



A Short Note

Muslim Jurists' View on Surrogate Motherhood*

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Surrogacy and infertility treatment are closely related, yet these two practices are different in some aspects. This is so because, infertility treatment is often sought by the infertile married couples, who wish to have children through artificial insemination, and in some cases by means of in-vitro fertilization (IVF). For infertile married couples, the fertilized egg is from the intended mother who is the legitimate wife of the intended father; without involving a third party, thus it does not involve surrogacy. In the practices of artificial insemination wherein infertility treatment involves another female, other than the intended legitimate mother (this female has the fertilized egg implanted into her womb and until birth), then in this case infertility treatment involves surrogacy; not all forms of surrogacy are sought due to infertility treatment, while not all infertility treatments are solved through surrogacy. Since the raise of infertility treatments and the practices of surrogacy, ethical and legal concerns have been raised time and again. In this short note, Muslim jurists' view on moral concerns of surrogacy is addressed.

Surrogate mother is a combination of two words; surrogate and mother, the former is associated to the meaning of 'substitution' and 'replacement' or the practice of taking the place of another, while the later reflects female parent.¹ The noun surrogacy refers to the arrangement in which a woman carries and delivers a child for another couple, thus surrogate is "a person or animal that functions as a substitute for another, as in a social or family role."² According to *American Heritage Dictionary of English Language*, a surrogate mother is: "a woman who bears a child for another person, often paid, through artificial insemination by carrying, until birth, another woman's surgically implanted egg."³ Forms of surrogacy include the followings;⁴ (1) the sperm and the egg are taken respectively from a legitimate husband and wife; a husband and wife

who are the intended father and mother. The egg is fertilized and then implanted in the womb of another woman who is not the wife of the intended father. Since both the egg and the sperm come from the intended parents, the fertilized egg is genetically related to the intended parents. In this case, the surrogate mother is not genetically related to the fertilized egg, but hosts the foetus in her womb until birth.

(2) Another form of surrogacy is the process in which the sperm is taken from the legitimate husband, but the egg is taken from woman who is not his wife. The egg is fertilized and then implanted in the womb of his legal wife. In this case, the legitimate wife bears a fertilized egg that she is not genetically related to.

(3) Different from this case, is the practice of taking the sperm from the intended father, but the egg is taken from a woman who is not his wife. The egg is fertilized, and then implanted in the womb of the same woman from whom the egg is taken. In this case the female egg donor is the surrogate mother. She has not only donated her egg to the childless couple, but she also becomes the bearer of the fertilized egg. Similar to the previous example, the intended mother, which is in this case the legitimate wife of the intended father, is not genetically related to the fertilized egg and the resulting embryo, however, the offspring is genetically related to the husband.

(4) In the case whereby the legitimate husband (the intended father) is unable to produce sperm, the egg is taken from the legitimate wife (the intended mother), and the sperm is taken by means of artificial insemination from a sperm donor, another male who is not the intended father. The fertilized egg is implanted in the legitimate wife (the intended mother). In this case, since, the egg of the legitimate wife of the intended father is fertilized by donated

sperm taken from another male, only the intended mother is genetically related to the embryo.

(5) There are also cases in which the sperm is taken from the legitimate husband, but the egg is taken from another woman who is not his legal wife. The egg is fertilized and then implanted in the womb of a third woman. This case involves two females which are not married to the intended father; both the egg donor and the surrogate mother are not related to the intended father. Thus the child is only related to the intended father.

(6) There are cases in which both of the intended parents are unable to produce egg and sperm; neither the husband produces viable sperm for fertilization, nor can the legitimate wife produce an egg. Hence, both the egg and sperm are received by means of donations, and the fertilized egg is implanted in the womb of the intended mother, or in the womb of the surrogate mother. In this case, neither the fertilized eggs, nor the resulting children, are genetically related to the intended parents.

(7) Another possible way of surrogacy, which is likely to happen in the Muslim world, is the instance in which the sperm is taken from a husband who has more than one wife, and the egg is taken from one of his wives. Upon fertilizing the egg, it is implanted in the womb of the intended mother, who is another wife of the intended father. In this case, the egg donor, as well as the intended mother are the legitimate wives of the intended father. However, though the egg donor is one of the legitimate wives of the intended father, only the intended father is genetically related to the fertilized egg.

(8) Among contemporary Western societies, there are cases in which gay and lesbian couples seek to have kids by means of surrogacy. Presumably, this is a process that is not free from legal and social challenges. The legal status of the child born of surrogacy whose intended parents are a gay or lesbian couple is but one of the many challenges which arise due to marriage status of the potential parents in this situation.

Though the forms and cases of surrogate mother differ, yet it raises legal and moral questions including among others, does the surrogate mother has to give up all rights and responsibilities of the child upon the child's birth, or some of these rights can still be with her? Who is the real mother of this baby; the one who give the ovum, or the female who hosted the fertilized egg? Is it morally right to permit women to make contracts about the use of their bodies? Can the authority of respective nations enforce surrogate contracts? Another concern is what happens if the surrogate mother refuses to cede custody of the baby to the intended parents? What is

the legal status of the child? Who is the true mother of the child; the surrogate or the intended mother? If the true mother of the child is the intended mother who offered the egg, then what is the status of the surrogate mother who brought the fertilized egg to birth? What happens if the fertilized egg did not originate from the intended mother; but rather from egg donors, can the egg donor demand custody of the baby? These are but a few of the moral and legal concerns about surrogacy and test tube babies.

Contemporary ethical and legal issues of surrogacy and test tube babies, as well as concerns about sperm donation and implantation of the fertilized egg in the womb are among the ethical issues debated in the Muslim world. The Islamic perspective of surrogate motherhood begins with the Islamic understanding of motherhood. As stated in the Qur'an, mother is a woman who bears a fertilized egg, generally by means of marriage wedlock, and gives birth to a child, then raises the resulting child to maturity. In chapter 58, verse 2, the Qur'an states that the status of being a mother cannot be achieved by means of claims, but by means of giving birth "they cannot be their mothers: None can be their mothers except those who gave them birth."⁵ Furthermore, in chapter 46, verse 15, as well as in chapter 31, verse 14,⁶ the Qur'an describes the process and the nature of motherhood whereby, according to the Qur'an: "in pain did his mother bear him, and in pain did she give him birth. The carrying of the (child) to his weaning is (a period of) thirty months."⁷ In these verses the Qur'an mentions that the true mother of a given child is the mother who, after pains of pregnancy, gives birth to a child, which implies that biological mothers are the true mothers. In addition, the Qur'an also mentions that, because she has suffered the travails and pains of pregnancy (*lamalathu umuhu kurhān wa wada'athu kurhān*) as well as breast feeding (*wahamluhu wa fisāluhu thalāthuna shahran*) during infancy, the children then owe respect and kind treatment to their mothers. Hence, from Islamic perspective, it is this type of motherhood that constitutes the basis of blood ties and family relations among relatives.

Another form of motherhood that is accepted in Islam is the 'adoptive mother' which is achieved by means of breast feeding an infant (*umuhātikum min al-raġā'ah*);⁸ while the former motherhood is achieved by means of pregnancy and birth as well as breast feeding, the latter is achieved by means of breast feeding. However, the question is, if breastfeeding (*raġā'ah*) is a permissible form of achieving motherhood in Islam, can surrogate motherhood too become an acceptable method of achieving motherhood? The answer is no; the reason

is because, surrogate motherhood cannot be equated to 'adoptive motherhood' (*umuhātikum min al-raġā'ah*). This is so because in adoptive motherhood (*ummahatukum min al-rada'ah*), the child's genetic mother is known, not confused with others, however, in the case of a surrogate mother, who is the biological mother is unknown. This is because, the intended mother who gives the egg, and the female who brought the fertilized egg into birth have both contributed to the formation and the growth of the embryo, and in this case it is not clear who is the child's real mother; one give the egg and thus related genetically (DNA) to the embryo, while the other provided other essential livelihoods and thus carried the growing embryo to live. Both played vital role in the formation of resulting baby, thus who is the real mother of this baby is indeed very confusing. Second, breast feeding of the child (*radā'ah*) takes place after the birth of the child, which means that the child's progeny and identity are not confused, hence breast feeding is just a matter of providing nutrition to an existing child.

Muslim jurists illustrated the forms and practices of surrogate motherhood, and addressed its current and potential moral and legal concerns. Because all forms of surrogacy go against the principle of protection of progeny (*hifz al-nasal*), the Islamic *Fiqh* Academy under Organisation of Islamic Countries, concluded that, all forms of surrogacy including the eight forms of surrogacy mentioned earlier, are not permissible in Islam.⁹ The main reason is because all forms of surrogate motherhood lead to confusion of family lineage (*nasal*), and thus violate the basic objectives of the *shari'ah*. This is so because, Islamic ethical and legal concerns about the surrogacy and test tube babies stems from the concerns about the source of the sperm and the egg. Among the basic objectives of the Islam law is protection of family lineage (*hifz al-nasal*). However, surrogacy violates this objective, for the following reasons;

First, one of the tenets of marriage is to protect lineage, and for this reason adultery is prohibited as it disrupts the sanctity of the lineage. Surrogate motherhood is viewed in very much the same manner. Introducing sperm or an egg from foreign third part to the family relationship is tantamount to adultery and breach of marriage contract as well as the honor and dignity of the intended family, and thus not permissible.

Second, in Islam marriage is not just a financial and physical arrangement of living together, but it is a sanctified contract (*mithāqan ghalīzan*), between a man and woman to live together and share a

dignified family life. Thus, any involvement of a third part by means of adultery or through biomedical techniques including artificial insemination from sperm or egg donors is a violation of this sanctified contract of marriage. Hence, surrogate motherhood and fatherhood are forbidden in Islam because of this involvement of a third person.

Third, blood relationship is the fundamental basis of marriage and inheritance (*mirath*) in Islam, thus any practice that may undermine family ties, or create lineage confusion is forbidden. Hence, since surrogate motherhood lead to identity confusion of the babies born as a result of surrogacy, then Muslim jurists concluded that surrogate motherhood is impermissible.

List of References

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3. *Majalah Majma'a al-Fiqh al-Islāmiyi* (OIC: al-Dawrah al-Thālithah li-Mu'tamar Majalah Majma'a al-Fiqh al-Islāmiyi, Vol. 1, liss. 3, 1987).
4. *Qararāt al-Majma' al-Fiqh al-Islāmiyi fī Makkah al-Mukaramah*, (al-Qarār al-Thānī al-Dawrah al-Thāniyyah).
5. Hashi, Abdurezak A., *Bioethics: A comparative Study of its Concepts, Issues and Approaches*, 2018, (Kuala Lumpur: IIUM Press).

* The contents of this short note are explained more in chapter 11, *Bioethics: A comparative Study of its Concepts, Issues and Approaches*, Hashi, Abdurezak A., 2018, (Kuala Lumpur: IIUM Press).

¹ *Merriam-Webster's Medical Desk Dictionary*, (Massachusetts: Merriam-Webster Incorporated, revised edition, 2002), p. 804.

² *American Heritage Dictionary of English Language*, op. cit., p. 289.

³ *Ibid*.

⁴ Mohd Mahmoud Hamzah, *Ijarah al-Arġām Bayna al-ġibb wa al-Shari'ah al-Islāmiyyah*, Op. Cit., pp. 26-53, and Arif Ali Arif, *Qadaya Fiqhiyyah fī Naql al-'Ada al-Bashariyyah*. op. cit., pp. 201-214.

⁵ The Qur'an (58:2):

If any men among you divorce their wives by zihār (calling them mothers), they cannot be their mothers: None can be their mothers except those who gave them birth. And in fact they use words (both) iniquitous and false: but truly Allah is one that blots out (sins), and forgives (again and again).

⁶ The Qur'an (31:14-15):

And We have enjoined on man (to be good) to his parents: in travail upon travail did his mother bear him, and in years twain was his weaning: (hear the command), "Show gratitude to Me and to thy parents: to Me is (thy final) Goal. But if they strive to make thee join in worship with Me things of which thou hast no knowledge, obey them not; yet bear them company in this life with justice (and consideration), and follow the way of those who turn to me (in love): in the end the return of you all is to Me, and I will tell you the truth (and meaning) of all that ye did.

⁷ The Qur'an (46:15):

We have enjoined on man kindness to his parents: In pain did his mother bear him, and in pain did she give him birth. The carrying of the (child) to his weaning is (a period of) thirty months. At length, when he reaches the age of full strength and attains forty years, he says, "O my Lord! Grant me that I may be grateful for Thy favour which Thou has bestowed upon me, and upon both my parents, and that I may work righteousness such as Thou mayest approve; and be gracious to me in my issue. Truly have I turned to Thee and truly do I bow (to Thee) in Islam.

⁸ The Qur'an (4:23)

Also (prohibited are) women already married, except those whom your right hands possess: Thus hath Allah ordained (Prohibitions) against you: Except for these, all others are lawful, provided ye seek (them in marriage) with gifts from your property,- desiring chastity, not lust, seeing that ye derive benefit from them, give them their dowers (at least) as prescribed; but if, after a dower is prescribed, agree Mutually (to vary it), there is no blame on you, and Allah is All-knowing, All-wise.

⁹ Islamic Fiqh Council classified artificial insemination into the following:

الأولى: أن يجري التلقيح بين نطفة مأخوذة من زوج وببيضة مأخوذة من امرأة ليست زوجته ثم تزرع تلك اللقيحة في رحم زوجته.

الثانية: أن يجري التلقيح بين نطفة رجل غير الزوج وببيضة الزوجة ثم تزرع تلك اللقيحة في رحم الزوجة.

الثالثة: أن يجري تلقيح خارجي بين بذرتي زوجين ثم تزرع اللقيحة في رحم امرأة متطوعة بحملها.

الرابعة: أن يجري تلقيح خارجي بين بذرتي رجل أجنبي وببيضة امرأة أجنبية وتزرع اللقيحة في رحم الزوجة.

الخامسة: أن يجري تلقيح خارجي بين بذرتي زوجين ثم تزرع اللقيحة في رحم الزوجة الأخرى.

السادسة: أن تؤخذ نطفة من زوج وببيضة من زوجته ويتم التلقيح خارجياً ثم تزرع اللقيحة في رحم الزوجة.

السابعة: أن تؤخذ بذرة الزوج وتحقن في الموضع المناسب من مهبل زوجته أو رحمها تلقياً داخلياً.

الطريقان السادسة والسابعة لا حرج من اللجوء إليهما عند الحاجة مع التأكيد على ضرورة أخذ كل الاحتياطات اللازمة.

Majalah Majma'a al-Fiqh al-Islāmiyi (OIC: al-Dawrah al-Thālithah li-Mu'tamar Majalah Majma'a al-Fiqh al-Islāmiyi, Vol. 1, Iss. 3, 1987), pp. 515-516.