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The Role of Shari'ah in Regulating Surrogacy An Analytical Study of Its Ethical and Social Consequences

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Abstract:

The practice of gestational help in procreation, or surrogacy, is still up for debate in Islamic law. The legality of surrogacy under Shari'ah law has been the subject of heated dispute among experts, leading to a variety of interpretations and positions. This article gives a summary of the debates surrounding surrogacy in Islamic law while stressing the main arguments for and against its legality. This article uses qualitative methods along with analytical and descriptive techniques to investigate the debates about surrogacy in Islamic law. It is critical to understand the differences between national surrogacy laws and regulations, which may or may not be in line with Islamic beliefs. People seeking advice are therefore urged to speak with competent and skilled scholars who can do so within the context of Islamic ethics and regional legal frameworks. The article highlights the ongoing scholarly debate around surrogacy in Islamic law. Understanding the various perspectives and conducting further study can help to create a greater awareness of the connection between surrogacy and Shari'ah compliance, even though there is no universal agreement on whether it is permissible or not. Islamic jurists (Fatwas) formed an absolute view that traditional surrogacy is strictly forbidden but so far as gestational surrogacy where the embryo is actually created by using the ova and sperm of the commissioning couple is concerned, there is no such absolute prohibition or permission under Shari'ah. The present paper argues that none of the arguments forwarded by the modern scholars against the legality of surrogate motherhood are sound and also argues that surrogate motherhood deserve to be declared valid though with certain conditions.

Keywords: Surrogacy, Gestational Help, Islamic Principles, Prohibition, Shari'ah Law, Interpretations, Welfare, Ethics, Shari'ah Compliance

Introduction:

The issue of surrogacy has been hotly contested from a Shari'ah perspective since the middle of the 1980's and is still being argued today.¹ Shari'ah provides the Islamic way of life, which can direct people in the proper direction², and includes medicine as an essential part.

The Prophet Muhammad (S.A.W.) proved a medical practice that treated people, taking into consideration not just their physical health but also their spiritual, psychological and also their

social context. According to the Islamic point of view, marriage and children create half of the religion. Children are also seen as a wonderful and precious gift from Allah.³

The hereditary structure of Islamic lineage regulations is facing a number of new issues as a result of assisted reproductive technologies (ARTs). In vitro fertilization (IVF) and surrogacy agreements, particularly, contradict the traditional definitions of paternity and maternity.⁴

Surrogate means "substitute" or "replacement".⁵ It is defined as a woman who conceives and births a child for another woman with whom she has made prior agreements and who will raise the child as his mother.⁵ Surrogacy is an arrangement wherein a woman ("the carrying mother") agrees to carry a child and give that child (or children) to one or more other people ("the commissioning parents") after birth.⁶

There are two types of surrogacy: traditional surrogacy (in which the intended father donates the sperm and the surrogate gives the egg), and gestational surrogacy (in which the surrogate carries the pregnancy but donor sperm and eggs are used).⁷

It's possible for surrogacy to be altruistic or commercial. In the first situation, the surrogate receives payment for either providing the egg or carrying the child. In an altruistic surrogacy, the surrogate receives no compensation, and the child born to the parents is treated as a gift.⁸

Shari'ah Perspective on Surrogacy

In order to preserve social harmony, contentment, and welfare, Islamic law (Shari'a Law) governs and modifies the daily lives of its followers.⁹ Four sources form the foundation of shari'a law. The Qur'an is the primary and most important source. The second foundation is Hadith or Sunnah, which states that the deed was carried out or authorized by Prophet Muhammad. Ijma is the third foundational element. The fourth element is analogy (qiyas), which acts in a manner comparable to Arab tradition during the Mohammadi period.¹⁰

Ijtihad, often known as "the rule of deductive reasoning."¹¹ Between Shi'ites and Sunnis, ijtihad has caused a significant difference.¹² The degree of agreement reached between revelation and reason constitutes the fundamental oneness of the Shari'ah. The main tool used to keep this harmony in place is ijtihad.¹⁴

Islamic scholars published bioethical directives on medically assisted reproduction two years after the birth of the first baby born in a test tube, allowing treatment for all types of ART but forbidding third-party reproductive technologies, including surrogacy.¹⁵ Sheikh Shaltut issued a verdict opposing this procedure and declaring it adultery. He says: "Artificial insemination of sperm into women's womb without wedlock is according to the shari'ah a great sinful crime and is equivalent to adultery"¹³

Following are some philosophical explanations for the ban on third-party reproductive assistance:

Prohibition of Adultery and Illicit Relationships

Islam views marriage as an agreement between two people to engage in sexual activity and procreate. No outsiders are permitted at the sexual activities.¹⁴

Allah says in Quran, "Who abstain from sex, except with those joined to them in the marriage bond, Or (the captives) whom Their right hands possess, For (in their case) they are free from blame, But those whose desires exceed those limits are transgressors".¹⁵ In Islam, it is forbidden to reproduce outside of marriage and considered as adultery (zina).

The embryo transfer is morally equivalent to adultery if done to someone other than the intended wife. Islam forbids the giving of sperm or eggs because it destroys lineage. In order to protect the bloodline, Islam designated adultery as a crime that must be punished.¹⁶

Preserving the Lineage and Inheritance

In Islam, it is clear that family, lineage, and blood relationships are significant from a legal perspective.¹⁷ As Quran says, 'It is He Who has Created man from water then has He established Relationships of lineage and marriage: for thy Lord Has power (over all things)'.¹⁸

Right to Child

As Islamic law or shari'ah indicates that every child has a right to know and has to be aware of his or her parents. The Prophet (S.A.W.) said: "The child is to be attributed to one on whose bed he is born, and for a fornicator there is stoning".¹⁹

Prohibiting Surrogacy: Logical and Scientific Arguments

In addition to the Qur'anic prohibitions, there are many other logical and scientific arguments in favor of prohibiting surrogacy. First of all, there is a major chance of lineage mixing. The OIC's Fiqh Council previously approved surrogacy in polygamous relationships, or between co-wives, where one co-wife donates the ova and the other co-wife acts as the child's surrogate mother. Due to the great likelihood of lineage mixing, the Council invalidated it even between co-wives after taking into account multiple situations. For instance, the committee was presented with a situation where the surrogate gave birth to twins, which caused a disagreement regarding the newborn child's lineage.²⁰

A struggle regarding his relationship with the two mothers will also likely arise for the infant following its birth. The father of a child who born through surrogacy is known, but the identity of mother remains unknown.²¹ Both the child and the surrogate mother, who carried the child during the whole pregnancy and formed an emotional attachment with the kid can experience psychological stress as a result of having to consider the possibility of giving up the child.²² Now medical professionals have clearly said that depression is a form of toxic exposure for the foetus.²³ The psychological health of the surrogate becomes important to consider in surrogacy, because sadness harms the unborn child severely, the intended parents would never tolerate it.²⁴

Analysis of Surrogacy within Islamic Legal Framework

In terms of their purposes (maqasid) and the methods used to achieve or obstruct those purposes, the laws of Shari'ah are generally discernible. The means must be stopped if they go against of the fundamental objectives of Shari'ah. In most cases, the means are seen in the context of the purposes they are supposed to achieve, and logically, since the means are guided by the ends. Islamic ethics dictate that a method must be stopped if it contravenes one of the

Shari'ah's fundamental goals.²⁵ Within the Islamic framework, surrogate motherhood has no place since the harms that would result outweigh any potential benefits.²⁶ Islamic law allows second marriage because it has no negative effects on the children's genetic heritage. However, it adamantly forbids surrogacy because it disregards the notion of lineage of the offspring that results.²⁷

People can regard women in terms of family and states can mediate their relationship to women through their roles as mothers and wives because of the conflation of gender and kinship and the patriarchal structure of kinship. This conflation makes it easier for women to be recognized, valued, and entitled solely because of how they vary from men.²⁸ The shari'a upholds the value of family, procreation, and marriage. Therefore, when infertility treatment is required, it is promoted because it allows for procreation.²⁹

Surrogate motherhood is prohibited under the principles of the shari'a and near sunnis since it includes the implantation of his sperm into a woman's uterus who is not his spouse and therefore obviously comes under the particular classification of violating Allah's boundaries.³⁰

Religious Shiites often agree with Sunnis who forbid receiving donations from outside sources. The Supreme Jurisprudent of the Shi'a in Iran, Ayatollah Khamane'i, however, issued a fatwa in 1999 allowing a wider use of donor technologies. Surrogacy and the donation of gametes, sperm, and eggs are permitted under specific circumstances, according to Khamane'i.³¹

For instance, egg donation is acceptable as long as the spouse temporarily weds the egg donor, guaranteeing that all three parties are wed.³⁵ It is important to note that temporary marriage, also known as mut'a, is a type of temporary partnership acceptable among Shi'a.³² The reason stated by Khamane'i for allowing embryo donation is that the embryo is donated by one married couple to another married couple and that there is no direct physical contact that would be considered adulterous. It is also essential to note that some of the egg donors were close friends or family, as well as members of the infertile couple's agnatic circle.³⁷

Surrogacy can be considered to be of two kinds, traditional and gestational. i. Traditional (or straight) surrogacy In traditional surrogacy, the surrogate is both the egg donor and the actual surrogate. In this process, the sperm taken from the biological father is transferred to the uterus of the surrogate so that the fertilization may take place naturally. In this type of surrogacy, the ovum of the surrogate woman is used to bear the embryo. Thus, the surrogate mother becomes the biological mother of the child as well.²⁰ ii. Gestational (or host) surrogacy In gestational

surrogacy, the ovum of the surrogate will not be used at all. In this process, the embryo after being created by using ova and sperm of the biological parents (commissioning couple) is transferred to the uterus of the surrogate. Therefore, in process, the child will not be biologically related to the surrogate mother.

SHARI'AH PERSPECTIVES ON SURROGACY IN GENERAL:

The issue of surrogacy was first addressed at the seventh session of the Muslim World League's Islamic Fiqh Council meeting in 1404 AH/1985 CE. In following year, the Council came up with the rule that these modern technologies were to be used to 'only offer lawful treatment to a husband and wife who wish to have a legitimate child and establish a family and who are mindful of their chastity, [not giving way to their desires] with any but their spouses or what their right hands possess': for then, behold, they are free of all blame, whereas such as seek to go beyond that [limit] are truly transgressors. Further, Islam does not accept Surrogacy on the premises that pregnancy should be "a fruit of the tree of a legitimate marriage." The consensus of the symposium, "Reproduction in the Light of Islam," attended by medical and juridical Muslim scholars, was that the technique is conditionally acceptable on its performance within a family structure of husband and wife, during the span of their marriage, and without the interruption of another person, through the provision of sperm, ovum, embryo, or uterus.

The Islamic Fiqh Council, after reviewing all the research on in vitro fertilization opined that while five forms of in vitro fertilization are prohibited, two are lawful under Islamic law. The five prohibited procedures as they result in confusion (ikhtilāf al-ansāb) regarding parentage are the following: Fertilization wherein from sperm of a husband and ovum of a woman other than his wife, embryo is created and then implanted in his wife's uterus, e.g., egg donorship. b. Fertilization wherein from product of a woman's ovum by the sperm of a man other than her husband, embryo is created and subsequently, implanted in the woman's own uterus, i.e., sperm donorship.

c. Fertilization wherein from sperm of a husband and the ovum of his wife, embryo is created and implanted in the uterus of a surrogate mother. d. Fertilization where the product of the sperm and ovum of two individuals other than the couple who want to conceive a baby, where the embryo is implanted in the wife's uterus, that is, egg and sperm donorship. e. Fertilization wherein the product of the sperm of a man who has two wives and the ovum originates with one wife, while the embryo is implanted in the uterus of the other wife.

However, the following two in vitro fertilization procedures are lawful under Sunni-Islam: a. Fertilization which is the product of the husband's sperm and the wife's ovum (sahibay alnutfa wal-buwayda) achieved outside the body, where the embryo is then inserted into the wife's uterus. b. Fertilization which is the product of the husband's sperm being mechanically inserted into his wife's uterus so that the fertilization takes place inside her body.

These recognition and non-recognition of procedures for treating infertility shows that surrogacy is not accepted in Islam in any of its forms.

Conclusion

In the perspective of Islam, surrogacy is a complex, multifaceted subject. Surrogacy is generally considered to be against the law in Sunni Islam despite differences in interpretations and fatwas since it is thought to violate the concepts of marriage, lineage, and adultery. In order to navigate this difficult landscape while upholding Islamic ethics and values, it is crucial for individuals and communities to comprehend the significance of Shari'ah compliance in surrogacy.

Surrogacy is unlawful (haram), according to those who believe it compromises the value of marriage, interferes with lineage maintenance, and may result in illegal partnerships. They express worries about potential exploitation and the moral ramifications of surrogacy partnerships, highlighting the need to protect traditional family structures and the ban on adultery. However, promoters of permissibility (halal) assert that there are instances in which surrogacy is both morally and legally legitimate. They emphasize the need to consider the rights and welfare of all parties involved, ensure that agreements are just and transparent, and take into consideration the particular circumstances within a comprehensive legal framework. According to these proponents, if surrogacy is correctly handled, it can satisfy the desire for children while adhering to Islamic principles of justice and welfare.

Recommendations

- It is essential to spread knowledge and awareness of the ramifications of surrogacy within the context of Islam. In order to make wise judgments, this includes educating people, couples, and communities on the moral and religious implications of surrogacy.
- Encourage people and couples who are struggling with infertility or the inability to conceive naturally to investigate alternate options. Fostering or adopting children, especially those who are close blood relatives, can be a sensible choice that is in line with Islamic teachings and offers children in need a caring and nurturing environment.
- Create thorough and lucid ethical standards for practitioners and medical professionals working with assisted reproduction technologies. The necessity of honoring and upholding Shari'ah values should be emphasized in these regulations, especially in situations when surrogacy may be sought or considered.
- Encourage the creation of legal structures for surrogacy that follow Shari'ah standards. While maintaining respect to Islamic norms and beliefs, these frameworks should protect the rights and wellbeing of all parties involved, particularly the child.

Encourage interreligious conversation and debate on the subject of surrogacy, bringing together academics, professionals, and representatives from various religious backgrounds. Such conversations can promote compassion, respect for one another and the sharing of viewpoints, which helps to advance knowledge about surrogacy in relation to various religious views.

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