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**INTRODUCTION OF THE SURROGACY (REGULATION) BILL, 2019**

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**ABSTRACT**

In 2012, Justice K.S. Puttaswamy, in a milestone judgment, had perceived the established right of ladies to settle on regenerative decisions, referring to individual freedom under Article 21 of the Indian Constitution. Actually, this was as basic as other key rights, which is the thing that Pragma Vats, who works with a global NGO and is single, vouches for. "It's about opportunity of decision and articulation," she says. "As ladies, we should have the option to possess our bodies. The law shouldn't infringe on that opportunity." The new Surrogacy (Regulation) Bill, 2019 doesn't ignore this contention yet makes the condition that lone legitimately wedded hetero couples can choose surrogacy. Presently this prohibits single people, divorced people, live-in couples, widows and single men, gay couples among others. One more condition is that couples ought to have been hitched for a long time and should be guaranteed 'barren' so as to have the option to enlist surrogates. It likewise says that under charitable surrogacy no money related advantages ought to be included other than the restorative costs and protection.

"Parenthood is past sex, sexuality or sexual inclinations! On the off chance that you are barring anybody from profiting surrogacy, in view of sexuality, position, religion, sex or sexual, it's a gross infringement of human rights. The ongoing surrogacy bill will forbid same sex couples and LGBTQ individuals from turning out to be guardians through surrogacy, which is truly disavowal of equity for sexual minorities in India. Keep in mind, gay individuals are conceived from hetero acts as well," says Abhina Aher, partner chief, Alliance India, and a trans rights lobbyist who distinguishes herself as transgender.

A gander at history uncovers that India's first IVF child was brought into the world through a surrogate authorized by a solitary man in 1978. The Surrogacy (Regulation) Bill 2019 stipulates that "a wedded lady between the ages of 25 and 35 who has her very own offspring can be a surrogate or can help in surrogacy by giving her egg". It additionally puts forth the defense for benevolent surrogacy by expressing that the surrogate mother ought to be a nearby relative of the "expecting couple" and should just turn into a surrogate once in her lifetime. Likewise, under the new law, a lady is prohibited from turning into a surrogate mother by giving her very own gametes (unfertilised eggs).

**Introduction**

Union Cabinet gave its nod to the Surrogacy Regulation Bill 2019, the bill that aims to prohibit commercial surrogacy was introduced in the Lok Sabha on the 15th of July. Commercial surrogacy a practice also known as rent a womb was legalized 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 surrogate motherhood industry was 2 billion dollars a year. A study backed by the United Nations also conducted in the year 2012 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 but the unregulated business 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. The Surrogacy (Regulation) Bill 2019 seeks to ban commercial surrogacy and contravention of the bill can invite imprisonment up to 10 years and fine up to Rs 10 lakh. The bill was passed by the 17th Lok Sabha by a voice vote in the Budget Session and moved for consideration to the Upper House by Health Minister Harsh Vardhan on November 19. A practice whereby a woman bears a child for an intending couple with the intention of handing over the child to them after birth is surrogacy. There is little doubt that this is a personal choice of the individuals involved—motivated by whatever reason—and it is only reasonable to expect that individuals' right to freedom of choice be respected. Commercial surrogacy is undertaken for monetary gain and it is but obvious that this cannot be a lasting means of minting money in case any detrimental downside is suspected. However, altruistic surrogacy, which is allowed, involves no monetary compensation to the surrogate mother other than medical expenses and insurance coverage during the pregnancy—making the massively impactful act of surrogacy virtually an act of charity. Rajya Sabha seeks a review of the provision which allows only a close relative to act as a surrogate for couples who are married for at least five years and are within the age group of 23-50 years for women and 26-55 for men. Some members of the Upper House were of opinion that with the changing fabric of the society, getting close relatives to act as a surrogate will be difficult. Women's welfare organisations have also said that the select committee should pay attention to various issues which have not been addressed in the bill. It is the natural right of a couple to want and have a child and if there is anything the state should do in this respect; it is to help and enable the individuals to exercise their right

and their choice. A more progressive move would be to make provisions that will prevent any foul play in this regard and support the surrogate mother.

### **The Surrogacy (Regulation) Bill, 2019**

The Bill defines surrogacy as a practice where a woman gives birth to a child for an intending couple with the intention to hand over the child after the birth to the intending couple.

Regulation of surrogacy: The Bill prohibits commercial surrogacy but allows altruistic surrogacy. Altruistic surrogacy involves contracting a 'close relative' as a surrogate by a heterosexual married couple and no monetary compensation to the surrogate mother other than the medical expenses and insurance coverage during the pregnancy. Commercial surrogacy includes surrogacy, or its related procedures undertaken for a monetary benefit or reward (in cash or kind) exceeding the basic medical expenses and insurance coverage.

It's a mystery, yet recently single ladies were being given inclination in selection. In 2017, the administration declared that it would encourage receptions by single ladies. A board of trustees under the Ministry of Women and Child Development (WCD) had pushed for single ladies who were 40 or more and monetarily stable to be knock up the rundown and given status of a half year once they enlisted for selection. While there have been concerns raised over unregulated ripeness treatment in the nation including IVF, a law drafted by the Indian Council of Medical Research (ICMR) in 2008- - the Artificial Reproductive Technology (ART) Bill to guarantee that "administrations gave are moral and that the therapeutic, social and legitimate privileges of each one of those concerned are secured"- - is yet to be postponed in Parliament. Surrogacy is a piece of it.

With respect to 'financial advantages', one 40-year-old single lady (who didn't wish to be distinguished) says the new bill encroached on her privileges over her own body. "It's my body, I ought to have the option to utilize it for money," she says. She additionally felt that the standard banning live-in couples from going for surrogacy was "ridiculous". Path in 1978, the Supreme Court had decided that live seeing someone were substantial. "In the event that the peak court perceives live seeing someone as substantial and much the same as wedded couples on the off chance that they have lived respectively for an extensively significant time-frame, in what manner can a bill say such couples can't go for surrogacy since they are not "legitimately hitched"? This bill is oppressive," she says.

"My normal mien is to be careful about any guideline on ladies' bodies, particularly with regards to grown-up ladies and restorative choices about their very own bodies. Yet, I have seen direct how ladies can get compelled to 'loan' their bellies by spouses and in-laws who are upbeat that there is no sex included, and don't generally think about the enthusiastic, medicinal and physical repercussions on the lady going about as surrogate. There is a great deal of cash to be made here, far more than prostitution and with no dread of social shunning. So I can perceive how this new law will help stem the backhanded maltreatment of these ladies," she says. The Surrogacy Bill, presented by Union wellbeing priest Harsh Vardhan, will accommodate setting up of a National Surrogacy Board, state surrogacy sheets and the arrangement of proper experts for the guideline of the training. The priest additionally put forth a defense for the bill, saying it would end the abuse of ladies and secure the privileges of youngsters brought into the world through surrogacy

### **Purposes for which surrogacy is permitted**

Surrogacy is permitted when it is:

- (i) for intending couples who suffer from proven infertility;
- (ii) altruistic;
- (iii) not for commercial purposes;
- (iv) not for producing children for sale, prostitution or other forms of exploitation; and
- (v) for any condition or disease specified through regulations.

### **Who can be a surrogate mother?**

Chapter I of the Bill defines a surrogate mother as, "a woman bearing a child (who is genetically related to the intending couple) through surrogacy from the implantation of the embryo in her womb...". A married woman between the ages of 25 and 35 who has a child of her own can be a surrogate or can help in surrogacy by donating her egg. The surrogate mother needs to be a close relative of the intending couple and can become a surrogate only once in her lifetime. Additionally, a woman cannot become a surrogate mother by providing her own gametes (unfertilised eggs).

**When is surrogacy permitted?**

As per the Bill, only altruistic surrogacy will be permitted in India, in cases where either or both members of the couple suffer from infertility, of which the certificate of essentiality is proof. Additionally, a certificate of eligibility is issued to the intending couple and is proof that the couple has been married for at least five years and are Indian citizens. The wife must be in the age group of 23-50, and the husband in the age group of 26-55.

The intending couple should not have any surviving biological child, through adoption or through surrogacy. An exception is made if the intending couple has a surviving child who is mentally or physically challenged or is suffering from a fatal illness with no permanent cure.

**Where can surrogacy procedures be carried out?**

Only surrogacy clinics registered under the Surrogacy (Regulation) Act, 2019 will be able to perform procedures related to surrogacy. The Bill defines surrogacy procedures as “all gynaecological, obstetrical or medical procedures, techniques, tests, practices or services involving the handling of human gametes and the human embryo in surrogacy”.

**Who can be guilty of commercial surrogacy?**

According to the Bill, if an individual is found advertising or undertaking surrogacy, exploiting the surrogate mother, selling, importing, purchasing or trading human embryos or gametes for surrogacy, conducting sex selection for surrogacy, or has abandoned, exploited or disowned a surrogate child, he/she can be liable for imprisonment of up to 10 years and a fine of up to Rs 10 lakh.

**Other provisions**

In case abortion of a surrogate foetus is considered, only the consent of the surrogate mother is required, as per the provisions under the Medical Termination of Pregnancy Act, 1971. The intending couple has no say in this decision. On the other hand, after being born, the child is the biological child of the intending couple

**Eligibility criteria for intending couple**

The intending couple should have a ‘**certificate of essentiality**’ and a ‘**certificate of eligibility**’ issued by the appropriate authority.

A **certificate of essentiality** will be issued upon fulfilment of the following conditions: (i) a certificate of proven infertility of one or both members of the intending couple from a District Medical Board; (ii) an order of parentage and custody of the surrogate child passed by a Magistrate’s court; and (iii) insurance coverage for a period of 16 months covering postpartum delivery complications for the surrogate. The **certificate of eligibility** to the intending couple is issued upon fulfilment of the following conditions: (i) the couple being Indian citizens and married for at least five years; (ii) between 23 to 50 years old (wife) and 26 to 55 years old (husband); (iii) they do not have any surviving child (biological, adopted or surrogate); this would not include a child who is mentally or physically challenged or suffers from life threatening disorder or fatal illness; and (iv) other conditions that may be specified by regulations.

**Eligibility criteria for surrogate mother:** To obtain a certificate of eligibility from the appropriate authority, the surrogate mother must be:

- a close relative of the intending couple;
- a married woman having a child of her own;
- 25 to 35 years old;
- a surrogate only once in her lifetime;
- possess a certificate of medical and psychological fitness for surrogacy. Further, the surrogate mother cannot provide her own gametes for surrogacy.

**Appropriate authority:** The central and state governments shall appoint one or more appropriate authorities within 90 days of the Bill becoming an Act. The functions of the appropriate authority include;

- granting, suspending or cancelling registration of surrogacy clinics;
- enforcing standards for surrogacy clinics;
- investigating and taking action against breach of the provisions of the Bill;
- recommending modifications to the rules and regulations.

**Registration of surrogacy clinics**

Surrogacy clinics cannot undertake surrogacy related procedures unless they are registered by the appropriate authority. Clinics must apply for registration within a period of 60 days from the date of appointment of the appropriate authority.

**National and State Surrogacy Boards:** The central and the state governments shall constitute the National Surrogacy Board (NSB) and the State Surrogacy Boards (SSB), respectively. Functions of the NSB include,

- advising the central government on policy matters relating to surrogacy;
- laying down the code of conduct of surrogacy clinics; and
- supervising the functioning of SSBs.

**Parentage and abortion of surrogate child:** A child born out of a surrogacy procedure will be deemed to be the biological child of the intending couple. An abortion of the surrogate child requires the written consent of the surrogate mother and the authorisation of the appropriate authority. This authorisation must be compliant with the Medical Termination of Pregnancy Act, 1971. Further, the surrogate mother will have an option to withdraw from surrogacy before the embryo is implanted in her womb.

**Offences and penalties**

The offences under the Bill include:

- undertaking or advertising commercial surrogacy;
- exploiting the surrogate mother;
- abandoning, exploiting or disowning a surrogate child;
- selling or importing human embryo or gametes for surrogacy.

The penalty for such offences is imprisonment up to 10 years and a fine up to 10 lakh rupees. The Bill specifies a range of offences and penalties for other contraventions of the provisions of the Bill.

- The Surrogacy (Regulation) Bill, 2019 was introduced by the Minister of Health and Family Welfare, Dr. Harsh Vardhan in Lok Sabha on July 15, 2019. The Bill defines

surrogacy as a practice where a woman gives birth to a child for an intending couple with the intention to hand over the child after the birth to the intending couple.

- **Regulation of surrogacy:** The Bill prohibits commercial surrogacy but allows altruistic surrogacy. Altruistic surrogacy involves no monetary compensation to the surrogate mother other than the medical expenses and insurance coverage during the pregnancy. Commercial surrogacy includes surrogacy, or its related procedures undertaken for a monetary benefit or reward (in cash or kind) exceeding the basic medical expenses and insurance coverage.
- **Purposes for which surrogacy is permitted:** Surrogacy is permitted when it is: (i) for intending couples who suffer from proven infertility; (ii) altruistic; (iii) not for commercial purposes; (iv) not for producing children for sale, prostitution or other forms of exploitation; and (v) for any condition or disease specified through regulations.
- **Eligibility criteria for intending couple:** The intending couple should have a ‘certificate of essentiality’ and a ‘certificate of eligibility’ issued by the appropriate authority.
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- **Parentage and abortion of surrogate child:** A child born out of a surrogacy procedure will be deemed to be the biological child of the intending couple. An abortion of the surrogate child requires the written consent of the surrogate mother and the authorisation of the appropriate authority. This authorisation must be compliant with the Medical Termination of Pregnancy Act, 1971. Further, the

surrogate mother will have an option to withdraw from surrogacy before the embryo is implanted in her womb.

- **Offences and penalties:** The offences under the Bill include: (i) undertaking or advertising commercial surrogacy; (ii) exploiting the surrogate mother; (iii) abandoning, exploiting or disowning a surrogate child; and (iv) selling or importing human embryo or gametes for surrogacy. The penalty for such offences is imprisonment up to 10 years and a fine up to 10 lakh rupees. The Bill specifies a range of offences and penalties for other contraventions of the provisions of the Bill.

### **View of LCI**

228<sup>th</sup> LCI report recommended prohibiting commercial surrogacy and allowing ethical altruistic surrogacy to the needy Indian citizens by an apt legislation.

### **Advantages of the Bill**

The Bill comes at a time when there is a huge need for legislation covering this subject. The Bill focuses on preventing commercialization of surrogacy, prohibit potential exploitation of surrogate mothers and children born through surrogacy.

### **Criticism**

- The Bill raises questions over the reproductive rights of a woman. The right to life enshrines the right of reproductive autonomy, inclusive of the right to procreation and parenthood, which is not within the domain of the state, warranting interference of a fundamental right. It is for the person and not the state to decide modes of parenthood. It is the prerogative of person(s) to have children born naturally or by surrogacy in which the state, constitutionally, cannot interfere.
- Restricting limited, conditional surrogacy to married Indian couples and disqualifying other persons on the basis of nationality, marital status, sexual orientation or age does

not appear to qualify the test of equality (article 14), or of being a reasonable classification, satisfying the objective sought to be achieved.

- The bill deprives single parents, homosexuals of availing the bliss of parenthood through surrogacy
- Infertility cannot be compulsory to undertake surrogacy. This violates the Freedom of choice available to citizens
- The Indian Council for Medical Research (ICMR), working under the ministry of health and family welfare, finalised the National Guidelines for Accreditation, Supervision and Regulation of Artificial Reproductive Technology (ART) Clinics in India, 2005, after extensive public debate all over the country with all stakeholders. In that it had been stipulated that there shall be no bar to the use of ART by single women who would have all the legal rights and to whom no ART clinic may refuse to offer its services for ART. Likewise, there was no legal bar on an unmarried woman going in for Artificial Insemination with donor semen (AID) and a child born to a single woman through AID would be deemed legitimate. By anomaly, single men too could claim this right. These guidelines have not been rescinded till date. Successive draft ART (Regulation) Bills in 2008, 2010 and 2013, had reportedly proposed that ART in India would be available to all, including single persons and foreign couples.

### **Surrogacy Laws Worldwide**

Most countries that allow surrogacy have framed laws to regulate it, thereby also protecting the rights of the surrogate while countries like Britain, America, Australia, Netherlands and Denmark are among those where altruistic surrogacies is legal. Countries such as France, Germany, Italy, Spain, Portugal and Bulgaria prohibit all forms of surrogacy.

#### **United Kingdom:**

- 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.

**United States of America:**

- In the United States of America 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.
- Michigan forbids absolutely all surrogacy agreements.

**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

Armenia, Georgia, Kazakhstan, Russia and Ukraine allow both altruistic and commercial surrogacy.

Kenya, Malaysia and Nigeria don't prohibit surrogacy but have no formal law to regulate the practice.

Czech Republic, Colombia, Chile and Hungary are among countries with unregulated surrogacy.

Surrogacy is prohibited in Cambodia, Denmark, France, Germany, Italy and Spain and some other countries.

However, a lack of internationally recognised laws creates difficulties for aspiring parents. In cases where intended parents go to surrogacy friendly countries, it can take a long time to bring a surrogate baby back to their home country. This is due to 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.

**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 some time 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.

**Surrogacy in India and Need for Regulation**

- **According to the Black's Law Dictionary, surrogacy means the process of carrying and delivering a child for another person.**
- Thus, a surrogate mother is a woman who bears a child on behalf of another woman, either from her own egg or from the implantation in her womb of a fertilized egg from another woman.
- **The world's second and India's first IVF (in vitro fertilization) baby, Kanupriya alias Durga was born in Kolkata on October 3, 1978.** Since then, the field of assisted reproductive technology (ART) has developed rapidly.
- Increasing infertility as a medical condition is a huge impediment in the overall well-being of couples and cannot be overlooked especially in a patriarchal society like India. Herein, surrogacy comes as a supreme saviour.
- In India, while **the parents construct the child biologically, the child constructs the parents socially.**
  - Woman in India is respected as a wife if she is the mother of a child so that her husband's masculinity and sexual potency are proved, and the lineage continues.
  - That's why surrogacy in India rather being a choice but is also a compulsion in Indian society.
- **Low cost:** Surrogacy cost in India is around 1/3rd of that in developed countries like the USA.
  - This had made India a favourable destination for foreign couples who look for **cost-effective treatment for infertility** and a whole branch of **medical tourism** has flourished on the surrogate practice.
  - Citing this malpractice of “renting the womb”, the government of India banned the surrogacy for foreign nationals in 2015.
- Due to all these factors surrogacy leads to **commoditization of the child.** Renting of the womb **breaks the bond between a mother and the child, interferes with**

**nature** and in many cases leads to exploitation of both poor women and the child Born.

- **Middlemen and clinics:** Surrogates have been reported to be exploited by the agents or the middlemen. There has not been any process to monitor the clinics or any law to ensure that the mothers are not defrauded by the clinics or the intending couples.
- **Negligence and lack of care:** The surrogate's mothers are not given good food or medical treatment and postpartum care are non-existent.

### **What are the issues related to Surrogacy (Regulation) Bill 2019?**

- Currently, Surrogacy in India is legitimate because no Indian law prohibits surrogacy. **However, Surrogacy (Regulation) Bill 2019 seeks to prohibit commercial surrogacy and provide only for Altruistic surrogacy.**
- Altruistic surrogacy includes contracting a 'close relative' as a surrogate by a heterosexual married couple who have been childless for five years of their marriage.
  - However, the Bill lacks the definition of the 'close relative'.

### **Altruistic surrogacy vs commercial surrogacy**

Commercial surrogacy involves an agreement, which includes monetary compensation to the surrogate mother along with medical expenses associated with the pregnancy. Altruistic surrogacy focuses on providing no monetary compensation to the surrogate mother

- The Bill specifies that the intending couples should be **married Indian couples**. There is no mention of Non-Resident Indians working or studying abroad who may want to come back home to have a baby.
- **Exclusionary:** The Bill leaves out a lot of people who might want to have a baby through surrogacy, **including unmarried couples, homosexual couples and single men and women.**

- Having a child is a basic human right. **Declaration of Human Rights 1948** says, inter alia, that “men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family”.
- The Judiciary in India also has recognized the reproductive right of humans as a basic right.
- **If the reproductive right is basic constitution right, then the right to have a child through surrogacy should also be a basic constitutional right.**
- The Bill further clarifies that any form of monetary **compensation or advertising about the act of surrogacy is a punishable criminal offence.**
  - But due to this, the livelihood of poor women who are engaged in commercial surrogacy will get compromised.
- There is a mention of regulation on ‘donor eggs’ in the Surrogacy Bill, however, there is no concrete law regulating assisted reproductive technologies.
- **Due to the prevalence of clandestine ART clinic, it is hard to regulate commercial surrogacy, this accompanied by prohibited commercial surrogacy will further lead to the exploitation of women.**
- Bill also prohibits ‘**fashion surrogacy**’ as only the couple who are infertile can opt for surrogacy.

### Way Forward

- For surrogacy to happen, we need embryos, and embryos are cultured in various In-Vitro Fertilisation (IVF) laboratories. **So, regulation of surrogacy must be preceded by law on Assisted Reproductive Technology (ART).**
- Rather than penalising surrogacy, the person providing a womb for surrogacy must be secured with a contract, ensuring proper, insurance and medical checks.
- Right to privacy of donor as well as surrogate mother should be protected.
- Surrogacy should be made inclusive for all class of people irrespective of their sexuality

The Surrogacy (Regulation) Bill 2019 cements the ban on commercial surrogacy, but it fails to effectively tackle the larger social, physical, psychological, emotional and economic issues that continue to challenge the welfare and safety of both the surrogate mother and the child.

Just the removal of the commercial aspects in the current surrogacy arrangements does not remove the chances of exploitation. So the rights of surrogate mother and child born must comprehensively be formulated, along with that ART must be regulated thoroughly.