

The Present State of Regulations Concerning Surrogacy in Thailand

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ABSTRACT

Thailand has become a hub for reproductive medicine (particularly surrogacy) within Asia since the start of this century. Nevertheless, in the wake of the surrogacy-regulating directives issued by the Indian Ministry of Home Affairs to the Ministry of External Affairs on July 9, 2012 and March 7, 2013, Thailand has not only experienced a rapid increase in surrogacy applicants since 2013, but also many surrogacy-related incidents. This multiple occurrence of surrogacy-related incidents triggered the military administration of Prayuth Chan-ocha to label “paid egg donation, commercial surrogacy, and sex selection through preimplantation genetic diagnosis (PGD)” as “human trafficking.” As well, the temporary National Legislative Assembly of Thailand subsequently passed the surrogacy-regulating legislation (พ.ร.บ.คุ้มครองเด็กที่เกิดโดยอาศัยเทคโนโลยีช่วยการเจริญพันธุ์ทางการแพทย์ พ.ศ. 2558; *Protection for Children Born Through Assisted Reproductive Technologies Act, 2015*), when it met on February 19, 2015. With Thailand's law banning both commercial surrogacy and regulating altruistic surrogacy becoming successfully approved by the Council of Ministers and King Bhumibol Adulyadej, effective since July 2015, the reproductive medicine ‘refugees’ of the developed world, including Japan, will likely shift their attention from Thailand to alternative countries, such as the United States, Georgia, Ukraine, Russia, and others.

Keywords: Thailand, surrogacy, medical tourism, ART, ethics

Introduction

Since 1998, every three years, the International Federation of Fertility Societies (IFFS) has investigated the state of regulations (guidelines and legislation) concerning reproductive medicine in Asia and has reported on the results (in reports entitled *IFFS Surveillance*¹). I have also published several papers on this topic², as well as a three-layer analysis of surrogacy in Asia³, in the period from 2000 to 2016.

By making medical tourism a part of national policy at the start of the 21st century, Thailand has become a hub for reproductive medicine, particularly surrogacy, within Asia, and has achieved rapid economic development in this area, as a result. However, major changes since 2014 have negatively impacted the climate for surrogacy in Thailand. This paper reports on and

analyzes the most up-to-date information on this issue for the benefit of researchers and patients involved with reproductive medicine.

1. Enactment of Thailand's first law banning commercial surrogacy

As is well known, India and Thailand have served as hubs for surrogacy within Asia. This became especially true of Thailand after 2013, when India underwent a policy shift in relation to the regulation of surrogacy (i.e., through directives issued by the Indian Ministry of Home Affairs to the Ministry of External Affairs on July 9, 2012 and March 7, 2013).⁴ The rapid increase of the number of foreign nationals flocking to Thailand to commission surrogacy led to a slew of surrogacy-related incidents. Notable among them was a multiple-surrogacy incident involving a young Japanese businessman. This incident,

uncovered in August 2014, shocked and appalled Thai society. This case triggered the military administration of Prayuth Chan-ocha to declare that “paid egg donation, commercial surrogacy, and sex selection through preimplantation genetic diagnosis(PGD)” amount to “human trafficking.”⁵ As well, the National Legislative Assembly of Thailand subsequently approved a law banning commercial surrogacy when it met on February 19, 2015 (พ.ร.บ. คุ้มครองเด็กที่เกิดโดยอาศัยเทคโนโลยีช่วยการเจริญพันธุ์ทางการแพทย์ พ.ศ. 2558; *Protection for Children Born Through Assisted Reproductive Technologies Act, 2015*).⁶

What was the impetus for the Chan-ocha military administration’s initiative to reverse its regulations surrounding the country’s traditional surrogacy promotion measures?

2. The impetus for the initiatives of the Chan-ocha military administration

Thailand is one of leading countries in the field of advanced medicine in Asia. Measures to promote medical tourism, including reproductive medicine, have been part of national policy ever since the administration of Thaksin Shinawatra, the 31st Prime Minister of Thailand. Yingluck Shinawatra, the 36th (and first female) Prime Minister of Thailand, continued her elder brother’s national policy, but was removed from office on May 7, 2014, over government corruption charges. Amidst the political turmoil following Shinawatra’s departure from office, Chan-ocha, then the Commander-in-Chief of the Royal Thai Army, declared martial law on May 20, and further launched a military *coup d’état* and appointed himself as Interim Prime Minister on May 22. With the swearing-in of the top Thai political leader sponsored by King Bhumibol Adulyadej on August 25, Chan-ocha assumed responsibilities as the 37th Prime Minister of Thailand. A hard-line conservative, Chan-ocha embarked on a national policy of tighter regulation of surrogacy while continuing the government’s promotion of medical tourism, and, at last, he vowed to shut down the commercial surrogacy altogether.⁷

Why did he decide to do so? Prompting these executive decrees were the cases of a young Japanese businessman that occurred in Bangkok

and an Australian couple who commissioned surrogacy but returned home after refusing to accept one of their twins who had Down syndrome.

3. Multiple-surrogacy incident involving a young Japanese businessman that triggered regulations on surrogacy

On August 5, 2014, Thai police abruptly stormed into the Bangkok condominium owned by a 24-year-old Japanese man, Mitsutoki Shigeta - the eldest son of the founder of Hikari Tsushin, Inc. and the operator of the business under suspicion - and took custody of nine infants. The condominium searched by the Thai police was already registered as the residential address of 21 infants (12 males and 9 females) born from eggs provided by women of various nationalities, hailing from countries from Europe and Asia. The young Japanese man’s plan to mass-produce children, unprecedented in history, was not only inconsistent with accepted morals in Japanese society, but also greatly divergent from the standard morals of international society. This was not all: there were concerns that Shigeta had violated the United Nations Convention on the Rights of the Child, to which both Japan and Thailand are signatories. Triggered by this multiple-surrogacy incident of puzzling motivation, the National Legislative Assembly approved legislation regulating surrogacy on February 19, 2015, backed by the Chan-ocha military administration. The law has been in force since July 30, 2015, following the approval of the Council of Ministers and King Bhumibol on July 21, 2015.

The next question is: what are the defining characteristics of the 2015 surrogacy regulation law?

4. Enactment and characteristics of the 2015 surrogacy regulation law

A “ban on commercial surrogacy” had been articulated in the Medical Council of Thailand (แพทยสภา)’s *Announcement No. 21/2545 on the Standards of Services Involving Reproduction Technology, 2002*.⁸ Despite this ban, flouting this

guideline was the norm in clinical settings until the summer of 2014. Doctors with the double standard of regularly performing commercial surrogacy treatments in privately-run clinics, were certainly not uncommon, even as they abstained from doing so in their positions as on-duty doctors of large hospitals. Under these conditions, prioritized above all else was the legal guarantee of the rights and welfare of surrogate children. In the absence of laws regulating surrogacy, the only regulation of surrogacy in Thailand was the *Thai Civil and Commercial Code* (ประมวลกฎหมายแพ่งและพาณิชย์). Section 1546 of the Code states that “A child born from a woman who is not married to an intended father is deemed to be the legitimate child of its birth mother”, and the surrogate mother of a surrogate child was deemed its mother. Therefore, in order for a couple who had commissioned surrogacy to take their surrogate child, a blood relative, back to their home country, they needed to enter into a surrogacy contract, including adoption provisions, with the surrogate mother. However, even bound by the surrogacy contract, one could envision scenarios in which the commissioning couple could refuse to accept a child born with defects or die before its delivery, and even the surrogate mother could have a change of heart. As a result, the rights and welfare of surrogate children were in jeopardy. Thailand was in a very dire moral and legal situation wherein commercial surrogacy was proceeding in the absence of a legal guarantee of the rights and welfare of surrogate children.

The Chan-ocha administration’s enactment of the surrogacy ban on February 19, 2015, was structured around the two major pillars of banning commercial surrogacy and regulating altruistic surrogacy, and was based on the *Protecting Children Born Through Assisted Reproductive Technology Medical Act, 2010* (มติคุ้มครองเด็กที่เกิดโดยอาศัยเทคโนโลยีช่วยการเจริญพันธุ์ทางการแพทย์)⁹, a 2010 bill abandoned in mid-deliberation. The defining characteristics of the surrogacy-regulating legislation *Protection for Children Born through Assisted Reproductive Technologies Act, 2015* published in the Royal Thai Government Gazette on May 1, 2015 are summarized below.¹⁰

- 1 Surrogacy is in principle restricted to female relatives who have already given birth.
- 2 In the event that no relative can carry

the surrogacy, the applicant must receive permission after the due consideration of the Committee on the Care of Children Born by Means of Assisted Reproductive Technology within the Ministry of Public Health.

- 3 Prior to surrogacy, the applicant must attend a seminar and receive a psychological examination.
- 4 Surrogacy is available only to legally married husband-and-wife couples who are both of Thai nationality.
- 5 Couples consisting of a Thai and a foreign national who commission surrogacy are obligated to provide proof of legal marriage lasting over three years (to prevent counterfeit marriages).
- 6 Surrogacy brokerage and compensation are prohibited.
- 7 Businesses that deal with gametes for use in surrogacy are prohibited, as is the import/export of gametes.
- 8 Only 60 domestic hospitals that have received permission to handle surrogacy are authorized to do so.

Conclusion

With the enactment of the 2015 legislation regulating surrogacy, will medical ‘refugees’ from developed nations, including Japanese surrogacy patients, be able to find other host countries as alternatives to Thailand?

After the complete ban on surrogacy by the Thai Government, the Nepalese Government decided to follow suit in October 2015. Accompanying these events, some surrogacy agencies considered neighboring Cambodia - where surrogacy treatment was still possible, due to the absence of laws governing reproductive medicine - as an alternative surrogacy destination to Thailand. Among them, The New Life Global Network opened a Cambodian branch in March 2015.¹¹ After Dr. Sean Sokteang opened the Fertility Clinic of Cambodia, the country’s first In Vitro Fertilization (IVF) clinic, the reproductive medicine field experienced rapid growth in Cambodia. At its peak, Cambodia was home to 16 surrogacy clinics. Even with the government’s announcement of a surrogacy ban in November 2014, the activities of surrogacy agencies continued unabated. The Cambodian Government

gave notice of a coming crackdown with the publication of an October 10, 2015 article in the newspaper *ผู้จัดการ* stating, “government officials plan to classify surrogacy as a form of human trafficking.”¹²

In addition, the Thailand IVF Support Center (represented by Takehiko Yokosuka), which had performed surrogacy services in Thailand, established Georgia Surrogacy Japan in collaboration with Dr. Tamar Khachaouridze, chief doctor of the Surrogate Motherhood Center of Georgia and board member of Hope for the Future¹³ (Commercial surrogacy was legalized in Georgia with the 1997 enactment of the *Law of Georgia On Health Protection*¹⁴). Georgia Surrogacy Japan now brokers surrogacy arrangements with Japanese surrogacy patients, but its services are limited to married Japanese heterosexual couples because their Georgian partner center refuses to serve single men and gay couples (marriages of the latter being against the law in Georgia).

Therefore, medical ‘refugees’ from developed nations, including Japan, seeking surrogacy treatment are expected to shift their sights to alternative countries to Thailand (e.g., the USA, Georgia, Ukraine, and Russia).¹⁵

Notes

1 Howard W. Jones, Jr. et al. (eds.): *IFFS Surveillance 2010*, American Society for Reproductive Medicine, 10, 2010.
 Steven J. Ory et al. (eds.): *IFFS Surveillance 2013*, American Society for Reproductive Medicine, 10, 2013.

2 Kodama, M.: Preliminary Research on Legal Restrictions and the Current State of Surrogacy in Multiethnic Singapore, *Biocosmology-Neo-Aristotelism*, 4(4), Autumn 2014, 461-468, 2014.
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International Bioethics, 24(1), 12-17, 2014.
 Kodama, M.: The Present State of Regulations Concerning Reproductive Medicine, Particularly Surrogacy, in both India and Thailand, *Eubios Journal of Asian and International Bioethics*, 26(1), 4-8, 2016.

3 In these papers, I introduced the state of surrogacy in Asian countries such as India and Thailand (layer 1), as experienced by renowned surrogacy experts, and examined their ethical assessments (layer 2) as well as their religious and cultural views of reproductive technology supporting these ethical assessments (layer 3).

4 The Indian Government’s tightening of surrogacy-related regulations began with directives issued by the Indian Ministry of Home Affairs to the Ministry of External Affairs on July 9, 2012 and March 7, 2013. It continued in 2015 with the announcement of a directive stopping the issuance of medical visas to foreign nationals wishing to commission surrogacy and the issuance of exit visas to surrogate children on November 3, as well as the announcement of a directive completely banning the admission of foreign-national patients to domestic reproductive medicine clinics on November 11. For details, see my previous paper: Masayuki Kodama: The Present State of Regulations (Guidelines and Legislation) Concerning Reproductive Medicine, Especially Surrogacy, in India, *Humanity and Medicine*, 6, 61-67, 2016. (in Japanese)

5 Thai generals had surrogacy in their sights [*Sydney Morning Herald*, August 9, 2014].
 Chan-ocha is not alone. Director Saowanee Khomepatr of the Ministry of Social Development and Human Security also shares his view, stating, “The government and the Prevention of Human Trafficking Act view commercial surrogacy as a form of human trafficking.” Wombs for hire: Aussie couples flock to Thailand to find surrogates [*SBS The Feed*, Oct 29, 2013].

6 *Asahi Shimbun*, February 19, 2015.

7 Preceding the 2014 multiple-surrogacy incident involving Shigeta, Babe-101, a Taiwanese surrogacy agency that had signed commercial surrogacy contracts with 15 Vietnamese women, was raided by Thai police on suspicion of human trafficking. Surrogate moms to give birth in Thailand [*Thanh Nien*, 3/11/2011].
 Having received reports from his subordinates of Thailand serving as a mecca for both commercial surrogacy and sex selection through PGD, Prime Minister Chan-ocha ordered Thai police to conduct raids of 12 reproductive clinics in Bangkok on July 24, 2014. These clinics then promised the Chan-ocha military administration, which views commercial surrogacy, sex selection through PGD, and paid egg donation as “human trafficking,” that they would no longer practice advanced reproductive medicine. Sex-selection reports trigger investigation of fertility clinics [*The Nation*, March 25, 2014].
 Afterwards, the Chan-ocha administration

met on July 31 to officially decide on the “shut-down of Thailand’s commercial surrogacy market.” This was directly followed by the revelation of the multiple-surrogacy incident at Shigeta’s condominium. Thailand’s largest surrogacy service, the All IVF Clinic (owned by Dr. Pisit), was revealed as one of those contracted by Shigeta, after it was searched on July 24, 2014. The Chan-ocha military administration ordered a second search on August 8, 2014, which led to the forced closure of one of the offices of the clinic (Sivatel Bangkok Hotel, 12F & 15F) on the grounds that the business was unauthorized and unregistered [*Bangkok Post*, 8/8/2014]. The All IVF Clinic, shut down on August 8, 2014, had 165 surrogate mothers. Cf. Sakura Lifesave Associates, Inc. Homepage.

- 8 Homepage of The Medical Council of Thailand (แพทยสภา): http://www.tmc.or.th/service_law03_7.php
- 9 Thailand Judicial Affairs Committee Homepage: <http://web.krisdika.go.th/data/news/news10866.pdf>
- 10 <http://www.posttoday.com/analysis/report/379175>
- 11 This reproductive medicine agency, headquartered in Georgia, also has offices in India, South Africa, Poland, Armenia, and Ukraine, and is a commercial organization dealing with egg provision and surrogacy services. The brave new world of the international egg trade [*Mail & Guardian*, May 17, 2013].
- 12 Gov’t to Crack Down on Surrogacy Clinics [*Khmer Times*, November 11, 2015].
- 13 This institution was established, in 2000, and was the first to provide surrogacy treatment in Georgia.
- 14 Article 143 permits *in vitro* fertilization, gamete/embryo provision, and surrogacy. The parents of the surrogate child must be those commissioning the surrogacy, and not gamete/embryo donors or surrogate mothers. Article 144, “Extracorporeal Fertilization (IVF),” permits the cryopreservation of gametes and embryos. The text of the *Law of Georgia on Health Protection* restricts surrogacy to heterosexual married couples in which the wife lacks a uterus, but both commercial surrogacy and altruistic surrogacy are permitted in practice. In January 2014, the Minister of Justice of Georgia stated plans to enact surrogacy-regulating legislation to ban commercial surrogacy and restrict surrogacy to altruistic surrogacy, but deliberation on the bill was suspended in 2016, due to pushback from opposition voices.
- 15 Rudy Rupak, CEO of Los Angeles’ Planet Hospital, said that he perceived India’s restrictions on surrogacy as a business opportunity, opening the door for Australian and Asian customers to migrate to Thailand and for American and Canadian customers to migrate to Mexico. So long Surrogacy in India, Hello Surrogacy in Mexico and Thailand [*PLANET HOSPITAL*, February 4, 2013].

The present state of surrogacy in Mexico, Ukraine, and Russia is outlined below.

With its inexpensive medical costs, the Mexican state of Tabasco has seen a continued flood of medical refugees from around the world, including

the USA and Canada, seeking surrogacy treatment there. As a result, the Congress of the State of Tabasco passed a law proposed on November 11, 2015 banning surrogacy requests from foreign nationals on December 14 of the same year. The bill was enacted as state law on January 13, 2016.

Ukraine experienced the birth of its first surrogate child in 1991. Ukraine adopted the *Bill on Restrictions for the Use of ART in Ukraine* on its first reading, a piece of ART legislation that provided the legal status of surrogacy [*Ukrainian Surrogates*, February 26, 2013]. Laws and regulations that paved the way include: Article 123 of *The Family Code of Ukraine 2002*; Paragraph 2.2 of Order No. 140/5, dated November 18, 2003, Ministry of Justice of Ukraine, entitled *Changes and amendments to the regulations of registering of civil acts in Ukraine*; Order 771, dated December 23, 2008, Ministry of Health of Ukraine, entitled *Instructions on the Use of Assisted Reproduction Technologies*, and Order No. 52/5, Ministry of Justice of Ukraine.

Russia’s first surrogacy program began operations in 1995. Surrogacy regulations that form the legal basis of surrogacy in Russia include the *Federal Law on the Fundamentals on Protection of Citizens’ Health* (enacted in 2011, in effect from January 1, 2012), Article 55, Paragraph 10, which specifically prohibits traditional surrogacy (via artificial insemination) in which the surrogate mother provides the egg. Others include *The Family Code of the Russian Federation* (enacted in 1995, in effect from March 1, 1996) and *The Federal Law on the Acts of Registration of Civil Status 1997*, Russian Federation Ministry of Health Order No. 67 (enacted in February 2003).

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