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SAFE, EMPLOYED, AND EQUAL:

THE POSH FRAMEWORK AND THE QUESTION OF MENSTRUAL LEAVE

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When a woman joins the Indian workforce, she doesn't just fill a job opening; she upsets a centuries-old status quo. It was never about the money. It has been a contested space, shaped by who has the office, who sets the rules of entry and, crucially, who decides what biological realities are acknowledged and which are weaponised. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013¹ is the most important legislative attempt to answer the first two questions. The emerging debate over statutory menstrual leave now forces a reckoning with the third, and the answers are far less straightforward than either side acknowledges.

WHAT POSH BUILT, AND WHAT IT STILL HASN'T FIXED

The POSH Act was never a parliamentary initiative. It was progressively put forward by the judicial conscience. In *Vishaka v. State of Rajasthan*,² the Supreme Court, confronted with the then legislative vacuum and the state's failure to protect Bhanwari Devi, a saathin worker gang-raped for preventing a child marriage, issued binding guidelines which considered workplace sexual harassment a direct violation of Articles 14, 15, 19(1)(g) and 21. The Court's structural insight was clear, pointing out that economic equality is an illusion if harassment drives women out of the workforce. This was codified in the POSH Act with easy access to Internal Complaints Committees, lawyer-free civil redressal, paid interim leave

¹ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Acts of Parliament, 2013 (India).

² *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241)

and employer accountability over a vast “workplace” that extends to transportation, client sites and educational institutions.

However, the gap between law and practice is still frightening. In *Aureliano Fernandes v. State of Goa*³, the Supreme Court observed that after a decade of enactment, sixteen out of the thirty national sports federations had non-functioning ICCs. Harassment is rampant, not because it is uncommon, but because women rationally calculate the professional price of reporting harassment from powerful respondents. The POSH architecture, even if well written, can only prove to be a deterrent if employers invest in it in a meaningful way. That’s a far cry from the reality. The Court’s writ of continuing mandamus to require public disclosure of ICC details and certified member training shows how far the reality still falls short of the statute.

THE HIDDEN PRICE OF MENSTRUAL LEAVE

The proposal for statutory paid menstrual leave has been discussed in the Menstruation Benefits Bills of 2017 and 2022 as Private Members’ Bills against the backdrop of providing a safe workplace. It was also recently examined by the Supreme Court in the case of *Shailendra Mani Tripathi v. Union of India*⁴. The Court chose not to issue a formal order and referred to the proposal as a "double-edged sword", something which is more than a health policy initiative or a workplace safety concern. While that description is legally correct, the more significant aspect has not received enough attention.

A legal requirement forces women to document their menstrual cycles for HR, compliance officers, and Internal Complaints Committees. This leads to a mandatory exchange of sensitive biological data directly from employee to employer. India's data protection system is still quite vague, and the right to informational privacy, recognised in Article 21 since the *Puttaswamy*⁵ case, lacks strong legal enforcement in the workplace. Menstrual data held by an employer is not a vague risk. It is a specific type of biological information that has historically been used to deny women promotions, label them as 'unreliable,' affect their performance reviews, or, as shown in the *Nergesh Meerza*⁶ case, create justifications for

³ Aureliano Fernandes v. State of Goa, 2023 SCC OnLine SC 621.

⁴ Shailendra Mani Tripathi v. Union of India, W.P. (C) No. 172/2023 (S.C. Feb. 24, 2023).

⁵ Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1.

⁶ Air India v. Nergesh Meerza, (1981) 4 SCC 335 (India).

termination. The very data meant to safeguard a woman's health could instead serve as grounds for her marginalisation.

Section 12 of the POSH Act, when observed in this context, really helps protect biological vulnerability by giving three months of private interim leave during inquiries. This allows women to be shielded from scrutiny. The law gives them space when they need it. The problem with mandatory menstrual leave is that it actually does the opposite of what POSH Act aims to do. Women are forced to share details, about their periods with their bosses. The POSH Act is meant to prevent this from happening. It is supposed to restrain bosses, not make women more exposed. The POSH Act tries to protect women. Mandatory menstrual leave can put them in a tough spot.

The labour market consequences compound the legal risk even more. The Code on Wages, 2019⁷ prohibits gender-based wage discrimination, and CEDAW⁸ obligates state parties to prevent discrimination arising from pregnancy and maternity. A mandatory menstrual leave policy, however, imposes a rather predictable and recurring cost on hiring women, which ultimately incentivises exactly the discriminatory avoidance behaviour these instruments intend to prohibit. The 'cost of motherhood' already depresses female employment in the formal sector to great lengths and an added 'cost of menstruation' would risk extending that penalty. The result would be a statute designed to support working women that makes women harder to employ, directly undermining what POSH's entire architecture was constructed to achieve which is to normalise women's presence in the workplace.

ACKNOWLEDGING THE REALITY WITHOUT WEAPONISING IT

None of this is to deny the physiological reality that the menstrual leave mechanism intends to redress. Women with periods, endometriosis and other conditions that happen before their period have a hard time doing their job. Making a woman choose between feeling and keeping her job can never be fair. It is like harassing her at work. When companies punish women for something their bodies do, it makes the workplace a bad place to be. If we make it against the rules to discriminate against women because of their periods, then companies will

⁷ Code on Wages, 2019, No. 29, Acts of Parliament, 2019 (India), § 3 (prohibiting gender-based wage discrimination).

⁸ United Nations Convention on the Elimination of All Forms of Discrimination Against Women art. 11, Dec. 18, 1979, 1249 U.N.T.S. 13.

really get in trouble for doing this. Menstrual leave is a deal, and companies should take it seriously.

The question is not whether women who experience menstrual pain should get help. They definitely should. The question is whether making them tell their company about their cycles is the best way to do it. We should let women take time off for menstrual pain as we do for any other temporary illness. They can get a note from their doctor to prove it. We can call this time off "health and wellness leave" so it does not go on their record. This way, women can keep their lives private. We also need to make sure women are treated with respect at work. This means giving them places to rest, flexible hours and the option to work from home.

Conclusion

We must protect women's health without exposing their privacy. Until data protection is ironclad and retaliation is stopped, mandatory disclosure remains a reform that women have every reason to fear.