

## **Surrogacy in Pakistan: Legal Perspectives**

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In 2005, a married couple of Pakistani origin living abroad decided to enter into a surrogacy arrangement with a Pakistani woman. The husband, Farooq, came to Pakistan, presumably entered into a nikah (marriage) with a lady called Farzana, and through an IVF process started a chain of events which would lead to the first court-decided case of surrogacy in Pakistan.

As soon as the baby was born, Farzana left the child with Farooq. However, a few days later, she decided to recover the child and filed a case against Farooq under the Code of Criminal Procedure (CrPC) section 491 (recovery of detainee) and the court awarded her custody. Farooq then moved the local Bench of the High Court where he stated that he had a contract of surrogacy; he also relied on the Guardian and Wards Act, 1890 and petitioned the court to be awarded guardianship under section 25. In raising this petition, he stated that he was wealthier than Farzana, being a practicing doctor. However, the court was not satisfied that wealth alone could be a ground of custody and since Farooq had not admitted to a marriage with Farzana, it decided that there was no link between Farooq and the child. Therefore, on merits, the court allowed the child to stay in the custody of Farzana and also noted that surrogacy had no legal status in Pakistan.

Farooq appealed against this decision but in its Appeal Judgment (in November 2012), the High Court of Lahore upheld the two previous orders. In its reasoning the court stated that children belonged to “the bed” or conjugal relationship, and their custody rested with parents who admitted to having a marital contract with each other. Since Farooq denied that he was wedded to Farzana, he could not claim any rights over the child. However, as Farzana was undeniably the mother, she was the child's rightful guardian. Further, the Court once again underlined the null and void status of a surrogacy contract as the law of the land did not recognize surrogacy. This ended a seven year legal battle on the custody of the child. (P L D 2013 Lahore 254)

What this case has served to illustrate is that a contract, whereby a woman (whether as a biological donor or as purely a gestational parent) carries a child for another couple, would neither be recognized as legal nor be enforceable in Pakistan. In fact, Pakistan like many other countries does not have a legislative framework that regulates surrogacy. Consequently, a surrogacy arrangement would be ignored and the court would rely on the Guardian and Wards Act, 1890 to award custody to a fit parent.

The question that then arises is whether there is a possibility of creating a framework of laws related to surrogacy in Pakistan. In order to fully answer that question (in line with the constitutional principles requiring that no law may contravene the Quran and Sunnah) we would have to determine the position held on surrogacy by the majority of Islamic jurists which is

beyond the scope of this paper. However, what we can try and understand are the challenges that lawmakers may face should they try to develop such a framework.

The first challenge would be to determine who would be deemed the mother in a Court of Law. The question of fatherhood is not at stake as issues of surrogacy tend to revolve around the rights of the gestational/birth mother versus that of the couple in the arrangement. In the Quran it is stated in Surah al-Mujadalah (58:2) "...their mothers are only those who conceived them and gave birth to them." This clarifies that the mother will be deemed the woman who has given birth. Therefore, in cases where there are no questions of DNA, the surrogate mother would be the mother who physically carried and gave birth to the baby. However, in the case where the birth mother is separate from the donor egg mother and we do involve considerations of DNA, the above ayat (verse) does not provide a clear answer. It clearly stipulates that a mother is one that has both (a) conceived and (b) given birth. It does not address the situation of the conceiving mother being separate from the mother who gave birth. If the two are separate then either of them may be deemed a mother, a situation that may open a Pandora's Box of complexities: If either of them can be a mother, then can neither of them claim the right to motherhood?

The second challenge is that of the provisions of the Hudood Ordinance impacting the legitimacy of the arrangement. Surrogacy essentially involves questions that relate to the legitimacy of procreation outside a marriage contract. In absence of a marriage contract between a donor father and surrogate mother, the provision of Pakistan Penal Code dealing with zina (adultery) may also come in to play. In the case of Farooq vs Farzana, the honorable Judge stated that the child belongs to "the bed" and absent a lawful marriage, a question of adultery could have been brought into this equation. Given the legal history of Pakistan, it would be challenging to establish the absence of coitus if someone outside the arrangement did in fact make an accusation. On the other hand, if a marriage contract does exist then the very concept of a surrogacy contract becomes irrelevant. The laws on marriage, its dissolution and the guardianship laws adequately provide for the custody of minors coming from a marriage.

The third, and I believe, the most significant challenge, is one that deals with the legitimacy of a surrogacy contract itself that is, a contract which would allow a woman to rent out her uterus. If a legislative framework is created that regulates a surrogacy relationship, can it be enforceable, and under what terms?

Surrogacy contracts, in countries where they are recognized, are often divided between commercial and altruistic. In Pakistan, the idea of a surrogacy contract on a commercial basis may be considered illegal because it would mean that the subject of the contract is a uterus. It may open up questions about the right of a person to rent out parts of their body and it may lead to exploitation, specifically in a country like Pakistan where there is a large economic divide and a history of bonded labor. Further, it would require a deeper analysis of an individual's right to rent out a body. Is it like providing manual labor? Or could it be equated to a form of prostitution?

Altruistic surrogacy, however, has a different basis from commercial surrogacy and one may imagine a situation where it may be considered legal in Pakistan. However, Pakistani courts do not always have the ability to gauge the true intentions of parties and it would be difficult to establish that a surrogacy contract was indeed altruistic unless a relative has been a surrogate parent. We may draw an analogy to the Human Organ and Transplant Donation Ordinance of 2007 which prohibited all forms of commercial donation and only allows filial proximity for live donors.

Even in UK, where surrogacy is regulated, a surrogacy contract is unenforceable. This means that it is legal but should the surrogate mother decide to violate the contract, the other party would not be able to enforce it. In Pakistan, taking all the discussed factors into account, it seems that we will not be developing surrogacy laws anytime soon and any arrangement of this nature would have to be essentially a private one which would be legally unenforceable and would depend on the trust all parties have on each other. Further, it would need the added protection of legalizing instruments, such as a lawful marriage, which could create its own complications.

References:

<http://en.wikipedia.org/wiki/Surrogacy>

<http://www.ilmgate.org/the-islamic-ruling-on-surrogate-motherhood/>

P L D 2013 Lahore 254

Guardians and Wards Act, 1890

Pakistan Penal Code, 1860

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