

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 2

2022

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Analysis of 'Paternity Leave' in India

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ABSTRACT

While some progressive Indian companies have taken the initiative to introduce paternity schemes for new fathers, or even at times, expecting fathers; these schemes are nonetheless few and far between. Apart from the obvious advantages of Paternity Leave such as a well-balanced household, it is also considered a method for organizations to bring about equality in the workspace. There are however several problems faced, with regard to the implementation of paternity leave provisions. These include instances where men refrain from availing such leave due to socio-cultural pressures. Several countries have amended their laws to ensure better compliance and efficacy of such provisions. At present, there exist several different models of paternity leave based on the peculiarities of each country and the objective behind the legislation.

This paper explores certain material themes surrounding the introduction and implementation of a 'Paternity Benefit' scheme in India. Part I examines the prevailing features of paternity leave in India. It elucidates the need for a broader paternity leave scheme in India and, argues that the absence of such a provision reinforces traditional caregiving models and socially constructed gender norms leading to bias and discrimination towards both sexes. It analyses the effects of the scheme as an instrument to bridge workplace inequalities within the country and its function as a tool to enhance family and child development. Part II contrasts the existing domestic framework against accepted international standards; and undertakes a review of domestic legal norms of different jurisdictions. It further identifies three distinct models of paternity leave that have been adopted across the world. Part III analyses the concept in light of India's unique socio-economic conditions, and identifies the most suitable model of paternity leave. The focus will be placed on the urban Indian population, working within the organized sector as the target beneficiaries of such a scheme.

I. INTRODUCTION

A shift in long-established gender roles, from bygone times when the man of the family was the sole breadwinner and the woman relegated to domestic work; to the modern-day family dynamic where women occupy equal positions of power in the working environment, brings

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into question the timeworn notion of exclusive Maternity Benefits. In this new world order, it is imperative to encourage men to be more involved and interactive fathers, who balance their child-rearing responsibilities with the working mother. As a natural corollary, men should be provided with a platform, in a manner similar to that afforded to young mothers, which allows them to accept a male caregiver role², without putting their careers in jeopardy. In this regard, a stimulus-driven model which incentivizes young fathers to break away from entrenched gender and workplace norms is most appropriate. This phenomenon has given rise to the concept of paternity benefits or shared paternity leaves, which was pioneered by Sweden nearly five decades ago.

“Paternity leave can be defined as a leave period either paid or unpaid, that is reserved for fathers. It is granted in relation to childbirth, as leave which can be taken by fathers exclusively. At present, India has no legal provisions on paternity benefits. However, it does provide for Maternity Benefits; and if maternity leave is a cultural reality, but paternity leave is not, women become much less attractive as potential employees.”³ Thus, a necessary corollary to boosting women’s workforce participation is an increase in men’s involvement in caregiving.⁴”

India, at present, has a law in place that regulates the employment of expecting mothers before and after childbirth, namely, the Maternity Benefit Act⁵ (hereinafter, Maternity Act). This legislation safeguards the interests of a woman around the time of childbirth and provides for certain benefits. In the international context, there have been three ILO Conventions on the subject of maternity benefits, the latest one being Convention No. 183⁶ (hereinafter, Convention). Though India has not ratified said Convention, it is an established international standard that the Indian legislation should be assessed against.

The Maternity Benefit Act entitles each woman to *paid* maternity leave, which is funded solely by the employer.⁷ In this regard, the wage replacement is calculated according to the average

² European Gender Equality Institute, *Reconciliation of work and family life as a condition of equal participation in the labour market: Report*, 2011, available at <http://eige.europa.eu/content/document/report-review-of-the-implementation-of-the-bpfa-in-the-area-f-women-economy-reconciliation>. (Last visited 24th September, 2016)

³ Ariel Meysam Ayanna, *Aggressive Parental Leave Incentivizing: A Statutory Proposal Towards Gender Equalization in the Workplace*, 9 U.P.A. J. LAB. & EMP. L. 293 (2007)

⁴ European Directorate General for Internal Policies, *Maternity, paternity and parental leave: Data related to duration and compensation rates in the European Union: Study, 2015* available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509999/IPOL_STU\(2015\)509999_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509999/IPOL_STU(2015)509999_EN.pdf) (Last visited 20th September, 2016)

⁵ The Maternity Benefit Act, 1961.

⁶ MATERNITY PROTECTION CONVENTION (REVISED), 1952 (No. 103). ENTRY INTO FORCE FEBRUARY 7TH, 2002.

⁷ MATERNITY BENEFIT ACT, *supra* note 4, § 5(1).

daily wage for the period of her actual absence.⁸ This, however, is in contravention with the Convention, which provides for cash benefits, that are paid to a woman during maternity leave. And these benefits are at the very least, to be either two-thirds of her previous earnings or, if other methods to determine cash benefits are used, then a comparable amount for at least 14 weeks.⁹ Thus, the Maternity Act should be amended in this regard. Additionally, the Maternity Act, in compliance with the Convention,¹⁰ provides for an additional leave of one month, that is, even post expiry of the maternity leave period; in case of any illness arising out of the pregnancy or any complications thereof.¹¹

Per contra, there exists no corresponding legal scheme that affords paternity benefits to new fathers in India. However, there exist certain specific legislation, applicable only to government employees, whereby men are granted paternity benefits, including paternity leave.¹²

II. PATERNITY BENEFITS

(A) Status of paternity benefits in India

It is essential to analyse the current attitude towards paternity benefits in India, to gauge the ‘public readiness’¹³ for such a scheme and ensure that any proposed legal change is sufficiently accompanied by cultural support.¹⁴

For instance, in 1999, the Central Government by notification under the Central Civil Services (Leave) Rules¹⁵ granted male Central Government employees¹⁶ with a statutory right to paternity leave. The caveat is that an employee is only entitled to such leave if he has less than two surviving children.¹⁷ The leave is fully paid¹⁸ for by the employer and is for a period of 15 days.¹⁹ The objective behind the leave is to support the employee, so that he may take care of his wife and his newborn child. It can be availed either 15 days before the date of delivery of the child or within a period of 6 months from the date of delivery.²⁰ If not availed within the

⁸ *Id.*

⁹ MATERNITY PROTECTION CONVENTION, *supra* note 5, Article 6(1).

¹⁰ *Id.*, Article 5, “On production of a medical certificate, leave shall be provided before or after the maternity leave period in the case of illness, complications or risk of complications arising out of pregnancy or childbirth. The nature and the maximum duration of such leave may be specified in accordance with national law and practice.”

¹¹ MATERNITY BENEFIT ACT, *supra* note 4, § 10.

¹² *See infra* text accompanying notes 17-24

¹³ Mordehai Mironi, *Work, Family and the Law in Israel*, 27 COMP. LAB. L. & POL’Y J. 507 (2006).

¹⁴ Ifat Matzner Heruti, *All You Need is Leave? Rethinking the concept of Paternity Leave*, 21 CARDOZO JL GENDER. 475 (2014).

¹⁵ Central Civil Services (Leave) Rules, 1972, § 43-A.

¹⁶ Employee includes an apprentice and a probationer.

¹⁷ CENTRAL SERVICES RULES, *supra* note 17.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

stipulated period, the leave is deemed to have lapsed.²¹ Payment for the period of this leave is equal to the pay that is last drawn immediately before going on leave. This provision has been extended, in 2009, to adoptive fathers as well.²²

Several State governments are also following in the footsteps of the Central government and extending similar benefits to their respective employees. These include Delhi, Gujarat, Maharashtra, Rajasthan, etc.²³ In Delhi, even the staff of unaided public schools have been extended this benefit by the State government.²⁴ Similarly, public sector banks such as the Reserve Bank of India offers paternity leave to their male employees with newborn child.²⁵

While the government sanctions paternity leaves for its employees, there are, at present, no legal obligations, in India, on the private sector companies to allot paternity leaves. This makes the concept of paternity leave open to interpretation by different companies. Nonetheless, several progressive companies tend to provide their male employees with such leaves. These companies include NIIT, Google, Microsoft, Intel and Accenture.²⁶ Cisco offers its employees 12 weeks' worth of paternity leave.²⁷ Facebook, has recently extended, to all its employees globally, paid paternity leave for a period of four months, as is offered to its employees in the United States of America.²⁸ TCS, one of India's largest private-sector employers, also acknowledges the need for paternity leave, and thus offers special leaves to its employees, who are single caregivers to an adopted child.²⁹

Interestingly, even sans legislation on the subject, the Delhi High Court passed a judgment that granted paternity leave to employees of private schools. This judgment was delivered in the year 2009. In this celebrated judgment, the Court not only recognized paternity leaves but also awarded the claimant the salary that had been deducted on account of these leaves. All these developments echo a change in the Indian social climate with respect to male caregiving roles. Thus, it now becomes incumbent upon the legislature to harness this shift in attitude and provide an impetus to Indian fathers, and not only government employees to avail of paternity

²¹ CENTRAL SERVICES RULES, *supra* note 17.

²² *Id.*, § 43-AA

²³ Palak Lotiya, Paternity Benefits Facilitate Fathers, available at <http://www.paycheck.in/main/career-tips/workandpay/paternity-benefits-facilitate-fathers> (Last visited 28th September, 2016)

²⁴ Jayalakshmi Venugopal, *Companies give dads a break*, DNA INDIA, October 23, 2005.

²⁵ Vinson Kurian, Paternity Leave for Bank Officers from June 1, THE HINDU, May 26, 2015.

²⁶ CENTRAL SERVICES RULES, *supra* note 17.

²⁷ Insiya Amir, *Indian mothers get leave, but what about the fathers ?*, TIMES OF INDIA, April 19, 2009.

²⁸ Shalini Nair, *In fact: The strong case for a policy on paternity leave in India*, THE INDIAN EXPRESS, January 18, 2016.

²⁹ Archana Sharma, *In a first, Mumbai cop takes paternity leave*, TIMES OF INDIA, November 19, 2007.

leave schemes.³⁰ The next section of this paper will examine the advantages of introducing a paternity leave scheme in India.

(B) Need for a paternity benefits scheme in India

It is argued in this section of the paper that there exists a need for a dedicated paternity leave scheme. It posits that paternity Leave can be used as a tool to break away from traditional caregiver structures and embrace a more gender-equal division of household labour. *Additionally, it has the potential to act as a gender equalizer in the workplace.*

- The case for Dedicated Paternity Leave

Paternity leave is generally given for a short period around the time of childbirth. However, it can be provided either as a specified and separate leave for fathers or is covered under “special leave” provisions that are available to all employees. Special leave provisions allow for a specific number of leaves that can be claimed in addition to the stipulated annual leaves for grounds that are expressly laid down. These grounds include childbirth, family events, etc. Even though most of these provisions make it possible for employees to take leaves for caring for the mother and the newborn at the time of childbirth, they are not specific leaves characterised for paternity. They can be used for other family-related events such as emergencies, weddings, deaths, etc.

As a result, there may not be any leave days available to be claimed at the time of childbirth. On account of this shortcoming, these measures fail to recognise childbirth as a crucial and legitimate concern for working fathers. This reflects the social attitude, which fails to address the needs of male employees in a caregiving role. It is therefore necessary for leaves of such nature to not be treated as substitutes for dedicated paternity leave.

- Breaking free from traditional caregiving models

In the Indian context, a 2014 review carried out by the Centre for Social Research stated, “...The right to paternity leave could be crucial for changes in the relationships and perceptions of parenting roles... The Maternity Benefit Act does not entitle working men such leave, and thereby does not make an adequate effort in the struggle towards a gender-balanced approach to caregiving and unpaid domestic work.”³¹

Traditional notions of caregiving attribute all filial responsibilities to the woman.³² This

³⁰ See *infra* text accompanying note 59; The ECORYS study as well as the Gender Equality Institute has observed that (parental) leave schemes reflect whether a Member State follows a culture of the (single - male -) breadwinner or rather the dual earner model, in which men and women alike are in paid employment.

³¹ SHALINI NAIR, *supra* note 30.

³² Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER. 20 (2005).

particular form of discrimination stems from the stereotype of a woman's role as the caregiver and the man's role as the breadwinner.³³ Thereupon, such a skewed model of parentage, largely contributes to the inability of women, to achieve an equal footing in the job market.³⁴

The dogma of the woman acting as a primary caregiver persists in countries across the world. This, in turn, has led to males shirking their filial responsibilities in the fear of appearing 'weak' or less 'masculine'.³⁵ This social norm has come to permeate the workplace as well, thus manifesting itself in the low uptake of paternity leave provisions. It is interesting to note, that this stigmatization has a negative impact on both the female and male parent, as well as the newborn child.

Male employees involved in caregiving generally experience mistreatment and harassment as opposed to working fathers not involved in caregiving, or male employees without children.³⁶ Research on male employees in Israel evinced hostile treatment³⁷ of fathers that claimed paternity leave. Studies in the United States show the general perception of employers, towards fathers claiming parental leave, as less committed. As a result, these fathers were evaluated lower than their counterparts who did not claim such leave.³⁸ Similarly, male employees who claimed family leave were considered to be poor workers.³⁹

Clearly, there exists a double standard wherein women are viewed as bad mothers if they focus on their work; and on the other hand, men are considered successful if they achieve professionally and hence provide for their families.⁴⁰ Evidence of male employees avoiding paternity leave indicates that they too acknowledge this double standard. In the same vein, if employers perceive, the utilization of family benefit policies, to be exclusively characteristic of female workers, rational employers may develop a myopic view towards young women in the workforce and assign them less meaningful jobs.⁴¹ In this regard, it is essential to up men's

³³ *Id.*

³⁴ Nancy Holmstrom, *Women's Work: the Family and Capitalism*, 45(2) SCIENCE AND SOCIETY. 197 (1981)

³⁵ Joan C. Williams, *Beyond the Maternal Wall: Relief for Family Caregivers who are discriminated against on the job*, 26 HARV. WOMEN'S J.L. 79 (2003)

³⁶ Jennifer L. Berdahl & Scott H. Moon, *Workplace Mistreatment of Middle Class Workers Based on Sex, Parenthood, and Caregiving*, 69 J. SOC. 341 (2013).

³⁷ The hostility took the form of demeaning and disrespectful comments from colleagues as well as employers.

³⁸ Scott Coltrane, Elizabeth C. Miller, Tracy DeHaan, & Lauren Stewart, *Fathers and the Flexibility Stigma*, 69 J. SOC. 281 (2013)

³⁹ Laurie A. Rudman & Kris Mescher, *Penalizing Men Who Request a Family Leave: Is Flexibility Stigma a Femininity Stigma?*, 69 J. SOC. 322 (2013).

⁴⁰ Keith Cunningham, *Father Time: Flexible Work Arrangements and the Law Firm's Failure of the Family*, 53 STAN. L. REV. 992 (2001).

⁴¹ LESTER, *supra* note 34, 24. *see also*, Barry McCormick, *A Theory of Signaling During Job Search, Employment Efficiency, and "Stigmatized" Jobs*, 57 REV. ECON. STUD. 308 (1990)

uptake of family leave policies, such that the schemes are no longer ascribed a ‘women’s benefit’ identity tag. Thus, making it less rational for employers to typecast female workers.

Several scholars also defend family policies on the grounds of their potential to enhance child development. For instance, Professor Gillian Lester has concluded that the lack of a male figure in the child’s early stages negatively impacts the development of the child.⁴² Studies, carried out in this regard have gone to show that fathers’ involvement in child-rearing, “leads to closer, more satisfying relationships with their children; the opportunity to witness and take part in their development; and a feeling of competency through child care.”⁴³

Instead, the ‘absentee father’, further breeds a culture of parenting where the father’s caregiving role also comes to be measured by his professional success⁴⁴, as opposed to any interaction or time spent with the child. It is a vicious circle wherein, the absence of a male caregiving role, prompts workplace success metrics to percolate into the family matrix. The introduction of paternity leave helps bridge this divide; as it intervenes at a crucial time for renegotiation of household work⁴⁵; which in turn, better equips men as caregivers by way of early involvement.⁴⁶

In order to encourage male employees to deviate from such socially assigned gender roles, paternity leave must necessarily be incentive-driven.⁴⁷ Ultimately, the dearth of such a model within the legal framework reinforces the woman’s role in the household as a primary caregiver of the newborn child and perpetuates a system of discrimination against fathers who opt for a more active role of child-rearing. This, in turn, reinstates gender-based bias and discrimination in the workplace, leading to additional workplace conflicts for women even in the context of existing paternity benefit schemes; given their low utilization by fathers. Remedies to rectify the low uptake of paternity schemes will be discussed in subsequent chapters.⁴⁸

- Paternity Leave as a tool to create gender equality in the workplace

Most countries, including India, have enacted legislation that provides for maternity benefits. These benefits, as a general rule, include maternity leave within its ambit. The objective of such family welfare schemes is to help working women achieve a work-family balance.⁴⁹

⁴² Peeter Fredlund, *Who takes paternity leave? A cohort study on prior social and health characteristics among fathers in Stockholm*, 31. J PUBLIC HEALTH POLICY. 326 (2010); LESTER, see *supra* note 34, 18.

⁴³ AYANA, *supra* note 2, 300.

⁴⁴ FUDLAND, *supra* note 44, 326.

⁴⁵ *Id.*

⁴⁶ Kathryn Kroggel, *Absent Fathers: National Paid Paternity Leave for the United States- Examination of Foreign and State Oriented Models*, 23 Penn St. Int’l L. Rev. 441 (2004).

⁴⁷ See *infra* text accompanying notes 88-96.

⁴⁸ *Id.*

⁴⁹ Chuck Halverson, *From here to Paternity: Why are Men Not Taking Paternity Leave under the Family and*

Although these schemes are considered to be beneficial legislation, they often create a backlash against the beneficiaries. This is because legislation providing for maternity leaves, not only specify periods for job secured leave, but also provide for wages to be paid for the given period. While these legislations seek to benefit expecting female employees, they often fail in their objectives as they place an additional burden on employers. Furthermore, the lack of a 'business case'⁵⁰ for the introduction of family schemes, acts as a catalyst for enhanced discrimination against female employees.⁵¹

This discrimination is not limited to pregnant employees but extends to expecting women as well as female employees in general. It manifests itself in several forms. Often enough, employers intentionally avoid hiring young female employees out of the fear that they will claim their maternity benefits at some point in their employment. Employers may also try to come up with reasons to terminate expecting female employees in order to avoid taking on the burden put on them by these legislations.

Such gendered practices have long become entrenched in modern-day society, such that it is now a universal reality mandating the intervention of the International Labour Organisation. The Convention⁵² has called for members to adopt measures to prevent discrimination in the field of employment, especially on grounds of maternity. Non-discrimination in relation to maternity means the right of women to not be treated any less favourably in any work situation on account of their sex, or because of circumstances originating from their reproductive function.⁵³ In order to achieve such non-discrimination, measures beyond the mere general prohibition of any discrimination based on maternity are required.⁵⁴

Additionally, Professor Martin Malin has observed that "as long as parental leave remains de facto maternal leave, work-family conflicts will remain a significant barrier to women's employment and a significant source of discrimination against women."⁵⁵ Per contra, if male employees were to take parental leave just as women do, bargaining power in the job market would be more equal.⁵⁶

In India, the lack of any legal provision for paternity leave, allows employers to completely evade any such responsibility when hiring male employees. Not only does this put women at a

Medical Leave Act?, 18 WIS. WOMEN'S L.J. 267 (2003).

⁵⁰ *Id.*

⁵¹ LESTER, *supra* note 34, 23.

⁵² MATERNITY PROTECTION CONVENTION, *supra* note 5.

⁵³ AYANNA, *supra* note 2, 324.

⁵⁴ *Id.*

⁵⁵ Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047 (1994).

⁵⁶ LESTER, *supra* note 34, 23.

massive disadvantage, but it also helps strengthen, the already prevalent gender bias in the Indian workplace. It is argued, in this paper that while the introduction of a paternity leave scheme may not, in itself, be sufficient to rectify this sort of gender profiling; it is nonetheless a crucial first step towards a gender-equal workplace setup.

III. GLOBAL SCENARIO

The International Labour Organization is yet to develop an international standard on paternity leave. Instead, at present, it has called upon governments to formulate domestic policies which provide for an equal sharing of filial responsibilities.⁵⁷ However, the ILO has gone on to state that such schemes should include incentive-driven paternity leave policies. Thus, the next section of this paper reviews the domestic policies of a different jurisdiction, with a specific focus on paternity leave provisions.

(A) Trends of paternity leave in foreign jurisdictions

The concept of paternity leave, as part of parental leave⁵⁸, came into being in Sweden in the year 1974. This category of paternity leave has now been adopted by 7⁵⁹ out of the 187 member states, as per the latest report of the International Labour Organisation (hereinafter referred to as the 'ILO'). However, data shows that utilisation of this benefit is biased towards the female gender. In Sweden itself, men, in the year 1995, failed to avail even as little as 10% of the leaves that they were eligible for.

Following are the statistics of the paternity leave benefits in the national legislations of the 79 countries for which the ILO has information. These countries include "29 in Africa, 7 in Asia, 5 in Eastern Europe and Central Asia, 24 in the Developed Economies, 13 in Latin America and the Caribbean and 2 countries in the Middle East, i.e. Saudi Arabia and the Syrian Arab Republic".⁶⁰ The length of the leave varies from country to country; however, the predominant understanding is that a two week period of paternity leave is a basic requirement.⁶¹

Paternity leave is *paid leave* in 90% of the abovementioned countries, i.e. 71 out of the 79 countries.⁶² However, there are certain exceptions to the same, namely the oft-criticized Family and Medical Leave Act (hereinafter, FMLA), in the United States. Paid leave, in these

⁵⁷ ILO Workers with Family Responsibilities Convention 1981, No 156, Article 3(1). Entry into force August 11th, 1983.

⁵⁸ Parental leave is a form of leave that both parents are entitled to, and can share amongst themselves.

⁵⁹ International Labour Organisation, *Maternity and Partner at Work: Law and Practice across the World* (2014) < <http://www.ilo.org/global/topics/equality-and-discrimination/maternity-protection/publications/maternity-partner-at-work-2014/lang--en/index.htm> >

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

jurisdictions is usually paid at the rate of 100% of the previous earnings. In India too, the Central Service Rules provide for fully-paid leave that is paid at 100% of the salary drawn immediately before the leave.⁶³ However, the Indian right to paternity leave is limited purely to central government employees, whereas the same does not hold true for the aforementioned states. In these countries, the right to paternity leave applies unequivocally to both public and private sector employees.

All jurisdictions provide for employer liability,⁶⁴ where 50% of the 79 countries provide for the entitlement to be paid by the employer, while 22 countries have a social security system for the same. In the Indian context, too, payments for maternity and paternity leave are borne by the employer alone.⁶⁵

Albeit, countries have taken several steps towards a statutory right of paternity leave; it is yet to be seen as crucial to the promotion of equal sharing of family responsibilities. Additionally, most of these countries only provide for a few days of paternity leave, and this alone may not be enough to transform traditional gender roles.⁶⁶ However, enshrining paternity leave as a statutory right in national legislation affirms that the governments, employers as well as employees value the role played by both men and women in caring for the family. This in itself is a vital step in promoting gender equality at work as well as at home.

(B) Global Structures of Paternity Leave

This section of the paper identifies three distinct models of paternity based on the broad themes of compulsory, and voluntary leaves. The concept of Compulsory paternity leave has not gained much traction in the international fora. Instead, the majority of the countries have opted for an optional paternity leave model that is secured by a specific statutory right. Under this broadhead of optional leave, there are two common types of paternity leave; namely, Shared Parental Leave or an independent statutory right to paternity leave.⁶⁷

Compulsory leave ensures that the father share childcare responsibilities with the mother, and at the same time increases their involvement in the early stages of child development. However, to date, only three countries have made paternity leaves compulsory for their male employees.

⁶³ CENTRAL SERVICES RULES, *supra* note 17.

⁶⁴ ILO, *supra* note 62; Incidence of leave cost is placed on the employer, in 24 out of 28 African countries out of 4 out of 24 Developed economies.

⁶⁵ MATERNITY BENEFIT ACT, *supra* note 4; CENTRAL SERVICES RULES, *supra* note 17.

⁶⁶ United Nations Development Programme [UNDP], *Report: Sustainability and Equity: A Better Future For us All*, available at http://hdr.undp.org/sites/default/files/reports/271/hdr_2011_en_complete.pdf (Last visited 21st September, 2016)

⁶⁷ It is hard to gauge the viability of an independent statutory right of paternity leave, given the 'unpaid' nature of this leave, provided under the FMLA.

Chile, in its national legislation, provides for, compulsory paternity leave for 5 days to be taken in the first-month post the birth of the child.⁶⁸ While, Portugal provides for a compulsory leave of 15 days, consecutive or staged, (5 of this must be consecutive and taken immediately after the birth of the child) and should be taken within 30 days of the birth of the child.⁶⁹ Employees also have an option to claim 10 additional days of paternity leave.⁷⁰ Italy, in its labour law reform in 2012⁷¹, introduced compulsory leave of 1 day with the option of two additional days of leave to be claimed voluntarily; and to be transferred, with the consent of the mother, from her share of compulsory maternity leave. However, there exist several drawbacks with respect to a mandatory paternity leave model. One such glaring shortfall, which is especially applicable to India, is that it would be to the detriment of families where the male member is the higher wage earner.⁷²

Parental leave is another popular category of leaves adopted by countries. It is usually for longer periods than both maternity and paternity leaves and may be available to either one or both parents. Some countries have now started providing parental leave that is non-transferable as well as in defined portions to each parent. This non-transferable leave available to fathers is known as ‘Daddy Quota.’⁷³ It uses a ‘Use it or Lose it’ model of leave to increase the uptake of paternity leave provisions.⁷⁴ One such example is that of Sweden, which amended its policy over time to provide for sixteen months of paid parental leave.⁷⁵

Various countries have taken cognizance of changing parentage norms, and have over time, amended and tweaked their laws to take paternity leave, or the father’s share of parental leave either compulsory, non-transferable or even incentive-driven.

IV. MATERNITY BENEFIT BILL

The paternity leave dialogue in the international fora has come to recognize a proactive male caregiving role as “one of the most significant social developments in the twenty-first century”.⁷⁶ In a similar vein, the debate on the new Maternity Benefit (Amendment) Bill, 2016

⁶⁸ OECD Social, Employment and Migration Working Papers, Huerta, M. et al., *FATHERS' LEAVE, FATHERS' INVOLVEMENT AND CHILD DEVELOPMENT: ARE THEY RELATED? EVIDENCE FROM FOUR OECD COUNTRIES*, No. 140, OECD Publishing, 2013.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Monti-Fornero Reform of Employment Law, 2012 (Italy).

⁷² HALVERSON, *supra* note 51, 271.

⁷³ MEHRUTI, *SUPRA* NOTE 16, 486.

⁷⁴ Aamna Mohdin, *How Sweden's "daddy quota" parental leave helps with equal parenting*, January 6, 2016, available at <http://qz.com/587763/how-swedens-daddy-quota-parental-leave-helps-with-equal-parenting/> (Last visited on 21st December, 2021)

⁷⁵ *Id.*

⁷⁶ AYANNA, *supra* note 2, 293.

which provides for a more forward-looking approach towards maternity benefit policies; helped bring to light public concern over the absence of Indian paternity leave provisions.⁷⁷ This dialogue has spurred talk about introducing an exclusive one month paternity leave clause period in the Rules, under the Maternity Benefit Bill.⁷⁸ These Rules will be drafted once the bill receives assent in the Lok Sabha and is enacted into legislation.

Thereupon, this section of the paper carries this debate forward and provides for a model Paternity Benefit Scheme for India. It argues that the policy should provide for paid paternity leave and should be a non-transferable entitlement provided exclusively to fathers.⁷⁹

(A) Model policy: the case for paid exclusive paternity leave in India

The law providing for paternal leave in the United States is the Family and Medical Leave Act⁸⁰(hereinafter referred to as the 'FMLA'). H. Kevin Knussman filed the first suit for sex discrimination under the FMLA.⁸¹ His wife gave birth prematurely and suffered health complications due to which she was bedridden. The FMLA provides for up to 12 weeks of paternity leave while the amended provision in Maryland allows for up to 30 days of paid leave in the capacity of the primary caregiver to the newborn or for up to 10 days in the capacity of the secondary caregiver. He was permitted leave for 10 days under Maryland law while being subject to offensive remarks from his superiors. Thereupon, he was awarded monetary compensation by the jury on the ground of mental anguish.⁸²

This case reaffirms that male employees suffer repercussions at their workplace for not behaving as per the dictation of their gender roles.⁸³ This is not only associated with the image of being a serious worker but also seen as an indication of being a "real man," and hence representative of their masculinity.⁸⁴ Masculinity is a social construct that not only exists within an institutional setting but is also dictated by it. The workplace, in modern society, is one of the most significant institutions. Hence, even though leaves are permitted legally, their utilisation depends on the culture of the organisation.⁸⁵

Scholars have recognized that a contributory factor, to the unpopularity of paternal leave provisions, is the fact that jurisdictions often fail to provide for paid parental leave.⁸⁶ This

⁷⁷ SHALINI NAIR, *supra* note 30.

⁷⁸ *Id.*

⁷⁹ Factors such as duration, funding mechanisms and compensation rates will not be analysed in the present model.

⁸⁰ The Family and Medical Leave Act, 1993, (U.S.).

⁸¹ Knussman v. Maryland, 65 F. Supp. 2d 353, 354 (D. Md. 1999)

⁸² See *supra* n. 13.

⁸³ MEHRUTI, *supra* note 16, 476.

⁸⁴ MALIN, *supra* note 57, 1052.

⁸⁵ See *id.*

⁸⁶ HALVERSON, *supra* note 52, 279.

means that availing of such leave would hamper their income, and workers often lack the financial capacity to take such a blow.⁸⁷ This undermines the objective of the legislation itself and relegates it to a mere ‘symbolic act’⁸⁸ with little or no real-world value.

Thus, the experiences of other jurisdictions indicate, that wage replacement is necessary for the success of a paternity leave policy.⁸⁹ Nonetheless, while paid leave is an essential condition for the promotion of greater gender equality, especially with respect to work-family responsibilities; it is not a sufficient condition, Another critical factor advancing the uptake of paternity leave provisions is the ‘Use it or Lose it Model’ of Paternity Leave. The ‘Use it or Lose it’ model, commonly known as the ‘Daddy Quota’⁹⁰, acts as a strong incentivize for families to utilize paternity leave options.⁹¹ This non-transferable entitlement is provided only to fathers; such that in cases of non-utilization, it is a lost benefit for the father as well as his family.⁹² In the Indian context, this model takes on the added responsibility of de-establishing gender norms, that are embedded in Indian society. The ‘Daddy Quota’ system by way of eliminating the possibility of shared leave, encourages each individual father to take leave.⁹³ Thus, this system has the long-term potential to generate a larger social acceptance for the paternity leave options.

Funding is another critical element that must be taken into account when formulating a policy on paternity leave, especially, one that provides for income replacement. It is argued in this paper, that funding for this model of paternity leave should not deviate from the current system of funding under the Maternity Benefit Act. As per provision 5 of the Maternity Act, maternity leave is funded solely by the employer. It is proposed that paternity leave in India should be funded in a similar manner.

V. CONCLUSION

If women are assured equal participation in the workplace, a necessary corollary is that men be given an equal right of participation at home, that is a right to be actively involved as a parent and not just in the capacity of breadwinners. Moreover, true substantive equality can only be achieved when both these phenomena work hand in hand, whereas the operation of one sans

⁸⁷ Wis, pg 264

⁸⁸ *Id.*, 265.

⁸⁹ Erin Gielow, *Equality in the Workplace: Why Family Leave Does Not Work*, 75 S. CAL. L. REV.1548 (2002).

⁹⁰ *Id.*

⁹¹ MEHRUTI, *supra* note 16, 484.

⁹² *Id.*

⁹³ *Id.*

the other will lead to the creation of a vacuum in society. Thus, the Maternity Benefits scheme in India, in the absence of any paternity scheme fails to achieve its true potential. Instead, it tends to rejuvenate deeply rooted gender stereotypes within the country, and at the same time generate backlash for its beneficiaries in the sphere of employment.

In view of these realities, it is crucial that paternity leave be made an inalienable entitlement and not just a suitable, convenient or attractive one, to ensure movement towards a gender-equal workplace setup. Incentives are necessary to overcome the historically and traditionally established norms that reinforce gender biases in the workplace. In this regard, the government must formulate a strategic family leave plan with the rigour to influence a shift in societal attitudes between two competing paths of behaviour. Thus, in order to attract the largest number of males, including fence-sitters; it is important to not only focus on the conscience of men or on family values but also to give due importance to monetary incentives. Thus, a well-established system of paid paternity leave could help solve these issues and help achieve a better work-family balance.
