

An overview of the underlying legal and psychological issues of surrogacy in Islam

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Abstract

Purpose of the study: This paper attempted to deal with the issue of Surrogacy from various angles by considering the very essence of Islamic law, i.e., of Shariah. Procreation has considered sacred in Islam; no doubt, it is one of the five fundamental objectives of Shariah (Islamic law), notwithstanding the protection of self, religion, honor, and property. In Muslim societies, religion strongly influences behavior, culture, practices, and policy-making; therefore, according to the Islamic viewpoint, just legitimate pregnancy would result from intermingling sperm and ovum of a legitimately wedded couple.

Research methods: The methodology applied in the discussion is a critical analysis based on inductive and deductive approaches to the collected data. The data for this study has been collected from various secondary sources like Academic Research Papers, Research Journals, and other Electronic Sources.

Main findings: the conclusion arrived at in the article is that Surrogacy is of various categories, some of which may be Islamically valid and some others invalid. In light of the discussion, it is also concluded that Surrogacy also leads to psychological confusion over the question of motherhood, which Islam considers the highest form of human love and compassion.

Application of the study: This study would leave significant implications for legal and social dimensions. The only way to minimize the differences of opinions over any issue in Islamic jurisprudence is deliberation over the issue concerned from the angle of the objectives of *Sharī'ah* (*Maqāsid al-Sharī'ah*). The issue of Surrogacy as to its validity or invalidity from the Islamic perspective may be resolved in this way. Therefore, the study would doubtlessly help reduce social, physiological, and legal issues based on surrogate practice.

Originality and novelty of the study: The least attention has been given to legal and psychological issues in the existing literature. The present study aims to deal with the legal, psychological, and even social issues caused by the practice of Surrogacy. Therefore, this is the first study that has investigated the practice of Surrogacy from multiple perspectives, particularly analyzing them in the framework of the objectives of *Sharī'ah*.

INTRODUCTION

The most significant aspect of Islam is that it deals with both the lives, worldly and the hereafter. Islam is about moderation in every affair, whether religious or material and encompasses all the domains related to human activity, material or spiritual. Therefore, marriage has an important place in Islam, and no doubt it has declared half of one's faith because of its vital part in Muslim life. In Islam, there are two primary elements of marriage: a legal sexual delight and deeply connected to another natural human urge, i.e., procreation of the next generation. It is because man is a social being, having been raised by the society he belongs to, and he wants to pay back to society in the form of social players who could take the society further ahead.

In some cases of marriage, the procreation process appears to be blocked. Consequently, both men and women feel guilty about being unable to procreate. The process of procreation satisfies a woman's desire to be a mother and a man's wish to be a father. However, in the cases where the process of procreation fails to begin due to what is medically termed as infertility, the nucleus family feels depressed. They do not know what to do to fulfil their urge. As per World Health Organization information, infertility influences roughly 8% to 12% of couples ([Zahedi et al., 2008](#)). However, Muslim societies have approved valid and legitimate only that pregnancy resulted through the intermingling of sperm and ovum of a legitimately wedded couple, but Surrogacy may hardly fall under this approved definition of pregnancy. Muslim jurists did not appear unanimous over the issue of Surrogacy due to their differences in opinions concerning its legal implications. In Surrogacy, the involvement of three persons has observed the donor of sperm, the donor of ovum, and the gestational carrier. It has given rise to several questions that were much significant from social, ethical, psychological, and legal perspectives. The controversial Islamic responses to these questions were consequent upon different arguments inferred from the Qur'an and the Prophetic traditions.

Several decades ago, modern technology brought about a revolution in the field of the procreation process. One is known as Surrogacy, out of several ways to impregnate women seminally. The word “surrogate” literally means “substitute” or “replacement” (Usman & Daud, 2017). Surrogacy is considered one of the modern treatments in medical science for infertility (Rahemi, 2008). It is a method for those women who are incapable of bearing a child due to 'blockage of the oviduct, i.e., uterine tube or 'faulty womb', and it is hard to overcome sterility in a typical and traditional way. It helps infertile women to have their biological children (Usman & Daud, 2017). This treatment involves not only the legally married husband and wife due to their natural inability to procreate but also requires the help of another woman who is hired as a gestational carrier through an agreement called a gestational agreement (Larkey, 2002) or a surrogacy contract (Andrews, 1991). This third person is technically known as a surrogate mother in whose uterus the artificially fertilized embryo is planted using an exemplary catheter. This surrogate mother carries the embryo for a total period before its natural delivery, and after the delivery, she hands over the newborn to the couple or the donors of sperm and ovum according to the agreement (Inhorn, 2006). Quite a large number of infertile couples have benefited from this technology. However, right-thinking people raised several questions about its legitimacy and socio-psychological impacts. Muslim scholars also came forward to brace the new phenomenon. They debated over the acceptability of the issue of Surrogacy. However, due to different ways of looking at the thing, their views differed, with some supporting it and others rejecting it as illegal from an Islamic angle. In such a controversy, the best way to resolve the issue is to focus on the objectives of Islamic law.

Research questions / objectives

- To highlight the causes for the difference of opinions of Islamic Jurists about Surrogacy, some have permitted, and others have strongly condemned the practice of Surrogacy.
- To discuss the issue about claiming the real motherhood right upon the child, either that surrogate mother who helps the embryo through pregnancy and goes through the delivery experience or the woman who is the honor of ovum.

BRIEF SURVEY OF THE LITERATURE

During the ancient era, infertility was solved through polygamous marriages. References to this kind of practice are available in the Bible. For instance, when Sara (A.S.) could not bear a child for Ibrahim (A.S.), then Ibrahim had cohabited with Hagar (A.S.), and then Ismael (A.S.), the son of Ibrahim (A.S.), was born (Genesis, 16: 30).

There have been activities to solve the problem of infertility in the Hindu religion. One such practice is mentioned in the ancient Hindu tradition named “*Nīyoga*,” which in Sanskrit means “command.” In “*Nīyoga*,” a woman whose husband is incapable of becoming a father or has died without his offspring would be commanded to have sex with another individual to be pregnant. For this purpose, the appointed male sexual partner used to be a revered person in society. The child thus born was considered the offspring of the legally married husband-wife, and the biological father had no parental right in this regard, nor was he allowed any paternal relationship with the child in the future (The Laws of Manu: IX).

In ancient Arabia, before Islam, the society practiced a tradition called in history as *Zawaj al-Istabda*. In this practice, some physically weak husbands would send their wives to someone physically strong to live with them until they became pregnant. After that, the woman would return to her legal husband's house to complete the gestation period and deliver the baby, considering the married couple's child (Van Gorder, 2014). In the United States of America (Behjati Ardekani et al., 2008) and the U.K. (Crawshaw et al., 2012), Surrogacy has become an increasingly popular means of building a family in recent years. It has also indulged in other societies' infertile couples (Usman & Daud, 2017). The debate about Surrogacy has been re-opened nowadays in the circle of Sunni scholars. Some religious groups have argued about its acceptance, and others have viewed that Surrogacy is associated with numerous legal, social, and cultural problems; therefore, it should not be accepted.

The aforementioned second type of Surrogacy is undoubtedly being practiced by *Shī'a Muslims*, whereas the Sunni *Muslims* do not allow this. Iran and Lebanon have allowed Surrogacy in the light of the verdict issued by *Ayatullāh Khāmenei* in 1999 (Mirza, 2004). Some prominent religious *Shī'a* scholars of Iran and Lebanon have allowed their communities to utilize the latest technological developments, like “In Vitro Fertilization (IVF)” as a solution to infertility (Abbasi-Shavazi et al., 2008). Many *Shī'a* scholars are against the permissibility of third-party donation, whereas leading *Shī'a* authorities have allowed the third-party donation under specific conditions (Inhorn, 2006). However, many *Shī'a* scholars in Iran are against the practice of Surrogacy to remove infertility (Garmaroudi, 2008).

Contrary to the above, *Sunnī* Islam is concerned with a literal understanding of the Sacred Texts, which have guided the Sunni Muslims to avoid gamete donation (Inhorn, 2006). Therefore, seeking donor gametes have been considered by *Sunnī* jurists as adultery because, according to their viewpoint, it brings changes in the purity of lineage of a child. However, few Sunni religious scholars have permitted Surrogacy between co-wives. In the case of bigamy (when a man has two wives) an ovum would be taken from one wife, and after its fertilization with the husband's semen, it would be kept in the womb of another wife who would carry it till birth (Farag F, 2001). This matter remained for long under discussion among *Islāmīc* jurists who issued a decree (*fatwa*) over the issue. Later, this controversial verdict (*fatwa*) was presented in the Egyptian parliament (*majlis al-sha'b*) for further discussion (Abu-Rabia, 2013). After observing numerous cases, the Council nullified the practice of the surrogacy system even between the co-wives due to fear of a

high rate of mixing or impurity of lineage. Most Islamic countries have viewed third-party donations against the integrity of the marriage contract and the purity of lineage required by Islam (Serour G, 2006).

The Legal Problems Surrounding Surrogacy and *Shar'ah* Injunctions

For a baby born through Surrogacy, the father is known, but the question about the mother remains unresolved. Is the mother the one who gave the ovum (in the second type of surrogate motherhood) or the other woman who served as a gestational carrier and delivered the baby? Dr. Yūsuf Qarḍāwī declares that the child's mother is the owner of the egg, not the surrogate mother, because according to his viewpoint, from her egg, the embryo has developed. The issues of human genealogy and embryology are very much clear from various verses of the Holy *Qur'ān* and *ḥadīth* of the Prophet (ﷺ). The *Qur'ān* guides the issue of the natural mother who gives birth to the child (Al- Qur'ān, 58: 2). The *Qur'ān* always highlights the relationship between the child and the mother through the womb. The *Qur'ān* exhorts the offspring to show kindness to their parents (*wālidayn*) with a particular emphasis on the significance of the mother who gives birth to the child in pain (Al- Qur'ān, 49:13).

Allah the Exalted has mentioned in the *Qur'ān*: “*And We have enjoined man in respect of his parents—his mother bears him with faintings upon faintings and his weaning takes two years—saying: Be grateful to Me and to both your parents; to Me is the eventual coming*” (Al- Qur'ān, 31:14).

Abbas has argued that this verse is sufficient to realize birth mothers (Kabir, 2007). Therefore, in the light of the abovementioned verse, which refers to the significance of the womb relationship, that is, the actual mother is the one who carries the child in her womb and gives birth to the baby with pain (Al- Qur'ān, 46:15).

Another important analogical question may arise: Who would claim the crop legitimately, the seed merchant or the farmer? Undoubtedly, separating the ovary relationship from the womb is a new experience. Similarly, the jurists also had not faced this kind of question before. It is a staggering challenge for contemporary jurists to find its answer (Abu-Rabia, 2013). Experts and Muslim jurists believe that the word for parents has been derived from natality, “*wilādah*” in Arabic. Its verb “*Canada*” means to give birth to someone. The Arabic word for father is “*wālid*,” and for the mother, “*wālidah*.” In the dual sense, the word for both parents is “*wālidan*” or “*wālidayn*.” Indeed *wālid* and *wālidah* both would mean the source of a person's birth (Hathoul, 1989). Therefore, Allah, the almighty, says in His revealed book:

“*o mankind; we created you from a pair of male and female*” (Al- Qur'ān, 49:13)

Hence the procreation of humans is the result of male sperm and the female egg (Fazli Dyan, 2017). The primary function of the uterus is no doubt to carry on the fertilized ovum, which is implanted into her womb, and the provision of nourishment from its blood vessels which are developed entirely for this cause (Robertson, 1983). When the pregnancy occurs, the uterus works as an incubator to develop an embryo, safely developing there until birth (Serour G, 2006). Al-Rāghib al-Asfahānī, an eminent Qur'anic scholar, says that *ar-Rahim* (womb of the mother) stands for family relations or ties as it is the primary source of procreation. The Prophet (ﷺ) has highlighted the importance of *Rahim* (womb) through a beautiful allegory in a *ḥadīth*.

The Prophet (ﷺ) said: “Allah created all His creations, including ar-Rahim (the womb). So, ar-Rahim argued to Allah, seeking refuge from those who would disjoin the ties of kinship, then Allah the exalted stated: I will shower My blessings upon those who will keep your ties, but withhold My blessings from those who will not respect your ties.” (Sahih al-Bukhari, Hadith No: 5987)

According to another *ḥadīth*, the Prophet (ﷺ) stated that *ar-Rahim* gets its name from *ar-Rahman*, one of the names of Allah; therefore, Allah the exalted addressed the womb: I will keep the great connection with the person who will keep a great connection with you, and I will be away from those who disjoin you. (Sahih al-Bukhari, Hadith No: 5988)

In Jewish law, the child born with Surrogacy belongs to the woman who gives him birth and the man as a father who donates his sperm for the purpose (Armour, 2012).

2- Another heated debate is about the husband's position on the gestational carrier. Not surprisingly, this kind of incident was noticed during the era of the Prophet (ﷺ). ‘Utba bin Abū Waqqās took a promise from his sibling Sa‘d bin Abū Waqqās to take the child of the slave-girl of Zam‘ah under his care because he was his (‘Utba's) child. Therefore, Sa‘d bin Abū Waqqās had claimed: He was my sibling's child, and I had promised him his (child) guardianship. Abū bin Zam‘ah stated: “He is my sibling and the child of the slave-girl of my father and was conceived on my father's bed.” With this controversy, they visited 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 then said: “(He is) my sibling and the child of my dad's slave girl and was conceived on my dad's bed.” The Prophet (ﷺ) then judged: “The kid is for you. O Abū bin Zam‘ah.” Then the Prophet (ﷺ) proclaimed: “The child belongs to the person on whose bed he was born, and the person who had committed illicit sex deserves the stones.” The Prophet (ﷺ) also advised his wife Sawda‘ bint Zam‘ah to hide from that boy as he saw the similarity in features between the boy and ‘Utba” (Sahih al-Bukhari, Hadith No: 269).

Because *sharī'ah* demands that a child has its legitimate right to exact information about his actual father and mother? The children born outside wedlock would be considered the result of adultery, and they would not associate with their paternal family because there would be no recognition there for them. In Islamic law, they would not be given the right to inheritance, as the illegal child has relations with his mother and his maternal family only ([Atighetchi, 2007](#)).

3- Some jurists permit Surrogacy based on the analogy of breastfeeding. They view that "it is legal to vent the breast benefit, so the womb may be measured analogically on the breast" ([Serour GI, 2006](#)). A deep analysis of the Sacred Text elucidates the fundamental difference between Surrogacy and wet nursing. The *Qur'ān* has permitted wet nursing in several verses. For example:

"And the [divorced] mothers may nurse their children for two whole years if they wish to complete the period of nursing." (Al- Qur'ān,2: 233)

Moreover, the children of the milk-mother (foster mother) are declared illegal for marriage as real siblings in the *Qur'ān* in a detailed manner (Al- Qur'ān, 4:23). The abovementioned *Qur'ānic* verse is solid proof of the permissibility of wet-nursing and establishes the milk (foster) relationship between those lactated by the same mother. The following two *hadīths* explain the matter categorically:

- 1) The Prophet (ﷺ) prohibited marriage between the milk relatives of the same wet nurse (Sahih al-Bukhari, Hadith No: 2645).
- 2) The Prophet (ﷺ) said: "What is unlawful because of blood relations, is also unlawful because of the corresponding foster suckling relations." (Sahih al-Bukhari, Hadith No: 5111)

All the previously mentioned *Qur'ānic* verses and the *ahādīth* demonstrate that wet-nursing is permitted in *sharī'ah*, and it additionally builds up a unique relationship between breastfed kids and the wet-nurse's families. Then again, the individuals who advocate for Surrogacy do not have any definite *sharī'ah* proof to help them aside from their analogy of the benefit, that is, the youngster is sustained by the surrogate's or the wet nurse's nutrition. Be that as it may, the similarity of Surrogacy with weaning is invalid, as there is no reason or 'cause' for the relationship in this situation. Additionally, Islamic law standards do not consider any such benefit repudiating the *sharī'ah*. Consequently, such authorization for Surrogacy can't be conceded ([Serour GI, 2006](#)).

Because of wet-nursing, the child's heredity is entrenched, while in Surrogacy, there is, up till now, a high possibility for mixing in the ancestry. Burdens in deciding the child's genealogy may occur in various structures, such as the treatment of the donor's sperm with the surrogate's egg rather than the donor's egg; fertilization of the surrogate's husband's sperm with the donor's egg; or even fertilization of the donor is better half's sperm with the surrogate's egg ([Abu-Rabia, 2013](#)). In these cases, the child's heredity cannot be set up until it is conceived and the DNA test result comes out. In light of the above central contentions, Surrogacy cannot be viewed as admissible merely on the outward similarity between wet nursing and Surrogacy. The *sharī'ah* does not allow the utilization of rental of private parts and uterus of a person except if there is an absolute *sharī'ah* proof to substantiate that ([Atighetchi, 2007](#)).

METHODOLOGY

The adopted methodology for this study is a critical analysis based on inductive and deductive approaches. The data was collected from primary and various secondary sources like Academic Research Papers, Research Journals, and other Electronic Sources.

RESULTS AND DISCUSSIONS

According to Muslim scholars, *Māqasid al-sharī'ah* (the Objectives of Islamic Law) based upon principles like Protection of Religion, Life, Progeny, Mind, and Wealth play a crucial role in determining the nature of issues whatsoever ([Serour GI, 2006](#)). These objectives are vehemently supported by the *Qur'ān* verses (Al- Qur'ān, 23: 5–7), in which Allah Almighty describes those people who develop the relation without wedlock as transgressors. Dr. Yūsuf Qardāwī, an eminent *Islāmic* scholar, states that insemination of semen in any woman's womb other than his wife is an open violation of *sharī'ah* ruling and "transgressing the limits of *Allāh*." He also indicates that the vagina is not allowed to receive any sperm which is not of her husband. To him, the following verse supports this view.

"And Allah has made for you mates (and companions) of your own nature, and made for you out of the sons and daughters and grandchildren." (Al- Qur'ān,16: 72)

According to GI Serour, "The fundamental idea of Islam is to abstain from blending qualities. It considers that every child must be identified with a known father and mother. Since marriage is an agreement between the spouse and the husband, no outsider can meddle in the conjugal elements of sex and procreation. An outsider is not allowed to give an egg, sperm, or uterus. In this way, sperm gift, egg gift, and Surrogacy are not permitted in Islam" ([Serour GI, 1998](#)). Salim Dimiyati explains that surrogacy "is hidden adultery even though it was not committed physically.

Moreover, the child resulting from Surrogacy will be considered among illegitimate children" ([Serour GI, 2006](#)). Sheikh Shaltut issued a verdict opposing this procedure and declaring it adultery. He says: "Artificial insemination of sperm into women's womb without wedlock is according to the *shari'ah* a great sinful crime and is equivalent to adultery" ([Atighetchi, 2007](#)). Dr. Ali Gommah emphasizes that all the practices that could be a source of confusion for offspring about identifying pure lineages, like Surrogacy and adoption, must be prohibited ([Abu-Rabia, 2013](#)).

The Islamic Fiqh Academy Council has announced that Surrogacy is Islāmically illegal due to it being the cause of confusion over the genealogy and the loss of motherhood (Islam et al., 2012). The MUI has denounced the sperm donation as unlawful because the presence of outside gametes is equivalent to infidelity or adultery; that it undermines the pure lineage and child's legacy; and that the child would confront social stigma or perplexity concerning the identification of his biological parents (Serour GI, 1998). Sheīkh Tantāwī issued a special verdict and condemned the illicit practice of "renting out a uterus" (Atighechi, 2007).

Surrogacy is not free from problems even in those countries where it is permissible, like the United Kingdom or the United States (Fox, Marie, 2009), because of numerous social, ethical, and legal issues (Serour GI, 2006). In addition to that, the main legal issue is related to the parentage and custody of the child born through Surrogacy. One could see many cases of this nature in the United States, Europe, and several other countries (Ragoné, 1994). For instance, the surrogate mothers often refuse to hand over their infants after the delivery, although they are legally bound to hand over the child to the couples who hired them to serve as surrogates (Clarke, 2007).

Psychologically, the woman who lends her womb to be artificially pregnant with the sperm of someone else other than her husband remains under distress throughout the pregnancy and feels embarrassed when moving into the society as she is not the birth mother of the baby she carries in her womb (Usman & Daud, 2017).

Several scientific issues are also related to Surrogacy, particularly the issue of the high rate of impurity of lineage through surrogate practice. Islamic Fiqh Council has therefore invalidated its previous verdict about the permissibility of Surrogacy between the co-wives (where one co-wife will be the owner of the ova and the other co-wife will practice like a surrogate mother) after considering the numerous cases. For example, a case involving the delivery of twins by a surrogate mother was brought to the committee, leading to the controversy over the purity of the lineage of the newborn twins (Serour GI, 2006). In the case of Surrogacy involving co-wives, the idea of purity of lineage remains in place. The child thus born will be in a dilemma, knowing not for sure who his birth mother was, the owner of the ova, or the surrogate one who gave him birth. This situation would certainly create the child's psychological distress.

On the other hand, the surrogate mother will probably suffer emotionally due to her attachment to the child she carried for nine months in her womb until the delivery. She may relapse into trauma after facing the bitter reality of surrendering the child (Van den Akker, 2007). The surrogate turns into a negligible 'situation' or 'human hatchery or incubator' for another person's child. There is always a possibility that the surrogate mother regrets her decision to be a surrogate for someone else after some time. It will then catapult her into depression, anxiety, stress, and other psychological disorders.

None can deny that the whole surrogate practice degrades the procedure of procreation by devaluing the importance of the womb, which can now be rented, bought, or purchased for service. The surrogate technique dehumanizes the procedure of human multiplication by lessening the belly to the dimension of a product that can be purchased or leased. Indeed, the womb is not something that can be given over, rented, or hired (Usman & Daud, 2017). Here human dignity comes into question. The entire procedure of Surrogacy disregards human honor and dignity.

If a woman is allowed to rent her womb, many people will surface to hire the womb for both sexual satisfaction and fertilization greedily. Sexual satisfaction without marriage and thus fertilization are forbidden in Islam. It also would destroy the basis of the Islamic legal and social system, and we cannot predict its deadly results and horrible consequences.

CONCLUSION

The surrogacy practice may or may not be allowed to consider several dimensions, legal, social, and psychological. Out of several categories of Surrogacy involving IVF techniques, one or two may be considered legally valid, with the rest as invalid hence unlawful. The Islamic Fiqh Academy Council views most surrogacy practices as hidden adultery. It is mainly because the protection of offspring is one of the well-known objectives of Islamic law, and the surrogacy system damages the concept of offspring in the real sense of the word. Surrogacy also leads to psychological confusion over the question of motherhood, which Islam considers the highest form of human love and compassion.

LIMITATIONS OF THE STUDY

The present study has a few limitations; for example, the research was designed qualitatively; therefore, the issue's intensity demands empirical research to analyze the general approach to curtail the problem.

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AUTHORS CONTRIBUTION

Musferah Mehfooz wrote the paper and worked on the research methodology. Asma Imran searched the relevant data and edited the manuscript. Sarah Azhar worked on references and a review of the literature.

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The Holy Books

- The Bible
- The Holy Qur’ān