

DESIDERATUM FOR PATERNITY LEAVE LAWS IN INDIA

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ABSTRACT

This research paper aims to explore the gender based discrimination compared to the tidal waves of Patriarchy in India. In today's contemporary context exhaustion and hard work of new parenting is encountered. The societal constraint of rigid gender roles are on deck for stereotypes. Personality traits, Domestic behaviours, Occupation and Physical appearances triggers sexism towards men in particular. Procreation requires prospective procreators. From the paternal ancillary it is appalled when the mother is territorialised to her offspring and the father to his billet. Morally parental rights and responsibilities are obligatory to both the parents but is it plausible for only the mother to take responsibility for rearing the child all by herself initially.

Countries such as Norway, Iceland, Denmark, Hungary, Lithuania, Serbia, Belgium and many more procure paternal leave policies unlike India. In this mega diversity nation, the paternity leave argument challenges conventional notions of child care, fatherhood and family. Structuring a divisive legal binding where the husband is equivalent to be affectionate towards his child like his wife is necessary. Progression in today's world is emphasising upon dual earning couples and decline of extended families which challenges the traditional gender roles prevailing around us. The Maternity Benefit (Amendment) Bill, 2016 is a dominion conquest for women in the field of work but lack of paternity leave in conjunction with childbirth supports the view that nurturing the child is solely a women's responsibility. The researcher attempted to highlight the gender disparity prevailing in India for the paternal rights for paid leave and absence of any legal provisions along with its needs for an indissoluble implementation of laws for the benefit of upcoming fathers.

Keywords

Paternity leave, Paid leave, Men, Equality, Women, India,

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Key Abbreviations

Sl. No.	Serial Number
Vol.	Volume
v.	Versus
A.P	Andhra Pradesh
ed.	Edition
art.	Article
Const.	Constitution
Aug.	August
FR	Fundamental Rules
SR	Supplementary Rules

Introduction

Most industrialised nations have made both paternity and parental employment leave available to fathers in conjunction with childbirth. Granting leave is the primary policy and programme efforts by governments to increase fathers' involvement with their children.¹ We often speak of the family, but there are many types of families. One can look upon the term *family* as a very complex word, with great variety of meanings.² Thus; we witness changes in the shared gender roles in the family. With the evolution of time, there is an impact upon paternal roles in households.

¹ Jesmin Syeda S & Rudy Ray Seward, Parental Leave and Fathers' Involvement with Children in Bangladesh: A Comparison with United Staes. Journal of Comparitive Family Studies, vol 42 no. 1, 95, 95-112 (2011). JSTOR, www.jstor.org/stable/41604584.

² BERT N ADAMS & JAN TROST, HANDBOOK OF WORLD FAMILIES ix (2005).

Husband and wife are integral entities of parenting partnership. Fatherhood is as equally important as a mother's affiliation towards her son or daughter. Due to a man's masculinity he is considered to contribute financially but the other aspects such as emotional, spiritual, physical and mental well-being are always ignored. This ignorance leads to bridge an emotional gap between a father and his child. Connecting with his offspring helps him understand the various duties of a parent along with nurturing the child at an early stage itself. Sharing the burden with the mother in rearing the child helps for the purpose of pivotal roles to face ahead in life.

In today's 21st century a large sector of working parents are reflecting around us. Women is no longer the object who would stay back at home and look after her family, instead she is a part of the work force army. With the changing trends we see boost male participation in the household, enhanced female participation in the labour force, and promotion of gender equity in both the domains.

India is a country which serves the Indian Constitution as an amalgamation from various constitutions around the world. It promulgates about equality to all and prohibits discrimination irrespective of a person's religion, race, caste, sex, place of birth, or any of them. A country which is rapidly developing must ensure that both the sexes are given equal representation, freedom, power and justice. Providing only maternity relief benefits for the women is explicit injustice done to the men as they have equal contribution for the procreation of their child.

The purpose of this research was to address three questions: (1) Is there a modernised approach to gender roles in India? (2) Are men treated equally? (3) Need for paternity laws in India?

Background of Indian Society

The Indian society has been hierarchical, it was based on "*Chaturvarna System*" which consisted of the four varnas which were vertically arranged.³ Indian society is one of the most oldest and complex one. It has covered a span of five thousand years since the period of its first known civilisation. During this long period, several waves of immigrants, representing different ethnic strains and linguistic families, have merged into its population to contribute to its diversity, richness & vitality.⁴ With the impact and influence of so many generations passing by its drawn that the Indian Society is traditional and conservative in nature.

³ 7 C.N.SHANKAR RAO, SOCIOLOGY OF INDIAN SOCIETY 36 (2d ed. 2013).

⁴ SHYAMA CHARAN DUBE, INDIAN SOCIETY 01 (2d ed. 1992).

Marriage is one of the dominant social institutions also contemplated as a religious sacrament. It was a social duty towards the family and the community and there was little idea of individual interest.⁵ The senior most male member is considered as the *Karta* of the family.⁶ This position is of *sui generis*. He is considered to be the head of a family and act on behalf of all the members holding a fiduciary relationship with all. Whereas the woman is considered to be the weaker sex and her role is to look after the family and her household chores. She was never allowed to voice her opinions out. India being a patriarchal society it was conducive to follow the same practices.

Modern Indian Society

After the British imperialism India witnessed innumerable changes. One of which was women being given valour and dignity amongst all. The Indian freedom struggle also perceived woman participation. Soon there was an impact upon the socio cultural environment and there was influence of legislations upon families. The legislations were provided to loosen the tight grip of the patriarchal values over the joint families by administering equal opportunities, privileges, rights and facilities to women.

- I. **The Married Women's Property Act, 1874** – The Act conferred ownership rights to women not only pertaining to their “Streedhan” but also the property which they have earned.
- II. **The Hindu Women's Right to Property Act, 1937** – The Act enables a woman's equal share to that of a son in the property of her deceased husband. If the property was joint at the time of her husband's death, she is entitled to have the same interest therein as her deceased husband was entitled.
- III. **The Hindu Succession Act, 1956** – The Act confers a woman right to property. Not only a daughter being given right in her father's property equal to her brothers, but also receives a share in her deceased husband's property equal to her sons and daughters.
- IV. **The Hindu Adoption and Maintenance Act, 1956** – This Act permits the wife deserted by her husband to claim maintenance allowances from her husband and it also permits a woman to adopt a child.

⁵ KANAIYALAL MOTILAL KAPADIA, MARRIAGE AND FAMILY IN INDIA 168 (2d ed. 1958).

⁶ Shreeama v. Krishnavenanama, 1957 A.P 434.

- V. **The Suppression of Immoral Traffic of Women and Girl's Act, 1956** – Provides protection to women against kidnapping and pushing them to brothel homes for prostitution.
- VI. **The Maternity Benefit Act, 1961** – Provides Maternity benefits to married women. 2 months maternity leave with paid salary.
- VII. **The Factories [Amendment] Act, 1976** – Separate toilets for females, maximum work of nine hours in a day for women and no employment of women between 10:00pm and 5:00am.
- VIII. **Domestic Violence Act, 2005** – Provides help to women who suffer from violence from husband and his family.

All the above legislations are in favour of women and there are many more legislations which protect women at large in India. The aberration is that men do not procure any invulnerability. The Indian Constitution enshrined states every individual who is a citizen of India shall be protected and be given the rights and freedom to lead a progressive life.

Equality as an Affirmative Action

There is a conspicuous need for policy initiatives to empower men as well as gender disparity prolongs in India despite economic growth. Due to a man's masculinity he is considered to be hefty, tough and strong, the real fact is ignored by all. Women and men differ in terms of biological make-up, power, status, norms, and roles in society.⁷ Leaving the biological disparity aside. If we look into the other aspects we can interpret that men are not treated equally as women are in the Indian Society. We see cultural imperialism taking over. If women are given equal opportunity then why do we leave men behind? Article 14 says that The state shall not deny to any person equality before the law or the equal protections of laws within the territory of India.⁸ From the diversified nature of society there should be different laws in different places and the legislature controls the policy and enacts laws in the best interest of the safety and security of the state. In fact identical treatment in unequal circumstances would amount to inequality. So a reasonable classification is not permitted but, is necessary if society is to progress. Thus, Article 14 forbids class legislation but it does not forbid reasonable

⁷ MANSAAH PRAH, INSIGHTS INTO GENDER EQUITY, EQUALITY AND POWER RELATIONS IN SUB-SAHARAN AFRICA, 282 (2013).

⁸ INDIA CONST. art 14.

classification.⁹ The classification however must not be arbitrary, artificial or evasive but must be based on some real and substantial bearing. A just and reasonable relation to the object sought to be achieved by the legislation itself. Article 14 applies where equals are treated differently without any reasonable basis. But, when equals and unequals are treated differently this does not apply. Class legislations is something which makes an improper discrimination by conferring particular privileges upon a class of persons arbitrarily selected from a large number of persons all of whom stand in the same relation of the privileged granted that between whom and the persons not so favoured, no reasonable distinction or substantial difference can be found justifying the inclusion of one and exclusion of the other from such privilege.¹⁰

Gender Mainstreaming

It is a contemporary concept being highlighted in today's world. The process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated.¹¹ Keeping this in mind we must affiliate to laws which pilot men.

Basic Principles of Gender Mainstreaming:-

- Adequate accountability mechanisms for monitoring progress need to be established.
- The initial identification of issues and problems across all area(s) of activity should be such that gender differences and disparities can be diagnosed.
- Assumptions that issues or problems are neutral from a gender-equality perspective should never be made.
- Gender analysis should always be carried out.
- Clear political will and allocation of adequate resources for mainstreaming, including additional financial and human resources if necessary, are important for translation of the concept into practice.

⁹ Shikha Singh, *Reasonable classification under Article 14*, (Aug. 21, 2017, 10:31 PM)

<http://www.legalservicesindia.com/article/article/reasonable-classification-under-article-14-1061-1.html>

¹⁰ *Supra* note 8.

¹¹ WHO, *Gender, Equity and Human Rights*, (Aug. 23, 2017, 01:06 AM) <http://www.who.int/gender-equity-rights/understanding/gender-definition/en/>

- Gender mainstreaming requires that efforts be made to broaden women's equitable participation at all levels of decision-making.
- Mainstreaming does not replace the need for targeted, women-specific policies and programmes, and positive legislation; nor does it do away with the need for gender units or focal points.¹²

Henceforth, this perspective aims at looking at both men and women equally to receive access or control over resources, decision making or benefits or rewards in a particular system.

Paternity

The concept of Paternity varies by time, place, and culture, and it remains problematic, complex and personal in the world. Since the 19th century, sometimes imperceptibly and sometimes preeminent and bounds the legal, social and cultural acceptance of a variety of family arrangements which has successfully challenged the patriarchal heterosexual reproductive family that had tended to dominate society, culture and the law. Paternity is the legal word for fatherhood. Establishing the paternity of the child, or who the legal father is, is very important.¹³

Establishing Paternity

There are a number of ways the paternity of a child can be established-

- A husband is presumed to be the father of any child born to his wife while they were married or within 10 months after they were divorced;
- The man named as a child's father on the birth certificate is presumed to be the child's father;
- The father can state that he is the child's father by signing an acknowledgement of paternity, which has to be co-signed by the child's mother;
- A court can declare that a man is a child's father. It also can declare that a man is not a child's father.¹⁴

¹² International Labour Organization, *Gender Equality Tool*, (Aug. 23,2017, 08:36 PM)

<http://www.ilo.org/public/english/bureau/gender/newsite2002/about/defin.htm>

¹³ ALEX SAMUEL & DR. SWATI PARIKH, DNA TESTS IN CRIMINAL INVESTIGATION AND PATERNITY DISPUTES (A MODERN SCIENTIFIC TECHNIQUE), 416 (2009).

¹⁴ *Supra* note 12, at 419.

Paternity Leave in India

There is no provision of paternity leave for working fathers in the private sectors in India as per the Labour Laws.

Labour law also known as employment law is the body of laws, administrative rulings, and precedents which address the legal rights of, and restrictions on, working people and their organizations. As such, it mediates many aspects of the relationship between trade unions, employers and employees. In other words, Labour law defines the rights and obligations as workers, union members and employers in the workplace. Generally, labour law covers:

- Industrial relations – certification of unions, labour-management relations, collective bargaining and unfair labour practices;
- Workplace health and safety;
- Employment standards, including general holidays, annual leave, working hours, unfair dismissals, minimum wage, layoff procedures and severance pay.¹⁵

Central Civil Services (Leave) Rules, 1972.

43-A. Paternity leave

(1) A male Government servant (including an apprentice) with less than two surviving children, may be granted Paternity Leave by an authority competent to grant leave for a period of 15 days, during the confinement of his wife for childbirth, i.e., up to 15 days before, or up to six months from the date of delivery of the child.

(1) During such period of 15 days, he shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

(2) The paternity Leave may be combined with leave of any other kind.

(3) The paternity leave shall not be debited against the leave account.

(4) If Paternity Leave is not availed of within the period specified in sub-rule (1), such leave shall be treated as lapsed.

43-AA. Paternity Leave for Child Adoption.

¹⁵ *Labour Laws In India*, (Aug. 23, 2017, 09:54 PM) http://ncib.in/pdf/ncib_pdf/Labour%20Act.pdf

NOTE: The Paternity Leave shall not normally be refused under any circumstances.¹⁶

However, not many are aware that the central government has a mandate paternity leave policy that provides leave for a central government employee for a period of 15 days so that he can take care of his wife and his offspring.¹⁷ This leave can be taken only when the father has less than two surviving children and he can avail the leave of 15 days prior or within 6 months from the date of birth of the child. If the father does not avail paternity leave within that period, it will be considered as lapsed. He will be paid the leave salary equal to what he draws before taking the leave. The law gives this provision in the case of adoption as well.¹⁸ This leave is authorized for government employees in India and there is no law that instructs the private sector to make it mandate. It is open to interpretation by companies individual. Along with that Private unaided school teachers working in the capital are given Paternity leave. It was laid down by the Delhi High Court in the case of Chander Mohan Jain Vs. N.K.Bagrodia Public School¹⁹

India a Corporate Hub

There are Seventy Thousand and Forty Three companies registered as per the 2014 reports of Ministry of Corporate Affairs.²⁰ Despite so many companies functioning and innumerable employees working in them there is no gender parity. As per The Maternity Benefit Act, 1961 a woman employee receives 26 weeks of paid leave during her pregnancy or after her delivery. It is a statute and it is binding upon every field of work on the other hand we see there is no legal provisions for men so they do not receive any form of leave either paid or unpaid. Yet few companies such as Genpact, Aviva Life Insurance, Yes Bank, Godrej Industries, Mondelez, EY and InMobi provide paternity leave to the new fathers.²¹ The perspective of a

¹⁶ FR & SR- PART III – LEAVE RULES, CENTRAL CIVIL SERVICES (LEAVE) RULES, 1972.

¹⁷ India Parenting, *Is Paternity Leave allowed in India?*, (Aug. 25, 2017, 3:32 PM), http://www.indiaparenting.com/pregnancy/117_5605/is-paternity-leave-allowed-in-india.html

¹⁸ *Supra* note 17.

¹⁹ Chander Mohan Jain v. N.K.Bagrodia Public School, (2009) W.P.(C)- 8104/2009.

²⁰ Ministry of Corporate Affairs, *Indian and Foreign Companies, LLPs*, (Aug. 25, 2017, 04:57 PM), http://www.mca.gov.in/Ministry/pdf/List_of_Companies_2014.pdf

²¹ The Economic Times, *Paternity leave: New fathers deal with what companies dole out*, (Aug. 25, 2017, 05:26 PM), <http://economictimes.indiatimes.com/jobs/paternity-leave-new-fathers-deal-with-what-companies-dole-out/articleshow/54534220.cms>

new baby in the family, the financial stability is a concern and taking unpaid leave is rarely an option for fathers. Hence, providing legal mandate for paternity leave which is paid is of utmost importance.

Need for Paternity Leave laws in India

The importance of paternity leave in India gives the expecting father a contingency to develop a stronger bond with his child from birth. Along with supporting his wife during labour, earlier the societal constraints had kept the fathers out of this for a long period of time. Parenting is a shared responsibility of both father and the mother which has come to recognition. The ubiquity of father during childbirth makes him sensitive towards the special needs of the little one, the exposure also enhances him to be more caring and affectionate. Many women are ambitious and career oriented these days and at the same time many are postponing motherhood because it would impact upon their career. If paternity leave is granted it will make them feel that their partners are involved and participate in parenting the child equally. This will promote sharing of the responsibility and it would make bonds between husbands and wives stronger along with having a special bonding with the child together. All together paternity leave benefits the whole family by augmenting the cognizance of confidence and comfort as men tend to get involved openly at the early stage of a child's life. If stringent laws are made equally for all then it would help every man to spend quality time with his child and wife initially.

Conclusion

The above examination helps us to understand the purported need for paternal leave in today's contemporary scenario being faced in India. There are three organs of the government i.e. the legislature, the executive and the judiciary. The three branches work hand in hand for legislating, executing and adjudicating matters. It is to their purview for implementation and percolation of new and existing laws in India. There is metamorphosis in form of culture and gender roles. Men and women incur the same potential in all aspects of life. The conservative or conventional mind set among the society members is being overcast with the new norms of acceptance. Thus, men who never were given the opportunity to be taken care by their own fathers initially are now being given a role in today's generation. Sharing responsibilities along with learning to be responsible is the integrated conception prevailing around.

However, the Women and Child Development Minister, Maneka Gandhi stated that “Men in India do not utilise their existing leaves in order to take care of their child. If men gave me one iota of hope by taking sick leave for child care, then yes, we can think of mootng a proposal for paternity leave.” The entire debate of seeking paternity leaves comes along with a paid leave where a father is entitled to take care of his child parting from the fear of deductions in his salary. The role of the father and mother is equivalent for the parturition of their young one, nobody can justify as who is extravagant or insignificant. Hence there is a discernible obligation for paid paternity leave in India. Change is needed simultaneously with it comes evolution of time and circumstances. With the new wave of gender mainstreaming, India strives for a holistic augmentation. Fatherhood is a new experience for every man. Emotionally, physically and mentally being with the child establishes an exemplary rapport with the child and influences other fathers too. Thus, India be a multicultural society accepting axiom from various countries or imparting favourable bylaws helps us in the amelioration of our Nation.

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