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Surrogate Mothers in Indian Maternity Benefit Law: A Blind Spot or a Blind Eye?

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ABSTRACT

Chapter 6 of the Social Security Code, 2020 provides for maternity leave and benefits in India. While this chapter is inclusive and does not conform to traditional notions of motherhood and pregnancy by including benefits for adoptive parents, commissioning parents and parents who miscarry, there seems to one glaring loophole. This loophole is that for the surrogate mother (child-bearing mother). In India, only altruistic surrogacy is permitted after 2015. Therefore, these surrogate mothers receive no consideration and cannot be renumerated or aided by the commissioning parents. The law seems to be gray on the point of whether surrogate mothers would be eligible for maternity benefit. The paper attempts to locate the Indian treatment of surrogacy within population theories and establish the link between labour legislation and larger policy goals.

Keywords: *Maternity Benefit Law, Labour Law, Surrogacy.*

I. INTRODUCTION

Women, historically, were relegated to the private sphere, discouraged and even seen incapable of forming part of the public/work life. A natural corollary to this was the convenient dismissal of parenthood, particularly maternity, as not being an aspect of work related legislation or discourse. Most countries posit and credit World War 1 as being the hailing moment for kickstarting discourse around maternity leave and benefits[2], possibly because of the formation of the International Labour Organisation[3] in 1919, which provided a platform for expansion of understanding of social welfare in labour laws[4]. The Washington Conference[5] of the ILO, inter alia, introduced the Maternity Protection Convention which is regarded as the earliest attempt to formalise the concept of maternity insurance[6]. However, in India, legislative action was propelled in 1929 when the Bombay Maternity Benefit Bill was tabled and passed by the

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[2] *Family, Maternity and Paternity*, HISTORY OF SOCIAL SECURITY IN SWITZERLAND, https://www.historyofsocialsecurity.ch/risk-history/family-and-maternity.

[3] ILO.

[4] History of the ILO, INTERNATIONAL LABOUR ORGANISATION https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm.

[5] The first ILO conference post its establishment.

[6] C003 - Maternity Protection Convention, 1919 (No. 3).

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Bombay Legislative Council[7]. The debates reveal that maternity benefit were touted to be humanitarian measures and were considered important for both the mother and her child[8]. Subsequently, the Bombay Act found itself repealed when the Indian Parliament passed the Maternity Benefit Act, 1961. The 1961 Act was enacted to consolidate various provincial/state legislations and extend uniformity across the country via this central Act[9]. These continued for half a century till the 2017 amendment ushered in an era of landmark reforms which were the first of their kind ranging from a 26 week paid maternity leave to inclusion of adoptive and commissioning mothers into the fold of maternity law[10]. It is this amended 1961 Act that forms the bulk of Chapter 6 in the *Social Security Code, 2020* entitled 'Maternity Benefit' which remains largely unchanged and has seemingly missed an opportunity to reduce grey areas in the law.

There are multiple aspects and classes of persons that seem to have eluded the new enactment ranging from rights of transgenders, persons with disabilities, fathers, non-binary genders and even those parents with more than 2 children. However, this paper attempts to focus specifically on the rights of the gestational surrogate which have been ignored under the Indian law, make a case for extending maternity leave to such surrogates and to understand the possible rationale of the Government in having ignored their inclusion in the 2020 code.

II. NAVIGATING SURROGACY IN INDIA

Surrogacy is often associated heavily with new age technological and medical developments. This is only partially true because records of 'traditional' surrogacy[11] can be traced back to biblical mentions in 'The Book of Genesis'[12]. Since then, medical advancements have made possible gestational surrogacy which is the process of artificially planting a foreign embryo in the womb of the gestational/biological mother[13] done through in vitro fertilisation. The first recorded case of such a 'test-tube baby' was in 1978 in the USA, which was followed by India's first test tube baby, two months later. Seen as an effective alternative to tackle infertility, this

[7] Amrita Chhachhi, *Who Is Responsible for Maternity Benefit: State, Capital or Husband? Bombay Assembly Debates on Maternity Benefit Bill,1929*, 33(22) EPW 21, 21-22 (1998).
[8] R.S. Asavale's comments on the introduction of the Bill.
[9] Sadanand Jha, *Maternity Benefits at present and their future in India*, 18(2) *Journal of the Indian Law Institute* 332, 323 (1976).
[10] Jean D' Cunha, *India's Bold Maternity Benefit Act Can Become a Game Changer if it Addresses Current Limitations.* 53(31) EPW [2018].
[11] Traditional Surrogacy is the process of begetting a child via the surrogate woman's egg and the sperm of the intended/commissioning father. Such an arrangement is also called partial surrogacy. See: Nayana Hitesh Patel et al., *Insight into Different Aspects of Surrogacy Practices*, 11(3) J HUM REPROD SCI 212, 212 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6262674/.
[12] Worldwide Surrogacy Specialists, *The History of Surrogacy: A Legal Timeline*, WORLDWIDE SURROGACY (Apr. 12, 2021), https://info.worldwidesurrogacy.org/blog/the-history-of-surrogacy-a-legal-timeline.
[13] Nayana Hitesh Patel, *supra* note 11, at 212.

 [ISSN 2581-5369]

progress resulted in the creation of a robust market for surrogates around the world[14]. These surrogates became known as 'wombs for hire' and in 2002, India legalised commercial surrogacy. While these advancements have been hailed by the proponents of human rights theorists, which will become clearer later, champions of family planning and population sociologists cast a shadow over them, beyond just the moral, ethical and legal predicaments of commercial gestational surrogacy.

The Law Commission of India in its 228th Report in 2009 argued for a ban on commercial surrogacy citing various reasons such as that it leads to commoditisation of the child and breaks the mother-child bond[15]. In this landscape then, the Indian government proceeded to ban surrogacy for foreign nationals in 2015 and introduced the *Surrogacy (Regulation) Bill, 2016* in the Lok Sabha which was not to come to fruition at the time, only to be revived in 2019. The Lower house has now ruled to allow only altruistic and not surrogacy with strict evidentiary requirements and narrow guidelines for the potential surrogate such as her age and degree of relation to the commissioning parents. The lens that seems to have been cast over surrogacy is one of exploitation of the surrogate woman and endangerment of the child. Assuming that this is an accurate depiction of the reality, what will essentially transpire is a situation where a surrogate will not be given monetary compensation owing to a ban on it by way of the 2019 Bill; but she will also not be certain that her right to maternity leave and benefits will become effective due the conspicuous silence of the Social Security Code, leaving her even more unprotected and vulnerable. The question that then becomes imminent is whether there is another camouflaged motivation behind the silence of the code particularly, when it recognises surrogacy inasmuch as commissioning parents find mention but not gestational surrogates.

III. A LEGISLATIVE LAPSE OR A DELIBERATE OMISSION

The previous section briefly outlined the Indian treatment of surrogacy. Yet, placing that in the larger context of family planning, population and policy is crucial to understanding the attempt at using social security legislation in systematically discouraging surrogacy and the reasons behind it. This is because world-over, as acknowledged by Tim Lüger, population theories have framed economic and social legislations, becoming defining points in managing per capita GDPs[16]. Therefore, it would be an analytical oversight to ignore or dismiss the effects that such

[14] Radhey Shyam Sharma et al., *Infertility & assisted reproduction: A historical & modern scientific perspective*, 148(7) IJMR 10 (2018), https://www.ijmr.org.in/article.asp?issn=0971-5916;year=2018;volume=148;issue=7;spage=10;epage=14;aulast=Sharma

[15] Law Commission of India, *NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATIONS OF PARTIES TO A SURROGACY*, Report No. 228 (2008).

[16] Tim Lüger, *The principle of population vs. the Malthusian trap: A classical retrospective and resuscitation*,

approaches could and do have on tangential legislations such as the Social Security Code.

Thomas Robert Malthus is credited with one of the most radical theories of family planning and population growth[17]. In a reductive and limited sense, the aspect of his hypothesis that is of significance to the present inquiry is that of 'preventive' restraints on population control which are largely 'moral restraint' and 'positive restraints', which include birth control[18]. He postulated the inverse relationship between poverty and population and gave biological reasons for it. Contrarily, Marx viewed the Capitalist structure to be the root cause wherein the Capitalist manufactured the population problem to enable exploitation of labour[19]. This can be peculiarly viewed in light of the fact that maternity benefits are not being extended to the gestational surrogate by the following three step argument.

The first corollary being that the Indian government has recognised (as Malthus would say) that there is a population problem and has attempted to address it through direct means such as the National Family Planning Programme which incentivises female contraception, the Prime Minister's acknowledgement of it in his 73rd Independence day address[20] along-with the impending Population Control Bill. More importantly it is also done through some rather indirect means such as reducing maternity benefits to women[21] if they opt to have a third child[22] and the two child norm for panchayat elections' eligibility. From this standpoint, the second branch then is that surrogacy has been coloured as morally unacceptable in line with Malthusian 'preventive restraint' but at the same time, the burden of family planning has been levelled on the working class, particularly the labour as they stand to lose the most by the application of these laws. The primary arguments of which are beyond the scope of this paper. However, tying these two observations in with the third moving part, being that it was a considered choice to not include the gestational surrogate, it becomes evident that the intention was to disadvantage or at least disincentivise that segment of the working class which chooses to be a surrogate or have a child through surrogacy.

While considering the Maternity Benefit Bill 2016, a reading of the parliamentary debates

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Darmstadt Discussion Papers in Economics, No. 232, Technische Universität Darmstadt, http://nbn-resolving.de/urn:nbn:de:tuda-tuprints-73419.

[17]Thomas Malthus, *An Essay on the Principle of Population*, ELECTRONIC SCHOLARLY PUBLISHING PROJECT (1798), http://www.esp.org/books/malthus/population/malthus.pdf.

[18] *Id.*

[19] 4 Karl Marx, *Capita: A Critique of Political Economy, The Process of Capitalist Production,* 697-698, (Eden and Paul, International Publishing Company, 1929)

[20] Mahendra Munjpara, *Family planning is at a crucial juncture. Politics must not hamper Modi's message: BJP MP*, THE PRINT, (31 August 2022, 12:48 p.m IST), https://theprint.in/opinion/family-planning-is-at-a-crucial-juncture-politics-must-not-hamper-modis-message-bjp-mp/492461/.

[21] This was also recognized by the Apex Court in T. Priyadharsini v. Govt, 2016 SCC OnLine Mad 30096.

[22] Proviso 1 to Section 60(3) of the Social Security Code, 2020.

reveals that Dr. Kakoli Ghosh Dastidar explicitly called for the inclusion of the surrogate mother within the fold of benefits but was categorically overlooked[23]. It is thus apparent that the exclusion was not an inadvertent lapse but perhaps a carefully made legislative choice to use law as a tool of social engineering. However, the silence of the 2020 code is not watertight and the Courts have and possibly will nullify the unstated.

IV. A CASE FOR MATERNITY LAW TO RECOGNISE GESTATIONAL SURROGATES

Population theorists face the stealthiest opposition from the gatekeepers of human rights. They stress on the inalienable right to dignity and bodily autonomy as also the right to reproductive choice which can be traced back to the ICCPR and CEDAW. Success of surrogacy was a watershed moment as it enabled even those persons who could not conceive to exercise their right to family and motherhood[24]. It is also a nationally and internationally accepted fact that the maternal healthcare is essential and a state's responsibility to provide. General Comment 14 to the ICESCR[25] makes it a non-derogable obligation on the State. This right has a parallel right which is that of right to work and livelihood. The ILO declaration cites it to be a fundamental one. The Indian Supreme Court has also read the right to livelihood in Article 21 and thereby exalting it to the status of a Fundamental Right[26]. The conjunction of these two rights necessitates that pregnant women/individuals[27] are given adequate social security/maternity leave and benefits so as to secure their right to livelihood. This is also in furtherance of Article 42 of the Indian Constitution. None of these documents then envision the creation of an artificial sub-class of women as gestational surrogates who should not be extended maternity benefits[28]. In fact, a counter to the oft cited ethical and moral argument against surrogacy is to ensure adequate renumeration/benefit so as to minimise the exploitation of the gestational surrogate[29].

The 1961 Maternity Benefits Act was bereft of any provisions that covered these seemingly new age ideas. Nevertheless, the foundation for the 2017 amendments was laid by the Madras

[23] http://loksabhadocs.nic.in/debatestextmk/16/XI/09.03.2017.pdf
[24] Motherhood has been read into Article 21 in: Rama Pandey v Union of India, 221 (2015) DLT 756.
[25] CESCR, General Comment No. 14, The Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2000/4 (2000).
[26] Olga Tellis v Bombay Municipal Corporation, AIR 1986 SC 180. See also: Article 39 making right to livelihood Directive Principle.
[27] Recognizing that trans women may also bear children and that there may be non cisgender individuals.
[28] This is noteworthy as the absence of mention of the gestational surrogate would also fail the Article 14 tests of reasonable classification and manifest arbitrariness.
[29] Louise Anna Helena Ramskold and Marcus Paul Posner, *Commercial surrogacy: how provisions of monetary remuneration and powers of international law can prevent exploitation of gestational surrogates*, 39(6) JOURNAL OF MEDICAL ETHICS 397, 400 (2013), https://www.jstor.org/stable/43282765.

 [ISSN 2581-5369]

High Court as far back as 2013 in ***K. Kalaiselvi v Chennai Port Trust***[30] wherein the Port Trust was directed to extend maternity benefits to the commissioning mother. This case provided the groundwork for the decision in ***Rama Pandey***[31] which unequivocally equated the right to motherhood with human rights and brought adoptive and commissioning mothers within the ambit of maternity benefits. The 2017 amendment to the Act came in the same year as this decision and accounted for it. However, in the same duration, the ***Chhattisgarh High Court***[32] had already flagged the loophole of the gestational mother's right in the Act. It noted:

"*….it is quite apparent that* ***no distinction can be made by the State Government to a natural mother, a biological mother and a mother who has begotten child by surrogacy procedure,*** *as right to life under Article 21 of the Constitution of India includes the right to motherhood and also the right to every child to full development. Therefore, the State Government is absolutely unjustified in refusing maternity leave to the petitioner who has begotten twin children by surrogacy procedure……* ***Admittedly, the petitioner has not undergone any prenatal phase which in fact, was undergone by the surrogate mother whose rights are not in issue/lis before this Court***"

Emphasis Supplied

The words of the Court aid our understanding that there was a grey area and it was incumbent upon the legislature to adequately address it. Albeit, the Bench went on to hint that for the purpose of maternity benefits, no distinction between a natural and a biological mother can be drawn. Despite having these judicial guidelines and comments, the Code seems to have stopped short.

Section 2(13) of the 2020 Code defines a only a commissioning mother and such that it leaves scope only for gestational surrogacy and not traditional surrogacy as it categorically applies to only those mothers whose egg is used to create the embryo. The definition section in the new code does not define a 'surrogate' or a 'gestational surrogate'. The only recognition occurs in *Section 91(i)* wherein she is referred to as 'another woman'. This is a problematic exclusion of a vital stakeholder from the text and intent of a welfare legislation. Since no compensation can be offered for carrying the child and the Act provides no safeguard, a gestational mother may be left in want and need of adequate monetary protection[33]. In fact, it is highly likely that she may be further disadvantaged as employers have the onus to not employ a pregnant woman for

[30]K.Kalaiselvi vs Chennai Port Trust, (2013) 3 MLJ 493 (1).
[31] Rama Pandey, *supra* note 24.
[32] Smt. Sadhna Agrawal v. State of Chhattisgarh, 2017 SCC OnLine Chh 19.
[33] Alok Kumar, *Surrogacy and the Laws on Maternity Benefits*, 52(3) EPW 10 (2017).

until 6 weeks after delivery[34] and in the absence of any law that requires them to give her leave instead of firing her, she may also lose out on further work.

However, in the present scenario, the Courts might find themselves obligated to extend benefits to the gestational surrogate because (i) the Act has no explicit bar therefore the language is open to interpretation and welfare legislations are to be construed liberally ; (ii) by virtue of the explanation appended to *Section 60(3),* even a woman who births a stillborn child is entitled to benefits; (iii) *Section 59* extends the benefits of the Chapter to women undergoing a miscarriage or medical termination of pregnancy and (iv) the Courts have also recognised that there are two aspects to maternity benefits, i.e. maternity and motherhood whereby the former is to do with the physical aspects of pregnancy and the latter is to do with child care and bonding[35]. Therefore, the cumulative effect will be to arrive at the conclusion that the mere factum of pregnancy also leads to entitlement to maternity benefits irrespective of whether the woman was birthing her own child or another's. If this was not the case, then there would be no rationale to entitle those women whose pregnancy does not result in a child being born to them such as miscarriages/medical terminations. Along these lines, *Rachel Shute* also argues for a *pari materia* pitfall in the USA's Family and Medical Leave Act[36].

V. BALANCING INTERESTS

One argument that holds water is that the 2020 Code does not envisage any one 'kind' of mother or woman that is eligible for maternity benefits; thus, *any* woman who is pregnant and qualifies the other criteria, is de facto entitled and that could be one reason why a gestational surrogate does not find an obvious mention. This also seems to be the case with other countries such as the UK where the government clarifies that a surrogate is entitled, but the Act only uses the words 'pregnant woman'[37]. It appears that this lacuna was recognised by the UT Administration of Chandigarh and they issued a notification granting maternity leave to both the commissioning and surrogate mother even when they are part of the same organisation, but it leaves some room for discretion with regard to determination of pre and post-natal requests[38]. The notification brings to the fore the baseline tension in labour legislations of the tug between industrial efficacy and worker welfare.

[34] Section 59, Social Security Code, 2020.
[35] P. Geetha, Geetham v. The Kerala Livestock Development Board, (2015) 1 KLJ 494.
[36] Rachel N. Shute, *Family and Medical Leave: Examining Recovery and Bonding Time to Promote Healthy Families Who Utilize Surrogacy*, 51(1) FAMILY LAW QUARTERLY, 95 (2017), https://www.jstor.org/stable/26425777
[37] UK Government, *Surrogacy: legal rights of parents and surrogates*, GOVUK (Jun. 7, 2021, 8:20 p.m. IST), https://www.gov.uk/legal-rights-when-using-surrogates-and-donors/maternity-leave.
[38] Chandigarh Administration, *Grant of Maternity Leave to Commissioning Mother and Surrogate Mother*, No. 28/1/94-IH(7)-2020/2269, http://chandigarh.gov.in/pdf/dop20-2269.pdf.

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Uma and Kamnath highlighted that with surrogacy, two women will avail benefits for one child[39].Even when the Courts attempt to bifurcate pre and post-natal entitlements, the gestational mother would have to be accorded full 26 weeks of leave and the commissioning mother 12 weeks. However, and especially when these mothers are part of the same establishment, certain other ambiguities also must be determined such as would both of them be given nursing breaks or only the nursing mother; further, within the entitlement of the 26 weeks of leave, only 8 are allowed to be pre-natal[40], the remaining are to be post-natal, this division is cognisant of the fact that maternity leave includes child rearing and not just child bearing. However, perhaps, a gestational surrogate should only be entitled to pre-natal leave and the mandatory 6 weeks post-natal[41]. This would go a long way in striking a just balance between worker welfare and industrial productivity.

Brushing surrogacy under the carpet may not have the chilling effect on the procedure that seems to be the goal of the legislature, it will merely hamper women's access to their rightful entitlement which is already dwindling.

VI. REFFORM RECOMMENDATION

It remains unchallenged that the Indian stance on maternity benefits has been blazing the path for forward and inclusive ideas of motherhood, maternity and equity. However, as shown, maternity benefits have also been systematically used to push policy agendas such as the one against surrogacy. A legislative instrument must strive to be comprehensive and, minimise discretion and areas that may turn litigious. The 2020 code would be a far more rounded Act if it is amended with clearer laws so as to explicitly include the gestational surrogate and demarcate maternity benefits between the two women. It would ensure uniformity and limit easily avoidable litigation.

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[39] Uma and Kamnath, *Gamechanger or a Trojan Horse?*, 55(20) EPW (2020), https://www.epw.in/journal/2020/20/review-womens-studies/gamechanger-or-trojan-horse.html

[40] Section 60(3), Social Security Code, 2020.

[41] Lawrence M. Berger and Jane Waldfogel, Maternity Leave and the Employment of New Mothers in the United States, 17(2) Journal of Population Economics 331 (2014), https://www.jstor.org/stable/20007911.