

ISLAMIC VIEWPOINT ON SURROGACY WITH THE SECOND WIFE

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Surrogacy is a technique of assisted reproduction that involves the employment of IVF in a distinct way. It is indicated in women who have a problematic uterus due to which they cannot gestate an embryo. Although surrogacy appears to be simple, but ethical, legal, and psychological issues involved in it are complex. A majority of Muslim jurists is against any kind of surrogacy; only a few of them approve it with strict regulatory measures. However, there is some hope for infertile Muslim couples if the surrogate arrangement is made between a man and his second wife. This paper aims to highlight the Islamic viewpoint on the possibility of surrogacy with the second wife.

Key Words: Surrogacy, gestational, necessity, mother, genetic mother, surrogate.

By definition, surrogacy is the practice whereby one woman (the surrogate mother) carries a child for another person or persons (the commissioning couple) as the result of an agreement prior to conception that the child should be handed over to that person after birth.¹ The practice of surrogacy comprises two kinds. In the first kind, a woman is impregnated with the sperm of the commissioning male by AI. The surrogate contributes her ovum as well as uterus; this is known as “traditional surrogacy.” The other kind of surrogacy is coupled with IVF-ET in which the embryo is transferred to another woman, who contributes only her uterus. This is known as “gestational surrogacy.”

Verdict against Surrogacy

The opinion of majority of Muslim jurists, the bodies of *fatāwāh* and Islamic biomedical organizations is against the use of any kind of surrogacy. For instance, the Seminar on Human Reproduction in Islām held by the Islamic Organization for Medical Sciences (IOMS) in 1983 A.D. stated in recommendation No. 5 while commenting on the practice of IVF-H:

“It was also agreed that the practice is unlawful if it involves an alien party, whether in the form of semen, an ovum, an embryo, or a womb.”²

This means the procreation must be a role of a married couple, with the exclusion of donated sperm, ovum, embryo, or womb. The surrogate is not related to the commissioning father, so his sperm cannot be deposited in her womb in a traditional surrogate arrangement, as this is forbidden to use a uterus for an alien sperm. The Prophet (ﷺ) made it *ḥarām* by the following statement:

لَا يَجِلُّ لِأَمْرِي يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ أَنْ
يَسْقِي مَاءَهُ زَرْعَ غَيْرِهِ

“It is not lawful for a man who believes in Allah and the last day to water what another has sown with his water.”³

The preservation of lineage (*ḥifẓ al-nasab*) is a necessary objective of *Shari‘ah* and care must be taken in matters related to genealogy. Therefore, the gestational surrogacy is also forbidden as it involves the donation of a human fertilized ovum to the uterus of an unrelated woman. The IOMS Symposium on “The Islamic Vision of Some Medical Practices” held in 1987 recommended in the 14th recommendation:

“It was unanimously approved to emphasize the fifth recommendation of the symposium on “Reproduction in Islām” regarding the prohibition of implanting a woman’s fertilized ova in another woman’s uterus. Adequate precautions must be taken to prevent the use of fertilized ova in such an illegitimate pregnancy.”⁴

The Council of the Islamic Fiqh Academy of Jeddah in its third session held in Amman in 1986 discussed seven methods related to test-tube baby, as they used the term, though it is a misnomer. Among these seven methods, only two were approved as permissible that concern homologous AI and IVF. The prohibited methods involve the donation of gametes, or transfer of embryos to unrelated women. One of them reads the following:

“(Prohibited is) The fertilization taking place *in vitro* between the semen and the ovum taken from the spouses, and the fertilized ovum is then planted in the womb of a volunteer woman.”⁵

This is the prohibition of gestational surrogacy with an unrelated (*ghayr mahram*) woman. This is strange to find that all five prohibited methods concern *in vitro* fertilization. The traditional form of surrogacy that involves *in vivo* fertilization in the surrogate by using a man’s semen has not been mentioned. The same Council discussed the fate of surplus fertilized ova and reiterated its verdict on gestational surrogacy in another way in its sixth session held in 1990 in Jeddah: “It is prohibited to inseminate fertilized ovules into another woman. Precaution must be made to prevent the use of the fertilized ovules in an unlawful pregnancy.”⁶

The Islamic Fiqh Council of Makkah discussed the issue of artificial insemination and test tube babies in its seventh session held in 1984. The Council detailed seven possible methods and prohibited all those among them that involve the donation of sperm, ovum or use of uterus of another woman. Two methods were approved that involved AI and IVF between husband and wife. One of the prohibited methods relates to surrogacy:

“The external insemination takes place in the test container between the sperm and ovum of the couple then, the zygote is planted in the uterus of a woman who volunteers to bear it.”⁷

On March 29, 2001, the Islamic Research Council of Al-Azhar issued a decision that prohibited all types of surrogacy arrangements that involve a third party including use of cryopreserved gametes subsequent to divorce or the death of a spouse. Despite these views,

some jurists approve of gestational surrogacy who disagree on whether the surrogate must or must not be a second wife of the husband⁸). For instance, Abd al-Mu‘ṭī Bayyūmī (d. 2012) argued for the permissibility of womb-leasing on the basis of an analogy with breast feeding.⁹

Surrogacy with the Second Wife

As seen above, the main thrust of all rulings related to surrogacy is on the risk of lineage that exists when the male and the surrogate are unrelated. However, the problem of lineage in the procedure of surrogacy may be removed if the commissioning male and the surrogate-to-be are related to each other with a valid marriage (*nikāḥ ṣāḥīḥ*).

As a general understanding, the participation of a third person in a husband-and-wife relationship has been denied by a majority of Muslim jurists even if that third person is the wife of the commissioning male. One striking reference was seen when the Islamic Fiqh Council, Makkah, approved of surrogacy in 1984, on the condition that the surrogate is the second wife of the commissioning male. It says while commenting on the permissible methods of IVF:

“The seventh method (in which the sperm and ovum are taken from the couple, and after their insemination in the test-container, the zygote is planted in the uterus of the other wife of the same husband, whereas she volunteers out of her own choice for this pregnancy on behalf of her co-wife, whose uterus is surgically removed) seemed to be permissible to the Council, if it is really needed and the above-mentioned general conditions are met.”¹⁰

The collective wisdom of the Council can be read in the words of the ruling. It was a conditional permission, and it laid down six conditions for this as follows:

1. The procedure of IVF shall be done with homologous gametes, i.e. “*the sperm and ovum are taken from the couple.*”
2. The male and the surrogate must be related to one another by a marriage, i.e. “*the zygote is planted in the uterus of the other wife of same husband.*”

3. The surrogate shall perform the procedure with her free choice; she cannot be forced to engage in it. Moreover, she shall do this as a volunteer; not for the sake of money, as it says “*she volunteers out of her own choice.*”
4. There shall be a definite necessity for it as the first wife is a person “*whose uterus is surgically removed.*”
5. The other causes of necessity or need shall be justified and the procedure is done only “*if it is really needed.*”
6. The conditions of caution shall be observed and the procedure is done only if “*general conditions are met.*” That is, expert doctors shall perform the procedure; preferably a female shall do it, and a male doctor is consulted only in the absence of a female; a family member shall be present at the time of transfer of embryos; and the exposure of the female body is limited to the possible extent.

The *fatwā* was a blessing for those couples who are infertile because the wife’s uterus has been removed. She becomes a barren after her hysterectomy, and there is no other choice for her to have her own child. Obviously, she experiences hardship (*mashaqqah*) and suffers from a necessity (*darūrah*). Similarly, a woman who has premature ovarian failure may become barren because she cannot produce ovum. Nonetheless, she has a uterus and can serve as a surrogate mother. She is also in need of marriage and children. Moreover, if a husband’s wife has become barren after hysterectomy, he may marry a woman who has premature ovarian failure, now both women may benefit from surrogacy. The first wife will give ovum and the second wife will gestate. Both will become mothers in this way.

The Holy Qur’ān proclaims concerning those who are in extreme necessity:

فَمَنْ اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ

“But whoever is forced (by necessity), neither desiring (it) nor transgressing (its limit), there is no sin upon him.”¹¹

Al-mashaqqah is more general than *darūrah* and an easement (*taysīr*) is brought to remove the hardship. One way of ease is to allow in time of necessity what has been disallowed in normal situation. The

surrogacy with the second wife is not allowed when the first wife is healthy and fertile as there is no need of it.

Idṭirār and *ḍarūrah*, on the other hand, appear due to *ḍarar* to the individual. When a person is afflicted with harm, he is in need of a way out to prevent himself from it. In such a needful situation, an effort is made to remove the harm as far as possible. Therefore, if the first wife of the husband is ill and does not have a uterus a harm (*ḍarar*) afflicts her that shall be removed:

الضَّرُّرُ يُدْفَعُ بِقَدْرِ الْإِمْكَانِ

“Harm shall be repulsed as far as possible.”¹²

Hence, when her *ḍarūrah* is justified, the surrogacy arrangement with the second wife that was impermissible in normal situation becomes permissible for her. The permission in her context means a concession (*rukḥṣah*) in her case due to necessity. Although she may also remain content with her childless status as a matter of resolve (*‘azīmah*), but resoluteness of one woman does not prevent the other from choosing concession. *Rukḥṣah* for her is to permit her surrogacy with a co-wife of her husband despite its prohibition for the general population of healthy women as per the juristic maxim:

الضَّرُورَاتُ تُبَيِّحُ الْمَحْظُورَاتِ

“Necessities render the prohibited things permissible.”¹³

The Qur’ānic verse puts two limitations to the doctrine of necessity: the absence of *al-baghy* and *al-‘adā’*. Now, the verse means that the concession due to necessity shall be extended to an individual who is not *bāghī*, i.e., who does not surpass the extent up to which the need can be fulfilled, and who is not *‘ādī*, i.e. who does not transgress the limits of permission to enter into the sphere of prohibition. If the couple undergoing surrogacy with the second wife fulfil both conditions, they can be considered a suitable case for *rukḥṣah* due to *idṭirār* or *ḍarūrah*.

Obviously, the concession is given for medical reasons, not for

non-medical reasons. Therefore, if someone performs gestational surrogacy with the second wife to preserve the physical beauty of the first wife, or to accomplish the pursuit of her career, or to relieve her of the pain and discomfort of gestation, then the concession will be revoked and the original prohibition will come into play:

مَا جَازَ لِغُدْرٍ بَطَلَ بِرَوَالِهِ

“Whatever is permitted due to an excuse becomes invalidated on cessation of the excuse.”¹⁴

The *fatwā* of 1984 was beneficial for women with a problematic uterus. It contained the spirit of consideration of public welfare (*maṣlahah murṣalāh*). However, in 1985, the same approval was withdrawn. This raises doubts on the withdrawal, as the duration of one year is a very short period to judge the pros and cons of the previous ruling. The *fatwā* of the approval of the practice and its dissemination required time more than a year. Even if people acted upon the permission, they would need more than one year to get a child via surrogacy with a co-wife. Did the Council receive sufficient data to come to a conclusion that the previous verdict had been problematic? If they did find it permissible a year ago, then for what reasons this was done? What appeared before them to change their opinion? If surrogacy with a co-wife was plainly against the principles of Islām, then the members of a Council could not have agreed to it for a while.

In 1985, the IFC, Makkah, gave reasons to revoke their previous verdict. Their main concern is the risk of the possibility of another pregnancy in the surrogate by the husband’s intercourse. The surrogate will contain two zygotes in this situation, one with her own ovum and the other with the ovum of the first wife. The complications will occur as regards to the identity of each zygote. The observations made by the Council follow:

“The second wife in whom the fertilized ovum of the first wife was planted, may conceive second pregnancy before the closure of her uterus for pregnancy of zygote, through the husband’s intercourse with her in a period that is close to the plantation of zygote, then she delivers twins and it is not known who is

the child born out of zygote and who is the child born out of the husband's intercourse. It is also not known who is the mother of the child born out of zygote and who is the mother of the child born out of the husband's intercourse. One of the two pregnancies may terminate as leech or embryo and its abortion takes place with the delivery of the other pregnancy, which is also not known whether this child is out of the zygote or out of the husband's intercourse. The whole situation causes the mixing of lineage from the side of real mother for each of the pregnancies. It also causes the confusion in respect of other related rulings. Therefore, the entire issue made the Council to stop its ruling on this case."¹⁵

The argument for the reversal of the *fatwā* can be scrutinized in the following:

1. The husband can avoid copulation with the second wife for three previous menstrual cycles before performing the procedure of surrogacy. If he confesses of the conjugal act with his second wife, then wait for three menstruations to pass by to ensure that her uterus is now free.
2. The surrogacy may be performed after ultrasound examination of the uterus for clarification (*istibrā' al-ḥamal*). Then, monitor her during the progress of the procedure. Once implantation has occurred after embryo transfer, it is established that this embryo belonged to the first wife. After this time, if she gets pregnant with her husband, the age of both embryos will be different, so they can be easily distinguished.
3. Another option is to perform the marriage contract (*'aqd al-nikāḥ*) between the husband and the second wife, and provide them separation for some time when there is no other impediment to copulation. This will establish *khalwah ṣaḥīḥah*, though actual copulation has not taken place. Now, the uterus of the second wife is free and embryo transfer can be performed without any risk of another pregnancy. The husband may copulate with her after the delivery of this child.
4. There is another solution that the second wife may agree to surrogacy provided she has her first child with the husband and has passed the suckling period of two years. Now, her

right of having a child is preserved and she can avoid copulation for three cycles before going for surrogacy for the first wife. This stipulation may be settled before the marriage contract.

Although, since 1985, the general prohibition on surrogacy with the second wife has existed in the Muslim world, but the exceptional cases can be treated with the procedure while observing the following limitations of the *Sharī'ah*:

1. The marriage contract shall be valid.
2. The second wife shall give her consent to the procedure.
3. She shall be treated as a wife, not a 'surrogate on rent'. She shall receive a dower (*mahar*), food and clothing (*nafaqah*) and accomodation (*suknā*) according to the custom and the agreement of the marrying parties.
4. The first child shall belong to her irrespective of the gender of the child, and surrogacy may be performed when two years of suckling have passed.
5. She may ask for the husband's right to divorce to be delegated to her before performing the surrogacy. In return, she shall agree to relinquish her right to the custody of the child to the first wife.
6. The surrogacy shall be done only for one child irrespective of the gender of the child, and that must be performed after the second wife has received her own child. Now, both women will have a child each.
7. Both wives shall live with the same husband like any other polygamous arrangement after the procedure.
8. Both women will become mothers in their respective manner. One is the ovum donor, the genetic mother, and the other has given birth, the surrogate mother.
9. As both are wives of the same husband, the right of visitation is secured. The emotional trauma to the surrogate mother may be relieved as she has her own child, and she can also visit the other child. The emotional bond between the genetic mother and the child is strong as he resembles her mother and gets her characteristics. Moreover, the genetic mother may receive medicines for an induced lactation and breastfeed him to experience the feeling of suckling. In this way, the surrogacy arrangement is superior to the adoption of a child.

10. The deprived women may be preferred for the second marriage in this case. Such women might agree to the procedure to find a safe home and a comfortable life, otherwise they are neglected on account of poverty, disability, ugliness, orphanage, widowhood, divorcement, ignorance, and cultural drawback. If the second wife is of a lesser status than the first, she is more inclined to accept her as a competitor. The second wife will also tend to avoid confrontation with the first woman. The relationship of the first couple may persist due to love, while the relationship of the second couple will persist due to children. Although the second wife is a marginalized woman, but she is the mother of both children in the home, hence, her status will improve in the family and in the society.

Real Mother in Gestational Surrogacy

The technique of artificial insemination involved separation between the conjugal and procreative acts. The *in vitro* fertilization involved the issue of collecting an ovum from a woman's body and fertilizing it in a laboratory. Now, the surrogacy poses another issue: the separation of ovum and uterus in procreation, i.e., a separation between the genetic mother and the gestational mother.

In AI and IVF, the embryo belonging to a woman is sent back to her uterus. Hence, the ovum and the uterus come from the same woman. But, in surrogacy the ovum and uterus are separated, which is unprecedented in Islamic jurisprudence. The main concern is to find who is the 'real mother', whether a genetic mother (ovum donor) or a surrogate mother (uterus donor)? A sundry of juristic, legal, ethical and economic issues relates to the real mother that may be jeopardized in confusion of *nasab* to the woman.

The Muslim discussions on the subject vary with respect to the identification of the real mother in a surrogate arrangement. Most of them consider the surrogate as the real mother because she suffers the pangs of pregnancy and childbirth, whereas some of them consider the ovum donor as the real mother because she is supplier of genetic matter of the child.

The arguments that consider the employment of the word *wālidah* to refer to the real mother might not be very useful. This is because a perusal of the text reveals that the words *umm* and *wālidah* have

been used interchangeably. In surrogacy, to define the real mother with the term *wālidah* is difficult, because normally *umm* (the genetic source) is the *wālidah* (the birth giver) and each of these terms can be used for the other. Consider the following verse that describes parental relations:

وَوَصَّيْنَا الْإِنْسَانَ بِوَالِدَيْهِ إِحْسَانًا حَمَلَتْهُ أُمُّهُ كُرْهًا وَوَضَعَتْهُ كُرْهًا وَحَمَلُهُ
وَفَصْلُهُ ثَلَاثُونَ شَهْرًا

“And We have enjoined on man kindness to his parents. His mother carried him with hardship and gave birth to him with hardship, and his gestation and weaning (period) is thirty months.”¹⁶

The injunction of kindness is given to a man about his ‘*wālidayn*’ (*wālid* and *wālidah*), i.e., those who give birth (*wilādah*). One has to perceive with a neat caution that the term *wālidah*, as referred to in the word *wālidayn*, has been used synonymously with the term *umm*, which occurs in the next part of the verse. Hence, *wālidah* (the birth giver) and *umm* (genetic mother) mean the same woman in this verse.

The above verse reveals that the mother (*umm*) is the one who bears the child (*ḥamalathu*), then delivers him (*waḍa’athu*), and suckles him (*fiṣāluhu*). Among these functions of a mother, pregnancy (*ḥamal*) and delivery (*waḍ’*) cannot be separated, but pregnancy (*ḥamal*) and suckling (*raḍ’*) may be separated from other processes. With this separation, however, the status of the woman as a mother does not break down. She who breastfeeds is equal to the mother who bears the pregnancy and gives birth.

In fact, a mother has four functions as mentioned in the Qur’ān: Pregnancy (*ḥamal*), delivery (*waḍ’ ḥamal*), suckling (*raḍ’*) and nurturing (*tarbiyah*). Three of them have been mentioned in the above verse. The fourth function is mentioned in the following prayer taught to the children to ask for their parents (father and mother):

قُلْ رَبِّ ارْحَمْهُمَا كَمَا رَبَّيْتَانِي صَغِيرًا

“Say, My Lord, have mercy upon them as they brought me up (when I was) small.”¹⁷

Pregnancy and delivery are biologically united, but suckling and nurturing may be separated. The foster mother (by milk) does not contribute ovum or uterus still she becomes a mother, whereas a surrogate is providing her uterus with full gestation, she shall preferably be called a mother.

The utilization of the womb is fairly a good point of reference for a mother. The woman whose womb has been used for pregnancy shall be a mother. A number of Qur'ānic verses hint that a mother (*umm*) is the woman in whose womb the fetus resides:

وَإِذْ أَنْتُمْ أَجْنَاءٌ فِي بُطُونِ أُمَّهَاتِكُمْ

“(He was the most knowing of you) when you were fetuses in the wombs of your mothers.”¹⁸

She is the woman who offers her womb so that the fetus undergoes its stages of creation in it:

خَلَقَكُمْ فِي بُطُونِ أُمَّهَاتِكُمْ

“He creates you in the wombs of your mothers.”¹⁹

She is the woman who delivers the child as the following verse says:

وَاللَّهُ أَخْرَجَكُمْ مِنْ بُطُونِ أُمَّهَاتِكُمْ

“And Allah has brought you out from the wombs of your mothers,”²⁰

The above verses show that gestation has a special connection with the identification of a mother. *Ummuhāt* are the ones whose wombs are used for gestation and development of fetuses and the same are also *wālidāt* as the fetuses come out of their wombs. In the last verse, *ummuhāt* is used in the sense of *wālidāt*.

Ummuhāt, the plural of *umm*, may be used to refer to the gene pool of ovum donors of a person, that is, it may refer to his mother up to all women above her. The Ḥanafī corpus, *al-Hidāyah*, comments on the prohibition of marriage with women in the following words:

قَالَ (لَا يَحِلُّ لِلرَّجُلِ أَنْ يَتَزَوَّجَ بِأُمِّهِ وَلَا بِجَدَّاتِهِ مِنْ قِبَلِ الرِّجَالِ
وَالنِّسَاءِ) لِقَوْلِهِ تَعَالَى {حُرِّمَتْ عَلَيْكُمْ أُمَّهَاتُكُمْ} وَالْجَدَّاتُ أُمَّهَاتُ، إِذِ الْأُمُّ
هِيَ الْأَصْلُ لِعَنَّا أَوْ تَبَّتْ حُرْمَتُهُنَّ بِالْإِجْمَاعِ

“It is not permissible for a man to marry his mother and his grandmothers from the paternal or maternal side. This is because Allah the Almighty says: Prohibited to you (for marriage) are your mothers. The grandmothers are also included in *ummuhāt*, because *al-umm* (mother) means *al-aṣl* (root, ancestry or pedigree). Moreover, their prohibition has been established by consensus.”²¹

In this particular sense, the woman who is the source of ovum shall also be a mother (*umm*), in addition to the woman who gives birth. However, the term *al-umm* is not specific for the child-bearer, birth-giver and originator (*aṣl*) of the ovum, the woman who breastfeeds a child is also known as *umm* (mother):

وَأُمَّهَاتُكُمُ اللَّاتِي أَرْضَعْنَكُمْ

“(Prohibited to you in marriage are) your foster mothers who nursed you.”²²

In fact, one of the functions of a mother is suckling. The above verse referred this function to *ummuhā*, now the following refers the same function to *wālidāt*. This shows that *umm* and *wālidah* are same in the text of the *Sharī‘ah*:

وَالْوَالِدَاتُ يُرْضِعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ

“And mothers may breastfeed their children two complete years.”²³

If the woman who gives birth is meant, the term *wālidah* may also be employed clearly:

لَا تُضَارُّ وَالِدَةً بِوَلَدِهَا وَلَا مَوْلُودٌ لَهُ بِوَالِدِهِ

“No mother should be harmed through her child, and no father through his child.”²⁴

Another mother (*umm*) is the mother of a person's wife and marriage has been prohibited with her forever (*hurmah muṣharah*). *Al-Hidāyah* comments on the prohibition of marriage with them in the following words:

قَالَ (وَلَا بِأُمِّ امْرَأَتِهِ الَّتِي دَخَلَ بِهَا أَوْ لَمْ يَدْخُلْ)
لِقَوْلِهِ تَعَالَى {وَأُمَّهَاتُ نِسَائِكُمْ} مِنْ غَيْرِ قَيْدِ
الدُّخُولِ

“He shall not marry with the mother of his wife, whether he has copulated with his wife or not. This is because Allah the Almighty says: (Prohibited to you for marriage) are your wives' mothers. This has been mentioned without the constraint of copulation.”²⁵

Ummuhāt has also been used for the wives of the Prophet (ﷺ) also, despite the absence of any physical relationship with them. Hence, a spiritual relationship with a woman is sufficient for the application of the term *al-umm*:

النَّبِيُّ أَوْلَىٰ بِالْمُؤْمِنِينَ مِنْ أَنفُسِهِمْ وَأَزْوَاجُهُ أُمَّهَاتُهُمْ

“The Prophet (upon him be peace and greeting) is closer to the Believers than their own selves, and his wives are their mothers.”²⁶

Most of the verses quoted above reveal that the term *ummuhāt* or *umm* has been used more commonly in the Qur'ān than *walidāt* or *wāidah*. The term *umm* is used in a wider sense. It may refer to the genetic mother (*aṣl*), the birth giving mother (*wālidah*), the suckling mother (*umm al-raḍā'*), the mother of wife (*umm al-imra'ah*) and the spiritual mother (*umm al-mu'minīn*). In case of gestational surrogacy, *umm* (mother) may refer to the surrogate for her roles of pregnancy, birth and suckling, and also to the ovum donor because she is the *aṣl*, the root of the genetic makeup of the child. By attributing the child to both mothers, there is no assault on the preservation of progeny and lineage (*hiḏ al-nasl wa al-nasab*).

Some Muslims suggest that surrogate motherhood can be considered analogous to foster motherhood. As a foster mother gives

her milk for the nourishment of the child, a surrogate also gives her blood for the nourishment of the fetus.²⁷ However, this analogy is faulty; firstly, because the surrogate places the fetus in her womb whereas the foster mother only breastfeeds him. Secondly, the surrogate experiences the sufferings of pregnancy and childbirth which are not felt by the foster mother. Thirdly, the foster mother may be unrelated to the father of the child but the surrogate shall be related to him as his co-wife to prevent the risk of adultery.

The assault on the preservation of lineage is seen when the male and the surrogate are not married. Only then, the prohibition of watering the plantation of another (*siqā al-mā'zar'a ghayr*) is applicable. However, if both are married, the embryo transfer can be done to the uterus of the second wife as it is the watering of own plantation, not of another. The question arises that it also entails the transfer of an ovum from one woman to another; is it permissible? The answer favours the permission as the prohibition says:

لَا يَجِلُّ لِأَمْرِي يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ أَنْ
يَسْقِي مَاءَهُ زَرْعَ غَيْرِهِ

“It is not lawful for a man who believes in Allah and the last day to water what another has sown with his water.”²⁸

It mentions *mā'ahu* (his water), and the pronoun refers to the male, not to the woman. The ovum of a woman is not included in the prohibition of water (sperm) of a man. Therefore, if there is a need, the ovum of a woman may be allowed to enter the uterus of another woman. This is *istihsān* based on necessity. Moreover, the ovum is also not present in its original form. It has changed to a zygote or an embryo. Now, the embryo consists of ovum and sperm of a married couple, which is permissible. This consists of the water of husband, which is entered in the uterus of a wife, not in another woman. This is also permissible. The transfer of ovum, which is problematic, is not clearly prohibited, rather there is a silence about it that entails permission. Even if someone claims disapproval of its transfer, still it may be allowed for a limited time due to necessity because the first wife is infertile due to the absence of her uterus or the presence of a faulty uterus. She has no other way to get her child except resorting to a gestational surrogate who is also her husband's

second wife. Lastly, it is impossible now to separate the ovum from the embryo and get it back to its original form. Hence, it is not obligatory to separate it as per the following maxim:

لَا وَاجِبَ مَعَ عَجْزٍ، وَلَا حَرَامَ مَعَ ضَرُورَةٍ

“Nothing is obligatory with inability; and nothing is prohibited with necessity.”²⁹

In a case of conflict for the custody of the child, a jurist has to decide which function of the mother is strong and effective than others that shall dominate her other roles and the child shall be given in her custody. Apparently, that role is pregnancy and delivery, during which she bears hardship or pain mentioned as *kurh* and *wahn* in the Qur’ān:

حَمَلَتْهُ أُمُّهُ كُرْهًا وَوَضَعَتْهُ كُرْهًا

“His mother carried him with hardship or pain and gave birth to him with hardship or pain.”³⁰

حَمَلَتْهُ أُمُّهُ وَهْنًا عَلَى وَهْنٍ

“His mother carried him, in weakness upon weakness.”³¹

Despite that the child belongs to both wives, the genetic mother and the surrogate mother, preference is given to the surrogate because the pain and hardship of pregnancy and delivery is an effective reason for the basis of rulings in their conflict. This is because:

1. Most verses of the Qur’ān relate to the pregnancy and childbirth, and not to the ovaries or ova. This is because the ovaries and ova are hidden and to build a legal ruling on them is difficult. It is impossible to judge the genetic mother with a naked eye. On the other side, pregnancy is a visible and apparent matter and to build a legal ruling on it is easy. Therefore, the basis of ruling is made upon pregnancy (*hamal*), and consequently, childbirth (*waḍ‘ hamal*) is biologically united to it. The hardship of pregnancy and the pain of childbirth are the reasons due to which mothers are given a

higher status than fathers. These are effective in a conflict between a genetic mother and surrogate mother. Since these hardships and pains are felt by the surrogate mother, her status is higher than the genetic mother, so, the child shall be given to the surrogate.

3. The Federal Shari'ah Court of Pakistan also gave the rights of the custody of the child to the surrogate and the petition of the commissioning father was disposed of. The case was *Farooq Siddiqui vs. Farzana Naheed* Shari'ah Petition no. 2/1 of 2015. Farooq Siddiqui was a Pakistani born American citizen whose wife was infertile. He made an oral agreement of surrogacy with Farzana Naheed at a cost of Rs. 25,000. After giving birth to a daughter, the surrogate refused to hand over the girl. Farzana, on the other hand, claimed that the story of surrogacy was false and she was his wife and wanted expenses for the upbringing of the child.

4. In cases of genealogy (*nasab*) of the child, the genetic source is not preferred to the visible source. For example, when a conflict arose between 'Abd b. Zam'ah and Sa'd b. Abi Waqqas, while Sa'd was asking for custody of a child who belonged to his brother 'Utabah out of adultery and 'Abd was claiming that the child was his brother as he was born to his father's *umm walad*, the child was given to 'Abd b. Zam'ah despite his resemblance to 'Utabah b. Abi Waqqas, the biological father. The ruling *al-walad lilfirash* (the child belongs to the owner of wedding bed) signifies that the decision is based on the apparent, not on the genetic source. Similarly, even if the ovum donor is the genetic mother, the ruling shall be based on the apparent reason, that is the pregnancy (*hamal*). The child shall be handed over to the surrogate mother and his descent shall be attributed to her as the Muslim jurists say:

فَنَسَبُ الْوَالِدِ مِنَ الْمَرْأَةِ يَنْبُتُ بِالْوِلَادَةِ سِوَاءَ كَانَتْ بِالزَّكَاحِ أَوْ
بِالدِّيْفَاحِ

“The descent of a child to a woman is proved by birth, whether by marriage or sin.”³²

5. *Wiladah* is close to *firash* in its meaning as it occurs within the wedding lock, on a wedding bed. If *firash* has been considered by the *Shari'ah* in case of a male, not his sperm, then *wiladah* shall be considered for a female, not her ovum. Therefore, preference shall be given to the woman who gives birth. Moreover, this point of

view is more compatible with the Qur'ān as the Qur'ānic references are abundant for the woman who gives birth.

6. As *firāsh* confirms *nasab* without claim, *wilādah* also confirms *nasab* without claim. The surrogate mother does not need to claim that the child belongs to her. The child, in fact, belongs to her by childbirth. If someone other than the owner of *firāsh* claims the child, he has to bring evidence in support. The child shall belong to the owner of *firāsh* as long as he does not go for *li'ān*. Similarly, the ovum donor needs to claim the child. However, as long as the birth giver does not deny the child, he cannot be given to another woman.

7. If the child is given to the genetic mother, the need for the surrogate will end and she will be sent out of the home. This will cause harm to her. If the child is given to the surrogate, she also shall not hold the child in custody and deprive the first wife to harm her. Both of them shall not harm each other as the juristic maxim says:

لَا ضَرَرَ وَلَا ضِرَارَ

“There should be neither harming nor reciprocating harm.”³³

Conclusion

The opinion of majority of Muslim jurists is against the use of any kind of surrogacy because there is a risk of illegitimate lineage that exists when the male and the surrogate are unrelated. However, this problem may be removed if the commissioning male and the surrogate are related to each other with a valid marriage. A woman who has become barren after hysterectomy has no choice other than surrogacy to have her own child. She experiences hardship (*mashaqqah*) and suffers from a necessity (*darūrah*). She may be allowed this procedure due to necessity what has been disallowed for others in a normal situation if certain conditions are observed as follows:

There shall be no harm to anyone involved in the process (*la darar wa la dirār*). The informed consent of all, the first wife, the second wife and the husband, is essential. The husband shall provide *mahar*, *nafaqah* and *suknā* to the second wife. The second wife shall get the first child for herself, then perform surrogacy after two

years of suckling. If she agrees to give this child to the first wife, she shall be delegated the right to divorce. Both wives shall live happily like any other polygamous relationship. With an agreement, both will become mothers and shall visit the child. However, if a conflict occurs, the surrogate mother shall be preferred.

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