



香港浸會大學應用倫理研究中心  
Centre for Applied Ethics  
HONG KONG BAPTIST UNIVERSITY



*Reproductive Technology and Ethics:  
Procreative Liberty and Its Limits*

edited by

**Gerhold K. BECKER**

OCCASIONAL PAPER SERIES  
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*Reproductive Technology and Ethics:*

*Procreative Liberty and Its Limits*

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## Foreword

The Centre for Applied Ethics held a *Symposium on Reproductive Technology and Ethics: Procreative Liberty and Its Limits* on March 19, 1997 and invited experts from various Hong Kong universities to discuss the moral, social, legal and religious implications of reproductive technology. The panelists were **Stephen Lau Shek-lam**, University Lecturer in the School of General Education at Lingnan College. **Athena Liu Nga-chee**, University Lecturer in the Department of Law at the University of Hong Kong. **Lo Ping-cheung**, Associate Professor in the Department of Religion & Philosophy, and Research Fellow in the Centre for Applied Ethics at Hong Kong Baptist University. **William So Wai-ki**, Consultant in the Department of Obstetrics & Gynecology, and in the Assisted Reproduction Programme at the University of Hong Kong, Queen Mary Hospital. **Julia Tao**, Dean of the Faculty of Humanities & Social Sciences, and Director of the Contemporary China Research Centre at City University of Hong Kong. The undersigned served as panel chair and introduced the issue in the context of the current debate in Hong Kong.

The following papers are the revised versions of the participants' oral presentations at the symposium. I would like to take this opportunity to thank all panelists for their conscientious contribution to the extremely complex issues discussed at the symposium. I am particularly grateful for their consent to the publication of their articles in this special edition of the Centre's *Occasional Paper Series*.

Hong Kong, June 3, 1997

Prof. Gerhold K. Becker

Director, Centre for Applied Ethics

# **Assisted Reproductive Technology: The Case of Surrogacy**

*by*

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## **Introduction**

“Procreative liberty” denotes freedom in activities and choices related to procreation. In our society, individuals and couples have no legal duty to procreate. Nor are there laws which prohibit or penalize married couples from having children as often as they like and can. At the same time, there has been little attempt made to determine the scope and the right to procreate. However, with the development of assisted reproductive techniques and services in recent decades, issues of access and regulation of reproductive technology have sparked growing concern and debate on the rights and limits of procreative liberty in Hong Kong. In 1987, the Hong Kong Government set up the Committee on Scientifically Assisted Human Reproduction (SAHR) to examine the related issues of regulation and legislation, as well as to seek public consultation before formulating policy.

The Committee produced a final report in 1993 which recommended the setting up of a statutory body to draft regulations and to enact laws, to license institutions to carry out SAHR and monitor practice. The Committee was later replaced by the Provisional Council on Reproductive Technology in 1989. In January 1997, the Council proposed a new Human Reproductive Technology Bill for Hong Kong which has since been given first and second reading in the Legislative Council. In essence, the proposed Bill limits the provision of reproductive technology services to legally married couples, makes surrogacy a non-commercial, unenforceable arrangement and defines human life as beginning 14 days after conception for the purpose of regulation of embryo research. The discussion in this paper will focus on the regulation of surrogacy as a form of assisted human reproduction, and will examine some of the ethical and public policy issues arising from the proposed Bill.

## **Surrogacy - Parenting Through Contract**

“Surrogacy is that arrangement in which a woman carries a child to term intending at the initiation of the pregnancy for another woman to raise the child as the social mother.”<sup>1</sup> It can take different forms depending on whether the arrangement is: genetically related or genetically unrelated; commercial or non-commercial. Surrogacy in whatever form is parenting through contract. It raises the issue of the proper legal status of parenting through contract. The experience of other countries suggest the following options open to the law:<sup>2</sup>

- (i) entirely banning the practice; and also
- (ii) criminalizing only some variants or elements of the practice (such as banning advertising or commercial surrogacy);
- (iii) allowing the practice but not enforcing contracts;
- (iv) allowing the practice and enforcing contracts; or
- (v) assimilating surrogacy to other practices, such as adoption

## **Surrogacy -- The Hong Kong Context**

Under the proposed Bill, genetic in-vitro fertilization surrogacy arrangements are accessible to legally married couples, and are permissible only on non-commercial basis. The Bill also makes surrogacy a non-enforceable arrangement. The gestational mother is deemed to be the legal mother of the baby born through surrogacy; she has right over the baby as well as right to decision over termination of pregnancy at any time. The commissioning couple can apply through adoption within three months of the birth of the child to become the legal parents of the child.

The proposed Bill however is silent on whether the surrogate mother would need to be married or should already have children or whether consent from her husband would be required.

## **Surrogacy -- The Pro-Welfare, Pro-Family Position**

The Hong Kong legislative response to surrogacy reflects a pro-welfare and pro-family position of the government. The premise of non-commercialization of surrogacy of the proposed Reproductive Technology Bill is to uphold the interest of the child by outlawing commercialization of reproductive processes. It protects the surrogate mother and the child to be born through surrogacy from being reduced to mere commodities. It prevents the exploitation of the financially needy women and provides sanction against what might be a disguised form of baby selling. The restriction of the technological assistance to legally married couples is intended to safeguard the welfare of the child because of the belief that a married couple is most likely to be able to provide a stable environment for the development of a child. It also strengthens the value of the family. A point underscored by the then Deputy Secretary of Health and Welfare at a press conference on proposals to regulate such practices in September 1994 when she stated categorically that: “There is a point in society in trying to strengthen family values and not weaken them.”<sup>3</sup>

At the same time, the non-enforcement policy protects the interests of the surrogate mother who reserves the right to reverse her decision to continue the pregnancy or to give up the child after the birth of the child. It respects the gestational mother's relationship to her child during gestation as a relationship of deep emotional and physical bonding which is the basis of parental love and concern for the child. It reinforces the long-standing legal view that the gestational relationship is one that shows that the surrogate mother was committed enough to the fetus to carry it to term. In the words of a Principal Assistant Secretary to the Health and Welfare Branch: "To make a surrogacy agreement legally enforceable would be to treat the child as property."<sup>4</sup> Thus contracts for mother are against public policy, and are therefore unenforceable. However, it also means that under the proposed Bill, if the agreement is breached by either the surrogate mother or the commissioning couple, the state will leave the parties as it finds them. All in all, the restriction to married couples, the non-commercialization and non-enforcement approach are clearly attempts to protect the welfare of the child and the surrogate mother to uphold family values and family integrity, and to keep the state and the market out of family relationships.

### **Surrogacy -- The Pro-Rights, Pro-Choice Position**

The attempt of the Hong Kong Government to regulate access to surrogacy by the proposed Bill is considered by some to be too restricting and interfering with the freedom and rights of those who wish to achieve procreation through their choice of assisted reproductive techniques. They advocate a pro-rights, pro-choice position that argues for public policy which ensures equal rights and access to this type of technological assistance to all adults in our society, irrespective of marital status or sexual orientation, and regardless therefore of whether they are gay or lesbian couples, single men or women, divorced or separated. Procreation rights is a universal human rights. There should be maximum freedom of choice, with services and opportunities open to all. Both commercial as well as non-commercial surrogacy should be permitted by the law. Genetical linkage should not be a requirement for use of surrogate arrangement for assisted human reproduction. According to the pro-rights, pro-choice position, parenting through contract does not violate the law or public policy. Its contracts should therefore be recognized as valid and enforceable. This is because a contract is a contract and enforcement can be effected through contract law. The state's role is to regulate the market and to enforce contracts. Surrogate mothers should receive proper remuneration as compensation for the service they provide to the contracting couple.

If one accepts the position that the surrogacy contract is enforceable, there is another set of questions which needs to be considered: (i) What sort of remedy is appropriate for breach of the contract, such as the mother's refusal to surrender the child or the contracting couple's refusal to accept it? (ii) Should a contracting couple be forced to accept a child born through contract? and would that be in the child's best interest? (iii) Should a mother be forced to surrender the child or should she only be required to pay damages? But this may damage contracted mothers who are generally less wealthy than contracting couples. Besides, money often will not adequately compensate a contracted mother who is left with a child that she never intended to parent. These questions have led some to conclude that surrogacy contracts are morally and practically unenforceable. It is further objected that the pro-rights, pro-choice position is in effect sanctioning the act

of a woman to create a child intentionally without an underpinning aspiration to want to rear the child, to form permanent relationships and bonding with the child as another human being, or to feel any lifelong unconditional commitment to the well-being of the child. It can create grave impact on our moral notions about reproduction, parent- child bonding, family and similar value concerns embedded in the deep structure of our society.

Those who defend the pro-rights, pro-choice position argue that there is little difference between making arrangements to adopt a mother's baby as soon as she knows she is pregnant and making arrangements to adopt a contracted mother's baby even before it has been conceived. The same rules that govern adoption should therefore govern surrogacy arrangements. This approach also harmonizes with the long-standing legal view that the woman who gives birth to a child is that child's mother. But others point out that there is a fundamental difference between surrogacy arrangements and adoption arrangements. We are not using surrogacy to solve the problem of a child being without a home. We are using surrogacy to call a child into existence to solve the problem of a couple that otherwise would not have a child. Society therefore has the responsibility to ensure maximum protection of the child's welfare while procreation rights are being exercised. Under the existing circumstances in Hong Kong, if surrogacy arrangement is extended to gay, single, or co-habiting parents, the burden on the child would be very great to have to cope with that kind of environment. There are also objections to commercial parenting through contract because it violates adoption laws and laws against baby-selling. It is not in the child's best interests, and that it involves unacceptable commercialization of reproductive processes.

### **Surrogacy -- The Prevention of Harm Position**

The principle of prevention of harm supports public policy which bans the practice of parenting through commercial and non-commercial surrogacy. It however endorses other kinds of assisted reproductive technology (e.g. in-vitro fertilization, artificial insemination, etc.) as well as adoption as ways to relieve the pains and sufferings of infertility because of their low risk of harm to all the parties involved, including society. Surrogacy whether through commercial or non-commercial arrangement causes harm to the self-image and self-concept of the contracted mother, the contracted child, especially where there is dispute and where court proceedings are initiated. Given the fact that no surrogate arrangement is enforceable, there is not much room for the court to intervene in case of dispute. Hence, all parties are placed in a very vulnerable position. If the surrogate mother decides to keep the baby, the contracting parents are hurt. If the commissioning parents decide they do not want the baby, the surrogate mother is left with all the responsibility. If neither the commissioning parents nor the surrogate mother want the baby, the child is harmed. Parenting through surrogacy also raises the possibility of symbolic harm because of their impact on moral notions about sexuality, reproduction, parenting, family and other value structures of society. It is unacceptable to the self-image of women. Instead of expanding liberty and empowering women, commercial surrogacy permits the exploitation of economically disadvantaged women. Non-commercial surrogacy can encourage the oppression of women by relatives seeking to preserve family names and lineage. In order to prevent harm, the options are to ban all kinds of surrogacy, to enforce criminal action against contracting couples and contracted mothers, or to penalize the people who serve as the "surrogate broker" in commercial surrogacy

negotiations, e.g. lawyers, physicians, and social workers, etc. In addition, publishers, directors, and managers of newspapers, periodicals, and telecommunications systems can be subject to fines and/or imprisonment if they accept advertisements such as “womb for hire.” The problem raised by the prevention of harm position is its legal moralism and what would be regarded by some people as inadequate sympathy for the harm suffered by infertile couples.

### **Surrogacy -- The Ethical and Legal Minefield**

Speaking at a press conference on SAHR on 15th September 1994, the then Deputy Secretary for Health and Welfare described the position of the Hong Kong Government on scientifically assisted human reproduction as being basically open and neutral.<sup>5</sup> The Government neither promotes nor prohibits SAHR. The Government will leave the decision to the freedom of conscience of individual citizens. But in fact, the Government’s position is far from being neutral and open. The proposed Bill, and in particular, the section that covers surrogacy, reflects a distinct policy position of restricted access and a strong ethos of moral paternalism.

The Government however lacks the political will and the moral courage to put its position and reasoning openly before the public, and to organize the public to engage in critical debate and scrutiny of its policy proposal and ethical stand. Under the pretext of neutrality and respect for self-determination based on individual conscience, the Government has failed to produce a coherent legal and moral framework for the drafting of legislation and the formulation of policies which are consistent and promote public awareness. Because of the Government’s evasive attitude, it has taken ten years since the setting up of the Committee on SAHR before a proposed Bill on Reproductive Technology was tabled before the Legislative Council for first and second reading in January this year although different forms of artificial reproduction have already been practiced in our society for more than twenty years.

More regrettably, in declaring surrogacy arrangement a matter of private conscience, it has left a number of important issues and problems unaddressed. The inability of the law to interfere in surrogacy arrangements under the proposed Bill leaves all the parties involved in a vulnerable position and fails to prevent the risk of harm to the contracted child to be born through surrogacy, the surrogate mother, the commissioning couple, and to society at large because of the burdens which these decisions may impose on others. The silence of the proposed Bill on requirements regarding consent from the husband of the surrogate mother, marital status and childbirth experience as pre-requisites for surrogate mothers -- all of which were recommendations originally included in the final report of the Committee on SAHR in 1993, calls for justification and explanation. Thoroughness, professionalism and commitment are required on the part of the Government to devise policies and legislation to define the limits and freedom of procreative liberty which reflects the endorsement of the community. It is time the Government should revisit the proposed Bill which as it stands, has the potential to become an ethical and legal minefield in our society.

Notes:

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<sup>1</sup>Furrow, Barry R., Johnson, Sandra H., Jost, Timothy S., and Swartz, Robert, *Health Law Cases, Materials and Problems*, second edition, St. Paul, Minn., West Publishing Co., 1991, pp. 974.

<sup>2</sup>Alpern, Kenneth D, (ed.) *The Ethics of Reproductive Technology*, Oxford, Oxford University Press, 1992, pp. 247.

<sup>3</sup>Eastern Express, dated 15/9/94.

<sup>4</sup>South China Morning Post, dated 8/11/94.

<sup>5</sup>Ta-kung Pao, dated 15/9/94.

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**The Centre for Applied Ethics**, strives

*\*to stimulate critical reasoning about fundamental ethical concerns in contemporary society,*

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