

**UNIVERSITY OF SOUTHAMPTON**  
FACULTY OF BUSINESS, LAW & ART  
School of Law

**ETHICAL AND LEGAL ASPECTS OF SURROGACY –  
RECOMMENDATIONS FOR THE REGULATION OF SURROGACY  
IN VIETNAM**

by  
**Tung Le Xuan**

Thesis for the degree of  
Doctor of Philosophy

**June 2016**



UNIVERSITY OF SOUTHAMPTON

ABSTRACT

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The decade long complete ban on surrogacy aimed to protect traditional and cultural values in Vietnam. However, in spite of the legal prohibition, the social and cultural pressure to produce offspring often led Vietnamese infertile couples to seek the help of surrogate women in the black market. In 2014, after long parliamentary debates, Vietnamese law makers allowed altruistic surrogacy, opening a new way to parenthood for infertile couples in the country.

This research begins with an exploration of the legal and social background within which surrogacy operates in Vietnam. By examining the need for Vietnamese infertile couples to have genetically related children from religious and cultural perspectives, it explains why some couples chose surrogacy and made illegal surrogacy arrangements in spite of implications resulting from the black market.

Through an examination of procreative autonomy and the right to procreate, the thesis provides explanations and justifications for the use of surrogacy by infertile couples in Vietnam. It demonstrates that by removing the total ban on surrogacy and allowing altruistic surrogacy, the Vietnamese state enabled its citizens to effectively exercise procreative autonomy and enjoy the right to procreate in their pursuit of family formation and happiness.

Despite this progress the thesis identifies flaws in the current law on surrogacy and hence, brings forward proposals for further reforms of the law on surrogacy in Vietnam by referring to resolutions to similar problems under English law. It concludes by making clear recommendations for ways in which the current law can better support procreative autonomy and individual freedom to choose surrogacy as a means of overcoming infertility.

This research will be structured into 6 main chapters (plus introduction and conclusion chapters). Chapter 1 provides an overview on the legal system in Vietnam. Chapter 2 examines the social and cultural context for surrogacy in Vietnam. Chapter 3 studies concerns over implications of the black market of surrogacy in Vietnam. Chapter 4 is a study on the right to procreate in the context of surrogacy. Chapter 5 conducts an in-depth analysis of procreative autonomy in the context of surrogacy. Chapter 6 analyses the flaws or imperfections in the current Vietnamese law on surrogacy. The conclusion chapter proposes recommendations for further legal reforms on surrogacy in Vietnam in years to come.



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# DECLARATION OF AUTHORSHIP

I, Tung Le Xuan

declare that the thesis entitled

## **Ethical and Legal Aspects of Surrogacy –**

### **Recommendations for the Regulation of Surrogacy in Vietnam**

and the work presented in it are my own and has been generated by me as the result of my own original research.

I confirm that:

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- where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
- I have acknowledged all main sources of help;
- where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
- none of this work has been published before submission.

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Date:



## ACKNOWLEDGEMENTS

I would like to express my profound gratitude to my supervisor, Professor Hazel Biggs, for her invaluable help since the first day I came to Southampton Law School. Over four years, she has been very supportive of my work and given me tender encouragement and guidance at any time with accompanied boundless generosity and tolerance. In writing this thesis, I have benefited from her creative supervision, her meticulous reading of countless drafts, and her insightful comments and suggestions. Without her, I would have missed an inestimable chance to acquire and enrich my knowledge of English case law, and would definitely not have completed this thesis.

My thanks also go to Project 165 and Ho Chi Minh National Academy of Politics in Vietnam for their financial assistance during my study in Southampton.

Finally, I would like to thank my parents for their love and everlasting spiritual support when I am away from home. They do not know any English words, but they are a source of continual inspiration for me to learn English due to their deep respect for English language and British culture. This thesis is a gift I have always wished to make for them.





## INTRODUCTION

As a method of medically assisted reproduction, surrogacy offers possible choices for infertile persons who want to have children genetically related to them with the assistance of reproductive technologies. Surrogacy might also be understood as a way of family formation in modern societies.<sup>1</sup> In conventional understanding, surrogacy is deemed a practice in which a woman bears a child for another woman who is unable to conceive herself or carry the foetus to term. This belief, in some way, has a religious ground which traces back to biblical times as written in the Old Testament that Sarah, Abraham's infertile wife asked her slave Sagar to be a surrogate to carry a child for her.<sup>2</sup> In practice, surrogacy is more complex because there might be people other than infertile women wanting to have children through surrogacy. In this regard, the Warnock Report, a major UK government document enquiring into human fertilisation and embryology, including the issue of surrogacy, provides a comprehensive definition of surrogacy which remains relevant and valuable today. According to Warnock, surrogacy is defined as 'a practice whereby one woman carries a child for another with the intention that the child should be handed over after birth'.<sup>3</sup> The term 'another' means that surrogacy agreements may be reached between a surrogate and a commissioning couple the wife of which is medical infertile<sup>4</sup>, between a surrogate and a gay couple who are socially infertile, between a surrogate and a single man who lacks a female partner, or between a surrogate and a grandparent who, after the death of their children, want to have biological grandchildren through posthumous insemination.<sup>5</sup> My research focuses on

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<sup>1</sup> Robin Mackenzie, 'Beyond Genetic and Gestational Dualities: Surrogacy Agreements, Legal Parenthood and Choice in Family Formation'. In: Horsey, K. and Biggs, H., (eds) *Human Fertilisation and Embryology: Reproducing Regulation*, Routledge Cavendish, 2007, pp.181-205.

<sup>2</sup> Anna McGrail, *Infertility: the last secret*, Bloomsbury, 1999, p.167.

<sup>3</sup> Mary Warnock, *Report of the Inquiry into Human Fertilisation and Embryology Cm 9314*, London: Department of Health and Social Security, 1984, para.8.1.

<sup>4</sup> For example, she is unable to produce eggs/has no womb/ or has suffered repeated miscarriages.

<sup>5</sup> This practice is very rare, but still mentioned in Landau's research. It is shown that grandparents might have a chance to have biological grandchildren through posthumous conception combined

surrogacy for commissioning couples who are medically infertile, because other forms of surrogacy agreements, such as arrangements between a surrogate and a gay couple<sup>6</sup> or between a surrogate and single persons/unmarried couples<sup>7</sup>, are rarely reported in Vietnam.

Traditionally, surrogacy is classified into two types: partial surrogacy and full surrogacy. Partial surrogacy involves 'the surrogate mother inseminating herself with the commissioning father's sperm'<sup>8</sup>, while full surrogacy is a practice where IVF is used, in particular 'an embryo is created in vitro, usually using the commissioning couple's egg and sperm, and transferred to the surrogate mother's uterus'.<sup>9</sup> In partial surrogacy, the surrogate mother is both the gestational and the genetic mother because she has provided reproductive materials and carried the child to term. In full surrogacy, the surrogate mother is only a gestational mother as the conception takes place in vitro and the surrogate gestates a foetus which is not genetically linked to her. In this case, the genetic mother is the commissioning woman who has provided her eggs for fertilisation *in vitro*. It is also noteworthy that in some cases, donor eggs could be used if the commissioning woman is unable to produce eggs for medical reasons, whereas the surrogate mother does not want to provide her own eggs.

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with surrogacy using the fertilised eggs of their deceased daughter. See Ruth Landau, 'Israel: Everyone person has the right to have children', in Blyth E. and Landau R (eds), *Third party assisted conception across cultures*, Jessica Kingley Publishers, 2004. Grandparents might also have grandchildren through posthumous insemination in which their deceased son's sperm can be used in combination with donor's or surrogate mother's egg. See Jonathan Herring, *Medical Law and Ethics*, Oxford University Press, 2010, p.322.

<sup>6</sup> The present law of Vietnam (the Family and Marriage Act 2014) forbids same-sex marriage and has not yet recognised a civil partnership between same-sex persons. Thus, it is impossible for a gay or lesbian couple in Vietnam to have biological children legally through any form of assisted reproduction. Their illegal surrogacy arrangements, if any, are not reported.

<sup>7</sup> Under the current law of Vietnam, artificial reproductive technologies (ARTs) are restricted to use by infertile married couples and single women only (Article 4(1) of Decree No 12/2003/ND-CP on human reproduction using assisted technologies). It is inferable that unmarried couples, fertile married couples, single men and other people are not allowed to use ARTs to have children.

<sup>8</sup> Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy*, Oxford: Hart, 2001, p.261.

<sup>9</sup> *Ibid*, p.262. It is notable that 'embryo transfer' may also be used in very rare cases if a woman is unable to conceive, but still able to carry the foetus. In these cases, the surrogate conceives and then the embryo is transferred to the commissioning woman. See Sharyn Roach Anleu, Surrogacy: For Love, but Not for Money, *Gender and Society*, Vol.6, No.1 (March 1992), pp.30-48.

Surrogacy is also classified into two other categories – altruistic surrogacy and commercial surrogacy. The distinction between altruistic surrogacy (or non-commercial) and commercial surrogacy is commonly made on the surrogate's motivations. Altruistic surrogacy is depicted as a generous action whereby a woman acts as surrogate mother on the basis of her altruistic, non-commercial motivations (such as love, sympathy for misfortune of the infertile couple)<sup>10</sup> in order to help couples who are unable to naturally have their biological children and hence, give them the pleasure of parenting. This means that the surrogate mother in an altruistic surrogacy arrangement does not look for any financial gain or other payment for her reproductive services.<sup>11</sup> Meanwhile, commercial surrogacy is construed as an arrangement with financial inducement on the part of the surrogate mother.<sup>12</sup> Altruistic surrogacy does not totally exclude the payment of money to the surrogate. In some jurisdictions where altruistic surrogacy is allowed, surrogates are still paid a substantial amount of money in the form of living subsidies, healthcare stipends and other benefits that are not related to the creation of a child.<sup>13</sup>

It has been claimed that the practice of surrogacy is regarded as the most controversial amongst possible ways of creating families.<sup>14</sup> Full surrogacy is different to other ways of family formation in that it separates gestation from genetics and childrearing.<sup>15</sup> Hence, identifying the legal parents of a child born through a surrogacy arrangement is complicated and often litigious<sup>16</sup> because there are possibly many people who could claim parenthood. For example, in a full surrogacy arrangement where donated embryos are used, the number of potential parents might be up to six (sperm and egg providers; the commissioning couple; the surrogate mother and her husband). For this reason,

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<sup>10</sup> This will be discussed later in Chapter 6.

<sup>11</sup> Swapnendu Banerjee, *Gestational Surrogacy Contracts: Altruistic or Commercial? A Contract Theoretic Approach*, *The Manchester School*, Vol.81, No.3, June 2013, p.439.

<sup>12</sup> *Ibid*, p.439.

<sup>13</sup> Cyra Akila Choudhury, *The Political Economy and Legal Regulation of Transnational Commercial Surrogate Labour*, *Vanderbilt Journal of Transnational Law*, Vol.48, No.1, January 2015, p.17.

<sup>14</sup> Susan Golombok, *Parenting: What Really Counts?* Routledge, 2000, p.38.

<sup>15</sup> Mackenzie, R., *supra* n1, at p.184.

<sup>16</sup> Jackson, E., *supra* note 8, at p.266.

surrogacy fragments the reproductive function of marriage, causing different outcomes: 'First, it separates sex from reproduction; second, it separates motherhood from pregnancy; and third, it separates the unity of one couple in the involvement of a third person within the potential family relationship'.<sup>17</sup>

Furthermore, it is said that surrogacy 'threatens accepted views of what a family is, of gender-appropriate parental behaviour, and of our ideas of what is natural in the realm of reproductive behaviour'<sup>18</sup> and thus, causes other social problems. Although some researchers argue that in post-modern society, traditional families are no longer regarded as the singular norm,<sup>19</sup> it is implicitly admitted that a child's welfare is best served when he/she raised in a home with his/her married, biological parents.<sup>20</sup> Surrogacy is not only a cause of gestational mothers' suffering of psychological detachment, but also has impact on the child born of surrogacy, affecting his/her later development.<sup>21</sup> Surrogacy might also be condemned for being a form of exploitation or human trafficking (of both women and children)<sup>22</sup>, and hence is regarded by some as contrary to human dignity where human trafficking is considered as 'an offense to the dignity and integrity of the human being'<sup>23</sup>, a violation of the human rights on the part of women and children who are the victims of human trafficking. Fluctuating

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<sup>17</sup> Olga van den Akker, 'The importance of a genetic link in mothers commissioning a surrogate baby in the UK', *Human Reproduction*, 2000, (15), p.1849.

<sup>18</sup> Rachel Cook et al, *Surrogate motherhood: international perspectives*, Oxford: Hart, 2003, p.5.

<sup>19</sup> Olga van den Akker, supra note 17, at p.1849-50. See also Jon Bernardes, 'Responsibilities in Studying Postmodern Families', *Journal of Family Issues*, 1993, (14), p.35.

<sup>20</sup> See Robert P. George & Jean Bethke Elshtain (eds), *The meaning of marriage: Family, state, market, & morals*, Spence Publishing, 2006, p.198; Wendy D. Manning & Kathleen A. Lamb, 'Adolescent well-being in cohabiting, married, and single-parent families', *Journal of Marriage and Family*, (65), 2003, p.876; Sandra L. Hoffert & Kermyt G. Anderson, 'Are all dads equal? Biology versus adolescent well-being in in cohabiting, married, and single-parent families', *Journal of Marriage and Family*, (65), 2003, p.213; The Centre for Social Justice, *Every family matters: An in-depth review of family law in Britain*, 2009, p.57, available at <http://www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20reports/CSJEveryFamilyMattersWEB.pdf>

<sup>21</sup> The Iona Institute, *The ethical case against surrogacy motherhood: What we can learn from the law of other European countries*, available at <http://www.ionainstitute.ie/assets/files/Surrogacy%20final%20PDF.pdf>

<sup>22</sup> *Ibid.*

<sup>23</sup> The Council of Europe, *Convention on Action against Trafficking in Human Beings preamble*, Warsaw, 16 May 2005, <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm> (last accessed March 29, 2016).

between a technological advance and a worrying social problem, surrogacy has raised concerns 'for so many societies because it renders the familiar ambiguous and forces us to think anew about values, and about the basis of those values'.<sup>24</sup> It is the complexity of surrogacy in medical, psychological, social or cultural aspects that has resulted in divergent legal regulations in different parts of the world.

Many countries ban or even criminalise surrogacy in all its forms (both non-commercial and commercial). Countries such as China, Australia, Sweden, Denmark, Switzerland, Italy, Germany, France, Mexico, Turkey, Singapore and some US states take this approach on the grounds that surrogacy arrangements are against public policy.<sup>25</sup> Meanwhile surrogacy, be it commercial or non-commercial, is legally permitted in a very few countries including India, Russia, Ukraine and the state of California, where commercial surrogacy is labelled as 'liberal market model'.<sup>26</sup> Another group of countries have adopted a liberal approach to surrogacy so that surrogacy is not subject to any policy or regulation. These include Argentina, Cyprus, Nepal, Colombia, Egypt, Morocco, the Philippines, Romania, Czech Republic, South Africa and Venezuela.<sup>27</sup> Some countries have a flexible policy on surrogacy, resulting in a double legal consequence: altruistic surrogacy agreements are allowed, but all commercial agreements are banned. Amongst others, the UK provides a special example of regulating surrogacy because the Surrogacy Arrangements Act 1985 does not legalise surrogacy, but does not make it illegal either. In particular, non-commercial surrogacy is permitted, but all surrogacy arrangements are unenforceable in the UK. This will be analysed in the main chapters of the thesis.

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<sup>24</sup> Rachel Cook et al, *supra* note 18, at p.4.

<sup>25</sup> Amrita Pande, 'It May Be Her Eggs But It's My Blood': Surrogates and Everyday Forms of Kinship in India, *Qualitative Sociology*, 2009, Volume 32 (4), p.381.

<sup>26</sup> *Ibid*, p.381.

<sup>27</sup> <http://www.ivf-worldwide.com/Education/surrogacy-rw.html> (last accessed 25 September 2016)). See also European Parliament, *A Comparative Study on the Regime of Surrogacy in EU Member States*, 2013, p.15-16.

In Vietnam, a developing country in South East Asia, surrogacy was outlawed on the basis of political and social concerns for a long time. Surrogacy emerged in Vietnam in the late 1990s with the introduction of in vitro fertilisation techniques,<sup>28</sup> but only became subject to regulation in 2003 with the coming into effect of a Government Decree on human reproduction using assisted technologies.<sup>29</sup> Article 6 of this decree banned both surrogacy and human cloning altogether. Although surrogacy was not criminalised, people involved in a surrogacy arrangement might be subject to monetary sanctions.<sup>30</sup> This prohibition of surrogacy deprived Vietnamese infertile couples of opportunities to use assisted reproductive technologies to procreate. Nevertheless, in order to complete family formation and maintain the continuation of a bloodline, many Vietnamese infertile couples accepted the risks of having biological children through an illegal surrogacy arrangement, particularly in cases where surrogacy was regarded as their only or last resort.<sup>31</sup> In practice, the incidence of ‘underground’ surrogacy has had many serious impacts upon the parties concerned such as the loss of money and children on the part of the commissioning couples<sup>32</sup> and hence, has shown that the blanket ban on surrogacy was no longer appropriate, and the need to adopt a more permissive legal approach to surrogacy was urgent.

After long parliamentary debates for many years, amendments to the ‘law on Marriage and the Family’ were made by the Vietnamese Parliament in June 2014<sup>33</sup>, making altruistic surrogacy permissible to a limited extent. Although the

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<sup>28</sup> Melissa J. Pashigian, ‘Inappropriate relations: The ban on surrogacy with in vitro fertilization and the limits of state renovation in contemporary Vietnam’, in *Assisting reproduction, testing genes: Global encounters with the new biotechnologies*, Daphna Birenbaum-Carmeli and Marcia C. Inhorn (eds), Berghahn Books, 2009, p.164.

<sup>29</sup> The 12/2003/ND-CP Decree on human reproduction using assisted technologies, enacted by the Vietnamese Government in February 2003.

<sup>30</sup> Article 31.2.a of the 45/2005/ND-CP Decree on administrative sanctions in the medical field provides that any parties to a surrogacy arrangement would be fined 20-30 million VND (about 600-900 GBP).

<sup>31</sup> Viet Ba, Surrogacy: Through the lens of altruism, <http://antg.cand.com.vn/vn-vn/ktvhkh/2013/10/81696.cand> (last accessed March 29, 2016).

<sup>32</sup> These issues will be discussed in Chapter 3.

<sup>33</sup> This new law were made in 2014, but only came into force from January 1<sup>st</sup> 2015. New provisions on surrogacy were added to this law. Hereafter this law will be referred to as the law

new law allows Vietnamese infertile couples to have their biological children through surrogacy arrangements, the limits of the new law on surrogacy restrict their opportunities by maintaining some obstacles to biological parenthood. For example, only sisters, sisters-in-law and female cousins of the wife or the husband are permitted to act as surrogate mothers for an infertile couple. This requirement seriously challenges Vietnamese infertile couples because not all of them have such family members and for some couples, there is a possibility that none of their sisters, sisters-in-law want to become surrogate mothers. It therefore follows that some infertile couples may look for surrogate mothers in the black market, facing risks and illegality. Therefore, it would be better if altruistic surrogacy arrangements are legally allowed with extended involvement of non-family members such as friends or even strangers, but with appropriate legal protections.

The other limit of the new law on surrogacy in Vietnam is the lack of regulations on surrogacy tourism. It has been shown across the globe that infertile couples are prepared to go abroad to make surrogacy arrangements in avoidance of domestic bans on surrogacy.<sup>34</sup> This may happen to Vietnamese couples if they do not find a surrogate mother in their home country. However, as shown in other jurisdictions, surrogacy tourism poses difficult challenges to couples in returning their child(ren) to their home countries. For instance, the surrogate child might not have a passport or might be refused citizenship of their commissioning parents' home country.<sup>35</sup> In the UK, even when the child born of surrogacy abroad is brought back home, it can still be difficult for the couple to obtain a parental order.<sup>36</sup> The Vietnamese law on surrogacy may benefit from the lessons and experiences of other jurisdictions in dealing with these challenges. For

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2015 on surrogacy.

<sup>34</sup> Hazel Biggs and Caroline Jones, 'Tourism: a matter of life and death in the United Kingdom', in Cohen, I. Glenn (ed.) *The Globalization of Health Care: Legal and Ethical Issues*, Oxford University Press, 2013, pp. 164-181.

<sup>35</sup> Richard S. Storrow, *New Thinking on Commercial Surrogacy*, *Indiana Law Journal*, Vol.88, 2013, p.1287.

<sup>36</sup> See *Re L (A Child)*, (Parental Order: Foreign Surrogacy), [2010] EWHC 3146 (Fam), *Re X (Children)* (Parental Order: Foreign Surrogacy), [2008] EWHC 3030 (Fam).

example, approval for or refusal to transcribe the filiation of the children born of international surrogacy arrangements in the civil registry may be included in the new law on surrogacy. If Vietnamese legislators want to dissuade Vietnamese infertile people from seeking a surrogate mother abroad, they may choose the latter (refusal).

This thesis comprises 6 chapters, discussing surrogacy in Vietnam before and after the law 2015 on surrogacy with a view to pointing out the need for further legal reforms. In more detail, the thesis has particular contents as follows:

Chapter 1 begins with an introduction of the Vietnamese legal system. It explains how this system works and how it differs from the English legal system. By examining the hierarchy of legal documents in Vietnam, this chapter gives an explanation as to how the total ban on surrogacy was created and how the law changed to reflect the views of Vietnamese legislators on surrogacy. In terms of legislation, it also informs the ways in which the law on surrogacy may be further reformed in the future.

Chapter 2 seeks to provide a brief understanding of the social and legal background to surrogacy in Vietnam. It aims to clarify social and cultural grounds on which the urgent need of Vietnamese infertile people to have genetically connected children at any cost has been established. It explains why infertility is a social problem for infertile married couples in Vietnam and why Vietnamese couples have been seeking to relieve their infertility through surrogacy. For instance, it attributes the importance of having offspring in Vietnam to traditional Confucianist values which are still relevant and prevalent today and, thus, demonstrates that giving birth to a child is regarded as a moral duty for married Vietnamese persons, fertile or not. In the majority of cases infertility is socially unacceptable and, therefore, surrogacy might be justifiable as it gives a



realistic chance of having biological children with the assistance of reproductive technologies.

Leading on from that, chapter 3 analyses the implications of the ban on surrogacy which existed for more than a decade in Vietnam. It sheds light on the emergence of the black market of surrogacy in Vietnam which raised concerns over human trafficking, exploitation of women and commodification of children. This chapter aims to justify the legitimization of surrogacy and the need to establish legal framework within which the welfare of parties to surrogacy arrangements are safeguarded.

Chapter 4 and chapter 5 go on to explain two main reasons in favour of surrogacy in Vietnam, including procreative autonomy and the right to procreate, which are justified to protect surrogate women and children in surrogacy arrangements. Chapter 4 emphasises the significance of procreative autonomy which allows parties to a surrogacy arrangement to have freedom of choice with a view to their genetically related children being born through technological assistance. It shows that a lack of respect for personal procreative autonomy may infringe a surrogate woman's body ownership and bodily integrity, and that respect for procreative autonomy may enable infertile persons to alleviate their reproductive incapacity.

Chapter 5 conducts an in-depth analysis of reproductive rights, including the right to procreate. It demonstrates that outlawing surrogacy equally constrains reproductive freedom of both surrogate women and commissioning couples and thus breaches their reproductive rights including the right to procreate, which are recognised in domestic and international legal documents such as the Universal Declaration of Human Rights adopted by the United Nations in 1948. By referring to the limitation of the right to procreate of prisoners in both the UK and Vietnam, it points out that the right to procreate might be lawfully restricted

in some circumstances without infringement of this human right and that the onus is on the state in such cases to prove that it has compelling reasons to do so. Therefore, where the Vietnamese State is not able to provide a valid justification for its interference with the contested right of involved parties to a surrogacy arrangement, the ban on surrogacy in Vietnam would be both irrational and ill-founded. In other words, the deprivation of the right to procreate through surrogacy might be groundless and, thus, the prohibition of surrogacy might be illegitimate. It follows that the need to permit surrogacy is reasonably justifiable in the current situation. The fact that the Vietnamese state recognised altruistic surrogacy in the recent legal reforms such as the law 2015 on surrogacy, has shown that the right to procreate of Vietnamese infertile couples through surrogacy are guaranteed and promoted by law, even though in restricted conditions, which will be developed more in chapter 6.

Chapter 6 discusses the imperfections in the law 2015 on surrogacy in Vietnam such as a narrowly construed definition of altruistic surrogacy within family and restricted conditions on infertile couples and potential surrogate mothers. By doing so, the chapter shows that these imperfections limited the opportunities for infertile couples and prevented them from using surrogacy, resulting in them seeking the help of surrogate women in the black market. Consequently, the chapter points out the need for further reforms of the law on surrogacy. For example, it argues that the availability of surrogacy should be extended to involve people other than family members with a view to assisting more couples to have their much wanted biological children.

The concluding chapter offers recommendations for further legal reforms on surrogacy in Vietnam in years to come. It aims to provide a legal framework on surrogacy under which the interests of all the parties involved in surrogacy arrangements in the country would be better protected. In order to reform the law on surrogacy, the Vietnamese state may look at lessons drawn from other jurisdictions in regulating this very complex issue, then apply them properly to

the particular context of Vietnam in terms of ethical, social, cultural and economic aspects.

For example, a close and detailed examination of how surrogacy is regulated in some countries including the UK, the first country in the world having specific legislation on surrogate motherhood,<sup>37</sup> will provide Vietnamese law makers with a range of mechanisms that might be useful in legally controlling the practice of surrogacy. It is noteworthy that although the UK's legal system is different to that of Vietnam, which borrowed heavily from civil law tradition, English case law still sets a useful example in dealing with specific aspects of surrogacy. For instance, Vietnam can learn from the UK's many experiences of safeguarding the best interests of children, particularly in cases where the child is born abroad through surrogacy tourism.<sup>38</sup> The current law in Vietnam has no regulations on surrogacy tourism, but the legal issues arising from surrogacy tourism are unavoidable given the possibility that Vietnamese couples may go abroad to make surrogacy arrangements and bring their children back home. For this reason, Vietnamese law makers may benefit from referring to the English law when drafting regulations on surrogacy tourism in the future. The determination of parenthood and the payment of surrogate women under the UK case law are also helpful sources of reference for Vietnamese authorities in finding the best solution to conflicts originating from surrogacy arrangements. In the future, were surrogacy legally accepted, Vietnam would face the similar difficult situations with regard to surrogacy in such problems the UK and other countries have had and dealt with within law. The UK model is not perfect because the UK courts, when hearing surrogacy cases, are facing challenges and difficulties, for example, in determining parenthood and protecting the welfare of children born through surrogacy. In spite of this, it still sets an example for Vietnamese legislators to follow in making and further reforming the law on surrogacy. Therefore, English cases relating to surrogacy are subject to in-depth research in this thesis.

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<sup>37</sup> Hugh V. Lachlan and J. Kim Swales, *Surrogate Motherhood: Beyond the Warnock and the Brazier Reports, Human Reproduction and Genetic Ethics*, 2005, Vol.11, No.1, p.12.

<sup>38</sup>For example, *In the matter of D and L (Minors) (Surrogacy)* [2012] EWHC 2631 (Fam).



## CHAPTER 1:

# THE LAW ON SURROGACY WITHIN THE FRAMEWORK OF THE VIETNAMESE LEGAL SYSTEM

### 1.1 The operation of the Vietnamese legal system and the formation of the legal ban on surrogacy in Vietnam

The advent of in vitro fertilization (IVF) techniques in Vietnam in 1997<sup>39</sup> expanded the array of possible options in infertility treatment in the country, enabling Vietnamese infertile couples to have their biological children through new assisted reproductive technologies. Before the introduction of IVF, Sino-Vietnamese traditional herbal medicine and simpler forms of Western biomedicine such as hysterosalpingography and tubal insufflation<sup>40</sup> were primarily used in infertility treatment. With IVF, surrogacy emerged as a new choice for Vietnamese infertile couples. In 2000, the Vietnamese Government gave an approval for one of the first gestational surrogacy cases where pregnancy with IVF was arranged between members of a family.<sup>41</sup> This case raised considerable disquiet about social and legal issues surrounding the birth of a child born of surrogacy. For example, it made it difficult for Vietnamese authorities to determine who should be named on the child's birth certificate as the legal mother.<sup>42</sup> As Pashigian argues, 'in the context of larger economic

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<sup>39</sup> Vinh Bao, Vietnam marks ten years of in vitro fertilization, <http://www.thanhniennews.com/health/vietnam-marks-ten-years-of-in-vitro-fertilization-12600.html> (April 26, 2011, last accessed March 29, 2016)

<sup>40</sup> Pashigian, M., *supra* note 28, at p.173.

<sup>41</sup> Pashigian, M., *supra* note 28, at p.164.

<sup>42</sup> Bernama (Malaysian News Agency), Vietnam surrogate pregnancy brings legal questions, <http://patrick.guenin2.free.fr/can Tho/vnnews/surro.htm> (2001, last accessed March 29, 2016).

liberalizations in Vietnam, concerns about kinship, descent, economic exploitation, and a person's relationship to the state all came into question'.<sup>43</sup> As a consequence, a decree regulating IVF reproduction was passed by the Vietnamese government in 2003 in a bid to cope with these challenges, inter alia officially putting a ban on surrogacy in all cases.<sup>44</sup> It is of note that the courts in Vietnam do not operate in the same way as they do in the UK, and hence the process of reforming the law is different and an Act of Parliament alone is not sufficient to reform the law on surrogacy in Vietnam. For this reason, it is necessary to examine the structure of the Vietnamese legal system and how it works to make a law and enforce it into the daily life before exploring the ban on surrogacy in Vietnam, clarifying how it was formed and how it could be officially removed.

The working of the Vietnamese legal system is based on the Constitution<sup>45</sup> and other laws on the organisation and performance of state authorities.<sup>46</sup> Amongst others, the Law on Enactment of legal documents, which was passed by the National Assembly (Parliament) of Vietnam in 2008, is often regarded as a significant foundation for the working of the Vietnamese legal system (See Appendix 1). First, this law reiterates the hierarchy of state authorities in Vietnam (from central to local governments), which is set out in the Constitution. For instance, it asserts that the Parliament is the most powerful. Parliament has the power to form and dissolve other authorities of central government, such as the Government. The Government is below the Parliament because it is constituted by the Parliament and has accountability to the latter. Secondly, the Law of 2008 respectively establishes a hierarchy of legal documents in Vietnam, which are

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<sup>43</sup> Pashigian, M., *supra* note 28, at p.164.

<sup>44</sup> Decree No 12/2003 on Childbirth using scientific methods, enacted by the Vietnamese government in 2003.

<sup>45</sup> The Constitution of the Socialist Republic of Vietnam is regarded as having the greatest legal effect in the legal system of the country. There has been 4 Constitutions which were passed by the National Assembly in 1946, 1959, 1980 and 1992. Most recently, on November 28<sup>th</sup> 2013, an amendment to the 1992 Constitution was approved by the National Assembly and came into effect from January 1<sup>st</sup> 2014.

<sup>46</sup> For example, the Law on National Assembly's organisation 2001, the Law on the central Government's organisation 2001 or the Law on Organisation of the People's Courts 2002.

classified in a top-down order, in which the Constitution and the laws made by the Parliament are the most significant. It means that other legal documents of other authorities have a lower value and must be made in accordance with the Constitution and the laws. The enactment of these legal documents aims at implementing the statutes of the Parliament, so that the laws passed by the Parliament are often explained in detail, particularized by other legal documents of lower authorities before being applied in practice. They are akin to enabling regulations or statutory instruments as used in the UK.

However, the most significant difference between the UK and Vietnamese legal systems in this regard is in that the courts in Vietnam are not entitled to put a legal gloss on the laws of Parliament. It is to note that, borrowing heavily from the civil law tradition, the Vietnamese jurisdiction mainly relies on statutory laws while ignoring the case law.<sup>47</sup> This feature differentiates the Vietnamese legal system from that of the UK, where the case law tradition is adopted and the courts' judgments are made on the grounds of precedents and statutes.

In Vietnam, decisions delivered by courts do not constitute any binding precedents because it is only binding on the parties to the present case and do not establish any legal rule for the application of future cases. The courts in future cases are not required to rely on previous cases' decisions in order to reach their own decisions. Moreover, only one judgment with no dissent is delivered in a particular case, which makes Vietnamese legal system different to that of the UK where a case may contain various judgements. Another difference between the two legal systems is that there are no law reports in Vietnam. The

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<sup>47</sup> In recent years there have been discussions amongst Vietnamese authorities about accepting case law in the jurisdiction of Vietnam. Article 104.3 of the Constitution 2013 stipulates: 'The Supreme Court is responsible for making annual brief statements on the practice of adjudication and assuring the consistent application of laws in adjudication nationwide'. That means the Supreme Court may issue reports based on summarizing typical cases/precedents in order to provide guidelines for lower court in the country (similar to case law). However, cases have not been recognized yet as an official source of law for adjudication in Vietnam. See Ministry of Justice, Precedents and recommendations for incorporating precedents into the Law on enactment of legal documents in Vietnam, <http://moj.gov.vn/ct/tintuc/Pages/nghien-cuu-trao-doi.aspx?ItemID=6000> (last accessed March 29, 2016).

original judgments of cases made by the Vietnamese courts are respectively stored in courts' archive rooms and only accessible to those who have permission from state authorities. In practice, the Supreme People's Court of Vietnam<sup>48</sup> is entitled to issue periodical reports with guidelines/instructions for lower courts' jurisdiction<sup>49</sup> which are established upon decisions delivered in typical cases under its jurisdiction. Normative instructions made by the Supreme People's Court are often referred to and followed by lower courts when they are dealing with similar legal issues. Therefore, the practice of issuing these guidelines by the Supreme People's Court by some means might be compared to the making of precedents in the UK. However, the Supreme People's Court's instructions for lower courts cannot be regarded as case law or establish a stare decisis system in Vietnam because they are classified as unofficial sources within the Vietnamese legal system.<sup>50</sup>

Under influence of the civil law tradition, the Vietnamese courts operate by making judgments which are only based on statutory laws.<sup>51</sup> Statutory laws, including the laws of Parliament and other legal documents of lower authorities,

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<sup>48</sup> Article 2 of Law on Organisation of the People's Courts 2002 depicts the court system in Vietnam as follows:

- (i) The Supreme People's Court;
- (ii) The People's Courts of the provinces and centrally-run cities;
- (iii) The People's Courts of the rural districts, urban districts, provincial capitals and provincial cities;
- (iv) The military courts;
- (v) Other courts prescribed by law.

It also provides that in special circumstances, the National Assembly may decide to set up the special tribunals.

<sup>49</sup> Pursuant to Articles 18 and 19 of Law on Organisation of the People's Courts 2002, the Supreme People's Court is the highest adjudicating body of Vietnam, one of the main tasks of which is to guide all the courts uniformly apply laws nationwide, sum up experiences and solutions produced in trials by courts.

<sup>50</sup> The official sources of the Vietnamese legal systems are general legal rules, statutory laws, international conventions to which Vietnam is a signatory and customs. Whether typical cases adjudicated by the Supreme People's Court can be seen as precedents and thus as an official source of the Vietnamese legal system is currently controversial and questionable amongst Vietnamese legal academics. See Nguyen Thi Hoi, *The sources of the Vietnamese legal system*, <http://thongtinphapluatdansu.edu.vn/2008/09/09/1635/> (last accessed March 29, 2016).

<sup>51</sup> Article 5 of the Law on People Courts' Organisation 2002 provides that judges and juries are independent from other external powers (i.e. political power) and only subject to laws in their adjudication.



are considered as the main source of the Vietnamese legal system, whereas cases are not regarded as its official source. In exercising their jurisdictional power,<sup>52</sup> the courts in Vietnam always make a reference to, and base their judgments on, the grounds of the laws of Parliament in the first place. In other words, the courts have to decide individual cases primarily in accordance with the laws of Parliament. In cases where regulations or laws are ambiguous, the courts may invoke legal documents of Governments, Chief Justice or Ministers to reach their judgments. The working of the Vietnamese courts in this way may be regarded as interpreting laws. However, the Vietnamese courts do not have the legal power to interpret the laws of Parliament as the UK courts do, and hence there is no legal practice akin to 'judge made law' in Vietnam. This power is legally given to another state authority which will be discussed below.

The power of interpreting laws in Vietnam<sup>53</sup> is constitutionally given to Standing Committee of the National Assembly.<sup>54</sup> This Committee exercises the power to interpret laws only where there exist divergent understandings about a law or an article of a law, and it is necessary to obtain a unique understanding about it. In reality, the Committee rarely exercises this function.<sup>55</sup> Instead, other authorities

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<sup>52</sup> As the current Constitution provides, Vietnam does not adopt the separation of state powers as in Western countries where the theory of separation of powers (based on the British thinker John Locke and the French philosopher Montesquieu's ideas) is applied. Nevertheless, in reality, there still exists a 'labour' division of legislative, executive and judicial powers. Respectively, Parliament has the power to legislate (i.e. pass the Constitution and laws/Acts) while Government exercises the executive power, and the judicial power is entitled to both the courts and the prosecutions. It is notable that in Vietnam, the judicial power is understood as including the jurisdictional power (vested to the courts) and the power to legal supervision (vested to the prosecutions).

<sup>53</sup> Article 74 (2) of the Constitution of Vietnam 2014 (as amended) and Article 85 of the Law on Enactment of legal documents, passed by the National Assembly of Vietnam in 2008.

<sup>54</sup> Standing Committee of the National Assembly is a particular organisation within the National Assembly in Vietnam. Due to the fact that the National Assembly does not work permanently through the year and only convenes in some short-term sessions yearly, its Standing Committee is established to work during intervals and also has the power to enact legal documents. Members of this Committee are also Parliament members. The Committee has a dual power of basic law making and interpreting all the laws. It is noteworthy that if necessary, the ordinances made by this Committee would be developed into laws (acts) approved by the Parliament in the following session.

<sup>55</sup> Should the Supreme Court be entitled to exercise the power to interpret the laws of Parliament?

[http://toaan.gov.vn/portal/page/portal/tandtc/Baiviet?p\\_page\\_id=1754190&p\\_cateid=1751909&item\\_id=16874465&article\\_details=1](http://toaan.gov.vn/portal/page/portal/tandtc/Baiviet?p_page_id=1754190&p_cateid=1751909&item_id=16874465&article_details=1) (last accessed, March 29, 2016).

such as the Government and its ministries, through their daily activities, often issue their legal documents to clarify regulations of laws and, in this way, they work as giving interpretation to the laws of Parliament.<sup>56</sup>

The hierarchy of legal documents also shows that legal documents issued by lower authorities are in a lower position in relation to those of higher authorities. It follows that legal documents of lower authorities are necessarily made based on legal documents of higher authorities, and the former might be overturned by the latter. For example, the legal documents made by any ministry (through its minister), such as a circular of the Minister of Justice, need to be consistent with both the Constitution and the laws of Parliament and decrees of the Government because ministries are subordinate to Parliament and the Government. Furthermore, the Vietnamese Government may issue a decree to nullify regulations of any circular. More details on the hierarchy of the Vietnamese legal documents can be seen in the Appendix 1 of this thesis.

The hierarchy of legal documents informs the ways in which the law on surrogacy may be reformed in Vietnam. First, it should be born in mind that decrees made by the Vietnamese Government are always below the laws passed by the Vietnamese Parliament and hence the former might be invalidated by the latter. It follows that Decree No 12/2003/ND-CP, which prohibited surrogacy in Vietnam, could be dismissed if a new law which allows surrogacy is passed by the Parliament, as will be discussed below.

In Vietnam, decrees are made by the Government in order to explain the content of the laws of Parliament and, in most cases, the Government issues decrees to

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<sup>56</sup> Khai Pham, Giải thích luật – Cách nhìn của hành pháp (Legal interpretation by the executive power), <http://xaydungphapluat.chinhphu.vn/portal/page/portal/xaydungphapluat/tinchitiet?title=S%E1%BB%B1+c%E1%BA%A7n+thi%E1%BA%BFt+ban+h%C3%A0nh+&perspectiveId=641&viewMode=detail&articleId=10001993> (last accessed, March 29, 2016).

guide the application of laws by setting out more specific regulations.<sup>57</sup> In other circumstances, the Government passes decrees in order to introduce new provisions on particular social issues, which have not been laid down in any laws.<sup>58</sup> In other words, decrees may be made to fill a gap in the law in some areas and in situations where state regulation is urgently required. In the end, the purpose of enactment of legal documents by the Government is to put laws (acts of the Parliament) into practice or to apply laws into the social life. Laws often establish general principles, the application of which, in reality, is very difficult without the specific guidance or decrees. The regulations set out in laws may be ambiguous and lead to different understandings. Hence, the enactment of decrees helps to obtain a consistent and unique understanding of that regulation and enables laws to be applied properly in practice.

Decree No 12/2003/ND-CP was enacted by the Vietnamese Government in 2003 when human reproduction through assisted reproductive technology (ART) was a novelty in Vietnam. The making of a law on this issue required more time to assess the practice of ART, taking more advice from the medical profession and weighing up the possible legal alternatives. However, prior to making such a law, it was necessary to bring in specific regulations in order to regulate the use of ART in the country and to fill a legal gap in this area. Therefore, a decree of the Government was issued instead of a particular law on assisted reproduction, and worked as a temporary legal solution to this new practice. In addition, this decree was also brought about to support and specify some regulations of two particular laws, namely the law on the Protection of People's Health 1989 and the law on Marriage and Family 2000.<sup>59</sup> The decree provides a range of restrictions on the use of IVF, related persons, and bodily products, inter alia surrogate mothers and

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<sup>57</sup> For example, the Decree No 70/2001/ND-CP was established by the Vietnamese Government in 2001 in order to give more details of regulations set out in the Law on Marriage and Family 2000.

<sup>58</sup> For example, the Decree No 12/2003/ND-CP on Childbirth using scientific methods was passed by the Vietnamese Government in 2003 at a time when there were no laws of Parliament on this novel issue.

<sup>59</sup> It was stated in the introduction of the Decree No 12/2003 on Childbirth using scientific methods that this decree was made on the grounds of the Law on Government's Organisation 2001, the Law on Protection of People's Health 1989, and Article 63 of the Law on Marriage and Family 2000 (regarding the determination of parentage for children born through ARTs).

donor gametes.

Article 6 of Decree No 12/2003/ND-CP imposed a total ban on surrogacy so that surrogacy was prohibited in any form in Vietnam, and persons or organisations involved in illegal surrogacy arrangements may risk legal penalty. Although it was permissible for a married woman to use donor ova for childbirth (it was obligatory for single women to use their own ova), surrogacy with ARTs was made illegal. It was not permissible for a woman to carry embryo(s) created from the commissioning woman's (in gestational surrogacy), the surrogate's (in traditional surrogacy), or a donor's ovum. In other words, the law effectively barred women who were unable to carry a pregnancy from having genetically related children. However, surrogacy was not a crime and thus people involved in surrogacy arrangements were not subject to criminal liability, but were merely liable for a civil wrong. They were only required to pay an amount of money as a fine for their illegal action. In particular, according to Decree No 96/2011/ND-CP on sanctions for violations in the area of medical consultation and treatment,<sup>60</sup> those who contemplated surrogacy arrangements were fined 30-40 million VND (about 900-1200 GBP) for their breach of law.

As mentioned above, a decree of the Vietnamese Government might be overruled by a law/Act of Parliament due to its lower position in the hierarchy of legal documents. The fact that surrogacy was prohibited by a decree means that the ban on surrogacy could be removed if this decree was nullified by a new law which allows surrogacy. This new law may take the form of a particular Act, possibly similar to the UK Surrogacy Arrangements Act 1985, which prohibited commercial surrogacy arrangements. It may also be a part of a general Act, as suggested to be incorporated into the amended law on Marriage and the Family. In fact, the amended law on Marriage and the Family 2015 included a chapter on surrogacy in which only non-commercial surrogacy was allowed.

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<sup>60</sup> Enacted by the Vietnamese Government in October 2011.

Secondly, because of the way the legal system operates in Vietnam, just an Act of Parliament is not sufficient to reform the law on surrogacy. As can be seen in the hierarchy of legal documents, such an Act, if passed, must be interpreted in more detail by a series of legal documents from lower authorities, for instance decrees of the Government or circulars of Ministers. As previously explained, an Act of Parliament in Vietnam often founds general regulations with principles which cannot be directly applied in practice without explanation or interpretation. For example, an Act on surrogacy may allow non-commercial surrogacy and establish provisions concerning non-commercial surrogacy arrangements, such as conditions for the making of such arrangements. Following the enactment of the Act, a Government decree on surrogacy may be made to specify these conditions, making them more concrete and more understandable. If necessary, a relevant circular on surrogacy arrangements might also be issued by the Minister of Justice or the Minister of Health (which are below the Government) to shed light more on the regulations set out in the law or in the previous decree.<sup>61</sup> This process of enacting legal documents on a particular issue like surrogacy would help enable the Act of Parliament to be properly applied in practice, contributing to the completion of law reform on surrogacy in Vietnam.

To reiterate, the Vietnamese courts do not have the power to interpret the laws of Parliament and there is no 'judge made law' in Vietnam. This means that the courts in Vietnam would need not only a law/an Act of Parliament on surrogacy, but also other relevant decrees of the Government and circulars of Ministers for the proper application of law. That is, in order to obtain proper judgements on litigations with regard to surrogacy arrangements. Therefore, the law reform on surrogacy must take into account the construction of both an Act of Parliament and decrees of the Government or circulars of Ministers on this issue. The Act of

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<sup>61</sup> A similar process happened in the application of the Law on Marriage and Family 2000. After the coming into force of the Law, Decree No 68/2002/ND-CP was passed by the Vietnamese Government in 2002 to specify the Law 2000's regulations concerning marriage and family issues with foreign elements. After that, based on the Law 2000 and the Decree 2002, a circular was issued by Minister of Justice in 2002 in order to give clear guidelines on the implementation of the Decree 2002.

Parliament must also be regarded as a central point of the reform because it sets foundations for the subsequent establishment of other legal documents such as a decree of Government, which specifies general regulations of the Act.

The process of law reform on surrogacy in Vietnam has faced many challenges, which prolonged the ban on surrogacy until the introduction of the new law 2015. Before surrogacy was prohibited in Vietnam in 2003, there had been many public debates as to whether to legalize surrogacy. It was the medical profession who pioneered the search for an appropriate answer to this question,<sup>62</sup> and a national conference organized by the Ministry of Health in 2002 in Ho Chi Minh City put forward a number of opposite opinions on this issue. Some people, including representatives of governmental organisations, raised concerns about surrogacy and voiced their opinions against it.<sup>63</sup> However, medical professionals attending the conference were in favour of surrogacy on the basis of it being a last (if not 'only') opportunity for some childless people to have biologically related children.<sup>64</sup> Therefore, they called for the legitimization of surrogacy. For example, Professor of Medicine, Nguyen Thi Ngoc Phuong from the leading hospital of obstetrics and gynaecology Tu Du, confirmed the existence of a 'black market' of surrogacy in Vietnam, where the welfare of surrogate women, infertile couples, and children born through surrogacy, were in danger.<sup>65</sup> Therefore, she recommended the legalisation of surrogacy so that people in need could make surrogacy arrangements in conformity with law to relieve their plight of infertility.

Following the coming into effect of the Decree No 12/2003/ND-CP, which prohibited surrogacy, public controversies over this practice still continued and surrogacy became subject to Parliamentary legislation. At a Parliamentary debate on 19 November 2004, the Vietnamese Parliament discussed the

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<sup>62</sup> *Có nên cấm việc mang thai hộ* (Should be banned surrogacy?) <http://nld.com.vn/83578POC1002/co-nen-cam-viec-mang-thai-ho.htm> (last accessed 4 October 2015).

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

regulation of surrogacy and a recommendation of incorporating regulations on surrogacy into the Civil Code was proposed, but declined on the grounds that surrogacy was a complex social and legal issue.<sup>66</sup> While there were convincing arguments from both medical and legal professionals in favour of this practice, it was believed by legislators to be too early to legalize surrogacy at that time.<sup>67</sup> The reason was that the draft law on surrogacy needed further adjustments which were subject to many subsequent debates.<sup>68</sup>

Surrogacy was only brought back to Parliament in 2011 when calls were made by legislators to legalise the practice.<sup>69</sup> When discussing the Bill to Prevent and Combat Human Trafficking, there was a suggestion to make surrogacy the subject of this law based on arguments that 'children born through surrogacy might be abused for inhuman purposes such as trafficking of human body parts'.<sup>70</sup> Surrogacy was likened to child trafficking and, thus, needed to be subject to criminalisation. Although surrogacy was not criminalised by this law, the prohibition of surrogacy remained a major obstacle for Vietnamese infertile couples wishing to have a genetically related child for whom surrogacy was a last resort. With the incidence of illegal surrogacy in Vietnam as a ring of surrogate women was spotted by the police in 2013,<sup>71</sup> a need to reform the law became more urgent. As long as the practice was forbidden, infertile couples did not have the chance to have their biological children through legitimate surrogacy arrangements and hence continued to take risks in the black market, where they and their offspring had no legal protection.

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<sup>66</sup> Mang thai hộ: Có nên điều chỉnh? (Is it necessary to regulate surrogacy by law?) <http://vietbao.vn/Xa-hoi/Mang-thai-ho-co-nen-dieu-chinh/40056571/157/> (last accessed March 29, 2016)

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Mang thai hộ có phải là mua bán trẻ em?* (Can surrogacy arrangements be regarded as children trafficking?) <http://www.phapluatvn.vn/tuphap/201103/Mang-thai-ho-co-phai-la-mua-ban-tre-em-2040280/> (last accessed March 29, 2016)

<sup>70</sup> *Ibid* (last accessed March 29, 2016).

<sup>71</sup> An illegal network of surrogate mothers in Vietnam, <http://tuoitre.vn/chinh-tri-xa-hoi/563296/duong-day-mang-thai-ho-de-thue.html#ad-image-0> (last accessed March 29, 2016).

## 1.2 Why surrogacy was banned in Vietnam – An explanation through the lens of culture

The ban on surrogacy persisted in Vietnam for more than ten years until being replaced with the permissive legislation in 2015. It is important to understand why Vietnamese legislators introduced the ban and maintained it for such a long time before turning to explain why they altered their position on surrogacy. It is argued that it is the possibility of surrogacy causing consternations or concerns over exploitation and commodification of both women and children<sup>72</sup> that caused surrogacy to be banned in Vietnam.<sup>73</sup> Moreover, there have been other reasons for prohibiting surrogacy in Vietnam: cultural and social concerns over the implementation of IVF in general and the emergence of surrogacy with or without IVF in particular in the wider context of socio-economic changes in the country,<sup>74</sup> which have been known as Doi Moi reforms (Renovation).<sup>75</sup> This section will focus on the latter reasons.

The introduction, promotion and regulation of IVF in Vietnam are greatly intertwined with Doi Moi reforms.<sup>76</sup> The introduction of IVF considerably extended the potential options available in infertility treatment in a dynamic context of socio-economic reforms with economic growth and national transformation under Doi Moi policy. As Doi Moi reforms were expected to bring about the effects which were depicted as reflecting traditional cultural values, the introduction of IVF during this period led to ‘a reevaluation of the most basic beliefs about reproduction as well as mother-foetus, mother-child, and maternity-paternity relationships’.<sup>77</sup> Furthermore, in an attempt to control

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<sup>72</sup> Pashigian, M., *supra* note 28, at p.177.

<sup>73</sup> These concerns will be subject to an in-depth analysis of implications of the black market of surrogacy in Vietnam in Chapter 3.

<sup>74</sup> Pashigian, M., *supra* note 28, at p.165.

<sup>75</sup> Doi Moi is the most significant policy of the Vietnamese government in the 20<sup>th</sup> century, which led to transition from a centrally planned socialist economy to a market economy, resulting in major impacts on the Vietnamese society as a whole.

<sup>76</sup> Pashigian, M., *supra* note 28, at p.165.

<sup>77</sup> Pashigian, M., *supra* note 28, at p.165.



changes in social practice arising from new economic freedoms, the Vietnamese government also worked to regulate the uses of IVF techniques in proper ways. As Pashigian argues:

'...among the regulations developed to control the use of IVF, the ban on surrogacy is a moral confirmation of long-standing cultural practices and values that exposes the limits of state renovation as well as both national and local understandings of morality during this time of transition'.<sup>78</sup>

IVF, and surrogacy with IVF, also challenged traditional beliefs about reproduction and its meaning in Vietnam. Amongst others, the dominant notion of 'womb-centrism' in Vietnamese kinship and social relatedness has been regarded as most challenged by the advent of IVF and the emergence of surrogacy with IVF. The term 'womb-centrism' reflects the womb 'as a site of relatedness-making; to illuminate the importance of the mother-child bond for Vietnamese kinship and individual identity information; and to highlight differentiation between social, biological, and genetic relatedness'.<sup>79</sup> That means that gestation is deemed to be a process through which the bond between the mother and the child establishes and develops to the extent that their relationship becomes inseparable. The gestational primacy in creating kin-relatedness in Vietnam not only shows the cultural and symbolic significance of gestation in the womb, but also requires the law to effectively reflect this reality. The use of IVF and ruminations about the use of surrogacy have all aimed at a reinforcement of the mother-child relationship in Vietnam.

It is well documented that surrogacy with IVF separates genetic heritage, gestation and childrearing.<sup>80</sup> In particular, the genetic mother, the gestational mother and the social mother are not the same person. By prohibiting surrogacy

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<sup>78</sup> Pashigian, M., *supra* note 28, at p.165.

<sup>79</sup> Melissa J. Pashigian, 'The womb, infertility, and the vicissitudes of kin-relatedness in Vietnam', *Journal of Vietnamese studies* 4, no.2, 2009, p.35.

<sup>80</sup> Mackenzie, R., *supra* note 1, at p.184.

the Vietnamese government confirmed and legally defined the cultural significance of gestation in establishing relatedness between mother and child. The ban avoided confusion over creating maternity and effectively reinforced the belief that maternal kinship ties could be established even in the absence of genetic relatedness. However, this way of reinforcing relatedness is controversial. Outlawing surrogacy made it impossible for a married woman who is unable to carry an embryo(s) to term to have her genetically related child. Due to the lack of a womb or other medical reasons, such a woman would need another woman to carry an embryo(s) created from using her ovum and her husband's sperm or that of a sperm donor. Prior to the availability of IVF, these women could not find any method to have children who were genetically related to them. With the introduction of IVF, hypothetically, surrogacy with IVF offers them the unique chance of having their much wanted children. But this unique possibility was denied by law.

In restricting parentage to the woman who gives birth to the child, the Vietnamese government, like the law in the UK,<sup>81</sup> prioritizes gestation over genetics in establishing maternal relatedness between mother and child. Prohibiting surrogacy abolishes the need to ascertain who is the mother and who is the surrogate, reinforcing the idea that the woman who carries the child is his/her mother irrespective of the involvement of genetic materials.<sup>82</sup> It follows that carrying a pregnancy is considered as the legitimate route to motherhood. Moreover, by defining women who carry the pregnancy as mothers in spite of their genetic link to the foetus, the decree annihilates the legal position of genetic relatedness (to donors or any claims to inheritance via a genetic link to donors).<sup>83</sup> Therefore, any woman who achieves pregnancy via IVF using a donor ovum or a donor embryo is recognised as the legal mother of the child even without genetic relatedness between mother and child.

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<sup>81</sup> Section 33, The Human Fertilisation and Embryology Act 2008.

<sup>82</sup> Pashigian, M., *supra* note 78, at p. 43.

<sup>83</sup> Decree No 12/2003/ND-CP on Childbirth using scientific methods, Articles 20.1, 20.2 and 21.

Banning surrogacy in Vietnam may also be attributed to the protection of uterine identity<sup>84</sup> and sentiment created during the gestational process, a specific aspect of relatedness kinship established in the womb.<sup>85</sup> In Vietnam, the focus on the womb is deeply rooted in beliefs surrounding gestational pregnancy, childbirth, and emotional ties between mother and child. During gestation, a special bond between mother and foetus/child is believed to start and develop within the womb. Pashigian opines that ‘confering identity through the transfer of shared nutritive and emotive substance in the womb engenders a ‘uterine identity’’.<sup>86</sup> Uterine identity is not only limited to the process happening in the uterus, but also demonstrates an important meaning of gestation in Vietnamese culture. It characterizes a dyadic bond between mother and child, confirming that a child’s identity belongs to his/her birth mother and, hence, awarding a socially accepted identity to the woman who visibly carries the pregnancy, regardless of the problematic morality surrounding the birth circumstances. Therefore, separating special bonds between a mother and child born through surrogacy may endanger this identity and, in this way, dilute traditional values embedded in Vietnamese culture around motherhood. That is why the law intervened to prohibit surrogacy in order to safeguard cultural values in a context in which the introduction of IVF paves the way to the use of it in a variety of forms.

However, in spite of government efforts to ban surrogacy, Vietnamese infertile couples continued to strive to find surrogate mothers at any cost in order to have their genetically related children.<sup>87</sup> Once again, culture helped to explain the incidence of surrogacy in the context of the ban by pointing out that infertility is a social problem and having children is a social duty in Vietnam. To put it another way, there was a tension between the legal ban on surrogacy and

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<sup>84</sup> The term ‘uterine family’ was coined by Margery Wolf in her research on creating family in a particular way in Taiwan. The concept of a ‘uterine family’ addresses kin-relationship after birth. The term ‘uterine identity’ was subsequently used by sociologists and anthropologists as a derivation of this term. See Margery Wolf, *Women and the family in rural Taiwan*, Stanford University Press, 1972.

<sup>85</sup> Pashigian, M., *supra*, note 78, at p. 44.

<sup>86</sup> Pashigian, M., *supra*, note 78, at p. 44.

<sup>87</sup> Viet Ba, Surrogacy: Through the lens of altruism, <http://antg.cand.com.vn/vn-vn/ktvhkh/2013/10/81696.cand> (last accessed March 29, 2016).

the cultural pressure to produce offspring in Vietnam. The next chapter will discuss this issue.

## **CHAPTER 2:**

### **INFERTILITY AS A SOCIAL PROBLEM - AN ANALYSIS OF SOCIAL AND CULTURAL CONTEXT FOR SUROGACY IN VIETNAM**

Unlike in wealthy Western countries, including the UK, where infertility is linked to disrupted life paths of both men and women who want a linear progression into adulthood (such as marriage and childbirth),<sup>88</sup> infertility in Vietnam is not so much a reproductive disruption, but regarded as a complex issue fraught with social, cultural and even religious viewpoints.<sup>89</sup> It is possible for a woman in Western society to choose to be childfree without fears of social criticism, but this is not the case for many women in Vietnam. In our country, marriage and childbearing are considered as a duty for most married couples and hence, infertility is an unfulfilled duty which may be socially criticized by way of explaining cultural and religious beliefs. Light will be shed on these beliefs in this chapter with a view to demonstrating that the ban on surrogacy in the context of the introduction and promotion of IVF was an obstacle for Vietnamese infertile couples in their efforts to overcome childlessness. Therefore, it is concluded that the removal of the ban on surrogacy is an appropriate legal move by the Vietnamese government in that it will enable infertile couples to manage their duty of childbearing in accordance with social and cultural expectations.

#### **2.1 To have biological offspring is a social and moral duty in Vietnam**

The birth of a child plays a very important role in family life in Vietnam. It contributes to the formation and maintaining of a family, reinforces traditional

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<sup>88</sup> Gary Becker, *Disrupted Lives: How People Create Meaning in a Chaotic World*, Berkeley and Los Angeles: University of California Press, 1997.

<sup>89</sup> Pashigian, M., *supra* note 78, at p.38.

family values, enhances both womanhood/motherhood and masculinity/fatherhood, and upholds family happiness.<sup>90</sup> Childlessness (even by choice) and infertility, therefore, are all too often assimilated to a personal plight, a family tragedy, but not a social sympathy.<sup>91</sup> For a Vietnamese married woman, infertility may cause negative implications for the stability of her marriage, and endanger the bonds with her husband and his family. In Vietnam, married women suffering infertility may be put in a marginal social status with fears of the potential dissolution of their marriage and possible abandonment by their husbands.<sup>92</sup> Even for never-married women, childlessness places them in difficult circumstances where they must find social networks of social and financial support to maintain their lives once their parents are dead.<sup>93</sup>

To begin with, it is important to understand the underlying cultural values of fertility and childbearing in Vietnam, which are regarded as derived from Chinese culture. As a result of being under Chinese feudal domination in many previous centuries, Vietnam has had a lot of Chinese cultural influences,<sup>94</sup> many of which still exist in modern life. One example is the Chinese symbol of fertility that has a common presence in Vietnamese families. Vietnamese households still typically display the three famous symbols in various forms of decoration: Phuc (happiness), Loc (windfall) and Tho (longevity). It might be three independent or juxtapositional wooden frames containing large words Phuc-Loc-Tho subtly written in a manner of Chinese or Vietnamese calligraphy art or carved in the

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<sup>90</sup> Melissa J. Pashagian, *Conceiving the happy family - Infertility and Marital Politics in Northern Vietnam* in Marcia C. Inhorn and Frank Van Balen (eds) *“Infertility around the Globe: New Thinking on Childlessness, Gender and Reproductive Technologies”*, University of California Press, 2002, pp.134-151.

<sup>91</sup> The plight of infertility. <http://nongnghiep.vn/nongnghiepv/72/3/3/109815/loi-dau-vo-sinh.aspx> (last accessed September 29, 2016).

<sup>92</sup> Danièle Bélanger, *Single and Childless Women of Vietnam: Contesting and Negotiating Female Identity?* In *Gender Practices in Contemporary Vietnam*, Lisa Drummond and Helle Rydstrom (eds), Singapore University Press, 2004, pp.96-116.

<sup>93</sup> Danièle Bélanger and Khuất Thu Hồng, *Too Late to Marry: Failure, Fate or Fortune? Female Singlehood in Rural North Viet Nam*, in *Gender, Household, State: Doi Moi in Viet Nam*, Jayne Werner and Danièle Bélanger (eds), Cornell University, 2002, pp.89-110.

<sup>94</sup> Influences of the Chinese civilization on the Vietnamese culture. <http://thanhtra.edu.vn/category/detail/463-anh-huong-cua-van-minh-trung-quoc-vao-viet-nam.html> (last accessed Viet Ba, *Surrogacy: Through the lens of altruism*, <http://antg.cand.com.vn/vn-vn/ktvkh/2013/10/81696.cand> (last accessed March 29, 2016).

bronze materials. It might also be three wooden or ceramic statues in a small size portraying three old men named Mr Phuc, Mr Loc and Mr Tho – three Gods of folk imagination (they were three most well-known mandarins in a Chinese legend)<sup>95</sup>: Mr Tho or the God of longevity, an old man with a long white-beard holding a long baton, represents a wish for health and immortality. Mr Loc or the God of windfall, an old man with a plenty of gold in his hands, symbolizes a willingness for wealth and prosperity. Mr Phuc or the God of happiness, an old man holding a beautiful child in his arms, reflects a dream of family happiness and fertility.

*Inter alia*, the God of happiness is commonly preferred since children are considered to be the most important and most valued asset of a person in his/her whole life. In this sense, Vietnamese families exhibit the image of the God of happiness in the hope of producing as many children as possible. It is a common belief in Vietnam that without the presence of the God of happiness in the house, the family might not be blessed by the Gods and, thus, may be subject to childlessness or infertility, which may result in unhappiness or more seriously, the collapse of a family.<sup>96</sup> Consequently, to have children is more prioritized than to have other properties; having offspring is a sign or measure of family happiness and vice versa.

The birth of a child has a variety of meanings not only for the formation of a family, but also for the stability and degrees of happiness of that family in Vietnamese modern society. For Vietnamese people, to get married, and then, to have children are integral parts of a perfect marriage as ‘while the union of a couple in marriage is regarded as the initial step in family formation, until a couple has children (including through adoption) ‘building a family’ is viewed as

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<sup>95</sup> The meaning of the three most popular Gods in the Vietnamese traditional beliefs. <http://www.vietnamfineart.com.vn/Story/Tapchimythuat/2013/11/3731.html> (last accessed March 29, 2016).

<sup>96</sup> It is also a widely held belief in Vietnam that a married couple without children might have made a grave sin in the ‘previous life’ and hence, have to pay for their sin in this current life by their childlessness or infertility.

incomplete'.<sup>97</sup> In other words, children are regarded as a crucial catalyst in the completion of a marriage between a man and a woman.<sup>98</sup> In research on happiness and infertility in Northern Vietnam in the perspectives of public health, gender and anthropology, Pashagian clarifies the significance of childbirth in Vietnamese families as follows:

An important aspect of having children in Vietnam is the establishment of harmonious relationship with the living, as well as ritualized respect for the dead. Childless women expect that the birth of children will create a closer relationship with their husband, increase the chances of having harmonious relation with their-in-law, and, in the case of a son, contribute to the husband's filial piety by producing a descendant who continues the lineage and maintains ancestor worship after the death of his parents. It is widely held by both men and women, regardless of their fertility status, that the purpose of marriage is to have children and that few couples can attain a special and coveted form of marital sentiment with each other without the birth of children.<sup>99</sup>

Bringing a child into the world also contributes to tightening the relationships between family members. A child may be regarded as a "bridge" between his/her mother and his/her father, makes the bond between his/her parents closer, more harmonious and happier. Furthermore, a child may also be a source of joy for his/her grandparents in their old age, especially as the model family with two or more generations under "a roof" becomes a tendency in Vietnam.<sup>100</sup> It is becoming the case in the country that a growing number of young men do not want to live independently from their parents even after getting married.<sup>101</sup> They prefer to live with their parents with a view to receiving parental help in various aspects of life. For example, the parents might continue to financially support their son and his newly founded family. More importantly, they might be able to

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<sup>97</sup> Pashagian, M., *supra* note 89, at p. 140.

<sup>98</sup> It is also a common perception in other East Asian countries, as a Chinese writer argued, that: 'But the mere relationship between man and woman is not sufficient; the relationship must result in babies, or it is incomplete'. See Li Yutang, *The importance of living*, Foreign Language Teaching and Research Press, Beijing, 1998, p.167.

<sup>99</sup> Pashagian, M., *supra* note 89, at p. 139.

<sup>100</sup> Young Vietnamese couples asked their parents to be babysitters, <http://vnexpress.net/gl/doi-song/gia-dinh/2012/05/vo-chong-tre-bien-ong-ba-thanh-osin> (last accessed March 29, 2016)

<sup>101</sup> *Ibid.*



spend plenty of time in their retirement looking after their grandchildren while their son and daughter-in-law leave home to work.<sup>102</sup> In this regard, young couples owe their old parents a moral debt or obligation, that is to give them a grandchild following their marriage.

The birth of a child is also widely viewed as a manifestation of respect the son and his wife have towards their parents in conformity with traditional Confucianist values of “Hiếu” (piety).<sup>103</sup> For a man, childlessness is regarded as disrespect for his parents because it interrupts the continuation of the family line. For a woman, childlessness is likened to a breach of her duties for her husband’s family because she is often expected to be “mẹ hiền, dâu thảo, vợ đảm” (self-sacrificing mother, devoted daughter-in-law, dedicated wife) – highly appreciated virtues for Vietnamese women, as Binh studied in her research on contemporary families in Vietnam.<sup>104</sup> It is also a widely held Vietnamese belief that “a good daughter-in-law is evaluated by how well she treats her husband's family, her ability to contribute economically to the household, and her fertility”.<sup>105</sup>

Sociological and anthropological research has shown that many women married to eldest sons felt a strong need to bear a son to sustain a husband’s patriline, while other infertile women who are married to other sons of the same family may simply expect children of any sex.<sup>106</sup> Moreover, women were clearly aware of the intricate role they have in assisting their husbands complete expectations

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<sup>102</sup> *Ibid.*

<sup>103</sup> Asian perceptions on the filial piety, <http://www.daophatngaynay.com/vn/van-hoa/vu-lan/8114-Quan-niem-chu-Hieu-cua-nguoi-A-Dong.html> (Asian perceptions of piety). (last accessed March 29, 2016). See also John K. Whitmore, Social Organization and Confucian Thought in Vietnam, *Journal of Southeast Asian Studies*, 1984, no.2, p.15.

<sup>104</sup> Ngo Thi Ngan Binh, ‘The Confucian four feminine virtues (tu duc): the old versus the new – ke thua versus phat huy’, in Lisa D. and Helle R. (eds), in *Gender practices in contemporary Vietnam*, Singapore University Press, 2004, p.47-73.

<sup>105</sup> Jayne Werner, ‘Managing womanwood in family: gendered subjectivities and the State in the Red River Delta in Vietnam’, in Lisa D. and Helle R. (eds), in *Gender practices in contemporary Vietnam*, Singapore University Press, 2004, p. 28.

<sup>106</sup> Pashigian, M., *supra* note 78, at p.37.

of filial piety.<sup>107</sup> For some women, the desire to bear a son to satisfy the family needs of a husband was a means of showing love for him, beyond their own personal and individual yearning for offspring.<sup>108</sup> In this context, it is understandable that having no children may amount to a major conflict within the family, perhaps resulting in separation or divorce. Both married men and women in Vietnam are, therefore, pressurized to reproduce, at least one child.

The birth of a child is also regarded as a measure of womanhood or the social position of women in Vietnam. It has been shown that Vietnamese women desire to give birth to a child in order to secure a place within their husbands' family because it is possible for childless married women to be placed as outsiders in an extended family network.<sup>109</sup> Historically, womanhood (in Vietnam and other Confucianist cultures in Asia like China, Japan and South Korea) had been underestimated and often systematically violated, as will be discussed below. The inferior social status of women in relation to that of men originates from one of the main views of Confucianism,<sup>110</sup> which undervalues woman in all her personal respects while overly highlighting the social status of men and heightening paternalism. This is vividly illustrated in the marital relationship between the husband and the wife - one of the three pillars on which a society is built and maintained.<sup>111</sup> Confucianist ideology imposes unfairly (in the aspect of gender) a great many obligatory rules on women amongst which the rule of "three kinds of dependence" is the best known: a woman is dependent on her father when unmarried, on her husband when married, and on her sons in case of her

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<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> Vu Khieu, *Confucianism – Past and Present*, Social Sciences Publisher, Hanoi, 1990 (in Vietnamese).

<sup>111</sup> Confucianism places great emphasis on three important relationships in a society: between ruler and ruled, between parents and children, and between husband and wife. It is commonly accepted by Confucianists that these three relationships are foundations on which society as a whole is built and maintained. See Nguyen Thi Thanh Mai, Confucianism and its influences on Vietnamese culture today. <http://huc.edu.vn/vi/spct/id45/Tu-tuong-dao-duc-Nho-giao-va-anh-huong-cua-no-o-nuoc-ta-hien-nay> (last accessed March 29, 2016). See also John K. Whitmore, *Social Organization and Confucian Thought in Vietnam*, *Journal of Southeast Asian Studies*, 1984, no.2, 15.

husband's death.<sup>112</sup>

Getting married is a milestone in a woman's life as it changes her life completely. It takes her from her father's family to locate her as a new member in her husband's family. From this point of time, she has a great many duties and obligations towards this new family. Not only must she economically contribute to her husband's family, she also assumes a more important responsibility with regard to procreation for a wide range of purposes: to keep her in-law's social face in terms of fertility, to demonstrate that her husband's family is blessed by the God of happiness, and to bring into existence an heir to continue the family line. In addition, a married woman is very likely to become a victim of unjustifiable social discrimination and condemnation, such as prejudice, if she does not have children. This is reflected in a popular Vietnamese saying: "A married woman incapable of childbearing is similar to a barren tree unable to produce seed and fruit".<sup>113</sup> Accordingly, to have a child of either sex has been regarded as the best guarantee for married women in Vietnam to protect both her public face and her personal life.

Also, due to the dominant values established in feudal times, the fact of giving birth to a son rather than a daughter mattered greatly to a woman as it resulted in major alterations to her life, especially should her husband have more than one wife in a polygamous marriage (this practice, however, ended in 1959 with our first law on marriage and the family).<sup>114</sup> In such a case, her status in the family would be significantly improved and superior to that of other wives who were infertile or had only daughters, and her voice would be more heard and valued more. All of which gives her certain power within the relationships with

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<sup>112</sup> Tran Trong Kim, *Confucianism*, Culture and Information Publisher, Hanoi, 2008 (in Vietnamese).

<sup>113</sup> An infertile woman is similar to a barren tree. <http://tuoitre.vn/Nhip-song-tre/Tinh-yeu-loi-song/93888/Dung-vi-cau-%E2%80%9C Cay-kho-khong-trai-gai-doc-khong-con%E2%80%9D.html> (last assessed March 29, 2016).

<sup>114</sup> Law on Marriage and Family 1959, the first law on marriage and the family issues of Vietnam, recognised monogamy as one of the most important principles of Vietnamese family law. This principle still remains in the latest Law on Marriage and the Family 2015.

her husband's family. By bearing a son she took a final step to complete her most important responsibility towards her husband's family and after that, she confirmed her solid position within it. However, the woman would risk losing everything and be powerless within her husband's family should she be childless.

It is a truism for many Vietnamese people that infertility is analogous to a great misfortune, an unforgivable affront to the ancestry, a punishment by Gods and irrationally, an infertile daughter-in-law in any event is to blame for all of this.<sup>115</sup> Therefore, it can be easily understood that infertility or childlessness is likened to a "felony" committed by a woman as a wife and a daughter-in-law and, hence, she would be punished by her in-laws. For example, her infertility might amount to grounds for a divorce by her husband. This kind of punishment used to be legalized in a famous code named Hồng Đức Code,<sup>116</sup> made under the feudal Dynasty Le in XV century in Vietnam, much of which was given to regulate marriage and family.

Article 310 of this law provided that the husband had the right to invalidate his marriage by divorcing his wife due to their childlessness and her infertility. The husband may still love his infertile wife, but under his family's pressure to provide an heir and his parents' need to have a grandson, he has no other choice than to divorce and then, to marry a new wife to accomplish the familial responsibility. In contemporary society, such perceptions of infertility and childlessness still persist somewhere and have caused serious problems for a number of Vietnamese families. For instance, even today Vietnamese men are still influenced by Confucianist beliefs of necessarily having a son as heir to the family continuation

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<sup>115</sup> The plight of infertility. <http://nongnghiep.vn/nongnghiepv/72/3/3/109815/loi-dau-vo-sinh.aspx> (last accessed March 29, 2016).

<sup>116</sup> Bộ luật Hồng Đức (The Hong Duc Code), [http://vksbacninh.gov.vn/index.php?option=com\\_content&view=article&id=904:luat-hong-duc&catid=77:cac-linh-vuc-khac&Itemid=131](http://vksbacninh.gov.vn/index.php?option=com_content&view=article&id=904:luat-hong-duc&catid=77:cac-linh-vuc-khac&Itemid=131) (last accessed March 29, 2016).

and may decide to divorce when their wife's infertility is recognized.<sup>117</sup>

Social and individual implications arising from infertility in Vietnam not only reveal underlying cultural views on reproduction as a duty (as mentioned above), but also expose deep-seated religious beliefs.<sup>118</sup> Vietnamese people's worldview or understanding about various aspects of life, including their perception of reproduction and having biological offspring, has been impacted by Buddhism, the largest religion in Vietnam.<sup>119</sup> One of the most popular principles of Buddhism is the rule of causality, or the reciprocal relation between the cause and the effect. Buddhists believe that the ongoing life where they are living here and now reflects the result of their previous life. All the good things (such as happiness, love, luck, wealth, health and success) they may receive from Buddha are often regarded as the consequences of the good things they had done in the past life. By contrast, all bad luck (unluckiness, infertility or childlessness, poverty, failure and death) are regarded as punishment for the sins or crimes they had committed in the previous life, which may be called 'karma'.<sup>120</sup>

It is beliefs about the power of the spirit world to shape the fortunes of the living, including reproductive success, as well as Buddhist beliefs about karma and preserving life, that lead to the view that procreative success is uncertain, not a

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<sup>117</sup> "Should I divorce my wife because she is infertile?" <http://afamily.vn/tam-su-ban-doc/1127/Anh-Tung-dau-kho-1-thi-vo-anh-dau-kho-gap-100.chn> (last accessed March 29, 2016).

<sup>118</sup> There has been a great deal of literature reviewing the influences of religions on Vietnamese people's spiritual life, on their views on the world and human life. See Nguyen Tai Thu, *The influences of ideologies and religions on Vietnamese people today*, National Political Publisher, 1997 (in Vietnamese); Nguyen Dang Duy, *Buddhism and Vietnamese culture*, Hanoi Publisher, 1999 (in Vietnamese); Buddhism's influences on Vietnamese people's life, <http://www.dulichachau.com/camnang/nonnuocvietnam/anh-huong-phat-giao-trong-doi-song-nguoi-viet/> last accessed March 29, 2016).

<sup>119</sup> According to the data collected and released by the Department of Religions (a governmental organization of Vietnam) in 2005, there were about 10 million buddhists in the country, who regularly practice formal Buddhist rituals and according to another data, more than 45 million people (about a half of the population) who acknowledge themselves as buddhists.

<sup>120</sup> Thich Thong Hue, Theory of Causality in Buddhism, <http://www.daophatngaynay.com/vn/phat-phap/giao-phap/nq-nb-lh/8549-Thuyet-nhan-qua.html>, last accessed March 29, 2016).

guarantee.<sup>121</sup> A few sociological studies demonstrate different views on reproductive success in Vietnam, and point out that some Vietnamese infertile women still have superstitious beliefs that childless women must be very wicked or bear the debt of their previous life.<sup>122</sup> A woman working as a butcher in the market had a fear that her slaughter of animals had a karmic effect, causing her childlessness.<sup>123</sup> Other women who have undergone abortions also raised concerns about the consequences of killing a foetus for their future lives and its karmic impact on reproduction in their current life.<sup>124</sup> Still other women do not have such beliefs, but simply attribute their infertility to their choices with regard to medical interventions like surgery, infection, or other reasons.<sup>125</sup> These different views indicate that infertility in Vietnam is often considered as a consequence of prior deeds, choices or fate, and hence, inform the way Vietnamese infertile people deal with their infertility.

Some people believing in Karma go to the pagodas<sup>126</sup> where the Buddha<sup>127</sup> is worshiped in the hope that the Buddha will let the good fortune continue to fall on them while stopping their misfortune. In the pagodas, people pray to the Buddha by promising to do more good things in the future and asking the Buddha to forgive all the sins they made in their current and previous lives. Those who regularly practice Buddhist rituals in the pagodas have a firm belief that their wishes will be heard and the Buddha will make their dreams come true. It is a widespread practice in Vietnam for married couples, whether infertile or not, to go to the pagodas with the sole purpose of praying for having a biological child as soon as they can.<sup>128</sup> The child is considered a gift from the Buddha and, thus,

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<sup>121</sup> Melissa J. Pashigian, *supra* note 78, at p.38.

<sup>122</sup> Pashigian, M., *supra* note 78, at p.38.

<sup>123</sup> *Ibid.*

<sup>124</sup> Tine Gammeltoft, Between 'Science' and 'Superstition': Moral Perceptions of Induced Abortion among Young Adults in Vietnam, *Culture, Medicine and Psychiatry*, 26, no.3, 2002, pp.313-338.

<sup>125</sup> Pashigian, M., *supra* note 78, at p.38.

<sup>126</sup> Going to pagodas on new year's day, <http://vnexpress.net/tin-tuc/thoi-su/dau-nam-no-nuc-di-chua-cau-may-2155603.html>, (last accessed March 29, 2016).

<sup>127</sup> It is notable that for Buddhists, there is a difference between Buddha as a supernatural symbol existing outside people's bodies and Buddha as a spiritual power living inside our bodies. In this section, Buddha is understood in the former meaning.

<sup>128</sup> Duong Nhung and Nhi Ha, Unexplainable mysteries around childbearing with Buddhist wishes,

they strive to attain this ultimate goal by showing their respect for the Buddha. Devoting money to pagodas' activities and to other charity organisations, regularly going to the pagodas, making use of every opportunity to do good things and confirming their altruistic behaviours, are some of their attempts in contemplating their wishes for a child to be heard by the Buddha.

For infertile married couples, this practice is more heightened and undertaken more frequently<sup>129</sup> as they have fewer chances to have offspring in comparison with other people. After making many attempts without resulting in pregnancy, they turn to Buddhism as a last spiritual reliance. Any child deemed to be born under this religious belief is accorded a special status (a son/daughter of God), and different from other children born “normally” (without praying to the Buddha).<sup>130</sup> However, those who overly rely on religious belief are very likely to be financially abused by opportunist people who claim to have “supernatural power” to reverse the state of infertility.<sup>131</sup> In practice, these opportunist people persuade infertile couples to believe that they are ‘ambassadors’ of the Buddha, possessing unusual abilities to relieve infertility (through acupuncture, massage or other treatments) and having a monopoly on a cure for infertility that can not be found anywhere else.<sup>132</sup> If agreed, the former provides the latter with some ‘special’ medicines, which are often made of unknown herbs following a secret recipe to enable conception to take place easily. In exchange for this, infertile couples have to pay a large amount of money holding a hope of having a child as soon as possible.<sup>133</sup> However, the recipe infertile couples have received has often proved to be ineffective because they cannot achieve any pregnancy, and their

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<http://www.doisongphapluat.com/gia-dinh/con-cau-tu-dieu-khong-de-ly-giai-a88866.html> (last accessed March 29, 2016).

<sup>129</sup> *ibid.*

<sup>130</sup> Sons of God - A social worry, <http://www.eva.vn/lam-me/hoi-chung-con-cau-tu-c10a59823.html> (last accessed March 29, 2016).

<sup>131</sup> Motherhood without childbirth, <http://vietnamnet.vn/vn/xa-hoi/24793/ky-nghe--xin-con--cua-nhung-ba-bau-khong-de.html> (last accessed March 29, 2016).

<sup>132</sup> *ibid.*

<sup>133</sup> Motherhood without childbirth, <http://vietnamnet.vn/vn/xa-hoi/24793/ky-nghe--xin-con--cua-nhung-ba-bau-khong-de.html> (last accessed March 29, 2016).

loss of money is obviously a consequence of deception.<sup>134</sup> All of these behaviours demonstrate that religious beliefs may be driving forces for Vietnamese infertile persons to assuage the pain of infertility.

Facing infertility, other than looking to the spirit world and religious beliefs, Vietnamese couples often also seek for practical ways to have a child. Adoption might be an option, but is all too often regarded as the least preferred alternative.<sup>135</sup> Pashagian gives an explanation for this as follows:

In some cultures adoption can be an alternative to biological reproduction for infertile couples. However in Vietnam, this option is not popular. There are numerous folk beliefs and cultural taboos regarding adoption. Not knowing the family of an adopted child is a large impediment to adoption. There is concern about whether the child's biological ancestors (alive or deceased) led decent lives or committed immoral acts. If the child comes from inauspicious stock, then it is possible for one's family to be beset by negative events through these ancestors. Furthermore, the child may have inherited a tendency towards negative behaviour and may therefore reflect poorly on the adoptive family. There is additional concern that the adopted child will leave the adoptive family to seek her or his birth mother. Finally, because the adopted child is not biologically related to the social parents, there is concern that adopted boys in particular will not have a vested interest in the family and will not pray to the adoptive family's ancestor after the adoptive parents are deceased.<sup>136</sup>

Another reason for Vietnamese people's rejection of adoption lies in their preference for a biological connection. In Vietnamese culture, the genetic link between family members is so highly appreciated that it often undervalues any non-genetic relationship, as a proverb says that 'a drop of blood is deeper than a pond of water' (or 'blood runs thicker than water').<sup>137</sup> Consequently, Vietnamese infertile people often adopt other approaches to have offspring genetically

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<sup>134</sup> Motherhood without childbirth, <http://vietnamnet.vn/vn/xa-hoi/24793/ky-nghe--xin-con--cua-nhung-ba-bau-khong-de.html> (last accessed March 29, 2016).

<sup>135</sup> Pashagian, M., *supra* note 89, at p.149.

<sup>136</sup> Pashagian, M., *supra* note 89, at p.149.

<sup>137</sup> Nguyen Lan, *Dictionary of Vietnamese Proverbs*, Literature Publishing, 2011.



related to them through assisted reproductive technologies, *inter alia* surrogacy is a preferred option.

In practice, prior to the ban on surrogacy in 2003, surrogacy (partial surrogacy or surrogacy without IVF) was referred to by Vietnamese infertile people as a way of dealing with their childlessness. This practice was mainly associated with polygamy which was popular in Vietnam many years ago, but no longer existed after the coming into force of the Marriage and Family Act 1959.<sup>138</sup> In order to provide more context to the background of surrogacy in Vietnam, the following section will examine the polygamy in which partial surrogacy emerged in Vietnam and how the Vietnamese law dealt with it.

## **2.2 Poligamy and surrogacy in the history of Vietnam – A cultural and legal review**

This section will focus on the relationship between polygamy and surrogacy in Vietnam from historical, cultural, and legal perspectives; explain how polygamy could lead to the emergence of surrogacy without IVF centuries ago in the country, and finally reveal social ramifications of this practice in recent years with the incidence of non-IVF surrogacy arrangements involving extramarital sexual relations which raised many ethical concerns. It is important to ascertain from the outset that polygamy in Vietnam is commonly used as a euphemism for polygyny (a marriage where a man is married to multiple wives), not polyandry (the marriage in which a woman is married to various husbands).<sup>139</sup> Polygyny with concubinage were amongst different forms of marriage in past centuries in Vietnam, reflecting the social phenomenon of second wives and the challenges of surrogacy arising from this phenomenon. To put it another way, polygamy was

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<sup>138</sup> This law was made by the Vietnamese Parliament of Vietnam in 1959 and considered to be the first Act on marriage and law in Vietnam. Three other acts on marriage and law were subsequently passed by the Parliament of Vietnam in 1986, 2000 and 2014.

<sup>139</sup> Pashigian, M., *supra* note 78, at p.52.

used as a socially legitimate form of de facto surrogacy in the absence of effective technological and medical treatment for infertility,<sup>140</sup> as will be discussed below.

Polygamy as polygyny was a common practice in Vietnam in the feudal times and recognized as a legal practice in different legal codes of Vietnam. It was first allowed in the Hong Duc Code (or the Lê Legal Code) under Lê dynasty in 15<sup>th</sup> century,<sup>141</sup> reiterated in the Gia Long Code under Nguyễn dynasty in 19<sup>th</sup> century,<sup>142</sup> continued to exist in Civil Code of Tonkin (the Northernmost area of Vietnam) and Annam (the middle section of Vietnam) under French colonisation in the 20<sup>th</sup> century,<sup>143</sup> and was only ended by the Marriage and Family Act in 1959.

Under the Hong Duc Code, wealthy families resorted to polygyny in order to extend a lineage by increasing the number of children of a man (particularly sons/male heirs) through a variety of wives (including a primary/first wife, secondary wives, concubines or serfs).<sup>144</sup> This was a way to raise social power by establishing strategic links between families through marriage to more than one wife or enhancing relationships between families.<sup>145</sup> Nevertheless, polygamy or polygyny was also considered as a social and procreative strategy in reaction to

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<sup>140</sup> *Ibid.*

<sup>141</sup> Nguyen Ngoc Huy and Ta Van Tai, *The Lê Code: Law in Traditional Vietnam: A Comparative Sino-Vietnamese Legal Study with Historical-Juridical Analysis and Annotations*, 3 vols, Athens: Ohio University Press, 1987. The Lê Code is regarded as the first complete legal code of Vietnam during feudal times, having official effect for more than 300 years from its first introduction and still remaining unofficially effective under subsequent feudal dynasties in Vietnam.

<sup>142</sup> See Arthur Daguin and Alphonse Dubreuil, *Le mariage annamite en Indo-Chine: Cochinchine, Annam, Tonkin, plus spécialement d'Annam* (Vietnamese Marriage in Indochina: Cochinchina, Annam, Tonkin, Especially in the Empire of Annam), Paris: L.Dorbon, 1906; Bui Thuong Chieu, *La polygamie dans le droit annamite* (Polygamy in Vietnamese Law), Publications de l'Institut de droit compare de l'Université de Paris, première série, Paris: Rousseau et Cie, 1933; Alexander Woodside, *Vietnam and the Chinese Model: A Comparative Study of Vietnamese and Chinese Government in the First Half of the Nineteenth Century*, Harvard University Asia Center, 1988.

<sup>143</sup> Binh An, The old regimes of marriage in Vietnam, <http://phapluattp.vn/plo/che-do-hon-nhan-xua-385950.html>, (September 2, 2010, last accessed March 29, 2016).

<sup>144</sup> Ta Van Tai, The Status of Women in Traditional Vietnam: A Comparison of the Lê dynasty (1428-1788) with the Chinese Codes, *Journal of Asian History*, 1981, no.2, 15, pp.97-145.

<sup>145</sup> *Ibid.*

female infertility, supposing that a man (husband) could be able to support multiple wives.<sup>146</sup> In other words, it was used to address the problem of infertility in which causes of childlessness originated from the first wife. In particular, in cases where the first wife was infertile or unable to bear a son, the husband was permitted to marry other women to reproduce a male heir. This may be seen as first forms of surrogacy (or may be called de facto surrogacy) in Vietnam before assisted reproductive technologies were available.

The Gia Long Code continued to restate polygamy and the resulting practice of surrogacy as recognized in the Hong Duc Code and added other meanings to this. During the 19<sup>th</sup> century, the Gia Long Code permitted contractual concubinage as a way of expanding one's patriline through the birth of sons. The Code made a clear distinction between concubines, who were considered base, and wives, who were regarded as noble.<sup>147</sup> There was also a further distinction between a second wife, a concubine and a mistress/a prostitute, as having a mistress or seeing a prostitute involved an informal liaison and represented a temporary relationship.<sup>148</sup> However, under this code, concubines were forbidden from being elevated to the same legal position and moral status as wives.<sup>149</sup>

Legal distinctions between wives and concubines resulted in various legal outcomes having impacts on themselves and their children in many areas of life, especially inheritance. Under the Gia Long code, the first wife (childless or not) was entitled to make significant decisions about the education and potential conjugal mates for the children of lower-ranking wives and concubines (in the context of the arranged marriage).<sup>150</sup> This implies that she was treated as social

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<sup>146</sup> *Ibid.*

<sup>147</sup> Ta Van Tai, *supra* note 143. It is notable that the use of term 'polygamy' to depict simultaneous unions between a man and various women is unclear in that it does not necessarily manifest marriage to multiple wives at once, but also to a first wife and one or more concubine.

<sup>148</sup> *Ibid.*

<sup>149</sup> Alexander Woodside, *Vietnam and the Chinese Model: A Comparative Study of Vietnamese and Chinese Government in the First Half of the Nineteenth Century*, Harvard University Asia Center, 1988, p.48.

<sup>150</sup> Ta Van Tai, *supra* note 143.

mother by law or, in other words, her role is similar to that of social mothers in surrogacy arrangements in the modern world. However, lower-ranking wives and concubines were still regarded as the (birth) mothers of these children. The offspring of lower-ranking wives and concubines were legally allowed access to inheritance.<sup>151</sup> Nevertheless, these children and their birth mothers could be abandoned by the first wife once the husband died. Although it was ambiguous why she had such authority, the abandonment of the children of lower-ranking wives and concubines by the first wife implies that these children were identified as the offspring of the mother who gestated them rather than of the first wife.

It is noteworthy that that practice of polygyny, as mentioned above, addresses only the problem of female infertility and the culturally persistent recognition of the maternal bonds between mother and her own child when there exists a hierarchy of wives.<sup>152</sup> It is not an effective solution to infertility in cases where the husband is infertile.<sup>153</sup> However, the law in the past did not intervene in the choices of the infertile couple in these cases and their decisions to overcome infertility to have a child who was genetically connected to the wife were often kept in secret.<sup>154</sup>

In contemporary times when IVF was introduced and increasingly promoted in Vietnam, the manifestation of second wives has been further complicated by the matter of surrogacy.<sup>155</sup> Relationships constituting surrogacy in contemporary Vietnam have been fraught with ambiguity. In particular, surrogate relationships may involve a range of possibilities such as relationships between a surrogate

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<sup>151</sup> This is comparable to the provisions of the Hong Duc Code (on the same issue) where a second wife had to renounce authority over her son with a view for him to inheriting the estate/property of his deceased father. See Ta Van Tai, *supra* note 143.

<sup>152</sup> Pashigian, M., *supra* note 78, at p.55.

<sup>153</sup> In these cases, the wife of the couple could achieve pregnancy through sperm donation by intercourse – that is she makes an arrangement with another man who impregnates her with the agreement of her husband. See Nghiem Tham, *Esquisse d'une étude sur les interdits chez les Vietnamiens* (A Study of Taboos among the Vietnamese), Publications de l'Institut de recherches archéologiques, Sai gon: Ministère de la Culture et de l'Éducation, 1965,p.53.

<sup>154</sup> *Ibid.*

<sup>155</sup> Pashigian, M., *supra* note 78, at p.55.

woman and an infertile couple in an IVF surrogacy arrangement. They might also be relationships established under a secret arrangement between a woman who acts as surrogate mother and a man who impregnates her in order to have a child genetically related to him. Moreover, they may be adulterous relationships associated with producing a male heir; or polygamous relationships in the form of taking second wives.<sup>156</sup> It is understandable that this ambiguity raised concerns over complex social and legal consequences for Vietnamese law makers so that they hesitated to legalize the practice of surrogacy, prohibited it and maintained the ban for more than a decade (from 2003 to 2014). It follows that the removal of the ban on surrogacy (as occurred in 2014) objectively reflects both the reduced power of the Vietnamese state in controlling and limiting the procreative choices of infertile couples in the country, and the increased reproductive freedom of Vietnamese infertile couples.

It is also notable that even though polygamy with forced marriage and concubinage were terminated upon the introduction of the Marriage and Family Act 1959,<sup>157</sup> the making of unofficial arrangements that create second wife relationships by Vietnamese infertile couples in response to their infertility are still not uncommon today, as shown in some sociologist studies.<sup>158</sup> In several instances, the husbands of the couples (of which the wife is infertile) were seeking to have offspring out of wedlock, either by taking a second wife (living together in a cohabitation relationship without marriage) or by indulging in adulterous relationships (both of these are in breach of the current law).<sup>159</sup> The husbands in these cases were primarily motivated by the need to fulfill their duty to their parents (to continue the patriline) while not wanting to divorce their infertile wives. In some cases, the husband may refer to the black market to find a 'second wife' to make a surrogacy arrangement with a view to having a child

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<sup>156</sup> Pashigian, M., *supra* note 28, at p.164.

<sup>157</sup> This Act abolished polygamy in order to introduce and protect monogamy in which a legal marriage is constituted between a man and a woman.

<sup>158</sup> Pashigian, M., *supra* note 78, at p.50.

<sup>159</sup> In Vietnam, cohabitation is prohibited under the Marriage and Family Act 2015 while adultery is criminalized under The Penal Code 2009 (amended) as a violation to monogamy.

genetically related to him (with or without his wife's agreement).<sup>160</sup> In practice, the black market of surrogacy has enabled infertile couple to have their own biological children, but it has also carried serious implications for the parties to surrogacy arrangements as well as the whole society. This problem will be discussed in more detail in the next chapter.

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<sup>160</sup> There were cases where the wife of the couple (childless or not bearing a son) actively made continuous efforts to find and 'marry' another woman to her husband in order to help him to have a male heir and fulfill the duty of continuing his patriline. See Thuan Thang, *Untold stories of a woman finding a second wife for her husband*, <http://baophapluat.vn/Utilities/PrintView.aspx?distributionid=187186> (last accessed December 29, 2016).

## **CHAPTER 3:**

### **CONCERNS OVER DANGERS AND HARMS IN SURROGACY ARRANGEMENTS: POTENTIAL EXPLOITATION OF WOMEN AND COMMODIFICATION OF CHILDREN**

The legal prohibition of surrogacy did not prevent the incidence of surrogacy in practice, but instead resulted in a trend towards clandestine surrogacy arrangements in Vietnam.<sup>161</sup> As mentioned in the previous chapter, infertility as a moral duty and a social problem had driven infertile Vietnamese couples to make attempts in order to have children genetically related to them, even developing surrogacy arrangements in the black market. In practice, black market surrogacy triggered many societal anxieties regarding parenthood, the stability of marriage and family, potential exploitation of women and commodification of children and, hence, contributed to the maintenance of the ban on surrogacy until the coming into force of the new law 2015. This chapter will explore the emergence and implications of this black market in Vietnam, analysing the theoretical and practical issues surrounding exploitation of women and commodification of children by referring to English and American literature and jurisdictions. In doing so, it will demonstrate that prohibition of all forms of surrogacy did not prevent the incidence of surrogacy nor abolish its dangers and potential harms that may confront parties involved in surrogacy arrangements. It will also show that permitting altruistic surrogacy in Vietnam from 2015 may reduce as many harms as possible, provide a legal solution to the problems arising from the practice of surrogacy in the country, and that further reform is still needed.

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<sup>161</sup> Mr Nguyen Viet Tien, Vietnam's deputy health minister, confirmed this practice in an interview on the law reform on surrogacy. See Viet Ba, Surrogacy: Through the lens of altruism, <http://antg.cand.com.vn/vn-vn/ktvhkh/2013/10/81696.cand> (last accessed December 29, 2016).

### 3.1 The implications of the black market of surrogacy in Vietnam

Although there was no particular case officially reported, it is generally accepted that the black market of surrogacy emerged in Vietnam even before the introduction of the legal ban on surrogacy in 2003. The proliferation of the Internet in the late 1990s and in the early 2000s led to the exponential growth of online forums regarding childbirth and parenting where members around the country could register easily to discuss, spread information and exchange experience surrounding these issues.<sup>162</sup> Surrogacy became one of the most viewed topics with the increased display of surrogacy service advertisements. Infertile couples who were members of such forums were lured by these advertisements to make and undertake ‘underground’ surrogacy arrangements. In this way, online forums became an ‘online market’ for reproduction where people in need met surrogacy service providers.<sup>163</sup> There, infertile persons (commonly women) made contact with surrogate women or brokers (by nicknames). The ‘price’ is set, the place of offline meeting is arranged, the phone numbers are left, and if both parties agree to meet in person in secret, surrogacy agreements would be decided afterward.<sup>164</sup>

In practice, clandestine surrogacy arrangements arising from online forums were made through brokers who recruited surrogate women and proposed a fixed cost of surrogacy service to commissioning couples. The commissioning couples had to make a total payment to the broker, including the fee paid to the service agency, the ‘salary’ of the surrogate, and other additional expenses while implementing the arrangement. The fixed amount paid to the surrogate varied

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<sup>162</sup> This way of social networking, if not pertaining to national security and politics issues, is rarely censored and only intervened by the police once something wrong occurs. The most often accessed forums on family and parenting are Webtretho (<http://webtretho.com>) and Lamchame (<http://lamchame.com>). (last accessed December 29, 2016).

<sup>163</sup> ‘Surrogacy - Womb leasing’, one of the most accessed online forums in Vietnam, worked as an intermediary between surrogate women and infertile couples. See <http://dethue.wordpress.com/2013/07/25/de-thue-mang-thai-ho/comment-page-1/#comment-79> (last accessed December 29, 2016).

<sup>164</sup> *Ibid.*



depending on her educational level and beauty, ranging between 100 and 200 million VND (about £3,000-6,000).<sup>165</sup> Partial surrogacy often costs 130 million VND, whereas full surrogacy may amount to 400 million VND.<sup>166</sup> Full surrogacy arrangements are more complex because assisted reproductive technologies such as in vitro fertilisation are involved. Some Vietnamese infertile couples chosen to make surrogacy arrangements in Thailand, a neighbouring country where more advanced medical technologies are provided, the price for treatment is generally affordable, and the liberal approach to surrogacy was adopted.<sup>167</sup> However, from early 2015, Thai law bans commercial surrogacy and restricts altruistic surrogacy to Thai citizens,<sup>168</sup> with the aim of ending Thai women's wombs from becoming the world's wombs.<sup>169</sup> Therefore, it is now difficult for Vietnamese infertile couples to refer to Thai surrogate mothers as they did before.

There were other methods by which infertile couples and surrogate mothers could make surrogacy arrangements without having to participate in online forums. They had meetings in person through a broker who 'hunts' for infertile couples in the hospitals. Mrs Minh was a broker living in Hanoi. She became a broker after assisting a couple (her relatives) to have a child through adoption.<sup>170</sup> The woman (Mrs Minh's neighbour) who put her child up for adoption was paid 30 million VND (about £900) while Mrs Minh was awarded 20 million (about

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<sup>165</sup> An illegal network of surrogate mothers in Vietnam, <http://tuoitre.vn/chinh-tri-xa-hoi/563296/duong-day-mang-thai-ho-de-thue.html#ad-image-0> (last visited December 29, 2016). It is notable that according to official statistics provided by the Vietnamese government, Vietnam's gross domestic product (GDP) per capita was about 2,200 USD by the end of 2015. See <http://tuoitrenews.vn/business/29314/vietnams-gdp-per-capita-to-hit-2200-by-end-of-2015-official> (last accessed December 29, 2016).

<sup>166</sup> Ibid.

<sup>167</sup> Surrogacy services: going abroad to find womb leasing, <http://nld.com.vn/phong-su-ky-su/dich-vu-mang-thai-ho-ra-nuoc-ngoai-thue-nguoi-de-20131202085712747.htm> (last accessed December 29, 2016).

<sup>168</sup> <http://www.theguardian.com/world/2015/feb/20/thailand-bans-commercial-surrogacy> (last accessed March 29, 2016).

<sup>169</sup> Thailand bans surrogacy for foreigner in bid to end 'rent-a-womb' tourism, <http://www.abc.net.au/news/2015-02-20/thailand-bans-surrogacy-for-foreigners/6163810> (last accessed December 29, 2016).

<sup>170</sup> An Thai Duy, *Surrogacy and its disgusting consequences*, <http://vtc.vn/394-329666/phong-su-kham-pha/de-thue-va-nhung-chuyen-gay-cam-phan-ky-2.htm>, (last accessed December 29, 2016).

£650). One year later, the husband of the couple contacted her, asked her to persuade that woman to be impregnated and carry a child for him. As the arrangement was successful, the woman was compensated with a house in the suburbs, whereas Mrs Minh received 50 million VND (about £1500).<sup>171</sup> Motivated by this event, Mrs Minh decided to make a living through making surrogacy arrangements. To do her job, she travelled to areas near Hanoi in order to find women who want to act as surrogate mothers. Almost all the women in her group were low-income workers who worked in industrial zones near Hanoi, had financial problems, and voluntarily engaged in this surrogacy ring. For several years, Mrs Minh has helped more than 40 infertile couples to have their own biological children born of surrogacy.<sup>172</sup>

The black market of surrogacy in Vietnam entailed a variety of risks for the concerned parties (including the brokers) because of its illegal nature. These risks were considered in parliamentary debates surrounding surrogacy in Vietnam prior to the introduction of the new law 2015 on surrogacy.<sup>173</sup> For example, Vietnamese law makers argued that as surrogacy was forbidden by law, surrogacy arrangements were inevitably carried out in secrecy, which caused psychological, social and economic difficulties to concerned parties.<sup>174</sup> That means that they may be under the pressure of fears and disquiet about their unlawful actions. Moreover, there was always a possibility of parties to surrogacy arrangements acting irresponsibly towards each other.<sup>175</sup> In particular, infertile couples may lose a great amount of money if fraud is made on purpose by other parties. For example, the surrogate may abuse her pregnancy to propose new conditions for surrogacy arrangements in order to extort commissioning couples.<sup>176</sup> In other cases where a professional surrogate (who earns a living by

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<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*

<sup>173</sup> Legalisation of surrogacy in Vietnam. <http://giaoduc.net.vn/Xa-hoi/Dua-mang-thai-ho-vao-luat/260300.gd> (last accessed December 29,2016).

<sup>174</sup> Legalisation of surrogacy in Vietnam. <http://giaoduc.net.vn/Xa-hoi/Dua-mang-thai-ho-vao-luat/260300.gd> (last accessed December 29,2016).

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*

surrogacy arrangements) was involved, she was more likely to break a surrogacy arrangement by avoiding conception or aborting the foetus and disappearing after receiving the money, and afterwards continue to make a new arrangement with other couples.<sup>177</sup>

For example, a young woman in Mrs Minh's surrogacy ring agreed to become a surrogate mother, was impregnated but disappeared after receiving a huge amount of money from the commissioning couple as a deposit. She wrote a letter to inform Mrs Minh that she had aborted the foetus. Mrs Minh was threatened by the couple and agreed to compensate money for their loss.<sup>178</sup> Another woman refused to hand over the child to the commissioning couple and for this reason, Mrs Minh also lost some money for compensation.<sup>179</sup> In another case, a young woman named K agreed to have a relationship with the husband of the commissioning couple with a view to giving birth to a son for them. The arrangement was successful until the couple discovered that the child was not genetically related to them as the surrogate mother had been impregnated by another man (her lover). The couple lost half a billion VND (£15,000) for this arrangement and asked Mrs Minh to recover some of these damages.<sup>180</sup> In all cases, written agreements were made in spite of the knowledge of all parties that their contracts were illegal and unenforceable by law. However, these written agreements were still used as a proof when asking for compensation when something wrong occurred, as in three cases mentioned above. They did not take the cases to court and so compensation was paid without a court judgement.

The black market of surrogacy in Vietnam placed surrogate women in dangerous situations where they were financially exploited by brokers whose only aim was

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<sup>177</sup> *Ibid.*

<sup>178</sup> An Thai Duy, *Network of surrogacy and unbelievable stories*, <http://vtc.vn/395-329577/phong-su-kham-pha/phong-su/duong-day-de-thue-va-nhung-chuyen-khong-the-tin-noi.htm> (last accessed December 29, 2016).

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*

to make profits, or by intended couples who mistreated them or underpaid them.<sup>181</sup> They may face a dilemma when a disabled child is born and abandoned by his/her commissioning parents.<sup>182</sup> There was no case reported in Vietnam, but this potential is not impossible as it did occur in a Australian case where the Australian commissioning couple left a child with Down's Syndrome behind while bringing home his healthy sister.<sup>183</sup> Furthermore, without legal regulation, there is a likelihood that a woman may act as a surrogate many times in the black market, which results in a number of dangers for her, such as obstetric complications, infertility or maternal mortality. In some circumstances, surrogate women may also be sexually abused or become victims of human trafficking across borders.<sup>184</sup> In 2011, 14 Vietnamese women were freed by Thai police from a surrogate baby ring in Thailand.<sup>185</sup> These women were tricked by their compatriots to travel to Thailand in order to work as house workers, but were instead forced into surrogacy arrangements and some of them had been raped.<sup>186</sup> According to Vietnamese law, all the parties involved in surrogacy arrangements in Vietnam would be civilly liable<sup>187</sup> for their actions if they are arrested by the police and some people may be criminally convicted if there is clear evidence of human trafficking.<sup>188</sup>

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<sup>181</sup> In practice, surrogate women may not receive the full payment as agreed because the brokers decide the allocation of payment and often get a larger part of it. In some cases, they may get nothing if miscarriages occur. See. Legalisation of surrogacy in Vietnam. <http://giaoduc.net.vn/Xa-hoi/Dua-mang-thai-ho-vao-luat/260300.gd> (last accessed December 29,2016).

<sup>182</sup> *Ibid.*

<sup>183</sup> The Sydney Morning Herald, Australian Couple Leaves Down Syndrome Baby with Thai Surrogate, <http://www.smh.com.au/national/australian-couple-leaves-down-syndrome-baby-with-thai-surrogate-20140731-zz3xp.html> (last accessed December 29, 2016).

<sup>184</sup> These Vietnamese women are vulnerable, poor, undereducated, and lured into surrogacy. See 'Eleven children born through surrogacy in Thailand returned to their birth mothers in Vietnam', <http://dantri.com.vn/su-kien/11-chau-be-doan-tu-gia-dinh-trong-vu-mang-thai-ho-tai-thai-lan-546646.htm> (last accessed December 29, 2016).

<sup>185</sup> BBC News, Thailand police investigate baby sales ring, <http://www.bbc.co.uk/news/world-asia-pacific-12575566> (last accessed March 29, 2016). See also Centre for Genetics and Society, Thai police free women from surrogate baby ring, <http://www.geneticsandsociety.org/article.php?id=5606> (last accessed December 29, 2016).

<sup>186</sup> *Ibid.*

<sup>187</sup> They may be fined up to 40 million VND (about £1,200) according to Decree No 96/2011/ND-CP on sanctions for violations in the area of medical consultation and treatment.

<sup>188</sup> The Law on Prevention and Combatting of Human Trafficking 2011 identifies 12 specific behaviours concerning human trafficking that might be criminalized according to the Penal Code

The black market of surrogacy in Vietnam also led to worrying social problems, especially pertaining to family happiness and the welfare of surrogate women. Surrogacy arrangements always require the involvement of a third party – another woman outside the marriage. The problem is that this extramarital contribution to the creation of a child might be regarded as adultery, which is both a legally and morally unacceptable practice because it is a breach of the law on monogamy<sup>189</sup> and threatens the core social value of family stability.<sup>190</sup> According to the Marriage and Family Law 2000, monogamy is considered as one of the most basic principles of this law. Article 2.1 protects ‘voluntary, progressive and monogamous marriage in which husband and wife are equal’. In addition, Article 4.2 forbids marriage and cohabitation: between married persons and others who are not part of that marital relationship, or between unmarried persons and married persons. The Penal Code 1999 amended in 2009 also provides that anyone who infringes monogamy might be imprisoned from 3 months to 1 year.<sup>191</sup> Other than being subject to legal liability, a surrogate woman may also be subject to social condemnation. She may be both emotionally and physically vulnerable, and her life may be put in danger, such as in the case described below in which a childless man was pressurized to engage the help of a young woman to be the surrogate mother without his wife’s knowledge and acceptance.<sup>192</sup>

It was reported that the man in that case had a private agreement to have sexual intercourse with a young woman with the aim of having offspring and promised to make a payment for her service.<sup>193</sup> However, their arrangement failed when

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1999 of Vietnam.

<sup>189</sup> The Marriage and Family Law 2000 (which was adopted by Vietnamese National Assembly on 9<sup>th</sup> June 2000 and came into force from 1<sup>st</sup> January 2001, and partly amended in 2010), Articles 2.1 and 4.2.

<sup>190</sup> The preamble of the Marriage and Family Law 2000 states that family is the cell of the society, and that a strong society is constituted by a set of healthy families.

<sup>191</sup> Article 147.

<sup>192</sup> Ms H, a young woman from a province in the Northern of Vietnam, agreed to act as a surrogate mother for a man without his wife’s involvement and in the end, was hospitalized due to the assault by the jealous wife. See <http://www.anninhthudo.vn/Phong-su/Doi-de-thue-va-nhung-man-danh-ghen-lanh-gay/427266.antd> (last accessed December 29, 2016).

<sup>193</sup> *Ibid.*

his wife discovered their plan and intervened in this arrangement. Regarding it as adultery, the wife came to the surrogate woman's house and violently assaulted her to the extent that the latter was hospitalized.<sup>194</sup> In similar cases, the surrogate is frequently disadvantaged. She may not dare to report the case to the police because of her shame.<sup>195</sup> Once an arrangement of this kind is revealed, the surrogate is the only one who is under social criticism and blamed for overturning the family happiness of others. Meanwhile, the wife of the couple often receives sympathy and support from the community because she is in a legal relationship. Physically and mentally hurt, the surrogate woman may become a silent victim whose right to private life and right to bodily integrity are violated without the state protection. Being regarded as outside the law and outside of society, she will not be regarded as having any dignity anyway.

Another negative consequence of illegal surrogacy carried out in the black market is that the child born through surrogacy might be socially and legally disadvantaged. Under Vietnamese culture, such a child may not be accepted as a member of the family due to being born within an extramarital relationship between a married man and a woman who is not his wife.<sup>196</sup> In cases where the baby may be abandoned by the commissioning couple and/or returned to the surrogate mother, he/she risks being fatherless and labelled as a 'bastard' who is set outside the margin of his/her father's lawful marriage. In addition, according to the existing law of Vietnam on civil status registration for children born out of wedlock, the place of the father on the birth certificate will be left empty if the father is not identified.<sup>197</sup> The surrogate mother, who is solely responsible for bringing up the child in such cases, has to struggle to cope with economic difficulties, especially if she is single/unmarried. What matters in this situation is to find solutions in order to lawfully protect the legitimate expectations of the

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<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid.*

<sup>196</sup> See 'It is very difficult for children born out of wedlock to be accepted by their biological fathers', <http://baophunuthudo.vn/sites/epaper/PNTD/Detail.aspx?ArtId=17161&CatId=171> (last accessed December 29, 2016).

<sup>197</sup> Article 50, Decree 158/2005/ND-CP (enacted by the Vietnamese government on 27 December 2005) on civil status registration and management.

child, for example to have children's allowance. This problem could not be resolved as long as surrogacy was forbidden, but the new law on surrogacy should provide a solution to this problem as will be discussed in Chapter 6.

The implications the black market of surrogacy caused to parties of surrogacy arrangements and to Vietnamese society as mentioned above affected Vietnamese law makers in maintaining the legal ban on surrogacy until the new law 2015.<sup>198</sup> However, the ban did not prevent the incidence of surrogacy arrangements and, hence, did not abolish or effectively alleviate these negative implications in practice. In this context, the new law 2015 allowing altruistic surrogacy and prohibiting commercial surrogacy provides a legal framework within which interests and welfare of parties to surrogacy arrangements are protected. Nevertheless, the black market of surrogacy may continue to exist because the scope of altruistic surrogacy is too narrow<sup>199</sup> and infertile couples who are unable to meet the legal requirements for altruistic surrogacy may look for another solution to their childlessness. That means the societal anxieties about the black market of surrogacy remain. Therefore, a review is needed of arguments surrounding potential exploitation of women and commodification of children in Western countries where the first laws on surrogacy were adopted, before offering solutions to control these problems and to further reform the law on surrogacy in Vietnam.

## **3.2 Potential exploitation of women and commodification of children in surrogacy arrangements – how possible is it to control?**

### ***3.2.1 Commercialisation of surrogacy and commodification of children***

In Western countries, commercial surrogacy or commercial surrogate

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<sup>198</sup> Legalisation of surrogacy in Vietnam. <http://giaoduc.net.vn/Xa-hoi/Dua-mang-thai-ho-vao-luat/260300.gd> (last accessed December 29, 2016).

<sup>199</sup> As will be discussed in Chapter 6.

motherhood via contract has often been approached in one of two ways. First, it might be attacked as immoral<sup>200</sup> and condemned as a form of the commodification of both women and children, involving the buying and selling of these people.<sup>201</sup> For opponents of commercial surrogacy, commodification is regarded as an ethical and cultural concept, not a legal one.<sup>202</sup> Any surrogacy contract undermines 'the autonomy and dignity of women and the love parents owe to their children'<sup>203</sup> and 'constitutes a degrading traffic in children'.<sup>204</sup> Therefore, it is justifiable to prohibit commercial surrogacy or make it unenforceable. These arguments about the commodification of children in commercial surrogacy are commonly based on the grounds that the contract treats babies as commodities as it allows parents 'to transfer rights to custody in their children for profit'.<sup>205</sup> The involvement of payment in commercial surrogacy arrangements is interpreted as 'the exchange of money for possession or control of children',<sup>206</sup> which 'threatens to erode the way that society thinks about and values children, and by extension all human life'.<sup>207</sup> This means that children born through commercial surrogacy might be considered as property which can be bought and sold in the market, and thus parties to commercial surrogacy arrangements take part in the sale of children. The existence of a valid surrogacy contract demonstrates that the child is 'merely the object over which possession is disputed',<sup>208</sup> and hence he/she is subject to ownership, having the status of a transferable or marketable object in any commercial transaction. As Anderson

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<sup>200</sup> Van Niekerk, A. and van Zyl, L. Commercial Surrogacy and the Commodification of Children: An Ethical Perspective, *Medicine and Law*, 1995, (14), p.163-170. Van Niekerk, A. and van Zyl, L. The Ethics of Surrogacy: Women's Reproductive Labour, *Journal of Medical Ethics*, 1995, (21), p.345-349.

<sup>201</sup> Elizabeth Anderson, Is Women Labour a Commodity? In *Value in Ethics and Economics*, Harvard University Press: The MIT Press, Cambridge, MA, 1993, p.168-189. See also Brazier, M., Campbell, A. and Golombok, S., *Surrogacy: Review of Health Ministers of Current Arrangements for Payments and Regulations*; Report of the Review Team, 1998.

<sup>202</sup> Elizabeth S. Anderson, Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales', *Health Care Analysis*, 2000, (8), p.20.

<sup>203</sup> Anderson, E., *supra* note 200, at p.168.

<sup>204</sup> *Ibid*, p.186.

<sup>205</sup> *Ibid*, p.171-172.

<sup>206</sup> The New York State Task Force on Life and the Law, cited in Cook, R., Sclater, S.D., Kaganas, F., (eds), *Surrogate Motherhood : International Perspectives*, Hart Publishing, 2003, p.234.

<sup>207</sup> *Ibid*, p.234

<sup>208</sup> Anderson, E., *supra* note 201, at p.21.



states, 'if this isn't literally selling a child, it is selling the child out'.<sup>209</sup>

Nevertheless, it is notable that those who criticize commercial surrogacy have different views on how children are commodified. Van Niekerk and Van Zyl opine that children are not property and treating children as property is wrong.<sup>210</sup> Similarly, parental rights are not property rights and, hence, by making a payment to a surrogate mother, the commissioning parents do not buy 'the right to treat the child as an object'.<sup>211</sup> To those who take this view, 'what is being sold by the surrogate mother in cases of commercial surrogacy is not the child, but the right to be regarded as the child's parent'.<sup>212</sup>

Although some opponents of commercial surrogacy recognise that surrogate mothers should be paid by the commissioning parents for actual reasonable expenses of pregnancy and childbirth,<sup>213</sup> they also maintain that the issue of commodification of children may still be regarded as an insurmountable objection to financial reward 'over and above legitimate expenses'.<sup>214</sup> Theoretically, as Brazier et al argue, a distinction between 'payment for the purchase of a child and payment for a potentially risky, time-consuming and uncomfortable service'<sup>215</sup> can be made. They claim that 'payment other than for genuine expenses constitutes a financial benefit for the surrogate mother'<sup>216</sup> and commercialises the transaction. In other words, what differentiates commodification of children from non-commodification of children might be based upon a determination of reasonable expenses caused by the pregnancy. Yet, it is difficult to draw this distinction in practice as the commodification of children is probably inherent and unavoidable in commercial surrogacy because

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<sup>209</sup> *Ibid*, p.21.

<sup>210</sup> Van Niekerk, A. and van Zyl, L. Commercial Surrogacy and the Commodification of Children: An Ethical Perspective, *Medicine and Law*, 1995, (14), p.163-170.

<sup>211</sup> *Ibid*, p. 167.

<sup>212</sup> *Ibid*, pp.168-169.

<sup>213</sup> Brazier, M., Campbell, A. and Golombok, S., *Surrogacy: Review of Health Ministers of Current Arrangements for Payments and Regulations*; Report of the Review Team, 1998.

<sup>214</sup> Cook, et al, *supra* note 18, at p.237.

<sup>215</sup> Brazier M. et al, *supra* note 212, para 5.11.

<sup>216</sup> *Ibid*.

of the nature of arrangements, even where there is no transaction which the law defines as a sale. In a more detailed explanation of this, Anderson argues that surrogacy contracts may commodify children by substituting parental norms with respect to rights and custody of children with market norms.<sup>217</sup> In so doing, it

moves away from regarding parental rights over children as trusts, to be allocated in best interests of the child, toward regarding parental rights as like freely alienable property rights, to be allocated at the will of the parents.<sup>218</sup>

However, there exist other opinions which neither regard commercial surrogate motherhood via contracts as intrinsically immoral, nor view it as the commodification of children, but instead argue for legal recognition of commercial surrogacy.<sup>219</sup> Proponents of commercial surrogacy argue that commercial surrogacy is not the buying and selling of babies and, furthermore, there is no possibility of it causing implications to both women and children.<sup>220</sup> They attempt to distinguish pregnancy contracts from baby selling, rejecting the argument that children are property by claiming that payment to the surrogate mother by commissioning parents is not for the purchase of a child, but 'for the services of carrying and delivering the baby'.<sup>221</sup> Furthermore, they argue that parents might own their gametes and embryos, but do not possess the children whose bodies are formed by the creation and development of such embryos.<sup>222</sup> Therefore, children cannot be treated as property in all respects.

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<sup>217</sup> Cook, et al, *supra* note 18, at p.20.

<sup>218</sup> *Ibid*, p.20.

<sup>219</sup> Richard J. Arneson, *Commodification and Commercial Surrogacy*, *Philosophy & Public Affairs*, Vol.21, No.2 (Spring, 1992), pp.132-164; Hugh V. McLachlan and J.K. Swales, *Babies, Child Bearers and Commodification: Anderson, Brazier et al., and the Political Economy of Commercial Surrogate Motherhood*, *Health Care Analysis*, 2000, (8), pp.1-18; Hugh V. McLachlan and J. Kim Swales, *Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defense of Legally Enforceable Contracts*, *Law and Contemporary Problems*, Summer 2009, Vol.72:91, pp.91-107.

<sup>220</sup> Hugh V. McLachlan and J.K. Swales, *Babies, Child Bearers and Commodification: Anderson, Brazier et al., and the Political Economy of Commercial Surrogate Motherhood*, *Health Care Analysis*, 2000, (8), p.3.

<sup>221</sup> Kornegay, R. J., *Is Commercial Surrogacy Baby Selling?* *Journal of Applied Philosophy*, 1990, (7), p.45-50.

<sup>222</sup> Hugh V. McLachlan and J.K. Swales, *supra* note 219, at p.3.

Advocates of commercial surrogacy also attempt to shed more light on what is being bought and sold in commercial surrogacy arrangements. They assert that the commissioning parents' expectations are to get custody of the baby and to obtain legal parenthood of the baby.<sup>223</sup> It follows that the commissioning parents pay the surrogate mother not merely to buy her services of carrying the baby for them, but also 'her refraining from pursuing her claim for the legal custody and parenthood of the child in addition to her physical surrendering of it'.<sup>224</sup> For those reasons, the issue of commodification of children does not arise. Consequently, they suggest that commercial surrogacy should not only be permissible, but also be legally enforceable.

### ***3.2.2 Commercial surrogacy and potential exploitation of surrogate mother***

The debate over potential harms arising from commercial surrogacy is not only driven by the arguments around the commodification of children, but also by the arguments discussing the exploitation of women who act as surrogate mothers. The most controversial question is whether or not a surrogacy arrangement potentially exploits the surrogate mother and, more importantly, how to pinpoint the significant aspects of this exploitation.<sup>225</sup> It is, therefore, necessary to begin with a broad account of exploitation before delving into its manifestations in the context of surrogacy.

Elizabeth Anderson writes that 'a kind of exploitation occurs when one party to a transaction is oriented toward the exchange of 'gift' values, while the other party operates in accordance with the norms of the market'.<sup>226</sup> This argument appears to be quite simple and may be refutable because sometimes the good exchanged is incommensurable on any metric and the value received in a transaction may be

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<sup>223</sup> *Ibid*, p.11.

<sup>224</sup> *Ibid*, p.11.

<sup>225</sup> Alan Wertheimer, Two questions about surrogacy and exploitation, *Philosophy & Public Affairs*, Vol.21, No.3, Summer 1992, pp.211-239.

<sup>226</sup> Anderson, E, *supra* note 200, at p.84.

at least as great as the value given. For example, one can make a deal of a priceless masterpiece without stating that its value is in proportion to the money that is paid. The definition of exploitation might be more complex than that. In his article considering the relation between surrogacy and exploitation, Alan Wertheimer has given a more detailed and precise account of exploitation in which he opines that A wrongfully exploits B when A takes unfair advantage of B.<sup>227</sup> In his opinion, the unfair advantage refers to two dimensions of an exploitative transaction, namely value and choice. With regard to the dimension of value, he explains, 'A must benefit from transaction, for A would not exploit B if A were to abuse B without benefiting from the abuse. In addition, A exploits B only when the transaction is harmful or unfair to B'.<sup>228</sup> With respect to the dimension of choice, Wertheimer argues that A exploits B only when B's choice is compromised to some degree. In this regard, exploitation needs at least some defect in choice, 'because A does not exploit B when B makes an entirely voluntary and altruistic transfer of disproportionate value to A'.<sup>229</sup>

It has been argued that exploitation must always be harmful to the exploitee and that a transaction can only be exploitative if the exploitee is coerced or tricked.<sup>230</sup> For example, Munzer states that 'persons are exploited if (i) others secure a benefit by, (ii) using them as a tool or resource so as (iii) to cause them serious harm'.<sup>231</sup> However, Wertheimer doubts this argument by claiming that exploitation is not always completely harmful. He classifies three kinds of exploitation: harmful exploitation, mutually advantageous exploitation, and moralistic exploitation. In the context of surrogacy, he argues that harmful exploitation occurs or surrogacy is exploitative because the commissioning couple gain from the transaction while the surrogate is harmed.<sup>232</sup> But the surrogate may also gain from a transaction (although in a way that is unfair to her

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<sup>227</sup> *Ibid*, p.213.

<sup>228</sup> *Ibid*, p.213.

<sup>229</sup> *Ibid*, p.213.

<sup>230</sup> Stephen R.Munzer., *A Theory of Property*, Cambridge University Press, 1990, p.171.

<sup>231</sup> *Ibid*.

<sup>232</sup> Wertheimer, A., *supra* note 224, at pp.213-214.

as the commissioning couple gain much more than her) – that may be called mutually advantageous exploitation.<sup>233</sup> On the third type of exploitation (moralistic exploitation), Wertheimer opines that surrogacy is exploitative on the grounds that the commissioning couple gain from a transaction that is fundamentally immoral, probably because ‘the relationship involves an exchange of radically incommensurate values’.<sup>234</sup> Here the focus will be on harmful exploitation and mutually advantageous exploitation because they help to clarify the extent to which financial interests might be involved to determine whether a surrogacy arrangement is exploitative.

When discussing harmful exploitation in the context of surrogacy, Wertheimer’s argument is that:

- (1) Surrogacy is wrong, say, because it is wrong to commodify procreational labour.
- (2) Because surrogacy is wrong, it is immoral for a woman to serve as a surrogate.
- (3) Participating in an immoral activity is bad for the participant.
- (4) Combining (1), (2), and (3), because it is immoral for a woman to serve as a surrogate, surrogacy ‘sets back’ her interest in being a moral person, that is, it constitutes a harm to her.
- (5) Because the surrogate is harmed by the transaction for the benefit of the intended parent (commissioning couple), surrogacy is exploitative.<sup>235</sup>

Thus surrogacy is exploitative because it commodifies what should not be commodified. It is a common belief that some goods and services can be exchanged for money (such as books, cars, houses, and some forms of labour)

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<sup>233</sup> *Ibid.*

<sup>234</sup> *Ibid.*

<sup>235</sup> Wertheimer, A., *supra* note 224, at p.221.

while others can not (such as citizenship, human beings, criminal justice, and some forms of human labour). The procreational labour of a woman should not be commodified as a woman has an interest in not being commodified, degraded, or treated merely as a means.<sup>236</sup> Therefore, in the context of surrogacy, commodification of procreational labour is harmful to the surrogate's benefits even if she does not perceive the harms herself.

A question arises here as to what is the nature of harm caused to the surrogate mother. Anderson argues that commercial surrogacy 'reduces the surrogate mothers from persons worthy of respect and consideration to objects of mere use'.<sup>237</sup> However, it is notable that the surrogate can lose the respect of others or be degraded in their eyes, but she may not lose self-respect or become degraded in her own eyes. Hence, surrogacy may only endanger the surrogate's interests or cause harm to her when looking into the way she is regarded by others. Even if commodification or degradation causes harm to the surrogate, it is impossible to say that surrogacy is harmful to her, all things considered because Wertheimer suggests that surrogacy 'would produce a net harm to the surrogate only if the degree of harm that resulted from commodification or degradation was greater than the benefits that she received from the compensation'.<sup>238</sup>

As far as mutually advantageous exploitation is concerned, Wertheimer assumes that a voluntary and mutually advantageous transaction may be unfair. It is widely believed that a transaction is fair when both parties gain equally. So a transaction is exploitative if it is insufficiently beneficial to the exploited party. In the context of surrogacy, a surrogate is exploited if she receives less value from the arrangement than the commissioning couple.<sup>239</sup> However, this perception of a fair transaction is not absolutely precise because sometimes the exploitee may

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<sup>236</sup> *Ibid.*

<sup>237</sup> Anderson, E., *supra* note 200, at p.80.

<sup>238</sup> *Ibid.*

<sup>239</sup> Wertheimer, A., *supra* note 224, at p.222.

get more benefits from a transaction than the exploiter.<sup>240</sup> This is because the former stands to gain more from the transaction than the latter, whose bargaining position is comparatively weak.<sup>241</sup> Nevertheless, this does not necessarily ascertain that in the context of surrogacy the commissioning couple is exploited by the surrogate. Instead, it implies that the fact the surrogate receives less value from the arrangement than the commissioning couple is not sufficient to constitute exploitation on the part of the surrogate.<sup>242</sup> Therefore, it would be better to suppose that the surrogate may be exploited if the compensation is insufficient or the contractual terms are unacceptably harsh.<sup>243</sup> Otherwise, it might be possible to say that the surrogate has not been exploited.<sup>244</sup>

The arguments against the exploitation of women in the context of surrogacy have often been made on the grounds that surrogacy directly harms the surrogate mother and that surrogate mothers are exploited due to a variety of reasons most of which relate to the issue of payment.<sup>245</sup> Defenders of these arguments often make allegations or draw conclusions that surrogate mothers are financially desperate, emotionally unstable and have low education, do not make fully informed choices, will regret their decisions after relinquishing the child, and will have psychological damage in the long run.<sup>246</sup> For example, influenced by the implications of the *Baby M* case and in the light of empirical studies under taken in the USA, the UK and Canada, some described surrogate mothers as often having very little education, little or no income, and very little personal security,<sup>247</sup> or depict them as likely to be poor, young, single and from

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<sup>240</sup> Wertheimer, A., *supra* note 224, at p.223. For example, in a case where a doctor undertakes a medical treatment (for a normal price) to save a patient's life, it is impossible to say that the patient has exploited the doctor's labour, although the former has gained more from the transaction than the latter.

<sup>241</sup> *Ibid.*

<sup>242</sup> *Ibid.*

<sup>243</sup> Wertheimer, A., *supra* note 224, at p.223.

<sup>244</sup> *Ibid.*

<sup>245</sup> Lina Peng, Surrogate Mother: An Exploration of the Empirical and the Normative, *Journal of Gender, Social Policy & the Law*, 21, no.3, 2013, pp.555-582.

<sup>246</sup> Karen Busby and Delaney Vun, Revisiting The Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers, *Canadian Journal of Family Law*, Vol 26, no.13, 2010. See also Martha Field, *Surrogate Motherhood*, Harvard University Press, 1990, p.27.

<sup>247</sup> *Ibid.*, p.17.

minority backgrounds.<sup>248</sup> A news article analyzing the trial court decision resulting in the 1993 California Supreme Court decision supporting gestational surrogacy in *Johnson v. Calvert*, portrayed most surrogate women as single mothers struggling for welfare and dead-end jobs with never-ending bills.<sup>249</sup> Another article denoted most surrogate women as truly needing finances.<sup>250</sup> Field, in her arguments against commercial surrogacy, also opines that the prohibition of surrogacy, like bans on the sale of children, 'reflect a judgement that we do not want a society in which people in extreme financial difficulty are tempted to sell a child'.<sup>251</sup> Critics of commercial surrogacy argued that these women did not give real consent or did not predict the consequences of their choices/decisions and, hence, would regret relinquishing their child and suffer psychological problems.<sup>252</sup> In the *Baby M* case, the court stated that the long-term effects of surrogacy were unknown but expressed fears that 'the impact on the natural mother as the full weight of her isolations is felt along with the full reality of the sale of her body and her child'.<sup>253</sup> The British Medical Association also suggested that relinquishing the child may be extremely distressing and may lead to psychological damage.<sup>254</sup> Still others went further to assert that even surrogate mothers who believed and claimed to have had a positive experience, were deceived on the grounds that 'however much surrogate mothers may say they benefit from the arrangement, surrogacy is not an advantage but a folly'.<sup>255</sup>

The arguments mentioned above implies that to avoid the exploitation of emotionally and financially vulnerable women, only those with a certain degree of financial resources could be permitted to act as surrogate mothers in

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<sup>248</sup> Mary Lyndon Shanley, *Surrogate Mothering and Women's Freedom: A Critique of Contracts for Human Reproduction*, *Signs*, Vol 18, no.3, 1993, p.618.

<sup>249</sup> Katha Pollitt, *Checkbook Maternity: When Is a Mother Not a Mother?* *Nation*, December 31, 1990, pp.839-842.

<sup>250</sup> Lorraine Ali and Raina Kelley, *The Curious Life of Surrogates*, *Newsweek*, April 7, 2008, p.45.

<sup>251</sup> Martha Field, *Surrogate Motherhood*, Harvard University Press, 1990, p.27.

<sup>252</sup> *In re Baby M*, 537 A.2d 1227, 1250, (N.J.1998).

<sup>253</sup> *Ibid.*

<sup>254</sup> British Medical Association, *Changing Conceptions of Motherhood: The Practice of Surrogacy in Britain*, 1996, pp.45-46.

<sup>255</sup> Carol Sanger, *Separating from children*, *Columbia Law Review*, vol 96, 1996, pp. 375-458.



surrogacy arrangements.<sup>256</sup> However, some empirical studies (as discussed in the following section) have shown that surrogate women are not always poor and financially insecure, but may be financially and psychologically stable. That means that financial distress is not necessarily a motivation for surrogate women and they may be content to relinquish a child born of a surrogacy arrangement.

From reviewing the outcomes of empirical studies of surrogate mothers following interviewed-based qualitative studies involving psychological testing, Busby and Vun concluded that:

The profile of surrogate mothers emerging from the empirical research in the United States and Britain does not support the stereotype of poor, single, young, ethnic minority women whose family, financial difficulties, or other circumstances pressure her into a surrogacy arrangement. Nor does it support the view that surrogate mothers are naively taking on a task unaware of the emotional and physical risks it might entail. Rather, the empirical research establishes that surrogate mothers are mature, experienced, stable, self-aware, and extroverted nonconformists who make the initial decision that surrogacy is something that they want to do.<sup>257</sup>

Furthermore, some studies reveal that the financial motive is one of many factors affecting a woman's decision to become a surrogate mother. For instance, Ciccarelli and Beckman state that 'although financial reasons may be present, only a handful of women mentioned money as their main motivator'.<sup>258</sup> In her studies on the same issue, Teman also points out that in almost all cases, money was rarely the sole or even the primary reason for surrogate women to be involved in surrogacy arrangements.<sup>259</sup> Instead, most surrogate mothers reported the enjoyment of carrying a foetus and giving birth to a child.<sup>260</sup> Many of them

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<sup>256</sup> Lori Andrews, *Between Strangers: Surrogate Mothers, Expectant Fathers, and Brave New Babies*, New York: Harper & Row, 1989, pp.252-272. See also Carmel Shalev, 1989. *Birth Power: The Case for Surrogacy*, New Haven, Conn.: Yale University Press, 1989, p.144.

<sup>257</sup> Busby, K., and Vun, D., *supra* note 245, at pp. 51-52.

<sup>258</sup> Janice C. Ciccarelli and Linda J. Beckman, Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy, *Journal of Social Issues*, vol.61, issue 1, p.30.

<sup>259</sup> Elly Teman, The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood, *Social Science & Medicine*, 67, 2008, p.1107.

<sup>260</sup> Olga van den Akker, Psychological Aspects of Surrogate Motherhood, *Human Reproduction*

reported that surrogacy strengthened their fulfillment and self-confidence and enlarged their social circles.<sup>261</sup> Others said that surrogacy offered them a way to continue being a mother to their own children.<sup>262</sup> It must be cautioned, however, that Ragoné indicates that surrogate mothers may be affected by social pressure to develop their motivations as altruistic because that is more socially tolerable than to claim money as their sole motivation.<sup>263</sup>

Studies in the USA also confirm that surrogate women have varying degrees of education, but many of them have gained some higher education.<sup>264</sup> Nevertheless, it is noteworthy that a sociological study in Britain displayed a different situation where British surrogate mothers showed lower education rates than American counterparts: 14 of the 19 women interviewed left school before the age of 17).<sup>265</sup> There was no evidence in any study reviewed by Busby and Vun that surrogate women were being tricked or coerced into surrogacy arrangements.<sup>266</sup> The authors concluded that

overwhelmingly, the research demonstrates that the women who become surrogate mothers go into the process on their own initiative, with a strong sense of what it is that they are committing to and that they rarely regret having been a surrogate mother.<sup>267</sup>

With regard to relinquishment of the child, empirical studies have shown that the majority of surrogate mothers have been satisfied with the arrangement and report no psychological damage as a consequence of relinquishing the child.<sup>268</sup>

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*Update*. Vol.13, no.1, 2007, p.56.

<sup>261</sup> *Ibid*.

<sup>262</sup> Melinda Hohman and Christine B. Hagan, Satisfaction with Surrogate Mothering: A Relationship Model, *Journal of Human Behavior in the Social Environment*, 2001, p.73.

<sup>263</sup> Helena Ragoné, *Surrogate Motherhood: Conception in the heart*, Westview Press, 1994, p.80.

<sup>264</sup> Hohnman and Hagan, *supra* note 261, p.61.

<sup>265</sup> Eric Blyth, I wanted to be interesting. I wanted to be able to say 'I've done something interesting with my life': Interviews with Surrogate Mothers in Britain, *Journal of Reproductive and Infant Psychology*, 12 (3), 1994, p.189.

<sup>266</sup> Busby, K., and Vun, D., *supra* note 245, at p.50.

<sup>267</sup> *Ibid*, p. 81.

<sup>268</sup> Hazel Baslington, The Social Organization of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process, *Journal of Health Psychology*, vol.7, no.1, pp

Many surrogate mothers viewed the relinquishment of the child as a happy event and displayed positive attitudes towards surrogacy over time by saying that they wanted to be surrogate again.<sup>269</sup> Data collected also supported this statement, showing that out of 25,000 surrogacy arrangements estimated to have occurred since the 1970s, less than one percent of surrogate mothers decided to change their minds and less than one-tenth of one percent of surrogacy cases led to disputes in the courts.<sup>270</sup>

The above analysis suggests that exploitation is a potential for surrogate mothers, but their financial problems and personal status are not always reasons for this exploitation. Therefore, banning surrogacy on the grounds that it may be financially and emotionally exploitative to surrogate mothers does not effectively prevent surrogate women from being exploited. It follows that removing the payment from surrogacy arrangements may amount to an exploitation because the surrogate mothers are not compensated at all for their provision of gestational services. This reinforces Brazier's suggestion that payments made to surrogate mothers for their gestational services does not make them into a mere means, on the contrary lack of payment (as in slavery or breadline wages) might be much more exploitative.<sup>271</sup> As Brazier et al argue, payment per se does not necessarily constitute exploitation even where there is risk in occupation. Therefore,

There is unlikely to be exploitation providing that people choosing to undertake such jobs do so with full knowledge and understanding of such risks, and that the payments made to them are not of a nature or at a level to induce them to take such risks against their better judgement.<sup>272</sup>

In a nutshell, the different arguments around the commodification of children and the potential exploitation of women in surrogacy arrangements, as discussed

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<sup>269</sup> Van den Akker, *supra* note 259, at p.56.

<sup>270</sup> Teman, E., *supra* note 258, at p.1104.

<sup>271</sup> Brazier et al, *supra* note 212, para 4.23.

<sup>272</sup> Brazier et al, *supra* note 212, para 4.24.

here, have given an explanation of the legal approaches toward surrogacy in Western countries. This implies that as long as there is insufficient evidence of exploitation on the part of surrogate mothers, as well as harms to children born of surrogacy, banning commercial surrogacy is not the optimal choice for legislators seeking to control this complex practice. Instead, it may result in a lacuna in legislation which may worsen the situation. It indicates that ‘well-designed regulation can greatly mitigate most of the potential tangible harms of surrogacy, and this would seem to be the appropriate function of law in a liberal society in response to an issue on which no societal consensus exists.’<sup>273</sup> In Vietnam, concerns over the commodification of children and potential exploitation of surrogate mothers might also be reasons for prohibiting surrogacy, but there have been other factors affecting social attitudes and the legal approach towards surrogacy because of the specific social and economic context of the country (in South East Asia), notably the role of the media. This will be discussed in the next section.

### **3.3 Concerns over commercialization of surrogacy in Vietnam – How the media affects the social perception of exploitation of women and commodification of children**

In Vietnam, the question of the commodification of children in commercial surrogacy arrangements is as controversial as in the Western world. The ban on surrogacy in Vietnam was put forward in response to concerns about exploitation and commodification,<sup>274</sup> but actually distorted the social perception of surrogacy so that surrogacy was regarded not as a method for relief of infertility, but assimilated to a stigma or a social evil which must be prevented at any cost.<sup>275</sup> These concerns hindered both the social acceptance and the legal recognition of surrogacy and, hence, prevented surrogacy arrangements from being legalized in

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<sup>273</sup> Elizabeth S. Scott, Surrogacy and the Politics of Commodification, *Law and Contemporary Problems* [Vol 72:109, Summer 2009], p.146.

<sup>274</sup> Legalisation of surrogacy in Vietnam. <http://giaoduc.net.vn/Xa-hoi/Dua-mang-thai-ho-vao-luat/260300.gd> (last accessed March 29, 2016).

<sup>275</sup> Viet Ba, *Mang thai ho: Duoi goc nhin nhan dao*, (Surrogacy: Through the lens of altruism), <http://antg.cand.com.vn/vn-vn/ktvkhk/2013/10/81696.cand> (last accessed 7 March 29, 2016).

Vietnam.<sup>276</sup> In practice, the Vietnamese media contributed a large part to the creation of these social concerns as explained below.

It has been shown that the media plays a very important role in establishing and changing public opinion about social issues,<sup>277</sup> especially with regard to something as novel and complex as surrogacy. It is useful to bear in mind that social perceptions of surrogacy have also been influenced by media portrayals in Western countries like the UK or the USA.<sup>278</sup> *Baby M* - a famous case in the USA - is a case in point.<sup>279</sup> In practice, media accounts of the *Baby M* case introduced most American people to the world of surrogacy and raised questions about surrogacy as a gift of love or baby selling.<sup>280</sup> Public attention on the case became intense when the surrogate mother disappeared with the resulting child, and continued to be more intense when the New Jersey Supreme Court held that surrogacy contracts unenforceable.<sup>281</sup> During the trial, the surrogate mother was increasingly described as a victim of exploitation.<sup>282</sup> The media also shifted the public attitude from 'an initial negative perception of Mrs Whitehead (the surrogate mother) as a woman who had entered into a contract to have a baby for money and then reneged' to 'a victim, exploited by the people better off than she and subjected to unfair scrutiny of her family life and personality'.<sup>283</sup> The American media divided American public into two opposing groups: one supporting surrogacy and the other with a strong negative position on surrogacy. The media demonstrated to the public that 'the case raised compelling questions about the uncertain impact of a novel use of reproductive technology on family structure, the nature of motherhood, the welfare of children, and the role of law

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<sup>276</sup> *Ibid.*

<sup>277</sup> Michael Gurevitch et al, *Culture, Society and the Media*, Routledge, 2005.

<sup>278</sup> Teman, E., *supra* note 258, at p. 1104. Van den Akker, *supra* note 259, at p.55.

<sup>279</sup> *In the matter of Baby M.*, 109 N.J.396 (1988).

<sup>280</sup> Susan Marken, *Surrogate Motherhood and the Politics of Reproduction*, Berkeley: University of California Press, 2007, pp 104-115.

<sup>281</sup> Elizabeth S. Scott, *supra* note 272, at p.114.

<sup>282</sup> Iver Peterson, Fitness Test for Baby M's Mother Unfair, Feminists Say, N.Y. TIMES, Mar. 20, 1987, <http://www.nytimes.com/1987/03/20/nyregion/fitness-test-for-baby-m-s-mother-unfair-feminists-say.html> (last accessed December 29, 2016).

<sup>283</sup> *Ibid.*

in this unfamiliar terrain'.<sup>284</sup> Even when the case ended, the media continued to reinforce the popular narrative of bad surrogacy experiences<sup>285</sup> and, hence, helped to maintain the public unease with surrogacy.

In Vietnam, as there was no case that was brought to the courts like the *Baby M* case, the public perception of surrogacy was constructed by the media in a different way. It is useful to begin with the linguistic issue to show that the Vietnamese media introduced the Vietnamese public to the world of surrogacy by wrongfully using the term 'surrogacy', which created the ambiguity surrounding surrogacy and, hence, raised public anger over this complex practice.

In the Vietnamese language surrogacy may be translated in two words with opposing linguistic meanings. In the first meaning, surrogacy (*mang thai hộ/surrogate motherhood*) is interpreted as an altruistic action and an act of morality where a woman voluntarily helps another woman who is unable to bear a child. The second meaning, surrogacy (*đẻ thuê/hiring childbirth*) is likened to a commercial activity or a paid motherhood, where surrogate women are motivated by their own financial problems.<sup>286</sup> In this sense, surrogacy is shown in a negative light in which the behaviours of surrogate women and commissioning couples are portrayed as immoral and socially unacceptable. The immorality of their behaviour lies in the fact that the birth of a child is being tainted with commercialism which illustrates the monetary dominance. More particularly, a child may be seen as a commodity that infertile persons pay large sums of money to buy, through hiring a surrogate woman. Furthermore, opportunistic brokers can also be involved in the birth of a child in order to make a profit by exploiting the surrogate's poverty and the infertile couples' desires. In addition, the involvement of poor surrogate women simply adds to the belief that they are

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<sup>284</sup> Elizabeth S. Scott (2009), Surrogacy and the politics of commodification. *Law and Contemporary Problems*, 72:109, p. 114.

<sup>285</sup> E. Teman., *supra* note 258, at p.1104.

<sup>286</sup> The poverty of surrogate women in Vietnam. <http://vnexpress.net/tin-tuc/thoi-su/phan-ngheo-cua-nhung-co-gai-de-thue-o-thai-lan-2189253.html> (last accessed December 29, 2016).

used as means to satisfy the needs of infertile couples and could be exploited by both the couple and the broker.<sup>287</sup> Since the first incidence of surrogacy in early 2000s, Vietnamese newspapers used this second meaning to depict surrogacy while bringing the plight of the infertile couples to the front of public attention.<sup>288</sup> For this reason, the Vietnamese public thought that surrogacy was nothing but a commercial action in which children were regarded as a commodity.<sup>289</sup> As a result, instead of appealing to the public sympathy, surrogacy was condemned for its commercial aspects and did not receive social acceptance.<sup>290</sup>

The Vietnamese media also contributed to making surrogacy socially unacceptable by linking surrogacy with commercialism and overly emphasizing commercial surrogacy. 'Hiring pregnancy',<sup>291</sup> a famous Vietnamese movie produced in 2005, is an example of this. The producers drew public attention to paid surrogate motherhood by telling a true story about a surrogate mother who had sexual intercourse with the husband with his wife's acceptance, in the form of 'partial surrogacy', in which the intended mother has no biological connection with the child. Additionally, the title itself provoked the thought that surrogacy is nothing other than a commercial practice where infertile couples can 'buy' their children. Moreover, the film complicated the arrangement between the surrogate woman and the husband of the couple by implying that their arrangement went beyond the contract as there was a love affair arising in the process. This reminded the audience of adultery and polygamy in the Vietnamese

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<sup>287</sup> This is similar to one of the reasons against surrogacy in Western which is based on Kant's 'treat people always as ends' moral principle.

<sup>288</sup> There are a number of articles in the Vietnamese press which condemn commercial surrogacy by assimilating it to a business transaction where money is involved in the creation of a child. For example, Network of surrogacy and unbelievable stories, <http://vtc.vn/395-329577/phong-su-kham-pha/phong-su/duong-day-de-thue-va-nhung-chuyen-khong-the-tin-noi.htm>, (last accessed December 29, 2016). See also, Surrogacy and its disgusting consequences, <http://vtc.vn/394-329666/phong-su-kham-pha/de-thue-va-nhung-chuyen-gay-cam-phan-ky-2.htm> (last accessed December 29, 2016).

<sup>289</sup> <http://vtc.vn/394-329666/phong-su-kham-pha/de-thue-va-nhung-chuyen-gay-cam-phan-ky-2.htm> (last accessed December 29, 2016).

<sup>290</sup> *Ibid.*

<sup>291</sup> <http://giaitri.vnexpress.net/phim/de-muon-1452.html> This movie can be seen on Youtube.

culture (as previously discussed in Chapters 1 and 2). When screened in cinemas and in review articles later in the press, the movie made the Vietnamese public believe that there exists only commercial surrogacy and put altruistic and non-commercial surrogacy out of the public perception. Furthermore, commercial surrogacy was condemned by the public for intruding into the stability of family and marriage. By constructing this problematic perception on surrogacy, the media contributed to the opposition against commercial surrogacy and commodification of human beings, and showed the necessity of finding immediate solutions to these problems in the country in the late 2000s.<sup>292</sup>

It is notable that the incomplete and inaccurate public perception of surrogacy influenced by the Vietnamese media has persisted through a long period until the introduction of the new law 2015. In research on assisted reproductive technologies and reproductive donation including surrogacy conducted by a Japanese researcher in Hanoi and Ho Chi Minh City between 2012-2013, it was reported that even surrogate women could not understand the difference between traditional and gestational surrogacy.<sup>293</sup> Some people indicated that they had inaccurate perceptions of surrogacy and genetics as one woman interviewed commented that: 'I think the child will resemble his/her birth mother but not the ovum donor in appearance, because the birth mother is the real mother of the child'.<sup>294</sup>

However, notably, public unease with surrogacy in Vietnam was not only influenced and constructed by the media. In practice, the social disapproval of surrogacy as a form of commodification of children and exploitation of women has been regarded as a part of the wider objection to the popular trend towards

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<sup>292</sup> "Thực trạng và giải pháp phòng chống tội phạm buôn bán phụ nữ và trẻ em". Facts and solutions to the fight against women and children trafficking, <http://thongtinphapluatdansu.wordpress.com/2008/01/13/1241-5/> (last accessed December 29, 2016).

<sup>293</sup> Yuri Hibino, Implication of the legalization of non-commercial surrogacy for local kinship and motherhood in Vietnamese society, *Reproductive BioMedicine Online*, 30, 2015, pp.113.

<sup>294</sup> *Ibid*, p.114.



commercialization in Vietnam. After entering into the period of open economy,<sup>295</sup> often called Doi Moi, Vietnam became increasingly driven towards commercialization, a trend commonly regarded as incorporating Western values regarding market norms into Vietnamese society and destroying many traditional values. In Vietnam, the implementation of the market economy has been routinely blamed for causing a number of worrying problems with negative consequences.<sup>296</sup> One of these problems is the dominance of money in society and the commodification of human beings. It is believed that since the market economy began to work in Vietnam, money prevailed to the extent that it can buy everything, including human beings.<sup>297</sup> According to an official statistic given in a national conference on facts and figures of women and children trafficking in Vietnam (organised in Hanoi in 2008), during the period of 10 years from 1998 to 2008, there were about 6,000 Vietnamese children and women being sold abroad for many purposes such as marriage, prostitution, enforced labour, surrogacy, and nearly 8,000 children and women are suspected to be sold outside the national territory.<sup>298</sup> In other words, this practice increased the risk of Vietnamese people becoming a kind of commodity that could be bought and sold in the market. The Vietnamese media, by reporting surrogacy arrangements taking place in foreign countries,<sup>299</sup> also constructed a perception among the public that surrogacy was a practice borrowed from the West. For this reason, it

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<sup>295</sup> CPV (Communist Party of Vietnam), the only ruling party in the country, launched its policy of economic reform in 1986 with a view to transforming the Vietnamese economy from a centrally planned model to a socialist market pattern. This policy ended the long period of exclusively closed relationships with the socialist bloc, the leader of which was the former Soviet Union, and commenced a new period of opening the door to the whole world outside. See Truong Huu Quynh, Dinh Xuan Lam, Le Mau Han, Vietnam on the way of innovation (1986-2000), *A General History of Vietnam*, Education Publisher, Hanoi, 2003, pp.1129-1134 (in Vietnamese).

<sup>296</sup> To Phan, Economic deficiency viewed through the social lens, <http://hanoimoi.com.vn/Tin-tuc/Suy-ngam/546821/khuyet-tat-kinh-te-nhin-tu-goc-do-xa-hoi-> (last accessed December 29, 2016).

<sup>297</sup> Tran Huu Quang, The money and its hidden strength in the Vietnamese society today, [http://www.tapchithoidai.org/ThoiDai10/200710\\_THQuang.htm](http://www.tapchithoidai.org/ThoiDai10/200710_THQuang.htm) (last accessed December 29, 2016).

<sup>298</sup> *Thực trạng và giải pháp phòng chống tội phạm buôn bán phụ nữ và trẻ em (Prevention and combating of child and women trafficking: Facts and Recommendations)* <http://thongtinphapluatdansu.wordpress.com/2008/01/13/1241-5/> (last accessed December 29, 2016).

<sup>299</sup> The Vietnamese public became familiar with surrogacy first and foremost through the media's coverage of surrogacy arrangements of foreign examples such as Sir Elton John, Ricky Martin or Sarah Jessica Parker.

is understandable that surrogacy was attributed to the commercialisation of Western style and, hence, not easy to be accepted in Vietnam.

The social unacceptability of surrogacy in Vietnam is one of the reasons for making and maintaining the ban on surrogacy. Banning surrogacy was expected to alleviate public concerns over the commodification of children and the exploitation of women, to protect cultural values by preventing 'the interchangeability of uteruses'<sup>300</sup> and, simultaneously, to facilitate the government's enduring commitment to socialist principles with a view to supervising commercialization in many areas of social life.<sup>301</sup> However, surrogacy per se is not regarded as commodification of children, as defenders of commercial surrogacy have argued.<sup>302</sup> Removing the ban by the new law 2015 is a new legal move in regulating surrogacy as it shows the government's efforts to control the problems surrounding the commodification of children and the exploitation of women in Vietnam. In the context of the introduction of the new law on surrogacy, which allows altruistic surrogacy arrangements, the media may help to bring the law into social life by changing the position of the public towards surrogacy. The media could do this with state support because there is no private press in Vietnam as in Western countries like the UK, and the media in Vietnam is subject to state ownership, state censorship, and under strict control of the State.<sup>303</sup> In assisting the government to effectively implement the new law 2015 through affecting the public perception of surrogacy, the media would perhaps encourage more social tolerance towards this practice which may pave the way for further legal reforms in years to come.

Changes in the legal approach towards surrogacy in Vietnam (from a total ban to permission of altruistic surrogacy) were caused largely by the negative

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<sup>300</sup> Pashigian, M., *supra* note 28, at p.180.

<sup>301</sup> Pashigian, M., *supra* note 28, at p.181.

<sup>302</sup> As discussed in sections 3.2.1 and 3.2.2

<sup>303</sup> The Press Law of Vietnam 1989 and The Amendments to the Press Law 1989 (passed by Parliament in 1999).

implications arising from the black market of surrogacy as well as concerns over commodification of children and the potential exploitation of women. Nevertheless, there are more arguments in favour of these changes which aim to protect the public interests and vulnerable people such as women and children in surrogacy arrangements. These arguments, including procreative autonomy and the right to reproduce in the context of surrogacy, are potentially more important than others and will be explored in detail in the next chapter.

## **CHAPTER 4:**

### **THE RIGHT TO PROCREATE IN THE CONTEXT OF SURROGACY**

In this chapter, a comprehensive discussion on reproductive rights in terms of fundamental human rights will support the idea that by introducing the new law 2015 and removing the total ban on surrogacy to ensure the availability of altruistic surrogacy in Vietnam, Vietnamese law makers opened a new way to parenthood for infertile couples. The main argument is that outlawing surrogacy equally constrains the reproductive freedom of both surrogate mothers and commissioning couples and, hence, breaches the reproductive rights to which they are be entitled as human beings. Consequently, permitting altruistic surrogacy as set in the 2015 law on surrogacy will, up to a point, promote not only the right to procreate but also human rights in general in Vietnam.

#### **4.1 Basics of reproductive rights and the right to procreate in the context of surrogacy**

The term ‘reproductive rights’ relates to a set of human rights in the area of reproduction and is a very complex area. For this reason, a number of definitions denote the nature and the scope of reproductive rights.<sup>304</sup> Amongst others, the definition given by the Cairo Programme of Action adopted in 1994 at an International Conference on Population and Development (ICPD) in Egypt is a

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<sup>304</sup> Much attention has been given to the definition of reproductive rights by international organisations and conferences, such as the World Health Organisation (WHO), ICPD or Fourth World Conference on Women (convened by the United Nations in Beijing, China in 1995). See Cook, Rebecca J.; Mahmoud F. Fathalla, *Advancing Reproductive Rights Beyond Cairo and Beijing, International Family Planning Perspectives*, Vol. 22, No. 3, 1996, p.115–121. See also, Sonia Correa, *Population and Reproductive Rights: Feminist perspectives from the South*, Zed Books, 1994.

distinctive example.<sup>305</sup> This defined reproductive rights as follows:

reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other relevant United Nations consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right of all to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents. In the exercise of this right, they should take into account the needs of their living and future children and their responsibilities towards the community.<sup>306</sup>

That is an all-embracing definition that generalises and encompasses almost all elements of reproductive rights in terms of legal recognition and regulation at both national and international levels. However, as it did not list particular components of reproductive rights or which human rights are regarded as reproductive rights, there is scope for different understandings of this definition. For example, it is not clear whether reproductive rights are confined to the right to have or not have children, or whether they might also be extended to the point where they include the right to access reproductive education and healthcare of good quality. Therefore, a better definition would name the rights belonging to the group of reproductive rights, such as the right to reproduce/procreate, the right to contraception or abortion, and so on. So doing draws the boundary between reproductive rights and non-reproductive rights on the one hand and, on the other, avoids research on this topic based on misunderstanding of the given definition.

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<sup>305</sup> The Cairo Programme of Action was adopted by 184 member states of the United Nations, including Vietnam. Although not legally binding, this Programme has been popularly cited as an international norm in relation to reproductive rights. See Paige Whaley Eager, *Global Population Policy : From Population Control to Reproductive Rights*, Ashgate Publishing Limited, 2004, p. 135-166.

<sup>306</sup> <http://www.iisd.ca/Cairo/program/p07002.html>. (last accessed December 29, 2016).

In this regard, the United Nations Population Fund (UNFPA) furnishes a better understanding of reproductive rights by categorizing a broader definition of sexual and reproductive rights into four groups, (i) the right to reproductive and sexual health, (ii) the right to reproductive decision-making, (iii) the right to equality and equity for women and men, and (iv) the right to sexual and reproductive security.<sup>307</sup> More specifically, the UNFPA identifies the rights to reproductive decision-making as embracing ‘choice in marriage, family formation, and determination of the number, timing, and spacing of one’s children, the right to the information and the means to exercise those choices’.<sup>308</sup> It also points out components of reproductive and sexual rights based on the views of the UNFPA, the WHO, and the International Planned Parenthood Federation (IPPF), including the right to family planning, the right to marry and found a family, and the right to a private and family life.<sup>309</sup> This suggests that reproductive rights as a comprehensive definition might consist of a set of rights, including the right to choose partners for marriage, the right to contraception, the right to procreate or not procreate, the right to determination of the number, the timing and spacing of children, the right to abortion, the right to access healthcare education and services, and the right for gender equality in reproduction. The prohibition of surrogacy in Vietnam undoubtedly interfered with these rights and prevented Vietnamese people wanting to have their own biological children through the making of surrogacy arrangements from exercising the right to procreate.

The ‘right to procreate’, inter alia, is central to the debate on reproductive rights because it forms the core of human reproduction and its exercise helps determine the basic thrust of a human reproductive life. The right to procreate is commonly scrutinized on both moral and legal grounds.<sup>310</sup> The moral and legal aspects of the right to procreate justifies the foundation of human rights in the

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<sup>307</sup> UNFPA, *The Right to Choose: Reproductive Rights and Reproductive Health*, 1999, p.3.

<sup>308</sup> *Ibid*, p.3.

<sup>309</sup> *Ibid*, p.7-8.

<sup>310</sup> Marleen Eijkholt, The Right to Found a Family as a Stillborn Right to Procreate? *Medical Law Review*, 18, Spring 2010, p.130.

context of reproduction in general and supports the involvement of a surrogate woman and a commissioning couple in a surrogacy arrangement. In particular, the right to procreate for human beings is fundamental and universal for everyone without discrimination on the basis of sex, religion, race, nationality, educational level, social status, and other elements of personal identity.<sup>311</sup> Therefore, the parties to a surrogacy arrangement<sup>312</sup> might claim such a right and rely on it in pursuit of having biological children. In other words, the right to procreate enables infertile persons to attain biological parenthood and hence, forms the basis of allowing altruistic surrogacy in Vietnam.

#### **4.1.1 The right to procreate as a moral right**

In its narrow sense, the right to procreate can be understood as the right to bring one's own biological children into the world.<sup>313</sup> In the context of medically assisted reproduction, this right might be extended to include the right to choose how to procreate because advances in medical technologies provide patients with a wide range of choices with regard to the way of having children (for example, through artificial insemination with donor gametes, IVF treatment or surrogacy). Wanting to have children, especially genetically connected children, is widely regarded as a natural desire for persons of reproductive age.<sup>314</sup> In Oriental societies like Vietnam, it is commonly considered as a social duty to produce biologically related offspring.<sup>315</sup> For this reason, as discussed in Chapter

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<sup>311</sup> The legal foundation of this will be discussed in more detail in section 4.1.2.

<sup>312</sup> 'The parties' may involve all those who contribute to the making of a surrogacy arrangement such as the staff of a hospital/clinic, the legal advisors, or the social workers, but in this situation it is confined to the commissioning couple and the woman who willingly acts as a surrogate mother.

<sup>313</sup> Athena Liu, *Artificial Reproduction and Reproductive Rights*, Dartmouth, 1991, p.26

<sup>314</sup> This might be demonstrated by the fact that many infertile persons have tried to overcome their infertility in order to have a biological child through IVF treatment and many children have been born in this way. At the meeting of the International Federation of Fertility Societies and the American Society for Reproductive Medicine in Boston in 2013, it was reported that some 5 millions babies in the world were born through IVF during the period from 1989 to 2007. <http://www.nbcnews.com/health/5-million-babies-born-through-ivf-past-35-years-researchers-8C11390532> (last accessed December 29, 2016).

<sup>315</sup> Pashigian, M., *supra* note 89, at pp.134-151.

2, infertile persons in Vietnam may strive to have their own biological children at any cost (for example, through illegal surrogacy arrangements). They do so because of an increasingly onerous social pressure they have to suffer, rather than because of the exercise of their freedom and choice. This reality is very different from Western societies which will now be examined.

In the west, the right to procreate as a moral right is mainly supported by a philosophical underpinning in relation to individual freedom.<sup>316</sup> In particular, the moral foundation of the right to procreate is all too often attributed to procreative liberty and reproductive freedom. For instance, Robertson has defined procreative liberty as 'the freedom either to have children or to avoid having them'.<sup>317</sup> Furthermore, he argues that this is 'a negative right against state interference with choices to procreate or to avoid procreation'.<sup>318</sup> As a negative right, procreative liberty does not require 'the duty of others to provide the resources or services necessary to exercise one's procreative liberty despite plausible moral arguments for governmental assistance',<sup>319</sup> and does not demand the state or particular persons to provide 'the means or resources necessary to have or avoid having children'.<sup>320</sup> Other writers base this moral right on individual autonomy. Dworkin, for example, has described the right to procreate as 'a right [of people] to control their own role in procreation unless the state has a compelling reason for denying them that control'.<sup>321</sup> In a similar vein, Harris states that:

procreation is something universally acknowledged to be not only one of the most important and worthwhile of human activities, but also one widely recognised to involve

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<sup>316</sup> Eijkholt, M., *supra* note 498, at p.130.

<sup>317</sup> Robertson, J., A., *supra* note 319, at p.22.

<sup>318</sup> *Ibid*, p.23.

<sup>319</sup> *Ibid*, p.23.

<sup>320</sup> *Ibid*, p.23.

<sup>321</sup> Dworkin, R., *supra* note 311, at p. 148. Although this definition had been made in Dworkin's discussion about abortion, it may be extended to include other issues relating to reproductive technologies (such as creating embryos, artificial insemination, or surrogacy) because procreation involves many different categories and is not confined to abortion.



a fundamental value or right, namely the right to procreative autonomy.<sup>322</sup>

Jackson also defends reproductive autonomy in favour of the right to procreate as a moral right. Acknowledging that 'procreative freedom is not something that every individual already possesses, rather it may be a goal to be actively pursued',<sup>323</sup> she argues that 'a more broadly conceived right to respect for reproductive autonomy is demanded by basic principles of justice, liberty and moral tolerance'.<sup>324</sup> A commitment to reproductive autonomy, in her opinion, may 'give maximum possible respect to individuals' interest in making some of the most important decisions of their lives according to their own conception of the good'.<sup>325</sup> According to Jackson, the right to procreate originates from our procreative freedom and our moral agency, thus it should be considered as a right 'to have one's reproductive choices treated with respect'.<sup>326</sup> In other words, the moral foundation of the right to procreate enables us to make critical reproductive choices in order to exercise this right.

The importance of regarding the right to procreate as a moral right is that a person can claim such a right to protect his/her reproductive freedom in litigation. In other words, the moral foundation of the right to procreate might be seen as a valid justification for individuals to claim their right to procreate through the courts. Even though it is clear that there is little or no a social acceptance of the right to procreate as a moral right in Vietnam at the moment,<sup>327</sup> it is likely that sooner or later Vietnam will adopt a different moral approach to reproductive rights based on individual freedom and personal choice. This is because Vietnam is now widely and profoundly integrating into the world with the policy of opening economy, bringing about a lot of changes in society as a whole, amongst which is the extension of human rights and

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<sup>322</sup> John Harris, *The Welfare of the Child*, *Health Care Analysis* (8), 2000, p.32.

<sup>323</sup> Jackson, E., *supra* note 8, at p.318.

<sup>324</sup> *Ibid*, p.9.

<sup>325</sup> Jackson, E., *supra* note 8, at p.9.

<sup>326</sup> *Ibid*, p.9.

<sup>327</sup> As analysed in Chapter 2, procreating is still regarded as a social duty rather than a moral right in Vietnam at the moment.

individual freedom towards the goal of building a society of justice and democracy. The abovementioned Western perspectives on reproductive rights, including the right to procreate, might be learned and incorporated in Vietnamese people's perception of procreation. Therefore, it is possible that in time the view on procreation as a duty and an obligation will be replaced by the view which regards it as exercising freedom and choice. In other words, individual freedom and personal choice may establish a new moral foundation of the right to procreate, on which Vietnamese infertile persons can rely to make their reproductive decisions in pursuit of having biological children of their own.

#### **4.1.2 The right to procreate as a formal legal right**

The legal basis of the right to procreate can be found in a wealth of international conventions and national laws on human rights such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 12) and the Human Rights Act 1998 of the UK (Article 8). Historically, reproductive rights (including the right to procreate) were indirectly mentioned as a human right by the United Nations in the Universal Declaration of Human Rights (adopted by the UN General Assembly in 1948) which provides that 'men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family'.<sup>328</sup> Reproductive rights only really became a subset of human rights at the International Human Rights Conference held by the UN in Teheran in 1968.<sup>329</sup> The Final Act of the Teheran conference states that 'parents have a basic human right to determine freely and responsibly the number and the spacing of their children'.<sup>330</sup> In Europe, Article 8 and Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms are most cited as the legal basis for the right to procreate.

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<sup>328</sup> The United Nation, *The Universal Declaration of Human Rights (1948)* <http://www.un.org/en/documents/udhr/index.shtml> (last accessed December 29, 2016).

<sup>329</sup> Lynn P. Freedman and Stephen L. Isaacs, Human Rights and Reproductive Choice, *Studies in Family Planning*, Vol. 24, No. 1, 1993, p.20.

<sup>330</sup> *Ibid*, p. 20.

Article 8 protects the right to private and family life stating that

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>331</sup>

Reproductive rights, including the right to procreate, might fall within the scope of 'private and family life' for procreation is normally identified as a private matter. It is noteworthy that the term 'family' in this Article is 'confined to existing family life, not to family life to be constituted'.<sup>332</sup> Therefore, once a family is founded any state intervention must be justified by virtue of Article 8. Simultaneously, it excludes the possibility of referring to Article 8 in order to justify state interference in cases where parties to surrogacy arrangements aim to form a family, such as through marriage/civil partnership or through adoption.<sup>333</sup> The main question concerns the relevance of the right to procreate in relation to Article 8 and how it can be interpreted under this Article.

The European Court of Human Rights has interpreted Article 8 as incorporating the right to procreate. For instance, in *Evans v United Kingdom*,<sup>334</sup> by defining 'private life' as a broad term 'encompassing, inter alia, aspects of an individual's physical and social identity including the right to personal autonomy, personal development, and to establish and develop relationships with other human

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<sup>331</sup> Council of Europe, The European Convention on Human Rights and its five protocols (Rome, 4 November 1950), <http://www.hri.org/docs/ECHR50.html> (last accessed March 29, 2016).

<sup>332</sup> Athena Liu, *supra* note 501, at p.30.

<sup>333</sup> The formation of a family might be debatable as some argue that a family is formed when two people marry, but others assert that a family is complete with the coming into the world of children.

<sup>334</sup> [2006] 43 EHRR 21.

beings and the outside world’,<sup>335</sup> the Court confirmed that Article 8 ‘incorporates the right to respect for both the decisions to become and not to become a parent’.<sup>336</sup> In other words, Article 8 was held to contain a form of a right to procreate. This interpretation was given to approve the UK’s approach to ethically difficult aspects of the case since the UK Court of Appeal in *Evans vs Amicus Healthcare*<sup>337</sup> acknowledged Ms Evans’ challenge based on her right to respect for private life under Article 8 as an interference with this right. The court equally held that there was no violation of Article 8 because the interference with her right was not disproportionate to the aim of safeguarding Mr Johnston’s rights.

The right to private life is not an absolute right by virtue of Article 8(2), so there might be some circumstances in which state interference is permissible, for example where it is necessary to protect the rights and freedoms of others. The ECHR’s explanation of Article 8 in *Evans v United Kingdom* granted a wide margin of appreciation to the UK courts in the context of no international consensus pertaining to the regulation of IVF treatment which ‘gives rise to sensitive moral and ethical issues against a background of a fast-moving medical and scientific development’.<sup>338</sup> In this sense, the UK courts may give equal priority to the wishes of both parties (male and female) in cases where there exist conflicting rights with regard to having or not having children.

There are other reasons to support the argument that the right to private and family life set out in Article 8 might also be used to justify the right to procreate. First, under this Article ‘there is an explicit balancing of individual (private) rights with societal (public) interests’.<sup>339</sup> In more detail, Article 8(1) imposes a positive obligation upon the state to respect individuals’ private lives, whereas Article

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<sup>335</sup> *Ibid*, para 57.

<sup>336</sup> *Ibid*, para 57.

<sup>337</sup> [2004] 3 All ER 1025.

<sup>338</sup> (2006) 43 EHRR 21, para 62.

<sup>339</sup> Elizabeth Wicks, *Human Rights and Healthcare*, Hart Publishing, 2007, p.163.

8(2) requires a negative obligation on the part of the state not to interfere with this right save in certain exceptions (such as for the sake of national security, for the prevention of crime, or for the protection of public health). In other words, individuals can freely exercise this right to the extent that the state can find legitimate causes to interfere with it by virtue of Article 8(2). Therefore, a person can choose to procreate at his/her wish without fearing of interference from the state. Moreover, the positive obligation imposed on the state might be understood to mean that the state should positively assist individuals who seek a right to procreate such as by relaxing the legal restrictions on reproduction, or financially supporting them in the way to parenthood rather than merely refraining from interfering with their reproductive choices. Secondly, Article 8 applies to everyone and is not confined to heterosexual couples, as in Article 12 which will be analysed below. This is consistent with the prohibition on discrimination on any ground as set out in Article 14 of the European Convention, which secures all people the right to found a family.<sup>340</sup> Therefore, all individuals, including single men or women and homosexual persons, may refer to this provision as a basic right to pursue their right to procreate with a view to founding a family. Third, although there are different views in favour of rejecting Article 8 as a basis for the right to procreate,<sup>341</sup> it can be seen that this Article is flexible to adapt to new and difficult situations in a changing world of reproductive technology and is capable of being interpreted as promoting human rights in the field of reproduction, where the right to procreate may be invoked.<sup>342</sup>

Article 12 recognises the right to marry and found a family as follows:

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<sup>340</sup> *Ibid*, p.161.

<sup>341</sup> For example, Eijkholt argues that it is not desirable to locate a right to procreate in this Article as 'the government would have no reason to provide facilities, if reproduction were to fall exclusively under an individual's own domain'. She also furthers that Article 8 'would not be suitable either, as its wording would be too broad for protecting the specific context of reproduction' and 'it would be unclear how effectively the provision could regulate issues of reproduction', thus it is not a proper protection for the right to procreate. See Eijkholt, M., *supra* note 498, at p.144.

<sup>342</sup> Eijkholt, M., *supra* note 498, at p.145.

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.<sup>343</sup>

Article 12 has a narrower meaning than Article 8 and provides restricted protection for the right to procreate. First, the wording of this provision gives priority to married couples rather than individuals in that it perceives the right to reproduce 'as a right of a married couple'<sup>344</sup> and 'there is no right to adopt or to found a family by alternative means'.<sup>345</sup> Moreover, as Wicks argues, 'it is institution of the 'family' (however one may define that), rather than an individual's freedom to reproduce, which is the basis of Article 12's protection'.<sup>346</sup> Therefore, single persons would find it difficult in their pursuit of family happiness and family formation by referring to this Article. Second, the meaning of Article 12 shows that the exercise of the right to marry and found a family is contingent on the national laws which regulate the exercise of this right. This follows that it has reduced scope in comparison with that of Article 8. In practice, different nations have different laws and thus, this right could be interpreted in different ways. In other words, domestic laws are considered to be determinative in defining the content of this right and in its exercise. Although Vietnam is not subject to the European Convention, Vietnam recognises the right to marry and found a family as a human right and interprets it in the special law regarding marriage and the family.<sup>347</sup> At present, Vietnamese law allows Vietnamese citizens of full age to exercise the right to found a family in different ways, such as through marriage, by adoption or through assisted reproductive technologies.<sup>348</sup> It is noteworthy that single persons are legally allowed to adopt children with a view to building a family.<sup>349</sup> That means that single persons and

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<sup>343</sup> Council of Europe, The European Convention on Human Rights and its five protocols (Rome, 4 November 1950), <http://www.hri.org/docs/ECHR50.html> (last accessed December 29, 2016).

<sup>344</sup> Athena Liu, *supra* note 501, at, p.30.

<sup>345</sup> *Ibid*, p.30.

<sup>346</sup> Wicks, E., 2007, *supra* note 527, at p.162.

<sup>347</sup> The Law on Marriage and Family, passed by the National Assembly of Vietnam in 2000.

<sup>348</sup> Article 9, 10, 63, 67 of the Law 2000.

<sup>349</sup> Article 67 (1) of the Law 2000 provides that a competent person of full age is permitted to adopt at least one child. However, it is prohibited for a competent person to adopt a child for the purpose of labour exploitation, sex abuse, human trafficking or other profit-seeking activities (Article 67(3)). It is also noteworthy that the age gap between the adopted child and his/her

married couples in Vietnam have an equal right to found a family in this regard. However, according to the new law on surrogacy, altruistic surrogacy is restricted to married couples. This is a discrimination against single persons who strive to have their own biological children through surrogacy in order to form a family of their own. Therefore, if the law on surrogacy is reformed, single persons should be eligible to make surrogacy arrangements as married couples.

The link between the right to marry and the right to found a family has been controversial. The idea that these rights might be regarded as 'one right, not two'<sup>350</sup> was favoured by the European Court of Human Rights until recently.<sup>351</sup> If this is the case, there is an inter-dependence between the right to marry and the right to found a family which means that the former provides a ground for the latter. In addition, it is possible that only those who are able to found a family are allowed to marry. This seems to be irrational because family is not necessarily established on the basis of marriage, and there are people who want to found a family without marriage. In fact, family formation may be fulfilled through other means such as adoption, as mentioned above. The problem was resolved with the case of *Goodwin v United Kingdom*,<sup>352</sup> in which the ECHR opened up a chance for disassociating the right to marry from the right to found a family. In this case, the Court held that there was a violation of Article 12's right to marry in the light of the UK's ban on marriage between a man and a male to female transsexual (because of refusal to recognise acquired gender) and, thus, recognised the separation of the two rights in question. This gives meaning to the struggle for the right to procreate because it has given opportunities for individuals of all genders to claim the right to found a family. In Vietnam, altruistic surrogacy is allowed, but limited to heterosexual married couples.<sup>353</sup>

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adoptive parent must be at least 20 years (Article 69 (2)).

<sup>350</sup> Baroness Hale, *From the Test Tube to the Coffin: Choice and Regulation in Private Life*, Sweet and Maxwell, 1996, p.8.

<sup>351</sup> Wick, E., *supra* note 527, at p.163.

<sup>352</sup> (2002) 35 EHRR 18.

<sup>353</sup> Parliament discussed the Law on Marriage and Family (amended): In favour of surrogacy on the basis of altruism, <http://moj.gov.vn/ct/tintuc/Pages/thong-tin-khac.aspx?ItemID=5481> (last visited December 29, 2016).

This might be a discriminatory policy in terms of sexuality because, due to their social infertility, single men and male same sex couples may need to use surrogacy and hence should be entitled to do this. This does make sense in the context of another Parliamentary debate on the recognition of same-sex marriage in Vietnam.<sup>354</sup> If same-sex marriage is allowed in Vietnam, homosexual married couples may be eligible to the same right to procreate through surrogacy as heterosexual married couples. If this is not the case, homosexual unmarried couples might still be entitled to do so on the grounds that the right to marry is separated from the right to found a family.

The above discussion on the basis of the right to procreate implies that reproductive rights, including the right to procreate, are universal and fundamental human rights which should apply to everyone without discrimination on any ground. Warnock, although suspicious of the existence of the right to have children, acknowledged that 'claims that something is a human right, that is a right that belongs to everyone who is human, regardless of the legal system under which they live, are made and upheld or rejected, even if, in the last analysis, it has to be in their courts of law that disputed cases must be decided'.<sup>355</sup> This shows that the right to procreate is universal and, hence, Vietnamese infertile people may also justify their use of surrogacy by having recourse to the right to procreate. Moreover, as the right to procreate might be regarded as both a legal right and a moral right, a person can claim such a right on both moral and legal foundations.

In the context of surrogacy, the right to procreate may be a valid justification for concerned parties (a surrogate woman and a commissioning couple) to enter into a surrogacy arrangement. This right allows a surrogate woman to decide to

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<sup>354</sup> Allow same sex marriage in Vietnam? Not yet, Parliament needs further reports, <http://vov.vn/xa-hoi/cho-phep-hon-nhan-dong-gioi-tiep-tuc-phai-nghien-cuu-328803.vov> (last accessed March 29, 2016).

<sup>355</sup> Mary Warnock, *The Limits of Rights-based Discourse*, in Jr Spencer and Antje Du Bois-Pedain (eds), *Freedom and Responsibility in Reproductive Choice*, Hart Publishing, 2006, p.9



give birth to a child for another on the grounds that she has freedom of choice in relation to procreation. Similarly, a commissioning couple may have a right to decide how to procreate or the way to have children (say, with assisted reproductive technologies) and from whom their biological child will be born (i.e. choice as to who will be chosen as surrogate mother). To prevent them from entering into a surrogacy arrangement means both a violation of their human rights with regard to reproduction, and a deprivation of their procreative liberty and reproductive freedom, as Liu has argued, 'where the surrogate is genetically linked to the child, then the freedom of both the surrogate and that of the other individual to reproduce would be equally restricted were surrogacy to be outlawed'.<sup>356</sup> However, as the right to procreate is not an absolute right, there might be some legitimate restrictions on this right in certain circumstances, as will be thoroughly examined in the following section.

## **4.2 Restrictions on the right to procreate**

As discussed in the previous section, the legal right to procreate is not absolute and it might be lawfully restricted in some circumstances without infringement of this human right. The onus is on the state in such cases to demonstrate that it has compelling reasons to do so, for instance, if there is a sufficiently pressing public concern over the exercise of the right to procreate amongst specified groups of persons. By referring to the English case law with regard to the right to procreate of a particular group, namely prisoners,<sup>357</sup> this section aims to understand the legal basis on which the UK courts made decisions as to the deprivation of the right to procreate. After that, it will enquire into the issue of whether state interference with the right to procreate of persons who contemplate having children through surrogacy arrangements might ever be

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<sup>356</sup> Athena Liu, *supra* note 501, at p.39.

<sup>357</sup> Imprisonment provides an example of a situation where it might be legitimate for the State to prevent a person having access to fertility treatment(s). Furthermore, prisoners are generally unable to conceive children because they are incarcerated outside of society, hence they might be deemed socially infertile, in much the same way as same sex couples might be regarded as socially infertile.

justifiable. It demonstrates that the complete ban on surrogacy in Vietnam before the new law 2015 was both irrational and ill-founded because the state was not able to provide a valid justification of its intervention in the contested right of involved parties to a surrogacy arrangement. For this reason, allowing altruistic surrogacy as set out in the new law 2015 is necessary to promote the legal right to procreate in Vietnam.

#### 4.2.1 The right to procreate of prisoners in the UK

It is asserted, at least by the case law, that prisoners serving life sentences in the UK do not necessarily forfeit all their rights, including the right to procreate through the use of assisted reproductive technologies.<sup>358</sup> Although there are restrictions on the right of British prisoners,<sup>359</sup> inmates are still sometimes allowed to father children while in prison<sup>360</sup> or get IVF treatment while in jail<sup>361</sup> on the basis of the right to a family life in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The principle established by Lord Wilberforce in *Raymond v Honey*<sup>362</sup> that ‘a convicted prisoner, despite his imprisonment, retains all civil rights which are not taken away either expressly or by necessary implication’,<sup>363</sup> has been generally referred to as a legal ground for claiming the right to found a family by having

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<sup>358</sup> A prisoner’s right to procreate in the natural way (through sexual intercourse) is excluded here as some writers have argued that ‘prisoners do not necessarily lose all their rights, but the right to have children, at least by natural means, is contingent on the very things which by definition prisoners have lost: privacy and freedom’. See Ruth Deech and Anna Smajdor, *From IVF to Immortality*, Oxford University Press, p. 128.

<sup>359</sup> For example, Lord Steyn in *R v Secretary of State for the Home Department, ex parte O’Brien and Simms* [1999] 3 WLR 328 stated as a principle that ‘a sentence of imprisonment is intended to restrict the rights and freedoms of a prisoner. Thus the prisoner’s liberty, personal autonomy, as well as his freedom of movement and association are limited’.

<sup>360</sup> Nick Collins, Prisoner granted right to father child from jail, <http://www.telegraph.co.uk/news/uknews/law-and-order/8549149/Prisoner-granted-right-to-father-child-from-jail.html> (last accessed December 29, 2016).

<sup>361</sup> Jack Doyle, Murderers and drug dealer to get IVF in prison and you’ll be paying! Criminals using European Human Rights laws to start families at taxpayers’ expense, <http://www.dailymail.co.uk/news/article-2253943/Murderers-drug-dealer-IVF-prison-youll-paying-Criminals-using-Human-Rights-laws-start-family-taxpayers-expense.html> (last accessed December 29, 2016).

<sup>362</sup> [1983] 1.A.C.1.

<sup>363</sup> *Ibid*, at 10.

children through artificial insemination, such as in *Mellor's* case.<sup>364</sup> Yet, it is worth noting that the UK courts' recent decisions in such cases 'have confirmed the discretionary nature of prisoner's access to artificial insemination facilities',<sup>365</sup> a policy which means that 'prisoners who wish to challenge a refusal of access are placed in the position of having to seek judicial review and bear the burden of proving the criteria were applied unreasonably'.<sup>366</sup> Applicants might therefore risk being denied access to artificial insemination in order to have their own biological children and should their application be rejected they may not be able to demonstrate that the authority's decisions were irrational and unjustifiable. The UK courts' refusal, as is evident in a number of cases including *Mellor* in the following analysis, mainly relied on the grounds of protecting the child's welfare and maintaining public confidence in the criminal justice system.<sup>367</sup> The justifications of the court in such a case might be useful in assessing the validity and rationality of similar justifications the state might provide for preventing infertile persons from having genetically related children through a surrogacy arrangement in Vietnam. There is, at least, a similarity in the final consequence on the claimants in both situations, that is being refused the right to procreate.

Mr Mellor, a prisoner sentenced to life imprisonment, applied to the Secretary of State for the Home Department to be allowed to access artificial insemination due to fears of both the uncertainty of his release date and the greatly declined ability of his wife to bear a child due to her age upon the expiry of his tariff. His application was rejected on a number of grounds, including the welfare of the potential child, the potential instability of his marital relationship, and public concern over permitting prisoners while serving sentences to conceive. Mellor then applied for judicial review of the Home Secretary's decision, which he

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<sup>364</sup> R v Secretary of State for the Home Department Ex Parte Mellor, [2000] 2 F.L.R 951, [2001] EWCA Civ 472.

<sup>365</sup> Helen Codd, Regulating Reproduction: Prisoners' families, artificial insemination and human rights, *European Human Rights Law Review*, 2006, 1, p.45.

<sup>366</sup> *Ibid*, p.46.

<sup>367</sup> This will be explored in the following paragraphs.

argued interfered with a prisoner's basic right to found a family as set out in Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. His application was dismissed by the High Court which confirmed that the arguments of the Home Secretary were correct in law.<sup>368</sup> The Home Secretary argued that Article 12, although permitting couples the right to marry, 'does not impose any obligation on the state to facilitate the conception of a child so that such a couple can found a family'.<sup>369</sup> The Home Secretary cited the case *X v United Kingdom*<sup>370</sup> where it was held that Article 12 does not mean that a person must at all times be given the actual possibility to procreate his descendants.<sup>371</sup> He furthered that 'the situation of a lawfully convicted person detained in prison...falls under his own responsibility, and that his right to found a family has not otherwise been infringed'.<sup>372</sup> The Home Secretary also argued that Mr Mellor was not seeking to exercise a right but, instead, 'seeking to obtain a privilege or benefit to which he was not entitled',<sup>373</sup> namely the facility to provide a semen sample for artificial insemination. In the judgment, the court held that public concerns such as 'the need to maintain the deterrent effect of imprisonment and public confidence in the system of criminal justice',<sup>374</sup> amounted to 'a sufficiently 'pressing need' to justify the interference with such a right which necessarily results from a refusal of the prisoner's request by the Secretary of State'.<sup>375</sup> Nevertheless, Mellor appealed against the court's dismissal, contending that this violated both his right to respect for life and family, and his right to found a family. He also maintained that this could not be justified on the basis of prison security policy.<sup>376</sup>

The Court of Appeal rejected the appeal,<sup>377</sup> stating that there was no breach of

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<sup>368</sup> *R. v Secretary of State for the Home Department Ex p. Mellor*, [2000] 2 F.L.R.951.

<sup>369</sup> *Ibid*, para 39.

<sup>370</sup> [1981] ECHR 6.

<sup>371</sup> *Ibid*, para 39.

<sup>372</sup> *Ibid*, para 39.

<sup>373</sup> *Ibid*, para 41.

<sup>374</sup> *Ibid*, para 51.

<sup>375</sup> *Ibid*, para 51.

<sup>376</sup> [2001] EWCA Civ 472.

<sup>377</sup> *Ibid*.

his fundamental rights based on the Convention. The Court's decision was principally made by referring to relevant cases within the Convention jurisprudence.<sup>378</sup> From this decision, a wealth of legal arguments flow in favour of restrictions on the right to procreate of prisoners.

First, the court held that the restriction on Mellor's right to respect for family life and his right to found a family is ordinarily justifiable under the provisions of Article 8(2). Lord Phillips acknowledged that 'the qualifications on the right to respect for family life that are recognised by Article 8(2) apply equally to the Article 12 rights',<sup>379</sup> and stated that 'imprisonment is incompatible with the exercise of conjugal rights and consequently involves an interference'<sup>380</sup> with these two rights. He cited the case *X & Y v Switzerland*<sup>381</sup> in which a married prisoner couple had complained about being deprived of sexual relations while in jail, claiming a violation of Articles 8 and 12 of the Convention. In this case, the Commission justified interference with the right to respect for family life under Article 8(2), particularly on the grounds of protecting 'security and good order in prison'.<sup>382</sup> The Commission also argued that this intervention did not constitute a violation of Article 12 as the applicants had already founded a family by marriage and, thus, had enjoyed the right by virtue of Article 8(1).<sup>383</sup> The Commission's decision suggested that a prison sentence may be regarded as a prevention to prisoners in their enjoyment of the right to conjugal visits. Lord Phillips, in Mellor's case furthered this by asserting that the deprivation of a prisoner's right to association with his partner did not require any obligation on the state to facilitate such visits. By rejecting Mellor's request, Lord Phillips argued:

It does not, of course, necessarily follow that, because it is justifiable to deprive a prisoner of the exercise of conjugal rights, he should not be permitted to inseminate his

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<sup>378</sup> For example, *X & Y v Switzerland*, (1978) 13 DR 15; *E.L.H & P.B.H v. United Kingdom*, (1997) 91A DR61.

<sup>379</sup> *R. v Secretary of State for the Home Department Ex p.Mellor*, [2000] 2 F.L.R.951, para. 39 (i).

<sup>380</sup> *Ibid*, para. 39 (ii).

<sup>381</sup> (1978) 13 DR 15.

<sup>382</sup> [2001] EWCA Civ 472, para. 27.

<sup>383</sup> *Ibid*, para.28.

wife artificially. Equally, however, it does not follow that a prisoner who is justifiably deprived of the exercise of his conjugal rights should be provided with the facilities to enable him to do this.<sup>384</sup>

Secondly, in exceptional circumstances,<sup>385</sup> to deny a prisoner the opportunity to conceive, whether via natural or artificial insemination, might constitute an infringement of their right to found a family by virtue of Article 12. Lord Phillips referred to the case *E.L.H and P.B.H v United Kingdom*<sup>386</sup> to suggest that even in the absence of the right to have conjugal visits, a prisoner might still claim the right to found a family through artificial insemination. The applicants, a prisoner and his wife, both of whom were Roman Catholics claimed against the refusal of conjugal visits by the prison governor on the grounds that it constituted a violation of Articles 3, 8, 12 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>387</sup> Particularly, the denial of conjugal visits prevented them from continuing infertility treatment (in conjunction with the surgical operation on the wife) in an attempt to have children, and, thus, violated their right to family life and to found a family. Their application was rejected by the Commission on the basis that there was no alleged violation of the said Articles. The Commission held that an interference with the right to respect for family life could be justified for 'the prevention of

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<sup>384</sup> *Ibid*, para. 45.

<sup>385</sup> The term 'exceptional circumstances', as explained in Mellor's case, refers to general considerations of (i) the necessity of the provision of artificial insemination facilities as the only means for conception, (ii) the prisoner's ability to assume parental responsibilities on the expected date of release, (iii) the medical authority's confirmation of medical fitness of the couple to AI, (iv) the stability of the marital relationship of the couple, (v) the welfare of the child including the length of time of a child being without a father or a mother, and (vi) the evidence of the public interest which does not support providing AI facilities in a particular case. See [2001] EWCA Civ 472, para.4.

<sup>386</sup> (1997) 91A DR61.

<sup>387</sup> Article 14 guarantees the right to non-discrimination on any ground whilst enjoying freedoms and rights set out in the Convention. It might be suggested that preventing prisoners from exercising the right to procreate in any way would constitute a discrimination between prisoners and non-prisoners with regard to procreation. In other words, Article 14 'might be thought to support a prisoner's claim to be able to reproduce. After all, non-prisoners can reproduce, so it is discriminatory to prevent prisoners from doing so'. Deech, R and Smajdor, A. *supra* note 413, at p. 132.

disorder or crime' under Article 8(2).<sup>388</sup>

Furthermore, the exceptional circumstances relating to the applicants' religion were not sufficient to support their claim that artificial insemination was not a resort available to them as Catholics. The Commission restated that Article 9 of the Convention, protecting the right to freedom of religion, 'does not guarantee the right to be exempted from rules which apply generally and neutrally, such as rules prohibiting conjugal visits in prison'.<sup>389</sup> The fact that the applicants had access to artificial insemination facilities showed that artificial insemination was an option available to them and, thus, there was no violation of the Convention. Similarly, the principle of exceptional circumstances could not be applied to Mellor's case because the applicant's claim for having access to artificial insemination on the grounds of the wife's fertility decline due to advancing age did not outweigh the legal arguments supported by the medical profession's views.<sup>390</sup> The Secretary of State's policy did not 'refuse to facilitate a prisoner to provide semen for the artificial insemination of his wife in all circumstances',<sup>391</sup> and 'the grant of facilities for artificial insemination to prisoners and their partners is made only in exceptional circumstances'.<sup>392</sup> Mellor's application was dismissed because he could not demonstrate the sufficiency of his exceptional circumstances.

Thirdly, the Court held that the punishment of imprisonment has justifiable consequences on the exercise of human rights, such as the deprivation of the right to found a family via procreation or the right to procreate. In more detail, the Court said that a degree of deprivation of human rights might be seen as part

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<sup>388</sup> [2001] EWCA Civ 472, para 27 & para 36.

<sup>389</sup> *E.L.H & P.B.H v. United Kingdom*, (1997) 91A DR61.

<sup>390</sup> A consultant obstetrician and gynaecologist, considering the medical propriety of the Mellor's request, confirmed that the wife's fertility should not decline so much so that medical intervention would be necessary. This statement was regarded as crucially contributory to the Secretary of State's decision as to Mellor's request and then restated by the Court of Appeal in its judgment. See [2001] EWCA Civ 472, para.14.

<sup>391</sup> [2001] EWCA Civ 472, para 59.

<sup>392</sup> [2001] EWCA Civ 472, para 17.

of the punitive regime or, in other words, the deprivation of liberty to which imprisonment has been designed may result in the restriction of a prisoner's freedom. However, the Court insisted that this restriction or interference can only be justifiable provided that it is not disproportionate to 'the aim of maintaining a penal system designed both to punish and to deter'.<sup>393</sup> In a case where it is disproportionate, 'special arrangements may be called for to mitigate the normal effect of deprivation of liberty'.<sup>394</sup> Otherwise, prisoners may have opportunity to conceive if there is clear evidence of disproportionality between the deprivation of their right to procreate and the aim of prison's punitive and deterrent policy. In addition, the Court also held that public concern might justify any hindrance to a prisoner's option of conceiving while serving a sentence. According to Lord Phillips, 'penal sanctions are imposed, in part, to exact retribution for wrongdoing'<sup>395</sup> and 'it is legitimate to have regard to public perception when considering the characteristics of a penal system'.<sup>396</sup> For that reason, public perception might be justified as a legitimate element of penal policy, such as the restrictive policy of the Home Secretary with regard to artificial insemination in Mellor's case.

These arguments illustrate a valid justification for denying a prisoner's right to access to artificial insemination or for restrictions on a prisoner's right to procreate. In the wider context of human rights, it suggests that restrictions on the right to procreate might be justifiable provided that the state gives sufficiently strong arguments for their restrictive reproductive policy. However, the Court's restrictive approach in Mellor's case has been criticised by some scholars for its reasoning.<sup>397</sup> William contends that to grant access to AI might be denied to male inmates, but then such access would have to be granted to their

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<sup>393</sup> *Ibid*, para.58.

<sup>394</sup> *Ibid*, para.58.

<sup>395</sup> *Ibid*, para.65.

<sup>396</sup> *Ibid*, para.65.

<sup>397</sup> See John William, 'Have the Courts Got it Right? The Queen on the Application of Mellor v Secretary of State for Home Department', 2002, 14, *Child and Family Law Quarterly*, pp.217-228. See also Steve Foster, Right to a Private Life, Right to Found a Family, *Journal of Civil Liberties*, 2000, 5(3), pp.347-357.



female partners and that 'to deny a right to somebody simply on the basis that another person may be denied it does not rationally further the cause of equal opportunities'.<sup>398</sup> He is also critical of the prison policy of controlling access to AI which might be tantamount to 'the constructive sterilisation of prisoners while incarcerated'.<sup>399</sup> Therefore, he advocates that the right to reproduce should not be too readily denied to prisoners, but rather should be considered on a case-by-case basis. More particularly, greater access to that facility should be encouraged in the context of prisoners' rights as it 'may promote good order and make the prospect of successful rehabilitation upon release that much more likely'.<sup>400</sup> In a similar vein, Foster criticises the Court's decision in Mellor's case for limiting basic human rights. He argues that 'even if the court was right in its interpretation of the Convention case law, there is strong authority in domestic law for giving an enhanced protection of general fundamental rights'.<sup>401</sup> He refers to the case *Ex parte Smith*,<sup>402</sup> in which the Court of Appeal required that the Ministry of Defence had to furnish stronger justification for banning homosexuals serving in the armed forces because of the human rights' context of the decision. With this reference, he suggests that the domestic courts may go further 'than the European Court in upholding certain fundamental rights in some instances',<sup>403</sup> for example where the case law is restrictive of human rights.

More recent cases of the European Court have demonstrated that imprisonment should not be a bar to procreation via AI, opening up the opportunity for prisoners to resort to AI to have their biologically related children. *Dickson v. United Kingdom*<sup>404</sup> is a case in point. Before taking a case to the European Court, the applicants (a married couple of whom the husband was a prisoner serving a life sentence) made an application to the Court of Appeal in the UK in the hope that they would be permitted to appeal against a decision refusing judicial

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<sup>398</sup> William, J., *Ibid*, p.228.

<sup>399</sup> *Ibid*, p.228.

<sup>400</sup> *Ibid*, p.228.

<sup>401</sup> Foster, S., *supra* note 585, at p.355.

<sup>402</sup> *R v Ministry of Defense, Ex parte Smith* [1996] 1 All ER 257.

<sup>403</sup> Foster, S., *supra* note 585, at p.356.

<sup>404</sup> (2008) 46 E.H.R.R. 41.

review of the Secretary of State's refusal to accord them facilities for AI.<sup>405</sup> The Court of Appeal's refusal of their application relied on the rationality and compatibility with human rights of the Secretary of State's policy which had been considered in Mellor's case. Nevertheless, Mr Dickson won his right to procreate via AI in the European Court. At first, the Court was in favour of the UK government's policy, then Dickson made an instant complaint to the Grand Chamber.<sup>406</sup> The Chamber upheld the applicants' complaint that a refusal of access to AI was in breach of his right under Article 8 of the Convention. The Chamber agreed that Article 8 applied on the grounds that 'the refusal of AI facilities concerned the applicants' private and family lives which notions incorporate the right to respect for their decision to become genetic parents'.<sup>407</sup> It was also held that 'there was no suggestion that a prisoner lost his Convention rights merely because of his detention following conviction. He could also not lose his rights simply to satisfy public opinion'.<sup>408</sup> In other words, AI facilities should be made available to prisoners even though the inability to beget a child was a consequence of imprisonment, and prisoners' rights should not be automatically forfeited based purely on what might offend public concern.

#### **4.2.2 The right to procreate of prisoners in other countries**

In other jurisdictions, restrictions on the right to procreate of prisoners or even convicted people who are serving non-custodial sentences, are different to that in the UK. In the US, the courts 'have recognised a constitutional right to procreate or not procreate',<sup>409</sup> but equally have acknowledged that in the presence of a compelling public interest it is legitimate for the state to interfere with the right to procreate. In the US, there has been a particular public policy relating to probation conditions applied to convicted persons who consent to opt

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<sup>405</sup> *Dickson v Premier Prison Service Ltd*, [2004] EWCA Civ 1477.

<sup>406</sup> (2008) 46 E.H.R.R 41.

<sup>407</sup> (2008) 46 E.H.R.R 41, para.66.

<sup>408</sup> *Ibid*, H6(a).

<sup>409</sup> William, J., *supra* note 585, at p. 221.

for a sentence of probation instead of being incarcerated. Under these conditions, individuals who have committed crimes whether related to children or not are subject to restrictions on their reproductive rights. For example, they have been forbidden to conceive, give birth, or father, and have to suffer methods of birth control.<sup>410</sup> In other words, they can be prevented from procreating while being put on probation. Probation conditions also mean that probationers may regain their right to procreate upon release as probationers usually suffer restrictions on their liberty while in the community. However, it might be a controversial question as to whether this policy would amount to a breach of human rights in cases where convicted individuals are not guilty of child sexual abuse or physical violence. Restrictions on the right to procreate might be more acceptable and justifiable when imposed on convicted persons who have had a history of violence against children, because this avoids possible harm to children they would beget if permitted and mitigates public concern over the possibility of them exhibiting violent behaviour towards children in the absence of permanent prison supervision. Therefore, it might be unfair if criminals who have not committed child sexual abuse were also prevented from procreating.

Israel has adopted a different approach to the policy on prisoners reproducing by allowing them to use AI to impregnate their partners.<sup>411</sup> Conjugal visits with a view to having children are permitted in Israel and, in so doing, the Israeli state simultaneously has made a positive intervention with regard to infertility treatment.

In Vietnam, there has not been a restrictive policy on prisoners' right to procreate, in the legal statutes and in practice. Marriage between male and female prisoners while in jail is not prohibited as part of government policy. The

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<sup>410</sup> Joanna Nairn, Is there a right to have children? Substantive due process and probation conditions that restrict reproductive rights, *Stanford Journal of Civil Rights and Civil Liberties*, vol 6, 2010, p.5.

<sup>411</sup> Deech, R and Smajdor, A. *supra* note 413, at p. 129.

Marriage and Family Law 2000 specifies exceptional circumstances in which marriage is not allowed, excluding the situation of being imprisoned. Article 10 of this law provides that marriage is legally forbidden (i) between those who are already party to another existing legitimate marriage, (ii) for those who have lost capacity for civil acts of individual (such as mentally disabled persons), (iii) between persons of the same direct bloodline, between relatives within three generations, (iv) between adoptive parents and adopted children; between former adoptive parents and former adopted children; between fathers-in-law and daughters-in-law, mothers-in-law and sons-in-law, stepfathers and stepchildren, stepmothers and stepchildren, (v) between people of the same sex.<sup>412</sup> Conjugal visits are also allowed for prisoners on a monthly basis.

In reality, the prison authority in Vietnam has enabled prisoners to have conjugal visits by providing appropriate facilities. In particular, in almost all prisons in the country, a specific building has been used for establishing 'happy rooms' where married prisoners serving sentences can have private meetings with their non-prisoner married partners.<sup>413</sup> The duration of conjugal visits in 'happy rooms' varies depending on the progress the prisoners have made while serving their sentence and is evaluated by the prison authority. For example, prisoners who have had tasks well done would receive a 24 hour conjugal visit. The duration will be extended to 48 hours for those who have had excellent achievements in jail.<sup>414</sup> Many children have been born as a result of such conjugal visits in prison.<sup>415</sup> However, conjugal visits might not be allowed for those who have received a death penalty and have been isolated under strict supervision. Nonetheless, some prisoners sentenced to death have sometimes made efforts

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<sup>412</sup> *The Marriage and Family Law* (No. 22/2000/QH10 of June 9, 2000), adopted by the Socialist Republic of Vietnam's 10<sup>th</sup> National Assembly at 7<sup>th</sup> Session on 9<sup>th</sup> June 2000, came into force from 1<sup>st</sup> January 2001, [http://www.moj.gov.vn/vbpg/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=373](http://www.moj.gov.vn/vbpg/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=373) (last accessed December 29, 2016).

<sup>413</sup> Le Nguyen, *A Little Corner of Paradise of Love in Vietnamese Prisons*, <http://dantri.com.vn/su-kien/can-canh-thien-duong-tinh-yeu-o-trai-giam-511880.htm> (last accessed December 29, 2016).

<sup>414</sup> *Ibid.*

<sup>415</sup> Lam Trinh, *Stories from happy rooms*, <http://dantri.com.vn/phap-luat/chuyen-nhat-o-buong-hanh-phuc-695661.htm> (last accessed December 29, 2016).

to conceive in order to avoid being executed. For example, a 45 year old woman, who was convicted of smuggling heroin and other addictive substances and sentenced to death, succeeded in conceiving with the cooperation of a male prisoner. Because she was pregnant, the Supreme Court decided to moderate her death penalty and replace it with a life sentence.<sup>416</sup>

The current policy on marriage and conjugal visits as mentioned above, shows that imprisonment is not a bar to procreation in Vietnam. Although it is unclear whether Vietnamese prisoners can procreate via AI or not, they are not denied the right to procreate. If it is possible to procreate for prisoners, who are regarded as dangerous to the community and are isolated in jail, the prohibition on producing a child via surrogacy for non-prisoners who are infertile and usually do not pose threats to society is questionable. If there is no evidence that the latter endangers society, prohibiting prisoners from using surrogacy seems to be unfair and imposes unreasonable restrictions on the right to procreate of prisoners. This suggests that altruistic surrogacy may be open to prisoners who are infertile and want to have their genetically related children.

In a nutshell, the legal right to procreate is a justification for allowing surrogacy. However, in Vietnam, only heterosexual married couples are allowed to use altruistic surrogacy, while single persons and same sex couples are prevented from having children through surrogacy. Therefore, reforming the law on surrogacy in years to come should remove this discrimination so that more people can refer to surrogacy to exercise the right to procreate and form a family of their own. In order to enjoy the right to procreate through surrogacy arrangements, infertile people need procreative autonomy, that is to have freedom of choice in procreation. The next chapter will discuss procreative autonomy in more details to justify the allowing of altruistic surrogacy and to show the need to further reform the law on surrogacy in the future.

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<sup>416</sup> VietNamNet, *A meeting with a female prisoner who successfully and extraordinarily avoided her death sentence*, <http://vietnamnet.vn/vn/xa-hoi/56061/gap-lai-nu-pham-nhan-thoat-an-tu-ngoan-muc.html> (last accessed December 29, 2016).

## CHAPTER 5:

### PROCREATIVE AUTONOMY IN THE CONTEXT OF SURROGACY

The complete ban on surrogacy in Vietnam denied many infertile persons the last (if not only) opportunity to have a child genetically related to them. It also prevented women from becoming surrogate mothers, restricting their capacity to make autonomous choices regarding the use of their body for gestational services. In this light, the prohibition on surrogacy infringed the procreative autonomy of both surrogate women and commissioning couples in Vietnam. In this chapter I will argue that procreative autonomy could be referred to as a justification for allowing altruistic surrogacy in Vietnam as has occurred from early 2015. However, as altruistic surrogacy is restricted to heterosexual married couples and it is allowed within families, Vietnamese infertile people have limited procreative autonomy. Therefore, the arguments in favour of procreative autonomy, which are constructed and developed here, aim to justify the need to reform the law on surrogacy in the future so that it could make surrogacy accessible to more people in Vietnam.

#### 5.1 Definition of procreative autonomy

This section begins with an overview of what constitutes autonomy in general before going on to explore procreative autonomy in the context of surrogacy. Autonomy is regarded as a major subject in bioethical debates, and respect for autonomy has been seen as one of the most important principles in medical law and bioethics.<sup>417</sup> The word ‘autonomy’ originates in Greek with the combination of *autos* (‘self’) and *nomos* (‘rule’, ‘governance’, or ‘law’) referring to the self-rule

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<sup>417</sup> Jonathan Herring, *Ethics and Medical Law*, Oxford University Press, 2014, p. 25.

or self-governance of independent city-states.<sup>418</sup> Autonomy also serves as a term to depict the self-rule, self-governance or self-determination of every individual which is 'free from both controlling interference by others and from certain limitations such as an inadequate understanding that prevents meaningful choice'.<sup>419</sup> In this sense, autonomy for human beings or personal autonomy can be defined as something inherent in persons who are capable of mastering their body, their mind, and their life independently of external interventions and inner constraints. As free-willed and capable agents, persons possess and exercise their autonomy by following their own values and beliefs as well as in determining their destiny.

As many different conceptions of autonomy have been established based on different approaches,<sup>420</sup> autonomy is identified in a variety of forms, but commonly, it consists of three main elements: to think, to decide and to act.<sup>421</sup> As a virtue or an attribute of individuals, personal autonomy may also be analysed based on a distinction between the autonomous person (the actor), the autonomous act and the autonomous life.<sup>422</sup> Thus it follows that the exercise of personal autonomy allows one to give choices and lead a life in accordance with their intention and without external interference. By contrast, 'a person of diminished autonomy...is in some respect controlled by others or incapable of deliberating or acting on the basis of his or her desires and plans'.<sup>423</sup> For example, the autonomy of mentally incapacitated persons is constrained due to their incapability of perception, whereas prisoners' autonomy is restricted due to the deprivation of their liberty by the State.

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<sup>418</sup> Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics* (6<sup>th</sup> edition), Oxford University Press, 2009, p. 99.

<sup>419</sup> *Ibid*, p.99.

<sup>420</sup> Alasdair Maclean, *Autonomy, Informed Consent and Medical Law*, Cambridge University Press, 2009, p.9-10.

<sup>421</sup> Raanan Gillon, *Philosophical Medical Ethics*, Chichester: John Wiley & Sons, 1985, p. 60.

<sup>422</sup> Maclean, A., *supra* note 306, at p. 12.

<sup>423</sup> Beauchamp, T., L., and Childress, J., F., *supra* note 304, at p.99.

Applied to human reproduction, personal autonomy is translated into procreative autonomy. In other words, procreative autonomy can be regarded as a sub-category of autonomy in general. Therefore, procreative autonomy might also be understood as self-governance or self-determination of every individual in making reproductive choices and decisions. In addition, as Beauchamp and Childress have pointed out, autonomy relies on two essential conditions, namely liberty (independence from controlling influences) and agency (capacity for intentional action),<sup>424</sup> procreative autonomy also necessitates procreative liberty and reproductive capacity as its indispensable qualities. For example, when discussing abortion Dworkin has defined procreative autonomy as ‘a right [of people] to control their own role in procreation unless the state has a compelling reason for denying them that control’.<sup>425</sup> This definition might also be extended to other aspects of reproduction including birth control, in vitro fertilisation, childbirth or surrogacy. Harris has argued in favour of widening the content of procreative autonomy to include the right:

to reproduce with the genes we choose and to which we have legitimate access, or to reproduce in ways that express our reproductive choices and our vision of the sorts of people we think it right to create.<sup>426</sup>

Autonomy has also been regarded as a ‘capacity’ which exists inside every person and has varying degrees. For instance, Nedelsky has defined autonomy as ‘a capacity that requires ongoing relationships that help it flourish; it can wither or thrive throughout one’s adult life’.<sup>427</sup> In this sense, some persons may have full capacity for autonomy, but for others it might be limited.

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<sup>424</sup> *Ibid*, p.100.

<sup>425</sup> Ronald Dworkin, *Life’s Dominion*, London: HarperCollins, 1993, p. 148.

<sup>426</sup> John Harris, Rights and Reproductive Choice, in John Harris and Soren Holm (eds), *The Future of Human Reproduction*. Oxford: Clarendon Press, 2000, p. 34.

<sup>427</sup> Jennifer Nedelsky, Reconceiving Rights as Relationships, *Review of Constitutional Studies*, 1(1), 1993, p.8.



In the area of human reproduction, people may have limited procreative autonomy due to constraints which prevent them from thinking and acting autonomously in relation to procreation. Some of these internal constraints are closely associated with biological weaknesses such as reproductive impairment or infertility. It is a truism that infertile persons are unable to procreate without external assistance and would need to seek fertility treatment if they hope to have their own children. In fact, infertile heterosexual couples resort to surrogacy arrangements because they want to have a genetically related child, but the female partners are incapable of childbearing due to lacking a uterus for instance, whereas other persons (such as same sex couples or single men) look for surrogate mothers due to the lack of a female partner. They do not choose adoption because the adopted child would have no blood relation with them and they would prefer a child of their biological connection.<sup>428</sup> Moreover, the limited availability of children for adoption, especially babies, and the complex procedure of adoption could discourage people from selecting this option. Furthermore, surrogacy could be the only choice when other forms of assisted reproductive technologies (ARTs) could not help them to have biologically related offspring. Eggs and sperm donation, for example, would provide them with reproductive materials, but that may not solve the problem because childbirth requires the female partner to be capable of conceiving and also able to carry the foetus to term. In this situation, finding a surrogate is the only pathway available for them to genetic parenthood. Preventing them from doing so means denying them the chance of dealing with their infertility, reducing their autonomy and infringing their liberty to procreate that they should equally have as fertile persons.<sup>429</sup>

In the context of surrogacy, respect for procreative autonomy legally requires the State first and foremost to entitle the right to self-determination in procreation to its citizens and facilitate rather than restrict their reproductive choices of childrearing through surrogacy. In the case of imposing a ban on

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<sup>428</sup> Anderson, E., *supra* note 200, at p.183.

<sup>429</sup> The equality with regard to the right to procreate will be discussed in the following section.

surrogacy, it should provide sufficiently convincing reasons to prevent them from making surrogacy arrangements. In particular, the State needs to prove that surrogacy may endanger the best interests of the parties involved such as children, surrogate women and commissioning couples, or that might be harmful to the public interest by increasing the burden on social security in relation to public health services. In the absence of compelling evidence, the restriction of procreative autonomy in the context of surrogacy may amount to an illegitimate interference with personal reproductive freedom. It might be both a violation of the right to autonomy and a breach of basic human rights with regard to reproduction.<sup>430</sup> Meanwhile, the right to autonomy and the right to reproduce are of the utmost importance for those who are involved in surrogacy arrangements and can be overruled by other influences as will be discussed below.

## **5.2 The sovereignty of procreative autonomy in the context of surrogacy**

Procreation is one of the most important and intimate spheres of human life. For a great many people of reproductive age, to have children is not merely to create new generation, but also to enhance their social status, and it can be of such a great importance in enabling them to live a happy life that 'childlessness can be a source of stress even to those who have deliberately chosen it', especially in Vietnam.<sup>431</sup> The intimacy of procreation suggests that it should be undertaken within a private atmosphere or outside the public eye, and procreative choices (to have children or not) should be personally made without any external interference. Making an autonomous reproductive choice can be difficult, even for those who are fertile, and might have a profound impact on our whole lives. Jackson has argued that the course of our lives is dependent on our procreative capacity or incapacity, and our reproductive decisions are 'among the most

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<sup>430</sup> This statement will be explained in more detail in the next chapter.

<sup>431</sup> Mary Warnock, *A Question of Life - The Warnock Report on Human Fertilisation and Embryology*, Basil Blackwell, 1985, p.8.

momentous choices that we will ever make'.<sup>432</sup> To produce a child or not is a life changing decision, so many factors should be taken into account such as economic conditions, health or career promotion. For infertile persons, who try to conceive and fail, this decision would be made much more difficult since they lack reproductive capacity and are unable to naturally conceive through sexual intercourse. However, procreative incapacity would not be an obstacle to infertile persons as they can seek external assistance to attain the goal of having children. Moreover, those who cannot conceive naturally should still be able to exercise procreative autonomy because they retain the capacity of self-determination or self-control over their reproductive life in spite of their infertility. Therefore, the procreative autonomy of both fertile and infertile persons needs to be equally respected without any legal discrimination. This section aims to explain why procreative autonomy is considered as sovereign (theoretically and practically) and hence, demonstrates that by removing the ban on surrogacy in the new law 2015 the Vietnamese State respects the procreative autonomy of both surrogate women and commissioning couples whose intention to bring a child into the world is deliberate and often well planned.

A review of literature, case law, and statutory law in the Western world (which will be analysed as follows) has shown that there are many reasons in favour of procreative autonomy being given priority over other concerns, such as public policy, culture or religion.

### **5.2.1 To disregard a person's procreative autonomy would deprive them of procreative liberty and reproductive self-determination**

John Robertson has written that 'procreative liberty is a primary liberty because it is central to personal identity, dignity and the meaning of one's life'.<sup>433</sup> Thus,

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<sup>432</sup> Jackson, E., *supra* note 8, at p.7.

<sup>433</sup> John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies*, Princeton University Press, 1994, p.22.

deprivation of procreative liberty might be synonymous with depriving a human being of his/her identity, dignity and meaningful life. In fact, procreative liberty is realised through making reproductive decisions by autonomous persons who have capacity and self-control over their procreation. Reproductive decisions, in turn, are a crucial part of moral responsibility, and Dworkin regards it as central to human dignity:

that people have the moral right – and the moral responsibility – to confront the most fundamental questions about the meaning and value of their own lives for themselves, answering to their own consciences and convictions.<sup>434</sup>

One of our most important convictions is the ‘conviction about what helps to make a good life<sup>435</sup> or a satisfying life, to which Jackson has argued that ‘reproductive freedom is sufficiently integral’.<sup>436</sup> Therefore, one’s satisfying life would be incomplete or unachievable when his/her reproductive freedom is limited due to the restriction of procreative autonomy. In this way, it is arguable that a life without procreative liberty means a life lacking dignity, personal identity and meaning, and in a nutshell, unhappiness.

First and foremost, it is necessary to understand the definition of procreative liberty. John Robertson has defined procreative liberty as ‘the freedom either to have children or to avoid having them’.<sup>437</sup> He has also argued that this is ‘a negative right against state interference with choices to procreate or to avoid procreation’.<sup>438</sup> As a negative right, procreative liberty does not require ‘the duty of others to provide the resources or services necessary to exercise one’s procreative liberty despite plausible moral arguments for governmental assistance’.<sup>439</sup> More accurately, it does not demand the state or particular

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<sup>434</sup> Dworkin, R., *supra* note 311, at p.166.

<sup>435</sup> *Ibid*, p. 202.

<sup>436</sup> Jackson, E., *supra* note 8, at p.7.

<sup>437</sup> Robertson, J., A., *supra* note 319, at p.22.

<sup>438</sup> *Ibid*, p. 23.

<sup>439</sup> Robertson, J., A., *supra* note 319, at p. 23.

persons to provide 'the means or resources necessary to have or avoid having children'.<sup>440</sup> It follows that procreative liberty is integral to people of reproductive ages. Adults who have decision-making capacity are the authors of their own life, have self-determination over the reproductive life according to their own value systems and beliefs in pursuit of familial happiness. However, autonomy is not unlimited based on Mill's harm principle, which dictates that 'the only purpose for which power can be rightfully exercised over any members of a civilised community, against his will, is to prevent harm to others'.<sup>441</sup> Furthermore, it is widely accepted that 'liberty consists in the freedom to do everything which injures no one else'.<sup>442</sup> Hence, it is arguable that freedom to make procreative choices (i.e. to procreate or not) is not constrained as long as it does not harm others. In more detail, 'each individual has a right to make her or his own decisions concerning reproduction, without others' interference, as long as decisions made do not result in 'substantial harm' for others and as long as a procreative interest exists'.<sup>443</sup> Therefore, whenever procreative liberty is prevented without any evidence of real harms to others, a human being would experience a life with reduced liberty, the happiness of family life would be threatened, if not unreachable, and human dignity would be severely damaged.

Respect for procreative autonomy allows autonomous persons not only to enjoy their procreative liberty by making their own reproductive choices as to when, where and how to produce a child(ren), but also to avoid procreating (or more precisely, conceiving), against their will. If a conception occurs without the intention of involved persons, for example because of a rape or as a result of a contraception failure or after a failed sterilisation, it will violate their procreative autonomy because it is impossible for them to act autonomously in such

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<sup>440</sup> *Ibid*, p. 23.

<sup>441</sup> John Stuart Mill, in J.Gray (ed), *On Liberty and Other Essays*, Oxford University Press, 1991, p.14.

<sup>442</sup> National Assembly of France, *The Declaration of the Rights of Man and the Citizen 1789*, [http://www.constitution.org/fr/fr\\_drm.htm](http://www.constitution.org/fr/fr_drm.htm) (last accessed 20 February 2013).

<sup>443</sup> Kristine Zeiler, Reproductive autonomous choice – A cherished illusion? Reproductive autonomy examined in the context of preimplantation genetic diagnosis, *Medicine, Health Care and Philosophy*, 2004, p.175.

circumstances. This disrespect for procreative autonomy has resulted from the disregard of both their capacity to make reproductive actions and their will of fertilisation and, hence, located them in a situation of very limited reproductive freedom. In other words, they are deprived of the chance of exercising procreative liberty in circumstances out of their control. It might, however, be suggested that abortion, if permissible, can help avoid having children and thus, procreative autonomy is maintained. However, were abortion not permitted, they would be involuntary pregnant and have unwanted children. The situation still remains and such 'victims' lose their procreative liberty and have their procreative autonomy disrespected. The legal consequences might possibly be in favour of the claimants if they took a case to court, for instance in *McFarlane v. Tayside Health Board*,<sup>444</sup> where an unwanted child was born due to a failed vasectomy. The parents made a negligence-based claim for damages which was finally dismissed by the House of Lords. Nevertheless, the House of Lords allowed general damages for the claimants on the grounds that they 'have lost the freedom to limit the size of their family [and been] denied an important aspect of their personal autonomy'.<sup>445</sup>

Procreative liberty is also regarded as a basic human right as recognised by the United Nations in the Universal Declaration of Human Rights which provides that 'men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family'.<sup>446</sup> The right to found a family does imply the right to choose a life with or without offspring. However, it is vital that the right to marry and the right to found a family are not seen as two sides of a coin, and that the latter is not based on the former. This means that it is unnecessary and not obligatory for those who enjoy the right to found a family to marry. The right to found a family does not require a person to be married as is vividly demonstrated by the fact that many women become single mothers

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<sup>444</sup> [2000] 2 A.C.59 (HL).

<sup>445</sup> *Ibid*, para.123.

<sup>446</sup> The United Nations, *The Universal Declaration of Human Rights* (1948) <http://www.un.org/en/documents/udhr/index.shtml> (last accessed 20 February 2013).

and many couples have children together without being married.<sup>447</sup> Therefore, everyone should have the freedom to procreate and to choose how to procreate, for example to reproduce with medical assistance. Any action to prevent someone who seeks to have offspring for family fulfilment should be considered as a violation of basic and fundamental human rights in procreation since it deprives persons the right to procreate which has a firm reliance on the moral and legal grounds.<sup>448</sup>

However, as previously mentioned, procreative autonomy is not absolute and might be restricted on the basis of the harm principle. This follows that that individual autonomy should only extend until the point where it causes harm to others. In the light of this insight, ‘harm’ may be regarded as a criterion for justifying the exercise of autonomy in the context of procreation so that restricting procreative autonomy might be regarded as harmful. Harm to others might also be considered as a condition to restrict the right to procreative autonomy. Were the state to impose restrictions on this right, it must prove the potential or the real existence of harm with regard to constraining procreative liberty. The one-child policy adopted in China is a case in point.<sup>449</sup> This policy was introduced by the Chinese government in 1978 with the aim of alleviating socio-economic and environmental problems.<sup>450</sup> On the one hand, this birth control policy might be condemned because it was draconian and enforced by strict punishment so that Chinese people were unable to decide the number of children they wanted to have without penalty. This appears to be contrary to procreative liberty which allows everyone to procreate and, more importantly,

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<sup>447</sup> Victoria Lambert, Forget the tired ‘single mother’ stereotype. All hail the rise of the new solo mum. <http://www.telegraph.co.uk/women/womens-life/11799007/IVF-The-rise-of-the-new-Solo-Mum.html> (last accessed December 29, 2016).

<sup>448</sup> A more detailed and close analysis of the right to procreate in terms of human rights will be conducted in the next chapter.

<sup>449</sup> It is notable that China has recently decided to end its decades-long one-child policy. Chinese couples will now be permitted to have two children. However, the analysis of this policy will still be useful in that it will show the reasons why the Chinese government has changed their position towards procreative liberty of their citizens. BBC News, China to end one-child policy and allow two. <http://www.bbc.co.uk/news/world-asia-34665539> (last accessed December 30, 2016).

<sup>450</sup> Pascal Rocha da Silva, *The politics of one child in the People’s Republic of China*, Universite de Geneve, 2006, pp.22-28 (French).

possibly have more than one child. In particular, the International Conference on Human Rights (organised in Tehran in 1968) proclaimed that 'parents have a basic human right to determine freely and responsibly the number and the spacing of their children'.<sup>451</sup> Obviously, the fact that Chinese citizens were denied the opportunity of reproducing more than one child violated human rights to a certain degree, and placed individuals in conflict with the State. More particularly, Chinese individuals should have had the right to decide on childbearing for themselves, but the Chinese Government did it for them, making them less autonomous in reproductive matters.

On the other hand, this stringent policy might also be justifiable on the grounds of the public interest.<sup>452</sup> If the Chinese Government believed that it was in the wider public interest to restrict population growth by insisting on a one-child policy, then it could be claimed that the policy was justified as a mechanism for reducing the harms that would result from overpopulation. Nevertheless, a number of brutal and unwanted consequences resulted from the one-child policy such as compulsory sterilisation and abortion, the abandonment, mistreatment or murder of baby girls/infants,<sup>453</sup> and it has shown that public interest is not necessarily sufficient to support this policy. In these ways the policy per se causes harms to Chinese citizens, especially in terms of human rights in the area of reproduction. Hence, human rights can be used as a cogent justification for phasing out such a policy in order to enhance individual autonomy. In other words, procreative autonomy should be prioritised over other state concerns such as population control or protection of religious or cultural norms because it enables persons of reproductive age to enjoy their procreative liberty and exercise a very basic human right, viz. the right to procreate, to its fullest extent.

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<sup>451</sup> The United Nations, *Final Act of the International Conference on Human Rights*, New York, 1968.

<sup>452</sup> It is understandable that an uncontrollable growth of population in China, the most populated country in the world, may cause harms to both the well-being of its citizens (for example, reduced living standards) and the socio-economic development of whole the country.

<sup>453</sup> Ma Jian, China's barbaric one-child policy, <http://www.theguardian.com/books/2013/may/06/chinas-barbaric-one-child-policy> (last accessed December 29, 2016).



From above analysis, it may be concluded that access to assisted reproductive technologies in order to have biological offspring is only legitimately restricted if the state has compelling reasons to do so. Moreover, the State's concerns should not be used as legitimate reasons to overrule individual procreative autonomy as it may cause many brutal consequences as in China's decades-long one-child policy. In the absence of clear evidence of harm to others,<sup>454</sup> any restrictive policy on infertility treatment, including surrogacy, is an invalid justification and amount to a breach of reproductive freedom in any part of the world.

The ban on surrogacy in Vietnam from 2003 significantly constrained the procreative liberty of infertile persons. It outlawed any infertile adult who strived to seek a biologically related child through a surrogacy arrangement. On the one hand, infertile couples where the female partner was unable to carry a pregnancy did not have any other choices to have their genetic child and thus, had to accept their infertility and childlessness. On the other, they often turned to the black market to get help from other women by making surrogacy arrangements.<sup>455</sup> In either case, their liberty to procreate was significantly reduced because having no choice and acting 'underground' or illegally would have similar implications. As discussed in the chapter 3, the black market of surrogacy in Vietnam caused negative implications to concerned parties of surrogacy arrangements (surrogate mothers, commissioning couples and children born through surrogacy), raising public concerns and societal anger towards this practice nationwide.<sup>456</sup> Therefore, it is asserted that removing the ban on surrogacy is not only a reasonable response to these implications, but also facilitated the development of a robust legal framework in which

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<sup>454</sup> Ibid. See also BBC News, China to end one-child policy and allow two. <http://www.bbc.co.uk/news/world-asia-34665539> (last accessed December 29, 2016).

<sup>455</sup> An illegal ring of surrogate mothers in Vietnam, <http://tuoitre.vn/chinh-tri-xa-hoi/563296/duong-day-mang-thai-ho-de-thue.html#ad-image-0> (last visited December 30, 2016).

<sup>456</sup> See Chapter 3.

procreative liberty of Vietnamese infertile persons is exercised and strictly protected.<sup>457</sup>

### **5.2.2 A lack of respect for personal procreative autonomy infringe one's body ownership and bodily integrity**

In the area of philosophy, 'self-ownership' is a centuries-long controversial issue that can be traced back to Aristotle's distinction between women and slaves.<sup>458</sup> It might be irrational and contradictory that persons who are not slaves should not use themselves for their own purposes.<sup>459</sup> Liberal theorists argue that if we do not have property in our own bodies, we are unable to have any other entitlements.<sup>460</sup> However, James W. Harris disapproves of this argument by stating that the fact we are not slaves does not mean we must own ourselves (our body) and thus, concludes that self-ownership is a nonsensical concept.<sup>461</sup> It is argued that if we are our bodies or embodied subjects, then it is meaningless to say that we own our bodies, but rather we simply are our bodies.<sup>462</sup> As Kant asserts:

Man cannot dispose over himself because he is not a thing; he is not his own property; to say that he is would be self-contradictory; for insofar as he is a person he is a Subject in whom the ownership of things can be vested, and if he were his own property he would be a thing over which he could have ownership.<sup>463</sup>

Nevertheless, there are other positions which still suppose self-ownership to be similar to property rights, saying that it comprises a wide range of 'relations of

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<sup>457</sup> Legalisation of surrogacy in Vietnam. <http://giaoduc.net.vn/Xa-hoi/Dua-mang-thai-ho-vao-luat/260300.gd> (last accessed March 29, 2016).

<sup>458</sup> Donna Dickenson, *Property in the Body: Feminist Perspective*, Cambridge University Press, 2007, p.36.

<sup>459</sup> *Ibid.*

<sup>460</sup> *Ibid.*

<sup>461</sup> James W. Harris, *Property and Justice*, Oxford University Press, 1996, p.189.

<sup>462</sup> Dickenson, D., *supra* note 344, at p.37.

<sup>463</sup> Immanuel Kant, *Lectures on Ethics*, (translated by Louis Infield), Harper & Row, New York, 1963, p.4

exclusion or control concerning a particular object or objects'.<sup>464</sup> Self-ownership in the sense of the physical body is often discussed in connection with a Lockean view on property rights resulting from labour of the creator.<sup>465</sup> Jeremy Waldron sheds more light on this by arguing that humans 'do not have creators' rights over their bodies. But they can be regarded in this strong sense as the creators of their own actions (and a fortiori of their work and labour)'.<sup>466</sup> Paul Ricoeur also distinguishes between the two senses in which something can be said to belong to me.<sup>467</sup> In the first sense, I own a physical subject; in the second sense, similar to that of owning the moral person, 'what belongs to me is more appropriately understood through the notion of constitution, as constitutive of who I am'.<sup>468</sup> He states that we should construe our bodies as belonging to us in the second sense:

They are "ours" because they are expressive of our agency... Our bodies belong to us in the sense that we are embodied in them, we express our agency and intentions through them, and we experience the world from the perspective of our particular embodied points of view.<sup>469</sup>

The above discussion of self-ownership in the philosophical meaning is important prior to analysing procreative autonomy, the right to bodily integrity (bodily non-interference and bodily self-determination) in the context of surrogacy because it provides assumptions with regard to the establishment of body ownership as well as the possibility of objectification and commodification of a person's body. In particular, it is argued that 'if we do not own our bodies straightforwardly (and we do not in law) then we do not own ourselves, and are less than full subjects'.<sup>470</sup> Therefore, this contributes to justifications in favour of women's freedom of choice in relation to their body and, simultaneously, to the reasons

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<sup>464</sup> Dickenson, D., *supra* note 344, at p.36.

<sup>465</sup> *Ibid.*, p.38.

<sup>466</sup> Jeremy Waldon, *The Right to Private Property*, Clarendon Press, 1988, p.179.

<sup>467</sup> Paul Ricoeur, *Oneself as Another*, (translated by Kathleen Blamey), University of Chicago Press, 1992.

<sup>468</sup> *Ibid.*

<sup>469</sup> *Ibid.*

<sup>470</sup> Dickinson, D., *supra* note 344, at p.38.

for removing the ban on surrogacy in Vietnam as we have seen since the introduction of the new law 2015.

The following section will explore the important roles body ownership and bodily integrity play in enabling a surrogate woman to exert her procreative autonomy prior, during and after the making of surrogacy arrangements. Procreative autonomy is also exerted by the commissioning couple, but that of the surrogate woman is prioritised in this analysis because it is her decision to use her body for gestational services that leads straightforwardly to the creation of the child born of surrogacy. This decision may also result in societal concerns over her being exploited emotionally and financially that could be believed to be avoided by a legal ban on surrogacy. For that reason, this section will focus only on the procreative autonomy of the surrogate woman in order to demonstrate that the prohibition of surrogacy aimed at eliminating procreative autonomy of surrogate women, but did not prevent women from becoming surrogate mothers in the black market. Furthermore, allowing surrogacy in the new law 2015 is an indicator of respect for and encouragement of procreative autonomy by the Vietnamese government.

*a. Body ownership supports procreative autonomy and allows a woman to use her body to become a surrogate mother*

The reasoning for regarding the human body as property and subject to body ownership may be found in the legal status of the human body. In law, the status of the human body is very complex. It has been described as property, sometimes as quasi-property, or it might be protected via a privacy interest.<sup>471</sup> Classification of the human body in such ways gives rise to many legal implications. As property, the human body would be treated as an object of

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<sup>471</sup> In her article about the law on the human body, Rao pointed out that: 'Sometimes the body is characterized as property, sometimes it is classified as quasi-property, and sometimes it is not conceived as property at all, but rather as the subject of privacy rights'. See Radhika Rao, Property, Privacy and the Human Body, *Boston University Law Review*, Vol. 80, 2000, p.361.

ownership and thus regulated by property law, but as a privacy interest it would be a subject of human rights, namely the right of personal interest or the right to bodily integrity.<sup>472</sup> English law (both statute law and case law) has provided many examples to demonstrate the complexity of the human body and of the use of it in the context of procreation.

Through statute English law recognises the human body and its relevant constituents (body parts, products produced by the human body like gametes) as objects of lawful proprietary possession, which might, in limited circumstances, be subject to transactions. For example, the Human Tissue Act 2004 allows commercial dealings in gametes, embryos and other human material which is the subject of property because of the application of human skill.<sup>473</sup> English courts have reinforced the statutory recognition of body ownership by protecting the proprietary interests of body owners in cases where their bodies (including body parts or bodily fluid) have been damaged at varying degrees due to negligence in medical circumstances, for instance, in *Yearworth v North Bristol NHS Trust*.<sup>474</sup> This is a very rare occurrence, but merits scrutiny in terms of the human body, as discussed below.

In *Yearworth* the court allowed the property claim for claimants whose sperm storage failed as a result of the hospital's negligence which irreversibly damaged it. Prior to cancer chemotherapy, six male claimants, including Yearworth, agreed to produce semen samples for storage and later use in order to attempt to father children. Unfortunately, the storage system failed and their semen samples perished. In their appeal to the Court of Appeal they claimed for: (i) personal injuries caused by negligence, (ii) damage to property, and (iii) losses resulting from breach of bailment conditions.<sup>475</sup> The personal injury claim was rejected,

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<sup>472</sup> Rao, R., *Ibid.*

<sup>473</sup> Human Tissue Act, s.32 (9). However, it is noteworthy that an individual from whom the tissue/body parts originate is not given a right to deal commercially in this way and hence he/she will not normally receive payments. Generally it is only institutions/organisations that can do so.

<sup>474</sup> [2009] EWCA Civ 37.

<sup>475</sup> Shawn H.E. Harmon and Graeme T. Laurie, *Yearworth v North Bristol NHS Trust: property*

but the bailment claim, serving as a basis for a remedy for psychiatric injury and opening up a broader scope for the property claim, was allowed.<sup>476</sup> The biggest issue for the men concerned was the fact that they had been denied the opportunity to become fathers, but this loss could not be quantified by law hence the property claim was brought. The property paradigm was used to identify the sperm as property and the sperm's originators as property owners. The Court recognised that for a claimant to claim in negligence for loss of or damage to property required legal ownership or a possessory title of his property at the time of the loss or damage.<sup>477</sup> The Court further held that the Human Fertilisation and Embryology Act 1990 (HFE Act) was 'designed to give legal effect to principles of good practice in modern reproductive medicine'<sup>478</sup> and thus, any interpretation to deprive the men of their ability 'to recover damages for an admitted breach of the trust's duty of care in respect of their sperm'<sup>479</sup> should not be encouraged. In addition, by referring to the requirement for informed consent, which was regarded as one of two pillars of the Act and identified in *Evans v. Amicus Healthcare Ltd*,<sup>480</sup> the Court stated that the men had rights over the sperm so that the Trust as license holder had respective duties not to use their sperm in any particular ways and for any purposes without their consent.<sup>481</sup> For these reasons, the claimants had ownership over their frozen sperm and hence, damage to it constituted a breach not only of the duty of care but also of body ownership. In other words, they were allowed to successfully sue for proprietary loss/damages.

However, it is noteworthy that this is an exceptional case. First, traditionally the English courts have not widely recognised the human body as property or subject to ownership, reasoning that regarding a living human body as incapable of being

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*principles, precedents and paradigms*, Cambridge Law Journal, (69), pp.476-493.

<sup>476</sup> *Ibid*, p.483.

<sup>477</sup> [2009] EWCA Civ 37, para.25.

<sup>478</sup> *Ibid*, para.41.

<sup>479</sup> *Ibid*, para.41.

<sup>480</sup> [2005] Fam.1 (CA).

<sup>481</sup> [2009] EWCA Civ 37, para 44.

owned was long ago adopted as a principle in the common law.<sup>482</sup> The legal prohibition against property applied to the whole body or parts of the body and was asserted in a host of cases.<sup>483</sup> Most recently, the House of Lords in *R v Bentham*,<sup>484</sup> confirmed that a person does not 'possess' his body or even any part of it. However, there still exists a trend of legal expansion where the courts have tried to recognise the right to control the human body and its parts and products.<sup>485</sup> These cases enabled 'the property paradigm to encroach slowly upon the prohibition'<sup>486</sup> against property in the human body. Viewed from this standpoint, *Yearworth* added a further contribution to 'the slow creep of the property paradigm'<sup>487</sup> by recognising proprietary interest in the human body's products, viz. sperm.

Another reason to ascertain the exceptionality of *Yearworth* lies in the legal reasoning of the court, particularly in its identification of something as capable of being owned. As Nwabueze<sup>488</sup> points out, the court was inclined towards a justificatory theory of property rather than the normative aspect of property theory.<sup>489</sup> He opines that in this case, 'the Court of Appeal of England and Wales

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<sup>482</sup> The court in *Yearworth* reiterated this principle by making a reference to a Latin phrase coined by Ulpian, a Roman jurist, that 'Dominus membrorum suorum nemo videtur' (no one is to be regarded as the owner of his own limbs).

<sup>483</sup> For example, in *R. v. Lynn* [1788] 2 T.R.394, *R.v.Sharpe* [1857] 169 E.R.959, and *Williams v. Williams* [1881-1885] All E.R. 840.

<sup>484</sup> [2005] 1 WLR 1057.

<sup>485</sup> For instance, the High Court of Australia in *Doodeward v. Spence* (1908) 6 C.L.R 406 (Aust HC) allowed third party ownership over a still-born two-headed foetus and recognised the right to proprietary possession of a human corpse. In the US jurisdiction, the courts also recognised the lawful possession of products produced by the human body. See *Hecht v. Superior Court of L.A. County* (1993) 20 Cal.R.2d 275 (Cal CA) where a sperm originator was allowed to have a proprietary interest. See also *Moore v. University of California* (1990) 793 P.2d 479 (Cal SC) where a proprietary interest in excised tissue was vested in a third party, but not in the originator of that issue.

<sup>486</sup> Shawn H.E. Harmon and Graeme T. Laurie, *supra* note 361, at p.481.

<sup>487</sup> *Ibid*, p.483.

<sup>488</sup> Remigius Nnamdi Nwabueze, Body parts in property theory: an integrated framework, *Journal of Medical Ethics Online*, <http://jme.bmj.com/content/early/2013/01/30/medethics-2012-100815.full> (last accessed December 29, 2016).

<sup>489</sup> The normative theory focuses on the meaning of property, whereas the justificatory theory emphasises the justification of property based on three layers: general justification (the existence of property), specific justification (what should be owned or recognised as property), and particular justification (who is the owner of property). This justification may be applied to property rights in excised body parts/products. See Nwabueze, *supra* note 374.

must have had the utilitarian justificatory theory of property in mind when it held that progress in modern biomedical technology entailed the protection of sperm samples on a proprietary basis'.<sup>490</sup> In more detail, the Court considered the sperm as property by concluding that the men 'had ownership of the sperm which they ejaculated'<sup>491</sup> and 'no person, whether human or corporate, other than each man has any rights in relation to the sperm which he has produced'.<sup>492</sup> This approach to the justificatory theory of property, however, was not really appreciated by some writers.<sup>493</sup> Commenting on *Yearworth*, Harmon and Laurie argue that the court 'failed to ground its finding of property, or to engage meaningfully with the very rich and important bioethical and legal scholarship on the subject'.<sup>494</sup> Furthermore, the court 'even failed' to apply the eleven factors of Honoré<sup>495</sup> in a rigorous manner'.<sup>496</sup> They suggest that the court 'might have used the unfairness argument advanced by Broussard J. in *Moore*<sup>497</sup> as a platform to discuss deeper and broader issues of justice and equity in arriving at its conclusion'.<sup>498</sup> In other words, the *Yearworth* judgment merely extends 'the property paradigm in an effort to give a remedy (in negligence) to sympathetic claimants who suffered a blow to their autonomy',<sup>499</sup> rather than developing solid foundations for the property paradigm or the body ownership on which the human body and its products might be validly justified as being owned. Nevertheless, in spite of its exceptionality, *Yearworth* still provides a certain degree of legal basis of body ownership to the justifications of the use of the woman's body in a surrogacy arrangement as discussed below.

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<sup>490</sup> Nwabueze, *supra* note 374.

<sup>491</sup> [2009] EWCA Civ 37, para.45 (f).

<sup>492</sup> *Ibid*, para.45 (f).

<sup>493</sup> Shawn H.E. Harmon and Graeme T. Laurie, *supra* note 361, at p.486.

<sup>494</sup> *Ibid*, p.486.

<sup>495</sup> The Court recognised 11 standard incidents of ownership enunciated by Professor A. M. Honoré, but only cited the second incident (the right to use) for the making of its decision as to whether the sperm can be regarded as being owned. However, this citation was not sufficient to justify ownership over the human body (as a whole or its parts) and its products because it confines ownership to the right (liberty) to use at one's discretion, rather than covers all the elements of ownership. See [2009] EWCA Civ 37, para.28.

<sup>496</sup> Shawn H.E. Harmon and Graeme T. Laurie, *supra* note 361, at p.486.

<sup>497</sup> *Moore v. University of California* (1990) 793 P.2d 479 (Cal SC).

<sup>498</sup> Shawn H.E. Harmon and Graeme T. Laurie, *supra* note 361, at p.486.

<sup>499</sup> *Ibid*, p.492.



When a woman decides to engage in a surrogacy arrangement, she acts as the body owner who controls her body as property and uses it according to her wishes.<sup>500</sup> Her decision to use her body to become a surrogate mother not only reflects her autonomy with regard to procreation, but might also be justified in terms of body ownership in which the body owner exercises her autonomy or self-determination over her property – her own body. In this context, self-determination is important because it enables the woman to represent her independence as an autonomous actor of full capacity in making reproductive decisions. In the absence of it, she might be involved in a surrogacy arrangement under pressure or under duress which deprives her freedom and considerably diminishes, if not completely destroys, her capacity to make a decision to control her life. In other words, it is important for the woman to have capacity if we are to accept her choice on the basis of autonomy, and it is also important to be certain that her choice is voluntary. Furthermore, the use of her body for procreation in this way may also be encouraged and guaranteed on the basis of exercising fundamental human rights, namely reproductive rights or the right to reproduce/to have children.<sup>501</sup> Therefore, as the ‘owner’ of her body, a woman should be permitted to use her womb for giving birth as a surrogate mother in accordance with her wishes.

To further explore body ownership in the context of surrogacy, it is necessary to consider the definition of ownership in general. The Oxford Dictionary of Law defines ownership as:

the exclusive right to use, possess, and dispose of property, subject only to the rights of persons having superior interest and to any restrictions on the owner’s rights imposed by agreement with

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<sup>500</sup> Being a surrogate is not the same as providing sperm, but a surrogate mother might be seen as a ‘womb leasing’ who provides uterus as an essential condition for childbearing and gets it back after childbirth.

<sup>501</sup> A more detailed analysis of reproductive rights and the right to procreate in the context of surrogacy will be conducted in the chapter 5 of this thesis.

or by act of third parties or by operation of law.<sup>502</sup>

This definition shows that ownership denotes the specific relationship between the owner and his/her property on so-called exclusive rights. Furthermore, the exclusive right is not a single right of possession, but a number of rights as there always exists a possibility that the owner may make multiple decisions relating to the use of his/her property. The multiplicity of property rights precisely reflects the complex nature of ownership and reinforces the argument that 'ownership is not a simple relation of attachment but a complicated bundle of rights'.<sup>503</sup> It might also be understood from the definition that the exclusivity of use and control constitutes the most important aspects of ownership. On the one hand, it allows the property owner to use and dispose of his/her properties at his/her discretion. On the other hand, it prevents others from using and disposing of these properties without the owner's permission. This exclusivity may reach a pinnacle when it includes the right to alienate properties, for example if the owner decides to transfer his/her property to others through a gift or by sale, terminating his/her ownership over the property.

These aspects of property ownership might be applied to the human body because the latter may be conceived as a kind of property. In the context of surrogacy, the use of a female body for providing a child for others might be justified from the point of view of the body 'owner' so that a fertile woman, as the body owner, can use her own body to act as a surrogate mother due to her right of self-determination over it, stemming from two principal dimensions of body ownership as follows:

First, body ownership guarantees that a person has the exclusive right to own his/her own body as a property against others' interference. That means that

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<sup>502</sup> Jonathan Law and Elizabeth A. Martin, *A Dictionary of Law*, Oxford University Press, 2009, p.376.

<sup>503</sup> John Lucas, *The Principle of Politics*, Clarendon Press, Oxford, 1985, p.184.

everyone has the right for his/her body not to be interfered with without his/her agreement and no one can own or control other's body for their own purpose. However, in human history, slavery demonstrated that human beings could be and have been treated as personal property and their bodies used by others with violence or other punishment, against their will and out of their control.<sup>504</sup> A slave was unable to decide what to do with his/her life other than pledge obedience to his/her owner's rules. He/she actually lost not only freedom but also ownership over his/her own body to the extent that it might be abused for forceful labour, for example, in agriculture, mineral industries or prostitution. A female slave might also be abused for the purpose of surrogacy, as black women were often forced 'to become surrogate mothers on behalf of slave owners',<sup>505</sup> under American slavery. The abolition of slavery and involuntary servitude by the Thirteenth Amendment to the United States Constitution<sup>506</sup> is a vivid demonstration of both the sanctity and inviolability of the human body, and the moral and social unacceptability of slavery in modern society. Now, the United Nations states that 'everyone has a right to respect for their dignity',<sup>507</sup> through which enabling everyone to live a life with dignity as free human beings, who can own and control their own body and destiny as well.

This dimension of body ownership also shows that any use of the human body (including body organs and bodily fluid) without the body owner's agreement or any actions causing damage to it may constitute a breach of property rights and thus, be subject to legal sanctions. *Yearworth v N Bristol NHS Trust*<sup>508</sup> as discussed above is an illustration of this statement.

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<sup>504</sup> Anita L. Allen, Surrogacy, Slavery, and the Ownership of Life, *Harvard Journal of Law and Public Policy*, (13), 1990, p. 140.

<sup>505</sup> *Ibid.*

<sup>506</sup> Congress of the United States, 13 Amendments to the US Constitution, <http://www.loc.gov/rr/program/bib/ourdocs/13thamendment.html> (last accessed March 29, 2016).

<sup>507</sup> Article 2, *UNESCO Declaration on the Human Genome and Human Rights*, adopted by UN in November 1997 <http://www.unesco.org/new/en/social-and-human-sciences/themes/bioethics/human-genome-and-human-rights/> (accessed March 29, 2016).

<sup>508</sup> [2009] EWCA Civ 37.

The dimension of body ownership also demonstrates that no one other than the body owner can decide to use their own body. Nevertheless, the fact that a person's human body might be used by others for the latter's purpose, even with the body owner's agreement, is likely to cause concerns as to autonomy over the body, especially in cases relating to surrogacy.<sup>509</sup> In *A Council v B (Children)*,<sup>510</sup> a British girl agreed to let her body used by her adoptive mother with a view to providing a child for the latter. The mother, who had three adopted daughters, contemplated a fourth and forced her oldest daughter (13 years old) to inseminate herself with semen that the mother bought online from a sperm bank in Denmark. The artificial insemination programme only ended after seven attempts when the daughter became pregnant at the age of 16 and gave birth the following year. The subsequent police investigation based on the suspicion of the midwives led the mother to the court and she was sentenced to 5 years imprisonment following a criminal trial in 2012.

In this case, apart from concerns over the easy accessibility to and availability of donor sperm as well as its safety and the criminality of child abuse, another concern is procreative autonomy in the context of surrogacy, especially within the circle of family members. The daughter allowed her body to be used by her mother for reproductive purposes because she loved her and wanted her to be happy. There was no evidence of the existence of commercial benefits in this case. Nonetheless, altruism should not be considered as a justification for using her body for surrogacy, especially since the girl was under age and clearly susceptible to exploitation. She clearly suffered some restrictions on her autonomy when making her reproductive decision. Moreover, there are also concerns about her decision-making capacity, especially as she was only 13 when it began. In fact, she did not want a baby and became only pregnant at her adoptive mother's request.<sup>511</sup> The mother expressly represented her wish of

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<sup>509</sup> There always exists a link between autonomy and ownership because autonomy as a legal ground allows the owner to exercise his/her control over his/her property.

<sup>510</sup> [2012] EWHC 2038 (Fam).

<sup>511</sup> [2012] EWHC 2038 (Fam).

having a child through surrogacy not only by planning the artificial insemination programme, but also by abusing her daughter's body many times to attain her goal, despite the probability of causing harm to her daughter's health and life.<sup>512</sup> Indeed, she was determined that the baby should be a girl and asked her daughter to undertake a wide range of practices aimed at influencing the baby's gender, which were degrading, humiliating and painful.<sup>513</sup> Furthermore, she had the intention to take over the care of the baby as soon as it was born.<sup>514</sup> The court recognised that this woman's adopted children were completely dependent on her to the extent that there was nothing that she would not require them to do for her.<sup>515</sup> In addition, the court stated that her daughters were too young to agree to anything and, for this reason, the cooperation she had with them was deemed to be achieved by duress. Her daughter's consent to become a surrogate mother was thus invalid. These findings were sufficient to confirm allegations of child cruelty on the part of the mother.<sup>516</sup>

Secondly, body ownership guarantees the ways in which one's body is used and controlled by the owner. It is personal autonomy that allows a person to decide to use his/her own body in different ways, in accordance with his/her wishes. For this reason, one can devote the use of his/her body for legitimate voluntary labour to make a living, for reproduction to maintain his/her marital relationship and continue his/her bloodline, or simply to let it be used in cosmetic surgery with a view to having a better appearance. When still alive or after death, one may donate (by himself/herself or through their family members) bodily fluid such as blood and sperm, or bodily organs such as heart (in the case of a death), kidney, bone marrow or cell, for medical treatment or research. In both theory and reality, although disposing of the human body is contingent on the body owner, body parts are given as gifts for charity purposes rather than be traded in

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<sup>512</sup> *Ibid.*

<sup>513</sup> *Ibid.*

<sup>514</sup> *Ibid.*

<sup>515</sup> [2012] EWHC 2038 (Fam).

<sup>516</sup> *Ibid.*

the form of property on the market.<sup>517</sup> This is because of the preference for gift norms, as Anderson argues, 'gift values, which include love, gratitude, and appreciation of others, cannot be bought or obtained through piecemeal calculations of individual advantage'.<sup>518</sup> Furthermore, it is the sanctity of the human body and the dignity of human life that make it less acceptable for human body parts to be subject to commercialisation. In other words, human body parts should not be treated as commodities that financially benefit people based on 'market norms of commodity exchange'.<sup>519</sup>

However, the situation of using the human body by the body owner is complex in English medical law. Body owners are not always allowed to use their body for procreation at their will. For instance, before the ban on using frozen eggs was lifted in October 1999, there was a case in which a British woman, who had cancer treatment and wanted to have a family with her frozen eggs, was prevented from doing so by Human Fertilisation and Embryology Authority due to uncertainty about the safety and efficacy of using thawed eggs.<sup>520</sup> The Authority did this on the grounds that it was not permitted by the then law to use frozen eggs for the purpose of having children. In particular, the HFE Act 1990, while maintaining a prohibition in relation to gametes, provided that any person 'in the course of providing treatment services for any woman'<sup>521</sup> was forbidden from using 'the woman's egg after processing or storage'<sup>522</sup> save in pursuance of a license. However, the Authority still retained a hope of permitting the use of frozen eggs in cases where they had sufficiently compelling scientific

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<sup>517</sup> For example, Murray has suggested that body parts should be treated as gifts to be freely given to others rather than as property to be traded on the market, in order to foster relationships and create a wider sense of community. Thomas H. Murray, *On the Human Body as Property: The Meaning of Embodiment, Markets, and the Meaning of Strangers*, 20 *J. Legal Reform* 1055-57 (1987).

<sup>518</sup> Anderson, E., *supra* note 200, at p.180.

<sup>519</sup> Anderson, E., *supra* note 200, at p.180.

<sup>520</sup> Cancer survivors fight for right to use frozen eggs, BioNews, issue 039 (December 29, 1999) [http://www.bionews.org.uk/page.asp?obj\\_id=5526&ASTemp=38738](http://www.bionews.org.uk/page.asp?obj_id=5526&ASTemp=38738) (accessed December 29, 2016).

<sup>521</sup> HFE Act 1990, Section 4 (1)(b)(ii).

<sup>522</sup> *Ibid.*

evidence of its safe use.<sup>523</sup> It is now legally permitted to do so.<sup>524</sup>

In *Natalie Evans v Amicus Healthcare Ltd*,<sup>525</sup> Ms Evans was denied the use of frozen embryos which had been created through fertilisation of her eggs with her then partner's sperm, because her partner withdrew his consent and requested their embryos to be destroyed.<sup>526</sup> In some cases, older women have been prevented from undergoing fertility treatment and becoming mothers due to social and ethical concerns relating to the welfare of would be children.<sup>527</sup> Despite their autonomy, the body owners must satisfy the requirements of the law with regard to the use of their body. For instance, body owners are required to meet the stringent requirements set out in the Human Tissue Act 2004 pertaining to any activity involving the use of human body or material from it in medical circumstances, notably specific provisions of 'appropriate consent' of adults which needs to be made in writing.<sup>528</sup> Body owners are also obliged to follow the governance of the Human Fertilisation and Embryology Act in connection with reproductive material and decisions.<sup>529</sup> It might be understood that the aim of making such requirements is to protect, first and foremost, the interests of body owner and, more importantly, encouraging them to use their bodies in responsible ways. If the body owners act irresponsibly, they may harm not only themselves, but also others.

Accordingly, if we recognise the assumption that body owners can use and control their body in whatever ways they chose, it may be justifiable for a woman to use her own body to become surrogate mother. In a traditional surrogacy, the surrogate mother exercises her body ownership through providing reproductive material (her egg and womb) thus, creating a genetic link with the

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<sup>523</sup> *Ibid.*

<sup>524</sup> Freezing and storing eggs, <http://www.hfea.gov.uk/46.html> (last accessed December 29, 2016).

<sup>525</sup> [2003] EWHC 2161 (Fam).

<sup>526</sup> *Ibid.*

<sup>527</sup> Ruth Deech and Anna Smajdor, *From IVF to Immorality*, Oxford University Press, 2007, p. 81.

<sup>528</sup> Human Tissue Act, s.3.

<sup>529</sup> HFE Act 1990, Sections 3, 3ZA, 3A and 4 (as amended).

baby.<sup>530</sup> In gestational surrogacy, the surrogate mother is not genetically related to the baby as she provides the uterus/the womb only.<sup>531</sup> In this situation, exercising body ownership seems to be more complex because theoretically and practically, the womb/uterus is a human body part which might be seen as an object under body ownership. However, the surrogate mother does not reject her ownership over her womb when it is used for another's sake. In practice, the commissioning couple 'rent' her womb to establish a 'biological environment' in which the foetus grows, and this womb leasing will be terminated once the child is born. During pregnancy, the surrogate mother shares her ownership over her womb with the commissioning couple. This cardinal feature of gestational surrogacy could result in restrictions imposed on the surrogate mother or requirements from the commissioning couple, which may impact on the surrogate mother's autonomy.<sup>532</sup> But it is noteworthy that whether or not restrictions are imposed will depend on the agreement/arrangement.

However, it is also noted that the exclusive use of the human body is not absolute as it might be restricted in the public interest, for example in cases of prostitution or HIV screening tests. Where there exists a ban on prostitution, like the current situation in Vietnam,<sup>533</sup> you cannot be permitted to sell your body for sexual services as it is against public policy. Even in countries where prostitution is not outlawed, such as in Singapore,<sup>534</sup> there are restrictions. For instance, under the criminal law of Singapore, a minimum age of 18 years is required for becoming a prostitute, and any sexual transactions with a prostitute under 18

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<sup>530</sup> Jackson, E., *supra* note 8, at p. 261.

<sup>531</sup> Jackson, E., *supra* note 8, at p. 261.

<sup>532</sup> This would suggest that they can control epigenetic factors like where she lives, what she eats, drinks, etc, during pregnancy. This issue will be examined in more detail in the following section.

<sup>533</sup> Prostitution is illegal in Vietnam. However, as set out in the Penal Code 1999, prostitutes themselves are not criminally punished (but may be fined for doing it), only those who act as prostitution businessmen, intermediaries, and those who have sex with underage prostitutes, make prostitution offences (Articles 254, 255, 256).

<sup>534</sup> In early May 2013, an ex-banker of Switzerland (the former of UBSN executive director of operation) provoked an international scandal when he was sentenced to four months and three weeks in prison for having sex with a 17 year old prostitute in Singapore. <http://www.bloomberg.com/news/2013-05-08/ex-ubs-executive-director-buergin-gets-jail-for-underage-sex-1-.html> (last accessed December 29, 2016).



would be criminalized.<sup>535</sup> Meanwhile, compulsory screening for HIV, such as in the UK, is necessary to prevent infected persons from donating blood or sperm because of risks possibly imposed on recipients who are unable to avoid these.<sup>536</sup> In this vein, outlawing surrogacy in many countries may be justified for the protection of public interests and in response to public angers and public concerns over negative implications the practice may have caused. The new law 2015 in Vietnam allows altruistic surrogacy but prohibits commercial surrogacy for the same reason, and, hence, maintains limits in the use of the human body in the area of procreation. This position will be discussed in more detailed in chapters 5 and 6.

*b. Bodily integrity protects a surrogate mother from any external interference into her body without her agreement*

Respect for body ownership is closely linked to bodily integrity. Respect for a person's bodily integrity is regarded as one of the greatest values in medical law and considered to stem from personal autonomy or a right of self-determination.<sup>537</sup> The right to autonomy guarantees 'a right not to have something done to your body without your consent'<sup>538</sup> and the fact that 'a patient with capacity gives consent before being subjected to any medical procedure is the legal reflection of the primacy of the principle of respect for autonomy'.<sup>539</sup> Individual autonomy also guarantees the right to refuse medical care on the basis that 'every human being of adult years and sound mind has an absolute right to decide what shall be done with his own body'.<sup>540</sup> For these reasons, any interference without consent may be regarded as a forcible invasion

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<sup>535</sup> Penal Code of Singapore, s.376B.

<sup>536</sup> For example, in the UK, according to Code of Practice (8<sup>th</sup> Edition, first published 2009, last revised April 2012) of HFEA, prior to the use and/or storage of donor gametes and/or embryos created with donor gametes, gametes donors must meet a lot of criteria, including being negative for HIV1 and 2 through laboratory tests.

<sup>537</sup> Andrew Grubb et al, *Principles of Medical Law*, 3<sup>rd</sup> edition, Oxford University Press, 2010, p.440.

<sup>538</sup> Jonathan Herring, *supra* note 303, at, p.23.

<sup>539</sup> Andrew Grubb et al, *supra* note 423, at p.439.

<sup>540</sup> J. Cardozo, in *Schloendorff v. Society of New York Hospital* (1914) 105 N.E 92,93.

of the human body, infringing bodily integrity, violating human rights and consequently, amounts to a breach of law, as Lord Goff stated in *Re F*:

It is well established that , as a general rule, the performance of a medical operation on a person without his or her consent is unlawful, as constituting both the crime of battery and the tort of trespass to the person.<sup>541</sup>

In the context of procreation, the right to bodily integrity means that a person's body should not be interfered with without their agreement in every aspect of reproduction, from conception or contraception to pregnancy, as well as childbirth and abortion. In relation to surrogacy, the surrogate mother can exercise her procreative autonomy at any stage of reproduction and, as a result of it, her right to bodily integrity should be respected throughout this process. More specifically, she has the right to resist any invasions into her body against her will and the right to protect it from any physical alterations on the basis of individual autonomy. As a woman, the surrogate mother has the right 'to prevent conception by means of contraception, to terminate pregnancy by means of abortion, and to resist compulsory sterilization'<sup>542</sup> and not to be forced to undergo/or to refuse any unwanted treatment during pregnancy or childbirth.

In principle, a pregnant woman's right to refuse medical care is likely to be prioritised where there exists a conflict of welfares. For example, in the American case *Re Baby Boy Doe*,<sup>543</sup> the court's decision acknowledged the procreative autonomy of the mother and did not balance her right to refuse medical treatment against the rights of the foetus. In this case, the mother was advised to undergo a caesarean section for her foetus's sake, but she refused to do it on the grounds of her religious belief. The Illinois Court of Appeal held that 'a woman's competent choice to refuse medical treatment as invasive as a caesarean section during pregnancy must be honoured, even in circumstances

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<sup>541</sup> *Re F (Mental patient sterilisation)* [1990] 2 AC, at 71.

<sup>542</sup> Rao, R., *supra* note 357, at p.390.

<sup>543</sup> 632 N.E.2d 326 (Ill. App.Ct.1994).

where the choice may be harmful to her foetus',<sup>544</sup> because her right to deny invasive medical treatment 'derived from her right to privacy, bodily integrity, and religious liberty, is not diminished during pregnancy'.<sup>545</sup> The appellate court refused to order the mother to have a caesarean section for her foetus's health or life based on the conclusion that:

if a sibling cannot be forced to donate bone marrow to save a sibling's life, if a competent brother cannot be forced to donate a kidney to save the life of his dying sister, then surely a mother cannot be forced to undergo a caesarean section to benefit her viable foetus.<sup>546</sup>

English law and legal scholarship holds the same position in this regard as Jackson points out:

Given that it is not possible to force an individual to act against their wishes to save the life of another person, it would seem anomalous for someone to be forced to submit to unwanted medical intervention in order to preserve a foetus before it achieves legal personhood.<sup>547</sup>

But the English courts have not always adopted this position. The case of *Re S*<sup>548</sup> is a case in point. A 30 year old woman had been in labour for more than two days with her third pregnancy. Her labour was obstructed so that it endangered the lives of the foetus and of herself. Nevertheless, both the woman and her husband refused to agree to a caesarean section operation because of religious objections.<sup>549</sup> The surgeon was concerned with the emergency of the situation, emphasising in court that it was a 'life and death situation' where 'minutes

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<sup>544</sup> *Ibid*, at 332.

<sup>545</sup> *Ibid*, at 332.

<sup>546</sup> 632 N.E.2d 326 (Ill. App.Ct.1994), at 334.

<sup>547</sup> Judith Jarvis Thomson, A Defense of Abortion, *Philosophy and Public Affairs*, vol.1, no.1, 1971, pp.47-66; Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy*, Oxford: Hart, 2001, p.133.

<sup>548</sup> [1992] 3 W.L.R.806, [1993] Fam.123.

<sup>549</sup> *Ibid*.

rather than hours' were crucial.<sup>550</sup> Therefore, the health authority applied for a declaration that caesarean operation could be carried out notwithstanding the refusal or consent of the mother.<sup>551</sup> Sir Stephen Brown accepted the evidence of the surgeon and granted the declaration, allowing the operation to be lawfully performed without the mother's consent.<sup>552</sup> However, this case is exceptional because subsequent case law has not upheld it (as discussed below) and indeed, this judgment, and others, was overturned on appeal.

In *Re MB*,<sup>553</sup> the autonomy of the mother was overridden by compulsory treatment but she subsequently appealed against the decision, which had forced her to undergo caesarean section. The appellant was 40 weeks pregnant when it was found out that the foetus was in breech position and a natural delivery would pose serious risks to the child. In fact, she had consented on more than one occasion to the caesarean operation to increase the foetus chances of survival, but had subsequently withdrawn her consent on each occasion because of her fear of needles. Although categorically stating as a principle that a person has an absolute right to refuse to consent to medical treatment even if the reasons are irrational and even where that decision might endanger his/her life,<sup>554</sup> and that it would be an unlawful caesarean operation carried out upon a competent woman regardless of her consent, the Court of Appeal still dismissed MB's appeal.

The Court held that temporary factors such as impairment or disturbance of mental functioning may completely erode a person's capacity; that fear and panic may also destroy her capacity to make a decision whether to consent to or refuse treatment; that intervention was necessary and in her best interests; and that the necessity of force or compulsion could only be judged by the health

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<sup>550</sup> *Ibid.*

<sup>551</sup> *Ibid.*

<sup>552</sup> *Ibid.*

<sup>553</sup> [1997] 2 FLR 426.

<sup>554</sup> *Ibid.* The court reiterated this principle of English law by citing *Re T (An Adult)(Consent to Medical Treatment)* [1993] Fam 95 per Lord Donaldson MR at page 102.

professionals in the individual case. In other words, the Court rejected the woman's right to autonomy and bodily integrity on the basis of her incompetence. This case has proven that the principle of protecting a pregnant woman's right to procreative autonomy might not always be applied in court, and Herring has suggested that 'the courts would always circumvent these fine-sounding principles by finding the woman incompetent to make the decision'.<sup>555</sup>

However, in a number of cases the pregnant woman's right to autonomy and bodily integrity has still been maintained so that compulsory treatment for a pregnant woman may constitute an infringement of her autonomy and amount to a trespass, as in *St George's Healthcare N.H.S Trust v S*.<sup>556</sup> The applicant, who was 36 weeks pregnant and diagnosed with pre-eclampsia, was advised to undergo an induced delivery in order to avoid risks to her life and that of her foetus. The woman acknowledged the risks, but continually refused the suggestion because she wanted a natural delivery. She was admitted to a psychiatric hospital for assessment against her will,<sup>557</sup> and was later transferred to a general hospital, where she was delivered a baby girl by compulsory caesarean section. The woman discharged herself from hospital when her detention under the Mental Health Act 1983 was terminated.<sup>558</sup> The applicant appealed against the declaration which dispensed with her consent to treatment and applied for judicial review of the decisions of the social worker to apply for her admission to a mental hospital, as well as of the hospital authorities to detain, confine her and compel her to undergo treatment.

The Court allowed her appeal by holding:

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<sup>555</sup> Jonathan Herring, Case Comment: Caesarean Sections and the Right of Autonomy, *Cambridge Law Journal*, 1998, p.440.

<sup>556</sup> [1998] 3 W.L.R. 936.

<sup>557</sup> S's social worker made an application for a compulsory admission to hospital for assessment by obtaining the written consent of two doctors in pursuance of section 2(3) of the Mental Health Act 1983.

<sup>558</sup> [1998] 3 W.L.R. 936.

that even when his or her own life depended on receiving medical treatment, an adult of sound mind was entitled to refuse it; that, although pregnancy increased the personal responsibilities of a woman, it did not diminish her entitlement to decide whether to undergo medical treatment; that the unborn child was not a separate person from its mother and its need for medical assistance did not prevail over her right not to be forced to submit to an invasion of her body against her will..., and that right was not reduced or diminished merely because her decision to exercise it might appear morally repugnant....and the perceived needs of the foetus did not provide the necessary justification.<sup>559</sup>

The Court further held that the Mental Health Act 1983 could not be used to justify the detention and treatment against S's will just because her thinking might seem 'unusual and contrary to the views of the overwhelming majority of the community at large',<sup>560</sup> unless her capacity to consent was reduced. Under sections 2 and 3 of the Mental Health Act 1983, a person may be detained, compulsorily assessed and treated against their will, but only for the mental illness. In this case, the treatment for her pregnancy (namely caesarean section) was not treatment of a mental condition 'for which she could be admitted to hospital under the Act of 1983'.<sup>561</sup> Moreover, during her period as a patient no specific treatment for mental disorder or mental illness was prescribed. For these reasons, the application for S's admission to a mental hospital was unlawful and hence, her detention for treatment was wrong.

In this case, the Court upheld the principle of respect for an individual's autonomy and bodily integrity by stating that the right autonomy and self-determination may be given priority over other principles such as sanctity of life.<sup>562</sup> In other words, S retained the absolute right to refuse medical treatment to the extent that 'no concession should be made'<sup>563</sup> to her right. However, Herring criticised the Court's decision about upholding the pregnant woman's

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<sup>559</sup> [1997] 2 FLR 426, at 937.

<sup>560</sup> *Ibid*, at 937.

<sup>561</sup> *Ibid*, at 937.

<sup>562</sup> *Ibid*, at 951-954.

<sup>563</sup> Herring, J., *supra* note 441, at p.440.

right to bodily autonomy because of its potential threats to both the mother and the foetus. He suggests there is 'a legal duty on a pregnant woman which requires an invasion of her body in order to promote the foetus's interest'.<sup>564</sup> Furthermore, the right to autonomy is undeniably of paramountcy, but sometimes 'it calls for the highest of sacrifices',<sup>565</sup> for example if the lives of both the mother and her foetus are at risk. This reiterates the argument that a person's autonomy is not without limits and, hence, in some cases it might be justifiably reduced for the sake of others in arrangements such as surrogacy.

In the context of surrogacy, other than the right to refuse medical treatment, a pregnant woman's right to bodily integrity might be seen as a manifestation of 'the right to autonomy in decisions affecting the health and welfare of the mother'<sup>566</sup> that the surrogate mother should possess. As Gostin has argued:

The right of a gestational mother to make future decisions about her body, lifestyle, and an intimate future relationship with her child are so important to her dignity and human happiness that they should be regarded as inalienable.<sup>567</sup>

This means that the surrogate mother should maintain her bodily integrity in relation to her lifestyle during pregnancy to the extent that the of her foetus may be overruled. Even if some surrogacy arrangements do seek to constrain her lifestyle choices, for example, with regard to smoking, drinking alcohol or similar activities which might be harmful to the foetus, her bodily autonomy should be prioritised over various concerns from other parties.

The right to bodily integrity might also extend to the point where it includes one of the most important and complex decisions that the surrogate mother may

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<sup>564</sup> Herring, J., *supra* note 441, at p.441.

<sup>565</sup> Herring, J., *supra* note 441, at p.441.

<sup>566</sup> Larry Gostin, A Civil Liberties Analysis of Surrogacy Arrangement, in Larry Gostin (ed), *Surrogate Motherhood: Politics and Privacy*, John Wiley & Sons, 1990, p.14.

<sup>567</sup> *Ibid*, p.14.

make during pregnancy, viz. the right to abort the foetus. In jurisdictions like the UK, where a surrogate mother is not bound to a surrogacy arrangement because of its non-enforceability, there is no legitimate legal dispute arising from the decision to abort so long as she satisfies the requirements of the Abortion Act 1967.<sup>568</sup> Therefore, the surrogate mother's procreative autonomy is always prioritized and she can resort to abortion in spite of the commissioning parents' wishes. If a UK surrogate mother meets the criteria for a lawful abortion (for example, criteria set out in sections 1(1)(a) and 1(1)(b) of the Abortion Act 1967)<sup>569</sup> and gives her consent, no one can prevent her from having the termination. Similarly, nobody can ask her to terminate the pregnancy without her agreement unless she lacks capacity.

However, the situation may be different and more complex in other countries where surrogacy arrangements are enforceable. In some US states, like California where surrogacy is contractually enforceable,<sup>570</sup> the surrogate mother may make a decision to abort the foetus based on the demand of the commissioning parents. Nevertheless, the commissioning couple cannot force her do it against her will. In practice, the disagreement between the surrogate and the couple in the event of multiple pregnancy may lead to complex legal battles. This happened in a US case involving a British woman (Helen Beasley), who entered into a commercial surrogacy with a Californian couple and became pregnant with twins. The commissioning couple requested her to abort one foetus because they only wanted one child, but she refused.<sup>571</sup> It is important to note that a

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<sup>568</sup> In the UK the legislation does not give a woman a right to decide to abort. Under Section 1(1) of the Abortion Act 1967, it is for two doctors to decide that she satisfies the requirements of the Act and they can then authorize the procedure.

<sup>569</sup> Sections 1(1)(a) and 1(1)(b) of the Abortion Act 1967 provides that an abortion is lawfully performed if (i) the continuance of the pregnancy would cause risk to the life of the pregnant woman or harm to her health or any existing children of her family and (ii) there is a high probability of the child being born with abnormalities.

<sup>570</sup> The enforceability of a contract depends on a resolution of a number of issues. First, the court must decide whether such a contract is void as against public policy or voidable by the birth mother. If the contract is enforceable, then the proper remedy for the breach of the agreement must be determined. Some courts may order the mother to hand over the child, whereas other courts will only allow monetary damage. See <http://www.legalmatch.com/library/article/surrogacy-contract-lawyers.html> (last accessed December 29, 2016).

<sup>571</sup> Surrogate mother pushes for adoption, <http://news.bbc.co.uk/1/hi/health/1485494.stm> (last



verbal agreement was previously made between the couple and the surrogate mother, in which she agreed to abort additional fetuses if more than one egg was fertilized and such a decision had to be given before the 12<sup>th</sup> week of her pregnancy. In her 13<sup>th</sup> week, the couple arranged for the abortion to be taken place in the hospital, but she refused on health grounds.

The couple rejected unborn twins and hence, the case was brought to court by the surrogate mother.<sup>572</sup> She filed a lawsuit in San Diego Superior Court, claiming damages for emotional distress and violation of contract.<sup>573</sup> She also took the case to the family court in order to revoke the commissioning couple's parental rights and put the twins up for adoption.<sup>574</sup> In response, the couple demanded 80,000 USD in expenses, claiming that the surrogate broke the terms of the surrogacy contract.<sup>575</sup> Because under California law parental rights are granted to the intended parents,<sup>576</sup> the surrogate was unable to seek adoptive parents for the twins. In the end, the court requested the couple to pay the surrogate 6,500 USD and to continue their payments to her in the future.<sup>577</sup>

This case has shown 'the unique vulnerability of surrogates in the context of these arrangements',<sup>578</sup> but equally 'shed light on the myriad legal and ethical issues concerning commercial surrogacy arrangements'.<sup>579</sup> Legal experts asserted that although it was impossible to envisage all the difficulties and issues that may arise in a surrogacy arrangement, the legal battle between the surrogate and the

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accessed March 29, 2016).

<sup>572</sup> See Surrogate mother sues couple who turned down twins. <http://www.dailymail.co.uk/news/article-65930/Surrogate-sues-couple-turned-twins.html> (last accessed December 29, 2016).

<sup>573</sup> *Ibid.*

<sup>574</sup> *Ibid.*

<sup>575</sup> Surrogate sues parents over unborn twins, <http://edition.cnn.com/2001/US/08/11/surrogate.twins/> (last accessed December 29, 2016).

<sup>576</sup> In a US high profile case *Johnson vs. Calvert* ((1993) 5 Cal.4th 84), surrogate mother Anna Johnson lose the case as the California Supreme Court decided that the custody of the child was given to the couple (Crispina and Mark Calvert).

<sup>577</sup> Rosemarie Skaine, *Paternity and American Law*, McFarland & Co Inc, 2002, p.112.

<sup>578</sup> Catherine London, Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts, *Cardozo Journal of Law and Gender*, vol.18, 2011/2012, p.392.

<sup>579</sup> *Ibid*, p.391.

couple could have been prevented provided that the parties fully understand the arrangement and are given the proper guidance.<sup>580</sup> Legal experts believed that the verbal agreement was the cause of all kinds of problems and it was recommended that the contract should be written and reviewed by all parties.<sup>581</sup> It was also suggested that even if decisions as to the future of the foetus(es) have been made clear at the commencement of arrangements, adjustments or alterations may still be achievable at the will of both parties and in favour of the children's interests. These revisions must be added to the contract and reviewed by the parties.<sup>582</sup> In so doing, the potential for conflict between both parties may be minimised when either of the parties change their mind, and the welfare of both the surrogate mother and the child(ren) might be safeguarded to its fullest extent.

In practice, there is also a possibility that the parties involved in a surrogacy arrangement may reach an agreement to abort in the specific circumstances where the foetus is seriously disabled. In this situation, although the commissioning parents might wish to abort the foetus, they still need the acceptance of the surrogate mother. If she changes her mind and wants to keep the foetus, regardless of any previous agreement, they cannot force her to abort against her will.<sup>583</sup> Her autonomy allows her to maintain the right to consent or refuse to terminate the pregnancy, but, equally, she cannot require the couple to take the child if they want to terminate and she refuses to do so. Obviously, were there to be a conflict between the parties over the problem of keeping such a foetus or having it aborted, the autonomy of the surrogate mother should take priority. This is consistent with the argument of Gostin that:

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<sup>580</sup> Bryan Robinson, Foetus and surrogacy lose in legal battle, ABC News (August 14, 2001) <http://abcnews.go.com/US/story?id=92627&page=1> (last accessed December 29, 2016).

<sup>581</sup> *Ibid.*

<sup>582</sup> *Ibid.*

<sup>583</sup> There has been a case in Canada where a couple in a commercial surrogacy arrangement requested the surrogate mother to abort the foetus diagnosed with Down's syndrome, but the latter denied to do so at first. However, a legal case was not brought about because in the end the surrogate made a decision on abortion due to her family obligations. See *Couple request surrogate mum to abort over disability* [http://www.bionews.org.uk/page\\_71982.asp](http://www.bionews.org.uk/page_71982.asp) (last accessed March 29, 2016).

As neither husbands nor parents can overrule a woman's decision to get an abortion, the courts would be highly unlikely to give this right to the father in a surrogacy arrangement.<sup>584</sup>

### **5.2.3 To respect procreative autonomy is to facilitate infertile persons to ameliorate their reproductive incapacity**

Procreative autonomy implies that infertile persons have a right to make their own reproductive choices with a view to their genetically related children being born through technological assistance. However, their freedom to act might be constrained by the way the law regulates the use of assisted reproductive technology. The ban on surrogacy in Vietnam, for example, restricted the autonomy of infertile persons by preventing them from having children with the help of a surrogate, robbing them of the opportunity to repair their reproductive imperfection, and thus depriving them of their chance to have genetically connected children.<sup>585</sup> This section makes an argument for upholding the procreative autonomy of infertile persons in relation to relaxing reproductive constraints that prevent them having children through surrogacy arrangements. In this section I will argue that disrespect for procreative autonomy may wreck the chance of infertile persons to relieve the pain of infertility.

Procreative autonomy might be seen as a positive right, the exercise of which requires intervention by others. Respect for autonomy means both respectful attitudes and respectful actions that acknowledge decision-making rights and enable people to act autonomously should be adhered to.<sup>586</sup> Furthermore, it is widely accepted that 'to be autonomous a person must not only be given a

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<sup>584</sup> Larry Gostin, A Civil Liberties Analysis of Surrogacy Arrangement, in Larry Gostin (ed), *Surrogate Motherhood: Politics and Privacy*, John Wiley & Son, 1990, p.15.

<sup>585</sup> The British Medical Association acknowledged that surrogacy may be seen as 'an acceptable option of last resort' for women who have clinical reproductive difficulties with regard to pregnancy and childbirth. See BMA, *Changing Conceptions of Motherhood: The Practice of Surrogacy in Britain*, London, 1996.

<sup>586</sup> Beauchamp, T., L., and Childress, J., F., *supra* note 304, at p.103.

choice but he must also be given an adequate range of choices'<sup>587</sup> and that, autonomy 'is not just the right to pursue ends that one already has, but also to live in an environment which enables one to form one's own value system and to have it treated with respect'.<sup>588</sup> This is consistent with the argument that 'in order to treat individuals with dignity and respect, we should give them both the freedom to exercise reproductive choice, and a set of realistic and valuable reproductive opportunities'.<sup>589</sup> For this reason, the state might be expected to provide a wide range of necessary assistance (from an effective healthcare system at national level to a transparent and unified legal system) to help all those who need infertility treatment make their reproductive choices, except in some cases where restrictions are imposed for the sake of public interest or in the name of countervailing interests.<sup>590</sup> Therefore, if infertile persons are denied the right to procreative autonomy, their reproductive lives might be affected in negative ways.

First, infertile persons may have limited choice when deciding to procreate. It follows that they are not always allowed to access to (in) fertility treatments at their will, but rather must satisfy a host of legal conditions. For example, in the UK the Human Fertilisation and Embryology Act 1990 (as amended by the HFEA 2008) requires women and couples to satisfy a number of criteria before they can be provided with treatment services. A woman shall be prohibited from any treatment services if account has not taken on 'the welfare of any child who may be born as a result of the treatment (including the need of that child for *supportive parenting*), and of any other child who may be affected by the birth'.<sup>591</sup> She might also be denied access to treatment services unless

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<sup>587</sup> Joseph Raz, *The Morality of Freedom*, Oxford University Press, 1986, p.873.

<sup>588</sup> Jackson, E., *supra* note 8, at p.6.

<sup>589</sup> Jackson, E., *supra* note 8, at p.5.

<sup>590</sup> For example, in the UK, if there are other more pressing calls on NHS resources, it may not be possible to provide NHS fertility treatment to all who need it. See Jonathan Herring, *supra* note 303, at p. 359.

<sup>591</sup> HFE Act 1990, Section 13 (5), amended by HFEA 2008, Section 14(2)(b).

she and any man or woman who is to be treated together with her have been given a suitable opportunity to receive proper counselling about the implications of her being provided with treatment services of that kind, and have been provided with such relevant information as is proper.<sup>592</sup>

The above-mentioned limitations set out by the Human Fertilisation and Embryology Act might be justified on the grounds of, on the one hand, preventing those involved in treatment services, even with a worthy aim of relieving infertility, from doing harm to others, and on the other, avoiding the socio-economic burden of providing healthcare services. For example, provided their welfare is taken into account, children born of surrogacy arrangements may be prevented from suffering harm of being abandoned by both the surrogate and the commissioning couple. From a socio-economic perspective, plethora of treatments at a large scale might be a burdensome as the public budget may be stretched to cover the cost of treatment and a society as a whole must deal with unwanted consequences of fertility treatments.<sup>593</sup>

According to this policy, licensed clinics in the UK were expected to transfer no more than three embryos in each cycle of IVF treatment from 1991 onwards. One decade later, in 2001 a two-embryo transfer policy for women under the age of 40 years was introduced (three embryos could be transferred in exceptional circumstances only).<sup>594</sup> In 2004, the policy was revised so that now ‘a maximum of two embryos can be transferred to women under the age of 40, with no exception, and a maximum of three can be transferred of three in women aged 40 and over’.<sup>595</sup> The limited number of embryos for implantation has been set up and changed in order to avoid multiple births – a serious problem both medically and socially. From a medical perspective, multiple births (resulting from surplus embryos) may impinge on the success rate of treatment

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<sup>592</sup> HFE Act 2008, Section 14 (3) (a substitute for section 13 (6) of HFEA 1990).

<sup>593</sup> However, it is noteworthy that this will really only apply in a publicly funded health care system – this is why the USA has different rules.

<sup>594</sup> Human Fertilisation and Embryology Authority, Embryo transfer and multiple births. See at <http://www.hfea.gov.uk/2587.html> (last accessed March 29, 2016).

<sup>595</sup> *Ibid.*

and impose the health risks upon both pregnant women and children. Moreover, these risks 'are far higher than those associated with singletons'.<sup>596</sup> From a social perspective and from the point of view of the economy, 'any additional burdens and expense of multiple births will fall in the end to the NHS and social security'.<sup>597</sup>

Multiple births are also a complex legal issue relating to personal autonomy. In the majority of cases, procreative autonomy of the pregnant woman will be prioritised and respected even though this may have serious consequences. In a very famous case in 1996, Mandy Allwood, a British woman, became pregnant with octuplets after taking fertility drugs, but refused to use contraceptive to avoid producing multiple eggs. She also refused to undergo selective abortion to maximize the chances of some of the foetuses being born alive. The tragic outcome happened when all of the foetuses were lost at 19 weeks of pregnancy. This case raised many concerns as to whether individual autonomy should be overridden in some circumstances.<sup>598</sup> In general, to a certain degree, the policy of restricting multiple births in the UK constrains the choice of infertile couples because they cannot act freely when contemplating having children through IVF. In a broader context, the limited choices available for infertile persons shows that their autonomy is restricted in order to ensure safety and to limit the burden of public health or social security services (as discussed above).

Infertile persons are also deprived of some valuable opportunities to relieve the pain of infertility in their own way. Persons are often infertile because of biological reasons - for instance, where a male does not have sperm or has a very low sperm count, or a female may be unable to conceive, gestate and give birth to a child due to hysterectomy, repeat miscarriages or malformation of

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<sup>596</sup> Deech, R and Smajdor, A. *supra* note 413, at p.39.

<sup>597</sup> *Ibid*, p.39.

<sup>598</sup> See Tim Adams, *When story's over*, *The Guardian online*, (Sunday, 27 January 2002) <http://www.guardian.co.uk/theobserver/2002/jan/27/features.magazine57> (last accessed December 29, 2016).

reproductive organs. In addition, there are individuals who are classified as socially infertile, for example, single people or a gay couple cannot have children coitally. Some people accept their infertility and can live happily without children, but others strive to have the children they want through infertility treatment. For those who seek infertility services, legitimate legal constraints on procreative autonomy may not only block their pathway to parenthood, but may also cause personal tragedies within their families, as illustrated in following UK cases.

In *Mrs U v Centre for Reproductive Medicine*,<sup>599</sup> a woman was denied the opportunity of the posthumous use of her deceased husband's sperm and was, thus, denied the opportunity to become a mother through IVF treatment with her husband's sperm. Mrs U and Mr U married in 1993 and it was a second marriage for both of them. Mrs U had no children whereas Mr U had two teenage children. They decided to have children together. Mr U had undergone vasectomy in 1978 and had a failed attempt to reverse his vasectomy in 1995. They made another attempt in 2000 to retrieve Mr U's sperm by surgical operation in order to use them for fertilizing Mrs U's eggs by the technique of intra-cytoplasmic sperm injection (ICSI). Initially, Mr U completed a consent form for the storage and disposal of sperm, in which he agreed that his wife could still use his frozen sperm if he died or became incapacitated. Yet, after a consultation with a specialist nursing sister, Mr U changed his mind and made some alterations to the form so that his sperm would be destroyed should he die or become incapacitated. This was consistent with the policy against the posthumous use of sperm, adopted by the clinical unit where they were treated. Unexpectedly, he died of asthma in 2001. Mrs U did not wish her husband's sperm to be destroyed, so brought the case, claiming that her husband first consent should be respected because his second consent had been made under undue influence. However, her case was dismissed as the court upheld her husband's final decision. She appealed against the order of the President of the

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<sup>599</sup>[2002] EWCA Civ 565.

Family Division,<sup>600</sup> but the Court of Appeal also rejected her appeal.

In this case, the continued storage and later use of Mr U's sperm by his wife was rendered unlawful by virtue of the HFE Act 1990. The storage of Mr U's sperm and bringing about the creation of the embryo, or storage or use of the embryo by Mrs U without explicit consent may amount to a criminal offence by virtue of Sections 4 (1) (a), 3 (1) (a) and 41 (2) of the HFE Act 1990.<sup>601</sup> The licenses for treatment and for storage of gametes and embryos could not be issued because the persons involved did not meet the condition governing consent to the use of gametes and embryos. In more detail, paragraph 8(1) of Schedule 3 states that a person's gamete must not be kept in storage unless there is an effective consent by that person to their storage and they are stored in accordance with that consent. Paragraph 1 explains that 'an effective consent' must be given in writing and has not been withdrawn. Furthermore, paragraph 4 deals with variation and withdrawal of consent, providing that the terms of any consent under this schedule may from time to time be varied, and the consent may be withdrawn, by notice given by the person who gave the consent to the person keeping the gametes or the embryo to which the consent is relevant. The courts also stated that her late husband's second consent was not made under undue influence, but was made consciously and independently as an alteration to the first consent.<sup>602</sup> For these reasons, despite having sympathy with Mrs U's plight, the Court of Appeal rejected her case.

It is also noted that although posthumous use of gametes or sperm is not prohibited, in this particular case, it was not accepted on the basis of protecting the welfare of children. Section 29 (6) (b) provides that where the sperm of a

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<sup>600</sup> [2002] EWHC 36, [2002] Lloyd's Rep. Med. 93.

<sup>601</sup> Section 4(1)(a) of the Human Fertilisation and Embryology Act 1990 provides that no person shall store any gametes except in pursuance of a licence; section 3(1)(a) provides that no person shall bring about the creation of an embryo or keep or use an embryo except in pursuance of a licence. Section 41(2) envisages that contravention of either of these provisions is a criminal offence.

<sup>602</sup> [2002] EWCA Civ 565.



man, or any embryo the creation of which was brought about with his sperm, was used after his death, he is not to be treated as the father of the child.<sup>603</sup> It follows that the child to be would be fatherless with no supportive fathering. However, since this case the situation has been changed. The HFE Act 2008 amended some conditions for licensed treatment set out in the HFE Act 1990 and removed the requirement of Section 13(5) with regard to considerations of children welfare, including the need for a father of a child who may be born as a result of the treatment.<sup>604</sup> But at the time of this case (2002), section 13 (5) was still valid and applied, and, hence, Mrs U was denied having the use of her dead husband's sperm to bring a child into the world through IVF treatment.

Another example where a woman's procreative autonomy was restricted and she was deprived of her opportunity of motherhood may be found in *Natalie Evans v Amicus Healthcare Ltd.*<sup>605</sup> In this case, Ms Evans lost her only chance of having genetically related children after the courts (the High Court and the Court of Appeal) dismissed her claims and her appeal that she may have the embryos created with her eggs and her ex partner's sperm transferred to her womb. The reason for her claim was that her ex partner withdrew his consent and refused to allow use or continued storage of the embryos, and, therefore, the embryos would be destroyed. The courts' judgment was made on the basis of the consent provisions set out in HFE Act 1990. In particular, Schedule 3 was cited to show that a person can withdraw or vary his/her consent at any time prior to the embryos being used. This case is more tragic than that of Mrs U because Ms Evans had had her cancerous ovaries removed before the creation of the embryos and could not achieve motherhood without these embryos. The destruction of the embryos meant that she lost her chance of having a biologically connected child, whereas her ex partner still had opportunity to find another partner and the capacity to start another family. This case was

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<sup>603</sup> HFE Act 1990.

<sup>604</sup> The term 'a father' written in Section 13(5) of the HFE Act 1990 was substituted by the term 'supportive parenting' in Section 14(2)(b) of the HFE Act 2008.

<sup>605</sup> [2003] EWHC 2161 (Fam)

welcomed by some for taking fatherhood as seriously as motherhood and improving the role of men beyond fertilization.<sup>606</sup>

The cases abovementioned support the idea that it is better for the law to relax its restrictions on infertile persons' procreative autonomy because these constraints may have profound and serious impacts on their personal lives, creating many family tragedies, and preventing many individuals from having genetically related children. In the context of surrogacy, this is of greater significance because surrogacy is commonly regarded as a last resort after infertile persons have experienced the failure of other assisted reproductive technologies, such as artificial insemination. The recent legal reforms in Vietnam have shown that the Vietnamese law makers have recognised the procreative autonomy of infertile couples and accepted a more permissive approach to surrogacy, enabling infertile couples to achieve parenthood. However, only heterosexual married couples are eligible to altruistic surrogacy. This means that other infertile people are being denied their procreative autonomy with regard to surrogacy. The next chapter will discuss the limitations of the new law on surrogacy, including the restricted availability of altruistic surrogacy, and suggest the ways to reform this law in the future.

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<sup>606</sup> Deech, R and Smajdor, A. *supra* note 413, at p.79.

## CHAPTER 6:

### IMPERFECTIONS IN THE LAW 2015 ON SURROGACY IN VIETNAM

By introducing regulations on surrogacy in an effort to make an amendment to the law on marriage and the family 2000,<sup>607</sup> the Parliament of Vietnam put an end to the decade long complete ban on surrogacy.<sup>608</sup> Vietnamese law makers adopted a new and dual approach to surrogacy by prohibiting commercial surrogacy while allowing surrogacy within families on the basis of altruism. However, this legal approach reveals imperfections in the law on surrogacy which may limit the availability of surrogacy arrangements in practice. For example, restricting the availability to altruistic surrogacy within the family may challenge intended couples to find a woman to act as surrogate mother and hence, would incite them to struggle in the same way as they did under the previous ban. This chapter will discuss the imperfections in the new law on surrogacy in Vietnam while looking at the UK jurisdiction, where many surrogacy cases have been resolved in the courts, in order to learn from those experiences and find appropriate solutions to problems possibly caused by these imperfections.

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<sup>607</sup> On 19<sup>th</sup> June 2014, the Parliament of Vietnam passed the amended Law on Marriage and the Family, which came into force from 1<sup>st</sup> January 2015. Regulations on surrogacy are incorporated in this law.

<sup>608</sup> As previously mentioned, the ban on surrogacy in Vietnam was introduced in the Decree 12/2003/ND-CP on human reproduction using assisted technologies, which was enacted by the Vietnamese Government in February 2003.

## 6.1 Altruistic surrogacy within the family – A small window of opportunity for parenthood for Vietnamese infertile couples

Before going on to discuss altruistic surrogacy within the family under the current law of Vietnam, it is necessary to have an overview of altruistic surrogacy in general. As discussed in the Introduction, surrogacy is categorised as full (or gestational) surrogacy and partial surrogacy. Surrogacy may also be classified into two types: altruistic surrogacy and commercial surrogacy. Altruistic surrogacy (or non-commercial surrogacy) is a practice where the surrogate mother is not paid for her procreative services, whereas in commercial surrogacy money is paid to the surrogate mother for her services.<sup>609</sup> Altruistic surrogacy is permitted in the few countries where surrogacy is recognised, but the enforceability of surrogacy arrangements might be denied by law. For example, the United Kingdom and Greece are the only two countries in the European Union that expressly recognise non-commercial surrogacy, but set strict conditions on the making of surrogacy arrangements. In Greece, the law allows surrogacy for altruistic reasons only and no financial benefits may be derived from the surrogacy arrangement.<sup>610</sup> Under Greek law, pre-conception judicial approval is required and a court order must be issued under stringent conditions, prior to the birth.<sup>611</sup> In the UK, non-commercial surrogacy has been recognised since 1985 when the Surrogacy Arrangement Act 1985 was introduced. This Act provides that negotiating surrogacy arrangements on a commercial basis may

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<sup>609</sup> Swapnendu Banerjee, Gestational Surrogacy Contracts: Altruistic or Commercial? A Contract Theoretic Approach, *The Manchester School*, Vol.81, No.3, June 2013, p.439.

<sup>610</sup> European Parliament, *A Comparative Study on the Regime of Surrogacy in EU Member States*, 2013, p.282. In Greece, surrogacy is regulated by the combination of the Articles 1458 and 1464 of the Civil Code, article 8 of Law 3089/2002 (domicile in Greece), and Article 13 of the Law 3305/2005. Article 1458 of the Greek Civil Code defines surrogacy as '[t]he transfer of fertilized eggs, which do not belong to the surrogate mother herself, into the body of another woman, so as to gestate them. This is allowed when there is a written agreement, without any financial benefit, between the parties involved, meaning the person(s) wishing to have a child and the surrogate mother, and her husband, if she has one. The court authorization is issued before the transfer and following an application of the woman who wants to have a child, provided that evidence is adduced proving that the intentional mother is unable (for medical reasons) to bear a child, and that the woman offering to become the surrogate is, with regards to her (physical and mental) health status, suitable for it'.

<sup>611</sup> *Ibid.*

amount to an offence and be punishable by criminal law (section 2). Furthermore, according to section 1A of the Surrogacy Arrangements Act (modified by section 36 of the Human Fertilisation and Embryology 1990), 'no surrogacy arrangement is enforceable by or against any of persons making it'. Therefore, the surrogate mother cannot be forced to transfer the child to the intended parents should she change her mind and want to keep the child.

Commercial surrogacy has been prohibited in countries where legislators have attempted to ban all payments to surrogate mothers and people involved in surrogacy arrangements. Those who ignore the ban may be liable to a term of imprisonment or to a fine.<sup>612</sup> One of the main objections to commercial surrogacy contracts relates to the protection of public policy. For example, the Law 40/2004 enacted by the Italian Parliament bans surrogacy by stating that all surrogate mother contracts, which require the surrogate mother to consent to third party adoption of the child following birth and to facilitate the transfer of child custody, are null under the Italian Civil Code (1942, art. 1325), because the law views them as being against public policy.<sup>613</sup> Other reasons for rejecting commercial surrogacy lie in the possible exploitation of reproductive capacities of financially needy women by well-off couples resulting in a depreciation of their worth as human beings. In particular, it is argued that disadvantaged surrogate mothers might be exploited because they may not fully understand the potential risks of surrogacy arrangements.<sup>614</sup> Furthermore, surrogacy contracts may lead to commodification of both children and surrogate mothers as discussed in Chapter 3. In Australia, for instance, legislation in all states and the Australian Capital Territory forbids commercial surrogacy on the ground that

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<sup>612</sup> For instance, the Federal Act on Medically Assisted Reproduction 1998 of Switzerland forbids surrogacy and provides the punishment for those involved in surrogacy arrangements by stating that 'anyone who uses an assisted reproductive technique in a surrogate mother shall be liable to a term of imprisonment or to a fine' and 'the same penalty shall apply to anyone who acts as an intermediary for surrogate motherhood'. See Federal Act on Medically Assisted Reproduction 810.11 (Reproductive Medicine Act, RMA) of 18 December 1998 (English translation), [http://www.admin.ch/ch/e/rs/810\\_11/index.html#fn3](http://www.admin.ch/ch/e/rs/810_11/index.html#fn3) (last visited December 29, 2016).

<sup>613</sup> Andrea Boggio, Italy Enacts New Law on Medically Assisted Reproduction, *Human Reproduction*, Vol 20, No.5, p.1153.

<sup>614</sup> Banerjee, S, *supra* note 607, at p.439.

there has been 'a deep discomfort with the commodification of children, women and reproductive services'.<sup>615</sup> Therefore, prohibiting commercial surrogacy may prevent exploitation and commodification. Moreover, some writers argue that banning commercial surrogacy reflects the intention of law makers in many jurisdictions that a surrogate woman should be motivated by altruism – a service out of love and a sense of social responsibility – rather than a profit motive.<sup>616</sup>

Altruistic surrogacy is preferred by some to commercial surrogacy because it not only excludes the involvement of money, but also 'reinforces dominant values and social aims regarding the family'.<sup>617</sup> Stuhmcke argues that 'these values are that it is inappropriate to mix love and intimacy with cash and commerce but that it is appropriate and acceptable to undertake actions out of generosity and feeling'.<sup>618</sup> According to Stuhmcke, 'cash and commerce, which are perceived as being the domain of commercial surrogacy, involve self-interest; human reproduction is seen as principally a matter of unselfish and noble behaviour'.<sup>619</sup> Altruistic surrogacy does not involve money and, thus, fits society's perception of human reproduction as a noble and selfless act.<sup>620</sup>

However, it is notable that, in spite of its non-commercial basis, altruistic surrogacy still raises concerns over exploitation of the surrogate mother. There is a possibility that in altruistic surrogacy within the family, those with less power and money might be forced to become surrogate mothers.<sup>621</sup> Some scholars

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<sup>615</sup> Mary Keyes, Cross-border Surrogacy Arrangements, *Australian Journal of Family Law*, No.26, 2013, p.42.

<sup>616</sup> *Ibid*, p.439.

<sup>617</sup> Anita Stuhmcke, For Love or Money: the Legal Regulation of Surrogate Motherhood, *Murdoch University Electronic Journal of Law*, Vol.3, No.1. 1996.

<sup>618</sup> *Ibid*.

<sup>619</sup> *Ibid*.

<sup>620</sup> *Ibid*.

<sup>621</sup> There was a case where Alejandra Munoz, a poor illiterate Mexican woman, illegally immigrated to the USA on the knowledge that once she attained pregnancy for her infertile cousin the embryo would be flushed out and transferred to the latter. But later she was told that she was obliged to maintain the pregnancy to term. She threatened to abort the foetus, but her relatives kept her under house confinement. They intimidated to expose her as an illegan alien. See Stainsby, M., The Surrogacy Debate Again: What abot Altruistic Surrogacy? *St. Vincent's Bioethics Centre Newsletter*, Vol.11, No.2, 1993, pp.5-6.

argue that low payment or no payment at all makes a contract more oppressive vis-a-vis those where payment is made.<sup>622</sup> Among others, Field opines that generous payment for a surrogacy arrangement makes it less exploitative and the most oppressive contracts are the ones in which the surrogate mother receives low payment.<sup>623</sup> She further argues that perhaps the most oppressive result of all is to permit surrogacy, but prohibit the payment of a fee.<sup>624</sup> This implies altruistic surrogacy arrangements where the surrogate mother has no compensation for her work. In other words, altruistic surrogacy might lead to exploitation of both women's reproductive capabilities and their reproductive labour.

In the famous *Baby M* case, the US Supreme Court asserted that surrogacy contracts were 'potentially degrading to women'<sup>625</sup> and opined that surrogacy arrangements without the payment of a fee would be acceptable. However, if this meant that the Court believed that altruistic surrogacy was tolerable and acceptable, it 'smacks all too familiar of a notion that while men get paid for their efforts, skills and services [sperm are among the things for which men get paid] women, being women, should do their women-things out of purity of heart and sentiment'.<sup>626</sup> Radin has suggested that 'whether surrogacy is paid or unpaid, there may be a transition problem: an ironic self-deception'.<sup>627</sup> That is, surrogates may feel they are fulfilling their womanhood by producing a baby for someone else, even though they may be just supporting oppressive gender roles. In fact, by categorising women as selfless, self-sacrificing and 'altruistic' entities, altruistic surrogacy only adds to the exploitation of women.<sup>628</sup> Therefore, if one

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<sup>622</sup> Banerjee, S, *supra* note 607, at p. 441.

<sup>623</sup> Martha A. Field, *Surrogate Motherhood: The Legal and Human Issue*, Harvard University Press, 1990, p.26.

<sup>624</sup> *Ibid.*

<sup>625</sup> *In re Baby M*, 537 A.2d 1227.

<sup>626</sup> Marjorie Maguire Shultz, Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality, *Winconsin Law Review*, No.297, 1990, p.380.

<sup>627</sup> Margaret Jane Radin, Market Inalienability', *Harvard Law Review*, Vol.100. No.8, 1987, pp.1849-1937.

<sup>628</sup> Banerjee, S., *supra* note 507, at p.441.

wants to benefit from women's reproductive capabilities then one should make a payment for it.<sup>629</sup>

One of major concerns for surrogacy agreements is the emotional trauma that the surrogate mother might suffer when giving up the child to the intended parents.<sup>630</sup> It has been suggested that a mother establishes not only physical but also strong emotional bonds to the child that she carries even before birth, and, hence, in terms of psychology, relinquishment of the child may cause harm to both the surrogate mother and the child.<sup>631</sup> The surrogate mother may feel an overwhelming sense of loss and emotional stress upon separation from the child.<sup>632</sup> But these problems apply to surrogacy agreements as a whole and are not particular to any form of surrogacy whether commercial or altruistic.<sup>633</sup>

The exploitive effects of surrogacy, whether altruistic or commercial, on the surrogate mother often do not manifest themselves until after the child is handed over to the commission couples.<sup>634</sup> It has also been noted above that some commentators suggest that the emotional exploitation of the surrogate mother is more likely occur in an altruistic arrangement than a commercial one.<sup>635</sup> The acceptance of altruistic surrogacy is based on the assumption that

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<sup>629</sup> *Ibid.*

<sup>630</sup> *Ibid.* It is noteworthy that not all surrogates suffer this problem. A study examining motivations, experiences and psychological consequences of surrogacy for surrogate mothers in Britain has shown that surrogate mothers did experience some psychological problems immediately after the handover of the child, but these were not severe, tended to be short-lived, and to dissipate with time. See. Vasanti Jadvā et al, Surrogacy: the Experiences of Surrogate Mothers, *Human Reproduction*, Vol.18, No.10, p.p.2196-2204.

<sup>631</sup> Stuhmcke, A., *supra* note 615.

<sup>632</sup> *Ibid.* In an Australian comprehensive survey of women who relinquished their children for adoption, the majority claimed to have an overwhelming sense of loss for periods of up to 30 years. This has been said to be analogous to the outcome of surrogacy. See Andrew Kimbrell, A Case Against the Commercialization of Childbearing, *Willamette Law Review*, vol.24, 1988, p.1044.

<sup>633</sup> Banerjee, S., *supra* 607, at p. 441.

<sup>634</sup> *The Iona Institute, The Ethical Case Against Surrogate Motherhood: What We Can Learn From the Law of Other European Countries*, <http://www.ionainstitute.ie/assets/files/Surrogacy%20final%20PDF.pdf> (last accessed December 29, 2016).

<sup>635</sup> Andrews, 'Surrogacy: New Procedures - New Problems' (1989) 7 *St Vincent's Bioethics Centre Newsletter*, p.10.



families and friends 'base decisions such as bearing a child for a family member on grounds where all parties are equal and with no pressure applying from other family members'.<sup>636</sup> However, this is not the case if a woman with less power within the family can be physically, financially, or more probably emotionally, coerced to assist an infertile relative. Elizabeth Kane, America's first surrogate mother, has identified her own altruism as stemming from 'low self-esteem' and commented that Maggie Kirkman (a commissioning mother) was more concerned about her unborn child than she was about her surrogate sister when the latter began to haemorrhage.<sup>637</sup> This implies that the term 'altruistic surrogacy' was used inappropriately in this situation.

It has also been suggested that altruistic surrogacy is more emotionally exploitative than commercial surrogacy because if the surrogate mother has agreed to bear the child, family dynamics may make it impossible for her to keep the child at her wishes – the loss of her family as retribution might be too much for her to give up.<sup>638</sup> To put it another way, it may be easier for a commercial surrogate to cancel the contract and return any money received than it is for a surrogate mother to withhold the child from a relative. As Stainsby has explained:

The repercussions [of refusing to relinquish a child] would be particularly painful in an altruistic surrogacy situation. It is here that a decision to keep or relinquish the child can cut deep into a surrogate woman's most intimate family ties and support systems. (If the child is disabled in any way neither the surrogate nor the commissioning parents may wish to keep it). In a commercial surrogacy situation a surrogate can still have her family support. In an altruistic surrogacy one's kith and kin can become one's accusers.<sup>639</sup>

The aforementioned discussion about altruistic surrogacy shows that the potential for emotional exploitation of the surrogate mother is unavoidable and

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<sup>636</sup> Stuhmcke, A., *supra* note 615.

<sup>637</sup> *Ibid.*

<sup>638</sup> Stuhmcke, A., *supra* note 615.

<sup>639</sup> Stainsby, M., *supra* note 619, at p. 6.

may affect the making of law on surrogacy in any country where altruistic surrogacy is encouraged.

Vietnam has followed the common policy of allowing altruistic surrogacy while banning commercial surrogacy. In literal wording, Vietnamese law makers use the term 'surrogacy for a humanitarian purpose' which seems equivalent to the term 'surrogacy on the basis of altruism' or 'altruistic surrogacy' as commonly used in the West. I use the term 'altruistic surrogacy' when discussing permitted surrogacy in Vietnam and comparing it to altruistic surrogacy elsewhere such as in the UK. However, altruistic surrogacy provided by Vietnamese legislators is different to that of other jurisdictions in that only intra-family surrogacy is permitted and this is more likely to prevent the infertile couple from using surrogacy as well as discouraging fertile women from becoming surrogate mothers. In particular, the new law on surrogacy in Vietnam provides that a woman who wants to act as surrogate mother must be a next of kin (in the same line) of the wife or the husband of the couple.<sup>640</sup> Concerns arising from this requirement will be discussed below.

Under Vietnamese law, 'next of kin' are those who are closely bound one to another by the matrimonial relationship (the wife and the husband), by the rearing relationship (adoptive parents and their adopted children), by the same direct bloodline (parents and their own biological children), or they are blood relatives within three consecutive generations.<sup>641</sup> Relatives within three consecutive generations, are, according to Article 3.18 of the Law on Marriage and the Family,

... those who were born of the same stock: parents constitute the first generation; full and half-blood siblings constitute the second generation; first cousins constitute the third generation.

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<sup>640</sup> Article 95.3 of the Law on Marriage and the Family 2015

<sup>641</sup> Article 3.19 of the Law on Marriage and the Family 2015.

It implies that parents and their children are not next of kin in the same line. Next of kin in the same line may only be siblings or first cousins. Therefore, women who are next of kin of the wife or the husband of the commissioning couple may be their sisters or first cousins. The problem is that not all couples have sisters or first cousins,<sup>642</sup> and, more importantly, their sisters and first cousins may not want to become surrogate mothers. In both circumstances, the infertile married couple who contemplate having children through surrogacy might not find an eligible surrogate woman and, hence, cannot use surrogacy in accordance with the law. If they still strive to have genetically related children at any cost, they might turn to the black market of surrogacy and make illegal surrogacy arrangements. Therefore, the introduction of the new law on altruistic surrogacy does not necessarily address the problems previously associated with surrogacy. To put it another way, the situation remains hopeless and risky.

By allowing altruistic surrogacy within the family, Vietnamese law makers perhaps want to keep surrogacy as a private matter of family. The potential dangers of exploitation and the commodification of both children and women in the black market (as discussed in Chapter 3) may be a justifiable reason for the Vietnamese law to refuse the involvement of strangers. In the eyes of the Vietnamese law, surrogacy arrangements between family members seem safer than between strangers because family members have long-established relationships and their agreements are, therefore, based on a solid foundation of mutual trust supported by familial sentiments rather than by commercial values. When a Vietnamese woman bears a child for an infertile relative who she has known for a long time and who has sympathy with his/her plight of infertility and childlessness, her pregnancy and childbirth are more tolerable and highly appreciated in terms of promoting cultural and traditional family values (as analysed in Chapter 2). In this regard, altruistic surrogacy within the family is expected to minimise the potential for commercialisation that seems more likely to occur in the black market (in arrangements between strangers) under the

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<sup>642</sup> They could not find their first cousins if both of their parents are children of one-child families.

influence of market rules. However, altruistic surrogacy between relatives in Vietnam may have the potential for emotional exploitation, as can be seen elsewhere and as mentioned above.

Altruistic surrogacy within the family may result in conflicts and complex issues and hence expose parties concerned to vulnerability and threaten to ruin their long-established relationships. Furthermore, the close family is likely to mean that the surrogate has a continuing relationship with the child once it is born, and this might be a source of tension between her and the infertile couple. In any surrogacy arrangement, 'surrogate motherhood is nothing more than the transference of pain from one woman [an infertile commissioning mother] to another [a birth mother]'.<sup>643</sup> Some writers also point out that:

'the centrally decisive factor determining whether there is post-birth disagreement between the parties, as well as long-term satisfaction with the outcome, is the relationship between the surrogate mother and the commissioning couple during the pregnancy and continuing contact post-birth'.<sup>644</sup>

In intra-family surrogacy on the basis of altruism, if the relationship between the surrogate mother and the commissioning couple worsens, this pain might be more serious because it is long term relationship they value and respect and which led them to be involved in the surrogacy arrangement in the first place. If the surrogate mother wants to keep the child while the commissioning parents (her relatives) strive to have the child handed over at any cost, even taking legal action against the surrogate mother, or the commissioning parents do not allow the surrogate mother to visit the child, their family relationship would be so severely reduced that it emotionally injures both parties. As Ragoné argues, 'it is the relationship with the commissioning parents that many birth mothers most

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<sup>643</sup> Robyn Rowland, *Living Laboratories: Women and Reproductive Technologies*, Bloomington and Indianapolis: Indiana UP, 1992, p.189.

<sup>644</sup> Ciccarelli JC and Berman LJ, Navigating rough waters: an overview of psychological aspects of surrogacy, *Journal of Social Issues*, 2005, Vol 61, No.1, pp.21-43.

value, and the severing or diminution of those relationships after birth that hurt them most'.<sup>645</sup>

As altruistic surrogacy restricted to family members may reduce the chances of finding surrogate mothers, I suggest that Vietnamese law makers should extend the scope of altruistic surrogacy by considering permitting altruistic surrogacy between friends. Friends are not 'strangers', so it is possible for them to make surrogacy arrangements on a foundation of mutual trust arising from their long held relationships. In cases where infertile couples do not have sisters/first cousins, - or their next of kin do not want to act as surrogate mothers, they may engage the help of friends who understand their situation and express a good will to bear a child for them. By allowing friends of infertile couples to act as surrogate mothers on the basis of altruism, the Vietnamese law would enable these people to exercise their procreative autonomy and, hence, increase the chance of having genetically related children for infertile couples.

## **6.2. Analysis of specific conditions of the Vietnamese law on surrogate motherhood**

### **6.2.1 Only married heterosexual couples are permitted to use altruistic surrogacy**

Vietnamese legislators have adopted a detailed but narrow definition of altruistic surrogacy, which is not only restricted to a limited number of people but also open to different interpretations.<sup>646</sup> Altruistic surrogacy in Vietnam is defined as

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<sup>645</sup> Ragoné H, *Surrogate Motherhood: Conception in the Heart*, Boulder, Westview Press, 1994, chapter 14.

<sup>646</sup> Article 3.22 of the Law on Marriage and the Family 2015 provides a definition of altruistic surrogacy as follows: 'Surrogacy on the basis of altruism is a practice in which a woman, voluntarily and with a non-commercial purpose, carries a child for a married couple whose the wife is unable to gestate and bear a child even when the assisted reproductive technologies have already been referred to. In the altruistic surrogacy, the egg of the wife and the sperm of the husband are used for the fertilisation in vitro, and the resulted embryo is implanted into the womb of the surrogate woman who will carry the foetus and give birth to a child'.

a practice in which a woman bears a child for a married heterosexual couple on a voluntary and non-commercial basis.<sup>647</sup> Gay couples, single persons and unmarried heterosexual couples are, therefore, excluded from lawfully using surrogacy. In the context of the non-recognition by law of same sex marriage and cohabitation between heterosexual couples,<sup>648</sup> this is understandable and reasonable within the cultural environment in Vietnam as discussed in Chapter 1. However, this requirement seems discriminatory against these people, denying them the right to found a family as well as procreative autonomy. In this section, I will argue that Vietnamese law makers should consider allowing altruistic surrogacy for gay couples and single persons if they choose surrogacy in order to form their own families on the grounds that by doing so the law will enable them to exercise procreative autonomy and enjoy the right to procreate as well.

In Vietnam, the establishment and maintenance of marriage are considered as the solid foundations for family happiness and societal stability.<sup>649</sup> Cohabitation between heterosexual people without marriage is seen as precarious or unstable, and may not guarantee the welfare of children in case of separation. For single people who are infertile and strive to have genetically related children through surrogacy, the legal restriction on using surrogacy seems harsh and unfair as it reduces their choice of procreation. For gay couples, this restriction is controversial as surrogacy is often their only way to have genetically related children. It is noteworthy that proposals for the recognition of same sex marriage and surrogacy were put forward in Parliament in parallel with the surrogacy regulations, but were declined. Proponents of same sex marriage argued that this promotes both human rights and equality between people of different sexuality,<sup>650</sup> but opponents rejected this argument on the grounds that same sex

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<sup>647</sup> Article 3.22 of the Law on Marriage and the Family 2015.

<sup>648</sup> Articles 8.2 and 14.1 of the Law on Marriage and the Family 2015.

<sup>649</sup> The Preamble of the Law on Marriage and the Family 2015.

<sup>650</sup> Truong Hong Quang, On same sex marriage and humanitarian values of the law, <http://www.moj.gov.vn/ct/tintuc/Pages/nghien-cuu-trao-doi.aspx?ItemId=6032> (last accessed March 30, 2016).

marriage contravenes morality, traditions and family values that Vietnamese people have respected through generations.<sup>651</sup>

It is remarkable that research around the world points out that even though same sex marriage is legally recognised and gay couples are allowed to use surrogacy, very few couples choose to have their own children in this way.<sup>652</sup> For example, according to Alto-Charo's research, less than 1 percent of people seeking surrogacy arrangements are gay couples.<sup>653</sup> Perhaps this is because the number of gay couples is proportionally lower and indeed, there are not so many gay couples generally. Nevertheless, the moot point is that gay couples do choose surrogacy as the means by which to have genetically related children, whether the law allows them to do so. The case law in the UK has shown many cases<sup>654</sup> where gay couples could obtain a parental order in the court mostly following international surrogacy arrangement).<sup>655</sup> There is a possibility that same sex marriage (or civil partnership) would be permitted in Vietnam in the future as the country is becoming more open to Western values. At that time, the law should facilitate Vietnamese gay couples to use surrogacy if they choose to do so because this will help them to realise their right to procreate and to form a family. As gay couples are regarded as socially infertile, surrogacy is the only option for them to have genetically related children. If they are not allowed to use domestic surrogacy, they might travel overseas to make international surrogacy arrangements and face legal challenges when bringing the child back home as UK gay couples have gone through. Therefore, Vietnamese law makers

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<sup>651</sup> Same sex marriage may not be allowed, <http://vneconomy.vn/thoi-su/co-the-van-khong-thua-nhan-hon-nhan-dong-tinh-2013110609201301.htm> (last accessed March 30, 2016)

<sup>652</sup> Alto-Charo, R. Legislative Approaches to Surrogate Motherhood, in Gostin, Larry (ed.), *Surrogate Motherhood: Politics and Privacy*, BloomingtonL University of Indiana Press, p.89.

<sup>653</sup> *Ibid.*

<sup>654</sup> See *Re G and M* (Parental Orders) [2014] EWHC 1561 (Fam), [2014] 2 FLR; *AB v SA* [2013] EWHC 426 (Fam).

<sup>655</sup> In a survey of surrogacy in the UK, it was shown that 74% respondents identified as being a gay male couple; they preferred to make overseas surrogacy arrangements; and the most common destination travelled to for surrogacy were in the US. See Kirsty Horsey et al, *Surrogacy in the UK: Myth busting and reform* (Report of the Surrogacy UK Working Group on Surrogacy Law Reform), November 2015, pp.23-25.

should take them into account if further reforms to the law on surrogacy are made in coming years.

The Vietnamese law also needs to consider single people who want to contemplate surrogacy arrangements. The UK provides a useful experience for this consideration. Some UK legal scholars have suggested that barriers to legal parenthood for single people should be removed<sup>656</sup> and parental orders should be available to single people who use surrogacy.<sup>657</sup> They argue that denying single people access to legal parenthood is particularly problematic and perhaps even 'discriminatory or in violation of the Article 8 right to found a family – in case of surrogacy as it is generally a single man in question as a woman would ordinarily be able to get help from sperm donor, unless she was doubly infertile'.<sup>658</sup> This suggestion is supported by recent cases<sup>659</sup> where single men using surrogacy encountered difficulties while attempting to obtain legal parenthood in the court.

For example, in *Re B v C*,<sup>660</sup> B was a single gay man who made an intra-family surrogacy arrangement with his mother, C. An embryo created by using B's sperm and a donor egg was implanted in C's womb and as a result, a baby boy, A, was born. When this arrangement was initiated, C was married to a man (D) who consented to the making of this surrogacy arrangement. Upon the child's birth, B could not be treated as A's legal father, in spite of the biological link between B and A under sections 38 (1) (2), 48 (1) (2) of the HFEA 2008. Instead, D had parental responsibility because he was married to C and had consented to the pregnancy. The surrogate mother (C) and her husband (D) became A's legal parents (under sections 33(1) and 35(1) of the HFEA 2008) and were registered as such on A's birth certificate. It is interesting that grandparents (C and D) were

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<sup>656</sup> Horsey, K., *supra* note 653, at p.31.

<sup>657</sup> *Ibid*, p.7.

<sup>658</sup> *Ibid*, p.31.

<sup>659</sup> See *Re B v C (Surrogacy: Adoption)* [2015] EWFC 17, [2015] 1 FLR 1392; *Re Z (A Child)* [2015] EWFC 73.

<sup>660</sup> *Re B v C (Surrogacy: Adoption)* [2015] EWFC 17, [2015] 1 FLR 1392.



A's parents while his biological father (B) was recognised as A's brother (a relative). However, this fact enabled B to overcome the obstacle that it is illegal to place a child for adoption other than by an adoption agency unless the child is related to the adoptive parent (sections 92 - 93 of the Adoption and Children Act 2002). Therefore, the adoption order that the court ultimately made in A's favour did not technically constitute a criminal offence. In this case, Theis J made a child arrangement order which gave B de facto parental responsibility for A, and leave to apply for an adoption order (sections 42(2) and (5) of the Adoption and Children Act 2002). This was necessary for an applicant like B who had not had A living with him for the requisite three years prior to the adoption.<sup>661</sup> Theis J exercised her discretion under section 51 of the Adoption and Children Act 2002) and granted the adoption order.

This case is perhaps the most bizarre example of the consequences of the UK law's assumptions as regards a child's parentage.<sup>662</sup> The fact that a man had to adopt his own biological child because he was unable, as a single person, to apply for a parental order, shows an unprecedented outcome in the UK jurisdiction and adds to the need to reform the law on surrogacy in the UK.

Although this case is a very rare occurrence, it still may happen in Vietnam when a single man wants to have a child genetically related to him through an intra-family surrogacy arrangement, but cannot find any woman other than his mother to act as the surrogate mother on an altruistic basis. If such an arrangement takes place in practice, how could the Vietnamese law deal with it? It is possible for the Vietnamese law to follow solutions provided by the UK jurisdiction in the aforementioned case. However, this legal consequence may be complex and is likely to be unacceptable in the cultural environment in Vietnam where Vietnamese people may consider a surrogacy arrangement between a mother and her son as a kind of incest, which is morally unacceptable and condemnatory

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<sup>661</sup> Mary Welstead, Surrogacy Update: Part 2, *Family Law*, Vol. 45, p.1105.

<sup>662</sup> Dickon Ceadel, A Fertile Window, [http://www.newLawjournal.co.uk/nlj/content/fertile-window](http://www.newlawjournal.co.uk/nlj/content/fertile-window) (last visited December 30, 2016).

(notwithstanding the use of IVF techniques). If the Vietnamese law on surrogacy is reformed to permit single people to use surrogacy on the basis of altruism, it should prevent such a case from happening in order to protect cultural and moral values. But if the avoidance of this is impossible, the law should maintain the current regulation for married couple using surrogacy<sup>663</sup> and apply it to single persons. In particular, the intended parents are recognised as legal parents upon the child's birth. In so doing, the Vietnamese law would reflect the precise intention of concerned parties to an intra-family surrogacy arrangement.

Another case in the UK, *Re Z*,<sup>664</sup> also shows the need to recognise legal parenthood for single men using surrogacy. In this case, a single man (the biological father) applied for a parental order in relation to the child born in the USA, but his application was dismissed by the court on the grounds that the applicant, as a single parent, could not bring himself within section 54 (1) of the HFEA 2008. Sir James Munby based his decision on the literal wording of section 54:

But for one matter this application would be unproblematic. The problem is that the application is made by a single parent, whereas section 54 seemingly requires an application to be made by "two people"<sup>665</sup>

The father asked the court to interpret the law flexibly, as if it said 'one or' two applicants. His lawyers argued that modern international surrogacy has made it practically possible for single fathers to conceive genetic children on their own.<sup>666</sup> They contended that the law should not deny the children legal recognition and, instead, the court should take responsibility for advancing the

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<sup>663</sup> Article 88, the Law on Marriage and the Family 2015.

<sup>664</sup> *Re Z (A Child)* [2015] EWFC 73.

<sup>665</sup> *Re Z (A Child)* [2015] EWFC 73, para 5.

<sup>666</sup> Natalie Gamble, High Court rules it cannot grant birth certificate to single dads through surrogacy, <http://www.nataliegambleassociates.co.uk/blog/2015/09/07/high-court-rules-it-cannot-grant-birth-certificates-to-single-dads-through-surrogacy/> (last accessed December 30, 2016).

law using its power under the Human Rights Act 1998.<sup>667</sup> They further agreed that the discrimination against single parents also makes no sense given the fact that single men and women in the UK are allowed to become parents through adoption and donor conception.<sup>668</sup> However, the judge held that he was unable to 'read down' the law because the possibility of allowing parental orders for single men and women had been considered and rejected in debates resulting in the HFEA 2008. The court refused to grant a parental order to the applicant, but suggested as a possibility that the father may go on to seek a declaration that the UK legislation (section 54(1) of the HFEA 2008) was incompatible with human rights law. The outcome of the case indicates that the welfare of children born of surrogacy arrangements as such is problematic. By denying a recognition to the father, the law put the child in legal limbo. It seems unfair that the father intentionally breached the law - attempted to circumvent the domestic law by travel abroad to find a surrogate mother – and now his child has to suffer from his decision.

Similar situations may occur in Vietnam after the coming into force of the new law on surrogacy. Although only married couples are permitted to use surrogacy, single men may try to bypass the law by going overseas to conceive their own biological children. The Vietnamese law should not ignore these children when they are brought back home by refusing to recognise biological fathers as legal fathers. In reforming the law on surrogacy, Vietnamese law makers should consider allowing altruistic surrogacy for single people in order to avoid repercussions arising from surrogacy arrangements by these people (for example, putting the child in legal limbo).

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<sup>667</sup> *Ibid.*

<sup>668</sup> *Ibid.*

## 6.2.2 The issue of gestational surrogacy

In surrogacy on the basis of altruism, the Vietnamese law requires that the wife of the couple must be unable to produce a child after a failure of attempts to use assisted reproductive technologies.<sup>669</sup> This means that the couple cannot refer to surrogacy if the wife is fertile and wants to avoid the challenges of pregnancy and delivery by engaging the help of another woman. It has been seen in the West that in the avoidance of pregnancy, an increasing number of women are resorting to womb hiring for reasons of time pressure, vanity, career promotion, or the pain of childbirth, with clinics in the UK as well as in the USA being asked to provide the service. Successful businesswomen, models, athletes and celebrities are among those who have chosen social surrogacy. The Los Angeles-based Egg Donation and Surrogacy Programme has estimated that 5%-10% of surrogacy requests are for social rather than medical reasons.<sup>670</sup> In addition, nearly half of those are from men who do not want their wives to go through the physical endurance of pregnancy. In general, the practice of using surrogacy for social reasons by healthy and wealthy women is not encouraged in the West.<sup>671</sup> It might also be understood that surrogacy is the last resort for Vietnamese infertile couples to have their own biological children. By creating this condition for the using of altruistic surrogacy, Vietnamese legislators seem to intend to discourage those who are still able to use other assisted reproductive technologies from using surrogacy, and to ensure that surrogacy is only available for those who are most in need .

Another requirement for altruistic surrogacy in Vietnam is that it must be undertaken with the assistance of IVF techniques. In this matter, the new law provides that the egg of the wife and the sperm of the husband must be used for the fertilisation in vitro and the resulting embryo(s) transferred into the body of

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<sup>669</sup> Article 3.22 of the Law on Marriage and the Family 2015.

<sup>670</sup> See Tessa Mayes, Career Women Rent Wombs to Beat Hassles of Pregnancy, <http://www.rense.com/general11/rental.htm> (last visited December 30, 2016).

<sup>671</sup> *Ibid.*

the surrogate woman.<sup>672</sup> In other words, both the wife and the husband have to provide genetic materials for creating embryos. This means that gestational surrogacy is allowed whereas full (or traditional) surrogacy is prohibited. In practice, some couples are disqualified if one of the couple is infertile, that is the husband cannot produce sperm or the wife is unable to produce eggs. It follows that they are denied the right to procreative autonomy and the right to procreate through surrogacy. It would be better if the law only requires the involvement of at least one party (the wife or the husband) in the creation of embryo. The rationale for this requirement is presumably to 'legitimise' the relationship and in some way to 'prevent and protect women and their husbands/partners being pressured into (or deliberately and criminally embarking on) conceiving babies purely with the aim of giving them away'.<sup>673</sup> It is possible for the Vietnamese law to clarify that the child born of surrogacy should be genetically related to at least one of the couple. In this regard, Vietnamese legislators may model the current law by following the UK legal approach set out in section 54(1) of the HFEA 2008 regarding requirements for applicants seeking parental orders as described below:

- (1) On an application made by two people ("the applicants"), the court may make an order providing for a child to be treated in law as the child of the applicants if—
- (a) the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination,
  - (b) the gametes of at least one of the applicants were used to bring about the creation of the embryo.

The Vietnamese law also does not shed light on the number of embryos transferred into the womb of surrogate. As shown in UK law and elsewhere,<sup>674</sup>

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<sup>672</sup> Article 3.22 of the Law on Marriage and the Family 2015.

<sup>673</sup> Horsey, K., *supra* note 653, at p.32.

<sup>674</sup> See Tim Adams, *When story's over*, *The Guardian online*, (Sunday, 27 January 2002) <http://www.guardian.co.uk/theobserver/2002/jan/27/features.magazine57> (last accessed

limiting the number of implanted embryos helps to safeguard the health and the life of both the pregnant woman and the foetus(es). In the absence of this particular regulation, the welfare of parties to surrogacy arrangements (the surrogate women), may be seriously compromised. These ambiguities of Vietnamese law have not yet been clarified in the subsequent articles which detail the specific conditions and other requirements for the making of altruistic surrogacy arrangements. Therefore, this lack of legal clarity is open to a future revision of law. The Parliament may include new provisions on surrogacy into the current law. Alternatively, the Vietnamese Government may issue a decree on surrogacy, giving detailed interpretation to the regulations of this law (as discussed in Chapter 1).

Given the importance of gestational surrogacy, it is necessary to discuss the issue of legal parenthood, to which the UK law and the Vietnamese law take different approaches. The law in Vietnam makes the commissioning parents the legal parents regardless of genetic connections. Article 94 of the new law on surrogacy 2015 provides that

A child born through surrogacy on the basis of altruism is the child of the commissioning parents from the moment he/she was born.

This approach to determination of parenthood in the context of surrogacy in Vietnam differs from the UK where by law the birth mother is the legal mother,<sup>675</sup> and if she is married her husband will be the legal father.<sup>676</sup> The approach taken by the Vietnamese law makers can be explained as follows. By

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December 29, 2016).

<sup>675</sup> Section 33 (1) of the HFEA 2008 makes it clear that 'the woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child'.

<sup>676</sup> Section 35 (1) (b) of the HFEA 2008 provides that if the woman, who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and egg or of her artificial insemination, and is married at the time of treatment, then 'the other party to the marriage is to be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her artificial insemination (as the case may be)'.

limiting altruistic surrogacy to married couples, the law makers in Vietnam expect that the commissioning couple will assume sole parental responsibility once the child is born, and that the surrogate mother (and her husband, if she is married) will be released from this responsibility. Furthermore, as surrogacy arrangement may be seen as a form of a service contract,<sup>677</sup> the Vietnamese law makers want to guarantee the enforceability of the contract and ensure that both parties to the contract strictly follow their agreements. In particular, the surrogate mother is obliged to surrender the child whereas the commissioning couple are obliged to receive the child and become his/her parents. By making the commissioning parents the legal parents, the law makers expect that the surrogate mother will be aware of the legal outcomes prior to making surrogacy arrangement. The law makers may also expect that in cases where conflicts arise, the courts will find it easy to reach a solution with regard to determining the legal parents in order to protect the best interests of the child.

Another reason that might explain the approach taken by the law in Vietnam to legal parenthood is that the law makers want to ensure that the child is cared for by both parents, who intend to have the child with a view to rearing the child and forming a family. Because the commissioning parents contemplate the birth of the child, they have to prepare all necessary conditions to raise the child, especially in terms of economic conditions. For this reason, they are in a better position to take care of the child.

The determination of legal parenthood in Vietnam is clear when the married couple are a party to surrogacy arrangements. However, this may be problematic in cases where single men strive to attain legal parenthood. As discussed in section 6.2.1, the fact that single men in the UK engaged in surrogacy arrangements caused a number of complex issues for the UK courts when determining legal parenthood for the applicants. This may provide the Vietnamese law makers with useful lessons if similar cases happen in Vietnam. Although for the time being the law in Vietnam restricts access to altruistic surrogacy to married couples, there is still a possibility of single men being

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<sup>677</sup> This will be discussed in detailed in Section 6.2.6.

involved in surrogacy arrangements (whether domestic or overseas) and making an application to the courts for determination of legal parenthood. In these cases, the principle of determining legal parents as set out in Article 94 of the law on surrogacy 2015 can not be applied because the applicants are single men, not married couples. Therefore, the Vietnamese law makers should take this possibility into account and envisage possible legal outcomes in relation to determination of legal parenthood for single men. This may be a part of the amendments to the law on surrogacy in Vietnam in the future.

### **6.2.3 The distinction between altruistic surrogacy and commercial surrogacy in Vietnamese law**

While permitting altruistic surrogacy within the family, the Vietnamese law also bans commercial surrogacy in order to avoid the commercialisation of arrangements which results in the commodification of children and the possible economically exploitation of vulnerable women.<sup>678</sup> Under the current law of Vietnam, the distinction between altruistic surrogacy and commercial surrogacy is judged by the criterion of commercial basis. However, the law on surrogacy did not go beyond offering a general definition of commercial surrogacy:

Surrogacy on the commercial basis is a practice in which a woman bear a child for another woman by the use of the assisted reproductive technologies in order to obtain economic benefits or other interests.<sup>679</sup>

There are some debatable issues arising from this definition. First, it is ambiguous that if commercial surrogacy means that the surrogate woman attempts to gain financially from the arrangement (as precisely as the law provides), then whether or not an arrangement is altruistic surrogacy must be

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<sup>678</sup> Legalisation of surrogacy in Vietnam. <http://giaoduc.net.vn/Xa-hoi/Dua-mang-thai-ho-vao-luat/260300.gd> (last accessed December 30, 2016).

<sup>679</sup> Article 3.23 of the Law on Marriage and the Family 2015.



understood in terms of there being zero financial cost to the surrogate at the end of the arrangement. In a recent survey of surrogacy undertaken in the UK,<sup>680</sup> some surrogate women reported that they engage in the arrangement for zero compensation.<sup>681</sup> However, there is a possibility that although many surrogate women in Vietnam would embark on the arrangement with zero compensation in mind, some wealthy commissioning couples may still want to give them some valuable gifts, such as a house, gold/diamond jewellery, or trips to foreign countries, upon/following the childbirth or even after the issue of legal parentage by the authorities. In that case, the question is whether *de facto* compensation by the commissioning couples may make the initial altruistic arrangement ineffective on a commercial basis.

Secondly, the regulation is unclear as to what acts or factors may constitute the commercial basis of surrogacy arrangements. For instance, whether any payment in money which is at any time received by a person in respect of making, or negotiating or facilitating the making of, any surrogacy arrangement may be seen as evidence of commercial basis. The scope of the terms 'economic benefits or other interests' is ambiguous and may lead to different interpretations. The Decree 10/2015 enacted by the Vietnamese government with a view to interpreting the particular regulations of the new law on surrogacy did not give any explanation as to these terms. Thirdly, it is also unclear who may be proceeded against for an offence due to the making of surrogacy arrangements on a commercial basis: the commissioning couple, the surrogate mother, or the broker? In addition, there are no specific regulations on liabilities/punishments in the case of a contravention of the law on surrogacy. The Surrogacy Arrangements Acts 1985 in the UK provides a good example for filling these gaps, especially its sections on negotiating surrogacy arrangements on a commercial basis and advertisements about surrogacy.

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<sup>680</sup> Horsey, K., *supra* note 653, at p.36.

<sup>681</sup> Horsey, K., *supra* note 653, at p.36.

Section 2 of the 1985 Act of the UK forbids the initiation and negotiation of surrogacy arrangements 'on a commercial basis' by specifically explaining that:

- (1) No person shall on a commercial basis do any of the following acts in the United Kingdom, that is –
  - (a) initiate or take part in any negotiations with a view to the making of a surrogacy arrangement,
  - (b) offer or agree to negotiate the making of a surrogacy arrangement, or
  - (c) compile any information with a view to its use in making, or negotiating the making of, surrogacy arrangements.
- (2) A person who contravenes subsection (1) above is guilty of an offence; but it is not a contravention of that subsection –
  - (a) for a woman, with a view to becoming a surrogate herself, to do any act mentioned in that subsection or to cause such any act to be done, or
  - (b) for any person, with a view to a surrogate mother carrying a child for him, to do such an act or cause such an act to be done
- (3) For the purpose of this section, a person does an act on a commercial basis (subject to subsection (4) below) if
  - (a) any payment is at any time received by himself or another in respect of it, or
  - (b) he does it with a view to any payment being received by himself or another in respect of making, or negotiating or facilitating the making of, any surrogacy arrangement.

In this section 'payment' does not include payment to or for the benefit of a surrogate mother or prospective surrogate mother.

Section 3 of the 1985 Act also makes the publication or distribution of advertisements indicating a willingness to take part in surrogacy arrangements a criminal offence as described below:

- (1) This section applies to any advertisement containing an indication (however expressed) –
  - (a) that any person is or may be willing to enter into a surrogacy arrangement or to negotiate or facilitate the making of a surrogacy arrangement
  - (b) that any person is looking for a woman willing to become a surrogate mother or for persons wanting a woman to carry a child as a surrogate mother.

- (2) Where a newspaper or periodical containing an advertisement to which this section applies is published in the United Kingdom, the proprietor, editor or publisher of the newspaper or periodical is guilty of an offence.

To reform the law on surrogacy, Vietnamese law makers may learn from these regulations to reform the current law. Doing so would help the courts in Vietnam to appropriately apply the law in particular cases where it is required to determine whether a commercial element exists in a surrogacy arrangement.

It is notable that the statutory law in the UK adds to the understanding of commercial surrogacy by setting out regulations on ‘an acceptable payment’ in surrogacy arrangements. The UK law mentions the terms ‘expenses reasonably incurred’ as the payment that may be acceptable in surrogacy arrangements and implies that any payment exceeding these expenses may constitute commercial surrogacy. Section 54 (8) HFEA 2008 requires that

(8)The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of—

- (a) the making of the order,
- (b) any agreement required by subsection (6),
- (c) the handing over of the child to the applicants, or
- (d) the making of arrangements with a view to the making of the order, unless authorised by the court.

In theory, commercial surrogacy is forbidden in the UK, but it still occurred in practice (even before the coming into force of the HFEA 2008). The Brazier Report 1998 received evidence that ‘payments for the service provided by the surrogate, in excess of any reasonable level of actual expenses incurred as a result of the pregnancy, are currently being made’.<sup>682</sup> The reason for the incidence of commercial surrogacy in the UK is that the courts are entitled to authorise payments made in contravention of the ban on commercial surrogacy. If the court considers that it is in the child’s best interests to remain with the

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<sup>682</sup> Brazier et al, *supra* note 212, para. 3.20.

commissioning parents, retrospective authorisation of any illegal payments will be obtained. This issue will be discussed more in the next section.

Under the current law on surrogacy in Vietnam, there is no regulation on 'expenses reasonably incurred'. Article 98 of the Law on Marriage and Family 2015 defines the broad term of 'expenses' as follows:

The intended couple has the obligations to pay incurred expenses in assuring reproductive healthcare in accordance with the regulations issued by the Ministry of Health

The Decree 10/2015, which was made by government to interpret the law on surrogacy, also affords no guidance as to the definition of these 'expenses'. It is unclear whether only genuine expenses associated with the pregnancy are accepted in surrogacy arrangements, or if payment could cover other expenses incurred outside pregnancy. For example, payment to the surrogate mother due to her loss of earnings while being pregnant; payment to the surrogate mother prior to pregnancy such as the fees for medical examination, legal and physical consultations or following childbirth such as salary during her time of maternal leave. It is also ambiguous as to whether 'reasonable expenses' exist, as can be seen in the UK law, and whether any payment exceeding 'reasonable expenses' may constitute commercial surrogacy. Vietnamese law makers could fill this gap in the law on surrogacy by setting specific regulations on reasonable expenses in surrogacy arrangements. The reason is that Vietnamese couples entitled to use altruistic surrogacy may make a payment to the surrogate mother more than genuine expenses incurred in the pregnancy, for example offering jewellery or trips as gifts. Moreover, in cases where altruistic surrogacy is inaccessible, some couples may engage commercial surrogacy arrangements in spite of the ban. What could the Vietnamese law do to protect the children's interests in such cases? The following section will indicate what and how Vietnamese law makers can learn from the UK experience in dealing with excessed payment while attempting to protect the best interests of the child.

#### 6.2.4 The issue of retrospective authorisation of payment to surrogate mothers

It is interesting that although the UK Parliament legislated against commercial surrogacy and expected that the courts would implement that policy consideration in its decisions, the UK courts have adopted a highly original legal approach to surrogacy arrangements containing commercial elements. The courts in the UK have been seen to indirectly legitimize commercial surrogacy by awarding parental orders to commissioning couples engaging in commercial arrangements.<sup>683</sup> Section 54 (8) of the HFEA 2008, a replacement for section 30 (7) of the HFEA 1990 on parental orders, requires that the UK court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants unless authorised by the court. However, the UK courts are ‘bending the rules to breaking points to ensure that the welfare of the children is met’<sup>684</sup> and, hence, using discretion to grant parental orders to commissioning couples who have engaged in commercial surrogacy arrangements.

This reflects the fact that as commercial surrogacy is unlawful in the UK, an increasing number of British people have travelled abroad to make arrangements and then return home to seek parental orders in an effort to obtain their legal parentage in the UK. It is estimated that in the UK about 2,000 babies are born of surrogacy every year, with 95 percent of these births taking place overseas.<sup>685</sup> In many cases,<sup>686</sup> some of which will be discussed below, the court found that payments in excess of what could be deemed to be ‘reasonable expenses’ were made to the surrogate mother, but still granted parental orders on the grounds

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<sup>683</sup> *Re L (A Minor)* [2010] EWHC 3146; *D and L (Surrogacy)* [2012]; *Re A&B (Parental Order) Domicile* [2013] All ER (D) 95 (Mar); *J v G* [2013] EWHC 1432 (Fam).

<sup>684</sup> Ceadel, D., *supra* note 660.

<sup>685</sup> Glosswitch, The feminist history of surrogacy: should pregnancy give a woman rights over a baby? <http://www.newstatesman.com/politics/2015/05/feminist-history-surrogacy-how-much-right-should-pregnancy-give-woman-over-baby> (last accessed December 30, 2016).

<sup>686</sup> See *X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), *Re L (A Minor)* [2010] EWHC 3146; *D and L (Surrogacy)* [2012]; *Re A&B (Parental Order) Domicile* [2013] All ER (D) 95 (Mar); *J v G* [2013] EWHC 1432 (Fam).

that doing so was in the best interests of the child(ren). There have been no reported cases where the UK court has refused to award a parental order as a result of the scale of payment made to surrogate mother.<sup>687</sup>

However, it is notable that although adopting a tolerant approach to commercial surrogacy as such, the UK courts have still maintained cautious positions on the issue of authorisation in respect of a payment for commercial surrogacy arrangements. In *Re S*,<sup>688</sup> Hedley J raised concerns over this issue in terms of public policy by identifying three important things that the UK courts have endorsed in subsequent cases when considering retrospective authorisation of the payment to the surrogate mother:

- (1) To ensuring that commercial surrogacy agreements are not used to circumvent childcare laws in this country, so as to result in the approval of arrangements in favour of people who would not have been approved as parents under any set of existing arrangements in this country.
- (2) The court should be astute not to be involved in anything that looks like the simple payment for effectively buying children overseas. That has been ruled out in this country and the court should not be party to any arrangements which effectively allow that.
- (3) The court should be astute to ensure that sums of money which might look modest in themselves are not in fact of such a substance that they overbear the will of a surrogate.<sup>689</sup>

As far back as 2008, when section 30 (7) of the HFEA 1990 was still effective, there was a key case in which the UK court had to consider whether the payments made to the surrogate mother fell within the restrictions of the UK law. In *X and Y*,<sup>690</sup> a couple engaged in a commercial surrogacy arrangement with a Ukrainian woman who gave birth to twins using donated eggs fertilised by the male applicant's sperm. In considering whether to grant a parental order to the

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<sup>687</sup> Ceadel, D., *supra* note 660.

<sup>688</sup> *Re S (Parental Order)* [2009] EWHC 2977 (Fam), [2010] 1 FLR 1156.

<sup>689</sup> *Ibid.*

<sup>690</sup> *X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam).

applicants, the court carefully scrutinised the issue of retrospective authorisation of the payment to the Ukrainian surrogate mother. In reference to the approach adopted in previous cases such as *Re C (Application by Mr. and Mrs. X under Section 30 of the Human Fertilisation and Embryology Act 1990)*,<sup>691</sup> Hedley J opined that in relation to the public policy issues, the court posed itself three questions:

- (i) was the sum paid disproportionate to reasonable expenses?
- (ii) were the applicants acting in good faith and without 'moral taint' in their dealings with the surrogate mother?
- (iii) were the applicants party to any attempt to defraud the authorities?<sup>692</sup>

In practice, the couple agreed to pay € 235 per month to the Ukrainian surrogate mother during pregnancy and a lump sum of € 25,000 on the live birth of the twins. 80% of that sum was payable on the surrogate mother's provision of a notarised consent to facilitate the applicants being registered on the Ukrainian birth certificate and the balance on the signing of written consent to the parental order application at six week. These payments were lawful under domestic Ukrainian law. Nevertheless, the difficulties facing the court in this case were that the court had to make a comparison between living costs in the UK and Ukraine where the surrogacy arrangement was made, before deciding whether the payments amounted to 'expenses reasonably incurred' as required by the UK law.

On the evidence the court had obtained, Hedley J concluded that the sums paid were not so disproportionate to 'expenses reasonably incurred' that the granting of an order would be an unacceptable affront to public policy.<sup>693</sup> Moreover, on the facts of this case, Hedley J believed that the applicants were acting in good faith and that no advantage was taken (or sought to be taken) of the surrogate

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<sup>691</sup> [2002] 1 FLR 909.

<sup>692</sup> [2008] EWHC 3030 (Fam), para 21.

<sup>693</sup> [2008] EWHC 3030 (Fam), para. 22.

mother who was herself a woman of mature discretion.<sup>694</sup> He was also satisfied that there was no attempt to defraud the authorities because he had no doubt that the applicants sought at all times to comply with the requirements of both English and Ukrainian laws. Furthermore, Hedley J held that the welfare of the children required that they be regarded as lifelong members of the applicant's family.<sup>695</sup> Giving his finding on the public policy considerations, Hedley J authorised the payments so made under section 30 (7) of the 1990 Act. Therefore, a parental order was awarded to the applicants.

It is noteworthy that while considering making a parental order to the applicants, Hedley J also made comments on the legal challenges attached to overseas commercial surrogacy arrangements. He opined that the UK law on surrogacy and immigration caused problems which resulted in a position where the children were 'marooned stateless and parentless whilst the applicants could neither remain in the Ukraine nor bring the children home'.<sup>696</sup> He suggested that it is 'almost impossible to imagine a set of circumstances in which by time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order'.<sup>697</sup>

After the enactment of the HFEA 2008, the UK court continued to follow the legal approach adopted in the previous cases considering commercial elements of surrogacy arrangements. That is, no parental order can be made unless those expenses are authorised respectively by the court pursuant to section 54 (8) of the 2008 Act. The retrospective authorisation of the payments to the surrogate mother must still be made on the grounds that no payments other than reasonable expenses are lawful. However, *Re L*<sup>698</sup> set a landmark ruling for parents through commercial surrogacy, establishing that the UK court would now

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<sup>694</sup> *Ibid*, para. 21.

<sup>695</sup> *Ibid*, para. 22.

<sup>696</sup> *Ibid*, para. 10.

<sup>697</sup> *Ibid*, para. 22.

<sup>698</sup> *Re L (a minor)* [2010] EWHC 3146.



always override the rules against payments to award parentage if it was in the child's best interests, unless the case represented the 'clearest abuse of public policy'<sup>699</sup>.

This case relates to a commercial surrogacy arrangement made in Illinois, USA. The agreement was wholly lawful under the law of Illinois, but regarded as unlawful under the HFEA 2008 in the UK because there was clear evidence that payments in excess of reasonable expenses were made. Hedley J cited decisions made in *Re X and Y (Foreign Surrogacy)*<sup>700</sup> and *Re S (Parental Order)*<sup>701</sup> to authorise the payments in this case in accordance with Section 54 (8) of the HFEA 2008. He acknowledged that 'reasonable expenses' remained a somewhat opaque concept and adopted the approach of treating any payment described as 'compensation' (or similar word) as prima facie being a payment that goes beyond reasonable expenses.<sup>702</sup> But he ascertained that 'each case must be scrutinised on its own fact'.<sup>703</sup>

In this case, Hedley J also highlighted changes in the UK law surrounding the child welfare. The 2010 regulations (Parental Orders) import into section 54 applications the provisions of section 1 of the Adoption and Children Act 2002 that mean that welfare is no longer merely the court's first consideration but becomes its paramount consideration. The effect of that, he reasoned, must be to weight the balance between public policy considerations and welfare decisively in favour of welfare.<sup>704</sup> It must follow that 'it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making'.<sup>705</sup> For these reasons, a parental order pursuant to section 54 of the HFEA 2008 was made in favour of

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<sup>699</sup> *Ibid*, para. 10.

<sup>700</sup> [2008] EWHC 3030 (Fam).

<sup>701</sup> [2009] EWHC 2977 (Fam).

<sup>702</sup> *Re L (a minor)* [2010] EWHC 3146, para. 7.

<sup>703</sup> *Ibid*, para. 7.

<sup>704</sup> *Ibid*, para.9.

<sup>705</sup> *Ibid*, para.10.

the applicants. Hedley J also emphasised, before concluding this case, that ‘notwithstanding the paramountcy of welfare, the court should continue carefully to scrutinise applications for authorisation under Section 54(8) with a view to policing the public policy matters identified in *Re S*<sup>706</sup> and that ‘it should be known that that will be so’.<sup>707</sup>

As far as retrospective authorisation of payments under the UK jurisdiction is concerned, the case of *J v G*<sup>708</sup> should not be overlooked. This is a key case on payments for overseas surrogacy, as it represents the highest ever payments authorised by a UK court which is only supposed to permit altruistic surrogacy. In one of the largest surveys of surrogacy in the UK, data shows that compensation paid to surrogates in the country is usually less than £15,000. In *Re S*<sup>709</sup>, \$ 23,000 (about £ 15,145) was paid. In *J v G*<sup>710</sup>, under the terms of the gestational surrogacy agreement between the parties, which was governed by Californian law, the applicants (a British couple) made payments to the surrogate totalling \$56,750 (about £ 37,400), which the applicants invited the court to authorise retrospectively pursuant to its powers under Section 54 (8) HFEA 2008. This sum could be broken down as follows:

- (i) \$ 2,750 as an allowance for unspecified ‘incidental expenses’
- (ii) \$ 1,000 inconvenience fee for the IVF transfer
- (iii) \$ 53,000 pregnancy compensation fee. This is made up of the base fee of \$ 45,000, an additional payment of \$ 5,000 for a twin pregnancy and a further sum of \$ 3,000 as compensation for giving birth by caesarean section.<sup>711</sup>

Mrs Justice Theis restated the public policy matters as identified by Hedley J in *Re X and Y*<sup>712</sup> and *Re S*,<sup>713</sup> but acknowledged that ‘the court is only likely to refuse

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<sup>706</sup> [2009] EWHC 2977 (Fam).

<sup>707</sup> *Ibid*, para. 12.

<sup>708</sup> *J v G* [2013] EWHC 1432.

<sup>709</sup> *Re S (Parental Order)* [2009] EWHC 2977 (Fam), [2010] 1 FLR 1156.

<sup>710</sup> *J v G* [2013] EWHC 1432.

<sup>711</sup> *J v G* [2013] EWHC 1432, para.14.

parental orders in the clearest case of the abuse of public policy where otherwise the child's welfare requires the order to be made'.<sup>714</sup> She argued on the facts of *J v G* case that

The payments in this case were not so disproportionate to expenses reasonably incurred that the granting of an order would be an affront to public policy. There is no evidence to suggest that they were of such a level to overbear the will of the surrogate. The surrogate was an experienced surrogate; she had been one twice before. She is a mature woman with financial means. She had legal advice before entering into the agreement and was able to command a higher compensation fee because of her proven track record.<sup>715</sup>

Mrs Justice Theis also reasoned that the applicants had acted in good faith at all stages and that they had taken all proper steps to comply with the legal parentage requirements in both the US and in the UK.<sup>716</sup> There was no evidence of any attempt to circumvent the relevant authorities at any stage including the immigration rules. Therefore, in the circumstances of this case the court exercised its discretion pursuant to section 54 (8) of the HFEA 2008 and authorised the payments made other than for expenses reasonably incurred.<sup>717</sup>

In addition to considering retrospective authorisation of the payments, the court also endorsed the rule that the court's paramount consideration is the children's lifelong welfare. Mrs Justice Theis granted a parental order to the applicants because a parental order is the only order which will safeguard the children's welfare on a lifelong basis because it would:

- (1) Confer joint and equal legal parenthood and parental responsibility upon both the applicants. This will ensure each child's security and identity as lifelong members of the applicants' family.

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<sup>712</sup> *X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam).

<sup>713</sup> *Re S (Parental Order)* [2009] EWHC 2977 (Fam), [2010] 1 FLR 1156.

<sup>714</sup> *J v G* [2013] EWHC 1432, para.21.

<sup>715</sup> *J v G* [2013] EWHC 1432, para. 22.1.

<sup>716</sup> *Ibid*, para 22.2 and para 22.3.

<sup>717</sup> *Ibid*, para 22.5.

- (2) Fully extinguish the parental status of the respondents under English law.
- (3) Make each of the children British citizens which will entitle them to live in the UK with their family on a permanent basis.<sup>718</sup>

The aforementioned cases in the UK provide useful examples to the Vietnamese law in dealing with similar problems that may arise from surrogacy arrangements. However, it is important to note that the courts in Vietnam do not operate in the same way as the UK courts do in handling surrogacy cases. In particular, the Vietnamese courts directly apply the regulations of the statutory law to particular cases instead of interpreting the letter and spirit of the law as the UK court do. For this reason, Vietnamese law makers should make the regulations as clear as possible while reforming the law on surrogacy in coming years. The law in UK has shown that even though non-commercial surrogacy is permitted and commercial surrogacy is unlawful, there still exists possible approaches to handling the welfare of children born of commercial arrangements.

Although there is a strong tradition of concern for the welfare of the child in the UK, where it represents a foundational element of family law generally, this is not the case in Vietnam. In other words, while the UK law has endorsed the rule that the welfare of children born of surrogacy arrangements should be the paramount consideration in the eyes of law, the Vietnamese law makers do not address the welfare of these children. Indeed, the welfare of the child is not considered in detailed in legislation on surrogacy in Vietnam. The new law on surrogacy 2015 does not include any specific regulations regarding the welfare of the child. This could be explained through the following reasons.

First, the society in Vietnam simply expects that parents will assume sole responsibility for the care of their children so that the law does not interfere. Perhaps this is based on a societal and religious expectation that children will be

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<sup>718</sup> *Ibid*, para.27.

cared for which means there is no need to include a welfare principle in the law. Second, the law in Vietnam relies on a mechanism other than welfare of the child to ensure that children are properly protected/cared for.<sup>719</sup> This mechanism works based on cooperation and coordination between political system,<sup>720</sup> state authorities and social organisations with a view to ensuring that children live in a healthy environment, enjoying their rights and being protected from all kinds of violation. However, due to the limited resources of the society, this mechanism seems to be insufficient to protect children in the context of surrogacy, which is a complex issue, potentially causing a host of ethical, legal and social problems as discussed in the previous chapters. Third, the welfare of children in the context of surrogacy is an important issue that the legal system in Vietnam needs to address, but has not addressed. When making the law on surrogacy 2015, the Vietnamese law makers could not see complex problems which may arise from surrogacy arrangements and have considerable impacts on welfare of the child. For example, as the Vietnamese law makers do not consider cross-border surrogacy, the welfare of children born of surrogacy arrangements abroad has not been taken into account. This gap in law on surrogacy in Vietnam could put children at risk. Therefore, although welfare of the child is not a principle of the Vietnamese law, it is necessary for the Vietnamese law makers to set out specific regulations relating to the welfare of children born of surrogacy so that these children can be protected more effectively. In other words, in the coming years, the law on surrogacy 2015 may be reformed to include the important issue of welfare of the child.

The Vietnamese law legislators may refer to the UK case law when considering to address the welfare of children born of surrogacy arrangements. As discussed above, the Vietnamese legislators may not have envisaged the cases where infertile couples who could not satisfy the requirements of altruistic surrogacy

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<sup>719</sup> This mechanism was first set out in Law on Children Protection, Care and Education 1991 and reiterated in Law on Children Protection, Care and Education 2004. Law on Children 2016, which replaces Law 2004 and comes into force from June 2017, continues to maintain this mechanism.

<sup>720</sup> In Vietnam, political system is under the direct control of the Communist Party, which is the ruling party and the sole party in the country.

under the domestic law, have to contemplate commercial surrogacy arrangements in the black market or go overseas to find a surrogate mother. As commercial surrogacy is outlawed, the children born through commercial arrangements either domestic or international may be subject to legal limbo or become marooned and parentless. Therefore, to protect the best interests of these children, the Vietnamese law should consider allowing legal parentage to the intended parents if they take their case to the court. Vietnamese law makers might set out the principle of reasonably expenses incurred to prevent the presence of commercial elements in all surrogacy arrangements. But the law may also provide flexible solutions to commercial surrogacy arrangements which come to the court by allowing the court to circumvent this principle on a case by case basis as can be seen in the UK law.

#### **6.2.5 Specific requirements for surrogate mothers**

The new legislation of Vietnam not only restricts surrogacy to family members, but also narrows the scope of surrogacy to a very limited number of women who want to act as surrogate mothers.

Under the new legislation on surrogacy, a woman must meet the following conditions in order to act as surrogate mother in Vietnam:

- a. Being a next of kin (in the same line) of the wife or the husband of the commissioning couple;
- b. Having given birth to at least one child, and acts as a surrogate mother on a one-time basis.
- c. Being of an appropriate reproductive age and have a certificate from medical authorities with regard to her ability to procreate;
- d. If being under marriage, her husband's written consent must be obtained;
- e. Having undergone clinical, legal and psychological consultations.<sup>721</sup>

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<sup>721</sup> Article 95.3 of the Law on Marriage and the Family 2015. (translated from Vietnamese).

The second condition, which requires the surrogate woman to have had at least one child of her own and to act as surrogate mother on a one-time basis, may be controversial. There are academic arguments in favour of this requirement, based on the idea of the relation between experiential knowledge and giving full informed consent.<sup>722</sup> For example, Ber questions that 'if the woman has never had a child of her own beforehand, how can she possibly be truly informed to give her consent to give up the child she has gestated and delivered?'<sup>723</sup> It may be reasonable that a woman who is already a mother can be in a better position than any woman, who lacks reproductive experience, to predict emotional responses to gestation and childbirth. Therefore, it is supposed that she can understand what she does as a surrogate mother before deciding to be involved in surrogacy arrangements. However, arguments of this kind might be rejected by the contrary argument that 'one does not need experiential knowledge of x in order to consent validly to x'.<sup>724</sup> Wilkinson concedes that there may be special experiences/activities where experiential knowledge is necessary for consent to be validly given; for instance, torture. But he argues that this is not going to work for surrogacy as being a surrogate mother cannot be considered as one of these special experiences because, according to his reasoning, women who are already mothers:

have already had direct experience of gestation, childbirth, and (perhaps most importantly) their own relevant emotional states – including love for their children and some resultant sense of how bad they would have felt if they'd had to give them up.<sup>725</sup>

This shows that experiential knowledge is unnecessarily required for giving valid consent in surrogacy arrangements and, hence, women who have not yet been mothers may still be capable of validly consenting to surrogate motherhood and should be allowed to act as surrogate mothers if they choose to do so.

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<sup>722</sup> Rosaline Ber, Ethical issues in gestational surrogacy, *Theoretical Medicine and Bioethics*, 21(2), 2000, pp.153-169.

<sup>723</sup> *Ibid*, p.158.

<sup>724</sup> Stephen Wilkinson, *Bodies for Sale: Ethics and Exploitation in the Human Body Trade*, Routledge, 2003, p.168.

<sup>725</sup> *Ibid*, p.168.

Nevertheless, Vietnamese law makers may have a reason for the requirement that the surrogate mother should have given birth to at least one child.<sup>726</sup> This may reduce the likelihood that the birth mother wants to keep the child with her. However, this likelihood might be enhanced if the law adds a further demand that the birth mother should also be married and should have completed her family and be leading a sustainable conjugal life.

The requirement for a woman to act as surrogate mother on a one-time basis is also unreasonable. Given the Vietnamese law recognises altruistic surrogacy arrangements on a voluntary basis,<sup>727</sup> it is asserted that a surrogate woman has freely and voluntarily chosen to become a surrogate mother. Research around the world shows that a woman may have different motivations when deciding to be surrogate mother on a non-commercial basis.<sup>728</sup> She may be motivated to give help by sympathy for members of her own family or close friends who have had a long and difficult battle against infertility.<sup>729</sup> She may be satisfied with the knowledge that she gives a precious gift to the couple by bringing into the world a child for them.<sup>730</sup> She may also be incited to help the couple by emotional incentives pertaining to her experience of gestation and childbirth.<sup>731</sup> Some women became surrogate mothers because they lost children in a previous pregnancy and want to assuage this pain by carrying a child, even for other people.<sup>732</sup> For these reasons, a woman may want to become a surrogate mother more than once on the basis of altruism. Therefore, the law should consider circumstances where a woman voluntarily chooses to act as a surrogate mother more than one time and on altruistic, non-commercial grounds.

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<sup>726</sup> Article 95.3 of the Law on Marriage and the Family 2015.

<sup>727</sup> Article 95.1 of the Law on Marriage and the Family 2015.

<sup>728</sup> For example, see Andrews Lori, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, *Virginia Law Review*, p.2353; Anna McGrail, *Infertility: the last secret*, Bloomsbury, 1999; Brazier, M., Campbell, A. and Golombok, S., *Surrogacy: Review of Health Ministers of Current Arrangements for Payments and Regulations*; Report of the Review Team, 1998.

<sup>729</sup> McGrail, A., *supra* note 716, at p.176.

<sup>730</sup> Parker PJ, *Motivation of Surrogate Mothers: Initial Findings*, *Am J Psychiatry*, 1983, 140 (1), p.117-118.

<sup>731</sup> Fisher, S. and Gillman, I., *Surrogate motherhood: attachment, attitudes and social support*, *Psychiatry*, 1991, vol.54, pp.13-20. See also Brazier et al, *supra* note 212, para 4.26.

<sup>732</sup> McGrail, A., *supra* note 716, at p.176.



It is understandable that the condition for one-time surrogate motherhood is put forward in Vietnamese law in order to prevent women from becoming 'professional' surrogate mothers. This restriction is proper in commercial surrogacy arrangements, but inappropriate in altruistic surrogacy. In surrogacy arrangements on the basis of altruism, commercial motivations are excluded and, hence, there is no reason to doubt that the surrogate mother may become a professional to make her living. Moreover, infertile couples who have had one child born of surrogacy may seek to have the second child in the same way with the help of the same surrogate mother they most confide in. In practice, there are a number of benefits of the couple being able to use the same surrogate for subsequent children, including that they have a relationship with the surrogate and know they can trust her. Also, any children will be likely to have more of a sibling bond, which may have positive effects on their personalities.<sup>733</sup> However, the surrogate should not be encouraged to have multiple pregnancies because this could be harmful to her physical and mental health, especially in cases where pregnancies are unsuccessful. Ideally, for her own sake, the surrogate could be encouraged to have more than one pregnancy if she wishes to do so.

#### **6.2.6 Enforceability of surrogacy arrangements**

Other conditions applied to a surrogacy arrangement also raise concerns over its feasibility. Pursuant to Articles 95.1, 96.1 and 96.2 of the law on Marriage and the Family 2015, altruistic surrogacy arrangements in Vietnam must be made in a notarized written form and include all information concerning the commissioning couple and the surrogate woman, as well as their respective rights and obligations in the process of surrogacy. In this regard, surrogacy arrangements

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<sup>733</sup> A study found that only children born of the one-child policy in China were often treated as little emperors and were likely to be more pessimistic, neurotic and selfish than their peers who had siblings. See <http://www.scientificamerican.com/article/chinas-one-child-policy-affects-personality/> (last accessed March 30, 2016).

would take the form of a civil contract which is regulated by the Civil Code. However, it is unclear which type of contract surrogacy arrangements may be as classified. Under Vietnam law, there are many types of contracts, such as contracts for property sale and purchase, contracts for property exchange donation/loan/lease/borrowing, service contracts, and contracts for transportation.<sup>734</sup> Each type of contract is governed by specific regulations. A contract for surrogacy arrangements may be regarded as similar to a service contract, in which the surrogate woman provides the commissioning couple with gestational service. Nevertheless, there is no detail on this in the new law on surrogacy. Therefore, it is possible that regulations on service contracts as set out in the Civil Code might be applied to surrogacy arrangements to deal with issues arising from these arrangements. However, a contract for a surrogacy arrangement is not purely a service contract as it does not satisfy the legal requirement of payment for service (paid by the service hirer to the service provider). It should, therefore, be considered as a special service contract because surrogacy arrangements in Vietnam are made on the altruistic, non-commercial basis. It follows that contract for surrogacy arrangements need specific regulations other than that of service contracts. For example, according to Article 525.1 of the Civil Code 2005:

In cases where the continued performance of a task does not benefit the service hirer, the service hirer shall have the right to unilaterally terminate the performance of the contract, but must notify the service provider thereof in advance within a reasonable period of time; the service hirer must pay the service charges for the service portion performed by the service provider and compensate for damages.

In the context of surrogacy, there are two points worth considering here. First, whether the commissioning couple as the service hirer have the right to unilaterally terminate their arrangements is a lacuna in the law on surrogacy. If they have such a right, what is the compensation they have to pay for harms caused on the surrogate woman during her pregnancy? As surrogacy

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<sup>734</sup> Chapter XVIII, Civil Code 2005, Articles 428-593.

arrangements are altruistic and non-commercial, do the couple have to pay a budget to the surrogate woman as a compensation? Or are there better alternatives forms of compensation? Furthermore, in case of termination of this arrangement, what happens to the child if the surrogate mother decides to continue pregnancy to term? Does she have the right to keep the child as the birth mother? Or will the child be under the court's control and discretion?<sup>735</sup> Will the court appoint a guardian for the child until he/she reaches the age of 18? Second, the law does not allow the couple to refuse to take the child after he/she was born,<sup>736</sup> but stays silent on the circumstances where the couple do not want to continue surrogacy arrangements while the surrogate mother is still pregnant. In such cases, does the surrogate mother has the right to an abortion or has to carry the child to term so that the couple must take it? What happens if the surrogate mother decides to abort the foetus without the agreement of the couple? All of these are complex questions still open to clarification by the Vietnamese legislators.

The legal vacuum in Vietnamese law on surrogacy as discussed above may be filled if Vietnamese legislators look at foreign experiences in dealing with the above-mentioned problems. Both US and UK jurisdictions provide relevant cases in respect of resolving conflicts between the surrogate mother and the commissioning couple in the process of undertaking surrogacy arrangements. For example, in *H v S*,<sup>737</sup> the UK court had to deal with cross applications in respect of a child following a disputed surrogacy arrangement between the birth mother and the commissioning couple. The judge considered what would be in the best interests of the child by applying the welfare checklist enshrined in the Children Act 1989, and decided that the child should live with the commissioning father and his partner.<sup>738</sup> However, as Jackson suggests, in any event 'the law should be able to offer a remedy that protects the interests of the various parties to the

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<sup>735</sup> This might be similar to terms "the ward of court" in UK jurisdiction.

<sup>736</sup> Article 97.6 of the Law on Marriage and the Family 2015.

<sup>737</sup> *H v S (Surrogacy Agreement)* [2015] EWFC 36

<sup>738</sup> *Ibid.*

agreement<sup>739</sup> through establishing a balance of interests and rights between the surrogate mother and the commissioning couple. She argues:

A remedy in damages for breach of contract would protect the surrogate mother's 'right' to keep the child, while compensating the commissioning couple for at least some of their losses. It is perfectly plausible for a surrogate mother's right to resile from her undertaking to hand over the child to coexist with the commissioning couple's right to compensation for losses resulting from their misplaced reliance upon the agreement.<sup>740</sup>

Another important point to note is the impact the validity of surrogacy arrangements has on the parties. Surrogacy arrangements are invalid if the conditions for valid civil arrangements set out in Article 122 of the Civil Code 2005 are not satisfied. In particular, what will happen if one or both of the concerned parties are incompetent (lost capacity for civil acts); the purpose and the content of arrangements are illegal or socially immoral; one or both concerned parties are coerced; and arrangements are not made in a notarized written form. As a result, an invalid arrangement does not give rise to, change, or terminate any civil rights and obligations of the parties from the time of establishment thereof (Article 137.1). In case of an invalid arrangement, 'the concerned parties shall be restored to the original status and shall return to each other what they have received; if the return cannot be made in kind, it shall be made in money' (Article 137.2).

In the context of surrogacy arrangements, that requirement is irrational because the restoration to the original status of the parties is impossible and unrealistic. In particular, it is unreasonable to determine their original status before the point of time the arrangements are made. For example, if the surrogate mother is pregnant, what is her original status? Is she able to be restored to being a non-pregnant woman? Is she forced to abort the foetus to be restored to her original status? The solutions provided by law in this case prove to be inappropriate. For altruistic surrogacy arrangements, there is no involvement of payment at the

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<sup>739</sup> Jackson, E., *supra* note 8, at p.314.

<sup>740</sup> *Ibid*, p.314-315.

time of signing the contract and thus financial compensation is not proper. Hence, the law should provide another feasible solution to this situation so that the welfare of the surrogate mother, the commission parents, and the child are protected. The non-enforceability of surrogacy arrangements, as in the UK law, may be a good lesson for the Vietnamese law in resolving these issues.

The flaws identified in this chapter show that the current law on surrogacy in Vietnam needs further reform to better support procreative autonomy and individual freedom to choose surrogacy as a means of overcoming infertility. The next chapter will conclude the thesis with some recommendations for these reforms.

## CONCLUSION

As discussed in the chapters, the legal ban on surrogacy was maintained in Vietnam for more than 10 years with a view to protecting traditional and cultural values, but failed to prevent the incidence of surrogacy in the country. The cultural and social pressure to produce offspring resulted in Vietnamese infertile couples seeking the help of surrogate women in the black market where risks for the surrogate mothers and the commissioning couples are obvious and inevitable. In order to resolve the tension between these two positions, Vietnamese law makers made legal reforms to change their approach towards surrogacy, which led to the introduction of the new law 2015 on surrogacy, removing the decade long ban and permitting infertile couples to use surrogacy to have their own biological children. This change is a big step in the process of reforming the law on surrogacy in Vietnam because the Vietnamese state has recognised the procreative autonomy and the right to procreate of infertile people for whom surrogacy was regarded as the last resort to bring a genetically related child into the world. However, there exist imperfections in the current law on surrogacy (as analysed in chapter 6) which make it difficult for Vietnamese infertile couples to use surrogacy in practice. Amongst others, the restriction of altruistic surrogacy to family members as well as a number of conditions for parties involved in surrogacy arrangements are obstacles which prevent infertile couples from using surrogacy to reach parenthood. Therefore, it is necessary for Vietnamese law makers to respond to those imperfections in years to come. Based on an analysis of the flaws in the current Vietnamese law as discussed in Chapter 6, the thesis offers some brief recommendations for reforming the law on surrogacy in Vietnam as follows:

1. The law should extend the availability of altruistic surrogacy to non-family members. Under the law 2015 on surrogacy, only sisters or cousins of the wife or

the husband of an infertile couple can be allowed to act as surrogate mothers. This is difficult or sometimes impossible for infertile couples to find a surrogate mother and hence, they have to seek the help of a woman in the black market. Consequently, in order to overcome this difficulty, friends should be permitted to become surrogate mothers on the basis of altruism.

2. The law should allow gay couples and single persons to resort to altruistic surrogacy to have their genetically related children. These people are deemed to be socially infertile as they are unable to produce a child without the help of a fertile woman. If they choose surrogacy to have children and form their own family, they should be permitted to do so. This will vividly demonstrate that the Vietnamese law respects and promotes more effectively their procreative autonomy as well as their legal right to procreate in the context of surrogacy.

3. The law should provide a clearer distinction between altruistic and commercial surrogacy. The current law does not give a definition of altruistic surrogacy. It only defines commercial surrogacy as a practice where a woman bears a child for another woman by using assisted reproductive technologies in order to obtain financial benefits or other interests. It is unclear whether or not altruistic surrogacy may be understood in terms of there being zero financial cost to the surrogate at the end of the arrangement. It is also unclear whether there can be reasonable expenses paid to the surrogate mother in altruistic surrogacy. Consequently, the Vietnamese law should shed more light on this to help parties to surrogacy arrangements take appropriate actions in accordance with the regulations on surrogacy.

4. The law should be clearer about gestational surrogacy. According to the law 2015's provisions, altruistic surrogacy must be proceeded with the assistance of IVF techniques. Moreover, both of the wife and the husband have to provide gametes in the creation of embryo(s). In practice, some couples cannot satisfy

this requirement because one of the couple is unable to provide genetic materials, for example, the husband cannot produce sperm or the wife cannot produce eggs. This follows that fewer people are eligible to use surrogacy to form a family of their own. Therefore, I suggest that Vietnamese law makers may learn from the UK experience when considering reforming the law on surrogacy. That is only one of the couple (the husband or the wife) are required to be genetically related to the child. In so doing, the law will make surrogacy accessible to more people in the future.

5. The law should allow a woman to act as a surrogate mother more than one time if she wishes to do so. The infertile couple may benefit from using the same surrogate mother for subsequent children because they have a relationship with the surrogate and know they can trust her. Furthermore, children will be likely to have more of a sibling bond which may be spiritually important for their lives.

6. The Vietnamese law could learn from the experience of UK case law in dealing with retrospective authorisation of payment to surrogate mothers. There is a possibility that in spite of the legal ban on commercial surrogacy, infertile couples will still make a payment to the surrogate mother. Under the Vietnamese law, their arrangements would be void and, as a consequence, children born of surrogacy, the surrogate mother, and the commissioning couple would be left in difficult situations. In particular, the commissioning couple who brought about the child's creation would have no legal rights in respect of the child, while the surrogate mother would take prima facie responsibility for a child that she may not want to rear. Therefore, in order to protect the best interests of the child, the law should consider the possibility of the courts retrospectively authorising the payment made to surrogate mothers, instead of deciding the arrangements are void.



7. The law in Vietnam has not addressed the important issue of welfare of the child in the context of surrogacy and this may be seen as a lacuna in the Vietnamese legal system. Therefore, the law on surrogacy should be reformed to fill this legal gap. For example, the law should have additional regulations on international surrogacy and set out new provisions on welfare of the child to protect the best interests of children born following surrogacy abroad. In future, Vietnamese infertile couples may go abroad to make surrogacy arrangements and face legal challenges (as can be seen in the UK) when bringing their children back home. For this reason, the law should also incorporate into the law 2015 new regulations as to citizenship as well as the determination of legal parenthood for the child born through international surrogacy in order to avoid putting the child in legal limbo.

8. Vietnamese law makers could consider an Act of Surrogacy Arrangements independent from the law on Family and Marriage. This Act would have more specific regulations on surrogacy than the law 2015, which is a part of the law on Marriage and Family. Such an Act would also enable the Vietnamese state to correct the flaws in the current law on surrogacy.

**APPENDICES:**

**APPENDIX 1**

**THE HIERACHY OF LEGAL DOCUMENTS IN VIETNAM<sup>741</sup>**

| <b>Hierarchy of State Authorities</b>           | <b>The kinds of legal documents</b> | <b>Note</b>                                                                                       |
|-------------------------------------------------|-------------------------------------|---------------------------------------------------------------------------------------------------|
| National Assembly or Parliament (most powerful) | Constitution<br>Law<br>Resolution   | Law (Acts of Parliament) is the most often enacted document                                       |
| Standing Committee of the National Assembly     | Ordinance<br>Resolution             |                                                                                                   |
| President                                       | Orders                              | President makes orders to announce and publish a law enacted by the Parliament <sup>742</sup>     |
| Government                                      | Decree                              | Government produces decrees to interpret a law enacted by the Parliament                          |
| Prime Minister                                  | Decision                            |                                                                                                   |
| Chief Justice (Head of the Supreme Court)       | Circular                            | Generally, they make independent circulars in their area. But, in some circumstances they may, in |

<sup>741</sup> This table is produced on the grounds of Article 2 of the Law on Enactment of legal documents, which was passed by the National Assembly of Vietnam on 3<sup>rd</sup> June 2008.

<sup>742</sup> A law is not valid without the orders of the Vietnamese president who is constitutionally regarded as the head of state in Vietnam. This procedure is similar to Royal Assent by the sovereign in the UK which is required before a bill can come into force as law.

|                                                              |                        |                                                                                                                                   |
|--------------------------------------------------------------|------------------------|-----------------------------------------------------------------------------------------------------------------------------------|
|                                                              |                        | their collaboration, enact shared circulars on a specific issue.                                                                  |
| Chief of Prosecution                                         | Circular               |                                                                                                                                   |
| Ministers                                                    | Circular               |                                                                                                                                   |
| State Auditor<br>General                                     | Decision               |                                                                                                                                   |
| Council of Lords (of<br>The Supreme Court)                   | Resolution             |                                                                                                                                   |
| People Committees<br>and People Councils<br>(least powerful) | Resolution or Decision | They are regarded as local governments and divided into 3 levels of administrative territories (province, district, and commune). |

## APPENDIX 2

### LAW ON MARRIAGE AND THE FAMILY OF VIETNAM 2015<sup>743</sup>

*(Extracts, mostly provisions relevant to surrogacy)*

*Translated from Vietnamese*

#### Chapter I: GENERAL PROVISIONS

##### *Article 3. Interpretations of terms*

1. Marriage means a conjugal relationship between the wife and the husband after legally getting married.
2. Family consists of people whose mutual attachments are based on the grounds of marriage, blood ties, or rearing relationships, which produce their rights and obligations by one towards the others according to regulations of this law.
3. The marriage and family regime consists of all legal regulations with respect to marriage, divorce; rights and obligations between the wife and the husband, between parents and child(ren), between other family members; support allowances; the determination of parenthood and biological children; marriage and family relationships with foreign elements, and other issues relating to marriage and the family.
4. Customs of marriage and family consists of a clear behaviour code with regard to rights and obligations between parties to a marriage and a family, repeatedly used in the long run and commonly accepted in a region or a community.

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<sup>743</sup> Passed by the National Assembly of Vietnam on 19<sup>th</sup> June 2014 and come into force from 1<sup>st</sup> January 2015.

5. Legally getting married is a legal fact by which a male and a female establish a conjugal relationship in accordance with the regulations of this law with respect to marriage conditions and marriage registration conditions.

6. Illegally getting married is a fact by which a male and a female undertake marriage registration in the authorities, but either or both commit a breach of marriage conditions as set out in Article 8 of this Law.

7. Cohabitation is a practice where a male and a female lead a conjugal life together and consider themselves as the husband and the wife.

(6-12: not translated)

13. Marriage period is a length of time in which conjugal relationship exists, commencing from the date of marriage registration until the date of termination of marriage.

(14-15: not translated)

16. Family members include: the wife, the husband; biological parents, adoptive parents, parents, parents-in-law; biological children, adopted children, step children, children-in-law; siblings having one or both parents in common, brothers-in-law, sisters-in-law of full siblings or of half-blood siblings; grandparents; grandchildren; aunts, uncles, and nieces/nephews.

17. Relatives of the same direct bloodline are those who have blood ties, in which the one bore the other consecutively.

18. Relatives within three generations are those who were born of the same stock: parents constitute the first generation; full and half-blood siblings constitute the second generation; first cousins constitute the third generation.

19. Next of kins are those who have matrimonial or rearing relationships, or having the same direct bloodline, or being relatives within three generations.

21. Procreation with the help of assisted reproductive technologies means artificial fertilisation or in vitro fertilisation.

22. Surrogacy on the basis of altruism is a practice in which a woman, voluntarily and with a non-commercial purpose, carries a child for a married couple whose the wife is unable to gestate and bear a child even when the assisted reproductive technologies have already been referred to. In the altruistic surrogacy, the egg of the wife and the sperm of the husband are used for the fertilisation in vitro, and the resulted embryo is implanted into the womb of the surrogate woman who will carry the foetus and give birth to a child.

23. Surrogacy on the commercial basis is a practice in which a woman bears a child for another woman by the use of the assisted reproductive technologies in order to obtain economic benefits or other interests.

*Article 5. Protection of the marriage and family regime*

2. The following actions are prohibited:

g, Having children with the use of the assisted reproductive technologies for commercial purposes, surrogacy on the commercial basis, foetal sex selection, and human cloning.

**Chapter V: RELATIONSHIPS BETWEEN PARENTS AND CHILDREN**

**Section 2: Determination of parenthood and biological children**

*Article 88. Determination of parenthood*

1. A child born in wedlock or as a result of the wife's pregnancy during the marriage is the child of the couple.  
A child born within 300 days from the date of termination of marriage is regarded as the child born by the wife of the couple during their wedlock.  
A child born prior to the date of marriage registration and acknowledged by his/her parents is the child of the couple.
2. In cases where a parent do not acknowledge their child, it is required for them to provide evidence and the case must be resolved in the courts.

*Article 93. Determination of parenthood in cases of procreation using the assisted reproductive technologies*

1. In cases where the wife of the couple procreates by the use of the assisted reproductive technologies, the determination of parenthood is proceeded based on the above Article 88.
2. In cases where a single woman procreates using the assisted reproductive technologies, she is the mother of the child born as a result of her pregnancy.
3. Procreation using the assisted reproductive technologies does not produce legal parenthood between sperm/egg/embryo donors and the resulted child/children.
4. The determination of parenthood in case of surrogacy on the basis of altruism is taken based on the regulation set out in Article 94 of this law.

*Article 94. Determination of parenthood in the surrogacy arrangements on the basis of altruism*

A child born through surrogacy on the basis of altruism is the child of the commissioning parents from the moment he/she was born.

*Article 95. Conditions for the making of surrogacy arrangements on the basis of altruism*

1. Surrogacy on the basis of altruism must be carried out on the grounds of voluntariness and take a written form.
2. The married couples have the right to engage a surrogate woman provided that they fulfil the conditions described below:
  - a, Having obtained the certificate issued by the medical authorities confirming the wife's inability to gestate and bear a child even when the assisted reproductive technologies have been referred to;
  - b, Not having their own biological child(ren);

- c, Having had clinical, legal and psychological consultations.
- 3. A surrogate woman must satisfy the following conditions:
  - a. Being a next of kin (in the same line) of the wife or the husband of the commissioning couple;
  - b. Having given birth to at least one child, and acts as a surrogate mother on a one-time basis.
  - c. Being of an appropriate reproductive age and have a certificate from medical authorities with regard to her ability to procreate;
  - d. If being under marriage, her husband's written consent must be obtained;
  - đ, Having undergone clinical, legal and psychological consultations.
- 4. Surrogacy arrangements on the basis of altruism must follow the legal regulations pertaining to procreation using the assisted reproductive technologies.
- 5. The Vietnamese Government issues regulations<sup>744</sup> detailing this Article.

*Article 96. Agreements on surrogacy on the basis of altruism*

- 1. Agreements on surrogacy on the basis of altruism between the intended couple (the commissioning parents) and the surrogate couple (the surrogate woman and her husband) must include the following content:
  - a, Full information about the intended couple and the surrogate couple pursuant with relevant conditions set out in Article 95 of this law;
  - b, Commitments to exercise the rights and fulfil obligations provided in Articles 97 and 98 of this law.
  - c, Resolutions to obstetric complications; assistances to the surrogate woman in assuring her reproductive health during pregnancy and delivery; the reception of children by the commissioning parents; the

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<sup>744</sup> In form of a Decree.



rights and obligations of both parties to surrogacy agreements with regard to the resultant child in case the child has not yet been handed over to the commissioning parents; and other relevant rights and obligations.

d, Civil liabilities in cases where one or both parties to surrogacy agreements break the agreed commitments.

2. Agreements on surrogacy must be in a written notarized form. In cases where either of the intended couple authorizes each other or the surrogate couple does in the same way to make surrogacy agreements, the authorization must be written in a notarized form. The authorization to the third party is legally invalid.

In cases where surrogacy agreements between the intended couple and the surrogate couple are made at the same time with agreements between these couples and the medical authorities, the first agreements must be certified by the mentioned medical authorities.

*Article 97. Rights and obligations of the surrogate mother in the surrogacy arrangements on the basis of altruism*

1. The surrogate woman has the right to demand the intended couple to undertake the reproductive health assistance and caring.
2. The surrogate woman and her husband, have the same rights and obligations as the parents do in reproductive healthcare, in caring and rearing the child until the time the child is handed over to the intended couple; they are required by law to hand over the child to the intended couple.
3. The surrogate woman must follow the regulations issued by the Ministry of Health with regard to periodical medical treatments, the procedures of prenatal screening and diagnosis with a view to detecting and curing foetal malformations, abnormalities.

4. The surrogate woman is entitled to enjoy maternity leave regulated by the law on labour and social insurance until the time the child is transferred to the commissioning parents. If from the date of childbirth to the date of child transfer, the time of maternity leave is less than 60 days, the surrogate mother is still entitled to maternity leave until the 60<sup>th</sup> day. The child born through surrogacy is not counted to the number of children of the family according to the National Population and Family Planning Policy.
5. The surrogate woman has the right to demand the intended couple to undertake the reproductive health assistance and caring.  
In cases where the continuance of pregnancy would involve risk to the life or the physical/mental health of the surrogate woman, or danger to the foetal development, she has the right to decide the number of foetuses, to continue or discontinue to carry the foetus(es) in accordance with the law on reproductive healthcare and procreation using the assisted reproductive technologies.
6. In cases where the intended couple refuses to take the child, the surrogate mother has the right to demand the courts to oblige the intended couple to do so.

*Article 98. Rights and obligations of the intended couple (commissioning parents) in the surrogacy arrangements on the basis of altruism*

1. The intended couple has the obligations to pay incurred expenses in assuring reproductive healthcare in accordance with the regulations issued by the Ministry of Health.
2. The rights and obligations of the commissioning parents towards the child born through surrogacy commence from the time the child is born. The commissioning mother is entitled to enjoy maternity leave (from the time the child is handed over to her until the time the child reaches 6 months) in accordance with the law on labour and social insurance.

3. The commissioning parents are not allowed to deny to take the child. If the commissioning parents take the child later than the agreed time or infringe their obligations to care and rear the child, they have an obligation to support the child in accordance with this law and simultaneously, are subject to legal liabilities by the relevant laws; the commissioning parents are also obliged to compensate for harms inflicted by them on the surrogate mother. If the commissioning parents die, the child born of surrogacy will be entitled to inherit their properties in accordance with the law on inheritance.
4. There exist the rights and obligations between the child born of surrogacy and other members of the commissioning parents' family according to this law, Civil Code, and other relevant laws.
5. The commissioning parents have the rights to demand the courts to enforce the handing over of the child if the surrogate mother wants to keep it.

*Article 99. Litigation/dispute resolution with regard to the use of the assisted reproductive technologies and surrogacy on the basis of altruism*

1. The courts assume the authority to resolve disputes relating to procreation using the assisted reproductive technologies, and surrogacy.
2. In cases where the commissioning parents die or become incompetent<sup>745</sup> while the child has not yet been handed over, the surrogate mother has the right to child custody; if she refuses to do so, the guardianship and support (alimentation) for the child are undertaken according to regulations of this law and Civil Code.

*Article 100. Sanctions for breaches in the use of the assisted reproductive technologies and surrogacy*

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<sup>745</sup> Literally, Lose capacity for civil acts of individuals.

People engaging procreation using the assisted reproductive technologies and both parties to surrogacy arrangements, in case of being in breach of conditions as well as rights and obligations set out in this law, will be subject to civil liabilities, administrative sanctions<sup>746</sup>, or criminal punishments, depending on the degree of their infringement.

*Article 101. Authorities for the determination of parenthood and children*

1. In cases where there is no disputes or litigations, the civil status registration agencies have the authority to determine parenthood and biological children according to the law on civil status registration and management.
2. The courts assume the authority to resolve disputes relating to the determination of parenthood and biological children, or in cases the claimants die and in a particular case as described in Article 92 of this law. The court judgement as to the determination of parenthood and biological children must be sent to the civil status registration agencies to note according to the law on civil status registration; to those who are subject to the determination of parenthood and biological children; to concerned individual, state agencies and social organisations according to the law on civil procedure.

*Article 102. Persons entitled to request the determination of parenthood and children*

1. Parents and adult competent children have the right to demand the civil status registration agencies to determine, for the sake of themselves, biological children and parenthood in cases as described in Clause 1 Article 101 of this law.

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<sup>746</sup> In the Vietnamese law, administrative sanctions mostly mean fines or financial punishments.

2. Parents and children, according to the law on civil procedure, have the right to request the courts to determine their own children/parents in cases as set out in Clause 2 Article 101 of this law.
3. According to the law on civil procedure, the right to request the courts to determine parenthood for minor children, for adult children losing capacity for civil acts; determine biological children for minor parents or adult parents losing capacity for civil acts in cases described in Clause 2 Article 101 is granted to the individuals, state agencies and social organisations as listed below:
  - a, Fathers, mothers, children, guardians;
  - b, State agencies responsible for the family management;
  - c, State agencies responsible for children management;
  - d, Women Union.

## **APPENDIX 3**

### **GOVERNMENTAL DECREE No 10/2015/ND-CP<sup>747</sup> (extracted)**

#### **On human reproduction through IVF techniques and conditions for altruistic surrogacy**

#### **CHAPTER I**

#### **GENERAL PROVISIONS**

#### **Article 2. Interpretation of terminologies**

( 1-6: not translated)

7. Relatives in the same generation of the wife or the husband of the infertile married couple includes:

#### **CHAPTER V**

#### **CONDITIONS FOR SURROGACY ARRANGEMENTS ON THE BASIS OF ALTRUISM**

#### **Article 13. Medical facilities entitled to undertake techniques relating to altruistic surrogacy**

1. Conditions for medical facilities to be licensed to undertake techniques relating to altruistic surrogacy:
  - a, Having at least one year of experience in IVF treatment and undertaking at least 300 cases a year in this domain.
  - b, Not having any violation of law in the area of medical treatment in relation to techniques of IVF.
  - c, Having abilities to meet needs of surrogacy treatment , and to facilitate patients.

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<sup>747</sup> Issued by the Vietnamese Government on 28<sup>th</sup> January 2015 and comes into force from 15<sup>th</sup> March 2015.

2. The list of facilities, which have met the above-mentioned conditions and may undertake techniques of surrogacy in the first place, includes:
  - a, National Gynaecology Hospital in Hanoi;
  - b, Central General Hospital in Thua Thien Hue province
  - c, Tu Du Gynaecology in Ho Chi Minh City.
3. One year after the coming into force of this Decree, pursuant to Article 13.1, Health Minister will decide to add to the list of surrogacy facilities other medical facilities, which have been recognised and certificated by Ministry of Health to undertake IVF techniques.

**Article 14. Documents for application for undertaking techniques pertaining to altruistic surrogacy**

1. The Infertile married couple apply to the licensed medical facilities for a grant of the use of altruistic surrogacy with the following documents:
  - a, Application for the use of surrogacy in accordance with Form No 04 issued with this Decree;
  - b, Commitments to voluntary surrogacy on the basis of altruism in accordance with Form No 05 issued with this Decree;
  - c, The undertaking of the woman, who agrees to act as surrogate mother and formally pledges not to have involved in any surrogacy arrangements in the past.
  - d, Certificate of not having children of the married couple, issued by the people committee of the commune where they domicile.
  - đ, Certificate issued by the IVF fully licensed facilities with regard to the medical condition of the wife of the married couple, certifies that the pregnancy may involve a substantial risk to the life, the physical or mental health of herself and of her foetus, that the woman is unable to carry the foetus and give birth to a child even if assisted reproductive technologies have been applied.

- e, Certificate issued by the IVF fully licensed facilities with regard to the ability to get pregnant of the surrogate woman and her childbirth experience;
  - g, Certificate issued by the communal people committees or provided by the surrogate woman, the infertile married couple with regard to the confirmation of their relationship deriving from the same bloodline within the same generation, based on the relevant documents of civil status; the document providers will be responsible to the authenticity of these documents.
  - h, Certificate by the husband of the surrogate woman (in case she is married) with regard to his consent to the making of surrogacy arrangement.
  - i, Certificate with regard to medical consultation by gynaecologists.
  - k, Certificate with regard to psychological consultation by psychologists.
  - l, Certificate with regard to legal consultation by lawyers or legal assistants.
  - m, Agreement of altruistic surrogacy between the infertile married couple and the surrogate woman (and her husband in case she is married) in accordance with Form No 6 issued with this Decree.
2. Within 30 days commencing from the date of certified document reception pursuant to Article 14.1, the licensed surrogacy medical facilities must have treatment plans in order to undertake techniques for surrogacy. In case of inability to do this, the medical facilities must reply to the applicants by written form and explain the reasons for denial of application.

#### **Article 15. Medical consultation**

- 1. The married couple should be consulted and informed on these issues:
  - a, Other options besides surrogacy or adoption;
  - b, The process of undertaking techniques of IVF and surrogacy;
  - c, Difficulties in the realisation of surrogacy.



- d, Success rate would be extremely low if the wife of the infertile married couple has a low ovarian reserve or she is over 35 years old;
  - đ, Expensive costs for treatment;
  - e, The possibility of multi-pregnancy;
  - g, The possibilities of disabled foetus/child and of termination of pregnancy;
  - h, Relevant issues.
2. The surrogate woman should be consulted and informed on the following issues:
- a, Risks and complications which may occur during pregnancy such as miscarriage, ectopic pregnancy, blood loss after vaginal delivery;
  - b, The possibility of undertaking caesarean section;
  - c, The possibility of multi-pregnancy ;
  - d, The possibilities of disabled foetus/child and of termination of pregnancy;
  - đ, Relevant issues.

**Article 16. Legal consultation**

1. Determination of legal parenthood for children born of altruistic surrogacy arrangements in accordance with Article 94 of the Law on Marriage and the Family.
2. Rights and obligations of the surrogate woman involving in an altruistic surrogacy arrangement in accordance with Article 97 of the Law on Marriage and the Family.
3. Rights and obligations of the married infertile couple contemplating altruistic surrogacy arrangements in accordance with Article 97 of the Law on Marriage and the Family.
4. Relevant issues.

## **Article 17. Psychological consultation**

1. The married couple should be consulted and informed on the following issues:
  - a, The long-term and short-term psychological consequences of surrogacy and its effects on their relatives and the child born of surrogacy.
  - b, The surrogate mother may intend to keep the child after birth.
  - c, Behaviours, habits of the surrogate woman during her pregnancy may have effects on the child she carries;
  - d, Their psychology and emotional changes when asking another woman for pregnancy and childbirth for their sake ;
  - đ, Failed attempts and huge expenditure relating to surrogacy treatments may cause psychological tensions and fatigue.
  - e, Relevant issues.
2. The surrogate woman should be consulted and informed on the following issues:
  - a, Psychology and emotional changes of her family members, relatives and friends in the process of surrogacy;
  - b, Sense of responsibility for the married couple in case of miscarriage;
  - c, Psychological effects on her existing children;
  - d, Sense of loss, complex after the handing over of the child to the couple;
  - đ, She is advised to act as surrogate mother only if the main motivation is to help the infertile married couples, on a non-profit basis;
  - e, Relevant issues.

## **Article 18. Responsibilities pertaining to medical, legal, psychological consultation**

1. The fully licensed medical facilities entitled to undertake techniques of surrogacy are obliged to organise medical, legal and psychological consultation for the infertile married couple and the surrogate woman.

2. In cases where the married couple or the surrogate woman submit one of certificates, the licensed medical facilities entitled to undertake techniques of surrogacy are not obliged to organise consultation if the concerned parties have obtained one of these certificates:
  - a, Certificate of medical consultation by doctors from the licensed medical facilities for IVF.
  - b, Certificate of psychological consultation by psychologists from the licensed professional facilities for Psychology.
  - c, Certificate of legal consultation by legal advisors who work for legal aid organisations.
3. Those who hold medical consultation must be gynaecologists and must consult on all the issues set out in Article 15 of this Decree. Those who hold legal consultation must be at least a Bachelor of Law and must consult on all the issues set out in Article 16 of this Decree. Those who hold psychological consultation must be a Bachelor of Psychology and must consult on all the issues set out in Article 17 of this Decree.
4. Those who hold medical or legal or psychological consultation must sign, write full names, titles, addresses of workplace and date of consultation on the paper of consultation certificates, and must be legally liable for their certification.

**Article 19. Responsibilities of the licensed medical facilities entitled to undertake techniques of surrogacy**

1. Examine, check the legality of documents in relation to application for the use of surrogacy by the infertile married couple with the assistance of the medical facilities. If necessary, check original papers, ask for other relevant papers, interview the applicants or call for the involvement of the police.
2. Be responsible for the legality of the documents submitted by the applicants and for the expertise and techniques undertaken by the facilities.

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