



Reforming the Maternity Benefit Act, 1961: Some Suggestions

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Maternal mortality and infant and child mortality rates appear to have dropped around the globe, but these continue to remain significantly high in India, as reported by the United Nations, recently. There is thus, a critical need to improve the quality and coverage of maternal health services in the country. Although the government has proposed to amend the Maternity Benefits Act, 1961, any meaningful change can be achieved only if the Act, along with policies and schemes of the state governments, are revamped with a view to recognizing the relevance of the reproductive labour performed by women. This issue of the Law & Policy Brief offers some suggestions on how a policy shift could be brought in this area by incorporating ideas of entitlements, universal access, gender equity and collective responsibility into the legal framework.

Introduction

Recently the government proposed to revise the Maternity Benefits Act, 1961 (MBA), in order to secure a social security code by providing right to food, health and livelihood to women and children. The Ministry of Labor (Women and Child Development) has recommended an increase in the period of maternity leave for every woman employed in both private and public sector, from the current 12 weeks to 24 to 26 weeks. If this amendment comes through, India would be one of the countries around the world to provide the highest period of paid maternity leave. Furthermore, the proposal for amendment, in all likelihood, is expected to extend its application to an adoptive mother and a commissioning mother in a surrogacy agreement. This is pursuant to several judicial pronouncements, wherein the courts have already recognized the need to extend maternity entitlements to these categories of women, for proper bonding between the child and mother. As promising as these proposals sound, they must be assessed against the realities of maternal health in the country. India's maternal

mortality ratio continues to remain as high as 174 in 2015, though there has been a slight drop from the previous years where it accounted for 181 in 2014 and 189 in 2013, however, there is a long way to go. We also need to look at the proposed amendments in relation to the broader question of what should be the social response to motherhood, for it is the underlying basis to any proposed legal reforms.

Brief Background

Maternity benefits are means to support a woman during pregnancy, childbirth and thereafter. It demands sufficient rest, nutrition and provisions for good health, to address safety of the mother and a holistic growth and cognitive development of the child. This idea is part of Article 25 of the Universal Declaration of Human Rights (UDHR), which states, "motherhood and childhood are entitled to special care and assistance". The idea evolved over time and its scope expanded through other international human rights instruments like the Convention on the Elimination of All Forms of Discrimination Against Women

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(CEDAW), which recognizes women's right to reproductive choice and the relevance of joint parenting in upbringing of the child. Though India has ratified the CEDAW and the Supreme Court has held that international covenants can be referred to for interpretation of our national laws, India's legal regime governing this area does not reflect the human rights guarantees enshrined in the international instruments.

Further, Article 39(e) of the Constitution of India provides that "the State shall direct its policy towards securing the health and strength of workers, men and women, and the tender age of children is not abused, and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength". Thus, the Constitution requires the State to require the provision of maternity benefits to every woman worker, in both government and private sectors, so that they are not compelled to resume work right after child-birth, resulting in poor health conditions. This is further endorsed by Article 42, which directs the State to "secure just and humane conditions of work and for maternity relief". Despite these enunciations, a stark disparity is created between the organised and the unorganised sector, with the maximum benefit reaching out to the organised sector alone. UNICEF states that mothers in the lowest economic bracket, (typically women employed in the unorganised sector) have about a two and a half times higher mortality rate. Though, the prime reason for it is poor access to healthcare, support and care in the form of legal entitlements can aid in improving the situation.

In *Sandesh Bansal v. Union of India* [WP (C) 9061/2008], the MP High Court pronounced that "the inability of women to survive pregnancy and child birth violates her fundamental rights as guaranteed under Article 21 of the Constitution of India, and it is primary duty of the government to ensure that every woman survives pregnancy and child birth". Similarly, in *Laxmi Mandal vs. Deen Dayal Harinagar Hospital & Ors.* [WP (C) 8852/2008], the Delhi High Court held that maternal mortality is a violation of a woman's fundamental right to life and that maternity benefits were to be provided to "homeless pregnant women" as well. Thus, time and again, the need to make maternity benefits accessible to all women has been reiterated but nothing concrete has been done to achieve this.

The scope of attainment of maternity benefits through the existing legal structure, particularly, The Maternity Benefit Act, 1961 (MBA), and national schemes such as Indira Gandhi Matritva Sahyog Yojana (IGMSY) and Janani Suraksha Yojana (JSY), is considerably limited. State government initiated schemes such as the Muthu

Laxmi Maternity Benefit Scheme of Tamil Nadu, which is moderately successful, are applicable only within the state's boundaries. Other state government schemes such as, Meghalaya's 2011, scheme have not been implemented yet for lack of funds. Thus, the overall realisation of maternity benefits has been quite poor and ineffectual till present.

The proposed amendments to the MB Act must be assessed against the background outlined above. The amendments proposed by the Government appear to be progressive measures, however, they are limited to the organised sector. Millions working in the unorganised sector, as construction workers, agricultural workers, piece-rate workers and domestic help are forgotten. Below are some tentative suggestions geared towards an overall policy shift in this area.

Suggestions towards a policy shift

(a) From 'benefits' to 'entitlements'

A predominantly patriarchal society like ours, recognizes only productive work, which is primarily paid work, and overlooks reproductive labour, which is vital as it contributes to the development of a society and produces the next generation of citizens for the country. Though the developed and several developing nations are increasingly aware of providing equal opportunities and treatment to all, reproductive labor is still chiefly viewed as women's domain. This stems from biology, where, since women produce children, they are essentially in charge of carrying out, the daily physical and ideological maintenance of human beings. As a result we continue to refer to these services provided by the State as "benefits", as if they are privileges bestowed by the State and not a woman's legitimate entitlement. We need a shift in the language in which we articulate support services provided to mothers. This shift could be reflected by changing the word 'Benefits' in the title of the Act to 'Entitlements'.

(b) Universal access

A combined reading of Sections 2 and 3 of current MBA makes it clear that it applies to a 'woman' who is employed, for wages in any 'establishment', where an 'employer' is identified as a person or an authority, appointed by the government or local authority, or where no person or authority is so appointed, the head of the department. Thus, the Act applies only to the formal/organized sector, which employs merely 4% of the total population of working women in the country and completely disregards the remaining section working in the unorganized sector.

The Report on the Conditions of Work and Promotion of Livelihood in the Unorganised Sector (2007) enunciated the poor conditions of livelihood and quality of work in the unorganised sector. Despite this, none of the social security laws such as the MBA, the Minimum Wages Act or the Factories Act protect workers in this sector, nor are assistances like gratuity or pension extended to it, further intensifying their struggles of survival. Though the Unorganised Workers Social Security Act, 2008 (UWSSA), makes provisions for maternity entitlements, in reality, there has been poor progress. Additionally, neither the UWSSA nor the MBA include an agricultural worker, thus, leaving a wide section of self-employed workers, without protection. The Planning Commission has acknowledged that women in the unorganized sector require social security addressing issues of leave, wages, work conditions, pension, housing, childcare, health benefits, 'maternity benefits', and this can only be safeguarded by extending labour protection to these sectors in a way that pays special consideration to the needs of women workers (Vol III of Twelve Five Year Plan 2012-2017).

It is therefore, suggested that the application and definitions of the Act are amended and it is done in a manner to extend the entitlements to all women, including adoptive mothers and commissioning mothers in surrogacy agreements, irrespective of the nature of employment or sector, whether a migrant or a temporary worker, home based or self-employed worker.

Other inclusions in the definition of woman have to be women with disability, as it is highly unlikely that they will be employed, homeless women as already recognized by judiciary, forest-dwelling tribal, single women, slum-dwellers, sex-workers, HIV positive women, and the like. The Justice Krishna Iyer Committee, way back in 1987, had proposed recommendations for maternity benefits to women prisoners but not much was done in this regard. However, it is notable that an obligation of the State to look after the health of women was documented back then.

A remarkable entitlement that has been carved under Section 4 of the recently implemented, National Food Security Act, 2013 (NFSA), mandates a provision of cash transfer of minimum of Rs. 6,000/- for "every" pregnant and lactating mother. Thus, the word "every" in the section can mean that the law has tried to de-link maternity entitlements with women's employment, and has begun to recognize both, the productive and reproductive economy.

The drawback, however, is that the implementation of NFSA, throughout India is carried out through the IGSMY scheme, which is also a conditional scheme making access to the benefits rather difficult. Several states, despite the Supreme Court's orders, have failed in implementing this scheme. Additionally, the IGSMY itself has shown poor performance, such as delayed payments to pregnant mothers and snags in accessing services, due to low budget allocation and no evaluation report. Moreover, many people are unaware of these provisions and the State has not undertaken enough steps to create awareness either. With different interpretations stemming under diverse schemes and laws, it is suggested that the UWSSA and the NFSA are merged or linked with MBA, in order cover a larger section of the society and to have in place, a complete social security code.

(c) Unidentifiable employer

The MBA in Section 5 provides for payment of maternity benefits by an 'employer' as defined under Section 3. This requires an employer-employee relationship to exist. Unfortunately, a large section of the women population is either home based or an agricultural worker, i.e. self-employed - working on her own land, or an unpaid care-worker, where it is difficult to identify an employer as defined in the Act. It is suggested that for a worker where her employer is unidentifiable, the State shall be identified as the employer and shall bear the responsibility to provide the entitlements.

(d) Joint Parenting

The proposed amendments to the MBA are silent on paternity or parenting leave. In India, Central and State Government employees are entitled to paternity leave for a month, which is a progressive step, however, the Sixth Central Pay Commission provides for 'child care leaves' up to 730 days which can be claimed only by women. Hence, creating both, a sectoral and gender divide, along with associating unpaid care work with a woman, yet again. Without tackling the issue of joint parenting, the law will continue encouraging the lopsided gender inequalities in unpaid care work, as well as, side-lining parent-child bonding. Several countries have revised their laws to include paternity leaves and since, India is a signatory to CEDAW, there is a pressing need to introduce paternity or parenting leaves and include the model of joint parenting.

(e) Crèche Facilities

The MBA at present does not require the provision of crèche facilities by the employer nor does it stipulate designation of spaces for breastfeeding. Several labor laws, such as the Factories Act, 1948, The Plantations Labour Act, 1951, and Mahatma Gandhi National Rural Employment Guarantee Act, 2005, mandate crèches at work site, but these are seldom enforced and no proper assessment is made to evaluate its compliance. Since this entitlement is dependent on the number of women employed, an employer, often under reports in order to avoid the provision of crèches. It is therefore, imperative to include crèche facilities to children and breastfeeding space to lactating mothers under MBA, irrespective of any conditions to strengthen other labor laws and to be in line with international labour law and women's rights standards. It is pertinent to note that the entitlement of nursing breaks is to a large extent contingent on the availability of crèche and breastfeeding spaces. If crèches are not included in the Act, it can directly affect the issue of nursing breaks and give an employer the right to dispense with this requirement. This lacuna therefore, in a way makes the provision of nursing breaks under Section 11 redundant. Further, over 90 member states of the International Labour Organization provide nursing breaks of at least one hour under national legislation, however, Rule 6 of the Maternity Benefit Rules, 1961, provides for two nursing breaks of only 15 minutes duration. Thus, there is a need to enhance the duration considering India is a member state of ILO.

(f) Miscellaneous

Section 9 of MBA provides for leaves for miscarriage, but does not extend the same to abortion. Thus, the benefit of leaves of 45 days shall also apply to a woman who has undergone abortion, whether induced or otherwise. Additionally, it is recommended that section 8 of the Act is deleted and provision for food security and complete health coverage for the pregnant and lactating mother, shall be provided by the employer or the State, as the case may be. A meagre amount of Rs. 25/-, mentioned under the section, as medical bonus, casts very low responsibility on the State and the employer, weakening the aim of securing a social security code. Lastly, it is suggested that the Act incorporates a new chapter on grievance redressal which shall be at district level, including severe penalties for non-compliance as the current penalties are not stringent enough and can enable an employer to easily evade the provisions of the Act. The powers of the inspector should be widened to cover the unorganised sector as well. The Act should also cast responsibility on State agencies to create awareness of the schemes available to avail maternity entitlements.

Conclusion

It is important that the while considering revision to the present Act, the Ministry of Labor engages with maternity health and protection holistically. It should undertake to develop a mechanism for covering expenditure towards payment of maternity entitlements on the lines of a cess fund. It should intend to dovetail the MBA with other labor legislations and schemes. Though the 2016-17 budget allocation for IGSMY to enable implementation under NFSA, is Rs. 400/- crores which is much below the minimum required amount of Rs. 15,000/- crores, which clearly indicates that maternity benefits may not be on the priority list of the government, at the moment.

References

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- ² See Trends in Maternal Mortality: 1990 to 2015: Estimates by WHO, UNICEF, UNFPA, World Bank Group and the United Nations Population Division (2015)
- ³ Elizabeth U. Eviota, *The Political Economy of Gender: Women and the Sexual Division of Labour in the Philippines*, Vol. 6, No. 1, pp. 137-139 (1994)
- ⁴ *R.D. Upadhyay vs State Of A.P. & Ors*, W.P.(C) 559/2006
- ⁵ ILO Report on Conditions of Work and employment database, 2004

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