

Bleeding in Silence: A Rights Based Argument for Legal Recognition of Menstrual Leave in Sri Lanka

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Abstract

It is widely accepted in international human rights that pregnancy and motherhood should not prevent a woman from right to work. Being a state party to numerous international treaties, Sri Lanka has recognized maternity leave in both during a birth of a live child and a miscarriage under Maternity Benefits Ordinance No.32 of 1939. Nevertheless, a woman's reproductive and sexual health goes beyond motherhood, including menstruation and menopause. Hence, in this article, researcher argues that this narrow legal approach on reproductive health should be revisited by legally recognizing menstrual leave in Sri Lanka. The study adopts normative judicial approach by employing existing primary and secondary sources.

Keywords: Menstruation; right to work; substantive equality; reproductive rights; international human rights

1. Introduction

"Schools, workplaces and other public institutions of bureaucratic equality assume a standard body with standard needs, and that body does not menstruate. This assumption of equality as sameness often unfairly discomforts and disadvantages menstruating women and threatens us with embarrassment and shame¹"

The right to work and right to health are inalienable socio-economic rights, which are enshrined in numerous human rights treaties and labour standards recognised by International Labour Organization (ILO). The cornerstone of these conventions are equality and non-discrimination on

¹ Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990) 109.

ground of sex. The global effort to recognize equality at workplace is reflected in the statistics where the global women labour force has increased to 48.7% in 2023¹.

Even though female contribution on global labour force is increasing, women still continue to be disadvantaged in terms of accessing equal opportunities at work which is evident in global labour force where more than two million women leaving their jobs in 2020s². As feminist scholars argue, this is an acknowledgment of reproductive capacity and responsibility of women or simply the biological capacity to become a mother and societal responsibility of domestic work, that restrict women participation in labour force³. Even though, States have recognized maternity leave principles, a woman's sexual and reproductive rights go beyond motherhood encompassing menstruation and menopause⁴. Menstruation or cyclic vaginal bleeding, occurs when lining of the uterus sheds which occurs as a series of coordinated hormonal shifts⁵. Over 300 million women and girls menstruate every day, including women who work⁶. Despite the significance of menstruation to millions of working women, the public attention on this matter has been very recent, particularly in Sri Lanka.

Borrowed on the critical feminist theory, this study explores the need of recognizing 'First Day of Period' Leave as a legal entitlement within Sri Lankan labour law regime. International law provides an array of workplace rights for women to ensure their reproductive health including pregnancy health and childcare, right to paid maternity leave and breastfeeding rights. In the study, the subsequent interpretation of right to work and right to health are borrowed from key international conventions of International Covenant on Economic, Social and Cultural Rights (ICESCR)⁷ and Convention on Elimination of All Forms of Discrimination against Women (CEDAW)⁸. Even though, there is no explicit recognition of menstrual rights, these conventions extend in scope to protect equality and non-discrimination of women at workplace. Thereby, these conventions are employed with critical feminist theory to address the key research problem.

¹ International Labour Organization, 'GEDI-STAT Brief (28 October 2024)

<https://www.ilo.org/sites/default/files/2024-10/GEDI-STAT%20brief_formatted_28.10.24_final.pdf> accessed 4 June 2025.

² Lean In and McKinsey, 'Women in the Workplace 2022' (19 October 2022) <<https://www.internationalwomensday.com/Missions/18530/Lean-In-reports-women-leaders-are-leaving-companies-at-an-unprecedented-rate>> accessed 4 June 2025.

³ Catherine A Mackinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 190.

⁴ Ibid

⁵ DK Thiagarajan, H Basit and R Jeanmonod, 'Physiology, Menstrual Cycle' (Statpearls, 2024) <<https://www.ncbi.nlm.nih.gov/books/NBK500020/>> accessed 02 June 2025.

⁶ World Bank, 'Menstrual Health and Hygiene' (World Bank, 2024) <<https://www.worldbank.org/en/topic/water/brief/menstrual-health-and-hygiene>> accessed 31 May 2025.

⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNTS 993, art 12.

⁸ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, art 11.

2. Materials and Methods

This study was undertaken by employing doctrinal research method. Existing primary and secondary sources were utilized with findings centred around Article 12(4) of the 1978 constitution⁹, UN conventions of CEDAW, ICESCR and its general comments.

3. Results and Discussion

The global rise of women participation in labour force in 21st century, make menstruation a harsh reality every month. Menstruation comes with pain, anxiety, dysmenorrhea, and fatigue which catastrophically disturbs the physical, mental, social well-being¹⁰.

In this context, a growing concern in international level have recognized menstruation as a gender equality and human rights issue while identifying the need of employment law and policy reform to address the inequalities and discrimination related to these. In 2022, UN Human Rights Council's panel discussion on menstruation and human rights recognised menstruation as a 'human rights, gender equality and public health issue¹¹'. While discussing the relationship between menstruation and paid work, OHCHR highted that 'The stereotypical portrayal of women who menstruate as overly unreliable and unfit for decision-making can result in lower earnings and fewer responsibilities, opportunities and promotions in the workplace¹²'. The central argument of menstruation rights is grounded on critical feminist theory –'equality must go beyond formal neutrality' to ensure equal treatment of men and women in all areas of their lives, including employment¹³. This goes beyond 'formal equality' founded by liberal feminism which requires treating women in same way as men. As Freedman argues, substantive equality requires to adopt measures to ensure 'real transformation of opportunities, systems, institutions which are no longer grounded on patriarchal power hierarchy¹⁴. As Nancy Fraser suggests, in formal equality, needs of women are invisible in male dominant settings and women are

⁹ Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art 12(4); Nothing in this Article shall Prevent special provisions being made, by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons.

¹⁰ Hilary OD Critchley and others, 'Menstruation: Science and Society'(2020) 223(5) American Journal of Obstetrics and Gynaecology 624.

¹¹ OHCHR, 'High Commissioner for Human Rights Statement on Menstrual Health'(2022) <<https://www.ohchr.org/en/statements/2022/06/high-commissioner-human-rightsstatement-menstrual-health>> accessed 31 May 2025.

¹² Ibid

¹³ Beth Goldblatt and Linda Steele, 'Bloody Unfair: Inequality Related to Menstruation -Considering the Role of Discrimination Law' (2019) 41(3) Sydney Law Review 293.

¹⁴ Sandra Fredman, 'Engendering Socio-Economic Rights' in Anne Hellum and Henriette Sinding Aasen (eds), Women's Human Rights: CEDAW in International, Regional and National Law (CUP 2013) 217.

‘routinely maligned or disparaged¹⁵. When applied this theory in context of work, law and policy reformations may require introducing differential treatment of workers with special care for women experiencing menstruation.

Evidence from existing studies in high income countries suggest the link between menstruation and workplace resulting absenteeism, less productivity and loss of earnings, particularly among women workers who suffer from dysmenorrhea, menorrhagia d chronic pain due to endometriosis¹⁶. However, available empirical findings vary. In a study in Holland, women with endometriosis were reported with reduced productivity and absenteeism¹⁷.

In another empirical study, 4,805 women representing eight countries, 35 % of participants responded that menstrual symptoms severely impact their daily life, including work¹⁸. In a 2021 survey by Australian Department of Health, reveals 37% of participants are negatively affecting their absenteeism at work, with menstrual pain as a key factor¹⁹. These findings suggest that, menstruation, a part of woman’ life, is a vitiating factor to gender and socio-economic inequalities in global labour market which creates the government intervention to do more in addressing menstrual health of women. Even though, evidence on impact of menstruation in mid and low-income countries are comparatively low, menstruation being a natural phenomenon common to most of the women, the available data can be borrowed to examine the need of recognizing first day of periods in Sri Lankan labour law framework.

Sri Lanka recognizes formal equality within workplace as visible in article 12(1) of the Constitution together with equal paid leave incorporated in different legislations. Moving beyond formal equality, the principle of substantive equality is reflected in domestic framework where article 12(4) of the 1978 Constitution does not prevent enactment of subordinate legislations or execute actions for the advancement of women, children or disabled individuals. This is positively evident in Maternity benefits ordinance No.32 of 1939 which recognizes paid maternity leave to ensure both best interest of the child and economic security of new mother²⁰.

¹⁵ Nancy Fraser, ‘From Redistribution to Recognition? Dilemmas of Justice in a Post-Socialist Age’ (1995) 212 *New Left Review* 68.

¹⁶ Dani Jennifer Barrington and others, ‘Experiences of Menstruation in High Income Countries: A Systematic Review, Qualitative Evidence Synthesis and Comparison to Low-and Middle-Income Countries’ (2021) 16(7) *PLoS One* 1, 32; Mike Armour and others, ‘The Cost of Illness and Economic Burden of Endometriosis and Chronic Pelvic Pain in Australia: A National Online Survey’ (2019) 12(1) *PLoS One* 1, 1.

¹⁷ KE Hansen, US Kesmodel, EB Baldursson and others, ‘The Influence of Endometriosis-Related Symptoms on Work Life and Work Ability: A Study of Danish Endometriosis Patients in Employment’ (2013) 169 *European Journal of Obstetrics & Gynaecology and Reproductive Biology* 331.

¹⁸ Lorraine Dennerstein and others, ‘The Effect of Premenstrual Symptoms on Activities of Daily Life’ (2010) 94(3) *Fertility and Sterility* 1059, 1059.

¹⁹ Alana Munro, ‘Periods Impact Potential: Findings from the Australian Department of Health 2021 Menstrual Health Survey’ (Australian Government Department of Health 2022) 1, 15.

²⁰ Maternity Benefits Ordinance No 32 of 1939, s 9.

International law has been a strong foundation in securing protection of reproductive rights of individuals. With the influence of critical feminism, reproductive rights have been a major concern since 1994 where International Conference on Population and Development defined reproductive rights as²¹ ;

“The rights of individuals to make informed choices about their reproduction, including the right to have children, the number of children to have, and the timing and spacing of those children, as well as the right to comprehensive sexual and reproductive health services”.

Followed by, in 1995, the Beijing Declaration and Platform for Action affirmed this definition while also accepting that women have special interests in reproduction that role of women in pregnancy and motherhood must not restrict their equal participation in labour force²². These principles are reflected in multiple ILO and UN conventions that offer protection on reproductive health of individuals, particularly on women.

Article 6(1) of the ICESCR sets out right to work²³, where Article 7 (a) – (d) provides for right to just and favourable conditions of work. The right to work enshrined in Art. 6(1) do not provide ‘absolute and unconditional right’, but guarantees right to equal access to labour markets and opportunities²⁴. Though there is no explicit recognition of reproductive bodies and capacities of workers, the issue of menstruation for women workers can be inferred within Art.6. The only direct reference of reproductive capacity of women is embedded with Art.10 (1) which requires State parties to ensure ‘widest possible protection to working mothers with access to paid leave or social security benefits²⁵. Art. 10 is significant in regards to reproductive health as it acknowledges the reproductive sphere of women in producing and raising children²⁶. CEDAW convention being the exclusive international human rights treaty on women’s rights, requires State parties to protect right to health on women including reproduction as enshrined in both Article 11(f) and Article 14(h). ILO Workers with Family Responsibility Convention No.156 of 1981 obliges State parties to develop national policies with the responsibility to enable individuals with caring duties to participate in workforce without any discrimination²⁷. ILO Maternity

²¹ Shalev, ‘Rights to Sexual and Reproductive Health’ (United Nations, 1994)

<<https://www.un.org/womenwatch/daw/csw/shalev.htm>> accessed 1 June 2025.

²² Beijing Declaration and Platform for Action, The Fourth World Conference on Women (September 1995) 12 <<https://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>> accessed 2 June 2025.

²³ ICESCR (n 4) art 6 (1) : State Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right”

²⁴ Ibid

²⁵ ICESCR (n 4) art 10: The widest possible protection and assistance should be accorded to the family.

²⁶ Beth Goldblatt, ‘The Work of Living: Social Reproduction and the Right to the Continuous Improvement of Living Conditions’ in Jessie Hohmann and Beth Goldblatt (eds), *The Right to the Continuous Improvement of Living Conditions: Responding to Complex Global Challenges* (Hart 2021) 218.

²⁷ International Labour Organization, Workers with Family Responsibilities Convention, 1981 (No 156) art 3(1): ‘In order to enable workers to reconcile their occupational and family responsibilities, measures shall be taken ... to promote equality of opportunity for men and women.

Protection Convention 2000 (No 183) addresses the particular needs of women in relation to pregnancy, breastfeeding workers and paid maternity leave²⁸.

However close reading of these conventions reveals, this narrow recognition of reproductive rights equates to the recognition of phases of pregnancy and motherhood. This limited approach was again reinforced by Committee on Economic, Social and Cultural Rights (CESCR) under General Comment No,18 and General Comment 23, which CESCR recognizes women in employment. As the Comments read, the gendered social and biological needs could be arguably to be interpreted to include biological functions as menstruation of women. CEDAW Committee has not yet adopted a General Recommendation on Art.11 which limits authoritative guidance on extent of these articles on menstrual health of working women. Nevertheless, these Articles should be read in conjunction with right to equality and non-discrimination provisions and other provisions within these international instruments. For example; The preamble of CEDAW notes that, role of women in procreation should not be a ground for discrimination' while Art.5 (b) requires an understanding of 'maternity as a social function.' Articles in ICESCR must be read together with Art.2(2) and 3 which guarantees equality and non-discrimination of men and women. It can be observed that international law, specifically ICESCR and CEDAW, has made transformative efforts towards women's reproductive capacity by protecting right to work by recognizing impact of pregnancy, childbirth of working women. However, the important reproductive issue, menstruation and their disadvantage in paid employment are not directly acknowledged in international sphere. Nevertheless, these articles together can be interpreted as an acknowledgment of the reproductive capacities of women and their impact on paid work through menstruation.

Sri Lanka, being a ratified party to this convention are obliged to protect women within workforce by recognizing FOP leave²⁹. On the other hand, 1978 Constitution guarantees both formal and substantive equality towards women creating an opportunity for FOP leave. Nevertheless, as existing studies suggest, social stigma and negative attitudes towards menstruation in countries contribute to lack of recognition and cultural concealment in law and public policy. Adding this, Bobel argues: Menstruation and more broadly, the menstrual cycle are often dismissed and derided. The same goes for menopause, at the further end of the reproductive life span. It is transgressive to resist the norm of menstrual (and menopausal) concealment. As a Nation, period poverty is a significant challenge where approximately 4.2 million people menstruate with only 30% having accessibility³⁰. 43% tax on imported menstrual hygiene products are imposed making

²⁸ International Labour Organization, Maternity Protection Convention,2000 (No 183) Art 3-4, 8-10.

²⁹ Office of the United Nations High Commissioner for Human Rights (OHCHR)' UN Treaty Body Database : Sri Lanka <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=LKA&Lang=EN > accessed 28 May 2025.

³⁰ Humanitarian Advisory Group, 'Fragile Cycles: Navigating Period Poverty Amidst Sri Lanka's Economic Turmoil' (2023)<<https://humanitarianadvisorygroup.org/fragile-cycles-navigating-period-poverty-amidst-sri-lankas-economic-turmoil/> > accessed 28 May 2025.

it nearly inaccessible to most of those from low-income households³¹. Despite the continuous struggle of women due to period poverty, there has been no legislative or policy efforts by the Government to recognize FOP leave, failing to ensure substantive equality as obliged by Art. 4(d)³² and 12 (4) of the Constitution. However, looking at comparative jurisdictions, paid menstruation leave has been a legislative policy across Asian countries for a considerable time. Countries including Japan, Indonesia, Taiwan have implemented domestic legislative provisions granting FOP leave for female employees. In the neighbouring country of India, State of Bihar became the first State to give menstrual leave in 1992.

As observed in General Comment No.22 of CESCR it observes that 'gender equality requires recognition of health needs of women, different from men to be taken to account by State parties³³ 'Further it imposes a positive obligation towards parties to address inequalities connected to stigmatised functions of reproduction;

"States must take affirmative measures to eradicate social barriers in terms of norms and beliefs that inhibit individuals of different ages and genders ... from autonomously exercising their right to sexual and reproductive health. Social misconceptions, prejudices and taboos about menstruation, pregnancy, delivery, masturbation, wet dreams, vasectomy and fertility should be modified³⁴"

This recommendation emphasises the need of a substantive equality approach that acknowledge different treatments to accommodate different biological needs of men and women. This provides as a country for Sri Lanka to consider how they have failed to respect and accommodate reproductive needs of women contributing gender inequality. Being a State party to ICESCR, adopting this approach in domestic context will allow acknowledgment of distinct reproductive health need of women which will change over time, thereby providing necessary support and services. The explicit legal recognition of menstrual leave is a significant need to recognize these biological functions as a form of gender equality and human rights issue.

4. Conclusion

This article argues that being a state party to different UN Convention, Sri Lanka has moved in the direction of protecting right to work by providing protection to women workers in pregnancy and childcare. Nevertheless, it needs to progress further in order to address other fundamental reproductive rights, specifically on menstrual rights. By employing Freedman's substantive equality framework, this article argues that these biological functions of women are linked with gendered disadvantage at workplace, thereby creating an obligation on the State by addressing these through menstrual leave to ensure right to work. This article argues that an analytical reading of right to work within Art. 6 and 7 of ICESCR coupled with Art 11 of CESAW provides

³¹ Ibid.

³² (n 6) art 4(d): the fundamental rights which are by the Constitutions declared and recognized shall be respected and secured by all organs of government.

³³ CESCR, 'General Comment No 22: the right to sexual and reproductive health' (2016) E/C.12/GC.22

³⁴ See (n 29)

a way forward by recognizing reproductive capacities of women extend beyond pregnancy to include other biological needs, such as menstruation. Thereby it can be suggested that State parties require an understanding that menstrual rights are legally protected through menstrual leave. Consistent with substantive equality framework on Art.12(4) of Sri Lankan Constitution it is argued that this recognition of menstrual leave can support right to work by requiring states to transform workplace barriers related to menstruation.

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