

## **Research on legislative regulation of surrogacy**

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**ABSTRACT:** *Surrogacy has its objective basis in the background of the increasing number of infertility and serious population ageing. In order to comply with the guidelines of the state's "three-child policy" and change the status quo of the "no surrogacy" in China, the state may consider regulating surrogacy at a higher level in legal documents, to legalize full and unpaid surrogacy for their peers. Based on the experience of the extraterritorial regulation of surrogacy, this paper reviews the current regulation model of surrogacy in China, and tries to put forward some suggestions on the future legislative regulation model of surrogacy in China.*

**KEYWORDS:** *Surrogacy; Complete and unpaid surrogacy; Legislative proposals*

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### **I. The connotation of surrogacy**

Surrogacy is the artificial insemination of a willing surrogate mother with the sperm of the client's husband or the implantation of the fertilized eggs of the client's husband and wife after in vitro fertilization, in the case of a surrogate mother who becomes pregnant and gives birth, the husband and wife of the consignor shall bring up the child in the capacity of legal parents.

There are two main types of surrogacy. The first classification classifies surrogacy into traditional/partial surrogacy and full surrogacy based on whether the surrogate mother is related to the foetus. Local surrogacy refers to the combination of the surrogate mother's eggs with the sperm of the requesting father through natural or artificial insemination and the conception of a child by the surrogate mother, that is, at the same time using the surrogate mother's uterus and eggs for surrogacy, the fetus and the surrogate mother has a blood relationship. Complete surrogacy is when a fertilized egg (or donor egg) from the mother's sperm (or donor egg) is implanted into the womb

of the surrogate mother to form the fetus, that is, a surrogacy carried out using only the womb of the surrogate woman and not her eggs, the fetus is not related to the surrogate mother.

The second classification is based on whether compensation for surrogate mothers is within reasonable limits, and surrogacy can be classified as pro bono (or altruistic surrogacy) and paid (or commercial surrogacy). To the extent that compensation is reasonable, it covers only the costs incurred during pregnancy and childbirth, mainly the costs of medical care, living expenses and correspondence with the expectant parents during pregnancy and childbirth, does not include payment for surrogacy itself. In the following part, based on the experience of the extraterritorial regulation of surrogacy, this paper rethinks the current regulation model of surrogacy in China, and puts forward some suggestions for the future legislative regulation model of surrogacy in China.

### **II. Experience in regulating surrogacy outside China**

At present, the attitude to surrogacy in various countries can be divided into two types: refl and acceptance. Refl is usually a complete ban on all forms of surrogacy. Surrogacy is also often accepted only certain types of surrogacy, while imposing a variety of restrictions, only a few countries and individual regions open to surrogacy.

#### **(1) totally reject surrogacy**

Civil law countries mainly for this type, such as Germany, France, countries prohibit all forms of surrogacy, and even through the penalty to be punished.

German law is negative on surrogacy. Before the Adoption Agency Act was amended, Germany did not explicitly deny surrogacy at the legal level, but in judicial practice, the German court can deny the validity of the surrogacy contract by denying the autonomy of will in the surrogacy contract for the violation of public order and good custom. Since its amendment in 1989, Germany has taken a clear position on surrogacy by denying any form of surrogacy. The law sets out in detail the prohibitive rules and the criminal liability for violations of the law. In 1991, Germany enacted the Embryo Protection Act, which also denied surrogacy, and doctors who broke the law were sentenced to high fines and three years in prison, however, neither of the above two laws imposes criminal penalties on the parties involved in surrogacy.

As a conservative Catholic country, France pays more attention to the traditional ethics of procreation, and has obvious conservative attitude in the legislation of surrogacy. France has also been developing specific legislation for the Assisted reproductive technology, starting in 1984, through the establishment of a national ethics committee, discuss and study the art itself and its possible impact. Before the introduction of specific legislation, the French Supreme Court on the prohibition of arbitrary disposal of their own body on the grounds of the legality of surrogacy. Since 1994, when the French bioethics law was promulgated, the illegality of surrogacy has been clarified legally. France has also introduced penalties for surrogacy, with women sentenced to three years in prison or a fine of 45,000 euros. From here, we can see that France has taken a compulsory passive attitude in the process of surrogacy legislation.

## **(2) surrogacy with limited opening**

Since the birth of the world's first in vitro fertilization in the UK on 25 July 1978, the UK has continued to explore and develop the Assisted reproductive technology. Technological Innovation has forced institutional innovation, and Britain is one of the few countries in Europe to allow surrogacy. But the British attitude towards surrogacy is not completely open, but will be paid for surrogacy and non-paid surrogacy made a clear distinction. The UK is open to non-commercial surrogacy for free.

Thanks to pioneering technology, the UK had its first surrogacy in 1985, sparking controversy and debate. But the UK did not let this uncertainty last long and immediately introduced the surrogacy arrangements act to take a stand and deny the legitimacy of paid commercial surrogacy, it has also tightened controls on the channels through which information is disseminated and the extent to which public opinion is open. It does not allow information about a woman who intends to become a surrogate mother to be published through advertisements or other means, believing that this will strengthen the commercial nature of surrogacy. It was not until 2008 that the UK made a distinction between surrogacy through the human reproduction and Embryo Research Act, to recognize the legitimacy of non-commercial surrogacy and related peripheral industries such as public service advertising.

## **(3) full access to surrogacy**

Russia maintains an extremely open attitude towards the promotion and application of surrogacy technology and encourages the use of surrogacy technology to achieve satisfaction of reproductive rights, the law of the Russian Federation on Marriage and the Law of the Russian Federation on Civil Conduct have established a sound legal system for surrogacy.

The formation of the surrogacy system in Russia is closely related to the reduction of its population. Russia's population has continued to decline since the collapse of the Soviet Union, with 2.3 million fewer people in 2010 than in 2002. In addition, the population ageing is a thorny problem for Russia, and the mortality rate is not on the decline. These issues subsequently attracted the attention of the government, which issued a series of documents to ensure the country's stable population development and launched relevant fund projects to promote fertility. Up to now, the above methods have achieved remarkable results. Thus, Russia's surrogacy system, which encourages births, is in line with the government's policy objectives. It is particularly noteworthy that the Russian legislation on surrogacy, while protecting the legitimate rights and interests of surrogacy mothers and surrogacy babies, has also laid down detailed provisions for the protection of the legitimate rights and interests of surrogacy clients, such as pay attention to protect the client's right to know, protect the client and surrogate baby's parental relationship, at the same time, the client's parental privacy was vigorously protected.

Because of Russia's tolerant attitude to surrogacy in legislation and its strong protection of clients'rights, many surrogacy users have chosen Russia as the first choice for surrogacy sites. However, it should also be noted that the abuse of surrogacy rights has made surrogacy lose its original intention in a sense.

### **III. The current regulatory model for surrogacy in China**

China has a clear prohibition on the use of surrogacy technology. In 2001, China's Ministry of health promulgated the "Assisted reproductive technology" article 3 clearly stipulates that medical institutions and medical personnel may not implement any form of surrogacy technology. However, it has the disadvantages of being a departmental regulation with a low level of effectiveness and the lack of a specific section; secondly, the regulation only prohibits the participation of medical institutions and medical personnel, however, the exclusion of surrogacy agents and other natural persons can not be taken as a basis for concluding that no natural person can have children through surrogacy, which has not produced good regulatory effects.

At the end of 2015, the population and family planning law was amended to include Article 5, which stipulates the conditions for medical institutions to carry out human Assisted reproductive technology, but prohibits the carrying out of surrogacy activities and the buying and selling of gamete embryos. Draft Article 6 sets out the criminal penalties to be imposed for violations of the above-mentioned circumstances. But the ban on surrogacy was eventually removed. The Standing Committee of the National People's Congress argues that

the regulation is not sufficiently relevant to the population and family planning policies, and that regulations on surrogacy are premature and open to debate.

The Civil Code, which came into force on 2021, partially responds to legislation on surrogacy. Article 1007 of the Civil Code on the right to personality prohibits the sale and purchase of human components, which reflects the protection of the human right to health and human dignity, although it does not directly address the issue of surrogacy, however, the prohibition of the sale of sperm, eggs on the commercial form of surrogacy made a negative evaluation. Article 1009 of the Civil Code stipulates that the relevant medical activities shall be governed by laws and regulations. Since surrogacy activities involve Assisted reproductive technology, it can be inferred that if surrogacy is to be effective, should not violate laws and regulations as a prerequisite. The article Assisted reproductive technology the bottom line, leaving room for uncertainty about the future of technology. The draft civil code on Marriage and family also contemplated the regulation of "the relationship between a child born of Assisted reproductive technology and a consanguineous couple", which was later deleted, but it can be seen that, the regulation of surrogacy has already entered the legislator's vision.

Now, to solve the population ageing problem, China's population and family planning law has clearly stipulated that a couple can have three children. Therefore, in order to comply with the guidance of the national policy, to solve the growing problem of infertility in China, to change the current situation of surrogacy in China, the state may consider regulating surrogacy at a higher level in legal documents, allowing some surrogacy to be legalized.

#### **IV. The future choice of surrogacy legislation in China**

According to the practice of most countries and the suggestion of most scholars in our country, the scope of legalization of surrogacy can be limited to complete and free surrogacy between peers. Complete and free surrogacy is in line with the requirement of blood inheritance in Chinese traditional culture. In cases where both spouses are unable to bear children, the only available remedy is adoption. But for most, adoption is a last resort, and many still want to have children by their own natural blood -- in other words, China seems to have more surrogacy to live on.

The legislature should issue a special law or administrative regulation on surrogacy as soon as possible. The specific mode of legislative regulation is suggested as follows:

First, the scope of application. The scope of surrogacy permitted by law should be limited to complete and unpaid surrogacy. Paid surrogacy may lead to the exploitation of surrogacy, impose a heavy financial burden on the couple and lead to the monetization of family relations, while local surrogacy may lead to confusion in the identification of parentage, are prone to disputes and disputes. Therefore, it is necessary for legislation to narrow its scope.

Second, the applicable premise. First, the subject of application should be limited to childless infertile couples. In this case, infertile couples refer to the couples who are in a legal marriage. One or both of them can not reproduce naturally due to congenital or acquired reasons. Couples who do not have children before applying for surrogacy or whose children die young for a variety of reasons may be allowed to have surrogacy, taking into account the couple's desire to have a child. Couples can not apply for surrogacy if they already have a child in their care. Second, the application for surrogacy must obtain the consent of both husband and wife, otherwise neither husband nor wife is eligible to apply for surrogacy. In addition, applications for surrogacy are generally made only after other legal reproductive techniques have been exhausted and the child remains infertile, of course, the law may also explicitly provide that an infertile couple may directly apply for surrogacy without having to attempt other reproductive technologies if they meet certain physical conditions determined by an authority. In other words, use surrogacy as a last resort to prevent the misuse of surrogacy.

Third, the surrogate mother subject. India's surrogacy (administration) Act 2019 explicitly limits surrogate mothers to the "close relatives" of infertile couples and to Indian citizens, at the same time, the age, marital status, health and address of both parties to the surrogacy agreement are restricted. Prior to this, India's relevant legislation has also made it clear that surrogate mothers must be married and have the birth experience and consent of the husband, and so on.

Therefore, in order to prevent the risk of infertile couples turning into paid commercial surrogacy by seeking surrogacy from strangers, our legislation may also refer to its provisions, it is clear that surrogate mothers should also be limited to close relatives and must be of the same generation as one of the spouses; it is clear that surrogate mothers must be married and have given birth with the husband's consent; Clearly surrogacy should be subject to a professional psychological assessment, legal advice and physical examination, and obtain a medical authority with the ability to have a surrogacy confirmation certificate or license.

Fourth, surrogacy. According to U.S. regulations, only four types of surrogacy are allowed: sperm and eggs from both partners, using only the womb of the surrogate mother; sperm from the husband and eggs from a third party provider, in vitro fertilization by a surrogate mother; eggs from the wife, sperm from a third party provider, in vitro fertilization by a surrogate mother; sperm and eggs from a third party, conceived by a

surrogate mother through in vitro fertilization. In short, the United States only allows in vitro fertilization, does not allow direct fertilization; surrogate mothers are not allowed to provide eggs for fertilization. Direct conception and egg from surrogate mother are against the public order and customs, easy to cause marriage and family emotional crisis and other unnecessary trouble, should be prohibited. Therefore, the non-commercial surrogacy method may refer to the American model.

Fifth, surrogacy operation. Surrogacy is risky and the damage is irreversible, and the profit-seeking capital has the motive to escape the government's supervision. In practice, some surrogacy agencies have difficulty ensuring the medical technology and medical environment, and some even provide surrogacy services for people infected with HIV, syphilis and hepatitis A. Therefore, the legislature should improve the access to human Assisted reproductive technology system and operating procedures and other aspects of regulation, clear implementation of surrogacy agency qualifications. At this stage, it is possible to set a higher standard for surrogacy institutions, limiting surrogacy technology to public medical institutions with licensing qualifications after strict examination and approval. In practice, China's public hospitals are in the forefront of the country in terms of both quality and volume, so they have the objective conditions to undertake the medical technical services involved in surrogacy. At the same time, the public hospital-led health care system is more convenient and feasible in terms of supervision and law enforcement, and is conducive to better regulating surrogacy in the early stages. In addition, medical personnel should also receive skills and ethics training and assessment, qualified only to be eligible to implement surrogacy technology.

Sixth, supporting disciplinary measures. The law is designed to punish and crack down on illegal surrogacy in addition to outright and altruistic surrogacy, and such a legislative arrangement would do much to eliminate illegal surrogacy. The UK, the Netherlands and Greece are among the few EU member states that have legalised surrogacy on specific conditions, and have cracked down on non legalised surrogacy. The Surrogacy Agreement Act of 1985 defined commercial surrogacy as a crime and punished Greece. The act on the implementation of medically assisted reproduction, introduced in 2005, criminalizes surrogacy outside the scope of the legislation; section 151B of the Dutch penal code criminalizes paid surrogacy. Cracking down on illegal surrogacy has a propaganda and deterrent effect on the public.

In France, illegal groups, associations or doctors who plan surrogacy face three years in prison and a fine of 45,000 euros; in Hong Kong, China, illegal surrogacy risks a maximum fine of 100,000 yuan and two years in prison. Relevant departments should speed up legislation, amend existing laws and regulations, illegal surrogacy, especially commercial surrogacy should be severely punished. Surrogacy should be a public good, and any attempt to seek personal gain through surrogacy should be strictly prohibited by law.

Seventh, surrogacy supervision measures. The human reproduction and Embryology Authority (HFEA) was established in the Human Reproduction and Embryology Act of 1990 and the regulation principle of the whole process of public power was established. The HFEA, the UK agency that administers and administers the surrogacy licensing system, avoids the risk of a downturn by placing surrogacy under the supervision of professional public powers. China can learn from the above management model and related principles, from the following three points to improve surrogacy supervision measures:

First, the introduction of public agencies specializing in the notarization and supervision of surrogacy and the establishment of a national human reproduction and Embryology Authority. The human reproduction and embryology authority, as the national directorate-general of the National Board of Health, coordinates the notarization and regulation of surrogacy-related matters throughout the country, the organization is set up according to the three administrative levels of the province of Foshan. This kind of ad hoc agencies to replace the current illegal surrogacy intermediary platform in society, as the only legitimate surrogacy agencies, notarization, licensing and regulatory agencies.

Second, the notarized license is the prerequisite for access to surrogacy services. The agreement between husband and wife and the surrogate mother in the act of complete and altruistic surrogacy must be examined by a statutory public notary before the act of surrogacy begins. Third, the cost of surrogacy generation management system. All costs of surrogacy are paid in advance by the consignor and his wife to a notary public and are transferred to the service provider after the institutional review. A unit for price estimation and auditing has been set up within the notary licensing agency to estimate the cost of surrogacy on the basis of the service needs of the client's husband and wife, who deposit the cost into the notary agency's special account prior to the start of the surrogacy. The costs of surrogacy are charged to a special account, and the medical institutions that provide surrogacy technical services only accept payments from such a special account.

Eighth, surrogate children paternity determination. First of all, the court is the final authority to establish the parental rights of surrogate children, the entrusted parents need to pass the way of court judgment to finally establish the legal parental rights of surrogate children. Secondly, the act of the client's parents abandoning the surrogate children is defined as the crime of abandonment, and the welfare adoption system of the abandoned surrogate children is established. Third, the legislation establishes the time limit for entrusting parents to request the court to confirm parental authority, which may be drawn from the time limit of six months

after the birth of a surrogate child set abroad; At a disadvantageous position in the ownership of surrogate children's parental rights.

Finally, in the event of a conflict between the consignor couple and the surrogate mother over the parental authority of the surrogate child, the court does not directly presume that the consignee couple, who have a genetic relationship, is the legal parental authority for the surrogate child, but needs from the surrogacy child benefit maximization angle, comprehensive measures each party's legitimate interest.

## V. CONCLUSION

Although surrogacy itself is a double-edged sword, in the context of rising infertility rates and population ageing, surrogacy has its objective and realistic needs, and legislation should conform to such needs and trends, it can not be completely and completely banned just because it has a bad side. As for the possible legal or moral risks of surrogacy, China should regulate them through legislation and system design as soon as possible, and legalize and standardize such surrogacy types as complete and altruistic surrogacy, and may cause the question to carry on the reasonable prevention, thus lets the surrogacy technology better serve the human society.

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