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SURROGACY AND LEGITIMACY OF THE CHILD

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ABSTRACT

Pakistan lacks legal framework to deal with issues related to surrogacy. Absence of legislation does not mean that surrogacy is not practiced. There is a need to analyse current framework, if any, to deal with surrogacy in Pakistan and suggest reforms. The Federal Shariat Court's decision in Farooq Siddiqui v Mst. Farzana Naheed, [2017] PLD 78 is a milestone with regard to development of jurisprudence on surrogacy in Pakistan. Pakistan being an Islamic state has to keep into consideration Islamic law as well. In family law issues influence of Islamic law has been immense. This research paper studies surrogacy in Pakistani as well as Islamic law and suggests reforms. Comparative and doctrinal methods have been used and effort has been made to consult primary as well as secondary sources

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Introduction

The term 'surrogacy' is derived from a Latin term 'surrogatus' or 'subrogare' which means replacement or substitute.[1] The Oxford Dictionary defines it as 'a process of giving birth to a child

[1]Nayana Hitesh Patel, Yuvraj Digvijaysingh Jadeja, Harsha Karsan Bhadarka, Molina Niket Patel, Niket Hitesh Patel and nilofer Rahematkhan Sodagar, 'Insight into Different Aspects of Surrogacy Practices' (2018) Journal of Human Reproductive Sciences 212 <pmc.ncbi.nim.nih.gov/articles/PMC6262674> accessed 17th October, 2026.

for any other person or couple, normally because they are not able to have children themselves'[2] Surrogacy is also defined as 'the procedure of carrying and bearing a baby for any other person'.[3]

Surrogacy can be traditional/genetic or gestational. If the intended father inseminates the surrogate mother's egg it is called traditional surrogacy. It makes the surrogate mother the genetic parent. In gestational surrogacy the surrogate mother is not genetically related to the child as the embryo, grown from the sperm and egg of intended parents, is implanted in her womb.[4]

Surrogacy can be categorized in four ways: Altruistic or Non-Commercial surrogacy; Commercial Surrogacy; traditional Surrogacy and gestational Surrogacy. Altruistic or Non-Commercial surrogacy is the arrangement in which no consideration/compensation/profit is paid to the surrogate mother by the intended parents. If the surrogate mother charges some consideration/compensation or profit from the intended parents it is called commercial surrogacy. Commercial surrogacy is considered objectionable as it not only objectifies or commodifies a woman's body but also turns the child into a product. In traditional Surrogacy the intended father inseminates the surrogate mother's eggs. In gestational Surrogacy eggs and sperm are donated by intended parents and surrogate mother plays the role of a carrier.[5]

In Pakistan, the intricacies of surrogacy against the background of statutory gap and multifaceted Islamic doctrines create an environment that is complicated and not governed by set laws. This failure on part of the lawmakers to define legal provision concerning the surrogacy arrangements makes any parties involved in such agreements vulnerable since there is legal ambiguity. The gap is a threat to the interests of all parties involved; the intending parents, surrogate mother, and, most importantly, the rights of children born through surrogacy. This research addresses these challenges comprehensively considering intricate problems emanating from an illegal surrogate setup in Pakistan. The main aim is to assess what effect surrogacy regulation is likely to have and the need for deliberate regulation which eliminates any legal doubts but also places other concerned parties' interest first. Such regulations should be made in such a manner so as to accommodate the socio-religious aspects of the country.

The article aims to explore the surrogacy laws in Pakistan and the associated issues, and intends to address the following research questions: What is the current legal framework in Pakistan regarding surrogacy, and how does it compare to Islamic legal interpretations and principles? How do the differing opinions of Islamic scholars in Pakistan impact the legal and ethical considerations surrounding surrogacy in the country? What are the rights and liabilities of the parties involved in surrogacy arrangements in Pakistan, given the absence of specific legislation? How can established

[2]'Surrogacy', Oxford Advanced Learner's Dictionary (9th edn., OUP) <http://elt.oup.com/catalogue/items/global/dictionaries/oxford_advanced_learners_dictionary_9th_edition> accessed 23rd March 2023.
[3]'Surrogacy', Black's Law Dictionary (2nd edn) < https://thelawdictionary.org/surrogate-parent/> accessed 23rd March 2023.
[4]Patel (n 1) 212; Aimen Akhtar, 'Surrogacy in Pakistan: Call for Positive Legislation' (2020) 7(1) Lums Law Review 128.
[5]Ibid.

judicial precedents and principles be effectively adapted and employed within surrogacy cases, and what implications do they bear on concerns pertaining to legitimacy, custody, parental rights, and citizenship? What restrictions and safeguards should be included in surrogacy legislation in Pakistan? What legal consequences should be outlined in the surrogacy legislation in Pakistan to address non-compliance with legal regulations?

The research seeks to delve into the current legal framework concerning surrogacy arrangements in Pakistan. This involves scrutinizing religious viewpoints, evaluating the associated legal challenges and ambiguities, exploring the welfare principle's application, analyzing the principle of acknowledgment, assessing the need for legal safeguards, and addressing the legal consequences in non-compliance case.

This article adopts doctrinal and analytical methodology and maintains a critical stance in addressing the consequences of the absence of surrogacy laws in Pakistan. Initially, the research has qualitative character, centering on the theoretical framework of surrogacy law's impact on different facets of such arrangements, particularly concerning the parties involved. The fundamental hypothesis driving this study suggests that a meticulous analytical and critical approach is employed when considering the potential introduction and implementation of surrogacy legislation in Pakistan. The primary sources employed in this study comprise legal statutes and regulations, supplemented by secondary sources like legal literature, scholarly journals, essays, commentaries, and international legal precedents.

In Pakistan, various studies are conducted to reflect public opinion toward surrogacy. For instance, a study was conducted to examine the individuals who have experienced surrogacy. The study was qualitative research based on "semi-structured interviews". In this research, eight participants were involved who had used surrogacy to have offspring. The findings reflect the complexity of the surrogacy procedure in Pakistan. The participants opted for surrogacy for various reasons for instance, infertility could be the factor, societal compulsion to have children was another main reason, and some participants preferred surrogacy over adoption due to their desire to have a genetic connection to their child. The study highlighted the challenges faced by the participants during the surrogacy process, for example, the struggle to find a surrogate, apprehensions regarding the health and well-being of the surrogate throughout the process, and legal intricacies attached to surrogacy procedures in Pakistan. The researchers suggest that proper guidelines must be provided to families considering/undergoing surrogacy.[6]

Another study highlights the absence of specific legislation concerning surrogacy and the subsequent numerous legal and ethical challenges. The study examines the consequences of this legal void and discusses the potential risks to surrogates in terms of exploitation due to the lack of protection and regulation. Moreover, the absence of clear rules about "parental rights" results enhancing complications for intended parents. The study discusses the ethical aspect of surrogacy as well, such as the probable "commodification of women's bodies" and the higher exploitation risks

[6] E. Javed and S.P. Wasti, "Understanding Intended Parents' Experiences of Surrogacy in Pakistan: A Qualitative Study" (2018) 36(3) Journal of Reproductive and Infant Psychology 291-302.

for individuals with unstable financial/economic backgrounds. In conclusion, the research stresses the need to address the legal and ethical concerns associated with surrogacy through comprehensive legislation in Pakistan. It is further suggested that the protection and interests of all parties involved must be addressed by the legislation on a priority basis.[7]

The significance of providing legal mechanisms for commercial surrogacy arrangements, in Pakistan, is also under discussion. A study claims that Pakistan, due to its affordable costs and lack of legal restrictions, has become a popular tourist spot for couples from developed countries pursuing surrogacy services. However, the lack of legal mechanisms would jeopardize the surrogates as it would lead the way to their exploitation and mistreatment. The issues related to parentage and citizenship of a child would remain unanswered for the intended parents. The study explains the advantages of regulating the surrogacy industry, for instance, protecting the rights and welfare of all parties involved, carrying out firm suitability standards for intended parents, prioritizing physical and mental health of surrogate mothers, and issuing clear guidelines for the entire surrogacy procedure. The study emphasizes the need for a proper legal framework that provides a legal basis for surrogacy contracts and addresses the issues, such as parental rights, citizenship, and financial and emotional support for surrogate mothers, and prevents any abuses/exploitation within the surrogacy industry.[8]

As far as Islamic law is concerned researches have been conducted on status of surrogacy in Islamic law both in Sunni and Shia jurisprudence. Mostly the focus has been on rights of the child and the mother. Current study focuses on status of surrogacy laws in Pakistan and Islamic law with reference to the issue of legitimacy of the child.

Legal Frameworks and Considerations

There is a Roman law maxim 'mater semper certa est, etiamsi vulgo conceperit, pater est quem nuptiae demonstrant'[9] which denotes that maternity is always certain even if the child has been conceived out of wedlock and the paternity follows marriage.[10]

Pakistani Law does not, specifically regulate surrogacy arrangements. Therefore, no specific legislation addresses the rights and liabilities of the parties involved in surrogacy arrangements. Consequently, in Pakistan, the provisions of contract law and family law, along with jurisprudence available through judicial precedents in family cases, may provide legal bases to govern surrogacy. The absence of legislative framework has led to a complex legal landscape.

Judicial Perspective

[7] Z. Ali, 'Legal Aspects of Surrogacy in Pakistan' (2014) 23(1) Dalhousie Journal of Legal Studies 1-32.
[8] F. Ahmed, 'Commercial Surrogacy Arrangements in Pakistan: The Need for Regulation and Legal Protection' (2020) 27(1) Pakistan Journal of Women's Studies: Alam-e-Niswan, 40-59.
[9] Richard F. Storrow, 'The phantom Children of the Republic: International Surrogacy and the New Illegitimacy' (2012) 3(20) American University Journal of Gender Social Policy and Law 561-609.
[10] Ibid.

In Pakistan's context the most important development regarding surrogacy took place in 2017 when the Federal Shariat Court (Hereinafter FSC) declared all forms of surrogacy arrangements repugnant to Islamic principles. The FSC's declaration of surrogacy as repugnant to Islamic principles adds a layer of intricacy to the discussion. The issues regarding commercial surrogacy are discussed comprehensively by the FSC in its judgment and considered surrogacy "exploitative". In the opinion of the Court, if such practices are not declared illegal, Pakistan would become the hub of surrogacy due to the possibility of cost-effective surrogacy arrangements. The FSC also discussed the possibility of abandoning the disabled/unwanted child in the absence of proper legislation safeguarding the rights of surrogate mothers. The Court discussed the issues regarding inheritance as well. It proposed a few amendments, for instance, an amendment to Section 2 of the Contract Act 1872 is recommended whereby the contracts regarding surrogacy are required to be declared as "unenforceable by law" due to "unlawful proposals and unlawful considerations". An amendment in the definition clause of the Pakistan Penal Code 1860 is recommended, whereby the definition of surrogacy is required to be included. It is further suggested that surrogacy is declared an "offense punishable with imprisonment" and fines not only for the couple but also the surrogate, and the doctor who performs the procedure. The Court suggested further amendment of the PPC to set fines, imprisonment, and cancellation of doctor's license as penalties for maintaining an egg and/or a sperm bank for future procedures. The Court's discussion, however, is termed as "the strict interpretation of the injunction of the Qur'an and Sunnah".[11] The question regarding the jurisdiction of the FSC to recommend amendments to the laws is also open to debate.[12]

The Court's position on this issue is highly important because it affects the future of assisted reproductive technology legislation. The article herein examines the implications of the Court's recommendations including, religious aspects, legal perspectives, socio-cultural aspects, and ethical points for consideration. It also assesses possible directions which could give rise to a sophisticated legislative framework conforming to cultural and religious norms, and legal standards.

Maternity and Paternity Issues

When it comes to contracts between partners within a marriage, and arrangements made with an assisting sperm donor, the FSC is rather critical. The former focuses on identifying the mother in particular where the donor's eggs were involved during fertilization process. In this respect, the Court puts much weight on these issues and demonstrates the Court's efforts to preserve Islamic family values. It also carefully weighs concerns related to inheritance and the child's overall well-

[11] Ayesha Ahmed, 'Assisted Reproduction in Pakistan and the Alternative Discourse, Farooq Siddiqui v Mst. Farzana Naheed PLD 2017 FSC 78' (2017) 4(1) LUMS Law Journal, <https://sahsol.lums.edu.pk/node/12841> accessed 6th July.2023.

[12] M. Z. Abbasi, 'Federal Shariat Court of Pakistan on Surrogacy: From Judicial Islamization of Laws to Judicial Legislation' (2017) Harvard Law School database: ShariaSource, <https://beta.shariasource.com/documents/2937> accessed 6th July 2023.

being and acceptance into the family. These are, therefore, not just legal issues but also examine the intricacies of family dynamics, religious beliefs, and societal norms.

The FSC looked into whether surrogacy is valid, based on how it is categorized. The child will belong to the biological father if the sperm was supplied by a third party, and this arrangement is prohibited. If sperm and egg are obtained from married couples and the embryo is subsequently implanted into the mother's womb, the FSC deems the operation to be lawful.[13] Surrogacy arrangement where a woman is hired by intended parents to carry and deliver the baby for commercial purposes or otherwise has been declared illegal. The court considered surrogacy a threat to Islamic family values. The legal issues involved here are paternity and maternity of the child, inheritance rights and the issues arising from refusal of intending parents of accepting the child having deformity or disability or refusal of the surrogate mother to handover the child. The judgement in Farooq Siddiqui v. Mst Farzana Naheed may lead towards abuse of rights of the parties involved and of the child.[14]

Custody and Best Interests of the Child

In surrogacy arrangement the primary issue, as mentioned above, is identification of the mother. Whether the woman donating egg is the mother or the woman delivering the child is the mother is the main issue. Involvement of surrogate mother raises several questions regarding identification of the mother..

There have been instances where the surrogate mother developed emotional attachment with the child and refused to hand it over.[15] In a case the Court of New Jersey handed over custody of a baby to the surrogate mother and intended parents were awarded visitation rights. The decision was based on the doctrine of 'the best interests of the child'.[16] Instances of surrogate mothers' refusing to hand over the child underscore the need for clear surrogacy contracts. The New Jersey case, based on the best interests of the child, highlights the importance of considering the child's welfare in custody disputes. The absence of a surrogacy contract may complicate paternity issues, potentially impacting the child's legal status.[17]

Zina Ordinance and Legitimacy

Another issue is whether the surrogate mother by getting involved in surrogacy arrangement has committed zina? Here we will look at the definition of zina in the Zina Ordinance 1979. The Zina Ordinance 1979 has defined the offence of zina as 'a man and a woman are said to commit 'zina' if they willfully have sexual intercourse without being married to each other.'[18] It implies that if ovum is placed in the womb of a woman without sexual intercourse it shall not amount to zina. The issue

[13] [2017] PLD78 (FSC).
[14] Akhtar (n 4) 129.
[15] See for example Re H (Surrogacy Breakdown) [2017] EWCA 1798 Civ.
[16] Re Baby M [1988] 109 NJ 396.
[17] Farooq Siddiqui v Farzana Naheed, [2013] PLD 254 (LHC).
[18] Offence of Zina (Enforcement of Hudood) Ordinance, s 4.

here will be regarding legitimacy of the child. The Zina Ordinance 1979's definition raises questions about the legitimacy of a child born through surrogacy. Clarity is needed to distinguish surrogacy from zina, especially when sexual intercourse is not involved. Balancing the prohibition on zina with the acknowledgment of legitimate surrogacy practices is crucial.

Legitimacy Issues in Pakistani Case law: Presumption of Legitimacy

Pakistani courts, lacking a specific statutory framework, rely on case law to establish the legitimacy of a child. According to the Pakistani courts if parents are living together as a married couple, the child will be presumed legitimate provided the father acknowledges the child either expressly or impliedly. The acknowledgment should extend beyond biological paternity to encompass legitimate paternity. If the alleged parents treat the child as their own, it is considered an acknowledgment.[19]

The conduct of the father is a critical factor in determining acknowledgment. If the father acknowledges that the relationship was legitimate and treats the child as his own it will be considered acknowledgement of paternity.[20] The court emphasize that direct proof is not essential; legitimacy can be inferred from the circumstances surrounding the acknowledgment or treatment of the child.[21]

Paternity will be proved in the case of the father's acknowledgment or his treatment of the child as his own in the case of absence of proof of marriage.[22] This presumption of legitimacy can be rebutted by contrary evidence.[23] While the courts recognize the significance of acknowledgment, they maintain that it must align with Sharī'ah principles. Due to the presumption of legitimacy the burden of proof is shifted to the party challenging paternity, it highlights the legal weight given to the presumption of legitimacy.[24]

The courts link the 'iddah period to the confirmation of pregnancy and the prevention of disputes over paternity. Recognizing the importance of legitimacy in Islamic law, the courts underscore the role of 'iddah in safeguarding the rights of the child and ensuring clarity regarding parentage.[25]

In Abdul Akbar through Legal Heirs v. Mst. Maryam Khushmoo and 5 others the Peshawar High Court decided that if there is no evidence of nikāh, acknowledgement of the father regarding his marriage and legitimacy of the child will be acceptable. The court observed that the governing

[19]Bashir v. Ilam Din, [1988] PLD 8 (SC); Habibullah v. Sakhi Muhammad, [1986] PLD 128 (Lahore); Ghulam Muhammad v. Muhammad Hussain, [1978] PLD 478 (Lahore); Malik Jiand Khan v Province of Sindh, [1986] MLD 2128 (Karachi).
[20]Sher Afzal v. Shamim Firdous, [1980] PLD 228 (SC).
[21]Munir Ahmad v Muhammad Saddique, [2005] MLD Lahore 364.
[22]Bibi Amu v. Mst. Asiat and others, [1958] PLD 420 (Karachi).
[23]Malik Jiand Khan v Province of Sindh, [1986] MLD 2128 (Karachi).
[24]Muhammad Hussain v. Sardar khan, [1993] PLD 575 (Lahore).
[25]Mst. Aisha Alias Nasim v the State, [2002] PLD 187 (Lahore).

principle in the cases of legitimacy is 'alwalad lil firash' meaning 'the child follows the bed.'[26] In Muhammad Akhter Hussain Pirzada v. Medical Superintendent, THQ Hospital, Lodhran and others, the Supreme Court rejected the petitioner's plea for a DNA test for his minor daughter and asserted that a birth during subsistence of marriage is a conclusive proof of legitimacy.[27]

In an inheritance dispute the step brother of the deceased claimed a share in inheritance stating that his brother's only son was illegitimate. He alleged that the nikāhnāma and the divorce deed produced to prove his deceased brother's marriage were fake. The original nikahnama was retrieved from the record of the nikah registrar. The Karachi High Court noticed that during his life, the deceased and his wife had a dispute regarding custody of the child. A compromise was reached before the appellate court that the minor will stay with his father. It was inferred from the custody dispute and the compromise that the child was the deceased's legitimate son.[28]

The analysis of legitimacy issues in Pakistani case law underscores the importance of acknowledgment, continuous cohabitation, and adherence to Sharī'ah principles. The rebutable presumption of legitimacy places the burden of proof on those challenging paternity, emphasizing the legal weight given to acknowledgment and the Islamic principles guiding the determination of a child's legitimacy. The courts' reliance on case law reflects the pragmatic approach taken in the absence of specific legislation, emphasizing the contextual and Islamic considerations in matters of parentage.

Determining the Rights and Liabilities of Involved Parties in Surrogacy

In Pakistan, as discussed above, the absence of specific legislation regulating surrogacy arrangements leads to certain legal risks and uncertainties. These issues are discussed in various research articles that cover the social, legal, and ethical aspects of surrogacy in Pakistan.[29] However, a few legal notions and limitations can be originated from various laws and judicial precedents. For instance, the Pakistani courts follow the principle of "welfare of the child" in family law and child-related matters.[30] This principle is beneficial to safeguard the child's best interests. In the context of surrogacy, the welfare of the child may be considered in deciding legal issues related to custody, parental rights, and citizenship.[31] Likewise, Pakistani Supreme Court recognizes

[26] [2011] PLD 78 (Peshawar); see also Muhammad Allahdad Khan v. Muhammad Ismail Khan, [1888] Allahabad High Court; Ghazala Tehseen Zohra v. Mehr Ghulam Dastagir Khan, [20015] PLD 327 (SC); Maqbool Hussain v. Abdur Rehman, [1995] PLD 124 (Peshawar).

[27] [2025 PLD 853 (SC).

[28] Syed Iftikhar Hussain Jafri v. Mrs. Shamshad Begum, [2011] PLD 232 (Karachi).

[29] S. Amjad and S.S. Naqvi, 'Ethical and Social Issues Surrounding Surrogacy in Pakistan: An Exploration of Perspectives from Religious and Medical Professionals' (2018) 18 (10) The American Journal of Bioethics 82-84; S. Iftikhar and N.U. Khan, 'Attitudes and Experiences of Pakistani Surrogacy Mothers: A Qualitative Study' (2019) 37(1) Journal of Reproductive and Infant Psychology 71-84.

[30] Ambreen Tariq Awan v Federal Government of Pakistan, [2013] MLD 1885.

[31] Ahmed (n 10)).

the principle of acknowledgement in multiple judgments.[32] Similarly, surrogacy cases may be assisted by this principle in determining paternity, and the presumption of legitimacy under the Qanun-e-Shahadat Order, 1984.[33]

Richard F. Storrow has discussed cases of European Human Rights Court where the state which prohibits surrogacy refuses to grant citizenship to a surrogate child as it was born in a foreign jurisdiction. The Court decided that the right to citizenship cannot be denied to such children. These states consider surrogacy reprehensible. Though states have authority to approve/disapprove surrogacy but this stance should not affect rights of the child. European legislatures have opposed surrogacy in general whereas European courts have embraced Roman law maxim of 'mater semper certa est'.[34] Internationally there are different responses to surrogacy. There are states which outlaw surrogacy, few allow it and others remain silent.[35]

Generally, surrogacy is not allowed under Islamic law. Some of the Shia' scholars think that surrogacy is allowed while most Sunni scholars consider of it as impermissible and some take it for adultery. As a result, issues of legitimacy, custody and other personal legal rights for such children under Islamic law raise more questions which make theological disagreements even stronger.

Legitimacy and Modern Reproductive Technologies

The issue of the legality of surrogacy and biological parenthood requires a tailor-made law for its solution. The above case becomes even more obvious among infertile couples. The problem is exacerbated by lack of legal recognition of adoption within Islamic law in general. Proponents advocating for surrogacy's legitimization define it as a practical measure aimed at helping childless desperate couples in making their dreams of biological parenthood come true. This statement expands the subject away from traditional Muslim beliefs to include the area where contemporary reproductive processes meet religious considerations. This makes the discussion more complex as all these domains converge in one direction. These overlaps make conversations all the more complex. However, it is through offering fresh outlooks and engaging in constructive yet provocative discourse that there can be any advancement.

Key Elements in Surrogacy Contracts and Legislation

Standard surrogacy contracts can affect the surrogate agreement's legal environment. Health protection and risk reduction policies must also feature in the framework for surrogacy which should be the primary objective. The said balance can be attained upon mentioning the necessary elements of these contracts.

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[32] For instance, Asma Naz v Muhammad Younas Qureshi, [2005] SCMR 401; Laila Qaygum v Fawad Qayum, [2019] PLD 449 (SC); Ghazaia Tehsin Zohra v Ghuiam Dastagir Khan, [2015] PLD 327 (SC).

[33] Qanun e Shahadat Order (X OF 1984), art 128.

[34] See Richard F. Storrow, 'International Surrogacy in the European Court of Human Rights' (June 30, 2018) 43 North Carolina Journal of International Law and Commercial Regulation 38-68.

[35] Ibid. Storrow discussed status of surrogacy in different jurisdictions.

It is essential to state eligibility criteria for possible adoptive parents and surrogates. As a result of this, surrogacy should only be permitted for a married couple who lives with an impediment to reproduction. It also means ensuring that fertility clinics involved are checked out therefore regulating the process adequately. It is also necessary for them to undergo a pretrial medical and psychiatric evaluation. These types of assessments guarantee the security of everyone involved and reflect on how parental care was manifested. Furthermore, a formal contract safeguards this by being explicit and having legal grounds for the surrogacy. The rights and obligations that pertain to each party of a contract must be articulated.

The effective communication rules are meant to enhance awareness through pregnancy so as to ensure that all emerging problems are well resolved, and no misperception takes place between parties. The approach with which these rules are drafted will ascertain the success of the surrogacy procedure.[36]

The protective measures for surrogate mothers are an additional layer of consideration in addressing issues related to surrogacy making such contracts complex. In a contract, factors such as the mother's age and her lifestyle choice such as smoking, diet, traveling, etc., should be taken into consideration. This will enhance due emphasis on ethics and responsibility while facilitating the surrogacy exercise. The contract also should contain a mechanism for settling disputes and avoiding risks in the event of their occurrence without causing conflicts.

Proper observance of the legal framework demands a profound analysis of the legal consequences in infringement cases. For instance, it becomes easy for involved parties to apply for liquidated damages clauses, if there, that are uniquely designed as a punishment for some specific breaches; plus it helps in increasing their enforcement powers. Nevertheless, it is necessary for the consequences not to be purely legal but rather to take into account moral, social, and even religious aspects. The welfare of everyone involved in surrogacy should also be guaranteed at any cost so that all parties' rights, needs, and concerns are taken into consideration equivalently.[37]

This means that surrogacy agreements create a robust and principled parameters for effective surrogacy procedures. The law enforcement requirements must be balanced with an understanding of societal and ethical concerns to achieve successful surrogacy regulations. Through appropriate management of applicant eligibility, communicative measures, legalistic perspectives, as well as amicable dispute resolution approaches, these agreements produce a complete and ethical framework for surrogacy contracts.

Islamic Law

In Islamic law nasab refers to lineage which is a right of a child to be associated to the parents. A major concern is that the child is legitimate which is determined on the basis of nasab and gives rise to several other rights like maintenance, guardianship and inheritance. A child is legitimate if

[36]D.S. Mazer, 'Born Breach: The Challenge of Remedies in Surrogacy Contracts' (2016) 28 Yale Journal of Law and Feminism 231-233.
[37] Ibid, 234-236.

he/she is born during a sahih[38] or fasid[39] marriage but not in a batil[40] marriage. One way to establish Legitimacy is acknowledgement of the father.[41] Only a legitimate child is entitled to paternity.[42] The right of nasab is possessed by a legitimate child right from the time of conception.[43] Paternity can be established by several ways: by marriage, acknowledgement, evidence or physiognomy. Maternity is established by biological processes like pregnancy, child birth breastfeeding. Paternity can be denied but maternity cannot be denied.[44]

Maternity is established in the biological mother regardless of her marital status. A child from a valid or irregular marriage[45] will be associated to the father. Jurists agree that to deny paternity in a valid marriage the parents have to go through the process of li'ān (imprecation).[46] According to Abū Hanīfah the process of li'ān can only be invoked in a valid marriage and not in an irregular marriage. As mentioned earlier, maternity is established by biological processes like pregnancy, child birth breastfeeding. Paternity can be denied but maternity cannot be denied.[47] Paternity is established if the couple had sexual relations under a semblance of the right to marital intercourse provided the father acknowledges paternity and declares that the child is not a child of adultery (zina).[48] Status of legitimacy can not be awarded to a child of adultery even if the mother claims that a particular person is the father or they get married afterwards.[49] This principle is established on the following hadīth: 'The child belongs to the bed, and to the adulterer belong stones' (al-walad lil firāsh wa lil 'āhir al-hajar).[50] Not to assign paternity rights to the adulterer father is considered a punishment for him. The governing principle in this situation is that one should not benefit from wrongdoing. It is argued that maternity is established for an illegitimate child as she is needed to take care of the child.[51]

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[38] Sahih means a valid marriage which fulfills all the conditions.

[39] Fasid means an irregular marriage in which there is an impediment which can be removed. .

[40] Batil means a void marriage in which there is an impediment which cannot be removed.

[41] Wahbah Zuhailī, Al-Fiqh-al-Islamī wa Adillatuh, vol. 10 (Dār-al-Fikr 2004) 7256; Jamal J. Nasir, Islamic Law of Personal Status (Graham and Trotman 1990) 156.

[42] John L. Esposito, Women in Muslim Family Law (Syracuse University Press 1982) 38; Nasir (n 37) 156.

[43] Nasir (n 37) 156.

[44] Ayman Shabana, 'Foundations of the Consensus against Surrogacy Arrangements in Islamic Law' (2015) 22(½) Islamic Law and Society 83.

[45] Muhammad Amīn b. 'Umar ibn 'Ābidīn, Hāshiyah Radd al-Mukhtār 'alā Al-Durr al Mukhtār, vol. 8 (Dār-al-Thaqāfah wa Al-Turāth 2000) 441-442.

[46] Abū Muhammad 'Alī b. Ahmad b. Sa'īd ibn Hazm, Al-Muhallā bil Athār, Ed. 'Abdul Ghaffār Sulaimān Al-Bindār, vol. 9 (Dār al-Kutb Al-'Ilmīyah 1984) 337; Nasir (n 37) 161.

[47] Shabana (n 40) 83.

[48] Nasir (n 37) 161.

[49] Zuhaili (n 37) 7249.

[50] Abī Al-Hussain Muslim ibn Hajjāj Al-Qashīrī, 'Sahīh Muslim' in Al-Kutb Al-Sittah: Sahīh Al-Bukhārī, Sahīh Muslim, Sunan Abī Dā'ūd, Jāmi' Tirmidhī, Sunan Al-Nisā'ī, Sunan Ibn Mājah, Ed. Sālih b. 'Abd-al-'Azīz b. Muhammad b. Ibrāhīm, (Dār-al-Salām) 924.

[51] Hammudah Abdul Ati, The Family Structure in Islam, (PhD Thesis submitted to the Faculty of Princeton University, 1970) 330-333.

There are two conditions to establish paternity in a valid or irregular marriage, first that the husband is major and second that the couple had sextual intercourse or were in valid retirement (khalwah sahīhah).[52] Another condition is according to the majority of jurists that the child must not be born earlier than six months from the date of sexual relations between the couple.[53] This point will be discussed in detail in the next section.

Under Islamic law, surrogacy is generally not permitted. Islamic scholars have different opinions on the matter, with some Shia scholars considering surrogacy permissible, while Sunni scholars consider it not permissible and some even equate it with adultery. Accordingly, the issues vis-à-vis legitimacy, custody, and access to various legal rights available to legitimate children under Islamic law arise.

Legitimacy by Birth

While discussing issues related to surrogacy the biggest question is regarding legitimacy of the child. Objections raised against surrogacy are based on the premise that such a child will be illegitimate. Legitimacy can be established by birth, by acknowledgement or by evidence. Following is the discussion regarding ways to establish legitimacy of child. Considering the significance of the status of legitimacy Muslim jurists have been lenient in this regard.

The 'Conjugal Bed' Principle

The Prophet said in a hadīth 'The child belongs to the bed (firāsh), and to the adulterer belong stones' (al-walad lil firash wa lil 'āhir al-hajar).[54] The jurists disagree as to the meaning of the term 'conjugal bed' (firāsh). Majority of Muslim jurists hold this opinion that the term 'conjugal bed' refers to the woman who gives birth to a child during a valid marriage.[55] Some jurists interpret this term as meaning the continuation of a sahih marriage at the time of conception of the child.[56] The child belongs to the husband of the mother after establishment/proof of conjugal bed. The principle of 'conjugal bed' is established in a fāsid marriage and also where there is semblance (shubha) of the contract of marriage.[57] The presumption of firāsh is so strong that even if there is no consummation or the couple lives apart from each other and the wife conceives, the child will be considered legitimate. Only if a husband claims and proves that there was no access, can the presumption be

[52]Mona Siddiqui, 'Mahr: Legal Obligation or Rightful Demand?' (1995) 6(1) Journal of Islamic Studies 18-20.
[53]Zuhailī (n 37) 7250-7251.
[54]Al-Qashīrī (n 46) 924.
[55]Shams-al-Dīn Abī 'Abdullah Muhammad b. Abī Bakr Ibn Qayyim, Zād-al-Ma'ād fī Hady Khayr-al-'Ibād, vol. 5, Ed. Mustafā 'Abd-al-Qādir 'Attā (Dār-al-Kutb al-'Ilmīyah, 1998) 160-163; Zuhailī (n 37) 7252; Muhammad Mustafā Shalabī, Ahkām-al-Usrah fil Islām (Dār-al-Nahda Al-'Arabīyah, 1973) 683; Ali Al-Khatīb, Fiqh al-Tifl: Dirasah Muqaranah fi Daw' al-Madhahib Fighiyah Al-Sab'ah: Al-Imamiyah, Al-Zaidiyah, Al-Hanafiyah, Al-Shafiyah, Al-Malikiyah, Al-Hanbaliyah, Al-Ibadiyah (Mu'ssasah Al-'Arif lil Matbu'at, 2002) 131.
[56]Zuhailī (n 37) 7252; Shalabī (n 51) 683; Al-Khatīb (n 51) 131.
[57]Abī Ishāque Burhān-al-Dīn Ibrāhīm b. Muhammad b. 'Abdullah b. Muhammad ibn Muflih, Al-Mubdi' Sharh Al-Muqni' (Dār-al-Kutb Al-Ilmīyah, 1997) Vol. 7, 64; Al-Khatīb (n 51) 131.

rebutted.[58] If 'conjugal bed' is proved paternity of the child is proved from the husband of the mother without acknowledgement or evidence of paternity.[59]

Following conditions must be met for applicability of the principle of 'the conjugal bed'. Firstly, it should be physically possible for the husband to impregnate the mother which means that the husband must be major; secondly sexual relations between the couple should be possible. Majority of jurists hold this opinion except Abū Hanīfah. According to him the 'conjugal bed' is proved by the existence of a marriage contract.[60] The third condition is regarding the time of birth. According to the Hanafīs the time period between the birth and the date of marriage contract should be at least six months. According to the majority of jurists six months should be counted from the possibility of consummation . The conjugal bed (firāsh) principle will not be applicable to a child who was born within this six months period. The last condition is regarding the maximum period of gestation from the date of dissolution of marriage either by death or divorce. In the case of dissolution of marriage, According to Abū Hanīfah the principle of conjugal bed applies to a birth taking place within two years from the time of death or divorce of the husband. The Mālikīs and Shāfʿīs consider it applicable within the time period of four years. In matters of legitimacy time of conception is important not the time of birth.[61]

If a woman conceives a child being unmarried, that child will be considered illegitimate. A child of unknown paternity however may be considered legitimate by acknowledgement of paternity provided paternity of the child was unknown. If the child is acknowledged by more than one person paternity will be established by evidence. For a married woman the firāsh principle shall apply and the husband of the mother will be presumed to be the father. In such a case the only way to deny paternity is by liʿān.[62] After liʿān the wife will not be considered firāsh.[63] The 'conjugal bed' is a conclusive proof of legitimacy and acknowledgement of legitimacy and other evidences will be resorted to if 'conjugal bed' could not be proved.[64]

As discussed above in surrogacy the issue is regarding identification of the mother. According to the principle of conjugal bed, in a marriage, the child belongs to the husband of the mother whereas Islamic law does not recognise an illegitimate child's relationship with the father. A child born out

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[58]Syed Ameer Ali, Muhammadan Law, vol. 2 (4th ed., Thacker, Spink and Co., 1917) 223-224.
[59]Al-Khatīb (n 51) 131.
[60]Zuhailī (n 37) 7249-7250; Shalabī (n 51) 684-686.
[61]Shalabī (n 51) 684-686; Abi Al-Walid Muhammad ibn Ahmed ibn Muhammad ibn Ahmad Ibn Rushd, Bidayat-al-Mujtahid wa Nehayat-al-Muqtasid, vol. 3, 4 (Dar Ibn Hazm, 1995) 1589; Mansūr ibn Yūnus Al-Buhūtī, Kashāf-al-Qanā' 'an Matn-al-Iqnā', vol. 5, Ed. Abū 'Abdullah Muhammad Hasan Muhammad Hasan Ismāʿīl Al-Shāfʿī (Dār-al-Kutb Al-'Ilmīyah, 1997) 473-474; Muhammad Amīn ibn 'Umar Ibn 'Ābidīn, Hāshiyah Radd al-Mukhtār 'alā Al-Durr al Mukhtār, vol. 10 (Dār-al-Thaqāfah wa Al-Turāth, 2000) 378-382; Zuhailī (n 37) 7252.
[62]Shalabī (n 51) 687-688.
[63]Muhammad ibn Idrees Al-Shāfʿī, Kitab-al-Umm, vol. 6 (Dar-al-Wafa lil-Tiba'ah wa al-Nashr wa al-Tawzi', 2005) 733.
[64]Ibid.

of surrogacy will be legitimate if surrogate mother is the second wife of the husband otherwise there is a question mark on legitimacy as well as parentage of such a child.

Legitimacy by Evidence

Paternity can be established by furnishing evidence as well as by acknowledgement but the evidence is considered stronger than the acknowledgement. In the case of contradiction of evidence and acknowledgement, the decision will be based on the evidence.[65] Paternity can also be proved by witnesses. Jurists disagree as to the quorum of witnesses required. According to Abū Hanīfah and Shaibānī testimony of two men or one man and two women will be required for this purpose. The Mālikīs don't accept female testimony in this regard and only accept testimony by two male witnesses. They do not accept the female testimony in cases regarding paternity. Abū Yūsuf, the Shāfʻī and Hanbalī schools hold that paternity is also proved by testimony of all legal heirs.[66]

According to Shāfʻī and Ibn Hazm if a woman is divorced or is a widow and claims that she is pregnant but her ex-husband or his legal heirs deny the existence of pregnancy, four midwives should be sent to inspect her. Testimony of less than four will not be acceptable in this case.[67]

If there is a dispute regarding the birth or identity of the child, the Hanafīs accept testimony of a midwife or a doctor. The Shāfʻīs accept testimony of four women whereas according to the Mālikīs testimony of two women is enough. Jurists agree that in the case of separation between spouses evidence of two men or one man and two women suffice. But if signs of pregnancy were apparent or it has been acknowledged by the husband or his heirs, the single testimony of a midwife is acceptable.[68]

In the case of acknowledgement the father does not need to provide evidence unless there is more than one person claiming the paternity. According to Abū Hanīfah if the acknowledgement of paternity is made by some relative other than the father, it will be accepted after confirmation by the father. If the father is deceased, such acknowledgement will be acceptable if two heirs testify to paternity of that child.[69] For other schools this question does not arise as they do not consider relatives other than the father (or grandfather according to the Hanbalīs) capable of acknowledging paternity.[70]

In the case where there is no evidence and there are more than one claimants of paternity, a physiognomy expert can be resorted to. This is the opinion of the Shāfʻīs, the Mālikīs and the

[65]Shalabī (n 51) 704.
[66]Zuhailī (n 37) 7270.
[67]Ron Shaham, The Expert Witness in Islamic Courts: Medicine and Crafts in the Service of Law (The University of Chicago Press, 2010) 88.
[68]Nasir (n 37) 162-163.
[69]Zuhailī (n 37) 7267-7268.
[70]Ibid.

Hanbalīs,. If there is no evidence the Hanafīs prefer a Muslim over a non-Muslim and a free person over a slave.[71]

With the introduction of scientific techniques like paternity/DNA tests, it has become possible to prove or disprove paternity. The general view among scholars is that a paternity/DNA test is an admissible evidence provided it is conducted with required expertise. As DNA testing is prone to error it is not considered a conclusive proof rather a circumstantial evidence.[72]

We have seen that Islamic legal rules are lenient regarding establishment of paternity. These rules are based on the principle of welfare of the child and are protective of the woman and the children.[73]

Islamic law and Surrogacy

There is difference of opinion regarding validity of surrogacy among Sunni scholars and Shi'a scholars. Majority of Sunni scholars reject surrogacy as it raises issues of legitimacy of the child. Their arguments revolve around sanctity of marriage and prohibition of commercialization of human reproduction. Gestational surrogacy is approved by some Sunni scholars but there is disagreement whether the surrogate must be the husband's second wife or not. Most of the Shi'a scholars are of the opinion that surrogacy is permitted. They consider the use of donor gametes in assisted reproduction allowed provided these procedures are laboratory based and do not involve physical contact. In both Sunni and Shi'a schools dissenting opinions are also there.[74]

As modern assisted reproductive techniques separate reproduction from the act of sexual intercourse, it raises several ethical and legal questions. These treatments include intrauterine insemination (IUI) and invitro fertilization (IVF). During IVF multiple embryos are transferred to the uterus of the mother to improve chances of pregnancy. IVF is also used to transfer a fertilized ovum to a woman other than the one who has produced oocyte/egg. Such a woman is called a surrogate carrier or a surrogate mother. The main question is that is infertility a disease which justifies or requires medical intervention.[75]

According to Sunni scholars to implant sperm of a man the woman is not married to is not allowed. Shia scholars treat am embryo totally different than sperm. Insertion of embryo is totally different than insertion of a sperm but there must be a marital relationship between the sperm and egg donors.[76]

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[71]Al-Khatīb (n 51) 142.
[72]Shaham (n 62) 170-174; For discussion on relevance of DNA test in Pakistani law see Fozia Naseem, Babar Shaheen, Aoun Muhammad Madni, Legitimacy of Child in Pakistan with Special Reference to Islamic Law and Medical Science: An Appraisal, Global Legal Studies Review, (Spring 2023), Vol. 8(2), 128-132.
[73]Shaham (n 62) 155.
[74]Shabana (n 40) 84-90.
[75]Ibid, 86.
[76]Shamima Parvin Lasker and Marcello Ghilardi, 'Genetic Gestational Surrogacy: Hope for Muslims' (2017) Bangladesh Journal of Bioethics, vol 8(3) 1, 8, 3.

Scholars like Mahmud Shaltut, Mustafa Al-Zarqa, Muhammad Abu Zahra and Hasanayn Makhluf are of the opinion that artificial insemination procedure is akin to the issue of permissibility of impregnation through the disposition of semen in a women's womb without sexual intercourse which has been discussed in the classical period. Distinction is made on the fact that this semen belongs to that woman's husband or a third party. Which means that if semen belongs to the husband it makes the child legitimate otherwise not.[77]

In 1980 a fatwa was issued by Shaikh Jad al-Haqq Ali Jad al-Haqq who was former grand shaikh of Al-Azhar University . This fatwa allows internal or external artificial insemination without involvement of third party. Any kind of third party involvement makes it unlawful and the child illegitimate which only belongs to its mother. This fatwa does not discuss surrogacy directly. In 2001 the Islamic Research Council 'Majma Al-Buhuth al-Islamiyyah' issued a decision prohibiting all forms of surrogacy involving third party. It includes post marital or post mortem insemination.[78] The Islamic Organization for Medical Science (IOMS) conducted a conference in 1983 on legal and ethical issues of modern reproductive techniques. It was concluded with consensus that all types of surrogacy was prohibited. Arguments for prohibition of surrogacy were sanctity of marriage, sad ul Dharai, and interfering within God's creation.[79]

There is an opinion the Quran defines a mother as the one who carries the fetus and delivers it. Genetic ties only matter if they result from a valid marriage. Muhammad Naeem Yasin was of the opinion that the child should be attributed to genetic parents only. A gestational or surrogate mother may be treated like a foster mother or milk mother on the basis of analogy. Some jurists emphasized that maternity can be multifaceted and cannot be based on genetic or gestational. Motherhood can have physical, physiological, emotional and psychological dimensions. If surrogate mother is already married there are chances of ikhtilat un Nasab. Answer to motherhood question should be given legally, medically or biologically? Just like sperm donation egg donation is prohibited.[80]

It can be seen from above discussion that most of the jurists do not allow surrogacy in which third party is involved. If surrogate mother is wife of the husband then there is no issue of legitimacy but identification of the mother still remains a problem.

Proposed reforms and future outlook

The legal analysis of surrogacy in Pakistan reveals a complex web of challenges arising from the absence of specific legislation and conflicting perspectives, particularly from the FSC and Islamic scholars. Establishing a comprehensive legal framework, grounded in contract law, family law, and a nuanced understanding of Islamic principles, is essential to safeguard the rights of all parties involved and, most importantly, the best interests of the child.

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[77]Shabana (n 40) 92.

[78]It is the use of cryopreserved gametes subsequent to divorce or death of a spouse. Ibid, 93-94.

[79]Ibid.

[80]Ibid. 96.

There is a need to continue a broad discourse on the topic of surrogacy as the FSC judgment and various research articles have already initiated it. The focus should be to assess the impact of the current unavailability of any legal mechanism to regulate surrogacy arrangements in Pakistan and the successful system available in other jurisdictions. This impact assessment must highlight the possible solutions to the issues discussed in the judgment of FSC, if available, to ensure a successful implementation of a mechanism for surrogacy in Pakistan. For instance, clear guidelines for the rights and responsibilities of the parties involved (intended parents, surrogate mother, and child) and issues related to citizenship and inheritance must be provided.[81] Pakistan should focus on regulating surrogacy as mere prohibition gives way to illegalities and loopholes. More flexible opinions can be considered and measures should be taken to stop it from turning into a commercial transaction.

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[81] Ahmed (n 10); Abbasi (n 11).

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