

The reality of surrogacy in Algerian law

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Abstract

Technological advancement has played a significant role in changing the concept of reproduction. It is no longer limited to the husband and wife; rather, it has transformed from a legitimate bilateral relationship between spouses to a tripartite relationship involving the husband, the wife, or both, along with one or two other individuals. Surrogacy involves entering into a contract whereby the child is delivered after birth, and the woman who rents her womb or donates her egg receives compensation for carrying out the pregnancy on behalf of others. In recent times, surrogacy contracts have become a profession adopted by some women to earn money while fulfilling the dream of many couples who have been deprived of parenthood for several years, regardless of the legitimacy of this process and its associated consequences, including neglecting the issue of parentage.

Keywords

Artificial Insemination;
Surrogacy;
Surrogate mother ;
Parentage;
Algerian law

الكلمات المفتاحية

تلقيح اصطناعي؛
استئجار الرحم؛
أم بديلة؛
نسب؛
قانون جزائري

واقع تأجير الأرحام في القانون الجزائري

ملخص

لعب التطور التكنولوجي دورا كبيرا في تغيير مفهوم الإنجاب إذ لم يعد هذا الأخير يقتصر على الزوج و الزوجة فقط بل تحولت عملية الإنجاب من علاقة ثنائية شرعية بين الزوجين إلى علاقة ثلاثية الأطراف تتكون من الزوج أو الزوجة أو هما أو أي شخصين آخرين و الأم البديلة بإبرام عقد بموجبه يتم تسليم الطفل بعد وضعه وحصول المرأة التي استأجر رحمها أو بويضتها على مقابل لقيامها بعملية الحمل لحساب الغير ، وفي الآونة الأخيرة أصبح عقد تأجير الأرحام مهنة تعتمد عليها بعض النساء للحصول على المال مقابل تحقيق حلم الكثير من الأزواج الذين حرموا من الإنجاب لعدة سنوات بغض النظر عن مشروعية هذه العملية والآثار المترتبة عنها من بينها إهمال قضية النسب.

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Introduction :

Proving parentage is no longer limited to natural means of conception between spouses. Scientific and medical advancements have led to other methods, including artificial insemination, which is a process conducted in a laboratory using entirely different techniques from natural reproduction, aimed at treating infertility experienced by one of the spouses.

Most legislations in Western and Arab countries have approved this technique, including Algerian legislation, which has kept pace with these developments under Order 02-05, especially in the text of Article 45 bis. It has established conditions and regulations to regulate resorting to artificial insemination in a manner consistent with the provisions of Islamic law. Furthermore, it has clarified the process of resorting to this technique under the new Health Law No. 11-18.

Moreover, procreation is no longer solely a result of a personal relationship between a man and a woman. A third party can now intervene to facilitate pregnancy, whether it be a man donating sperm, a woman donating eggs, or both. New methods have emerged to address various infertility cases, such as a woman donating her womb to carry embryos for another woman who is capable of conceiving but suffers from uterine defects, for example. This process is termed surrogacy.

Scholars' opinions differ regarding the ruling on this matter. Some have sanctioned it, while others have prohibited and banned its practice until the issuance of a ruling by the Islamic Fiqh Academy affiliated with the Organization of Islamic Cooperation, which decreed the prohibition of this practice. The stance of Algerian legislation was similar in that it explicitly rejected surrogacy in Article 45 bis 2 of Order 02-05. However, the penalties for violation were not specified until the enactment of Health Law No. 11-18, which prohibits any form of dealing with sperm, eggs, surplus embryos, etc., for anything other than scientific research or other specified purposes. It also imposes civil and criminal penalties for violations, as stipulated in Article 435 of Law No. 11-18.

The objective of this study is to address the conceptual framework of surrogacy and to understand the Algerian legislator's stance regarding this phenomenon and the parentage of children born through it. This study employs both analytical and descriptive methods, analyzing legal texts and citing them to understand the Algerian legislator's perspective on surrogacy and the extent of its regulation and control in artificial insemination processes.

This leads us to pose the problem: What is the Algerian legislator's stance on surrogacy? We will attempt to answer this problem by dividing the article into two sections. The first section will discuss the concept of surrogacy (the surrogate mother), while the second section will address the legal and religious status of surrogacy.

First Section: Concept of Surrogacy (The Surrogate Mother)

In recent times, various innovative methods have emerged to address infertility, including the phenomenon of surrogacy. Surrogacy is a contract where a woman agrees to carry a foreign embryo in her uterus in exchange for compensation. It represents a scientific breakthrough that provides effective solutions for many challenging cases of infertility, fulfilling the dreams of numerous families who have been unable to conceive for several years. This infertility may result from various factors, such as severe uterine defects or the complete removal of the uterus following surgical procedures while preserving the woman's ovaries, among other reasons.

The demand for surrogacy contracts, also known as surrogate motherhood, is increasing due to its emergence as a novel type of contract originating in the Western world and gradually spreading to the Arab world. This necessitates a deeper understanding of this technique, starting with defining the concept of surrogacy and tracing its historical development.

First Subsection: Definition of Surrogacy

Before delving into defining surrogacy, it is essential to clarify the various terms associated with it, including surrogate uterus (الرحم الظئر), gestational carrier (الأم المستعارة), surrogate mother (الأم البديلة), and agency surrogate (الأم بالوكالة). It is noteworthy that all these terms express a single legal concept.⁽¹⁾

Surrogacy is a compound word composed of "surrogate" (الأم البديلة) and "uterus" (الرحم). "Surrogate," linguistically, is derived from the act of leasing, hiring, or employing in exchange for specified compensation or wage⁽²⁾. It also conveys the notion of deriving benefit from the leased property in return for financial compensation, i.e., procuring something for rent⁽³⁾.

Technically, the term "surrogacy" refers to: "a contract wherein one party agrees to allow the implantation of a fertilized egg belonging to another party, typically a couple, into her uterus, either due to the latter's uterine defect or for any other reason. The resultant child is handed over to them in exchange for compensation."⁽⁴⁾

Alternatively, surrogacy can be defined as: "the utilization of another woman's uterus to carry a fertilized embryo consisting of the sperm of a man and the egg of a woman, with the objective of giving birth to a child who will be legally recognized as the offspring of the intending parents."

The term "uterus" (الرحم) has two meanings:

Firstly, the uterus is the site of fetal development and resides within the abdomen. It is also referred to as the womb of the woman, wherein the fetus resides during pregnancy.⁽⁵⁾

Secondly, it refers to all relatives, including kin and others.⁽⁶⁾

The first meaning is the focus of our research, as mentioned by Allah Almighty in the Quranic verse:

فَجَعَلْنَاهُ فِي قَرَارٍ مَّكِينٍ (٢١)

"Placing it in a secure place" [Quran 77:21]⁽⁷⁾

Here, the "place" refers to the pelvic cavity where the two fluids of the spouses meet.

Surrogacy is defined as: "an agreement between two parties wherein a woman agrees to allow the implantation of a fertilized egg belonging to a man and a woman, usually a couple, into her uterus due to a defect in the latter's uterus or for any other reason. The child is then handed over to them in exchange for their commitment to pay compensation."⁽⁸⁾

Or it can be said that it is the exploitation of another woman's uterus to carry an embryo formed from a man's sperm and a woman's egg, to carry the fetus and deliver it for the intending parents to raise, making the child legally theirs.⁽⁹⁾

A surrogate mother (الأم البديلة) is someone who agrees to carry a pregnancy for another person or couple, either for financial compensation or altruistically, with the resulting child not being genetically related to her.⁽¹⁰⁾

There are several motivations that lead surrogate mothers to accept pregnancy for the benefit of others, including familial reasons such as carrying a child for a sister or daughter, or for social and financial reasons.⁽¹¹⁾

The core of surrogacy involves carrying the fetus in the surrogate mother's uterus, and after birth, it is handed over to its biological or intending parents. Among the permutations of surrogacy is egg donation, where a woman donates her eggs, which are then fertilized with the sperm of the infertile woman's husband and implanted into her uterus. The surrogate mother is considered the biological mother in this scenario, as she provides both the egg and the uterus. Alternatively, surrogacy may involve renting the surrogate mother's uterus for intending parents, where the fertilized embryo resulting from the couple's gametes is implanted into the surrogate's uterus. In this instance, the surrogate mother is not considered the biological mother, and the procedure may involve the use of an artificial uterus, representing a modern form of surrogacy.

Second Subsection: Historical Evolution of Surrogacy

The origin of the practice of surrogacy, or the technique of the surrogate mother, can be traced back to the American Richard Devin, who found that some of his patients were unable to conceive due to the absence of a uterus. He then proceeded to hire another woman with a healthy uterus, artificially inseminated her with the sperm of the first patient's husband, and after delivery, the child was handed over to its biological parents. This idea found further applications in multiple states in America, particularly in California, starting from the year 1975, with the emergence of specialized "intermediary" agencies involved in contracting with surrogate mothers and prospective couples.

Following this, agencies and associations specializing in this activity proliferated, equipped with a set of specialized laws to formulate contracts that delineate the rights and duties of the parties involved. Eventually, the activity took on a commercial form between intermediary parties. The popularity of this method spread beyond the American continent, finding numerous applications in countries like England, Germany, and Australia.⁽¹²⁾

The first application of this method in France occurred in 1983, involving the twins Christine and Magali. The former was divorced and already had a child, while the latter was married but unable to conceive. The former volunteered to carry the fetus for her sister through artificial insemination using her sister's husband's sperm.

The child was born after being carried by his aunt, and she relinquished him to her sister. The latter then sought to legally adopt her husband's child, which she had no difficulty accomplishing, especially since she was over thirty years old, and more than five years had passed since their marriage. Following this, there was a proliferation of agencies and associations for surrogate mothers in France.⁽¹³⁾

Second Section: Legal and Sharia Perspective on Surrogacy

After discussing the concept of surrogacy and completing the picture regarding the technique of the surrogate mother, which is considered one of the modern issues, it is necessary for us to understand its legal ruling regarding the lineage resulting from it, by addressing the Sharia perspective and the legal stance on the child's lineage born through this technique.

First Subsection: Sharia Perspective on Surrogacy

There is a conflict of opinions among jurists regarding the ruling on this issue. Some prohibited it, while others permitted it, taking into account the situation of the pregnant woman and distinguishing between whether she is a stranger to the husband or another wife of the husband.

First Branch: Advocating the Technique of Surrogacy

Those who advocate this approach argue for the permissibility of surrogacy, stating that the default ruling is permissibility until evidence of prohibition is presented⁽¹⁴⁾. Since there is no explicit prohibition on surrogacy, they conclude that surrogacy is permissible if the wife's egg is fertilized with the husband's sperm and implanted in another woman's uterus who is not the egg's owner.

However, it is required for the husband to separate from his wife - the surrogate mother - during the first three months of her pregnancy. Additionally, regarding the case of a daughter carrying her own fetus through the surrogate mother's uterus, the Islamic Fiqh Council, in its seventh session, linked the legitimacy of these two cases to the fulfillment of extreme necessity conditions, which is the complete impossibility of the wife carrying her own fetus by herself.

The most important condition in this matter is that the surrogate mother carries the fetus with her full consent and without any coercion to carry someone else's embryo.⁽¹⁵⁾

They equated surrogacy with wet nursing, basing their argument on the connection between pregnancy and breastfeeding, which are mentioned together in several verses of the Quran, including the following: "Provide for them where you dwell from your wealth, and do not harm them so that you may straitened them. And if they are with child, then spend on them until they deliver their burden. And if you breastfeed for them, then give them their due compensation; and consult among yourselves in kindness. And if you should disagree, then another woman shall breastfeed him."⁽¹⁶⁾ This is what made the rules of pregnancy apply to breastfeeding, and they considered surrogacy to be permissible by analogy to breastfeeding a child.

The surrogate mother does not pass on any of her genes or traits to the fetus; rather, she shares with it the food it nourishes on inside her womb, thus making the surrogate mother like a wet nurse.

However, scholars differ on this point, with some saying that the surrogate mother affects the fetus's development through the placenta and passes on some of its characteristics, as the placenta is responsible for extracting nutrients from the blood and transferring them to the fetus. The fetus is born through the union of the sperm and the egg, the DNA is housed in the nucleus of the egg, which carries the genetic material that transmits the fetus's traits. It is noteworthy that this material is found in the cytoplasm of the cell, and as the fetus grows in the womb, this part is affected by the surrounding environment.⁽¹⁷⁾

The second branch: The opposing view on surrogacy.

Scholars and legal researchers unanimously agree on the impermissibility of resorting to the womb of a foreign woman, even if she is a second wife. Scholars revised their ruling on the permissibility of a woman carrying her sister's child during the eighth session of the Islamic Fiqh Council in Mecca in 1985. The council decided to retract the permission mentioned in the seventh session, as indicated in the council's decision issued on this matter in the seventh session.⁽¹⁸⁾

Some scholars attribute the prohibition of surrogacy to the legal principle that preventing harm takes precedence over achieving benefits. The benefits derived from surrogacy are often private and not essential in many cases. For example, if a woman is naturally capable of conceiving but refrains from doing so due to psychological factors such as a strong desire to maintain her figure or fear of childbirth, this approach may serve her private interest while spreading significant corruption in society. Thus, the act of childbirth, one of the noblest values and finest roles of women, is reduced to commercial transactions, stripping them of their humanity.

Furthermore, some scholars liken surrogacy to temporary marriage (mut'a) due to its association with sexual intercourse and the desire for offspring without legitimate marriage, a practice prohibited by the Prophet Muhammad. Some even argue that the ruling on surrogacy is akin to that of adultery because a man's semen enters the womb of a woman who is not his wife.

Surrogate motherhood raises several suspicions, including its potential impact on the genetic traits of the fetus and the mixing of lineages. Surrogate mothers may suffer from various psychological and physical harms due to relinquishing their offspring.

The Islamic Fiqh Council in Amman reaffirmed the prohibition of surrogacy in its third session in 1986. Similarly, the Islamic Research Academy in Cairo issued a decree in 2001 prohibiting the involvement of a third party in the reproductive process, whether through surrogacy, donation, or preference.⁽¹⁹⁾

Our stance on this issue aligns with the view that deems surrogacy impermissible. We emphasize the importance of not legitimizing fertilization through surrogacy, even if it appears to be an effective solution to infertility or a barrier to the

dissolution of marital bonds. Despite its potential benefits, surrogacy entails numerous drawbacks, including the mixing of lineages, the spread of immorality in society, and the potential psychological consequences for children born through this technology, who may grapple with identity issues and question who their biological mother is—whether it is the egg donor or the one who carried them.

The second issue: The legal perspective on surrogacy.

After examining the Islamic jurisprudential stance on the surrogate motherhood technique, we will delve into the positions of Western and Arab laws, with a particular focus on Algerian law.

First Branch: Western Legal Positions

Reviewing the various legal stances on artificial conception for the benefit of others, it is evident that many Western countries have moved towards criminalizing this practice and banning its exploitation for profit. For instance, English legislation criminalizes all artificial fertilization procedures if conducted for commercial purposes and permits them if the purpose is altruistic.

German law punishes with imprisonment for up to 3 years or a fine anyone who conducts artificial insemination or transfers fertilized ova to a woman with the intent that she relinquishes the child after birth to another woman, exempting the woman providing the womb.

Referring to French legislation, surrogacy technology is prohibited. In the law issued on July 29, 1994, Article 16 of the French Civil Code stipulates respecting human dignity and not subjecting it to assault from the beginning of life. This law also criminalizes intermediation in surrogacy but does not address the criminalization of the parties involved directly. However, contracts made in this regard law 653-94⁽²⁰⁾ are void and not legally binding according to Article 16-7 of the French Civil Code.

Nevertheless, couples desiring parenthood through this technology are turning to countries where it is permitted, prompting French legislators to enact a penalty of imprisonment for one year and a fine of €15,000 for anyone resorting to parenthood through this technology, according to Article 227-12, paragraph 3 of the French Penal Code. Furthermore, a penalty of three years of imprisonment and a fine of €45,000 is imposed if this operation is conducted for financial gain, as stated in Article 227-13 of the French Penal Code.

The reason for the severity of the penalty in this case lies in the nature of the offense, as it can be committed abroad if the surrogacy takes place there. However, its effects extend to pose a threat to civil order in France, making the crime more serious, as the offense stipulated in Article 227-12 occurs within France⁽²¹⁾.

Second Branch: The Position of Arab Laws

Most Arab and Islamic legislations have encountered a legal vacuum concerning medical practices related to reproduction. While some have prohibited surrogacy, others have allowed artificial insemination using the husband's sperm and the wife's egg without the involvement of a third party in the relationship. For example, Bahraini law has prohibited this technique, even if the surrogate is a second wife of the husband.

Qatari law, in its provision (Article 03), prohibits the transfer of reproductive organs carrying genetic traits, undoubtedly including the use of sperm and female eggs.⁽²²⁾

Iraqi law, on the other hand, lacks any specific legal provisions or regulations regarding these medical advancements and does not address what is known as surrogacy because this process contradicts Islamic Sharia law.

Similarly, Egyptian law condemns the idea of surrogacy due to the mixing of lineages, which is rejected by Islamic law. The Iranian law stands as the only exception among these laws, as it permits surrogacy.

Most legislations consider surrogacy contracts void from a civil law perspective, while some deem them contrary to public policy, thus having no legal effects⁽²³⁾.

Third Branch: The Position of Algerian Law

The Algerian legislator explicitly affirmed its complete rejection of surrogacy through the amendment of the Family Law in 2005. Referring to Article 45, it is explicitly stated that resorting to artificial insemination using a surrogate mother is not permissible. This means that it is not allowed for couples to rent the womb of a woman who is not the wife, even if the woman is a second wife of the husband who owns the sperm, due to the resulting mixture of lineages.

Thus, it is clear that the Algerian legislator, through this amendment, has explicitly prohibited the involvement of a surrogate mother as a third party in reproduction, which is supposed to be a bilateral process between a husband and wife⁽²⁴⁾. It also indicates that this process is illegal and absolutely void.

The Algerian legislator did not follow up Article 45 of the Family Law with obligatory criminal penalties for its violation, and this prohibition ruling was not accompanied by any amendments to the Penal Code.

After the issuance of Law No. 11/18 related to health in 2018, it was stipulated that assistance for reproduction is exclusively reserved for responding to a request made by a man and a woman of childbearing age, who must be alive and

legally married, suffering from medically confirmed infertility, and agreeing to transfer or artificial insemination. It is only permissible to use the husband's sperm and the wife's egg, excluding any other individuals. Furthermore, Article 374 specifies that trading, whether for scientific research, donation, sale, or any other form of transaction related to sperm, eggs, or surplus embryos, is prohibited, even between related women, such as sisters, mothers, or daughters. Civil and criminal penalties were established for violating the provisions of this article, as stated in Article 435 of Law 11-18. Anyone who violates the prohibition stipulated in the provisions of Article 374 regarding donation, sale, or any form of transactions related to human body materials shall be punished with imprisonment ranging from ten (10) to twenty (20) years and a fine ranging from 1,000,000 DZD to 2,000,000 DZD.⁽²⁵⁾

Additionally, penalties were set for crimes related to assisted reproduction, with imprisonment ranging from 5 to 10 years and a fine ranging from 500,000 DZD to 1,000,000 DZD for violating the provisions of Article 371 of the Health Law regarding medical assistance for reproduction.

Conclusion

Based on the foregoing study, the following conclusions can be drawn:

- The Algerian legislator has kept pace with scientific advancements under Order 02-05 and introduced Article 45bis, which permits recourse to artificial insemination provided that it involves the husband's sperm, the wife's egg, and her womb, while they are both alive and without the intervention of any third party.
- The legislator attempted to address the legislative gap witnessed in family law for thirteen years with the recent amendment to Health Law No. 11-18, thereby attempting to address the deficiency of Article 45bis. The phenomenon of surrogacy is one of the most dangerous issues threatening the foundations of families, in particular, and society as a whole, as it encourages the conception of children outside the framework of marital relations.
- Imposing permission for surrogacy technology inevitably leads to lineage confusion, which contradicts the child's best interests and threatens their future.

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