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Criminal legal aspects of surrogacy for commercial purposes—Case of Vietnam

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Abstract: Surrogacy has opened new doors for many people who need children but are infertile or unable to have children. Through modern scientific technology, couples or mothers can find women to ask them to be surrogates using their eggs or sperm. The nature of surrogacy is reproductive support, but the complexity of the surrogacy procedure causes a lot of controversy not only in the field of criminal law but also regarding its implementation in practice. The article uses qualitative analysis to study current commercial surrogacy formulas. The main goal of this study is to clarify the legal aspects of commercial surrogacy in the world and in Vietnam. The article also concludes that Vietnam and other countries need to agree or develop common principles to avoid cross-border surrogacy as well as establish legal tools to prevent surrogacy for sexual purposes trade to protect human rights and prevent child trafficking.

Keywords: surrogacy; commercial purpose; criminal; responsibility; Vietnam

1. Introduction

Over the past few decades, surrogacy has attracted worldwide attention with ongoing efforts in international legal documents to ensure best practices in surrogacy. Countries approach the issue of surrogacy from different perspectives. Some countries completely ban surrogacy, while others allow surrogacy to a non-commercial level. Some countries are considered surrogacy-friendly because they explicitly allow surrogacy, while others do not have clear regulations on surrogacy.

Increasing globalization and advances in artificial reproduction techniques have opened up entirely new possibilities for infertile couples across the globe. Advances in assisted reproductive technology have led to an increasing number of the public accepting same-sex relationships being single, or living together or separated and still having children. Especially in Western society, traditional heterosexuality or biologically natural childbirth by couples is no longer the only norm. Therefore, the popularity of transnational surrogacy has become a hot topic and has attracted much research attention (Abdullah, 2019). Fairly paid cross-border surrogacy is one of the products of medical tourism that meets IVF embryo transfer. It is also a hot topic of discussion in the legal and bioethical fields. Concerns about abuse and violation of autonomy have arisen from the current situation, where there is no international regulation of surrogacy arrangements—only a web of conflicting national laws that create gaps and also remove protections for both surrogate and proxy couples.

In practice on human rights in the world, women are identified as one of ‘vulnerable groups’—a concept that refers to groups of people at high risk of being physically vulnerable to human rights. Based on that awareness, international law has emphasized the need to protect women’s rights in terms of human rights in general as well as gender-specific rights in particular in basic human rights laws, as well as other

human rights laws on women's rights and the rights of vulnerable groups. Therefore, the protection of women's rights is set as an important task for the laws of all countries in the world, especially criminal law. However, in the wake of surrogacy, in the face of the global context of international surrogacy, a report has pointed out that previous studies have not sufficiently emphasized women's rights, that lack of independent legal representation, and medical, psychological and social impact. In addition, there is concern about the perception of the child in most surrogacy agreements (Cheney, 2014).

Therefore, the content presented below will answer the question posed, from a criminal legal perspective, is surrogacy considered a crime? What should countries including Vietnam do to protect women's rights in commercial surrogacy?

2. Methodology

The method adopted is the method of analyzing the legislation related to surrogacy under the reference of some legislative perspectives of the world. The comparative assessment method is also used to clarify the legal provisions on surrogacy between some countries in the world and the laws of Vietnam. The relationship between surrogacy and child trafficking has been analyzed to form conclusions and recommendations. The results of the study provide Vietnam's perspective on the issue of surrogacy and how the state deals with the problem of commercial surrogacy. Results will be obtained by analyzing available legislation and literature and comparing the results of these analyses.

3. Results and discussion

3.1. Types of surrogacy for commercial purposes

Traditionally, surrogacy was sought by heterosexual infertile couples but is now increasingly sought by gay couples, especially men, to have a child that can biological relationship with a parent (Susan, 2008). In traditional surrogacy, the surrogate mother donates her ovum to the couple, thus she is the genetic mother. However, it is more common for couples to pursue the route of surrogacy, in which the intended mother's egg and the intended father's sperm are implanted into the surrogate mother (Cheung, 2014). Surrogacy, which is an assisted reproductive technology used in vitro fertilization to implant embryos into a surrogate mother, is a method for infertile women due to the inability of the woman's uterus to give a child pregnancy a chance to have a surrogate gestational carrier. Surrogate pregnancy has a similar success rate to standard in vitro fertilization (IVF), and both procedures have very minimal medical significance. However, surrogacy, due to the complexities involved in dealing with contracts, regulations, and surrogate third parties, is often legal and ethical (Brinsden, 2003).

Surrogacy is classified into two categories: commercial surrogacy and humanitarian surrogacy. Commercial surrogacy is a form of surrogacy where the surrogate mother receives financial compensation for her services as the surrogate. Humanitarian surrogates do not receive any additional financial compensation other than compensation for reasonable expenses related to pregnancy and childbirth. While

the challenge of pursuing altruistic surrogacy is to tap into its emotional potential, commercial surrogacy has the potential to tap into the 'reproductive capacity' of women in disadvantaged backgrounds financial hardship by the upper class and middle-class couples leading to a loss of their value as human beings (Banerjee, 2013). However, all surrogacy involves money even if the representative is involved for the sole purpose of receiving financial compensation.

A study has shown that there are reasons to choose surrogacy. One is the biological factor. The woman is older, so the natural process of fertilizing an egg is no longer possible for the body (Li and Johnson, 2014), or is not able to get pregnant due to other health problems, such as if they have an egg that cannot be fertilized (Konečná and Svatoš, 2019). Second, the physical and psychological burden. In addition to the physical and psychological symptoms of pregnancy, it often takes a few weeks for women to recover from childbirth, so many women who are choosing to hire a surrogate have to bear the burden of giving birth while they can work without the limitations of pregnancy. Third, the health factor, physique. To avoid the effects on health and shape, a woman can choose to hire a surrogate if she wants to keep her body shape, as a woman's body changes during pregnancy and maintains her figure. A slim figure is an important aspect of contemporary culture.

Surrogacy has become an increasingly pressing issue in each country and has been openly debated internationally over the past 20 years (Chintamani, 2012). Surrogacy challenges couples because it breaks the norm and creates a non-traditional family in which the child has at least two mothers, a biological mother, and an intended mother. The genetic mother is either the surrogate or the intended mother, but the embryo can also be the result of a donor egg, in other words, the child can technically have three mothers (Tazia, 2016). Depending on the cause of the infertility, the child may also have a genetic father and an intended father. The type of non-traditional family created through surrogacy has caused controversy internationally, where countries do not recognize surrogacy arrangements, as well as countries that have legalized surrogacy.

Commercial surrogacy has been called by many critics the accused and scornful phrase 'global baby business'. The international trend of reproductive travel that appears to be on the rise may be due to the opportunities created by assisted reproductive technologies (ART) such as in vitro fertilization (IVF), in addition to travel relatively easy in a globalized world. Thus, starting a family is no longer associated with intercourse, closeness, and traditional conceptions of the family. The aforementioned reproductive technologies have created a rift between sexuality and reproduction. As a result, surrogacy has become a viable and even attractive alternative for many couples with infertility or sexual orientation that rule out pregnancy 'naturally' or when a woman does not want to be pregnant. In addition, women's financial interests can play an important role, especially in developing countries, in determining or influencing their choice to enter into a pregnancy agreement. In some documented cases, a woman becoming a surrogate can secure a livelihood for their family for many years, and possibly even provide their children with a better future through educational opportunities that would otherwise be forfeited. Poverty is another worrying factor of commercial surrogacy (Jennifer, 2009). In addition, the link between poverty and health has been clear (Allyn and

Karen, 2007), with surrogacy likely to have a larger negative impact on the country's public health destination. The risks of pregnancy are known, can be life-threatening, and increase with the number of fetuses in the womb or the number of pregnancies in the past (Susan, 2011). Even in the 'best case scenario'—where the pregnancy is uncomplicated and the baby is born healthy and without a cesarean section—the surrogate will face labor pains (or the possibility of complications from the epidural) and may face physiological damage from childbirth, infections, negative health effects from pregnancy, such as weight gain, depression postpartum and emotional changes (Kalsang et al., 2009).

Since the beginnings of commercial surrogacy, surrogacy scandals have played an important role in bringing about legal changes around the world, most famously the 1986 Baby M case in New Jersey State of the United States 9 (Susan, 2007). India also has its own Baby M—'Baby Manji' is publicized in many cases. A couple from Japan hired a surrogate mother in India and used the eggs of an anonymous donor. Just a month before baby Manji was born, the couple separated. When his ex-wife refuses to travel with him to possess the baby, the father plans to fly to India alone. However, the Indian authorities refused to give Manji to the father because the Guardian Act of 1890 prohibited single men from accepting daughters in India. Manji is declared the first representative orphan. In the end, there was a happy ending, with the Supreme Court of India stepping in and directing the government to issue a Japanese travel certificate to Manji (Dhananjay, 2008). Or a more recent story in India involving an Australian couple who abandoned their twin boys and took their baby girl home. This case echoes the famous case of baby Gammy in Thailand, where Australian parents decided to bring the girl back healthy and leave her twin brother diagnosed with Down syndrome behind. The controversial case of baby Gammy has pushed the Thai government to outlaw international surrogacy. In the Indian version, the couple decided to leave the boy behind because they couldn't afford to take care of him. They announced that they had a son at home and wanted to 'complete the family' with a daughter. The incident almost sparked a diplomatic crisis between Australia and India, each blaming the other for creating a stateless child (Maniere, 2017).

The above practical cases have raised legal issues on surrogacy for commercial purposes, forcing governments of countries to review their legal frameworks so that appropriate regulations can be made to control surrogacy activities. At the same time, it is necessary to prevent illegal surrogacy acts from leading to consequences and consequences for society, especially affecting the rights of children born as products of surrogacy transactions.

3.2. Legislative views of other countries on surrogacy

The Hague International Judicial Conference (HCCH) held in the Netherlands in 2012 concluded that the world's institutions regulating surrogacy are divided into four groups: a group of countries without regulations, a group of countries that oppose it, a group of countries that allow it for humanitarian purposes and a group of countries that accept commercialization. Countries that have legalized surrogacy are divided into two groups: humanitarian surrogacy and commercial surrogacy.

3.2.1. The legislative position of some countries in favor of allowing surrogacy

Ukraine, the Russian Federation, and some states of the United States of America are typical representatives in the group of countries that allow surrogacy, including surrogacy for commercial purposes. These countries believe that surrogacy is a good solution for cases of incurable infertility. On the other hand, surrogacy is considered a bridge to help couples who want to have children to fulfill their dream of becoming a father and mother, and to help poor women get rid of the economic burden. With such an open view, many couples have chosen these countries as destinations to give birth through the route of ‘birth tourism’. For example, Ukraine is one of the most prominent European destinations for prospective surrogate parents because Ukrainian law allows for paid surrogacy services. Prospective surrogate parents can easily find a sperm or egg donor in Ukraine at an affordable price (Kuchma and Siniova, 2019). This is one of the main reasons why people from European countries come to Ukraine for surrogacy purposes the country is becoming one of the main surrogacy business centers in the world (Reznik and Yakushchenko, 2020). In contrast, the United States is a country where surrogacy is not regulated by federal law, but state laws vary from prohibitive to permissive. This is because the legislative authority in areas of surrogacy access and decisions on legal parenthood arising from it lies with individual states (Gerber and O’Byrne, 2015). However, allowing surrogacy raises some worrying legal issues, such as: not accepting children after the child is born will become a burden to society and directly affect the legitimate interests of children; the birth registration and the determination of nationality for the child when the child is handed over to the parents for surrogacy; risks turning surrogates into international ‘surrogates’. In particular, with regulations allowing egg and sperm donation like Ukrainian law, which also means that the child may not be blood-related to the person asking for surrogacy, the risk of children’s rights being violated exists.

3.2.2. The legislative position of some countries prohibits surrogacy

In some countries with advanced medical and legal backgrounds such as Sweden, Spain, France, and Germany or some other countries in Asia, such as Taiwan, and Japan, surrogacy is illegal. For example, The French Civil Code has established a direct prohibition on transactions involving ‘the human body, its components, and products’, and therefore surrogacy contracts are null and void. According to the French Criminal Code, acting as an intermediary between people who want to adopt a child and a woman who offers to carry that child for them to transfer is a crime, as is the intentional substitution of a child, the feigning of a birth or the concealment of a birth (Shestak and Sukhorukova, 2021). Any case found will be subject to court, even criminal charges. To explain the ‘strict’ regulations in not accepting the act of surrogacy for whatever purpose, most of these countries put forward legislative views that surrogacy is an act which may infringe on human rights. Because surrogacy can cause physical impairment to the surrogate mother and create psychological damage to the pregnant woman and even to the child being born. At the same time, surrogacy is an act that can infringe on the body and human dignity, even if it is done for any purpose. Allowing surrogacy also easily creates risks for the exploitation and commercialization of surrogate mothers.

The views listed are that surrogacy is a child trafficking practice that devalues people's lifestyles (Trowse, 2011). There are many opinions against surrogacy from a moral perspective. One of these objections is the consequence of treating the pregnant mother as a commodity. Surrogacy reduces the cost of motherhood. Eventually, the child emerges as a commodity and the mode of reproduction becomes a commercial enterprise (Dijana et al., 2012). In addition, the relationship between the surrogate mother and her biological mother remains uncertain beyond its role in the child's destined existence. Some scholars argue that the traditional concept of family is being lost (violated marriage, in which the child genetically belongs to the surrogate mother and the fiduciary father and is not biologically related to the legal wife).

Even a view that surrogacy should be banned according to standards that reflect the human rights and inherent dignity of every human being. Even if the Council of Europe has not yet written a treaty to deal with the particular difficulty of surrogacy, tenets of legislation from different countries, treaties can provide a framework by which thereby able to perform a consistent function of integrated surrogacy. Human dignity is at the core of the defense of human rights: it is the basis of freedom, justice, and peace at the international level (according to the Universal Declaration of Human Rights). In the mandatory treaties in Europe, there is a public policy in favor of protecting human dignity, prohibiting trafficking in persons, especially women and children, ensuring the best interests of children, and intervening in natural methods of conception and birth (Bromfield and Rotabi, 2012). This is evidenced by the ban on the sex selection of a child created by in vitro fertilization and the ban on human cloning because such an act is contrary to human dignity. The Council of Europe should implement a policy of banning surrogacy due to the technical nature of the contract and the practice of surrogacy where it turns the mother and infant into a commodity that violates the agreement in their dignity (Abdullah, 2019).

3.2.3. The legislative position of some countries only allows surrogacy for humanitarian purposes

Typical countries for the group of countries that only allow surrogacy for humanitarian purposes are the United Kingdom, Australia, the rest of the United States of America, and Vietnam. For example, in Australia, states only allow surrogacy if the parents consent to the pregnancy, and the surrogate woman is only paid certain costs for the pregnancy and birth. Meanwhile, commercial surrogacy is prohibited in Australia. In Australian jurisdictions, entering into a commercial surrogacy agreement is a crime and applies to both parties (Beaumont and Trimmings, 2013). Also seen from a humanistic perspective, but the main point of view is approached in the direction of permission for surrogacy for humanitarian purposes is necessary. Vietnam believes that allowing surrogacy for humanitarian purposes is necessary for the following reasons (Nguyen and Vu, 2021):

Firstly, surrogacy for humanitarian purposes will create opportunities for couples who cannot conceive and give birth to satisfy their desire to be a father and mother. Because this is the only opportunity to realize the desire of infertile couples to have children.

Second, clear regulation and only allowing surrogacy for humanitarian purposes will create a legal basis to protect the surrogate from the risk of being commercialized

and becoming a 'surrogacy tool' for others and protect children from the negative effects of commercial surrogacy. Ensure that a child born from surrogacy for humanitarian purposes is a child expected to be born in the happiness of parents and relatives, not a child born with an arrangement and is influenced by material factors.

Third, allowing surrogacy for humanitarian purposes also creates a legal corridor to better control acts of 'underground' surrogacy with many consequences if the law does not allow it. If there are no specific regulations, in one way or another, couples still find solutions including asking another person to carry out surrogacy so that they can have children. Therefore, the market of underground surrogacy is formed with potential risks for the parties, and negative impacts on individuals, families, and society.

From a human rights perspective, around the world, when it comes to feminism and women's rights protection, feminist scholars do not share the same view on the increasing commercial surrogacy activities. There are two views of feminism today: abolitionists and reformists—each with slight differences and some overlap. The abolitionist view is closest to the dominant policy situation on commercial surrogacy globally, where there is no systematized policy on surrogacy, including seventy-one countries that prohibit surrogacy commercial mode (Allan, 2016). Reformists accept the existence of commercial surrogacy, at least in some jurisdictions, and seek to minimize the abuses they perceive. However, both views have a lot in common about worrying about the behavior and consequences of surrogacy, specifically that commercial surrogacy will make women's and women's bodies worse. Or infants born from surrogacy shall be treated as commodities. They are also interested in the implications of genetics and biology, the redeployment of gender and racial hierarchy, and the specific form of alienation that surrogacy entails. Reformists, who believe that surrogacy should only be managed, share these concerns. In addition, they question the meaning of 'choice' and 'organization', draw attention to alternative every day realities encountered, and sometimes make policy recommendations.

Reformists tend to highlight the day-to-day realities of surrogates, especially the multitude of pre-existing disadvantages they face, and inform their decisions about surrogacy. Simply put, women who work as agents often have little prospects for economic growth and are likely to be impoverished. Instead of working in factories or clean homes, they choose to bring their pregnancies to term. They are told and come to accept that the child will not be theirs, and consider this preferable to the physical or emotional exploitation that may accompany their alternatives, especially since surrogacy often offers much more lucrative economic prospects (Pande, 2014). In other words, in the context of a surrogate's life, a contract pregnancy is a reasonable option. In the words of one agent: 'This work has no morals, we just have to do something to survive' (Allan, 2016). It is obvious whether this is a valid assessment of surrogacy or not, or a claim that since she is engaged in this business to survive, ethical concerns are irrelevant. The bottom line is that surrogacy is economically beneficial. It has been suggested that surrogacy is a unique service that allows the surrogate to be honored for her work, and to enjoy the feeling of having helped another family (Jean, 1997).

Both reformists and abolitionists were uncomfortable with the market controlling such an intimate area of life as human reproduction and often suggested that public

policy was necessary. Necessary to regulate surrogacy. Teman argues that state intervention can be positive. She asserts that ‘State control over reproduction is always contrary to the interests of women and children, at least in this regard, the benefits of state control outweigh the costs’ (Teman, 2010). In summary, both views are deeply concerned with the ethical implications of commercial surrogacy. Both fear that this will facilitate the exploitation of women due to economic inequality, that women or women’s bodies may be viewed as a commodity, and question choices. Which agency to perform surrogacy? These views deeply concern the role of women that sometimes overshadow the best interests of children created through surrogacy arrangements.

Because each country in the world has different views on the practice, it is important that the international community balance international surrogacy agreements with domestic policies. Wolf argues that ‘legalizing domestic practice will create regulatory structures that prevent citizenship and origin from becoming a major issue, maximizing the amount of protection in place for all parties’ enter into the contract as well as the children born (Wolf, 2014). Likewise, Cheung states that some experts believe that an international policy, similar to the Hague Convention on Adoption, is needed to promote homogeneity between countries (Cheung, 2014). When discussing the context of assisted reproductive technology in India, Nelson makes an important assertion that ‘criminalization of commercial surrogacy has not prevented further continues to take place in the domestic context and it will not put an end to international commercial surrogacy’ (Nelson, 2013). A comprehensive surrogacy management plan will impact several different areas of law, both nationally and internationally (Bartha, 1987). Such a plan would cover family law issues, such as parenting (Ikemoto, 2009) and custody decisions, questions about default parental responsibility, and boundaries about agreements with child welfare benefits (Brugger, 2011). Furthermore, to improve regulatory practices in assisted reproduction matters and protect individuals from illegal exploitation, it is necessary to apply uniform standards across all countries’ regulation of surrogacy, which takes into account the interests of all parties involved and creates a mechanism against shadow surrogacy under criminal law (Brugger, 2011).

3.3. Criminal legal aspects of surrogacy in the laws of some countries

The legal basis of surrogacy deals with the current, much-discussed issue of the child’s right to know the father and mother (Article 7 of the Convention on the Rights of the Child) and the right to preserve identity (Article 8 of the Convention on the Rights of the Child), and last but not least, it places clear limits on the abuse of the human body as an object of commerce. Legal regulation that clearly outlines the boundaries of surrogacy will also contribute significantly to criminal law to remain a means of ultimatum proportions—and will only penalize violations of basic principles. Rights outlined in the Biomedical Convention (Císařová et al., 2015).

Even now, there are still different views on the criminal handling of surrogacy for commercial purposes. However, it cannot be denied that commercial surrogacy is also necessary to address the need to find children for couples who cannot bear children or for women who have lost their natural resources in motherhood. Therefore, the criminal laws of countries around the world have also adopted appropriate criminal

policies based on considering the rights and interests of women, children, and those who have real needs for children to determine their rights and interests appropriately define crimes in criminal law. This, on the one hand, is to punish illegal surrogacy acts that infringe upon social relations protected by criminal law, and on the other hand to prevent other criminal acts from arising or morphing from this behavior.

Referring to the criminal law of some countries, it can be seen that surrogacy, if performed for a fee, can be considered a crime of giving the child to another person according to article 169 of the Czech Penal Code: Persons handing over the child to another person for adoption or a similar purpose shall be punishable by imprisonment for up to three years or a ban from operating a business (Ivana and Roman 2021). Surrogacy is (generally) not illegal. However, commercial surrogacy (providing a reward for pregnancy and childbirth, surrogacy and delivery of the child to the ordered couple) meets the characteristics constituting the crime of giving the child to someone else (Marek and Renáta, 2013). In cases where the woman is forced to act as a surrogate mother, the coercer may be considered guilty of human trafficking under Article 168 of the Penal Code. But if the woman is not forced to carry out the surrogacy, the couple asking for surrogacy may be criminally responsible as participants in the crime along with the woman for the crime of handing the child to another person is different. In essence, an offense is committed by one person receiving remuneration in the delivery of a child to another for adoption or other similar purpose. If a couple is unable to have the desired child in the surrogacy standard and provides remuneration in addition to the costs associated with carrying the child and giving birth, they may be able to meet the crime. In addition, the criminal law of the Czech Republic also provides for criminal liability for legal entities in the case of intermediaries for a surrogate mother for a client and this person will know that the surrogate mother will receive remuneration. For their actions from the client, they may be suspected of giving the child to another person (Ivana and Roman, 2021).

Meanwhile, the criminal law of the Slovak Republic stipulates that anyone who, in violation of a generally binding legal provision, transfers a child to another person for adoption or who violates the binding legal regulations. Forcible joint adoption is punishable by imprisonment for up to three years, committing the crime of entrusting a child to another person (article 180 of the Penal Code) in the spirit of Directive 2011/93/EU of the Parliament and Council of Europe from 13 December 2011 on combating the sexual abuse and sexual exploitation of children and against child pornography. More importantly, the Slovak law is stricter in determining the act of surrogacy, just signing a surrogacy contract without proving that they are performing this activity to receive remuneration is also considered a surrogacy act committing the crime of entrusting a child to another person (Čečot, 2015). However, criminal liability for the legal entity is not set, but only in the role of an organizer or an assistant for the person performing the act of surrogacy.

Article 221 of the Spanish Penal Code provides that those who transfer a child to another person through economic compensation without a parental relationship, evade legal guardianship proceedings, place or receive adoption children, to establish a similar relationship with paternity, shall be sentenced to imprisonment for a term of between one and five years and unable to exercise parental rights, guardianship or guardianship for a while. For a term of four to ten years. The same remedy applies to

the person who mediated the child, even if the ‘handover’ of the child took place abroad. Moreover, for these acts, sanctions are provided in the form of fines, so surrogacy can be fined from ten thousand to one million euros, and can lead to the closure of the center. Medical or assisted reproductive medicine services engaged in such activity (Чукреев, 2022).

Italian law that provides for the conduct, organization, or commercialization of surrogacy is punishable by imprisonment from 3 months to 2 years and the payment of fines in the amount of 600,000 to 1,000,000 euros to anyone, under any form. This regulation punishes not only intermediaries and clinics that practice surrogacy, but also the intended parent and a surrogate mother. Clause 9 of the law prescribes additional penalties for doctors because of this act forcible termination of professional activities for a term of 1 to 3 years. It is important, however, that so far criminal cases in Italy under this crime have not been brought to trial and that the parents or surrogate mothers have not been convicted. Spain is the same, no case has been brought to trial (Чукреев, 2022).

Bulgarian law prohibits in vitro fertilization for surrogacy. In particular, article 182(a)(3) provides that a person acts as an intermediary to make illegal money, between a person or family wishing to adopt a child and a parent wishing to refuse a child or a woman who agrees to adopt an unborn child, punishable by imprisonment for up to two years and a fine of up to 1531 euros. Although surrogacy is banned in Bulgaria, cases of surrogacy are still common in the dark (Nayana et al., 2018).

Article 227–13 of the French Penal Code criminalizes the act of intentionally substituting, misrepresenting, or harboring violations of the civil status of children, punishable by imprisonment for a term of up to three years, and fines of up to 45,000 euros. Article 227–13 of the French Penal Code criminalizes the intentional substitution, misrepresentation, or harboring of a child’s civil status violation, punishable by imprisonment for a term of up to three years in prison and a fine of up to 45,000 €. Also under article 227–13, it is possible to be punished by three years in prison and a fine of 300,000 francs for intentionally substituting, pretending to give birth by a fictitious mother, or concealing the truth about the birth of a biological mother. According to articles 227–14 of the French Penal Code, legal entities can also be held criminally responsible for these offenses.

In addition, another criminal legal issue is raised, which is whether cross-border surrogacy is considered a crime and criminally handled. Because couples, including same-sex couples (mostly medically infertile men, as well as any other option than adoption), use surrogacy services abroad, in countries where it is allowed, or easier, and return home with children that are considered theirs under foreign birth certificates. From here comes the form of cross-border surrogacy, a cross-border surrogacy agreement because domestic law prohibits surrogacy for commercial purposes or allows surrogacy for non-commercial purposes but the conditions are extremely tight. This will likely create an incentive to enter into or create international commercial surrogacy arrangements. International law supports the right of children to know the identities of their parents, and states must prohibit anonymity for the donation of genetic material. The rationale for this clause would also extend to the prohibition on anonymity of the pregnant mother (where she is not the biological mother). Some of the human impact of allowing new-technology fertility and

especially cross-border commercial surrogacy contracts, to be part of a multi-billion dollars industry that often places financial gains above human health and welfare. Thus, the role of the agent is mainly explored in the context of socioeconomic deprivation or inadequate regulation, not only in the global south but also in European countries such as Greece and Romania, countries that have weak economies and where wages are often crippling low (Howard, 2015). However, if this activity exists, it will cause many consequences and affect the state's policy on human control as well as create a favorable environment for transnational child trafficking activities. Implemented in practice.

Also, the fact is that the surrogacy industry is currently growing rapidly. Not only is this an effective way to help couples not have the opportunity to have children on their own, but it is also a big business. Because criminals also pocket a large profit due to the high cost of a commercial surrogacy transaction. This also abets transnational organized crime groups. Therefore, to prevent cross-border surrogacy, when that country bans surrogacy, it inevitably leads its citizens to seek to go abroad, where there are regulations that allow or do not prohibit surrogacy, that country must not issue passports or citizenship to children born from overseas surrogacy arrangements. This can be considered as one of the effective measures to prevent transnational surrogacy.

3.4. Regulations of Vietnamese law on surrogacy for commercial purposes

The Law on Marriage and Family, enacted on 1 January 2015, legalizes altruistic surrogacy among relatives. Specifically, only legally married infertile couples can register to use a surrogate; such couples must undergo counseling; the surrogate must be a relative of the couple; the surrogate must have children of her own; the surrogate's husband must consent; and the embryo must be created from the couple's sperm and egg (Tuong, 2013). This means that Vietnam will only allow non-commercial surrogacy based on relatives. Family ties are strong in Vietnamese society, and people believe that relatives should help each other in times of trouble. Therefore, infertile couples can find prospective surrogates among their relatives relatively easily (Hibino, 2015).

Besides allowing surrogacy for humanitarian purposes, Vietnamese law also firmly opposes surrogacy for commercial purposes. Previously, in Clause 1, Article 6 of Decree No. 12/2003/ND-CP issued on 12 February 2003, on giving birth by the scientific method, there was a regulation that 'prohibited surrogacy'. More than 10 years later, the Law on Marriage and Family 2014 promulgated explains two concepts: surrogacy for humanitarian purposes and surrogacy for commercial purposes. In addition, at point g, clause 2, Article 5 of the Law on Marriage and Family 2014, there is also a regulation that 'prohibited surrogacy for commercial purposes. Thus, it can be seen that the Law on Marriage and Family 2014 only prohibits surrogacy for commercial purposes, not surrogacy in any form.

Also according to the provisions of Clause 22, Clause 23 of Article 3 of the 2014 Law on Marriage and Family, the criteria to distinguish the purpose of these two forms of surrogacy is whether or not there is "economic benefit or other benefit". However, the law has not yet regulated how to determine what is considered "economic benefit

or another benefit”. To specifically regulate this content is not a simple matter, because listing the cases to determine whether the surrogate mother receives economic benefits or other benefits will not cover the cases that arise. For example: after agreeing to help her cousin be a surrogate mother, Ms. B was provided with a very generous amount of money by her cousin and her husband to help her improve her health, as well as cover living expenses due to having to take time off work to take care of her pregnancy. When the baby was successfully born, Ms. B continued to receive a large sum of money to recover her health after giving birth. So is this case considered commercial surrogacy? It is very difficult to control similar cases in practice. Because, in fact, the money that Ms. B received is not health compensation at all but remuneration for surrogacy, how can the law regulate it? Therefore, it is necessary to have clear and detailed criteria for commercial surrogacy to limit the variations of surrogacy in practice and to limit the occurrence of commercial surrogacy.

To synchronize with the Law on Marriage and Family on the handling of acts of organizing surrogacy for commercial purposes, to regulate the abuse of surrogacy because for humanitarian purposes contrary to the human nature of surrogacy, the 2015 Penal Code added the crime of organizing surrogacy for commercial purposes (Article 187): ‘A person who organizes surrogacy for commercial purposes shall be liable for a fine of from VND 50,000,000 to VND 200,000,000, face a penalty of up to 02 years’ community sentence or 03–24 months’ imprisonment’. This is a new law to prevent acts of taking advantage of the provisions of the Law on Marriage and Family allowing surrogacy for humanitarian purposes to make profit.

Currently, commercial surrogacy in Vietnam is not permitted by Vietnamese law. Offenders are those who stand up and organize support for parties to carry out surrogacy activities. They can connect, facilitate, and promote the parties in the surrogacy activities. In return, they can receive a significant economic benefit from the insiders. That is the nature of commercial surrogacy activities. Specifically, recently, in 2023, Vietnam broke up a large surrogacy organization ring that organized large-scale surrogacy and bought and sold human tissues and organs nationwide, operating professionally. The subjects often post advertisements in groups on cyberspace to approach people in need, and contact and discuss issues with infertile families. Each surrogacy costs about 450–600 million VND, egg donation about 25 million VND, kidney transplant about 900–1.45 billion VND (Hoang, 2023). Cases occurring in Vietnam show that the surrogacy situation is still painful, challenging the law, and criminals carry out many sophisticated and cunning tricks to deceive the authorities.

Approaching from a human rights perspective, the act of surrogacy for commercial purposes causes women to be taken advantage of and infringes upon their basic rights. On the other hand, some argue that commercial surrogacy is in itself a form of degrading and degrading human beings (Nisand, 2010). However, that conclusion is erroneous because it does not take into account the wide and varied range of values in modern society. For example, surrogacy between relatives can reduce the severity of the genetic and biological mother’s conflict. That makes it relatively easy for infertile couples to find a future surrogate who is their relative. Therefore, we do not support the commercialization of surrogacy. However, we agree with the view that to harmonize interests between individuals, families, and the whole society, it is

appropriate to strictly prohibit surrogacy for commercial purposes as prescribed by current Vietnamese law and in the right direction. The practice has shown that some countries that were once ideal destinations for commercial surrogacy in the world, such as India and Thailand, have also faced great consequences not only for the surrogate mother herself, the person asking for surrogacy and the child being born but also negatively affect the social order.

From the analysis in Section 3 of the article, it can be seen that the criminal law of all countries considers the destination of the act of surrogacy to be the child. Therefore, in addition to the fact that some countries stipulate the crime of surrogacy in the penal code, some other countries consider the act of a child being born and given to another person by surrogacy for commercial purposes as a crime instead of handling the crime of surrogacy. This means that the laws of many countries are more concerned with protecting the rights of the born child than with the protection of the marriage and family regime. Meanwhile, Vietnam considers the act of surrogacy as an offense that belongs to the group of crimes infringing on the marriage and family regime instead of the group of crimes infringing on life, health, honor, and human dignity. According to one author, crimes infringing upon the marriage and family regime, including the crime of organizing surrogacy for commercial purposes, are particularly serious violations of the values of surrogacy morality protected by the state. The legislator has indirectly acknowledged that violations between subjects having a marriage, blood, or rearing relationship are also acts of infringing upon the social order protected by law and that these acts can also be very dangerous behaviors for society, it is necessary to punish criminally to be more deterrent (Diep and Ngu, 2018).

3.5. Challenges in enforcing the law on surrogacy in Vietnam and some recommendations

First, the current situation of surrogacy is increasingly diverse in form and sophisticated in tricks. For example, Nghe An Provincial Police discovered 25 cases of ethnic minority women in Ky Son District who became pregnant and went to China to give birth, of which 5 cases were verified and clarified, claiming that after giving birth, they sold their children to the Chinese. Ho Chi Minh City Police discovered 05 subjects who were Chinese and 03 subjects who were Vietnamese organizing surrogacy for commercial purposes... In many cases, the subjects not only sold fetuses and newborns but also abused the mothers, leaving many tragic consequences, causing confusion and indignation among the masses, creating bad public opinion in society (Canh and Thi, 2020). However, from the perspective of criminal law, at present, the criminal law of Vietnam only deals with the act of organizing surrogacy for commercial purposes but does not deal with the person performing the act of surrogacy or the person performing the act of surrogacy asking someone else to do surrogacy. Those who directly carry out surrogacy are only subject to administrative sanctions—which is a milder sanction than criminal sanctions. This is because, first, they are women, and pregnancy also affects health. According to the Vietnamese people, women are the ones who ‘carry the burden of giving birth’, so it also takes a lot of damage to their health. Second, if the person asking for surrogacy does not accept the child, the pregnant person when giving birth to the child is also responsible for the

child like the mother, and may have to raise the child. This will bring the burden on the woman herself. Meanwhile, there is still an opinion that it is necessary to handle this behavior more severely by defining the offense in the Penal Code (Minh and Kim, 2022).

Second, Vietnam only recognizes full surrogacy, and only recognizes it in cases where the parents requesting the surrogacy are the genetic parents of the child, not accepting cases where donated sperm/eggs are used. With this regulation, surrogacy is much narrower but is legally safer. However, the challenge is that if the surrogate and the parents requesting the surrogacy agree to join hands on the pregnancy for humanitarian purposes, but in reality, they have to pay a significant amount of money to the pregnant woman, who, according to Vietnamese law, must be a relative of the wife or husband requesting the surrogacy. Therefore, in essence, this is still surrogacy for commercial purposes, but it is difficult to detect and handle.

Third, the 2015 Penal Code, although criminalizing the act of organizing surrogacy for commercial purposes in Article 187, ignores the act of forcing surrogacy for commercial purposes (Trần, 2016). Regarding the subject of the crime, Article 187 of the Penal Code stipulates that individuals who organize surrogacy for commercial purposes are individuals aged 16 years or older with criminal capacity. Considering the correlation between the crime name “Organizing surrogacy for commercial purposes” and the criminal subject according to the spirit of the law, the subject of this law is not only directed at individuals who directly perform surrogacy but also those who organize surrogacy for commercial purposes. However, both the name of the law and the criminal subject prescribed in Clause 1 of this Article create different interpretations. The provisions of the law tend to narrow the scope of the crime, only for the “organizer”, while the surrogate mother (without any organizational element) is not subject to this crime. To have a unified understanding and application, it is necessary to overcome this limitation by revising the name of the law in the direction of maximally expanding the subject of the crime such as “Crime of surrogacy for commercial purposes”, and at the same time, stipulating the sign “organization” in the name of the crime as an aggravating circumstance in the same law (Le, 2017).

Fourth, another challenge today is that this type of crime is active on social networks and in groups. The subjects often collude with staff at some medical facilities to carry out surrogacy in a closed network. From the stages of seduction, approach, and embryo and egg transplantation, the subjects are all closely linked together. In particular, the subjects all falsified papers and documents, turning surrogacy into a humanitarian activity to perform transplantation procedures at hospitals. Therefore, commercial surrogacy transactions are still taking place through social networking forums such as Facebook and Zalo. For example, Phan Thi Hang Oanh created a “Surrogacy–Egg Donation–Sperm Donation Group” on Facebook to find surrogates, egg sellers, and people in need of surrogacy to organize commercial surrogacy, or Dinh Thi Binh and her husband led the surrogacy ring. In each contract, the subjects agreed on a price of 700 million VND to 1 billion VND, including the contract fee for embryo implantation and care of the surrogate mother. From May 2021 to April 2022, Binh’s network successfully brokered 8 cases, earning about 6 billion VND (Mai, 2022). However, the management of online information sites is still not strict, lacking experienced staff in detecting and transacting surrogacy agreements online and on

electronic transactions. This has made criminals now tend to use high technology to connect people with the need for fetuses and economic needs to meet easily and quickly.

From the above challenges, the authors make the following recommendations:

First, quickly research and supplement regulations on the prohibition of commercial surrogacy as a crime so that both the pregnant woman and the person requesting the pregnancy can be treated as accomplices to prevent acts of colluding to agree on surrogacy for commercial purposes instead of humanitarian purposes.

Second, it is necessary to supplement regulations on the crime of fetal trafficking in the Penal Code to limit and prevent the act of surrogacy to exchange and buy and sell fetuses right at the time of pregnancy as well as after the child is born.

Third, it is necessary to have infrastructure facilities and a team of skilled professionals, especially knowledge of information technology, to be able to detect and find electronic evidence to help investigate and handle crimes quickly and promptly.

Fourth, the authorities need to control users on social networking sites and clearly define responsibilities if there is any act of posting information or content that is contrary to the provisions of the law.

Fifth, continue and promote international cooperation to prevent cross-border and cross-national surrogacy, when countries have different regulations on this issue, by signing international agreements or at least establishing common principles in promoting the right to parenthood by having someone else carry the pregnancy, but also not affecting or violating basic human rights that are recognized and protected by international law.

4. Conclusion

In short, surrogacy is a form of reproductive support for parents who want to have children without traditional methods. Surrogacy is a medical success because it provides opportunities for women who, for some reason, cannot conceive or give birth. However, surrogacy also leaves behind distortions and causes serious consequences, including violations of basic human rights. Therefore, there are still opposing opinions in the world on the issue of criminalizing surrogacy. As one opinion has stated, “criminalizing commercial surrogacy has not prevented the activity from continuing in the domestic context and it will not end international commercial surrogacy” (Nelson, 2013). Meanwhile, the remaining opinion believes that it is necessary to prevent commercial surrogacy by criminalizing this act in criminal law or having a more stringent policy for cross-border surrogacy. Altruistic surrogacy as the only legal alternative may eventually lead to the complete abolition of surrogacy, which may lead to even worse exploitation of women.

Although Vietnamese law allows surrogacy, it also prohibits it if it is for commercial purposes and can be considered a violation or crime. However, up to now, the current Penal Code has only criminalized the act of organizing surrogacy, and is not considered a crime for the person who directly carries out the surrogacy for commercial purposes. In addition, clearly defining the legal boundaries of surrogacy will also contribute significantly to the fact that criminal law will remain a necessary

and strict measure to regulate and punish violations of essential rights related to the rights of women and children, the vulnerable groups in society. This means that society has a responsibility to clearly define the boundaries and possibilities of technological use and to continuously prosecute their possible violations.

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