

## Multiple Perspectives on Surrogacy and In-Vitro Fertilization in Turkey

### Türkiye’de Taşıyıcı Annelik ve Tüp Bebek Konusunda Çoklu Perspektifler

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**Abstract:** In November 2018, all types of Assisted Reproductive Technologies (ART) involving third parties, including surrogacy, were prohibited in Turkey. In-Vitro Fertilization (IVF) methods for married heterosexual couples, however, are highly promoted by the official-legal framework despite the fact that the number of people seeking surrogate mothers abroad has been increasing dramatically. This reveals not only several ethical questions about the practice of surrogacy but also legal debates both in Turkey and in the world. Thus, this article presents a conceptual and legal framework for the practice of surrogacy in Turkey. It aims to make a basic examination of surrogacy and introduce some of the ethical questions and their implications for law in this area.

**Keywords:** Surrogacy in Turkey, assisted reproductive technologies (ART); in-vitro fertilization (IVF)

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**Özet:** Türkiye’de taşıyıcı annelik dahil üçüncü şahısları içeren her türlü Üremeye Yardımcı Tedavi Uygulamaları (ÜYTE) Kasım 2018’de yasaklanmıştır. Buna rağmen yurt dışında taşıyıcı anne arayanların sayısı gün geçtikçe artmaktadır. Resmi otoriteler ise sadece evli heteroseksüel çiftler için tüp bebek yöntemlerini teşvik etmektedir. Bu durum taşıyıcı annelik uygulamasına ilişkin birçok etik meselenin yanı sıra hem Türkiye’de hem de dünyada yasal düzenlemelerin tartışılmasına sebep olmaktadır. Bu makalede, Türkiye’deki taşıyıcı annelik uygulaması hakkında temel kavramsal ve yasal bir çerçeve sunulmakta, etik sorunların hukuka olan etkisi incelenmektedir.

**Anahtar Kelimeler:** Türkiye’de taşıyıcı annelik; üremeye yardımcı tedavi uygulamaları; in-vitro fertilizasyon (IVF)

## INTRODUCTION

In November 2018, all types of Assisted Reproductive Technologies (ART) involving third parties, including surrogacy, were prohibited in Turkey by introducing a prison sentence for those found guilty. With this law, Turkey became the first country to legislate even against the travel of its citizens abroad for seeking third-party reproductive assistance. This law, however, is in sharp contrast with how the official-legal framework promotes In-Vitro Fertilization (IVF) methods for married heterosexual couples while considering the third party ART as ‘unacceptable’ despite the fact that the number of Turkish women illegally seeking surrogate mothers abroad, especially in countries where the practice is common and legal or women offering to become surrogates for money have been rising dramatically.

In fact, since the birth of the first test-tube baby in 1989, Turkey has witnessed the rapid growth of its ART market, with more than 150,000 public and private clinics, according to figures provided by the Turkish

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Ministry of Health. These serve 2.6 million infertile people every year (1), and approximately 7,500 births occur annually using these technologies. Moreover, Turkey is right now the seventh-largest IVF market (2). Turkey, thanks to the steep increase in the number of IVF clinics (3), is serving not only the local consumers but also ‘reproduction tourists’ coming from Europe, Russia, and the Middle East (4). Besides, banks offer “IVF loans,” famous obstetricians appear on television programs to inform the public about the latest technologies, and the print media includes pages with “success stories” of women who have given birth thanks to IVF. Therefore, IVF currently enjoys enormous visibility and popularity. This situation of IVF is very consistent with the interaction of state regulations and historical-political conceptualizations of motherhood, infertility, and family through which surrogacy or sperm or egg donation is denaturalized and delegitimized on the one hand although traditional IVF is routinely performed and highly normalized. As a result, the boundaries between natural and unnatural so what is acceptable and what is not are reconstructed by the legal framework. Thus, this article presents a conceptual and legal framework for the practice of surrogacy in Turkey. It has been divided into four parts. In the first part, a conceptual perspective in order to clarify different terms is adopted. The second part presents different views on surrogacy. It aims to introduce various ethical debates regarding the issue. The third part puts Turkey in a global framework, and finally, the fourth part presents the Turkish legal framework. The article, in the end, aims to make a basic examination of surrogacy and introduce some of the ethical questions and what implications they may have for law in this area.

### **CONCEPTUAL FRAMEWORK: SURROGATE MOTHERHOOD and IVF**

Assisted Reproductive Technologies (ART) is a set of technologies and techniques designed to interfere with the human reproduction process. They can be categorized into four groups; contraceptive, management, monitoring, and conceptive technologies that are about fertility control, labor and childbirth assistance, pregnancy and delivery control, and the promotion of pregnancy through overcoming or bypassing infertility (5). Belonging to the fourth category, IVF puts the process of outside the body ‘into the glass’ or ‘in-vitro’ as expressed in Latin. Its method distinguishes IVF from other ART, such as Artificial Insemination (AI), which is the injection of a selected high-quality sperm directly into the uterus to increase the chances of conception in the body. Although there is more than one technique of IVF, the common procedure is the extraction of genetic material from the male and female bodies, fertilization in the laboratory, and the application of the resulting embryo in the mother’s womb for pregnancy to occur. Thus, surrogacy (when a third-party woman is carrying another couple’s baby), Artificial Insemination by Donor (AID) (in the case of a third party’s sperm), or Artificial Insemination by Husband (AIH) (when a woman’s legal partner’s sperm is involved) do not occur alone, because they are all technologically possible.

A surrogate mother is a woman who, for financial or other reasons, agrees to bear a child for another woman, who again, for financial or other reasons, is unable or unwilling to do it on her own (6, 7). Here the third party is the person who becomes pregnant with another couple’s embryo (8); agreeing to give the child to them (9). Sometimes this procedure may require the ‘surrogate mother’ to donate an egg as well (10). In today’s world, some women do this with self-sacrificing motives, such as helping a friend, relative, or sister. There are also cases in which same-sex couples prefer to hire surrogate mothers to have babies, besides unmarried men resort to this method.

There are three types of surrogacy. The first is the traditional method. This is based on the fertilization of the surrogate mother’s egg with the sperm of the husband of the woman who cannot ovulate, give birth, or bear children. Here, the surrogate mother is also the biological mother of the child to be born, and lineage is established between the woman is established through adoption. Besides, the surrogate mother gives birth, and the lineage continues, as Turkish Civil Code Article 282 states. Single men and same-sex couples can opt for this method.

The second method is called the gestational or full surrogacy method. In this method, the woman has the ability to ovulate, but her uterus is not suitable for pregnancy. In this case, the woman's egg is fertilized with her husband's sperm in the laboratory by IVF, and the fertilized egg is transferred to the surrogate mother, who has no genetic connection with the child. Apart from these medical reasons, single women or lesbian couples sometimes resort to this method. In addition, women who want their bodies not to deteriorate although they are able to give birth or who think that giving birth will negatively influence their career planning may also want to benefit from this method. With this method, the embryo formed by IVF of the woman's egg cell is transferred to the surrogate mother. Here the child has two mothers; the genetic one and the one who carries the child.

The third method is the egg donation method. In this method, egg cells are obtained by donation. Pregnancy is achieved by IVF of the donor's egg cell and implantation in the surrogate mother's womb. This method is used if the woman's egg reserves are depleted to prevent the transmission of a genetic disease to the unborn child, in case the chance of success in IVF is very low due to low egg reserve, in the case with a history of repeated unsuccessful AI practices, if the woman loses her ovaries for any reason. In this method of surrogacy, the child has three mothers. These are the surrogate mother, the genetic donor mother, and the volunteer mother making the issue much more complicated than ever.

### **DIFFERENT VIEWS and SOME ETHICAL QUESTIONS ON SURROGACY**

In general, the literature on the ethics of surrogacy includes two main debates revealing the multi-dimensionality of the issue: one in favor of it and the other one against it. The first body of literature was mainly grown in the 1960s-70s in relation to the second-wave feminists seeking new ways to liberate women of their reproductive capacity. The supporters generally argue that it brings freedom to women while allowing them to have reproductive choices on their bodies (11). Panitch (12) states that surrogacy may protect positive freedoms by, for example, allowing women, LGBTs, and single people who cannot have children because of their sex, career choices, or infertility. In addition, from a liberal perspective, some authors also state that women are free to decide to rent their wombs so they can choose voluntarily to become surrogate mothers. Therefore, surrogacy is different from selling a baby in this context because what is being rented is not the baby but a woman's reproductive system. In this sense, it is similar to sperm donation.

Moreover, some argue that the only thing surrogacy requires is extra physical labor, as is the case in jobs like military service and athletics. And in these jobs, people get paid for what they are doing. This must happen in the case of surrogacy, too (11). This point leads to the ethical question about whether surrogacy is the same as the other types of paid work or is it just a unique work. Given the presence of a 'finished product' as the baby, the situation becomes much more complicated, raising another question about the commodification of a living being. Several critics argue that gestation is different from other types of labor (13, 10). Pateman (14) says that the labor of bearing a child is complex and involves emotional and physical bonding between women and the fetus. Therefore, it is different than sperm donation. Another objection is related to the vulnerability of children. According to Okin, surrogate pregnancy contracts do not consider the child's best interests (15). As Satz also says, children are weak agencies in these contracts as they are dependent on the sides of the contract (11).

From a Marxist perspective, surrogate motherhood is a kind of exploitation of someone's body by someone else. Here, the woman's body becomes reproductive labor, and the baby becomes a commodity. Then, the reproductive body is alienated from what 'it' produces at the end. Anderson also stresses that surrogacy contracts alienate a woman from her love for the child and frequently involve exploitation, as surrogate sellers have less wealth and are emotionally vulnerable than buyers (16). Satz also argues that surrogacy is not a voluntary choice because ovulation, conception, gestation, and, finally, birth occur without the conscious direction of the mother

(11). At this point, Foucault's concept of 'biopower,' referring to modern nation state's categorizations of their subjects in relation to their bodies to achieve the control of populations, is a significant theoretical tool (17). Through reproductive policies, states create ideal categories in terms of gender, sexuality, fertility, race, and healthiness and attempt to suppress those who are not good fits (18, 19, 20). From this perspective, having a child, 'being a father', and especially 'being a mother' are all perceived as the only suitable and accepted option in people's lives. Besides, Satz argues that surrogacy contracts give other people, such as doctors or the parents of the child, access to and control over women's body and sexuality in a Foucauldian way (11). For example, surrogacy contracts involve conditions concerning medical treatment, abortion, and regulation of the emotions of surrogates. In addition, these contracts emphasize the reductionist views about women simply as reproducers or birth machines. In fact, the practice of surrogacy itself reinforces the 'gendered division of labor' because the surrogate needs to be usually a woman – who has a uterus.

In addition, Rothman states that technologies created by 'men' inevitably result in unequal power distribution, for these technologies tend to place women's bodies under masculine and medical control (21). At this point, from a radical feminist perspective, ART legitimizes the already established power relations within the society (22). Panitch and Satz highlight that race and class dimensions also need to be considered (11, 12). Panitch looks at surrogate tourism in India, where poor and uneducated women work as surrogate mothers. She thinks that surrogacy contracts exploit the labor of the disadvantaged women in India (12).

### **A BRIEF ACCOUNT of SURROGACY LAWS in DIFFERENT COUNTRIES**

All types of surrogacies are banned in Catholic countries such as Spain, France, and Italy (23). Surrogacy is prohibited in Austria, Switzerland, Germany, Denmark, Sweden, and China. According to German Law, surrogacy does not serve the child's best interests if one takes hesitations about which mother the child will feel close. Surrogacy contracts are null and void according to the Swiss Law of Obligations. Only in the canton of Zurich surrogacy is free, provided that certain conditions are met. These conditions are that the reproductive cells should belong to the mother or father and that there should be a court decision regarding the suitability of surrogacy. No legislation recognizes surrogacy in Ireland, the Netherlands, Belgium, and the Czech Republic (24). Some countries, such as most South American countries (25)<sup>1</sup> and Albania, do not have a specific legal framework related to surrogacy (24). In the Turkish Republic of Northern Cyprus, in the eleventh part of the statute prepared under Article 32, with the title of "Conditions for Allowing Surrogacy and Examinations to be Applied in Surrogacy", according to paragraph 1 of Article 27; "A woman's use of a surrogate is permitted by the Competent Authority if at least one of the following conditions is met for a woman's use of a surrogate: congenital absence of uterus; Removal of the uterus after benign or malignant events of the uterus; congenital anomalies of the uterus (T-shaped uterus, hypoplastic uterus); uncorrectable uterus; medical conditions in which the woman's life could be endangered such as severe heart disease. In England, sperm donation, egg donation, and embryo transplant are allowed. But the child must be genetically related to at least one of the volunteer couples. In addition, surrogacy contracts are considered void if they are made for commercial purposes. The voluntary couple has no right to force the surrogate mother to give the baby. In Greece, surrogacy is restricted to heterosexual couples and single women. A genetic link between the surrogate mother and the child is prohibited. The surrogate mother has no parental rights over the child and is contractually obliged to hand the child to the voluntary family after birth. However, if the surrogate mother proves a genetic link with the child, the right to motherhood arises.

In India, there was no regulation on surrogacy until 20 December 2018. According to the 2018 law, surrogacy is allowed only for infertile Indian couples. Once surrogacy is permitted, the relationship of close kinship with the voluntary couple is sought. Besides, surrogacy is forbidden for singles and homosexuals. In Israel, delivery

<sup>1</sup> Altruistic surrogacy allowed in Brazil and Uruguay. In Mexico, Tabasco state banned surrogacy in 2016 but except that there are no state level laws. (See: "Intended Parents, All You Need to Know about Completing Surrogacy in Mexico", <https://surrogate.com/intended-parents/international-surrogacy/surrogacy-in-mexico/>)

by surrogacy can only be performed in Israeli hospitals. Since the religious identity is transmitted through the mother in Judaism, the person giving birth must also be Jewish for the child to be Jewish. The surrogate mother and the volunteer couple each must prove that they belong to the Jewish religion, in addition to the obligation to submit their medical and genetic background and criminal record to the committee. Besides, surrogacy, sperm, and egg donation are legal in Georgian legislation, and only married couples are allowed to practice surrogacy. The surrogate mother cannot adopt the baby.

In addition, Saudi Arabia and Egypt prohibit surrogacy as well as the use of donor eggs and donor spermatozoa (26, 27). Like Catholics, one of the reasons why Sunni Muslims do not allow surrogacy is adultery (23). On the other hand, Shiite countries like Iran and Lebanon allow surrogacy (28). In Iran, surrogacy was accepted in 2002, and in big cities like Tehran, it is recommended as a treatment method for couples who cannot have children naturally. On the other hand, Inhorn states that the fatwa about reproduction issued by Al Azhar University in Egypt is still important (27). It prohibited any third-party interference with the “marriage functions of sexuality and reproduction” as adultery, and the adoption of a child obtained because of an illegal medical assisted reproduction operation, as it was considered illegitimate and belonged to the family. These rules are still widely accepted in the Sunni world (29, 30). Here, Sunni authorities also emphasize the importance of possible confusion in lineage, which is one of the most important elements of identity and kinship in Islam. In this context, the Directorate of Religious Affairs (*Diyanet*) supports the application of assisted reproductive technology among married couples. However, it was also stated that in vitro fertilization methods among unmarried people “hurt human feelings and contain elements of adultery.” According to *Diyanet*, surrogacy is religiously unacceptable as it includes elements of adultery (31). Within this framework, the popular destinations where Turkish people go for surrogacy are the US, India, Georgia, Greece, and Northern Cyprus<sup>2</sup>.

## LEGAL FRAMEWORK in TURKEY

In Turkish Law, AI is divided into two according to the source of the reproductive cells used. If the sperm and egg are taken from a married couple, there is homologous fertilization. This is the type of AI allowed in Turkish Law. On the other hand, if the reproductive cells used in fertilization are taken from unmarried people, there is heterologous fertilization. This type of fertilization is prohibited.

According to the Regulation on Assisted Reproductive Treatment Applications and Assisted Reproductive Treatment Centers article 4/ğ, assisted reproductive treatment is the practice accepted as a medical treatment method in modern medicine, which includes the transfer of gametes or embryos to the expectant mother. According to the “sanction form” in the Appendix Article 17 of this regulation: it is forbidden to keep, use, transport, and sell the eggs and sperms taken from the spouses and the embryos obtained from them for any purpose. Violation of this regulation is reported to the public prosecutor’s office. But we need to clarify that since this regulation does not have a penal sanction, it is only an administrative sanction for the centers. These actions do not constitute a crime, and the public prosecutor’s office will also decide not to prosecute. In the regulation, no sanctions are foreseen for the surrogate mother. A similar legal regulation is included in Appendix Article 1 of The Law on Harvesting, Storage, Grafting, and Transplantation of Organs and Tissues. According to this regulation, ART is carried out only between married couples, and surrogacy is prohibited.

Pursuant to Article 15/1 of The Law on Harvesting, Storage, Grafting, and Transplantation of Organs and Tissues, the provisions of Article 91 of the Turkish Penal Code shall apply to those who illegally buy, sell,

<sup>2</sup>Recent news show that Turkish authorities may have some pressure to Northern Cyprus to ban surrogacy (<http://www.hurriyet.com.tr/dunya/kktcd-tasiyici-annelik-yasaklaniyor-40623138>) “İnternette taşıyıcı anne pazarı” <https://www.gazeteduvar.com.tr/gundem/2018/02/05/internette-tasiyici-anne-pazari/>; “Yüzlerce kişi taşıyıcı olmak veya taşıyıcı anne bulmak için internete ilan veriyor.” <https://www.haberturk.com/yuzlerce-kisi-tasiyici-anne-olmak-icin-internete-ilan-veriyor-1824309>. There are many ads/web pages/videos on the Internet by those who want to be surrogate mothers in Turkey. There are audience/reader comments saying that they are either looking for a surrogate mother or want to be surrogate mother. For example: “Yasağı internete deliyorlar; Ev fiyatına taşıyıcı annelik,” 9 March 2020, <https://www.milliyet.com.tr/gundem/ev-fiyatina-tasiyici-annelik-6161678>

purchase, mediate the sale of organs and tissues, store, transport or vaccinate. In the second paragraph of the article, those who donate, vaccinate, keep, use, store, and transport embryos and reproductive cells, and those who buy and sell them, act as intermediaries or brokers in the purchase and sale of them or those who encourage, direct them to these acts, or place or publish advertisements or advertisements for them will be sentenced to imprisonment. It should be noted that in the second paragraph, all the situations in which the provision is applicable are listed, but the surrogate mother is not mentioned. In other words, the woman who is a surrogate mother will not be sentenced to prison.<sup>3</sup>

The 282/1 article of the Turkish Civil Code accepted the system of establishing the lineage between child and mother by birth, that is, it gave superiority to biological motherhood. In other words, the woman who gives birth does not have to be a mother genetically. Since there is no lineage between the genetic mother and the child in the practice of surrogacy in Turkish Law, the genetic mother has no custody rights over the child. The child cannot be the legal heir of the genetic mother, and the genetic mother cannot be the legal heir of the child. There is no parent-superior kinship relationship between the child and the genetic mother. The genetic mother is not obligated to pay alimony to the child and the child to the genetic mother. The genetic mother has no right to manage, use and dispose of the child's property. The genetic mother does not have the right to file a maternity case by saying, "I am the mother of the child". In this vein, surrogate motherhood does not have any place in Turkish law because the surrogate mother is considered as the mother.

### CONCLUDING REMARKS:

Article 41 of the Constitution of the Republic of Turkey states, "family is the foundation of the Turkish society," and no forms of marriage except for the one between a man and a woman are recognized by the state. Accordingly, the only approved patient of traditional, appropriate IVF technologies is the legally married, thus heterosexual couple. Single persons are not included as well, which is the other source of inequality a changing world (32). Therefore, the state banned any other combination of persons or any other methods, including third parties. However, the ban would not stop people from going abroad and practicing ART techniques, including surrogacy. In fact, as long as the desire to reproduce continues, people can use the surrogacy method like many other methods. At this point, Satz states that markets for human kidneys, child labor, prostitution, contract pregnancy, and bondage labor are "noxious markets," and these markets have extremely harmful results for individuals and society (11). Her main argument is that these "noxious markets" should not be banned but regulated because banning will not stop people searching for surrogate mothers (11).

In this context, regardless of whether a country-specific approach or a universal one is adopted, regulation related to surrogacy and other ART methods needs to be done. There is, in fact, lack of legal framework in Turkey. Therefore, what is needed is a clear detailed outline as some other areas such as stem cell production (33). The regulations should include a determination of the legal position of the embryo. Besides, the type, time, and limit of interventions that can be made on the embryo should be determined by law. In this framework, preimplantation genetic diagnosis, sex selection, and prenatal genetic diagnosis should be regulated as well. The use of the embryos created for other purposes should be prevented, and the conditions for the destruction of the embryo should be prevented. Moreover, changing laws related to surrogacy requires using a new terminology brought by new reproductive technologies. This would help find out new definitions of parenthood. Last but not least, adoption should be positioned as a strong alternative to ART with decreasing procedures that would make adoption easier and desirable.

<sup>3</sup> The situation frequently encountered in Turkey regarding surrogacy is reporting identity to the hospital on behalf of the volunteer mother instead of the surrogate mother who gave birth to the child. This act constitutes the crime of changing the lineage according to Article 231 of the Turkish Penal Code.

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