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"You Were an Embryonic Dragon, Nurtured Temporarily in a Dog's Belly" v. "children are a piece of heart". Surrogacy in China and Italy among Tradition, Ideology, Gender, and the Law

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"YOU WERE AN EMBRYONIC DRAGON, TEMPORARILY NURTURED IN THE BELLY OF A BITCH" V. "CHILDREN ARE PIECES OF HEART". SURROGACY IN CHINA AND ITALY AMONG TRADITION, IDEOLOGY, GENDER, AND THE LAW

Joëlle LONG[1] and Simona NOVARETTI[2]

Résumé

Cet article vise à montrer comment la méthode de droit comparé appliquée à la maternité de substitution met en évidence des problèmes imbriqués de tradition, idéologie, genre et droit dans des contextes lointains, contribuant ainsi à surmonter le manque d'intérêt pour une comparaison avec le droit chinois de la famille. En effet, malgré la grande distance séparant les scénarios chinois et ceux de l'Europe occidentale, tant la tradition judéo-chrétienne que celle de la Chine ancienne fournissent des exemples ante litteram *de maternité de substitution, c.à.d. l'utilisation du corps d'une autre femme pour surmonter l'infertilité féminine dans un couple. En raison du lien étroit entre droit de la famille, morale sociale et tradition ainsi que de l'écart entre genres encore bien réels dans les deux pays, nous nous concentrons ici sur une comparaison entre le droit écrit et la jurisprudence chinoise et italienne. L'analyse met en évidence, malgré certaines différences, les efforts dans les deux systèmes pour protéger d'une part les femmes de l'exploitation et d'autre part les enfants de la traite, tout en garantissant l'intérêt supérieur de l'enfant ainsi conçu.*

Mots clés : *maternité de substitution — genre — famille — Chine — Italie*

Abstract

This paper aims at showing how the method of comparative law applied to surrogacy highlights intertwining issues of tradition, ideology, gender and the law in faraway contexts, thus contributing to overcome the lack of interest for a comparison with Chinese Family Law. Indeed, despite the great distance separating the Chinese and the Western European scenarios, both the Judeo-Christian tradition and ancient China provide interesting ante litteram *examples of surrogacy, intended as the use of*

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another woman's body to overcome female infertility in a couple. We here focus on a comparison between China and Italy. Indeed, the two countries share a close link among family law, social morality and tradition, as well as a huge gender gap. The analysis shows, despite the differences in statutory law and courts' decisions, the common attempt to protect women from exploitation and children from trafficking albeit ensuring the best interest of the child so conceived.

Keywords*: Surrogacy — gender — family — China — Italy*

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Introduction

Family law has always been a complex field of comparative law as its deep roots in society, moral values and religion can hinder the use of the comparative law methodology when the latter is essentially functional to identifying elements in common and serves the purpose of harmonising legal systems through mutual "legal transplants" and parallel legislative reforms. In fact, the ideas that family exists regardless of the recognition by *ius positum* (family as "an island around which the sea of law can only lap"[3]) and that family relations derive from the *ius naturale,* can prevent statutory and case law interventions that would break with social *consensus* and tradition.

Lambert's views against the inclusion of family law in comparative law research and discourses at the first International Congress of Comparative Law (Paris, 1900) are exemplary[4]. A few decades later, Kahan-Freund reiterated that geographical and cultural distance between systems can hamper the circulation of legal models, particularly in family matters[5].

Nowadays, legal particularism explains why family law remains the competence of individual EU countries and why the possibility for the EU to legislate on family law with cross-border implications is limited by a special and burdensome legislative procedure: in fact, Article 81(3) of the Treaty on the Functioning of the European Union requires unanimity for any legislative measure, making the enactment of actions almost impossible (or, at least, very difficult, unless by way of enhanced co-operation).

Additionally, the European Court of Human Rights grants Member States a wide margin of appreciation in implementing the European Convention whenever there is no common European approach on the subject matter of the case[6]. On the contrary, when a comparative overview assesses the existence of

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[3] Jemolo, Arturo Carlo. 1949. In *La famiglia e il diritto*, 57. Napoli: Tipografia Zuccarello & Izzi.

[4] Lambert, Edouard. 1905. *Congrès international de droit comparé, Procès-verbaux des séances et documents*, 26. Paris: Librairie générale de droit et de jurisprudence. The opinion is reiterated in Idem. 1931. « Comparative Law », 127-29. In *Encyclopedia of the Social Sciences*, 4.

[5] Kahn-Freund, Otto. 1974. On Uses and Misuses of Comparative Law, in The Modern Law Review, 37 (1974), 1.

[6] The ECtHR's recourse to the comparative law method and its connection to the doctrines of European consensus and the margin of appreciation is extensively analysed by scholars: see for instance Kanstantsin,

a *consensus*, the margin of appreciation is reduced and the Court might find the minority position in breach of the European Convention.

Nonetheless, starting from the last decades of the 20th century, scholars have been demonstrating both the feasibility and value of a comparative family law approach. Already in 1968, Müller-Freienfels published an important study which identified the cultural lines of common evolution of reforms affecting Western family rights in the 1960s[7]. Since the 1980s, Glendon has been publishing numerous comparative law analyses dedicated to the family in Western legal systems[8]. In the new millennium, research centres dedicated to comparative family law appeared. In 2001, in Utrecht, the Commission on European Family Law was established to pursue the harmonisation of family law in Europe through the creation of a set of common principles based upon research of national legislation of European States [9]. More recently, the Cambridge Family Law Centre was instituted offering a combination of academic, policy and practice-oriented insight into family law issues around the globe: in 2016, its director, Jens M. Scherpe, published a four-volume work mapping the evolution of families and the challenges for Family Law in many European countries.

Still, comparisons tend to be limited to Europe and North America, while little, if any, attention is paid in other legal systems, in particular the Chinese one. The reasons are manifold. The peculiarities of Chinese historical and social evolution, so different from that of other countries, often discouraged Western legal scholar from dealing with the subject. In addition, other branches of Chinese law, especially the ones related to business relations, are generally perceived as more useful (and possibly easier) to compare, as less connected with the local social fabric. Additionally, the language barrier prevents many

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Dzehtsiarou. 2015. *European Consensus and the Legitimacy of the European Court of Human Rights*. Cambridge: Cambridge University Press.

[7] Müller-Freienfels, Walter. 1968. The unification of family law. *American Journal of Comparative Law*, 16: 175-218.

[8] Glendon, Mary Ann. 1981. *The new family and the new property*. Toronto : Butterworths. Eadem. 1987. *Abortion and divorce in Western law*. Cambridge, Mass : Harvard University Press; Eadem. 1989. *The transformation of family law: State, law, and family in the United States and western Europe*. Chicago: University of Chicago Press.

[9] Boele-Woelki, Katharina. 2005. The Principles of European Family Law: Its Aims and Prospects. *Utrecht Law Review*: 160-168.

foreign scholars from accessing Chinese legislative texts, courts' decisions and doctrine in their original language.

The case of surrogacy, however, can contribute to overcome such lack of interest for a comparison with Chinese Family Law[10]. Just as intercountry adoptions or international children's abductions, surrogacy has acquired a massive, global dimension that is urging the attention of scholars and knowledge of faraway legal systems. In addition, despite the great distance separating the Chinese and the Western European scenarios, an interesting parallelism can be found in the way in which the legal systems have dealt with surrogacy, both in the past and nowadays.

This study will specifically focus on surrogacy in China and Italy. Italy was chosen as a term of comparison since it presents specific features that make the comparison with China particularly interesting. A first element is the close link between family law, social morality, and "tradition". The definition of family as "natural society founded on marriage" is enshrined in art.29 of the Italian Constitution. Public policy and morality have broadly been used by courts to limit private autonomy and to exclude the recognition in Italy of foreign family laws perceived as contrary to the very fundamental principles of the State. Moreover, gender gap is still very real. The fact that, for a long time, filiation out of wedlock and unwanted pregnancies were just a women's problem explains the legal recognition of the right of the woman to give birth anonymously to then give out the newborn baby for adoption.

In the following paragraphs, we identify and analyse similarities and differences between the Italian and Chinese surrogacy systems. In fact, both States have chosen a prohibitive approach, invoking the necessity to protect women from exploitation and children from trafficking. However, although aware of the legal ban, in the child's best interest, Italian and Chinese lower-tier courts have been recognising intended parents as the legal parents. Finally, today, in both countries, there is strong pressure on Parliament for a regulatory approach to admit and regulate altruistic surrogacy, with commercial surrogacy

[10] See Yongping Xiao, Jue Li, Lei Zhu. 2020. Surrogacy in China: A Dilemma Between Public Policy and the Best Interests of Children. In *International Journal of Law, Policy and the Family* (34) 1: 1-19; Zhengxin, Huo. 2013. The People's Republic of China. In Katarina Trimmings, Paul Beaumont (eds), *International Surrogacy Arrangements. Legal Regulation at the International Level*, chapter 5.

remaining prohibited [11]. Under this perspective, in both countries the legalisation could be facilitated by traditional concepts such as Italy's anonymous birth and China's "pawning wife" and "double motherhood"[12].

In a nutshell, the method of comparative law applied to surrogacy can show how the intertwining issues of tradition, ideology, gender and the law play in faraway contexts.

I. ITALY

A. Yesterday: surrogacies ante litteram

In the Judeo-Christian tradition, as well as in ancient China (*infra* III.A), there were *ante litteram* examples of surrogacy, intended as the use of another woman's body to overcome female infertility in a couple.

In common there was a misogynistic and patriarchal mentality focused on the superiority of the masculine gender and on mastery and devoted servitude. In fact, in both traditions the social role of women was strongly conditioned by motherhood, with sterile and childless wives considered as afflicted by divine punishment[13]. Male infertility, instead, was hardly ever addressed as it was confused with male impotence. Consequently, the body of another woman could be used to let the husband of a sterile woman have offspring. Besides, the practice showed that surrogate mothers usually belong to vulnerable groups and therefore could hardly oppose the surrogacy "proposal". Thus, the necessity to embrace what we would nowadays call an intersectional

[11] See *infra* for Italy para. II.C and for China para. III.C.

[12] *Infra* para II.A and III.A.

[13] Exemplary are the words Sarah tells Abraham in the Bible: "The Lord has prevented me from having children" (Gen 16:2). The principle of agnatic descent was at the basis of Chinese social and political system at least since the Western Zhou's era (1100 BC-771BC). A man's greatest duty was to provide his lineage with at least one (preferably male) heir. Furthermore, Confucian orthodoxy considered "continuing the lifeline of the family" at the core of the concept of "giving birth", and "having no male heir" as "the gravest of the three cardinal offences against filial piety" **不孝有三 无后为大** buxia you san wu hou wei da). Moreover, from the women's side, "The rites of Dai the Elder" (Former Han Period, 206 BC-8 A) listed "be childless" among the "seven out", i.e.: the seven reasons that allowed a man to legally discard his wife. See *infra* para. III.A.

perspective[14], highlighting the risk of exploitation and discrimination especially against destitute and migrant women.

In the Bible, Sarah offers her husband Abraham her slave Hagar so that the latter can bear a child on her behalf: however the two women end up quarrelling and Hagar is kicked out of the house twice, first when pregnant and then together with her son Ishmael, who follows the condition of his mother (it is no coincidence that Sarah tells her husband «Get rid of that slave woman and her son, for that woman's son will never share in the inheritance with my son Isaac», Gen. 21:10, emphasis added). Undoubtedly, an early example of a failed surrogacy arrangement, at least from the point of view of the intended parents ...

Better luck falls to Abraham's grandson, Jacob, whose wives, Rachel first and then Leah, offer their husband their servants to procreate: in Rachel's words: «Here is Bilhah, my servant. Sleep with her so that she can bear children for me and I too can build a family through her» (Gen. 30:3). Jacob obliges, the servant gives birth and Rachel says: «God has vindicated me; he has listened to my plea and given me a son» (Gen 30: 6, emphasis added). Four of the founders of the twelve tribes of Israel generated by Jacob were coming from this surrogacy motherhood, although Jacob's favourite is the biological son of Rachel, who succeeds with two pregnancies at a very late age. Even here the surrogacy appears peculiar as the pregnant slaves remain in the family and raise the children (also?) as their own. A final consideration on the two cases: surrogate mothers are in both Sara and Rachel's cases slaves, that is, women whose body belonged to the intended mother and who, therefore, could hardly oppose the decision of their masters.

Similarly, in Roman times a woman could be lent to a man married to an infertile woman in what was called "leasing of the womb" (*locatio ventris*)[15]. An example is the story of Marcia (told by Appiano in *De bellis civilibus Romanorum*,

[14] For an overview, see recently Collins, Patricia Hill, and Sirma Bilge. 2020. Intersectionality. 2nd edition, Chicester: John Wiley & Sons. In fact, the situation does not seem to have changed much even today: the Italian leading case on commercial surrogacy of 1989 concerned, not by chance, a destitute surrogate mother of Algerian nationality: see infra II.2.

[15] Cantarella, Eva. 1989. La vita delle donne. In *Storia di Roma, IV. Caratteri e morfologia*, Torino: Einaudi, 590 and ff.; EAD., 1955. Marzia e la *locatio ventris*. In *Vicende e figure femminili in Grecia e Roma*, Ancona: Commissione per le pari opportunità tra uomo e donna della Regione Marche, 251 and ff.

2, 99): Cato «had married Marcia, the daughter of Philippus, as a girl; he was extremely fond of her, and she had borne him children. Nevertheless, he gave her to Hortensius, a friend of his, — who desired to have children but was married to a infertile wife, — until she gave him a child, after which Cato brought her back home as though he had merely lent her».

Until the first half of the XX century, other ways of overcoming infertility problem, were the adoption (or institution of heir ... the difference was sometimes very tenuous) by the wife of her husband's illegitimate children or their legitimation (by will or king's privilege) by the husband. In order not to compromise the institution of marriage and the rules of succession *mortis causa*, these solutions were only allowed in the absence of legitimate children. A famous example is Valeria, daughter of Roman emperor Diocletian and wife of co-emperor Galerius, who adopted her husband's illegitimate son, Candidianus. A literary example is Chiara Uzeda in De Roberto's *I viceré* ("The viceroys") who "could not accept the lack of motherhood, she blamed herself and considered it a fault to be forgiven by her husband ... ", therefore she chooses beautiful and healthy maids to put in her husband's bed and when one becomes pregnant, she protects and takes care of her until delivery, perceiving herself as the "mother" of the newborn baby ("since she wanted a biological child of his and she was unable to deliver one, yes she was satisfied with that of another woman, it seemed to her very natural to take care of this child that Federico had procreated")16 and whom she wants to adopt .

Finally, we should mention as an *ante litteram* surrogacy scheme the wife's simulation of pregnancy and childbirth, with the presentation of the husband's natural child as her own. This solution, however, involved serious risks, as it amounted to a specific offence, the "supposition of childbirth" (see, nowadays, art. 566 Italian Criminal Code. In the past, liber XLVIII *Pandectarum*, § 3). In all these situations, indigent biological mothers were frequently paid by the father to disappear after giving birth.

[16] "[Chiara] flaunts her motherhood, deferred, transposed and transferred into the womb of the maid, almost as every modern gynecological operation, a "transplant" of semen into a rented uterus" (Sipala, P. M., 1993. Il romanzo "ostetrico" da d'Annunzio a De Roberto, in *Maternità trasgressiva e letteratura*, ed. A. Neiger, 78, Napoli: Liguori).

B. Today

In the last two centuries, new techniques have been opening new paths to parenthood among which "procreative surrogacy".

Intrauterine *in vivo* fertilisation (dating back to the end of the 18th century) allows reproduction without sexual intercourse thus opening the way to "traditional surrogacy", – where a woman consent to be fertilized with the intended father sperm, being therefore both the genetic and the biological mother of the surrogated child. Later, *in vitro* fertilisation allowed the separation between the biological mother and the genetic mother, leading to the currently widespread "gestational surrogacy" where the embryo is formed with genetic material from the intend father and from an egg donor, different from the woman that will carry on the pregnancy. The idea behind this technique is that such separation of roles helps surrogate mothers acknowledge that the embryo they are carrying is not theirs and consequently accept separation from the baby at birth more easily[17].

In 2004 law n. 40 on medically assisted procreation introduced an explicit prohibition of any form of selling of either gametes or embryos, as well as surrogacy. Specifically, the new law envisages up to two years of imprisonment and penalty fines up to one million euros for anyone (private individuals, health workers, organisations) performing or arranging surrogacy (art. 12 paragraph 6 ° Law 40/2004). The Constitutional Court endorsed and reiterated this legislative ban stating that "the practice of surrogacy unbearably violate women's dignity and deeply undermines human relations" (Const. court, judgement 18 December 2017 no. 272). Besides, well before the introduction of the legislative ban, Italian case law agreed on the unlawfulness of surrogacy. In the first Italian judicial case of surrogacy, the court found the surrogacy agreement void because it clashed with two tenets: the right of the child to grow up in his or her own family, which entails the impossibility to transfer parental responsibility by private agreement; the principle that the mother is

[17] Instead, we believe that there is no surrogacy when a new-born baby is not genetically linked to either of the parents (for a well-known case see the Grand Chamber of the European Court of Human Rights' judgment in *Paradiso and Campanelli v. Italy*, 24 January 2017).

the woman who gives birth (*mater semper certa est*)[18]. Nonetheless, the best interests of the child principle has been increasingly interpreted by Italian courts as child's right to the recognition of social parenthood (right to the protection of the existing parent-child relationship or, in the language of the European Court of Human Rights, as a right to respect for family life (European Court of Human Rights, Section II, *Paradiso and Campanelli v. Italy*, 27.1.2015) and used to legitimise surrogacy *ex post* (starting from a child already born). Turned into a famous Italian theatrical quote: "*I figli so 'piezz' 'e core*" [children are pieces of heart][19], that is to say the (interest of) children should be a paramount consideration for their parents (as well as every adult) and love and affection ("heart") are at the foundation of parenthood.

Already in 1992, long before the introduction of the legal prohibition of surrogacy, an Italian Court granted the legal recognition of the parenthood between the surrogate child and the intended non-biological parent. The case concerned a woman who had filed an appeal for the adoption of her husband's biological child, born from gestational surrogacy[20]. Although affirming the unlawfulness of the surrogacy agreement, the Court granted the adoption on the grounds of the best interests of the child ("voluntarily relinquished by the biological mother: and certainly no one could deny that his best interests are realised by allowing the child to stay with his father, who recognised him, and with the latter's wife, who wants to adopt him").

In another case – decided in 2009 but pertaining to facts preceding the entry into force of the Medically Assisted Reproduction Act of 2004 – a divorcing Italian-English couple requested the recognition in Italy of an English parental order which, some years earlier, in an English gestational surrogacy, attributed parenthood to the intended mother[21]. The Court granted the

[18] Court of Monza, 27.10.1989, case Valassina and other vs Bedjaoui, in *Foro it.*, 1990, I, 298. The case involved a traditional surrogacy performed between an Italian heterosexual couple and an Algerian woman who had agreed to be artificially inseminated with the sperm of Mr. Valassina to then relinquish the baby to the biological father and his wife. When the surrogate mother refused to surrender the child, the couple lodged a claim for enforcement of the contract. However, the claim was rejected by the Court since, as explained in the text, the agreement, was found void.

[19] As Filomena Marturano says in the eponymous theatrical piece by Eduardo De Filippo.

[20] Court of Appeal Salerno, 25.2.1992, in *Nuova giur. civ. comm.*, 1994, I, 177.

[21] Court of Appeal Bari, 13/02/2009, in *Giur. merito*, 2010, 2, 349.

recognition as it guaranteed the children the same filiation status in Italy and England and free movement within the borders of the EU.

After the entry into force of the legislative ban, Italian Courts have only dealt with cases of international surrogacy. Although there are no official statistics, children born from surrogacy to couples residing in Italy are estimated in some hundreds. In 2019, no less than 400 Italian couples contacted Bioetexcom, one of the biggest Ukrainian surrogacy clinics[22]. In the vast majority of cases, Italian couples using surrogacy are heterosexual and go to Ukraine. The couples are usually married and the intended father is the biological father, while neither the woman undergoing fertilisation nor the intended mother have any genetic link with the child: frequently the intended mother presents herself to the Italian authorities and to family and friends as the "biological mother", simulating pregnancy. Only in a minority of cases the intended parents are gay and, in these cases, surrogacy is performed mainly in Canada or California.

The legal issues examined by Courts concern the effects of surrogacy after the birth of the child (therefore, the enforceability of the agreement and the differentiation between altruistic and commercial surrogacy are not at stake). In particular, Courts consider a) the adoptability of the child by the intended parent who does not share the biological or genetic link; and b) the transcription into the records of the Italian General Register Office of the foreign birth certificate indicating the intended parents as the legal parents. As already mentioned, in both legal issues, the principle of the best interests of the child plays a decisive role.

a) Considering adoption by the intended parent in the best interest of the child, since 2014 Courts have been using the so-called "adoption in special cases" ("*adozione in casi particolari*") to recognise the social bond between the intended parent and the surrogate child. Italian Courts have been called to decide upon cases concerning both heterosexual couples (with adoption by the non-genetic mother[23]) and homosexual couples (with adoption by the co-father[24]). This solution has been criticised, since it involves a lot of time and

[22] De Luca Maria Novella. Le culle della maternità surrogata, in *La Repubblica*, 22 May 2020.
[23] Court of Appeal of Salerno 25 February1992 previously mentioned.
[24] See for instance Juvenile Court of Rome, 23 December 2016 and most recently Juvenile Court of Milan judgment of 10 October 201.

money[25]. In fact, on average, the procedure lasts one year, during which the child is legally bound to just one parent and is exposed to major risks arising from the possibility of sudden death of that parent or of parents' splitting up.

b) Very recently, an important signal in favour of the recognition of the parenthood of intentional non-biological parents came from the Constitutional Court. In judgement n.33 of 2021, the Court urged a legislative intervention that may strike a fair balance between the legitimate aim of discouraging surrogacy and the child's best interests of obtaining legal recognition of the ties which, as a matter of fact, already exist with the non-biological parent. The question of constitutionality of courts' refusal to give effect to a foreign decree recognising two Italian men as the parents of a child born abroad to a surrogate mother was ruled inadmissible by the Constitutional Court on technical grounds. Previous similar cases lead, us to believe that, unless Parliament legislates in this sense, the Constitutional court might declare such refusal unconstitutional, thus granting effect to (international) surrogacy in Italy and overcoming Parliament's inaction.

C. Tomorrow: what perspectives *de iure condito et condendo*?

The analysis conducted in the preceding paragraphs demonstrates the difficulty of implementing a prohibitive approach to surrogacy in Italy.

Indeed, the national legislative ban is ephemeral. Globalisation favours international surrogacy and Italian Courts are continuously dealing with co-parents applying for the legal recognition of their de facto parental relationship with the surrogate baby.

The fact that, in the best interests of children conceived in this way, the Italian legal system grants full effects to the procreative project (albeit in stages: transcription of the birth certificate for the biological parent and adoption for the co-parent), leads to further surrogacies. And thus, on the one hand, the problem is relocated abroad, with women and children from elsewhere enduring things that would not be allowed in Italy. Moreover, inequalities

[25] Gattuso, Marco. 2019, *Certezza e tempi "breves que possible" per trascrizioni e adozioni in casi particolari dopo il parere Cedu* 10/4/2019. In www.articolo29.it (last accessed on: August 31, 2021). The need for a "timely and effective" procedure for the adoption by the social parent of the child born by surrogacy is also reiterated by the ECtHR in its opinion of 10 April 2019.

increase as the cost of surrogacy allows only people who have sufficient means to pay for medical expenses, travel, intermediaries and other providers of surrogation services and legal advice to enjoy reproductive and family rights.

What to do then?

At present, in Italy there are two opposed approaches. While center-right and right-wing politicians want to impose extraterritorial criminal liability for international surrogacies, maintaining that they are instrumental to the commodification of the child and the exploitation of the woman's body (see law proposals: C.2599 Carfagna and others; S.519 Gasparri; S.280 Candiani and others; S. 201 Bertacco and others; S. 66 Quagliariello; C 306 Meloni and others). The other approach, advocated by several human rights and LGBT associations (*Associazione Luca Coscioni per la libertà di ricerca scientifica, Certi Diritti, Famiglie Arcobaleno*), is pursuing the introduction of a legal regulation for altruistic surrogacy, which would reduce the risk of human rights violations through a balance of interests that ensures maximum protection for all the individuals concerned. After all, before the entry into force of the legislative ban of surrogacy in 2004, an Italian Court already considered altruistic surrogacy "admissible, lawful and legitimate", emphasizing the legitimate and worthy aim pursued by the intended parent, in particular the "fundamental right of the person ... to become parent and to evaluate and make decisions in relation to the need to procreate", and stating that no public policy or moral principles were being infringed[26].

Finally, worth mentioning is a proposal drawn up by The Hague Conference on private international law, which seems to encounter transversal resistance. The tentative draft explicitly declares that it does not want to enter the merits of surrogacy. Still, it regulates in detail the legal relationships between the surrogate child and the intended parents. A guiding principle of the draft text is the automatic recognition, through international surrogacy arrangements, of legal parentage established abroad by operation of law or by

[26] The case originated by an action brought by an Italian couple against a doctor who had previously signed a contract to form an embryo with gametes of both spouses and to implant it in the uterus of another woman, that has made herself available for the purpose purely out of altruism. The doctor later declared himself unavailable since a new medical code of ethics expressly forbade surrogacy. The Court ordered to proceed with the implant. Court of Rome, 17 February 2000, in *Foro it.*, 2000, I,1697.

a judgment[27]. With all the limits already experienced in prohibitionist systems like Italy's.

II. CHINA

A. Yesterday: surrogacies "ante litteram"

> *"[Xu Yingkui] was Governor-general of Fujian in 1897 […]. Xu was born to a concubine of his father, who died after he had just passed the imperial examination. Xu's request to let his birth mother's (生母 sheng mu) coffin pass out through the main entrance of the house for the funeral procession was repeatedly refused 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, nurtured temporarily in a dog's […]".*[28]

The dialogue between Xu Yankui and his "formal mother" shows, in a crude but rather effective way, that Late Imperial China was "*a patrilineal, polygynous society, with its own forms and practices of surrogacy or multiple parenthood*"[29]. The principle of agnatic descent was at the basis of Chinese social and political system at least since the Western Zhou's era (1100 BC-771BC). A man's greatest duty was to provide his lineage with at least one (preferably male) heir. Furthermore, Confucian orthodoxy considered "continuing the lifeline of the family" at the core of the concept of "giving birth"[30], and "having no male heir"

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[27] https://assets.hcch.net/docs/a6aa2fd2-5aef-44fa-8088-514e93ae251d.pdf (last accessed on August 31, 2021).

[28] Kiung Jai Koh Clan Association. 1971. "Genealogical Records of the Koh Clan in Singapore". Private Records, Microfilm Number: NA 343, 63, my translation. A slightly different translation of the passage could be found in Tien Ju-Kang, 1988. *Male Anxiety and Female Chastity: A Comparative Study of Chinese Ethical Values in Ming-Ch'ing Times*, 9, Leiden, the Netherlands: Brill.

[29] Bray, Francesca. 2009. Becoming a Mother in Late Imperial China. Maternal Doubles and the Ambiguities of Fertility, in *Chinese Kinship: Contemporary Anthropological Perspective*, eds. Susanne Brandtstädter, and Gonçalo Santos, 182. London: Routledge.

[30] *Ibid.*

as "the gravest of the three cardinal offences against filial piety" (**不孝有三 无后为大** *buxia you san wu hou wei da*) [31]. Moreover, from the women's side, "The rites of Dai the Elder" (Former Han Period, 206 BC-8 A) listed "be childless" among the "seven out", i.e.: the seven reasons that allowed a man to legally discard his wife[32].

In such a context, multiple parenthood, generally stemming from adoption or polygyny, often appeared as the only solutions for childless couples eager to avoid the shame of infertility. In fact, the law considered the father's principal wife as the biological and ritual mother (**嫡母** *dimu*) of all the children recognized by him[33].

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 the dual understanding of women's fertility, on the other. For space reasons, in this paper we will focus only on the second aspect, which is generally less known. In the case of multiple motherhood, the yin-yang **阴阳** duality of reproduction was embodied in the different roles assigned in the process to concubines and maids, on the one hand, and to formal wives on the other. Being strong and fecund (yang characteristics), the former were fit to give birth but unsuitable to educate the master's heir because of their humble origins (yin characteristic). Principal wives, instead, too week to conceive and deliver a child (yin characteristic) had the social status, authority and culture required to bring up and educate their husband offspring (yang characteristic)[34]. In this sense, traditional surrogacy 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

[31] *Ibid.*

[32] **大戴礼**记-**本命**， 13 , Dadai Liji – Benming, n. 13. The original text (in Chinese) can be found online at https://ctext.org/da-dai-li-ji/ben-ming/zhs.

[33]杨**海超**. 2020**年**4**月**. **我国民法典中的**亲**子关系确定**问题 —**以代孕生育**为视**角**. ***研究生法学,*** **第**35**卷第**2**期**. Yang Haichao. April 2020. Wuogou minfadian zhong de qinzi guanxi queding wendi – yi daiyun shenyu we shejiao (Chinese Civil Code problem in defining parent-child relationship – taking surrogacy as reference – from the perspective of surrogacy*). Yanjiusheng faxue*. (35) 2: 12-23, 13.

[34] *Ibid.*

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 another kind of "surrogacy" and multiple motherhood: the custom of "renting out" wives, also referred to as ""borrow a woman's belly to produce offspring" or, more technically, "pawning wife" (**典妻** *dianqi*). The practice was mentioned for the first time during the Northern and Southern Dynasties era (approx. sec. half of the VI Century)[35]. In its basic structure, it was a contract pursuant to which one (the original husband **原夫** *yuanfu*) could rent his wife (the *dian* wife, **典妻** *dianqi*) for a certain time to a childless man (the *dian* husband, **典夫** *dianfu*) in exchange for a certain amount of money. The main purpose of this agreement was to let the *dian* husband perpetuate the *qi* of his family, so the *dian* wife had to have sex with him and get pregnant. The contract established the "ownership" of the children the *dian* wife would give birth to during the *dian*. 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 her original husband's house.

This practice, which was always considered immoral as contrary to the Chinese "*li*" (**礼** rites)[36], became illegal starting from the Yuan dynasty[37]. Nevertheless, it continued to be practiced over the centuries[38], also because imperial magistrates often failed to punish such a crime, in particular when the

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[35]**徐海燕**. 2005**年**. **略**论**中国古代典妻婚俗及其**产**生根源**. *沈阳师范大学学报(社会科学版)*. **第**92**卷**, **第**4**期**, Xu Haiyan, 2005. Lüe lun Zhongguo gudai dianwi hunsu jiqi chansheng genyuan (Brief discuss.ion on the origin of the custom of "pawning a wife"). *Shenyang shifan daxue xue bao (shehui liaxue ban)*. (92) 4: 77-81 ; **李群**. 2010**年**. **典妻与**变**通的礼法适用**. **当代法学**(**双月刊**).**第**2**期**(总**第**140**期**) , Li Qun. 2010. Dianqi yu biantong de lifa heyong (The "pawning of a wife" and the flexible application of rites), Dandai faxue (shunyueli), (140) 2: 42-47, 42.

[36]**李群**, Li Qun, cit., 43.

[37]**李群**, Li Qun, cit., 42; **徐海燕**, Xu Haiyan, cit., 78.

[38]**徐海燕**, Xu Haiyan, cit., 78; **李群**, Li Qun, cit., 42-43.

wife was the very last asset of the family, and renting her out represented the family's only hope of survival[39].

The above custom was finally wiped out as any other "feudal" residue after the foundation of the PRC, in 1949. Tradition, however, was stronger than ideology. Despite the government attempt to reduce the birth rate, especially through the launch of the "one-child" policy in 1978, the stigmatization of infertile couples continued, pushing in particular infertile women, the so-called "hen(s) who can't lay an egg", into a desperate search for fertility treatment[40]. Starting from Eighties, progress in assisted reproductive technologies (ARTs), such as *in-vitro* fertilization (IVF) and intracytoplasmic sperm injection (ICSI), gave them a new hope.

B. Today: surrogacy in a "socialist economic market with Chinese characteristics"

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 (aged 15-45 years)[41]. Among the possible causes of these high rates, particular importance seems to have the interplay amid social institutions of marriage and family, economic development and government policies, which is at the root of the singular Chinese attitude towards the regulation of ARTs in general, and surrogacy in particular. Indeed, the 2015 amendment of the "Law of the People's Republic of China on Population and Family Planning" (*hereinafter LPFP*) put an end to the "one-child policy" and introduced the "two

[39]**李群**, Li Qun, cit., 43-44.

[40] Handwerker, Lisa. 1993. *The Hen that Can't Lay an Egg (bu Xia Dan Mu Ji): The Stigmatization of Female Infertility in Late Twentieth Century China*. Berkeley: University of California. On the topic, see also Logan , Shanna, Gu, Royce, Wen Li, Shuo Xiao, Anazodo, Antoinette. 2019. "Infertility in China: Culture, society and a need for fertility counselling". *Asian Pac J Reprod [serial online]*, 8, 1-6, 1. Online: http://www.apjr.net/text.asp?2019/8/1/1/250416 (last accessed on June 9 2021).

[41] Shanna Logan , Royce Gu, Wen Li, Shuo Xiao, Antoinette Anazodo, cit., *ibid.*

children policy"[42]. Moreover, in 2016 the Chinese government stopped the incentives for couples who decided to marry "late"[43].

The first Chinese test-tube baby was born at the Third Hospital of Beijing University in 1988[44], and the first test-tube surrogate baby was born at the same hospital in 1996[45]. Since the beginning of the new century, the phenomenon of surrogacy has boomed, as shown by the increasing numbers of surrogacy agencies springing up in Chinese big cities[46], and the huge number of advertisements on the web or even written on the walls, offering surrogacy services[47]. Nevertheless, at the time of writing (June 2021) in PRC's national laws there are no specific rules governing surrogacy. Actually, the draft of the above-mentioned 2015 amendment to the LPFP contained article 6 which explicitly prohibited "any form of surrogacy", but the provision was deleted in the final version[48]. At present, the matter is regulated only by some administrative documents issued by the Ministry of Health, which provide for the total ban of surrogacy. Being sectorial rules, these provisions only regulate medical institutions and doctors' activities[49]. Therefore, they do not apply to surrogacy agencies, surrogate mothers or commissioning parents, nor can they

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[42] Adopted at the 25th session of the Standing Committee of the Ninth National People's Congress of the People's Republic of China on the 29 December 2001, and emended Amended in accordance with the Decision of the 18th session of the Standing Committee of the Twelfth National People's Congress on Amending the Law of the People's Republic of China on Population and Family Planning on December 27, 2015.

[43]End to late marriage holidays upsets young couples, Xinhua, 20 Jan. 2016, online: https://www.globaltimes.cn/content/964661.shtml (last accessed on: June 9, 2021

[44]**傅适野**. 2018**年**10**月**29**日**. **中国**试**管**婴**儿技**术30**年**：**是**赋**予女性生育**权 还**是剥**夺女性主体性**. ***界面*** Fu Shiye. 29 Oct. 2018. Zhongguo shiguan ying'er jishu 30nian: shi fuyu nüxing shengquan haishi boduo nüxing zhutixing? (Thirty years of China's test-tube baby technology: should it endow women with reproductive rights or deprive women of their subjectivity?). *Jiemian*.

[45] **李**晓**宁**,**章**晓**敏**; **徐**欢. 2013**年**. 试论**完全代孕合法化的可行性**. ***法制博***览, 03(**中**) Li Xiaoning, Zhang Xiaomin, and Xu Huan. 2013. "Shilun wanquan daiyun hefahua de kexinxing." (The Feasibility of Legalizing Full Surrogacy). *Fazhi bolan*. 3: 245, 245.

[46]Shi Lei. 2019. Surrogacy in China. In *Eastern and Western Perspectives on Surrogacy*, eds Jens M. Schere, Claire Fenton-Glynn, Terry Kaan, 359-376 .Cambridge: Intersentia Ltd, 360.

[47]**杨海超**, Yang Haichao, cit., 14. Ding Chunyan. 8 January 2015. Surrogacy Litigation in China and beyond. *Journal of Law and the Biosciences*: 33-55, at. 34.

[48]**杨海超**, Yang Haichao, cit., *ibid.*

[49] Shi Lei, cit., *ibid.*

be of help when the validity of a surrogacy contract is at stake. Besides, no Chinese law provides for legal parenthood at the time of birth.

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 meaning of the surrogacy agreement was true and did not violate laws and administrative regulations[50]. However, in a similar case, the People's Court of Siming District (Xiamen City) held that the surrogacy agreement was invalid, since it was against public order and good customs[51]. To be fair, in recent years the latter position has become common among Chinese courts, both in commercial surrogacy contract cases and in traditional surrogacy contract cases, which are rarely brought before a court[52]. On the contrary, the issue of legal parenting is still quite controversial, even after the decision of the case Chen Yin v. Luo Ronggeng and Xie Juanru (2015)[53]. Considered as being "the first case on custody of a surrogate child", this lawsuit was published in the Supreme People's Court (hereinafter: SPC)'s Journal, Renmin sifa as an "example-case"[54] , and it was even mentioned in 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 April 28, 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 had already 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

[50]杨**海超**, Yang Haichao, cit., *ibid.*

[51] *Ibid.*

[52] Xiao Yongping, Li Jue, and Zhu Lei. 2020. Surrogacy in China: A Dilemma Between Public Policy and the Best Interest of the Child. *International Journal of Law, Policy and the Family*. 34: 1-19, 8-14..

[53] People's Republic of China. Trial: (2015)闵**少民初字第**2**号** (2015) minshao minchu zidi 2 hao; Appeal: **沪一中少民**终**字第**56**号**hu yizhong minzhong zidi 56 hao.

[54]**侯**卫**清**. 2017 **年**1**月**15**日**. **养育母**亲获**得代孕子女**监护权**之法律基**础. ***案例-本期关注 – 人民司法***, **第**2**号** Hou Weiqing. 15th November 2017. Yangyu muqin huode daiyun zinü jianyuquan zhi falü jichu (The legal basis for fostering nurturing mothers to obtain custody of surrogate children). *Anli-benqi guanzhu – Renmin Sifa*. 2: 4-11.

oocytes, and were eventually transplanted to the womb of a surrogate mother through IVF. On February 13, 2011, the surrogate mother gave born to twins, who lived with Mr. Luo and Ms. Chen. On February 7, 2014 Mr. Luo died. On December 29, 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 July 29, 2015, Shanghai Minhang District People's Court fully accepted the plaintiffs' claims: according to the court, there was neither a natural nor a social parenthood between Ms. Chen and the twins. Since the twins' biological father was dead, and their mother was unknown, their father's parents should have the sole care and control of them. On appeal, the Shanghai First Intermediate People's Court reversed the decision and awarded Ms. Chen the sole care and control 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"[55].

However, and notwithstanding its importance, the above interpretation does not address all the questions on surrogacy. Apparently, 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" (**社会的基本细胞** *shehui de jiben xibao*), i.e.: family. What are the options and the legal models – if any – currently taken into account by the Chinese Legislator?

C. Tomorrow: what perspectives *de iure condito et condendo*?

The Chinese national legislator's choice not to express itself on the issue in the 2015 LPFP, confirmed in the latest revision of the law, approved on 20th August 2021, seems odd, considering the total ban on surrogacy implemented since the beginning of the new century by the PRC's governmental agencies in

[55] **侯卫清** Hou Weiqing, 11.

charge of health and family planning and the national campaigns against ART(s)' abuse in 2013[56] and 2015[57]. The latter, launched in April 2015, explicitly targeted surrogacy[58]. 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 ART's drugs and medical equipment[59].

Undoubtedly, this opens more than one possible scenario. It is worth reminding that, due to its special state structure, Greater China encompasses various different legal systems that differ in their attitude towards surrogacy[60]: from allowing surrogacy under certain conditions (Hong Kong Special Administrative Region) [61] to the total ban of surrogacy (Macao Special Administrative Region) [62] passing through the lack of regulation (Republic of China – Taiwan). Among them, it is especially the situation in Taiwan that looks quite close to that of Mainland China, in particular in terms of the number of people concerned in comparison to the total population[63] and as even Taiwan lacks specific regulation on the matter. Unlike Mainland China though, it seems that this legal void in Taiwanese legislation is about to be filled. In fact, on May 1, 2020, legislator Wu Ping-jui of the ruling Democratic Progressive Party presented an amendment to the law on assisted reproductive technology, the Artificial Reproduction Act (hereinafter: LAR), which legalizes surrogacy[64]. That

[56] Shan Juan. 2013. "Govt rejects rumored end to surrogacy ban." China Daily, March 3. http://www.chinadaily.com.cn/china//////2013-03/14/content_16306894.htm (last accessed on: May 21, 2021).
[57] Global Times. 2015. "China to crack down on surrogacy industry". Global Times, April 10. https://www.globaltimes.cn/content/916200.shtml (last accessed on: May 21, 2021).
[58] *Ibid.*
[59] *Ibid.*
[60] Raposo, Vera, and Sio Wai. 2017. "Surrogacy in Greater China: The Legal Framework in Taiwan, Hong Kong, Macao, and Mainland China." UCLA Pacific Basin Law Journal. 34: 135-148, 136.
[61] Raposo, Vera, and Sio Wai, cit., 140; Cheung, Daisy. 2019. Surrogacy in Hong Kong. In *Eastern and Western Perspectives on Surrogacy*, eds. Jens M. Schere, Claire Fenton-Glynn, Terry Kaan, 419-438. Cambridge: Intersentia Ltd.
[62] *Ibid*.
[63] Ho, Chih-Hsing. 2019. Surrogacy in Taiwan. In *Eastern and Western Perspectives on Surrogacy*, eds. Jens M. Schere, Claire Fenton-Glynn, Terry Kaan,, 377-396, 378.
[64] UCA News reporter. 6th May, 2020. Church concerned as Taiwan moves to legalize surrogacy. *Union of Catholic Asian News (UCA)*. https://www.ucanews.com/news/church-concerned-as-taiwan-moves-to-legalize-surrogacy/87931# (last accessed on: February 14, 2021).

was only the last of many draft amendments to the LAR proposed by Taiwanese legislators and even by the Ministry of Health and Welfare in recent years to ease restrictions on surrogacy[65].

It is maybe too early to say whether Mainland China will follow the same path. For sure, the decision of repealing the provision contained in art. 6 of the 2015 LPFP draft was a consequence of the heated debate among law-markers on whether to totally ban surrogacy and of the dissent expressed by many citizens[66] and academics[67] against the introduction of a legal prohibition on that practice. In general, Chinese advocates of surrogacy remark that a prohibition would be useless, as it would not eliminate demand for surrogate maternity services. In addition, 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, legalizing the former and prohibiting the latter[68]. This would be beneficial for both commissioning parents and surrogate mothers. Women affected by a womb condition would not be denied their reproductive rights, thus safeguarding family harmony possibly put at risk by their infertility. Surrogate mothers, instead, would be protected from exploitation, since the decision to "rent out" their womb would only depend on their wish to help another woman to have a child. Finally, from the State's perspective, the legalization of altruistic surrogacy would not affect the common good or threaten the social order[69]. Certainly, such a choice would involve a change in the definition of parenting, to be broadened in order to include social aspects (i.e.: the willingness to raise the child, the relevant responsibilities after birth or long-term responsibility and the formation of a family) alongside the biological ones[70]. This will maximize the

[65] Chih-Hsing Ho, cit., at 381-382.

[66] See also: Duan Tao. 13th February, 2017. "Why China Should Legalize Surrogacy, Now". Six Tone. https://www.sixthtone.com/news/1921/why-china-should-legalize-surrogacy%2C-now (last accessed on: February 9, 2021).

[67]时**永才**, **庄**绪龙. 2016**年**. **有限开放代孕的法理思考与基本路径**. **法律适用**. **第**7**期**. Shi Yongcai, and Zhuang Xulong. 2016. Youxian kaifang daiyun de fali sikao yu jiben lujing. *Falü shiyong*. 7: 43-47.

[68] Shi Lei, cit., 373.

[69] *Ibid.*

[70]杨**海超**, Yang Haichao, cit., 19.

interest of the children involved, increase the social value of "parenting" and, by improving the stability of the family[71], increase the stability of the Chinese society as a whole. It is especially the last aspect that could drive the PRC's legislator to consider this advice; if, how, and to what extent are only a matter of time.

Conclusions

This paper analysed the issue of surrogate motherhood in Italy and China. Starting by quoting some of the most famous Italian and Chinese statements on maternity the research investigated if, and to what extent, the geographical and cultural distance between these two countries is reflected in their regulatory attitude towards surrogacy. To this end, their legal systems have been diachronically and synchronically examined and compared.

Our historical analysis has found unexpected similarities but also interesting differences in the way of solving the problem of female infertility.

In the case of Italy, the idea of motherhood as a biological and emotional bond suggested by the popular saying "I figli so' pezz'e core" (litt.: children are pieces of our heart) appears less ancient (or culturally rooted) than one may think at a first glance. As shown in section 1, the Bible offers examples of what can be considered an archaic form of surrogacy. Moreover, from the Roman age to recent times, sterile and wealthy women have taken advantage of their social position to avoid the stigma brought by childlessness by adopting illegitimate children of their husbands or by raising as their own the children born out of sexual relationships (that they sometimes even facilitated) between their husbands and their servants. In this perspective, the institution of *locatio ventris* – the most famous example of which is probably the "transfer" of Marcia from Cato to Ortensio, described in section 1 – is rather misleading. In fact, even if the English translation recalls a synonym of surrogacy (i.e.: "rent a womb"), the way in which it was performed differentiated it from the examples of archaic surrogate motherhood mentioned above. According to Roman law scholars, *locatio ventris* implied the divorce of a woman from her first husband,

[71]杨**海超**, Yang Haichao, cit., 19.f

her engagement with another man without offspring in the presence of the original husband (and, sometimes, even of her father) and, eventually, their marriage. This practice involved just one woman, who would become the legal wife of the man that requested her, and the legal mother of the children born after their marriage. In addition, *locatio ventris* was a way to give Rome new free citizens (*liberii*), and strengthen political and social ties among powerful families.

In this view, the unrelatedness between the social statuses of a (male) child and his biological mother found in Chinese culture and crudely described by the title of this paper, where the biological mother is referred to as a bitch, captures better the traditional Chinese concept of the mother-child relationship. In fact, the analysis of ancient socio-legal institutions such as "pawning wife" (**典妻** *dianqi*) and "double motherhood"showed that – differently (?) from Western Legal Tradition – not only the legalisation of gestational surrogacy is unhindered, but even facilitated by the Chinese traditional concepts of "family" and "parenthood".

In Ancient China, the passing on of the male seed was at the core of procreation and, at least since the Zhou era, to achieve this aim no form of traditional surrogacy would be discarded. Such attitude combined the dualistic thought – predominant in Chinese philosophy – and the fundamental role of education typical of Confucian ideology. As a result, the maternal role could be split between "biological" maternity (often carried out, from conception to birth, by lower-class women or concubines, **妾** *qie*) and "social" motherhood (education of the male child by the father's wife, considered the "real" or official mother, **嫡母** *dimu*).

In a functionalist perspective, such idea of motherhood matches the one described in the Bible with reference to Sarah and Rachel. In particular, similarities between Chinese and western traditional forms of surrogacy are evident as regards social statuses, relationships between the people concerned (usually a master and a slave) and the goals pursued.

From this point of view, "pawning wife" (*dianqi*) seems to be more original and typically Chinese than the other institutions discussed above. Its scheme entails the participation of just one woman/mother, making it somehow

comparable to the Roman *locatio ventris*. The latter, however, did not involve any monetary exchange, while the dianqi implied the conclusion of a contract for consideration. Moreover, the parties involved in *dianqi*(s) were usually not members of the social élite but, especially in the case of the original husband and the *dian* wife, people in a situation of extreme poverty, for whom dianqi was the last hope of survival. As remarked in section 2.1, it is probably for this very reason that, even after banning the dianqi, the imperial magistrates frequently decided not to administer punishments. The choice to put aside the law (**法** *fa*) applying "benevolence" (**仁** *ren*) after considering the "circumstances of the case" (请 *qing*) in the light of reasonableness (**理** li) should not surprise. In fact, the judges were supposed to decide a case by combining such principles in order to deliver a "heli heqing hefa" judgement (**合情合理合法**, litt: in accordance to circumstances, reasonableness and the law).

Undoubtedly, and in spite of the (not just physical) remoteness, both Roman and traditional Chinese rules reflect the patrilineal, patriarchal and male chauvinist roots of such societies and the idea of women as "borrowed wombs" or objects to be exchanged for political purposes.

Many centuries passed, bringing ideological and cultural changes reflected (at least formally) in the attitude towards women. However, parallels still emerge when analysing recent decisions of Italian and Chinese courts. In particular, we can affirm that, in both legal systems, judges called to solve surrogacy controversies are guided by the same principle, i.e.: "the best interest of the child". Nevertheless, the concept takes different meanings and values according to the context, and even to the court concerned.

In Italy, surrogacy is considered contrary to the best interest of children as a general category and also a violation of women's dignity, since it entails a "civil" filiation without the safeguards afforded by an adoption. The practice is prohibited by art. 12.6 of the Italian Act on assisted reproductive technologies (Law 40/2004), following which in the last two decades Italian courts have denied the registration of intended non-genetic parents on the basis of public policy and the collective best interest of children, who should never be the subjects of transactions.

However, a recent judgement by the Constitutional court could open the way for a "downstream" recognition of surrogacy that takes into account the best interest of the child as an individual. This choice implements the right of the child to the recognition of a parental bond which, as a matter of fact, already exists. Nevertheless, it legalises a conduct that in Italy would amount to a criminal offence, thus discriminating between couples with financial means and couples who cannot afford to carry out their parenting projects abroad.

In the PRC, by not addressing the matter, the LPFP seems particularly incongruous, as it conflicts with the total ban on surrogacy implemented by PRC's health and family planning agencies since the beginning of the new millennium. In fact, Basic and Intermediate People's Courts are not invalidating surrogacy agreements tout-court, but they evaluate their effectiveness on a case-by-case basis, guided by the "best interest of the (surrogate) child"[72]. The trend has become particularly evident since 2017 when, in his annual report before the NPC, the President of the Supreme People' s Court called on judges to follow this principle in their decisions[73]. As discussed in section 2.2, the best interest of the child is often referred to by the courts just to strengthen judgements that have already been decided on other grounds. However, the increasing use of the concept as a way to give judicial recognition to a de facto relationship between intended parents and a surrogate child would likely influence lawmakers' attitude towards this reproductive technique. In fact, the PRC's leadership is currently dedicating increasing attention to the practice, considered as a means to increase satisfaction "within the people" and, consequently, social stability. The risk perceived by the Party is that, without offspring, tens of millions of Chinese couples could easily lose interest in the

[72]**李帆**, **范继增**. 2019**年**5**月**. 隐**藏的合**宪**性**审查：'**代孕子女**监护权**案**' **的法理路径与司法影响**. ***四川师范大学学报 (社会科学版)***. **第**46**卷**, **第**3**期**. Li Fan, and Fan Jizeng. May 2019. Yincang de he xian xing shencha:'Daiyun zinü jianhu quan' an' de fali lujing yu sifa yingxiang. *Sichuan Shifan Daxue Xuebao (shehui kexue ban).* (46) 3: 19-31, 19.

[73]**周**强. **２０１７年３月１２日**. **最高人民法院工作**报告 - **２０１７年３月１２日在第十二届全国人民代表大会第五次会**议**上**. Zhou Qiang. 12th March 2017. Zuigao renmin fa yuan gongzuo baogao - 2017 nian 3 yue 12ri zai dishier jie quanguo remin daibiao da hui diwuci huiyishang (Report of the Supreme People's Court at the fifth session of the Twelfth National People's Congress). http://www.court.gov.cn/zixun-xiangqing-82602.html (last accessed on: June 9, 2021).

goals that 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*).

Comparative legal scholars know well that having a common cultural basis does not automatically lead to the development of similar legal systems or similar attitudes towards a given institution. Section 2.3 evidenced it also with reference to family law in general and surrogacy in particular, through a brief analysis of the regulation (or the lack of regulation) of the issue in Greater China's four legal orders. In fact, their positions on surrogacy reflects more the various foreign influences received for historical reasons than their shared traditions. This is particularly evident in the case of the Special Administrative Regions, with Macao banning and Hong Kong allowing (to a certain extent) surrogacy, in ways respectively consistent with Portuguese and British legislation. Nevertheless, or maybe for this very reason, developments on the matter in the Republic of China (Taiwan) should be monitored to understand what could be the future of surrogacy in Mainland China.

Our research showed that, in spite of the bans, every day many Chinese and Italian citizens resort to surrogacy to fulfil their dream of becoming parents. Not only has the prohibitive approach implemented in the two countries proven ineffective, but it can also jeopardize the rights of the people it is supposed to protect. When choosing the path to follow, Italian and Chinese legislators should consider these aspects, and possibly provide the countries with clear rules on the matter. Only by understanding what is restricted and what is legitimate (e.g. prohibition of commercial surrogacy, statutory limits for altruistic surrogacy, eligibility of surrogate mothers/intended parents etc.) will it become possible to achieve legal certainty and effective protection of the "best interest of the child(ren)", either surrogate "pieces of heart" or "embryo(s) of dragon(s)". Finally, yet importantly, the rights, dignity and freedom of choice of all the women concerned can be defended in one of the most delicate moments of their lives.