

3° Round Table: From Far East to Europe? Some Reflections on Desires, Law and Perceptions around “Surrogacy”

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Introduction

At the end of the third Round Table about surrogacy, its high level of complexity is clear. This practice involves different kind of aspects – moral, economic and social – as well as specific gender issues, and the implications of surrogacy are many and are so relevant, that it is hard even to draw a basic map of the issues.

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The first step is trying to understand and we believe that a key for better understanding the social construction is adopting a gender approach. This means observing and reading societies from a situated point of view. Gender, indeed, is *a total social fact*, in the meaning proposed by Marcel Mauss, it is something that bring into play the whole of society and all its institutions – legal, economic, religious, and aesthetic – and it constructs and determinates the perception of our surrounding and environment. It does that in many ways, giving shape at our perception regarding our work’s choices, as well as the different kinds of traditional cooking. As Amelia Simmons states, even cooking was used to create “good wives and useful members of society”⁷ and recipes used to enforce the traditional gender expectations for women’s domesticity, their time spent at home and in the kitchen. It is natural that even stronger suggestions are in force on motherhood and family.

Although, as human being, we have free will and we are able to modify the world around us, even changing its nature, the construction of our societies, especially with the structural subordination of women, influences our desires, beliefs and cultures, also partially directing our present choices.

Surrogacy issue fits on amplifying controversial aspects of motherhood, as it is situated at the intersection of different opinions, approaches and interests. The three Round Tables published on AG want to show this complexity, illustrating the differences between peoples’ cultures and their perceptions. However, our tour around the world is not yet completed. In this third RT we present a view from the (for us) Far East.

We believe a red thread can be followed that keeps together the different contexts, even if cultures or beliefs are different from countries and in the same way women are different each other.

As already emerged in the previous RTs on surrogacy, also in the countries involved in this third RT a plurality of points of view and different readings of this social practice emerge as well as a diversified range of perceptions of the people involved in the process. A new aspect that may be underlined about the RT, which has not emerged so clearly from the previous explorations, is the existence of a traditional form of socially

⁷ American Cookery, 1796.

defined and “normed” surrogacy. A form that strongly discriminating against women, as explained by Heonjoo Sohn (South Korea) in her contribution. In the described Korean context, we are faced with a paradigm that underlines some ancient roots of the practice, highlighting how the introduction of technology could be reactive to tradition. It should be interesting re-read the contribution of Barbara Katz Rothman in the first RT where she remember the Old Testament to testimony the existence of the practice.

Our “journey”, as a diagnostic investigation, leads us to reconsidering what could be thought of as a kind of implicit assumption of our starting point about surrogacy. Mainly perceived as a “novelty” concept to inquiry the social changes and its diffusion in our reality (however relative, considering the traditional use of some forms of it), surrogacy has to deal with the traditions and history of peoples. Technology is grafted onto the traditional paradigm. Analyzing the philosophical approach, the normative response and the social impact of surrogacy is something that goes deep in our societies. This awareness this leads us to reflect on the role played by technology in our society, and how it is central its relationship with norms and social construction. The perception of this interrelation between new technology and cultural tradition could play an important role also in the construction of legal issues, on their definitions and maybe in losing the typical generality requested to the law in favour of more particularistic definitions.

Our research around surrogacy is still gathering information and points of view, considering the varieties of positions that emerge in different places of the world and in different cultures. Our study about surrogacy, about the normative and social response to the contemporary development and their application is aimed at understanding our society and the way in which it is (maybe too) quickly changing.

1. In a very brief explanation, if there is, could you give us an idea about the regulation of surrogacy in your country? Do you have an opinion on how the law should deal with the issue?

Heon Joo Sohn - There is no law on surrogacy in South Korea. There is no legal provision to ban or permit surrogate procedure and nobody will be punished for conducting such activities. The only law closely related to surrogacy is the Bioethics Law, which

took effect in 2005. According to it, buying and selling of sperm or eggs is illegal. However, in reality, surrogacy is conducted on the personal level, considering the fact that on the internet portals, we can easily find advertisement or discussions related to surrogacy, e.g., looking for surrogate mother candidates and questions about the expenses for surrogacy procedure.

Korea is traditionally a patriarchal society with a particular concern for male bloodlines. Thus, procuring male heir was crucial to a family. There used to be a traditional form of surrogacy called “Ssibachi” to procure an heir to the couple with a fertility problem. The literal meaning of “Ssibachi” is “a receptacle for seeds”, assuming that the role of a woman is complementary in procreation while that of a man is the key to decide the gender and identity of the baby to be born. Stories of Ssibachi are scattered in Korean folklores and often tragic. A typical story line is like this. A young girl from a poor family is chosen for a Ssibachi. After giving birth to a baby, she is forced to surrender her baby and is discarded with a certain financial compensation. Deprived of her baby, she gets insane or takes her own life in despair. Another tactic to procure a male heir was taking a second or third wife. Although those customs are outdated, they are still alive in the memories of Korean people. Surrogacy, therefore, is not a news here. What the new surrogacy differs from the old one is that there is a sensitive issue of sexual fidelity on the male part of the intended parents and to procure a male heir is not the sole purpose of the practice. To deal with the fidelity issue, artificial insemination is involved.

Patriarchal tradition remains in the Korean society, along with the prejudice and discrimination towards infertile women. People do not want others to know about surrogacy, which makes the practice of surrogacy often conducted in secret as is the cases of child adoption.

Professionals in the medical field point out practical problems concerning surrogacy. The fact that there is no surrogacy law or guidelines means that each medical institution has to make decisions regarding surrogacy related issues when they occur. In this situation of legal void, each institution establishes Institutional Review Board (IRB) to deal with all the questions and problems ensued to such practices. Professor Jung-Ok Ha describes the situation stating that: «As there is no legal statement on surrogacy, but

treatments are actually carried out, each institution faces an ethical predicament». She insists that principles on surrogate pregnancy procedures should be at least be established at the institutional level instead of deliberating and discussion every issue from scratch for every case⁸.

According to Professor Chang Suk Suh, obstetrician and gynecologist and the president of Seoul National University Hospital, the practice of surrogacy in Korea seems to decline (at least on the official level) for several reasons. The lack of legal support and the secrecy issue are among them. Instead, surrogacy tourism is increasing. One of the most popular destinations for the rich is the US. For surrogacy is legal in some states of the US, the surrogate mother can give birth in safety and a legally supported environment and all parties involved work together to facilitate the desired outcome. It appears that keeping secrecy about surrogate birth is easier when it is done in a foreign country⁹.

I am ambivalent about surrogacy. It is certain that surrogacy can offer a solution to an infertile people who want children with their genetic heritage. However, surrogacy involves various issues, social, cultural, legal, ethical, and perhaps many more I cannot think of at the moment. First, surrogacy needs to utilize the third party, either in the form of surrogate mother, egg or sperm donor, or sometimes both. If surrogacy is legalized, there is another issue of commercial surrogacy. There is a danger of exploiting economically vulnerable people for our desire for reproduction. Second, the interest of the surrogate child should be considered. If a child finds out or eventually understands the fact that s/he was born out of surrogacy, the child may suffer confusion in recognizing the parental relationship with surrogate mother, genetic mother, genetic father, and (if there is) legal mother and father in the society s/he belongs to. Third, I have a question: “Do we really need to come through this complicated procedure to have a child?” I cannot help suspecting that surrogacy is the result of the weird combination of our modern scientific knowledge and individualism. Without the knowledge of genetics

⁸ Jung-Ok Ha (2012), *Current issues on a standard for surrogate pregnancy procedure*, in «CERM»,. p. 138 - available from: <http://www.eCERM.org>.

⁹ Professor Chang Suk Suh is an obstetrician and gynecologist and the president of Seoul National University Hospital. He was very kind to agree to be interviewed and provided me with valuable references and information about how surrogacy has been practiced in Korea.

and the help of genetic engineering, we would not dare to attempt to produce a child without the genetic mother's body. The desire to have one's own genetic child may be an innate one. However, the problem is that it is encouraged and stimulated by the individualism in the modern urban commercial society. Therefore, if surrogacy is to be legalized, it should be non-commercial. Otherwise, we may not be able to avoid having helpless women exploited to the point of crime such as kidnapping and human trafficking.

Sharmila Rudrappa - In 2002 commercial surrogacy was legalized in India, soon resulting in the country being the leading provider of gestational services in the world. By 2012, however, the industry in India slowly started closing down. First, single men and women, and queer identified couples were banned from pursuing surrogacy in India. Then in 2016 that ban extended to all commercial surrogacy, effectively bringing a highly profitable reproductive business, estimated to have garnered anywhere from U.S. \$500 million to \$1 billion per year, to a screeching halt.

In the years between 2002-2016 the fertility business had rapidly grown in India; by 2012 there were an estimated 200 infertility clinics registered with the National Association for Assisted Reproduction in India. Other sources say this number could have been as high as 500 to 3,000 clinics. All this growth in global surrogacy in India, however, was *not* mediated by legislation. That is, to date, there are no surrogacy laws in India. Instead, surrogacy has been guided a series of regulations, proposed bills, and guidelines. The Indian Council for Medical Research's National Guidelines for Accreditation, Supervision, and Regulation of Assisted Reproductive Technology (ART) Clinics, 2005 was the first set of recommendations meant to regulate surrogacy¹⁰. The very first bill proposed to regulate surrogacy, the Assisted Reproductive Technology (ART) Regulation Bill, 2008 was stuck in debate for three years before it was vigorously protested.

¹⁰ http://icmr.nic.in/art/Prilim_Pages.pdf - accessed on February 2, 2018.

It did not become law¹¹. The second bill, the ART Regulation Bill, 2010 too failed to pass¹².

Even the 2012 ban on gay couples and single men and women was not accomplished through legislation. Instead, the Foreign Regional Registration Office sent various Indian consulates around the world that new visa rules were to be implemented, wherein only married foreign couples would henceforth be issued medical visas for surrogacy purposes¹³. The injunction came through the Indian Ministry of Home Affairs' stipulations that medical visas for surrogacy purposes would be available for only heterosexual couples, in cases where «[t]he foreign man and woman are duly married and the marriage should have sustained at least for two years¹⁴».

The third bill, the Assisted Reproductive Technologies (Regulation) Bill, 2013 too did not pass the parliament vote. A decade after having commercialized surrogacy, the country still had no laws governing surrogacy. The fourth bill, the first to propose a ban on foreigners from coming to India for surrogacy purposes, was offered up in 2014 but that too did not pass.¹⁵

Then, in 2015, Ms. Jayashree Wad filed a public interest litigation case in the New Delhi Supreme Court to prohibit foreigners from coming to India for surrogacy. Ms. Wad expressed that India had become a baby factory for a large number of international couples wanting surrogate mothers who were illiterate, impoverished, and exploited for commercial gain. She maintained that surrogacy was a violation of women's human rights. India's Supreme Court directed the central government to respond on the question of whether commercial surrogacy amounted to exploitation, and whether the practice was an affront to the dignity of womanhood. There was no debate in Parliament. In-

¹¹ Sarojini, N.B. and Sharma, A. (2009), *Comment. The Draft ART Regulation Bill: Whose Interest?*, in «Indian Journal of Medical Ethics», vol. VI, No 1, January-March 2009.

¹² Bhanj, P. (2014), *The Assisted Reproductive Technologies (Regulation) Bill, 2010: A Case of Misplaced Priorities?*, in «Journal of Indian Law and Society», Blog. <https://jilsblognujs.wordpress.com/2014/07/17/the-assisted-reproductive-technologies-regulation-bill-2010-a-case-of-misplaced-priorities/> - accessed on February 2, 2018.

¹³ http://www.bionews.org.uk/page_242618.asp - accessed on October 23, 2017.

¹⁴ Cited in the Library of Congress' *Global Legal Monitor*. <http://www.loc.gov/law/foreign-news/article/india-draft-legislation-regulating-assisted-reproductive-technology-published/> - accessed on June 23, 2017.

¹⁵ [http://www.prsindia.org/uploads/media/draft/Draft%20Assisted%20Reproductive%20Technology%20\(Regulation\)%20Bill,%202014.pdf](http://www.prsindia.org/uploads/media/draft/Draft%20Assisted%20Reproductive%20Technology%20(Regulation)%20Bill,%202014.pdf), accessed on Feb 2, 2018.

stead, in a letter dated October 27, 2015, Dr. R.S. Sharma, head scientist of the Indian Council of Medical Research addressed 100 infertility clinics in various parts of India. In his letter he stated that, «... as per the stand of the Department of Health Research, Ministry of Health and Family Welfare, Govt. of India, surrogacy will be limited to Indian married couples only and not foreigners». Though there is no law or regulation banning commercial surrogacy, the central Indian government has very publically and repeatedly censured the practice. Various infertility doctors, surrogacy companies, and client/ surrogate mother recruiters claim this has effectively stopped international traffic, and Indian nationals from pursuing commercial surrogacy. Other observers on the ground, however, note that commercial surrogacy continues in various parts of the country, including in the cities of Ahmedabad, Anand, Mumbai, and Bangalore, but this is hearsay, and has not been verified through research.

Based on my research on surrogacy in India since 2008, I maintain that bans on surrogacy, such as the one in India, are highly ineffectual. Bans can have two effects: First, they can deepen working class women's vulnerabilities to deeper oppression and exploitation. And second, country-specific bans export the problem to other countries.

Let me provide two examples.

When gay couples were banned from coming to India in 2012, various infertility businesses located in Delhi continued to sign on gay clients from all over the world. Men shipped their frozen sperm to Delhi, which was used to fertilize eggs from Indian donors. The resulting embryos, legally belonging to the men, were implanted in Indian surrogate mothers who then crossed international borders into Nepal where they gave birth in Kathmandu, from where clients picked up their children. This emerging trade route between Delhi and Katmandu halted when an earthquake hit Nepal on April 25, 2015 that left 8,000 people dead and injured more than 21,000 people. While various governments in the North airlifted surrogated babies belonging to their citizens, the fate of the Indian mothers and how they got back home remains unclear.

My second example: My post-research trip to India in September 2015 led me to a Mumbai infertility specialist who recruited women from Kenya who were implanted with embryos belonging to gay men. The Kenyan women underwent IVF for foreign gay clients, stayed in apartments in Mumbai rented by the infertility business, and then were

flown back to Nairobi after twenty-four weeks, where they birthed babies who were picked up by their gay fathers.

These two examples show how the industry continues to operate even when there are embargoes. Tracing the global contours of prohibitions, restraints, legality and illegality, some surrogacy brokers map out new transnational routes to continue the trade in reproduction. They take advantage of the patchy and uneven juridical-legal terrain of country-specific laws that govern surrogacy and move working class pregnant women from one country to another to continue their business. Under these circumstances women are far more vulnerable than before because they are now completely dependent on agencies that have brought them into countries where they are total strangers, and in unfamiliar linguistic, cultural, and social contexts. The situation women face is far closer to trafficking than ever before. They are wholly dependent upon agents who move them to foreign locations where they do not know language or have networks. They are wholly dependent upon the surrogacy business for their wellbeing.

Yinlan Xia, Wenjia Chen - In 2001, the third article on the Measures for the Management of Human Assisted Reproductive Technology¹⁶ (hereinafter referred to as MMHART) issued by the Ministry of Health of China have been clearly defined that medical institutions and medical staff are not allowed to implement any form of technology of surrogacy. At the same time, the “MMHART” also clearly stipulates the legal responsibility of the medical institutions to carry out the surrogacy illegally. In 2003, two legal documents-the Human Assisted Reproductive Technology Specification and the Ethical Principles of Human Assisted Reproductive Technology and Human Sperm Bank¹⁷ – revised by Chinese Ministry of health, respectively, stipulate «prohibit the implementation of surrogacy technology» and «medical personnel should not carry out surrogacy technology». In 2015, 12 departments, including the National Health and Family Planning Commission, jointly formulated a plan to launch a nationwide campaign against

¹⁶ <http://www.nhfpc.gov.cn/zwgk/wlwl/200804/56c333396f3b4e2ab150491c33129f5a.shtml> – accessed 2018-1-8.

¹⁷ <http://www.nhfpc.gov.cn/zwgkzt/wsbyjsj/200805/35747.shtml> - accessed 2018-1-8.

surrogacy from April to the end of December. To sum up, we can see that the current laws and regulations in China adopt a consistent negative attitude towards surrogacy.

Andrea Wittaker - Surrogacy in Australia is highly regulated and the laws vary from state to state. The only legal forms of surrogacy in states of Australia are those involving uncompensated or altruistic surrogacy, when the surrogate mother receives reimbursement only for her out-of-pocket expenses (such as medical costs) associated with pregnancy and birth. The items that may be reimbursed are restricted and vary from state to state. States also vary in the definitions of who is eligible to act as a surrogate, the level of counselling required, the legal costs and whether a regulatory authority is involved. Altruistic surrogacy arrangements are not enforceable – a surrogate mother cannot be compelled to hand over a child after birth to the intending parents. In all states, it is illegal to advertise for a surrogate, or for a surrogate to advertise. Finally, the IVF costs associated with a surrogate pregnancy are not covered under the national health benefits insurance scheme (unlike other IVF procedures) which also makes it costly for intended parents, many of whom have already undertaken many rounds of unsuccessful IVF treatments.

The result of these complex mazes of laws is that many Australian intended parents find it difficult and time consuming to find someone willing to be a surrogate, especially same-sex couples. Some couples have travelled interstate to pursue surrogacy arrangements. The result is that Australians have been a major source of clients for the international commercial surrogacy industry in India and Southeast Asia, but now that many of these states have now banned foreign surrogacy arrangements, they are seeking new locations such as Laos, Ukraine, Canada and Kenya. Three states of Australia have brought in extra-territorial laws banning residents of New South Wales, Queensland and the Australian Capital Territory from pursuing commercial surrogacy arrangements overseas, however, yet no couples have been prosecuted under these laws. It is also illegal in those states to assist people seeking to undertake a commercial surrogacy arrangement overseas, making it an uncertain legal territory for doctors, lawyers and advocacy groups who may wish to provide advice or medical assistance.

A number of commentators are calling for harmonization of state laws and for an easing of the Medicare restrictions and advertising restrictions to make it easier for Intending Couples to find and navigate surrogacy arrangements in Australia. There are calls for a limited compensation scheme for surrogates to allow a fixed amount of compensation that would not serve as an inducement but ease the financial pressure for women who wish to gestate for others. Although I doubt these measures will in themselves stop couples from going overseas to pursue surrogacy it would make it easier to access and undertake surrogacy within Australia where it is better regulated and all parties are protected under Australian laws.

2. To better understand the phenomenon of ‘surrogacy’ and its many faces, are the categories of ‘women emancipation’ and ‘patriarchal values’ the most helpful to be used? If they are not, which other categories or concepts can lead to a better understanding of the topic? If they are, are these categories able to clearly describing the choice to be involved in the surrogacy process? That is, are they useful to explain the choice of the surrogate, but even of the intentional mother and of the intentional father?

Heon Joo Sohn - Traditionally, surrogacy used to promote ‘patriarchal values,’ for its main purpose was to procure a male heir to guarantee the continuation of patriarchy at least in Korea. Infertile couples in Korea used to receive strong pressure from family to produce a male heir to preserve paternal lineage. Although nowadays such tendency has been diluted but still the notion that having children is obligatory to a married couple is prevalent. Thus in many cases, surrogacy might not be the couple’s genuine decision but the result of family [often the husband’s family] or social pressure on them to have a child whatever it costs. Innovative ways to overcome infertility have been developed and helped people who want to have children. However, the availability of those technologies can be a pressure to childless people to have children at all costs.

As for the point of ‘women’s emancipation, surrogacy may relieve women of the burden and pain of childbirth, if it can utilize artificial womb, which technology has not yet fully arrived on the scene. However, if it has to borrow other women’s womb, there is a

danger of exploiting woman's body, especially in cases of commercial surrogacy or paid surrogacy. In this perspective, I would like to suggest that we approach surrogacy regarding the new technological innovation in the post-human era. Childbirth has been both a privilege and a shackle to women. Woman's ability to produce a new living human is a magical power, but it costs dearly sometimes even life. To develop an artificial womb may truly emancipate woman from this risky task and also help many infertile people, including those who cannot dream of having their own children due to old age or homosexuality. Surrogacy in this term can help those peoples to build a family with their own children if needed. We are heading towards a new era where human reproduction could be reconsidered due to the miraculously lengthened lifespan and overpopulation. In developed countries, people tend to marry late or not marry at all. If they either marry or cohabit, the notion of having children is declining. It became a choice than something obligatory. If the technology like artificial womb could be put in practical use, we can be benefited immensely because we could decide to have children even in later life long after the time we are biologically fertile. It could be the happy and positive version of Mary Shelley's novel, *Frankenstein* (1818).

Sharmila Rudrappa - Women's emancipation and patriarchal values cannot be understood as universal concepts or ideals because they have little meaning outside of specific social-historical contexts. The question to be asked is this—how does patriarchy look within specific social formations, shaped by class, caste, religion, migration, and legal citizenship? And, women's emancipation from what, and to what end? An analysis of women's oppression and emancipation needs to emerge through careful attention to the local and the particular, to a specific set of historical and social contingencies within which men and women's moral subjectivities are shaped. For the surrogate mothers, the contours of free will, choice, and agency operate in an already unequal world structured by a gendered international division of labor, and global labor markets.

I want to emphatically state that the surrogacy industry in India has been structured in a way to deeply disempower surrogate mothers. Often, two women were recruited for one client couple. Four embryos were implanted into each woman. Doctors routinely performed "fetal reduction" if more than an ideal number of embryos began to grow into

fetuses; the ideal number of fetuses was not decided by the surrogate mother, but the doctor in charge in consultation with the client. Surrogate mothers lived in dormitories (which some women found liberating – more on that later), separated from their own children and families for close to nine months. At week 36-38 of their pregnancies, women almost all underwent caesarian surgeries, often with minimal post-natal medical attention. In Bangalore, where I did research between 2008 and 2011, many of the women did not see the babies that were cut out from them. Many did not meet the persons, the client parents, for whom they provided reproductive labor. Though various media sources and surrogacy businesses maintain that the mother workers received up to U.S. \$7000, the women I met in Bangalore in 2011 received just U.S. \$4000 for their considerable efforts. Contrary to the media portrayals, and what the women themselves believed initially, because \$4000 seemed to be such a large sum of cash, the women's lives did not change. The cash quickly disappeared because the women needed to pay off debt, pay for medical treatment for illnesses in extended families, better schooling for children, safer housing and homes for their families, and investments needed on small agricultural holdings which belonged to their parents or in-laws. Women soon realized that they needed to sell their ova again or sign up to become surrogate mothers all over again, with the hope that they could have some savings the second time around. By any standard of imagination these are abysmal conditions under which Indian surrogate mothers labored. Yet, many of the 70 surrogate mothers I met in Bangalore in 2011 found this line of work to be life affirming. The task for us is to understand the realities of many surrogate mothers in Bangalore, where deepening bodily commodification entailed in surrogacy is experienced as a revitalizing life development, even though surrogacy is marked by high levels of hormonal infusions into the body, routine trans-vaginal ultrasounds that many surrogate mothers themselves describe as invasive and shaming, and finally, routine caesarian deliveries of babies even when women are able to deliver vaginally. To understand why this kind of bodily commodification is experienced as empowering, we need to examine transnational surrogacy through the mothers' perceptions, which are embedded in their specific life worlds. Many of the surrogate mothers I met were recruited from garment sweatshops that crowded working class neighborhoods in Bangalore. Anecdotal information and infor-

mal conversations with other researchers suggest that this garment-reproduction nexus is unique to the southern Indian city of Bangalore. Part of this reason is because of the preponderance of women garment workers in the city, which is atypical in India. Whereas in the rest of the country just over 60% of garment workers are women, in Bangalore nearly 85% of the workers are women.

The surrogate mothers I met constantly contrasted labor conditions on the garment sweatshop to labor conditions in the surrogacy sweatshop. The production cycle in garment sweatshops is dependent upon global demand. If brokers working for retailers like H&M, Gap, or Zara want 10,000 tee-shirts, for example, in a week's time, then women work without breaks, and overtime to meet production quotas. If women are unable to meet the quotas, they are verbally abused. The women said they do not want to draw the supervisors' attention –almost all of them men – upon themselves because these men castigate them in sexual terms, and sometimes grope them sexually to humiliate them in front of their co-workers. To avoid such sexual humiliation the women work continuously without taking bathroom breaks. The only time most of them use the restrooms is during the midday 45-minute lunch break, and upon completion of work around 6:00pm. Some women explained that the only way to stop sexual harassment in garment factories, was to replace all men supervisors with women.

Research shows that Bangalore's women garment workers put in over sixteen hours of work a day at factory and at home. Their most time-consuming chores outside the factory were laundry, cooking, childcare, and commuting to work. For the women I met, work in the factory and home was absolutely exhausting. If the women garment workers were unable to meet production quotas, then they had to stay after work hours to complete the job; but they would not receive overtime pay. During these times, the women said that their husbands and in-laws expressed disapproval; not only was housework not completed, but also, their paychecks did not reflect their overtime work. Their husbands and in-laws wondered whether the women were really at the factory, or whether they were having an extramarital affair. As a result women reported that they felt degraded at work by their supervisors, and at home by suspicious husbands and in-laws.

Under these conditions, surrogacy felt empowering to them. The women stayed away from their homes, in surrogacy dormitories, which allowed them to escape the exhaust-

ing day-to-day responsibilities of work in the garment sweatshop, and care work in the home. They were also in women-only spaces, free from the sexual harassment prevalent in garment sweatshops. Moreover, the very conditions of their disempowerment and oppression, that is, their sensual, sexual, and fecund bodies, were now the source of considerable familial income. Because they earned a substantial amount of money through reproductive labor, far more than their husbands could earn in nine months, they wielded considerable decision-making power within their homes. They were respected by extended kith and kinfolk for their considerable sacrifices, and earnings garnered through surrogacy.

Finally, women recognized the importance of what they had produced. They often contrasted what they produced in garment sweatshops to what they produced in surrogacy sweatshops. They noted that garments and clothes were inevitably discarded. In the larger scheme of life, garments really did not matter. However, as surrogate mothers they made babies, who were priceless additions to social life.

The mothers I met in Bangalore almost uniformly recognized that surrogacy was deeply exploitative, but within the context of the deepening economic crises that loomed large in their lives, and the abysmal working conditions in other sorts of factory work, namely garment work, they experienced surrogacy as life affirming. They felt that by making babies they were adding value to our social worlds in ways that no other labor could add. In addition, because of that, they took pride in their work.

There is no denying that in various parts of the world – if not in various parts Europe – pregnancy and childbirth have entered the market. It is close to impossible to institute bans on a market mediated practice that has existed since almost the birth of that first “test-tube” baby, Louise Joy Brown, born in 1978. Instead, a far better way to deal with surrogacy is to recognize pregnancy and childbirth as labor processes. Whether women receive wages or not for their reproductive labor is up for discussion, and something each country needs to decide for itself.

However, in countries like India where surrogacy has been commercialized, bans have very perverse effects of deepening women’s vulnerabilities, and exporting the problem to other countries like Nepal, Bangladesh, Kenya, Cambodia, and Laos. As an informed observer and research of global surrogacy since 2008, I believe that instead of bans, In-

dia needs to legalize commercial surrogacy, with very strict enforcement of ethical norms on how surrogate mothers will be treated with regard to choice in medical treatment, and adequate wages for their considerable effort in providing reproductive labor for global and Indian elites. That is, women must be empowered with bargaining rights regarding labor conditions and wages. These norms can be enforced *only if* surrogate mothers are empowered – through employment organizations such as unions, worker cooperatives, and feminist legal representation – to seek redress if clients, clinics, and agencies are not in compliance with the law.

I come to my ethical position *not* because I think commercial surrogacy is a just and equitable labor process. Far from it. Instead, I locate surrogacy in the larger context of the gendered international division of labor where Third World women receive abysmal wages and face degrading working conditions, as exemplified in garment sweatshops. We could, I suppose, depend on consumers to be more ethical and care for how commodities such as garments or services such as pregnancy are produced. But, to date, that has had little impact. For consumers, how goods and services are produced, that is working conditions, are often secondary if they are guaranteed good quality at competitive pricing. Instead of consumers, it is the workers who have the greatest interest in enforcing ethical working conditions because their bodies are on the line. They make garments. They make babies. Stronger norms regarding bargaining rights on working conditions and wages must be enforced whether it is in garment production or baby production.

Yinlan Xia, Wenjia Chen - Regulations and other legal documents in China did not clearly define on a surrogacy. However, most scholars hold a view that surrogacy is the act of pregnant and giving birth to babies in use of womb of the surrogate mother with human assisted reproductive technology by signing a surrogate contract, in the case of a wife is completely infertile or unfit for giving birth to a baby. In order to understand surrogacy better, we divided the surrogacy into two categories: paid surrogacy and unpaid surrogacy, and then discuss. Paid surrogacy is also called commercial surrogacy, means that the surrogate mother gets the economic benefits through the pregnant and delivery, and obtains more than the cost of reasonable compensation from the contract

clients¹⁸. This kind of surrogacy regards surrogacy as a direct way of making profits, and regards surrogacy entirely as a commercial transaction. The unpaid surrogacy, also known as the altruistic surrogacy, is an act of pregnant and delivery via giving up compensation voluntarily¹⁹. This type of surrogacy means that the surrogate mother starts from altruism, to help the contract clients – husband and wife-get their children. After analysis, we believe that the paid surrogacy should be prohibited under any conditions, and the main reasons are as follows:

Firstly, paid surrogacy damages women's human rights. As we all know that there is a limit to the exercise of any right. Although the Chinese law stipulates that husband and wife both enjoy the right to give birth to babies and the obligation to carry out family planning, the exercise of reproductive rights should also follow the principle of harmless to society and harmless to others (especially surrogate mothers and surrogate children). In fact, the exercise of reproductive rights of husband and wife by means of surrogate contract is based on the sacrifice of the life right, health right, reproductive right and personal liberty of the surrogate mother. From the perspective of human rights, these rights of surrogate mothers should not be abandoned based on autonomy of will, and the reproductive rights of the couple should not compete against the above mentioned legal interests of surrogate mothers. As a result, considering the rights and interests of surrogate mothers, we believe that the implementation of surrogacy should rely on the development of science and technology such as artificial uterus, rather than human being surrogacy.

Secondly, it infringes on women's personal dignity and personal liberty. The paid surrogate makes the womb of surrogate mother commercialized and instrumented, which leads to the derogatory personality of the surrogate mother. From the view of pregnancy experience of a surrogate mother, the whole process of the surrogate mother is fully manipulated by the contract clients. Their diet, living, attention and freedom of action,

¹⁸ Dina, Liu (2014), *The Study of Surrogacy in the Perspective of Human Dignity*, Master's Degree Thesis of the Liaoning Medical University, p. 11.

¹⁹ Yi Huang (2014), *Research on the Legal System of Surrogacy*, Master's Degree Thesis of the Southwest University of Political Science and Law , p. 4.

have been restrained by their clients, depriving them of personal dignity and becoming a surrogate tool.

Thirdly, it negates the value of women and reflects the patriarchal culture. In the concept of traditional patriarchal culture, carrying on family line is the only purpose of marriage and the sole mission of wife. As the Chinese saying goes, «three unfilial acts, no posterity becomes the first», women who cannot have children have always been regarded as having “original sin”, and are condemned by the society and the family. In many cases, the motivation for seeking surrogacy of women who are unable to have children often come from social and family pressures²⁰, rather than from themselves. In essence, the autonomy of such choice of surrogacy is a kind of forced choice, and it is the disregard of the patriarchal culture for the women's own value.

Fourthly, it may induce the occurrence of crimes, such as kidnapping and trafficking in women. As we can see, the social status and economic income of men are generally higher than that of women at present, in China. This indirectly caused some women to undertake surrogacy to obtain high remuneration in order to change their social status and economic status. The recognition of paid surrogacy means that women are allowed to rent their bodies at will. It makes women become surrogate tools and become the object of exploitation in the unequal sex relationship, and makes them into surrogate slaves. The high profits in paid surrogacy will drive criminals to take advantage of women and to force women to surrogacy, which will lead to the occurrence of crimes such as kidnapping and trafficking in women, once the paid surrogacy is recognized legally.

Fifth, it leads to the uncertainty of the legal status of surrogate women and complicates the relationship between parents and children. From the practice of surrogacy in China, the surrogate mother give birth to the baby, while the contract clients (husband and wife) have the willing of becoming parents, and in some time, the egg of the embryo may also come from the third female. As we can see, the legal status of the three women has been, in fact, in a state of uncertainty, which leads to the uncertainty of parent-child

²⁰ Yujiao Fu (2010), *Research on “Surrogacy” from the Perspective of Women's Human Rights and Law*, in «Legal System and Society»,. p. 64.

relations and ethical relations. The legal recognition of the baby's mother has become a worldwide problem.

Law, in view of the above-mentioned disadvantages, should prohibit paid surrogacy. However, is it necessary to adopt a completely prohibited view for unpaid surrogacy? Most scholars have indicated that the law should provide habitat for unpaid surrogacy in exceptional circumstances.

Some feminist scholars believed that the prohibition of surrogacy in China's current law documents and regulations is the product of gender bias. Influenced by patriarchal culture, the traditional chastity view emphasizes that women's sexual rights and reproductive rights are controlled in the hands of their husbands. Yet, the surrogacy becomes a challenge to chastity view under the patriarchal culture and endangers the male fertility dominant position in the family, as it involves third party outside the marriage (surrogate mother). In such respect, the prohibition of surrogacy is the embodiment and continuation of patriarchal culture in modern society, and recognition of the law of unpaid surrogacy is the most powerful refutation of patriarchal continuation. Some Chinese scholars have also pointed out that surrogacy is the product of artificial reproduction techniques such as in vitro fertilization and embryo transfer, and based on current regulations and prohibition articles of surrogacy technology in China. They also observed that male with azoospermia, oligospermia, partial or complete loss of fertility can reproduce through artificial assisted reproductive technology, in contrast, the women who are partially infertile and completely infertile cannot have children through surrogacy technology. Some Chinese scholars implied that there are gender differences in the current regulations of China, which undoubtedly guarantees the male reproductive rights and restricts the female reproductive rights²¹. Therefore, the legal recognition of unpaid surrogacy under special conditions is the embodiment of the equal protection of both male and female reproductive rights.

With the decline of the patriarchal culture and the development of women's self-consciousness, more women realize that the right to reproduce should be mastered by

²¹ Rong Zhang (2017), *Analysis of Ban of Surrogacy and Legal Suggestions*, in «Journal of China Women's University», p. 25.

themselves. At present in China indeed, in addition to being forced to choose a surrogacy, there are also wives who are fully willing to have babies through surrogacy. Surrogacy coincides with the desire of the infertile women to yearn for their own children. For wives who want to have children, surrogacy frees them from the physiological limits of infertility, realizes their desire to become a mother and achieving their goal of being respected. At the same time, surrogacy can effectively control women's fertility, which, to a certain extent, would transform women's reproductive roles and conception of childbirth, so that some women have been liberated from traditional family patterns²². Based on the above considerations, we believe that surrogacy is not appropriate to be regulated in a “all or nothing” way in China. We should allow the unpaid surrogacy in extremely special circumstances which comply with the full willingness of the parties to the contract and comply with the strict regulations of the law.

Andrea Whittaker - I think the categories of ‘women’s emancipation’ and ‘patriarchal values’ are not particularly useful especially when considering surrogacy in cross-cultural settings and that more nuanced understandings are needed. As an anthropologist my own work on surrogacy has concentrated upon international surrogacy in Thailand and how moral views are “socially sited”, the discursive spaces different moral views create, and the positions of agency and distributions of responsibility they produce. I prefer to question the specific social, economic and political structural conditions in which surrogacy arrangements take place, in short, I don’t think it is a singular phenomenon.

For example, in Thailand, surrogacy is understood within a frame of Buddhist values in which nurturing a foetus and giving birth is viewed as a meritorious act that creates positive karma for all concerned. Surrogacy is described as *umbun* ‘carrying the merit’ and surrogates frequently talk of the merit of the selfless act of gestating for others brings.

The other important framing of surrogacy in Thailand is *bunkhun* which can be roughly glossed in English as feelings of gratitude for a meritorious act. When a woman nurtures

²² Biao Yang (2015), *The Problem of Enforceability of Surrogacy Contracts: Market, Ethics and Law*, «Tribune of Political Science and Law». p. 39.

a child in her womb and gives birth, the child is understood to always carry a debt of gratitude to her. With regards to surrogacy, the act of carrying a pregnancy and giving birth thus implies a relationship of *bunghun*, not only between the surrogate mother and child who is born, but also between the surrogate mother and intended parents. The act is one that is understood by Thais to bring a debt of gratitude and merit to the surrogate mother, regardless of whether she receives monetary payment for it. It implies a karmic link with the child who is born that lasts forever (and across Buddhist incarnations), and the good/meritorious acts of the child will impart some of their merit to the surrogate mother as well as the child's biological parents or the parents who raise him/her. This remains so regardless of whether the child and birthing mother ever meet again. In this way, such relatedness is performed rather than inherited through biology, or even developed through interaction.

Within Thai Buddhist, making money and making merit are not opposed concepts. Social gratitude and obligations are commonly expressed in Thai society through financial support; hence, there is a positive attitude towards women earning money as surrogates to support their family (an act of merit). Second, financial support through payment for surrogacy services is compatible with the notion of providing support for the one to whom one shows gratitude and with whom one has a *bunghun* relationship. It therefore also implies moral recognition of the obligations of intended parents to their surrogate for giving birth.

To speak of choices requires an understanding of the social and economic conditions of surrogates and of intended parents. For intended parents who desire to form a family, it can be difficult to speak of choice when they have been faced with disastrous reproductive histories or legal conditions, which make it difficult to form a family, by other means. Likewise, decisions to gestate a pregnancy for other parents by a surrogate may involve pragmatic economic decisions as well as affective values. I think it is important to consider how decisions are influenced by the settings, in particular the stratification of reproduction and the growth of the surrogacy industry in some parts of the world. In my latest work I try to explore how the organisation of the industry creates vulnerabilities for those enmeshed within it.

3. How do you think it is socially represented the intentional mother, the surrogate mother and the genetic mother (or the woman that gives eggs)? How do you think they perceive themselves?

Heon Joo Sohn - To answer the question how to represent the parties involved with surrogacy procedure, we have to consider it in two different terms. First, it should be viewed in the perspective of the baby born by surrogacy. It is the intentional mother who is the most likely to be called 'mother or mom' by the child. Then, what about the surrogate mother and the genetic mother (if the egg was donated by the third woman). Before considering the matter, we need to decide whether we inform the child of the fact that s/he was born by surrogacy. In some countries like UK, the surrogacy law makes it obligatory to inform the child of his/her surrogacy birth when s/he reaches a certain age as his or her right. In this case, in what terms does the child recognize these people involved in his birth, the intended mother, the surrogate mother, and the genetic mother. Such different mothers for one single child could be confusing and hard to accept if the society is not flexible but rigidly conservative. In a society, which has a tradition of the large extended family like the old time Korea, the child may simply call them all mothers big mother or little mother, first mother or second mother or even the third. If surrogacy takes place on a more frequent basis, we have to invent new cognitive terms to cover such unprecedented vistas of human reproduction.

Yinlan Xia, Wenjia Chen - Relevant legislation in China explicitly prohibits surrogate. The surrogate contract in civil law is usually found to be ineffective because of violation of public order and good customs. However, in our real life, the phenomenon of underground surrogacy often occurs, despite the prohibition of the law. The parent-child relationship of the surrogate children based on the ineffective contract is the primary condition for the protection of the legitimate rights and interests of the children of the surrogate. At present, domestic scholars have different opinions on the identification of parent-child relationship of surrogacy. There are mainly four kinds of cognizance theories

of parent-child relationship: genetic relationship theory, delivery theory, the doctrine of the children' greatest interest, and the wish of the contract client²³. In China's judicial practice, the court usually finds out who is the mother of the child based on the doctrine of the children' greatest interest when the surrogate mother and the contract client have custody disputes over the surrogate children.

We believe that the doctrine of the children' greatest interest is an open parent-child relationship and it should be considered as the priority factor in the case of the dispute between the contract client and the surrogate party on the custody of surrogate children. The doctrine of the children' greatest interest should be evaluated on the premise of maximization and prioritization of children's interests. We should comprehensively consider the wish of the contract clients to become parents and the emotional factors of surrogacy mothers under such doctrine.

Andrea Whittaker - In my research the ways in which people define their relationships varies. In Australia, because surrogates generally know and have contact with the families they help create, they usually have some form of continued contact and acknowledgement as 'tummy mummies'. Surrogates are usually viewed as very special women. The degree of relationship is usually negotiated by the families and children and may change over time. Likewise, oocyte donors usually have the opportunity for some form of continued relationship and contact as there is no anonymous donation. More broadly there is increased social acceptance in Australia of families formed through surrogacy. For families that have been formed through overseas surrogacy arrangements, however it can be difficult to maintain relationships, especially due to distances and if there are language differences. Some intended parents have gone overseas to access anonymous oocyte donations and may have little desire or opportunity for contact with their donors or surrogates.

It is difficult to answer a question about self-perceptions, but in the narratives I have, collected most intended parents describe themselves as people who have gone through

²³ Zhiqiang Li (2011), *On the Parenthood of Children Born from Surrogacy*, in «Journal of Beifang University of Nationalities», p. 124.

extraordinary efforts to form a very much desired family. However, they note the importance of the nurturing role of parenthood, as far more important in defining their role as a parent and relationship with their children, than the circumstances of their children's conceptions and birth. Surrogates I have spoken to do not see themselves as the mothers of the children they gestate but as people who have undertaken a special and selfless act to help other people.