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# Protection of rights and legal remedies for surrogate mothers in China

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Surrogacy has grown significantly as an underground industry in China over the last two decades. Accordingly, an increasing number of surrogate mothers are being bound by surrogacy contracts. As surrogacy contracts are unregulated in China, the contractual obligations of surrogacy may cause serious harm to surrogate mothers due to the infringement of their rights and increased risk of injury. Sociocultural concerns and financial considerations have made surrogate mothers hesitant to seek legal remedies. Additionally, gaps in the legislative and judicial rules make it difficult for surrogate mothers to receive sufficient compensation after suffering injuries. This study examines the infringement of the rights of surrogate mothers and potential injuries to them during surrogacy transactions and contract fulfillment. Furthermore, it presents the current legal framework of surrogacy regulation and remedies for preserving the rights of surrogate mothers. The causes of the current dilemma of protecting rights are analyzed, and regulative and legislative suggestions for preventing injury and providing legal remedies are offered.

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## Introduction

The development and application of assisted reproductive technology (ART) has improved human reproduction. There are a variety of reasons for applying ART. Statistical data indicate a current infertility rate of 7–10% in China, meaning that more than 30 million people are affected by infertility (NHO, 2021). This number has risen from 2.5% to 3% over the past 20 years. Same-sex parents, single parents, or those experiencing fertility issues rely on ART to have children. However, the rigid administrative regulations and application procedures in China restrict eligibility for such technologies. Thus, those who are ineligible for legitimate access to ART have turned to surrogacy services, which have not received approval in China. As a result, surrogacy has grown into an enormous underground market consisting of surrogacy agencies that offer surrogate mothers to clients who wish to become parents (Long and Wang, 2022).

Surrogacy transactions are considered illegal, as they violate certain principles of the Civil Code of China. Nevertheless, a surrogacy contract is binding for all participants. Statistical data show that more than 10,000 surrogate babies are born each year in China (Xiao et al., 2020), indicating that even more surrogate mothers are involved in this industry. In surrogacy transactions in China, specific services provided by surrogate mothers around the delivery of surrogate children have put their health at significant risk, including the possibility of permanently damaging their reproductive abilities or endangering their lives. To meet the demands of clients, the agencies require surrogate mothers to follow a series of medical instructions designed to ensure the success of delivery while placing less emphasis on their health and well-being (Luzzi, 2019).

Unreasonable demands of clients, unqualified medical practices, and improper use of medications increase risks to the health and lives of surrogate mothers throughout pregnancy and delivery. As in other countries where surrogacy has not been legalized, the terms of a surrogacy contract in China rarely address health protection and injury compensation for surrogate mothers (Birenbaum-Carmeli and Montebruno, 2019). When injury does occur, the illegitimacy of the transaction and the disadvantaged financial status of surrogate mothers often mean they do not have the ability or desire to claim compensation for temporary or permanent injuries caused directly or indirectly by surrogacy.

In China, public and scientific researchers remain unconcerned about the difficulties faced by surrogate mothers since surrogacy is considered a violation of public interest and social morality (Ma, 2020). However, the rights of surrogate mothers as citizens and women remain fundamentally valid. The regulation of surrogacy contracts is a necessary means to prevent injury and protect the rights of surrogate mothers.

This study analyzes the infringement of the rights of surrogacy contracts and explores possible methods to protect surrogate mothers in China. First, it examines the content of contractual obligations that infringe on the rights of surrogate mothers and the possible injuries they might accordingly suffer. Then, it presents the legal framework of surrogacy and legal remedies in China. By exploring the social and legislative causes of the dilemmas associated with remedies concerning surrogate mother rights, it provides suggestions for filling the legislative gaps to improve injury prevention and surrogacy rights protection.

## Review of the literature

**Empirical investigations of surrogacy transactions.** During the last two decades, the underground surrogacy market has grown rapidly. According to investigations in 2014 and 2019, there were more than 400 surrogacy agencies in China that facilitated the births of over 10,000 surrogate children each year (Wang, 2019;

Johnson and Li, 2014). In China, most surrogacy agencies claim that they are able to “customize gender”, which refers to the ability to fulfill client requests to select the sex of surrogate children or for multiple fetal implantations (Tang, 2021). Many surrogacy agencies require surrogate mothers to undergo forced abortions to achieve this goal; these procedures can lead to serious physical harm for which inadequate compensation is provided (Long, 2012; Zhang, 2015). During surrogacy, surrogate mothers are required to accept designated medical treatment, which often disregards their health or the possibility of long-term damage (Yu, 2021). Furthermore, to fulfill client demands and improve reproductive efficiency, multiple implantations, and fetal reduction procedures are usually performed, greatly increasing surrogate mothers’ risks of injury and death (Iqilu, 2017). When a surrogate mother dies, her family is compensated with the amounts agreed upon in the surrogacy contract; however, those amounts are usually very low (Chen, 2009). Notably, some investigations have pointed out that surrogate mothers are mainly motivated by financial problems, including low incomes and high family debts (Shi, 2009). In contrast, other investigations have exposed the large profit margins of surrogacy agencies (Wang, 2017).

### Protection of the rights and interests of surrogate mothers.

Previous studies from a global perspective have focused mostly on reproductive tourism and surrogacy exports from high-income countries, inadequate legislation to protect surrogate mothers in low-income countries, and the provision of surrogacy services (Zafran and Hacker, 2019; Frati et al., 2020). Some have noticed that surrogate mothers may suffer from extra risks and injuries in order to meet their contractual obligations to give birth to healthy babies (Frati et al., 2020). However, in China, which is a surrogacy exporter with a large domestic underground surrogacy market, little attention has been given to the protection of surrogate mothers. Some studies have mentioned that surrogacy harms the health and dignity of surrogate mothers (Liu, 2016). Furthermore, studies have highlighted serious violations of the rights of surrogate mothers, including restrictions on their personal freedom and forced fulfillment of client demands, which may expose surrogate mothers to increased risk of pregnancy complications and psychological disorders (Long and Wang, 2022).

**Surrogacy exploitation.** Exploitation in surrogacy is an issue of great concern. Studies have indicated that commercial surrogacy contracts may lead to the exploitation of surrogate mothers through unfair agreements and remuneration (Ramskold and Posner, 2013). To ensure justice in surrogacy transactions, the rights of women and children must be upheld. Studies have argued that injustice in surrogacy worldwide is caused by ineffective governance and unclear regulations, while the accountability of medical institutions and their personnel, as well as intended parents, has also been called into question (Saravanan, 2015; Fayemi and Chimakonam, 2022).

**Regulating surrogacy.** Regarding regulating surrogacy in China, there are sharply opposing views on whether surrogacy should be legalized. Studies supporting the legalization of surrogacy have argued that the reproductive needs of individuals should not be ignored and that surrogacy brings other benefits to families and society (Yang, 2015; Tian, 2021). Contrasting studies have emphasized that surrogacy is a violation of public interests and social morality and have further suggested that it be criminalized (Liu, 2016, 2020, 2021).

**Validity of the surrogacy contract.** Previous studies have taken different positions on the validity of surrogacy contracts. In determining surrogate child parenthood, some studies have denied that surrogacy violates public interests and social morality and argued that a valid contract may help to prevent the parties from imposing additional unreasonable requirements (Li, 2020). Additionally, studies have pointed out that gaps in the current legislation and judicial rules have resulted in contradictory adjudications in courts (Ding, 2015; Zhao, 2022). These gaps have caused further ethical dilemmas and gaps in the protection of the rights of all parties in surrogacy transactions.

**Research gaps.** Surrogacy has long been a widely discussed issue in China and around the globe. However, a review of studies of surrogacy topics in China from 1979 to 2020 showed that the protection of the health and rights of surrogate mothers has been of less concern (Wu, 2021). Specifically, there are four main research gaps:

1. Although studies have noted serious violations of the rights of surrogate mothers in China and called for legislative protection for them, further research is still lacking (Ma, 2020; Long and Wang, 2022). Previous studies have focused mostly on the overall regulation of surrogacy, the protection and legal parentage of surrogate children, and the validity of surrogacy contracts. Furthermore, no research has specifically addressed the violation of surrogate mother rights, potential remedies for these violations, and future protections in China.
2. Few studies have referenced empirical investigations into actual surrogacy transactions. Surrogacy transactions and the fulfillment of surrogacy contracts are the main methods by which the rights of surrogate mothers are violated. However, few studies have concentrated specifically on empirical investigations.
3. The dilemmas and difficulties related to the protection of rights and legal remedies for surrogate mothers in China under current legislation and regulations have yet to be revealed. Gaps in the current legislation have led to insufficient protection of surrogate mothers and challenges in providing remedies if they suffer injury or death. Few studies have recognized and conducted research on these issues.
4. Although most studies on surrogacy in China have mentioned the exploitation of surrogate mothers, few have further explored the causes of this exploitation and potential countermeasures.

This study aims to examine the exploitation and rights infringement of surrogate mothers in China, analyze the legislative and social dilemmas regarding potential remedies, and further explore relevant countermeasures.

This study contributes to the literature in three ways. First, it is the first jurisprudential analysis of surrogacy transactions from the perspective of protecting the rights of surrogate mothers. Second, it moves beyond the previous research and discussion on the validity of surrogacy contracts, providing the first comprehensive jurisprudential analysis of contractual surrogacy obligations, which are the direct causes of surrogacy exploitation and violation of surrogate mother rights. Third, it further explores the inadequacies of current civil legislation and regulations on surrogacy, which cause legal and ethical dilemmas regarding the provision of protections and remedies to surrogate mothers. It also considers sociocultural influencing factors that cause difficulties for surrogate mothers in obtaining legal remedies.

## Rights infringement in surrogacy contracts

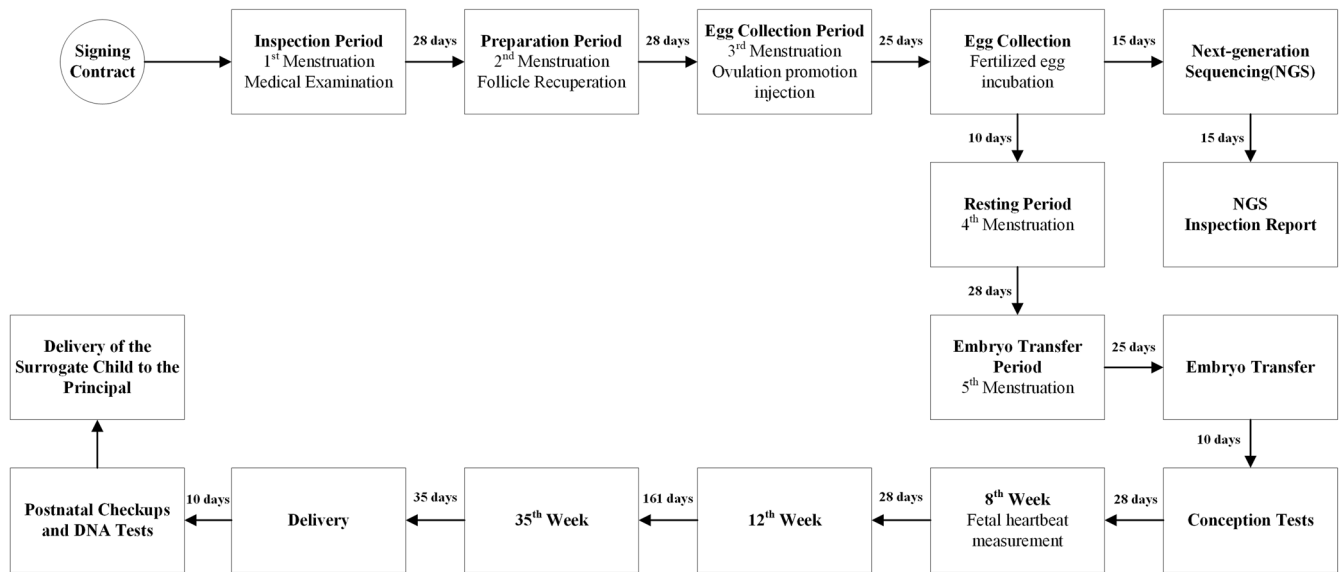
In most cases, a surrogacy contract is a tripartite agreement between the surrogate mother, the client, and the surrogacy agency or is established directly between the client and the surrogate mother. The terms of surrogacy are set and maintained by the contract, which is a service contract with a solid personal dimension (Yang, 2015). The purpose of the service contract is for the surrogate mother to waive her parental right to the surrogate child in exchange for payment. The contract also imposes personal and medical control on the surrogate mother to fulfill client requirements, including the guarantee of a healthy baby, gender selection, and the number of fetuses to be implanted (Frankford et al., 2015). As a party to the contract, the surrogate mother is contractually obligated to provide specific services and forced to accept a particular diet, pharmacological interventions, and medical procedures at designated medical or nonmedical facilities that may be staffed by unqualified personnel. In addition, surrogacy can be divided into different categories according to the diverse needs of clients and ART applications. Thus, the obligations of surrogate mothers vary depending on the type of surrogacy.

Figure 1 illustrates a typical standard gestational surrogacy process that surrogacy agencies claim is ideal. In reality, surrogate mothers usually undergo a much more difficult process. In gestational surrogacy, in vitro fertilization and embryo implantation are necessary since the surrogate mother needs only to gestate and deliver the child, making ART essential to surrogacy. Therefore, a medical institution and its personnel always participate in gestational surrogacy, making the role of the agency indispensable, as it must secure these illegal medical services. Surrogacy agencies claim to serve their clients by providing health monitoring and management of the surrogate mother to ensure the fulfillment of contractual requirements. Following the arrangements of the agency, the surrogate mother is required to accept a series of pregnancy interventions and medical procedures that significantly increase her risks, thereby infringing on her rights.

**Personal freedom.** To ensure the health of the surrogate child, the life and health of the surrogate mother and unborn child are closely monitored and managed daily during the entire surrogacy process. Therefore, most surrogacy contracts require surrogate mothers to live in a residence designated by the surrogacy agency or client until they give birth. Additionally, further restrictions on their personal freedom are commonly imposed to keep the surrogacy secret and avoid law enforcement. The surrogate mothers can have no contact with friends or relatives, cannot disclose the contract or residence location, and cannot leave the dwelling (Wang, 2017). Various surrogacy case investigations have found that the same restrictions may exist in a direct surrogacy contract between a client and a surrogate mother (Shi, 2009).

In China, personal freedom is an inviolable, constitutional right determined by public law. From Article 109 of the General Principles of Civil Law to Articles 109 and 990 of the Civil Code, the right to personal freedom has been gradually extended from a public right to a civil right that is more broadly protected (Wen, 2022). The most important feature of this change is that civil citizens are obliged not to violate this right of others. Civil remedies and compensation are required for violations (Yang, 2018). In surrogacy, the infringement of the surrogate mother's right to personal freedom is related to the specific restrictions determined by the agency or client.

On the one hand, regardless of the contractual relationship between parties, the restrictions on the personal freedom of the surrogate mother and consequent obligations are unenforceable



**Fig. 1** The standard process of gestational surrogacy.

by law. On the other hand, the way an agency or client imposes the restrictions determines whether they constitute an infringement of rights. Although the restrictions may be included in the agreement, they could be too harsh to be voluntarily accepted by a surrogate mother. In such cases, surrogate mothers are monitored by people hired by agencies or clients, and some even use violence to ensure compliance (Shi, 2009). Therefore, assessing whether the restrictions are violent or overly restrictive is one way to determine whether they infringe on the personal freedom of surrogate mothers.

Furthermore, the duration and content of the restrictions must be considered. The surrogacy process lasts for more than 10 months. Thus, these severe restrictions may intensify the mental distress and harm to the surrogate mother, thereby infringing on her right to health.

**Right to medical self-determination.** Almost all surrogacy contracts contain medical control clauses, including medication interventions, designated medical treatment, and multiple implantation and fetal reduction.

1. *Accepting medication interventions:* The process of impregnating a surrogate mother involves a series of dietary and medical interventions that increase the efficiency of conception and preserve the fetus. However, the medications or hormonal drugs that are used were originally intended to treat fertility disorders rather than to obtain additional gestational benefits; thus, side effects occur. Specifically, in the in vitro fertilization and embryo transfer (IVF-ET) procedure, surrogate mothers must be injected with hormonal drugs to prepare for the conception and preservation of the fetus. In contrast to other contracts, the injection of hormonal medicines such as progesterone usually lasts more than 70 days (Iqilu, 2017).
2. *Accepting designated medical treatment:* According to Article 3 of the Administrative Measures for Assisted Human Reproductive Technology, medical institutions and their personnel are prohibited from performing surrogacy. Furthermore, Article 12 of this administrative regulation stipulates that ART is allowed only at registered medical institutions, which implies that only approved institutions have the required technology. Therefore, surrogacy agencies must bribe medical institution personnel to illegally

perform medical procedures on surrogate mothers or choose underground medical institutions that lack qualified personnel because there are restrictions on legitimately acquiring medical services. Therefore, accepting medical treatment from institutions designated by surrogacy agencies is another contractual obligation for the surrogate mother. After decades of growth, the underground market in China has formed a complete industrial chain of surrogacy that contains different sources of medical services ranging from legal to illegal institutions. Although most agencies claim that they can provide surrogate mothers with ART and surgical services from the highest-rated legal hospitals, few can fulfill this claim due to the cost of access. Most surrogacy agencies choose underground clinics to perform all procedures for surrogate mothers, including egg retrieval, embryo implantation, and delivery (Wang, 2019).

3. *Multiple implantation and fetal reduction:* Currently, the success rate of legal IVF-ET (the method of using the mother's egg on its own) in China is ~40% (Liu, 2016, p. 174). In contrast to the legal method, more than one embryo is often implanted into the uterus of a surrogate mother to achieve a higher success rate. Because multiple embryos are transferred, agencies claim that the success rate of a single conception is more than 80%. Along with an increase in clients and the financial benefits to agencies and medical institutions, this procedure puts the surrogate mother at risk. Multiple embryo implantation increases the possibility of multiple pregnancies, possibly leading to fetal reduction surgery (Long, 2012). As a result, the surrogate mother risks multiple pregnancies and fetal reduction.

**Right to abortion.** Almost all surrogate contracts contain an abortion clause. This compulsory demand benefits the client and rarely considers the needs and desires of surrogate mothers. Typically, the contract has multiple purposes. Beyond the surrogate mother having the child, the child must be healthy. A newborn with congenital diseases is unacceptable to the client. China still has a deeply patriarchal view of women that is reflected in surrogacy since gender selection appears in almost all advertisements for surrogacy agencies. Paying extra to obtain a child of a specific sex, usually a boy, is highly attractive to intended parents. The client will probably reject a girl, in which

case the surrogate mother must undergo an abortion. The examination of the health and sex of the child in genetic surrogacy can be performed only during pregnancy or after delivery. Although agencies and medical institutions claim to use genetic screening technologies, such as PDG or PDS, in IVF-ET for detection, prevention, and gender “customization”, failure may still occur due to the limits of the technology. The tremendous cost and limited access to genetic diagnostic technologies limit most agencies to relying on ultrasound, which is a postpregnancy test. Once they discover that an embryo is female, the surrogate mother will be asked to have an abortion (Tang, 2021). Due to the natural sex ratio, a single contract may involve more than one abortion, with some cases reaching four or more (Zhang, 2015). Notably, client defaults may also force surrogate mothers to choose abortion. During the surrogacy process, the relationship between the client and couple may break down, eliminating the purpose of the contract (Zhao and Zhang, 2022). In this situation, the clients will neither make the payment nor accept the baby if the surrogate mother delivers. Giving birth to the baby and raising it puts an enormous and unexpected burden on the surrogate mother, which may leave her no choice but to abort.

**Right to health.** The surrogate mother takes the risks that are generally related to pregnancy along with additional risks. The other risks are related to the reproductive method and the specific requirements of the client and agency, which contribute to more types of injury and a higher probability of injury (Goli et al., 2019). Injury from either set of risks should be considered a loss for the surrogate mother. From a jurisprudential perspective, the contractual commitment of the surrogate mother is to deliver the surrogate child and surrender the child to the client, but this does not account for possible damages to the surrogate beyond the risks of a normal pregnancy.

Moreover, the commitment to possible bodily damage through a contract potentially points to a transaction of trading the right to health for financial benefits, which is considered invalid under Article 157 of the Civil Code. Therefore, all damages suffered by the surrogate mother during the fulfillment of contractual obligations should be compensated, and damages caused by additional risks should be considered an infringement of her right to health. Additionally, injuries attributed to different causes all sufficiently constitute the infringement of the surrogate mother’s rights because they may lead to further complications, including direct and indirect and short-term and permanent/chronic injuries.

**Right to life.** Deviation from the norms of ART and severe medical malpractice endanger the life of a surrogate mother and potentially lead to her death. As the most important civil right of a citizen, the right to life is stated in Articles 110 and 1002 of the Civil Code. Although agencies may attempt to prevent death, the occurrence of rare conditions is attributed to the recklessness of agencies and clients and their disregard for the interests of the surrogate mother. While the consequence involves criminal charges, such a dispute might still be settled privately, and the compensation paid to the relatives of the surrogate mother is usually far less than the legal standard. According to Article 15 of the Interpretation of the Supreme People’s Court of Some Issues Concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury, death compensation is calculated by the standard of disposable income of urban residents of the previous year in the location of the court under appeal. The total number is based on twenty years of this standard. Regarding the practice of the surrogacy contract, the terms of compensation for the death of a surrogate mother are generally set at one

hundred thousand yuan (Chen, 2009). In the same year of the report, the disposable income of urban residents in China was 17,175 yuan per year, which made the legal standard of death compensation more than three times that of the surrogacy contract.

### Potential injuries to surrogate mothers

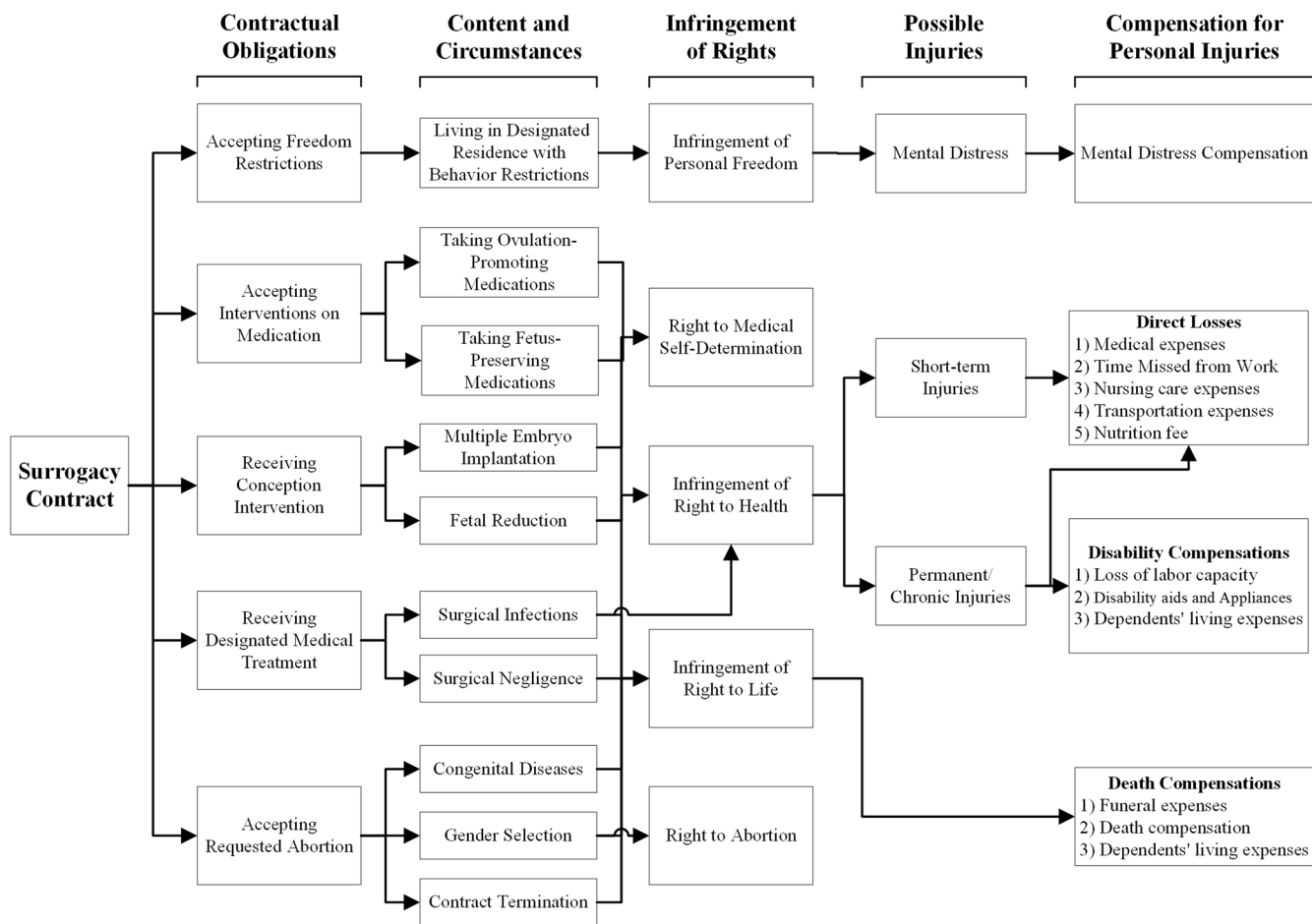
Figure 2 illustrates the five contractual obligations that surrogate mothers may accept, including specific contents that may be imposed on them under agreed-upon circumstances. Fulfilling these obligations may cause injury and an infringement of rights, and each damaging consequence should result in compensation to the surrogate mother.

**Mental distress caused by the restriction of freedom.** The restriction of the freedom of surrogate mothers during pregnancy may last more than 10 months. Physical discomfort, possible postpartum depression, and parting with the surrogate child after delivery may cause continuous mental distress and harm (Xiao et al., 2020). Among the harms that surrogacy can cause a surrogate mother, mental damage can be as distressing as physical harm. Since surrogacy is a long and painful process, physical pain and changes in hormone levels significantly impact the surrogate mother. This leads to mental vulnerability, leading to self-pity, anger, emotional sensitivity, and mental pressure (Taebi et al., 2020). Therefore, restricting freedom of movement during surrogacy will likely cause more harm to the surrogate mother than other factors, such as psychological disorders (Shayestefar and Abedi, 2017).

**Harm caused by medication.** Drugs can lead to significant damage to surrogate mothers during surrogacy. Most surrogacy agencies require surrogate mothers to be injected or subjected to hormonal treatments before and after conception. However, hormonal medications mainly treat infertility or hormonal disorders and have many side effects when taken for long periods or in large amounts (Deng and Huang, 2017). For example, short-term injections of hormonal medication can increase the risk of various symptoms, including ovarian hyperstimulation syndrome, acute pelvic pain, and menopause. Injections over a long period increase the risk of developing ovarian cancer, endometrial cancer, breast cancer, and even infertility (Yu, 2021). Furthermore, some women choose to be a surrogate more than once or continuously over a short period, which could aggravate the damage caused by hormone injections.

**Risks of implantation and fetal reduction.** In IVF-ET, multiple pregnancies pose significant health risks to women and are prohibited. However, multiple embryo transfers are commonly performed in surrogacy to increase the chance of conception. According to the Norms of Assisted Human Reproductive Technology, multiple pregnancies that require fetal reduction to avoid twin and triplet pregnancies are strictly prohibited. According to the American College of Obstetricians and Gynecologists, women carrying multiple embryos are at increased risk for various conditions, such as preeclampsia, gestational diabetes, preterm delivery, cesarean section, and postpartum depression. Other risks include gestational hypertension, anemia, miscarriage, and postpartum hemorrhage. Some of these conditions have long-term effects, such as increased risk of diabetes, chronic hypertension, cardiovascular disease, coronary artery disease, and stroke (Birenbaum-Carmeli and Montebruno, 2019).

**Trauma.** In China, the application of ART is specifically and strictly regulated to guarantee the health and safety of patients.



**Fig. 2** Possible infringement of rights and personal injuries to the surrogate mother and corresponding compensations.

High requirements are set regarding the qualifications of medical institutions, their staff, and ART implementation. Medical premises, including egg retrieval rooms, in vitro fertilization laboratories and embryo transfer rooms, and other medical requirements, including sterile laboratory materials, sterilization procedures, and medical personnel qualifications, should all meet the standards set by the Ministry of Health. However, when a surrogacy agency chooses an unqualified medical institution and ignores these norms and instructions, the health risks to both the surrogate mother and the egg donor during the procedure increase significantly. Infections due to improper sterilization and reuse of equipment, along with traumatic damage due to improper operations, occasionally occur during surrogacy (Huang et al., 2021). As a result, infections caused by egg retrieval and other surrogacy processes may cause pelvic inflammatory disease, which affects future fertility; other serious infectious diseases, such as hepatitis B, syphilis, and AIDS; or even death (Wang, 2019).

**Life endangerment.** Reproduction risks the health and lives of women, and surrogacy heightens that risk. The reproductive method in gestational surrogacy and the potential for improper medical treatment threatens the health of surrogate mothers. The incidence of pregnancy complications is higher in surrogate mothers than in normal IVF mothers due to the absence of genetic connections between the fetus and surrogate mother and the possibility of life-threatening situations resulting from multiple embryo transfers (Berk, 2020). Furthermore, contracted medical institutions without qualifications most likely reduce

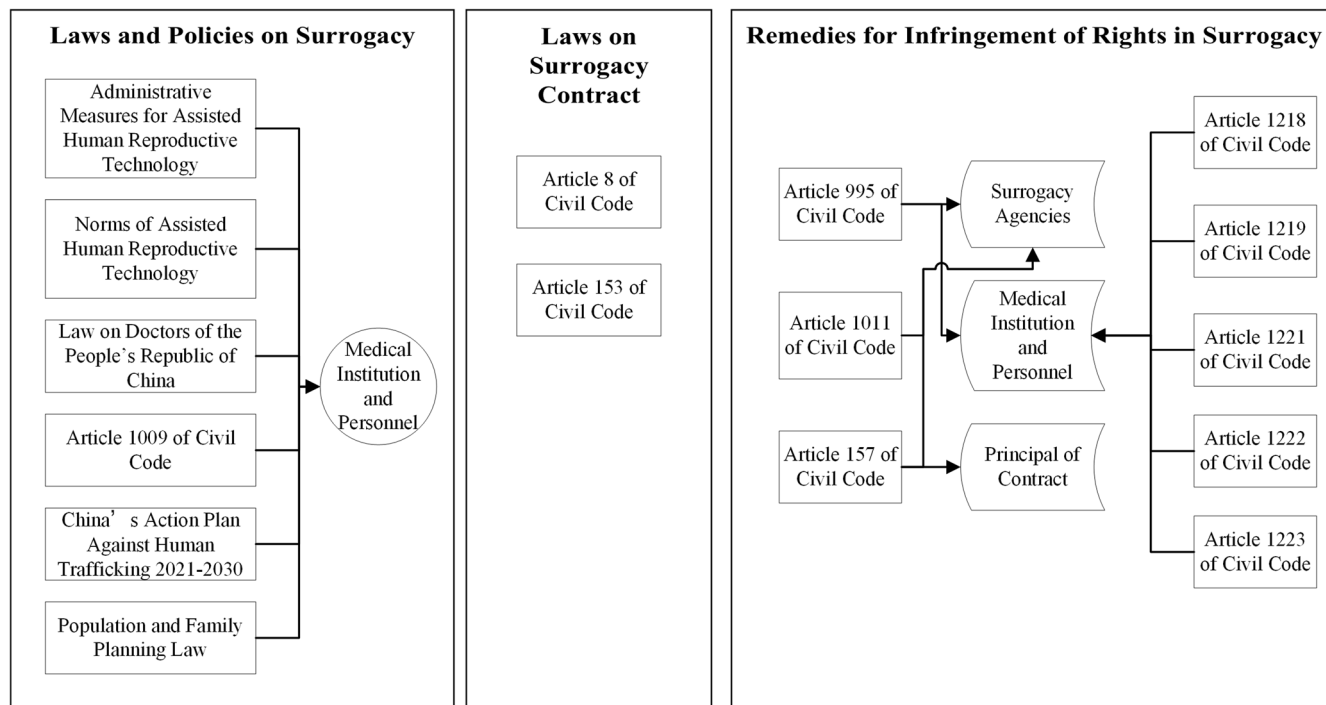
costs by not following standard procedures and ignoring the safety and security of the treatment. These factors increase the risk of trauma for the surrogate mother and may even lead to death (Iqilu, 2017).

**Legal framework for surrogacy regulation and rights remedies**

In Fig. 3, the legal framework for surrogacy and its contract are presented, including the laws and policies on surrogacy and the validity of the surrogacy contract. The remedies for possible infringement of rights are also displayed.

**Legislation and regulation of surrogacy.** A surrogacy contract involves various participants, and the rules for each are indispensable for protecting their rights and interests. However, China still needs to regulate the entire industrial chain and respond with legislation. Through investigations of underground surrogacy markets and reports of legal disputes, a vague social awareness of the prohibition of surrogacy has been created. However, the only legal documents available to determine the legality of surrogacy are two departmental regulations issued by the Ministry of Health. The prohibition and liability of surrogacy are limited to technical and administrative aspects.

Further laws and regulations can be invoked to resolve surrogacy issues that still do not cover entities beyond medical institutions and their personnel. Article 1009 of the Civil Code prohibits medical activities that endanger human health and violate social morality and public interest, obligating medical personnel to comply with Article 23 of the Law on Doctors. In



**Fig. 3** Legal framework of surrogacy in China.

addition, Article 39 of the Population and Family Planning Law prohibits sex identification based on nonmedical necessity and abortion based on gender selection, making it illegal to perform abortion in surrogacy for this reason. In addition to departmental regulations, the policy of fighting surrogacy is stated in the China Action Plan Against Human Trafficking 2021–2030, which specifies that surrogacy is illegal and should be combated.

**Legitimacy of surrogacy contracts.** Since the current regulations on surrogacy do not involve parties other than medical service providers, more legal documents are needed to invoke and determine the legality of surrogacy transactions and specific rules for solving surrogacy disputes. Therefore, surrogacy contracts in China are practiced in a gray area driven by the demand of each party. When disputes arise and are argued in court, the agreement is considered invalid from a judicial point of view. Case studies (Ding, 2015) have shown that courts have denied the validity of surrogacy contracts for violating public interests and morality under the Civil Code as well as the terms of the General Principles of Civil Law and Contract Law. Additionally, research perspectives have suggested that surrogacy does not significantly impact ethics and should be considered valid for adjudication (Li, 2020).

According to the theory of civil and contract laws in China, the validity of the commitments made by the surrogate mother is individually determined. The general terms of an agreement include pregnancy and delivery, surrender of the surrogate child, and the possibility of a required abortion, which leads to different evaluations. The first two violate civil laws involving the commercialization and trading of the bodies of the woman and the child, and the last violates the abovementioned Population and Family Planning Law.

**Rights remedies for surrogate mothers under current laws.** A surrogacy contract rarely addresses compensation terms for possible injuries to the surrogate mother. Payments received by surrogate mothers are spent mainly on medical treatment, living

expenses, surrogacy remuneration, and intermediary fees to the agency. The compensation to the surrogate mother is limited to the execution of additional demands such as abortion or the fulfillment of particular purposes such as gender selection and twin babies. Therefore, the amount of compensation for a specific matter is fixed without considering the real risk of injury to the surrogate mother. In addition, most contracts do not establish the compensating liabilities of the agency, regardless of whether it caused the injury.

Under the current legal framework, possible remedies for the infringement of rights and injuries to the surrogate mother are based on two methods: tort and contractual liabilities. This study shows three damages the surrogate mother might endure: the infringement of personal freedom, injury due to medication, and injury due to medical procedures. According to the Tort Law of the Civil Code, the injuries directly caused by a medical institution through the fault of its personnel during medical procedures and the infringement of personal freedom can be remedied through tortious liabilities. Such liabilities are rigidly restricted to the behaviors that directly cause injury. The rules for compensation from contractual relationships are narrow and constrained. Article 157 of the Civil Code is the only term to be invoked under such circumstances, based on the invalidity of the surrogacy contract. Thus, the fault of each party for invalidating the contract determines the liabilities of compensation for injuries. Under judicial views, since all parties operate in a civil capacity, the liabilities are ambiguous and are equally attributed to each party in most adjudications.

**Current dilemma of rights remedies**

**Social conception.** Surrogacy in China is considered unethical and morally condemnable, as it is an instrumentalization of the bodies of women and a commercialization of parenthood that is mired in bioethical controversies (Liu, 2020). Identity flaws have led to surrogate mothers being considered less worthy of sympathy when seeking rights remedies. Moreover, participation in surrogacy could be shameful to the surrogate mother and her

family (Brugger, 2012). If a woman makes such a dispute public, she faces pressure and shame even though she has already suffered harm beyond what was expected (Roberson, 2015). Consequently, it is expected that surrogacy will remain private for the surrogate mother, which reduces her willingness to seek legal remedies.

**Financial considerations.** Financial considerations are another reason surrogate mothers are unwilling to seek compensation through litigation. Good remuneration is the initial motivation for low-income women to become surrogate mothers. Forfeiting the surrogacy payment should they make any additional demands is a significant problem for them. This concern seems reasonable. Compensation obtained through litigation may be less than expected or less than they already earned in surrogacy contracts. Therefore, the risk of being asked by the court to return the payment due to the invalidity of the contract prevents surrogate mothers from using the legal system.

After clients pay for the living expenses and medical treatment of the surrogate mother, their obligations are considered fulfilled unless agreed-upon situations occur, such as an abortion or cesarean section. In these specific cases, the surrogate mother may be compensated or awarded a small amount. Damages to her health, such as diseases, functional impairments, or even infertility and other disabilities, are beyond the concerns of the other parties. Furthermore, these consequences might be seen as the cost of the job and be ignored even by the surrogate mother herself (Fрати et al., 2020). However, the impact on her health may lead to enormous recovery costs. Ultimately, the compensation from surrogacy may be spent on the injuries of the surrogate mother, which her family may not be able to cover, ultimately meaning that surrogacy exploits such women and their families (Ramskold and Posner, 2013).

**Legal concerns.** The surrogate mother is disadvantaged in the process of establishing the surrogacy contract, making it difficult for her to seek legal remedies. First, without regulation, the agreements are more likely to protect the interests of the dominant parties. Due to insufficient knowledge of possible risks and the absence of legal consultation (Jana and Hammer, 2021), the surrogate mother has little influence over the terms of the contract, making it difficult for her to avoid exploitation (Saravanan, 2015). Finally, the contract will likely be structured with fewer obligations for the client and agency. The surrogacy agreement should have proper rights protection for the surrogate mother, in terms of both injury prevention and compensation, and should be relied on to assert her contractual rights to other parties.

Second, the liabilities for specific injuries remain unclear. With blurred engagement, establishing the liabilities of the client and agency is difficult after injuries have occurred. Severe injuries caused by fulfilling specific requirements and contractual obligations that exceed the risks of normal pregnancy and delivery may be considered the holistic commitment that the surrogate mother made in agreeing to the contract. Such views weaken the rights of the surrogate mother to ask the client and agency for reasonable reimbursement. Third, the perception of the illegality of surrogacy and concerns about legal consequences should be considered. Although the direct legal basis still needs to be included, surrogacy has come to be vaguely perceived as illegal in China. This social perception leads to possible confusion for the surrogate mother regarding her rights and reduces her willingness to seek legal remedies (Semba et al., 2010). In addition, due to uncertain regulations around the legal determination of surrogate child parenthood, the surrogate mother might obtain custody of the child in accordance with the principle that

“the mother is the one who gives birth” (Lv, 2010). This implies that the surrogate mother must return all surrogacy payments and take responsibility for raising the child, which will inevitably place a heavy financial burden on her family and nullify her initial motivation to become a surrogate.

### **Inadequacies in legislation and legal remedies**

**Gaps in Surrogacy Legislation.** There are no specific rules and regulations regarding commercial surrogacy and contracts within the previous 1987 General Principles of Civil Law, the 1999 Contract Law, or the current Contract Law of the Civil Code. As a result, the validity of surrogacy contracts is determined when disputes between parties are brought before the court and by the adjudications of litigation. There are three areas for improvement in the current method of validity determination. First, the lag of the legislation and the absence of judicial rules to make legal determinations eliminates the preventive function of the law. The signing and performing of contracts are typical private law behaviors. Without regulations for other participants except for the provision of medical services, the overall constraints on surrogacy and the protection of surrogate mothers are poor (Liu, 2016). Therefore, legal remedies typically occur only after injuries have transpired; thus, these remedies cannot help prevent injury. Second, without specific rules to invoke, courts may have issued conflicting verdicts in cases of a similar nature (Zhao, 2022). The articles that courts can invoke in determining contract validity are general clauses of the Civil Code, which requires a supplementary explanation of the values of its vague content (Xu, 2022). However, owing to the different interpretations, courts may make a variety of decisions or even conflicting decisions, undoubtedly offering little protection of rights. Third, only legal authorities can interpret general clauses based on the circumstances of specific cases. Unlike regulatory provisions, general clauses cannot provide clear rules for citizens to follow and help build expectations of possible legal consequences.

**Inadequacies in legal remedies.** Current legal remedies have failed to realize adequate or even sufficient rights protection for surrogate mothers. It is difficult to fully compensate a surrogate mother through current tort liability methods and contractual obligations in the absence of appropriate liabilities for the client and agency. Moreover, the tort liabilities of medical institutions are insufficient to protect surrogate mothers' rights. There are two types of damages that surrogate mothers suffer that are attributed to the medical institution: traumatic injuries from medical treatment and the harm caused by the application of ART. The former results from improper operations by medical personnel, while the latter results from illegal medical procedures, such as multiple embryo transfer and artificial abortion.

Nonetheless, according to Article 1222 of the Civil Code, the medical institution is responsible for injuries inflicted through illegal medical procedures in surrogacy. Institutions can be sanctioned for disregarding the norms of regulation and thus may be unlikely to compensate surrogate mothers for specific damages and losses, including chronic diseases or even disabilities. Unlike in typical medical malpractice, the fault of the medical institution and its personnel is not considered the only factor in determining the consequences since the doctor–patient relationship in surrogacy is not legally protected. Moreover, because they have no direct involvement in performing the medical procedure, the client and agency cannot be pursued for tort liabilities. In such cases, the contractual liabilities established by current laws are not reasonable solutions to surrogacy disputes. First, the liabilities have been distributed improperly to each contracting party. Article 157 of the Civil Code establishes a particular form of



contractual liability for negligence (Ye, 2022). Its goal is to determine appropriate compensation for losses to other parties based on the fault that leads to the invalidity of a contract and not the injury. Therefore, the court holds each party equally accountable, for they are all operating in a civil capacity. Second, it can be challenging to calculate compensation due to a lack of specific rules for establishing liability for all damages. Under current laws, the client and agency are responsible only for the direct losses of the surrogate mother. The compensation for the costs of curing pregnancy complications and chronic diseases or disabilities caused by gestational surrogacy and abortions is still pending, and specific rules are needed to establish liability and calculate compensation amounts (Ber, 2000).

### **Suggestions for improving rights protection and legal remedies**

**Urgent need to strengthen rights protection.** Due to severe rights infringement and the dilemma of legal remedies, strengthening the rights protection of surrogate mothers involves balancing the interests of all parties in surrogacy and the pursuit of justice (Fayemi and Chimakonam, 2022). First, damages suffered by the surrogate mother should not be considered a contractual obligation or the necessary cost of acquiring remuneration. In surrogacy transactions, the surrogate mother risks her life and health to fulfill her contractual commitments (Liu, 2020). Since damages to the surrogate mother are not what the client is buying and the promise of trading the right to health for financial benefit is invalid, the infringement of her rights should be compensated accordingly. Second, the other parties have advantages and play dominant roles. Although all parties are at fault for involvement in surrogacy, which may cause harm, the client and agency play more dominant roles, as they exploit the poor financial status of the surrogate mother (Damelio and Sorensen, 2008). The strong desire to perform the job and be paid makes it difficult for surrogate mothers to refuse client requirements, even though some requests will harm them. This fact not only differentiates the roles of each party but also makes them unequally responsible for any injuries. Third, irreversible injury to the surrogate mother must be prevented. Damage to her health, such as infertility and other disabilities, can be permanent and incurable and may even lead to death. Strengthening measures to prevent such injury is more important than compensation. Fourth, the exploitation of surrogate mothers must be prevented. The signing of a surrogate contract seems voluntary and equal between parties, but the disadvantages experienced by surrogate mothers mean they have no ability to bargain with the client and agency (Li, 2011a). The surrogate mother can hardly protect her interests, as she lacks the necessary knowledge and guidance to do so. Unfortunately, surrogate mothers are replaceable and abundant in the surrogacy market, which leaves them little choice but to accept the terms of a contract. Consequently, cases have shown that more than half of the remuneration paid by the client goes to the surrogacy agency (Liu, 2020). The reality of surrogacy in China leads to the potential exploitation of surrogate mothers, a problem that requires legal intervention and prevention.

**Supplementary legislation on regulating surrogacy transactions.** To address the infringement of rights in surrogacy and the current dilemmas around legal remedies, it is crucial to demonstrate a clear regulatory attitude and fill the gaps in the legislative and judicial regulation of surrogacy transactions (Ramskold and Posner, 2013). Since the attitudes of the government and legislators toward surrogacy remain unclear, there are two possible paths for supplementary regulations. The first choice is to further combat surrogacy and place legislative prohibitions on surrogacy

transactions. Arguments have been made that the organization or forcing of surrogacy should be criminalized to eliminate commercial surrogacy and prevent possible violation of interests. The regulatory attitude associated with criminalization can target the whole industrial chain, including the illegal collection of and trade in human reproductive cells, involving multiple crimes and using the criminal law system to apply punishment (Li, 2021). In addition, it is necessary to combine current criminal law provisions to regulate crimes related to surrogacy, including bribery of medical personnel, trade in illegal personal medical information, and forgery of birth certificates (Tian, 2021).

However, from a cost–benefit perspective, stricter prohibitions on commercial surrogacy may also harm surrogate mothers. Since people with infertility who are ineligible for ART will continue seeking reproductive solutions, legislative options for strict regulation seem to be unable to eliminate surrogacy; rather, they exclude competition and undermine the bargaining capacity of surrogate mothers and the remuneration they receive (Yang, 2015). In addition, criminalization would make surrogacy more covert, implying the enforcement of more and stricter forced restrictions on the personal freedom of surrogate mothers. Therefore, while prohibiting surrogacy, legislation should consider addressing medical needs by expanding the legal application of ART (Shan and Sui, 2019).

The second regulatory choice is to approve certain types of surrogacy, with gestational surrogacy being supported mainly to avoid ethical controversies. If surrogacy were legalized, the regulation of surrogacy agencies and transactions would benefit surrogate mothers since the terms of the agreements could be rigidly restricted and compiled through comprehensive guidance. Women who wish to become surrogates should undergo an application process. Eligibility to become a surrogate mother should mean protection for their health based on their age, physical condition, and other considerations. Moreover, a regulated agreement can ensure each party's fair remuneration and profit, thus contributing to the prevention of exploitation. Whether commercial surrogacy should be legitimized only for cases of infertility to address bioethics concerns and human rights protection requires further discussion (Chen and Ng, 2001).

**Contract regulation under legalization of surrogacy.** While the law on surrogacy contracts is crucial to the protection of each party, especially surrogate mothers, there are four aspects to consider.

1. Regulated and standard medical procedures should be applied in surrogacy. Since the nonstandard implementation of ART and other medical procedures brings significant risks to surrogate mothers, regulated surrogacy procedures should follow the Norms of Assisted Human Reproductive Technology. Medical institutions not equipped and qualified for the standardized implementation of ART should be strictly prohibited from performing surrogacy and held accountable if they do. Accordingly, compared to the vast demand for performing ART, China should expand authorized medical institutions and related medical services along with the expansion of applications.
2. Medical self-determination should be ensured. To protect the rights and interests of surrogate mothers, decisions on medical treatment and intervention in surrogacy should be based on their informed consent (Burrell and Edozien, 2014). Surrogate mothers should not be subjected to excessive life restrictions or medical treatment based on ensuring the health of the surrogate child. Furthermore, according to Article 21 of the Law on the Protection of Women's Rights and Interests, medical institutions should

obtain a woman's consent to perform fertility surgery. Due to gaps in information and communication and the imbalance in power during clinical decision-making, informed consent in surrogacy is complex; thus, fully achieving such protection is challenging (Tanderup et al., 2015). However, providing adequate information to surrogate mothers and obtaining their consent remain the responsibilities of the medical institution and its personnel. Furthermore, in addition to regulated and standard medical procedures, legal consultation and necessary aid should be involved in surrogacy to achieve informed consent (Hevia, 2018).

3. Abortion for purposes of gender selection should be prohibited. According to Article 21 of the Law on the Protection of Women's Rights and Interests, artificial termination for gender selection purposes is prohibited. Therefore, surrogacy agreements should not involve such a promise. Additionally, the right to abortion is seen as inalienable in China, as it can help surrogate mothers preserve their health if necessary (Yang, 2015). Therefore, abortions for appropriate reasons should be considered as the fulfillment of the contract, and the surrogate mother should be wholly remunerated (Lascarides, 1997). However, when a fetal abnormality occurs, the decision should be made according to the best interests of the fetus as well as the health of the surrogate mother, including the future life of the child and the arrangements for parenthood (Walker and van Zyl, 2015).
4. Administrative penalties should be established. In addition to contractual prohibitions, liability for breach of these terms should be clarified and adjusted. According to Articles 21 and 22 of the Administrative Measures for Assisted Human Reproductive Technology, the administrative penalties for unapproved and nonstandard implementations of ART are fines of 10,000 and 30,000 yuan, respectively. Compared to the enormous profits of surrogacy, the penalties in current departmental documents need to be revised to achieve regulation. More comprehensive liabilities should be applied to each party, and adjusted penalties are needed.

#### **Ensure compensation for injuries to the surrogate mother.**

Whether or not China chooses to legalize surrogacy, establishing a set of liabilities for agencies and clients for injuries to surrogate mothers is essential for achieving injury prevention and comprehensive and reasonable compensation. Furthermore, ensuring compensation to surrogate mothers is also a significant way to prevent exploitation in surrogacy. Specifically, on the one hand, China must fill the gaps in establishing tort and contractual liabilities in surrogacy cases. Under current contractual legislation, the formation of a civil contract is fully autonomous, and compensation terms address the liabilities only after an injury has occurred. Although Article 506 of the Civil Code states that the personal injury exclusion clauses are invalid, liability is based on the labor contract relationship. However, the validity of the surrogacy contract and the nature of the surrogacy relationship are currently ambiguous. As a result, even if the surrogacy contract is valid, the absence of compensation terms makes it unlikely that the contract will hold the other parties accountable for injuries.

Furthermore, agencies and clients are not considered to have conducted tort in surrogacy transactions under the current tort laws in China. Therefore, China needs to clarify the nature of the contract or the path to providing tort remedies. Additionally, regardless of whether compensation is in the contract terms, the

liabilities for compensating the costs and injuries incurred in fulfilling contractual obligations should be established by law (Li, 2011b), including all possible infringements of the rights of surrogate mothers.

On the other hand, compensation should be made comprehensively for the injuries suffered by surrogate mothers. By establishing liabilities of the surrogacy agencies and clients, the calculation of damages should invoke the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Personal Injury Compensation Cases. The scope of compensation should include health damages due to improper treatment, medical care, or the implementation of ART and other medical procedures that have not adhered to regulations. Furthermore, the damages should include immediate and long-term damage.

Nevertheless, overall, the liabilities should be a preventative approach to the irreparable injury of surrogate mothers and their children. For instance, research has shown that the restriction of the personal freedom of pregnant women causes mental stress, which could affect newborns psychologically and have long-term impacts on their health (Simopoulou et al., 2018).

#### **Conclusion**

Substantive regulation of surrogacy is essential for protecting the rights of surrogate mothers and preventing their abuse (Brugger, 2012). Otherwise, the greed of surrogacy agencies for profits and the arbitrary demands of clients will continue to cause severe injury to surrogate mothers. From a global perspective, the dilemma of protecting the rights of surrogate mothers is caused by more profound issues of social injustice (Bailey, 2011). The legitimate rights of surrogate mothers as female citizens should no longer be ignored or denied. Moral controversies and condemnations, as well as government indifference, have led to practical difficulties and obstacles in safeguarding their rights. Therefore, both legislation and its practice, administrative regulations, and socio-culture, together play an indispensable role in addressing the issues. China must recognize the urgent need to strengthen the protection of the rights of surrogate mothers and the government's crucial role in making changes and solving the exploitation problems of surrogacy. Supplementary legislation to regulate both surrogacy and the associated contracts is required to establish the liabilities of agencies and clients and further prevent rights infringement and injury. In addition, with the development of transnational surrogacy and medical tourism, the strong demand for surrogacy in China extends to surrogacy markets in other countries. Protecting the rights and interests of surrogate mothers is an international issue requiring cooperation and joint responses from all countries (Zafran and Hacker, 2019).

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**Author contributions**

YZ designed the study, conducted the research, authored the draft and revised the manuscript.

**Competing interests**

The author declares no competing interests.

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**Informed consent**

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