

Ethics of Surrogacy:

A Comparative Study of Western Secular and Islamic Bioethics

DOI: <http://dx.doi.org/10.5915/44-1-5920>

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Abstract

The comparative approach regarding the ethics of surrogacy from the Western secular and Islamic bioethical view reveals both commensurable and incommensurable relationship. Both are eager to achieve the welfare of the mother, child and society as a whole but the approaches are not always the same. Islamic bioethics is straightforward in prohibiting surrogacy by highlighting the lineage problem and also other social chaos and anarchy. Western secular bioethics is relative and mostly follows a utilitarian approach.

Key words: Islamic bioethics, Medical bioethics, Surrogacy

Surrogacy: Definition, Reasons and Classification

Surrogate literally means “substitute.” In this case, a woman bears a child for another woman. The concept of surrogacy is a by-product of artificial insemination (AI) and in-vitro fertilization (IVF) techniques. In a surrogacy arrangement, a woman carries a fetus in her womb throughout pregnancy and, after delivery of the newborn, it is handed over to another family who is unable to have a child on its own. The surrogate mother will be free from all responsibilities to the child or its family.¹ Surrogacy is actually the most low-tech treatment to overcome infertility

Surrogacy is of two types, genetic and gestational. In genetic surrogacy, the ovum of the surrogate is artificially inseminated by the donor’s sperm (the father of the child). In gestational surrogacy, the ovum of a woman is fertilized by the sperm of a male in vitro and the resulting embryo is implanted in the uterus of the surrogate.

Married couples look to surrogacy when the wife is physically unable to conceive a child due to absence of the uterus or a disease or when the wife is just unwilling to carry a baby. She may have a genetic disease that she is unwilling to pass to her offspring. She may not want to become pregnant because of her busy schedule. The couple may choose surrogacy over adoption because the child will be at least half-related to them (in genetic surrogacy). Sometimes, unmarried couples look for a surrogate mother although the practice is not very common. Similarly, this practice is open for a single man willing to be a father or to a

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homosexual couple who want to have a child.²

When a woman is incapable of producing ova as a result of disease or normal aging, the surrogate can provide the ovum that is then fertilized by the woman's husband and then implanted in the surrogate's uterus to carry the fetus to term. The surrogate then delivers and hands the baby to the couple (genetic surrogacy).

This technique allows post-menopausal women or many women once considered hopelessly barren to become mothers even though they have no genetic link to the child.³

Surrogacy can be either commercial or altruistic. In the former case, the surrogate is paid for donating the egg, gestating the fetus or both. In altruistic surrogacy, the surrogate is unpaid and the resulting baby is regarded as a gift to the couple.⁴

Surrogacy: Islamic Bioethics Perspectives

In making a legal ruling, Muslim scholars consider *Maqasid al-Shari'ah* or purposes of the Law. *Maqasid al-Shari'ah* are *Hifz al-Din* (Protection of Religion), *Hifz al-Nafs* (Protection of Life), *Hifz al-Nasl* (Protection of Progeny), *Hifz al-'Aql* (Protection of Mind) and *Hifz al-Mal* (Protection of Wealth).⁵ This classification describes clearly the paramount and basic necessities of human beings. These purposes need protection, preservation and promotion.

The purpose of law that is most related to the topic of surrogacy is protection of progeny. As Islam encourages reproduction, it advocates treatment of infertility. Further, protection of progeny entails care for pregnant women and the health of the children. It further entails preservation of lineage. Each newborn should know and be related to both his/her mother and father.

Hiring a 'womb' for procreation is a very recent phenomenon that contemporary jurists have to handle. Islamic bioethics cannot accept this practice because surrogacy is a clear form of using donor sperm, a foreign element, in the womb of a woman which results in the mixing of lineage. Mufti Sheikh Ahmad Kutty, an Islamic scholar, opines that the introduction of male sperm into the uterus of a woman to whom he is not married transgresses the bounds of Allah.⁶

In view of the term 'transgressing the bounds of Allah' he mentions the following verses of the *Qur'an*:

وَالَّذِينَ هُمْ يُفْرَجِهِمْ حَافِظُونَ إِلَّا عَلَىٰ أَزْوَاجِهِمْ أَوْ مَا
مَلَكَتْ أَيْمَانُهُمْ فَإِنَّهُمْ غَيْرُ مَلُومِينَ فَمَنْ ابْتَغَىٰ وَرَاءَ
ذَلِكَ فَأُولَٰئِكَ هُمُ الْعَادُونَ

and who are mindful of their chastity, [not giving way to their desires] with any but their spouses or what their right hands possess": for then, behold, they are free of all blame, whereas such as seek to go beyond that [limit] are truly transgressors.⁷

Again, a very basic component of *hifz al-nasl* is to protect lineage.

Consider a case of gestational surrogacy. If the surrogate mother is married, the resultant child would legally be that of her husband although the sperm was donated by another person. The case of genetic surrogacy is more critical and troublesome because here the woman is not only carrying the fetus but also donating her egg. So she is the actual mother of the child but cannot be given the status of a mother. In fact, surrogacy creates a dilemma regarding the identity of the offspring. In a word, the status of any baby born under the surrogacy contract would be illegitimate because the contracting man has not entered into matrimonial contract with the surrogate. "Even if a husband gave written consent that his wife could act as a surrogate, there is a religious problem that would prohibit this. Islam prohibits the semen of one man to touch a fetus that is a product of another man's semen. Will we issue a law prohibiting husbands from exercising their legal right [to sexual relations] with their wives when they are pregnant with another man's baby? And were such a law passed; how it will be enforced?"⁹

To quote G I Serour, professor of obstetrics and gynecology, and director of the International Islamic Centre for Population Studies and Research, al-Azhar University, Cairo, Egypt, "The basic concept of Islam is to avoid mixing genes, as Islam enjoins the purity of genes and heredity. It deems that each child should relate to a known father and mother. Since marriage is a contract between the wife and the husband during the span of their marriage, no third party intrudes into the marital functions of sex and procreation. A third party is not acceptable, whether providing an egg, a sperm, or a uterus. Therefore, sperm donation, egg donation, and surrogacy are not allowed in Islam."¹⁰

Even in case of bigamy (a husband married to two wives) in which an ovum is taken from one wife and fertilized with the husband's sperm and carried till birth in the womb of the second wife, the pregnancy is carrying an alien seed, the ovum of the first wife which is outside the marriage contract binding the husband and his second wife. The child will belong to the second wife who carried it and gave it birth although she is not the child's biological mother. Thus surrogacy, even in that context, is not permissible.¹⁴

The Council of the Islamic Fiqh Academy holding its third session, in Amman, Hashemite Kingdom of Jordan, from 8 to 13 Safar 1407H (October 11-16, 1986), declared that surrogacy (the fertilization taking place in-vitro between the sperm and the eggs taken from the spouses, and then the fertilized ovum being implanted into the womb of a volunteer woman) is Islamically forbidden and absolutely prohibited due to the consequences of the lineage confusion and loss of motherhood.¹⁷

Another Islamic concept that is to be considered is the clear identification of mothers as those who give birth to their children as stated in the Quran.

إِنَّ أُمَّهَاتُهُمْ إِلَّا اللَّائِي وَلَدَتْهُمْ

None can be their mothers except those who gave them birth.¹¹

So, a surrogate mother may claim to be the real mother even though she bears the egg of another woman in her womb. She may have a marriage bond in case she is a second wife to the embryo's father, but she does not have any genetic relation to the child in this case. So, how could she claim to be the real mother? Similarly, how could the ovum donor have claim over the child even though she did not bear the child or give birth to the child as mentioned in the *Qur'an*?

Some Muslims argue for the permissibility of surrogacy in Islam by resorting to *qiyas*. However, rulings based on *qiyas* could be unreliable because the current issues of medicine are drastically different in nature and context to be analogous. They suggest that surrogate motherhood could be considered analogous to foster motherhood. Is this analogy be justified?

It is true that Muslims can transfer their child to a wet nurse to be breast fed by her and she will be a foster mother of the child by virtue of

suckling. In the case of gestational surrogacy, the sperm and ovum of a legally married couple is fertilized in vitro and the embryo is replaced in the womb of the surrogate either on a volunteer or on a commercial basis. The woman who provided the ovum may be considered the real mother because the child will have genetic link with her and the woman who carries the fetus in her womb and gives birth to it would be considered a foster mother. But this is a faulty analogy. In the first place the wet nurse does not have any relationship with the father of child of whose she is a wet nurse. But in a surrogacy contract, either the woman is artificially impregnated with the sperm of the father of the child or the embryo is produced by the father's sperm and then placed in her womb to carry it up to term and give birth to it.

Further, the wet nurse feeds the child only up to a certain period and does not have any biological relationship with him.¹²

Comparison of Western Secular and Islamic Bioethics of surrogacy

A comparative study of Islamic and Western secular philosophical perspectives reveals some similarities and several dissimilarities. Both approaches are concerned about the well-being of both mother and child. Both are very concerned about the welfare of the society. Robertson looks for a very straight forward utilitarian interpretation to justify the practice of surrogacy. He opines that although surrogacy is a deviation from our cultural norms of reproduction, nevertheless it is good for the parties involved. His argument is that if the surrogacy arrangement can fulfill the desire of a barren couple, why should we deprive them from taking this opportunity? He argues that it also opens the way for financial gains of some needy women. In addition, some women enjoy pregnancy and the respect and attention that it draws. It is a blessing for the child because he/she would not have come to the light of the world except through this special arrangement.¹³

The approach of Islamic ethics is very different. Islam prohibits surrogacy because it interferes with proper lineage. To quote Mohammad Hashim Kamali, "The laws of *Shari'ah* are for the most part distinguishable in regards to their objectives (*maqasid*) and the means which procure or obstruct those objectives. If the means violate a basic purpose of the *Shari'ah*, then it must be blocked. The means are generally viewed in

light of the ends they are expected to obtain and it is logically the latter which prevail over the former in that the means follow their ends, not vice versa.”¹⁶ According to Islamic ethics, if the means violate a basic purpose of the *Shari’ah*, then it must be blocked. There is no place for surrogate motherhood within the Islamic system, for the evils that would accrue from it will far outweigh any good.

Western secular philosophers criticize surrogacy on different grounds. They frequently argue that, instead of making a better family tie, it threatens it. Even they worry about the family of the surrogate mother. For example, Krimmel thinks that through surrogacy arrangement, the family of the surrogate would face some hazardous situations. When the baby is handed over to the adopting parents, it is removed not only from the surrogate mother but also from her family. Are not the siblings of that baby hurt that their little baby sibling has been given away? Instead of having happiness, the adopting couple may engage themselves in conflict and ultimately the marriage bond may be broken. It may happen that the adopting mother has no biological link to the baby but the adopting father has. May not the father say to his wife, “Well, he is my son, not yours”? In any case, if the marriage ultimately breaks, will the custody be treated simply as a normal child custody dispute?¹⁵

Krimmel compares surrogate motherhood with second marriage where the children of one party by a prior marriage are adopted by the new spouse. As asymmetry in second marriage situations causes chaos in a family, surrogacy is also no exception.¹⁵ Analysis of the above arguments in relation to Islamic ethical viewpoints reveals dissimilarities. While both argue against surrogacy, the arguments are different. Islamic ethics permits second marriage because it does not create any problem in the lineage of the offspring. But it vehemently prohibits surrogacy because it fails to preserve the principle of lineage of the resulting progeny.

Human nature is such that when one pays money, one expects value. It is very disappointing for the parents when they learn that the child is born with some genetic or congenital birth defect. The surrogate mother might blame the biological father for providing defective sperms and, similarly, the adopting parents might accuse the surrogate for a defective ovum or for improper care of the fetus during pregnancy. So, the consequence is that neither the adopting parents

nor the surrogate would like to keep the child. Like brushed fruit in the produce bin of a supermarket, this child would become a reject.¹⁵ Is it not like treating the child as commodity?

Islamic ethics strictly advises to form the family solely on the basis of biological ties. Islam condemns surrogacy because the child will be deprived of information about his lineage and may result, unknowingly, in half-sibling marriage which is a dangerous consequence for a society. But on the contrary, a Western secular bioethicist argues that family ties have never been only biological: a husband and a wife, to take the most obvious example, are not biological relatives. It is also argued that, if ‘the family’ is a good thing, then developing more children by different methods, including non-biological ones, to form a family should also be seen as a good endeavor.⁴

Paid surrogacy sometimes becomes a means of exploitation. Sometimes, poor women lease their wombs to carry the fetus for some money. Evidence shows that sometimes they are given a very small amount of money for their service; sometimes they are given no money at all. Supporters of surrogacy reject this point. Michael Kinsley argues that if women are forbidden to enter into surrogacy contracts, why not ban other kinds of services that women contract to perform? Why do we not forbid women to work as maids or nannies? Why not forbid them to work at all? He also argues that, if the product in question was food or telephones rather than children, a shortage would be seen as a failure of the system. For instance, when the Soviet Union forbade market contracts, shortages occurred. Similarly, if the United States banned procreative contracts, shortages would occur.⁴

Besides, there is at least some evidence that the opportunity to be paid for one’s services in bearing a child has not been exploitative of poor women. Statistics show that the “average surrogate mother is white, attended two years of college, married young, and has all the children she and her husband want.”¹⁸

Furthermore, some women enjoy this service with an altruistic vision. If we really want to protect those women who consider child bearing for somebody else as degrading but are compelled to do so because of economic necessity, then we have another way. We can put restrictions on who can enter into contracted child-bearing arrangements, but need not prohibit the practice entirely. Some may object that such restrictions would be unjust because they would prohibit poor

women from doing something that other women were permitted to do. But that would imply that the restrictions would be denying the poor women a good, rather than protecting them from a harm, which in turn means that the initial assumptions about exploitation itself was misguided.¹⁸

Conclusion

The discussion of ethics of surrogacy in a comparative perspective makes one point clear. It is that although in Western secular bioethics there are arguments and counter arguments in judging its moral worth, Islamic bioethics denounces the practice altogether as incompatible with the five purposes of the *Shari'ah*.

The debate regarding surrogacy will continue as we are free to cultivate our own reasons to judge the morality of surrogate motherhood. The overall analysis shows that its benefits are less than its harm. It is bad both from the deontological and consequential points of view. If it would have been good from consequential point of view, then we should re-evaluate its deontological position and try to justify its relevance to the society. But we see it can neither satisfy the deontologist nor the consequentialist nor the feminist nor society. So why should we support it?

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