

# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS (ISSN 2582 - 6433)

VOLUME 2 ISSUE 5  
(February 2022)

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**IJLRA**

INTERNATIONAL JOURNAL  
FOR LEGAL RESEARCH & ANALYSIS

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**PAID PARENTAL LEAVE: A 'JUST' ALTERNATIVE TO MATERNITY LEAVE**  
**(AN ANALYSIS THROUGH RAWLS' VEIL OF IGNORANCE)**

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## INTRODUCTION

The term 'justice' holds different meanings for different individuals. This paper deals with Rawls' rendition of justice that advocates for rational individuals to look beyond their identities, focusing solely on decisions that shall benefit the least advantaged in the society to protect the paramountcy of justice.

We, however observe that certain facets of identity, primarily an individual's 'sex' plays an important socio-historical role in perpetuating injustice, hence requiring significant consideration while formulating 'just' and 'equitable' laws, which can be noticed in affirmative policies such as paid-maternity leave. Paid-maternity leave enables pregnant and new mothers to take paid leave from work to focus on child care and their own recovery. It also covers women who experience miscarriage.<sup>1</sup>

However, this lies in contradiction to the Rawlsian concept of original position and the veil of ignorance (practices necessary to achieve justice). Hence, we will analyse the existing maternity leave policy in India through the application of Rawls' concept of veil of ignorance, highlighting the need for a neutral approach that satisfies all the stakeholders involved.

## RAWLSIAN CONCEPTS DECODED

Rawls theory of justice, provided as an alternative to classical utilitarianism, was based upon the notion of society as a cooperative system to achieve mutual advantage. Hence, according to Rawls, the societal concept of justice was conflicted between differing individual interests and the identity of shared interest. In such a scenario, "fairness" gained primacy since only a fair society and institutions could arrive at fundamental principles of justice. He theorised the central feature of "original position" which placed upon individuals the restraint of the "veil of ignorance".

Herein, contracting parties, upon assuming the original position, are unaware of their identity representation, i.e., they represent principles of justice that don't play to the advantage of any particular identity. The redacted biases and arbitrary factors, which according to Rawls include gender, render the choice impartial thus universal, implying the assumption that females have identical accessibility as men. This abstraction of individual characteristics is ignorant of the reality where there exists a requirement of fulfilling special needs- including biological

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<sup>1</sup> Maternity Benefit Act, 1961, No. 53, Sec 9, Acts of Parliament, 1961 (India).

needs arising out of pregnancy in order to bring certain individuals to the level of equality.<sup>2</sup> Such fulfilment of special needs is termed affirmative action,<sup>3</sup> with paid-maternity leave being one of them.

The basic assumption of abstraction of identities in itself may possibly lead to inequalities. Arguably, it not only neglects the socio-historic circumstances that have prevailed but also ignores the different biological needs that require it to be taken into account. For instance, continuance of several male-specific jobs<sup>4</sup> that do not require gender specific performance is the result of the same assumption. Moreover, even if we assume that all jobs have been designed to suit all genders then too the biological needs of females are still not accounted for unless certain affirmative actions are in place.

#### APPLICATION OF RAWLSIAN CONCEPTS ON PAID-MATERNITY LEAVE

By using the approach of placing all in the same position, all individuals should have equal liberty to work and parenthood. However, the same is not true for women, who owing to their biological capacities are put at an inherent disadvantage. This effectively puts ‘Original Position’ under deliberation. Ultimately, to compensate the disadvantageous position of females, this positive gender bias becomes imperative for the Original Position. The question of its effect on the veil of ignorance becomes hard to ignore. Its implementation through the aforesaid veil can be twofold in nature.

Firstly, rational individuals, adopting the veil and advocating a viewpoint from the Original position (placing primacy on neutrality), could probably be unwilling to gamble away their lives based on mere probabilities and hence seek a society in which the worst off person is as well off as possible. Herein, the possibility of being mindful of females’ challenges and plights would be elevated, with an attempt to serve both genders would be strived for. Alternatively, the divide between work and maternity can be assumed to be deeply entrenched in the systematically patriarchal regime existent in our society. Such issues demand a deep, personal and intricate understanding of the lived experiences and needs of a particular gender, which is subjected to subjugation on various levels. This generic standpoint taken by the veil would prove to be detrimental to the understanding of the problem at hand, thus rendering it antithetical. Therefore, while the veil provides advantage point to view society holistically,

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<sup>2</sup> L Cordeiro-Rodrigues, *Is Rawls’ Liberal Justice Gendered?* REVISTA DE LETRAS, 56(1), 121–134.

<http://www.jstor.org/stable/26459994>

<sup>3</sup> M. Nussbaum, *Sex and social Justice*. OXFORD UNIVERSITY PRESS (1999).

<sup>4</sup> W. Kymlicka, *Contemporary Political philosophy*. OXFORD UNIVERSITY PRESS (2002). ; I.M. Young, *Polity and Group Difference; A Critique of the Ideal of Universal Citizenship*. ETHICS. CHICAGO, v.99, n.2, p.250-274, 1989.

unfortunately, it fails to penetrate the deep-rooted intricacies of the social structure.

If Rawls was to counter-argue, he would claim that individuals stepping behind the veil of ignorance are rational and would account for historical inequalities. Although it would be flawed to imply that after centuries of a power imbalance and the collective failure of a society to completely recognize all pastures of these imbalances, they shall be rational enough to incorporate that understanding in an analysis of maternity leave.

Secondly, assuming that those in original position are rational, reasonably objective and neutral to their optimal capacity, they would still lack the requisite knowledge and in-depth personal recognition of such intricate issues. Hence, being rational would not satisfy the requirement of contemporary affirmative policies. It drives us to the deduction that a neutral stance would not always serve the just purpose that we aspire to inculcate in our policies that provide for fairness in society. The rationale of this argument can be comprehensively understood in relation to the administration of epidurals on women during childbirth.

From the outlook of neutral and rational persons occupying the Original Position, an objective assessment of epidurals and its induced side-effects like low BP, possible paralysis etc, would lead them to restrict its usage<sup>5</sup>, as observed in Italy, wherein, it was recently included as an ‘essential level of care’ item.<sup>6</sup> This occurred due to relentless campaigning by women for better care and pain relief. However, this deliberation should be privy to a person who has actually experienced child-birth pain, enabling the most-sound decisions in such intricate matters. Additionally, expertiserecognizing the said experience, should also be taken into account, a point which can be furthered by the use of Bolam principle<sup>7</sup> where judges recognising their lack of knowledge in technical fields, often delegate responsibilities to the professionals of such fields. Hence, when courts are capable of recognizing their blind spot, we should also recognize these individuals.

However, this can indeed be refuted by individuals behind the veil, who might not necessarily be rational. They might be inclined to consider it a privilege by alienating themselves from female experience and hence argue against maternity leave. This lack of perception stems from the consideration of female experience as a minor inconvenience, leading to non-rational individuals (like co-workers/ employers) feeling disadvantaged for substituting for a woman on

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<sup>5</sup>Jan Skouen, F. Wainapel, Marcelle Willock, Paraplegia following epidural anesthesia. *Acta Neurologica Scandinavica*, v 72, 4, p. 437-443, Wiley Online Library, 1985.

<sup>6</sup>Elissa Strauss, *Italy Is Finally Guaranteeing Women Access to Epidurals During Childbirth*, SLATE, August 10, 2016.

<https://slate.com/human-interest/2016/08/italy-is-finally-guaranteeing-women-access-to-epidurals-during-childbirth.html>

<sup>7</sup>*Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

paid-maternity leave, eventually raising questions of equality of effort and efficiency. This is evident in India with mostly liberal policies concerning paid-maternity leave, still faces a stagnant and declining rate of women occupying the working sector, which subsequently raises several questions about the effectiveness of its policy reforms and failure to achieve their objective.

### DEMERITS OF MATERNITY LEAVE

Currently, women working in the corporate sector are awarded a 26-week paid-maternity leave.<sup>8</sup> However, this generous and deserved paid-leave of 26 weeks to women seldom proves to be a relief and rather results in their frequent replacement due to it being perceived as an 'inconvenience' to the employer.<sup>9</sup> Furthermore, lower female employment rates are observed in countries with paid-maternity leaves,<sup>10</sup> because an assumption of lower efficiency is created. Moreover, in situations where sufficient employment persists, women are seldom sufficiently represented in the top-management.<sup>11</sup> This discrimination has been prominently observed in cases of potentially fertile females.<sup>12</sup> In fact, the situation is worse in the informal sector which lacks sufficient formal data.<sup>13</sup>

Hence, with paid-leaves being provided exclusively to mothers, women become highly prone to be replaced by the employer, affecting their socio-economic liberty and status. Additionally, the onus of child-rearing solely falls on the mother, considering the relief is exclusively limited to her 'benefit', further encouraging propagation of existent patriarchal notions of women being child-bearers whilst men remain the bread-winners.

### SOLUTION: PARENTAL LEAVE

Lastly, we propose that the Rawlsian theory could help provide a solution for dealing with such disadvantages that come with exclusive paid-leaves for mothers. This is because, pre-supposing a neutral Original Position, if rational individuals assume that their interest may lie on the mother's side on the other end of the veil, i.e., if they think from all perspectives, it could be a

<sup>8</sup>Maternity Benefit (Amendment) Act, 2017, No. 6, Sec 5, Acts of Parliament, 2017 (India).

<sup>9</sup>Aparna Mathur, *Opinion: India's Wrong Approach to Paid Maternity Leave*, Aug 08, 2018.

<https://www.livemint.com/Opinion/XXInpbtOzgRWwe28GBr9aM/Opinion-Indias-wrong-approach-to-paid-maternity-leave.html>

<sup>10</sup>Press Release, International Labour Organisation, More than 120 Nation Provide Paid Maternity Leave (February 16, 1998) [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_008009/lang--en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_008009/lang--en/index.htm)

<sup>11</sup>Jasmine Tucker, Julie vogtman, *When Hard Work is Not Enough: Women in Low Paid Jobs*, NATIONAL WOMEN'S LAW CENTER (April 2020).

[https://nwlc.org/wp-content/uploads/2020/04/Women-in-Low-Paid-Jobs-report\\_pp04-FINAL-4.2.pdf](https://nwlc.org/wp-content/uploads/2020/04/Women-in-Low-Paid-Jobs-report_pp04-FINAL-4.2.pdf)

<sup>12</sup>Sascha O. Becker, Ana Fernandes, Doris weichselbaumer, *Discrimination in hiring based on potential and realized fertility: Evidence from large scale field experiment*, *LABOUR ECONOMICS* 59, 139-152 (2019).

<https://doi.org/10.1016/j.labeco.2019.04.009>

<sup>13</sup>*Supra*, note 8.

reasonable and rational choice to be neutral in the truest sense and equally distribute the paid leave between both mothers and fathers, amounting to 13 weeks each.

Furthermore, an application of the two principles and the veil of ignorance will help demonstrating how parental leaves comply with Rawls's conception of Justice. Being in accordance with the first principle,<sup>14</sup> it gives men the liberty to be able to tend to their family's needs whilst being able to bond with them, a liberty which was otherwise overlooked due to the workload. It also grants women the liberty to be able to address their children's welfare and personal health without having to compromise on their professional life. Subsequently, it honours the second principle<sup>15</sup> by providing a fair and equal opportunity to both parents to cater to their parental responsibilities without neglecting fair and equal professional opportunities. A single segment is not alienated on grounds of inefficiency or extreme workload. The assumption that a female will at a certain point in life choose to conceive and that would result in her time off is no more just restricted to her. The same assumption can now be made for all individuals.

Moreover, under the veil of ignorance, individuals ignorant to historical oppression or lived experiences or lived experiences wouldn't view such policies as providing special treatment to some while burdening the other with work arising from it. Such individuals shall also agree upon parental leave, as through their view-point it promotes non-differential treatment. Moreover, the only possible situation wherein anyone could reject paternity leave would be the engrailment of severe patriarchal notions in their mind-sets, for instance, rural India, wherein despite a woman's appointment as the "sarpanch", she is not allowed to function as a sarpanch but is instead controlled by a male member of the society who is given the title of "sarpanch-pati". Although, even in such a situations the male is benefiting from the paid leave and hence, would choose not to actively voice dissent despite not agreeing with the approach.

Therefore, by applying the conceptual understanding of Rawlsian justice to paid-maternity leaves, we can suggest the implementation of paid-parental leaves as a more-just and equitable solution to secure justice for all, without creating ripple effects of discrimination towards women.

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<sup>14</sup> JOHN RAWLS, A THEORY OF JUSTICE (1971).

<sup>15</sup> *Id.*