

**MOTHERS ON THE TWO SIDES OF THE RADCLIFFE LINE: HOW SOCIALLY
SECURE?**

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ABSTRACT

In a country which is steadily marching towards economic growth with the twin goals of economic independence and economic equality in mind, social security for mothers in the form of maternity benefits is of paramount importance. Despite changes in social structures, babies are still biologically dependent on their mothers and the same necessitates adequate provisions of leave and benefit to women employees for motherhood and childcare. As per the Act, benefits are available to women who have worked at least for 80 days during the 12 months immediately prior to the pregnancy.

Maternity Protection Convention, 2000 (No.183) of International Labour Organization (ILO) stipulates 14 weeks maternity leave with cash benefit in case of an instrument being used in the delivery of the baby. For babies delivered normally by labour, the mother is entitled to six weeks of leave before and six weeks immediately after the birth of the child. However, in India, pursuant to an executive order, the maternity leave for women in the public and private sector¹ is to be extended to 26 weeks thereby helping employers retain skilled force and their loyalty.² She cannot be employed in any work that might endanger the baby's health. This seldom seems to be the case and the majority of women end up losing their jobs during pregnancy.

¹ Mahendra Singh, 'Maternity leave for 26 weeks likely soon' *The Times of India* (July 24 2016) <<http://timesofindia.indiatimes.com/india/Maternity-leave-for-26-weeks-likely-soon/articleshow/53360216.cms>>

² Surya Sarathi Ray, 'Good news for women employees, govt to enhance maternity leave to 26 weeks soon' *The Financial Express* (May 20 2016) < www.financialexpress.com/article/economy/govt-to-enhance-maternity-benefit-by-14-weeks-soon/260483/ > accessed on 9 July 2016

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By virtue of a recent policy to encourage small families, a woman is allowed maternity benefits only for the first two children. The flaw in this policy has been rightly pointed out by a certain section of feminists who say that in India it is mostly the husband who makes the decision of having children and usually an Indian couple attempts conception till a boy is born. Here, the wife does not have a substantial say in family planning and is being deprived of maternity benefits as well.

The aim of this paper is to examine the current Indian laws regarding maternity benefits. The paper is divided into two parts; the first part deals with the basic introduction and analytical description of the existing laws on maternity benefits while the second part attempts to offer a comparative study between existing maternity benefit laws in India and that in its neighbouring countries such as Pakistan. Through a comparative analysis, the author seeks to suggest ways in which the existing laws can be supplemented.

Keywords: The Maternity Benefit Act, 1961; Maternity benefits in Pakistan; Economic equality

Introduction

Economic growth and economic equality are two complimentary concepts whose success is dependent on social security laws framed in that regard. Since women constitute nearly half of the country's population,³ favourable social security laws for women go a long way in ensuring economic growth and equality. Parenthood and livelihood constitute two very important aspects of a modern individual's life. In today's world, when the woman is bravely marching towards emancipation, it is grossly unfair to hold her back by denying her maternity benefits and compelling her to choose between parenthood and livelihood.

This research paper has been essentially divided into two major parts. The first part looks at The Maternity Benefit Act, 1961, examining its constituent sections with a critical approach. The founding sections of the Act are discussed herein. In here, the constitution and its guardian's views on maternity benefits have been discussed. The discussions have been supplemented by making reference to different constitutional articles and judicial pronouncements by the higher judiciary of India.

The second part of this paper deals with the lacunae in maternity benefit laws that are present in India and Pakistan. A comparative analysis has been done between the two countries. The choice of these two countries for this purpose was a rather natural one, considering their shared history of integration and separation.

The socio-cultural compositions of India and Pakistan are very similar, Pakistan having been a part of India till 69 years back. The patriarchal societal structure in both the countries being heavily prejudiced against women contributes highly to the choice of countries. Pakistan, like India, is a developing nation and has been on that path for the same number of years. Women in both the countries have steadily been coming out of the literal and metaphorical veils for quite some time now and the same calls for attention to their laws regarding women. Women in both the countries are still expected to marry, find a family and bear children. Despite the progress that has been made, child-bearing is still considered to be

³ <http://censusindia.gov.in/Census_And_You/gender_composition.aspx > accessed 9 July 2016

the primary responsibility of a woman in both the countries. Progress has been made in respect that society has also realised how women could also work. However, professional ambition is still considered secondary to their primary obligations to the family. Against this backdrop, if any kind of emancipation, empowerment and progress of the women folk is to be achieved, it has to take place gradually and with the help of accommodating laws which do not push women towards the dilemma of parenthood and livelihood where they will be compelled to choose parenthood in most cases.

Pakistan does not have an Act regarding maternity benefits per se but an ordinance by the name West Pakistan Maternity Benefit Ordinance, 1958⁴ operates across the entire country. Pakistan has a cluster of laws which grant maternity benefit to women workers.

Apart from West Pakistan Maternity Benefit Ordinance, 1958, there are Mines Maternity Benefits Act, 1981,⁵ Provincial Employees Social Security Ordinance, 1965,⁶ Revised Leave Rules, 1980,⁷ which have explicit provisions on the issue of maternity benefit in Pakistan. It is essential to note here the constitutional backing that maternity benefit receives from the Constitution of the Islamic Republic of Pakistan through Articles 25A and 27 as Fundamental Rights and Article 37(e) under Principles of Policy. While Article 25A allows for special provision for women, Article 27 states that positions appropriate for only one sex and not the other may be filled as per requirement and as such acts as a legitimate and constitutional exception to the constitutional principle of equality among all citizens which guarantees no discrimination on grounds such as sex. Article 37(e) specifically provides for maternity benefit for women in employment.⁸

It must be said that the maternity benefit laws in Pakistan are too many and too scattered with each law catering to specific areas. Such situations cause overlapping of laws

⁴ The West Pakistan Maternity Benefits Ordinance 1958 is applicable to all the organizations, establishments (whether industrial or commercial) and factories as defined under the Factories Act 1934.

⁵ Mines Maternity Benefits Act, 1981 which is applicable only to women working in mines and is a rather unfit for comparison.

⁶ Provincial Employees Social Security Ordinance, 1965 (Preamble, Sections 36, 38, 51 and 72) are applicable only to those women who have paid contributions to the social security institution.

⁷ Revised Leave Rules, 1980 which was The Civil Servants Act, 1973 applies to women in the public sector.

⁸ Constitution of the Islamic Republic of Pakistan, Arts. 25A, 27, 37(e)

and in such cases supersession of laws needs to be decided. However, as stated in Provincial Employees Social Security Ordinance, 1965,⁹ the Act has supersession over the other three statutes in this regard. Yet, the West Pakistan Maternity Benefit Ordinance, 1958, has been the most comprehensive statute out of the four statutes and the closest to being a proper piece of legislation on maternity benefit.

In 2011, however, through the 18th Amendment, the West Pakistan Maternity Benefit Ordinance, 1958, was repealed as a federal law with the intention to promulgate it as a provincial law.¹⁰ Unfortunately, at this point, this law stands repealed and there is no new provincial law in place thereby not allowing women in industries to avail of maternity benefit at all. Needless to say that it is strongly advocated that a law to this effect be promulgated and implemented at once.

It may be said that a research analysis on a repealed law renders this paper irrelevant. However, that is not the case. The law has been repealed with the primary purpose of changing its jurisdiction from federal to provincial which has nothing to do with the substantial portions of the Ordinance. The Pakistani law is a skeletal structure which provides for most of the provisions that it needs to provide and the substance is similar to its Indian counterpart. It is another matter that the Indian law is a more complete law. It is a matter of drafting that the Pakistani ordinance just gave a basic structure. This repeal does not invalidate this research as the paper is on the substance in the law rather than its jurisdiction in the two countries. Therefore, even in future, when the Pakistani law is properly formulated and eventually promulgated as an Act, its substance will probably be revised only to make the law more complete. Such modifications which may be attempted will be mostly to roughen the edges of the ordinance rather than making substantial changes in the law.

As an extension of the second part of this paper, the section discussing the author's concluding thoughts talks about two major ideas – paternity leave and surrogacy with respect

⁹ Provincial Employees Social Security Ordinance 1958, s 81

¹⁰Shamsul Islam, '18th Amendment: Maternity benefit law lapses' *The Express Tribune* (Pakistan, June 19, 2011) <<http://tribune.com.pk/story/191985/18th-amendment-maternity-benefit-law-lapses/>> accessed on 13 July 2016

to maternity benefits. This section seeks to touch upon the latest ideas of relevance that deserve thought and discussion.

The Maternity Benefit Act, 1961 – India: An overview

This portion of the paper aims to discuss the Act¹¹ and the features in them, in brief. While discussing the same, the author intends on portraying the Supreme Court of India's stand on questions of law in this regard and also enlist her interpretations under the relevant heads.

Since prior to the formulation of this legislation, different states had their own maternity benefit laws, the object of this Act has been to do away with disparities between such Acts. This Act has seen a drastic change by virtue of Act 61 of 1989 which massively amended the Act. This paper concerns itself with the amended version of the Act.

The Act in Brief

The fundamentals of the Act are as follows:

- Section 3 of the Act defines terms such as 'child', 'delivery', 'miscarriage', 'establishment', 'employer', 'mine,' etc.¹² Section 3 of this Act is indeed a very important one in that it includes direct employment or one through an agency in its definition for 'woman' within the meaning and purpose of this Act.¹³ The section also clarifies how 'wage' only means remuneration payable in cash.
- Section 4 of the Act lists down circumstances and restrictions on work for women. The employer is prohibited from knowingly employing a woman during six weeks immediately following the day of delivery or her miscarriage or medical termination of pregnancy.¹⁴ On a request being made by a woman, she cannot be engaged in work that is of arduous nature or that involves long hours of standing or that which is likely to interfere with her pregnancy. This option is available to her from one month prior

¹¹ Maternity Benefit Act 1961

¹² Maternity Benefit Act 1961, s3

¹³ Maternity Benefit Act, 1961, s3

¹⁴ Maternity Benefit Act, 1961, s4

to the period of six weeks preceding her expected date of delivery and extends to the time period of six weeks before the date of expected delivery in case she does not avail of the six weeks leave of absence. The provisions are very specific in this case and the health of the mother and the child has been given paramount importance.

- Section 5 deals with the payment that the woman is entitled to.¹⁵ She is entitled to an average daily wage for the period of her actual absence – preceding, including and following the day of her delivery. This is applicable to only those women who have been working for the employer for a period of twelve months prior to the pregnancy and has worked for at least eighty days. This provision is not applicable to those who immigrated to the State of Assam while pregnant. The rationale behind this provision is that it has socio-political and strategic significance since it is common knowledge that Assam attracts a huge number of immigrants from the border country of Bangladesh. It would indeed be difficult to implement this Act without this provision. This section also says that the maximum benefit a woman can expect is that of twelve weeks and additionally the leave preceding the day of delivery cannot be more than six weeks.
- Section 6 of the Act¹⁶ concerns itself with notice of claim of maternity benefit and payment thereof. A female employee of an establishment may give a written notice claiming maternity benefit from any date preceding the expected date of delivery as long as it is not more than six weeks prior to the expected date of delivery. A woman who fails to give such notice of claim must do so at the earliest after delivery. The law regarding the payment of maternity benefit stipulates that the same for the period preceding the expected date of delivery must be paid in advance to the employee on production of proof of her pregnancy. For the payment of the subsequent period, production of proof of delivery would necessitate payment to the employee within forty-eight hours of such production of proof. However, in the event that the woman fails to give such notice, the Inspector¹⁷ may, either on the woman's request or of his own accord, order payment of the benefit.

¹⁵ Maternity Benefit Act, 1961, s5

¹⁶ Maternity Benefit Act 1961, s 6

¹⁷ Section 14 of the Act mentions the procedure for appointment of the Inspector who will be appointed by the Government if deemed fit for the purposes of this Act through a notification in the Official Gazette and will function within their jurisdiction of defined local limits. The powers and duties of such duly appointed Inspector

- Section 10¹⁸ makes provision for maternity benefit during periods of illness arising out of pregnancy, delivery, premature child birth, miscarriage, for up to one month on production of relevant proof. This is in addition to the stipulated twelve weeks (now twenty-six weeks vide an executive order mentioned and cited supra).
- Section 12¹⁹ of the Act disallows and prohibits dismissal of female employee while she is on her leave of absence pursuant to the maternity benefit to which she has rightfully claimed entitlement. During such period of time, the employer may not discharge her of her duties or alter her services so as to disadvantage her. A more detailed discussion in relation to the provision contained in this section may be found infra while comparing it with the relevant maternity benefit laws of Pakistan.

Constitutional Validity

The cause of maternity benefit finds strength, support and backing from several constitutional provisions, some of which are listed herein. Right to equality in law [Article 14],²⁰ Right to social equality [Article 15],²¹ and Right to social equality in employment [Article 16]²² ensure that pregnancy is not viewed as an infirmity and the physiological and childcare issues a woman has to deal with does not come in the way of her professional competence. Being physiologically disadvantaged, granting of benefits in this regard would provide a cushioning effect and ensure that Article 14 is upheld.

- Right to adequate means of livelihood [Article 39(a)]²³ — As an extension of the argument supplied hereinabove, the Article provides that a female employee's right to adequate means of livelihood is not impeded by the natural phenomenon of child birth.

is to be found in Section 15 of this Act which, among other things, empowers him to inspect the premises within his jurisdiction at any reasonable time and also empowers him to compel anyone to answer his question(s).

¹⁸ Maternity Benefit Act 1961, s 10

¹⁹ Maternity Benefit Act 1961, s 12

²⁰ Indian Constitution, Art 14

²¹ Indian Constitution, Art 15

²² Indian Constitution, Art 16

²³ Indian Constitution, Art 39(a)

- Right to equal pay for equal work [Article 39(d)]²⁴ — this Article also aims to level the female employee with her male counterpart so as to balance out the disadvantageous situation of pregnancy with the privileges of maternity benefit.
- Right that the health and strength of workers both men and women are not abused [Article 39(e)]²⁵ ensures that women are able to deal with pre-natal and post-natal physiological changes and difficulties without sacrificing their health and livelihood.
- Right to just and humane conditions of work and maternity relief [Article 42]²⁶ specifically draws attention to the health of new mothers in the workforce and lends constitutional validity to the case for maternity benefits. While Article 42 is under Part IV of the Indian Constitution, which contains the Directive Principles of State Policy, Article 21²⁷ – Right to life, when not subjected to a narrow definition may be taken to include right to sustenance of the mother and the child for which the mother should be entitled to maternity benefits.

What say you, Hon’ble Judiciary?

The Supreme Court of India as the apex court of the country has adopted a liberal interpretation of maternity benefit laws through its observations in numerous cases that have come before it. The landmark case of *Municipal Corporation of Delhi v Female Workers (Muster Roll) and another*²⁸ witnessed the Supreme Court examine the intention of the legislators through the provisions of the Act. In this case, female workers (muster roll) in unregularised services working on behalf of the Municipal Corporation of Delhi demanded maternity benefits, which were given only to female workers in regularised services. It was observed that female workers (muster roll) engage in work that is similar in nature to that of female workers in regularised services. The question was whether female workers (muster roll) are entitled to maternity benefits. The Supreme Court observed that the rural woman of India has recently stepped out of her traditional village home to work out of necessity and is employed in work in the nature of hard physical labour. Considering the nature of work that

²⁴ Indian Constitution, Art 39 (d)

²⁵ Indian Constitution, Art 39 (e)

²⁶ Indian Constitution, Art 42

²⁷ Indian Constitution, Art 21

²⁸ 2000 SCC (L&S) 331.

these female workers engage in even in advanced stages of pregnancy and soon after her delivery, in the absence of maternity benefits the woman and the child are at a very high health risk.

Considering that the nature of work in the above-mentioned case was similar, the Supreme Court upheld Article 15 by not sanctioning the discrimination which would have prevailed otherwise. Article 15 of the Constitution of India provides that the State will not discriminate against an individual on the basis of religion, race, caste, sex or place of birth and Clause (3) of the same article makes an exemption by allowing the State to make special provisions for women and children.²⁹ In the case of *Yusuf Abdul Aziz v State of Bombay*,³⁰ it was held that Article 15(3) is applicable to both current and future laws.

The Supreme Court has time and again lent credibility to the constitutional principle behind maternity benefits by invoking the same in relevant cases. In *Crown Aluminium Works v Workmen*³¹ and *J. K. Cotton Spg & Wvg. Mills Co. Ltd v Labour Appellate Tribunal of India*,³² the Supreme Court upheld the status of India as a welfare and socialist state as mentioned in the Preamble to the Constitution of India.³³ The Apex Court also observed that the definition of social justice cannot have a narrow interpretation and in this context its aim is the removal of socioeconomic inequalities. Overall, the judiciary adopts a dynamic yet pragmatic approach in the administration of the concept of ‘social justice.’

The Apex Court has managed to free itself from the shackles of technicalities in the case of maternity benefits. In the case of *Ram Bahadur Thakur (P) Ltd. v Chief Inspector of Plantations*,³⁴ a female worker was denied maternity benefits because she had worked for 157 days instead of the stipulated 160 days. The Supreme Court held that for the purposes of computing the total number of days, Sundays and unpaid leave days were to be included in the stipulated 160 days.

²⁹ Indian Constitution, Art 15

³⁰ AIR 1954 SC 321

³¹ AIR 1958 SC 30

³² AIR 1964 SC 737

³³ Indian Constitution, Preamble

³⁴ (1989) 2 LLJ 20

In the case of *Air India v Nergesh Meerza*,³⁵ the Apex Court had to deal with the legal validity of air hostesses being asked to retire on their first pregnancy. Among other issues discussed in the case, the Supreme Court took a strong view here and directed this provision to be struck down and very importantly remarked that pregnancy is ‘a natural consequence of marriage’ and not a disability. Whether the female employee will be able to handle the workload and manage childcare are her personal and individual matters and not the Airline’s concern as long as the Airline does not suffer loss of any kind due to such personal obligations of the female employee. The chief import of this judgment is that it puts to rest all arguments for women’s retirement on the basis of pregnancy as if it is an infirmity.

West Pakistan Maternity Benefit Ordinance, 1958: An Introduction

The Ordinance which has its application nearly across the entire country of Pakistan reflects the characteristic hastiness of an ordinance. However, it is quite suitable for its intent and purposes and covers almost all provisions that have been covered in the Indian Act. It is more like a summary of the Indian Act, in that it has all the provisions but gives the impression of being incomplete and inadequate on deeper analysis.

Lacunae – common and unique; Maternity Benefit Laws in India and Pakistan

The rationale behind choosing these two countries is rather simple. India and Pakistan are countries which are united by history and divided by more recent history. India and Pakistan have been sharing borders only for the past 69 years. Therefore, as far as the societal structure and social construct are concerned, it is more or less the same, just like any other present-day part of India. Another question that may arise is – why not any other country is being chosen for comparison and analysis? Bhutan, though a friendly neighbouring nation has social and political structures quite different from India. Operating under a monarchy, ruling a handful across a territory the size of a small Indian province, Bhutan hardly seems to be a choice to be weighed against India. Nepal, on the other hand is in its nascent stage of democracy, grappling with the formulation of a Constitution. Against such a backdrop, pitting it against India in case of comparison seems to be rather unfair. China, like Bhutan,

³⁵ (1981) 4 SCC 335

has a very different form of government and its socio-cultural background is as similar to India as India's is to Saudi Arabia. It may seem that Sri Lanka and Bangladesh fit the bill just as well as Pakistan; however, in order to make the analysis relevant it is pertinent that a number of countries are not taken at once. A comparison among a total of four countries would naturally render it difficult for the reader to be able to comprehend the essence of the research paper. It is hereby reiterated that comparative studies with Sri Lanka and Bangladesh have immense potential and demands extensive research. Therefore, primarily through the procedure of elimination, Pakistan has become the author's country of choice. Shared colonial history, which heavily influenced the subcontinent's present political structure, has automatically led to similar socioeconomic conditions in both the countries. The Constitutions of both the countries swear to the ideal of 'social justice' in their respective Preambles³⁶³⁷ which put the two countries under the obligation of legitimate expectation of legislating extensively and implementing widely the social security laws which eventually culminate in the achievement of its primary goal of social justice.

While India has the Maternity Benefit Act, 1961,³⁸ Pakistan has West Pakistan Maternity Benefit Ordinance, 1958.³⁹ The analysis that follows has been done provision-wise and appropriate sections of both the laws have been referred to wherever relevant. The analysis, which is based on five major points, is as follows:

1. Definitions of terms and expressions

Section 3 of the Indian Act and Section 2 of the Pakistani law defines terms and expressions within the meaning of the respective laws. While most of the definitions are similar, attention may be drawn to the definition of 'woman;' while the Pakistani law⁴⁰ refers to it simply as a woman who is employed the Indian Act⁴¹ specifies it to include employment, both direct and by agency. 'Stillborn child' is clearly defined by the Pakistani law⁴² while the Indian Act⁴³ simply includes it under the definition of 'child.'

³⁶ Pakistan Constitution, Preamble

³⁷ Indian Constitution, Preamble

³⁸ Maternity Benefit Act 1961

³⁹ West Pakistan Maternity benefit Ordinance 1958

⁴⁰ West Pakistan Maternity Benefit Act 1958, s 2(1) (1)

⁴¹ Maternity Benefit Act 1961, s 3(o)

⁴² West Pakistan Maternity Benefit Ordinance 1958, s 2(a) (j)

⁴³ Maternity Benefit Act 1961, s 3(b)

2. Minimum time period, preceding the date of delivery, for which the woman has to work

While the Indian Act stipulates that a woman be employed for at least twelve months and actually work for a minimum of eighty days in that time period in order to be entitled to the maternity benefits listed under the Act,⁴⁴ the Pakistani law requires the woman to be employed for four months.⁴⁵ While the Indian law is comparatively more stringent, the Pakistani law seems to be designed to encourage more women to join the workforce. For many women, since parenting gains predominance, incentives such as these go a long way in attracting and retaining women folk in the workforce.

3. Regarding payment and dismissal

Under Section 5(3) of the Indian Act⁴⁶ and Section 5(3) of the Pakistani Ordinance,⁴⁷ a woman is entitled to leave of absence on the day of delivery and six weeks preceding and following that day. Payment of wages at an average daily rate is to be made in favour of that woman for the duration of time mentioned above. In the event of the woman's death, the employer has to pay the amount of wage due to the woman till the day of her death as per Section 7 of the Indian Act⁴⁸ and Section 6 of the Pakistani Ordinance.⁴⁹

As per Section 12 of the Indian Act⁵⁰ and Section 7 of the Pakistani Ordinance,⁵¹ the employer is not permitted to serve the woman with a notice of dismissal while she is on a leave of absence due to pregnancy. Section 12(2)(a) of the Indian Act⁵² prevents the employer from dismissing the woman from service which would have the effect of depriving her of her medical bonus or maternity benefit. Section 7 of the Pakistani Ordinance⁵³

⁴⁴ Maternity Benefit Act, 1961 s 5(2)

⁴⁵ West Pakistan Maternity Benefit Ordinance 1958, s 4

⁴⁶ Maternity Benefit Act 1961, s 5(3)

⁴⁷ West Pakistan Maternity Benefit Ordinance 1958, s 5(3)

⁴⁸ Maternity Benefit Act 1961, s 7

⁴⁹ West Pakistan Maternity Benefit Ordinance 1958, s 6

⁵⁰ Maternity Benefit Act 1961, s 12

⁵¹ West Pakistan Maternity Benefit Ordinance 1958, s 7

⁵² Maternity Benefit Act 1961, s 12(2)(a)

⁵³ Section 7 (2), West Pakistan Maternity Benefit Ordinance 1958, s 7(2)

prohibits the employer from dismissing the woman from her services during her pregnancy without reasonable cause and also provides her with recourse in the form of the option to approach the Director of Labour Welfare within sixty days of the service of notice of such dismissal.

By virtue of Section 13 of the Indian Act,⁵⁴ the employer is prohibited from causing a deduction in the woman's wages during the period of her pregnancy. Pakistan has no such provision. It will, probably, be beneficial if Pakistan amends its law in order to include a provision similar to its Indian counterpart complete with penalty or recourse in case of inefficiency in implementation. A pronounced provision with regard to the prohibition of deduction in the woman employee's wages would give them incentive and assurance to be a part of the labour force in the first place. When the woman knows of a steady inflow of benefit during the period of her pregnancy, she will not have to resign and thereby her skills may be retained in the workforce.

Section 11 of the Indian Act⁵⁵ provides for daily nursing breaks during the course of work apart from her regular intervals of rest until the child attains the age of fifteen months. The law in Pakistan remains entirely silent on the issue of nursing breaks. It is strongly recommended that Pakistan amend the Ordinance accordingly so as to accommodate provisions for nursing breaks.

4. Penalty for woman and employer

In the event of non-compliance with the provisions of the Act by the employer, he/she can be penalised under Sections 21 and 22 of the Indian Act⁵⁶ with imprisonment of three months to one year and a fine ranging from two thousand rupees to five thousand rupees. In the occurrence of the same event, the Pakistani Ordinance renders the non-compliant

⁵⁴ Maternity Benefit Act 1961, s 13

⁵⁵ Maternity Benefit Act 1961, s 11

⁵⁶ Maternity Benefit Act 1961, ss 21, 22

employer punishable under Section 9 of the Act⁵⁷ with a fine that may extend to five hundred rupees.

While it is humbly suggested that the Indian Act considers a revision with respect to the fine keeping the changing times in mind, it is also recommended that the Pakistani law puts an upper limit with regard to the fine so as to add to the deterrent value.

In case the woman does not comply with the provisions of the Act and goes to work despite being granted a leave by her employer as under the Maternity Benefit Act, such act would invite a mere forfeiture of the right to maternity benefit by the woman under Section 18 of the Act.⁵⁸ However, in Pakistan, the woman is liable to pay a fine, which is ten rupees at the most under Section 8 of the Pakistani Ordinance.⁵⁹ Forfeiture of the right to maternity benefit, as in the case of India, seems to be a much more practical option that can better serve the purpose of discouraging women from working during pregnancy. The significance of this provision lies in the fact that working in that time period is likely to endanger the health of both the mother and the child.

5. Inspector – Appointment, Status, Duties and Powers

Sections 14, 15, 16 and 17 of the Indian Act⁶⁰ relate to the appointment, status, duties and powers of an inspector. Section 14 stipulates that the appointment of the inspector may be made by a notification in the official gazette. The inspector will enjoy the status of a public servant vide Section 16 of the Act. As per Section 15 of the Act, the inspector is empowered to pay a visit where women are employed at all reasonable times and seek information from whoever is present on the respective premises. Under Section 17, he is also vested with powers to direct payments to be made to women who have been wrongfully deprived of the same.

⁵⁷ West Pakistan Maternity Benefit Ordinance 1958, s 9

⁵⁸ Maternity Benefit Act 1961, s 18

⁵⁹ West Pakistan Maternity Benefit Ordinance 1958, s 8

⁶⁰ Maternity Benefit Act 1961, ss 14, 15, 16, 17

The Pakistani law does not have a special inspector appointed under this Ordinance but for all purposes of this statute, the ‘Inspector of Factories’ is to function as one under the definition of this piece of legislation .⁶¹

It is strongly recommended that a special inspector for this Ordinance be provided for immediately in order to ensure better functionality and effectiveness of the purpose of ensuring maternity benefits to all eligible women, that this Ordinance seeks to achieve.

6. Enforcement of penal provisions

As per the Pakistani law, no court below the magistrate of first class can try any offence against the Ordinance.⁶² Also, to institute prosecution under this Ordinance, previous sanction of the Inspector of Factories is a prerequisite.⁶³ The Indian law, however, does not call for any such sanction and permits an aggrieved woman, an office-bearer of a registered Trade Union or an Inspector to file a complaint under the Act.⁶⁴ It may be noted that the limitation period for institution of an action under this Act by an aggrieved woman is one year in India⁶⁵ and six months in Pakistan.⁶⁶

Concluding Thoughts

At the end of interpreting and analysing the laws, the author feels that Pakistan must add on to the legal framework that is already in place vide the Ordinance. Since the matter of repealing and amending the law so as to adjust its jurisdiction is beyond the scope of this research paper, the author has restricted herself to commenting only on the substantive part of the law which is likely to be retained even when a new and stronger law is formulated.

⁶¹ West Pakistan Maternity Benefit Ordinance 1958, s 2(1)(f)

⁶² West Pakistan Maternity Benefit Ordinance 1958, s 10(3)

⁶³ West Pakistan Maternity Benefit Ordinance 1958, s 10(1)

⁶⁴ Maternity Benefit Act 1961, s 23

⁶⁵ Maternity Benefit Act 1961, s 23

⁶⁶ West Pakistan Maternity Benefit Ordinance 1958, s 12

The Indian Act calls for some revision as per the recommendations suggested by the author in relation to specific provisions and definite sections.

The Amending Bill

It is pertinent to include the salient changes that is being proposed to be brought about by the amending bill⁶⁷ which was introduced by the Minister for Labour and Employment, Mr. Bandaru Dattatreya in the Rajya Sabha on August 11, 2016 during the Monsoon Session of the Parliament. The Bill seeks to include five main changes which have also been listed under the five salient features of the Bill under Statement of Objects and Reasons⁶⁸. If this Bill is passed, it will mostly amend Section 5 and Section 11 of the Principal Act.⁶⁹

1. Duration of leave

Instead of the previous twelve weeks leave, the Bill proposes to increase it to twenty six weeks. As per the Act, the woman is not permitted to avail of her maternity leave till six weeks before the expected date of delivery⁷⁰. The bill seeks increasing that to eight weeks. A new provision restricting the aforementioned proposed changes to women with two or less children is also to be added. In such cases, the woman is entitled to the twelve weeks leave. This may be seen being in keeping with India's policy on family planning encouraging families with two children.

2. Adoptive and Commissioning Mothers

The proposed provision is discussed later in this paper after a brief discourse on the subject of maternity benefits with respect to surrogacy.

3. Work from home

The Bill allows the option of working from home, should the nature of work and the employer so permit, after the completion of a certain period of time subsequent to the delivery of the child. Such period of time maybe mutually agreed to by the woman and the employer.

⁶⁷ The Maternity Benefit (Amendment) RS Bill (2016) [XLIII]

⁶⁸ *Ibid.*

⁶⁹ Maternity Benefit Act 1961

⁷⁰ Maternity Benefit Act 1961, s 5

4. Crèche

The Bill contemplates inclusion of a provision which would require every establishment with fifty or more employees to provide crèche facilities within a certain prescribed distance. The woman will be allowed four visits to the crèche in a day, including her interval for rest.

5. Informing women employees about their rights

This Bill aspires to necessitate informing women of their maternity benefit rights at the time of their appointment compulsorily in written form via an electronic medium.

On a slightly different note, advancing times call for engineering of laws so as to suit the changing needs of those whom the law caters to. Therefore, in a world where patriarchy is being challenged more than ever and gender equality is gaining prominence, alongside modifications to maternity benefit, paternity leave is an idea that is being increasingly deliberated upon and in due time will hopefully also be legislated upon.

On the case for Paternity Leave

Advocates of the concept of Paternity Leave, surprisingly, consist mostly of feminists. In understanding the rationale behind the same, it is essential to keep an open mind and examine the concept of Feminism in the first place. Feminism essentially advocates gender equality and stands for equal responsibility and opportunity in individuals' public and private lives. If one looks at it closely, it isn't hard to see how acceptance of the feminist premise logically leads to the advocacy of paternity leave since fathers are supposed to be equally responsible for the child as the mother. This is quite a weak argument for the case of Paternity Leave owing to its radical premise which calls for absolute equality till a rather impracticable degree.

To take a less extreme view, it must be accepted that a child's dependence on the mother for basic sustenance is graver than his dependence in the father. However, it must also

be accepted that present times have led to changing societal roles whereby compared to traditional roles the mother's role has diminished while the father's has been magnified.

Granting paternity leave, albeit for a lesser number of days compared to maternity leave, would definitely help send a social message about equal responsibility of father and mother towards the child. However, on the flip side, it might just result in loss of a work culture if implemented in a country such as India. This is because the patriarchal Indian society has a strong bias against women when it comes to defined roles for the two sexes. The orthodox social construct in this country puts the woman under an implied obligation of child bearing and rearing. The paternity leave, in the absence of appropriate and adequate provisions, will allow the father to take the leave and treat it as an extended one. It is hereby suggested that provisions be legislated to the effect that both the parents cannot apply for parenting leave at the same time.

India today has an unequal sex ratio that is heavily prejudiced against women and the formal employment sector has an even worse sex ratio whereby men outnumber women in the workplace by a lot. So, the output-oriented employers are unlikely to be very open to this idea, given the possibility of being left without a considerable portion of the workforce.

On surrogate mothers

The issue of surrogate mothers being entitled to maternity benefits has been one of dispute. However, in a recent order, the Bombay High Court has ruled in favour of surrogate mothers. The facts of the given case are as follows:

The petitioner got married in 2004 and for a long time could not conceive of a child. Hence, she decided to go in for the surrogacy procedure. Accordingly, an agreement was signed with a surrogate mother. When the surrogate mother completed 33 weeks of pregnancy, the petitioner applied for maternity leave, but her application was rejected by the

Central Railways. Being aggrieved, she moved the High Court.⁷¹ As per the order in the case of *Amisha Girish Ramchandani v The Divisional Manager (Personnel Branch) Mumbai CST & Ors.*⁷² Anoop V Mehta and G.S. Kulkarni, JJ said that “A newly born child cannot be left at the mercy of others. A maternity leave to the commissioning mother like the petitioner would be necessary. A newly born child needs rearing and that is the most crucial period during which the child requires the care and attention of his mother.”The Bombay High Court, in this case, ruled in its order that mothers who have conceived through the surrogacy procedure are also entitled to maternity leave.

The Delhi High Court has also ruled in a similar manner in an order, "A female employee, who is the commissioning mother, would be entitled to apply for maternity leave under sub-rule (1) of Rule 43. The competent authority based on the material placed before it would decide on the timing and the period for which maternity leave ought to be granted to a commissioning mother who adopts the surrogacy route," by Justice Shakhder.⁷³

The fast-paced busy life today is plagued by the problem of infertility which has led to the growing popularity of surrogacy. Although surrogate mothers are paid for their services yet the great physical exhaustion that their bodies undergo must also be taken into account. This is when their bodies are in need of nourishment and rest.

When the world is gradually waking up to the reality of infertility, a legislation to the effect of granting the surrogate mother post-labour maternity benefits will in fact promote the practice. It is hereby put forward as a suggestion that our Parliamentarians discuss, deliberate and legislate upon this issue. In the case of *Rama Pandey v Union of India*,⁷⁴ Justice Shakhder comments that female employees tend to take substantial part of the assigned leave post-delivery and the same is perhaps influenced by several factors such as family

⁷¹ ‘Surrogate Mothers Entitled to Maternity Leave: HC’ *The Indian Express* (01 February 2016), <<http://indianexpress.com/article/cities/mumbai/maternity-leave-bombay-high-court-hc-order/>> , accessed on 20 March 2016.

⁷² 2016 SCC OnLine Bom 71

⁷³ Abhinav Garg ‘Moms of Surrogate Babies can get Maternity Leave: HC’ *The Times of India* (18 July 2015) <<http://timesofindia.indiatimes.com/india/Moms-of-surrogate-babies-can-get-maternity-leave-HC/articleshow/48120809.cms>> accessed on 20 March 2016

⁷⁴ (2015) 221 DLT 756

circumstances, health of the child, etc. He reasons that “except for physiological changes and difficulties, all other challenges of child rearing are common to all female employees, irrespective of the manner she chooses to bring a child into this world.”

In keeping with this trend, the Indian Parliament, has recently come up with The Maternity Benefit (Amendment) Bill, 2016⁷⁵, whereby provision for adoptive and commissioning mothers have been included. As an extension of the Section 5 of the Principal Act⁷⁶, a clause is added stating that mothers who have legally adopted a child who is below the age of three months and commissioning mothers are entitled to twelve weeks maternity leave from the date of handing over of the child to such mother.⁷⁷ This provision is in keeping with the changing times and is a rather welcome inclusion.

To briefly summarise, this paper has examined the Indian law at a very basic level at first and has then gone on to compare the lacunae in the laws of Pakistan and India. It is the author’s humble opinion based on the logical deduction that the Indian Act is a better piece of legislation in comparison with the Pakistani one when it comes to completeness. The overall look, feel and ultimate import of the Pakistani law seems to be that of haphazardness and incompleteness. However, that seems only natural given that it is an ordinance which by definition is made in a state of urgency. So, to be fair, the Pakistani law looks like itself – an ordinance. The Indian Act could definitely improve on several counts as has been duly and respectfully mentioned in the preceding paragraphs of this paper. It is a matter of sheer urgency that the Pakistani law be made fuller and be given the shape and name of an Act as soon as possible. India, on the other hand, must do away with the redundancy that some of its provisions pose and embrace the working mothers’ childcare duties by recognising today’s problems and legislating on the same lines. A forward step in that direction has already been taken with the provision for maternity leave for adoptive and commissioning mothers and such progressive legislation may be further tailored to suit the requirements of changing times by inclusion of a provision for paternity leave.

⁷⁵ The Maternity Benefit (Amendment) RS Bill (2016) [XLIII]

⁷⁶ Maternity Benefit Act 1961, s 5

⁷⁷ The Maternity Benefit (Amendment) RS Bill (2016) XLIII, cl 3B (4)