

Surrogate Mother According to Science and the Opinions of Contemporary Islamic Scholars

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Abstract

The desire to have a children in family is the natural wish of all the spouses, but this desire is not being fulfilled in some spouses due to several reasons, so those spouses who misses the opportunity to have a child to lead their life happily do various other efforts to acquire a heir, one of which is the hiring of a surrogate mother or in other words implementing a surrogate mother in their family. Surrogate mother emerged as a result of the development of Science and Technology in the field of medicine. The fact is that a practical process is done on a surrogate mother which results as a help to the couples who are unable to breed their own offspring naturally; but as it is said that all the actions have a reaction in same way the process or the result of implementing a surrogate mother has triggered a lot of problems in the field of Law and Religion in Muslim Community. The first problem is the implementation of a surrogate mother which is not legalised by Islamic law or which is prohibited in Islamic Law. The second problem is the status of the child (Lineage) born through a surrogate mother. The Fuqaha differs from the opinions of the surrogate mother between the one that permits and the other which forbids the practice of being a surrogate mother. Looking at the problems that arises through the implementation of in vitro fertilization (IVF) or surrogate mother process so it is necessary to study a law of legal certainty on the practice of surrogate mother so a to give a clear clarity to the people who will practice the surrogate mother and to those who already have a offspring through a surrogate mother.

Keywords: *Surrogate Mother, Child, Lineage, Fuqaha Opinions*

Introduction

One of the purpose of marriage is to have a child, but not all the couples are naturally inherited with their own child born with a natural process. With the advancement of technology in medicine the spouse who desire but cannot get inherited naturally can be helped with artificial reproduction or genetic techniques. These genetic techniques are the emerging test tube program which is an artificial reproduction program that initially aims to help the couple in getting a offspring, therefore, with the discovery of the test tube baby it

has brought a lot of Fortune to the *infertility* case (barren) as well as has provided a solution for the spouses who don't acquire child through natural method.

While in mid 1978 the world community was shocked by the success of the controversial trial conducted by Dr. P.C. Steptoe and Dr. R.G. Edwards, with the birth of Louis Brown to a couple called John Brown and Leslie on 25th July 1978 at Oldham England (HS, 2006). From the development of *in vitro fertilization* or test tube baby the idea about a *surrogate mother* was born.

Definition of Surrogate Mother

Surrogate mother is a woman who is willing to rent her womb on a agreement or conduct to another spouses for 9 months for the fertilization of a sperm which is implemented into her womb. After giving birth she has to deliver the baby she has agreed to the spouse according to the agreement. This agreement is usually called a gestational agreement (Ratman, 2012) or surrogacy contract (Salim, 1993). In addition, surrogate mother is a term used for woman who are incharge of mixing seeds as a result of a spouse and are expected to give birth to a child than to the rental of the uterus. In other words, he means "mother guardian "(Ratman, 2012). This definition is known as surrogate mother because of the spouse's who pay her for renting her womb for a child. The spouse who heir a surrogate mother has to pay a certain amount of money to her and in return she will give birth to a child from their seed and provided that the surrogate mother will surrender the child after birth or at the time of birth has been promised (Abu Zaid, 1995).

In addition, in Arabic a surrogate mother or rent a womb is known for its various terms such as: al-'ummu al-musta'jir, al-ummu al-badilah, al-musta'jir, al-hadlanah, syatlul janin, al-ummu al-kazibah, ar-rahmu al-musta'ar, or ta'jirul arham. But surrogate mother is better known ar-rahmu al-musta'jir or al-'ummu al-badilah. But in English is known as surrogate mother (Zabidi, 2007).

While Ali 'Arif, in his book al-'Ummu al-Badlilah (ar-Rahmu al-Musta'jirah) as quoted by Radin Seri Nabahah bt. Ahmad Zabidi, the rent a womb is to use the uterus of another woman to conceive the female seed (ovum) that has been mixed with male seed (sperm), and the fetus is conceived by the woman until birth. Then the child was given back to the husband and wife to take care of him and the child was considered to be their child from the legal point of view (Zabidi, 2007).

Factors Causing To Surrogate Mother

Implementation of a surrogate mother is usually performed because of certain unavoidable problems, i.e., when a wife or woman with her egg is unable and cannot give birth, or the uterus is not good for her pregnancy, or has no uterus, or for other reasons such as, woman who is able but desire to maintain their beauty of body or some some other reasons. Therefore, the purpose of practicing surrogate mother varies from couple to couple. The first reason, a woman or a wife who has no hope of natural pregnancy due to illness or disability which can prevent her from conceiving and giving birth to a child. Second, a woman who has no uterus because her uterus has been removed from the operation of the uterine surgery. Third, the woman is eager to have a child but does not want to bear the burden of pregnancy, during the pain of giving birth and breastfeeding her child and wants to keep her body beauty by avoiding anything that happens due to pregnancy Fourth, woman who wants to have child but have menopause. Fifth, a woman who wants to earn money by renting her womb to couples as a commodity to meet her economic needs (Jamdin, 2011).

Forms of Surrogate Mother

There are various forms of mothers or surrogates. The first form, the sperm (ovum) is fertilized with the seed of the sperm, then it is inserted into the womb of another woman. This method is used where a wife has a very good seed, but her womb is removed due to surgery, severe disability, due to chronic illness or some other cause. The second form, it is also similar to the first form but here the fertilized seed is frozen and placed into the womb of the surrogate after the death of the spouse. The third form, sperm is fertilized with other male seed (not her husband) then is inserted into the womb of another woman. This condition occurs when the husband experiences infertility and the wife has an obstacle or disability in her womb although she has a good seed. The fourth form, the sperm of the husband is fertilized with another female ovum, then put into the womb of another woman. This condition occurs when the wife is overtaken by the ovaries and the womb is unable to carry out the task at the time of pregnancy, or the wife has reached menopause. The fifth form, the sperm of the husband and the sperm (ovum) is fertilized then inserted into the womb of the other than the same husband. In this case the other wife is able to conceive of her husband's child from an unborn wife (La'bah, 2012).

So far known there are two types of womb rent. The first one is gestational surrogacy. The embryo, which is usually derived from the sperm of the husband and ovum wife who is met through IVF technology, is implanted in the female womb of the rented mother. Second, in this the womb and ovum is rented of a surrogate mother (genetic surrogacy). The ovum that embraces the embryo is the ovum belonging to the woman whose womb is hired (surrogate mother), while the sperm of the husband. Although the female owner of the womb is also the owner of the ovum but still has the obligation to surrender the child she conceived and was born to the couple who rented her. This is because, legally, when making an agreement, surrogate mother isn't the mother of the baby. Mixing sperm and ovum in the second form can be done through artificial reproduction, possibly through intercourse between the husband and the spouse of the ovum owner whose womb is rented (La'bah, 2012).

Effects of the Implementation on Surrogate Mother

As for the effects of surrogate mother implementation were, at first forcing a woman to donate her uterus for pregnancy and childbirth. Second, the feeling of motherhood is being killed due to the pain while giving birth. Third, there has been a mixing of nasab when a mother's husband overlaps or a female owner of the womb with his wife. Fourth, there is a disagreement when a surrogate mother refuses to hand over her baby to the ovum owner or the couple who rented her. Fifth, the problems that arise when surrogate mothers are overwhelming as they are the relative of the couple. Sixth, causing a lot of damage and defamation to surrogate mothers during pregnancy as without a husband or being married she has got pregnant (Ewinda), 2012).

The Contemporary Scholar's Opinions Towards Surrogate Mother

The problem of surrogate mother who overlap with various forms is a contemporary problem that has not been discussed by law by the previous fuqaha. The fuqaha agreed that practically the spleen surrogate mothers whose sperm and ovum come from foreign parties (without legal marriage) and then are planted to other women under any circumstances is not allowed (haram).

The fuqaha differs in the case of the spouse's mate's case, which sperm and ovum of the spouses are embryonically transferred into the womb of the surrogate mother or into the

womb of the second wife from the husband. The fuqaha differed in opinions on this issue, which both allowed and prohibited. Here are the views and the arguments that allow and ban the practicality of a surrogate mother.

Fuqaha's Opinion Allows Surrogate Mother

According to Dr. 'Abdul Mu'thi Bayyumi member Majma' Buhuts Islamiyah in Al-Azhar Egypt. He said: Practical surrogate mothers are legally married to the spouses and the implementation is not for business purposes, besides that he also said that the practice of surrogate mother can solve various problems of desirable women but it can not conceive and give birth (Khauli, 2011, p. 284).

Ali Akbar said: "Taking a baby tube in a woman who is not his mother because the mother can not conceive it as her womb is disturbed or having certain problems is not allowed while breastfeeding a child of another woman is allowed in Islam, so it can be taken. Then it can also give wages to women who loan their womb (HS, 1993: 46).

The above views and opinions explicitly explain that the way in which the surrogate mother is allowed is this way and this is likened to a familiar nursing mahram in Islam. Based on that assertion, it can be said that a child born to a surrogate mother can be eligibility as a child.

In addition, Husein Yusuf gave a similar opinion to Ali Akbar. He states that the status of a child born on deposit, remains a child of a woman who has the seed and also the woman who has breastfeed is also the mother (Husein Yusuf, 1989).

Then Salim Dimiyati stated: "The test tube baby that uses the egg and sperm from legitimate husbands after which the embryo is deposited into surrogate mother, then as the child which is born is not a child as it doesn't have any inheritance or inherited because the adopted child is not his own so it cannot be likened to the biological child "(HS, 1993: 46).

The above view of the fuqaha basically agrees with the use of test tube baby techniques which use sperm and ovum from the spouses and then the embryo is transplanted into the womb of the surrogate mother.

Reasons and Evidence

1. It emphasize the problem of surrogate mothers who are overwhelmed with breastfeeding laws, where a woman is allowed to be a mother for a child who needs milk and thus be allowed to be a mother to a need for hereditary.
2. The existence of the fiqh method which means "The Original of the Law On Something is Mubah Until There Is a Banal It". Prohibition can only be carried out with the existence of nash and proposition, and in this case their is absence of a nash which bans the practice of a surrogate mother (Khauli, 2011, p. 289).
3. Then, the fiqh method which means, "The Emergency Situations Allows a Certain Matter Which is Normally Forbidden". In this case a barren woman who wants to have hereditary is a state of emergency and practically the she can be mother of a child from surrogate mother.

Fuqaha's Opinion Prohibits Towards Surrogate Mother

Based on the decision of the Islamic fiqh institute which was held in Mecca in 1985, in Oman in 1986 and the decision of the Islamic research institute in Egyptian Qahirah in 2001 which stated the danger of practicing this surrogate mother. Among the Al-Azhar scholars who forbidding the practice of mummies are: DR. Jad Al-Haq 'Ali Jad Al-Haq (Former Mufti and

Grand Sheikh Al-Azhar), DR. Syeikh Sayyid Wafa (Al-Amin Al-'Am Al-Azhar Research Institute), DR. 'Ali Jum'ah (Egyptian Mufti), DR. Muhammad Sayyid Thanthawi (Former Grand Sheikh Al-Azhar), DR. Yusuf Al-Qaradawi (Professor of Feqah at Universitas Qathar), DR. Mustafa Zarqa (Member of the Islamic Research Institute in Cairo), DR. Muhammad Ra'fat Usman (Dean of the Faculty of Shari'ah Al-Azhar University). (Qarat).

The results of ijthid Fiqh members from various parts of the Muslim world in 1986 in Aman listed in the resolution from the third sitting of Majma'ul Fiqhil Islamiy Athfaalul Annabilb Baby Testing Tubes, which means: "The fifth way is done outside of the contents between two husbands The wife then implanted in the womb of the other wife (from the husband) it is prohibited according to the Islamic law "(HS, 1993: 47).

The result of the ijthid prohibits the use of test tube baby techniques that use sperm and ovum from spouse and then the embryo is transplanted into the other womb (second, third or fourth wife).

While Al-Qardawi says that: "Islam has protected the offspring, by forbidding adultery and adoption, so as the situation of the family will always be clean from foreign elements. Then Islam also prohibits sperm attachment (test tube baby), when a non-spell of husbands sperm". (Al-Qardawi, Halal and Haram in Islam, 1990: 312).

In addition, Syaltut argues: "The sperm coverage (test tube baby) that is done is not a husband's sperm so it is undoubtedly a very bad crime, and a more delusional act than the adoption of a child. The reason for the joining son is to gather between the adoption of the child, to include the foreign element in the lineage, and among other acts of misconduct in the form of adultery at a time which is opposed by Islam and the Law, and opposed by high morality, and gliding to the degree of beast Who have no humanity and noble social ties" (Al-Qardawi, 1990: 312-313).

Salim Dimiyati further said that: "Test tube baby which use the sperm of a sperm donor father, while the egg cells are from the mother and obtained by direct operation of the egg content, here is clearly a third element in the mother's body. Therefore, in this case there has been a hidden adultery despite not committing physical adultery. So the child born through this process is also included in adulterous children" (Dimiyati, 1986: 64).

The fuqaha proponents of this opinion point out:

1. Al-Qur'an

As the word of Allah SWT in surah Al-Mukminun verse 5 which means:

"And who guard their private parts, Except before their mates or those whom their right hands possess, for they surely are not blameable "

In this verse it is clear that the illegitimate mothers have been harassed because the vagina is absolutely necessary to protect the whole as well as to put the sperm into the vagina.

Mukhatab in this verse covers men and women.

There is a ban on the use of sperm donors, as found in the word of Allah in Surah Al-

Baqarah verse 223 which means :

"Your wives are a tilth for you, so go into your tilth when you like, and do good beforehand for yourselves, and be careful (of your duty) to Allah, and know that you will meet Him, and give good news to the believers".

The above verse instructs the husbands to always hold their gaze and his genitals, including preserving the sperm from the vagina (the genitals) scattered or sown into the womb which is not his wife. Similarly, believing women are commanded to always keep their penis, which means that the vagina does not receive a sperm that does not belong to her husband.

2. Hadith

They reasoned based on the hadith of the Prophet Muhammad (peace be upon him) which means:

"Narrated by Ruwaifi 'bin Thabit Al-Anshary Radhiallahu' anhu: I was with the Prophet sallallahu 'alaihi wasallam in the battle of Hunain, Rasulallah Shallallahu' alaihi wasallam standing among us he said: It is not lawful for those who believe in Allah and the last day watering Mani) is a woman who is not lawful to her ".

Then, based on hadith narrated by Muslim which means:

"From al husyaimi ibn malik ath-tha'i of the Prophet SAW. Said, "There is no sin beside Allah after a shirk is greater than a man who puts his body into a womb that is not lawful for him".

Based on the hadith of the Prophet Muhammad mentioned above, it is clear that putting the semen into the womb of a woman who does not begin with a legal marriage is a great sin after shirk. In this case it is very clear that we know that in practice the seminal mothers who enter into the uterine womb despite being mixed with the legitimate wives are still not a halal place for the semen to be in the womb of a surrogate mother. When examined the above mentioned two verses then it is clear that the practice of the overwhelming mother is a great sin after shirk to Allah SWT.

Based on the word of Allah and the Prophet Muhammad's Hadith, it can be said that a wife is not permitted to receive sperm from others, whether physically or pre-embryo. And this last thing is analogous to the use of donor sperm because donors do not have physical contact with the wife, but the wife receives the sperm in the form of pre-embryo. And if this is also done by the wife, then this also includes great sin after shirk.

3. Fiqh Methods

a. *"The original principle in private organs is tahreem".*

Body contact is not permitted without a lawful marriage, and it is understood that women's wombs follow the halal law of the relationship between males and females. In the Qawaid Al-fiqhiyyah it is mentioned that the following follows the law of the latter then when the relation of the body is only lawful with the legal marriage then the womb can only be conceived if it starts with a valid contract as well.

b. *" The repealing of harm is preferred to the attainments of benefits "*

The obvious damage from practicing mumps is the mixing of lineage. Lineage or descendant is one of the five essential of life (dharuriyat) that must be guarded (guarding religion, soul, mind or intellect, lineage and property). This combination of lineage is most likely to occur, if the mother overtake the body with her husband after the transplantation embryo growing on the mother appears to be disturbing whether the fetus comes from a natural pregnancy or is practiced by a surrogate mother.

The case was evident in Germany, after a doctor's examination process found that the embryo which transplanted to the surrogate mother was not attached to her, but the surrogate mother was pregnant naturally from her husband. The surrogate mother can not cancel the contract because she has already received 8000 dollars. And this means that this surrogate mothers have sold her own biological children (Khauli, 2011, p. 287).

c. *"Everything that leads to haram is therefore haram".*

Practical surrogate mothers lead to disagreements, hostilities and differences (Usman, 2002) which we see much from what is happening in Europe. In Islam disagreement and

quarreling is something that is illegal then practically the surrogate mother overlapping that will lead to it is illegal also the law.

d. *“There is no causing of harm and there is no reciprocating of harm”*

Practical surrogate mothers give harm to women who lend their womb, especially psychiatric problems, where surrogate mother overlooked the child she was born to have been conceived and born, but in reality she was the one who only exploited her womb to conceive and to give birth to another. This is a serious mental burden. Practical mothers have killed motherhood, after having a baby and giving birth which leads to a lot of pain.

4. Evidence Aqli

- a. Womb is not something that can be handed over. It is something that cannot be handed over and even can't be hired or rented (Usman, 2002).
- b. Practically the surrogate mother requires the opening of awrah (intimate parts) and touching her, and it is illegal to do so except for the sake of syar'i. Although it is acceptable to open the anatomy of the owner of the ovum because of the emergency, but it is not possible for the surrogate mother to lend her womb because the surrogate mother is not the necessary or real mother of the child (Khauli, 2011, p.228).
- c. The surrogate mother overlaps in any way can be the wife of others until her pregnancy and childbirth will cause a mixture of lineage Or if the surrogate mother is an unmarried virgin, then this will give him a big problem in which he may be in qazaf (accused of adultery) or it is also said that a despicable woman causes many delays and defamation to mothers during pregnancy without a husband (Ewinda), 2012). With a fetus care act on the womb of a surrogate mother, a girl or widow can be engineered to get pregnant without being preceded by a marriage bond.
- d. Marriage is a strong agreement "mitsaaqaan ghallizhaan" or the contract with which it is permitted to be called husband and wife. Marriage is a sacred institution to form a life of sakinah, mawaddah, and rahmah. Surrogate mothers are defaming on the meaning of marriage.
- e. Surrogate mother can cause the possibility of commercialization of the womb, thus bringing disasters to humanity and humanitarian values. Marriage is no longer considered a sacred one which is the basis for a woman to become pregnant and have children. It can lead to a shift in value in a society that sees outrageous pregnancies not as a disgrace, but as a matter of course.

Conclusion

As a conclusion, based on the strengths of the prophecies employed by the fuqaha that enable the practitioners to overtake and even forbid them, that the stronger opinion of the matter is the practical illusion of the mother in spite of the urgent need of a spouse to get hereditary or other because of the consequences of these acts, there are many problems and greater damages in both religion, humanity and Malay customs. The majority of fuqaha view surragote mother is haram and impermissible, whether paid or voluntary.

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