

Legal Issues of A Surrogacy Contract Based on Iranian Acts Continuation

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Abstract

Assistive technologies have always opened new horizons in human's life, posed solutions to problems and brought relief and prosperity for human beings. Iranian judicial authorities have recently recognized the importance of medical technologies. Accordingly, Iranian legal system has recognized surrogacy and a surrogacy contract seems unavoidable for surrogacy to be legally valid, socially acceptable and religiously legitimate. As a legal defense of including a typical surrogacy contract in contract law, this review studies the four building blocks of a valid contract: the intention and consent of parties, their legal capacity, the subject of the contract and its legitimacy. Discussing related Iranian Acts concerning contracts and responsibilities of parties, the authors of the present article deal with main commitments and responsibilities of the parties to a typical surrogacy contract: infertile couples, surrogate, fertility clinic or medical institute, and surrogate's husband. The authors conclude that a surrogacy contract is accepted based on article 10 of Iranian Civil Act 1928, pose some suggestions to be included in such a contract, and emphasize that a specific Act concerning surrogacy should be approved to cover rights and legal needs of all parties to a surrogacy contract.

Keywords: Iranian Acts, surrogacy contract, Infertility, Parties to a contract, Responsibilities and commitments

Introduction

As the month of April drew to a close, I realized that the old feelings of grief, self-hatred, and worthlessness, which I had experienced when I let the Sterns take the baby home the first time, had returned. There were days when my chest ached as if my heart had ruptured inside me (1).

In 1985, the tragic story of Baby M turned apparently into a Solomonic tale of love and greed that centered on the tiny child, born to one mother yet claimed under law by another. When Bill and Betsy Stern learned that Betsy was suffering from multiple sclerosis, they decided not to risk the dangers of

childbearing. The Sterns contracted with a surrogate, a 26 year-old woman named Mary Beth Whitehead, and agreed to pay her \$10,000 in exchange for the conception and birth of 'their' child, the genetic offspring (via artificial insemination) of Bill Stern and Mrs. Whitehead. Four days after the baby was born, though, Mary Beth argued that, "I signed on an egg. I didn't sign on a baby girl." Is the 'real' mother in the above case the woman who physically bore the child or the one who paid for the conception? Finally, Bill Stern won the case. As her above quotation shows, Mrs. Whitehead experienced extreme emotional distress after losing Melissa in the custody dispute between herself and the Sterns. While looked 'pale and shaken' in the New Jersey Family Court, she complained in a 'trembling voice', "People treat it like we are fighting over a car, but she's not a possession, she's a part of me" (2). It is just one side

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of a story called surrogacy; detrimental psychological effects on the surrogate, who would have to give up a child she carried for nine months. Yet in a medical case, on January 26, 2009, a woman gave birth to octuplets: six boys and two girls (3). Many argued that the lack of oversight of the fertility industry led to the implantation of eight embryos in an unemployed woman who could not support her own children (4). The octuplets controversy highlighted the need to regulate certain aspects of the practice of Artificial Reproductive Technology (ART).

The term 'surrogate' or 'surrogate mother' is usually applied to a woman who carries and delivers a child on behalf of another couple (5, 6). The couples who are intending to parent a child resulting from a surrogate pregnancy are referred to as the 'commissioning or intended parents'. In vitro fertilization (IVF), which involves the fertilization of an egg with sperm in the laboratory, is now widely applied (7, 8, 9). It is important to distinguish between two types of surrogacy: traditional and gestational surrogacy. Also called 'straight', 'natural' or 'partial', traditional surrogacy uses the egg of the surrogate mother and the sperm of the commissioning father (10). In a traditional surrogacy arrangement, "a married or single woman would be injected with the sperm of a married man who was not her husband, and she would bear a child for the couple" (11). In contrast, 'gestational' surrogacy, also called 'full' or 'host' surrogacy "involves using a woman who agrees to carry a child for intended parents (who may or may not also be the genetic parent or parents), conceived by the gametes of others, with a result that she gives birth to a child with whom she has no genetic connection." (11). Traditional and gestational surrogacy is either commercial, where the surrogate is compensated by the commissioning parents (this is illegal in most countries); or altruistic, where the surrogate chooses to carry the child for reasons other than financial gain (10). For women with no eggs due to surgery, chemotherapy, or genetic causes, and for women with poor egg quality, IVF with oocyte donation is an option for achieving pregnancy (12).

Beginning in the late 1970s, the advent and swift reproductive technology accelerated the transformation of the family by undermining sacred assumptions about the productive process. Moreover, reproductive technology has placed egg or sperm donors, surrogates, and lawyers at the center of the reproductive process. Inevitably, legal disputes have developed about the parameters of parenthood and the

rights and duties of all participants in the reproductive process. Nowadays, Iranian legal and judicial authorities have been compelled to respond to disputes demanding concrete solutions to these novel arrangements. Affected with religious, social, ethical and legal concerns, Iranian society has no way to face medical developments which have made something impossible of the past, quite possible. Iranian legal system, which follows Islamic jurisprudence (1), in its turn, not only has no way to recognize a surrogacy contract but also to cover the rights and needs of all parties to such a contract.

The authors of this article try to study a surrogacy contract with Islamic, legal and medical concerns. In addition, the present study covers rights and duties of participants whether natural persons (i.e., individuals) or a legal person (i.e., a medical institute) in a typical surrogacy contract. All the above issues have made the present study quite unique as it tries to cover as much as medico-legal concerns which obsess Iranian legal and medical societies concerning surrogacy. On first impression, it seems obvious that contract law is inappropriately applied in a context involving the creation and nurturing of human beings. It may be argued that contract law is concerned with the exchange of goods and services and not with something as sacred as the institution of family. Yet, the claim that contracts are foreign to the family context is false. For example, marriage is a type of contract (13). Marriage "is in law an essentially contractual relationship, the parties with respect both to each other and to any children born to them" (13). Certainly, marriage should not be treated as if it were simply a contractual relationship in which services are exchanged. As such, although a surrogacy contract involves a kind of service, it should not be treated as if the purpose were to give other services. In the present article, the authors also deal with legal issues of a surrogacy contract in Iranian legal system, terms and conditions which should be agreed on, responsibilities of the parties, and legal effects a typical surrogacy contract may have on the rights of the parties to a surrogacy contract. The authors also agree with Bahatia et al. (10) that all healthcare providers, including obstetricians, general practitioners, midwives and pediatricians, need to be aware of the law surrounding surrogacy.

A) Why a surrogacy contract?

Conflicting legal pronouncements regarding the legal issues surrounding the procedure inhibited adoption

of the technology for many years (14). Naomi Cahn's book, *Test Tube Families*, (15) reveals that the regulatory void in the area of reproductive technology is a much broader phenomenon encompassing practically all aspects of the practice of ART. The medical profession filled this regulatory void with its own norms. For example, physicians, fertility clinics, and sperm banks have diverse policies regarding recipient access and the number of embryos transferred (16). Nevertheless, Cahn's book demonstrates that the industry's self-regulation failed and further articulates a complex network of laws needed to regulate the practices of ART (15). As gestational surrogacy becomes more commonplace, it is essential for reproductive endocrinologists to understand legal issues pertaining to its arrangements (17).

James et al (17) reported several lawsuits surrounding gestational contracts which have named the physician and their IVF facility as parties for failure to provide psychological screening, failure to screen for infectious diseases and participation in gestational agreements that are not compliant with state laws; gestational carriers who seek compensation from the reproductive endocrinologist for uncovered medical bills, lost wages and disability; family members of a gestational carrier who filed a wrongful death claim when the gestational carrier died as a result of pregnancy. They also maintained if a gestational carrier decides to seek custody of the child following embryo transfer, reproductive endocrinologists participating in gestational agreements that are not in compliance with state laws may be named as a party in an emotionally charged child custody dispute.

In order to maintain consistency in gestational surrogacy law, it is important to follow basic contract principles (18). A standard surrogacy arrangement involves a contract for the surrogate to be artificially inseminated, carry a fetus to term, and relinquish her parental rights over the child once born (19). Accordingly, a surrogacy contract can be defined as a private contract based on which a woman (single or married), as a surrogate, agrees to become pregnant by implementing a gamete of a couple in her womb, carry the fetus to term, give birth to the baby, and relinquish the baby to his/her intended parents. In Iranian society, a woman becomes pregnant when she is married. Hence, pregnancy without marriage is an exception to a rule. Religious beliefs, cultural and customary stereotypes and some prejudices are so integrated that pregnancy without marriage is rarely

observed. Moreover, law and religion in Iran are joined together and can not be separated (20).

As Omani Samani et al. (20) argue, there is often a social stigma attached to infertility. This is the reason that we need to examine unorthodox solutions like surrogacy in detail. Rather, we have to consider the various complex arguments around such arrangements and analyze potential welfare effects, to suggest what could be done to make people reap the benefits of medical technology. In such a situation a surrogacy contract will remove ambiguities and negative views to a pregnant single woman or to a woman who carries a fetus which is not her own. Followings are main reasons to conclude a surrogacy contract: (a) according to Islamic law, 'principle of bed' (al-valad Lelferash or qa'edah al-ferash) should be established. According to the above principle, a child is attributed to the man who has slept with the child's mother. In the absence of a surrogacy contract, the new-born child will be legally attributed to a surrogate's husband; (b) suspicion of adultery will be removed. In a typical Iranian culture, pregnancy usually happens after marriage. Otherwise, individuals may suspect that the pregnant single woman commits adultery. Hence, a surrogacy contract is a justified and legitimate reason to remove all possible suspicions; (c) child's intended parents will be specified without any controversies; (d) both parties to the contract will agree on commitments, responsibilities and other terms and conditions.

B) Legal nature of a surrogacy contract

A number of developing countries in Asia are struggling to regulate the rapidly growing assisted reproduction market within their jurisdictions (21). Because of the very personal and sensitive nature of surrogacy arrangements, it is extremely important, if not absolutely necessary, for the legislature and judiciary to consider all the potential public policy implications in making decisions about its legality (18). In Iranian legal system a surrogacy contract can be accepted in the framework of article 10 of Iranian Civil Act 1928 which holds: "Private contracts will be effective to those who conclude them if they are not in contrast with the law." Iranian legislator mentioned the term 'private contracts' to include every kind of contracts which individuals intend to conclude. This article contains two features: first, the validity of private contracts provided that they are not against the law. Hence, if one party wants to evade his/her commitments the court will oblige that person

to fulfill the legally demanded responsibilities and commitments. Even if the delay to fulfill the commitments inflicts some harm on one party, the court will again oblige the other party to redress the harm. Second, this article is applicable to all kinds of private contracts with their related terms and conditions. Accordingly, parties to a surrogacy contract have some responsibilities and commitments to fulfill and some legal sanctions are considered for offenders who breach the terms and conditions. Accordingly, contractors are obliged to fulfill confirmed commitments upon which they agreed knowingly and intentionally. Freedom of contract is inextricably linked to the right of privacy. This ability of individuals to arrange their affairs involves both the privacy of determining what relationships to create and legal recognition of those relationships (22).

Child adoption is legal based on Iranian Child Adoption Act 1975 (20). Logically, if regulation of adoption is constitutionally permissible to safeguard the interests of the adoptive child, her biological parents, and would-be adoptive parents, so is regulation of reproductive technology aimed at protecting the various actors involved and any children that might be borne (23). Article 960 of Iranian Civil Act 1928 holds: "No person can remove his/her freedom and/or disregard it to the extent that it breaches laws and/or public good." As this article maintains, an individual can remove or limit his/her freedom provided that he/she does not breach laws or public good. The above article refers to general and basic freedom such as right to freedom and right to life but it implies that every human can limit some of his/her subordinate personal rights to gain some benefits or for humanitarian aims.

We may compare surrogacy to organ transplantation. According to article 59 (clause II) of Islamic Penal Act 1991, organ transplantation can be legally achieved with the donor's consent, preserving technical standards and governmental disciplinary and formalities. Also, a surrogacy contract has no conflict with public order and fair virtues, neither is it in conflict with a surrogate's physical integrity and human rights. Furthermore, a surrogate is going to sign up a surrogacy contract willfully and knowingly as informed consent is a fundamentally legal criterion for an enforceable contract. The right to make reproductive choices and the right to contract freely both stem from the dearly-held constitutional rights of privacy and personal autonomy (22). One possible reaction to the development of reproductive

technologies is that they represent new choices and give women greater control over their bodies (24).

C) Legal status of a surrogacy contract

Surrogacy is a difficult topic for discussion, because it has so many—thical, religious, psychological, social and legal—dimensions (25). Because the controlling party has the power to control the flow of information and the presentation of options, courts and legal scholars worry that commissioning parents and their agents might attempt to mislead or unduly influence a potential surrogate (26). Article 190 of Iranian Civil Act 1928 stipulates four basic provisions for every deal [and contract] to be valid; "the intention and consent of the parties, their legal capacity, the subject of the deal and its legitimacy." Ignoring such legal issues in surrogacy contracts will deem them void and therefore unenforceable. As a result, unenforceable surrogacy contracts might be harmful to the unborn child, might increase the likelihood of exploitation of needy surrogates, and incite the intended parents not to pay a surrogate as much as she deserves for her optimal care.

1) Intention and consent

Intention and consent are two main necessary elements for a contract to be valid. In Iranian legal system any document signed up without informed consent is not legally effective. Intention should also be based on actual and voluntary consent to be effective. Accordingly, legal effect is not attributed to any consent obtained by force or duress. In a surrogacy contract, intention of parties will be declared through an infertile couple's offer and surrogate's acceptance. Surrogate should sign two letters of satisfaction; one for using medicine and another for surgery operation. According to a study (27) surrogate and intended parents should be encouraged to obtain separate legal counsel to protect their individual interests and they should also understand the emotional, psychological, and legal risks of the arrangement.

It is suggested that an infertile couple sign up their letters of satisfaction separately; that is, every one of them signs his/her letter of satisfaction. It is possible that one of the infertile couple signs up the contract on behalf of the other and medical institute can do it on behalf of both of them but in the latter case, if any misconduct is committed, the institute will be responsible for that. If a surrogate is married, her husband's consent is also necessary because without

that a surrogate contract is not legally effective.

2) Legal capacity

Article 956 of Iranian Civil Act 1928 holds: “legal capacity starts when an individual is born and ends when he/she dies”. Also, article 958 of the same Act maintains: “every individual enjoys civil rights but no one can enforce his/her own rights without legal capacity”. It seems that Iranian legislator considers surrogacy to be the last resort for infertile couple without which they have to get divorce or face intolerable difficulties. Also according to article 211 of Iranian Civil Act 1928 “each of the parties to a contract should be mature and sane to be considered legally capacitate.”

A collection of medico-legal conditions make individuals capacitate and competent to enter into a surrogacy contract. Some of these conditions are as follows: (a) infertility of the intended mother or existing risks which threaten her life and/or that of her child such as genetic or untreatable diseases; (b) receiving a license from a family court. Such a license is also necessary for donated embryos based on article 2 of the Act of How to Donate an Embryo to Infertile Couples 2004; (c) no harm should threaten a surrogate, her children and the fetus she intends to carry based on the rule “no harm, no harassment” in Islamic law. As Sachedina (28) maintains, the above rule “is regarded as one of the most fundamental rules for deducing rulings [2] dealing with social ethics in Islam”. Furthermore, he reported from Shahid al-Awwal that “no harm, no harassment” is among the five major rules that shaped the new rulings in the area of interpersonal relations. Of the five rules, the fourth one holds: “Harm must be rejected”; (d) surrogate’s good health should be certified to fulfill her commitment and she should neither be addicted nor infected with lethal diseases. Based on a study (29), a prospective surrogate must be seronegative for HIV, hepatitis B and C viruses. It is the same for infertile couple according to article 2 of the Act of How to Donate an Embryo to Infertile Couple (2004); (e) it would be better if the surrogate is married due to Iranian culture, social norms and prejudices. Banerjee and Basu (25) suggest that a surrogate should have already had children of her own, preferably of both genders, so she knows how childbirth feels and does not bond with a baby of any sex; (f) If a surrogate carries a fetus based on altruistic motivations and doesn’t intend to be compensated, it is suggested to

stipulate it in the contract.

3) The subject of a surrogacy contract

Article 216 of Iranian Civil Act 1928 holds: “the subject of a contract should not be ambiguous unless in special cases about which general knowledge is enough”. Also, based on articles 215 and 348 of the same Act, legitimacy and possibility of the subject and its legitimate benefit are necessary for the validity of the contract. Moreover, article 214 of Iranian Civil Act 1928 maintains: “the subject of the contract should be a property or a work which each of the contractors commits to fulfill.” Any commitment mentioned in a surrogacy contract should be possible for the parties to conduct whether it is the transfer of money or property or achievement of something. Impossible commitments deem the contract legally invalid.

Based on article 215 of Iranian Civil Act 1928, the subject of the contract should be legitimate. Legitimacy is attributed to any action or benefit that is not forbidden by law. If the subject of a contract is illegitimate, the contract will be nullified. Legitimacy has a broader meaning than legality. It covers both what Iranian statutes forbid and what is also forbidden by Islamic jurisprudence. Moreover, article 975 of Iranian Civil Act 1928 holds: “A court can not enforce foreign Acts and/or private contracts which are against moral sense and/or are considered against public order due to inflicting harm on the feelings of society or to any other reasons even if such Acts [and contracts] are legally enforceable.” Hence, this article forbids Iranian courts to enforce the contracts which are against public good and public order.

D) Commitments and responsibilities

Cahn’s proposal (15) advocates the idea that jurisdictions should adopt a comprehensive regulatory regime which regulates both the practice of ART and the relationships between the parties using ART. No doubt, relationships between the parties in a surrogacy process can not be determined in the absence of a surrogacy contract. The parties to a surrogacy contract are generally the surrogate mother and the intended father, who is most often also the genetic father (22). Nevertheless, because several parties may be involved in a surrogacy arrangement, all will need to be included in any rules that apply. James et al. (17) argue that with appropriate groundwork, participation in gestational contracts can be a rewarding experience for all parties involved.

Article 1 of Iranian Civil Act 1928 holds:

Everybody inflicts harm illegally, intentionally or negligently on an individual's life or health or freedom or honor or commercial reputation or on other rights, which law considered for an individual, so that the harm inflicts financial or spiritual loss on others, the offender is responsible to redress the harm inflicted as a result of his/her conduct.

Responsibility is arisen from a surrogacy contract provided two following conditions: (a) a legally valid contract is concluded between parties. Legality depends on some elements including intention; consent and legal capacity; (b) the harm is inflicted on one party due to refusing or failure to fulfill the other party's commitment. Although according to article 231 of Iranian Civil Act 1928, "contracts are effective only for contractors or their legal guardians," the nature of a surrogacy contract necessitates legal authorities consider rights of third parties including those who are living with the surrogate. Followings are main commitments and responsibilities of the parties to a surrogacy contract.

1) Infertile couples

Depending on the content of a surrogacy contract, infertile couples are usually committed to pay a due sum of money to the surrogate. Based on article 1168 of Iranian Civil Act 1928, "keeping children is both a right and a duty of parents." Hence, parents are responsible for children's guardianship before they are born. Parents cannot evade such a legal responsibility through embryo donation or based on a surrogacy contract before or after the fetus is born. Accordingly, the intended father is responsible for paying all expenses of carrying and keeping the fetus including expenses of medical care, medication, feeding surrogate and the fetus. He also should pay for all formalities to be completed whether in hospitals or in courts including related licenses which are necessary in the treatment process. A study (17) goes further and suggests that intended parents should be required to provide for the medical expenses, disability insurance and life insurance for the gestational carrier. Parents should also receive the new-born baby in due time. According to the Executive Guideline of the Act of How to Donate an Embryo to Infertile Couples 2004 (clause I), parents should declare their religion to the fertility clinic or institute. Also, parents have no right to choose a non-Muslim surrogate to carry their fetus because

according to Islamic law, a non-Muslim has no guardianship to a Muslim (30). Furthermore, a new-born baby may choose the religion of his/her surrogate mother later on or even other religions may be imposed to Muslim children in this way.

2) Surrogate

A surrogate has a right to require the due sum of money. She is committed to carry the fetus to the term. She is also responsible for any hurt inflicted on the fetus if she does not fulfill her responsibilities and commitments intentionally or negligently. A surrogate should consider the physician's medical advice including medication, food and any other conduct which is harmful for the fetus. She also commits to relinquish the new-born baby to intended parents after the baby is born. Once the surrogate is pregnant, the health of the child will depend on her behavior and particularly whether she smokes, drinks or takes other drugs. The commissioning parents will wish the surrogate to desist from these activities (31).

The prospective surrogate must declare that she will not use drugs intravenously, undergo blood transfusion excepting of blood obtained through a certified blood bank, and avoid sexual intercourse during the pregnancy (29). A potential surrogate must also be in good overall mental and physical health and have no known significant medical or social factors, such as obesity, heavy drinking or smoking (10).

3) Fertility clinic or medical institute

The role of fertility clinics and support groups is very important. In particular, they can motivate women to become surrogates and childless couples to think of surrogacy as an alternative (25). Prior to embryo transfer, all parties to a gestational agreement should undergo psychological screening. Factors investigated should include personal and family psychiatric history, legal history, interpersonal relationships, life stressors, coping skills and motivation for participation in a surrogacy arrangement, among others (32). In Iranian legal system based on articles 6 (clause III) and 7 of the Executive Guideline for the Act of How to Donate an Embryo to Infertile Couples 2005, the medical institute is responsible for diagnosing or approving the surrogate's physical and psychological health and issuing a certificate indicating this and also a certificate confirming couple's infertility. Also, article 6 (clause IV) of the above Executive Guideline maintains that a medical institute is responsible for

receiving, preserving and transforming donated embryos based on classified data. And according to article 6 (clause I) of the above Guideline received embryos from Muslims and Non-Muslims should also be preserved separately. Moreover, article 6 (clause II) of the same Guideline considered receiving and preserving a decree issued from a judicial authority as another responsibility of a medical institute.

Informing both parties to a surrogacy contract about medical performances so that they sign up the contract knowingly and intentionally is another responsibility of a medical institute. Based on a study (25), by counseling before and after the signing up a surrogacy contract, a surrogate's commitment to a relationship is raised. A medical institute is also responsible for observing all medical principles and taking medical unreasonable risks. For example, before accepting a woman as a possible surrogate for a particular intended couple's child, the ART clinic must ensure that the woman satisfies all the testable criteria to go through a successful full-term pregnancy (32). Physicians—whether as an individual or as a medical team—have legal responsibilities when they are involving in a medical treatment process. Article 319 of Islamic Penal Act 1991 holds:

When a physician – even an expert and experienced physician – causes a patient's death or amputation or inflicts financial loss on a patient in a medical treatment process, whether personally or through his/her advice, the physician or physicians are responsible even if they receive the patient's permission or that of his/her guardian.

According to above article, every physician who deals with treating a patient has a responsibility for the harm they inflict on the patient. The only solution in Iranian legal system is to receive physician's acquittal of responsibility. Acquittal is to discharge a specific person's obligation, whether they had not been charged or was charged at first and then, discharged from obligation (33). Article 60 of Islamic Penal Act 1991 holds:

If the physician receives acquittal from the patient or their legal guardian before beginning to perform medical treatment or surgical operation, they will not be liable for the damage to life, property or amputation and they're not liable either in emergency cases where it isn't possible

to receive permission.

Accordingly, if professionals who deal with medical duties begin the treatment process and achieve it without any failure and negligence while they had received the acquittal, they will not be liable for the possible threats and damages. Nevertheless, physician's acquittal neither removes the constituent elements of the crime nor paves the way for the offender to flee from punishment. In the above article, the word 'consequences' refers to the damages inflicted due to medical mistakes and failures and there should be a causative relation between the conduct committed and the principal [3]. To be more specific, article 59 (clause II) of Islamic Penal Act 1991 states:

Every medical or surgical legitimate operation which is achieved based on the person's consent or that of their guardian and observing scientific and technical standards and government obligations is not considered as a crime.

Hence, the basic requirement of acquitting a physician of their criminal liabilities is bound and limited to the following terms and conditions: (a) the legitimacy of medical or surgical operation; (b) observing scientific and technical standards and governmental obligation; (c) the patient's consent (33). Fertility clinic has a right to demand a sum of money based on the tariff issued by the Iranian Ministry of Health and Medical Education.

4) Surrogate's husband

A surrogate is not necessarily a girl or a widow. If she is married, her husband has some rights and responsibilities the law considered. Article 1117 of Iranian Civil Act 1928 states: "A husband can prevent his wife from doing a profession or work which is against the familial interest or honor or against that of his wife." Enacting the above article, Iranian legislator's purpose was to prevent a wife from occupying a job or profession which either prevents her from fulfilling her commitments or causes any problem in the family. Article 1103 of Iranian Civil Act 1928 holds: "A husband and a wife are obliged to preserve sociability in respect of each other." Also, article 1104 of the same Act maintains: "Couples should help each other in fortifying principles of training children and fundamentals of the family." Moreover, article 1105 of Iranian Civil Act 1928 states: "Regarding the relationship of couples, a husband's characteristic is to be in charge of the family."

As above articles show, Iranian legislator considered some legal responsibilities and commitments for the couples in relation to each other in one hand, and determined the husband as the chief of the family on the other. Hence, a husband can not be ignored when a surrogacy contract is going to be concluded because a surrogate, if married, has always some legal responsibilities and commitments to her husband which she should fulfill. It can be concluded that every occupation, although being legitimate, if prevents a wife from managing her duties or training her children, is illegal in Iranian legal system. It seems that Iranian legislator intended to prevent every family in Iranian society from entangling in consequences which are likely to demolish familial relationship and result in divorce. Regarding all these, if a husband's consent is received, there will be no legal problem to conclude a surrogacy contract.

Iranian legislator also considered a husband responsible to pay expenses of everyday life called 'maintenance'. Nevertheless, the legislator in article 1108 of Iranian Civil Act 1928 holds: "When a wife refuses to fulfill her commitments to her husband without a legitimate hindrance, she does not deserve to receive maintenance." Undoubtedly, when pregnant, a surrogate can not fulfill her maintenance due to some unavoidable result of pregnancy. In addition, during pregnancy a husband is usually deprived of sexual relation for at least a period of time. Simultaneously a pregnant surrogate needs physical and psychological medical cares. This situation exposes some financial burden on the family in one hand and causes disorders in the family and results in losing the husband's peace and tranquility on the other. All of these factors pave the way to breach husband's rights and this will result in denying a surrogate's maintenance based on the above article. Also, a surrogate's husband is supposed to refuse to have a sexual intercourse with her at least, during a period of time. In sum, he is committed to cooperate with the surrogate and to avoid any conduct which is harmful to the fetus otherwise he is legally responsible for any harm inflicted on the surrogate and the fetus.

Discussion

Reproductive endocrinologists need to be cautious when participating in gestational contracts prepared by attorneys representing the intended parents, the gestational carrier or the surrogacy agency because these contracts may not adequately protect the

physician or their IVF facility (17). Facilitation of an illegal contract can potentially lead to both criminal and civil liabilities. The development of reproductive choices plays an important role in women's rights. Women now have the right to access contraceptives, the right to use artificial insemination and the right to control the progress of pregnancy (34). Like other societies, Iranian society has no way but to accept novel solutions brought out by science and technology. Islamic jurisprudence which constitutes the base of Islamic law and Iranian Acts is dynamic and has always been in line with human relief and prosperity. Accordingly, Muslim jurists, although have accepted assistive technologies to treat infertility in general. Many religious decrees have been issued concerning assisted reproductive techniques in Iran. Based on these decrees, the basic idea of using such techniques to treat infertility has been accepted, yet controversies are arisen over the use of methods such as employing third parties (20).

As Baykal et al. (35) reported, every country differs in terms of which ART procedures are permitted based on the sociocultural milieu, religious beliefs, and moral and ethical values of the community. In its turn, Iranian legal system not only has no opposition to new medical treatments but also enacted articles and provisions in the Acts to cover the needs of Iranian society. Among other things, Iranian legislator has paid special attention to familial relationships, commitments and responsibilities of the couples to preserve and to fortify family as a building block of Iranian society. Moreover, the legislator has not ignored social and humanitarian needs in the society.

It seems that a surrogacy contract is needed to specify the responsibilities and commitments of all parties in a surrogacy treatment process. Concerning legal problems, misunderstandings, breaching rights, redressing harms, fulfilling responsibilities and commitments of each party in such a medical treatment, a surrogacy contract seems unavoidable. This kind of contract is included and studied mainly in Iranian Civil Act 1928. In a typical surrogacy contract, the rights of all parties should be considered even those who are living with the surrogate and to whom she has some commitments and responsibilities to fulfill.

In Iranian legal system only one Act and one Executive Guideline of this Act have been approved to deal with surrogacy. Even such scarce legislation does not deal with surrogacy directly. A special Act on surrogacy is required and is suggested to approve

in order to cover all legal issues of surrogacy and terms and condition to fulfill the following legal gaps: (1) considering severe criminal sanctions and sentences for the offenders who intend to abuse the needs of people and gain financial benefits illegally and simultaneously for each of the parties to the surrogacy contract who intends to breach the rights of the other party; (2) determining a tariff based on custom and according to a woman's rights in Islamic law to pay to the surrogates; (3) make it an obligation to receive the consent of a surrogate's husband; (4) determining a mean average of age concerning medical and legal issues with consulting medical experts and lawyers for a person to be a surrogate. A study (36) suggests that the quality of eggs of women in their early thirties is inferior to that of eggs of women in their twenties. Consequently, facilities recruiting egg donors can not alter their recruitment policy to recruit older women as egg donors. Also, it is suggested that no woman may act as a surrogate more than three times in her lifetime and a surrogate should not be over 45 years of age (37); (5) public order in a typical Iranian society and culture necessitate that a surrogate be either a married woman or a widow; (6) It is suggested that some cultural programs are designed and put on air so that all Iranians become more familiar with such necessary subjects which seem to be a taboo rather than solutions to pressing needs of some citizens; (7) some researches need to be done and some solutions need to be proposed so that some obscure parts of the subject become clear and the process of decision making becomes easier.

It seems a pressing need of Iranian infertile couples to take advantage of new assisted technologies to prevent shattering their family, an issue which arisen to some extent from infertility, and simultaneously help them to feel psychologically secure in a conservative society with some social, cultural and religious prejudices. As Omani Samani et al. (20) maintain, problems concerning surrogacy are more severe in the religious societies like Iran. It is also proposed that experts of Islamic studies achieve some studies to propose new solutions with strong religious viewpoints and reach a consensus on issues of surrogacy. Hopefully, this article will be a small step to reach big academic and scientific aspirations in Iranian medical and legal societies and help to solve medico-legal problems in surrogacy, at least to some extent.

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Endnotes

1. Islamic jurisprudence is the main core of Islamic law. It includes the teachings of the holy Qur'an and Tradition (Sunna). Narrations and reports which are quoted from prophet Mohammad (P.B.U.H) are called Tradition. The authors of this article followed Sachedina (28) and used the word "Tradition" (with a capital "T") for the Sunna.
2. The rulings (fatawa; plural of fatwa) deduced by Muslim jurists from revelatory sources which include the Qur'an and Tradition.
3. Principal is the actor or the person who directly commits a criminal act.

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