

# Understanding Legal Perspectives of Surrogacy in Context of Religious Guidelines

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**Abstract-** The Islamic Fiqh Council inferred that five types of IVF are disallowed and two are legal according to the *sharī'ah* viewpoint. Despite the fact that surrogacy is not acceptable in Sunni Islam, the yearning for own offspring may lead the couples to settle on choices in opposition to *sharī'ah* injunctions. The aim of this article is to unveil the underlying legal, social, ethical and particularly the psychological issues related to surrogacy and surrogate mothers as well as that beside the religion what is basically immoral in whole procedure of surrogacy and particularly from surrogate mother's perspective? Nevertheless, the study will end up with concluding remarks by highlighting the objectives of *Sharī'ah* (*Maqāsid Sharī'ah*).

**Keywords:** Lineage, Surrogate Mother, Procreation, Child, *Maqāsid Sharī'ah* Injunctions, In vitro fertilization, Jurist Verdict

## I. INTRODUCTION

The essence of Islam lies in its comprehensive approach to life, bridging the worldly and the hereafter. It emphasizes moderation in all aspects, be they religious or material, encompassing various domains of human activity. In this context, marriage holds a significant place in Islam and is considered a cornerstone of faith, as it plays a vital role in a Muslim's life.<sup>i</sup> The last Prophet (ﷺ) stated:

*"Wed ladies who will love you and bring forth more kids that I would pride in the colossal number of my follower on the resurrection Day".<sup>ii</sup>*

Therefore, children have considered a great and blessing and endowment of Allah had been

mentioned in Quran as *an ornament of life for this world like wealth*.<sup>iii</sup> Unfortunately, all married couples with natural process are not capable to be inherited with their own child born. Therefore, these couples are encouraged for treatment of their infertility when it is necessary, because it will make procreation possible<sup>iv</sup> and in the Islamic bio-ethics no religious complaint is found for an infertile couple seeking medicinal treatment to cure their infertility. It has been observed that, Female infertility may cause of innate imperfections, for example, inability to ovulate, blockage or absence of the fallopian tubes, an unfavorably susceptible response due to presence of proteins in sperm, and occasionally ovulation amid times of month, usually when sex has denied. Sometimes, female is conceived without a uterus and richness is for all intents and purposes nonexistent.<sup>v</sup>

According to the latest report of World Health Organization, roughly 8% to 12% couples in the world facing infertility issues.<sup>vi</sup> In this way, infertility is a worldwide medical problem that influences around 80 million individuals around the world, and the greater part of them are Muslims.<sup>vii</sup> In Middle Eastern nations, infertility is required to influence in the vicinity of ten and fifteen percent of wedded couples.<sup>viii</sup> Therefore, Issues regarding infertility have been debated for a long time now. Surrogacy, often described as "hiring a womb," is a topic of growing importance in addressing infertility. It presents a challenge not only to bioethicists but also to contemporary theologians and Islamic jurists. The ethical and moral values surrounding surrogacy are a subject of debate, not only within Islam but also in other world religions. However, in medical sciences, it is latest and advanced treatment for fertility like assisted reproductive technology (ART) In vitro fertilization (IVF) or donor gametes and surrogacy etc.<sup>ix</sup> The first baby was belonged to USA, who had

born through surrogate procedure<sup>x</sup>. However, the study will intrinsically focus on the legal, social, ethical, and cultural, issues related with surrogacy and surrogate mother as well.

Surrogacy has considered as one of the modern treatment in medical science for infertility.<sup>xi</sup> It is instructive to mention here that surrogate mother is in fact that woman who is agreed for contract to rent her womb to other spouses for whole pregnancy duration for fertilization of semen that will implant into her womb, and after the delivery she will hand over the new born to the couple or to the honor of ovum according the agreement. This type of agreement is called gestational agreement<sup>xii</sup> or surrogacy contract.<sup>xiii</sup> It is also important to discuss here that in animals for the result of better rearing the bulls and camels are kept. Then the owner of the male animal receives the payment of the money from the perspective of female animal. According to the Prophet (ﷺ), it is likewise prohibited and called “*Kasab ul Fahal*”, that is, earning money from a male animal for mating.

*“The Prophet (ﷺ) prohibited studding the stallion”<sup>xiv</sup>*

Being a Muslim we can easily derive the intention of *sharī'ah* if a religion is opposing to receives the payment of better rearing of an animal, how it could allow this dehumanize practice for human, who is the vicegerent of Allah on earth<sup>xv</sup> whereas on the other side one of the harmonious effect of this practice is to threatens the integrity of lineage (which is main element of *Māqasid al-sharī'ah*) and beside it the sacred motherhood status has given in Islam has reduced from its significance to a price. Children become a commodity, subject to buy/sell rules and the supply and demand of the market.

## 2- Discussion

In the context of surrogacy, determining who the mother is can be a complex issue with psychological, legal, and financial implications. The answer to this question varies depending on the type of surrogacy. As for as the opinion of jurists are concerned, *Yūsuf Qarḍāwī* had declared that<sup>xvi</sup> the child's mother is owner of egg not a surrogate mother because according to his viewpoint, from this egg the embryo has developed. Therefore, child will raise

under her custody. The *Qur'ān's* descriptions of human genealogy and embryology are considered a source of guidance and knowledge for those seeking to understand the origins of human life. The Holy *Qur'ān* guides us about the real or actual mother who will give birth to child.<sup>xvii</sup> Obviously, Allah is well aware about our connection both the ovary and the womb of our mother, but *Qur'ān* always highlights the womb relation, and it has indicated in the *Qur'ān* that offspring must show kindness to their parents (*wālidayn*) and specially an emphasis has given about mother who has given birth to him in pain.<sup>xviii</sup>

Allah the exalted has mentioned in the *Qur'ān*: *that man has advised to be kind with his parents (wālidayn), and specially in this verse the mother has mentioned that she bears the duration of whole pregnancy with weakness and gives him birth with pain...<sup>xix</sup>*

Abbas have argued that this verse is sufficient to realize about real mother.<sup>xx</sup> Therefore, in the light of above-mentioned verse which clearly signify the womb relation-ship, that actual mother is who carries the child in her womb and gives birth gives to baby with pain, thus will considered being the mother of resulting offspring.<sup>xxi</sup>

Another important question would be raised, "that who would claim on crop legitimately, seed merchant or the farmer?"<sup>xxii</sup> Doctors and jurists, during the symposium, considered the following data in order to reach a conclusion:

In Fact, the word for parents has been derived from natality, "*wilādah*" in Arabic, and verb "*wālada*" which means gave birth to someone. Therefore, the word for father is "*wālid*" and for the mother is "*wālidah*". Both parents mentioned in the dual sense is "*wālidan*" or "*wālidayn*." Both *wālid* and *wālidah* would mean the source for birth of a person.<sup>xxiii</sup>

In *Al-Qur'ān*, Allah the exalted says:

*“o mankind; we created you from a pair of male and female”<sup>xxiv</sup>*

While commenting on above mentioned verse of *Qur'ān* a very well-known jurist al *Qurtubī* stated that “in fact Allah almighty created mankind from both male and female.” So, in the light of above statement *Fazlī Diyān* has argued that following verse further strengthens the verse where in *Al-Qur'ān*, Allah the exalted says:

*“Verily, we created human from a drop of mingled sperm”<sup>xxv</sup>*

Human procreation results from the fusion of a male sperm cell with a female egg cell.<sup>xxvi</sup> Hence, the uterus plays a vital role in human reproduction. Its primary function is to carry and nourish a fertilized ovum (egg) that has implanted into its lining.<sup>xxvii</sup> When the pregnancy has occurred, the uterus will work like incubator for developing embryo, and embryo will safely develop here till birth<sup>xxviii</sup>. Thus, in their view the womb, serves as a nurturing environment for the developing embryo but does not impact its genetic composition.<sup>xxix</sup> But on the other side when we consult the Arabic language, "*al-rahim* (and its plural "*arham*") means the womb (and wombs) is not only an organ or merely a pot where the embryo develops, it also refers to a value/concept of blood relations and the tie of compassion that binds them together (*Silat al-rahim*).<sup>xxx</sup> Allah the exalted says:

*"And those related by arham (kindred by wombs) have prior rights against each other in the Holy Qur'an."*<sup>xxxi</sup>

*Rāghib Al-Asfahānī* an eminent scholar has said, that *Ar-Rahim* "womb of mother", stands for family relations or ties and it was the primary source where they were produced" In the light of sacred text, the actual meaning of *Ar-Rahim* has considered for family bonds and relations, which just like in English has considered as kinship or relationships. The Prophet (ﷺ) has highlighted the importance of *rahim* (womb) in the mod of beautiful allegory during the *ḥadīth*.

*The Prophet (ﷺ) said: "That Allah has created all his creation, included ar-rahim (the womb). Then ar-rahim argued to Allah and seek refuge from those who would disjoin the ties of kinship, then Allah the exalted stated, I will be blessed upon them who will keep your ties, and withhold My blessings who will not respect your ties."*<sup>xxxii</sup>

*According to another ḥadīth in which The Prophet (ﷺ) stated, that 'Ar-Rahm gets its name from Ar-Rahman which is among the names of Allah, therefore, Allah the exalted addressed to the womb: that 'I would keep great connection*

*with the person who would keep great connection with you, and would be separated to those who will disjoin to you."*<sup>xxxiii</sup>

Therefore, based on this concept, it can be derived that the *rahim* (womb) represents the compassionate, intimate relationship between the fetus and the mother and foundation of kinship. Even, in Jewish law the child born with surrogacy will belong the woman who gave him birth and father whom sperm has taken.<sup>xxxiv</sup>

2- Another heated debate is about the husband of gestational mother either would be the legal father is more ambiguous. Not surprisingly, this kind of incident had noticed during the era of Prophet (ﷺ), when *Utba bin Abū Waqqās* took a promise from his sibling *Sa'd bin Abū Waqqās* to take the child of the slave-young lady of *Zam'ah* under his care because he was his (*Utba*'s) child. Therefore, *Sa'd bin Abū Waqqās* had claimed, that he is my sibling's child, and I had promised to him about his (child) guardianship. *Abū bin Zam'ah* stated, "He is my sibling and the child of slave-young lady of my father and was conceived on my father's bed." And they visited to Prophet (ﷺ) and *Sa'd* stated,

*"O Prophet (ﷺ)! He is the child of my sibling and he has taken a promise from me that I will take him." 'Abū bin Zam'ah stated, "(He is) my sibling and the child of my dad's slave-young lady and was conceived on my dad's bed." Prophet (ﷺ) stated, "The kid is for you. O 'Abū bin Zam'ah." Then Prophet (ﷺ) has proclaimed, "The child will belong to that person whose bed he was born and the person who had committed illicit sex deserves the stones." The Prophet (ﷺ) advised his wife *Saūda' bint Zam'ah* to screen herself from that boy as he saw a comparability between the boy and *Utba*".<sup>xxxv</sup>*

Therefore, the concept about '*al-walad lil-firāsh*,' (It means, if the husband does not deny paternity within a prescribed period, the child will be attributed to him) or the child is the product of the '*matrimonial bed*'<sup>xxxvi</sup> where the gestational mother gave birth<sup>xxxvii</sup> would be followed in the light of

above-mentioned incident. In Islamic law (Sharī'ah), it is essential that a child has the right to know the identity of their biological parents. Children born out of wedlock are considered a result of adultery, and this status can have significant legal and social consequences.<sup>xxxviii</sup>

### 3- Ethical Issues, Caused by Surrogacy

Surrogacy develops the issues related parentage of child and his custody, because similar cases have noticed in the United States, West and in other countries.<sup>xxxix</sup> In surrogacy, the situation where surrogate mothers refuse to hand over infants and claimed them the rightful mothers to whom they had given birth after delivery is a complex legal and ethical issue.<sup>xl</sup> Furthermore, it is also much defamation and psychologically distress the woman (surrogate mother) during her pregnancy with these feelings that she has got pregnant without husband or without being married.<sup>xli</sup> Like, a case was brought to the committee when the surrogate delivered the twins, and this incident has started a conflict about the impurity of lineage of newborn<sup>xlii</sup> and even between the co-wives there has found the high rate for impurity of lineage.

Furthermore, the recognition about the real mother for a child that to whom he will consider the real mother either owner of ova or who had given him birth? This situation would create for the child a psychological distress, and other side the surrogate mother has been emotionally attached with the child due to carried him throughout the pregnancy and now after delivery she has to face the bitter reality of surrendering the child.<sup>xliii</sup>

The issue with surrogacy courses of action is thusly that it makes a lady be pregnant while anticipating that she should not recognize the way that she is expecting her child. It tries divorce pregnancy from the conscious knowledge that you will bring forth your child.<sup>xliv</sup> One of the tenacious surrogacy-related feelings of dread has been that ladies who convey for others will regret their decision after some time, it also causes of swear depression, anxiety, stress and other psychological disorders.<sup>xlv</sup> Particularly, the delicate affectionate connection exists between mother and child long before the child is **born**, and that the bitter and painful experience of

perinatal loss or miscarriage for women following the self-punishment and failure, similar situation a surrogate mother have faced when she handed over the child after its birth.<sup>xlvi</sup>

Therefore, the children who has given up for adoption by their biological mothers very often those mothers suffer high guilt feelings. In addition, pregnancy, birth and "loss" of child may become the reason for severe stress in life, and further it leads physical and mental de-compensation in future.<sup>xlvii</sup> It has additionally been suggested that surrogate mothers may move toward becoming excluded or be evaded by opposing neighbors, friends and relatives<sup>xlviii</sup>, which no doubt, have left inauspicious and harmful impact on psychological and mental well-being of surrogate mothers along their families.

Mary Wamock refers to a comparable complaint, probably communicated by a specialist: surrogacy is depicted as 'a type of misuse like prostitution'<sup>xlix</sup>. Andrea Dworkin, the notable American women's activist, expresses that: 'motherhood is transforming into another branch of female prostitution with the help of specialists who require access to the womb for experimentation and power .... Ladies can offer regenerative limits a similar way old fashioned whores sold sexual ones yet without the disgrace of whoring on the grounds that there is no penile interruption.<sup>l</sup> The Catholic Church opposes various forms of assisted conception, with a strong stance against gamete donation and surrogacy. This opposition is rooted in the Catholic Church's teachings and ethical principles.<sup>li</sup> Unless one can confirm the authenticity of the surrogate's bond with the child and her viewpoint on her pregnancy without in this manner preventing that from claiming the appointing couple, the surrogacy plan can simply be said to dehumanize or distancing.<sup>lii</sup> Since it is usually done for money, motherhood is reduced from a value to a price. Children become a commodity, subject to buy/sell rules and the supply and demand of the market.<sup>liii</sup> Because womb isn't something that can be given over and even can't be rented or hired.<sup>liv</sup> In sum, such a procedure, once more, disregards the honor and dignity.<sup>lv</sup>

If a woman allowed rent her womb, the multiple faces of fertilization and sexual satisfaction

would be appeared. Which are forbidden according Islamic Stand point? It also would have detrimental effects on the Islamic legal and social system. Therefore, all illegal forms of in vitro fertilization must be controlled by the State. If it is used freely for the purpose of procreation (such as a needy child), would be used freely to fulfill the sexual desires as well, then social and moral systems create such problems that are anti-Islamic teachings. Islam condemns all the ways of misleading and void, apart from its devoted wife, and the following aims are:

- Protection of lineage
- Sustainability of Family System
- Anti-suspicion and mistrust based inherited system
- prevention from vulgarity and obscenity

Now, if the use of this vehicle is used freely then all the above objectives are under-whelmed and no doubt, it would ruin the social and moral system of Islam and bringing disasters to humanity and humanitarian values.

The MUI (Majelis Ulama Indonesia) has issued a verdict denouncing sperm donation and considers the presentation of outside gametes as equivalent to infidelity or adultery. This perspective is rooted in the belief that using donated sperm or eggs undermines the lineage and legacy of a child. According to this view, a child conceived with donated gametes may face social judgment or confusion when trying to identify their biological parents. The Islamic Fiqh Academy Council had announced in its third session that surrogacy is *Islāmically* illegal and totally denied because of the results of the genealogy disarray and loss of motherhood, therefore according to some jurists “it is a hidden adultery even though it was not committed physically. And child result from surrogacy will consider among illegitimate”.

#### 4- Conclusion

It is instructive to mention here that in surrogate practice societies, the children who gives up

for adoption by their biological mothers very often those mothers suffer high guilt feelings. In addition, pregnancy, birth and “loss” of child may become the reason for severe stress in life, and further it leads physical and mental de-compensation in future, which no doubt, have left inauspicious and harmful impact on psychological and mental well-being of surrogate mothers along their families. Furthermore, the recognition about the real mother for a child that to whom he will consider the real mother either owner of ova or who had given him birth? This situation would create for the child a psychological distress, and other side the surrogate mother has been emotionally attached with the child due to carried him throughout the pregnancy and now after delivery she has to face the bitter reality of surrendering the child.

If a woman allowed to rent her womb, the multiple faces of fertilization and sexual satisfaction would be appeared. Which are forbidden according *sharī'ah* Stand point? Therefore, all illegal forms of in vitro fertilization must be controlled by the State. If it is used freely for the purpose of procreation (such as a needy child), would be used freely to fulfill the sexual desires as well, then social and moral systems create such problems that are anti-Islamic teachings Surrogate technique adds up to dehumanizing the procedure of human multiplication. Because womb isn't something that can be given over and even can't be rented or hired. In sum, such a procedure, once more, disregards the honor and dignity. In outline, surrogacy isn't permitted in the light of *sharī'ah* in any of its structures.

With a specific end goal to take care of the issue of childlessness, Muslims are encouraging to choose foster children. A few couples encourage kids who are close blood family, especially posterity of their own kin. In spite of the fact that this arrangement is expensive regarding time, cash, travel, physical and physiological enduring, and mental strain, a definitive outcome is viewed as beneficial from their viewpoint.

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