

- 6 *Ibid.*
- 7 *Ibid.*
- 8 Ministry of Health, 'Recommendations of the Public Committee for Examining Legislative Regulation of Fertility and Childbirth in Israel' (May 2012) ('Mor-Yosef Committee'), available at: www.health.gov.il/PublicationsFiles/BAP2012.pdf (Hebrew).
- 9 Although they did recommend that it should be opened up to single women.
- 10 Mor-Yosef Committee above, n 8 at 57.
- 11 This practice is judicial because there is no statutory basis for it.
- 12 HCJ 566/11 *Mamat-Magad v The Interior Ministry* (28 January 2014).
- 13 For details of the work of the Hague Conference on International Law on this issue, see various documents prepared by the Permanent Bureau, available at: www.hcch.net/index_en.php?act=text.display&tid=178 and www.hcch.net/index_en.php?act=text.display&tid=183.
- 14 See Schuz, 'The Developing Right to Parenthood' above, n 4.
- 15 As evidenced inter alia by the fact that Israel enjoys the highest rate of infertility therapy per capita coverage and most of these treatments are funded by the state, *ibid.*
- 16 *Ibid.*
- 17 Eg, to ensure fair payment in cases that do not lead to birth of a child, see Lipkin and Samama above, n 5.
- 18 For discussion of this balance, see Schuz, 'Surrogacy in Israel' above, n 2.
- 19 See general decision of the European Court of Human Rights in App no 65192/11 in *Mennesson v France* (2014), holding that failure to give full recognition to the status of the children in relation to their intended parents was a breach of the children's right to family life.

The potential risks of surrogacy arrangements in Malaysia

MALAYSIA

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The Malaysian government has, in recent years, identified the health tourism industry, including reproductive treatment, as one of the national key economic areas for promotion by the Malaysian Healthcare Tourism Council¹ for increasing revenue for the country.

Here in Malaysia, modern medical reproductive technologies have become readily available to assist couples with infertility issues. The cost of such treatment is low compared to neighbouring countries. The medical tourism boom has resulted in the mushrooming of local fertility clinics offering reproductive medicine, fertility treatment (eg, artificial insemination (AI), in vitro fertilisation (IVF), gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), intracytoplasmic sperm injection (ICSI)) in our big cities. However, there is a lack of proper legislation and the reproductive industry is woefully unregulated.

In the context of surrogacy, as infertility is perceived as a social stigma, not many couples are willing to come forward to share their experiences. Unsurprisingly, there is a lack of publicly available statistics on the surrogacy industry, be it commercial or altruistic.

In 2006, the Malaysian Medical Association² produced guidelines for assisted reproduction and on the subject of surrogacy, there is only

one paragraph, which is reproduced in full below. '12. SURROGACY

In a surrogate arrangement a woman agrees to become pregnant and bear a child for another person/persons and to surrender it at birth. The above practice is not acceptable to most of the major religions in this country. Such a surrogate pregnancy can also potentially lead to many legal dilemmas for the persons involved'.

Malaysian Medical Council (MMC) guidelines also state that the use of assisted reproductive technology (ART) is a prohibited practice and ethically unacceptable for *unmarried* couples. Malaysia does not recognise same-sex marriages.

In 2009, the Health Ministry initiated the proposed Assisted Reproductive Technology Technique Services Act to address issues such as surrogacy, sperm and egg banking and sperm donation in consultation with various stakeholders, including religious groups, non-governmental organisations, doctors and government ministries.

Although no legislation is yet in place, the Standards for Assisted Reproductive Technology (ART)³ provides some guidance on the 'minimum standards required for any ART facility operating in Malaysia'. The other act of relevance is the Human Tissues

Act 1974, which was based on the United Kingdom Human Tissues Act 1961.⁴ However, the Human Tissues Act 1974 does not deal with human reproductive technologies, licensing of ART centres or with the manner of storage/disposal of gametes or embryos with the attendant moral, ethical and psychological issues.

In Malaysia, any proposed ART statute would need to consider the added complexity of the dual legal system for Muslims and non-Muslims. This is because personal law (family law) for Muslims is governed by Sharia law, whereas non-Muslims are governed by civil law.⁵

Apart from this, for those professing the Islamic and Catholic faith, involvement of third parties in the reproductive process in a legally binding marriage of a couple is prohibited. In Islam, there is the added dimension of potential confusion caused to inheritance laws, which required the determination of a bloodline for inheritance rights. The National Council of Islamic Religious Affairs, on 12 June 2008, issued a fatwa prohibiting surrogacy⁶ for Muslims.

This article's focus will be on the civil law surrogacy position vis-à-vis non-Muslims.

Surrogacy and non-Muslims

In Malaysia, any surrogacy arrangement relating to the status of a child born as a result of a surrogacy arrangement remains unclear and there have been no reported Malaysian cases on surrogacy arrangements. A child who is born under a surrogacy agreement in Malaysia where the parties are non-Muslims would be governed by existing Malaysian legislation.

A commissioning couple engaging a surrogate who is implanted with third-party sperm and ova may be faced with some of the following issues:

- Which mother is legally recognised under the law – the mother who donates the ova or the surrogate?
- What is the status of the resulting child born?
- Are surrogacy agreements enforceable?

Married Malaysian surrogate

A surrogate mother who is married⁷ is considered to be the legal mother of the child and her husband, the father of the child, based on section 112 of the Evidence Act 1950,⁸ which provides:

'The fact that any person was born during the continuance of a valid marriage between his mother and any man,... shall be conclusive proof that he is the legitimate son of that man'.

This results in favour of the surrogate mother who decides to keep the child. The present laws provide her with sufficient recognition and protection of her rights as a mother over that child whose citizenship would follow the surrogate's husband.

Unmarried Malaysian surrogate

In the second scenario of an unmarried Malaysian surrogate mother, the child born is illegitimate. The surrogate holds sole guardianship and custodial rights and the child's citizenship would follow hers.⁹ The commissioning father as the biological father is not vested with any rights over the child.

Adoption

However, if the surrogate mother is willing to give up the child, the commissioning parents (and natural father) may then adopt the child. Section 2 of the Adoption Act 1952 provides that: "Father" in relation to an illegitimate child means the natural father'. In a proposed adoption, the written consent of the surrogate mother is required and the child and proposed adoptive parents must be ordinarily resident in West Malaysia.¹⁰ Payment or reward in consideration of the adoption of the child is forbidden under section 6(c) of the Adoption Act 1952.

Hence, the fees to be paid to the mother of a child to be given up for adoption are limited to pregnancy- and birth-related medical expenses. Any sums paid for the child that are not sanctioned by the court may jeopardise the prospects of any proposed adoption.

Based on the above, for a commissioning couple to acquire legal rights over the child born out of surrogacy, an adoption order is required. However, an adoption order would not automatically confer Malaysian citizenship upon the resulting child.

Citizenship

A child born in Malaysia to a surrogate who is stateless, would likewise inherit her statelessness. This legal dimension of the child's citizenship requires consideration. In the case of Malaysian commissioning parents, an application for citizenship may be made

for the child under Article 15A of the Federal Constitution. However, this is at the discretion of the Malaysian Home Minister, to be exercised based on certain guiding factors.¹¹

Non-Malaysian commissioning parents would need to ascertain the legal position for citizenship in their respective home countries to avoid the citizenship quandary as illustrated by the Indian experience of the *Baby Manji* case.¹²

The child's birth certificate

There have been instances of commissioning parents acting in concert with the surrogate to falsify the registration and birth of the child to reflect the commissioning parents' name (instead of the surrogate mother's). In Malaysia, this is a criminal act under section 466 of the Penal Code that carries a maximum seven-year prison sentence or fine.

Legality of surrogacy agreements

Any surrogacy agreement made between the commissioning parents and the surrogate mother may be rendered void for being against public policy under section 24(e) of the Contracts Act 1950, which provides that, 'the court regards it as immoral, or opposed to public policy... Every agreement of which the object or consideration is unlawful is void'.

The issue has yet to be tested in the local courts. As it stands, the law leans in favour of the surrogate who would be under no contractual obligation to hand over the baby to the commissioning parents. Thus, any claim for damages by the commissioning parents for breach of a surrogacy contract for expenses incurred would have poor prospects of success. There is every likelihood that the Malaysian courts may adopt the reasoning used in *Baby M*¹³ to strike down the surrogacy contract where the surrogate mother had formed a psychological tie to the baby and chose not to honour the agreement. The court in *Baby M* found the said agreement to be against public policy saying: 'This is the sale of a child, or at the very least, the sale of a mother's right to her child... Almost every evil that prompted the prohibition on the payment of money in connection with adoptions exists here'.

Possible maintenance claims by a surrogate mother

In the event a surrogacy contract is held unenforceable by the commissioning parents, there remains the possibility of a surrogate mother seeking maintenance of the child against the commissioning father, relying on section 3(2) of the Married Women and Children (Maintenance) Act 1950, which provides:

'If any person neglects or refuses to maintain an illegitimate child of his which is unable to maintain itself, a court upon due proof thereof, may order such person to make such monthly allowance, as the court deems reasonable.'

This provision was considered in *Koh Lai Kio v Low Nam Hui* [2005] 3 CLJ 139, where the court held that a mother would need to prove by extrinsic evidence (eg, DNA testing) that the father is the biological father of the child. Once established, the father could be ordered to pay a reasonable sum of maintenance depending on the facts of each case.

If the surrogate mother is non-Malaysian and delivers the baby in Malaysia

This course of action should be approached with extreme caution. Due to the lack of a regulatory body to oversee surrogacy arrangements, this may open the floodgates to commercial exploitation of marginalised foreign women. In Malaysia, the provisions of the Anti-Trafficking in Persons Act 2007, needs to be considered in the context of foreign surrogates being flown into the country by commissioning parents.

Section 12 of the Anti-Trafficking in Persons Act 2007 states:

'Any person, who traffics in persons not being a child, *for the purpose of exploitation*, be punished with imprisonment for a term not exceeding fifteen years, and shall also be liable to fine'.

Section 2 defines 'exploitation' as 'all forms of sexual exploitation, *forced labour or services*, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs.' 'Trafficking in persons' is defined as 'all actions involved in *acquiring or maintaining the labour or services of a person through coercion*, and includes the act of recruiting, conveying, transferring, harbouring, providing or receiving a person for the purposes of this Act'.

The other relevant provisions are sections 13 to 19 of the Anti-Trafficking in Persons Act 2007. There are additional legal pitfalls for commissioning parents to avoid contravening, inter alia, that:

- the foreign surrogate is not a trafficked person;
- they have not been coerced to provide the surrogacy services. Studies have indicated that economics is the primary motivation and surrogates come from lower class women of colour;¹⁴ or
- they have not been coerced to travel to Malaysia.

The surrogate must not travel using fraudulent travel/identity documents.¹⁵ Breaches of the Anti-Trafficking in Persons Act 2007 attract severe penalties, which include heavy prison terms and substantial fines. Section 16 of the said act also provides that the consent of the trafficked person is not a defence under a prosecution under the act. As addressed in the earlier paragraphs, any child born in Malaysia of a foreign surrogate mother would inherit her nationality (if she is unmarried).

Conclusion

Approximately 15 per cent of the Malaysian population¹⁶ are unable to have children. A *Sin Chew Daily* news item dated 12 July 2009 referred to a United Nations report, stating that the country's fertility rate had dropped from 3.6 babies per couple in 1990 to 2.6 babies. The article quoted the Health Minister Liow Tiong Lai who said: 'Many of the couples will remain childless unless they are helped using the 'assisted reproductive technology' technique', Liow said between 10 and 15 per cent of childless couples in the country, aged between 30 and 40, had fertility problems (AFP).¹⁷

Due to the benefits that it offers to infertile couples, ART technology and surrogacy are permanent features of the Malaysian medical landscape. Regrettably, the Malaysian legal position for surrogacy arrangements remains rudimentary. Comprehensive legislation is needed to keep abreast of the progress of modern reproductive technology to address the myriad complex issues. These issues include, inter alia, the legal status of the commissioning couple, the surrogate, the resulting child, the gamete donors, sex selection, storage/disposal of spare embryos, remedies for breakdown in the surrogacy arrangement, refusal of commissioning

parents to take the child if born with disabilities, the possibility of death of one or both of the commissioning parents and/or unsuccessful outcomes.

The human aspect should not be forgotten as the pregnancy results in an intimate psychological bonding between the surrogate and the child. In many other countries (eg, Australia), where altruistic surrogacy is permitted, criminal background checks, psychological assessment and counselling are a mandatory and integral part of the process for the commissioning parents and the surrogate (and her partner).

Malaysia has yet to take any firm position vis-à-vis commercial and/or altruistic surrogacy. This is in stark contrast with neighbouring Thailand, which has, since 30 July 2015,¹⁸ banned commercial surrogacy for foreigners and same-sex couples under the Protection of Children Born from Assisted Reproductive Technologies Act. This development arose from the controversial *Baby Gammy* case,¹⁹ where an Australian commissioning couple had abandoned one twin born with a hole in the heart and Down's syndrome while taking the normal baby girl. The commissioning father, David Farnell, was also reportedly a child sex abuser.

Clearly, inaction can no longer be an option. The Malaysian government is urged to resume legislative efforts for comprehensive regulation and consistent monitoring of reproductive medicine practices in the areas of IVF/surrogacy procedures and bio-medical/embryo research in order to provide certainty as to the rights and obligations of parties to a surrogacy. Non-legislation creates a dangerous legal lacuna in which the rights of the commissioning parents, surrogate and the resulting child remain unprotected, leading to potentially devastating outcomes for the parties concerned.

Notes

- 1 'Malaysia expands health tourism and plans laws on fertility treatment' Middle East Healthcare Intelligence (13 March 2011).
- 2 'Assisted Reproduction' *The Malaysian Medical Council MMC Guideline 003/2006*.
- 3 Prepared by Standards for ART Laboratories Working Committee, Medical Development Division, Ministry of Health dated October 2012.
- 4 Fadilah Abd Rahman 'Regulating Embryo Research: United Kingdom as a model and the position of Islam in Malaysia' (2012) 1 LNS(A) lxi.
- 5 The Law Reform (Marriage and Divorce) Act of 1976.
- 6 See www.e-fatwa.gov.my/fatwa-kebangsaan/hukum-menggunakan-kaedah-khidmat-ibu-tumpang-surrogate-motherhood-untuk-mendapatkan: 'The 80th Muzakarah (Conference) of the Fatwa Committee National Council of Islamic Religious Affairs Malaysia held on 1st-3rd

- February 2008 has discussed on the ruling obtaining the service of surrogate mother to have a child. The Committee has decided that surrogacy is forbidden in Islam even if the sperm and ovum were taken from a married couple as this will bring genetic confusion to the unborn baby'.
- 7 Section 87 of the Law Reform (Marriage and Divorce) Act 1976 – definition of child.
 - 8 The Evidence Act 1950 applies to Muslims and non-Muslims.
 - 9 Article 14(1)(b) of the Federal Constitution.
 - 10 Section 4(3) of the Adoption Act 1952.
 - 11 M Navin citizenship case in the Court of Appeal reported on 29 July 2015, available at: <http://my.news.qa2p.global.media.yahoo.com/court-dismisses-ministry-appeal-deny-101614618.html> and Hansard Parliamentary Debates dated 31 January 1962 at p 4528 where it is stated that the law 'gives the Government discretion to register a person under the age of 21 as a citizen, if the Government thinks that there are grounds for registering such persons as citizens. I cannot, of course, state here the circumstances. If the Government thinks that a child probably has no parents here, or who obviously has

attachment to the country, in such a case possibly the Government will register him as a citizen. This is merely to give discretion to the Government in cases of hardship and in cases where Government thinks that it is in the interest of the child and the country that the child be registered as a citizen. It is a new one'.

- 12 *Baby Manji Yamada v Union of India* (UOI) and Another (2008) 13 SCC 518.
- 13 *In the Matter of Baby M* 217 N.J. Super Ch 313.
- 14 Jay R Combs, 'Stopping the Baby-Trade: Affirming the Value of Human Life Through the Invalidation of Surrogacy Contracts' (1999) 29 N.M.L.R. 407.
- 15 Section 18 of the Anti-Trafficking in Persons Act 2007.
- 16 Estimated at 27 million as at 2009.
- 17 *Sin Chew Daily* online news item dated 12 July 2009 available at: www.mysinchew.com/node/27091#sthash.rIA0MuPM.dpuf.
- 18 Available at: www.bangkokpost.com/news/general/638264/law-banning-commercial-surrogacy-takes-effect.
- 19 Available at: www.theguardian.com/world/2014/aug/07/gammy-child-protection-officers-contact-australian-couple.

New Zealand's approach to domestic and cross-border surrogacy

NEW ZEALAND

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This paper will summarise New Zealand's approach to both domestic surrogacy and the increasing phenomenon of international surrogacy arrangements.

Domestic surrogacy

Surrogacy itself is not illegal in New Zealand, but a surrogacy arrangement is deemed by law unenforceable.¹ Commercial surrogacy is prohibited but compassionate surrogacy is allowed, subject to regulation, where the pregnancy is a result of assisted reproductive techniques. If the procedure is undertaken at a fertility clinic, then the involved parties are required to seek consent from a National Ethics Committee that meets five times a year. Applications to that committee must comply with guidelines that establish:

- the health and wellbeing of the child to be born must be an important consideration;
- that the intended legal mother has the medical condition that prevents pregnancy or makes pregnancy potentially damaging to her or
- the applicants have a medical diagnosis of unexplained infertility that has not

responded to other treatments.

The Ethics Committee considers applications on a case-by-case basis. Each application must be accompanied by a written report from counsellors engaged by both the intended parents and the birth parents and includes a report of a joint counselling session. All parties must receive independent legal advice and the nature of that advice must be reported to the Ethics Committee. If granted, the approval is valid for three years.

Most of the surrogacy applications that come before the Ethics Committee are gestational surrogacy arrangements. They may involve the use of a donor egg or a donated embryo.

If the pregnancy is successful, as with most other jurisdictions, the woman who gives birth to the child is the legal mother. This rule applies even if the ovum or embryo is donated. The birth mother's consenting partner to the procedure is deemed to be the other legal parent.

That other legal parent may be a same-sex partner or spouse.² Donor insemination (including home inseminations), donor egg, donor sperm and embryo transfers are all defined as assisted human reproduction