

## A Study on the Surrogate Womb Issue through the Lens of Jurisprudence

Nasrin Salehikia

Master of International Law, Margheh Branch ,Islamic Azad University, Maragheh, East Azerbaijan, Iran.

Maboud Zaeri Esfahani

Master of International Law, Margheh Branch ,Islamic Azad University, Maragheh, East Azerbaijan, Iran.

**Abstract:** Interest in having a child is one of the basic human needs. From the beginning of the history, fertility has had remarkable importance and childbearing and number of children have been regarded as a kind of social value. However infertility has always been associated with the humans and they have sought to treat it with different methods. One of the newest techniques is the surrogate womb. In this method, after fertilization of the egg and sperm, the fetus is transferred to the uterus of the surrogate mother who keeps the fetus for 9 months and then after childbirth delivers the infant to the original parents. Accordingly this paper seeks to appreciate and experience this phenomenon with the aid of mothers requesting surrogate womb. These mothers had no doubt in accepting the infant born by this method and most of them preferred to cut the relation with the womb owner completely after childbirth. To regard the agreement and relation between the parents and surrogate mother upon using the surrogate womb as among legal events so as to create legal effect(s) for the related parties, the legislator is first required to investigate the cause and process of such a phenomenon and then specifies that whether such a womb utilization meets the conditions of legal events and can be regarded as among them or not. If positive, the legislator must determine how it is carried out. This paper studies jurisprudential commands regarding surrogate womb.

[Nasrin Salehikia. **A Study on the Surrogate Womb Issue through the Lens of Jurisprudence.** *J Am Sci* 2024;20(10):40-46]. ISSN 1545-1003 (print); ISSN 2375-7264 (online). <http://www.jofamericanscience.org>. 04 doi:[10.7537/marsjas201024.04](https://doi.org/10.7537/marsjas201024.04)

**Key words:** surrogate womb, experiences of mothers requesting womb, jurisprudential commands

### Introduction

By advancement of medical science in different aspects, human life has encountered many extensive developments. Advancement of this science in the modern methods of "fertilization" has created different developments in the human reproduction process and has made such a process to have sophisticated structures and various new methods.

Diversity of fertilization new structures has provided the stage of removing infertility problem. However in parallel with utilization of these methods in the experimental sciences, other sophisticated and new matters are created in such human sciences as psychology, sociology, philosophy, jurisprudence, and law which warrant attention of the related experts to study and evaluate the effects of using these methods and present proper solutions. There are different assisted reproductive techniques; so achieving a single jurisprudential and legal verdict for all of them is difficult or impossible. Therefore it is required to study each method separately and infer a proper verdict for similar method(s).

### Part I: Surrogacy Contract

The concept of surrogacy in pregnancy indicates that for this contract, at least three wills are needed. So such an act must be actualized within the framework of the legal act structure; because among legal acts and events, it is contract that needs agreement of two or more wills to create the favorable effects. Therefore, legal acts and legal events are excluded from the scope of this issue; because the legal effect in the legal act is created by one will and in the legal event it is created by law regardless of the person's will (Amiri Qaem Maqami, 1981, p. 4). The nature of such agreement must be studied based on contracts principles.

Nature of any contract including surrogacy in pregnancy can be explained by conditions of conclusion, free will, subject, goals, effects (Katuzian, 1995, p. 337) and also the genetic relation between parents and the baby, or the lack thereof (Alizadeh, 2006, p. 177).

It seems that conclusion conditions play a greater role and have priority over other items in explaining the nature of surrogacy contract; because studying surrogacy contract in terms of conclusion conditions determines whether this contract is a specified or unspecified contract and this can influence many other classifications like revocable or irrevocable contract,

contract of ownership or obligation, collective or individual, free or mutual interest contracts. So conclusion conditions are first studied to explain the nature of surrogacy contract.

### **Chapter One: the Nature of Surrogacy Contract in terms of Conclusion Conditions**

Some of the aspects of any contract nature can be explained based on conclusion conditions allocated to such issues as "specified and unspecified contracts", "consensual contract and contract by deed", and "accessory contract and independent contract".

#### **1. Specified and Unspecified Contract**

By virtue of Article 10 of Civil Law, free will governs the contract in the Iranian legal system unless law, public order, and ethics make contract ineffective (Katuzian, 1995, p. 144). However, there are some exceptions in this regard and in some cases the importance of some issues like the relationship between employee and employer is such that the government is bound to interfere and adds to its mediation role and even the leading role is converted into an independent legal entity through obligatory rules governing them and ineffectiveness of free will; this entity is organized by law. It is a ready framework only within which people may act without governing destiny of their future relationship (the same). Such matter has not yet occurred in the Iranian law regarding surrogacy in pregnancy and no specific rule has been enacted by the legislator in this regard. Also there is no precedence in this regard. Therefore, to determine legal situation of such a contract based on the Iranian legal system, it is inevitable to apply appropriate laws (like Civil Law and Embryo Donation Law 2003) and other legal references.

Consequently, as per Article 10 of Civil Law, it is not necessary to create an obligation under the title of a specified contract. The jurists do not have consensus on people agreement outside specified contracts and some have an opinion in contrast with the mentioned legal result; because they believe that people agreement outside the specified contracts is a kind of promise which is required to be stipulated in an irrevocable contract (Kho'ie, 1415 AH, v. 7, p. 147).

This is also the case in surrogacy contract when there is no religious or legal obstacle and people may agree upon a private contract and determine its conditions and effects

based on contracts general rules and free will principle.

So, there are many advantages in referring specified contracts to sign an agreement upon new issues such as surrogacy in pregnancy; otherwise parties must determine the contract conditions and effects according to Article 10 of Civil Law.

With regard to the above mentioned matters, the surrogate womb issue (Imami, 1991, pp. 359 and 558) seems that these contracts including "deposit", "reward", and "hire of persons" have more proper structure for surrogacy. So their structure may be studied to determine whether they can be used for such a goal.

#### **2. Hire of Persons**

This contract structure is proper for surrogacy in pregnancy, because the hired person transfers specific interests by virtue of hire of person contract (Katuzian, 1995, 557). The surrogate mother is committed to be fertilized by using assisted fertilization techniques and the fertilized egg or a specific fetus belonging to the legal parents or third persons and keep the fertilized egg or fetus in her own womb and deliver the baby to the legal parents after childbirth.

However surrogacy contract cannot be merely hire of persons. Besides a specific undertaking against a specific consideration, the surrogate mother is committed to keep and take care of the fertilized egg or the fetus (Katuzian, 1995, p. 4). If pregnancy occurs in order to do a specific act or transferring a specific interest against a specific consideration, the rules of lease govern it; though keeping the fertilized egg or fetus is required for the main obligation.

Besides deposit contract that is an accessory contract, if the suggestion mentioned in the jurisprudential legal situation of using the surrogate womb is enforced to create legitimacy and remove religious obstacles, temporary marriage contract that is accessory will be also added.

Nevertheless some do not consider hire of person contract proper for surrogacy and have mentioned some arguments for lack of appropriateness. They believe that the contract signed in this regard cannot be analyzed in the framework of specified contracts and will be regarded as an unspecified contract; because the title

selected by the parties is not certain in identifying type of contract (Jafarzadeh, 2009, p. 155).

For example it has been argued that, If human manpower is regarded as an interest, the interest of this contract is the surrogate mother and this interest, "the natural function of the surrogate mother womb in growing the fetus", belongs to the physics and personality of the surrogate mother and as mentioned earlier, the legal parents cannot own this interest; furthermore, owning such an interest is regarded as owning the surrogate mother and no one can own someone else by virtue of a contract (Nayebzadeh, 13). This argument for lack of appropriateness of hire of person contract for surrogacy does not seem accurate; because regarding human manpower as an interest is one type of lease contracts and there is no disagreement on this matter that the hired person may transfer specific interest(s) against a consideration or the "lessee" undertakes doing something against a specific consideration for a specific time. This indicates that such interests are subject to situational orders unless there is an explicit prohibition on an interest.

### 3. **Consensual Contract or Contract By Deed**

Whenever the surrogacy contract possesses the nature of hire of person contract, it is evident that it must be regarded as among consensual contracts; because agreement of two wills is the required element for conclusion of hire of person contract. So it is signed by mutual consent and does not need any particular form.

However due to importance of this contract and its effects on attribution, heritage, and legitimacy and also the therapeutic aspect of this type of pregnancy, it seems that specific formalities must be required to protect family better and regard it as among contracts by deed and as another exception in the consensual contract principle so as to be able to supervise conclusion of such contracts more. Specific formalities may include specific medical examination for approving infertility of legal parents, approving physical health of the surrogate mother, gaining necessary medical permits from therapeutic centers, supervision of its stages by specific centers.

### 4. **Independent Contract**

Independency or dependency is not caused by the legal nature of the contract and a contract may be independent relative to one contract and simultaneously dependent relative to another contract. Surrogacy contract is an independent contract; because this contract has conclusion and effectiveness conditions like other independent contracts. Also its validity, or the lack thereof, is investigated separately regardless of another contract. However it may be converted to a dependent contract by mutual consent.

### 5. **Contract of Reward**

Another form of the mentioned reward allocated to the mutual interest contract is when a person gives a property to another person or undertakes an obligation, yet he does not expect any equal or more consideration.

It seems that the best method for surrogacy contract is legislation of control and supervision rules which regard this contract as among contracts of reward rather than contracts of sale; that is, the surrogacy contract does not have an economic nature and the surrogate mother has ethical motivations without expecting any reward equal to or more than the related obligation.

## **Part II: Jurisprudents Opinion regarding the Surrogate Womb**

The jurisprudents who do not authorize using the surrogate womb without marriage relationship argue probably by one or more reasons as per below.

### 1. **Necessity of Guarding the Private Parts**

The jurisprudents infer the necessity of guarding the private parts from several verses of the Holy Quran (Momenun/ 5, 6; Ma'arej/ 29, 31). Among them, the verse indicating "And say to the believing women that they cast down their looks and guard their private parts" (Nour, 31) is more appropriate. The imperative structure of this verse implies the necessity of such an act by faithful women. On the other hand, it has not been stated that from what women must guard their private parts. However it can be inferred that faithful women must guard their private parts against any act that is in conflict with its preservation. There are some criticisms regarding this argument; below criticism is one example. "Guarding the private part means guarding it against other people not everything. So it

does not include pouring an alien sperm into the woman womb by the woman herself or an artificial device. Furthermore, it may mean preserving from the eyes of other persons, and Abu Basir narrative about Imam Sadiq implies the same matter (Haram Panahi, 1997, p. 136).

## 2. Prohibition of woman fertilization by an alien sperm

Most jurists believe in prohibition of woman fertilization by an alien sperm. The jurists refer to several narratives to infer such a verdict (for example Faqih narrative, Eshaq Ibn Amar narrative, Mohammad Ibn Sanan narrative, Ahmad Ibn Ali Ibn Abi Taleb Tabarsi narrative, Sahih Sho'ayb Hadad) (Haram Panahi, 1997, 136). Ali Ibn Salem has narrated from Imam Sadiq that the most severe torture in the Hereafter belongs to a man who has poured his sperm into a woman womb that is forbidden for him (Hor Ameli, 1140 AH, v. 14, 239).

This narrative implies that it is not permissible to pour the sperm of a man into the womb of a woman that is forbidden for him.

Some have criticized the narrative evidence. Assuming the narrative valid, the matter raised in the surrogacy is that the surrogate mother is made pregnant by the fertilized egg (i.e. a sex cell composed of the man sperm and the woman egg in the laboratory or its fetus). Therefore, it may raise this question that whether this fertilized ovum particularly if converted into the fetus is included in the concept of sperm or not; because the physicians differentiate among sperm, egg, fertilized egg, and fetus (Akhundi and Sadeghi, 2001, 36).

## 3. Conflict of this Act with Purposes of Marriage

Some jurists believe that in spite of the fact that the appearance of verses and narratives does not imply prohibition of artificial fertilization by an alien sperm, it is inferred from the concept and logic of the evidence and also removal of important purposes of marriage that using this kind of artificial fertilization is not permissible. For example, Late Milani states,

"The appearance of verses and narratives regarding artificial fertilization imply nothing, yet it can be inferred from its

jurisprudential tone that it is not permissible certainly" (Jafarzadeh, 1996, 2).

Or Ayatollah Safi Golpayegani states in this regard,

"Reproduction of wife and husband through artificial devices without an ordinary sex is no doubt permissible, unless one of them does not agree and seeks its natural process. However if they are alien, whether the woman has husband or not, one can state that permission of this act is in conflict with marriage purpose; because legislation of marriage and prohibition of adultery and satisfying sexual instinct by other forbidden means are aimed at strengthening the legitimate acts, but permission of this kind of fertilization removes many interests targeted by the legislator" (Akhundi and Sadeghi, 2001, 402).

It seems that argument by virtue of the jurisprudential tone is not consistent with the jurisprudential principles; because permission or prohibition of a matter requires some evidence of such valid references as the Holy Quran, tradition, consensus exploring the innocent vote, and wisdom. When there is not such evidence, its permission or prohibition cannot be determined.

## Part III: General Effects of Using the Surrogate Womb

### 1. Obligations of the Surrogate Mother

The hired person in the hire of person contract is normally committed to undertake the obligation as per contract terms, submit the subject matter, or preserve the commodity until delivering to the lessee, and the lessee is committed to receive the commodity, accept the subject matter and pay the consideration (Katuzian, 1995, 578).

These general effects exist in the surrogacy contract, but this contract has some differences due to its relation with human physical and spiritual personality. The surrogate mother is committed to keep the fertilized egg or fetus of the legal parents in her womb for a specific period as per contract terms, customary norms in pregnancy and medical principles and grow it with respect to the matters necessary for her and fetus health (Brindsen Pr., 2003, p. 59).

So the hired person (the surrogate mother) in surrogacy is the one who undertakes pregnancy and childbirth, unless the

surrogate mother is permitted to assign it to another woman by observing required conditions. However if she does not have such permission and refrains from doing her obligation after contract conclusion and before pregnancy, the court may oblige her to undertake her obligation; otherwise, the legal parents may terminate the contract and claim for damages. Also if she refrains from doing her obligation after pregnancy, the problem gets difficult particularly when this leads to crime commitment against persons or physical damages against the fetus. In this case, refraining from undertaking the obligation has criminal aspect besides civil aspect (Klendpeter CB, 2002, p. 159).

Based on contractual civil liability, the legal parents may claim for damages that are obvious, direct, legitimate, personal, not compensated, and predictable. So if the surrogate mother (Katuzian, 2009, p. 278) does not undertake her contractual obligation after contract conclusion and before pregnancy, the legal parents may claim for costs paid for tests, therapeutic affairs and other preliminary affairs and also the money that the surrogate mother has committed to pay in lieu of not undertaking the obligation in the penal clause (the same, p. 243). If no damages have been brought about by the surrogate mother, they do not need to prove losses; but the fact that it may bring about probable losses in the future is not expected with regard to the subject of surrogacy contract. However if it occurs, it can be regarded as current obvious and direct damages by virtue of Article 5 of Civil Liability Law, though as regards future losses there is no certainty and everything is probable unlike past losses. Thus for the amount of probable losses, it is referred to the violent presumption which is regarded as knowledge and is the basis of many commands (the same, p. 279). Also the surrogacy obligation is not focused on the result of pregnancy; rather it seems that the obligation is focused on doing some endeavors to preserve and grow the fetus, because survival, health, and growth of the fetus is beyond the ability and will of the surrogate mother. Hence, it suffices that the surrogate mother proves that she has undertaken all obligations as per the contract conditions and customary norms of pregnancy. However the surrogate mother

obligation to deliver the baby after childbirth is focused on the result and if she refrains from doing this obligation, she must prove that an external cause has impeded her in order to be exempted from liability. This cause must be external so that it must not pertain to the obligator, it must be unpredictable and inevitable and the person cannot repel it; otherwise she is liable according to Article 229. Also the surrogate mother is bound to foster and take care of the born infant until delivering it to the legal parents by virtue of the surrogacy contract. If it is proved that the surrogate mother is kinship mother, fostering the born infant is both a right and an obligation as per Article 1168 of Civil Law. If such a blood relationship is not proved, fostering is an obligation created by surrogacy contract.

## 2. Obligations of the Legal Parents

As the surrogate mother is bound to deliver the infant to the legal parents, the legal parents are bound to receive the infant; otherwise they must compensate the losses caused by delay like feeding, clothing, and health costs and maintenance and lactation fees. Also, the legal parents are bound to pay the surrogate mother fees when the contract obligation is finished and it seems that childbirth is the end of contract obligation unless otherwise stipulated in the contract and it includes lactation too.

## 3. Specific Effects

Besides the above general effects, the surrogacy contract embraces other specific effects such as the situation of the blood relationship of the born infant with the legal parents and the surrogate mother, intimacy, and heritage (Akker, 2007, p. 123).

The situation of the blood relationship of the born infant with the legal parents and the surrogate mother plays a fundamental role, because it directly influences other specific effects and can be the basis of confirmation or rejection of heritage. So it is necessary to investigate firstly the blood relationship of such an infant so as to determine situation of other effects.

### 3.1 Parentage of the Baby born by Surrogacy

The owner of sperm and owner of egg and womb are religiously deemed as the

kinship father and mother in all cases except for adultery; and there is no disagreement among Islamic jurists in this regard (Najafi, 1988, p. 256).

There is disagreement about the blood relationship of the owner of egg or the owner of womb with the child born by surrogacy. Most contemporary jurists regard the owner of egg as the kinship mother and the owner of womb as the customary mother (the same, p. 394).

Some believe that determining the mother in this case is difficult from the religious perspective (the same, pp. 432 and 459).

#### 4. Intimacy

When there is a blood or causal relationship between two or more persons, various effects are created; intimacy is one of these effects (Mohaqeq Helli, 1409 AH, p. 71). Intimacy has various effects like impeding their marriage (Najafi, 1988, pp. 29 and 495).

The jurists and lawyers have consensus on the fact that intimacy created by a blood or causal relationship impedes marriage of the parties of such relations (Nesa/ 23) which is mentioned in Articles 1045 and 1047 of Civil Law.

#### Conclusions

With respect to the definition of surrogacy, the first type (surrogacy in pregnancy) and the third type (surrogacy by using donated egg or fetus) are included in this issue and the second type is specifically excluded.

On the other hand, though there are some arguments regarding prohibition of surrogacy in pregnancy, the legislator may evaluate the interests of this surrogacy and declare it permissible or prohibited by predicting some conditions. It can be inferred that using the surrogate womb may be permissible if its requirements are not forbidden based on the Iranian legal system. Therefore surrogacy in pregnancy may be permissible from a legal perspective, unless a law is enacted to prohibit using this method due to other reasons.

However the persons whose Marja has prohibited using the surrogate womb without a marriage contract between the sperm owner and the surrogate mother, cannot sign such a surrogacy contract due to illegitimacy of the contract subject matter for them.

Also at the current conditions that there is no specific law or precedent regarding surrogacy, some judges

may infer prohibition of surrogacy by virtue of Principle 167 of Constitutional Law and Article 3 of Civil Procedure Law. Consequently they may declare some of these contracts void, but this matter does not prejudice the mentioned situation unless it leads to creation of a precedent by General Board of the Supreme Court indicating prohibition of such a contract.

The proper solution for surrogacy which makes the jurists opinions uniform and prevents issuance of conflicting verdicts by the courts is that the surrogate mother must be single and so a temporary marriage contract must be signed between the owner of sperm and the surrogate mother at least for a short time period.

#### References

1. Adib Haj Bagheri, Mohsen, et al. (2010). *Qualitative Research Methods*, Boshra, Tehran.
2. Ahmari Tehran, et al. (2010). *The Infertile Women Attitude towards Surrogate Womb*, *Journal of Medical Ethics and History*, fourth period, No. 1.
3. Besharat, Mohammad Ali and Ruhieh Hosseinzadeh Bazargani (2004). *A Comparison of Mental Health and Sexual Problems of Fertile and Infertile Women*, *Journal of Thought and Behavior*, 12<sup>th</sup> year, No. 3.
4. Ruhani, Mohammad; Noghani, Fatemeh (1997). *Medical Commands*, Teimurzadeh Publication, Tehran.
5. *Modern Human Reproduction Methods (papers collection)*, Samt Publication, Tehran, 2001.
6. Seif, Diba, et al. (2001). *The Effect of Some Emotional and Demographic Factors on Life satisfaction of infertile women*, *Quarterly Journal of Fertility- Infertility*.
7. Sane'ei, Ashraf al-Sadat and Nikbakht Nasrabadi, Alireza (2004). *Qualitative Research Methodology in the Medical Sciences*, Baraye Farda Publication, Tehran.
8. Safaei, Seyed Hossein; Emami, Asadollah (2002). *Family Law*, v. 2, third edition, Publication of Tehran University, Summary of Family Law, fifth edition, Mizan Publication, Tehran, 2003.
9. Fazli Khalaf, Zahra, et al. (2008). *Mental Aspects of Pregnancy by the Surrogate Womb in the Host Women*, *Quarterly Journal of Fertility- Infertility*.

10. Falik, Ouveh (2008). An Introduction to the Qualitative Research, translated by Hadi Jalili, Tehran, Ney Publication.
11. Ghazi Tabatabaei, Mahmud and Dahir, Abuali (2008). Surrogate Womb: A Realistic Reflection of Motherhood Medicalization, Quarterly Journal of Fertility- Infertility, No. 2, 9<sup>th</sup> period, pp. 144-164.
12. Katuzian, Naser (1998), Criticism of Judicial Practice, Mizan Publication, Tehran.
13. Karami Nouri, Reza, et al. (2001). Mental Social Aspects of Infertility through the lens of Iranian Physicians, Quarterly Journal of Fertility- Infertility.
14. Alizadeh, Mehdi (2009). The Effects of Surrogacy Contract, legal teachings, Razavi Islamic Sciences University, No. 12.
15. Mohammadpour, Ahmad (2010). Anti-Method, Logic and Design in Qualitative Methodology, v. 1, Tehran, Jama'e-shenasan Publication.
16. Momen, Mohammad (1415 AH). Sound Words in New Issues, Al-Eslami Publication.
17. Nayebzadeh, Abas (2001). A Legal Study on Modern Artificial Fertility Methods, Majd Publication, Tehran.
18. Internal Journal of Law, Research and Information Office of the Presidential Administration, No. 9, 2001. Human, Heidarali (2006), A Practical Guide to Qualitative Research, Samt Publication, Tehran.
19. Yusefi, Humid, and Shahrbanu Ghahari (2008). The Surrogate Womb: A Glance at its Different Aspects and Challenges. Quarterly Journal of Fertility- Infertility.
20. Akker, Van Den. (2007). Psychological aspects of surrogate motherhood, Human Reproduction Update, Vol.13.
21. Brindsen Pr. 2003. Gestational surrogacy. Hum Report. Update
22. Klenpeter CB, 2002.surrogacy: the parent's story. Psycho report
23. Practice of surrogacy in Britain, 2004, UK. British Medical Association, London.

9/2/2024