International Surrogacy is Dangerous and Unfair

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Recent revelations by Fairfax Media that an Australian couple may have abandoned one of their surrogate twins who had tested positive for down syndrome, while whisking his healthy sister off to Australia, shed a rare light on the hidden and fundamentally unjust world of international commercial surrogacy.

We don’t know the identity of the couple: they found a broker and stayed firmly in the shadows until Monday when the father denied any knowledge of the second twin.

The woman who was used so badly does not have the luxury of anonymity. We know that Pattharamon Janbua was barely out of her teens when recruited. We know that she was pressured to have a late-term abortion when the baby’s condition was discovered but refused on religious grounds. We know that her payment depended on her misleading Australian Embassy officials in order to secure the necessary permissions for the healthy twin to leave the country. We know that she is now left caring for a sick baby that is not her own.

Australia recognises the dangers of commercial surrogacy: throughout this country it is illegal to enter into any arrangement that compensates the surrogate for anything more than out-of-pocket expenses. But only NSW, Queensland and the ACT have seen fit to apply a similar standard to international surrogacy, using criminal law to discourage residents from engaging in such arrangements overseas. The motivation behind these rules is simple: if it is difficult to prevent exploitation in commercial surrogacy in Australia, it is virtually impossible to do so in other countries. In addition, as the Thai case illustrates so well, international surrogacy raises complex legal issues of nationality and parentage that can be unimaginably difficult to resolve.

There is no doubt that many couples seeking surrogacy services overseas have good intentions. They don’t want to exploit their surrogate and actively try to ensure she receives fair payment. Some even attempt to keep up contact with the woman who carried their child, sending photos and updates. But some are not so careful and caring and it is impossible to control things the other end. Anyone trying to maintain this fiction is either naive or lying.

In my work on human trafficking I have come across many cases of ruthless exploitation in the "womb-for-rent" trade. Women are sometimes pressured into surrogacy by their families or grossly deceived about the conditions of the arrangement, cheated by the brokers, medical personnel and entrepreneurs who make the real money. The surrogate is seen purely as a commodity – an investment that must be closely guarded.

Many are virtual prisoners, forced to remain in a compound for the duration of the pregnancy. The common realities of repeated pregnancies, abortion when something is not quite right, complications from the use of fertility drugs, non-payment in cases of miscarriage, and failure to provide surrogates with independent legal advice are rarely acknowledged. Foreign parents are usually shielded from these uncomfortable details: the profiteers understand all too well how important it is to maintain the illusion that this is somehow an altruistic service, where everyone benefits and no one is harmed.

International commercial surrogacy has much in common with the global trade in organs. In both cases, the bodies of poor women and men are used for the benefit of the rich. In both cases the argument is made that the poor should be given control over their bodies – to deny them the right to sell a kidney or rent out their womb is paternalism at its worst, preventing individuals from climbing out of the quagmire of poverty and disadvantage.

Governments in poor countries are often complicit in this opportunistic manipulation of what freedom and consent really
mean. They adopt laws our government would never accept in the hope of developing lucrative niche markets in “fertility tourism” and “organ tourism”.

So where do we go from here? The single most important thing that Australia can do is to stop accepting the hypocrisy of us having different laws for domestic and international surrogacy. All Australian states and territories should join NSW, Queensland and the ACT in banning surrogacy overseas. Our consular officials in countries like India and Thailand – the main sources of surrogate mothers – should vigorously monitor applications for visas in these cases. Our law enforcement agencies should be given the resources and training to pursue investigations and prosecutions. In all cases, absolute priority should be given to protecting the rights of the most vulnerable: the surrogate mothers and the children born through such arrangements. What is reported to have happened in Thailand is a disgrace and a national shame.

Anne T. Gallagher is an international lawyer specialising in human trafficking and migrant smuggling.

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