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In Depth – New Surrogacy Bill

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Surrogacy (Regulation) Bill, 2019 has been introduced in the Lok Sabha. The Bill aims to **prohibit commercial surrogacy** in India.

Commercial surrogacy, a practice also known as '**Rent a Womb**', was legalised in India in the year 2002, in order to promote medical tourism. And soon, India became the hub of surrogacy. Driven by factors like **low cost** and the **absence of a strict legislation**, commercial surrogacy became a booming business in the country.

According to a 2012 study by the Confederation of Indian Industry, the size of India's surrogate motherhood industry was \$2 billion a year. Another 2012 study backed by the United Nations estimated the economic scale of the Indian surrogacy industry to be 400 million dollars a year with more than 3,000 fertility clinics across the country.

However, the **unregulated business of surrogacy** led to concerns over the rampant exploitation of surrogate mothers as well as their children, prompting the need for a legislation to regulate surrogacy in the country.

Features of the Surrogacy (Regulation) Bill, 2019

- It provides for constitution of **surrogacy boards** at the national as well as state levels to ensure effective regulation.
- It seeks to **allow ethical altruistic surrogacy** to the intending infertile Indian married couple between the age of 23-50 years for female and 26-55 years for male.
- Only Indian couples who have been **legally married for at least 5 years** would be allowed to opt for surrogacy.
- It makes it mandatory for the couple to obtain a certificate of essentiality and also a certificate of eligibility before going ahead with surrogacy. It also provides that intending couples should not abandon the child born out of surrogacy under any condition.
- It also stipulates a separate **eligibility criterion** for the **surrogate mother**.
 - The surrogate must be a close relative of the intending couple and be a married woman having a child of her own.
 - She should be between the age of 25-35 years, not have been surrogate earlier and must be certifiably mentally and physically fit.
- On the **legal status of a surrogate child**, the Bill states that any child born out of a surrogacy procedure shall be the biological child of the intending couple.

The new born child shall be entitled to all rights and privileges that are available to a natural child.
- The Bill also seeks to regulate **functioning of surrogacy clinics**. All surrogacy clinics in the country need to be registered by the appropriate authority in order to undertake surrogacy or its related procedures.
- The Bill provides for various **safeguards for surrogate mothers**. One of them is insurance coverage for sometime to cover not only the period of pregnancy but after that also.
- It also specifies that **no sex selection** can be done when it comes to surrogacy.

Background

- In recent years, **India** has emerged as a **surrogacy hub** for couples from other countries.

- There were multiple reports concerning unethical practices, exploitation of surrogate mothers, abandonment of children born out of surrogacy and **rackets** involving intermediaries **importing human embryos and gametes** prompting the need for a stringent law on surrogacy.
 - The surrogates generally turn out to be poor illiterate women of rural background who are persuaded by their spouse or middlemen to enter such deals to earn easy money. **These women have no power to decide about their own body and life.**
 - After recruitment by the commercial agencies, these women are shifted to hostels on the pretext of taking antenatal care. The real motive is to cart them and avoid social stigma of being made outcaste by their community. These women end up spending the whole tenure of pregnancy worrying about their household and children.
 - The worst part is that in case of unfavourable outcome of the pregnancy they are **unlikely to be paid** and there is no provision of insurance or post-pregnancy medical and psychiatric support for them.
 - Due to lack of proper legislation, sometimes, both surrogate mothers and intended parents are exploited. **Only middlemen and commercial agencies profit from the arrangement.**
 - The most unequal party in the surrogacy contract, however, remains the child that results from it. There are also incidents when the child given to the couple after surrogacy is not genetically related and in turn is disowned by the intended parent and the child has to spend his/her life in an orphanage.
- The **Law Commission of India** also highlighted the need to enact such a law. In its 208th report, the commission **recommended prohibiting commercial surrogacy** citing concerns over the prevalent use of surrogacy by foreigners and the lack of a proper legal framework resulting in exploitation of the surrogate mother who may have been coerced to become a surrogate due to poverty and lack of education.

Criticism of the Bill

- **It prevents same sex couples from having surrogate children** even though there is a credible scientific research to show that same sex parents are as good as heterosexual parents, thus **violating the Article 14** of the Constitution.
- The Bill also **violates the Puttaswamy judgement** of the Supreme Court (Right to privacy was added in the list of fundamental rights guaranteed by the Constitution).
- The eligibility condition under the Bill amounts to unreasonable **restriction on the reproductive rights of a married Indian couple**, violative of Article 21 of the constitution.

Surrogacy

- It occurs when a **woman agrees to gestate a baby for another couple** or individual.
- There are two kinds of surrogacy- **gestational and traditional**.
- In **gestational surrogacy** the embryo that is fertilised by the in-vitro method is implanted into the uterus of the surrogate mother who then carries and delivers the baby.

Gestational surrogacy became popular in India due to advances in reproductive medicine, a large pool of impoverished women and low cost compared to countries such as the United States, Canada and Australia.

- In **traditional surrogacy**, the surrogate mother is impregnated with the sperm of the intended father artificially which makes her both the genetic and gestational mother.
- Surrogacy can be **commercial or altruistic** depending upon whether the surrogate is paid money for her pregnancy.
- The world has warmed up to the concept of surrogacy that allows childless couples or single persons to become parents.
- Most countries allowing surrogacy have framed their own laws for regulating surrogacy and also protecting the rights of surrogate as well as the child.

Problems Associated with Cross-Border Surrogacy

- For cross border **childless couples**, not only do they have to cope up with the language barrier, they sometimes have to fight long **legal battles** to get their children.
- Cross border surrogacy also leads to **problems in citizenship, nationality, motherhood**, parentage and rights of a child. Children are at times denied nationality of the country of the intended parents.
- **Lack of an international law** on surrogacy creates complications for surrogates as well as intending parents. It is quite possible that there are different surrogacy laws in the home country and the country where the baby is born.
- Many experts argue that **an international agreement similar to the Hague Adoption Convention** could provide consistency across countries thereby making the process more streamlined.

Laws Governing Surrogacy in Different Countries

- While countries like Britain, America, Australia, the Netherlands and Denmark are among those where altruistic surrogacy is legal, countries such as France, Germany, Italy, Spain, Portugal and Bulgaria prohibit all forms of surrogacy.
- Armenia, Georgia, Kazakhstan, Russia, Ukraine allow both altruistic and commercial surrogacy.
- Kenya, Malaysia and Nigeria do not prohibit surrogacy but have no formal law to regulate the practice.
- The Czech Republic, Colombia, Chile and Hungary are among countries with unregulated surrogacy.

In Britain

- Commercial Surrogacy is not legal in the United Kingdom.
- The surrogate is the child's legal parent at birth. Legal parenthood can be transferred by parental order or adoption only once the child is born.

In USA

- The surrogacy laws vary from state to state.
- Surrogacy friendly states allow both commercial and altruistic surrogacy. Arkansas, California, New Hampshire are some such surrogacy-friendly states.
- New York does not allow commercial surrogacy and Michigan forbids absolutely all surrogacy agreements.

In Canada

- Canada's Assisted Human Reproduction Act permits only altruistic surrogacy.
- Surrogate mothers may be reimbursed only for approved expenses.
- However, all surrogacy arrangements are illegal in Quebec in Canada.