

## Assisted Reproduction in Pakistan and the Alternative Discourse

*Farooq Siddiqui v Mst. Farzana Naheed*  
PLD 2017 FSC 78

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### **Introduction**

The first In Vitro Fertilization ('IVF') baby was born in 1978.<sup>1</sup> Since then, there has been immense development in assisted reproduction. The discourse surrounding this issue in the Sunni Schools has been relatively stable, but in Shi'ite Schools, it has been nothing short of contentious. The debate has consistently weighed the preservation of lineage in contrast with overcoming infertility within a marriage. The complex and nuanced underpinnings of this discussion have given rise to a plurality of views amongst the Muslim jurists. A majority of jurists equate third party assisted reproduction as infringing upon the clarity of lineage. However, some Shi'a scholars prioritize preservation of marriage over preservation of lineage and, as a result, have allowed the use of certain third party assisted reproduction techniques in Iran and Lebanon. The law in Pakistan, however, has remained unconcerned with this debate until the recent judgment of the Federal Shariat Court (FSC) in *Farooq Siddiqui v Mst. Farzana Naheed*.<sup>2</sup> This case note discusses the complexities underlying the *Farooq Siddiqui* judgment, and subsequently compares its reasoning with the discourse surrounding assisted reproduction in other Muslim countries.

Before dealing with substantive issues, there are some Assisted Reproductive Technique ('ART') terms which require clarification at the outset. IVF is a process where a woman's egg is removed, fertilized with sperm in a lab setting, and the fertilized egg (embryo) is subsequently transferred back into the woman's uterus to impregnate her. This technique is often used to overcome female infertility. Similarly, Intracytoplasmic Sperm Injection ('ICSI') is for combating male infertility whereby previously collected sperm is introduced into the woman's uterus in order to fertilize the egg. Third party donation can include eggs, sperm, and embryos. Gestational Surrogacy is where an embryo is transferred into the surrogate (also referred to as gestational carrier) so that she can carry the pregnancy to full term. Cryopreservation is where sperm and embryos are frozen for later use.

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<sup>1</sup> Adam Eley, 'How has IVF developed since the first 'test-tube baby'?' (*BBC News*, 23 July 2015) <<http://www.bbc.com/news/health-33599353>> accessed 15 January 2018.

<sup>2</sup> PLD 2017 FSC 78.

### **Part I - Farooq Siddiqui v Mst Farzana Naheed**

In *Farooq Siddiqui v Mst Farzana Naheed*,<sup>3</sup> the FSC discussed various types of assisted reproduction and their legal validity in the backdrop of the injunctions of the Qur'an and Sunnah. Farooq Siddiqui and his wife were unable to have children. As a result, Mr. Siddiqui published an advertisement in the newspaper for a surrogate. Ms. Farzana Naheed responded to the advertisement and offered her services for a certain amount of consideration. Pursuant to this agreement, she gave birth to a baby girl. According to Mr. Siddiqui, this was an oral contract, and in order to avoid public speculation regarding the private affairs of the individuals involved, a false cover story of marriage was concocted. After the birth of the child, Ms. Naheed refused to fulfill her contractual obligation of giving custody of the child to Mr. Siddiqui, and instead claimed that she was his wife; the child was the result of the union; and Mr. Siddiqui was bound to pay for the maintenance of the child. The main issues before the FSC were, firstly, whether the contract between Mr. Siddiqui and Ms. Naheed was valid under the Contract Act 1872; and secondly, whether it was in conformity with the injunctions of the Qur'an and Sunnah.

The FSC discussed several scenarios within assisted reproduction. First, the FSC held that the child belonged to the sperm donor and to the egg donor. The husband of a woman who had given birth through third party sperm donation could not claim paternity of the child. Such an arrangement would be illegal and against the injunctions of Islam as laid down in the Qur'an and Sunnah.<sup>4</sup> Second, the sperm donation from the husband and egg donation from the wife when the egg was fertilized in the test tube and transferred into the womb of the wife would be legal and legitimate.<sup>5</sup> This would not be against the injunctions of Islam as laid down in the Qur'an and Sunnah. Third, an embryo being transferred into the surrogate who would then give birth to the child would be illegal and against the injunctions of the Qur'an and Sunnah.<sup>6</sup> The FSC reasoned that surrogacy was exploitative and cruel as the surrogate mother would develop emotional attachment with the child;<sup>7</sup> it would open Pakistan to exploitation.<sup>8</sup> People from the developed countries would come to Pakistan to take advantage of low costs and would possibly abandon the child if s/he was disabled or disadvantaged in some

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<sup>3</sup> Ibid.

<sup>4</sup> Ibid, [16].

<sup>5</sup> Ibid, [17].

<sup>6</sup> Ibid, [18].

<sup>7</sup> Ibid, [19].

<sup>8</sup> Ibid, [19].

way. Moreover, the court held that assisted reproduction would lead to the destruction of inheritance laws as provided under Islamic law. The FSC referred to the family unit as a basic building block of a healthy society and equated surrogacy to an axe which would destroy the family unit.<sup>9</sup> The FSC emphasized that the object of sexual relations is reproduction, but even then, it had to be within the institution of marriage.

The FSC proposed a few changes to the law. First, it suggested that an amendment needed to be made to section 2 of the Contract Act 1872,<sup>10</sup>

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<sup>9</sup> Ibid, [23].

<sup>10</sup> Contract Act 1872, s. 2:

‘Communication, acceptance and revocation of proposals. The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

Communication when complete. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. The communication of an acceptance is complete,— as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer. The communication of a revocation is complete,— as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; as against the person to whom it is made, when it comes to his knowledge.

Illustrations

(a) A proposes, by letter, to sell a house to B at a certain price. The communication of the proposal is complete when B receives the letter.

(b) B accepts A's proposal by a letter sent post.

The communication of the acceptance is complete,—  
as against A, when the letter is posted;  
as against B, when the letters received by A

(c) A revokes his proposal telegram.

The revocation is complete as against A when the telegram is despatched.

It is complete as against B when B receives it.

B revokes his acceptance by telegram. B's revocation is complete as against B when the telegram is dispatched, and as against A when it reaches him.

Revocation of proposals and acceptances. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustrations

A proposes, by a letter sent by post, to sell his house to B. B accepts the proposal by a letter sent by post. A may revoke his proposal at any time before or at the moment B posts his letter of acceptance, but not afterwards.

whereby any agreement concerning surrogacy would not be enforceable.<sup>11</sup> Second, the Pakistan Penal Code 1860 ('PPC') should be amended to include the definition of surrogacy.<sup>12</sup> It should be declared an offense punishable with imprisonment and fine for the couple, the individual who arranges such a procedure, the surrogate, and the doctor who conducts the procedure. Third, the PPC should be amended to prescribe punishment for doctors who maintain an egg and/or a sperm bank to be used in the future.<sup>13</sup>

The judgment reflects the current discourse with regards to third party assisted reproduction amongst Sunni scholars. This is reflected in the concurring opinion of Justice Allama Fida Muhammad Khan, who – in support of his arguments – cites the resolution of the Islamic Fiqah Academy, Jedda, wherein the interference of a third party in assisted reproduction was prohibited. However, the strict interpretation of the injunctions of the Qur'an and Sunnah has led to illogical underpinnings within Pakistani law that the FSC has not effectively addressed. In the following paragraphs, I analyze the various arguments of the FSC from this lens.

### ***Emotional Attachment of the Surrogate***

Here, the FSC presumes that once the child is born, the surrogate would not have the right to the child and would suffer from emotional detachment. This can be substantiated by rising awareness in India of women who have become surrogates for financial consideration in order to escape poverty.<sup>14</sup> But, because they signed the surrogacy contract, the child is taken from them as soon as s/he is born. Rising awareness of this sort of exploitation has triggered a debate about assisted reproduction regulations.<sup>15</sup>

Law in other jurisdictions is also not entirely ignorant of these concerns. In the United Kingdom, the surrogate mother is considered to be the legal mother.<sup>16</sup> According to Human Fertilization and Embryology Act

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B may revoke his acceptance as any time before or at the moment when the letter communicating it reaches A, but not afterwards.'

<sup>11</sup> (n 2) [33].

<sup>12</sup> Ibid, [34].

<sup>13</sup> Ibid.

<sup>14</sup> Geeta Pandey, 'India surrogate mothers talk of pain of giving up baby' (*BBC News*, 15 August 2016) <<http://www.bbc.com/news/world-asia-india-37050249>> accessed 7 April 2017.

<sup>15</sup> BBC News, 'India unveils plans to ban surrogacy' (*BBC News*, 25 August 2016) <<http://www.bbc.com/news/world-asia-india-37182197>> accessed 7 April 2017.

<sup>16</sup> Human Fertilisation and Embryology Act 2008, s. 33:

2008, the second parent of the child will be either the husband of the mother or, in case she is in a same-sex relationship, the mother's wife or civil partner.<sup>17</sup> The English courts do not enforce surrogacy agreements. If, for example, the intended parents refuse to make the payment for general expenses to the surrogate or if the legal mother refuses to give the custody of the child to the intended parents as per the contract, the courts will not enforce such contracts. The reasoning of the FSC is similar; however, while the FSC uses possible emotional attachment by the surrogate as a disqualification for the third party assisted reproduction, the English courts have responded with the welfare principle.<sup>18</sup> The welfare principle is used to decide the living situation of the child with the paramount focus being upon its wellbeing.<sup>19</sup> In the United States, there is a well-known case – *In Re Baby*

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Meaning of 'mother'

'(1)The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.

(2) Subsection (1) does not apply to any child to the extent that the child is treated by virtue of adoption as not being the woman's child.

(3) Subsection (1) applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs.'

<sup>17</sup> Human Fertilisation and Embryology Act 2008, s. 35:

'Woman married to a man at time of treatment

(1) If—

(a) at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination, W was a party to a marriage with a man, and

(b) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage, then, subject to section 38(2) to (4), the other party to the marriage is to be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her artificial insemination (as the case may be).

(2) This section applies whether W was in the United Kingdom or elsewhere at the time mentioned in subsection (1)(a).'

Human Fertilization and Embryology Act 2008, s. 42:

'Woman in civil partnership or marriage to a woman at time of treatment

(1) If at the time of the placing in her of the embryo or the sperm and eggs or of her artificial insemination, W was a party to a civil partnership or a marriage with another woman, then subject to section 45(2) to (4), the other party to the civil partnership or marriage is to be treated as a parent of the child unless it is shown that she did not consent to the placing in W of the embryo or the sperm and eggs or to her artificial insemination (as the case may be).

(2) This section applies whether W was in the United Kingdom or elsewhere at the time mentioned in subsection (1).'

<sup>18</sup> 'Surrogacy' (*Alternative Family Law*) <<http://www.alternativefamilylaw.co.uk/children/surrogacy/>> accessed 4 April 2017.

<sup>19</sup> 'Parental Rights & Child Welfare' (*Alternative Family Law*) <<http://www.alternativefamilylaw.co.uk/children/parental-rights-child-welfare/>> accessed 4 April 2017.

*M* of 1988.<sup>20</sup> The facts here are remarkably similar to those of the *Siddiqui*<sup>21</sup> case. William Stern and his wife entered into a surrogacy contract with Mary Beth Whitehead. Under this contract, Ms. Whitehead agreed to bear their child and then give it up for adoption to the biological father (Mr. Stern) and his wife. In consideration, Ms. Whitehead would receive \$10,000. After the birth of the child, Ms. Whitehead developed emotional attachment for the child and sought custody. The Supreme Court of New Jersey declared the surrogacy contract to be unenforceable as it violated statutory law and public policy. Payment of financial consideration was held to be degrading to women and, as a consequence, the agreement to terminate the parental rights of Ms. Whitehead was void. However, custody was decided on the basis of the best interest of the child. Mr. Stern was granted custody as the biological father while Ms. Whitehead was allowed visitation rights.

The Pakistani courts have employed the welfare principle consistently as well. In *Iram Shahzad v Additional District Judge*, the Lahore High Court held that the welfare of the child has paramount significance for the court.<sup>22</sup> This principle of welfare of child has also been held by the Supreme Court of Pakistan to take precedence over any agreement between parties with regards to custody.<sup>23</sup> In *Feroze Begum v. Lt. Col. Muhammad Hussain*, the Supreme Court defined the welfare of the child to include the financial, moral, spiritual, and intellectual health of the child.<sup>24</sup> This principle can be developed to incorporate the nuances of third party assisted reproduction. The FSC has taken steps towards such a development in *Mrs Ambreen Tariq Awan v Federal Government of Pakistan* wherein it was held that since the Qur'an and Sunnah have not provided comprehensive rules regarding the appointment and removal of guardians, the government may make rules as to how this is to be done.<sup>25</sup>

In the *Siddiqui* case,<sup>26</sup> the FSC held surrogacy and other types of third party assisted reproduction to be contrary to the injunctions of Islam. In order to reach this conclusion, the FSC referred to several verses from the Qur'an.<sup>27</sup> However, these injunctions do not expressly refer to third party

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<sup>20</sup> *In Re Baby M* 109 N.J. 396 (1988).

<sup>21</sup> (n 2).

<sup>22</sup> PLD 2011 Lahore 362.

<sup>23</sup> PLD 2002 SC 267.

<sup>24</sup> 1983 SCMR 606.

<sup>25</sup> 2013 MLD 1885 [FSC].

<sup>26</sup> (n 2).

<sup>27</sup> The Qur'an 4:24:

assisted reproduction. Shi‘ite scholars have found a way around this conundrum by considering the admission of an embryo into the surrogate’s womb to be different from sperm and, as a consequence, the surrogate is contextualized as a milk mother.<sup>28</sup> The egg donor is considered to be the actual mother for inheritance purposes. This view is based on the jurisprudential principle of *isaliat-ol-ibaha* under which everything is permissible unless expressly stated otherwise in the Qur’an and Sunnah. This reasoning is not entirely foreign to Sunni jurists. Surrogacy was accepted in 1984 by the Fatwa of the Fiqh Council where the father (sperm donor) had to be married to the egg donor as well as the surrogate.<sup>29</sup> However, this allowance was withdrawn in the next year.

The groundwork for third party assisted reproduction has already been set by the Pakistani courts through the welfare of child principle in *Ambreen Tariq Awan v Federal Government of Pakistan*.<sup>30</sup> The welfare of the child is paramount and this can allow the child to be placed under the custody of the biological mother (egg donor), biological father (sperm donor), or the surrogate. Granting custody to a non-relative is not entirely foreign concept as seen in *Bashir Ahmad v Incharge (Female) Darulman, District Mianwali*.<sup>31</sup> In this case, a non-relative was granted the custody of the child as he was the *de facto* guardian and the mother could not effectively provide for the child.

### ***Exploitation from Developed Countries***

The FSC argues that third party assisted reproduction should be banned because it may result in the exploitation of women by foreign nationals from

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‘But it is lawful for you to seek out all women except these, offering them your wealth and the protection of wedlock rather than using them for the unfettered satisfaction of lust’.

The Qur’an 23:5-7:

‘Who strictly guard their private parts save from their wives, or those whom their right hands possess; for with regard to them they are free from blame – As for those who seek beyond that, they are transgressors –’

The Qur’an 2:223:

‘Your wives are your tilth; go, then, into your tilth as you wish but take heed of your ultimate future and avoid incurring the wrath of Allah. Know well that one Day you shall face Him. Announce good tidings to the believers’.

<sup>28</sup> Kiarash Aramesh, ‘Iran’s Experience with Surrogate Motherhood: An Islamic View and Ethical Concerns’ (2009) 35 (5) *Journal of Medical Ethics* 320.

<sup>29</sup> Bagher Larijani and Farzenah Zahedi, ‘Ethical and Religious Aspects of Gamete and Embryo Donation and Legislation in Iran’ (2007) 46(3) *Journal of Religion and Health* 399.

<sup>30</sup> 2013 MLD 1885 [FSC].

<sup>31</sup> 2011 SCMR 1329.

developed nations. These concerns are not baseless. A similar controversy is currently raging in India. In April 2015, news reports emerged of an Australian couple who left a baby boy born through surrogacy in India.<sup>32</sup> The surrogate had given birth to twins but the couple returned to Australia with one baby as they could not afford to care for both children. News reports have also shown that neither the surrogates are given enough time to read the surrogacy contract,<sup>33</sup> nor are they allowed to see the children they have borne.<sup>34</sup> Furthermore, financial consideration for the surrogates is decreased if they exceed their stay in the hospital or if the birth is premature.<sup>35</sup> Indian government has recently stated in the affidavit submitted before the Supreme Court of India that the government does not support commercial surrogacy.<sup>36</sup> Under the Assisted Reproductive Technology (ART) Regulation Bill 2014, the Indian government proposed to make it illegal for foreign nationals to enter into a contract for commercial surrogacy.<sup>37</sup> The United Kingdom, on the other hand, has set a more firm ban. Commercial surrogacy, for both its own citizens and foreign nationals, is not allowed.<sup>38</sup> As a consequence, only

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<sup>32</sup> Samantha Hawley, Suzanne Smith and Micheal Mckinnion, 'India surrogacy case: Documents show New South Wales couple abandoned baby boy despite warnings' (*ABC News*, 13 April 2015) <<http://www.abc.net.au/news/2015-04-13/australian-couple-abandon-baby-boy-in-india-surrogacy-case/6387206>> accessed 6 April 2017.

<sup>33</sup> Abby Rabinowitz, 'The Trouble with Renting a Womb' (*The Guardian*, 28 April 2016) <<https://www.theguardian.com/lifeandstyle/2016/apr/28/paying-for-baby-trouble-with-renting-womb-india>> accessed 6 April 2017.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> 'No commercial surrogacy, only for needy Indian couples, Govt tells SC' (*The Indian Express*, 6 March 2017) <<http://indianexpress.com/article/india/india-news-india/govt-to-make-commercial-surrogacy-illegal-panel-to-decide-on-cases-of-infertile-couples/>> accessed 6 April 2017.

<sup>37</sup> Ibid.

<sup>38</sup> Surrogacy Arrangements Act 198, s. 2:

2. Negotiating surrogacy arrangements on a commercial basis, etc.

(1) No person shall on a commercial basis do any of the following acts in the United Kingdom, that is—

(a) initiate any negotiations with a view to the making of a surrogacy arrangement, (a ) take part in any negotiations with a view to the making of a surrogacy arrangement,

(b) offer or agree to negotiate the making of a surrogacy arrangement, or

(c) compile any information with a view to its use in making, or negotiating the making of, surrogacy arrangements;

and no person shall in the United Kingdom knowingly cause another to do any of those acts on a commercial basis.

(2) A person who contravenes subsection (1) above is guilty of an offence; but it is not a contravention of that subsection—

(a) for a woman, with a view to becoming a surrogate mother herself, to do any act mentioned in that subsection or to cause such an act to be done, or

surrogacy for altruistic purposes is sanctioned by law. Hence, it is not altogether necessary to ban surrogacy in order to avoid exploitation of women in Pakistan. Improved regulation can weigh the needs and requirements of donors with those of the intended parents more effectively as technological developments allow individuals to take advantage of the solutions that were not previously available.

In 2015, the Council of Islamic Ideology ('CII') of Pakistan declared the act of renting a womb (i.e. surrogacy) to be against Islam.<sup>39</sup> CII is not alone in this view. Judith C. Areen has also argued against commercial surrogacy – albeit on a different basis. She points out that the objective of contract law and family law is different.<sup>40</sup> Contract law is a representation of the market place where self-interested behavior is not only acceptable but also is assumed to benefit society. This is in contrast with familial relationships which are built upon providing care as well as self-satisfaction. The surrogacy contracts, as seen from the cases of child abandonment by intended parents, have led to the commodification of the child as a product where the buyer has the right to abandon 'damaged goods'. This is coupled with the fact that the surrogate and the intended parents' experiences with the developing fetus would be entirely different. Areen proceeds to argue that the surrogacy contracts should be denied recognition as otherwise it would lead to exploitation of economically vulnerable women. For this, she recommends that the surrogacy contracts be given no recognition by the courts. Hence, only surrogates who are motivated by altruistic motives would participate in such a venture.

Moreover, the FSC has proposed certain steps such as the non-enforceability of surrogate contract, criminalizing the maintenance of a sperm/egg bank, and the act of arranging such an agreement. Furthermore, the FSC has suggested additional measures of imprisonment and a fine for the intended parents as well as the surrogate engaging in third party assisted reproduction. According to Areen, this would be going a step too far as it would interfere with 'private reproductive conduct'. This may be so in English and American law where the reproductive conduct is usually kept out of the purview of the state. This is not so in Pakistan. Under the the Offence of Zina (Enforcement of Hudood) Ordinance 1979, any sexual

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(b) for any person, with a view to a surrogate mother carrying a child for him, to do such an act or to cause such an act to be done.

<sup>39</sup> Malik Asad, 'As CII terms surrogacy un-Islamic, man goes to Shariat court' (*Dawn*, 16 November 2015) <<https://www.dawn.com/news/1220009>> accessed 9 August 2017.

<sup>40</sup> Judith C. Areen, 'Baby M Reconsidered' (1988) *Georgetown Law Faculty Publications and Other Works* 1439.

contact outside marriage is unlawful and, hence, such conduct comes within the purview of the state. This instead emphasizes the danger of equating sexual contact with surrogacy where the embryo has been transferred into the surrogate in a lab setting; the *mens rea* and *actus rea* for the act of *zina* is not present.

### ***Destruction of Inheritance Laws***

In the judgment, the FSC presumes that the confusion over the lineage would cause destruction of the inheritance laws.<sup>41</sup> However, it is uncertain as to how this would be so. According to Article 128 of the Qanun-e-Shahadat Order 1984, if a child is born after six months into a marriage and before the end of two years after the dissolution of marriage then it will be presumed that the child resulted from the marriage.<sup>42</sup> This provides a perspective for sperm donation. The child given birth to by the wife will be presumed to be of the husband unless the husband himself denies the paternity. However, even then, according to *Ghazala Tehsin Zohra v Mehr Ghulam Dastagir Khan*, paternity has to be denied within 40 days of the birth of the child.<sup>43</sup> In this context, the child would be able to inherit from the intended father and the biological mother in cases of sperm donation.

Furthermore, even if the husband chooses to exercise his right to divorce through *li'an*,<sup>44</sup> the child under Sunni inheritance law would be

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<sup>41</sup> (n 2) [22].

<sup>42</sup> Qanun-e-Shahadat Order 1984, art. 128:

Birth during marriage conclusive proof of legitimacy:

(1) The fact that any person was born during the continuance of a valid marriage between his mother and any man and not earlier than the expiration of six lunar months from the date of the marriage, or within two years after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate child of that man, unless—

(a) the husband had refused, or refuses, to own the child; or

(b) the child was born after the expiration of six lunar months from the date on which the woman had accepted that the period of *iddat* had come to an end.

(2) Nothing contained in clause (1) shall apply to a non-Muslim if it is inconsistent with his faith.

<sup>43</sup> 2015 SC 327.

<sup>44</sup> Divorce by *li'an* is where the husband accuses the wife of committing adultery and is unable to produce witnesses. The husband swears an oath four times regarding the truthfulness of his accusation. He then swears a fifth oath where he invites God's wrath upon him if he is lying. This is then followed by the wife swearing an oath four times in which she proclaims her innocence. She then takes the fifth oath where she invites God's wrath upon herself if her husband's accusation is true. Upon taking of this oath, the wife is divorced from the husband. The husband, on the other hand, gives up any right to paternity over any children born after the oaths taken. John L. Esposito (ed.) 'Lian' (*The Oxford*

attributed to the mother. In this case, Sunni schools recognize the right of inheritance of the illegitimate child from the mother and the child's maternal relatives. In surrogacy cases, presuming that the egg donor and the sperm donor are married, the child would inherit from both of his biological parents. This was even noted so by the FSC in the surrogacy judgment that the child belongs to the sperm donor and to the egg donor.<sup>45</sup> Under Islamic law, a person cannot claim to be a father of a child unless the child was produced from lawful intercourse.<sup>46</sup> Jurists apply the principle that the male adulterer should not benefit from his own acts and, as a result, he cannot be declared the legal father of the child. The illegitimate child belongs to the bed and would only be able to inherit from the mother.<sup>47</sup> It does appear quite unnecessary to punish the illegitimate child (or in this case, a child resulting from assisted reproduction) by depriving him/her of their inheritance simply because of the acts committed by their parents. But even so, it should be noted that assisted reproduction through non-traditional methods does not lead to an act of *zina* (unlawful sexual intercourse).<sup>48</sup> This leads to a question as why a biological father should not be allowed to claim the paternity of the child if his contribution was a sperm donation in a lab setting. The act of sexual intercourse has not occurred nor is the intent present.

This also brings one to the principle of acknowledgment. In *Asma Naz v Muhammad Younas Qureshi*, the Supreme Court held that the child can be granted legitimacy and paternity through acknowledgment.<sup>49</sup> The court provided an understanding of the distinction between adoption and acknowledgment. Adoption occurs when the line of ancestors of the child is not hampered with. In contrast, acknowledgment occurs when a child of unknown paternity is integrated into the family as if s/he was born through a legitimate wedlock. Under this principle, the law of inheritance would apply as it applies to a legitimate child. This principle of acknowledgment can be developed for the use of intended parents in the circumstance of a child

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*Dictionary of Islam*) <<http://www.oxfordislamicstudies.com/article/opr/t125/e1345>> accessed 2 October 2017.

<sup>45</sup> (n 2) [16].

<sup>46</sup> Daniel Pollock, Moshe Bleich, Charles J. Reid and Mohammad H. Fadel, 'Classical Religious Perspectives of Adoption Law' (2004) 79 (2) *Notre Dame Law Review* 732 <<http://scholarship.law.nd.edu/ndlr/vol79/iss2/5>> accessed 6 April 2017.

<sup>47</sup> PLD 2015 SC 327.

<sup>48</sup> The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979, s. 4:

'A man and a woman are said to commit 'Zina' if they wilfully have sexual intercourse without being married to each other.

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of Zina.'

<sup>49</sup> 2005 SCMR 401.

resulting from third party assisted reproduction in order to integrate the child into the family. A child born from third party assisted reproduction would be claimed by the intended parents as long as there is no objection by the biological parent(s). Confusion over the lineage would not lead to the destruction of the inheritance laws. Against this backdrop, the principle of acknowledgment already provides a mechanism within the Pakistani case law as to how to avert discrimination in inheritance law when it comes to non-legitimate children.

### **Shi'ite Discourse on Third Party Assisted Reproduction**

The various interpretations of the Sunni Schools have remained remarkably tame and unwilling to ignite any controversy. The first birth from IVF was in 1978.<sup>50</sup> In 1980, the Grand Sheikh of the reputed Al-Azhar University of Egypt issued a *fatwa* declaring IVF to be permissible as long as the egg and sperm of the fertilized embryo was of a husband and wife.<sup>51</sup> No third party could infringe upon the sexual relation and procreation within the marriage contract.<sup>52</sup> This reasoning appeared to have its basis in protection of sanctity of life,<sup>53</sup> to restrict conception outside marriage,<sup>54</sup> to prevent confusion of family lineage,<sup>55</sup> to check the mixture of genealogy,<sup>56</sup> and to stop the equation of the status of motherhood to the gestational surrogate.<sup>57</sup> Since then, this particular *fatwa* has obtained widespread acceptance from Sunni jurists. The Fatwa Council of Malaysia approved the use of frozen embryos in 1982 but only where the couple in question was married.<sup>58</sup> At the same time, it denounced pregnancy through preserved sperm or embryo after the marriage had ended either through divorce or death. Similar view was reflected in Saudi Arabia at 1985 when Fiqh Academy of Makkah decreed that *vivo* (within the body) and *vitro* (outside the body) fertilization to be allowed by the Sharia.<sup>59</sup> But, again, this acceptance did not extend to the third party assisted fertilization. Furthermore, the Fiqh Academy of Makkah opined that assisted reproduction should only be used in cases of necessity

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<sup>50</sup> Marcia C. Inhorn, 'Fatwas and ARTs: IVF and Gamete Donation in Sunni v. Shi'a Islam' (2005) 9 *The Journal of Gender, Race & Justice* 291.

<sup>51</sup> *Ibid.*

<sup>52</sup> Marcia C. Inhorn, "'He Won't Be My Son': Middle Eastern Muslim Men's Discourses of Adoption and Gamete Donation' (2006) 20 (1) *Medical Anthropology Quarterly* 94-120.

<sup>53</sup> The Qur'an, 17:33.

<sup>54</sup> The Qur'an, 24:54.

<sup>55</sup> The Qur'an, 33:4-5, 25:54.

<sup>56</sup> The Qur'an, 33:4-5, 25:54.

<sup>57</sup> The Qur'an, 58:2.

<sup>58</sup> Dariusch Atighetchi, *Islamic Bioethics: Problems and Perspectives* (Springer 2007) 142.

<sup>59</sup> *Ibid.*, 143.

due to possibility of error. The stance adopted by the Sunni Scholars has prioritized lineage above all else. The basis of this reasoning appears to be that third party assisted reproduction would cause confusion as to the lineage of the child, which could result in problems regarding kinship, inheritance, and can possibly lead to incestuous relationships due to anonymity of donors.

The vast majority of Muslim countries have either followed the Sunni school of thought or have remained unclear regarding their own position. There are two exceptions, i.e., Iran and Lebanon. Both of these countries have a comparatively larger Shi'a population, which has resulted in an alternate discourse.

### *Iran*

The Shi'a and Sunni positions on third party assisted reproduction were indistinguishable until 1999. In 1999, Ayotollah Khamene'i, the Supreme Leader of Islamic Republic of Iran, issued a *fatwa* allowing egg and sperm donation to be permissible.<sup>60</sup> He did not consider third party assisted reproduction to constitute *zina* as the element of sexual intercourse was not present. The child would be legitimate and his/her legal relations would be the egg and the sperm donor. The child would not inherit from the intended parents. The male child would also become *na-mehrum* to the intended mother upon reaching puberty. It should be noted that the child being a *mehrum* to his intended mother due to her 'milk-mother' status was not considered by Ayotollah Khamene'i. This *fatwa* was considered to be quite liberal and his critics seem to be of the opinion that he was creating a movement of his own.<sup>61</sup> While Ayotollah Khamene'i's *fatwa* was impactful, the denial of third party sperm donation among Shi'ite scholars has since become prevalent. Ayotollah Yusef Madani-Tabrizi (1928-2013) was of the opinion that it was not permissible to artificially inseminate a woman with the sperm of a man who was not her husband.<sup>62</sup> This would be so even if she or her husband had given the permission. However, even Ayotollah Yusef Sane'i did not consider sperm donation by a stranger to be permissible.<sup>63</sup> He did follow the reasoning of Ayotollah Khamene'i and Ayotollah Madani-Tabrizi that the child belonged to the sperm and egg donor. However, from this point he diverged. He held that the sperm donor could only be considered the father if he was recognizable and not if he has given up his

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<sup>60</sup> (n 50).

<sup>61</sup> Morgan Clarke, 'Children of the Revolution: 'Ali Khamene'i's 'Liberal' Views on in vitro Fertilization' (2007) 34 (3) *British Journal of Middle Eastern Studies* 287.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

ownership by giving his sperm to the sperm bank. The intended father's relationship with the child was that of a stepfather, and the former could be *mehrum* to the latter if the intended father had engaged in intercourse with the mother. By implication, he allowed artificial insemination if the egg is fertilized *in vitro*, i.e. outside the body and within the lab setting where an embryo is created and transferred into the woman's body.

Identification of the egg donor and sperm donor as the legal parents of the child implies that the surrogate would not have a right to the child. Grand Ayatollah Hossein Ali Montazeri declared gestational surrogacy to be permissible as long as the surrogate was unmarried.<sup>64</sup> The surrogate mother was equated to a milk-mother, and as pointed out by K. Aramesh, this reasoning reflected the jurisprudential principle of *isaliat-ol-ibaha* where everything is considered permissible unless explicitly declared forbidden by the Qur'an and/or the Sunnah.<sup>65</sup> It should be noted that the issue of being a non-*mehrum* may not arise specifically in Iran which passed the Protecting Unprotected Children Act 1975 in order to allow legal adoption of a child by a family.<sup>66</sup> Under this Act, the family would at the very least need to constitute a husband and a wife who have been together for at least five years. This shows that the welfare of the child and happiness of the married couple has been prioritized above the presumed illicitness of a non-*mehrum* raising the child.

Following Ayatollah Khamene'i's *fatwa* regarding the permissibility of IVF, the Iranian Parliament passed a bill in 2002, allowing sterile married couples to take advantage of third party assisted reproduction. However, the bill was not approved by the Guardian Council that supervises legislation's conformity with the Islamic principles. In 2003, the Embryo Donation to Infertile Couples Act 2003 was passed.<sup>67</sup> The Act allowed egg donation under the arrangement of *mut'a*. *Mut'a* is a temporary marriage contract between an unmarried woman and a married or unmarried man for a specific time period and in return for some financial provision. Under this Act, the husband would have to enter into a *mut'a* agreement for the entire period of the procedure with the egg donor. This would then avoid the implications of *zina*. Under this reasoning, sperm donation was not allowed. While

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<sup>64</sup> (n 28).

<sup>65</sup> Ibid.

<sup>66</sup> MJ Abbasi-Shavazi, 'The "Iranian ART Revolution": Infertility, Assisted Reproductive Technology, and Third-Party Donation in the Islamic Republic of Iran' (2008) 4 (2) *Journal of Middle East Women's Studies* 1-28.

<sup>67</sup> Bagher Larijani and Farzenah Zahedi, 'Ethical and Religious Aspects of Gamete and Embryo Donation and Legislation in Iran' (2007) 46 (3) *Journal of Religion and Health* 399.

polygamy is allowed in Islam and in Iran, polyandry is not; hence, the wife cannot contract a *mut'a* agreement with another man in order to take advantage of sperm donation. Furthermore, sperm donation has been marred with controversy as it would call into question the paternity of the child. This Act made embryo donation permissible as long as the donation was from one married couple to another. However, this appears to be in contradiction with the reasoning for allowing egg donation and for disallowing sperm donation. As pointed out by Abbasi-Sharvazi et al., in embryo donation, the paternity of the father is still disrupted and does cause the acceptance by the woman of the foreign sperm when the embryo is transferred into her.<sup>68</sup> These points in contention do not appear to have been considered by the relevant authorities while passing the legislation. Since then, legal loopholes have been employed in Iran to bypass certain limitations upon third party assisted reproduction. The lack of effective enforcement coupled with discrepancy between religious rulings has created 'legal-moral-medical ambiguities'.<sup>69</sup> According to Tremayne, women for the purpose of being morally correct and to take advantage of sperm donation facilities at the same time, divorce their infertile husbands before going through the artificial insemination procedure and then upon expiration of the *iddat* period, they remarry their previous spouse.<sup>70</sup> The plurality of juristic opinions coupled with the legislature's high regard for the success of marriage over clear lineage lines has led to availability of third party ART in Iran. Any restriction imposed by legislation upon third party assisted reproduction has been carefully circumvented.

### ***Lebanon***

The stance in Lebanon on the third party assisted reproduction is the same as in Iran. Grand Ayotollah Fadhallah of Lebanon declared egg donation to be permissible as long as it took place within the *mut'a* arrangement.<sup>71</sup> However, he does not allow sperm donation. He argues that there is no formal institution regarding adoption in Islam which would give the position of intended father any validity. The intended father would be *na-mehrum* to the female child. Furthermore, the child would have a legal relationship with

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<sup>68</sup> Mohammad Jalal Abbasi-Shavazi, Marcia C. Inhorn, Hajiieh Bibi Razeghi-Nasrabad and Ghasem Toloo, 'The "Iranian ART Revolution": Infertility, Assisted Reproductive Technology, and Third-Party Donation in the Islamic Republic of Iran' (2008) 4 (2) *Journal of Middle Eastern Woman's Studies* 1.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Morgan Clarke, 'New Kinship, Islam, and the Liberal Tradition: Sexual Morality and New Reproductive Technology in Lebanon' (2008) 14 (2) *The Journal of Royal Anthropological Institute* 153.

the biological donor and this can pose as a contradiction for the infertile parents when having children of their own. While majority of the Lebanese Shi'ite Muslims have followed the lead of Ayotollah Fadhallah, the political party of Hizbullah has also commanded a great deal of social and religious influence within the region. Hizbullah has followed the direction of Ayotollah Khamene'i of Iran, and, as previously noted, he issued a *fatwa* in 1999 in which he held egg donation, sperm donation, and gestational surrogacy to be permissible. Even more so, he did not consider the *mut'a* arrangement to be necessary. This has allowed two interpretations of third party assisted reproduction to exist simultaneously in Lebanon. The Lebanese Parliament, unlike Iran, has not passed any legislation that would admit a particular *fatwa* into the realm of legal validity.<sup>72</sup> The plurality of juristic opinion and the lack of legislation has allowed the average Lebanese to take advantage of third party assisted reproduction without any restrictions.

### **Conclusion**

The FSC in *Farooq Siddiqui v Mst Farzana Naheed* has followed the traditional view of Sunni scholars who regard artificial insemination with the aid of an external donor contrary to the injunctions of the Qur'an and Sunnah. As a result, principles such as welfare of the child and acknowledgment, developed by the Pakistani courts, have been sidelined. The FSC has declared third party assisted reproduction illegal on the grounds that it will lead to emotional attachment, exploitation of the surrogate mother, and destruction of inheritance laws. In the process, the FSC has not considered as to how different jurisdictions have tackled the same issues by considering the welfare of the child to be the paramount concern for the court. In order to avoid exploitation, the United Kingdom has refused to recognize surrogacy contracts while India has also considered banning gestational surrogacy where foreign nationals are concerned. As for destruction of inheritance law, it should be noted that the principle of acknowledgment has been used by the courts in Pakistan to integrate non-legitimate children into the family. Even otherwise, the child would still be able to inherit from the egg donor as an illegitimate child.

On the other hand, the plurality of opinions among Shi'a scholars is evidently visible ever since Ayotollah Khamene'i issued a *fatwa* in this regard. Since then, *muta* arrangement has been consistently relied upon which, as a consequence, precludes the option of sperm donation for a

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<sup>72</sup> (n 52).

married couple. One can observe a similar pattern in Lebanon. The FSC has prioritized the preservation of lineage over reproduction within a marriage and has suggested criminalization of the acts concerned with third party assisted reproduction. The extremity of the response appears to be somewhat unwarranted, given that in the Shi'ite school, no conclusive interpretation has been adopted with regards to third party assisted reproduction. Furthermore, to criminalize such acts would be to suggest illicitness where none exists as sexual intercourse outside of marriage has not occurred. Unfortunately, in the *Farooq Siddiqui* case, a strict interpretation has been followed and, as a result, the avenues available to those suffering with infertility have been restricted.