

Question:

We are asking specifically about a second method: In gestational surrogacy (aka the Host method) the surrogate becomes pregnant via embryo transfer <http://en.wikipedia.org/wiki/Embryo_transfer> with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother or father to raise, or to a parent who is unrelated to the child (e. g. because the child was conceived using egg donation <http://en.wikipedia.org/wiki/Egg_donation> , sperm donation <http://en.wikipedia.org/wiki/Sperm_donation> or is the result of a donated embryo). The surrogate mother may be called the gestational carrier.

Answer:

In the Name of Allah, the Most Gracious and the Most Merciful

The question of the permissibility of gestational surrogacy (as described above) in Islam is being posed frequently in this day and age. Most Muslim scholars and thinkers seem to view the question as one of *fiqh* and base their findings on legal analogies and considerations.

One group says that surrogate motherhood of this kind is not allowed because it is akin to *zina* (adultery) since the surrogate is carrying the fertilized egg of someone who is not her legal husband. The child produced therefore has no lineage through legal marriage and will have to be considered as illegitimate. Therefore, if the product is *haram*, the means of acquiring the product (the surrogate's renting of her womb) is also *haram*. Furthermore, this group argues, since the biological mother has a genuine stake in the product, there is an overwhelmingly high probability for emotional and legal confrontation between the two "mothers". Law, by definition, aims to remove potential disputes among human beings. Law is not legislated to increase the possibility of dispute. As it is quite apparent from certain cases of legal dispute between biological and surrogate mothers, no law has been able to quash the probability of dispute.

Perhaps, the most compelling evidence supporting this group of scholars is the *ayah* (verse) in *Surah al-Mujadalah* (58): 2 where the Quran says:

"...their mothers are only those who conceived them and gave birth to them (*waladna hum*)."

The Arabic verb "*walada*" is used for the whole process of begetting (*wiladah*) – from conception to delivery. It does not only refer to the act of carrying (*haml* in Arabic) and giving birth (*wad'*). Thus, this ayah categorically denies any rights of motherhood to the surrogate 'mother'. Furthermore, this group can argue that the harms of confusion and dispute far outweigh the benefit of offering someone a child. The child will be a source of perpetual stress for all parties involved which will invariably cause harm to the child also.

“Harm is to be avoided before benefit is derived” is a well established maxim in Islamic law.

Another group of scholars favor the permissibility of this kind of surrogacy. They base their claim on secondary considerations and not on any primary principle. This group claims Islamic law recognizes the preservation of the human species as one of its primary objectives (*maqasid*). It follows that allowing married couples to pursue conceiving children is also part of this primary objective. Therefore, if a married couple is not able to conceive children themselves, they should be allowed to use means that override their inability to do so. If surrogacy is one method, it should also be allowed on the principle of *maslaha* (public interest). The fact that the surrogate mother is not carrying her own child can be overridden by saying that she is merely renting her womb as an incubator and she is not actually engaged in any act of *zina*. Besides, there is no fear of confusing the lineage of the child as the biological parents are already confirmed. This could be made analogous – some say – to hiring a woman to breast feed someone else’s child which is an acceptable practice.

My retort to this group of scholars is that this line of argumentation fails to address the *ayah* in *Surah al-Mujadalah* which defines who is a mother and who is not. The *ayah* is a primary source of Islamic law and provides conclusive evidence regarding the definition of motherhood as one who both conceives and gives birth. Since neither the biological mother nor the surrogate has comprehensively fulfilled the definition of motherhood, as defined in the *ayah*, Islamic law will not be able to determine who the mother is. This – as I have explained above – will definitely lead to dispute and harm – neither of which fall in the ambit of the *maqasid* (objectives) of Islamic law. The *ayah* cannot be simply discarded by secondary legal considerations such as *maslaha*¹. That would be analogous to saying that since wine has some benefits (*maslaha*) for human beings, the Quranic *ayaat* that prohibit the drinking of wine should be discarded because of that *maslaha*. Furthermore, the analogy to hiring someone to breast feed (*ridaa’ah*) is absurd as that happens only after the mother gives birth where there is no confusion as to who the mother is.

However, my personal approach to the question of the permissibility of gestational surrogacy is not at all a legal one-- it is a theological one. More often than not, contemporary Muslim scholars, both the conservative minded and the liberal minded, do not consider the theological implications of using a legal discourse to determine an answer for contemporary issues. Issuing a fatwa assumes that both the theology – which is conclusive – and the ethical paradigms - which blossom from the theological discourse - are unshaken by the fatwa offered. If a fatwa dismantles the Islamic theological and ethical paradigms, then perhaps the question leading to the fatwa should be investigated first.

I see the following fundamental theological problem in addressing the issue of surrogacy.

¹ That is assuming that *maslaha* actually is valid here.

Not all couples in human history have had children. The Quran acknowledges this fact in no uncertain terms:

“To Allah belongs the dominion of the heavens and the earth. He creates what He wills. He bestows (children) male or female according to His Will; or He bestows both males and females, and **He leaves barren whom He will**: for He is full of Knowledge and Power.” Surah al-Shura (42): 49/50

A fundamental Muslim belief or *aqeedah* is that everything happens according to the will of Allah. However, how one navigates life within the system of Allah’s will is what gives one an Islamic identity. Some phenomena in life can be resolved through man’s earning (*kasb*) through *halal* means. For example, sickness occurs according to the will of Allah, but Islam mandates that Muslims (and others) ‘earn’ their cure by utilizing *halal* means such as medicine. Thus, theologically speaking, man ‘earns’ his cure which is recourse to petitioning an alternate manifestation of Allah’s will. From this analysis, you can see why the Prophet Muhammad (SAW) said: “Allah has not placed a cure in *haram* (substances).” Therefore, seeking a cure is Islamic and required as this is also Allah’s will as long as the means are *halal*.

There are other phenomena where Islam does not allow Muslims to override Allah’s will and thus they do not have the mandate to earn what is contrary to Divine will, even if the means exist. If one does, that would be tantamount to fighting with God and become guilty of not submitting to His will. An example of this type of phenomena is extreme suffering. If due to ill fate, someone suffers severely and does not find a solution to his suffering, he must submit to Allah’s will. He cannot resort to committing suicide as a means to relieve his sufferings because it undermines Allah’s will first and foremost. The theological maxim that prohibits an explicit failure to submit to Allah’s will when there is no Islamic recourse to earn an alternate manifestation of His will is the basis for the legal prohibition of suicide.

Now let us apply this maxim to the issue of gestational surrogacy.

It is clear that if a couple feels compelled to resort to gestational surrogacy, they have exhausted all other forms of medicinal means for facilitating conception. Whereas, we cannot argue against the permissibility of those means as they do not contravene the Will of God. Muslims in the past have always sought *halal* medicine for impotency and for infertility. However, it is quite clear that Muslim couples who did not find any cure for those illnesses, never found fault with Allah and hence, either, acquiesced, resigned, or submitted to Allah’s will at the end. They were fine with that ultimate submission as they did not see having children as some kind of human right. Muslims did not legally resort to *haram* methods of conceiving children – such as *zina*, nor did they utilize secondary considerations of Islamic law (such as the need to procreate) to argue in favor of using *haram* methods. They did believe what Allah has explicitly mentioned in the Quran – which is a primary source of theology and law – that ultimately, it is only Allah’s will that decides who does and does not have children. They followed the lead of their own

Prophet (SAW) in that he did not have any male child who survived him. When Mariyah (his concubine) gave birth to his son Ibrahim, Allah took him away in his infancy. The Prophet (SAW) although naturally shaken by the loss, submitted to Allah's will and left it at that. Their Prophet (SAW) did not even ask Allah to grant him a son as other prophets did. He submitted to Allah's will as he knew that he had sought children from his wives and no one –except his first wife, Khadijah, bore children for him.

In summary, while having children is not a legal right for every married couple, pursuing the idea of conceiving children is a prerogative. Whether a couple begets or does not beget should not be left for the secular legal society to decide because they cannot perceive what is sinful or not sinful in the hereafter². Muslims must follow the theological maxims of the Quran and Sunnah when addressing these types of phenomena and practitioners of Islamic law must ascertain whether or not there is sin or not in any act – as that is their primary agenda. In my opinion, the permissibility of gestational surrogacy does not even exit the gate of theological permissibility and the idea that some would actually treat the matter as worthy of any legal attention is quite simply: inconceivable.

Issued by Shaykh Mohammed Amin Kholwadia, Dec. 14 2009

² Based on Maturidi and Ash'ari theology