

## The Impact of Surrogacy Contract on the Relationship Between Infertile Couples in Iran Law

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**Abstract:** Every couple has desire to have a child and the desire has existed from the beginning of the creation of Adam to the present. However, some families have been deprived of the blessing of having a child due to medical reasons. In this regard, about 10-15% of couples are infertile and they are always seeking to find a solution for infertility problems. They may appeal to prayer, use medical treatments, or adopt a foster child. In many cases, the couples separate due to such infertility problems. Nowadays, with the progress of medical science, many modern methods have been proposed to solve the problem of infertility; for instance when medical or surgical methods are useless in infertile women, another woman can be chosen for obtaining the eggs or accepting pregnancy which is called Surrogacy Method. In addition to the identification of the procedure, this study tries to explain and investigate the nature and types of surrogacy contract in the rights of Iran.

**Key words:** Surrogacy, infertility, contracts, marriage, study

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### INTRODUCTION

For the first time, Patrick Steptoe and Robert Edwards have given birth to a girl called Louise Brown using *In Vitro* Fertilization Method (IVF) in July 25, 1978. They have given birth to the first laboratory baby by implantation of the embryo in the womb of his mother. In 1985, Otian has reported the first case of surrogate birth. However, Patrick Steptoe and Robert Edwards were the first scholars make the first surrogacy contracts in Europe; the child was born in 1989 (Akhondi and Bahjati, 2008). Surrogate motherhood is carried out in the following cases: absence of uterus because of medical or congenital reasons, occlusion of the uterine cavity because of getting tuberculosis or chronic diseases such as high blood pressure, severe diabetes, heart disease or severe thalassemia which make pregnancy impossible for women, small uterine that will lead to successful implantation, recurrent abortions or the impossibility of pregnancy for women due to the sensitivity of the RH.

Although, Iran's law has not referred to surrogacy but this Fertilization Method is used like Finland and Greece, for which there is no specific law. Apart from Article 10 of Iran's Civil Code that is a base for all white contracts, some contracts including hire a person, jialah and peace contracts are consistent with this issue because they are not contracts limited to specific titles

and special formats. The principle of freedom in contracts have extended the power of individuals' will and it is excluded from named contracts thus all named and unnamed contracts and private agreements are valid and binding provided that it has the legal conditions of contracts and is not contrary to public order and good morality. Scholars and jurists have not made an agreement about contracts related to surrogacy. Differences of opinion and lack of explicit and codified text of the law on surrogacy indicate the need for a comprehensive study on this issue by legal experts and the intervention of the legislature to enact related laws.

### ADVANCED TECHNIQUES FOR FERTILIZATION

Basically, infertility results from either problem in men such as defect in sperm production, defect in the quality and number of sperms, defect in sperm output and the inability of sperm to reach the fallopian tubes or problem in women such as women inability to produce eggs, defect in embryo transfer from fallopian tube to the uterus, the uterus inability for implantation and the uterus inability for keeping embryo. The infertility may result from both partners as well. According to the type of infertility problem, doctors will use various treatments including different methods of reproduction like IVF or IUI or surrogacy when defect is in women's uterus.

## ASSISTED REPRODUCTIVE TECHNOLOGIES

**In Vitro Fertilization (IVF):** IVF is a process by which an egg is fertilized by sperm outside the body (in laboratory) then the normal pre-embryos are transferred back to the woman's uterus within 2 days in 4-8 cells stage.

**Intrauterine Insemination (IUI):** IUI is a laboratory process in which sperm that have been washed and concentrated are placed directly in your uterus around the time your ovary releases one or more eggs to be fertilized. In they use the husband's sperm, it is called AIH; it is called AID (artificial insemination by husband) in the case of using a stranger's sperm.

**Zygote Intra Fallopian Transfer (ZIFT):** ZIFT is an assisted reproductive procedure in which egg cells are removed from a woman's ovaries and the resulted zygote is placed into the fallopian tube before cell proliferation.

**Gamete Intra Fallopian Transfer (GIFT):** In this method, male sperm and female egg are placed in fallopian tube; then, both zygosis and embryo developments carry out in fallopian tube.

**Intra cyto Plasmic Sperm Injection (ICSI):** ICSI third reproductive method they choose a single sperm that is unable to reach egg and inject it into a mature egg. After culturing in laboratory, the zygote is placed in womb 2 days after embryo developments (Akhondi and Bahjati, 2008).

## SURROGACY

Surrogacy is a way for infertile couples to have a child in which the surrogate mother accepts the embryos obtained from legal parent's sperm and egg using assisted reproduction methods and *in vitro* fertilization (fusion of sperm and egg by artificial and nearby tools); then she delivers the baby to the infertile couple after a period of pregnancy and his birth.

## LEGAL PARENTS

Legal parents are infertile couple demanding a child and are a party of the surrogacy contract; in many cases they are baby's biological parents and the embryo is obtained from their sperm and egg. Although, it seems irrational to call them legal parents, jurists argue that they are the real parents because the embryo is obtained and attributed to them, thus they are his/her relations. Hence,

it is not possible for the parties of surrogacy contract to use sperm, egg or even others' donated embryo because the embryo is attributed to the original owners religiously and he has no relation with infertile applicant couples; in this manner, Ayatollah Makarem Shirazi says that religion does not permit using strangers' sperm to have a child.

## SURROGATE MOTHER

Despite impressive advances in medical science, doctors have not found more suitable environment for the growing fetus from the uterus; therefore, one of the great achievements of assistive reproduction is the use of another woman's womb (Surrogacy).

Surrogate mother, also called rented mother or mediator mother, is a party of lease contract of the uterus who agrees to carry embryo obtained from artificial zygosis of infertile couple's sperm and egg using assisted reproduction methods and delivers the baby after pregnancy and childbirth to biological parents who are other party of the contract. The surrogate mother must have the physical and mental health and pass the tests related to non-addictive, non-susceptibility to HIV, non-hepatitis and non-thalassemia, communicable diseases and mental illness. She must have a minimum of once pregnancy and preferably be in the age between 20-35 years. Of course, if the woman is married, her husband's consent must be obtained in addition to a lease agreement of the uterus because according to Article 1117 of Civil Code, "The husband can prevent his wife from occupations or technical work which is incompatible with the family interests or the dignity of himself or his wife." This study is approved to maintain family interests and the dignity. Since, "in relations between husband and wife; the position of the head of the family is the exclusive right of the husband", according to Article 1105 of Civil Code, he is allowed to reject surrogacy contract of his wife because the surrogate mother subject to the contract face with restrictions, difficulties and pains in her married life.

## SURROGACY CONTRACT

Surrogacy contract is an agreement by which a woman accepts to carry an embryos obtained from legal parent's sperm and egg using assisted reproduction methods and *in vitro* fertilization (fusion of sperm and egg by artificial and nearby tools) and delivers the baby to the infertile couple after a period of pregnancy and his birth. Surrogacy contracts are concluded in two forms:

**Non-gratuitous contract:** In this contract, the infertile couples are committed to pay money or clear an account in response to services presented by the surrogate mother. The money is considered as a payment for woman's uterus.

**Gratuitous contract:** In this contract, the surrogate mother carries the child solely for humanitarian motives and does not receive a fee. This type of contract is often concluded between friends and relatives to legal parent.

### THE NATURE OF SURROGACY CONTRACTS

In the division of legal acts, surrogacy contract is included in the class of irrevocable contracts; none of the parties is allowed to terminate the contract unless both parties agree on its termination. Hence, in terms of surrogacy contract, termination of the contract is possible only before the formation of zygote in the surrogate mother's uterus. According to jus cogens, termination after the formation of zygote is impossible (ibid); the termination in latter case is impossible even if the parties agree on the termination. In order to explain the nature of surrogacy contracts, the contracts should be adopted consistent with certain contracts (named contracts) in Civil Code. It seems that "persons rent contract", "reward contracts", "loan contracts", "deposit contracts" and "peace contracts" are more proper in this regard.

**Persons rent:** Surrogacy contracts can be generated from persons rent agreements because the hired person can possess a property, a fixed fee or an interest as a payment for a specific time service based on this contract (Shahidi, 2005). Hiring a woman to nurse a baby or "succession in breastfeeding" is an example in this regard (Thani *et al.*, 2007). Therefore, as a woman can be hired for succession in breastfeeding, she can be hired also for the normal function of her womb in form of persons rent contracts.

**Contract of reward:** According to Article 561, *ji'ala* or contract of reward is defined as the engagement of a person to pay a known recompense, in return for an act, whether the other party is specified or not. There is a fundamental difference between contract of reward and persons rent. In the rent, wage and the amount of service should be clear and specific; the parties who accept the obligations should be a certain person. Nevertheless, in contract of reward, not only the work amount is specific but also wage and contract party may not be

specific. Some believes that the nature of surrogacy contract is applicable to contract of reward (Moeini, 2008).

The problem with this view is its inconsistency with Civil Code's text that says the contract of *ji'ala* is a permissive engagement and until the act has not been finished, each of the two parties can withdraw but if the rewarder withdraws during the course of the act, he must pay to the agent a reasonable compensation for his act. In response to these problems, some have said that although, the contract of reward is permissive, surrogacy contract loses its voidability after putting baby in the womb because terminating the contract is contrary to the rights of a third person (Shahi, 2008).

**Deposit:** Deposit contract explains an agreement in which one person assigns the maintenance of a possession free. Basically, surrogacy contract is not integrated and consistent with deposit contract because the main purpose in deposit contracts is giving a property to a person for maintaining. On the contrary, the main purpose of surrogacy contract is to grow fetus in the alternative womb and deliver it to legal parents. However, the principal obligation of the contract is the maintenance of sperm, but the surrogate mother accepts to carry embryo as a subsidiary obligation. In addition, deposit is a permissive contract and it cannot define the features on surrogacy contracts' necessities.

**Borrowing-loan contract:** Some layers argue that surrogacy contracts can be called borrowing-loan contracts because the surrogate mother permits another one to use her womb for growing the embryo of insemination of infertile couple's sperm and egg. The surrogacy contract may be non-gratuitous or gratuitous; it can be called borrowing-loan in the case of gratuitous (Safaei, 2001).

The problem with this relates to the nature of contract. According to Iran Civil Code, borrowing-loan contracts are attributed to an object and it is away from the dignity of humanity to regard women's womb as an object because human body is non-tradable. Hence, womb's borrowing-loan is contrary to Iranian public order and good morality (Zadeh, 2011). Moreover, the problem with womb's permissive contract represents its inconsistency with surrogacy contracts.

**Peace:** While the legal nature of surrogacy contracts is consistent with some certain contracts like persons rent and contract of reward, it may be consistent also to peace contracts because peace is an independent agreement in

Iran law and it is not subsidiary aspect of other contracts. It can be concluded for agreements without the features of the previous contracts. In Persian and Arabic dictionaries, the word "peace" refers to reconciliation between the parties (Al-Isfahani and Ibn Muhammad, 1983). Langroodi and Jafar (1999) defines peace as "an agreement for establishment or profit about one or more legal effects without dependency on the provisions of a certain contract (Langroodi and Jafar, 1999). Shahidi (2003) defines it in the following words, "Peace is a contract in which two parties agree on the rise or decline of a legal relationship. Be comparing the above definitions, one can conclude that peace has a wide subject range and it can be employed as a means for development of different types of contracts and the rule of will. Through peace contract, one can establish a legal nature that cannot be concluded with other certain contracts. This multiple functioning with special place has brought the titles of "Master of contracts and provisions" or "The most useful contracts" (Langroodi and Jafar, 2003). Meanwhile accepting the range of peace contracts, Iran Civil Code has stipulated its types as "A settlement of account is possible either in the case of the adjustment of an existing dispute or for avoidance of a possible dispute or in the case of a transaction and the like".

Therefore, Iran Civil code has explained the subject of peace contract by saying, "the like" so that every legal affair can be the subject of peace contracts. Based on the Holy Quran and the sayings of the Imams, Shiite jurists have presented peace as a means for expressing free will. In this manner, on the one hand, they are consistent with named contracts that have specific titles and conditions; on the other hand, it has not the subject-related restrictions of certain contracts and its parties can met every legal form. Consequently, if one asserts that surrogacy contracts are inconsistent with certain contracts, he certainly cannot reject its inclusion in the class of peace contracts because of its wide range. That is to say, peace contract has been introduced to be a title for unnamed contracts and a ground for free will in contracts.

#### **THE LEGAL STATUS OF SURROGACY CONTRACT TYPES**

As explained, the surrogate mother in this contract accepts to grow the embryo of others, who are legal parents, in her womb and delivers them after the lapse of a baby carriage. Therefore, based on assuming that sperm and egg are from legal parents, some hypotheses can be proposed. In the following, different types of surrogacy contract, its effects and the decrees will be mentioned.

**Surrogacy and embryo donation agreement:** In this case, both sperm and egg are from a third person and the obtained embryo is injected in the womb of surrogate mother. Some contemporary jurists like Ayatollah Fazel Lankarani consider this as an illegal relationship. Nevertheless, Ayatollah Khamenei and Makarem Shirazi consider it religious if it is not concurrent with a sinful action.

According to the law of the donation of embryos to infertile couples approved 1382.05.08, there are no legal restrictions in the donation of embryos by couples fertilized in laboratory to the womb of an infertile couples that the husband or wife is infertile. However, it is difficult and sometimes impossible to determine the genealogy of the child because genealogy is the filiation. In fact, genealogy is the blood relationship between two persons who have been born for a father and mother with legal marriage. This type of relation brings some effects including privacy, inheritance, custody and natural guardianship. The more difficult issue in this regard is determination of the mother that results in three different opinions by Shiite jurists. A group of jurists such as Ayatollah Ardabili and Sadeghi Tehrani has accepted the theory of two-mother and they consider such children as a two-mother children including relative mother (owner of egg) and foster mother (substitute mother that has brought him to the world). Another group such as Ayatollah Khoei, Araki, Marefat and most Sunni jurists, regard the mother who has born the child as the real mother because they believe that the reason for considering one a foster child is his/her growth in a specific time with the foster mother's milk while this case meet the formation and growth of fetal cells from maternal blood. However, it is not far to say that the baby carrier who bears the child is baby's foster mother.

Relativeness and fostering kinship is a unique institution in Islam and it has not a parallel case in western countries. According to this institution, a baby who has drunk a woman's milk consistent with above conditions is considered as Mahram. The Mahram status has some effects like the prohibition of marriage. As some special relationships with some Mahram relatives are prohibited, these relationships with foster relatives are prohibited, too.

The third group, the majority of Imami scholars like Imam Khomeini, Ayatollah Khamenei, Ayatollah Makarem Shirazi, Sistani and Sanei, consider the egg owner as the real mother.

**Surrogacy and egg donation agreement:** Two assumptions can be imagined in this method. First, the donated egg is from a third woman; second, the mother's

egg is replaced. In both cases, stranger women's egg is fertilized by sperm of the legal father without a sexual intercourse *in vitro*. Most of jurists reject the lawfulness of this type of fertilization. As stated in the collection of juridical articles, such action is contrary to caution because it is contrary to the principle of family bonds and maintaining the divine covenant of marriage. In this manner, permitting the fertilization of a strange man with a strange woman violates the purpose of Holy Legislator and sinful reproduction. Therefore, spermatogenesis and the subsequent embryo should be formed by sperm and oocyte insemination of man and woman with parity relationship either permanent or temporary. However, the germ (embryo) may not be fertilization in the womb of a stranger woman. For instance, the injection of donated embryo from a fertile married couple to an infertile married couple (La on the Donation of Embryo Approved in 1382.05.08).

**Surrogacy and full replacement agreement:** In this method, the genetic father's sperm and his wife's egg is fertilization using assisted reproduction using *In Vitro* Fertilization Method and it is injected in the surrogate mother's womb; the method is called renting a womb or full replacement. It is still controversial about its legitimacy among jurists. Opponents of using the surrogate mother's womb such as Ayatollah Bahjatm Tabrizi, Fazel Lankarani and Noori Hamedani, argue that as placing the sperm directly into the uterus through adultery (which is the usual way) is forbidden, it is forbidden to place it in unusual ways (combination of sperm and egg and transferring it to the stranger's uterus) (Proceedings, 2003) because the permitted place of sperm is the womb of genetic father's wife and other positions are prohibited. In contrast to this view is the opinion of few jurists. Most of contemporary jurist permit this action and believe that it is neither an instance of adultery nor an instance of injecting man's sperm in the womb of stranger woman because the opponents regard it as a sinful sexual intercourse, also called adultery while it is not true about surrogacy contracts. In addition, based on the principle of "permitting", every action is permitted unless there is a reason for its sinfulness; since it is the last hope for infertile couples to have children, reason confirms it. As everything that is approved by reason, it is confirmed by religion, it can be considered legal and religious. Of course, if the surrogate mother has a husband, majority of jurists, like Ayatollah Khamenei, Ayatollah Makarem Shirazi, Ardabili, Sistani, Safi Gulpaygani, Mousavi Ardabili, Momeni and Sanei, believe that she must have his husband's permission.

Considering the legality of surrogacy contracts, there is disagreement among lawyers. According to the principles of "free will", "accuracy" and "permitting", some argue that it is legal because the contract is rational and is not against the law. On the contrary, some agree that it is illegal because human body cannot be the subject of a binding agreement and it is a new form of modern slavery (Katouzian, 2003). They assert that the contract is contrary to the principles of "non-presentation of human body" and non-presentation of human conditions. Therefore, it is contrary to public order and good morals (Safaei, 2004).

## CONCLUSION

One can claim the consistency of surrogacy contracts' nature with agreements like persons rent and peace. Most Shiite jurists disagree the permission of pregnancy using the surrogacy in which the embryo is obtained from a stranger woman or surrogate mother because the spermatogenesis and the subsequent embryo should be created through the insemination of a married couple's sperm and egg. However, there is no married couple in this method. Contrary to the previous case, most jurists permits surrogacy by full replacement (in which the surrogate mother carries the embryo obtained from genetic parent). Of course, if the woman is married, her husband's consent must be obtained. It is worth noting that jurists attribute the baby to the genetic or legal parents (Owners of sperm and egg) and the surrogate mother is considered as baby's foster mother; hence, she is not allowed to marry baby and she has not an inheritance or custody right.

The same as jurists, lawyers disagree about the legality of surrogacy contracts. According to the principles of "free will", "accuracy" and "permitting", some argue that it is legal. On the contrary, some agree that it is illegal because according to the principles of "non-presentation of human body" and non-presentation of human conditions. Therefore, it is contrary to public order and good morals (Safaei, 2004).

Using surrogacy as a form of infertility treatment is inevitable. Therefore, jurists and lawyers should try more to explain and demystify this complex issue. Legislators should also attempt more efficiently in making new rules based on the ideas of thinkers in order to determine the responsibilities of the legal entity.

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