

The Legal Basis and Legislative Regulation of Limited Open Surrogacy in China

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Abstract: China's "surrogacy" market is turbulent, social public opinion has been condemned, and the attitude of regulations is unclear. This paper focuses on the legal basis of surrogacy and the countermeasures to improve the existing mechanism of surrogacy. This paper discusses the pros and cons of surrogacy from the angle of law, puts forward the point of view of limited open surrogacy, and then analyzes the current situation of the law on surrogacy, and offers some suggestions to improve surrogacy. This study may provide a new way to solve the surrogacy problem. This paper comprehensively examines surrogacy's legal, ethical, and practical dimensions, advocating for a limited opening of surrogacy practices. It then delves into an in-depth analysis of surrogacy's current legal landscape and proposes recommendations to refine the surrogacy process. This study holds the potential to offer a novel and constructive approach to addressing the surrogacy challenge in China.

Keywords: surrogacy legality, regulation and supervision, reproductive rights, limited open

1. Introduction

The law currently adopts a comprehensive ban on surrogacy. Still, it is contrary to the social reality of many infertile parents and the loss of only-child families, which has promoted the development of underground surrogacy and other gray industries, which is highly destructive to society. From a cultural point of view, Chinese people have a typical oriental artistic personality and attach great importance to ethics and morality [1]. Therefore, from the psychological level of the public, surrogacy is not accepted. Both the surrogate family and the surrogate mother are silent about surrogacy because talking about it will likely bring a huge burden of public prejudice. Previous studies on surrogacy focus more on the ethical issues of surrogacy, the comparison of surrogacy at home and abroad, the surrogacy law in China, etc. Researchers' attitude mostly is either for or against. Few of them systematically explored the limited opening of surrogacy. This research studies the narrow space of surrogacy and the corresponding legal measures.

This paper discusses the legal basis and the legal risks of surrogacy. It articulates the perspective advocating for a stance of controlled and regulated open surrogacy, subsequently delving into an in-depth examination of the present state of surrogacy legislation. Furthermore, this paper provides recommendations aimed at enhancing the overall surrogacy landscape. This study has the potential to offer a novel approach to addressing the complex challenges posed by the surrogacy dilemma. By delving into previously unexplored facets of the issue and considering a multidimensional perspective,

the findings of this research might pave the way for a fresh and innovative solution to the intricacies associated with surrogacy.

2. The Legal Basis of Surrogacy

2.1. The Realization of Reproductive Rights

In Chinese law, Women's reproductive rights are stipulated in Article 51 of the Law on the Protection of Women's Rights and Interests, which states in paragraph 1: "Women have the right to bear children by the relevant regulations of the State, and they also have the freedom not to bear children [2]."

Surrogacy allows individuals or couples who cannot still carry a pregnancy to become parents. It gives them a choice to have a biological child when traditional pregnancy may not be an option due to medical conditions, infertility, or other reasons. This supports individuals' autonomy over their reproductive decisions. Reproductive disorders arise from personal reasons and cannot be classified as situations in which reproductive rights are denied or violated. Some would argue that the reproductive rights of infertile people is a pseudo-proposition. However, with the advancement of technology, surrogacy gives infertile people the dawn of fertility. The other side of prohibiting surrogate mothers from conceiving is depriving infertile women of the opportunity to have children. The government order prohibiting infertility is a restriction on the right to life and childbirth and a violation of legal principles.

2.2. The Need for Social Development

Currently, the infertility rate of couples of childbearing age in China is as high as 12-18% [3]. Some of these women can ovulate, but the fallopian tubes, uterus, and other abnormalities, or the entire physical condition (high blood pressure, kidney disease, etc.) is not suitable for fertility, still makes themselves and their spouses cannot have their children, leaving a regret in life. Before surrogacy technology, women themselves had to accept this regrettable status quo. Suppose the male spouse is fertile and does not accept this condition. In that case, he has no alternative but to break the existing marriage state, choose to divorce and remarry, borrow the other's abdomen to give birth, keep a mistress, and different ways. The emergence and development of modern surrogacy technology provide a new solution for these women and their spouses to have their children - "surrogacy" enables women who can ovulate but cannot conceive to get their blood children and benefit their spouses. Therefore, from this angle, surrogacy not only does not harm society. On the contrary, it further meets and satisfies the legitimate needs of the community, is conducive to the stability of marriage and family, and is conducive to maintaining modern ethics [4].

2.3. Surrogacy Respects Each Subject's Right to Personal Dignity

As a civil act, surrogacy follows the basic principles of civil law—equality, voluntariness, and no harm to society. In surrogacy, the relationship between the surrogate and the client is equal, and the entrustment and acceptance of entrustment are out of their own will. Judging whether the natural person's dignity is infringed should start from the natural person's subjective self-respect feeling. In the case of the surrogate mother's voluntary surrogacy, there is no problem of impaired emotional self-esteem [5]. Reproductive rights embody dignity, and safeguarding reproductive rights also protects dignity. Therefore, for the demand side of surrogacy, who cannot have children, surrogacy not only does not violate their satisfaction but also respects their dignity. If surrogacy is prohibited blindly, it will ignore the dignity of women who cannot have children.

3. The Legal Risks of Surrogacy

3.1. Commercial Surrogacy Damages the Life Dignity and Personal Dignity

A woman who carries out commercial surrogacy gives birth to offspring for the client through her reproductive capacity, and the baby is handed over to the surrogate demand party, which gives the corresponding reproductive labor remuneration to the woman. As the buyer, the surrogacy demand party is more willing to choose those surrogate women with good reproductive conditions, so the surrogacy intermediary marks the price of surrogate women according to the reproductive requirements related to pregnancy, such as appearance, figure, health status, IQ, education, etc., resulting in surrogate women being divided into different levels according to the reproductive conditions. This kind of commercialization of surrogate women degrades the intrinsic value of surrogate women and violates the dignity of surrogate women to a certain extent. According to Kant, "In the kingdom of ends, cutting things has either a price or a dignity. Something with a price that something else can replace as an equivalent; On the contrary, that which surpasses all prices, and thus allows no equivalent, has a dignity." [6] Therefore, commercial surrogacy equates babies with money and treats babies as commodities that can be exchanged for cash, which is the root cause of the immorality and illegality of commercial surrogacy. Human beings are dignified beings, and dignity is the essence of social personality based on the nature of human life. Babies have no autonomy, but they are also members of the human family, and if babies are traded for money, it means that everyone can be sold and exchanged with cash for equal value. In addition, once commercial surrogacy is allowed, surrogacy demand parties can spend money to buy surrogate babies, women can ignore the pressure of public opinion, rely on reproductive labor to make a living, and babies can be exchanged with currency. Thus, commercial surrogacy falsely implies that money can buy reproductive work and babies. If so, the personality of human nature will disappear, and human beings will be reduced to objects.

3.2. Challenge to Traditional Ethics

There is a mismatch between the traditional role of the surrogate mother as wife, mother, or housewife and the part of the modern public figure as the surrogate mother. This behavior deviates from the traditional role of women in childbearing and the family, goes against the traditional ethics and moral thoughts of Chinese society, and brings chaos to family ethics. On the other hand, in conventional ethics, procreation is often seen as a natural outcome between husband and wife, an expression of love and affection. Surrogacy separates fertility from the emotional relationship of marriage and family, which can lead to confusion about the purpose of having a child. If surrogacy is legalized, the law will allow the subversion of traditional ethics by surrogate pregnancy and the impact on the current bioethical order [7].

3.3. Surrogacy Is Challenging to Regulate

The first reason is that laws and regulations are not perfect. In China, surrogacy involves complex legal issues, including reproductive rights, the legal status of the child, and legal parents. Currently, China lacks explicit legal provisions to regulate surrogacy, resulting in an imperfect legal system that is difficult to supervise and manage effectively. (This part will be discussed in detail later.) Second, supervision is complex, and resources are insufficient. Surrogacy involves many links, including the physical health of the surrogate mother, medical procedures, contractual agreements, etc., and supervision is very complicated. Surrogacy also involves multiple subjects. In addition, there is a severe underground phenomenon in the surrogacy industry, and it is difficult for regulatory authorities

to grasp the scale and situation of surrogacy accurately. Limited resources also make effective regulation difficult.

4. Legislation Regulation of Limited Opening Surrogacy

A review of existing laws is necessary to improve the surrogacy mechanism. The following is an analysis of existing surrogacy laws.

In 2001, the Ministry of Public Health of China issued the “Administrative Measures for Human Assisted Reproductive Technology [8],” which explicitly prohibits surrogacy in administrative regulations: “Medical institutions and medical personnel shall not implement any form of surrogacy technology.” This is our current human-assisted reproductive technology to surrogacy made an explicit prohibition of legal regulation. However, from the perspective of practical operation, such code does not seem to have the expected effect. Worse still, in recent years, the surrogacy black market has been booming and has increasingly shown the development trend of industrialization [9].

Legislative deficiencies include, but are not limited to, the following: China’s prohibition of surrogacy is limited to stipulating that medical institutions and medical personnel are not allowed to implement surrogacy technology, but it does not prohibit other institutions and individuals from organizing surrogacy behaviors, objectively resulting in a vague regulatory attitude. Attempts to indirectly ban surrogacy by regulating medical behaviors must be more robust and comfortable in an awkward state. The huge benefits that surrogacy can objectively bring will inevitably prompt all kinds of intermediaries to break through the ethical protective net, collude with individual unscrupulous medical institutions and medical personnel, and jointly promote the realization of underground gray surrogacy. Not only that, the current surrogacy regulation legislation is only ministerial. Its scope of regulation is limited, and the level of effectiveness could be higher, resulting in a large amount of punishment, which is not conducive to the judicial enforcement of surrogacy. There needs to be a legislative blank in the current regulation of surrogacy. So far, there is no specific crime against surrogacy (commercial or general surrogacy) in criminal law. In civil legislation characterized by ethics, such as the General Principles of Civil Law or the Contract Law, no provision declares the illegality or invalidity of the surrogacy agreement. These omissions have caused our country’s surrogacy present predicament to different degrees.

Considering the legitimacy of surrogacy and the reality of growing demand, the author believes that in our country’s future legislation, taking corresponding measures to make up for the above deficiencies in legislation is of great significance.

4.1. Perfect Relevant Laws

It should be considered that the National People’s Congress or its Standing Committee should issue an Assisted Reproduction Law to expand the effectiveness and scope of the application of surrogacy regulation legislation and make it more suitable for surrogacy needs. At the same time, it increases the number of fines for agencies and people who illegally carry out surrogacy activities. For medical institutions and medical personnel who illegally carry out surrogacy activities, they can consider adding qualification penalties in the relevant legislation, increasing their illegal costs by revoking their medical institutions’ practicing licenses or doctors’ practicing permits so that they dare not engage in unlawful surrogacy activities, and technically block the development of illegal surrogacy. Moreover, more specific laws should be regulated on how a surrogacy process is legitimate, which includes egg retrieval, embryo transfer, pregnancy, fetal transfer, and other steps.

4.2. Administrative Supervision and Implementation of Designation

Surrogacy is not a simple civil act. It involves all aspects of the relationship. Regarding control, it is necessary to designate a specific administrative department to approve the surrogate behavior to prevent the bucking of responsibility between various departments when there is a dispute. Regarding technical implementation, it is also necessary to designate a particular hospital to carry out the fertilized egg implantation of surrogacy and strictly control the technology to ensure that surrogacy technology can only be implemented through official means. Stop the illegal underground surrogacy from the source [10].

4.3. The Protection Mechanism for Surrogate Women

Regulate the protection mechanism for surrogate women before, during, and after surrogacy. First of all, before non-commercial surrogacy, it is necessary not only to obtain the consent of the surrogate woman but also to obtain the consent of her family to ensure that she is signed on the premise of a voluntary surrogacy agreement but also to avoid the internal discord of the surrogate woman's family and make the surrogate woman under family pressure. Secondly, it is necessary to ensure that surrogate women are fully aware of the surrogacy process and possible emergencies and fully informed of surrogacy information and measures to deal with them. Thirdly, during the surrogacy period, the surrogacy demand party shall provide the surrogate mother with adequate living security and surrogacy expenses, including the cost of daily birth examination, the cost of nutrition for the baby, the cost of possible missing work, and the cost of final delivery; At the same time, as a party of cooperative reproduction, the surrogate woman has equal status and rights with the surrogate demand party, and the surrogate demand party should also give the surrogate woman sufficient emotional care and certain autonomous rights, such as the choice of medical behavior during prenatal examination, the choice of reproductive issues such as termination of pregnancy [11, 12].

5. Conclusions

In our country, surrogacy remains in a legal gray area, with many surrogate babies being born each year. Nevertheless, the uncertain legal status of surrogacy and the absence of a comprehensive regulatory framework have led to a situation where the existing laws and regulations fail to regulate all participants within the surrogacy process effectively. Consequently, many judicial cases involving the characterization of surrogacy arrangements and the validity of surrogacy agreements remain unresolved. This legal ambiguity significantly compromises the protection of the rights and interests of vulnerable parties involved in surrogacy arrangements. Hence, the author believes that embracing a system of limited open surrogacy presents a viable solution to address this challenge. More importantly, a corresponding legal framework must be promptly established and adhered to, ensuring the practice remains ethical and regulated.

While some voices of opposition persist, upon thorough consideration and regulation, the author is inclined to believe that surrogacy holds the potential to yield substantial benefits for society soon.

Achieving social harmony and justice requires a comprehensive approach that carefully considers the limited legalization of surrogacy, the refinement of relevant legislation, the vigilant crackdown on illegal surrogacy activities, and the robust protection of all parties involved in surrogacy arrangements. Within this balanced and multifaceted framework, people can move towards a more equitable and just society.

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