Knesset, you defined Israel as a Jewish state, remember?

By JULIA FEUER

The Knesset is presently debating a bill regarding amendments to legislation governing surrogacy arrangements. In Israel there is no separation between church and state regarding personal-status issues. Therefore, legislation should not be passed by the Knesset which negates Jewish law. The current approach could prevent a child born as a result of certain surrogacy arrangements from ever legally marrying another Jew.

The present legislation on surrogacy arrangements combines both Jewish and civil law, in order to reach a situation where the child on marriage will not be presented with a problem of consanguinity or mamzerut. A mamzer is a child born of certain unions forbidden by the Torah, or the descendant of such a person. A mamzer is forbidden to marry another Jew, and likewise for the mamzer’s descendants.

Presently, under Israeli law a married woman or a relative of the commissioning couple is not permitted to act as a surrogate. This is to ensure that a child born as a result of the surrogacy arrangement not be classified as a mamzer. Although in Israel there is not a large pool of women willing to act as surrogates, legislation should create a supply of surrogates in a way that does not encroach on Jewish law, thus creating problems for future generations.

Since mamzerut includes children born of incestuous relationships, the Knesset should not allow a sister to act as a surrogate for her brother. If a woman were to act as surrogate for her brother, even if there is no direct sexual relationship and the egg is from a third-party donor this should still be considered incest. This arrangement should not be permitted, since the birth mother is still the sister of the man providing the sperm. This arrangement is culturally unacceptable and goes against the welfare of the child. The best interests of the child should be considered before the wishes of the commissioning parent. Even if this matter is not significant to the intended parents it may be significant to the child at a future date, especially when the child wishes to get married. The intended parents and the state should ensure that the child’s personal status level is not impaired.

Even though intra-familial surrogacy donations do occur in other countries, many of these arrangements are seen as going against cultural taboos. Even today’s more permissive atmosphere, marriage between prohibited degrees of relatives is still illegal in most legal jurisdictions. Until the rabbinate is prepared to unilaterally accept that any such arrangement is not incestuous or illegitimate in any way, and that a child born by a married woman to a man not her husband, or by a sister to her brother, will not be declared a mamzer, then married women and close relatives should not be permitted under legislation to act as surrogates.

The best interests of the child must be paramount and protected both now and in the future. The legislation must be in coordination with Jewish law and until such time as there is a definitive change from this current perspective, legislation should only permit single women and women with no familial relationship to the commissioning couple to act as surrogates, thereby preventing future problems regarding the status of the Jewish child.

If the Knesset determines that a certain piece of legislation was a mistake, that legislation can be repealed by a later Knesset. What cannot be repealed, or ever changed, is the status of mamzer. This is an impediment which can never be repealed. Even though an unborn child does not have rights in law, the legislator must still ensure that the future rights of the intended child are safeguarded. The intended child has the right to have his status as a Jewish child living in a Jewish state protected.

The writer is a lecturer at Bar-Ilan University, The Interdisciplinary Center, Herzliya and Netanya Academic College.