

Surrogacy and its Complexity as a Misunderstood Concept: An Islamic Perspective

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Abstract

The aim of this paper is to examine the concept of surrogacy, identify the legal issues associated with it, and analyze its legal implications from an Islamic perspective. The paper discusses the concept of surrogacy and its practice among Muslims, including the nature of surrogacy, the factors driving its practice, and how it operates in medical clinics. The research also identifies the different types of surrogacy and examines its effects on the surrogate parties and the children born through surrogacy. These effects include legal, emotional, social, and health risks. Additionally, the paper highlights secular views on the legal perceptions of surrogacy, including the perspectives of pro-surrogacy advocates, opponents of surrogacy, liberal views, and feminist perspectives. The complexities of determining the real parent of a surrogate child, as well as the child's relationship to their biologically born siblings, are also discussed. Documentary and survey methods were adopted in writing the paper. The research finds that surrogacy presents inherent problems related to the lineage of the surrogate child, and as a result, some aspects of surrogacy are considered forbidden (Haram), while others are deemed reprehensible (Makruh). The research also concludes that the biological mother is the real mother of the surrogate child, and the child is considered illegitimate, except in the case of a reprehensible (Makruh) surrogacy.

Key words: Surrogacy, Surrogate mother/Biological Mother, Genetic Mother

Introduction

Family life, historically, is one of the ways of generating a society that can live and organize as a common unique disciplined under social values. This gives courage to individual in the society, the ambition of getting siblings, tracing to a father, mother and extended family relations. The best way of achieving all these is through marriage. The function of marriage is not

only for sexual gratification but also procreations. Thus, human procreations in Islam is essential for the continuance of the human species on earth to worship Allah (SWT). Islam basically provides two legitimate ways of human procreation, i.e. through valid marriage and concubinage as the Glorious Qur'an stated in the following words "*And those who guard their chastity (i.e. private parts from illegal sexual acts). Except with their wives and the (women slaves and captives) whom their right hands possess, for(them) they are not to be blamed. But whosoever seeks beyond that and them it is those who are trespassers*".¹ However, it is within the power of Allah some people are created with means of procreations while others infertile. In a situation whereby the couple lacks procreation, they become disturb and start blaming each other, thereafter start looking for solutions to their condition. With the introduction of ARTs technology in this modern time, the couples who come to know about the new development resort to any possible solution of their infertility through it without considering ethical and religious implication associated to that alternative.

One of these alternatives (of Assisted Reproductive Technologies (ARTs) is surrogacy; It is a situation whereby an infertile couple will solicit the services of the womb of fertile woman to be artificially inseminated with the husband's semen and the wife's eggs, and the surrogate carries the pregnancy for a time up to nine months and give birth, then the surrogate mother transfers such a child with all his parentage status to the soliciting couple and being paid her remuneration. In this case, the begotten child has one biological father and two mothers that is genetic mother who provided the ovum for the procreation of such child and biological birth mother who carried the pregnancy of the child and gave birth to him.² So it is complicated in the Islamic Law of Inheritance to determine which of the two mothers is the real mother of the begotten child so as to establish right of inheritance among them because Islam reserve the portion of inheritance to only one mother, "...*And for one's parents, to each one of them is a*

¹M.T Hilal and M. M. Khan , "*Interpretation of the Meanings of the Noble Quran: A translation into modern English*, Quran 70:29-31

²Al-Bar MA, Chamsi-Pasha H. "*Contemporary Bioethics: Islamic Perspective*" Chapter 11, Assisted Reproductive Technology: Islamic Perspective. 2015 May 28. published online on <https://www.ncbi.nlm.nih.gov/books/NBK500175/> accessed on 28/07/2021 8:10

sixth”³. It is also difficult to determine whether there is a right of Inheritance between the father and the begotten child or not. Other legal issues associated to surrogacy which require legal verdict include permissibility or prohibition of surrogacy; permissibility or otherwise of marriage between surrogate children and their normally born brothers and sisters from the two sides of their two mothers; permissibility or prohibition of hiring the womb (of surrogate); and permissibility or prohibition of In-vitro fertilization.

Therefore, looking at the complexity surrounding the practices of surrogacy and the divergent opinions of Jurists(*Fuqaha*) as regard to its practice, as well as other legal issues associated to it, is necessary to conduct a research on the correct legal opinions of Muslim scholars on it and find out the accepted view on the permissibility or otherwise of surrogacy and legal status of the already born children in the law of inheritance, so as to give a focus to the Judges, Scholars and Muslim *Ummah*.

Concept of Surrogacy

As highlighted in the introduction, there are various biomedical methods for addressing infertility through Assisted Reproductive Technologies (ARTs). One such method is surrogacy. In technical terms, surrogacy involves the practice of hiring a woman's womb to be artificially impregnated with the husband's sperm, so that she carries the embryo for a specified term. Upon birth, she gives the child to the intended couple. In this arrangement, the child has two mothers: the egg donor and the biological birth mother, along with one biological father. The intended couple is referred to as the commissioning parents, and the agreement is known as a gestational agreement.⁴

Historical Background of Surrogacy

The first case of surrogacy can be traced back to 1980 when a traditional Surrogate Mother was paid Ten Thousand US Dollars for her services.

³ Qur'an 4:11.

⁴Al Bar, M.A Chamsi; Pasha, *Contemporary Bioethics: Islamic Perspective*, op cit, p.177

Later in 1984, a couple hired a woman to be their traditional surrogate. After the successful operation, the surrogate mother failed to respect the agreement of handing over the child to the commission parents. The matter was brought before the court of law where it was declared that the surrogacy arrangement made between the parties has no legal backing as such, it is illegal. Therefore, the court granted the custody of the surrogate child to the biological father, while giving visitation rights to the surrogate mother. The Intended mother was never able to adopt the child.⁵

In Nigeria, historically the introduction of surrogacy is hardly being traced because of religious and ethical implications associated to it. Thus, in Nigeria, surrogacy is neither banned nor legalized, those who engage in its practice may or may not be liable for conviction as the practice is not a defined offence in the country's legal system rather there have been legislative attempts to legalize the practice.⁶

Surrogate Mother

The noun *surrogate* is derived from the Latin word *surrogatus*, the past participle of *surrogare* or *subrogare*, meaning a substitute or a person appointed to act in the place of another. In the Arabic language, surrogate mothers are referred to by various terms, including *Ummu al-Kazibah* (false mother), *Ummu al-Badilah* (substitute mother), *Ummu al-Musta'jir* (rented mother), *Ummu al-Hadanah* (foster mother), and *Ummu Ar-Rahimu al-Musta'ar* (rented uterus mother), among others. All of these terms describe a woman whose womb is rented and who is impregnated with the sperm and egg of a couple, assuming the responsibility of carrying and giving birth to the child.⁷

⁵An Internet Material, Published online on <https://www.worldwidesurrogacy.org/blog/the-history-of-surrogacy> accessed on 25 September, 2022

⁶Dr. Alhaji Sanda, 46 years old, A medical Doctor of IRCC on March 2023

⁷ Khairina G. U. et al, *Surrogate Mother according to the Science and Opinions of Contemporary Islamic Scholars*, International Journal of Academic Research , Vol. 7 N0. 8, p. 87

Types of Surrogacy

Basically, there are two types of surrogacy, namely, traditional surrogacy and gestational surrogacy.⁸

1. Traditional Surrogacy

It is a process of procreation whereby the egg of the Surrogate and the sperm of the husband is used in the procreation. This can be done either through natural sex or involve 'In-Vitro fertilization' (IVF). Thus, successful operation of this, requires an artificial insemination of the sperm of the intended father or sperm donor into the surrogate. Thus, the surrogate mother in this type is genetically related to the child she gave birth.⁹

2. Gestational Surrogacy

This is a type of surrogacy where embryo is fertilized with the sperm and egg of intending parents and implanted into the surrogate mother. In this instance, the resulting child has no genetic relation with the surrogate mother.¹⁰

The gestational surrogacy requires more intricate medical interference than traditional one. Unlike traditional surrogacy which can be carried out even in a natural way through sexual contact or by simple insemination of the sperm, the process of gestational surrogacy requires In-Vitro fertilization (IVF) and the embryo transfer (ET) to the womb of the surrogate mother.

Factors Causing Surrogacy

There are certain factors emanating from both the commissioning couple and Surrogate mother that lead to the involvement and engagement of

⁸ Rozee. V, et al, *Gestational Surrogacy in India*, available at https://www.researchgate.net/publication/309769094_gestational_surrogacy_in_india accessed on 12th March, 2020

⁹ Ibid

¹⁰ Ibid

surrogacy. The fundamental factors initially rise from the commissioning couple, this is as a result of certain unavoidable problems i.e. infertility, while for the surrogate mother mostly is commercial or altruistic reasons. Some of these reasons for the couple include:

1. When a wife's egg is unable to fertilize and give birth.
2. If the uterus of a wife is not good for the conception.
3. When the wife has no uterus.
4. When the wife has uterus and is good for the pregnancy but she desire to maintain her beauty of the body or she does not want to bear the burden of pregnancy and the pain of giving birth and breastfeeding after birth.¹¹

Mairiga (2023) opines that most women who engage in surrogacy do so primarily to preserve their physical appearance and to avoid the physical demands of pregnancy, rather than as a response to infertility. According to the author, if surrogacy were genuinely pursued for infertility-related reasons, there are numerous alternative options available that do not carry legal or religious implications or potential risks related to genetics. However, it is important to note that surrogacy does not pose genetic complications, as scientific evidence confirms that the resulting child maintains a direct genetic connection with the biological parents.¹²

Legal Framework of Surrogacy

Surrogacy is not widely accepted as an alternative means of human procreation due to the potential for lineage confusion and the complex legal issues associated with its practice. However, in countries where surrogacy is permitted, specific rules, terms, and conditions govern the contractual arrangements. In contrast, countries that prohibit surrogacy impose

¹¹ Khairina G. U. et al op cit p. 87

¹²Interview with Prof. A.G. Mairiga, Obstetrician in the Department of Gynecology, UMTH, in his office on 24th April, 2023 around 11:00 AM

penalties on those who engage in it and provide legal provisions that determine the status of the resulting child.

Notably, some countries permit only traditional surrogacy while prohibiting gestational surrogacy, whereas others allow both or reject both entirely. For example, in Indonesia, traditional surrogacy is legal, while gestational surrogacy is prohibited due to its complex implications, particularly in matters of inheritance. Furthermore, Indonesian law explicitly prohibits the renting of a uterus for surrogacy purposes.¹³

In Nigeria, surrogacy is neither explicitly banned nor legally recognized; therefore, individuals who engage in the practice are not liable for prosecution, as it is not classified as an offence under the country's legal system. Nevertheless, there have been legislative efforts to regulate and legalize surrogacy. In 2016, a bill aimed at establishing a legal framework for surrogacy passed its second reading in the National Assembly. The bill outlined the rules and conditions governing surrogacy arrangements. Some of the rules include:

1. The commissioning parents and Surrogate mothers are to enter into a legal agreement before making any surrogacy arrangement.
2. Surrogate commissioning couples, are to take the responsibility for all the liabilities relating to the pregnancy, insurance and post-natal expenses.
3. The commissioning parents are to compensate surrogate mother for acting on their behalf.
4. The surrogate mother is to surrender all parental rights and status of the surrogate child to the commissioning couple upon giving birth.
5. The commissioning parents are the legitimate parents of the surrogate child.

¹³Yasanta op cit p.425

6. The Surrogate born child is to bear the name of the commissioning parents in certificate and register.
7. The commissioning parents are obliged to accept the surrogate child regardless of any abnormalities.
8. The commissioning parents must issue a certificate of declaration that the surrogate mother acted on their behalf.
9. The bills finally stated penalty for commissioning parents who refuse to accept or take custody of the surrogate child.
10. The surrogate mother must be between the ages of 21-45 years.¹⁴

Agreement in Gestational Surrogacy

Generally, a gestational agreement refers to a formal arrangement or mutual commitment between the intended parents (husband and wife) and the surrogate mother to facilitate the birth of a child. This agreement establishes the rights and obligations of each party involved. The intended parents have the right to receive the child from the surrogate mother upon delivery. Conversely, the surrogate mother is obligated to relinquish the child to the intended parents immediately after birth. She also has the right to receive financial support throughout the pregnancy and during the childbirth process. In return, the intended parents are obligated to provide financial assistance and cover all the needs of the surrogate mother until she gives birth to the child.¹⁵

The contract of surrogacy can either be altruistic or commercial. Altruistically surrogacy is an arrangement whereby the surrogate mother entered the surrogacy based on compassion. Thus, the intended couple would not pay the surrogate mother any compensation apart from the

¹⁴Enobong M. et al, *Legal Position on Surrogacy Arrangement in Nigeria and some Selected Jurisdiction*, International Journal of Research in Humanities and Social Science Vol. 3 PP ISSN 23941 839 2020 p. 21

¹⁵Honandar, S. et al, *Inheritance Right of a Child born from a Surrogate Mother according to Indonesian Law*, Social Science Research, 2019, p. 428

reasonable expenses like, legal charges, loss of earnings, medical expenses and insurance coverage related to the pregnancy and period after childbirth. While commercial surrogacy on the other hand, is a compensatory arrangement of surrogacy.¹⁶

Process for the Operation of Surrogacy in the Medical Clinic

For a successful operation of surrogacy to be carried out in medical clinic, there are certain procedures and methods to be followed. It usually operates through In-Vitro Fertilization (IVF). The first process is that the egg of a woman would be extracted and then manually combined the egg together with the retrieved male sample sperm in a laboratory *Petri dish*, then transferred the embryo into the uterus of the surrogate mother.

The most effective method of collecting semen is through masturbation (*istimnā*). Although semen can sometimes be collected by withdrawal during intercourse, this method is generally unsuccessful because the initial drops—which contain the highest concentration of sperm—are often lost, resulting in a low sperm count. Additionally, condoms cannot be used for semen collection because they typically contain spermicidal agents that can compromise the quality of the sample.

For the female, the process involves four basic steps:

- (i) The woman is first administered reproductive hormones to stimulate the maturation of her ova. Just before ovulation, a small incision is made in the abdomen, and a laparoscope is inserted to directly examine the ovaries. Once mature eggs are located, they are extracted using a vacuum aspirator.
- (ii) In the second step, the selected sperm is added to the retrieved egg and placed in a biochemical solution that mimics the natural environment of the fallopian tubes. Once a single sperm penetrates the ovum, fertilization occurs.
- (iii) In the third step, the fertilized egg is transferred into a nutrient solution. Within a day, it begins to undergo cell division. When the embryo

¹⁶ Available on internet <https://www.sciencedirect.com/topics/medicine-and-dentistry/surrogacy> accessed on 17th April, 2024

reaches the eight-cell stage, it becomes suitable for transfer. (iv) At this final stage, the fertilized egg is ready to be implanted into the uterus. The Surrogate woman is then to be given hormones' injections so as to prepare for the conception. (iv) The Fourth, the fertilized egg to be transferred to the uterus of surrogate mother. If the operation is successful then the embryo begins to develop in the normal procedure as natural.¹⁷

Some Secularists Views on Legal Perceptions of Surrogacy

The issues of surrogacy as a concept are juridically viewed from different perspectives. These include:

1. The View of Pro-Surrogacy

This group bases its opinion on the principle of individual choice. According to them, surrogacy arrangements are voluntary contracts entered into with informed consent and a clear understanding of the terms. Therefore, the parties involved should be allowed to proceed, as neither the surrogate mother nor the commissioning couple is compelled to act against their will. Moreover, once the surrogate mother has entered into the surrogacy agreement, she should not be permitted to revoke the contract upon the birth of the child.¹⁸

2. The Views of Those who opposed the Practice Surrogacy

The opinion of this group is based on ethics. To them, the practice of surrogacy is an exploitation of the woman and the resulting child as well, since it is an arrangement made for financial benefits and disvirginity. Therefore, the practice is tantamount to encouragement of prostitution. Moreover, according to them, the arrangement could have an unhealthy impact on the woman, because her uterus is treated as mere incubator just for the happiness of someone. It is also unhealthy for the resulting child

¹⁷Ibid p. 59

¹⁸Nasirudeen M. *A Critical Analysis of Artificial Human Reproduction: An Islamic Perspective*, Department of Islami Law, A.B.U Zaria, 2016 p. 21

because, once the child is born; he/she becomes a subject of a legal dispute.¹⁹

3. The Liberalists Views

This group bases its arguments on sympathy and compassion. They maintain that commercial surrogacy arrangements should be prohibited, while surrogacy carried out for altruistic reasons should be permitted. Their position is that, since such arrangements aim to reduce the suffering of childless couples, they ought to be allowed. This is grounded in the belief that alleviating the suffering of others promotes humanitarian values.²⁰

4. The Feminists Views:

From a feminist perspective, this group argues from a human rights standpoint. According to them, since a woman has autonomy over her body, she should be allowed to make decisions regarding its use, including engaging in surrogacy. They base their argument on the principle of bodily autonomy and draw comparisons with men, noting that if the law permits men to sell certain organs such as kidneys, semen, or blood, then women should likewise not be prohibited from temporarily renting their reproductive organs. Furthermore, they contend that the woman, by acting as a surrogate, is assisting an unfortunate infertile couple without causing harm to others, and if any harm does occur, it affects only herself.²¹

Islamic Perspectives on Surrogacy

As far as Islamic legal system is concerned, all aspects of human lives whether personal, spiritual, social, political, private or medical are all defined by religious legal system. Islam has clearly provided natural ways of human procreations, and it allows it (procreations) to take effect through matrimony and or concubinage as Almighty Allah says: *“And those who guard their chastity (i.e. private parts, from illegal sexual acts). Except from their wives or (the captives and slaves) that their right hands possess,*

¹⁹Ibid p. 21

²⁰Ibid p. 22

²¹Ibid p. 22

for them, they are free from blame; But whoever seeks beyond that, then those are the transgressors."²² As indicated in the Verse, Islam strictly condemned any third party intervention in the process of procreations. Surrogacy involves the transfer of an egg from one woman into the uterus of another or use of Assisted Reproductive Technology (ARTs). This is clearly a third party intervention in human procreations, and therefore may be termed as contrary to the provision of Islam.

The objectives of Islamic Law (*Maqāṣid al-Sharī'ah*) relevant to the issue of surrogacy include *Hifẓ al-Nasab* (protection of lineage) and *Hifẓ al-Māl* (protection of wealth). Under *Hifẓ al-Nasab*, the focus is on determining whether the lineage and chastity of the parties involved are preserved. *Hifẓ al-Māl*, on the other hand, pertains to evaluating the permissibility of the commercial dimension of surrogacy, particularly the hiring of the surrogate mother's womb as a reproductive organ.²³

It is important to note that there is no explicit Qur'anic verse or prophetic tradition that directly justifies or forbids surrogacy as a solution to infertility. As such, Islamic jurists engage in *Ijtihād* (independent legal reasoning) and refer to the relevant principles of *Shariah* to address the issue. There is a juristic disagreement concerning the legality of surrogacy agreements. Muslim jurists are unanimous in declaring the traditional type of surrogacy as forbidden, as it is regarded as an arrangement akin to *Zina* (illegal sexual intercourse). However, they differ on the gestational type. Some scholars have justified its permissibility, others have prohibited it, and some have deemed it *Makruh* (reprehensible). The arguments of both sides are outlined below:

Mallam Bala Sa'id:²⁴ when he was asked about the permissibility of surrogacy in Islam has this to say: "*we the followers of Ahl al Baitir Rasool*

²²Ibid Qur'an 23:05

²³ Sharmi Islam, *Ethics of Surrogacy: A Comparative Study of Western Secular and Islamic Bioethics*, Islamic Medical Association of the North America, published online 2013 <https://ncbi.nlm.nih.gov/pmc/articles/PMC3708631>

²⁴Interview with Mallam Bala Sa'id, 51 years old, Borno State Representative of Shiite sect of at his Resident Bulunkutu Yan Nono on 22nd May, 2022

otherwise known as Shiites do not have our independent opinions on a matter concerning religion, we refer all our religious matters to our superior scholar who is responsible to give verdict on every matters, he was popularly known as Ali al Kamena'i and therefore his opinion is our stand on this issue. According to him both traditional and gestational surrogacy is permissible. Thus, an infertile couple is allowed to hire a woman who will be impregnated with their spouse *Nutfa* (egg) and upon birth take the resulting child as their biological and legally born child. Likewise, the legally married fertile husband is also permitted to seek a donation of an egg to his infertile wife from a fertile woman to use his (husband's) semen in the fertilization and to impregnate his legally married wife, with the following conditions:

- (i) The reason of doing so is infertility but not for the maintenance of the beauty
- (ii) The wife's womb is incapable to conceive and
- (iii) No any prohibited act is done in the process.

According to the proponents among Muslim jurists, the surrogate mother must be legally married to the intended husband, and there must be a clear agreement between the egg donor and the surrogate mother. Additionally, the surrogacy arrangement should be driven by sympathy or compassion for the barren wife, rather than for commercial purposes. Mallam Bala Sa'id further clarified that the status of a surrogate mother is similar to that of a nursing or foster mother in Islam. It is important to note that in 1984, the Islamic Fiqh Council of Makkah issued a verdict allowing surrogacy, specifically by implanting embryos into the uterus of the second wife of the same husband who donated the semen. However, in 1985, the Council withdrew its approval of surrogacy.²⁵

Majority of the proponents of surrogacy are members of the Shiite sects. According to them, it is allowed for a surrogate to carry another woman's fertilized egg, as long as the fertilized egg came from a married couple.

²⁵A1-Bar MA and Chamsi-Pasha H. *Contemporary Bioethics: Islamic Perspective*, Published online: <https://ncbi.nih.gov/books/NBK500175> p. 178

Likewise, they permitted traditional type of surrogacy with the condition that the husband and the surrogate enter into a *Mutu'a* (temporary marriage).²⁶ Their reasons are:

1. Since a woman is allowed to be a mother of a child through fosterage relationship and thus she should be permitted to be a mother for hereditary in a need (*Daruriyya*) situation.
2. Islam permits anything forbidden during the emergency situations and for that being an infertile is a state of emergency the woman should be allowed to be a mother of surrogate child.

To support Shiite assertion, in the late 1990s, Ayatullah Ali Kamenai, the then leader of the Islamic Republic of Iran, gave verdict which permits the third-party donations including egg donation, sperm donation and surrogacy. From then henceforth, Shiite scholars issue a *fatwa* (juristic verdict) legitimized by religious authorities and passed decrees that allow the arrangements of surrogacy as a solution for infertility only for a legally married couples. Following the Kamenai's verdict, all issues of eggs, sperm, and embryo donation, as well as surrogacy, continue to operate.

Opponents of Surrogacy

The jurists who oppose the practice of surrogacy argue that any act of placing semen into a woman who is not married to the man, even if the woman is carrying a fertilized egg from the married couple, constitutes adultery (*Zina*). They base their position on the Hadith narrated from al-Husaymi ibn Malik Ath-thai, in which the Prophet Muhammad (SAW) said, "There is no sin in the eyes of Allah after *shirk* greater than a man putting his body (sperm) into the womb of a woman who is not lawful for him." This Hadith underscores the belief that introducing sperm into the womb of a woman who is not legally married to the man is a grave sin, second only to *shirk* (associating partners with Allah), and is considered tantamount to *Zina* (fornication or adultery).

²⁶An Internet Material, Published online: <https://classroom.synonym.com/islam-surrogacy-12087837.html> accessed on 11/03 /2022

This argument emphasizes the sanctity of marriage and the prohibition of any form of sexual relations outside the lawful bounds of marriage. For these scholars, surrogacy represents a violation of Islamic principles, as it involves a man's sperm entering the womb of a woman who is not his wife, even if the woman is carrying the fertilized egg of the couple. Therefore, they see the practice as both morally and legally impermissible in Islam.²⁷

According to the group it is clear that transferring the *Nutfah* of a man into the womb of a woman who is not legally married is a great sin after *shirk*.

In his opinion, Sheikh Sheriff Ibrahim Saleh al-Hussain stated that both traditional and gestational surrogacy are forbidden in Islam due to the complex legal issues surrounding the mixture of the *Nasab* (genealogy) of two mothers. He argued that the status of the resulting child, particularly in relation to inheritance law, is uncertain. Despite the fact that the biological father and the biological birth mother may not necessarily be married prior to conception, the attribution of parentage remains unclear. Specifically, it is uncertain which of the two mothers, either the genetic mother who contributed the egg or the biological birth mother, should be regarded as the child's true mother. Similarly, the father's status is also uncertain, as he may not be legally married to the mother of the resulting child. As a result, Sheikh Saleh al-Hussain asserts that surrogacy is forbidden in Islam, with its prohibition extending to all related arrangements. This includes gestational agreements, hiring the services of a surrogate mother's womb, and in-vitro fertilization (IVF) for surrogacy purposes. According to him, children born through such methods are considered illegitimate and, therefore, have no right to inherit from their father.

Concerning the status of already born surrogate children despite the prohibition of surrogacy, majority of Scholars gave legal preferences to the surrogate mother over the egg's donor mother, because, many verses of the Qur'an describe mother as the one who beared the suffering during pregnancy and had difficulties during the child's birth. Allah says: "*And we have enjoined upon man, to his parents, good treatment. His mother*

²⁷Al-Bar MA and Chamsi-Pasha H. op cit

carried him with hardship and gave birth to him with hardship, and his gestation and weaning [period] is thirty months”²⁸

If we consider the description of the mother in the above Qur’anic verses we would conclude that the mother is none but the one who gave birth. Concerning a question whether or not it is permissible to perform surrogacy between the husband and his two wives, where one of the wives is infertile and the other one is fertile, Prof. Muhammad Alhaji Abubakar²⁹ said there are differences of opinions of scholars on the issue, some opined as permissible while others prohibited it, but to him it is reprehensible to do so. Although, the resulting child’s progeny with his father is difficult to be determined in this situation, complexity also arises in determining who among the wives have genetic relation with the resulting child.

Muhammad Ali Goni Gabciya³⁰: observes that in Islam, he said in Islam unity of man and woman to satisfy their desire and begets children is only allowed through matrimony and concubinage, thus any unity of a spouse shorten of these two ways is tantamount to going beyond the limits of *Sharia*, Allah says" *But whoever seeks beyond that, then they are the transgressors*" (Al-Ma'aarij 70: Verse 31). An exception to this rule where satisfaction of one’s sexual desire and human procreation may be permissible based on *Darura* (necessity/need), for instance, in a situation where a couple have problem of infertility and then seek modern medical intervention and beget a child through biotechnical methods, this may be said that such a couple satisfied their sexual desire and begot a child through *Darura*. In this regard, Imam Gabciya classified surrogacy and its related cases into five categories and each has its different ruling in Islamic Law, this includes the following:

²⁸ Qur’an, Quran 46:15

²⁹Interview with Prof Sheikh Muhammad Alhaji Abubakar, 53 years old, Chief Imam of Indimi Masjid Maiduguri, at his office in Indimi Masjid on 28th May, 2022

³⁰Interview with Dr. Imam Muhammad Goni Gabciya, 64 years old, Chief Imam of University of Maiduguri, in his office at University of Maiduguri, Borno State on 9th May, 2022 1

In the opinion presented, all the scenarios of artificial insemination and surrogacy outlined in (i) to (v) are considered in terms of their permissibility under Islamic law. The jurist acknowledges the potential for such practices to be deemed *Haram* (forbidden) for several reasons, primarily due to the involvement of a third party, which disrupts the sanctity and unity of the marriage relationship in Islam.

- i. **Scenario (i):** The situation where the husband's sperm and wife's egg are used to create a fetus in a laboratory, and the fetus is transferred to the wife's womb is generally permissible in Islam, as long as no third party is involved in the process. This method falls within the bounds of the marital union, maintaining the sanctity of the husband and wife relationship.
- ii. **Scenario (ii):** The practice where the fertilized egg is implanted in another wife of the same husband, with the egg of a donor woman, is problematic. It introduces a third party (the donor woman), and since marriage in Islam is considered a union between one husband and one wife, the involvement of another woman is viewed as a violation of the marital integrity and unity. This could be considered *Haram*.
- iii. **Scenario (iii):** This situation, where the fertilized egg (from a husband and wife) is transferred into the womb of another woman (who is not the wife) for pregnancy, is also seen as forbidden. This is because it involves a third party and changes the legal and social status of the child, which could lead to confusion regarding lineage, inheritance rights, and parental responsibilities.
- iv. **Scenario (iv):** In cases where sperm from a man other than the husband is used to fertilize the egg of a legally married wife, this is considered *Haram* due to the involvement of a third party. The practice could lead to confusion about the child's biological father and disrupt the purity of marital lineage, making it incompatible with Islamic principles.
- v. **Scenario (v):** In this case, where sperm from a man other than the husband and egg from a woman other than the wife are used to fertilize the egg in a laboratory and the fetus is then implanted in the wife's womb, the practice is also viewed as *Haram*. The

involvement of two external individuals (the sperm donor and the egg donor) breaks the unity of the marital contract and could result in issues related to parentage and inheritance.

Regarding the **third ruling** mentioned, where a couple hires a woman (who is not the wife) to carry a child for them, the situation is unequivocally prohibited in Islam. This practice introduces a third party into the marriage, violates the principles of familial integrity, and creates confusion about the lineage and inheritance rights of the child. Islam places great emphasis on the purity of lineage and the legitimacy of children, which would be undermined in such a surrogacy arrangement.

Therefore, based on these views, **surrogacy**, both traditional and gestational, is forbidden in Islam for the reasons outlined. The involvement of third parties, whether it is a sperm or egg donor or a surrogate mother, complicates the natural marital bond and poses significant issues related to lineage, inheritance, and parental responsibility. Surrogacy contracts are considered contrary to Islamic principles, and all such arrangements are regarded as *Haram*.

The scholars mentioned, both from Nigeria and internationally, who forbid surrogacy, emphasize the Islamic legal and ethical perspectives on the sanctity of marriage, the integrity of lineage, and the prohibition of third-party involvement in the procreation process. Their stance is based on the idea that surrogacy, in its various forms, disrupts the purity of familial ties and creates complications regarding parentage and inheritance. Here is a brief overview of some of these scholars:

Nigerian Scholars:

1. **Sheikh Sherriff Ibrahim Saleh Al Hussain** – A notable Islamic scholar who strongly opposes surrogacy due to concerns about its impact on lineage and the potential for confusion regarding the identity and inheritance rights of children.

2. **Sheikh Goni Gabciya** – From the University of Maiduguri, he is also among those who forbid surrogacy, citing its negative impact on marital unity and societal integrity.
3. **Professor Muhammad Alhaji Abubakar** – From the Department of Sharia at the University of Maiduguri, he holds a position against surrogacy, emphasizing the importance of keeping the natural biological relationship between husband and wife intact.
4. **Sheikh Gambo Kyari** – National Secretary of JIBWIS Nigeria, known for his conservative stance on Islamic matters, including surrogacy.
5. **Dr. Muhammad Abubakar Muhammad Talha** – From the Department of Islamic Studies at the University of Maiduguri, he condemns surrogacy due to its contradiction with Islamic principles regarding family structure and lineage.
6. **Sheikh Sani Umar Fage** – Based in Kano State, he is among those who oppose surrogacy for similar reasons related to lineage and parental identity.
7. **Sheikh Khalifa Al'Amin Abba Banki** – A scholar based in Al'ansar Masjid in Maiduguri, known for his stance on protecting the integrity of the marital bond and family relationships in Islam.

International Scholars:

1. **Dr. Yusuf Al-Qaradawi** – A prominent Islamic scholar and professor at Qatar University, Dr. Qaradawi is known for his views on various contemporary issues, including surrogacy. He has argued that surrogacy, particularly when it involves third-party donors, violates the Islamic principles of family integrity and lineage.
2. **Dr. Jad Al-Haq Ali Jad Al-Haq** – Former Mufti and Grand Sheikh of Al-Azhar, he has expressed opposition to surrogacy, citing the uncertainty it creates regarding the child's lineage and the ethical concerns surrounding the practice.
3. **Dr. Sayyid Wafa Al Amin Al-Am** – A researcher at the Al-Azhar Research Institute, who has highlighted the legal and moral complications of surrogacy under Islamic law.

4. **Dr. Ali Jum'ah** – Former Mufti of Egypt, who has voiced his opinion against surrogacy, stating that it disrupts the natural order and poses challenges to the clarity of parentage.
5. **Dr. Muhammad Sayyid Thanthawi** – The former Grand Sheikh of Al-Azhar, who strongly opposed surrogacy, believing that it conflicts with the Islamic understanding of family and lineage.
6. **Dr. Mustafa Zarqa** – A member of the Islamic Research Institute in Cairo, who views surrogacy as problematic due to the uncertainties it creates about parentage and inheritance rights.
7. **Dr. Muhammad Ra'fat Usman** – Dean of the Faculty of Sharia at Al-Azhar University, who has criticized surrogacy for the potential harm it causes to the social and familial structures in Islam.

These scholars argue that surrogacy undermines the integrity of the marital relationship and poses legal and moral issues concerning the identity, parentage, and rights of children born through such arrangements. Their collective stance reflects a commitment to preserving traditional Islamic views on family structure, lineage, and the natural procreation process.³¹

Some of their reasons for prohibition include the citation of the following Qur'anic verse: *"And those who guard their chastity (i.e. private parts, from illegal sexual acts). Except from their wives or (the captives and slaves) that their right hands possess, for them, they are free from blame; But whoever seeks beyond that, then those are the transgressors"*³²

Effects of Surrogacy on Surrogate Parties and their Children

There are four effects so far identified (*Ilal*) of surrogacy on surrogate mothers and their children. They are:

1. Legal effects of Surrogacy

³¹Khairina G. U. et al, op cit Pp. 90-91

³²Ibid Qur'an 23:05

There is difficulty in determining the nature and status of the child, born through surrogacy, so also that of the parents as there are possible mix ups of the *Nasab* which requires proving the legality of the child's status.

2. Emotional Effects of Surrogacy

Despite all the sufferings, hope, compassion and overwhelming joy, the feeling of motherhood is being killed at the end of the agreement. Thus, during and or after the pregnancy there is a feeling and suffering which is expected to cease at the end of the agreement. The surrogate mother will be happy of having a child for the intended couple, but experience difficult feelings for the loss of the child following the termination of the agreement (child birth). That is why in some cases (as mentioned above earlier) some surrogate mothers refused to hand over the child's custody and parenthood to their biological parents. Moreover, sometimes there is a tension with one's spouse and or children and challenging the forming of a relationship with the intended parents through quasi-natural way.

According to M., Sa'id³³ even though there are rare cases of surrogacy in Nigeria and there are challenges encountered with its practice in countries allowing the surrogacy arrangements. For example, recently in India many surrogate mothers had demonstrations, demanding for the return to their surrogate children, because they present themselves as the real mothers of the children.

3. Social Effects of Surrogacy

In a society where surrogacy is a relatively new issue, surrogate children are often stigmatized due to their birth through a method considered quasi-natural. Some Islamic scholars argue that a surrogate child should be regarded as illegitimate, and as such, would not inherit from the biological father, even if the father consents to the inheritance. Furthermore, surrogacy can damage the reputation of the surrogate mother, as some individuals may make defamatory statements about her due to her pregnancy outside of marriage. Surrogate children are similarly viewed as different by society, particularly by those who are aware of the

³³Muhammad Sa'id, 45 years old, A Medical Doctor at UMTH Maiduguri on 22nd April 2023

circumstances of their birth. As a result, they often face stigmatization and may sometimes be labeled as illegitimate.

4. Health Risk of Surrogacy

The primary health risk associated with surrogacy affects the surrogate mother. However, the egg donor (mother) faces a minimal risk during the egg extraction process, as her reproductive organs are vulnerable when an incision is made during the procedure. Similarly, the sperm donor (father) faces health risks during semen retrieval. This process typically involves masturbation (Istimna'i) or direct extraction, both of which are considered unhealthy from both a religious and medical perspective.³⁴

Nasab of Already born Surrogate Children in Islam

Nasab in Arabic terminology means paternity or blood relationship which gives the heirs right to inherit. The heirs include Qur'anic, Agnatic and Cognatic who are related to the propositus by blood both near and remote relations.³⁵ In the perspective of biomedical *Nasab*, especially in the surrogacy contract can be created through genetic connections between the egg donor mothers, biological, sperm donor father and surrogate child but not vice versa.³⁶

However, in the Islamic legal system, attribution of the *Nasab* of a child to his parents as well as paternity can only be established through birth, thus, if the child is born, his/her *Nasab* would be attributed to his biological father and biological birth mother as the Prophet (SAW) said in the

³⁴Internet Material, Published on the web <https://surrogate.com/surrogates/pregnancy-and-health/emotional-and-medical-risks-of-surrogacy/> accessed on 01/03/2023

³⁵An article titled *Blood Relationship as a Basis of Inheritance under Islamic Law: A Case Study of the Inner and Outer Circles of Family* published online on <https://eduproject.com.ng/law/blood-relationship-as-a-basis-of-inheritance-under-islamic-law-a-case-study-of-the-inner-and-outer-circles-of-family/index.html> 10/07/2022 02:00 PM

³⁶Prof A.G Mairiga, an Obstetrician at UMTH Maiduguri

following Hadith: “*The child is attributed to the owner of the bed (in which it was born) ...*”³⁷

In the Hadith, the owner of the bed is the husband and wife and when the child is born the *Nasab* would be attributed to the couple. However, if the child is born out of wedlock, the owner of the bed is the woman herself, and therefore the *Nasab* of a child is attributed to the mother and the family of the mother alone.³⁸

However, regarding the *Nasab* of surrogate children, there are differences of opinions among the Nigerian Muslim Scholars. In *Alfasil Baina Haqq wal Batil*, Sheikh Sheriff Ibrahim Saleh was quoted to have said that, the transaction carried out or money given for the sale of semen or hiring the womb is forbidden and the resulting child would be considered as the child came through prohibited means (*Zina*).³⁹

According to Imam Goni Gabciya⁴⁰ the children born in a traditional type of surrogacy have the same status with those born out of wedlock as such, their *Nasab* is to be attributed to the surrogate mother only not the egg donor mother. Thus, in Islamic ruling, the biological father and mother have no legal lineage connections with the children even if they so wish. In Islam, the *Nasab* which creates right of inheritance and establishes prohibited degree of marriage between persons can only be found through valid marriage, and if we observe the case of traditional surrogacy there is no valid marriage between the husband and the surrogate woman. Similarly, in the case of gestational surrogacy, the *Nasab* of the resulting children is to be attributed to only biological birth mother. The egg donor mother’s *Nasab* to the child remained like fosterage mother to the surrogate children and in Islam fosterage relationship creates only prohibited degree of marriage between the persons involve not a right of inheritance. However, there is an exception to this ruling. If the surrogacy arrangements

³⁷Sahih Al-Bukhāri Hadith no. 2053

³⁸ Interview with Sheikh Arabi Ahmad Abulfathi on 12th June, 2022

³⁹ Sheikh Sheriff Ibrahim Saleh Al-Hussain, *Alfasil Baina Haqq wal Batil*, Abuja Publication, Nigeria, p.255

⁴⁰ Interview with Dr. Imam Goni Gabciya on 9th May, 2022

took place between the husband and his two wives as explained above, the *Nasab* is to be attributed to both father and the surrogate mother, because both the wife and the husband were legally married. The other mother remains as fosterage mother to the children, although such an arrangement (gestational surrogacy) is reprehensible in Islam.

According to Sheikh Arabi Ahmad Abulfathi⁴¹ *Nasab* of the surrogate children to their parents where surrogacy has already taken place, he has this to say: “under normal circumstances, the *Nasab* of a child should be attributed to none but the birth mother and the father, because the Prophet (SAW) said that, the child is for the Bed owner (*Alwaladu lilfirash*). However, as in the case of surrogacy the resulting child’s *Nasab* is still to be attributed to the birth mother not the genetic mother; this is because Islam describes the motherhood in terms of various sufferings during pregnancy and difficulties during birth but not by mere donation of an egg. Allah Almighty says: “*And We have enjoined on man (to be dutiful and good) to his parents. His mother bore him in weakness and hardship upon weakness and hardship and his weaning is in two years gives thanks to Me and to your parents, unto to Me is the final destination*” (Q31:14). Although surrogacy is *Haram*, however, if the parties know its prohibition and still went ahead and perform the act, the children’s *Nasab* is to be attributed to the mother who gives birth alone and not vice versa. However, for the arrangements of surrogacy made in a state of ignorance of ruling, the scholar said: “in Islam ignorance of the ruling is not an excuse that exonerate a person from responsibility”, as stated in *Ahalari* (a Maliki school book on jurisprudence) that “a believer is urged not to perform any act unless he knows the Islamic ruling on it”. Though the *Nasab* of children in this situation is to be attributed to the intended couple, i.e. woman that owns the egg’s and surrogate father because the arrangements is not a direct adultery but *Zina gaira mubashir* (indirect adultery). Therefore, in this situation the status of their act is not different from the status of a woman who married in another State and being disputably divorced or widowed and went to another State and remarried to a person who is ignorant with her marriage disputable condition. Here in this situation the marriage is invalid (*fasid*) and consequently would be revoked but the

⁴¹Interview with Sheikh Arabi Ahmad Abulfathi on 12th June, 2022

resulting children's *Nasab* (with the second husband) is to be attributed to father and mother without any doubt. Therefore, the same ruling applies and the *Nasab* should be attributed to the intended couple in order to avoid the complications of the lineage.

In their views, Mal. Bala Sa'id and Mal. Muhammad Alhaji gana Albakir⁴² opined that since surrogacy contract is permissible (in their view), the *Nasab* is to be ascribed to the biological father and owner of the egg mother but not the surrogate mother, this is because, it was biomedically proved that the surrogate child is genetically connected to the surrogate intended parents not to a surrogate mother, thus, the relationship between the surrogate mother and her surrogate children is only womb fosterage relation, not a genetic one, her womb is used for the same purpose as keeping a fetus in the glass womb (ectogenesis). Therefore, since the glass womb cannot be considered as the mother of its resulting child the surrogate mother too cannot, because the development of their growing and birth are the same.

Conclusion

This research examines the concept of surrogacy and the legitimate status (*Nasab*) of surrogate children, based on Islamic perspectives as interpreted by some Nigerian Muslim scholars. The paper discusses the concept of surrogacy and Islam's position on its practice, including an overview of the nature of surrogacy, its causes, and the medical procedures involved in clinics. The research also identifies two main types of surrogacy: traditional and gestational. Traditional surrogacy involves the intended father providing only his semen (without his wife's ovum), which is then combined with another woman's egg and implanted in a woman's womb other than his wife's. In contrast, gestational surrogacy requires both the husband's sperm and the wife's egg, which are inseminated into another woman's womb for fetal development. The study highlights the effects of surrogacy on the surrogate parties and the resulting children. It also includes the views of some secularists on the legal implications of surrogacy. Additionally, the research presents the different opinions of selected Nigerian Muslim scholars regarding Islam's stance on surrogacy

⁴²An interview with Mallam Bala Sa'id and Muhammad Alhajigana Albakir op cit

and the legitimate status (Nasab) of already-born surrogate children. The majority of the scholars interviewed concluded that both traditional and gestational surrogacy are forbidden, while a few argued that surrogacy is permissible. The study concludes that Islam does not oppose modern solutions to infertility or attempts to cure various illnesses, provided the methods do not conflict with Islamic principles.