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# Regulating surrogacy intermediaries: a comparative analysis of regulatory approaches and implications in the Chinese context

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## Abstract

This article addresses the significant research gap concerning the regulation of surrogacy intermediaries in China's rapidly growing surrogacy market. Employing a 'law in context' perspective, it explores the question of how to effectively regulate surrogacy intermediaries in the Chinese context. Situated within China's unique socio-cultural landscape, where procreation carries profound significance, the study navigates the complexities of surrogacy regulation, including ethical dilemmas, rights infringements and regulatory ambiguities. The article advocates for the regulation of surrogacy in China to prevent possible exploitation, referencing three international models: prohibiting commercial surrogacy, governing non-profit surrogacy organisations and imposing duties on for-profit surrogacy agents. The aim is to construct a robust, context-sensitive regulatory framework for surrogacy in China, focusing on identifying suitable intermediaries and defining the scope of effective regulatory oversight.

**Keywords:** family law; ethics; surrogacy intermediaries regulation; China

## 1 Introduction

Despite extensive global research efforts to unravel the societal, ethical and legal dimensions of commercial surrogacy (Spar, 2006; Jacobson, 2016; Rudrappa and Collins, 2015; Smietana *et al.*, 2021; Hibino, 2022; Luo *et al.*, 2022), there remains a pronounced research gap in the context of China, particularly in the regulation of surrogacy intermediaries within its rapidly expanding commercial surrogacy market. This article aims to address this gap through a 'law in context' approach, exploring effective regulatory mechanisms for surrogacy intermediaries in China. For the purpose of this article, and further echoing the definition articulated by Professor Kirsty Horsey (2023), commercial surrogacy is characterised as a model involving profit-driven entities in the surrogacy process. These entities, known as surrogacy intermediaries, derive profit from organising, negotiating, facilitating and managing surrogacy arrangements. It is customary within this model for the surrogate to receive reimbursement, though the amount can significantly vary relative to the local cost of living. In contrast, 'altruistic surrogacy' refers to systems devoid of profit-driven intermediaries, where surrogates are not traditionally compensated but are instead reimbursed for expenses directly related to the surrogate pregnancy.

Most legal studies on surrogacy in China have predominantly employed a doctrinal methodology, which entails a detailed analysis of legal rules for the purpose of developing and understanding legal doctrines (Zhao, 2023; Shanyun, 2022; Ding, 2015; Tang, 2019; Raposo and Wai, 2016; Chunyan, 2022). The purpose of this method is 'parsing the law from the density of rules, legislation, case law and possibly scholarly materials that may apply to a particular issue

being examined' (Egan, 2017). However, it is important to recognise that the law extends beyond mere doctrines, especially in the case of complex practices like commercial surrogacy, which are deeply interconnected with broader socio-cultural contexts (Lindheim *et al.*, 2014; Smietana, Thompson, and Twine, 2018). In response, this study adopts the 'law in context' perspective, an approach that situates legal norms within the wider socio-cultural, economic and political realities that influence them (Atapattu *et al.*, 2023). This perspective acknowledges the significant impact socio-cultural factors have on legal systems and norms. By adopting this approach, this study seeks to consider the specific socio-cultural context of China and its impact on the regulation of surrogacy intermediaries.

In China, where childbearing is highly valued and childlessness stigmatised, commercial surrogacy has emerged as a sought-after option for those facing infertility, with agencies playing a key role in aiding individuals' pursuit of parenthood (Handwerker, 2002; Tang, 2021; Yang, 2023). However, the surrogacy industry in China grapples with multiple challenges and controversies (Yang, 2014; CGTN, 2021). The tension between the urgent need to address China's aging population and the moral opposition to commercial surrogacy is a notable example (Cao and Zhang, 2022). Moreover, the country's legal framework for commercial surrogacy is marked by regulatory gaps and ambiguities, with surrogacy intermediaries operating in a regulatory grey area and often evading effective sanctions (Xiao *et al.*, 2020). This has led to concerns about exploitation and has highlighted the need for a more comprehensive understanding of the regulation of surrogacy intermediaries.

This article seeks to contribute to the ongoing discourse on the role of the state in addressing and preventing exploitation within the context of surrogacy (Damelio and Sorensen, 2008; Laufer-Ukeles, 2013; Zervogianni, 2019). To further this conversation, it presents a comparative analysis of surrogacy regulation models worldwide, highlighting three primary frameworks: the Asian model, as seen in the prohibitive stances of Thailand and India against commercial surrogacy; the UK's altruistic model, which allows for the operation of non-profit surrogacy organisations while disallowing commercial intermediaries and specific US case law, where judicial rulings have identified affirmative duties on for-profit surrogacy agents.

In examining these diverse models, it is crucial to recognise that, despite variations in legal cultures, societies often face similar social problems, albeit with differing responses – a concept encapsulated by the 'functionalist' approach (Graziadei, 2006). From a functionalist perspective, comparative legal scholars are encouraged to perceive laws of different countries as mechanisms devised to address similar societal challenges, and they advocate for a thorough consideration of the context within which laws operate (Whytock, 2009). This perspective is especially relevant to surrogacy, a field where universal concerns regarding the potential exploitation of women and the ethical complexities of commercial surrogacy are prevalent (Radin, 1994; Whittaker, 2016; Rudrappa and Collins, 2015; Jacobson, 2016). The objective of this article is to analyse these legal frameworks and investigate how they respond to the common dilemmas posed by commercial surrogacy, aiming to glean insights into the varied approaches employed by different regulatory bodies to tackle these concerns (Creutzfeldt *et al.*, 2016).

This study calls for a reevaluation of the regulation of surrogacy intermediaries in China. It emphasises the importance of drawing lessons from international surrogacy regulation experiences to inform the development of a regulatory framework that is finely attuned to the unique Chinese context. The primary goals of this article are twofold: identifying suitable entities to assume the role of surrogacy intermediaries and determining the scope and strength of regulations required to effectively oversee them. By achieving these goals, this study aims to contribute to the establishment of a robust and responsible surrogacy system in China that addresses the unique challenges and complexities associated with surrogacy arrangements, thereby benefiting surrogates, intended parents and the children involved.

## 2 Background: socio-cultural context of the surrogacy industry in China

China's integration into the global economy have facilitated the dissemination of information and awareness about reproductive technologies (Handwerker, 2002). The application of reproductive technologies in China has been shaped by prevailing cultural norms and societal preferences, which often expect women to embrace motherhood and value the desire for male offspring (Lung *et al.*, 2021). Surrogacy agencies in China have emerged in response to the deep-seated respect for family ties and the significant emphasis on lineage within Chinese society (Yan, 2017). In China, surrogacy agencies offer specialised services that collaborate with IVF professionals to provide 'gender customisation', granting clients the choice of the child's sex in surrogate pregnancies or the option for multiple foetal implantations (Tang, 2021; Yang, 2023). Investigate into the commercial aspects of surrogacy has uncovered significant profit margins within this sector (Wang, 2017). These intermediaries have expanded across both urban and rural China, facilitating connections between intended parents and potential surrogates (Chen, 2017).

The Zhongtuo Hesheng Medical Investment Co. Ltd case (hereafter ZTHS) provides an instructive insight into the operation of commercial surrogacy companies (Xiao *et al.*, 2020). Registered as a financial investment company with a specialisation in medical projects and equipment, ZTHS successfully diversified into the surrogacy industry, utilising a multifaceted business model. To start with, ZTHS set up a website that served as an intermediary platform for intended parents and potential surrogates. This service simplified the complex process of surrogacy by providing a central hub for information exchange and communication. ZTHS also managed to integrate medical services into their business model. The company took the initiative to rent a hospital department where they conducted IVF procedures. The combination of these services led to significant financial success for ZTHS. Over a period of twenty-six months, from July 2012 to September 2014, the company made a staggering profit of more than 6.09 million RMB. This impressive figure underscores the demand and profitability of surrogacy services in China.

However, commercial surrogacy in China is a contentious issue, especially after the amendment to the Family Planning Law in 2015, which brought an end to the near 40-year one-child policy and encouraged families to have a second child (Xiao *et al.*, 2020). This change was aimed at addressing the problem of China's rapidly aging population (Alpermann and Zhan, 2019). Despite this policy shift, commercial surrogacy did not quickly become an accepted family planning option. Recent research shows that societal attitudes towards commercial surrogacy in China are mostly negative (Liu *et al.*, 2022). There are three primary reasons for this: the belief that surrogacy commodifies women, treating them more as goods than individuals; the concern that surrogacy exploits women for the benefit of others and the view that surrogacy objectifies human life, treating it as a mere commodity. Hao Cao and Xiaoguang Zhang (2022) argue that the debate on surrogacy in China involves complex interactions between different groups, such as pro-surrogacy gay men who may minimise their marginalised sexual orientation to capitalise on male privileges, thereby supporting a loosely state-regulated surrogacy market. This, they suggest, inadvertently perpetuates a heteropatriarchal reproductive regime. Conversely, Cao and Zhang (2022) note that anti-surrogacy feminists adopt an intersectional approach to confront gendered and other forms of oppression reinforced by traditionalist families, unchecked markets and erratic state intervention. According to their analysis, these multifaceted challenges – ethical, cultural and legal – are exacerbated by existing legislative voids in surrogacy regulations.

## 3 Regulatory challenges and legal ambiguity in China's surrogacy industry

Chinese assisted human reproduction technology are primarily governed by two major legislations issued by the Ministry of Health: the 'Administrative Measures of Assisted Human Reproduction Technology 2001' and the 'Ethical Principles of Human Assisted Reproductive Technology and Human Sperm Banks 2003'. Article 3 of the Administrative Measures on Assisted

Human Reproductive Technologies 2001 prohibits medical institutions and medical personnel from performing any form of surrogacy procedures. This article was initially intended to regulate medical institutions involved in assisted reproduction, but their interpretation and application have been expanded to encompass a broader prohibition on surrogacy-related activities conducted by non-medical entities. In 2015, an action plan was introduced to address the issue of surrogacy, specifically targeting four categories of entities engaged in surrogacy-related activities, including medical organisations, surrogacy brokerage agencies, media platforms advertising surrogacy services as well as distributors of medical instruments, devices and pharmaceuticals (Xiao *et al.*, 2020). However, this plan did not introduce new legal provisions or offer a comprehensive regulatory framework to enforce the prohibition effectively.

The regulatory oversight of surrogacy agents falls under the Administration for Industry and Commerce. Surrogacy agents, who only face administrative penalties, have been reported to breach regulations in 2016, as seen in Hubei and Guangdong provinces (Xiao *et al.*, 2020). In these cases, surrogacy procedures, such as IVF, were covertly conducted under the guise of legitimate operations. In Hubei, an IVF department was rented to a surrogacy agent, while in Guangdong, a clinic used a borrowed doctor's license for surrogacy procedures. Sanctions included confiscation or revocation of licenses and fines.

However, the imposition of administrative penalties has proved insufficient in curbing the activities of surrogacy agents. The prevalence of surrogate agents using multiple domain names in various cities demonstrates the adaptability and resilience of these illicit operations. An illustrative example is the case of Shenzhen Zhongtai Health Consultancy Services Ltd. Although its business registration was revoked, and its website was shut down in Wuhan, it appears that the company is still in operation. The company now has at least eleven domain names for its official websites, all containing identical information and the same toll-free telephone number (Xiao *et al.*, 2020).

In addition, a notable gap existed in the legal framework regarding the regulation of surrogacy intermediary agencies that facilitated cross-border surrogacy arrangements. Prior to the pandemic, a considerable number of Chinese parents showed an interest in international surrogacy arrangements (Thompson, 2016; Weis, 2021). However, the nature of these transactions occurring outside the jurisdiction of the regulating country posed challenges for legal actions against these entities. Additionally, it remains unclear whether surrogacy intermediary agencies are allowed to refer intended parents to foreign clinics that offer reproductive services. The significant scale of commercial surrogacy and cross-border surrogacy brokerage, coupled with the lack of regulatory sanctions, indicates a lack of clarity or a nuanced approach on the part of public authorities.

#### 4 The imperative for regulating commercial surrogacy intermediaries in China

The commercial surrogacy industry, driven by societal demand, is estimated to facilitate around 10,000 births annually within the country (Qiao *et al.*, 2014). Despite its prevalence, this sector operates within a legally ambiguous territory. Surrogates often face a lack of remedy for their rights, a situation exacerbated by inadequate oversight (Zhao, 2023). The case of *Zheng Maoqin v. Xu Liang & Yan Xiaoli* (2018) Gan 1121 Min Chu No. 3180 serves as a prime example of the regulatory gaps associated with the surrogacy industry, particularly concerning the potential vulnerability and lack of protection for surrogates and other parties involved. In this case, the court ruled that the surrogacy brokerage contract was invalid, depriving Ms. Yan, the surrogate, of legal protection and enforceable rights under the contract. Consequently, her claim for unpaid surrogacy fees was dismissed. Furthermore, she was ordered to return the surrogacy fee she had already received, leaving her without compensation for her surrogate services, despite her entering into the agreement in good faith. Although the court permitted deductions from the surrogacy fee to compensate for physical harm caused by the termination of pregnancy and other reasonable costs and expenses, it did little to alleviate Ms. Yan's overall loss.

This case underscores the findings of Xiao *et al.* (2020) regarding the broad interpretation of Article 3 of the 2001 Measures. The Chinese courts have consistently applied this Article to prohibit all surrogacy-related activities and invalidate surrogacy contracts, even though it was primarily designed to regulate medical institutions involved in assisted reproduction. However, the courts' expanded interpretation to include commercial intermediaries has led to the invalidation of brokerage contracts, which may overstep the boundaries of the original law. It is important to note that within the Chinese legal system, it is deemed unconstitutional for a ministerial department to strip individuals of their rights and freedoms through administrative regulations. This context points to the urgent need for more specific regulations governing surrogacy intermediaries in China.

In addition, in rural areas of China, the surrogacy industry functions informally and without regulation, presenting significant challenges in safeguarding the rights and welfare of participants (Chen, 2017). Moreover, there are reports that some surrogacy agencies enforce abortions when they do not align with the clients' requests for a specific gender, subjecting surrogates to significant health risks without offering fair compensation for such invasive procedures (Zhang, 2015; Tang, 2019). In the worst scenarios, surrogacy can even amount to the sale of children, as highlighted by UN Special Rapporteurs (Smolin, 2016). There have been reports of counterfeit birth certificates being illicitly sold in China.<sup>1</sup> These alarming circumstances reinforce the need for the regulation of commercial surrogacy intermediaries in China.

While surrogacy has faced criticism based on concerns about exploitation and unsafe practices, this article aligns with perspectives that acknowledge the potential role of the state in establishing mechanisms to mitigate exploitation through the implementation of stringent surrogacy regulations and the enforcement of ethical standards, thereby curbing unsafe practices (Damelio and Sorensen, 2008; Laufer-Ukeles, 2013; Zervogianni, 2019). Furthermore, this article supports the advocacy for a harm-minimisation strategy (Millbank, 2015). Regulating surrogacy, along with the involvement of professional intermediaries, can establish a more secure framework for surrogacy arrangements (Luo *et al.*, 2022). These intermediaries play a fundamental role in the surrogacy process, serving as crucial links between surrogates and intended parents. Given their extensive involvement, they hold significant influence over the surrogacy experience for all parties involved (Carbone and Madeira, 2015). With appropriate regulation, these central actors are uniquely positioned to uphold ethical standards, safeguard the rights and well-being of all stakeholders, prevent exploitative practices, ensure adequate care and compensation for surrogates, and protect the welfare of the children born through surrogacy. Hence, it is essential for countries like China to acknowledge the critical role of these intermediaries and consider the benefits of such an approach in their surrogacy regulations. It would be valuable to learn from surrogacy practices in different jurisdictions around the world and adapt those practices to suit China's unique socio-cultural landscape and regulatory framework.

## 5 Regulatory pathways in surrogacy: a comparative study of prohibitive, altruistic and for-profit models

This section examines three regulatory approaches to surrogacy observed globally: the Asian model, as seen in the prohibitive stances of Thailand and India against commercial surrogacy; the UK's altruistic model, which allows for the operation of non-profit surrogacy organisations while disallowing commercial intermediaries; and specific US case law, where judicial rulings have imposed affirmative duties on for-profit surrogacy agents.

<sup>1</sup>See for example in the case of *Xing & Zhang* (Purchasing and Selling Identity Documents), (2018) Xiang 0903 Xing Chu No. 836.

### **5.1 Prohibition of commercial surrogacy: the Asian paradigm**

High-profile surrogacy scandals involving the exploitation and commodification of vulnerable parties have had a significant impact on the legislative landscape surrounding surrogacy in various countries. Particularly notable is the case of Thailand, which was once a significant hub for surrogacy services. In response to the Baby Gammy scandal, where an Australian couple left their surrogate baby with Down syndrome in Thailand, a new law was enacted in 2015, prohibiting commercial surrogacy in Thailand (Hibino, 2022; Schover, 2014; Whittaker, 2016). The law on surrogacy now restricts this practice only to married couples who have been in the union for at least three years. This restriction, as Linda Anderson (2013) critiques, may reflect an adherence to traditional moral values rather than embracing the diverse familial structures accepted today. Nonetheless, such limitations may foster stability and commitment in surrogacy agreements, which theoretically reduces the risk of exploitation by ensuring surrogates engage with individuals in long-term, stable relationships. Financial restrictions are also imposed to safeguard against commercialisation, with surrogates only entitled to compensation for necessary pregnancy-related expenses, not profit. However, Jutharat Attawet (2022) observed that despite such bans, a covert commercial surrogacy market persists in Thailand. Further, while these prohibitions are enacted with good intentions, they often inadvertently push surrogacy into illicit avenues, intensifying the exploitation of economically disadvantaged women (Bhattacharyya, 2016).

The Surrogacy (Regulation) Act, 2021 in India illustrates an alternative approach by allowing only altruistic surrogacy with close relatives, thereby nullifying commercial surrogacy arrangements (Kashyap and Tripathi, 2023). This regulation prohibits surrogates from receiving any monetary compensation for their services, except for medical and insurance coverage. The Act also provides a regulatory framework for governing surrogacy clinics by establishing a national registry to oversee their functioning (Center for Reproductive Rights, 2023). However, these laws have been criticised for being framed in a heteronormative and exclusionary way (Center for Reproductive Rights, 2023). Under these laws, surrogacy is made available only for infertile heterosexual married couples or single women who are either widowed or divorced, excluding the LGBTQI+ community and unmarried partners (Rudrappa, 2018). The prohibition of commercial surrogacy under these laws is also seen as perpetuating a paternalistic model that undermines women's autonomy and reproductive labour (Gola, 2021; Kashyap and Tripathi, 2023).

### **5.2 Non-profit surrogacy organisations: the UK model**

The UK's regulatory framework for surrogacy endorses an altruistic model, prohibiting profit-making intermediaries from engaging in surrogacy arrangements, yet permits non-profit organisations to operate within this sphere (Horsey and Sheldon, 2012). Surrogacy arrangements in the UK are directed by the Surrogacy Arrangement Act 1985 ('SAA 1985') and the Human Fertilization and Embryology Act 2008 ('HFEA 2008'). The UK legally prohibits commercial surrogacy, viewing it as 'exploitative when financial interests are involved' (Report CMND, 1984).

According to the Section 1(7A) of SAA 1985, it provides a definition of not-for-profit organisations in which a 'non-profit making body' means a body of persons whose activities are not carried on for profit. These organisations are allowed to take the role of initiating negotiations and collecting information without the risk of criminal sanctions, and are now permitted to advertise these services, even on a commercial basis. The UK parliament further provides an explanatory note to the law ([UK Fertilisation and Embryology Bill](#)):

'Initiating negotiations with a view to the making of a surrogacy arrangement means that a non-profit making body might charge, for example, for enabling interested parties to meet each other to discuss the possibility of a surrogacy arrangement between them.'

Compiling information about surrogacy means that non-profit organisations would, for example, be able to charge for establishing and keeping lists of people willing to be a surrogate or intended parents wishing to have discussions with a potential surrogate.

A non-profit body can advertise that it held a list of people seeking surrogates and a list of people willing to be involved in surrogacy, and that it can bring them together for discussion.

Not-for-profit bodies are not permitted to receive payment for offering to negotiate a surrogacy arrangement or for taking part in negotiations about a surrogacy arrangement. These activities are not unlawful if there is no charge, however.'

On 29 March 2023, the Law Commissions of England, Wales, and Scotland put forth recommendations for surrogacy law reform in the UK (UK Law Commissions, 2023). The latest reform proposals suggest the establishment of Regulated Surrogacy Organisations (RSOs) that would function on a non-profit basis to facilitate surrogacy agreements under the oversight of the HFEA (UK Law Commissions, 2023, p. 17). The UK's approach to surrogacy is both unique and forward-thinking, emphasising altruistic surrogacy and implementing measures to prevent the commercialisation of surrogacy. By prohibiting commercial surrogacy, the UK law prevents surrogacy agents from offering financial incentives that could unduly influence a woman's decision to become a surrogate (Gola, 2021). However, despite its progressive intentions, this approach may present certain challenges.

UK legislation permits non-profit surrogacy organisations to charge fees exclusively for covering the costs associated with facilitating surrogacy arrangements, thus avoiding commercial exploitation (Surrogacy Arrangements Act 1985, s2(2A); HFEA Act 2008, s59). However, Cabeza *et al.* (2018, para. 9.13) have critiqued this provision, arguing that non-profit status does not inherently guarantee efficient or ethical operations, nor does it cap staff compensation. Furthermore, Horsey (2023) raises concerns that the advent of RSOs might escalate costs for intended parents due to the implementation of additional safeguards and the possible transfer of these new expenses. A significant point of debate is the potential conflict of interest for surrogacy organisations responsible for assessing child welfare risks before conception (Nuffield Council on Bioethics, 2023). Critics warn that such organisations may prioritise the completion of surrogacy agreements over a rigorous and unbiased evaluation of the prospective parents' capabilities and the protection of the child's best interests (Nuffield Council on Bioethics, 2023).

### **5.3 Affirmative duties on for-profit agents: the US perspective**

In the US, surrogacy regulation falls under state authority, creating a diverse regulatory environment (Spar, 2006). Professor Richard Storrow (2015) notes a legislative trend towards legalising surrogacy in jurisdictions where it was once forbidden. This shift is exemplified by New York's recent adoption of a permissive regulatory stance on commercial surrogacy, reversing its prior ban on commercial surrogacy arrangements (Darling, 2020). In California, where commercial surrogacy is allowed, the industry is flourishing, with intermediary agencies garnering a significant portion of the market's revenue (Nicolas, 2014). While medical and legal professionals are regulated to a degree by their respective associations and licensing requirements, the agencies co-ordinating surrogacy arrangements remain largely unregulated (Ventrelli *et al.*, 2016). Prominent cases such as *Stiver v. Parker*, 975 F 2d 261 (6<sup>th</sup> Cir, 1992) (hereafter the *Stiver* case) and *Huddleston v. Infertility Center of America*, 700 A 2d 453, 456 (Pa, 1997) (hereafter the *Huddleston* case) have identified the responsibilities of surrogacy agencies towards participants and the children resulting from surrogacy agreements (Crockin, Edmonds, and Altman, 2020). In these instances, the judges recognised the necessity for surrogacy agencies to assume an affirmative duty towards surrogates and children, promoting the welfare of the child and protecting against commodification.

In the *Stiver* case, Judy Stiver, a surrogate from Michigan, entered into a surrogacy contract in 1982 arranged by Noel Keane, a well-known Detroit lawyer specialising in surrogate agreements. The contract involved Stiver carrying a child for Alexander Malahoff. Following the birth of the child, named Christopher, it was discovered that he suffered from hearing loss, mental retardation and severe neuromuscular disorders. These conditions were determined to be the result of an infection with cytomegalovirus (CMV), a virus that can cause birth defects and can be transmitted sexually. Judy Stiver and her husband Ray filed a lawsuit alleging negligence against Noel Keane and the doctors involved in the surrogacy program. They claimed that Keane and the doctors had failed to properly test semen for sexually transmissible diseases, including CMV, leading to the child's health issues.

The Stivers argued that the surrogacy agency, represented by Noel Keane, had a duty of care towards the surrogate and the child, and that their negligence in not testing the semen for diseases contributed to the child's health problems. In response, Keane and the doctors involved in the surrogacy program asserted that they did not have a legal obligation to protect the surrogate and the child, and therefore should not be held accountable for any harm or negligence.

The judge of the Michigan court considered that surrogacy agencies should bear an affirmative duty to surrogates because of the fact that the intermediary is in a position of dominance, wherein 'the parties were led to rely on the broker-designer's direction and advice concerning procedure' (para. 272). In essence, surrogacy parties entrusted themselves to those who were 'engaged in the surrogacy business and expected to profit thereby' (para. 268). Even if the intermediary entertains no harmful intention, the agency gains profit because of a relationship in which others bear risks and, therefore, should be liable for their injury.

In the *Huddleston* case, the Pennsylvania High Court not only addressed whether the intermediary agency bears an affirmative duty to the child born through surrogacy but also determined whether the scope of this obligation extends to preventive measures to prevent an intended father from abusing the child. The court held that the scope of a defendant's duty was subject to the foreseeable consequences of his or her actions or omissions. The court referred to the judgment in the *Stiver* case, holding that the surrogacy agency is 'for the sole purpose of responsible for planning and supervising (the) very delicate process of creating a child (and) reaps handsome profits from this process' (para. 460); thereby, the surrogate intermediary agency, having a 'special relationship' with the surrogate child, thus 'must be held accountable for the foreseeable risks of the surrogacy undertaking' (para. 460).

The judgments from the *Stiver* and *Huddleston* cases have implications for all parties involved in surrogacy. By holding intermediary agencies responsible for taking active steps to protect the interests of surrogacy parties, the court restrict the rights of intermediaries, balancing the conflicting rights of intermediaries, surrogates, surrogate-born children, and intended parents and preventing intermediaries from evading potential responsibilities.

However, the regulatory framework relies heavily on judicial rulings for the establishment of norms and responsibilities, which suggests that solutions emerge reactively, in response to disputes that have transpired, rather than proactively to preclude potential issues. While judicial decisions such as those in the *Stiver* and *Huddleston* cases can confer certain responsibilities, these do not constitute a substitute for comprehensive, statutory regulations. The allowance of commercial surrogacy without stringent government regulation opens the door to potential unethical practices. This vulnerability was starkly illustrated by the Theresa Erickson scandal. Erickson, a renowned attorney in the field of surrogacy, engaged in a deceptive baby-selling operation that duped aspiring parents and manipulated the Superior Court of California. Her actions culminated in a 2012 conviction, resulting in a sentence of five months of incarceration and nine months of home confinement, highlighting the dire consequences of inadequate oversight (Federal Bureau of Investigation, 2012). In light of such events, Jordan Stirling Davis (2017) contends that acknowledging surrogacy as a regulated market could more effectively address the ethical issues currently present as market failures. Davis advocates for regulatory



measures that would empower surrogacy intermediaries to perform their roles more responsibly, thereby ensuring the protection of the interests and rights of everyone involved, from the intended parents and surrogates to the resultant children.

## 6 Rethinking surrogacy in China: harnessing international perspectives for contextually informed regulation

In light of the complexities surrounding surrogacy, China should reassess its current approach and draw valuable insights from international experiences. By considering lessons learned from other countries, China can develop a regulatory framework that is better aligned with its unique context. If China were to look to its Asian neighbours as models for enforcing a total ban on commercial surrogacy, it would need to address a multitude of considerations and implications. To effectively regulate surrogacy, it is essential for China to enact a specific law that encompasses all entities and individuals involved in surrogacy activities. This should include intermediaries who facilitate surrogacy agreements, providers of surrogacy-related information or advertisements and any other entities engaged in various aspects of surrogacy.

However, banning surrogacy may contradict with national policies promoting population growth, a pressing issue in China. The argument presented in the Legal Committee highlighted the high demand for surrogacy among infertile couples, suggesting that a ban on surrogacy would be inconsistent with the national policy of encouraging couples to have more children (Liu, 2015). Moreover, the experiences of countries like India and Thailand with surrogacy indicate that a ban would simply prompt intended parents to explore alternative avenues, such as cross-border surrogacy (Hibino, 2022). However, this introduces complications, as countries prohibiting surrogacy often do not recognise parent-child relationships established through cross-border surrogacy, potentially leaving children born via surrogacy in a stateless situation (Blauwhoff and Frohn, 2016).

Alternatively, if China decides to establish standards for commercial surrogacy agents, it is expected to face challenges related to the rights of surrogates. Empirical research and numerous scandals from developed and developing countries where commercial surrogacy is legal have exposed the potential for the industry, when driven by market forces, to violate the rights of both women and children. (Spar, 2006; Pande, 2014; Deomampo, 2013; Smolin, 2016). This is a position supported by Patricia Fronek (2020), who contends that the business models of surrogacy agencies, which are designed to maximise profits for service providers and intermediaries, fundamentally clash with the well-being of women and children. This is because these models are predicated on the primary objective of producing a desired child for the consumer, often sidelining the rights and welfare of the surrogates and the children themselves.

The risks inherent in commercial surrogacy, are likely applicable to China as well, even under stringent supervision and accountability mechanisms. Cases like Huddleston underscore the necessity for robust legal frameworks to safeguard the rights of vulnerable parties involved in commercial surrogacy. However, the execution of effective oversight and accountability mechanisms might present challenges in the Chinese context. The prevalence of small agencies in rural areas, which engage in informal relationships with surrogates without formal contracts, adds another layer of complexity to the regulation of commercial surrogacy in China (Chen, 2017; Luo, 2023). These non-contractual arrangements evade official channels, making the practice less visible and more challenging to regulate (Luo, 2023).

China could learn valuable lessons from the UK's handling of surrogacy. It is essential for appropriate regulation to aim at striking a balance between the desire to have children, cultural traditions and ethical concerns. The regulations should consider the diverse aspects of surrogacy and reproductive technologies while upholding the values and beliefs of Chinese society. A viable strategy could involve the legalisation and establishment of non-profit reproductive surrogacy

organisations, facilitating surrogacy agreements. Surrogacy offers a promising path for individuals in China to realise their dreams of having children and experiencing the profound joy of parenthood. The government's reluctance to set up comprehensive regulatory guidelines, however, is fueled by apprehensions about commodification and possible exploitation – issues that are frequently intertwined with commercial surrogacy. It is crucial for any significant reform to address the commodification within the surrogacy market. This market structure encourages surrogacy agencies to sidestep ethical norms, putting profit before public health.

## 7 Towards better surrogacy legislation in China

This section proposes the key elements necessary for the progression of surrogacy legislation in China, with a specific focus on the regulation of non-profit surrogacy organisations. By drawing lessons from international models, such as those implemented in the UK and the US, this analysis identifies best practices and underscores areas in need of improvement.

### *7.1 Expanding the operational framework of non-profit organisations*

This article proposes that non-profit organisations, particularly within China, could be instrumental in adopting key responsibilities related to surrogacy. These organisations, akin to their counterparts in the UK that provide core matching and facilitation services, should focus on creating and distributing honest and ethical advertisements collecting vital information on intended parents, surrogates and donors. More importantly, they should assist in the correct registration of children born through surrogacy. This function has become increasingly vital due to recent occurrences of fraudulent birth certificate sales in China. Ensuring a clear and lawful registration procedure is imperative to affirming the legal rights and establishing the identities of children born via surrogacy.

However, it is essential to recognise the potential challenges associated with entrusting non-profit organisations with significant responsibilities, particularly when it comes to ensuring their adequate protection and fair financial compensation. These factors have the potential to significantly impact the organisations' capacity to effectively fulfill their roles. As such, a recommended solution would be to implement a structured system of fixed fee schedules. Such a framework delineates the remuneration that can be allocated to staff, establishing a definitive boundary on the organisation's total income. This may mitigate the risk of inordinately high staff wages that conflict with the altruistic nature of non-profit entities. As Pamela Laufer-Ukeles (2013) observes, 'capping the price reflects the desire to ensure that surrogacy is not fully marketised but rather appreciated for its dual function of creating intimate and monetary relationships'.

### *7.2 Prioritising the protection of surrogates*

As discussed above, surrogates in China, particularly those entangled in the unregulated shadow surrogacy industry, face a multitude of adversities including a lack of state protection, coercive practices such as forced abortions, seizure of their income and the weight of patriarchal familial pressures. Addressing these pressing issues necessitates comprehensive, multi-pronged interventions aimed at revising laws, ensuring healthcare accessibility, providing health support and driving societal changes that respect these women's rights and well-being. Non-profit organisations can be instrumental in paving the path towards these changes. They can serve as staunch advocates for the rights of surrogates, employing their influence on lobby for legal reforms that guard these women from coercive practices and ensure they retain their hard-earned income. With strategic advocacy at both governmental and societal levels, these organisations can foster an environment that acknowledges and respects the rights of surrogates.

Beyond advocacy, non-profit organisations can also leverage their resources to disseminate crucial knowledge. By conducting workshops and seminars, they can educate surrogates about their rights and the legal intricacies of surrogacy, empowering them with information to protect their interests. In addition to education, these organisations can also provide much-needed counseling services. Surrogacy often brings a heavy emotional and psychological toll, and professional counseling can offer surrogates tools and strategies to navigate these challenges.

### 7.3 Regulating non-profit surrogacy organisations

As previously discussed in the context of the UK surrogacy model, a notable ethical dilemma arises when non-profit surrogacy organisations are entrusted with the responsibility of evaluating child welfare risks prior to conception. This dual role can engender a potential conflict of interest, given that their primary mission is centered on connecting intended parents with surrogates and ensuring the seamless progression of surrogacy arrangements. This primary focus tends to lean towards prioritising the facilitation of surrogacy agreements over rigorous child welfare assessments. This issue underscores the imperative need for the establishment of clear and robust regulatory frameworks to effectively govern and oversee the operations of these surrogacy organisations. Legal precedents in the US, such as the *Stiver* and *Huddleston* cases, underscore the obligation of surrogacy agencies to protect surrogates and children. Owing to their influential role and potential profit, these agencies are accountable for potential harm or risks experienced by the parties they serve. Nevertheless, for non-profit organisations operating with limited resources, these responsibilities may be overwhelming. Drawing inspiration from the UK's proposed surrogacy reforms, where organisations such as the HFEA provide oversight for non-profit entities, China might consider adopting a parallel framework. The establishment of an autonomous regulatory body, tasked exclusively with the oversight of surrogacy organisations, represents a pivotal advancement. This body would stand apart from surrogacy agencies, dedicating itself entirely to safeguarding child welfare and ensuring that the child's best interests remain paramount. Given the existing regulatory mechanisms in China, which are predominantly under the purview of the Administration for Industry and Commerce and focus chiefly on administrative penalties, there is an apparent need for a more specialised form of regulation for non-profit surrogacy organisations.

The creation of an independent authority tasked with implementing a licensing system for non-profit surrogacy organisations constitutes a fundamental measure for the effective governance and supervision of their activities. The licensing process would include comprehensive education and the successful completion of an examination assessing the organisations' understanding of the legal and ethical aspects of surrogacy. For example, staff members should undergo educational programs offered by regulatory bodies. These programs would enhance their competency in areas such as ethical considerations, legal frameworks and best practices in surrogacy. Only upon passing the examination of the educational program should non-profit organisations be granted a license. The license should be time-bound, meaning it needs to be renewed periodically and there should be strict penalties for organisations operating without a license or with a suspended/revoked license.

In addition, the licensing system would not only serve as a means of regulation but also provide a level of assurance for intended parents seeking the services of non-profit surrogacy organisations. It would enable them to make informed decisions based on the organisation's licensing status, ensuring that they are working with a reputable and ethical entity. In cases where a non-profit organisation breaches the principle of altruism or provides misleading information, severe violations should lead to permanent license revocation. By implementing a robust licensing system, strengthening oversight and accountability measures, and promoting ongoing professional development, China can take significant strides towards prioritising the protection of all parties involved in surrogacy. These measures will help uphold ethical practices, safeguard

the rights and well-being of surrogates and maintain the integrity of the surrogacy process within the non-profit sector.

## 8 Future research directions: surrogacy legislation and regulation in China

The insights presented in this article serve as a starting point for initiating a broader dialogue on surrogacy regulation in China. However, these initial reflections and perspectives highlight the need for more extensive and comprehensive studies to establish a regulatory framework that aligns with China's unique socio-cultural environment and addresses the interests of all parties involved in surrogacy, while upholding the highest ethical standards. Future legal research should be centered on integrating evidence-based practices and considering viewpoints from all stakeholders involved in surrogacy. This includes capturing the lived experiences of surrogates, understanding the concerns of prospective parents, and exploring the rapidly evolving landscape of reproductive technologies, which remains an area that is currently under-explored.

While this research focuses on the regulation of surrogacy intermediaries, it is important to highlight the need for comprehensive and effective surrogacy regulations that address the compensation of surrogates and establish safeguards to protect their financial and psychological well-being. Additionally, it is crucial to address the custody rights of intended parents and devise methods that affirm these rights while simultaneously recognising and respecting the rights and contributions of surrogates. To achieve these objectives, future legal research should embrace a multi-disciplinary approach that incorporates perspectives from fields such as ethics, gender, medicine and social sciences. Such an approach will enable a holistic understanding of the complexities surrounding surrogacy and ensure that regulations are comprehensive, fair and responsive to the unique needs and dynamics present within the Chinese context.

Moreover, in drafting its own legislation, China should consider an inclusive approach that allows all adults, regardless of marital status, sexual orientation, or gender identity, to access surrogacy services (Han, 2023). This consideration addresses criticism against India's surrogacy laws, which exclude certain groups such as the LGBTQI+ community and unmarried individuals. The importance of regulations that prioritise the best interest of children born from surrogacy agreements cannot be overstated. However, research on this specific topic, particularly within the Chinese context, is currently underrepresented. This scarcity of research underscores the urgent need for further investigation and comprehensive analysis to fully understand and address the unique challenges and implications these children face in the Chinese context.

The potential legalisation of non-profit organisations' involvement in surrogacy in China opens new dimensions of discourse. Domestic alternatives for prospective parents established by these organisations could potentially minimise reliance on cross-border surrogacy. Yet, it is essential to acknowledge that, despite these initiatives, some prospective parents may continue to engage with for-profit intermediaries for cross-border surrogacy solutions. The regulation of domestic for-profit surrogacy intermediaries is relatively straightforward as the governing country can enact and enforce laws regulating their practices. However, the extraterritorial nature of operations complicates the regulation of for-profit intermediaries facilitating cross-border surrogacy, highlighting the need for further scholarly attention in this area.

## 9 Conclusion

The commercial surrogacy industry in China faces significant regulatory challenges due to the lack of specific regulations and legal ambiguity. This has allowed surrogacy intermediaries to operate in a regulatory grey area, raising concerns about exploitation and inadequate sanctions. Looking at international models, such as those in the US, the UK and other Asian countries, provides valuable insights for developing effective regulations tailored to China's unique socio-cultural context. The

UK's non-profit surrogacy intermediary model showcases the value and ethical viability of eliminating the profit motive. By shifting the focus of surrogacy towards providing optimal care and support for all stakeholders, including surrogates, intended parents and children, the UK model aligns with ethical considerations and cultural nuances. Implementing a similar approach in China could help harmonise the aspiration for children with ethical standards and cultural sensitivities. To achieve this, an adaptive approach is needed that synthesises the best practices observed internationally and tailors them to China's specific context.

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