2-2 A Baby “Made in India”:
Intended Motherhood and Transnational Surrogacy

Karen Hvidtfeldt Madsen

During the recent years, India has become a popular destination for fertility tourism. A growing number of Indian fertility clinics offer surrogacy services to a Western audience at prices very competitive compared to the US market. Nobody seems to know if the number of Indian fertility clinics should be counted in hundreds or thousands, but the surrogate industry is undoubtedly a growing part of Indian medical tourism industry. The Indian government has supported this by introducing a ‘Medical Visa’ and the number of foreign patients seeking medical service at Indian hospitals has been steadily increasing during the recent years. Still more customers are European, Japanese, Australian and North American without any special connections to India - simply people who decide to use a surrogate mother in India, because they estimate it to be the best offer present on the global market. Besides the low cost, private Indian clinics offers expertise and international standards, less or little to no waiting periods, English-speaking doctors educated abroad, and many treatments available with fewer restrictions than in Western countries. The extended use of internet-based communication technology reduces the feeling of geographical distance (Falkheimer and Jansson).

These developments are followed by new narrations, as journalists, artists and the people involved take up the challenge of understanding these new ways of creating life — and the stories migrate and remediate. Surrogacy has been the subject of documentaries as well as Bollywood movies and is discussed intensely on various internet sites. In the period between 2009 and 2011, I have followed about twenty weblogs, all dealing with the specific subject of surrogacy in India. Blogs, as “havingababyinindia.blogspot.com”, “tajmababy.blogspot.com” and “millionrupeebaby.blogspot.com” are narrated by Western men and women, (infertile couples, who have tried available treatment options in their home country, as well as single men and gay couples using egg donation, reproductive technology and one or more surrogate mothers in order to become a family). They are, or hope to become, parents with the help of one of the numerous fertility clinics in India.
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On the weblogs, the pain of infertility is described, the stressful waiting periods, as well as the joy accompanying the long desired children. A central part of the blogging activity concerns the possibility of sharing visual images: the ultrasound pictures of the fetus’ growing, colorful images of adorable babies, where dark hair and brown eyes often bear witness of their Indian genes, along with pictures of Indian surrogate mothers and exotic surroundings, like also the graphics and illustrations are marked by the transnational theme. The intended parents exchange factual information about the Indian clinics, their procedures and how to deal with Indian and domestic authorities. They share and discuss the numerous, often highly emotional aspects of the process— and within a framework of neoliberal arguments, they discuss the relationship to the surrogate mother and of course to the child.

Commercial surrogacy—where a woman is paid for carrying out a pregnancy for another woman has been said to be “the new adoption”, and there are indeed aspects pointing toward that the transnational surrogate industry has become an alternative to adoption for childless singles and couples, who are not able to — or do not want to - meet the requirements for international adoption. The combination of new reproductive technologies and a surrogate mother also gives the possibility of a genetic child and the opportunity to follow the pregnancy from the very beginning.

As a media, the weblog genre gives users the opportunity to create unique and personal expressions and the chronological structure of the weblog makes it suitable for identity work. Reproduction is obviously a process extended in time: the bloggers hope and wish for a pregnancy, often in several attempts. The weblog makes it possible to express the detailing of waiting and count-down of days until the expected time of birth. The diary-like form of communication that characterizes a weblog seems to have a therapeutic purpose for the bloggers.

The communication on the blogs draws on a neoliberal mindset in which (in)fertile individuals takes personal responsibility for their fertility, and kinship is something you can create yourself. (In)fertility treatments and surrogacy is situated within an individualist rhetoric of choice and draws on an understanding of the body (and its parts) as individually owned and governed. The transnational fertility treatment does in some sense reinstate existing hierarchies between the ‘rich’ and the poor world— the global north and the global south. But in the neoliberal world all agents are potentially active clients, consumers or assistants: the reproductive northern citizen is transformed from the passive citizen of the welfare states and the poor citizen of neo-India is potentially entrepreneur in the global economy in reproductive services (Krol й kke and Pant).

The blogger ‘CharlieCat’, argues that the surrogate mother obviously, in line with for example the doctor, has a right to be paid, as here expressed on the blog Chai Baby: “Everyone else gets paid; the doctors, the lawyers, the psychologist, the infertility specialist, but not the one person who is being poked and prodded and is actually doing the work and carries the risk?”. Importantly, the service of surrogacy is what is paid for, not the child: “How is this any different to a woman who becomes pregnant in the "natural" way, who buys the services
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of medical professionals in order to have her baby? If she decides to give birth in a private hospital, she purchases the services of her OBGYN, nursing staff, a private room and other goods and services required for her to give birth. Are these not commodities? Because she is paying for these services does this then mean she is buying her baby, or that her medical team are selling the baby to her? With surrogacy, there is just one more step in the process to have a baby, the services of a woman willing to carry the baby.”

Thus a surrogate mother can be said to be an extraordinary part of a pregnancy, but does not otherwise stand out from all the medical and technological services a pregnancy or childbirth requires today. All (Western) women are currently serviced during pregnancy by doctors and health professionals, thus the relationship between a ‘natural’ and a ‘non-natural’ pregnancy is de- and reconstructed.

As a guest in an Oprah Winfrey-talkshow, named “Journey to Parenthood”, the Indian fertility doctor Nayana Patel described the Indian surrogates as “India’s gift to the world” and declared the relationship between surrogate and intended mother as a “win-win”-relationship, where infertile Westerners have a baby and Indian women are helped into a better economic situation. Thus, she narrates and legitimizes the transnational surrogacy arrangement as a new kind of foreign aid and a way of expanding intercultural understanding: “Now this baby and this couple will have this bond with this country. And in a way, become these a sort of ambassadors, these cultural ambassadors [...] It’s a confirmation of how close our countries can really be.”

Blog names like Made in India, Procreated in India and Million Rupee Baby indeed reflects the need of the intended parents to disarm the commercial aspects of transnational surrogacy by using humor and irony. At the same time, a courtesy to the Indian culture, of which the child is experienced as being a part of, is expressed. For example, the blog title Chai Baby mediates between the Indian context and the Australian’s intended parents specific needs, and URLs as www.tajmababy.blogspot.com and www.cocoamasala.blogspot.com points directly towards the Indian context through the exotic terms like ‘chai’ and ‘masala’. The blog A Distant Miracle has a photo of the grand Taj Mahal as cover and the title “Traveling 7.500 Miles to Grow Our Family”, and the bloggers “Christmas Eve Boys” have a series of colorful saris as their cover illustration. Chai Baby offers a handwritten introduction, explaining how “masala chai” is made _and what the drink symbolizes in Nepal and India.

Humility and gratitude are feelings continuously expressed, and are directed both to possible donors, surrogate mothers, doctors, the Indian nation and God. “There is a glorious palace set aside in Heaven for our donors and surrogates”, Meg writes from a waiting room in an Indian hospital, and thereby blends a characteristic Indian image of the ‘palace’ with a Christian framework of understanding in line with the Out of India-blog.

The subtitle “A MIRACLE OF LIFE WILL BUD IN DELHI AND BLOSSOM
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The subtitle “A MIRACLE OF LIFE WILL BUD IN DELHI AND BLOSSOM
IN CALIFORNIA AS A GIFT FROM GOD THROUGH EGG DONATION AND GESTATIONAL SURROGACY" communicates an understanding of the child as a gift from one nation to another, in line with doctor Patel, but simultaneously introduces a religious discourse standing side by side with metaphors of nature ("bud", "blossom") and a medical discourse ("egg donation" and "gestational surrogacy"), where the ‘donation’ also has the gifting inscribed as a central part, and the title ‘Out of India’ points towards the interaction between the West and a (post) colonial culture.

It is in many ways comparable to the narrative structure of a traditional fairytale, when the bloggers tell their stories of becoming parents in India, as a story where a childless couple’s dearest wish finally comes true. In addition a touch of magical realism is often seen, as the adventures in the distant and foreign surroundings appear supernatural and almost incomprehensible. ‘Dream’ is a common metaphor in this virtual community of bloggers, along with ‘magic’ and ‘journey’, which not only refers to the concrete journey to India, but also the mental process of coming to terms with this untraditional way of becoming a mother.

But besides the money, the intended parents feel to have invested much more. CC has brought home the twins Max and Lily from New Delhi to Adelaide in Australia, and underlines the great efforts and costs that infertility has meant for the couple. Even though not having gone through the actual physical pregnancy, they have felt and lived through a pain that can be measured with a birth. On Chai Baby CC lists the ‘birth pains’ that bloggers typically mention in relation to the ‘journey’, being one of the central metaphors:

"The miscarriages, the missed attempts, the failed attempts, the exotic flus and whooping coughs, the dead sperm, paying for surrogates & egg donor we didn’t use, the grief of using an egg donor, the hurt, the sorrow, the anxiety, the fights, the worry, the bureaucracy — these are our birthing pains."

Like all birthing pains, no-one’s is the same as anyone else’s and you can’t compare journeys, but there are consistent themes that run through our stories. Anyone who thinks surrogacy is the easy option, think again and read some of these blogs from the beginning.

We, who do surrogacy are a brave, resilient tribe of people, we believe that miracles happen and we are privileged to be part of a community who gets to see these miracles being born every week. What I know to be true is that in one of those weeks, the baby being born will be yours.

Thus kinship occurs where people make an active effort. Feelings and intentions are transformed into kinship, also in ‘Edward’ s comment to one of CharlieCat’s other postings; here on the many concerns she and her husband had up to the decision not to meet the surrogate mother personally:

"But the truth is, no matter what the nuance, this is YOUR pregnancy ...even if it’s not in your body. You and your husband are the only reason this pregnancy exists. I like to think that all IPs on this path are brave souls who maintain a strong emotional connection that replaces a physical connection that would have occurred in a traditional pregnancy."

The blogs document that the commissioning parents are very well aware of that the surrogacy arrangements are not simply comparable to foreign aid. The Western ‘patients’ do in some sense understand themselves as cultural ambassadors (a term that is also used on the fertility clinics websites), but at the same time they consider and reflect the commercial part of the deal within a framework of neoliberal arguments. Names, metaphors and the visual
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expression of the weblogs reveal that the intended parents use a ‘gift economy’ framework, and that the gift is the child. While you typically do not pay for a gift, the intended parents understand their payment as symbolically consisting of intentionality combined with the pain and worries they have felt during the long waiting period. Only the service of the surrogate is paid for with actual money.

In the 1980s, Emily Martin (Martin) noted how women’s demands for autonomy and ‘natural’ birth procedures (meaning active and possibly without medical intervention) during the last half of the 20th century was followed by a corresponding set of metaphors for the birth procedure. Already here the ‘journey’ showed to be a key metaphor, and according to Martin, women sought metaphors with the ability to capture “the sense of acting and doing”, for example by comparing the act of giving birth to running a marathon or climbing a mountain. The metaphor of travelling was, according to Martin, used in the sense of an ‘inner journey’, as women reinterpreted birth as an opportunity of psychological development and learning.

This is remarkably comparable to the surrogate bloggers’ ways of highlighting their active efforts in order to justify their parenting. Martin argued that the metaphors of the female body and reproduction during the 20th century were influenced by the industrial society (i.e. efficiency, regularity), and has since moved into what she describes as a theoretical framework of chaos, where rather the unpredictable and flexible counts as ideals. Similarly the surrogate bloggers seem to develop metaphors, which in many ways reflect late-modern ideals in the era of globalization. The global community is for example celebrated when Megan welcomes the transnational opportunities made available for them through internet communications:

“So, here we have an egg donor from South Africa, a surrogate in India and a couple in Australia making a family. Wow. It is such an honour to be the instigator of this process and make friends with people from across the world, who only have our best interests at heart.”

And Tracy compares her experience of the Indian reproduction process with a sports team, though in a way that it also addresses the rhetoric in late modern business management where coaching, project management and team building are key words:

“Anyone pursuing surrogacy should know that it is the ultimate team effort.
M is the captain - the glue (literally) that holds us all together
I am the quarterback - in charge of distributing the ball (or eggs, if you will)
B is on special teams - usually on the sidelines, but an indispensable part of the team
Dr. Patel is the coach - writing the play book and leading us all to victory
We have learned to trust in and have created a lifelong bond with our new teammates.
Although we all have different tasks we all share the same goal.”

Tracy distributes ‘roles’ that reflect the way in which she emotionally experiences the situation. In this manner, the surrogate mother ‘M’ is ‘starring’ as ‘Captain’, the doctors are ‘coaches’ and she and her spouse takes more peripheral positions. But in reality the surrogate mother does not have much to say and will be replaced if she does not meet the intended parents’ expectations, just as the doctor and the clinic does. It is without discussion the paying parents who puts together and leads the team, and the mentioned ‘lifelong’ relationship will only be through the child’s existence, since the parents neither have intention nor the possibility of keeping in touch with the Indian surrogates.

There is no doubt that Indian surrogates and the intended parents operate on quite unequal conditions in the global fertility industry/neoliberal reality. The
expression of the weblogs reveal that the intended parents use a ‘gift economy’ framework, and that the gift is the child. While you typically do not pay for a gift, the intended parents understand their payment as symbolically consisting of intentionality combined with the pain and worries they have felt during the long waiting period. Only the service of the surrogate is paid for with actual money.

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Thus globalization, new medial and technological possibilities and neoliberal ways of thinking interacts with our most essential longings and feelings of belonging and traditional frames of narration; as kinship seems increasingly to be understood as dynamic, flexible and mobile: something you do rather than something you are. Like women in the late 20th century sought to gain control over their own birth processes, parents today seek control of reproductive processes, which not only lies in the hands of the medical staff, but also can take place in a foreign part of the world. These weblogs provides an opportunity of gaining insight into the complex and challenging scene of transnational assisted reproduction of today.

Notes
(2) http://www.oprah.com/world/Wombs-for-Rent/7.
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- Amani and Bob’s Indian Surrogacy http://amaniandbobsurrogacy.blogspot.com
- Cocoa Masala. Just a Guy & a Girl exploring the possibility of gestational surrogacy in India http://cocoamasala.blogspot.com/
- Procreated in India. http://procreatedinindia.blogspot.com/
- Taj Ma Baby http://tajmababy.blogspot.com
- A Distant Miracle http://adistantmiracle.blogspot.com/
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- Out of India http://fromindia-withlove.blogspot.com/
- Made in India. http://152am.blogspot.com/

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非配偶者間人工授精導入時の法律問題研究
——法的父子関係をめぐる議論を中心に

由井秀樹

はじめに

特例法3条1項の規定に基づき男性への性別の取扱いの変更の審判を受けた者は……夫として婚姻することができるのみならず、婚姻中にその妻が子を懷胎したときは、同法【民法；筆者注】772条の規定により、当該子は当該夫の子と推定されるというべきである。

2013年12月、最高裁判所は「性同一性障害者の性別の取扱いの特例に関する法律」により、法律上の性の変更が認められた元女性を夫とする夫婦と、提供精子を用いた人工授精（非配偶者間人工授精【Artificial Insemination by Donor；AID】）により出生した子との間に嫡出親子関係を認めた。二宮周平は、嫡出親子関係が認められなかった第二審までの経緯を紹介した上で、民法は父子関係の決定に必ずしも血縁を絶対視していないこと、学説の多数説や判例が通常の夫婦がAIDを選択した際、夫の同意があれば子に嫡出推定が及び得としていること2を指摘し、平等を求める視点から下級審判決を批判する3。今回のケースは最終的に二宮の見解を支持する形になったが、水野紀子のように二宮と異なる見解を示す民法学者もおり4、最高裁判決の評価も割れることが予想される5。

二宮は自身の見解を提示するためにあたり、前述のように通常の夫婦がAIDを選択した際の法的父子関係に関する学説の動向を検討したが、その際、民法772条の推定が及ぶ嫡出子と解する第一の立場、772条の推定が及ばない嫡出