
MATERNITY BENEFITS FOR SURROGACY: ADDRESSING GAPS IN LEGAL PROTECTION

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ABSTRACT

The issue of maternity benefits for surrogacy has become an increasingly important topic in contemporary discussions surrounding reproductive rights, labor policies, and social justice. As the practice of surrogacy grows globally, legal frameworks in many countries are still evolving to deal with the rights of both intended parents and surrogate mothers. In India, the Maternity Benefit Act, 1961 deals with leave with for child birth for the pregnant employee along with other benefits. Maternity benefit was also given to the workers through service rules and terms of employment. The surrogacy procedure is regulated by Surrogacy (Regulation) Act, 2021 which was enacted to ensure ethical practices in case surrogacy, protect women from exploitation, and safeguard the children's rights born through this procedure.

This paper examines the legal frameworks surrounding maternity benefits for surrogate and commissioning mothers, including the lack of adequate legal protection in some jurisdictions, the varying policies across countries, and the impact of these policies on the health and welfare of surrogate mothers. Additionally, the paper analyzes the social and economic implications of granting maternity benefits to surrogates, drawing attention to disparities in compensation, health care, and post-birth support. This paper proposes suggestions to ensure equitable and supportive policies for surrogates, aiming to balance the welfare of interested parties while promoting moral and ethical practices in reproductive technologies.

Keywords: Maternity benefits, Surrogacy, Eligibility, commissioning mother, Child rights, Medical procedure.

INTRODUCTION

The greatest gift that God has given to women is motherhood. It is biologically necessary for every child to have a mother. Motherhood is a reality, while fatherhood is a highly appreciated theory. Maternity protection for women employees gained importance in the early 20th century among the many rights to protect their living and working conditions. In an effort to preserve the honour of motherhood, maternity benefits pay for a woman's and her child's full and healthy maintenance during her time off from work. Article 42 of Indian Constitution mandates that the State offer fair and acceptable working conditions as well as maternity leave. The legislative structure established in India following its independence to provide maternity protection has a limited scope and coverage, which excludes the vast majority of women employed in the unorganised sector. Female employees are entitled to maternity benefits equal to their average daily wage for the 26 weeks that they had been really absent due to childbirth, as per the Maternity Benefit Act of 1961. This Act also has extra provisions to safeguard the rights of pregnant workers.

Every individual has the right to privacy, which includes the right of reproductive autonomy. One way for a woman to ask another woman to help her give birth is through surrogacy. The issue of providing maternity benefits comes up in these situations. Maternity benefits for commissioning mothers and surrogate mothers should be comparable to those for regular female employees. As medical jurisprudence around surrogacy developed, the judiciary made various pronouncements in four consecutive cases at various State High courts, specifically in *K. Kalaiselvi v. Chennai Port Trust*¹ (Madras High Court), *P. Geetha v. The Kerala Livestock Development Board Ltd.*² (Kerala High Court), *Rama Pandey v. Union of India & Ors.*³ (Delhi High Court) *Dr. Hema Vijay Menon v. State of Maharashtra*⁴ (Mumbai High court) respectively granted child care leave to surrogate mothers after giving the intending or commissioning mother the same legal standing as the biological mother as the adoptive mother.

Thus yet, they have only been granted maternity benefits after judicial review. There isn't a specific clause in any law that offers them maternity benefits. To now, the government

¹*K. Kalaiselvi v. Chennai Port Trust*, 2013 (2) CTC 400.

²*P. Geetha v. The Kerala Livestock Development Board Ltd.*, 2015 (1) KLJ 494.

³*Rama Pandey v. Union of India & Ors.*, 221 (2015) DLT 756.

⁴*Dr. Hema Vijay Menon v. State of Maharashtra*, 2015 SCC OnLineBom 6127.

has just put forward policies. None of these have been put into practice. The necessity of equal rules when it comes to giving maternity benefits to female employees will be the main topic of this essay.

SCOPE OF MATERNITY BENEFIT ACT

The Maternity Benefit Act of 1961 regulates women's employment in certain establishments for a specified period of time before and after childbirth, in addition to offering maternity and other benefits. It includes India as a whole.⁵ Maternity benefits are intended to preserve the honour of motherhood by providing for a woman's and her child's full and healthy maintenance during her time off from work. This Act of 1961 applies to mines, factories, the circus, plantations, shops, and businesses with ten or more workers. It may be extended to other establishments by the state governments.⁶

Maternity benefit, as defined by Section 3(h) of the Act, is the payment mentioned in Section 5(1) of the Act.⁷ After the period of six weeks immediately after a woman's delivery, miscarriage, or medically assisted pregnancy termination, the employer is prohibited from intentionally hiring her at any place.⁸ All women are entitled to maternity benefits, and the employer is obligated to pay them at the rate of the average daily income for the period of time she was actually absent, which includes the days before, during, and after her delivery.⁹ A woman can get maternity benefits for a maximum of 26 weeks, with no more than 8 weeks left before the expected delivery date.¹⁰

Any woman working for an organisation and eligible for maternity benefits under the Act's provisions may notify her employer in writing using the format specified by the Act that she will not be working for any company during the time she receives maternity benefits and that she or a designated representative will receive her maternity benefit as well as any other sum to which she may be eligible under the Act.¹¹ Upon returning to work after giving birth, all women are entitled to two breaks of the necessary length of time to nurse their child until the kid reaches the age of fifteen months, in addition to the rest period that is permitted for

⁵ Sec. 1 (2), Maternity Benefit Act, 1961.

⁶ Sec. 2, Maternity Benefit Act, 1961.

⁷ See *Municipal Corporation of Delhi v. Female Workers (Muster Roll) & Anr.*, AIR2000SC1274.

⁸ Sec. 4, Maternity Benefit Act, 1961.

⁹ Sec. 5 (1), Maternity Benefit Act, 1961.

¹⁰ Sec. 5 (3), Maternity Benefit Act, 1961.

¹¹ Sec. 6, The Maternity Benefit Act, 1961.

them.¹² According to the Act, each employer is required to create and keep these registers, records, and muster-rolls.¹³

CONSTITUTIONAL RIGHT TO REPRODUCTIVE AUTONOMY

Women have been given the special capacity to bear children by nature. Sometimes, nevertheless, social, physical, or psychological factors prevent women or couples from becoming pregnant. They look for alternate alternatives through Assisted Reproductive Technologies (ART) because they want a baby. Surrogacy is the most practical substitute. The act of carrying and delivering a child on behalf of another individual is known as surrogacy.¹⁴ The genetic/biological mother (commissioning mother) can be replaced by a surrogate mother.

The Indian Constitution's Article 21 protects both the right to life and the right to personal freedom. The freedom to have children is a fundamental constitutional right that is safeguarded by the right to privacy, according to legal assessment. As part of his "right to privacy," the Andhra Pradesh High Court upheld a person's right to reproductive autonomy in *B. K. Parthasarathi v. Government of Andhra Pradesh*¹⁵. In the case of *Jack T. Skinner v. State of Oklahoma*¹⁶, the US Supreme Court ruled that the ability to procreate is "one of the basic civil rights of man." It also agreed with this finding. Even while the Supreme Court upheld the two-living-child limit, which forbids someone from running for office in a Panchayati Raj election, it did not rule in *Javed v. State of Haryana*¹⁷ that the right to procreate is not a fundamental human right. The 228th Law Commission Report, 2009,¹⁸ also acknowledged the aforementioned incidents. One method of reproduction is surrogacy. Everyone in the nation is entitled to this fundamental right. In our nation, medical tourism has grown significantly.

In India, maternity protection is sector-specific and employer-employee focused, despite the fact that women contribute to the economy through their unpaid labour and social reproduction activities. The vast majority of women in the unorganised sector are so excluded.

¹²Sec. 11, The Maternity Benefit Act, 1961.

¹³Sec. 20, The Maternity Benefit Act, 1961.

¹⁴*Surrogacy*, 1674, Black's Law Dictionary, Tenth Edition.

¹⁵*B. K. Parthasarathi v. Government of Andhra Pradesh*, AIR 2000 A. P. 156.

¹⁶*Jack T. Skinner v. State of Oklahoma*, 316 US 535.

¹⁷*Javed v. State of Haryana*, (2003), 8 SCC 369.

¹⁸ Report No. 228, *Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy*, Law Commission of India, 5th August 2009, <http://lawcommissionofindia.nic.in/reports/report228.pdf>

In the unorganised industry, many women serve as surrogates. Commissioning moms and surrogate mothers are not covered by the current Maternity Benefit Act of 1961. In order to guarantee that the right to reproductive autonomy is upheld, the State must create maternity benefit legislation that include surrogate mothers, intending moms, and intending dads in the scope of providing maternity benefits.

LEGISLATIVE AND JUDICIAL DEVELOPMENTS IN GRANTING MATERNITY BENEFITS TO SURROGATE & COMMISSIONING MOTHERS

Legislative initiatives and court rulings have been made to provide maternity benefits to the women who commission surrogacy in lack of legislation regulating such practice. By adopting a rights-based viewpoint, the court has recognised the intending/commissioning mother as the legal mother of the child (on similar footing with the adoptive mother) and granted maternity benefits to commissioning mothers in a series of cases. On this specific topic, there are seven court rulings from different High Courts:

- 1) K. Kalaiselvi vs Chennai Port Trust¹⁹
- 2) P. Geetha vs The Kerala Livestock Development Board Ltd.²⁰
- 3) Rama Pandey vs Union of India and Ors.²¹
- 4) Hema Vijay Menon vs State of Maharashtra²²
- 5) SumithaBindu vs Jayakeralam Higher Secondary School²³
- 6) Amisha Girish Ramchandani vs Divisional Manager²⁴
- 7) Sadhna Agrawal vs State of Chhattisgarh and Ors.²⁵

¹⁹*Supra* note 1.

²⁰*Supra* note 2.

²¹*Supra* note 3.

²²*Supra* note 4.

²³*Sumitha Bindu v. Jayakeralam Higher Secondary School*, 2015 SCC OnLine Ker 36714.

²⁴*Amisha Girish Ramchandani v. Divisional Manager*, 2016 SCC OnLine Bom 71.

²⁵*Sadhna Agrawal v. State of Chhattisgarh and Ors.*, MANU/CG/0017/2017.

In the case of *K. Kalaiselvi v. Chennai Port Trust*²⁶, the issue of maternity benefits for a woman who became pregnant through surrogacy was first raised. In this case, the child was obtained through a surrogacy agreement by a women worker of the Chennai Port Trust, who then requested maternity leave. However, because the child was born through surrogacy and maternity leave was not granted to her who had a surrogacy procedure under the Chennai Port Trust (Leave) Regulations, 1987, the leave was disallowed.²⁷ The petitioner argued that she was the child's legal mother and that she should receive maternity benefits while taking the child's interests into account. She did this by citing a number of international conventions pertaining to motherhood and child interests, such as the Beijing Declaration,²⁸ the Universal Declaration of Human Rights,²⁹ the Platform for Action Fourth World Conference on Women, and the Convention on the Rights of the Child. The Madras High Court agreed with this viewpoint and ordered that the concerned Port Trust to provide the petitioner with maternity leave in accordance with Rule 3-A of the Chennai Port Trust (Leave) Regulations, 1987.

The following example occurred in the matter of *P. Geetha v. The Kerala Livestock Development Board Ltd*³⁰ before the Ernakulam High Court in Kerala. The Respondent Board's Deputy General Manager was the petitioner. After being childless for more than 20 years, she had a kid through surrogacy. In accordance with the Staff Rules and Regulations, she was denied maternity benefits.³¹ On behalf of the petitioner, it was argued that maternity, whether achieved biologically or through surrogacy, is identical, and that the commissioning parents are essentially the same as the biological parents, with the equal rights and responsibilities.³² In this context, other international covenants were also mentioned.³³ In terms of maternity benefits, the Court ruled that a woman should not be subjected to discrimination only because she became pregnant through surrogacy.³⁴ Because there was no clause allowing maternity leave to a worker who undergone surrogacy surgery, the petitioner in *Rama Pandey v. Union of India and Ors.*³⁵, was denied maternity leave.³⁶

²⁶*Supra* note 1.

²⁷*Supra* note 1 at ¶ 1.

²⁸*Supra* note 1 at ¶ 7.

²⁹*Supra* note 1 at ¶ 6.

³⁰*Supra* note 2.

³¹*Supra* note 2 at ¶ 5.

³²*Supra* note 2 at ¶ 9.

³³*Supra* note 2 at ¶ 11.

³⁴*Supra* note 2 at ¶ 74.

³⁵*Supra* note 3.

³⁶*Supra* note 3 at ¶ 2.

The Delhi High Court cleared the path for commissioning mothers to be granted maternity leave by using the ratio in *K. Kalaiselvi Case*³⁷. It further concluded that a commissioning parent, who aims to acquire a child through a surrogacy agreement, is no different from an adoptive parent.³⁸ According to the HC, denying leave would be harmful to both the mother and the kid.

According to the present leave regulations, the Delhi High Court enumerated the legal justifications for providing leave to commissioning mothers. Additionally, the court pointed out the legal void created by the Central Government Services Rules, 1972's failure to define "maternity leave" (Rule 43-Maternity leave). The law does not prohibit or limit maternity leave for women who became pregnant through surrogacy in the absence of this criterion. Rather, it is possible to incorporate the same. In order to address this legal gap, the Delhi High Court added commissioning moms who work for the Central Government and are having children through surrogacy to the list of eligible leave recipients.

Guidelines for female employees requesting childcare leave in the event of surrogacy were also proposed by the Delhi High Court³⁹:

- As long as she has the necessary supporting documentation, including the surrogacy agreement, the ART clinic's medical records, and the child's birth certificate, a female employee may request maternity leave at the prenatal stage under Rule 43(1), Central Government Service Rules 1972, on the ground of getting maternity through surrogacy.
- In situations where the commissioning mother and the surrogate mother both serve as employees who would typically be entitled for leave—one because she is the commissioning mother and the other because she is the pregnant woman—the competent authority would make the proper adjustment.
- It is up to the concerned authority to decide whether to grant such maternity leave, including when and for how long, after reviewing the application and any relevant documentation that has been presented to them.

³⁷*Supra* note 3 at ¶ 22.

³⁸*Supra* note 3 at ¶ 22.1.

³⁹*Supra* note 3 at ¶ 24.

- Maternity leave can be requested either before or after the baby is born, although in the former situation, there is more scrutiny and the leave might be rejected.
- If a leave request is made for the postpartum period, the general norm allows for the “ordinarily grant of such leave,” unless there are “substantial reasons” to deny it.
- If either prenatal or postnatal leave is denied, the appropriate authority will issue a speaking order outlining the reasons for the refusal in relation to the information presented to it.

In *Hema Vijay Menon v. State of Maharashtra*⁴⁰, the Bombay High Court ordered the government to provide the petitioner with maternity benefits, ruling that it was difficult to understand why the government denied maternity leave to a mother who falls pregnant through surrogacy. The Kerala High Court’s previous ruling in *P. Geetha case*⁴¹ was adhered to in *Sumitha Bindu v. Jayakeralam Higher Secondary School*⁴².

The Bombay High Court’s previous ruling in *Hema Vijay Menon case* was adhered to in *Amisha Girish Ramchandani v. Divisional Manager*⁴³ as well. The High Court of Chhattisgarh in Bilaspur recently heard the case of *Sadhna Agrawal v. State of Chhattisgarh and Ors*⁴⁴, which dealt with providing maternity benefits to surrogate mothers. In his ruling, Sanjay K. Agrawal, J., took into account all prior rulings in this area and provided a thorough analysis of why a woman shouldn’t face discrimination simply because she became pregnant through surrogacy. He also went into detail regarding the constitutional protections for child care and motherhood. He believed that in surrogacy circumstances, women should receive the maternity benefits.⁴⁵

LEGAL FRAMEWORK FOR MATERNITY BENEFIT IN CASE OF SURROGACY

India has reportedly legalised surrogacy since 2002. In India, surrogacy has grown significantly over time, leading to the establishment of more than 3000 fertility clinics. Due to excellent medical facilities and a favourable exchange rate, the Indian surrogacy sector is in

⁴⁰*Supra* note 4.

⁴¹*Supra* note 24 at ¶ 2.

⁴²*Supra* note 24.

⁴³*Supra* note 25.

⁴⁴*Supra* note 26.

⁴⁵*Supra* note 26 at ¶ 32.

high demand worldwide. It is estimated that the Indian surrogacy market generates about \$400 million annually. Surrogacy's legal ramifications are intricate, varied, and mostly unresolved. Laws that address all current gaps should be draughted in order to safeguard the rights of women and children.⁴⁶

Because of its “modern medical infrastructure,” low costs, virtually nonexistent laws, and plentiful supply of surrogates, India is the world's top destination for commercial surrogacy.⁴⁷ The Assisted Reproductive Technology (Regulation) Bill of 2014 and the Surrogacy (Regulation) Bill of 2016 are two surrogacy-related laws that are still pending in the Legislative Assembly.

While surrogacy for foreigners is specifically prohibited in India by the Assisted Reproductive Technology (Regulation) Bill, 2014, it is permitted for a limited number of individuals, such as Overseas Citizens of India (OCIs), People of Indian Origin (PIOs), Non-Resident Indians (NRIs), and foreigners married to Indian citizens.⁴⁸ Therefore, the Bill allows or forbids commissioning surrogacy by classifying commission couples as foreigners or citizens based on their marital status, sexual orientation, and other factors.⁴⁹

Types of Surrogacy

- **Altruistic Surrogacy:** In India, this is the only type of surrogacy that is permitted by law. Under this arrangement, a surrogate mother receives no additional financial compensation beyond insurance coverage and medical costs. It is illegal to engage in commercial surrogacy, in which the surrogate is paid more than only for medical care.
- **Commercial Surrogacy:** This is banned in India. Before 2020, commercial surrogacy was widely practiced, but the government has since taken a strong stance against it to

⁴⁶See Express Web Desk, *What is surrogacy? Everything you need to know*, The Indian Express, March 6, 2017 2:26 pm, <http://indianexpress.com/article/lifestyle/health/draft-surrogacy-bill-2016-what-is-surrogacy-all-you-need-to-know-2994140/> (last visited Nov 29, 2024).

⁴⁷*Legality*, Surrogacy Laws India, http://surrogacylawsindia.com/legality.php?id=%207&menu_id=71 (last visited Nov 29, 2024).

⁴⁸See Tariq Ahmad, *India: Draft Legislation Regulating Assisted Reproductive Technology Published*, Library of Congress, November 2, 2015, <http://www.loc.gov/law/foreign-news/article/india-draft-legislation-regulating-assisted-reproductive-technology-published/> (last visited Nov 29, 2024).

⁴⁹See Bindu Shajan Perappadan, *ART Bill may close surrogacy doors for foreigners, unmarried people*, The Hindu, October 23, 2015, 05:33 AM, <http://www.thehindu.com/news/cities/Delhi/art-bill-may-close-surrogacy-doors-for-foreigners-unmarried-people/article7793884.ece> (last visited Nov 30, 2024).

prevent exploitation.

The Surrogacy (Regulation) Act, 2021

Surrogacy law in India has undergone significant changes over recent years. The Surrogacy (Regulation) Act, 2021 was enacted to regulate the practice of surrogacy, aiming to ensure ethical practices, protect women from exploitation, and safeguard the children's rights born through this process. The law was passed in December 2021 and is a part of a broader initiative to regulate assisted reproductive technologies (ART) in the country.

Purpose of the Surrogacy (Regulation) Act, 2021:

The primary goal of this Act is to:

- Prevent women from being exploited, especially those who may be at risk in commercial surrogacy agreements.
- Encourage moral behaviour by permitting only selfless surrogacy agreements and making sure the surrogate mother is not compensated in excess of insurance and medical costs.
- Protect the rights of surrogate children by making that their parents are acknowledged by the law and that they are treated with respect and decency.
- Stop cross-border surrogacy, which has been linked to unethical behaviour, human trafficking, and exploitation.
- The National and State Surrogacy Boards were established to ensure oversight and control.

KEY PROVISIONS OF THIS ACT

1. Prohibition of Commercial Surrogacy: The Act forbids commercial surrogacy in India. This involves paying a surrogate mother more than what is covered by insurance and medical bills. The only type of surrogacy that is permitted is altruistic surrogacy, in which the surrogate mother receives no compensation for her services other than insurance and medical costs.

2. Eligibility of Intended Parents

- **Married Heterosexual Couples:** The only Indian heterosexual couples who can choose surrogacy are those who have been wed for at least five years.
- **Age Requirements:** • The prospective mother must be between the ages of 23 and 50. The prospective father must be a guy who is between the ages of 26 and 55.
- **Infertility:** The pair must be unable of becoming pregnant or carrying a pregnancy to term. To show infertility, a medical certificate is needed.
- **Indian Citizens:** Surrogacy services are available only to Indian citizens. Foreign nationals and NRIs (Non-Resident Indians) are not eligible for surrogacy in India.

3. Eligibility of Surrogate Mother

- The surrogate mother must be an Indian citizen.
- She must be married, have at least one child of her own, and be between the age of 25 to 35 years.
- The surrogate can carry a child for surrogacy only once in her lifetime.
- She must be medically fit and mentally sound to undergo the surrogacy process.
- The surrogate mother must not have any history of multiple pregnancies or health complications.

4. Role of Surrogacy Clinics: To guarantee moral behaviour, surrogacy clinics need to be registered with either the State Surrogacy Boards or the National Surrogacy Board (NSB). High medical standards must be upheld by clinics to guarantee the wellbeing of the kid and the surrogate.

5. Legal Framework for Surrogacy: Both the intended parents and the surrogate must sign a binding contract. This contract guarantees that, upon delivery, the surrogate mother will turn the child over to the intended parents. To safeguard the interests of all parties, the agreement should also address financial, medical, and legal matters.

6. Rights of the Child Born through Surrogacy: All legal rights will pass to the surrogate child, who will be regarded as the intended parents' biological child. Once the kid is given to the intended parents, the surrogate mother loses all legal claim to the child. The intended parents will be shown as the legal parents on the birth certificate.

7. Establishment of the National Surrogacy Board: The Act established the National Surrogacy Board (NSB) to oversee and control surrogacy activities nationwide. The board will make sure that surrogacy laws are respected and that neither individuals nor clinics engage in unethical behaviour.

8. Surrogacy for Single Parents: The Act prohibits surrogacy for same-sex couples, unmarried couples, and single parents. It is strictly restricted to infertile married heterosexual couples.

9. Punishments for Violations: Commercial surrogacy or violations of the rules under the Surrogacy Act attract heavy penalties, including imprisonment and fines. Clinics that engage in illegal surrogacy practices, or who violate the legal provisions, can face penalties, including the cancellation of their registration.

10. Prohibition of Surrogacy for Foreign Nationals: Surrogacy is prohibited for foreigners, including NRIs, and PIOs (Persons of Indian Origin). Only Indian citizens are allowed to enter into surrogacy arrangements in India.

11. Post-Surrogacy Provisions: To supervise the medical elements of surrogacy agreements, a medical board will be established. Before, during, and after the pregnancy, the intended parents are responsible for the surrogate mother's health and welfare.

The Surrogacy (Regulation) Act, 2021, aims to curb exploitation and regulate the surrogacy process in India by allowing only altruistic surrogacy, protecting the benefits of the surrogate mother, the child, and the intended parents. The legal framework ensures that surrogacy is performed ethically and that it remains a solution for infertility, not a commercial transaction.

However, neither the commissioning mother nor the surrogate mother are mentioned in this Act with relation to maternity benefits. They only discuss surrogacy-related topics prior to

the baby's birth. It says nothing about child care leave. It goes without saying that as soon as the child is born, the commissioning mother might develop a bond with the infant and occasionally take the role of a breastfeeding mother. Just because the commissioning mother did not bear the child does not mean that her right to maternity leave can be refused.

MATERNITY BENEFIT FOR A SURROGATE MOTHER

After the Rajya Sabha passed the Maternity Benefit (Amendment) Act 2016 in August 2016, the Lok Sabha did the same in March 2017. Under the new law, maternity leave will be extended to 26 weeks rather than the current 12 weeks. A commissioning mother has the right to a 12-week maternity leave when the child is given to her.⁵⁰ Consequently, the commissioning mother's maternity leave request has been granted. The status of surrogate mothers is still unclear, though.

In addition to requirements from current labour laws, including the Maternity Benefit Act, 1961, the Surrogacy (Regulation) Act, 2021 governs the Maternity Benefit for a surrogate mother in India. In order to protect surrogate mothers' welfare during the surrogacy procedure, their rights are carefully addressed.

For women who are employed and giving birth, the Maternity Benefit Act of 1961 offers maternity benefits, such as paid leave and other perks. Surrogates, who are not often employed in formal contexts, are not covered by this Act; rather, it usually relates to women who work in factories or organisations. Surrogate moms are entitled to medical treatment and insurance coverage during the surrogacy procedure under the Surrogacy (Regulation) Act, even if this Act does not immediately apply to them unless they are properly employed.

Maternity Benefits under the Surrogacy (Regulation) Act, 2021:

- **Medical Expenses:** All costs associated with the surrogacy procedure, including as prenatal care, birth, and postpartum care, must be paid for by the intended parents.
- **Insurance Coverage:** Surrogate mothers must have insurance coverage to cover any potential health risks or complications that may arise during pregnancy and

⁵⁰See *Maternity and Work*, Paycheck.in, <http://www.paycheck.in/main/labour-law-india/maternity-and-work> (last visited Nov 30, 2024).

childbirth.

- **Post-delivery Care:** The surrogate mother is entitled to post-delivery medical care to ensure her physical and mental well-being after childbirth.

No Financial Compensation beyond Medical Expenses: Under this Act, surrogate mothers are not paid a fee beyond the reimbursement of medical expenses and the provision of insurance coverage. The Act bans commercial surrogacy, meaning surrogate mothers cannot receive any additional monetary compensation, unlike what was previously allowed under commercial surrogacy arrangements.

Mental and Physical Health: The surrogate is entitled to medical care to maintain her health during the surrogacy process. This includes access to healthcare for both physical and mental well-being, ensuring she is fit for pregnancy and well looked after throughout the surrogacy term. The intended parents are responsible for the surrogate's health and any necessary medical procedures during the pregnancy.

Legal Protection and Welfare: The Surrogacy (Regulation) Act ensures that the surrogate mother's welfare is safeguarded by requiring a legally binding contract between her and the intended parents. This contract outlines all medical and legal rights, ensuring that the surrogate receives the necessary care and support. The contract also ensures that the surrogate mother's mental health and physical health are monitored and protected throughout the surrogacy process.

Surrogate mothers are not immediately covered by the Maternity Benefit Act of 1961, unless they are legitimately employed, even though it offers maternity leave and benefits to working women. The legislation places a high priority on the surrogate mother's physical and mental well-being, and she is entitled to medical treatment for any risks or issues that may arise throughout the pregnancy. The financial side of the surrogacy is restricted to paying for medical bills because altruistic surrogacy is prohibited by the Surrogacy Act from allowing monetary remuneration beyond medical expenses.

Although the Maternity Benefit (Amendment) Act of 2016 has been criticised for a number of reasons since it was passed, if correctly executed, it might propel India into the top tier of nations with maternity benefits. The exclusion of women in the unorganised sector is

the most significant of these issues.⁵¹ In India, the majority of surrogate moms work in the unorganised sector. Low-income female employees frequently take on surrogate roles to support their families.

Unorganised sector workers do not have access to proper pay scales, state benefits, documentation, or channels of recourse. To the best of their abilities, their employers decide how much of the above they are entitled to. In addition to the salary disparity, women in this industry face a disproportionate risk of losing employment and income if they take maternity leave. Therefore, women in the probably greatest labour force segment—the group that includes surrogate mothers—are not taken into consideration by this Act.⁵²

The Act is a significant first step in the direction of improved maternity care and workplaces that are more welcoming to women. However, more cannot be done if the range of women who require such a policy is not completely addressed.

DICHOTOMY IN GRANTING MATERNITY LEAVE TO SURROGATE & COMMISSIONING MOTHERS

According to Robert Brown, motherhood—in which a woman assumes the role of God—is the beginning and the conclusion of all love. It is a wonderful gift from nature, both sacred and selfless, but once more, science has compelled us to change the way we think about motherhood. Having and raising a kid is no longer a mother's primary instinct. As reproductive science has advanced, the seed bearer is now sometimes only a receptacle, a nursery for the seed to sprout, and the sapling is quickly moved to another soil to grow on. It is now Law's turn to recognise the dual nature of the split motherhood and divine responsibility.

We must unavoidably face the prenatal and postnatal maternity divide. The surrogate mother actually went through the prenatal phase, but the commissioning mother hasn't. The commissioning mother must be handled as though she had a newborn child from the moment of delivery. Therefore, it can be concluded that the commissioning mother is qualified for all benefits that are granted to an employee following delivery under the Act or the Staff Rules, without discrimination. The commissioning mother cannot force her employer to elevate her

⁵¹See Padmapriya Govindarajan, *India Gets Serious About Maternity Benefits, But It Must Go Further*, The Diplomat, March 29, 2017, <http://thediplomat.com/2017/03/india-gets-serious-about-maternity-benefits-but-it-must-go-further/> (last visited Dec 2, 2024).

⁵²*Id.*

above what a natural mother may have been after giving birth, thus neither more nor less is acceptable.

Because maternity and motherhood are different, the commissioning mother is entitled to all benefits that a worker would get after giving birth, excluding leave for the mother's medical condition. Stated differently, the commissioning mother is entitled to and ought to receive any legislative benefits that are special to her child.

SUGGESTIONS

It is believed in India that women working in the private sector are denied the same maternity benefits as those employed by the government. Large private companies like Amazon, Adobe, Facebook, Google, Microsoft, Twitter, Yahoo, and others offer paid maternity leave to commissioning and surrogate moms and fathers in other regions of the world, such as the USA!⁵³ Better work performance is encouraged by their policies. We may incorporate such concepts from other nations into our own system and offer maternity benefits in both public and private industries.

The surrogate mother has the right 52 weeks of maternity leave with pay in the UK, just like any other pregnant employee. A birth mother's right to maternity leave is unaffected by her actions after the baby is born. The Children and Families Act 2014 grants UK parents of surrogate children employment protection, leave, and compensation (equal to maternity rights). It also holds true for same-sex and heterosexual couples who use surrogacy to conceive a child. These are two outstanding policies that India could adopt as well.⁵⁴ This will also protect each person's right to reproductive autonomy.

It is often recommended that commissioning fathers in surrogacy be given paternity leave as well. Just as crucial as maternity is fatherhood. The foundation and future lives of children greatly depend on the father's participation. The second recommendation is that the Maternity Benefit Act of 1961 be revised to include precise language in order to prevent misunderstandings. Children born through surrogacy could potentially be included in the

⁵³See Alicia Adamczyk, *These Are the Companies With the Best Parental Leave Policies*, Money, Nov 04, 2015, <http://time.com/money/4098469/paid-parental-leave-google-amazon-apple-facebook/> (last visited Dec 2, 2024).

⁵⁴See *UK law gives maternity leave for surrogacy, while Europe lags behind*, Brilliant Beginnings, <http://www.brilliantbeginnings.co.uk/blog/uk-law-gives-maternity-leave-for-surrogacy-while-europe-lags-behind> (last visited Nov 30, 2024).

definition of a kid. Therefore, commissioned moms and surrogate mothers can both be included in the concept of women. Maternity benefits under the social security policy can also be viewed as a right rather than a program, and all employers should be required to offer them regardless of the child's birth manner.

CONCLUSION

Under the Surrogacy (Regulation) Act, 2021, surrogate mothers are entitled to significant medical treatment and insurance protection during the surrogacy procedure, even if they lack the right to the same maternity leave and benefits as employed women under the Maternity Benefit Act. Although the law does not offer a wage or other financial remuneration beyond medical costs and insurance coverage, it does seek to protect the surrogate mother's health and well-being.

Only instances of government women employees receiving maternity benefits have been documented, and commissioning moms are entitled for maternity payments under the Maternity Benefit (Amendment) Act of 2016. However, a private sector worker who wishes to become a surrogate mother or choose surrogacy cannot receive these advantages unless they are granted by the administrative authorities of her job.

It should be mentioned that motherhood is a very important notion, and regardless of how it was born, a newborn infant needs love, care, and devotion. Notwithstanding the fact that surrogacy is governed by law in India, diversity professionals there will eventually take this into account. There isn't much information on this subject in the Maternity Benefit Act of 1961. It might take a long time to implement any legislative reforms in this area. Corporate India will need to develop its own policies and regulations in the interim.