CHAPTER 5

LEGAL POSITION OF SURROGACY IN COUNTRIES OTHER THAN INDIA

1. INTRODUCTION

There are a plethora of views regarding the issue of "surrogate birth" in various countries. It is rather a tumultuous point of law as there are only a handful of nations recognising it and there is also a lack of uniformity in the principles being followed in these nations with respect to the phenomenon of surrogate birth.427

In contemporary world, a parent’s surrender of a child for a fee, known as baby selling, is a crime all over the world. Many countries have regulations limiting or prohibiting compensation of intermediaries related to the transfer of child. Although, gestational surrogacy is partially legal in several countries around the globe, in most jurisdictions it is not possible going to another country to avoid the local prohibition is not always option. The surrogacy map of the world gives better understanding of the provisions to learn the laws across the world.

Surrogate motherhood can be viewed as a classic social problem in that its life history can be measured by the rise and fall of attention given to it. Media coverage is the first clear indicator of surrogacy’s arrival as social problem in the mid– to late 1980s. Legislative attention provides an important index as well. In 1987, the year of peak news coverage of surrogate motherhood, twenty-six state legislatures in America, introduced seventy-two bills on the topic. In addition to prompting an increase in the number of proposals for dealing with the problem of surrogate motherhood, the Baby M case influenced the type of policy responses proposed in the years immediately following the dispute.428

428 Susan Markens, Surrogate Motherhood and the Politics of Reproduction 22 (2007).
A detailed study of legal position of surrogacy in countries other than India is discussed under the following headings.

2. UNITED STATES

As of March 1990, most jurisdictions in United States did not have any specific rules concerning surrogacy. The issue of surrogate motherhood came to national attention during the 1980s, with the Baby M case.\textsuperscript{429} The Baby M decision inspired state legislatures around the United States to pass laws regarding surrogate motherhood. Most of those laws prohibit or strictly limit surrogacy arrangements. Nonetheless the flurry of legislative activity that followed the Baby M decision did result in some state legislatures’ adopting positions, and many state legislatures still were considering the issues and debating which rules to adopt. Since Baby M there had been little significant judicial activity in the United States— a matter that could change, of course, whenever the next interesting case arises and the parties decide to pursue their rights in court.

Congressional attempts to establish national law concerning surrogacy had failed, and for the moment the U.S. Congress appeared content to leave the issue to the states and to the courts. One of the most important federal bills was introduced in the House on May 14, 1987, by Democrat Tom Luken of Ohio. It would have prohibited making, engaging in, or brokering a surrogacy arrangement on a “commercial basis”, that is “under circumstances in which a person who makes, engages in, or brokers the surrogacy arrangement receives or expects to receive, directly or indirectly, any payment for the conduct.” The bill would also have prohibited advertising for surrogacy. It was much like the United Kingdom’s Surrogacy Arrangements Act, 1985 except that it imposed criminal liability on commissioning parents and surrogates as well as on go-betweens. It also prohibited private paid arrangements, thus filling a troublesome loophole in the British law. During the 1987 session, the Luken bill did not make it out of subcommittee. An identical bill was introduced in 1989 session. A second important bill had been introduced by Barbara Boxer (D.-Cal.) and Henry Hyde (R. –Ill.). That bill imposed criminal sanctions on surrogacy brokers (a maximum penalty of five years in prison and a $50,000 fine), but no penalties apply to the surrogate or the contracting couple.\textsuperscript{430}

\textsuperscript{429} 109 N.J. 396, 537 A.2d 1227(1988)
\textsuperscript{430} Martha A. Field, Surrogate Motherhood: The Legal and Human Issues 155 (1990).
Other efforts to formulate nationwide policy in the United States have also been unsuccessful. The first major attempt was that of the Ethics Committee of the American Fertility Society, which issued a report in 1986 expressing “serious reservations” about surrogacy but reaching no firm conclusions; one member of the committee, in dissent, argued that the surrogacy should be made illegal forthwith.\(^{431}\)

The National Conference of Commissioners on Uniform State Laws took on the subject of surrogacy, and in the 1988 the commissioners approved the Uniform Status of the Children of Assisted Conception Act (USCACA). Six months later the USCACA was approved also by the House of Delegates of the American Bar Association. The Act itself, however, reflected no consensus concerning surrogacy; instead it contained two alternative provisions for the states to choose between.\(^{432}\) Alternative A would regulate surrogacy and make it fully enforceable unless either party withdraws before conception or unless the mother withdraws within 180 days of conception (which is, of course, before birth and which coincides approximately with the time when the mother’s constitutional right to abort could expire under the \textit{Roe vs. Wade}\(^{433}\) decision, which was in effect at that time). If the mother does not repudiate the agreement within the 180 days, she loses all claims to the child, and the father and his wife will be listed as the parents on the birth certificate. Alternative A limits surrogacy to married couples with fertility problems and requires that at least one of them be genetically related to the child to be produced. It also requires a pre-contract judicial hearing to consider whether the couple is infertile, whether they are fit to be parents, whether the surrogate mother is acting voluntarily, and whether she has had at least one pregnancy and delivery. Although some members of the American Bar Association, partly under the influence of Lori Andrews of the American Bar Foundation,\(^{434}\) originally favoured enforcement by the contracting couple, Alternative A could not carry the day with the Commissioners or the Bar Association. Alternative B was added, making surrogacy contracts void and

\(^{431}\) American Fertility Society, \textit{Ethical Considerations} 67 (1986).
\(^{433}\) 410 U.S. 113 (1973).
unenforceable and making any resulting child the child of the “surrogate mother.”

The quest for statewide uniformity therefore ended with the Commissioners unable to achieve consensus even themselves. It is doubtful that there would be any advantage in a state’s adopting either one of their two radically differing alternatives rather than formulating an approach of its own. In fact all the states that had acted had passed over the Uniform Law Commissioners’ proposals and produced their own legislation except for North Dakota, which adopted the Commissioners’ Alternative B.

In 1992, over five years after Baby M catapulted surrogate parenting into the national spotlight, only fifteen states had enacted laws pertaining to surrogacy. Of these laws, two-thirds can be classified as prohibiting and banning surrogacy and one-third as permitting and regulating surrogacy. In 1993 District of Columbia also passed legislation prohibiting surrogacy and declaring such contracts unenforceable. It was not until 1999 that legislation was again passed on the state level. That year, Illinois enacted regulations that recognised parental rights under gestational surrogacy transactions. Since then, most legislatures have not addressed the issue. Texas was an exception. A law passed in 2004 allows for and regulates surrogate parenting arrangements. In general, though, at the beginning of the twenty-first century, United State’s most common response to surrogate motherhood remains a lack of legislation.

Among those states that have implemented specific laws, the dominant policy response is similar to that found on the international level, namely policies that ban and/or do not recognise surrogacy contracts. This contradicts the common assumption that the United States, unlike most other nations, uncritically embraces new reproductive practices such as surrogate motherhood. At the same time, the range of state level legislation institutionalised thus far signals a diverse political response to surrogate motherhood. Additional evidence of the lack of consensus that surrounds surrogate parenting is present in the scores of bills, introduced but never passed. Between 1987 and 1992, for instance, 208 bills on surrogacy were introduced into state legislatures. Fifteen were enacted. During the same period, fifty-five bills to form study commissions were introduced; the vast majority of these proposals did not make it out of their respective localities.

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436 Supra note 6.
437 Supra note 2 at 27.
legislatures. This relative standstill and inability to reach consensus has continued past and peak period of legislative attention to surrogate parenting. In the ten years between 1993 and 2003, fifty-one more bills on surrogacy were introduced into state legislatures, and only three were signed into law.\textsuperscript{438}

Furthermore, within the groupings of states broadly categorised as prohibiting or permitting surrogacy, there are many variations at the state level of specific provisions. Of the states prohibiting surrogate parenting, some, like Louisiana and Nebraska, merely claim surrogacy contracts as void and unenforceable; others, like Kentucky and Washington, further specify that payments to surrogates are prohibited. Of the states with a prohibitory surrogacy approach, only Michigan criminalises the practice. The states with a more permissive approach to surrogacy likewise exhibit a variety of legislative responses. Nevada, for instance, bans payments but provides limited guidelines for contracts. Both New Hampshire and Virginia provide extensive regulatory schemes for contracts. In New Hampshire, only contracts preapproved by the court are legally recognised. And although New Hampshire and Virginia allow and regulate surrogacy contracts, surrogates may be compensated only for medical and legal costs.\textsuperscript{439}

By 1995 nineteen states had adopted laws regarding surrogate motherhood. Most of these are designed to prevent or discourage surrogacy. Arizona, the District of Columbia, Kentucky, and Utah all have complete bans on surrogacy. Thirteen states bar the enforcement of paid surrogacy contracts. Ten jurisdictions prohibit a third party, such as a lawyer or physician, from collecting compensation for arranging surrogacy agreements.\textsuperscript{440}

State laws differ in the way they handle disputes over custody. Surrogacy laws in Michigan and Washington make custody determinations on a case-by-case basis, attempting to reach the decision that best serves the interests of the child. In New Hampshire and Virginia, such laws presume that the contracting couple are the legal parents, but give the surrogate a period of time to change her mind. In North Dakota and

\textsuperscript{438} Id. at 30.
Arizona, the surrogate and her husband are the legal parents of the child.\textsuperscript{441}

The Commission on Uniform Laws created a stir when it amended the Uniform Parentage Act to authorise gestational agreements as valid contracts. According to the prefatory note to the Uniform Act, the commissioners determined that such agreements had become commonplace during the 1990s, so the law was merely designed to provide a legal framework for such agreements. However, several organisations have decried the inclusion of these provisions. As of 2013, two states, Texas and Washington, had adopted the new Uniform Act, while legislatures in four other states were considering its adoption.\textsuperscript{442}

2.1 Enforceability Issues

Of the nineteen states whose surrogacy policy has been articulated by lawmakers, fourteen (Arizona, Florida, Indiana, Kentucky, Louisiana, Michigan, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Utah, Virginia and Washington State) have taken the position that surrogacy contracts will not be enforced against the birth mother who wishes to keep the child. (New York also appears to be following that approach, although its position, unlike the other states’, has not been definitively adopted). The remaining five (Arkansas, Iowa, Kansas, Ohio and Wisconsin) have not expressed any position on this issue. Jurisdictions making surrogacy contracts unenforceable reach this bottom line in quite different ways.

Like New York, a handful of other states either prohibit surrogacy contracts; refuse to enforce them, or both. For example, Arizona, The District of Columbia, Indiana, Michigan, and Nebraska prohibit and/or do not enforce surrogacy contracts.\textsuperscript{443}

\textbf{District of Columbia, Nebraska, North Dakota and Indiana}. A number of state statutes make surrogacy “void and unenforceable”: District of Columbia (D.C.), Nebraska, North Dakota. The District of Columbia likewise prohibits surrogacy contracts, and will not enforce them.\textsuperscript{444} Like Arizona, D.C. defines surrogate parenting contracts as contracts for both traditional and gestational surrogacy where the surrogate

\textsuperscript{441} Ibid.
\textsuperscript{444} D.C. Code S 16-402(a).
agrees to renounce her parental rights to the child.\footnote{Id. S 16-401(4).} Unlike Arizona, D.C. has provisions for both civil and criminal penalties for any party to a surrogate parenting contract or anyone who helps arrange such a contract.\footnote{Id. S 16-402(b) (stating that parties to the agreements, or anyone who assists in creating the agreement, can be subject to “a civil penalty not to exceed $10,000 or imprisonment for not more than 1 year, or both”).}

Nebraska’s statutes define a surrogate parenthood contract as “a contract by which a woman is to be compensated for bearing a child of a man who is not her husband.”\footnote{Neb. Rev. Stat. S 25-21, 200(2) (2010).} It further declares such contracts void and unenforceable.\footnote{Id. S 25-21,200(1).}

North Dakota’s surrogacy laws, while prohibiting traditional surrogacy agreements,\footnote{N.D. Cent. Code S 14-18-05 (West 2009).} are silent on the issue of the validity of gestational carrier agreements.\footnote{Id. S 14-18-08.} The statute relevant to traditional surrogate contracts declares surrogate contracts as void.\footnote{Ibid.} In addition, the statute pronounces the surrogate’s husband as the father of the resulting child if he is a party to the surrogate agreement.\footnote{Id. S 14-18-05.} However, the section dealing with gestational carrier contracts merely says that the intended parents are the parents of any child resulting from such a contract.\footnote{Ibid.} It does not specify whether North Dakota prohibits these types of contracts, permits them, or will or will not enforce them.\footnote{Ibid.} It can be inferred that because the statute does not expressly prohibit gestational carrier agreements, it permits them.

Indiana simply declares it “against public policy to enforce” the operative provisions of surrogacy contracts.\footnote{Ind. Code Ann. S 31-8-2-1, S 31-8-2-2 (West 2010).} Indiana has effectively stated that it will not enforce surrogacy contracts at all.\footnote{Id. S 31-20-1-1.} For example, Indiana will not enforce a term of a contract that requires the surrogate carrier to undergo a medical examination.\footnote{Id. S 31-20-1-1(4).} In addition, Indiana will not enforce terms that require the surrogate to become pregnant.\footnote{Id. S 31-20-1-1(2).}
Furthermore, Indiana law states that an agreement formed with such terms is void.\textsuperscript{459}

**Arizona and Kentucky.** Arizona’s and Kentucky’s statutes speak in terms of a prohibition of surrogacy, but they provide no penalties and functionally seem just to make surrogacy unenforceable. Kentucky prohibits either participating in paid surrogacy transactions or receiving compensation to help arrange them. It also declares surrogacy contracts void.\textsuperscript{460} In addition to this explicit law, some provisions of Kentucky law that were not specifically designed for surrogacy have been applied to surrogacy arrangements. For example, its adoption statutes prohibit advertising in connection with them.\textsuperscript{461} The Arizona provision differs in that its prohibition extends to unpaid surrogacy.\textsuperscript{462} Section A of the Arizona Revised Statutes Section 25-218 prohibits a person to “enter into, induce, arrange, procure or otherwise assist in the formation of a surrogate parentage contract.”\textsuperscript{463} Section D defines surrogate parentage contract to include any “contract, agreement or arrangement in which a woman agrees to the implantation of an embryo not related to that woman or agrees to conceive a child through natural or artificial insemination and to voluntarily relinquish her parental rights to the child.”\textsuperscript{464} Thus, the statute fails to address the differences between traditional and gestational surrogacy, and the fact that a gestational carrier is not the biological mother of the child. Like Kentucky’s, its prohibition extends to intermediaries as well as to participants. But because neither statute carries sanctions, the main effect of the statutory prohibitions is probably to make the surrogacy contract unenforceable.

**New Jersey.** Even though it does not carry criminal sanctions, surrogacy may be considered illegal in Arizona and Kentucky. In this respect, the law of these jurisdictions is like the law announced by the New Jersey Supreme Court for that state. In *Baby M*,\textsuperscript{465} it declared surrogacy “illega...
Nevada. Some states have pursued the policy of unenforceability through another route, not calling the contracts unenforceable but explicitly giving the birth mother a chance to withdraw for a specified time after the birth of the child. The rules of these jurisdictions may appear more friendly to surrogacy than those of jurisdictions calling the contracts void or illegal, but in terms of enforceability the result is largely the same. The state of Nevada permits gestational surrogacy contracts, but prohibits traditional surrogacy contracts. However, Nevada has one requirement placed that limits the number of gestational surrogacy contracts that are permissible. Specifically, only two persons who are legally married can enter into a surrogacy contract in that state. Nevada also does not allow payment to the surrogate for anything other than “medical and necessary living expenses related to the birth of the child as specified in the contract.” Nevada’s law specifically states minimum requirements for what must be in the surrogacy contract. For example, Nevada requires the surrogacy contract to have provisions specifying the rights of each party with regards to “(a) Parentage of the child; (b) Custody of the child in the event of a change in circumstances; and (c) The respective responsibilities and liabilities of the contracting parties.” The law also has a provision requiring the individuals named as the intended parents in the contract to be “treated in law as a natural parent under all circumstances.”

Florida. Nevada is not alone in handling the surrogacy controversy through application of rules invalidating pre-birth consents to adoption. In Florida, for example, the statutory provision regulating surrogacy expressly provides that a birth mother cannot give valid consent to adoption or to relinquishment of parental rights before the child is seven days old. For her consent to be valid, she also must be aware that she has a right to renounce that contract. Unlike Nevada, however, Florida is in no sense a pro-surrogacy jurisdiction; instead it is one of a few jurisdictions that actually attach criminal penalties to surrogacy. These few jurisdictions have gone further than Arizona and Kentucky, not only calling it illegal to participate in surrogacy as either a principal or an intermediary,

467 Id. S 126.045(1).
468 Id. S 126.045(3).
469 Id. S 126.045.
470 Id. S 126.045(1).
471 Id. S 126.045(2).
but also attaching criminal penalties. Florida, for example, makes violation of its provisions a felony; the penalties are imprisonment for up to five years and a fine up to $5,000. The statute makes it “unlawful” to engage in paid surrogacy. It makes paid surrogacy contracts “void and unenforceable.” But it permits agreement to pay expenses, as long as the payment of expenses is not conditioned upon the transfer of parental rights. This provision would be relevant to volunteer, unpaid surrogacy. As well as regulating participants in surrogacy, Florida joins most other regulating states in prohibiting payments to intermediaries. It does, however, make some explicit exceptions for intermediaries who render professional services in connection with unpaid surrogacy.

Many have criticised the terms surrogate and surrogacy as both inaccurate and demeaning, but few rise above the use of the conventional terms. The Florida statute, however, does not use the terms surrogate, surrogacy, or surrogate motherhood contracts, but speaks of a “volunteer mother”, “preplanned adoption arrangements”, and “intended father” and “intended mother.” The statute is unusual and interesting also because it adopts an elaborate regulatory scheme for “preplanned adoption arrangements.” Though prohibiting payment, it allows for “preplanned adoption arrangements” in which a volunteer mother at least eighteen years old agrees that she will bear a child and terminate her rights in favour of the intended parents, subject to her right of rescission during the seven days after birth. The volunteer is required “to adhere to reasonable medical instructions about her prenatal health”, among other things. The statute also provides that the agreement cannot contain any provision requiring termination of the volunteer mother’s pregnancy or allowing any amount paid to the mother (presumably as expenses) to be reduced because the child “is stillborn or is born alive but impaired”. Nor can it “provide for the payment of a supplement or bonus for any reason.” The statute is also unusual in providing “that the agreement may be terminated at any time by

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473 Id. S 63.212-(6)
474 Id. S 63.212-(1)-(i).
475 Id. S 63.212-(1)-(i)-5
476 Id. S 63.212-(1)-(i)-1-b.
477 Id. S 63.212-(1)-(i)-2-b.
478 Id. S 63.212-(1)-(i)-3-b.
479 Id. S 63.212-(1)-(i)-3-a.
any of the parties.”

Utah. Utah is one of the several states that only allows surrogacy contracts for gestational surrogacy. Utah’s statute states that “the gestational mother’s eggs may not be used in the assisted reproduction procedure [and] . . . if the gestational mother is married, her husband’s sperm may not be used in the assisted reproduction procedure.” Additionally, the intended parents must be married “and both spouses must be parties to the [surrogacy contract].” Utah’s law requires all parties to be at least twenty-one years old, and that the surrogate mother may not be receiving any state assistance, such as Medicaid. Finally, Utah only enforces surrogacy agreements that are “validated as provided in Section 78B-15-803.” This section adds stringent requirements for the contracts. First, the intended parents must be observed at home to be sure they meet the “standards of fitness applicable to adoptive parents.” The statute also requires that the gestational carrier have had at least one previous pregnancy and birth, and that the intended mother is unable to bear a child or is unable to bear a child without serious risk to herself or the child. This must be shown by “medical evidence.” All parties to the contract must attend counseling with a mental health professional to discuss the meaning and effects of entering into such an agreement and the professional must provide a signed certificate attesting to the counseling sessions. The parties to the agreement must enter into the contract voluntarily and must understand the agreement, and, finally, the surrogate’s consideration must be “reasonable.”

In Utah law makes it class A misdemeanor (carrying a prison term of up to a year and a fine of up to $2,500) to participate in paid surrogacy. Contracts entered into in violation of the provision are “null and void, and unenforceable as contrary to public

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480 Id. S 63.212-(1)-(i)-2-i.
482 Id. S 78B-15-801(3).
483 Ibid.
484 Id. S 78B-15-801(6).
485 Id. S 78B-15-801(2).
486 Id. S 78B-15-801(4).
487 Id. S 78B-15-803(c).
488 Id. S 78B-15-803(f).
489 Id. S 78B-15-803(b).
490 Ibid.
491 Id. S 78B-15-803(d).
492 Id. S 78B-15-803(e).
493 Id. S 78B-15-803(h).
Unpaid surrogacy agreements are not criminal but are “unenforceable.”

**Virginia and Washington State.** Virginia and Washington permit both types of surrogacy contracts, provided they are for uncompensated surrogacy. These states recognise the potential for abuse of the child’s rights, the rights of the intended parents, and, in the case of traditional surrogacy, the rights of the surrogate mother. Accordingly, their state laws regarding surrogate parenting contracts are lengthy and detailed in the regulation of such contracts. Virginia does not allow agreements for compensated surrogacy. It does, however, allow surrogacy agreements for uncompensated surrogacy. These agreements must be approved by the court to have their provisions enforced outright. Should the agreement not be approved by the court, the contract is governed by separate provisions of Virginia’s Domestic Relations Law. The relevant provision of Virginia’s law states:

> Prior to the performance of assisted conception, the intended parents, the surrogate, and her husband shall join in a petition to the circuit court of the county or city in which at least one of the parties resides. The surrogacy contract shall be signed by all the parties and acknowledged before an officer or other person authorised by law to take acknowledgments.

The court must then review the contract, hold a hearing regarding the contract, and continue to supervise the arrangement until after the birth of the child. The law also requires that the contract is entered into voluntarily by all parties, the contract spells out the medical and ancillary costs allocations, and the intended mother is infertile or unable to bear a child. Unlike other states, however, Virginia requires the surrogate to have had “at least one pregnancy, and . . . experience[ ] at least one live

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494 Id. S 76-7-204.
498 Ibid.
499 Id. S 20-159(B).
500 Ibid.
501 Ibid.
502 Id. S 20-160(A).
503 Id. S 20-160(A)-(B), (D).
504 Id. S 20-160(B)(4).
505 Id. S 20-160 (B)(5).
506 Id. S 20-160 (B)(8).
Washington, like Virginia, has declared surrogacy contracts entered into for compensation as void and unenforceable, leaving contracts for uncompensated surrogacy enforceable. Washington also distinguishes between traditional and gestational surrogate carriers. Washington has a specific provision regarding the surrogate carrier herself, to protect women of the state. The law provides that the surrogate carrier may not be “an unemancipated minor female or a female diagnosed as having an intellectual disability, a mental illness, or developmental disability.” The surrogate contract provisions also provide that a parent-child relationship is established between a child and a woman or a child and a man by a valid surrogate parenting contract under which the man or woman is the intended parent of the child. Washington state makes it a “gross misdemeanor” (involving imprisonment not greater than one year and a fine not to exceed $5000) to enter into or assist a paid surrogate parentage contract.

**Michigan.** Michigan in some ways has the most interesting legislative history with respect to surrogacy. Like Florida, it was one of the first to adopt explicit criminal provisions, and like Florida applies the felony classification to any surrogacy transaction. Moreover, Michigan’s penalties appear stricter than those in Florida, Utah or Washington. But Michigan’s provisions have only the effect of making surrogacy unenforceable. The statute makes it a felony to broker any surrogacy contracts or to enter into a contract with an unemancipated minor female or a female who has developmental disabilities or mental illness. The penalty is imprisonment up to five years and a fine up to $50,000. It is a misdemeanor, subject to one year’s imprisonment and a $10,000 fine, to enter into other paid surrogacy arrangements.

The clear intent of the statute is to forbid both paid surrogacy and the compensation of brokers of paid and unpaid surrogacy (like Michigan’s own Noel Keane). Michigan’s attorney general has interpreted the statute in such a way that it does not accomplish that result, and a Michigan trial judge has accepted that interpretation. The problem arose because the Michigan statute defined a “surrogate parentage contract”

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506 Id. S 20-160 (B)(6)
510 Ibid.
as “a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination, or in which a female agrees to surrogate gestation, and to voluntarily relinquish her parental or custodial rights to the child.”

When the American Civil Liberties Union (ACLU) challenged the constitutionality of the Surrogacy Act as soon as it was passed, the Michigan attorney general contended that the statute prohibited only agreements that expressly required the surrogate to relinquish her parental rights. He avoided the constitutional challenge by declaring that paid surrogacy in which the birth mother’s promise was revocable would not violate the law. Similarly, brokering surrogacy contracts that did not contain a promise to terminate parental rights would not be illegal. The ACLU agreed that the statute so interpreted did not violate the Constitution.

The Michigan Supreme Court had already held that it is constitutionally permissible to ban paid surrogacy and to impose criminal penalties, but the ACLU hoped to reverse that precedent. The attorney general’s action avoided that challenge but also left the Michigan statute in a very different posture from that intended by its framers. The attorney general and Judge John H. Gillis (Michigan Circuit Court judge) do have the wording of the statute to support their interpretation. Since the statute defines surrogacy contracts as those that require gestation and termination of parental rights rather that gestation or termination it appears that a contract that does not require both is not forbidden. The problem is that this plain interpretation of the statute’s words makes nonsense of the statutory scheme. The surrogate brokers continue to write surrogacy contracts; they just do not mention anything about a fee for relinquishment of parental rights. The contracting couple pays for the service of pregnancy and not for the baby. Such contracts now seem permissible even for paid surrogacy, which was not allowed in Michigan prior to this statute, so one primary (and surely unintended) effect of the statute, which was designed to criminalise all paid surrogacy, is actually to legalise paid surrogacy, as long as it is unenforceable. In effect the differences between the “restrictive” Michigan scheme and the “permissive” Nevada scheme are not very great.

No such narrow reading of the statute is necessary. In particular, when a contract

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514 Id. S 722.853(i).
516 Ibid.
for money mentions only gestation but the clear intent is for the surrogate to surrender custody and parental rights, it would seem plausible to find a violation of even the literal wording of the statute. It is not obvious that both elements of the consideration must be express for the contract to be forbidden. It should be of some relevance that everyone knows that these contracts are entered into so the contracting couple can receive a baby. It seems mistaken to make the validity of particular surrogacy arrangements turn just on the wording in the particular surrogacy contract. That approach makes surrogacy the province of lawyers and achieves no other discernible policy, except sometimes to promote surrogacy.

Since, under the interpretation adopted in Michigan, payment is only for gestation, a mother who changes her mind and keeps the child will still be entitled to full compensation under the contract. (In that respect, Michigan does differ from Nevada). That could discourage would-be fathers from employing this means of procreation. But perhaps confidence that they could win in a custody contest with the mother, even if she decided not to abide by the contract, would make the arrangement seem reliable enough to them. In Michigan the mother’s right to revoke will simply leave her in the position of one unwed parent battling with another over their mutual biological child; the child’s placement will be decided in accordance with the infamous “best interests of the child” standard.

Iowa and Kansas. Some of these laws do appear more favourable to surrogacy contracts than laws that make them void and unenforceable or even criminal. These laws are like the Nevada statute in that they all remove some barrier to the practice of surrogacy. For example, the Iowa provision that the felony of purchasing or selling another person “does not apply to a surrogate mother arrangement” does carry the implication that surrogacy is legal.\(^{517}\) (Ironically, because the statutory language defines such an arrangement as involving artificial insemination, the bearing of a child, and relinquishment of parental rights, statutory interpretation in the style of Michigan’s Judge Gillis would allow surrogacy only when relinquishment was actually mentioned). Kansas’ statute exempting from a ban on advertising “any person advertising to serve as a surrogate mother [and] any person advertising for the services of a surrogate mother”

\(^{517}\) *H.F. 628, No. 128, S 710.11.*
similarly carries the implication that surrogacy is illegal. That is an early provision passed in July 1984.\textsuperscript{518}

**Ohio and Wisconsin.** Other statutes regulating isolated aspects of surrogacy are more neutral with respect to surrogacy, for example, Ohio’s enactment that the provisions of the state code concerning non-spousal artificial insemination does not apply to surrogate motherhood.\textsuperscript{519} And Wisconsin’s statute seems neutral concerning the legality of surrogacy but also seems to reinforce the birth mother’s rights when it provides, in a section dealing with the registry of births generally:

**Surrogate Mother:** *If the registrant of a birth certificate under this section is born to surrogate mother, information about the surrogate mother shall be entered on the birth certificate and the information about the father shall be omitted from the birth certificate.*

The statute goes on to provide that a new birth certificate will be issued and filed as a replacement if a court determines parental rights.\textsuperscript{520}

But none of these provisions—not even those suggesting that surrogacy is legal—suggests that the contracts are enforceable. Nevada’s statute illustrates that legalisation of paid surrogacy does not require that contracts be enforceable. There the legislature made it explicit that the surrogate had the right to revoke her promise. Iowa, Kansas, Ohio and Wisconsin have each made some explicit law about surrogacy without suggesting any particular position on the issue of enforceability of pre birth surrogacy promises.

**Arkansas.** The Arkansas statute is probably also an example of an enactment legislating with respect to an isolated issue and not affecting the rights of the birth mother who changes her mind. The statute is ambiguous, however, and unlike any of the other laws discussed, contains language supporting an argument that surrogacy is enforceable in Arkansas.

Arkansas has a birth registration provision similar to Wisconsin’s, placing the birth mother’s name on the birth certificate, including the “surrogate” birth mother. The statute also codifies the traditional presumption that a child born to a married woman by

means of artificial insemination is the child of the woman and her husband, at least if he has consented to the insemination. But Arkansas also creates an exception to that rule for children born to surrogate mothers. In that case, whether the surrogate is married or single, “the child shall be that of; (1) the biological father and the woman intended to be the mother if the biological father is married; or (2) the biological father only if unmarried; or (3) the woman intended to be the mother in cases of a surrogate mother when an anonymous donor’s sperm was utilised for artificial insemination.”

In a sense, the provision is like Ohio’s; expressly disclaims application of the usual artificial insemination rules for surrogacy. But the Arkansas rule goes further by decreeing who the legal parents are. Arguably it could thereby make surrogacy contracts self-executing at the birth of the child (although the birth-registration provision, requiring courts to substitute the intended parents for the natural mother, militates against that interpretation). The presumptions also seem to eliminate the surrogate mother as a contender for parenthood, at least if the biological father is married. But the provisions do not necessarily resolve whether surrogacy will be enforceable when the birth mother does not want to perform, because in that event she may not be a “surrogate” within the meaning of the statute transferring parental rights; that term could refer only to those who still intend to serve as surrogates at the moment of birth or transfer of custody.

It is not possible just from the language to know whether Arkansas’s statute regulates surrogacy generally or instead affects only one small part of the surrogacy dilemma. That will not be certain until the law is interpreted by courts or until the subject of surrogacy is further addressed by the legislature. State Representative Henry Wilkins, who sponsored the bill, reported that its purpose was to clarify rights in situations in which neither set of parents might want the child—an outcome feared when the child is born with obvious deformities. Florida has a similar provision requiring the intended parents to accept custody and assume parental rights immediately upon the child’s birth, regardless of any impairment to the child.

New York. In addition to the nineteen states with explicit rules concerning

522 Before Arkansas’s 1989 amendment, the exception from the traditional artificial insemination approach applied only when the surrogate mother was single. The offspring of married surrogates was considered the child of the “surrogate” and her consenting husband; Ark. Stat. Ann. § 9-10-201.
surrogacy, New York may be deemed to have a position on the issue—a position, like that of other states, making surrogacy unenforceable. New York, however, has neither enacted law nor definitive judicial precedent; its rules have been announced by the state’s lower courts. Nonetheless New York clearly appears to be a state where paid surrogacy contracts are voidable but not void or criminal—that is, they are not enforceable over the birth mother’s objection but they can legally operate when all parties remain in agreement.524

The New York State Task Force on Life and Law took on the problem of articulating statewide policy.525 In May 1988 it produced a report thoroughly analysing the issues and announcing a unanimous judgment among the diverse twenty-six members that public policy should discourage surrogate parenting. The task force’s proposed statute would make surrogacy contracts void and unenforceable. It would criminalise commercial surrogacy brokering and paying for surrogacy (thereby imposing liabilities on the contracting couple to a paid arrangement but not on the surrogate mother).

Following the Task Force’s recommendation, the New York State Legislature enacted New York Domestic Relations Law Article 8 prohibiting surrogate parenting contracts.526 Article 8 Section 122 of the New York Domestic Relations Law declares all surrogate parenting contracts “contrary to the public policy of this state . . . void and unenforceable.” The law does not prohibit women from voluntarily relinquishing their children after birth. However, under Section 123 of the legislation, the payment of fees other than reasonable medical expenses incurred because of pregnancy and child birth to the surrogate, and the payment of fees to individuals who “act as brokers for the arrangements” are prohibited.

As enforcement, civil penalties can be imposed on individuals for entering into such prohibited fee agreements. The penalised parties can be the surrogate carrier (whether the egg donor or not), her husband (if she is married), “a genetic father and his wife, and, if the genetic mother is not the birth mother, the genetic mother and her husband,” and they can be subjected to a fine of up to $500.00 for violating the section. Should an individual or entity outside of the noted group assist in the arrangement for a

fee, they will be subject to a fine of up to $10,000.00, and will have to forfeit whatever fee they received from the parties of the agreement to the state. If an outside individual or entity violates Section 123 after previously being fined for violation of the same, that person is then guilty of a felony.\textsuperscript{527}

Section 124 deals with determining parentage in suits arising out of surrogate parenting contracts. These provisions make it clear that the state does not distinguish between traditional surrogacy and gestational surrogacy. Section 124 provides that in any action involving a parentage dispute, “the court shall not consider the birth mother’s participation in a surrogate parenting contract as adverse to her parental rights, status, or obligations . . . .” Because section 122 does not differentiate between traditional and gestational surrogacy, the application of Section 124 could result in a gestational surrogate mother receiving parental rights, even though she is not the biological mother, should she decide she wants to keep the child she carried.\textsuperscript{528}

As a result, New York’s current law treats traditional and gestational surrogacy contracts exactly the same, flatly prohibiting both. In addition, the law ultimately penalises the contracting parties by classifying them as felons for more than one offense, and imposing substantial civil penalties.\textsuperscript{529}

Other states, of course, also have some lower court rulings or even opinions in isolated cases, but unlike the situation in New York it is not yet possible to identify them with a discernible state policy. The law awaits development either through legislative action or by a case reaching the appellate courts. Many states have statutes that, if applied to surrogacy, would reflect a clear state policy, but absent judicial or legislative direction it is unknown whether the statutes will be applied to surrogacy.\textsuperscript{530}

**Massachusetts.** In Massachusetts, for example, one might expect surrogacy to be illegal, since, like few other states, Massachusetts prohibits independent adoption. But there is no legislation specifically referring to surrogacy, nor are there definitive judicial opinions. There was an interesting probate court decision, but it did not result in a written opinion. It held “illegal” surrogacy contracts that, among other things, contained a provision that the surrogate would be liable to pay a $25,000 penalty if she failed to

\textsuperscript{527} Ibid.  
\textsuperscript{528} Ibid.  
perform any of her obligations under the contract, such as undergoing amniocentesis or turning over the child at birth. This penalty provision was used as a matter of course by the New England Surrogate Parenting Program, which was involved in setting up the contract. The evidence showed also that the agency sought women on welfare, especially single women, and other persons it deemed not in a position to contest the contract—a predictable reaction when surrogacy is legal but unenforceable.

**California.** No survey of existing state law would be complete without some reference to California, even though it has not yet enacted legislation or produced definitive judicial precedent. At this point, some believe it dangerous to the legislative health to take defined positions. The California legislature rejected a full range of surrogacy bills during its 1987-88 legislative sessions: a bill to legalise and regulate a bill to criminalise, and a bill to render contracts unenforceable. Although surrogacy legislation has been reintroduced, it has not made headway. At this time, California seems not to be seriously pursuing a legislative approach to surrogacy.

In some states with law on the subject seem all to have made surrogacy contracts unenforceable. Some states’ laws say they are unenforceable, and some contain another provision accomplishing the same thing. Of all the statutes, Arkansas’s is the only one that could arguably support enforcement, and its history suggests that it was not intended to accomplish that result.

Although all states make surrogacy unenforceable, Arkansas, Nevada, Kansas and Iowa call surrogacy legal, while Michigan, Utah, Arizona, Florida, Kentucky, New Jersey and Washington call it illegal. Some states that call surrogacy illegal (for example, Arizona, Kentucky, New Jersey and North Dakota) nonetheless do not attach any criminal penalties to it. Only Arizona prohibits volunteer, unpaid surrogacy, and no state attaches any criminal penalties to unpaid surrogacy (except with a minor or a woman with mental retardation). All states, however, make unpaid surrogacy contracts, like commercial surrogacy contracts, unenforceable. States allowing only unpaid surrogacy differ in whether payments to such surrogates are limited to medical and legal expenses as in Washington) or whether living expenses can be included as well (as in Florida).

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530 Sherwyn and Handel vs. California State Department of Social Services, 218 Cal. Rptr. 778 (1985).
531 S. 2635 (introduced by Watson); A. 3200 (introduced by Mojonnier); Los Angeles Daily Journal, August 8, 1988; California Lawyer 32 (August, 1988).
Many states (for example, Michigan, Arizona and Kentucky) have aimed legislative prohibitions against intermediaries in surrogacy arrangements, rather than just regulating participants, but not all have taken this approach. (Arkansas, Louisiana and Nebraska for example, have not. And Nevada affirmatively allows paid intermediaries). Issues of legality may make less difference in practice than other issues, such as whether contracts are enforceable, whether penalties are imposed on intermediaries and whether penalties are imposed on contracting couples.

2.2 Custody Issues

One of the most important differences in the various statutory schemes proposed or enacted for surrogacy lies in whether they address issues concerning custody of the child. In many instances in which the contract is not followed—either because it is illegal or simply unenforceable—it appears that parental rights will then be determined through a classic custody contest in which each biological parent tries to demonstrate that she or he would be the better custodian for the child. If there is no particular provision concerning the child’s custody, it is likely to be determined by the jurisdiction’s usual custody rules.

**Michigan.** In Michigan, for example, the unenforceability of the contract means that custody will be determined according to the “best interests of the child” standard—a standard that may not serve the child’s interest at all. The evils in the traditional custody contest are illustrated in the case of Laurie Yates, the mother of twins who was splitting custody with the intended parents while they litigated over whether the birth mother and her husband could keep the children. The intended parents had moved to Michigan in order to be able to participate in the split custody arrangement, and pending the more permanent award of custody, each family kept the twins for two weeks at a time. In January 1988 Yates won the first round when a judge struck down the surrogacy contract, but the Yates family lives near the poverty level and could not take on a custody battle. A week before the trial was to begin, they settled because Mrs. Yates “realised that they would not be able to financially give these kids what the Hubers could.”

The Yates family thus avoided further litigation expenses, but they did not receive the surrogacy fee and had to pay some of the hospital costs. They were allowed six supervised visits annually with the twins, in Arkansas where the Hubers live, for a total of fifteen days a

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Nebraska, Washington and Indiana. Just as Michigan’s seemingly stern criminal provisions end with a custody contest in which the surrogate is usually financially unable to present her case, so in Nebraska the statutory provision that “the biological father of a child born pursuant to such a contract shall have all the rights and obligations imposed by law with respect to such child” probably undercuts the effectiveness of the statutory declaration that would surrogacy contracts are “void and unenforceable” (even though the enactment settles that if the mother did win the custody contest, the father would be liable for support).533 Similarly, the Washington statute, despite its criminal sanctions, provides for a general custody contest, making a specific rule only that the right to retain physical custody belongs to the person having physical custody, pending issuance of a court order.534 Indiana also apparently opts for custody contests to replace the contracts, which it voids, providing only that “a court may not base a decision concerning the best interests of a child in any civil action solely on evidence that a surrogate and any other person entered into a surrogate agreement or acted in accordance with a surrogate agreement unless a party proves that the surrogate agreement was entered into through duress, fraud or misrepresentation.”535

New York. The New York State Task Force on Life and the Law attempted to improve upon this situation in New York by retaining the comparative contest between the parents but altering the burden of proof. It provided that the birth mother should be awarded custody unless the court “finds, based on clear and convincing evidence, that the child’s best interests would be served by awarding custody to the genetic father, genetic mother, or both.”536 The proposal goes on to say that the traditional presumption for the mother’s husband as the legal father applies, but that it is rebuttable by the biological father who can establish his paternity and then seek custody. The proposal thus attempts to modify the usual “best interest” approach by placing a heavy burden on the parent attempting to challenge the surrogate mother’s custody. The Marchi bill, 1988 which in other ways was modeled upon the task force proposal, adopted different provisions

536 Supra note 99.
concerning custody, providing as the main protection of the birth mother in a custody dispute that her legal expenses and counsel fees will be paid by the party, proceeding against her. It also provided that her status as a surrogate should not be used against her (section 124, 1-2).

**Arizona and New Jersey.** Some lawmakers have taken notice that surrogacy cannot be discouraged if the surrogate mother must undergo a court battle in order to keep custody, and that the child’s interest also requires that the court fight be eliminated in favour of a certain custodian. The Arizona statute, for example, provides that “a surrogate is the legal mother of a child born as a result of a surrogate parentage contract and is entitled to custody of that child.” It also creates a rebuttable presumption that her husband is the legal father of the child. The rule for the mother’s custody is thus even stronger than the presumption that the New Jersey Supreme Court made in *Baby M* for future cases by allowing the surrogate mother to serve as the custodian pending final decision.

The New York State Task Force proposal and Arizona and New Jersey law show a variety of devices for setting most issues without litigation that turns custody upon supposed comparative parental fitness. Another group of Statutes operates through a presumption of paternity. Such a presumption can be a way to decide custody without a custody contest; after all, custody and rights to custody are certainly part of legal parenthood. But as we saw in the discussion of Arkansas’s enactment, which contains such a provision, the presumption may or may not have the purpose and effect of deciding custody.

**North Dakota.** Sometimes it is clear that the rule the statute makes concerning parentage is intended to determine the entire surrogacy arrangement. Interestingly, all jurisdictions in which it is clear that the parentage rules do affect custody favour the birth mother or the birth mother and her husband. In North Dakota, for example, if there is a surrogacy agreement, “the surrogate... is the mother of a resulting child, and the surrogate’s husband, if a party to the agreement, is the father of the child. if the surrogate’s husband is not a party to the agreement or the surrogate is unmarried,

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paternity of the child is governed by (the usual rules applicable to unwed fathers).”

The traditional presumption for birth mother and her husband is particularly strong in North Dakota’s statute, because the only permissible challenge to the presumption is an action brought by the husband himself in which it is determined that he did not consent to insemination. The statute goes on to provide that “a child whose status as a child is declared or negated by (the applicable sections) is the child only of his or her parent or parents as determined by (those sections) for all purposes.” Similarly, commentators on European law, have deemed rules concerning parentage, even those do not speak of surrogacy, not only to apply to surrogacy but also to settle custody disputes. And the proposal of the British Columbia Bar Association governs surrogacy by providing firm rules enabling the mother to keep the child.

Utah. In Utah, by contrast, it is clear that the provision concerning parentage is not intended to govern issues concerning custody, for the statute provides, in two adjacent sections:

(3) (a) in any case [of paid or unpaid surrogacy], the surrogate mother is the mother of the child for all legal purposes, and her husband, if she is married, is the father of the child for all legal purposes. (b) In any custody issue that may arise [concerning paid or unpaid surrogacy] the court is not bound by any of the terms of the contract or agreement but shall make its custody decision based solely on the best interest of the child.

Although subsection (a) alone would indicate that the mother and her husband would necessarily be custodians; subsection (b) suggests a custody contest between the biological parents.

Arkansas and Ohio. As we have seen, it is not clear whether the Arkansas statute, which legislates concerning the legal parenthood of newborns, resolves the

539 *N.D. Cent. Code* S 14-18-05 (1989). As discussed above, the North Dakota statute is Alternative B of USCACA.

540 *Ibid.*, S 14-18-03. Moreover the action must be brought by the husband “within two years of learning of child’s birth”.

541 *Ibid.*, S 14-18-06. By contrast the presumptions that North Dakota makes concerning paternity in the case of most unwed parents are rebuttable by “clear and convincing evidence” (*ibid.*, S14-17-04-2), and “any interested party” may bring an action “at any time” to determine paternity (*ibid.*, S 14-17-05-2).

542 *Utah Code Ann.* S 76-7-204(3).
problem when custody is disputed. Similarly, it is not certain what the outcome would be in Ohio, which has enacted simply that the usual artificial insemination rules do not apply in the case of surrogacy. Unlike the other legislative rules concerning parentage, these seem more favourable to the contracting couple than to the surrogate, if they apply when there is conflict between them.\footnote{Florida is another jurisdiction in which there are explicit rules concerning custody, but the outcome is not entirely clear; the mother does have seven days after the birth to rescind the contract, but it is not clear how the statute’s several clear rules regarding parentage and custody fit together. Fla. Stat. Ann. S 63.212-(1)-(i)-2-c,d,g,i.}

Most jurisdictions have in effect traditional presumptions concerning parenthood, either embodied in statutes or established by judicial precedent.\footnote{In June 1989 the U.S. Supreme Court upheld the application of California’s presumption of paternity in the mother’s husband, against the claim of a biological father; \textit{Michael H. v. Gerald D.}, 485 U.S. 903 (1989).} Those presumptions do not deal explicitly with surrogacy, and they may or may not apply to it. It is those traditional presumptions that statutes such as Arkansas’s, Ohio’s and North Dakota’s are designed to overcome, but the traditional rules remain in effect in other states. Usually the rules antedate public recognition of surrogacy. Until a controversy arises and courts rule on the issue, it cannot be known whether such rules apply to surrogacy.

\textbf{Massachusetts and Tennessee}. In Massachusetts, for example, a statute provides that “any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband.”\footnote{Mass. Gen. Laws ch. 46, S 4B.} Tennessee is one of many states having an equivalent provision.\footnote{Tenn. Code Ann. S 68-3-306.} Such statutes seem potentially determinative of any custody litigation between the surrogate and the sperm donor, and thus might be an effective way of bypassing custody contests.\footnote{New Jersey has a provision antedating public awareness of surrogacy and dealing with parentage in relation to artificial insemination. The statute was not controlling in \textit{Baby M}, however, because there is an explicit exception when “the donor of semen and the woman have entered into a written contract to the contrary”; \textit{N.J. Stat. Ann.} S 9:17-44(b).}

Even when state statutory or judicial decision makes clear that the traditional presumption of paternity by the birth mother’s husband does apply, other important questions remain—such as what paternity is presumed when the husband has not consented; or who will be permitted to defeat the presumption of paternity. If third persons are allowed to present themselves as putative fathers, and prove their biological
parenthood through blood testing, the presumption is far less important than if it can be challenged only by the husband himself, or by the birth mother, or by the husband and birth mother together. If only the mother or her husband were permitted to challenge the presumption, then application of the traditional presumption that the birth mother and her husband are the birth parents would avoid the custody contest.

This study suggests that most existing legislative pronouncements creating rules or presumptions concerning parentage raise many questions. Until courts rule, it is not even clear whether the presumptions apply in the context of surrogacy, but court rulings on the subject could potentially be controlling of surrogacy. Moreover, presumptions of parentage that are explicitly applicable to surrogacy— and explicit rules concerning custody— could be an effective way for legislatures to control surrogacy, especially if the presumptions were irrebuttable or rebuttable only by the surrogate and her husband. Such rules would avoid the classic custody contest that otherwise follows from an unenforceable contract.

3. UNITED KINGDOM

Laws of England and judicial decisions of Privy Council have always been guidelines for all the countries within Commonwealth. Here, we are having a bird’s eye view upon the novel medico-legal situation in U.K. The Surrogacy Arrangements Act 1985 combines with the sections of the Human Fertilisation and Embryology Act, 1990 to provide a workable framework within which such arrangements can take place. One of particular concern relates to the financial reward a surrogate may receive. The Surrogacy Arrangements Act, 1985 makes it a criminal offence for commercial surrogacy to be arranged, punished by a fine and/or upto three months imprisonment. It also prohibits advertising and other aspects of commercial surrogacy.\textsuperscript{548}

Surrogacy is legal if it involves payment only of expenses reasonably incurred by the surrogate mother, which have to be determined by the parties under sections 2(2) and (3) of Surrogacy Arrangements Act, 1985. The contract is not binding on either of the parties. After six weeks of child birth the genetic parents can apply for a parental order which gives them full and permanent rights over the child and the surrogate relinquishes her right (section 30 of Human Fertilisation and Embryology Act, 1990). Lastly, the

\textsuperscript{548} J.P.S. Sirohi, \textit{Criminology and Penology} 700 (2012).
transfer can be through Parental Responsibility Agreements when the genetic father is registered as father of the child.\textsuperscript{549}

The United Kingdom has a fairly complicated statutory and case law. The bottom line is that British law does not forbid even paid surrogacy, although it makes all surrogacy contracts unenforceable over the objection of the birth mother. The debate in Great Britain appears, however, to be not about whether to enforce surrogacy over the birth mother’s objection but about whether to allow the arrangements to go through even if all parties consent. An early case in Britain permitted a surrogate mother to repudiate the contract as being against the public policy.\textsuperscript{550} A 1984 report\textsuperscript{551} by the United Kingdom’s Committee of Inquiry into Human Fertilisation and Embryology had suggested that “legislation should be introduced to render criminal the creation or the operation in the United Kingdom of agencies whose purposes include the recruitment of women for surrogate pregnancy or making arrangements for individuals or couples who wish to utilise the services of a carrying mother; such legislation should be wide enough to include both profit and non-profit making organisations.”\textsuperscript{552} Subsequently, in 1985, commercial surrogacy arrangements were banned in the United Kingdom, but the ban does not extend to private arrangements, and only agencies and go-betweens are criminally responsible, not those who use their services.\textsuperscript{553}

Not long after the Warnock Report was published the British Parliament responded with the Surrogacy Arrangements Act, 1985. While it embodies several of the Warnock Committee’s recommendations, the Act omits to address many of the basic issues identified in the report of the Committee. The intention of the Act is to make the conducting of commercial surrogacy a crime, but only where third parties are involved. Criminal sanctions are imposed on commercial brokers who make, negotiate or facilitate a surrogacy agreement for payment. It has been suggested that this provision is wide enough to include lawyers, medical practitioners and psychologists who for a fee assist parties involved in a surrogate-mother contract. The provision of the Act does not apply to the commissioning couple and a surrogate who concludes a surrogacy agreement, and

\textsuperscript{549} Dr. Chintamani Rout, “Surrogacy- A Conceptual and Legal Analysis in 21\textsuperscript{st} Century” Oriental Journal of Law and Social Sciences 29 (November, 2012).
\textsuperscript{551} Warnock Committee Report (Chairman- Dame Mary Warnock) (1984).
\textsuperscript{552} Id. at 85.
\textsuperscript{553} Surrogacy Arrangements Act, 1985, ch. 49.
it would seem that no prohibition is placed on the payment of a fee to the surrogate mother. Nor does the Act prohibit agents as long as they do not receive payment.\textsuperscript{554}

The 1985 Surrogacy Arrangements Act has been criticised for being ambivalent on the legal status of surrogacy agreements. Section 1(9) states that the Act governs surrogate agreements 'whether or not they are lawful, and whether or not they are enforceable'. The Surrogacy Arrangements Act was intended as an interim measure. There have been other legislative proposals since, but Parliament has not responded. The Family Law Reform Act, 1987 is the exception, however, and does substantially affect surrogacy. It does this by legislation defining who the child’s parent is, and defining it in a way that creates an obstacle to surrogacy, although it does not altogether defeat it.\textsuperscript{555}

The 1987 Family Law Reform Act vests parental rights in the surrogate’s husband if he consented to the insemination. The presumption can be rebutted only by showing lack of consent; proving the existence of the genetic tie between biological father and child is immaterial. Accordingly, surrogacy contracts cannot be enforced over the objection of the married surrogate and her husband. Perhaps more important (since the contracts seem unenforceable anyway), even when all parties agree to the surrogacy arrangement, this provision makes it procedurally more difficult to fulfil a surrogacy contract, because the intended parents now must seek custody through wardship proceedings, rather than through the less cumbersome procedure they could have followed if the biological father were regarded as the child’s parent.\textsuperscript{556}

It is worth noting that the hurdles the statute places upon the contracting father in a surrogacy arrangement apply only when the pregnancy is achieved through artificial insemination. They do not apply when pregnancy is achieved through sexual intercourse, even as part of a surrogacy agreement. Such provisions can create substantial loopholes, leading those who want a binding surrogacy contract to accomplish the conception through sexual intercourse.\textsuperscript{557}

If applied literally, the Family Reform Act would also accomplish another unintended result— it would also make the gestational surrogate, implanted through

\textsuperscript{554} “Surrogate Motherhood: The Legal Dilemma” Available at: http://www.heinonline.org; Citation: 103 S. African LJ. 381(1986) (visited on July 8, 2013).
\textsuperscript{555} Martha A. Field, Surrogate Motherhood, the legal and Human Issues 176 (1990).
\textsuperscript{556} Ibid.
\textsuperscript{557} Ibid.
embryo transfer, lose her standing as a parent. The Act’s language gives significance to biological—genetic motherhood, not to gestation and parturition. So interpreted, the Act would actually facilitate surrogacy when the intended mother supplies the ovum.\textsuperscript{558}

4. FEDERAL REPUBLIC OF GERMANY

German Law seems more antisurrogacy than that of the United Kingdom. Court interpretations may reflect an attempt to interfere with unpaid as well as with paid surrogacy.\textsuperscript{559} They also may reflect a willingness to take the step British Law has rejected so far of interfering even with surrogacy contracts that all parties are willing to carry out.

This antisurrogacy approach is reflected; first, in interpretations that commentators and some courts have given to regulations that do not explicitly apply to surrogacy. First, the German Civil Code presumes the legitimacy of a child born to a married woman who lived with her husband at the time of conception (actually most American states have the same law, but they may not apply the presumption in surrogacy situations to defeat contractual arrangements with married surrogates). In Germany, the presumption is a strong one because it can be challenged only by surrogate’s husband, so he effectively has to consent after the child’s birth if his wife is to lose custody. The last provision, of course, does not resolve issues for unmarried surrogates or those whose husbands cooperate in the surrogacy arrangements. The Berlin Court of Appeal has applied the presumption of paternity in the context of a surrogacy arrangement; it also held that the status of being a surrogate is no ground for judicial revocation of parental rights.\textsuperscript{560}

In another early case, the Regional Court of Appeal of Hamm ruled a surrogacy contract void as being \textit{contra bonos mores}, or a “legal act in violation of accepted ethics”, which the Civil Code prohibits.\textsuperscript{561} A central problem, according to the court, was that the arrangement turned the child into an article of commerce by treating him as the object of a business transaction. Strangely, that case was a suit for restitution brought by the sperm donor husband when he discovered, through blood tests after the child’s birth,

\textsuperscript{558} Ibid.
\textsuperscript{559} The presumption of paternity especially has its effect, although it applies only when the surrogate is married.
\textsuperscript{561} Hamm, \textit{Neue Juristische Wochenschrift} 39 (1986).
that the child was not biologically his.

Moreover, German Courts could also find adoptions of children born to surrogates to violate laws prohibiting independent adoption, which carry criminal penalties. This is also a viable path to banning surrogacy in those of the United States that forbid independent adoptions, a problem that has so far received little attention from state courts. In addition in Germany as elsewhere, paid surrogacy could be considered illegal baby selling.\textsuperscript{562}

German Courts thus early established an antisurrogacy stance, even without legislation explicitly applying to surrogacy.\textsuperscript{563} In 1989 the German parliament passed legislation reflecting the same view of surrogacy. The law imposes criminal penalties on surrogacy intermediaries, but it does expressly exempt surrogates and intended parents. The penalties are imprisonment up to a year if the intermediary acts without compensation, two years if the intermediary is paid, and up to three years if the intermediary makes a business of arranging surrogacy. As an alternative, courts can impose a fine. The statute defines surrogacy to include natural or artificial insemination (thus avoiding the limitations of the United Kingdom’s Family Law Reform Act) or embryo implantation or custody. The statute does not, however regulate the disposition of the child born of surrogacy, leaving that to be determined in accordance with general provisions of family law; accordingly it is not certain whether an arrangement that all parties want to fulfill can have its intended effect.\textsuperscript{564}

In 1991, two German Parliaments, Bundesrat and Bundestag, passed Germany’s laws and set into force on January 1, 1991 completely banning traditional and gestational surrogacy and regulating assisted reproductive technologies under Embryo Protection Act, 1991. According to The Embryo Protection Act, it is punishable with up to three years imprisonment or a fine to us donor eggs, to transfer more than three embryos into a woman in one treatment cycle, to fertilise more eggs than can be transferred into a woman in one treatment cycle, or to utilise traditional or gestational surrogacy. Likewise, it is illegal to create embryos “without intending to bring about a pregnancy in the

\textsuperscript{562} Kassel, \textit{Neue Juristische Wochenschrift} 41 (1988).
\textsuperscript{564} Adoption Mediation Law of November 27, 1989 (Bundesgesetzbblatt part I, no. 54, November 30, 1989, at 2017).
woman from whom the egg cell originated.”

5. FRANCE

Unlike the United Kingdom and Germany, France does not have legislation that explicitly concerns surrogacy, but several more general provisions of law apparently interfere with it. In France, surrogacy agreements of any kind (both commercial and non-commercial) are unenforceable under civil law and declared illegal under criminal law. One can however, foresee parties to a surrogacy agreement complaining to the European Commission on Human Rights that the courts in rejecting applications for adoption preceded by surrogacy are violating Article 12 of the European Convention on Human Rights which states, “men and women of marriageable age have the right to marry and found a family.”

In January 1988 the council d’état affirmed a decision refusing to admit a surrogacy society to the local register of associations and said that the activities of the association would violate the criminal prohibition against encouraging parents to abandon for profit their yet-to-be-born children. Even before the Council d’état spoke on the subject, commentators had suggested that surrogacy was illegal. They also suggested that it was unenforceable under a preexisting statute placing some things “outside commerce” and declaring that they cannot be the subject of binding obligations. Although that may be true, it is worth noting that the only decisions to date relate to the commercial agencies. Other more general provisions may apply more broadly to surrogacy, as the commentators suggest, but many states in United States have comparable provisions, similarly enacted prior to public awareness of surrogacy, and they have not always been considered to apply.

Since 1994, any surrogacy arrangement in France, that is commercial or altruistic, is illegal or unlawful and is not sanctioned by the law. The French Courts the Cassation already took this point of view in 1991. It held that if any couple makes an agreement or arranges with another person that she is to bear the husband's child and surrender it on

568 Supra note 4 at 179.
birth to the couple, and that she is choosing that she will not keep the child, the couple making such an agreement or arrangement, is not allowed to adopt the child. In its judgment the court held that such an agreement is illegal on the basis of articles 6 & 1128 of the Code Civil, together with article 353 of the same code.  

6. CANADA

Contrary to popular belief, surrogacy is legal in Canada. The Assisted Human Reproduction Act, 2004 permits only altruistic surrogacy. It prohibits the provision or acceptance of consideration to a woman for acting as a surrogate; it is illegal to pay a surrogate mother for her services. However, it is legal to reimburse a surrogate mother for her reasonable expenses arising as a result of the surrogacy. The Quebec Civil Code renders all surrogacy contracts, whether commercial or altruistic, unenforceable.

As a matter of common law, surrogacy contracts in Canada seem to be either void or voidable and are not enforceable against the birth mother. In most provinces the biological father would be able to establish his paternity, but Quebec and the Yukon, because of statutory presumptions that the surrogate’s husband is the father—similar to the current British presumption—it is necessary for the commissioning couple using a married surrogate to institute more complicated adoption proceedings. Adoption by consent is permissible at least in Quebec, however, although a parent may withdraw consent for thirty days after birth, the effect is that in Quebec as elsewhere surrogacy contracts can accomplish their intended effect when all remain willing to perform them, but the intended parents cannot specifically enforce them.

As early as 1985 the Ontario Law Reform Commission published a report recommending that surrogacy be regulated, including a requirement of prior judicial approval, and that it be made enforceable. Its position has not been adopted in Ontario

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572 Quebec Civil Code, 1991, article 541: “any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null”
573 Code Civil Art. 586,588 (Crepeau, 1986) (unconsentable presumption of paternity in husband when pregnancy results from artificial insemination with consent of the spouses).
574 Quebec Arts. 607-609, 1059 (governing contracts bearing on an illicit object and contracts against public policy).
or anywhere else. In 1989, the British Columbia Branch of the Canadian Bar Association appointed a Special Task Force Committee on Reproductive Technology, which issued a report recommending, among other things:

1. The donor of sperm or eggs should not be considered at law as a parent of the child and should have no legal rights vis-a-vis the child.
2. A woman who bears and gives birth to a child should be considered the legal parent of the child for all purposes, subject to recognized exceptions under the Family Relations Act and the Adoption Act.
3. Paternity should be presumed by marriage or other relationship to the mother or acceptance of the paternity. The presumption of paternity in S 61.2 of the Family Relations Act should apply to the definition of “parent”.
4. Birth registration should reflect social parentage; but, adequate records of biological origin should be maintained.
5. Medical practitioners should be required to accurately record biological origin and to report these facts to a centralised information bank, provided that adequate safeguards for anonymity and security of information are established.
6. Records of biological origin should be confidential and non-accessible except in cases of medical necessity, other legislated exceptions, or by court order.\footnote{576} The Special Task Force Committee had not ban surrogacy but assimilated it to the adoption model and would not allow payment. It joined in the international consensus in declaring surrogacy contracts unenforceable. It had declared that “there should be no rights of access to the proposed adopting parents if the birth mother chooses not to enforce the agreement and does not relinquish custody”.\footnote{577}

7. **AUSTRALIA**

   In May 1982 the government of the state of Victoria, Australia, appointed a committee under the chairmanship of Professor Louis Waller \textquoteleft to consider the social, ethical and legal issues arising from \textit{in vitro} fertilisation\textquoteleft. Its \textit{Report on the Disposition of Embryos Produced by In Vitro Fertilisation} contains the recommendation that when a fee is paid for a surrogate-mother arrangement, the agreement should not be countenanced, as

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\footnote{576}{British Columbia Branch, Canadian Bar Association, \textquoteleft Report of the Special Task Force Committee on Reproductive Technology\textquoteleft \ 38 (June, 1989).}

\footnote{577}{\textit{Id.} at 39.}
in reality it is no more than the purchase of a child. Agreements which contemplate the adoption of the child by the infertile wife could amount to criminal conspiracies to controvert the provisions of the Adoption of Children Act. Some members of the Committee were of the opinion that the criminal law should be amended to make it clearly an offence to enter into or contribute in any way to a commercial surrogacy agreement. Even voluntary surrogacy, despite its altruistic motives, the committee found could result in serious problems, but it did not suggest that it be prohibited. It was recommended, however, that voluntary surrogacy arrangements should for the present in no circumstances be made part of an in vitro fertilisation programme. The principles stated by the Waller Committee were accepted by the legislature of Victoria. The Infertility (Medical Procedures) Act 1984 brings all forms of commercial surrogacy within the net of the criminal law, and makes it an offence to give or receive payment, pursuant to a surrogacy agreement. Commercial corporations and surrogates are included in this provision. No criminal penalty is imposed on voluntary surrogate arrangements, but such an arrangement is rendered void and unenforceable.\textsuperscript{578}

The Queensland government also appointed a special committee on new reproductive techniques. Its 1984 report noted the widespread opposition to surrogate motherhood on moral grounds; the spectre of "baby buying" was raised in many of the submissions to the committee. The report did not recommend criminal sanctions for the arrangements themselves. It suggested, instead that any such contracts be unenforceable and that it be made illegal "to advertise to recruit women to undergo surrogate pregnancy, or to provide facilities for persons who wish to make use of the services of such women." A 1983 South Australia government report found surrogate motherhood to be similarly unacceptable. It recommended that the law should not facilitate such arrangements and, further, that "a policy should be formally adopted by the Government in relation to the Adoption of Children Act to prevent surrogacy from being practiced in South Australia."\textsuperscript{579}

If the 1988 Baby M case in the US forced many to put on legal thinking caps, then that year also saw Australia battling with societal eruptions over the Kirkman sisters’

\textsuperscript{578} Supra note 128.
case in Victoria. Linda Kirkman agreed to gestate the genetic child of her older sister Maggie. The baby girl, called Alice, was handed over to Maggie and her husband at birth. This sparked much community and legal debate and soon Australian states attempted to settle the legal complications in surrogacy. Now in Australia, commercial surrogacy is illegal, contracts in relation to surrogacy arrangement unenforceable and any payment for soliciting a surrogacy arrangement is illegal. The surrogate mother is deemed by the law to be the legal mother of the child and surrogacy agreement relinquishing the child to the others is void.

Australia has been unanimously and consistently antisurrogacy, and surrogacy is criminal in Victoria and Queensland. In Queensland, the criminal penalties cover participation even in unpaid surrogacy. Moreover, they apply not only to surrogacy performed in Queensland but also to acts performed elsewhere if “the offender is ordinarily resident in Queensland at that time”.

Further in Australia, traditionally the birth mother i.e. the biological mother and her husband, are treated as the legal parents, but the legal presumptions are contradicting due to fertility revolution. The Australian Capital Territory has the most liberal surrogacy laws among all Australian states. Amendments in legislation have enabled the intending parents to be the legal parents, if at least one of the intending patents is the child’s genetic parent.

In the Brisbane state, the Brisbane Family Court decided the first and the only case of, Re Evelyn, involving the dispute of parenthood rights of such child born out of surrogate contract. The court decided the surrogate contract to be invalid and decided the genetic parents to be the legal parents i.e. the surrogate mother and the intending father. And for custodial rights it opined that the best interest of the child needs to be the prime consideration.

583 Supra note 1 at 110.
584 Ibid.
8. JAPAN

Japan has not initiated a legislation touching upon this sensitive issue. The professional association of obstetricians and gynecologists, JSOG, has an industry-wide prohibition on surrogacy. While JSOG has no official authority over a doctor’s ability to practice medicine, violating the guidelines means risking expulsion from the professional association. The organisation tends to have conservative views on Assisted Reproductive Technologies (ART), favouring a prudent and cautious approach over expanded access to new technologies. For instance, when the first Japanese surrogate birth was announced in 2001, the JOSG Ethics Committee developed a policy statement against surrogacy, which was formally adopted in 2003. JOSG concluded that surrogacy threatens child welfare, is likely to be psychologically and physically damaging to surrogate mothers, is likely to strain family relations, and that surrogacy contracts are not ethically tolerable.\(^{585}\)

A legislative subcommittee of the Ministry of Health, Welfare and Labour also submitted recommendations for a law against surrogacy. In 1998, as reproductive technologies were becoming more pervasive, the Ministry set up a committee of specialists to make recommendations for a law on reproductive technology. In December 2000, this committee released a report which recommended banning surrogacy because it violates the principle that humans not be used solely as a means of reproduction.

Other groups, such as the Japanese Bar Association and the National Institute for Research Advancement (NIRA)\(^ {586}\) also recommended banning surrogacy, and do not support recognising non-birth parents. The Japanese Bar Association released a report in 2000 that recommended banning surrogacy and emphasised the right of children to know their blood relations. In 2001 NIRA recommended that gestation be the determinant of legal parentage. A common fear is the possibility that the surrogate will not hand over the child. The United States’ Baby M case has been touted by the Health, Labour and Welfare Ministry and JOSG as an example of this risk.\(^ {587}\)

While there is no law regulating the use of ART, various laws affect the legal status of children born using a surrogate. For instance, the Civil Code does not contain a definition of parentage that would recognise a non-birth parent. The Family Registration


\(^{586}\) NIRA is a government approved independent policy research body.

Law also bases legal parenthood on birth. Instructions from the Justice Ministry have also been used to deny recognition of the intended mother in a surrogacy arrangement.\(^{588}\) Under current statutory law, “relatives by blood up to the sixth degree” are considered relatives.\(^{589}\) This defines parenthood exclusively by blood relationship.\(^{590}\) According to the Civil Code, an adopted child has the same legal relationship with its parents as between blood relatives. These laws create two kinds of legal parent-child relationships: blood parents and adoptive parents. There is no guidance as to what, if any, relationship is formed through surrogacy. This is probably because when the Civil Code was drafted, it was unimaginable that motherhood could ever be in question. Parents who have used a surrogate do have the option of adopting the child. However, adoption is an undesirable option for many hopeful parents because of the strong importance placed on family ties in Japan. Many couples choose surrogacy because it most closely resembles a natural birth and maintains genetic ties with the child.\(^{591}\)

Courts generally reject parent-child relationship formed through reproductive therapies and instead base parenthood solely on births, as specified by Japanese Civil Code and Family Registration Law. In some cases, courts have abandoned the traditional analysis and employed a more flexible approach that considered other factors, such as the best interest of the child, written consent and the existence of a blood relationship between the parent and child. Japanese courts base the decision on whether a mother-child relationship exists solely on the basis of whether or not the mother gave birth to the child. This rule was established in a 1962 Supreme Court decision. In that case a woman gave birth to a child out of wedlock, and the court considered whether the woman needed to acknowledge the child as her own in order for a mother-child relationship to exist. The principle that birth establishes maternal parenthood was reaffirmed in a case involving a Japanese couple that traveled to the U.S. to use a surrogate. The couples resented their baby’s U.S. birth certificate listing them as the parents, but the registration of their child was denied. In September 2006, the Tokyo High Court made a groundbreaking decision by recognising the existence of a parent child relationship even though a surrogate

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\(^{589}\) *Japanese Civil Code of 1898*, Art 725.

\(^{590}\) Id. at 727.

mother was used. A contract between parents and the surrogate held that the children legally belonged to the couple and the surrogate had no rights or responsibility for them. This case has been critiqued for disregarding the significance of the act of parturition, and instead emphasising the best interest of the child as the paramount factor. While factors such as the existence of a blood relationship and written consent can influence Japanese courts, cases in which non-birth mothers are recognised as legal parents are rare, and the act of giving birth likely will continue to define motherhood. The recent reversal by the Supreme Court of Tokyo the Tokyo High Court’s groundbreaking decision makes this even more likely. Without legislative intervention, birth will be the exclusive mode of establishing legal motherhood, and non-traditional families created through ART will not be provided recognition.\footnote{Stellina Jolly, “Surrogacy and Family Ties: A Comparative Analysis of Indian and Japanese Legal Framework” Journal of University Institute of Legal Studies 305 (2009).}

Currently Japan is considering a bill that would legalise surrogacy and egg donation drafted by a panel of Liberal Democratic Party.

9. ISRAEL

In this country, a child is said to be Jewish when the mother is Jewish. They have legislated that the genetic mother is the legal mother of the child and adoption is not needed. Others view it differently. They argue that the surrogate mother is the legal mother because she accepts the embryo, nurtures it and ultimately delivers the baby. She is, therefore, the female parent. They argue further that fatherhood is solely genetical but motherhood is not. There is an element of mental attachment which is no less than genetical link. A surrogate mother carries the baby for nine months in her womb and is no way different from normal mothers.\footnote{Dr. Nandita Adhikari, “Surrogate Motherhood” Law and Medicine 165 (2012).}

Israel, like the United Kingdom, has legislatively banned commercial surrogacy agreements. Moreover, gestational surrogacy is prohibited by 1987 regulations; it is illegal to implant a donated egg unless it is fertilised by the sperm of the implanted woman’s husband; and a fertilised egg may be implanted only in a woman “designed to be the child’s mother”. In addition, a fertilised egg may not be implanted in a woman related to the egg donor. The regulations do not expressly apply to the more usual form of surrogacy in which the birth mother is herself genetically related to the child to be born, but commentators have predicted that Israeli courts would hold such transactions to be
void because they contravene public policy.\(^{594}\)

In the year 1992, a Public Multi-Professional Commission headed by Justice Aloni was set up to consider all aspects of reproductive technologies in Israel and to make recommendations for their regulation. Based on their recommendations, the Surrogate Motherhood Agreements (Approval of Agreements and Status of Newborn) Law was passed in the year 1996. The law created a statutory Approvals Committee to act as a supervisory and approving medium for all forms of surrogacy. The Committee is composed of seven members belonging to different professions which have a bearing on the act of surrogacy like physicians, social workers etc.\(^{595}\)

The Committee gives its approval only after a proper medical evaluation about the inability of the designated mother to become pregnant or carry a pregnancy. In order to protect the surrogate mother from exploitation the Committee demands proper screening of the candidates to ensure their suitability to perform the act. The Law demands that an initial medical and psychological suitability assessment of potential candidates are to be made by an independent professional because there is a presumption that the surrogate mother is unable to objectively assess her own suitability.\(^{596}\)

The Committee further insists that the consent of the candidate should be voluntary and based on knowledge of all relevant facts and consequences. It is the duty of the Committee to protect the financial interests of the surrogate mother hence it may approve the monthly payment of actual medical expenditures as well as suitable compensation for any suffering, loss of time, income and earning capacity. It may also provide for any other reasonable compensation. The Committee in order to ensure fairness to both the parties insists legal counseling for both the parties, including the surrogate mother. There must be full disclosure about the nature of medical treatment, types of facilities available and any restriction to be imposed. The right of the surrogate mother to refuse medical treatment during the process is respected as well as her right to privacy. The Committee insists for psychological counseling of the surrogate mother even after the birth of the child. During the final stage, the Committee reviews the entire


\(^{596}\) Ibid.
surrogacy agreement to ensure that all the necessary points as required under the law are covered in the contract.\textsuperscript{597}

The surrogate Motherhood Law in Israel provides adequate precaution to ensure the proper physical and mental health of the surrogate mother during the course of pregnancy. The government hospitals in Israel perform screening of candidates and provide IVF treatment to the couples at very low cost.\textsuperscript{598} The hospitals also provide social workers to accompany the parties throughout the process. Thus the efforts made in Israel indicate that commercial surrogacy can be legalised but at the same time criticism on ethical and moral grounds can be avoided if rights of all the parties concerned are protected.

In March 1996, the Israeli government legalised gestational surrogacy under the “Embryo Carrying Agreements law”. This law made Israel the first country in the world to implement a form of state-controlled surrogacy in which each and every contract must be approved directly by the state.

10. \textbf{IRAN}

In Iran Gestational surrogacy as a treatment for infertility is being practiced in some well-known medical institutions in Tehran and some other cities. While the majority of Muslims in the world are Sunni, the majority of Iranians are Shiite. Most Sunni scholars do not permit surrogate motherhood, since it involves introducing the sperm of a man into the uterus of a woman to whom he is not married. Most Shiite scholars, however, have issued jurisprudential decrees (fatwas) that allow surrogate motherhood as a treatment for infertility, \textit{albeit} only for legal couples. They regard this practice as transferring an embryo or foetus from one womb to another, which is not forbidden in Shiite jurisprudence. Nevertheless, there are some controversies concerning some issues such as kinship and inheritance. The main ethical concern of Iran’s experience with gestational surrogacy is the monetary relation between the intended couple and the surrogate mother. While monetary remuneration is practiced in Iran and allowed by religious authorities, it seems to suffer from ethical problems which requires

\textsuperscript{597} Id. at 11.
\textsuperscript{598} Id. at 12.
new legislation and religious decrees.\footnote{Dr. K. Aramesh, “Iran’s Experience with Surrogate Motherhood: An Islamic View and Ethical Concerns” \textit{Journal of Medical Ethics} 5 (2009).}

11. \textbf{NETHERLANDS}

The popular image of the Netherlands as a liberal bastion does not as yet extend to its approach to surrogacy. Altruistic surrogacy is legal in the Netherlands, but commercial surrogacy is illegal. Entering or attempting to enter a surrogacy arrangement can be punished with imprisonment. Moreover, although altruistic surrogacy is technically legal, there are very few hospitals taking in couples and there are extremely strict rules to get in. This makes a lot of couples seek their treatment outside the Netherlands. The chief prosurrogacy proposal in Europe is that of the Dutch Health Council, which would establish a noncommercial government supervised body to handle all surrogacy arrangements in the Netherlands. It would even participate in recruiting surrogate mothers, and it would accept fee-based surrogacy. But even that group’s enthusiasm for surrogacy is limited. It would allow it only when medical necessity on the part of the infertile couple could be shown and when they could be shown to be worthy parents. Moreover, it would give the birth mother three months after the birth to decide whether she wanted to keep the baby despite the surrogacy contracts.\footnote{Maurice and Guido, “In the Netherlands, Tolerance and Debate”, \textit{17 Hastings Centre Report} 15 (June, 1997).}

The Netherlands is planning to relax the regulations for recognising children born to surrogate mothers from abroad. But opponents strongly disapprove of what they call “reproductive prostitution.” Though things are about to change, finding a surrogate mother can prove difficult under Dutch Law. At present surrogacy is only allowed if a family member is prepared to give birth on your behalf. In addition, the potential surrogate mother must already have children and not want any more children of her own.\footnote{Maike Winters, “Commercial Surrogacy: A Sign of the Times?” \textit{Available at}: http://www.rnw.nl/english/article/commercial-surrogacy-a-sign-times (visited on February 18, 2014).}

12. \textbf{RUSSIAN FEDERATION}

Gestational surrogacy, even commercial is legal in Russia being available for practically all adults willing to be parents. There has to be a certain medical indication for surrogacy: absence of uterus; uterine cavity or cervix deformity; uterine cavity synechia;
somatic diseases contraindicating child bearing; repeatedly failed IVF attempts, when high-quality embryos were repeatedly obtained and their transfer wasn’t followed by pregnancy. The first surrogacy program in Russia was successfully implemented in 1995 at the IVF Center of the Obstetrics and Gynecology Institute in St. Petersburg. Registration of children born through surrogacy is regulated by the Family Code of Russia (Art. 51-52) and the Law on acts on civil status (Art. 16). Clause 4 of Art. 51 of Family Code says: *Persons who are married to each other and who have given their consent in written form to the implantation of an embryo in another woman for the purpose of bearing may be entered as parents of the child only with the consent of the woman who gave birth to the child (surrogate mother).* A surrogate’s consent is needed for that. Apart from that consent, neither adoption nor court decision is required. The surrogate’s name is never listed on the birth certificate. There is no requirement for the child to be genetically related to at least one of the commissioning parents.\(^{602}\)

Children born to heterosexual couples who are not officially married or single intended parents through gestational surrogacy are registered in accordance to analogy of jus (Art. 5 of the Family Code). A court decision might be needed for that. On August 5, 2009 a St. Petersburg court definitely resolved a dispute whether single women could apply for surrogacy and obliged the State Registration Authority to register a 35 year old single intended mother Nataliya Gorskaya as the mother of her “surrogate” son. On August 4, 2010, a Moscow court ruled that a single man who applied for gestational surrogacy (using donor eggs) could be registered as the only parent of his son, becoming the first man in Russia to defend his right to become a father through a court procedure. The surrogate mother’s name was not listed on the birth certificate; the father was listed as the only parent. After that a few more identical decisions concerning single men who became fathers through surrogacy were adopted by different courts in Russia listing men as the only parents of their “surrogate” children and confirming that prospective single parents, regardless of their sex or sexual orientation, can exercise their right to parenthood through surrogacy in Russia.\(^{603}\)

Liberal legislation makes Russia attractive for “reproductive tourists” looking for

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\(^{602}\) Konstantin N. Svitnev, “Surrogacy and its Legal Regulation in Russia” *Available at:*

\(^{603}\) *Ibid.*
techniques not available in their countries. Intended parents come there for oocyte
donation, because of advanced age or marital status (single women and single men) and
when surrogacy is considered. Foreigners have the same rights as for assisted
reproduction as Russian citizens. Within 3 days after the birth the commissioning parents
obtain a Russian birth certificate with both their names on it. Genetic relation to the child
(in case of donation) just doesn’t matter.604

13. UKRAINE

Since 2002, surrogacy and surrogacy in combination with egg/sperm donation has
been absolutely legal in Ukraine. According to the law a donor or a surrogate mother has
no parental rights over the child born and the child born is legally the child of the
prospective parents. Ukrainian surrogacy laws are very favourable and fully support the
individual's reproductive rights. Surrogacy is officially regulated by Clause 123 of the
Family Code of Ukraine and Order 771 of the Health Ministry of Ukraine. One can
choose between Gestational Surrogacy, Egg/Sperm Donation, special Embryo Adoption
programs and their combinations. No specific permission from any regulatory body is
required for that. A written informed consent of all parties (intended parents and
surrogate) participating in the surrogacy program is mandatory.605

Ukrainian legislation allows intended parents to carry on a surrogacy program and
their names will be on birth certificate of the child born as a result of the surrogacy
program from the very beginning. The child is considered to be legally "belonging" to the
prospective parents from the very moment of conception. The surrogate's name is never
listed on the birth certificate. The surrogate can't keep the child after the birth. Even if a
donation program took place and there is no biological relation between the child and
intended parents, their names will be on birth certificate.606 Embryo research is also
allowed, gamete and embryo donation permitted on a commercial level. Single women
can be treated by known or anonymous donor insemination. Gestational surrogacy is an
option for officially married couples and single women. There is no such concept as
gay/lesbian marriage in Ukraine; meanwhile such persons can be treated as single
women/men.

(visited on September 13, 2013).
605 Ibid.
14. SOUTH AFRICA

The South Africa Children's Act of 2005 (which came fully into force in 2010) enabled the ‘commissioning parents’ and the ‘surrogate’ to have their surrogacy agreement validated by the High Court even before fertilisation. This allows the commissioning parents to be recognised as legal parents from the outset of the process and helps prevent uncertainty—although if the surrogate mother is the genetic mother she has until 60 days after the birth of the child to change her mind. The law permits single people and gay couples to be commissioning parents. However, only those domiciled in South Africa benefit from the protection of the law, no non-validated agreements will be enforced, and agreements must be altruistic rather than commercial. If there is only one commissioning parent, he/she must be genetically related to the child. If there are two, they must both be genetically related to the child unless that is physically impossible due to infertility or sex (as in the case of a same sex couple). The commissioning parent or parents must be physically unable to birth a child independently. The surrogate mother must have had at least one pregnancy and viable delivery and have at least one living child. The surrogate mother has the right to unilaterally terminate the pregnancy, but she must consult with and inform the commissioning parents, and if she is terminating for a non-medical reason, may be obliged to refund any medical reimbursements she had received.  

15. OTHER COUNTRIES

In Europe, although surrogacy is legal only in the United Kingdom but no commercial agreements are allowed and surrogate will receive only expenses. In the European Union countries, only married couple will participate in the surrogacy agreement. However, Russia and Ukraine are the only European countries where surrogacy is fully legalised. Foreign couples are allowed to pursue surrogacy arrangements in these countries but countries like Germany, Norway and Italy banned all forms of the surrogacy. There are many unclear regulating laws on surrogacy in various countries like Thailand, Malaysia and Philippines. In China Gestational surrogacy is banned according to their laws. Surrogacy is banned in Sweden, but Sweden recently took a step towards a possible lifting of its ban on surrogate motherhood, when the

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Riksdag’s Committee on Social Affairs on March 13, 2012 voted by a wide majority on to authorise the government to carry out an inquiry into surrogate motherhood. Surrogacy in Sweden is on the right track, but still a very long way from liberalisation.

In Iceland law does not approve surrogacy. According to Icelandic laws, the surrogate mother’s husband is child’s father.608 In Belgium altruistic surrogacy is legal, but commercial surrogacy is illegal. In Quebec the Quebec Civil Code renders all surrogacy contracts, whether commercial or altruistic, unenforceable.609 That law has been interpreted to mean the genetic mother of a child born to a gestational surrogate will not be recognised as the legal mother, not via adoption nor by any other means, even if that leaves a child with no legal mother at all. Surrogacy, along with ovum and sperm donation, has been legal in Georgia since 1992. Under applicable law, a donor or surrogate mother has no parental rights over the child born. There is no law in Ireland governing surrogacy. In 2005 a Government appointed Commission published a very comprehensive report on Assisted Human Reproduction, which made many recommendations on the broader area of assisted human reproduction. In relation to surrogacy it recommended that the commissioning couple would under Irish law be regarded as the parents of the child. Despite the publication there has been no legislation has been published and the area essentially remains unregulated. Due to mounting pressure from Irish citizens going abroad to have children through surrogacy the Minister for Justice, Equality and Defense published guidelines for them on the February 21, 2012.610 In Hong Kong Commercial surrogacy is criminal under the Human Reproductive Technology Ordinance 2000. The law is phrased in a manner that no one can pay a surrogate, no surrogate can receive money, and no one can arrange a commercial surrogacy (the same applies to the supply of gametes), no matter within or outside Hong Kong. Normally only the gametes of the intended parents can be used. In Hungry, Serbia and Pakistan surrogacy is illegal.611

A gestalt view of legality of surrogacy in various country other than India has

609 Civil Code of Quebec, Article 541 (1991), “any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null”.
been given in Table 5.1.

Table 5.1  
*International Law on Surrogacy, 2013*

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16. CONCLUSION

Despite the growth in international surrogacy, there is no international regulation of surrogacy or minimum standards to which nations must adhere. Moreover, there are no international conventions, or reciprocal arrangements for the recognition of the legal parentage of a child.

Jurisdictions in various countries have held different views regarding the legalisation of surrogacy. In England surrogacy arrangements are legal and the Surrogacy Arrangements Act, 1985 prohibits advertising and other aspects of commercial surrogacy. In U.S. also, commercial surrogacy seems prohibited in many states. In famous Baby M case, New Jersey Supreme Court, though allowed custody to commissioning parents in the “best interest of the child,” came to the conclusion that surrogacy contract is against public policy. It must be noted that in US, surrogacy laws are different in different states. In Australia, commercial surrogacy is illegal, contracts in relation to surrogacy arrangements are unenforceable and any payment for soliciting a surrogacy arrangement is illegal. In some states in Australia, arranging commercial surrogacy is a criminal offence and any surrogacy agreement giving custody to others is void. However the legislation is not uniform, each state distinguishes between the concepts of paid and unpaid surrogacy. In the majority of jurisdictions, the legislation treats paid surrogacy more punitively, attaching criminal sanctions to its practice while leaving unpaid surrogacy unregulated. In Canada and New-Zealand, commercial surrogacy has been illegal since 2004, although altruistic surrogacy is allowed. In France, Germany, Hong Kong, Italy, Norway and Sweden, surrogacy, commercial or not, is unlawful. In Israel, law only accepts the surrogate mother as the real mother and commercial surrogacy is illegal. In March 1996, the Israeli government legalised gestational surrogacy under the “Embryo Carrying Agreements law”. This law made Israel the first country in the world to implement a form of state-controlled surrogacy in which each and every contract must be approved directly by the state. In Iceland law does not approve surrogacy. According to Icelandic laws, the surrogate mother’s husband is child’s father. In Iran gestational surrogacy as a treatment for infertility is being practiced in some well-known medical institutions in Tehran and some other cities. In Japan, the latest position is that the mother who gives birth to the child is the legal mother and the intending parents need to adopt the child to gain the legal status of parents. This was upheld by the Ministry of Justice in
a 2003 Supreme Court decision by reiterating the stand laid down in a 1962 decision by Supreme Court of Japan. In March 2008, the Science Council of Japan proposed a ban on surrogacy and said that doctors, agents and their clients should be punished for commercial surrogacy arrangements.

Some countries demand evidence that at least one parent of the child has a genetic relationship with the child, usually by DNA testing, while other countries insist on seeing the legal release of the child by the husband of any married surrogate (which makes the use of a single surrogate mother more attractive). Where surrogacy follows a gifted embryo and neither new parents are genetically linked obtaining citizenship and travel documents become far more difficult and protracted, even into U.S. In any event, compliance with numerous regulations and formalities takes months and greatly adds to the stress of the intended parents.

No country has taken the position that surrogacy contracts should be enforceable over the objection of the birth mother, just as no state in the United States has. To this extent there appears to have developed an international consensus as to how to treat surrogacy contracts. There is much less unanimity on other important questions, however, especially the central issue of how to proceed to determine parental rights once the contract is set aside.