

WOMEN'S HEALTH AND LABOUR LAW. NOVELTIES FROM SPAIN¹

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1. Introduction: the context of a new law

Following the steps of some Asian countries (for example, in 1947, Japan recognized this right, albeit unpaid, in its labour legislation; in 1948, Indonesia prohibited women from being forced to work during the first two days of their menstruation, although it was not until 2003 when it was recognized as a paid leave; and it also included in the legal systems of South Korea, Taiwan, or China²), Spain become the first European country in approving a paid menstrual leave³.

According to Kantar⁴, in 2021, the most prevalent casual pain in women in Spain was headache (73%), followed by menstrual pain (49%). Medical research studies highlight that endometriosis, one of the most common causes of secondary dysmenorrhea, affects around 10 per cent of the female population and, from these, a quarter are serious, altering the capacity to work. This means that around 2.2 per cent of female population could be affected by this kind of incapacity to work. Other research studies increase it up to 3.4 per cent⁵.

The Organic Law 1/2023⁶ modifies the Organic Law 10/2010 on sexual and reproductive health. It is not only takes into consideration these factors, but it is the result of various

¹ This article is part of Women's Health Care (WHC) Research Project. It includes the most significant aspects of the lecture delivered online in 15th September 2023. The author wants to express his gratitude to prof. Hiroyo Tokoro for both her kind invitation to participate in the seminar and publish its conclusions.

² HASHIMY, S. Q., «Menstrual Leave Dissent and Stigma Labelling: A Comparative Legal Discourse», *International Journal of Law Management & Humanities*, vol. 5 Issue 6, 2022. Aside Asian countries, this right is also recognised in Zambia.

³ There were attempts in Italy to provide the same leave back in 2017, but this proposition was not supported by Italian MPs.

⁴ KANTAR, «Un 94% de los españoles ha sufrido dolor ocasional en los últimos 6 meses», 2021, fecha de consulta 20 septiembre 2023, en <https://cdne.kantar.com/es/inspiracion/salud/el-dolor-ocasional-en-espana>.

⁵ DE FUENTES GARCÍA-ROMERO DE TEJADA, C.; ARMIJO SUÁREZ, O., «La nueva regulación de la dismenorrea o reglas dolorosas», *Asociación Española de Derecho del Trabajo y de la Seguridad Social*, 2023, fecha de consulta 5 marzo 2023, en <https://www.aedtss.com/la-nueva-regulacion-de-la-dismenorrea-o-reglas-dolorosas/>.

⁶ Organic Law 1/2023, of February 28, which modifies Organic Law 2/2010, of March 3, on sexual and reproductive health and voluntary interruption of pregnancy (Ley Orgánica 1/2023, de 28 de febrero, por la que se modifica la Ley Orgánica 2/2010, de 3 de marzo, de salud sexual y reproductiva y de la interrupción voluntaria del embarazo). [Official Gazette 1st March 2023, number 51](#). In Spain, Organic Law are those relating to the implementation of fundamental rights and civil liberties, those adopting statutes of autonomy and the legal order governing the general electoral system, and others provided for in the

commitments made by Spain in the international context, within the framework of the process of progress in the recognition of sexual and reproductive rights over the last few decades. Thus, the International Conference on Population and Development in Cairo in 1994, and the IV World Conference on Women in Beijing in 1995 developed the concept of sexual and reproductive health in terms of rights. Since then, through the work of the conventions and the UN Committees that interpret and monitor them, a standard of protection for sexual and reproductive rights has been adopted and underpins this norm.

The right to sexual and reproductive health is part of the right of everyone to the highest attainable standard of physical and mental health, the enjoyment of which is essential for life and well-being and for participation in all spheres of public and private life. More specifically, the UN Office of the High Commissioner links women's sexual and reproductive health to human rights, including the right to life, health, privacy, education and the prohibition of discrimination. Specifically, goals 3 and 5 of the 2030 Agenda for Sustainable Development also address this right.

The Convention on the Elimination of Discrimination against Women (CEDAW), in its article 16, establishes the right of women to decide freely and responsibly on their maternity and the right to access information and education to enable them to exercise these rights. The Committee that monitors compliance (CEDAW Committee) points out that States have the obligation to respect, protect and guarantee the rights to sexual and reproductive health, through resources that must be available, physically and economically accessible, and meet all standards of quality.

The European Parliament Resolution of 24 June 2021 stresses the importance of guaranteeing sexual and reproductive rights in the European Union, within the framework of women's health, by defining reproductive and sexual health as a state of physical, emotional, mental and social well-being in relation to all aspects of sexuality and reproduction, not merely the absence of disease, dysfunction or infirmity; and affirming that all persons have the right to make choices that govern their bodies free of discrimination, coercion and violence and to access reproductive and sexual health services that support this right and provide a positive approach to sexuality and reproduction, given that sexuality is an integral part of human existence.

At the country level, the Organic Law responds to the fulfilment of the principle of equality and non-discrimination, based on Article 14 of the Spanish Constitution. The full guarantee of this right implies compliance with the mandate of Article 9(2) for the public authorities to promote the conditions for the real and effective freedom and equality of the individual and of the groups in which he or she is integrated. It is also based on the right to life and to physical and moral integrity (Article 15), the right to liberty and security (Article 17), in connection with the autonomy of will inherent to the dignity of the person, which, in accordance with Article 10(1), is the basis of political order and social peace, and the right to personal and family privacy (Article 18). The Economic and

Constitution. The Spanish Constitution requires absolute majority for their approval and stipulates special guarantees of the protection of their content.

Social Council (CES, in the Spanish acronym) has insisted in analysing and supporting health as a whole, and sexual and reproductive health from a gender perspective.⁷

2. Before the Organic Law 1/2023

Risks related to women's health were covered by Spain's Social Security but without and explicit legal treatment. Particularly, the Spanish General Social Security Law (GSSL) covers the following situations for temporary disability: common or occupational diseases (and accidents), whether they are work-related or not if the worker is unable to work and is receiving Social Security health care⁸. Pain menstruation was considered a common disease, as it is not related to work.

Under this so-called "ordinary sick leave" or "common contingencies leave"⁹, the person is entitled to a benefit with a maximum duration of three hundred sixty-five days, extendable for another one hundred and eighty days when presume that during them the worker can be discharged by medical healing. Nevertheless, during the first three days of the sick leave, neither the company nor the Social Security does have to pay anything. From the 4th to the 15th day of the sick leave, an allowance consisting of 60% of the calculation basis is to be paid by the company; from the 16th to the 20th day of the sick leave, an allowance consisting of 60% of the calculation basis is to be paid by social security; and, finally, from the 21st day of the sick leave: an allowance consisting of 75% of the calculation basis is to be paid by social security also. The calculation base amount is quite similar to previous salary, so it is possible to say that these benefit guarantees the percentages of the wage that the person usually earns before the leave.

This general framework, not adapted to severe pain menstruation, provided an inappropriate coverage to this contingency owed to several reasons. First, it requires health care, what means that women must attend doctor's office, being assessed and obtained his or her approval. This puts both doctors and women in a quite complicate situation. Doctors must explain to his or her superiors why someone obtains a sick leave almost every month. Women must suffer the inconveniences of attending periodically to health service and the uncertainty of doctor's periodical evaluation. Second, although the sick leave is approved, women did not receive any money during the first three days. Taking into consideration that the duration of this kind of leave is frequently very short, this is synonym of being out of financial support most of the time of the leave. Finally, it is quite complicate to manage it from both administrative and company's point of view as the person is going to be under continuous periodical leaves, what means initiating and finalizing leaves constantly.

⁷ CES, *Informe 01/2022 a iniciativa propia sobre Mujeres, trabajos y cuidados: Propuestas y perspectivas de futuro*, Consejo Económico y Social, Madrid, 2022, fecha de consulta 30 septiembre 2023, en https://www.ces.es/prensa-digital/-/asset_publisher/YxhW58UL4j1M/content/informe_01-2022_mujeres_trabajos_cuidados/maximized?inheritRedirect=false. Conclusions can be consulted in English: Informe 01/2022: [Women, work and care: proposals and prospects for the future. Conclusions and proposals](#)

⁸ Article 169(1) a) of the GSSL.

⁹ A complete explanation of Spanish Social Security Law in English can be found in the monograph GUERRERO PADRÓN, T.; RIBES MORENO, I. (EDS.), *Social Security Law in Spain*, Kluwer Law International B.V., 2023.

3. The paid menstrual leave for women suffering severe period pain

The Organic Law 1/2023 is a comprehensive regulation focused on different aspects concerning sexual and reproductive health. In this regard, the proposed measures concerning menstruation (paid leave, education, information, etc.) aims to permit that menstruation is no longer taboo in the society, presenting it as something common that must be treated from different perspectives. The menstrual leave is only one of these approaches.

This holistic approach can be seen in its objective, as the Organic Law 1/2023 pursues: a) to guarantee fundamental rights in the field of sexual health and reproductive health; b) to regulate the conditions of voluntary interruption of pregnancy and sexual and reproductive rights; c) to establish the obligations of public administrations to that the population achieves and maintains the highest possible level of health and education in relation to sexuality and reproduction; and d) to prevent and respond to all manifestations of violence against women in the reproductive sphere¹⁰.

This Organic Law also set some important concepts which are necessary to interpret its content properly. From the aim of this analysis the following ones must be underlined. First, it describes “health” as «the state of complete physical, mental and social well-being and not merely the absence of disease or infirmity». Second, “sexual health” is defined as «the general state of physical, mental and social well-being, which requires an environment free of coercion, discrimination and violence and not the mere absence of illness or disease, in all aspects related to a person's sexuality. It is also a comprehensive approach to analyse and respond to the needs of the population, as well as to guarantee the right to health and sexual rights». Third, “health during menstruation” is «the comprehensive state of physical, mental and social well-being, and not merely the absence of illness or disease, in relation to the menstrual cycle. Fourth, “Menstrual management” will be understood as the way in which women decide to manage their menstrual cycle, and various menstrual products may be used for such management, such as pads, tampons, menstrual cups and similar items». Finally, the concept of «secondary disabling menstruation» is described as a «situation of disability derived from dysmenorrhea generated by a previously diagnosed pathology»¹¹.

On the base of these objectives and taking into consideration these definitions, the Organic Law 1/2023 introduces the following new articles into the Law 2/2010 on sexual and reproductive health and voluntary termination of pregnancy. These articles show the two main tools the reform create in order to manage health and reproductive health, particularly during menstruation.

On the one hand, article 5 bis regulates sexual health as a standard of health. Particularly, it sets some duties on public administrations which shall recognize health during menstruation as an inherent part of the right to sexual and reproductive health. In the same

¹⁰ Article 1 Organic Law 2/2010, after its reform by Organic Law 3/2023. All articles mentioned here follow the same scheme, that is, belongs to the first Organic Law after being amended by the second one.

¹¹ Article 2 Organic Law 2/2010. Other definitions are included, by they are not important concerning the object of this research study.

way, they will combat stereotypes about menstruation that negatively impact the access or exercise of the human rights of women, adolescents and girls.

On the base of this article, public administrations must develop what can be called “instrumental mechanisms”, that is, policies focused on improving both health during menstruation and fighting against stereotypes. These policies include approving the minimum standards of health care during menstruation, promoting research from the perspective of sexual and reproductive rights, and guaranteeing equity at all levels and the elimination of discrimination based on stereotypes about menstruation.

Within instrumental mechanisms, it is particularly important the affective-sexual education, which is contemplated in all educational stages, adapted to the age of the students and contributing to their comprehensive development. Likewise, specific policies are being developed for women with disabilities, including the respect and promotion of sexual rights throughout the entire life cycle of women, without being exclusively linked to the area of reproduction, fertility or motherhood.

Finally, these policies also include free menstrual management products in educational centres, in situations where it is necessary, as well as in penitentiary centres and social centres so that women in vulnerable situations can access them. Public administrations will also promote, in accordance with the Organic Law, the use of menstrual management products that are respectful of the environment and women's health¹².

On the other hand, article 5 ter develops measures in the workplace and Social Security on health during menstruation. In other words, the second tool created by the reform is the use of social security benefits as a mechanism to adapt woman's professional or working daily life to her biological situation. Particularly, the article sets that «in order to reconcile the right to health with employment, women with secondary disabling menstruations are recognized the right to a special situation of temporary disability in the terms established by the consolidated text of the General Law of Social Security, approved by Royal Legislative Decree 8/2015, of October 30».

Following the mandate of new Article 5 ter, the GSSL is reformed by introducing new wording into the article 169. According to its new content, «it is considered as an “special situations of sick leave” due to common contingencies those in which the woman may find herself in the case of secondary disabling menstruation, as well as that due to the interruption of pregnancy, voluntary or not, while receiving health care from the Public Health Service and being enabled to work [...]». The following paragraph additionally sets that «the special situation of temporary incapacity due to common contingencies shall also be considered to be that of pregnancy of the working woman from the first day to the thirty-ninth wee.».

Analysed with detail, the article is setting three different leaves concerning women's biological issues, although this paper focuses only on one of them: first, the leave covering secondary disabling menstruation: second, the one protecting the situation following the termination of pregnancy, whether voluntary or not, when it is disabling for

¹² Article 5 quarter Organic Law 2/2010.

work; third, the leave used from the first to the thirty-ninth week of pregnancy as, this period itself, is considered to be a special disabling situation for work as well¹³.

Focusing on the protagonist of this analysis, the paid menstrual leave, according to this article, would be characterised by:

1. It is necessary that a doctor recognises the existence of a menstruation severe pain. The diagnosis must take into consideration previous diseases «such as endometriosis, fibroids, pelvic inflammatory disease, endometrial polyps or polycystic ovaries, among others». In other words, the objective scope is limited to “secondary disabling menstruation”, which is defined as the «situation of incapacity due to dysmenorrhea caused by a previously diagnosed pathology»¹⁴.

The last reference to “among others” has been interpreted by some scholars such as a way to include other symptoms such as dyspareunia (pain in relationships sexual activity), dysuria (painful urination), infertility or heavier bleeding than normal¹⁵.

2. It lasts the strict necessary time to be recovered for work. The available data shows that the average duration is around three days.
3. Despite it is considered a sick leave caused by a common contingency, it has the following specialties:
 - a) Doctors can declare it for a period up to one year, permitting women not to attend health centre every 28 days. Additionally, the disabling menstruation in no case constitutes a “relapse” (each process will be considered new), which is important for the purposes of the maximum duration and possible extensions, as it cannot be topped. In other words, after, for example a one year declared-period, subsequent new periods of the same duration can be followed.
 - b) From the 1st day of the leave, an allowance consisting of 60% of the calculation basis is due. As it was mentioned above, this base is close to the previous salary. Nevertheless, it is subjected to a maximum and minimum threshold. As a consequence, the minimum regulatory base for social security contributions ranges between EUR 1,260 and the maximum base is EUR 4,495.50 per month (around JPY 213,067 and JPY 760,193 per month respectively).

¹³ RAMOS QUINTANA, M.I., «Salud sexual y reproductiva: los nuevos derechos sociales para las mujeres», *Asociación Española de Derecho del Trabajo y de la Seguridad Social*, 2023, fecha de consulta 3 marzo 2023, en <https://www.aedtss.com/salud-sexual-y-reproductiva-los-nuevos-derechos-sociales-para-las-mujeres/>.

¹⁴ Article 2 Organic Law 2/2010

¹⁵ BLÁZQUEZ AGUDO, E.M., «La prevención de riesgos laborales desde una perspectiva de género», *Revista del Ministerio de Trabajo y Economía Social*, 155, 2023, Revista del Ministerio de Trabajo y Economía Social, p. 110.

c) No previous social security contributions are required

4. Employers will still be obliged to pay the employer's social security contributions for the affected employee during the leave.

The reform recognises that the effectiveness of both instrumental and social security mechanism depends on its continuous practical implementation and the results obtained from it. Consequently, article 11(4) sets that, not only these tools, but the whole National Strategy on Sexual and Reproductive Health must be evaluated every two years. Particularly, the National Strategy itself shall establish mechanisms for internal and external evaluation of the achievement of its objectives. The internal evaluation will be biennial and carried out by a Commission expressly destined for these evaluation tasks, formed by representatives of the Technical Committee and the Institutional Committee of the State Strategy for Sexual and Reproductive Health. The external evaluation, which will also be biennial, will be carried out by a Commission different from the Technical and Institutional Committees of the Strategy or their representatives designated for the internal evaluation, guaranteeing, in any case, the inclusion of the gender perspective in its evaluation methodology.

At the end of the day, this article is setting both institutional and substantial mechanisms of evaluation. On the hand, it obliges to develop to different assessments which are assigned to different people and bodies. On the other hand, it orders to set a specific assessment methodology that must include gender perspective. Obviously, the results will inspire quicker change in policies rather than social security benefits, as the last one frequently requires the change of the GSSL, but both of them are important in order to promote better sexual and reproductive health including at the work place.

Aside this formal evaluation tools, and in spite of the fact that the Organic Law entered into force the 1st June 2023, some preliminary assessments are already available.

Before its entry into force, the draft law was evaluated by the CES, whose general assessment was positive as this institution «shares the common objective of strengthening the guarantees that make women's right to sexual and reproductive health effective as a materialisation of human rights and its consideration as a manifestation of the dignity of the person and of the rights to equality and non-discrimination, to physical integrity, to life, to privacy, to health and to education»¹⁶.

Nevertheless, according to its opinion, including this kind of contingencies as a special sick leave is not the most appropriate legal solution, as it must not be considered as a type of “sick” and the confidentiality of the causes must be guaranteed: «The CES agrees with the need to adapt the social protection system to social change and to progress in the recognition of new rights. The draft law goes on to distinguish, as special situations of temporary incapacity due common contingencies, those of women who suffer from secondary incapacitating menstruation, the situation after the interruption of pregnancy, whether voluntary or not, and pregnancy after the 1st to the 39th week. The Council does

¹⁶ CES, *Dictamen 2/2022 sobre el anteproyecto de Ley Orgánica por la que se modifica la Ley Orgánica 2/2010, de 3 de marzo, de salud sexual y reproductiva y de la interrupción voluntaria del embarazo*, Consejo Económico y Social, Madrid, 2022, p. 10, fecha de consulta 29 septiembre 2023, en <https://www.ces.es/documents/10180/5275470/Dic092022.pdf/9766cb9c-7acf-89cd-d8d3-5d69e7e78dd6>.

not consider that the legal design of these situations is adequately justified and, therefore, raises doubts from a conceptual point of view, from the point of view of coherence with the pre-existing scheme of incapacity protection provided by Social Security and the need for equal treatment of comparable situations, with confidentiality in the causes of sick leave being guaranteed in all cases»¹⁷.

Although more details are not delivered, the report seems to show three concerns. First, menstruation must not be considered a “sick”, but a biological fact that should be covered by a different type of leave or other social security benefits. Second, the time frequency puts women’s confidentiality on their own biological situation at risk. Third, it is not sufficiently justified why secondary disabling menstruation must be covered instead of other comparable situations (such as primary menstruations).

Among scholars, research studies highlight two controversial issues. From a medical point of view, as the reform focuses on the secondary dysmenorrhea, it uncovers the primary one, that is, the idiopathic menstrual pain not associated with a gynaecological disease or disorder. The consequence is that this kind of disabling pain would be considered not a special but common sick leave with all the difficulties and inconveniences mentioned above and that caused, among other factors, the development of the legal reform.

On the other hand, from a sociolegal perspective, it points the measure can disincentive women hiring or job promotion: «if the aim is to encourage female hiring, this provision seems discouraging it for the company. We would like to be able to say that the coverage of the contingency by Social Security (in the case of secondary dysmenorrhea and provided that the rest of the minimum contribution requirements are met) will be sufficient to compensate the company, but the truth is that, compared to other common illnesses or contingencies (even serious and long-term ones), this special cause of disability is, by definition, cyclical, which implies the absence of the worker on a periodic basis (probably monthly). And, although there is no difference with other types of existing ailments of these characteristics (for example, migraines, which are not only suffered by women, although they do occur mostly in them), expressly contemplate this measure in the Law, even if we do not like to recognizing this, it can be an obstacle for female hiring, especially taking into account that menstruation, in general terms, is common in all women during their working age until they reach menopause (which occurs, on average, between 45 and 60 years)»¹⁸. Close to this point, it has been also highlighted that «the qualification of these leaves as special will lead the company to know what is its cause and to conclude that pathology will extend over time. This can stigmatize women and influence their hiring and promotion». As a consequence, this well-intentioned measure could contain a “boomerang effect”¹⁹.

¹⁷ CES, *Dictamen 2/2022 sobre el anteproyecto de Ley Orgánica por la que se modifica la Ley Orgánica 2/2010, de 3 de marzo, de salud sexual y reproductiva y de la interrupción voluntaria del embarazo*, cit.

¹⁸ RIZZO LORENZO, G., «Incapacidad Temporal Por Menstruación Dolorosa», *Adecco Institute*, 2023, fecha de consulta 14 junio 2024, en <https://www.adeccoinstitute.es/diversidad-e-igualdad/incapacidad-temporal-por-menstruacion-dolorosa/>.

¹⁹ BLÁZQUEZ AGUDO, E.M., «La protección de las trabajadoras con menstruación incapacitante: ¿un beneficio o una medida con efectos perniciosos?», *El Foro de Labos*, 2023, fecha de consulta 20 mayo

Concerning the relationship between the medical treatment and legal regulation, some authors suggest to open the possibility of setting other type of adaptations, creating a sort of “menu” of measures. For example, creating the possibility to agree (individually or collectively) on an adaptation of the day and/or functions, taking into account the specific circumstances of each woman. Even, provide for teleworking as a solution during the days of menstruation in order to make it easier for women to be more comfortable at home.²⁰ Furthermore, going beyond the limits of the legal institution of common incapacity of sick leave would permit a better treatment of the very varied situation related to menstruation. If this pathology not only causes absenteeism but also a drop in productivity or very abundant periods, with uncontrollable bleeding that can prevent a normal life during some days of the month, pain in different phases of the cycle (not only on the days of menstruation), there should be different legal measures planned so that each woman can choose the one she needs, according to her personal circumstances. It cannot be a single solution for several situations²¹.

Regarding job disincentives, it must be kept in mind that the menstrual cycle, by itself, it is a caused of discrimination against female workers, besides it a source of stereotypes and prejudices. From this perspective, «it cannot be neglected that menstruation is also connected with the reproductive role of women in society, which is unique. Women are given special protection against discrimination only in order to have an equal treatment with men. Menstruation might be seen as a part of this significant role that is given to women by nature, which is why menstruation leave should be allowed to women, as a part of special protection. Prescribing this kind of leave would be a way of acknowledging the right to women’s mental and physical health during menstruation and thus to contribute to gender equality»²².

As a consequence, this approach suggests that, what it is discriminatory is not the leave, but the fact of dismissing or jeopardizing a female worker by the fact of having menstruations that enable her to continue working temporarily. Accordingly, as other biological issues connected naturally to women, being pregnancy the archetype, its complete protection requires other additional measures, particularly in the procedural arena.

From the Spanish legal system perspective, this additional mechanism would require the recognition of menstruation such as a specific type or ground of gender discrimination, as pregnancy it is nowadays considered. This provides women the maximum legal protection as a case of discrimination and, particularly, against dismissal, as it considered void, besides the possibility of obtaining a compensation for infringement of fundamental

2024, en <https://www.elforodelabos.es/2023/03/la-proteccion-de-las-trabajadoras-con-menstruacion-incapacitante-un-beneficio-o-una-medida-con-efectos-perniciosos/>.

²⁰ LÓPEZ INSUA, B. M., «Derecho a trabajar “sin dolor”: la cara femenina de la incapacidad temporal tras la Ley Orgánica 1/2023, de 28 de febrero», *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*, vol. 11, 2, 2023, ADAPT University Press, p. 55.

²¹ DE FUENTES GARCÍA-ROMERO DE TEJADA, C.; ARMIJO SUÁREZ, O., «La nueva regulación de la dismenorrea o reglas dolorosas», cit.

²² RELJANOVIĆ, M. L.; RAJIĆ ČALIĆ, J. M., «Menstrual leave and gender equality», *Strani pravni život*, vol. 68, 1, 2024, p. 11.

rights. Although this would be desirable, for legal certainty, it is not essential, as, even without this explicit recognition, it would be possible to prove the existence of gender discrimination with the general legal tools (article 14 of the Spanish Constitution prohibits discrimination based, among, other factors, on gender) by the natural connection between gender and menstruation, as it was the case of pregnancy before its concrete legal recognition.

But this approach suggests another very interesting field of development, as menstruation is not the only biological fact related to women. On the contrary, similar problems of health, disabling to continue working, can be suffered during menopausal processes. The advances on the legal and practical treatment of menstruation could inspire remedies for these other period and aspect of the women's life. Additionally, it can be found here another situation that could be included as protected ground within the concept of gender discrimination.

4. Conclusions: looking at the future

As we have analysed above, situations affecting women's health such as pain menstruation, voluntary interruption of pregnancy or the pregnancy itself were previously covered, in practice, by Spanish social security. Nevertheless, the approval of the Organic Law 1/2023 and their inclusion of three situations as contingencies for a paid leave «deserves a highly positive assessment in terms of the overall improvement of health and safety conditions at work»²³. They are the recognition of new labour rights for women which can be synthesized in the “right to work without pain”²⁴

The new Law recognises a special case of sick leave for these three circumstances. This improves legal certainty, diminishes practical problems in its declaration and permits to visualize these contingences.

Concerning legal certainty, the requisites have been simplified and the simple medical evaluation is enough to be granted to the menstruation paid leave. Compared to the common leave, it is too much easier to be covered by this benefit as the doctor is able to concede it up to one year. This is one of the aims of the new law, as it is explained in the preamble: «in order to guarantee the principle of legal certainty, a stable, predictable, integrated, clear and certain regulatory framework is introduced, which facilitates knowledge and understanding and, consequently, action and decision-making; all of this, in coherence with the rest of the legal system, national and European Union, as well as with the obligations assumed by our country at the international level.».

This also contributes to diminish practical problems. Besides the longer duration, the new benefit permits to receive the allowance from the 1st day of the leave, which is a crucial aspect if it takes into consideration that this kind of situation usually takes up to three days. Additionally, women avoid the inconveniences of attending periodically to health service and no case constitutes a “relapse” (each process will be considered new), which

²³ RAMOS QUINTANA, M.I., «Salud sexual y reproductiva», cit.

²⁴ GUAMÁN HERNÁNDEZ, A., «Menstruación y trabajo: el derecho a trabajar sin dolor», *Según Antonio Baylos...*

is important for the purposes of the maximum duration and possible extensions, as it cannot be topped.

Finally, and this is a very important aspect, although immaterial, this new right contributes to visualize that menstruation is no longer taboo in the society, presenting it as something common that must be treated from different perspectives. As it has been highlighted, «menstrual leave signifies a progressive shift in workplace culture by recognizing the biological realities that many women and individuals with menstrual cycles encounter each month. Menstruation is not merely a routine bodily function; it can bring about a range of physical and emotional changes that might impact a person's overall well-being and their ability to engage fully in work and other activities. By granting menstrual leave, society acknowledges the intrinsic right of every individual to manage their health and wellness without compromising their professional or personal lives»²⁵.

Nevertheless, the Ministry of Social Security has published data for the ten first months of application of the menstruation leave: only 1,418 leaves were declared with an average duration of 2,8 days²⁶. These figures show that there are obstacles to the free use of this right and that it is necessary to continue working in the development and effectiveness of these measures.

Different lines of action have been explained. First, as the reform focuses on the secondary dysmenorrhea, it would be necessary to cover the primary one, that is, the idiopathic menstrual pain not associated with a gynaecological disease or disorder. Furthermore, going beyond the limits of common incapacity leave would permit a better treatment of the very varied situation related to menstruation. Other pathologies such as very abundant periods, with uncontrollable bleeding that can prevent a normal life during some days of the month, pain in different phases of the cycle (not only on the days of menstruation) or, even, not related to menstruation, but with sexual and reproductive health, as dyspareunia, dysuria, or infertility could be considered in order to be covered by a common contingency leave. In this sense, it is necessary to take into consideration that menstruation is completely connected to gender issues, whereas other kind of pathologies related to sexual and reproductive health could lose this approach.

Second, although leave seems to be the preferred tool all over the world, although with differences concerning if it is paid or non-paid and who pays it, other alternatives are possible whether the aim is to make work and the physical situation compatible. Hence, other adaptations have been mentioned in this analysis such as paid breaks, time off, flexible scheduling, or telework; affordable menstrual products and safe spaces to apply them; or modifications like uniform changes, fans, or workstations placed in closer proximity to restrooms, etc²⁷. The aim is achieving not a single alternative, but a sort of “menu” of measures. In this sense, collective bargaining can play a very important role by concreting the actions that can be applied. In other words, it would not be necessary to determine the complete list of options by law, but creating a regulatory framework in

²⁵ GOPALA, B., «Exploring menstrual leave as a human right: nurturing gender equality», p. 17.

²⁶ Source: Ministry of Social Security and Inclusion

²⁷ KARIN, M. L., «Addressing Periods at Work», p. 256.

which the parties could choose those which are the most appropriate one depending on the circumstances of the person.

Third, another difficult issue is the need of guaranteeing confidentiality when dealing with adaptations related to menstruation. From the sick leave perspective, there is an obvious contradiction between the confidentiality, that characterises all kind of sickness, and menstruation which, owed to its periodicity, it is easy to discover that is the cause that activates the leave. Nevertheless, as it has mentioned before, menstruation must not be considered as an illness, but a natural circumstance that should not be hidden. In this process of making menstruation something natural and common, the logic of traditional benefits, such as the sick leave, does not suit neither with the circumstances nor with this new approach. From this perspective, confidentiality become less importance in favour to adaptation and person's wellness.

Fourth, when speaking about menstruation and job disincentives, we have set some parallelisms between menstruation and pregnancy. As in this last case, it must be kept in mind that the menstrual cycle, by itself, can be considered a cause of discrimination against female workers, besides it a source of stereotypes and prejudices. If pregnancy, such as biological fact connected to women, has make emerge different mechanisms to provide special protection against discrimination, menstruation should adopt a similar strategy. From this perspective, what it is discriminatory is not the leave, but the fact of dismissing or jeopardizing a female worker by the fact of having menstruations that enable her to continue working temporarily. Accordingly, as other biological issues connected naturally to women, being pregnancy would be the archetype, its complete protection requires other additional measures, particularly in the procedural arena.

In the case of Spain, pregnancy enjoys the maximum legal protection as a type of gender discrimination. Particularly, any dismissal or unjustified behaviour related to it must be considered void, besides the possibility of obtaining a compensation for infringement of fundamental rights. This scheme should be translated to menstruation as biological situation exclusively connected the fact of being women. As a consequence, any unjustified treatment caused by menstruation should be considered gender discriminatory. As it was mentioned before, although its explicit inclusion such as type of gender discrimination would be desirable for legal certainty, it is not essential, as by judicial interpretation of the current rules concerning equal treatment and non-discrimination it would be possible to obtain the same result. The natural connection between gender and menstruation would be enough to declare the existence of gender discrimination if the decision was based on it, as it was the case of pregnancy before its concrete legal recognition.

Finally, it must be considered that menstruation is not the only biological fact related to women. As well as menstruation has been made to emerge new rights similar circumstances related to sexual and reproductive health, such as menopause, could contribute to create others. Indeed, some menopausal processes can be as disable as menstruation but, so far, without obtaining any legal treatment. The new field open by the legal and practical treatment of pain menstruation should inspire remedies for these other period and aspect of the women's life. Actually, the parallelism is so significant that menopause could justified the existence of gender discrimination in the same way it was explained for menstruation. As in its case, menopause it is covered by Spanish social security through a common sick leave. The question is if it an adequate protection. For pain menstruation the answer was "no". What would be the reply for menopause?

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