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LEGAL DISCUSSIONS ON SURROGATE MOTHERHOOD

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Abstract

The surrogate motherhood and IVF (test-tube baby) practice has currently reached an advanced level and people who are not allowed to pregnancy for medical reasons, look at positively the surrogate motherhood. The surrogacy is permitted worldwide in many countries like USA except in New Jersey, Michigan and Arizona states). Georgia, Thailand, India, Belgium, England, Brazil, some countries of Africa. It is banned in Germany, Sweden, Italy and Norway.

In Turkey, The Presidency of Religious Affairs has given a permission that there is no harm in IVF method. Although the practice of surrogacy seem to be as an aid to couples without children, it has some legal, social and psychological problems, such as, the status of child, her/his custody, moral degradation in society, degrading the human dignity and emotional problems of the child and surrogate mother.

The Islamic jurists made surrogate motherhood is impermissible due to generating problems of cultural, religious, juristical, individual and social, On the otherhand, Twelver Shia jurisprudence have accepted surrogacy within the frame of mutah marriage. Based on the five principles of conservation of life, protection of generation, protection of

intelligence, protection of property and protection of the religion, the over all the Islamic jurists have forbidden all types of surrogacy and artificial fertilization with agreement.

This applications must be controlled to some extent by the competent governmental authorities throuhout the world and some regulations should be introduced for this.

1.Introduction

The Surrogacy (surrogate motherhood) and IVF (test-tube baby) practice has now reached an advanced level. In this study, it is addressed and examined that both the current IVF practice technologically came to what level in terms of health technology, as well as the problems emerging from intersection of reached point with society's religious, social, cultural and moral the understandings. The woman who is married and could not have children and due to lack of a uterus to carry the crop of pregnancy or for any reason inability to conceive; getting pregnant by placing the embryo resulting from outside fertilization of sperm taken from men with egg cells of woman in another woman's womb, carrying the baby in her womb and woman giving birth is called surrogate mother. Those who do this process for a fee is called to "rent surrogate mother", and those who do without being paid named as "volunteer surrogate mother" [1]. The cases causing for surrogacy are as follows: Either the woman has no egg or the woman has the egg but there are medical obstacles to pregnancy. Else or permanent pregnancy loss and, even if the uterus exist, there are cases where the uterus is conducive to pregnancy. Also cases where a woman's risk of giving birth are involved. There are those whose womb had to be taken at young age or born with no uterus

People who are not allowed to pregnancy for medical reasons, look at positively the surrogate motherhood. Babies born this way carries the genes of their parents. In other words, spouses are

the baby's biological mother and father. If there is a problem with the woman's eggs or she has no ovary, in this case the egg cell can also be received from a third person as well as surrogate mother. If the egg is taken from surrogate mother, in this case she is genetically also mother of the baby.

1.1 Surrogate Motherhood In Our Country: In our country, the baby's mother legally is considered the person gave birth to a baby. The Hadith related to this matter is like this" The child born belongs to owner of the mattresses. There is also deprivation to adulterers" [2] ,[3]. Based on this, the person is the mother who gave birth to baby regardless from whom eggs or sperm are taken. The views of lawyers about surrogate motherhood are as follows: Eventhough surrogate mother gave birth to the baby, the parents who claim the baby, have to register the baby's birth registration on them; this case will means changing of the baby's paternity. This is because the biological mother of baby is the one who owns the baby, so the mother is the one who has given the egg. However, the person who will receive the baby in her pedigree is the mother given birth to a baby. This will also mean the changing of baby's paternity, and this behavior is considered a crime according to the Turkish Penal Code [4]. In our country, the application of surrogacy has not been accepted as legal [5].

The following conclusion is depicted from a fatwa given by Presidency of Religious Affairs in response to a question asked: There is no harm in IVF method, provided that a fertilized egg should develop in the womb of woman who is the owner

of the egg, not in another woman's womb, and this process has medically proven having no negative effects on physical, spiritual and mental health of both parents and the child to be born. But, the following statements are also made on the continuation: The starting and resulted test-tube baby (IVF) application is not permissible between the persons who are not actually married since it degrades or hurts the feelings of humanity and transports the elements of adultery.

1.2 Countries Allowing Surrogacy: In some countries surrogacy is permitted. These countries are: Georgia, Thailand, India, Belgium, USA, England and Brazil. Surrogate motherhood is also permitted in many countries in Africa. In law in Cyprus the phrases have been used such as, surrogacy can be done likewise and also can not be done. Although the surrogacy is banned in Turkey, there are some going secretly abroad to perform this operation. In Turkey, surrogate mothers are illegally rented at a higher amount by disobeying the ban. In social media, those who want to be a surrogate mother in return for a fee to the couples who can not have a child, by giving their contact information and informing that they can be a surrogate mother. Most of the women announcing this advertisement are married and their spouses or husbands also support them on this regard. But those who want to do it legally apply to the private hospitals in Georgia, not doing it in Turkey. Those who want to make this process in Turkey are invited to Georgia by agencies.

In Georgia State the surrogacy is officially implemented in the state control and by making contract with surrogate mother within a framework of a certain program. Georgia with her legal framework for surrogate motherhood is one the few countries that provide international surrogacy [6]. According to Georgia legislation surrogate mothers

never own the baby after the birth. The eggs and sperms are obtained from the couples applied for the surrogacy process and by fertilizing these eggs and sperms like in test-tube baby (IVF) process they are transferred into the womb of surrogate mother. For this process, before the embryo transfer for the development of female eggs in vitro fertilization (IVF) treatment of woman of applied couples is performed in the city she lives. While this treatment is made, the surrogate mother is simultaneously prepared for embryo transfer in a clinic in Georgia. When approaching the end of treatment, the couples perform the operation by going to Georgia. The contract is certainly signed before the operation. The name of surrogate mother is not written on the birth certificate only mother and father's name are written.

This application is free in many countries in Europe, except in Italy. In Italy, the practice of surrogate motherhood is prohibited by the results of the referendum with 51 % vote due to the influence of the Pope, the leader of the Catholic Christians, who lives there. This practice is partly allowed in Ukraine, Russia, Spain, England, Belgium, Holland, France, Crete Island dependent of Greece, and in Iran. The mutah marriage in Iran serves to facilitate this event. The man accept, the woman who will donate the egg, as his wife with temporary marriage, after the egg is taken according to Twelver Shia jurisprudence, under which Mutah is practiced, man leaves her and goes back to his ex-wife.

In USA, the practice of surrogacy is free except in New Jersey, Arizona and Michigan. On the other hand, it is banned in Germany, Sweden and Norway. In Australia, it is recognized free except for one province. The families can bear the costs of the surrogate mother until the baby is born [7].

In the legal context as being example for some remarkable problems that may require the control of IVF centers; the cases can be mentioned that the magazine world's few famous people making decision among themselves to have child out of wedlock. In this context again, the unwanted applications include acquiring hundreds of children from the same person's sperm taken from a sperm bank. Such inconvenient practices constitute sufficient reason to keep this work under control on a global level and for taking necessary measures.

The definition of a crime within the meaning of hiding and changing of legitimacy is held in TCK's 231. matter [8]. Here the main interest is the benefit of the child. The paternity is important from point of the fact that the family constitutes the foundation of society and state, and for having the right to determine the future of the embryo. As a rule, the child is always connected to the mother.

2. Materials and Methods

With this study, the religious dimension of the issue is tried to be clarified in terms of different fiqh sects (Islamic Jurisprudences) and even from the point of different religions. Both the ideas were acquired and defined by recouring to related experts about how in vitro fertilization process developed and the approaches were tried to be uncovered on this subject by researching various sources of Islamic Jurisprudence (Fiqh) and the opinions of the different schools of fiqh related to the process definition emerged.

3. Results

The criticism might come about surrogate motherhood of the following points:

In case of acceptance of human body as a commodity or known ordinary goods that can be sold in exchange for predetermined amounts, the

corruption in society, an unfair and unjust access and distribution system are invited, since in this kind of system the rich are always be on receiving side, the poor will be on giving side [9].

3.1 Legal Aspects of Surrogate Motherhood: In case the surrogate mother is married, the husband will be considered the child's legal father, the genetic father can not legally recognize the child provided that he did not refuse the lineage. If the surrogate mother is not married, then the child will be in the status of child out of wedlock and therefore, the custody of the child will be in surrogate mother. In addition to these, there may be the cases, such as the surrogate mother is not giving baby back by saying that the baby belongs to her or decide to make abortion by ceasing to have a baby. As it can be seen that the surrogacy application will raise many legal issues in content [10].

3.2 Sociological and Psychological Aspects of Surrogate Motherhood: The maternity is not just giving birth to baby by bearing the baby in the womb. Although the pregnancy and birth, are biological things, it should be noted that it has emotional aspects. Though the surrogate mother carry a baby, who is not belong to her, in her womb, having an emotional closeness during pregnancy is not something that can be avoided. It should not be looked at this event just from point of surrogacy. How the baby's genetic mother, who will take the delivery of baby, will establish a bond with the baby, and how to acquiesce to the baby is also a controversial issue. Although the science has been developed and many scientific studies have been put forward, there are no specific study about to examine and set out the prospective social and psychological status and aspects of developments of the children born by this method

Although the practice of surrogacy seem to be as an aid to couples without children, there are many social and psychological discussions under it. By ignoring them all, whatever happens, to address the issue only in the framework of having a child is quite wrong angle of view [11].

3.3. Religious Aspects of Surrogate Motherhood:

The scholars of Islam stated that the purpose of the religion is the protection of the five basic principles which the religious and worldly affairs depends on itself. These five principles are as follows: conservation of life, protection of generation, protection of intelligence, protection of property and protection of the religion. In the context of generation protection, as Islam prohibited living together out of wedlock, similarly has banned the ways that could lead to it. Although the practice of artificially fertilization of man's sperm with the surrogate mother's eggs and placing it in the womb of surrogate mother is not considered adultery with truest sense of the word, while bringing baby to the world by the help of reproductive technologies, it has gone willingly or unwillingly beyond the institution of marriage and the principle of protection of lineage and generation has been violated [12].

Maternity is accepted as long as in natural ways. Surrogacy is strictly forbidden. In Qura'an Allah (C.C) has stipulated that the child's mother is the woman who gave birth to. "Those among you who make their wives unlawful to them by (Zihar i.e. by saying to them "You are like my mother's back") they can not be their mothers except those who gave them birth. And verily, they utter an ill word and a lie. And verily, Allah is Oft-Pardoning, Oft-Forgiving" [13]. In another ayat, it is also ordained that "And We have enjoined on man (to be dutiful and good) to his parents. His mother bore him in weakness and hardship upon weakness and

hardship, and his weaning is in two years" [14]. Today's medical and scientific research say that all kinds of internal state (like what she is eating and drinking) of a mother carrying a baby in the womb has significant impact on nature of the child to be born

Some typical problems resulting from the practice of surrogacy is sufficient to prove the fallacy of this practice. The following problems can be listed as examples on this subject; it causes moral degradation in society, perceiving baby as a thing that can be bought and sold, considering woman as a "baby birth machine", and also emotional problems may be experienced by the child to be born and by the children of surrogate mother.

This idea that destroys the human dignity, and though hiring woman to a certain period of time, by taking opportunity of knowing the financial hardships and difficult circumstances which she is in, looks at women (who is the most valuable asset) as a highly disreputable commodity. This idea does not have a base in principles and values of Islamic teachings and can not be explained consistently [15]

4. Discussion

As for the causes of differences of opinion around the world these can be summarized as follows:

It is a clear fact that the societies, looking at the issue in terms of religious and moral perspective, are skeptical to allow surrogacy application. But in countries where the society has gotten away from religious point of view and seeing everything permissible for sake of freedom or accepting surrogacy as legal, the permission for surrogate motherhood is easily given.

As mentioned above Islamic jurists, based on the idea that this application can generate many problems of cultural, juristical, individual and

social, say that surrogate motherhood is impermissible. They can not accept it since this application at foremost means opposing to the divine will. Yet they argue some verses as evidence [16]. In this context, they also mentions this verse “ To Allah belongs the kingdom of the heavens and the earth. He creates what He wills. He bestows female (offspring) upon whom He wills, and bestows male (offspring) upon whom He wills. Or He bestows both males and females, and He renders barren whom He wills. Verily, He is the All-Kower and is Able to do all things” [17].

Some scholars, argue that the surrogacy is permissible, say that there is no definite prohibitive Quranic verses on this issue and they assert that the original thing in goods is the doctrine of permission [18]. They defend that yearning for a child is the basic need for individuals and even they look at it as a requirement of the principle of necessity to increase the lineage . They claim that the alleged problems could arise in the future might possibly be solved with some legal and medical arrangements.

Beside these discussions, according to the over all the Islamic jurists, when a third party person is mixed to the fertilization of the germ cell, all types of surrogacy and artificial fertilization are forbidden with aggreement. The all types of applications that are done through the donation of sperm or egg and mixture of reproductive cells with the cells of a strangers or those performed without any medical necessity are forbibidden. Thus, Islamic Fiqh Academy is certainly found surrogacy inconvenient by its decision taken in 1985 [19].

5. Conclusion and Suggestions

To put the problem in general surrogacy is not considered appropriate by Sunni scholars [20]. On the other hand, there are some Shiite scholars who see it permissible. Although it is as an opinion of minority, some Islamic jurists have given

permission to this process only under certain conditions

Should I express this matter as a person who is investigating and questioning, the surrogate motherhood in Islamic Fiqh is forbidden. Having children of married spouses is a grace of Allah (C.C) to them. Beyond this, it is considered accurate, up to a point, for those people without children somehow to apply to treatments and search for cure in this way. On the continuation of this process, if the problem is still unsolved and if the experts are suggesting IVF (test-tube baby) to the family, this application is also legitimate. Despite everthing, people without children should never involve a relationship out of marriage, whereas they must be steadfast to the discretion of Allah (C.C). It might be advised to the women who could not get a result at all, to be a foster-mother for the babies not reached at two years of age yet by breastfeeding and to establish a milk kinship between them and themselves. However, also on this way, true maternity facility absolutely has not been considered to be established. The most stable and most accurate way to keep or for the maintenance of human generation and descent, there has to be marriage bond between men and women only. In our religion, unification of men and women and having a closeness is named prostitution so called evil. Therefore, externally surrogacy application degrades to human dignity. The lineages of children produced in this way are mixed. As stipulated by Islamic law, the protection of each individual's modesty and dignity is a fundamental principle in society. It is obvious that in future secret or open talks will be made about the child produced in surrogacy, his/her personality will be offended and his/her dignity will be broken

This kind of behaviors are not welcome by religion. Besides the method of surrogacy, striving to have a child against all odds, is interpreted as an

attitude contrary to the divine will and Allah's creation that this attitude has also been condemned in religion [21]. In some of the ways of surrogacy application when a father or mother of the child is not known clearly, then adoption, paternity can not assign inheritance. Beside the nexus and relationships desirable between the people have broken and also that child would be deprived from heritage.

Apart from these, there are problems arising from public concern and when parents of the child, as a foreign entity, share the same home or environment with child problems may arise. In addition, problems are also found such as when breaching of the distance between the mother who is in position of carer and child the child and when the child acts rebellious he/she is easily dismantled by elders and thrown into the Street.

At the global level the number of travel agencies, health agencies and organizations that shed this work to trade and health tourism is increasing every day. It is also true that the number of companies engaged in organization of hiring, selling, donation, transferring of sperm, eggs and

ovary and surrogate mothers will increase exponentially by each passing day

The contact information circulating on the internet is the most obvious evidence of this. Moreover, as a human being does not have the right to rent out his/her organs, it is not legitimate religiously and morally opening his/her own intimate parts in the treatment process with such purposes. Having child with the cells of ones from outside without the bond of marriage also leave the health care workers under the suspicion and it leads to shake confidence against these institutions. The most accurate way for the people is to submit nicely to Allah's discretion about themselves and to trust in Allah.

New developments in the field of health and artificial reproductive techniques and their applications must be controlled to some extent by the competent governmental authorities and some regulations should be introduced for these. Otherwise, some people who take advantage of legal gaps will exploit these dazzling developments in the field of medical technology. We believe that this field should not be left adrift. Allah knows the best.

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