MINISTRY OF EDUCATION AND TRAINING MINISTRY OF JUSTICE

HANOI LAW UNIVERSITY

REGULATIONS ON SURROGACY UNDER VIETNAMESE LAWS

ABSTRACT OF PhD LAW DISSERTATION

Major : Civil and Civil Procedure Law

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INTRODUCTION

1. The necessity of researching on the topic

As a country embedded with traditional Eastern values like Vietnam, for centuries, giving births as a continuation of the family from generation to generation is considered the most important value in marital relationships. The right to be a father, mother is the "supreme" right of any individual which are always respected and enshrined by the laws. Nevertheless, not everyone is lucky enough to be able to perform the function of being a father or mother naturally. Today, the advance of medicine has brought aspirations to hopeless couples by surrogacy. However, before, surrogacy is mainly performed by way of illegal "*surrogacy agreement*" with complicated outcomes and risky for the relevant parties. Stemming from the above conditions of reality and the laws, Law on Marriage and Family 2014 for the first time recognizes and allows surrogacy for humanitarian purposes. Nevertheless, besides the positive aspects as mentioned above, the fact that the National Assembly passed the regulations on surrogacy for humanitarian purposes has caused controversy. In which, the issue received much attention is whether these regulations are feasible and meeting the needs of reality. Based on the analysis above, with the aspiration to research Vietnamese regulations on surrogacy – one of the brand new issues, the author selects the topic "*Regulations on surrogacy under Vietnamese laws*" for PhD dissertation, with the hope to have a comprehensive and systematic approach to legal issues and related practice. Based on that, the author shall propose solutions to complete the laws and enhance the effectiveness of implementation of regulations on surrogacy – one of the newest and contemporary topics in Vietnam in the current period.

2. Purpose and mission of the reseach

Research for the Disseration aims to give a comprehensive and systematic assessment on the theory of regulations on surrogacy, the current conditions of Vietnamese laws and practice of implementing regulations on surrogacy to propose solutions to complete the laws and enhance the enforcement of the law in this issue.

With the above purpose, the Dissertation has the following missions:

- Clarify definitions, characteristics of regulations on surrogacy, surrogacy for humanitarian purposes; the significance of surrogacy for humanitarian purposes under multiple facets.

- Assess the conditions of regulations under Vietnamese laws on surrogacy as well as laws of certain countries in the world on this issue.

- Assess the implementation of regulations on surrogacy in Vietnam. Based on that, point out advantages and disadvantages, causes of shortcomings in implementation.

- Provide directions and propose recommendations to complete the laws and enhance the effectiveness of implementation of regulations on surrogacy.

3. Subject and scope of the research

The subject of the research is theoretical issues on surrogacy; current regulations of Vietnamese laws on surrogacy and especially surrogacy for humanitarian purposes as stipulated in Law on Marriage and Family 2014 and some relevant legal normative instruments; Laws of some countries in the world on surrogacy; Enforcement practice on surrogacy in Vietnam through specific cases in recent years.

The scope of the research:

- Regarding contents, the Dissertation focuses on regulations on surrogacy in general. Nevertheless, current Vietnamese laws recognize surrogacy for humanitarian purposes only, therefore, within the scope of the research, the Dissertation mainly focuses on clarifying current regulations on surrogacy for humanitarian purposes. In the meantimes, the Disseratation places much attention to analyze and assess the substantive regulations on surrogacy and with less focus on formality and procedural regulations. On the other hand, in order to be in line with the code, therefore within the scope of the research, the contents of the Disseration limits the research to surrogacy for humanitarian purposes without any foreign elements.

- Regarding space and period, the Disseration researches on practical enforcement of surrogacy for humanitarian purposes in Vietnam from 2015 – 2019.

4. Methodology and research methods

The Dissertation is conducted based on application of methodology of Marxism-Leninism on dialectial materialism and historical materialism together with Ho Chi Minh's idealogy, opinions, directions of the Party and the laws of the State. Besides, other scientific methods such as historical, statistics, analytic, synthetic and comparative, sociological methods etc. are also applied to research the contents of the Dissertation. Especially, study of typical cases is used to clarify the issues and current practices of enforcement of the regulations.

5. Scientific significance and practice of the Dissertation

The Dissertation is a scientific work, study comprehensively on surrogacy in general and surrogacy for humanitarian purposes in particular under Vietnamese laws. The result of the research of the Dissertation contributes to complete legal theory on surrogacy, laws on marriage and family and contributes to the pool of legal scientific knowledge. The Dissertation can be used as reference for researching, teaching and studying at law education and research institutions etc. The Disseration can also be used as reference for enforcement bodies and enforcement of the law to solve related matters on surrogacy for humanitarian purposes which is quite new in Vietnam in the current period.

6. New contributions of the Dissertation

The result of the Dissertation contributes to the theoretical and practical aspects as follows:

- Overall, the Dissertation is a comprehensive and systematic research on surrogacy under Vietnamese laws.

- The Dissertation develops, supplements and enriches theoretical foundations on surrogacy; Develop scientific definitions on surrogacy, surrogacy for humanitarian purposes; Objectively assess practical needs in enforcement of regulations on surrogacy, therefore, show the necessity of developing and regulating by legal norms for this legal relationship.

- The Dissertation assesses current Vietnamese laws on the issue. Therefore, the Dissertation provides multiple facets assessment on the research issue, points out shortcomings in regulations on surrogacy under Vietnamese laws.

- The Dissertation points out the practice of enforcement of regulations on surrogacy for humanitarian purposes. Therefore, points out difficulties, shortcomings as well as causes of these shortcomings in the enforcement of relevant parties.

- The Dissertation proposes scientific and feasible directions and solutions to overcome these shortcomings of regulations on surrogacy, in order to complete Vietnamese laws governing this issue.

7. Structure of the Dissertation

Apart from the introduction and conclusion, the Dissertation includes 4 chapters structured as follows:

Chapter 1. Overview on the research situation

Chapter 2. Theoretical issues on surrogacy

Chapter 3. Current Vietnamese laws on commercial surrogacy and practice

Chapter 4. Directions and solutions for completion, enhancement of effectiveness of enforcement of regulations on surrogacy

CHAPTER 1
OVERVIEW ON THE RESEARCH SITUATION

1.1. Published scientific works relating to the Dissertation

1.1.1. Thesis, Dissertation

**** Law PhD of Truong Hong Quang (2019) on "Rights of homosexual, bisexual, transgender and intersex under current Vietnamese laws",*** Graduate Academy of Social Sciences, Hanoi.

The Dissertation mainly focuses on right of lesbian, gay, bisexual, transgender and intersex (LGBTI) under current Vietnamese laws. The author assesses difficulties and influences to LGBTI relating to their needs to have children and custody of their children borned from surrogacy services.

**** L.L.M of Bui Quynh Hoa (2014) on "Certain theoretical and practical issues on surrogacy",*** Hanoi Law University, Hanoi.

The structure of the Thesis includes two chapters. The author analyzes the directions for developing Vietnamese laws governing surrogacy as well as proposes recommendations, solutions to complete the laws on this issue.

**** L.L.M of Pham Thi Huong Giang (2015) on "Surrogacy in Law on Marriage and Family 2014",*** Law faculty – Vietnam National University Hanoi, Hanoi.

The structure of the Thesis includes three chapters. The author researches theoretical foundations of surrogacy; Analyzes substantive regulations on surrogacy for humanitarian purposes; Solutions for practice of surrogacy in Vietnam, the ability to apply surrogacy for humanitarian purposes and some recommendations.

1.1.2. Journals

* Article of **Nguyen Van Cu** on ***"Laws on surrogacy in Vietnam"***, Hanoi Law Review, Hanoi Law University, Vol. 6/2016, Pages.11 – 22.

In this article, the author analyzes certain opinions on surrogacy; the necessity for allowing surrogacy for humanitarian purposes in Vietnam; Opinion on regulations on surrogacy for humanitarian purposes. On that basis, the author provides recommendations

and solutions for completion of Vietnamese laws governing surrogacy for humanitarian purposes.

* Article of author **Nguyen Thi Lan** on "***Surrogacy and arising matters",*** Hanoi Law Review Vol. 4/2015, Hanoi Law University, Pages.12 – 21.

The article researches conditions for surrogacy; Rights and obligations of intended parents, surrogate; legal consequences of surrogacy. The author assesses regulations and provides recommendations to ensure legitimate rights and interests of parties in surrogacy.

* Article of **Nguyen Xuan Hoi, Nguyen Thanh Tung** with title ***"Clinical, subclinical characteristics and prescribtion of patents in vitro fertilization – surrogacy in Central Hospital"***, Journal of Military Pharmaco - Medicine, Vol. 3/2017, Pages. 55 – 61.

The article is the result of the research based on survey on surrogacy cases performed in Hanoi Central Hospital. The conclusions are based on medical aspect which is significant in practical aspect. This is the baseline for reference, adjusting legal regulations to be in line with enforcement.

* Article of author **Nguyen Huy Cuong** on ***"Certain shortcomings in regulations on surrogacy for humanitarian purposes under Law on Marriage and Family 2014***", Journal of State and Laws, Vol. 9/2016, Pages.38- 40.

The article clarifies issues relating to shortcomings in regulations on surrogacy for humanitarian purposes, of which focusing on analyzing personal relations of the child.

* Article ***"Certain issues relating to enforcement of the current laws on surrogacy in Vietnam"*** of **Tran Duc Thang**, Legal professional Journal, Vol. 2/2016, Pages.57 – 61.

The article shows author's view on legal nature of surrogacy for humanitarian purposes also assesses certain issues on enforcement of the current laws on surrogacy in Vietnam.

1.1.3. Scientific researches; conference proceedings

**** Scientific research at university level (2015), "Theoretical and practical basis of new change in Law on Marriage and Family 2014"***, Principal researcher: **Nguyen Van Cu**, Hanoi Law University, Hanoi.

Theme 1 with title ***"Theoretical and practical basis for amending, supplementing Law on Marriage and Family 2000 and issuance of new Law on Marriage and Family"*** of author **Bui Minh Hong,** Pages.95 – 113. This theme focuses on certain aspects on theoretical and practical basis for governing surrogacy.

**** Conference proceedings "Right to be a mother – a perspective" (2013),*** Hanoi Law University, Hanoi. Article relating to research on regulations on surrogacy, ***"Certain legal aspects on protection right to be a mother of women giving birth by scientific method"*** of author **Bui Thi Mung,** Pages.17 – 28.

The article's approach is to recognize and protect right to be a mother of women giving birth by scientific method, including surrogacy.

**** Conference proceedings "Surrogacy and arising matters", (2019),*** Hanoi Law University, Hanoi.

Conference proceedings include quality and expertise articles on surrogacy and arising legal matters and practice of enforcement of regulations on surrogacy for humanitarian purposes in Vietnam.

1.1.4. Books

**** "The homosexual, bisexual, transgender in Vietnam and the issue of innovation of the legal system"*** of author **Truong Hong Quang**, (2014), National Politics Publishing House, Hanoi.

This book points out that, different from other normal cases, to realize the right to be father, mother, LGBT often recouse to adoption or in vitro fertilization without surrogacy for humanitarian purposes. Therefore, surrogacy for humanitarian purposes should be allowed to LGBT to ensure personal rights. (Pages. 257-258). The author of the book does not agree with "traditional" surrogacy applied in some countries in the world.

1.1.5. Foreign reference

**** PhD Dissertation of Le Xuan Tung (2016)*** with the title***"Ethical and Legal aspects of surrogacy – recommendations for the regulatinon of surrogacy in Vietnam"***, Southamton University, U.K.

The Dissertation presents an overview of Vietnamese law governing surrogacy; Analyze social opinion in Vietnam and its influence on opinion on surrogacy; Concerns about "black" market on surrogacy; Reproductive right as a human right; Analyze the right to determination based on free will in the current context of surrogacy. On that basis, the author provides recommendations to complete Vietnamese laws on surrogacy.

* Article with title ***"Surrogacy Agreements in French Law"*** of author **Eva Steiner,** The International and Comparative Law Quarterly Journal, Vol.41, No.4, Pages.866 – 875. The article focuses to analyze legal aspects of French laws in prohibiting acts of surrogacy.

* Article **"Surrogacy and the Politics of Commodification"** of **Elizabeth S. Scott,** *Law and Contemporary Problems Journal*, vol. 72, no. 3, 2009, Pages. 109–146.

author discovers the history of surrogacy, answers a question that how a surrogacy case in the U.S[1]. could influence the legalization in Illinois and other states. Explain the political and social significance; Review and assess surrogacy for humanitarian purposes from the case Baby M; Since then, withdraw learning lessons for the completion of the laws.

1.2. Assess research situation on issues within the scope of research of the Dissertation

1.2.1. Theoretical Basis

The above research works even though having basic theoretical foundation however there are still issues needed to be completed in the Dissertation, specifically:

1.2.1.1. On definitions, characteristics and significance of surrogacy and surrogacy for humanitarian purposes

The authors have developed definitions, characteristics and significance based on provisions to interpret terms but insufficient. Therefore, the Dissertation shall review on theoretical aspects, assess the essence, inherit scientific thesises as reference and supplement to thesises with more persuasion value on this issue.

1.2.1.2. On definitions, characteristics and substance of regulations on surrogacy

Definitions, characteristics and substance governing regulations on surrogacy is the issue not receiving much attention from researchers. The Dissertation shall continue to complete these issues based on analyzing essence of regulations on surrogacy under multiple facets.

1.2.1.3. On the necessity of the laws governing surrogacy for humanitarian purposes

The author continues to assess the necessity for governing by laws on surrogacy for humanitarian purposes under multiple aspects: economic-social; Practice-customs, ethics; Perspective on family and individual benefits; Idealogy on legislation, politics of the Party and the State.

1.2.1.4. On the development of surrogacy and surrogacy for humanitarian purposes in the world and in Vietnam

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[1] **Scott, Elizabeth S,** đd, pp.109. The case *Baby M* between intended parent William and Elizabeth Sterm and surrogate Mary Beth Whitehead in the U.S.

This contents do not receive much attention in researches. The author continues to clarify the formation and development of surrogacy techniques; surrogacy for humanitarian purposes through developmental periods, placing in the formation of this matter in the world and in Vietnam.

1.2.1.5. On legislative standing of countries in the world on surrogacy

These works do not provide comprehensive assessment on legislative standing leading to controversies on surrogacy. Therefore, the author shall continue to assess the popularity of legalizing surrogacy for humanitarian purposes.

1.2.2. On the substance of regulations on surrogacy under Vietnamese laws

1.2.2.1. On conditions to perform surrogacy for humanitarian purposes

Opinions of the authors provide a number of valuable scientific thesises. Nevertheless, for better completion, it is necessary to place regulations on conditions under current laws in different connection. With that in mind, the author continues to inherit these valuable scientific thesises and develop them with more width and depth.

1.2.2.2. On rights and obligations of intended parents and surrogates

The issue of rights and obligations of parties in surrogacy for humanitarian purposes are widely discussed. Nevertheless, the author considers that it is necessary to comprehensively assess rights and benefits of the parties; develop a mechanism to ensure legal obligations of the parties.

1.2.2.3. On surrogacy for humanitarian purposes agreement

The number of current researches specialized in surrogacy is limited and sporadic. Therefore, to develop a legal framework on this issue is an important task during the research and complete of this Dissertation.

1.2.2.4. On dispute resolution in surrogacy for humanitarian purposes cases

Identify jurisdiction of the People’s Court in solving cases relating surrogacy for humanitarian purposes causes certain difficulties. Therefore, the author needs to continue to research to complete this issue to ensure legitimate rights and interests of parties in this legal relationship.

1.2.2.5. On legal consequences of surrogacy for humanitarian purposes agreements

The majority of researches do not touch upon consequences of surrogacy agreements which are claimed to be invalid. Clarifying these issues is the basis to create legal

framework for enforcement and solve effectively disputes arising from surrogacy in Vietnam.

1.2.2.6. On sanctions for violating acts relating to surrogacy

The authors provide different opinions on application of sanctions in handling violations. Nevertheless, specific solutions for overcoming and completion are not introduced. Therefore, the author shall continue to complete the above mentioned directions.

1.3. Research questions and research orientations of the author in the Dissertation

1.3.1. Hypothetical questions and research orientations of the author relating to theoretical issues on regulations on surrogacy

Research question 1*:* Definition, characteristics, significance of surrogacy, surrogacy for humanitarian purposes and regulations on surrogacy?

Research hypothesis 1: Currently there are different definitions on surrogacy in general and surrogacy for humanitarian purposes in particular but it is necessary to have a proper assessment on the essence. Besides, regulations on surrogacy contain specific characteristics.

Research result 1: It is necessary to view this issue in relation to relevant definitions. In the meantimes, objective assessment on different perspectives to have an overview look and correct assessment of the essence of the research question is needed.

Research question 2: What factors affect the laws governing surrogacy for humanitarian purposes?

Research hypothesis 2: The regulations are affected by recent policies, opinions of the Party and the State. In the meantimes, they are influenced by economic-social factors; customs, traditional values, policies.

Research result 2: This issue is significant in both theoretical and practical aspects; it is necessary to assess opinions and strategies of the Party and the State on human rights; on our national customs; on needs and interests of individuals, families and society.

Research question 3: How is the advance of science and laws on surrogacy in general and surrogacy for humanitarian purposes in particular in Vietnam and in the world?

Research hypothesis 3: In the world, surrogacy is not a new issue in practice however the pace of development at different countries is different. In Vietnam, the formation and development of surrogacy is relatively new especially in legal aspect.

Research result 3: Assess this issue to identify legal basis for issuance and enforcement of regulations on surrogacy to have an overview on surrogacy for research throughout its developmental periods.

1.3.2. Research hypothesises and research orientation of the author relating to regulations and practice of enforcement of surrogacy

Research question 4: What are the current regulations on surrogacy for humanitarian purposes under Vietnamese laws?

Research hypothesis 4: There are many opinions that even though regulations on surrogacy are advanced, there are still issues to consider such as the conditions for surrogacy for humanitarian purposes; Rights and obligations of the parties; surrogacy for humanitarian purposes agreements; dispute resolution in case of surrogacy etc. Therefore, the above issues need to be considered comprehensively.

Research result 4: The Dissertation analyzes the current conditions on regulations on surrogacy in order to complete the current laws governing surrogacy for humanitarian purposes related issues.

Research question 5: How is the practice of enforcement of regulations on surrogacy for humanitarian purposes in Vietnam? Causes of the shortcomings during the enforcement of regulations on surrogacy for humanitarian purposes?

Research hypothesis 5: The assessment on practice of surrogacy for humanitarian purposes shall resolve many issues, create sufficient legal framework so that not to limit the opportunity to be father, mother of couples and not to create loophole for other parties for illegitimate benefits.

Research result 5: The author shall assess data of institutions which are allowed to perform surrogacy for humanitarian purposes in Vietnam. On that basis, the author provides analysis on advantages and disadvantages in the enforcement of regulations on surrogacy for humanitarian purposes.

1.3.3. Research hypothesises and research orientation of the author relating to solutions to complete the laws and enhance the effectiveness of enforcement of regulations on surrogacy

Research question 6: From the assessment of theoretical issues as well as practice of enforcement of regulations on surrogacy for humanitarian purposes, what are the solutions

to complete the laws and enhance the effectiveness of enforcement of the regulations on surrogacy for humanitarian purposes in practice?

Research hypothesis 6: The author shall propose solutions to complete the laws on surrogacy for humanitarian purposes, in which issues such as developing definitions and other theoretical issues will be solved; current regulations governing surrogacy for humanitarian purposes; enhance the effectiveness of enforcement of the regulations on surrogacy for humanitarian purposes in practice.

Research result 6: Research to propose solutions, the author aims to achieve the following results:

Firstly, develop comprehensive assessment on theoretical aspects of the issues

Second, propose recommendations, solutions to complete the regulations on surrogacy

Third, propose recommendations to overcome difficulties, shortcomings in compliance and enforcement of the laws

Fourth, social solutions are assessed objectively, sufficiently and comprehensively, in order to enhance the effectiveness of enforcement of the regulations on surrogacy for humanitarian purposes in practice.

Conclusion of chapter 1

Through an overview of the research situation on issues related to the topic of the Dissertation, we find out that, in the world, surrogacy is not a new issue in practice. Nevertheless, the number of research on this issue is not abundant, with narrow approach, in some certain legal aspects. Therefore, within the scope of the Dissertation, the author shall inherit the research results from previous publications, in the meantimes, the author researches deeply and systematically remaining issues in order to complete Vietnamese laws and regulations.

CHAPTER 2
THEORETICAL ISSUES ON SURROGACY

2.1. Definition of surrogacy and regulations on surrogacy

2.1.1. Definition, characteristics of surrogacy and surrogacy for humanitarian purposes

2.1.1.1. Definition, characteristics of surrogacy

** Definition of surrogacy*

In essence, surrogacy is a process of performing medical techniques with modern scientific methods to intervene in natural pregnancy when fertility is limited by a number of different reasons.

Therefore, *surrogacy is a technique to take the embryo of the intended mother and sperm of the intended father for in vitro fertilization then transferred to the uterus of the surrogate so that the surrogate will carry the pregnancy and give birth to child for the intended parents.*

** Characteristics of surrogacy*

Firstly, voluntary nature, agreement: surrogacy needs the consent of the surrogate because the application of techniques relevant to the body of the surrogate, for whatever reasons. So, the voluntary nature and agreement are typical of legal relationship on surrogacy.

Secondly, technical, unnatural characteristics: the nature of surrogacy is giving birth to intended parents therefore, the embryo is not from the surrogate herself but is created outside of her body, from the embryo and sperm of the intended parents. Therefore, in nature, surrogacy is unnatural pregnancy and requires medical intervention.

2.1.1.2. Definition, characteristics and significance of surrogacy for humanitarian purposes

** Definition of surrogacy for humanitarian purposes*

Surrogacy for humanitarian purposes is recognized lately under Vietnamese laws. This issue was mentioned for the first time at Clause 22 Article 3 of Law on Marriage & Family 2014. However, under legal and natural aspects of surrogacy, a definition could be concluded:

"Surrogacy for humanitarian purposes is the act of a voluntary surrogate who helps intended parents of which the mother is unable to carry pregnancy and give birth even when applied reproductive support techniques, by way of taking the embryo of the intended mother and sperm of the intended father for in vitro fertilization, which is then transferred to the uterus of the surrogate to carry pregnancy and give birth".

** Characteristics of surrogacy for humanitarian purposes*

Firstly, humanitarian: the ultimate purpose of agreement on surrogacy for humanitarian purposes is to perform a humanitarian act: create a chance of being parents for hopeless couples who are unable to have their biological babies even when applied reproductive support techniques.

Secondly, supportive, non-commercial: surrogacy for humanitarian purposes is to help hopeless couples who are unable to have babies on their own. Therefore, surrogacy is performed voluntarily and is not for economic benefits, non-commercial.

** Significance of surrogacy for humanitarian purposes*

Firstly, socially significant: surrogacy for humanitarian purposes is important to satisfy the need to have biological child of an individual; surrogacy for humanitarian purposes helps to maintain sustainability and emotional connection in marriage & family relationships; satisfy human needs to have children for family happiness.

Secondly, legally significant: surrogacy for humanitarian purposes creates legal standard for behaviours of the parties also controls the need for surrogacy in Vietnam. On the other hand, the governing of surrogacy for humanitarian purposes is an urgent need which helps to protect legitimate rights and interests of human beings.

2.1.2. Definition, characteristics and substance of regulations on surrogacy

2.1.2.1. Definition, characteristics of regulations on surrogacy

** Defintion on regulations on surrogacy*

The State has used the laws to impact surrogacy relationships in order to govern in the desired direction by the State. Social relationships sharing similar nature on surrogacy which are regulated by laws create regulations on surrogacy.

Therefore, *Regulations on surrogacy is the totality of legal norms issued by the State, governing the establishment, occurrence, change and termination of legal rights and obligations of parties in surrogacy relationships.*

** Characteristics of regulations on surrogacy*

First, regulations on surrogacy attached to ensure human rights.

Second, regulations on surrogacy closely attached to ethical norms, customs.

Third, regulations on surrogacy closely attached to technical – medical factors.

Fourth, regulations on surrogacy attached to typical governing measures of legal relationship of marriage and family.

2.1.2.2. Substance of regulations on surrogacy

The substance of regulations on surrogacy include issues on conditions for surrogacy for humanitarian purposes including conditions on the parties, contents and formality of the agreements and conditions on procedures of surrogacy for humanitarian purposes; Rights and obligations of parties of surrogacy for humanitarian purposes; Identification of father, mother, child relationship in cases of surrogacy for humanitarian purposes; Dispute resolution in cases of surrogacy for humanitarian purposes; Handling of violation on reproductive support techniques and surrogacy.

2.2. Development history of the laws governing surrogacy in the world and in Vietnam

2.2.1. Development history of science on surrogacy in the world

Surrogacy is applied using in vitro fertilization. History of in vitro fertilization and embryo transfer is earliest made known in 1890 when Walter Heape, a professor – doctor at Cambridge University, England recorded the first case of surrogacy in the world reported in 1980 in the U.S. So, surrogacy was a phenomenon received much attention from scientists from around the globe and became greatest achievement in the field of medicine in XX century.

2.2.2. Legislative standing on surrogacy of some countries in the world

Surrogacy is considered a highly social sensitive issue. To date, legistlative standing of countries in the world on surrogacy can be divided in three main groups: (1) countries which absolutely prohibit surrogacy, such as France, Germany etc. (2) countries which allow surrogacy for humanitarian purposes only, such as Vietnam, England, Australia etc. (3) countries which allow both surrogacy for humanitarian purposes and commercial surrogacy, such as India. Legislative standing and regulations of some typical countries represent the groups are diverse and gradually changing.

2.2.3. Development history of Vietnamese laws on surrogacy

Surrogacy in general and surrogacy for humanitarian purposes in particular is quite a new issue in Vietnam. In legislation, surrogacy was regulated for the first time in Decree No. 12/2003/ND-CP. Then the National Assembly passed Law on Marriage and Family 2014 in which recognizes and legalize surrogacy for humanitarian purposes. Also, other legal instruments including Criminal Code 2015, Social Insurance Law 2014, Decree 10/2015/ND-CP, Decree 98/2016/ND-CP amending and supplementing Decree

10/2015/ND-CP have regulations on this matter which create a legal framework for enforcement of regulations on surrogacy in Vietnam.

2.3. Factors affecting the laws governing surrogacy for humanitarian purposes in Vietnam

2.3.1. Customary factor

The laws govern surrogacy for humanitarian purposes in order to satisfy the desire for clan in Vietnamese culture. Besides having children following marriage is a must because children will be the saving for the parents when growing old. This is also one of the factor affecting regulations on surrogacy. Therefore, the fact that Vietnamese laws recognize and legalize surrogacy for humanitarian purposes has satisfied one of the demands from society in current context.

2.3.2. Psychological and ethical factors

In surrogacy for humanitarian purposes legal relationship, psychological and ethical factors are both in harmony and contradiction existing intrinsically within both surrogate and intended parents. Besides, the laws governing surrogacy is influenced in assessing psychology and ethics to the born child and medical staffs performing this technique.

2.3.3. Economic-social factors

The development of medicine, especially in reproductive support area, there are a plenty of desired but hopeless couples. In the meantimes, these regulations is necessary and apt when commerical surrogacy, new born trafficking are getting more complicated in terms of quantity of cases and nature of the behaviors. This is a dramatic change in legislation which needs to be respected and recognized.

2.3.4. Policy factors

** Ensure human rights principle*

Our State always respects and aims at protecting basic human rights. This is an important principle and direction for policies and trategies of our Party and State.

2.3.3.1. Ensure humanitarian principle

Humanitarian in laws is the recognition and appreciation of human values in legislation and enforcement of the laws. However, there are opinions that surrogacy for humanitarian purposes are “inhuman” to surrogate and babies born from surrogacy for humanitarian purposes. The above concerns are not groundless. However, we are of the opinion that

placing in harmony and balance of interests of social relationships, regulations on surrogacy still have positive values.

2.4. Principles for performing surrogacy for humanitarian purposes

First, humanitarian principle, this is the most basic principle in performing surrogacy for humanitarian purposes

Second, surrogacy for humanitarian purposes is performed based on voluntary principle.

Third, privacy of individual, family confidentiality are respected and protected by laws.

Fourth, ensure technical procedure.

Conclusion of chapter 2

1. Surrogacy for humanitarian purposes is a highly sensitive and complicated relationship which affects multiple aspects such as individual, family and society interests.

2. Having the laws governing and legalizing surrogacy for humanitarian purposes is necessary, meeting demands in both theory and practice.

3. Even though efforts have been made, currently theory on surrogacy for humanitarian purposes is still limited, therefore it is necessary to clarify and comprehend the nature of surrogacy for humanitarian purposes.

CHAPTER 3
CURRENT VIETNAMESE LAWS ON SURROGACY FOR HUMANANITARIAN PURPOSES AND PRACTICE

3.1. Current Vietnamese laws on surrogacy for humanitarian purposes

3.1.1. Conditions for surrogacy for humanitarian purposes

3.1.1.1. Conditions for intended parents

First, there are still shortcomings in regulations on intended parents seeking surrogacy for humanitarian pursposes, specifically:

First, there is a lack of coherence between Decree 10/2015/ND-CP and Law on Marriage & Family 2014 in regulating intended parents seeking surrogacy for humanitarian purposes.

Second, the laws haven’t governed cases of illegal marriage but want to resort to surrogacy for humanitarian purposes.

Third, right to be mother of single women, LGBT is not ensured.

Second, intended parent must have "confirmation of competent medical facility that the wife is unable to carry pregnancy and give birth even when already applied reproductive support techniques." This is apt. Because, this is one of the important basis for developing a proper legal regime, ensuring that surrogacy is genuinely for humanitarian purposes.

Third, the compulsory condition to request surrogacy for humanitarian purposes is "*the parents are not having common child*". This regulation is one of the concerning issues in cases they have child but the child is deformed.

Fourth, to ensure condition to request surrogacy for humanitarian purposes, the intended parents must be "*consulted on medicine, law and psychology*" in order to raise awareness and responsibility to perform his/her rights and obligations and to avoid unnecessary disputes.

3.1.1.2. Conditions for surrogate

First, according to point a mentioned above, the surrogate is "*relative at the same level of the wife or husband who are the intended parents"* is "unnecessary" to certain subjects; unsuitable with regulations of Law on Marriage & Family 2014 and even deemed contradicted with the Law; there is a chance of taking advantages to perform surrogacy for humanitarian purposes for benefits.

Second, point b clause 3 regulates that the surrogate "*gave birth before and can perform surrogacy for one time only*" there is no specific guideline to interpret "*surrogacy for one time*" and there is no regulation on the distance between the first time giving birth and the time of performing surrogacy.

Third, according to point c clause 3 Article 95 of Law on Marriage & Family 2014 on conditions for surrogacy for humanitarian purposes, the surrogate must be "*in a appropriate age*" but there is no regulation on what age is considered "*appropriate*".

Fourth, point d clause 3 regulates that in case the surrogate has husband then it is required to have "*written consent from the husband*" there is no regulation in case the husband of the surrogate loses civil behavior capacity.

3.1.1.3. Conditions for medical facility to perform surrogacy for humanitarian purposes

Medical facility is the unit to perform medical techniques to support the intended parents and the surrogate can deliver with technical support for surrogacy for humanitarian purposes.Therefore, this subject plays an important role in realize dream of intended parents.

3.1.1.4. Conditions on contents and formality of agreement on surrogacy for humanitarian purposes

** Contents of agreement on surrogacy for humanitarian purposes*

The laws do not regulate the responsibility for violating obligations of the agreement, what is the procedure for handling invalid agreement, legal consequences of invalid agreement… Therefore it is necessary to have specific guidelines to avoid arising disputes and unnecessary outcomes.

** Formality of agreement on surrogacy for humanitarian purposes*

Agreement on surrogacy for humanitarian purposes must be made in writing and notarized. The formality is one of the compulsory requirements for the contents of the agreement to be legally valid.

3.1.2. Procedures for surrogacy for humanitarian purposes

The intended parents seeking surrogacy for humanitarian purposes must submit documents requesting surrogacy for humanitarian purposes technique to medical facility allowed to perform the surrogacy techniques. Within the period of 30 days, since the date of receipt of the documents, the medical facility allowed to perform the surrogacy techniques must have plan for treatment. In case unable to perform, the medical facility must response in written, explaining reason. Regulations on the documents still have shortcomings which need to be amended.

3.1.3. Rights and obligations of parties in surrogacy for humanitarian purposes

3.1.3.1. Rights and obligations of the intended parent in surrogacy for humanitarian purposes

First, the laws do not control the payment of the intended parent to the surrogate for items outside of the list or within the list but what is the reasonable amount is not yet identified.

Second, regulations on maternity in Law on Marriage & Family 2014 are not necessary and unified with other regulations.

Third, regulations on the compulsory obligation to take the baby from the surrogate are not appropriate, one thing needs to be ensured is that the baby receives the love and best care.

Besides, in relation with other regulations in Law on Marriage & Family 2014, regulations on the rights of the intended parent still pose certain shortcoming, of which is the regulation on the right to divorce.

3.1.3.2. Rights and obligations of the surrogate in surrogacy for humanitarian purposes

First, regulations on social insurance should be stipulated in Law on Social insurance.

Second, there is no management mechanism to control regular visit of the surrogate in practice.

3.1.4. Identify father-mother-child relationship in case of surrogacy for humanitarian purposes

The time to identify the child as the baby of the intended parent should be considered because it could affect rights of the parties and especially legitimate rights of the child and the surrogate, causing inappropriateness in relation with regulations of the Criminal Code 2015 on protecting the right to live of children. In the meantimes, regulations on the time to identify the child mentioned above also create conflict with legitimate rights of the intended parent and the surrogate in certain cases stipulated in Law on Social insurance 2014.

3.1.5. Dispute resolutions in case surrogacy for humanitarian purposes

First, there are no legal instruments regulating types of disputes relating to surrogacy for humanitarian purposes.

Second, clause 2 Article 99 of Law on Marriage & Family 2014 also regulates the priority right to adopt the child but places it in Article 99 on “dispute resolution” is inappropriate. On the other hand, dispute resolution in case the parties want to adopt the child born from surrogacy for humanitarian purposes as adopted child is contradict with regulations of Law on Adoption 2010.

3.1.6. Handling violation relating to giving birth with reproductive support techniques and surrogacy

Current regulations on handling violations relating to surrogacy still pose shortcomings and are not in unity with other regulations, causing difficulties in the enforcement process as well as the administrative handling of violations does not have specific guidelines. For civil sanctions, there are no specific regulations on handling violations on surrogacy. For criminal sanctions, supplement penalties are still too lenient.

3.2. Practice of enforcement of regulations on surrogacy for humanitarian purposes in Vietnam

3.2.1. Practice of performing surrogacy for humanitarian purposes in Vietnam

Currently there are five medical facilities satisfying conditions to perform surrogacy for humanitarian purposes, including: National Hospital of Obstetrics and Gynecology (Hanoi); Tu Du Hospital (Ho Chi Minh city); Hue Central Hospital (Thua Thien Hue); My Duc Hospital (2017) and Hung Vuong Hospital (2019). The current increase of two more medical facilities has increase options and chances for couples seeking surrogacy for humanitarian purposes in recent period. According to statistics, up to 2019, after 5 years of enforcing regulations on surrogacy for humanitarian purposes, there are 406 successful cases performed this technique nationwide[2]. So in average, each year our country has 80 successful cases, bringing joy and happiness to many couples hoping for their biological children, reinforcing humanitarian values in policies of the Party and State in supporting and protecting human beings. Noticeably, there is no dispute case on surrogacy for humanitarian purposes recorded at the People's Courts nationwide. However, the practice of enforcing regulations on surrogacy for humanitarian purposes still shows difficulties, specifically:

Regulations on identifying couples in which the wives are unable to carry pregnancy and give birth even when applied reproductive support techniques but haven't had detailed guidelines, causing difficulties in enforcement of the laws, affecting interests of the parties. In the meantimes, potential risks to the surrogate and the intended parents and even the babies still exist. Besides, awareness of the community is still one of the barriers to perform surrogacy for humanitarian purposes recently. Besides, the desire to have babies – a very human need of the unlucky and hopeless couples is turning into opportunities for commercial surrogacy for illicit benefits. At the same time, the criminal handling of commerical surrogacy is still limited and poses shortcomings.

3.2.2. Causes leading to difficulties in enforcement of regulations on surrogacy for humanitarian purposes

First, due to limits of the regulations

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[2] See ***Pham Hai,*** *Should we relax regulations on surrogacy?* Accessed on 2/ 8/2019. http://daibieunhandan.vn/default.aspx?tabid=81&NewsId=423521

Some regulations are not appropriate, feasible and unified with other regulations. In the meantimes, some regulations do not have detailed guidelines leading to difficulties for parties in this relationship.

Second, limits in law enforcement

First, due to limits in infrastructure, the effectiveness of information management is not so high.

Second, the enforcement of the laws at competent bodies are not smooth because of difficulties in identifying the conditions to implement.

Third, human resources of competent bodies are not sufficient for the enforcement of regulations on surrogacy for humanitarian purposes.

Fourth, regulations on surrogacy for humanitarian purposes are still influenced by customs, tradional values leading to different awarenss in enforcement.

Conclusion of chapter 3

1. Current legal norms governing surrogacy for humanitarian purposes are quite specific, sufficient and focused. However, surrogacy for humanitarian purposes is new regulations therefore limits are unavoided, first of all the shortcoming comes from the regulations themselves leading to difficulties in enforcement of these regulations or creating uncontrollable loopholes.

2. Legal enforcement bodies on surrogacy for humanitarian purposes have achieved significant results in performing infertility treatment by reproductive support techniques. However, practice of enforcement of surrogacy for humanitarian purposes shows that shortcomings need to be overcome.

CHAPTER 4

DIRECTIONS AND SOLUTIONS FOR COMPLETION, ENHANCEMENT OF EFFECTIVENESS OF ENFORCEMENT OF REGULATIONS ON SURROGACY

4.1. Directions for completion of regulations on surrogacy

4.1.1. Regulations on surrogacy must realize principles on human rights

4.1.2. Regulations on surrogacy must represent humanitarian principle, ensuring balance of interests of the parties

4.1.3. Regulations on surrogacy must be in unity

4.1.4. Regulations on surrogacy must be feasible and predictable

4.2. Solutions for completion and enhancement of effectiveness of enforcement of regulations on surrogacy

4.2.1. Solutions to complete regulations on surrogacy

4.2.1.1. Completion of legal definition relating to surrogacy under current Vietnamese laws

Scientific definitions such as surrogacy for humanitarian purposes, commercial surrogacy need to be developed in a unified way in terms of the nature of surrogacy to propose appropriate explanation of terminology. Besides, certain related definitions for the enforcement and performance of surrogacy for humanitarian purposes in practice are not yet clear, such as definitions on embryo and pregnancy, hopeless couples and couples who are unable to give birth to baby even when applied reproductive support techniques need to be used systematically.

4.2.1.2. Complete regulations on conditions for surrogacy for humanitarian purposes

** Conditions for intended parents in surrogacy for humanitarian purposes*

In case of illegal marriage of intended parents, there should be more detailed guidelines to two issues: (1) man and woman who are illegally married but already requested the Court to solve, the parties satisfy the conditions stipulated at Article 11 of Law on Marriage & Family 2014 and Article 4 Joint Circular 01/2016/BTP – TANDTC – VKSNDTC; (2) In case man and woman who are illegally married but request surrogacy for humanitarian purposes and carry out. During the performance, there is decision to declare cancellation of illegal marriage, there should be detailed guidelines on legal consequences and especially rights and obligations of the new born baby.

Second, clause 3 Article 95 of Law on Marriage & Family 2014, it should be under consideration to add more parties who can seek surrogacy for humanitarian purposes such as single male, female, LGBT because their desire to be father, mother is justifiable.

Third, regulating in a way to broaden conditions to perform surrogacy for humanitarian purposes in case the couples have common child but the child is deformed and considering that the deformity is not affected by genetic factors.

** Conditions for surrogate in surrogacy for humanitarian purposes*

First, develop detailed guidelines so that judical staffs have sufficient ground to verify relationship between the intended parent and the surrogate, creating favourable conditions for parties seeking surrogacy for humanitarian purposes.

Second, detailed guidelines on terminology "regulation that the surrogate must "gave birth before and can perform surrogacy for *one time* only" is needed. Besides, current regulations need to clarify the period between the previous delivery and the surrogacy.

Third, the age limit of the surrogate is from 20 to 40 years old is appropriate.

Fourth, the law should foresee the case the husband of the surrogate loses civil behaviour capacity or has difficulties in awareness and behaviour control.

4.2.1.3. Complete regulations on procedures for surrogacy for humanitarian purposes

First, the dossier to request surrogacy for humanitarian purposes needs to supplement regulation that the document to prove marital relationship between the intended parents is a compulsory document.

Second, point d Article 14 Decree 10/2015/ND-CP needs to be amended as "The confirmation of the *commune People's Committee where the intended parents reside* on the condition that the intended parents do not have common child" to be appropriate with regulations of Law on Residence.

Third, point e Article 14 Decree 10/2015/ND-CP needs to be amended to exclude "*already gave birth before*" to simplify the procedures for the parties but still in accordance with the law.

Fourth, point h Article 14 Decree 10/2015/ND-CP needs to be amended as "*The confirmation of the husband of the surrogate "except the case the surrogate is a single woman or the husband of the surrogate loses civil behaviour capacity or has difficulties in awareness and behaviour control) to consent the surrogacy*"

Fifth, dossier for surrogacy for humanitarian purposes needs to have a compulsory written confirmation of doctors that the surrogate has sufficient visitations.

4.2.1.4. Complete regulations on rights and obligations of parties performing surrogacy for humanitarian purposes

First, clause 1 Article 97 of Law on Marriage & Family 2014 should be amended as: "*the surrogate and her husband have parental rights and obligations to the baby since starting pregnancy to transference of the baby to the intended parents".*

Second, clause 2 Article 98 Law on Marriage & Family 2014 should be amended as: "*the intended parents seeking surrogacy for humanitarian purposes have moral and property rights, other rights of father, mother in accordance with the laws since the date of receiving the baby."*

Third, clause 1 Article 98 Law on Marriage & Family 2014 should regulate that apart from costs according to invoices as in the list, there needs to be average quota accepted for reasonable costs.

Fourth, clause 3 Article 97 and clause 2 Article 98 Law on Marriage & Family 2014 regulates maternity of the surrogate and the intended parents need to be amended to be regulated in accordance with specialized legal instruments on social security regime.

Fifth, clause 3 Article 98 Law on Marriage & Family 2014 regulates that "the intended parents are not allowed to refuse to receive the baby" need to be amended so as to maximize and prioritize the interests of the baby.

Sixth, clause 2 Article 99 Law on Marriage & Family 2014 needs to be amended so that regulations on rights and obligations of the surrogate are logical with substance of the Article.

Seventh, the subjects to enjoy maternity regulated at Article 34 Law on Social insurance 2014 need to be broadened to include the husband seeking surrogacy; Regulations on death pension of baby born from surrogacy for humanitarian purposes techniques with the direction to omit the situation "*the baby is born when the father deceases and the mother is in pregnancy".*

Eighth, the right to divorce of the parties needs to be amended in a way to ensure legitimate interest of the parties.

4.2.1.5. Complete regulations on identifying father, mother and child relationship in case surrogacy for humanitarian purposes

There should be regulations that the female surrogate and her husband shall be legitimate parents of the baby since starting pregnancy to transference of the baby to the intended parents. This regulation is humane to both the surrogate and the baby as well as in conformity with relevant legal normative instruments.

4.2.1.6. Complete regulations on dispute resolution in case surrogacy for humanitarian purposes

First, regulation in Article 28 Civil Procedure Code 2015 needs to have detailed guidelines on specific types of disputes on surrogacy for humanitarian purposes. Also, it is needed to have detailed guidelines on how to handle cases that surrogacy for humanitarian purposes is declared invalid due to violation in conditions for performing the surrogacy.

Second, the current laws need to promulgate legal normative instruments to foresee the settlement of disputes in cases disputes occur in practice.

Third, when there is opportunity for amendment, Law on Adoption 2010 needs to be amended in a way that the surrogate has the right to adopt the baby and has the priority right in selecting replaced family. The priority right applied even in case the intended parents go missing, with unidentified residence.

4.2.1.7. Complete regulations on handling violations on surrogacy

First, for administrative and civil sanctions, legal normative instruments guiding sanctioning violations of surrogacy and surrogacy for humanitarian purposes should be issued soon.

Second, for criminal sanctions, Article 187 Criminal Code 2015, the title of the Article should be amended to broaden to the greatest extent subjects of "Crime on commercial surrogacy", also, regulate "organization" as aggravated circumstance in the same Article. On the other hand, the amount of fine should be proportional; criminal sanctions should be applied in case the intended parents are late in performing the obligation to adopt the child causing serious consequences.

4.2.2. Solutions to enhance the effectiveness of enforcement of regulations on surrogacy

First, competent authorities need to strictly implement the inspection, supervision of enforcement of the laws, technical procedures of medical staffs at facilities providing reproductive support services.

Second, medical industry should have recommendations to hospitals to apply modern technical system to manage information on the surrogate.

Third, it is necessary to enhance legal awareness and capacity of medical staffs performing surrogacy for humanitarian purposes when appraising requests to apply this technique.

Fourth, it is necessary to have collaboration between competent bodies in finding and handing violations on surrogacy.

Fifth, it is necessary to educate to enhance awareness and legal knowledge of the community.

CONCLUSION OF CHAPTER 4

1. Regulations on surrogacy are appropriate in the current economic and social context therefore the continuation and completion of the laws and regulations on surrogacy for humanitarian purposes is a necessity.

2. Based on assessment of regulations, practice of enforcement of the laws and regulations on surrogacy for humanitarian purposes, the author strongly proposes solutions for completion on the ground of identifying directions, requirements of current legislation process.

GENERAL CONCLUSION

1. Through 5 years of enforcement of Law on Marriage & Family 2014 on surrogacy, it is shown that these regulations are positive with strong humanity values. The achievements should be respected and strongly promoted.

2. Vietnamese laws governing surrogacy for humanitarian purposes have basically developed core regulations, creating firm legal framework for enforcement of these regulations in practice. However, objectively, it is admitted that besides the positive outcome, current Vietnamese laws governing surrogacy for humanitarian purposes still pose certain shortcomings.

3. Practice of application of the laws and regulations on surrogacy for humanitarian purposes shows that Vietnam has gained achievements. However, there are still difficulties in application of the law in practice. Therefore, to enhance the effectiveness of enforcement of the laws on surrogacy for humanitarian purposes, unified collaboration between competent authorities is needed to implement solutions so that the community has correct understanding on this very humane regime.