

LEGAL APPROACHES TO GENETIC AND GESTATIONAL SURROGACY IN THE ISLAMIC JURISPRUDENCE

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ABSTRACT

The topic of surrogacy is perplexing and titillating in not only contemporary biomedical ethics, but also in religio-legal area. In Islam, it is a delicate issue that had sparked the modern Islamic scientists and scholars to argue based on their respective perceptions of the medical service and the issues involved. Understandably, the debate had leaped to intensity nowadays because the practice of surrogacy is on the rise globally with intending Muslim parents travelling away from their respective countries where there are legal restrictions to places where surrogacy arrangements are allowed. The resulting ‘reproductive tourism’, however, came with its own consequences. It flickered lots of judicial decisions, both domestically and upon cross-borders. This paper thoroughly examine the general principles of Islamic law with a view of finding the equilibrium between the law and this techno-medical practice. From the Islamic perspective, this topic (of surrogacy) had far-reaching effects on a number of legal sub-themes such as paternity, fosterage, adoption, marriage, parenting, family life, contract, child’s right, crime and law of inheritance.

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1. Introduction

Surrogacy is one of the new phenomena that is witnessing exponential rise globally. The Muslim world is inescapably involved in it because its procedures are not only about science, technology and medicine, verily, they translates into family law and human rights law issues. The choice of the surrogate 'mother', the egg donor and the sperm donor (all of which are critical in the procedure) may approximate transnational controversies bordering private international law and even human trafficking.² That is why the apex courts of various countries and the European Court of Human Rights found themselves giving rulings on the subject matter. There are numerous internationally publicised cases to attest to that. The case of *Paradiso and Campanili v. Italy*³ intricate diplomatic interface between Russia and Italy and had, at a point of time, placed the involved surrogate child into a state of abandonment for the purpose of the law. Similarly, the case of *S.H. and Others v. Austria*⁴ attracted the involvement of the European

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² For transnational controversy, see for example the cases of *Mennesson v. France*, (ECtHR, Application No. 65192/11), and *Labassee v. France* (ECtHR, Application No. 65941/11) where in both cases, France refused the legal recognition to parent-child relationships that had been legally established in the United States, where surrogacy is legal. In both cases, (the *Mennessons* and the *Labassees*), the wives were infertile, so they went to California and Minnesota respectively. Both embryos were formed with the sperm of the intending fathers and donated eggs. And in respect of human trafficking, there is a case in Thailand where it was discovered that a Japanese man had fathered at least sixteen children through surrogacy arrangements, and this raised suspicions of child trafficking.

³ ECtHR, 2nd Section, 27th Jan.2015, Application no. 25358/12. Equally see the cases of *Foulon v. France* (ECtHR, Application No. 9063/14) and *Bouvet v. France* (ECtHR, Application No. 10410/14).

⁴ ECtHR, Application No. 57813/00. In the case, the applicants were two Austrian married couples whose wives were infertile. They wished to make use of surrogacy techniques, which were not allowed in Austria by virtue of the Austrian Artificial Procreation Act. They approached the European Court of Human Rights alleging that the Act had violated their rights under Article 14 (prohibition of discrimination) and Article 8 (right to respect for private

Court of Human Rights in deciding the constitutionality of the Austrian Artificial Procreation Act which the applicants (in respect of whom natural fertilization is impossible) alleges violated their fundamental rights and freedom to procreate.

This paper explores the multiple dimensions associated with surrogacy, most especially how the Islamic jurisprudence trend the controversial landscape. The subject matter was approached from both ethical and legal perspectives and, a unique and insightful examination into the underexplored issues is made.

2. Definition, Process and Intendment

The expression surrogate is derived from the Latin word *surrogatus* which literally means ‘substitute’ or ‘alternative’.⁵ The word is rooted to the Latin *subrogare* (to substitute), which means ‘appointed to act in the place of’. In the case of *Baby Manji Yamada v. Union of India and Another*,⁶ the Supreme Court of India defined the term as a method of reproduction, whereby a woman substitutes another for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracting party. The procedure or process involves the practice of one woman carrying and subsequently giving birth to a child for another individual or couple. It is therefore an arrangement that involves using one woman's uterus for the purpose of implanting and carrying an embryo in order to

and family life) of the Convention. The Court, however, upheld the constitutionality of the Austrian Act based on the wide margin of Appreciation Doctrine, because the case concerned issues where there is no consensus in the European Union. The Court thereby stated that there was no cause for a separate examination of the same facts from the standpoint of Article 14 read in conjunction with Article 8, and found that the procedural deference owed to the member state (Austria) outweighed the protections granted by these Articles. Despite the fact that it held that there had been no violation of Article 8 in the present case, the Court underlined in its decision that the subject of artificial procreation, because of its particular dynamic development in science and law, had to be kept under review by the Contracting States.

⁵ Jolly [S.](#), Cross-Border Surrogacy: Indian State. A chapter from the book ‘[Private International Law: South Asian States’ Practice](#)’, pp.175-197.

⁶ (2008) 13 SCC 518.

deliver a baby for another person or couple. Such arrangement is a form of contract in which a woman obliged herself to bear a pregnancy and subsequently deliver the resultant child to the arranged couple or person.⁷

The technique of surrogacy essentially allows women who are physically unable to conceive a child as a result of being hopelessly infertile, or for the reason of disease (such as blocked fallopian tubes or lack of ovaries), or absence of the uterus, or being post-menopausal, or old age to have child of their own. The same thing with those who are simply unwilling to conceive a child by themselves for being paranoid, or for fear of transmitting a genetic disease (to the child), or because of their busy schedule. Surrogacy is therefore entirely devised for one goal: to give someone, or a couple, the opportunity of having a child through another woman.

There are two types of surrogacy, one is traditional whilst the other is gestational, and each works in a somewhat different fashion. In gestational surrogacy (otherwise called full surrogacy), the surrogate 'mother' does not provide her own genetic material, so the child born is not genetically related to her. In other words, the surrogate mother's 'eggs' are not used at all, rather, an embryo, which is fertilized by *in vitro* fertilization, is implanted into the uterus of the surrogate mother who then carries and delivers the baby for the commissioning parent(s). Accordingly, the child will not be biologically related to the surrogate mother. The process in gestational surrogacy, involve the embryo being actually created by using both the biological father's sperm and the biological mother's 'eggs' through a process called *in vitro* fertilization.⁸ In this situation, the gametes of both commissioning parents are used. It may also be that both gametes come from donors (donation of either supernumerary or *de novo*-created embryos). This may arise in typical situation where the biological mother's egg and/or the

⁷ Saxena P et al, Surrogacy: Ethical and Legal Issues, Indian Journal of Community Medicine, Vol. 37 (4), Oct-Dec. 2012
<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3531011/>> @ 12/5/19.

⁸ Bhakare J., 'Surrogacy- A Reality Eclipsed by Ethical, Social, Legal Issues- Indian Perspectives' (2011) 2 IJ

biological father's sperm are unable to be used. Again, gestational surrogacy may arise where only one of the commissioning parents provides the gametes and a gamete donor gives the other.

In contrast to the gestational surrogacy, traditional surrogacy (otherwise called partial surrogacy) refers to a situation where the surrogate 'mother' has a genetic link by providing the oocyte.⁹ She does this by being the egg donor as well as being actual surrogate for the embryo. She provides her own genetic material (egg). It may also be a case where she artificially infused with the sperms of the intended father through a process known as intrauterine insemination, or IUI.¹⁰ This instance makes her both genetic and gestational mother. In all the cases *afore*-mentioned, the gestating woman intends or agrees to relinquish the child to the commissioning parents, who want to assume parental responsibility. In a nutshell, the concept of surrogacy can be said to be a by-product of artificial insemination (AI) and *in-vitro* fertilization (IVF) techniques. This procedures of IVF was first clinically carried out by Doctor Patrick Steptoe¹¹ and Sir Robert Edwards¹² upon Louice Brown who had suffered blocked fallopian tube.¹³

The followings are the conceivable different combinations of possible use of eggs and sperm that may result into surrogacy. This may be:

⁹ Fadya V., 'Surrogacy, Issues and Complexities', in Susan Golombok et al. (eds), *Regulating Reproduction*, (Cambridge University Press 2015) 126, 164.

¹⁰ In this IUI procedure, the doctor will transfer sperm that is taken from the biological father and will subsequently transfer that sperm into the surrogate's uterus so that fertilization may take place naturally.

¹¹ Dr. Steptoe (9th June 1913-21st March 1988) was a British obstetrician and gynaecologist and a pioneer of fertility treatment.

¹² Sir Edwards (27th September 1925-10th April 2013) was an English physiologist and pioneer in reproductive medicine, and in-vitro fertilization (IVF).

¹³Urbarshah U, Status of Surrogate Mother in Islamic Prospective, <<http://taakles.blogspot.com/2013/06/status-of-surrogate-mother-in-islami.html>> @ 11/4/19.)

- a) Where a husband and wife provide sperm and ovum respectively but the wife cannot or does not want to carry the pregnancy so they "hire" the womb of a surrogate. The hired surrogate agrees or contracted to give the commissioned couple the child upon delivery. And so, the *in vitro* fertilized egg/embryo that comes from the couple is transferred into her womb (the wife's egg plus the sperm of her husband placed in the womb of a third party who 'donated' her womb).
- b) Where a surrogate woman is solicited by a married couple to be impregnated by the husband's semen alone. So her egg got mixed with the semen of someone's husband. After delivery the surrogate mother gives the child to the married couple (the running formulae is 'the egg of a donor plus the sperm of a commissioning married male placed in the donor's womb). In this case, the baby will be the biological offspring of the husband and the surrogate "mother," while being the legal offspring of the couple. The baby is biologically alien to the "legal" mother.
- c) Where the man is unmarried (or even a homosexual) but is willing to be a father (or a case of homosexual couple who want to have a child). The blend is that of the surrogate mother's egg and the man's sperm.
- d) Where the woman is unmarried (or the two women are lesbians) and she (or they) desire to have a child by arranging (one of them) to be inseminated with the sperm of someone not married to her.

Surrogacy arrangement may be commercial (for profit) or altruistic (non-profit). In commercial one, the surrogate mother is mostly unrelated to the commissioned parent(s) and she gets paid for donating the egg or for gestating the fetus or both. The financial compensation may normally even exceeds a "reasonable expenses." The poor, illiterate women of rural background are often persuaded in such deals by their spouse or middlemen for earning easy money. In altruistic surrogacy,

surrogates will usually be family members or friends and as such, usually the intending parent(s) pay the surrogate nothing or, more frequently, only her "reasonable expenses" related to the surrogacy (depending upon whether the surrogate receives financial reward for her pregnancy).

3. Reproduction in the Light of Islamic Law

All Muslim jurists, having considered the *Maqasid al- Shari'ah* (purpose of the Law) as regards marriage, are unanimous in agreeing with the fact that in Islam, posterity of the society is of utmost priority.¹⁴ It is one of the purposes of marriage. Allah says:

And God has made for you mates (and companions) of your own nature, and made for you, out of them, sons and daughters and grandchildren, and provided for you sustenance of the best: will they then believe in vain things, and be ungrateful for God's favours?¹⁵

The prophet was reported to have encourage people to marry consequent upon which to produce offspring so that that they multiply and in the Day of Judgement he (the prophet) will pride himself on the abundance of his people. In fact the institution of marriage as an avenue for procreation is greatly revered and encouraged in Islam, with several principles placed to ease its attainment and also discourage its break-down. Numerous values were equally placed by the religion to firmly establish progeny in the societies. In one verse, Allah described children as the beauty of the world. Says He, "Wealth and sons are allurements of the life of this world."¹⁶ The desire to have children is instilled by Allah. The holy Qur'an relates the story of Sarah, the wife of prophet Ibrahim (AS), and the unnamed

¹⁴ Sharmin Islam, *1 Ethics of Surrogacy: A Comparative Study of Western Secular and Islamic Bioethics* at: <https://www.researchgate.net/publication/279851233> @ 11/4/19.

¹⁵ *Surat Nahl*, Chapter XVI: 72.

¹⁶ *Surat Kahf*, Chapter XVIII: 46

wife of prophet Zachariah (AS) who are both barren but miraculously became pregnant through divine intervention.

Further protection of progeny by Islamic law is the caring aspect of pregnant wife. Her maintenance in terms of feeding, clothing and health care was guaranteed by Islamic law. There are even specific chapters that deals with that in Islamic jurisprudence. The care of the children, their maintenance, their custody and their right to inheritance all have doctrines in the Islamic jurisprudence. Even the lactation period of a child was mentioned in the holy Qur'an.¹⁷

There are medical and juridical Muslim scholars who deduced that surrogacy is not acceptable in Islam on the premises that its resultant pregnancy is not an appropriate fruit of the tree of a legitimate marriage.¹⁸ One group of scholars liken it to *zina*, adultery, since it entails a woman carrying the fertilized egg of someone other than her husband. This view was reflected in the consensus reached at the symposium in 1983 on 'Reproduction in the Light of Islam.'¹⁹Expounding on the concept of *Hifz al-Nasl* (Protection of Progeny), some scholars emphasize that Islam prohibits the semen of a man to touch the womb of other than his legal wife, notwithstanding any consent coming from anyone. To this end, a prominent North American Islamic scholar, Mufti Sheikh Ahmad Kutty,²⁰ opines that the introduction of male sperm into the uterus of a woman to whom one is not married is transgressing the bounds of Allah. This transgression was referred to in the holy Qur'an which says:

¹⁷ *Surat Baqarah*, Chapter ii: 233 reads: 'Mothers may breastfeed their children two complete years for whoever wishes to complete the nursing (period)...'

¹⁸ Hathout, H: Islamic Perspectives in Obstetrics and Gynecology, Islamic Organization of

Medical Sciences, Kuwait, 1986, Chapter 7, pp 131-135.

¹⁹ . (Hathoul M. Surrogacy - An Islamic Perspective, journal of the Islamic Medical Association of North America, [Vol 21 No 3 \(1989\)](http://dx.doi.org/10.5915/21-3-13364) <http://dx.doi.org/10.5915/21-3-13364>) @ 11/5/19.)

²⁰ (born in 1946 he served as a senior resident Islamic scholar at the Islamic Institute of Toronto and has taught at Emanuel College of the University of Toronto)

Who are active in deeds of charity; who abstain from sex, except with those joined to them in the marriage bond, or [the captives] whom their right hands possess, for [in their case] they are free from blame, but those whose desires exceed those limits are transgressors.²¹

In line with above argument, the position of Islam is that, since marriage is a contract between the wife and the husband, then during the span of their marriage, no third party should intrude into the marital functions of sex and procreation by providing either egg, or sperm, or uterus.

Another group of jurists condemned surrogacy on the basis that it violates the systematic planning of Allah in the normal process of procreation. In addition to that, they view its procedure as one that involve exposing and looking at the private parts, (*awra*), of the surrogate ‘mother’ in order to undertake the fertilization between the sperm from the husband and the eggs from his wife. Such indecent exposure is greatly abhorred in Islam. The holy Qur’an speaks of those “... who abstain from sex, except with those joined to them in the marriage bond...”²²

Significantly, some scholars made analogy that there is nothing wrong with surrogacy so long it is performed within the family structure of husband and wife in the institution of marriage. Conversely, if there is intrusion of another party, through the provision of sperm, ovum, embryo, or uterus, then it is forbidden. This group favours the permissibility of surrogacy on the basis of secondary considerations and not on any primary principle. Their point of argument is that Islamic law recognizes the preservation of the human species as one of its primary objectives (*maqasid*). They employ the principle of public interest (*maslaha*) to allow married couples do it if they are unable to get child by natural means.

²¹ *Surat Mu'minun*, Chapter 23, Verses 5-7.

²² *Surat Mu'minun*, 23:5-6

4. Progeny Right

The practice of surrogacy is for the protection of progeny and in reality, it allows people who cannot conceive children to have them. This makes it to mistakenly be associated with reproduction right; implying that it reflect human's right to found a family. A prime query, nonetheless is, does the right to establish family equal to reproductive right? Certainly no. The issue at stake is that Islam encourages reproduction; it even advocates treatment of infertility and disability. Also Islamic family law, issues of sterility and use of contraception are well founded and discussed in Islamic jurisprudence. But the right to procreate in Islam is subject to the established ways of getting progeny, e.g. through legal marriage and natural process of reproduction as mentioned in the holy Qur'an and Hadith. Significantly, the holy Qur'an reminds us that the children are a grant from Allah and that there will be those who may not have the privilege of getting the gift. Accepting the will of Allah in this regards, is an act of piety. Allah says:

To God belongs the dominion of heavens and the earth. He creates what He wills (and plans), He bestows (children) male or female according to His will (and plan), or He bestows both males and females, and leaves barren whom He will: For He is full of knowledge and power.²³

4.1 Establishment of Biological Link

There is no doubt that surrogacy interferes with proper biological lineage because there is no 'natural' parenthood. Some scholars, having regards to *hifz al-nasl* consider this interference as enough ground to forbid surrogacy. Unquestionably, Islamic law recognizes children's right to preserve their identity by name and family relations. Contrast this with the infamous Indian case of *Jan Balaz v. Anand*

²³ *Surat Shura*, Chapter 42, Verse 49-50.

*Municipality & 6 Others*²⁴ which was a two-year legal battle that took many twists and turns over the proper identity of surrogate twins. In fact the Islamic law of defamation applies against anyone who deprecate the legitimacy of another. This law and the law of inheritance are aspects of Islamic right to private and family life. In this regards, to quote an Egyptian professor of obstetrics and gynecology, Gamal Ibrahim Serour,²⁵ “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.”

Truly, there may be predicament when, for example, ‘womb’ relationship gets separated from ‘ovary’ relationship. Who could be the ‘real’ mother of a surrogate child in situation where a commissioning mother’s ovum is gestated by a surrogate mother? Could the mother be the one who gave the ovum or the one who carried the pregnancy and gave birth? As it was eloquently asked, “Who has the legitimate claim on the crop: the farmer or the seed merchant?” Most Islamic scholars attached the motherhood to the surrogate mother who gave birth to the child on the basis of the Qur’an verse that says “None can be their mothers except those who gave them birth (*waladna hum*).”²⁶ This word ‘*waladna hum*’ is derivative of ‘*walada*’ whose verb is used for the whole process of begetting, *wiladah*. The word does not only refer to the act of carrying, *haml*, and

²⁴ (2010) AIR Guj 21. The case is that of childless German couple who had twins through an Indian surrogate ‘mother’ in Gujarat region of India. The couple realized that German law would not allow the twins, born out of surrogacy, to be treated as German citizens, and fearing them to be rendered stateless, they approached Gujarat High Court seeking Indian citizenship for the children. The High Court rule in their favour, but the Central Government rushed to the Supreme Court challenging the verdict. The case resulted into the passing of Protection of Children Born from Assisted Reproductive Technology Act of 2015. See also *Baby Manji Yamada V Union of India & Ant, supra*

²⁵ He serve as the Director of the International Islamic Centre for Population Studies and Research, al- Azhar University, Cairo, Egypt.

²⁶ *Surat Mujadila*, Chapter 58, Verse 2.

giving birth, *walada*. It follows therefore that the referred verse, *ayah*, removes motherhood from the commissioning mother.²⁷

Yet again, by terminology and by description, the mother is the one who gives birth. The Arabic terminology used for 'womb' is '*rahim*'. This word is also used to describe one of the attributes of Allah that is him being the Most Compassionate. Perhaps the reason behind it is that the manifestation of Allah's compassion to human kind begins while when they, as humans, are still in the dark recesses of their mother's womb. Ominously, however, the word *rahim* is not only referring to an organ where the embryo develops, it furthermore denotes to a concept of blood relations and the tie of compassion that binds them together. Allah says: "And those related by *arham* (kindred by wombs) have prior rights against each other in the book of Allah." Accordingly, the scholars maintained that the motherhood relationship between a surrogate mother and the child is much more than that of the child and the commissioning mother. A significant point here is that, although people are related both through the bond of 'ovary' and 'womb', the holy Qur'an had always refer to relationship by 'womb'. To further drive their point home, the scholars use allegorical deduction, *qiyas*, to the concept of 'Lactating Fosterage' by which brotherhood and motherhood are attained through shared nursing. The *in vitro* existence and development over a period of 40 weeks is definitely a more effective and far-reaching relationship than three breast feedings (suckling of an infant), which could make a woman a mother, and make her sons and daughters brothers and sisters, to the infant in question.²⁸

The Council of the Islamic *Fiqh* Academy, in 1986,²⁹ equally shared the view that surrogacy is absolutely prohibited due to the lineage confusion it causes. This, perhaps is what influenced many Muslim countries into prohibiting it. They include the Middle Eastern countries of Egypt, Iran, Kuwait, Jordan,

²⁷ Kutty A. Does Islam Allow 'Surrogate Motherhood'? Doha, Qatar: Islamonline.net, <<http://bit.ly/ZJv6bp>> google scholar, on 8/4/19.

²⁸ Ibid.

²⁹ At its third session, in Amman, Hashemite Kingdom of Jordan, held between 8 to 13 *Safar* 1407H (October 11-16, 1986).

Lebanon, Morocco, Qatar, and Turkey, as well as a number of non-Middle Eastern Muslim countries including Indonesia, Malaysia, and Pakistan.³⁰

4.2 Right to Human Dignity and Physical Integration

Surrogacy greatly undermine the dignity of both the surrogate mother and the resultant child. The body and, more precisely, the womb of the surrogate woman is 'being hired', as such it is used as commercial instrument to reach the commissioning parents' goal. Her personality is relegated to 'service provider.' Again the commissioning parents may impose conducts that may include dietary rules, lifestyle pattern and even sexual restrictions all of which tantamount to violation of her freedom and self-determination. All these are in addition to the health hazards involved in the process. It is known fact that there is a risk of maternal mortality for women who are implanted with other women's eggs. And in the event of any complication, the life of the surrogate 'mother' is relegated to second place, because the child's life is the main concern in the arrangement. These perspectives formed the basis of surrogacy being declared forbidden by some scholars. These jurists fervidly hold to the argument that it is forbidden for the human organ and elements (such as womb or sperm) to be lent out, or be rented out, or even sold.³¹ Against this arguments, though, there is disagreement that 'hiring a womb' is analogous to 'hiring a woman to breast feed someone else's child which the Islamic law had accepted. Again, commercializing personal services is not *mala prohibita per se* except upon unlawful services such as sex trade. The norm is that any act in relation to sexual organ is prohibited in Islam. Whatsoever, the issue of exploiting the woman involved and making her psychologically distressful is undeniably there.

4.3 Surrogate Child's Right

On the face of it, surrogacy may be said to help the evolvement of child's life, but contrariwise it only makes the child's lifespan

³⁰ Ibid.

³¹ Ibid.

susceptible to loss on account of many instances. The commissioning parents, for example, may change their mind after the child was conceived by the surrogate 'mother', the result of which may be abortion. The surrogate 'mother' may equally put the child at risk when it deliberately exposes the pregnancy to health hazard. And then again, a more alarming problem is where the child's life was placed in a legal limbo, such as where (after the commissioning parents changed their mind), the abortion is not possible, or the surrogate 'mother' does not want it, the child then was bereaved of parental appendage. It may also be where the surrogate 'mother' gave birth to twins, but the commissioning parents just want one child. A point of reference here is the *Baby Gammy Case*, which is an internationally publicized Thai surrogacy case (that took place in 2014) in which a Thai woman, Pattaraman Janbua, was hired as surrogate 'mother' for an Australian couple. Seven months into the surrogate pregnancy, ultrasound result revealed that the pregnancy has twins but one of them has *Down syndrome*. The commissioning parents intend the surrogate 'mother' to abort the pregnancy but she refused on the basis of her Buddhist faith. Subsequently, the couple abandoned the child with the syndrome, leaving it the exclusive care of her surrogate 'mother'. Another scenario that may place the child in legal embattlement is where the surrogate 'mother' changes mind and decide not to give away the child to the commissioning parents as had happened in the American case of *In re Baby M* ³².

All the above hypothetical situations are bound to affect the child's welfare and rights. The resulting predicament made some scholars to adjudge surrogacy as forbidden on the basis that Islamic law urges Muslims to clear away from doubtful acts (precarious uncertainties). But then some scholars conclude on the prohibition of surrogacy on the understanding that it makes a

³² 537 A.2d 1227, 109 N. J. 396 (N. J. 1988). In this case, the surrogate 'mother' refused to release the surrogate child to the commissioning parents, and they sued for parental recognition. The court held the surrogacy contract invalid for being contrary to public policy. Contrast this with the case of *Johnson V Calvert* (1993) Nos. X633190 and AD 57638 and *In Marriage of John A. Buzzanca V Luanne H. Buzzanca* (1998) Nos. G022147, G022157

kind of ‘commodification’ of the child; it has been characterized as "baby selling" and that such commercial trafficking in human beings is abhorred in Islam.

No law guaranty children’s right not to be separated from their parents against their will as Islamic law. Even in the event of separation of the child’s parents, the Islamic law had elaborated the rules of custody in order to safeguard the child’s interest.

5. Interfamily Surrogacy

Surrogacy for family members raises a serious concern about moral values and relational grading of the surrogate offspring. The procedure is prone to complicated relationship in the sense that there are cases of sister-to-sister gestational surrogacy, or mother-to-daughter surrogacy (or vice versa). In fact situations are abound where a daughter serves as a surrogate for her mother; or where a sister provide eggs for her brother’s infertile wife to be inseminated by a donor; or a brother providing sperm to a sister to use with an anonymous egg donor. These issues of ‘gestational incest’ cause some scholars to out rightly condemn the practice in Islam. There is rare case of Lisa Fitzgerald who, through surrogacy, carried three babies for her older sister who was unable to give birth.³³

It needs to be understood that the issue of surrogacy presents serious family law issues. The case of *Farooq Siddiqui v. Mst. Farzana Naheed*³⁴ tried by the Federal Shariat Court of Pakistan, was instructive on this. It involved married Muslim couple of Pakistani origin living abroad. They decided to enter into a surrogacy contract with another Pakistani woman. The husband, Farooq, came to Pakistan, presumably entered into a *nikah* (marriage) with a lady called Farzana, and through an IVF process she got a surrogate child for him. Initially, after the birth, Farzana left the child with Farooq. However, a few days later, she decided to recover the child and filed a case against Farooq under the Code of Criminal Procedure (CrPC) section 491 (recovery of detainee) and the court awarded her custody.

³³ The New York Times, December 23, 2007.

³⁴ Sh. Petition No. 2/1 of 2015 decided on Feb. 2017.

Farooq then moved the local Bench of the High Court where he stated that he had a contract of surrogacy; he also relied on the Guardian and Wards Act, 1890 and petitioned the court to be awarded guardianship under section 25. In raising this petition, he stated that he was wealthier than Farzana, being a practicing doctor. However, the court was not satisfied that wealth alone could be a ground of custody and since Farooq had not admitted to a marriage with Farzana, it decided that there was no link between Farooq and the child. Therefore, on merits, the court allowed the child to stay in the custody of Farzana and also noted that surrogacy had no legal status in Pakistan. Farooq appealed against this decision but in its Appeal Judgment (in November 2012), the High Court of Lahore upheld the two previous orders.

6. Conclusion

Infertility is not a new problem experienced by couples all over the globe. In all times, Muslim families also faced similar problems. If that is so, then surrogacy had become an inescapable issue to deal with in Islam. From the foregoing, it is clear that jurisprudential issues relating to the practice are diverse as in the contemporary legal position, across the world. Such diversity is a result of the varied angles the practice is being viewed. For instance, while some scholars try to block whatever seek to undermine the institution of marriage and family life, others emphasized about the well-being of both mother and child. Yet, some cogitate on the declining fertility rate (of the Muslims) and the suffering caused (to some couples) by not reaching the fulfillment of the dream of becoming a parent, while others look at the general welfare of the society. More importantly, some scholars exclusively refer to the primary sources of the Islamic law in coming up with legal consideration upon this modern practice, while others utilized the flexibilities and accommodation of the secondary sources.

Very importantly, the issue of surrogacy, like all other advancements, had come up within the scope to be rule about in Islamic jurisprudence. All matters, no matter how fresh and recent they look could be adequately dealt with by the Islamic

law because of its flexibility to be compatible with the modern innovations and practices. The challenge is with the Islamic scholars. Extensive jurisprudential discourse are needed on the matter, more especially as the practice of surrogacy has raised a complex web of issues not only in biomedicine and technology but also in theology, politics and law. The issues involved in the practice had serious impact on germane matters in Islam. Specifically, it present challenges to important Islamic subjects that include, but not limited to, family law, rules of paternity, fosterage and guardianship, adoption, law of inheritance and law of contract.

What is obvious is that, at the moment, the legal position of surrogacy in Islam as per its validity is far from being absolutely clear and concluded. Perhaps this is because it is a new socio-medical phenomena unknown during the lifetime of the prophet (SAW) and his rightly guided caliphs. The answer to the legal issue lies with the Islamic secondary sources of the law, precisely the principles of *qiyas*, *ijtihad* and objectives of Sharia.