

# Human reproductive rights: Can the law keep pace with science?

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**23rd Commonwealth Law Conference 2023**

*March 2023*



## Surrogacy

- Derived from Latin 'surrogatus', meaning a substitute, that is, a person appointed in the place of another.
- An arrangement in which a couple (intending parent) or woman (intending woman) agrees to have a child through the womb of another woman (surrogate mother).

## Artificial reproductive technology (ART)

- All techniques that attempt to obtain a pregnancy by handling the sperm or the oocyte outside the human body and transferring the gamete or the embryo into the reproductive system of a woman.

# Things to keep in mind regarding surrogacy



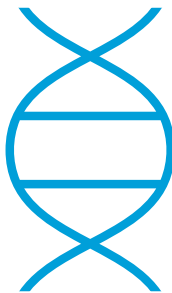
**Genetic mother**



**Commissioning  
mother**



**Surrogate mother**



**Genetic father**



**Commissioning  
father**

01

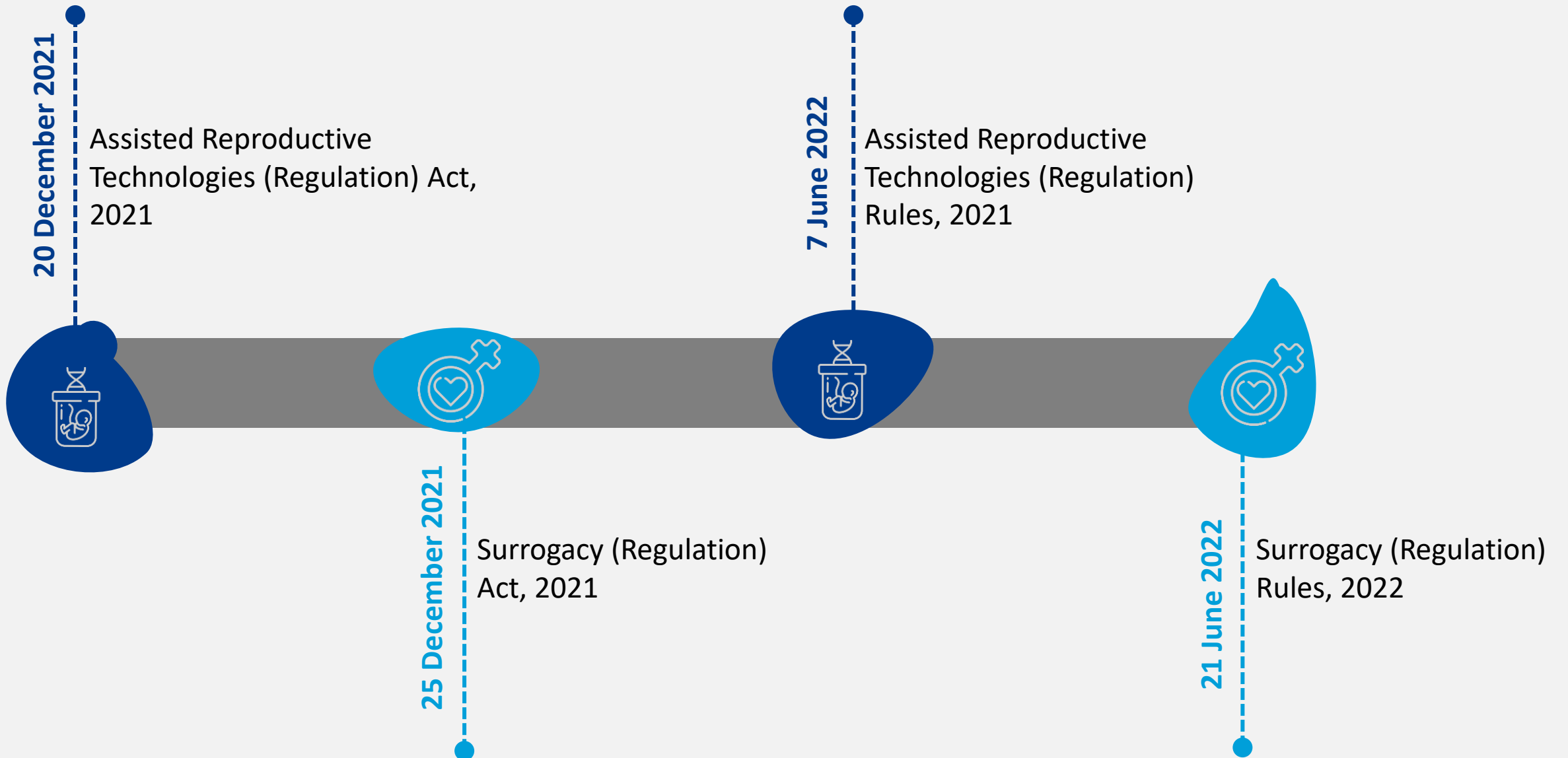
India's first and world's second IVF baby was born in Kolkata in 1978.

02

Shortly after, India emerged as a hub for transnational surrogacy, being a major destination for couples from US and Europe and for *inter alia* the following reasons:

- absence of regulations,
- low cost of fertility clinics, and
- a large number of poor women willing to provide this service.

# A new dawn in India in 2021: Law introduced



Altruistic surrogacy only; Commercial surrogacy prohibited and penalized.

Gestational surrogacy only

### Pre-requisites to commissioning surrogacy:

- **Compensation to surrogate:** No monetary compensation; 36 months of insurance cover to be purchased by the intending parent(s) in favor of surrogate.
- **Safeguarding parental status:** Order of parentage to be obtained from court of Magistrate of First Class or above before commissioning surrogacy.
- **Consent / surrogacy agreement:** To be obtained in the prescribed format.

### Who can commission surrogacy?

- **Marital Status:** (i) Legally married couple / (ii) Woman (widow or divorcee only)
- **Nationality:** Indian citizens (and Persons of Indian Origin in certain cases) only
- **Age:** (i) Couple – husband (26-55 years) and wife (23 -50 years); (ii) woman (35-45 years)
- **Children:** No surviving child (biological, adopted or surrogate) / child with fatal physical or mental illness
- **Medical necessity:** Medical indication necessary. This includes:
  - i. If the woman has no uterus or missing uterus or abnormal uterus; OR
  - ii. Parents have failed after multiple IVF attempts; OR
  - iii. Multiple pregnancy losses resulting from an unexplained medical reason; OR
  - iv. Any other illness that makes pregnancy impossible.

### Who can be a surrogate?

- **Marital Status:** Married
- **Children:** Have a biological child
- **Age:** Between 25 to 35 years
- **Consent:** Out of her own free will
- **Egg donation:** Does not provide her own oocytes (gestational surrogacy)
- **History of surrogacy:** Must not be a surrogate mother in past
- **Medical screening:** Provides a certificate of medical and psychological fitness for surrogacy procedures from a registered medical practitioner



## ART organizations classified into 2 categories:

- i. ART Banks: For collection, storage, supply of gametes
- ii. ART Clinics: Medical premises where ART procedures take place

Registration of ART Banks and ART Clinics compulsory – valid for 5 years

Grievance cell mandatorily to be maintained by ART organizations

Reporting Requirements: ART organizations to share data of donors screened, maintained, etc and ART procedures with National Registry

Confidentiality: ART organizations to keep information about commissioning couple / donor confidential. Disclosure of treatment information only permitted: (a) to National Registry's database; (b) in a medical emergency with consent from relevant commissioning couple; and (c) by court order

Sale / transfer of gametes within or outside India prohibited except for own gametes for personal use – where permission from National Board is required. Sale / purchase / trading of gametes penalized

Advertising related to sex-selection related ART procedures is prohibited

### Donor related restrictions / Duties of ART Banks:

- i. Age: Male (21-55 years); and Female (23-55 years)
- ii. Medical screening for communicable diseases
- iii. ART Banks shall not supply sperm or oocyte of a single donor to more than one commissioning couple
- iv. Consent from donors and their use to be obtained and maintained by the ART Banks in prescribed format
- v. Oocyte donor can donate only once and ART Banks cannot retrieve more than 7 oocytes

### ART procedure related restrictions / Duties of ART Clinics:

- Eligible Persons: (i) Married infertile couple; or (ii) Woman (Age: 21 – 55 years)
- Cryo-preservation / freezing of gametes possible with written consent
- Compensation to donors: No monetary compensation; Insurance coverage of 12 months to be obtained in favour of oocyte donor
- Written consent of all parties related to ART procedure must be obtained
- Gamete restrictions: (i) Not more than 3 oocytes / embryos can be placed in a woman's uterus during the treatment cycle'; (ii) Should not be treated with gametes of more than one man / woman; (iii) Unused gametes or embryos to be preserved for use on same recipient and not used for any other couple / woman

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What does that really mean?

# INTERNATIONAL | Surrogacy comparative

Comparison points	INDIA	CANADA	SOUTH AFRICA	UNITED KINGDOM	NEW ZEALAND	SINGAPORE	MALAYSIA	HONG KONG
Is surrogacy regulated?	Yes	Yes	Yes	Yes	Yes	Yes	Regulated by fatwas for Muslim couples, but largely unregulated for non-Muslim couples	Yes
Whether commercial surrogacy allowed	Commercial surrogacy not permitted	-	Commercial surrogacy not permitted	Commercial surrogacy is an offence.	Commercial surrogacy is an offence.	No surrogacy activities may be carried out by ART centers, whether for monetary consideration or not.	Practitioners are warned that surrogacy is not acceptable to most major religions	Commercial surrogacy not permitted
Marital status	Married	Married to or in a conjugal relationship	Married or single	No strict requirements, may be same-sex couple / civil partnership, etc.	Married, same-sex couple or single	-	-	Married

# INTERNATIONAL | ART comparative

Comparison points	INDIA	CANADA	SOUTH AFRICA	UNITED KINGDOM	NEW ZEALAND	SINGAPORE	MALAYSIA	HONG KONG
<b>Eligibility: Age (commissioning couple)</b>	Between 21 to 55 years; (Both male and female)	-	-	-	-	If below 35, must ensure there are sufficient listed clinical indications	-	No specified age, but subjected to assessments
<b>Eligibility: Marital status</b>	Married couple, and unable to conceive after 1 year of unprotected coitus or other proven medical condition); Single woman	Married or in a conjugal relationship of interdependence of some permanence	-	Single parent or married or civil partnership or in a relationship	Single women, same-sex couples, heterosexual couples	If for procreation, married women with husband's consent	Married couples	Married couples
<b>Eligibility: Medical screening</b>	Yes	-	Yes	Yes	Yes	Yes	Yes	Yes
<b>Number of eggs to be frozen</b>	Not more than 7 oocytes	-	No more than three zygotes or embryos contrary.	-	-	Can only store if medically indicated or if donated for research.	-	-
<b>Permission from authority</b>	Permission required from appropriate authority	-	Authorisation of a fertility clinic to the Director General required	-	-	Prior approval from the Director of Medical Services	Need permission from Ministry of Health	-
<b>Clinic regulation (registration requirement)</b>	Registration with the National Registry compulsory	-	Authorisation required	-	-	Certification from Director of Medical Services	Accredited by Ministry of Health	Must be licensed

- On a study of certain commonwealth countries (being Canada, Hong Kong, India, Malaysia, New Zealand, Singapore, South Africa and the United Kingdom), on a comparative analysis, the best practices can be summed up as follows:
  - In terms of eligibility to commission surrogacy, New Zealand has set gold standards by allowing single women, same-sex couples, heterosexual couples.
  - In terms of eligibility for donor, South Africa allows donors not younger than 18 years, and most jurisdictions like Malaysia, New Zealand, Singapore, South Africa and the United Kingdom have thorough medical screening requirements as a measure of having a healthy foetus.
  - In terms of clinic regulation, India has a requirement to register the fertility clinic.
  - In terms of egg freezing, the United Kingdom permits storage of gametes can only be done after obtaining license and consent.



# THANK YOU

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