

MATERNITY PROTECTION DURING COVID: AN INQUIRY INTO INDIA'S COMPLIANCE WITH INTERNATIONAL STANDARDS

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ABSTRACT

Maternity, undoubtedly is divine and natural. It is said that “life began with waking up and loving mother’s face.” In raising children, the role of mother is unparalleled. Maternity protection assumes more importance because it is interconnected with other important human rights and touches upon different aspects of the work-family policies for women. Enumerating its association with other rights, it aims at protecting the health and safety of the working women and their new born. It also provides protection against economic vulnerability on account of pregnancy and maternity. Further, it takes a pivotal position in ensuring gender equality and inclusivity in employment. The standards set under different international instruments pertaining to maternity protection depict it as an integral part of women’s human right to work. International instruments, particularly ILO conventions, have expanded the scope and entitlements with respect to maternity protection over a period of time. This expansion is in consonance with the evolving status and recognition of women’s rights in the world of work. This paper is aimed at ascertaining the extent to which India complies with its international commitments relating to maternity protection. Several countries across the globe provide for some type of maternity protection legislation and many others can be found to adopt measures to assist workers with family responsibilities. The researcher undertakes comparative study of a few selected jurisdictions. In the changed circumstances, the research also focuses on exploring whether the legislative amendments and judicial approach in India have in fact led to substantive equality and inclusivity for working women.

Keywords: *Maternity protection, international standards, national implementation, accommodative workplace, Covid-19 pandemic*

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RAISING A family is set as a cherished goal of mothers all over the world. The motherhood entrusts women with the responsibility of raising a child. The entire process of child bearing and rearing changes the way in which women participate at the workplace. It also brings noticeable changes in the way they are perceived at work. A working mother can be defined as a woman who has been able to strike a balance between the work and the added responsibility pertaining to raising a child.¹ Speaking specifically about the dual role performed by the single working mothers, it is the combination of the role of both the parents. Here, the single mother not only has to maintain the family, but she also has her status as an independent head of the family.²

Indian women across regions are not found to be part of a homogenous social group. A wide chasm is evident between the *de facto* and *de jure* position of women and gender inequality can be seen in the form of a series of disparate but interconnected issues.³ Women in India are often seen taking entire responsibility of intensive parenting of the child especially in the absence of the support from joint family system which has been very much prevalent in Asian countries.⁴ At the same time, an exponential growth can also be seen in their participation in various spheres of the economy of the country. The dominant role of mothers in the sphere of childcare has been well recognised. Apart from this, the particular responsibility of child care has been found to be interfering with the working life of women more than that of others. In the light of these factors, the need for supporting working mothers have been emphasised and recognised at both international and national level.⁵

¹ Jayita Poduval and Murali Poduval, "Working Mothers: How Much Working, How Much Mothers, and Where Is the Womanhood?" *NCBI*, Jan, 2009, available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3151456/> (last visited on Apr. 27, 2021).

² *Ibid.*

³ Anuradha Saibaba Rajesh, "Women in India: Abysmal Protection, Peripheral Rights and Subservient Citizenship," 16 *New England Journal of International and Comparative Law* 112 (2010).

⁴ *Supra* note 1.

⁵ *Ibid.*

There are a series of legislations and governmental policies which are meant for attaining equality between men and women and protecting basic human rights of working mothers in different ways. These legislations and policies are largely guided by the provisions of the Indian Constitution and several international legal instruments.⁶ Several provisions relating to equal and fair wages, equal remuneration, maternity pay and employment rights during maternity leave period are aimed at improving their working conditions and encourage their continued participation in the economy.

Motherhood, being the most natural phenomenon in the life of women followed by a lot of physical and mental difficulties, should not be allowed to attract any kind of discrimination in the society as well as at the workplace. It can never be treated as a disability which can adversely impact the performance of work, on permanent basis, by women employed in organized and unorganized sectors of the economy. The performance at workplace depends on the education, competence, training, intelligence and commitments of employees and not merely on the basis of their physical difficulty to work actively for a certain period of time as happens in case of maternity leave taken by women.

Maternity protection can be directly connected with the Sustainable Development Goals towards achieving gender equality, good health, decent work, *etc.* Therefore, it is not only a sympathetic attitude of the society as well as of the employer which is desirable, rather it is the commitment of a nation to protect and promote basic human right of working women.

It has to be, necessarily, ensured that women's reproductive rights, maternity rights,⁷ and health rights (pre and post pregnancy) do not pose a hurdle in the way of recruitment, retention and promotion of female employees. A number of provisions have been laid down in the Constitution of India, especially in Part III and Part IV, which seem to be in the direction of creating a workplace where men and women can enjoy equal employment opportunity and

⁶ These international legal instruments are in the form of declarations, resolutions and conventions supporting working mothers and their children. A few of these instruments are - Universal Declaration of Human Rights, 1948, art. 25; International Covenant on Civil and Political Rights, 1966, art.23; International Covenant on Economic, Social and Cultural Rights, 1966, art.10; International Code of Marketing of Breast-Milk Substitutes, 1981; Convention on the Rights of the Child, 1989, arts. 18 and 24; Innocenti Declaration, 1990; International Labour Organisation's Maternity Protection Convention, 2000, arts. 3, 4, 8.2, 10.1; The Millennium Development Goals, 2000, goals 3, 4, 5; The Convention on the Elimination of All Forms of Discrimination against Women, 1979, arts. 11 and 12.

⁷ The enforcement of maternity right is the precondition to protect child right. It is the sole way by which special assistance and care for childhood is ensured.

equal access to all kinds of work under just and humane conditions. The specific provision, directing the state towards making arrangements in order to secure just and humane conditions of work and for maternity relief, has been incorporated as part of Directive Principles of State Policy.⁸

Normative standards have been set through international documents which cover the rights of working women. Gradual and continuous efforts are visible on the part of India to adhere to these standards at national level. For instance, in the area of maternity protection, a number of new provisions have been added by way of amendments introduced in the Maternity Benefit Act in the year 2017.⁹ This amendment *inter alia* enhances the period of paid maternity leave in India from twelve weeks to twenty six weeks. This step is in tune with the time period recommended by the World Health Organisation. The stipulated period of leave covers the most crucial initial months of exclusive breastfeeding associated with a number of health benefits for both, mother and child.¹⁰ It can also be seen as a further improvement over the standard set by ILO through Convention no. 183 that mandates only fourteen weeks of paid leave.¹¹

When the amended provisions of 2017 started being implemented in India, it was reported that these provisions are not being uniformly implemented across sectors. Major problems have been found in the private sector. Complaints have been received by the Ministry of Labour & Employment that when the employers become aware of the situation when female employees are in the family way or they apply for maternity leave, their employment contracts get terminated on some unrealistic and flimsy grounds and they are also asked to quit many a time.¹² A wide perception is there suggesting that women employees are not being welcomed by private entities because of the mandate to provide for paid leave covering twenty six weeks. This problem is apparently deterrent for women employees and seems to hinder India from ensuring proper compliance with the relevant international standards.¹³ The shortcomings of

⁸ The Constitution of India, art. 42.

⁹ The Maternity Benefit Amendment Act, 2017 (Act 6 of 2017).

¹⁰ WHO, Exclusive Breastfeeding for Six Months Best for Babies Everywhere *WHO*, Jan 15, 2011, *available at*: <https://www.who.int/news/item/15-01-2011-exclusive-breastfeeding-for-six-months-best-for-babies-everywhere> (last visited on April 12, 2021).

¹¹ ILO Convention on Maternity Protection, 2000 (No.183).

¹² Ministry of Labour & Employment, "Clarification regarding Maternity Leave Incentive Scheme", Nov. 16, 2018, *available at*: <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1553017> (last visited on Apr. 12, 2021).

¹³ *Ibid.*

the existing provisions necessitate for India to revisit its domestic legal framework and bring required changes.

II. International Standards on Maternity Protection

Rights of women workers, especially in the light of maternity protection, have been recognized and protected under various international instruments and human rights documents, including the Universal Declaration of Human Rights (UDHR),¹⁴ International Labour Organization (ILO),¹⁵ International Covenant on Civil and Political Rights (ICCPR)¹⁶, International Covenant on Economic, Social & Cultural Rights (ICESCR),¹⁷ World Health Organization (WHO), Convention on the Rights of the Child (CRC),¹⁸ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹⁹ *etc.* All these international instruments are directed towards protecting a number of human rights of women with the ultimate objective of improving their economic and social status. Many of these international instruments have been either ratified or endorsed by India which demonstrates its intention to fulfil its international commitments domestically and ensure uniform implementation of these human rights of working women across the sectors.

Key Elements of Maternity Protection at Work with Reference to ILO Instruments

Maternity protection, as a multidimensional concept, includes related areas of concern emphasising the reasons for it being an important protection. Firstly, this protection constitutes a fundamental human right to be exercised by a woman in the form of exclusive rights; it provides women with job security in terms of protection from discrimination and dismissal, right to resume work after child birth, and payment of wages and benefits during maternity.²⁰

¹⁴ It has been stipulated, under art. 25(2) of the Declaration, that motherhood and childhood are entitled to special care and assistance.

¹⁵ International Labour Organisation's Maternity Protection Convention, 2000, arts. 3, 4, 8.2, 10.1, *etc.*

¹⁶ This covenant recognises family to be the natural and fundamental unit of society which is entitled to protection by society and the State.

¹⁷ Special protection has been required to be accorded to the working mothers under art 10 of the covenant.

¹⁸ Convention on the Rights of the Child, 1989, art. 18. This article mandates for the state parties to render appropriate assistance to parents and legal guardians in the performance of their child rearing responsibilities.. Further, art.24 directs the state parties to pursue the full implementation of the rights and take appropriate measures in this direction.

¹⁹ The Convention on Elimination of All Forms of Discrimination against Women, 1979, arts. 11, 12.1 and 12.2. These articles read with preamble emphasise on elimination of various types of discrimination and adoption of measures by state parties to ensure maternity rights and health rights of working women.

²⁰ ILO, "Maternity Protection at work: Why is it important?" *Maternity Protection Resource Package*, 2012, available at: <http://mprp.ilo.org/allegati/en/m3.pdf> (last visited on Apr. 14, 2021).

Secondly, it is an intrinsic aspect of the gender equality. Thirdly, it is significant in improving the maternal and child health. Fourthly, it has a vital role to play in reducing poverty and boosting overall economic growth, and finally, it forms an important element of the ‘Decent Work Agenda’ of ILO.²¹

The coverage, maternity leave, health protection, other cash and non-cash benefits, job protection, non-discrimination, arrangements for breastfeeding facilities *etc.* have been recognised as the key elements of maternity protection.²² ILO conventions have been expanded over time to comprehensively deal with all these elements with improved standards. It was in the year 1919 when ILO was founded and first accepted and recognised the importance of maternity protection. It adopted a second maternity protection convention in 1952 improving upon the first one and in 2000 a third convention was adopted. These three conventions along with corresponding recommendations have improved the scope and entitlements of maternity protection at work and further provided countries a detailed guidance regarding national policy and action.²³

Maternity Protection and CEDAW

Recalling that any kind of discrimination against women has the potentiality of violating the principles of equality of rights and respect for human dignity, CEDAW has aimed at eradicating all forms of discrimination against women. Considering the interest of the children as primordial consideration, CEDAW²⁴ has encouraged state parties to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women and society as a whole regarding the upbringing and protection of children, rather than making maternity as a tool which can be used for discrimination in employment opportunities including selection in the matters of employment.²⁵ Article 12, specifically, stipulates that states parties shall ensure appropriate services associated with pregnancy, confinement and post-natal period as well as adequate nutrition during pregnancy and lactation.

²¹ *Ibid.*

²² Maternity Protection Campaign Kit , Key Elements of Maternity Protection at Work with Special Reference to ILO Convention 183 and Recommendation 191 WABA, *available at*: <http://waba.org.my/v3/wp-content/uploads/2018/08/2-Key-Elements-of-Maternity-Protection-at-Work.pdf> (last visited on May 14, 2021).

²³ International Labour Organisation’s Convention No. 3 of 1919, Convention No. 103 of 1952 and Convention No. 183 of 2000 also Recommendation No. 95 of 1952, & Recommendation No. 191 of 2000.

²⁴ *Supra* note 19, art. 5.

²⁵ *Id.*, art. 11.

III. Legislative Framework on Maternity Protection at National Level

In India, the benefits which women are entitled to and the rights which they can claim, during pregnancy and after childbirth, have been governed by the Maternity Benefit Act (MBA), 1961.²⁶ The MBA was enacted keeping into consideration the standards set by ILO and the need to consolidate and bring uniformity in the pre-existing legislations which differed in different aspects, such as eligibility of the beneficiary, rate and quantum of the benefits, stipulated period of leave *etc.*²⁷ In India, the MBA has not been the only piece of law that dealt with maternity protection. The Employees' State Insurance Act, 1948 (hereafter called ESI)²⁸ and the Central Civil Services Rules, 1972 (CCL)²⁹ also cover some aspects of maternity protection.

The MBA saw a few major amendments in the year 2017. Five major aspects of the amendments include increased maternity leave, recognition of the rights of new categories of mothers- adoptive and commissioning mothers, mandatory provision for crèche facilities, work from home option after expiry of maternity leave and intimation about available benefits by employers.

Like MBA, the amendment extends coverage to those establishments employing ten or more persons and those women who have worked for at least eighty days in the twelve months immediately prior to the date of expected delivery. The amendment extends paid maternity leave for women employees with less than two surviving children.³⁰ This increase is from the original twelve weeks to new twenty six weeks. . Commissioning and adoptive mothers have also been brought under the coverage of the Act and these mothers can get twelve weeks of maternity leave.³¹

Additionally, women employees are entitled to non-monetary benefits including nursing breaks and a mandatory provision of crèche facilities at the place of work. As per the new provisions, every establishment, in case of having fifty or more employees will mandatorily provide for creche facility. Women employees are also entitled to visit the crèche four times a day, including their rest interval. In addition to these changes, the amendment also allows for an

²⁶ The Maternity Benefit Act, 1961 (Act 53 of 1961).

²⁷ The mandate of ILO concerning maternity protection specifically Maternity Protection Convention, 1952 (No. 103) was taken into consideration.

²⁸ The Employees' State Insurance Act, 1948 (Act 34 of 1948).

²⁹ Central Civil Services (Leave) Rules, 1972.

³⁰ The Maternity Benefit (Amendment) Act, 2017 (Act 6 of 2017), available at: <https://labour.gov.in/sites/default/files/Maternity%20Benefit%20Amendment%20Act%2C2017%20.pdf> (last visited on Apr. 14, 2021).

³¹ *Ibid.*

option to work from home after maternity leave, which will be entirely based on the mutual agreement between an employer and a woman employee. Another important provision, regarding prior information about the benefits available, has been incorporated in the amendment Act.³² MBA along with some other Acts, providing for social security measures, has been consolidated by the 'Code on Social Security.'³³ Part six of the Code contains provisions on maternity benefits. Most importantly, a number of the provisions pertaining to MBA have remained largely unaltered under the Code.³⁴ Since the ESI Act has also got subsumed in the Code, now employees have to decide whether they want to avail the benefit pertaining to the part relating to ESI or they want to avail the same under the chapter containing provisions pertaining to MBA.

IV. Indian Judiciary and Succour for Maternity Protection

In addition to the protection provided by the Constitution and legislations, judicial contribution in securing gender equality and inclusivity in the light of maternity protection has been of paramount importance in India. Looking at the developments in the sphere of case laws on maternity protection, it can be observed that the courts have been trying to give a wider interpretation to the provisions of MBA which is a social welfare legislation. The court while deciding the case of *Shah v. Presiding Officer, Labour Court, Coimbatore*³⁵ went ahead to interpret the legislative intention behind MBA in the light of the doctrine of 'beneficial rule of construction.' It was noted by the court that the benefits provided by the MBA read with article 42 of the Constitution are aimed at making the female employees able not only to subsist but also to preserve their health along with the health of their child and maintain their efficiency rendering further assistance in maintaining a balance between productive and reproductive roles.

In an important case of *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*,³⁶ the matter related to maternity protection for daily female workers came for adjudication. In this case the Delhi Municipal Workers Union wanted maternity benefits for women workers asserting that the nature of work performed by them is the same as in case of regular workers.

³² *Ibid.*

³³ The Code on Social Security, 2020 (No.36 of 2020).

³⁴ *Ibid.*

³⁵ *Shah v. Presiding Officer, Labour Court, Coimbatore*, 1978 AIR 12.

³⁶ *MCD v. Female Workers (Muster Roll)* (2000) 3 SCC 224.

The corporation, on the other hand, contended that their services were not regularised and since these workers on daily wage were not included by the ESI Act, they are not eligible to avail maternity leave stipulated under the MBA. The Supreme Court adopted a much wider interpretation of the relevant provisions of MBA and was of the opinion that the MCD must provide the equal maternity benefits to these females working for daily wage.³⁷ Further, upholding the entitlement to maternity benefits of these employees, the court observed that depriving female workers of maternity benefits was not in consonance with the principles of social justice because the concerned employees had been working in for a number of years in the MCD and they have been performing in the same way as regular workers of the corporation.³⁸

The principle laid down in this case has been, time and again, reiterated by the courts in India which can be discussed through different cases adjudicated by the courts over a period of time. For instance, in the case of *Shalini Pathak v. State of Uttarakhand*,³⁹ the court condemned the distinction made between permanent, temporary or contractual female workers for the purpose of extending maternity benefits to them. The court was of the opinion that if the concerned woman worker has worked for the minimum number of days stipulated under MBA, entitlement to maternity benefits arises automatically.⁴⁰

As per a judgment pronounced in 2019 by the Delhi High Court, in *Manisha Priyadarshini v. Aurobindo College-Evening*,⁴¹ even in the matter of contractual employment, where rules are not covering maternity leave, the court has succinctly upheld the validity of maternity leave for such employees. This case assumes importance as the Delhi High Court quashed the termination order issued by the employer-college in favour of the petitioner, whose contract expired during covid-19. The court has also directed the college to appoint the petitioner forthwith to the post of assistant professor on ad-hoc basis till the vacant posts are filled up through regular appointment. Similarly, in the same year, it was observed by the Allahabad High Court in the case of *Anshu Rani v. State of U.P.*⁴² that it is the woman's rights to avail six months' maternity leave and there can be no curtailment of maternity leave period from what

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Shalini Pathak v. State of Uttarakhand*, 2014 SCC OnLine Utt 2233.

⁴⁰ *Ibid.*

⁴¹ *Manisha Priyadarshini v. Aurobindo College-Evening*, 2020 (6) SLR 483.

⁴² *Anshu Rani v. State of U.P.*, 2019 SCC OnLine All 5170.

is stipulated under the Act, Again in the year 2020, the Supreme Court held that maternity leave has to be made available to women employees irrespective of the fact that they are permanent, casual or contractual workers. This is how the court has expanded the scope and reach of the statutory provisions through liberal interpretation.

Further, considering the seriousness and significance of the matter related to childcare leave for women, it has been progressively discussed by the court. For example, in *Kakali Ghosh v. Andaman & Nicobar Admn.*, the court observed that a female government employee who has got to take care of minor children is entitled to an uninterrupted paid leave as per the provisions of the CCL Rules, 1972.⁴³ The full bench of Uttarakhand High Court in *Tanuja Tolia v. State of Uttarakhand*⁴⁴ observed that “the rights of women and children are interdependent and in CCL the real beneficiary is the child; the mother taking the CCL is only an instrument for enforcement of the child’s rights.” In case of a contractual employment, CCL should be granted on a *pro rata* basis.⁴⁵

Additionally, the apex court, taking a step further, has gone to the extent of recognizing the maternity rights in cases of pre-marital pregnancy and in case of live-in relationship upholding the principles of equality and non- discrimination.⁴⁶ Progressive thinking has been displayed by courts and it is evident from the approach of the Judiciary that constitutional provisions have been interpreted broadly in order to make them beneficial and effective and the practices found discriminatory against women have been discarded. However, there are a lot of changes required in the law to cater to the needs of the society in order to keep in tune with the realities. As discussed in Part VI of the article, some of the fundamental defects can be found in the existing law, which show the need to revisit the existing provisions of the Act giving them true meaning and content.

V. Comparative Analysis of Laws Related to Maternity Benefits in India with UK, US & Bangladesh

⁴³ *Kakali Ghosh v. Andaman & Nicobar Admn.* (2014) 15 SCC 300.

⁴⁴ *Tanuja Tolia v. State of Uttarakhand*, 2020 (142) ALR 668.

⁴⁵ The court calculated *pro rata* basis as follows: An employee whose entire employment is for one year, and she fulfils other parameters referred to in the government order concerning CCL, (if he/she has two children of less than 18 years of age), he/she will be entitled to CCL amounting to a paid leave of 31 days.

⁴⁶ *Lata Singh v. State of U.P.*, AIR 2006 SC 2522 and *S. Khushboo v. Kanniamal*, AIR 2010 SC 3196.

As per the report prepared by the International Labour Office on Maternity Protection at Work, many countries around the world provide paid maternity leave along with other health benefits by enacting various legislations. Most industrialized nations of the world except Australia, New Zealand and the United States, have enacted laws which regulate maternity related matters as women's health rights and concerned issues have been given importance in most of the countries of the world.⁴⁷ The purpose behind selecting UK, US and comparing the provisions with countries like India and Bangladesh is to note as to how high income and industrially developed countries with no scarcity of resources respond towards maternity protection as compared to countries facing economic constraints and combating multiple related issues.

Countries like Czech Republic, Hungary, Italy and Canada provide for extensive leave which may be taken by either parent. Laws in different countries, having regard to the ILO Standards, are aimed to provide a legal guarantee that women will not lose their jobs due to the state of pregnancy and childbirth, and they will be provided with the full opportunity for career advancement.⁴⁸

By way of comparative analysis of major practices in some of the countries like UK, USA and Bangladesh, it can be found as to where India stands in terms of its strength and weakness of its legal system with respect to maternity protection, and which are the areas in which it needs to incorporate more stronger and effective practices for a robust and user-friendly maternity benefit regime. The English maternity benefit system provides for fifty two weeks statutory maternity leave to the entitled women employees in case they give the correct notice to the employer. These fifty two weeks have been further grouped into two categories.⁴⁹ However, there is no compulsion to take fifty two weeks, but the first two weeks after the birth must be taken and for those who work in a factory, it is four weeks. In UK, there is no minimum length of service required before taking maternity leave like India, but the employee must inform the employer about the pregnancy at least fifteen weeks before the child is due.⁵⁰

⁴⁷ F. J. Dy-Hammar, "Conditions of Work Branch, who oversaw the report, Maternity Protection at Work ILO", available at: https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_008009/lang--en/index.htm (last visited on Sept. 25, 2021).

⁴⁸ *Ibid.*

⁴⁹ Ordinary Maternity Leave of 26 weeks & additional maternity leave of 26 weeks.

⁵⁰ *Supra* note 83.

The employer may request a notice in writing, medical certificate to find out the expected week of delivery and may enquire from the employee regarding her intention to start maternity leave. In case of pre mature or sick babies, leave will automatically start on the day after the birth. Employee is entitled to leave even if baby dies or is stillborn after the start of the 24th week of pregnancy. Women employee's right to be paid, holidays and returning to job are well protected, even more than the statutory amount can be paid if there is a company maternity scheme as there may be statutory maternity pay, contractual maternity pay or maternity allowance as the case may be. Agency works may not qualify for the leave, but they can still be allowed to take at least two weeks leave period in UK.⁵¹ Women employees have no automatic right to be paid fully in case of pregnancy related absence, but after returning from the maternity leave they have the same rights subject to certain factors which are to be necessarily adhered to. After returning, they can request for flexible working hours. All these provisions seems to be positive and more favourable to working women, but UK's maternity law is found to be different as it, generally, gives the picture that employees are qualified to take a full year off. On the other hand, reality depicts something else, *i.e.*, the amount women get while they remain absent beyond statutory maternity pay varies from industry to industry.⁵²

The Maternity and Parental Leave Regulations, 1999, which is in accordance with the Employment Rights Act, 1996, deals with regulation of maternity and parental leave, *etc.* The principle statutory provisions in relation to maternity leave are contained in part VII of the Employment Rights Act, 1996, as amended by the Employment Relations Act, 1999, and Paternal leave *etc.* Regulations, 1999.⁵³ In USA, the Family and Medical Leave Act of 1993 (FMLA) guarantees certain employees with up to twelve weeks of job protected leave which is not a paid leave. USA has the same motive behind enacting this legislation as other nations have to help employees balance their family obligations and work. The Act sufficiently accommodates the interests of the employers while promoting equal work opportunities for men and women.⁵⁴

⁵¹ ACAS, Maternity, paternity and adoption leave and pay ACAS, available at: <http://www.acas.org.uk/index.aspx?articleid=1753#antenatal>- (last visited on Sept. 23, 2021).

⁵² Government of UK, Statutory Maternity Pay and Leave: employer guide GOV.UK, available at: <https://www.gov.uk/employers-maternity-pay-leave> (last visited on Aug. 3, 2021).

⁵³ Legislation.gov.uk., Social Security, available at: http://www.legislation.gov.uk/ukxi/1987/1967/pdfs/ukxi_19871967_310818_en.pdf (last visited on Sept. 21, 2021).

⁵⁴ Government of US, Family and Medical Leave US Department of Labour, available at: <http://www.dol.gov/general/topics/benefits-leave/fmla> (last visited on Sept. 18, 2021).

There is a minimum length of service required in USA in order to be eligible for availing the benefits of unpaid maternity leave (*i.e.*, at least twelve months, at least one thousand two hundred and fifty hours over the past twelve months). This is said to be the only law addressing family leave. Other federal laws such as the Pregnancy Discrimination Act (1978), the Patient Protection and Affordable Care Act (2010), and Fair Labor Standards Act (1938), contain some additional protection for parents on the birth of a child.⁵⁵ This shows how states have supplemented federal regulations on their own for providing more extensive benefits to women employees. For example, the department of defence increased the paid maturity leave for all branches. However, the FMLA does not provide a universal coverage due to limiting stipulations, for instance, employees are required to work in a firm of fifty or more employees if they want to receive maternity benefits, similarly fixed minimum length of work required also pose hurdles in its wider coverage. There are several piecemeal attempts by some states in USA to bring improvements towards the legal framework on maternity protection, but uniform provisions are lacking at federal level. As compared to other rich and industrialized nations of the world, USA stands in a weak position which cannot ensure paid maternity leave to its citizens uniformly.⁵⁶

Bangladesh, which is a developing country in south Asian region, is providing maternity benefits for women workers, increasingly entering into job market, tea garden, health care services, commercial enterprises, food processing industries, export processing zones, *etc.* Social security system of Bangladesh and its laws are, generally based on the rules and regulations which were formulated by British colonial regime. The Bangladesh Labour Act, 2006, in Chapter IV, regulates the maternity benefits scheme operating in the country. Before this Act, there were three different Acts dealing with the maternity benefits.⁵⁷ The new law has brought changes in the maternity leave period, procedure of payment of the maternity benefit, whereas amount to be paid remains unchanged. It has increased the maternity leave to sixteen weeks⁵⁸ and decreased the duration of the service period for getting the benefit.⁵⁹ The benefit

⁵⁵ Childbirth Connection, Quick Facts about Labor Induction, *National Partnership for Women & Families*, Aug., 2016, available at: <https://www.nationalpartnership.org/our-work/resources/health-care/maternity/quick-facts-about-labor-induction.pdf> (last visited on Sept. 19, 2021).

⁵⁶ Susan Bisom-Rapp & Malcolm Sargeant, "It's Complicated: Age, Gender, and Lifetime Discrimination against Working Women - the United States and the U.K. as Examples" 22 *Elder Law Journal* (2014).

⁵⁷ Three different legislations dealing with the maternity benefits in Bangladesh before 2006 were: The Maternity Benefits Act, 1939, The Mines Maternity Benefits Act, 1941 & The Maternity Benefits (Tea Estate) Act, 1950.

⁵⁸ The Bangladesh Labour Act, 2006, s. 46.

⁵⁹ Reduced from nine months to six months.

does not extend in case of third child. Changes made in the procedure of payment of the benefit seem to be in the favour of the management as they can take more time to pay the benefits.⁶⁰

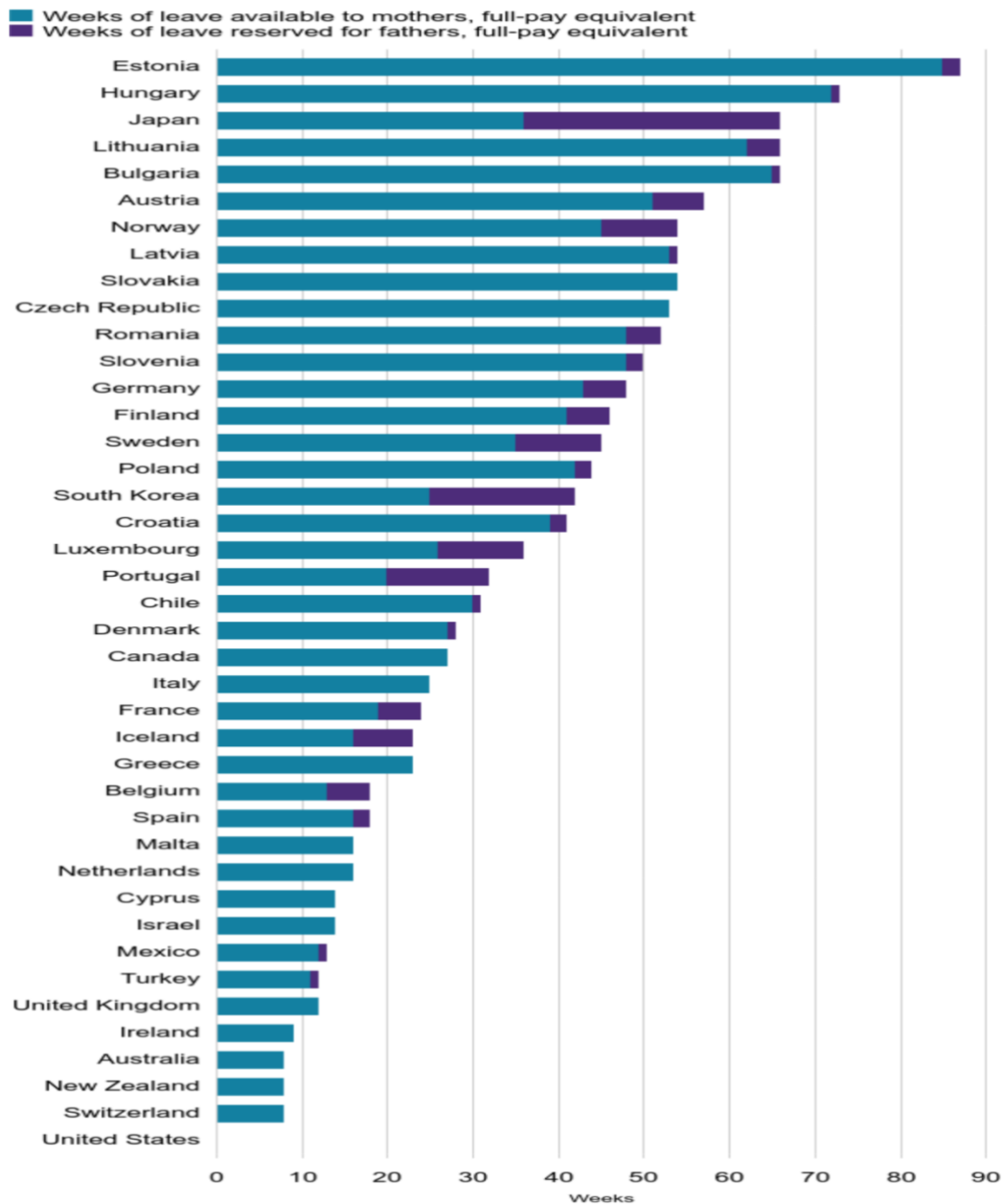
In addition to these provisions, definition of workers (chapter 1, section (2) (65)) is not including women who are working at the management level, leaving them totally dependent on the discretion and mercy of the organizations to avail maternity leave (except those in public services). This exclusion of women shows that these women are not participants in decision making and consultations. The Labour Law Act, 2006 and Bangladesh Service Rules (specifically rule 197(1)) providing for pregnant government servants are not consistent with each other as the leave period in both the documents are different. Women in unorganized sector of the economy have been neglected similarly like Indian system.

As per the available data regarding the paid maternity leave available to working mothers around the world, it is visible that US ranks last. It has a very limited mandatory family and medical leave policies in place generally. As per the data compiled by Organization for Economic Cooperation and Development (OECD), despite several transformations, it is the only country among forty one nations which does not provide for any paid leave for new parents at federal level. The data has been shown below:

⁶⁰ *Supra* note 70, s. 47.

Time off for kids

Across 41 wealthy countries in the EU and OECD, the amount of paid leave for mothers and fathers varies substantially.



Source: OECD, EU

VI. Shortcomings of the Present Legislative Framework

In addition to recognizing and protecting women's access to paid maternity leave, greater protective and effective measures are required to be incorporated in the current legal framework. There are certain issues pertaining to discrimination and harassment which have not been addressed by the amended provisions. For instance, it has been often highlighted by the researchers that pregnant employees and those resuming to work post maternity break face

high levels of harassment and discrimination at work.⁶¹ In this backdrop, it is required that provisions incorporated are wider and comprehensive enough to capture the gaps immediately.

The Indian legislature seems to have progressive view behind amending the law on maternity benefit in the year 2017, such as providing for increased health benefits to women and children thereby, planning towards increasing economic efficiency and benefits for the country as a whole, but the impact of the said amendment cannot, apparently, reflect the original welfare motive. It has brought a considerable change in the attitude of the employers who are weighing the increased paid leave against the costs and finding it cost prohibitive thereby allowing adverse impact on prospective hiring of women by companies.⁶² This undesired change seems to discourage equal and continued participation of women in the labour market.

The Act extends its coverage only to the organised sector where only small proportion of women can be found working and the employees have more certain and assured work. Economic units in organised sector are, generally, registered and it is easy for the government to implement laws. On the other hand, workers in unorganised sector are forced to work in unsupportive and less conducive environment. In this sector, it becomes hard to implement laws with the desired effect. The unorganised sector, which has witnessed obvious increase in the participation of women employees, has been left out without any legal protection with respect to maternity protection of women employees.⁶³ The surrogate working mothers, who have same rights and have to confront same health and other issues, have not been provided protection and coverage under the Act. The amended provisions provide maternity leave only to commissioning mothers who have children through surrogacy. The paid leave is provided for the period of twelve weeks which is to be calculated from the date on which the surrogate mother hands over the child to the commissioning mother.

Further, mandatory provision for crèche facility without any financial support is found to be additional financial burden on the employers and tend to discourage them from encouraging more and more female participation.

⁶¹ Neysa Amber Gomes Desouza, "Equality and Maternity Benefits for Women in The Labour Force" *ILI Law Review* 23 (Winter Issue 2020).

⁶² Maternity Benefits Act – Startups and SMEs wary of hiring female staff even after Govt says it will pay 7 week's salary, *available at*: localcircles.com/a/press/page/startups-way-of-hiring-female-staff#.XYCoZtUzIV (last visited on Aug. 18, 2021).

⁶³ Dipa Sinha and Sudeshna Sengupta, "How Maternity Benefits Can Be Extended to Informal Women Workers", *The Wire*, Feb. 06, 2019, *available at*: <https://thewire.in/women/how-maternity-benefits-can-be-extended-to-informal-women-workers> (last visited on May 12, 2021).

As the child can be adopted either by a man or a woman, leave should be availed by both of them, but in the Act, only adoptive mother has been entitled to avail such leave to have sufficient bonding time. This provision, vehemently, attacks the emerging campaign for gender neutrality and shared parentage for the purpose of providing level playing field to women employees.⁶⁴ In the same year when amendments were introduced in MBA, the Paternity Benefit Bill was introduced with a view to propose *inter alia* a paternity leave for the period of fifteen days, extendable again to a further period of three months.⁶⁵ This proposal aimed to cover all workers irrespective of the sector in which they are employed. This important step seems to be in the direction of supporting gender equality and neutrality but, unfortunately it could not be transformed into law.⁶⁶

In addition to this, there is no provision for any supervisory committee within establishments to monitor and redress the grievances related to violation of provisions of the Act. In all the sectors of the economy, there is an escalating requirement for intensive work and workers working in these sectors, whether organized or unorganized, have same responsibility of parenting. Therefore, they all should be provided with same facilities related to maternity protection, but the Act does not take into account employees employed in unorganized sector, which is not a welcome step towards protecting basic human rights of women employees.

VII. New Challenges Posed by Covid-19 Pandemic

Respecting human rights in the time of crisis becomes all the more challenging. The Covid-19 pandemic calls for more effective and inclusive measures and solutions. UN Secretary-General recently stated that “the virus does not discriminate, but its impacts do.”⁶⁷ The impacts of crises have never been gender-neutral and Covid-19 is no exception. He said that this pandemic is an economic crisis, a social crisis and a human crisis which is going to become a human rights

⁶⁴ Manvendra Singh Jadon, Ankit Bhandari, “Analysis of Maternity Benefit (Amendment) Act, 2017 and its Implication on the Modern Industrial Discourse” 8 *Christ University Law Journal* 84 (2019).

⁶⁵ The Paternity Benefit Bill, 2017 (Bill 90 of 2017).

⁶⁶ *Ibid.*

⁶⁷ António Guterres, We are all in this Together: Human Rights and COVID-19 Response and Recovery *United Nations*, April 23, 2020, available at: <https://www.un.org/en/un-coronavirus-communications-team/we-are-all-together-human-rights-and-covid-19-response-and> (last visited on Sept. 26, 2021).

crisis but at the same time he emphasized that “human rights cannot be an afterthought in times of crisis.”⁶⁸

Women's employment has been adversely and disproportionately affected by the current pandemic and its overall impact on the economy. The ramifications of the current situation seem to leave a long lasting impact on working women.⁶⁹ As compared to their male counterparts, working women are at a greater disadvantage in pandemic due to the fact that fewer women have jobs that allow them to telecommute. Further, additional childcare responsibilities and other care giving duties have posed an additional challenge to working mothers as their work, childcare and housework pressures have intensified tremendously. Single mothers are expected to face all the more hardships.⁷⁰ Single mothers face a lot of troubles in case they are sacked or their remunerations are not paid on time and are held up for unusually long time. As a consequence of the unprecedented impact of pandemic on working women, more and more women have been found losing their jobs in the organised sector, which is more than the male workers working in the same sector.⁷¹ It cannot be negated that inequality against women, in one form or the other, has always been prevalent in the workplace but, the pandemic which is continuing to ravage lives, livelihoods and economies, has brought it's magnitude to the forefront.⁷²

Poor and marginalized women are bearing the brunt and are facing comparatively higher risk of COVID-19 fatalities and transmission in terms of loss of jobs, and increased violence.⁷³ There is a serious apprehension, which has been depicted below, that the current situation will lead to the worsening of gender-gap poverty.

⁶⁸ *Ibid.*

⁶⁹ Eleni X. Karageorge, "COVID-19 Recession is Tougher on Women" 143 *Monthly Labor Review* (2020).

⁷⁰ *Ibid.*

⁷¹ Mini Tejaswi, “Women are hit hard by economic fallout of COVID-19”, *The Hindu*, Oct. 12, 2020.

⁷² *Ibid.*

⁷³ UN Women, COVID-19 and its economic toll on women: The story behind the numbers *UN Women*, Sept. 16, 2020, available at: [https:// www. Un women.org/en/news/stories/2020/9/feature-covid-19-economic-impacts-on-women](https://www.unwomen.org/en/news/stories/2020/9/feature-covid-19-economic-impacts-on-women) (last visited on Sept. 19, 2021).



Many establishments have successfully used work from home (WFH) option during the current pandemic. Considering the current situation of COVID-19, emphasis may be laid on the Amendment Act, 2017 wherein an employer may permit a woman to WFH. This permission would depend on the nature of work and can be used after the expiry of the maternity leave period of twenty six weeks and the duration of this kind of arrangement will depend on mutual agreement between employer and the employee. This provision is not a mandatory one thereby leaving lot of scope for discretion of the employer in providing flexible work arrangements.

VIII. Conclusion and Suggestions

Maternity protection to be accorded to women is a universally recognised human right of working women who enjoys reproductive rights, maternity rights and health rights-pre and post pregnancy. This protection is an important support for achieving associated Millennium Development Goals and Sustainable Development Goals towards promoting gender equality and women empowerment, reducing child mortality and improving maternal health. The implementation of rights of women is essential for protecting the rights of children whose physical, psychological, emotional and developmental needs can be best taken care of by the mother. Enforcement of these rights at national level, ensuring equality of opportunity and treatment, is an integral component of policy framework to meet international standards.

However, it is disheartening to note that this human right remains on papers, even though many countries have enacted legislations to meet the international obligations. There is a worldwide demand for the maternity protection of women to protect them against many odds, which are prejudicial to their health and career advancements, existing in the complex labour market. A robust and effective law with wide coverage will ensure their valuable and continuous participation in the labour market and, at the same time, health of both women and children will improve which will significantly add to the development of the country.

The provisions which have been set out in the Maternity Benefit Act should indicate that these are, wholly, in consonance with the real motive behind the enactment of the legislation. In order to adhere to the ILO standards and other international legal instruments, it has to be ensured that the operation and enforcement of the national legislations on maternity benefit rights are not defeated simply due to mere technicalities.

Based on the above discussion, it can be said that the spirit of law must prevail over the technicalities. Further, there should be adequate clarity regarding how the Maternity Benefit Act is supposed to interface with other Acts and service rules. For instance, there are a number of legislations covering different aspects of maternity benefits for working women such as the Factories Act, the ESI Act, the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, Food Security Act the unorganized Workers. Social Security Act, 2008, Civil Services (Leave) Rules, *etc.* There is no uniformity in application of these Acts and Rules. This clarity regarding the interface will ensure proper alignment of these legal instruments to provide extensive coverage and protection. Given the financial constraints, it is the responsibility of government to have such a model wherein strong partnership of employers and government can take this law to a logical and balanced implementation throughout the country. India must pay heed to the positive developments seen in case of other countries and incorporate in its system to the extent it is possible. For instance, Norway has been leading in this area providing for paid parental leave for both parents. This country has set an example as to how investment in this sphere has the capacity to yield more economic benefits for the entire nation.⁷⁴

⁷⁴ *Supra* note 76 at 77.

There are a few issues such as, the numbers of women at work, their remuneration, their sustenance and advancement at the workplace, their career graph *etc.* which have already been a matter of serious concern. These are much-discussed issues at global level. Now, in the light of corona virus outbreak, it is advisable that India must have an effective and new work-life balance directive in place. The employers must have clear guidelines on how to make required accommodations for pregnant employees and how to monitor the impact of their decisions taken with respect to female employees' pregnancy related illness, leave requirements, childcare needs and providing for more flexible work schedules and other related options.

Although the available data suggests that employment opportunities of women will suffer severely in the time of crisis, the employers' considerate attitude will assist in mitigating the adverse impact. The experience of WFH during lockdown and social distancing period should teach us a lesson as to how in many establishments, the considerate decision can be taken in favour of mothers allowing them to WFH in genuine cases. The spirit of the 2017 Act has to be given effect in this way. While enhanced maternity has shown negative changes in the availability of job opportunities for women, it has also increased the costs for employers in terms of payment of wages during leave for a long time. The social insurance scheme is urgently needed in the area of maternity protection as employers have also been affected adversely by the crisis and relying on them solely is restrictive in nature and will not serve the purpose.