

VALORACIÓN DE LA MATERNIDAD SUBROGADA EN EL ISLAM¹

Assessing Surrogate Motherhood in Islam

JESÚS FRANCISCO RAMÍREZ BAÑUELOS*

Universidad de Guadalajara

RESUMEN

Este ensayo reflexiona sobre la impermisibilidad de la maternidad subrogada en la mayoría de los países del Islam, con la excepción de Irán. Sin ser un estudio omnicomprendivo, se realiza una valoración de las principales razones que impiden a las parejas musulmanas acceder al método de asistencia reproductiva de la maternidad subrogada. El planteamiento de este ensayo es que la maternidad subrogada no es permitida dado que bajo el derecho islámico no es posible negar la maternidad. La presunción de la maternidad está sustentada tanto en el Corán como en el idioma árabe y se refleja en las interpretaciones que realizan los estudiosos del Islam. Se concluye que la maternidad subrogada gestacional es la única variante de la maternidad subrogada que puede ser compatible con los principios del Islam.

Palabras clave: maternidad subrogada, Islam, maternidad subrogada gestacional.

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* Abogado y maestro en Gestión de Servicios Públicos en Ambientes Virtuales por la Universidad de Guadalajara. Máster en Derecho Penal Internacional por la Universidad de Granada, España. M2 en Historia del pensamiento jurídico contemporáneo por la Universidad Paris 1 Panthéon-Sorbonne. LLM en Derecho Internacional y Comparado por el Trinity College Dublin.

ABSTRACT

This essay reflects on the impermissibility of surrogacy in most Islamic countries, except for Iran. Without being an all-encompassing study, an assessment is made of the main reasons that prevent Muslim couples from accessing the reproductive assistance method of surrogacy. The approach of this essay is that surrogacy is not allowed since under Islamic law it is not possible to deny motherhood. The presumption of motherhood is supported in both the Qur'an and the Arabic language and is reflected in the interpretations made by Islamic scholars. It is concluded that gestational surrogacy is the only variant of surrogacy that can be compatible with the principles of Islam.

Keywords: Surrogacy, Islam, gestational surrogacy.

INTRODUCTION

Procreation is one of the most common goals in the life plan of human beings. However, not all people are able to achieve it through sexual intercourse with their partners. Given this reality, reproductive assistance techniques are considered as an alternative to achieve it. One of the most controversial of these alternatives is surrogate motherhood. Surrogate motherhood is almost unanimously —except for Iran specifically for gestational surrogacy— rejected by authorities in the Islamic world. However, the reasons for preventing surrogacy are not uniform and differ markedly depending on whether the community is predominantly Sunni or Shiite (Shabana, 2015 pp. 84-85; Aramesh, 2009, pp. 320-322).

It has been noted that the reasons for preventing surrogate motherhood in Islam are of two types. The first category corresponds to ethical and psychological reasons common to any society in the world, namely, the concern for monetising the arrangement between the surrogate mother and the biological parents; and the emotional impact that may result for the surrogate mother in giving up the

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conceived child, as well as the psychological implications for the child growing up and knowing that he or she has "two mothers" (Fadel, 2002, p. 154). The second category are reasons specific to Islam, namely a) the intervention of third parties outside the marriage; b) the priority of family unity, based on the marriage bond and the preservation of patriarchal lineage; and c) the protection of the right of children to know the identity of their parents (Fadel, 2002, p. 148; Muaygil, 2017; Shabana, 2015, p. 83). Although the first set of arguments for rejecting surrogate motherhood have merit for analysis, they will not be addressed in this essay as they are beyond the scope of this study and do not relate directly to Islam (Shabana, 2015, pp. 115-116). However, none of the analyses have focused on the role of the mother in the construction of the family model that Islam protects. That is, the nuclear family originating from the marriage bond. This paper aims to contribute to the sense that the reason for the refusal to allow the use of surrogate motherhood in Islam is the legal impossibility of disregarding motherhood. This is so, since according to Islamic law there is a presumption of motherhood as the structural axis of the family unit.

Although medically there are two types of surrogate motherhood, namely, a) partial; and b) total, this paper will focus only on the first type, i.e., partial, or gestational surrogacy. This paper examines the compatibility of gestational surrogacy with Islam. For the purposes of this paper, partial or gestational surrogacy is defined as assisted reproductive techniques performed by a married couple in which one or both partners are infertile. In these cases, the couple resorts to *in vitro* fertilisation from the union of the husband's sperm with the wife's egg to create an embryo. The embryo is then implanted in the uterus of the surrogate mother. The surrogate mother carries the pregnancy to term and delivers the child to the commissioning couple (Fadel, 2002, p. 153). This essay limits its study to this type of surrogate motherhood, as it is the only variant that is in accordance with the principles of Islam (Muaygil, 2017, p. 113).

This paper is structured based on an analysis of the arguments given by Islamic scholars to reject surrogate motherhood. The first part establishes the premise underpinning this paper, namely that the mother is the fundamental actor in the institution of marriage, and it is around her that the family is legitimised. In the second part, the argument against the intervention of third parties outside the marriage as an element to prevent surrogate motherhood is studied. The third part analyses the preservation of lineage as a possible ground for excluding the acceptance of surrogate motherhood. The fourth part examines whether surrogate motherhood guarantees the right of children to know the identity of their parents. It concludes that only gestational surrogacy can satisfy the requirements of Islamic law. It is argued that so far, most states in the Islamic world do not allow it because their laws do not provide for the possibility of disregarding maternity. Thus, for those countries that are against it, surrogate motherhood is a risk to family stability. The risk is conceived not because of paternal filiation but because it is considered that there may be social uncertainty in distinguishing the person who gives birth from the concept of mother. For them the conclusion is aberrant: there are two mothers or no mother at all.

1. THE FUNDAMENTALITY OF THE MOTHER IN ISLAM

Contrary to the widespread idea that the family in Islam is structured around the father, this paper argues that it is the mother who is the pivot for the social and legal configuration of the family in Islamic law. It is true that children bear the appellations of the father, even when they are born out of wedlock (Shabana, 2015, p. 114). However, unlike paternity, maternity is not subject to legal disregard and there is even a verse in the Qur'an that refers to the mother as the one who gives birth: "None can be their mothers except those who gave them birth" (Fadel, 2002, p. 154). This divine affirmation is strengthened in the language itself. In this respect, it is revealing to note that the Arabic word *Walad* —to give birth— is very

close to the different *Walidah* —mother. There is an irrefutable conviction that the mother is the person who gives birth and no other (Fadel, 2002, p. 154).

It is around this linguistically endorsed divine truth that the legal provisions in the Islamic world are located. The mother is considered the centre of the family, legally formed by husband and wife. The offspring of this relationship are the only legitimate children. In the case of unmarried mothers, their children are considered illegitimate, but they remain their mother's children legally and socially —with the negative consequences for the woman.

The conceptualisation of the mother in the Islamic world is based on the naturalness of the human being. That is, the mother is the woman who is fertilised by a man's sperm and who, after carrying the pregnancy —during which time she nourishes the foetus in her own body and exchanges its genes and blood fluids— gives birth to a new being. That new being, her child, is also her father's child. But the truth is that the mother is unquestionable, not the father. Understandably, this biological view of the mother-child-father relationship, naturally reflected in the Qur'an, is called into question when faced with the intervention of medical science to facilitate procreation through surrogate motherhood. Of particular concern to Islam is the involvement of a third party, i.e., the surrogate mother, in the process of conception of a new being.

2. THE INTERVENTION OF THIRD PARTIES IN MARRIAGE

Islamic law is structured on the acceptance of divine designs as a guide to achieve virtue on earth. God is the creator and from him comes life. However, when couples become infertile, the question arises as to whether it is permissible in Islam for human beings to use assisted reproductive techniques. In Islam, the aim is for the human being to develop during his or her earthly existence in the best possible circumstances. Islam does not demand human resignation in the face of problems, but rather that the solutions be in accordance with the Qur'an, as well as the Sunnah

and, where applicable, the interpretations of scholars and religious authorities (Fadel, 2002, pp. 147-148).

For Islam, the community is at the centre of the life of human beings, who have a specific role according to the place they occupy in their family. Therefore, the family as a social nucleus is fundamental for human beings to maintain their relationship with God. In that sense, procreation is essential for the continuity of the family. However, Islam protects the nuclear family based on legitimate marriage (Shabana, 2015, p. 88). That is why adultery and even adoption as it is known in the West is rejected (Fadel, 2002, p. 150; Muaygil, 2015, p. 114).

According to Islam, marriage is the social space intended by God for procreation. As a central figure validated by God, marriage has a sacred value for the community (Alam, 2019, p. 249). Husbands and wives are obliged to keep their intimate relations within their marriage and not to display them to outsiders (Muaygil, 2015, p. 115). In fact, even when a wife must be treated for a health condition, Islamic law provides strict rules indicating who can treat her, with a woman being the preferred provider.

As marriage is a space reserved for husband and wife, the general opinion is that the intervention of a third person such as a surrogate mother breaks with the sanctity of the family institution. Those who believe otherwise point out that in the case of gestational surrogacy no such violation occurs, since the process of fertilisation of the husband and wife's sperm and egg takes place outside the family in a medical environment in front of competent personnel. Furthermore, they consider that the embryo is a distinct being, i.e., it does not involve the direct impact of the husband's sperm with the surrogate mother's eggs. In other words, the implantation of the embryo in the uterus of the surrogate mother does not break the marriage bond because the new being is the product of the union of the spouses' gametes (Muaygil, 2015, p.117).

The analogy with the milk mother to explain gestational surrogacy is very illuminating, especially when it is understood that the surrogate mother has no contact with the husband and there is no blood or genetic transfer with the embryo (Muaygil, 2015, p.117).

If this scientific explanation is accepted, then it follows that in the specific case of gestational surrogacy there is no third-party involvement in the marriage (Muaygil, 2015, p.113).

3. THE PRESERVATION OF LINEAGE

For Arab countries, even from the pre-Islamic tribal period, the preservation of lineage has been fundamental to social harmony. It is generally accepted that lineage follows paternal filiation, with the father's appellation being passed on to children and serving as an identification of the individual's family background (Muaygil, 2015, p.114).

In this regard, opponents of surrogacy point out that surrogacy confuses lineage by mixing the genes between the biological parents and the surrogate mother (Ahmed, 2015, pp. 38-39; Alam, 2019, p. 250). However, while this may be true in cases of full surrogacy where the husband's sperm fertilises the surrogate's egg, it is not true in the case of gestational surrogacy. Today, scientific advances make it possible to be certain that in the case of gestational surrogacy there is no transfer of genes or blood between the embryo —created from the husband's sperm and egg— and the surrogate mother's body. In this sense, without implying surrogate motherhood objectify the surrogate mother, her womb is the receptacle that nurtures a new being independent of her own genetics. Beyond the natural fact of giving birth, the surrogate mother does not share any genetic link with the new being, the child of the commissioning parents. Therefore, there is no confusion of lineages.

When a medical view is taken, it is possible to conclude that the parentage of the new being, and thus its lineage, is solely that derived from the marital

relationship between the commissioning spouses. However, the permanence of the Qur'anic and linguistic concept of mother makes many Islamic scholars doubt the denial of the motherhood of the woman who gave birth. In this regard, Iran sets several requirements to ensure that *in vitro* insemination does not confuse the lineage. These requirements are a) that the biological parents are married to each other; b) that the sperm comes from the husband; c) that the fertilisation occurs within a legally valid marriage; and d) that the procedure is performed by competent persons (Fadel, 2002, p. 152). In addition, the surrogate mother is required to abstain from sexual intercourse after the implantation of the embryo and for the duration of the pregnancy. As can be seen, if these elements are observed, it is possible to identify precisely who the biological parents of the new being are and what the role of the surrogate mother is. Under these conditions the right of the child to know the identity of the parents is not violated (Aramesh, 2009, p. 320).

4. THE RIGHT OF CHILDREN TO KNOW THE IDENTITY OF THEIR PARENTS

Another argument for opposing surrogate motherhood in Islam and concomitant with the preservation of lineage is the right of children to know the exact identity of their parents (Shabana, 2015, p. 89). This is perhaps the strongest argument, as the right of the child takes precedence over the right of the parents. Everyone should know where they come from and identify both their father and their mother (Muaygil, 2015, p. 89; Fadel, 2002, p. 150). In practice this right has greater implications for the knowledge of paternity, since, as mentioned above, motherhood is assumed to belong only to the woman who gives birth (Muaygil, 2015, p. 115).

For scholars of Islam who are against surrogacy—even gestational surrogacy—the fact that the birthing mother is not legally considered the mother is a contradiction in terms (Muaygil, 2015, p. 114). This confusion of roles of the women involved in procreation causes religious authorities to consider surrogate

motherhood as a risk to the stability of the family unit: how to explain in religious terms that the mother is the one who provided her egg to be fertilised *in vitro*, but did not give birth, and on the other hand, how to deny in terms of the Qur'an that the woman who gave birth is not the mother of the new being? (Aramesh, 2009, pp. 320-322) This dilemma between the literal interpretation of the Qur'an or applying the *qiyas* more broadly is why gestational surrogacy is permitted in Iran, as it is accepted as the only one that leaves no scientific doubt as to how the child was procreated. Even if its gestation occurs inside a woman other than the mother (Muaygil, 2015, p. 115).

This difficulty in reconciling the Koranic precept with the need to offer a legal alternative to infertile married couples has led to the issue of surrogate motherhood being discussed on several occasions in medical and religious forums from an Islamic perspective. However, no conclusive solution has been reached mainly because of concerns about legally distinguishing kinship (Shabana, 2015, pp. 89-98). In general, there are three positions and an absolute denial. The first position states that the commissioning parents are the legal parents, and the surrogate mother has the character of milk mother. The second position states that the new being is the child of the surrogate mother and her husband. The third position is that the mother is the surrogate mother—the one who gives birth—and the father is the biological father. The denialists say that neither woman fulfils all the elements to be considered a mother (Shabana, 2015, pp. 107-108).

5. CONCLUSIONS

This essay explores the compatibility of surrogacy with the principles of Islam. The research shows that the only type of surrogacy possibly valid in Islam is gestational surrogacy because it is performed by a married couple who are infertile, whose gametes unite and form an embryo that is then implanted into a surrogate mother to carry the pregnancy to term without mixing genes nor blood.

This essay shows that the almost unanimous refusal of Muslim countries to accept surrogate motherhood is explained by the impossibility of denying the

motherhood of the woman giving birth. For Islam there is a link between the concept of mother and the event of childbirth. Under the logic of Islam, recognising as a mother one who does not give birth or disowning one who does destabilise marriage and confuses lineages (Shabaik and Nelson, 2020, p. 1507). Ultimately, this paper shows that what is being protected is the preservation of the mother's role in the family.

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