

Protection for Children Born Through Assisted Reproductive Technologies Act, B.E. 2558: The Changing Profile of Surrogacy in Thailand

Alessandro Stasi*

Mahidol University International College (MUIC), Salaya, Thailand

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ABSTRACT: The National Legislative Assembly of Thailand has enacted on February 19, 2015 the Protection for Children Born through Assisted Reproductive Technologies Act (ART Act). Its primary objective aims at protecting children born through assisted reproductive technologies and providing the legal procedures that the intended parents must follow. The focus of this article is to discuss the ongoing issues involving assisted reproduction in Thailand. After reviewing the past legal framework surrounding surrogate motherhood and the downsides of the assisted reproductive technology market in Thailand, the article will discuss the new ART Act and its regulatory framework. It will conclude that although the new law contains some flaws and limitations, it has so far been successful in tackling surrogacy trafficking and preventing reproductive scandals from occurring again.

KEYWORDS: reproductive techniques, public policy, surrogacy contracts, surrogate mothers, Thailand

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CORRESPONDING AUTHOR: Alessandro Stasi, Mahidol University International College (MUIC), 999 Phutthamonthon 4 Road, Salaya 73170, Nakhonpathom, Thailand.
Email: alessandro.sta@mahidol.ac.th

Introduction

Several thousand babies are born every year in the world through the use of assisted reproductive technology (“ART”). ART is the term referring to the various techniques used to achieve pregnancy by means other than sexual intercourse and includes in vitro fertilization, gamete donation, donor insemination, intracytoplasmic sperm injection, and intrauterine insemination). New advances in the technology are enabling an increasing number of possibilities in future ART research programs helping couples who would otherwise be unable to conceive.¹ These recent medical and technological advances have given rise to a growing number of people using ART arrangements as a method to procreate around the world.² Using ART procedures with gestational surrogacy, sperm donation, and egg donation, biological parenthood is now a realistic option for a consistent number of prospective parents including older women, homosexual couples, and single parents. These new technologies of reproduction have made the word biological inadequate for making some critical conceptual distinctions, along with consequent moral decisions. In particular, the possibility to distinguish the process of producing eggs from the act of conception makes outdated the use of the term biological to replace the term mother. The newly developed artificial means of reproduction make it possible for 2 women to make a biological contribution to the creation of a child.³ In these cases, both the woman who contributes through her genetic structure and the other who contributes through her hormonal and other biological components can be considered as biological mothers.⁴

Beyond gamete donation, donor insemination, intracytoplasmic sperm injection, and intrauterine insemination, surrogacy gives rise to legislative debate because “it challenges the fundamental categories of woman and of mother as something not tied to pregnancy.”⁵ In the case of a surrogacy agreement, in fact, a woman accepts to carry a child to term for a couple and to relinquish that child to them after birth.⁶ The embryo is developed in vitro and then transferred to the womb of the gestational surrogate either using the egg and the sperm of the client couple (ie, the prospective parents) or the donor egg and donor sperm for the use by the client couple. In the first case, the child is the full genetic child of the prospective parents and unrelated to the surrogate. In the second case, the child is biologically unrelated to the intended parents and the surrogate. In this case the gestational mother, the commissioning mother, and the genetic mother are 3 separate people.⁷

Given the new opportunities surrogacy offer for family building, it should come as no surprise that reproductive care is now a growing phenomenon worldwide and its use has reached a global scale.⁸ This category of reproductive care involves the movement by patients across international borders to use surrogacy services and surgery.⁹ It was first described by Knoppers and LeBris¹⁰ as “procreative tourism” which allows individuals “to exercise their personal reproductive choices in other less restrictive states.” Some scholars define this category of reproductive care as “reproductive tourism”¹¹; others find more accurate the expression “reproductive exile” to stress the numerous problems faced by infertile couples who are “forced” to travel globally for assisted reproduction.¹² Medical clinics often use different terminologies such as “medical” holiday or “reproductive health.”¹³ In contrast, the European Society of Human Reproduction and Embryology

*A. S. is a Lecturer at Mahidol University International College, Salaya.



[ESHRE] has recommended using the more neutral term “CBRC” including “cross-border surrogacy.”⁸ It has also been defined as the traveling by “candidate service recipients from one institution, jurisdiction or country where treatment is not available to another institution, jurisdiction or country where they can obtain the kind of medically assisted reproduction they desire.”¹¹ This includes travel for intracytoplasmic sperm injection, in vitro fertilization (IVF), and similar procedures, such as preimplantation genetic diagnosis, gamete and embryo donation, and surrogate pregnancy.⁹

Until recently, these agreements were not clearly regulated by Thai law. In the absence of binding statutory law, surrogacy agreements were deemed void as against public policy and thus without legal effect. According to Section 150 of the Thai Civil and Commercial Code “an act is void if its object is expressly prohibited by law or is impossible, or is contrary to public order or good morals.” Despite good intentions and well-written contracts, all surrogacy agreements were inevitably baby-selling contracts and entering into such agreement was prohibited. As a consequence, when a legal dispute occurred over custody between the commissioning couple and the gestational carrier, it relied on the judges to decide which party could be considered as the legal parent of the surrogate child.

After a series of high-profile international scandals drew public attention to women exploitation, human trafficking and legal ambiguities surrounding surrogacy in Thailand in 2014, Thai authorities launched a crackdown on commercial surrogacy. More precisely, the new legislation became a priority after an Australian couple decided to abandon a surrogate child with Down syndrome after they discovered his condition. A second major scandal broke when 9 babies fathered by a Japanese businessman using a Thai surrogate were found in a Bangkok condominium living with 9 nannies. After discussing for several months, the National Council for Peace and Order (NCPO) approved a surrogacy draft law to protect the legal rights of the surrogate child and discourage surrogate motherhood. The draft law suggested that this objective be reached through legislation declaring surrogate agreements void as against public policy and banning fees to gestational surrogates and surrogate clinics beyond reasonable expenses. The NCPO specified that these new rules were going to be adopted to prevent foreign couples from having children through surrogate mothers and eliminate growing phenomenon of procreative tourism in Thailand. The NCPO also denounced the notion of surrogate motherhood as a service which depersonalizes women and their role in human reproduction. It concluded that surrogacy should not be permitted because it put children at risk and low-income women were exploited.

The proposed legislation was finally put before the National Legislative Assembly on November 28, 2014 and enacted on February 19, 2015. The Public Health Minister Rajata Rajatanavin announced that the decision was aimed at controlling artificial fertilization technology for infertile couples and

set up the legal status and regulations on surrogacy services by banning commercial surrogacy and trade in human sperm and eggs.¹⁴

The Legal Framework Before the Enactment of the ART Act, B.E. 2558

Before the enactment of the ART Act in 2015, Thailand represented an attractive destination for international surrogacy. A high number of “procreative tourists” choose Thailand as procreative hub due its “liberal market model” taking advantage of the loose regulatory framework. Surrogacy in Thailand was a high-profitable business where agencies, private clinics, doctors, legal advisors, and surrogates provided surrogacy services to foreign couples. Profit-making agencies meticulously recruited surrogate mothers and egg donors for the growing ranks of people anxious to have a child but unable to do so.¹⁵ The surrogate mother then entered into a complex contract with the agency or intended parents in which the surrogate mother agreed to be artificially inseminated, to carry any resulting fetus, and to relinquish parental rights for payment.¹⁶

From a legal standpoint, surrogacy was highly unregulated and hardly ever monitored. Thailand only had 2 Medical Council Regulations introduced in 1997 and 2001 addressing the use of ARTs (Announcements 1/2540 and 21/2545). The purpose of these Announcements was to assure that the reproductive procedures met the medical standards and principles of care. Section 4/2 of the Announcement was of particular interest and stated that “in case a couple wants to have a child through surrogacy, the medical practitioner may provide the service only in the case of embryo from that couple’s gametes.” Furthermore, under the Announcement 21/2545, the surrogate mother had to be a relative of either of the applicants, and economic compensation for the surrogate mother was not allowed. These announcements, however, were not legally binding.

In most of the cases, the rules to determine legal parentage followed the principle *mater semper certa est* (the mother is the one who gives birth). More specifically, the legal mother of the child was considered to be the surrogate, even if there was no genetic link between the birth mother and the baby. Under Section 1546 of the Civil and Commercial Code, in fact, “a child born of a woman who is not married to a man shall be deemed to be the legitimate child of such woman.” The father of a child born outside marriage has no rights over the child even though his name “is recorded on the birth certificate and has a DNA test showing that he is indeed the biological father.”¹⁷

In accordance with the generally accepted interpretation of Section 1546 of the Thai Civil and Commercial Code, the woman who gives birth to a child is considered its mother. If a surrogate is married, the issue she bears will be presumed by law to be the legitimate child of herself and her husband. It follows that under Thai law the commissioning couple does not automatically acquire parental rights and responsibilities in respect of the surrogate child. Under Section 1547 of the Civil

and Commercial Code “A child born of the parents who are not married to each other is legitimate by the subsequent marriage of the parents, or by the registration made on application by the father, or by a judgment of the Court.”¹⁸ It must be added, however, that in recent years, clinics performing gestational surrogacy have provided a different interpretation to the word “mother” and allowed intended parents to register their names as the parents of the child in the surrogate child’s birth certificate. It was a simple procedure: the fertility clinic had to report the child’s birth to the nearest Registrar Office to obtain a birth certificate. The commissioning couple then only had to request the birth certificate from the Registrar Office regardless of their nationality. There was no need to undergo a “complex legal adoption.”¹⁹

To formally regulate surrogacy arrangements, Thai government and members of the parliament had submitted a draft bill to the assembly in late 2010 containing regulations pertaining to the ART (Assisted Reproductive Technologies Bill number 167/2553). Although the proposed bill was approved by Office of the Council of State, it was never enacted by the National Assembly. Some of the changes in the draft bill indicated that only married heterosexual should have the right to treatment using either their own sperm and eggs or those of other donors. Section 22 of the draft bill is of particular interest as it stated that

Surrogacy under this act can be performed through two methods and in particular:

- (1) Creation of an embryo using eggs and sperm of the intended parents implanted in the gestational carrier’s womb;
- (2) Creation of an embryo using either donated eggs fertilized with husband sperm or wife eggs fertilized with donated sperm implanted in the gestational carrier’s womb; it is prohibited to use the gestational carrier’s eggs in any case.

The draft bill also provided that ART procedures had to be performed in accordance with particular requirements. More precisely, Section 21 established that

Surrogacy shall be performed according to the following criteria:

- (1) The commissioning parents must be unable to conceive and desire to have a child by using another woman as surrogate mother. The commissioning parents must be both physically and mentally healthy.
- (2) The gestational carrier cannot be the mother or the daughter of one or both of the commissioning parents.
- (3) The surrogate mother must have a child of her own before the surrogacy procedure and, if she is married, her husband must consent.

As the draft Act was left unratified by the National Assembly, legal problems proliferated leaving commercial

surrogacy in a legal limbo. The loose regulatory regime saw the growth of an international trade in surrogacy services and several high-profile scandals exposed the negative downsides “of an assisted reproductive technology market that takes advantage of countries with little or no regulation in place.”²⁰ There were reported several cases where third parties contributed the eggs or sperm (or both), where a woman agreed to be a carrier and gestate a child for others to adopt, or where 5 parties were involved in the conception and birth of a child (namely, the commissioning couple, the surrogate mother, the sperm donor, and the egg donor). Various controversies eventually brought the industry into disrepute. A prevalent problem in surrogacy parentage proceedings in Thailand was related to the custody disputes between parents when a traditional surrogate mother “changed her mind” and wanted to keep the baby. As there was no legal mechanism to protect the parties involved and the surrogacy agreement did not hold in court, it was difficult to determine the parentage of the surrogate child. In other reported cases, even more complex legal issues have arisen about parentage, parental responsibilities, jurisdictional conflicts, and parties’ rights and obligations toward the child.

Booming Baby Business: From Baby 101 to Baby Gammy

Public attention to the issue of commercial surrogacy services in Thailand was heightened after widely read media coverage exposed the negative downsides of the ART market in Thailand. What started as a discrete practice with time became a large and booming industry. More precisely, the rapid development of the surrogacy industry took place in 2012 following the new Indian surrogacy requirements that restricted access to ART exclusively to married heterosexual couples. As a consequence of the increasing public acceptance of ART, a wide range of private fertility clinics, medical practitioners, and surrogate parenting agencies emerged. The rapid growth of the surrogacy industry in Thailand attracted a large number of foreign couples in search of gestational carriers.²⁰ In the absence of legislation and regulation to limit discretion, a series of illegal practices took place on an extensive scale. These practices violated the spirit, if not the letter, of the Announcements 1/2540 and 21/2544 of the Medical Council of Thailand.

A first major scandal occurred in January 2011 when a raid conducted by Thai police freed 13 Vietnamese women from a surrogacy clinic operated by the Taiwanese-owned company “Baby 101.” The business advertised surrogate motherhood services in Thailand offering commercial surrogacy arrangements to international clients for a fee of about US \$5000.²¹ The illegal company “Baby 101” even had a Web site which described itself as a company with offices in Bangkok, Phnom Penh, and Vietnam and registered with the Russian Federation in Vladivostok that offered “eugenics surrogacy.”²² Baby 101 provided both surrogacy and egg donation services and had on

its Web site several photographs of women who could be chosen as surrogate mothers by potential customers (ie, intended parents). For women who were unwilling or unable to conceive and/or carry a child on their own in the natural manner, there was a US \$32 000 package where the commissioning parents had to provide their eggs and sperm, determine the sex of the future child, and select the gestational carrier of their choice.²³ Subsequently, the surrogate mothers were brought to specific clinics in Bangkok waiting to give birth to the surrogate child as stipulated in the surrogacy agreement.

At the time of the raid, police arrested 4 Taiwanese staff and 1 Chinese. Among the 13 Vietnamese women who were rescued, 7 were pregnant with children allegedly destined for other people and a further 2 women were identified at a hospital after just having given birth.²⁴

This high-profile case reached its conclusion on June 22, 2012 when the Court of First Instance of the Minburi District found all 5 defendants in the case guilty as charged. The Court found that the 5 defendants did not inform the victims of the nature of the job, and the victims agreed to this offer without knowing that they would have to act as surrogates for the company's customers. The defendants arranged a 1-way trip to Thailand for the 4 victims. After their arrival in Thailand, the defendants picked the victims up from the airport and brought them to a house in Thararom Village in Bangkok. The victims were forced to stay in the house and their movements were strictly monitored by the defendants at all times (Minburi Provincial Court Black Case No. 3375/2554). The Court also found that

after staying in the house for a while, the defendants told the victims that they had been hired to become pregnant for the company's customers. If they did not, they would have to pay 940 USD as a penalty, and to pay for the tickets to go back to Vietnam themselves. The victims did not have any money, they were far away from home, unfamiliar with Thailand, and their passports had been taken away by the defendants. Therefore, they could not leave Bangkok and had to agree to the defendants' demands. (Minburi Provincial Court Red Case No. 2176/2554)

The 4 Taiwanese defendants were sentenced to 5 years and 3 months in jail for working in the Kingdom without a work permit (Section 9 Subsection 1 and Section 51 Subsection 1 of the Working of Alien Act, B.E. 2551 (2008)), deprivation of liberty of others (Section 310 of the Criminal Code), trafficking in persons for the purpose of exploitation (Section 6 and 52 of the Anti-Trafficking in Persons Act, B.E. 2551 (2008) together with Section 83 of the Thai Criminal Code), and a 220 000 baht fine (US \$7040) for hiring illegal migrants. The Chinese defendant was sentenced to 3 months in jail for working in the Kingdom without a work permit. After several discussions and legal processes, on December 11, 2011, 11 babies involved in the scandal were finally sent to Taiwan to their biological families. On this point, Whittaker²⁰ interestingly notes that "Despite public outrage within the Thai press at the time, this case prompted no widespread investigation into the industry."

A second high-profile surrogacy controversy erupted in 2014 when an Australian couple was accused of abandoning a baby with Down syndrome (Baby Gammy) carried by a Thai surrogate while taking his healthy twin sister. This case, in fact, made international headlines and highlighted to the eyes of the world the laxity of ART regulations in Thailand.

More precisely, the case of Baby Gammy, being cared in hospital by his Thai gestational surrogate, garnered worldwide attention in August 2014. Mother-of-2 Ms Janbua Pattharamon received 16 000 in Australian dollars to undergo a pregnancy for a commissioning couple and successively fell pregnant with twins in breach of Thai Medical Council guidelines²⁵ (Murdoch, 2014). However, when one of the twins was diagnosed with Down syndrome, Janbua was requested to terminate her child's life and undergo a partial abortion. As she refused, the intended parents decided to abandon Gammy in Thailand and return with Gammy's twin sister, Pipah, to Australia. It must be pointed out, however, that the commissioning couple has denied the accusations and several versions of the story have been circulated in the media. While the Thai surrogate mother stated that an "Australian couple took home only one baby after she had twins, leaving a boy, Gammy, who is being cared for by Ms Janbua in hospital, the commissioning couple has said that they had not been told about Gammy's birth."²⁶ In an interview to ABC news, the Australian couple declared that they were not told about the baby boy's existence and that the surrogacy agency no longer existed.²⁷

The story was reported by the media after appeals from Ms Janbua Pattharamon for contributions for her son's medical expenses from international foundations. In an interview, she declared that she had decided to be a surrogate mother to pay her debts and had rejected the possibility of abortion when she found out that one of the twins was affected by Down syndrome. Instead of institutionalizing Baby Gammy, she decided to care for him. Subsequently, the commissioning couple took only the healthy child and went back to Australia, abandoning Baby Gammy with the surrogate mother. As the story hit the news headlines, further media investigations revealed that the Australian father David Farnell was a convicted sex offender who spent time in prison for sexually abusing young girls and Australian authorities were investigating into the welfare of Baby Gammy's sister.²⁰ Several hundred thousand dollars were raised in funds to support Baby Gammy who became an Australian citizen in January 2015 and remains in the care of his surrogate mother.²⁸

After Baby Gammy's high-profile international scandal exposed the unethical practices of certain IVF clinics in Thailand, Thai authorities launched a crackdown on commercial surrogacy and the new legislation became a priority.

The Establishment of a New Regulatory Regime

After discussing for several months, the NCPO approved a surrogacy draft law to protect the legal rights of the surrogate

child and discourage surrogate motherhood. The draft law suggested that this objective be reached through legislation declaring surrogate agreements void as against public policy and banning fees to surrogate mothers and surrogate clinics beyond reasonable expenses. The NCPO specified that these new rules were adopted to prevent foreign couples from having children through surrogate mothers and eliminate growing phenomenon of procreative tourism in Thailand. The NCPO also denounced the notion of surrogate motherhood as a service which depersonalizes women and their role in human reproduction. It concluded that surrogacy should not be permitted because it put children at risk and surrogate mothers were exploited.

The proposed legislation was finally put before the National Legislative Assembly on November 28, 2014 and enacted on February 19, 2015. The Public Health Minister Rajata Rajatanavin announced that the decision to enact the Protection for Children Born through Assisted Reproductive Technologies Act, B.E. 2558 was aimed at controlling artificial fertilization technology for infertile couples and set up the legal status and regulations on surrogacy services by banning commercial surrogacy and trade in human sperm and eggs.¹⁴

The new law specifies the parents' legal status and the rights of related parties during and after surrogacy. More precisely, it defines surrogacy as "pregnancy by ART" and ART as "any medical scientific procedure that removes eggs or sperm from a human body for the purpose of unnatural pregnancy, including artificial insemination" of a third party.¹⁹ The main objectives of the ART Act are (1) to establish the intended parents' legal rights prior to the birth of the child; (2) to define the rights and obligations of all parties in the surrogacy arrangements; (3) to control the manner, technique, and use of ART technologies; and (4) to ban commercial surrogacy and prevent foreigners from having children by Thai surrogate mothers (Ad Hoc Committee on National Legislative Assembly Affairs, Report of the Consideration of the Protection for Children Born through Assisted Reproductive Technologies Act, Thai Senate Web site [January 22, 2015] [in Thai]).

To guarantee that a child is genetically related to at least one of the intended parents, the new Act states that an embryo can only be created by the eggs and sperm of the intended parents, a donated egg fertilized with sperm from the intended father, or a donated sperm fertilized with eggs of the intended mother. This provision is of particular interest as it requires genetic relatedness. In other words, at least one of the intended parents must be genetically related to the child.

According to the ART Act, every case of surrogacy requires a special authorization by a special committee—The Committee on the Protection for Children Born through Assisted Reproductive Technologies Act. This is multidisciplinary, nominated by the Department of Health Service Support (DHSS) and includes 17 members. To reduce illegal surrogacy treatments, Section 2 of the Act requires specific conditions under which noncommercial surrogacy arrangements may take

place including assessment of mental, psychological, and physical health of the parties involved; examination of the providers of genetic materials; prohibition of sex selection (also known as "predetermination"); usage and preservation of embryos; ban on same-sex couples (in fact, Thailand does not recognize same-sex marriage); single parents and unmarried individuals access to ART; and a requirement for a consent from a married couple when using sperm donation.²⁹

The main conditions for surrogacy are laid down in Part 3, Articles 21 to 28 of the ART Act. In particular, Section 21(1) provides that the intending parents must be adult Thai citizens or, if only one of the applicants is Thai citizen, the intending parents must have been married for at least 3 years to prevent exploitation of vulnerable Thai surrogates from foreign couples and the possible commercial use of artificial fertilization technology. The same section also states that "the intending parents must be a legally married couple whose wife is unable to conceive," and Section 36 adds "no one shall create an embryo other than for the purpose of infertility treatment for a legally married couple." What the law neglects to do, however, is to define the terms "unable to conceive" and "infertility" and therefore leaves open to interpretation the criteria necessary for applying to surrogacy treatments. Specifically, the law does not explain how these terms should be interpreted and then used in any given circumstance. Although the literary meaning of the term "unable to conceive" seems to be intended to accommodate a "broader situation other than in the case of infertility since a woman's inability to conceive can stem from various reasons," when the 2 provisions, namely, Sections 36 and 21(1), are being read together, the narrow reading applies.²⁹ The ambiguity and contradictions of the legislation will probably allow multiple interpretations and give wide discretion to judges in the determination of the criteria necessary for applying to surrogacy treatments.

Under the new law, surrogate seeking becomes illegal and the surrogate mother cannot be a parent or descendant of the commissioning couple (ie, mother, daughter, granddaughter, are excluded. Sister, cousin, aunt, and adopted relatives are permitted). In this way, ART law tries to avoid any influence on relatives to act as gestational carriers and further difficulties within the family. The prohibition of surrogate seeking, however, does not apply in the case that the commissioning couple does not have any blood relatives who can serve as surrogate. It follows that if the commissioning parents do not have any sibling who may act as surrogate mother, they will be able to use a gestational carrier who is not blood relative in accordance with specific regulations issued by the Minister of Public Health. Moreover, Section 21 of the ART states that the gestational carrier must have had a pregnancy before the surrogacy procedure takes place and the approval of her husband is necessary. It follows that the new surrogacy law not only prohibits the practice of commercial surrogacy but it also ensures that altruistic surrogacy agreements meet specific criteria and are based on necessity instead of convenience. More precisely, Section 3

of the ART Act establishes that the “commissioning parents and the gestational carrier must have a written agreement before the pregnancy takes place, stating that the commissioning parents will be the legal parents of the child born by use of ART technology.”

Some authors argue that ART Act may not be effective in solving issues surrounding international commercial surrogacy and making commercial surrogacy illegal will “push the industry underground rather than eliminating it.”³⁰ The weight of evidence so far, however, appears to indicate the contrary. Since the ART Act took effect, only 1 person has been punished under the law and there are indications that the surrogacy business is shifting to Laos. In April 2017, a Thai man was arrested at a customs checkpoint in Nong Khai for attempting to smuggle semen into Laos. The man was trying to smuggle 6 vials of human semen into Laos in a nitrogen tank, which was destined for a fertility clinic in Vientiane.³¹ Thus, the implementation of the new law seems to have been successful in tackling the use of exploitative surrogacy services from foreign infertility patients in developed countries.

Commercial surrogacy becomes a very dangerous practice under the new Thai law as it carries severe penalties for all violations. More precisely, in the case of noncompliance to the above guidelines, the surrogate mother who carries a baby for profit is liable for legal action for 10 years imprisonment and fine up to 200 000 baht (Id. §§ 24 and 48). The penalty for breaching ART provisions is 1 year of imprisonment and/or a fine up to 20 000 baht for the care provider unqualified to perform the service and 5 years of imprisonment and/or a fine of up to 100 000 baht for anyone who acts as an agent by requesting or accepting money, property, or other benefits in return for managing or giving advice about surrogacy (Id. §§ 27 and 49).

The new legislation also contains a number of provisions that resolve the ambiguity over the legal parentage of a child born of gestational surrogacy arrangements. It establishes that the intended parents will be the legal parents of a child born out of ART and cannot deny such parentage (§§ 29 and 33). This provision will apply in place of the principle *mater semper certa est* which was deeply rooted in Thai private law and implied that motherhood had to be established through birth. These new provisions of the ART Act do not only protect the parental rights of the intended mother, but they also protect the surrogate child’s rights in the sense that by ascertaining the parents’ legal status will secure the children’s entitlement to social and legal benefits.²⁹ This significantly modifies the legal definition of motherhood “from the birthing mother to privilege intending parents, reversing long-standing cultural and legal traditions that define kinship through gestation.”²⁰

The establishment of the intended parents’ legal parentage, however, is counterbalanced by the right of the surrogate mother to perform medical procedures according to her free will, including pregnancy termination, which makes the surrogacy agreement voidable.²⁹ In this way, the legislation aims to

balance the competing interests of the key parties involved in these arrangements. It is also important to point out that according to section 56 of the ART Act apply retroactively to children born from surrogacy before the Act’s entry into force, through relevant court procedures. It follows that surrogacy contracts dated before the bill was passed will be governed under the new Act.

With respect to the powers and obligations of the government as concerns surrogacy, sections 6 and 7 of the Act establish a “special committee under the Permanent Secretary of the Ministry of Public Health to advise the Minister of Public Health about policies to protect children born through ART, in conformity with the purposes of the Act.”³²

Conclusions

The distinction between genetics and gestation defies the nature and role of legal parentage.³³ Developing a legal framework for surrogate motherhood represents a critical threshold which has challenged lawmakers, lawyers, and judges for over 3 decades now all over the world.³⁴ In Thailand, the complete absence of regulation of commercial surrogacy has created a legal vacuum which has translated what was initially considered as an opportunity for infertile couples to achieve parenthood to commercial exploitation.

After a series of high-profile international scandals drew public attention to women exploitation, human trafficking, and legal ambiguities surrounding surrogacy in Thailand in 2014, Thai authorities have decided to regulate surrogacy and respond to social issues around legal parentage associated with surrogacy techniques. The new ART Act represents a response to issues surrounding surrogacy arrangements in Thailand and undoubtedly brings predictability to this area of law. Although the new law contains some flaws and limitations, it has so far been successful in tackling surrogacy trafficking and preventing reproductive scandals from occurring again.

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Author Contributions

AS is the only author of this work.

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