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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

EXPLORING THE DISCREPANCY BETWEEN POLICY AND PRACTICE: MATERNITY BENEFIT LAWS AND THE CONTINUATION OF THE MOTHERHOOD PENALTY

AUTHORED BY - SHRESI SINHA

Abstract

Gender inequality has been a constant struggle in a patriarchal society like ours. New age modernity addresses to new age problems. Women labour force have been constantly considered to be lesser even with same capability from their male counterparts. For similar reasons there has been persisting gender gap in the workforce. This gap calls for an inclusive policy to ensure women's participation and continuation in the workforce. Liberal maternity benefit laws have been implemented in a number of nations so that childbirth won't be a factor in women choosing to leave the employment. According to World Bank estimates, the percentage of Indian women working dropped from 26% in 2005 to 20% in 2019. This further highlights the fact that India has some of the lowest rates of female employment participation globally. Although the Indian Constitution mandates gender equality in the workplace, most women are compelled to leave their employment to care for their unborn children and to give birth. The 2017 Maternity Benefit Amendment Act in India was a step towards increasing the participation of women in the working and fostering greater inclusivity in the workforce. However, so many years after the Act's implementation, the Act has generally failed to bridge that gap. Motherhood Penalty is understood as the gender wage gap between working mothers and non-mothers as well as fathers. The primary cause of the gender pay gap is now the motherhood penalty, or the lifetime income loss that comes with being a mother. A working mother may lose up to 5% of her income due to the "wage penalty" for each child. The paper explores this discrepancy between the Policy and practice.. The paper provides for certain suggestions which may lower the gap between this policy and practice.

Keywords: Maternity Benefit Act, Motherhood penalty, mental health, women employment, Gender inequality

I. INTRODUCTION

Motherhood is considered as one of the most significant aspects of a woman's life. It changes and transforms almost everything in a woman- be it, physically, mentally, psychologically and emotionally. Unfortunately, this transition to parenthood seems to be full of challenges particularly for working mothers.

Various conventions, like that of Violence and Harassment Convention, 2019, Maternity Protection Convention, Workers with Family Responsibilities Convention, Discrimination(Employment and Occupation) Convention, Equal Remuneration Convention laid down by the ILO and the Human Rights Organisations have universal labour standards for the upliftment of men and women at work. These labour conventions in very clear terms mention that there shall be no discrimination merely on the ground that a woman worker has become a mother.¹ In fact, the policy of equity is followed which leads to the legislations we have today in the country guaranteeing maternity benefits to the female workers. When it comes to the black and white letters of law India is amongst the top 5² most progressive country in terms of maternity benefit.

Despite progressive strides in legislation aimed at protecting the rights of pregnant employees and new mothers in the workplace, a persistent and troubling phenomenon persists: the motherhood penalty. This penalty refers to the systemic disadvantage experienced by women in terms of pay, promotion opportunities, and overall career advancement following the birth of a child.

At the heart of this issue lies the disconcerting incongruity between policy intentions and their practical implementation. Maternity benefit laws are designed to safeguard the rights of women during pregnancy and postpartum, providing them with essential support such as paid leave, workplace accommodations, and protection against discrimination. However, the stark reality is that these legal protections often fall short of addressing the complex web of societal attitudes, organizational cultures, and systemic biases that perpetuate the motherhood penalty. This paper analyses as to why there is a gap between the Policy and practice and what can be the probable causes and solutions to the same.

¹ International Labour Organisation: Conventions, Protocols and Recommendations <http://hdl.handle.net/10603/476957>, accessed 28th October, 2024

² T.S.Kavita Rajeshwari, Avanindra Nath Thakur, Manini Ojha, <https://www.indiaspend.com/womenwork/workplace-maternity-benefits-elude-94-working-indian-women-919567>, accessed 28th October, 2024

II. WHAT ARE MATERNITY BENEFIT LAWS?

A. History

In 1928, during British India Bombay Presidency, maternity benefits and leave were first mentioned by the Indian government. Dr. Babasaheb Ambedkar was a fervent advocate and propagator of the concept of Maternity Benefits. He advocated maternity benefits for the Bombay legislature.³

India's first strategy for maternity benefits focused solely on helping working women in factories. It is clear that the act's goal was to protect women employed in the formal sector of the economy from any potential harm. It came to the conclusion that certain vocations do not pose health risks for women, giving little consideration to those who work in agriculture or other unorganized sections of society. Additionally, it placed more emphasis on the mother's prenatal care than on child care and providing the infant with enough attention in the early days of life. However, the Bill placed the onus of providing maternity benefits on the government, stating that the government, not specific employers, should be responsible for the welfare of the populace.

B. Maternity Benefit Act, 1961

On December 12, 1961, The Republic of India, following its independence, passed The Maternity Benefit Act, 1961. The statute included conditional benefits related to pregnancy, childbirth, and complications stemming from the same, in compliance with the then-current international standards. The fundamental truth is that, despite the fact that India was still a developing nation and had just gained its 14th year of Independence, the legislation addressed a wide range of topics in great depth, paying particular attention to different aspects of maternity benefits.

Every type of enterprise, including government-owned factories, mines, and plantations, as well as those that employed people to perform acrobatic, equestrian, or other shows, were subject to the legislation. Additionally, it applied to any store or establishment with ten or more employees. The main upgrade from the 1928 Maternity Benefit Bill was the inclusion of rules pertaining to commercial, industrial, and agricultural establishments.

Following are the major aspects relating to the legislation: -

³ Savari, Adivasi Bahujan and dalit women conversing < <https://www.dalitweb.org/?p=3430> > accessed 28th October, 2024

⁴ MATERNITY BENEFIT ACT, 1961 (No. 53 of 1961)

- The statute provides that a woman may take a twelve-week maternity leave, of which no more than six weeks may be taken before the woman's anticipated delivery date. At the time, this was taken into consideration along with the International Labour Organisation's suggestion.⁵
- Maternity benefits, equivalent to the average daily income for the duration of the employee's real absence, are payable to women who meet the requirements outlined in the act and are qualified for maternity leave.⁶
- In compliance with the requirements of this legislation, it has been declared unlawful for an employer to dismiss or discharge a woman at any point during her employment. However, the employer may notify the employee in writing if the termination or dismissal was the result of serious wrongdoing.⁷
- Under this act, every woman is entitled to maternity benefits. In addition, if her employer does not provide free prenatal care or postnatal care, she is also entitled to a medical bonus of a specific amount.⁸ If a woman dies, her employer is responsible for paying all of her bills, including maternity benefits, to her designated beneficiary or legal representative.⁹
- The Act recognises cases of Miscarriage and mentions that upon production of proof as prescribed, she will be entitled to leave with wages for a period of six weeks immediately following the day of her miscarriage.¹⁰
- The Act also mentions that a woman suffering illness arising out of pregnancy, delivery, premature birth of child or miscarriage can avail an additional leave of one month upon production of such proof as may be prescribed.¹¹

⁵ S.5(3) of Maternity Benefit Act, 1961.

⁶ S.5(1) of Maternity Benefit Act, 1961.

⁷ S.12(1) of Maternity Benefit Act, 1961.

⁸ S.8 of Maternity Benefit Act, 1961.

⁹ S.7 of Maternity Benefit Act, 1961.

¹⁰ S.9 of Maternity Benefit Act, 1961.

¹¹ S. 10 of Maternity Benefit Act, 1961.

- Provision for two nursing breaks in course of her daily work of prescribed duration until the child attains the age of fifteen months was also present.¹²

C. The Maternity Benefits (Amendment) Act, 2017

The Maternity Benefit (Amendment) Bill, 2016 was introduced in the Rajya Sabha by the minister of State for Labour and Employment, Mr. Bandaru Dattatreya on 11th August, 2016.¹³ The Maternity Benefits (Amendment) Bill was approved by the Rajya Sabha on August 11, 2016, and the Lok Sabha on March 9, 2017¹⁴. On 27th March, 2017 the President of India signed the bill.¹⁵ As on 1st April, 2017, The Maternity Benefit (Amendment) Act, 2017 provisions are operative in India. On the other hand, Section 3(5) of The Maternity Benefit (Amendment) Act, 2017 which provides for the option of work from home for women taking into consideration the nature of the work for such period and on such conditions as maybe mutually decided by the employer and the employee came into force on 1st July, 2017.¹⁶ Even with the modifications, the Act maintains its fundamental framework while offering improved benefits and promoting higher-quality child care.

The amendments brought about the following changes in the Maternity Benefit Act :-¹⁷

According to the 2017 amendments to Section 5 of the Maternity Benefit Act, 1961, the government extended paid maternity leave from 12 to 26 weeks,¹⁸ with the maximum amount of time allowed to elapse before the planned delivery date being eight weeks. Section 5(5) of the Act allows women to work from home for a period of time and under terms that the employer and the employee may mutually agree upon, depending on the type of work allocated to them. It also complies with the recommendation of 18 weeks or longer made by the ILO. The purpose of this amendment was to minimize the rate of newborn mortality

¹² S. 11 of Maternity Benefit Act, 1961.

¹³ THE MATERNITY BENEFIT (AMENDMENT) BILL, 2016. No. 12/LN/Ref/November/2016.

¹⁴ The Maternity Benefit (Amendment) Bill, 2016 <https://prsindia.org/billtrack/the-maternity-benefit-amendment-bill-2016> accessed on 28th October, 2024.

¹⁵ THE MATERNITY BENEFIT (AMENDMENT) ACT, 2017 NO. 6 OF 2017.

¹⁶ THE MATERNITY BENEFIT (AMENDMENT) ACT, 2017 No.6 OF 2017

¹⁷ Maternity Benefit Act, 1961.

¹⁸ ANNEXURE – 1 ,THE MATERNITY BENEFIT (AMENDMENT) BILL, 2016. No. 12/LN/Ref/November/2016

by giving mothers adequate time for self-healing and by improving child care.

- Twelve weeks of maternity leave are available to commissioning mothers¹⁹ or women who adopt children younger than three months of age.
- Another amendment is that all establishments with fifty or more workers are required to include a childcare facility, either on-site or in shared space. The employer will permit the woman to attend the childcare centre four times²⁰.

III. WHAT IS MOTHERHOOD PENALTY?

The "motherhood penalty" refers to the systematic disadvantages and biases that working mothers face in their careers, ranging from reduced pay and diminished career opportunities to perceptions of lower competence and commitment. Women have advanced significantly in the workforce in recent decades, and more mothers than ever before are working outside the home. Nonetheless, women's careers continue to be significantly impacted by the shift to parenthood. Studies repeatedly show that women who have children have different challenges in their jobs than do fathers and women without children. Motherhood penalty is the term used to describe this phenomenon.

Though this phenomenon has been quite popular in the west, the relevance can be seen in the Indian market as well. Women are "vastly underrepresented in the global labour market and, when they work, they earn less than men," according to the research²¹ conducted by American economist Claudia Goldin, who was awarded the Nobel Prize in Economic Sciences. While her research focuses on the gender pay gap in the United States, similar findings apply to India across all industries²².

¹⁹ **Commissioning mother** means a biological mother who uses her egg to create an embryo implanted in any other woman. A woman employee who is a Commissioning Mother can avail paid maternity leave upto 12 weeks. The period of maternity leave will be calculated from the date on which the child is handed over to the Commissioning Mother.

²⁰ Insertion of new section 11A. Creche facility.

²¹ Johan Ahlander, Simon Johnson " Claudia Goldin wins Nobel economics prize for work on gender gap"< <https://www.reuters.com/world/claudia-goldin-wins-2023-nobel-economics-prize-2023-10-09/> > accessed on 28th October, 2024.

²² Parvathi Benu, "In India, women struggle with pay gap across sectors" < <https://www.thehindubusinessline.com/data-stories/data-focus/in-india-women-struggle-with-pay-gap-across-sectors/article67457643.ece> > accessed on 28th October, 2024.

IV. DISPARITY BETWEEN POLICY AND PRACTICE

The Policy of the government seems to be progressive and in pace with the changing needs and circumstances of the women force in India. Although there seems to be a general positive response to the amended provisions, which improve inclusivity and accommodations for working mothers, complaints have been made regarding inadvertent negative effects on women's labour force participation resulting from the implementation of the statutory provisions in the private sector.

The Ministry of Labour and Employment clarified the "Maternity Leave Incentive Scheme" in a press release on November 16, 2018²³, and mentioned that they have received complaints alleging that private sector employers have terminated the contracts of their female employees on the basis of flimsy or unrealistic grounds when they discover that the employees are taking time off or wish to take maternity leave.

The volume of representations the ministry has received supports the idea that paid maternity leave for women has discouraged them from engaging in more productive activities, as evidenced by the fact that they are frequently asked to resign or are laid off on dubious and flimsy grounds.

Because of deeply ingrained views of patriarchy, a significant portion of India still views women as less valuable than males. India has fallen 28 spots since 2020 to be placed No. 140 out of 156 countries in the Global Gender Gap Index²⁴. Only 62.5% of the gender gap in the nation has been closed, and there is particularly little gender parity in terms of political empowerment, economic engagement, and opportunity. The gender pay gap between men and women in the same employment with equal qualifications can reach up to 34%, according to some study, indicating that women are paid significantly less than males.

V. LACUNAE IN THE MATERNITY BENEFITS (AMENDMENT) ACT, 2017

Even though the intention behind the act is a noble one, there are several lacunae in the Act which makes it difficult to achieve its true intentions.

²³ Press Information Bureau, Ministry of Labour & Employment, Government of India, <<https://pib.gov.in/Pressrelease/share.aspx?PRID=1553017>> accessed on 28th October, 2024.

²⁴ Amar Patnaik, "The motherhood penalty that employers must eliminate" <<https://www.livemint.com/opinion/online-views/the-motherhood-penalty-that-employers-must-eliminate-11633536201944.html>> accessed on 28th October, 2024.

- The Maternity Benefit Act of India has long been criticized for placing all financial burdens on the employer. Maternity benefits and the indirect costs of training temporary staff for the duration are the employer's responsibility. Following the modification, the employer will incur higher expenses as a result of the longer duration of maternity leave in addition to the increased cost of providing childcare services. Due to their legal need to provide maternity leave and pay for the full 26-week leave to such women, many private company employers may choose not to hire these women who may soon become pregnant. Since the amendment, a lot of businesses consider recruiting women to be difficult. Employers' production expenses are raised by their exclusive duty to pay all wages in full within the designated time. According to a Teamlease survey²⁵ of 300 employers across ten industries, large, professionally run companies will probably promote recruiting women in order to achieve their diversity targets, providing that the benefits are completely supported by the employer. On the other hand, small businesses are likely to reduce their hiring of women. The latter will bear severe financial consequences: keeping white-collar women employed after giving birth will cost 80–90% of their yearly pay, while keeping blue-collar workers employed could cost up to 135%. The white collar jobs are office setting jobs and may range from administrative, managerial, executive roles and like, whereas the blue collar jobs are the ones which involves manual labour and workers. Another distinction can be taken in terms of payment, where white collar workers are paid salary on a monthly basis, the blue collar workers are paid on hourly basis or work basis.²⁶ Teamlease predicts that within the first four years of the Act's implementation, 11–18 lakh jobs for women will be lost due to its implementation, given the majority of work is in the informal sector.

²⁵ FE Bureau, “ India’s maternity benefits law will do more bad than good- Here is why” <https://www.financialexpress.com/opinion/indias-maternity-benefits-law-will-do-more-bad-than-good-here-is-why/1225954/> , accessed on 28th October, 2024.

²⁶ Melissa Parietti, Blue- Collar v. White- Collar: What’s the Difference?, < <https://www.investopedia.com/articles/wealth-management/120215/blue-collar-vs-white-collar-different-social-classes.asp> >, accessed on 28th October, 2024.

- The modified act's provisions are unclear in a few places. The availability, frequency, and duration of nursing breaks, for example, as well as the time frame for which the employee may use the crèche facility, are all unclear. There is much uncertainty about the clauses pertaining to the Act's applicability to the unorganized sector. On the one hand, the act claims to protect all women employed in factories, mines, plantations, stores, and other businesses in both the organized and unorganized sectors. However, unorganized sector workers are defined as wage workers, self-employed individuals, or those who work from home for an organization with fewer than ten employees under the Unorganized Workers' Social Security Act, 2008. This is particularly problematic since more than 90% of the women workforce belongs to the unorganised sector.
- Another problem lies in the fact that the Act fails to see father as an equal partner in this journey of parenthood. Whereas there is a just a mere 2 weeks paternity leave provided in the government jobs, the same remains dependent on the internal policy of the private sector jobs, making child rearing the sole responsibility of the mother and hence the employer of the mother.

VI. CONCLUSION AND SUGGESTIONS

The theme for 2024 International Women's Day which is celebrated on 8th of March each year was "Invest in Women: Accelerate Progress"²⁷. It is high time when we understand that in order for the economies to flourish there is a need of gender equality and investment in women. Since most of the work done by women as care giver has been unaccounted , it is important now that their contribution is accounted for and major efforts are made for their upliftment and progress.

From the findings above the following recommendations and suggestions are proposed:-

²⁷ UNITED NATIONS, ' Invest in women: Accelerate progress' < <https://www.un.org/en/observances/womens-day> >, accessed on 28th October, 2024.

A. Financial Responsibility

- The most important factor in maternity protection is how nations pay for monetary benefits that last the whole time a woman takes maternity leave. In the instance of India, it has been observed that employers in the private sector bear all financial responsibility. Furthermore, it is clear that the cost of maintaining facilities like crèches and the financing of paid maternity leave represent significant obstacles to the efficient application of the current legal provisions. Corrective action in this circumstance could involve offering 26 weeks of paid leave via mandatory social insurance (as in Australia and Canada) or public funds (like in South Africa and Brazil). This seems to be a workable plan for reducing the possibility of prejudice and reducing the financial burden of the employer.
- Another option can be through the CSR Funds of the company, where the unutilised funds or funds generated through CSR can be used to bear the cost of the female employees during maternity leave.
- More and more start-ups and companies can be given incentives in the form of interest free loans for hiring and retaining female employees in their firms. Private sector businesses may be eligible for additional tax breaks and advantages if they hire a specific proportion of female staff members. When companies financial responsibility is reduced, they will be more inclined to hire women and make workplace accommodations for female employees.
- It is recommended to establish a “Maternity Benefits General Pool” which would collect contributions from participating employers paid proportional to their size of workforce and inversely proportional to the percentage of women in their workforce. The apportionment of the funds can be overseen by committee to be constituted under The Maternity Benefits (Amendment) Act, 2017.

B. Role of Government

- Following complaints that private sector employers were unwilling to hire and retain women after their maternity leave was extended from

twelve to twenty-six weeks, the government took a number of corrective measures, including budgetary steps, but the proposed schemes have not yet been put into action. For example, in 2018, the Ministry of Labor proposed to reimburse earned salaries for seven weeks of the whole extended term of paid leave to employers in the private sector²⁸. Unfortunately, this proposal hasn't seen the light of the day. It is proposed that similar steps can be taken up where the Government can partly reimburse for the paid salaries and offer some relief to the employers.

- The government can also inspire the employers by creating a government backed certification for “Maternity – Friendly employers” This certification can be awarded to employers who comply to the Maternity Benefit (Amendment) Act, 2017 and also demonstrate proactive support and brings about gender justice. This would definitely create a positive brand value.

C. Compliance and Monitoring

- The next crucial step is to properly monitor the execution and make arrangements for the reporting agency after creating and executing maternity protection regulations. Establishing a strong and impartial reporting agency at work is necessary to stop instances of violations remaining undetected. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 provides guidelines in this area by directing employers to form an Internal Complaints Committee to investigate allegations of sexual harassment of women at work, however, it is suggested that a separate committee be constituted under the Maternity Benefit (Amendment) Act, 2017 which looks into the compliance of its provision.
- Periodic audits and centralised monitoring committee within the Ministry of Labour and employment can bring about transparency in the implementation of the law.

²⁸ Yogima Sharma, ‘ Maternity leave: Employers may get financial support’ <<https://economictimes.indiatimes.com/news/economy/policy/maternity-leave-employers-may-get-financial-support/articleshow/66626313.cms?from=mdr>> , accessed on 28th October, 2024.

- AI – Based system can be set up for the employers which would automatically detect and identify any potential non- compliance risks allowing intervention before the problems escalate.

D. Regular review of Legislation

- Establishing an annual review of the Act to ensure it aligns with its object and the intent of the lawmakers can be done. Anonymous feedbacks from stakeholders including employers and employees can help to make the Act at par with the workforce dynamics and changing family structures.

E. Digitalisation of Maternity Claims

- A government portal can be developed where all the details of the Maternity Benefit(Amendment) Act, 2017 are present along with option to apply for maternity benefits. The portal can help to access and track the leave entitlements and also ensure compliance.

F. Remote work and flexibility regulation for post- maternity phases

- Encouraging and creating adequate work environment for Remote Work and flexibility in post maternity phases will be helpful for the women employees to gradually go back to their work.

G. Creche Facilities

- Though India's economy is among the fastest-growing in the world, gender disparities in women labour force participation remain a significant concern. On the basis of this observation, it is proposed that employers and the government should work together to create better child care services. Since infant care is an essential component of maternity care, it may be a major barrier to women entering the workforce if working mothers are unable to obtain high-quality, reasonably priced child care facilities. Therefore, it is important that the government may provide for funds so that proper child care facilities are brought about. These can be free or a nominal fee can be charged for the same.

- Mobile creche facilities especially for smaller companies can be brought about which can be established with reduced setup costs and allowing it to operate on a demand basis.

H. Parental Benefits

- In India's private sector, paternity leave and associated benefits for male employees are primarily optional. In the absence of independent and specific legal rules regarding paternity benefits, it is common for both Indian and international enterprises to offer such rewards in accordance with their internal policies. It is necessary to create a culture in India where maternity leave and paternity leave are equally appreciated and favoured by designing leave regulations accordingly.
- There is no legal requirement for shared parental leave in the maternity protection framework. Women's participation in the labour field can be greatly increased by providing shared parental leave with the necessary legislative support. This appears to have the potential to advance gender justice because parental leave permits both partners to divide the leave according to their need, reducing the likelihood that a specific employee will be singled out by employers for taking paid time off. In this context, it is proposed that maternity benefits should actually be fully realized as gender neutrality and should be fully protected as "parental benefits," since men frequently have to care for children on their own or because adoptive parents aren't always mothers or women.

I. Legal Aid on Maternity Rights

- Establishing free and subsidised legal clinics specifically dealing with issues related to Maternity Benefit can help in the entire compliance of the Act. These Legal aid clinics can be in person or online.

With these suggestions in hand certainly the gap between the policy and practice of the enactment can be reduced if not bridged. The idea of inclusive governance and inclusivity is extremely important to ensure that there is a holistic development of the society.