Babies, Borders and Big Business

Babies for sale. Transnational surrogacy, human rights and the politics of reproduction. Edited by Miranda Davies. London, Zed Books, 2017, £19.99 (Paperback), ISBN 978-1-78360-701-3

Today, someone with money, woman or man, who is unable to have a child for whatever reason, can buy the services of a “gestational surrogate” somewhere in the world. This woman – most likely quite poor and from a low-middle income country – will have the egg from another woman, which has been fertilised by the sperm of a known or unknown man, implanted in her uterus. She will gestate it for nine months then give birth and the person will arrive in her country to take the baby for their own.

It sounds easy.

And yet, questions start to crowd in. Is the baby in good health? Will bottle-feeding be easy? What about getting a passport for the baby? Will she/he automatically get the nationality of the intended parent? Will he/she develop normally? What, if anything, should be told to her/him about their origins? And what about the surrogate? Was she really paid adequately? Was she given proper medical care? What does her family think? What about the egg donor, the sperm donor? Will they have any interest in this genetic offspring of theirs at some future date? And how much money is the fertility clinic making?

These questions and many others are the focus of this new anthology, Babies for sale: transnational surrogacy, human rights and the politics of reproduction, edited by Miranda Davies, launched in April 2017. In her introduction, Davies explains that the collection of papers from leading academics and activists in the field seeks to offer a fresh approach to the complex ethical questions surrounding this increasingly recognised method of procreation. In particular, priority is given to the concerns and experiences of the women, men and children most directly involved, and it highlights the work of national feminist organisations from India, Mexico, Sweden and the USA, often the voices that are not well heard in the debate. A central topic, too, is the interests – both psychological and legal – of the children who are born from commercial surrogacy arrangements, and frequently absent from international debate.

Whose interests?

A swift trawl of the internet shows that the worth of the commercial surrogacy industry is estimated at around US$2.3 billion annually. This frequently cited figure is almost certainly a serious underestimate, given that much of the industry lies in the grey zone just beyond the boundaries of both national and international law which are woefully inadequate to address all the issues arising.

Bearing in mind this underestimate, this is a big and growing industry, with many vested interests. The driving force behind the desire for children is, of course, the person or couple who would like to have their own child – with their own genetic material if possible – but who cannot, for a host of reasons ranging from infertility, being a gay couple, being single, and being unwilling or unable (legally) to adopt.

There are cases of women acting as surrogates for altruistic reasons, free of charge. Much more common now, though, are those women who can earn a serious amount of money – reputedly around US$20,000 in California, more like $3000 in India – for going through nine months of pregnancy and bearing a child, a job that in both locations requires only the demonstrated ability to bear a child, and probably provides them with significantly more money than the alternatives available.

But there are a host of others who have highly vested interests. As Davies points out in her introduction, while adoption involves the protective services
of social care, legal and sometimes medical professionals, “surrogacy tends to entail a far greater but less legitimate cast of characters, from the providers of the genetic material, to doctors, recruiters, agents, insurance brokers, travel agencies, taxi drivers, guides and other intermediaries employed in the surrogate’s country to ensure that the whole process runs as smoothly as possible”. In India, for example, the commercial surrogacy industry has been built up through a complex network involving a whole new cadre of agents who recruit surrogates for in vitro fertilisation (IVF) clinics. These agent facilitators play an essential role in sustaining the surrogacy arrangement, rife with inequalities.

Globally, the commercial surrogacy industry has given rise to extraordinary marketing networks, in great part due to the internet, with dozens of commercial surrogacy agencies touting their wares – “miracle”, “dream” or “designer” babies – to anyone with access to the internet. The gay community is a key target, with agencies emphasising the merits of having one’s “own” child, by one or both of the male partners supplying sperm.

What about the surrogates?
Transnational surrogacy involves women who, for the vast majority, are poor. A number of the papers in this collection shows that “informed consent”, if undertaken at all, rarely provides adequate information to surrogates about the procedures they will be undergoing, or about the risks and expected effects (particularly because they have often been transported across borders into a country of which they do not speak the language). Indeed, a whole gamut of health problems affecting both the surrogate and the baby are beginning to be documented.

The most substantial risks related to IVF and surrogacy come from the implantation in the surrogate’s womb of multiple embryos, to help reduce implantation failures. Apart from possible risks involved in the taking of exogenous hormones and from the anaesthesia used in the implantation procedure, a multiple pregnancy significantly increases the risks of pregnancy and childbirth over singleton births, including hypertension, haemorrhage, obstructed labour and maternal mortality.

Routine delivery by C-section, which appears to be widely practised by fertility clinics involved in surrogacy arrangements, also involves greater risks to women than vaginal birth (unless there is a medical reason for conducting a C-section). And while women may be relatively well looked after during the pregnancy, in the interests of producing a healthy baby, once the birth is successful continued oversight, postnatal care and follow-up are often inadequate or non-existent. In “contract” pregnancies, unlike many other IVF pregnancies, the fertilised eggs a woman carries are not her own. Although there are few studies on the long-term outcome of pregnancies with third-party eggs, there is a demonstrated increased risk of complications for the mother.

Legal loopholes and conundrums
Commercial surrogacy agencies are quick to protect their interests in the face of changing legal circumstances. When the law became highly restricted in India, agencies operating there moved to Thailand and later again to Nepal. But for the intending parents, having a surrogate child in a third country poses other problems. For example, Israeli law allows only women resident in the country to act as surrogates and women cannot be “imported” into the country for such a purpose. When Nepal was struck by an earthquake in April 2015, revealing the fact that dozens of surrogates from India who were about to give birth on behalf of Israeli couples had to be evacuated from Kathmandu hospital, there were appeals and attempts to have the pregnant surrogates flown to Kathmandu to give birth safely. This could not be done as the women had no passports and the action would have constituted trafficking in women.

In Romania, intending parents can have a child using a surrogate mother only by adopting the child after birth, as the surrogate remains the legal mother until the competent authorities agree to the adoption of the child by the intending parents (who may or may not be the genetic parents). If the surrogate decides to keep the child or children, no-one can take the child away from her. This situation has led Romanian couples, along with many from countries with a similar legal environment, to use the services of women in the Ukraine where commercial surrogacy is legal and where the intended parents are specifically named as biological parents on the birth certificate without any mention of the surrogate mother. Greece is another country where “reproductive tourism” has mushroomed because of the dire economic situation of the country, combined with legislation which requires only one of the
two parties (intended mother or surrogate) to be a permanent resident of Greece.\textsuperscript{8}

It is clear from papers in this collection that national legislators in many countries are struggling to adapt their legislation to the constantly evolving situation of global commercial surrogacy. Many states have now put a total ban on surrogacy while others allow “altruistic” surrogacy but not commercial surrogacy. But as long as some countries allow commercial surrogacy, a complete ban in another country will only have the effect of changing the location, and will likely contribute to the continuing exploitation of women and children.

\textbf{The children}

At the heart of the legal conundrums is the child. Davies’ collection very consciously includes a section on the children born of commercial surrogacy arrangements, as they are often left out of the debate. With changing legislation, intending parents who use a surrogate in, say, the Ukraine, may find that they are unable to register the child as theirs in their own country. If their home country legislation forbids surrogacy, the very existence of this child violates domestic law, and there are numerous cases where such children have been stateless, and passed from one agency to another until some solution is found, sometimes years later. International law specifically governing surrogacy is non-existent, and the only standards available are those of the Convention on the Rights of the Child and the Hague Conference on Private International Law with the over-riding principle of the best interests of the child.\textsuperscript{9}

However, the question of what are the best interests of the child is open to debate. And there is a void with regard to follow-up data on how children born of transnational surrogacy arrangements are actually faring.\textsuperscript{10} The case of an Australian man and his partner, parents through international commercial surrogacy, sexually abusing the child and making him available to an international paedophile network,\textsuperscript{11} is an extreme example of lack of regulation, oversight and control. The case of Baby Gammy, a twin born with Down’s syndrome in Thailand, who was abandoned there while his twin sibling was taken back to Australia, is another example of child abuse arising from international commercial surrogacy.

Apart from the legal dimensions and their effect on the child’s status, there is also the question of identity. We all ask at some point: who am I and where did I come from? For at least some children resulting from third-party surrogacy, finding out who their genetic parents are will be fundamentally important. And while there is growing recognition of this need, many jurisdictions still guarantee anonymity to sperm and egg donors.\textsuperscript{12} A positive innovation in this respect is the development of various internet-based genetic and communication technologies – DNA paternity testing and genetic genealogy – along with the creation of donor sibling registers and photographic “detective work” through software and social media, is now providing the opportunity for children to trace their genetic parents.\textsuperscript{12}

\textbf{What is to be done?}

All the papers in the collection recognise that assisted reproductive technologies, combined with the growing acceptance of different family formations and ways of achieving parenthood, have allowed people who might otherwise have remained childless, to partake of the joys of having and bringing up a child. The question, then, of how to deal with the increasingly documented damaging effects of transnational commercial surrogacy as outlined here, is urgent. At the end of her introduction, Davies asks, “Can transnational surrogacy ever be ethical?” Many actors – from radical and socialist feminists to the Catholic Church and pro-life groups – take a position in favour of a complete ban. Others argue in favour of a regulatory regime which recognises and protects women’s rights to be free to enter into a contract, to work (including with protective labour laws) and make informed choices about what they do with their bodies.\textsuperscript{1,13}

The final chapter of the collection lays out detailed considerations that should be taken into account, through legal regulation, in any surrogacy arrangement, regardless of a country’s position.\textsuperscript{13} In the absence (for the time being) of any international law specifically governing surrogacy, such actions include giving children access to information, safeguarding women’s health, ensuring pre-screening of commissioning persons, legal advice and counselling. Whether this will be done, and if so, how rapidly, will depend on the energy brought, by actors across the world, to maintaining the issue at the forefront of the global debate. Miranda Davies’ anthology is an invaluable contribution to galvanising that energy.
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