



## CONSTITUTIONAL SCRUTINIZATION OF MENSTRUAL TABOOS

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### ABSTRACT

In this rapidly changing era, violence and discrimination against women have always been persistent and universal. The most common parlance of violence is exhibited by ensuring perpetual dominance over women. Women's subordination in society asserts the inherent values of patriarchy which is inculcated through traditions, norms, social practices, and customs. Period-shaming is just one such social practice that demeans the dignity of the whole gender by ensuring the prevalence of social prejudices and denial of menstrual rights. This article places 'menstrual customs' under Constitutional scrutiny to understand the violation of fundamental rights and duties guaranteed under Article 14, 15, 16, 17, 19 (1) (g), 21, 21-A, 51A (e) & (h). The prevailing transformative constitutionalism vouches for the ideals of equality, fraternity, justice, and liberty, and abolishing unconstitutional social practices ensures a step closer to the achievement of these ideals. The article also makes certain relevant recommendations for enforcing the menstrual rights of women in India.

**Keywords-** *Constitutional Morality, Indian Constitution, Gender Dignity, Gender Justice, Menstrual Rights, Menstrual Taboos*

### Introduction

*"Let the welfare of the people be the ultimate law."* - Marcus Tullius Ciero<sup>1</sup>

It's the 21<sup>st</sup> century and period shaming still haunts the life of Indian women. It is a fact that menstrual hygiene is an underlying foundation of menstrual health although it never received any attention in the countless schemes initiated by the Central and State governments. And, the reason behind this irresponsible attitude is menstrual taboos. Since time immemorial, women's right to sexual dignity and reproduction have been undermined and the existing perceptions are shaped by the whims of patriarchal society. Further, concerning menstruation, the conflict between liberalism and religious orthodoxy is the major blockade in the path of menstrual justice. The secularism in India has been a three-fold structure of freedom of religion, commemorative neutrality, and reformatory justice. Concerning gender-based violence, the quest is always for reformatory justice. The Indian Constitution strikes at distinguishing "secular", "superstitious beliefs" and "essential religious practices" which have shaped the existing religions in India today. Perhaps the struggle between religion and the Indian Constitution is because the constitutional philosophy adheres to the principle of giving primacy to the individual, placing the individual above and before religion, and acknowledging the freedom of religion only as incidental to the individual's well-being and liberty. With Constitution being the backbone of the Indian legal system,<sup>2</sup> judiciary tends to be the arm in being the

<sup>1</sup> CICERO, DE LEGIBUS, Loeb Classics, 467, (213, 1977)

<sup>2</sup> H.M SEERVAI, CONSTITUTIONAL LAW OF INDIA (4<sup>th</sup> ed., 1993). Blatant violation of religious freedom by the arbitrary action of religious heads has



instrument of protecting the rights of citizens through its judicial approach which is bound to attract criticism of religious scholars.<sup>3</sup> And, thus the Constitution of India envisioned a reformed society<sup>4</sup> and the judiciary & its approach became a vocal and important instrument to this commitment. The Constitution of India serves as the foundation and framework for the formulation and implementation of national legislation and policies. It possesses the status of the highest norms against which all state acts and omissions are evaluated. The Constitutional provisions are often inspired by the international human rights obligations of states, and therefore reflect a broad range of social, economic, cultural, political, and civil rights and guarantees of public goods. International Conventions and norms have always played a pivotal role in shaping the legal provisions of India. Of all Conventions at the International level, CEDAW<sup>5</sup> “is the most comprehensive instrument on human

rights of women and contains more concrete provisions aimed at the actual implementation of rights already recognized.”<sup>6</sup> An extensive definition of the term ‘discrimination against women’ has been provided by the Convention<sup>7</sup> as “Any distinction, exclusion or restriction made based on sex which has effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, of human rights and fundamental freedoms in the political, social, cultural, civil or any other field”.<sup>8</sup> To prohibit gender-based discrimination and enshrine the principle of equality, the State Parties have amended their constitutional provisions introducing reforms to create a gender-neutral society as demonstrated by the Beijing Declaration and Platform for Action<sup>9</sup> in its review twenty-five years ago. Indian Constitution initially propagated the idea of the right to equality through Articles 14 and 15. While Article 14 provides for the general application of the

to be dealt with firmly by our highest Court. This duty has resolutely been discharged by our high courts and the Privy Council before our Constitution. No greater service can be done to our country than by the Supreme Court and the High courts discharging that duty resolutely, disregarding popular clamor and disregarding personal predilections.

<sup>3</sup>B.N KIRPAL, ASHOK H DESAI, et.al., SUPREME BUT NOT INFALLIBLE ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 263 (2000). The Supreme Court needs to review its jurisprudence on religious freedom. The Court must take religion as it finds them, even if the claims made are unusual. Obvious cases of fraud can be easily detected. It does not lie with the judiciary to tell people what constitutes the faith, or whether they are Hindus, or which particular tenet or practice is an ‘essential practices’ exclusively entitled to constitutional protection. The ‘essential practices’ test was originally designed to enhance those aspects of faith which called for rigorous scrutiny and not to deprive non-essential practices of constitutional protection altogether. If any particular practice is found to be invidious, it can

always be restrained by way of the extensive range of permissible restrictions rather than be controversially rejected by judges playing high priests of every faith. See also J.DUNCAN M. DERRET, RELIGION LAW AND THE STATE IN INDIA 447 (1<sup>st</sup> ed., 1999).

<sup>4</sup> Ibid.

<sup>5</sup> The Government of India ratified the resolution of CEDAW on 25<sup>th</sup> June 1993.

<sup>6</sup> S.K. VERMA, "HUMAN RIGHTS OF WOMEN: INTERNATIONAL STANDARDS AND THE INDIAN LAW" IN HUMAN RIGHTS IN INDIA, PROBLEMS, AND PERSPECTIVES, 485 (1999)

<sup>7</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, UNITED NATIONS, TREATY SERIES, vol. 1249, p. 13, (18 December 1979), <https://www.refworld.org/docid/3ae6b3970.html>

<sup>8</sup> Ibid.

<sup>9</sup> United Nations, *Beijing Declaration and Platform of Action*, adopted at the Fourth World Conference on Women, (27 October 1995), available at <https://www.refworld.org/docid/3dde04324.html>



right to equality, Article 15 provides for a particular application of the general principle embodied in Article 14. The 74<sup>th</sup> Constitutional amendment sanctioned democracy at the grass-root level by establishing the Panchayati Raj system in villages and Municipalities at the local level and made a reservation of seats for women at both levels. With the revolution of political representation favoring women, gender equality mechanisms were also created to regulate the socio-economic rights and family life and marital rights of women. With the introduction of the Maternity Benefit Act, 1961, the maternity rights of women were not only recognized but also protected. Similarly, the Equal Remuneration Act, 1976 was incorporated to provide equal remuneration to both genders working in the same field and doing the same job. Further, the Prevention of Sexual harassment at Workplace, 2013 was another step ahead towards ensuring the economic independence of women and keeping up with their dignity since women turn deaf ear to all the harassments they face due to their financial constraints and family needs. These legislations ensure that women enjoy the same status and are treated equally along with their male counterparts. Gender-based violence does not only violate the Article of 14, 15, and 21 but also includes violation of Article 19 (1) (g), 42, and 51A (e). While it is not only the duty of the State to protect the women but also it is obligatory on every citizen to keep up with the dignity of the women. As the role of women evolves as a mother, laborer, and wife, the law tries to ensure the decisive rights with the women for equality in the status of women. In a similar context, the Apex court in *Geetha Hariharan* case<sup>10</sup> declared that '*the mother is also the*

*natural guardian of the child as the father*'<sup>11</sup> thus, legally recognizing the dignity of motherhood and restoring the rights of a mother. In a similar context, the recognition of abortion laws and the introduction of the Medical Termination of Pregnancy Act, 1971 which was recently amended to allow women to make choices about abortion as inherent within the reproductive rights striving towards gender justice. With this amendment, India ensured that women can make individual decisions and choices from their perspectives and predicaments. Slowly and silently prejudices in the form of customs, rituals, rules, etc. follow women right from menstruation through pregnancies to menopause, in most cases without any legal or family support. This amendment has terminated at least one set of uncertainties. Whether it is recognition of motherhood or up-keeping dignity at the workplace, time and again judiciary has harmoniously constructed the provisions of the Indian Constitution and became the flag-bearer of the freedom and rights of women. The impact of constitutional decisions on women is not always clear, however, and the enforcement of constitutional decisions is generally a matter for the legislative and executive branches of government. Women's rights on their body, reproductive health, menstrual health, and her freedom to make choices for her body are vital notions of gender justice which seeks not only the well-being of women but also the welfare of the balance between a man and women on which the present social functions. This article assesses trends and patterns in constitutional provisions to address menstruating women's rights when they are affected by customary, religious, or patriarchal laws or practices.

<sup>10</sup> *Geetha Hariharan v. Reserve Bank of India*, AIR 1999 SC 1149

<sup>11</sup> *Ibid.*



### Constitutionality of Menstrual Taboos

The complex social structures, culture & traditions, stereotypes, and attitude about women and their dignity and role in society make them easy victims of end-number of crimes. Very often it has been observed that the religious extremists and conventional thinkers believe in controlling women and so, they center their cultural arguments against women's rights and freedoms. Further, the state of ignorance is high among women and unaware of their basic rights, women can easily be persuaded to accept and follow superstitions as part of culture and religion which in reality makes their life a nightmare in every aspect. Further, even where the women are educated, they feel powerless to bring the change necessary for gender equality as the dominance of patriarchy overrides the interests and welfare of women. Social issues are intrinsic to the identity of nations, communities, and individuals. The legal intervention to curb social evils is bound to create chaos in the societal order. Personal laws are civil in nature and do not enforce penalties. These personal laws may be treated as customs and rituals and freedom to practice what one believes on a personal basis is well-recognized. However, if any dispute arises and the matter is brought before the court, such dispute is to be settled by the Indian Civil Code envisaged by the Indian Constitution. Laws always do not reflect the values of a society, however, in the presence of ambiguity, laws have to provide

a framework within which people can navigate knowing with certainty what is legal and what is not legal. This makes the point that the limit can be seen as arbitrary but it is necessary. This is not a reflection of what is right and what is wrong. That's why we need laws.

Religious practices and customary norms viewed from the gender dimension prominently show the discriminatory practices against women. While the Indian jurisprudence is adhering to progressive notions of women's freedom, the judiciary is still reluctant in its approach to ground its decisions relating to personal laws on gender equality. In the cases wherein women achieved "victory", time and again the courts have refused to test the specific personal law provisions against the doctrine of equality. For example, in Mary Roy case<sup>12</sup>, the conflicting provision in the Trivancore Christian Succession Act as struck down on a technical device.<sup>13</sup> Further, in another leading case<sup>14</sup>, the court "read down" the discriminatory provision rather than declaring them unconstitutional.<sup>15</sup> Religious freedoms in India mean personal laws immune from the constitutional scrutiny of courts which create reluctance in the judiciary to deal with those religious practices even when they violate the fundamental principles of the Indian Constitution.

One of the major concerns behind such reluctance is that the invalidation of any

<sup>12</sup> Mrs. Mary Roy & Ors v State of Kerala & Ors AIR 1986 SC 1011

<sup>13</sup> INDIRA JAISING, Gender Justice: A Constitutional Perspective, Men's LAWS, WOMEN'S LIVES: A CONSTITUTIONAL PERSPECTIVE ON RELIGION, COMMON LAW AND CULTURE IN SOUTH ASIA, 6 (Indira Jaising ed., 2005)

<sup>14</sup> Madhu Kishwar & Ors v State of Bihar & Ors AIR 1996 SC 1864

<sup>15</sup> INDIRA JAISING, Gender Justice: A Constitutional Perspective, Men's LAWS, WOMEN'S LIVES: A CONSTITUTIONAL PERSPECTIVE ON RELIGION, COMMON LAW AND CULTURE IN SOUTH ASIA, 7 (Indira Jaising ed., 2005)



socio-religious norm or customary practice is inevitable for the creation of chaos in the societal order as well as the framework of the legal system. Considering India to be the land of cultural diversity, gender equality is still considered as a 'Modern' concept owing to its origin to the West, and inclusion of sex equality in the religion aspect can be termed as disrespect of cultural diversity. Owing to 'Men' as the gatekeepers of the religious norms and culture, the interference of courts to judge the bias against women inherent in religious customs can also be seen as cultural insensitivity. Deviance from social and customary rules raises questions on the woman's character backed by social sanctions. Fear and superstitions are the root cause of the perpetual existence of evil customary practices. For example, Female Genital Mutilation, a practice not so prevalent in India, however, a typical cultural practice followed in other parts of Asia and Africa under the beliefs such as sexual desires of the women ought to be controlled, marital fidelity and prevent sexual deviance amongst women. Child marriage, a common practice in India wherein the age of the boy is never considered and such that even a 7-year-old girl can be forced to get married to a 50-year old man. The practice traces no origin in the Vedic period, howsoever, child marriage is considered a social custom mostly followed as girls are considered a burden, and with age, the dowry increases so the early marriage is termed as a 'custom' to reduce the father's burden. The Child Marriage Restraint Act, 1929 was passed to eliminate this social custom. In a similar context, dowry is also considered as a social custom and even Sati. Recognizing the impact of such social

custom on the life of women, the Dowry Prohibition Act, 1961 came into existence, however, Indian families having daughters are still reeling under the burden of dowry as the law was inefficient in eradicating this social evil. The practice of polygamy in Islam is a social custom and not a religious practice, thus the court can interfere to ensure that the fundamental rights of Islamic women are not violated.<sup>16</sup> Menstrual seclusion is also a typical social practice which finds no place as an integral part of any religion or faith or "essential religious practice" test and so, such practice owes its validity to other such customs such as Sati, Triple Talaq, Polygamy, etc. which have failed to achieve the overarching goals of gender equality, justice & dignity guaranteed to every citizen under the Indian Constitution.<sup>17</sup> The norms compromising the gender parity and dignity of women are "non-negotiable".<sup>18</sup>

The laws on child marriage, Sati, Dowry, etc. have been enforced in Indian society to value the dignity and existence of a woman. Considering menstrual customary norms in a similar context, need to be addressed as a menace to women's health. The speculations on menstrual hygiene practices owe its roots to the prevailing menstrual taboos across the Indian societies which create hindrance in menstrual hygiene management and to eradicate this obstacle, constitutional provisions come to rescue. Unless the origin is traced, the effective remedy is also not known. Menstrual taboos being trans-cultural in nature, which exists from mild distrust of menstrual fluid to extensive complexes of restrictions and ultimately leading to complete seclusion during menstruation.

<sup>16</sup> Krishnadas Rajagopal, *Polygamy is not a religious practice, the government tells the Supreme Court*, THE HINDU, April 11, 2017.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.



Many societies, however, forgo such taboos hence cannot be said that these taboos are universal. There has been an unfolding side to these menstrual taboos which have been sighted and depicted by Bruno Bettelheim known as the concept of "vagina envy".<sup>19</sup> As far as this concept is extended, basically, it starts with the feeling of envy persisting with the male community concerning sexual organs and functionality of womanhood.<sup>20</sup> Further, the concept elaborates that the existing link between menstruation and reproduction is a well-understood fact by men as well as men are aware of the importance of it and this realization creates the feeling of jealousy and resentment for being excluded from the entire process of this natural system.<sup>21</sup> And, the outcomes of this ambivalence are the prevailing menstrual taboos that stigmatize menstruation and menstruating women leading to their exclusion.<sup>22</sup> The role of women in the formulation of these taboos is yet to be known. The fact that menstrual taboos are followed by women with any resistance would rather indicate that it is the woman who is embarrassed about menstruation.<sup>23</sup> Whether the feelings of shame and embarrassment related to menstruation originated with women or internalized in response to men's attitude is still not known.<sup>24</sup>

Further, the various religious preaching and scriptures have played their due role in the enhancement of menstrual taboos. The religious preaching on menstruation is so deeply instilled in the female minds that even if anyone tries to educate the right way, the feeling of 'shame' and 'damaged' about their own body is more natural than the occurrence of menstruation.<sup>25</sup> In fact, access to water for personal hygiene is even denied during menstruation, and also, women are asked to hide and clean their menstrual clothes since menstrual blood should not be seen by any man or animal or else it may lead to their death. The restrictive values, norms, and practices apart from being derogatory in nature create unnecessary challenges in accessing necessities such as water, privacy to change and dispose of absorbents, safety, and security of their own lives.<sup>26</sup> These menstrual taboos discriminate against one gender and the stigma and myths around menstruation not only violate the rights of women but also infringe her right to bodily integrity, equality, privacy, health, and well-being, and freedom from inhuman treatment during menstruation.<sup>27</sup> Menstrual seclusion, unhygienic menstrual practices in the name of customs, and treating of menstruation as pollution of the body are not only barbaric views but also illogical superstitious and

<sup>19</sup> Rita E. Montgomery, *A Cross-Cultural Study of Menstruation, Menstrual Taboos, and Related Social Variables*, *Ethos*, 137-170, 2(2), (1974).

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Mark Guterman, *Identity conflict in Modern Orthodox Judaism and the laws of family purity*,

*Method & Theory in the Study of Religion*, 92-100, 18(1), (2006)

<sup>26</sup> R. Karki, Cristina Espinosa, *Breaking Taboos: Menstruation, Female Subordination, and Reproductive Health, the Case of India*, *Insights Anthropol*, 111-120, 2(1), (2018).

<sup>27</sup> Stefanie Kaiser, *Menstrual hygiene management, Sustainable Sanitation, and Water Management*, (2013), <https://sswm.info/humanitarian-crises/urbansettings/hygiene-promotion-community-mobilisation/important/menstrual-hygiene-management>



lacking real religious grounds.<sup>28</sup> Interpretations can be many which vary from person to person, however, those interpretations in the name of religion to harass and demean an entire gender is nowhere a part of freedom of religion. Sati was similarly an evil practice that claimed many lives in the name of religion. But my question is why only women are made to be within religious boundaries? Why religion is different for men? Is not religion be subjected to law due to its discriminatory nature? Is religion above humanity? If the answer is negative, the entire system of religion concept is flawed. When anything bad occurs, the belief persists that God has given it and we should accept it and let it pass with time, why does the same belief of acceptance does not exist in case of menstruation even if it is 'dirty' or 'curse' or 'bad'. The feelings of inferiority complex and female subordination are rather taught at the onset of menarche than menstrual education. Since misconceptions and social taboos have rusted the educational institutions and minds of parents, the teachers feel that it is the duty of the mothers to educate their draughts about menstruation while mothers think that with time their daughters will grow and learn everything on their own in the same way as they themselves got to acquire knowledge about menstruation.<sup>29</sup> And, the majority of times, the father is out of the picture when menstrual education is to be imparted. With this outlook in the 21<sup>st</sup> century, the intervention of law is essential to empower

women about their dignity and integrity and not just objects of sexuality for men.

The menstrual taboos are known in India as menstrual customs, however, the legit definition of 'custom' in no way capitulates menstrual customs within its ambit. The connotation of "customs" as been widely recognized by the courts are those ancient, established, certain practices which are invariable, obligatory, uniform, reasonable, exist in perpetuity and their existence does not oppose any statute or public policy and morality.<sup>30</sup> Menstrual customs are trans-cultural and vary across societies, localities, households and religious communities and groups. So uniformity and certainty are never been part of menstrual customs. In the eyes of women, menstrual customs are never reasonable while men consider it well-reasonable and part of the culture. Women carry forward these customs to their daughters and daughters-in-law and thus, equally affecting the health and hygiene of future generations. Human rights are uniform and certain and these so-called customs are well against the human rights of women. When none of the criteria fits into menstrual customs, therefore, logically, it was never a custom, just a belief. And, for the reason that it is ancient and even though variable, exists in some or other form, then also menstrual customs grossly violate the freedoms and rights of a woman which is sufficient to consider it against public morality or rather, constitutional morality. Dr. B.R. Ambedkar, the father of the Indian Constitution visualized 'Constitutional Morality' as the

<sup>28</sup> Supra note 11.

<sup>29</sup> Devpriya Chakravarty, *Fighting the Menstrual Hygiene battle in rural India: A development communication perspective of the menstrual practices of rural India*, Journal of Content, Community & Communication, 4(2), (2016).

<sup>30</sup> Gilles Tarabout, *Ruling on Rituals: Courts of Law and Religious Practices in Contemporary Hinduism*, South Asia Multidisciplinary Academic Journal, 17 (2018), <http://journals.openedition.org/samaj/4451>



balance between the pervasive contradictions between the hierarchical social structures inherited from the history and socio-political order that India was preparing itself to head shortly.<sup>31</sup> According to him, Indian society is a household to traditions since time immemorial.<sup>32</sup> The effectiveness of Constitutional laws rests based on Constitutional morality which is not a mere natural element but rather, the long lost democratic traditions which are required to be cultivated in the Indian society comprising of caste and communities to transform the society into a society of citizens based on equality of individuals without any kind of discrimination.<sup>33</sup> He has further, asserted that no matter how elaborate the constitutional provisions are, in the absence of constitutional morality, these provisions tend to become capricious, erratic, and arbitrary.<sup>34</sup> Considering this view, constitutional morality forms the basic structure of the Indian Constitution which cannot be ignored under any circumstances. Gender justice and gender equality rest on the substratum of constitutional morality. Customary norms disgracing the dignity of women cannot be ignored when gender justice is termed as one of the Constitutional goals and without which, half of the Indian population are denied to enjoy their rights and freedoms. It is an essence of time to recognize the derogatory practices and customs and separate those from the religion. Once segregated, the validity of these customs rests on the breach of the fundamental rights under the Indian Constitution. It is an utter truth that the survival of democratic values depends on the constitutional parameters which hold its roots in constitutional morality.

The menstrual taboos have their roots in superstitions rather than having any religion or customary facet. Coming to the Constitution of India, it is the grundnorm which validates any law or custom. The practices of child marriage, Sati, dowry system, were also deeply rooted in the social norms and customs until declared as illegal and unconstitutional by the judiciary. Reformative laws are brought into the picture when the existing custom reasoned with logic and faith fails the scientific analysis which our Indian Constitution validates under Article 51-A (h). The menstrual taboos are also inconsistent with Article 51-A (h) wherein all citizens are under the duty to develop the scientific temper, humanism, and the spirit of inquiry and reform. The word 'scientific temper' was coined by India's first Prime Minister to promote science and technology and its applications as well as include the scientific approach as an integral part of social interactions. This means 'reasoning' was sufficient to create tremors in the root of social evils. Historical shreds of evidence such as in Kalma Sutra, Lord Buddha has said:

*“Believe nothing merely because you have been told it or because you yourself imagined it; do not believe what your teacher tells merely out of respect for the teacher. But whatsoever after due examination and analysis, you find to be conducive to the good, the benefit, the welfare of all beings*

<sup>31</sup> Andre Béteille, *Constitutional Morality*, Economic and Political Weekly, 35-42, 43(40), (Oct. 4 - 10, 2008).

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.



*that doctrine believe and cling to, and take it as your guide.*"<sup>35</sup>

Thus, scientific temper is equally a part of Indian traditions to avoid bias and preconceived notions.<sup>36</sup> The right to question and to be questioned and the spirit of inquiry are the fundamental features of scientific temper.<sup>37</sup> According to a study, it has been observed that scientific temper can be only achieved through a democratic political process.<sup>38</sup> Since science has its own limitations, Article 51-A (h) combines rationality with humanity to build a society free from all kinds of socio-political bias. The roots of superstitions are too strong to impede any analytical thinking and rational and reasonable decision-making process. It is observed that superstitions are blindly followed in those societies where caste and religion hold dominance.<sup>39</sup> Further, ignorance is seen as the biggest reason behind the rampant growth and implementation of superstitions. Basically, when the human minds are not able to process any ambiguity or fail to understand any specific occurrence or phenomenon, then superstitions creep in to fill those gaps in human minds and gradually these beliefs become general practices and usages.<sup>40</sup> Age-old superstitions have been replaced in today's modern society as customs and traditions. The change has been only of the name backed by religious force due to the perpetual existence of

ignorance and absence of common sense. Mythological stories are of great value and interests, however, when these stories tend to take shape of treacherous customs and practices particularly towards one gender then scientific temper and humanity ought to step in to achieve the goals of gender justice. Further, regarding fundamental duty under Article 51-A (h), Article 21 needs an amendment to make women's life free of taboos and menstrual life a way better and also, religious practices free of superstition. Throughout history, mankind has progressed by outgrowing beliefs. So, irrational taboos need to be outgrown; the sooner, the better. But the issue is how to achieve it. In religious reform, it is counter-productive to put exclusive reliance on law.<sup>41</sup> Law is coercive and reductive. Law has no means to reach or read the depth of the human psyche, where taboos lurk. Religious reform should not be undertaken without addressing these tricky zones of collective existence.<sup>42</sup> Reform should be a by-product, not a primary goal. Regrettably, religion has become an irresistible quarry for politicians; and the custodians of religions today play second fiddle to them, preferring a parasitical to a prophetic role. The judicial system needs to take an enlarged view in adjudicating religious issues, lest judges in their fidelity to 'the letter of the law' come short of 'the spirit of justice'.<sup>43</sup> If discriminatory practices exist in a religious zone, as against the public

<sup>35</sup> NANCY WILSON ROSS, *THREE WAYS OF ASIAN FREEDOM: HINDUISM, BUDDHISM, ZEN, AND THEIR SIGNIFICANCE FOR THE WEST*, Simon and Schuster, (1966).

<sup>36</sup> Subhash Kumar, Noklencyangla, *Scientific Temper, and Superstitions: Debating the Twain in Our Daily Lives*, Journal of Scientific temper, 47-56, 4(1&2), (2016).

<sup>37</sup> Ibid.

<sup>38</sup> Subodh Mahanti, *A Perspective on Scientific Temper in India*, Journal of Scientific Temper, 46-62, 1, (2013).

<sup>39</sup> Supra note 34.

<sup>40</sup> Ibid.

<sup>41</sup> Valson Thampu, *Tracing the taboo around Menstruation*, THE NEW INDIAN EXPRESS, July 25, 2019

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.



sphere, it is up to the people concerned to deal with it, say by boycotting it. The idea that God is more powerful in one place than in another is superstition, not faith.<sup>44</sup> The Constitution of India does not confer on anyone the right to practice superstition. If anything, it imposes on citizens a duty to develop a scientific temper.<sup>45</sup>

Under Article 51-A (e) of the Indian Constitution, it has been clearly stated that it is the duty of every Indian citizen to renounce practices that are derogatory to the dignity of women. So be it be a custom or superstition, it's a practice that is derogatory in itself. In *Union of India v. Naveen Jindal*<sup>46</sup> the Supreme Court has said that fundamental duties are implicit in the concept of fundamental rights, the former providing certain restrictions on the exercise of the latter. The question of enforceability of fundamental duties thus takes a "back seat".<sup>47</sup> While fundamental duty under Article 51-A (k) is read with Article 21-A that it is the duty of every parents or guardian to admit their ward to a school for elementary education under the right to free and compulsory education under Article 21- A. Elementary education is no doubt important, however, menstrual education is equally important irrespective of gender. What is the use of such education when a woman cannot protect her own health and life and men cannot learn to respect a woman and her dignity? All education goes futile when the health of women is not taken care of. So, elementary education should be in the inclusion of menstrual education to every child

irrespective of gender so that humans become gender-sensitive.

### **Menstrual Taboos Hinders the Right to Menstrual Hygiene- A Constitutional Perspective**

While the patriarchal society is still globally acknowledging the reproductive rights of women as part and parcel of the development docket since the women's rights have been recognized internationally as human rights and fundamental instrument in sustainable development,<sup>48</sup> howsoever, menstruation continues to remain a non-standard topic and menstrual rights, as usual, are simply ignored to be part of any development agenda. All the more, the slightest attention that menstruation gained at the international level is all about menstrual hygiene management. The Sustainable Development Goals stressed so much on addressing issues of gender equality and need to access water and sanitation by all women worldwide but the menstruation<sup>49</sup> and its accessory rights were sidelined and again in all International instruments. Further, almost even after two decades of the Beijing Declaration, menstrual taboos continue to form the core of the local communities, development circles, and also the plans for women's rights development. Seemingly, the problem of menstrual stigma has become invisible within all those mainstream development plans including those all global instruments which focused on the development of the rights of women.<sup>50</sup> About its invisibility, menstruation and its related problems have become part of the long lost reproductive right.<sup>51</sup> Hence, it is quite natural that the inbuilt cultural silence

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> AIR 2004 SC 1559

<sup>47</sup> Ibid.

<sup>48</sup> Supra note 24.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.



of menstruation also subdues the menstrual health and hygiene as part of the stigma and not addressed globally the way it should be. India, being part of major International Conferences and Programmes, followed its footsteps and till now and all it has done is the distribution of sanitary pads in the name menstrual hygiene management and the majority of these schemes were a complete failure.

The stigmatization of menstruation conflicts with the women's identities, self-esteem, and their overall participation in every activity of life which pushes their life into the vicious circle of female subordination and patriarchal dominance. The traditional culture imparts that sexual differences between a man and woman make a woman inferior to a man and so man tends to dominate women in every sphere of life. However, that needs to be clarified since our Indian Constitution provides for the 'right to equality' under Article 14. Gender superiority is equal to gender inequality and menstrual taboos violate Article 14 on the ground that the taboos are the typical symbols of gender superiority. Gender equality or neutrality strives to attain neutrality as humans who are sexually different yet have access to equal rights and entitlements. The family planning policies ought to be gender-neutral and the necessary focus on female sterilization ought to be discontinued.<sup>52</sup> Also, in *Air India case*<sup>53</sup>, the Supreme Court struck down the *Air India Regulations* and restrictions on the age of retirement and pregnancy bar on the services of air hostesses as unconstitutional on the ground of being violative of Article 14. Gender justice never meant similitude and likeness rather emphasized on the need for

equality of treatment of different sexes who have separate needs yet equal rights. Absolute equality among human beings is not the idea that has been propagated through the concept of 'Equality' under Article 14 since such equality lacks real existence and can never be achieved. The concept simply implies that the absence of any kind of special privilege because of birth, creed, or the like in favor of any individual. The myths surrounding menstruation oppose all those rights of freedom and dignity that women are entitled to by her being human which is a gross violation of Article 14. Curtailment of movement or restricting the movement of menstruating women in access to the public as well as private spaces violates the freedom of movement under Article 19. Hygiene is of utmost importance for the menstrual cycle and restricting access to public water resources and sanitation is a gross violation of the human rights of women. One gender cannot restrict the other gender from accessing any public places due to the personal beliefs of that gender. It is the choice of women to go to any public place or rest at home but that choice is never given only. Many women do not follow these taboos, they are still alive and enjoying their life. So it is necessary to understand that taboos are not to be passed to the next generation while they should be educated about it. The first thing we get to hear about menstruation is 'dirty' or 'not to participate in any religious activity'. I presume that every girl on the onset of menstruation first becomes aware of the attached restrictions including what to touch and what not or where to go or not go even before she gets to know about how to use an absorbent or learn about the functioning of menstruation since same had

<sup>52</sup> *Devika Biswas v. Union of India*, AIR 2016 SC 4405 on page 4425.

<sup>53</sup> *Air India v. Nargesh Meerza* AIR 1981 SC 1829



happened even with me. However, when the same menstruation process helps in protecting the child inside a mother's womb that time the woman is worshipped and taken to the temple. When the same blood which shreds every month protects a child, that pregnant woman is not impure in fact she is the purest of the pure as she is a childbearing woman. All notions of impurity disappear into the air when the same woman becomes a mother. To date, over 20% of girls drop out of school on attaining puberty and this is due to the existence of menstrual taboos that oppose women's empowerment and deny women equal opportunities for education, employment, and life which violates Article 14 as well as Article 16.

The Sabrimala Temple case<sup>54</sup> wherein the court held that restricting the entry of women into the temple during the menstrual age is unconstitutional and violates Article 14, 19, and 21. The dissenting judgment of this case makes some interesting revelations on menstruation. Indu Malhotra J. clearly states that the right to equality under Article 14 is to see through a different perspective in terms of religious matters that is the right ought to be adjudged among the believers of that particular religion or shrine who are aggrieved by certain practices which are found to be oppressive or pernicious. From her viewpoint, freedom of religion under Article 25 and 26 insulates the religious group practices and beliefs from those fundamental rights of Constitutional scrutiny and the court should not intervene with the practices of faith unless a social evil like Sati. Thankfully, she agreed that Sati was an evil religious practice. In brief, any custom or religious practice that is not as evil as the

practice of Sati that it goes to the extent of killing women, such practices should not be interfered with by the Courts as that would amount to rationalizing a religion which is outside the purview of the Court. Hence, the exclusion of menstruating women into the temple is purely a belief and so immune from any kind of judicial review or norms of equality and this practice of exclusion is whether an essential religious practice or no, should be left to be determined by the religious community. And, the religious community is dominated by the male members and those conventional and orthodox women who believe in the men's world and let them rule. Had the religious community been so efficient to determine without any bias or injustice, then definitely there would have been no case to be adjudged upon.

Justice D Y Chandrachud's argument<sup>55</sup> that menstrual exclusion is a form of untouchability under Article 17 was denied by the other judges for the reason being that untouchability is only concerning caste discrimination under the Indian Constitution. Dr. Ambedkar the framer of the Indian Constitution never gave any particular definition or meaning of untouchability which exactly means that it has a much broader aspect to reach than the only caste. When racial discrimination can be a form of untouchability, then why gender discrimination cannot be one of the forms of untouchability. The question is not of the extent of Article 17, it is basically of what differentiate menstrual taboos from caste taboos that women cannot seek protection under Article 17.

<sup>54</sup> Indian Young Lawyers Assn. v. State of Kerala, 2018 SC 1690

<sup>55</sup> Ibid.



If a woman has the right to live with dignity under Article 21 then equality, freedom of choice, and movement, protection from inhuman treatment such as seclusion during periods are the fundamentals for the enjoyment of the right to life. In *Suchitra Srivastava v. Chandigarh Administration*<sup>56</sup> the Supreme Court held that the right to personal liberty under Article 21 includes the right to make the reproductive choice. The woman's right to privacy, dignity, and bodily integrity ought to be respected. Considering this judgment, menstruation is an equal body process which also holds a major time period of woman's life so liberty to ensure menstrual health and hygiene and make menstrual choices are the right to a woman which has not yet been recognized by the Indian Constitution. The rights relating to health, hygienic environment, etc. are all recognized as fundamental to the value of the right to life under Article 21, howsoever, when the taboos are to be treated as religious freedoms, how can women enjoy the truest meaning of the right to life under Article 21? Menstrual injustice is what the women are still bearing in the name of faith and religious beliefs. And, Article 21 by literal words means to protect the life and dignity of every person.

### Conclusion

Menstrual justice is quintessential to gender justice and gender justice is integral to social justice. The Preamble to Indian Constitution strives for social justice as an objective which ought to ameliorate the recognition of menstrual injustice and eradicate it. One of the critical areas of concern is the development of an institutional mechanism for the advancement of women under the strategic objective of integrating a gender

perspective in legislation, public policies, programs, and projects. To conclude in the words of Justice Krishna Iyer "*whatever the paramount parchment of the Constitution may intone, whatever the Universal Instruments may inscribe, we have miles to go and promises to keep if gender justice is not to be mere dope but sure hope*".<sup>57</sup>

The correlation between religion and superstition is inherent in the Indian Society and menstrual customs are the outcome of this relation. No doubt, customary practices are the major hindrance to women's right to health however no law is incorporated to ban these derogatory practices. The status of women accorded by the religion as well as by society is a contributing factor in the low health status of women and healthcare outcomes. Abolition of the Devdasi system, Sati Pratha, Child Marriage, the introduction of the Widow Remarriage Act, etc. has been enforced time and again to improve the status of women. Once upon a time, even all these were customary practices that denied women the basic right to life. For ages the religious practices including culture and customs have been variations in their implementation based on the erratic human interpretations of religious scriptures, for example, a woman is not allowed to choose her husband which sanctioned '*Honour killings*' as a customary practice even though both religion and law have validated against such killings. The common thread through these social customs and restrictions is patriarchy, which is premised upon the notion of women's impurity, which then becomes a justification for their subordination. The other connecting thread is the perception that women are evil seductresses with the power to tempt men. So

<sup>56</sup> AIR 2010 SC 235

<sup>57</sup> DR. SUKANTA K. NANDA, LAW RELATING TO WOMEN AND CHILDREN, 79, (1<sup>st</sup> ed. 2011)



gender justice, reproductive rights are inclusive of menstrual rights, however, specific recognition is still needed to break the superstitions and myths. It is clear that the Indian Constitution enshrines to the goals of gender-based equality as a fundamental right and the idea of social justice has been articulated also in the Directive Principles of State Policy. But after seventy years of Indian Independence when we sit to address the issues relating to a woman what is needed is that the problem needs to be examined in the context of rights for the establishment of a just and equitable social order, where nobody can be treated or exploited by another, is unequal. It is pertinent to quote Lord Denning who way back in 1981 wrote:

*“A woman feels as keenly thinks as clearly as a man. She is in her sphere does work as useful as man does in his. She has as much right to her freedom- to develop her personality to full- as a man. When she marries, she does not become her husband’s servant but his equal partner. If his work is more important in the life of the community, her’s is more important in the life of the family. Neither can do without the other. Neither is above the other or under the other. They are equals.”<sup>58</sup>*

Thus, in this 'age of rights' we need to move beyond the rhetoric of human rights and direct the public policies and programs for the welfare of the woman. The key issues should be solved by going to the ground realities and ensure that fight for gender equality becomes a reality. Menstrual taboos and menstrual seclusion are invisible barriers in the achievement of gender equity and menstrual justice. Thus, there is an urgent

need to end discrimination against women and menstrual health is an important component for the full realization of the human rights of women.

### Recommendations

According to the author, the following recommendations need to be incorporated for achieving menstrual justice:

- Under the Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Act, 1989 atrocities against scheduled caste and scheduled tribe members is a punishable offense. The Act enlists certain acts as offenses such as any act against human dignity, and acts are done with the intent to cause nuisance, annoyance, insult, or injury to the members of scheduled caste and scheduled tribe, forcing any member of the community to consume something obnoxious or inedible, outraging the modesty or sexually exploiting any women belonging to scheduled caste or scheduled tribe, infringing their political rights or trespassing on their property or wrongly dispossessing their land, etc. The commission of the above-mentioned acts is punishable under the Act. In a similar context, legislation on the prevention of atrocities against women requires urgent attention to address gender-based violence. Under the Indian Constitution, the provision for special laws for women to meet the special needs was initially framed by the framers of the Constitution. Taking into consideration the crimes against schedule caste and schedule tribe, the Ninety-Third Constitutional Amendment added clause (4) to Article 15 to enable the State to make special laws for the schedule caste and schedule tribe. In this sense, considering the rise in the number of gender-based crimes, a

<sup>58</sup> LORD DENNING, DUE PROCESS OF LAW, Butterworths, London, 194-195, (1981)



legislative enactment to abolish social customs such as menstrual seclusion is the need of the hour.

- Enshrining menstrual leave is a normal part of the organizational policy to facilitate equal participation of women in the economic sphere.
- Customs are recognized as a source of law under the constitutional scheme but discriminatory customs derogatory in nature violating the fundamental rights and freedoms of women should be declared as ultra vires. Recognition of discriminatory customary practices as violative of Article 14 of the Indian Constitution through a constitutional amendment.
- Focus on the framing of separate legislation defining menstrual rights and benefits and penalizing those practices derogatory to woman's dignity and sanitary waste management. The legislation ought to include a detailed framework for inclusion of menstrual education at primary levels of education structure, compulsorily sanitary pad-vending machine & sanitary pad disposal system in every public toilet including those at workplaces, schools, colleges, and other public and private organizations. A clear ban on the acts amounting to menstrual seclusion and any violation in this regard should be penalized. The legislation must include directions for the state governments for the establishment of menstrual cells under the supervision of gynecologists at every academic institution to inculcate menstrual hygiene practices and disseminate information concerning PMS, PCOS, menstrual discomforts, and problems.
- The Central and State governments should make a timely review of menstrual hygiene schemes and in case of failure, need to revoke it and emphasize introducing those policies which focus on long-term menstrual health.
- The discriminatory menstrual practices such as the practice of menstrual huts, even the practice where girls & women stay in separate rooms within the boundary of the house abet sexual abuse and exploitation especially among young girls. The Protection of Children from Sexual Offences Act, 2012 should expand its ambit to include these discriminatory menstrual customs for abetting sexual offenses.
- The stereotyped roles of gender cultivated by the socio-cultural attitudes of both men and women promote the idea of inferiority status of women. The differential thinking is the primary cause of women's psychological abuse lowering their confidence level and forcing them to silently endure the pain of the violence practiced under male dominance. To revile such violence, the definition of "verbal and emotional" abuse under the Protection of Women from Domestic Violence Act, 2005 needs to be amended to include the emotional stress and abuse created by discriminatory menstrual practices. Or, else inclusion of a separate definition for mental abuse and harassment which must include the impairment of mental health due to menstrual customary practices.
- The public health policies in India have failed to consider menstrual hygiene as a part of reproductive health. The incorporation of menstrual hygiene schemes for providing sanitary pads at the public and private organizations and educational institutions still does not find a place in any normative framework of public health policy. Thus, the government must recognize and include the 'right to menstrual hygiene' as a part of reproductive health in public health policies.
- The expansion of roles of police as social workers is seen to be an effective understanding and addressing community problems. Since menstrual practices are



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regional and community-oriented, Community Policing should be rendered as one of the most effective ways to check and eliminate derogatory menstrual practices.

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