

As loving the child; Surrogacy from a Jurisprudential Perspective

Jafaritabar H. (Ph.D.)

- Department of Private Law, Faculty of Law & Political Sciences, Tehran University, Tehran, Iran.

Abstract

Introduction: There are two historical paradigms in the Iranian family law: love law and libido law. The approach to surrogacy according to these two paradigms will be different. Understanding the two approaches is possible through understanding the four categories of love: 1. Libido: the passion of life and manifestation of sexual drive.

2. Eros: the romantic love and the material of poem and literature. 3. Philia: the mere love purified from libido like the relatedness of father, mother and their children. 4. Agape: the spiritual love in mysticism. Love law ceases at libido but love law promotes to philia passing through libido and eros. The paper explains two approaches to surrogacy and prefers the love approach to libido. For example, the legal theory which nullifies surrogacy, suffers from its libido perspective. Moreover, the doctrine which binds the surrogate mother to return the child to the commissioning family, only for the consideration and payment mentioned in contract, is a libidinal doctrine. The thesis of this essay discusses that the mother should be determined by philia and relatedness criterion not by libido.

Materials & Methods: Surrogacy in this essay is studied from a philosophy of law point of view. After describing its theoretical foundations in legal principles, the essay tries to prepare a jurisprudential response to the “Is and ought problem” of surrogacy by referring to the Iranian literature and mysticism.

Results: 1- In libido law, the concept of marriage is equal to sexual intercourse but in love law the purpose of marriage is relatedness of a man and a woman to each other and their children. 2- Libido law treats woman as an object and instrument, but love law tries to treat her as an end in herself. 3- In the literature of libido, law borders pornography but in the literature of love law it has a chaste language. 4- In libido love, this is only woman who has to remain faithful towards her husband but in love law the man is obliged to faithfulness to his wife and family. 5- Libido law, in spite of the term, treats libido in a cursory and perfunctory manner, but love law respects the values of libido and puts it in its correct place. For example, in the libido law if a man and a woman undertake, under marriage contract, to abandon sexual intercourse, this contractual term will be correct and effective but in love law, the term is certainly void because of the serious role of sexual intercourse in the frame of marriage and in faithfulness of both.

Conclusion: 1. The theory that invalidates the contract of surrogacy is a theory of libido law which rejects having the child without sexual intercourse. 2. The theory that obligates the surrogate mother to give the child back is also in libido sphere because the requisites of sexual intercourse are presumed superior than relatedness of surrogate mother to her born child.

3. On the other hand, the law should not have an inconsiderate conduct to libido. The continuity of philia differs from libido in being pure from lust and concupiscence, but we can not ignore the importance of libido in materialization of philia. The parents love their child because it is born after an amorous intercourse with a unity in the physical body of a man and a woman, and because the child is formed by their gametes. 4. Love is an accident in which human falls in with; it does not occur by choice. Therefore, the surrogate mother should not oblige herself, in her agreement, not to be attached to the child. Love is an act of God which frustrates the contract in this field; like any major force. 5. Parenthood is a legal fiction and a conventional presumption. In surrogacy, if the surrogate mother conceives, she is not the owner of the zygote like other normal or natural mothers. If the owner of zygote renders as mother and as she has not actually given birth to the child, like other natural mothers, she should not be presumed the mother by law. In the Iranian law, it is better to leave the case to judges and not to the legislature. The judge will presume the most related woman to the child as the mother. Regarding all circumstances, philia and relatedness in this field will be evidenced through the common sense of the judge. 6. The prima facie of the case is the most important evidence for judgment; the owner of the egg and the sperm who endorse surrogacy, as the last resort to parenthood, deserve the child and the burden of proof is on the surrogate mother to prove her prevailing philia. But, if a woman does not want to be pregnant because of aesthetic problems of pregnancy she has to expect not to be presumed as the mother of the child in the court. The burden of proof in this case is on the owner of egg to prove that her relatedness is more than the surrogate mother.

Key Words: Eros, Philia, Civil law, Offspring, Precedent, Law, Surrogate Mother, Decent, Lineage, Agreement, Civil liability, Legal presumption, Infertility.

Corresponding Author: Hassan Jafaritabar (Ph.D.), Department of Private Law, Faculty of Law & Political Sciences, Tehran University, Enqelab St., Tehran, Iran.

E-mail: hjtabar@ut.ac.ir