Child's Right to Identity in Family Relations: An Asia Pacific Perspective

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Family Law

- An area of substantive law that inexorably reflects state policies often moored to fundamental beliefs and societal values.
 - the acceptance of surrogacy as a means of forming a family remains a contested site in Asia
 - particularly challenging in cross border legal parentage cases, including International Surrogacy Arrangements

Hague Conference on Private International Law 2011 Report

1st. Scientific
developments
such as artificial
insemination and
in-vitro fertilization
("IVF") have made
surrogacy a
realistic option.

2nd. There has been an "increasing acceptance in some States of parenting within alternative family forms.

3rd. There are different legal approaches to surrogacy by States where some are liberal and others restrictive.

4th. Cross border surrogacy likely involve *lower* costs or fewer perceived risks and "the ready availability of poor surrogates".

Legal Alternatives to Addressing Surrogacy in Asia

1st – Impose a blanket prohibition of all forms of surrogacy.

- a) by national law
- b) rules and ethical guidelines

2nd - Allow or disallow surrogacy based on

- a) whether it is altruistic or commercial;
- b) the parties' circumstances, such as their religion or nationality; or
- c) general rules in contract law and family law.

3rd -Allow surrogacy (altruistic and commercial), leaving the matter wholly to private ordering.

Express ban surrogacy

Through national laws

Macao

- Art. 1726 , Macao Civil Code
- Any agreement to give birth or pregnancy to a third person is void.

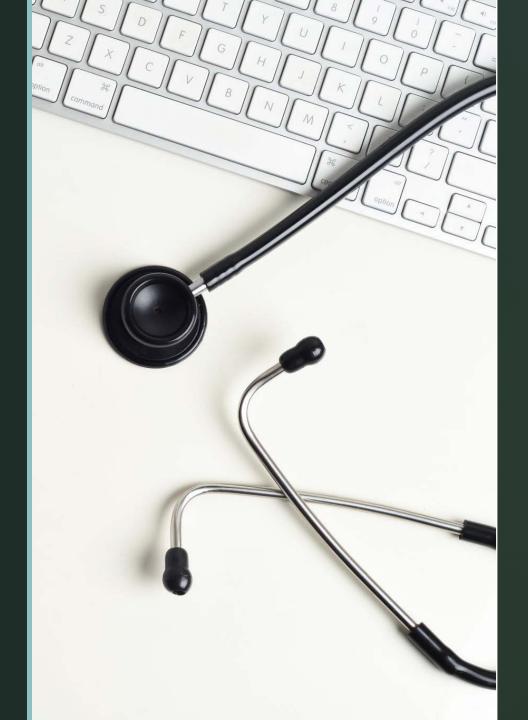
Express ban on commercial surrogacy

Express ban on commercial surrogacy but allow altruistic surrogacy thru national laws

South Korea, Hong Kong, Thailand, India

Hong Kong

- Surrogacy is recognized as legal in Hong Kong,
 - Requisites provided in the Human Reproductive Technology
 Ordinance, Part 1 sec 2
- The contract is made before the surrogate gets pregnant through ART (not sexual intercourse); it requires the delivery of the child to the other contracting party and transfer of the biological mother's legal parental rights.
- Part. 3, Sec. 17 of the HRTO expressly prohibits commercial surrogacy.



Express ban through rules & guidelines

- Countries such as China, Indonesia,
 Cambodia and Taiwan regulate surrogacy,
 whether commercial or altruistic, through
 other means such as administrative
 regulations directly dealing with surrogacy.
- Countries regulation through ethical guidelines
 - Singapore trhu Assisted Reproduction
 Centres and
 - Japanese Society of OB-GYN Guidelines for physicians performing surrogacy.

Indirect ban through related laws

- 1) Laos' recourse to anti-trafficking and other criminal laws; or
- 2) The Philippines' application of general provisions on contracts and family law

Philippines

- Article 1409 of the Philippine Civil Code requires the object of the contract be "within the commerce of man", meaning that their ownership is transferrable.
- Surrogacy contract would be considered void, since its object is the use or rent of the surrogate's womb.
- The surrogate mother and the commissioning father will be considered the parents of the child = two unmarried persons have a child outside of wedlock.
- If the surrogate mother is married, the Court would likely apply the presumption of legitimacy = child of the surrogate and her legal husband.
- Subject to the surrogate mother's husband's filing an action to impugn the legitimacy of the child based on scientific proof.

Partial Recognition of Surrogacy

In Myanmar and Malaysia, surrogacy is legal or illegal depending on the parties' religion.

For Muslims in Malaysia, surrogacy is expressly prohibited by rulings (or "fatwa") issued by the National Fatwa Committee in 2008.

"It is not permissible for the sperm of the male of a married couple to be implanted into the egg of another woman,"

Conclusion

- Trend in Asia : Ban on commercial surrogacy
 - The triggers for these changes are mainly highly publicized incidents that sparked public outrage.
 - Baby Manji case in India
 - Baby Gammy case in Thailand
 - Davis-Charles conviction in Cambodia

Ban on commercial surrogacy



India, which expressly allowed commercial surrogacy, recently amended its laws to ban the practice and allow only altruistic surrogacy.



Thailand was a haven for commercial surrogacy until the practice was banned in 2016 and only altruistic surrogacy for heterosexual couples was allowed by law.

 □ No regulation of surrogacy in until all forms of surrogacy were banned by the Ministry of Health in 2016.

Justice Ministry's unilateral action to forcibly stop all surrogacy procedures.

Legal experts in Cambodia agree that the current ban falls short of an actual law against surrogacy.

Cambodia

Rationale & Consequences of the ban

Prevent the commodification of children and women.

Right to identity

Nationality

Legal Parentage

Concerns

- Children
 - Right to Identity
 - Citizenship-
 - Jus Soli
 - Jus Sanguinis
 - By Descent– legal parent
 - Statelessness of children born out of ISAs

☐ Legal Parentage-a) Parentless children

Non-recognition by the state of Commissioning Parents

though the ISA is legal in the state of the Surrogate Mother or of the *lex loci* contractus

- Status as marital or non-marital child
 - Name/ Surname
 - Support
 - Custody
 - Succession
 - □ China:
 - Validity of the contract

Zheng Maoqing v Xu Liang & Yan Xiaoli (2018)-The surrogacy agreement contradicted with the mandatory rules and was in breach of public order and morals. It has no binding effect from the very beginning. Therefore, the parties do not enjoy any right under the contract, nor are legally required to perform the obligations.

Status and Filiation of Children Born by Surrogacy

Xie vs Gao (2017)

Though the surrogacy contract is invalid, this does not change the fact that the resulting child is recognized as a person in law and is entitled to all his legal rights. His natural father is the sperm donor and natural mother is the surrogate mother.

☐ Other identity rights

Right to be registered at birth

Right to know one's family relations

□ NO Asian country studied leaves surrogacy to private ordering

While surrogacy pertains to choices personal and intimate by nature,

it implicates a whole range of legal and ethical questions that are quintessentially public in character.

Need for uniformity in the regulation of Cross border Surrogacy Agreements

- Thank you.
 - Salamat.