

## SURROGACY IN MEDICAL LAW: LEGAL AND ETHICAL PERSPECTIVES

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### Abstract

*Surrogacy stands as one of the most complex and widely debated issues in contemporary medical law, intersecting reproductive rights, bioethics, and shifting legal landscapes. With infertility impacting an estimated 15–20% of couples globally, the demand for alternative reproductive pathways, including surrogacy, continues to grow. Yet, regulatory responses vary sharply between jurisdictions. Countries such as Türkiye and Azerbaijan, for example, still lack comprehensive legislation to govern such practices. This paper investigates surrogacy from legal, ethical, and medical perspectives, advocating for a rights-based, interdisciplinary framework that protects all parties involved particularly the child. The study highlights key legal ambiguities concerning the recognition of parenthood, enforceability of surrogacy contracts, and the ethical boundaries of assisted reproductive technologies. Drawing from comparative legal systems, including those of the United Kingdom, the United States, and select Eastern European states, the paper argues for recognition of genetic motherhood and the establishment of ethics committees comprising legal, medical, and psychosocial professionals. It outlines permissible conditions for surrogacy, such as medical necessity, genetic links between the embryo and intended parents, and strict non-commercial intent. Moreover, it addresses biological phenomena like microchimerism and calls for the creation of registries to guard against inadvertent incest. The welfare of the child remains central, and the paper proposes that future surrogacy legislation explicitly address matters of custody, inheritance, and contractual withdrawal. Looking ahead, it acknowledges the transformative potential of technologies such as uterus transplants and artificial wombs. Ultimately, the article urges legislative reform in Türkiye, Azerbaijan, and comparable jurisdictions to ensure transparency, justice, and ethical integrity in surrogacy arrangements.*

**Keywords:** surrogate motherhood, paternity, surrogacy agreements, infertility, artificial insemination, assisted reproductive technologies, zygote, fetus.

### 1. Introduction

The drive to reproduce and ensure the continuity of human life is among the most deeply rooted instincts of individuals and societies. When biological reproduction becomes unattainable, alternative paths to parenthood once regarded as exceptional have gained legitimacy and accessibility thanks to medical innovations. One such path is surrogacy: the process of having a child through a gestational carrier, which has become increasingly common in recent decades. Although the historical origins of surrogacy remain obscure, archaeological findings suggest it dates as far back as 2000 BCE. A clay tablet found in Kültepe, an ancient Assyrian site in modern-day Turkey, contains legal references to infertility, egg donation, and surrogate arrangements, indicating that these practices were once formally regulated. Similarly, biblical narratives such as those of Sarah and Hagar, or Rachel and Bilhah are often cited as early examples of surrogate motherhood. Contemporary surrogacy began to take legal and medical shape in the United States during the late 20th century, with the first formally documented surrogacy arrangement recorded in 1976. Landmark cases such as *Baby M* and *Baby Cotton* ignited fierce legal and ethical debates, exposing the gaps in legislative frameworks and challenging traditional notions of parenthood. Globally,

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legal responses to surrogacy differ substantially: some jurisdictions ban it outright, while others permit it under strict conditions. In Azerbaijan, however, the legal landscape remains undeveloped and unclear. Neither the Family Code nor existing medical or human rights laws explicitly define the legal standing of surrogacy. This legal vacuum fosters uncertainty, raising ethical dilemmas and practical issues related to parentage, custody, and medical liability.

This paper aims to critically examine surrogacy within a legal-medical framework, with a particular focus on Azerbaijan. It assesses the current state of domestic law, evaluates its alignment with international standards, and proposes reforms to promote ethical and effective governance of surrogacy. By doing so, the article contributes to broader debates on reproductive autonomy, legal personhood, and family rights in evolving legal contexts.

## *II. The Concept and Definition of Surrogacy*

Before exploring surrogacy in detail, it is essential to understand the broader context of artificial insemination a foundational reproductive intervention often linked to surrogacy [2]. Artificial insemination involves introducing sperm into a woman's reproductive system without sexual intercourse, with the goal of achieving fertilization. Modern applications of this technique include gamete transfer and in vitro fertilization (IVF), all of which are designed to facilitate conception outside of sexual reproduction. Artificial insemination is primarily used when natural conception is medically impossible or impractical, including cases involving physical separation of partners (such as military deployment or incarceration), psychological barriers, or complex medical conditions. These technologies are now integral to surrogacy practices [2]. To better understand surrogacy, it is helpful to clarify several biological terms:

- A *zygote* forms when a sperm cell fertilizes an egg, resulting in a single cell with a complete set of chromosomes.

- Within 24 hours, the zygote begins cellular division and becomes an *embryo*, which is classified as a *fetus* beginning in the eighth week of gestation.

In Turkish law, assisted reproductive technologies (ART) which include fertilization and embryo transfer outside the human body are defined under Article 4 of the Regulation on Assisted Reproductive Treatment Practices and Centers (ÜYTE) [6]. This regulation distinguishes between:

- *Homologous fertilization*: Only between married partners using their own gametes (legally permitted).

- *Heterologous fertilization*: Involving donor gametes, often from unmarried third parties (legally prohibited in Turkey) [6].

Surrogacy typically involves a woman, the *surrogate mother*, who agrees to carry and deliver a child for another individual or couple [3]. This often occurs when the intended mother is unable to conceive or carry a pregnancy safely. The arrangement is governed by a formal contract that outlines obligations such as abstaining from harmful substances, undergoing regular medical supervision, and relinquishing the child post-birth. Despite its increasing use, there is no universal agreement on terminology; some prefer terms like *gestational carrier* or *host mother* to reflect the surrogate's limited parental role [13]. Broadly, surrogacy is divided into two types: Genetic Surrogacy and Gestational Surrogacy. *Genetic Surrogacy*-In this model, the surrogate mother is also the genetic mother, as she provides her egg. The sperm may come from the intended father,

and fertilization can occur naturally or via artificial insemination. Because the child is biologically related to the surrogate, legal motherhood lies with her, and the intended mother must adopt the child to establish legal parental status [12]. *Gestational Surrogacy*—here, the surrogate has no genetic connection to the child. The embryo is created using the intended parents' or donors' gametes via IVF and is then implanted into the surrogate. In principle, no biological bond exists between the surrogate and the fetus [10]. However, recent scientific findings suggest otherwise. The phenomenon of *microchimerism*—the transfer of a small number of cells between the surrogate and the fetus—may result in subtle and lasting biological links, with implications for immune function and long-term health. These complexities further underscore the need for nuanced legal recognition of surrogacy arrangements.

Surrogacy arrangements are frequently categorized based on whether or not financial compensation is involved:

- *Commercial Surrogacy* (also referred to as compensated or paid surrogacy): In this model, the surrogate mother receives monetary payment beyond the reimbursement of medical and pregnancy-related expenses. Although ethically contentious, such compensation is often justified as acknowledgment for the surrogate's time, physical demands, and potential health risks [4].

- *Altruistic Surrogacy* (also known as unpaid or gratuitous surrogacy): This arrangement occurs when the surrogate agrees to carry the child without receiving financial reward, typically motivated by empathy or familial connection. Such models are more prevalent in jurisdictions with stricter legal controls on reproductive commodification [7].

For consistency and clarity, this paper uses the terms *compensated surrogacy* and *altruistic surrogacy* throughout.

Surrogacy can also be defined by the geographical relationship between the parties involved:

- *Domestic Surrogacy* occurs when both the surrogate and the intended parents reside within the same legal jurisdiction [5].

- *Cross-Border Surrogacy* involves parties from different countries. This model has become increasingly common among individuals or couples from countries where surrogacy is either banned, heavily restricted, or financially prohibitive. High-income families often seek surrogacy arrangements abroad, raising serious ethical questions about exploitation and the global marketization of reproductive labor [11].

The terminology used in surrogacy discourse is itself a subject of debate. Critics argue that the label "*surrogate mother*" fails to adequately reflect the surrogate's limited parental role, proposing alternatives such as *gestational carrier*, *host mother*, or *pregnancy for another* [13]. The South African Law Commission, for example, uses the term *hostess mother* [13]. Such linguistic diversity reflects the legal and cultural complexity surrounding surrogacy, highlighting its evolving nature across medical, ethical, and jurisprudential domains.

Surrogacy generally involves at least three participants and is often undertaken for medically justifiable reasons. Women may turn to surrogacy if they lack a uterus (due to congenital absence or surgical removal), have uterine conditions that preclude safe pregnancy (e.g., Asherman's syndrome, fibroids, septate uterus), or suffer from systemic illnesses such as heart disease, kidney failure, or recurrent miscarriage [6]. Beyond medical necessity, surrogacy is also sought by same-sex couples, single

individuals, or women wishing to avoid the physical and psychological burdens of pregnancy [1].

Historically, surrogacy was performed through natural sexual relations between the intended father and the surrogate. However, advances in assisted reproductive technologies (ART) have introduced more ethical and medical control over the process. Today, surrogates may conceive through artificial insemination or via embryo transfer using IVF [3]. These techniques allow for embryo screening, increase pregnancy success rates, and reduce ethical concerns related to direct sexual involvement.

Modern surrogacy arrangements may differ legally depending on the marital status of the surrogate or intended mother, and whether donor gametes are used. Based on the source of the egg, surrogacy practices are generally categorized as follows:

*The Egg is Provided by the Intended Mother*-In this gestational surrogacy model, the intended mother's egg is fertilized through IVF, and the resulting embryo is implanted into the surrogate's uterus. This method is typically used when the intended mother is medically unable to carry a pregnancy due to anatomical or health-related conditions, or when she prefers not to undergo pregnancy for personal or professional reasons.

Although the child is genetically related to the intended mother, the legal mother under Turkish Civil Code (TMK) is the woman who gives birth i.e., the surrogate. Consequently, intended parents must complete legal steps such as adoption or paternity acknowledgment (in cases involving sperm from the intended father) to secure parental rights. If the surrogate is married, her husband is presumed to be the child's father unless paternity is legally contested and reassigned.

*The Egg is Provided by the Surrogate Mother*-In traditional surrogacy, the surrogate provides her own egg, making her both the genetic and gestational mother. Fertilization occurs through artificial insemination or IVF using sperm from the intended father or a donor. This arrangement is frequently used by male couples or single men seeking biological parenthood [12].

According to Turkish law, the surrogate in this model is recognized as the legal mother. If she is unmarried and the sperm is provided by the intended father, paternity can typically be established without legal conflict. However, if the surrogate is married, her husband is presumed to be the child's father under the law regardless of the sperm donor's identity unless that presumption is legally rebutted.

*The Egg is Donated Anonymously*-When neither the intended mother nor the surrogate contributes the egg, an anonymous donor may be used. The donated egg is fertilized via IVF and implanted into the surrogate. This model is often chosen by women with premature menopause, poor egg quality, or genetic conditions [4]. In this scenario, legal complexities increase. If the surrogate is unmarried and the sperm is provided by the intended father, legal paternity is straightforward. If the sperm also comes from an anonymous donor, then neither parent has a direct biological connection, and adoption becomes necessary. Legal clarity requires that both egg and sperm donors waive all parental claims.

Each of these models whether involving the intended mother's egg, the surrogate's, or a donor's poses unique legal and ethical challenges. Issues surrounding consent, parental recognition, contractual obligations, and reproductive autonomy must be addressed through transparent regulation to prevent exploitation and ensure that the best interests of the child are preserved.

### *III. Surrogacy in Azerbaijan: legal ambiguity and reform needs*

In Azerbaijan, surrogacy is not explicitly prohibited, yet it is not clearly regulated either [1]. This legislative silence creates a legal vacuum with significant consequences for families, medical professionals, and policymakers. Existing laws, such as the Family Code, Civil Code, and the Law on Public Health, fail to define or address surrogacy arrangements. Although the Constitution and Family Code emphasize the protection of children's rights, there are no specific provisions outlining the roles, responsibilities, or rights of surrogate mothers and intended parents. This regulatory gap leads to substantial difficulties, particularly in establishing legal parentage, issuing birth certificates, and obtaining citizenship for children born via surrogacy. Consequently, some Azerbaijani couples seek surrogacy services abroad in countries like Georgia, Ukraine, or the United States where legal frameworks exist [8]. However, these arrangements often face complications when reintegrated into the Azerbaijani legal system. While assisted reproductive technologies like IVF are legally available in Azerbaijan, the absence of surrogacy-specific legislation discourages domestic application due to legal risks and professional uncertainty [1]. Ethical perspectives are also polarized. Some scholars and religious authorities view surrogacy as contrary to natural biological roles, while others, especially legal and medical experts, advocate for its regulated implementation as a means to support individuals affected by infertility.

To address these concerns, Azerbaijan should adopt comprehensive legislation that clearly defines:

- The enforceability of surrogacy contracts [3],
- Legal mechanisms for assigning parentage and registering births [9],
- Medical and ethical criteria for surrogate eligibility, including health status, age, and psychological readiness [6],

Such legislation would enhance legal certainty, protect all parties involved, and ensure ethical and equitable reproductive practices in Azerbaijan.

### *IV. Conclusion*

Infertility, affecting approximately 15–20% of couples worldwide, continues to represent a significant public health and societal challenge. As the innate human drive for reproduction endures, individuals and couples increasingly seek alternative means to build families among them, surrogacy remains one of the most prominent and contentious options. Even in jurisdictions where surrogacy is restricted or prohibited, the practice often proceeds through informal channels or international arrangements, giving rise to the phenomenon of “reproductive tourism.”

The absence of coherent legal frameworks particularly those addressing parentage, child status, and contract enforcement fosters ambiguity, legal disputes, and potential harm to all parties involved. This is especially evident in countries such as Türkiye and Azerbaijan, where surrogacy remains legally undefined. These circumstances call for immediate and comprehensive legislative action that embraces the realities of modern reproductive medicine while safeguarding ethical standards.

Future legal reforms should address key issues, including:

- The legal status of embryos
- Restrictions on genetic manipulation and embryo destruction
- Permissible scope of medical interventions
- Regulation of surrogacy contracts

- Legal determination of parentage
- Protection against the exploitation of surrogates

Given that reproductive autonomy is increasingly recognized as a constitutionally protected personal right, surrogacy should be permitted albeit under strict conditions. These should include medical necessity, genetic linkage between the child and the intended parents, and a non-commercial, ethically supervised process. Such oversight should be entrusted to a multidisciplinary ethics or judicial committee comprising legal, medical, and psychosocial experts. The longstanding Roman legal doctrine *mater semper certa est* (“the mother is always certain”) is no longer sufficient in the context of gestational surrogacy, where genetic and gestational motherhood may diverge. The law must evolve to recognize genetic maternity where appropriate and provide clarity regarding the rights and responsibilities of all involved.

Furthermore, biological factors such as *microchimerism* the exchange of cells between the fetus and the surrogate demand legal acknowledgment, particularly in preventing unintended incestuous relationships through well-maintained registries [10]. Limiting surrogacy to a single occurrence per surrogate may prove too restrictive, especially if future medical treatments such as stem cell transplants rely on biological relationships formed during surrogacy. It is also crucial to legally recognize the emotional bonds that may develop between the surrogate and the child, as well as to regulate withdrawal rights: intended parents should be permitted to revoke consent prior to embryo implantation, while surrogate mothers especially those with a genetic link should have rights aligned with national abortion laws. In the event of the death or incapacitation of the intended parents, existing guardianship laws, such as those found in Turkish and Azerbaijani civil codes, should ensure continuity of care and preserve the child’s link to their genetic origins [1].

Ultimately, surrogacy is a reality of modern reproductive life. While it remains ethically complex and legally divisive, it is essential that countries like Türkiye and Azerbaijan enact forward-thinking, transparent, and inclusive legislation. Looking ahead, technological advances such as uterus transplants and artificial wombs may reshape this landscape. For now, the path forward lies in embracing a rights-based, multidisciplinary approach that upholds the dignity of all participants and prioritizes the welfare of the child.

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