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## Book Review

# Surrogacy: women's bodies between globalisation and national reform

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Borders have become a crucial variable shaping reproductive markets. Individuals cross borders to 'have' children (whether by giving birth, adopting or contracting surrogates); entrepreneurs organise and broker medical, legal, travel and gestational services; states make law and policy taking into account their comparative advantages in relation to the global supply and demand of child-making components and services. In the second part of Chapter 4, 'Transnational reproduction services', Daphna Hacker tracks these processes in relation to surrogacy, having already done so with respect to abortion with a focus on the Republic of Ireland and the UK. Cogently arguing that both procreation and abortion constitute aspects of reproduction, she notes that 'In both cases, the central moral issue is reproduction autonomy .... In both cases, women are at risk of being reduced to their wombs' (Hacker, 2017, p. 147). How, then, do women's rights as reproductive subjects come into play in the bordered globalisation of surrogacy?

The global surrogacy market, Hacker argues, illustrates three basic propositions. First, globalisation can engender 'the legal objectification of human beings' (Hacker, 2017, p. 133). Second, the lack of an overarching international legal framework can place individuals (and states) in untenable positions, caught between discordant national laws. Third, despite the advantages to be derived from selling global reproductive services, states may choose to enact restrictive legislation, closing rather than opening their markets to foreign demand. Hacker demonstrates these propositions by focusing on the interplay between Israeli demand for and Indian supply of surrogacy services.

Despite the pronatalism that led Israel to enact the first surrogacy legislation, Israeli citizens regularly resort to foreign surrogate markets. They do so in significant measure, Hacker argues, because of the restrictiveness of their national legislation, which limits both supply and demand. Israeli surrogates must be neither married nor related to the intended parents and their compensation is capped at a 'reasonable' level – provisions that depress the availability of surrogates. At the same time, for many years, only heterosexual couples could resort to surrogacy services; singles and homosexual couples could not access them. While the prohibition on single individuals has been revoked, those on gay

couples have not, as will be discussed below. The overall effect of these rules has been to create a demand for commercial reproductive surrogacy that has not been satisfied internally. *But, unlike in many other countries of the Global North, in Israel, those who generate this demand have not been prohibited from seeking services abroad.*<sup>1</sup> As a result, Israelis excluded from the national market have turned to foreign suppliers. Among these, India long occupied a central place.

The existence of national guidelines notwithstanding, Hacker shows that, until 2012, when a ban on same-sex couples and single intending parents was enacted, India's surrogacy market was de facto largely unregulated. Such regulation as was applied simultaneously stripped surrogates of any rights they might have claimed as 'mothers' and severely limited their negotiating capacity as parties to a contract engaged in an economic transaction (compensation for gestation and delivery). Hacker's observation comports with that of researchers who have found surrogates in clinics in India to be subjected to a paradoxical injunction. On the one hand, they are instructed *not* to identify as mothers, and therefore not to consider the child they gestate and deliver as their own. Instead, they are told, they must view themselves as service-providers, working on behalf of the child's (true) mother, namely the intended parent. On the other hand, they are exhorted *not* to view themselves as economic actors, bargaining, for example, over compensation, but rather to nurture the developing child – as a mother (Pande, 2014). Hacker shows us the legal consequences of this process that simultaneously extrudes surrogates from the spheres of family relations *and* of labour relations, leaving them without the ability to appeal to the legal protections of either.

Drawing on sources that range from documentaries to anthropological studies, Hacker describes the contractual scene in vivid detail. We form the picture of a situation that can only be characterised as abusive. An already-pregnant surrogate, devoid of her own legal representation, listens. She is with her husband, who may or may not be coercing her into this service; Hacker tells us there are no provisions to protect the surrogate from his pressure. The surrogate learns that she may have to undergo a caesarian, lose her uterus, be exposed to other significant health risks and possibly die – all on her own responsibility, for the clinic bears no liability. After this explanation, she and, sometimes, he too must sign a contract written in English – a language neither may understand. The clauses are oppressive, specifying rules regarding contact with her family and living arrangements. Choice of law provisions favour the intended parents. Careful not to be identifiable as a party to the contract, the clinic (or agency) through which the surrogate's services are actually being offered leaves no legal imprint. This image, and others like it, informs Hacker's analysis of the legal objectification of the surrogate mother. Poverty has become rightlessness; the contractual process, far from fostering agency, has been reduced to a 'legally misleading ritual, a façade of a bilateral act' (Hacker, 2017, p. 138).

Unsurprisingly, from the perspective of the market, the surrogate's rightlessness is advantageous. She receives a small fraction of the sums paid by the intended parents – generally, about 10 percent (Hacker, 2017, p. 138). Moreover, she cannot mount significant opposition to the conditions imposed upon her. The comparative advantage India and the intermediaries are utilising to maximise their market share is the large supply of inexpensive female womb-labourers. In fact, the government appears to have promoted the growth of the surrogacy industry, including by offering incentives to private clinics (Hacker, 2017, p. 136 and n. 62), but not by protecting that labour force. The result is, Hacker says, borrowing a phrase from philosopher Vida Panitch, a situation of *mutually advantageous exploitation* (Hacker, 2017, p. 140 and n. 77). Surrogates acquiesce to abusive labour conditions in return for compensation that represents many multiples of the income that they might otherwise earn. In the meantime, India profits from an expanding industry.

Why, then, did India restrict this thriving market, first closing it to single and gay intending parents and later shutting out foreign demand altogether? Hacker finds this change of policy surprising, but she lists several possible explanations. These include concern for the surrogates, nationalist pride and the difficulties of addressing situations of children abandoned to Indian institutions – 'stateless and

<sup>1</sup>France, Germany, Australia and Italy, amongst others, have all attempted to prohibit transnational surrogacy. For a discussion of the effects of such regulations, see e.g. Ergas (2012).

parentless' in the memorable phrase of UK Judge Hedley<sup>2</sup> – either because the intended parents changed their minds or because conflicts of laws rendered recognition of their parentage impossible. Further research is needed to determine the causes of a state pushing back against 'global hyper-capitalism' and re-establishing control over its borders; the theoretical point Hacker rightly draws is that such nationally bound resistance to globalisation is possible. In fact, today, disentanglement rather than globalist engagement, in particular in relation to family law and gender rights, is a favoured modality of neo-sovereignist governments.

India's policy change altered the contours of the global market. Hacker traces its shifting geography as, faced with the closure of India, Israelis turned to Nepal, Mexico, Cambodia and other countries. But market after market has been closed down and a definite trend is emerging with countries that have hitherto supplied surrogates limiting foreign access and, sometimes, prohibiting surrogacy even to internal demand. At the same time, another trend is evident: the mobilisation of actors, hitherto barred from acceding to surrogacy services within their own countries, who press for market liberalisation. As a result of such mobilisations, the Israeli government, for example, has repeatedly been expected to revise the regulations that prohibit same-sex couples as well as single individuals from employing domestic surrogates. Indeed, since the publication of Hacker's book, prohibitions pertaining to single individuals have been removed, but those regarding same-sex couples have not, leading to massive protests.<sup>3</sup> Similarly, in the US, mobilisations have focused on liberalising laws in states that have restrictive regulations, such as New York.<sup>4</sup>

If these mobilisations – whether in Israel or elsewhere – succeed, they may foster a nationalisation of surrogacy. But this nationalisation will occur in a context that is marked by an intensification of international attention to surrogacy.<sup>5</sup> The results may significantly impact the scope for national decision-making. If, for example, surrogacy is deemed to constitute a sale of children (an issue Hacker does not address), as the Special Rapporteur on the Sale of Children has argued is the case unless very specific conditions are met, it may be difficult for states to hearken to those who seek market liberalisation (Special Rapporteur, 2018).<sup>6</sup>

In this excellent chapter, as she tracks the interaction between Israel and India, Hacker substantiates two theses that inform the entire book. First, the current international patchwork of discordant family law and policy incentivises transnational forum shopping: individuals cross borders to satisfy needs that they cannot meet domestically. Second, when states combine internal prohibitions – such as Israel has done with respect to same-sex couples' access to surrogacy – with external permissiveness, they engage in a form of legal hypocrisy that is not disinterested. As Hacker puts it, 'nation states benefit from their citizens' ability to perform *immoral outsourcing*', for such outsourcing provides a safety valve that weakens the potential pressure to change domestic legislation (Hacker, 2017, pp. 146–147).<sup>7</sup> What now needs to be explored is how current trends towards renationalisation will interact with both neo-sovereignist governments and the renewed impulse to international regulation.

<sup>2</sup>X & Y *Foreign Surrogacy* [2008] EWHC 3030 (Fam).

<sup>3</sup>See e.g. Israelis demand equal gay surrogacy rights, BBC News, 22 July 2018, available at <https://www.bbc.com/news/world-middle-east-44919764> (accessed 5 March 2019).

<sup>4</sup>See e.g. MenHavingBabies, available at <http://www.menhavingbabies.org/> (accessed 5 March 2019). See also NY State Senate Bill 17A, The Child-Parent Security Act (2017), available at <https://legislation.nysenate.gov/pdf/bills/2017/S17A> (accessed 5 March 2019).

<sup>5</sup>See e.g. the work of the Hague Conference on Private International Law regarding surrogacy and parentage, available at <https://www.hcch.net/de/projects/legislative-projects/parentage-surrogacy> (accessed 5 March 2019) and that of ISS, available at <https://www.iss-ssi.org/index.php/en/what-we-do-en/surrogacy> (accessed 5 March 2019).

<sup>6</sup>It should be noted that the kind of regulation that the Special Rapporteur recommends relates to the nature of the exchange between the surrogate, the child and the intended parents. She does not endorse discriminatory policies that would limit the ability of LGBT+ couples or single individuals to gain access to such surrogacy as may be legal.

<sup>7</sup>See also Ergas (2016).

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# Book Review

## Familial citizenship and familial violence

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In her acknowledgements to *Legalized Families in the Era of Bordered Globalization*, Daphna Hacker thanks her former law Dean for planting the idea that became this innovative, beautifully written book. A few years ago, my own Dean similarly challenged me to look beyond the family law within my nation’s borders and explore the interrelations between families, law and globalisation (Hacker, 2017, p. ix). I recall being rather terrified by the prospect, perhaps imagining that I would have to write a book about conflicts of law. It is my own loss that I remained caught within my own ‘methodological nationalism’ (Hacker, 2017, pp. 14, 67) and failed to take up the challenge to think about families and law beyond borders. It is completely the gain of the socio-legal and family-law communities that Hacker did. She offers us a whole new way to think about family law and its relevance in the modern world, drawing on examples and literature from many different jurisdictions.

Despite its innovative nature, this book offers familiar aspects and approaches. Like most feminist scholars who teach family law, Hacker addresses topics that lie beyond the traditional categories of family law. For example, she examines how normative ideas about ‘family’ affect different areas of law such as immigration, deeply relevant to the chapter on ‘Familial citizenship’ I discuss. She also highlights the role that gender plays, for example, in affecting how women might experience a particular law or issue in comparison to men, often in conjunction with other factors such as poverty or race or sexual orientation or, importantly for this book, citizenship or immigration status. I particularly appreciate Hacker’s focus on economic issues and the redistribution of monetary and non-monetary resources – something too often missing from family-law scholarship.

Far from offering a naive perspective on what globalisation might mean for families or family law, Hacker notes both potentially negative and potentially positive implications. For instance, global human rights discourse and cross-border movement enhance the possibility for women living within patriarchal countries to be liberated from abusive intimate relations. This possibility is deeply relevant to the chapter on ‘Familial violence’ – my other focus in this review. As well, Hacker highlights that, while globalisation brings people together as families, it can also separate them. Notably, some family members migrate from their country of origin to find more lucrative work in a more well-off country. Moreover, borders remain relevant in relation to that separation of family members from one another, including separation of children from their parents. Numerous examples of this phenomenon can be cited in recent years, including under the Trump presidency as the US attempts to restrict immigration.