

Siddhi Gupta, 'Menstrual Leave – A Step Towards Substantive Equality'
(2021) 7(2) NLUJ L Rev 166

**MENSTRUAL LEAVE - A STEP TOWARDS SUBSTANTIVE
EQUALITY**

*Siddhi Gupta**

ABSTRACT

This paper looks at menstrual leave policies from the lens of discrimination law and argues that such policies promote substantive gender equality. There is a need for providing menstrual leave to improve India's falling female labour force participation rate as well as to recognize the inherent physiological differences between men and women and accommodate for the same. A gender-neutral sick leave policy would not be more suitable than a gendered policy to fulfil these objectives because it would still lead to unequal outcomes and opportunities for women. The equal treatment principle in the case of menstrual leave would also encounter the problem of having no suitable male comparator for menstruation, as for pregnancy. Accordingly, there is a need to move beyond the formal approach to equality, i.e., mere gender neutrality or gender blindness, and adopt the substantive approach to gender equality, which takes into account the special needs of women. Further, menstrual leave does not breach the anti-stereotyping principle under sex discrimination law because it fits into the principle's exception that classifications can be made based on the real differences between men and women for legitimate objectives such as promoting

*The author is a fifth year student at National Law School India University, Bengaluru and may be contacted at [siddhigupta\[at\]therate\[nls\]\[dot\]ac\[dot\]in](mailto:siddhigupta[at]therate[nls][dot]ac[dot]in).

equality of opportunities for women. Nonetheless, measures must be taken to address the possibilities of any stigma or other disadvantages women may face while availing the menstrual leave, like ensuring their privacy and dignity, shifting some of the cost of paid menstrual leave from the employers to the State, and designing a flexible menstrual policy which can accommodate all women's diverse menstruation experiences.

TABLE OF CONTENTS

I. INTRODUCTION 169

II. NEED FOR PROVIDING MENSTRUAL LEAVE171

III. WOULD BROADER GENDER-NEUTRAL SICK LEAVE POLICIES BE MORE SUITABLE? 175

A. ACHIEVEMENT OF FORMAL EQUALITY, NOT SUBSTANTIVE EQUALITY..... 176

B. INADEQUATE RELIEF TO WOMEN DUE TO THE MALE COMPARATOR TEST 178

C. INEQUALITY IN EFFECT181

D. MEDICALIZATION’ OF MENSTRUATION.....181

IV. MENSTRUAL LEAVE POLICIES AND THE ANTI-STEREOTYPING PRINCIPLE 182

V. BALANCING THE DIFFERENT DIMENSIONS OF SUBSTANTIVE EQUALITY..... 185

VI. CONCLUSION 189

I. INTRODUCTION

Menstrual leave is commonly provided in many Asian countries like Japan, South Korea, Indonesia, and Taiwan since as early as 1947.¹ In India, the first menstrual leave policy with 2 days a month paid leave was introduced by the Bihar government in 1992.² Almost thirty years since, the policy has been running smoothly, without any hurdles or perceived disadvantages for the women.³ Subsequently, menstrual leave policies were introduced by some start-up companies like Culture Machine and Gozoop as well, which also recorded an overwhelmingly positive response from the women working in those companies.⁴

Further, in 2017, a Private Member's Bill was introduced in the Lok Sabha for the provision of two days a month paid menstrual leave for all women working in the public and private sector.⁵ However, there was major pushback against the policy by both men and women, due to concerns that such a policy could result in employers' bias against women in hiring, promotions and pay scales, and the possible perpetuation of stigma against menstruating women. It was argued that a special menstrual leave would be

¹ AJ Dan, 'The Law and Women's Bodies: The Case of Menstrual Leave in Japan' (1986) 7 *Health Care for Women International* 1.

² Urvashi Prasad, 'India Needs a Menstrual Leave Policy' *The Hindu Business Line* (New Delhi, 7 June 2018) <www.thehindubusinessline.com/opinion/india-needs-a-menstrual-leave-policy/article24105589.ece#> accessed 16 September 2020.

³ Ankita Dwivedi Johri, 'When Lalu Prasad gave nod for leave during menstruation' *The Indian Express* (New Delhi, 31 August 2020) <<https://indianexpress.com/article/opinion/columns/when-bihars-women-got-period-leave-6575393/>> accessed 29 September 2020.

⁴ Jessica L Barnack-Tavlaris and others, 'Taking Leave to Bleed: Perceptions and Attitudes towards Menstrual Leave Policy' (2019) 40 *Health Care for Women International* 1, 2.

⁵ The Menstruation Benefits Bill 2017, 249 of 2017.

a setback for gender equality, and thus, the Private Member's Bill could not be passed.

Now in 2020, online restaurant guide and food delivery application, Zomato's policy to grant an additional ten-day period leave to its women employees⁶ has re-ignited this debate on whether providing menstrual leave to women is a step towards or away from gender equality.

While much has been said about the issue from a feminist angle, this paper attempts to look at menstrual leave policies from the lens of discrimination law. It will be argued that providing special menstrual leave to women is a positive step towards substantive gender equality, and it does not infringe the anti-stereotyping principle under sex discrimination law.

Accordingly, this paper has been broadly divided into four sections. The *first* section will discuss the need for granting menstrual leave from the perspective of the reducing female labour force participation rate in India as well as the substantive law considerations of redressing disadvantages and accommodating differences. Next, the *second* section will provide arguments on why a gender-neutral sick leave policy is not better suited than a gendered policy to fulfil the intended objectives of providing menstrual leave. Further, the *third* section will determine if menstrual leave breaches the anti-stereotyping principle under the sex discrimination law. American as well as Indian jurisprudence on the principle will be dealt with for the same. In the abovementioned sections, all major arguments made

⁶ PTI, 'Zomato Introduces 'Period Leave' For Employees' *The Hindu* (New Delhi, 9 August 2020) <www.thehindu.com/news/national/zomato-introduces-period-leave-for-employees/article32308642.ece> accessed 18 September 2020.

against menstrual leave policies will be countered. Lastly, the *fourth* section will lay out some policy solutions for addressing any disadvantages that women may face while taking menstrual leave.

This paper is particularly relevant in the context of the need to openly talk about menstruation and to design policies around it in the best possible way. The paper attempts to provide a new perspective from which menstrual leave policies ought to be looked at.

II. NEED FOR PROVIDING MENSTRUAL LEAVE

According to the recent World Bank estimates, the female labour force participation rate in India has fallen to its lowest level since 1990 and is among the lowest worldwide.⁷ One of the most significant barriers to the entry of women into the workforce is the lack of access to basic sanitation and hygiene facilities such as clean toilets,⁸ which can be problematic especially during menstruation. Even where women do participate, the workplaces are not modified to accommodate their specific needs,⁹ leading to absenteeism and laying off.

It is also estimated that India can potentially boost its gross domestic product by USD 770 billion by 2025 by getting more women to

⁷ World Bank, Labor Force, Female (% of Total Labor Force) – India <<https://data.worldbank.org/indicator/SL.TLF.TOTL.FE.ZS?locations=IN>> accessed 16 September 2020.

⁸ Garima Sahai, 'Period Leave: Gender Blindness is Never the Same as Gender Equality' *The Wire* (11 September 2020) <<https://thewire.in/women/period-leave-zomato-women-gender-blindness>> accessed 16 September 2020.

⁹ Neha Banka, 'Period Leaves is Really About Giving Women the Freedom to Choose' *The Indian Express* (New Delhi, 16 August 2020) <<https://indianexpress.com/article/lifestyle/health/period-leaves-is-really-about-giving-women-the-freedom-to-choose-6556933/>> accessed 16 September 2020.

work.¹⁰ In this light, it is crucial for all the stakeholders – the government, private sector, civil society – to recognize women as vital economic accelerators and work towards targeted interventions to retain them in the workforce.¹¹ Granting paid menstrual leave is one such intervention because of the significant impact that premenstrual symptoms have on the quality of life of women; over 35% women of the reproductive age have their daily life activities moderately to severely impacted because of premenstrual symptoms.¹² Further, working through menstrual symptoms, such as pain and heavy bleeding, can result in 9 days of lost productivity per year for women on average.¹³ Thus, paid menstrual leave not only compensates women for the failure to provide them with suitable public infrastructure¹⁴ but also increases their comfort level and job contentment. The latter can potentially increase women's productivity too, hence encouraging employers to hire more women. This would give effect to the

¹⁰ McKinsey Global Institute, *The Power of Parity: Advancing Women's Equality in Asia Pacific [Focus: India]* (May 2018) <www.mckinsey.com/~media/McKinsey/Fatured%20Insights/Gender%20Equality/The%20power%20of%20parity%20Advancing%20womens%20equality%20in%20India%202018/India%20power%20of%20parity%20report.pdf> accessed 16 September 2020.

¹¹ Mitali Nikore, 'Where are India's Working Women? The Fall and Fall of India's Female Labour Participation Rate' *LSE South Asia Blog* (22 October 2019) <<https://blogs.lse.ac.uk/southasia/2019/10/22/where-are-indias-working-women-the-fall-and-fall-of-indias-female-labour-participation-rate/>> accessed 16 September 2020.

¹² L Dennerstein and others, 'The Effect of Premenstrual Symptoms on Activities of Daily Life' (2010) 94 *Fertility & Sterility* 1059, 1064.

¹³ ME Schoep and others, 'Productivity Loss Due to Menstrual Related Symptoms: A Nation-wide Cross-sectional Survey Among 32748 Women' (*BMJ Open*, 12 March 2019) <https://menstrualhygieneday.org/wp-content/uploads/2019/08/MenstruationProductivityStudyNetherlands_2019.pdf> accessed 28 December 2020.

¹⁴ Sahai (n 8).

State's duty to provide just and humane conditions of work to everyone under Article 42 of the Constitution of India¹⁵ as well.

Further, providing menstrual leave is a much-needed recognition of the inherent physiological differences among the workforce and accommodation of that difference through a structural change that modifies the workspace as per the specific needs of women.¹⁶ Currently, women disproportionately bear the cost of menstruation by either working through pain, leading to unproductivity and health issues,¹⁷ or taking unpaid leaves, leading to loss of income. Grant of paid menstrual leave would redistribute these costs of menstruation in a fairer manner and de-masculinise the workspaces.¹⁸ Such transformation is crucial for achieving genuine and substantive equality, and not formal equality which strives for mere gender blindness.

Nonetheless, an argument made against menstrual leave policies is that since all women do not need leave during their menstruation, a special policy for the same is over-inclusive and unnecessary. However, a legitimate affirmative action policy can benefit just a single member of a protected group and does not have to target all its members.¹⁹ Moreover, the

¹⁵ The Constitution of India 1950, article 42.

¹⁶ Vrinda Aggarwal, 'Leave to Bleed: A Jurisprudential Study of the Policy of Menstrual Leaves' (2017) 8 *Journal of Indian Law and Society* 1, 12; *Banka* (n 9); The Ladies Finger, 'Period Leave Isn't Radical; It's Simply Making the Workplace Amenable to the People Who Work In It' (*First Post*, 12 August 2020) <www.firstpost.com/india/period-leave-isnt-radical-its-simply-making-the-workplace-amenable-to-the-people-who-work-in-it-3817151.html> accessed 16 September 2020.

¹⁷ *Banka* (n 9).

¹⁸ Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712, 734.

¹⁹ Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 219.

alternative to an over-inclusive policy is a need-based policy, in which women will be required to prove their menstruating status and incapacity to work to claim leave. This alternative would impinge on the privacy and dignity of women and would perpetuate more stigmas against women who take menstrual leave, thus undermining the intended benefits of the policy itself. In fact, these were the precise reasons for the failure of menstrual leave policies in many countries such as Japan and Indonesia.²⁰

Another argument made against menstrual leave policies is that they could lead to discrimination against women with regard to hiring, pay-scale, promotions and the type of work assigned to them.²¹ These were some of the primary arguments made against the Menstrual Benefits Bill, 2017. Similarly, in *Vasantha R v. Union of India*²² (“*Vasantha*”) and *Triveni KS v. Union of India*²³ (“*Triveni*”), allowing women to work during night shifts in factories - and holding Section 66 of the Factories Act, 1948²⁴ unconstitutional - was resisted, since the same could lead to sexual harassment and other security breaches against women. In *Anuj Garg v. Hotels Association of India*²⁵ (“*Anuj Garg*”) as well, permitting women to be employed at places where alcohol was served was resisted for the same ‘security’ reasons. However, in all these cases, the courts held that such

²⁰ Kuntala Lahiri-Dutt and Kathryn Robinson, “‘Period Problems’ at the Coalface’ (2008) 89 *Feminist Review* 102, 108.

²¹ Barkha Dutt, ‘I’m a Feminist. Giving Women a Day Off for Their Period is a Stupid Idea’ *The Washington Post* (Washington, 4 August 2017) <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/> accessed 17 September 2020.

²² [2001] II ILJ 843.

²³ [2002] III ILJ 320.

²⁴ The Factories Act 1948, s 66.

²⁵ [2008] 3 SCC 1.

social realities should not be used as grounds to further disadvantage women. Rather, the State has a positive obligation to alter that reality and remedy the discrimination,²⁶ so that women can enjoy their fundamental right to equality. Hence, all the possible biases against women resulting from menstrual leave policies are social constructs that would be further allowed to flourish if such a policy is not introduced. Nonetheless, numerous ways to reduce the possibility of any biases against women due to menstrual leave policies have been discussed in the last section of this paper.

III. WOULD BROADER GENDER-NEUTRAL SICK LEAVE POLICIES BE MORE SUITABLE?

Even when the need for menstrual support is recognized, many scholars argue that having a more robust gender-neutral sick leave policy would be better suited to fulfil the desired objectives, as it would not lead to any stigma against menstruating women.²⁷ However, this approach suffers from numerous drawbacks, as discussed below.

²⁶ *Anuj Garg* (n 25); *Vasantha* (n 22); *Triveni* (n 23); Gautam Bhatia, 'Sex Discrimination and the Constitution - X' *Indian Constitutional Law and Philosophy* (29 August 2015) <<https://indconlawphil.wordpress.com/2015/08/29/sex-discrimination-and-the-constitution-x-the-culmination-of-the-anti-stereotyping-principle-in-anuj-garg/>> accessed 16 September 2020.

²⁷ Radhika Santhanam, 'Should Women be entitled to Menstrual Leave?' *The Hindu* (New Delhi, 21 August 2020) <www.thehindu.com/opinion/op-ed/should-women-be-entitled-to-menstrual-leave/article32407772.ece> accessed 17 September 2020.

A. ACHIEVEMENT OF FORMAL EQUALITY, NOT SUBSTANTIVE EQUALITY

A gender-neutral sick leave policy follows the formal approach of equality, according to which merely *treating* everyone alike is enough to achieve equality. Such an approach fails to recognize that starting points may not be alike for all due to historical, structural or physiological disadvantages faced by them, like by women, *Dalits*, Muslims, etc. Due to the failure to recognize this, equal treatment of unequal classes often leads to unequal outcomes, i.e., indirect discrimination, which rather entrenches the antecedent disadvantages.²⁸ For instance, requiring individuals with different socio-economic classes and education levels to pass the same test for a government job based entirely on merit would inevitably favour the upper class, thus perpetuating the class differences among the candidates. Similarly, policies that award a monthly bonus or coveted work assignments to employees with a 100% attendance record would disproportionately affect women who may be absent for a day or two due to their menstruation. Hence, formal equality fails to consider the impact an equal treatment policy can have on unequal classes of individuals.

In light of such concerns, there has been a consistent move from a formal conception of equality towards a more substantive conception of equality. As per the Supreme Court of India (SC) in *Anuj Garg*, the substantive approach to equality requires taking into account the actual

²⁸ Fredman (n 18) 718.

effects of a legislative policy as well.²⁹ Further, substantive equality aims to redress the disadvantages and accommodate the differences among unequal classes by levelling the starting points of the people involved.³⁰ For this purpose, Article 15(3) of the Constitution of India³¹ empowers the State to make special provisions to increase women's status economically, socially, and politically. Hence, substantive equality ensures equality of opportunities rather than mere equality of treatment, so that the inherent differences among people are acknowledged as well as accommodated within the policy framework.³²

The SC has also held in numerous cases that recognizing the existing inequalities in society and overcoming the same through measures like reservations and affirmative action is crucial for effecting substantive equality.³³ Even the European Court of Human Rights (ECHR) has consistently held that States' obligations under the right against discrimination include treating differently situated individuals differently.³⁴ Similarly, the Supreme Court of the United States (SCOTUS) has recognized that formal equality is insufficient to protect women against sex

²⁹ *Anuj Garg* (n 25); Jenny Goldschmidt, 'New Perspectives on Equality' (2017) 35(1) *Nordic Journal of Human Rights* 1, 3.

³⁰ Fredman (n 18) 727.

³¹ The Constitution of India 1950, article 15(3).

³² Margaret Davies, *Asking The Law Question* (Thomson-Reuters 2017) 230; Perna Dhoop, 'Remaking the Indian Military for Women' (2020) 55(20) *EPW* 18, 20; Santhanam (n 27).

³³ *Government of Andhra Pradesh v P B Vijayakumar* [1995] 4 SCC 520; *B K Pavitra and Ors v Union of India* [2012] 7 SCC 1; *National Legal Services Authority v Union of India* [2014] 5 SCC 438.

³⁴ *Thlimmenos v Greece* [2000] ECHR 162.

discrimination.³⁵ Therefore, recognizing that equality does not necessarily mean sameness is critical for moving towards substantive equality.³⁶

In this light, having alike sick leave policies for men and women despite their unlike physiological status would not be in line with substantive equality. This is because even though broader gender-neutral sick leave policies would cover menstrual care on the face of it, they would not provide adequate relief to women as per their specific requirements and would still result in inequality in effect.

B. INADEQUATE RELIEF TO WOMEN DUE TO THE MALE COMPARATOR TEST

The principle of equal treatment employs a comparator test, wherein a person or a class of persons is compared to a similarly placed person or a class or persons and it is ensured that the treatment accorded to both is equal.³⁷ However, such a comparator-based approach wrongly presumes that a suitable comparator is available in all circumstances.³⁸ For instance, concerning conditions specific to women, like pregnancy and menstruation, the comparator test would inevitably fail because there simply are no male comparators available for a pregnant or menstruating female. Then, treating a pregnant or menstruating woman as being similarly placed as a man, and according to her the same treatment even in the face

³⁵ *Nevada Dept of Human Resources v Hibbs* 538 US [721], [738] [2003].

³⁶ Sandra Fredman, *Human Rights Transformed* (OUP 2008) 8; Fredman (n 18) 717; Goldschmidt (n 29) 3.

³⁷ Fredman (n 18) 719.

³⁸ *ibid.*

of such differences would not adequately recognize and accommodate the needs specific to the woman.³⁹

Even with regard to pregnancy, efforts were initially made to bring it within the fold of the equal treatment principle by equating a pregnant woman to an ‘ill’ man.⁴⁰ Resultantly, pregnancy was covered under gender-neutral leave policies, which did not entitle women to adequate relief as per their requirements. For instance, it is still covered under a gender-neutral Family and Medical Leave Act in the United States, under which all eligible employees, including pregnant women, are entitled to get only 3 months of unpaid leave per year for the birth of a child, to take care of a close relative or for self-care in certain cases.⁴¹ However, with time, it was realized in many other jurisdictions that covering something as specific to women as pregnancy under gender-neutral laws does not protect women’s rights appropriately.⁴² This is because they do not grant enough duration of leave or a paid leave, stigmatise pregnancy as a ‘sickness’, and do not give the space required to develop a system of pregnancy rights independent of the sick leave entitlements.⁴³ Therefore, special legislations for pregnancy leave came to be enacted around the world, including in India, which provide at least 4 months of paid leave to pregnant women.⁴⁴ Hence, women could

³⁹ Carol Bacchi, ‘Do Women Need Equal Treatment or Different Treatment?’ (1992) 8 *Australian Journal of Law and Society* 80, 86.

⁴⁰ Sandra Fredman, ‘Reversing Roles: Bringing Men into the Frame’ (2014) 10 *International Journal of Law in Context* 442, 444.

⁴¹ The Family and Medical Leave Act 1993, 29 USC s 2612(a)(i).

⁴² Fredman (n 18) 719.

⁴³ Fredman (n 40) 445.

⁴⁴ Fredman (n 40) 450.

achieve suitable pregnancy rights only when the policymakers moved beyond the male comparator test.⁴⁵

Similarly, if menstruating women are compared to sick men and a gender-neutral sick leave policy is broadened to cover menstruation within it, the employers can just provide minimal unpaid sick leaves to both men and women. As a result, women might get only 5 additional leaves in a year, that too unpaid, to accommodate menstruation. That would be inadequate to take care of the sixty days of menstruation that women experience in a year on average.⁴⁶ On the contrary, under gendered menstrual leave policies, women would get ten to twenty-four days of additional paid leave in a year, as under the special policies of Zomato and the Bihar government respectively.⁴⁷ That would go a long way in redressing the disadvantages that women face on account of menstruation.

Hence, there is a need to discard the comparator test and formulate special policies for conditions that are specific to a particular class, such as menstruation. Even otherwise, conceiving gender equality as mere gender neutrality is highly problematic because it deems a non-neutral status quo constructed around the needs and convenience of men as acceptable and worth striving for.⁴⁸

⁴⁵ Fredman (n 18) 719.

⁴⁶ Hiralal Konar (ed), *DC Dutta's Textbook of Gynaecology* (6th edn, 2013) 82.

⁴⁷ J Jagannath, 'Zomato introduces 'period leave' of up to 10 days per year for employees' *Livemint* (8 August 2020) <<https://www.livemint.com/companies/news/zomato-introduces-period-leave-of-up-to-10-days-per-year-for-employees-11596898781696.html>> accessed 1 March 2021; Urvashi Prasad, 'India needs a menstrual leave policy' *Hindu Business Line* (7 June 2018) <<https://www.thehindubusinessline.com/opinion/india-needs-a-menstrual-leave-policy/article24105589.ece#>> accessed 16 September 2020.

⁴⁸ Bacchi (n 39) 82.

C. INEQUALITY IN EFFECT

Further, a gender-neutral sick leave policy does not take into account women's special need for menstrual leaves apart from the leaves available for actual sickness. This is because while women would have to accommodate sickness plus menstrual care within their limited number of sick leaves, men would just need to fit in sickness within the same. Gender-neutral sick leave policies would still amount to inequality in effect. Therefore, only a special menstrual leave policy would ensure equality of opportunities and level the playing field.

D. 'MEDICALIZATION' OF MENSTRUATION

Lastly, covering menstrual discomfort under 'sick' leave would equate menstruation with sickness and medicalise it.⁴⁹ This would in turn further the stigma of women being the weaker sex and menstruation as something unhealthy which makes women unfit to work. On the other hand, a special menstrual leave policy has the space to say that menstruation is just different – not a disease or a disability incapacitating women – but an inherent physiological difference that warrants special accommodation for them.

Hence, while gender-neutral sick leave policies may reduce the possibility of stereotyping against women, they definitely do not further substantive equality for them.

⁴⁹ Fredman (n 40) 445.

IV. MENSTRUAL LEAVE POLICIES AND THE ANTI-STEREOTYPING

PRINCIPLE

One of the strongest oppositions to menstrual leave is that such a policy would reinforce stigmas towards menstruation.⁵⁰ In light of the opposition, it is important to determine whether it breaches the anti-stereotyping principle under sex discrimination law.

As per the anti-stereotyping principle, some legislations perpetuate the subordination of women as they are based on certain stereotypes against them and should be thus held unconstitutional.⁵¹ This is because while these policies are touted as being for the benefit of women, in actuality they entrench skewed gender realities⁵² and harm women's prospects for equality. For instance, policies restricting women from working during night shifts⁵³ or from working in places where alcohol is served⁵⁴ stem from the State's idea of 'romantic paternalism'⁵⁵ and harm women's right to equality of opportunities instead of 'protecting' them.

However, it is important to understand that while the anti-stereotyping principle strives for equality of opportunity for women in

⁵⁰ Katie Forster, 'Chinese Province Grants Women Two Days "Period Leave" A Month' *The Independent* (18 August 2016) <www.independent.co.uk/news/world/asia/china-period-leave-ningxia-women-two-days-month-menstruation-a7197921.html> accessed 17 September 2020; Dutt (n 21).

⁵¹ Unnati Ghia and Dhruva Gandhi, 'The Anti-Stereotyping Principle: A Conundrum in Comparative Constitutional Law' *LACLAIDC Blog* (5 May 2020) <<https://blog-iacl-aidc.org/2020-posts/2020/5/5/the-anti-stereotyping-principle-a-conundrum-in-comparative-constitutional-law>> accessed 17 September 2020.

⁵² *ibid.*

⁵³ *Vasantha* (n 22).

⁵⁴ *Anuj Garg* (n 25).

⁵⁵ *Frontiero v Richardson* 411 US 677 [1973].

education, employment, and civic participation without them having to face any barriers built upon stereotypes against them,⁵⁶ it does not necessarily seek ‘identical’ treatment with men in all situations.⁵⁷ Accordingly, in the landmark judgment of *United States v. Virginia*⁵⁸ (“*Virginia*”), the SCOTUS had held that sex classifications based on ‘real’ differences between men and women, like the ability to get pregnant, cannot be used to reinforce gender stereotypes against women and to perpetuate their social, legal and economic inferiority.⁵⁹ However, classifications based on these ‘real’ differences can be employed for a legitimate end, such as “*to compensate women for particular economic disabilities [they have] suffered, to promot[e] equal employment opportunity, [and] to advance full development of the talent and capacities of our Nation's people.*”⁶⁰ Therefore, rather than overlooking inherent differences between the sexes, the anti-stereotyping principle serves to check the State’s regulation of those differences.⁶¹

Subsequently, in *Nevada Department of Human Resources v. Hibbs*⁶² (“*Hibbs*”) as well, the SCOTUS furthered the reasoning given in *Virginia*. It recognized that since workplaces are modelled around the needs and conditions of men only, they disadvantage women when they do not fit into

⁵⁶ Pauli Murray and Mary Eastwood, ‘Jane Crow and the Law: Sex Discrimination and Title VII’ (1965) 34 *George Washington Law Review* 232, 239.

⁵⁷ Cary Franklin, ‘The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law’ (2010) 85 *NYU Law Review* 83, 120.

⁵⁸ 518 US 515 [1996].

⁵⁹ Courtney Cahill, ‘Abortion and Disgust’ (2013) 48 *Harvard Civil Rights-Civil Liberties Law Review* 409, 446.

⁶⁰ *Virginia* (n 56) 533-534.

⁶¹ *Franklin* (n 57) 145-146.

⁶² *Hibbs* (n 35).

this mould, like when they are pregnant.⁶³ Thus, the SCOTUS held that substantive forms of legal intervention and structural changes need to be made to re-design the workspaces and truly enforce women's right to equality.⁶⁴

Then, in the case of menstrual leave policies, employing sex classification does not infringe the anti-stereotyping principle because the same is done for the legitimate objective of promoting equal employment opportunities for women. Rather, such a policy is a great example of the kind of substantive entitlements needed to reshape a male-oriented workspace as *Hibbs* had advocated for.

In the Indian context, the SC judgments in *Anuj Garg* and *Secretary, Ministry of Defence v. Babita Puniya*⁶⁵ (“*Babita Puniya*”) constitute the jurisprudence on the anti-stereotyping principle. *Anuj Garg* had recognized that policies based on stereotypical notions against women are unconstitutional because they discriminate against them in effect.⁶⁶ Further, *Babita Puniya* had held that even policies that rely on the “*inherent physiological differences between men and women*” are unconstitutional because they are based on the stereotypical notions about the strength or weakness of both the sexes.⁶⁷ Thus, as per the *Virginia* standard, the SC here has recognized that real differences cannot be used to disadvantage women. However, the SC's analysis lacks the further nuance under *Virginia* – of considering situations

⁶³ *Hibbs* (n 35) 734; *Franklin* (n 59) 152.

⁶⁴ *ibid.*

⁶⁵ [2020] 7 SCC 469.

⁶⁶ *Anuj Garg* (n 25) [46].

⁶⁷ *Babita Puniya* (n 65) [69].

where inherent physiological differences can be legitimately used to benefit women, like under pregnancy and menstrual leave policies, and holding that these would not be unconstitutional. It is hoped that Indian courts draw this important distinction soon and then include menstrual leave policies within its fold.

Further, even if menstrual leave policies are held to be against the anti-stereotyping principle, they should not be held unconstitutional. This is because the legitimate objectives of the policy should be balanced against the goal of not reinforcing the alleged stereotype it perpetuates.⁶⁸ In doing so, the considerations of redressing disadvantage against women and accommodating their real differences should weigh over the anti-stereotyping goal. Moreover, if the fear of stigma on granting menstrual leaves still persists, various methods to address and reduce the same can be employed, rather than resorting to gender-neutral policies.

V. BALANCING THE DIFFERENT DIMENSIONS OF SUBSTANTIVE EQUALITY

While menstrual leave policies do not breach the anti-stereotyping principle, there is a need to acknowledge that granting such leaves might lead to a stigma against women in reality and to take steps to redress the same. Failure to do so might undercut the intended objectives of the policy as women might be discouraged to take the leave itself.⁶⁹

⁶⁸ Ghia and Gandhi (n 51).

⁶⁹ Fredman (n 18) 737.

Firstly, the privacy and dignity of women availing the menstrual leaves should be protected at all costs. They should not be answerable to anyone regarding when they take the leave or have to justify taking it by proving they are menstruating or suffering from pain. The absence of such needless scrutiny is the reason why the Bihar government's menstrual leave policy has been running successfully since 1992.⁷⁰ Lack of privacy while availing a menstrual leave and the consequent fear of sexual harassment are also the reasons for the reluctance of most Japanese women to exercise their menstrual rights.⁷¹ Possible measures to ensure the privacy of the leave-takers can be marking the leave records of an employee as confidential, restricting the access to such records to only a female superior officer, and imposing liability upon them for divulging these confidential leave records to anyone.⁷² Further, the leave-taking process can be automated, such as that at Gozoop, where employees simply need to apply for menstrual leave on an online portal and it is approved automatically.⁷³ The organization has seen over 75% of its women employees using menstrual leave since its implementation.⁷⁴

⁷⁰ Santhanam (n 27).

⁷¹ Justin McCurry, 'Period Leave in Asia: Time Off May Be Seen as a Sign of Weakness' *The Guardian* (New York, 4 March 2016) <www.theguardian.com/lifeandstyle/2016/mar/04/period-policy-asia-menstrual-leave-japan-women-work> accessed 1 January 2021.

⁷² Aggarwal (n 16) 23.

⁷³ MW Staff, 'Meet the Pioneers Who Have Implemented Menstrual Leave Policy in their Companies' *Man's World India* (14 July 2017) <www.mansworldindia.com/uncategorized/in-conversation-with-the-pioneers-who-have-implemented-menstrual-leave-policy-in-their-organisations/> accessed 1 January 2021.

⁷⁴ Rachel B Levitt and Jessica L Barnack-Tavlaris, 'Addressing Menstruation in the Workplace: The Menstrual Leave Debate' in C Bobet et al (eds), *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave Macmillan, Singapore, 2020) 564.

Secondly, steps should be taken to make hiring women less costly than hiring men, to the maximum extent possible, so that employers are not discouraged from employing more women. This can be done by shifting some of the cost of providing paid menstrual leave from the employers to the State,⁷⁵ like by providing tax benefits for hiring women, as is done in various countries in the European Union.⁷⁶

Thirdly, since the extent of menstrual discomfort varies widely across women, a flexible menstrual benefit policy should be designed, such that it allows women to take a paid leave as well as have the option to work from home.⁷⁷ Wherever work from home is not feasible, in cases such as where women are incapacitated from even working from home during their menses, other types of menstrual flexibility measures can be explored. For instance, a policy can allow women to take leave during their menstruation, but require them to compensate for a specified percentage, say 50%, of the work missed due to the same on other days of the month.⁷⁸ Such a policy would reduce the possibility of employers' bias against women concerning their hiring, salaries, promotions, etc., as well as address any stereotypes

⁷⁵ Fredman (n 40) 448.

⁷⁶ European Commission, 'Stimulating Job Demand: The Design of Effective Hiring Subsidies in Europe' European Employment Policy Observatory Review (2014) <www.ec.europa.eu/social/BlobServlet?docId=11950&langId=en> accessed 18 September 2020.

⁷⁷ Prasad (n 2).

⁷⁸ Lara Owens, 'Why We Need School and Workplace Policies for Menstruation & Menopause' *Lara Owen* (March 2016) <<http://laraowen.com/articles/why-we-need-school-and-workplace-policies-for-menstruation-menopause>> accessed 30 September 2020.

against women at workplaces, like them misusing menstrual leaves just to not have to work.

Lastly, women often do not avail menstrual leave out of the fear of being blamed for disruption of work and being accused of putting additional burden on their co-workers.⁷⁹ Accordingly, contingency planning can be done, such that someone can temporarily fill in for the women on menstrual leave on a reciprocal basis.⁸⁰ This was introduced by Co-Exist, a social enterprise organization in the UK, where women made a list of employees who could take over their role when needed.⁸¹ As a result, 7 out of 13 women make use of the menstrual leave policy in the organization.⁸² Moreover, even the male employees of Co-Exist appreciated that menstruation was discussed openly and felt that such an environment also allowed them to adjust their working days as per their bodies' needs.⁸³

In any case, employers should actively engage with and seek feedback from their employees while formulating a menstrual policy. It would not only help in designing a truly workable policy as per the specific requirements of women but also provide an opportunity to address any concerns men may have which might later turn into resentment against their women co-workers. The ultimate goal should be to formulate an

⁷⁹ Jung Min-ho, Kim Bo-eun and Bahk Eun-ji, 'Menstrual Leave – An Entitlement Men Reject' *The Korea Times* (30 December 2012) <www.koreatimes.co.kr/www/news/culture/2014/04/399_123535.html> accessed 1 January 2021.

⁸⁰ Lara Owens, 'Menstruation and Humanistic Management at Work: The Development and Implementation of a Menstrual Workplace Policy' (2018) 25(4) *e-Organizations & People* 23, 28.

⁸¹ *ibid.*

⁸² Levitt and Barnack-Tavlaris (n 74) 563-564.

⁸³ Owens (n 78) 28.

effective menstrual leave policy such that it gives adequate space to women to take the leave if needed, but not have to be disadvantaged for that in any manner.

VI. CONCLUSION

There is a need for providing menstrual leave to women to retain them in the workforce and to improve India's dismal female labour force participation rate. It is further needed to satisfy the important substantive equality law consideration of recognizing the biological differences between the sexes and accommodating for the same through structural change and targeted intervention. Such policies re-distribute the costs of menstruation more fairly and try to re-model the otherwise masculinised workspace. Arguments as to the possible discrimination against women with regard to hiring, pay-scale and promotions due to menstrual leave policies cannot be used to dislodge the very need for the same, and rather obligate the State to address such possibilities in practice.

Further, a gender-neutral sick leave policy would not be better suited than a gendered policy because it fails to move beyond the gendered status quo tilted against women and encounters the problem of having no suitable comparator for menstruation in the case of their male counterparts, as for pregnancy. It may also lead to unequal outcomes and opportunities for women, which only a gendered policy can account for. A gender-neutral leave policy may additionally lead to levelling down, leaving women with far lesser leaves than what they may need and which a special leave policy can provide for. Lastly, covering menstrual care under sick leaves would equate menstruation with sickness and thus further the stigma against

menstruation rather than reducing it and creating a safe environment for women.

As for the anti-stereotyping principle, it allows for sex classifications based on the real differences between the sexes, such as menstruation, if it is done for legitimate objectives like promoting equality of opportunities for women. Menstrual leave policies fit into this exception and rather work as much-needed structural changes required to enforce women's right to equality. Even if they are held as a breach of the anti-stereotyping principle, they should not be held unconstitutional by balancing the legitimate objectives behind them against the anti-stereotyping objective.

Nonetheless, all efforts must be made to address the possibilities of any bias or stigma against women for taking menstrual leave, such as ensuring their privacy and dignity, shifting the cost of the paid menstrual leave from the employers to the State, and modelling a flexible policy design which can accommodate all women's menstruation experiences.