

WOMBS FOR HIRE

With no worldwide regulatory framework, some Asian countries are struggling to legislate to protect children born through Western “fertility tourism”—and the surrogates who carry them.

Sally Howard reports

The recent case of surrogate baby Gammy, left in Thailand by his commissioning parents after being born with Down’s syndrome and a congenital heart defect, provoked censorious press coverage worldwide. “Surrogate mom vows to take care of abandoned twin,” ran the typical headline when the story broke in August. Outrage grew when it emerged that the father had 22 child sex convictions.¹

But behind its sensationalised aspects—taking one healthy child from twins and the questionable background of the Australian father—the case was more legally and ethically nuanced than it might have seemed.

Gammy’s gestational mother, 21 year old Thai food vendor Pattaramon Chanbua, told news agency Agence France Presse that she had found out that one of the twins had a chromosomal disorder four months into the pregnancy.¹ The commissioning parents, David and Wendy Farnell, told Australia’s Channel Nine television (*60 Minutes*, 9 August) that they had then urged Chanbua to selectively abort the abnormal fetus. However, Chanbua claimed that she refused to abort the child because it was against her Buddhist faith. She also complained that she



Baby Gammy, born of Thai surrogate Pattaramon Chanbua with Down’s syndrome

had been promised \$9300 (£5800; €7300) to carry the children but had not been paid in full.³

Gammy remained in Thailand under the care of Chanbua who, under Thai law, was considered the child’s mother. After the case gained media attention, pressure grew to repatriate the 7 month old to Australia.

“A bodge job or worse”

The family law barrister Barbara Connolly QC says that the labyrinthine tangles of family, immigration, and contract law exposed by Gammy’s case are typical of international commercial surrogacy.

“When it comes to commercial surrogacy our laws are a bodge job or worse,” she told *The BMJ*. “Unlike international child abduction and adoption, there are no international conventions and agreements in this area. Legal issues relating to parentage and immigration vary so widely that the process can result in dramatic outcomes, such as a child born via surrogacy who is both legally orphaned and stateless.”

Regulations have done little to curb what the Indian press has derisively referred to as the trade in “Indian wombs for hire”

Asia legislates

The call for a unified legal framework around commercial surrogacy is loudest in the “fertility tourism” destinations of the global south. In Thailand, where the commercial surrogacy industry is worth \$125m according to the Thai Department of Health Service Support, the military government responded trenchantly to the baby Gammy case by approving a draft law to criminalise commercial surrogacy. If the law is approved by Thailand’s National Legislative Assembly in early 2015, it will criminalise both commercial surrogacy agencies and commissioning parents, allowing only altruistic surrogacy for infertile, married Thai nationals.

Reverberations are being felt most keenly in India, the world’s largest destination for fertility tourism. (The Indian commercial industry, legalised in 2002, was valued at \$449m in 2006.) Last month the Indian government introduced into parliament the 2010 Assisted Reproductive Technologies Regulation (ART) Bill, which has been grinding on to the statute book since 2008.⁴ The bill, in its current draft, includes a chapter that considers oocyte donors, gestational surrogates, and surrogate born children in altruistic and commercial surrogacy agreements. When the bill is enacted, surrogacy agreements will become legally enforceable, and the age and background of surrogate mothers will be restricted. All foreign surrogacy arrangements will require the appointment of a local guardian who is legally responsible for the surrogate mother throughout the pregnancy as well as the resulting child if the commissioning parents fail to claim him or her.

“Indian wombs for hire”

This law change comes after the Indian Ministry of Home Affairs issued new guidelines on

LEGAL STATUS VARIES FROM COUNTRY TO COUNTRY

Georgia, Ukraine, and South Africa—All surrogacy agreements are legal and enforceable.

United States and Australia—Commercial surrogacy is regulated or criminalised, with a patchwork of common law and case legislation that is enforced at state level.

France, Italy, and Switzerland—All forms of surrogacy are banned, and they will not recognise children born through commercial surrogacy abroad as legal citizens.

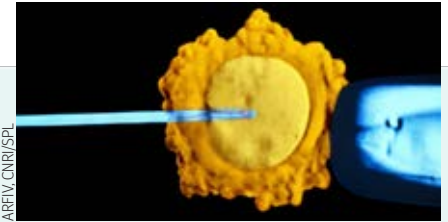
United Kingdom and Denmark—Altruistic surrogacy (when the mother can receive only reasonable expenses) is permitted but agreements are unenforceable and commercial surrogacy is banned. However, when couples have sought commercial surrogacy abroad, the courts may retrospectively sanction payments that have already been made in the interests of the child.

MODERN SURROGACY: THE BIRTH OF A \$6BN INDUSTRY



In 1980, two years after the birth of the first baby conceived in vitro, Louise Brown, the US lawyer Noel Keane wrote the first legally binding surrogacy contract through his own infertility centre, a business that sought to connect couples to willing surrogates.

In 1986 Keane wrote the contract pertaining to Baby M, a controversial case in which surrogate Mary Beth Whitehead refused to cede custody of the resultant child, Melissa, to the couple with whom she made the surrogacy agreement. The case led many US states to ban commercial surrogacy arrangements.



In traditional surrogacy the egg of the surrogate mother and the sperm of either the intended father or a sperm donor are used. From the 1990s advances in in vitro and implantation methods enabled gestational surrogacy, in which the surrogate carries a child that she is not genetically related to, created from eggs and sperm of the intended parents or donors.

The arrival of gestational surrogacy led to a boom in commercial surrogacy worldwide. The global industry is now worth an estimated \$6bn.¹²

surrogacy in January 2013. These included a visa requirement for foreign nationals commissioning surrogacy in India, with such visas being restricted to married couples from countries where surrogacy is legal.⁵ N B Sarojini, founder of the non-profit making Delhi based women's health advocacy and research organisation Sama, thinks that these regulations have done little to curb what the Indian press has derisively referred to as the trade in "Indian wombs for hire." Sarojini, who has lobbied for amendments to the ART bill, hopes that the new legislation will check the untrammelled commercialisation of India's assisted reproduction industry but fears that the bill will be "hugely lacking" in its reach.

"The ART bill has been led by the ART industry—that is, by commercial clinics and gynaecologists, largely for the purpose of validating this lucrative business," she says. "It fails to regulate big players in the industry, such as surrogacy agents. And it provides little support, or legal recourse, for the gestational surrogate. It seems the free trade mandate brushes aside all ethical questions."

An early draft of the bill said that the health risks to the surrogate mother were small. But Deepa Venkatachalam, who also works for Sama, says the organisation's research shows that surrogacy "can have grave effects on women's health. The surrogate is subjected to repeated hormonal injections in preparation for implantation, putting her at risk of ovarian hyperstimulation syndrome, and most surrogates undergo non-indicated caesarean sections to time the birth for the commissioning parents' convenience."

Human trafficking

Anil Malhotra, a lawyer based in the north Indian city Chandigarh, is also a critic of the

upcoming legislation. At a conference on surrogacy organised by the Centre for Social Research, a New Delhi non-governmental organisation, in September he raised concerns that the bill fails to consider the background and credentials of commissioning parents, a problem that emerged in the baby Gammy case.

Malhotra also noted the absence of a clause pertaining to human trafficking for surrogacy. "You cannot just close your eyes and hope that baby breeding cartels won't develop. With such financial incentives involved, it's a false hope." He argued that India is losing its opportunity to set a legislative standard for surrogate source nations.

China's ban

China is one of the few Asian nations to have taken a firm stance on commercial surrogacy from the outset. In 1994, as gestational surrogacy was emerging, the Chinese government banned commercial surrogacy on the grounds of its implications for defining true parenthood. However, by the early 2000s an unregulated market was flourishing. In 2009 the Chinese government strengthened the criminal enforcement of the surrogacy ban, and reports emerged of surrogates having forced abortions.

Health and human rights campaigners say that there is a pressing need for an international legal framework to regulate the commercial surrogacy industry. But such agreements will be a long time coming. The Hague Conference on Private International Law convened to consider international surrogacy arrangements in March 2012 and April 2014. It will reconvene in early 2015. To Connolly, the conference's preliminary reports⁹ ¹⁰ "highlighted the huge problems in these cross

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border arrangements," she said. "But they also pointed to the real obstacles in the way of reaching any kind of international consensus, let alone a convention."

Affluent nations

Meanwhile there is pressure for affluent nations to legalise the commercial surrogacy market within their own borders. Connolly agrees that the argument is attractive. "But you have to be realistic about market forces," she said.

"If you liberalise commercial surrogacy in the UK you won't prevent UK nationals from seeking a cheaper surrogate abroad. For example, as India and Thailand impose restrictions there are signs that an unregulated commercial surrogacy industry is emerging in Mexico."

For baby Gammy the future is bright. He will soon live with his surrogate mother in a new three bedroom apartment paid for with funds from the reported \$AU240 000 (£130 000; €165 000; \$210 000) donated to a charitable endowment established for his long term care.¹¹ For the industry that brought Gammy into being, the future is less certain.

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