
“You were an Embryonic Dragon, Temporarily Nurtured in the Belly of a Bitch”.

Surrogacy in China: Tradition, Ideology, Gender, and the Law

by

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Abstract: On 27th December 2015 the Standing Committee of the National People’s Congress of the People’s Republic of China passed the amendments to the “Law of the People’s Republic of China on Population and Family Planning”, removing the prohibition of “any form of surrogacy” contained, instead, in previous NPC’s drafts. The national legislator’s decision reflects the tendency recently showed by some People’s courts and shows the growing attention dedicated by the Chinese leadership to this reproductive technology that may potentially increase satisfaction “within the people” and improve social stability. In this paper, I will analyse Chinese legislation, jurisprudence and Courts’ decisions on the matter using the comparative method to better understand the complex relationship among legal transplants, tradition, ideology and gender issues in a socialist market economy.

On 27th December 2015 the Standing Committee of the National People’s Congress of the People’s Republic of China (hereinafter NPC) passed the amendments to the “Law of the People’s Republic of China on Population and Family Planning” (中华人民共和国人口与计划生育法 *Zhonghua renmin gongheguo renkou yu jihua shengyu fa*, hereinafter LPPF). The new law has been globally welcomed for ending the Chinese one-child policy inaugurated by Deng Xiaoping in 1979. How-

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ever, its latest version aroused the interest of Chinese citizens and legal scholars also for another reason: the removal of the prohibition of “any form of surrogacy” (禁止以任何形式代孕 *jinzhi yi renhe xingshi daiyun*) contained in the drafts previously discussed by the NPC (睢素利, 李京儒, 刘欢, 中国计划基于学杂志 Sui Suli, Li Jingru, and Liu Huang 2017: 804).

The Chinese legislator’s choice has left room for further regulation allowing surrogacy, or – as it is also called – “surrogate motherhood”. This expression generally refers to a woman bearing a child on behalf of someone else, waiving her parental rights (Gervasi 2018: 213). Surrogacy can be carried out in many ways, the most significant distinction being the one between “traditional surrogacy” and “gestational surrogacy” (Gervasi 2018: *ibid.*). In the first case, the surrogate mother provides her own genetic material. She becomes pregnant through sexual intercourse with the intended father or through in vitro fertilisation and she is biologically related to the newborn baby (Gervasi 2018: *ibid.*). In the case of gestational surrogacy, instead, the embryo is always generated through in vitro fertilisation. The oocyte and the sperm can be provided by the intended parents or by donors. The surrogate mother, thus, has no genetic links with the child (Gervasi 2018: *ibid.*). It is worth noting that both kinds of surrogacy can imply an “altruistic” or “commercial” arrangement or contract (Gervasi 2018: *ibid.*). In altruistic surrogacy the surrogate mother will only be reimbursed medical costs incurred. In commercial surrogacy the intended parents will also remunerate the surrogate mother (Gervasi 2018: 213-214). In many countries – mainly of the Western Legal Tradition – problems stem from the evolving concept of parenting and from the broadening of the legal and cultural definition of “father” and “mother”. In the case of China the debate is characterised by cryptotypes established in millennia of patrilineal and polygynic society.

Somehow, such cryptotypes – which became illegal after the foundation of the PRC as they were perceived as “feudal” relics – are coming back due to a combination of factors. These include falling fertility rates caused by decades of “only child” campaigns, reforms and economic development, coupled with the availability of new reproductive techniques and the recent emphasis on traditional Chinese values introduced by President Xi Jinping. What do “motherhood” and “surrogacy” mean in contemporary China? What are Chinese legal scholars’ opinions on the subject, and what are the proposals put forward to reconcile the legitimate expectations and rights of all parties involved, in particular the “supreme interest of the child”? To put these questions in context, it is necessary to examine the evolution of these concepts over the centuries, with a brief analysis of some Chinese traditional family law institutions.

Surrogacy in China: traditional legacy

[Xu Yingkui] was Governor-general of Fujian in 1897 [...]. Xu was born to a concubine of his father’s, who died after he had just passed the imperial examination. Xu’s request to let his natural mother’s (生母 *sheng mu*) coffin pass through the main entrance of the house during

the funeral procession was repeatedly denied by his formal mother (嫡母 *di mu*). [...] At last, Xu asked, “Will my own coffin be allowed to pass through the main entrance after my death?”. The formal mother answered: “Yes, of course it will. You were an embryonic dragon temporarily nurtured in the belly of a bitch (儿乃龙胎狗肚 *er nai long tai gou du*) [...] (Kiung Jai Koh Clan Association 1971: 63).

The above passage is reminiscent of Marilyn Strathern’s (1993: 23) position on the relationship between reproduction and kinship. In particular, the British anthropologist criticises the emphasis placed on the bodily process, rejecting the axiom that the biological aspect should prevail in the social recognition of parenthood. According to her, this is rather limited in both space and time, being, in reality, nothing more than a Euro-American Twentieth-century view. In fact: “[...] *While everywhere social arrangements attend to the production and rearing of children, it is not the case that everywhere the facts of procreation are taken to be of prime significance*” (Strathern 1993: *ibid.*).

Certainly, due to reproductive technology innovations, in the last decades the link between procreation and parenthood has started to be questioned even in the Euro-American context. Legal systems, in particular of the Western Legal Tradition, are now forced to (re)define the notions of “mother” and “father”, adapting them to situations in which the conception of a child is not always the result of intercourse between two individuals of opposite sex (possibly) in the privacy of their marital bed, but can involve a plurality of subjects in the public space of a hospital (Carmen Shalev 1989: 16).

The latter aspect is part of the broader debate on the ever-increasing medical control over matters of life and death. In this paper, however, I would like to focus on another aspect: the capacity of ART technologies, in particular gestational surrogacy, to break down the concept of parentage and “motherhood”, splitting them into distinct genetic, gestational and social functions (Shalev 1989: *ibid.*).

While interference of technology and science is unprecedented, the dissociation between biological and social parenting can be traced in history, as the Late Imperial China dialogue between Xu Yingkui and his “formal mother” shows, in a crude but rather effective way.

In fact, as Francesca Bray (2009: 182) pointed out, Late Imperial China was “*a patrilineal, polygynous society, with its own forms and practices of surrogacy or multiple parenthood*”. The principle of patrilineal descent was at the basis of the Chinese socio-political system at least since the Western Zhou’s era (1100 BC-771BC) and it became an imperial cornerstone under the Han dynasty (206 BC-8 AD) when Confucian thought was transposed into government ideology. A man’s greatest duty was to provide his lineage with at least one (preferably male) heir, who would inherit his ancestors’ *qi* 气, take care of the ritual offerings to their spirits, and contribute sons to continue the lineage (Bray 2009: 185). “Blood continuation” (血缘延续 *xueyuan yanxu*) and “son and grandson pervaded the hall” (子孙满堂 *zisun mantang*) represented the traditional Chinese view of a perfect family life (石雷, 占泸霞 Shi Lei, Zhan Luxia 2019: 79). Furthermore, Confucian orthodoxy considered “continuing the lifeline of the family” (延续家族命脉 *yanxu jiazhu mingmai*) at the core of the

concept of “giving birth” (石雷, 占泸霞 Shi Lei, Zhan Luxia 2019: *ibid.*), and “having no male heir” as “the gravest of the three cardinal sins against filial piety” (不孝有三 无后为大 *buxia you san wu hou wei da*) (石雷, 占泸霞 Shi Lei, Zhan Luxia 2019: *ibid.*). Moreover, regarding women, “The rites of Dai the Elder” (大戴礼记 *Da Dai Liji*) listed “being childless” among the “seven out” (七去 *qi qu*), i.e.: the seven reasons that allowed a man to legally repudiate his wife (大戴礼记-本命, Dadai Liji – Benming, n. 13).

In this context, multiple parenthood, generally stemming from adoption or polygyny, often appeared as the only solution for childless couples eager to avoid the shame of infertility. Indeed, not only adoption, but even concubinage could benefit at the same time husbands and wives, as the law considered the father’s principal wife as the biological mother of all the children recognised by him (杨海超 Yang Haichao 2020: 13). The principal wife would become, in all respects, the only legal and ritual mother (嫡母 *dimu*) of the family (杨海超 Yang Haichao 2020: *ibid.*), and the children had to mourn and worship her as their full parent (Bray 2009: 186), regardless of who (concubine 妾 *qie*, or maid, 女佣 *nüyong*) had given birth to them (Bray 2009: 185). Hence, both concubinage and adoption served principal wives as socially (and legally) approved forms of “surrogate motherhood” or “surrogacy”, allowing them to appropriate the biological labour of less privileged women. The reason why in Chinese imperial society such behaviour was accepted as perfectly “natural” could be more easily understood considering the value attributed by Confucian orthodoxy to education and, on the other hand, the dual understanding of women’s fertility. According to Confucius, education was, at the same time, a means of transformation and cultivation of the self, and a way to acquire the Dao (Charlene Tan 2017: 3). It was only through learning and practice that people could differentiate themselves: “By nature, men are alike. By study, men become far apart (性相近也, 习相远也 *xing xiang jin ye, xi xiang yu-an ye*) (孔子, Kongzi ch. 17 n. 2). That means that people could only develop their potential if and how they preserved their heart-and-mind and cultivated their character (Rita Mei-Ching Ng 2009: 3). It is through education that one could grow into a true gentleman (君子 *junzi*), a person at the same time worthy and morally obligated to serve the people and the state (Ng 2009: 3). Not surprisingly, therefore, during imperial times the quintessence of motherhood was not to give birth, but to provide a child a moral education that would encourage him to pursue honourable goals and achieve social success.

That is not to say that “biological” contribution was considered of little importance. On the contrary, according to Chinese traditional reproductive medicine, it was one of the two fundamental aspects of female fertility: the ability to reproduce life (生 *sheng*), or to give birth (产 *chan*), counterbalanced by the ability to nurture life and successfully bring up a child (养 *yang*) (Bray 2009: 189). In the case of multiple motherhood, this yin-yang (阴阳) duality was embodied in the different roles assigned to concubines and maids on the one hand and to principal wives on the other. Being strong and fecund (阳 *yang* characteristic) the former

were fit to give birth but unsuitable to educate the master's heir because of their humble origins (阴 *yin* characteristic). Principal wives were, instead, too weak to conceive and deliver a child (阴 *yin* characteristic), but had the social status, authority and culture required to bring up and educate their husbands' offspring (阳 *yang* characteristic) (Bray 2009: *ibid.*). In this sense, multiple motherhood not only allowed the master of the house to give continuity to his lineage; through the (harmonious?) combination of the yin-yang characteristics of the household women, multiple motherhood also secured him a healthy, properly cultivated progeny, that would bring honour to family and ancestors.

Besides concubinage and adoption, Ancient China knew at least one other kind of "surrogacy" and multiple motherhood: the custom of "renting out" (出借 *chujie*) wives, also referred to as "borrow a woman's belly to produce offspring" (借腹生子 *jiefu shengzi*) or, more technically, "pawning wife" (典妻 *dian qi*).

This practice – which comes from the even more ancient custom of "selling a wife" (嫁妻 / 卖妻 *jiaqi/maimai*) (徐海燕 Xu Haiyan 2005: 77) – is mentioned for the first time in the "Book of Southern Qi: The Biography of Wang Jingze (南齐书·王敬则传, Northern and Southern Dynasties era (approx. sec. half of the 6th Century) (徐海燕 Xu Haiyan 2005: *ibid.*; 李群 Li Qun 2010: 42). It is worth remarking that as other forms of *dian*, in the first phases of its development the *dianqi* was a kind of mortgage, or a sale with redemption agreement (李群 Li Qun 2010: *ibid.*). In particular, it was a contract according to which a man (the original husband 原夫 *yuanfu*) could pledge an asset (his wife, who became the *dian* wife 典妻 *dianqi*) to another man (the *dian* husband 典夫 *dianfu*) for a certain amount of time (generally between three and five years) (徐海燕 Xu Haiyan 2005: 78).

The wife was a sort of collateral for a loan; thus, once the term expired and the loan was reimbursed, she was supposed to return to her husband's home. However, due to the "ordinary depreciation" of the woman after the years spent in *dian*, few husbands were willing to redeem their wives when the contract expired (徐海燕 Xu Haiyan 2005: 78). Due to the inherent risks for the *dian* husband, this type of contract was not very common. It was only later, approximately during the Tang dynasty (618-907), that the *dianqi* changed its social function, becoming more appealing and spreading throughout China. In practice, it was transformed into a kind of contract of employment or leasing (徐海燕 Xu Haiyan 2005: *ibid.*), the characteristics of which could be slightly changed according to the will of the parties or local customs (徐海燕 Xu Haiyan 2005: 79). In its basic structure, it was a contract pursuant to which a man could rent out his wife for a certain time (five, ten or fifteen years, generally depending on the wife's fertility) to a childless man in exchange for a certain amount of money. The main purpose of this agreement was to let the *dian* husband perpetuate the *qi* (气, vital energy) of his family, so the *dian* wife had to have sex with him and get pregnant. In order to avoid confusion, she could not live with the original husband and sometimes she was not even allowed to look after her original children (徐海燕 Xu Haiyan 2005: 78).

The parties (i.e. the original husband and the *dian* husband) also specified whether the *dian* wife had to live in the *dian* husband's home, or to meet the *dian* husband in another place (徐海燕 Xu Haiyan 2005: *ibid.*). Moreover, they established the ownership of the children she would give birth to during the *dian*. In fact, the *dian* husband could decide to keep all the children or choose to retain only the boys. In the latter case, once the *dian* period expired, the girls would have to follow their mother, and go back to the original husband's house. In any case, the son born during the *dian* would take the *dian* husband's surname, inherit his estate and be included in his genealogy (徐海燕 Xu Haiyan 2005: *ibid.*).

This practice, which was always considered immoral and contrary to the Chinese rites (礼 li) (李群 Li Qun 2010: 43), became illegal starting from the Yuan dynasty (李群 Li Qun 2010: 42). Nevertheless, and even though the Ming and the Qing Codes harshly punished the crime of "Facilitating and tolerating the wife's or concubine's fornication" (see arts. 391 and 367, The Great Qing Code) under which the case of *dianqi* fell (Matthew H. Sommer 2000: 227; 李群 Li Qun 2010: *ibid.*), the custom of "pawning a wife" continued over the centuries (徐海燕 Xu Haiyan 2005: 78). This happened perhaps also because imperial magistrates often failed to follow the law when deciding on such cases, especially in times of famine, or when the wife was the very last asset of a family, and renting her out was the family's only hope of survival (李群 Li Qun 2010: 43-44). The above custom was finally wiped out as was any other "feudal" residue after the foundation of the PRC. However, infertile couples have always continued to look for solutions, due to the pressure of traditional culture, and the sense of inferiority and social discredit caused by the lack of children.

Surrogacy in Today's Chinese Law and Practice

According to recent studies, China's current infertility rate reaches 15%-20% (40-50 million) in women and 10%-12% (45 million) in men of reproductive age (15-45 y.o.) (Logan, Gu, Li, Xiao, Anazodo 2019: 1). Among the possible causes of these high rates, the interplay among the institutions of marriage and family, economic development and government policies seems to have particular importance. This interplay could also be at the root of the Chinese attitude towards the regulation of ARTs in general, and surrogacy in particular. As we have seen, the 2015 amendment to the LPFP put an end to the "one-child policy" and introduced the "two children policy". Moreover, in 2016 the Chinese government stopped the incentives for couples who decided to marry "late" (Global Times 2016). Nevertheless, many couples are still reluctant to get married – not to mention to procreate – at a young age, due to career pressure, intense competition, and the rising costs of buying a house (China Daily 2018). Unfortunately, the right time to conceive in a social and economic perspective does not always coincide with the most fertile phase of life. It is worth remembering that the first Chinese test-tube baby was born at the Third Hospital of Beijing University in 1988 (傅适野 Fu Shiye 2018), and the first test-tube surrogate baby was born at the same

hospital in 1996 (李晓宁, 章晓敏, 徐欢 Li Xiaoning, Zhang Xiaomin, Xu Huan 2013: 245). Thus, since the beginning of the new century, an increasing number of people have been turning to ART(s), and – once all the other infertility treatments appear ineffective – to surrogacy. Among these families, there are the ones meeting the conditions provided for by LPFP to have a second child but too old to procreate (tens of millions, according to the People’s Daily), and parents whose single child died (睢素利, 李京儒, 刘欢 Sui Suli, Li Jingru, Liu Huang 2017: 804). For the last two groups, surrogacy could be the last chance to fulfil the desire to have a(nother) biological child.

Not surprisingly, then, in the last two decades in the People’s Republic of China surrogacy has boomed, as shown by increasing numbers of surrogacy agencies springing up in big cities (Shi Lei 2019: 360), and the huge number of advertisements offering surrogacy services available on the web or even written on the walls (Ding Chunyan 2015: 34). Nevertheless, at the time of writing (May 2021) in PRC’s national laws there are no specific rules governing surrogacy. Actually, in the draft of the above-mentioned 2015 amendment to the LPFP, article 6 explicitly prohibited “any form of surrogacy” (任何形式的代孕 *renhe xingshi de daiyun*), but the provision was deleted in the final version (杨海超 Yang Haichao 2020: 14). At present, therefore, the matter is only regulated by some administrative documents issued by the Ministry of Health. I am referring in particular to the Measures on the Administration of Human Assisted Reproductive Technology (人类辅助生殖技术管理办法 *Renlei fuzhu zhengzhi jishu guanli banfa* 2001; hereinafter: Measures); the Code of practice on Human Assisted Reproductive Technology (人类辅助生殖技术规范 *Renlei fuzhu shengzhi jishu guifan*, 2001, revised in 2003); Basic Standards for Human Sperm Banks (人类精子库基本标准 *Renlei jingzi ku jiben biao zhun*, 2001, revised in 2003); Code of Practice of Technology Concerning Human Sperm Bank (人类精子库技术规范 *Renlei jingzi ku jishu guifan*, 2001); Ethical Principles of Performing Human Assisted Reproductive Technology 实施人类辅助生殖技术的伦理原则 *Shishi renlei fuzhu shengzhi jishu de lunli yuanze*, 2001, revised in 2003).

The Measures make it clear that ART(s) can only be implemented in medical institutions approved by the administrative department of health (art. 1), and no medical staff should ever participate in surrogacy (art. 3). The other documents mentioned reiterate the prohibition of any form of surrogacy and forbid other reproductive technologies, such as stimulating ovulation to achieve multiple births or providing oocytes for commercial purposes. Being sectoral rules, these provisions only regulate medical institutions and doctors’ activities. Therefore, they do not apply to surrogacy agencies, surrogate mothers or commissioning parents, nor can they be of any help when the validity of a surrogacy contract is at stake. Besides, no Chinese Law provides for legal parenthood at the time of birth. This loophole was not eliminated by the promulgation of the Civil Code of the People’s Republic of China (民法典 *Minfa dian*, enacted on 28th May, 2020 and effective from 1st January, 2021). The only articles of the Civil Code dealing (indirectly) with the matter are art. 1071, pursuant to which an illegitimate child

will have the same right as a legitimate child, and art. 1073, which regulates the right of standing in lawsuits for affirmation or denial of maternity or paternity.

Since no definition of a legitimate child can be found in the Civil Code or in any other Chinese law, the judges of the People's Republic of China can only follow the guidelines on the determination of parenthood issued by the Supreme People's Court (hereinafter SPC) from the 1950s (Shi Lei 2019: 363). In practice, as summarized by Shi Lei (2019: *ibid.*), the basic rules on the parent-child relationship applied by Chinese courts are: a) couples in a marriage are the legal parents of children born in that marriage; b) a child born out of marriage is an illegitimate child. The legal mother is the woman who gave birth to the child. The legal father is the man who acknowledges paternity or the one who is proved to be the genetic father by a DNA test; c) a child born through ART agreed by both husband and wife is that couple's legal child. Most of these principles were formed well before the spread of ARTs, and in fact they work perfectly in "normal" circumstances, when a child's biological mother, gestational mother, and intended mother are the same person. However, they are difficult to apply to surrogacy cases, i.e. cases in which intended mother and gestational mother are always two different women, and sometimes even the gestational mother and the biological mother are not the same person.

In these situations, the absence of specific rules has led to recurrent inconsistency in courts' decisions. For example, in a guardianship dispute case heard by the People's Court of Dingcheng District (Changde City, Hunan Province) in 2009, the judge awarded the surrogate child's guardianship to commissioning parents, stating that the content of the surrogacy agreement was true and did not violate laws or administrative regulations (杨海超 Yang Haichao 2020: 14), while in a similar case decided in 2012, the People's Court of Siming District (Xiamen City) declared a surrogacy agreement null and void, affirming that it was against public order and common decency (杨海超 Yang Haichao 2020: *ibid.*). To be fair, in recent years this position has become increasingly common among Chinese courts, both in commercial surrogacy contract cases and in (rarely brought before a court) traditional surrogacy contract cases (Xiao Yongping, Li Jue, Zhu Lei 2020: 8-14). On the contrary, the issue of legal parenting is still quite controversial, even after the decision of the case Chen Yin v. Luo Rong-geng and Xie Juanru (2015). Considered as the first case on custody of a surrogate child, this lawsuit was published in the SPC's Journal, Renmin Sifa (人民司法 People's Judicial) as an "example-case" (侯卫清 Hou Weiqing 2017: 4-11), and it was even mentioned in the SPC's annual report to the National People's Congress as a showcase for the protection of the "best interest of the child". The facts are as follows: on 28th April 2007, Ms. Chen Yin and Mr. Luo Xin registered their marriage, the second one for both of them. At the time of the wedding, Mr. Luo already had a son and a daughter, while Ms. Chen suffered from infertility. They decided to have children through surrogacy. The embryo(s) were created using Mr. Luo's sperm and a third-party donor's oocytes, and were eventually transplanted into the womb of a surrogate mother through IVF. On 13th February 2011, the surrogate mother gave birth to twins, who lived with Mr. Luo and Ms. Chen. On 7th February

2014 Mr. Luo died. On 29th December 2014, having learnt that the twins had no blood relationship with Ms. Chen, Mr. Luo's parents filed a lawsuit, claiming the sole care and control of the surrogate children. On 29th July 2015, Shanghai Minhang District People's Court fully accepted the plaintiffs' claims: according to the court, there was neither a natural nor a social parent-child relationship between Ms. Chen and the twins. Since the twins' biological father was dead, and their mother was unknown, their father's parents should have custody of them. On appeal, the Shanghai First Intermediate People's Court reversed the decision and awarded Ms. Chen the custody of the surrogate children. The court held that Ms. Chen had formed a step-parent-child relationship with the children, and therefore she should take precedence over her husband's parents. Besides, she could guarantee a more comfortable and peaceful life to the children. According to the judge: "In the case of unclear legal provisions or loopholes [...] the judge has to apply the functionalist approach, taking the 'best interest of the child' as reference" (侯卫清 Hou Weiqing 2017: 11). At the same time, the court made it clear that the decision should not be taken as a judicial legitimation of surrogacy. In fact, it was merely a recognition of the fact that Ms. Chen's guardianship was more conducive to the healthy growth and development of the twins, and more consistent with the children's "best interest" (侯卫清 Hou Weiqing 2017: *ibid.*). In my opinion, such interpretation recalls the traditional idea of double motherhood, and the view according to which a child's "social mother" is the woman who acts as the "de facto" caregiver.

As shown by the analyses above and commented by many Chinese authors (Xiao Yongping, Li Jue, and Zhu Lei 2020: 19), the PRC's lack of regulation on surrogacy has made it risky, full of ambiguity, and even dangerous. The problem could only be solved by adopting a regulated approach that would bring certainty in Chinese law and increase harmony in what has been considered, from Ancient Times to Xi Jinping's era, the "basic cell of society i.e.: family (社会的基本细胞 *shehui de jiben xibao*)" (Maurice Freedman 1961-1962; 刘忠世 Liu Zhongshi 1997; An Baijie 2018). What are the options and the legal models – if any – currently taken into account by the Chinese legislator?

Surrogacy in China: New Tendencies?

The Chinese legislator's choice not to express an opinion on the issue in the 2015 LPFP seems odd, considering the total ban on surrogacy implemented since the beginning of the new century by the PRC's government agencies in charge of health and family planning and the 2013 and 2015 national campaigns against abuse of ART(s) (Shan Juan 2013; Global Times 2015). The latter was launched in April 2015 (i.e. only eight months before the final approval of LPFP's amendment), and explicitly targeted surrogacy (Xiao Yongping, Li Jue, and Zhu Lei 2020: 19). Involving twelve government departments, it focused on identifying and punishing medical staff and intermediary agencies performing surrogate maternity services, shutting down web pages and prohibiting traditional media from presenting surrogacy advertisements, and strictly controlling the sale and circulation of

ARTs drugs and related medical equipment (Xiao Yongping, Li Jue, and Zhu Lei 2020: *ibid.*).

Undoubtedly, the silence of the authorities opens more than one possible future scenario. It is worth noting that, due to its special state structure, Greater China encompasses various legal systems that differ in their attitude towards surrogacy (Vera Raposo, and Sio Wai 2017: 136). I am referring to the Hong Kong Special Administrative Region (hereinafter: SAR), the Macau SAR and, even if formally not recognised, the Republic of China (RoC or, as it is called in the PRC, the Province of Taiwan). Due to the profound influence of UK legislation, Hong Kong is the only SAR that provides a complete set of rules on the matter, allowing surrogacy just under certain conditions. In particular, Part III (Prohibitions) of the Hong Kong SAR's Human Reproductive Technology Ordinance (2000, last time revised: 2021, hereinafter: HRTO) forbids providing ARTs, including surrogacy, to people who are not married, and prevents posthumous children (art. 15 HRTO). The HRTO also prohibits commercial dealings in prescribed substance (as a gamete, embryo, fetal ovarian tissue etc.) (art. 16) and surrogacy arrangements on a commercial basis (art. 17 HRTO) "whether in Hong Kong or elsewhere" (art. 16 and 17, (a)) (Daisy Cheung 2019). The Portuguese influence had the same effect in Macao, even if with opposite results. Indeed, for several years after its return under PRC's sovereignty, in 1999, Macao continued to follow the Portuguese legal attitude towards surrogacy (Rute Teixeira Pedro 2019) not explicitly banning it, but letting the courts infer its prohibition from the interpretation of general norms (Vera Raposo, Sio Wai 2017: 144). Things changed only in 2016, with the promulgation of the Macau Civil Code. Indeed, even if, in general, the latter law replicates the Portuguese Civil Code, it differentiates from it adding to article 1726 a provision by which agreements for procreation or gestation on behalf of a third party are invalid (Vera Raposo, Sio Wai 2017: *ibid.*). It is worth mentioning that, in any case, surrogacy does not seem very common in Macao, nor does it seem that many Macanese citizens relied on surrogacy abroad (Vera Raposo, Sio Wai 2017: *ibid.*).

In terms of numbers of people concerned in comparison to the total population, the situation in Taiwan is completely different, and more similar to that of Mainland China. Moreover, Taiwan, as well as the PRC, lacks specific regulations on the matter (Chih-Hsing Ho 2019: 378). Unlike Mainland China though, it seems that this legal void in Taiwanese system is about to be filled. In fact, on 1st May 2020 legislator Wu Ping-ju of the ruling Democratic Progressive Party presented an amendment to the law on assisted reproductive techniques, the Artificial Reproduction Act (人工生育法 *Rengong shengyu fa*, 2007, hereinafter: LAR), which legalises surrogacy (UCA News reporter 2020). That was only the last of the many draft amendments to the LAR proposed in recent years by Taiwanese legislators, and even by the Ministry of Health and Welfare, in order to ease restrictions on surrogacy. These attempts were certainly driven by the results of polls carried out on the issue by the government of the ROC in 2010 and 2013, according to which 86% of respondents agreed that under specific conditions, and following a medical examination, altruistic surrogacy should be legally permitted for infertile couples (Chih-Hsing Ho 2019: 381-82).

It is maybe too early to say if Mainland China will follow the same path. Indeed, the decision of repealing the provision contained in art. 6 of the 2015 LPFP draft was a consequence of the heated debate among law-makers and academics on whether to totally ban surrogacy, and pressure from ordinary citizens not to include such a prohibition in ordinary legislation (Duan Tao 2017; 时永才, 庄绪龙 Shi Yongcai, Zhuang Xulong 2016). In general, Chinese advocates of surrogacy remark that a prohibition would be useless, as it would not eliminate demand for surrogate maternity services but, on the contrary, it would drive surrogacy activities underground, with actions performed in black market clinics, increasing exploitation and health risks for the most vulnerable members of society. Therefore, scholars propose to differentiate altruistic surrogacy and commercial surrogacy, legalising the former while prohibiting the latter. This would be beneficial for commissioning parents, surrogate mothers and even the State. First, Women affected by a womb condition would not be denied their reproductive rights, thus safeguarding family harmony, possibly put at risk by their infertility. Then, surrogate mothers would be protected from exploitation, since their decision to “rent out” their womb would only depend on their wish to help another woman have a child. Finally, from the State’s perspective, the legalisation of altruistic surrogacy would not affect the common good or threaten the social order. The same scholars admit that such choice would involve a change in the definition of parenting, that should be broadened in order to include social aspects (i.e. the willingness to raise a child, the relevant responsibilities after birth or long-term responsibility and the formation of a family) alongside the biological ones (Xiao Yongping, Li Jue, and Zhu Lei 2020: 19). Undoubtedly this choice implies the acceptance of some kind of “multiple parenthood”, but not even this consequence is seen as a shortcoming. On the contrary, it will benefit the social value of “parenting”, maximise the interest of the children concerned and, by improving the stability of the family (杨海超 Yang Haichao 2020: *ibid.*), increase the stability of Chinese society as a whole.

It is especially the last aspect that could drive the PRC’s legislator to consider such advice; if, how and to what extent are only a matter of time.

Conclusions

In this paper I used the tools offered by comparative law to understand if and to what extent Chinese legal-cultural characteristics and socio-economic aspects could have an impact on the PRC’s current attitude towards surrogacy. Indeed, the analysis of Chinese legal history has showed interesting parallels between this reproductive technique and some traditional Chinese legal institutions, specifically the concepts of “multiple motherhood” and the custom of “pawning wife” (典妻 *dianqi*) or “borrowing a belly to produce offspring” (借腹生子 *shengfu shengzi*). Of course, this is not to say that in Ancient China there was such a thing as surrogacy. However, the diachronic and synchronic examination of Chinese legal and social context indicated that, despite the country’s frequent changes of ideology over the twentieth century, the principles at the basis of the traditional remedies to

female infertility have not disappeared. On the contrary, they have become part of the Chinese cultural approach to reproduction, turning out to be even more evident in the last decade due to the interplay between demographic factors and President Xi's emphasis on "Chinese cultural tradition". The values, or cryptotypes, I am referring to are all reflected in the sentence by Xu Yingkui's formal mother quoted in the title of this work: "You were an embryonic dragon, temporarily nurtured in the belly of a bitch". They are, in particular the moral duty to continue one's patrilineal bloodline, the social discredit caused by the lack of children, and (last but not least) the split between cultural and biological motherhood, with the former taking precedence on the latter. It seems to me that these very concepts can explain some of the internal inconsistencies we found in our analysis of Chinese regulations on surrogacy, especially the reluctance of the national legislators to take a clear stand against it, and the tendency of Chinese courts to attribute surrogate children's sole care and control to intended parents, using "the best interest of the child" as the basis of their judgement. As repeatedly noticed, the legislators' decision to leave a window open to surrogacy seems particularly incongruous, since it conflicts with the total ban on surrogacy implemented by the Chinese governmental agencies in charge of health and family planning from the beginning of the new millennium. However, and as we have seen, surrogacy is often the last hope to secure descent for tens of millions of Chinese families. The risk perceived by the Party is probably that, without offspring, these people could easily lose interest in the goals the leadership has set to regain public trust, in particular the "building of a moderately prosperous society" (建设小康社会 *jianshe xiaokang shehui*). Considered in this perspective, the silence of the law appears to reflect the increasing attention the PRC's leadership is currently dedicating to the practice, taken as a possible way to increase satisfaction "within the people" and, therefore, social stability. Anyway, and whatever the reasons, the legislators' choice is certainly not without cost. In the absence of an explicit prohibition on individuals and intermediaries, and without a precise definition of motherhood, in the most sensitive cases relating to surrogacy such as those concerning legal parenting and/or custody of the surrogate child, the balancing of values and interests is left entirely to the discretion of the courts. It is true that by considering the *Chen Yin v. Luo Ronggeng and Xie Juanru* as an "example-case", the Supreme People's Court has given the judges useful guidance on how to deal with surrogacy. Unfortunately, however, the case does not address all the questions on the matter. In particular, it cannot be applied in cases in which it is the surrogate mother who seeks custody rights in court. In these circumstances, the judge would very likely consider her as the "real" mother, and the commissioning parents would have little (if any) chance to obtain custody of the surrogate child. The problem is that, in the present legal framework, the surrogate mother could always change her mind, and decide to claim parentage and custody rights at any moment, even years after the child's birth. This leads to insecurity and confusion in a matter that touches the most intimate aspects of a person's life, and seriously threatens, rather than protecting, the best interest of surrogate children. Moreover, the principles at the basis of "*Chen v. Luo*" case seem to me questionable even when the ruling of the case is applicable. In fact, and at least in my opin-

ion, it can lead judges to consider a person's social and cultural status as the most important criterion for deciding legal parenting. This attitude, as I have already remarked, recalls the traditional division between "cultural" and biological mother, but could also confirm the idea that "only the rich can have children", a concept that is hardly acceptable everywhere, but particularly in a "socialist country of law" as the PRC is defined by art. 5 of its Constitution.

However, gestational surrogacy remains widely practiced by Chinese citizens, in China or abroad. I believe that this proves that the prohibitive approach until now implemented in the PRC has not only been ineffective, but it risks jeopardising the rights of the persons at stake. When choosing the path to follow, Chinese legislators should consider such failure, and possibly quickly provide the country with clear rules on the matter, also taking into account the experiences of the other legal systems encompassed in Greater China, especially the Taiwan Province (also known as Republic of China)'s one. Making clear what is restricted and what is not can ensure legal certainty, protecting at the same time the "best interest of the child", and the dignity of all the women concerned. In fact, if all the children, no matter how conceived, are baby dragons, no woman should ever be considered a bitch.

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