

Paternal and Maternal Lineage and Milk-Kinship in Children Born via Surrogacy

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ABSTRACT

Lineage is a legal relationship that emerges through the genesis of a human from another human's reproductive fluid, which the law has recognized and established its legal provisions. The realization of lineage in Islamic jurisprudence and positive law is founded on two axes conventional (natural method) and unconventional (laboratory method), with surrogacy being one of the unconventional methods. In this context, the fundamental question concerns the nature of paternal and maternal lineage of children born through this method. The present article, compiled through library research, investigates paternal and maternal lineage and examines the existence of milk kinship (radā'ī) between a child born through surrogacy and the surrogate mother. In this regard, the views of jurists and legal scholars have been critically analyzed. The results demonstrate that despite divergent perspectives among jurists and legal scholars in determining the lineage of infants born through surrogacy, the infant is attributed to the juridical parents (owners of the ovum and sperm). By a fortiori reasoning, the surrogate mother is recognized as the child's milk mother (umm al-radā'ah); consequently, she bears only marital prohibition (ḥurmah), but not other lineage effects such as inheritance or custody.

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Introduction

Nasab (lineage) refers to the kinship relationship established through the birth of a person from the gametes of another human being. In legal and Islamic jurisprudential systems, *nasab* is recognized as one of the foundational concepts, serving as the basis for numerous rulings, including inheritance, custody, and marital prohibition. In both Islamic jurisprudence and statutory law, *nasab* may be established in two ways: naturally (through conventional reproduction) and non-naturally (through assisted reproductive methods). One of the non-natural methods of establishing *nasab* is surrogacy, whereby a woman (the surrogate mother) carries and delivers a fetus conceived from the ovum and sperm of the intended parents. With advances in reproductive technologies in recent decades, surrogacy has expanded significantly and has raised complex questions concerning lineage determination and related rulings.

The primary questions in this field concern the determination of paternal and maternal lineage of children born through surrogacy, as well as the possible establishment of a *riḍāʿī* (milk-kinship) relationship between the child and the surrogate mother. These issues are contentious from both jurisprudential and legal perspectives, as jurists and legal scholars differ in their views on the lineage of such children. Some emphasize the biological connection (ownership of ovum and sperm), while others consider the gestational role of the surrogate mother in determining *nasab* or *riḍāʿī*. This study seeks to address these questions by analyzing the opinions of Islamic jurists and legal scholars concerning the lineage of children born via surrogacy. It aims to clarify the status of paternal and maternal *nasab* and the *riḍāʿī* relationship in such cases through a close examination of relevant jurisprudential and legal sources.

Methodology

This research employs a library-based method. Primary sources include classical jurisprudential works, scientific articles, statutory laws, and the opinions of jurists (*fuqahāʾ*) and legal scholars in the fields of lineage and surrogacy. Initially, major jurisprudential sources, including works of *fiqh istidlālī* (jurisprudential reasoning) and the fatwas of contemporary *marājiʿ al-taqlīd*, were reviewed. In addition, civil law provisions relating to *nasab* in Iran and in selected other jurisdictions that recognize surrogacy were analyzed.

Subsequently, scholarly articles and research published in reputable journals on surrogacy and lineage were studied. To ensure comprehensiveness, the views of leading jurists, as well as family law experts, were examined. Content analysis was employed to extract and compare different perspectives, enabling the identification of areas of consensus and divergence in jurisprudential and legal opinions. Furthermore, through analogical reasoning (*qiyās*) and jurisprudential inference (*istinbāt*), rulings

related to the possible *riḍāʿ* relationship between the child and the surrogate mother were derived.

Findings

The findings indicate significant differences of opinion among jurists and legal scholars regarding the lineage of children born through surrogacy. These divergences stem primarily from different jurisprudential and legal foundations, as well as from varying interpretations of the biological and gestational roles in determining *nasab*. The key findings are presented under three main headings:

a. Paternal and maternal lineage (*nasab abawī wa-ummī*)

The majority of jurists and legal scholars hold that paternal and maternal *nasab* of children born through surrogacy belongs to the intended parents—that is, the genetic parents who provided the ovum and sperm. From a jurisprudential perspective, paternal lineage is attributed to the man whose sperm was used to fertilize the ovum, and maternal lineage is attributed to the woman whose ovum was used in conception. This view is grounded in the principle that the genetic origin of the fetus is the decisive factor in establishing *nasab*. In Iranian civil law, Article 1158 of the Civil Code implicitly supports this position, as it defines lineage on the basis of genetic connection. However, some jurists, citing the surrogate mother's role in carrying and nourishing the fetus, argue that she may also be recognized in certain rulings—such as marital prohibition—as a *riḍāʿ* mother.

b. *Riḍāʿ* (milk-kinship) relationship

One of the central issues in this research is whether a *riḍāʿ* relationship is established between the surrogate mother and the child. In Islamic jurisprudence, *riḍāʿ* arises when a woman breastfeeds a child with her own milk. In the case of surrogacy, some jurists, by analogy (*qiyās al-awlawiyya*), argue that because the surrogate mother nourishes the fetus in utero through the umbilical cord, she may be considered a *riḍāʿ* mother. This analogy is based on the priority that nourishing a fetus during gestation is more direct than postnatal breastfeeding. However, this *riḍāʿ* relationship is generally limited to the prohibition of marriage and does not extend to other legal consequences of *nasab*, such as inheritance or custody. Other jurists reject this analogy, maintaining that *riḍāʿ* is restricted exclusively to breastfeeding after birth.

c. Jurisprudential and legal divergences

The existing divergences are largely due to differences in the interpretation of jurisprudential and statutory sources. In Shīʿī jurisprudence, for example, some authorities, such as Ayatollah Sistani, emphasize the primacy of the genetic connection and regard the surrogate solely as a gestational carrier, whereas some Sunni jurists place greater weight on the role of gestation. In Iranian law, there is no explicit statutory provision addressing this matter, leaving a legal vacuum.

Conclusion

This study demonstrates that the lineage of children born through surrogacy is a complex issue in both jurisprudence and law, requiring nuanced analysis. While differences exist among jurists and legal scholars, the predominant view is that both paternal and maternal *nasab* belong to the intended parents (the genetic parents). This conclusion is grounded in the central role of genetic factors in determining lineage, as recognized in Islamic jurisprudence and Iranian civil law. Nevertheless, by *qiyās al-awlawiyya*, the surrogate mother is considered a *riḍāʾ* mother with respect to marital prohibition—a ruling that, while limited in scope, holds significant jurisprudential importance.

From a legal perspective, the absence of explicit legislation in Iran regarding surrogacy and the lineage of children born through this method underscores the need for clear and comprehensive laws. It is recommended that lawmakers, in collaboration with jurists and legal scholars, develop a legal framework that both adheres to Islamic jurisprudential principles and responds to the growing societal demand for clarity in matters relating to advanced reproductive technologies. Future research may benefit from comparative studies of surrogacy laws in different jurisdictions and their implications for lineage rulings, offering more effective solutions to the current challenges.

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