* at ¶644.

right to privacy as codified in the European Convention on Human Rights into private spheres.¹²⁸ Later, this was codified by way of the Human Rights Act in 2001.¹²⁹ The US laws also protect privacy especially with regard to medical information disclosed to the employers. The American Disabilities Act requires employers to protect medical information.¹³⁰ Further, Equal Employment Opportunity Commission guidelines also requires medical information disclosed to a potential employer, prior to employment, to be kept private.¹³¹

Protection of privacy in private sphere remains a grey area in Indian Law. The tort of trespass protects physical invasion of privacy into private property. More specifically, the court in the case of *R. Rajagopal* observed that '*the right to privacy as an independent and distinctive concept originated in the field of Tort law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognised.*'¹³²

However being vaguely defined, such a protection seems inadequate. Protection of employment data against misuse is elemental to dignity. Therefore any policy which aims to create such an entitlement ought to necessarily consider this facet. In the absence of adequate safeguards, women might be discouraged from availing the benefit. From this standpoint, a specific framework for protection of privacy is suggested.

- A. Categorising the female employee's medical information as 'confidential'.
- B. Limiting the access to such data to a female officer of a company
- C. Imposing liability upon sharing this confidential data
- D. Necessary Deletion of Past Data

VI. CONCLUSION

The article is a primer for those who wish to banner under the right to menstrual leaves in India. It explains numerous facets and themes which the law may possibly touch upon. The article commences by arguing the need to define feminine identity devoid of sexism or elements of biological determinations

¹²⁸ Thomas D.C. Bennett, *Corrective Justice and Horizontal Privacy: A Leaf Out of Wright J's Book*, 7 J. JURIS 545 (2010).

¹²⁹ B. Cardonsky, *Towards Meaningful Right to Privacy in the United Kingdom*, 20(2) B.U. INT'L L.J. 393 (2002).

¹³⁰ Americans with Disabilities Act, 42 U.S.C. § 12112(d)(3)(B); §12112(d)(4)(C).

¹³¹ Rule 22, U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act* (2000) available at <https://www.eeoc.gov/policy/docs/guidance-inquiries.html> (Last Visited December 26, 2019).

¹³² *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632 : AIR 1995 SC 264 at ¶9.

attached with it. In doing so, the law ought to be careful in recognising women's personal experiences in their daily lives. Such a nuanced understanding would enable policy formulators to define the contours of such a provision in a manner which is neither patronising nor insufficient. The article also sheds light on the public space which women occupy as economic citizens as well as social beings. Such a consideration is relevant because menstrual leaves have often been viewed with scorn from a capitalistic point of view, which aims to juice out maximum productivity in minimal costs. Such an agenda may often stand in the face of the legitimate needs of women. In such circumstances the government, of a welfare state, is called upon to do the balancing act.

The discussion on menstrual leaves from the lens of dignity and privacy enables us to theoretically justify the existence of such a strategy and how it fits in our constitutional set up. The scepticism surrounding the policy makes it a 'hard case' in the Dworkinian sense and therefore existing principles and values need to be touched upon to place and justify the said proposal. An analysis of the said policy from the paradigm of dignity indicates that it is thoroughly rooted in the principle of substantive equality. Furthermore, it also respects the inherent personhood of female labour that is entitled to rest during the course of menstruation. However, this policy flies in the face of communitarian dignity since it concerns an object of 'shame'. But history indicates that communitarian values often get trumped in the face of substantive rights and liberty. Lastly, the article concludes that there is a necessary need for a framework to preserve the private data on women's fertility cycle which might get generated in the process of availing such a right. A violation of the same could cause a deep hurt to inherent dignity of women. India currently lacks such a framework. While formulating, the said framework must account for methods to communicate personal information, storage and dissemination of such information. Further, in order to ensure preservation of privacy and dignity, access to this data should be restricted to the female officers of a workspace. Therefore, legislators ought to be careful to incorporate necessary changes in the Bill, in case there is enough political will to introduce the right to avail leaves during menstruation.

Menstrual cycles form an unavoidable biological reality of every woman and yet it is reflected so little in both policy and legal spaces. There is a telling absence of menstruation, which has been rendered to a status of *persona non grata* in policy sphere. It is now time that we remedy our social consciousness and imaginations which surrounds menstruation as a biological process and actively acknowledge this innate reality of womanhood.