



A BARGAIN WITHIN THE BARGAIN – AN EMPIRICAL EXAMINATION OF THE LABOUR ACT, 2003 (ACT 651) IN THE CONTEXT OF MATERNITY PROTECTION IN GHANA

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Abstract

Maternity is frequently viewed as an obstruction to productive work. As such, the existence of maternity protection laws appears not to entirely settle the question of maternity-related employment discrimination and the safety of pregnant women, unborn babies, and infants in the work environment. Some workers have had to bargain for their statutory rights and, in some cases, suffer discrimination in various forms. Using a socio-legal research approach, the paper empirically examines maternity protection in Ghana to determine how maternity protection laws are applied in society. It proposes that Ghana's maternity protection laws be more closely aligned with international standards and be enforced fully. It further advocates that employees should know their statutory rights and employers be more willing to bargain flexible work terms to ensure the core goals of maternity protection are realised.

1. Introduction

Maternity protection is a fundamental labour right that seeks to enable women to successfully combine their reproductive and productive roles and to promote equal treatment in employment without prejudice to health or economic security.¹ It has two main aims: the preservation of the health of mother and child and the provision of financial security.² International organisations such as the United Nations (UN) and the International Labour Organisation (ILO) have adopted conventions that regulate maternity protection.³ Ghana is a member state of the UN and ILO and has ratified some of these conventions.⁴ At the domestic level, maternity protection is regulated by the Labour Act 2003 (Act 651). Though labour laws, institutional policies and collective bargaining agreements outline employment rights, including maternity protection, maternity is still

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¹ 'Maternity Protection Resource Package - From Aspiration to Reality for All. Module 1: Maternity Protection at Work: What is it?' (*Mprp.itcilo.org*, 2012) <<http://mprp.itcilo.org/allegati/en/m1.pdf>> accessed 1 May 2021; Laura Addati and others, *Maternity and Paternity at Work: Law and Practice Across the World* (ILO Geneva 2014).

² 'Maternity Protection Resource Package – Module 1' (n 1) 2.

³ These are discussed in detail in section 3.1 of this paper.

⁴ Ghana was admitted into the UN on March 8, 1957 and joined the ILO on May 20, 1957. Section 3.1 of this paper discusses the international conventions on maternity protection and identifies those ratified by Ghana.



perceived by some as an obstacle to workplace productivity. As a result, countless women workers worldwide are subjected to unequal treatment and employment discrimination of various forms.⁵ Law is a tool for social change,⁶ but the law in the books is not the same as law-in-action.⁷ Discretion is a common feature of the operation of the legal system, and bargaining, a form of the exercise of discretion, is inevitable.⁸ Thus, an appreciation of social conditions is necessary to understand law⁹ to respond to a dynamic society.¹⁰ For this reason, this paper examines the law and practice of maternity protection in Ghana using the socio-legal research method. We aim to determine whether (a) Ghana's domestic law on maternity protection conforms to international standards; (b) the existing practice of maternity protection in Ghana conforms to Ghana's domestic law; and (c) instances of bargaining within or outside the ambit of the law on maternity protection exist and the nature of bargain. The paper is organised into five parts. In part one, we introduce the subject, identify the problem and set the tone for the discussion. Part two reviews the literature on maternity protection globally and in Ghana while part three discusses the regulatory framework of maternity protection internationally and nationally. In part four, we present and analyse the empirical data collected for this paper. We conclude the discussion in part five and make recommendations.

2. Maternity Protection – A Global Concern

Maternity protection at work is a fundamental human right aimed at enabling women to combine their reproductive and productive roles devoid of unequal treatment in employment.¹¹ It is an essential element of equal opportunity and the prevention of discrimination against women in the workplace.¹² Maternity protection is considered to be an indispensable element of comprehensive work–family policies and crucial in promoting maternal and child health.¹³ According to the ILO Maternity Protection Resource Package Module 2,¹⁴ maternity protection is for all women,

⁵ *Women and Work: Seminar for Members of Parliamentary Bodies Dealing with Gender Equality and Committees Addressing Labour Issues, 6-8 December 2007, ILO Headquarters, Geneva* (IPU 2008), 77

⁶ Richard A Posner, 'The Decline of Law as an Autonomous Discipline: 1962-1987' (1987) 100 Harv L Rev 761, 762; Brian Bix, 'Law as an Autonomous Discipline' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP 2003) 975, 975

⁷ Daniel Blocq and Maartje van der Woude, 'Making Sense of the Law and Society Movement' (2018) 2 Erasmus Law Rev 134, 135.

⁸ Stewart Macaulay and others, 'The Legal System in Operation: Highlighting the Importance of Discretion, Bargaining, and the Law' in Stewart Macaulay and others (eds) *Law and Society: Readings on the Social Study of Law* (WW Norton & Co. Inc. 1995), 160.

⁹ Posner (n 6) 762 quoting Oliver Wendell Holmes, Jr., *The Common Law* (London Macmillan 1881).

¹⁰ Cyril Glasser, 'Radicals and Refugees: The Foundation of the Modern Law Review and English Legal Scholarship' (1987) 50 Modern Law Review 688, 695-697.

¹¹ 'Maternity Protection Resource Package – Module 1' (n 1) 1; Addati and others, *Maternity and Paternity at Work* (n 1).

¹² *ibid.*

¹³ Addati and others, *Maternity and Paternity at Work* (n 1) 1-2.

¹⁴ 'Maternity Protection Resource Package - From Aspiration to Reality for All. Module 2: Maternity Protection at Work: For Whom?' (*Mprp.itcilo.org, 2012*) <<http://mprp.itcilo.org/allegati/en/m2.pdf>> accessed 1 May 2021, 1-2.



including those in atypical forms of work.¹⁵ It covers five main issues: health protection in the workplace; maternity leave and leave in case of illness or complications; cash and medical benefits; employment protection and non-discrimination; and breastfeeding arrangements.¹⁶ Research on maternity protection is replete in developed economies and often in relation to large firms, but the same is limited in developing countries like Ghana, where small businesses and the informal sector dominate the work environment.¹⁷ Though many women in Ghana work in the formal sector, many more are self-employed or work as domestic workers.¹⁸ In the ensuing paragraphs, we discuss the literature on maternity protection, which is grouped into five focal areas.

2.1 Health Protection in the Workplace

One of the major concerns of maternity protection legislation and practice is the protection of women's and children's health at the workplace. The ILO has, over the years, advanced this cause through legislation and policy aimed at eliminating health risks to women and their children from pregnancy, through birth to nursing and beyond.¹⁹ A research conducted in Cape Coast, Ghana, found that women workers in the informal sector and their children are often exposed to unsafe and perilous work conditions.²⁰ Some women reportedly brought their new-born babies to work without any provision for special care.²¹ In a review of literature on maternity protection around the world, Lewis and others reported that, for various reasons, most women in the formal sector couldn't take their babies to work.²² The reasons include the unavailability of safe places to leave the children and the existence of health hazards.²³ Another concern unveiled by their research was the effect of harmful chemicals that lactating mothers inhaled on their breastmilk composition. The studies reviewed recommend preventive measures to reduce workplace risks to the health of women and children during breastfeeding and the provision of facilities such as private rooms and

¹⁵ *ibid* 2. Atypical forms of dependent work is defined to include 'a broad range of non-standard work arrangements, such as part-time, casual and seasonal work, job-sharing, fixed-term contracts, temporary agency work, homework and remote working; pieceworkers; informal employees in all sectors as well as women in disguised employment relationships (disguised self-employment). These forms of work differ from the historical norm of 'typical' or standard work, which is full-time, legally protected employment of unlimited duration, with a single employer, performed at a single employer's workplace and with a guaranteed regular income.'

¹⁶ 'Convention C183 - Maternity Protection Convention 2000 (No. 183)' (*Ilo.org*, 2021) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C183> accessed on 1 May 2021.

¹⁷ Suzan Lewis and others, *Maternity Protection in SMEs: An International Review* (International Labour Organisation 2014) 6.

¹⁸ ILO, 'Maternity Protection and Workers with Family Responsibilities in the Formal and Informal Economy of Ghana. Practices, Gaps and Measures for Improvement' (2017) <https://www.ilo.org/global/topics/care-economy/parental-leave/WCMS_601900/lang-en/index.htm> accessed 1 May 2021, 14-15.

¹⁹ Section 3.1.1 of this paper outlines the relevant provisions of the ILO Convention 183 on the subject.

²⁰ Antoinette C Kumi-Kyereme and Francis O Boachie-Mensah, 'Human Resource Practices in the Informal Sector in Cape Coast, Ghana' (2012) 4 *Journal of Management Research* 1, 19.

²¹ *ibid*.

²² Lewis and others (n 17) 36.

²³ *ibid*.



good sanitary conditions for breastfeeding and other child care needs.²⁴ Additionally, to ensure the safety of pregnant women, nursing mothers and their children at the workplace, the ILO recommends, the elimination of risks; adaptation of work conditions; transfer to a safer position without loss of pay; or paid leave where a transfer is not feasible.²⁵

2.2 Maternity Leave and Leave in Case of Illness or Complications

In a 2013 study in Accra, on the enjoyment of statutory rights in Ghana, 70.6% of the respondents indicated that they had maternity leave of between one to three months, while 9.5% indicated their entitlement to maternity leave for a duration beyond three months.²⁶ It was, however, not clear from the study what accounted for the extra leave period, whether it was as a result of illness or complications, the birth of twins or more children, a private bargain or simply a favourable workplace policy. A 2014 study, which had a wider coverage across the country, reported that just about 10 to 32% of employed women in Ghana enjoyed paid maternity leave.²⁷ Additionally, though maternity leave was mainly provided in the formal sector in line with legal requirements, other forms of support from direct supervisors and colleagues were lacking.²⁸ On the contrary, some women in the informal economy who did not have a structured maternity leave got the support of their employers, supervisors and colleagues and could remain at home after childbirth for as long as they desired but often without wages.²⁹ Notably, there is no statutory paternity leave or parental leave for adoptive parents in Ghana.³⁰ Considering the increasing roles men play in home and childcare the extension of maternity protection benefits to them is encouraged.³¹

2.3 Cash and Medical Benefits

Ensuring economic security is part of maternity protection. In Ghana, employers are responsible for paying cash benefits in respect of maternity protection.³² There is, however, inefficient enforcement of the right to paid maternity leave, especially in the informal sector.³³ Some employers pay monthly wages but exclude other bonuses. A 2013 study by Amankwah and Anku-

²⁴ *ibid.*

²⁵ 'Recommendation R191 - Maternity Protection Recommendation, 2000 (No. 191)' (*Ilo.org*, 2021) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312529:NO> accessed 3 May 2021, art 6.

²⁶ Majoreen Osafroadu Amankwah and Olivia Anku-Tsede, 'Enjoyment of Statutory Employee Rights? A Myth or a Reality in Ghana?' (2013) 4 *International Journal of Business Administration* 145, 153.

²⁷ Addati and others, *Maternity and Paternity at Work* (n 1) 144.

²⁸ ILO, 'Maternity Protection and Workers with Family Responsibilities' (n 18) 3.

²⁹ Amankwah and Anku-Tsede (n 26) 153.

³⁰ Addati and others, *Maternity and Paternity at Work* (n 1) 151. There is no such provision in the Labour Act, 2003, (Act 651).

³¹ ILO, 'Maternity Protection and Workers with Family Responsibilities' (n 18) 52; Lewis and others, *Maternity Protection in SMEs* (n 17) 40. This argument has also been advanced from the perspective of gender equality and discrimination against men.

³² Act 651 (n 30), s. 57(2); Addati and others, *Maternity and Paternity at Work* (n 1) 31.

³³ Bianca Stumbitz and others, 'Maternity Management in SMEs: A Transdisciplinary Review and Research Agenda' (2018) 20 *International Journal of Management Reviews* 500, 507.



Tsede revealed that only 38.9% of respondents were paid their bonuses while on maternity leave.³⁴ A larger majority of 49.2% were not paid any bonuses and 4.8% received some bonuses but not all.³⁵ According to Baah-Boateng, some employers even avoided employing women to minimize cost to their businesses.³⁶ Addati notes that employers fund maternity cash benefits using employment-related social insurance (contributory schemes); direct payment of maternity benefits by the employer (employer liability); or a combination of the two methods (mixed system). Additionally, there is a system of paying maternity benefits out of public funds (non-contributory schemes) either exclusively or in conjunction with social insurance or employer funding.³⁷ According to Stumbitz and others, in many developed economies cash benefits related to maternity are usually state-funded and in some cases incentives are given to firms for processing maternity pay.³⁸

2.4 Employment Protection and Non-Discrimination

Maternity is never to be a basis for employment discrimination.³⁹ However, this is sometimes not the case. Kumi-Kyereme and Boachie-Mensah in their study in Cape Coast, Ghana found that women apprentice dressmakers were specifically forbidden from getting pregnant during their training and risked termination of the training on violation of this rule.⁴⁰ Apprenticeships of this kind are considered to be a form of on-the-job training and so falls within the category of work in the informal sector. Women working as food vendors and fish processors were not forbidden from getting pregnant but as there was neither financial security nor maternity-related financial benefit, they had to be circumspect in making maternity decisions.⁴¹ In the formal sector, job security was more prevalent. At least 50% of women in formal sector employment returned to work after their maternity leave.⁴² That notwithstanding, there was often a ‘motherhood penalty’ to pay as the career progression clock, particularly in the corporate world, seemed to stop ticking for some women while they attend to childbirth, care and other family responsibilities.⁴³ Another study on labour market discrimination in Ghana found that some employers indulged in workplace discrimination against women to maximising profit.⁴⁴ This trend was related to the cost implication

³⁴ Amankwah and Anku-Tsede (n 26) 153.

³⁵ *ibid.*

³⁶ William Baah-Boateng, *Labour Market Discrimination in Ghana: A Gender Dimension* (LAP Lambert Academic Publishing 2012) 60.

³⁷ Laura Addati, ‘Extending Maternity Protection to All Women: Trends, Challenges and Opportunities’ (2015) 68 *International Social Security Review* 69, 78.

³⁸ Stumbitz and others (n 33) 506.

³⁹ Addati and others, *Maternity and Paternity at Work* (n 1).

⁴⁰ Kumi-Kyereme and Boachie-Mensah (n 20) 19; Lewis and others (n 17) 21.

⁴¹ *ibid.*

⁴² Abigail Opoku Mensah, ‘Is There Really Support for Breastfeeding Mothers? A Case Study of Ghanaian Breastfeeding Working Mothers’ (2011) 4 *International Business Research* 93, 93.

⁴³ ILO, ‘Maternity Protection and Workers with Family Responsibilities’ (n 18) 49.

⁴⁴ Baah-Boateng (n 36) 184.



of maternity protection, which caused employers to choose men over women regardless of their qualifications.⁴⁵ In some cases, women were unjustifiably constricted to lower responsibility positions and paid relatively lower wages and benefits compared to their male counterparts.⁴⁶

2.5 Breastfeeding and Nursing Arrangements

Studies on return to work after maternity leave show that some mothers struggled with resocialization into the work environment and faced identity issues. The nursing mothers among them had concerns about breastfeeding, especially because in most cases the maternity leave period was less than the recommended 6 month period of exclusive breastfeeding.⁴⁷ Women working in the informal sector were allowed to bring their babies to the workplace but this often posed health hazards to them and their babies.⁴⁸ In Ghana most, but not all, employers allow nursing mothers to close earlier than the general closing time.⁴⁹ A study conducted among breastfeeding working mothers in Accra, Ghana revealed that the stress related to returning to work after maternity leave could reduce breast milk supply and affect the ability to focus on work-related tasks.⁵⁰

3. Regulatory Framework for Maternity Protection

Maternity protection provisions exist in several conventions of international organisations but are mainly regulated internationally by the International Labour Organisation (ILO)⁵¹ and nationally by domestic legislation. In Ghana, the Labour Act of 2003 (Act 651) is the main legislation regulating maternity protection. This part of the paper presents an overview of the regulatory framework on maternity protection internationally and in Ghana.

3.1 International Regulatory Framework

The Universal Declaration of Human Rights (UDHR) provides that motherhood and childhood be accorded special care and assistance.⁵² Similarly, the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵³ and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁵⁴ contain special provisions for protecting of mothers during a reasonable period before and after childbirth. Maternity protection has been high on the

⁴⁵ *ibid*, 60.

⁴⁶ *ibid*.

⁴⁷ Stumbitz and others (n 33) 508.

⁴⁸ Kumi-Kyereme and Boachie-Mensah (n 20) 19; Lewis and others (n 17) 36.

⁴⁹ Amankwah and Anku-Tsede (n 26) 153.

⁵⁰ Mensah (n 42) 94.

⁵¹ Other Organisations such as the United Nations Human Rights agency also work towards the protection of women's rights including maternity protection. The United Nations Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) is an example of such effort.

⁵² United Nations, 'Universal Declaration of Human Rights | United Nations' (*United Nations*, 1948) <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> accessed 7 May 2021, art 25(2)

⁵³ 'OHCHR | International Covenant on Economic, Social and Cultural Rights' (*Ohchr.org*, 1966) <<https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>> accessed 7 May 2021., art. 10(2).

⁵⁴ 'OHCHR | Convention on The Elimination of All Forms of Discrimination Against Women' (*Ohchr.org*, 1979) <<https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>> accessed 4 May 2021., art. 4, 5 and 11.



ILO's agenda since its inception. In 1919, the same year it was institutionalised, the ILO adopted its first Maternity Protection Convention.⁵⁵ The convention entered into force on 13th June 1921 and has since been ratified by 34 member states.⁵⁶ This was followed by the Maternity Protection Convention (Revised) 1952 (No. 103)⁵⁷ and the Maternity Protection Convention 2000 (No. 183).⁵⁸ Two Recommendations, No. 95 of 1952⁵⁹ and No. 191 of 2000,⁶⁰ were also adopted by the ILO and some other conventions that relate indirectly to maternity protection. These include the Convention on Occupational Health and Safety at Work 1981 (No. 155),⁶¹ the Convention on Workers with Family Responsibilities 1981 (No. 156)⁶² with its Recommendation No. 165⁶³ and the Night Work Convention, 1990 (No. 171).⁶⁴ Whereas ILO conventions are binding on member states, the recommendations are not. The provisions of ILO's Maternity Protection Convention No. 183 (C183), the convention presently in force, cover the five main aspects of maternity protection. These are health protection in the workplace;⁶⁵ maternity leave and leave in case of illness or complications;⁶⁶ cash and medical benefits;⁶⁷ employment protection and non-discrimination⁶⁸ and breastfeeding arrangements.⁶⁹ The provisions apply to women in typical and atypical work forms of or employment forms.⁷⁰

⁵⁵ 'Convention C003 – Maternity Protection Convention, 1919 (No. 3)' (*Ilo.org*, 2021) <https://www.ilo.org/dyn/normlex/de/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312148> accessed on 1 May 2021.

⁵⁶ 'Ratifications of ILO Conventions' (*Ilo.org*, 2021) <https://www.ilo.org/dyn/normlex/de/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312148> accessed 2 May 2021.

⁵⁷ 'Convention C103 – Maternity Protection Convention (Revised) 1952 (No. 103)' (*Ilo.org*, 2021) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312248:NO> accessed on 1 May 2021. This Convention is now outdated and has been replaced by C183 of 2000.

⁵⁸ Convention C183 (n 16).

⁵⁹ 'Recommendation R095 - Maternity Protection Recommendation, 1952 (No. 95)' (*Ilo.org*, 2021) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312433:NO> accessed 3 May 2021. This recommendation has been replaced by R191 of 2000.

⁶⁰ 'Recommendation R191 (n 25).

⁶¹ 'Convention C155 - Convention on Occupational Health and Safety at Work 1981 (No. 155)' (*Ilo.org*, 2021) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312300:NO> accessed 3 May 2021.

⁶² 'Convention C156 - Convention on Workers with Family Responsibilities 1981 (No. 156)' (*Ilo.org*, 2021) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312301:NO> accessed 3 May 2021.

⁶³ 'Recommendation R165 - Workers with Family Responsibilities Recommendation, 1981 (No. 165)' (*Ilo.org*, 2021) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312503:NO> accessed 3 May 2021.

⁶⁴ 'Convention C171 - Night Work Convention, 1990 (No. 171)' (*Ilo.org*, 2021) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312316:NO> accessed 3 May 2021. art. 7.

⁶⁵ Convention C183 (n 16) art 3.

⁶⁶ *ibid*, art 4 and 5.

⁶⁷ *ibid*, art 6.

⁶⁸ *ibid*, art 8 and 9.

⁶⁹ *ibid*, art 10.

⁷⁰ *ibid*, art 1. ILO's 'Maternity Protection Resource Package -Module 2' (n 14), 2 defines atypical form of dependent work to include "a broad range of non-standard work arrangements, such as part-time, casual and seasonal work, job-sharing, fixed-term contracts, temporary agency work, home work and remote working; pieceworkers; informal



3.1.1 Health Protection in the Workplace

On health protection, C183 requires ILO member states to adopt appropriate measures to ensure that pregnant or breastfeeding women are not obliged to perform work which is prejudicial to the health of the mother or child.⁷¹ Relatedly, Maternity Protection Recommendation 2000 (No. 191) (R191) recommends that member states adopt measures to ensure the assessment of any workplace risks to the safety and health of pregnant or nursing women and their children and make the results of the assessment available to the women concerned.⁷² Where the existence of a safety risk is established, the R191 outlines in article 6 (2) measures that should be taken to eliminate or reduce the risk.

3.1.2 Maternity Leave and Leave in Case of Illness or Complications

C183 provides an entitlement to maternity leave for a period of not less than 14 weeks, including 6 weeks of compulsory post-natal leave.⁷³ It also provides for the grant of leave before or after childbirth in the case of illness, complications or the risk of these.⁷⁴ R191, however, goes further to recommend the extension of the maternity leave period to 18 weeks.⁷⁵ In addition, it provides for the extension of maternity leave in the event of multiple births. It also recommends that a woman be allowed to choose when she takes any non-compulsory portion of her maternity leave; whether before or after childbirth.⁷⁶

3.1.3 Cash and Medical Benefits

Another important aspect of maternity protection is the sustenance of financial benefits and the protection of the employment of working parents⁷⁷ against discrimination on account of pregnancy and childbirth. For this reason, C183 provides that national laws in respect of maternity protection make provision for cash benefits at a level which ensures that a woman can maintain herself and her child in proper health conditions and with a suitable standard of living.⁷⁸ In line

employees in all sectors as well as women in disguised employment relationships (disguised self-employment). These forms of work differ from the historical norm of “typical” or standard work, which is full-time, legally protected employment of unlimited duration, with a single employer, performed at a single employer's workplace and with a guaranteed regular income.” Available online at ‘Maternity Protection Resource Package - From Aspiration to Reality for All. Module 2: Maternity Protection at Work: For Whom?’ (*Mprp.ilo.org*, 2012) <<http://mprp.ilo.org/allegati/en/m2.pdf>> accessed 1 May 2021, 2.

⁷¹ Convention C183 (n 16) art 3.

⁷² Recommendation R191 (n 25) rec. 6(1).

⁷³ Convention C183 (n 16) art 4.

⁷⁴ *ibid* art 5.

⁷⁵ Recommendation R191 (n 25) rec 1.

⁷⁶ *ibid*.

⁷⁷ African countries such as Togo, Kenya, South Africa, Morocco and Ethiopia have provision for paternity leave in their domestic legislations. Addati and others, *Maternity and Paternity at Work* (n 1)150 – 163.

⁷⁸ Convention C183 (n 16) art 6(2).



with this, it is provided that where, under national law or practice, the value of cash benefits are based on previous earnings, the amount of such benefits shall not be less than two-thirds of the woman's previous earnings.⁷⁹ Also, where, by national law, a woman does not satisfy the conditions for the grant of cash benefits, adequate provision must be made for other social assistance funds from which the woman may benefit.⁸⁰ The convention also provides medical benefits, including prenatal, childbirth and postnatal care, as well as hospitalisation care when necessary.⁸¹ R191 recommends extending of medical benefits to cover pharmaceutical and medical supplies, examinations and tests prescribed by a medical practitioner, and dental and surgical care.⁸²

3.1.4 Employment Protection and Non-Discrimination

On employment protection and non-discrimination, C183 renders it unlawful to terminate the employment of a woman on grounds of pregnancy, childbirth or nursing of a child.⁸³ Further, it guarantees the right of a woman to return to the same position or an equivalent position, at the same rate of payment, after her maternity leave.⁸⁴ Generally, member states are enjoined to put in place appropriate measures to ensure that maternity is not a source of employment discrimination.⁸⁵

3.1.5 Breastfeeding and Nursing Arrangements

Post-maternity leave, women are to be afforded the opportunity and conducive environment to nurse their children. Accordingly, it is provided in article 10 of C183 that breastfeeding mothers be given paid daily breaks or a daily reduction of working hours to breastfeed their children. These breaks or reduction of daily work hours is to be counted as working time and remunerated. R191 recommends the establishment of facilities for nursing under adequate hygienic conditions at or near the workplace.⁸⁶ R191 also recommends extending the protection offered under C183, particularly regarding leave, benefits and employment protection, to working fathers and adoptive parents, where necessary.⁸⁷

3.1.6 Other Related Laws

Other conventions related to maternity protection such as the Workers with Family Responsibilities Convention, 1981 (No. 156) also regulate the provision of family-friendly working conditions for workers with family responsibilities. It expressly prohibits the termination of

⁷⁹ *ibid*, art 6(3).

⁸⁰ *ibid*, art 6(6).

⁸¹ *ibid*, art 6(7).

⁸² Recommendation R191 (n 25) rec 2 and 3.

⁸³ Convention C183 (n 16) art 8(1).

⁸⁴ *ibid*, art 8(2).

⁸⁵ *ibid*, art 9.

⁸⁶ Recommendation R191 (n 25) rec 9.

⁸⁷ *ibid*, rec 10.



employment on grounds of family responsibilities.⁸⁸ According to the CEDAW, maternity should be properly understood as a social function as such the adoption of special measures aimed at maternity protection should not be considered discriminatory.⁸⁹

3.2 National Regulatory Framework

The 1992 Fourth Republican Constitution of Ghana guarantees the provision of special care to mothers during a reasonable period before and after childbirth.⁹⁰ The constitution also guarantees a paid maternity leave for working mothers.⁹¹ The Labour Act, 2003 (Act 651) contains the detailed provision regarding these rights, among others. Act 651 applies to all workers and employers with a few exceptions.⁹² Though Ghana has not ratified any other ILO Convention on maternity protection aside Convention C103,⁹³ Ghana's regulatory regime on maternity protection largely mirror the ILO standards.⁹⁴ In the following paragraphs we give an overview of the provisions of Act 651 that are relevant to maternity protection. We do so under the five themes identified in the ILO conventions and discussed above.

3.2.1 Health Protection in the Workplace

According to Act 651, unless it is consensual, an employer shall not assign or engage a pregnant woman to do night work between the hours of 10pm and 7am.⁹⁵ Also, neither a pregnant woman nor a mother of a child of less than 8 months old is to be engaged for overtime work.⁹⁶ Further, where in the opinion of a medical practitioner or midwife, it will be detrimental to the health of a pregnant woman, an employer shall not assign her to a post outside her place of residence after the completion of the fourth month of pregnancy.⁹⁷ There is also a general obligation under Act

⁸⁸ Convention C156 (n 62) art 9.

⁸⁹ CEDAW (n 55) art. 4 and 5. Article 11(2) of the CEDAW also provides for maternity leave, cash and health benefits.

⁹⁰ 1992 Constitution, art 27.

⁹¹ *ibid.*

⁹² Act 651 (n 30) s. 1. Excluded are members of the Armed Forces, the Police Service, the Prison Service and the Security and Intelligence Agencies specified under the Security and Intelligence Agencies Act 1996 (Act 526). In respect of the Armed Forces, the relevant maternity leave provision is in Section 2 of Chapter 16 of the Armed Forces Regulations, 1970.

⁹³ 'Ratifications of ILO Conventions: Ratifications for Ghana' (*Ilo.org*, 2021) <https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::no:11200:p11200_country_id:103231> accessed 1 May 2021.

⁹⁴ See Maurizio Gnot, 'Ghana - Maternity Protection 2011' (*Ilo.org*, 2011) <https://www.ilo.org/dyn/travail/travmain.sectionReport1?p_lang=en&p_countries=GH&p_sc_id=2000&p_year=2011&p_structure=3> accessed 1 May 2021 for a country-by-country account of maternity protection legislation.

⁹⁵ Act 651 (n 30) s. 55(1)(a). According to section 57(9)(a), in relation to women, night work means "work at any time within a period of eleven consecutive hours that includes the seven consecutive hours occurring between ten O'clock in the evening and seven O'clock in the morning but in industrial undertakings which are influenced by the seasons, the work may be reduced to ten hours in sixty days of the year."

⁹⁶ *ibid* s. 55(1)(b). Overtime work is defined in section 35(1) as work that a worker does after the hours of work fixed by the rules of the employment.

⁹⁷ *ibid* s. 56(1).



651 for employers to ensure that every worker works under satisfactory, safe and healthy conditions.⁹⁸

3.2.2 Maternity Leave and Leave in Case of Illness or Complications

Under Act 651, fully paid maternity leave of at least 12 weeks is available to qualified women workers⁹⁹ in addition to any period of annual leave the worker is entitled to.¹⁰⁰ In cases of complications or multiple births,¹⁰¹ the period of maternity leave may be extended to at least two additional 2 weeks.¹⁰² Where there is medical certification in proof of illness due to the pregnancy or confinement of a woman worker, the woman is entitled to additional leave as recommended by the medical practitioner.¹⁰³

3.2.3 Cash Benefits; Employment Protection and Non-Discrimination

Under Act 651, a woman worker on maternity leave shall be paid her full remuneration and other benefits to which she is entitled, as if she were not on maternity leave.¹⁰⁴ Also, a woman worker who is on maternity leave is protected from dismissal based on her absence from work, on account of maternity leave.¹⁰⁵ If on investigation of a complaint, to the National Labour Commission (NLC), about unfair dismissal it is discovered that the termination of employment is due to pregnancy or absence on maternity leave, the re-instatement, re-employment or payment of compensation to the worker may be ordered.¹⁰⁶

3.2.4 Breastfeeding and Nursing Arrangements

A nursing mother is entitled to take an hour's break daily to nurse her baby.¹⁰⁷ Nursing breaks are to be regarded as working hours and remunerated accordingly.¹⁰⁸ Nursing mother is defined as 'a woman with a child suckling at her breast for a period of not more than one year.'¹⁰⁹

3.3 Analysis of Ghana's Legislative Framework for Maternity Protection

⁹⁸ *ibid* s. 118(1).

⁹⁹ The only qualification is the production of a medical certificate indicating the expected date of confinement.

¹⁰⁰ Act 651 (n 30) s. 57 (1) and (2).

¹⁰¹ This refers to twins or other multiple births.

¹⁰² Act 651 (n 30) s. 57(3).

¹⁰³ *ibid* s. 57(4) and (5).

¹⁰⁴ *ibid*, s 57(2).

¹⁰⁵ *ibid*, s 57(8), 63(2)(e).

¹⁰⁶ *ibid*, s 64(2).

¹⁰⁷ *ibid*, s 57(6).

¹⁰⁸ *ibid*, s 57(7).

¹⁰⁹ *ibid*, s 57(9).



Certain observations may be made to measure Ghana's regulatory framework on maternity protection by the international standards, some of which project Ghana as conforming to international standards and others revealing areas of lack.¹¹⁰ Act 651 meets international standards in many respects. It defines a worker as 'a person employed under a contract of employment whether on a continuous, part-time, temporary or casual basis.'¹¹¹ By this definition, all that is required to qualify for maternity leave and other cash and medical benefits under Act 651 is a contract of employment. There is no limitation regarding employment status, whether permanent or casual. There is also no requirement for length of service to qualify for maternity protection. Notably, also, there is no limit on the number of times a woman worker may enjoy maternity protection rights. Further, the period of maternity leave under the Act is not static, the use of words and phrases such as 'may' and 'at least' are indicative of the fact that administrative discretion may be exercised to extend the period as is appropriate in any circumstance. Act 651 has also made provisions for enforcing its provisions by setting up and designating the NLC as the forum for complaints of unfair labour practices.¹¹²

Notwithstanding the above, Act 651 falls short in some focal areas of maternity protection. First is the scope of protection. Whereas protection is offered, under C183, to all workers, Act 651 makes certain exceptions which in a sense reduces the protection offered under the Act.¹¹³ For instance, in the case of the Armed Forces, a service woman on maternity leave is entitled to only half of her previous remuneration.¹¹⁴ Also, she is compelled to take 6 weeks of pre-natal maternity leave, which reduces the duration of post-natal maternity leave.¹¹⁵ Further on the issue of scope, Act 651 neither provides maternity protection for women in certain atypical types of employment nor does it afford such for employed fathers or adoptive parents.¹¹⁶ Act 651 includes temporary and casual workers in the scope of maternity protection; however, the requirement of an employment contract limits the enjoyment of maternity protection by women whose employment is of a nature that does not warrant concluding employment contracts or who are denied such contracts for any reason.

Note may also be made of the definition of nursing mother which is too narrow and unnecessarily limiting. In its present form, the definition excludes all mothers who are not breastfeeding their babies. Such an exclusion may turn out to be discriminatory particularly against mothers who feed

¹¹⁰ It should however be noted that since Ghana is yet to ratify C183, the true measuring rod for its compliance with international standards is C103 of 1952, the predecessor of C183, which it ratified but which is now outdated.

¹¹¹ Act 651 (n 30), s. 175.

¹¹² *ibid*, s. 138(1)(c).

¹¹³ *ibid*, s. 1.

¹¹⁴ Armed Forces Regulations (n 99) s 2 of Chapter 16.

¹¹⁵ *ibid*.

¹¹⁶ ILO, 'Maternity Protection Resource Package – Module 2 (n 14) defines atypical types of work.



their children by other means due to medical or other reasons and yet need to be with their babies to feed them. Also, regarding the nursing breaks, in some circumstances, an hour a day may be inadequate to meet infants' feeding and other nursing needs. C183 mentions one or more daily nursing breaks.¹¹⁷ Further, R191 recommends the establishment of facilities for nursing under adequate hygienic conditions at or near the workplace.¹¹⁸ Also, where practicable, and with the agreement of the employer and the woman worker, it should be possible to combine the time allotted for daily nursing breaks to reduce working hours either at the beginning or end of a working day.¹¹⁹

There are no express provisions under C183 or Act 651 regarding cash benefits in the case of extended maternity leave. C183 appears to have left the issue for various member states to determine in their national laws. In Act 651, though there is the provision for extension for at least 2 weeks in the case of multiple births or medical complications, no mention was made of financial benefits with regard to the period of extension.¹²⁰ It may, however, be argued that since this extension flows from the original maternity leave and is specifically referred to as 'maternity leave', as opposed to additional leave flowing from illness occasioned by pregnancy or confinement,¹²¹ the requirement of full remuneration should apply. It is further submitted that in respect of the additional leave,¹²² an agreed percentage of the full remuneration be paid for a period determined under the Act. This will accord with the provisions of C183 which by national legislation, limits the reduction of cash benefits associated with maternity leave to two-thirds of the woman's previous earnings.¹²³

3.4 Regulatory Enforcement and Bargaining

Customarily, many institutions in the formal sector outline their maternity protection policies in their Human Resource and Administrative Manuals. In some cases, these fall short of the provisions of Act 651.¹²⁴ Some, however, perfectly accord with the law and even go further to

¹¹⁷ Convention C183 (n 16), art 10(1).

¹¹⁸ Recommendation R191 (n 25), rec 9.

¹¹⁹ *Ibid*, rec 8.

¹²⁰ Act 651 (n 30) s 57(3).

¹²¹ *ibid*, s 57 (4) and (5).

¹²² *ibid*.

¹²³ Convention C183 (n 16) art 6(3).

¹²⁴ Armed Forces Regulations (n 99), s 2 of Chapter 16 entitles female officers to only half their salaries while they are on maternity leave. Further, they are compelled to take 6 weeks of their maternity leave ahead of the birth of their babies.; Per the *KNUST Administrative Manual* (University Press, KNUST 2018), s. 2.1.9.4, a female staff may take further leave, without pay, after the expiration of her maternity leave. These provisions fall short of the international standards and the requirements of Act 651.



provide better protection.¹²⁵ The situation is different in small and informal sector businesses. Some of these businesses have no structured maternity protection policies. Even where policies exist, there is pervasive evidence of a policy-practice disparity.¹²⁶ Besides, enforcing employment legislation under collective bargaining agreements is limited in small firms where collective bargaining is practically unknown.¹²⁷ There is enough room in Act 651 to exercise administrative discretion to extend maternity leave and to afford other benefits. ILO Technical Report, 2017, reporting on research conducted in Ghana, notes that women in smaller establishments tend to view maternity protection support as a favour, while their counterparts in larger firms have higher support expectations and tend to perceive extra support beyond statutory provisions as part of their entitlements.¹²⁸ This trend is linked to the lack of knowledge of maternity protection laws, as a result of which most women workers are unable to adequately measure the support received against any benchmark in order to make informed decisions or even enter into gainful bargains.¹²⁹

4. Presentation and Analysis of Empirical Data

4.1 Research Design and Method

The research, a qualitative one, has an exploratory case study design¹³⁰ and was conducted using the socio-legal research method, a type of interdisciplinary legal research. A socio-legal research generally entails the theoretical and empirical analysis of law as a social phenomenon.¹³¹ This research approach is common to law and societal scholarship and is fit for the present research because it examines how the maternity protection provisions of Act 651 function in Ghanaian society.

4.1.1 Population and Sampling

¹²⁵ The Ghana National Gas Company Limited (GNGC)'s Human Resource Policies and Conditions of Service Manual per section 7.6 grants paternity leave of 5 working days to employees who become fathers. The only condition to qualify for the grant is the production of a birth certificate or medical report naming the employee as the father of the child in respect of whom the leave is sought. This is a step ahead of the provisions of Act 651 as there is presently no statutory paternity leave in Ghana.

¹²⁶ Amankwah and Anku-Tsede (n 26) 154; Caroline Jane Gatrell, 'Managing the Maternal Body: A Comprehensive Review and Transdisciplinary Analysis' (2011) 13 *International Journal of Management Reviews* 97; Clem Herman and Suzan Lewis, 'Entitled to a Sustainable Career? Motherhood in Science, Engineering, and Technology' (2012) 68 *Journal of Social Issues* 767; Ellen Ernst Kossek and others, 'How Work-Family Research Can Finally Have an Impact in Organizations' (2011) 4 *Industrial and Organizational Psychology* 352.

¹²⁷ Lewis and others (n 17) 20.

¹²⁸ ILO, 'Maternity Protection and Workers with Family Responsibilities' (n 18) 47-48.

¹²⁹ *ibid*, 47.

¹³⁰ John W. Creswell, *Qualitative Inquiry and Research Design* (3rd ed, SAGE Publications Inc 2013) 47-48, 97; Robert K. Yin, *Case Study Research and Applications: Design and Methods* (6th ed, SAGE Publications Inc 2018) 45.

¹³¹ Felicity Bell, 'Empirical research in law' (2016) 25 *Griffith Law Review* 262, 263; Fiona Cownie and Anthony Bradney, 'Socio Legal Studies – A Challenge to the Doctrinal Approach' in Dawn Watkins and Mandy Burton (eds) *Research Methods in Law* (Routledge 2013) 35.



A Google form¹³² was used to gather the views of the target audience using random sampling. As the questionnaire was administered online with the identity of respondents concealed, it was difficult to screen every participant for suitability. Nonetheless, the researchers directed the Google form mostly to working mothers. 82 responses were submitted at the end of the survey period.

4.1.2 Data Analysis

A mix of doctrinal and empirical research data analysis approaches was used in this research. Data from authoritative sources of law was analysed using the doctrinal analysis of law. This approach systematically organises, analyses and interprets existing knowledge in law to inform the development of law.¹³³ A thematic analysis was used to analyse the empirical data. The data was classified under seven major themes, five being the focal points in maternity protection, the sixth on knowledge of the labour law and the seventh on bargaining and use of administrative discretion in applying law in society. After classification, the various responses were read and interpreted in the light of the law and existing literature to determine if they confirmed or refuted the latter. The researchers' reflections on the results were also noted and discussed.

4.2 Survey Results and Analysis

The 82 responses received are coded as R001 to R082, where R means Respondent and the accompanying number refers to the sequential numbering of the responses. The survey was open to both male and female participants to allow the researchers to form a broader opinion on the application of labour law in Ghanaian society and to gather firsthand information and experience regarding paternity-related rights in Ghana.¹³⁴

4.2.1 Demographics of Survey Respondents

The 82 respondents comprised of 78% female and 22% male. Over 65% of the respondents were married and had young children. One respondent was an adoptive parent. The charts below present the statistics.

¹³² The survey form is available online at <https://forms.gle/iVpAhqvsoSK7VKo6A>. The data was also collected between April 1 to May 10, 2021

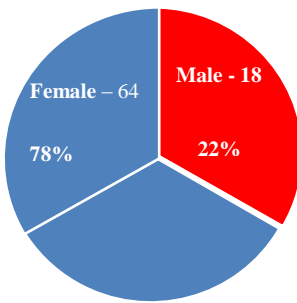
¹³³ Douglas W Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31 *Journal of Law and Society* 163, 178; Terry Hutchinson and Nigel James Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research.' (2012) 17 *Deakin Law Review* 83, 102.

¹³⁴ As noted already, there is no statutory paternity leave in Ghana.



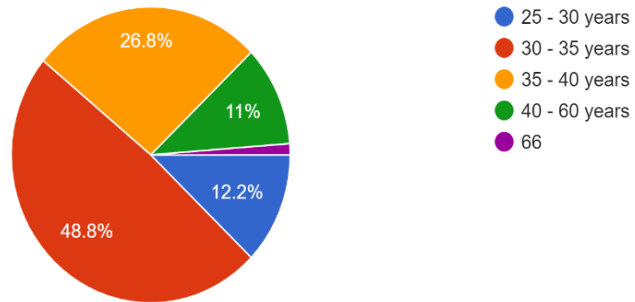
1. Gender

82 responses



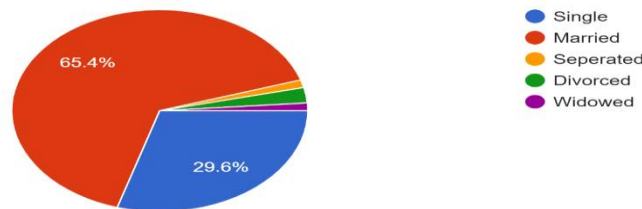
2. Age

82 responses



3. Marital Status

81 responses



The respondents covered the public/private as well as the formal/informal sector divides and included self-employed persons.¹³⁵ The professions and occupations recorded included lawyers, nurses and midwives, teachers, lecturers, scientists, construction workers, bankers, accountants, human resource managers, social workers, army officers and entrepreneurs. Others included a psychologist, a cartographer, a fashion designer, a baker, and a trader. 62.2% of respondents had been working for over five years, with eight in top-level management positions. 34 were in middle-level management, 37 at the operation level and three were self-employed. 45 respondents stated that their jobs may be done from a location outside their work premises, while the other 37 stated that their jobs could only be done from their work premises. The rest of the results are presented and analysed under the thematic areas identified:

4.2.2 Health Protection in the Workplace

The survey data revealed that, some women workers were given special treatment of varied nature during their period of pregnancy to ensure that they work under satisfactory, safe and healthy conditions. The table below shows the statistics:

¹³⁵ The views and experiences of employers were not surveyed as this is not a focus of the present research.



SPECIAL TREATMENT GIVEN BY EMPLOYER	PERCENTAGE OF RESPONDENTS PROTECTED BY EMPLOYER'S ACTION
No special treatment whatsoever	29.3%
Reduction of work schedule	13.4%
Allowed to work from home	11%
Removal from hazardous work	8.5%
Extra rest hours allowed	7.3%
Reduction of work hours	7.3%
Provision of better working tools and environment	4.9%
Removal from night shifts	4.9%
Allowed to work at personal convenience	1.2%

Table 1 – Health Protection at Workplace

One in every four respondents stated that their work could not be carried out from a location other than their workplaces, which meant that unless their employers took some special measures, they were required to be present at work during pregnancy. Some of these were engaged in high-risk jobs. These include construction, structural and chemical engineering. For such works, the provisions of ILO C183¹³⁶ and R191¹³⁷ on risk assessment and corrective measures become more relevant. Although Act 651 requires employers to ensure that pregnant women and, generally, all workers work under satisfactory, safe and healthy conditions,¹³⁸ there is no specific requirement to undertake a workplace risk assessment of the nature recommended by R191. From the survey responses, there is a mixed reaction from employers towards the safety of pregnant women and their children at work. While some respondents enjoyed various forms of special treatment to give them a satisfactory, safe and healthy working experience, others were left to watch over themselves.

¹³⁶Convention C183 (n 16) art 3.

¹³⁷ Recommendation R191 (n 25) rec. 6(1) and (2).

¹³⁸ Ibid, s. 56 and 118(1).



4.2.3 Maternity Leave and Leave in Case of Illness or Complications

Six in every 10 respondents, representing 62%, reported being granted maternity leave for periods ranging from a month to four months after childbirth. As most of these are female, it confirms compliance with the provisions of Act 651 on maternity leave, albeit only to an extent in some cases.¹³⁹ 11 respondents stated they were not entitled to maternity related leave at their workplaces. As these respondents were all male, it gives credence to the fact that there is no statutory provision for paternity leave in Ghana. That notwithstanding, R-006, an environmentalist in the field of environmental sanitation went on a five-day unpaid paternity leave when his child was born. However, he also reported that he was not entitled to paternity leave, which suggests that he might have taken some other leave rather than paternity leave. R-016, a civil servant and R-025, a trained teacher working as an education statistician, both male, also went on paternity leave of ten and fourteen working days respectively. In their cases, they stated that they were entitled to the leave. Similarly, R-003, a geomatic engineer working as a construction manager, went on five days' paid paternity leave. Some self-employed had private arrangements and could remain at home if they wished. For example, R-035, a practicing psychologist, in response to the question of paternity leave, stated:

'Frankly as long [long] as I wanted, so far as I can still get work done.'

R-046 and R-057 female guardians of five and two children, respectively, reported not going on maternity leave with respect to these children. Another female, an adoptive parent¹⁴⁰ has never been on maternity leave. The research also revealed that there may be other reasons why persons who are otherwise entitled to maternity leave may not enjoy it. Such was the case of R-034, a fashion designer who works as a lecturer. When asked why she did not go on maternity leave when her child was born, she said:

'I had to step in for my Head, since he resigned at the exact time.'

The conclusion from the circumstances above is that employers generally grant maternity leave to women workers who are entitled to it. However, the durations varied greatly with some falling short of the statutory 12 weeks. The self-employed did whatever was convenient for them, as the research findings of Amankwah and Anku-Tsede suggested.¹⁴¹ In the case of male workers, some are entitled to paternity leave per their workplace policies, but there is no maternity/paternity leave for t to adoptive parents and guardians.

4.2.4 Cash and Medical Benefits

¹³⁹ Act 651 (n 30), ss 57(1) and (2).

¹⁴⁰ R-70.

¹⁴¹ Amankwah and Anku-Tsede (n 26) 153.



Of 58 respondents who went on maternity/paternity leave, 54 stated it was a paid leave. The survey asked about respondents' willingness to negotiate leave without pay for more flexible work terms such as working from home, being placed on fewer shifts/schedules etc., but the majority did not prefer to do so. The majority response suggests that the workers preferred financial security to flexible work arrangements. This finding confirms the findings of Kumi-Kyereme and Boachie-Mensah that many women in the informal sector did not stay home too long after childbirth mainly because of the need to earn income.¹⁴² Some respondents stated that they had suffered discrimination in the form of denial of financial benefits but it was not clear if the benefits denied were related to maternity cash benefits. Consequently, the general picture presented on cash and medical benefits is positive, as most women respondents received cash benefits while on maternity leave.

4.2.5 Employment Protection and Non-Discrimination

A respondent, R-020, noted that his application for paternity leave was denied, which he found unsatisfactory and discriminatory.¹⁴³ Three respondents stated that on their return from maternity leave, their positions/schedules at work had been taken over by other persons. However, they were reassigned to other schedules.¹⁴⁴ In R-020's instance, the action taken by his employers may not be classified as discrimination since, in the absence of an institutional policy on paternity leave, a male worker is not entitled to paternity leave in Ghana. In the case of the three respondents, they do not consider the actions of their employers to be discriminatory. This may in fact exhibit good maternity absence management on the part of the employers as long as the new schedules do not lead to reduced remuneration or other inconveniences that were not associated with the previous schedule. C183 guarantees the right of a woman to return to the same or equivalent position, of the same rate of payment, after her maternity leave.¹⁴⁵ Other respondents gave instances of denial of annual or other leave and financial benefits which they regarded as discriminatory and which, indeed, would be classified as such if the employers' actions were premised entirely on maternity.¹⁴⁶ Asked what they did in response to the acts of discrimination, the majority of them stated that they let it be since they either counted the employer's action as normal or believed their actions in response were unlikely to yield any results. Only a few took any action, such as writing a petition, reporting to regulatory bodies or taking legal action. Three respondents also resigned from their work as a result of employment-based discrimination. The survey results show that discriminatory treatment toward women as a result of maternity exists in

¹⁴² Kumi-Kyereme and Boachie-Mensah (n 20) 19.

¹⁴³ R-20.

¹⁴⁴ R-40, R-61 and R—79 – All three of them worked in the formal sector.

¹⁴⁵ Convention C183 (n 16), art 8(2).

¹⁴⁶ For instance, R-7, R-28, R-34, R-54, R-72 and R-79.



various forms. However, the victims of such discriminatory acts are not very much inclined to taking action against their employers or enforce their statutory rights.

4.2.6 Breastfeeding and Nursing Arrangements

Respondents were asked to state their experiences at work on resumption from maternity/paternity leave. The table below shows a summary of the responses given:

ACTION TAKEN BY EMPLOYER	NUMBER OF RESPONDENTS
I was allowed to work on a half-day schedule/reduced working hours for a period between 3 – 9 months.	29
I was allowed to bring my child/children to work	4
I was provided with a better working environment conducive for my situation as a nursing mother	3

Table 2 –Breastfeeding and Nursing Arrangements

From the table above, employers' dominant action upon resumption of work from maternity leave is to allow nursing mothers to work for reduced hours for a period between three and nine months, that is, up to 12 months from the date of the child's birth. This arrangement aligns with the statutory provisions regarding nursing breaks for nursing mothers.¹⁴⁷ Though the statutory requirement is an hour's nursing break, the evidence from the survey and from the Human Resource policies of some institutions supports the provision of more nursing break hours, which are often accumulated into reduced working hours.¹⁴⁸

Of those who were allowed to bring their children to work, two were lecturers,¹⁴⁹ one was a cartographer¹⁵⁰ and the other a midwife.¹⁵¹ Two of the respondents who were provided with a better working environment worked as midwives¹⁵² and the third was a logistician.¹⁵³ It is apparent from the survey that the decisions by employers to accord one treatment or the other to nursing

¹⁴⁷ Convention C183 (n 16) art. 10(1), Recommendation R191 (n 25) rec. 8, Act 651, s 57(6) and (7).

¹⁴⁸ KNUST Administrative Manual (n 124), s 2.1.9.6 provides three hours off for nursing mothers ie between the hours of 2:00 – 5:00p.m. or in the alternative, any other time agreed with the woman worker's head of division/department/unit, for a continuous period of twelve (12) months from the date of birth of the child. Also, GNGC HR Policies (n 125) s 7.5 allows nursing mother to close 2 hours before end of normal working hours.

¹⁴⁹ R-18 and R-34.

¹⁵⁰ R-41.

¹⁵¹ R-50.

¹⁵² R-58 and R-64.

¹⁵³ R-62.



mothers may be informed by the nature of the work and the possibility of implementing the decision. This confirms the findings of the ILO Technical Report, 2017 that maternity protection practices are shaped by the location and conditions of the workplace.¹⁵⁴ In respect of self-employed persons and the question of resumption from maternity leave, a self-employed fashion designer stated that she simply started working bit by bit following the birth of her child.¹⁵⁵ Her response confirms the findings of Amankwah and Anku-Tsede which suggested that the self-employed regulated their maternity leave arrangements to best suit their circumstances.¹⁵⁶

Some respondents stated that they bargained for more flexible arrangements. The bargained terms included being put on fewer shifts or further reduced hours, being allowed to work from home, taking of additional maternity leave without pay, or being allowed to take annual leave or sick leave in addition to maternity leave.¹⁵⁷ When asked about their satisfaction with the arrangements, some respondents had this to say:

‘It was presented as more of a favour than a formal arrangement.’¹⁵⁸

‘Tine [time] for academic meetings were held close to 5pm’¹⁵⁹

‘I was doing more work. Sometimes colleagues didn’t respect my reduced hours and I was not in a position to push back.’¹⁶⁰

‘[I] Had still wished I could resume work after 6mths so as to be able to stick to the exclusive breastfeeding.’¹⁶¹

R-041’s frustration over not being able to stay home for six months to exclusively breastfeed her baby confirms Stumbitz and others’ observation that on return to work from maternity leave, some nursing mothers had concerns about not being able to practice exclusive breastfeeding for six months.¹⁶² It also confirms Mensah’s empirical evidence of a woman who could not concentrate at work as a result of leaving her breastfed infant at home.¹⁶³ A respondent wished she had bargained for her maternity leave. She stated:

‘I did not negotiate any terms at that time but may be willing to do so looking back’¹⁶⁴

4.2.7 Knowledge of Labour Laws

¹⁵⁴ ILO, ‘Maternity Protection and Workers with Family Responsibilities’ (n 18) 2; Recommendation 9 of the ILO R191 also recommends the establishment of facilities for nursing under adequate hygienic conditions at or near the workplace.

¹⁵⁵ R-78.

¹⁵⁶ Amankwah and Anku-Tsede (n 26) 153.

¹⁵⁷ R-53, R-41, R-11, R-21, R-59, R-76, R-81.

¹⁵⁸ R-5, a lawyer working as a Customs and Tax Consultant.

¹⁵⁹ R-34, a Lecturer.

¹⁶⁰ R-24, a lawyer.

¹⁶¹ R-41, a cartographer

¹⁶² Stumbitz and others (n 33) 508.

¹⁶³ Mensah (n 42), 94.

¹⁶⁴ R-10, a judge.



The survey's inquiry into respondents' knowledge of labour laws produced response tabulated in the table below:

LEVEL OF KNOWLEDGE OF LABOUR LAW	PERCENTAGE OVER TOTAL RESPONDENTS
No Knowledge (I have not heard of or sighted the labour laws of Ghana/other jurisdiction)	4.8%
Fair Knowledge (I have heard of some of my rights and responsibilities under the law but I am not very certain)	48.8%
Working Knowledge (I know and understand my rights and responsibilities under the law)	35.4%
Expert Knowledge (I know and understand my rights and responsibilities under the law and can advise others on these)	11%
TOTAL	100%

Table 3 – Knowledge of Labour Law

As noted above, some women bargained for flexible arrangements after the statutory maternity leave, and, in some cases, the bargain entailed being allowed to take their annual leave or sick leave in addition to maternity leave. Notably, Act 651 already allows women to take other types of leave in addition to maternity leave hence such arrangement did not call for bargaining.¹⁶⁵ However, the situation of bargaining for what one is already legally entitled to may have occurred due to limited knowledge of the labour law on the part of the women involved. Another instance was the case of a male Public Relations Expert who applied for paternity leave but was denied. He was offered leave for one day which he found unsatisfactory and so rejected it. He stated:

‘A day leave was shun [shunned] by me.’¹⁶⁶

Obviously, the denial may have been because of absence of statutory paternity leave in Ghana yet the respondent appears unaware of this and felt entitled to the leave sought. As noted earlier, ILO Technical Report, 2017 reported a lack of awareness of maternity protection law among both

¹⁶⁵ Act 651 (n 30), s. 57 (1) and (2).

¹⁶⁶ R-20.

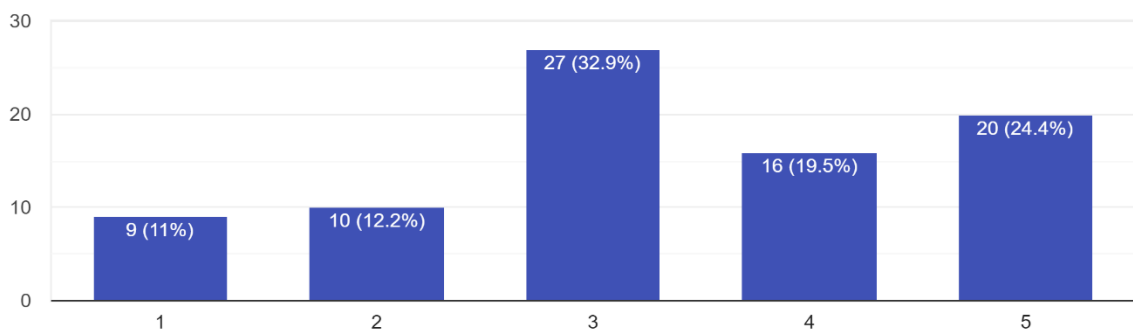


employers and employees in Ghana.¹⁶⁷ Consequently, there is a tendency for workers in smaller establishments to view maternity protection support as a favour, while their counterparts in larger firms perceive extra support beyond statutory provisions as part of their entitlements.¹⁶⁸ The survey results confirm this hypothesis and suggests lack of knowledge of the labour laws as a major contributory factor.

4.2.8 Bargaining and the Use of Administrative Discretion.

As noted earlier, law and society scholarship recognises the use of discretion as a common feature in the operation of the legal system and bargaining is one of the ways in which discretion is exercised¹⁶⁹ The survey inquired into the likelihood and actual existence of bargaining with respect to maternity protection in Ghana. Respondents were asked to state how likely it was for them to negotiate more favourable employment rights and responsibilities both within and outside the law. The graphs below show the result.

49. On a scale of 1 – 5, with 1 being the lowest and 5 the highest level of likelihood, how likely is it that you would negotiate more favourable employment responsibilities WITHIN the ambit of the law?
82 responses



Graph 1 – Bargaining within the law

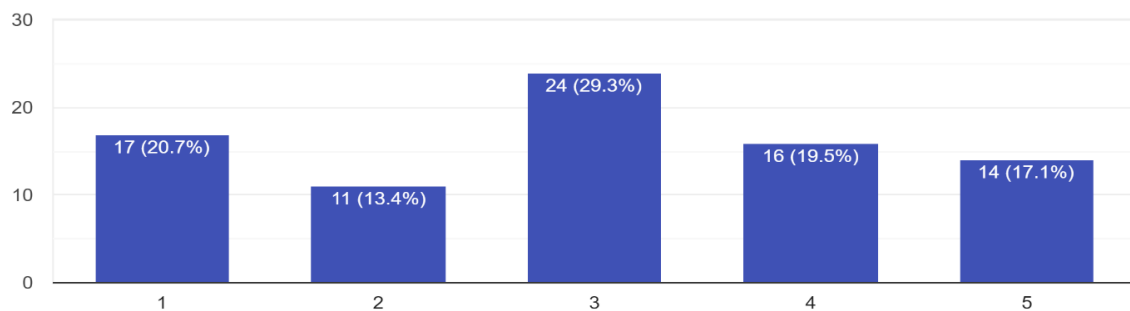
¹⁶⁷ ILO, 'Maternity Protection and Workers with Family Responsibilities' (n 18), 3.

¹⁶⁸ Ibid, 47-48.

¹⁶⁹ Macaulay and others, (n 8) 160.

50. On a scale of 1 – 5, with 1 being the lowest and 5 the highest level of likelihood, how likely is it that you would negotiate more favourable employment conditions outside the law as long as it works for both parties?

82 responses



Graph 2 – Bargaining outside the law

From the graphs above, the likelihood of bargaining is average, however, more respondents were willing to bargain within the confines of the law than outside it. While 24.4% stated that they were extremely likely to enter a bargain within the ambit of the law, only 17.1% were extremely likely to do so outside the law. The survey results also shows that the nature of employment such as formal or informal, private or public sector can affect the changes and outcomes of the bargaining process. The examples below are responses from some respondents when asked about negotiations with their employers for flexible work terms:

‘Not applicable. With government employees you cannot negotiate.’¹⁷⁰

‘I work with the government and I do not negotiate with my employer. The negotiation is often done by the Union on behalf of the employees.’¹⁷¹

‘My employers are [a] private institution and they don’t allow for that.’¹⁷²

The above notwithstanding, as noted earlier, some respondents bargained for more flexible work terms following the expiration of their maternity/paternity leave periods. While some found the bargain satisfactory, others did not. For example, the experiences of some respondents, as shown below, exhibit dissatisfaction with either the bargaining process or the outcome.

‘It wasn’t granted easily.’¹⁷³

‘I was not given many choices.’¹⁷⁴

‘I wasn’t given enough time to bond and nurse my infant baby satisfactorily.’¹⁷⁵

¹⁷⁰ R-10.

¹⁷¹ R-1.

¹⁷² R-47.

¹⁷³ R-53.

¹⁷⁴ R-76.

¹⁷⁵ R-40.



Also, the cases of R-005, R-024, R-034 and R-041, quoted earlier exhibit dissatisfaction. That notwithstanding, others like R-069 found the leave terms satisfactory and R-010, for example, wishes she had bargained for more leave when she had the opportunity to do so. Generally, however, the survey results exhibit greater satisfaction than dissatisfaction.¹⁷⁶ The survey results also confirm Macaulay's and others' observations that bargaining is an inevitable part of the legal system's operation.¹⁷⁷ It also suggests that the law-in-action¹⁷⁸ may not necessarily be the law in the books.¹⁷⁸

5. Conclusion and Recommendations

This research set out to examine the law and practice of maternity protection in Ghana in order to find out whether (a) Ghana's domestic law on maternity protection conforms to international standards; (b) the existing practice of maternity protection in Ghana conforms to Ghana's domestic law; and (c) instances of bargaining within or outside the ambit of the law on maternity protection exist and the nature of the bargain. The findings reveal first that the Ghana's Labour Act, 2003 (Act 651) does not entirely conform to the international standards regarding maternity protection. Secondly, the research has established by empirical evidence that the existing practice of maternity protection in Ghana generally conforms to the provisions of Act 651 but with some modifications depending on institutional policies and the nature of employment as formal, informal, in the public or private sector. Lastly, the research has also established the existence of bargaining both within and outside the confines of the law. On this issue, it has been shown that while employees are often willing to enter negotiations with their employers if the outcome satisfies their needs, some employers are conscious of regulatory enforcement and the cost of such negotiations to their businesses.

Considering the above findings, the following recommendations are made:

1. ***Government involvement in maternity protection*** – as it is the responsibility of the state to adopt international conventions and ratify them, it is recommended that the government of Ghana takes steps to ratify and domesticate the ILO Maternity Protection Convention 2000 (No. 183) and ensure the total conformity of domestic law with it. Further, as an ILO member state, Ghana should implement measures to implement the ILO Maternity Protection Recommendation, 2000 (R191) and endeavour to keep up with the international standards on maternity protection. Additionally, it is recommended that the government of Ghana adopt social policies aimed at sharing the cost of maternity

¹⁷⁶ 14 respondents stated that they found the terms of their bargain satisfactory while 7 stated otherwise.

¹⁷⁷ Macaulay and others (n 8) 160.

¹⁷⁸ Blocq and van der Woude (n 7) 135.



protection with employers, particularly those in the private and informal sectors, and the provision of cash benefits for women without job and financial security.

2. ***Employers' role in maternal protection*** – Employers are the first-hand enforcers of maternity protection laws. As such, they should be monitored, encouraged and incentivised to ensure compliance with the law. Where possible, employers should not hesitate to go beyond the law to do whatever is legal to provide better maternity protection to employees. Further, regulatory bodies, including the National Labour Commission (NLC) must also be vigilant and take steps to ensure compliance with the labour laws of Ghana.
3. ***Workforce knowledge empowerment*** – Employees and workers in general must seek to know and understand their rights and responsibilities under the labour law and exercise them. Additionally, workers should be willing to enter reasonable bargains with their employers, as well as willingly support the process by adjusting to workable arrangements that will favour themselves or other workers in need of maternity protection. If a worker suffers abuse of their labour rights, they should be encouraged to report such abuse to the appropriate authorities, which in some cases may be a higher authority in their employment structure or the NLC, as provided in Act 651.
4. ***Provision of paternity and parental leave*** – Although there is presently no ILO convention on paternity leave and parental leave in the case of adoptive parents and guardians, the ILO acknowledges necessity, and research has shown that some countries and institutions around the world have already brazened the trail in this regard. It is therefore recommended that the government of Ghana consider a national policy on paternal and parental leave. It is further recommended that employers progressively introduce such policies and, at least at the start, consider each circumstance on its peculiar facts to determine how to exercise the discretion to grant or deny paternal or parental leave. This calls for bargaining between employers and employees.

Maternity protection is everyone's responsibility, from government to employers and further to employees and other stakeholders. In practice, though the bargain is already set by law there is always room for a bargain within the bargain.



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