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Paternity Leave - Amending Article 42

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ABSTRACT

In January 2021, Indian skipper Virat Kohli took a paternity leave and opted to leave the India-Australia test series in between. Since then there is an ongoing debates and discussions on paternity leave. Currently, India does not have any nationwide paternity leave policy. Although in 2017, a bill was introduced to make such policy but it could not be passed. This paper analyses the importance and need for paternity leave while giving the world wide scenario of it. The paper argues for adding the concept of paternity leave in the constitution along with article 42 of the Indian constitution. Our constitution provides for maternity relief under the article 42 of directive principles of state policy. Various laws have also been made to protect women interest during her maternity period at workplace. Unfortunately still women participation is far below the world's average and still women in our country being discriminated or at disadvantageous position at workplace. The paper argues for amending this article and adding paternity leave giving importance to a gender neutral society and eliminating the patriarchal gender roles where child is considered to be sole responsibility of women. This amendment can bring an attitudinal change in society and the paper also discusses the need and benefits of such amendment in the present fast pacing world.

Keywords- Gender neutral society, Article 42, paternity leave.

I. INTRODUCTION

The battle for equality between men and women is an ongoing struggle. The amount of time spent caring for children and the family is one of the most significant disparities between men and women in general. One of the reasons that women in most parts of the world have less opportunities to pursue a career, be financially stable, or participate in politics is because of the disparity between men and women. This disparity is important, and the only way to address it and achieve true gender equality is to seek an equitable distribution of household work and workplace. One place to start is to make sure that from the moment an infant is born; all parents have joint responsibility for the child's wellbeing. Not only should mothers be given time off to provide for their children, but fathers should be given time off as well. It should be as natural

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for a father to care for his child as it is for a mother.

In India, Time has come to create more gender neutral and just society and making paternity provision for men can be a big step taken in this direction which will not only help in eliminating stereotypes and male macho attitude from the society but also in relieving psychological pressure and burden of rearing child from women which will ultimately ensure her freedom and allow her to work freely. Paternity leave has been widely recognized all around the world and received positive responses and various European countries and multi-national companies (MNC's) have framed policies recognizing it.

II. UNDERSTANDING THE CONCEPT OF PATERNITY LEAVE

According to oxford dictionary "Paternity Leave is a length of time where the father of a new baby is permitted to be away from work". In more simple words², Paternity leave is typically a brief amount of time taken by the father shortly after the birth of his child to help care for the child and support the mother.³

According to research, fathers' leave, men's family commitments, and child growth are all related. Many who take time off after giving birth, particularly those who take two weeks or more, are more likely to be concerned with their young one. This can reflect changes in families, expectations of parental roles, and dominant norms, and can have a positive impact on gender equity at home and at work.⁴

Paternity leave is available to those with parental responsibility. This requires them to be the child's biological parent (whether or not they live with the child) and to accept any responsibility for its upbringing. They may either be the child's parental or foster parent, or their partner.⁵

III. PATERNITY LEAVE WORLDWIDE

Paternity leave law prevailed in 78 of the 167 countries with available data in 2013. The areas with the highest changes in paternity leave legislation were

Eastern Europe and Central Asia, Developed Economies, and Latin America and the Caribbean have all received assistance since 1994. Paternity leave is paid in 70 of the 78 countries where

² Gavett G., Brave Men Take Paternity Leave, HARV. BUS. REV., July 14 2014, at 3.

³Addati, L., Cassirer, N. and Gilchrist, K., 2014. Maternity and paternity at work: Law and practice across the world. International Labour Office.

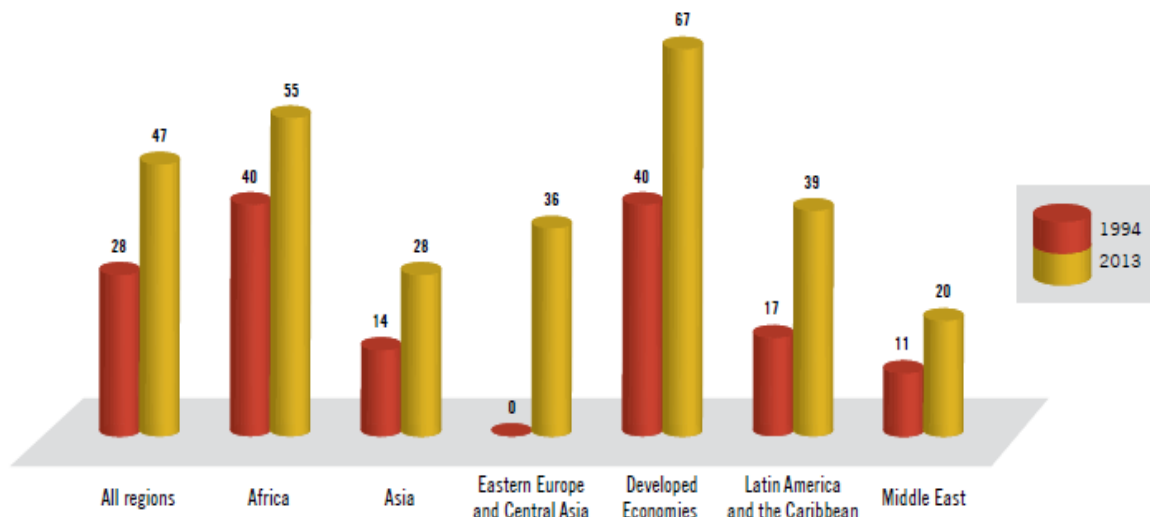
⁴ M. Huerta et al.: "Fathers' leave, fathers' involvement and child development: Are they related? Evidence from Four OECD Countries", in OECD Social, Employment and Migration Working Papers, No. 140 (OECD Publishing 2013)

⁵ MEHROTRA, C. and SONI, H.K., PREVALENCE OF PATERNITY LEAVE IN OFFICE GOING PERSONNEL ANJALI SHARMA, ASHNAB KHAN, AYUSHI CHATURVEDI.

it is accessible (89 percent).⁶

The Nordic welfare states were among the 1st to publicly promote greater use of paternity leave, with Sweden leading the way in 1974 by declaring parental leave gender neutral, followed by Iceland, Denmark, Norway, and Finland.⁷

Figure 2. Provision of statutory paternity leave, by region, 1994 (141 countries) and 2013 (167 countries) (%)



Employees in the private sector: Paternity Leave There is no regulation requiring private companies to give paternity leave to their workers but still some MNC's have this provision

Some of the MNC with such policies are-⁸

- a. Zomato: 26 weeks parental leave
- b. Microsoft : 12 weeks
- c. Infosys : 5 days
- d. TCS : 15 days
- e. Oracle : 5 days
- f. Starbucks : 12 weeks
- g. Facebook : 17 weeks

⁶ Addati, L., Cassirer, N. and Gilchrist, K., 2014. Maternity and paternity at work: Law and practice across the world. International Labour Office

⁷ ILO Working Conditions Laws Database – Maternity Protection, 2013. Available at: <http://www.ilo.org/travdatabase> and the Conditions of work digest: Maternity and work (ILO, 1994).

⁸ MEHROTRA, C. and SONI, H.K., PREVALENCE OF PATERNITY LEAVE IN OFFICE GOING PERSONNEL ANJALI SHARMA, ASHNAB KHAN, AYUSHI CHATURVEDI.

- h. Deloitte : 16 weeks
- i. IKEA: 6 months of Parental Policy
- j. Tata Steel: 10 days of Parental Leave

UNICEF – 16 weeks

Examples of countries with leave provisions in national legislation which can be used by fathers at the time of childbirth⁹

Country	Provision
Africa	
Algeria	Three days' paid paternity leave
Cameroon	Maximum ten paid days' special family leave
Djibouti	Three days' paid paternity leave
Ethiopia	Five days of unpaid leave in the event of exceptional or serious events
Kenya	Two weeks' paid paternity leave
Madagascar	Ten days of unpaid leave for family events
Rwanda	Four days' paternity leave
Seychelles	Four days of paid leave for "compassionate reasons"
South Africa	Three days' paid family responsibility leave
Tanzania	Three days' paid paternity leave
Togo	Up to ten days of paid leave for "family events directly related to home"
Tunisia	One day of paternity leave (private sector); two days (public sector)
Uganda	Four working days' paid leave immediately after delivery
Asia (East, South-East, Pacific and South)	
Afghanistan	Ten days of "essential leave" (unpaid) that can be used for the birth of a new child
Cambodia	Ten days' special leave for family events
Indonesia	Two paid days when wife gives birth
Myanmar	Six days of paid "casual leave" that can be used by fathers to assist their spouses at the time of confinement
Philippines	Seven days' paid paternity leave for married workers
Viet Nam	Workers are allowed unpaid leave for family reasons
Central and South-Eastern Europe (Non-EU) and CIS	
Azerbaijan	Fourteen days' unpaid leave for men whose wives are on maternity leave
Bosnia and Herzegovina	Seven working days' paid paternity leave
Croatia	Seven days' paid leave for personal needs
Macedonia	Up to seven days' paid leave (determined by collective agreements)
Developed Economies and EU	
Belgium	Ten days' paid paternity leave
Estonia	Fourteen calendar days
Finland	Eighteen days' paid ²

⁹ The table accounts for leave provisions reserved for fathers or leave that can be used by fathers as paternity leave. It does not include parental leave provisions that can be used by the father or mother unless a portion of the leave is reserved for fathers or such leave is indistinguishable from paternity leave (e.g., in Norway and Sweden maternity, paternity and parental leave are all considered part of the same system).

Country	Provision
France	Eleven days' paid paternity leave, plus three days' paid leave for family reasons
Hungary	Five days' paternity leave
Iceland	Three months' paid parental leave reserved for the father
Latvia	Ten calendar days
Netherlands	Two days' paid paternity leave
New Zealand	Two weeks' unpaid paternity leave (or one week if only employed six months)
Norway	Ten weeks' paid parental leave reserved for the father
Portugal	Five days' paid paternity leave
Romania	Five working days' paid paternity leave
Slovenia	Ninety days' paternity leave (15 to be used before child is six months, remainder to be used before child is 3)
Spain	Four weeks' paid paternity leave ³
Sweden	Ten days' paid paternity leave, plus two months' paid parental leave reserved for the father
United Kingdom	Two weeks' paid paternity leave
Middle East	
Saudi Arabia	One day of paid paternity leave
Latin America and the Caribbean	
Argentina	Two days' paid paternity leave
Bahamas	One week of unpaid family-related leave
Brazil	Five days' paid paternity leave
Chile	Five days' paid paternity leave
Colombia	Eight days' paid paternity leave
Guatemala	Two days at birth of child
Paraguay	Two days' paid paternity leave
Uruguay	Three days' paternity leave for civil servants

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IV. PATERNITY LEAVE IN INDIA

In India there is no national legislation on paternity leave but there are provisions in some sectors or jobs where paternity leave is given, for the first time in 1999,, the Indian government issued a notification under Central Civil Services (Leave) Rule 551 (A) allowing a male Central Government employee (including an apprentice or probationer) with less than two surviving children to take 15 days of paternity leave to care for his wife and new born child. Under this provision, the central government employee may take this leave (15 days) before or after the child's birth, but not more than 6 months after the child's birth. ¹²Also, the private companies are free to make paternity leave policies if they desire to do so. Thus, it is on the whim and will of the employer to grant paternity leave.

¹⁰ Sources: ILO Database of Conditions of Work and Employment Laws on Maternity Protection (2009) and ILO NATLEX.

¹¹ Sources: ILO Database of Conditions of Work and Employment Laws on Maternity Protection (2009) and ILO NATLEX.

¹² Central Civil Services (Leave) Rules 1972, Rule 551 (A)

V. PATERNITY LEAVE IN THE JUDICIARY

There have been many occasions where query or demand for paternity leave reached the Courts but none of them got success in getting a nationwide formulation of such policy.

In *Chander Mohan Jain v. N.K Bagrodia Public School*, Chander Mohan Jain, a private school teacher, challenged N K Bagrodia Public School's denial of his paternity leave application and deduction of his salary for taking leave to provide for his wife and newly born child in the High Court of Delhi in 2009. Despite the lack of regulation, the New Delhi High Court ruled that all male staff of unaided recognized private schools is entitled to paternity leave in this case. The court then ordered the school to refund Chander mohan Jain the money that had been deducted. As a result, private-sector teachers are being relieved as they are under the control of Director of Education and thus CCS (paid) leave would be applicable.¹³

In the case of *RAKESH MALIK V STATE OF HARYANA*¹⁴, the petitioner who was state government employee prayed for paternity leave but was denied which he later challenged in the High Court and urged the Court under the ambit of Article 226 to frame such policy but the Court denied.

Also, In the case of *Vijendra Kumar V. Delhi Transport Corporation*, govt of NCD¹⁵, The Court was once again called to intervene where a driver in the Delhi Transport Corporation filed a OA but the Court rejected the appeal stating that there were no provisions in the DTC regarding paternity leave and CCS Paternity leave rules were not adopted by them.

VI. PATERNITY LEAVE BILL 2017

For the first time in 2017, in a historic move MP Rajiv Satav proposed a Paternity Benefit Bill in loksabha to safeguard the paternity rights of working men and provide a nationwide recognizance to paternity with uniform policy across all sectors. Unfortunately the bill cannot be changed into law and India is still a country without any legislation on paternity leave.

Important Provisions of the bill¹⁶-

Mainly the bill proposes to include employees from both organized and unorganized sectors to get benefit from the Paternity Benefit Act 2017. It proposes to create a Parental Benefit Scheme Fund for extending paternity benefits where all employees and employers would contribute in the ratio prescribed by union government. The Employer needs to pay the paternity amount in

¹³ 2009 SCC OnLine Del 2693

¹⁴ (2013) SCC OnLine P&H 3546

¹⁵ 2015 SCC OnLine CAT 3012

¹⁶ THE PATERNITY BENEFIT BILL, 2017

advance after the production of valid proof that the employee's wife is expecting a child. Any man with less than two living children shall be entitled to paternity benefits for a maximum of fifteen days, not to exceed seven days prior to the scheduled delivery date. It will be available for three months from the date of the child's birth. The bill also had a provision if an employer fails to pay any amount of paternity benefit to a man who is entitled under this Act, he will be sentenced to imprisonment for not less than three months but not more than one year, as well as a fine of not less than 20,000 rupees but not more than 50,000 rupees.

VII. ENSURING EQUALITY – INDIAN CONSTITUTION

The Constitution's Articles 14, 15, 15(3), 16, 39(a), 39(b), 39(c), and 42 contain provisions for the protection of women's rights and ensure Fair justice and equal rights for women under the law; forbid discrimination on the basis of race, sex, religion, or origin and to ensure that all people have equal access to opportunities in employment-related matters. All these provisions were enshrined in the constitution at the time of independence to guarantee women a fair and gender neutral society and also to empower the government to take constructive discrimination steps in their favor to offset the combined socioeconomic, educational, and political disadvantages they face.

Article 42 and the Maternity Leave Provisions

Number of policies and provisions are made by the government to protect the interest of women and create a gender neutral society where women have equal rights as men and stereotypes and other kind of discrimination can be removed from Indian society.

One of the most affirmative steps was taken in 1961 when Maternity Benefit Act ¹⁷ and subsequently various laws such as Employees State Insurance Act, 1948, Central Civil Services Rules of 1972, Mines Act 1952, Plantations Labor Act 1951 and *The Equal Remuneration Act, 1976 (ERA)*. was introduced to ensure women participation at workplace and to give her job protection during her maternity period. Under this act, pregnant women are entitled to paid leave up to 26 weeks (amended in 2017) with job security.

These entire acts are in accordance with Article 42 of the Indian Constitution-

*Provision for just and humane conditions of work and maternity relief- the state shall make provision for securing just and humane conditions of work and for maternity relief.*¹⁸

¹⁷ Singh, S., 2016. The Maternity Benefit (Amendment) Bill, 2016: A Critical Analysis. Space and Culture, India, 4(2), pp.22-28.

¹⁸ INDIA CONST. art. 42

In the number of judgments¹⁹, Courts reiterated that Maternity Benefit Act and all other such acts are to be read and are in consonance with Article 42 of the Indian constitution which is although not enforceable by any court but is fundamental in governance and obliges the state as a duty to provide for provision for maternity relief and to secure just and humane conditions.

Now in the *Municipal Corporation of Delhi v. Female Workers*²⁰ case, apex court said that “just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due. Women who constitute almost half of the segment of our society have to be honored and treated with dignity at places where they work to earn their livelihood. Whatever be the nature of their duties, their avocation and the place where they work; they must be provided all the facilities to which they are entitled. To become a mother is the most natural phenomena in the life of a woman. Whatever is needed to facilitate the birth of child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realize the physical difficulties which a working woman would face in performing her duties at the work place while carrying a baby in the womb or while rearing up the child after birth.” The Maternity Benefit Act,²¹ 1961 aims to provide all these facilities to a working woman in a dignified manner so that she may overcome the state of motherhood honorably, peaceably, undeterred by the fear of being victimized for forced absence during the pre or post-natal period.

Need for Amendment in Article 42 – Adding Paternity Leave

The above judgment and Maternity Relief Act and all other such acts although provides measures for women participation in workplace even during her pregnancy and protects her job but also sets an idea that child rearing is the sole responsibility of women and fails in creating a gender neutral society. That’s why even after the 75 years of independence, the patriarchal gender roles which means it is the responsibility of mother only to take care of her child continues to exist. Although mother biologically gives birth to child but various studies and research have shown that both mother and father roles are equally important in the development of child. Thus Article 42 is incomplete in the sense that it does not remove the stigma of patriarchal gender role from our society.

¹⁹, *Shah vs. Presiding Officer, Labour Court, Coimbatore and others* (1977) 4 SCC 384 ANURADHA ARYA V. PRINCIPAL GOVT GIRLS SENIOR SCHOOL (2013), gangama v the secretary 2020, state of uttrakhand v urmila masih 2019

²⁰ *Municipal Corporation of Delhi v. Female Workers* (2000) 3 SCC 224

²¹ Singh, S., 2016. The Maternity Benefit (Amendment) Bill, 2016: A Critical Analysis. Space and Culture, India, 4(2), pp.22-28

Although DPSPs are not enforceable by any Court, that is, no Court can force the government to enforce these Principles or make laws regarding them. But mere non-enforceability does not make them useless. For the following reasons, this Part has become an important part of the Constitution:

1. Sir B.N. Rau believed that these Principles had an “educative value”. This educative value was for reminding those in powers what the aim of the Indian polity is. All the provisions in the Part encompass the goal of the Welfare State that is India.

2. Though these Principles are not legally enforceable, they do have political justifiability. As put by Dr. B.R. Ambedkar, “the government has to answer for them before the electorate at election time.”

3. They help the Courts in interpretation of various statutes. The interpretation shall be such that the statutes are not in conflict with them. They also help the courts to determine the scope of Fundamental Rights.

4. They also aim to establish social and economic democracy promised in the Preamble²²

5. Aim of establishing a ‘socialist pattern in the society’ and not subscribe to either of the extremes-Individualism or Socialism.²³

Amending article 42 under DPSP’s of the constitution is important because maternity leave is only given in article 42 in the entire constitution which clearly shows the dream of our constitution makers to make a gender neutral society and on following this, maternity act and various acts were passed to fulfill this dream but it has been now clearly realized that a dream of gender neutral society cannot be accomplished until all this patriarchal gender role stigma is removed from our society. Now, if we can add paternity leave provision in the article 42, it will have an educative value which will send message for a more gender neutral society. Furthermore, it has been shown that also institutional environments or policies can influence attitudes ²⁴and then it will also oblige the state to come up with paternity leave policy and then it will help courts to interpret this provision as a human and fundamental right. India being the largest and oldest democracy of the world with a provision of paternity and maternity leave in the constitution will send a message to the world of its vision of just and neutral world.

A review by the Centre for Social Research for the National Commission of Women said in 2014, “...The right to paternity leave could be crucial for changes in the relationships and

²² Durga Das Basu, *Introduction to the Constitution of India*, 163 (22nd ed., 2015)

²³ *ibid*

²⁴ Unterhofer, U. and Wrohlich, K., 2017. Fathers, parental leave and gender norms

perceptions of parenting roles...The Labor Ministry's four-year-old report acknowledged that for women, decent maternity leave alone "results in mounting a very huge pressure of family, childcare responsibilities as well as demands of workplace". In the absence of parental leave, child care is solely the responsibility a mother a paternity leave programme will aid in gradual attitude changes and the removal of gender roles. The International Labor Organization (ILO) published a report in 2014 on "Fathers who take leave, particularly those taking paternity leaves" are most likely to be involved with their children and can. This can reflect changes in marriages, expectations of parental roles, and dominant norms, and may have positive implications for gender equity at home and at work." ²⁵Researchers have linked fathers' use of leave with increased earnings for the mother, reduced mother-absenteeism due to sickness and higher female employment in private firms²⁶. Paternity leave also has a wide range of benefits that can improve development outcomes, including health and economic benefits to the mother, more equitable division of household labor and increased child bonding. ²⁷

According to McKinsey Global Institute report of November 2015, in India the women participation in labor force is only 24 percent as against the global average participation of 40 percent. ²⁸Even after so many provisions for women ensured by our constitution and various legislations

Thus adding paternity leave provision in article 42 will help in creating just and gender-neutral society.

VIII. CONCLUSION

The constitution although has various articles and provisions to ensure gender equality and various laws thereafter also been made to comply with the vision of just and gender neutral society with various incentives and positive discrimination for women. Maternity Relief for women to provide her just and humane conditions at workplace mentioned in Article 42 under Directive Principles of State Policy significance cannot be overlooked or disregarded as it obliged the state to make various laws for women including maternity benefit act 1961. Therefore, author suggested amending this article and adding paternity leave along with

²⁵ Johansson, E.A., 2010. The effect of own and spousal parental leave on earnings (No. 2010: 4). working paper.

²⁶ Amin, M., Islam, A. and Sakhonchik, A., 2016. Does paternity leave matter for female employment in developing economies? evidence from firm data. The World Bank

²⁷ Thor Arnarson, B. and Mitra, A., 2010. The Paternity Leave Act in Iceland: implications for gender equality in the labour market. Applied Economics Letters, 17(7), pp.677-680

²⁸ Endendijk, J.J., Groeneveld, M.G., van der Pol, L.D., van Berkel, S.R., Hallers-Haalboom, E.T., Bakermans-Kranenburg, M.J. and Mesman, J., 2017. Gender differences in child aggression: Relations with gender-differentiated parenting and parents' gender-role stereotypes. Child development, 88(1), pp.299-316

maternity relief in accordance with the need and importance of paternity leave in the present-day Indian society.

In this paper, it is proposed that, in order to promote true gender equality, men should be allowed to, expected to, and even needed to care for their small children and the home for a few months. This was done in the hopes that such an encounter would strengthen the relationship and well-being of both the child and the father, and that stereotypical gender stereotypes in the household, as well as sex stereotyping of men and women's roles, would be eliminated in the future. With fair participation in domestic work by men and women, as many women as men would have the ability to seek a career and achieve more freedom, as well as participate in and control politics in the pursuit of a more equal society.
