

Engendering the Right to Work in International Law: Recognising Menstruation and Menopause in Paid Work

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Abstract

It is widely accepted in international law that pregnancy and parenthood should not prevent women from exercising their human right to work. Across various international conventions, special labour rights and protections have been enshrined for pregnancy, childbirth, and childrearing to ‘engender’ the right to work and remedy workplace inequalities that arise in relation to these reproductive issues. However, other reproductive (and post-reproductive) issues, specifically menstruation and menopause, have not received adequate attention in international law despite their direct relationship to gender inequality in paid work. In this article, we argue this narrow approach to the reproductive body needs to be revisited. If the right to work is to be properly ‘engendered’, then menstruation and menopause must be acknowledged as important processes that, like pregnancy and parenthood, shape the capability of ciswomen and all people who experience menstruation and menopause to realise this right. Applying Fredman’s substantive equality framework to these specific issues, this article develops a critical feminist reading of the right to work in two key human rights conventions, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW), to argue for an expanded understanding of the reproductive body and its significance for workers over the life course.

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1. Introduction

The right to work is an inalienable socioeconomic right, enshrined in multiple UN human rights treaties.¹ Minimum labour standards and rights at work set by the ILO, the specialist international agency for labour-related rights, are also embedded in numerous conventions.² Most of these conventions prohibit discrimination on grounds of sex in relation to the right to work. Even so, women across the world continue to be at a disadvantage when it comes to realising this right and accessing equal opportunities in paid work. This is reflected in the global labour force participation rate for women, which has averaged 50 per cent compared to 80 per cent for men over the past three decades.³ Feminist scholars have written extensively on the legal, institutional, cultural and biological factors that constrain the ability of women to participate in paid work.⁴ Across this literature is an acknowledgment that it is the reproductive bodies, capacities and activities of cisgender women. It is namely the biological ability to fall pregnant and the socially inscribed responsibility for unpaid care and domestic work, that limits workforce participation and can lead to discrimination. Building on this feminist scholarship, this article explores the impact of menstruation and menopause on the workforce

¹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(111) arts 23 and 24; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3, arts 6 and 7; Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entry into force 3 September 1981) 1249 UNTS 13, art 11; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entry into force 4 January 1969) 660 UNTS 195, art 5; Convention on the Rights of the Child (adopted 20 November 1989, entry into force 2 September 1990) 1577 UNTS 3, art 32.

² ILO 'Conventions and Recommendations' <<https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm>> accessed 26 August 2022.

³ World Bank, 'Female Labour Force Participation' (2022 <<https://genderdata.worldbank.org/data-stories/flfp-data-story/#:text=The%20global%20labor%20force%20participation,compared%20to%2080%25%20for%20men>> accessed 26 August 2022.

⁴ Meghan Campbell and others, 'A Better Future for Women at Work' (2018) 1 University of Oxford Human Rights Hub Journal 1, 1.

“Recognising Menstruation and Menopause”

participation and experiences of ciswomen and the role of international law in addressing and remedying workplace inequalities related to these bodily functions.

International law offers a range of important workplace protections to ciswomen for their reproductive bodies, capacities and activities. These include anti-discrimination protections for pregnancy and childcare, health protections for pregnant workers, the right to paid maternity leave and, to a more limited extent, workplace breastfeeding rights. These protections reflect a substantive approach to gender equality that respects and recognises social and biological differences between men and women, rather than treating women in the same way as men. As feminist legal scholar Sandra Fredman argues, such an approach is needed to ‘engender’ socioeconomic rights and to challenge and transform structural barriers to women’s workforce participation.⁵ By offering protections to workers for pregnancy and childcare, international law has moved in the direction of engendering the right to work and facilitating the participation of women in paid employment. However, it is argued here that more progress is needed. This is because other fundamental elements of the reproductive body that may affect the needs of ciswomen in paid work, specifically menstruation and menopause, have not received adequate attention.⁶

In the text and subsequent interpretations of the right to work in two key international conventions that formally enshrine this right, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention to Eliminate All Forms of Discrimination against Women (CEDAW), there is no explicit recognition of menstruation and menopause. Instead, as discussed above, these conventions extend important rights and protections to women workers for their reproductive bodies but only in relation to pregnancy. This narrow approach to the reproductive body is significant because the right to work, as expressed in these conventions, provides the foundation for other international actors and institutions, such as the ILO, to develop

⁵ 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.

⁶ In this article we focus primarily on ciswomen (referred to as ‘women’ or ‘ciswomen’ throughout) and their experiences of menstruation and menopause in the workplace. We acknowledge this is a limitation of our analysis as many people across the sex and gender spectrums experience these bodily functions including transgender, gender fluid and non-binary people. Though our article focuses on ciswomen in the workplace, in parts of the article we use the terms ‘women’ and ‘people who experience menstruation and menopause’ interchangeably in recognition of the fact that these bodily functions do not only affect ciswomen; Joan Chrisler and others, ‘Queer Periods: Attitudes toward and Experiences with Menstruation in the Masculine of Centre and Transgender Community’ (2016) 18(11) *Culture, Health and Sexuality* 1238; Tania Glyde, ‘LGBTQIA+ Menopause: Room for Improvement’ (2022) 400 *The Lancet* 1578.

more detailed labour standards and protections. This means that if menstruation and menopause are not built into our understanding of the right to work, then international law offers limited protection to workers for these innate bodily functions. Despite this, the relationship between menstruation, menopause and gender inequality at work is largely unacknowledged and under examined in human rights law and scholarship, though academic interest in other disciplines is growing and these issues have received attention in the human rights space in relation to health, hygiene and education.⁷ This article aims to redress this oversight. It is argued that if the right to work is to be properly ‘engendered’ and support substantive equality in paid employment, then menstruation and menopause must be acknowledged as important processes that, like pregnancy and parenthood, shape the capability of ciswomen to realise this right over the life course.

Fundamental social and demographic shifts demand this more expansive approach to the reproductive body in international law. The rising participation of women in paid work over the 20th and 21st centuries, along with ageing populations and rising share of mature women in employment, make menstruation and menopause an everyday reality for millions of workers.⁸ Importantly, menstruation and menopause are receiving attention in a growing body of academic research that shows these bodily functions and other important, but under acknowledged, reproductive health issues such as pregnancy loss and fertility treatment, are connected to gender inequalities in employment.⁹ In this context, a growing chorus of feminist activists, academics and policy makers in multiple countries are calling for increased recognition of menstruation and menopause as a gender equality and human rights issue.¹⁰ This global movement has given rise to several distinct but related concepts that identify a need for law and policy reform to address socioeconomic inequalities related to these

⁷ Marcy Karin, ‘Addressing Periods at Work’ (2022) 16 *Harvard Law and Policy Review* 1; Inga Winkler and Virginia Roaf, ‘Taking the Bloody Linen out of the Closet: Menstrual Hygiene as a Priority for Achieving Gender Equality’ (2014) 21(1) *Cardozo Journal of Law and Gender* 1.

⁸ Claire Harasty and Martin Ostermeier, ‘Population Ageing: Alternative Measures of Dependency and Implications for the Future of Work’ (2020) ILO Working Paper 5, 8.

⁹ Sydney Colussi, Elizabeth Hill and Marian Baird, ‘Reproductive Leave - An Expanding Approach to Work and Care’ in Marian Baird, Elizabeth Hill and Sydney Colussi (eds) *At A Turning Point: Work, Care and Family Policies in Australia* (Sydney University Press 2023).

¹⁰ Beth Goldblatt and Linda Steele, ‘Bloody Unfair: Inequality Related to Menstruation - Considering the Role of Discrimination Law’ (2019) 41(3) *Sydney Law Review* 29; Inga Winkler, ‘Introduction: Menstruation as Fundamental’ in Chris Bobel and others (eds), *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave Macmillan 2020) 9; Karen Zivi, ‘Hiding in Public or Going with the Flow: Human Rights, Human Dignity, and the Movement for Menstrual Equity’ (2020) 42(1) *Human Rights Quarterly* 119.

“Recognising Menstruation and Menopause”

bodily functions. For example, the term “menstrual equity” emerged in the US and was coined by feminist activist Jennifer Weiss-Wolf to highlight the need for safe and affordable menstrual products to enable menstruators to participate in all areas of daily life, including school and work.¹¹ Activists in the US context have favoured the term “menstrual equity” over “menstrual equality” because the former is equated within the US with a substantive approach to equality, discussed above, that ‘seeks fair treatment for all people, in light of their differences’ while the latter is seen as requiring the ‘the same treatment for all people, regardless of their differences’.¹² The term “menstrual justice” is also used by feminist activists and scholars in this space but goes significantly further in addressing a range of structural inequalities or injustices related to periods ‘from the taxing of [menstrual] products to harassment in the workplace to health disadvantages’.¹³ Menstrual justice scholarship aligns with the concerns of reproductive justice scholars, who critique the structural oppression of women and their reproductive bodies through an intersectional lens,¹⁴ and highlight the ways in which the social and economic forces of patriarchy, systemic racism, classism and transphobia shape and inhibit the rights and capabilities of menstruators.¹⁵ While these concepts are new and evolving, with on-going debate over their application and meaning,¹⁶ they reflect a growing consensus among feminists that menstruation and menopause should be respected and accommodated in law and public policy.

These issues are also beginning to receive attention at the highest levels of international law and policy. In 2022, in the context of a high-profile UN Human Rights Council panel discussion on menstruation and human rights, the UN Office of the High Commissioner for Human Rights (OHCHR) released a statement on menstrual health for the first time that recognised menstruation as a ‘human rights, gender equality and public health issue’.¹⁷ In a concurrent statement, the World Health Organization (WHO) acknowledged the human rights dimensions of these issues and called for increased recognition of their ‘physical, psychological and social

¹¹ Jennifer Weiss-Wolf, *Periods Gone Public: Taking A Stand for Menstrual Equity* (Arcade 2017) xvi.

¹² Bridget Crawford and others, ‘The Ground on Which We All Stand: A Conversation about Menstrual Equity Law and Activism’ (2019) 26(2) *Michigan Journal of Gender and the Law* 341, 343.

¹³ *ibid* 373; Margaret Johnson, ‘Menstrual Justice’ (2019) 53(1) *UC Davis Law Review* 1, 1.

¹⁴ Loretta Ross, ‘Reproductive Justice as Intersectional Feminist Activism’ (2017) *Souls: A Critical Journal of Black Politics, Culture and Society* 286; Loretta Ross and Rickie Solinger, *Reproductive Justice: An Introduction* (University of California Press 2017).

¹⁵ Crawford and others (n 12) 373.

¹⁶ *ibid* 341.

¹⁷ OHCHR, ‘High Commissioner for Human Rights Statement on Menstrual Health’ (2022) <<https://www.ohchr.org/en/statements/2022/06/high-commissioner-human-rights-statement-menstrual-health>> accessed 2 August 2022.

dimensions...from before menarche to after menopause'.¹⁸ In these statements, the OHCHR and WHO recognised menstruation as an important determinant for the ability of people to realise the full range of their human rights, including the right to work. On the relationship between menstruation and paid work, the OHCHR noted '[t]he 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 workplace'.¹⁹ The WHO observed that more must be done to ensure people can 'live, study and work in an environment in which menstruation is seen as positive and healthy and not something to be ashamed of'.²⁰

These important acknowledgments by the OHCHR and the WHO signal a shift in focus from pregnancy to other inherent biological and reproductive issues that are linked to gender inequality in paid employment. As momentum continues to build around these critical issues, it is timely to make the relationship between menstruation, menopause and paid work more visible in international law. To support this endeavour, this article develops a critical feminist reading of the right to work in the ICESCR and CEDAW that acknowledges the significance of menstruation and menopause for over half the global population and their capability to realise this right. Adopting the concept of 'engendering' socioeconomic rights, developed by Fredman, we argue there is an opportunity to build on the progress international law has made in recognising and offering protection to workers for pregnancy and childrearing in these conventions. By extending these protections to a wider range of biological and reproductive issues, specifically menstruation and menopause, it is argued that the right to work can be more fully engendered to support the economic participation of ciswomen and destigmatize reproductive health. The article argues that this feminist interpretation of the right to work is needed to ensure that menstruation and menopause, like pregnancy and parenthood, are respected and protected under international law.

This article offers a unique and original reading of the right to work that acknowledges the significance of menstruation and menopause, which can help international law progress to a broader understanding of the reproductive body at work. However, international law cannot resolve all the inequalities discussed in this article and there are limitations to our analysis that need to be acknowledged. First, the right to work is

¹⁸ WHO, 'WHO Statement on Menstrual Health and Rights' (2022) <<https://www.who.int/news/item/22-06-2022-who-statement-on-menstrual-health-and-rights>> accessed 3 August 2022.

¹⁹ OHCHR (n 17).

²⁰ WHO (n 18).

“Recognising Menstruation and Menopause”

constrained in its capacity to deliver gender equality in the workplace on account of the feminisation of informal, precarious and unpaid work. The traditional gender division of labour means that not only is the essential unpaid domestic and care work performed by women undervalued and not recognised as work, but that when women do participate in paid work, they experience a double burden of productive and reproductive labour, rather than full equality and economic security.²¹ These challenges speak to the limitations of legal frameworks in addressing gender inequality in the labour market and the need to also pursue organisational and cultural change in conjunction with law and policy reform to reshape ‘deeply entrenched gender relationships that permeate the economy’.²² Second, this article draws primarily on research that focuses on cis women and their experiences of menstruation and menopause in the workplace. While the arguments presented here focus on ciswomen and their bodies, this analysis shows that unless all people who experience menstruation and menopause are respected and accommodated in the workplace, including transgender and non-binary people, then substantive equality will not be achieved.

Feminist legal scholar Fredman argues a substantive approach to equality is needed to address the distinct needs of women and ‘engender’ the right to work.²³ Applying this framework to the experiences of menstruation and menopause in paid work, the article is structured as follows. The next section begins with an explanation of Fredman’s substantive equality framework and, applying this lens, reviews empirical data on workplace inequalities related to menstruation and menopause. Focusing on the ICESCR and CEDAW, in Section III the article considers the possibilities and limitations of international law and the right to work in redressing these inequalities and transforming workplace barriers related to menstruation and menopause. Drawing on Fredman, in Section IV the article develops a critical feminist reading of the ICESCR and CEDAW to show how the right to work, as enshrined in these conventions, could be more fully engendered by accommodating menstruation and menopause. In Section V the article discusses directions for future research and concludes by arguing that international law must progress to ensure the reproductive bodies and capacities of women do not limit their capability to realise the right to work over the life course.

²¹ Fredman (n 5) 220; 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.

²² Campbell and others (n 4) 2.

²³ Fredman (n 5) 217.

2. Fredman and Substantive Equality: Addressing Workplace Inequality Related to Menstruation and Menopause

Fredman has developed a multidimensional approach to substantive equality to show how law and public policy must overcome gendered disadvantage across several levels – distribution, recognition, participation and transformation – in order to ‘engender’ socioeconomic rights and achieve full equality between men and women. Designed to support critical feminist analyses of socioeconomic rights and the extent to which they support a formal or substantive approach to gender equality, this is an appropriate framework within which to consider how international law might respond to workplace inequalities related to menstruation and menopause.²⁴ The central thesis of this framework is that ‘equality must go beyond formal neutrality’ and to facilitate the equal treatment and participation of men and women in all areas of life, including paid employment.²⁵ This is because formal equality, or treating women in the same way as men, fails to address underlying causes of gender inequality. An obvious example is pregnancy and the need for special labour rights that accommodate the distinct physiological needs of women, notably paid maternity leave, which safeguards maternal and child health while also supporting the labour market attachment and economic security of new mothers.

A substantive approach to equality recognises the need for such laws and policies, which accommodate differences between men and women. However, as Fredman argues, substantive equality also requires measures to secure a ‘real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns’.²⁶ This means that to secure full equality in paid employment, decision makers must address and change labour market norms and institutions that are based on a male breadwinner/female homemaker model and geared towards an ideal (cisgender male) worker that is assumed not to have reproductive health or caring obligations.²⁷ As this worker is assumed to be incapable of falling pregnant, it is argued here, then he is also assumed not to menstruate or experience menopause. Accordingly, a substantive approach to equality

²⁴ *ibid* 225–28.

²⁵ *ibid*; Goldblatt and Steele, ‘Bloody Unfair’ (n 10) 299.

²⁶ CEDAW Committee, ‘General Recommendation No 25 on temporary special measures’ (2004) CEDAW/C/GC/25 [10]; Fredman (n 5) 225.

²⁷ Joan Acker, ‘Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations’ (1990) 4(2) *Gender and Society* 139, 151.

“Recognising Menstruation and Menopause”

requires that menstruation and menopause, like pregnancy, are recognised as important biological functions that shape the distinct needs of ciswomen in the workplace. Each dimension of Fredman’s framework, discussed below, highlights a different aspect of gender inequality that needs to be addressed to ensure menstruation and menopause are not a barrier to the full and equal participation of women in paid work. This is not a hierarchy of inequalities, as each dimension – distribution, recognition, participation and transformation – is intertwined with the others and must be addressed simultaneously to achieve full equality.

The distribution or redistributive dimension addresses gender-based disadvantage and focuses on remedying this socioeconomic disadvantage rather than achieving gender neutrality.²⁸ When applied to menstruation and menopause, this means addressing material and social disadvantages that arise as a result of these natural functions. In the context of paid employment, this may require differential treatment of workers to address disadvantage. For example, people experiencing menopause may require formal workplace support or adjustments to ensure the working environment does not exacerbate symptoms such as hot flushes.²⁹

The recognition dimension aims to remedy recognition wrongs or gender inequalities that arise due to stigma, stereotyping, humiliation and violence related to menstruation and menopause.³⁰ As feminist scholar Nancy Fraser argues, this type of inequality can manifest as *non-recognition*, for example when the needs of women are rendered invisible in male-dominated settings like the workplace, and *disrespect*, when women are ‘routinely maligned or disparaged’ in everyday workplace interactions and negative gender stereotypes.³¹ This means the taboo nature of menstruation and menopause, their stigmatisation in professional settings, and harmful stereotypes that women are less capable of leadership due to these health issues, requires attention from decision-makers.³²

The participation dimension ‘requires decision-makers to hear and respond to the voice of women, rather than imposing top-down decisions’.³³ This would require governments and employers to respond to the growing numbers of activists and trade unions across multiple countries who are calling for law and policy reform to accommodate menstruation

²⁸ *ibid* 226.

²⁹ Jo Ann Pinkerton, ‘Money Talks: Untreated Hot Flashes Cost Women, the Workplace and Society’ (2015) 22(3) *Menopause* 254, 254.

³⁰ Fredman (n 5) 226.

³¹ Nancy Fraser, ‘From Redistribution to Recognition? Dilemmas of Justice in a ‘Post-Socialist’ Age’ (1995) 212 *New Left Review* 68, 71.

³² Alicia Grandey, Allison Gabriel and Eden King, ‘Tackling Taboo Topics: A Review of the Three *Ms* in Working Women’s Lives’ (2019) 46(1) *Journal of Management* 7, 12.

³³ Fredman (n 5) 227.

and menopause in the workplace.³⁴ Importantly, this dimension requires an awareness of the ‘possible disjuncture between those who speak and those who are affected’.³⁵ This means decision makers should be aware of differences between workers and how social movements can privilege the voices and experiences of some groups while marginalising others.³⁶

The transformation dimension is concerned with the ‘detriment that is attached to difference’ and requires measures that ‘respect and accommodate difference, removing the detriment but not the difference itself’.³⁷ This entails the removal of workplace inequalities related to menstruation and menopause without requiring ciswomen (and transgender and non-binary people who experience these bodily functions) to conform to an ideal cismen worker norm. This would require an approach analogous to existing legal and policy responses to pregnancy in the workplace, which include anti-discrimination protections for mothers, paid parental leave and workplace breastfeeding entitlements. These types of law and policy initiatives acknowledge the impact of pregnancy and childcare on paid work without requiring women to conform to an ideal worker norm. Similarly, a transformative response to menstruation and menopause would require a readjustment of male-oriented workplace norms and practices that directly or indirectly penalise workers for experiencing these bodily functions. An obvious example is investment in workplace infrastructure to ensure toilet facilities are appropriate and suitable for workers to address their menstrual and menopausal health concerns. Applying Fredman’s framework, we now introduce empirical data on workplace inequalities related to menstruation and menopause and show how these issues are embedded across the global labour market. We first explore the distribution and recognition dimensions of equality as they relate to menstruation and menopause, before discussing how the participation and transformation dimensions of equality can inform law and policy reform to secure progressive change for people who experience menstruation and menopause at work.

³⁴ Michelle Hennessy, ‘Union Calls for Menstrual Health Policy in Every Irish Workplace’ (*The Journal*, 20 May 2022) <<https://www.thejournal.ie/menstrual-leave-5769083-May2022/>> accessed 8 August 2022; Geeta Pandey, ‘India Teachers’ Fight for Period Leave Gathers Steam’ (*BBC News*, 8 August 2021) <<https://www.bbc.com/news/world-asia-india-58110935>> accessed 18 July 2022.

³⁵ Fredman (n 5) 228.

³⁶ Sarah Vander Schaaff, ‘Black Women’s Health Problems during Menopause Haven’t Been a Focus of Medicine. Experts and Activists Want to Change That’ (*The Washington Post*, 6 March 2021) <https://www.washingtonpost.com/health/black-women-menopause-hot-flashes/2021/03/05/97a02c44-7b8a-11eb-a976-c028a4215c78_story.html>.

³⁷ Fredman (n 5) 228.

A. Menstruation: Distributive Inequality and Recognition Wrongs

Menstruation is a natural biological function – across the world over 300 million women and girls menstruate every day, and many of them work.³⁸ Despite the significance of menstruation for millions of people of working age, it has only recently attracted public and media attention as an important process that may contribute to gender inequality at work. This is reflected by growing calls from within the feminist movement, discussed above, for legal and policy innovations to address structural inequalities and injustices related to menstruation.³⁹

Menstruation can result in distributive inequalities due to the failure of employers to ‘provide the time, space and equipment’ needed to manage menstruation in the workplace.⁴⁰ This disregard for the social and physical needs of menstruators limits their ability to participate in ‘public institutions that afford our main access to social benefits and recognition’ over the life course, from education to employment.⁴¹ As Young argues:

*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 shame.*⁴²

This argument shows how male-oriented institutional norms and practices, such as the ideal worker—the ‘standard body with standard needs’—contribute to gender inequality in educational and labour market outcomes. This type of inequality has been documented across multiple countries and sectors and is occurring in different ways. For example, in the male-dominated context of remote Antarctic fieldwork, female expeditioners are not provided with the type of infrastructure and support required to address their menstrual health concerns, leading some to

³⁸ The World Bank, ‘Periods Don’t Stop for Pandemics – Neither Will Our Efforts to Bring Safe Menstrual Hygiene to Women and Girls’ (28 May 2020) <<https://www.worldbank.org/en/news/feature/2020/05/28/menstrual-hygiene-day-2020>> accessed 15 July 2022.

³⁹ Crawford and others (n 12) 341; Johnson (n 13) 1.

⁴⁰ Iris Marion Young, *On Female Body Experience: “Throwing Like a Girl” and Other Essays* (OUP 2005) 114; Goldblatt and Steele, ‘Bloody Unfair’ (n 10) 300.

⁴¹ Young (n 40) 109.

⁴² *ibid* 113.

resort to menstrual suppression.⁴³ Similarly, at the beginning of the COVID-19 pandemic, female health care workers in China reportedly used adult diapers to manage their periods while wearing personal protective equipment, with limited access to menstrual products and support from their employers.⁴⁴ These examples demonstrate a failure to align organisational policies and practices with the needs of menstruating employees in both a male-dominated working environment and the feminised health and care sector.⁴⁵ Interestingly, distributive inequalities can also arise in countries where menstruation is formally recognised in national legislation through paid menstrual leave entitlements. This occurs when employers routinely deny requests for menstrual leave or penalise workers for claiming the benefit.⁴⁶ For example, in South Korea, where menstrual leave has been legislated since 2001, the ex-CEO of Asiana Airlines was fined 2m won in 2021 for refusing 138 requests by flight attendants for menstrual leave.⁴⁷ Similar issues have been documented in Japan and Indonesia, where menstrual leave is also legislated but employers routinely deny requests for leave.⁴⁸

Issues of distributive inequality can also arise where menstruation imposes an economic penalty on women. There is mixed evidence on the impact of menstruation on female labour force participation, but the available empirical data suggests that some women may experience reduced work time and loss of earnings due to this innate bodily function. As discussed above, this suggests that the norm of an ideal (male) worker may be contributing to a lack of attention to menstruation by governments and employers, and that investment in policies and workplace infrastructure to address the menstrual health concerns of workers are needed. The available evidence on this subject, discussed below, also

⁴³ Meredith Nash, 'Breaking the Silence around Blood: Managing Menstruation during Remote Antarctic Fieldwork' (2022) 30(8) *Gender, Place and Culture* 1083, 1083.

⁴⁴ Alexandra Stevenson, 'Shaved Heads, Adult Diapers: Life as a Nurse in the Coronavirus Outbreak' (*The New York Times*, 28 February 2020) <<https://www.nytimes.com/2020/02/26/business/coronavirus-china-nurse-menstruation.html>> accessed 15 July 2022; Audrey Jiajia Li, 'How China's Coronavirus Health Care Workers Exposed the Taboo on Menstruation' (*South China Morning Post*, 28 February 2020) <<https://www.scmp.com/comment/opinion/article/3052524/how-chinas-coronavirus-health-care-workers-exposed-taboo>> accessed 15 July 2022.

⁴⁵ WHO and ILO, 'The Gender Pay Gap in the Health and Care Sector: A Global Analysis in the Time of COVID-19' (2022) viii. <<https://www.who.int/publications/i/item/9789240052895>> accessed 9 October 2023.

⁴⁶ Sydney Colussi, Elizabeth Hill and Marian Baird, 'A Bloody Controversy – Menstrual Leave in Indonesia' in *SAGE Business Cases* (Sage 2003).

⁴⁷ 'Menstrual Leave: South Korea Airline ex-CEO Fined for Refusing Time Off' (*BBC News*, 25 April 2021) <<https://www.bbc.com/news/world-asia-56877634>> accessed 15 July 2022.

⁴⁸ Colussi, Hill and Baird, 'A Bloody Controversary' (n 46).

“Recognising Menstruation and Menopause”

suggests that a failure to respect and accommodate menstruation in organisational and national policy may not only financially penalise individual women, but also harm workforce sustainability and national economic productivity by undermining women’s participation in paid employment.

Several studies from high income countries suggest menstruation may be linked to workplace absenteeism, reduced productivity and loss of earnings, particularly among workers who report menstrual pain (‘dysmenorrhea’), heavy or prolonged bleeding (‘menorrhagia’) and chronic pain associated with endometriosis.⁴⁹ However, survey questions, methodologies and findings vary. For example, in a study of 32,748 women in the Netherlands, 13.8 per cent of respondents reported missing work during their periods and 80.7 per cent reported ‘presenteeism’ or decreased productivity for a mean of 23.3 days per year.⁵⁰ In another study of 4,085 women across eight different countries, 35 per cent of participants said their menstrual symptoms moderately or severely affected their daily life, including participation in work.⁵¹ Empirical data on menstruation in specific industries and sectors is also emerging. In a survey of 240 employees in the Australian Department of Health, for example, 37 per cent of respondents said menstruation negatively affected their work attendance, with menstrual pain identified as a key factor.⁵² In another survey of 1,800 women published by Fórsa, the largest public sector union in Ireland, 70 per cent reported taking time off work due to menstrual pain.⁵³

These studies suggest that menstruation, an innate bodily function, is contributing to socioeconomic and gender inequalities across the global labour market and that workplace policies and infrastructure need to do more to address the menstrual health concerns of workers. This will require governments and employers to move away from the ideal worker norm and to integrate a strong understanding of the reproductive body and

⁴⁹ 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) 14(1) PLoS One 1, 1.

⁵⁰ Mark Schoep and others, ‘Productivity Loss Due to Menstruation-Related Symptoms: A Nationwide Cross-Sectional Survey among 32,748 Women’ (2019) 9 BMJ Open 1, 1.

⁵¹ Lorraine Dennerstein and others, ‘The Effect of Premenstrual Symptoms on Activities of Daily Life’ (2010) 94(3) Fertility and Sterility 1059, 1059.

⁵² Alana Munro, ‘Periods Impact Potential: Findings from the Australian Department of Health 2021 Menstrual Health Survey’ (Australian Government Department of Health 2022) 1, 15.

⁵³ ‘Workplace Menstrual Health Policies Benefit Employers Too’ (*Fórsa*, 28 June 2022) <<https://www.forsa.ie/workplace-menstrual-health-policies-benefit-employers-too/>> accessed 9 August 2022.

its processes into workplace practices and policy architectures. However, it is important not to essentialise the experience of menstruation and for policymakers not to assume it will have a uniform impact on the workforce participation of women. As mentioned above, survey findings and data on this issue vary and there are well-documented methodological challenges in accurately tracking the prevalence and severity of menstrual symptoms and their impact on workforce participation, which is the subject of ongoing academic debate. For example, one econometric study that identified a link between the menstrual cycle and workplace absenteeism among female employees at an Italian bank has been critiqued due to methodological flaws that distorted the estimated impact of menstruation on gender gaps in earnings and absences.⁵⁴ This speaks to the need for caution when interpreting data on menstruation and workplace absenteeism. As King observes, '[p]opulation-based research is...limited by the fact that participants are more likely to recall severe menstrual symptoms' which raises a risk of over-estimating their effect on daily activities, including work.⁵⁵

Fewer studies explore the relationship between menstruation and work in low- and middle-income countries but some are available.⁵⁶ For example, in a comparative study on workplace absenteeism in Burkina Faso (n = 998), Niger (n = 212) and Nigeria (n = 3,638), 19, 11 and 17 per cent of respondents, respectively, reported missing work due to menstruation.⁵⁷ In a cross-sectional survey of 435 women working in marketplaces, primary schools and health care facilities in Uganda, 15 per cent of respondents reported missing work due to their last period and 41 per cent said they would prefer not to work while menstruating.⁵⁸

⁵⁴ Mariesa Herrmann and Jonah Rockoff, 'Does Menstruation Explain Gender Gaps in Work Absenteeism?' (2012) 47(2) *The Journal of Human Resources* 493 in response to Andrea Ichino and Enrico Moretti, 'Biological Gender Differences, Absenteeism and the Earnings Gap' (2009) 1(1) *American Economic Journal: Applied Economics* 183.

⁵⁵ Sally King, 'Menstrual Leave: Good Intention, Poor Solution' in Juliet Hassard and Luis D. Torres (eds), *Aligning Perspectives in Gender Mainstreaming: Aligning Perspectives on Health, Safety and Well-Being* (Springer Nature 2021) 158.

⁵⁶ Marni Sommer and others, 'Managing Menstruation in the Workplace: An Overlooked Issue in Low- and Middle-Income Countries' (2016) 15(86) *International Journal for Equity in Health* 1; Julie Hennegan and others, 'Women's and Girls' Experiences of Menstruation in Low- and Middle-Income Countries: A Systematic Review and Qualitative Metasynthesis' (2019) 16(5) *PLoS Medicine* 1, 31.

⁵⁷ Julie Hennegan and others, 'School and Work Absenteeism Due to Menstruation in Three West African Countries: Findings from PMA 2020 Surveys' (2021) 29(1) *Sexual and Reproductive Health Matters* 409, 409.

⁵⁸ Julie Hennegan and others, 'Menstrual Health Challenges in the Workplace and Consequences for Women's Work and Wellbeing: A Cross-Sectional Survey in Mukono, Uganda' (2022) 2(7) *PLOS Global Public Health* 1.

“Recognising Menstruation and Menopause”

Menstrual pain was identified as the most common driver of workplace absenteeism in this study.⁵⁹

Inability to access menstrual products and inadequate water sanitation and hygiene (WASH) facilities, particularly in male-dominated industries, are other contributors to distributive inequality. For example, a study in Burkina Faso found improved access to disposable pads reduced workplace absenteeism by approximately 21 percentage points.⁶⁰ In the above-mentioned study in Uganda, the use of improvised rather than commercially produced menstrual products was associated with higher rates of work absenteeism.⁶¹ And in Indonesia women working as industrial labourers in the mining sector have reportedly struggled to address their menstrual health needs due to unsuitable toilets.⁶² These issues are not exclusive to workplaces in lower-income, informal economic contexts. Period poverty has been identified as a barrier to school and workforce participation in multiple high-income countries,⁶³ leading some countries, such as Scotland and New Zealand, to make menstrual products free to the general public and students, respectively.⁶⁴ Inadequate WASH facilities are also a problem in these contexts. For example, in 2021 a report by the Australian Electrical Trades Union found inadequate toilets in the construction industry had ‘forced women to take drastic action, risking their own health, safety and hygiene through practices like drinking less water or deliberately delaying their menstrual cycles’.⁶⁵

Recognition wrongs—or inequalities that arise due to stigma, stereotyping, humiliation or disrespect related to menstruation—are also widely documented in the global labour market and explored by feminist scholars

⁵⁹ *ibid* 9.

⁶⁰ Astrid Krenz and Holger Strulik, ‘Menstrual Hygiene Management and Work Attendance in a Developing Country’ (2019) CEGE Discussion Papers No. 364 1, 1.

⁶¹ Hemegan and others, ‘Menstrual Health Challenges’ (n 58) 9.

⁶² Kuntala Lahiri-Dutt and Kathryn Robinson, ‘Period Problems at the Coalface’ (2008) 89 *Feminist Review* 102, 114.

⁶³ Alana Munro, ‘A Systematic Review of the Menstrual Experiences of University Students and the Impacts on their Education: A Global Perspective’ (2021) 16(9) *PLoS ONE* 1.

⁶⁴ Linda Steele and Beth Goldblatt, ‘Engaging with Law’s Menstrual Moment’ (2020) 46(1) *Australian Feminist Law Journal* 83, 84; Natasha Frost, ‘New Zealand to Roll Out Free Period Products to All Students’ (*The New York Times*, 18 February 2021) <<https://www.nytimes.com/2021/02/18/world/asia/new-zealand-period-schools.html>> accessed 8 September 2023. A similar initiative was rolled out in Kenya; BBC News, ‘Kenya’s Schoolgirls to Get Free Sanitary Pads from Government’ (*BBC News*, 22 June 2017) <<https://www.bbc.com/news/world-africa-40365691>> accessed 8 September 2023.

⁶⁵ Madeline Hislop, ‘Toilets for Female Tradies “Overlooked” on Construction Sites’ (*Women’s Agenda*, 19 August 2021) <<https://womensagenda.com.au/latest/toilets-for-female-tradies-overlooked-on-construction-sites/>> accessed 15 July 2022.

in the field of critical menstruation studies. For example, Bobel argues periods have been pathologized to demonstrate the inferiority of women across the globe,⁶⁶ while Przybylo and Fahs argue ‘cultural messages of menstruation and the menstruating body as gross, disgusting or shameful have created a dominant narrative of menstruation as a negative, troubling, problematic experience’.⁶⁷ Negative attitudes toward periods in many countries and regions contribute to a culture of concealment and lack of recognition in law and public policy. As Bobel argues:

*[M]enstruation 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.*⁶⁸

Menstrual stigma is a global issue but is shaped by local customs and practices that determine its impact on labour force participation. For example, cultural norms requiring social isolation during menstruation have been documented in Nepal and Ethiopia.⁶⁹ The practice of *chhaupadi* in Nepal, in which girls and women are exiled to ‘menstrual huts’ each month,⁷⁰ undermines the personal safety of menstruators and their ability to ‘work and be perceived as viable workers across the lifespan ... since the ages of menstruation overlap with the ages of the majority of productive employment years’.⁷¹ In some cases recognition wrongs can result in the physical exploitation of menstruators in the workplace, including violations of dignity and privacy. For example, in Indonesia there have been reports that factory workers in the garment sector are required

⁶⁶ Chris Bobel, *New Blood: Third-Wave Feminism and the Politics of Menstruation* (Rutgers University Press 2010) 31; Ingrid Johnston-Robledo and Joan Chrisler, ‘The Menstrual Mark: Menstruation as Social Stigma’ (2011) 68 *Sex Roles* 9, 9-10.

⁶⁷ Ela Przybylo and Breanne Fahs, ‘Feels and Flows: On the Realness of Menstrual Pain and Crippling Menstrual Chronicity’ (2018) 30(1) *Feminist Formations* 206, 210.

⁶⁸ Chris Bobel, ‘Introduction: Menstruation as Lens - Menstruation as Opportunity’ in Chris Bobel and others (eds), *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave Macmillan 2020) 1.

⁶⁹ Allison Traylor and others, ‘Expanding Research on Working Women More Globally: Identifying and Remediating Current Blindspots’ (2020) 76(3) *Journal of Social Issues* 744, 756.

⁷⁰ Sara Parker and Kay Standing, ‘Nepal’s Menstrual Huts: What Can be Done about this Practice of Confining Women to Cow Sheds?’ (*The Conversation*, 24 January 2019) <<https://theconversation.com/nepals-menstrual-huts-what-can-be-done-about-this-practice-of-confining-women-to-cow-sheds-109904>> accessed 15 July 2022.

⁷¹ Traylor and others (n 69) 756.

“Recognising Menstruation and Menopause”

to remove their underwear and provide proof of menstruation in order to claim menstrual leave.⁷²

In less extreme cases menstrual stigma is still associated with increased levels of employee anxiety and shame and may have a negative impact on work performance.⁷³ In high-income countries, ‘menstrual etiquette’ dictates appropriate menstrual conduct, with women taught not to discuss menstruation in public settings like the workplace.⁷⁴ This creates an expectation that people should engage in various strategies to conceal their periods at work, such as hiding menstrual products, which could be viewed as a form of risk management against gender discrimination.⁷⁵ Failure to conceal menstruation can result in derision or reprisal for workers in high income countries. For example, in 2017 in the US an emergency call operator filed a sex discrimination case in the District Court of Georgia after she was dismissed for experiencing a heavy pre-menopausal period that stained an office chair and carpet.⁷⁶ Similarly, in New Zealand in 2022 a client services worker took her employer to the Human Rights Review Tribunal, alleging discrimination after her manager criticised her for taking sick leave for period pain.⁷⁷

B. Menopause: Distributive Inequality and Recognition Wrongs

In the context of ageing populations and the rising participation of mature women in paid work, menopause and its relationship with the workplace has become a subject of growing public and media interest.⁷⁸ While the reproductive bodies and capacities of mature workers are traditionally under acknowledged in legal and policy frameworks, this is gradually

⁷² Colussi, Hill and Baird, ‘An Expanding Approach’ (n 9).

⁷³ Grandey, Gabriel and King (n 52) 21; Raisa Tasneem Zaman and Fazia Mohiuddin, ‘Impact of Menstruation-Related Stigma and Behaviour on Female Employee Performance in Bangladesh: Mediating Role of Non-Work Related Stress’ (2021) *South Asian Journal of Business Studies* 1, 11.

⁷⁴ Sophie Laws, *Issues of Blood: The Politics of Menstruation* (Palgrave MacMillan 1990) 16.

⁷⁵ Winkler and Roaf (n 7) 4.

⁷⁶ Goldblatt and Steele, ‘Bloody Unfair’ (n 10) 306.

⁷⁷ Hannah Filmer, ‘Auckland Woman Takes Her Manager to Human Rights Tribunal over Period Stigma’ (*Re News*, 26 February 2022) <<https://www.renews.co.nz/auckland-woman-takes-her-manager-to-human-rights-commission-over-period-stigma/>> accessed 15 July 2022.

⁷⁸ Emily Bariola and others, ‘Employment Conditions and Work-Related Stressors are Associated with Menopausal Symptom Reporting among Perimenopausal and Postmenopausal Women’ (2017) 24(3) *Menopause* 247, 247; T. Kopenhagen and F. Guidozi, ‘Working Women and the Menopause’ (2015) 18(3) *Climacteric* 372, 372.

changing as governments and employers grapple with growing research evidence that shows menopause contributes to gendered disadvantage and economic insecurity at mid-life. This body of research sheds light on the relationship between paid work and the menopause transition, which is defined as including three stages: perimenopause, menopause, and post-menopause.⁷⁹ As Beck and others explain:

*Perimenopause marks the transition into menopause, characterized by significant decreases in oestrogen, progesterone and testosterone production and the beginning of symptoms but continued (if often irregular) menstruation [...] Menopause occurs twelve months following a woman's last menstrual period, and as such lasts only twenty-four hours [...] Post-menopause follows menopause. Here symptoms may still be experienced, but usually at a lower intensity.*⁸⁰

This definition highlights the distinct physiological changes experienced at different points in the menopause transition, which suggests that a discussion of work and 'menopause' may oversimplify and obscure the distinct needs of people as they move from peri to post-menopause. However, the literature on menopause and work, like the medical literature on menopause, does not always distinguish between these stages, with research findings often referring to 'menopause' rather than peri or post-menopause.⁸¹ This makes it difficult to identify the specific impact of perimenopause, menopause, and post-menopause on work. The remainder of this section discusses the reported impact of 'menopause' on paid work but acknowledges that the precise meaning of this term fluctuates across publications and may cover symptoms and workplace experiences related to perimenopause or post-menopause.

Menopause can result in distributive inequalities that contribute to gendered disadvantage if workers experience reduced job satisfaction, productivity or retention due to menopausal symptoms and a lack of organisational support and recognition of these issues. Menopausal symptoms are highly diverse and context dependent (reflecting both

⁷⁹ Kathleen Riach and Gavin Jack, 'Women's Health in/and Work: Menopause as an Intersectional Experience' (2021) 18 *International Journal of Environmental Research and Public Health* 1, 1.

⁸⁰ Vanessa Beck, Jo Brewis, Andrea Davies and Jesse Matheson, 'Cis Women's Bodies at Work: Co-modification and (In)visibility in Organization and Management Studies and Menopause at Work Scholarship' (2022) *International Journal of Management Reviews* 1, 2.

⁸¹ Ananthan Ambikairajah, Erin Walsh and Nicolas Cherbuin, 'A Review of Menopause Nomenclature' (2022) 19(29) *Reproductive Health* 1, 2.

“Recognising Menstruation and Menopause”

geographical location and personal factors such as ethnicity and socioeconomic status), and for this reason do not represent a universal barrier to economic participation.⁸² However, research shows a range of symptoms including hot flushes and night sweats (‘vasomotor’ symptoms), fatigue, anxiety and depression may be linked to reduced confidence, productivity and loss of income.⁸³ For example, a study of 252,273 women with untreated vasomotor symptoms in the United States found participants in this group experienced productivity losses that were 57 per cent higher than those in the control group.⁸⁴ In a survey of 2,000 workers in the medical profession in the United Kingdom, 90 per cent of respondents said menopausal symptoms had impacted their working lives and a significant number had reduced their hours, left management roles or intended to retire early due to difficulties related to menopause.⁸⁵ In another study of 850 workers employed in the Australian higher education sector, researchers found ‘the more frequently women reported experiencing menopause-related symptoms and the more bothersome the symptoms were, the less engaged they felt at work, less satisfied with their job, the greater their intention to quit their job and the lower their commitment to the organisation’.⁸⁶ However, this study found it difficult to attribute these findings to menopause alone, noting the findings should be understood in the context of organisational attitudes toward ageing and the working environment, including levels of occupational stress and work intensity.⁸⁷

⁸² Patrizia Monteleone and others, ‘Symptoms of Menopause - Global Prevalence, Physiology and Implications’ (2018) 14 *Nature Reviews Endocrinology* 199, 200; Vanessa Beck, Jo Brewis and Andrea Davies, ‘Women’s Experiences of Menopause at Work and Performance Management’ (2021) 28(3) *Organization* 510, 512.

⁸³ Gavin Jack and others, ‘Menopause in the Workplace: What Employers Should Be Doing’ (2016) 85 *Maturitas* 88, 92; Joanna Brewis and others, *The Effects of Menopause Transition on Women’s Economic Participation in the UK* (Department for Education 2017) 1, 25 <<https://www.gov.uk/government/publications/menopause-transition-effects-on-womens-economic-participation>> accessed 9 October 2023; Amanda Griffiths, Sara Jane MacLennan and Juliet Hassard, ‘Menopause and Work: An Electronic Survey of Employees’ Attitudes in the UK’ (2013) 76 *Maturitas* 155, 155; Pragya Gartoulla and others, ‘Menopausal Vasomotor Symptoms are Associated with Poor Self-Assessed Work Ability’ (2016) 87 *Maturitas* 33, 33.

⁸⁴ Philip Sarrel and others, ‘Incremental Direct and Indirect Costs of Untreated Vasomotor Symptoms’ (2015) 22(3) *Menopause* 260, 260.

⁸⁵ British Medical Association, *Challenging the Culture on Menopause for Working Doctors* (2020) 1, 1–3. <<https://www.bma.org.uk/media/2913/bma-challenging-the-culture-on-menopause-for-working-doctors-report-aug-2020.pdf>>

⁸⁶ Gavin Jack and others, *Women, Work and the Menopause: Releasing the Potential of Older Professional Women* (La Trobe University, September 2014) 1, 3–4. <<https://www.menopause.org.au/images/stories/education/docs/women-work-and-the-menopause-final-report.pdf>> accessed 9 October 2023.

⁸⁷ *ibid.*

Similar issues have been documented in lower-income economies. For example, a study of 239 health care workers in Kenya found women going through menopause experienced a 28 per cent net productivity loss compared to 18 per cent in the control group.⁸⁸ In another study of 131 women employed at a university in Egypt, 91.6 and 100 per cent of respondents, respectively, identified a poor physical working environment and work stress/overload as factors that aggravate menopausal symptoms in paid work.⁸⁹ This study highlights the ‘bi-directional’ nature of the relationship between work and menopause, in which menopausal symptoms can negatively affect job productivity and satisfaction and the working environment can exacerbate the frequency and severity of symptoms.⁹⁰ As Carter and others explain:

*A vicious cycle can occur where emotional distress, financial standing, workload, and the social environment of a workplace can all contribute to stress, resulting in increased mental fatigue and hot flush occurrences. Whilst workplace stressors can influence the hot flush frequency, the reverse paradigm is hot flush frequency can also exacerbate stress, cause emotional distress, and increase intentions to leave the workforce.*⁹¹

This has been identified as an issue in high-income countries, with several studies exploring ventilation, temperature control and managerial support as important work-related factors that may impact the well-being of menopausal workers.⁹² For example, in a survey of 896 women in professional, managerial and administrative occupations in the UK, 71.3 per cent of respondents said hot flushes were more difficult to manage in hot or unventilated workspaces.⁹³

⁸⁸ Edith Mwangi and others, ‘Influence of Menopause on Work Productivity among Health Workers in Public Hospitals in Kiambu County, Kenya’ (2019) 32(1) African Journal of Health Sciences 27, 27.

⁸⁹ Rehab Hammam, Reem Abbas and Myra Hunter, ‘Menopause and Work - The Experience of Middle-Aged Female Teaching Staff in an Egyptian Governmental Faculty of Medicine’ (2011) 71 Maturitas 294, 296.

⁹⁰ Carol Atkinson and others, ‘Menopause and the Workplace: New Directions in HRM Research and Practice’ (2021) 31 Human Resource Management Journal 49, 51; Beck, Brewis and Davies, ‘Women’s Experience of Menopause at Work’ (n 82) 512.

⁹¹ Sarah Carter, Ollie Jay and Kirsten Black, ‘Talking about Menopause in the Workplace’ (2021) 30 Case Reports in Women’s Health 1, 2.

⁹² Bariola and others (n 78) 250; Jack and others, ‘Women, Work and the Menopause’ (n 86) 4; Pinkerton (n 110) 254.

⁹³ Griffiths, MacLennan and Hassard (n 83) 157.

“Recognising Menstruation and Menopause”

Like menstruation, menopause-related recognition wrongs are the product of stigma and negative gender stereotypes that undermine the dignity and economic security of menopausal workers. However, unlike menstruation, menopause is linked to gendered ageism, attracting stigma as a bodily process that is embedded in negative social and organisational attitudes toward ageing and mature women. This is a global issue but is shaped by cultural and socioeconomic context, with ethnographies of menopause showing ‘all cultures attach both positive and negative meanings to ageing and menopause’.⁹⁴ In high-income countries, menopausal stigma has been found to have an adverse effect on individual well-being and gender equality in the workplace.⁹⁵ Women in these contexts are often hesitant to disclose their menopausal status at work and ‘fear being stereotyped as old and past it’.⁹⁶ An awareness of negative attitudes toward menopause means that many women are unwilling to seek managerial support or workplace adjustments due to a fear of discrimination, particularly if their manager is younger, male or both.⁹⁷ For example, a study of 1,197 women in the UK police service found 61 per cent of participants did not disclose their symptoms to a manager due to gender bias in leadership, embarrassment and fear of being viewed as less competent.⁹⁸ These issues are less widely covered but still documented in lower-income economies, with 72.5 per cent of participants in the above-mentioned study in Egypt identifying discrimination as a work-related factor that might affect menopausal symptoms.⁹⁹

The evidence shows that menstruation and menopause can be a significant source of gendered disadvantage in paid employment and that the right to work for a substantial portion of the global population may be curtailed due to these innate features of human biology. This suggests that

⁹⁴ Carla Makhoul Obermeyer, ‘Menopause across Cultures: A Review of the Evidence’ (2000) 7(3) *Menopause* 184, 190; Vanita Singh and M. Sivakami, ‘Normality, Freedom and Distress: Listening to the Menopausal Experiences of Indian Women of Haryana’ in Chris Bobel and others (eds), *Critical Handbook of Critical Menstruation Studies* (Palgrave Macmillan 2020) 985.

⁹⁵ Vanessa Beck, Jo Brewis and Andrea Davies, ‘The Post-Re/Productive: Researching the Menopause’ (2018) 7(3) *Journal of Organizational Ethnography* 247, 252; Riach and Jack (n 79) 13–14.

⁹⁶ Vanessa Beck, Jo Brewis and Andrea Davies, ‘The Remains of the Taboo: Experiences, Attitudes, and Knowledge about Menopause in the Workplace’ (2020) 23(2) *Climacteric* 158, 161.

⁹⁷ Grandey, Gabriel and King (n 52) 19; Griffiths, MacLennan and Hassard (n 83) 157; Jack and others (n 49) 4; Claire Hardy and others, ‘Tackling the Taboo: Talking Menopause-Related Problems at Work’ (2018) 12(1) *International Journal of Workplace Health Management* 28, 28.

⁹⁸ Carol Atkinson, Fiona Carmichael and Jo Duberley, ‘The Menopause Taboo at Work: Examining Women’s Embodied Experiences of Menopause in the UK Police Service’ (2020) *Work, Employment and Society* 1, 13.

⁹⁹ Hammam and others (n 89) 296.

existing labour market norms and institutions in multiple countries are male-oriented and unable to respect and accommodate the distinct physiological needs of ciswomen over the life course. The participation and transformation dimensions of equality, discussed below, show how law and public policy can begin to remedy these inequalities and secure progressive change and substantive equality for people who experience menstruation and menopause in the workplace.

C. Participatory and Transformative Responses to Menstruation and Menopause at Work

The participation dimension of Fredman's framework imposes positive duties on decision makers to respond to the growing chorus of activists, workers and trade unions across multiple countries that are demanding legal and political solutions to the inequalities discussed above. To satisfy this dimension, governments need to consider how labour market institutions can be reorganised to facilitate the equal participation of people who experience menstruation and menopause in paid work.¹⁰⁰ For example, in the UK, policy makers are finding that an increasing number of individuals are citing menopause as proof of unfair dismissal and sex discrimination in employment tribunal cases,¹⁰¹ prompting calls for menopause to be included as its own protected attribute under anti-discrimination legislation.¹⁰² Similarly, governments in Australia, India and Ireland are witnessing an increase in demand for new workplace protections and entitlements for menstruation and menopause by workers and unions.¹⁰³ These cross-national trends show how workers in different contexts are voicing their concerns with the status quo and advocating for a shift in workplace norms and practices that overlook and penalise

¹⁰⁰ Fredman (n 5) 228.

¹⁰¹ Amelia Hill, 'Menopause at Centre of Increasing Number of UK Employment Tribunals' (*The Guardian*, 7 August 2021) <<https://www.theguardian.com/uk-news/2021/aug/07/menopause-centre-increasing-number-uk-employment-tribunals>> accessed 24 August 2022.

¹⁰² Alexandra Topping, 'Equality Laws Could Be Changed to Protect Women in Menopause, Says MP' (*The Guardian*, 18 August 2021) <<https://www.theguardian.com/society/2021/aug/18/equality-laws-could-be-changed-to-protect-women-in-menopause-says-mp>> accessed 24 August 2022.

¹⁰³ Brianna Boecker, 'Forced to Suffer in Silence: Unions Push for Menstrual and Menopause Leave' (*Women's Agenda*, 24 November 2022) <<https://womensagenda.com.au/latest/forced-to-suffer-in-silence-unions-push-for-menstrual-and-menopause-leave-for-women-in-the-workplace/>> accessed 1 December 2022; Michelle Hennessy, 'Union Calls for Menstrual Health Policy in Every Irish Workplace' (*The Journal.ie*, 20 May 2022) <<https://www.thejournal.ie/menstrual-leave-5769083-May2022/>> accessed 24 August 2022; Pandey (n 77).

“Recognising Menstruation and Menopause”

individuals for experiencing menstruation and menopause. The participation dimension requires decision makers to be proactive in their response to worker demands but, critically, they must also be aware of the needs of the least vocal and how race and class inequalities are reproduced in social movements.¹⁰⁴ For example, in high-income countries there have been growing calls for menstrual leave but some privileged groups, particularly cisgender white women, have exercised the most voice on these issues.¹⁰⁵ This means less attention has been paid to the suitability of these policies for transgender, gender fluid and non-binary people, who may not wish to disclose their gender identity at work, or people for whom public discussion of menstruation is culturally inappropriate.¹⁰⁶ The participation dimension of Fredman’s framework demands an intersectional approach to law and policy that acknowledges these complex realities.

A transformative response to these issues will require governments and employers to implement policies to remove gendered disadvantage related to menstruation and menopause, without requiring ciswomen to conform to an ideal (cis male) worker norm. This will entail a transformation of labour market structures and institutions that directly or indirectly penalise workers for experiencing these bodily functions. If individuals endure discomfort, distress, or discrimination in relation to these issues or are forced to reduce their hours, retire early or are unable to work, the capability of ciswomen and all people who experience menstruation and menopause to realise their right to work will be curtailed. As the above discussion illustrates, discomfort is a product of distributive inequality and arises when an individual is unable to meet physiological needs related to menstruation and menopause, while distress is a product of recognition wrongs and anxiety, embarrassment or exploitation related to these bodily functions. Discrimination is a product of distributive inequality and recognition wrongs and occurs when workers, either directly or indirectly, face adverse employment outcomes due to menstruation and menopause, such as unfair dismissal or withdrawal from the labour force due to a lack of support. Failure to redress these inequalities will entrench economic insecurity for ciswomen and all people who experience menstruation and menopause due to the negative implications for earnings, opportunities for

¹⁰⁴ Fredman (n 5) 228.

¹⁰⁵ ‘Spain Plans Menstrual Leave in New Law for Those with Severe Pain’ (*BBC News*, 12 May 2022) <<https://www.bbc.com/news/world-europe-61429022>> accessed 25 August 2022; Alison Millington, ‘Italy Could Soon Offer Women Three Days of Paid Menstrual Leave Each Month’ (*Business Insider*, 29 March 2017) <<https://www.businessinsider.com/italy-paid-menstrual-leave-for-female-employees-2017-3>> accessed 25 August 2022.

¹⁰⁶ Mumro (n 52), ‘Periods Potential Impact’ 34.

training and promotion and retirement savings. This underscores the significance of the reproductive body for all people over the life course, including in the post-fertile years, and signals the need for governments to respect and accommodate the bodies of young and mature workers.

The transformation dimension of equality has important implications for the right to work itself, in that it must be reconceptualised or transformed to take menstruation and menopause into account. As Fredman argues, it is ‘not enough to have the formal opportunity’ to participate in paid employment when these innate bodily functions are not respected or accommodated in the workplace.¹⁰⁷ Thus, to more fully engender the right to work, it is necessary that menstruation and menopause, like pregnancy, are recognised as distinct biological attributes that may contribute to gendered disadvantage in the workplace. Making these issues more visible in international law will not only help to set new normative standards in relation to work, gender and the reproductive body, but can also create binding legal obligations on duty-bearers to ‘respect, protect and fulfil these standards’ towards the rights-holders.¹⁰⁸

It is important to acknowledge, however, that pursuing a transformative response to menstruation and menopause in the workplace raises important tensions between the distributive and recognition dimensions of equality. In particular, there is a risk that accommodating physiological needs related to menstruation and menopause, to remedy distributive inequalities, may inadvertently reinforce and entrench recognition wrongs, such as negative gender stereotypes. This cross-dimensional conundrum has been observed in relation to workplace accommodations for pregnancy and childcare. For example, the literature shows that even if parental leave policies are designed to support the health and economic security of new mothers, they can reinforce the female homemaker norm by only offering leave to women and failing to enable shared care between parents.¹⁰⁹ This in turn contributes to the ‘motherhood penalty’ – a gender gap in working hours and pay over the life course – with the normative expectation that women will perform the bulk of unpaid care work firmly entrenched.¹¹⁰ In relation to menstruation and menopause, there is a risk that formal workplace supports or policies for these bodily functions could

¹⁰⁷ Fredman (n 5) 228.

¹⁰⁸ Meghan Campbell, *Women, Poverty, Equality: The Role of CEDAW* (Hart 2018) 4.

¹⁰⁹ Anna Chapman and Marian Baird, ‘Employing the Law for Women: Gender, Work and Legal Regulation in Australia’ in Ramona Vijayarasa (ed) *International Women’s Rights Law and Gender Equality: Making the Law Work for Women* (Routledge 2021); Alison Koslowski and others, ‘18th International Review of Leave Policies and Related Research 2022’ (2022) <http://www.leavenetwork.org/lp_and_r_reports/> accessed 25 May 2023.

¹¹⁰ Marian Baird and Alexandra Heron, ‘The Life Cycle of Women’s Employment in Australia and Inequality Markers’ in Russell Lansbury, Anya Johnson and Diane van den Broek (eds), *Contemporary Issues in Work and Organisations* (Routledge 2019).

“Recognising Menstruation and Menopause”

reinforce negative gender stereotypes of women as ‘hysterical’ or ‘irrational’ and therefore unsuitable for paid work.¹¹¹ This speaks to the enduring challenge of aligning law and policy reform with organisational and cultural change and the need to simultaneously address distribution and recognition wrongs.¹¹² Indeed, unless gender stereotypes related to menstruation and menopause are addressed and prioritised in government and employer responses, then special policies such as paid menstrual or menopause leave could backfire and reinforce rather than revolutionise gender inequality in the workplace.¹¹³

This discussion of workplace inequalities related to menstruation and menopause now leads to a consideration of the specific role of international law in redressing these inequalities. The next section explores the extent to which the reproductive body—and, by implication, menstruation and menopause—has been acknowledged in international law and key UN conventions that enshrine the right to work. With a focus on ICESCR and CEDAW, the following discussion sheds light on the possibilities and limitations of international law in transforming workplace barriers related to menstruation and menopause.

3. Exploring the Role of International Law in Redressing Workplace Inequalities Related to Menstruation and Menopause

In many respects, international law has been a strong basis for securing rights and protections for the reproductive bodies, capacities and activities of people. ‘Reproductive rights’ have been a prominent issue in human rights law since 1994 when the International Conference on Population and Development (ICPD) first defined the concept as the right of people to reproduce on their own terms and the right to attain the highest standard

¹¹¹ Sally King, ‘Premenstrual Syndrome (PMS) and the Myth of the Irrational Female’ in Chris Bobel and others (eds), *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave Macmillan 2020) 287. See also, Rachel Levitt and Jessica Barnack-Tavlaris, ‘Addressing Menstruation in the Workplace: The Menstrual Leave Debate’ in Chris Bobel and others (eds), *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave Macmillan 2020) 567.

¹¹² Campbell and others (n 4).

¹¹³ Marian Baird, Elizabeth Hill and Sydney Colussi, ‘Mapping Menstrual Leave Legislation and Policy Historically and Globally: A Labour Policy to Reinforce, Remedy or Revolutionize Gender Equality at Work?’ (2021) 42(1) *Comparative Labor Law and Policy Journal* 187, 220.

of sexual and reproductive health.¹¹⁴ In 1995 the Beijing Declaration and Platform for Action affirmed this definition while also recognising that women have special interests in this area and that the role of women in procreation and childrearing must not restrict their full and equal participation in paid work.¹¹⁵ These conferences affirmed the significance of the reproductive body and recognised the need for special rights and protections to enable people to procreate and start a family, while also acknowledging the distinct challenges faced by women in balancing productive and reproductive labour.

The principles of the ICPD and Beijing Declaration are reflected in various ILO and UN conventions that are binding on member states and offer a range of protections to people for their reproductive bodies, capacities and responsibilities. For example, the ILO Workers with Family Responsibilities Convention, 1981 (No 156) requires states to develop national policy to enable persons with caring duties to participate in employment without discrimination.¹¹⁶ The ILO Maternity Protection Convention, 2000 (No 183) addresses the specific needs of women that arise in relation to pregnancy and sets out special measures including health protections for pregnant and breastfeeding workers, paid maternity leave, non-discrimination and employment protection, and workplace breastfeeding rights.¹¹⁷

These ILO Conventions offer critical protections to women and help to entrench a transformative approach to the reproductive body by recognising the distinct social and biological needs of ciswomen in paid employment. However, currently they also take a narrow approach to the reproductive bodies, capacities and activities of women that focuses on pregnancy, childbirth and childcare and overlooks other important reproductive (and post-reproductive) issues, specifically menstruation and menopause. Apart from a significant acknowledgment of the needs of breastfeeding mothers, no other biological or reproductive issues are recognised in these conventions as potentially having an impact on paid employment. Importantly, this limitation is also evident in key UN conventions that enshrine the right to work, including the ICESCR and CEDAW, discussed below. As our analysis shows, these conventions offer important protections for the reproductive bodies and capacities of

¹¹⁴ Lucia Berro Pizzarossa, 'Here to Stay: The Evolution of Sexual and Reproductive Health and Rights in International Human Rights Law' (2018) 7(3) *Laws* 1, 6.

¹¹⁵ *ibid* 9; 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 4 August 2022.

¹¹⁶ Workers with Family Responsibilities Convention, 1981 (No 156) Art 3(1).

¹¹⁷ Maternity Protection Convention, 2000 (No 183) Arts 3-4, 8-10.

“Recognising Menstruation and Menopause”

women in paid work but only in relation to pregnancy and childrearing, with no explicit acknowledgment of menstruation and menopause.

A. ICESCR

As Article 6(1) of the ICESCR sets out the right to work while Articles 7(a)-(d) set out the right to just and favourable conditions of work. The right to work does not provide an ‘absolute and unconditional right’ to employment but it does guarantee right of access to the labour market and the opportunity to seek paid work on a basis of equality with others.¹¹⁸ By extension, this means the reproductive bodies, capacities and activities of women must not act as a barrier to economic participation.

The reproductive bodies and capacities of workers are not explicitly acknowledged in the text of Articles 6 and 7 but these issues can be inferred. Each article in the ICESCR must be read in conjunction with Articles 2(2) and 3, which respectively guarantee non-discrimination and equality of men and women in the exercise of socioeconomic rights. This interpretive requirement calls for an acknowledgment of the reproductive capacities of ciswomen and their gendered impact on paid work. However, the fact that these issues need to be implied is significant and shows how the right to work is based on an ideal worker norm. As Goldblatt observes, ‘the imagined worker to which [the right to work] applies is seen as a (male) breadwinner supporting a family’.¹¹⁹ The only direct reference to reproductive issues in the ICESCR is in Article 10, which notes the ‘widest possible protection’ should be accorded to families and that working mothers should have special protection and access to paid leave or social security benefits before and after childbirth.

Article 10 is significant because it acknowledges the reproductive sphere and the distinct role of mothers and families in producing and raising children.¹²⁰ However, this is a narrow conception of reproduction that equates this process with procreation and childrearing. This limited approach is reinforced by the Committee on Economic, Social and Cultural Rights (CESCR) in General Comment No 18: The Right to Work and General Comment No 23: The Right to Just and Favourable Conditions of Work. In these comments, the CESCR recognises that gendered disadvantage accumulates over time and that a life cycle approach is needed to address the distinct social and biological needs of

¹¹⁸ Winkler and Roaf (n 7) 19.

¹¹⁹ Goldblatt (n 21) 218.

¹²⁰ *ibid.*

women in employment.¹²¹ This arguably supports a transformative approach to the reproductive body, namely an acknowledgment that ciswomen may require different levels of workplace support over the life course as the body experiences physiological changes related to menstruation, pregnancy, childbirth, and menopause. However, in both comments the CESCR adopts a narrow approach to reproduction and the reproductive body that focuses on pregnancy and childrearing. There is a brief but significant reference to the ‘specific hygiene needs’ of women in General Comment No 23, which alludes to menstruation in the workplace,¹²² and an acknowledgment of the needs of breastfeeding workers,¹²³ but in terms of policy the General Comments only recognise the need for maternity and parental leave benefits.¹²⁴ In summary then, ICESCR recognises the reproductive body, human reproduction and women’s special needs as mothers but does not extend this recognition to other important biological and reproductive issues, namely menstruation and menopause.

B. CEDAW

CEDAW is the only human rights convention focused exclusively on the rights of women and aims to eliminate all forms of sex discrimination. For this reason, human reproduction and its relationship with gendered disadvantage in paid and unpaid work is a key organising concept. Unlike the ICESCR, the text of CEDAW goes significantly further in acknowledging these issues and requires states to accommodate the reproductive bodies, capacities and activities of women as an inherent part of the right to work. Article 11, which addresses discrimination in employment, requires states to safeguard the ‘function of reproduction’ in Article 11(1)(f) and in Article 11(2) prohibits discrimination against women on grounds of pregnancy, maternity or childcare and sets out the need for paid maternity leave and anti-discrimination protections.

These are important articles that help to engender the right to work by recognising the distinct needs of women at the intersections of production and reproduction. However, a close reading of CEDAW reveals similar limitations to ICESCR, namely a narrow approach to reproduction and the reproductive body focused on pregnancy and maternity. For example, the meaning of the phrase ‘function of reproduction’ needs to be

¹²¹ CESCR, ‘General Comment No 18: the right to work’ (2006) E/C.12/GC/18 [31]; CESCR, ‘General Comment No 23: the right to just and favourable conditions of work’ (2016) E/C.12/GC/23 [47].

¹²² CESCR, ‘General Comment No. 23’ (n 121) [30].

¹²³ *ibid* [38].

¹²⁴ *ibid* [17], [26], [38] and 47; CESCR, ‘General Comment No 18’ (n 121) [13].

“Recognising Menstruation and Menopause”

understood in the context of the Convention as a whole. This phrase could arguably be interpreted broadly to include biological functions like menstruation, an approach that is supported by the significant reference to lactation, rather than breastfeeding, in Article 12 on the health rights of women.¹²⁵ But throughout the Convention there is a focus on eliminating discrimination related to pregnancy, maternity, procreation and parenthood. The Preamble notes the ‘role of women in *procreation* should not be a basis for discrimination [and] that the *upbringing of children* requires a sharing of responsibility between men and women’ while Article 5(b) requires an understanding of ‘*maternity* as a social function’ and Article 12 identifies the need for reproductive health services for ‘*pregnancy, confinement* and the *post-natal* period’.¹²⁶ This pattern reveals a narrow approach to reproduction that equates this concept with pregnancy, childcare and domestic work. Accordingly, the phrase ‘function of reproduction’ likely refers to the ability of workers to procreate. This might include menstruation as a precursor to conception but is less likely to include menopause as a process that occurs after the fertile years.

Alternatively, it could be argued Article 11(1)(c), which protects the right to social security and paid leave for ‘sickness’ or ‘other incapacity to work’ might offer protection to workers for a wider range of reproductive health concerns, including menstruation and menopause. However, this section has its own limitations. As Golding and Hvala argue, providing ‘sick’ leave for an intrinsic biological function is problematic and may ‘undermine the hard-fought achievements of feminism, which include disassociating women’s reproductive and bodily functions from connotations of disease’.¹²⁷ As our discussion in Section II demonstrated, it is often the failure of governments and employers to respect and accommodate menstruation and menopause that can undermine the participation of women in employment, rather than the experience of menstruation or menopause itself. Accordingly, it is a transformative response to male-oriented workplace practices that at best overlook or, at worst, penalise workers for experiencing these bodily functions that is required, not merely access to sick leave or social security benefits.

The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has not yet adopted a General Recommendation on Article 11 and, as a result, there is limited authoritative guidance on these issues. However, it is worth noting that while the Committee has

¹²⁵ Judith Galtry, ‘Strengthening the Human Rights Framework to Protect Breastfeeding: A Focus on CEDAW’ (2015) 10(29) *International Breastfeeding Journal* 1, 5.

¹²⁶ Emphasis added.

¹²⁷ Gabrielle Golding and Tom Hvala, ‘Paid Period Leave for Australian Women: A Prerogative Not a Pain’ (2021) 43(3) *Sydney Law Review* 349, 356.

raised concerns over gender stereotyping in several of its General Recommendations,¹²⁸ the text of the Convention itself inadvertently reinforces the stereotype of women as wives and mothers by equating their reproductive capacities and activities with pregnancy and motherhood. As a result, Article 11, like Articles 6 and 7 of the ICESCR, offers limited protection to workers of different ages and genders, at distinct stages of the reproductive life cycle. If a worker does not wish to procreate or have a child, or indeed cannot, this does not mean they are without reproductive bodies that may require distinct recognition in the labour market.

International law, specifically CEDAW and the ICESCR, has made significant progress in entrenching a transformative approach to the reproductive body and engendering the right to work by recognising the distinct impact of pregnancy, childbirth and parenthood on the workforce participation of women. However, other important reproductive issues, including menstruation and menopause, and their relationship with gendered disadvantage in paid employment are not acknowledged. This is a major gap in protection for millions of workers across the global labour market. To fully engender the right to work, menstruation and menopause must be recognised as important reproductive issues that, like pregnancy and parenthood, shape the capability of cis women and all people who experience these bodily functions to realise this right over the life course. Continuing to apply a feminist lens, the next section provides an overview of existing legal and feminist approaches to the reproductive body and explores why pregnancy and parenthood are more likely to be acknowledged in law and public policy than menstruation and menopause. In the following discussion, we argue there is an opportunity to build on legal and feminist success in securing labour rights and protections for the reproductive body by developing a critical reading of the right to work that recognises the significance of menstruation and menopause.

4. Legal and Feminist Approaches to Reproductive Body

As discussed above, unlike pregnancy and parenthood, menstruation and menopause are not built into our understanding of the right to work.

¹²⁸ See, for example, CEDAW Committee, ‘General Recommendation No 25’ (n 26) [7]; CEDAW Committee, ‘General Recommendation No 36: right of girls and women to education’ (2017) CEDAW/C/GC/36 [27]; CEDAW Committee, ‘General Recommendation No 23: political and public life’ (1997) CEDAW/A/52/38 [12].

“Recognising Menstruation and Menopause”

There are several important reasons why, historically, this has been the case.

First, within the Western feminist movement labour market discrimination related to pregnancy and motherhood was justifiably prioritised as the key issue that required attention in legal and policy reform in the 20th century.¹²⁹ A pervasive problem across the globe, women face discrimination in hiring and promotion,¹³⁰ are over-represented in casual and part-time work, and experience a motherhood penalty on earnings due to their reproductive capacity and childcare responsibilities.¹³¹ In response to these inequalities, Western feminism and international law developed over the 20th century with a focus on special rights and protections for pregnancy and maternity. However, as women in industrialised economies entered the paid workforce from the 1970s, feminists also sought to minimise biological differences between men and women in order to challenge the idea that women are intrinsically suited to reproductive work in the domestic sphere.¹³² As Galtry observes, this focus on ‘sameness’ rather than ‘difference’ drove a move away from protectionist responses to women in the workplace, such as sex-based restrictions on working hours, and saw the significance of the female body downplayed by activists intent on challenging stereotypes and gender segregation in employment.¹³³ Though it was accepted that formal workplace supports for ‘inescapable differences’ like pregnancy were needed, other biological and reproductive issues, such as breastfeeding, menstruation and menopause, were strategically minimised.¹³⁴

At the same time as the feminist movement tried to dissociate itself from biological determinism in the 20th century, governments across the globe became increasingly concerned with declining fertility rates and the need to reproduce the labour force in the post-war period. This skewed legal and public policy measures towards a focus on pregnancy and parenthood, with some notable diversions into menstruation in industrial workplace contexts where this bodily function was viewed as a fundamental precursor to motherhood and therefore in need of protection.¹³⁵ Historical concerns

¹²⁹ Laura Addati, Naomi Cassirer and Katherine Gilchrist, ‘Maternity and Paternity at Work: Law and Practice across the World’ (ILO 2014) x.

¹³⁰ Sascha Becker, Ana Fernandes and Doris Weichselbaumer, ‘Discrimination in Hiring Based on Potential and Realized Fertility: Evidence from a Large-Scale Field Experiment’ (2019) 59 *Labour Economics* 139.

¹³¹ Megan Bugden and others, ‘Hegemonic Gender and Australian Women’s Mothering Aspirations’ (2021) 8.5 *Women’s Studies International Forum* 1, 1.

¹³² Galtry (n 125) 6.

¹³³ *ibid* 2, 6.

¹³⁴ *ibid* 6.

¹³⁵ Marian Baird, Elizabeth Hill and Sydney Colussi, ‘Mapping Menstrual Leave’ (n 113), 220.

with fertility and nation building have seen governments make some concessions around the childbearing and parenting responsibilities of women and policies to help reconcile the competing demands of work and care, such as childcare and paid parental leave, in an effort to increase women's labour supply and economic growth.¹³⁶ However, the pronatalist focus on the fertility and economic participation of younger women has left the labour market needs of mature women in the post-reproductive years, including those that arise in relation to menopause, largely under-acknowledged.

There is also the highly stigmatised and taboo nature of menstruation and menopause which, as our discussion in Section II demonstrated, has hampered their recognition and inclusion in legal and policy frameworks.¹³⁷ This lack of recognition is due, in part, to the fact that these bodily functions are not as physically observable as pregnancy and, as a result, women are encouraged to keep these bodily functions hidden. While there has been increased resistance to these norms globally—reflected in the rise of concepts like 'menstrual equity' and 'menstrual justice'—different notions of privacy shaped by cultural and socioeconomic context make it difficult to address these stigmatised bodily functions under a universal framework like human rights law.

These challenges provide some explanation as to why pregnancy and parenthood are more likely to be acknowledged in international law than menstruation and menopause. However, these rights had to be won through feminist struggle. As Goldblatt and Steele observe, '[p]rotection of women's employment, their health and their reproductive rights in relation to pregnancy has been a long struggle in the workplace in many parts of the world'.¹³⁸ As a result of feminist activism, critical workplace supports including employment and anti-discrimination protections for pregnancy, paid maternity and parental leave, flexible working entitlements, and to a more limited extent workplace breastfeeding rights, are embedded in international law and available to workers across the global labour market.¹³⁹ But the focus on pregnancy and maternity in the feminist movement and international law has left menstruation and menopause under acknowledged in the struggle for full equality in paid

¹³⁶ World Economic Forum, 'Global Gender Gap Report 2022' (2022) 49 <https://www3.weforum.org/docs/WEF_GGGR_2022.pdf> accessed 8 August 2022.

¹³⁷ See Chris Bobel, *New Blood: Third-Wave Feminism and the Politics of Menstruation* (Rutgers University Press 2010) 31.

¹³⁸ Goldblatt and Steele, 'Bloody Unfair' (n 10) 307.

¹³⁹ See, for example, Laura Addati, 'Extending Maternity Protection to all Women: Trends, Challenges and Opportunities' (2015) 68(1) *International Social Security Review* 69, 77; Mireya Vilar-Compte and others, 'Breastfeeding at the Workplace: A Systematic Review of Interventions to Improve Workplace Environments to Facilitate Breastfeeding among Working Women' (2021) 20(110) *International Journal for Equity in Health* 1.

“Recognising Menstruation and Menopause”

work.¹⁴⁰ As women increase their participation in the paid labour force, in particular older women, it is critical that menstruation and menopause are rendered visible in legal and public policy debates about discrimination, economic security and the right to work.

To ensure that people of all ages and genders have the capability to realise the right to work over the life course, menstruation and menopause, like pregnancy and parenthood, should be built into our understanding of this human right. To help map a pathway toward a more expansive approach to the reproductive body in international law, the next section considers several General Comments and Recommendations issued by CESCR and the CEDAW Committee that have explicitly acknowledged menstruation and menopause as a gender equality and human rights issue. While these recommendations do not recognise the relationship between these issues and employment, it is argued they can inform a critical reading of the right to work, as enshrined in the ICESCR and CEDAW, that acknowledges the significance of menstruation and menopause. This could help to more fully engender the right to work by requiring states to take account of the gendered impact of menstruation and menopause on the paid workforce.

5. Areas of Progress and Possibility for Engendering the Right to Work

A. ICESCR

In General Comment No 22 on the Right to Sexual and Reproductive Health, the CESCR observes that ‘[g]ender equality requires that the health needs of women, different from those of men, be taken into account and appropriate services provided for women in accordance with their life cycles’.¹⁴¹ This approach is helpful because in addition to acknowledging the distinct reproductive health needs of women, the Committee recognises that these needs will change over time and require different types of support and services. This implies that the reproductive needs of women include but extend beyond pregnancy, childbirth and breastfeeding. The CESCR also takes the significant step in this comment

¹⁴⁰ Goldblatt and Steele (n 10) ‘Bloody Unfair’ 294.

¹⁴¹ CESCR, ‘General Comment No 22: the right to sexual and reproductive health’ (2016) E/C.12/GC.22 [25].

of imposing a positive obligation on States to address inequalities related to stigmatised functions of the reproductive body:

*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 modified.**¹⁴²*

This is a critical passage that challenges us to consider how a failure to respect and accommodate the reproductive body and its functions contributes to social disadvantage and limits the capability of people of different ages and genders to realise their human rights. The explicit acknowledgment of menstruation and, by implication, menopause later in the life cycle, is significant and helps to make these biological functions visible as a gender equality and human rights issue. Mirroring the approach of critical menstruation scholars discussed above, CESCR observes that it is not menstruation or menopause itself that contributes to inequality, but rather the ‘social misconceptions, prejudices and taboos’ that construct these bodily functions as inherently disruptive and problematic. This is an important acknowledgment that highlights the need for progressive law and policy reform to counteract these negative social forces.

This comment has implications for the right to work, as well as the right to sexual and reproductive health because, as the CESCR observes, these and other human rights are indivisible and interdependent.¹⁴³ Thus, the expansive approach to the reproductive body adopted by CESCR in this General Comment could help to move away from a bounded approach to the body at work that only considers pregnancy and post-partum health. But, interestingly, CESCR reverts to a narrow approach to the reproductive body when discussing the interdependence of the right to work and the right to sexual and reproductive health:

*The right to sexual and reproductive health, combined with the right to work (article 6) and just and favourable working conditions (article 7) ... requires states to ensure employment with **maternity protection and parental leave***

¹⁴² *ibid* [48] emphasis added.

¹⁴³ *ibid* [10].

“Recognising Menstruation and Menopause”

*for workers ... and prohibition of discrimination based on pregnancy, childbirth, parenthood.*¹⁴⁴

It is significant that CESCR redirects its attention to these issues when the discussion shifts to paid work. Though the Committee explicitly acknowledges the significance of a wide range of sexual and reproductive health issues earlier in the General Comment, when it comes to the right to work there is a narrow focus on pregnancy and maternity. While discrimination on grounds of pregnancy, childbirth and parenthood is proscribed, there is no similar prohibition for menstruation and menopause and no direct acknowledgment of these issues in the context of paid work. Nevertheless, this General Comment provides an important opportunity to broaden our approach to the reproductive body in international law and shows that special rights and protections for reproductive issues other than pregnancy may be needed to secure full equality in the workplace.

B. CEDAW

CEDAW sets important international standards in relation to the human rights of women and is therefore an important focus of our discussion and argument. In General Recommendation No 24 on the Right to Health, the CEDAW Committee explicitly recognises the significance of menstruation and menopause as a gender equality and human rights issue:

States parties should report on their understanding of how *policies and measures on health care address the health rights of women... and how it addresses...*

(a) *Biological factors that differ for women in comparison with men, such as their **menstrual cycle, their reproductive function and menopause ...***¹⁴⁵

This recommendation underscores the need for a substantive approach to equality and acknowledges that differential treatment may be required to accommodate the distinct biological experiences of men and women. It also recognises the life course dimensions of reproductive health and that targeted ‘policies and measures’ may be needed to address the changing health concerns of women in relation to menstruation, pregnancy (‘their

¹⁴⁴ *ibid* [9] emphasis added.

¹⁴⁵ CEDAW Committee, ‘General Recommendation No 24: on women and health’ (1999) CEDAW/A/54/38 [12] emphasis added.

reproductive function’) and menopause. This approach could have transformative implications for the right to work, as well as the right to health, by expanding the meaning of the phrase ‘function of reproduction’ in Article 11(1)(f), as discussed above, to include menstruation and menopause as critical elements of the reproductive system. This in turn could expand the obligation of states under Article 11(2) to prohibit employment discrimination on grounds of menstruation or menopause, as well as pregnancy. However, like CESCR, the CEDAW Committee reverts to a narrow approach to the reproductive body in this recommendation when discussing the interdependence of the rights to work and health, and only notes that states have a responsibility to provide special protections to workers for pregnancy.¹⁴⁶

In General Recommendation No 27 on the Rights of Older Women, the CEDAW Committee observes:

*post-menopausal, post-reproductive and other age-related and gender-specific physical and mental health conditions ... tend to be overlooked by research, academic studies, public policy and service provision.*¹⁴⁷

This is an important excerpt that considers how a failure to recognise post-reproductive health issues in law and public policy can entrench gender inequality in later stages of the life course. This has significant implications for the participation of older women in employment, on which the CEDAW Committee observes:

*States parties have an obligation to **facilitate the participation of older women in paid work** without discrimination based on their age and gender. States parties should ensure that **special attention is paid to addressing problems that older women might face in their working life**, and that they are not forced into early retirement or similar situations.*¹⁴⁸

As fertility and pregnancy are less relevant in the context of this General Recommendation, the CEDAW Committee avoids a narrow focus on these issues and considers the specific challenges that older women might face in employment. We argue this statement could be interpreted widely to include menopause as one of these challenges and an essential

¹⁴⁶ *ibid* [28].

¹⁴⁷ CEDAW Committee, ‘General Recommendation No 27: on older women and protection of their human rights’ (2010) CEDAW/C/GC/27 [21].

¹⁴⁸ *ibid* [41] emphasis added.

“Recognising Menstruation and Menopause”

precursor to the ‘post-menopausal’ and ‘post-reproductive’ health conditions recognised by the CEDAW Committee earlier in the General Recommendation. This argument is strengthened by the concern with protecting older women from early retirement. As discussed above in Section II, there is evidence that workers experiencing menopause may switch to part-time hours or retire early due to a lack of recognition and workplace support. This signals the need for a proactive response from decision makers, who should implement policies to ensure this innate feature of the body does not contribute to age and gender discrimination in paid work.

In General Recommendation No 36 on the Right of Girls and Women to Education, the CEDAW Committee recognises menstruation as a potential barrier to education and the need for states to address the following issues:

Lack of an enabling school environment, including inadequate water and sanitation and hygiene facilities segregated by gender, untrained or unsupportive staff, lack of appropriate sanitary protection materials and lack of information on puberty and menstrual issues, contribute to social exclusion, reduced participation in and focus on learning and decreased school attendance.¹⁴⁹

This recommendation is significant for several reasons but of particular importance is the attention it draws to the ‘lack of an enabling school environment’ and how educational institutions are geared toward a non-menstruating norm. The consequences of failing to consider menstruation in educational policy are analogous to those discussed in the context of paid work in Section II, including inadequate WASH facilities and access to menstrual products, lack of formal support, awareness and training and reduced participation. This underscores the life course dimensions of these issues and how a failure to respect and accommodate menstruation in the early years sets into train a series of other inequalities later in life. The CEDAW Committee itself recognises the intrinsic connection between educational and employment outcomes,¹⁵⁰ observing gendered disadvantage in schooling entrenches ‘socio-economic inequalities from quite early in the life cycle and well before students...enter the labour

¹⁴⁹ CEDAW Committee, ‘General Recommendation No 36: the right of girls and women to education’ (2017) CEDAW/C/GC/36 [30] emphasis added. These issues are also briefly recognised by the CEDAW Committee in ‘General Recommendation No 34: the rights of rural women’ (2016) CEDAW/C/GC/34 at [42]-[43] and [85].

¹⁵⁰ *ibid* [78].

force'.¹⁵¹ These inequalities are evidence of the fact that periods, despite being a private bodily experience, are shaped by institutional forces that constrain the capability of people to realise their rights to health, education and work.¹⁵²

The recommendations discussed above provide a foundation for rethinking the scope of Article 11 and its bounded approach to the reproductive body. By acknowledging the significance of menstruation and menopause, these recommendations show how biological and reproductive issues other than pregnancy shape the distinct needs and experiences of cis women in all areas of life, including paid work, and that measures are needed to accommodate these bodily functions.

6. *Conclusion*

This article argues that international law has moved in the direction of engendering the right to work, offering protection to women workers for pregnancy and childcare, but needs to progress further in order to accommodate other fundamental reproductive issues, specifically menstruation and menopause. Adopting the substantive equality framework developed by Fredman, the article shows these innate biological functions are linked to gendered disadvantage in paid work and that law and public policy will need to redress these inequalities in order to more fully engender the right to work. Informed by this feminist framework, the article developed a critical reading of the right to work that takes menstruation and menopause into account.

The article argues that a critical reading of the right to work under Articles 6 and 7 of the ICESCR is supported by reading these articles in conjunction with General Comment No 22 on the Right to Sexual and Reproductive Health. This General Comment provides a way forward because it recognises that the reproductive capacities of people extend beyond pregnancy to include other fundamental biological functions, such as menstruation and menopause. When read in conjunction with the right to work, this General Comment requires an acknowledgment that different types of reproductive bodies participate in the labour market and may require distinct forms of legal protection or support. Consistent with Fredman's equality framework, it is argued this approach can help to engender the right to work by requiring states to recognise and transform

¹⁵¹ *ibid* [58].

¹⁵² Goldblatt and Steele (n 10) 'Bloody Unfair' 323.

“Recognising Menstruation and Menopause”

workplace barriers related to menstruation and menopause, as well as pregnancy and parenthood.

Additionally, the article argues a critical reading of the right to work under Article 11 of CEDAW is supported by reading this article in conjunction with General Recommendations No 24 on the Right to Health, No 27 on the Rights of Older Women and No 36 on the Right to Education. The explicit recognition of menstruation, menopause, post-menopausal and post-reproductive health conditions in each of these recommendations, as well as an acknowledgment that male-oriented institutional and social norms frequently overlook these issues, supports a reimagining of the reproductive rights and interests of workers. Similar to our approach to ICESCR, this reading can help to engender the right to work by requiring states to accommodate a wider range of biological and reproductive functions in the labour market beyond pregnancy, childbirth and childrearing.

The article argues a more expansive approach to the reproductive bodies and capacities of workers is needed to secure full equality in paid employment. However, the analysis presented in the article has limitations and further research and analysis is needed to more fully understand the experiences of menstruating and menopausal workers and the ability of law and policy to secure progressive change in this area. As discussed in the introduction, menstruation and menopause affects not only ciswomen in the workplace but a range of people across the sex and gender spectrums including transgender, non-binary, and gender fluid people.¹⁵³ As our analysis shows, unless the right to work is secured for all people who experience menstruation and menopause, then full equality in the labour market will not be achieved.¹⁵⁴ Hence, the extent to which international law offers support and protection for the reproductive bodies of workers who do not identify as a cisman or woman is an important issue that requires attention.¹⁵⁵ Another important area of future research is the

¹⁵³ Sarah Frank, ‘Queering Menstruation: Trans and Non-Binary Identity and Body Politics’ (2020) 90(2) *Sociological Inquiry* 213; Benjamin Lane and others, ‘Improving Menstrual Equity in the USA: Perspectives from Trans and Non-binary People Assigned Female at Birth and Health Care Providers’ (2022) 24(10) *Culture, Health & Sexuality* 1408; A.J. Lowik, ‘“Just because I don’t bleed, doesn’t mean I don’t go through it”: Expanding Knowledge on Trans and Non-binary Menstruators’ (2021) 22(1-2) *International Journal of Transgender Health* 113.

¹⁵⁴ For a discussion of the impact of menstruation and menopause on transgender and non-binary workers: Katherine Sang and others, ‘Blood Work: Managing Menstruation, Menopause and Gynaecological Health Conditions in the Workplace’ (2021) 18(4) *International Journal of Environmental Research* 1951, 1951.

¹⁵⁵ Darren Rosenblum, ‘Unsex CEDAW, or What’s Wrong with Women’s Rights’ (2011) 20(2) *Columbia Journal of Gender and Law* 98, 100. See generally, International Commission of Jurists, ‘Yogyakarta Principles: Principles on the Application of

practical enforcement and regulation of international standards in relation to menstruation, menopause, and the right to work. This should include tracking whether menstruation and menopause have been acknowledged by member states of ICESCR and CEDAW in their compliance reports and exploring potential consequences for failing to accommodate these bodily functions.

This article makes an original contribution to feminist legal scholarship by shining a light on menstruation and menopause as important but underacknowledged issues that require attention in paid work and international law. In our analysis, we have shown it is possible to interpret the right to work, as enshrined in the ICESCR and CEDAW, in a way that acknowledges the significance of menstruation and menopause. This means it is possible to progress international law toward a broader understanding of the reproductive body at work and its significance for the rights and interests of workers over the life course. This is important because international law not only enables individual workers to make human rights claims, but also sets normative standards and expectations for national governments and legislatures. Making menstruation and menopause more visible in international law will also lend support and credibility to unions, civil society organisations and grassroots movements that are seeking increased protection for and recognition of these issues. In other words, international law has the potential to be a strong foundation for a new generation of reproductive rights at work that expands on the rights and entitlements already available to workers for pregnancy and childcare.

Reproductive capacity and the experiences of menstruation and menopause, like pregnancy, childbirth and lactation, are innate biological features of the human body. For this reason, it is imperative that law and policy ensure they do not prevent affected groups, notably ciswomen and all people who experience menstruation and menopause, from exercising their right to work.

International Human Rights Law in relation to Sexual Orientation and Gender Identity'(2007) <<https://yogyakartaprinciples.org/>> accessed 23 May 2023.