

Exploring The Status of Surrogacy: An Islamic Juridical Review

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Abstract:

With recent advances in medical research linked to modern techniques of reproduction, it has been very pleasant news for couples who were unable to have a child owing to infertility. Among these, gestational surrogacy has become a viable option for couples who were previously unable to benefit from In-Vitro Fertilization (IVF). However, this practice is still regarded as unfeasible for Muslim couples by many schools of thought, particularly Sunni Islam, which severely opposes it due to its unharmonious nature in relation to Islam. Our research addresses the key problems raised by these schools of thought. These mostly include lineage preservation, third-party involvement, and negative psychological effects. These arguments for prohibiting gestational surrogacy are thus contested based on moral philosophy, medical research findings, and Islamic Juridical Law (Sharī'ah). This research grounds its findings on Sunni Islamic traditions, which are not only morally permissible but also necessary for the overall well-being of society. Finally, this study includes a comparative investigation of Islamic and Western secular theoretical perspectives. As a result, based on the explanation for the highlighted concerns, Islamic scholars are requested to reassess their viewpoints on the issue of surrogacy in Islamic Law.

Keywords: *Surrogacy, Islamic Law, Surrogate Child, Surrogate Mother, Islamic Bioethics, Infertility.*

Introduction

Definition of Surrogate Mother

Surrogate literally means “substitute.” It’s a medical process that involves ‘artificial insemination’ followed by ‘in-vitro fertilization (IVF)’ techniques, and the result is to overcome infertility.

A Surrogate mother is a woman who bears another couple’s child in her womb. The process happens outside the womb by mixing the couple’s viable germ cells (ovum and sperm), which are then medically implanted in the womb of a surrogate.¹ Essentially, by a gestational or surrogacy contract, a woman’s womb is rented to conceive for the espoused couple who are unable to give birth to an offspring on their own. The surrogate mother carries the child until delivery and then returns the baby to the couple, marking the end of the contract. She may be financially compensated for it.² Thereafter, the surrogate mother will not partake in any responsibility to the child or its family.³

There are two forms of surrogacies: traditional and gestational. In the first form, the sperm from the intended father is used to artificially inseminate the surrogate mother’s egg, in the traditional form, the surrogate mother’s egg is artificially inseminated with the sperm of the intended father, here the child and surrogate mother are genetically identical. Whereas in the latter form of surrogacy, the fertilized embryo of the original couple is implanted surrogate mother’s womb, hence no genetic relation.⁴

Reasons for offering surrogacy may be commercial or of altruistic nature, as are reasons for opting for surrogacy both of a medical nature (recurrent miscarriages, absent uterus, repetitive failures of in vitro fertilization (“IVF”), to name a few) or personal preference.⁵

Reasons and Causes of Surrogacy

Several reasons account for surrogacy:

- A woman is unable to conceive due to an illness or disability
- The woman has her womb surgically removed
- The woman cannot bear the burden of pregnancy, childbirth, and feeding
- Inability due to old age
- By lending their wombs women can generate a source of income.⁶

- Surrogacy offers genetical identity rather than adopting an unrelated child
- Fear of passing on debilitating genes.⁷

Arguments for Surrogacy

Eternal Good Deeds

As with any other faith, Islam recognizes individuals who perform good actions. Especially when it comes to aiding people in need and treating them with compassion. Among good actions, those that persist long after death are most valued in Islam.

There is a hadith of the Holy Prophet (PBUH) that says:

“When a man dies, his deeds come to an end except for three things: ceaseless charity; knowledge which is beneficial; or a virtuous descendant who prays for him”.⁸

A baby delivered via surrogacy to an infertile couple in great need of a child unquestionably fits under "unending charity," which is rewarded even after the individual's death. Conceive of it as a woman intending to do good by assisting a couple in desperate need of a child.

Similarity with Uterine Transplant

Islam emphasizes that the marital secrets of the marriage should be kept private and not be communicated with a third party. This also involves reproduction-related issues. However, these directions are breached when it comes to the preparations needed for surrogacy, which entails the involvement of a third party in the reproduction process. Uterine transplant is also a violation of the couple's marital secrets. Yet, the first uterine transplant recipient was a Saudi woman who got the donation from an unknown donor. The medical team carried out this treatment after getting a suitable religious fatwa, but the transplanted organ was rejected after about three months. Turkey, which professes to have a secular legal system and a Sunni Muslim majority, carried out its first uterus transplant in 2011. The transfer of the uterus from the biological mother to the surrogate mother for reproduction involved a third person who is not a member of the legitimate married couple. Sunni Muslim clerics support uterine transplants but vehemently oppose gestational surrogacy owing to the preparations required. The womb in which the baby is born does not belong to the real biological mother in any of these

cases, thus it should not matter whose body it is in.

An argument might be made that there is no similarity between uterine transplants and gestational surrogacy. Uterine transplant, unlike egg donation, tries to restore the normal bodily function of an infertile biological mother using the donor's transplanted organ. For this surgery to be effective, the organ is fused into the body of the original mother, becoming her organ rather than that of a third party. In contrast to uterine transplantation, gestational surrogacy involves the substitution of the woman herself. The above debate is particularly pertinent to surrogacy, but it may not support the reasonable and ethical distinction between uterine transplants and gestational surrogacy in terms of third-party participation.⁹

Similarity with Wet Nursing

According to some scholars, Quranic passages dealing with pregnancy do not explicitly prohibit surrogacy. Their argument, which allows surrogacy in Islam, is based on the notion of wet nursing. Wet nursing provides sustenance to the infant through the milk of the foster mother, much as surrogacy provides nourishment to the baby in the womb of the surrogate mother. As a result, they believe there is not much of a difference between the two, and since wet nursing is permitted in Islam, surrogacy should be permitted as well.¹⁰

Another Muslim Scholar, H. Ali Akbar, adds that because surrogate moms are not fertilized by IVF and the biological mother's womb is compromised or does not have the potential to have a child, it may be permitted but only in this specific instance. Surrogate moms may be compensated for allowing their wombs to be rented in the same way that foster mothers might be compensated for nursing the kid.¹¹

Violation of Rights Due to Failure in Legalizing Surrogacy

Despite the uncertainty about surrogacy's legitimacy, there has been an increasing desire for surrogacy adoption because childbearing is the foundation of any family, and infertility in our society is stigmatized. The birth of a kid makes sure that one's heritage will remain. Since the government has not authorized surrogacy, it is viewed as something that is not allowed since Muslim academics are still divided on its legitimacy in Islam. As a result, couples experiencing infertility opt to contact black brokers to achieve their desire of having a child and avoid being shamed in society for not having a child. Furthermore, denying society advantages and depriving individuals participating in this arrangement of their rights breaches both Pakistan's

constitutional values and the international obligations related to this surrogacy agreement.¹²

1. Surrogate Child's rights being denied

The Federal Shariat Court's unwillingness to embrace a perspective that assures the protection and security of the surrogate child has resulted in their abuse and mistreatment in society. Although the court has prohibited surrogacy, it has not considered the issues that this has created in terms of safeguarding the parties involved in this agreement. Surrogate moms and surrogate kids are not included in the definitions of "mother" and "child." Every citizen of the country, including surrogate moms and surrogate babies, is granted constitutional rights; thus, the FSC should not deprive them of their fundamental rights. They must evaluate how the surrogate child's unlawful status may expose it to vulnerability in a nation like Pakistan. That is, if there is no law protecting the rights of a child born via surrogacy, they are vulnerable to abandonment and abuse, denial of nationality/citizenship, and denial of legitimate paternity.

This FSC ruling also stands in contrast to the Nations Convention on the Rights of the Child, to which Pakistan is a signatory. This convention ensures that the child's identity is safeguarded and that he or she is not disadvantaged because of the method of birth. It also protects the child's right to know and be tended to by its biological parents. Furthermore, it has prohibited the separation of a newborn from its biological parents and said that the government has no right to interfere in a child's personal life or to take steps that damage the child's character. Finally, the primary duty for the child's care is allocated to the biological parents, and the government is required to adopt all legal, regulatory, and other measures that assure the preservation of these rights.

The surrogate child's claim to paternity, support, and inheritance from his father gets denied by the FSC judgment. Furthermore, its biological parents are stripped of their legitimate paternity and legal recognition. The FSC has taken no significant efforts to protect the well-being of the kid, which should be their main priority in these circumstances. The state has a constitutional responsibility to protect the surrogate child's rights and interests.¹³

2. Surrogate mother's rights being denied

Obligations centering around the surrogate mother become more

complicated when there are no clear regulations governing surrogacy arrangements. Women who seek to have a child through these arrangements for financial reasons risk jeopardizing their moral integrity. As a result, these women must be made aware of the risks and must not feel compelled to sign into these arrangements. This is because they are frequently under-informed about the numerous problems and difficulties in this arrangement. The surrogate mother's psychological and emotional connection with the child is also not seen. It's also important to accept the surrogate mother's decision to be a child carrier for the intended parents. The surrogate should not get defamed for delivering an illegitimate child because that diminishes her dignity and social identity. The FSC acknowledged the surrogate mother as only a caregiver for the kid, but it rejected to provide any payments to the surrogate mother as recompense for rearing the child. By declaring surrogacy unlawful and marriage the sole acceptable option for having a child, the FSC has effectively revoked the surrogate mother's legitimate rights. This way, a surrogate mother's privacy, and identity get compromised. The surrogate mother's dignity further gets shattered as the Court tries to maintain society's traditional norms by saying that a surrogate is having an illegitimate marital relation. Although a surrogate mother is assisting an infertile couple that has lost hope of having a child, she is nonetheless treated unfairly by society by being disfavored

3. Intending Parent's rights being denied

The intended parents' rights and legal rights were also affected by the FSC judgment. Infertile couples should be able to use surrogacy if they fail to conceive. In this society, reproducing is seen as the base of a family, and the inability to do so is regarded as foreboding. In nations like Pakistan, childlessness is considered a curse, and infertile couples, particularly infertile women, are shunned. Even if this is not the case, infertility is frequently associated with women, who are subsequently subjected to the psychological and emotional consequences raised by the family. Infertile couples can use medically assisted technologies like ART, IVF, and surrogacy, to offset the societal as well as biological consequences of not having a child. This is also in accordance with the couples' sexual rights, which allow them to produce children with the same DNA as them. However, because surrogacy is not yet authorized, the women who bore the child on their behalf have the option of

refusing to give the child to its biological parents at delivery. As a result, stripping them of their genetic inheritance is extremely unfair to the biological parents. The intended parents are not only responsible for the child's well-being, but also for the surrogate mother who is carrying their kid. As a result, if surrogacy is permitted, the woman carrying the child may be obliged to renounce her rights at the child's birth. This would aid in ensuring that all parties to the surrogacy arrangement receive the rights which they were promised. A Shia Muslim filed this lawsuit in front of the court. In Shia Fiqh, the FSC opposed recognizing the legitimacy of surrogacy-related agreements. Surrogacy has been ruled lawful in Islam by Shia scholars. The Court should have decided based on the claimant's religious beliefs.¹⁴

Arguments against Surrogacy

Quranic Verses that Depict Impermissibility of surrogacy

The Quran serves as a guideline for Muslims to walk the straight path. Its words are absolute, its commands are the law, and it is strict in dealing with obscenity. Muslims are directed to protect their virtue and thus many scholars argue surrogacy as being transgressive.

The Holy Qur'an states:

“And who guard their modesty; Save from their wives or the (slaves) that their right hands possess, for then they are not blameworthy, but whoso craveth beyond that, such are transgressors.”¹⁵

The Holy Qur'an states:

“And those who guard their private parts, except from their wives or those their right hands possess, for indeed, they are not to be blamed, but whoever seeks beyond that, then they are the transgressors”¹⁶

These verses deem it obligatory for Muslims to protect their virtue. Surrogacy calls for the injection of semen into a uterus of a surrogate woman who is not the donor's wife. These verses interdict the revelation of genitals to anyone apart from spouses. Thus, insemination on a woman other than the wife is an infringement of Quranic Directives.

Likewise, the Holy Qur'an states:

“And Allah has made for you from yourselves mates and has

made for you from your mates sons and grandchildren”¹⁷

Islamic scholars have used this verse to prohibit surrogacy because it states that children and grandchildren should only be born through spouses. Surrogacy involves a woman other than the spouse to carry the child.¹⁸

Reproduction is viewed as the supreme goal of marriage, but Muslims are commanded to refrain from including anyone other than the married couple in their conjugal affairs. The virtue and privacy of marriage are deemed paramount in Islam. Thus, the same verse of Surah Al-Nahl extrapolates the involvement of anyone other than the married couple in the reproduction process.¹⁹

Incorrect Comparison with Wet Nursing

To adjudge surrogacy as permissible, many have compared it to wet nursing, but it is a flawed analogy. While it is correct that Muslims can give their child to a wet nurse for breastfeeding only up to a certain period and the nurse would be viewed as the foster mother of the child by the honor of suckling, she would have no biological relationship with the child. Nor would she have any relation to the father of the child she is breastfeeding. The incorrect comparison of wet nursing is drawn with gestational surrogacy in which the woman who provided the ovum is considered as mother and the surrogate is the foster mother. In surrogacy, the surrogate women are impregnated with the sperm of the father or the embryo produced from the father’s sperm.²⁰

The Preservation of Lineage

Islam advocates reproduction which calls for fostering of pregnant women, the well-being of children, and remedy for infertility, but it also encourages the protection of lineage. Every infant should know who his/her parents are, be related to them, and they should take up the family name of their biological father. Surrogacy demands the introduction of a foreign component into the uterus of a woman and the consequence is fusion in lineage. Mufti Sheikh Ahmad Kutty, a prominent scholar observes that this lapses the limits set by Allah. In 1986, the Islamic Fiqh Academy had declared surrogacy forbidden due to the concern of mixing of lineage and loss of mothership.²¹ Gestational surrogacy is also prohibited due to dubiousness in deciding on fatherhood. For instance, If the surrogate mother is married, then who will be the father? The intended or the husband?²²

Empirical and rational perspectives veto surrogacy. There is a bigger likelihood of merging of lineage through surrogacy which Islam is strictly against. The Islamic Fiqh Council had primarily approved surrogacy in a polygamous relationship where the surrogate co-wife carries the ova of the other wife. After contemplating several cases and due to concern of merger of lineage even between co-wives, the council had to avert their decision-making surrogacy impermissible even in polygamous relations.²³

Verses of the Quran about the relation of Child and mother depict its impermissibility

The Quran identifies mothers as those who give birth to their children. The Holy Qur'an states:

“None are their mothers except those who gave birth to them.”²⁴

The egg donor cannot be regarded as the real mother since she did not carry and give birth to the child. Thus, the surrogate mother can be alleged as the real mother even if she carries the ovum of another woman in her belly. However, if the surrogate mother does not share genes with the child, how can she be considered the real mother?²⁵

The Holy Qur'an states:

“We enjoined upon man to be dutiful to his parents. His mother bore him in weakness upon weakness, and his weaning lasted two years. We, therefore, enjoined upon him. Give thanks to Me and to your parents. To Me is your ultimate return.”²⁶

Allāh says:

“We have enjoined man to be kind to his parents. In pain did his mother bear him and in pain did she give birth to him.”²⁷

These verses also support the statement that the mother is the one who gives birth to the child.²⁸

Psychological Effect

Surrogate mothers become pregnant to give away the infant they will give birth to in return for money. Motherhood is turned from a value to a price because it starts becoming a method of earning. Children become a product, subject to market supply and demand.²⁹

To explain their prohibition, Islamic scholars highlight the negative

impacts of surrogacy arrangements on both surrogates and offspring. Surrogacy, according to Islamic philosophers, is a deception of needy and financially insecure women. Among religious thinkers, there is a fear of poor women being recruited as surrogates as they can get paid for this work. As a result, these women may not seek out their well-being and mental health to better their standard of living.

Another concern is that the surrogate mother may develop a spiritual attachment to the child after carrying it for nine months and may experience pain and guilt from losing a child at the time of delivery back to the child's biological parents. Not to forget the complications of having "two moms" will cause mental harm to children. These situations are especially true if there are custody issues or if the child grows up and finds out about a surrogate mother. The infants being born might also have medical difficulties and can be abandoned by both the intended parents as well as the surrogate. Because of the numerous potential negative implications of surrogacy, Islamic scholars prohibit it.³⁰

There is a high probability that the surrogate mother forms an emotional attachment to the child but then must face the prospect of renouncing the child. In surrogacy, the mental stability of the surrogate mother has become imperative to be taken into consideration since doctors have determined that depression subjects the fetus to toxicity. In her research, Christina Chambers found that women who were administered the antidepressant fluoxetine had higher odds to give birth to infants with three or more minor abnormalities. These results were coherent with the findings of another group of researchers at Massachusetts General Hospital.

Even after birth, the child would face a dilemma of the relationship between his/her two mothers, who would he/she reckon as their mother, and what would be the position of the other. This might lead the child to develop mental stress. This is clearly harmful.³¹

Complications in Surrogacy Contract (Legal Aspect)

A case was brought to the Islamic Fiqh Council where the surrogate had birthed twins which resulted in a dispute over determining the lineage of the infants. From a contractual point of view, this is an invalid agreement because of the presence of uncertainty, gharar. In respect of surrogacy, there is no assurance whether the surrogacy will be finished smoothly i.e., the surrogate will live till completing the pregnancy, or if the child/s will be born without

anomalies. The case of Judy Stiver and Alexander Malahoff illustrates this when Judy Stiver had to bear a child for Malahoff but the child was born with a small head depicting an abnormal brain. Both parties abandoned the claim of the child.³²

Therefore, Shariah prohibits using or renting a person's private parts or uterus. Surrogacy is regarded unlawful in general since there is little textual suggestion to support any case of surrogacy.³³

Rebuttals Against Arguments Forbidding Surrogacy

1. Lineage Preservation

The most major argument in favor of lineage preservation focuses on the problem of "gene mixing," which has been brought to light by many Islamic critics, who believe that this concern hampers the appropriate establishment of the relation between parents and their offspring.

According to medical professionals, there is no genetic link between the surrogate mother and the child in gestational surrogacy, and no blood is physically passed between them. So, what do the critics worry about, according to whom this may not be permitted? Their fears are reasonable, but such genetic mixing is extremely rare. The fertilization of the egg to create an embryo occurs externally, which eliminates the risk of the surrogate's husband's DNA mingling with the egg.

Concerns about lineage preservation raised by Islamic scholars about traditional surrogacy are valid and should be outlawed. However, their fears about DNA mixing and lineage preservation in gestational surrogacy are largely overstated.³⁴

2. Third-Party Involvement

Moving on to the argument that focuses on the third-party exclusion from the legitimate married couple, the implantation of sperm in the surrogate's womb that does not belong to her husband. Scholars who reject surrogacy cite passages from the Holy Quran that expressly forbids adultery and producing children without the required lawful relationship or *Nikah*. However, this was not meant to preclude the implantation of exogenous DNA into the surrogate's womb. Furthermore, the embryo is fertilized outside before getting implanted in the womb for further nourishing. When it is implanted into the surrogate's body, it is an embryo with its own set of cells and DNA that is the genetic

material of its intended father. This is comparable to a lady getting a donated organ from a man she is not married to. Donating blood and organs is not only a very good deed, but it is also highly fortified by Islam.³⁵

3. Negative Psychological Effects

Several Muslim scholars believe that surrogacy is prohibited in Islam because the arrangements cause harm to society, including the surrogate mother exploiting the biological parents at the time of delivery, both the surrogate and biological parents abandoning the child, and finally, the emotional trauma experienced by the surrogate mother when giving up the child. These concerns are shared not just by Islamic academics, but also by other surrogacy critics. Because of the expanding adoption of this practice, some have been concerned about the issues. As a result, research has been conducted to study these assertions to find solutions, and it has been shown that many of these statements are patently untrue. Over the last 30 years, research has examined about 25,000 surrogacy agreements in America, and just 1% of women have expressed remorse about their participation. This is mostly since these women were well-educated and so less likely to be swayed by cultural pressure. They were aware of the contract's conditions; therefore, they decided to return the baby to its original parents upon delivery. The research also reflects the concerns of those who thought that surrogate moms were compelled into signing surrogacy contracts under financial duress. According to the findings, the women who entered surrogacy arrangements were financially strong, as opposed to the typical imprint of needy and uninformed.³⁶

Comparison with Western Secular Beliefs

Islam and the West both have the same interest to attain the well-being of the child, mother, as well as society. Islamic bioethics prohibits surrogateship by stressing the problems related to lineage and other crucial social anarchy. Whereas a relatively lenient, and mostly utilitarian approach is adopted by Western secular bioethics.

A few similarities and several differences are revealed upon comparing Islamic and Western secular philosophical perspectives. The well-being of both mother and child in society is at the forefront of both. Although unorthodox from cultural Western standards of reproduction, they still regard it as beneficial for all participants, the couple can enjoy a child while the surrogate can be compensated financially and emotionally. It's a win-win!

Surrogacy is critiqued in different facets by the Western secular philosopher. They worry it will badly affect familial matters of both parties involved. When the couple retrieves the baby, it is taken away not just from the surrogate, but also from her family. Conflict in marriage may arise and lead to custodianship problems. A western philosopher Krimmel compares surrogacy to a second marriage where a couple must adopt a child from the first marriage

While both Islam and the West argue over surrogacy, they differ in their reasoning. As per Islamic ethics, a second marriage is allowed as it does not make for problems with the offspring's lineage as opposed to surrogacy. As with other things human nature is selfish when money is involved. If the child develops some genetic or congenital birth defect, parents as well as the surrogate would be disappointed and will eventually blame each other.

Paid surrogates can be exploited; poor women bear the baby for some cash. Data has shown that they receive little to no money at all at times. Michael Kinsley claims that if women are prohibited from surrogacy contracts, then other services provided by women should also be questioned. He believes the prospect of being compensated for the services of bearing a child has not been manipulative of poor women. There can be some restrictions put in place to prevent exploitation. In the United States, statistics display that the "average surrogate mother is white, attended two years of college, married young, and has all the children she and her husband want."³⁷

Conclusion

Based on the above discussions from multiple points of view, this topic can be settled for now from two concluding perspectives. However, further detailed consideration is needed by the Federal Shariat Court (FSC) and the Islamic Scholars.

The Discovery of knowledge or the creation of new technology does not inadvertently permit its adoption because technology can be used for the amelioration of life or its deterioration. Surrogacy has been a hot topic and the debate on its legitimacy will continue. We are free to establish our arguments, keeping in mind our religious teachings, to determine if surrogacy is licit. Due to a large number of couples facing infertility, the societal pressures faced by them, and the violation of rights, the permissibility of surrogacy has become the need of the hour. But just because something is relevant to society does not mean it may be permissible in Islam. For an Islamic society, religion is a

concept of life that deals with public order to achieve social and moral goals through materializing peace and prosperity. Hence as an Islamic State, all verdicts must be finalized considering our religious teachings. Islam considers the needs of the society to help its advancement and it recognizes sincere judgments as long they don't controvert its concepts and beliefs and are beneficial to humanity. Surrogacy goes against Islamic beliefs, especially in the case of protection of lineage, chastity, and motherhood. Through the process of qiyas, we should consider surrogacy impermissible in Islam.

However, even among Muslims, another viewpoint exists which supports legalization of surrogacy under certain conditions. An infertile couple should have the option of surrogacy based on necessity, negative social and psychological impacts, and protection of their marriage. The Quranic Teachings must be viewed in a holistic manner considering factors like increasing infertility rates among couples, the desire of having one's children for the protection of lineage, problems faced by infertile women, and social and psychological stigmas. Positive legislation is needed for this matter as even if it is banned in some countries, out of desperation, infertile couples visit black markets and other unlawful sources to fulfill their yearnings for Parenthood. In this case, there are high risks that the right of the surrogate mother, child, or intended parents may be violated. In the situation of absolute necessity, we can view the following verse of the Quran:

“But if one is compelled by necessity, neither craving nor transgressing—there is on him no sin, for indeed God is Clement, Merciful.”³⁸

Such needs for infertile couples urge us to maintain the marriage, family growth, and reproduction claims of the couple. Allāh says:

“Wealth and progeny are the allurements of this world”³⁹



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³⁸ Al Qur'an 2:173.

³⁹ Al Qur'an 18:46.