

## Maternity Leave in India - Past Present and Future

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### Abstract

In India, with the changes in traditional family roles, democratic notions are positively creeping into the social system. In the epoch of globalization, women are found to be immensely active in their career, while motherhood retains a special and deeply emotional place in their lives too. However, their path towards achieving this binary objective is replete with obstacles. On one hand, their ties with pregnancy and child rearing remains intact and on the other hand, the failure of policymakers and employers to deal with it have both legal and socio-cultural dimensions. To this effect, the Ministry of Labour has amended the Maternity Benefit Act, 1961, thereby increasing the maternity leave for women employed in private firms from the existing 12 weeks to 26 weeks. Such a change however, should not be understood as a panacea. This paper looks to trace the constitutional evolution of maternity benefits in India, and further highlighting the possible roadblocks in its efficient implementation. It also aims to bring forward an argument regarding the role of fathers and the need to emphasize on paternity leave as well.

**Keywords:** employment, equality, maternity leave, workplace.

### Introduction

Benito Mussolini once said, "War is to man, what maternity is to a woman." Though gender-sensitive lenses would certainly and necessarily contradict the inherent sexism of this statement, the point in highlighting this is to exhibit the struggle and bravery that are attached to the word "maternity". Conventionally, woman has always been associated with the home and man with the outside world. As a result, this parameter led to a conventional thought of men having the sole responsibility for economic production. Very often, the contribution of women towards home and the community is overlooked. Women have always been at work; but not according to the traditionally accepted definitions of "work" and "workplace". Consequently their contribution to the economy and society have been neglected, (Bala, 2012). Since it is erroneously believed that only men work, it is the need of the hour to pull up our socks and to initiate much needed changes. The incompatibility created between child-rearing and paid labour has led to sheer inequality for women. "The reality is that the upper echelons of society are occupied by men, while women are disproportionately concentrated into lower-paying part-time work. Consequently, women who do the unpaid domestic work are rendered dependent on men for access to resources in households, where, most of the 'household income' comes from the men's

paid work.” (Kymlicka: 2002) It is in this context that we must revisit the rules and regulations regarding maternity benefit rules and regulations pertaining to Indian workplace.

### **The Constitutional and Legal Evolution**

The Indian Constitution provides that “the State shall make provision for securing just and humane conditions of work and for maternity relief” (Article 42, Directive Principles of State Policy). In this regard, according to the Maternity Benefit Act, 1961, working women in India are allowed to take maternity leave upto three months. It ensures that every woman shall be entitled to the payment of maternity benefit, which is the amount payable to her at the rate of average daily wage for the period of her actual absence. The Act also stated that the woman must have actually worked in the establishment for a period of at least 80 days during the 12 months immediately preceding the date of her expected delivery in order to receive the maternity benefits. Moreover, no employer is allowed to employ a woman during the period of 6 weeks immediately following the day of her delivery or miscarriage or medical termination of pregnancy. If a pregnant woman is absent from her work in accordance with the provisions of this Act, it shall be unlawful for her employer to dismiss her citing such absence (Maternity Benefit Act: 1961) Along with the Maternity Benefit Act of 1961, there are other legislations as well, namely The Employees’ State Insurance Act, 1948 (ESIA) and the Central Civil Services Rules, 1972 that cover maternity benefits.

The ESI Act. (1948) envisions a need based social insurance scheme that would protect the interest of workers in organized sector during any emergency including inter alia, maternity. All non-seasonal factories running on power and employing 10 or more persons along with those running without power and employing 20 or more persons come under the purview of this Act. In case of any confinement, miscarriage, sickness arising out of pregnancy, or premature birth of the child, the Act provides for periodical payment to the insured woman. The duration of maternity benefit available to an insured woman in case of confinement is 12 weeks - extendable upto an additional period of one month in case of illness arising out of pregnancy, delivery, premature birth of a child or miscarriage, (Bala, 2012) Women in the government sector get a six-month maternity leave as per the Central Civil Service (Leave) Rules 1972. Moreover, they are allowed to take childcare leave of up to two years in different phases at any point till their child turns 18 years old. (Nair, 2015).

The concept of maternity benefit was introduced to enable the women workers to carry on childbearing and rearing without any exertion on their health and loss of wages. This essential need has been recognized in various international human rights instruments such as the International Covenant on Economic, Social and Cultural Rights, 1996 and various international labour conventions. In 1975, the Declaration on Equality of Opportunity for Women Workers was adopted by the International Labour Organization (ILO) and during its 92nd conference in 2004, the ILO member states adopted resolutions relevant to

extending maternity protection access and promoting work- life balance. (Bala, 2012) and recommends a minimum standard maternity leave of 14 weeks or more. The ILO Maternity Protection Convention, 2000 considers protection during pregnancy to be a shared responsibility of government and society.

The hitherto existing Indian laws on the subject clearly fell short of the ILO recommendations. Recognizing this drawback, the Ministry of Labour, on advice from the Ministry of Women and Child Development agreed to amend the Maternity Benefit Act. (1961). The Maternity (Amendment) Bill 2017, an amendment to the Maternity Benefit Act, 1961, was passed in Rajya Sabha on August 11, 2016, in Lok Sabha on March 09, 2017 and received an assent from President of India on March 27, 2017. The amendment increases the maternity leave for women employed in private firms from the existing 12 weeks to 26 weeks. Thereby making India one of the 42 countries where maternity leave exceeds 18 weeks. (Nair: 2015) The amendment includes few other measures as well. For instance, nursing mothers may be allowed to work from home even after 26 weeks of maternity leave if a mutual agreement is reached between the employer and the employee regarding the terms and duration of such a 'work from home' arrangement. Rather absurdly, women employees who have two or more children will be allowed only 14 weeks of leave instead of 26 weeks. 12 weeks of maternity leave is also granted to commissioning mothers -i.e. who use surrogates to bear a child as well as to working women adopting a baby below the age of three months. A 'commissioning mother' is defined as "a biological mother who uses her egg to create an embryo implanted in another woman". Creche facility has to be mandatorily set up by firms with at least 50 employees or a few firms can choose to set up a common facility within a prescribed distance. In cases where creche facility is available, the women employees will have to be allowed at least four visits to the creche, (Singh, 2016) However, minor details such as the duration of each visit to the creche have not been notified in this Amendment Act.

### **Impediments and Roadblocks**

The move by Ministry of Labour, Govt. of India is undoubtedly progressive, and long overdue. Several studies and surveys that triggered the government to initiate this change, evidently point out that ambitious women put off marriage and delay childbirth. Once they return to work, they have struggled to pick up from where they left off, eventually affecting their performance at work. It has also been pointed out that the reason for delaying their pregnancy is that they receive only three months of postnatal leave. Through a number of studies of high-level executives it has been found that while thirty three to fifty percent of women are childless, virtually all the men have children. A report titled "Research Initiative: Women in India's IT Industry" by The Centre for Internet and Society, found that among the IT companies in India, TCS had only one female non-executive director out of a 14 member Board of Directors while Infosys Ltd. fared even worse with no women among 15 board members. The probable reason for this disparity is that the career paths leading to top-echelon positions generally require long working hours.

Notwithstanding the fact that a section of corporate India is consciously choosing gender-sensitive policies such as flexible hours and creche services for working mothers, there are innumerable cases of women at private companies having to face discrimination and harassment after revealing their pregnancy. As has already been mentioned, according to the rules of Maternity Benefit Act in private firms, pregnant women cannot be sacked and they do have the right to ask for light jobs avoiding any kind of hazardous task. However, in practice, the duration of maternity leave enjoyed by a woman employee is often recorded as a time of average or no performance. Now, since promotions are largely performance based and not tenure-based, it's not uncommon for companies to deny promotions to women who have returned from maternity leave. This is an indication that companies are completely insensitive to the needs of the employee (Johari, 2017). This insensitivity is also evident from the apprehension expressed by the Ministry of Labour, about increasing the maternity leave any further as they perceive that doing so will adversely affect the employability of women in the long run. As mentioned above, employers cannot terminate a woman employee's tenure on account of pregnancy. However, termination is more common than we realize and is symptomatic of a more pervasive discrimination against working mothers in Indian organizations.

Moreover, around 90 percent of women workforce is in the unorganized sector and so, the bill impacts only 10 percent of the workforce, leaving out a large percentage of women who are employed in the unorganized sector. (Madhok, 2014). The plight of women workers in the unorganized sector needs to be heard for there are gross human rights violations prevalent in this sector. For instance, hysterectomy (surgery to remove all or part of the uterus) is forced by the contractors upon the women being employed for cane-cutting in the sugar belt of Maharashtra. It is not difficult to guess that women without wombs are preferred by the contractors to avoid disruptions due to menstruation and pregnancy even though such operations carry the risk of complications arising due to hormonal imbalances. (Jadhav, 2019).

### **Case for Paternity Leave**

Loopholes relating to the amendment suggest that it is prudent to come up with some alternatives rather than just increasing the duration of the leave period. In this context, it is pertinent to bring in the role of paternity. Maternity is essentially intertwined with paternity. The male breadwinner model continues to play a decisive role as far as gender equality is concerned in this regard. In fact, the amended Act hardly embraces a human rights approach in the ideal sense. It continues to reinforce the stereotype about childcare being exclusively a woman's responsibility. It is infused with androcentric notion of family and workplace which assumes that only the mother is the primary caregiver (Raha, 2016) A strong relationship between the father and the child leads to strong emotional bond that helps the child in its long term learning abilities. Though Indian companies are increasingly waking up to the need to introduce paternity leave policies, the question is, are they doing enough? This policy was introduced in

India a decade ago by technology companies who wanted to attract talent. However, since it is not a mandatory rule like maternity leave, it did not gain much traction among employers.

Care is a key concern for feminist scholars because it is rigidly gendered and has fashioned our notions regarding what men and women should or should not do. How care is provided, therefore, also has consequences for the functioning of economies and the wellbeing of societies. Despite the high profile that care and gender equality have attained in the recent years, policy remains underdeveloped and the importance of care is often inadequately reflected in mainstream debates (Evans, 2014). Very few companies in India provide paternity leave because the human resource experts say that they have not seen any demand for this. Policymakers should recognise that raising a child is a social function and the responsibility is commonly owned by both the parents and not just by biological mothers.

While a limited form of paternity leave is authorized for government employees, there is no such law that instructs the private sector to make it obligatory. In 1997, Central Services Leave Rules brought in 15 days paternity leave for men in central government service and the provision was extended to adoptive fathers in 2009. For the private sector, though, policy makers have failed to see the link between division of labour at home and equality at the workplace. Post maternity responsibility is one of the main reasons why women take a career break and it is natural that women who receive support from their partners have a more successful career trajectory. Therefore, Maternity Benefit Act alone can never constitute an adequate effort in the struggle towards a gender-balanced approach without effective formulation and implementation of similar Paternity leave provisions.

### Conclusion

At the heart of the debate lies the dichotomy between a '*feminist*' ethic of care and a '*feminine*' ethic of self-sacrifice. The idea that women's psyche and behaviour is care oriented has been exploited to justify male dominance for centuries. Male theorists across the political spectrum have accepted that the confinement of women to the domestic sphere is justified. 'Justice' and 'rights' have been gendered in a masculine sense, while 'care' and 'responsiveness' have been gendered in a feminine sense. In "Seeing like a feminist", (Menon, 2012) writes : "feminism is not about individual 'men' and 'women' but about understanding the ways in which 'men' and 'women' are produced and inserted into patriarchies that differ according to time and place." From a clear feminist perspective, it brings to light the gender inequality that is inherent in society. When a woman is pregnant, it is her biological right to be granted maternity leave, and is completely unfair to be culturally discriminated.

Feminist writers such as Gilligan ( ) argue that we need to distinguish a 'selfless' conception of caring from a 'self-inclusive' conception of caring. The two conceptions are mutually incompatible. In her studies of women's moral

development, Gilligan contends that self-less caring requires women to always subordinate their interests to others, while self-inclusive caring encourages women to learn to take care for themselves, and not just for others. (Kymlicka: 2002) Care theorists rightly stress that a 'feminist ethic of care' is geared towards self-inclusive care rather than selfless care. In other words, the 'feminist ethic of care' through its emphasis on self-inclusive caring, accentuates women's emancipation; whereas, the feminine ethic of self-sacrifice' through its emphasis on self-less caring, accentuates women's entrapment in a stereotypical sexist division of labour.

Extending this theoretical distinction between the two conceptions of care to the frame of reference of maternity benefit seems to strengthen the claim of also introducing comprehensive paternity benefits rules in the near future. It is not befitting for a progressive society that its women have to face social stigma and professional discrimination in their quest towards gaining parity in the job market while being bound to the traditional duties of child rearing. The onus therefore lays both with the government, which must proceed with a sustained will to swiftly implement the present reforms, as well as the society at large, which eventually needs to liberate their minds from orthodoxies. It must be ensured that women's caring activities do not compromise with their freedom and equality. Rather, the responsibilities for care are shared more fairly with men. Being care-givers must not prevent women from taking active part in the public sphere, and it must not also come in the way of them realizing their career goals. In the near future, efforts should also be made by the government to include the huge number of women working in the unorganized sector under the purview of this Act so that they can avail the benefits of maternity leave and live their lives in the best way possible granting them the right justice that they deserve.

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