

## A COMPARITIVE REVIEW ON THE MATERNITY BENEFIT UNDER SOCIAL SECURITY CODE, 2020 AND THE MATERNITY BENEFIT ACT – WITH SPECIAL MENTION TO SURROGACY

**AUTHOR** – SEATHAL DEVI, LL.M SCHOLAR AT GOVERNMENT LAW COLLEGE – DHARMAPURI

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### ABSTRACT

*The ideal womanhood in India is motherhood – that marvellous, unselfish all – suffering, ever-forgiving mother.*

*–Swami Vivekananda*

During pregnancy, women experience a range of physical discomforts, from morning sickness and fatigue in the early stages, to back pain, leg cramps, and pelvic pressure as the baby grows. The hormonal changes can lead to mood swings and emotional strain, while the physical strain intensifies as the body adjusts. During this period, women require maximum support and care. Recognizing this, the state bears the responsibility to regulate women's employment and ensure access to maternity benefits such as maternity leave with wages, nursing breaks, creche facilities, and more.

Therefore, this paper offers a comparative analysis of maternity benefits under two key legal frameworks in India: the Maternity Benefit Act, 1961 and the Social Security Code, 2020. The paper aims to critically examine the provisions of both legislations in terms of eligibility, duration, wage replacement, and overall impact on working women. A special focus is placed on surrogacy, an emerging area that is not fully addressed by the existing maternity benefit laws. While the Maternity Benefit Act provides comprehensive maternity leave and benefits to biological mothers in formal employment, its provisions do not extend to surrogate mothers, leaving a significant gap in legal protection. This paper delves into the differences and similarities between the two laws, particularly in the context of surrogacy, and evaluates whether the current framework adequately supports all women, including surrogate mothers, in their reproductive roles.

**Keywords:** Maternity Benefit, Surrogacy, Social Security Code 2020, Female Workforce.

### INTRODUCTION

Motherhood is often regarded as one of the most beautiful phases in a woman's life. Becoming a mother is a profound experience that she treasures forever. However, this remarkable journey also brings a mix of emotions, including stress, pain, anxiety, and mood swings. It is essential for her to receive

unwavering support from her family and community during this pivotal time.

Globally, the International Labour Organization (ILO) has acknowledged the need to protect women during maternity and has adopted three major "Maternity Protection Conventions" between 1919 and 2000.<sup>2560</sup> These conventions

<sup>2560</sup> Ms. Bhumika Sharma & Dr. Rajinder Verma, "OVERVIEW OF MATERNITY PROTECTION: INTERNATIONAL AND NATIONAL

affirm women's rights to paid leave during childbirth and employment protection. However, these conventions are not ratified by India. Yet in India, The Maternity Benefit Act, 1961<sup>2561</sup> was enacted under Article 42<sup>2562</sup> of the Constitution, reflecting the state's commitment to safeguard maternity rights. In 2017, the Act was amended to enhance employment protection during maternity by extending paid maternity leave, introducing provisions for adoptive and commissioning mothers, allowing work-from-home options, and mandating creche facilities. Additionally, pregnant women are entitled to benefits under the Employees' State Insurance (ESI) Act, 1948.<sup>2563</sup>

However, most of the females leave their job after pregnancy<sup>2564</sup> or the maternity benefit itself act as a setback in their career.<sup>2565</sup> In response, the Social Security Code, 2020, was introduced in the Lok Sabha on September 19, 2020, to consolidate and revise existing labour laws, including the incorporation of maternity benefits. Article 15 of the Indian Constitution<sup>2566</sup> underscores the principle of social justice, which is reflected in the Social Security Code, 2020<sup>2567</sup>. Chapter VI of this Code acknowledges and addresses the need for social security for women. This study specifically focuses on maternity protections related to surrogacy. It highlights the disparity in maternity benefits, which are explicitly provided for adoptive parents but not adequately extended to surrogate mothers. Additionally, it examines societal perceptions and misconceptions surrounding surrogacy, along with key

provisions of the Surrogacy Act<sup>2568</sup>. The study also proposes recommendations for reforms in labour legislation to enhance the effectiveness and ethical regulation of surrogacy practices.

### **MATERNITY PROTECTION IN INDIA**

Maternity Benefit Act was legislated on December 12, 1961, with the aim of regulating the employment of women in designated establishments both before and after childbirth, while providing them with crucial entitlements.<sup>2569</sup> The Act guarantees maternity protection for women employed across industries such as factories, mines, plantations, and other work environments, encompassing any establishment that has employed 10 or more workers on any given day within the preceding 12 months.<sup>2570</sup>

The primary objective of the Maternity Benefit Act is firmly anchored in the principle of social justice. This was notably emphasized in the case of *B. Shah v. Labour Court, Coimbatore*, where the court highlighted that the Act was specifically enacted to ensure the protection and welfare of working women.<sup>2571</sup>

### **KEY PROVISIONS OF THE MATERNITY BENEFIT ACT, 1961**

Initially, the Act provided for a minimum of 12 weeks of maternity leave, which was later extended to 26 weeks under the Maternity Benefit (Amendment) Act, 2017.<sup>2572</sup> The leave is divided into pre-delivery and post-delivery periods, allowing women to manage their health and care for their newborn effectively.<sup>2573</sup> Women are entitled to average daily wages for up to 6 weeks following childbirth to support their recovery and the child's well-being.<sup>2574</sup> In

*PERSPECTIVES*”, An International Multidisciplinary Research e-Journal, December 2018, (Last visited 20 Jan 2025).

<sup>2561</sup>The Maternity Benefit Act, 1961, No. 53, Acts of Parliament, 1949 (India).

<sup>2562</sup> India Const. art. 42.

<sup>2563</sup> “*Maternity Benefit (Amendment) Act, 2017*”, available at: <https://www.pmfias.com/maternity-benefit-amendment-act-2017/>, (Last visited 20 Jan 2025).

<sup>2564</sup> Divya Arya, “*WHY MOTHERHOOD MAKES INDIAN WOMEN QUIT THEIR JOBS*”, BBC NEWS, (Last visited 20 Jan 2025), <https://www.bbc.com/news/world-asia-india-32377275>.

<sup>2565</sup> Vasudha Mukherjee, *MATERNITY PENALTY: 75% MOTHERS FACE CAREER HURDLES AFTER LEAVE – REPORT*, BUSINESS INSIGHT OUT, (last visited at: 17 Jan 2025).

<sup>2566</sup> India Const. art. 15.

<sup>2567</sup> “*Unveiling the Unyielding: Article 15 of the Indian Constitution and its Impactful Journey*”, available at: <https://www.claww.in/post/unveiling-the-unyielding-article-15-of-the-indian-constitution>, (last visited at: 17 Jan 2025).

<sup>2568</sup> “*Maternity Benefit Act, 1961: Objectives, Provisions, Impact and Challenges*”, available at: <https://www.geeksforgeeks.org/maternity-benefit-act-1961-objectives-provisions-impact-and-challenges/>, (last visited at: 17 Jan 2025).

<sup>2569</sup> The Maternity Benefit Act, 1961, No. 53, Acts of Parliament, 1961 (India).

<sup>2570</sup> The Maternity Benefit Act, 1961, § 2, No. 53, Acts of Parliament, 1961 (India).

<sup>2571</sup> *B. Shah v. Presiding Officer, Labour Court, Coimbatore & Ors.*, 1978 AIR 12, 1978 SCR.

<sup>2572</sup> The Maternity Benefit Act, 1961, § 5, No. 53, Acts of Parliament, 1961 (India).

<sup>2573</sup> *Ibid.*

<sup>2574</sup> *Supra.*

cases where the woman gives birth to a third child, the maternity leave is limited to 12 weeks.<sup>2575</sup> If the child does not survive beyond 6 weeks after delivery, the employer remains liable to provide the full maternity benefits, ensuring the mother's financial security during this difficult time.<sup>2576</sup> Women are entitled to 6 week's leave following a miscarriage, calculated from the date of the miscarriage.<sup>2577</sup> For women undergoing sterilization (tubectomy), the Act provides 2 week's leave to aid recovery.<sup>2578</sup> In the case of post-delivery complications or critical illness related to pregnancy, women can avail of an additional 1 month of leave.<sup>2579</sup>

The Act prohibits employers from dismissing women during the maternity leave period and safeguards their right to return to their job after the leave. Employers are required to pay maternity benefits promptly and cannot reduce the wages of women taking maternity leave.

#### THE 2017 AMENDMENT:

The 2017 Maternity Benefit (Amendment) Act<sup>2580</sup> brought significant reforms to strengthen maternity protections include extended maternity leave from 12 to 26 weeks for women with up to two surviving children. Further, it introduced maternity leave of 12 weeks for adoptive mothers and commissioning (surrogate) mothers.<sup>2581</sup> This Act provides flexibility for women to work from home, subject to the nature of their work and mutual agreement with the employer. This Act mandated the establishment of creche facilities, where 50 or more workers employed and allows women to visit the creche four times a day, including breaks for nursing.<sup>2582</sup>

The Act represents a significant step toward empowering women in the workforce, balancing their professional and personal responsibilities, and safeguarding their health and rights during maternity. By ensuring these protections, the legislation aligns with the broader goals of gender equality and social justice in India.

#### MATERNITY BENEFITS UNDER THE SOCIAL SECURITY CODE, 2020

The Social Security Code, 2020<sup>2583</sup>, was introduced with the aim of amending and consolidating existing laws related to social security, with a focus on extending these protections to employees across both the organized and unorganized sectors. This legislation represents a significant step toward ensuring comprehensive social security coverage for workers in diverse employment settings. The Code was introduced by Labour Minister Santosh Gangwar, following the recommendations of the Second National Commission on Labour, which emphasized the need for streamlined and consolidated labour laws.<sup>2584</sup> The bill was passed by the Lok Sabha on September 22, 2020, and subsequently by the Rajya Sabha on September 23, 2020.<sup>2585</sup>

#### Transition from the Maternity Benefit Act, 1961

The Social Security Code repeals the Maternity Benefit Act, 1961<sup>2586</sup>, integrating its provisions into the new framework with notable changes and expansions. Once the Code comes into effect, women working in eligible establishments will seek maternity benefits under the Social Security Code rather than the now-repealed Maternity Benefit Act.

<sup>2575</sup> The Maternity Benefit Act, 1961, § 5, No. 53, Acts of Parliament, 1961 (India).

<sup>2576</sup> The Maternity Benefit Act, 1961, available at: <https://blog.ipleaders.in/the-maternity-benefit-act>, (last visited: 12 Jan 2025).

<sup>2577</sup> The Maternity Benefit Act, 1961, § 9, No. 53, Acts of Parliament, 1961 (India).

<sup>2578</sup> The Maternity Benefit Act, 1961, § 9A, No. 53, Acts of Parliament, 1961 (India).

<sup>2579</sup> The Maternity Benefit Act, 1961, § 10, No. 53, Acts of Parliament, 1961 (India).

<sup>2580</sup> The Maternity Benefit Act, 2017, No. 6, Acts of Parliament, 1949 (India).

<sup>2581</sup> The Maternity Benefit Act, 2017, § 3, No. 53, Acts of Parliament, 2017 (India).

<sup>2582</sup> The Maternity Benefit Act, 2017, § 3, No. 53, Acts of Parliament, 2017 (India).

<sup>2583</sup> THE CODE ON SOCIAL SECURITY, 2020, (Bill No. 121 of 2020), available at:

[https://labour.gov.in/sites/default/files/ss\\_code\\_as\\_introduced\\_in\\_lok\\_sabha.pdf](https://labour.gov.in/sites/default/files/ss_code_as_introduced_in_lok_sabha.pdf), (last visited on: 30 Dec 2024).

<sup>2584</sup> Press Information Bureau Government of India Ministry of Labour & Employment, available at: <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1657898>, (last visited on: 30 Dec 2024).

<sup>2585</sup> Epidemic Diseases (Amendment) bill passed in Lok Sabha, available at: [https://www.gktoday.in/epidemic-diseases-amendment-bill-passed-in-lok-sabha/#google\\_vignette](https://www.gktoday.in/epidemic-diseases-amendment-bill-passed-in-lok-sabha/#google_vignette), (last visited on: 30 Dec 2024).

<sup>2586</sup> The Maternity Benefit Act, 1961, No. 53, Acts of Parliament, 1949 (India).



### ▪ **Expanded Provisions for Maternity Benefits**

The Social Security Code builds upon the protections originally established in the Maternity Benefit Act, 1961<sup>2587</sup>, introducing several key enhancements. The scope of maternity benefits has been expanded to cover adoptive mothers and commissioning mothers (surrogacy arrangements), ensuring equal protection and support for non-traditional forms of motherhood. The Code includes provisions for women working from home, offering greater flexibility and recognizing evolving workplace practices.<sup>2588</sup> Establishments employing a specified number of workers are mandated to provide creche facilities, with women permitted to visit the creche multiple times during working hours to nurse or care for their children.

### ▪ **Structural Changes and New Authority**

The Code replaces the role of the "Inspector" under the Maternity Benefit Act, 1961, with the newly designated Inspector-cum-Facilitator. This change aims to promote a more collaborative approach, focusing on compliance facilitation rather than enforcement alone.<sup>2589</sup> Women working in the unorganized sector seeking maternity benefits are required to furnish their identity and that of their nominated beneficiary through an Aadhaar number. This measure enhances transparency, ensures the rightful disbursement of benefits, and minimizes misuse.

### ▪ **Stricter Penalties for Non-Compliance**

Employers failing to provide maternity benefits as required under the Code can face imprisonment for up to six months, a fine of ₹50,000, or both. These enhanced punitive measures aim to

deter violations and ensure that employers uphold their responsibilities.<sup>2590</sup>

### ▪ **Significance of the Social Security Code**

The Social Security Code not only consolidates existing laws but also addresses gaps in previous legislation, providing a unified framework that adapts to contemporary workforce needs. By expanding maternity protections, introducing new oversight mechanisms, and emphasizing transparency, the Code ensures that women across both organized and unorganized sectors receive the support they deserve during maternity.<sup>2591</sup> This progressive legislation underscores the government's commitment to promoting social justice, gender equality, and inclusive welfare for all working women in India.

### **COMPARITIVE ANALYSIS OF MATERNITY BENEFIT UNDER MATERNITY BENEFIT ACT, 2017 AND SOCIAL SECURITY CODE 2020**

	<b>MATERNITY BENEFIT ACT</b>	<b>SOCIAL SECURITY CODE 2020</b>
<b>Scope of Application</b>	<ul style="list-style-type: none"> <li>Applied to establishments employing 10 or more employees.</li> <li>Covered women employed in factories, mines, plantations, and other establishments.</li> <li>Exclude the unorganized</li> </ul>	<ul style="list-style-type: none"> <li>Broadens the coverage to include workers in both the organized and unorganized sectors, subject to registration and identification (e.g., Aadhaar).</li> <li>Includes all establishments covered under the repealed Maternity Benefit Act.</li> </ul>

<sup>2587</sup> Adv Hemant More, "INTRODUCTION TO THE CODE ON SOCIAL SECURITY, 2020", [THE LEGAL QUOTIENT](https://thelegalquotient.com/labour-laws/code-on-social-security/3737/), available at: <https://thelegalquotient.com/labour-laws/code-on-social-security/3737/>, (last visited on: 31 Dec 2024).

<sup>2588</sup> Ibid.

<sup>2589</sup> Section 122, The Social Security Code, 2020.

<sup>2590</sup> [5 Changes Made To Maternity Benefits Under The New Labour Code](https://www.ungender.in/ungender-change-in-maternity-benefits-after-labour-code-2020), available at: <https://www.ungender.in/ungender-change-in-maternity-benefits-after-labour-code-2020>, (last visited on: 27 Dec 2024).

<sup>2591</sup> The Code On Social Security 2020: Addressing The Key Changes And Their Impact, available at: <https://www.mondaq.com/india/employee-benefits-compensation/1277138>, (last visited on: 27 Dec 2024).

	sector and workers in smaller establishments.		<b>Home Option</b>	from home after their maternity leave, subject to the nature of their work and mutual agreement with their employer.	home provision, ensuring continued flexibility for women in managing work-life balance during and after maternity.
<b>Duration of Maternity Leave</b>	<ul style="list-style-type: none"> <li>Increased maternity leave from 12 weeks to 26 weeks for women with up to two surviving children.<sup>2592</sup></li> <li>Limited to 12 weeks for mothers with three or more surviving children.<sup>2593</sup></li> </ul>	<ul style="list-style-type: none"> <li>Retains the 26 weeks leave provision for up to two children and 12 weeks for subsequent children.<sup>2594</sup></li> <li>Ensures continuity of this benefit under the new legislative framework.<sup>2595</sup></li> </ul>	<b>Enforcement Mechanism</b>	<ul style="list-style-type: none"> <li>Enforcement through Inspectors, responsible for ensuring compliance with the Act.</li> </ul>	<ul style="list-style-type: none"> <li>Replaces Inspectors with Inspector-cum-Facilitators, focusing on a collaborative approach to compliance and enforcement.<sup>2598</sup></li> </ul>
<b>Inclusivity</b>	<ul style="list-style-type: none"> <li>Introduced maternity leave for adoptive mothers and commissioning mothers for up to 12 weeks.<sup>2596</sup></li> <li>Lacked provisions specifically targeting women in the unorganized sector.</li> </ul>	<ul style="list-style-type: none"> <li>Retains provisions for adoptive and commissioning mothers.</li> <li>Extends maternity benefits to the unorganized sector workers, provided they register and furnish identity proof (e.g., Aadhaar).<sup>2597</sup></li> <li>Enhances inclusivity and ensures more comprehensive protection.</li> </ul>	<b>Creche Facilities</b>	<ul style="list-style-type: none"> <li>Mandated establishments with 50 or more employees to provide creche facilities within the workplace.<sup>2599</sup></li> <li>Allowed women to visit the creche four times a day.</li> </ul>	<ul style="list-style-type: none"> <li>Retains this provision, ensuring that childcare support remains a key component of maternity benefits.</li> </ul>
<b>Work-from-</b>	<ul style="list-style-type: none"> <li>Allowed women to work</li> </ul>	<ul style="list-style-type: none"> <li>Retains the work-from-</li> </ul>	<b>Penalties for Non-Compliance</b>	<p>Penalty provisions were less stringent, focusing primarily on fines.</p>	<p>Strengthens penalties for employers failing to provide maternity benefits:</p> <ul style="list-style-type: none"> <li>Imprisonment up to 6 months, a fine of ₹50,000, or both.<sup>2600</sup></li> </ul>

<sup>2592</sup> The Maternity Benefit Act, 1961, § 5, No. 53, Acts of Parliament, 1961 (India).

<sup>2593</sup> Ibid.

<sup>2594</sup> Section 60, The Social Security Code, 2020.

<sup>2595</sup> Ibid.

<sup>2596</sup> The Maternity Benefit Act, 1961, § 5, No. 53, Acts of Parliament, 1961 (India).

<sup>2597</sup> Section 45, The Social Security Code, 2020.

<sup>2598</sup> Section 122, The Social Security Code, 2020.

<sup>2599</sup> The Maternity Benefit Act, 2017, § 11A, No. 6, Acts of Parliament, 2017 (India).

<sup>2600</sup> Section 133, The Social Security Code, 2020.

		<ul style="list-style-type: none"> <li>The stricter penalties aim to ensure better adherence and accountability.</li> </ul>
<b>Transparency and Anti-Misuse Measures</b>	<ul style="list-style-type: none"> <li>Did not include specific provisions to prevent misuse of benefits or ensure transparency in disbursement.</li> </ul>	<ul style="list-style-type: none"> <li>Introduces transparency by requiring unorganized sector workers to furnish their identity (e.g., Aadhaar) and that of a nominee to claim maternity benefits, particularly in cases of the mother's death.</li> </ul>
<b>Analysis</b>	<ul style="list-style-type: none"> <li>The Maternity Benefit Act, 2017, was a landmark reform, significantly expanding maternity leave, introducing benefits for adoptive and commissioning mothers, and promoting flexible work arrangements. However, it was primarily limited to the organized sector, leaving out a</li> </ul>	<ul style="list-style-type: none"> <li>The Social Security Code, 2020, builds on the foundation of the 2017 Amendment by consolidating maternity benefits into a broader social security framework. It addresses the gaps in coverage by including the unorganized sector, enhancing enforcement mechanisms, and incorporating</li> </ul>

substantial portion of women in the unorganized sector. <sup>2601</sup>	measures for transparency and accountability. <sup>2602</sup>
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Overall, while the 2017 Amendment was a progressive step in its time, the Social Security Code, 2020, represents a more inclusive and integrated approach, aiming to provide maternity benefits to a larger section of the workforce, particularly women in vulnerable employment categories. However, its success will depend on effective implementation, awareness, and accessibility for beneficiaries.

### SURROGACY IN INDIA – A NEW PERSPECTIVE IN MATERNITY

Surrogacy is widely regarded as a practice that offers hope to couples who are biologically unable to conceive and bear a child. In essence, surrogacy involves an arrangement where a surrogate mother carries and nurtures the child in her womb on behalf of the intended parents. This process enables individuals and couples to fulfil their dreams of parenthood, bridging biological and reproductive limitations.

India legalized surrogacy in 2002, and over the years, the practice witnessed substantial growth, especially in its commercial aspect.<sup>2603</sup> However, this rapid expansion led to a host of ethical, social, and legal challenges. The unregulated surrogacy industry in India became a hub for commercial transactions, often attracting foreign nationals seeking to hire Indian women as surrogate mothers.<sup>2604</sup> These arrangements frequently exploited socio-economically disadvantaged women, commodifying their reproductive capabilities

<sup>2601</sup> CS Nishvitha, “AN OVERVIEW ON THE MATERNITY BENEFIT (AMENDMENT) ACT, 2017”, available at: <https://www.icsi.edu/media/portals/22/Article%20on%20MBA%20Act,%202017.pdf>, (last visited on: 21 Dec 2024).

<sup>2602</sup> Code on Social Security, 2020 - Key Provisions, Significance and Issues, available at: [https://testbook.com/ias-preparation/code-on-social-security-2020#:~:text=](https://testbook.com/ias-preparation/code-on-social-security-2020#:~:text=,), (last visited on: 21 Dec 2024).

<sup>2603</sup> Neha Tiwari, “COMMERCIAL SURROGACY IN INDIA: AN OVERVIEW”, Vol.8 No.2, Asian Review of Social Sciences, pp. 35, 35-37, (2019).

<sup>2604</sup> Ibid.



and reducing the process of childbirth to a purely transactional and commercial exchange.

The increasing prevalence of exploitative practices in the surrogacy industry sparked widespread concern, prompting the need for regulatory measures to safeguard the dignity and rights of Indian women. Recognizing these issues, the 228th Report of the Law Commission of India, submitted on November 21, 2016, strongly recommended the prohibition of commercial surrogacy in the country.<sup>2605</sup> The report emphasized the need to protect women from being treated as mere tools for reproduction, ensuring that surrogacy arrangements do not undermine their autonomy, dignity, or health.

In response to these recommendations and growing public outcry, the Surrogacy (Regulation) Bill was introduced. The Bill was passed by the Lok Sabha on December 17, 2019, and by the Rajya Sabha on December 14, 2019.<sup>2606</sup> It aimed to address the exploitative nature of commercial surrogacy while preserving the option of altruistic surrogacy under strict guidelines.

The Surrogacy (Regulation) Act, 2021, formally established legal norms and frameworks to govern surrogacy practices in India.<sup>2607</sup> It strictly prohibits commercial surrogacy, allowing only altruistic surrogacy where a surrogate mother is not compensated financially except for medical expenses and insurance coverage during pregnancy. The Act also stipulates that surrogacy arrangements are permissible only for specific categories of individuals, such as Indian couples facing proven infertility, and bans foreigners, single individuals, and same-

sex couples from engaging in surrogacy within India.

The legislation reflects a significant step toward protecting the rights and well-being of women, preventing exploitation, and upholding the sanctity of childbirth. It ensures that surrogacy is carried out in a manner that prioritizes the surrogate's health, safety, and dignity, transforming surrogacy from a commercial enterprise into an ethical and socially responsible practice.

### PREDOMINANT REGULATIONS OF THE SURROGACY ACT, 2021

The Surrogacy (Regulation) Act, 2021, which came into force on December 25, 2021, introduced a comprehensive framework to govern surrogacy practices in India.<sup>2608</sup> This Act established the National Assisted Reproductive Technology and Surrogacy Board and the State Assisted Reproductive Technology and Surrogacy Boards, along with appointing appropriate authorities to oversee and regulate surrogacy procedures nationwide.<sup>2609</sup>

The Act primarily aims to prohibit commercial surrogacy, a practice where surrogate mothers are paid or incentivized beyond necessary medical expenses, thereby commodifying the process of childbirth.<sup>2610</sup> It strictly forbids selling or purchasing human embryos, trading the services of surrogate mothers for financial rewards, and any form of monetary remuneration except for covering medical expenses. The Act instead promotes altruistic surrogacy, which is centered on compassion and humanity while preventing the exploitation of surrogate mothers.<sup>2611</sup>

<sup>2605</sup> Dr D. Radhika Yadav and Pavan Kasturi, "REPRODUCTIVE HEALTH AND SURROGACY IN INDIA" available at: <https://www.sconline.com/blog/post/2021/09/27/reproductive-health-and-surrogacy-in-india/>, (last visited on: 17 Jan 2025).

<sup>2606</sup> "COMPARISON BETWEEN SURROGACY (REGULATION) BILL, 2019 (AS PASSED BY LOK SABHA) AND SURROGACY (REGULATION) BILL, 2021 (AS PASSED BY RAJYA SABHA)", PRS, available at: [https://prsindia.org/files/bills\\_acts/bills\\_parliament/2019/](https://prsindia.org/files/bills_acts/bills_parliament/2019/), (last visited on: 17 Jan 2025).

<sup>2607</sup> Satwinder Singh, "AN OVERVIEW OF THE SURROGACY (REGULATION) ACT, 2021", available at: <https://www.legalbites.in/topics/articles/an-overview-of-the-surrogacy-regulation-act-2021-986640>, (last visited on: 17 Jan 2025).

<sup>2608</sup> Advocate. Aameer V. Kale, "IMPACT OF THE NEW SURROGACY REGULATION ACT 2021 ON SURROGACY ARRANGEMENTS IN INDIA", available at: <https://aklegal.in/impact-of-the-new-surrogacy-regulation-act-2021-on-surrogacy-arrangements-in-india/>, (last visited on: 24 Dec 2024).

<sup>2609</sup> Prashant Kanha, "OVERVIEW OF THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) ACT, 2021", available at: <https://redlaw.in/overview-of-the-assisted-reproductive-technology-regulation-act-2021>, (last visited on: 24 Dec 2024).

<sup>2610</sup> Surrogacy Act, available at: <https://blog.ipleaders.in/surrogacy-act/>, (last visited on: 24 Dec 2024).

<sup>2611</sup> The Surrogacy (Regulation) Act, 2021, § 38(1)(e), No. 47, Acts of Parliament, 2021 (India).

To prevent misuse and unethical practices, the Act imposes strict penalties for violations. It prohibits activities such as publishing advertisements related to commercial surrogacy, abandoning or exploiting children born through surrogacy, selling human embryos or gametes for trade, importing human embryos for commercial purposes, and conducting sex selection in surrogacy procedures.<sup>2612</sup> Any infringement of these provisions constitutes an offense punishable by up to 10 years of imprisonment and a fine of ₹10,00,000.<sup>2613</sup>

Additionally, surrogacy clinics must register under this Act to legally perform surrogacy-related procedures. The legislation applies exclusively to Indian couples who meet specific eligibility criteria<sup>2614</sup>:

1. The intending couple must be legally married for at least 5 years.
2. The female partner must be aged between 23 and 50 years, and the male partner between 26 and 55 years.
3. The couple must not have any surviving biological, adopted, or surrogate children, with exceptions for children who are physically or mentally challenged or suffer from life-threatening disorders.

#### ▪ **Eligibility Criteria for Surrogate Mothers<sup>2615</sup>**

The Act also outlines stringent eligibility conditions for surrogate mothers:

1. The surrogate must be between 25 and 35 years of age at the time of implantation or oocyte donation.
2. She must not use her own gametes in the surrogacy process.
3. A woman is permitted to act as a surrogate only once in her lifetime.

<sup>2612</sup> The Surrogacy (Regulation) Act, 2021, § 38, No. 47, Acts of Parliament, 2021 (India).

<sup>2613</sup> The Surrogacy (Regulation) Act, 2021, § 39, No. 47, Acts of Parliament, 2021 (India).

<sup>2614</sup> The Surrogacy (Regulation) Act, 2021, § 4, No. 47, Acts of Parliament, 2021 (India).

<sup>2615</sup> Ibid.

4. The surrogate mother must be married and have at least one biological child of her own.

#### ▪ **Protection of Surrogate Mothers' Rights**

The Act safeguards the reproductive rights and health of surrogate mothers. Surrogacy procedures cannot be performed without the informed consent of the surrogate mother, and the side effects and risks must be clearly explained to her beforehand.<sup>2616</sup> Furthermore, no abortion during the surrogacy process is permitted without the written consent of the surrogate mother, ensuring her autonomy and well-being.<sup>2617</sup> Any coercion or undue pressure by the husband, intending couple, or relatives to participate in surrogacy is strictly prohibited, and violators are subject to penalties under this Act.<sup>2618</sup>

#### **SUGGESTION**

The Maternity Benefit Act is typically designed to regulate the employment rights and benefits of pregnant women, providing them with support once pregnancy is confirmed. However, surrogacy presents unique circumstances that warrant a different approach. Unlike conventional pregnancy, surrogacy involves a complex medical procedure, such as in-vitro fertilization (IVF), which carries significant physical and emotional implications. This process can vary greatly among individuals, with each surrogate potentially facing different medical challenges and recovery periods. Therefore, it is essential that maternity benefits be extended to surrogate mothers from the very beginning of the treatment phase to ensure their well-being throughout the surrogacy process.

Despite its robust framework, the Act notably omits provisions for maternity benefits for surrogate mothers. The child born through surrogacy is legally recognized as the biological child of the intending couple, and the intending

<sup>2616</sup> The Surrogacy (Regulation) Act, 2021, § 35, No. 47, Acts of Parliament, 2021 (India).

<sup>2617</sup> Ibid.

<sup>2618</sup> Supra.



mother is entitled to 12 weeks of maternity leave starting from the child's birth. However, the surrogate mother, who endures the physical and emotional toll of pregnancy and childbirth, is not recognized under Indian labour laws for maternity benefits. Hence, this paper strongly suggests for the regulation of separate maternity benefit for the surrogate mother under Social Security Code, 2020.

While the Act focuses on protecting surrogate mothers from exploitation, it falls short of acknowledging their contribution through maternity benefits. It is essential to address this gap by extending maternity protections to surrogate mothers, ensuring their health and financial security during and after pregnancy. Providing such benefits which includes encouraging altruistic surrogacy by offering support and acknowledgment of the surrogate's role, holding employers accountable for ensuring the welfare of surrogate mothers, promoting societal acceptance and recognition of surrogacy as a selfless act of compassion, especially in cases where women act as surrogates for close relatives.

The inclusion of maternity benefits for surrogate mothers would reflect a more holistic approach to surrogacy regulation, balancing the rights of intending parents with the welfare of surrogate mothers. This enhancement would uphold the principles of equality, dignity, and social justice that underpin India's legal and ethical frameworks.

Additionally, the situation of surrogate mothers differs from that of women who give birth to their own children, as they typically do not raise the child post-birth. Once the child is born, it is immediately separated from the surrogate mother and handed over to the intending parents. Despite this, surrogates undergo considerable physical and emotional strain during pregnancy and childbirth, which underscores the importance of comprehensive support throughout this period.

Regulating maternity benefits for surrogate mothers should therefore be done in a way that supports their health and safety, while also recognizing the complexities of surrogacy. Providing maternity benefits from the time of treatment up to a safe and healthy delivery would not only protect the surrogate mother but also promote ethical practices within the surrogacy process and reinforce the dignity of motherhood.

## CONCLUSION

Globally, India holds the 3rd position in providing a variety of employee benefits, including comprehensive maternity protection, to enhance workplace productivity and support female workers. These maternity-related benefits are essential components of India's labor laws and reflect a commitment to supporting women during an important phase of their lives. However, despite these advances, the female labor force participation rate in India has declined from 24% in 2011 to 19.23% in 2021. This indicates that while policies are in place, their impact is not effectively translating into greater female participation in the workforce.<sup>2619</sup>

Currently, there are approximately 432 million women of working age in India, with 343 million employed in the unorganized sector. Although India has created opportunities aimed at achieving gender equality in the workplace, women's contribution to the national GDP remains at around 19%.<sup>2620</sup> This figure highlights a significant gap between the legal and social empowerment of women and their real-world participation and impact in the economy. The existence of laws designed for women's welfare is not enough if their practical benefits are limited, resulting in low utilization.

Maternity benefits, for instance, are intended to support all women, including those who give birth through surrogacy or adoptive parents.

<sup>2619</sup> Sadhan Kumar Chattopadhyay, Siddhartha Nath & Sreerupa Sengupta, "RECENT DYNAMICS OF WOMEN LABOUR FORCE PARTICIPATION IN INDIA", Volume 66, *The Indian Journal of Labour Economics* 1041, 1041-1048, (2024).

<sup>2620</sup> "ROADMAP FOR WOMEN'S ECONOMIC EMPOWERMENT IN INDIA", IBEF, <https://www.ibef.org/blogs/roadmap-for-women-s-economic-empowerment-in-india>, (26<sup>th</sup> March 2024).

However, the maternity benefits for surrogate mothers are not explicitly mentioned in the regulations. Surrogacy has become an increasingly viable option for couples seeking to experience parenthood, and while there are laws regulating this practice, the process often involves close relatives of the intended parents acting as surrogate mothers.

To address this gap, it is crucial that maternity benefits for surrogate mothers be expressly included and regulated. Recognizing and providing maternity benefits for surrogates would contribute to dispelling myths and misconceptions about surrogacy and would foster a more positive and supportive societal view of women who choose to help others build families. Such measures would not only uplift surrogate mothers but also empower all women by reinforcing their dignity and value, which, in turn, would pave the way for a more inclusive and equitable society. Ultimately, the foundation of society would be unsustainable without the essential contributions and well-being of women.

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