



Surrogacy: A commodification that needs legislative attention

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Abstract

Fatwa prohibits surrogacy agreements for the Muslims in Malaysia. The legal stand for non-Muslims is left in silence, whereas surrogacy raises issues concerning women and children that necessitate legal attention. Regulative measures are imminent to regulate issues arising in a surrogate arrangement. Malaysia has yet to report of any surrogacy cases. Thus, this article analyses decided cases from other countries that have gained international attention to synthesize issues arising in surrogacy arrangements. Based on the case study analysis, this article discourses areas that regulation should encroach specifically to safeguard the welfare and safety of women and children.

Keywords: Surrogacy, Conundrum, Welfare, Fatwa.

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1.0 Introduction

The conduct of surrogacy in modern science is where a childless couple employs a woman to take the role of a surrogate to conceive and deliver a child with the childless couple's genetics. Upon delivery of the child, the surrogate is to hand over the child to the childless couple and sever all ties with the child. The responsibility of the surrogate is merely to carry the child in her womb. She has to take all measures to safeguard the well-being of the fetus. The surrogate is not to bond with the unborn child before and after birth, even though she is the biological mother. Though surrogacy arrangements may seem to be a straightforward agreement, it has raised many religious, moral, ethical and legal issues which call for regulative attention. The stand that Malaysia has taken is to pass a fatwa banning surrogacy arrangements. The binding of the fatwa is deemed to apply only to the Muslims of the country. The non-Muslims have no legal recourse. If the legality of a surrogate agreement is disputed, the law would be in the state of conundrums, which is why other countries such as India, Nepal, Thailand and United Kingdom have undertaken to regulate surrogacy arrangements. These countries are either banning it or recognizing it with legislative measures because these countries faced disputed surrogacy contracts that brought worldwide attention. Decided cases arising in other countries are evident that surrogacy arrangements cannot be left without any legal recourse in Malaysia. By adopting the qualitative research method through case study analysis, this article discourses the brewing issues of surrogacy that needs regulative attention.

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1.1 Definition of Surrogacy Arrangement

The current era sees women, especially from the developed countries chasing after time for carrier enhancement and compete with male gender for compatibility and equality. Little thought is given to marriage or family life. Those who are married limit their childbearing to one or two or none. Childbearing becomes burdensome as it takes a toll on the physical feature of a woman's body such as varicose veins, stretch marks, flabby stomach, vagina distortion and other physical disfigurements apart from the pain endured in delivering the baby. To avoid going through the maleficent of pregnancy and childbirth, some women are resorting to surrogacy arrangements. In a surrogacy arrangement, a woman known as the 'surrogate mother' consents to bear a child for a childless couple with or without monetary consideration. The surrogate mother is impregnated either by artificial insemination or in vitro fertilization. After carrying the child for forty weeks and gave birth to the infant, the surrogate mother handed over the baby to the custody of the childless couple. The surrogate's ties or bond with the child ends upon the delivery of the child. In a surrogacy arrangement, the surrogate mother is not legally married to the sperm donor, and in most circumstances, she does not know the identity of the sperm donor. Her willingness to go through surrogacy may be noble where she genuinely wants to help the childless couple (altruistic surrogacy) or for money consideration (commercial surrogacy). However, the sin and perception of the public on surrogacy are daunting. The surrogates standing may be metamorphosed to a lady of disrepute in the context of custom and culture. Let it be in the Holy Quran, the Vatican, the way of life nurtured in Hinduism, surrogacy is unnatural and not to be condoned as it threatens the sanctity of a traditional family unit. Even though surrogacy raises moral, religious and ethical cynicism, surrogacy arrangements have also gauged attention from a legal perspective for the many issues arising evident from the world of the published judgement over necessitating a call for regulative measures.

1.2 Lessons to Be Learnt from Published Judgements

United Kingdom (UK): In the *Matter of TT (a Minor)* [2011] EWHC 33 (Fam); the case of TT (a minor) involved a woman who met a married couple over the Internet. She was then agreed informally to become a surrogate mother for them, conceiving by private arrangement using her egg and the intended father's sperm. The agreement was not set up by one of the UK's not for profit surrogacy agencies, and so the parties did not have the benefit of advice, counselling and support that such agencies routinely provide. The arrangement also followed a history of dealings with several Internet surrogacy sites, the facts of which were disputed by the parties. The parties' relationship broke down during the pregnancy, and the surrogate mother had a change of heart and decided to keep the baby. The intended parents then applied to the court for a residence order. The baby girl was five months old when the court gave judgment, and the intended parents had had only limited contact with her since birth.

The court's decision to award care to the surrogate mother was guided by the paramount consideration of the baby's welfare. This decision was based on the close attachment formed between the surrogate (and biological) mother and the baby, the ongoing breastfeeding and the risk of emotional harm if the baby was moved into the care of the intended parents in a stark manner the intended parents proposed. The court expressed concern about the intended parents' ability to meet the baby's emotional needs in the long term and their lack of insight as to the importance of the baby girl's relationship and close attachment with the surrogate mother. Mr Justice Baker went on to highlight the risk that the '...natural process of carrying and giving birth to a baby creates an attachment which may be so strong that the surrogate mother finds herself unable to give up the child'. It was, therefore, a fact-based decision and did not set a binding precedent, although it will inevitably strike an uncomfortable note amongst prospective intended parents. In the *Matter of W and W v H (Child Abduction: Surrogacy)* No 2 [2002] 2 FLR 252; The case of *Re W and B and H (Child Abduction: Surrogacy)* involved a surrogacy arrangement between an English surrogate and US intended parents who entered into a binding surrogacy agreement in California. During the pregnancy, the surrogate mother had a change of heart and returned to the UK, where she gave birth to twins. The court eventually determined that the babies should be returned to California following international abduction proceedings brought by the US intended parents. In the *Matter of N (a Child)* [2007] EWCA Civ 1053, the case of *Re N (a Child)* involved a dispute over a surrogate born child between the surrogate parents and intended parents, where the court eventually awarded care of the then 18-month-old child to the intended parents. The outcomes of these cases indicate the wide-ranging and fact-based approach taken by the court.

India: In *Baby Manji's case (2008)* 13 SCC 518 at 521, created an uproar in India. Baby Manji Yamada was a child born to an Indian surrogate mother for a Japanese couple who before a month of the child's birth separated and the future of the child was left in the dark. The biological father, Ikufumi Yamada, wanted to take the child to Japan. Still, the legal framework had no such provision for such a case nor did the Japanese government permit him to bring the child back home. In the end, the Supreme Court of India had to intervene, and the child could leave the country with her grandmother. The most significant impact of Baby Manji's case decision is that it spurred the government of India to enact a law regulating surrogacy.

Thailand: In *Baby Gammy's case (2016)* FLC 93-700, the Farnells were an Australian couple who contracted with a Thai surrogate to bear a baby for them. The young surrogate became pregnant with a twin, a boy and a girl. Upon ultrasound scans, it was revealed that the boy had Down syndrome. He would also be born with a congenital heart condition. The Farnells took the healthy girl twin back to Australia but left the boy who would be named "Gammy" with his mother in Thailand. It was later revealed that David Farnell had previously been convicted of molesting two girls, yet he was still allowed to keep his surrogate female infant.

United States of America (USA): There are no federal regulations on the enforceability of surrogate motherhood contracts in the United States. Surrogacy contracts, therefore, are dealt with on an ad hoc basis. For example, in the case of *Belsito v Clark*, 644 NE 2d 760 (Ohio 1994), the commissioning parents were held to be the natural parent of the child on the basis that the term natural parents refer to the child and parent being of the same blood or related by blood. As such, in this case, since the

surrogacy was total surrogacy where commissioning parents' egg and sperm was fertilized before being implanted into the surrogate mother's womb, the baby was that of the commissioning parents legally. The case had not been dealt with the arrangement of surrogacy as a contract but on *de facto* basis. In *Anna J. v Mark C*, the surrogate mother bore the baby using in vitro fertilization (total surrogacy). She agreed to relinquish all her parental rights, whereby she was denied custody of the child upon delivery because she had agreed to relinquish her full parental rights. The surrogacy agreement inferred the intention that she gestated the child for the pure reason of giving it up to the commissioning parents upon delivery. Furthermore, the legal mother was held to be the genetic mother and not the surrogate. The decision was based on the overall consideration of which was to be the best interest of the child. Thus, the court decided that the commissioning parents should be rightfully the parents and not the surrogate. In *Baby M case (1988) 537 A.2d 1227, 109 N.J. 396*, Mary Beth Whitehead, a high-school dropout married to a garbage collector, contracted with a married couple to be impregnated with the husband's sperm. Then, a day after delivering a girl known as "Baby M," Whitehead showed up at the couple's front door, demanding the baby back under threat of suicide. She absconded with Baby M but was eventually forced by law to give her back. It was the first legal ruling on surrogacy in American history. Upon reaching adulthood, Baby M—now known legally as Melissa Stern—terminated Whitehead's parental rights. In *Doe v Doe 710 A.2D 1297 (Conn.1998)*, the problem was not with the surrogacy contract. The problem arose when the commissioning parents divorced. The husband claimed full ownership of the child and asserted that his wife did not have any right over the child because there is no genetic link. Before the final decision by the court, as there were no proper laws governing surrogacy contracts, the court considered whether the child of fourteen years should be surrendered to the surrogate even though the surrogate had disclaimed all rights to the child. Finally, considering the best interest of the child, the court held that the wife should have custody of the child even though she had no genetic link with the child.

These cases highlighted above from the UK, US, India, Australia, and Thailand are cases evident that surrogacy arrangements are not devoid of legal complications. These cases are just to name a few of the published judgements. Many other disputed issues are arising from surrogacy agreements, especially if the surrogacy arrangement involves 'monetary consideration,' i.e. commercial surrogacy. Hence, human trait follows. That is the good, bad and ugly. Good because surrogacy arrangement gives hope to childless couples to have a child with their genetic link. Bad and ugly because it has reached a disturbing state of commodification warranting regulative interference for the following reasons namely;

- a. Commercial surrogacy has the propensity to become a commercial trading activity thus exploiting women from the lower income;
- b. Perturbs the basic tenet of relationship where a mother is acting as a surrogate. The mother becomes the biological mother and the grandmother to the child she impregnates from the sperm of her son in law;
- c. Psychological impact on the surrogated child especially not knowing who the biological father or mother is, the child is from a same-sex couple or depilated family relationship where the biological mother is the grandmother;
- d. Manipulation of surrogacy arrangements to deliver babies purely for baby selling rackets and also an avenue for selling organs;
- e. Becomes an avenue for paedophile, perverts or sexual predators to enter into surrogacy arrangements to utilize the babies for sexual gratification.
- f. IVF went wrong where for example the sperm of a black donor is implanted in the embryo of a surrogate for a white couple.
- g. Breach of surrogate contract, for example, the medical bills are not paid, or the surrogate does not receive an agreed monetary fee for surrogating, or the surrogate refuses to handover the baby.

Case analysis from these published judgements, however, surfaces the following issues namely;

1. Adoption process as to the preferential right to adopt which differs from state to state as in the USA;
2. Conflict of Laws as reflected in Baby Manji's case, and Re W and B and H;
3. The welfare of the baby where the baby is born deformed and rejected by the childless couple and the surrogate as in Baby Gammy's case;
4. No proper background check as to the stability and the credibility of the childless couple as in Baby Grammy's case;
5. The legitimacy of virtual surrogate agreements, for example, in TT's case.

1.3 Regulative Stand in Other Countries

Currently, there is no harmonization of laws across jurisdictions, nor any international convention dealing with surrogacy. Therefore, there are fundamental differences between countries regarding the regulation, legality and legal implications of surrogacy. Table 1 below shows the current state of laws in the different countries of the world.

Table 1 Current state of laws in the different countries in the world

Status	Countries
Legal	India, Ukraine, Georgia and some states in the USA like California, Illinois, Arkansas, Maryland, Thailand and New Hampshire & Nepal.
Commercial surrogacy is illegal, but altruistic surrogacy is permitted.	Canada, New Zealand and Australia.
Illegal	France, Germany, Italy, Belgium, Netherlands, Saudi Arabia, Finland, Hong Kong, Hungary, Iceland, Japan, Pakistan, Portugal, Serbia, Spain, Switzerland.
Status not clear	Sweden, Malaysia

While the USA deals surrogacy cases on ad hoc basis, Britain and Israel, for example, takes a more moderate regulative approach. The *Baby Cotton Case* (1985) Fam.846, created a furore in Britain because; firstly, the surrogate contract was for a monetary consideration. Secondly, the British government was aghast that an American surrogacy organization was recruiting surrogates from Britain. This case led to the Surrogacy Arrangement Act 1985. The Act forbids gestational surrogacy and sanctions third parties engaged in the surrogacy arrangement. However, it allows private surrogacy arrangement, which does not involve monetary consideration.

In Israel, the Israeli Surrogate Motherhood Agreements Law allows commercial surrogacy agreements provided the sperm is provided by the commissioning parent, i.e. the intended father. Parentage is granted to the commissioning parents upon the delivery of the child. The surrogate is denied of any parental rights over the child, and the surrogate cannot retract her consent to the surrogacy arrangement. Countries such as France, Germany, Norway and France, however, ban surrogacy arrangements for monetary consideration. In France, surrogacy arrangements are illegal. In Germany, those who violate the reproductive technology laws are subject to a prison term or fine. In Australia, Victoria, the Infertility Medical Procedures Act 1984 declares surrogacy contract to be void and imposes criminal penalties on those who solicit participation in surrogacy arrangements. In most ASEAN countries, however, surrogacy arrangement is still a grey area. There is no legislation for surrogacy arrangements. Countries with no laws on surrogacy arrangement, such as India, for example, rely on guidelines which have no legal effect. In India, guidelines were deemed necessary because India thrives on fertility tourism.

1.4 Conundrums in Malaysia

In Malaysia, the National Council of Islamic Religious Affairs fatwa committee had in 2008, passed a ruling that surrogacy was forbidden in Islam because surrogacy distorts the traditional convictions of procreation and family formation. It also distorts strong human values that could render a surrogacy contract to be immoral or against public policy. Hence, a surrogacy agreement is rendered void ab initio. Thus, the validity of a surrogacy arrangement is rule-bound to the normal contractual principles. In Malaysia, any legally enforceable agreement is a contract by section 2(g) of the Contracts Act 1950. An agreement is legally enforceable if the basic elements of a contract are present and there are no negating factors to vitiate free consent such as coercion, misrepresentation, undue influence and mistake or render the contract void due to illegality. The basic elements of a contract are; proposal, acceptance, consideration, intention to create legal relations, the capacity to contract and free consent (Sinnadurai, 2003). Thus, provided the basic principles of a contract are present in a surrogate agreement, the agreement would tantamount to a legally binding contract in Malaysia. Furthermore, there are no specific laws in Malaysia prohibiting surrogacy arrangement. One deterring factor, however, which may vitiate the legality of a surrogate motherhood contract is section 24(e) of the Contracts Act 1950 which provides;

'The consideration or object of an agreement is lawful, unless—

(e) The court regards it as immoral or opposed to public policy.

Every agreement of which the object or consideration is unlawful is void.'

A surrogacy agreement can be set aside on the grounds of immorality or being opposed to public policy since commercial surrogacy is perceived as a controversial method of conception due to religious, ethical and moral issues involved. Law springs from a system of values and beliefs. Law and morality can be said to be intertwined because it has been stated that, "All laws, whether prescriptive or prohibitive, legislate morality. All laws, regardless of their content or their intent, arise from a system of values, from a belief that some things are right and others wrong, that some things are good and others bad, that some things are better and others worse. What a bridle is to the horse, the law is to human nature. And what law is to human nature, morality is to law. Law helps regulate the people; morality helps regulate the law (Bauman, n.d.)." Surrogacy invokes moral issues. Thus, even though a consenting adult (surrogate mother) agrees to a surrogacy arrangement with the commissioning parents for a monetary consideration, the biological activity of carrying a child to give it up for money consideration would be rendered immoral or against public policy. As a result, in recent years, commercial surrogacy has been made illegal or restricted in many countries, including parts of the United States and the United Kingdom.

The act of surrogacy would be considered immoral in our society because marriage and family hood are sacred. The reason why couples go through a solemnized wedding is to prove that they are not cohabiting but living as husband and wife in the eyes of the law, public, and religion. The child they bear is to be legitimate. The child is conceived through the natural union of a husband and wife. Otherwise, the woman would be regarded as lewd and the child she bears as illegitimate or known in Bahasa Malaysia as "*anak haram*". In the eyes of the public cohabiting and childbearing without a solemnized marriage is a misdemeanour, and in any religion, this act is sinful. Marriage, the union between a husband and wife, and the procreation are to be very sacred, personal and private. Surrogacy is, however, secular. In a surrogacy arrangement, the surrogate mother is not legally married to the sperm donor, and in most circumstances, she does not know the identity of the sperm donor. If the surrogate mother gets impregnated through total surrogacy, the child she carries would still be considered as out of wedlock.

Without proper regulations, commercial surrogacy has the propensity to become a commercial activity to get rich which may have the repercussion of exploiting women from the lower-income especially from third world countries (*Surrogate Parenting V. Com. Ex Rel. Armstrong*, 1986). It has also been predicted by John Stehura, President of the Bioethics Foundation Inc., that commissioning couples will be able to recruit women from the third world countries for surrogacy by offering them payment ("The Case Against the Commercialization of Childbearing", 1998). For example, it was stated in an article that the clinics in India

reported that the demand for surrogacy has more than doubled in the past years, with the demand driven by fertility requests from abroad especially from Europe and East Asia (Ramesh, 2013). The requests from abroad are partial because the cost of hiring a surrogate is relatively cheap in the third world countries (Ramesh, 2013). Exploiting women of their reproductive capabilities depreciate their worth as human beings. Brian, in his article, stated that:

“surrogate motherhood is not the answer to infertility or childless because it is one which potentially exploits women or draws class distinctions and encourages the destructions of the family by permitting women to enter pregnancy with the preconceived intent to abandon the child”. (Carney, 1988)

Some authors have gone to the extent of relating surrogacy to slavery as practised in early American history. The author states that “southern black mothers were in a sense surrogate mothers because they knowingly gave birth to children understanding that those children would be owned by others” (Vijandren, 2011). She observes likewise in a surrogacy arrangement, “affluent white women’s infertility, sterility, preferences and power threaten to turn poor African-American women into a ‘surrogate class’” (Vijandren, 2011).

Other social indecorous of surrogacy arrangements are; the surrogacy arrangement is open for abuse where, single men and women wanting to be a single parent can opt for having a child without going through marriage (Jhordan C. V. Mary K., 1986). The career concern people are opting for social surrogacy because of the fear that pregnancy may affect their carrier in any way (Vijandren, 2011). It is also an avenue for the body and beauty conscious not to have a child for the fear that their physical beauty may be affected. Surrogacy arrangement can also be used by people wanting a specific feature of a child, i.e. designer babies. As formerly reported in the newspaper, whereby the late Michael Jackson’s (MJ) children, Prince and Paris, both of whom do indeed appear to be white were fathered by an anonymous Caucasian sperm donor chosen for his physical characteristics by MJ from a catalogue. The third child is said to be born to a surrogate mother selected by MJ because she resembled the beautiful Mexican actress Salma Hayek. The father is also said to be a sperm donor (New Sunday Times, 2006). However, the fact that surrogacy is practised, pragmatism calls for legislative intervention to outlaw surrogacy because of its improper moral nature. On the other hand, surrogacy could be legalized but with proper guidelines that lays down the rights and liabilities of all the parties concern in a surrogacy arrangement, especially medical surrogacy.

1.5 Concluding Remarks

The method and prevalence of surrogacy have progressed and changed with the evolution of science. So, has the change taken place in the social norms and religious attitude of the society in general? Surrogacy is not a misnomer or a taboo anymore, especially for couples who genuinely need medical surrogacy. Currently, surrogacy is advocated in medical tourism or more specifically in fertility tourism. Proper regulative measures would avoid pitfalls of ugly legal actions and safeguard the welfare of the parties involved in the surrogacy arrangement. The courts would not be burdened delineating on what should be the appropriate propositions.

Moreover, if surrogacy is to be accepted, the business of surrogacy would boost the economy of the country, and the nation need not be perturbed with the enigmas arising in surrogacy arrangements. Nonetheless, strong moral values create a divide on whether to accept or reject surrogacy. As a result, some countries have undertaken regulative measures. Whereas, others choose to be tightlipped about it as it is a taboo. The author presupposes that surrogacy arrangements need international legislative recognition because surrogacy has become discernable globally. Otherwise, underground surrogacy arrangements may overwhelm, leading to catastrophic repercussions, especially in countries where poverty is at stake. For example, desperate childless couples are flocking to India and Thailand because the cost is cheaper as compared to countries in the West. Without proper regulative measures, there are possibilities foreigners may target impoverished women which creates immense potential for exploitation. Surrogacy may be morally reprehensible, but if it is left as an option for a childless couple to utilize it, the operation of surrogacy will continue. Regulating it may afford some form of control to its operation and protection to the parties involved.

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