

Surrogacy and Inter-Related Issues: A Legal Analysis from the Perspective of Islamic Law

Fazli Dayan¹, Mian Muhamamd Sheraz²

Faculty of Shariah & Law, International Islamic University, Islamabad, Pakistan

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ABSTRACT

The issue of surrogacy and surrogate mother has been debated for a long time. Several conclusions have been made but each one of them still needs to establish the ethical and moral values, as Islam and other religions have objection there too. Although surrogacy and surrogate mother is an artificial method which restoratively helped infertile couples, but the issues regarding surrogate motherhood are neither simple nor being consider merely a tool and technique, as many aspects of the reproductive innovations are morally, ethically and sacredly unacceptable in Islam. Therefore it needs proper investigation in order to let the people know about; what is permitted in religion than those are prohibited.

KEY WORDS: Surrogacy and *zinā*, sperm and egg donation, freezed embryos, illegitimate child (*walad al zinā*),

INTRODUCTION

The bio-medical issues are not new. Issues regarding family laws and especially those concerning with the subject of human sexuality and infertility¹ have been debated for a long time now. But some issues are still relatively fresh and debatable. One of the most important development involving the human subject to counter infertility through hiring womb i.e. surrogacy² is not only a challenge for the bioethicist, but also for the contemporary theologians and jurists of Islamic law. Since these issues are also a challenge to establish the ethical and moral values, as Islam and other world religions have objections on these issues too. Hence surrogacy needs a thorough research from the perspective of Islamic law keeping in view the bioethics and the human genealogical norms.

The assisted reproductive techniques and inter-related issues to the surrogate mother³ are not new to the Islamic law. The preservation of genealogy is very much clear from various verses⁴ of the holy *Quran*. But most importantly, that

¹ For infertile couple reproductive technologies offer a beam of trust to counter infertility in order to build a family. The infertile couple can take help from various methods to counter sterility, like (AI) artificial insemination; "There are two kinds of artificial insemination. The semen that is deposited in a woman, usually with a syringe, may have come from her or from husband, known as (AIH), or from a donor called (AID). Both methods can be used when a man has fertility problems. But the later i.e. AID, because of the involvement of a donor other than the husband, has been much more controversial. Some other methods like, *in vitro fertilization* (IVF) can also be very helpful to overcome sterility. Thus the major purpose of IVF has been to join the egg of a woman to the sperm of her husband, so that they can produce a biological child together". See for further details: Judith N. Lasker & Susan Borg, *IN SEARCH OF PARENTHOOD* (Temple University Press, Philadelphia, 1994) at p. 31 & 50

² "Surrogacy; the practice of hiring a woman to bear a child" see for details: Judith N. Lasker & Susan Borg, *IN SEARCH OF PARENTHOOD* (Temple University Press, Philadelphia 1994) at p. 70; "Surrogacy is an agreement in which the child should be handed over after birth". See for further details: Warnock Dame Mary, 1984. *REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILIZATION AND EMBRYOLOGY* (Department of Health and Social Security, London: Published by Her Majesty's Stationery Office) at p 42

³ "The term surrogate mother is used here because it is the most recognized name for the women who have babies for others. It is misleading, however, perhaps intentionally so, since the word surrogate usually refers to a substitute for the real thing. Thus after the birth a surrogate mother who has agreed to give up her child to its father. The terminology itself is a subject of debate". See for details: Judith N. Lasker & Susan Borg, *IN SEARCH OF PARENTHOOD* (Temple University Press, Philadelphia, 1994), at p 71. The learned author stated that surrogate mother is subject to debate and in my opinion it is because of the sperm and eggs of the intended parents. As we know that it is in fact the sperm and egg when joins together can result of a biological child, hence the female (intended mother or strange lady) who donated her egg has also some kind of biological link, and it is because that Allah almighty says in the holy *Quran* Ch No. 25, verse No. 54; "indeed we have created human being from (a drop of) water". In another place Allah says in the holy *Quran*: Ch No. 16, verse No. 4 that "human beings are created from a drop of sperm", so the drop of water is not only a sperm or egg but a combination of both. In the Ch No. 76, verse No. 2, Allah the Exalted says that "verily; we created human from a drop of mingled sperm". While In Ch No. 49, verse No. 13 Allah says that "o mankind; we created you from a pair of male and female". It means in-fact Allah almighty created mankind from both male and female.

⁴ See for details: Al Quran, Ch No. 23, verses No. 12-14; *ENGLISH TRANSLATION AND COMMENTARY*, by Abdullah Yusuf Ali (Da'wah Academy, IIU Islamabad, Pakistan) at pp 265-266 (Where Allah almighty shows His creative work in very simple language, as for as the human being is concerned, that how he created human beings); See also: Ch No. 2, verse no. 117, at p 48; (For the earliest stages of creations) See also Ch No. 15, verse No. 29, at p 712; (For the human physical growth and complete cycle): See Ch No. 22, verse no. 5, at pp 938-939, along with Ch No. 75, verse No. 37, at pp 1772-1773; (In-fact Allah created human from mingled water/sperm and egg) See: Ch No. 76, verse No. 2, at p 1774, along with Ch No. 49, verse No. 13, at p 1524, and read also Ch No. 76, verse no. 2, at p 1774 (then it will be very much clear that Allah

some issues which are still unattended along with the value of addition thereof, thus its exploration is majorly necessary in the light of Islamic principles, therefore I will try to extract few related issues from the issue of surrogacy in order to divert our attention towards its importance.

SURROGACY AND LEGAL ISSUES:

Generally, the infertile couples often encounter several problems regarding their offspring. Hence it is necessary to remonstrate that curing sterility is not only permitted in Islam and in other religions, rather it is a duty and an obligation. Since procreation and preservation is the ultimate goal of the marriages particularly in Islam. Therefore the treatment itself, however, should not go beyond the limits of that what is permitted by the God almighty.

In the modern world of advanced biomedical technology, there are many usable techniques for the mates i.e. wife and husband, who suffering from sterility, but unfortunately many of these techniques/methods are ethically and sacredly un-acceptable. Therefore, people generally and Muslims particularly necessitate being conscious of what is permitted in Religion and what is not. Usually, any technique/method that makes use of semen i.e. sperm/eggs that do not belong-to lawfully married couple; hence it is utterly objectionable and obviously un-acceptable in Islam.⁵ However in Judaism, where many ‘*Rabbis*’ allowed to practice surrogacy and other artificial methods, provided that the gestational carrier must be of the *Jewish* community, because in *Jewish* law system effects is given to wombs and not to the gamete i.e. sex cells.⁶

Recently, Surrogacy a new method to cure aridity/reproductive disorder has sparked debates on legal and moral grounds, and especially the religious aspects of it, that whether such process runs counter to the intention of God? Notably, surrogacy is a process where; a strange haired lady carries a child for another woman incapable to bear children due to sterility. In such case the hired female is termed as “surrogate mother” or “surrogate parentage” holding child for an infertile couple (intended parents, i.e. wife and husband), or those who having troubles in gestation and disorder in conception. Thus surrogacy is a common practice in these sort of cases where a woman/intended mother is incapable to bear a child due to ‘*blockage of oviduct, i.e. uterine-tube*’ or ‘*faulty-womb*’ or otherwise as the case may be, and is hard to overcome sterility in normal and traditional way.⁷

Through the method of surrogacy⁸; an external fecundation for semen of the intended couple i.e. wife and husband is taken place in order to form a fertilized embryo, and then further artificially implanted it in the womb of a hired female voluntarily or on payment through a contract of surrogacy; as a surrogate mother. Hence few questions arise in the result of such process, first: who will be the ‘*real mother*’ of the child born? Secondly: is the ‘*intended mother*’; “the one who contributed the genes/eggs”? Thirdly: the ‘*surrogate mother*’; “the one who bore and gave birth to the child”? And fourthly: whether transfer of embryo and its implantation in other female’s womb may lead to maxing of lineage or not? Moreover, there are some other inter-related issues to surrogacy and surrogate mothers which are needed an investigation. Therefore, for this purpose some core issues will be discussed in order to know, that surrogacy and the process thereof is not simply a question of legitimacy or otherwise, because several other interconnected issues are involved.

ISSUE NO.1 OF SEPARATION OF THE WOMB FROM THE OVARY:

Nowadays the hiring of a womb is considered one of the modern techniques to counter sterility similar to ‘*in-vitro fertilization*’ (IVF). In this method the semen are taken from the original mother and father i.e. wife and husband, and put it in the lab until it form the karyon of an embryo. After it the fertilized embryo is implanted in the womb of a lady who had accepted to rent-out her womb for intended couple. Normally, this procedure is done after signing of a contract by the parties (i.e. surrogate and intended couple) on payments, or gratuitous as a donation. The contracted ‘*surrogate mothers*’ role ends instantly after the birth and handing-over the child to the woman i.e.

created human from “a pair of male and female” out of the mingled water of sperm and egg jointly, therefore the creation of human is not of the man’s sperm only, but jointly with the female’s egg); See also: Ibn al Qayyim, *Tuhfatul al Mawdud bi-Ahkam al-Mawlud*, (Dar Ibn al-Qayyim lil-Nashr wa-al-Tawzi’, 1421.H), at p 272

⁵ International Islamic Fiqh Council Jeddah; See the *MUJALLAH OF THE ACADEMY* (the third number, vol.1) at p 423

⁶ SM, Kahn. *MAKING TECHNOLOGY FAMILIAR: ORTHODOX JEWS AND INFERTILITY SUPPORT, ADVICE, AND INSPIRATION* (*Cult Med Psychiatry*. 2006, 3:4) at pp. 467–480

⁷ *STATUS OF SURROGATE MOTHER IN ISLAMIC PROSPECTIVE*: Available at <http://taakbs.blogspot.com/2013/06/status-of-surrogate-mother-in-islamic.html>, See also, *INFERTILITY FROM AN ISLAMIC VIEWPOINT*, by Dr. Aisha Hamdan

⁸ For the basic concept of surrogacy, see: Danny R. Veilleux, Annotation, 1989. *VALIDITY AND CONSTRUCTION OF SURROGATE PARENTING AGREEMENT*, 77 A.L.R. 4th 70; see also: *SURROGACY AND INDIA A LEGAL PERSPECTIVE* by Smith Chandra (NALSAR University of Law); See for more details, *ICMR* (Indian medical council for research, 2004) Available at: www.ivf-infertility.com

intended mother; the one she donated her gamete.⁹ This does however give rise to ethical and legal issues. Some consider surrogate as a real mother, while other reckon intended mother as mother.

Remarkably, child parentage can be determined in light of the textual authorities. As the human genealogy and embryology is very much clear from various verses of the holy *Quran* and *Sunnah* of the Prophet Muhammad (peace be upon him). Similarly, there are various references to the concept of motherhood and on the subject of fertilization in the holy *Quran*. Allah Almighty says what mean: “none can be their mothers except those who gave birth to them”.¹⁰ In another place Allah says: “we have enjoined on man kindness to his parents, in pain did his mother Bears him, and in pain did she give him birth, the carrying of the (child) to his weaning (a period of) thirty months”.¹¹ While in another verse of the holy *Quran*: “And we have enjoined on man to be good to his parents: In travail upon travail did his mother bear him his mother carried him, and in year twain was his weaning: (hear the command)”.¹² In Arabic language the word ‘*walidān*’ is used for parents i.e. father and mother. In this sense the child is related to both the womb and ovary; reproductive organ that involved in sexual reproduction, of his mother. But references in the holy book evidently accentuate the womb relations says that “mothers are those who gave birth to the child”. In another place Allah says: “he who created you from a single person.....reverence (fear) Allah, through whom ye demand your mutual rights, and (reverence) the wombs (that bore you)”.¹³ In another verse of the holy *Quran* stated that: “and break your ties of kith and kin (relationship)”.¹⁴ Thus these mentioned verses clearly signify the womb relation-ship, and hence inferring that the one who gives birth to a child, will considered being the mother of the resulting offspring. But there are other verses of the holy *Quran* where Allah almighty show his creative work, that how He created human, says: “man we did create from a quintessence(of clay)¹⁵; then we placed him as sperm¹⁶; in a place of rest,¹⁷ firmly fixed, then we made the sperm into clot of congealed blood; then that of that clot we made a lamp¹⁸; then we made out of lamp bones with flesh¹⁹; then we developed out of it another creature²⁰; so blessed be Allah, the best to create!”²¹ In another place Allah says in the holy *Quran*: that “he has created human being from a sperm drop”.²² While in another verse Allah says: “we created you out of dust, then out of sperm, then out of leech like clot, then out of a morsel of flesh, partly formed and partly unformed, in order that we may manifest (our powers) to you; and we cause whom we will to rest in wombs for an appointed term, then we bring you out as a babes, then (foster you) that ye may reach to your full strength”.²³ Thus this verse talks about the physical growth from lifeless matte of seed, then fertilized ovum, then convert it into fetus, and out of which it gives birth to child. These are in fact the physical stages of human life to which Allah almighty wants to divert our attention that your growth is from nothing till the completion of whole life cycle, and all these are well known to us nowadays because of the modern medical technologies.

On the other hand, it is not possible to declare social mother as a real mother on the basis of this argument that “none can be their mothers except those who gave birth to them”, as it can’t be taken as a lawful standard; since the subject of the verse is only to educate the individuals affirming the separation by way of *zihār*²⁴, which is not the

⁹ See details: Abbas Ziad Kamel Al-Sa’adi, *LEGALITY OF THE LEASE UTERUS AND ITS EFFECTS* (Al-Ma,moon University college - Department of Law)

¹⁰ Al Quran, Ch No. 58, verse No. 2, *ENGLISH TRANSLATION AND COMMENTARY*, by Abdullah Yusuf Ali (Da’wah Academy, IIU Islamabad, Pakistan) at p 1625

¹¹ Al Quran, Ch No. 46, verse No. 15, at p 1483

¹² Al Quran, Ch No. 31, verse No. 14, at p 1173

¹³ Al Quran, Ch No. 4, verse No. 1, at p 204

¹⁴ Al Quran, Ch No. 47, verse No. 22, at p 1500

¹⁵ The word ‘of clay’ means: “inorganic constituents of the earth are absorbed into living matter by way of food and living matter reproduces itself by means of sperm”. See: Al Quran, *ENGLISH TRANSLATION AND COMMENTARY*, by Abdullah Yusuf Ali (Da’wah Academy, IIU Islamabad, Pakistan) at p 965

¹⁶ Sperm means: “a drop of sperm, deposited in the ovum and fertilizing it and rests for a time in security of mother’s womb”.

¹⁷ The word ‘place of rest’ attributes that “the growth in the fetal stage is silent and unseen, this fetus is protected in the mother’s womb like a king in the castle, it is firmly fixed and gets protection of the mother’s body till it is grown and up to birth”.

¹⁸ This is another stage, known as fetus: “the first change in the fertilized ovum is the conversion into a sort of clot as thickly congealed blood; then further the zygote cells grow by segmentation; then the mass gradually attains a shape of in its growth as a fetus”.

¹⁹ The second stage: “where from the lamp develops bones and flesh, as well as other organs and a nervous system”.

²⁰ Another creatures means: “that so for man’s growth is like that of an animal, but further process take place which makes the infant animal into the infant of human, and this is the breathing of Allah’s spirit into him, which changes its shape, and from a mere animal He create a human, and it is Allah Almighty He who created a man from the same process like animal”.

²¹ Al Quran, Ch No. 23, verses No. 12-14, *ENGLISH TRANSLATION AND COMMENTARY*, by Abdullah Yusuf Ali (Dawah Academy, IIU Islamabad, Pakistan) at pp 965-967; see also: Ch No. 15, verse No. 29, at p 712

²² Al Quran, Ch No. 16, verse No. 4, at pp 726-727

²³ Al Quran, Ch No. 22, verse No. 5, at pp 938-939

²⁴ *Zihār* “was an evil in Arab old custom by which the husband selfishly deprived his wife of her conjugal rights and kept her tied himself like a slave without her being free to remarry”, and the words to consider ‘*zihār*’ “thou art to me as the back of my mother means that she was/is like

right type of separation for the husband because he cannot call his wife as his mother since she has not given him birth. Moreover the standard meaning of this verse is further restricted by the text itself on the grounds of '*rada'ah*'²⁵ which forbidding marriages between the breastfed and wet nurse. Hence '*rada'ah*' also forbidding marriages between the breastfed and wet nurse, and even between their offspring. Therefore in Islamic law a wet nurse is also considered as a mother of the breastfed even though she has not given him birth.²⁶

The holy *Quran* clearly states: "*let another woman suckle (the child) on the (father's) behalf*".²⁷ It means, if the mother's milk fails due to her health or any other unavoidable circumstances to feed her own child, then let another woman to suckle on mother's behalf for payments or otherwise. In another verse Allah almighty says: "*prohibited to you....foster-mothers (who gave you suck), foster-sisters*".²⁸ Fosterage or milk-relationship play a very important role in Muslim family laws, and thus consider sister as foster mother's sister, which come in all and count in a prohibited degree. This is also clear from various Prophetic traditions. A famous '*hadith*' narrated by 'Aisha (blessing of Allah upon her) says: "*breastfeeding renders prohibited what is forbidden by birth*". In another '*hadith*' narrated by her "*indeed Allah has made unlawful through suckling whatever he made unlawful through birth*" while in another '*hadith*' narrated by Ali (blessing of Allah upon him) says that messenger of Allah said: "*indeed Allah has made unlawful through suckling whatever he made unlawful through lineage*". It was also narrated from Aisha that Allah's Messenger (peace be upon him) said: "*what becomes unlawful (for marriage) through breast-feeding is that which becomes unlawful through lineage*".²⁹

In the light of above discussion we come across that "separation of the womb relation from the ovary relationship" is a new concept and very important phenomenon regarding surrogacy. Several ratiocinations have been drawn and rulings are made, but what is the Islamic perspective on the issue? And what are the impacts of surrogacy on the Muslim personal law? Hence some important questions arise, first: will a resulting baby through surrogate agreement would be illegitimate? Since the partner (husband/intended father) had not contacted a legal marital bond with surrogate mother. Secondly: apparently there is likelihood that the surrogate mother has some sort of genetic relationship, so to distinguish between these arrangements resulting in the birth of a child, to whom the surrogate is biologically related? Thirdly: whether the '*contract of surrogation*' would be considered as void? Since, it is the sale of fetus carrying a free child and also reducing motherhood to a price. Fourthly: will payment for such contract is acceptable in Islam?

ISSUE NO.2 OF FREEZING OF THE EMBRYOS AND ITS DONATION:

There are permissible methods like, an IUI³⁰, where in this technique the acquired hubby semen is artificially injected-in at appropriate place in the uterus or neck of his wife. Normally, in such process further fertilization takes place inside the womb naturally. While in IVF³¹; usually in this method the germ cells, of both male and female i.e. husband-sperm and wife-eggs, are fertilized outside in the laboratory till it form an embryo. After completion of the fertilization process, a fertilized embryo is artificially implanted in female's womb. These are permitted techniques only for sterile couple those who have valid marital contact.

Notably, in IVF; *in-vitro fertilization* process, possibly not all of the embryos, but typically two or three are imbedded in women's uterus. Medically the purpose of IVF process is to glean 15 to 20 percent of fertilized eggs, which are the integral standards for nidation in biomedical procedures. Thus the couple has two option; first: to dispose the leftover embryos, and secondly: to freeze the remaining embryos for future use.

Another important inter-related issue to surrogacy is the question of freezed embryos, whether freezing of the embryos and its donation to other couples will be allowed? As this issue lead to numerous questions, first: does an embryo compose a kid? Secondly: whether the act of disposing it prohibited? Thirdly: well is this a form of abortion? Fourthly: donation of freezed embryos is acceptable in Islam? Fifthly: does a freezed embryo can be used

her mother". After that "she could not demand conjugal rights, but was not free from his control and could not contract another marriage". See for further details: the holy *Quran* Ch No. 33, verse No. 4, at pp 1195-1196; and Ch No. 58, verses No. 1-5, at pp 1625-1627

²⁵ *Rada'ah* is an Arabic word means "Suck at foster mother's breast; wet nurse" see for details: *A DICTIONARY OF ANDALUSI ARABIC*, by Federico Corriente (Brill, Leiden- New York-Koln, 1997) at p 210; Further, Ibn Manzur stated that, "*Rada'ah* is an Arabic word rooted from *Rada'a*, which literally means: Sucking the breast and drinking its milk". See for details: Ibn Manzur, 1883. *LISAN UL ARAB*, (Cairo, Dar ul Maarif edition) at pp 1660-1661

²⁶ Al Quran, Ch No. 4, verse No. 23, *ENGLISH TRANSLATION AND COMMENTARY*, by Abdullah Yusuf Ali (Da'wah Academy, IJU Islamabad, Pakistan) at pp 213-214

²⁷ Al Quran, Ch No. 65, verse No. 6, at p 1684

²⁸ Al Quran, Ch No. 4, verse No. 23, at pp 213-214

²⁹ See for details: *Jami at-Tirmidhi* (vol. 1), book No. 7, *hadith* No. 1147, and *hadith* No. 46; *Sunan an-Nasai* (vol. 4) book No. 26, *hadith* No. 3304; *Sunan ibn Majah* (vol. 3) book No. 9, *hadith* No. 1937

³⁰ IUI: (intra-uterine insemination).

³¹ IVF: (in-vitro fertilization).

by a woman of her deceased husband? And sixthly: does a freezed embryo can be used by a woman after her divorce?

Generally (as for as freezing of the embryos are concerned) donation of the freezed embryos to other couples is disregarded in Islam, and hence considered unlawful due to some severe predicaments and social problems as we stated earlier. Mostly scholars are of the view that donation as well as discarding (of the embryos) is prohibited due to the definition of abortion³², but in case of IVF the discussion relating to abortion center-on “the definition of fetus and not the womb”. Thus the notion of abortion is not be so relevant to IVF process, since the embryo is outside of the womb, and the eggs are artificially fertilized externally. Conversely, in our opinion disposal of the leftover embryos has nothing to deal it as abortion, because it does not qualify the actually meaning of “deliberate termination of pregnancy”. More over these remaining embryos are lacking the natural constituents, thus the rules for abortion cannot be so applied.

Consequently, using of the freezed embryos in future is allowed only in valid and unbroken marital contract, which is not terminated by death or separation”. Questionably, if a husband dies, for example, widow is not permitted to use these freezed embryos due to the absence of matrimonial connection”. But *Shaykh Abd Allah al-Mushidd*³³ in his controversial *fatwā* issued in 1988, allowed the wife of a deceased husband to use the semen of her dead husband after his death.³⁴ One of the most important reasons which made some scholars disagree with this ruling was the fear that pregnancy in the absence of her husband would create a social problem for the woman and also the lineage of the child will be questioned in the society, and gestation would-be deprived of its due rights. However one of the most important issue which needs a thorough investigation is, if these embryos are used during the period of ‘*iddah*’³⁵ by a woman, then; first: using of freezed embryos during the period of ‘*iddah*’ is acceptable or not? As we know that a woman can claim her maintenance and other necessities during her waiting period. Secondly: what will be the real status of the resulting baby in such case, if the freezed embryos are used during the period of ‘*iddah*’? Thirdly: in case of donation of the freezed embryos, a woman – the donor – can claim the baby after birth? On the basis that she has some kind of biological link to her donated gamete.³⁶ And fourthly: in such case if the embryos are donated, the resulting baby will be consider of the surrogate mother’s child, as she given him birth, or it will be consider the child of those who donated such embryos due to some sort of biological link?

ISSUE NO.3 OF SURROGACY AND LEGITIMACY OF THE CHILD:

Notably, a very important and foremost issue is the legitimacy of the child, which is based on the establishment of legal paternity. Thus, the status of a child begotten through lawful bond would be regarded as legitimate. Hence, he or she would be entitled to their rights available in Muslim family law. Whereas an illegitimate genealogy denotes any child whose status is not legitimized on the basis of “*al walad li al firāsh*”; baby belongs to bed. Allah Almighty says: “مَا هُنَّ أُمَّهَاتِهِمْ إِلَّا اللَّائِي وَلَدْنَهُمْ” none can be their mothers except those who gave birth to them”. In another verse of the holy *Quran* Allah Almighty says: “وَوَصَّيْنَا الْإِنْسَانَ بِوَالِدَيْهِ إِحْسَانًا حَمَلَتْهُ أُمُّهُ كُرْهًا وَوَضَعَتْهُ كُرْهًا وَحَمْلُهُ وَفِصَالُهُ ثَلَاثُونَ شَهْرًا” we have enjoined on man kindness to his parents: In pain did his mother bears him, and in pain did she give him birth, the carrying of the child to his weaning a period of thirty months”. Another verse stated that: “وَوَصَّيْنَا الْإِنْسَانَ بِوَالِدَيْهِ حَمَلَتْهُ أُمُّهُ وَهْنًا عَلَى وَهْنٍ وَفِصَالُهُ فِي عَامَيْنِ أَنِ اشْكُرْ لِي وَلِوَالِدَيْكَ إِلَى الْمَصِيرِ” and we have enjoined on man to be good to his parents, In travail upon travail did his mother bear him his mother carried him, and in year twain was his weaning: hear the command, show gratitude to me and to thy parents, to me is thy final goal”. Resultantly, these verses clearly signify the “womb-relationship”, and hence inferring that the “one who gives birth to a child, is the original mother”. Meaning thereby, no other lady does not qualify the meaning of a mother except who has given him birth. In other words: thy lady will be considered a mother of the child, if she gives him birth, and equally parents should have a valid marital connection. Hence, question arises that a child born under a surrogate-contract would be illegitimate”? Since the partner/intended father may not entered into a valid marital contract, or a surrogate mother is not tied in a

³² Abortion is mainly an “intentional termination of the pregnancy”, thus abortion takes place internally in the womb to cease the fetus from further development. Biologically abortion refers to: “an early stop to the development of an organ, so that it is not fully formed or is absorbed”.

³³ He was head of the *fatwā* committee of al-Azhar.

³⁴ See: Qaiser Shehzad, *BIOMEDICAL ETHICS; PHILOSOPHICAL AND ISLAMIC PERSPECTIVES* (IRI IIU, Islamabad) at p 174; See also: Muhammad Shaltut (Shaykh al-Azhar, 1958-63), *AL-FATAWA: A STUDY OF THE GENERAL PROBLEM OF CONTEMPORARY MUSLIMS DAILY LIFE*, at p 328

³⁵ The word ‘*iddah*’ means: “waiting period; thus a woman must observe it after the death of her husband or divorce”. During this period she may not marry to someone else, for the purpose to ensure the male parentage of the resulting offspring if any, in order to establish the purity of lineage of a child born after the death of her husband or after her divorce”.

³⁶ It is because that Allah has created human from the mingled semen, See: Al Quran, Ch No. 76, verse No. 2, at p 1774, along with Ch No. 49, verse No. 13, at p 1524, which clearly indicates that Allah created human beings from a “single pair of male and female”, out of the mingled water of sperm and egg jointly, therefore the creation of human is not of the man’s sperm only, but jointly with the female’s egg.

legal bond. Although in Islamic law a wet nurse is also considered as a mother of the breastfed even though she has not given him birth.³⁷

Typically, contemporary scholars have disagreement in this regard; several out-rightly rejected surrogacies' considering it a deviation from Islamic law, and (viewing that such type of techniques) may open the doors for abomination.³⁸ However others permitted it on an analogy to wet-nursing. Since it is lawful to vent-breast benefits, then the womb may be measured analogical on suckling. Further the womb in reality does not transfer any genetic property, and does not lead to mixing of lineage. Because specialists of the fields confirmed that womb in reality being a pot does not carry heritable and genetic implications to the fetal, as an embryo is artificially fertilized in the laboratory outside the womb. Further they also confirmed that leased womb debar the chances of pregnancy for women by her husband's semen; because pregnancy hormones stop ovulation completely until after birth.³⁹ Further, one group feels surrogacy is not allowed because it is adultery (*zinā*) on the basis that surrogate mother is carrying a fertilized embryo comprised of female egg and sperm of a male that is not her legal husband. Thus, the child has no lineage and is technically illegitimate genealogy. Furthermore, the resulting offspring could cause stress between the parties, which may lead to dispute and litigation. Therefore Islamic law says relevant laws should remove potential for dispute and confusion, as "*Harm is to be avoided before benefit is derived*" is an established maxim in Islamic law. Hence, issues of parentage and inheritance are leaning towards unlawfulness of surrogacy.

In the opinion of the group favoring surrogacy, urged that surrogacy is permissible on the basis that preservation of the human species is one of the primary objectives of *Shariah*. Therefore if a married couple is unable to conceive children, they should be allowed to practice surrogacy, because the womb is in reality being rented as an incubator and the surrogate is not actually engaged in '*zinā*'? In addition, there is no way of confusing the lineage of the child. Actually it is the same as hiring a woman for wet-nursing which is acceptable to all the jurists. This does, however, establish a child-mother relationship with no rights of inheritance. Thus wet-nurse and her breastfeeding child can never marry, because her children are as brothers and sisters of the breastfed.⁴⁰

Generally in Islamic law, rights are determined for an illegitimate child i.e. '*walad al zinā*', but for the child born under the process of surrogacy, no rights are noticed? If rights for an illegitimate genealogy can be ascertained so why not for the baby born through surrogacy? And can we follow the same criterion as followed for delimiting the rights of an illegitimate child or same as legitimate genealogy? Both Islamic law and modern world legal regime is completely silent on the rights and duties of surrogate child. So the present issue of surrogacy is a challenge for the modern world legal regime and also its implication in Islamic law for the contemporary Islamic jurists too, in order to draw a clear line between the legitimate and illegitimate, and also to determine the status of the resulting baby thereof, especially his rights, both in modern world legal regime and in Islamic law, keeping in view the *Shariah* rulings and International human rights norms with reference to the primary objectives of *Shariah*.

In addition to that, according to all the jurists⁴¹ only '*zinā*' is the strongest reason for an illegitimacy of a child resulting from an unlawful sex. Further to note, in Islam '*zinā*' occurs through illicit sexual relations, either fornication⁴² or adultery⁴³, and the act is properly witnessed i.e. four witnesses seeing the act, will be punished by the '*hadd*'⁴⁴ penalty. The resulting offspring will be considered as an illegitimate (*walad al zinā*). So those considering surrogacy as '*zinā*', then can the '*hadd*' penalty be imposed? And the '*hadd*' penalty can be imposed on the intended parent's i.e. wife and husband? Or the penalty can be imposed on surrogate mother only? Or it can be imposed on male only? Further the '*hadd*' penalty can be imposed on both parties to the contract of surrogacy?

³⁷ Al Quran, Ch No. 4, verse No. 23, *ENGLISH TRANSLATION AND COMMENTARY*, by Abdullah Yusuf Ali (Dawah Academy, IIU Islamabad, Pakistan) at pp 213-214

³⁸ The doors of abomination means the doors of evil, they (Islamic scholars) consider surrogacy as '*zinā*' (adultery), thus they present and take support from a verse of the holy *Quran* in order to strengthen their view point. But the said verse is revealed for '*zinā*'. See: Al Quran, Ch No. 17, verse No. 32, at p 780

³⁹ See details: Abbas Ziad Kamel Al-Sa'adi, *LEGALITY OF THE LEASE OF THE UTERUS AND ITS EFFECTS* (Al-Mamoon University college - Department of Law)

⁴⁰ *MUSLIM SURROGACY* by Delwyn Lounsbury, available at: <http://ezinearticles.com/?Muslim-Surrogacy&id=5930826>

⁴¹ See: Mohamed Salim Awwa, 1982. *PUNISHMENT IN ISLAMIC LAW A COMPARATIVE STUDY* (Indianapolis, American Trust Publications)

⁴² Fornication means: "voluntary sexual intercourse between male and female not married to each other, in other words: when both parties are unmarried and are engaged in unlawful sexual relation".

⁴³ Adultery means: "extramarital sex that willfully and maliciously interferes with marriage relations, in other words: when one or both parties are married and having an illicit sexual relation".

⁴⁴ '*Hadd*': "A punishment which is prescribed by Allah almighty in the holy *Quran* or in the *Sunnah*, and cannot be varied in any way, thus in this sense '*hadd*' is totally a right of Allah almighty which cannot be changed as compared to '*tazir*'; (dictionary punishment)". See for details: Mohamed Salim Awwa, 1982. *PUNISHMENT IN ISLAMIC LAW A COMPARATIVE STUDY* (Indianapolis, American Trust Publications)

ISSUE NO.4 OF THE WORD SPERM/DROP OF WATER:

Another important issue is the word sperm/drop of water from which Allah created the mankind. So, the drop of water i.e. sperm can only be considered of male semen, or it includes female's egg also? As we know that both sperm and egg jointly forming an embryo, from which the process of fertilization and human evolution starts. Remarkably, different verses of the holy *Quran* are obviously enumerating such process of fertilization and complete cycle of human's creation. Therefore the virtue of preserving genealogy is evident in the holy *Quran*, says: *وَهُوَ الَّذِي خَلَقَ مِنَ الْمَاءِ بَشَرًا فَجَعَلَهُ نَسَبًا وَصِهْرًا ۚ وَكَانَ رَبُّكَ قَدِيرًا* "it is he who has created man (human being) from water; then has he established relationship of lineage and marriage; for thy Lord has power over all things". Allah Almighty further says in the holy *Quran* that: "he has created human being from a sperm drop".⁴⁵ In another place he says that: "we created you out of dust, then out of sperm, then out of leech like clot, then out of a morsel of flesh, partly formed and partly unformed, in order that we may manifest (our powers) to you; and we cause whom we will to rest in wombs for an appointed term, then we bring you out as a babes, then (foster you) that ye may reach to your full strength".⁴⁶ Thus in these verses Allah almighty is talking about the physical growth from lifeless matter of seed, then fertilized ovum, then he converts it into fetus, and out of which gives birth to a child. These are in fact the physical stages of human life to which Allah almighty wants to divert our attention towards the fact that the growth of a human being is from nothing till the completion of whole life cycle, and all these are well known to us through modern medical technologies. In verse no. 37 of chapter no. 75, Allah almighty indicates that: "was he not a drop of sperm emitted in lowly form⁴⁷; then he becomes a leech like clot, then did (Allah) make a fashion (him) in due proportion". He creates from it (sperm and egg) both sexes male and female. In the verse no. 2 of chapter no. 76, Allah the exalted says: "verily, we created human from a drop of mingled sperm". It means that "the female ovum has to be fertilized with the male sperm before a child is born". According to verse no. 13 of chapter no. 49, where Allah says that: "O mankind; we created you from a pair of male and female". While commenting on the said verse of the holy *Quran*, a very well known jurist *al-Qurtubī* stated that in fact Allah almighty created mankind from both male and female. Therefore in our view this verse further strengthens the verse no. 2 of chapter no. 76, where Allah says: "we have created mankind from mingled sperm" which means both of male and female. Hence the procreation of human is the result of male sperm along with the female egg. The same view is held by *Ibn al-Qayyim* in his book *tuhfatul al mawdud* at page no. 272.⁴⁸ Consequently, in our view the intended parents will be considered as real parents due to the usage of their sperm and egg, while surrogate mother will be considered that of a breastfed and as a wet-nurse because of the biological link in between the surrogate mother and the resulting baby.

Those who consider surrogate mother as real mother of the baby born through surrogacy, they have to answer some questions that, first: the sperm i.e. drop of water from which Allah created human beings, can be considered male sperm only? Or secondly: the semen i.e. the drop of water can be considered of female egg only? Or thirdly: the semen/germ cell can be considered of both male and female jointly? Fourthly: if it is established that drop/semen attributes to male sperm only, then what about female egg and child genetic relationship? Moreover can we call surrogate mother the genetic and real mother of the child born through surrogacy? And if yes, then what about the embryo so transferred in case of surrogacy? Fifthly: if it is established that drop/semen amounts to female egg only, then what about male sperm? Since solely an egg i.e. female gamete cannot be fertilized without intervention of male sperm. Further the sperm so transferred is acceptable in Islam? Furthermore, who will be the real mother of the resulting offspring, i.e. the surrogate mother or the one whose gamete is used? Or both (surrogate mother and social mother) jointly will be the mothers of the child? Sixthly: if it is established that drop/semen attributes to both male sperm and female egg, then in such case the baby born under the contract of surrogacy will be legitimate? Further, surrogate mother analogically can be considering a real mother of breastfed or otherwise?

ISSUE NO.5 OF SURROGACY VS ZINĀ:

The process of surrogacy needs proper research to let the Muslim and others know that whether it is 'zinā' or not? From the technical definition of 'zinā', it seems that surrogacy cannot be an instance of 'zinā'. It lacks one of the constituents of 'zinā', namely coitus (the sexual intercourse). So we are not sure whether to consider it 'zinā', or not? But it would be very interesting if we look towards the traditional definition of 'zinā' with reference to the primary objectives of *Shariah* for the protection of one's dignity and honor, then surrogacy can be an instance of 'zinā' which has been prohibited. On one hand it seems that surrogacy cannot be labeled 'zinā', because the

⁴⁵ Al Quran, Ch No. 16, verse No. 4, at pp 726-727

⁴⁶ Al Quran, Ch No. 22, verse No. 5, at pp 938-939

⁴⁷ It means that "his lowly form of an animal origin makes him no higher than a brute, his fetal development is still that of a brute animal; then at some stage come human limbs and shape".

⁴⁸ *Tuhfat al-Mawdud bi-Ahkam al-Mawlad*, (Dar Ibn al-Qayyim lil-Nashr wa-al-Tawzi', 1421.H)

technical definition according to all the jurists depends on the coitus (sexual intercourse), which does not include artificial insemination by husband with the element of surrogacy.

Those scholars who consider that surrogacy is '*zinā*' on the basis of Prophetic tradition: "*it is unlawful for a man who believes in Allah and the last day that he waters the plant of another*".⁴⁹ Thus from the words: "*watering the plant of another*"; they extract a conclusion that it means to bring one's sperm into the womb of a strange lady or someone else's wife. They are of the view that embedding a sperm into the womb of a strange lady other than the wife amount to adultery (*zinā*). In this way, embedding sperms or fertilized ovum into a surrogate mother also amount to '*zinā*', and hence it shall be considered and declared '*zinā*'. But it is submitted with great reverence, whether any activity without an illicit sexual intercourse amounts to adultery (*zinā*), if not? then how artificial insertion of semen into the womb of a strange lady without sexual activity attributed to '*zinā*'. On the other hand looking towards the technical definition of '*zinā*', it seems that surrogacy cannot be an instance of '*zinā*', as it lacks one of the constituents of '*zinā*', namely coitus (the sexual intercourse). Thus it seems that surrogacy cannot be labeled '*zinā*', because the technical definition according to all the jurists depends on the coitus (sexual intercourse), which does not include artificial insemination by the husband with the element of surrogacy.⁵⁰

It is submitted with great reverence that the grounds laid down by the contemporary scholars to declare surrogacy as '*zinā*', are not convincing for various reasons in Islamic law.⁵¹ In Islamic law '*zinā*' establishes if, 1) there is an illicit sexual relation; and 2) the act must be properly witnessed by four witnesses seeing the act at one time. Only then it will be punishable with the '*hadd*' penalty. Conversely, only the unmarried woman will be punished if she becomes pregnant without the act having been witnessed. Resultantly, in such case the offspring will be considered as illegitimate genealogy i.e. (*walad al 'zinā*'). Further, where in case if '*zinā*' is not proved, then it will amount to '*qadhif*' (defamation) invoking the severe penalty of eighty stripes. '*qadhif*' means: 'wrongly accusing someone of fornication or adultery without any proofs/evidences and eye witnesses'. The holy *Quran* laid down the details and its punishment.⁵²

Furthermore the quoted tradition is also debatable as it was on the occasion of '*hunayn*'⁵³, in which the Messenger of Allah ordered the army men that: "*it is not lawful for a man who believes in Allah and the last day to water what another has sown with his water, meaning thereby intercourse with women who are pregnant, and he further said that it is not lawful for a man who believes in Allah and the last day to have intercourse with a captive woman till she is free from a menstrual course; and it is not lawful for a man who believes in Allah and the last day to sell spoil till it is divided*".⁵⁴ In this commandment the Prophet Muhammad (peace be upon him) educating his warriors that engaging slave girls in physical relations after victory is not allowed. Therefore for warriors it is not legitimate to enjoy sexual relation with a pregnant lady, in whose womb the developing fetus planted by her own spouse would mean that watering a plant, planted by someone else.

Notably, in Islamic law the offence of '*zinā*' constitutes when certain conditions are met, first: it requires the meeting of sexual parts, secondly: penetration of a male into female sexual parts, i.e. incursion (insertion the tip of penis). Thirdly: infiltration and incursion of the private part must be seen by four male eye witnesses.⁵⁵ Hence, each and every aforesaid condition must be met to constitute the offense of '*zinā*'. While, the first two conditions in case of a surrogate mother are totally lost. Consequently, surrogacy cannot be declared '*zinā*', keeping in view the necessary conditions. So, while doing so as to declare surrogacy as '*zinā*', merely by insertion of sperm into the womb through therapeutic methods, will spoil the principles laid down for constituting a '*zinā*' offence in Islamic law. Therefore, those who declaring surrogacy as '*zinā*' will have to answer some legal questions; whether surrogacy can be an instance of '*zinā*', even if it lacks one of the most important element i.e. sexual intercourse? And even in their view point, if it is established that surrogacy is '*zinā*', then the resulting baby will be a '*walad al zinā*'?

⁴⁹ *Sunan Abu Dawud* (Darul Ghad al Jadeed, Mansoor, Egypt, 2013) book No. 11, *hadith* No. 2153; and *Jami at Tirmidhi* (Darul Ghad al Jadeed, Mansoor, Egypt, 2013, vol. 2) book No. 6, *hadith* No. 1131

⁵⁰ Qaiser Shehzad, *BIOMEDICAL ETHICS; PHILOSOPHICAL AND ISLAMIC PERSPECTIVES* (IRI IIU, Islamabad) at p. 173. See also: Wahbah al Zuhayli, *AL FIQH AL ISLAMI WA ADILLATUHU* (vol.7) at pp 5349-5360

⁵¹ Islam stresses on purity of sexual relation, equally for male and female, and those guilty of illicit sexual relations will be punished as prescribed by the Allah almighty in the holy *Quran* and in the Prophetic traditions. Thus any activity which does not include illicit sexual intercourse will not be considered as adultery or fornication.

⁵² See for details: Al Quran, Ch No. 24, verses No. 2 and 4-9, at pp 987-989; and Ch No. 4, verse No. 15, at pp 211-213

⁵³ The battle of '*hunayn*' was fought by Prophet Muhammad (peace be upon him) and his companions against the Bedouin tribe of '*Hawazin*' and its subsection of '*Thaqif*' in 8th year of '*hijrah*' (630-AD). '*Hunayn*' is one of those two battles mentioned in the holy *Quran* by its original name in '*Surah al Tawbah*', verse no. 25. See for further details: Lammens, H. and Abd al Hafez Kamal, 2012. *HUNAYN: IN ENCYCLOPEDIA OF ISLAM* (Second Edition, eds P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs) Brill Academic Publishers.

⁵⁴ *Sunan abu dawud* (Darul Ghad al Jadeed, Mansoor, Egypt, 2013) book No. 11, *hadith* No. 2153; and *Jami at Tirmidhi* (Darul Ghad al Jadeed, Mansoor, Egypt, 2013, vol. 2) book No. 6, *hadith* No. 1131

⁵⁵ See: Al Quran, Ch No. 4, verse No. 15, at pp 211-213; and Ch No. 24, verse No. 4, at p 987

Those who argue and consider surrogacy as '*zina*', and the resulting baby as '*wald al zinā*', then in such case; first: can the '*hadd*' penalty be imposed or not? Secondly: can the '*hadd*' penalty be imposed on the intended parent's i.e. wife and husband? Thirdly: can the '*hadd*' penalty be imposed on surrogate mother's only, as she uses others semen? Or it can be imposed on male only? And further, can '*hadd*' penalty be imposed on both parties to the contract of surrogacy? Conversely, if surrogacy is established otherwise, then what about '*qadhf*' penalty?

OTHER RELATED ISSUES:

The means and methods of artificial insemination have consequences and several Islamic, legal and social problems in lineage and the relationship of baby to the intended parents thereof. Scholars have disagreement in this regard and even though still there is diversity between Islamic and legal jurisprudence on artificial insemination and on the status of resulting baby also. Although scholars are unanimous on that; if the methods of artificial insemination take place during valid marital contract, the said process is legal and the lineage of baby is legally established due to the lawfully wedded couple i.e. father and mother. But whereas the said process if taken place after the death or divorce of husband, then, does a lineage of the baby is established? Further jurists have agreement on the prohibition of artificial insemination for unmarried couple, but they were divided on lineage of the resulting baby in several opinions, some of them regarded the intended father is the real father, and others regarded the baby has not a father, while others consider it an adoption, meaning thereby the child has no father but adopted. Furthermore we can find that there is deference amongst jurists, in regard of other related issues, like in case; 1) Where artificial insemination takes place in woman's womb, then in such case; A) the intended father is considered a real father of the baby, and also considered him as a husband of intended mother, B) while others consider the intended father as real father but consider him as the husband of surrogate mother—the one who leases her womb. As for as the mother is concerned; some consider the intended mother as a real mother of the baby, and some consider the surrogate as a real mother, while other consider both—the intended and surrogate—as mother jointly. 2) Where artificial insemination takes place in the animal's womb—although it is inhuman—then in such a case; the sperm user considered as a father and egg user considered as a mother, of the resulting baby. Meaning thereby that those who provide sperm and egg will remain common, but in case of surrogacy the baby parentage will be questioned by some scholars, to whom the baby belongs. 3) Where artificial insemination takes place in artificial womb, the same theory will apply as mentioned in case of animal's womb or otherwise? Many other religious, legal and ethical questions arise that; first: whether surrogacy agreements are against the public policy? Secondly: what would be appropriate damages for breaches of the contract? Would they be monetary, or otherwise? Thirdly: whether payment of fee in lieu of surrogacy contract violates child trafficking laws? Or is it payment for services rendered or for the child? Fourthly: would prohibition of surrogate contract violate constitutional rights to privacy or rights to procreate? Fifthly: what would be the status of surrogate child in the absence of grant of citizenship? Sixthly: will surrogacy be allowed, and whether it falls under the concept of Islamic law and objectives of *Shariah* that favors "preservation of the human species", provided with some specific conditions as per principles and guidelines of Islamic law? Seventhly: is there any material deference between '*zinā*' and artificial insemination by the husband, and AIH with the element of surrogacy or not? Eighthly: what rights will be available to the baby born under the contract of surrogacy in Islamic law? Ninthly: to what extent the types of surrogacy are compatible or incompatible with Islamic law? Are all forms of surrogacy prohibited and forbidden in Islamic law? Or do legal, moral and ethical values permit all types of surrogacy? Would legalization of surrogacy affect maintaining rule of law? And for this purpose statutory reforms are the need of the day or not?

CONCLUSION

The issue of surrogacy and the process thereof, which is the core theme of this research study, contends that it is not simply a question where theologians will deal it solely, but it is a legal, ethical and medical issue. Thus it must be settled by comprehended scholars of Islamic law along with the well-meant bioethicist or specialist's of the field. Therefore, we may presume that assisted reproductive technologies; particularly the issue of surrogacy which restoratively helped assisted births and the surrogate parentage is not as simple as deem by the contemporary Muslim scholars, because several other inter-related legal issues are involved, which ought to be settled through the course of law keeping in view the biological aspects. Hence, researchers, who are not experts in the field, and even specialist's physician, have to familiarize themselves completely with the guidelines of Islamic law and jurisprudence.

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