

Surrogacy in Israel

Status Report 2010 and Proposals for Legislative Amendment

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المركز النسوي حيفا

The Women and Medical Technologies program operates under the auspices of Isha L'Isha – Haifa Feminist Center. This project aims to develop public involvement and feminist discourse on subjects related to science and society. We aspire to advance in-depth discussion of the social, ethical and economic implications of the advancement in medicine and science.

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Preface

This report examines the Israeli Embryo Carrying Agreement (Agreement Authorization & Status of the Newborn Child) law of 1996 and its implementation in the 14 years since its legislation. Pregnancy and childbirth are deep, intimate and complex identity-related processes, which have significant physical and mental repercussions for the woman experiencing them. **It is our belief that perceiving pregnancy and childbirth for another couple or individual solely as a financial business transaction is inappropriate and unthinkable. The fact that surrogacy is a complex relationship which might be fertile ground for harm and exploitation must be recognized, especially when private organizations with financial interests are allowed to become involved. We believe, that surrogacy in Israel should be prohibited. In the least, surrogacy must not be allowed to become an accepted, routine procedure, and should provide a solution only in rare, very extreme cases**

Whatever decision will be made, the state has an obligation **to provide clearly defined rules** to enable the existence of a fair relationship which will benefit all participants. It also has an obligation **to ensure the practical implementation of these rules and to conduct a long-term follow-up** of all participants in the procedure, to make sure that no party suffers long-term harm.

Introduction

Israel was the first country which passed a bill allowing surrogacy - in March 1996. The Israeli law focuses on creating a bureaucratic procedure to authorize surrogacy agreements, but despite its innovative nature, it does not set down rules for supervision of the manner in which the agreements are carried out, nor for a follow-up procedure for the long-term implications of their implementation. Thus, in spite of the long time that has passed since the surrogacy law was legislated, and in spite of the fact that surrogacy is a situation that can bring about significant harm to the parties involved, and to the surrogate mother in particular, insufficient data have, as yet, been gathered to enable full evaluation of this innovative social experiment.

This document is an abstract of an extensive report in Hebrew. The aim of the report is to examine the implementation of the law to date, drawing on the practical research by Elly Teman and Etti Samama.¹

1 Teman, E. (2001). "Technological Fragmentation and Women's Empowerment, Surrogate Motherhood in Israel". *Women's Studies Quarterly* 3-4, 11-34; Teman, E. (2010). *Birthing a Mother: The Surrogate Body and the Pregnant Self*. University of California Press, Berkeley; Samama, E. (2002). **My womb, her baby: The motives for surrogacy as reflected in stories of surrogate mothers in Israel**. Unpublished MA thesis, Paul Baerwald School of Social Work, The Hebrew University of Jerusalem, under the supervision of Prof. Ruth Landau. (In Hebrew); Samama, E. (2011). **Embryo Carrying Agreement (Surrogacy): Vision, policy and reality**. Doctoral dissertation (in process), the Department for Health Systems Management, Ben-Gurion University of the Negev, under the supervision of Prof. Haim Reuveni and Dr. Liat Lerner. (In Hebrew).

The Significance of Widespread Access to Surrogacy in the Fertility-Promoting Israeli Society

It is beginning to be taken for granted that surrogacy will be the next stage in reproductive assistance as an accepted “technology” that can be used when pregnancy is not achieved through individual fertility treatments.

Establishing surrogacy as a “prevalent, accepted way” of bringing children into the world entails significant risks, both to the surrogate mother herself and to society in general, for several reasons:

1. As surrogacy becomes more prevalent, the circle of surrogate mothers exposed to the physical and mental risks involved will become wider. These risks will be discussed further on.
2. As surrogacy becomes more prevalent, the objectifying, impersonal use of the surrogate mother’s body, which is inherently degrading, will become more intense. In countries such as India, where an extensive surrogacy industry exists, it is already possible to “order” surrogate children by mail, with no contact whatsoever with the surrogate mother.² “Baby farms” exist, housing many women who serve as human incubators for Western couples.³
3. Removing the social, bureaucratic and economic barriers from the application for surrogacy strengthens the message that motherhood should be the center of a woman’s life. It makes the acceptance of one’s infertility less and less legitimate and increases the social and family pressure

2 Marcy Darnovsky (28.9.2010). “Pregnancy without Borders: Reproductive Tourism’s Global Reach”. <http://www.biopoliticaltimes.org/article.php?id=5393>.

3 Amanda Fontanella-Khan (23.8.2010). “India, The Rent-a-Womb Capital of the World”. <http://www.slate.com/id/2263136/>

on women and couples to invest all their resources in the attempt to achieve parenthood.

4. The widespread accessibility to surrogacy harms the currently existing social perceptions of the importance of the relationship between the mother and the baby in her womb, and conveys a social message that this relationship has no actual emotional and legal significance. As the use of surrogacy increases, this message will become stronger, will undermine the concept of motherhood and will have a negative impact on the status of women in relation to their children.

The Fertility Industry in Israel

Parenthood in Israel is not only a social command, but is also a flourishing medical industry. In Israel, approximately 12,000 in-vitro fertilization (IVF) cycles are performed each year: approximately 1,600 cycles per one million residents, which is four times the rate of IVF in Western countries such as France and Australia and twice the rate of IVF in Iceland, which is the country with the second highest rate of IVF, after Israel.⁴ The number of babies born through IVF is constantly increasing: approximately 3.6% of all births in Israel are as a result of IVF treatment.⁵ In 2006, there were 30 fertility clinics in Israel serving a population of seven million.⁶ Unlimited fertility treatments up to the second child receive public funding in Israel.

By virtue of the limitations imposed on surrogacy in Israel, its degree of commercialization is moderate. Nonetheless,

4 Carmel Shalev (2.1.2010). Senate no. 387 on socioeconomic issues: The Governability of Fertility Technologies in Israel. (In Hebrew).

5 Dan Even (24.3.2010). "The rate of fertility treatments in Israel is continuously increasing." <http://www.haaretz.co.il/hasite/spages/1158690.html> (in Hebrew).

6 Tal Tamir. **Women in Israel 2006: Between Theory and Reality**. (Report published by the Women's Lobby in Israel), p. 99. (In Hebrew).

the law does not limit commercial involvement in surrogacy, and commercial organizations (which are neither supervised nor required to undergo an authorization procedure) are indeed involved in mediation between couples and surrogate mothers, in preparing both parties for the procedure vis-à-vis the committee which wuthorizes the surrogacy agreements, and in overseeing the process. Surrogacy mediation centers advertise their services on the Internet, among other places, and encourage couples and surrogate mothers to apply for this type of procedure. Also operating in Israel are private organizations, which mediate between Israelis who are interested in surrogacy and surrogacy services overseas, mainly in countries with low levels of supervision and protection for the surrogate mother.

The Global Surrogacy Industry

The demand for children in Western countries has lead to the development of a commercial surrogacy industry in some countries where there is a low level of supervision. In India, the surrogacy industry is especially well-established, with an estimated annual turnover of half a billion dollars.⁷ Commercial surrogacy exists also in China, Argentina, Spain and Guatemala.⁸ Apparently involved in this industry in Guatemala were organizations previously linked to international adoption scandals, in which it was claimed that children were abducted or bought from their parents to

7 Amanda Fontanella-Khan (23.8.2010). "India, The Rent-a-Womb Capital of the World". <http://www.slate.com/id/2263136/>

8 Marcy Darnovsky (28.9.2010). "Pregnancy without Borders: Reproductive Tourism's Global Reach". <http://www.biopoliticaltimes.org/article.php?id=5393>; Julio Shappiro (5.10.2010). "Globalization and Surrogacy as Substitute for Adoption", <http://julieshapiro.wordpress.com/2010/10/05/globalization-and-surrogacy-as-a-substitute-for-adoption/>.

supply the need in the West, and that women were forced to become pregnant for this purpose.⁹

Principles of the Legal Agreement in Israel

The Embryo Carrying Agreement (Agreement Authorization & Status of the Newborn Child)¹⁰ consists of two parts: the first part deals with the surrogacy agreement, and the second part deals with the status and parenting of the newborn.

The law views the surrogacy agreement as an independently drawn-up contract by the parties operating in the “free market,” but which must be submitted to an authorization committee for validation. The committee’s role is to approve the contract after ensuring that it meets the conditions set down by the law and is convinced that both parties signed of their own free will, and after establishing that no risks are posed to the mother’s health or to the child’s welfare. It was also decided that the committee has the authority to approve conditions for the surrogate mother regarding “monthly payments to cover substantial expenses and to compensate for wasted time, suffering, loss of income or temporary loss of working capacity or any other reasonable compensation.” The surrogate mother cannot withdraw from the surrogacy agreement, unless a “genuine change occurs to justify this” prior to the issue of the parental order.

The law prohibits a family member of one of the intended parents to serve as the surrogate mother, as well as “traditional surrogacy,” where the surrogate mother is genetically related to the fetus. The law states that the sperm used for IVF has to come from the intended father, and that, excluding exceptional

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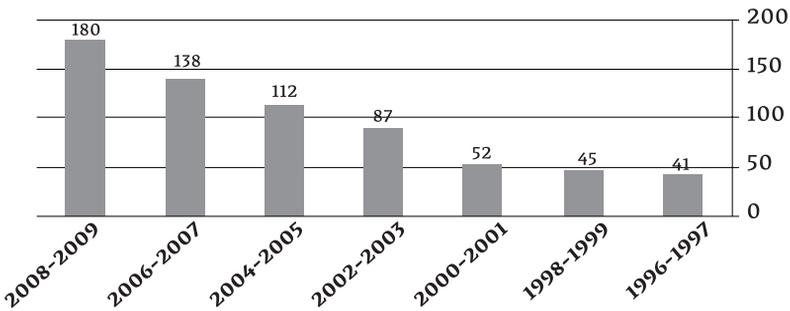
10 The Embryo Carrying Agreement (Agreement Authorization & Status of the Newborn Child), 1996, Statute Book 176.

cases, only unmarried women of the same religion as the intended mother can serve as a surrogate mother.

The law states that the embryo carrying agreement cannot include clauses which prevent the surrogate mother from receiving any medical treatment of her choice, including abortion.

The law allows only heterosexual couples with legal couple status to use surrogacy. Single men and women, as well as lesbian and homosexual couples are not allowed to use the procedure.

From the time that the law came into force until the end of 2009, 655 applications for surrogacy approval were registered with the committee.¹¹ In 82% of the cases, the committee approved the process. An examination of the distribution of applications indicates a steep rise in the number of files opened each year. For example, in 2000, 90 files were opened, compared to 15 in 1996.



Overall number of files opened with the committee, distribution by years (N=655)

11 Van den Akker, O. B. (1999). "Organizational Selection and Assessment of Women Entering a Surrogacy Agreement in the UK". *Human Reproduction* 14(1), 262-266.

Health-Related and Emotional Risks and Ethical Concerns with Surrogacy

Physical-Medical Risks

The surrogacy procedure exposes the surrogate mother to significant health risks, including risks involving exposure to medications and hormones used during IVF. Surrogate mothers are also exposed to pregnancy-related risks, in particular those involving multifetal gestation and to the risk of contracting diseases such as Hepatitis B and C and HIV, as a result of exposure to untested biological substances. The long-term risks involved in hormonal treatment are not sufficiently clear, but research indicates an increased risk of endocrinological disturbances and fertility problems.¹²

Pregnancy itself involves considerable risks, such as backache, nausea, swelling, weakening of the pelvic muscles, anemia, urine infections and hypertension, permanent disability and death. At present, no insurance policies cover the risks of pregnancy.

The risk to the surrogate mother increases with multifetal gestation, as does the risk of miscarriage and the need for Caesarian section.

Emotional impacts

Studies show that the surrogate mother makes a complex emotional effort to work on herself to prevent over-attachment to the fetus and to enable her separation from the child. In addition, it seems that in many cases, the surrogate mothers develop a strong emotional and asymmetrical attachment to

¹² Ibid.

the intended couple, usually toward the intended mother. This emotional connection, based on gratefulness and the sense of latent value, is a source of satisfaction for the surrogate mother and is crucial for preserving the sense that she is not being exploited by the procedure. Nevertheless, as described below, the emotional commitment sometimes causes self-sacrificial tendencies among the surrogate mothers, and a weakening of the relationship after the birth might lead to disappointment and to the sense of exploitation.

The emotional work required to avoid over-attachment to the fetus and the need to separate from the newborn child

Avoiding attachment demands a considerable emotional effort by the surrogate mother.¹³

For example, many surrogate mothers avoided looking at the ultrasound screen so as not to develop an emotional attachment.¹⁴ Many surrogate mothers allowed neither themselves nor their children to touch their abdomen during the pregnancy.¹⁵ The surrogate mothers reported the fear of losing control emotionally and reported creating a separation from the fetus during the birth. The accepted approach to coping with the “threat” of the birth was to request a Caesarian section after the 38th week of the pregnancy.¹⁶

Although the surrogate mothers claimed not to have developed a connection with the newborn child, they reported a sense of closeness and responsibility toward their surrogate children.

13 Samama, E. (2002). **My womb, her baby: The motives for surrogacy as reflected in stories of surrogate mothers in Israel**. Unpublished MA thesis, Paul Baerwald School of Social Work, The Hebrew University of Jerusalem, under the supervision of Prof. Ruth Landau, p.97. (In Hebrew)

14 Ibid, pp.130-131.

15 Ibid, pp. 131-132.

16 Ibid, p. 132.

In the interviews with Teman and Samama, the surrogate mothers told how they developed a relationship of separation and disregard with parts of their bodies that were related to the surrogate pregnancy: "The head and the chest – are me, the legs – are me, the abdomen – is not me."

The trauma of separation from the intended parents

Teman¹⁷ noted that in nearly all the investigated cases, the surrogate mother developed emotional dependence on the intended parents, and as the birth approached, nearly always developed the fear that the intended mother would abandon her after the birth.

The surrogate mothers' tendency to develop self-sacrifice

The combination of the perception that elevates motherhood, the power disparity between the intended couple and the surrogate mother, the lack of recognition of the economic value of the surrogate mother's work and pregnancy and the expectation that women should be altruistic, particularly in the context of motherhood, provide the ground for exploitation of the surrogate mother.¹⁸

The inconvenience involved in surrogacy performed for payment, the social appreciation for the altruistic aspect of surrogacy and the surrogate mother's strong emotional commitment toward the intended couple, serve as considerable psychological pressure to "succeed" in becoming pregnant to make the intended couple happy. In light of this, some surrogate mothers continued the process in spite of emotional difficulties that arose within themselves and within their children. Some left their jobs and some even had such a deep

17 Teman, p. 260

18 Shalev, C. (1996). "The Embryo Carrying Agreement – a Legal and Ethical View," *Exceptional Pregnancy: A Multidisciplinary Study of In-vitro Fertilization* 191, S. Almog and A. Ben Zeev (Eds.), p. 205. (Hebrew)

sense of commitment that, on their own initiative, requested invasive medical examinations,¹⁹ or asked to give birth without an epidural, for minimum risk to the fetus.²⁰ Some surrogate mothers took a higher dose of hormones than the medical recommendation, which could endanger their health,²¹ in an attempt to increase the likelihood of embryo reception.

The surrogate mothers' sense of commitment and the social pressure exerted upon them might lead them also to make financial concessions.

Emotional harm to the surrogate mother's own children

The surrogate mothers' own children often experience distress, because of the time and attention that the mother devotes to the surrogacy process, and because of the fear of being given away themselves.

Undermining autonomy and privacy

Surrogacy involves a considerable degree of loss of privacy and control, in relation to the medical treatment as well as in day-to-day life. Studies show that some intended couples assume that because they are paying for the surrogacy and the surrogate mother's behavior affects "their" child growing inside her body, they have the right to make far-reaching demands on her lifestyle during IVF and pregnancy.

Compensation for the Surrogate Mother as Reflected in the Current Legal Agreement

An examination of the factors that contributed to the surrogate mother's satisfaction reveals that the current legal

19 Ibid, p. 61.

20 Ibid, p. 72.

21 Ibid, pp. 56, 61.

arrangement does not assist the surrogate mothers in reaping the benefits from the surrogacy process, and even serves as a stumbling block.

Teman and Samama's research findings show that the primary motive for surrogacy is economic, and that most women who apply to be surrogate mothers have a low income. The legal arrangement hinders the surrogate mothers' effective accomplishment of economic and social/emotional goals.

From a financial point of view, the payment to the surrogate mother is defined as "reimbursement", and the law does not allow transactions involving large sums of money. The law does not even address fair distribution of payments – between 1/2 to 3/4 of the payment is made after a live birth at the 35-th week of pregnancy and on. In practice, the law guarantees no payment for effort and suffering, but rather for handing over the child.

The findings also show that surrogacy cannot be perceived as an emotionally detached and rational economic agreement. The surrogate mother's strong attachment to the intended couple, her mental effort invested in not creating a bond with the fetus and her acts of self-sacrifice testify that the surrogacy process, as expected, involves interpersonal interactions replete with emotion. Nevertheless, the emotional aspect has no legal relevance and the law does not enable effective achievement of the surrogate mothers' social and emotional goals. The law expropriates the surrogate mother's custody and guardianship rights immediately after the birth, and almost completely limits her ability to retract the agreement. She is granted no rights over the child, nor the right to maintain long-term contact with the intended couple. These issues are entirely dependent on the goodwill of the intended parents. In fact, the surrogate mothers' main compensation is based, in the end, on the parents' sense of gratefulness and on her own sense of having done an altruistic deed.

Proposals for Legislative Change

This chapter will provide details of our specific proposals for changes to the legislation, dealing with two main topics: First, we will discuss whether the surrogacy agreement should continue to be recognized and will discuss the question of the suitable scope of accessibility to surrogacy. We will then present our specific suggestions regarding arrangements to improve the surrogate mother's prospects of benefiting from the procedure, if it is deemed inappropriate to cancel surrogacy agreements.

Recognizing Surrogacy and the Scope of Accessibility to Surrogacy

Should surrogacy agreements continue to be recognized?

By its very definition, surrogacy is an institution that contains an inherent contradiction: The intended parents are interested in having a child without any external partnership, whereas the surrogacy procedure necessitates the involvement of another woman, which essentially includes deep physical, emotional and identity-related processes. Surrogacy is not a type of fertility treatment, but is a social agreement that compels the involvement of another person.

The fundamental interests of the parties involved in surrogacy are contradictory: The intended parents are not genuinely interested in the human involvement of the surrogate mother, and would have preferred to grow "their" baby in a test-tube than inside another woman. From the surrogate mother's point of view, however, the human relationship and gratefulness that she experiences with the intended parents is a major source of her sense that the procedure is an act of heroism and not of exploitation.

Objective utilization of identity-related aspects of the human body contradicts basic ethical values,²² and by nature, has high potential for exploitation and degradation. Surrogacy is an experimental procedure with great potential for harm, especially if it will become prevalent and accepted. **The distance between heroically presenting a unique human gift to a childless couple and time spent on a “fertility farm,” which uses human machines, is not large, and the ability to preserve this distance will diminish as surrogacy becomes more widespread and routine.**

One issue that can clearly illustrate the potential problems of a surrogacy contract is the hypothetical possibility that a healthy woman, who prefers to avoid pregnancy side-effects (such as nausea and stretch marks), could hire another woman’s body to carry the pregnancy for her. The idea that one person could use another person’s body in such a way is outrageous.²³ The instinctive sense of recoil from the use of a surrogate mother’s body by an intended mother who could carry the pregnancy herself is a very good illustration of how the surrogacy contract differs **in essence** from a business contract, which is worthwhile for both parties. The importance that we ascribe to the reason behind the surrogacy application clarifies that the surrogacy agreement **can not be thought of** as a fair contract which amounts to one party wishing to find a woman to give birth on its behalf and the other party wishing to receive payment.

In light of the unavoidable complex emotions in the surrogacy procedure and the built-in conflict of interests between the intended parents and the surrogate mother, it

22 The categorical imperative of the philosopher, Immanuel Kant – Each man is an end in himself, see, for example: http://en.wikipedia.org/wiki/Categorical_imperative

23 The Embryo Carrying Agreement (Authorization Agreement & Status of the Newborn Child), 1996, Statute Book 176, Section 4(A)(1) Requires “a properly proven health reason.”

is very difficult to draft an arrangement in which surrogacy agreements that will be drawn up on a routine basis can benefit the surrogate mother in the current social reality. Such an agreement would have to be in keeping with ethical values that respect autonomy, perceiving a person - the surrogate - as an end in herself, rather than as means to an end,²⁴ and without creating charged and complex social situations, many of which are likely to end in harm.

In addition, broad accessibility to surrogacy would have negative implications for women's social status. This is because it would strengthen the social dictate that requires women to become mothers at any cost and because it would convey a message that diminishes the importance of the relationship between the pregnant woman and the fetus growing in her womb.

Widespread accessibility to surrogacy would essentially change the perception regarding parental rights and obligations. A society in which anyone who has the money could purchase an egg and/or sperm and could hire a woman to give birth to a child would be very different from the society in which we live today.

In light of all the above, we believe that surrogacy should be prohibited in Israel.

In any event, it is very important to prevent the slide down the slippery slope to a situation in which surrogacy is no longer a solution for specific and particularly severe medical cases, but becomes a "widespread and accepted method of bringing children into the world."

24 Kant's absolute moral principle, see e.g. <http://www.philosophypages.com/hy/5i.htm>

The Slippery Slope – the Degree of Accessibility to Surrogacy

Accessibility to surrogacy can be limited in two ways: through imposing stringent accessibility criteria or through arbitrarily determining annual quota. Both these approaches raise difficulties, and examining them in-depth clarifies **the inherent problematic nature of the surrogacy institution**, and also indicates that a more appropriate solution would be the complete prohibition of surrogacy.

In the present legal arrangement, surrogacy is accessible only to heterosexual couples in which the man has fertile sperm²⁵ and the woman “cannot become pregnant or cannot carry the pregnancy, or when the pregnancy is likely to pose a serious risk to her health.” This being the case, surrogacy is inaccessible to singles (women or men) or to homosexual couples.

The criteria that limit accessibility to the surrogacy procedure raise difficulties regarding equality between people in need of surrogacy. It is very difficult to justify the legal prohibition against single women or homosexual couples from applying for surrogacy under the same circumstances in which heterosexual couples can be helped by such a procedure.

The minority opinion within the Inslar Committee was that single women should be allowed to apply for surrogacy, but that this option should not be opened to men (either single or homosexual), as men’s inability to become pregnant can not be seen as “pathology.” The authors of this report are also divided on this issue. Some of us believe in the essential difference between meeting the needs of infertile women, whose a-priori expectation to produce offspring was not

25 The use of donated sperm is not allowed, as opposed to donated eggs, which are allowed.

realized for medical reasons, and the situation of men, whose inability to become pregnant is inherent. On the other hand, some of us are of the opinion that, as surrogacy is not a medical treatment, but a social/ legal institution, it is, therefore, unclear why the option should be granted to women (or, more precisely, heterosexuals) but not to men, as the aim of social institutions is not to rectify medical defects, but to regularize relations between individuals in society.

Nevertheless, making surrogacy accessible to men would undeniably create a huge demand and would increase tenfold or hundredfold the number of procedures performed. As already mentioned, we believe that **if our society could tolerate surrogacy at all, it would be only as a solution for extreme cases and not as a mainstream method because such an increase in the rate of the procedure could have destructive outcomes.**

Another possibility that some of us prefer would be reduced accessibility to surrogacy in an egalitarian manner, for example, by limiting the number of procedures performed annually. This would avoid a situation in which women's bodies were exploited for "mass production", without the need for guidelines regarding the discriminatory question of who is or is not "entitled" to have children. This option is also not without its difficulties: What would be the appropriate number determined so as not to lead to negative social outcomes? How can such arbitrary limitation be justified? Will it be possible to withstand pressure exerted by couples and singles who are longing for children in the future, when this limitation would prevent them from realizing their dream?

These difficulties are an even stronger indication that the appropriate solution is comprehensive outlawing of surrogacy.

Surrogacy by Gamete Donation

The current law authorizes utilization of egg donations for surrogacy, but prohibits sperm donation.²⁶ The basis for this is unclear.

The reasons stated by the Inslar Committee to establish the prohibition against anonymous sperm donation were medical (the risk of sibling marriages), social (the right to know one's genetic origin), psychological (the need to know the identity of the genetic parent) and religious (the risk of "Mamzerut" — a Jewish Halachic concept of illegitimacy through forbidden relationships).²⁷ These considerations, except for the risk of Mamzerut (which is also not clear cut), are valid also for egg donation.

Another consideration that was presented in this context was the fact that permitting the combination of surrogacy and gamete donation would create additional branching of parenthood and multi-parental relationships, including the social parents, the genetic parents and the surrogate mother.

It is also noteworthy that the empirical findings from Samama's doctoral study, indicate that some of the intended mothers have difficulty in developing an emotional connection to a child who was born from a combination of surrogacy and egg donation.

The issue of utilizing gamete donation in surrogacy gives rise to questions similar to those that raise other issues that were discussed in the question of accessibility to surrogacy. Nevertheless, we wish to emphasize that in any event, **we found no justification for the distinction between sperm donation and egg donation** in the surrogacy context.

26 The Embryo Carrying Agreement (Authorization Agreement & Status of the Newborn Child), 1996, Statute Book 176, Section 2(4).

27 Report by the public committee to examine the subject of entitlement to conclude the Embryo Carrying Agreement (Inslar Committee) www.health.gov.il/Download/pages/insler_internet.pdf, p. 7. (In Hebrew)

Improving the Surrogacy Procedure

If surrogacy in Israel will not be prohibited, we suggest changing its method of operation. The main aim of the proposals detailed below is to increase the benefits for the surrogate mother during the procedure and to enable detailed, long-term follow-up to allow the drawing of conclusions regarding the required legislative changes.

Tightening Control and Supervision over Surrogacy Relationships

The original approach adopted by the Embryo Carrying Agreement law allowed the formulation of the surrogacy agreement by the signatories on both sides. The authorization committee that operates by law recognized that the need to protect the surrogate mother could not be ignored and that a gap, therefore, existed between the contractual concept of the law and reality. Nevertheless, the current role of the committee is solely to approve the agreement. It does not conduct a follow-up of its implementation in practice. Neither does it collect data that could indicate the difficulties in its implementation, nor does it enable an examination of the law for its improvement.

We believe that the human and social interaction involved in surrogacy is too complex, its implications too diverse and its potential for harm too high to allow significant portions of it to be privately regulated. Recognition of the surrogacy procedure is a kind of social experiment, and thus the state needs to take broad responsibility to ensure the welfare of those involved.

The state must ensure the fairness of surrogacy agreements as well as the proper protection and preservation of the rights of the weak party—the surrogate mother. The state must be actively involved in all stages of the procedure. It would be appropriate to formulate a standard contract, from which

any deviation would require special authorization. Attention should be paid to the need for **a suitable arrangement for control and supervision of the actual implementation of the procedure**, including establishing an authority that would be responsible for dealing with surrogate mothers' applications. In addition, **proper gathering of information** must be achieved to enable evaluation and improvement of the situation.

Ensuring Fair Remuneration for the Surrogate Mother

The main motivation for applying to be a surrogate mother is financial, and most applicants have a low income. Apparently due to recognition of the potential harm involved in surrogacy, the current legal arrangement attempts to reduce low-income women's motivation to apply through imposing limits on the size of the payment that they can receive. We believe that these limits are inappropriate and rather than protecting the women from physical exploitation, they add financial exploitation to the situation.

The authorization committee is allowed (but not obliged) to approve payments to the surrogate mother for return of expenses, wasted time, suffering, loss of income, temporary loss of working capacity or "any other reasonable compensation." The law also states that any of the parties who give/ receive payments unauthorized by the committee will be committing a criminal offence for which a prison term of one year can be imposed.

In practice, the first monthly payment to the surrogate mother can be made only after she becomes pregnant and the majority of the payment (between half and three-quarters) is paid only after a live baby is born after the 35th week of pregnancy. Only \$300 is paid for an incomplete fertility cycle. Therefore, surrogate mothers who have a spontaneous abortion or who do not become pregnant receive a very low fee for their suffering and for the risks to which they were exposed.

We propose **canceling all legal limitations on the sum paid to the surrogate mother**. Furthermore, for surrogacy that is not performed for altruistic reasons, **no agreements should be allowed in which the sum falls below a minimum fee** that will be determined according to the risks to which the surrogate mother will be exposed. **Fair distribution of payments** should be ensured, which will reflect the time invested and the degree of exposure to risks and physical discomfort at any given time. It is unacceptable that a surrogate mother who aborts spontaneously at an advanced stage of the pregnancy should receive only a small fee in compensation. It should be stated in the contract that the intended parents who initiated the procedure and chose to endanger another human being because of their desire to have a child should bear the risks. In addition, the authorization committee's guidelines regarding the financial aspects of the relationship should be established in the regulations, including the guideline that determines that the fee intended for payment to the surrogate mother should be entrusted to a third party in advance.

In addition, **contractual stipulations that limit the surrogate mother's right to make future claims should not be allowed**. The intended parents should bear the cost of risks for which the surrogate mother cannot be insured. **The government should also allow insurance for pregnancy risks**, because without this, the intended parents could find themselves owing money that they cannot afford and the surrogate mother could find herself financially abandoned.

A Para-financial Relationship Model

The findings of studies carried out in Israel provide adequate proof that a woman cannot undergo a pregnancy and birth without deep emotional involvement. Therefore, it is impossible to consider the surrogacy procedure solely as a business transaction and relationships that do not deeply

consider the surrogate mother's emotional involvement and human needs should not be allowed.

In light of this, we see the importance of developing a surrogacy model that combines recognition of the surrogate mother's human contribution and strict protection of her human rights throughout the entire process.

A Para-financial Surrogacy Model that Includes Limited Relationship Rights for the Surrogate Mother

The findings of studies on surrogacy show that surrogate mothers are not interested in parental responsibility for their surrogate children and that the model of a tight ongoing bond, such as with open adoption, is not in the interest of either of the parties involved in surrogacy. In addition, there is apparently no need for concern that the surrogate mothers will refuse to hand over the child after the birth. The arrangements drawn up to cope with this fear, such as the transference of the newborn to the child protection officer, who receives guardianship immediately after the birth, are redundant and unnecessarily harmful.²⁸

We believe that appropriate recognition of the surrogate mother's human involvement in the procedure necessitates the granting of her limited rights to receive information about the surrogate child, as well as the possibility of future contact, if both sides are interested.²⁹

28 In this context, we are of the opinion that the agreement about the surrogate mother's withdrawal from the contract, as worded in Section 13(1) of the Embryo Carrying Agreement, provides an appropriate balance between the rights of the different parties involved in the procedure.

29 Possibilities of complex parenting structures in the context of surrogacy were discussed by Yael Weiler (1996). "The Surrogate Mother and Changes in Perception of Parenthood" (Published in *Assia* 57-58). www.daat.co.il/daat/kitveyet/assia/haem-2.htm (in Hebrew) and by Ruth Zafran (2006) "The Family in the Genetic Era: Defining Parenthood in Families Created through Assisted Reproduction Technologies as a Test Case, *Din U'dvarim* 223, pp. 272-277. (In Hebrew) Rosalie Bar (2002) "Ethical Problems in Creating Children through a Surrogate Mother." *Medical Ethics Dilemmas* 189 (Edited by Raphael Cohen-Almagor), p. 202 (in Hebrew) raised a possibility similar to open adoption.

In light of this, we suggest:

- Allowing an appropriate separation process during the crucial period following the birth: to allow the surrogate mother to see the newborn immediately after, one day after and one week after the birth and to insist on separation meetings after approximately three months and one year.
- Preparing the request for the parental order during the second half of the pregnancy after a meeting is held with the child protection officer, the surrogate mother and the intended parents and to stipulate its implementation by the surrogate mother's signature of agreement to hand over the child after the birth.
- Granting temporary guardianship to the intended parents immediately after the birth.³⁰
- Prohibiting the inclusion of clauses in the contract obligating the severing of relations between the surrogate mother and the intended family.
- Obligating the parents to send annual updates about the child to the surrogate mother, if this is her wish.
- Allowing the surrogate children to locate information about the surrogate mother and to make contact with her once they reach the age of 18, similar to adopted children.

In addition, we recommend not limiting the possibility of altruistic surrogacy, such as by a family member, subject to a proper investigation to confirm that the surrogacy is being performed out of free will.

³⁰ There is no need to grant guardianship to a state authority that has no emotional bond with the child and who is unavailable if the need for decision making should arise. Guardianship should be transferred from the surrogate mother to the intended parents at the time of transfer of the newborn.

Protecting the Health and Human Rights of the Surrogate Mother

Ensuring the Health and Well-being of the Surrogate Mother

- To ensure prevention of the surrogate mother's exposure to tissue that was not properly tested for viruses such as HIV and Hepatitis B, a procedure similar to that used by the Ministry of Health for IVF sperm donation should be adopted: The pre-embryo should be frozen and implanted only after six months, when the repeated test of the genetic parents is deemed intact.³¹
- It should be determined that the criteria guiding the considerations of the authorization committee will take into account the well-being of the surrogate mother's own children.³²
- Mothers of children between the ages of four and 10³³ should not be allowed to be surrogate mothers because of indications of negative impact on the surrogate mothers' own children.³⁴
- The number of embryos that can be implanted in each IVF cycle should be limited to one. Increasing the number of implanted embryos raises the likelihood of a multifetal pregnancy.
- The age of the woman who donates the egg should be limited. Using eggs from a woman over the age of 42 greatly reduces the likelihood of embryo reception and of a

31 Recommendation by Prof. Rosalie Bar that is summarized in a document of the Knesset Research and Information Center, as well as in Rosalie Bar (2002) "Ethical Problems in Creating Children through a Surrogate Mother." *Medical Ethics Dilemmas* 189 (Edited by Raphael Cohen-Almagor). (In Hebrew).

32 Recommendation of Orna Hirschfeld, Head Child Protection Officer for the Embryo Carrying Agreement and member of the authorization committee, summarized in "Background Document on Surrogacy in Israel" (Report of the Knesset Research and Information Center, Lior Ben David, submitted to the Committee on the Advancement of the Status of Women, 28 November 2005). (In Hebrew).

33 See Chapter 5 above.

34 Etti Samama (2011). *Embryo Carrying Agreement (Surrogacy)*. Doctoral dissertation (in process), the Department for Health Systems Management, Ben-Gurion University of the Negev, under the supervision of Prof. Haim Reuveni and Dr. Liat Lerner. (In Hebrew).

live birth, and exposes the surrogate mother to treatments with low prospects for success.³⁵

- A professional committee should be established to formulate rules about medical treatment undergone by surrogate mothers that could threaten their health and well-being. Proper consideration of treatment ethics in this case necessitates finding a point of balance between preservation of the patient's health and prospects for success of the treatment, which will be specific to the surrogacy context. For example, it would be reasonable to examine whether the use of steroids is appropriate as a rejection-preventing medication.³⁶
- Criminal punishment should be determined for physicians who violate the guidelines in a manner that exposes the surrogate mother to extreme risk.

Strict Preservation of the Surrogate Mother's Human Rights

It is unthinkable that the surrogate mother's basic human rights, such as freedom of movement and full rights over her own body could be violated because her activities could affect the fetus inside her womb. Such violation is indicative of slavery and is in complete contradiction to the fundamental values expressed in the Basic Law: Human Dignity and Liberty. Just as it is unthinkable, for example, that a man could draw up a contract that forces his wife and the mother of his future child not to smoke during pregnancy or that compels her to undergo amniocentesis, the same rule must apply regarding surrogate mothers.

We propose the following:

- Prohibit the inclusion of stipulations that would, in any way, limit the surrogate mother's personal liberty, privacy

³⁵ See Graph 3 above.

³⁶ "Surrogacy in America" CRG report, M. Gugucheva, 2010. pp. 22
. <http://www.councilforresponsiblegenetics.org/pageDocuments/KAEVEJ0A1M.pdf>

and full rights over her body during IVF and pregnancy, with the clarification that any such stipulations that were made are null and void. Many pregnant women choose to limit themselves regarding smoking, drinking alcohol and using drugs, as well as avoiding types of food that can harm pregnant women. However, imposing such limitations on the surrogate mother in the contract is a violation of her human rights. Limitations of this kind need to be agreed upon through goodwill and mutual trust, as is the case between the members of a couple.

- Prohibit the demand for financial guarantee from the surrogate mother to ensure that she honors the contract.
- Prohibit the inclusion of stipulations that limit the surrogate mother's right to carry out or refuse to carry out medical instructions or procedures of any kind/take medications of any kind/avoid taking medications of any kind. Prevent the possibility of fining the surrogate mother for performing/not performing any kind of medical procedures.
- Prohibit the inclusion of stipulations that limit the surrogate mother's right to perform an abortion for any reason, as well as stipulations that obligate the surrogate mother to pay compensation to the intended parents following an abortion and clarify that such stipulations are null and void.
- Exempt the surrogate mother from pleas and prosecution by the intended parents regarding the health condition of the newborn or regarding any kind of harm that was caused during the pregnancy.³⁷
- To avoid conflict of interests that could harm the health and rights of the surrogate mother, the medical personnel who

³⁷ This proposal was raised by the Women's Lobby in an opinion regarding the law. Letter from lawyer Rachel Benziman, Legal Adviser of the Women's Lobby in Israel to the Labor and Social Affairs Committee on the Status of Women (17.12.1995). "Opinion on the Bill for the Embryo Carrying Agreement (Authorization Agreement & Status of the Newborn Child: 1995)". (In Hebrew).

deal with the intended mother's fertility problems must be different from the staff treating the surrogate mother.³⁸ In addition, it must be clarified that the obligation of loyalty by the staff treating the surrogate mother is to her alone, that all medical information will be given to her alone and that she will make the medical decisions.

- Within the regulations, establish the internal guidelines of the authorization committee that was designated to protect the surrogate mother (e.g., limiting the number of times that she can serve as a surrogate mother, imposing limits on suitability to be a surrogate mother: determining women's unsuitability following a crisis, immediately after giving birth, etc., limiting the surrogate mother's contractual commitment to six IVF cycles).³⁹

Prohibiting Mediation for Profit

As opposed to many countries in which the law explicitly prohibits the mediation of an embryo carrying agreement in return for pay, and contrary to the recommendations of the Aloni Commission,⁴⁰ Israeli law imposes no limitations on commercial mediation for surrogacy.

In light of the ethical, psychological and social complexity involved in surrogacy, commercial mediating raises considerable difficulties and is fundamentally unacceptable. Commercial mediation carries an inherent conflict of interests:

38 Rosalie Bar (2002) "Ethical Problems in Creating Children through a Surrogate Mother." *Medical Ethics Dilemmas* 189 (Edited by Raphael Cohen-Almagor). (In Hebrew).

39 This proposal was raised in "Background Document on Surrogacy in Israel" (Report of the Knesset Research and Information Center, Lior Ben David, submitted to the Committee on the Advancement of the Status of Women, 28 November 2005). (In Hebrew).

40 The Aloni Commission recommended establishing a criminal prohibition against payment for medication that was not authorized by the Commission, as well as demanding the Commission's authorization for any payment for professional services related to the agreement (e.g. physician's or lawyer's services). Report by The Public-Professional Commission in the Matter of In Vitro Fertilization, July 1994). (In Hebrew).

The interest of the mediating agency is to maximize its profits, to satisfy the paying client, i.e., the intended parents and to cause as many surrogacy contracts to be signed as possible. These objectives are not necessarily in keeping with broad social interests.

Therefore, we propose **the prohibition by law of commercial mediation** for surrogacy as well as **advertising** to promote surrogacy, and to establish that receiving payment for surrogacy mediation will be considered a criminal offence. In addition, we propose that the centers dealing with surrogacy should be non-profit, rather than commercial organizations, **similar to the permanent agreement in the adoption law.**⁴¹

As part of the obligatory changes, the guidelines in the Adoption of Children Law should be endorsed: Section 28(3) (registered non-profit organization), 28(32) (advertising prohibition), 28(33) (payments prohibition) and 32 (compensation prohibition—a section that establishes that receiving compensation for this issue will be considered a criminal offence).

Authorization and Supervision of Mediation Centers

Coping with the complex surrogacy procedure requires knowledge, expertise and professionalism. The mediation agency accompanies the intended parents and the surrogate mother at a sensitive period of their lives and can assist them in coping with frustrations, crises, tensions and confrontations. It deals with profound issues and the importance of its work cannot be underrated.

From the various sources in the literature and from Internet forums, surrogate mothers appear to attribute great importance to the support provided by the mediation centers, particularly the contribution of the support groups.

41 Adoption of Children Law, 1981, Statute Book 293, Section 28(3).

The state needs to **authorize and supervise the surrogacy centers** to authenticate the level of professionalism and service that they provide.⁴² It must impose upon the centers **clear obligations of loyalty and confidentiality** and to ensure that **essential information will be conveyed to the authorities** to be able to **collect data** for examining and improving the law. The data should include complete information about every surrogate mother (data collection according to IVF cycles only should not be allowed. The data should include a list of the surrogate mother's screening tests, documentation of IVF cycles, the number of embryos that were implanted, as well as full details of medication treatments, results of procedures and their mental impact on the participants in the process. These data must be accessible to the public to enable independent criticism.

Similar issues arose on the subject of non-profit organizations dealing with international adoption and the relevant guidelines in the Adoption of Children Law of 1981 can be endorsed as part of the obligatory changes.

Prohibition of "Importing" Surrogate Babies from Countries in which No Appropriate Protection for Surrogate Mothers Exists

The Israeli law reflects the attitude toward surrogacy in Israeli society and establishes the standards considered moral and appropriate. Under these circumstances, Israeli citizens should not be permitted to perform any procedure overseas that is

42 In this context, the recommendation of Mina Yulzary and Ada Atias of the Parenthood Center that the government should oversee the activities and training of the mediation centers and should determine clear criteria by law. The recommendation is summarized in "Background Document on Surrogacy in Israel" (Report of the Knesset Research and Information Center, Lior Ben David, submitted to the Committee on the Advancement of the Status of Women, 28 November 2005). (In Hebrew).

not permitted in Israel. The “Fertility Trade,” which includes “human factories” in developing countries for trading eggs and surrogacy is a rapidly developing global problem. It must be established that the use of surrogacy services overseas is a criminal offense, except for Israeli citizens who are also residents of the foreign country in which they are undergoing the procedure.