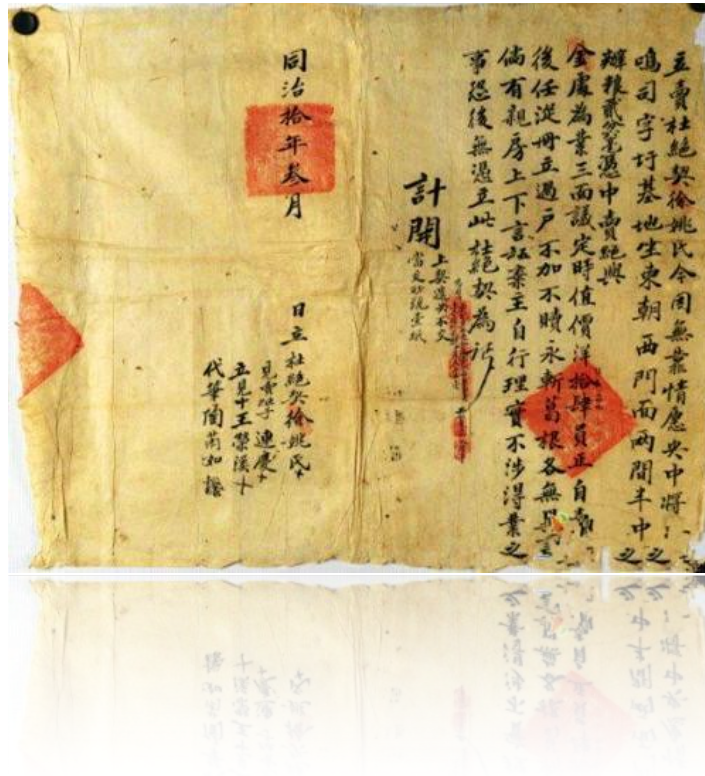


Informal Surrogacy in China : A Critical Interpretive Synthesis



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Abstract

Aim: This thesis uses a critical interpretive synthesis to explore the causes of informal underground surrogacy in China and to propose policy recommendations that are consistent with the national context in light of the causes.

Background: Surrogacy, as a form of assisted reproduction, is at this stage prohibited by Chinese law because it is considered to be against the moral order and good customs. Yet on the surface, lenient penalties and vague regulations have led to a large number of informal agencies engaging in surrogacy for high profits. Informal surrogacy can lead to violations of the rights of those involved, and substandard facilities can expose surrogate mothers to physical harm. In fact, the factors that cause informal surrogacy go far beyond incomplete laws. What are these factors and how do they influence and give rise to illegal surrogacy?

Methods: This thesis was searched electronically through three databases, Google Scholar, PubMed, and CNKI, to identify the required studies. Literature on the causes of informal surrogacy in China was identified to provide a framework for validating the studies, and literature that did not meet the norms was screened based on the criteria. The results of the studies involved were then subjected to secondary transformation. 41 papers were finally identified and reviewed to categorize them into four main sections: ideology result, historical result, social result and legal result. and each category was explained in separate detail in the 'Results' section.

Conclusions: Surrogacy needs to be regulated through a more developed and controlled regulatory process and policy that integrates agencies from multiple sectors. However, these still need to be combined with a sense of personal autonomy and traditional cultural awareness.

Contents

Chapter One: Introduction	4
Chapter Two: Theoretical Framework	7
2.1 Background and theory.....	7
2.2 Literature review	8
Chapter Three: Research Methodology	13
3.1 Research design.....	13
3.2 Data source and collection.....	14
Chapter Four: Results	17
4.1 Analysis of sociological result.....	17
4.2 Analysis of ideological result.....	19
4.3 Analysis of legal-judicial result	21
4.4 Analysis of historical result.....	23
Chapter Five: Discussions and Conclusions	27
Chapter Six: Strength and Weakness	31
Reference	32
Appendix	43

List of Tables

Table 1.....	16
--------------	----

List of Figures

Figure 1.....	16
---------------	----

Chapter One: Introduction

'There are three kinds of unfiliality, the failure to have offspring being the greatest.' (Mencius, 150 B.C.). A proverb from ancient times reveals the traditional Chinese concept of fertility. The advent of assisted reproductive technology (ART) has given infertile or homosexual families the opportunity to raise children that are related to them by blood. One ART, surrogacy, works by transplanting a fertilized egg obtained from in vitro fertilization into a surrogate mother, and it has been controversial worldwide ever since its birth. Depending on the motivation, surrogacy could be categorized into altruistic and commercial surrogacy. (Brinsden 2003; Brazier and Jensens 2020). It is well recognized that the ideas to conceive and deliver a baby in exchange for money and to treat the baby as a commercial object contradict the bioethics in many cultures and religions (Tanderup et al., 2015; Umeora et al., 2014). Even though any kind of surrogacy in practice without complete institutional protection is subject to legal issues, surrogate mothers are often vulnerable to trauma, both tangible and intangible (e.g. postpartum depression) (Fisher 2013; Anleu 1990; Yang 2015; Holzberg, 2018). In addition, it is often difficult to guarantee that the surrogate mother's human rights are not violated and that she is not subject to exploitation by the upper social classes, and there is no recourse to resolve conflicts over custody and jurisdiction of the child after birth, especially in cross-border surrogacy (Bradley 2018).

In China, the current legal provisions prohibit medical personnel and medical institutions from performing surrogacy. However, the social status quo, a result of biological factors, gender imbalance, feudal ideology, and sex selection, has made many Chinese families consider childbirth as an 'obligation' that must be fulfilled. The surrogacy market remains even with prohibitive departmental regulations, but the reality is that both the surrogate mothers and the women asking

for a surrogate may join the market only under social influence. Such a reality is particularly important for the law, policy, and judicial decisions when there are not sufficient specific provisions to base them. In modern society, individualism is gradually challenging the dominance of traditional familism, this does not mean that the modern family is out of alignment with the beliefs of traditional Chinese society, which valued family bloodlines (Tang, 1995; Yang, 2015). There is a growing grey area between childbirth and ethics, as well as between life and legal regulations. The number of surrogates is increasing. The proportion is also rising, with the increasing acceptance of homosexual couples has gradually been recognized (logan et al., 2019; Yang, 2021). At the same time, the number of surrogacy cases in the Judgment Document Network (The most authoritative website for official adjudication documents in China) has rapidly increased from two cases in 2012 to 400 cases today. In this grey zone, a new huge industry is growing wildly, creating a commercial kingdom hidden in secrecy. Consequently, The strong demand and insufficient legal safeguards for surrogacy and the crisis of ethics and morality have worked together to create the plight of surrogacy in China today.

From there, the question is born, what are the reasons behind the informal underground surrogacy market in China? In order to answer this question, several sub-questions have been designed to answer it step by step.

- What are the main forms of informal surrogacy prevailing in China?
- How the policy has evolved?
- When did this phenomenon first occur?
- What is the traditional moral acceptance of surrogacy?
- What are the possible social causes for this phenomenon?

All of the above research questions will be answered in the thesis. After answering these questions, we are likely to have a deeper understanding of the phenomenon and better suggestions for the direction of policy. To fulfill this goal, potential aspects and a map of the industry are identified and depicted in this article. This thesis aims to understand the objective reasons for illegal surrogacy to exist in a specific country with its social, political, and cultural contexts, thereby providing recommendations and suggestions on the policies and laws based on the current situations. Specifically, a critical and interpretive literature review on grey surrogacy is conducted to understand the legal provisions, ideology, and attitudes of the Chinese people toward reproduction.

Thesis consists of six chapters, this chapter being the introduction chapter. The second chapter is the theoretical framework chapter providing the theoretical support for this article and a brief summary of the previous literature. The third chapter presents the methodology and design of the study, including the source selection of the literature. The fourth chapter will present the results of the literature and the fifth chapter will focus on extending the results obtained. The final section will present the strengths and weaknesses of this literature.

Chapter Two: Theoretical Framework

This chapter concentrates on the theoretical framework, the background and objectives of the thesis topic and an overview of previous research. It aims to sort out the connections between the concepts behind the thesis question and to give the reader an initial understanding of the research context. In addition to this, the chapter identifies and briefly introduces the key points covered in previous literature through a critical summary, while some of the literature and cases give feasible solutions to the research objectives which are worth studying.

2.1 Background and theory

The underground surrogacy market, or the commercial surrogacy market, is illegal and lucrative, where surrogate mothers receive additional payments aside from necessary expenses (Wichterich 2015). Whether this reproductive labor is acceptable has been questioned for a long time, and commercial surrogacy has reinforced the discriminatory image of women as reproductive machines without much maternity (Debra Satz 2020, p127-133). From a feminist perspective, the theory of reproductive justice supports a woman's right to freely choose when and where to have children, or even not to have children at all. It focuses on the female perceptions of their autonomy, yet the content of reproductive justice is context-dependent. Such a phenomenon has been explained by a number of studies on the Indian surrogacy market, where surrogate mothers are treated very unequally and discriminatorily by client agencies and communities without understanding the possible dangers. Surrogacy in such cases is not based on the surrogate mothers' own wishes (Bailey, 2011; Wilson, 2018; Pande, 2017). Foremost among the concerns are that surrogate mothers engage in surrogacy primarily for the sake of impoverished families and that they do not have the higher literacy levels and ability to protect themselves (Pande, 2017; Yang, 2014).

China has made tremendous progress in gender equality since the reform and opening up, but Chinese women are still experiencing inequality and discrimination in some areas (Robinson, 2009; Honig, 2011; Ding, 2015). Therefore, it is debatable whether women's willingness or their need for surrogacy comes from themselves or social pressure, and it is difficult to exclude the potential vulnerability in women's behavior based on individual surrogacy activities. Besides, it is certain that the mother-baby relationship differs from others as it is an emotional and genetic bond starting from pregnancy (Pande, 2017). The priceless child is thus a commodity. Many other contractual breaches involve only the obligation to pay property when they happen, but surrogacy contracts involve the ownership of the child, and some informal agencies even consider the sex and quality of the child as a criterion for rich or poor remuneration.

Therefore, underground surrogacy is a very complex field, and there are no strict laws to regulate them. What's worse, private agreements make surrogacy contracts untraceable, putting all stakeholders in a position where they are difficult to defend themselves via formal channels when conflict occurs (Tang, 2019; Yang, 2014; Zhou, 2018) . From this perspective, understanding the social context will be the key to solve this problem.

2.2 Literature review

Following the extensive previous literature, this study presented our understandings and discussions of informal surrogacy in China, followed by a presentation of the relevant literature and case studies. Besides, we summarised the reasons that shape the current society. Finally, we explored and discussed the potential problems and made our recommendations on the relevant policies.

Extensive literature has discussed the concept and different classifications of surrogacy, as well as the motivations among classifications (ZYL & Walker, 2012; Anleu, 1990; Banerjee, 2012). Some

authors argued that the classification of surrogacy is based on gender norms, and the intention of pregnancy should be based on love rather than monetary compensations (Fisher 2013; Anleu 1990). Compared to altruistic surrogacy, commercial surrogacy faces more ethical challenges since it views female motherhood and fertility and children as commodities that can be exchanged for money, but all children should not be regarded as so. Marx explored the exploitation of reproductive labor in a patriarchal society, which is essentially a form of control over women. Even if his theories did not explore much about surrogacy, surrogacy is long and irreversible labor, and informed consent given by a surrogate mother at the time of surrogacy cannot guarantee her consent during the coming unknown process (Oakley, 1992; Meléndez, 2013; Rao, 2012; Vertommen & Barbagallo, 2021, Niekerk & Zyl, 1995). Some critics argued that it is a woman's individual right to surrogate and that surrogacy can be seen as invisible physical labor. Moreover, some scholars believed that if a state legalizes abortion, it should also legalize surrogacy (Satz, 2010). Nevertheless, this idea seems to place the civil rights capacities of the fetus and the child on the same scale. In some countries, e.g. the Netherlands, altruistic surrogacy is considered the only legal surrogacy under regulations while other types of surrogacy are illegal because they violate human rights and dignity (Piersanti et al., 2021). The informal form of surrogacy in China adopts the form of commercial surrogacy, where contracts are signed with both parties through an agency and the surrogate mother receives the profits and gives birth to the child. These agencies advertise programs that include choosing the sex of the fetus and multiple births to attract people and earn high profit (Yang, 2015) .

Varieties of empirical studies have documented the current situation of surrogacy in China and discussed the reasons behind it. A similar practice to altruistic surrogacy had emerged in ancient times, where poor families gave their children to be raised by childless ones. Several literatures refer to Confucianism and filial piety as one of the main reasons for informal surrogacy. Since the

Han Dynasty, Confucianism, a distinctive ideology represented by Confucius and Mencius, has been integrated into and dominated traditional Chinese culture (Kwon, 2021; Tang, 1995; Wei&Li, 2013; Huang&Charter, 1996; Yan&Sorenson, 2004; Rosenlee, 2012). For example, the concept of 'ritual' in Confucianism advocates standards of personal cultivation, moral norms, and social customs (Yin, 2011; Ma&Yang, 2007;). Besides, the norm that governs kinship and family relations is called 'filial piety' (Xu, 2012). Filial piety advocates the obligation of future generations to their ancestors and elders, and Confucianism has always been emphasizing the concept of 'noble birth' - the raising of one's offspring - as one of the obligations that later generations must fulfill (Ye & Yang, 2008; Zhou 2017). Under the influence of such reproductive perspectives, families today without offspring may still be subject to pressure and rejection from society (Gao, 2003; Lo & Kok, 2015). Numerous literatures have mentioned the negative emotions that this social pressure brings to families. (Greenhalgh, 2013; Lau et. al 2019; Zhao, 2019).

Ding(2015) has mentioned a form of commercial surrogacy, pawning off wives to have children for others in exchange for compensation, began to prosper in ancient China. In addition, without mandatory penalties, altruistic surrogacy and informal surrogacy often worked on a commercial model. There are also references in other sources to early Chinese forms of surrogacy such as renting a wives, or giving a children, which are similar to the present form of surrogacy. This has been considered to be the historical reason that influenced the current form of surrogacy (Ye, 2000; Yang, 2015; Liu & Chen, 2004). In addition, another reason that has been repeatedly cited is the legal reason. In China, domestic laws and regulations on surrogacy remain incomplete. In 2001, the Chinese health authorities issued the Administrative Measures on Human-Assisted Reproductive Technology (2001), which prohibits surrogacy operated by medical institutions and personnel. Such an attitude was strengthened in the revised Technical Guidelines on Human-Assisted Reproduction (revised 2003), in which the government declared its clear standpoint to prohibit surrogacy.

Complex historical, political, cultural, and legislative factors in a specific patriarchal social context have resulted in the industry of informal, underground, and commercial surrogacy in China (Yang 2015). Some scholars believed that a complete ban on surrogacy technologies would deprive women of their reproductive rights (Zhu 2021). Meanwhile, Yang Jie (2015) did a large descriptive analysis with interviews to expose informal surrogacy in China from a biopower perspective. Based on a phenomenological approach, her study found that specific social contexts could alter family structures and gender relations, which could affect women's choice on whether to use ART. When these women talk about their own surrogacy experience, they mentioned that this experience is humiliating and deprives women of their dignity. Moreover, even though their choices are affected by gender inequalities, social practices, and policies, more invisible flaws and harms under male power can be reflected in body language. Greenhalgh (2013) and Jiang et al. (2011) used statistical data to discuss the gender imbalance in China and linked the reasons behind it to surrogacy. They believed that gender imbalance is associated with long-term population policies as well as sex-selection practices. Under the traditional evaluation system, offspring are considered the most important, and traditional families consider boys to be more important because only sons can carry on the family name. Such an ideology is reflected in Confucianism, which regards the raising of offspring as one criterion of filial piety (Ye et al., 2008). In the early twentieth century, China embarked on a 'women's revolution' that included freedom of marriage and monogamy to liberate women from being subordinate in the old society (Feng, 2021).

Furthermore, surrogacy itself was less discussed in legislative practices. The main focus shifted to the custody of children, inheritance rights, and the validity of surrogacy contracts. However, the difficulties in children protection remain. Surrogacy already creates some vulnerability in children protection as it deprives the biological mother of kinship with the child in the first place, as reflected by the only two available previous legal cases on the custody of surrogate children. In

juridical practice, a child born from surrogacy is often proposed to accept an adoptive relationship and become a stepchild, which varies from the real situation of surrogacy. Shaw (2020) describes this situation in detail and analyses the moral choice of a surrogate mother to become a natural mother and protect the best interests of her surrogate child even by conflicting with the laws. Previous cases and literature on relevant issues in the surrogacy market have not succeeded in safeguarding the best interests of the child as well as the surrogate mother under different circumstances. Some issues remain unresolved in the current policy, such as the legal conflicts in the custody of the child when a couple's relationship breaks down during pregnancy. Issues of privacy protection for surrogate mothers and children and dispute resolution in the absence of legal provisions in the event of a conflict of laws (Tang, 2019; Guo, 2019; Zhou, 2018). In accordance with the principle that justice must not be denied, judges should apply and interpret existing law in a reasonable manner, even if there is no available basis for them to do so (Yang, 2014). On the one hand, the underground surrogacy contract is invalid according to the Chinese civil law and customs; on the other hand, the parents of the baby are registered based on the blood. As a result, the surrogate mother would naturally gain custody of the child upon giving birth and be registered as the biological mother (Ding, 2015; Luo, 2009; Xiao et al., 2020).

All in all, we suspect that all the causes mentioned in the above literature are present and interact with each other. There is no literature that has examined and analyzed all potential mutual effects in the previous literature. The reasons behind surrogacy also determine how exactly China should further regulate it in terms of policy. Essentially, the policy of surrogacy depends on whether it is morally recognizable and behaviorally self-determinative to women. Therefore, it is important to fill the knowledge gap in surrogacy with a mature framework. A critical review of these factors in the conjunction of feminist theory allows for more reflective thinking and suggestions.

Chapter Three: Research Methodology

3.1 Research design

In terms of design methodology, after defining the research question we chose to search the literature based on different electronic databases. The commonly used literature search databases Google scholar and PubMed were taken into consideration. To stay close to the research objectives, CNKI, the most comprehensive literature database commonly used in China, was also included in the selection. First of all, in contrast to the continuous screening from a large scope, the inclusion of this thesis was done by overlapping and screening different keywords in order to purposefully identify relevant literature that fits the research theme. By considering high frequency keywords in the broad search and using different directions for the research questions in the subsequent search, we broadened the entire field of search and determined the general direction of the categorisation. Prior to selection, guidelines were established for inclusion: (1) the subject of the literature needed to be entirely or mainly about surrogacy (2) the country analysed was mainly or partially China (3) the content of the literature needed to include geographical and specific reasons for the existence of surrogacy.

It is noteworthy that some articles are vague in their analysis and may involve one or more relevant factors in the field. Therefore, before interpretation, the articles were classified and grouped more clearly based on all the aspects covered in the literature. Moreover, we attempted to include jurisprudential analytic methods in this study, such as case studies, to make it more comprehensive. Practical legal experience, e.g. case law and judgments, often diverge from the theoretical jurisprudential view, allowing a more objective examination of the relevant categories and discussions.

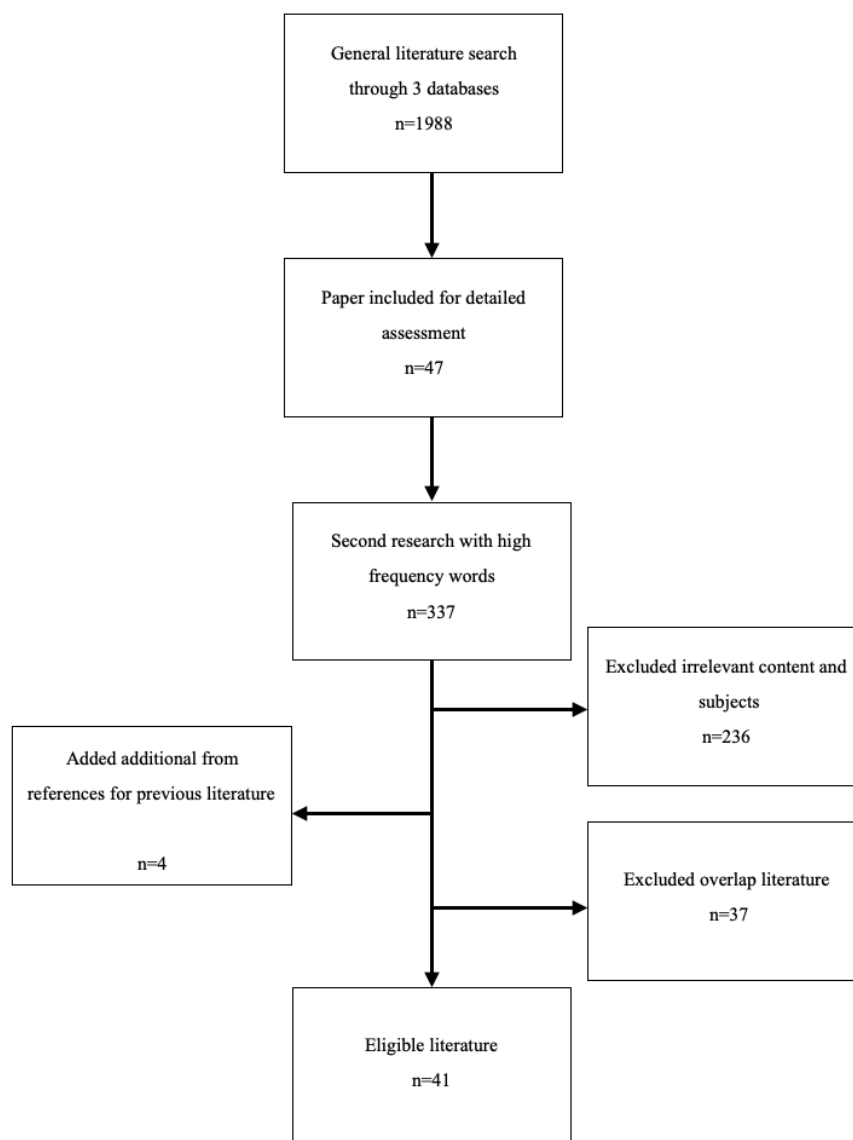
3.2 Data source and collection

The existence of underground surrogacy is only a microcosm of the needs of society, so the soil that nurtures the needs is the object and direction of this study. Based on the criteria and based on previous research, the final search approach was chosen to be taken. We first chose two commonly used databases, Google Scholar and PubMed. Secondly, in order to avoid omitting research from mainland China, we chose CNKI, the most commonly used Chinese Integrated Knowledge Resources Database, which includes master's and doctoral theses, statistics, books, journals, patents and other resources. Thus, three databases, Google scholar, PubMed and CNKI, were finally chosen for the search exercise, which allowed us to search in both English and Chinese and to synthesise the literature from as many different regions as possible to prevent omissions. The search tool for the literature was restricted to China, with no time limit.

Firstly, an extensive search was performed on all three platforms with the keyword 'underground surrogacy in China', revealing a total of 1,988 articles as a result. Judging from the abstracts, most of the articles were excluded because they were completely unrelated or only partially related to surrogacy. The abstracts of the remaining articles were browsed to identify frequent terms that are relevant to the research topic.

Secondly, we repeated the search with the frequent terms obtained in the first search and adjusted the overlay so that all relevant articles could be seen. The keywords used included 'surrogacy, Confucianism', 'surrogacy, infertility', 'surrogacy, sex selection', 'surrogacy social family', 'surrogacy history', and 'surrogacy law'. Most result articles lay in the fields of anthropology, sociology, and law, giving us the criteria for review. As a result, only 337 articles that could potentially fit the theme remained. Among these 337 articles, we established clear exclusion criteria, removing any of

them that were clearly irrelevant to our research aims. Some of these papers did not provide any insight into the emergence of clandestine surrogacy, but merely mentioned the existence of the phenomenon. Duplicate literature among databases and clinically-focused papers were excluded. Besides, jurisprudence papers that analyzed ineffective laws and regulations were also discarded. Finally, four grey papers mentioned in the literature were added to the review. After all the exclusions, only 41 pieces of relevant literature remained (Figure 1).



(Figure 1)

As for the legal analysis, we did a search for 'surrogacy' on the authoritative China Judicial Documents website and found 420 previous judgments. Among the judgments, we excluded cases that are apparently unrelated to surrogacy. The contradictory causes of legal decisions are the main focus of our study. Statistical analysis results of the judgments based on the case causes are given in Table 1.

Costudy	2
Inheritance	69
Validity of contract	30

(Table 1)

Chapter Four: Results

In this chapter, all the selected texts are divided into four main results according to the areas they cover: social, ideological, historical and legal. Some interdisciplinary findings have also been separately and elaborately classified and included.

4.1 Sociological factor

Another reason for the existence of surrogacy is the social pressure that agents have to face. From the time when procreation becomes an obligation, families unable to have children will have to deal not only with the pain of being childless but also with emotional and life pain. Infertility is habitually associated with social dignity and the integrity of one's existence, so that not having one's own offspring leads to feelings of anxiety, depression and guilt, and individuals question their personal integrity. In pre-Communist Chinese society, the old society before women's emancipation still followed more stringent traditional attitudes. Stigmatising epithets against childless people circulated in the society of the time. These stigmatising comments and pressures can lead to childless couples finding barriers to social integration (Greenhalgh, 2013).

This pressure is reflected in the individual's perception of self. A survey of infertile couples in rural areas showed that nearly one in five husbands perceived this physical impairment as a form of humiliation, and twice as many wives felt the same (Lau et. al, 2019). When analysing differences in perceived fertility-related stress between couples, infertile women generally experienced higher levels of stress than men, particularly in the three dimensions of social pressure, sexual pressure and relationships. In contrast, the stress felt by men was mainly due to the desire for parenthood and sexual pressure (Zhao, 2019). The reasons for this impact are multiple. Historically, society has been accustomed to viewing infertility as the fault of women. This harsh blame can further affect

women's lives. As a result, women are more likely to feel depressed or anxious about having children, especially for highly traditional patients. Of these, patients with lower levels of literacy are generally more likely to be bound by perceptions and thus unable to see things dialectically, leading to greater psychological stress (Qi et. al, 2007). This stress comes not only from the self-pressure caused by one's own ideology, but also from the feudal nature of the family and the surrounding environment. On the other hand, for men, a patriarchal society that demands male support and continuity of the family creates a desire for fatherly duties, and biological reasons can frustrate self-esteem and affect self-identification with gender roles (Logan et. al, 2019; Zhao, 2019). Even though women are more likely to feel the pressure of infertility in society, it is undeniable that men are also having discriminatory feelings. This seems to be a negative effect of reproductive beliefs, where the deprivation of value is experienced when personal values are forced to be tied to offspring and fertility is not achieved.

Huo et. Al (2016) found that infertile individuals with low traditional rate and high modern rate still had low levels of well-being if they received high levels of social attention. Regardless of gender, the consequences of being unable to have children include and are not limited to low social acceptance and self-identity, while in some areas, individuals are discriminated against and unable to achieve negative value judgements such as personal worth. Even though some people feel they do not need to find their identity in childbearing. The above studies have already argued that individual traditionalism influences attitudes towards living without offspring more than anything else, however this study proves that social influences outweigh even individual traditionalism. This negativity increases when social attention is felt. The environment around the individual is not a vacuum, and family and social pressures can subconsciously influence the individual's actions.

At the same time for surrogate mothers, agents in surrogacy continue to face social concerns and pressures. In modern China, heavy industry is gradually being replaced. The state began to implement a movement towards the transformation of high-tech knowledge industries in several regions, and the gap between rich and poor gradually widened between different regions. A large number of workers from rural areas flocked to these high-tech regions in search of a place to work (Yang, 2015; Xiao, 2011). However, the perception and status of women was already different from the Maoist period when both sexes pursued productive non-differentiation (Wu & Dong, 2018). 1960s feminism argued that women were actively encouraged to take up any occupation or role that men could, and marriage laws were born from that time. The pursuit of non-differentiation between men and women was groping to abolish the shackles placed on women in the feudal era (Leung, 2003). After this, the state gradually withdrew from its role in calling for the lead in gender relations. And poverty, the gap between rich and poor in different regions, and consumerism led some women to exchange reproduction for money. This trade seems on the surface to have been entered into voluntarily, yet unfortunately the level of knowledge many women possessed at the time of surrogacy was not sufficient to support her in understanding and protecting herself, with no awareness of the terms and the trauma she could suffer. A life of poverty also drives their choices. And that choice is exactly what another group of people needs. Families without offspring or in desperate need of a son to carry on the legacy, social pressure becomes the norm so that people do not question the need. Surrogacy - the quickest way to fulfil one's duty and complete the individual.

4.2 Ideological factor

Filial piety is a very distinctive Chinese psychological culture, which is described by Ye & Yang (2008) as a willingness to blend one's particular social attitudes and behaviors towards his parents. In fact, it is a logical form of spontaneous structure influenced by different environmental factors. When following filial piety, a person's behaviors become so unique that they must be understood

from numerous aspects, including his parents, his own personality and abilities, the social environment, and his ability to perceive it.

Traditionally, filial piety could promote collectivist families and social co-existence. Aside from Confucianism, the dominant ideology in China (Li, 2010; Xie, 2010), filial piety has been interpreted by many schools of thought in different ways throughout history. Particularly, Confucianism preaches the 'rule of filial piety' and believes that man should follow the principles of heaven. Men are the 'yang' and women are the 'yin', so family inheritance and heirship is an act of obedience to the Divine Principle. A family of a husband and a wife is considered the 'point of origin'. In other words, Confucianism emphasizes blood ties and life and advocates an ethical concept of life continuity with the husband and the wife at its core (Liu, 2017; Zhou, 2017; Xu, 2012; Guo, 2016). This shows that the purpose of traditional Chinese doctrine is a kind of harmony, including family harmony and social harmony. Therefore, the ideas advocated in the doctrine are obedient. Children need to obey their parents, and there is a difference between the elder and the inferior.

However, doctrines cannot be separated from real life. Filial piety and a doctrine to explain and regulate it go hand in hand (Fang, 2015). Confucianism's emphasis on fertility is also derived from older cultures, in which ancestor worship was common and fertility was equivalent to the continuation of ancestors and family names (Hu, 2015). To this day, most families retain ancestor worship, as well as genealogy and memorial rituals (Chen, 2005; Hu, 2016). Despite this, traditional surrogacy and expectant gestational surrogacy both challenged the Confucianism theory to some extent in the case of family primacy because they undermine the integrity of the family and introduce other roles into the lives of the couple. However, ancient China when Confucianism was born was a male-dominated society in which husbands could take multiple wives to produce

offspring. Therefore, even if the Confucian ethic of life emphasizes the absolute value and significance of natural blood relations, its emphasis on offspring makes its attitude ambiguous for children gifted outside the marriage relationship (Liu, 2017; Xu, 2012).

On the other hand, Confucianism is also a highly politicized ideology, and traditional filial piety viewpoints ask children to obey their parents, serve their elders, and continue the incense lineage without any doubt (Ye & Yang 2008). They also believe that family interests are superior to individual ones. Therefore, it is morally permissible and expected for infertile couples to adopt children from close relatives in order to keep the integrity and continuity of the family (Guo 2016). From this perspective, traditional surrogacy somehow serves as an alternative to preserving marriage and the family. Another idea in Confucianism is 'benevolence', which is divided into benevolence towards family and that towards the world. For the world, benevolence means empathy and compassion, which permits altruism as a manifestation of benevolence. Thus, altruistic surrogacy is not rejected by Confucianism in its morals (Xu, 2012).

In a word, the predominant ideology of Confucianism has made traditional and modern Chinese society focused on reproduction, and surrogacy is certainly a tiny hope for families who desire offspring even if it is against the law.

4.3 Legal factor

Since 1980, the Chinese government has responded to population growth by introducing the one-child policy, preaching the need to have fewer children in order to curb population growth. However, the preference for sons has led some areas, particularly rural families in need of labour, to

opt for extreme gender choices, such as female foeticide or infanticide, to ensure that offspring are male (Ding 2015; Xiao 2020). As a result, the government had to make an exception for people in rural households: when the first child was a girl and reached the age of five, she could have another child. The first successful cases of in vitro fertilisation emerged at the end of the twentieth century, yet the debate on the regulation of in vitro fertilisation has not ceased. As of 2021, Chinese legislation on surrogacy is still limited to the regulations on human assisted reproductive technology issued by the health authorities in 2001 (see Appendix 1). However. In terms of subject matter, these regulations can only require that applicable medical institutions and medical personnel be prohibited from engaging in surrogacy activities, but cannot prohibit non-medical institutions and personnel from participating in surrogacy activities. In fact, it is not medical institutions and medical personnel who play a leading role in the development of the underground commercial surrogacy industry, but rather intermediaries, who are not subject to the existing laws. Second, the regulations on assisted human reproduction are departmental regulations with little legal status, and even medical institutions and medical personnel who carry out surrogacy can only be fined up to 30,000 yuan, which is a significantly low cost of breaking the law (Raposo & Wai 2021; Ding 2015; Qiu 2021).

Moreover, as current Chinese law does not clearly classify and regulate different types of surrogacy, there is no way to protect the rights and interests of those involved even with a full contract. Firstly, according to *Hua v. Zhao* (2020), the court ruled that the surrogacy contract was in breach of the law and mandatory administrative regulations, which is the case under contract law, and that such informal surrogacy was considered to be in breach of the General Principles of Civil Law on good customs. In fact, the existing cases on surrogacy contracts have been ruled invalid, and the code under which the 2021 Chinese People's Civil Code was introduced has changed but the provisions of the law have not changed this provision (Statucki, 2016; Xiao et al., 2020). Secondly, in cases

involving custody and inheritance rights, courts often rely on civil law provisions relating to marital and adoption relationships to fill the legal gaps, as illustrated by the dilemma faced by surrogate children in *Luo v. Chen* (2015), where Chen was not the child's biological mother but the child had lived with her since childhood and the identity of the surrogate mother was not known and could not be traced. The identity of the mother was not known and could not be traced. The court recognised the existence of surrogacy in the judgement, but the principle of 'the one who gives birth is the mother' was adopted and registered in China, and therefore the birth mother was denied custody in the first instance. In order to protect the interests of the child, the court of second instance had to find another way to treat the child as Chen's proposed blood relative, i.e. a stepchild in a dependent relationship. This opened up a new, if controversial, path for the custody of the surrogate child. In addition to this, the situation of the surrogate mother is worryingly unclear as to whether she enjoys the same bodily integrity and autonomy as other pregnant women, or whether she is allowed to unilaterally terminate the pregnancy in certain circumstances. Some women do not choose to become surrogates themselves, often women in poorer areas are lured by high advertising profits and have no choice but to give birth to someone else's child in these institutions where hygiene and privacy are not guaranteed (Yang 2015). Informal agencies involved in the world may violate advertising laws, but there is no way to circumvent them except for a relatively small fine. Thus, in practice, there are no detailed laws to punish or directly protect those involved when surrogacy occurs. The huge demand coupled with the lack of legislation has kept surrogacy from disappearing from life, only to go underground and trade in a murky and unsafe grey area. Surrogacy involves multiple sectors, including business and taxation, and a more effective legislation is needed to regulate it and to effectively integrate the enforcement powers of all relevant sectors.

4.4 Historical factor

In ancient China, a form of surrogacy similar to commercial surrogacy was widespread among the people, which is why surrogacy was also known as 'borrowing the womb', meaning borrowing another woman's eggs and womb to give birth to an offspring. After birth, the pregnant mother and the resulting child are not legally related to each other as mother and child. The importance of and reasons for inheritance rights have been discussed in the previous section. The family was willing to give birth to as many heirs as possible for the sake of the child - or more accurately, the son. As early as the Warring States period, there are written records of the sale of wives as a commodity transaction. During the Northern and Southern Dynasties, the concept of renting a wife and redeeming her at the end of the term emerged, hence the term 'rented wife' at the time. In addition to procreation, in the Tang dynasty the rented wives took the form of slaves and were required to perform domestic labour. It was not until the Song dynasty that Dian Qi, an early form of surrogacy, matured among the people and took shape until the founding of New China (Ye, 2000; Yang, 2015).

Basically, Dian Qi was more common among the underclass, as poor or infertile families 'borrowed' the wives of their tenants for a predetermined period in order to have sons of their own. In some areas, Dian Qi was also used as a punishment for unfaithful women, and some criminals would even use it as a means to snatch other people's wives. Under a traditional smallholder economic structure, men were considered the main laborers, and women were inferior compared to men. The significance of a woman was attached to her significant male relatives, and once married, she would be considered subordinate to their husbands, producing labor to the husband's family (Liu 2009). Consequently, there was a desire for boys in almost all families in ancient China. According to an official record in the 1620s, the male-to-female ratio in Pucheng County of Fu Jian province was as high as 2.8:1 (Chen et al., 1968). Such an abnormal male-to-female ratio led to a greater social imbalance. In the Tang dynasty, the legal system prevailed, and divorce laws were already in place. There were seven rules for men to repudiate their wives, the first of which was that the wife had not

produced an heir by the age of fifty (Liu & Chen, 2004). Women were bound by feudal social rules, which required them to be talentless. The birth of a baby girl did not bring joy to the family, and to nurture a girl was even perceived as raising children for other families. The custom of female infant drowning is also prevalent in China, especially in the South. Feng Menglong, a writer and thinker in the Ming Dynasty, felt resentful of this custom and personally wrote a notice prohibiting the drowning of female infants. However, little effect has been achieved. (Chen et al., 1762; Wang, 2007; Zhang, 1995).

Ye (2000), in her book *Dian Qi Shi*, argued that *Dian Qi* was prevalent in various provinces, including Zhejiang, Jiangsu, and Anhui. The actual manifestation and period of *Dian Qi* varied across different regions, but the one and only goal were to reproduce. On the other hand, men were allowed to marry multiple women, and the flooding of women into the upper classes made the situation worse for proletarian families. At that time, most ordinary people led a hard life, and marriage was a complex procedure that asked for high bride costs and other expenses. These reasons and the requirement to reproduce made people pursue 'rented wives' to reduce the costs (Ye 2000; Zhao 2019; Zhang 2016). After 1979, the one-child policy became effective, which was widely regarded as a radical population control policy. However, sexism was unexpectedly largely curbed for women. Families with only one female child would face large fines if they tried to have more children (Statucki, 2016). Meanwhile, the government prohibited hospitals to reveal the sex of the fetus and advocated gender equality to prevent female infanticide. With such efforts, the status of women improved significantly as people began to really think about why females exist (Sudbeck, 2012).³

The superficial reason for the prevalence of *Dian Qi* is the cult of fertility caused by the demand for labor in traditional society and the survival plight of the lower classes. In essence, however, *Dian Qi*

was a product of the feudal husband system, where gender discrimination and feudal ideology enslaved women under male authority. During the Ming and Qing dynasties, Dian Qi was forbidden by law, but these laws were not compassionate and sufficient to soothe the needs of the common people and to change their mindset. Dian Qi is the earliest form of surrogacy in China before the ART. Similar to the present day, laws had been prohibiting Dian Qi but failed to eradicate it in reality. At that time, women themselves were not aware of their oppression or even rationalised it. While husbands saw women as property to be rented out, society demanded that women remain chaste. These customs contradicted each other but could not be helped.

Chapter Five: Discussion and Conclusion

The situation of surrogacy in China is partly due to the fact that it epitomises the quest for an heir over thousands of years of history. The offspring represent the unbroken legacy and hope of a family. Ancestral family names and the rise and fall of families are continually birthed from the wombs of women. A variety of irreplaceable factors contribute to the contradictions displayed in surrogacy. The arguments of those who oppose surrogacy within China today focus on the following points (Guo, 2019). The first is the ethical issue of altruistic surrogacy - paying to help another human being out of benevolent compassion - which, upon ideological analysis, is not inherently unethical. The second is the exploitative nature of surrogacy for women. Admittedly, existing surrogacy without qualified legal protection is also fraught with deceptive and discriminatory provisions, gender selection and class differences (Murphy, 2003). It is difficult to determine how exploitative this is and how it can really be done in a way that puts both parties on a completely equal footing. In addition to this, surrogacy can be a challenge to the existing order. The protection of reproductive rights in the constitution is defined more in relation to what the family wants to be associated with, due to China's focus on protecting family harmony since ancient times. Extending the right to reproduction beyond the family would therefore create ambiguity in the existing order and philosophy. On the other hand, although the kinship link between mother and child does not necessarily lead to family harmony, the baby born in October is related to the person who gave birth in a natural sense. Surrogacy presents a challenge to kinship and 'motherhood', which is why, in this context, Chinese court practice has expressed surrogate children as stepchildren or as proposed blood relatives in an adoptive relationship (Li, 2021). This remains precarious compared to biological blood relations in the event of a dispute.

The prohibition of surrogacy seems to set an appropriate boundary between the abuse of reproductive rights and autonomy, a boundary that is as blurred as it has ever been in successive generations. Surrogacy has become a dilemma. A strict set of laws and regulatory procedures are essential to the current state of affairs, whether surrogacy is banned or allowed to take place. There are many more issues to be faced in the current legislation, and the most pressing one at the moment should be to outlaw the existence of illegal intermediaries. These agents are rarely medically qualified therefore practising surrogacy is dangerous for both parties involved. The surrogate mother suffers physical harm and the couple seeking surrogacy may face fraud without receiving the child that was contractually promised. It may even result in an increase in cases of human trafficking. Therefore, if surrogacy of any kind is considered an offence then the punishment should be commensurate with the criminality of the offence according to the principle of proportionality. While the subject of offences such as fraud and intentional injury can only be a natural person, the penalties for violating advertising laws are under a million dollars, which is hardly enough compared to the huge profits of informal surrogacy. Therefore, if surrogacy is to be completely banned, the first step is to cut off access to surrogacy so that there is no way for commercial surrogacy, which is not publicly acceptable, to continue to exist. The best way to deal with this is to incorporate it into the criminal law and to establish criminal law standards that are commensurate with the consequences.

However, can surrogacy really be banned entirely? Broken families from the family planning era, infertile families, families unable to have children all still live in the land where reproduction is pursued. It is human nature to produce offspring, and this is especially apparent in this land. When the draft amendment to the Law on Population and Family Planning was prepared in 2015, it was proposed that a provision be added to prohibit any form of surrogacy. However, the amendments that were actually introduced did not include this change. The issues raised by surrogacy are too

numerous to consider in detail and have therefore been put aside by policy makers for the time being (Li, 2021; Zhang, 2013). This also implies that the legalisation of surrogacy in China is possible. However, this will be a long process that will require good decision-making and review bodies as well as enforcement agencies. The motivation for surrogacy needs to be entirely self-motivated by the woman's true intentions. At the same time, there would have to be a change in the notion of what is currently understood in the prevailing view in civil and criminal law as well as in constitutional law.

Whether surrogacy is outlawed or not, the current cases of surrogacy reveal the existence of numerous problematic issues. While surrogacy is temporarily unacceptable, the birth of a surrogate child should not be ignored. Surrogacy policies vary from country to country considering their own circumstances (Shalev, 2014; Shetty, 2012; Jadva, Prosser & Gamble, 2018). The principle of the best interests of the minor child to safeguard the child's dignity should be taken into account when determining paternity of the child, as well as in exceptional cases where custody of the child is contested (Zeng, 2021). Surrogate children are legally vulnerable and therefore in practice, the courts are expected to take into account a number of factors. These include the ability and willingness of the parents to care for the child, and the establishment of appropriate supervisory procedures to provide the child born in such an environment with the most equitable and beneficial life. This will set the standard for judicial decisions. At this stage, the best way to protect a surrogate child is to consider each case on its own merits and provide a prudent solution.

The Chinese cultural word 'Xiao' has gradually evolved over the centuries to become a stone that weighs people down. The stone was written with parenting and hope, but read as giving birth and nurturing. Many families have had to do everything they can to raise their offspring out of desperation and pressure. When everyone in society and the environment displays a template for

coping with such a society, does the will of the individual who cannot do so come from themselves or from the mapping of society. This is admittedly pessimistic, and the tragedy is repeated from generation to generation. Feminism in China today is still figuring out its own path, which is a long and difficult process. The day will come when women are more assertive about their rights, understand that needs come from within themselves, and have the ability and willingness to understand and take control of their own bodies. Only then will the policy of surrogacy be better pushed and understood in a more definitive direction.

Chapter Six: Strengths and weakness

This thesis is searched through the English and Chinese literature and national restrictions to exclude potential linguistic and cultural bias. Allows us to dialectically look at research from local and other perspectives and extract the evidence needed. As the research involves a historical element, the absence of temporal restrictions on reference selection allows for a long-term, dynamic analysis on the historical element. At the same time, the required literature search covers a wide range of disciplines, allowing flexibility in achieving the research objectives and integrating them from a variety of social perspectives in order to confirm relevance.

However, the thesis also contains some limitations in that a reasonable examination is based on previous research and therefore does not provide an overview of all potential variables, but only focuses on aspects that have been of interest or mentioned in previous studies. This suggests that the direction of the research is fixed. At the same time, the limited number of qualified case studies may have led to a narrow perspective of legal analysis from which the views of the main schools of the courts could not be obtained. In addition to this, the research encompasses a large span of disciplines, encompassing both qualitative and quantitative analysis, and the analysis may be biased by different perspectives.

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Appendix 1

Regulation of Assisted 2001
Human Reproductive
Technology

Article 3 The application of human assisted reproductive technology shall be carried out in medical institutions for medical purposes and in conformity with national family planning policies, ethical principles and relevant legal provisions. The sale and purchase of gametes, congeners and embryos in any form shall be prohibited. Medical institutions and medical personnel shall not perform any form of surrogacy techniques.