

Artificial Reproductive Technology in Pakistan: Implications of Surrogacy in the light of Supreme Court Judgment

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Abstract

Nature has bestowed the beautiful capacity to procreate a life within women, but, unfortunately, not every couple is lucky enough to have such experience. Medical issues or infertility, the main reasons of incapacity, are, now-a-days, being addressed through different technological techniques. However, in quest of having their own genetic baby, couples are being attracted towards the assisted reproductive technique of surrogacy. Surrogacy involves the hiring of a womb of other women for the purpose of reproduction of a child, either artificially or naturally. Where most of the western countries are permitting it, Islam doesn't allow because it destroys the principle of inheritance, the annihilation of lineage, and consider as adultery, which is strictly prohibited by Qur'an and Sunnah. On these grounds majority of the Muslim countries ban surrogacy, however the mode of proscription varies. In Pakistan, the Federal Shariat Court has declared surrogacy as un-Islamic which should be declared illegal and required the legislature to amend the law and prescribe strict punishments for those who are involved in it. However, the absence of legislation in Pakistan possess many practical challenges for the determination of criminal liability and the status of surrogacy contract. What has long been needed is a codified roadmap against surrogacy arrangements that delineates the punishment. This paper attempts to find out the challenges faced by Pakistan in the criminalization of surrogacy codification of law and the overseas response of countries, and thus to concluded on legal recommendations for criminalizing surrogacy in Pakistan.

Keywords: Surrogacy, Islamic bioethics, Third party assisted reproduction, artificial reproductive technology

Introduction

Human body is a wonderful creation of Allah (SWT). The birth of a child is often a very special and fascinating event for all the people involved. Nature has bestowed the beautiful capacity to procreate a life within a woman but unfortunately, not everyone has such a beautiful experience of giving birth to a new life. Due to some medical issues or infertility, some women are unable to give birth to their offspring.¹

Nowadays one of the greatest problems faced by humans is infertility.² Around the world, approximately 1 out of every 6 couple is suffering from infertility and more than half-million couples affect with it.³ It was treated by medication and surgery to fulfill hormonal deficiency and anatomical defects, these procedures are commonly used as they are non-controversial from a both ethical, moral, and religious points of view.⁴

If infertility was not able to be treated by medication or surgery, people moved towards adoption to achieve their parenthood dreams. However due to development in technology, there are alternative solutions of infertility that include Artificial Reproductive Technology (ART), In-Vitro Fertilization (IVF), and Intra-Uterine Injections (IUI). However, in quest of having their own genetic baby, couples are being attracted towards the assisted reproductive technique of surrogacy. It involves the hiring of a womb of other women for the purpose of reproduction of a child, either artificially or naturally.⁵

Discussion

Surrogacy is “hiring womb” to counter infertility.⁶ Where a woman hired to bear a child on the behalf of another person who will become the parents of the child. The new technology for infertility is debated worldwide. However, Muslims prohibit the use of such technologies for the treatment of infertility.⁷ As it threatens the traditional concept of family that is based on separation of the social and biological identity of family. Islam maintains the importance of family life and creates a link between marriage and procreation by laying down simple and straight forward rules by placing certain restrictions on the family and reproduction of children.⁸ The saying of Prophet Muhammad (PBUH). *“Marry so that you may procreate and multiply”*.

This new infertile treatment, surrogacy, is cruel, illogical, absurd, and based on the exploitation of women. Before coming to Quranic injunctions for the impermissibility of surrogacy, there are many other reasons for the proscription of surrogacy. Surrogacy is a void agreement from both

legal and contractual point of view because it involved Gharar (uncertainty). Gharar applied to those contracts in which the subject matter of the contract is unknown and there is risk involved. In the case of surrogacy, it is not sure that the baby born alive or the surrogate that was hired for such procedure will live until the delivery of the child or not. The surrogacy procedure is not itself illegal but the child produce from such procedure is also illegal as the whole procedure is against the injunction of the Qur'an and Sunnah.⁸

Arguments for the prohibition of surrogacy are as follows.

1. The Quranic verses Al-Mu'minun: 5-7 and Al-Ma'arij: 29-31 make obligatory for Muslims to preserve their chastity. These verses direct that fertilization of one's semen into the womb of women to whom he is not validly married is a violation of Quranic ruling. As the Holy Qur'an says,

*“Those who guard their private parts except their spouses... but whoever seeks to go beyond that, these are they that exceed the limits”.*⁹

“And Allah has made for you mates (and companions) of your own nature, and made for you out of them sons and daughters and grandchildren”.

2. These verses indicate that Allah (S.W.T) produces children only through marriage, and any child that produces outside marriage is illegal and reproduction is considered adultery (Zina). The transfer of embryos other than the wife is equal to adultery. Islam allowed man and woman to make a sexual relationship, but only within the bond of Nikah, as the main object of sexual relations and Nikah is a reproduction of the child. As Holy Qur'an says in Surah Baqarah Ayat No. 223:

“Your wives are your tilth; go, then, into your tilth as you wish but take heed of your ultimate future and avoid incurring the wrath of Allah. Know well that one Day you shall face Him. Announce good tidings to the believers”.

3. It also expresses from the tradition of the Prophet that: *“It is unlawful for a man who believes in Allah and the last day that he waters the plant of another”*. The words *“watering the plant of another”* means introducing one's sperm into the vagina of a woman other than wife. Therefore, the implanting of sperm other than the wife's womb is amount adultery (Zina) or called unlawful sex. The second argument is the insertion of semen other

than the wife's womb is as watering of the plant of another is adultery, in the same way implanting zygote and sperm into surrogate mother also considered Zina. Due to this, the purposes of Shariah are not established, that is to protect dignity, honor, and transparency of lineage. Therefore, the whole process is declared unlawful and the resulting child is also considered illegitimate.

4. The other legal issue that arises due to surrogacy is the mixing of lineage. In Islam the importance of family, blood relation, and lineage are clear. It prohibits both sperm and egg donation as they destroy the lineage. Transparency of lineage is one of the objectives of Shariah, to preserve lineage, adultery is a punishable crime in Islam. As Qur'an mentions it in Sura Al-Furqan 25: 54

“It is He (Allah) who created mankind from water, then has He established the relationship of lineage and marriage for your Lord has power over all things”.

The annihilation of family lineage disturbs both the kinship and inheritance. The third-party donation destroys the child's lineage and psychologically affects the child, because of which, child has upsetting consequences.

5. Islam gives a right to the child to inherit from the property of his or her genetic parents. Surrogacy not only disturbs the settled rules of shares of the Holy Qur'an but also destroys the doctrine of inheritance as given by the Holy Qur'an. Allah says in Surah Nisa Ayat 24:

“But it is lawful for you to seek out all women except these, offering them your wealth and the protection of wedlock rather than using them for the unfettered satisfaction of lust”.
6. The prohibition of surrogacy is also evident by other verses of the Holy Quran. As Allah mentioned in Surah al-Mujadalah (58:2)

“Their mothers are only those who conceived them and gave birth to them”.

The above verse means that the mothers are only those who have given birth, and it doesn't include a social mother or surrogate mother as a surrogate mother is not intended mothers.

In the view of the majority of Islamic scholars; surrogacy is impermissible, both the paid one and voluntary. The paid surrogacy is called gestational surrogacy, which is common practice in the western world; completely prohibited in Islam as it is considered a greater sin. The use and rental of private parts are forbidden in Islam, as no evidence allowed it. On these grounds, there

are debates, agreement, disagreement, and controversy of Islamic jurists that proscribed surrogacy. In a case where a baby is produced by a sperm and egg of the actual father and mother is lawful and legal, but in all other cases, surrogacy procedure is unlawful as it is against the injunction of the Qur'an and Sunnah. On the ruling of the Qur'an and Sunnah, the Federal Shariat Court (FSC) passed judgment due to the absence of legislation in the country.

The judgment of FSC, is very important as it transforms the role of the Shariat. It has not only discussed the various types of ART but also explain their legal validity under the injunction of the Qur'an and Sunnah. Court in the Pakistan legal system by moving beyond its mandate, to determine the legality of surrogacy and to criminalize it under Islamic law. The transformation of FSC is from judicial Islamization of law to judicial legislation, as it constitutes to confirm all laws of the country according to the ruling of Islam. The power to examine the law is given by the Constitution of Pakistan under Article 203D stated as "FSC has the power to examine and decide the question whether or not any law or provision of law is repugnant to the injunction of Islam, as laid down in the Holy Qur'an and Sunnah of Holy Prophet (PBUH)".¹⁰ By using such power if FSC declares any law repugnant to the injunction of Islam then legislature is bound to amend such law to bring it in conformity with Islamic law. The surrogacy judgment of the Shariat Court is the third phase of historical transformation in the legal system of Pakistan. In this landmark judgment on surrogacy, the Court not only extends its jurisdiction but also extend its power by making a policy decision, on an important legal issue. The court not only discusses the difficulties but also compares its reasoning with Muslim countries in the world. He only mentioned the views of Sunni Jurists and declared surrogacy unenforceable and illegal.

FSC, in his judgment, not only discussed the several scenarios of assisted reproduction but also checked their validity under the ruling of Islamic law. At very first the court held that the child that produce through surrogacy procedure belonged to the donor of sperm or egg. Therefore, the paternity of a child cannot be claimed by the husband of a woman who had given birth by sperm donation of a third party. Secondly, the court declared such a process legal if it carried between husband and wife that the sperm of the husband and egg of the wife was inseminated in a test tube and then is transferred into the womb of women. This procedure is legal and the child born is also legitimate. Third, the transfer of the embryo into surrogate is against the injunction of the Qur'an and Sunnah. Therefore, it would be declared illegal and the child is also illegitimate.

The whole surrogacy procedure was illogical, cruel, and absurd. It was based on the exploitation of women because emotional detachment was faced by a surrogate as maintaining a child for 9 months in a womb developed emotional attachment, but once the child was born, the child is immediately taken from her and she has no right on the child. All the feelings of love, pain that developed are evaluated in terms of money and woman a feeling less machine of child production which is the worst sort of cruelty.

The other terrible aspect of surrogacy is, if a deformed baby was born, the couple disown such a baby and left with a surrogate. Here the exploitation was not stopped, it becomes worst when people of developed countries moved to third world countries for arranging surrogacy. In 2015 a surrogacy case of India was reported in the news where an Australian couple left one baby with a surrogate, as the surrogate had given birth to twins. Sometimes the surrogate mother is not allowed to see the baby and the consideration that was given against surrogacy agreement was also decreased if the birth is premature or if hospital charges increase.⁸

Furthermore, FSC held that the new assisted reproduction technology, surrogacy, not only destroys the family unit but also destroying the lineage that leads to the annihilation of inheritance law as laid down in the Holy Qur'an and Sunnah.⁸

FSC by following a Sunni school of thought, prohibited surrogacy under the injunction as laid down in the Holy Qur'an and Sunnah. After the judgment, in 2015 the Council of Islamic Ideology (CII) of Pakistan also declared the surrogacy procedure illegal as it is against the injunction of Islam. Shariat Court suggested certain steps in judgment to avoid exploitation like unenforceability of surrogacy contract, by criminalizing the act and the maintenance of sperm or egg bank. Not only this, FSC also suggested imprisonment and fine both for the couple, and surrogate who was hired for such procedure. The court recommends certain changes in the law to legislature. First, it was recommended to amend section 2 of the Contract Act 1872, under which contract of surrogacy wouldn't be enforceable.

Secondly, the amendment is needed in Pakistan Penal Code 1860 (PPC) to include surrogacy definition and declare it an offense, under which those involved in the arrangement of surrogacy procedure should be punished with both imprisonment and fine. It includes a couple, individuals who arrange such procedure, a surrogate who hired for it, and a doctor who conduct

the whole procedure of surrogacy. The third legislature was recommended to prescribe punishment for doctors who preserve egg and sperm bank for future use, punishment should include both imprisonment and fine and also cancellation of a license who conduct such procedure.⁸

The judgment of FSC is highly important not only in determining surrogacy unlawful but also for historical transformation that is from judicial review to judicial transformation. The traditional view of Sunni scholars was followed by FSC for declaring the third party assisted reproduction against the ruling of Islam. In pronouncing judgment, FSC has not considered the procedure adopted by different countries to tackle the same issues.

From the above discussed case law it is evident that Pakistan stands in the group of those countries that require legislation to deal with the issue of surrogacy.¹¹ Delivered judgment of FSC efficiently challenges the sovereignty of Parliament and suggests to make law for the criminalization of surrogacy, but no step was taken within 3 years, which give rise to a question that, whether it is possible to make a law on the subject of surrogacy in Pakistan?¹² To answer this question there is a need to determine the position of surrogacy as held by Islamic jurists under Islamic law. In legislating surrogacy, legislators may face some challenges.¹³

The first challenge that may be faced is who would be considered the mother of a surrogate child in a court of law. Whereas the question of fatherhood is not as supported issue as the question of motherhood. The answer to this question is found in the ruling of the Qur'an and Sunnah as the Holy Qur'an stated in Surah al-Mujadalah (58:2),

"... their mothers are only those who gave birth to them".

This verse of the Qur'an explains that the mothers are only those who gave birth to the child. Therefore, in the surrogacy cases, the surrogate mother would be considered the mother of the child if there is no question of DNA involved. But in cases where donor-egg mother and birth mother are different, the question of DNA is involved. In such a case the above verse doesn't provide a clear answer. It is specified that the mother is only those who conceived and birthed it, but it doesn't provide an answer to a situation where conceiving mother and birth mother is separate. If such a situation arises where conceiving and birth mother is separate, then both of them considered mother, it will open a Pandora's Box of intricacies: both of them considered mother or none of them have right of motherhood?

The second challenge is related to the Hudood Ordinance that striking the legality of the surrogacy procedure. The third-party assisted reproduction involved an important question of the legality of reproduction outside the marriage. If no marriage contract exists between donors (sperm/egg) or such procedure is not carried out within the bond of marriage, then it is considered Zina under Islamic law, and the provision of the Pakistan Penal Code also deals with it, as the child belongs to the bed and a question of adultery involved if lawful marriage is absent. It is challenging for Pakistan to constitute procreation outside the marriage. On the other side of the coin, if there exists a valid marriage contract than it is valid and the concept of surrogacy becomes irrelevant.

Surrogacy gives rise to various issues, one of them is the status of a child that is the third most important challenge. Surrogacy gives birth to various questions regarding the legitimacy, custody, inheritance, maintenance, citizenship of the surrogate child, like whether the child born through surrogacy procedure is legitimate or illegitimate; whether he has the right of inheritance; who will be the legal parents of the child; either he is entitled to get maintenance, or not? If entitled than from whom he gets maintenance; from biological parents or legal parents? In case of dispute to whom the custody of the child is given? And what is the nationality of a child in case of cross-board surrogacy? Not only this, the question of the identity of the child also arises, right to identity not be separated from parents. These issues arise from the surrogacy procedure. The legislature must answer these questions while legislating law on surrogacy by keeping in mind the welfare and best interest of the child.¹⁴

The other legal challenge that may be faced by lawmakers is the legality of the surrogacy contract. Whether the surrogacy contract should be lawful or unlawful as the subject matter is renting the uterus of the woman. If legislators create a framework under which surrogacy regulates the procedure then is it enforceable, if so than under what terms and conditions.

The countries that recognized surrogacy, divide surrogacy contract into two kinds, one is commercial and the other is altruistic. After the FSC judgment the contract of commercial surrogacy is considered illegal in Pakistan, because of the subject matter of the contract that is the uterus, which gives rise to the question of a person's right to rent out their body parts. Renting body parts lead to the exploitation of rights of a person especially in a country like Pakistan where there are bonded labor and a weak economic system. In legislating surrogacy, a deeper analysis is required for renting out the body. Renting out the body is equal to prostitution. All forms of the commercial donation were prohibited by The Transplantation of Human Organs and Tissues

Ordinance 2007; it only permits family proximity for live donors. The Shariah law also prohibits to rent body parts except explicit evidence is given by Shariah. Pakistan needs to legislate a law that not only prohibits surrogacy procedure but also tackles the problems if such action took place.

The new assisted reproductive technology is speedily evolving in the world. Many countries of the world-recognized it legal whereas many countries still prohibit it.¹⁵ Countries that legalize surrogacy have different laws on a different footing. Worldwide statics shows that there are one hundred and ninety-six independent states, out of which fourteen countries legalized both commercial and altruistic surrogacy, twenty-one countries allowed only altruistic surrogacy, thirty-nine countries have no law on surrogacy, fifty countries completely prohibit surrogacy both compensated and uncompensated.¹⁶ The surrogacy procedure is highly expensive especially in European countries or other countries where it is allowed, that includes United Kingdom (UK), Denmark, Belgium, Ireland, Russia, India, United States (US), and Ukraine. Due to an increase in prices, there is a great decrease in infertility treatment via surrogacy, as people of developed countries moved to the undeveloped country to take advantage of low cost for surrogacy procedures. Because of this and other reasons, there is a great increase in international surrogacy, but at the international level, there is no rules or regulation to deal with it. In some countries where surrogacy is allowed required DNA of the surrogate child that must match with one of the hiring couples.

Nevertheless, many countries of West Europe prohibit all kinds of surrogacy by adopting a restrictive approach. These countries include France, Italy, Germany, Spain, Austria, Finland, Malta, Norway, Slovakia, Iceland Slovenia, Switzerland, and Sweden. These countries not only prohibit surrogacy procedures but also punished all those who are involved in it. Some Islamic countries also prohibit surrogacy arrangements. These include Saudi Arabia, Egypt, and Malaysia. The prohibition of surrogacy usually because of religion and moral concerns, such as it violates the rights of surrogate and child and affects human dignity. Islamic countries ban surrogacy on the ruling of Islamic law as laid down in Holy Qur'an and Sunnah.

The countries that prohibit surrogacy adopt a restrictive approach to biomedicine by ratifying the Oviedo Convention based on human dignity. These countries include France, Spain, Slovakia, Slovenia, and Iceland. Some countries didn't ratify the convention on the basis that it was too restrictive or it was too permissive like the United Kingdom and Germany. The ban on

surrogacy is because it conflicts with the laws of protecting human dignity, violates rights, causes exploitation, and the child that is born through surrogacy suffers psychological damage.

Surrogacy is not new to India. However, before *Baby Manji Yamada v Union of India case*, Indian courts had not faced a case relating to surrogacy. In *this case* the Supreme Court did not rule surrogacy contracts as valid under Indian law, but it did not rule against their validity either. In fact, it elaborated on the concept of surrogacy, methods of surrogacy and recognized all forms of surrogacy, including altruistic and commercial.¹⁷

Muslim countries ban surrogacy on the ruling of Islamic law and some are in process of making laws on ART like the United Arab Emirates (UAE), The Federal National Council passed a draft law to forbid surrogacy and punish those who were involved with five years' imprisonment and also with fine up to 1 million dirhams.

The above-discussed countries adopt a restrictive approach to ban all forms of surrogacy, based on religion, moral concerns, and human dignity. These laws of countries also set example to other countries to criminalize surrogacy.¹⁸

After discussing all the challenges above, it looks that Pakistan is not in a position to develop a law for the prohibition of surrogacy anytime soon. Pakistan urgently needs surrogacy to address by legislation as it is an important issue that affects both socially and legally. Worldwide countries adopt different approaches to ban surrogacy. These countries provide a strong example for other countries to legislative on surrogacy. Pakistan needs not only to forbid surrogacy but there is also need to provide strict punishment for the couple who involved in surrogacy, the person who arrange the surrogate, the surrogate, as well as the doctor who conduct the whole procedure and who maintain the sperm bank or egg bank for future use, should be punished with both imprisonment and fine and the licenses of the doctors should also be canceled who are involved in such un-Islamic procedure of surrogacy. Pakistan needs a law that not only forbids surrogacy or punishes culprit but also to handle problems if such action took place.

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