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Legalizing altruistic surrogacy in response to evasive travel? An Icelandic proposal[☆]

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Abstract Surrogate motherhood has been prohibited by Icelandic law since 1996, but in recent years, Icelandic couples have sought transnational surrogacy in India and the United States despite uncertainties about legal parental status as they return to Iceland with infants born to surrogate mothers. This reflects global trends of increased reproductive tourism, which forces restrictive regimes not only to make decisions concerning the citizenship and parentage of children born to surrogate mothers abroad, but also to confront difficult moral issues concerning surrogacy, global justice, human rights and exploitation. In March 2015, a legislative proposal permitting altruistic surrogacy, subject to strict regulation and oversight, and prohibiting the solicitation of commercial surrogacy abroad, was presented in the Icelandic Parliament. The proposal aims to protect the interest of the child first, respect the autonomy of the surrogate second, and accommodate the intended parents' wishes third. After a brief overview of the development of the surrogacy issue in Iceland, this article describes the main features of this legislative proposal and evaluates it from an ethical and global justice perspective. It concludes that the proposed legislation is a response to problems generated by cross-border surrogacy in the context of evolving public attitudes toward the issue, and constitutes a valid attempt to reduce the moral hazards of surrogacy consistent with insights from current bioethical literature. Although the proposed legislation arguably represents an improvement over the current ban, however, difficult problems concerning evasive travel and global injustice are likely to persist until effective international coordination is achieved. 

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KEYWORDS: altruistic surrogacy, commercial surrogacy, cross-border reproductive travel, ethics of surrogacy, surrogacy law, Iceland

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Introduction

Surrogate motherhood has been prohibited by Icelandic law since 1996, but in recent years, surrogacy has received increased discussion and debate in Iceland. Couples have sought transnational surrogacy in India and the United States despite uncertainties about legal parental status as they return to Iceland with infants born to surrogate mothers. The Icelandic parliament has granted some of these infants citizenship. In at least two cases, intended parents have sought recognition of parental status in court, with varying results (*Fær að vera skráð sem móðir*, 2015; *Hagir barns breyta ekki konu í móður*, 2016).

This development in Iceland reflects larger trends of increased cross-border reproductive care both within Europe and between the Global North and Global South (Hudson et al., 2011; Palattiyil et al., 2010; Pande, 2014). It has been relatively easy to evade restrictive legislation concerning assisted reproductive technology by travelling for IVF treatment and gamete donation. Surrogacy travel is inevitably more conspicuous, however, and it forces restrictive regimes to make decisions concerning the citizenship and parentage of children already born to surrogate mothers abroad. It also forces legislators and the public at large to confront difficult moral issues, not only concerning the acceptability of surrogacy as such, but also concerning global justice, human rights and potential exploitation (Laufer-Ukeles, 2013; Rotabi and Bromfield, 2012; Tobin, 2014).

A legislative proposal permitting altruistic surrogacy, subject to strict regulation and oversight, was presented in Alþingi, the Icelandic Parliament, in 2015. After a brief overview of the development of the surrogacy issue in Iceland, this article describes the main features of this legislative proposal and then attempts to evaluate certain aspects of it from an ethical and global justice perspective. The primary method employed is bioethical analysis and argumentation. Sources for analysis include the proposal itself, parliamentary documents, stakeholder consultation letters, specialist and media reports, as well as academic literature on surrogacy issues from various disciplines including bioethics, law, anthropology and social work. It will be argued that the proposed legislation is a response to problems generated by cross-border surrogacy in the context of evolving, but unsettled public attitudes toward the surrogacy issue. The proposal attempts to reduce the moral hazards of surrogacy and is consistent with some of the more promising insights in the current bioethical literature. Although the proposed legislation is arguably an improvement over the current ban, difficult problems concerning evasive travel and global injustice are likely to persist until effective international coordination is achieved. Despite recent interest in this issue in Iceland, it remains to be seen whether public and political attitudes are ready to embrace legislation permitting surrogacy.

Assisted reproductive technology legislation and the surrogacy issue in Iceland

The use of assisted reproductive technology in Iceland has increased steadily since the birth of the country's first IVF-baby in 1992. Now, several hundred fertility treatments

are performed each year in this tiny country of about 330 000 inhabitants (Saga, n.d.; Geirsson and Guðmundsson, 2014; Óskarsson, 2001). Surrogate mothers are excluded, however, by the Icelandic 1996 Act on Artificial Fertilization (*Lög um tækniþrjóvgun og notkun kynfruma og fósturvísu manna til stofnfrumurannsókna 55/1996*, n.d.), which explicitly prohibits surrogacy (Article 6), defined as 'artificial fertilization performed on a woman who intends to carry a child for another woman, having agreed before conception to surrender the child immediately after its birth' (Article 1, author translation).

Surrogacy was briefly addressed as a controversial issue in the 1995 commentary accompanying the legislative proposal that later became Act 55/1996 on artificial fertilization (Doc. 184 – Case 154). The commentary quickly dismissed the possibility of permitting surrogacy by saying that it raised a host of difficult ethical issues and was contrary to the *mater semper certa est* principle, according to which, the woman who gives birth to a child is certainly the mother. Dominant public and political views at the time seem to have concurred. A search through Icelandic media reports (using the comprehensive database timarit.is) and the parliamentary record (using the parliament's web althingi.is) revealed that public and political attention concerning this proposal was directed primarily at the issues of egg donation and donor anonymity, but not surrogacy. Only one parliamentarian, representing the Women's Alliance (Kvennalistinn), mentioned the ban on surrogacy, just to assert the strong opposition to surrogacy from the women's movement generally (*Guðbjörnsdóttir*, 1995). No other mention appears to have been made of surrogacy in the otherwise quite extensive parliamentary discussions and reports relating to the 1995 proposal on artificial fertilization.

By contrast, visible interest in widening the scope of assisted reproductive technology, even to the point of legalizing surrogacy, has increased markedly in recent years. From 2006, the law has allowed women in same-sex relationships to undergo fertilization treatment (Act 65/2006). In April 2007, a couple posted a newspaper advertisement for a surrogate mother willing to travel abroad for the procedure. Prominent physicians, including the Director of Health, responded openly by suggesting that surrogacy might become an accepted form of fertility treatment in Iceland (*Finnsdóttir*, 2013; *Jónsdóttir*, 2007; *Óheimilt að taka greiðslu fyrir*, 2007). In 2008, the law was amended again, now to include single women (Act 54/2008). This time around, the possibility of permitting surrogacy was seriously considered by the working group preparing the 2008 amendment, concluding however that this would require more thorough public discussion (Doc. 992 – case 620). Generally, Iceland would be classified as having progressive public policies when it comes to reproductive rights and gender equality (*Jafnréttisstofa*, 2012), and these developments would not seem surprising in that respect.

In September 2008, the issue of surrogacy was raised in Alþingi (the 63-member Icelandic Parliament) when the Minister of Health, Guðlaugur Þór Þórðarson, was urged to commission a working group on the issue, which he did in January 2009. In its report, submitted in February 2010, the working group discussed ethical and legal issues around surrogacy but concluded, as the group preparing the 2008 amendment to the assisted reproductive technology-law had done, that further public discussion would be necessary

before legislation could be proposed. Contrary to this conclusion, however, 18 parliamentarians from various political parties proposed in November 2010 a parliamentary resolution calling for the legalization of surrogacy in Iceland. Their proposal underwent significant changes during the parliamentary process. It was resubmitted by a multi-partisan group of 23 parliamentarians in October 2011, and eventually approved by Alþingi in January 2012.

Meanwhile, signs of public interest continued to increase. Fig. 1 shows the number of Icelandic print media items (reports, articles and opinion pieces) containing the word 'staðgöngumæðrun' ('surrogate motherhood' or 'surrogacy'), based on a search in the database timarit.is, which includes nearly all newspapers and magazines printed in Iceland since 1920 ([What is Timarit.is?](#), n.d.). Before 2007, surrogacy hardly appears in these sources, and then only in connection with Act 55/1996. Since then, however, the term 'surrogacy' appears regularly in Icelandic print media, with coverage peaking in 2011. A rudimentary count of Google-hits, using the term 'staðgöngumæðrun' and restricting the search to pages in Icelandic, revealed a similar pattern, turning up virtually no results prior to 2006 and a steady flow from 2010 and onward.

Possible explanations for this surge of interest include the parliament's involvement and other local events, which in turn reflect global themes and developments. In November 2009, Staðganga, a voluntary organization supporting legalization, was established by and for 'those who need surrogacy to have a child' ([stadganga.com](#)). In late 2010 and early 2011, the case of a child born to a surrogate in India for Icelandic intended parents received media coverage for the difficulties they had bringing the child to Iceland. Questions of filiation and citizenship were unresolved and this prevented the intended parents from leaving India with the newborn for several months. The majority of Icelandic media reports sympathized with the intended parents, who told reporters as they finally arrived that they hoped their case would lead to the legalization of surrogacy in Iceland ([Vonar að mál Jóels leiði til þess að staðgöngumæðrun verði leyfð, 2011](#)). The public appears to have been moved by these events; in January 2011, a poll of a random sample of 890 Icelanders aged 18–67 indicated 85% support for the legalization of surrogacy ([Market and Media Research, 2011](#)). In March 2016, this support had fallen to 52% according to a comparable survey ([Maskína, 2016](#)).

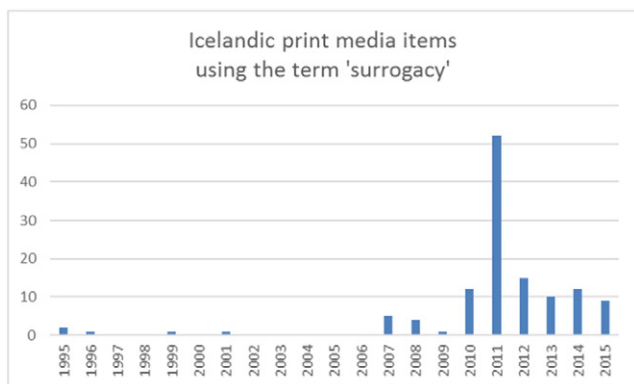


Fig. 1 Icelandic print media items using the term 'surrogacy'.

The parliamentary resolution of January 2012 called for a working group preparing legislation that would permit altruistic surrogacy. The working group of two legal experts and one expert in philosophical ethics was established in September 2012. Two additional legal experts were assigned to work with the group, one by the Ministry of Welfare and one by the Ministry of the Interior. The working group submitted a legislative proposal to the Minister of Health in February 2015, and the Minister in turn submitted it to Alþingi in March 2015. The first round of parliamentary discussion occurred in October 2015 ([Staðgöngumæðrun í velgjörðarskyni, 2015](#)).

When it became publicly known that work on the legislative proposal was reaching its finishing stages, a number of media stories surfaced of Icelandic couples, straight and gay, seeking surrogate mothers, abroad and in Iceland ([Reyndu að leyna staðgöngumæðrun, 2015](#); [Eignuðust barn með hjálp staðgöngumóður, 2015](#); ['Mikilvægt að leyfa staðgöngumæðrun, 2015](#)), and seeking recognition of parental status ([Mikil þörf fyrir lög um staðgöngumæðrun, 2015](#)). In September 2015, state-run television ran a tragic story of a woman who had intentionally become pregnant in order for a friend and relative to adopt, but who subsequently, much to her chagrin, was prevented by him and his spouse from interacting with the baby (['Ég verð að biða' –viðtalið í heild, 2015](#)). The public and the media have thus followed with interest any new developments in connection with this proposal.

Despite the surge in media interest, especially around the Indian surrogacy case in early 2011, it would be difficult to argue that a great deal of genuine public deliberation on this issue has occurred in Iceland. Sensational stories of individual couples and reports of parliamentary initiatives do not amount to a public exchange of opinion and argument. It is hard to predict, therefore, how public and political opinion on this matter will develop.

In fact, early indications suggest considerable opposition. In the first round of parliamentary debate (October 20, 2015), the majority of speakers were opposed to the proposal ([Staðgöngumæðrun í velgjörðarskyni, 2015](#)). Reasons for opposition included concern about the interests of children, global justice and exploitation, incentives for increased cross-border surrogacy, probable lapse into commercial surrogacy, objectification and commodification of women's bodies, the rights, interests and autonomy of surrogate mothers generally, lack of social consensus and contrary legislation in the other Nordic countries.

Similar themes appeared in the comments submitted to Alþingi by 21 stakeholders in autumn 2015 ([Alþingi, 2015](#)). [Table 1](#) presents an overview of the reasons stakeholders stated in their consultation letters for opposing the proposal. The most common theme is a call for caution when dealing with such a complicated issue, where so much is uncertain and so much can go wrong. Many also state worries about increased cross-border surrogacy travel, contrary legislation in other Nordic countries, exploitation and commodification, and the interests of children.

An overwhelming number of stakeholders who commented opposed the proposal in autumn 2015 ([Alþingi, 2015](#)). [Table 2](#) presents the kinds of stakeholders who submitted commentary, and the stance they took. Out of 21 stakeholders who commented, 15 were opposed to passing the proposal and four were neutral. The only ones supporting legislation were the

Table 1 Stakeholders' reasons for opposing surrogacy legislation.

Reasons	No. of stake-holders
Complicated issue, too many unanswered questions, too much can go wrong, too little consensus and too little solid research exists	9
The proposal will lead to the normalization of surrogacy and increased cross-border surrogacy travel.	7
The other Nordic countries have not legalized surrogacy and there is no reason for Iceland to pioneer Nordic surrogacy legislation.	6
Legalizing altruistic surrogacy will lead to commercial and possibly exploitative surrogacy.	5
Surrogacy is a threat to the welfare, autonomy and empowerment of the surrogate mother.	5
Surrogacy is a threat to the future interests of children born to surrogate mothers, and the interests of surrogate's other children.	4

two organizations established specifically to support the causes of surrogacy (Staðganga) and artificial fertilization (Tilvera). The National Queer Organization took a neutral stance because of conflicting opinions within the organization. The National Registry and the Personal Data Authority were also neutral, and so was the professional organization of psychologists. The two religious organizations submitting a commentary comprise less than 0.5% of the population, but the National, Evangelical Lutheran Church, to which approximately 80% of Icelanders belong, did not participate in the consultation process.

According to the proposal, the new legislation permitting altruistic surrogacy would take effect on 1 January, 2017. When the parliamentary session 2016-2017 ran out, however, the proposal had not passed the parliamentary welfare committee. Given the opposition described above, it seems uncertain when or indeed whether it will be reintroduced. Regardless of how it ultimately fares in the context of Icelandic politics, it is a notable attempt to replace a surrogacy ban with a regulative framework that aims to reduce the moral hazards of surrogacy.

Table 2 Stakeholders and their stance to the legislative proposal permitting altruistic surrogacy.

Stakeholder type	Opposed	Neutral	Support	Total
Professional organization	3	1	0	4
Government agency	3	2	0	5
Non-government association	3	0	0	3
Advocacy/support organization	0	1	2	3
Research institute	2	0	0	2
Religious organization	2	0	0	2
Individual specialist	2	0	0	2
Total:	15	4	2	21

The proposed legislation on altruistic surrogacy in Iceland

Key premises

The legislative proposal on altruistic surrogacy ([Doc. 1141 case 671 /144, 2015](#)) represents an attempt to realize the aims and conditions stated in the 2012 resolution, according to which the first priority should be to secure the interest and rights of the child; second, to secure the autonomy and welfare of the surrogate and her family; and third, to enable the successful involvement of the intended parents ([Doc. 702, case 4/140, 2012](#)). This is a reversal of the priorities stated by the working group preparing the 2008 amendment, according to which 'the individuals who need to be taken into consideration are first of all the commissioning couple, second the surrogate mother and third the child' ([Doc. 992–case 620 / 135, 2007; p. 7](#)). This reversal, putting the child's interests first and the intended parents' interests last, is a fundamental premise in the proposed legislation.

Another key development was that the 2012 resolution repudiates an assumption explicitly made by the 2008 working group concerning the definition of maternity. The 2008 group said that if surrogacy were to be permitted, an exception would have to be made from the *Mater semper certa est* rule, that states the woman who gives birth to the child is the child's mother. Contrary to that assumption, the parliamentary committee on health insisted in its comments on the 2012 resolution that 'nothing can take away from a woman the right to be the mother of the child she bears' ([Doc. 4 case 4 /140, 2012; p. 9](#)). This judgment is reflected in the legislative proposal, according to which the surrogate mother cannot confirm her consent to the transfer of maternal status until two months after the child is born. She is therefore the newborn's mother and retains a legal possibility of keeping that status should she change her mind about the surrogacy arrangement.

Main features

The proposal defines surrogacy as artificial fertilization performed on a surrogate mother who has agreed to carry a child for particular commissioning parents, intends for them to receive the child after its birth, and where they have in turn committed themselves to apply for transfer of parental status in accordance with the Children's Act ([Doc. 1141 case 671 /144, 2015; Article 3](#)).

The proposal creates a legal avenue for altruistic surrogacy but prohibits commercial surrogacy, defined as an arrangement whereby the surrogate mother, or someone close to her, receives money or other compensation for her carrying the pregnancy. It considers surrogacy altruistic when a surrogate mother intends to carry a child for particular commissioning parents of her own free will and without receiving any monetary or other compensation, except for reimbursement of costs that are directly related to the application process, IVF treatment, pregnancy and delivery (Article 3). To prevent commercial surrogacy, advertising and mediation is prohibited, and so is any giving, receiving, or benefitting from payments in connection with surrogacy, beyond permissible reimbursements (Articles 30–32). Although mediation need not be a

commercial activity, the proposal’s commentary on the relevant article explains that the purpose of prohibiting mediation is to prevent such parties from taking advantage of the vulnerable position of parties to surrogacy. Permissible reimbursements are not defined in monetary terms but by enumeration of the type of expense, and by leaving it otherwise to be specified through government regulation.

In order for surrogacy to be permitted in a particular case, an investigation into the circumstances of the surrogate mother, her spouse and the commissioning parents must confirm that they all enjoy good mental and physical health, material and social conditions, and that circumstances are conducive to a good, nurturing environment for the child (Article 4). The surrogate mother has full autonomy concerning all decisions regarding pregnancy and birth, and enjoys the same services as any other pregnant woman, such as maternity care and health services (Article 5).

The proposal stipulates that a *Committee on Surrogacy* will be established (Article 6). The tasks of the committee include issuing a license for surrogacy, ensuring that those who apply for such a license have equal access to professional counselling and determining paternal status for children born in accordance with foreign law on surrogacy. Based on fundamental concern for the child’s best interest, the Committee on Surrogacy is responsible for upholding the following requirements:

To qualify for a license, the *surrogate mother* needs to have had legal domicile and continuous lawful residency in Iceland for the preceding five years, and she must consent to the surrogacy. If she has a spouse, the spouse must also consent, and their relationship must have lasted at least three years. She must be 25–39 years old and have at least one child over the age of two, following a normal pregnancy and birth, and neither she nor her spouse may have lost a child in the last two years. Her mental and physical health must be strong enough for her to undertake the fertility treatment, pregnancy, and birth. Neither she nor her spouse can be the sibling of a gamete-supplying intended parent, nor can they be related to that parent in direct lineage (Article 8).

The *intended parents* also need to satisfy various conditions. It must be impossible for them, for medical or biological reasons, to have a child through their own pregnancy. They must consent to the surrogacy arrangement and commit themselves to apply for transfer of parental status after the child is born. They should be legally domiciled and have had lawful and continuous residency in Iceland for the preceding five years. They must be of the age of 25–45, have lived together for at least three years, and not be responsible for the care of a child under the age of two. Single individuals may become intended parents in exceptional circumstances, where the best interests of the child are indisputably secured (Article 9).

Several restrictions apply to the *origin of gametes*. The use of the surrogate’s own ova is prohibited, and it is obligatory to use gametes from at least one of the intended parents. The use of donor gametes is only permissible if serious medical or biological reasons prevent one of the intended parents from supplying gametes. The spouse of the surrogate is excluded from supplying gametes and so are ancestors and offspring of the surrogate and her spouse. The

ancestors and offspring of intended parents are similarly excluded and so are siblings of a gamete-supplying intended parent (Article 10).

Fig. 2 outlines the legal process for altruistic surrogacy, based on the legislative proposal (Articles 11–25 and 40). The intended parents and the surrogate mother and her spouse apply jointly for a surrogacy license, supplying various documents and information specified in the law (Articles 11–12). Applicants undergo clinical assessment at an approved fertilization clinic (Articles 7 and 14) and receive mandatory, thorough counselling on medical, legal, ethical and social implications of surrogacy (Article 13). Informed by counselling, applicants are expected to agree upon a mutual declaration of intent (Article 16) regarding various aspects of the arrangement, such as communication during pregnancy, attendance at birth, care and custody until parental status is transferred, etc. This declaration of intent is not a contract and not enforceable except for the possibility of surrogate parents demanding reimbursement for relevant costs. Applicants also sign formal consent to surrogacy, having been informed about its legal implications (Article 15).

If the Committee approves the application, a license is issued and IVF treatment may begin. A refusal can be appealed to the Ministry of Health. During IVF treatment and pregnancy, applicants are required to see a counsellor at least twice, and once again after birth. While the intended parents may take the child into their care immediately after birth, based on the mutual declaration of intent, the surrogate and her spouse have full custody of the child until the transfer of parental status unless other legal arrangements have been agreed upon. The ‘full autonomy of the surrogate mother in all decisions concerning pregnancy and birth’ is prominently asserted in the proposal (Article 5).

No later than two months after birth, the intended parents need to apply to a District Commissioner for transfer of parental status. For transfer to be issued, the surrogate and her spouse need to renew their consent for surrogacy no earlier than two months after birth. This allows the surrogate mother to change her mind; however, if the infant has been with the intended parents from birth, their case for custody will become stronger over time regardless of legal maternity. When (and if) eventually issued, the transfer of parental status applies retrospectively from birth. It entails that the child acquires the legal status of the child of the intended parents and his or her legal ties to the surrogate family are cancelled. The District Commissioner informs the public registry of the transfer (Article 40).

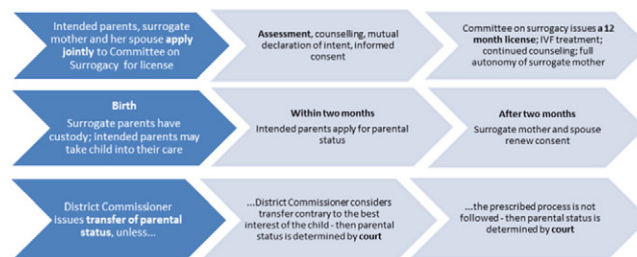


Fig. 2 Legal process of altruistic surrogacy according to the 2015 legislative proposal.

If the process for transfer of parental status described above is not followed, parental status can be determined by the courts. This applies if the paperwork is not in place and also if the District Commissioner considers transfer contrary to the best interest of the child. The proposed legislation contains various amendments to the Children's Act to manage possible complications in the process of transfer of parental status, for example due to divorce, death, failure to request transfer and failure to confirm consent (Article 40).

The proposal asserts the child's *right to be informed about its origin* (Articles 27–29). Parents are obligated to tell the child before its sixth birthday that it was born by a surrogate mother. At 16, the child can request information about the surrogacy arrangement, including information about gamete donor. Parents and child are entitled to counselling in connection with these matters.

The proposal prohibits seeking, brokering or taking steps to make use of surrogacy abroad that does not fulfill the conditions of Icelandic law (Articles 31–33). It also contains a provision for handling cases where children born according to foreign law on surrogacy are brought to Iceland (Article 26). Such cases are directed to the Committee on Surrogacy for determination of parental status. The Committee may confirm a decision made under foreign law and report parental status accordingly to the public registry. However, the Committee is not allowed to confirm such a decision if it is contrary to the interests of the child or basic principles of Icelandic law (*ordre public, public order*). Decisions will therefore presumably not be confirmed in cases of commercial surrogacy. In cases of refusal, the Committee informs child protection authorities of the child's circumstances. The Committee's refusal to confirm parental status can be challenged in court.

The proposal's stance on ethical issues

The proposal takes a stance on key ethical issues concerning surrogacy, including the following: (i) interests of the child have first priority, the autonomy of the surrogate mother comes second and the involvement of the intended parents last; (ii) surrogacy must be altruistic, not commercial; (iii) surrogacy must be gestational, not traditional, and neither the surrogate mother nor her spouse may be genetically related to the child. Furthermore, the proposal stipulates: (iv) the child's right to be informed about its origin: and (v) implies that cross-border travel for surrogacy is wrong if it involves commercial surrogacy or any other violation of the basic principles set forth in domestic legislation.

Position (i) shapes the proposal in fundamental ways. The interests of the child are served by strong requirements for counselling and for ensuring that both surrogate and intended parents are capable of offering a nurturing environment for a child. The interests of the child are also prioritized by the provision of information about its origins. The autonomy of the surrogate mother is prioritized over the interests of the intended parents by granting her full autonomy in all decisions concerning pregnancy and birth. It is also served by stipulating that she is the legal mother of the child, and her spouse the legal father, until they confirm their consent to the surrogacy at least two months after the child is born. The interests of the intended parents are served by the very possibility of becoming parents through IVF surrogacy. However, they must

bear the risk of not getting the child in case the surrogate mother changes her mind; the proposed law does not allow for the intended parents to abandon their commitment once they have given their initial consent to surrogacy, unless the surrogate mother decided not to confirm her consent to transfer parental status. Should it happen that both sets of parents, or neither, end up wanting to be the child's parents, the case is brought to court on behalf of the child, its parents, or the intended parents. The child's best interests then become the determining factor for filiation. Conflicts over the child are generally contrary to the child's best interests, and the benefit of professional counselling in connection with the mutual declaration of intent, as well as at later stages, is meant to prevent such disagreements from arising.

The priorities expressed by position (i) are easily defended on moral grounds, insofar as many of the moral worries about surrogacy reflect fears that the interests of children and surrogates will not be sufficiently protected. It could be objected, however, that the *mater est* rule makes surrogacy less feasible for some intended parents, leading them to seek surrogacy abroad rather than risking uncertainty about the eventual transfer of parental status. In other words, by setting such high moral standards for domestic surrogacy, the law might in effect encourage cross-border surrogacy. However, psychosocial studies of surrogacy indicate that prenatal bonding is extremely rare, and it is estimated that less than 0.1% of surrogacies result in court battles (Teman, 2010). The risk for the intended parents is therefore minimal, and should not rationally deter them.

Position (ii) is that surrogacy must be altruistic. Altruistic surrogacy may be described as involving a freely offered 'gift of life', an expression of generosity and beneficence as well as a sense of purpose. Although doubts can be raised about the authenticity of such motivation (Ragoné, 1994; Raymond, 1990), about whether the surrogate can ever be duly informed (Dodds and Jones, 1990), and about whether the expectations involved in the gift relationship are fully realistic in the case of surrogate motherhood (van Zyl and Walker, 2013), these doubts do not carry the same weight as arguments that commercial surrogacy risks treating children as commodities and women as objects of exploitation (Anderson, 2000; Osberg and Sherwin, 2006; Rotabi and Bromfield, 2012; Wilkinson, 2003). Although altruistic surrogacy is by no means universally accepted, the most damning moral criticisms of surrogacy have been levelled against the commercial variety, which many commentators have therefore considered more controversial than altruistic surrogacy (Porsteinsdóttir et al., 2010).

Yet, the moral significance of this distinction is a matter of debate. It has been argued that since exploitation and oppression is possible in altruistic as well as commercial surrogacy, there are reasons to move beyond these categories and frame surrogacy instead as a professional endeavor (van Zyl and Walker, 2013). On that model, fair payment for service is part of the arrangement without ruling out that the surrogate is partly motivated by a genuine sense of purpose and pride.

Another problem for position (ii) is that the enforcement of a ban on compensation may require extensive invasions of privacy in order to be effective, which calls into question how realistically such enforcement can be expected.

Position (iii) requires a genetic link between at least one intended parent and the child and the absence of a genetic

link between surrogate and child. The main purpose of this requirement is to increase the likelihood of a successful surrogacy process by reducing the difficulties the surrogate may have in giving up the baby, and strengthening the intended parents' commitment. A successful surrogacy arrangement, resulting in a nurturing, loving environment with parents who are at peace with themselves and the entire process, is obviously in the child's fundamental interest. On the downside, this means that the surrogate must undergo full IVF treatment, which is not without inconvenience or risk. This requirement therefore appears to impose burdens on the surrogate for the sake of the best interests of the child, while also benefitting the intended parents.

These benefits of gestational over traditional surrogacy are speculative, however, and it is unclear whether evidence supports the assumption that a traditional surrogate is more likely than a gestational surrogate to change her mind or to have difficulties giving up the child. By contrast, certain benefits of traditional surrogacy are confirmed by studies suggesting that intended parents are more likely to show traditional surrogates requisite gratitude and kindness (Teman, 2010).

The burdens of gestational surrogacy to the surrogate should not be underestimated either. In light of the invasive procedure, medication and surveillance involved, the preference for gestational over traditional surrogacy has been criticized in the Indian context for favouring the interests of intended parents and clinics at the expense of surrogates (Pande, 2014).

Position (iii) may also be criticized for requiring a genetic link between the child and at least one intended parent. According to the Surrogacy UK Working Group for Surrogacy Law Reform, this requirement discriminates against couples who are both medically infertile and insults parents who are not genetically linked to their children. This requirement has recently been ruled unconstitutional by a court in South Africa (Horsey et al., 2015).

Restricting possibilities of genetic relations among parties to a surrogacy arrangement can be controversial in other ways as well. For instance, the requirement that neither the surrogate nor her spouse be genetically related to a gamete-supplying intended parent may rule out some of the cases where genuine altruism is perhaps most likely to be found, e.g. where a sister or even a mother of an infertile woman serves as a surrogate. Similarly, the prohibition of donor gametes from certain relatives of the intended parents rules out cases where altruistic donations would perhaps be especially welcome and likely to occur. The proposal permits siblings to be involved in surrogacy as long as their gametes are not, and this restriction is explained in the commentary as reflecting caution in light of the potential risk of needlessly complicated kinship relations.

Position (iv) asserts the child's right to be informed about its origins. The proposal obligates the parents to tell the child as soon as possible that it was born in surrogacy and conceived from donor gametes if that was the case. At age 16, the child also receives the right to seek specific information about donors, and licensed IVF clinics take on a corresponding obligation to maintain a register of gamete-donors. This proposed regulation would change the current assisted reproductive technology-regulation in Iceland, according to which parents can choose between anonymous and non-anonymous

donation. The change accords with the Icelandic Children's Act from 2003, which explicitly states a child's 'right to know both its parents' (Barnalög 76/2003, n.d., Article 1). The comments accompanying the 2012 resolution, on which the proposal is based, state that individuals born through surrogacy therefore ought to have this right (Doc. 4 case 4 /140, 2012; p. 9). To the extent that public commentary on the proposal in autumn 2015 addressed this issue, whether in Alþingi or stakeholder comments, it was overwhelmingly supportive of this position.

The assumption behind this proposed change is that openness and access to identifying information is in the child's best interest. The validity of that assumption has been challenged however (Frith, 2001; Pennings, 1997), and further empirical research on this issue seems called for. Empirical evidence should also be brought to bear on the question of the appropriate age at which children ought to be informed that they were born by a surrogate.

Position (v) states, in effect, that if surrogacy is to be sought beyond borders, its practice must be consistent with the principles set forth in domestic regulation. This may be seen as reflecting Alþingi's intentions, because in its commentary on the parliamentary resolution of 2012, Alþingi's welfare committee stated that 'if surrogacy is publicly prohibited, it is very likely that people will turn abroad or seek other questionable means' (Doc. 4 case 4 /140, 2012; p. 11). However, it is very difficult to predict how, if enacted, this proposal would affect cross-border surrogacy. On the one hand, experience from the UK suggests that legalizing altruistic surrogacy domestically may perhaps increase cross-border demand for commercial surrogacy by normalizing the practice (Crawshaw et al., 2012). On the other hand, recent comprehensive data-gathering in the UK suggests that this impending boom in cross-border demand may be one of the pervasive myths about surrogacy (Horsey et al., 2015). However these trends lie, it is safe to say that most cross-border surrogacy is commercial and it is therefore likely that if the proposal becomes law, there will be cases where the Committee on Surrogacy refuses to confirm parental status of children born by surrogates abroad. It seems likely that such cases would then be brought to court. In recent decisions by European courts, foreign decisions on filiation have been confirmed based on the child's rights and interests despite conflict with domestic law (Mennesson v. France, 2014; Skatteverket v. Brännström and Nyberg, 2014). It seems possible, therefore, that legalizing narrowly circumscribed surrogacy in Iceland will have the unintended effect of opening the door to cross-border surrogacy that does not satisfy domestic regulations. As already mentioned, this possibility became one of the arguments levelled against the proposal in autumn 2015.

Should the ban on IVF-surrogacy be removed?

Should the Icelandic parliament, Alþingi, pass this legislation? More fundamentally, should it pass any legislation that would legalize and regulate surrogacy, or should it instead maintain the current ban on all forms of assisted reproductive technology-surrogacy? In effect, Alþingi has already answered this latter question in the affirmative, by passing the parliamentary resolution in 2012, on the basis of which the government appointed a working group for drafting the legislative proposal permitting altruistic surrogacy, subject

to strict regulation. What made legislators think this was a good idea?

Although political ideology may play a role, it is hardly the determining factor. Based on public speeches and other evident involvement, supporters in parliament generally seem more likely to be on the right wing of the Icelandic political spectrum (The Independence Party and the Progressive Party) and critics on the left wing (The Left-Green Alliance and the Social Democratic Party). Citizens who support the latter two parties are also less likely to endorse legalization than supporters of the former two (Maskina, 2016), but this difference has increased significantly since 2011 (Market and Media Research, 2011). The most significant political arguments against legalization have been feminist concerns about objectification of women's bodies and lack of genuine autonomy in the absence of full gender equality. Yet, the 2012 resolution was supported by representatives from the whole political spectrum, and political ideology seems to have played only a partial role in parliamentary or public debates about surrogacy in Iceland so far. Instead, surrogacy has been framed as a moral issue, albeit without any overt religious overtones. Supporters of legalizing surrogacy have typically referred to the plight of childless couples and the free choice of would-be surrogates. Opponents have typically used a language of caution in light of the imperative to protect children's rights and well-being in the context of uncertainty about possible outcomes, accompanied by awareness that powerful emotions and untested social forms are involved in surrogacy arrangements. In this way, surrogacy has been framed as an innovative co-operative scheme, entered into for a highly beneficial purpose, while also carrying risks of serious disappointment, harm and even exploitation.

Before drafting this legislative proposal on altruistic surrogacy in Iceland, the working group solicited consultation letters from a variety of stakeholders, including professional organizations, NGOs, research institutes and government agencies. The language of caution characterized the majority of these stakeholder letters, all of which were written in the year 2013. Many expressed scepticism that the moral risks involved in surrogacy can be mitigated through regulation, and quite a few stated an outright opposition to the legalization of any form of surrogacy. Despite their caution and scepticism, however, many of the letters contained helpful advice on how to craft such regulation. This indicates that the letter writers did not consider regulation a pointless effort. They may have thought that although it might be safest not to lift the current ban on surrogacy, the legislature nevertheless might do so and because of this, the responsible approach would be to take the opportunity to influence regulation in a positive way. None of these consultation letters have been made public, but many of the same stakeholders also submitted comments to Alþingi in 2015, as already described in Tables 1 and 2 (Alþingi, 2015).

The strong theme of caution and even opposition in the consultation process suggests that the current move towards lifting the ban on IVF-surrogacy in Iceland is not driven primarily by indigenous cultural change in attitudes toward reproduction. Instead, the main impetus seems to have been the relatively sudden availability of commercial surrogacy services abroad and the willingness of childless couples in Iceland to make use of such services. The legislature was

thus reacting to the growing number of actual cross-border surrogacy cases, which in some cases were sensationalized in the media. It did so without clear guidance from either political ideology or social morality. This creates an urgent need for sustained ethical reflection and informed public dialogue.

If the primary objective of the proposed legislation is to deal with practical problems resulting from cross-border surrogacy, it could be argued that what is needed is not the legalization of surrogacy domestically but rather the clarification of the legal status of children brought to the country as a result of commercial surrogacy abroad. Why take the further step of removing the ban on domestic IVF-surrogacy?

It is probably relevant here that even though surrogacy is still considered an extremely sensitive issue, an outright ban no longer seems as obviously justified as it did when the 1996 assisted reproductive technology legislation was being prepared and virtually no public discussion on this issue had taken place in Iceland. Public attitudes have evolved in the direction of willingness to entertain the possibility of legalizing some form of surrogacy. Removing the ban may or may not be necessary as a response to current cross-border surrogacy, but legislators and the general public have at least to some extent become prepared to consider removing it.

A significant reason to consider this possibility is the hope, realistic or not, that lifting the domestic ban would reduce or perhaps eliminate local demand for cross-border surrogacy, especially if regulation would also put obstacles in the path of cross-border surrogacy travel. Reducing or eliminating cross-border surrogacy travel must be considered a worthy goal insofar as such travel utilizes surrogacy arrangements that may involve exploitation or other human rights violations. Although the practice of surrogacy varies widely, human rights concerns, injustice and the potential for exploitation is well and increasingly documented (Karandikar et al., 2014; Pande, 2010; Rotabi and Bromfield, 2012; Saravanan, 2015). Surrogacy travel can therefore be said to carry moral risk. On the other hand, it is important not to make automatic assumptions about the actual risks of exploitation involved in cross-border surrogacy. Examining such assumptions requires sustained ethical and conceptual analysis of exploitation as well as relevant empirical information (cf. Cattapan, 2014; Jansen and Wall, 2013; Wertheimer and Zwolinski, 2015; Wilkinson, 2003).

If well-crafted regulation can create the possibility of domestic surrogacy with minimal moral risks, such a regulative framework for satisfying the domestic demand for surrogacy seems preferable to maintaining the current ban, especially when it is known that under a continued ban, couples will in all likelihood continue to travel abroad for commercial, and possibly in some cases, exploitative surrogacy. As already mentioned, it is admittedly possible that lifting the ban would have a normalizing effect that tended to increase rather than decrease the demand for cross-border surrogacy travel. On the other hand, lifting the ban may also create an opportunity for more open discussion and greater awareness of the larger issues surrounding cross-border surrogacy. Such awareness may in the long run create an incentive for potential commissioning parents to be morally selective in their choice of surrogacy arrangement. As a context for moral choice and reflection, open and informed discussion is generally preferable to suppressed private needs.

In support of lifting the domestic ban in response to actual cross-border surrogacy, it may be said that maintaining the ban while accommodating children born to surrogate mothers abroad could be seen as involving a double standard (cf. [SOU 11, 2016](#)). It would be as if the legislature was saying that surrogacy is morally unacceptable to the point of deserving legislative ban and yet, citizens who wish to have children through surrogacy can do so abroad and have their parental status smoothly recognized upon return. This would put such returning citizens in the strange position of having done something abroad that their own society deems completely beyond the pale morally speaking, but will nevertheless tolerate for the children’s sake. Such a situation raises concerns about the coherence, or lack thereof, between stringent moral beliefs backing a domestic ban on surrogacy and an accommodating attitude regarding cross-border surrogacy travel. If legislation in this area is to be based on communal or culture-specific moral values, as opposed to a liberal attitude of registering private preferences whatever they may be (cf. [Ergas, 2013](#)), the communal values themselves should at least be minimally coherent. The morality underlying the domestic ban would presumably recommend discouraging involvement in international surrogacy as strongly as possible.

Put in a wider context, the legislature needs to make two basic decisions: whether or not to maintain the current ban on surrogacy domestically, and whether or not to ‘be tough’ on cross-border surrogacy travel (CBST). The combination of these choices results in four logical possibilities presented in [Table 3](#). The legislature might: (1) lift the ban and follow a ‘soft’ CBST policy; (2) maintain the ban and follow a ‘soft’ CBST policy; (3) lift the ban and follow a ‘tough’ CBST policy; or (4) maintain the ban and follow a ‘tough’ CBST policy.

Let us assume that if the ban was lifted it would be replaced with a regulative framework that effectively reduced the moral difficulties with surrogacy as compared with some of the surrogacy arrangements available elsewhere. This is indeed a defensible assumption. Recent bioethical research suggests several measures for reducing the moral risks and difficulties involved in surrogacy, and some of these measures resemble features of the proposed Icelandic legislation, even if the fit is not perfect. For example, [van Zyl and Walker \(2013\)](#) defend a professional model of surrogacy, emphasizing the moral (altruistic) purpose, autonomy and knowledge of the surrogate mother. [Walker and van Zyl \(2015\)](#) apply this professional model to the difficult issue of abortion on grounds of fetal abnormality. [Overall \(2015\)](#) argues that intended parents should be licensed based on a screening process, and [Damelio and Sorensen \(2008\)](#) argue for education aiming to enhance surrogate autonomy. All these arguments make the common assumption, as does the Icelandic proposal, that appropriate regulation can reduce the moral risks involved in surrogacy.

Given this assumption, options (1) and (3) above involve the possibility of a culturally acceptable moral framework for surrogacy. Qualifying citizens and long-term residents could then choose surrogacy as a legal option, within the domestic health and welfare system, and without the risks, uncertainties, moral hazards and great expenses involved in seeking surrogacy abroad. Options (2) and (4), by contrast, represent the status quo, in which domestic surrogacy occurs ‘underground’, outside legal frameworks and without the benefit of proper counselling or education. Such secret surrogacy arrangements may sometimes succeed without moral problems but as some of the media reports referred to earlier witness, things can also go terribly wrong ([‘Ég verð að biða’-viðtalið í heild, 2015](#)). and even when they don’t, secrecy alone is a heavy burden. Options (2) and (4) also mean that for those determined to seek surrogacy, the only alternative to going underground domestically is going abroad. As already explained, the option of regulated, domestic surrogacy would seem far more appealing than these two alternatives.

These are all reasons for preferring lifting the ban to maintaining it. What about the choice between ‘soft’ and ‘tough’ policy regarding cross-border surrogacy travel? Without going into technicalities, a soft policy would generally be characterized by leniency concerning the recognition of filiation and citizenship of surrogate-born children, while a tough policy would tend to refuse to recognize foreign determinations of filiation unless they were compatible with basic principles of Icelandic law or international obligations. Domestic legislation, aided by institutional practices, may indeed be used to either hinder or help intended parents crossing the border with their surrogate-born children in reaching their goal of forming a legitimate family, insofar as this doesn’t conflict with international law. The question here is whether there are moral reasons to prefer either a soft or a tough policy in this regard.

There are, in fact, problems with both approaches. A tough policy risks harming children, or at least not acting in their best interest. It will usually not be in a child’s best interest, for example, to be returned at the border, removed from their intended parents, or denied registration necessary for the enjoyment of common rights and benefits. A lenient policy, on the other hand, may risk creating an avenue for child-trafficking and encourage the use of morally dubious and irresponsible surrogacy practices generally. Policy makers therefore face a difficult dilemma concerning cross-border surrogacy, which arguably can only be resolved through international dialogue ([Ergas, 2013](#); [Humbyrd, 2009](#); [Pande, 2014](#)). From a moral point of view, it therefore seems imperative to try as far as possible to avoid the problems that can follow from both kinds of policy. If this requires international coordination then such coordination seems morally required. In the meantime, individual states should strive to maintain policies that are neither too tough nor too soft.

Table 3 Possible legislative stances toward domestic surrogacy and cross-border surrogacy travel (CBST).

CBST policy / surrogacy ban	Lift and regulate	Maintain
‘Soft’	1	2
‘Tough’	3	4

Conclusion

The legislative proposal permitting altruistic IVF surrogacy in Iceland, submitted to Parliament in March 2015, is the culmination of increased public and private interest in

surrogacy in Iceland over the last decade, and increased cross-border surrogacy. The proposal prescribes thorough regulation and strict conditions, based on fundamental concern for the interest of the child, respect for the autonomy of the surrogate, and concern for the interest of the intended parents. It prohibits commercial surrogacy and the solicitation of commercial surrogacy services abroad. While it remains to be seen how such a legislation affects cross-border surrogacy, there are strong moral reasons for replacing the prohibition of all IVF surrogacy with a regulation that would place surrogacy within a regulative framework that protects children's best interests and the autonomy of surrogate mothers.

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