

The Extent of Legality of Surrogacy “A Comparative Study”

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Research Topic:

As a result of the astonishing scientific and technical development in all aspects of life, especially in the field of medical and biological sciences, which directly affect people's lives, providing them with solutions to problems that were impossible to solve in the past. Among these matters is what is known as *Assisted Human Reproduction*, to solve the problems of pregnancy and childbirth, such as narrowing or obstruction of the uterus (*Cervical Stenosis*) in women or infertility in men, which leads to missing the opportunity for natural reproduction.

One of the methods of Assisted Human Reproduction is what is known as “*surrogacy*” by which a wife’s egg is fertilized with a sperm from her husband’s semen in most cases, and then the fertilized zygote is implanted in the healthy uterus of another woman for the duration of pregnancy, provided that she hands over the baby to the parents after its birth, oftentimes, in return for an agreed fee, but it may also be voluntary.

Several names have been given to this type of reproduction, including: “*seedling of embryo*,” “*custodial mother*,” “*surrogate mother*,” “*rental belly*,” “*pregnancy for others*,” and “*rented womb*,” and “*surrogacy*” and this last name is the one that became famous in the United States and the European continent, and lately in the Arab countries. This is what prompted me to choose the expression ((*surrogacy*)) in my research, as it is the most obvious and indicative of this type of reproduction.

The wave of artificial insemination, which is considered as a form of surrogacy, began since “the birth of the First Test Tube Baby” called “Louise Brown” that brought the world’s attention the 25th July 1987.

Since the emergence of artificial insemination in the last quarter of the twentieth century, Muslim doctors have held conferences and symposiums to study such innovations that led them to a preliminary truth, which is that artificial insemination and similar procedures, such as surrogacy, if between a married couple, is permissible, and if a third party is involved, then it is prohibited.

In 2001, an Arab doctor specializing in obstetrics and gynecology raised the issue of “surrogacy” to solve the problem of a patient whose uterus was removed. The issue was presented to some Sharia jurists, who issued a fatwa permitting a woman to volunteer or rent her womb to carry the sperm (the wife’s egg is fertilized with a sperm from her husband’s semen) and the owner of the rented womb or the “surrogate mother” shall carry the pregnancy instead of the owner of the defective womb until childbirth.

Based on this matter, which sparked widespread controversy among the jurists, the Islamic Research Academy decided in its session dated 29 March 2001 that: “It is forbidden to use the womb of an unrelated to put the semen or egg of a married couple in her womb, whether the subject is in the womb of that woman a sperm, an egg or a fetus.” This means that surrogacy is prohibited if it is from an unrelated who is not the wife of the owner of the sperm.

However, given that the subject has many different opinions and trends, I decided to write about it to investigate the different opinions, follow their evidence, and discuss them seriously and objectively, leaving a wide space for further discussion of this calamity.

Research Importance:

The importance of the research lies in that it deals with the issue of surrogacy, which is considered

one of the most prominent modern methods of Assisted Human Reproduction, and which is resorted to to solve the problem of the inability to have a child among many of those who suffer from infertility and are deprived of children. This has led many people to consider it and to question its legality despite the existence of some fatwas that permitted it. Here it was necessary to understand this calamity and know the opinion of Islamic Sharia jurists and the man-made laws related to it.

Research Problem:

This research deals with a set of problems that arise about the legality of surrogacy, the description of surrogacy, the ruling on surrogacy in Sharia and law, and the effects of surrogacy.

Research Methodology:

In this research, we will rely on the comparative analytical method

Search Plan:

The research: includes an introduction, three chapters, and a conclusion.

The introduction, in which I spoke about the topic of the research, its importance, methodology, and previous studies

The first chapter: the description of surrogacy

The first requirement: the definition of surrogacy

The second requirement: the forms of surrogacy

The second chapter: the ruling on surrogacy in Sharia and law

The first requirement: the ruling on surrogacy in Islamic law

The second requirement: the ruling on surrogacy in comparative legislation

The third chapter: the effects of surrogacy

The first requirement: the mixing of lineages and the dispute over motherhood.

The second requirement: the psychological effects on the child and the family renting its womb.

Conclusion: the research findings and recommendations.

The First Chapter

The Description Of Surrogacy

The First Requirement

The Definition Of Surrogacy

Surrogacy is a practice or agreement in which a woman called "*the surrogate mother*" agrees to carry another person's pregnancy in return for money or for free as a "*donation*". This practice helps many married couples whose health conditions did not help them to have children, where the matter is often caused by the health conditions of a woman or her husband¹. Infertility is closely related to surrogacy, as infertility is the most important reason for surrogacy, and therefore I think that it is important to define it, so what is infertility and what are its causes?

First: The Term Infertility:

1- Definition of Dr. Khaled Mohamed Mansour, who defined infertility as: "a real or presumed inability to give birth to both spouses or one of them, and the wife is at an age at which she can usually give birth"².

2. Others defined the infertile as "he who does not have children, it is said: the woman and the man are sterile, meaning they have something that prevents them from procreation such as a disease or old age"³.

Second: Infertility Described by Doctors.

1. Dr. Ibrahim Adel Al-Adgham defined the condition of infertility as "the inability of the wife to have children for a year, despite the occurrence

¹ Dr. Khaled Abdel Azim Abu Ghaba, see in detail and with great discretion, infertility and its rulings, a comparative study between medicine, religion and law, first edition, the National Center for Legal Publications, Cairo 2008, p. 94.

² Dr. Khaled Mohamed Mansour, Medical rulings related to women in Islamic jurisprudence, Dar Al-Nafaes Publishing and Distribution, Amman, Jordan, p. 72.

³ Abu Jib Al-Saadi, Islamic Jurisprudence Dictionary, Dar Al-Fikr, Damascus, first edition, 1982, p. 145.

f regular marital intercourse without the use of any contraceptive”⁴.

2. The definition of Dr. Ahmed Muhammad Kanaan, who defined it as “the inability to have children”⁵.

Through all these previous definitions, I can define infertility as “the inability of the spouses to have children despite the possibility of its occurrence”. It is a brief definition that includes all types of infertility while observing the controls of the terminological definitions, away from long and extended definitions.

After I defined infertility, which is the first reason that calls for surrogacy, I return to the definition of the term surrogacy - the title of the research - so what is meant by surrogacy?

First: Defining The Term Surrogacy.

We mentioned earlier that there are many names for surrogacy that were mentioned by the jurists, and among those names are: the receptive uterus, the seedling of embryo, the borrowed mother, the mother by proxy, the surrogate mother, the custodial mother, and pregnancy for others, and all of them indicate one meaning, which is the surrogacy.⁶

Surrogacy is defined in the Islamic Jurisprudence terminology as: “The implantation of an egg from a woman fertilized with a sperm from her husband in the womb of another woman until she gives

birth, in return for a sum of money or without financial consideration”⁷.

It was also known as: “Using the uterus of another woman who carries a zygote consisting of a man’s sperm and a woman’s egg – and they are often a couple – and she carries the fetus and gives birth to it, after which the spouses take care of the newborn and it is a legal child to them.”⁸

On the other hand, Dr. Saad bin Abdulaziz bin Abdullah Al Shuwairah defined it as “a contract of compensation for the use of the womb of an unrelated to implant the zygote in it, provided that the newborn is not attributed to her”.⁹

Through these previous definitions, it becomes clear to us that surrogacy is “a contract of leasing a woman’s uterus that entails carrying the egg of another fertilized woman implanted in her womb from the beginning of the pregnancy to its end, provided that the newborn is handed over after birth, whether with or without a financial consideration”.

The Second Requirement

The Forms of Surrogacy

Surrogacy has many forms related to the circumstances of the man or woman. Accordingly, there are several forms of surrogacy, which are as follows:

The first form: The insemination is taken from the spouses (the egg from the wife and the sperm from the husband) and insemination is carried out outside the womb in the laboratory through a test vessel, then the zygote is implanted in the uterus of another woman. This is often the case of the woman who doesn’t want to get pregnant out of luxury or the one whose uterus is unable to conceive. In this case, the zygote is not returned to

⁴ Dr. Ibrahim Adel Al-Adgham, consultant of dermatology, venereology and infertility, *Women, Infertility And Childbearing, a Recent Study of The Causes And Methods of Treatment*, Dar Al-Qalam, Damascus, p. 47.

⁵ See: *The Islamic Jurisprudence Medical Encyclopedia* (a comprehensive encyclopedia of jurisprudence rulings on health, disease and medical practices) Dar Al-Nafais, Jordan, p. 733.

⁶ Dr. Hind Al-Khouli, *Surrogacy in Islamic Jurisprudence*, research published in *Damascus University Journal of Economic and Legal Sciences*, Volume 27, Third Issue 2011, p. 278. And see: Khaled Mohamed Mansour, *Medical rulings related to women in Islamic jurisprudence*, previous reference, p. 100.

⁷ Safa Mahmoud al-Ayasra, *Scientific developments and their impact on the fatwa on personal status*, Dar Imad al-Din, Jordan, 1, 1430 AH, p. 251.

⁸ Aisha Ahmed Hassan, *Pregnancy Related Provisions in Islamic Jurisprudence*, Majd. University Foundation for Studies and Publishing, Beirut, 1, 1429 AH, p. 106.

⁹ Saad bin Abdulaziz Al Shuwairah, *Rulings on Artificial Insemination*, Treasures of Seville for Publishing and Distribution, Riyadh, Saudi Arabia, Edition 1, 1430 AH, Part 1, p. 347.

the wife, and when this woman, the owner of the rented womb, gives birth to the newborn, she hands it over to the spouses, and this form is the most famous and it's the form by which the process of surrogacy is known in the world¹⁰.

The second form: The zygote is from a married couple and the insemination is done outside the womb in the laboratory by means of a test vessel, and after the zygote grows, it is implanted in the womb of one of his wives as a donor. This method was suggested by Sheikh Muhammad bin Uthaymeen - may Allah have mercy on him - in the seventh session of the Fiqh Council of the Muslim World League in the year 1404 AH, which was accepted by the Council at the time, but banned it later on in its eighth session, after it became clear to it that it was not legal.¹¹

The third form: The insemination is from donors (the egg is from a donor and the sperm is from a donor) and the pregnancy and birth are carried out by a donor woman. The insemination is done externally, then the zygote is implanted in the womb of another woman for the benefit of a third woman who pays money for taking the newborn without participating in its formation or carrying it. In this case, the wife is barren, as she is unable to become pregnant and her uterus is not suitable for pregnancy. The surrogate may be the same as the egg donor or another woman.

The fourth form: The insemination is from a donor, and the sperm is from the husband, and pregnancy and childbirth are carried out by a donor woman¹². This form is resorted to if the wife is barren, as she is unable to produce eggs and is unable to become pregnant, and the surrogate may

be the same as the one who donated the eggs or another woman¹³.

The fifth form: The wife's egg is fertilized with the semen of an unrelated man who is not her husband, then the frozen zygote is implanted in the womb of an unrelated, and this form is used if the husband is sterile, and the wife has a deficiency in her womb, but her ovary is healthy¹⁴.

The sixth form: The donated egg of an unrelated is fertilized with the semen of an unrelated man who donated his sperm, and another unrelated woman donates her uterus. This form is resorted to if both spouses are sterile and have no hope of recovery or childbearing. Therefore, the couple goes to the sperm banks to buy a frozen embryo, and in agreement with the sperm bank or with other companies specialized in surrogacy, they rent the womb of an unrelated who can become pregnant. After giving birth, the newborn is handed over to them as their son¹⁵.

Considering what was mentioned in all these forms, there are those who participate with the couple in reproduction, and thus the newborn is born with a controversy that will accompany him all his life because he will remain confused and will not know who his mother really is: is she the owner of the egg or the owner of the uterus? Because, in all these cases, the owner of the uterus is not the owner of the egg, in addition to the absence of a legal marriage contract between the husband and the owner of the uterus, and the owner of the uterus (the surrogate mother) here is considered an external third party unrelated to the spouses.

The Second Chapter

Ruling on Surrogacy in Sharia And Law

The First Requirement

Ruling on Surrogacy in Sharia

¹⁰ Dr. Karima Abboud Gir, Surrogacy and its Consequences, College of Basic Education, University of Mosul, 2010 edition, p. 244. And see: Omar Suleiman Al-Ashqar and others, Jurisprudential Studies in Contemporary Medical Issues, Dar Al-Nafaes, Jordan, Amman, edition of the year 1421 AH, vol. 2, p. 812.

¹¹ Rabia Ghandoufa, Surrogacy, Faculty of Social Sciences and Humanities, El Oued University, Algeria, 2014 edition, p. 16.

¹² Muhammad Abdul-Jawad Hijazi, Emerging Medical Issues in the Light of Islamic Law, Dar Al-Hikma, Britain, edition of the year 1422 AH, vol. 1, p. 177.

¹³ Rabia Ghandoufa, Surrogacy, College of Social Sciences and Humanities, previous reference, p. 16.

¹⁴ Aisha Ahmed Hassan, Pregnancy Related Provisions in Islamic Jurisprudence, previous reference, p. 142.

¹⁵ Muhammad Mahmoud Hamza, Surrogacy Between Medicine and Islamic Law, Beirut, Dar al-Kutub al-Ilmiyya, Edition 1, 1428 AH, p. 166.

The first opinion: the opinion that it is absolutely permissible.

Contemporary jurists of this opinion think that surrogacy is absolutely permissible, whether the owner of the womb is another wife to the owner of the sperm or not. In Egypt, Sheikh Abdel Moati Bayoumi¹⁶, former Dean of the Faculty of Jurisprudence at Al-Azhar University and a member of the Religious Committee in the Egyptian People's Assembly, and Dr. Ismail Barada¹⁷ permitted surrogacy. These scholars mentioned rational evidence that established the argument for permissibility. Among these is analogical deduction, as they considered the mother owner of the womb as similar to the foster mother, from two aspects:

The first aspect: that Allah Almighty combined pregnancy and breastfeeding in the necessary period for them in His saying: **“And his carrying and his weaning is (in) thirty months”**¹⁸.

The second aspect: the existence of a direct relationship between the growth of the breast of the pregnant woman and the growth of the fetus, for the breast is linked in its growth with the growth of the fetus until it is ready to replace the uterus in feeding. If it is permissible to hire a nurse and even entrust her with his custody and upbringing, and the clear impact of that on him; in pregnancy there is no significant impact on him¹⁹.

The second opinion: The opinion that it is permissible if the uterus is that of another wife.

The proponents of this opinion relied on the fact that the surrogacy contract is permissible, but on condition that the owner of the rented womb is another wife of the husband who owns the sperm, then one of his wives gives the egg and the other

donates the pregnancy after the fertilization of the egg by the husband, which is what was permitted by the Islamic Fiqh Academy in Makkah in its seventh session held in the period between 11-16 Rabi' al-Akhir 1404 AH, then changed its opinion and said that the prohibition was due to the mixing of lineages, assuming (that the other wife in whom the first wife's egg was implanted may become pregnant, before her uterus is blocked carrying the zygote, from the husband's intercourse with her in a period close to the implantation of the zygote. In that case, if she gives birth to twins, the child born owing to the implanted zygote will not be differentiated from the child born from the intercourse, just as the mother of the child born from the implanted zygote from which the egg was taken will not be differentiated from the mother of the child of the person who was born from the intercourse. Also, as a clot of congealed blood or embryo of one of the two pregnancies may die and not fall apart except with the birth of the other pregnancy, and in that case also we wouldn't know if is the child born owing to the implanted zygote, or the pregnancy resulting of the intercourse with the husband. This entails mixing the lineages in terms of the real mother of each of the two pregnancies, and the consequent confusion of the provisions of inheritance, alimony and righteousness, and all of this necessitates the cessation of judgment in the aforementioned case²⁰.

Among those who agreed with this statement are Sheikh Abdullah bin Salman Al-Manea, a member of the Council of Senior Scholars in the Kingdom of Saudi Arabia, Dr. Ali Muhammad Yusuf Al-Muhammadi, Professor of Sharia at Qatar University, and others²¹.

The third opinion: the opinion of prohibition.

¹⁶ Wafaa Ghunaimi Ghoneimy, see: *The Shariah Controls*, Riyadh, Dar Al-Sumaei, 143 AH, i 1, p. 202.

¹⁷ Ghnaimi Ghonimi, see: *The Shariah Controls*, Wafaa Al-Seeq reference. p. 202.

¹⁸ Surat Al-Ahqaf, verse (15).

¹⁹ Ahmed Muhammad Lutfi, *Artificial Insemination between Doctors' Sayings and the Opinions of Jurists*, Dar Al-Fikr Al-Jami, E 1, Alexandria, 2006 AD, pp. 255-256. See: Shawqi Zakaria Al-Salihi, *Rented Womb, Sperm Banks And Embryos And Their Jurisprudential And Legal Rulings*, Dar Al-Ilm and Al-Iman, Cairo, 2006, p. 259.

²⁰ Ahmed Muhammad Lutfi, *Artificial Insemination between Doctors' Sayings and the Opinions of Jurists*, Ibid., p. 247. And see: Ibn Idris Al Hilli Center for Jurisprudence Studies, the jurisprudential report entitled (*The Alternative Mother*), first issue, 2007 AD - 1428 AH, pp. 35 - 36.

²¹ Arif Ali Arif, a *Jurisprudential Study of Contemporary Medical Issues*, vol. 2, p. 280. See Sajida Taha Mahmoud: *Surrogacy And Its Impact in The View of Sharia, Medicine And Law*, research published on the Internet, p. 15.

While others, who hold this view, stated the absolute prohibition of pregnancy through womb renting, since there is no difference between the owner of the rented uterus, being an unrelated or another wife to the man who owns the sperm, which I mentioned in both the first and second forms of the forms of surrogacy. This is the opinion of the masses of contemporary jurists, which was issued by the Islamic Fikh Academy in Makkah in its eighth session in 1985 AD²², and the decision of the Islamic Research Academy in Cairo, Egypt in 2001 AD²³, and it is the opinion of many modern jurists, including Sheikh Mustafa Ahmed Al-Zarq, Sheikh Abdullah Al-Bassam, and Sheikh Abdullah bin Zayed Al Mahmoud, and Sheikh Bakr bin Abdullah Abu Zaid²⁴.

Those who say that surrogacy is forbidden cited several evidences from the Holy Qur'an, the Prophet's Sunnah and reason, as follows:

First: Evidence from the Holy Qur'an: There are many verses from the Qur'an that show that the origin regarding the woman's private parts is the prohibition, and only what is stipulated by the Legislator is permitted from them, and the uterus is part of the woman's private parts. Therefore, just as a woman's private parts are only permitted by a valid legal contract, the uterus may not be occupied without a pregnancy out of marriage, so the principle of prohibition shall remain. Ibn Nujaym said: "The basic principle with regard to private parts is prohibition. If the permitted and the forbidden meet in a woman, the prohibition shall prevail, and that is why it is not permissible to investigate the private parts²⁵. Among these Holy Verses:

1- The Almighty saying: {"And those who guard their private parts. Except with their wives, or what their right hands own, for they are the unblameworthy. But whoever sought beyond that, they indeed are the transgressors."}²⁶

2- The Almighty saying: {"And Allah hath given you wives of your own kind, and hath given you, from your wives, sons and grandsons, and hath made provision of good things for you. Is it then in vanity that they believe and in the grace of Allah that they disbelieve?"}²⁷.

Second: Evidence from the Sunnah: There are several hadiths showing that it is forbidden for a woman to marry if her womb is occupied by the semen of a man other than her husband, such as the hadith of Ruwafa' bin Thabet al-Ansari who said: I was with the Prophet (peace be upon him) when he conquest Hunain and he spoke to us and said (peace be upon him): ("It is not lawful for a man who believes in Allah and the Last Day to water what another person has sown.")²⁸. And the hadith: "There must be no intercourse with pregnant woman till she gives birth to her child or with the one who is not pregnant till she has had one menstrual period."²⁹. The evidence in the two previous hadiths is the prohibition of sexual intercourse with a woman who was pregnant with someone other than her husband, so her womb is preoccupied with the semen of a man other than her husband³⁰.

Third: The evidence from reason: such as the existence of a suspicion of mixing lineages due to the possibility of failure of the implantation of the fertilized egg and the wife becoming pregnant from intercourse with her husband, then he thinks

²² Dr. Ahmed Muhammad Lutfi, see: Artificial insemination between the sayings of doctors and the opinions of jurists, Dar Al-Fikr Al-Jami'i, 1st Edition, Alexandria, 2006, p. 246.

²³ Resolution No. (1) in its session held on 29/03/2001 AD.

²⁴ See: Hosni Mamdouh Abdel-Dayem, The Surrogacy Contract between Prohibition and Permissibility, Dar Al-Fikr Al-Arabi, 1st Edition, Alexandria, p. 221..

²⁵ Zain al-Din bin Ibrahim bin Najim, The Similarities and Analogies on the Doctrine of Abu Hanifa al-Numan, Beirut, Dar al-Kutub al-Ilmiyya, edition of the year 1400 AH, p. 67.

²⁶ Surat Al-Muminoon, verses 5-7.

²⁷ Surat An-Nahl, Verse 72.

²⁸ Ahmad bin Hanbal, Musnad of Imam Ahmad, vol. 4, p. 108.

²⁹ Narrated by Ahmad in his Musnad, Book of Marriage, Chapter Intercourse with Female Slaves, Part 3, pg. 62. And Abu Dawood in his Sunan, Hadith No. (2157) vol. 2, p. 248.

³⁰ See: Saad bin Abdulaziz Al-Shuwairekh, Rulings on Unnatural Insemination, p. 451, and what follows.

that the child is born from the fertilized egg³¹. Also, the insemination in this way necessitates the exposure of the woman's nakedness, looking at her and touching her, and the principle is that it is forbidden by Sharia except for necessity, and if the necessity is justified for the owner of the egg, it is not permissible for the owner of the rented womb³².

The Second Requirement

Ruling on Surrogacy in Comparative Legislation

First: The ruling on surrogacy in comparative legislation

A - Ruling on surrogacy in Arab legislation.

The laws of Arab countries have not given great importance to the rulings on surrogacy until recently. The reality of surrogacy in many countries of the world imposed on them to regulate some of the rulings governing this urgent issue in those countries. The following is a review of what the Arab laws dealt with in the field of surrogacy:

It is worth saying that most of the laws of the Arab countries relied on what resulted from the jurisprudence councils that dealt with the issue of surrogacy, and since most of those laws depend on Sharia as an important source of their sources, the articles of those laws stipulated such as the law of the United Arab Emirates and other laws of the Gulf countries, Egypt, Syria and Iraq Bahrain and some countries of the Maghreb, such as Mauritania, prohibit surrogacy in all its forms. It is not permissible for a woman to germinate in her womb a fertilized egg from another woman, whether it was fertilized by her husband or someone else, and whether the owner of the egg is an unrelated, a relative, or a co-wife with whom she shares the same husband.

The federal legislature of the United Arab Emirates prohibited the method of surrogacy under

Article 10 of Law No. 11 of 2112 AD regarding licensing fertility centers, as it was stated in the aforementioned article that the center is prohibited from practicing the following methods of assisted reproductive technologies:

1. The fertilization takes place between a sperm taken from the husband and an egg taken from an unrelated, then the fertilized egg is implanted in his wife's uterus.
2. The fertilization takes place between a sperm taken from an unrelated man and an egg taken from the wife, then the fertilized egg is implanted in the uterus of this wife.
3. The external fertilization takes place between a sperm taken from the husband and an egg taken from the wife, then the fertilized egg is implanted in the uterus of a volunteer woman who carries it.
4. The external fertilization takes place between a sperm taken from a man and an egg from a woman, and the fertilized egg is implanted in the uterus of another woman.
5. The external fertilization takes place between a sperm taken from the husband and an egg taken from the wife, then the fertilized egg is implanted in the uterus of another of wife of the man.

The Dubai Court of Cassation also settled on a legal principle that the child is attributed to the woman who conceived it and gave birth to it in the delivery room, so that she would be the only mother based on the text of Article (90) of the Personal Status Law, which states that:

1. The child is born in wedlock if the shortest period of pregnancy has lapsed since the valid marriage and it is not established that carnal knowledge was impossible between the spouses.
2. The affiliation of the child shall be established from suspected copulation if he is born for less than the shortest period of pregnancy after the said carnal knowledge.
3. Affiliation of the born child shall be established to his mother upon evidence of his birth.
4. Once the affiliation is legally established, the action in disavowal shall not be heard.

³¹ Souad Saleh, Honoring the Human Being And Surrogacy, an article in Al-Ahram newspaper, dated 3/13/2006 AD, Issue 4157, published on the website of Al-Ahram newspaper (<http://www.ahram.org.eg>).

³² The previous source.

The Court of Cassation in the United Arab Emirates concluded its judgement based on the Sharia in the Almighty's saying: {"None can be their mothers except those who gave them birth"}³³ And here the child is attributed to the one who gave birth to him, i.e., the woman who became pregnant and gave birth in the delivery room is the only mother. This is what was affirmed by "paragraph 3 of Article 90 of the Personal Status La"). It is a matter related to public order and it is not permissible to agree on its disagreement or to apply a foreign law that contradicts it, so surrogacy is a manipulation that is rejected by Sharia, and the preservation of offspring or lineage is one of the five necessities that Islam guarantees its preservation, which are "preserving religion, preserving the soul, preserving money, preserving offspring, and the mind."

Contemporary jurists unanimously agreed during the discussion of this issue on its prohibition; because there is a third party other than the husband who owns the sperm and the wife who owns the egg, and it is not possible to be certain with the presence of the third party to determine the true mother of this child, so is the owner of the egg from which the child is created and carries all her genetic characteristics more entitled to him? Or the custodial mother who owns the womb in which it grew, developed and changed, until it became a fully-fledged fetus? Therefore, this act was forbidden, and the statement of prohibition is the decision of the Islamic Research Academy in Egypt and the decision of the Islamic Fiqh Council in its eighth session held at the headquarters of the Muslim World League in Makkah Al-Mukarramah from 28/ Rabi' al-Akhir/ 1405 AH to 07/ Jumada al-Ula/ 1405 AH. corresponding to 19 to 28 January 1985 AD³⁴.

While some Arab laws surrogacy as legal under conditions that must be met according to what the jurists of those laws see, among those laws:

1- The Algerian law: Article forty-five of this law explicitly stipulates the provision of surrogacy and

artificial insemination, an article that was added to the Algerian Family Code in its last amendment in 2005 AD, in which it stated "spouses may resort to artificial insemination and artificial insemination is subject to the following conditions:

The first condition: that the marriage be legal.

The second condition: that the insemination be with the consent of the spouses and during their lifetime.

The third condition: that it is performed with the husband's sperm, and the egg of the wife's only.

The fourth condition: It is not permissible to resort to artificial insemination using the surrogate mother.

If artificial insemination was in accordance with these conditions, it is permissible without legal punishment, and otherwise it is one of the crimes punishable by Algerian law.

2- Libyan law: Articles No. (403) bis (a) of the Penal Code and bis (b) of the same law clarified the rule of artificial insemination (and a form of surrogacy). The first article stipulates that "Whoever artificially inseminates a woman by force, threat, or deception shall be punished with imprisonment for a period not exceeding ten years, and the penalty shall be imprisonment for a period not exceeding five years if the insemination was with her consent, and the penalty shall be increased by half if the crime is committed by a doctor or a pharmacist or one of his assistants"³⁵ While the other article stipulates that "a woman who accepts artificial insemination or artificially inseminates herself shall be punished with imprisonment for a period exceeding five years", and the husband shall be punished with the same penalty stipulated in the previous paragraph if the insemination was with his knowledge and consent and whether the insemination took place by the wife or by a third party."³⁶

It is noted by looking into the two articles that artificial insemination in all its forms, including surrogacy, is a punishable crime in Libyan law, except in the case of necessity. Article seventeen

³³ Surat Al-Mujadila, verse (2)

³⁴ Muslim World League, Decisions of the Islamic Jurisprudence Council of the Muslim World League, Islamic Jurisprudence Council, 2nd edition, p. 142.

³⁵ Article (403) (a) of the Libyan Penal Code, crimes against family morals.

³⁶ Article (403) (b) same reference.

of the Libyan Medical Responsibility Law, issued in 1986 AD, stipulated the following “it is not permissible for a woman to be artificially inseminated or to implant the fetus in the uterus except when necessary and provided that the insemination in both cases is from the spouses and after their consent”, which indicates that the permissibility is limited to the fact that insemination and implantation are between the spouses, and therefore the illegality of surrogacy.

The penalty for violating this is provided for in Article thirty-five of the Libyan Medical Liability Law, which stipulates that “Anyone who violates the provisions of Articles Four, Clause F of Article Six, Article Ten, Paragraph Two of Article Fifteen and Article Seventeen of this law shall be punished by imprisonment for a period of no less than one year and a fine not exceeding one thousand dinars.”

B: The ruling on surrogacy in Western laws.

First: surrogacy contract in the United States of America: The ruling in the United States of America differs from one state to another. There are states that allow the idea of rented womb (the surrogate mother) and consider that it is legitimate and that the spouses have the right to use this method if they made up their mind, as the last appropriate solution to the problem, and these states are (Kentucky, New York, Nevada, Arkansas, California)³⁷.

In the state of California, the surrogacy contract is considered a valid and enforceable contract, and this was confirmed by the California Supreme Court in the case of³⁸ (Johnson V. Calvert 1993).

The spouses can take sperm and an egg from the sperm and embryo banks, even if they do not belong to them i.e., of unknown parentage, and despite that, the newborn is attributed to them, and this was confirmed by the California court in a ruling issued on 10 March 10 1998³⁹.

³⁷ Dr. Shawqi Zakaria al-Salihi, Rented Womb, Sperm Banks And Embryos And Their Jurisprudential And Legal Rulings, Library of Science and Faith for Publishing, 2006 edition, p. 34

³⁸ See this on (<http://www.California-surrogacy-law.com>)

³⁹ Previous source

Although there are states that absolutely prohibit this contract such as (Indiana, New Jersey, Louisiana, Florida), where any activity of surrogacy offices is prohibited and consider that the personality of women must be respected and treated as a human being and not as a receptacle for reproduction, as for the rest of the states aforementioned, they allow this method to have the child with the unenforceability of the contract⁴⁰, which means that the mother renting her womb can keep the child without any law compelling her to hand it over to his biological parents

Second: Surrogacy contract in France: The French law issued on 29 June 1994 regarding respect for the human body did not allow the idea of surrogacy, as it criminalized mediation in surrogacy. However, the law did not address the criminalization of the two parties to the relationship, meaning that the act is not criminalized if it occurred without mediation, but the contract concluded is void and is not legally valid⁴¹.

The French judicial rulings regarding the lineage of the born child conflicted. For example, the Aix-en-Provence court on 15/12/1984 when the biological mother requested the adoption of the newborn from the womb of the surrogate mother, the court decided the simple adoption, in the interest of the boy and for him to understand the reality of the relationship with his aunt (the surrogate mother). This may help the child’s psychological stability without recognizing the idea of a surrogate mother or the legalization of the contract⁴². In another ruling and because of the appeal against the ruling of the Paris Court of Appeal issued on 31 May 1991, which recognized the idea of a surrogate

⁴⁰ Dr. Shawqi Zakaria Al-Salihi, Rented Womb, Sperm Banks And Embryos And Their Jurisprudential And Legal Rulings, previous reference, p. 35.

⁴¹ Hosni Mahmoud Abdel-Dayem, Surrogacy Contract, p. 183-184. Look at the presentation of Western countries’ positions on the surrogacy contract, and on the same topic, see the link <http://www.surrogate-mother.com>.

⁴² Dr. Shawqi Zakaria Al-Salihi, Artificial insemination between Islamic law and man-made laws, a comparative study, Dar Al-Nahda Al-Arabiya, Cairo, 2001 edition, pp. 116-117.

mother, and the French Court of Cassation decided that this contradicts the text of Article (1128) French Civil and Articles (6,8,11,763) thereof, as it is the mother's abandonment of her powers over the child and this also leads to circumventing the provisions of natural filiation and adoption, the Court of Cassation confirmed this orientation in its ruling in 1994, and overturned the ruling of the court of Poitiers by deciding the simple adoption of the stepmother of his child resulting from a surrogacy and the Court of Cassation confirmed the illegality of a surrogacy⁴³.

However, the legal controversy over the surrogacy contract emerged in France when a bioethics bill was presented, which defined the idea of surrogacy, but within conditions that were specified in this aspect, the most important of which are⁴⁴:

1- The requirement that the surrogate (rented) mother be given the right to refrain from handing over the newborn for a period of up to three days after birth.

2- Depriving the adoptive father of refraining from handing over the newborn because of a handicap or disability.

Which indicates, in the opinion of the researcher, that there are many problems for this type of operation.

The Third Chapter

The Effects of Surrogacy

The First Requirement

Mixing lineages and the dispute over maternity

The mixing of lineages is one of the biggest evils that are the result of the process of surrogacy, and researchers and those interested in this issue have monitored several problems caused by it, including:

1 - The many problems and issues that occur between mothers who own the egg against the surrogate mother, because the latter may refuse to hand over the newborn to the owner of the egg even though she fulfills her contract and pays her the price agreed upon in her capacity as the newborn's mother, because this mother (the surrogate) feels that this is emerging from her womb, and her plans change with pregnancy and childbirth. She feels that she is the mother of that child, and after the pregnancy and birth, she cannot give it up, nor can stand to be separated from it, because of the psychological bonds that existed between them during pregnancy, and because she suffered from pregnancy pains and aches which are not valued with money and a price. She then holds to it and disregards the contract. If the courts take it away from her, she suffers a deep emotional wound, or a serious mental illness on the one hand, and on the other hand, it the cause of the dispute and problems may be the non-receipt of the child by the owner of the egg and her husband, because the child is a handicapped boy.

2 – This allows a poor woman to earn money through this action, under the pressure of poverty and need for money, and all what the rich people who want a pregnancy without hardship or fatigue have to do is to secure the egg only, and the surrogate mother has to carry out pregnancy and childbirth: a woman lays eggs and another carries and suffers pregnancy and labor pains for money.

3- The commercial aspect of maternity, since it becomes a commodity to be bought and sold after Allah Almighty has surrounded it in all religions, laws and moral norms with reverence and respect. Special agencies for surrogacy have spread in many countries of the East and West, and these wombs have turned into a popular commercial market for material profit⁴⁵.

The Second Requirement

Psychological Effects on The Child And The Family Renting Its Womb

Since the process of surrogacy is in contradiction to all that divine providence for the Muslim child,

⁴³ Hosni Mahmoud Abdel-Dayem, Surrogacy Contract, previous reference, p. 190.

⁴⁴ Shawqi Zakaria al-Salihi, Rented Womb, Sperm Banks And Embryos And Their Jurisprudential And Legal Rulings., previous reference, p. 41. See on the same topic the link <http://www.surrogacyissuesblog.com>

⁴⁵ See: Arif Ali Arif, a jurisprudential study of contemporary medical issues: previous reference, vol. 2, p. 114-115.

it would have raised him in an environment full of chaos, where he could not distinguish who his real mother was, whether she was the one who conceived and gave birth to him and from whom he took many of her genetic characteristics. He is raised in a broken family, and he cannot determine his identity or prove his lineage⁴⁶.

Also, his separation from his mother who gave birth to him leads to many psychological problems for the child. Dr. Muhammad Zahra says: "The surrogacy system leads to endangering the future of the child, in terms of causing him several psychological and social problems, and the first of these problems is neglect and abandonment. Abandonment for the child, regardless of the circumstances and justifications, is a phenomenon that is difficult to bear psychologically, and may have negative effects on the psyche of the child."⁴⁷

This behavior is in violation of the nature of the mother that Allah Almighty created in her. Dr. Muhammad Al-Mursi says: In fact, the behavior of a woman who accepts to have a child for another woman seems - and from the point of view of psychiatry - strange and may seem incomprehensible from the point of view of the traditional role of the mother. That a woman accepts carrying a child then leaves him after his birth and gives him up to another woman, with such simplicity that such a way seems strange in the light of maternal instinct⁴⁸.

Perhaps one of the misfortunes of this crime on the family is what Dr. Youssef Elfert mentioned: that one of the surrogate mothers in Germany, after she handed over the girl to the renting family and received the agreed-upon price, the new family had to conduct a blood analysis for her a year after her birth. The surprise was that this child resulted from a normal relationship between the man and the wife (surrogate mother), and it was not the product of the fertilized egg provided by the other woman, but the courts refused to hand it over to her natural family on the grounds that she had

received the price⁴⁹. This shows the great injustice that some surrogate mothers are subjected to, which is contrary to the divine honor that women were given in Islamic Sharia, as it makes every woman renting her womb an instrument for remuneration⁵⁰.

Conclusion

First: the results.

- 1- What is meant by surrogacy is the modern image that has emerged in recent years to treat several cases of Infertility of the spouses.
- 2- What scientists have done in the modern era of reproductive technologies, artificial insemination and test-tube babies is a continuation of what the ancients started in this field with different possibilities and results.
- 3- The main reason for resorting to surrogacy and artificial insemination is infertility.
- 4- The relationship between surrogacy and artificial insemination lies in the fact that surrogacy represents a form of artificial insemination.
- 5- The jurists differed in the issue of surrogacy in only two forms. As for the rest of the forms, they agreed on its prohibition.
- 6- Exposing the private parts is permissible in medical cases under the conditions laid down by the jurists for that.
- 7- The agreement with the opinion that it is forbidden to rent wombs in its various forms.
- 9- There is no inheritance between the owners of the fertilized egg and the rented womb and its newborn.
- 10- The positions of the Arab man-made laws that stipulate this issue took the position of prevention and made the perpetrator liable to punishment, while some of those laws consider the surrogacy legal under the conditions mentioned by the researcher previously.

⁴⁶ Youssef Abdul Rahman Al-Fart, Contemporary Jurisprudence Issues, previous reference, p. 37.

⁴⁷ Muhammad Al-Mursi Zahra, Artificial Reproduction, previous reference, p. 166.

⁴⁸ Muhammad Al-Mursi Zahra, Artificial Reproduction, previous reference, p. 163

⁴⁹ Youssef Abdul Rahman Al-Fart, Contemporary Jurisprudence Issues, previous reference, p. 64

⁵⁰ The previous reference, pg. 64.

11- These operations make the child a product or a commodity, since, as soon as the hired woman completes the pregnancy and childbirth, she hands it over to the one who hired her.

Second: recommendations.

I recommend adopting the opinion that considers the illegality of surrogacy, for the following reasons:

1- The absence of a marriage contract between the owner of the sperm and the surrogate woman, which entails the absence of a legitimate marital relationship, and therefore her carrying of the fertilized egg of an unrelated woman from the woman's husband is illegal.

2- Children are related to marriage, meaning that in order for them to be legitimate children, they must be born to two spouses, and therefore it is not permissible for a woman to bear a fetus for another woman.

3- Whoever has the right to intimate with a woman has the right to occupy her womb with pregnancy from him, and whoever does not have the right to enjoy a woman does not have the right to occupy her womb with pregnancy from him.

4- Enjoying a woman is not subject to tolerability and permissibility, because it is forbidden for a woman to be alone with someone other than her husband, and therefore her womb is also not subject to tolerability and permissibility, a fortiori.

5- Surrogacy carries the meaning of committing a sin - even if imperfectly - since a sperm was placed in the womb of a woman who is not the wife of this man, and sin is forbidden in this sense.

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