

# The Status of Surrogacy, Surrogate Mother in Islamic Law: A Critical Analysis

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Received: February 24, 2017

Accepted: May 7, 2017

## ABSTRACT

The concept of surrogacy and surrogate mother is frequently dismissed by a number of contemporary Muslim scholars, as they think of its prohibition and consider it adultery (*zinā*), and cite various verses of the holy *Quran* and the *Sunnah* to support their point of view. Conversely this paper contends that surrogacy and the process thereof does not fall under the definition of *zinā*, since the evidences given by these Islamic scholars—against the illegitimacy of child and surrogate parenthood—have no foundations in this juncture to declare the practice of surrogacy as adultery and the resulting baby as an illegitimate.

**KEYWORDS:** surrogacy and surrogate mother, infertility and assisted reproduction, *zinā* and illegitimate child, bioethics and law

## INTRODUCTION

The issue of surrogacy debated for a long time. Numerous contemporary Muslim scholars out rightly rejected the idea of surrogacy, as they deem it prohibited and consider it adultery (*zinā*), by citing various verses of the holy *Quran* and the *Sunnah* of the holy Prophet Muhammad (peace be upon him) to declare that such a process runs counter to the intention of the Lawgiver. Although surrogacy and the process thereof does not fall under the definition of *zinā*, and thus, only mere a declaration of the surrogacy practices as an adultery and a resulting baby as an illegitimate without looking the core concepts will spoil the real essence of the Islamic law and jurisprudence.<sup>1</sup>

Arguably, we know that biomedical issues regarding personal laws and especially those concerning the subject of human sexuality and infertility<sup>2</sup> have been debated for a long time now. But some issues are still relatively fresh and debatable, like the issue of surrogacy<sup>3</sup> i.e. “*hiring womb*” to counter infertility by artificial methods, is not only a challenge for the bioethicist but also for the contemporary theologians and jurists. Since these issues are also a challenge to establish the ethical and moral values of different Religions including Islam, as these religions have objections on these issues too. Hence surrogacy and the status of surrogate mother is the subject which needs a thorough research from the perspective of Islamic law with reference to the primary objectives of *Shariah* and other world religions, keeping in view the biomedical and biotechnological norms.<sup>4</sup>

## SURROGACY, SURROGATE MOTHERHOOD AND LEGAL ISSUES:

The issues of assisted reproductive techniques and the surrogate mother<sup>5</sup> are not new to Islamic law. The preservation of genealogy and the procedure thereof are very much clear from various verses<sup>6</sup> of the holy *Quran*. On

<sup>1</sup> See, *SURROGACY AND INTER-RELATED ISSUES: A LEGAL ANALYSIS FROM THE PERSPECTIVE OF ISLAMIC LAW* by Fazli Dayan. J. Appl. Environ. Biol. Sci., (7:6, 2017) at pp. 31-40.

<sup>2</sup> For the infertile couple reproductive technologies offer a beam of trust to counter infertility in order to establish a family. See, Judith N. Lasker & Susan Borg, *IN SEARCH OF PARENTHOOD* (Temple University Press, Philadelphia, 1994) at pp. 31 & 50 (viewing that infertile couple can take help from various methods like AI: *artificial insemination* and IVF: *in vitro fertilization*).

<sup>3</sup> *Ibid.* at p. 70 (in their view; surrogacy is the practice of hiring a woman to bear a child); In Latin: “*surrogatus*” “means a substitute”. In other words; “a person appointed to act in the place of another”. See, *BLACK LAW DICTIONARY* (Oliphant RE, New York, Aspen Publishers, 2007) at p. 349 (surrogacy is the process of carrying and delivering a child for others); See also, Warnock Dame Mary, 1984. *REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILIZATION AND EMBRYOLOGY* (Department of Health and Social Security, London: Published by Her Majesty's Stationery Office) at p. 42 (Surrogacy is the practice whereby one woman carries a child for another with an agreement that the child should be handed over after birth).

<sup>4</sup> For details, see, *SURROGACY AND INTER-RELATED ISSUES: A LEGAL ANALYSIS FROM THE PERSPECTIVE OF ISLAMIC LAW* by Fazli Dayan. J. Appl. Environ. Biol. Sci., (7:6, 2017) at pp. 31-40.

<sup>5</sup> See, Judith N. Lasker & Susan Borg, *IN SEARCH OF PARENTHOOD* (Temple University Press, Philadelphia, 1994) at p. 71 (“the term surrogate mother” is used here because it is the most recognized name for a woman who has babies for others. It is misleading; however, since the word surrogate usually refers to a substitute for the real thing, the surrogate mother is actually the real mother, a mother who has agreed to give up her child to its father. The terminology itself is a subject of debate). The learned author stated that surrogate mother is subject to debate

the other hand Jewish law tries to manage the issues in its own specific manner as it can be seen from the compositions of law in the Jewish system<sup>7</sup>, and the Christian law is no different to it as well.<sup>8</sup> In secular and technological advanced states, there is a great concern over the negligence made by the specialists and medical staffs, where fertilized embryos are placed in the wrong wombs and the fetuses are allotted to the wrong tickets. What could possibly be done in such situations, as these not only lead to disputes but also litigation and the consequences are grave in nature. Numerous cases were lodged in different countries but the two famous cases over the parentage in the United Kingdom may be cited as an example.<sup>9</sup> Other issues where the surrogate mother chooses to keep the baby herself and claim the custody of minor on the plea of that she has a more prominent right over the child than the social parents.<sup>10</sup> Such issues not only emerged in secular states but also in Islamic countries like Pakistan.<sup>11</sup> However for the present there is a great concern regarding the legality of surrogate motherhood to discuss it under the rubric of Islamic law with the surrounding guidelines of morality and the objectives of *Shariah*.

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and in our opinion it is because of the donated semen i.e. “sperm and eggs” of the intended parents. Factually, it is the “sperm and egg” when joins together can form an embryo, hence the female i.e. intended mother who donated her egg has some kind of biological link. See, verse no. 54 of chapter no. 25 (Allah almighty says: “indeed we have created human being from—a drop of—water”); See, verse no. 4 of chapter no. 16 (God says: “he has created human being from a sperm drop”, so the drop of water is not only a “sperm or egg” but a combination of both); See, verse no. 2 of chapter no. 76 (Allah the exalted says: “verily, we created human from a drop of mingled sperm” mean that “the female ovum has to be fertilized with the male sperm before a new child is born”); See, verse no. 13 of chapter no. 49 (Allah says that “o mankind; we created you from a pair of male and female”). It means that in fact Allah almighty created mankind from both male and female); for further details, See, *infra* note 6 (the human genealogy is very much clear from various verses of the holy *Quran*).

<sup>6</sup> See, *Al Quran*, verses no. 12–14 of chapter no. 23 (where Allah almighty shows his creative work in very simple language. he says: “man we did created from a quintessence of clay”, “of clay” mean: that in-organic components of the earth are converted into an experiencing subject by means of multiple substance that can be metabolized by an animal to give energy and build tissue and reproduces itself a source of living in shape of sperm, “then we placed him as sperm” i.e. “drop of sperm” and the ovum i.e. female gamete takes fertilization inside the womb, “in a place of rest, firmly fixed” (here the growth in the fetal stage is silent and unseen, this fetus is protected in the womb and is firmly fixed and gets protection of the mother’s body till it grown and up to birth. “then we made the sperm into clot of congealed blood; then that of that clot we made a lamp”, it form a fetus i.e. conversion of the ovum into a sort of clot as thickly congealed blood, out of which the zygote cells grow by segmentation and gradually attaining the shape of fetus. “Then we made out of lamp bones with flesh”, and from the lamp develop bones and flesh, as well as other organs and a nervous system. “then we developed out of it another creature”, it mean that, so for the human growth same is like as an animal, but this is the breathing of Allah’s spirit into him, which changes its shape, and from a mere animal he consider it as human, “so blessed be Allah, the best to create”<sup>1</sup>, as to he created a man from the same process like animal. See also, verse no. 29 of chapter no. 15; See, verse no. 117 of chapter no. 2 (for various stages of creation); See, verse no. 4 of chapter no. 16 (the creation of human as “he has created human being from a sperm drop”); See, verse no. 5 of chapter no. 22 (where Allah says that “we created you out of dust, then out of sperm, then out of leech like clot, then out of a morsel of flesh, partly formed and partly unformed, in order that we may manifest—our powers—to you; and we cause whom we will to rest in wombs for an appointed term, then we bring you out as a babes, then—foster you—that ye may reach to your full strength”). Thus in this verse Allah is talking about the physical growth from life less matte of seed, then fertilized ovum, the convert it to fetus, and out of which gives birth to child. These are in fact the physical stages of human life to which Allah almighty wants to divert our attention that your growth are from nothing till the completion of whole life cycle, and these are all well-known nowadays to the biologists. See also, verse no. 37 of chapter no. 75 (where Allah almighty indicated that “was he not a drop of sperm emitted in lowly form; Then he become a leech like clot; then did—Allah—make a fashion—him—in due proportion”. See, verse no. 2 of chapter no. 76 (Allah the exalted says: “verily, we created human from a drop of mingled sperm”, it means that the female ovum has to be fertilized with the male sperm before a new child is born. See, *e.g.*, verse no. 13 of chapter no. 49 (Allah says that “o mankind; we created you from a pair of male and female”). While commenting on the said verse of the holy *Quran* a very well-known jurist *al Qurtubi* stated that in fact Allah almighty created mankind from both male and female. So in our opinion this verse further strengthens the verse no. 2 of chapter no. 76, where Allah said that “we have created mankind from mingled sperm”. Hence the procreation of human is the result of male sperm along with the female egg. See, *Ibn al Qayyim, TUHFATUL AL MAWDUD BI AHKAM AL MAULUD* (Published by Maktabah al Asriyyah) at p. 272 (as he holds the same view that “procreation of human is the result of male sperm along with that of a female).

<sup>7</sup> Susan Martha Kahn, 2000. “*REPRODUCING JEWS*” a cultural account of assisted conception in Israel (Durham NC: Duke University Press); see also, *MAKING MUSLIM BABIES: IVF AND GAMETE DONATION IN SUNNI VERSUS SHIA ISLAM* by Marcia C. In-horn. Culture Medicine and Psychiatry (30:2006) at pp. 427–450.

<sup>8</sup> See Mohamed Salim Awwa, 1982. *PUNISHMENT IN ISLAMIC LAW A COMPARATIVE STUDY* (Indianapolis, American Trust Publications) at pp. 13–14 (the Jews and Christian laws also forbid and renders punishable all type of sexual relation outside marriages; the difference arise only in nature of punishment prescribed for unlawful sexual relation).

<sup>9</sup> For details see, *WHO IS A PARENT: PARENTHOOD IN ISLAMIC ETHICS* by M. Kabir, Banu az-Zubair. Journal of Medical Ethics (33:10, 2007) at pp. 605–609.

<sup>10</sup> Social parents those who hired the surrogate mother to render her servicers by carrying the baby for them in lieu of payment or otherwise. But in our opinion social parents—i.e. wife and husband or the social mother who donated her egg—seems to be consider a real mother instead of surrogate mother in light of verse no. 2 of chapter no. 76 (where Allah the exalted says that “verily, we created human from a drop of mingled sperm”, it means “that the female ovum has to be fertilized with the male sperm before a new child is born”. Thus in this sense surrogate mother will only be an incubator same as breastfed or wet nurse). See, *LEGALITY OF THE LEASE OF THE UTERUS AND ITS EFFECTS* by Abbas Ziad Kamel Al-Sa’adi (Al-Ma,moon University college-Department of Law).

<sup>11</sup> See, Farooq Siddiqui. *Vs. Ms. Farzana Naheed* (Pakistan Legal Decision PLD, 2013, Lahore 254) Vol. LXV, *GUARDIANS AND WARDS ACT* (VIII of 1890); See also, Rana Muhammad Altaf Hussain and others (Appellants). *Vs. The State and 2 others* (Respondents) case filed in *Federal Shariat Court* (Shariat petition No. 6/L of 2006).

## SURROGATE MOTHERHOOD AND THESIS OF THE PAPER:

The surrogate mother is a lady who bears a child for the infertile couple on behalf of the intended mother, without any sexual relation with the intended father, for the payment or otherwise, as the case may be, has under obligation to hand over the resultant baby born through the process of surrogacy to the intended couple i.e. the infertile wife and husband.<sup>12</sup> The process of surrogacy and surrogate motherhood faces legal questions and involves various legal issues; however our, discussion will be focus on the narrative whether surrogacy is *zinā* or otherwise as per Islamic law. Therefore we will first look at the proofs from the holy *Quran* and the *Sunnah* of the Prophet Muhammad (peace be upon him) that are applied by the contemporary scholars to declare surrogacy unlawful. Last but not the least the arguments which are advanced by the scholars from the textual authorities i.e. the holy *Quran* and the *Sunnah* will also be analyzed in the following section.

## ANALYSIS AND INTERPRETATION OF THE ARGUMENTS:

One of the arguments advanced by the contemporary scholars from the holy *Quran*; Allah says: “if any men among you divorce their wives by *zihār* (calling them mothers), they cannot be their mothers: none can be their mothers except those who gave birth to them. And in fact they use words (both) iniquitous and false: but truly Allah is one that blots out (sins), and forgives (again and again)”.<sup>13</sup>

Islamic scholars are in fact looking at the words: “none can be their mothers except those who gave birth to them”, which means in this way that only those ladies can be your mothers who have given you birth and not the social mother, meaning thereby that the mothers in fact are those who gave them birth i.e. surrogate mothers and not the intended mothers. But if we look into the meaning of the mentioned verse, it seems that the scholars take the facial meaning of the verse without taking into account the true spirit of the revelation, rather their focus is on the words and not on the exact occasion.<sup>14</sup> Hence there is nothing in this contention to declare social mother as a real mother and the argument is weak in strength for various reasons. First, the words: “none can be their mothers except those who gave birth to them” can't be taken as a lawful standard; the subject of the verse is only to educate the individuals affirming the separation by way of *zihār*<sup>15</sup>, which is not the right type of separation for the husband because he cannot call his wife as his mother since she has not given him birth. Secondly, the standard meaning of this verse is further restricted by the text itself on the grounds of *rada'ah*<sup>16</sup> which is forbidding marriages between the breastfed and wet nurse. Regardless of the facts whether the meaning so taken is definitive (*qati*) or otherwise, because of the possibility that the importance of the words even if the meaning is taken to be conclusive and thus it is yielded that a man's mother is the one who give them birth only, hence the standard meaning stands limited by the text that allow wet nursing or *rada'ah*; which forbidding marriage between the breastfed and wet nurse and even between their offspring. Therefore in Islamic law a wet nurse is also considered as a mother of the breastfed even though she has not given him birth.<sup>17</sup>

<sup>12</sup> See, *BLACK LAW DICTIONARY* (Olipphant RE, New York, Aspen Publishers, 2007) at p. 349; See, Judith N. Lasker & Susan Borg, *IN SEARCH OF PARENTHOOD* (Temple University Press, Philadelphia, 1994) at p. 70; See also, Warnock Dame Mary, 1984. *REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILIZATION AND EMBRYOLOGY* (Department of Health and Social Security, London: Published by Her Majesty's Stationery Office) at pp. 42–43.

<sup>13</sup> Abdullah Yusuf Ali, *AL QURAN ENGLISH TRANSLATION AND COMMENTARY* (Dawah Academy, IIU, Islamabad, Pakistan) verse no. 2 of chapter no. 58; See also, verse no. 4 of chapter no. 33, along with verses no. 1–5 of chapter no. 58.

<sup>14</sup> *Ibid*, at pp. 1195 & 1625–1627 (the immediate occasion was what happened to ‘*Khawlah bint Tha'ibah*’, wife of *Aws* son of *Samit*, divorced by an old pagan custom in Arab, known as ‘*zihār*’. For the core concept of ‘*zihār*’, see, *infra* note 15. Before the advent of Islam this custom was frequently used in Arabia, but after the arrival and influx of Islam considered it as degradation of women. In the mentioned story, it was particularly hard on ‘*Khawlah*’—for various reasons—and hence she urged her plea to the Prophet Muhammad—peace be upon him—and also “in prayer secretly to the Allah almighty”. Thus, her just plea was accepted, as Allah almighty not allowing those human customs/pretences to trample on the just rights of the weakest of his creature. And that is why this iniquitous custom—of ‘*zihār*’—was abolished. Therefore, in case of ‘*zihār*’, those who want and wish to go back, a penalty is imposed on him in respect of ‘*zihār*’, in order to safeguard the woman’s right—to sue him for maintenance for herself and her children—and the husband could not claim his conjugal rights until the performance of penalty as provided in the holy *Quran*).

<sup>15</sup> *Ibid*, verse no. 33 of chapter no. 4, and verses no. 1–5 of chapter no. 58 (“*zihār* was an evil, Arab old custom: “by which the husband selfishly deprive his wife of her conjugal rights and kept her tied himself like a slave without her being free to remarry”. The words to consider ‘*zihār*’: “thou art to me as the back of my mother, means that she was like her mother”, and after it a women/wife could not demand conjugal rights, but was not free from his control and could not contract another marriage); See also, *supra* note 14.

<sup>16</sup> For details see, *A DICTIONARY OF ANDALUSI ARABIC* by Federico Corriente (Brill, Leiden- New York-Koln, 1997), at p. 210 (*Rada'ah* is an Arabic word means “Suck at foster mother’s breast; wet nurse”; See also, *LISAN AL ARAB* by Ibn Manzur (Cairo: Dar al-Maarif) at pp. 1660–1661 (“*Rada'ah* is an Arabic word rooted from the verb *Rada'a*”, which literally means “Sucking the breast and drinking its milk”).

<sup>17</sup> See, *Al Quran*, verse no. 6 of chapter no. 65 (the holy *Quran* clearly stated that “let another woman suckle—the child—on the—father’s—behalf”. It means “if the mother milk fails due to her health or any other unavoidable circumstances to feed her own child, then let another woman to suckle on mother’s behalf for payments or otherwise”; See, e.g., verse no. 23 of chapter no. 4 (Allah almighty says: “prohibited to you—for marriage—are, your foster mothers—who gave you suck—and your foster-sisters”. Fosterage/milk-relationship plays a very important rule in Muslim family laws, and thus considers sister as foster mother’s sister, which come in all and count in a prohibited degree. See, *JAMI AT TIRMIDHI* (Darul Ghad al Jadeed, Mansoor, Egypt, 2013) vol. 1, book no. 7, *hadith* no. 1147 and *hadith* no. 46; See, *SUNAN AN NASAI* (vol. 4) book no. 26, *hadith* no.

Consequent upon the facts, the social mother can be called the mother of the baby borne by the surrogate mother, and the social parents are the parents, provided they have some breed of biological link due to the fertilized embryo comprised of the sperm and egg of the intended parents or they have some sort of organic connection with the treated incipient organism developing inside the surrogate mother, same as the connection between the wet nurse and breastfed in Islamic law.<sup>18</sup> The biological connection between social parents with their resulting baby through by surrogacy is very much clear from the verse of the holy *Quran*, Allah says: “it is he who has created man (human being) from water: then has he established relationship of lineage and marriage: for thy Lord has power over all things”<sup>19</sup> In another verse no. 2 of chapter no. 76, Allah the exalted says that: “verily, we created human from a drop of mingled sperm; (means that the female ovum has to be fertilized with the male sperm before a new child is born”. According to verse no. 13 of chapter no. 49, Allah says that: “o mankind; we created you from a pair of male and female”. While commenting on the said verse of the holy *Quran* a very well-known jurist *al Qurtubi* stated that in fact Allah almighty created mankind from both male and female. Thus in our opinion this verse further strengthen verse no. 2 of chapter no. 76, that we have created mankind from mingled sperm, means both of male and female. Hence the procreation of human is the result of male sperm along with the female egg. The same view hold by *Ibn al Qayyim* in his book *tuhfatul al mawdud*.<sup>20</sup>

On the other hand the scholars of Islamic law advance another verse of the holy *Quran*: “we have enjoined on man kindness to his parents: in pain did his mother bears him, and in pain did she give him birth”<sup>21</sup>. Further they are of the view that social or intended mother or not a real mother but only the one who gave him birth i.e. the surrogate mother due to this verse of the holy *Quran* and another verse where Allah almighty says that: “none can be their mothers except those who gave birth to them”<sup>22</sup> further strengthen the womb relationship, but this verse is only for the case of *zihār* as stated earlier. In another verse Allah says: “and we have enjoined on man to be good to his parents: in travail upon travail did his mother bear him his mother carried him, and in year twain was his weaning: hear the command, show gratitude to me and to thy parents: To me is thy final goal”<sup>23</sup>.

In Arabic language the term that is used for parents is derived from the verb “*wilādah*” which means to give birth. Thus in this sense the word “*wālid*” attributes to father and “*wālidah*” is to the mother. And both the parents are called “*wālidān*”. The baby is related to both the ovary and the womb of his mother, but the references in the holy *Quran* clearly emphasize the womb relation by stating that “mothers are those who give birth to the child”. The womb i.e. “*rahim*” (*arhām* is the plural) in Arabic which refers to a “value” based on relatives and the tie of compassion that binds them. Allah Almighty says: “o mankind! reverence your guardian-Lord, who created you from a single person (soul), created of like nature, his mate and from them twain scattered (like seeds) countless men and women; reverence (fear) Allah, through whom ye demand your mutual rights, and (reverence) the wombs that bore you: for Allah Indeed ever watches over you”<sup>24</sup> In another verse Allah says: “then, is it to be expected of you, if ye were put in authority, that ye will do mischief in the land, and break your ties of kith and kin (relationship)”<sup>25</sup> In these verses, again we see the significance of the womb relationship and the understanding that the one who gives birth is the mother of the child. Hence the question arises that “a child born under a surrogacy contract would be illegitimate in Islamic law”? Since the husband (intended father) had not entered into a valid marital contract with the surrogate mother. In addition to all of this, the contract of ‘*surrogation*’ would be considered void or not? As it involves sale of the fetus carrying a free child and also reducing motherhood to a price.

3304; See also, *SUNAN IBN MAJAH* (vol. 3) book no. 9, *hadith* no. 1937 (this is also clear from various Prophetic traditions narrated by Aisha—blessing of Allah upon her—says: “breastfeeding renders prohibited what is forbidden by birth”. In another ‘*hadith*’ narration stated that: “indeed Allah has made unlawful through suckling whatever He made unlawful through birth”, while another *hadith* narrated by Ali—blessing of Allah upon him—says that messenger of Allah said: “indeed Allah has made unlawful through suckling whatever He made unlawful through lineage”. It was also narrated from Aisha that the Prophet said: “what becomes unlawful—for marriage—through breast-feeding is that which becomes unlawful through lineage”).

<sup>18</sup> See, *Al Quran*, verse no. 233 of chapter no. 2 along with verse no. 23 of chapter no. 4 (“if ye decide on a foster mother for your offspring, there is no blame on you provided ye pay (the foster mother) what ye offered, on equitable terms”. While in another place Allah almighty says: “prohibited to you—for marriage—are, your foster mothers—who gave you suck—and your foster-sisters”; See also, *LEGALITY OF THE LEASE OF THE UTERUS AND ITS EFFECTS* by Abbas Ziad Kamel Al-Sa’adi (Al-Ma,moon University college-Department of Law); For further details see, *supra* notes 6, 10 & 17.

<sup>19</sup> See, *Al Quran*, verse no. 54 of chapter no. 25 along with verse no. 45 of chapter no. 24, and verse no. 3 of chapter no. 21. See also, *LOWSON’S TEXTBOOK OF BOTANY* (Indian edition, London, 1922) at p. 23 (arguing for the biological connection); See, *TEXTBOOK OF ZOOLOGY* by T. J. Parker and W. A. Haswell (London, 1910, vol. 1) at p. 15.

<sup>20</sup> See, *TUHFATUL AL MAWDUD BI AHKAM AL MAULUD* (Published by Maktabah al Asriyyah) at p. 272.

<sup>21</sup> See, *Al Quran*, verse no. 15 of chapter no. 46.

<sup>22</sup> See, *Al Quran*, verse no. 2 of chapter no. 58.

<sup>23</sup> See, *Al Quran*, verse no. 14 of chapter no. 31.

<sup>24</sup> See, *Al Quran*, verse no. 1 of chapter no. 4.

<sup>25</sup> See, *Al Quran*, verse no. 22 of chapter no. 47.

The scholars have disagreement in this regard; some scholars rejected the idea of surrogacy and considered it a departure from the Islamic law on the basis that it may open the doors for abomination.<sup>26</sup> Despite of some legal objections on leasing the womb—resultant births and the subsequent legal disputes—, on the contrary others permit surrogacy on the basis of analogy to breastfeeding. Viewing, since “it is legal to vent the breast benefit so as the womb may be measured analogically on the breast”. Thus in their view the womb does not transfer any genetic property, and does not lead to the possibility of mixing of lineages. Some doctors affirm that the womb in procreation is merely a pot and does not carry any hereditary implications to the fetus, which may have already been created and completed genetically outside the womb by fertilizing the egg by sperm. They confirmed the exclusion of pregnancy for women with the leased womb by her husband during her pregnancy of fertilized sperm; because pregnancy hormones stop ovulation completely until after birth.<sup>27</sup>

The scholars of the Islamic law also advance another argument from the Prophetic traditions that: “it is unlawful for a man who believes in Allah and the last day that he waters the plant of another”.<sup>28</sup> Thus from the words “watering the plant of another” extract a conclusion that it means to bring one's sperm into the womb of someone else's wife. Rationally, they are of the view that embedding a sperm into the womb of a strange lady other than the wife amount to adultery (*zinā*) or unlawful sex. The argument then is that the insertion of semen into the womb of a strange lady, as to water the plant of another is *zinā*, in this way, embedding sperms or fertilized ovum into a surrogate mother also amount to *zinā*, and hence it shall be considered and declared unlawful keeping in view the principles of Islamic law and objectives of *Shariah* which is to protect one's dignity and honor, equally the legitimacy of the purity of lineage is not established. Thus the resulting baby will be considered as an illegitimate child.

Consequent upon the aforesaid arguments it is submitted with great reverence that whether any activity without an illicit sexual intercourse amount to adultery (*zinā*), if not, then how insertion of semen into the womb of a strange lady without sexual activity amount to *zinā*. On the other hand looking towards the technical definition of *zinā*, it seems that surrogacy cannot be an instance of *zinā*, as it lacks one of the constituents of *zinā*, namely coitus (the sexual intercourse). But interestingly, even if we consider the traditional definition of *zinā* with reference to the objectives of *Shariah* for the protection of one's dignity and honor, then in their view surrogacy can be an instance of *zinā*, while it seems that surrogacy cannot be labeled *zinā* because the technical definition according to all the jurists depends on the coitus (sexual intercourse), which does not include insemination with the element of surrogacy.<sup>29</sup>

In classical manuals it appears that there is diversity among the early traditionalists and jurists regarding the moral and religious status of an illegitimate child (*walad al zinā*) even in case of an established *zinā*. They report traditions from the Prophet Muhammad (peace be upon him)—with regard to the moral and religious status of *walad al zinā*—which are particularly vague and debatable.<sup>30</sup> Then how can the modern scholars evaluate surrogacy as *zinā* and termed the resulting baby an illegitimate, only on the basis of objectives of *Shariah*.

In my humble opinion, the grounds laid down by the contemporary scholars to declare surrogacy as *zinā*, are not convincing for two reasons; First: merely looking at traditional meaning of the text without considering the true spirit of textual authorities, it will not only lead to confusion but also has severe consequences and implications in Islamic law.<sup>31</sup> Secondly: the quoted tradition which is narrated by *Ruwayfi ibn Thabit al Ansāri* was on the occasion

<sup>26</sup> The doors of evil, they—Islamic scholars—consider surrogacy as *zinā*, thus they present and take support from a verse—of the holy *Quran*—in order to strengthen their view point. But the said verse is revealed for *zinā*. See, *Al Quran*, verse no. 32 of chapter no. 17 (where Allah says: “nor come night to adultery: for it is a shameful deed and an evil, opening the road—to other evils”).

<sup>27</sup> See, *LEGALITY OF THE LEASE OF THE UTERUS AND ITS EFFECTS* by Abbas Ziad Kamel Al-Sa'adi (Al-Ma'moon University college-Department of Law); See also, Delwyn Lounsbury, *MUSLIM SURROGACY*, at: <http://www.surrogacy-surrogate-mother.com>; Qaiser Shehzad, *BIOMEDICAL ETHICS: PHILOSOPHICAL AND ISLAMIC PERSPECTIVES* (IRI IJU, Islamabad) at p. 173; See, *AL FIQH AL ISLAMALI WA ADILLATUHU* by Wahbah al Zuhayli (vol. 7) at pp. 5349–5360; Muhammad Shaltut, Shaykh al-Azhar (1958–63) *AL-FATAWA: A STUDY OF THE GENERAL PROBLEM OF CONTEMPORARY MUSLIMS DAILY LIFE*, at p. 328.

<sup>28</sup> See, *SUNAN ABU DAWUD* (Darul Ghad al Jadeed, Mansoor, Egypt, 2013) book no. 11, *hadith* no. 2153; See also, *JAMI AT TIRMIDHI* (Darul Ghad al Jadeed, Mansoor, Egypt, 2013) vol. no. 2, book 6, *hadith* no. 1131.

<sup>29</sup> See, Qaiser Shehzad, *BIOMEDICAL ETHICS: PHILOSOPHICAL AND ISLAMIC PERSPECTIVES* (IRI IJU, Islamabad) at p. 173; See also, *AL FIQH AL ISLAMALI WA ADILLATUHU* by Wahbah al Zuhayli (vol. 7) at pp. 5349–5360; See also, *SURROGACY AND INTER-RELATED ISSUES: A LEGAL ANALYSIS FROM THE PERSPECTIVE OF ISLAMIC LAW* by Fazli Dayan. J. Appl. Environ. Biol. Sci., (7:6, 2017) at pp. 31–40.

<sup>30</sup> See, Al Sanani, *AL MUSANNAF* (vol. 7) at pp. 453–455; See also, Al Bayhaqi, *AL SUNAN AL KUBRA* (vol. 10) at pp. 58–59.

<sup>31</sup> In Islamic law ‘*zinā*’ occurs through a: “illicit sexual relations”; ‘fornication in which both parties are unmarried’, or ‘adultery when one or both parties are married’, b: “the act is properly witnessed”, i.e. ‘four witnesses seeing the act’, will be punished by the ‘*hadd*’ penalty, and the resultant offspring will be then called illegitimate as ‘*walad al zinā*’. Further if the case of *zinā* is not proved then it will amount to “*qadhif*” (defamation) invoking the severe penalty of eighty stripes. “*qadhif*” means: wrongly accusing someone of fornication or adultery without any proofs/evidences and eye witness. See, e.g., verses no. 4–9 of chapter no. 24 (wherein the holy *Quran* laid down the details and its punishment, stated that criminal shall be liable to eighty stripes, and further his testimony shall never be accepted in future in any matter).

of *hunayn*<sup>32</sup>, and (in which) the Prophet ordered the army men that: “it is not lawful for a man who believes in Allah and the last day to water what another has sown with his water, meaning thereby intercourse with women who are pregnant” and he further said that: “it is not lawful for a man who believes in Allah and the last day to have intercourse with a captive woman till she is free from a menstrual course; and it is not lawful for a man who believes in Allah and the last day to sell spoil till it is divided”.<sup>33</sup> In fact in this commandment the Messenger of Allah educating his warriors that: “engaging slave girl’s in physical relations after triumph is not allowed”. Therefore for warriors it is not legitimate to enjoy sexual relation with a pregnant lady, in whose womb the developing fetus planted by her own spouse would mean that watering a plant, planted by someone else.

In Islamic law the offence of *zinā* constitutes when certain conditions are met; first, it requires the meeting of sexual parts, secondly, penetration of a male into female sexual parts, i.e. incursion (insertion the tip of penis). Thirdly, infiltration and incursion of the private part must be seen by four male eye witnesses.<sup>34</sup> Hence, each and every aforesaid condition must be met to constitute the offence of *zinā*. While, the first two conditions in case of a surrogate mother are totally lost. Consequently, surrogacy cannot be declared *zinā*, merely by insertion of sperm into the womb through therapeutic methods. As this will spoil the principles laid down for constituting a *zinā* offence in Islamic law. Therefore, those who declaring surrogacy *zinā* will have to answer some legal questions, whether surrogacy can be an instance of *zinā* even if it lacks one of the most important element i.e. sexual intercourse? In their view point if it is established that surrogacy is *zinā* then the resulting baby will be a *walad al zinā*?

According to all the jurists<sup>35</sup> only *zinā* is the strongest reason for the illegitimacy of a child born as a result of unlawful sex. In Islam *zinā* occurs through illicit sexual relations, either fornication in which both parties are unmarried, or adultery when one or both parties are married and the act is properly witnessed, i.e. four witnesses, will be punished by the *hadd*<sup>36</sup> penalty. The resulting offspring will be an illegitimate (*walad al zinā*). So those who argue that surrogacy is *zinā*, then in such case; will the *hadd* penalty may be imposed? And the *hadd* penalty may be imposed on the intended parent’s i.e. wife and husband? Or the penalty may be imposed on surrogate mother only? Or it may be imposed on male only? Further the *hadd* penalty may be imposed on both parties to the contract of surrogacy? Furthermore in Islamic jurisprudence the textual implications (*al dalalah*)<sup>37</sup> of the word *zinā* literally does not include the meaning of incursion of sperm into the womb of a surrogate mother, nor does analogy (*qiyās*) can be used in criminal cases.<sup>38</sup> Thus extending the meaning of *zinā* to the incursion of sperm to the womb of surrogate mother by surrogacy process is totally inconsistent as per the textual interpretation of the Islamic jurisprudence in Islamic law.

<sup>32</sup> See for further details: Lammens, H. and Abd al Hafez Kamal, 2012. *HUNAYN: IN ENCYCLOPEDIA OF ISLAM (Second Edition, eds P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs) Brill Academic Publishers* (Stated that the battle of ‘*Hunayn*’ was fought between Prophet Muhammad and his companions against the ‘*Bedouin*’ tribe of ‘*Hawazin*’ and its subsection of ‘*Thaqif*’ in 8<sup>th</sup> year of *Hijrah*–630: AD–in a valley situated on one of the roads leading from Mecca to ‘*Taaif*’. The battle was fought after the Prophet conquered Mecca and when things are settled, so news came that entire tribe–of ‘*Thaqif*’ along with the tribes of ‘*Banu Jusham*’, ‘*Banu sad bin Bakar*’, and a few people of ‘*Awza*’ from ‘*Banu Hilal*’, and some people from ‘*Bani Amr bin Aamir*’ and ‘*Awf bin Aamir*’–brought their women, children, sheep and camels along, in addition to their armed forces and adequate supplies. Upon the news the messenger of Allah Prophet Muhammad (peace be upon him) marched towards them along with his army men He brought to Mecca. Both the armies met at ‘*Hunayn*’ a valley between Mecca and ‘*Taaif*’. The battle ended in a decisive victory for the Muslims, who captured enormous spoils. The battle of ‘*Hunayn*’ is one of only two battles mentioned in the holy *Quran* by its original name in ‘*Surah al Tawbah*’, verse no. 25).

<sup>33</sup> See, *SUNAN ABU DAWUD* (Darul Ghad al Jadeed, Mansoor, Egypt, 2013) book no. 11, *hadith* no. 2153; See also, *JAMI AT TIRMIDHI* (Darul Ghad al Jadeed, Mansoor, Egypt, 2013) vol. no. 2, book 6, *hadith* no. 1131.

<sup>34</sup> See, *Al Quran*, verse no. 15 of chapter no. 4, and verse no. 4 of chapter no. 24.

<sup>35</sup> For details see, Muhamamd Salim Awwa, 1982. *PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY* (American trust publication).

<sup>36</sup> *Ibid*, (“*hadd*”; a punishment which is prescribed, by the God almighty in the holy *Quran* or in the *Sunnah* of the Prophet, and cannot be varied in any way. Thus “*hadd*” is totally a right of Allah almighty which cannot be changed as compared to “*ta’zir*”; dictionary punishment).

<sup>37</sup> See, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* by Mohammad Hashim Kamali, at pp. 118–130 (stated that in Islamic jurisprudence “*Al dalalah*”; for the textual interpretation, there are two major analyses, regarding the method of meaning of the words and text; the ‘*Hanafi*’ and the ‘*Shafi*’ methodologies. The jurists of ‘*Hanafi*’ school of thought have distinguished “Four levels of meaning”. First method is “*ibarah al nass*”: ‘the explicit meaning’, See verse no. 3 of chapter 4. Secondly, “*isharah al nass*”: ‘indicative meaning’ See verse no. 236 of chapter no. 2 along with verse no. 4 of chapter no. 4 of the holy *Quran*. Thirdly, “*dalalah al nass*”: ‘inferred meaning’, See verse no. 13 of chapter no. 17. Fourthly, “*iqida al nass*”: ‘required meaning, See verse no. 22 of chapter no. 4. On the other the jurists of the ‘*Shafi*’ school of thought have classified textual implications into “Two basic types”. First, “*dalalah al mantuq*”: ‘pronounced meaning’. Secondly, “*dalalah al mafhum*”: ‘implied meaning’. Further, “*Dalalah al mantuq*” has been divided into “*dalalah al iqida*”: ‘required meaning’ and “*dalalah al isharah*”: ‘alluded meaning’. While “*Dalalah al mafhum*”: implied meaning has been subdivided into “*mafhum al muwafaqah*”: ‘harmonious meaning’ and “*mafhum al mukhalifa*”: ‘divergent meaning’ or ‘meaning not in accord with the purpose of text’. The ‘*Shafi*’ jurists do not accept “*mafhum al mukhalifa*” unless it fulfills six conditions. Further they have also imposed restrictions in regards to “*sifah*” attribute, “*shart*” condition, “*ghayah*” extent, and “*adad*” implication of the stated number. The ‘*Hanafi*’ jurists are more opposed to “*mafhum al mukhalifa*”. They do not accept any meaning which is not in accord with the text or its true spirit. They do not accept it at all in the case of interpretation of the holy *Quran* and the *Sunnah* of the Prophet Muhammad–peace be upon him). See also, *infra* note 38, at pp. 77–79.

<sup>38</sup> See, *GENERAL PRINCIPLES OF CRIMINAL LAW* by Imran Ahsan Khan Nyazee (Islamabad, Federal Law House, 2002) at p. 77.

Generally scholars of the Islamic law and particularly those who consider surrogacy as *zinā*, advances another argument in support of their view point. They believe that baby belong to bed, on the authority of the Prophetic tradition: “*the child goes to (the owner of) the bed and the adulterer gets nothing but the stone*” narrated by *bukhari*<sup>39</sup> and *muslim*<sup>40</sup>. But the quoted tradition was for married couple in case of *zinā* (adultery), where as in surrogacy the resulting baby is born through scientific medical procedure and the surrogate mother is artificially inseminated. Thus here lies the center of debate, whether this tradition can be extended to such situation?

In fact this tradition laid down a principle that a child belong to the man who has a legal access for sexual relations. While it also attributes towards another meaning which includes the paternity of the child born to a slave girl too; where paternity belongs to her master. It may be noted here that paternity of an illegitimate child can be claimed at any time by the father on the basis of earlier marriage (*shubhah* marriages), but till that time child remains attributed to its mother.<sup>41</sup> Therefore the quoted tradition will stand in its original meaning, and hence cannot be extended to surrogacy. Thus declaring surrogacy as *zinā* on the basis of this tradition will spoil the true spirit of the Prophetic sayings. Further in Islamic law *zinā* if not proved by the person who alleges others for *zinā* is liable to *hadd-e-qadhif*<sup>42</sup>. Allah almighty says in the holy *Quran* “*and those who launch a charge against chaste women, and produce not four witnesses (to support their allegations) flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors*”<sup>43</sup> Hence keeping in view the *Quranic* verse regarding *qadhif* penalty, whether it can be extended to the viewpoints of those who declare surrogacy as *zinā* and the resulting baby as *walad-as-zinā*? Further if they avoid such situation of *qadhif* by saying that the pregnancy or the birth of a child through surrogacy is enough to declare such process as *zinā* without presenting four eye witnesses, even then the question remains the same that without sexual intercourse any such activity can be labeled as *zinā* in Islamic law? Another important question where if a person with his open eyes seeing any unlawful sexual activity, even though if it falls under the category of *zinā*, that cannot be termed as *zinā* until proved as such by the procedure laid down in Islamic law. Therefore in such situations *hadd* penalty will not be imposed on the adulterer, for the reason that even the established *hudud* (plural of *hadd*) offenses are overturned by the slightest of doubts (*shubuhah*) in Islamic law.<sup>44</sup> Then calling such procedure as *zinā* is far beyond our understanding.

## CONCLUSION

The contemporary Muslim scholars have evaluated surrogacy on the basis of traditional definition of *zinā* (adultery), because they feel it has elements of unlawfulness, while some others appraised on the basis of objectives of *Shariah*; which is to protect one’s dignity and honor, as the legitimacy of the purity of lineage is not established. However on the basis of clear evidences we come to the conclusion that surrogacy is not *zinā* as it lacks essential conditions, and also viewing that Islamic law favors the preservation of the human species which is one of the primary objectives of *Shariah*. Certainly, there is nothing in the text that restricts this type of procedure. Likewise there are enough arguments and classical writings in the Islamic literature that would empower such a process to counter infertility. Therefore this study contends that surrogacy and surrogate mother does not fall under the technical definition of *zinā* lacking—sexual intercourse—one of the primary constituents of *zinā*. Consequently surrogacy and surrogate parentage may be considered valid provided with specific conditions with the guidelines of Islamic law and jurisprudence, since it restoratively helps the disillusioned infertile couple through assisted births.

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<sup>39</sup> See, *SAHIH BUKHARI* (Darul Ghad al Jadeed, Mansoor, Egypt, 2013) book no. 87, *hadith* no. 6818.

<sup>40</sup> See, *SAHIH MUSLIM* (Darul Ghad al Jadeed, Mansoor, Egypt, 2013) book no. 37, *hadith* no. 1458.

<sup>41</sup> See, *GENERAL PRINCIPLES OF CRIMINAL LAW* by Imran Ahsan Khan Nyazee (Islamabad, Federal Law House, 2002) at pp. 111–112.

<sup>42</sup> See, *CRIMINALIZING SEXUALITY: ZINĀ LAWS AS VIOLENCE AGAINST WOMEN IN MUSLIM CONTEXTS* by Z. Mir-Hosseini (SUR-International Journal on Human Rights. (8:15, 2011) at pp. 7–33 (“False accusation of unlawful sexual intercourse”: means “accusing someone of illicit sex but failing to present four eye witnesses”. Any person who falsely charges a chaste others with *zinā*—unlawful sexual intercourse—, shall be liable to “*hadd*” penalty. The punishment of “*qadhif*” is eighty stripes). See also, *THE OXFORD HANDBOOK OF CRIMINAL LAW* by Silvia Tellenbach (edit: Markus D. Dubber and Tatjana Hornle, Oxford University Press, 2015) at pp. 251–253 (viewing that “*qadhif*” is a crime of “accusation of illicit sex or rape against chaste women without four witnesses”).

<sup>43</sup> See, *Al Quran*, verse no. 4 of chapter no. 24, along with verse no. 15 of chapter no. 4; For further details see, *THE OFFENCE OF RAPE IN THE ISLAMIC LAW OF PAKISTAN, WOMEN LIVING UNDER MUSLIM LAWS: DOSSIER* by R. Mehdi (18: 1997) at pp. 98–108 (stated that any person who alleging other for *zinā* and fail to provide four consistent Muslim witnesses, he or she can be sentenced to eighty lashes for unfounded accusation of fornication).

<sup>44</sup> See, *SHARIAH THEORY, PRACTICE AND TRANSFORMATIONS* by Wael, B. Hallaq (Cambridge University Press, 2009) at p. 311.

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