

## Legitimizing surrogacy in Israel

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**Recently the Israeli Parliament passed legislation regarding all aspects of assisted reproductive techniques, including surrogacy. The main points of this legislation are presented and discussed. The most important aspects are: (i) a public committee authorizes and supervises every single case; (ii) only full surrogacy is permitted; (iii) the agreement is not commercial, reasonable expenses can be paid to the surrogate mother under the supervision of the Approving Committee; (iv) the surrogate mother must be single or divorced; (v) under certain conditions the surrogate mother can withdraw from the agreement; (vi) the child is under the tutelage of a social worker, representing the state, from birth until the completion of the adoption procedure. The religious, social and legal status of surrogate pregnancies worldwide are discussed.**

*Key words:* ethical aspects/legal aspects/legislation/surrogacy

### Introduction

In 1991 the Ministers of Health and of Justice in Israel nominated a public committee to inspect the social, ethical, religious and legal aspects of in-vitro fertilization (IVF). The committee was nominated to prepare a proposal for legislation, especially pertaining to the question of the surrogate mother.

According to the committee's recommendations, the Israeli parliament, the Knesset, passed the law concerning surrogacy on March 1996. The new surrogacy law in Israel is the first law concerning infertility, as previous legislation was based on legal regulations established by the Ministry of Health. The new law had to negotiate a compromise between the restrictions of the orthodox regulations and the liberal views of the secular Israelis. It is the only law besides that of the United Kingdom that allows state-controlled surrogacy. This paper presents the main points of the Israeli law. Legal and ethical aspects of surrogacy are dealt with briefly, as these aspects have been debated by us and others elsewhere (Schenker, 1995; Schenker and Eisenberg, 1996)

### The surrogacy law in Israel

#### *The Approving Committee*

Under the new law in Israel every single case of surrogacy must be authorized by a special committee — The Approving

Committee. This is multidisciplinary, nominated by the Health Minister and includes seven members: (i) two physicians qualified in obstetrics and gynaecology; (ii) one physician qualified in internal medicine; (iii) a clinical psychologist; (iv) a social worker; (v) a lawyer, as public representative; (vi) a clergyman, according to the religion of the parties involved.

The decisions of the Committee must be accepted by the majority of its members, and must be made in the presence of at least five of the members including the chairman.

#### *Guidelines set by the Approving Committee for surrogacy*

These include the following:

(i) Full surrogacy is permitted only when the gametes are provided by both parties of the commissioner couple (CC), who are married according to the law of the country. In special cases the Committee can authorize surrogacy with ovum donation. Sperm donation is not allowed, since according to Judaism it would make the child 'illegitimate'.

(ii) The parties for the agreement are adult Israeli citizens, in order to prevent abuse of women from underdeveloped countries and illegal commercialization of the procedure.

(iii) The surrogate mother should be single or divorced, otherwise the child is 'illegitimate' according to the Jewish religion. The Committee can authorize an agreement with a married woman in very extreme cases.

(iv) The surrogate mother is anonymous and not a relative of one of the parents (i.e. mother, daughter, granddaughter, sister, aunt, cousin are excluded. Adopted relatives are permitted). This avoids any potential pressure on relatives to become surrogate mothers and subsequent complications within the family.

(v) Since the Israeli population consists of multi-ethnic and multi-religious groups, including Jews, Moslems, Christians and others, the attitude of the various religions was considered. According to Judaism, the religion of the child is determined by the religion of the mother. Therefore, the surrogate mother should be of the same religion of the CC, although if all the parties are not Jewish, the Committee may allow an inter-religious agreement following consultation with the clergyman from the Committee. However, since Moslems and Christians do not allow surrogacy, they are unlikely to approve such an agreement.

#### *Preconditions for approving surrogacy by the Approving Committee*

(i) A medical report stating that the mother of the CC is unable to become pregnant or carry a pregnancy to term, or that a pregnancy could be a major risk for her health, should be presented.

(ii) A medical opinion must approve the suitability of both parties for the process. The surrogate mother should receive a general and gynaecological check-up to rule out diseases that could be aggravated by pregnancy and delivery. A history of drug use, alcohol abuse or medications that could affect pregnancy should be obtained. The gynaecological history should exclude medical conditions that may cause early and late abortions, early deliveries, and other complications of pregnancy. Tests for transmissible diseases including human immunodeficiency virus (HIV), hepatitis B and C and VDRL should be performed, together with analysis of blood group to prevent rhesus incompatibility. Ultrasound examination of the pelvis must exclude major malformations of the uterus and other pathologies of the uterus or the cervix.

(iii) A psychological assessment of the parties involved must be provided, followed by a statement by a psychologist or a social worker that the CC had received a suitable professional consultation, in which other possibilities for parenthood were discussed.

(iv) The procedure will be performed in a certified in-vitro fertilization–embryo transfer department.

(v) If the parties were selected through a paid mediator, the agreement with the mediator and his name should be presented to the Committee.

### **Expenses**

One of the main objects of the Approving Committee is to prevent illegal commercialization of the procedure. The Committee supervises the agreement of expenses and can recommend monthly payments to the surrogate mother to cover actual expenses including medical expenses, insurance, legal consultation, loss of time and income, suffering or any other reasonable compensation.

### **The legal position of the newborn**

According to international law, the mother is defined as the woman who gives birth. Thus, withdrawal of the surrogate mother can create a serious legal problem and, in fact, several trials have been held in the USA on this matter. In order to avoid such problems, the Israeli law has set the following regulations:

(i) The social worker, nominated by the Ministry of Welfare, is the only legal guardian until the legal procedure of adoption is complete.

(ii) The CC and surrogate mother should notify the social worker of the birth place and estimated date of delivery at the end of the fifth month of pregnancy. Within 24 h of the delivery the CC or the surrogate mother should notify the social worker.

(iii) Following delivery, the child will be under custody of the CC.

(iv) The surrogate mother will transfer the child to the CC, in the presence of the social worker, as soon after birth as possible.

(v) Within 7 days from delivery the CC will admit a request for adoption or, if this is lacking, the social worker will issue the request.

(vi) The court will approve the adoption request, unless it would seem against the child's own good. Following adoption

approval by the court, the CC will become the child's sole parents for all matters.

In extreme cases, where the child has a malformation at birth or becomes HIV positive during pregnancy, or in any other circumstances where the CC withdraws from the agreement, the surrogate mother becomes the legal guardian of the newborn. In cases where the surrogate mother refuses to raise the child, he will be transferred to the welfare authorities of the state.

### **Withdrawal of the surrogate mother from the agreement**

The court will approve withdrawal of the surrogate mother from the agreement only in cases where the social worker's report provides convincing evidence of a change in circumstances that justifies such and that the well being of the child would not be compromised. After the adoption act has been finalized the court cannot authorize withdrawal from the agreement. In cases where the court approves withdrawal it should nominate the surrogate mother as the legal mother and only guardian of the child. The court can also pass judgment upon the relationship between the child and one or both members of the CC.

In the case that the court has granted custody to the surrogate mother it can pass judgment upon the repayment of expenses to the parties.

### **Legal rights of the surrogate mother**

The new law should not contradict the rights of the surrogate mother to medical treatments and will not prevent her from procuring or performing a medical procedure according to her free will, including interruption of pregnancy under the terms set by the law. Neither the CC nor any other body have the right to control the surrogate's way of life during pregnancy, including nutrition, drinking habits, sexual behaviour, or use of drugs. The CC cannot intervene in the prenatal care received by the surrogate mother, nor can it force her to undergo invasive and non-invasive perinatal procedures, such as amniocentesis, against her will.

### **Enforcement of the law**

According to this law, establishment of a surrogacy agreement without the authorization of the Approving Committee is a criminal act that carries a punishment of 1 year in prison.

Publication of details from the Committee's discussions that include information that could identify any of the parties involved is forbidden and carries a punishment of 1 year in prison.

A party that offers, gives or asks money or benefits for participation in such an agreement without the approval of the Committee is performing a criminal act.

Deliverance or acceptance of a child without the presence of the social worker or without a court order will lead to a punishment of 1 year in prison.

### **Comment**

In 1996 the Knesset passed a law concerning the practice of surrogacy in Israel. Thus Israel joined with the United King-

dom, the first and only country that has passed legislation, in 1985, to allow surrogacy — ‘The Surrogacy Arrangement Act’. Worldwide, a variety of laws and regulations relevant to surrogacy have been established (Bromham *et al.*, 1989; Erin *et al.*, 1991; Blyth, 1993). The present status of legislation is as follows: in Australia, France, Germany, The Netherlands and Scandinavian countries, surrogacy has been prohibited by law (Schenker, 1991). In France, the legal basis for complete prohibition of surrogacy is enshrined within rules which go back to the fundamental rights established at the time of the French Revolution, in reference to the condemnation of slavery. According to these rules, the status of an individual cannot become the matter of a commercial arrangement, nor can part of the human body be submitted for sale (Sureau, 1997). The American Bar Association favours a private ordering model, guided by the Fertility and Sterility Association regulations. However, last month, the Pennsylvania legislature began a debate about the regulation of surrogacy contracts, following a case where a father was alleged to have killed such a child conceived with a donated oocyte and carried in a surrogate mother (McGee, 1997). Other countries either do not address the subject or allow it only in extreme cases.

Religious aspects are very important, and the attitude towards the issue of surrogacy differs among the main religions; Judaism agrees with its practice, and the earliest recorded case of surrogacy appears in the Bible (Genesis 16:2). Most Christian churches forbid it, on the basis that it is contrary to the unity of marriage and to the dignity of procreation of a human being. Islam does not permit surrogacy on the premise that pregnancy should be a fruit of a legitimate marriage. Also, according to the Quran ‘Our mothers are those who provide the womb and give birth’. Hinduism allows surrogacy, but problems may arise if a male child is not conceived, as this is considered a religious duty. Surrogacy is also permitted according to Buddhist law, and surrogacy is offered to couples in India in the majority of IVF centres; however, there is no legislation concerning any form of assisted reproductive technology in India, including surrogacy.

## Summary

In 1991 the Ministries of Health and of Justice in Israel nominated a public committee to inspect the social, ethical, religious and legal aspects of assisted reproduction. According to the committee’s recommendations, the Knesset passed a law in 1996 concerning the practice of surrogacy in Israel. The law became possible only after the committee managed to satisfy the Jewish orthodox establishment requirements. Thus, only full surrogacy is allowed, and the surrogate mother has to be single or divorced.

Social aspects of the law are that commercial surrogacy is forbidden, and the surrogate mother has to be anonymous and not a relative of either party. The new surrogacy law sets principles to protect the legal rights of the surrogate mother and to establish the legal position of the offspring. As already mentioned, this paper deals mainly with the new law in Israel; and the social, religious and ethical aspects are only mentioned briefly, where appropriate.

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