

What Are the Current Practices of Surrogacy in China?

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Abstract

This research paper explores the current practices of surrogacy in China and asks what these practices mean for human rights. Gestational surrogacy first came into practice in China in the second half of the 20th century. Minimal government laws on surrogacy have caused an underground surrogacy market to form and expand. This paper uniquely combines a sociological perspective on surrogacy with biological data and ancient Chinese lore. The data collected in this paper comes from other scholarly texts on surrogacy, and detailed data collection of online news outlets. By connecting the practices of surrogacy with human rights, this paper offers multiple perspectives and a comparison of surrogacy and abortion that connects these surrogacy practices with daily life.

Keywords: surrogacy, China, human rights, feminism

Introduction

Surrogacy is a form of artificial insemination in which sperm and egg are combined, rather than a natural pregnancy. The concept of surrogacy is believed to have first appeared in the Bible to address the problem of infertility. Subsequently, due to the large ethical and moral issues involved in traditional surrogacy and the increasing improvement of human test-tube technology, gestational surrogacy emerged (Brinsden, 2003). From a philosophical, moral and legislative point of view, it has more advantages than traditional surrogacy. In previous studies, many scholars have expounded the issue of surrogacy from a single perspective of law, sociology or biology, with detailed and in-depth analysis, but lack of effective combination. Based on this prior research, this study will look at the issue of surrogacy in China from a sociological disciplinary perspective, and it will also discuss the relevance of human rights. Surrogacy is banned in China, and the legislation on surrogacy is incomplete (Ding, 2015), which leads to some misunderstanding of surrogacy. Therefore, this paper hopes to see the causes and consequences of surrogacy through the analysis of the above problems: its impact on infertile individuals, human daily life and government decisions, so that we can have a more thorough understanding of surrogacy.

This research is building on prior studies that explored surrogacy in China. Chunyuan Ding proposed that the earliest surrogacy in China was originated from the story of " a man wants to borrow a woman's belly to produce offspring " in ancient times, because people wanted to solve the problem of infertility through surrogacy and have a connection with their offspring

(2015). E. Scott Sills and Peter R. Brinsden introduced that with the passage of time, global surrogacy technologies have become increasingly advanced, with traditional surrogacy and gestational surrogacy successively coming into practice (2016). But since traditional surrogacy involves controversial ethical issues, gestational surrogacy has sprung up. Chenzi Wei and Li Ji pointed out that although surrogacy is prohibited in China, due to the imperfect legislation, many underground markets have arisen and are difficult to crack down on (2019). Tingting Yu and Chen Qin discusses the legitimacy of the legalization of surrogacy from a positive perspective, and what benefits it can bring to the whole society and women. However, they also touched upon in the criticism of surrogacy by the academic community (2020). This paper uniquely focuses on China and by analyzing its practices through the perspectives of sociology, biology and law. In the next section, I will offer a history of surrogacy and its development in China.

The History of Surrogacy and Its Development In China

Surrogacy has become a controversial subject in the past one hundred years, because of the challenges it poses to ethics and morality (Saxena, Mishra & Malik, 2012). In this paper, I will explore the research question, what are the current practices of surrogacy in China. To do so, I will first introduce a history of surrogacy, with a focus on China.

According to Christian websites, the concept of “surrogacy” is first mentioned in biblical times and can be found in “The Book of Genesis” (“The History of Surrogacy,” 2020). In the story of Sarah and Abraham, Sarah was infertile, which broke their dreams of conceiving a baby. As a result, Sarah convinced her maid, Hagar, to be the mother of Abraham’s child. Thankfully, Hagar bore a healthy boy, Ishmael, for the couple (Sills & Brinsden, 2016). This is an example of traditional surrogacy (also known as partial surrogacy) in which the surrogate is inseminated with the sperm of the husband. Practically, the intended mother is not biologically related to the child, in some way their child is “illegitimate”. A genetic relationship can complicate traditional surrogacy legally and emotionally. Due to these complications, in general, only single men, same-sex male couples or intended mothers that cannot provide healthy eggs will consider this method. (Xiao, Li & Zhu, 2020)

The other primary type of surrogacy is gestational surrogacy (also known as full surrogacy or IVF surrogacy). In 1677, Leeuwenhoek, the founder of the microscope, first discovered human sperm. He also assumed that sperm could be fertilized in a woman's womb. In 1790, Scottish surgeons and venereologist John Hunter succeeded in artificial insemination for the first time in human history. He transplanted his husband's sperm into his wife, who became pregnant and gave birth to a healthy baby. In 1880, humans first tried artificial insemination of rabbits and guinea pigs. Eleven years later, French scholar Neare succeeded in artificial insemination and transferred embryos from rabbits to another. From 1893 to 1897, V.S. Gruzdev concluded the importance of eggs for fertility, and for the first time tried to deliver rabbits in vitro, which

paved the way for in vitro fertilization. Since the 20th century, artificial insemination has become a method to deal with infertility (Ombelet & Robays, 2015)

Since 1980s, gestational surrogacy has been practiced in China. The notion of surrogacy is not totally new for Chinese; the story of “a man wants to borrow a woman’s belly to produce offspring” can be traced back to ancient China as people wanted to bond with their future generations. After the first tube babies were successfully delivered at the Third Hospital of Peking University in Beijing in 1988 and the first surrogate baby came to China in 1996, the demand for surrogacy increased drastically in order to solve the problem of infertility (Ding, 2015). In addition, the one-child policy led to a surge in demand for surrogacy as well. In the impoverished areas in China, people are more likely to have boys than girls because of the traditional mindset that boys can do more work for families and having a girl baby is “shameful”. Some people continue to deliver boy babies even though they already have six or seven girls (“Avoid family planning”, 2020). Despite the preference for the male gender, some parents would like to have more children as they hope their children can support each other after they pass away. However, government interference with the one-child policy made these desires impossible because of the limitation on the number of children a couple could have. Therefore, many people felt like the only way for them to have more children, was to resort to surrogacy.

According to Administrative Measures for Assisted Human Reproductive Technology (人类辅助生殖技术管理办法), medical staff are not allowed to perform any surrogacy procedures. However, this law does not set a clear standard for the people who enforce surrogacy or donors. The 1986 General Principles of Civil Law have little deterrence to the third parties who make a profit by exploiting financially vulnerable surrogate mothers and child-desperate intended parents, including surrogacy agencies and the individuals (Ding, 2015). Due to the complexity of this issue, the Chinese government has “turned a blind eye” toward surrogacy. Although they physically disfavor it as it complicates traditional morality and ethics, there are still a number of surrogacy markets thriving underground (Zhang, 2020).

The city of Shenzhen is an example of this underground surrogacy market in China. A decade after surrogacy arrived in Shenzhen, an underground surrogacy market gradually emerged. Surrogacy service arising from infertility provides many high-income professional women a chance to deliver a baby. In general, the regulation of surrogacy in China is still in the process of developing. The legal system has many improvements to reach the maturity of whole system.

The pioneers of surrogacy

In the history of surrogacy, one figure played an important role in the development of surrogacy. Noel Keane, a lawyer from Michigan in the US, devoted his whole life to surrogacy, helping many infertile couples to have their first child. Keane signed the first surrogacy contract in American history in 1976 (Gelder, 1997). Although the contract has been criticized philosophically, morally or legally, Noel still supports surrogacy through the combination of surrogate mother's eggs and biological father's sperm.

In a typical agreement, a surrogate mother gives birth to a child with a biological father and then relinquishes custody to the biological mother. From the perspective of some individuals, the biological mother is just the adopter of a child (Nakash & Herdiman, 2009).

The turning point was in 1986 in New Jersey. Mary Beth Whitehead charged \$10,000 to give birth to William Stern. Following this agreement, Mary went back on her promise and wanted to take back the custody of her child. Finally, it went to court, and William's wife, Elizabeth, won. However, the State Supreme Court held that the surrogacy agreement was illegal, so Mary also retained the visitation right to the child. Mrs. Whitehead sued Mr. Keane, saying he had not adequately screened her.

As a result of the case, many states have laws prohibiting people from adopting a child from a surrogate mother. Still, Noel kept his infertility center in Indianapolis and drafted his first Surrogate Parenthood seven years later. In 1983, he struck down the adoption system, and he said he had contacted more than 2,000 couples. His infertility centers have spread across the country: California, Indiana, Michigan, New York and Nevada, and his behavior has given childless couples hope.

Noel Keane has played an indelible role in the development of surrogacy. The traditional method of surrogacy has been much debated, but there is no denying his role in promoting modern surrogacy.

Current Practices of China

Dilemma of the regulation of surrogacy in China

Globally, surrogacy has increased in acceptance and practice over the last three decades. However, in China, the government does not endorse surrogacy, causing an underground surrogacy market to emerge. Curbing surrogacy is becoming more and more difficult and posing a big challenge for government regulation.

First, administrative punishment for illegal surrogacy business is weak and the profits that surrogacy agencies get are high. According to Specification of Human Assisted Reproductive Technology, the medical institutions which develop assisted reproductive technology will be fined under 30,000 RMB. According to Regulations on the Administration of Medical Institutions, the non-medical institutions carrying out human assisted reproductive technology without approval will be fined under 10,000 RMB. Since Regulations on the Administration of Medical Institutions is formulated earlier, the amount of fines for non-medical institutions is far lower than that of medical institutions. Therefore, non-medical institutions are more popular than medical institutions. But the risk is that it brings poor-quality medical safety. Weak administrative punishment cannot fully inhibit the development of illegal agencies which means the government experiences a regulatory vacuum in the practice of China.

Second, it is difficult to define the boundaries of illegality. The whole surrogacy process includes sperms and eggs collection, the transformation of the embryo, and surrogate's final delivery. However, based on Measures for the Administration of Human Assisted Reproductive Technology and Measures for Human Sperm Bank, they regard these behaviors as illegal acts but they do not have punitive measures. In other words, if those agencies engage in activities that are not relevant to medical treatment, the government have no rights or evidence to supervise them. Moreover, some agencies will register websites to promote surrogacy. According to the National Security Department, they are only entitled to prohibit gambling and pornography. Since surrogacy has too many uncertainties, it is hard to convict individuals involved in it.

Third, the legislation of surrogacy is incomplete. If the National Health Department finds the surrogate mother in order to investigate illegal agencies, the surrogates can lie to them or be silent in that situation. National Health Department has no measures to deal with the case or to test whether surrogates tell the truth or not. In addition, if the eggs or sperms or both of them come from third parties, there is no clear legal designation to solve this problem thus far (Wei & Ji, 2019).

Surrogacy and Women

Due to traditional Chinese beliefs, the majority of Chinese believe that men are the superior gender. Women occupy a weaker status in terms of employment, economy, and education. Even now, many women are unable to receive an education. Instead, they are expected to be housewives and serve their husbands and take care of their children forever. From the perspective of feminist socialism, only when women are economically liberated and independent, can women's self-confidence and discursive power be enhanced (Wang, 2019). Low-income women in particular, have become surrogates to achieve economic independence in China.

However, China's laws on surrogacy are unfinished, and the rights and interests of surrogate mothers and children are hardly protected. The following section provides a feminist perspective to explore the implementation of surrogacy and offers a background to understand the current practices of surrogacy in China.

1. Opposition to surrogacy

There are many voices against surrogacy in the world today. For example, Professor Charles J. Dougherty of Creighton University in the United States pointed out that surrogacy is contrary to the traditional concept: it is a kind of adultery and violates the natural law. He argues that surrogacy will lead to incest, and the surrogate mother is not her own biological mother. Professor Martha Field of Harvard Law School also pointed out that surrogacy makes grownup children feel ashamed to know that they are born of another mother. Moreover, surrogacy expands the gap between the rich and the poor, letting low-income women sell their wombs as a form of exploitation.

Many Chinese scholars believe that we should pay attention to the "typical oriental cultural personality" of family and emotion (Chinese traditional culture stresses the relationship between family and people in society, and surrogacy will make this relationship distorted), so surrogacy should not be carried out. Moreover, surrogacy is generally prohibited in the countries of continental law systems in the world, and there is no successful legislation to learn from (Yu & Qin, 2020).

To sum up, the above objection is largely speculating what surrogacy will bring, and often objections because of the inconsistency with the traditional concept of motherhood. To explore the feasibility of surrogacy, we should start from the various interests of the parties to surrogacy.

2. Inequality in the family life pattern

Structural inequality in the family provides an understanding for why low-income women are so drawn to becoming surrogates in China. Due to the different social attributes of women and men: women always play the role of childbearing. Because it is difficult for women's work in the family to be measured as men make money, the value created by women is easy to be ignored. Today's women are often expected to bear the pressure from family and work, which is also a challenge for women's survival. According to Pew Research Center, among working parents of children younger than 18, mothers in 2013 spent an average of 14.2 hours per week on housework, compared with fathers' 8.6 hours. And mothers spent 10.7 hours per week actively engaged in childcare, compared with fathers' 7.2 hours. In addition, because men have an absolute advantage in income, they also have an absolute discourse power in the family. Therefore, it is difficult for men and women to be totally equal in terms of family. The inequality of family life pattern leads to the lack of normal economic income of many women, which is also the reason why many women, especially low-income women, choose surrogacy.

3. Surrogacy and human rights

Many people criticize surrogacy because the parent-child relationship is not clear. According to American scholar D. Schuck, surrogate mothers sign surrogacy agreements voluntarily. To fight for the custody of children after childbirth does not mean that they did not agree to be a surrogate in advance (Schuck, 1988).

Reproductive rights are regarded as human rights internationally. It should not be decided by people other than those involved. In fact, the right to procreate is the freedom of procreation. Women have the right to choose the number of children to give birth to, determine the quality of childbearing and the choice of childbearing mode.

Abortion politics and policies offer an interesting lens through which to understand surrogacy and human rights. Abortion law similarly demonstrates government's control on women's bodies and their political rights. In September 2019, Alabama passed the anti-Abortion Act, which means that no one can have an abortion under any circumstances. Abortionists are sentenced to felony murder and the executive doctor is sentenced to 99 years in prison. This

undoubtedly deprives women of the right to choose freely, which brings a huge shadow for women's future survival. "My then-boyfriend while in college raped me in my mom's basement and the word 'NO' was not part of his vocabulary. This changed me forever. I never told my mom what happened because I feel as if no one will believe me." Jean R said on the Twitter. Rape is uncontrollable, but the consequences of rape can be controlled. The girls who are forced to conceive have the right to choose to have a child, but they also have the right to give up because they are unable to support the children. Women are also victims. If human rights only focus on unborn children, how should those women's lives be treated?

Now many female victims are invisible because it is male who dominate the world. Women are sometimes discriminated against just because they are female (Bunch, 1990). They are subject to political oppression, sexual harassment or domestic violence. In most of time, they are reluctant to resist, but this does not mean that the world should deprive them of their rights.

Conclusion

This paper mainly explores the history of surrogacy, practices of surrogacy in China and its significance for women. In the section of the history of surrogacy, I mainly focused on the rise of surrogacy in China and the global scope. In addition, I have mentioned the leading figure in surrogacy, who have played a crucial role in the development of surrogacy as a whole. In the second part, I elaborated the current legislation of surrogacy in China. The last part of the paper is about the influence of surrogacy on women, including the criticism of surrogacy, unequal family relations and the exploration of women's rights and interests. This paper suggests that surrogacy is illegal in China, but its high rewards have led many families and women to take risks. It is evident that surrogacy is increasingly popular in China and more research needs to be done on the practices of surrogacy.

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