

Legal Status Of Surrogacy In Islam (A Critical Analysis In View Of Jurisprudence Ruling)

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ABSTRACT

On the basis of Shari'ah and ethics, Islam distinctively offers solutions to the challenges of the present day. The science of 'Principles of Islamic Jurisprudence' has been formulated for this reason, with the sole purpose of deducing sub-issues in the light of Shari'ah principles. The contemporary era's scientific and medical innovations have generated a lot of problems. So the devoted individuals must seek answers to in religious basic sources. Surrogacy's legal and moral standing is one of the most pressing issues in the area of medicine today. This topic has been debated in all of the celestial faiths and ethical systems, not only in Islam. Consequently, several objections and concerns have been expressed regarding various forms of surrogacy. There is a consensus among Muslim jurists on the prohibition of all cases of surrogacy except the one i.e. the total surrogacy. There is a difference of legal opinion among Muslim jurists in this form of surrogacy. One class prohibits it and the other justifies it under duress. Both the groups have arguments on their point of view. This study examines this contentious kind of surrogacy, as well as the arguments against it and the responses to them. It will help scholars better understand different points of view.

INTRODUCTION

Adam was the first human creation created by Allah Almighty, who was endowed with inexhaustible desires, including the desire to be everlasting. But, because a human being must die at some point, he must rely on the act of reproduction to ensure the survival of his species. The desire to have a great generation is a natural process that is not only permitted but actively encouraged in every religion and moral code. The human mentality has developed as a result of the overwhelming yearning for eternal existence. Man was given the greatest source of psychological consolation in the shape of wife and progeny.

However, sometimes a human being loses his potential to propagate his race due to a stroke of bad luck, and this condition causes him psychological troubles. As a result, he fears being without descendants and attempts to conceive through medical means. Surrogacy is one of these methods.

AREA AND OBJECTIVE OF RESEARCH

This research deals with:

1. Necessity, importance and history of surrogacy.
2. Various forms of surrogacy and their legal status in Islamic jurisprudence.
3. The most controversial form of surrogacy among Muslim scholars and their arguments.
4. Jurisprudential rules that can regulate the Gestational/ Complete Surrogacy in Muslim societies.

RESEARCH METHODOLOGY

Scientific, critical and descriptive analysis is the method applied the research conducted.

WHAT IS SURROGACY?

Literally the word 'surrogate' has been derived from a Latin word 'surrogatus' which means a substitute (Surrogate | Definition of Surrogate by Merriam-Webster, n.d.), i.e. a person appointed to act on behalf of another. So surrogacy is the process of giving birth to a baby for another woman who is unable to have babies herself. (Hornby & Wehmeier, 2009) Moreover, surrogate mother is the one who agrees to bear a child for another woman. In other words, surrogacy is a method of assisted reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child for others to raise. (Kumar et al., 2013)

Surrogacy is a promising therapy for infertility that has the potential to alleviate many of the unendurable hardships that infertile couples and their families experience. Infertility has grown considerably more frequent across the world, especially since many couples wait until later in life to start a family.

NECESSITY AND IMPORTANCE OF SURROGACY

Approximately, one in four couples in developing countries is affected by infertility, and about 48.5 million couples experience infertility worldwide. Some doctors and researchers would say that

infertility is becoming an epidemic, and infertility treatments are becoming more popular as couples look for ways to start a family. ('See the Most Recent Fertility Stats', 2020) In most countries surrogacy can provide a solution to infertility to prevent the increasing divorce ratio and oppression on women. As some reports say that infertility is one of the primary reasons for divorce among couples. Besides, up to 60% of infertile individuals reported psychiatric symptoms with significantly higher levels of anxiety and depression than fertile individuals. ('See the Most Recent Fertility Stats', 2020)

HISTORY OF SURROGACY

Old Babylonian law and custom allowed the husband of an infertile woman to have another wife bearing a child for the couple. This practice was allowed to infertile woman to avoid the inevitable divorce otherwise. (Postgate, 1994) In this scenario, we are familiar with the narrative of Abraham and Hagar's marriage. Following then, several stages of advancement in the fields of medical and infertility therapy prepared the path for contemporary surrogacy. As a result the first sign of the description of surrogacy was found in USA in 1985 but the guideline on this subject was not issued until 2008. ('ACOG Committee Opinion No. 397', 2008) While in Europe, the legal surrogacy started in the year 1989, after publication of the Warnock report on human fertilization and embryology in 1984. (Brahams, 1984) The commercial surrogacy was made legal in India in 2002. India has established itself as one of the most popular surrogacy destinations worldwide. Now the 'Surrogacy (Regulation) Bill of 2019' aims to regulate this industry in India. It places a ban on commercial surrogacy and allows altruistic surrogacy for infertile Indian couples. (Chaturvedi, 2020)

SURROGACY IN MUSLIM SOCIETY

As far as Muslim communities are concerned, they have been unable to accept the process of surrogacy in general and orthodox religious societies in particular, and as a result, they have yet to reach a definitive judgement on its legal validity. Because surrogacy occurs in a variety of procedures, it is difficult, if not impossible, to apply the same jurisprudential and ethical standards to all procedures. It is important to discuss all forms of surrogacy in this context in order to arrive at a jurisprudential decision for each instance independently. Due to the negligence of this point, in most studies of surrogacy, only one rule has been stated to be valid or invalid which is not at all compatible with the different types of the procedure.

FORMS OF SURROGACY

Generally two types of surrogacy are described:

1. Gestational Surrogacy
2. Traditional Surrogacy

1. Gestational Surrogacy

This method of reproduction is also known as IVF (In Vitro Fertilization). If a woman is unable to conceive, she can donate her egg to a surrogate mother who will carry the child. The wife's egg is fertilized in vitro with the husband's sperms through an IVF or Intra-Cytoplasmic Sperm Injection (ICSI) treatment, and the embryo is then placed into the surrogate mother's uterus, where she bears the child for nine months.

2. Natural/ Traditional Surrogacy

In this kind of surrogacy, the surrogate mother is inseminated with the husband's sperm. Sperms are implanted in the surrogate's vaginal canal or straight into her uterus, and the surrogate utilizes her own eggs rather than the intended mother's because her eggs are of poor quality or she lacks them. As a result, the child born through traditional surrogacy has no biological ties to the commissioning female spouse. IVF is not required in this form of surrogacy because IUI (Intrauterine insemination) can be used instead.

All Muslim jurists have declared “Traditional Surrogacy” to be absolutely forbidden. In other words, there is a consensus among Muslim jurists on its prohibition legally and ethically. Likewise there are some other certain methods of artificial fertilization that have been considered forbidden by Muslim jurists collectively as:

1. Fertilizing the wife's egg with the semen of a third man other than the intended husband while the sperms of intended husband are deprived of the ability to produce children.
2. Taking the egg from a third woman and inseminating it into the intended wife’s vaginal canal or the uterus with the sperms of intended husband.
3. Some times a surrogate mother is hired for the above two cases if the intended mother’s uterus has some fault in producing of baby.

COMMON EVIDENCES OF PROHIBITION

In light of the teachings of the Qur'an and Sunnah, all Islamic jurists have unanimously determined that the aforementioned three circumstances, as well as traditional surrogacy, are banned. They give some of the following evidences in support of their verdict:

1. Genealogical Amalgamation

From an Islamic point of view, the protection of lineage is one of the requirements of Sharia. (Maḥmūd bin ‘Abd al-Raḥmān, 1986) Therefore, genealogical amalgamation is prohibited. In case the wife’s egg is fertilized with the sperm of a stranger, the intended husband can’t attribute the child to himself as it is against the confirm order of shari’ah. Likewise the sperm donor can’t be the father of that child because there is no legal relationship of marriage. Prophet Muhammad (PBUH) once said that a kid produced as a consequence of adultery would not be attributed to the father if he denied nor would he inherit from him. (Abū Dawūd, 2001)

2. Hiring of a Prohibited Entity

The hiring of the uterus is one of the forbidden entities in Islamic Shari‘ah because its commandment is associated to the woman’s vagina which has been given great respect according to the Quranic text for the protection of the lineage from discord. (al-Qurān, Surah al-Muminūn 23: 5) For this reason, the Shari‘ah has commanded “Iddah” (prohibition period) for a woman in the case of divorce or husband’s death; so that there may be surety of absolution of her uterus.

Regardless of religious perspective traditional surrogacy has been objected widely on legal, ethical and psychological grounds. In USA, the American College of Obstetricians and Gynecologists compiled in 1987 that there were 64 state bills introduced in the current legislatures from January to June 1987. On ethical grounds many argue that surrogate arrangements depersonalize reproduction and create a separation of genetic, gestational, and social parenthood. Others argue that there is a change in motives for creating children: children are not conceived for their own sakes, but for another’s benefit. (Van den Akker, 2000)

Along with ethical issues surrogacy raises the psychological questions. So the surrogate pregnancy should be treated as a high-risk psychological experience. In this regards it becomes essential to provide surrogates professional counseling before, during and after pregnancy. (Meinke, 1990)

CONTROVERSIAL FORMS OF SURROGACY

‘Gestational surrogacy’ or ‘complete surrogacy’ is the most controversial form among Muslim jurists. There are two options for gestational surrogacy that are discussed among Muslim jurists and both are controversial:

1. Second Wife as Surrogate Mother

In gestational surrogacy the second wife of intended husband can provide her services on moral basis. But most of the Muslim jurists have considered this from prohibited. On the other side, considerable jurists have allowed this form of surrogacy. In this form a decree of its legality was issued by the Majlis al-Fiqhi in its 7th session (1404 AH) on the condition that full caution be exercised in it and that it be done only in times of extreme need. (Al-Bāsam, 1404 AH)

The Majlis, however, revoked the order after a year for a variety of reasons, including the continual possibility of the second wife becoming pregnant by her husband. Differentiating between the infants would be tough in this situation. However, this is very likely, especially when the husband is taking full precautions. One of the strongest arguments of those who justify this option of surrogacy is that there isn’t any danger of interbreeding since the both women are the wives of the same man, so there is protection of lineage as per the requirements of Shari‘ah. In the same way, the problem of the hiring of the uterus is solved, because in this case, the uterus is not a lease, but it can be a donation or a present from the second wife, which further enhances the respect for humanity.

As a result, this option of surrogacy can be taken without any Shari‘ah objections in a larger sense. It can also be authorized, with the exception of nations where second marriage is forbidden by law.

2. Hiring a Stranger as Surrogate

In this case, the commissioning husband's sperm and the commissioning wife's eggs are combined in the laboratory to create an embryo, which is then transferred to a stranger woman's uterus, where it develops naturally into a full-fledged kid. Since the woman's egg is fertilized by her husband's sperm and then artificially inserted into the uterus of the surrogate mother, so there isn't any genetic link or affiliation generated between the child and the surrogate mother. Rather, the couple from whom the reproductive material was obtained is considered to be the genetic parents of the child.

Again the above two arguments i.e. genealogical amalgamation and hiring of a forbidden entity are used to prove the prohibition of this case. But the fact is that the above mentioned arguments are insufficient here in this case of surrogacy. Moreover, the application of the principles of Islamic jurisprudence undermines the practicality of these arguments.

Islamic scholars are well aware of the relevance of jurisprudential principles in modern challenging situations. By inferring instructions according to the Islamic Shari'ah, these principles play an essential part in the solution of current global challenges. Essentially, these principles are not particular to a single issue, but they may be used to debate and deduce instructions for a wide range of fundamental and sub-issues. Therefore, the jurisprudential principles are a source of inferring the Shari'ah commandments regarding the modern issues. These laws even have the potential to ensure the survival of Shari'ah itself, the availability of Shari'ah directives, and the perpetuation of jurisprudence at all times and places. Therefore, the problem associated with this form of surrogacy can also be solved by looking at it in the context of following jurisprudential principles.

1. Primacy of Permission (Aṣālat al-Ibāḥah)

The main argument of the jurists for the justification of the said case of surrogacy is 'Aṣālat al-Ibāḥah' (Primacy of Permission). In light of this principle, Islamic jurists debate whether it is permissible for a person to engage in an action whose ruling is not found in primary Shari'ah sources. We find two approaches answering this question; the first one is 'Aṣālat al-Ibāḥah' (primacy of permission) and the other is 'Aṣālat al-ḥadr' (primacy of prohibition). Aṣālat al-ḥadr means that everything is forbidden and must be avoided, unless there is Shari'ah evidence proving that it is permissible and 'Aṣālat al-Ibāḥah' means that everything is permissible, unless proven otherwise. There are two important categories of deeds in religion i.e. the worships and dealings. In worships 'Asalat al-hadr' is applied, unless the Shari'ah proves something permissible. On contrary, in dealings 'Aṣālat al-Ibāḥah' is applied, unless the Shari'ah proves something prohibited. There is consensus on 'Aṣālat al-ḥadr' in worships but controversy on 'Aṣālat al-Ibāḥah', as some jurists weigh 'Aṣālat al-ḥadr' in dealings too. According to Imām Abū Ḥanīfah the principle of 'Aṣālat al-ḥadr' will be applied in dealings as well. (Al-Sayūtī, 1990) But mostly the later scholars of Ḥanafī Muslim school of thought apply 'Aṣālat al-Ibāḥah' in dealings like Kamāl al-Dīn ibn Hammām says that validation is the essence of things. (Ibn Hammām, 1997)

Before Kamāl al-Dīn, the most prominent Hanafī scholar Imām Sarakhsī has written that there is primacy of permission in things and ḥarām (prohibition) will be based on Shari'ah evidence only. (Al-Sarakhsī, 2002) So it can be said that majority of Muslim jurists believe that both religion and

reason prove 'Aṣālat al-Ibāḥah' (primacy of permission). They mention some verses from the Holy Qur'an proving their opinion:

1. "He it is Who created for you all that is in the earth." (al-Qurān, Sūrah al-Baqarah 2:29)

From this verse of Quran the jurists have inferred the ruling for primacy of permission in land sources as Zamakhsharī and other interpreters of Quran has also mentioned this ruling in their books of exegesis. (Al-Zamakhsharī, 1407 AH) In another verse of the same chapter Allah Almighty says:

2. "O mankind! Eat of that which is lawful and wholesome in the earth." (al-Qurān, Sūrah al-Baqarah 2:168)

This verse addresses the whole human being and the jurists have extracted the principle that in Islam basically all the divine blessings are permissible unless there is a mentioned ruling against them in Quran or Hadith. (Tanṭāwī, 1997) The prophet Muhammad (PBUH) once said that, "What God has permitted in his book is permissible, and what is forbidden is forbidden, and what is silent about it is admissible, so accept from God admissible, for God does not forget. (Al-Hākīm, 1990)

It is narrated as well from Imam Ja'far Ṣādiq (RA) that everything is lawful for you, unless you know its unlawfulness, so that you may leave that. (Muhammad bin Yaḳūb Al-Kulaynī, 2007)

Thus, there is no problem in the above-mentioned case of surrogacy on the basis of the jurisprudential principle of 'Aṣālat al-Ibāḥah'. Since the prohibition in this matter has not been proven and there is no Quranic verse, Hadith of Holy Prophet (PBUH) or a special Shari'ah evidence that indicates the prohibition of this form of surrogacy, then the primacy of permission will be considered. (Bajnordī, 1992)

2. Necessities Allow Prohibitions

This is another Islamic principle of Islamic jurisprudence that relates to the aforementioned kind of surrogacy. The principle, necessities allow prohibitions states that in the case of a pressing need or demand, forbidden items may be permitted on a temporary basis. This idea is based on several verses in the Holy Quran. As in Sūrah al-An'ām it is stated: "He has clearly spelled out to you what He has forbidden you unless you are constrained to it." (al-Qurān, Sūrah al--An'am 6:119)

The principle or law is outlined in this verse of the Quran. When a person is in a circumstance where the only way to prevent personal or social harm is to take the prohibited route, Shari'ah allows them to do so.

If we look at the issue of female infertility in the light of this rule, it will be obvious that many infertile women in our culture are scolded the entire life for something that is beyond their control. Because not being able to have children is something that a woman cannot accomplish. In such a circumstance, it would be legal for women in a constrained situation to use surrogacy to avoid the psychological and occasionally bodily sanctions that society imposes.

Surrogacy provides a number of social benefits in addition to meeting individual needs. One of them is a solution to the problem of divorce caused by infertility, which is particularly prevalent in the Subcontinent. As a result, the practice of surrogacy will be justified in such situations based on the preceding premise.

It's also worth noting that, according to all jurists, while the above-mentioned principle may be used to verified banned acts or things in times of necessity, it can be applied first and foremost to the act of surrogacy because the prohibition of surrogacy isn't even proven by jurists.

There are still two uncertainties about surrogacy that need to be addressed briefly:

i) IS SURROGACY ADULTERY?

Some people suspect that just as a child born of adultery is born without a legal (shar'i) contract, so too a woman who has sperm and eggs in her womb as a result of surrogacy gives birth to a child without a legal (shar'i) contract. Therefore, the act of surrogacy is like adultery which is forbidden in any revealed religion. As Holy Quran warns the believer: "And do not approach unlawful sexual intercourse. Indeed, it is ever an immorality and is evil as a way." (al-Qurān, Sūrah al-Isrā' 17:32)

Adultery, on the other hand, has nothing to do with having a kid; if it did, adultery for a barren woman would be impossible to fathom. Rather, from a shar'i point of view, adultery means having illegally sexual intercourse by a man and a aphrodisiac woman and at least the amount of glans being penetrated (Al-Nawawī, 1405) (Al-kasānī, 1986) , which is not the case in surrogacy; as this process is performed artificially where no penetration of glans or lust is involved. Besides, there is no danger of the lineage being mixed because the embryo develops outside the womb of the surrogate. Consequently, a child born of surrogacy cannot be considered as a child born of adultery according to Shari'ah because the concept of adultery is not found in the process of surrogacy.

THE PEDIGREE OF A CHILD BORN OF SURROGACY

Although some scholars are of the opinion that the child born of surrogacy should be associated towards the surrogate, not towards the commissioning mother, or the commissioning father but considering this issue, it is clear that pedigree is based on sperm, not just birth. In Holy Quran it is narrated that: "And it is He, Who created man from water: then from him He caused two kinds of kindred, by blood and by marriage. And ever is your Lord competent [concerning creation]." (al-Qurān, Sūrah al-Furqān 25:54)

The verse shows that the human being created from the same water (sperm) is actually a descendant and his pedigree is in fact a changed state of water (sperm).

Naturally, reproduction begins with the union of sperm and egg, whether through sexual intercourse or IVF. In fact humans are diploid organisms, meaning they have one set of 23 chromosomes from their father and one set of 23 chromosomes from their mother. (Regina Bailey, 2019) The two sets combine to form a full complement of 46 chromosomes that is called Zygote. ('Zygote', 2021)

At this stage the hereditary substance has passed away and now the risk of interbreeding has also vanished. As a result, the born child's lineage, which is based on the genesis of his creation, will also, be traced back to his actual parents. Even genetically, there is no connection between the kid and the surrogate, nor is she the reason for the child's existence; rather, the woman whose ovum is implanted in her womb is the reason for the child's existence. Therefore, since the rights of the child such as

inheritance, alimony, custody, etc. are determined on the basis of pedigree; all such rights of the child born of surrogacy will belong to his original parents, not to the surrogate mother.

CONCLUSION

It is obvious from the above discussion that:

1. The legal, moral and social necessity and significance of surrogacy can not be denied.
2. The issue of surrogacy is not a very complicated one from Shari‘ah point of view but the justification of some of its forms like total surrogacy can be deduced very simply from jurisprudential rulings.
3. Moreover, this practice is not only legal but also a social necessity in many areas to ensure the security and respect of a barren woman.
4. There is a dire need of formal legislation in this regard so that the practice of surrogacy in a state can be safely practiced while preventing the misuse of this legitimate practice in terms of Shari‘ah.

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