

# **Analysis on Effectiveness of the Implementation of the Maternity Benefit Act, 1961**



CSR



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**Ranjana Kumari**

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## **Glossary**

BPL – Below the Poverty Line

CCT – Conditional Cash Transfer

ESI – Employees State Insurance Act

IGMSY – Indira Gandhi Matritava Sahayog Yojana

ILO – International Labour Organization

JSY – Janani SurakshaYojna

MBA – Maternity Benefit Act

NMBS – National Maternity Benefit Scheme

SC – Schedule Caste

ST – Schedule Tribe

UN – United Nations

UT – Union Territory

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## Table of Contents

1.0	Introduction .....	7
1.1	Motivation for the report .....	7
1.2	Content and structure of the report.....	7
1.3	Objectives .....	8
2.0	Background .....	8
2.1	Maternity Benefit Act of 1961 .....	8
2.2	Comments on the Maternity Benefit Act .....	9
2.3	Employees State Insurance Act of 1948 .....	10
2.4	Conditional Cash Transfer schemes.....	11
2.4.1	<i>National Maternity Benefit Scheme (NMBS)</i> .....	11
2.4.2	<i>Janani Suraksha Yojna (JSY)</i> .....	12
2.4.3	<i>Indira Gandhi Matritava Sahayog Yojana (IGMSY)</i> .....	12
3.0	Effects of maternity benefits programmes.....	13
3.1	Health benefits.....	13
3.1.1	<i>Maternal health</i> .....	13
3.1.2	<i>Child health</i> .....	14
3.2	Economic benefits.....	14
3.2.1	<i>Economic participation</i> .....	15
3.2.2	<i>Economic efficiency</i> .....	15
3.3	Gender division of labour .....	16
4.0	Maternity Leave - A Comparative Perspective .....	20
4.1	Developed economies and the EU.....	20
4.2	Africa.....	20
4.3	Asia and the Pacific .....	20
4.4	Information on a country level for selected countries .....	22
5.0	Study .....	26
5.1	Need for the study .....	26
5.2	Methodology .....	27
5.3	Limitations .....	27
5.4	Findings.....	28
5.4.1	Personal profile.....	28
5.4.2	Organisational policy.....	31
5.4.3	Health benefits.....	34

5.4.4 Experience of damage and complaint .....	37
5.4.5 Awareness .....	38
5.5 Conclusion.....	40
Recommendations.....	41
Annex 1 - High Court Judgement Summaries .....	42
Annex 2 - Maternity, paternity and parental leave in selected countries.....	48
Annex 3 - Questionnaire.....	50
Annex 4 – Madras High Court Judgment.....	60

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## Figures

5.1 Type of organization

5.2 Number of years in the organisation

5.3 Ever applied for maternity leave

5.4 Period of maternity leave taken

5.5 Period of maternity leave by type of org.

5.6 Existence of maternity policy in org.

5.7 Weeks of maternity leave available in org.

5.8 Number of times a woman may take maternity leave

5.9 Number of times a woman may take maternity leave by type of org.

5.10 Possibility to dismiss a pregnant woman or a woman on maternity leave

5.11 Provision of free medical care for pregnant employees

5.12 Provision of medical bonus for pregnant employees without free medical care

5.13 Provision of nursing breaks during work hours

5.14 Provision of nursing breaks during work hours by type of org.

5.15 Number of nursing breaks provided

5.16 Experience of any damage to career because of maternity leave

5.17 If ever filed a complaint for denial of maternity rights

5.18 Whether there is a way to claim maternity benefit if it is withheld by org.

5.19 Awareness of the existence of a maternity benefit law in India

5.20 Awareness of the existence of a maternity benefit law in India among those who have applied for maternity leave and those who have never applied

5.21 Whether employer display the maternity law by type of org.

5.22 Awareness of the maternity benefit law among those who work in an org. where the law is displayed

## **1.0 Introduction**

### **1.1 Motivation for the report**

Globally, women lag far behind men in access to paid work. In addition, working women are often paid less than men for their work and are concentrated in insecure, unsafe and low-wage work. The major reason behind this phenomenon is the perception of women as housewives, caregivers, mothers and secondary sources of household income. Women are often responsible for children, household labour and unpaid community work, which limits their opportunities to decent salaried employment.

At the same time, salaried employment is very important for women's empowerment. This is since salaried employment makes women less economic dependent of male kin and the spouse, and offers women exit options in i.e. cases of domestic violence. Labour force participation is however perceived to not be necessarily positive per se, since it can be a result of economic pressure, inequalities or poverty, and can place a double burden of work on women who are responsible for all domestic work in the household. Because of this, employment benefits, and especially maternity benefits, are central complements to women's salaried employment. Maternity leave can create an environment that improves a woman worker's capacity to balance work and family life. Thus, there is a need to discuss and analyze maternity benefits in India as well as in other countries.

### **1.2 Content and structure of the report**

This report consists of four parts. The central part is the study chapter, in which the implementation of the Indian Maternity Benefit Act (1961) in Delhi is analyzed. The study is based on the experiences of 62 women, working in different sectors of the labour market, and has been undertaken by Centre for Social Research (CSR), with the support of the National Commission for Women (NCW).

Before the study chapter, the report has a chapter which gives background information about the maternity legislation in India. Although the study chapter is focused on the Maternity Benefit Act, the background chapter also covers the Employees State Insurance Act and Conditional Cash Transfer Schemes. After the background chapter, there is a literature review of the benefits and disadvantages of maternity benefit programmes. The topics that are presented are: health effects, economic effects and effects on the gender division of labour. Finally, the report also includes a chapter that gives an overview of the maternity legislation in other regions and countries of the world.

### **1.3 Objectives**

The objectives of this report are:

- To overview the maternity legislation in India.



- To find out about the general benefits and disadvantages of maternity benefit programmes.
- To briefly summaries maternity benefits globally.
- To ascertain the number of women availing the Maternity Benefit Act.
- To learn about the attitude of employers towards the Maternity Benefit Act.
- To bring out the difficulties (if any) faced by women leaving for or returning after maternity leave.
- To analyze the level of awareness among the women employees regarding the existing law.

## **2.0 Background**

### **2.1 Maternity Benefit Act of 1961**

The Maternity Benefit Act (MBA) is a law passed in India December 1961. It regulates the employment of women in certain establishments for certain period before and after child-birth, and provides for maternity benefits.

#### **Eligibility criteria**

The MBA extends to the whole of India and covers female employees in any shop or establishment employing 10 or more persons. The definition of establishment includes factories, mines, plantations and establishments where people are employed for the exhibition of equestrian, acrobatic and other performances. Further, casual and daily wage workers are covered by the Act. A woman is eligible for maternity benefits if she has been employed 80 days or more in the 12 months preceding delivery.

#### **Leave**

According to the MBA, a female employee is entitled to 12 weeks of maternity leave. Not more than six of these weeks shall precede the date of delivery. In case of miscarriage or medical termination of pregnancy, the MBA entitles an employee to leave for six weeks following the miscarriage, and in case of tubectomy operation, the employee is entitled to leave for two weeks after the operation. In addition, a female employee suffering from illness arising out of pregnancy is entitled to a maximum one month of additional leave.

#### **Pay**

Concerning payment, the MBA states that a female employee shall be paid at the rate of her average daily wage by her employer when she is on maternity leave. The average daily wage

shall also be paid in cases of leave following miscarriage, tubectomy operation or illness arising out of pregnancy.

### **Health Benefits**

A woman has the right to 2500 rupees in medical bonus and two nursing breaks per working day until her child attains the age of 15 months.

### **Job protection**

It is according to the Act unlawful for an employer to discharge or dismiss an employee during or on account of maternity leave. It is also unlawful for an employer to give notice of discharge or dismissal on such day that the notice will expire during an employee's maternity leave.

### **Filing a complaint**

If a woman is deprived of maternity benefit or medical bonus, or discharged or dismissed during or on account of maternity leave, she can appeal against the decision within sixty days. For doing this, she can approach an Inspector appointed under the Act. If she is not satisfied with the orders of the Inspector, she can appeal against the orders to the prescribed authority within thirty days. She can also file her case in court within one year if she is unsatisfied with the orders passed by the Inspector, or if a larger question of law is involved.

### **Employer obligations**

The MBA makes clear that an employer shall not employ a woman during the six months immediately following her delivery. An employer shall also not make a woman do arduous work, or work that interferes with her pregnancy, during the month before her expected delivery. Further, an employer has the obligation to display the Act in every part of the establishment in which women are employed. In addition, every employer shall prepare and maintain attendance records and submit annual returns.

## **2.2 Comments on the Maternity Benefit Act**

### **Merits**

As have been pointed out in the introduction chapter, and as also will be noted several times throughout this report, the existence of a maternity benefit law is very important for women's rights and women's economic security. The benefits and disadvantages of maternity benefit programmes in general will be discussed in chapter 3 in this report. This section will point out a few central merits and shortcomings that relate to the Indian law in particular.

First of all, it is positive that the MBA covers all female employees in any shop, factory, mine or plantation. This means that there is no need to evaluate the kind of work women perform at these workplaces in order to find out whether they are eligible. In addition, it is of value to note that the MBA allows the State Government to extend the Act to any other establishment. The Government of Kerala has for example extended all the provisions of the MBA so that it covers the establishments defined as commercial establishments in the Kerala Shops and Commercial Establishments Act of 1960. In this act, a commercial establishment means “a commercial or industrial or trading or banking or insurance establishment, an establishment or administrative service in which the persons employed are mainly engaged in office work, hotel, restaurant, boarding or eating house, café or any other refreshment house, a theatre or any other place of public amusement or entertainment...”.<sup>1</sup>

Another important merit is that the MBA provides full pay (100 per cent) for women on maternity leave, since it states that female employees shall be paid at the rate of their average daily wage. As can be understood by chapter 4 in this report, this part of the Indian law is more progressive than the corresponding part in the legislation of several European and other developed countries. The payment part of the MBA is also in line with the ILO convention No. 183, which states that maternity cash benefits shall be based on previous earnings and not be less than two-thirds of the woman’s previous earnings.<sup>2</sup>

### **2.3 Employees State Insurance Act of 1948**

The Employees State Insurance Act (ESI) is social security legislation with the object of providing certain benefits to employees in the event of sickness, maternity and injury at the site and during employment. Below are details for the maternity benefits in the Act.

#### **Eligibility criteria**

The ESI extends to the whole of India and covers women working in an establishment which employs more than 10 persons if not using power and more than 20 persons if using power. To be eligible for the benefits, a woman should have been working not less than 70 days in the preceding year before confinement, and her income shall be less than 15 000 rupees per month. The woman must be registered and possible to identify in the records of ESI Corporation, who manages the scheme.

#### **Leave**

The ESI entitles an insured woman to 12 weeks of leave in case of confinement, and 6 weeks of leave in case of miscarriage. In case of sickness arising out of pregnancy, confinement, pre-mature birth, miscarriage or medical termination of pregnancy, a woman is entitled to one additional month of leave.

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<sup>1</sup> The Kerala Shops and Commercial Establishments Act of 1960, Chapter 1, Definitions

<sup>2</sup> ILO Convention No. 183, Article 6(3).

## **Pay**

An insured woman is entitled to periodical payment when she is on maternity leave. The daily benefit rate is double the standard benefit rate, which is half of the average daily wage.<sup>3</sup> In other words, the payment is 100 per cent of the woman's average daily wage. The ESI scheme is mainly financed by contributions from employers (4.75 per cent of wages payable to employees) and employees (1.75 per cent of the wages payable an employee).

## **Job protection**

The ESI states that no employer shall dismiss, discharge, or reduce or otherwise punish an employee during the period the employee receives maternity benefits. Notice of dismissal, discharge or reduction during the period when a woman receives maternity benefits is invalid.

## **Filing a complaint**

For adjudication of claims and disputes there are Employee Insurance Courts. An order from such a court cannot be appealed. An Employee Insurance Court can however give order of appeal to the High Court if a substantial question of law is involved.

## **2.4 Conditional Cash Transfer schemes**

Conditional Cash Transfer (CCT) schemes generally have the aim to reduce poverty by transferring money to persons who meet certain criteria and/or take certain actions. In India, there are several CCT schemes that provide maternity benefits. Three key national CCT schemes that provide maternity benefits in India are presented below. In contrast to the MBA and the ESI, maternity benefits in these schemes are not based on the employment status of women.

### ***2.4.1 National Maternity Benefit Scheme (NMBS)***

The National Maternity Benefit Scheme provides cash assistance to pregnant women. It is linked to the provision of better diet for pregnant women from families who live below the poverty line. The amount of benefit is 500 rupees. To be eligible a woman should:

- be a permanent resident of a village
- belong to a below the poverty line (BPL) category
- be pregnant 8-9 months

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<sup>3</sup>Minimum benefit rate is 14 rupees per day.

- be pregnant for the first or second time

#### **2.4.2 Janani Suraksha Yojna (JSY)**

Janani Suraksha Yojana is a conditional cash transfer scheme that integrates financial assistance with antenatal care during pregnancy and institutional care during and immediately after delivery. The goals of the scheme are to decrease maternal and infant mortality, and to increase institutional deliveries in below the poverty line families. The amount of benefit is 500 rupees for home delivery and additional 200 rupees (total of 700 rupees for rural areas) or 100 rupees (total of 600 rupees for urban areas) for institutional delivery.<sup>4</sup> The benefits are available both for deliveries in government hospitals and deliveries in recognized private institutions. In cases where Government health specialists are not available to manage complications or for Caesarean Section in the Government's health institution, 1500 rupees can be utilized by the health institution for hiring specialists from the private sector. To be eligible for the benefits under the JSY, a woman should:

- be of the age of 19 or above
- belong to BPL category or be a SC/ST woman
- be pregnant for the first or second time<sup>5</sup>

#### **2.4.3 Indira Gandhi Matritva Sahayog Yojana (IGMSY)**

The Indira Gandhi Matritva Sahayog Yojana (IGMSY) is a central government scheme that is operational on pilot basis in 52 districts among all States/UTs in India. It aims to provide partial compensation for wage loss for pregnant women, so that they are not under compulsion to work in the last stage of pregnancy or shortly after delivery. The logic behind this compensation is that women who rest before delivery will to a larger extent be able to avoid giving birth to low birth weight babies, and women who rest after delivery will be able to recover as well as breastfeed their babies. The basic objective of the scheme is to improve the health and nutrition status of pregnant and lactating women and their children. This shall be done by supporting women with nutrition and enhancing early infant nutrition and survival through protection and promotion of early and exclusive breastfeeding during the first six months of a child's life. The amount of benefit is 4000 rupees, and shall be provided in three instalments between the second trimester of pregnancy till the infant completes six month of age. Women enrolled under IGSMY will be encouraged to avail JSY package and vice versa. To be eligible for the benefits under the IGMSY, a woman should:

- be of the age of 19 or above
- be pregnant for the first or second time

In addition, Anganwadi workers and Anganwadi helpers at Anganwadi Centres (focal points of implementation of the scheme), will receive cash benefits if they encourage women to

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<sup>4</sup> In low performing states the total amount of benefit for institutional delivery is 1400 in rural areas and 1000 rupees in urban areas.

<sup>5</sup> In low performing states a woman who gives birth after the second time is eligible if she agrees to undergo sterilization immediately after delivery.

participate in the scheme and service the women efficiently. The amount of benefit is 200 rupees for Anganwadi workers and 100 rupees for Anganwadi helpers per pregnant and lactating woman.

## **3.0 Effects of maternity benefits programmes**

### **3.1 Health benefits**

In an extensive review of maternity at work in different countries, the ILO states that maternity protection for women workers contributes to the health and well-being of mothers and their infants. Maternity protection is therefore viewed as a way to achieve the UN Millennium Development Goals 4 and 5, which aim to reduce child mortality and improve the health of mothers (ILO 2010, p 1). In order to make clear in what ways maternity benefits improve the health of mothers and children, the sections below present academic findings on the relations between maternity protection and maternal health, and maternal protection and child health.

#### **3.1.1 Maternal health**

Concerning the health of mothers, public health literature shows that women who leave work too late before childbirth or return to work soon after childbirth experience more mental and physical health symptoms than other women. In regard to physical health, a study suggests that the risk for caesarean deliveries is 4 times lower for women who take maternity leave during the ninth month of their pregnancy than for those who do not (Guendelman et al 2009, p 30). In addition, studies show that employed postpartum women have higher rates of breast symptoms, respiratory infections and gynecologic problems compared to postpartum women who are not employed (Chatterji & Markowitz 2005:24).

In regard to mental health, the findings are mixed. Some scholars come to the conclusion that depressive symptoms increase for mothers who have a short maternal leave only if they also have marital or job concerns. Others however conclude that returning to work within 24 weeks after childbirth is associated with poor mental health (Chatterji & Markowitz 2005:18).

In the economic literature, a study from 2005 which uses a sample of 1762 women in the US shows that longer maternity leave is associated with lower probability of being a likely case of clinical depression and a lower likelihood of having frequent outpatient visits. More specifically, the study suggests that increasing maternity leave by one week is associated with a 6-7 % decline in depressive symptoms, and that returning back to work later changes the probability of having at least three outpatient visits in the six months after childbirth (Chatterji & Markowitz 2005:16).

### **3.1.2 Child health**

Moving on to child health, economic theory predicts that parental time is one of the direct inputs of child health capital. A few studies have tried to analyse the effects of parental leave on child health (Tanaka 2005:5). One of them is a study in which 17 OECD countries are analyzed in 1959, 1969, 1979 and 1989. The authors of the study state that one added week of paid maternity leave decreases infant<sup>6</sup> mortality rates by 0.5 deaths per 1000 live births (Winegarden & Bracy, 1995:1027). Christopher Ruhm, professor of public policy and economics, has also shown that paid parental leave decreases infant mortality. Using data from 16 European countries between 1969 and 1994, he comes to the conclusion that a 10 week increase in paid leave is predicted to reduce infant mortality rates by 2.5 -3.4%. Interestingly, unpaid leave is unrelated to infant mortality in Ruhm's study. In addition to infant mortality, Ruhm finds that a ten week extension of paid leave reduces post-neonatal<sup>7</sup> mortality by 3.7-4.5% and child mortality<sup>8</sup> by 3.3-3.5% (Ruhm, 2000:946-948). A quite recent study, which controls for generosity of social expenditure and also includes the US and Japan, confirms that paid leave decreases infant mortality rates (Tanaka, 2005:27).

Besides decreasing infant death rates, research has also shown that maternity leave increases the period of breast-feeding. According to the WHO breast-feeding is the normal way of providing young infants with the nutrients they need for healthy growth and development, and exclusive breast-feeding is recommended for children up to six months of age.<sup>9</sup> By collecting data on the micro level, American researchers have come to the conclusion that there is a positive correlation between maternity leave after childbirth and the period of breast-feeding (Roe et al, 1999:164). Another study in the US shows that children of mothers who return to work early after delivery are less likely to receive breast-feeding or regular medical check-ups in the first year of life. In addition, they are less likely to receive full polio immunization and more likely to have externalizing behavior problems at the age of four (Berger et al 2005:44-45).

### **3.2 Economic benefits**

The Beijing Platform for Action, from the UN Fourth World Conference on Women 1995, states that Governments should take appropriate measures so that pregnant or breast-feeding women do not get dismissed, and ensure that women on maternity leave do not get discriminated against when re-entering the labour market. According to the action plan, this should be done in order to promote women's economic rights and independence (Beijing Platform for Action 1995). In order to make clear in what ways maternity benefits impact economic factors, the sections below present academic findings on the relations

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<sup>6</sup>Infants less than one year

<sup>7</sup> Infants between 28 days and 1 year

<sup>8</sup> Infants 1-5 years

<sup>9</sup> <http://www.who.int/topics/breastfeeding/en/e>

between maternity protection and economic participation, and maternal protection and economic efficiency.

### **3.2.1 Economic participation**

According to feminist scholars, economic participation is necessary for women's autonomy and empowerment. Access to salaried employment is especially important in regards to economic participation. This is since salaried employment makes women less economic dependent of male kin and the spouse, and offers women exit options in i.e. cases of domestic violence. Labour force participation is however perceived to not be necessarily positive per se, since it can be a result of economic pressure, inequalities or poverty, and can place a double burden of work on women who are responsible for all domestic work in the household. Because of this, employment benefits, and especially maternity benefits, are claimed to be central complements to women's salaried employment. Maternity leave is believed to create an environment that improves a woman worker's capacity to balance work and family life. (Moghadam & Senftova 2005:398-399).

Although the theory above suggests a positive relation between maternity leave and women's economic participation, empirical findings on this relation are ambiguous. While one study show that maternity leave in the US has insignificant effects on employment, leave or work (Klerman & Leibowitz 1997:82), another study suggest that maternity leave in the US and Great Britain make women more likely to return to their previous employer after childbirth (Waldfogel 1998:534).

Besides analyzing *maternity leave* in particular, scholars have also investigated the effects of *parental leave* on economic participation. A study on European countries finds that short periods of parental leave increases the employment-to-population ratios (Ruhm 1998:312). Furthermore, research on Europe and North America shows that a moderate duration of parental leave entitlements increases employment levels, and that short to intermediate duration of parental leave raises the labour force participation rates. It is however interesting to note that workers' rights to lengthy absences from jobs are associated with less favorable labour market outcomes (Ruhm and Teage 1997:20).

### **3.2.2 Economic efficiency**

Economists are in general wary of mandated benefits, such as parental leave, arguing that they interfere with the free operation of labour markets and thereby are likely to reduce welfare. It is assumed that the most efficient outcome can be reached if the employer and the employee freely negotiate over terms of benefit packages. Further, it has been states that mandated benefits could lead to increased unemployment for the group that are most likely to use it. In the case of parental leave, this would be the women. Parental leave could also increase occupational segregation, since it may cause employers to limit women to jobs where absences are least costly. This has been claimed to be the case in Sweden. (Ruhm & Teage 1997:5, Ruhm 1998:287).

On the other hand it has been shown that mandated benefits are positive because of the effects they have on unemployment and job tenure. A study on America concludes that the



average benefits of parental leave are six times greater than the costs, mainly because of reduced unemployment and preserved job tenure. Moreover, parental leave is suggested to increase productivity, since it allows workers to continue in positions in which their sector-specific skills are best utilized (Ruhm & Teague 1997:6).

Another justification for general paternal leave concerns adverse selection under asymmetric information. To shortly explain, this term means that employees have more information about whether they will need parental leave than the employers (asymmetric information). This will lead to a situation where employers that provide these benefits will receive disproportionately more applications from employees who require benefits (adverse selection) and thus lose money. It has therefore been suggested that it is optimal for governments to intervene in provision of goods that only some employers provide for their workers (Summers 1989:179).

Finally, there is a justifying argument that concerns positive externalities. A positive externality is a positive effect that cannot be directly captured by either the provider or the recipient. In the case of parental leave, child health could be an example of a positive externality. As discussed above a child will probably be healthier and medical costs will probably decline when at least one parent is away from employment. To the extent these medical costs are not fully paid for by the families, workers will undervalue the leave benefits, which is why a mandate has the potential to improve efficiency (Summers 1989:178).

### ***3.3 Gender division of labour***

As can be understood from the sections above, maternity leave can prevent pregnant women from quitting the labour market or to re-enter the labour market on worse terms. The fact that maternity leave keeps women employed throughout intensive care provision and thereby increases women's access to the labour market is important for increasing gender equality. And in so far such leave is paid and keeps the income of those who take maternity leave from falling too far behind those who do not; it reduces gender inequalities in income too.

Scholars have however noted that the terms and conditions of maternity leave can have quite different effects on gender equality. In a paper written in connection with an UN expert group meeting on equal sharing of responsibilities between women and men, Susan Himmelweit states that longer periods of leave may put workers at a disadvantage and may reduce promotion prospects. In the case of leave connected with childbirth, the perception that women (not men) are likely to take long period of leave might lead to discrimination against women workers and pregnant women in particular. Himmelweit mentions that cases of pregnancy discrimination in the UK have increased since maternity leave has been lengthened. She states that while policy should outlaw discrimination against those who take their leave entitlements, if leave is taken for long periods by one sex only, it will increase gender inequality both in employment and in the ability of men and women to contribute equally to the care of family members. According to Himmelweit, patterns of unequal sharing in caring responsibilities that are set up during parental leave can be fixed

and grow long after both parent have returned to employment (Himmelweit 2008:8). A long period of maternity leave can thus reinforce the traditional gender division of labour.

Because of the negative consequences of leave for one sex only, and in order to decrease the difference of leave between the sexes, Himmelweit suggests gender-neutral leave. According to her, there is no need for having leave that is especially for women after the period required for recovery after childbirth. The leave should instead be an individual right or a family right (Himmelweit 2008:8). In regards to gender-neutral leave, a number of studies have stated that for fathers to take a reasonable amount of leave, the right to take leave should be independent with some non-transferable time available for each parent, the leave should be paid at a rate high enough to be comparable with male earnings and it should be flexible in the ways it is taken (Carlsen 1998:10, Moss and Deven 2006:279, Math & Meiland 2004).

A study of the policy responses to pregnant workers in Sweden, Canada and the US however comes to the conclusion that neither gender-neutral nor gender-specific benefits for employed benefits can resolve the problem of gender inequality in the labour market. Although some form of maternity or parental leave is stated to be essential for women's employment equity, the author argues that there must also be program that focus on pay equity, provision of affordable child care and men's participation in child care and household. In addition, the structure of work must be changed in order to remove the assumptions that it is separate from personal life. Further, the study brings up that maternity and parental leave programs assume male work characteristics as the norm, even though many women work on temporary contracts or in part time positions. The study therefore suggests that the traditional gender division of labour has to be taken into consideration in order to achieve justice and equity (Baker 1997:68).

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## **4.0 Maternity Leave - A Comparative Perspective**

In year 1952, the ILO Maternity Protection Convention (No. 103) prescribed at least 12 weeks of maternity leave. Since year 2000, the ILO however mandates the leave period to be 14 weeks (Convention No 183). In addition, the accompanying Recommendation (No. 191) suggests that countries should try to increase the period of leave to 18 weeks. Although Convention No. 183 has only been ratified in 17 countries, 51 per cent of all countries in the world provide maternity leave for at least 14 weeks and 20 percent provide it for at least 18 weeks. In fact, only 14 percent of all countries provide less than 12 weeks of maternity leave. Since different regions in the world vary in the proportion of countries that meet international standards, the aim of this chapter will be to trace general regional practices in regards to maternity leave in three regions. More detailed information about certain selected countries will also be presented. All numbers mentioned in this chapter are from the "ILO Database of Conditions of Work and Employment Laws" from 2010.

### **4.1 Developed economies and the EU**

In the developed economies and the EU, no countries provide less than 12 weeks maternity leave. 46 per cent of these countries provide 14-17 weeks of leave, while 46 percent provide 18 weeks or more. The situation is similar in the non-EU and CIS (Commonwealth of Independent States) countries. All countries in this region provide at least 14 weeks maternity leave.

Concerning cash benefits, 78 per cent of the countries in developed economies and the European Union provide cash benefits equal to at least 2/3 of earnings during 14 weeks of maternity leave, which is in conformity with ILO Convention No. 183. Only 22 per cent of these countries provide unpaid maternity leave or maternity leave that is paid less than 2/3 of earnings.

### **4.2 Africa**

In Africa, 18 percent of the countries provide less than 12 weeks of maternity leave. The most extreme case is Tunisia, which only allows women to be on leave for a period of 30 days. 34 percent of the African countries provide 12-13 weeks of leave, while 48 per cent provide 14-18 weeks. This means that no countries in this region provide 18 weeks or more. In regard to payment, 39 per cent of the countries in Africa provide cash benefits for at least 2/3 of earnings for 14 weeks. This is about half of the corresponding number for the developed economies and the EU. However, almost all of these countries (37 per cent in the region) pay 100 per cent of earnings. Concerning unpaid maternity leave, 61 per cent of the countries in Africa provide no cash benefits or benefits less than 2/3 of earnings for 14 weeks.

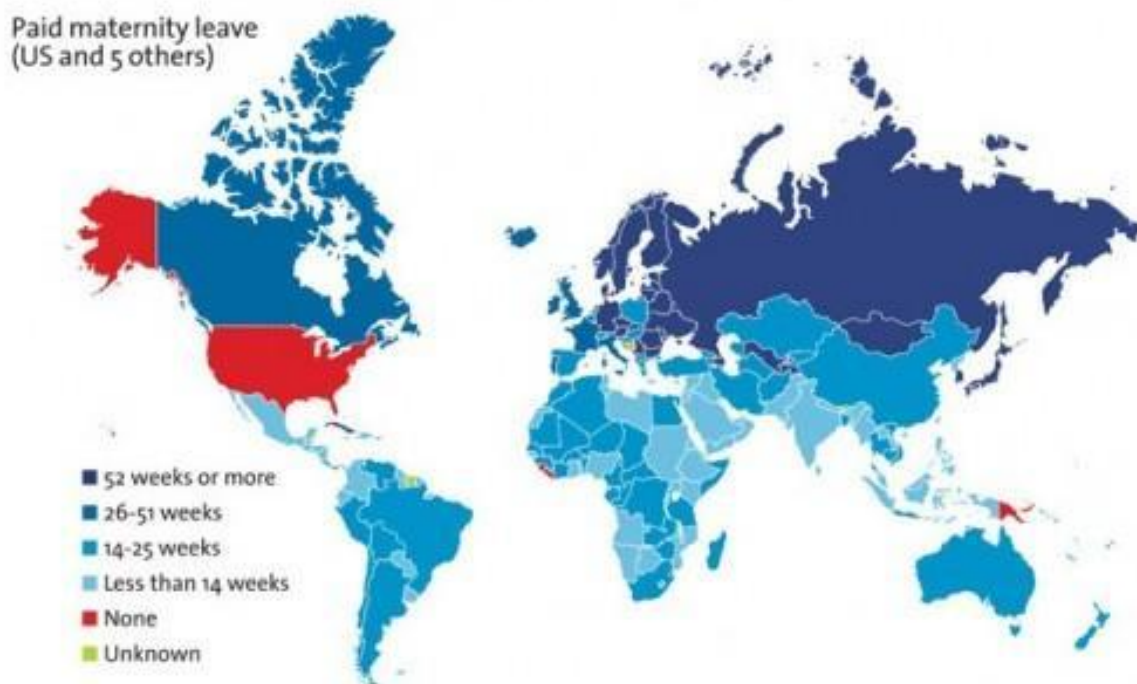
### **4.3 Asia and the Pacific**

Similarly to Africa, no countries in Asia and the Pacific provide maternity leave for 18 weeks or more. Concerning the current ILO standard, only 4 countries (17 per cent) in the region provide at least 14 weeks of leave. Most countries (65 per cent) provide 12-13 weeks of

maternity leave, while four countries (17 per cent) provide fewer than 12 weeks. These are Malaysia, Nepal, Papua New Guinea and the Philippines.

Concerning cash benefits, only 17 per cent of countries in Asia and the Pacific provide at least 2/3 of earnings for 14 weeks. This is the lowest number among the three regions compared in this chapter. Out of this 17 per cent, one example is Mongolia that provides 70 per cent of earnings for 120 days, and another is Vietnam that provides 100 per cent of earnings for four to six months. It should however be noted that a large number of countries in this region provide full earnings during maternity leave, but for less than 14 weeks. Examples are Afghanistan (90 days), India (12 weeks), and Nepal (52 days). As can be seen in Annex 2 in this report, a big difference between a lot of South Asian countries and the developed countries is that the source of funding of maternity leave in the South Asian countries is the employer, while the source of funding in developed countries is social security.

Image 4.1. Paid maternity leave worldwide<sup>10</sup>



<sup>10</sup>[http://www.wikiprogress.org/index.php/Hours\\_Worked](http://www.wikiprogress.org/index.php/Hours_Worked)

#### **4.4 Information on a country level for selected countries**

Below is more detailed information for selected countries in two of the regions presented above: South Asia and developed economies. See appendix for a shorter summary of this section.

##### South Asia

###### **Afghanistan**

- In Afghanistan, a female employee shall be entitled to 90 days of full paid maternity leave.
- A third of such leave shall be granted before delivery and the other two thirds after delivery.
- In case of an abnormal delivery or delivery of twins or more than twin babies, fifteen extra days of maternity leave shall be granted.

###### **Bangladesh**

- A pregnant female worker in Bangladesh, who has worked in the establishment for not less than six months immediately preceding the day of her delivery shall be entitled to maternity benefit.
- The benefit consists of 16 weeks of full paid maternity leave for two live births.
- A female worker who has two or more surviving children is entitled to 16 weeks of unpaid maternity leave.

###### **India**

- In India, a female employee has the right to six weeks maternity leave before and six weeks maternity leave after the date of childbirth if she has worked for an employer 80 days or more in the 12 months preceding delivery.
- She should be paid maternity benefit at the rate of her average daily wage.
- She has the right to 3500 rupees in medical bonus.
- She has the right to two nursing breaks until her child attains the age of 15 months.

###### **Nepal**

- A pregnant woman worker or employee in Nepal shall be granted maternity leave with full pay for a total of 52 days before or after delivery.
- The leave may be obtained for not more than two live births.

## **Pakistan**

- In Pakistan, a woman has the right to 12 weeks of full paid maternity leave.
- 45 days of the leave should be taken prior to confinement, and 45 days after the confinement.
- The qualifying period of getting this leave is four months of preceding employment with the employer.

## Developed countries

### **Italy**

- In Italy, maternity leave lasts for five months, paid at 80 per cent of a mother's usual salary. Women must take two prenatal months and three postnatal months. Healthy women can transfer one prenatal month to the postnatal leave with a doctor's permission.
- Women are guaranteed to return to their previous post after maternity leave.
- Both mothers and fathers may access parental leave. Each parent have six month of parental leave (maximum 11 month per child). Parental leave allowance of 30 per cent is given for a maximum of six months per child.
- Self employed mothers have only right to three months of parental leave, and self-employed fathers have no right to parental leave or benefits.

### **France**

- Under French law, maternity leave begins six weeks before the expected date of the childbirth, and ends ten weeks after.
- Parents may extend these provisions in cases of multiple births or adoptions, or if the family has a total of at least three children.
- New fathers in France may use 11 consecutive days of fully-paid paternity leave. In the case of twins (or more), paternity leave is extended to 18 days. To this basic paternity leave fathers may also add three days of "family leave".
- For the first three years after a child's birth or adoption, parents have the right to job-protected leave (unpaid) or part-time arrangements in order to care for the child at home. This parental leave can be taken in up to three one-year increments, and can be taken by either parent or both simultaneously.

### **Germany**

- German law allows for 14 weeks maternity leave. 8 of these must be taken after childbirth.
- During maternity leave, women are entitled to maternity allowance (full after tax wage) if they have been enrolled in a statutory insurance program for at least 12



weeks during the period between 10 months and 4 month before the child is born. Insurance enrollment is available to women who are employed, receiving unemployment benefits or in an educational program.

- The leave is extended in cases of prenatal or multiple births.
- German parents have the right to parental leave until their child is three years old. Parents taking parental leave receive parental allowance for 12 month of parental leave per family at a rate of 67 per cent of their usual salary.
- Two additional months of benefit are available exclusively for the father's use.
- Full time-workers have the right to return to their previous position when they return from parental leave. Employees at firms that employ more than 15 workers have the right to part time schedules if they have home-care responsibilities.

### **The Netherlands**

- Netherlands guarantees 16 weeks of maternity leave. Dutch mothers are entitled to 6 weeks leave before and 10 weeks leave after childbirth. To leave four weeks before and six weeks after childbirth is mandatory.
- During maternity leave mothers receive 100 percent of their usual salary up to a ceiling (slightly above national average earnings).
- Once workers return they have the right to go back to the same position, and they have the right to breaks two hours a day for the purpose of nursing.
- Father can take two days of leave within the first four weeks after delivery, and is paid 100 per cent of usual wages.
- Parents may also access unpaid parental leave: 26 weeks of unpaid leave.

### **Spain**

- Spain guarantees 16 weeks of maternity leave. New mother must take six weeks immediately after childbirth. The 10 remaining weeks are optional and can be transferred to the father.
- Mothers receive 100 per cent of the usual salary during maternity leave.
- To qualify for leave and benefits women must be employed, self-employed or receiving unemployment benefits, and they must have made Social Security contributions for at least 180 days in the last seven years, or 360 days in their entire working life.
- In cases of multiple births, disabled child or hospitalized child the leave can be extended.
- Employers must allow women to return to the same job after maternity leave, and must provide two paid half-hour breastfeeding breaks during the day for nine months after childbirth.

- A new father has the right to leave work the day and the day after the childbirth. He also has the right to 13 days off anytime during the maternity leave. He can also take up to 15 days of the mother's leave.
- Both parents of the child have the right to unpaid leave until the third birthday of the child, if they have serviced at least one year at their current employer. If the leave is one year or less in length, the employer must guarantee that the employee can return to his/her previous position (if more than one year only similar position can be guaranteed).

## Sweden

- A female employee is entitled to parental leave in connection with the child's birth for a period of seven weeks before the expected date of birth and seven weeks after giving birth. If she is not free on other grounds the two weeks of this maternity leave are compulsory in the period before or after birth.
- She is entitled to leave to nurse the baby.
- A female employee who is pregnant and due to this cannot perform physically demanding tasks, are entitled to be transferred to another job with full employment benefits from the sixtieth day before the expected childbirth.
- New fathers may take 10 workdays of paternity leave within the first 60 calendar days after their child's birth.
- A working parent is entitled to full leave to care for a child until the child is 18 months (480 days) while he/she receives parental allowance (80%).
- If parents have joint custody of the child, each parent is entitled to half of the days. A parent may waive the right to parental benefit in favour of the other parent with the exception of 60 days that are reserved for each parent.
- Parents of children under age eight may reduce their working hours by 25 percent.

## UK

- British family leave consists of 52 weeks of maternity leave, 39 which are paid.
- The leave is divided into two 26-weeks part; Ordinary Maternity Leave (OML) and Additional Maternity Leave (AML). During AML, a woman's seniority and annual leave accruals stop increasing and resumes when she gets back to work. A woman who takes AML is not guaranteed to come back to her previous position (only a similar one) upon return to workplace.
- Women may begin maternity leave up to 11 weeks before expected delivery. Once their leave has begun, they must take all of the leave continuously.
- There is two weeks of paid paternity leave.
- In addition, each parent has the right to 13 weeks of unpaid parental leave.

## US

- In the US, companies must give qualifying employees (both women and men) at least 12 weeks of annual unpaid leave due to certain family-related or medical reasons. The law applies to most employers with 50 or more employees, as well as public agencies. Qualifying employees must have worked for the company for at least 1,250 hours and for at least one year.
- The certain family-related or medical reasons are: care for a new baby, following the adoption of a child, following the placement of a foster child with the employee and to care for his or her child, if he or she has a serious health condition.
- In addition to the Family and Medical Leave Act, most states have some type of parental-leave laws. If the state laws provide greater protections or benefits to workers than the FMLA, the state laws will govern. If a state law, however, provides inferior protections to its workers, the federal law applies.

## 5.0 Study

### 5.1 Need for the study

Globally, women lag far behind men in access paid work. In addition, working women are often paid less than men for their work and are concentrated in insecure, unsafe and low-wage work. The major reason behind this phenomenon is the perception of women as housewives, caregivers, mothers and secondary sources of household income. Women are often responsible for children, household labour and unpaid community work, which limits their opportunities to decent salaried employment.

At the same time, salaried employment is very important for women's empowerment. This is since salaried employment makes women less economic dependent of male kin and the spouse, and offers women exit options in i.e. cases of domestic violence. Gladly, the female workforce in India has grown fast since the end of the millennium compared to both female population and growth of male workforce. Between 2000 and 2005 the female workforce in India grew at 3.25 per cent per year, with the female urban workforce growing at 5.66 per cent per year.<sup>11</sup>

Labour force participation is however perceived to not be necessarily positive per se, since it can be a result of economic pressure, inequalities or poverty, and can place a double burden of work on women who are responsible for all domestic work in the household. Because of this, employment benefits, and especially maternity benefits, are claimed to be central complements to women's salaried employment. Maternity leave is believed to create an environment that improves a woman worker's capacity to balance work and family life.

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<sup>11</sup>ILO 2012, Maternity Protection in India : A National Assessment, p 42

Since 1961, the Maternity Benefit Act of India entitles female workers 12 weeks of paid maternity leave. Because of the important effects this Act can have on women's empowerment, there is a need for analyzing it in different ways and from various perspectives. This chapter will present a study of the *implementation of the Maternity Benefit Act of 1961 in Delhi*. The study has been undertaken by Centre for Social Research (CSR), with the support of the National Commission for Women (NCW) in August- December 2012.

## 5.2. Methodology

The sample in this study consist of 62 randomly selected women employees who work in an organization (private, government, NGO) in Delhi that employs more than 10 people. The ten people limit has been set since employees in any shop or establishment that employs ten people or more are covered by the MBA.

Primary data has been collected by a structured questionnaire<sup>12</sup> with different sections:

1. Personal Profile
2. Organisational Policy
3. Leave Application Procedure
4. Nursing Breaks
5. Medical Bonus
6. Return to Work
7. Complaints
8. Awareness
9. Suggestions

The questions in the different sections of the questionnaire has been designed to mainly focus on the rules and practices in organizations, and is therefore not limited to the experiences of individual women. Thanks to this design, both women with and without the experience of being pregnant have been possible to include in the study.

Considering the way of answering the questionnaire, two methods have been used. Since the answers in the questionnaire has been in English, some of the respondents have read and answered the questionnaire by themselves; while others have had the questions read out loud to them in Hindi and then answered orally. All women who have answered the questionnaire have been assured that responses and employee details will be anonymised and not released to any other organisation.

## 5.3 Limitations

As mentioned in the methodology section, this study contains data from 62 respondents. Although the data is highly relevant and valuable, and collected from respondents that work

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<sup>12</sup>See appendix for the entire questionnaire

in different sectors and in different organizations, there is a need to be careful in regards to generalizing the findings in this study.

In addition and as in any study in which data is collected through interviews and questionnaires, it should be kept in mind that some of the respondents who have agreed to participate and answer questions might have previous knowledge or a certain interest in the subject studied. One should also be aware that there is a risk that potential respondents who thought they would put themselves at a risk by participating (i.e. because of vulnerability at the workplace) have refused to answer the questionnaire to a higher extent than others.

## 5.4 Findings

In this section, different findings from the study are presented. With the effort to not neglect important data, certain key topics have been chosen from the questionnaire. All numbers in this chapter are rounded to the nearest integer.

### 5.4.1 Personal profile

#### Workplace and work experience

The personal profiles of the participants in this study vary a lot. To start with, the women who have answered the questionnaire have a variety of professions: teacher, manager, social worker, government officer, customer relation assistant, administrative assistant, nurse, assistant professor, therapist, clerk, engineer etc. This means that the study covers private, government and non-government organisations. As can be seen in figure 5.1 below, 44 per cent of the women who participated in the study work in the private sector, 31 per cent in the public sector and 16 per cent at an NGO. Further, the women have a different amount of work experience at their workplace. As figure 5.2 shows, about one fourth of the participants have worked at their organisation for 0-2 years and about one third for 5-10 years. The groups who worked 3-5 years and more than 10 years in their organisation, each make up about one fifth of the participants.

Figure 5.1

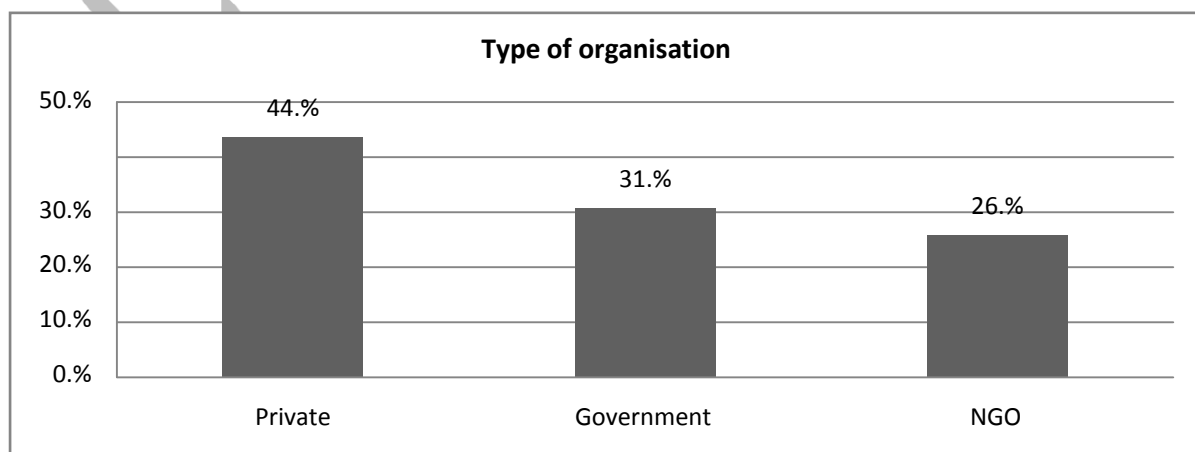
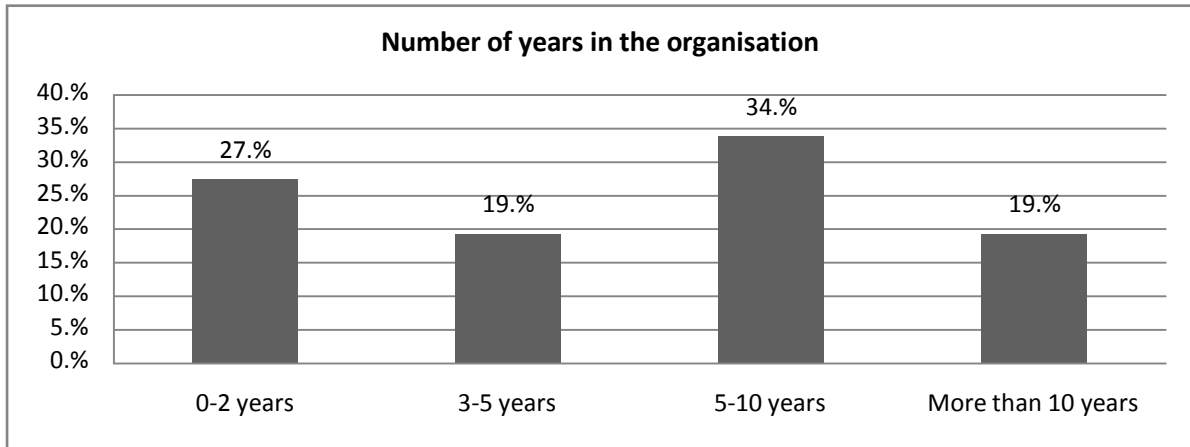


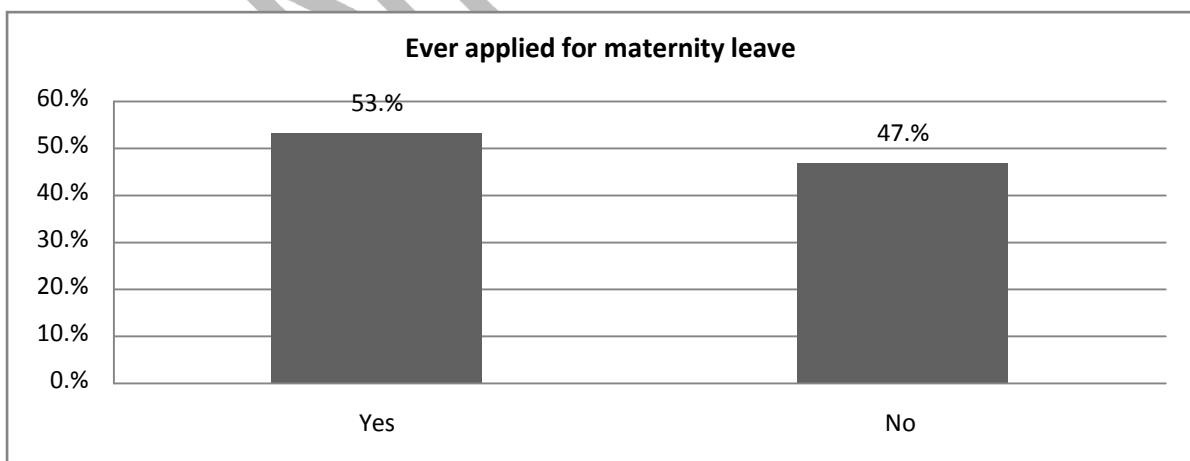
Figure 5.2



**Experience of leave**

Among the women who answered the questionnaire, only one is currently pregnant. However, a little more than half of the participants in the study have at least once applied for maternity leave (Figure 5.3). This group is especially important when it comes to analysing the length of maternity leave in practise and the experience of filing a complaint. As mentioned above, answers from both women with and without the experience of being pregnant are valuable. This is since the focus of the study is organizational policies, but also since the two groups can be compared in regards to i.e. awareness of the Maternity Benefit Act.

Figure 5.3



### **Period of maternity leave taken**

Among the women who have ever applied for maternity leave, a majority have taken three months leave, which is in accordance with the Maternity Benefit Act. As can be observed in figure 5.4, 53 per cent of the women have been on maternity leave for three months, while 30 per cent have been on leave more than three months. However, 9 per cent of the women who applied for maternity leave have been on leave for less than three months. In figure 5.5, which shows the period of maternity leave by type of organisation, it becomes clear that these 9 per cent work in the private sector. Although it is hard to generalize one single study to an entire city, this finding is worrying and should definitely be followed up.

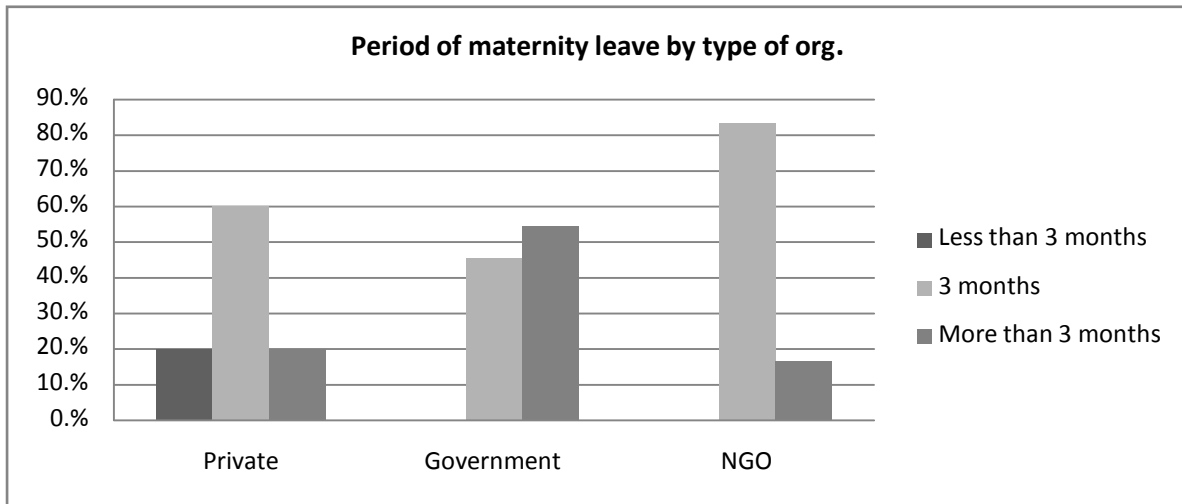
In figure 5.5 it can also be observed that women working in the public sector that gained more than 3 months leave are more than those who gained 3 months leave. This is however not surprising, since the government first extended the maternity leave for government employees to 135 days (4.5 months) in 1972, and then to 180 days (6 months) in 2008 for women with less than 2 children.<sup>13</sup>

**Figure 5.4**



<sup>13</sup>Central civil services (leave) rules (43) 1972, [http://www.referencer.in/CS\\_Regulations/CCS\\_Leave\\_Rules\\_1972/Default.aspx](http://www.referencer.in/CS_Regulations/CCS_Leave_Rules_1972/Default.aspx)

Figure 5.5



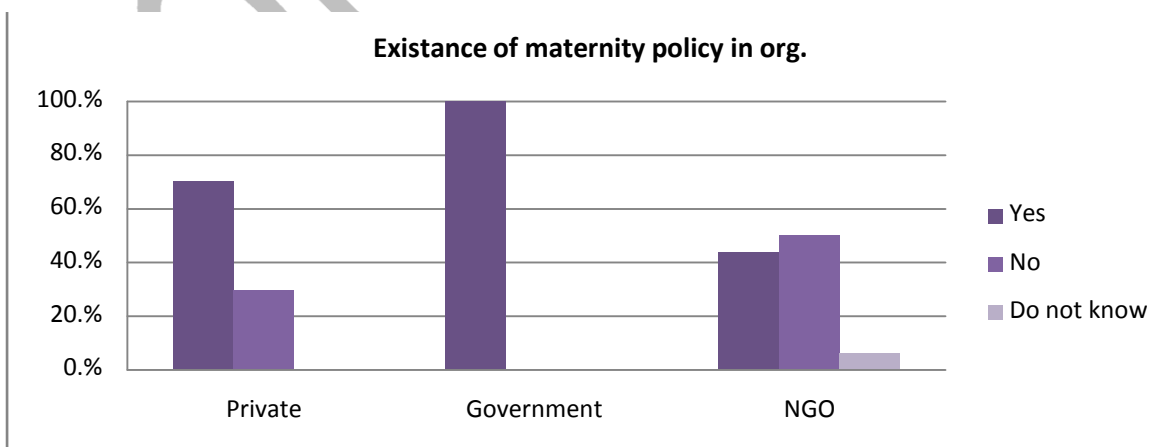
#### 5.4.2 Organisational policy

##### Existence of policy in the organization

Of all participants, about 73 per cent answered that there exists a maternity policy in their organization. If one looks at each sector separately (Figure 5.6), 70 per cent of the women in the private sector answered that there exists a maternity policy in their organization.

Further, all women in the public sector answered that there exists a maternity policy in their organisation, which is a very positive result. In regards to the NGO sector, 44 per cent of the women answered that there is a maternity policy in their organisation, while half of the women answered that they miss such a policy. This is of course a very unfortunate result.

Figure 5.6



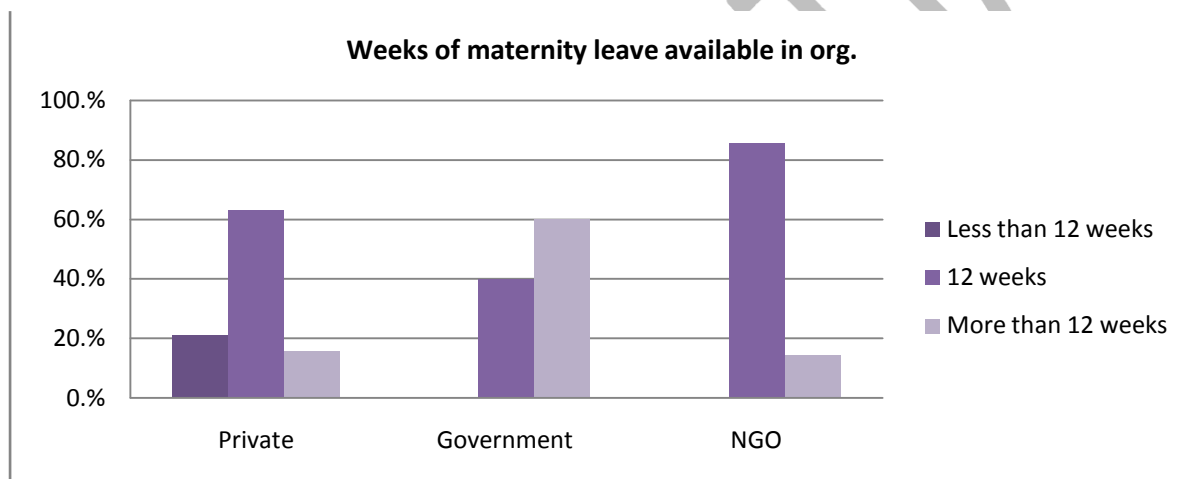


### Weeks of maternity leave available

In the questionnaire, the 73 per cent (45 women) who answered that there is a maternity benefit policy in their organisation also answered questions about the content of the policy. 80 per cent of the women answered that at least 12 weeks of maternity benefit is available in their organisation. 13 per cent however answered that less than 12 weeks of leave is available. This means that more than every tenth woman work under an organisational policy that breaches the law.

As can be seen in figure 5.7 the women with less than 12 weeks leave available work in the private sector. It is interesting to note that this finding confirms the finding in figure 5.5 above, which describes the period of maternity leave the women have taken. Thus, the reason that the women in the private sector seem to be those who take less than 12 weeks maternity leave, could be that the maternity policy at their workplace do not allow them to take more leave.

Figure 5.7



Considering the payment during maternity leave, the Maternity Benefit Act states that a female employee shall be paid at the rate of her average daily wage by her employer when she is on maternity leave. As discussed in the chapter about the benefits and disadvantages of maternity benefit programmes, it is of great importance that the maternity leave is paid. In this study, 76 per cent of the participants answered that all of the weeks they are entitled to maternity leave by their employer is fully paid. 11 per cent however answered that they are only paid for some of the weeks, that they are paid at a reduced rate or that they are not paid at all. Out of the organisations that breach the law and do not fully pay employees during maternity leave, 80 per cent are private and 10 per cent are governmental.

### Number of times a woman may take leave

Taking a look at the number of times a woman may take maternity leave according to the organizational policy, 71 per cent of the participants answered that they are allowed to take maternity leave twice (figure 5.8). Only 18 per cent have no limit of number of times they may take leave. Having in mind that the Maternity Benefit Act does not state any number of pregnancies that makes a woman eligible to take leave, this finding is surprising and

worrying. A first guess for the reason behind this situation could be that the government’s policy mentioned above, which allow women to take 6 months of leave, is limited to women who have less than two children. When looking at the number of times a woman may take leave by breaking the data into different types of organizations (figure 5.9), it becomes clear that women in all types of organizations faces similar policies concerning this issue. Thus, it is not only government employees who are limited to take maternity leave twice.

Figure 5.8

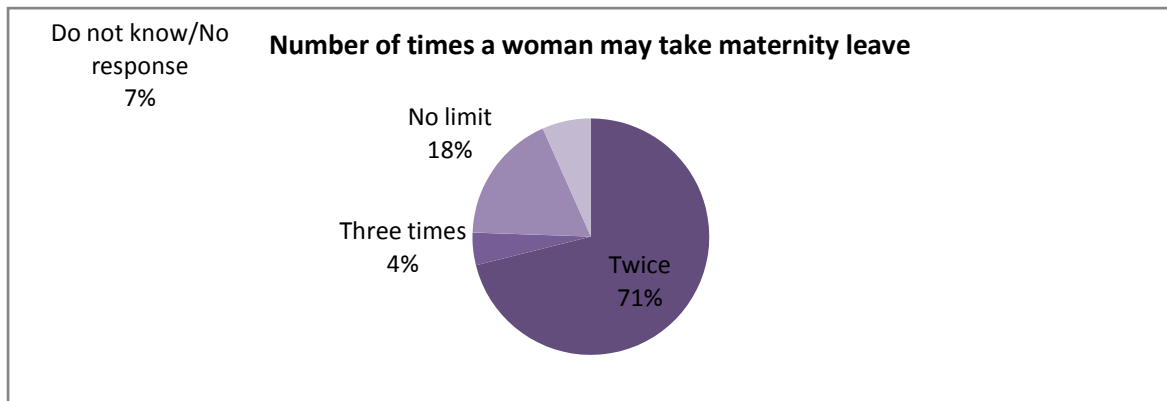
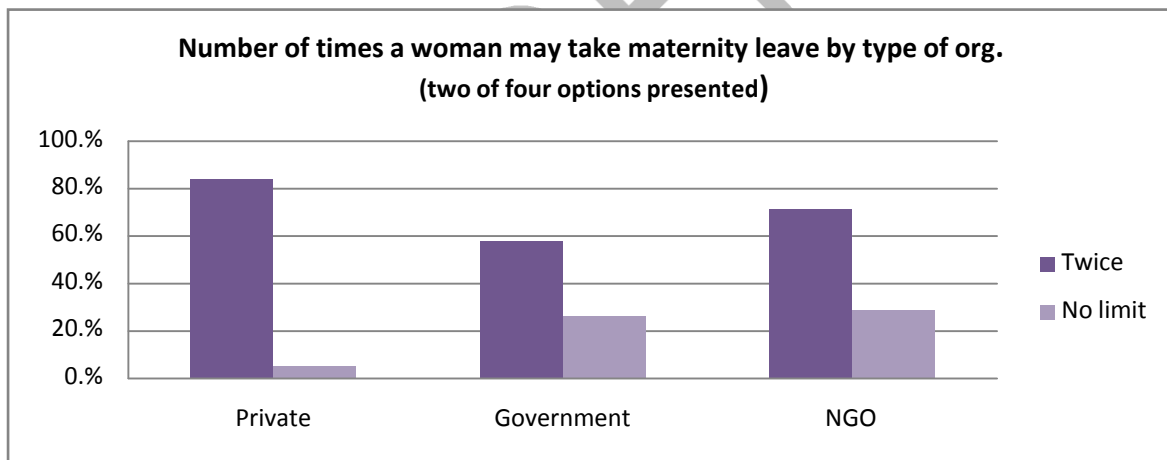


Figure 5.9

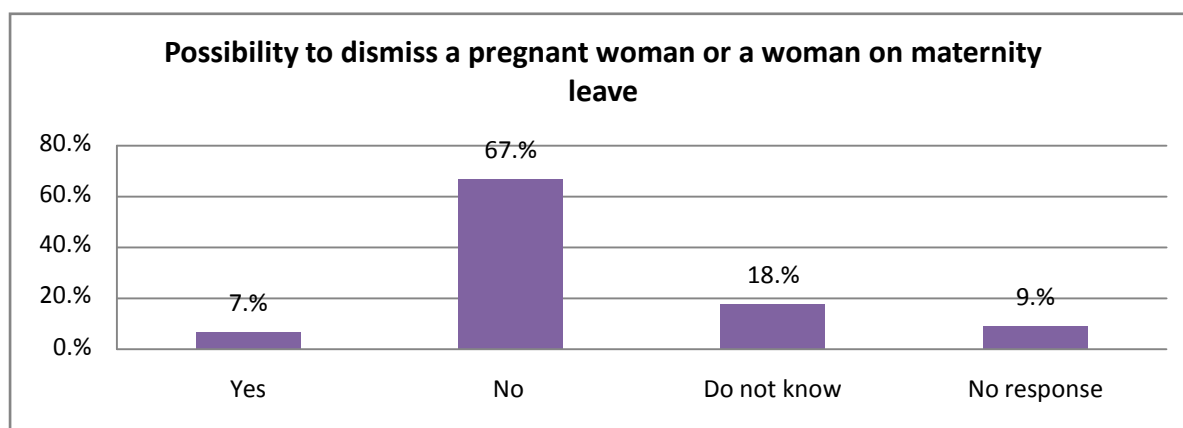


### Possibility to dismiss

Finally, a very important part of the maternity policies is the possibility to dismiss a pregnant woman or a woman on maternity leave. According to the Maternity Benefit Act, it is unlawful for an employer to discharge or dismiss an employee during or on account of maternity leave. As can be seen in figure 5.10 below, 67 per cent of the women work in organizations where it is not possible to dismiss a pregnant woman or a woman on maternity leave. 7 per cent have however answered that this is possible. When asked to explain for what reason this is possible, these women have mentioned decrease of workload at the workplace and a long period of leave<sup>14</sup>.

<sup>14</sup>Not specified what is meant by a long period of leave.

## 5.10



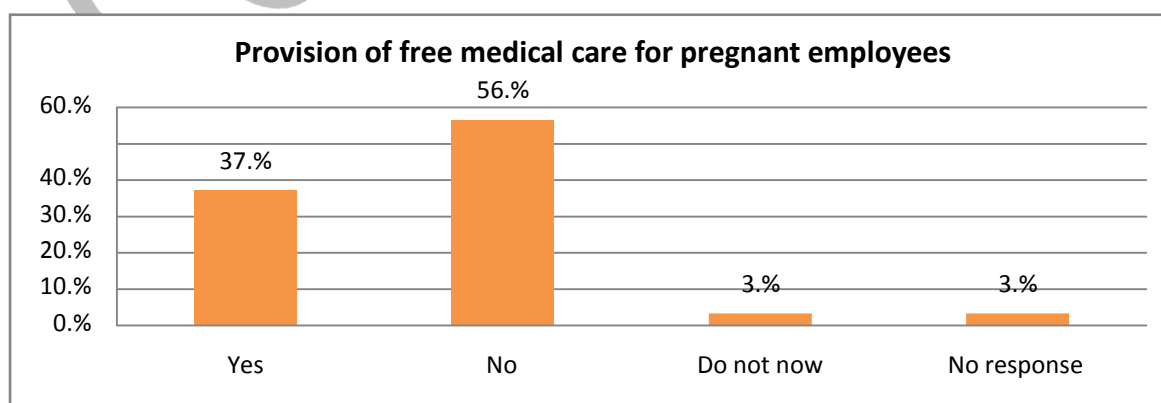
### 5.4.3 Health benefits

#### Medical bonus

According to the Maternity Benefit Act, a pregnant woman has the right to 2500 rupees in medical bonus. In order to find out to what extent this part of the Act is implemented, one has to first find out whether some of the participants are entitled to free medical care during their pregnancy. A medical bonus would be unnecessary for these women, since their employer covers all medical costs.

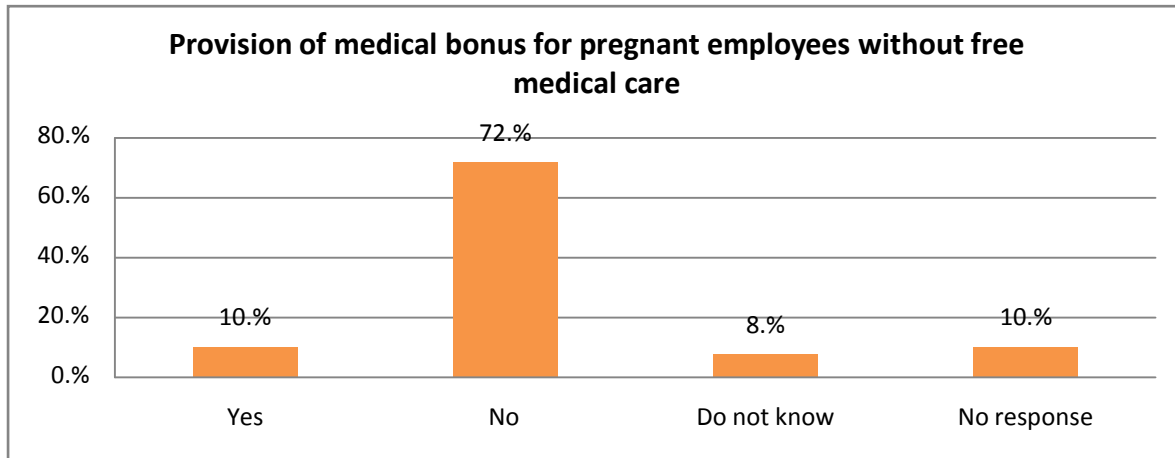
Out of the 62 women, 23 women answered that pregnant employees have access to free medical care. 16 of these women work in the public sector. As can be seen in figure women (56 per cent) are left to analyze in regards to the medical bonus granted in the Maternity Benefit Act. These women mainly work in the private sector or at an NGO.

Figure 5.11



Of the women who are not entitled to free medical care by their employer, 72 per cent are neither entitled to medical bonus while they are pregnant (figure 5.12). In fact, only 10 per cent of these women have answered that their employer provides medical bonus. The fact that such a high extent of employers seem to breach this part of the Maternity Benefit Act is troublesome and should be taken seriously.

**Figure 5.12**



### **Nursing breaks**

According to the Maternity Benefit Act, an employee who returns to duty after delivery shall be allowed two nursing breaks in the course of her daily work until her child attains the age of fifteen months. As can be seen in figure 5.13 below, only 32 per cent of the participants in this study answered that nursing breaks are provided during work hours. This means that two thirds of the women cannot take such breaks when they are back from maternity leave. When looking at different sectors separately in figure 5.14, one can see that the situation is worst in the public sector where 84 per cent answered that nursing breaks are not provided. A majority in the private sector have however also given the same answer, and in the NGO sector there are similar portions of “yes” and “no” answers.

Figure 5.13

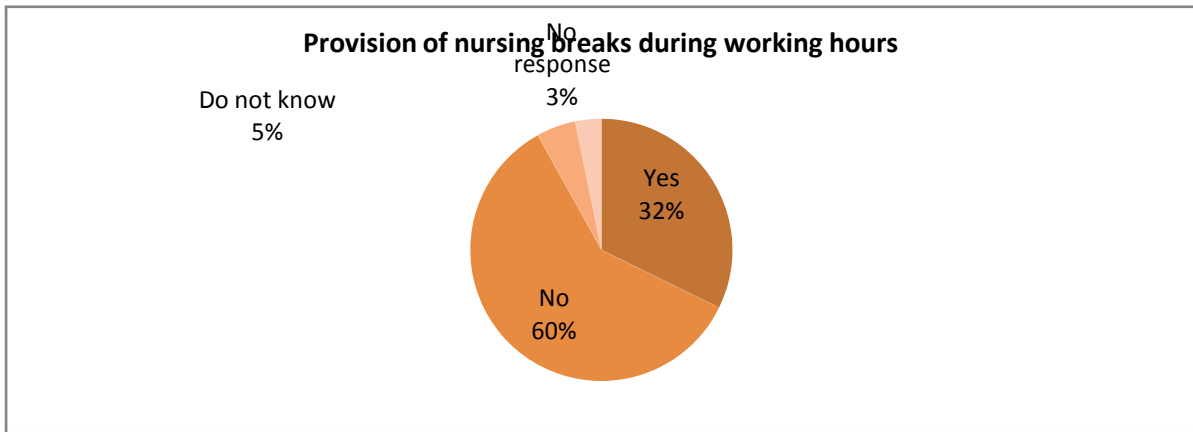
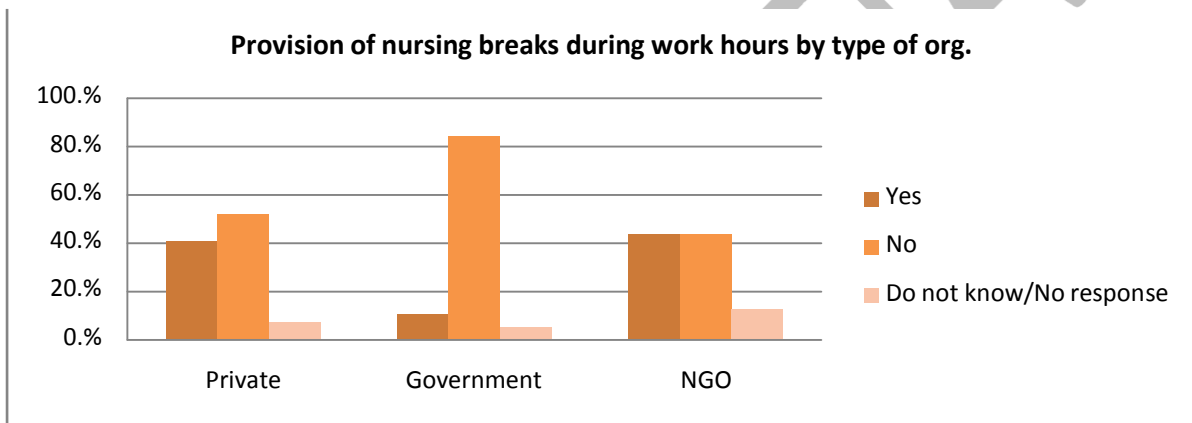
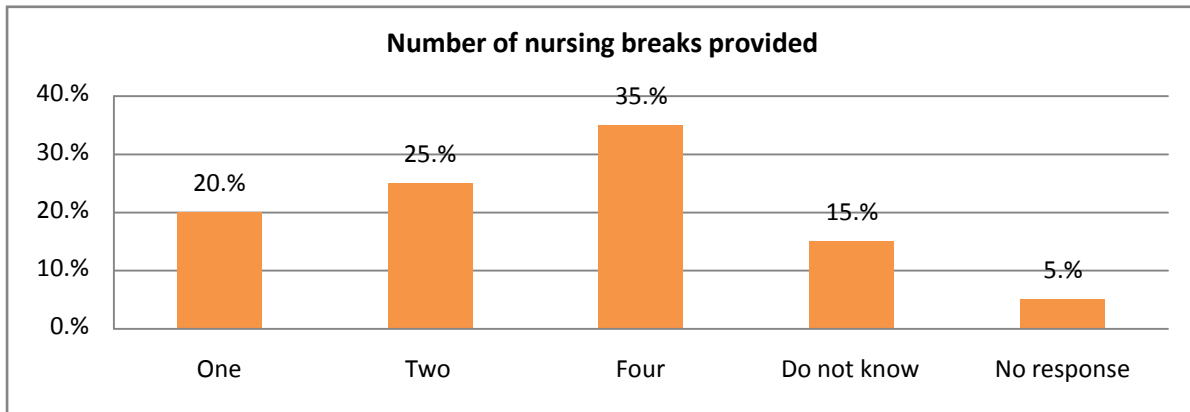


Figure 5.14



Of the 32 per cent of the participants who answered that nursing breaks are provided, 60 per cent get at least two breaks during the course of the day (figure 5.15). The fact that two breaks are allowed for a majority of the participants who are entitled to breaks is quite encouraging. One should however note that 30 per cent of these participants have answered that nursing breaks are not additional to their standard rest breaks. In addition, half of the participants are only provided with nursing breaks for 12 months. Only one fifth can have such breaks for at least 15 months, which is in accordance with the law.

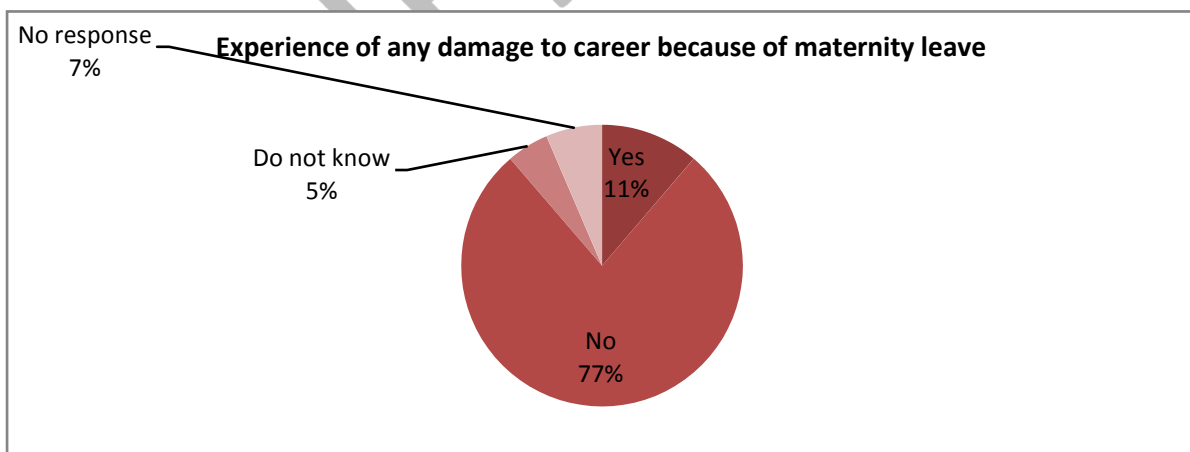
Figure 5.15



#### 5.4.4 Experience of damage and complaint

One of the questions the participants have answered is whether they or any colleague has experiences any damage to their career because they took maternity leave. As can be seen in figure 5.16, 11 per cent have answered yes and 77 per cent have answered no to this question. The explanation for damage to career among the 11 per cent is mainly dismissal, which is obviously prohibited by the Maternity Benefit Act. Two women for example stated that they had to leave their job in their 7<sup>th</sup> month of pregnancy because of upcoming leave. However, there is also other kind of damage mentioned. One woman stated that her period of probation was extended with one year because she due to complications in her pregnancy took her leave eight days before her period of probation would have ended.

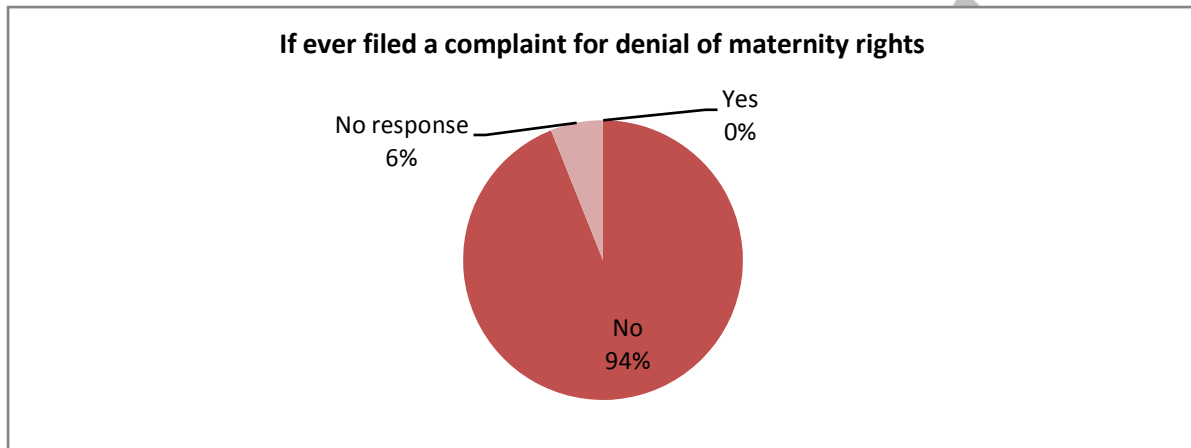
Figure 5.16



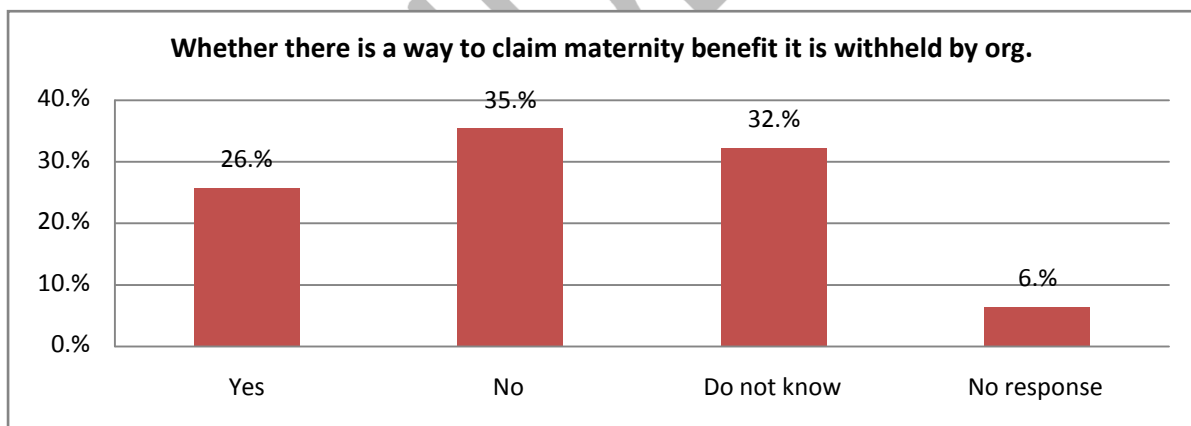
Although 11 per cent of the participants in the study answered that they or any colleague experienced damage to their career because of taking maternity leave, none of the women who have ever applied for maternity leave have filed a complaint for denial of their maternity rights (figure 5.17). One reason for this could be that such an option does not exist in the organisation. As can be seen in figure 5.18, 35 per cent of the participants have answered that there is not a way to claim maternity benefit if it is withheld by the

organisation, despite the fact that such an option is granted by the Maternity Benefit Act. Another reason for not filing a complaint could be that the employees are not aware whether they can complain or not. 32 per cent of the participants have actually answered that they do not know if there is a way to complain. Finally, it could also be that employees have chosen to not complain because of potential difficulties that might appear as a consequence of complaining (concern about a long process of filing a complaint, fear of more damage to career etc.).

**Figure 5.17**



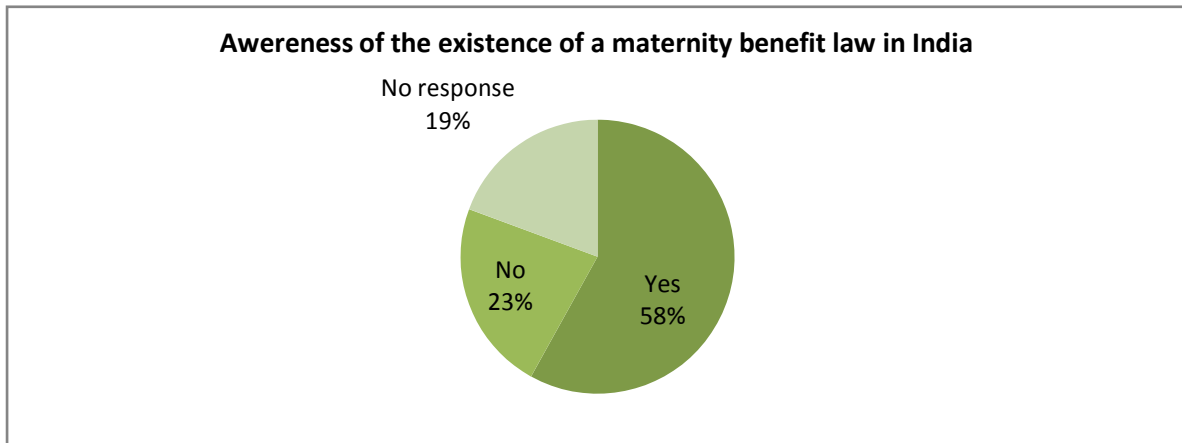
**Figure 5.18**



### 5.4.5 Awareness

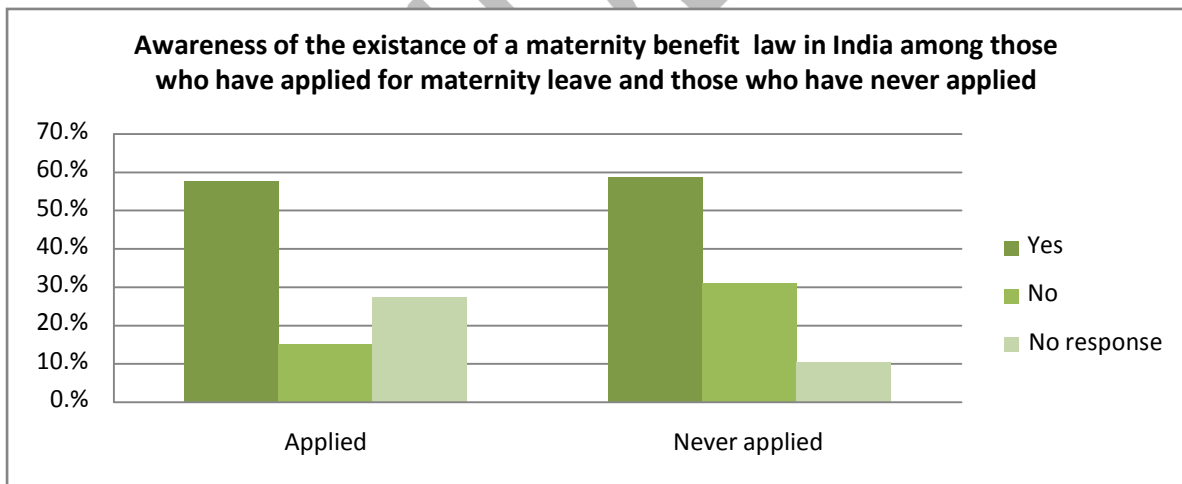
The participants in this study have answered questions related to their awareness of the law. First of all, they were asked if they are aware that there exists a law in India that gives pregnant working women the right to certain benefits. As is shown in figure 5.19, a 58 per cent of the participants answered that they are aware of the existence of the law. Although this is a majority of the women in this study, little less than half of the women do not seem to be aware of it. As awareness is one of the first steps when it comes to claiming rights, this finding is highly problematic.

Figure 5.19



Since half of the women in the sample have never applied for maternity leave, one might suspect that these women are the reason behind the low number of “yes” answers in the figure above. Looking at figure 5.20 below it however becomes clear that there is almost the same share of “yes” answers among those who have ever applied for maternity leave, and those who have never applied. The fact that only 53 per cent of all participants are aware of the law does in other words not seem to be a consequence of the fact that half of the woman in the sample have never applied for maternity leave.

Figure 5.20

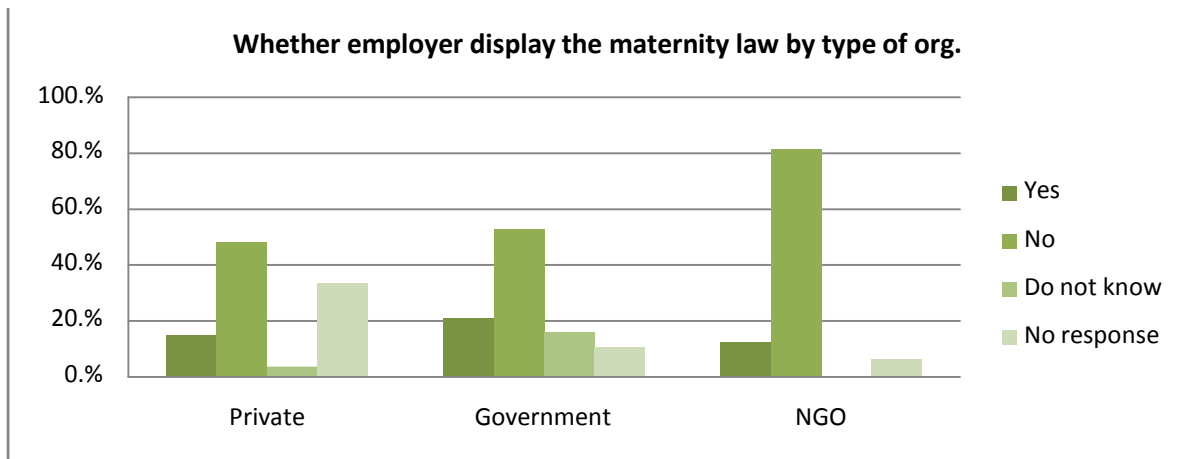


Further, the participants also answered whether their employer displays the maternity law anywhere in the organisation. Only 16 per cent of the women answered that their employer does display the law, while 58 per cent answered that their employer does not. As can be seen in figure 5.21 below, the share of “yes” answers is 15 per cent in the private sector, 21 per cent in the public sector and 13 per cent in NGOs. In other words, all types of organisations face a low number when it comes to displaying the law.

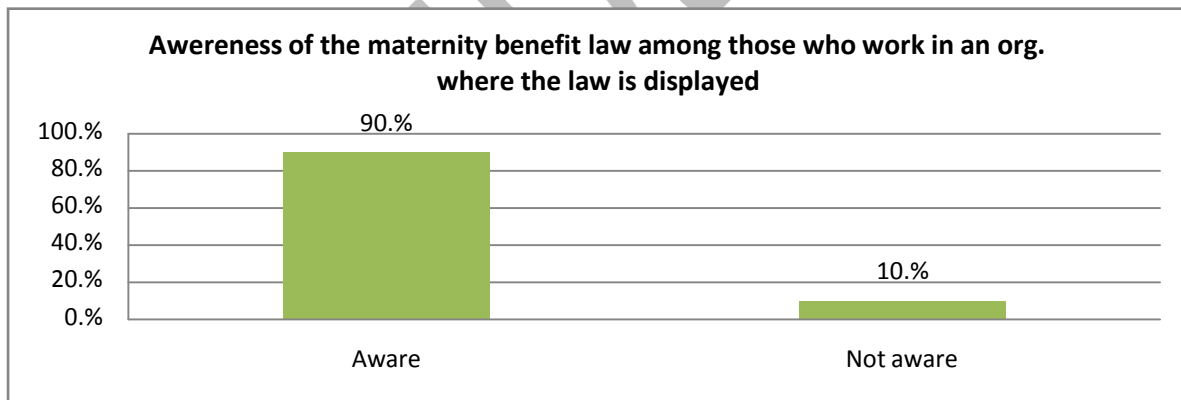


There is however also an uplifting finding. As figure 5.22 shows, the awareness among those employees that work in an organisation where the law is displayed is 90 per cent. Thus, it seems though displaying the maternity law could have a positive impact on the awareness of the maternity law. Pushing for employers to display the Maternity Benefit Act is therefore accurate and should be of high priority.

**Figure 5.21**



**Figure 5.22**



## 5.5 Conclusion

This study consists of 62 working women from different sectors of the labour market. They have a variety of years of experience in their respective organisation, and there is a mix of women with and without the experience of having applied for maternity leave.

The study has found that a majority of the women that have the experience of having applied for maternity leave have taken three months of leave. Those women in study who have taken less than three months of leave work in the private sector. These findings show that the Maternity Benefit Act has been implemented to some extent, but that there is room for improvement.

In regards to organisational maternity leave policy, three fourth of the participants in this study have answered that such a policy exists in their organisation. Among these women, 80 per cent are entitled to at least three months maternity leave. Once again, those policies that provide less than three months leave belong to private organisations. Although 80 per cent of the organisations provide at least three months maternity leave in their maternity policy, it has been noted that one fourth of the policies do not grant full payment for women on maternity leave. Further, another important finding is that only about one fifth of the women in this study have unlimited accesses to maternity leave, while most are limited to only take leave twice.

In regards to access to medical bonus and nursing breaks, the implementation of the Maternity Benefit Act is more flawed. In this study, only one tenth of the participants have answered that pregnant women in their organisation are entitled to medical bonus (those with free medical care excluded). When it comes to nursing breaks, about one third have answered that women in their organisation are entitles to such breaks. Thus, there is great need to improve the implementation regarding these parts of the Act. .

As always when it comes to implementation of a law, high awareness among those the law concerns can be very helpful in order to push for the implementation. In the case of the Maternity Benefit Act, this study has found that a little more than half of the working women are aware of the existence of the law. The same number appears when the participants are divided are analysed in two groups: those who have ever applied for maternity leave and those who have not. These findings show that awareness about the law has to be raised, and that this conclusion is valid among both women who never have been pregnant and those who have had the experience of pregnancy.

## RECOMMENDATIONS

As can be understood from above, the Maternity Benefit Act has merits. However, there are some shortcomings that should be noted. First of all, the Maternity Benefit Act is restricted to female workers who are registered by their employer. Although casual and daily wage workers are covered by the Act, there is a risk that these employees are registered to a lesser extent. This is since they are present at the workplace less often/less regularly or do not have an identifiable employer or a designated place of work. This situation could create a bias of maternity benefits in favour of permanent full-time workers. In addition it should be noted that according to a report on maternity protection in India written by the Ministry of Labour and Employment of India and International Labour Organization, only 6 million of 138 million (4.4 per cent) female workers aged 15 to 49 in India work in the formal sector.<sup>15</sup> In other words, the Maternity Benefit Act is not applicable to 95.6 per cent of female workers in the reproductive cohort in India.

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<sup>15</sup> Maternity Protection in India: A national assessment, Ministry of Labour and Employment and ILO, August 2012.

Secondly, the Maternity Benefit Act is one of four laws<sup>16</sup> of social security in India which is based on the principle of employer's liability. This principle means that workers are protected through labour codes whereby affected employers are required to provide payments or services to their employees. In the case of the Maternity Benefit Act, this means that the liability for payment of maternity benefits is placed directly on each employer. Because of this, the Act is likely to decrease the amount of women who want to or are able to make use of their maternity rights. Pregnant women might be afraid of losing their job or to get a decreased salary if they apply for maternity benefits, while employers might be worried that they will face a financial loss if they allow for maternity benefits. Due to the balance of power in favour of the employers, which exists since workers are dependent on their employers for their employment and salary, it is likely that the interests of employers override the interests of working women. In connection with this discussion, it is worth noting that the principle of employer's liability actually contradicts one of the general guiding principles in the ILO recommendation no. 67, which states that income security as far as possible should be organized on the basis of compulsory social insurance.<sup>17</sup>

Thirdly, the Maternity Benefit Act disregards fathers as caregivers when a child is born. This is in spite of the fact that paternity leave could be an important opportunity for men to nurture their children and support new mothers with the physical and emotional demands relating to childbirth. It should also be noted that the right to paternity leave could be crucial for changes in the relationships and perceptions of parenting roles in the long run. The Maternity Benefit Act however does not entitle working men such leave, and thereby does not make an adequate effort in the struggle towards a gender-balanced approach to care-giving and unpaid domestic work.

For Central Government:

- The law should be amended to increase the number of days
- The Government of India should take note of the recent ruling of Madras High Court in **K.Kalaiselvi Vs. Chennai Port Trust, rep by the Chairman, 1,Rajaji Salai, Chennai-600 001 on 04.03.2013** (see Annexe 4)
- All women found working in service sector establishment should be brought under the ambit of the Act
- The Government of India should include the provision of UID within the ambit of the Act for transfer of amounts
- The Government of India should include the provision of women working under Mahatma Gandhi National Rural Guarantee Employment Act, 2005 within the ambit of the Act

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<sup>16</sup> The others are: Workmen's Compensation Act, 1923, The Industrial Disputes Act, 1947, The Payment of Gratuity Act, 1972.


<sup>17</sup> R067 - Income Security Recommendation, 1944 (No. 67), Recommendation concerning Income Security Adoption: Philadelphia, 26th ILC session (12 May 1944)

- There needs to be convergence of Ministries of Women and Child, Health, Rural Development, Labour on entitlement of benefits as enumerated under the Act
- Awareness about the law has to be raised
- There is great need to improve the implementation of the Act with regard to access to medical bonus and nursing breaks
- Sex disaggregated database needs to be created for entitlements of nutrition, maternity benefits and access to health care

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## Annex 1 -

### High Court Judgement Summaries

Name	Summary	Nature of Employer	Forum	Decision favourable to working women?
Management of Kallayar Estate v. Chief Inspector of Plantations  1999 (81) FLR 639	No minimum work period to be entitled to paid leave for miscarriage.	Private	Madras High Court	
J Sharmila v The Secretary to Government  2009 W.P. (MD) No. 13555	A government rule stating that maternity benefit would only be paid to its employees with less than 2 surviving children should be interpreted to mean less than 2 successful deliveries, and not number of children. The justification for this was based on assuming that the rule regarding two deliveries was targeted at protecting the health of the employees and not to promote a maximum family size. Therefore a woman who had twins during her first delivery was entitled to the benefit for her second delivery.	Government	Madras High Court	
Malayalam Plantations Ltd v Inspector of Plantations  1975 (30) FLR 148	'Week' in terms of section 5(3) should be interpreted to mean normal working week of the employee. The employee is not entitled to 7 days of wages per week while she is on leave if she did not work 7 days per week. She is entitled to be reimbursed the amount that she would have earned (based on the number of days per week she routinely worked) if she had not been pregnant.	Private	Kerala High Court	
Mrs. Bharti Gupta v Rail India Technical...  2005 (84) DRJ 53	6 month rolling contract over an extended period. Maternity Benefit was payable.	Government	Delhi High Court	
Dr. (Smt.) Hemlata Saraswat v State of Rajasthan and	A consolidated salary on a contractual basis is not a ground for denial of maternity rights.	Government	Rajasthan High Court	

Ors 2008 RLW (2) Raj 1397				
Mrs. Pramila Rawat v District Judge, Lucknow and... 2000 (87) FLR 134	Ad hoc employees entitled to same maternity benefit as other employees. The failure to renew ad hoc rolling contracts solely based on exercising maternity rights (where there are no other grounds or conditions fulfilled for not renewing) is not permitted.	Government	Allahabad High Court	✓
S Amudha v Chairman Neyveli Lignite... (1991) 1 MLJ 137	A woman who cleared an interview and selection process but failed the medical test due to pregnancy (temporarily unfit to work) was unfairly treated. It was not legitimate to tell her that she would be appointed after the maternity period.	Private	Madras High Court	
Dr Thomas Eapen v Asst. Labour Officer and Ors. 1993 ILLJ 87 Ker	A state order exempting certain establishments e.g. hospitals from the provision of the MBA was safe. The hospital was not obliged to pay maternity benefits to its staff.	Government	Kerala High Court	
K. Chandrika v Indian Red Cross Society and Anr. 131 (2006) DLT 585	Termination of employment (with no reason) that coincided with the first day of maternity leave would be deemed to be termination on account of pregnancy and thus illegal and unjustifiable (despite the contract of employment stating that termination could occur without the provision of reasons).	NGO	Delhi High Court	
Tata Tea Ltd. v Inspector of Plantations 1992 ILLJ 603 Ker	Women were entitled to receive both the payment under the MBA and the customary payment under the National & Festival Holidays Act – the maternity benefit should not be adjusted due to the payment received under the NFHA during the relevant period.	Private	Kerala High Court	
Ganpatlal Mulchandji Joshi v Payment of Wages Authority 1958 ILLJ 178	Maternity Benefit is not wages within the meaning of the Payment of Wages Act. Therefore the Authority constituted under the PWA has not authority to order the direction of such payments.	Private	Bombay High Court	∅
F.M. Kolia and Anr. V Manager, the	For calculation of number of days service: days where the factory was closed due to the rain should be added to the woman's	Private	Gujarat High Court	

Tiles and Pottery...  (1981) 22 GLR 528	total, thereby she reached the 160 day threshold and qualified for benefit.			
Bhartiben Babulal Joshi v Administrative Officer  23 December 203	Leave was sanctioned but without pay for a worker on the grounds that she was not regularly appointed. This was unjust. Payment of maternity benefit was ordered.	Government	Gujarat High Court	✓
Jacob Thomas, Managing Director v Assistant Labour Office  8 April 2010	Not relevant: a hearing on the issuance of a non-bailable warrant due to failure to appear.	Private	Kerala high Court	
N Mohammed v Petitions Filed Under Article 226  9 June 2008	Workers covered by the MBA have no limit to the amount of deliveries. Employers that place such a limit are in breach of the MBA. This was not a government employer.	Private	Madras High Court	
Food Corporation of India Workers.. v Shri G.R. Majhi and Ors  20 December 2006	The case concerned a challenge by union members to certain standing orders applicable to the employees of the company. One such challenge was to a provision that stated leave of any kind may be cancelled or refused, as required – the challenge related to the applicability of this provision to maternity leave. Held: No standing order can overrule the Maternity Benefits Act, therefore must be interpreted as applying to leave other than maternity leave.	Private	Delhi High Court	
Ram Bahadur Thakur (P) Ltd. v Chief Inspector of Plantations  1989 ILLJ 20 Ker	When computing days worked, half days are to be counted as full days.	Private	Kerala High Court	
Durgesh Sharma v State of Rajasthan & Ors  RLW 2008 (2)	Maternity benefits cannot be denied merely on the ground of mode of payment of wages.	Government	Rajasthan High Court	✓

Raj 1304				
Steel Authority of India Ltd. v Ispat Khandan Janta Mazdoor Union  6 September 2010	Not relevant: an employment law case regarding whether a batch of contracts were a sham – case concerned definition of employee.	Private	Madhya Pradesh High Court	
A. Arulin Ajitha Rani v The Principal  27 June 2008	The case concerned a student's right to maternity leave. To sit exams there is a minimum attendance requirement – can maternity leave be used to negate absence as a result of pregnancy? The court did not rule on this matter as it noted that even if the maternity period was removed from the absence record the woman's attendance would not qualify her to sit the exams.  The court stated that the issue of the application of the Act to students was a policy question best left to the legislature.	Government	Madras High Court	
Dr. Parul Misra W/O Arvind Shukla v State of U.P. Thru Prin. Secy. ...  27 January 2010	Contractual employees are equally entitled to maternity leave – the purpose of maternity leave does not change with the nature of employment.	Government	Allahabad High Court	
Yamini J. Dave v The Director, I.U.C.A.A and Anr.  6 April 2004	Termination of employment while on Maternity leave is a violation of article 14 of the constitution – there was a dispute over contract type and the employers argued merely not renewed (not terminated). Court held that the employee was a permanent employee and this was an illegal termination of employment.	Government	Gujarat High Court	
Aruna S. Pardeshi (Dr.) v Dean Swami Ramanand Tirth  1987 (2) BomCR 311	A medical Houseman was denied sanctioned maternity leave. The court held that the MBA did not apply to her – hospital was not covered in the list of applicable establishments.	Government	Bombay High Court	



## Annex 2 -

### Maternity, paternity and parental leave in selected countries<sup>18</sup>

Country	Maternity			Paternity		Parental	
	Length of leave	Payment	Source of funding	Length of leave	Payment	Length of leave	Payment
India	12 weeks	100% of wage	Employer liability and social security				
Afghanistan	90 days	100% of wage	Employer liability				
Bangladesh	16 weeks	100% of wage	Employer liability				
France	16 weeks	100% of wage up to a ceiling	Social security	11 days	100% of wage	Three years after child's birth	Unpaid
Germany	14 weeks	100% of wage	Mixed (Social security up to a ceiling and employer)			Three years after child's birth	12 month per family at a rate of 67 % of wage
Italy	20 weeks	80% of wage	Social security			6 month for each parent. Max. 11 months per child.	6 month per child at a rate of 30 % of wage
Nepal	52 days	100% of wage	Employer liability				
Netherlands	16 weeks	100% up to a ceiling	Social security	Two days	100 % of wage	26 weeks for each parent	Unpaid
Pakistan	12 weeks	100% of wage	Employer liability				
Spain	16 weeks	100% of wage	Social security	Four weeks	100 % of wage	Three years after child's birth	Unpaid

<sup>18</sup>ILO database 2010

Sweden	14 weeks	80% of wage	Social security	Ten days	80 % of wage	The first 18 months after child's birth (60 days reserved for each parent)	80 % of wage
United Kingdom	52 weeks	90 % for 6 weeks , flat rate week 7-39, unpaid week 40-52	Mixed (Employer reimbursed for 92 % by the state)	Two weeks	Fixed rate	13 weeks for each parent if at least one year of employment.	Unpaid
United states						12 weeks for each parent if employed at least 1250 hours and at least one year.	Unpaid

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## Annex 3 -

### Questionnaire

#### Questionnaire for working women on the Maternity Benefit Act, 1961

**Privacy policy:** Responses will be treated in strict confidence. Responses will not be released to your employer. Your details and responses will not be released to any other organisation or individual. All data will be anonymised prior to inclusion within the final report.

#### 1. Basic Data

Respondent number:

Date of interview:

1.1 Name:

1.2 Type of organisation you work for:

Private

Government

NGO

1.3 Job Title:

1.4 Date you joined the organisation:

1.5 Are you currently pregnant?

Yes  No  Do not know  No response

1.6 Have you ever applied for pregnancy or reproductive related leave?

Yes  No (go to section 2)  Do not know  No response

1.7 If yes, what type of leave did you apply for?:

• Maternity

• Miscarriage

• Still birth

• Premature delivery

- Pregnancy related illness
- Tubectomy operation
- Other (specify)

1.8 When did you take this leave?

1.9 How long was your leave?

**2. Organisational Policy**

2.1 Does your organisation have a policy on maternity benefits?

Yes  No (go to section 3)  Do not know  No response

2.2 If yes,

- What are the criteria for being entitled to maternity benefits?:
  - Length of service:
  - Contract type:
  - Notification period:
  - Required documents:
  - Other:

2.4 How many weeks of maternity leave are available?:

2.5 Is the maternity leave in addition to your annual leave?:

Yes  No  Don't know  No response

2.6 How many weeks of the maternity leave is at full pay?:

2.7 Has your employer ever pressurized anyone into not taking their full leave amount?

Yes  No  Do not know  No response

If yes, please explain:

2.8 When does your maternity benefit get paid? :

- Before the delivery on production of proof
- After the delivery on production of proof
- Other (specify)
- Do not know
- No response

2.9 If a woman dies during her delivery, does her benefit get paid to her nominee or legal representative?

Yes  No  Do not know  No response

2.10 Are you required to name a nominee on your leave application?

Yes  No  Do not know  No response

2.11 How many times may a woman take maternity leave?

2.12 How many working days must there be between leave periods?

2.13 What happens if a woman does not return to work after her leave?

2.14 Can a woman be dismissed during her pregnancy or leave?

Yes  No (go to q 2.17)  Do not know  No response

If Yes, for what reasons?:

2.15 If dismissed will she retain her maternity benefit?

Yes  No  not know  No response

2.16 If dismissed will she retain her medical bonus?

Yes  No  No medical bonus provided  Do not know  No response

2.17 Can a woman's terms of employment be changed after notifying your employer of her pregnancy (but before taking leave), during the leave or on return to work?

Yes  No (go to 2.19)  not know  No response

2.18 Would these changes be based on her consent?

Yes  Sometimes  No  Do not know  No response

2.19 Other than maternity leave, what reproductive related leave does your employer provide?

- 
- Miscarriage
  - Still birth
  - Premature delivery
  - Pregnancy illness
  - Tubectomy operation
  - Other (specify):

2.20 Is this leave in addition to annual leave?

Yes  No  Do not know  No response

2.21 To what extent has your employer's attitude to maternity leave affected your decision to have children?

Positive effect  Negative effect  No effect  Do not know  No response

2.22 To what extent has your employer's attitude to maternity leave affected your decision to take up this employment?

Positive effect  Negative effect  No effect  Do not know  No response

### 3. Leave Application

3.1. Does your organization have a procedure for making a maternity leave request?

Yes  No (go to section 4)  Do not know  No response

If yes when do you need to serve the notice?

- 6 weeks before the date of expected delivery
- Any time before the delivery
- After the delivery
- Other, please specify
- Do not know
- No response

3.2. In the application, do you state the amount of leave you require?

Yes  No  Do not know  No response

#### 4. Medical Bonus

4.1 Are pregnant employees provided with *free medical care* by your employer?

Yes (go to section 5)  No  Do not know  No response

4.2 Are pregnant employees provided with a *medical bonus* from your employer?

Yes  No (go to section 5)  Do not know  No response

4.3 How much is the bonus?

Less than 500 Rs  501–1000 Rs  Above 1000 Rs  Do not know  No response

4.4. Did you ask for medical bonus?

Yes  No  Do not know  No response

If yes, did you receive any bonus?

Yes, all of it.  Yes, Part of it.  No  Do not know  No response

If no, why not?

#### 5. Return to Work

5.1 Have you or any colleague experienced any damage to your career because you took maternity leave?

Yes  No  Do not know  No response

If yes, please explain?



5.2 After her leave, will a woman return to the same job she left?

Yes (go to section 6)  No  Do not know  No response

If answered No, please explain why there may be a change:

5.3 Will the new job be at the same pay grade?

Yes  No  Do not know  No response

5.4 Will the new job have the same conditions of employment?

Yes  No  Do not know  No response

## 6. Nursing Breaks

6.1. Are nursing breaks provided during working hours?

Yes  No (go to section 7)  Do not know  No response

6.2. How many nursing breaks are provided?

Two  Four  Other (specify)  Do not know  No response

6.3. Are these breaks in addition to standard rest breaks?

Yes  No  Do not know  No response

6.4 For how long are these breaks provided?

12 months  15 months  Other (specify)  Do not know  No response

## 7. Complaints

7.1 Is there a way to claim your benefit if it is withheld by your organisation?

Yes  No  Do not know  No response

If yes, what is that procedure?

7.2 Have you ever filed a complaint for denial of your maternity rights?

Yes  No (go section 8)  Do not know  No response

If Yes, before whom?

7.3. Did you receive any assistance with your complaint?

Yes  No (go to q 7.5)  Do not know  No response

If yes, what assistance did you receive?

If no, did you attempt to seek assistance?

7.4 Who provided the assistance?

7.5 What is the status of your complaint?

## 8. Awareness

8.1 Do you know that there is a law in India that gives pregnant working women the right to certain benefits?

Yes  No  No response

8.2 Has your employer displayed this maternity law anywhere in your organisation?

Yes  No  Do not know  No response

8.3 Are you aware that this is a legal requirement?

Yes  No  Do not know  No response

8.4 Do you think you are aware of your rights under this law?

Yes  No  Do not know  No response

8.5 How many weeks leave do you think the law provides for:

Maternity:

Misscarriage: Still

birth: Premature

delivery:

Pregnancy related illness:

Tubectomy operation:

8.6 What amount of medical bonus do you think the law says an employer should pay?

## 9. Suggestions

9.1 Do you think the law is beneficial to the condition of women's health?

Yes  No  Do not know  esponse

If Yes, why?

If No, why not?

9.2 Are you happy with the duration of maternity leave provided by law?

Yes  No  Do not know  No response

If Yes, why?

If No, why not?

9.3 How much maternity leave do you think a woman should be entitled to?

9.4. Do you have any suggestions for improving the current law or for increasing women's awareness of it?

Yes  No  not know  sponse

If Yes, what are those?

9.5 Is there anything else you would like to add?

Thank you for completing the survey. Can we contact you for further discussion about these issues?

CONTACT DETAILS Your personal details will be used for contacting you only. They will not be used in any reports, nor will they be passed to any other organisation or individual.

Address:

Phone number:

Email:

## **Annex 4 –**

### **IN THE HIGH COURT OF JUDICATURE AT MADRAS**

DATED : 04.03.2013

THE HONOURABLE MR.JUSTICE K.CHANDRU

**K.Kalaiselvi Vs. Chennai Port Trust, rep by the Chairman, 1,Rajaji Salai, Chennai-600 001**

#### **ORDER**

2. The petitioner is working as an Assistant Superintendent in the Traffic department of the Chennai Port Trust. She had put in 24 years of service. She is married. Her son (Shyam Sundar) aged 20 years died die to road accident on 31.01.2009. After his birth, the petitioner has removed her uterus due to some problem on 30.04.2008. Therefore, she in order to have a child had entered into an arrangement with Prashanth Multi speciality hospital, Chennai to have a baby through surrogate procedure. Finally with the consent of her husband and his cooperation, a female baby was born on 08.02.2011 through a host mother. She had incurred substantial expenditure towards treatment. In order to look after the newly born baby, she had applied for maternity leave. But she was informed that she was not entitled for maternity leave (post delivery) for having a child through surrogate procedure though such a rejection was not possible in case of a person adopting a child. The petitioner, therefore, requested for sanction of maternity leave to look after the newly born girl child and reimburse the medical expenses and also to issue the FMI Card incorporating the newly born child through her representation, dated 17.6.2011. She sent a reminder on 13.8.2011. However, by proceedings, dated 22.11.2011, she was informed that the Chairman of the Port Trust had granted her two months period leave as a special case, which will be treated as an eligible leave. But the leave granted on 17.9.2011 for a period of 59 days from 08.02.2011 to 07.04.2011 vide medical certificate dated 17.09.2011 was subsequently cancelled. Her request for inclusion of the female child in the FMI card was also rejected. She was informed by a letter dated 05.12.2011 that inclusion of her daughter name G.K.Sharanya in the FMI Card does not arise. The petitioner produced before the respondent Port Trust all documents relating to surrogate arrangement, hospital expenditures incurred by her as well as the birth certificate given by the Corporation of Chennai evidencing that the female child was born on 08.02.2011. The names of the parents are described as the petitioner being the mother and her husband as her father. It is under these circumstances, writ petition came to be filed seeking to set aside the order dated 05.12.2011 and for a consequential direction to the Chennai Port Trust to grant leave to the petitioner on equal footing in terms of Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987, which benefit was granted to adoptive parents.

3. In order to appreciate the contentions, it is necessary to extract Rule 3A, which reads as follows:

"3-A.Leave to female employees on adoption of a child:

A female employee on her adoption a child may be granted leave of the kind and admissible (including commuted leave without production of medical certificate for a period not exceeding 60 days and leave not due) upto one year subject to the following conditions :

(i) the facility will not be available to an adoptive mother already having two living children at the time of adoption;

(ii) the maximum admissible period of leave of the kind due and admissible will be regulated as under :

(a) If the age of the adopted child is less than one month, leave upto one year may be allowed.

(b) If the age of the child is six months or more, leave upto six months may be allowed.

(c) If the age of the child is nine months or more leave upto three months may be allowed."

4. When the writ petition came up on 28.03.2012, this court admitted the writ petition and in the two direction applications, notice was ordered. On notice from this court, a counter affidavit has been filed by the respondent, dated 31.5.2012.

5. The facts alleged by the petitioner regarding her marital status and the fact of her son died in a road accident was admitted. The birth of a child through surrogate arrangement was also admitted by the respondent. However, it was informed that on the petitioner sending a proposal, the matter was referred to the Ministry of Shipping and Surface Transport for clarification and guidelines. The Ministry in their letter dated 20.9.2011 informed the Port Trust that there was no provision / guidelines available in the CCS (Leave) Rules for the grant of maternity leave to a female Government employee for looking after her baby obtained through surrogate procedure. It was based upon the advice given by the Ministry, the leave given to her was cancelled and it was treated as eligible leave. Her further request to include the child in the FMI card was also rejected and it was informed that it cannot be considered. It was further stated that it was a peculiar case. In our Country getting a child through surrogate procedure is at a nascent stage. There are no rules or guidelines available. There are no provision in the Chennai Port Trust (Leave) Regulations, 1987 granting maternity leave to an employee who underwent surrogate procedure. No inspiration can be drawn from the Maternity Benefit Act, 1961. Apart from referring to the practice in the Australia where surrogacy was never treated as legal and in U.K., where surrogacy arrangement was legal, but advertising and other aspects of commercial surrogacy was prohibited under the Surrogacy Arrangements Act, 1985. Strangely the respondent in paragraph 18 made the following averments:

"18. It is submitted that apart from legal, other issues such as moral, ethical, psychological and religious are involved in surrogacy procedure. Hence, in India a comprehensive legislation is very much the need of the hour to address the complex legal issues related to surrogacy."

6. The question of becoming parents through surrogacy came to be considered by the Supreme Court in a judgment in Baby Manji Yamada v. Union of India reported in (2008) 13 SCC 518. Though in that case, there was a dispute between biological parents and host, the matter was directed to be taken to the Commission for Protection of Child Rights Act, 2005. But, however various forms of surrogacy was discussed in the said judgment from paragraph 8 to 16 and it was stated as follows:

*"8. Surrogacy is a well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child's genetic mother (the more traditional form for surrogacy) or she may be, as a gestational carrier, carry the pregnancy to delivery after having been implanted*

with an embryo. In some cases surrogacy is the only available option for parents who wish to have a child that is biologically related to them.

9. The word “surrogate”, from Latin “subrogare”, means “appointed to act in the place of”. The intended parent(s) is the individual or couple who intends to rear the child after its birth.

10. In traditional surrogacy (also known as the Straight method) the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing the child to be raised by others; by the biological father and possibly his spouse or partner, either male or female. The child may be conceived via home artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (intracervical insemination) which is performed at a fertility clinic.

11. In gestational surrogacy (also known as the Host method) the surrogate becomes pregnant via embryo transfer with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother or father to raise, or to a parent who is themselves unrelated to the child (e.g. because the child was conceived using egg donation, germ donation or is the result of a donated embryo). The surrogate mother may be called the gestational carrier.

12. Altruistic surrogacy is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, and other related expenses).

13. Commercial surrogacy is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well-off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This medical procedure is legal in several countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms wombs for rent, outsourced pregnancies or baby farms.

14. Intended parents may arrange a surrogate pregnancy because a woman who intends to parent is infertile in such a way that she cannot carry a pregnancy to term. Examples include a woman who has had a hysterectomy, has a uterine malformation, has had recurrent pregnancy loss or has a health condition that makes it dangerous for her to be pregnant. A female intending parent may also be fertile and healthy, but unwilling to undergo pregnancy.

15. Alternatively, the intended parent may be a single male or a male homosexual couple.

16. Surrogates may be relatives, friends, or previous strangers. Many surrogate arrangements are made through agencies that help match up intended parents with women who want to be surrogates for a fee. The agencies often help manage the complex medical and legal aspects involved. Surrogacy arrangements can also be made independently. In compensated surrogacies the amount a surrogate receives varies widely from almost nothing above expenses to over \$30,000. Careful screening is needed to assure their health as the gestational carrier incurs potential obstetrical risks."

7. Mr. Srinath Sridevan, learned counsel for the petitioner also referred to a judgment of the Supreme Court of California in a case relating to Anna Johnson Vs. Mark Calvert et al., reported in 5 Cal 4th 84, wherein the court affirmed the judgment of the lower court that genetic parents were the natural parents of child gestated through surrogate. He also drew attention of this court to the Universal Declaration of Human Rights evolved by the United Nations and adopted by the General Assembly on 10.12.1948. He placed reliance upon Article 25(2) which reads as follows:

"(2) Motherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock, shall enjoy the same social protection."

8. He also referred to the Beijing Declaration and Platform for Action Fourth World Conference on Women, dated 15.09.1995, wherein the right of all women to control all aspects of their health, in particular their own fertility is basic to their empowerment was reaffirmed. Articles 17 and 33 reads as follows:

*"17. The explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment;*

*33. Ensure respect for international law, including humanitarian law, in order to protect women and girls in particular;"*

9. He further referred to the Convention on the Rights of the Child by United Nations General Assembly by a resolution on 20.11.1989, wherein Article 6 reads as follows:

*"Article 6.*

*1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child."*

10. In the light of this, he submitted that the petitioner is undoubtedly the mother of a minor girl child and she is entitled to develop a bond with the child obtained through surrogate agreement and there is no moral issue involved in this matter. In the interest of the child, the petitioner is entitled to have the leave granted in her favour and in future also she is entitled to have the name included as her daughter in the FMI card as she is the legitimate daughter of the petitioner. He further contended that even if the rule do not contemplate the surrogate arrangement, at the time of enacting of Maternity Benefit Act, 1961, such a practice was not there. What was not recognised by the law, at some point of time need not be the same in the light of the changed situation.

11. He referred to a judgment of the Supreme Court in Laxmi Video Theatres v. State of Haryana reported in (1993) 3 SCC 715, wherein the Supreme court read within the term Cinematograph showing of a film under the Video cassette recorder. Though at the time of enacting of Cinematograph Act in the year 1952 such a method was never available, but still took note of the subsequent scientific development in the field. He referred to the following passage found in paragraphs 7 and 8, which reads as follows :

*"7. We are in agreement with this view. The definition of the expression 'cinematograph' contained in Section 2(c) of the Cinematograph Act, 1952 and Section 2(a) of the Act is an inclusive definition which includes any apparatus for representation of moving pictures or series of pictures. The said*



*definition cannot be confined in its application to an apparatus for representation of moving pictures or series of pictures which was known on the date of the enactment of the said provision. It must be given a meaning which takes into account the subsequent scientific developments in the field in accordance with principle of statutory construction laid down in The Senior Electric Inspector v. Laxmi Naryana Chopra and Ors. MANU/SC/0221/1961 : [1962] 3 SCR 146. In that case it has been held-*

*.....In a modern progressive society it would be unreasonable to confine the intention of a Legislature to the meaning attributable to the word used at the time the law was made, for a modern Legislature making laws to govern a society which is fast moving must be presumed to be aware of an enlarged meaning the same concept might attract with the march of time and with the revolutionary changes brought about in social, economic, political and scientific and other fields of human activity. Indeed, unless a contrary intention appears, an interpretation should be given to the words used to take in new facts and situations, if the words are capable of comprehending them.*

*(pp.156-157)*

*8. The VCR/VCP were developed in 1970s and achieve the same purpose as the traditional media for exhibition of moving pictures. There is nothing in the Act which excludes the applicability of the Act to VCR/VCP."*

12. He further referred to a judgment of another judgment in The Senior Electric Inspector and others Vs. Laxmi Narayan Chopra reported in AIR 1962 SC 159. In that case, the Supreme Court held that the term "telegraph line" found in the Indian Electricity Act, 1910 will take within itself the wire used for the purpose of an apparatus of the post and telegraph wireless section though legislature in the year 1885 could not have dreamt of a future discovery of wireless telegraphy. Therefore, he wanted the Maternity Benefit Act to be interpreted so as to grant maternity leave even for parents who gets child through surrogacy agreement.

13. Alternatively, he contended that if law can provide child care leave in case of adoptive parents as in the case of Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987, then they should also apply to parents like the petitioner who obtained child through surrogate agreement since the object of such leave is to take care of the child and developing good bond between the child and the parents.

14. However, the learned counsel for the Port Trust contended that in the absence of any specific legal provision, the question of this court granting leave will not arise.

15. In the light of these rival contentions, it has to be seen whether the petitioner is entitled for a leave similar to that of the leave provided under Rule 3-A and whether her child's name is to be included in the FMI Card for availing future benefits?

16. This court do not find anything immoral and unethical about the petitioner having obtained a child through surrogate arrangement. For all practical purpose, the petitioner is the mother of the girl child G.K.Sharanya and her husband is the father of the said child. When once it is admitted that the said minor child is the daughter of the petitioner and at the time of the application, she was only one day old, she is entitled for leave akin to persons who are granted leave in terms of Rule 3-A of the Leave Regulations. The purpose of the said rule is for proper bonding between the child and

parents. Even in the case of adoption, the adoptive mother does not give birth to the child, but yet the necessity of bonding of the mother with the adoptive child has been recognised by the Central Government. Therefore, the petitioner is entitled for leave in terms of Rule 3-A. Any other interpretation will do violence to various international obligations referred to by the learned counsel for the petitioner. Further, it is unnecessary to rely upon the provisions of the Maternity Benefit Act for the purpose of grant of leave, since that act deals with actual child birth and it is mother centric. The Act do not deal with leave for taking care of the child beyond 6 weeks, i.e., the post natal period. The right for child care leave has to be found elsewhere. However, this court is inclined to interpret Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987 also to include a person who obtain child through surrogate arrangement.

17. It will not be unnecessary if a reference is made to the All India Services (Leave) Rules, 1955, wherein the Central Government had recognised even paternity leave to be granted. Rule 18(D) was introduced with effect from 21.09.2011. The child care leave is given to a female member of the service. Rule 18(D) reads as follows:

*"18(D)Child Care Leave to a female member of the Service--(1)A female member of the Service having minor children below the age of eighteen years may be granted child care leave by the competent authority for a maximum of 730 days during her entire service for taking care of upto two children.*

*(2)During the period of child care leave, such member shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.*

*(3)Child care leave may be combined with leave of the kind due and admissible.*

*(4)Notwithstanding the requirement of production of medical certificates contained in sub-rule (1) of rule 13 or rule 14, leave of the kind due and admissible (including commuted leave not exceeding 60 days and leave not due) up to a maximum of one year, if applied for, be granted in continuation of child care leave granted under sub-rule(1).*

*(5)Child care leave may be availed in more than one spell.*

*(6)Child care leave shall not be debited against the leave account of the member of the Service."*

18. In the result, the writ petition will stand allowed. The respondent Chennai Port Trust is directed to grant leave to the petitioner in terms of Rule 3-A recognising the child obtained surrogate procedure. Further a direction is issued to the respondent to include the name of the child G.K.Sharanya, as a member of the petitioner's family and also include her name in the FMI card forthwith. With reference to the expenditures incurred, since such a procedure has not been contemplated for the purpose of reimbursement, this court is not inclined to give any direction with reference to reimbursement of the amounts involved in such procedure. No costs. Consequently, connected miscellaneous petitions stand closed.