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Maternity Benefit (Amendment) Act, 2016 *

“When a child is born, the mother also is born again”¹

Gilbert Parker, Parables of a Province

1. Introduction

Raising a family is a cherished goal for many working people. Pregnancy and maternity are an especially vulnerable time for working women and their families. Expectant and nursing mothers require special protection to prevent harm to their or their infant's health, and they need adequate time to give birth, to recover, and to nurse their children. They also require protection to ensure that they will not lose their job simply because of pregnancy or maternity leave. Such protection not only ensures a woman's equal access to employment, it also ensures the continuation of often vital income which is necessary for the well-being of her entire family. Safeguarding the health of expectant and nursing mothers and protecting them from job discrimination is a precondition for achieving genuine equality of opportunity and treatment for men and women at work and enabling workers to raise families in conditions of security.²

Historically, maternity has been treated as a state of disability in women workers from undertaking any work during the few weeks immediately preceding and following child birth.³

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¹ Gilbert Parker. (n.d.). BrainyQuote.com. Retrieved March 22, 2017, from BrainyQuote.com Web site: <https://www.brainyquote.com/quotes/quotes/g/gilbertpar209785.html>

² Anne C. L. Davies (2004) Perspectives on Labour Law, Cambridge University Press.

³ Anne-Marie Mooney Cotter (2013) Pregnant Pause: An International Legal Analysis of Maternity Discrimination (Google eBook)

With the emergence of the system of wage labour in the industrial undertakings, many employers tended to terminate the services of the women workers when they found that maternity interfered with the performance of normal duties by women workers. Many women workers, therefore, had to go on leave without pay during this period in order to retain their employment. Many others had to bear a heavy strain to keep up their efficiency during the period of pregnancy, which was injurious to the health of both, the mother and the child.⁴ To remove this hardship faced by the women workers, the concept of maternity benefit emerged in order to enable the women workers to perform the sacred duty of bearing child and also rearing the child without undue strain on their health and loss of wages. In the course of the last few decades, the pressures on women have increased along a number of magnitude and due to numerous factors. These include the changing demographic picture, increased participation of women in the work sphere combined with increasing marginalization, increase in the number of woman dependant households, erosion of certain family structures and networks, female and child malnutrition, high female illiteracy, increasing violence against women, commercialization of marriage and several other factors, including indirect attempts by the State to manipulate reproduction.

The social, economic and cultural pressures on women are likely to increase further in the context of the New Economic Policy and of the impact of the globalization of the economy adversely affecting the informal sector, in which many women find employment. It thus becomes all the more important to review the nature and extent of the support now available for maternity and child care, not only in terms of its historical development but in the context of its relevance in the present day, and to chart directions for the future.

A significant finding that emerges at, first sight is that while the vast majority of women workers in the country are found in the unorganized or informal sector, most of the existing provisions, at both the legal and program level are aimed at the organized sector. Hence it is desirable to give adequate attention to each sector separately instead of concentrating only on one sector.

In each of the sectors, a critique of the responses, both legal and programmatic, to the needs of the mother/child to be made in relation to the varying requirements of each of three distinct periods; defined as follows:

⁴ Anne Marie (1990) Women and Social Security, Geneva, ILO Publications.

1. Pregnancy/child birth from the beginning of the trimester of pregnancy, up to and including child birth. During this period, support services should be directed to the health, nutrition and well-being of the woman worker who is a mother-to-be, such support has indirect consequences on the child, and also affects safe delivery.
2. It is the period from childbirth till the child reaches the age of about two years that emphasis is to be given on the healthy growth, development, protection and adequate care of the young child during this critical period, as well as on the health, nutrition and well-being of the lactating mother. In this context, the recognition of the importance of breastfeeding during the early months, combined with the practical difficulties and dangers of running crèches for very young babies near the mother's place of work, indicate that the focus should be on mother support programs such as extended leave, as well as fiscal and nutritional support to women.
3. From the age of two till the child reaches the age of five or six. At this time, emphasis has to be placed on the child's overall development, including health and adequate social and mental stimulation, preparation for education and protection from, hazards. The mother should be free from anxiety and, Day-care programs along with parental education assume maximum importance during this period.

2. International Maternity, Legal and Policy Frameworks

Globally various protections to workers are spearheaded by the International Labour Organisation hereinafter referred to as “ILO”. It had laid down in the Maternity Protection Convention, 1919, various maternity-related entitlements for women workers. Women workers were entitled to 12 weeks of leave with cash benefits; daily breaks for nursing and protection against dismissal during leave. Twenty Nine countries (29) ratified this convention. The 1952 revision of the convention stated that six weeks’ leave should be given after confinement. Medical benefits should include prenatal and post-natal care by a midwife or a qualified medical practitioner or a hospital, if necessary.

The origin of the scheme of maternity benefit can be traced towards the end of nineteenth century in Germany when maternity allowance itself became a part of the insurance scheme. Other developed countries, including the United Kingdom and Australia, also adopted similar schemes. In Great Britain, maternity allowance was included in the health insurance scheme in 1912 and in Australia; Maternity Allowance Act came into force in 1912. However,

international recognition for maternity benefit was only achieved by the efforts of the ILO.⁵ The core concerns of the ILO have been to ensure that women's work does not pose risk to the health of the women and her children and also to ensure that women's reproductive roles do not come in the way of their economic and employment security.⁶

The conclusions of the 98th International Labour Conference in June 2009⁷ have also acknowledged that strengthened Maternity protection is the key to gender equality at work and therefore called on the ILO to promote the ratification and application of Convention No.183⁸ and to compile and disseminate good practices on parental leave and paternity and Maternity leave and benefits, and to provide technical support to governments to help them develop effective laws and policies (ILO, 2010).

3. National Maternity, Legal and Policy Frameworks

After India attained Independence, the Constitution was formulated and adopted in 1950. The constitution, which is the foundation and the guiding principle for all future legislations, contains specific provision, providing rights and privilege to the women. These right and privileges are enshrined in the Fundamental Rights and Directive Principles of the state policy. In order to regulate the employment of women in certain establishments for certain periods before and after childbirth and to provide for Maternity benefits and certain other benefits, the Indian Legislature enacted the Maternity Benefit Act, 1961. The Maternity Benefit Act, 1961 was enacted keeping in view not only all those legislations related to maternity that existed from the pre-Constitution days, but also ILO's mandate regarding maternity protection (ILO Maternity Protection Convention 103, 1952). In India, the Maternity Benefit Act of 1961 is not the only piece of legislation that provides for maternity protection or benefit. The Employees' State Insurance Act, 1948 and the Central Civil Services Rules, 1972 among others legislations which covers maternity protection.

3.1 Maternity Benefit and Indian Constitution

⁵ Anne Marie (1990) Women and Social Security, Geneva, ILO Publications.

⁶ *Ibid.*

⁷ <http://www.ilo.org/ilc/ILCSessions/98thSession/lang>, visited on 21.03.17.

⁸ *Convention concerning the revision of the Maternity Protection Convention (Revised), 1952 (Entry into force: 07 Feb 2002)*; http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C183 visited on 21.03.17.

These rights and privileges are: right to equality in law⁹, right to social equality¹⁰, right to social equality in employment,¹¹ right to protective discriminations,¹² right against exploitations of women,¹³ right to adequate means of livelihood,¹⁴ right to equal pay for equal work,¹⁵ right that the health and strength of workers both men and women are not abused,¹⁶ right to just and humane conditions of work and maternity relief,¹⁷ and right to improvement in employment opportunities and conditions of the working women.¹⁸ According to Article 42 of Directive Principle of State Policy, “The State shall make provision for securing just and humane conditions of work and for maternity relief.” Article 21 a fundamental Right to Life and Personal Liberty is not merely a right to protect one’s body but the guarantee under this provision contemplates a larger scope. Right to Life means the right to lead meaningful, complete and dignified life. It does not have a restricted meaning. It is something more than surviving or animal existence. The meaning of the word “life” cannot be narrowed down and it will be available to every citizen of the country. Therefore, the State must guarantee to a pregnant working woman all the facilities and assistance that she requires while protecting her employment as well as her own and her child’s health. The measures and provisions which are made in the Post-Constitution Period for women workers are mostly based on these constitutional provisions.

3.2 Maternity Benefit Act 1961

⁹ Article 14 of the Constitution of India hereinafter referred as COI.

¹⁰ Article 15 COI.

¹¹ Article 16 COI .

¹² Article 15 (3) COI.

¹³ Article 23 COI.

¹⁴ Article 39 (a) COI.

¹⁵ Article 39 (d) COI.

¹⁶ Article 39 (e)] COI.

¹⁷ Article 42 COI.

¹⁸ Article 46 COI.

The consolidated Act was passed with a view to reduce disparities under the existing Maternity Benefit Acts and to bring uniformity with regard to rates, qualifying conditions and duration of maternity benefits. The Act repealed the Mines Maternity Benefit Act, 1941, the Bombay Maternity Benefit Act, 1929 along with the provisions of maternity protection under the Plantations Labour Act, 1951 and all other provincial enactments covering the same field. However, the Act does not apply to factory or establishment to which the provision of Employee's State Insurance Act 1948 applies, except as otherwise provided in Sections 5A and 5B of the said Act.

3.2.1 Object and Scope

The Act seeks to standardize the employment of women in certain establishments for certain periods before and after childbirth and to provide maternity benefit and certain other benefits to women workers. The Act extends to the whole of India. It applies, in the first instance: to every establishment being a factory, a mine or plantation including any such establishment belonging to Government and to every establishment wherein persons are employed for the exhibition of equestrian, acrobatic and other performances; to every shop or establishment within the meaning of any law for the time being in force in relation to shop and establishments in a state, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months.

The State Government is empowered to extend all or any of the provisions of the Act to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise with the approval of the Central Government by giving not less than two months notice of its intention of so doing.

However, as stated above, the Act excludes the applicability of the provisions of the Act to any factory or other establishment to which the provisions of the Employee's State Insurance Act, 1948 applies except as otherwise provided in sections 5A and 5B of the Act.

The Act has been amended from time to time. The Amendment of 1972 provides that in the event of the application of the Employee's State Insurance Act, 1948 to any factory or establishment, maternity benefit under the Maternity Benefit Act would continue to be available to women workers, until they become qualified to claim similar benefit under Employee's State Insurance Act.

Again, in 1973 the Act was amended so as to bring within its ambit establishments in the circus industry. A 1976 amendment further extends the scope of the Act to the women employed in factories or establishments covered by the ESI Act, 1948 and in receipt of wages exceeding entitlement specified in that Act.

The Act was again amended in 1988 to incorporate the recommendations of a working group of Economic Administration Reforms Commission. The Act was extended to shops or establishments employing 10 or more persons. The rate of maternity benefits was enhanced and some other changes were introduced. The Amendment of 1995 further expanded the coverage of the Act and recognized the medical termination of pregnancy and provided incentives for family planning. Maternity Benefit (Amendment) Act, 1995 provides that there shall be a six weeks leave with wages in case of medical termination of pregnancy, two weeks leave with wages to women employees who undergo tubectomy operation and one month leave with wages in cases of illness arising out these two. By an amendment in 2008 the existing ceiling of maternity benefit was increased from Rs. 250 to Rs. 1000. The Central Government is empowered to increase the medical bonus from time to time subject to a maximum of Rs. 20,000/-.¹⁹

3.2.2 Salient Features of the Act

According to Section 4 of Maternity Benefit Act, no employer shall deliberately employ a woman in any establishment during the six weeks immediately following the day of her delivery, or miscarriage, nor shall any woman work during this period. In addition, no pregnant woman shall, on a request made by her in this behalf, be required by her employer to do any work of arduous nature, or that which involves long hours of standing, or which in any way is likely to interfere with her pregnancy or the normal development of the fetus or is likely to cause her miscarriage or otherwise to adversely affect her health, during the one month immediately preceding the six weeks before the date of her expected delivery. Every woman shall be entitled to, and her employer shall be liable for, the payment of Maternity benefits at the rate of the average daily wage for the period of her actual absence immediately preceding and including the day of her delivery and for the six weeks immediately following that day, says the provision under Section 5. However no woman shall be entitled to these benefits unless she has actually worked in an establishment of the employer from whom she claims them, for a period of not less than 80 days in the twelve months immediately preceding the

¹⁹ <http://pib.nic.in/newsite/erecontent.aspx?reid=45891> visited on 12.2.17.

date of her expected delivery. The maximum period for which any woman shall be entitled to Maternity benefits shall be 84 days.

In case a woman dies during this period, then the Maternity benefit shall be payable only for the days up to, and including, the day of her death. Similarly, if a woman dies during her delivery, or during the period of six weeks immediately following the date of delivery, leaving behind in either case the child, the employer shall be liable for the Maternity benefits for the entire period of six weeks immediately following the day of her delivery. But if the child also dies during the said period then for the days up to, and including, the day of the death of the child. In the event of a women's death, the employer shall pay such benefits or amount to the person nominated by the deceased in the notice given under **Section 6** and if no notice has been given, then to her legal representatives. Any woman who has not given the notice when she was pregnant may give such notice as soon as possible after delivery.

The provision under Section 6(5) says that the amount of maternally benefits for a period preceding the date of her expected delivery shall be paid in advance by the employer. Miscarriage has also been given same importance. Section 9 provides that in case of miscarriage, a woman shall be entitled to leave with wages at the rate of maternally benefit for a period of six weeks immediately following the day of her miscarriage. Besides a woman suffering from illness arising out of pregnancy, delivery, premature birth of child or miscarriage shall be entitled to an additional leave with wages at the rate of Maternity benefit for a maximum period of one month under Section 10,

Regarding nursing breaks Section 11 provides for two additional breaks of the prescribed duration for nursing the child until the child attains the age of 15 months. Moreover, deduction of wages in certain cases has been made unlawful. A woman cannot be discharged or dismissed by the employer when she absents herself from work in accordance with the provisions of this Act.²⁰ In *The Municipal Corporation of Delhi v Female Workers (Muster Roll)*,²¹ wherein the Hon'ble Supreme Court had held female muster roll employees to be entitled to maternity leave under the Maternity Benefit Act, 1961. The Municipal Corporation of Delhi was treated to be an industry for the purpose of reference to be made to the Industrial Tribunal. The Maternity Benefit Scheme was modified and new Scheme called *Janani Suraksha Yojna* was introduced.

²⁰ K. Dhamodharan, *Maternity Protection as Human Right in India*, ICRJMSS, volume 1 issue 2 march 2015.

²¹ 2000 SCC (L & S) 331.

In *Peoples Union for Civil Liberties v. Union of India*,²² Court emphasised that the Maternity Benefit Act is a beneficial piece of legislation which is intended to achieve object of doing social justice to women workers employed in factories, mines and plantation.

4. OTHER RELATED CHILD CARE PROVISION

4.1 THE EMPLOYEES' STATE INSURANCE ACT, 1948

The Act provides for periodical payment to an insured woman at the prescribed rate and for a prescribed period in case of confinement, miscarriage, sickness arising out of pregnancy or premature birth of a child.

The term confinement means “Labour resulting in the issue of living child or labour after 26 weeks of pregnancy resulting in the issue of a child whether alive or dead” and the expression miscarriage as defined in the Act means “expulsion of the contents of a pregnant uterus at any period prior to or during twenty six weeks of pregnancy, but does not include any miscarriage the causing of which is punishable under the Indian Penal Code”.

4.2 CENTRAL CIVIL SERVICES RULES OF 1972

The Central Civil Services Rules of 1972 also provide maternity protection. The scope of application and quantum of relief differ vastly from the other two legislations i.e. Maternity Benefit Act, 1961 and Employee's State Insurance Act, 1948.

4.3 MINES ACT, 1952

According to the explanation to Section 52 Mines Act (Annual Leaves) provides that “in the case of female employees, maternity leave for any number of days not exceeding 12 weeks.” According to Section 58 power of Central Government to make rules in this regard is provided. The Central Government may, by notification in the Official Gazette, make rules consistent with this Act for all or any of the following purposes, namely:-

“for requiring the maintenance in mines wherein any women are employed or were employed on any day of the preceding twelve months of suitable rooms to be reserved for the use of

²² AIR 2008 SC 495.

children under the age of six years belonging to such women, and for prescribing either generally or with particular reference to the number of women employed in the mine, the number and standards of such rooms, and the nature and extent of the amenities to be provided and the supervision to be exercised therein.”

4.4 FACTORIES ACT, 1948

According to Section 79 of Factories Act annual leave with wages. As pre explanation 1 of the same law, for the purposes of this sub-section- (b) in the case of a female worker, maternity leave for any number of days not exceeding twelve weeks; and Section 48 provides provision for Crèches facility as follows:

- (1) In every factory wherein more than thirty women workers are ordinarily employed there shall be provided and maintained a suitable room or rooms for the use of children under the age of six years of such women.
- (2) Such rooms shall provide adequate accommodation, shall be adequately lighted and ventilated, shall be maintained in a clean and sanitary condition and shall be under the charge of women trained in the care of children and infants.
- (3) The State Government may make rules-
 - (a) prescribing the location and the standards in respect of construction, accommodation; furniture and other equipment of rooms to be provided, under this section;
 - (b) requiring the provision in factories to which the section applies, of additional facilities for the care of children belonging to women workers, including suitable provision of facilities for washing and changing their clothing;
 - (c) requiring the provision in any factory of free milk or refreshment or both for such children;
 - (d) requiring that facilities shall be given in any factory for the mothers of such children to feed them at the necessary intervals.

It is important to recognize that women participation in labour market has significantly increased in recent years, particularly in urban areas. Further, most of the increase in women participation in labour market is contributed by young women in urban areas. Since India is committed to creating a gender friendly labour market environment, there is increasing realization to provide a conducive working environment. Within above stated background the present paper tries to put further portrait of Maternity Benefit provision in selected public and private firm. Post Maternity women work participation is negatively affected in labour market.

Enactment of Maternity Act in private sectors would help in more meaningful participation of female labour force in the labour market which would be stepping stone towards adopting ILO convention No. 156, Workers with Family Responsibilities Convention, 1981.

5. The Maternity Benefit (Amendment) Act, 2016

Prior to coming of, The Maternity Benefit (Amendment) Act, 2016, women employed in certain sectors, like factories, mines, shops and establishments with 10 or more employees, and other establishments notified by the state government were eligible for paid maternity leave up to 12 weeks under the Maternity Benefits Act, 1961. Various other labour laws provide for maternity benefits as discussed above. The Employees' State Insurance Act, 1948 provides for payment of wages to an insured woman, during her 12-week maternity leave. Women employed in newspapers or working as journalists are entitled to similar maternity leave under the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955. Further, women employed in the central government are provided about 24 weeks of paid maternity leave and additional child care leave up to a period of two years. The Unorganized Sector Workers Act, 2008 defines unorganized sector workers as those who are home based, self-employed or wage workers in an enterprise with less than 10 employees. The 2008 Act mandates the central government to formulate health and maternity benefit schemes for women workers in the unorganized sector. The *Janani Suraksha Yojana*,²³ which promotes child birth in an institution by providing financial assistance to women below poverty line, is being implemented under the 2008 Act. The *Indira Gandhi Matritva Sahyog Yojana*²⁴ (IGMSY) was launched to compensate women for loss of wages and to ensure that a mother can afford rest after a delivery and take care of health requirements of the new born child. The IGMSY is a cash transfer scheme that provides Rs 6,000 to pregnant and lactating women above the age of 19 years with less than two children. In 2015, the Law Commission of India recommended increasing the period of maternity leave under the 1961 Act to 24 weeks,²⁵ and bringing the unorganised work force within its ambit. Over the years, including in 2016, the

²³ Janani Suraksha Yojana, National Health Mission, Ministry of Health and Family Welfare, <http://nrhm.gov.in/nrhmcomponents/rmnch-a/maternal-health/janani-suraksha-yojana/background.html>.

²⁴ Indira Gandhi Matritva Sahyog Yojana: 2011 Guidelines and 2013 notification, Ministry of Women and Child Development, <http://wcd.nic.in/sites/default/files/IGMSYscheme.pdf>;

²⁵ <http://wcd.nic.in/sites/default/files/nfsigmsytd10012013.pdf>. 8. Report no. 259: Early Childhood Development and Legal Entitlements, August 2015, Law Commission of India.

Indian Labour Conference²⁶ also recommended that the period of maternity leave be increased from 12 to 24 weeks. For a woman who has two or more children, the maternity leave will be 12 weeks, which can only be availed six weeks before the date of the expected delivery. Maternity leave for adoptive and commissioning mothers is also provided in the new law. It provides 12 weeks of maternity leave to a woman who legally adopts a child below three months of age; and a commissioning mother. A commissioning mother is defined as a biological mother who uses her egg to have a surrogate child. The 12-week period of maternity leave will be calculated from the date the child is handed over to the adoptive or commissioning mother. The amendment also mandatory provides for creche facilities. It requires every establishment with 50 or more employees to provide crèche facilities within a prescribed distance. The woman will be allowed four visits to the crèche in a day. This will include her interval for rest.

A new addition of option to work from home has been added. An employer may permit a woman to work from home, if the nature of work assigned permits her to do so. This option can be availed of, after the period of maternity leave, for a duration that is mutually decided by the employer and the woman. It is the duty of employer to inform the woman of maternity benefits. Every establishment has to inform a woman at the time of her appointment of the maternity benefits available to her. This communication must be in writing and electronically too.

Under the National Food Security Act 2013, pregnant women and lactating mothers are entitled to receive maternity benefit of at least Rs. 6,000. The Act further requires that subject to such schemes as may be framed by the Central Government, every pregnant woman and lactating mother will be entitled to free meals during pregnancy and six months after the child birth, through the local *anganwadi*, so as to meet their nutritional needs.²⁷

A pregnant women worker is entitled to a maternity benefit (in the form of medical bonus) of one thousand rupees if no prenatal confinement and post-natal care is provided by the employer free of charge.²⁸ It can be increased to a maximum limit of twenty thousand rupees. The Central Government is authorized to increase the basic amount every three years. In

²⁶ 46th Session of Indian Labour Conference, July 2015, Ministry of Labour and Employment, <http://www.labour.nic.in/46thsession-indian-labour-conference>.

²⁷ Section 5 of the Maternity Benefits Act 1961; Section 4 of the National Food Security Act 2013.

²⁸ Section 8 of the Maternity Benefits Act 1961.

August 2008, the amount of medical bonus was 2500 Indian rupees which have been later raised in 2011 to 3500 Indian rupees.

6. Conclusion

As per Laura Addati,²⁹ *“While our findings suggest that many countries have adopted the principles of maternity protection and support workers with family responsibilities in their laws, lack of protection in practice remains one of the major challenges for maternity and paternity at work today.”* Despite these strides, maternity discrimination persists in all countries, with around 830 million workers lacking adequate maternity protection in terms of leave and income security around childbirth. Almost 80 per cent of these women work in Africa and Asia, according to the report. They are often self-employed, migrant, domestic, agricultural, casual or temporary workers, and indigenous and tribal peoples. In Africa and Asia, less than 15 per cent of women workers are effectively protected by maternity leave cash benefits. These are the regions where employer liability schemes are more prevalent, informal work is predominant and maternal and child mortality ratios are still very high. An increasing number of women and men face important challenges not only in starting their family with health and dignity, but also in earning sufficient income while providing adequate care to their children, dependent elderly people and family members living with permanent or temporary disabilities or illnesses. Women and girls still perform the large majority of unpaid care work, which limits their equal employment opportunities and treatment in labour markets. Measures to assist women and men in balancing work and family responsibilities, particularly adequately paid parental and paternity leave, family-friendly working arrangements and quality, State-funded childcare and other social care services, are unavailable, inaccessible or inadequate for most. Governments should adopt and implement inclusive laws and policies for effective protection. These include making maternity protection and work-family measures universal and providing essential maternal health and income security around childbirth a basic social security guarantee. Pooling resources through social insurance or public funds and social care services to take the weight off employers and promotes non-discrimination at work.

²⁹ Laura Addati the report’s co-author, Maternity Protection and Work-Family Specialist from the ILO’s Gender, Equality and Diversity Branch. http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_242615.pdfvisited on 21.01.17.

In this regard 2016 Amendment brings hope that it will benefit women working in unorganized sectors but the doubt still persist where employer may not implement the law as government do not have direct control over these private players. So we need to wait for sufficient time to envisage the reality for considerable time to lapse to further study the enforcement of the Amendment.

