

## Legal and Ethical Challenges of Surrogacy Contracts in Iranian Judicial and Medical System

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### Abstract

**Background and Objectives:** Surrogacy is a legal solution to infertility treatment. However, the lack of a clear and rational law has created challenges in the application of this solution. The purpose of this study was to investigate the legal practices and gaps in terms of infertility treatment with surrogacy in Iran.

**Methods:** This review study utilized documentary method carried out through the assessment of books, articles, uniform judicial precedent votes, and valid judicial procedures.

**Results:** Use of a surrogacy contract is permissible under civil law. However, the existence of uncoordinated and sometimes unreasonable judicial procedures has caused many problems in practice. According to the evidence, the establishment of commercial or noncommercial contracts, based on the agreement of the infertile couple and the surrogate mother, has resulted in the emergence of a black market and uterine brokers, as well as unusual costs. Failure to issue a certificate for a genetic mother is another legal anomaly that can lead to crime commitment genetic parents can only register by providing evidence regarding their biological relationship with the neonate. On the other hand, the number of surrogacy applicants is higher than surrogate mothers. This results in the use of surrogate mothers over the age of 35 years, which increases the risk of high-risk pregnancy for the mother and fetus. Other challenges in this domain include alimony payment, pregnancy expenses, and the possibility of extortion.

**Conclusion:** Therefore, the adoption of the same law and procedure, adherence to ethical principles, and rejection of any out-of-contract changes can facilitate infertility treatment, reduce costs for applicants, and satisfy both parts of the surrogacy contract.

**Keywords:** Judicial Procedure, Legal Status, Medical Ethics, Uterus, Surrogacy Contract.

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### Introduction

Infertility is the most important crisis in the life of an infertile couple. One of the newest methods of fertility and family formation is the use of surrogacy. Infertility treatment is accomplished through a third party called surrogate mother (1). Study of the surrogacy-related laws in different countries and the legal system of the world illustrates the variety and diversity of approaches in this domain. None of the international or European treaties and agreements explicitly address the issue of surrogacy and its prohibition or

prescription given the disagreement among various countries on this practice.

Despite all efforts having been made by the 'Hague Private International Law Conference' since 2016 to pass law codes on surrogacy and its resultant newborns, no promising results have been achieved yet (2). According to the civil law, private contracts are applicable to the contract correspondents in case of entailing no terms that explicitly oppose to the law. Contracts are divided into several categories. There are certain types of contracts that are

explicitly indicated in civil law or other laws with determined terms and conditions (e.g., pending, renting, and pre-sale of apartments) (3). There are other contracts that are tailored to the needs of the community and used by natural and legal persons to meet their needs. These contracts are protected and valid under 'Article ten of the Civil Code'. However, they are referred to as innominate contracts because they are not specifically enshrined in the law (3).

Surrogacy contracts, in case of fulfilling the legal conditions, are categorized as innominate contracts since there is no law in this area. This issue has led to disagreements among jurists (4). In Iran, the surrogacy method has been used since 2001 as one of the solutions to infertility treatment in infertility centers. In this practice, the surrogate mother carries a fetus in place of the infertile spouse and commits to deliver the neonate to the infertile couple upon the completion of pregnancy and childbirth (5).

In general, surrogacy is performed in two ways:

1. Partial surrogacy (traditional surrogacy): in this type of surrogacy, the surrogate mother and the legal father are the genetic parents of the fetus (6).

2. Full surrogacy (host or gestational surrogacy): In this type, the surrogate mother merely plays the role of a "carrier", and the neonate is genetically dependent on its legal parents. In this method, it is possible to use a gamete donor, as a result of which the genetic mother, surrogate mother, and legal mother will be three separate individuals.

The unique ethical, rational, and psychological aspects of surrogacy have turned this method to one of the most controversial assisted reproductive techniques in recent years (6). A surrogacy contract is concluded in two ways, namely commercial and altruistic forms. In the commercial surrogacy contracts, the surrogate mother is paid for performing her commitment. On the other hand, in the second type (i.e., noncommercial or altruistic surrogacy contract), the surrogate mother undergoes this commitment with an altruistic incentive without a paycheck (7). The use of

surrogacy in modern societies is a necessity for infertility treatment (8).

However, the majority of applicants for this method and the treatment staff employed in infertility centers do not know much about the ethical, juridical, and legal foundations of this therapeutic method.

As a result, the use of assisted reproductive technologies for infertility treatment has always faced challenges that can induce adverse psychological effects on both the host (i.e., surrogate mother) and egg donor mother (9).

These methods, in addition to being effective in fertility, have numerous positive and negative effects on the lives of infertile women (10). Therefore, the awareness of treatment applicants (i.e., genetic parents and surrogate mother) and healthcare staff at infertility centers should be considered as an urgent need to advance the goals of infertility treatment in today's society.

The surrogacy contract and its terms are one of the new legal and juridical issues that have raised many questions in the current legal and medical community. Therefore, the importance of infertility treatment legalization, identification of the associated legal terms,

the existence of legal and ethical challenges to treatment, and the presence of various judicial procedures underscores the need for addressing this issue.

## Methods

This review study was conducted with the aim of explaining the legal and ethical status of surrogacy contracts and the existent challenges in the Iranian judicial and medical system. For the purpose of the study, documentary research was performed using validated books, articles, laws, uniform judicial precedent votes, judicial procedures, and scientific references.

## Result

### Legal history of surrogacy

The issue of artificial insemination and surrogacy has a long legal history. The first fertility and infertility center in Iran started operating in 1989 (11). In 2002, a plan on how to donate an embryo to infertile couples was

adjusted in five articles and approved by the members of the Islamic Parliament of Iran. In 2004, in an executive regulation, 12 articles were approved by the Cabinet (12). The first laboratory neonate, Louise Brown, was born in London in 1987 with the efforts of Dr. Steve and his colleagues (12). In the UK, various lawsuits were filed in the courts given the long history of the issue on the one hand and the lack of an associated law code in the legal system on the other hand. As a result, the judges in this state only concerned the legal status of the child without considering the legality of the surrogacy contracts.

Given the importance of the issue, the legislature of the country

attended to the legality of this practice by enacting the 'Surrogacy Arrangements' law in 1985. However, they failed to explicitly determine the status and legal regime governing surrogacy. Finally, in 1990, they passed a relatively comprehensive law on fertility and embryology, called "Human Fertilization Embryology" (12). In this law, none of the terms of the surrogacy contract is considered imperative; accordingly, neither party has any rights or obligations. This dismisses the value of such a contract in the UK courts.

In section two of the 'Surrogacy Arrangements' law, any negotiations, activities, or arrangements targeted toward the establishment of a surrogacy contract with a commercial purpose are prohibited and declared as a crime.

In addition, section three of the mentioned law prohibited any commercial attempts in this domain and proclaimed it as a crime. This law was revised in 2008 and is currently enforced in England. However, this law did not forbid any agreement to hire a surrogate mother. Therefore, a surrogate mother could receive money or any other benefits if her agreement is non-commercial (12). In Iran, the use of surrogacy in both commercial and non-commercial ways is legal, and unlike the UK, it is not a crime to advertise this practice in this country.

As a result, the majority of surrogacy contracts established in this country have

become commercial, which has led to the creation of anarchy and unconventional rise of cost in the black market.

Faqihs' views on the use of surrogate mothers

Surrogacy has evolved with the advancement of medical science and infertility treatment. Hence, there is no narrative or fatwa (i.e., a ruling on a point of Islamic law given by a recognized authority) from faqihs that deal directly with this practice. Therefore, in the present age, imperative rules regarding the surrogate mother are based on the decisions and opinions of Faqihs. In this regard, many Shia jurists and faqihs have considered this method permissible without any religious prohibition. Many authorities (Marjas) believe that surrogacy can be used in the absence of the uterus or in case of inability to carry a child. For this purpose, payment to the surrogate mother is correct and permissible (13).

According to Imam Khomeini, surrogacy is permissible in its essence; however, it is imperative to avoid religiously forbidden issues, such as touch and sight. He also stated that the resultant child will belong to the wife and husband who own the sperm and egg (13). Ayatollah Ali Khamenei and Ayatollah Khoi have also permitted this act.

The majority of contemporary faqihs have declared this practice as permissible. Only a few of faqihs, including Ayatollah Fazel Lankrani, have rejected the permissibility of this practice (13). According to the literature, contemporary faqihs have issued fatwas for this practice, and the most important reason they have cited in this regard is the principle of permission. The faqihs of Imamiyyah believe that an issue is considered religiously permitted when there is no reason to ascribe it impermissible (14). According to Imam Sadeq, everything is permissible for individuals as long as it is not forbidden (14). Regarding this, surrogacy is religiously permissible since there is no reason to forbid it.

Civil liability in surrogacy contracts

The judicial procedure recognizes the fault as the basis of civil liability and considers it as the basis for liability and conviction (15). In civil liability, even an unintentional fault is

sufficient for the delegation of the responsibility and the investigation of the committed fault is subjected to

civil procedure. In civil liability, the purpose is to compensate for the specific loss, while in criminal liability, the protection of the public interest is considered (16). Liability is the legal obligation of a person in causing no damage to another person either directly or indirectly. Civil liability refers to the obligation of a person to compensate for the inflicted loss on another individual, whether the loss is caused by the action of the responsible individual or the persons affiliated to him and the objects or property he/she possesses (16).

There are two views regarding the civil liability of surrogacy. The first view is based on compulsory liability, and the other is based on the contractual obligation from which the theory of obligation to outcome and commitment to means are derived. In contractual obligation, it is sufficient to have the proof of the defendant's breach. This is the case in which the surrogate mother fails to perform her duty to carry and deliver the fetus that can be pursued by civil law (17).

In accordance with Article 221, the surrogate mother can be held responsible in case of obligation breach imposed by the contract. Therefore, this requires that two parties initially come to complete agreement to identify their total commitments. In surrogacy contracts, the obligation breaching is either in the form of complete violation of the commitments or postponing the implementation of the terms and conditions (17). In this case, the surrogate mother is required to compensate for spiritual and material damage.

Contractual liability includes two conditions as follows:

1. There should be an accurate and effective contract between the one who suffers the loss and the one who is liable for the loss which requires obliged commitments between either party or both.
2. One of the parties fails to fulfill its obligations which leads to causing damages to the other party. In case, one of these conditions is not met, the liability will be annulled in the

contract and is acknowledged based on coercive liability (16).

Inaccurate surrogacy contracts, if the surrogate mother breaches her obligations, she will be liable to the genetic parents and has to pay the entire compensation. In this case, the compensation will be paid either by reducing the amount of the paycheck to the surrogate mother or using the guarantee deposit received from her (17).

#### Legal and Ethical Issues in Surrogacy Contracts

A contract is a legal practice that requires at least two parties. These two parties are intertwined within the boundaries of the public order and great ethics leading to the development of agreements with common intentions. Regarding current civil law, individuals draw up contracts to regulate their private relationships based on their needs in different domains. Accordingly, they develop case laws, different rules and regulations on contract negotiations, and conclude an agreement or treaty. (18).

The contract conditions determine the parties' obligations based on its specific nature upon the mutual agreement of the parties (19).

Surrogacy contracts follow general contractual terms and conditions. Since these contracts consider human rights, they should not be against human treaties and agreements. Surrogacy is a legal solution to infertility, and the lack of awareness about the laws and regulations results in legal and ethical conflicts among the applicants of this method. Therefore, it is of utmost importance to develop written contracts to reduce the discrepancies and decrease the worries during infertility treatment (20).

On the other hand, one of the main reasons for an increase in the conflicts between the parties can be a lack of commitment to the contractual conditions by either party (i.e., surrogate mother and adoptive parents). The adherence to complete and explicit agreement between the surrogate mother and the genetic parents under civil law determines the civil liability of the surrogate mother and parents to

each other. In case of loss, the party who suffers loss will be able to claim damages.

The intended parents have different obligations regarding the type of surrogacy contract. In friendly agreements, the parents are only obliged to pay for food and medical expenses. On the other hand, in commercial treaties, the parental obligation includes paying the agreed amount to the surrogate mother.

There is no definite and consistent terms and conditions for paying a surrogate mother. It is worth mentioning that no prohibition exists in this regard. However, it seems unfair to not include any payment (even if there are no conditions for payment) for such mothers who suffer all discomforts. The legal aspect of surrogacy in Iran has attracted the attention of a greater number of applicants in need of infertility treatment (21).

The absence of statutory law in the field of surrogacy and the ineffectiveness of general laws in addressing these issues have generated a great variety of challenges and problems in the field of infertility treatment in the health care system (21). The term "mother" is not defined legally in Iranian civil law due to its obvious meaning. In this regard, "mother" is the one who gives birth to a baby and this creates many problems for genetic mothers who have been motivated to have their own child using this infertility treatment.

According to the laws, the physician is obliged to issue a birth certificate in the name of the person who gives birth to a baby. If the birth certificate is issued in the name of the genetic mother, the physician is subjected to criminal liability and subsequent legal punishment (21).

This problem is due to the absence of any laws on how to issue a birth certificate in case of surrogacy. Although the use of surrogate mothers is considered legal, it is illegal in practice. Moreover, it poses legal and ethical challenges since it led the adoptive parents to deviate from the law to have a baby. However, a birth certificate can be issued by the name of the adoptive mother using letters from the physician or the authorities in the infertility center and getting the required permission of the court. On the other hand, in the Iranian

context, it is extremely difficult and takes months to follow the set legal procedures which require the presence of the surrogate mother in the court and the proof of kinship. Another issue regarding surrogacy in Iran is the lack of volunteers to be surrogates. This led to the presence of commercial surrogates which resulted in the emergence of brokers, increased rates of surrogacy, and the creation of a black market. Therefore, there would be no altruism and altruistic acts to help the ones during infertility treatment which is not consistent with the ethical issues of an Islamic society. Another challenging issue that increases the risk of pregnancy for the mother and fetus is the utilization of surrogates who are over 35 years of age since advanced maternal age causes medical disorders and untreatable malformations (22). Furthermore, the findings of several studies showed that surrogates of advanced age increased the risk of cesarean section, hypertension, gestational diabetes, and perinatal complications in females who got pregnant using Assisted reproductive technology (23).

Among the other complications of surrogates of advanced age, one can name the potential risk of cancer which is not morally acceptable. Moreover, the possibility of multiple pregnancies has increased due to raising the success rates of infertility treatments and inserting several fertilized eggs (embryos) directly into the uterus to increase the chance of fertility. This is an important factor in raising the risks of pregnancy that is not yet regulated in the law (24). Alimony and pregnancy expenses are among the other issues that should be addressed in this regard though the intended parents are responsible for paying these expenses. This issue has also caused many problems, including extortion. Therefore, it is necessary to draw on contracts between the parties under legal protection to prevent the emergence of discrepancies in this regard.

## Discussion

The prevalence rate of infertility is about 15% in Iran. Surrogate motherhood has not been prohibited by Iranian law. Under the



contract, the surrogate mother agrees to become pregnant and keep the fertilized egg of the adoptive parent in her uterus for a specified period of time and give up the baby after birth. The involvement of the third party (i.e., surrogate mother) in the infertility treatment process is considered an important factor in the creation of legal and ethical issues. The challenges associated with the lack of a clearly established surrogacy law include the failure to register the genetic mother as a legal parent, the emergence of brokers, the creation of commercial markets for surrogacy, lack of volunteers, high demands for surrogacy, use of females over 35 years of age, increased risk of pregnancy and damage to the surrogate mother and fetus, the way to pay alimony during pregnancy, and abortion.

Considering the legal custody of the kinship parent, the faqihs regard adoptive parents as legal for the child's parenting and consider the surrogate mother as a "wet nurse". However, in practice, the term "mother" has no definition in Iranian civil law and its meaning is derived from Persian dictionaries so that the legal mother is the one who gives birth to a child.

Therefore, it is very important to register the genetic mother as a legal parent which necessitates the proof of kinship at the court and takes the adoptive parents a long time to prove it. Accordingly, this issue should be evaluated morally and legally. On the other hand, the factors which worsen the situation during infertility treatment using surrogacy include the differences in judicial procedures due to the lack of adopted laws in this regard, the implementation of different treatments in infertility centers in accordance with their domestic law, cultural and social differences across Iran and the world, lack of a standard contract for surrogacy in infertility centers, and the use of notarized documents instead of contracts between the adoptive parents and the surrogate mother. The advances in modern sciences and technology have led to the adoption of new laws and regulations; however, the lack of balance between the needs of the modern communities and the laws results in increased disparities and discrepancies among individuals.

With this background in mind, the surrogacy treatment requires comprehensive and specialized counseling services. Additionally, the medical centers are responsible for providing the infertile couples and egg donors with medical and psychological examination before treatment and raising their awareness about

legal and religious issues to prevent the upcoming legal, religious dilemmas/discrepancies. Consequently, the determination of the contract type between the intended parents and the surrogate mother plays an important role in addressing both parties' concerns and preventing possible litigations. Finally, it is inevitable to gain a complete understanding of the term and conditions in surrogacy contracts in order to improve infertility treatment procedures.

## Conclusion

It is essential to adopt unified laws for infertility treatment. Moreover, the existence of the laws passed by parliament annuls the civil liability of the parties in surrogacy contracts. The defects in existing laws have led to different and sometimes conflicting judgments. Therefore, making the families aware of the complete treatment procedure along with written agreements before treatment can be helpful in resolving worries and anxieties during treatment. In addition, it is beneficial in settling the disagreements between parties and removing any uncertainties in contract execution. Therefore, the introduction of new laws could pave the way for the emergence of new phases in infertility treatment and the health care system. The legal rules can prevent the violation of the law and make the proof of liability easier in case of breaching.

## Conflict of interest

The authors declare no conflict of interest.

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