

## Shariah Perspective on Surrogacy: Legislation in Pakistan Regarding Protection of Woman's Right

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### Abstract

*This research paper is highlighting the emergent issue of Surrogacy prevailing rapidly in the medical sciences universally. Surrogacy refers to a woman's concept of 'Motherhood' by a contract with a couple. The paper aims to focus establishing legal status of surrogacy in the light of Ijtihad and Fatawas by the Muslim Jurists. Keeping in view of Maqasid e Shariah on protection of lineage and. Although the legal contract appears to be beneficial for all parties concerned, there are uncertain issues emerged need to be addressed through carefully framed laws in order to protect the rights of the surrogate mother and the intended parents. An evaluation of Legislative measures on protection of Rights of motherhood and children on surrogacy by Federal Shariah Court Pakistan Judgment's has been discussed.*

**Keywords:** Surrogacy, Nasab Shariah, Ijtihad, Artificial Reproductive technology, Federal Shariat Court Pakistan.

## 1. Introduction

Human beings are the subject of Shariah through which Allah Almighty's order and obligations established. These obligations are courses of conduct lead Muslims to get divine favor in next world by practical demonstration of their religious persuasion.<sup>1</sup> Islamic gives certain rights to Muslim men and women and even children, and meanwhile it also places obligations on them which must be fulfilled according to Allah's command. Every society has different emerging problems which will continue until the Last Day and Shariah gives solutions to these emergent issues.

لِكُلِّ جَعَلْنَا مِنْكُمْ شِرْعَةً وَمِنْهَاجًا

"To each among you have we prescribed a law and an open way."<sup>2</sup>

To solve modern-day problems, there is the method of *ijtihad* in Shariah through which Muslim Jurists give (*fatawas*) based on legal reasoning on the legality of the emergent issue through derivation of laws from primary sources i.e. Quran and Sunnah. Surrogacy is an emerging problem in this era. In one place, it is a blessing for couples who are unable to reproduce. A woman is subject to Shariah and definition legal or illegal is the issue and the status in this regard.

## 2. Surrogacy: its concept and Process

The literal meaning of surrogacy is 'substitute'. In technical terms, it is a process in which a third-party woman carries a child in her womb and delivers it to the intended couple. If the surrogate mother's

egg is fertilized by the sperm of the intended couple, it is called straight or traditional surrogacy<sup>3</sup>. If the intended couple's egg and sperm are fertilized via in vitro fertilization and placed in the womb of a third-party woman then it will be called partial gestational surrogacy. While if germs taken from the intended couple are fertilized in vitro by putting it in a womb of a third-party woman, it is called full gestational surrogacy.<sup>4</sup> In gestational surrogacy, the third-party woman will have no biological link with the child. There are two types of surrogacies, commercial as a surrogate mother will be paid for it and non-commercial means she will not be paid for the process<sup>5</sup>.

### **3. Surrogacy-A modern medical development**

Medically the process of Surrogacy may have many reasons like ovaries or uterus being absent in women, women having carcinoma or hemorrhage, the woman who can't have a healthy embryo, repeated miscarriages, heart or renal disease or cancer as a threatening disease to women.<sup>6</sup>

The intended couple or parents choose the type of surrogacy that shows the child at least half related to them. This medical process is for infertile couples (hopelessly barren women).<sup>7</sup>

The history of surrogacy starts from the oldest Hammurabi code where surrogacy was dealt with. Surrogacy was used to protect male offspring. Surrogate motherhood was commonly used in Egypt, by Pharaoh for having male descendants. Children delivered by Pharaoh's concubines were entitled as Pharaoh's legitimized offspring. If there was no nobleman, the throne was given to them. In Greece and Rome, straight surrogacy was also applied<sup>8</sup>.

"Surrogate motherhood is, a practice in which a woman (the surrogate mother) bears a child for a couple unable to produce children in the usual way, usually because the wife is infertile or otherwise unable to undergo pregnancy, the resulting embryo is implanted in the surrogate mother."<sup>9</sup>

The first traditional surrogate child in the USA was reported in late 1976. The first contract of commercial surrogacy was done with Elizabeth Kane, for 10, 000 USDs. Later, she became surrogacy advocate and also wrote a book on the surrogate motherhood experience including problems faced by the child, her family and society<sup>10</sup>. The gestational surrogacy report has two rough statistics. In 2009, live gestational surrogacy births in 411 clinics were around 45,870 according to the Disease Control and Prevention Center of USA. Thousands of babies are born via surrogacy around the world. These surrogacy arguments numbers in Brazil, Australia and Canada were equal to those reported in the USA.<sup>11</sup>

### **4. Surrogacy practices and Legislation in the contemporary world**

ART industries were developed in Italy initially but parliament banned them in 2004. Not only surrogacy but all ART techniques were banned there and the law resulting from this ban was called 40/2004.<sup>12</sup> And the justification given for it included sexual issues, paternity problems, lineage problems and risk of increase in racial perfection like getting a child with special donor's features.<sup>13</sup> In all countries, there are different views on surrogacy.

Surrogacy is legally allowed in Canada and US. America's ten states; Florida, Nevada, Virginia, Illinois, North Dakota, New Hampshire, and Washington) has permitted surrogacy with many conditions whereas seven states; Kentucky, Arizona, New York, Michigan, Indiana, Nebraska and New Jersey had not allowed surrogacy and also given punishment to its doers. California had also permitted it but no law exist for it there. South America also does not permit surrogacy. As in the USA, in many Australian states surrogate motherhood is available freely while some states have not called it illegal but restrictions are there for commercial surrogacy. Non-commercial surrogacy is legal throughout Australia.<sup>14</sup>

Surrogacy is not legally permissible in many European states such as Austria, Germany, France and Switzerland. For violation of rules, many penalties are imposed. From the European Union, only four countries Belgium, the UK The Netherlands and Finland has permitted surrogacy.<sup>15</sup>

The center of European reproductive tourism is Spain. Spanish women donate eggs either commercially or selflessly.<sup>16</sup>

Greece allowed surrogacy in 2002 but with the condition of an intended mother provide her

inability to a reproduction certificate and a third-party woman if married will have to get her husband's permission and both the parents intended and the surrogate will live in Greece.<sup>17</sup>

Many of the Soviet Union countries allowed traditional surrogacy. Russian Federation's law of citizen's health allows embryo implantation permissible in an adult woman.<sup>18</sup> In Russia, posthumous surrogacy is allowed. There is no fatherhood right. The right of fatherhood will be given to the single parent who applied for it. Only both parties' consent is required. No adoption decision or court verdict is required.<sup>19</sup>

Israel legitimized surrogacy in 1996. All kinds of surrogacy is are allowed in South Africa. If there is an illegal agreement then the child will belong to the mother who has given birth to it. The contract can be broken by the surrogate mother at any time after giving a written letter in court.<sup>20</sup>

Surrogacy is not an easy topic to discuss in Asia but a report by Reuters (2009) showed almost 25,000 commercial surrogate children's births. In China, hundreds of surrogacy agencies are working. The country's firm law is challenged on childbirth. In Guangzhou, authorities got to know about three surrogate mothers with forcefully aborted fetuses.<sup>21</sup> In India commercial surrogacy has been popular since 1992 but it is not clearly mentioned in the law. Indian people with age 21-35 years can apply for surrogacy. In Korea Artificial Reproductive Technology is practiced without any rules and regulations.<sup>22</sup>

In 1980, Iran and Lebanon gave a bioethical law that allowed ART but not surrogacy. Egg and sperm donation and surrogacy were not permitted in these countries for three reasons: Adultery, Illegal sexual relations among offspring donors and lineage problems.

## 5. Muslim Jurists Ijtihadon Surrogacy

In 62 Muslim countries, Gamete donation and prohibition of surrogacy was made enacted by medical professionals of ART and legislation. These countries are Saudi Arabia, Morocco, Indonesia, Sudan, India, Pakistan, The United Arab Emirates, Bangladesh, Malaysia, Sub-Saharan Muslim countries, Syria, Turkey, Qatar, Afghanistan, Kuwait and Egypt.<sup>23</sup>

Though a Shia Jurist following Ayatollah Khomeini allowed surrogacy and egg sperm donation in 1999. Shia in Iran, Syria, Pakistan, India, Arabia, Bahrain, Afghanistan, Lebanon, etc. follow his ruling.<sup>24</sup>

### 5.1 Ijtihadon Contemporary Emergent Issues

*Ijtihad* is called independent reasoning according to Islamic terminology. This method is used to elaborate on a contemporary issue in such a way that it does not contradict the text of the Quran and hadith. *Ijtihad* is defined by Abu Ishaq Shtibias as a method in which a jurist according to his capacity puts his full effort to give a real judgement on an issue. First, a Muslim jurist tries to get the solution from Quran or Sunnah.<sup>25</sup>

Due to speedy world progress, *ijtihad*'s need has been increased. Islam gives methods of adaptability and assimilation for every age. It does not only give a solution for old but for modern-day problems. Muslim *Ummah* needs to survive the challenges. Otherwise, it gets backwardness. Some scholars, unfortunately, closed *ijtihad*'s doors and give contemporary issues solutions according to their own will, which shows extremism and rigidity in matters and sometimes against Islam.<sup>26,27</sup>

*Ijtihad* is needed for solving emergent issues as the Quranic and hadith text also supports it. There is a dire need for *ijtihad* to solve modern-day issues as it is encouraged by Quran and Sunnah.

## 6.2 Councils and Centers of Fatwas

### 6.2.1 Al-Azhar University Fatwa; 1980

After being given basic information related to reproduction and the development of family, the fatwa gave addressed different queries.

- Artificial Insemination (AI) in Intended Couple

Jadd al-Haqq said that the real purpose of marriage is to reproduce. The semen of the intended couple's husband can be taken but there should not be any doubt of mingling with others if pregnancy is not possible because of a disease. It is allowed in Shariah. The child born after a successful process will be attributed to the husband. This is according to the rule given by jurists for a wife conceiving with the implantation of the husband's semen into her womb with an artificial method.

- Artificial means between two different couples

Jadd al-Haqq calls this process prohibited because there is lineage mixing in it. The child belongs to the stranger. This process is like *zina* which itself is not allowed.

- Donating Egg

This process is also not allowed because a third-party ovum gets fertilized with the intended couple's husband's sperm and it is obvious *zina*. The thing causes destruction in lineage. The wife's description given in verse 223 of Surah al-Baqarah, is also violated because the stranger woman does the task of a legal wife. This is also prohibited as the stranger woman's egg is fertilized by the husband's sperm and it also resembles adultery. It also destroys the preservation of lineage. The description of wife given by verse 2:223 is violated by it as a third-party woman takes place of a legal wife<sup>28</sup>.

- Fertilization outside the body

This process is of the following forms:

- a) Intended couples' germs are fertilized in vitro and then placed into the woman's womb. In the first place, it is allowed. Shariah allows treatment of infertility where no prohibited method is used and treatment is necessary to save a life.
- b) For sometime, the egg after fertilization is implanted in the animal's uterus before it is put in the woman's womb. It is not allowed as the child may get animal characteristics. Also, it is against the natural method. This process is called *fasad* (corruption) according to Jadd al-Haqq.

- Status of physician

For permitted methods, the physician should be careful and if he uses some prohibited method, he will be sinful as this act is illegitimate in Shariah.<sup>29</sup>

### **6.2.2 Islamic Fiqh Council Fatwa; 1986**

After having a discussion on AI subjects and hearing expert doctors, Islamic Fiqh Council cleared that for AI seven methods are used nowadays.<sup>30</sup>

a. Five of them are forbidden due to parents' confusion or prohibited methods of Shariah. Five methods are forbidden because of parenthood confusion or loss of mother or Shariah's prohibition. They are as: Legal husband's sperm and egg of stranger woman are taken and after IVF, egg is placed in womb of wife. Egg of wife and sperm of a stranger are acquired and after IVF, fertilized egg is set in into wife's womb. Egg and sperm are taken from biological couple and afterward fertilization of egg in vitro, the fertilized egg be place in womb of surrogate. Egg and sperm both are of strangers, after fertilizing egg out of body, be inserted into womb of who is already legal spouse of some other man. Both egg and sperm are of intended couple and after fertilization egg in vitro, it is kept in second spouse of the husband.

b. After taking all the precautions, sixth and seven methods are not prohibited and can be used in need. Both egg and sperm from intended couple and after fertilizing the egg out of body, be placed in the same wife's womb. Husband's sperm is taken and after fertilization of egg in vivo, it is implanted into appropriate place in wife's womb.<sup>31</sup>

### **6.2.3 Mukhtara Fatwa Wa Rasail; 2021**

It is acceptable to get husband's sperm via medical procedure and injected into wife's womb with strict conditions that there is no risk of mixing of sperm with other man's sperm. In this method, doctor should be professional. This is called homologous artificial insemination (AI). Only legal husband and wife are involved in it. Many couples can't reproduce easily and they can be cured by suitable treatment.

In this regard, Holy Prophet SAW said:

"مَا أَنْزَلَ اللَّهُ دَاءً إِلَّا أَنْزَلَ لَهُ شِفَاءً"

"There is no disease that Allah has created, except that He also has created its treatment."<sup>32</sup>

So, the infertile couples should not violate the rulings given by Shariah by taking third-party assistance and must adopt the legal ways to cure the disease.<sup>33</sup>

#### 6.2.4 DaarulIftaawal-Ikhlās Karachi; 2022

For lineage protection, Muslims are commanded by Allah Almighty to get into marriage contract. All other methods of reproduction are called illegal except nikah.

In surah Nisa, verse 1 Allah Almighty says:

"يَا أَيُّهَا النَّاسُ اتَّقُوا رَبَّكُمُ الَّذِي خَلَقَكُمْ مِنْ نَفْسٍ وَاحِدَةٍ وَخَلَقَ مِنْهَا زَوْجَهَا وَبَثَّ مِنْهُمَا رِجَالًا كَثِيرًا وَنِسَاءً"

"O mankind! reverence your Guardian-Lord, who created you from a single person, created, of like nature, His mate, and from them twain scattered (like seeds) countless men and women;- reverence Allah, through whom ye demand your mutual (rights), and (reverence) the wombs (That bore you): for Allah ever watches over you."<sup>34</sup>

Women are called farmlands of precreation as the earth is for production of food.

In Surah al-Baqarah verse 223 Allah Almighty says:

"نِسَاؤُكُمْ حَرْثٌ لَكُمْ فَأْتُوا حَرْثَكُمْ أَنَّى شِئْتُمْ"

"Your wives are as a tilth unto you; so, approach your tilth when or how ye will..."<sup>35</sup>

As farming in other's land is not permitted so is the non-natural process of inserting gamete into womb of surrogate.

It is said by Prophet SAW:

"لَا يَحِلُّ لِامْرِئٍ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ أَنْ يَسْقِيَ مَاءَهُ زَرْعَ غَيْرِهِ"

"It is not lawful for a man who believes in Allah and the last day to water what another has sown with his water."<sup>36</sup>

So, nikah is the natural method to conceive procreation through other woman either by natural or artificial process is called *zina*. So, surrogacy is not allowed whether gamete is inserted into surrogate mother's womb or zygote is transferred from intended mother's womb to surrogate's womb. These kinds are not legal on basis of following things:

- Third-party woman is not legal wife of intended father and Shariah does not give permission to take third-party assistance.
- Islam does not allow earning by body parts and it is also called haram by Prophet SAW. It means commercial surrogacy is not allowed in Islam.
- The mentioned method mixes *nasab*. *Zina* is also prohibited for same cause.

For this reason, *iddah* is obligatory for widowed and divorced females.

As for as the *nasab* proof is concerned, woman must be wife of man legally and the child born via surrogate motherhood will not be lineally linked to the father who donated the sperm to surrogate mother. But when surrogate is married before, child's *nasab* will be attributed to spouse of that mother as Holy Prophet SAW said:

"الْوَلَدُ لِلْفَرَّاشِ وَلِلْعَاهِرِ الْحَجَرُ"

"The child is the bed's and for the fornicator is the stone."<sup>37</sup>

If the surrogate mother is not married, she will be considered the mother as she delivered her. And the surrogate will mother will have the rights of lineage, inheritance etc. as it is said by Allah SWT in Holy Quran that permitted way to conceive is *nikah* and if the first wife is incapable of procreation because of any medical issue, husband is able to do *adl*, he can have second *nikahto* procreate and must not use these illegitimate procreation methods.<sup>38</sup>

### 6.3 Fatwas of Independent Muslim Jurists

#### 6.3.1 Moulana Khaled Saifullah Rehmani

Moulana Khaled Saifullah Rehmani in his book 'Jadeed Fiqhi Msail', discussed test tube bay types

and also explained all legal and illegal types. He wrote that test tube baby has two types<sup>39</sup>:

First method is to mix sperm and egg of strangers and it is done: In the same tube, by mixing germs of two strangers, Or in the womb of same woman, Or in womb of man's wife. This procedure is not permissible due to *nasab* mixing as *zina* is not permitted for the similar cause. Hadith exists on this. (Sunan Abi Dawud: 2158)

To avoid *nasab* mixing, *iddah* is made compulsory for divorced or widowed woman. Shah Waliullah Dehlvi (r.a.) says that one of the *iddah's masalih* is:

منها معرفة برأة رحمها من ماء لئلا تختلط الانساب أحداً يتشاح به ويطلبه العقلاء وهو من خواص نوع الانسان ومما "امتاز به من سائر الحيوان"

Woman's womb gets empty by her ex-husband's germ so there is no mixing of lineage. *Nasab* is a desired thing and need of wise people, which is human characteristic and for this reason humans are different than animals.

In the second type, the intended couple's germs are used for procreation. It can have three types.

In these methods, the intended couple's germs are got via scientific technique and put into same or another wife's womb. Scholars don't allow it due to few reasons. First, man will have to masturbate for getting sperms. Secondly, *satar* of woman is uncovered and third is that it is not a natural process. For *masliha* and necessity, Khalid Saifullah called these methods legal. So, in accordance with his saying the method where biological couple's germs are used is permitted.

So, he calls this non-natural process (where intended couples' germs are used) legal.<sup>40</sup>

### **6.3.2 Mufti Muhammad Ibrahim Qadri**

He is a member of Islamic Ideology Council Pakistan. He wrote a report in which he stated test tube baby method legal where it does not involve assistance of third-party. He stated that if woman or man or both are unable to have offspring via natural way because of a health problem, test tube baby's is needed at this stage. Husband's sperm after satisfaction (of not mixing with other man's sperm), is inserted into wife's womb. This process is not only permissible but in this era, a great blessing for infertile couples by Allah Almighty.<sup>41</sup>

### **6.3.3 Dr. Abdul Mu'taa Bawmi**

He, the former principal of Usul al Din Department in Al-Azhar University Egypt called surrogacy legal. He said it is like *torida'ah*. For example Shariah allowed fostering; from other woman offspring gets only nourishment for growth so is the surrogacy where egg and sperm are taken from intended couple and womb of the surrogate gives it nutrition only. This method is allowed with all the precautionary measures e.g. If surrogate mother is married and she avoids sexual contact with her husband during the process of surrogacy and there is no doubt of lineage mixing then.<sup>42</sup>

### **6.3.4 Yusuf al Qardawi**

In answer to question about artificial insemination, Dr Yusuf al Qardawi said that Islam prohibits *zina* for the lineage safety. Adaptation of a child legally is also prohibited so that lineage can be made safe without any foreign element invasion. So, if there is involvement of third-party donor (not the husband) so, artificial insemination is prohibited.<sup>43</sup>

On surrogate motherhood, Yusuf al-Qardawi wrote an essay and also gave conditions for surrogacy:

1. There is risk of *fasad* for unmarried woman so she must be married before and have children.
2. The surrogate must have her husband's consent otherwise he will not get his needs. The problem here is same to voluntary worship where a woman is not allowed to fast without her spouse's permission then how she will not be fulfilling his necessities and rights till 9 months and 40 days.
3. Third-party mother's womb must be empty from her husband's sperm so there is no lineage mixing.
4. The intended husband will provide for surrogate mother during whole process as she is providing nourishment to his child through her body.
5. The intended father will be responsible to provide fostering, nurturing and child upbringing and not the surrogate's husband.

6. Surrogate mother will have to nurture the baby which is healthier for the child. Intended father will be paying for it.<sup>44</sup>

### Concluding remarks of Scholars on Surrogacy

Sunni Muslim authorities agree that some Artificial Reproductive Technologies (ART) are forbidden in Islam<sup>45</sup>. They include:

- Sperm, egg or embryo donation from third-party
- Gestational surrogacy: implantation of embryo in another woman's womb
- Usage of egg, sperm or embryo by a person after divorce
- Achieving specific baby gender by sorting sperms
- Modifying genes for desired offspring reproduction
- Using human reproductive cloning for cloned child
- Creating cloned child by human reproductive cloning<sup>46</sup>

First type of forbidding involvement of third-party assistance is important as it involves surrogacy also.<sup>47</sup> Getting egg or sperm donation from any third-party is violation of Islamic Law. Islamic bioethics clear this violation from natural method by three points.<sup>48</sup>

- Islamic law permits reproduction through marriage bond as al-Azhar University *fatwa* calls procreation without *nikah* *zina*. Though it does not involve the conditions of *zina*; gaze or body contact, still some scholars call it *zina* as it involves involvement of third-party. It is also a threat for marital relation.
- Third-party assistance can lead to illegal sexual relation among offspring of donors. For example, if a man donated multiple gametes to infertile couples then their offsprings when mature may involve in incest after developing marital link with their biologically half-siblings. Similar case may occur in egg donation.
- Assistance of third-party in reproduction (including surrogacy) leads to destruction of kinship, inheritance and descent. Preserving *nasab* (lineage) is moral authority. Child's lineage and parenthood is destroyed by it which is unjust to the child. Surrogate child born through illegal ART will be illegitimate even after legal adoption. So, selecting specific gender of baby, changing embryo genetically and cloning are come under the category of destroyer of lineage.<sup>49</sup>

The Sunni views about ART had influential authority since 1980 so in Majority of Sunni Muslim countries, third-party assistance is not practiced but Shia scholars had different view since late 1980s.<sup>50</sup> This is so because in Shia Islam, high priority is given to *ijtihad*. Shia authorities had a debate on assistance of third-party in reproduction and they allowed its all forms.<sup>51</sup> At the end of century, Iran's supreme leader, Ayatullah Ali al-Khomeini issued a *fatwa* on taking help from third-party in reproduction.<sup>52</sup> He allowed third-party assistance without touch and gaze by saying that it will end psychological or marital issues from infertile couples by continuing the family.<sup>53</sup>

Ayatollah Khomeini agreed with jurists who support third-party assistance in reproduction. He did not forbid gametes donation when donors of gametes obey Shariah in parenting. Child will get inheritance from mother as she is like her adoptive mother. Child's father will be the donor of sperm and infertile father will be his adoptive father and child will get his name. So, lineage issue is solved by this *fatwa*. And the Shia scholars defined lineage again and gave consent to donor who gives child's rights to the recipient father. However, inheritance issue is not solved. Shia jurists allowed egg donation according to their practices and principles.<sup>54</sup>

Surrogate mother is allowed to get egg, conceive for intended couple and nurture him/her. Fostering a good method in Islam for making new family ties. Husband can do *muta'* marriage in Shia Islam. One wife is allowed to donate egg to another wife. Thus, in Shia Islam, donating egg is allowed via *muta'* marriage and solution of third-party assistance issue. Only sperm donation is challenging in Shia Islam.<sup>55</sup>

## 7. Surrogacy in Present-day Muslim Countries

In Iran and Lebanon surrogate motherhood is practiced as Shia law has allowed it on *ijtihad* basis.

### 1.1 Surrogacy Practice in Iran: Embryo Donation to Infertile Couples Act, 2003

No Sunni or Shia Muslim country except Lebanon and Iran, has accepted this technology. As many leading Shia jurists allowed this, in Iran, many private IVF clinics practice the donation of sperm.

After this acceptance, patriarchal values are challenged in Iran which involves paternal relationship accountability. In this, priority of ownership is given to father. According to twelve Shia imam, mother is only caretaker and father is the real owner. So, donation sperm means taking some other man's child. That's why, many Muslim infertile couples including Shia, don't accept assistance of third-party reproduction. They do so because they consider the child born through this process as biologically related to other whose sperm was taken.<sup>56</sup> To cope with patrilineal issue, taking egg or sperm from close relatives either brother or sister is preferred in infertile Shia couples. So, they practice gametes donation within family. Sisters get eggs or uterus from their sister-in-laws and brothers get sperm from their brothers.<sup>57</sup>

*Mehrmia* (privacy) rules are violated by egg and sperm donation. These rules tell the interaction limitation between different society genders. For this purpose, relations are divided into two groups: *mehram*<sup>58</sup> and *na-mehram* "Na-mehram".<sup>59</sup> It is not legitimate in both Shia and Sunni Islam. Couples who practice this procedure don't see in this regard as they think in gamete donation, no physical contact takes place. AIT allow the intended family to neglect incest feelings, unlawful polyandry or *mehrmia* rules. According to them, donation sperm or egg within family maintains purity of lineage by strengthening family relations.<sup>60</sup>

Iran's parliament made an act in 2003 with the name 'Embryo donation to Infertile Couples Act'. Surrogacy was allowed to only licensed clinics of Iran. The couple applying for surrogate mother must be married lawfully and not the single or gay person. It gave the conditions for surrogacy in it as the married couple having no treatable ailment. The eligibility of intended couple is accessed by family court. The main purpose is to not give any harm to surrogate mother and health of the child is also seen. This process was allowed only in *muta* marriage. In this method, child born will be legal and there will be no doubt of adultery. This act did not allow sperm donation. Embryo donation from one legally married couple to other was allowed but it is against the reason of not allowing egg donation and allowing sperm donation. Child's paternity is also disturbed by it but authorities did not consider this point. Moreover, the surrogate mother must have awareness of contract's legal and social aspects. Article 3 of Act describes duties of the intended parents. On inheritance issue, the article is silent. Religious scholars made this act in interest of all the parties.

### 7.2 Surrogacy Practice in Lebanon

Lebanon has the same ruling on surrogacy as in Iran. Grand Ayatollah Fadhallah permitted donation of egg within *muta* marriage. As adoption is not allowed in Islam and also the father is the owner according to their law so sperm donation was not permitted. The female child can be *namahram* to the intended father. The surrogate child may also be in problem if the intended couple gets children later. Fadhallah's ruling is followed by Shia majority.<sup>61</sup>

There is social and religious influence of Hizbullah's party. He gave a *fatwa* in 1999 allowing gestational surrogacy without *muta* marriage necessity and also allowed sperm and egg donation. So, at one time two interpretations on surrogacy are there in Lebanon. Unlike Iran, there is no legislation on surrogacy by Lebanon parliament. Due to presence of different juristic opinion, Lebanese people use this method with no restrictions.<sup>62</sup>

### 7.3 Practice of Surrogacy in Pakistan and Judgement of Federal Shariah Court (2017)

In 2017, Federal Shariah Court after examining surrogacy's different types, gave a judgement in



FarzanaNaheedvs Farooq Siddiqui case. Basic purpose of marital relation (established by *nikah*) is procreation.

In Surah al-Mominun verse 5-7, Allah Almighty says:

"وَالَّذِينَ هُمْ لِأُزُوجِهِمْ حَافِظُونَ إِلَّا عَلَىٰ أَرْوَاحِهِمْ أَوْ مَا مَلَكَتْ أَيْمَانُهُمْ فَإِنَّهُمْ غَيْرُ مَلُومِينَ ..."

"those who guard their chastity. Except with their wives or those bondwomen in their possession, for then they are free from blame, but whoever seeks beyond that are the transgressors."<sup>63</sup>

It shows that Quran allows sexual relation only in marital relation and not else.

In Surah Baqarah verse 223, Marriage bond is stressed because it shows the paternity and maternity of the child born. In surrogate motherhood, child's paternity is not clear which is against Quranic injunctions.

If the intended couple's germs are taken and after in vitro fertilization, put into wife's womb, it is legal method and biologically child will belong to parents but according to Quranic and Sunnah commandments, third-party involvement is not allowed. This contract is void as it involves unlawful consideration. (Contract Act, 1872: Section 2 ) Punishment and fine be imposed for committing the offence. The doctor who runs gamete's bank or arranges be fined, imprisoned and his license must be cancelled.<sup>64</sup>

Scholars' views are not totally against surrogacy but there are some opinions for its support in Islamic literature. Some professional doctors and scholars call it a big sin. Some of the arguments are in the favour of this process as: If for *zihar* in divorce as calling it not the proper way of divorce because wife can't be called mother as she has not given birth to her. Surrogacy is similar to fostering. As fostering is allowed so should be the surrogate motherhood as her womb only provides nourishment.

Second argument presented by scholars is a hadith on watering other's wombs.

this is not adultery as it has no sexual relationship. Firstly, the hadith is about sexual relation with enemies. Holy Prophet SAW also forbade to water a woman's womb who is carrying other man's baby. Secondly, the conditions for *zina* are not fulfilled in it. It's legal issue and in accordance with the legislation, it is not *zina*. In Shafi'i school, the essential condition for *zina* penetration. Masturbation is given as another reason for prohibiting it but she says that it's for medical purpose and not for pleasure.

Scholars presented another hadith for its illegality as which means that child will be <sup>65</sup>الولد للفراش attributed to the father who is legal husband of her mother and adulterer is stoned to death. She says it is for illegal sexual relation and for that purpose the couple will go through *lian* procedure. But when they both take oath, women will be preferred, her husband can deny this relation within 7 days after child birth and if he does not do so he will be called the child's father as the tradition says. In the same way, when a slave woman delivers a child for owner, he/she will belong to the owner.

However, the scholar explained that if there is no involvement of third-party in the donation of sperm or egg then surrogate motherhood is similar to fostering otherwise it is a legal issue. The child born from germs of a planned couple will be attributed to them and the surrogate will fulfill the conditions of agreement and inheritance issue will be solved through *walla'* and *Hibba'*.<sup>66</sup>

## Findings and Conclusion

Surrogacy is a latest scientific method for treating infertility. Majority of jurists called it illegal and forbidden act due to violation of many parties' rights. Selling sperms and eggs, doctor's involvement in process, commercial surrogacy are called illegal by them. The ruling given by Islamic Fiqh council is same. They call it illegal as it will lead to immorality and subjection of poor women to violence. Scholars and Jurists gave many arguments for not legalizing it.

- They said that it will lead to *zina* but the conditions needed for *zina* are not fulfilled in it and also they did not mention the type of *zina*.
- Surrogacy will lead to incest among donor's offspring but when intended couple's germs are used and after fertilization inserted into surrogate's womb then her womb will only be a pot and child's lineage will not be disturbed as Allah Almighty said in the verse related to adoption; The child is called with his/her father's name.

- It leads to uncovering of woman's body parts. But for medical purpose uncovering the body is allowed in front of doctor.
- Scholars allowed test tube baby which also involves the body uncovering and not only surrogacy.
- Masturbation is *haarm* in Islam. He will do it for medical purpose and not the pleasure.
- Surrogacy causes *nasab* mingling when donor of gametes is from third-party but they entitled it lawful if intended couple's germs are used. Surrogate her is only describes as seller but earning through body parts is not allowed in Islam as body is trust from Allah Almighty.
- Shia law allowed surrogacy and it is practices in Iran within *muta* in Iran. Sperm donation is not allowed. Issue arising from egg donation is not taken into consideration and it is allowed.
- Ayatollah fadhallah's ruling for surrogacy in Lebanon is same as in Iran but Hizbullah's ruling did not call *muta* marriage necessary for third-party assistance, Both rulings are practices in Lebanon without consideration of lineage and inheritance. Moreover, there will be improper use of wealth, destruction of religious rulings etc.

### **Epilogue: Need of Legislation to protect "Motherhood"**

Jurists and legislation did not mention many things as if the one of the mothers dies, the child's actual mother is not declared. Likewise, if surrogacy is considered adultery, the offspring is attributed to his/her mother. None of the juristic opinion discussed that either child will be given to surrogate or not.

If both the woman are child's mothers; one for egg donation and one for conceiving and delivering her as Allah Almighty said in Quran: 'as the mothers are those who have given birth to them', Islamic concept of motherhood has no place in surrogacy.

If the intended couple shows itself actual parent in hospital and they refuse to take child or surrogate mother does not give paternity to them and they claim paternity in court to have parental rights, they did fraud. Provisions of punishment are there in legislation for fraudulent activities but not for surrogacy contract as it is called illegal act by jurists. Moreover, if the provisions were enough, Federal Shariah court would have suggested to make legislation on it.

Problems occur in every society and will occur till last day. Islam has given the method of *ijtihad* to solve modern issues. Surrogacy is one of the emergent issues of contemporary era. There are many opinions of jurists on legality and illegality of surrogacy. Shia Muslims allowed it with some conditions. However, majority of Sunni Muslims called it illegal. In Pakistan, FSC has given a judgment in 2017 and recommended to pass legislation on it. Unfortunately, the doors to *ijtihad* on this modern issue are closed in Muslim world, and also there is no proper legislation for it so the Muslims couples applying for it, physicians involved and the donors are not aware of their rights and duties in this regard. There is a dire need to protect Maqasid e Shariah of Protection of Progeny as well as the respect of "Motherhood".

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<sup>58</sup>“*Mehram*” group includes people with *nikahis* not allowed and sexual relation with them it is named incest. They contain parents, grandparents, children and grand children, uncles, aunts, siblings

<sup>59</sup>.group has all the people with whom marriage is allowed and no social or sexualrelation is acceptable with them. This group involves all those who are not in *mahram*grouping, are not the family members. The third group“*mahram*”and because of change in their marital position, they convert to“*na-mehram*” bid., 160.

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