

# MATERNITY BENEFIT ACT AND THE PRIVATE SECTOR: IMPLEMENTATION

## ISSUES

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### **ABSTRACT**

*The most relevant and the fundamental purpose of the implementation of the provisions related to maternity leave is to cherish and preserve the self-respect of women who are conceiving. Due to the onset of globalisation and increasing awareness and the education of the womenfolk, there has been a rapid surge in the number of women employees in the government and private sectors alike. Thus, it becomes very necessary to implement laws and grant maternity leave to the women employees. This is the primary objective of the Maternity Benefit Act, 1961, in the Indian context. The Act prominently enunciates the various provisions with regard to the benefits given to the women employees during maternity leave. The Act forbids the employer from knowingly engaging a woman at the workplace six weeks after her delivery or miscarriage. Now the Labour Ministry is expected to mandate the maternity leave of 26 weeks in the government sector as well as in the private sector. However, still, many women employed in the private sector are at the suffering end due to discrepancies in the implementation of the maternity benefits. There is evidence that on quite a few occasions the management removes the women employees by retrenchment even before they apply for maternity benefit. This paper addresses the issues in reference to the women in the private sector. It tries to carve out a concise solution for a better implementation of maternity benefits in the private sector. To understand the argument of this paper from an objective standpoint, some of the International Conventions on maternity benefits have been referred to.*

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## Introduction

### Feminist Jurisprudence and Maternity Benefit

Feminist jurisprudence has taught us that even law is biased against females – there is a male bias in the legal superstructure wherein the test of a reasonable ‘man’ still generalises the applicability of the law.<sup>1</sup> The dark cloud of rampant gender discrimination behind the closed walls and veils of what one calls ‘law’ is a major glitch that needs to be thoroughly addressed. This can be understood in a socio-historic context; but to dwell upon feministic conceptions of law is not the objective of this paper, although to disregard the impact of feminist jurisprudence on maternity benefits altogether, especially when maternity leave is being discussed, will not be correct.

Women have long been disadvantaged by the legal superstructures themselves – been ostracised and left out, stereotyped and discriminated upon by the very ones from whom they seek their solace. This problem has been there since almost the times from when formal ‘law’ has been there, and has not changed ever since. The poor representation of women in most, if not all the legislature<sup>2</sup> speaks a thousand words about where the problem of law relating to females lies. Patriarchal authority, coupled with male hegemony, has forever dominated the arena of law-making.

While the debate in the House of Commons was going on regarding the Surrogacy Bill, Hon’ble Ms. Joe Richardson had spoken what had not been spoken for a long time:

*“[...] this House will eventually be asked to decide. But this is a male-dominated House, and that dominant male voice will decide the future of millions of women [...]”*<sup>3</sup>

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<sup>1</sup> See generally Catharine Mackinnon, ‘Toward a Feminist Theory of the State’ (1990-1991) 12 Women's Rts. L. Rep. 205, 208.

<sup>2</sup> Anahita Mukherjee, ‘Women in House: India's rank slips from 117 in 2014 to 144 this year’ *The Economic Times* (Mumbai, 8 Mar 2016) <[http://articles.economicstimes.indiatimes.com/2016-03-08/news/71309602\\_1\\_constitution-amendment-bill-lok-sabha-parliament](http://articles.economicstimes.indiatimes.com/2016-03-08/news/71309602_1_constitution-amendment-bill-lok-sabha-parliament)> accessed 15 Mar. 2016.

<sup>3</sup> HC Deb 23 November 1984, vol 68, col 560. See also Committee Of Enquiry Into Human Fertilisation And Embryology, ‘Human Fertilisation and Embryology (Warnock Report)’ <<http://hansard.millbanksystems.com/commons/1984/nov/23/human-fertilisation-and-embryology-1>> accessed 15 Mar. 2016.

Yet this is how the laws are made, without account for female needs and requirements, without hearing any of the voices of the millions of women affected by such legislation and without due regard to any practical problems any woman may face. Irrelevant and outdated male knowledge and experience of problems with the fair sex lead to the disproportionate effect of hardship that the legal structure has on women today.

To begin with, motherhood is not essentially female; motherhood is as much a duty and responsibility of the male as much as it is of the female.<sup>4</sup> Both the mother and the father form a non-negotiable part in raising a child. But, equality is far from being a reality in the law of employment. Child rearing and child care are generally seen as the domain of the 'Mother'. Maternity benefit, though has its measures of furthering the cause of abolition of a 'childbearing penalty' by making women lose their jobs when they have a child due to their extended leave, does further the cause of discrimination against women with regard to recruitment and wage reduction. The very fact that a term such as 'motherhood penalty'<sup>5</sup> exists to denote the loss in an increase of wages in the long run due to a pregnancy shows how far law has gone to provide a remedy to women that is never practically implemented.

### **The concept of maternity benefit**

Maternity benefit is largely a part of labour law, and mainly centres around 'job protection' during pregnancy and 'maternity leave' as a compulsory leave so that mothers can spend time to take care of their newborns. It is one of the various benefits that are available under labour laws and is a measure of social security to preserve the sanctity of childbirth, though sadly the law speaks that only females are entitled to spend time nurturing the child and the father inherently has no role to play.

Maternity leave can be of two types: paid or unpaid. Paid maternity leave is the norm in the 21<sup>st</sup> century, with a minority adopting the concept of unpaid maternity leave. Unpaid maternity leave is merely a token leave which means that the employee will not be retrenched

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<sup>4</sup> See generally Derek Morgan, 'Making Motherhood Male: Surrogacy and the Moral Economy of Women', (1985) 12 J.L. & Soc'y 219, 238.

<sup>5</sup> See generally Stephen Benard; In Paik; Shelley J. Correll, 'Cognitive Bias and the Motherhood Penalty', (2007-2008) 59 Hastings L.J. 1359, 1388. See also Tamar Kricheli-Katz, 'Choice, Discrimination and the Motherhood Penalty', (2012) 46 Law & Soc'y Rev. 557.

on the ground that such an extended leave has been availed by the employee, and the employee gets no monetary or economic benefit whatsoever when she essentially requires it. Paid maternity leave, at least, solves half the purpose it seeks to achieve – nurturing the child by ensuring that the parents spend quality time with their newborn babies. In both cases of paid or unpaid maternity leave, however, there are mandatory minimum periods of leave that have to be granted by the employer. The employer may, however, choose to extend the leave beyond the statutory minimum as a matter of policy.<sup>6</sup>

In India, this leave is governed by the Maternity Benefit Act, 1961 and it grants 12 weeks<sup>7</sup> of paid leave to a female employee expecting childbirth. The payment of wages in this case is the full amount of wages that is ordinarily paid to the female employee during regular days. However, even this leave comes with a rider that the woman must have worked for a minimum of 80 days in the preceding one year under the employer to be eligible for the benefit under the Maternity Benefit Act.<sup>8</sup>

### **The International Labour Organization and Maternity Benefit**

The International Labour Organization (ILO) is a strong voice for the grant of maternity benefits, and had succeeded in getting all countries legislate maternity benefits – except for the United States and Papua New Guinea which, according to a ILO Report that studied the extent of maternity benefits in 185 odd countries,<sup>9</sup> do not have any statutory mandate for paid maternity leave.

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<sup>6</sup> For example, Airtel India gives 22 weeks' maternity leave and Microsoft India allows for 6 months' maternity leave. See Somya Abrol, 'Besides Airtel, these are the companies that offer extended maternity leave in India' *India Today* (Delhi, 10 Mar 2016) <<http://indiatoday.intoday.in/story/extended-maternity-leave-in-india-airtel-flipkart-hcl-godrej-hindustan-unilever-maternity-leave-around-the-world/1/616754.html>> accessed 15 Mar. 2016.

<sup>7</sup> See S. 5(3) of the Maternity Benefit Act 1961.

<sup>8</sup> See S. 5(2) of the Maternity Benefit Act 1961.

<sup>9</sup> See Laura Addati; Naomi Cassirer; Katherine Gilchrist, 'Maternity and paternity at work: Law and practice across the world' <[http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS\\_242615/lang--en/index.htm](http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_242615/lang--en/index.htm)> accessed 15 Mar. 2016. See also Catherine Albiston; Lindsey Trimble O'Connor, 'Just Leave', (2016) 39 Harv. Women's L.J. 1, 66.

The primary convention governing the area of maternity leave is the Maternity Protection Convention of 2000<sup>10</sup> which provides for an array of benefits and mandates that there should be a minimum period of 14 weeks' leave for pregnant mothers.

### **The Maternity Protection Convention of 1919**

ILO in one of its general conferences adopted the Maternity Protection Convention in 1919. The original text of the Convention consisted of 12 Articles. This Convention was ratified by many countries later on. This was done to ensure a sound financial support for all the working women. Article 1 deals with terms such as industrial undertaking<sup>11</sup> and commercial undertaking.<sup>12</sup> Article 2 of the Convention deals with the scope of the term 'woman.'<sup>13</sup> Article 3 of the Convention talks about the grant of maternity leave to women who are working in the public, private, industrial or commercial undertaking and further states that a woman shall not be permitted to work in the six weeks following her confinement (childbirth). She can, furthermore, claim the right to leave the work by the production of a medical certificate proving that the confinement is going to take place within six weeks.<sup>14</sup> Article 3 also envisages the payment of sufficient benefits to the woman for the full and healthy maintenance for her own being and her child. Article 4 of the Convention talks about the prohibition of unlawful dismissal of a female employee by her employer during her maternity leave. It states that the employer cannot give her the notice of dismissal during her leave period.

### **The Convention Concerning Maternity Protection (Revised), 1952**

The ILO Maternity Protection Convention, 1919 was revised in 1952. According to the revised Convention "*every woman irrespective of age, nationality and status in public or private, industrial or commercial undertaking was required to be absent for a period of six weeks after the childbirth and allowed to be absent for a period of six weeks prior to*

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<sup>10</sup> International Labour Organization, Maternity Protection Convention (C183) (entered into force 7 February 2002).

<sup>11</sup> See Article 1 of Maternity Protection Convention (Revised) (C103), 1952 (No. 103) <[http://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55\\_TYPE,P55\\_LANG,P55\\_DOCUMENT,P55\\_NODE:REV,en,C103,%2FDocument](http://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REV,en,C103,%2FDocument)> accessed 18 Mar. 2016.

<sup>12</sup> Includes any place where articles are sold or where commerce is carried on.

<sup>13</sup> For the purpose of this Convention, the term 'woman' means any female person, irrespective of age, nationality, race or creed, whether married or unmarried, and the term 'child' means any child whether born of marriage or not.

<sup>14</sup> See Article 3 of Maternity Protection Convention (C003), 1919 (No.3).

*childbirth*". In furtherance of this absence from her respective duty, she had to be paid full benefits which amounted to sufficiency for the full maintenance of herself and her child. The benefits had to be paid out of public funds or by the system of implementation of insurance but the exact amount and the dues were to be decided by the appropriate authority or the government in each country. Additional benefits over and above the basic benefits which included two nursing breaks of half an hour in one day of work and the services of the doctors and midwives were provided completely free of cost.<sup>15</sup> This furthermore included the protection of woman from unlawful dismissal during her absence from work in the period of the leave.<sup>16</sup>

### **C183 - Maternity Protection Convention, 2000 (No. 183)**

*Convention concerning the revision of the Maternity Protection Convention (Revised)*

Maternity protection was a crucial point of development of nations through protection of women. The ILO terms maternity protection as a 'core issue' and has been striving to advance the cause since its inception in 1919<sup>17</sup>. Cultural stereotypes coupled with economic ruthlessness and social and political norms have discriminated women for generations and one such area is the workplace. During pregnancy, women across the world are at considerable economic and medical risk. What the ILO endeavours to do through maternity benefit is not only to provide economic security to women when they require it so but also to ensure the health and safety of both the mother and the newborn by cutting out work-related risks through compulsory leave. Through the lifespan of the ILO, three conventions have been adopted, namely one in 1919, one in 1952 and one in 2000. Years of progress on the issue has culminated into the latest 2000 convention.

This convention was enacted keeping in view of the principles of the Universal Declaration of Human Rights, 1948, United Nations Convention of Elimination of All forms of Discrimination Against Women, 1979, and all other related conventions for the equality of treatment of men and women workers. It applied to all the women workers irrespective of their place of employment and without any discrimination. The term 'child' was also applied

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<sup>15</sup> *Supra* note 11, Article 4.

<sup>16</sup> *Supra* note 11, Article 6.

<sup>17</sup> See ILO, International labour standard instruments on maternity protection, <[http://ilo.org/travail/aboutus/WCMS\\_119238/lang--en/index.htm](http://ilo.org/travail/aboutus/WCMS_119238/lang--en/index.htm)> accessed 19 Jan 2017.

to any child without any kind of the discrimination.<sup>18</sup> This Convention forms a major part of the international framework on maternity benefit that is present in the world today. This is not the first convention, however, and contains some compromises as compared to its predecessor – the C103 Maternity Protection Convention, 1952 to achieve its desired object through possibility of more ratifications. The stringent measures were softened in this Convention, but it still cannot be said to be of universal acceptance. India has not yet ratified the Convention. However, this forms an important part of the discussion on maternity benefit law in the present world nevertheless for even though it is still just an endeavour, it is the most ambitious endeavour till date.

The Convention addresses the following subjects:<sup>19</sup>

- Benefits
- Breastfeeding mothers
- Employment Protection and Non-discrimination
- Health Protection
- Leave in the case of illness or complication
- Maternity Leave (more than 14 weeks)

### **Ensuring Maternity Protection<sup>20</sup>**

A working mother aspires for a healthy pregnancy as well as sound financial support for her child and herself during and after her pregnancy. The maternity protection benefits fulfil these aspirations by encompassing two broad goals. These goals are:-

- 1) to make sure that a woman's job preferences and her economic ventures do not act as a hindrance or pose any kind of health risk to her and her child.
- 2) to ensure that the role of being a mother doesn't compromise the financial security of the woman and her family.<sup>21</sup>

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<sup>18</sup> *Supra note 10, Preamble of the Convention.*

<sup>19</sup> *See generally supra note 10.*

<sup>20</sup> *See generally* Maternity Protection Resource Package by the ILO, <<http://mprp.itcilo.org/pages/en/introduction.html>> accessed 17 Mar 2016.

<sup>21</sup> *See generally* Assane Diop, Manuela Tomei, Philippe Marcadent, 'Goals of maternity protection', <<http://mprp.itcilo.org/pages/en/introduction.html>> accessed on 17 Mar 2016.

## **The Maternity Benefit Act, 1961**

In India, the Maternity Benefit Act was passed in 1961 which applied to all the states. Prior to that, different states had laid down their own laws in relation to maternity protection. The Maternity Benefit Act is heavily based on the aforementioned guidelines of the ILO. It aims to ensure complete safety and welfare of both the mother and the child. It includes the grant of maternity leave along with the benefit in the form of payment of wages and remuneration during the time of leave. It states the granting of leave and the benefits both before and after the date of delivery. Though the provisions of this Act apply to both the government and the private sectors, there are certain major lacunae in the implementation of the Act in the private sector.

### **Salient Features of the Maternity Benefit Act, 1961**

Till 1961, there was no specific beneficial legislation for the achievement of the goal of the social justice to the women workers in both the private and the public sectors. Thus, the Maternity Benefit Act was passed in 1961 in tune with the ILO Conventions to protect the health and the financial security of both the mother and the child.

The Act is a special law for women that nobly endeavours to ensure gender equality at workplaces and provides certain benefits to women for the hardships they have to endure during childbirth. This forms the backbone and framework of the national legislation on the protection of women's economic interests on childbirth prescribed by law, alongside the Employees' State Insurance Act, 1948 and a few other concurrent labour laws. It is through the provisions of this Act that employed women can claim maternity benefit, and as a welfare legislation, it ordinarily follows that this Act adopts a pro-employee approach. It has a wide application covering 'mines, factories, plantations, shops and establishments' and provides no wage limits or eligibility criteria to be covered under the Act. Section 3 of the Act deals with various definitions that include the definition of 'child',<sup>22</sup> 'delivery',<sup>23</sup> etc.

### **Section 4 [Before the Maternity Benefit (Amendment) Bill, 2016]**

Section 4 of the Act embodies the very primary aspect of this piece of legislation. According to Section 4, "*no employer shall knowingly employ a woman in any establishment*

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<sup>22</sup> See section 3 (b) of the Maternity Benefit Act 1961.

<sup>23</sup> See Section 3(c) of the Maternity Benefit Act 1961.

during the six weeks immediately following the day of her delivery.”<sup>24</sup> This section also includes the issue of miscarriage wherein an employer is prohibited from allowing any woman to work immediately after her miscarriage. It also restricts the women employee to work during this period. Added to it, no pregnant woman will, even on a request made on her behalf, be required by the respective employer to do any kind of arduous work. She is also forbidden to do any kind of work which involves long hours of standing, or which is likely to affect her pregnancy and the normal development of the foetus. Furthermore, she is restricted from doing any kind of work which is likely to cause her miscarriage or otherwise to adversely affect her health, during one month immediately preceding six weeks before the date of her expected delivery.<sup>25</sup>

All women are entitled to, and their employer would be liable for, the payment of maternity benefits. The benefits are prescribed and calculated at the rate of the average daily wage of the female employee. The period included is the period of her actual absence which also includes the preceding as well as the day of her confinement. In brief, she is entitled to six weeks before and including her date of delivery and also six weeks after her delivery. No woman is eligible for these benefits unless the criteria of being in the employment for not less than 80 days in the twelve months immediately preceding the date of her confinement is met with. Furthermore, the maximum period for the entitlement to maternity benefits is 84 days. In the case of any casualty during the confinement, the benefits would be payable upto and including the day of her death.

### **The Maternity Benefit (Amendment) Bill, 2016**

Very recently, the Prime Minister of India gave his ex-post facto approval and the Rajya Sabha passed The Maternity Benefit (Amendment) Bill, 2016.<sup>26</sup> The amendments will be benefiting 1.8 million (approx.) women workforce in the organised sector.<sup>27</sup> This is a huge relief for all the working women in all the sectors. The major increase in the number of weeks granted for maternity leave is very welcoming. The salient features of this amendment are as follows:-

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<sup>24</sup> See section 4 of the Maternity Act 1961.

<sup>25</sup> *Ibid.*

<sup>26</sup> See Maternity Benefit (Amendment) Bill, 2016. See also TNN & Agencies, ‘Bill allowing 6-month maternity leave passed in RS’ *Times of India* (London, 11 Aug 2016) <<http://timesofindia.indiatimes.com/india/Bill-allowing-6-month-maternity-leave-passed-in-RS/articleshow/53652957.cms>> accessed 26 Jan 2017.

<sup>27</sup> *Ibid.*

- The granting of 12 weeks of maternity benefit to the ‘Commissioning mother’<sup>28</sup> and the ‘Adopting Mother.’
- The increase in the granting of maternity benefit from the present 12 weeks to 26 weeks for two surviving children. Furthermore, a leave of 12 weeks is also granted for woman with more than two children.<sup>29</sup>
- The inclusion of the work-from-home system and also the provision of Crèche facilities for the establishments which are having 50 or more than 50 employees.

This amendment is especially relevant to the private sector since these are economic burdens ordinary employers or small to medium-sized businesses would not have provided. The line between the exemplary benefits to the government employees and the meagre benefits in the private sector is clearly being blurred. In the private sector, a 26-week leave by an employee would have otherwise definitely cost her the job and any benefits associated with employment which might in consequence lead to any other prospective employer seeing her as a liability to the company.

### **Maternity Benefit Act - Implementation in the Private Sector**

The Act does not distinguish between the private sector and the government sector. Women working in both the private sector as well as the government sector are covered under the Act. However, this Act does not cover the unorganised sector which consists of the temporary and casual workers and those employed through sub-contracting, outsourcing, etc. This is mainly because of the absence of an identifiable employer and workplace in the unorganised sector<sup>30</sup>. Even the implementation of the Act in the private sector is not very effective. There are many discrepancies and loopholes when it comes to the implementation of the provisions of the Act in the private sector. These sectors include small-scale companies and other small private enterprises. The women employees of these sectors are mostly at the suffering end. The employers use smart tactics in preventing the women in getting their due

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<sup>28</sup> A commissioning mother is defined as a biological mother who uses her egg to create an embryo implanted in another woman. The 12-week period of maternity benefit will be calculated from the date the child is handed over to the adoptive or commissioning mother. *See generally* ‘Maternity Leave in India and Other Countries’, <<http://www.prsindia.org/theprsblog/?p=3695>> accessed on 11 Aug 2016.

<sup>29</sup> *See supra* note 30.

<sup>30</sup> Anita Abraham, Devika Singh and Poulomi Pal, Critical Assessment of Labour Laws, Policies and Practices through a Gender Lens, National Resource Centre for Women, Ministry of Women and Child Development, Government of India, <<http://nmew.gov.in/WriteReadData/1892s/8261924589Final%20World%20Bank%20Report.pdf>> accessed 26 Jan 2017.

maternity benefits during and after their pregnancy. Moreover, women are also willing to do arduous work even during the final stages of their pregnancy in the fear of losing their wages and job. This is a really unfortunate scenario.

Women who remain in the employment after the childbirth are often at a very disadvantageous position altogether. They are often penalised in terms of career opportunity and wages. Many of them also postpone their career aspirations in the pursuance of their childcare duties. The hostile circumstances, thus, force the women to leave the job altogether.

## **The Major Issues of Implementation in the Private Sector**

### **The Lacuna on the part of the Employers**

One of the major issues concerning the implementation of the Act is the lack of proper adherence to the statute by the employers. Despite the prevalence of this statute over any employment contract which provides for a reduced period, it is very common practice in the employment contracts to provide for a lesser period or to make the maternity leave unpaid.<sup>31</sup> The employers mostly don't pay any heed to the statutory provisions and leave no scope for bargaining. The employer doesn't take much adequate measures to ensure maternity protection. Increased medical costs happen in relation to a child who is not being taken care of by either of the parents. These costs are mostly borne by the employer through the medical benefits to dependents, and can be avoided or reduced by providing maternity benefit.<sup>32</sup> They tend to disregard the maternity protection allowance as it involves the paying of wages to the female workforce who has opted for maternity leave. Under this Act, a female employee is entitled to 12 weeks of paid maternity leave. The employer hesitates to give the financial support because he/she does not get the requisite profit due to the absence of the female employee. Thus, it provides for a major drawback in the accurate implementation of the Act. The employer should adhere to the statutory regulations so that the maternity protection can be ensured.

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<sup>31</sup> *Ibid.*

<sup>32</sup> Sashi Bala, 'Analysis on Effectiveness of the Implementation of the Maternity Benefit Act, 1961' (Report of National Commission for Women, 2014), page 17.

### **The Issue of Retrenchment<sup>33</sup>**

There is also evidence of the misdemeanour practices on behalf of the employer when he/she gets to know about the employee going on maternity leave. The employer takes the ultimate step of retrenchment against the female employer even before she applies for maternity leave. This is done to get rid of the responsibility and the liability to sanction the maternity leave.<sup>34</sup> This is done in furtherance to avoid the granting of cash benefits as a part of the maternity leave to the female employee.

### **Resignation from the Job**

Another reason for the non-implementation of the Act is the voluntary resignation of the employees from jobs during the ongoing pregnancy. Family pressure and the apprehension of the non-payment of the maternity benefits force women employees to avail voluntary resignation from their jobs. They are furthermore forced to take these adverse steps as they prefer to devote their maximum time for their children. The added responsibility of motherhood along with the aims and expectations of the employers creates additional pressure on the mothers. The demands of the employers in the workplace are similar to the demands of the men present at the respective households of the female employees as they are expected to handle the household responsibility single-handedly. Women are, therefore, left with no other option but to opt for resignation from their respective jobs.

### **Hesitation of the Employer to Employ Female Workforce**

The employers, especially in the private sector, generally hesitate to employ females due to the apprehension that they would certainly take maternity leave in the future. Thus, it also leads to the lowering of the prospects of hiring female workforce. This is more prominent in the private sector since the employer has to pay the women availing of maternity benefits as his/her own expenditure.

### **Employers Role During the Absence of a Female Employee from the Workplace**

During the absence of a female employee from the workplace, the employer is prohibited from terminating the employee, as is stipulated under the provisions of the

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<sup>33</sup> See section 2(oo) of the Industrial Disputes Act 1947. It defines retrenchment as: “the termination of the of the employee by the employer/workman for any reason whatsoever , otherwise than as a punishment inflicted as a way of the disciplinary action”.

<sup>34</sup> Sashi Bala ‘Implementation of the Maternity Benefit Act’, V.V Giri National Labour Institute, NLI Research Series No. 099/2012. <[http://www.vvgnli.org/sites/default/files/publication\\_files/099-2012\\_Shashi\\_Bala.pdf](http://www.vvgnli.org/sites/default/files/publication_files/099-2012_Shashi_Bala.pdf)> accessed on 17 Mar 2016.

Maternity Benefit Act. During this period, the employer tries to fill up the vacant position(s) on an ad-hoc basis. Thus, it sometimes happens that the employer no longer needs that post or manages to deal with the activities without the need for the female employee. Therefore, when the employee returns after the maternity leave, she is informed that there is no requirement of her service as the post has been removed altogether. This technique prominently works on the employees who are less aware of their rights and they are left with no other option but to forego their jobs. The other employees may become duty-bound during their co-workers' maternity leave to take up their co-workers' job for no extra remuneration. This further encourages the employer to terminate the employee. Thus, this leads to discrepancy and eventually to the inefficient implementation of the Act as the employee is again put into financial risks and the troubles for no reason at all.

#### **The Absence of the Provision in Relation to Adequate Facilities for Nursing Period:**

The Act, under section 11, provides for grant of mandatory nursing breaks to the breastfeeding mother. The law enacted hardly provides other facilities to the mother, for example, separate nursing rooms and other ancillary facilities. Absence of such facilities for nursing in private companies with a significant number of female workforce discourages women to breastfeed during the nursing breaks. In the United States, companies usually have a 'lactation room' where women can use breast pumps or breastfeed in private.<sup>35</sup>

#### **The Trilegal-NASSCOM report**

This report was very recently published which emphasised on the implementation of the maternity benefits at the Indian Business Processing Management sector.<sup>36</sup> It states that though India continues to be a major stronghold in the field of business processing management, there is a significant drop in the diversity at the senior managerial level. There is less number of women employed at the senior level. This can be deduced from the fact that the women ought to take longer break or opt out of the workplace pre- or post-pregnancy. This indicates the inefficiency in the lack of implementation of the maternity benefit law.

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<sup>35</sup> See Brit Mohler, 'Is the Breast Best for Business: The Implications of the Breastfeeding Promotion Act', (2011) 2 Wm. & Mary Bus. L. Rev. 155, 184.

<sup>36</sup> See NASSCOM & Trilegal, 'Maternity benefits and facilitating return to work: IT-BPM Industry's Experience' <<http://www.nasscom.in/maternity-benefits-and-facilitating-return-work-it-bpm-industrys-experience>> accessed on 7 Apr. 2016.

Maternity benefit as a system does not operate independent of other social obligations of 'parenting'. Although the system purports to ensure economic and medical stability for women, a considerable focus on childcare has been given and is also a primary objective. Shifting childcare exclusively to the mother while obligating the other partner to work everyday is a flaw that has been addressed by many countries. In India, the Maternity Benefit Act is only women-centric. In countries such as France, Sweden and United Kingdom, parental leave (both paid and unpaid) is duly provided. In France, parents can share unpaid leave up to three years. This is based on the ethos that "child rearing is a shared responsibility." This report also indicates that there is a major drop in the number of female workforce in the senior and the mid-managerial level as compared to the entry level. Women tend to leave the workforce post-pregnancy due to the lack of a supportive environment.<sup>37</sup> They don't get appropriate support from their employer(s) to give time to their new-born. This is a major setback to their career. This implicates the lacuna in the implementation of the Act. Though 75 percent of the employees tend to return to their workplace after availing the maternity benefits,<sup>38</sup> a few of them leave before the end of two years. This portrays a grim picture and it can be inferred that the objective of this Act is not duly fulfilled.

### **The Increase in the Maternity Benefit Entitlement**

Recently, the Ministry of Women and Child Development has proposed an increase in the maternity leave from 12 weeks to 26 weeks.<sup>39</sup> This is a welcome change as it ensures maternity protection on the guidelines of the ILO. The government is expected to implement this change very soon. This would put India among the few<sup>40</sup> countries that provide the maximum amount of maternity leave. This is done to encourage women in continuing their participation in the workforce. The nursing of the babies has also been an important factor behind this change. This will give the scope to the working women to breastfeed their children for an uninterrupted period of six months.<sup>41</sup>

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<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> See Sunitha Sekar, 'Maternity leave in private sector to be 26 weeks' *The Hindu* (Chennai, 4 Jan 2016) <<http://www.thehindu.com/news/cities/chennai/maternity-leave-in-pvt-sector-to-be-26-weeks/article8060095.ece>> accessed 18 Mar. 2016.

<sup>40</sup> India would be put in a league of 16 countries that give the maximum paid maternity leaves to women.

<sup>41</sup> See Aarefa Johari, 'Extended maternity leave is the right move But what about paternity leave and unorganised sector?' (Scroll.in, 4 Jan. 2016) <<http://scroll.in/article/801322/needed-after-extended-maternity-leave-a-policy-for-paternity-leaves-and-women-in-the-unorganised-sector>> accessed 17 Mar. 2016.

## **The Argument against the Implementation of the Change**

Many professionals argue that this step would affect the career map of the women as it would be very difficult to cope up with the stiff competition in the private workplace after six months of maternity leave. This may hinder the professional growth of the women after reabsorption as there would be major changes in the working environment at a given time.<sup>42</sup> The unorganised sector is untouched by the change in the provision. The companies would be again hesitant in hiring the female employees.

## **Authors' View**

Keeping all the aforementioned arguments in mind, the authors would like to elaborate on the need to legislate these into comprehensive laws by taking into consideration the cohesive needs of all. The above step in increasing the maternity benefit would no doubt be praiseworthy but there needs to be a law with respect to paternity benefit also. As the implementation of paternity benefit would encourage the fathers to take care of their offsprings and it would lessen the burden on the mothers.<sup>43</sup>

## **The Proposed Solution**

1. **Shared Paternal Leaves-** India should follow the footsteps of Sweden, which offers approximately two months of paternity leave and 16 months of shared paternal leave. Few weeks of the paid paternal leave can also be duly provided. It was observed from the Swedish model that for every paternity leave taken by the father, the mother's income increased by 6.7% in the later four years.<sup>44</sup>
2. **Proper Orientation Programme**  
There should be an apt orientation programme in the workplace from time to time where all the employers, as well as the employees, need to be present. This should be conducted by the experts so that the female employees become duly aware of their right to maternity benefits.
3. **Due Compliance to be Followed**  
The employer should mandatorily send the details of the female employees and their record of maternity leave availed in the form of a report or otherwise to the labour

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<sup>42</sup> *Ibid.*

<sup>43</sup> According to the Report of the ILO in the year 2014 approximately 78 countries already provide paternity leaves so as encourage the fathers to take part in the child rearing.

<sup>44</sup> Report of Sweden Johansson, 2010, cited by Paid Family Leave Report, University of Washington 2016 <[https://www.washington.edu/pso/files/2016/07/uw-pso-pflac-report\\_June-2016.pdf](https://www.washington.edu/pso/files/2016/07/uw-pso-pflac-report_June-2016.pdf)> accessed 12 Aug 2016

inspector. It should also include the exact details of the grant of maternity leave and other incentives provided by the employer. This should be done on a regular basis. The inspector should frequently visit the workplace to personally see the due compliance.

### **Mandatory Clause legislation**

Law has long been known for its omnipotence and omnipresence – it pervades all domains, and such an instance can be found in the example of having some clauses being statutorily mandated in contractual agreements.<sup>45</sup> Such mandatory clauses in contracts are often prescribed by legislation for better implementation of the law that the legislature seeks to enforce. The authors, in their opinion, find it worthy that the Maternity Benefit Act should prescribe non-discrimination clauses for employment contracts relating to maternity benefit for speedy justice in such cases of employment so as to bring maternity benefit within the purview of contractual obligations as well as legislative mandate.

Clauses relating to maternity benefit in employment contracts, if mandated, would also have to include a standard procedure to apply for maternity benefit amongst all employers so as to ensure a fair and transparent process of availing maternity benefits. This procedure, coupled with the compliance requirements as discussed, would further the goal of the Maternity Benefit Act. The advantage of such mandatory clauses is tremendous – it seeks to entail judicial review of maternity benefit applications within its ambit through contractual obligations, and would also be better covered under the Industrial Disputes Act for those seeking to raise an industrial dispute with the support of a trade union.

Such clauses, if incorporated, would also give the employer and employee a room to negotiate on the finer details of the procedure and benefits under the Maternity Benefit Act, instead of solely relying on the Act to solve its purpose automatically. Through this, we may one day see increased time of leave, enhanced payments, no ‘wage-loss’<sup>46</sup> and increasing benefits without the requirement of legislative intervention. Minimum requirements have already been prescribed by the legislature through statutes, and an argument of unequal bargaining power to the detriment of the employee will not hold good in this context. If the

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<sup>45</sup> See generally Henry N. Butler; Larry E. Ribstein, ‘Contract Clause and the Corporation, The’, (1989-1990) 55 Brook. L. Rev. 767.

<sup>46</sup> See ‘motherhood penalty’, *supra* note 5.

benefits change through negotiation, it will change for the better and can never be less than the statutory limits.

## **Conclusion**

In the course of our research on the topic, we observed that maternity entails for a career break for the working women due to multifarious reasons. This is more prevalent in the private sector. Though the government is making concerted efforts to ensure maternity protection in this regard, the actual implementation varies from place to place. Thus, there needs to be a time-to-time survey and a grievance redress mechanism to identify and combat the problems in relation to the Maternity Benefit Act. The family of the women should not also pressurise the mothers in taking their career break from work but rather encourage and help the mothers in increasing their financial independence. The unorganised sector along with the private sector should also be given due importance in this regard.

After the passing of the Maternity Benefit (Amendment) Bill, 2016, there is new hope that the mothers can look forward to. It seeks to expand the definition of ‘mother’ and increases the maternity leave available to the mothers. Although a step in the right direction, this is only a stepping stone towards a bright future where these benefits will culminate into a perfect gender-sensitive maternity-benefit system on the basis of shared responsibility, especially in the private sector.