

Paternity Leave: Need for a Central Law with Judicial and International steps

Abstract

Maternity leave is based on the idea that it is natural for women to undergo biological changes during pregnancy. It allows them to be a part of the workforce and not have their physical difference be a hurdle in the capitalist society. Despite the positive intent behind legislating and legalising this, maternity leave without paternity leave reinforces the idea of women as primary caretakers. It burdens the women with additional household responsibilities and childcare rather than a resting period as it should be.

The need for paternity leave has also been highlighted internationally. India, on the other hand, has a long way to go. There is no national legislation for the same and the age-old patriarchal beliefs exist. Even though the Paternity Benefit Bill was introduced in the parliament in 2017, it was never passed.

There are varied patriarchal norms in the Indian society that lead to this and ensuring central legislation regarding the same will lead to a more gender-equitable society which the Indian Constitution makers aspired it to be.

Introduction

The Indian Constitution is characterized as a 'living document' due to its amendability provision. Coupled with Fundamental Rights and Directive Principles of the State Policy, the Indian Constitution continues to adapt to the sociological changes in society be it the ban of the triple talaq practice or the decriminalization of same-sex relations.

CJI D. Y. Chandrachud remarked recently that the "Constitution is itself feminist". He articulated, "Feminism is a lot about the disruption of social hierarchies and that is what the constitution intends to do. Transformation involves a disruption of the existing social structures"¹.

¹ Mehal Jain, "Constitution Itself Is Feminist', Justice Chandrachud On Transformative Constitution & Feminism" available at: [livelaw.in](https://www.livelaw.in) (last visited on January 29, 2024)

The same is implied from provisions such as Articles 14, 15 (3), 16, 39, 42 and so on. The demand for reforms regarding gender equality has only risen in the past years and continues to do so. Legal reforms give impetus for societal development.

In the same light, it is to be observed that India has had maternity leave legislation since 1961. It has been amended timely for the maximum benefit of women. Whilst the said legislation empowers working women, it is to be noted that maternity leave without paternity leave is practically patriarchal rather than liberal and uplifting.

Maternity leave in India is paid leave for women after childbirth for their recovery and infant care and usually, it is for up to 6 months. This period includes before and after the birth of the child. Paternity leave on the other hand has no legislation. This enlightens the gender inequality approach where childcare is primarily seen as a female-centric duty rather than a parental duty in which both parents are supposed to be involved.

This paper aims to highlight the legal provisions of maternity and paternity leave in India. The need for paternity leave, judicial acknowledgement of the same and international comparisons.

Maternity leave in India

Maternity leave in India is regulated under the Maternity Benefit Act, of 1961². According to Section 3 (o) a “woman” means a woman employed for wages in any establishment. Section 4 specifies that no employer is to employ or no woman is to work for 6 weeks immediately following the day of delivery. Moreover, the woman is not made to work anything that’s arduous or needs to stand for a long time and so on.

Section 5 provides that the maximum leave for maternity benefit shall be 26 weeks from which 8 weeks shall be before the expected delivery date. The benefit extends to women who have worked at least 80 days before the expected delivery date in the establishment. It was 160 days earlier but reduced to 80 after the 2017 amendment of the Act.

Paternity Leave in India

² The Maternity Benefit Act, 1961 (Act 53 of 1961)

As of 2024, there is no national legislation for paternity leave in India. Rule 551(A) of the Central Civil Services (Leave) Rules, 1972, allows paternity leave for Central Government Civil Services Employees only. Some shortcomings of the same are:

1. It applies to Central civil servants only.
2. The rules aren't accommodative of same-sex couples.
3. The rules apply only to heterosexual men with less than 2 children.
4. The leave is merely for 15 days i.e. half a month.

In 2017, The Paternity Benefit Bill³ was introduced in Parliament by MP Rajeev Satav. This was the first step in the direction of providing paternity leave in India. The bill never became an Act due to its shortcomings and other factors. Nonetheless, it was an essential step in the much-needed direction.

The Bill had 26 sections overall. The Preamble states that the Bill aims to regulate male employment before and after becoming a father and provide paternity and other benefits.

1. Section 2 states the application of the Act will be certain establishments and includes self-employed or men in the unorganized sector.
2. Section 3 (i) reiterates the abovementioned application and defines "man" which means a man employed for wages in any establishment or self-employed or working in an unorganized sector or an establishment with less than 10 persons employed.
3. As per Section 4, the Paternity benefit extends to anyone working in an establishment for a minimum of 80 days in a year before the delivery of his legal child. The paternity leave is equal to the average daily wage for the absence period of the man. This period includes time before and after the delivery of the child.

Moreover, a man is entitled to leave only if he has less than 2 children and the leave is for a maximum of 15 days of which 7 days are to precede the delivery date.

Need for Paternity Leave Law in India

³ The Paternity Benefit Bill, Bill no. 90 of 2017.

Maternity leave provides women the impetus to be paid and enjoy their healthcare rights. However, maternity leave without paternity leave is a denial of human rights from the same perspective. A person about to become a father is not provided with any right to take leave during the childbirth period. This leads to less involvement in the process, widening the parental gap between the spouses. A father is equally responsible for taking care of the infant after birth and before delivery, being present for the spouse or the woman pregnant with the child. Denial of such presence reinforces the idea that women are the prime caretakers of a child and it is justified if the father isn't involved. The absence of one parent puts the entire childcare responsibility in the hands of a mother.

Some arguments for the need for paternity leave are:

1. Women, in general, spend a larger amount of time taking care of their children, compared to fathers. This enables them less opportunity in the employment sector, making them dependent on their spouses.
2. There should be equal distribution of housework and workplace as well. The absence of paternity leave allows men to not be present at home thus burdening women with housework and childcare despite pregnancy and postpartum issues.
3. No paternity benefit leads women to take higher psychological and physical pressure.
4. Men end up having little to no connection with their children as they are absent before, during and after childbirth. Childbirth leads to financial burden making it difficult for a family to survive on the salary of one person, making men usually burdened with earning more for the sake of the child. This causes them unable to be involved in the childbirth process and see their infants grow as well.
5. Paternity leave is important as it changes relationships and parenting role perceptions. Usually, mothers are considered as prime caretakers, but paternity leave is based on the perception that both parents are to be involved in childcare as it forms a better connection with the child and both are equally responsible for parenting. Unlike the patriarchal setup, the father only takes the financial responsibilities.
6. Due to maternity leave, women are pressured with childcare rather than the rest, that the Maternity Benefit Act aims or intends to provide.

7. Paternity leave will ensure an increase in earnings of the mothers, an increase in female presence in employment, development in healthcare and employment benefits of a woman, increase in participation in the labor force. This will lead to a more gender-equitable society that is enshrined in our Constitution by the Constitution makers.
8. Men should not only be allowed for childcare but expected to do so. Paternity leave is a human right of a person to be present for the child and their. Moreover, it is a prenatal duty to look after one's child and not just the duty of the mother as implied by paid maternity leave and absence of paternity leave at all.
9. Because there is no legislation granting men leave, private companies are free to exploit men and their parental rights. The private sector is free to have its rules regarding paternity leave. Since there is no legislation to regulate, hardly any private sector has equal paternity leave provisions compared to maternity, which is regulated. Therefore, the private sector easily exploits the rights of a father-to-be.
10. Men refrain from availing paternity leave cause of socio-cultural pressure as well. Men feel ashamed to avail the paternity leave, even if their establishment provides the same. This is due to the social conditioning that it is a female job and men aren't supposed to help with housework or childcare. This refrains men from being involved at home, having a connection with their children, and not helping their spouse during this period. Paternity leave will reduce this mentality as men will be present at home and expected to participate in domestic affairs rather than only contribute financially.

Gender inequality is a major sociological evil that penetrates every aspect of the world, be it political, cultural, educational and so on. One of the many patriarchal practices of society is the unpaid labor that females are expected to provide. It includes performing household chores and childcare. Women entering the workforce led to an increase in their psychological and physical pressure. And the solution is to decrease the same through shared household responsibilities in a heterosexual setup most importantly.

With ensured maternity leave, the intent was to accept the fact that women undergo biological changes during pregnancy rendering it difficult to impossible for them to work especially in the

labor force. This led women to take unpaid leave for a long duration or leave the work permanently. Also, the employers exploited women and refused to hire them.

With maternity leave, women could be a part of the establishment and still take care of themselves. However, a wider approach shows that maternity leave without paternity leave reinforces gender inequality and is against the intent of providing maternity leave itself. Without the biological father, the mother is burdened with additional household responsibilities and childcare after the delivery. All of this with the physical and mental pressure of pregnancy and postpartum period. Paternity leave will ensure the biological fathers are present and take care of their child and spouse.

Judicial steps

The Judiciary has acknowledged the absence of paternity leave and highlighted its importance as well. Some landmark cases regarding the same are explained further.

In the Chander Mohan Jain⁴ case, a private school teacher challenged the school's denial of paternity leave. The school also deducted his salary according to the leave taken by the teacher. The teacher challenged the same and the New Delhi High Court ruled that the staff of the school is entitled to paternity leave and the Petitioner was reimbursed.

In the case of Rakesh Malik V State of Haryana⁵, the petitioner, a State Government employee, demanded paternity leave but was denied. So he challenged the denial in Court and urged it to frame leave policy under Article 226 but was denied the same as there was no legislation for the same and beyond the powers of the Court.

Lastly, in Vijendra Kumar V. Delhi Transport Corporation, govt of NCD⁶ the petitioner demanded paternity leave but since there was no legislation, he was denied the same.

⁴ Chander Mohan Jain v. N. K. Bagrodia Public School, 2009 SCC OnLine Del 2693

⁵ (2013) SCC OnLine P&H 3546

⁶ 2015 SCC OnLine CAT 3012

Even though the judiciary was unable to help the people avail the paternity leave, these cases did highlight the importance of paternity leave and the need for legislation so the judiciary could impart justice.

International aspect

There are no international guidelines on paternity leave however certain countries have their legislations on the same.

The Nordic Welfare States and Sweden were the first to promote paternity leave publicly in 1974. They declared the paternity leave to be gender-neutral, widening its application. Other countries with Paternity leave laws include- Finland, Norway, Iceland, Denmark, Portugal and so on.

Various companies have paternity leave. These include IKEA, Zomato, Starbucks, Microsoft, Infosys and so on.

Although Indian employees working in such companies in India do get the benefit of paternity leave, the same is often homophobic, unregulated and hardly availed due to cultural pressures.

The International Labor Organization too does not have a particular convention or guideline for the same. Although the 1981 Convention on Family Responsibilities⁷ does talk about the issue.

It states:

“The Committee is pleased to note that, in addition to the strengthening of maternity protection, paternity leave is increasingly being introduced. Arrangements to facilitate the reconciliation of work and family life following maternity and paternity leave may include: parental leave; adoption leave; family leave.....It notes that despite the gradual uptake in paternity leave by men and the expansion of parental leave for both parents, mothers are still overwhelmingly the primary users of parental leave”

This supports the argument mentioned above that despite paternity leave being available, it is usually women who avail the leave right as the society conditions women to be primary

⁷ ILO Workers with Family Responsibilities Convention 1981, No 156, Article 3(1). Entry into force August 11 th 1983.

caretakers and men see it socio-culturally stereotypical to have an active parenting role before, during and after childbirth.

Conclusion

It can be easily concluded that maternity leave without paternity leave is hardly uplifting for women. Undeniably, it gives women the benefit of staying in the work culture and getting paid as well, as the leave accepts biological differences between the sexes. But, without paternity leave, the household responsibilities of women increase and fathers tend to have no participation in the upbringing of their children among other issues. Therefore, by ensuring paternity leave, India can further grow ensuring gender equality.