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Womb-Lease Contracts with particular reference to the Jordanian law: comparative research

عقود تأجير الأرحام من المنظور القانوني الأردني: دراسة مقارنة

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ملخص

في الآونة الأخيرة تعددت الحالات التي يلجأ فيها الأفراد الى استئجار رحم امرأة أجنبية رغبةً في أن تقوم هذه الأجنبية بعملية احتضان النطفة المخصبة والعائدة للزوجين مقابل مبلغ نقدي يدفع لها و في حالات استثنائية قد تقوم بهذا العمل بالمجان. تعمل هذه الاجنبية ومع نهاية فترة الحمل بتسليم المولود الى كل من الزوج والزوجة وعليه فإن مسألة استئجار الارحام تثير العديد من التساؤلات القانونية والاخلاقية كتلك المرتبطة بحقوق كل ذوي العلاقة والتزاماتهم. تتناول هذه الورقة عقود تأجير الأرحام بالتحليل المقارن مع تسليط الضوء على موقف المشرع الأردني منها وذلك من منظور القانون المدني من ناحية ورأي الفقه الاسلامي لمثل هذه العقود ، وهل من الممكن اعتبارها عقوداً قانونية واجبة التنفيذ ام انها تصطدم بعقبات تمنع تطبيقها على ارض الواقع.

الكلمات الدالة: عقود استئجار الارحام، الام البديلة، عقد نافذ، عقد باطل.

Abstract

The commodification of the womb has become increasingly popular in the 21st century whereby; women who are unable to conceive due to a variety of reasons become look for women who are willing for a specified amount of money, to lease her womb be used to bear the pregnancy of the other people. The commodification of the womb has raised various ethical and legal questions. Some are related to the rights of both the surrogate mothers and the biological parents of the child. Others are related to the

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legitimacy of the child that results from this process. This paper will focus on the Jordanian legal approach to such contracts and what steps should be taken to regulate such the subject matter, with particular reference to the civil code and Islamic shari'a Religious Views. The paper will also highlight the issue on comparative study basis.

Keywords: Womb-Lease Contracts, Surrogate, Enforceable Contract, Void Contracts.

Introduction

In the yester years for couples who desired to raise a child and were unable to conceive one, the alternative option was adopting a child if their religious believes allowed them to do so. However, today, due to the advancement of technology, there are various options that couples who face difficulties in conceiving a child can adopt, such as artificial insemination, in vitro fertilization and surrogacy.

Although there are ethical and legal questions or issues regarding womb commodification, there have also been calls to provide women with the right to make decisions, and even possibly enter into a contract if they feel like in matters that regard their bodies. There have also been questions that have been raised about whether the commodification of the womb provides women with control of their bodies- an economic opportunity, or whether they are being exploited. The need for such a consideration is that there has been observation not only on this topic at hand but also on other issues whereby the rich exploit the poor for their benefits. In this case, in particular, the rich couples may take advantage of the economic position of the poor women and ‘entice’ them through financial rewards to be ‘willing’ surrogates who will perform the job because they will be able to earn a certain amount of money.

There are also legal issues, especially in countries that do not have adequate legal frameworks that can be used to create an oversight, and regulations for this practice. In most cases, the surrogate mothers, reproductive clinics and even the commissioning couples choose a market that is beneficial or profitable for them. For couples they look for an estimate cost for the whole process before deciding on going through the

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whole process, the cost depends on many factors such as the Carrier reimbursements, Maternity clothing, Estimated monthly expenses (e.g., mileage, childcare, prenatal vitamins and Advance on contingencies in Carrier Agreement.

Problem of the study

Womb-lease contract became the phenomena of this era. Married couples intend to have their small happy families similar to those in fairytales. Due to some medical conditions in some cases wives find it difficult and in some cases- impossible to carry the babies in their womb. Married couples start to find alternative solutions to have their own kids, one of those solutions is to refer to the help of other females who are willing to help such couples, in return to money and sin some cases for free. Upon agreement, the later women will have to hand out the new born to the married couples. Beside the ethical point of view of such transactions, one might ask several questions mainly as to on which ground such contracts stand? And what re the legal consequences if such contracts were approved.

In doing so, the following questions will be answered:

- shall this contact be legally valid?
- can we consider this contract similar to lease contract and rent contracts?
- What is the Islamic and sharia regime point of view of such contracts?
- What if this contract is considered as void, what the legal consequences on such consideration?
- What if a Muslim couples hold the Jordanian nationality and form such in foreign regimes that recognize such contract, how will the Jordanian law deal with this matter?

Importance of the study

This paper is significant since it will tackle an important issue that news is covering lately. In many countries, womb-lease contracts are

accepted. parties to the contracts have both rights and obligations. This study is important since it have legal, religious ethical aspects. It also tries to provide many questions which raise with the common use of such contracts world-wide This paper will cover the subject matter the author of this paper chose to write in English, since most of the previous research related to the Arab World and Islamic regime were found in Arabic. The author believes that it is important to widely spread the legal Jordanian approach in relation to wom-lease contracts in addition to the suni Sharia approach to foreign countries

Objectives

This study aims to:

1. Highlight the element of valid contract according to the Jordanian law and apply them to womb-lease contracts
2. Highlight the Islamic Religious Views regarding womb-lease contracts.
3. Trying to establish whether such contracts which are valid contracts outside Hordan could be enforced in Jordan and the newborn baby will have any rights according to the Jordanian law.

Research Plan

This paper will tackle the subject matter through giving a brief introduction to the subject of this paper in th e first section. After defining the scope, objectives, importance of the study and previous work, the paper will move to cover the subject by Defining Womb-Lease and Surrogate Contracts in the second section. While the third section will try to tackle the issue of Balancing of Rights among the contract parties. In doing so, this section was divided into two sub-section, the first will stand to discuss where Womb-Lease and Surrogate Contracts are real binding contracts, and the later sub-section will consider whether or not womb lease contracts enforceable under the Jordanian laws? In doing so, the paper will highlight the currently legislative world-wide work before standing on the Jordanian work. Finally, the paper reach to some conclusions and recommendations in its fourth and final section.

Previous studies

Previous papers have been introduced tackling issues related womb-lease contracts. Most papers which were found published related to the subject in English language. Papers were also found in Arabic language. The later type of papers usually covers the legal and religious perspective of the subject matter from the Arab and Islamic point of view.

Most of this work was written in the United States of America, united Kingdome and Europe.¹ As for the Arab word, what was found was articles published in newspapers² and conference preceding. Up to this date the writer found no published article or report on the use of 3D printers in Jordan. Because of that, the writer will write this paper starting from the point where other international authors have stopped, using the relevant laws and material available.

Methodology

This paper will tackle the subject matter by understanding the main legal and ethical challenges that are brought by womb lease contract on a comprehensive comparative basis. The paper will discuss the subject matter through-out the existing regal rules found related to contracts in general and lease in particular. Taking in consideration the

Defining Womb-Lease and Surrogate Contracts

There are thousands of women in various parts of the world who cannot bear children. This is due to different factors such as diseases like having cervical cancer, accidents that affected their wombs, complications that were brought about by previous pregnancies and for some women; they do not have a uterus due to birth defects. For these women who are

(1) For example: Mendis, D, "'Clone Wars' Episode II—The Next Generation: The Copyright Implications Relating to 3D Printing and Computer-Aided Design (CAD) Files", *Law, Innovation and Technology* 6, no. 2 (2014): 45, doi: 10.5235/17579961.6.2.265. Mendis, D, "'Clone Wars' Episode II—The Next Generation: The Copyright Implications Relating to 3D Printing and Computer-Aided Design (CAD) Files", *Law, Innovation and Technology* 6, no. 2 (2014): 45, doi:10.5235/17579961.6.2.265.

(2) 3D printers as the toy of the future, newspaper article. Alghad newspaper.

unable to become or hold the pregnancy to its full term, the surrogacy process provides them with an alternative whereby; they may have their children at an affordable cost as compared to other reproduction processes. However, even though for most people, they see or feel that gestational surrogacy is a viable method to get a child, it is not an option for all women because, in some countries or states, it is an illegal process. In addition, there are various religions such as Islam that have provided specific prohibitions against the surrogacy process.

The aspect of surrogacy is mainly defined as a practice whereby; a willing woman agrees to become pregnant with the sole intention of giving up the child to another person that they agreed on once she gives birth either for free or in return to sum agreed upon in advance. The surrogacy contract contains the date of the agreement, name of the parties involved and statement that all the parties have at least attained the age of eighteen years. The agreement also contains a statement that the surrogate will not terminate the pregnancy unless her life is in danger. In addition to that; the surrogate has to sign that she agrees to surrender the legal parental status to the prospective parents after birth. It is important to point out that there are two types of surrogacy options- the traditional and gestational surrogacy.

In the traditional surrogacy, it involves a woman who will use her eggs during the fertilization process. The sperm will be with either the couple's male partner or a sperm donor. In this option, the surrogate mother is genetically related to the child, because her eggs were used in the pregnancy process. On the other hand, in gestational surrogate, the surrogate mother is not genetically related to the child that she carries. In most cases, the in-vitro fertilization is the one that is used to create the embryos whereby; the sperm and the eggs are derived from the intended parents of sperm and egg donors.

The surrogacy arrangements are normally divided into types of contracts: altruistic and commercial. The altruistic surrogacy is an arrangement whereby the surrogate mother will not be paid for service of gestation. If there is any form of payment that will be accorded to her during her pregnancy phase, it will be for expense purposes such as

prenatal care and to cater for her medical bills. In this surrogacy agreement, although the surrogate mother technically leases her womb to the couple or another woman whom they have come into an agreement with to carry a baby for a woman who is unable to carry or become pregnant, she is not paid for the gestation service. If the commissioning party and the surrogate mother agree on the altruistic surrogacy, then they can either use the traditional or gestational surrogate. It is important to note that; altruistic surrogacy is only permitted in New Zealand and Australia⁽¹⁾. In addition to that; the surrogate mother is usually a family member or a close friend to the couple.

However, on the other hand, in commercial surrogacy, the commissioning parents will normally pay or compensate the surrogate mother considerable remuneration, which is above the prenatal care and medical bills expenses. In most countries, commercial surrogacy has been banned because of the commercialization aspect that it has taken. For instance, in 1991 when France was banning the surrogacy process it was declared that; "The human body is not lent out, is not rented out, and is not sold⁽²⁾." It is a suggestion that when people enter into a commercial surrogacy agreement, they can be termed as renting out or selling the body. However, in countries such as India, the surrogacy industry is proving to be very profitable with statistics showing that in 2016, the market made approximately \$2.3 billion⁽³⁾.

The commercial surrogacy is similar to a business agreement, and it has to include a contract between the surrogate mother and the intended parents of the child. The contract includes a coverage of all the medical costs that the surrogate mother has undergone, and also payment for the services that she has accorded to the couple. On the other hand, in altruistic

(1) Commonwealth of Australia, "International Surrogacy Arrangements: Legal Regulation at the International Level", Commonwealth of Australia, 2016, 25-56, doi: 10.5040/9781474200066.

(2) S. Greenhouse, "French Supreme Court Rules Surrogate-Mother Agreements Illegal," New York Times, 1991, 1.

(3) Julie Bindel, "Outsourcing pregnancy: a visit to India's surrogacy clinics", The Guardian, April 1, 2016,1.

surrogacy, it is usually seen to be an act of kindness and compassion to the couples involved. In some cases, altruistic surrogacy is seen to be ethical because it is an act of compassion and the surrogate mother usually a close family member or friend is doing it out of kindness to help a couple that is experiencing challenges of conceiving to have their own biological or a child that they feel is theirs⁽¹⁾. On the other hand, they vilify the commercial surrogacy because they feel that it objectifies women, and makes it seem that they can lease out parts of their bodies for various services- such as their womb for the pregnancy of another couple. By compensating the surrogate women, it changes their intentions and even attitudes, and most people feel that their action was not reached from a willing decision but was motivated by the financial gains that they are going to receive after the end of nine months.

Womb-Lease and Surrogate Contracts and The Balancing of Rights

When focusing on the legal issues of surrogacy, it is important to take the different aspects of human rights from the different perspectives of the participating couples. On the one hand, the surrogacy process fulfills the needs of the couples that are desperately looking to have a child or children- in most cases a child that contains the biological components of the couple or one of the couple members through egg or sperm donation. On the other hand, there is the need for consideration to assess whether the vulnerable women. Most of whom come from a poor background (in commercial surrogating) are being exploited by rich couples, and coerced to accept a process that otherwise they would not have agreed to participate in based on their ethical or even religious principles.

The members of the two sides of the contracting parties are each protected by a set of laws that provide guidelines for the human rights and freedoms that should be accorded to them. However, in some incidences, the provision of the human rights and laws as has been stipulated by law, actually brings about a sense of conflict between the two parties that are

(1) P. Fronek and M. Crawshaw, "The 'New Family' as an Emerging Norm: A Commentary on the Position of Social Work in Assisted Reproduction", *British Journal of Social Work* 45, no. 2 (2014): 737-746.

involved in the surrogacy process. Therefore, in such cases, courts become involved to provide an adequate ruling that will balance the exercise and ensure that they protect the contracting parties that are involved. There is the assumption when it comes to the balancing of human rights that the commissioning couple that participates in the surrogacy process has the right to have the child.

Looking at the Universal Declaration of Human Rights Article 15 and 16, which focus on the issue of surrogacy, this right is not mentioned⁽¹⁾. In Article 15 of the document it points out that couples, especially the ones that face challenges regarding conceiving a baby, they can benefit from scientific progress or technology to aid them in the process. On the other hand, Article 16 provides people and individuals in particular with the right to marry and start a family. Therefore, the human rights that are accorded to them (commissioning couple) are that they have been provided with the right and freedom to choose the partners of their liking to marry and start a family. Secondly, the couples who face challenges regarding conceiving and giving birth to children can use the available approved technology to assist them in the process. However, there is no mention of the use of surrogate mothers, and it has not been stipulated on the party that should rightfully claim the child when this method is used. The court and the ruling judge or jury will have to look at different factors to determine the 'rightful' parent (s) of the child born from this process.

In 2015, the high court in London made a ruling against a surrogate mother and ordered her to hand over the child that she had conceived with a gay couple to them as the legal parents. The high court judge ruled for the commissioning couple because; in their initial agreement (before the surrogacy process was initiated), the surrogate mother had agreed to become the surrogate mother. She had also pointed out that it was in the best interests of the child to grow up under the parental care of the commissioning couple. The ruling of the case has brought about the debate

(1) United Nations, "Universal Declaration of Human Rights", United Nations, last modified 2016, http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

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regarding the legal framework of the surrogacy concept, especially in countries where the process is legal. In most cases, when the surrogacy process takes place, it is an informal arrangement between different commissioning parties and they can easily fall apart, leaving the court with the mandate to make a ruling and there is no guarantee of which side or to which party the ruling will favor⁽¹⁾.

However, there are some countries such as the US where they have laws such as the DC’s new surrogacy statute, which deals with issues that may arise from the surrogacy concept⁽²⁾. In this framework, all the parties that are involved in the process have to make clear agreements usually in writing and in the presence of witnesses regarding the future of the child. It clearly stipulates the parents that will be provided with the mandate to take care of the child. Also, both parties have to be subjected to psychological screening to ensure that they are in the right state of mind when making the decision. In such countries, the process is legally regulated to protect the rights of the intended parents and those of the child.

Are womb lease contracts enforceable under the Jordanian laws?

It is important to point out that just because the commissioning couple wants to have a child even though they are unable to conceive one, does not provide them with a right to produce a child, especially using the surrogacy method. Nina Bjork focuses her argument on the rich or affluent people. Their wealth blinds them to the point that they are unable to distinguish their desires from their needs. She feels that the desire to have a child becomes so strong that they invariably turn it into a need and because they have financial resources, they look for ways in which they can satisfy their new ‘need.’ Although there are other options that they can take such as adoption of a baby that is in their orphanage, most of them

(1) Olga Van den Akker, Isatou Camara, and Ben Hunt, "‘Together ... for only a moment’: British newspaper constructions of altruistic non-commercial surrogate motherhood", *Journal of Reproductive and Infant Psychology* 34, no. 3 (2016): 271-281, doi:10.1080/02646838.2016.1141398.

(2) Kavita S. Arora and Valarie Blake, "Uterus transplantation: ethical and regulatory challenges", *Journal of Medical Ethics* 40, no. 6 (2013): 396-400, doi: 10.1136/medethics-2013-101400.

prefer this method because they will be able to raise a child that has at least one of their genes- they do not want to raise other people's children.⁽¹⁾ The problem with womb-lease contracts and having a surrogate mother that it violates the rights of both the surrogate mother and the child. For the mother, especially commercial surrogates, even though most of them may claim that they do not want any form of attachment with the child, it may have been motivated by the financial reward that they were promised once they carry the baby to full-term. On the other hand, the child may one day know that he or she was conceived from the surrogacy process and may want to know more about the mother who carried her for nine months in her womb. Similar cases have been seen in children who are born as a result of sperm or egg donors. Most of them go to extreme lengths to find more information about the people who donated their sperms or eggs and made it possible for them to be born.

The commissioning parents' desire or 'need' to have a child makes them feel that they are entitled to use another woman's womb to fulfill their desire. They may state, especially in commercial surrogacy that they leased out the womb, and therefore they reserve the right to raise the child without the assistance or even presence of the surrogate mother. The question then that begs to be answered is the rights of the other parties that are involved in the surrogacy process. One of the fundamental rights of a child as has been stipulated in the Conventions on the Rights of the Child state; that a child reserves the right to know his or her parents. Just because the two parties involved in the surrogacy process came to an agreement that the commissioning party was to raise the child, it does not make it right to deny the child the opportunity to know the woman who carried her for nine months.

Before considering the Jordanian approach towards this type of contract, it is critical to point out that countries legal system vary when considering whether or not womb lease contracts are legal and therefore

(1) It should be noted that this approach could only be considered where the laws which are applied accept this form of procedures.

enforceable or not. The following paragraphs will highlight the different approaches found before considering the Jordanian approach.

Countries where Surrogacy is Illegal

In Europe, there are countries such as Norway, Sweden, France, Italy, Poland, and Germany whereby surrogacy is illegal⁽¹⁾. According to article 16-7 of the Civil Code in France, any form of surrogacy arrangement whether commercial or altruistic is considered to be illegal and therefore it is not sanctioned by the law. In 1991 the Court of Cassation provided a ruling about the surrogacy arrangement between the contracting couples. In the ruling it was determined that if a commissioning couple enters into an agreement with a surrogate mother, that she will become pregnant, and when she gives birth, she will surrender the child and the parenting rights of the baby to the commissioning couple as an illegal agreement according to Articles 6, 353 and 1128 of the Code Civil of France. In the ruling that was provided in the Cour de Cassation, it was determined that the surrogacy agreement entered by the two parties was actually in contradiction with the public policy principle regarding both the human body and civil status.

However, over the last few years, there have been calls by various people and even bodies such as Lesbian, Gay, Bi-sexual and Transgender community to ensuring that gestational surrogacy is legalized in the country. For most people, they feel that this is a personal matter and therefore the state should not meddle or interfere with their ability to make personal choices. People that use this line of thinking feel that; if there is an agreement between two parties regarding the surrogacy process, then they should be allowed to go ahead and practice it, after all, it is a legal practice in other countries. There have also been calls from women who face the challenge of becoming pregnant or carrying the baby to its full term due to various factors such as diseases, congenital malformation, exposure to Distilbene and other factors. In addition to that; as has been

(1) Norbert Lang, "German Alternative Investment Fund Regulation – Wrong Answers to the Wrong Questions?," Research Handbook on Hedge Funds, Private Equity and Alternative Investments (2015), 1.<doi:10.4337/9781849806084.00026.

mentioned before, there are countries where surrogacy is legal, and there are specialized clinics whereby foreigners seek such services such as in the United States, Ukraine, and India⁽¹⁾.

There is also the issue of the recent court decisions whereby they show that it is becoming a complex process to enforce the prohibition of surrogacy in this modern age. Currently, according to the country's laws, it is illegal to adopt, and they do not recognize children that are born to surrogate mothers, even if the process took place abroad. The reason for this is that; it is against their fundamental principles. According to the Cour de Cassation, it is illegal for a woman to register a child under her name, if she is not the one who gave birth to the child, and she has not legally adopted the child. In 2008 in the *Mennesson* case, the high court ruled that the birth certificate that was issued in California was unlawful because the child had been born to a surrogate mother. The complexity of this matter is that the child is a US citizen and that the birth certificate was issued legally in the US⁽²⁾.

The majority of the French citizens still support the prohibition of surrogate motherhood based on ethical concerns, especially from the child⁽³⁾. Most of the French citizens feel that children who are born from such processes, especially commercial surrogacy may be affected psychologically. The contracting parties deny the child the mother-child relationship, and this can have a negative effect on the child's psychological state in future and affect the way he or she relates to his or her parents. The child may feel that he or she was a commodity that was traded between the surrogate mother and the contracting couple, especially in commercial surrogacy where the surrogate mother was compensated for

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- (1) Dean A. Murphy, "The Desire for Parenthood", *Journal of Family Issues* 34, no. 8 (2013): 1104-1154, doi:10.1177/0192513x13484272.
 - (2) Case of *Mennesson v. France*, Application n. 65192/11, Judgment 26 June 2014. Judgment of the Fifth Section of the European Court of Human Rights sitting as a Chamber.
 - (3) Laura B. Lotti, "Psychological Assessment in 'Surrogate' Motherhood Relationships", *Journal of International Law and Politics*, January 2012, xx, doi:10.5040/9781472562760.ch-010.

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the service that she offered. There are also unforeseen complications that can result from this type of pregnancy. There is also the likelihood that the gestational mother will become attached to the child and she will be psychologically affected once she is separated from the child. In addition to that; in most cases, the surrogate mothers are usually from low economic backgrounds and therefore if the process is legalized in the country, then it can lead people especially the wealthy who have the desire to have children, but they are unable to conceive to exploit these women from low economic backgrounds economically. The surrogacy process threatens the dignity and symbolic image of women. They will be regarded as commodities that can be leased for a certain period, to fulfill a certain purpose and that is to lease their wombs. Therefore, most people in the public feel that the whole process- from conceiving to giving birth to a child should be a dignified process, and therefore should not be commercialized.

Italy has one of the most conservative legislation when it comes to assisted reproductive technologies. In particular, Law number 40 passed on February 19, 2004 popularly known as ‘About assisted reproductive technologies⁽¹⁾.’ The law does not only forbid surrogacy, but it also restricts the other assisted reproductive technologies that are used in different parts of the world to assist couples that are facing various challenges when it terms of becoming pregnant or maintaining the pregnancy to its full term.

By this law, the only way that the Italians can be able to apply for the artificial fertilization procedures legally is if they can provide an infertility certificate. The law further stipulates that if the couples applying for the use of artificial fertilization are found to have used unlawful methods, then they will not be recognized as legal parents, even in cases where they are the ones who donated the eggs and sperm for reproduction purposes. In Law No.40, it has also been clearly stipulated that any person who is found producing, organizing or advertising the donation of gametes and

(1) Parliament Italian, "Rules on medically assisted procreation", Parliament Italian, February 2016, 1-3.

surrogacy within the borders of Italy will be charged, and given a prison term that ranges from 3 months to 2 years, and a fine of between 600,000 to 1,000,000 Euros.⁽¹⁾

Italian's interior minister Angelino Alfano in 2015 was quoted saying that surrogate parents should be considered to be sex offenders, charged and sent to prison. In addition to that; he considers the womb for rent aspect to be an illegal trade. He was quoted by Italy's mainstream newspaper Roman Catholic newspaper stating that; "We want wombs-for-rent to become a universal crime, which is punished with a jail term just as happens for sex crimes⁽²⁾." Most Italian couples have opted to use surrogates abroad. However, the status of the children that are born using this method has led to legal battles in court as these parents seek to be regarded as the legal parents of the child, within the Italian constitution. In Italy, the issue of surrogacy is still a contentious issue. Furthermore, Italy still has one of the world's most conservative laws in regards to surrogacy. The reason for this is that; Roman Catholic teachings are still very influential in this country with most Italians feeling that surrogacy is an evil process that should never be legalized in their country. The Roman Catholic Church is mainly opposed to all of the assisted reproductive technologies that couples can use to have a baby. It is important to note that; although the application of the IVF is legal in the country, it is only applicable to married couples⁽³⁾.

In Germany, surrogacy is also considered to be illegal. The offenders of the surrogacy law in the country, if found guilty will likely be given a period sentence of up to three years, a penalty, and even custodial restraint. Both commercial and altruistic surrogacy are prohibited in the country under Section 1, item number 7 of the German Embryo Protection Act and Article 14b of the Adoption Placement Act. Also, according to the German Civil Code (1591), it defines the woman who gives birth as the legal

(1) C. Balmer, "Italian minister says surrogacy should be treated like a sex crime", Reuters, Africa, January 2016.

(2) *ibid.*

(3) Michael Peppard, "Begotten or Made? ", *The Son of God in the Roman World*, 2011,1, doi: 10.1093/acprof:oso/9780199753703.003.0004.

mother of the child and does not recognize motherhood from another woman even in incidences whereby; the latter woman is considered to be the child’s genetic mother. The aim of this law is that it acknowledges the social and biological bond that a child has with the mother before it is born, and therefore it aims at avoiding scenarios whereby; the mother, even if she is a surrogate mother is separated from her child based on an agreement that was made prior to the mother becoming pregnant. The law aims to protect the rights of both the mother and the child. This means that a couple cannot be assigned as the legal parents of a child that has been born through the surrogacy process, even if there was an agreement and the process took place in other countries where surrogacy is allowed.

However, in 2014, in what seemed like a deviation from the laws that prohibit the practice of surrogacy, The German Federal Court of Justice granted legal parenthood to the intended parents of a child who was born as a result of the surrogacy arrangement. Despite the fact that German laws prohibit the aspects of surrogacy within its territory. The judge who provided the ruling upheld the foreign judgment, which was provided in California that granted the couple from Germany the legal parenthood of the child who was born using the surrogacy process.

The appellants are the same sex couple who are habitual residents of Berlin, Germany and live as a registered couple, by the German laws. In 2010, they signed a legal contract with an unmarried woman in California- they were the commissioning couple, and she was the surrogate mother. In the surrogacy contract, it clearly stipulates that appellant no.1 provided the sperm, and the egg was from an unknown donor, and the child was conceived through the use of the assisted reproduction technology⁽¹⁾. In addition to that; prior to the birth of the child, appellant no.1 went to the German Consulate General in San Francisco and acknowledged that he was the father of the child that was about to be born. It was done with the consent of the surrogate mother and by a judgment that had been provided

(1) Elly Teman, "Surrogate Selves and Embodied Others", *Birthing a Mother*, 2010, xx, doi:10.1525/california/9780520259638.003.0002.

by the Superior Court of the State of California. Therefore, legal parenthood was provided to the appellants.

The German Federal Court of Justice ruled in their favor to be recognized as the legal parents of the child by the civil registry in Germany⁽¹⁾. The ruling that was provided in the court stated clearly that the couple or the appellants had not violated the German public policy because they had been assigned legal parenthood of a child born using the surrogacy process in a foreign country (USA). The reason for this was that; one of the intended parents was the biological father of the child, and the surrogate mother did not have any genetic relation to the child. It further acknowledged that the court decision that had been made in California was based on several issues. It had to determine the validity of the surrogacy agreement and also status issues (which appellant no.1 had sought when he went to the German Consulate in San Francisco). The court further acknowledged that in such cases the public policy exception has to be interpreted in a restrictive manner to ensure that there is international harmony when it comes to decision-making. The reason for this is that; there are instances whereby it can be noted that two countries have different legislation or interpretation of legislation in a certain matter. In this case, for instance, the difference regarding legislation did not imply a violation regarding the domestic public policy. The ruling has been considered by most of the supporters of the surrogacy process in Germany to be a considerable milestone regarding their fight towards ensuring that the country's legislation approves the surrogacy process within its borders.

In Poland, the surrogacy process is also an illegal process, and therefore it is banned. However, it is important to note that there is a difference of opinion in the country by surrogacy. The majority of the people in the society support surrogacy as one of the methods that couple who have fertility issues can use as a means to give birth and become legal parents of a child that is genetically related to them. On the other hand, the

(1) Norbert Lang, "German Alternative Investment Fund Regulation – Wrong Answers to the Wrong Questions? ", *Research Handbook on Hedge Funds, Private Equity and Alternative Investments* (2015), 1, doi:10.4337/9781849806084.00026.

Polish Catholic Church is opposed to the surrogacy process⁽¹⁾. There is on-going debate as to whether surrogacy can be allowed in the country and laws which will be formulated to regulate the process and ensure that people are not mistreated. The process of surrogacy has been banned in Estonia. According to the country’s legislation both the woman who acts as a surrogate mother and the physician that performs the in-vitro fertilization process will be charged and punished for their actions.

Countries where Surrogacy is Accepted on the Premise that it is for Non-Commercial Purposes

Although the surrogacy process in Canada is legal through *the Assisted Human Reproduction Act*,⁽²⁾ it is highly restricted⁽³⁾. The country’s legislation allows only altruistic surrogacy, and this means that the surrogate mothers should not be paid.⁽⁴⁾ The only form of payment that is granted to them is the basic expenses that pertain to the pregnancy such as clinical visits and compensating them for staying at home in incidences when the surrogate mother could have been working especially if it is as a result of sickness due to her pregnancy.

Unlike the surrogacy programs that are conducted in other countries especially in Asia, in Canada, the process is managed by the intended parents, and therefore, it means that it can be a long process finding a qualified surrogate mother, and going through the surrogacy process. The surrogacy agreement between the commissioning couple and the surrogate mother in Canada should at all times follow the Assisted Human Reproduction Act. In this act, it provides various constraints by the surrogacy process in that country:

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- (1) E. S. Sills, *Handbook of gestational surrogacy: International clinical practice and policy issues*, Gestational Surrogacy, 2016, 1.
 - (2) (S.C. 2004, c. 2). For full text < <http://laws-lois.justice.gc.ca/eng/acts/a-13.4/>> accessed 30 august 2017.
 - (3) Sensible Surrogacy, *Surrogacy in Canada is Legal but Restricted. Here Are All the Details*, Sensible Surrogacy, last modified 2014, <http://www.sensible-surrogacy.com/surrogacy-in-canada/>.
 - (4) Assisted Human Reproduction Act art. 3 & 6 .

- It clearly stipulates that it is illegal to pay a person to become a surrogate mother or a commissioning couple advertising that it will pay for these services.
- It is also illegal for a woman intending to provide these services to advertise that she is offering such services.
- It is illegal to pay an individual to provide services of linking up an intended surrogate mother and the commissioning couple

As was stated earlier, the surrogate mother will only be compensated for the out-of-pocket costs that are directly related to the surrogacy pregnancy, and whereby receipts were offered as proof of the costs.

It is important to note that; according to the Canadian surrogacy laws, the surrogate mother is the one who is granted with all the parental rights of the child, regardless of the agreement that was made prior to the pregnancy. It means that she can demand and be granted the custody of the child if she feels that she is attached to the baby. Therefore, the intended parents are usually advised to be prepared for a potentially lengthy parental process in case such incidences arise. The child born through the surrogacy process in the country is also eligible for a Canadian citizenship. The law also fails to provide stipulations for the intended parents, and therefore the surrogate mother is not protected if the intended couples change their mind in terms of being recognized as the legal parents of the child. There have been reported cases whereby; the intended parents, especially foreigners abandon the child during the pregnancy stage, and the surrogate mother is forced to put the baby up for adoption. ⁽¹⁾

According to the UK laws, the surrogate mother is considered to be the legal mother of the child, even when she is not genetically related to the child. In most cases, the legal parental rights are transferred from the surrogate mother to the commissioning couple through parental order or

(1) Assisted Human Reproduction Act.

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through adoption⁽¹⁾. This therefore points out that the surrogacy contracts are not enforceable under the UK laws even when there is a signed agreement and the commissioning couple have covered all the pregnancy expenses. In order to become the child’s legal parents, the commissioning couple must apply for a parental order. There also various stipulations that must be taken into consideration before the couple is granted the parental order. At-least one of the appellant has to be genetically related to the child. The couple’s relationship has to be legally recognized under the UK laws such as through the marriage process; they are recognized as civil partners or have been living as partners for a long period. In addition, they have to be permanent residents of UK, Channel Islands or Isle of Man. A single person (one who does not have a partner) cannot apply for a parental order. In the event that the child was born abroad, the commissioning couple can only apply to be granted the parental order if they live in the UK. ⁽²⁾

Countries where both altruistic and commercial surrogacy processes are legal

Commercial surrogacy is allowed in a few countries whereby the surrogate mother is paid for providing the service of being pregnant. In Ukraine for instance, the country has placed various legal parameters to ensure that the process is smooth, and also attract people from different parts of the world to come and seek this service in their country. Surrogacy in this country is well regulated unlike in countries that do not allow commercial surrogacy. One of the unique components of the country’s law on surrogacy is that the intended parents are considered to be the legal parents of the child. When the baby is born, the birth certificate that is issued contains the names of the intended parents, and the surrogate mother is not granted any parental rights. The law is also applicable even in circumstances whereby the egg of the surrogate mother was used, and the

(1) B. C. Van Beers, "Is Europe 'Giving In To Baby Markets?' Reproductive Tourism in Europe and The Gradual Erosion of Existing Legal Limits to Reproductive Markets", *Medical Law Review* 23, No. 1 (2014): 103-134, doi:10.1093/medlaw/fwu016.

(2) Rights for surrogate mothers < <https://www.gov.uk/rights-for-surrogate-mothers>> accessed 28 August 2017

child is not biologically related to the intended parents. It seeks to offer protection to the intended parents against parental claims by the surrogate mother.

The Ukrainian laws, in particular the Family Code of Ukraine⁽¹⁾ Clause (123) allows couples that are looking for the surrogacy process to choose the process that they desire such as gestational surrogacy, egg or sperm donation, special Embryo adoption programs and the combination of these processes. All that is required for the process to be legal is that there should be a written informed consent from all the participating parties in the surrogacy process. In this country, there are stipulations that only allow the intended parents to be married couples or that their relationship is legally recognized. Single women and men can be granted parenthood of the child if they provide an informed written consent that contains the signatures of both parties in the process.

In the USA, there are some states such as California that permit commercial surrogacy⁽²⁾. The laws that deal with surrogacy regularly enforce the gestational surrogacy contracts and grant legal parentage to the intended parents regardless of their marital status and sexual orientation. Other states that allow commercial surrogacy include: Arkansas, Illinois, Florida, and Maryland.

Countries that do not have laws covering such contracts: Jordan as an example.

There are countries that do not have laws that clearly regulate the womb-lease and surrogacy contracts that may take place in their countries. In Ireland for instance, it does not have any laws that govern surrogacy. However, the country is coming up with recommendations that will cover issues pertaining to assisted human reproduction. One of the proposed recommendations is that; under the Irish law, the commissioning couples are the ones who are regarded to be the legal parents of the child. In Colombia, although the surrogacy process is legal, the governing laws of

(1) Family Code of Ukraine < <http://www.refworld.org/pdfid/4c4575d92.pdf>.

(2) C. A. Choudhury, Transnational Commercial Surrogacy. Oxford Handbooks Online. (2016).

the country have a lot of loopholes that people can take advantage of when it comes to the surrogacy contracts. It is important to note that; the current laws that are applied are the ones that were formulated to deal with issues that may arise from a natural childbirth.⁽¹⁾ Therefore, in this case, the surrogate mother is the one who is recognized as the legal parent to the child even in incidences where she does not have biological relations to the child. It has been established that the only way in which the intended parents can get legal custody of the child is by challenging the paternity of the child. In this case, they are highly likely to be provided with the legal custody of the child once genetics tests provide the evidence that is required, although it can be a long and expensive process. Also, in the Czech Republic, there are no laws that clearly regulate the surrogacy process, although the process is deemed as legal in that country. In fact, the only law that focuses on the surrogacy process is law no.804 whereby there is a ban in terms of the adoption of siblings that were carried by a surrogate mother.

Moving to the Jordanian legal approach, according to article 87 of the Jordanian Civil Code a contract is [t]he joining and consistence of the offer from one of the contracting parties with the acceptance from the other in a manner, which proves the effect therefore on the object of the contract and the obligation of each party by what he is bound with to the other.

Every contract shall have a subject-matter appertaining to it.⁽²⁾ According to article 88, a contract may apply to :

1. Property, movable or immovable, material or moral,
2. Benefits of property
3. Certain work or services.
4. Any other thing not prohibited by legal provision or not contrary to public order or morality.

(1) B. C. Van Beers, "Is Europe 'Giving In To Baby Markets?' Reproductive Tourism in Europe and the Gradual Erosion of Existing Legal Limits to Reproductive Markets", *Medical Law Review* 23, no. 1 (2014): 103-134, doi:10.1093/medlaw/fwu016.

(2) Article 157.

Having said that, the civil code has set up a rule that every contract must have a cause.⁽¹⁾ The law has put a presumption that every contract shall have valid and existent cause which is not contrary to public order or morals.

When considering the womb-lease contracts it is said that is a lease contracts where provisions of lease contracts found in the civil code should be applied. According to the civil code ‘the lease is the bestowal by the lessor upon the lessee of an intended usufruct of the leased thing for a specified period of time for a certain consideration’.

Having said that, the question raises as whether the womb-lease contracts are real “lease contract” according to the Jordanian law. A contract should fulfill the legal requirement considered by the law to be an enforceable contract. Otherwise, such contract will not be considered as binding contract and therefore enforceable. Any contract as mentioned earlier requires according to the Jordanian law three elements: parties to the contracts, a subject and a cause. First of all, any contract as mentioned earlier requires two parties who are willing to engage in a contractual relationship. This element is met in the case of womb-lease contracts. As for the subject of the womb-lease contact it is said that, the womb-lease contracts both parties agree on Certain work or services.

Having said that, it is fundamental to say that there is no law in Jordan that regulates womb-lease contracts, therefore examining such contracts will be done in light of the current traditional contract law provisions. Article 2 of the Jordanian civil code made it clear that if the court does not find any provisions in the civil code it shall decide by the rules of the Islamic jurisprudence, which are more adaptable to the provisions of the civil code, and if there is none by the principles of the Moslem Shari’a.

In order to examine the Islamic approach towards womb-lease contracts it is important to examine the Islamic approach towards artificial insemination varies. Artificial insemination is about the process of

(1) According to article 165, The cause according to the law is the direct purpose intended in the contract.

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insemination of a woman's egg with a man's sperm artificially, whether inside the uterus or in a test pipe, then plant it back into the uterus. which means that the insemination and birth are done in a way other than the natural way, which is the sexual intercourse between a male and a female. This process can take place internally inside the woman's uterus or externally in a test pipe that has a woman's egg and a man's sperm in a proper environment to achieve insemination.

When considering the internal insemination between married couples, the Islamic jurists agreed that it's acceptable to perform the artificial insemination in such cases, because it is the same as the natural sexual intercourse between the husband and wife except that the penis is replaced by a tool that delivers the semen to the wife's uterus. Having said that, the approval of such method has the following restrictions:

1. This should happen between the couple when they are married, and no one should intervene in the process.
2. During treatment, the woman should only expose herself to a trusted Muslim female doctor, and if there is not any, to a trusted non- Muslim female doctor, and if there isn't any, to a trusted male Muslim doctor, and if there isn't any, to a trusted non- Muslim male doctor.
3. The husband's semen cannot be kept or stored not so ever.
4. The husband should be present at the insemination procedure.

The mentioned above procedure will result the following: the born child will have the same rules applied to a child born as a result to a natural insemination, he/she will be named to his parents, they will be able to inherit each other, and other similar rules.

On the other hand, one might talk about the insemination between the wife and a donor. In this case, if the husband is sterile, which could be due to various reasons such as; there are no sperms in the husband's semen, or sperms are present but weak or dead. In such cases, the semen is collected from a man other than the husband to be injected into the wife's uterus. This form is forbidden in Islam because the sperm donor and the host woman are not married. The husband will not be considered the father

since he is not the sperm donor, which will result the mixing and losing of the line of ancestry.

This method will result the following:

The wife's husband will not be considered the born child father, and the husband is obligated to renounce his fatherhood to this child.

Since the semen in the insemination process was not taken from the husband, he will not be able to sleep with his wife during her pregnancy. Prophet Mohammed has said: "It is not permissible for a person who believes in Allah and the Day of Reckoning to water what another has sown with his water"

Another method is using the ex-husband's sperm to impregnate a woman. Here the sperm from the sperm bank will be collected and inject it into the wife's uterus after the husband is deceased, whether the process is performed during the period prescribed by Islamic law for a woman during which she may not remarry after being widowed or divorced—Eddah-, or after it's finished. This method is forbidden because the marriage ended by death.

Moving from the above internal insemination scenarios to the external artificial insemination definition, methods and Islamic religious ruling. Here the woman's egg is inseminated by the male sperm outside the woman's uterus. Then the inseminated egg is injected back into the uterus. Such insemination is considered if the woman's tubes are blocked or injured, and the efforts of repair them surgically have failed. It might also be considered if the women suffer from endometriosis. Doctors also guide for this type of insemination if there are immunological fertility problems between the husband and wife or severe defects in the husband's semen.

In the external insemination, it could be done between married couples as in the following scenarios:

the first scenario is to inseminate the egg by a sperm in a lab cuvette, and then inject the egg back into the woman's uterus to let it grow naturally. This procedure is called In-Vitro-Fertilization IVF. This method

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is approved by all modern Islamic scholars, provided that it is obedient to the following rules and restrictions:

- a. To make sure that the used egg is from the wife and the used sperm are donated by the husband, then the egg is inseminated outside of the uterus, and then the fertile egg is planted back into the wife’s uterus without switching or mixing the husband’s semen with other human or animal semen.
- b. There must be a medical necessity for this procedure, like the wife being sick in a way that prevents completing sexual intercourse with her husband.
- c. The procedure must be decided by a skilled, trusted doctor who concluded that the wife cannot be impregnated using other methods.
- d. To make sure not to switch the lab cuvette that holds the egg and the sperm after the insemination.

The second scenario is to inseminate the wife’s egg using the husband’s sperm, then plant the egg in another woman’s uterus – a surrogate mother-. This method has many assumptions:

A man has more than one wife where one of them is sterile but her ovary is healthy. An egg is taken from here ovary then inseminated using her husband’s sperm, after that the fertilized egg is planted into the other wife uterus so she would give birth to the child.

Religious ruling: This procedure is allowed because there is a legitimate relationship between the husband and both wives.

A surrogate mother volunteers to carry the fertilized egg from a sterile woman and her husband. This method is used when there is a problem with the wife’s uterus, or the uterus was surgically removed, or the wife just does not want to get pregnant although she can.

Religious ruling: some modern religious jurists allowed it while the others forbid it.

On the other hand, insemination could take place between unmarried couples as in:

1. To inseminate an egg from a donor woman using the husband's semen, then plant the fertilized egg into the wife's uterus. This method is used in cases when the wife's ovary is surgically removed or infected while here uterus is fine and can host the fertilized egg.
2. The egg is from the wife but the semen is from other man than the husband, and the wife's uterus is used to host the egg.
3. The artificial insemination for a woman internally or externally after her husband passed away using a preserved sperm from her husband from a sperm bank, which was preserved while he was still alive.
4. To inseminate a donor egg with a donor sperm then plant the egg into a married woman uterus. This method is used when the married woman is sterile because a problem with her ovary while her uterus is fine, and she and her husband want a child.

In this type of insemination, the following Islamic religious ruling should be considered:

- a. The egg in the first two cases was not a part of the husband and wife, but from the husband and a different woman or from the wife and a different man. This resulted that the pregnancy was not a result of a legitimate relationship between the husband and the wife, whether we used genitals to deliver the semen to the egg or inserting the semen using a tool.
- b. In the second case the inseminated egg has nothing to do with the husband or the wife since the egg and the sperm are donated from other people.
- c. The third case is forbidden, since the marriage is terminated by death so the preserved sperm is not from her husband anymore.

Applying the previous Islamic approach alongside the previous of the contract law, womb-lease contract the author argues that such contracts should be considered as void contracts. A void contract according to the

civil code is a contract which is basically and descriptively unlawful in its base, subject-matter, purpose or the form prescribed by the law for its celebration being deficient, and which has no effect and cannot be ratified. The Islamic approach which is calling for family rights and children are result of legitimate marriage. Therefore, rights to motherhood shall only raise of there is a marriage contract formed according to the law. Therefore, any agreement contrary to the Islamic provisions shall not be enforced.

As for the provisions of the contract law, such contracts are to be considered as illegal and unenforceable since it will be considered prohibited on the ground that it is contrary to the public order or morality. Nor will courts permit the recovery of benefits conferred under such contracts.⁽¹⁾ Therefore, a party to womb-lease contract cannot enforce such contract, but may be able to recover money transferred under it on the ground of the nullity of such contract.

Having said that, even if the contractual parties went to other countries where womb-lease contracts are legally formed, they will still face some legal obstacles when trying to enforce such contracts in Jordan. Article 11 of the civil code clearly states that: “the Jordan law shall be the reference in regulating relationship when their nature is required to be determined in a case where there is conflict of laws in order to ascertain the applicable law among them. Therefore, even if the party’s chooses a legal regime that allows womb-lease contract they will still find themselves on the ground that the Jordanian law will not enforce their contract. As for the rights of the newborn baby which was a result of a womb-lease contract, article 14 of the civil code states that [t]he laws of the state to which the husband belongs at the time of celebrating the marriage shall be applicable to the consequences of the marriage contract including the financial consequences. Bearing this article in mind, article 15 of the law, the Jordanian law shall still be applied if one of the two spouses is Jordanian at the time of celebrating the marriage. The question still raise when talking about the rights of the newborn baby, let’s take the following

(1) Mckendrick, E Contract law Palgrave Macmillan (seventh edition, UK) 326.

scenario: the Jordanian law consider such contract as void, the parties to the contract chose to form the contract outside Jordan, and go into the pregnancy stages and deliver the baby outside Jordan. The Jordanian laws requires the official notification of the delivery of such baby in order to give him rights as Jordanian. The father will not be able to add the baby to his name unless the mother of this baby is his legally announced wife.

Conclusion

The different types of surrogacy that exist functionalizes the process of motherhood. The meaning of this is that one becomes pregnant in order to benefit other people, especially those who are unable to become pregnant. Pregnancy becomes something that can be lent, and the mother-child relationship in such cases is not recognized.

The woman is forced to deny her interest in the baby that she has carried for nine months- it is as if she is a robot because; she is expected not to display emotions or affection towards the child, and therefore it undermines and violates the human rights of the mother and child and it can be considered to be human indignity.

As has been examined throughout the paper, countries vary when talking about womb-lease contracts. As for the Jordanian law, the womb-lease contracts are not directly regulated in Jordan. Therefore, the traditional contract law rules shall be applied alongside the rules of Private International Law. Such contract should be considered as void. To stay on solid ground, the current author is calling for a direct action taken by the responsible authorities to regulate such contracts. It is not enough to apply the traditional contract law rules, as many parties are involved in such contracts. In addition, the medical laws and regulations should be modified to regulate giving medical advice to parties who are willing to be engaged in such contracts. Furthermore, the rights of the baby who is a result of such contract should be regulated.

Calling for such contracts to be legally recognized will affect the family rights on one hand, and will create complicated relationship within the society on the other hand. Mothers and babies who are involved in such contracts need protection as for their rights. The mother of the baby might

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face medical complications that might affect her life during pregnancy and after giving birth to the baby. Ignoring the need of balancing the rights and duties within the society will raise the number of cases related to this contract. Therefore, such contracts should remain unacceptable from an ethical point of view alongside the legal point of view.

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