Assisted Reproductive Technologies (ART): Legal Framework for Surrogate Parenting under Islamic Law

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Abstract

When a man and a woman enter matrimonial relationship, it is expected that the union will procreate and raise children. So many marriages have fall-short of this expectation, making the life of couple miserable. To assist couple overcomes such misery, biotechnology came up with certain innovations through assisted reproductive technologies (ART), and surrogacy is one of them. Couple makes surrogate arrangement when conceiving a child is medically impossible or when it is deemed dangerous to the to-be mother. Surrogate parenting also allows post-menopausal women or unproductive women, career women, etc become mothers and bear children, even though they have no heritable relationship to the child. Under Islamic Law, family bond, matrimonial relations, and parent and child connection are very crucial when discussing surrogate parenting. The permissibility or otherwise of surrogacy is dependent on the interpretation and application of Islamic principles to the circumstances, thus, Muslim Jurist have divergent views on the issue. Adopting the doctrinal research methodology, this paper underscores the legal, moral, ethical, and religious challenges involved in surrogate parenting under Islamic law. The paper argued that although this scientific breakthrough raises hope to barren women that they too can be productive, the altering of human nature gives rise to several issues that are beyond human comprehension and with far-reaching consequences under Islamic law. The paper concluded that the acceptability of surrogate parenting under Islamic Law is subject to conditions that it does not infringe the sacredness of matrimonial relation and preservation of lineage.

Keywords: Assisted Reproductive Technologies, Legal Framework, Surrogate, Parenting, Islamic Law

1. Introduction

With the advancement of biotechnology especially in the field of genetic modifications as a means of overcoming infertility, couple can make surrogate arrangement when conceiving a child is medically impossible or when it is deemed dangerous to the would-be mother. Surrogate parenting allows post-menopausal women or unproductive women, homosexuals, lesbians, bisexuals, heterosexual, career women, etc. become mothers without heritable relationship to the child. Although surrogate parenting provides emotional respite for infertile spouses, yet it raises series of ethical, moral, and religious issues with legal connotations.[1]

The issue of Surrogate parenting from the Islamic Law perspective has been a much debatable one since the mid-1980s and is still being discussed with differing views amongst Islamic scholars. However, one key principle in Islam is the preservation of lineage, with the Quran clearly placing high value on the institution of marriage, and surrogacy, which traditionally involves a third party, can be seen as a challenge to this institution.[2]

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[1] S Islam, et al, 'Ethics of Surrogacy: A Comparative Study of Western Secular and Islamic Bioethics' <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3708631/#:~:text=Islamic%20ethics%20strictly%20advises%20to,dangerous%20consequence%20for%20a%20society.> accessed 28 July 2024.

[2] L Nazari, 'Surrogacy in Islam: Is Surrogacy Haram in Islam?' Med Tourism, <https://tebmedtourism.com/surrogacy-in-islam/> accessed 28 July 2024.

Muslim scholars have exerted maximum efforts to interpret and apply the rules of Islamic jurisprudence (ʾuṣūl alfiqh), in the search for views that better addresses surrogate parenting. This very feature of Islamic law has made it susceptible to development and adaptable to change in different ways through choosing certain legal views that are more appropriate as new issues emerged and makes the law legally valid regardless of time and place. However, the importance of the interpretation of Islamic Law does not lie in the different legal views held by different Jurists about a particular legal case; rather it chiefly resides in the way in which the jurist interprets the law.[3]

Under Islamic law, actions are classified in to five categories, viz; first, the forbidden acts, which are punishable. Second, the compulsory acts, which are punishable for refusal to do those acts considered mandatory. Third, the recommendable acts, which are rewarded for performing and refusal to do those acts considered abomination. Fourt, the permissible acts, which are neither permissible nor prohibitive and doing or abstaining from doing those acts attract neither reward nor punishment. Fifth, the abominable acts, which are punishable for refusal to do those acts considered recommendable and doing those considered abominable. Hence, when Islamic Jurist referred to a verse in the Qurʾān and/or Sunnah/Hadith of the Prophet (SAW), which may include an imperative or prohibitive form, he is required to specify within which categories the legal ruling of the verse and/or the tradition falls.[4]

2. Conceptual Clarification

Surrogate parenting is a brainchild of artificial insemination (AI) and in-vitro fertilization (IVF) anchored on assisted reproductive technologies (ART). In a surrogate agreement, the surrogate mother bears the fetus in her womb through the pregnancy period and hands over the baby to another family after given birth in consideration of certain amount of money as may be agreed by the parties. The surrogate mother is discharged from all responsibilities accruable to the child or its family. The basic pattern of surrogate motherhood is that the surrogate mother agrees to carry a baby for a woman who is not able to bear children due to blockage of fallopian tube, lack of uterus, infertility, making a career, etc.[5]

Surrogacy may either be genetic or gestational. In genetic surrogacy, the surrogate mother's ovum is clinically fertilized with the donor's sperm (usually the father). While, in gestational surrogacy, the ovum of a woman is fertilized by the sperm of a man in vitro and the resulting embryo is implanted in the uterus of the surrogate mother.[6]

There are, therefore, some genetic affiliations between the carrying mother and the receiving parent, which will be based on genetic contribution of the carrying mother, whether she provides the ovum. Thus, if the woman who will receive the child after birth is unable to produce her own ova and would be unsuitable for ovum or embryo donation, she requires a surrogate. But where the recipient of the child after delivery could provide her own ova, it could be implanted in another woman by the process of embryo donation. It is this concept that is referred to as 'womb leasing'. Womb leasing itself can be divided into those occasions when the recipient woman is unable to sustain a pregnancy or is unwilling to do so. In this circumstance, there is a possibility that the recipient woman who can provide the ovum but could not sustain a

[3] Ibid.
[4] JK Mason, *Medico-Legal Aspects of Reproduction and Parenthood*, (Dartmouth Publishing Co., Limited, 1990) 226.
[5] Ibid, 228.
[6] Y Elkhabaz, 'Does Islam Allows Surrogacy?' <*https://www.linkedin.com/pulse/does-islam-allow-surrogacy-yasin-elkhabaz/*> accessed on 15 June 2024.

pregnancy has, at the same time, an infertile husband and, thus, requires the help not only of a surrogate mother but also of an anonymous semen donor. Surrogacy is the most low-tech treatment to overcome infertility.[7]

It is important to distinguish between womb-leasing and surrogate motherhood, in the former, the surrogate mother would have no hereditary affiliation with the child. The essentials of womb leasing are embryo donation followed by the surrender of the resultant child to its genetic parents. In contrast to surrogate motherhood, womb leasing entails an absolute need for technical expertise. This procedure no doubt allows an infertile couple to have a child who would have the genetic complement of the husband, if the husband's sperm is used to fertilize the ovum of the surrogate mother.[8]

3. Theoretical Framework

More than forty years ago, precisely on 25th July 1978 Louise Brown, born at Oldham General Hospital, made history and became the first test tube baby given birth through IVF process. The initiative was undertaken by Patrick Steptoe, Jean Purdy, and Bob Edwards, who in 2010 received the Nobel Prize in Physiology and Medicine. IVF has given birth to the field of human embryonic stem cell biology and has led to major advances in reproductive biology.[9]

In Re - Baby M,[10] Mr. Stem's wife was infertile, and a surrogate contract arrangement was made with one Ms. Whitehead, who was eager to conceive a child for Mr. Stem, in consideration of the sum of $10,000. Ms. Whitehead was artificially fertilized with Mr. Stem's sperm, and she bears the baby and delivers it to Mr. and Mrs. Stem, and subsequently relinquishes her maternal rights and responsibilities to allow Mrs. Stem the right to adopt the child. In view of the contractual terms, the child will only be in the custody of Mrs. Stem, should Mr. Stem die. The order of Superior Court was challenged. Subsequently, the court reversed its ruling and held the contract to be invalid on point of law because it violates Statute and public policy. The court also held that any contract abandoning parental rights is illegal and further declared the adoption by Mrs. Stem unlawful.

In 1993, Dr. Jerry Halls and his team of researchers successfully cloned human embryo to aid millions of couples who were unable to have their own children overcome infertility.[11]

In 1997, Pat Anthony, a 48-years-old grandmother of Tzameen, South Africa bears the triplets of her own biological daughter, Karen Ferreira-Jorge, a 25-year-old gymnastic instructor, who could not conceive children anymore. Anthony was implanted with an ovum produced by her daughter, Karen and fertilized in vitro with the sperm of her son-in- law. This case triggered a passionate debate within medical, legal, and church circles about the complex ethical, moral and legal nature of surrogacy. Anthony is South Africa's first surrogate mother and world's first mother to bear her own grandchildren.[12]

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[7] JK Mason (n. 4) 225.
[8] Ibid.
[9] Health Europa, 'Celebrating 40 Years since the First Test Tube Baby was born' *<https://www.healtheuropa.eu/40-years-first-test-tube-baby/87294/>* accessed 16 September 2024**.**
[10] 542 A2d 52, Ct, Ch. Div. 1988.
[11] K Sawyer, 'Researchers Clone Human Ebryo *Cells'* <*https://www.washingtonpost.com/archive/politics/1993/10/25/researchers-clone-human-embryo-cells/7990c15f-2b87-4cd5-a660-2b0c7ce8bc06/*>*accessed*>*accessed 2 September 2023.*
[12] *S Orlando, 'Surrogate Mother Bear Her Own Tripplet Grandchildren', available at <https://www.orlandosentinel.com/news/os-xpm-1987-04-09-0120190269-story.html> accessed on 03/03/2023.*

In 1998, there was the birth of the first test-tube baby by Nigerian doctors at Nisa Premier Hospital, Abuja. This was considered a revolution in Nigeria's medical practice.[13]

4. Legal Framework

4.1 The Holy Quran

The Holy Qurʾān being the principal text of Islamic Law encompasses verses connected to God-the Almighty, Exalted be He, humanity, this worldly life, and the hereafter. It contains about five hundred legal and non-legal verses that unambiguously support the establishment of an Islamic legal system.[14]

4.2 Tradition (Sunnah/Hadith)

The *Sunnah* deals with the actions, sayings, and approvals of the Holy Prophet Muhammad (PBUH). Since the Holy Qur'an mainly contains broad Islamic texts, the explanations were regularly provided through the Sunnah of the Holy Prophet Muhammad (PBUH). Following the death of the Holy Prophet Muhammad (PBUH), a logical gathering of his Sunnah commenced, and the six most reliable collations of the Traditions, known as the Siha'i Sitta or Kutbu Sitta, the Six Authentic Ones, in existence today, dealing with numerous subjects were completed.[15]

4.3 Consensus (Ijma')

Consensus (ijmāʿ) denotes the unanimity of Islamic Jurists of a certain period, regarding a legal ruling on a particular action, after being subjected to divergent views and opinions. However, the Qurʾān and or the Sunnah must be the basis for consensus since it plays an important role in determining legal rules that are founded on probability.[16]

4.4 Analogy (Qiyas)

Analogy (Qiyās) denotes the basis that can provide a means to be employed by the Islamic Jurist to arrive at legal rules. To arrive at qiyas, four different stages must be followed: firstly, a fresh case that requires a legal opinion (new case *al-far*'). Secondly, the original case that was stated in the Qurʾān or the Sunnah or acknowledged by way of consensus (original case *al-asl*). Thirdly, it relates to the features of the new and the original one (effective course *al-illah*). Fourthly, it is dependent on the legal tradition that serves as the ruling in the original case, and applicable to the new case on basis of resemblance (the rule governing the original case *al-hukm*).[17]

4.5 Preference (Istiḥsān)

Preference (Istiḥsān) is a specific practice employed by Islamic Jurists that conforms to (ijtihād). It is considered a suggestion made on the grounds of a revealed text, though it prompts a diverse legal result from that reached by Qiyas. While the thought behind analogy is contained within the

[13] *B Gbadebo,* 'Nigeria: Country's First Test Tube Baby Turns 17' Leadership Newspaper, <https://allafrica.com/stories/201509010064.html> accessed 9 June 2024.
[14] RY Alwazna, 'Islamic Law: Its Sources, Interpretation and the translation of it into Laws Written in English' International Journal (2016) (29) 251 – 260.
[15] Sahih Bukhari by Imam Ismail Bukhari 194-256 AH, Sahih Muslim by Imam Muslim bin Hajjaj 204-261 AH, Jamia Tirmizi by Imam Abu Isa bin Tirmizi 209-279 AH, Sunan Abu Daud by Imam Abu Daud Sulaiman 202-275 AH, Sunan Nisai by Ahmad bin Shuaib al-Nisai 215-306 AH and Sunan Ibn Majah by Abu Abdullah bin Yazid ibn Majah 209-273 AH.
[16] RY Alwazna (n. 14)
[17] Ibid.

enormous body of the law without exemption, the thought with regards to preference is to discover a specific exemption, through the jurist's choice of a revealed text that allows it.[18]

4.6 Public Interest (Istiṣlāḥ)

Many Islamic Jurists consider public interest as an appendage of analogy due to the connection between ratio and suitability. Islamic Law is generally based on certain universal principles; the protection of life, family, marriage, etc. and the intention of Islamic Law are to serve the interests of Muslims at large. Thus, if some percentage of public interest in a certain case is consistent with these universal principles, analogy based on Istislah must be applied.[19]

5. Causes of Surrogate Parenting

So many married couples look up to surrogacy as a means of overcoming infertility because of the followings:

i. Lack of uterus
ii. Blockage of the fallopian tube
iii. Unwillingness of the wife to bear a baby.
iv. Presence of a genetic disease that the woman is unwilling to pass to her child.
v. Unwillingness of the wife to bear a child because of her career.
vi. The couple may choose surrogacy over adoption.
vii. Unmarried couples may choose surrogacy to bear a child.
viii. Same sex couples who want to have a child may choose surrogacy.[20]

6. Effects of Surrogate parenting under Islamic Law

Some Islamic Scholars argued that surrogate parenting is not permissible in Islam. According to them, the disadvantages of surrogacy outweigh its advantages and its acceptance would,[21] amongst other things:

i. It tempers with the Sunnah and natural procedure of childbirth.
ii. It lures unmarried women to hire their wombs for financial consideration.
iii. It undermines the sanctity of marriage institution, family lineage, and the bond between mother and child.
iv. It tempts married women to avoid the natural process of childbirth.
v. It encourages same sex couples to have children.
vi. It encourages legal tussle between the surrogate mother and the couple.
vii. It creates mix-up in blood ties.

7. Surrogate Parenting from Islamic Law Perspectives

Islam acknowledges infertility as two of its great Prophets had to face the trauma and taunting from their people and was later blessed with children in their old ages; Prophet Ibrahim (AS) was blessed with Ishaq (AS) and Ismail (AS),[22] while Prophet Zakariyya (AS) was blessed with Yahya (AS).[23]

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[18] Ibid.
[19] Ibid
[20] S Islam, et al, (n. 1).
[21] N Qurashi, 'The Changing Face of Reproductive Technology: Surrogate Motherhood' (*Dayton School of Law*, 1998) 67.
[22] (Qur'an 11: 71-72)
[23] (Qur'an 3:39)

The Quran, as the grundnorm of Islamic Law was revealed long before the advancement of ART; hence, it did not directly discourse the issue surrogate parenting. However, the Qur'an contained doctrines and instructions that relates to marriage institution and family lineage as the foundation for Islamic jurisprudence when considering emerging issues such as surrogacy,[24] which traditionally involves a third party and thus a challenge to marriage institution and ultimately accounted for the conservative views of some Islamic scholars towards surrogacy. While considering Islamic principle of relief for believers, other scholars argued for a more harmonious approach regarding surrogacy. This enduring clarification of Islamic values from the perspective of surrogacy reflects the dynamic nature of its jurisprudence in responding to emerging issues.[25]

However, in the absence of any Qur'anic provision or hadith expressly prohibiting surrogacy, majority of Islamic scholars assessed the issue as that of Fiqh and validated their opinions on legal analogies and considerations. Although most of the scholars consider surrogacy as unlawful in Islam, there have been a few who supported it.[26]

However, for want of space, the views of some selected Islamic School of Thoughts would be discussed to aid our understanding. These are:

7.1 Sunni School of Islamic Thought

In Sunni, jurists are on two different sides: According to the antagonists, the inclusion of another person, other than the legal husband in the process of surrogacy is akin to adultery (Zina) and the child is illegitimate. They also argued that due to genetic affiliation of the surrogate mother to the baby, there is likelihood of legal tussle between her and the would-be mother. They further argued that surrogacy is a challenge to the family, parentage and lineage, and is therefore unlawful and ethically undesirable, since the baby's origin to its biological parent cannot be established. Similarly, it contravenes the Islamic rules of inheritance founded on biological parenthood, which are proportionally and clearly stated in the Qur'an.

The protagonists, on the other hand, argued whether gestational surrogacy is acceptable in Islam. They opined that the implantation of an embryo in the surrogate mother is tantamount to inserting the sperm of a third party, other than her husband, since the main goal of Islamic Law is the preservation of humanity. However, surrogacy is permissible on fulfillment of the following conditions:

i. Insemination without the wife's body must occur by joining the husband's sperm and the wife's egg and subsequently transmitting it to the wife's uterus (IVF + Embryo transfer).
ii. Insemination within the wife's body must occur by mechanically transmitting the husband's sperm into wife's uterus (IUI).

Other conditions are:

i. Couple must be legally married.
ii. Couple must be contented with the process.
iii. The Physician must, preferably be a woman, and
iv. The physician should be a Muslim, if possible.

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[24] L Nazari, (n. 2).
[25] Ibid.
[26] Tawfique Al Mubarak, 'Surrogacy and Islam: Between Permissibility and Prohibition' <https://icrjournal.org/index.php/icr/article/view/410/389CoXmo4rqMPQ2h8FCSIdT5aA&ved=2ahUKEwjvt6rC6aWKAxWDVUEAHVDuK4EQ8tMDegQIDBAE&biw=1280&bih=559&dpraccessed> 6 September 2024.

7.2 Hannafi School of Islamic Thought

Hanafi School accepts surrogacy if the fertilization occurs with sperm of the husband and egg of the wife. Hanafi Jurists allow surrogate parenting to assist infertile couples bear children of their own, subject to maintenance of clear family lineage and parentage in surrogate arrangements. The surrogate mother uses her own egg, inseminated by the husband's sperm for the child to be considered legitimate, with all the rights and responsibilities accruable to that status. The Hanafi scholars also require that surrogacy arrangement must be transparent, and the terms and conditions must be precise, unequivocal, leaving no room for speculations. The Scholars frown at surrogate commercialization, in which the surrogate mother is entitled to remuneration for the services rendered. However, opinion varies amongst the Hanafi Jurists, but the popular view is that surrogate parenting is acceptable under exceptional circumstances, subject to Islamic principle and moral considerations.[27]

7.3 Shi'a School of Islamic Jurisprudence

The Shi'a accepts surrogacy through the application of *ijtihad* (individual intellect) and distinguished it from adultery due to the absence of penetration of the penis into the vagina. Shi'a clerics[28] apply *maslaha* (public interest) to aid their understanding of the ethical concerns in relation to ART under Islamic law. They emphasized the need to avert divorce and emotional engagements by accepting surrogacy via the application of both Qur'an and *ijtihad*. While employing *ijtihad*, their perception of an embryo is distinct from the sperm and do not contemplate the implantation of an embryo into the uterus of a surrogate mother to be like the sperm of a man not legally married to her. Majority of Shia Clerics advocated for surrogacy and opined that it is not sinful, and it is important for the preservation of the family. Thus, surrogacy is legally supported and religiously approved in the Islamic Republic of Iran,[29] a stronghold of the Shia.

7.4 Islamic Fiqh Academy Council

The issue of surrogate parenting was deliberated at the meeting of the Islamic Fiqh Council.[30] After a thorough examination of the subject matter, study the research and views of Jurists and experts presented, Council resolved that the methods of artificial insemination that are currently identified are seven, viz:

i. Where insemination occurs between the sperm of a man and the egg of a woman who is not legally married to him, then the embryo is inserted into his wife's uterus.
ii. Where insemination occurs between the sperm of a man who is not her legal husband and the wife's egg, then the embryo is inserted in the wife's uterus.
iii. Where fertilization occurs between the sperm and egg of the couple, and the embryo is inserted in the uterus of a surrogate mother.
iv. Where insemination occurs between the sperm and egg of strangers, outside the womb and the embryo is inserted in the uterus of the wife.
v. Where insemination occurs between the sperm and egg of the couple, outside the womb and the embryo is inserted in the uterus of the other wife.
vi. Where sperm and egg of legally married couple is taken and insemination occurs outside the womb, and the embryo is implanted in the wife's uterus.

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[27] Ibid.
[28] In 1999, Ayatollah Khamenei, the Supreme Leader of the Islamic Republic of Iran issued a *fatwa* (a religious decree) that permits surrogate parenting, if the sperm and egg are taken from legally married couple.
[29] L Nazari, (n. 2).
[30] Held on 8 – 13 Safar 1407 AH (11th – 16 October 1986).

vii. Where the husband's sperm is taken and placed in the wife's vagina or uterus so that insemination may take place inside her body.

After due considerations of all the facts presented, the Council came to the conclusion that the first five methods as stated above are not permissible under Islamic Law due to their effects: mixing of lineages, loss of motherhood, etc. However, the Committee advocated for the sixth and seventh methods, with emphasis that all necessary precautions be essentially taken.

7.5 Other Islamic Jurists

Many Islamic jurists are of the view that the principles of fairness, public good, and necessity (*maslahah*) is applicable to the state of surrogacy. They argued that even some forbidden behaviours are permissible in Islam due to necessity and greater benefit of society. They maintained that the doctrine is applicable to infertile couples for the preservation of their rights to marriage, family formation, and procreation. They also argued that since the principal aim of Islamic law (maqasid) is to preserve humankind and if infertility is seen as an illness, then surrogate parenting can serve as a cure. Therefore, surrogate parenting is permissible to infertile legally married couples due to the necessity to save their marriage and family lineage, as well as social and psychological trauma. As such, surrogacy should be seen from the perspective of liberal analysis of Islamic law instead of complete proscription.[31]

On the analogy of Maqasid, the group claimed that if a married couple is unable to bear children themselves, surrogacy, as a means that overrides their inability should be accessible to them based on maslaha (public interest). The surrogate mother not bearing her own child can be excusable; she is merely acting as an incubator by leasing her womb and not engaged in any form of zina. Besides, since genetic parentages are already established, there is no fear of unclear lineage of the child.[32]

On the other hand, the opponents of surrogacy argued that surrogate parenting is not permissible in Islam, because it is tantamount to Zina (adultery) since the surrogate mother is inseminated with the sperm of someone who is not legally married to her. They also argued that the lineage of the child, being a product of surrogate arrangement is devoid of lawful marriage and must be considered illegitimate. Thus, if the product is haram, the means of acquiring the product is also haram. They argued further that, since the surrogate mother has a higher stake in the child, there is possibility for emotional and legal tussle between the surrogate mother and the would-be mother. They contended that aim of law is minimize the likelihood of disputes in the society, as it is apparent from legal dispute between surrogate mother and would-be mother that law has been battling to quash.[33]

To buttress their argument, this group of scholars relied on Surah al Mujadalah,[34] where the Quran states: "… their mothers are only those who conceived them and gave birth to them (waladna hum) ". They contended that the Arabic verb "walada" refers to the procedure of bearing (wiladah) – from conceiving to delivery and not the act of carrying (haml) and giving birth (wad). Thus, the Surah explicitly repudiates any rights of motherhood to the surrogate mother. They further contended that the ill of family mix-up and legal dispute arising therefrom far outweighs the benefit

[31] S Farid, 'Why Islam has two ways of Looking at surrogacy' (2023) <https://360info.org/why-islam-has-two-ways-of-looking-at-surrogacy/> accessed 22 September 2024.
[32] N Quraish, (n. 21).
[33] (n. 10).
[34] Qur;an 58, Verse 2

of surrogacy. The child will be a cause of eternal stress for all parties and subsequently harm the child. They relied on the Islamic maxim that states: "Harm is to be avoided before benefit is derived".[35]

They also relied on the hadith of Prophet (SAW) that states: "The child belongs to the marriage-bed and for the adulterer is the stone." They further cited the Qur'an,[36] where Allah (SWT) has commanded us to guard our chastity, as HE states: "And those who guard their chastity (i.e., private parts, from illegal sexual acts) except from their wives or (the slaves) that their right hands possess, for them, they are free from blame."

Moreover, they argued that the process leading to surrogacy undoubtedly requires looking at the 'awrahs, the private parts of another person's wife, sperm collection, eggs extraction and insertion in the uterus, which is not permissible in Islam. As Allah (SWT)[37] says "Tell the believing men to lower their gaze (from looking at forbidden things) and protect their private parts (from illegal sexual acts)." These Jurists vehemently argued that surrogate parenting is an invention of western civilization, which is indecently materialistic and without regards for moral values.[38]

Other opponents of surrogacy argued that fertilization outside the human body is permissible subject to certain strict conditions. They contended that it is not permissible to insert the sperm of any man into the uterus of a woman other than his legal wife. It is also unlawful to insert an embryo that is developed in an unlawful manner into a married woman. Consequently, the rulings will be as follows: [39]

i. If the couple is married, the child belongs to the husband even if the inseminated sperm was not his.
ii. If the child is gotten from haram embryo, the child belongs to the husband even if the embryo was formed by fusion of the wife's ovum with the sperm of a man other than the husband.
iii. The sperm donor has no legal right over the child even if prior agreement was entered into, given him such right.
iv. Where the surrogate mother is not married, the child would be considered illegitimate and regarded as hers.

They relied on a well-founded principle of Shariah that if the means violate a basic purpose of Islam, then it must be blocked. According to them, surrogate parenting is not welcomed within the Islamic system, for the disadvantages outweigh the advantages.[40]

There is also a strong indication that infertility is a disease, but as far as Islam is concerned, for every sickness, there is a cure. Abu Dawud recorded that Abu al Darda reported that the Prophet (SAW) said, "Allah created the disease and also the cure and for every disease, He has provided a cure, so treat yourselves with the medicine, but do not treat yourselves with the prohibited things."

In another hadith recorded by Imam al-Bukhari on the authority of Mas'ud (RA) that the Prophet (SAW) says, "The Almighty Allah has not provided as treatment for you in that which is

[35] Health Europa, (n. 9).
[36] Qur'an 23 Verses 5-6
[37] Qur'an 28
[38] U. Mohammad, 'Does Islam Allows Surrogate Motherhood? (2022) <littn://foi-ums.nlmnelirib.or2/showthi-eacI.DhD?t=3444?> accessed on 6 September 2024.
[39] Y Elkhabaz, (n. 6).
[40] Ibid.

prohibited." It is also reported that the Prophet (SAW) says, "Never is a believer stricken with discomfort, hardship, illness, grief or even mental worry, except that his sins are expiated for him."

The Qur'an states that: "To Allah belongs the dominion of the heavens and the earth. He creates what He wants. He bestows children (male or female) according to His will; or He bestows both males and females, and He leaves barren whom He will: for He is full of Knowledge and Power."[41]

To lend credence to this line of argument, one is tempted to ask whether Pat Anthony's bearing of the children of her biological daughter, Karen, is morally justifiable? The situation is dicey, as the surrogate children share multiple parenthoods. They are Karen's, brothers, and sisters, and at the same time, would be legally regarded as Karen's children. Karen would in turn be sharing two types of relationship with the same children; she is their mother and their sister too.

It is to be noted that one of the major factors that motivate Muslims to seek for knowledge in the scientific field is primarily to understand the creation of Allah (SWT) to be drawn closer to the Creator. It is neither intended to exploit nature, nor to dominate it as rivals of Allah (SWT), or to exert some level of control over life and death.[42]

8. Notable Criticisms on Surrogate Parenting

Islam is not alone in its condemnation of surrogate parenting; it is frowned at even within the Church circle.

The Warnock Committee was quick to point out that the objection to surrogate parenting was thought to be that it attacked the values of marital relationship.[43]

In Re Baby M,[44] the Court held the surrogate contract to be invalid because it violates state statute and against public policy. The statute sanctions the use of money in relation to adoption of children and considers it inconsistent with public policy because it allows parents to determine the child's custody in advance of birth and fails to consider the best interest of the child. The court further held that the transaction constitutes the sale of a child.

The Bishop of New Jersey, United States of America (USA) suggests that surrogate parenting exploits the child as a commodity and the woman as a baby-maker.[45]

In 1964, the Archbishop of Canterbury, United Kingdom (UK) constituted a committee to study the implication of artificial insemination. The report held that donor artificial insemination is essentially breaches marriage institution, illicit and detrimental to the child and therefore contravenes Christian values.[46]

Western secular philosophers argue that rather than promoting a healthier family tie, surrogacy threatens it and rather than been happy for overcoming infertility, couple may engage in disputes, since the wife may have no genetic affiliation to the child, but the husband has; this may ultimately be a source of challenge to the marriage.[47]

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[41] Chapter 42 Verse 49 – 50.
[42] AM Ebrahim, *Abortion, Birth Control and Surrogate Parenting: An Islamic Perspective,* (International Islamic Publishing House, Saudi Arabia, 1989) 33.
[43] JK Mason, (n. 4) 227.
[44] (n. 10) per J. Super
[45] Times Magazine, January 19, 1987.
[46] EM Ebrahim, (n. 42) 22.
[47] S Islam, (n. 1).

It was suggested that before 1981 about 40 per cent of surrogate mothers in the US were either unemployed or in receipt of welfare benefits. This means that the economic pressures are probably greater than one would care to admit, thus consent to surrogacy cannot be said to be free and unfettered in all cases.[48]

9. Conclusion

It is uncontestable that biotechnological advancement contributed positively towards assisting infertile couple become parent and bear children of their own, however, there are legal, moral, ethical, and religious challenges involved in surrogate parenting under Islamic law.

As discussed above, the attitude Islamic Jurists towards surrogate parenting is not unanimous. From the view of a group of Sunni scholars, surrogate parenting is not permissible because it is akin to adultery. While other Sunni Jurists and almost all Shia Jurists and Leaders of Thought approved of it and believed that it is not comparable to Zina since it lacks the physical penetration of the penis into the vagina.

Under Islamic Law, family bond, matrimonial relations, and parent and child connection are very crucial when discussing surrogate parenting. Its permissibility or otherwise in Islam is dependent on the interpretation and application of the principles to the circumstances of each case, subject to conditions that it does not infringe the sacredness of matrimonial relation and preservation of lineage.

Islam teaches that procreation is an exclusive prerogative of Allah (SWT); whatever techniques and resources one applies, if Allah (SWT) in His infinite mercy refuses to bestow one with a child, one can never have it. Consequently, a Muslim should first have recourse to beseeching Allah (SWT), for if Allah (SWT) wishes to bestow him with a child, nobody can thwart it.

Alternatively, couples resorting to surrogate parenting must ensure that the processes are not unlawful and must always contact Islamic Jurists and experts in this area in order not to contravene the conditions and values as prescribed under Islamic Law.

[48] JK Mason, (n. 4) 229.