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**Author:**

Raposo, Vera

Wai, U Sio, U Sio Wai is a fourth year bachelor student at the Faculty of Law at Macau University.

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**Author Bio:**

Vera Lúcia Raposo is Assistant Professor at the Faculty of Law of Macau University (Macau) and Auxiliary Professor at the Faculty of Law of Coimbra University(Portugal).

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**Abstract:**

Nowadays surrogacy contracts are becoming increasingly more frequent all over the world. Nonetheless, the complex juridical and ethical issues involved raise relevant doubts in legal orders. This article focuses on legislation regarding surrogacy in China and Taiwan. Due to its special state structure, legislative attitudes towards surrogacy are different in Taiwan, the Hong Kong Special Administrative Region, the Macao Special Administrative Region and the Chinese Mainland. Although surrogacy is only expressly allowed in Hong Kong, surrogacy contracts are also used in other jurisdictions, even if they “exist” in a grey area. This article will give a brief introduction about surrogacy legislation in these four regions in China and reveal the differences amongst them, many of which are due to the cultural specificities of each territory.

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# **SURROGACY IN GREATER CHINA: The Legal Framework in Taiwan, Hong Kong, Macao, and Mainland China**

Vera Raposo & U Sio Wai\*

*Nowadays surrogacy contracts are becoming increasingly more frequent all over the world. Nonetheless, the complex juridical and ethical issues involved raise relevant doubts in legal orders. This article focuses on legislation regarding surrogacy in China and Taiwan. Due to its special state structure, legislative attitudes towards surrogacy are different in Taiwan, the Hong Kong Special Administrative Region, the Macao Special Administrative Region and the Chinese Mainland. Although surrogacy is only expressly allowed in Hong Kong, surrogacy contracts are also used in other jurisdictions, even if they “exist” in a grey area. This article will give a brief introduction about surrogacy legislation in these four regions in China and reveal the differences amongst them, many of which are due to the cultural specificities of each territory.*

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\* Vera Lúcia Raposo is Assistant Professor at the Faculty of Law of Macau University (Macau) and Auxiliary Professor at the Faculty of Law of Coimbra University (Portugal).

U Sio Wai is a fourth year bachelor student at the Faculty of Law at Macau University.

## INTRODUCTION

### A. Surrogacy Contracts

A “surrogacy contract” is an agreement whereby a woman agrees to bear a child and give the newborn to another person or couple,<sup>1</sup> resigning all rights regarding the child in favor of that person or couple, including the legal status of “mother.” Although surrogacy can take place by means of sexual intercourse between the surrogate mother and the contracting male (the biological father), nowadays it is commonly performed using artificial reproductive techniques (ART), namely artificial insemination and in vitro fertilization. In vitro fertilization is becoming more frequent as the use of oocyte donors increases, and the modern tendency in surrogacy agreements is to avoid unnecessary biological connections between the surrogate mother and the child in order to facilitate contract compliance.

Surrogacy is accepted in some legal orders, yet it is banned, and even punished by criminal law, in some others. Indeed, the legitimacy of surrogacy is highly contested, with many arguing that surrogacy undermines human dignity, that it constitutes the selling of a child, that it is a kind of hidden prostitution, that it violates the prohibition on using the human body and its parts as a source of financial gain, and that it disrupts the notion of family.<sup>2</sup>

Some of these criticisms, however, are only applicable to paid surrogacy, that is, when the surrogate receives a payment for delivering the child. Thus, most legal orders only allow surrogacy agreements that are gratuitous. At most, many legal systems allow the surrogate to receive compensation that is strictly restricted to the expenses and inconveniences she had (for instance, medical expenses and days absent from work), although frequently the so-called “compensation” actually hides a real payment which can be classified as a profit.

In the present study we will mainly focus on surrogacy legislation in the so-called Greater China. Due to its special state structure, Greater China encompasses different legal orders, all of them grounded in different legal and cultural values. Therefore, social attitudes towards surrogacy are different in Taiwan, the Hong Kong Special Administrative Region (Hong Kong), the Macao Special Administrative Region (Macao), and Mainland China, giving rise to different legal solutions regarding this issue.

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1. In the less controversial scenario the child is delivered to a heterosexual couple, but the child can be delivered to a same sex-couple, to a single woman or to a single man.

2. CRISTINA CAMPILIO, PROCREAZIONE ASSISTITA E FAMIGLIA NEL DIRITTO INTERNAZIONALE 190 (CEDAM 2003); Ferrando Mantovani, *Problemi Penali Delle Manipolazioni Genetiche*, 29 RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 653, 667-69 (1986); GUILHERME DE OLIVEIRA, MÃE HÃ SÓ UMA (DUAS)! (O CONTRATO DE GESTAÇÃO) 16 (Coimbra Editora 1992).

## I. THE PEOPLE'S REPUBLIC OF CHINA, A SPECIAL STATE STRUCTURE

The important principle “one country, two systems” was formulated in the 1980s by Deng Xiaoping in order to facilitate China’s regaining of sovereignty over Hong Kong and Macao and to achieve the peaceful reunification between Mainland China and Taiwan.<sup>3</sup>

More specifically, “one country, two systems” means that within one country, the People’s Republic of China, the socialist system will be maintained in the mainland, while Taiwan, Hong Kong, and Macao will retain their capitalist systems.<sup>4</sup>

After having defeated the Nationalist Party (國民黨) in the Second Chinese Civil War, the Communist Party (共產黨) founded the People’s Republic of China (中華人民共和國) on Oct. 1, 1949, and the Nationalist Party fled and established a new government, the Republic of China (中華民國), which is now known as Taiwan.<sup>5</sup> To solve the controversies between Taiwan and Chinese Mainland peacefully and achieve Chinese reunification, the principle “one country, two systems” was created.<sup>6</sup>

Hong Kong and Macao, on the other hand, were both territories under foreign administration. The United Kingdom administered Hong Kong, and Portugal administered Macao. However, after China resumed sovereignty over Hong Kong (in 1997) and over Macau (in 1999), the “one country, two systems” principle was also applied to these two special administrative regions, with the aim of guaranteeing their stability and prosperity while especially pursuing reunification.<sup>7</sup>

The principle “one country, two systems” is also constitutionally ingrained. According to the Basic Law of Hong Kong (Article 2)<sup>8</sup> and the Basic Law of Macau (Article 2),<sup>9</sup> the National People’s Congress authorizes both territories to exercise a high degree of autonomy and their own legislative powers. Therefore, the laws from Mainland China shall not be applied in Hong Kong and in Macau, except for those listed in Annex III to the Basic Law of Hong Kong and to the Basic Law of Macao (both in the Article 18 of the respective Basic Laws).<sup>10</sup>

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3. Jin Huang & Andrew Xuefeng Qian, “One Country, Two Systems,” *Three Law Families, and Four Legal Regions: The Emerging Inter-Regional Conflicts of Law in China*, 5 DUKE J. OF COMP. & INT’L L. 289, 290 n.5 (1995).

4. See generally *id.* at 290–91 nn. 5–6.

5. See e.g., Tay-sheng Wang & I-Hsun Sandy Chou, *The Emergence of Modern Constitutional Culture in Taiwan*, 5 NAT’L TAIWAN U. L. REV. 1, 13 (2010); Tzu-wen Lee, *The International Legal Status of the Republic of China on Taiwan*, 1 UCLA J. INT’L L. & FOREIGN AFF. 351, 355 (1996).

6. Huang & Qian, *supra* note 3, at 290 n.5.

7. *Id.* at 290–91 nn. 5–6.

8. XIANGGANG JIBEN FA art. 2 (H.K.).

9. ZHONGUA RENMIN GONGHEGUO AOMEN TEBIE XIN ZHENGQU JIBENFA art. 2 (Macao).

10. XIANGGANG JIBEN FA art. 18 (H.K.); ZHONGUA RENMIN GONGHEGUO AOMEN TEBIE XIN ZHENGQU JIBENFA art. 18 (Macao).

Due to these juridical and political specificities, Greater China encompasses four different legal orders, each with significant differences in the legal framework for surrogacy.

## II. SURROGACY IN TAIWAN

Taiwan plays a leading role in the development of ART in China. The first Chinese test-tube baby was born in Taipei in 1985,<sup>11</sup> and, since then, ART regulations have been called for in Taiwan.<sup>12</sup>

The present regulations are basically the Ethical Guiding Principles of Artificial Reproductive Technology (人工生殖技術倫理指導綱領),<sup>13</sup> the 1994 Regulations for Management of Artificial Assisted Reproductive Technology (人工協助生殖技術管理辦法),<sup>14</sup> and the Artificial Reproduction Act (人工生殖法).<sup>15</sup>

The Ethical Guiding Principles were published by the Department of Health<sup>16</sup> in October 1986.<sup>17</sup> In the original version of the Ethical Guiding Principles surrogacy was allowed when a woman was unable to carry a pregnancy normally.<sup>18</sup> However, the Ethical Guiding Principles were

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11. *The ROC Joins the Test Tube Baby Club*, TAIWAN TODAY (May 1, 1985), <http://taiwantoday.tw/ct.asp?xItem=112402&ctNode=124> [https://perma.cc/3SCK-QCFC].

12. Iao Weng Ian (邱永仁), *Disputes on Legislation of Surrogacy* (代理孕母之立法爭議), TAIWAN MED. J. (台灣醫界), July 2004, [http://www.tma.tw/magazine>ShowRepID.asp?rep\\_id=1701](http://www.tma.tw/magazine>ShowRepID.asp?rep_id=1701) [https://perma.cc/ZXZ9-97G3].

13. Ethical Guiding Principles of Artificial Reproductive Technology (人工生殖技術倫理指導綱領) (as promulgated by the Ministry of Health and Welfare, Oct. 20, 1989), <http://www.rootlaw.com.tw/LawArticle.aspx?LawID=A040170031006000-0781020> [https://perma.cc/B8HX-W4J9] (Taiwan) [hereinafter Ethical Guiding Principles].

14. The Regulations were repealed in 2007. *Regulations for Management of Artificial Assisted Reproductive Technology* (人工協助生殖技術管理辦法), L. & REG. DATABASE OF THE REPUBLIC OF CHINA, <http://law.moj.gov.tw/Law/LawSearchResult.aspx?p=A&k1=%E4%BA%BA%E5%B7%A5%E5%8D%94%E5%8A%A9%E7%94%9F%E6%AE%96%E6%8A%80%E8%A1%93%E7%AE%A1%E7%90%86%E8%BE%A6%E6%B3%95&t=E1F1A1&TPage=1> [https://perma.cc/5UCR-2KBX] [hereinafter ART Regulations].

15. Artificial Reproductive Act (人工生殖法) (as promulgated by Ministry of Health and Welfare, Mar. 21, 2007), <http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=L0070024> [https://perma.cc/3KK6-2K6] (Taiwan).

16. The Department of Health was changed to the Ministry of Health and Welfare on July, 23 2013. *MHW Officially Formed on July 23, 2013; BNHI of Department of Health, Executive Yuan, Renamed as NHIA of Ministry of Health and Welfare*, MINISTRY OF HEALTH & WELFARE (Oct. 22, 2013), [http://www.mohw.gov.tw/EN/Ministry/DM2\\_Pasp?list\\_no=378&fod\\_list\\_no=3846&doc\\_no=33076](http://www.mohw.gov.tw/EN/Ministry/DM2_Pasp?list_no=378&fod_list_no=3846&doc_no=33076) [https://perma.cc/5Q2E-PJFR].

17. Specifically, the Ethical Guiding Principles were promulgated on August 7, 1986, by Order No. 597301 of the Department of Health, <http://www.rootlaw.com.tw/LawContent.aspx?LawID=A040170031006000-0781020> [https://perma.cc/X8QG-YKXV].

18. The Ethical Guiding Principles of 1986 are not available in any official or academic website of Taiwan. However, the fact that the Principles allow surrogacy when a woman is unable to carry a pregnancy normally is cited in various theses. See e.g., Mei-ling Huang (黃嬌綾), *The Development and Dispute of the Surrogate Motherhood Policy Formation in Taiwan*, NANHUA U. 49 (2006), <http://nhuir.nhu.edu.tw/jspui/handle/123456789/10000>.

amended in 1989—Article 5, Principle Four, Part Two now prohibits surrogacy entirely.<sup>19</sup>

In the 1994 Regulations, Article 3(6) defines the surrogate mother as the person who agrees to both the transfer of gametes or embryos from the recipient couple into her uterus as well as the subsequent conception and birth (with the ultimate goal of handing over the child to the recipient couple). Meanwhile, Article 7(5) of 1994 Regulations forbids any medical institutions from performing artificial reproductive procedures by means of surrogacy.

In sum, these two sets of administrative rules show the government's disfavor of surrogacy. However, it is undoubtedly lawful for the infertile couple to accept either sperm or oocytes from a donor<sup>20</sup> since gamete donation is not forbidden.

But this regime faced a problem: The Department of Health may have lacked the authority to regulate these issues. Both the 1989 Ethical Guiding Principles and the 1994 Regulations constitute two sets of ordinances aimed at regulating the rights and obligations of the recipient couple and of the children conceived through artificial reproduction. Nevertheless, according to Article 5(2) and Article 6 of Central Regulation Standard Act,<sup>21</sup> the rights and obligations of the people shall be regulated by statutes passed by the Legislative Yuan and enacted by the President. In other words, those matters cannot be regulated by administrative ordinance. Therefore, the Department of Health's regime has been found to violate the Central Regulation Standard Act.<sup>22</sup>

In order to comprehensively regulate the issues of artificial reproduction a corresponding statute was vital. As a result, the Artificial

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edu.tw/retrieve/30066/094NHU05054008-001.pdf [https://perma.cc/LU6R-BCRU]; Shie-Huei Lin, *Examining the Legal Status of Children Born Through Assisted Reproductive Technology on the Aspect of Artificial Reproduction Act*, MING CHUAN U. 58 (2008); Yi-Hsuan Lee, Birth After Death: The Law and Policy of Posthumous Procreation 3–4 (June 2008) (master's thesis, National Chiao Tung University), https://ir.nctu.edu.tw/bitstream/11536/81851/1/851601.pdf [https://perma.cc/6RCP-AWD8].

19. Article 5, Principle Four, Part Two of the Ethical Guiding Principles states: "It should be prohibited from any artificial reproductive procedure of the following: (3) artificial reproductive procedure by the means of surrogacy." Ethical Guiding Principles, *supra* note 13.

20. ART Regulations, *supra* note 14, art. 6.

21. See Central Regulation Standard Act (promulgated by Executive Yuan, Aug. 31, 1970, amended, May 19, 2004), <http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=A0030133> [https://perma.cc/3AUK-UKJH] (Taiwan).

22. See, e.g., SECOND CONFERENCE OF THE 6TH SOCIAL WELFARE AND ENVIRONMENTAL HYGIENE COMMITTEE OF THE LEGISLATIVE YUAN (立法院第6屆第2會期衛生環境及社會福利委員會全體委員會議), REPORT ABOUT THE ARTIFICIAL REPRODUCTION ACT (人工生殖法草案書面報告) 2005, <http://npl.ly.gov.tw/npl/report/941006/4.pdf> [https://perma.cc/CR9S-L4SW]; Xu Lin v. Lai Fengjiao, Civil Decision no. 310 (臺灣高等法院 95 年重上字第 310 號民事判決) (Taiwan High Court, Nov. 14, 2006), <http://www.rootlaw.com.tw/BookContent.aspx?Page=1&TOID=36072&L->

Reproduction Act (人工生殖法)<sup>23</sup> was promulgated in 2007. Nonetheless, the act mentions nothing about surrogacy. This omission has various causes, including several juridical and ethical difficulties.<sup>24</sup>

The fight for the legitimacy of surrogacy still continues. In recent years, an increasing number of parliamentary members have proposed different versions of *Artificial Reproduction Act Bill*<sup>25</sup> in order to legalize surrogacy. Presently, however, none of them has been passed into law.

Despite the prohibition, it is a known fact that surrogacy arrangements are made in Taiwan, that some arrangements even involve international participants,<sup>26</sup> and that some websites advertise surrogacy services.<sup>27</sup>

### III. SURROGACY IN HONG KONG

Compared to the rest of China, surrogacy legislation in Hong Kong is relatively advanced. Hong Kong is the only region in China that allows surrogacy (though only under certain requisites), and Hong Kong also provides an exhaustive set of rules on the issue. The influence of the UK legislation<sup>28</sup> was certainly the main inspiration for such detailed and liberal regulation.

The main regulation for surrogacy in Hong Kong is the Human Reproductive Technology Ordinance (HRTO).<sup>29</sup> According to the HRTO, surrogacy arrangements are partially permitted in Hong Kong as long as some material and procedural requisites are fulfilled.<sup>30</sup>

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C o d e = 1 1 , 1 3 , 1 5 , 1 7 , 1 9 , 2 1 , 2 3 , 1 0 1 , 1 0 3 , 1 0 5 , 1 0 7 , 1 0 9 , 1 1 1 , - 1 1 3 , 1 1 5 , 1 1 7 , 1 1 9 , 1 2 1 , 1 2 3 , 1 2 5 , 1 2 7 , 1 2 9 , 1 3 2 , 1 3 4 , 1 3 6 , 1 3 8 , 1 4 0 , 1 4 2 & Year=95&TWord=% E9%87%8D%D%E4%B8%8A%E5%AD%97&TNumb=310&Conj1=AND&Conj2=AND&CCode=13 [https://perma.cc/8VQP-SLKS].

23. *Supra* note 15.

24. Mei-ling Huang (黃嬪綾), *supra* note 18.

25. Examples of the proposed Bills: Draft Revision of the Artificial Reproduction Act (Sept. 26, 2013), [http://www.ly.gov.tw/03\\_leg/0301\\_main/leg\\_bill/billView.action?id=9364&lgno=00011&stage=8](http://www.ly.gov.tw/03_leg/0301_main/leg_bill/billView.action?id=9364&lgno=00011&stage=8) [https://perma.cc/8A8A-5E4L] proposed in 2013; [Draft Revision of the Artificial Reproduction Act] (Sept. 26, 2013), [http://www.ly.gov.tw/03\\_leg/0301\\_main/leg\\_bill/billView.action?id=9984&lgno=00078&stage=8](http://www.ly.gov.tw/03_leg/0301_main/leg_bill/billView.action?id=9984&lgno=00078&stage=8) [https://perma.cc/P6AN-AF64] proposed in 2014.

26. *Woman Prosecuted for Brokering Surrogacy*, CHINA Post (May 4, 2016), <http://www.chinapost.com.tw/taiwan/local/hsinchu/2016/05/04/465110/Woman-prosecuted.htm> [https://perma.cc/G4G2-FFAJ].

27. See e.g., *Surrogacy Agency, Kaohsiung, Taiwan, FIND SURROGATE MOTHER*, [https://www.findsurrogatemother.com/surrogacy-agencies/kaohsiung-taiwan\\_6208](https://www.findsurrogatemother.com/surrogacy-agencies/kaohsiung-taiwan_6208) [https://perma.cc/NU73-PLZB] and *FAQ of Surrogacy, BABE-101 EUGENIC SURROGATE*, <http://www.baby-1001.com/en/faq.htm> [https://perma.cc/EV93-A5X9].

28. The Surrogacy Arrangements Act 1985, c. 49 (U.K.), <http://www.legislation.gov.uk/ukpga/1985/49> [https://perma.cc/W7PT-3EX4].

29. See Human Reproductive Technology Ordinance, (2000) Cap. 561 (H.K.), <https://www.elegislation.gov.hk/hk/cap561> (last visited Apr. 2, 2017) [hereinafter HRTO].

30. Jie Qiao & Huai L. Feng, *Assisted Reproductive Technology in China: Compliance and Non-Compliance*, 3 TRANSLATIONAL PEDIATRICS 91 (2014); Ernest Hung Yu Ng, et al., *Regulating Reproductive Technology in Hong Kong*, 20 J. ASSISTED REPROD.

According to the HRTO, “surrogacy arrangement” means a contract by virtue of which a woman carries a child in accordance with a contract’s clauses.<sup>31</sup> To be a “surrogacy arrangement,” this contract must be made before the surrogate actually gets pregnant, must require the delivery of the child to the other contracting party, and must transfer the biological mother’s legal parental rights. Notably, this definition only covers situations in which the child is conceived by means of ART, thus, it is not applicable to those cases (certainly rare) in which the surrogate gets pregnant by sexual intercourse. In accordance with this definition, the “surrogate mother” is a woman who carries a child pursuant to the referred arrangement.<sup>32</sup> Parentage determination is governed by the Parent and Child Ordinance (PCO),<sup>33</sup> which also governs parentage determination when the birth or pregnancy results from medical treatment services.<sup>34</sup>

#### A. *Forbidden Conduct*

Despite having relatively liberal regulations in the Chinese context, some conduct remains forbidden. Surrogacy arrangements may not involve remuneration. In other words, only altruistic surrogacy arrangements are legal.<sup>35</sup> Additionally, it is not only illegal to take part in a paid surrogacy contract; it is also illegal to promote a surrogacy contract or to participate in the negotiation of one.

According to Section 39 of HRTO, any act in contravention of Section 17 will constitute a criminal offence.<sup>36</sup> Although commercial surrogacy arrangements are forbidden under the HRTO, reimbursement for expenses is allowed.<sup>37</sup> For example, it is lawful for the surrogate to receive

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& GENETICS 281 (2003).

31. HRTO, *supra* note 29, § 2(1).

32. *Id.*

33. See Parent and Child Ordinance, (1997) Cap. 429 (H.K.), <https://www.elegislation.gov.hk/hk/cap429> (last visited Apr. 2, 2017).

34. *Id.* § 9-12.

35. HRTO, *supra* note 29, at § 17. The generality of this Article is reiterated in a Joint Statement issued by the Council on Human Reproductive Technology (CHRT) and the Medical Council of Hong Kong (MCHK) in September 2011. See Joint Statement, Council on Human Reprod. Tech. & Med. Council of Hong Kong, Surrogacy Arrangement (Sept. 2011) [http://www.mchk.org.hk/english/guideline/files/joint\\_statement-e.pdf](http://www.mchk.org.hk/english/guideline/files/joint_statement-e.pdf) [<https://perma.cc/ZP6N-Q5NF>] [hereinafter Joint Statement].

36. Section 39 Offences (HRTO), *supra* note 29:

(1) A person who contravenes section 13, 14, 15(1), (2), (3) or (5), 16(1) or (2) or 17(1) or (2), or any condition specified in a notice mentioned in section 27(7) or under section 29 or 32(2), or the condition specified in section 34(7), commits an offence and is liable-

- (a) on a first conviction, to a fine at level 4 and to imprisonment for 6 months;
- (b) on a subsequent conviction, to a fine at level 6 and to imprisonment for 2 years.

37. Section 17's Prohibition against surrogacy arrangements on commercial basis (HRTO) states:“(1) No person shall-(a) whether in Hong Kong or elsewhere, make or receive any payment for . . . [a surrogacy arrangement]”

“bona fide” medical expenses arising from pregnancy that are paid by the contracting couple under the surrogacy arrangement.<sup>38</sup> This applies to expenses that derive from the reproductive treatment and medical procedures associated with the pregnancy.<sup>39</sup> In contrast, losses of income cannot be reimbursed.<sup>40</sup>

Hong Kong also prohibits the marketing and advertising of surrogacy services, including gratuitous ones.<sup>41</sup> It is a criminal offense for any person (even for doctors of licensed medical institutions) to publish or distribute an advertisement relating to surrogacy arrangements.<sup>42</sup>

### B. *Conditions Required for Licit Surrogacy Arrangements*

According to the HRTO, gratuitous surrogacy arrangements are legal. However, some additional requirements must be fulfilled.

In Hong Kong, it is illegal to provide any surrogacy procedure to unmarried persons.<sup>43</sup> Consequently, single persons, unmarried couples, and homosexuals<sup>44</sup> cannot benefit from a surrogacy arrangement. Additionally, only gametes from the contracting couple can be used, so that additional, complex ethical issues related to the definition of parenthood can be avoided.<sup>45</sup>

Nor may surrogacy result (legally) from a capricious choice. It, legally, must arise from a medical decision grounded in health concerns. For example, the contracting woman must 1) be unable to become

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Regarding the interpretation (while in Section 2: Interpretation (HRTO)):

“payment” (付款) means payment in money or money’s worth but does not include any payment for defraying or reimbursing:

- (a) the cost of removing, transporting or storing an embryo or gamete to be supplied;
- (b) any expenses or loss of earnings incurred by a person and attributable to the person supplying an embryo or gamete from the person’s body;
- (c) in the case of a surrogacy arrangement, any expenses incurred by the surrogate mother for:
  - (i) any reproductive technology procedure; or
  - (ii) bona fide medical expenses arising from pregnancy and delivery of a child born pursuant to the arrangement.

38. *Id.*

39. *Id.*

40. *Id.*

41. HRTO, *supra* note 29, § 16(2)(b), 17(2); Joint Statement, *supra* note 35, at para. 3(e).

42. HRTO, *supra* note 29, § 16(2)(b), 17(2), 39(1); Joint Statement, *supra* note 35, at para. 3(e).

43. HRTO, *supra* note 29, § 15(5).

44. Regardless of whether they are single or in a couple, since same sex marriage is not allowed in Hong Kong.

45. HRTO, *supra* note 29, § 14; COUNCIL ON HUMAN REPROD. TECH., CODE OF PRACTICE ON REPRODUCTIVE TECHNOLOGY AND EMBRYO RESEARCH ch. 12.2 (2013), <http://www.chrt.org.hk/english/service/files/code.pdf> [<https://perma.cc/PHV4-STVU>] [hereinafter CODE OF PRACTICE].

pregnant or to carry a pregnancy successfully to its term and 2) there cannot not be another reproductive treatment suitable for her situation.<sup>46</sup>

Furthermore, the surrogate mother must also be at least twenty-one years old and she must have no special risk of medical complications during pregnancy.<sup>47</sup> If the surrogate is married, both her consent and her husband's consent must be obtained.

### C. *Enforceability of Surrogacy Arrangements*

Under Section 18 of the HRTO, “no surrogacy arrangement is enforceable by or against any of the persons making it.” This principle is reiterated by Section 5 of the Joint Statement:

While the Ordinance<sup>48</sup> allows the making of surrogacy arrangements which do not involve any commercial dealing, no surrogacy arrangement is enforceable. If any party to an arrangement refuses to act pursuant to the arrangement, the other party cannot compel the defaulting party to act in accordance with the terms of the arrangement, including handing over of the child by the surrogate mother.

Therefore, surrogacy arrangements, whether lucrative or gratuitous (although only gratuitous ones are legally permissible), are not enforceable if any party refuses to act in accordance with the stipulated contract, which means that the surrogate cannot be forced to give up the child.

## IV. SURROGACY IN MACAO

The Macanese legal order is very similar to the Portuguese one, and the interpretation of its norms basically copies interpretations given by Portuguese legal scholars.

During the Portuguese administration of Macao there was no express prohibition of surrogacy.<sup>49</sup> But even then a de facto surrogacy ban was sustained by existing norms, much as surrogacy was effectively banned in Portugal.<sup>50</sup>

In fact, according to Article 273 of the Macao Civil Code, the contract which violates public order or something called “bons costumes”—the good values (善良風俗)—is void. According to Portuguese

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46. CODE OF PRACTICE, *supra* note 45, at ch. 12.2(b); Joint Statement, *supra* note 35, at para. 4.

47. CODE OF PRACTICE, *supra* note 45, at ch. 12.3–12.5.

48. HRTO, *supra* note 29.

49. In effect, the Civil Code in place in Macao at the time of Portuguese administration (and until November 1, 1999) was completely silent about surrogacy and no other norm dealt with this matter.

50. The surrogacy ban in Portugal was not based in an express legal prohibition, but resulted from the interpretation of some existing norms. Thus, mainstream scholars (Oliveira, *supra* note 2; João Álvaro Dias, Procriação Medicamente Assistida, Dignidade e Vida, in AB UNO AD OMNES – 75 ANOS DA COIMBRA EDITORA, Coimbra, 1998) sustained that surrogacy contracts were not allowed.

legal scholars, surrogacy contracts violate public order and “bons costumes,” and therefore are null and void.<sup>51</sup>

Another argument against surrogacy contracts is grounded in the norms stipulating the requisites for adoption. Article 1834 of the Civil Code establishes that the mother can consent to the adoption of her child only if two weeks have passed since birth, while in surrogacy contracts the consent for delivering the child is provided before birth and even before conception.

Finally, the norms of motherhood determination also provide support to the surrogacy ban. Article 1657(1) of the Civil Code defines the mother as the woman that gives birth, thus precluding the selection of another woman as the legal mother (unless by means of a subsequent adoption).

These norms were already part of the Macanese legal order when Macao was under Portuguese Administration and the Portuguese Civil Code was in effect. However, besides the above arguments against surrogacy contracts in Macao, a definite prohibition was added to the new Civil Code (民法典) in 1999.

After sovereignty of Macao was transferred to China in 1999, Macao created its own Civil Code which basically followed the Portuguese one, but which added a specific prohibition on surrogacy. Article 1726 of Macao's civil code now directly prohibits agreements that provide for procreation or gestation in favor of third parties.<sup>52</sup> Despite the clear contractual prohibition, surrogacy is still not considered as a crime, nor does there appear to be any kind of administrative sanction for hospitals or health care staff engaging in surrogacy procedures.

Currently, no litigation about surrogacy has occurred in Macao; nor have there been many reports of surrogacy contracts in Macao or of Macanese citizens participating in surrogacy arrangements overseas.

## V. SURROGACY IN MAINLAND CHINA

### A. *Admissibility of Surrogacy Contracts*

Chinese law does not expressly prohibit nor expressly permit surrogacy. There is no specific rule governing surrogacy, except for several relevant provisions in three sets of departmental rules made by the Ministry of Health (re-named the National Health and Family Planning Commission in 2013).<sup>53</sup>

According to Article 3 of the 2001 Administrative Measures for Assisted Reproductive Technology (人類輔助生殖技術管理辦法) it is

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51. Oliveira, *supra* note 2, at 63.

52. Article 1726 (Procreation or Gestation Agreements for Third Parties) states that agreements for procreation or gestation on behalf of a third party are void. MACAO CIV. CODE art. 1726 (1999), [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=301408](http://www.wipo.int/wipolex/en/text.jsp?file_id=301408) [<https://perma.cc/XZ6M-L7UP>].

53. Chunyan Ding, *Surrogacy Litigation in China and Beyond*, 2 J.L. & BIOSCIENCES 33, 35 (2015).

forbidden for all medical institutions and medical staff to perform any surrogacy procedure or to commercialize fertilized eggs and embryos.<sup>54</sup> Moreover, Article 22 indicates that the medical institutions that violate Article 3 shall be warned and fined up to 30,000 Yuan. People responsible for the violations can be punished with administrative sanctions. In addition, individuals may be subject to criminal liabilities. Nevertheless, participating or promoting a surrogacy arrangement is not a crime *per se*.

The other two sets of departmental rules relevant for this issue are the 2003 Norms of Assisted Reproductive Technology (人類輔助生殖技術規範) and the 2003 Ethical Principles of Assisted Reproductive Technology and Human Sperm Banks (人類輔助生殖技術和人類精子庫倫理原則).<sup>55</sup> Subsection 5, Part 3 of the Ethical Principles of Assisted Reproductive Technology and Human Sperm Banks also prohibits the medical staff from performing surrogacy procedures.<sup>56</sup>

However, administrative regulations do not have as broad an effective reach as legislative rules,<sup>57</sup> therefore some authors argue that it is vital to create a special legislative regulation to comprehensively regulate artificial reproduction.<sup>58</sup>

The fact is, although the government seems to disapprove of surrogacy, it would be hasty to conclude that surrogacy is totally forbidden. In effect, these departmental provisions made by the Ministry of Health do not carry any criminal penalty, but merely administrative sanctions.<sup>59</sup> Furthermore, they only impose administrative liabilities on the violating medical institutions and medical staff, but not others. For instance, there is no sanction for the surrogate or for the commissioning parents.

In sum, the Chinese government has not issued a general prohibition on surrogacy and surrogacy contracts are not necessarily invalid under Chinese law. Their validity will depend on how the content of these contracts is evaluated by a court.<sup>60</sup>

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54. Administrative Measures for Assisted Reproductive Technologies (人类辅助生殖技术管理办法) (promulgated by Ministry of Health, Feb. 20, 2001), <http://www.moh.gov.cn/mohzcfgs/s3576/200804/29614.shtml> [<https://perma.cc/7ANP-SER4>] (China).

55. The Biomedical Research Ethics Committee has published two sets of rules. *Ministry of Health Revised the “Human Assisted Reproductive Technology Specifications,” “Human Sperm Bank Basic Standards and Technical Specifications,” “Human Assisted Reproductive Technology and Human Sperm Bank Ethical Principles,”* BIOMEDICAL RES. ETHICS COMM. (June 2003), <http://www.sibs.ac.cn/iec/new.asp?id=351> [<https://perma.cc/4QE3-88TS>] (China).

56. See *infra* note 63.

57. Although the Legislation Law of the People's Republic of China grants an important role to administrative regulations, it is generally understood that they are low-level norms, not suitable to rule the most important issues, such as the ones involving reproduction.

58. Also criticizing the administrative nature of these norms, Mu Jiahui, *Discussion on Legal Issues of Artificial Reproduction*, 1 FRONTIERS LEG. RES. 78, 84 (2013).

59. It should be noted that currently there are not criminal provisions associated to surrogacy, not even to ART in general.

60. Ding, *supra* note 53, at 35–36.

Surrogacy contracts will still be illegal if a court concludes that they violate “public interest,” which is generally understood as a kind of “social morality,” according to Article 55(3) and 58(5) of the 1986 General Principles of Civil Law (中華人民共和 國民法通則).<sup>61</sup>

Nonetheless, Chinese legal scholars cannot reach a consensus on whether surrogacy contracts violate the “public interest” or not.<sup>62</sup> If the contract involves a payment to the surrogate, it is definitely illegal, since the 2003 Ethical Principles of Assisted Human Reproductive Technology and Human Sperm Bank (人類輔助生殖技術和人類精子庫倫理原則) impose a prohibition on any kind of commercialization in the context of reproductive technologies, including human gametes and human embryos.<sup>63</sup>

This raises the important legal question, why was the surrogate getting paid? Is the surrogate paid for the egg (which may even be provided by a donor) or for the embryo or because of the gestational service she provides? If it is the first (the egg) or the second (the embryo) then the payment violates the Ethical Principles. Conversely, if the surrogate is merely being paid for the gestational service it can be argued that the Ethical Principles are not being violated. Practically, however, it seems that unpaid surrogacy escapes from the legal prohibition.<sup>64</sup>

Despite the dubious legal status of surrogacy arrangements, surrogacy arrangements remain surprisingly widespread in China.<sup>65</sup> Some studies allege that in the last thirty years more than 25,000 babies were born from surrogacy arrangements carried out by around 500 unlicensed agencies.<sup>66</sup> In addition, the demand for this procedure is growing by up to thirty percent, especially underground, as the market takes advantage of the internet. The reasons for the proliferation of surrogacy arrangements are various, but the increase of infertility rates and the importance of pre-

61. See General Principles of the Civil Law of the People's Republic of China (promulgated by Order No. 37 of the President of the People's Republic of China, Apr. 12, 1986), [http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/11/content\\_21898337.htm](http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/11/content_21898337.htm) [<https://perma.cc/K94H-3832>].

62. Ding, *supra* note 53, at 44.

63. See Ethical Principles of Assisted Human Reproductive Technology and Human Sperm Bank, § 6, <https://www.google.pt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjTps7Li57LAh-VFWRoKHZugAJcQFggcMAA&url=http%3A%2F%2Fwww.nhfpc.gov.cn%2Fewebeditor%2Fuploadfile%2F2015%2F07%2F20150720160021245.doc&usg=AFQjCNF2Wd4nTjP8aXOH-8gi1W4P8YsCqw&sig2=hnKaP9oW14yufb91VFK-06g> [<https://perma.cc/C4SZ-FQTX>] (China).

64. Ding, *supra* note 53, at 45–46.

65. Some of the cases were quite bizarre, as the Guangdong couple that in 2006 had five babies at once after hiring two surrogates (in addition, the female member of the couple also got pregnant with triplets; thus, the couple actually had eight children) and paying one million yuan. Jack Perkowski, *China's One-Child Policy's Unexpected Issue: Infertility*, FORBES (May 25, 2012, 9:25 AM), <http://www.forbes.com/sites/jack-perkowski/2012/05/25/chinas-one-child-pollicys-unexpected-issue-infertility> (last visited Apr. 2, 2017).

66. Ding, *supra* note 53, at 34–35; Qiao & Feng, *supra* note 30, at 95.

serving bloodlines (or, at least, a bloodline semblance) are probably the main reasons for the boom in surrogacy contracts.

### B. *Enforcement of Surrogacy Contracts*

The enforceability of surrogacy contracts is largely an open question in Chinese contract law, and it is much debated what would happen if litigation about surrogacy arrives in court. In fact, courts are divided on this issue. The analysis of the existing case law shows that some courts consider surrogacy contracts totally invalid, while other courts consider surrogacy contracts only partially invalid; but the courts that consider surrogacy contracts totally invalid tend to allow the surrogate to keep the money already paid to her.<sup>67</sup>

However, courts agree that the specific clause of the surrogacy contact that involves the sole care and control of the child is not enforceable. This conclusion is derived from Articles 15–17 of the Opinions of the Supreme People's Court on the Issue of Care and Control of the Child (最高人民法院《關於人民法院審理離婚案件處理子女撫養問題的若干具體意見》), which state that all agreements established by divorced parents can be modified at any moment and thus cannot be enforceable.<sup>68</sup> This solution seems to be applicable to agreements between the surrogate and the commissioning parents.<sup>69</sup>

## CONCLUSION

Since Greater China includes four different legal orders, each one inspired in its own set of values, surrogacy arrangements are ruled (or sometimes not ruled, due to the absence of a specific legal norm) by four different legal regimes. Hong Kong features the most complete and clear range of legal norms, which were inspired by the British administration of the territory, and which allow surrogacy under certain conditions. In Taiwan and Mainland China the juridical status of surrogacy is not clear due to the lack of specific juridical norms on the issue. Nonetheless, surrogacy remains widely practiced and it seems that the surrogacy contacts which do not involve payment are not illegal, yet their legality remains to be clarified. Conversely, Macao has the most restrictive law on this matter, since it expressly forbids surrogacy contracts, even though it does not criminalize them.

Still, a common set of norms regarding surrogacy in Greater China is neither plausible nor desirable. Each territory maintains its own legal system because each territory is very different and because a common

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67. Ding, *supra* note 53, at 41, 46.

68. These Opinions are a set of regulations provided for solving parental supervision after a divorce. *Opinions on the Issue of Care and Control of the Child: On the People's Court to Deal with Divorce Cases to Deal with Children's Support a Number of Specific Views*, SUPREME PEOPLE'S COURT (Nov. 3, 1993), [http://ht.66wc.com/News\\_Bank.asp?ID=48](http://ht.66wc.com/News_Bank.asp?ID=48) [<https://perma.cc/R9XV-T73Q>] (China).

69. Ding, *supra* note 53, at 46.

solution would demand profound modifications in all the involved legal orders.

However, clarifications about what is restricted and what is legitimate regarding surrogacy would be desirable for the legal orders in which surrogacy contracts are legally dubious (Taiwan and Mainland China); and a more open and liberal approach to surrogacy would be desirable in the legal orders that forbid it (Macao).