

A New Challenge to the Turkish Family Law Posed by Artificial Insemination: Validity and Consequences of Contract for Surrogate Motherhood

Eylem Apaydın

Kocaeli University

Law and Forensic Science, Volume 16 (2018/2).

Submitted: July 20, 2018

Abstract: Contract for surrogate motherhood is an onerous or gratuitous contract where a woman contracts to another, who either cannot produce fertile eggs or cannot carry a pregnancy through to birth, to conceive, gestate and deliver a baby for the intended mother. According to the Turkish Civil Code art.282 para.1 lineage is established between mother and child by birth. Simply, mother is the woman who gave birth to that child. There are two main issues concerning the surrogate motherhood: validity and lineage. Contract for surrogate motherhood is void in Turkish law as it is against to the mandatory rules, personal rights and public morality. As for the lineage of the baby, the mother will be the giving birth woman, whether by her own eggs or the intended mother's fertilized eggs and whose father will be the husband of the giving birth woman at the time, regardless whose sperms were used. This article aims to demonstrate the current problems in surrogate mothering in Turkish law and suggests solutions compared with and inspired by the Human Fertilisation and Embryology Act 2008, which regulates the contracts surrogate motherhood in the UK.

Keywords: contract for surrogate motherhood, validity of the contract, lineage of a baby, Turkish family law

Funding: Kocaeli University

Introduction

General

There is an adversarial relationship between law and technology. The former regulates the latter and the latter imposes changes on the former. The recent developments in technology and medicine posed new challenges to the millenary rules of family law. Indeed, family law is a "minimalistic" branch of law where the legal intervention should be exceptional in case of healthy and peaceful relations between individuals (Başoğlu & Kapanç, & Serozan, 2016, p.531). However, one of the family law issues, artificial insemination namely, has recently been one of the primary concerns of the law makers all over the world.

The discussion about the artificial insemination started during the Second World War when the US soldiers demanded to have children when they were away from home. Artificial insemination has gained another perspective at the early 1980s by surrogate motherhood. The first surrogate motherhood case was the Baby M case. The New York Times broadcasts an informative video about the case (The New York Times, 2014). In Baby M case;

“...The Sterns found Mary Beth Whitehead, a 29-year-old from New Jersey, through a Manhattan surrogate agency. Whitehead agreed to a fee of \$10,000 to bear Mr. Stern’s child via insemination and yield her parental rights. On March 27, 1986, Whitehead gave birth to a girl. A week later, Mary Beth begged the Sterns to give the child back. The Sterns assented to a temporary visit, but Whitehead wouldn’t return the infant until compelled by police officers. New Jersey had no laws governing surrogacy agreements. Neither did any other state. Judge Harvey Sorkow defined the matter as a basic custody case, with the best interest of the girl—known in court documents as Baby M—governing his decision. During the haphazard proceedings, the Sterns’ counsel supplied a recorded phone call Whitehead placed to William Stern’s office while she had possession of the baby, in which she stated, “I gave her life, I can take her life away.” On April 1, 1987, Sorkow granted custody to the Sterns and terminated Whitehead’s rights as the baby’s mother. The following February, the Supreme Court of New Jersey reversed Sorkow’s verdict. Whitehead got visitation rights, but the Sterns kept custody.” (University of Virginia, n.d)

Human beings instinctually want to reproduce and if they are not fit to have babies due to various reasons, they tend to try unorthodox ways to have one. As stated in a UK High Court decision, adoption is no longer a preferable choice. “As babies become less available for adoption and given the withdrawal of donor confidentiality (wholly justifiable, of course, from the child's perspective), more and more couples are likely to be tempted to follow the applicant's path to commercial surrogacy in those places where it is lawful, of which there may be many.” (X & Y)

The use of artificial insemination in Turkey started in late 1980s and the first baby was born in 1989 as a result of homologous in vitro fertilization. So far, there is no recorded case of artificial insemination in the form of surrogate motherhood in Turkey.

There is not one single reference to surrogate motherhood in Turkish legislation in any form of regulatory legal documents. The only regulatory legal document regarding artificial insemination is the “By-law on the Applications of Assisted-Reproductive Treatment Technologies and the Centres of Assisted-Reproductive Treatments”, a by-law implemented by the Ministry of Health. (Official Gazette) Its 17th annex named as The Sanction Form states that (4) “Only their own reproductive cells are applied to the married couples having the assisted-reproductive treatments. Using a donor in any form, obtaining embryo by using donor, using and applying the embryos obtained from the applicants’ eggs and sperms to other applicants and the embryos obtained from the non-applicants to the applicants are prohibited.” Hence, it is not legally possible to have surrogate motherhood operation in Turkey at present. However, this does not mean that Turkish people are not using this method to have a child. Even if it is illegal, hundreds of people give advertisements on the Internet websites (Taşıyıcı Anne Bul, n.d) either to be a surrogate mother or to find one. Cyprus, Georgia and the USA are preferred destinations for the operation and the tariff of surrogate motherhood contracts ranges from 150.000 TL to 300.000 TL. (Habertürk, 2018). Another website explains the possibilities to find a surrogate mother in Georgia (Atlas Tüp Bebek Kliniği, n.d). There are some important legal issues regarding the cross border surrogate motherhood agreements (Ekşi, 2016). This also raises a conflict of law problem as to which law should apply to cross-border surrogate motherhood contracts. (Şensöz Malkoç, 2015).

Turkish Civil Code was translated from Swiss Civil Code and accepted in 1926 at an era of early Turkish codification. Interestingly, the current Swiss Constitution art.119/parag.2.d states that “The donation of

embryos and all forms of surrogate motherhood are unlawful.” This reflects the approach of the source of our civil law to surrogate motherhood. French Civil Code explicitly prohibits surrogate motherhood; Art. 16-7 “All agreements relating to procreation or gestation on account of a third party are void.” In ECHR judgement regarding the application of this provision in *Mennesson v. France* and *Labassee v. France*, the court stated that:

“In both cases the Court held that there had been no violation of Article 8 of the Convention concerning the applicants’ right to respect for their family life and a violation of Article 8 of the Convention concerning the children’s right to respect for their private life.”...“examining whether the interference had been ‘necessary in a democratic society’, the Court stressed that a wide margin of appreciation had to be left to States in making decisions relating to surrogacy, in view of the difficult ethical issues involved and the lack of consensus on these matters in Europe.” (European Court of Human Rights, 2018).

As there is not any explicit reference to the consequences of surrogate motherhood in Turkish legislation, some serious legal questions arises, where someone concludes a contract for surrogate motherhood and indeed gives a birth to a child under this contract. Heretofore, there is no one single decision given by the Turkish Court of Appeal regarding the validity and the consequences of the surrogate motherhood contracts yet.

Contract for surrogate motherhood is a *sui generis*, onerous or gratuitous contract where a woman contracts to another, who either cannot produce fertile eggs or cannot carry a pregnancy through to birth, to conceive, gestate and deliver a baby for the intended mother. Some authors resemble it to proxy contracts (Şensöz Malkoç, 2015 and authors mentioned there).

There are two main problems regarding surrogate motherhood in Turkish law; one is contractual and the other one is a family law issue. Initially, contract for surrogate motherhood is deemed to be void in Turkish law as it is against the mandatory rules, personal rights and public morality. (Erol, 2012; Kırkbeşoğlu,2006; Kalkan Oğuztürk, 2011; İlçin Gönenç, 2015; Hakeri, 2015; Aytaç, 2002; Kamaci, 2010).

Hence, the surrogate mother cannot be forced to comply with the contract and hand in the baby to the intended parents under the current legislation. The second one is the lineage of the baby. The provisions establishing the lineage in Turkish civil law (TCC art. 285-304) are based on the notion that the pregnancy is conceived with sexual intercourse. The pregnancy via assisted-reproductive treatment technologies, which is not the result of actual sexual intercourse but artificial insemination, and its consequences are not regulated in Turkish Civil Code (Kamaci, 2010). According to the Turkish Civil Code art.282 para.1, lineage between mother and child is established by birth. Simply, mother is the woman who gave birth to that child. On the other hand, where a child is born in wedlock, the husband is deemed to be the father (TCC art.285). Accordingly, the baby’s mother will be the birth giving woman, regardless the fact that her own eggs or the intended mother’s fertilized eggs are used. The baby’s father will be the husband of the birth giving woman at the time of birth, regardless of whose sperms were used. In spite of such an explicit rule, the primary problem here is the lineage of the baby from the perspective of *de lege ferenda*.

This article aims to demonstrate the current problems in surrogate motherhood in Turkish law and suggests solutions compared with and inspired by the UK legal regulation on the matter.

Definitions

To be able to grasp the legal problems arisen from surrogate motherhood, the reader should be familiar with the basic terms regarding the issue.

According to the “What is Surrogacy?” booklet of Saint Mary’s Hospital, “Surrogacy is when a woman carries a baby for a couple who are unable to conceive or carry a child themselves for medical or physical reasons. The intended parent(s) are person or persons who become the legal parent(s) of a child born through surrogacy.” (The National Health Service, n.d. p.2) Surrogate mother is defined as “a woman who agrees, usually for pay, to give birth to a child resulting from artificial insemination or the implantation of an already fertilized egg and who surrenders any parental rights to a third party.” (The Legal Dictionary, n.d).

Definitions below cited from the study conducted by the EU.

Surrogacy: “A practice whereby a woman will become pregnant with the intention of giving the child to someone else upon birth.”

Surrogate mother: “The woman who carries and gives birth to the child.”

Intended parent: “The person who intends to raise the child.”

Traditional surrogacy arrangement: “A surrogacy arrangement where the surrogate mother's eggs are used and she is the genetic mother of the child. The pregnancy comes about either through an insemination procedure with the sperm of the intended father or donated sperm, or through sexual intercourse with the intended father or another man.”

Gestational surrogacy arrangement: “A surrogacy arrangement in which the surrogate mother's eggs are not used and someone else is the genetic mother of the child. The pregnancy comes about through an IVF procedure using either the intended mother's eggs or donated eggs.”

Altruistic surrogacy arrangement: “A surrogacy arrangement where the surrogate mother is paid nothing, or only remunerated for her expenses associated with the surrogacy.”

Commercial surrogacy: “A surrogacy arrangement where the surrogate mother is remunerated beyond expenses associated with the surrogacy. This may be termed a 'fee' or 'compensation' for pain and suffering.” (European Parliament, 2013).

Invalidity of the Contract for Surrogate Motherhood in Turkish Law

It is against the Mandatory Rules

In Turkish law, clauses that deviate from those prescribed by law are admissible only where the law does not prescribe mandatory forms of wording or where deviation from the legally prescribed terms would contravene public policy, public morality or personal rights. According to the Turkish Code of Obligations art.27, the contracts against the laws’ mandatory rules, morality, public order, personal rights or impossible contracts are invalid.

It is claimed that contract for surrogate motherhood is invalid as it is against the mandatory rules, (Turgut, 2016, p.107-109.) even though the fact that there is not one single provision in Turkish parliamentary laws explicitly prohibiting the surrogate motherhood, as French Civil Code does.

There are two provisions claiming to be prohibiting the surrogate motherhood. The first is art.4 of the 17th annex (The Sanction Form) of the By-law on the Applications of Assisted-Reproductive Treatment Technologies and the Centres of Assisted-Reproductive Treatments stating that only their own reproductive cells are applied to the married couples having the assisted-reproductive treatments. This provision is placed in the by-law implemented by the Ministry of Health. In Turkish constitution law, primary sources of Turkish law are the

constitution, laws, law amending ordinances, international treaties, regulations, by-laws in a hierarchical structure. (Yazici) Article 124 of the Constitution regulates by-laws, which states: “The Prime Ministry, the ministries, and public corporate bodies may issue by-laws in order to ensure the application of laws and regulations relating to their particular fields of operation, provided that they are not contrary to these laws and regulations.” On the other hand, in accordance with the article 87 of the Constitution, the Turkish Grand National Assembly is authorized to make, amend, and abrogate laws. In this case, it is obvious that the Ministry of Health, In this case, it is obvious that the Ministry of Health, by regulating the matter via a by-law, exceeds its authority and objective. (Ungan Çalışkan, 2016, p.503).

I agree the below quotation from a report on human rights law regarding surrogate motherhood, which clearly states that having a child by the method of surrogate motherhood can be deemed as a freedom.

“Human rights law recognises the right to found a family. ... Further, the right to privacy and family has been interpreted to include ‘the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose’. However, because surrogacy involves contingent decisions by each of those involved in the arrangement, it cannot be said that intended parents as parties to that arrangement have a positive and unqualified right to have a child through a surrogate. They may have the freedom to do so provided the rights of others, in particular the surrogate mother and any children born as a result of a surrogacy arrangement, are adequately protected.” (Australian Human Rights Commission, 2016).

The article 13 of the Turkish Constitution requires that fundamental rights and freedoms may be restricted by parliamentary laws, in conformity with the letter and spirit of the Constitution. Hence, in my opinion, the restriction on the surrogate motherhood, which is brought into force through a by-law, is against the constitutional requirements unless it is along with the parliamentary acts. Hence, contracts for surrogate motherhood cannot legally be prohibited through a by-law implemented by a ministry.

The second one is the provision of Turkish Civil Code art.282 para.1 stating that lineage is established between mother and child by birth. It is the ancient rule of *mater semper certa est*. Some authors claim that this provision prohibits having a child by surrogate motherhood. In my opinion, this provision may only affect the consequences of the surrogate motherhood contracts and determine the lineage of the baby. In this context, I believe, if the contract for surrogate motherhood includes a clause, which requires that the surrogate mother refrains from being the mother of the baby, whom she gave birth, this clause is invalid. Indeed, almost every surrogate motherhood contract includes such a clause, which can be deemed as the fundamental component of this type of a contract. Since, it is an undetachable part of the contract, the invalidity of it renders the whole contract void.

In accordance with the article 27 of the Turkish Code of Obligations, “However, where the defect pertains only to certain terms of a contract, those terms alone are void unless there is cause to assume that the contract would not have been concluded without them.” Hence, as in almost every case, surrogate motherhood contracts include a clause prohibiting the surrogate mother from claiming the paternity; the whole contract would be void. This clause can be given as an example:

“The Surrogate and Surrogate's Husband agree to relinquish all claims to parental rights and custody of the Child(ren) born pursuant to the terms of this Agreement immediately after the birth of said Child(ren), and enter into any Consent Entry or Judgment with respect to paternity, custody, and/or step-parent adoption of said Child(ren).” (All about Surrogacy, n.d).

Nevertheless, I also agree that the contract for surrogate motherhood is void in Turkish law as it is against the mandatory rules.

The consequence of the contract for surrogate motherhood being void is that surrogate mother cannot be legally forced to hand in the baby after the birth even though she has already promised to do so. Where the contract is onerous, she may be sued for unjust enrichment (Şipka). In this case, I believe, despite the counter arguments, (İlçin Gönenç, 2015, p. 74) she may get away with the virtue of the article 81 of the Turkish Code of Obligations, which states that “no right to restitution exists in respect of anything given with a view to producing an unlawful or immoral outcome.” (Metin, 2012, p. 43).

It is also worth mentioning that concluding a contract for the surrogate motherhood is not a punishable crime in Turkish law, even though some authors (Şensöz Malkoç, 2015) think that is a deficiency and criminal punishments should be brought immediately.

It is against the Personal Rights

As mentioned, many authors assert that contract for surrogate motherhood is void as it is against the personal rights. TCC Article 23/para.1-2 clearly states that “no person may, wholly or in part, renounce his or her legal capacity or his or her capacity to act. No person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals.” The surrogate mother is under an obligation to get pregnant and hand in the baby to the intended parents under the contract for surrogate motherhood. These obligations are deemed to be against the personal rights. (Kalkan Oğuztürk, p.120).

In accordance with the article 63/2 of the Turkish Code of Obligations, consent of the victim is an enabling act. Hence, at the first sight, if the surrogate mother explains her informed consent to the contract, the contract would be not against the personal rights. On the other hand, the consent of the victim may only remove the illegality if the consent is lawful. When TCC art. 23 and TCO art.63 are interpreted together, we may conclude that nobody can give consent to a contract, which surrenders his or her freedom or restricts the use of it to a degree which violates the law or public morality. For instance, in Turkish law, one cannot make a contract to be tortured, to be killed (euthanasia), to never get married, to never own anything such and such (Karabağ Bulut, 2014, pp.113-131). Pregnancy is a very difficult process, which includes nine months of restrictions of certain things, “constipation, cramps, feeling faint, feeling hot, incontinence, peeing a lot, skin and hair changes, varicose veins, backache, bleeding, bleeding gums, deep vein thrombosis (dvt), headaches, high blood pressure and pre-eclampsia, indigestion and heartburn, itching, leaking nipples, morning sickness and nausea, nosebleeds, pelvic pain, piles (haemorrhoids), sleeplessness, stretch marks, swollen ankles, feet and fingers, teeth and gums, tiredness, vaginal discharge and vaginal bleeding.” (The National Health Service, 2018). Furthermore, the contract includes handing in the baby, whom she just gave birth, to the other party. In this context, contract for surrogate motherhood restricts the use of one’s freedom to a degree which violates the law or public morality.

When discussing the matter in this context, Eşelioğlu explains “this contract turns the woman’s body into a commercial tool. It means that a woman rents her body as it happen in prostitution. We know that the women do not enjoy this, the primary purpose is to earn money and the body is used for this purpose. To assert that the surrogate mother concludes this contract with consent is the same with the defence that the sex workers work with free will.” (Eşelioğlu, 2015, p.64). Although, this view has a point, it is too generic, excluding the voluntary surrogate motherhood contracts between the relatives, such as siblings.

To sum up, in my opinion, commercial surrogacy arrangements may be deemed to be against the personal rights. However, there is not assuredly convincing evidence to regard an altruistic surrogacy arrangement void as it is against the personal rights.

It is against the Public Morality

As mentioned above, many authors assert that contract for surrogate motherhood is void as it is against the public morality. Some people using others' body as a tool to reach their aims and denial of the child's human dignity by neglecting his/her relationship with the woman who gave birth to him/her make the contracts for surrogate motherhood are against the public morality (Erol, 2012, p.120).

Some authors resemble surrogate motherhood to prostitution. In their view, a woman having a baby from a man who is not her husband is immoral. On the other hand, some claim that where the surrogate motherhood contact is done gratuitously and the only aim is to have a child, this contract is not deemed immoral as they do not have an immoral objective at all. (Turgut, 2016, pp.109-114, and the authors mentioned there).

When discussing the public morality, it is determined by the general attitude of the society to the matter. The research on infertile Turkish women shows that minority of the patients approve of gamete donation (23.3% for accepting oocytes and 3.4% for accepting sperm) and gestational surrogacy (15.1%) (Baykal&Korkmaz&Ceyhan&Göktolga&Başer, 2008). Hence, it can be said that the overall Turkish society is still not in favour of surrogate motherhood and contract for surrogate motherhood is currently deemed to be against the public morality.

Here, I think, a categorisation should be made. If the contract is onerous, it is not against the public morality (same approach Özcan, 2015). Some authors assert the opposite. (Kalkan Oğuztürk, 2011, p.396). Kalkan Oğuztürk also states that surrogate motherhood, in a way, means renting a woman body. This is against the human dignity (Kalkan Oğuztürk, 2011, p.396) As in commercial surrogacy, a human body and life is used as a commercial tool and it degrades the woman and child into a property (Şensöz Malkoç, 2015). Whereas it is an altruistic surrogacy arrangement, it would not be against the public morality as it is primarily concluded by a noble purpose; give life to a soul and have a child.

Lineage of the Baby

Father of the Baby

If the surrogate mother is married, the husband is deemed to be the father in accordance with the TCC art. 285. It is the rule of *pater est quem nuptiae demonstrant*. Hence, where the surrogate mother is married, her husband will be father of the child born under the surrogate motherhood contract, regardless the fact that whose sperm was used. This is called as presumption of paternity.

If the genetic father's sperm was used and he wants to be regarded as the legal father, first, the presumption of paternity may be challenged in family court by the husband or by the child in accordance with the art. 286. Once, the lineage between the husband and child was successfully challenged and resolved and where the parent-child relationship exists only with the mother, the genetic father may recognise the child (TCC art.295). With this recognition, the lineage between the genetic father and child is established and the genetic father would be the legal father.

In the second scenario, if the surrogate mother is not married, the genetic father would be the legal father if he recognizes the child (TCC art.295), or gets married to the surrogate mother later (TCC art. 292).

Mother of the Baby

According to the Turkish Civil Code art.282 para.1, lineage is established between mother and child by birth. It states that the parent-child relationship is formed between child and mother on the birth of the child. Simply, mother is the woman who gave birth to that child. This is an un rebuttable presumption (Şipka). Some authors say that it is no longer an un rebuttable presumption because of the surrogacy. Hence, the lineage

between mother and child can be challenged as it happens between father and child (Başoğlu&Kapancı&Serozan, 2016, p.531).

In my opinion, the rule in the Turkish Civil Code art.282 para.1 is explicit and as long as this rule keeps it place in the TCC, the mother will always be the surrogate mother. A legal action to challenge the lineage between mother and child cannot be taken (Şipka; Kiliçoğlu Yılmaz, 2015; Acabey, 2002, p.210; Oğuztürk claims otherwise. Kalkan Oğuztürk, 2011, p.396). On the discussion about the consequences of this rule, there are various opinions below, which is noteworthy.

1. Traditional surrogacy arrangement: It is a surrogacy arrangement where the surrogate mother's eggs are used and she is the biological and genetic mother of the child. In this type of the surrogacy, there is no discussion about the identity of the mother; she is the surrogate mother. The giving birth woman cannot deny the maternity or the baby (İlçin Gönenç, 2015, p.72; Hakeri, 2015, p.88; Kirkbeşoğlu, 2015, p.15). The only way to establish a lineage between the intended mother and child is adoption.
2. Gestational surrogacy arrangement: It is a surrogacy arrangement in which the surrogate mother's eggs are not used and someone else is the genetic mother of the child. The general view in this case again the surrogate mother is being the legal mother (İlçin Gönenç, 2015, p.73; Turgut, 2016, pp.138-142; Serozan, 2017, Parag.29-30; Acabey, 2002, p.210; Kirkbeşoğlu, 2006, p.15; Baygın, 2002, p.258; Kamaci, 2010, p.45; Öztan, 2015, p.19). However, Nomer (2000, pp.45-46) asserts that the woman whose eggs are used should be deemed the legal mother even though someone else gives the birth. According to him, the Turkish Civil Code recognizes the kinship by blood. Hence, the woman, whose eggs are inseminated, should be the mother. The surrogate mother has the opportunity to challenge the lineage between her and the child in order to be regarded as mother. Erol (2012, p.190) has the same opinion (2012, p.190). Kalkan Oğuztürk (2011, p.399) suggests a slightly different solution. She argues that a legal action can be taken for the determination of the mother by either the biological mother or the genetic mother. Hatemi (with Kalkan Oğuztürk, 2018, p.142), on the other hand, defends an extreme view. He states that the giving birth woman should be the mother. However, family law and inheritance law should regard that both women are the mothers. The judge should decide who will keep the child in the light of child benefit. Kirkbeşoğlu (2006, p.78) agrees with Hatemi.

Crime for Changing Lineage of a Child

Turkish Criminal Code article 231 states that

“Changing lineage of a child

(1) Any person who changes or conceals the lineage of a child is punished with imprisonment from one year to three years.

(2) Any person who causes exchange of children in a health institution by breaching obligation to take proper care or precautions is sentenced to imprisonment up to one year.”

It is obvious that if the surrogate mother hands in the baby to the intended mother and the intended mother registers the baby under her name at the civil registration, it is a crime punishable with prison sentence. It may also constitute a perjury (Hakeri, 2015, p.90). After these explanations, Hakeri (2015, p.90) argues as his personal thoughts that if the genetic mother takes these actions, it does not constitute these crimes. He states that it is a technical issue that civil law recognizes the surrogate mother as mother.

Proposed Solutions

It is not easy to reach a conclusion that each legal system around the globe is in favour of the surrogate motherhood currently. Indeed, the legal systems allowing it are still minority. Corethics (2015) website lists approaches of all the countries over the World towards the surrogacy. Even Council of Europe recently rejected proposal on surrogate motherhood (Life Site News, 2016). Furthermore, Pope Francis told that “History is burdened by the excesses of patriarchal cultures that considered women inferior, yet in our own day, we cannot overlook the use of surrogate mothers and “the exploitation and commercialization of the female body in the current media culture.” (Vatican, 2016).

The primary problem with the surrogate motherhood contracts in Turkish law is that it is not regulated by a Code. Immediately, Turkish law makers should make their mind and implement an act either prohibiting or legitimising it and give an end to the discussions about its validity.

There are three mainly ways to regulate surrogate motherhood.

- 1) to ban it: Turkish law may ban surrogate motherhood by a parliamentary law. (not by a by-law)
- 2) to fully liberalize it. Turkish law may liberalize surrogate motherhood by a parliamentary law. Hence it can be done as an onerous or gratuitous contract.
- 3) to liberalize it with certain restrictions. Turkish law may liberalize surrogate motherhood with certain restrictions by a parliamentary law.

Here, I am in favour of the third option. Furthermore, I consider that the UK act on surrogate motherhood can be taken as a model law.

The main legislations in the UK regulating the surrogate motherhood are the Surrogacy Arrangements Act 1985, Human Fertilisation and Embryology Act 1990, and Human Fertilisation and Embryology Act 2008. Below there are some important provisions of the Act.

The Surrogacy Arrangements Act 1985 Art .1 requires surrogate mother to hand over the child to the intended parents. Surrogate mother “means a woman who carries a child in pursuance of an arrangement— (a) made before she began to carry the child, and (b) made with a view to any child carried in pursuance of it being handed over to, and [parental responsibility being met] (so far as practicable) by, another person or other persons.” The Surrogacy Arrangements Act 1985 Art. 1A states that surrogacy arrangements are unenforceable. It means that if the surrogate mother decides not to comply with the agreement later, she cannot be forced to comply with it. The Surrogacy Arrangements Act 1985 Art.2 prohibits any commercial activity regarding the surrogate motherhood. Hence, commercial surrogacy is prohibited in the UK. Human Fertilisation and Embryology Act 2008 section 33 indicates the mother of a child born under a surrogacy agreement is the woman, who is carrying or has carried the child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman unless the child is subsequently adopted or parenthood is transferred through a parental order. Human Fertilisation and Embryology Act 2008 section 35 states that the father of a child born under a surrogacy agreement, if the mother married at time of treatment, is the other party to the marriage, unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her artificial insemination (as the case may be).

The legal mechanism providing the intended parents to be treated in law as the child, born under the surrogacy agreement, of the intended parents is the parental order.

“The 2008 Act sets out the following key requirements that must be fulfilled before a court can grant a parental order:

- *At least one of the intended parents must be the child's genetic parent;*

- *The intended parents must be husband and wife, civil partners or "two persons who are living as partners in an enduring family relationship";*
- *The intended parents must bring the application within six months of the birth of the child;*
- *The child must live with the intended parents, either or both of whom must be domiciled in the UK;*
- *Both of the intended parents must be over eighteen;*
- *The birth mother (and any other legal parent) must freely give informed consent to the order unless they cannot be found or are incapable of agreeing;*
- *The birth mother's consent must be given more than six weeks after birth; and*
- *There must not have been the exchange of any payment beyond reasonable expenses, unless authorised by the court." (Bremner, 2017, p.283).*

On deciding the parental order, "the courts are required to interpret the statutory provisions, as far as possible, in order to be consistent with the best interests of the child by the Human Fertilisation and Embryology (Parental Orders) Order 2010,¹⁷ which imported section 1 of the Adoption and Children Act 2002, for England." (Bremner, 2017, p.284).

The Law Commission of England and Wales sought views on surrogacy in 2016 pointing out the reason as "The main legislation concerning surrogacy is the Surrogacy Act 1985 and (in respect of the making of parental orders) the Human Fertilisation and Embryology Act 2008. The law has struggled to adapt to changes in attitudes, a growing demand for surrogacy arrangements, and an increasing number of overseas surrogacy arrangements." (Law Commission, n.d). Nothing has been revealed as to the results.

Upon these explanations, I can summarize my proposal for the surrogate motherhood for the Turkish law:

1. The regulation must be done as an amendment in Turkish Civil Code.
2. The regulation must allow altruistic surrogacy arrangement where the surrogate mother is paid nothing, or only remunerated for her expenses listed in the Code and associated with the surrogacy.
3. The intended parents should be a married couple and must be medically unfit to have babies as a couple.
4. Only gestational surrogacy arrangements should be allowed or at least one of the intended parents must be the child's genetic parent.
5. The surrogate mother should be single.
6. The existing rules on the lineage of the baby should not be altered.
7. For the intended parents, there must be time limits to claim the baby.
8. Surrogate mother should spend time with the baby after the birth and experience to be a mother.
9. For surrogate mother, there must be time limits to renounce her rights as mother.
10. The decision on the validity of the contract and handing over the baby should be taken by the family court.
11. Only the surrogate mother should be entitled to change her mind and decide not to comply with the contract and she cannot be forced to do so.

The below rules from a model global family code may be taken into consideration when legislating the surrogate motherhood in Turkey as well.

"Article 3.8 (Challenge by Genetic Parent)

1 The person who alleges that he or she is the genetic parent of the child may, during the child's minority, challenge the parentage of legal parents established under Articles 3.4 or 3.5 and have his or her own parentage established by adjudication under Article 3.10.

2 The challenge must be lodged within six months of the birth of the child.

3 A later challenge is only admissible where there is no active family relationship between the child and the legal parent challenged. In this case, the challenge must be lodged within one year of becoming aware of both the possible genetic parentage and the lack of an active family relationship. Above the age of twelve, the child's personal consent is required.

4 No challenge may be lodged by an intentional donor of genetic material.

Article 3.9 (Challenge by Birth Mother or Other Legal Parent)

1 Despite having given her consent, the birth mother may, until the child reaches the age of fifteen, challenge the parentage of the legal parent established under Article 3.5 if there is no active family relationship between the child and the legal parent challenged.

2 Under the same circumstances, the legal parent established under Article 3.5 or 3.10 may challenge the parentage of the birth mother.

3 The challenge must be lodged within one year of becoming aware of the lack of an active family relationship.

4 Above the age of twelve, the child's personal consent is required.

Article 3.10 (Parentage by Adjudication)

1 Legal parent is the person determined by judicial adjudication to be the genetic parent of the child.

2 A request for adjudication may be brought by

(a) the child, or

(b) the person alleging to be the genetic parent of the child.

3 If parentage under Article 3.4 or 3.5 exists, adjudication may only be initiated together with a challenge under Article 3.7 or 3.8. (Schwenzer&Dimsey, 2006, p.105-113)

Conclusion

The developments in technology and medicine has made possible to have babies via surrogacy. This is something alien to the Turkish civil code, which assumes the babies could be brought into the world only as a result of sexual intercourse. The code does not include one single provision about the surrogate motherhood. Indeed, one can find nothing regarding it there.

On the other hand, in current Turkish legislation, surrogate motherhood is banned by the By-law on the Applications of Assisted-Reproductive Treatment Technologies and the Centres of Assisted-Reproductive Treatments' 17th annex named as The Sanction Form. Moreover, according to the Turkish Civil Code art.282 para.1, lineage is established between mother and child by birth without making any reference to the surrogate motherhood. Any contract contradicting these rules is void as it is against the mandatory rules in

Turkish law. Furthermore, contract for surrogate motherhood is deemed to be void as it is against the public morality and personal rights.

From another perspective, the surrogate motherhood challenges the established rules on lineage of the Turkish civil code. Some author has started to question the un rebuttable presumption about the mother of a baby placed in the TCC art.282/parag.1 due to the surrogate motherhood.

Despite the prohibition, Turkish people tend to have babies through surrogate motherhood abroad. This shows that there is a public demand to legalize it.

Turkish law makers should regulate surrogate motherhood soon by a parliament act and I believe, it should be allowed with certain restrictions. This opinion has been defended by many authors in Turkey. Erol agrees on this view. She states that surrogacy should be allowed provided that the married couple's reproduction cells should be used and the mother should be unfit to carry babies. (Erol, 2012, p.123). Savran agrees too. He adds restrictions: it should be a commercial sector and it should be decided in certain medical indications (Savran, 1996, pp.74-78). Çam also agrees. She asserts that surrogate motherhood should ne allowed for the purpose of couple's having babies (Çam, 2013, pp.155-171). Şensöz Malkoç (2015) also states that Turkish law regulation on surrogate motherhood is inadequate and old regarding the medical developments. Hakeri agrees too. He remarks that surrogate motherhood should be allowed and the legal regulation should be based on the child benefit and genetics (Hakeri, 2015, pp.83-92). Kılıçoğlu Yılmaz also agrees. She concludes that an administrative body should be institutionalised and the courts should decide who would the surrogate mother according to the legal criteria (Kılıçoğlu Yılmaz, 2015). Aytaç agrees too. He states that surrogate motherhood should be regulated by an act and commercial surrogate motherhood should be banned. (Aytaç, 2011). However, Hatemi (Hatemi&Kalkan Oğuztürk, 2018, p.142) and Kalkan Oğuztürk (2011, p. 409) disagrees with this view and state that the current legislation on the surrogate motherhood is accurate.

Unless Turkish law makers should regulate surrogate motherhood soon by a parliament act, it would push the people making illegal contracts and they will have to face undesired consequences such as the disputes over the payments, custody and lineage of the number of babies.

References

- Acabey, M.B. (2002). Soybağı Kurulması Genel Olarak Sonuçları (Özellikle Evlilik Dışında Doğan Çocukların Mirasçılığı). İzmir: Güncel.
- Aytaç, I. (2002). Yardımcı Üreme Tekniklerinin Nesep Hukuku Açısından İncelemesi. Adalet Dergisi, 11(5). Retrieved From <http://www.yayin.adalet.gov.tr/adaletdergisi/11.sayi/5ismail.pdf>.
- Başoğlu, B.&Kapancı, B&Serozan, R. (2016). Aile Hukukunun Özellikleri, İlkeleri Ve Gelişimi. İstanbul Kültür Üniversitesi Hukuk Fakültesi Dergisi, 15(2), 531-560.
- Baygın, C. (2002). Kan Bağına Dayanan Soy Bağı. AÜEHFD, IV(1-4), 255-284.
- Baygın, C. (2010). Soybağı Hukuku. İstanbul: On İki Levha Yayıncılık.
- Baykal, B.& Korkmaz, C.& Ceyhan, S. T.& Göktolga, Ü.& Başer, İ. (2008). Opinions Of Infertile Turkish Women On Gamete Donation And Gestational Surrogacy. Fertility And Sterility, 89 (4), 817-822.
- Bremner, P. (2017). Surrogacy And Single Parents Following Re Z. Edinburgh Law Review Edin. L.R., 21(2), 281-286.

- Çam, G. (2013). Taşıyıcı Annelik Ve Soybağı İlişkisi. Maltepe Üniversitesi Hukuk Fakültesi Dergisi, 3(2), 155-171.
- Ekşi, N. (2016). Mahkeme Kararlarında Sınıraşan Taşıyıcı Anneliğe İlişkin Hukuki Sorunlar. Public And Private International Law Bulletin, 36(2), 1-51.
- Erol, Y. (2012). Yapay Döllenme Yöntemleri Ve Taşıyıcı Annelik. Ankara: Yetkin.
- Eşelioğlu, R. (2015). Üreme İle İlgili Problemlerin Uluslararası Metinler Ve Türk Hukuku Karşılaştırılarak Feminist Teori Bakımından İncelenmesi. Ankara: Unpublished LLM Thesis.
- Hakeri, H., (2015). Taşıyıcı Annelik. In Prof. Dr. Dr. H.C. Hakan Hakeri & Av. Cahid Doğan (Eds) Uluslararası Sağlık Hukuku Sempozyumu (pp.83-92). Ankara: Türkiye Barolar Birliği.
- Hatemi, H. & Kalkan Oğuztürk, B. Aile Hukuku. (2018). İstanbul:Vedat.
- Ilçin Gönenç, F. (2015). Yardımcı Üreme Tekniklerinde Hukuki Sorunlar. In Prof. Dr. Dr. H.C. Hakan Hakeri & Av. Cahid Doğan (Eds) Uluslararası Sağlık Hukuku Sempozyumu (pp. 63-82). Ankara: Türkiye Barolar Birliği.
- Kalkan Oğuztürk, B. (2011). Türk Medeni Hukuku'nda Biyoetik Sorunlar. İstanbul: Vedat.
- Kamacı, M. (2010). Embriyo Transferi (Aktarımı) Ve Ortaya Çıkan Soybağı Sorunları. Yargıtay Dergisi, 36 (1-2).
- Karabağ Bulut, N. (2014). Medeni Kanununun 23. Maddesi Kapsamında Kişilik Hakkının Sözleşme Özgürlüğüne Etkisi. İstanbul: On İki Levha Yayıncılık.
- Kılıçoğlu Yılmaz, K. (2015). Yapay Döllenmede Soybağı Sorunu. Terazi Hukuk Dergisi, 10(104), 43-47. Retrieved From <https://jurix.com.tr/article/2658>.
- Kırkbeşoğlu, N. (2006). Soybağı Alanında Biyoetik Ve Hukuk Sorunları. İstanbul: Vedat.
- Metin, S. (2012). Yörüngesinden Çıkan Tabiat: Etik, Sosyal, Psikolojik Ve Hukuki Görünümleriyle Taşıyıcı Annelik. Sağlık Hukuku Makaleleri – II, İstanbul:İstanbul Barosu Yayınları, 7(53).
- Nomer, N. H. (2000). Suni Döllenme Dolayısıyla Ortaya Çıkabilecek Nesep Problemleri, In Prof. Dr.Kemal Oğuzman'ın Anısına Armağan. İstanbul, 563-565.
- Özcan, H. (2015). Çocuğun Soybağının Kurulması Ve Yardımcı Üreme Teknikleri Sonucu Soybağının Tespiti. Antalya Bilim Üniversitesi Hukuk Fakültesi Dergisi, 3(5), 95-112. Retrieved From <https://jurix.com.tr/article/4322>.
- Öztan, B. (2015). Aile Hukuku. Ankara: Turhan.
- Savran, B. (1996). İn Vitro Fertilizasyon Ve Embriyo Transferinde Etik Ve Hukuki Sorunlar. T Klin Tıbbi Etik, 4, 74-78.
- Schwenzer, I.& Dimsey, M. (2006). Model Family Code From A Global Perspective. Oxford, Antwerp: Intersentia.
- Şensöz Malkoç, E. (2015). Uluslararası Taşıyıcı Annelik Sözleşmesinden Doğan İhtilaflarda Uygulanacak Hukuk. Public And Private International Law Bulletin, 35(2), 13-49. Retrieved From <http://dergipark.gov.tr/download/article-file/410978>.
- Serozan, R. (2017) Çocuk Hukuku. İstanbul: Vedat.

Şipka, Ş. Taşiyıcı Annelik Ve Getirdiği Hukuki Sorunlar. Retrieved From www.turkhukusitesi.com/makale_537.htm.

Turgut, C. (2016). Yapay Döllenme Taşiyıcı Annelik Ve Soybağına İlişkin Hukuki Sorunlar. İstanbul: On İki Levha.

Ungan Çalışkan, H. (2016). Birakınız Taşısınlar: Taşiyıcı Anneliğe Güncel Bakış. Mühf - Had, 22(1), 489-509.

X & Y (Foreign Surrogacy) [2008] Ewhc 3030 (Fam).

Yazici, S. A Guide To The Turkish Public Law Order And Legal Research. Retrieved From <http://www.nyulawglobal.org/globalex/turkey.html>.

Internet Sources

All about Surrogacy. (n.d). Retrieved on 4.4.2018 from http://www.allaboutsurgacy.com/sample_contracts/GScontract1.htm.

Atlas Tüp Bebek Kliniği. (n.d). Retrieved from <http://www.atlasivf.com/tup-bebek-blog/tasiyici-anne-nasil-bulunur>.

Australian Human Rights Commission. (2016). Retrieved on 4.4.2018 from https://www.humanrights.gov.au/sites/default/files/20160217_AHRC_SurrogacySubmission.pdf.

Corethics. (2015). Retrieved on 4.4.2018 from <http://corethics.org/wp-content/uploads/Surrogacy-Laws.pdf>

European Court of Human Rights. (2018). Retrieved from https://www.echr.coe.int/Documents/FS_Surrogacy_ENG.pdf

European Parliament. (2013). Retrieved on 4.4.2018 from [http://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET\(2013\)474403_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf).

Habertürk. (2018). Retrieved on 4.4.2018 from <http://www.haberturk.com/yuzlece-kisi-tasiyici-anne-olmak-icin-internete-ilan-veriyor-1824309>.

Law Comission. (n.d). Retrieved on 4.4.2018 from <https://www.lawcom.gov.uk/surrogacy/>

Life Site News. (2016). Retrieved on 4.4.2018 from <https://www.lifesitenews.com/news/council-of-europe-rejects-proposal-on-surrogate-motherhood>

Taşiyıcı Anne Bul. (n.d). Retrieved on 4.4.2018 from <http://tasiyiciannebul.blogspot.com.tr/>

The Legal Dictionary. (n.d). Retrieved on 4.4.2018 from <http://www.legal-dictionary.thefreedictionary.com/surrogate+motherhood>.

The National Health Service. (2018). Retrieved on 4.4.2018 from <https://www.nhs.uk/conditions/pregnancy-and-baby/common-pregnancy-problems/>

The National Health Service. (n.d). (Retrieved on 4.4.2018 from <http://www.cmft.nhs.uk/media/1531644/16%2009%20what%20is%20surrogacy%20feb%202016.pdf>

The New York Times. (2014). Retrieved on 4.4.2018 from <https://www.nytimes.com/2014/03/24/us/baby-m-and-the-question-of-surrogate-motherhood.html>.

University of Virginia. (n.d). Retrieved from <https://archives.law.virginia.edu/dengrove/writeup/surrogate-mother-mary-beth-whitehead-decides-not-give-baby-controversial-reproductive>.

Vatican. (2016). Retrieved on 4.4.2018 from https://w2.vatican.va/content/dam/francesco/pdf/apost_exhortations/documents/papa-francesco_esortazione-ap_20160319_amoris-laetitia_en.pdf.