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Maternity Benefits under the Code on Social Security 2020: The Legal Framework and Limitations

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ABSTRACT

This article examines the evolution, legal frameworks, and contemporary challenges surrounding maternity benefits in India, with an analysis of the recent Social Security Code of 2020. Maternity benefits, essential for ensuring the well-being of working mothers and their newborns, have undergone significant legislative developments over the years. The article delves into the constitutional provisions, judicial precedents, and international obligations guiding maternity benefit policies, emphasizing the imperative of upholding women's rights and social equality in the workforce. Furthermore, it critically evaluates the provisions and limitations of the Social Security Code, highlighting gaps in implementation and disparities in coverage, particularly for women in the unorganized sector. The article underscores the need for holistic support measures beyond mere leave provisions, including accessible childcare facilities and flexible work arrangements, to facilitate women's seamless integration into the workforce post-maternity. Additionally, it advocates for the inclusion of paternity leave provisions as a means to foster gender equality and alleviate the financial burden on employers. Drawing upon legal precedents and policy recommendations, the article concludes by offering suggestions for enhancing the effectiveness and inclusivity of maternity benefit policies in India, thereby fostering a conducive environment for working mothers and promoting social justice in the labour sphere.

Keywords: Maternity Benefits, Social Security.

I. INTRODUCTION

Maternity benefits are the set of safeguards provided to working women during their pregnancies and postpartum periods, to ensure the mother's physical and mental well-being and the adequate care of the newborns, through which the working women are guaranteed certain monetary and non-monetary benefits. It gives them enough time to recuperate and tend to the

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newborn's health rather than making them work in such dire circumstances. Therefore, these benefits remove the fear amongst women of losing jobs as they tend to their personal roles.

In India, maternity benefit legislation started with the Province of Bombay in 1929 and was followed by other provinces. The central government also passed three Acts, the Mines Maternity Benefit Act (Act XIX OF 1941), 1941), the Employees' State Insurance Act (Act XXIV of 1948) and the Plantations Labour Act (Act LXIX of 1951). The provisions of these enactments differed widely and ultimately the central government took remedial measures by enacting the Maternity Benefit Act (Act LIII of 1961).³

In order to better support women in the workforce, maternity benefits have undergone numerous changes in India. The Employees State Insurance Act of 1948 (ESIA), the Maternity Benefits Act of 1961 (MBA), and the Guidelines under the MGNREGA Act of 2012 were the legal framework governing maternity benefits in India prior to the passage of the Social Security Code of 2020. By offering incentives, these laws primarily sought to boost participation of female employees in the workforce.

The twelve weeks of maternity leave was first granted by the Maternity Benefit Act of 1961 and through the amendment⁴ in 2017, that amount was raised to twenty-six weeks. This leave period has been included as such in the code⁵ of 2020. While the extended leave was a welcome development, there may still be certain gaps in the legislation and its implementation.

II. MATERNITY BENEFIT AND THE CONSTITUTION OF INDIA

The State has to safeguard a working mother's job along with the health of the woman and her child, while simultaneously providing her all the amenities and services she needs. Under the article 42, one of the directive principles of state policy, it is stated that "the State shall make provision for securing just and humane working conditions and for maternity relief." The article 41 directs the state to guarantee right to work, the article 43 provides for a living wage, and conditions of work ensuring a decent standard of life, and the article 39(e) safeguards the health and well-being of the workers.

Further, the right to protect one's body is guaranteed under article 21. It includes being able to have a meaningful and honourable life, which goes beyond mere animal existence⁶. The Article

³ Sadanand Jha, *Maternity Benefits: At Present and Their Future in India*, 18 Journal of the Indian Law Institute 332-343 (1976).

⁴ Maternity Benefit (Amendment) Act, 2017, No. 6, Acts of Parliament, 2017 (India).

⁵ Code on Social Security, 2020, No. 36, Acts of Parliament, 2020 (India).

⁶ Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295.

15(3) of the Indian Constitution grants social equality and gives the government the authority to make special provisions for women, following its object of "protective discrimination" towards women. The State has been able to pass special legislation for the benefit of women because of this provision.

III. MATERNITY BENEFITS UNDER THE CODE ON SOCIAL SECURITY, 2020

The section 60 of the Code, which has been straight away taken from the Section 5 of the Maternity Benefit Act 1961, (as was amended in 2017) states that maternity benefits are payable to any woman who has worked for at least eighty days in the twelve months preceding her expected delivery date, which includes the days for which she was laid off and public holidays. During the complete period of her absence from work, maternity benefit is payable at the rate of the average daily wage⁷. The eligible female workers can avail up to 26 weeks of paid maternity leave, in which up to 8 weeks of maternity leave can be availed prior to the expected date of delivery⁸.

The Chapter IX of the Code on Social Security states that the Central Government is responsible for drafting and notifying laws and welfare schemes related to unorganised workers. These laws and schemes cover things like life and disability insurance, health and maternity benefits, old age protection, education, and other benefits which the government deems appropriate. Additionally, under Section 114 of the Code, maternity benefits are provided to the gig workers and platform workers.

Every mother who returns to work after giving birth is entitled to two nursing breaks, to continue nursing the kid until the child turns fifteen months old, as stated in Section 66 of the Code on Social Security, 2020. The length of this break is determined by the Central Government. Further, under Section 67 of the Code, 2020, any establishment with fifty or more employees is required to have a crèche facility, and the female employees are entitled to four daily visits to the crèche facility.

A woman cannot be fired by her employer for missing work during her maternity leave, as stated in Section 68 of the Code, unless the termination is due to gross misconduct as prescribed by the Central government, in which case an employer may deny the female employee her bonus, or maternity benefit, or both. Under Section 68(2) of the Code, a woman

⁷ The average daily wage is payable for the days she worked in the three calendar months immediately preceding the date she leaves on maternity leave.

⁸ Code on Social Security, 2020, § 60(3), No. 36, Acts of Parliament, 2020 (India).

who is refused maternity benefits or dismissed while on maternity leave has sixty days from the date of the order to appeal to a competent authority. The competent authority's judgment in this regard shall be final.

Further, the section 69 of the Code provides that a woman who is eligible for maternity benefit under the terms of this Chapter may not have any deductions from her regular daily salary made for the sole reason that she was delegated less challenging work, in accordance with section 59(3) or that she took nursing breaks⁹.

The section 142 of the Code seeks to require an employee or unorganised worker or any other person, to establish his identity or, as the case may be, the identity of his family members or dependants through Aadhaar number, for the purposes of registration as member or beneficiary; or seeking benefit whether in kind, cash or medical sickness benefit or pension, gratuity or maternity benefit or any other benefit or for withdrawal of fund; or availing services of career centre; or receiving any payment or medical attendance as Insured Person himself or for his dependants. It further provides that any employee who is a foreigner, shall obtain and submit Aadhaar number for establishing his identity, as soon as possible, on becoming resident within the meaning of clause (v) of section 2 of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016.

Any employer who wilfully refuses to provide maternity benefits to a woman that she is entitled to under the Code faces up to a six months jail sentence and/or a fine of INR 50,000 under Section 133 of Chapter XII of the Code. A second offense is punishable by a minimum of two years and a maximum of three years in jail, as well as a fine of INR 3,00,000, as per Section 134 of the Code.

IV. LIMITATIONS AND GAPS

The Code was seen as a chance to bolster the status of female workers and close any gaps in the previous labour law legislations. Instead, the Code in the chapter VI, under the heading 'maternity benefits' has simply merged all the previous laws pertaining to social security, disregarding the legal issues and challenges.

Although, the Code provides for a maternity leave of 26 weeks, this is applicable for a woman's first two surviving children and for the third child and subsequent children, the maternity leave stands at a 12 weeks period.

⁹ Code on Social Security, 2020, § 66, No. 36, Acts of Parliament, 2020 (India).

Although the Code, permits the application of maternity benefits to the unorganized sector, it seems unlikely given the absence of a timeframe, duration, schematic provisions, etc. Even that description is vague because the "unorganized sector" depends on enterprises, notwithstanding the Code's absence of a definition for the term.

Until their child turns 15 months old, female employees are entitled to two 15-minute nursing breaks. Nonetheless, the majority of female workers in the unorganized sector are not covered by this rule, which solely applies to women in the organized sector¹⁰. Because of this, many women miss out on these vital breastfeeding intervals that are essential to the child's growth and development.

Paternity leave remains an exclusive entitlement for government personnel, as delineated by the paternity benefit regulations¹¹ instituted by the government in 1999, affording a maximum duration of 15 days. Conversely, within the private sector, male employees are consistently deprived of this privilege due to the absence of statutory provisions mandating its provision. Notwithstanding the dearth of legislative mandates in the private domain, a select few multinational corporations in India have demonstrated commendable initiative by extending such crucial benefits to their male workforce.

Under the Indian labour regulations, casual labourers, farmers, and self-employed women continue to be unrecognized. When a woman gets pregnant, she is seen as a liability by the employer. The new law contains no provisions to do away with this way of thinking. Maternity benefits are not available to women who work for small businesses or are self-employed because the rule only applies to companies with ten or more employees¹².

While extending maternity leave duration is beneficial for mothers, it imposes financial burdens on employers, particularly small and medium-sized enterprises. SMEs may struggle to manage the costs associated with prolonged employee absences and hiring temporary replacements. This financial strain could disincentivize SMEs from hiring women of reproductive age, leading to potential discrimination in hiring practices.

Addressing the expense associated with providing creche facilities emerges as an additional challenge warranting resolution. While the legislation does not expressly mandate that employers shoulder the financial burden of such facilities, an interpretive analysis of the law

¹⁰ Id.

¹¹ Central Civil Services (Leave) Rules, 1972, Rule 43-A (India).

¹² Neeta Lal, *The New Maternity Benefits Act Disregards Women in The Unorganised Sector*, *The Wire*, (Aug. 21, 2016), <https://thewire.in/law/indias-new-maternity-benefits-act-criticised-as-elitist>.

suggests this inference. Clarification provided by the Ministry of Labor and Employment through a response to a Right to Information (RTI) inquiry affirms the overarching objective of the legislation: to necessitate employer provision for childcare facilities, despite the absence of explicit legal mandate. Consequently, employers are effectively tasked with assuming responsibility for financing early childhood care.

While the Code aims to cover a wide range of establishments and workers, it may not apply uniformly to all sectors. Some smaller establishments might be exempted from certain provisions, which could affect the availability of maternity benefits for women working in those establishments.

In *Municipal Corporation of Delhi v. Female Workers (Muster Roll) 2000*, the court held that daily wage women workers working on the muster roll are entitled to receive maternity leave and benefits. That they cannot be denied the maternity leave, pay, and allowances only because the women were working on a daily wage basis on muster roll and not in regular employment. That, the activity of the Delhi Municipal Corporation of construction work falls well within the ambit of the Maternity Benefit Act¹³.

Maternity includes both child bearing and child care. There should be no distinction between a surrogate mother and a biological mother. Five high courts across India have uniformly held that women employees who have children through surrogacy would be entitled to maternity benefits in accordance with the rules. The earliest case that seems to have addressed the issue of maternity leave in the case of children born of surrogacy is *K Kalaiselvi v Chennai Port Trust*¹⁴ decided by the Madras High Court in 2013. Justice K Chandru's judgment holds that there is nothing wrong or per se illegal in granting maternity benefits under the Port Trust's leave regulations. The regulations relating to maternity are interpreted to mean and include surrogacy as well, and the court found that there was no reason to deny such leave even if there is no specific mention of surrogacy¹⁵. According to General Comment 14 of the ICESCR¹⁶, maternal healthcare is an essential duty of the state that cannot be disregarded. The state is obligated to provide maternity benefits to surrogate mothers and cannot withhold such support from them.

¹³ Maternity Benefit Act, 1961, No. 53, Acts of Parliament, 1961 (India).

¹⁴ 2013 SCC OnLine Mad 811.

¹⁵ Alok Prasanna Kumar, *Surrogacy and the Laws on Maternity Benefits*, 52(3) Economic and Political Weekly, 10-11 (Jan. 21, 2017).

¹⁶ International Covenant on Economic, Social and Cultural Rights, 1967.

V. SUGGESTIONS AND WAY FORWARD

It needs to be understood that maternity benefits extend beyond just leave provisions. There's a need for comprehensive support measures, including access to affordable childcare facilities, lactation support at workplaces, and flexible work arrangements to facilitate women's return to work post-maternity leave. Addressing these aspects is crucial for creating a supportive environment that enables women to balance their caregiving responsibilities with their careers.

The state providing assistance to working mothers in this regard, and sharing the monetary burden placed on the employers, is an essential in the fight against workplace discrimination and in advancing female participation in the workforce. One way through which this can be achieved is increasing the coverage of mandated social insurance for all workers.

Certain legislative attempts that were founded on ILO conventions in the past had the opposite outcome. The employers can be reluctant to hire women as a result of policies aimed at protecting women's interests, such as restricting women from working night shifts in factories and underground mining. Maternity benefits shouldn't be discontinued as a result of this. Perhaps granting paternity leave would put things back in balance and remove the incentive for employers to employ men solely¹⁷.

The provisions regarding nursing breaks and creche facility are only technically operative for a minuscule number¹⁸. It should be mandated that all employers must contribute to providing creche and childcare facilities. This expansion will ensure that more women working in various services and professions are covered by protective laws. Additionally, the current regulations should be updated to allow for flexibility in meeting the obligation to provide creche facilities. This could involve individual employers maintaining creches, groups of employers pooling resources for common creches, or employers contributing to creches managed by suitable governmental or non-governmental organizations.

Although the creches are an essential support system for working mothers. The women workers often face difficulties bringing their infants to workplaces, especially due to long commutes and hazardous environments. Worldwide experience over the last 50 years shows that workplace childcare is only effective when work and housing are close, as seen in institutional campuses. Even socialist countries are transitioning towards residential creches. Infant care in creches is

¹⁷ C. S. Venkata Ratnam, *India and International Labour Standards*, 35(4) Indian Journal of Industrial Relations 461-485 (Apr., 2000).

¹⁸ Mina Swaminathan, *Breast-Feeding and Working Mothers: Laws and Policies on Maternity and Child Care*, 28(18) Economic and Political Weekly, 887-891 (May 1, 1993).

challenging, with a focus on older children, typically over eight months old. The creches should therefore be seen as a secondary measure, and tertiary support systems like part-time work, take home work, flexible timings, shift work and extended parental leave should be the primary focus. These systems aim to provide flexibility and support for mothers in the first year after childbirth and beyond, ensuring better childcare arrangements and work-life balance¹⁹.

A fundamental shift in perspective is necessary, acknowledging that a woman's role in reproduction is a form of "social production." This means that time spent on maternity should not be viewed solely as a break from economically productive work but as active participation in the socially and economically valuable work of raising the next generation or fostering human capital development. In this context, a working mother balancing both production and reproduction requires support from various sources including family, community, state, and employer. Legal intervention can play a crucial role particularly concerning the state and employers in providing this support²⁰.

Paternity leave needs to be inculcated in the legislations, for tending to young children and as a support system that encourages women to seek employment, participate in active public life and achieve equality.

Developing digital platforms or mobile applications that facilitate access to maternity benefits for gig workers and contractual workers. These platforms could provide information on available benefits, facilitate enrollment in maternity benefit schemes, and streamline the process of accessing benefits, making it easier for workers to access the support they need.

The National Food Security Act, enacted in August 2013, endeavours to ensure food security by affording fundamental entitlements to food grains for every household, as well as food provisions for pregnant and lactating women, along with children up to the age of 14. According to the provisions, each pregnant woman and lactating mother is entitled to complimentary meals throughout pregnancy and for six months following childbirth, facilitated through local anganwadis, aimed at meeting specified nutritional standards, in addition to a significant cash maternity benefit. Other such supporting steps can be taken by enacting legislative provisions which assist in fulfilling the maternity benefit goals.

¹⁹ Id.

²⁰ Lakshmi Lingam And Vaidehi Yelamanchili, *Reproductive Rights and Exclusionary Wrongs: Maternity Benefits*, 26(43) Economic and Political Weekly, 94-103 (Oct. 22, 2011).

VI. CONCLUSION

The evolution of maternity benefits in India reflects a journey towards recognizing the fundamental need of providing support to women during pregnancies and child care, while ensuring their continued participation in the workforce. There has been development, from the early 20th-century legislative attempts to the comprehensive framework given in the Code on Social Security, 2020. However, given the gaps and limitations that still exist, there is still a long way to go.