

Surrogacy in Pakistan: Call for Positive Legislation

Aimen Akhtar*

Abstract

The advances in medical science have propelled infertile couples to use modern assisted reproductive techniques such as surrogacy, which allows them to reproduce a child through a third party i.e. the surrogate mother. It gives hope to those infertile couples who are socially stigmatised and bear psychological and emotional consequences. In Pakistan, however, this hope is coupled with some challenges. The Federal Shariat Court ('FSC') refused to acknowledge the validity of third-party surrogacy in its 2017 judgment. This paper highlights the implications of this judgment such as the abuse of rights of various parties involved in a surrogacy arrangement, particularly the surrogate mother and the surrogate child. It calls for legal reforms for the protection of these weaker parties by assessing the legality of surrogacy and comparing its regulation in another Islamic jurisdiction such as Iran.

Keywords: Third-party surrogacy, surrogate mother, surrogate child, intending/commissioning parents, Iran, regulation of surrogacy

Introduction

This paper conducts an in-depth analysis of surrogacy in the Islamic Republic of Iran and argues for regulation of surrogacy in the Islamic Republic of Pakistan. Invalidating surrogacy does not only accentuate the menace of infertility by posing a considerable risk of psychological and social consequences among infertile couples, but also, it is against the fundamental and reproductive rights of the relevant parties. Religious arguments are often employed to highlight the negative aspects of surrogacy. However, this paper applies religious arguments to illuminate the positive dimensions of surrogacy for its legalisation in Pakistan. By liberally interpreting religious texts, Iran has made positive reforms for regulating surrogacy. Iran has used religious authorities and legislative instruments in facilitating hopeless infertile couples to make use of medical advances for surrogacy, and to create greater social acceptance in the society.

* B.A. LL. B (Hons) Lahore University of Management Sciences (LUMS).

The paper underlines the negative consequences of invalidation of surrogacy which results in the violation of fundamental human rights of an infertile couple, the surrogate mother, and the resulting surrogate child. It also recommends a balanced approach for the preservation and protection of family, which mitigates the harmful consequences of surrogacy and promotes its regulation through the contours of religion, and human rights.

This paper consists of four parts. Part I analyses the recent judgment passed by the FSC which recommends criminalisation of third-party surrogacy arrangements in Pakistan by referring to a number of legal, ethical and religious controversies regarding surrogacy. Part II examines the impact of this judgment on the rights of the surrogate woman and the surrogate child who are vulnerable during the entire process of surrogacy. Surrogacy influences not only the surrogate mother and the surrogate child, but also impacts the infertile intending parents who want to avail the benefits of this process. It is argued that the FSC judgment does not comply with the constitutional principles and international obligations of Pakistan including treaties such as the United Nations Convention on the Rights of Child ('Convention'). To propose positive regulation of surrogacy in Pakistan, Part III evaluates the legalisation of surrogacy in another Islamic jurisdiction such as Iran where the surrogacy arrangements are regulated to protect the interests of each party involved. It appreciates the jurisprudential contribution of Iranian scholars who have reconciled their religious opinions with the advancement of medical science. The last Part attempts to reconcile the religious objections to surrogacy. It proposes recommendations, and stresses upon the need to regulate surrogacy in Pakistan by balancing out the legal rights of the parties and legitimate demands of the State and society.

Part 1: The Invalidity of Surrogacy in Pakistan

Surrogacy may be defined as a method to reproduce a child through medically assisted reproductive techniques for the benefit of commissioning parents. There are two types of surrogacy: first, traditional surrogacy where the surrogate mother's own egg is artificially inseminated with the sperm of the intended father; second, gestational surrogacy where the embryo, grown out of egg and sperm of intending parents, is transferred to the womb of a surrogate mother, who acts as a carrier for the surrogate child. In traditional surrogacy, the surrogate mother is genetically related to the child; in gestational

surrogacy, however, there is no genetical relation of the resulting child with the surrogate mother. Surrogacy may be carried out for commercial or altruistic purposes. Women usually undergo surrogacy arrangements due to certain medical problems such as an absent uterus, recurrent miscarriages, repeated failure of *in vitro* fertilization (“IVF”), etc.¹

In Pakistan, surrogacy is considered against the injunctions of Islam as laid down in the Qur’an and the Sunnah. The FSC has declared a surrogacy contract as invalid. In *Farooq Siddiqui v Farzana Naheed*,² the FSC analysed different categories of surrogacy. In the first category, the sperm does not belong to the intended father. In such cases, the child would belong to the person from whom the sperm is obtained. The FSC declared this arrangement as illegal. However, in the second category, the test tube arrangement, where the sperm and egg have been obtained from the duly wedded couple and the embryo is then placed in the womb of the wife, was held legal by the FSC. All other cases of surrogacy arrangements, where a surrogate mother is hired by a commissioning couple for some monetary compensation, were held to be against the Islamic injunctions and thus, illegal.

The FSC held that where a woman is arranged as a surrogate mother, it involves social and ethical dilemmas because it exploits poor women who bear the physical and emotional pain of giving birth to a child. The Court observed that monetary compensation involved in surrogacy reduces surrogate mothers to emotionless machines. Viewing it from an Islamic point of view, the Court observed it as a threat to the institution of family and the kinship system due to the interference of a third-party in this process. The Court observed that surrogacy gives rise to innumerable legal problems regarding maternity and paternity of the child, the relationship between the actual children of surrogate mother and the surrogate child, and the inheritance rights of the surrogate child.³ The Court also noted the issue of the refusal of the intending parents to own a deformed surrogate child, and the complexity which arises when the surrogate mother refuses to give up parental rights over

¹ Sambhu Charan Gondal, Anuradha Verma, Shiv Kumar Gupta and Babita Kumar, ‘Genetic and Gestational Surrogacy: An Overview’ (2012) 9 *Walailak Journal* 189-190.

² PLD 2017 FSC 78.

³ Muhammad Zubair Abbasi and Shahbaz Ahmad Cheema, *Family Laws in Pakistan* (1st ed, Oxford University Press 2018) 239-244.

the surrogate child. The Court considered marriage as the only legal means of reproducing children under Islamic law. Due to the multitude of complications associated with surrogacy, the Court refused to recognise surrogacy and declared it against the injunctions of Islam. The Court also sought to invalidate any surrogacy contract under the Contract Act 1872 and proposed to criminalise such contracts under the Pakistan Penal Code 1860. It will be argued later in this paper that an absolute ban of surrogacy is unjustifiable and a harsh judicial approach. It may be emphasised that a rights-based approach should be followed to protect interests of all the parties engaged in a surrogacy arrangement.

Complexities of a Surrogacy Arrangement

Surrogacy is a complex arrangement. Thus, it requires a thorough examination. The absence of a formal surrogacy contract makes this arrangement more complicated. The primary issue pertains to the identification of the real mother of the child because surrogacy involves the separation of womb from the ovary of the intending mother. Though the intending mother donates her gamete; it is the surrogate mother who provides her womb as a host to the surrogate child till its birth. Since the intending mother is different from the birth-giving mother, the question of motherhood remains ambiguous. Sometimes, the surrogate mother develops an emotional attachment with the surrogate child and refuses to forgo the child after birth.⁴ Baby M is a famous U.S. case where the surrogate mother, Mary Beth, refused to hand over the custody of the surrogate child to the hiring couple.⁵ Based on the principle of “best interests of the child”, the Court of New Jersey gave the custody of the child to the surrogate mother, and only visitation rights were granted to the commissioning couple. Thus, surrogacy arrangement is a difficult legal phenomenon and a unique human relationship.

The validity of a surrogacy arrangement also remains problematic because it embodies the exploitation of a woman’s body and objectifies her womb. The legitimacy of a commercial surrogacy is viewed in a doubtful manner because it turns the surrogate child into a product exchanged between the two parties. Hence, countries like Germany, United Kingdom and

⁴ *Re H* (Surrogacy Breakdown) [2017] EWCA 1798 Civ.

⁵ *Re Baby M* [1988] 109 NJ 396.

Australia view commercial surrogacy as a form of commodification; and they have prohibited it on policy grounds, because it leads to the vulnerability of the real mother, the surrogate mother and the surrogate children.⁶ Feminist literature also challenges the legitimacy of surrogacy because of the alienation of women from their reproductive activity by medical technology, and their objectification and susceptibility to economic exploitation as human breeders.⁷ Issues of parentage and inheritance also create a legal dilemma.⁸

The situation gets even worse when neither party wants to assume the custody of the child. The intending parents sometimes abandon a surrogate child, such as in the case of birth of a deformed baby or a baby produced with a disability. This issue arose in 1983 when a deformed baby was born in Michigan to a surrogate mother, and neither she nor the intending father wanted to take the responsibility of his care.⁹ The absence of a formal surrogacy contract leaves the surrogate child as practically an orphan. In absence of any proof of a surrogacy contract, the courts also refuse to recognise the paternity of the child, arguing that the child is associated with the bed.¹⁰ Denial of paternity negates the rights of a child such as maintenance and inheritance rights, which makes the position of a child vulnerable. The identity of a surrogate child also becomes stigmatised.

Many countries such as in Europe and the United States view surrogacy with suspicion of giving rise to illegitimate forms of family. The legal maxim “*mater semper certa est, etiamsi vulgo conceperit, pater est quem nuptiae demonstrant*” (maternity is always certain even of illegitimate children, paternity follows marriage) indicates that birth itself is the conclusive proof of motherhood.¹¹ Islamic jurists also remain unconvinced

⁶ Sonia Allan, ‘Commercial Surrogacy in a Global Environment: Ethical and Legal Issues Regarding Surrogate and Child and Regulatory Suggestions’ [2014] *SSRN Electronic Journal* 4.

⁷ Carmel Shalev, *Birth Power-The Case for Surrogacy* (Yale University Press 1989) 146-166.

⁸ Fazli Dayan and Mian Muhammad Sheraz, ‘Surrogacy and Inter-Related Issues: A Legal Analysis from the Perspective of Islamic Law’ (2017) 7 *Journal of Applied Environmental and Biological Sciences* 31-40.

⁹ (n 7) 99-98.

¹⁰ *Farooq Siddiqui v Farzana Naheed* PLD 2013 LHC 254.

¹¹ Richard F. Storrow, ‘The Phantom Children of the Republic: International Surrogacy and the New Illegitimacy’ (2012) 3(20) *American University Journal of Gender Social Policy and Law* 561-609.

about the legitimacy of a child born through surrogacy because of the absence of any legal marital bond between the father and the surrogate mother.¹² Some Islamic scholars equate surrogacy with adultery (*Zina*) and consider the surrogate child as illegitimate. From the perspective of Islamic law, illegitimate children are deprived of many legal rights, and their parentage is only associated with their mother. It thus follows that the categorisation of a surrogate child as an illegitimate child is problematic. In the absence of a proper regulatory framework, the drawbacks of surrogacy supersede its advantages, and it is considered as a violation of fidelity and a threat to the integrity of lineage or kinship of family unit in Islam.¹³

Part 2: Invalidation of Surrogacy Leading to Violation of Rights

Despite the sceptical nature of the legitimacy of surrogacy, there has been a growing demand for legalisation of surrogacy because childbearing is a starting point for any family, and childlessness is stigmatised in our society. Birth of a child provides satisfaction as to the continuance of one's lineage. Regardless of the difficulty of reconciling conflicting views of the government, religious scholars, intending parents, policymakers, surrogate mother and surrogate child, and also the criminalisation of surrogacy, infertile couples would continue to approach the flourishing markets of surrogacy, especially the black-market brokers.¹⁴ Moreover, denying the benefits of surrogacy to the society and refusing to recognise the rights of the parties involved in a surrogacy arrangement will infringe constitutional principles and international obligations of Pakistan under the Convention.

Rights of the Surrogate Child

In passing the judgment on surrogacy,¹⁵ the FSC failed to adopt a rights-based approach, ignoring the welfare and the best interests of surrogate children. While banning surrogacy, the FSC has overlooked constitutional provisions

¹² Aref Abu-Rabia, 'Infertility and Surrogacy in Islamic Society: Socio-Cultural, Psychological, Ethical, And Religious Dilemmas' (2013) 6 *The Open Psychology Journal* 57.

¹³ Ibid 54-60.

¹⁴ Joseph Chamie and Barry Mirkin, 'Surrogacy: Human Right or Reproductive Exploitation?' (*Yale Global Online*, 28 October 2014) <<https://yaleglobal.yale.edu/content/surrogacy-human-right-or-reproductive-exploitation>> accessed 03 March 2019.

¹⁵ (n 10).

relating to the protection of marriage, family, mother, and the child.¹⁶ It may be argued that the words ‘mother’ and ‘child’ do not exclude intending or surrogate mother, or surrogate children. The surrogate mother and child are entitled to their rights provided under the Constitution and thus the Court may not deprive the surrogate child and mother from their constitutional rights. The Court may appreciate that a surrogate child becomes a victim to many problems accruing from an invalid status of surrogacy in Pakistan. In the absence of any law harmonising the triangular relationship of surrogacy, the surrogate child is exposed to risks of abandonment and abuse, refusal of nationality/citizenship, and denial of legal parentage.¹⁷

The FSC judgment also violates the Convention, to which Pakistan is a signatory. The Convention ensures the preservation of a child’s identity¹⁸ and discourages any discrimination based on birth.¹⁹ Under the Convention, it is the right of a child to know his/her parents and to be cared for by them.²⁰ It prohibits any separation between the child and parents,²¹ and discourages the State against any unlawful intervention with the child’s privacy, family, home, and reputation.²² Furthermore, it places the primary responsibility to take care of the child upon the parents²³ and orders the State to take all necessary legislative, administrative and other measures to ensure these rights.²⁴ Most importantly, the Convention obligates all state actors to place the best interest of the child as their primary consideration.²⁵

It may be argued that invalidating surrogacy limits the rights of a surrogate child by exposing its identity. The surrogate child is susceptible to societal abuse when the State invades his/her privacy through alienating them.

¹⁶ The Constitution of Islamic Republic of Pakistan 1973, art. 35.

¹⁷ Filipa Redondo, Filipa Valente and Maria João Esteves, ‘Surrogacy: A Clash of Competing Rights’ 14-17
<<http://www.ejtn.eu/Documents/Team%20Portugal%2020semi%20final%20B.pdf>>
accessed 23 March 2019.

¹⁸ United Nations Convention on Rights of Child 1989, art. 8.

¹⁹ *Ibid*, art.3.

²⁰ *Ibid*, art.7.

²¹ *Ibid*, art. 9.

²² *Ibid*, art.16.

²³ *Ibid*, art.18.

²⁴ *Ibid*, art. 4.

²⁵ *Ibid*, art.3.

Under the FSC judgment, the surrogate child was denied the rights of claim of paternity, maintenance, and inheritance from his father. The surrogate child was shorn of his legal parenthood as well as his legal identity. The Court also disregarded the best interests of the surrogate child, which ought to be their primary consideration in such like cases. The State is constitutionally bound to regulate the rights and interests of the surrogate child. However, the FSC seems to have abandoned the surrogate child in utter disregard of constitutional and international law obligations of Pakistan.

Rights of the Surrogate Mother

In the absence of a positive legislative instrument regulating surrogacy, a wide range of complexities arise with respect to the rights of a surrogate mother. Surrogacy, especially paid/commercial surrogacy and the repercussions of resulting pregnancy, can undermine the integrity of a woman.²⁶ Hence, it is pivotal to regulate surrogacy arrangements while taking into consideration the following factors.

First and foremost, in surrogacy, free and fully informed consent is crucial. Very often, the surrogate mother is not thoroughly informed about the range of challenges and complexities posed by the surrogacy arrangement. The psychological and emotional contact, which is established between the surrogate mother and the foetus is also not taken into account. It is also necessary to respect the surrogate mother's choice to act as a carrier of a child for the intending parents; she should not be stigmatised as giving birth to an illegitimate child as it harms her dignity and identity in the society.

The FSC considered the surrogate mother as the sole custodian of the child, however, it failed to grant her any maintenance rights for the upbringing of the surrogate child. By declaring a surrogacy contract invalid and by emphasising on wedlock as the only legal means to conceive and reproduce a child, the FSC, in fact, denied all legal rights to the surrogate child. The privacy of a surrogate mother was also breached, and her identity was exposed to the public. In an effort to preserve the conventional norms of society, the Court ruptured the dignity of the surrogate mother by stigmatising her as performing 'extra-marital' chores. It may also be viewed as discrimination

²⁶ (n 17) 13-4.

against the surrogate mother owing to her choice to reproduce for a hopeless infertile couple.

Rights of Intending Parents

The FSC judgment also damaged the interests and legal rights of the intending parents. Infertile couples should have the right to take recourse to surrogacy. Reproducing is considered as a starting point of family in this society, and the lack of ability to achieve it is considered ominous. Childlessness is considered a curse in countries like Pakistan and the infertile couple, especially an infertile woman is condemned in our society. Infertility is mostly associated with the woman even if the case is otherwise, and it is the woman who faces psychological and emotional consequences in the family. Medically assisted technologies such as ARTs and IVF, including surrogacy, give hope to infertile couples to mitigate the consequences of sociological and psychological effects of childlessness. It is also in line with their reproductive rights; these rights provide an opportunity for parents to exercise the right to have children by their choice in order to fulfil their reproductive goals.²⁷

In the absence of a legislative instrument protecting the rights of the infertile couples, the surrogate mother can deprive the intending parents of their child after birth. It is unfair to deprive the commissioning couple of their child; it is the commissioning couple who takes care of both the surrogate mother and the child. A valid surrogacy contract, regulating the rights of all the parties in a surrogacy arrangement, can obligate the surrogate mother to relinquish her rights by the operation of law upon birth of the surrogate child.

It may also be pointed out that petitioner before the FSC was from Shia school of thought. The Court failed to appreciate the legality of surrogacy arrangement in Shia *fiqh*. The Shia scholars have declared surrogacy as a permissible act in Islam. Arguably, the Court should have pronounced the judgment according to the religious belief of the claimant.

Part 3: Iranian Perspective on Surrogacy

Increased demand of surrogacy requires its regulation in Pakistan. The benefits of surrogacy are suppressed without examining the issue from a

²⁷ Virginie Rozée Gomez and Sayeed Unisa, 'Surrogacy from a Reproductive Rights Perspective: The Case of India' (2014) 70 *Autrepart* 185-205.

social and rights-based perspective, which is followed in Iran. In order to inform the policy-makers, this paper examines both the religious arguments and the legislation that promoted and protected surrogacy arrangements in Iran.

Religious Aspect

Islam endorses the use of science and medicine as a solution to human suffering, but it is argued that it prohibits situations in which a third-party invades a marital relationship. Islamic countries primarily rely on *Sharia* law to regulate the life of their people. The *Sharia* law is based on four sources: Qur'an, Hadith/Sunnah of Prophet Muhammad (Peace Be Upon Him), *Ijma* (consensus of scholars), and *Qiyas* (analogy).²⁸ Besides, Muslim scholars also rely on *ijtihad* (individual intellect) to make a decision based on necessity and public interest. However, the issue of ART is not directly addressed in any of the abovementioned sources of Islamic law. Hence, to address this issue, Islamic *ulemas*/scholars provide their own verdicts. The first bioethical decree on ART was issued in 1980 by Grand Shaykh of Al-Azhar University in Egypt.²⁹ All treatments of ART, except those involving a third-party reproduction in any form including surrogacy, were permitted. Hence, since then, the donation of a reproductive material or assisting the reproduction of child by keeping the child inside the womb has become a contested question amongst Muslim scholars.

Two leading sects of Islam, i.e., the Sunni and the Shia sect, sharply differ in their approach towards surrogacy. The majority of population in Iran belongs to Shia sect while Sunni sect is the leading sect in Pakistan. Therefore, it is prudent to highlight the difference of opinion between both religious sects regarding third-party surrogacy. The Sunni school of thought mainly relies on *Sharia* law and prohibits the use of a third-party gamete donation and surrogacy on the grounds of preservation of lineage and sanctity of religion and marriage.³⁰ The Sunni scholars take a strict approach while interpreting the traditional Islamic text to weigh the rights of all parties in a surrogacy arrangement. They draw a parallel between surrogacy and *Zina*

²⁸ Shamima Parvin Lasker and Marcello Ghilardi, 'Genetic Gestational Surrogacy: Hope for Muslims' (2018) 8 *Bangladesh Journal of Bioethics* 3.

²⁹ Ibid.

³⁰ Ruaim A. Muaygil, 'Reexamining the Prohibition of Gestational Surrogacy in Sunni Islam' (2016) 17 *Developing World Bioethics* 112-20.

(adultery), and as a result, remain sceptical about the legitimacy of the surrogate child. They rely on the following verse from Qur'an: "Those who guard their private parts except from their spouses... but whoever seeks to go beyond that, these are they that exceed the limits." (Quran Sura Al-Mu'minin 23: 5 & 7)

In their view, the transfer of embryo into the womb of the surrogate mother is tantamount to adultery because it annihilates family lineage.³¹ They lay emphasis on preservation of family lineage by mentioning the following verse from Qur'an: "It is He (Allah) who created mankind from water, then has He established the relationship of lineage and marriage for your Lord has power over all things." (Qur'an Sura Al-Furqan 25: 54)

The Sunni scholars opine that the destruction of genealogical lineage will have devastating effects on the kinship and inheritance rights of the surrogate child. Not only the surrogate child will suffer psychologically but will also face domestic abuse and economic hardship.³² On the contrary, the Shia school of thought allows surrogacy through the use of *ijtihad*. In 1999, the Supreme Leader of Islamic Republic of Iran, Ayatollah Khomeini, issued a *fatwa* (a religious ruling) allowing the use of donor technologies, especially in case of surrogacy, in which the egg and sperm is obtained from a legally wedded couple.³³ The act of surrogacy was distinguished from *Zina* where the latter involved the performance of sexual intercourse, while the former lacked this physical act. The birth of a surrogate child was also considered legitimate. Ayatollah Khomeini's position concerning medical ethics has been strikingly liberal and progressive.³⁴ As a result, donor gametes are now being purchased by the infertile couples in Shia majority Iran. The religious scholars have played a significant role in legitimising ARTs for overcoming the peril of infertility. They refer to early Islamic texts in order to provide nuanced

³¹ (n 28) 4.

³² Ibid.

³³ In *Ajwibat al-istifta'a*, a collection of Khomeini's fatwas, under the heading 'artificial conception' (*al-talqi4 al-sina'i*), when asked about IVF and surrogacy arrangements, Ayatollah Khomeini replied in affirmative, provided that one should avoid contravening any associated prohibitions such as looking at and touching of the private parts. He further established that the resulting child will belong to the egg and sperm donors. See: Morgan Clarke, 'Children of the Revolution: 'Ali Khamenei's 'Liberal' Views On in vitro fertilization' (2007) 34 *British Journal of Middle Eastern Studies* 296-301.

³⁴ Morgan Clarke, 'Children of the Revolution: 'Ali Khamenei's 'Liberal' Views On in vitro fertilization' (2007) 34 *British Journal of Middle Eastern Studies* 287-303.

conception of the formation of kinship and family relations in Islam. For example, they use the concept of *maslaha*³⁵ (meaning ‘public interest’) to develop a better understanding of ethical issues surrounding medically assisted conception in Islamic jurisprudence. To strike a balance between Islamic values and rights of all the parties involved in a surrogacy treatment; they have permitted surrogacy in case of absolute necessity.³⁶ The use of reproductive technology has fundamentally altered the traditional understanding of the ways in which families or marriages can be saved in Iran.³⁷ Through the use of both scripture and *ijtihad*, Shia scholars have prioritised the prevention of breakage of marriage and psychological disputes, by allowing surrogacy treatments.³⁸ The Shia scholars, in a nutshell, regard third-party donations as legitimate and allow them without breaching any of the religious norms.³⁹

Scholars of both Sunni and Shia sect also differ in their interpretation of surrogate motherhood. Sunni scholars argue that the surrogate mother implants another man’s sperm, to whom she is not lawfully married, in order to give birth to his child. Shia scholars while using *ijtihad*, view the concept of an embryo totally different from the sperm. They do not equate the insertion of an embryo into the surrogate mother’s uterus similar to that of the sperm of a man to whom she is not legally married.⁴⁰

It may be argued that opinion of Shia scholars, is based on a compromise between religious, ethical, social, and jurisprudential dynamics. Iranian religious scholars have adopted a liberal approach to help infertile couples. Therefore, Iran claims to have gained a leading position on surrogacy amongst the Muslim countries to allow the use of reproductive technologies.

³⁵ In Islamic jurisprudence, this term connotes the doctrine of necessity under which an act is declared permissible if the situation so necessitates. *See*: Hayatullah Laluddin, ‘Maslahah’s Role as An Instrument for Revival of Ijtihad’ (2015) 8 *International Journal of Islamic Thought* 27-38.

³⁶ (n 12) 57.

³⁷ Marcia C. Inhorn, *Making Muslim Babies: Sunni Versus Shi’A Approaches to IVF and Gamete Donation* (2005).

³⁸ (n 28) 3.

³⁹ Marcia C Inhorn and Soraya Tremayne, *Islam and Assisted Reproductive Technologies: Sunni and Shia Perspectives* (Berghahn Books 2012) 1-6.

⁴⁰ (n 28).

Legal Aspect

Shia scholars issued a *fatwa* which highlighted that embryo donation was legitimate only if the embryo was formed by the egg and sperm of a legally married couple. However, there was still a need for legislative intervention to formally address the relationship between the relevant parties in a surrogacy arrangement. Therefore, in 2003, the Iranian Parliament promulgated the “Embryo Donation to Infertile Couples Act” (‘Act’). Its bylaw was also passed by the Council of Ministers in 2005. This Act defined the legal conditions related to embryo formation and its transfer. According to the Act, only licensed infertility clinics are authorised to carry out a surrogacy arrangement;⁴¹ the infertility clinics are required to ensure that there is a marital relationship between the egg and sperm owners.⁴² This means that homosexual couples and single parents are excluded, and it is unlawful for them to reproduce a child through surrogacy. The Act also specifies the qualifications of the recipients, i.e., the couple should not only be legally married but either of the spouses must also not be suffering from any incurable ailment or addiction.⁴³ The assessment of the eligibility of couple is carried out by the Family Court.⁴⁴ The purpose of this assessment is to avoid any mishap in the future and to protect the surrogate mother from any unforeseeable harm. It also protects the health of the surrogate child.

Furthermore, the Act envisages free and voluntary consent of all the parties in a surrogacy arrangement. It ensures that the surrogate mother is aware of all the legal and moral aspects of the whole procedure and agrees to perform it for the infertile couple without any undue influence. Article 3 of the Act describes the duties and responsibilities of the intending couple with respect to the child; these duties are the same as that of actual parents. This means that the intending parents must be aware of their legal responsibilities with respect to the surrogate child.

⁴¹ Embryo Donation to Infertile Couples Act 2003, art. 1.

⁴² *Ibid*, art. 2.

⁴³ *Ibid*, art. 2(d).

⁴⁴ Zohreh Behjati-Ardakani and others, ‘Embryo Donation in Iranian Legal System: A Critical Review’ (2015) 16 *Journal of Reproduction and Infertility*; (n 41), art. 4.

The Act, however, is silent on the issue of inheritance; but, the Act itself endorses flexibility in this regard. It protects the identity of all the parties to shield them from any societal stigmatisation. The decisive basis for the Act was provided by the religious scholars who have interpreted Islamic law in a liberal manner by allowing the use of reproduction technologies.⁴⁵ The Act aims to adjust the rights and interests of all the parties by minimising the negative consequences of surrogacy. The Act appears to have fine-tuned the rules of Islamic law with the needs of infertile couples.

Practical Application in Iran

Public Acceptance

Around 10-15 percent of couples in Iran are infertile. The progressive step of legitimising surrogacy has attracted the attention of infertile couples as a solution to their infertility. People also use adoption, but under Islamic law, an adoptive child does not have the same rights and privileges as a biological child. Hence, surrogacy provides a viable means of reproducing one's biological child.

Apart from religious and legislative support, ART technologies such as surrogacy have also been legitimised through public acceptance. The public considers the surrogate mother as analogous to the foster mother or the wet-nurse. Most of the religious authorities in Iran call the genetic mother as the actual mother of the surrogate child, which has mitigated the controversy amongst the public regarding the question of the motherhood of the surrogate child.

A study was conducted in the infertility and gynaecology clinics of Al-Zahra hospital affiliated with Tabriz University of Medical Sciences, Iran.⁴⁶ It consisted of two groups of fertile and infertile women to know about the attitudes of both categories of women towards surrogacy. According to this study, the payment to the surrogate mother was considered acceptable. Both

⁴⁵ Shirin Garmaroudi Naef, 'The Birth of Embryo Donation and Surrogacy in Iran' [2013] In: Schreiber, Jenny; Eich, Thomas and Clarke, Morgan (eds), Conference Proceedings of the International Conference: Health Related Issues and Islamic Normativity 102-16.

⁴⁶ Gader Dargahi and others, 'Attitudes Toward Surrogacy amongst Iranian Fertile and Infertile Women' (2014) 3 *Global Advanced Research Journal of Microbiology* 5-11.

groups of women agreed that the State should regulate surrogacy effectively to eliminate any ambiguity about the legality of surrogacy. They disagreed about any conflict between religion and surrogacy. Both groups agreed that surrogacy should be the last resort if other treatments fail to cure infertility of married couples. Hence, the study showed a positive attitude about the legitimisation and public acceptance of ART technologies, followed by a need for effective law-making.⁴⁷

The response of fertile women towards allowing surrogacy treatment was also positive.⁴⁸ The role of the surrogate mother was also appreciated positively. Barring a few exceptions of religious and cultural nature, the study confirmed the need to educate people about the religious and legal aspects of surrogacy.⁴⁹

Practices of Infertility Clinics in Iran

In its first annual report in 2011, 52 infertility centres were found in Iran, among which 27 clinics (52%) were private, 21 clinics (40%) were governmental, and four clinics (8%) were academic centres for education, culture, and research. A total of 21 centres were located only in the capital city of Iran, Tehran. They had a total number of 20786 clients per month, which was the highest proportion (53%) in the country. The mean number of new monthly admissions among the centres was 641. Every centre had a documented record of patients' general information. The number of centres which provided different ART services were: IVF (94%), surrogacy (67%), embryo donation (67%), egg donation (83%), and sperm donation (2%), etc.⁵⁰ These statistics show a rapid increase in the usage of reproductive technologies in Iran. This initiative is supported by both religious scholars and the state, in order to solve the issue of infertility. These infertility clinics observe both the religious boundaries, and the law. They perform their task whilst keeping in view the religious as well as legal aspects of ART

⁴⁷ Ibid 7-8.

⁴⁸ Azad Rahmani and others, 'Viewpoints of Fertile Women on Gestational Surrogacy in East Azerbaijan Province, Iran' (2014) 11 *Indian Journal of Medical Ethics* 29-33.

⁴⁹ Ibid 31.

⁵⁰ Mehrandokht Abedini, Azadeh Ghaheri, and Raza Omani Samani, 'Assisted Reproductive Technology in Iran: The First National Report on Centers, 2011' (2016) 10 *International Journal of Fertility & Sterility* 283-89.

technologies. It shows that Islamic scholars, the State, and the public in Iran have shown remarkable open-mindedness and flexibility in accepting innovations in medicine, including third-party reproduction.⁵¹

The professional services of infertility clinics may be further explained through an example. The Royan Institute (established in 1991) in Iran provides a broad range of services in education, research, and treatment across three research institutes and two clinical service centres. In these clinics, before entering the process, the surrogate clients undergo complete examination, including medical, psychological, and addiction tests. Only those couples can pursue surrogacy who meet a certain criterion. Those legally married intending parents or intending surrogate mothers who are diagnosed with any ailment, are not considered fit for a smooth surrogacy procedure, and hence rejected to avoid any uncertainty in the future.

After the completion of the first step, i.e., going through a series of tests, the surrogate mother and the commissioning couple go through counselling sessions commissioned by the ART centres. This includes familiarisation with surrogacy and the treatment process, the legality of the process, professional advice, and the religious concerns regarding surrogacy. The intending couple is informed about all treatment options to help them make an informed decision. Before beginning the treatment, the couple is also informed about the possibility of multiple births, increased expenses, or the likelihood of miscarriage. Likewise, the surrogate mother is provided honest information about the effects of this arrangement. She is apprised of the fact that the surrogate child will not belong to her, and that she must hand over the surrogate baby to the commissioning couple immediately after the birth. The parties are also acquainted with each other in several informal meetings to prevent a hasty entry into the surrogacy arrangement. All the parties are completely informed about the legal status of surrogacy to avoid any kind of ambiguity in future. To conform to the religious norms of the people, clerics are also available at ART centres to respond to any religious questions.

Surrogacy Contracts

In order to completely regulate the surrogacy procedure by listing down the rights and liabilities of each party beforehand, comprehensive surrogacy contracts have also been developed to balance the interests of each party

⁵¹ Bagher Larijani and Farzaneh Zahedi, 'Ethical and Religious Aspects of Gamete and Embryo Donation and Legislation in Iran' (2007) 46 *Journal of Religion and Health* 399-408.

involved in the arrangement. After going through a lengthy and well-versed decision-making process, both parties (the intending parents and surrogate mother) enter into a surrogacy contract; the relationship between the parties is governed according to the specified rights and obligations stipulated in the contract.⁵² The validity of a surrogacy contract is derived from Article 10 of the Iranian Civil Act, 1928. The contract stipulates written and informed consent of both the parties. It also lists down the legal capacity and competence of the parties to enter into a surrogacy contract. Such a contract will be unenforceable in courts if it contains anything which is against the public order or public good. Therefore, the relevant authorities make sure that the contract is designed keeping in view the legal requirements and religious teachings.

The importance of a surrogacy contract seems obvious because it enlists the commitments and responsibilities of all the three parties.⁵³ It includes the rights and obligations of the infertile couple such as the child's guardianship, payment of all medical or legal expenses etc. The surrogate mother's duties and rights such as carrying the foetus for the term, and relinquishing the new-born baby to intended parents are also enumerated in the contract.⁵⁴ The surrogacy contract also lays down the responsibility of the fertility clinic.⁵⁵ This includes the duty to fully inform and educate the surrogate mother and the childless couple about the procedure they are about to enter into, taking multiple screening, psychological and medical tests, confirming the infertility of the couple and issuing a certificate in this regard, counselling, and conforming with all principles of medical ethics to avoid any unreasonable medical risks.⁵⁶

If the intending surrogate mother is married, the consent of her husband is also required in the process. There are certain legal duties and

⁵² Mitra Zandi and Zohreh Vanaki, 'Reproductive Surrogacy in Iran' in E. Scott Sills (ed), *Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues* (Cambridge University Press 2016) 149-55.

⁵³ Amir Samavati Pirouz and Nassrin Mehra, 'Legal Issues of a Surrogacy Contract Based on Iranian Acts Continuation' (2011) 5 *Journal of Family and Reproductive Health* 41-50.

⁵⁴ *Ibid* 46.

⁵⁵ *Ibid* 46-7.

⁵⁶ These responsibilities are enlisted in the articles of Executive Guideline for the Act of How to Donate an Embryo to Infertile Couples, 2005.

rights of the surrogate mother's husband.⁵⁷ This is in accordance with articles 1117 and 1103 of the Iranian Civil Act 1928 under which a husband has certain rights over his wife and hence can forbid or allow his wife to become a surrogate mother. A husband's consent is also needed to avoid any disruption of familial bonds between the surrogate mother and her husband in future. Once such consent is provided, the husband is obligated to provide adequate everyday maintenance, and to fulfil other medical and psychological needs of the surrogate mother. Otherwise, he can be held legally responsible for inflicting harm to the surrogate mother or the foetus under the surrogacy contract.⁵⁸

Iran is the only Muslim country where assisted reproductive technologies have been legitimised by both the religious authorities and the state functionaries. To avoid any uncertain consequences, the legislature has regulated the process of surrogacy. Being the Middle Eastern hub of reproductive tourism, Iran has ignited hope for many infertile Muslim couples from around the world who travel to Iran to have a child through surrogacy.⁵⁹

Part 4: Recommendations for Pakistan

Unlike Iran, by passing a judgment against third-party surrogacy arrangements, the FSC has failed to recognise the best interests of the infertile couple, the surrogate child and the surrogate mother. The infertility rate in Pakistan is quite high; around twenty-two percent of couples are infertile, which is a significant number.⁶⁰ Infertility is a social stigma. Particularly, women bear the consequences of infertility. They are subdued and marginalised by their in-laws; the husband usually opts for a second marriage with a hope to reproduce through another wife; or it often leads to separation

⁵⁷ (n 53), 47-48.

⁵⁸ Ibid.

⁵⁹ Muhammad Jalal Abbasi-Shavazi and others, 'The Iranian ART Revolution: Infertility, Assisted Reproductive Technology, and Third-Party Donation in the Islamic Republic of Iran' (2008) 4 *Journal of Middle East Women's Studies* 1-28.

⁶⁰ Bushra Naz and Syeda Shahida Batool, 'Infertility Related Issues and Challenges: Perspectives of Patients, Spouses, and Infertility Experts' (2017) 15 *Pakistan Journal of Social and Clinical Psychology* 3
<http://www.gcu.edu.pk/FullTextJour/PJSCS/2017b/1.%20Infertility%20Related%20Issues%20and%20%20Challenges_final%20changes%206-2-2018.pdf> accessed 11 May 2019.

or divorce.⁶¹ This leads to depression and emotional distress among infertile women. It disrupts marital life, ending up in family conflicts.⁶² The FSC seems to have overlooked these complications and has based its decision on a strict and literal interpretation of the Islamic law.

The FSC has invalidated any surrogacy arrangement. In this way, the FSC has refused to grant any legal status to the surrogate child, and thus, the surrogate child loses its paternity and his/her maintenance and inheritance rights. The surrogate mother is also left unattended because she is deprived of her compensation by the contracting party. The surrogate mother is pilloried as giving birth to an extra-marital child. Hence, the surrogate child and surrogate mother become weaker parties in a surrogacy arrangement. The infertile couples are also in dire need of due protection of law in order to reproduce a child through reproductive technologies. Therefore, it has become crucial to regulate surrogacy arrangements in Pakistan. Surrogacy can enlighten a hope in infertile couples with the support of religious scholars and the State.

From a Religious Perspective

Instead of putting a blanket ban on surrogacy arrangements, it is imperative to view surrogacy in the light of progressive interpretation of Islamic law. Pakistan primarily follows the Sunni school of thought and addresses legal, ethical, and biomedical issues through the sources of *Sharia* law. It is suggested that in addition to these sources, the Sunni scholars should use *ijtihad* (individual intellect) to deal with the issue of surrogacy. Instead of literally interpreting the textual sources of *Sharia* law, it is incumbent upon the scholars to read the textual sources in light of *maqasid* (objectives) of Islam.

While majority of Sunni scholars prohibit surrogacy arrangements, some Sunni scholars have been debating on the permissibility of surrogate motherhood.⁶³ Their reasoning is also grounded in the principles of Islamic law i.e. the preservation of human species, which is the primary objective of

⁶¹ Ibid, 4-5.

⁶² Ibid, 4-6.

⁶³ Serour I. Gamal, 'Religious Perspectives of Ethical Issues In ART' (2005) 10 *Middle East Fertility Society Journal* 187.

Islam. They also place their reliance on Hadith, which says: “Allah provided a cure to every suffering as He promises.”⁶⁴ The introduction of IVF and surrogacy has become a cure for childless couples and hence, this promise has now become real.⁶⁵ It has also been argued that there is no possibility of breakdown of lineage in gestational surrogacy because the biological parents of the surrogate child are already known; the egg and sperm owners are the biological parents and the matters of kinship and inheritance will not be interfered with. It also cannot be equated with *Zina*/adultery because the surrogate mother does not get involved in any kind of sexual act with the intending father. *Zina* has also been defined in section 4 of The Offense of Zina (Enforcement of Hudood) Ordinance, 1979 which states that “a man and a woman are said to commit '*Zina*' if they wilfully have sexual intercourse without being married to each other.” In a third-party surrogacy arrangement, there is no act of sexual intercourse between the surrogate mother and the intending father; hence, the Court cannot compare surrogacy with *Zina*. The ambiguity about the real mother of the surrogate child can also be dealt with through the interpretation of textual sources. The Qur’an mentions motherhood (*waladna hum*) from the period of fertilisation to birth. It has been mentioned in Surah Al-Mujadalah (58:2): “Their mothers are only those who conceived them and gave birth to them (*waladna hum*).” The surrogate mother does not conceive the child by fertilisation but in fact hosts the fertilised egg in her womb which becomes home to the surrogate foetus. She only performs the act of carrying and giving birth to the surrogate child, which was conceived outside of her womb.⁶⁶ Hence, the surrogate mother cannot be granted any rights over the surrogate child because she is not the real mother.

The doctrine of necessity (*maslahah*), public benefit, and justice can be used in this regard. In the context of absolute necessity, Islam even allows certain prohibited acts. This can be viewed in terms of the following verse of Qur’an: “But if one is compelled by necessity, neither craving nor transgressing—there is on him no sin, for indeed God is Clement, Merciful.” (Quran Sura Al Bakara 2:173) Therefore, for greater public good and necessity, Islam allows prohibited actions which normally violate the primary

⁶⁴ Muḥammad Fu’ād ‘Abd al-Bāqī and Muḥammad Muḥsin Khān, *The Translation of The Meanings of Al-Lu'lu'wal-Marjān* (Dar-us-Salam 1995).

⁶⁵ (n 28), 2.

⁶⁶ Ibid 5.

sources of Islamic law. Such necessity for infertile couples encourages us to preserve the marriage, family formation, and reproduction rights of the couple. The Qur'an states: "Wealth and progeny are the allurements of this world" (Quran, Surah 14:46)

To this end, preservation of human species is the primary objective of Islamic law.⁶⁷ Qur'an also acknowledges the hardships of infertility. The example of two childless Prophets (Ibrahim and Zacharriya) has also been mentioned in Qur'an to illustrate their longing for a child.⁶⁸ Hence, if infertility is thought of as a disease, its cure through surrogacy should become a necessity.⁶⁹ An infertile married couple should be allowed to perform surrogacy on grounds of necessity, social and psychological factors, and preservation of their marriage. Like Iran, the sources of Islamic law should be reviewed in a broader and holistic framework. The factors such as the increasing percentage of infertile couples, the risks faced by infertile couples especially the women, and the need to have a child of one's own lineage must be considered by the judiciary and the legislature.

Pakistan is in dire need of enacting a positive legislation on surrogacy by taking guidelines from its neighbouring Muslim country, Iran. Islam has defined roles, responsibilities, and duties of parents regarding the birth, care, adoption, fosterage, and guardianship of children. These premises may be expanded to redefine the scope of surrogacy agreements, and the rights and responsibilities of each party under such arrangements.⁷⁰ The constitutional protections with reference to women, children, and family may also be liberally interpreted to protect basic rights of the mother and child in a surrogacy relationship.

⁶⁷ Ibid 6.

⁶⁸ Mohammed Ali Al-Bar and Hassan Chamsi-Pasha, *Contemporary Bioethics: Islamic Perspective* (Springer Open 2015) 173-4.

⁶⁹ Infertility is defined as the inability of a couple to conceive after 1 year of regular, unprotected intercourse. Qur'an also mentions that "wealth and progeny are adornments for the life of this world." Hence, seeking a cure for infertility is appropriate. *See:* (n 68), 173.

⁷⁰ Ameer Ahmad, 'Need for Legislation to Address Legal Issues Around Surrogacy, In Pakistan'

<https://www.academia.edu/25903162/Need_for_legislation_to_address_legal_issues_around_surrogacy_in_Pakistan?auto=download> accessed 11 May 2019.

Obligations under the United Nations Convention on Rights of Child

The Convention could inform recommendations for a legal change by emphasising the need for a holistic framework of law and policy; one that protects rights of a surrogate child. Pakistan ratified this Convention in 1990; hence, any action which goes against the welfare of surrogate children will violate Pakistan's international obligations. It is crucial that a child rights-based approach be undertaken by the State of Pakistan; and this requires the development of an all-inclusive regulatory framework that protects the rights of a surrogate child. This includes the surrogate child's right to be taken care of by its parents; surrogate child's parents will be those who donated their embryo.⁷¹ Under the Convention, States are also obliged to ensure that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies; the best interests of the child shall be a primary consideration.'⁷² Therefore, a surrogate child in Pakistan should not be discriminated against, due to birth through surrogacy, in the enjoyment of his/her rights. A surrogate child should also not be implicated as a child born out of a wedlock and hence, an extra-marital child, as under the Convention, Pakistan has an obligation to protect the identity of a surrogate child, and not to unlawfully interfere in the privacy of a surrogate child.

Therefore, the rights of a surrogate child, its intending parents, and the surrogate mother should be protected. By not recognising the legal status of a surrogate child, the State unlawfully deprives the surrogate child of his/her legal rights. The child is also stigmatised in the society, which may lead to his/her exploitation and also mental abuse.⁷³ Therefore, Pakistan should provide a robust regulatory framework which supports the intending parents in the protection of their surrogate child's rights. The surrogate child has the right to know his/her biological parents and the right to have his/her views taken into account under Article 12 of the Convention.⁷⁴ Any legislation in Pakistan must conform to these requirements of the Convention.

⁷¹ Katherine Wade, 'The Regulation of Surrogacy: A Children's Rights Perspective' (2017) 29 *Europe PMC Author Manuscripts* 113-131.

⁷² Convention on the Rights of Child 1989, art. 3.

⁷³ Article 19 of the CRC obligates the states to take all measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.

⁷⁴ Convention on the Rights of Child 1989, art. 7; 12.

Positive Legislation

In order to emphatically comply with religious as well as international obligations, Pakistan should enact positive legislation on surrogacy.⁷⁵ Not only should the religious scholars take a liberal and holistic approach, but the state functionaries and courts should also adopt a rights-based approach by accommodating the rights and interests of all parties involved in a surrogacy arrangement. This will help in removing religious, cultural, and legal obstacles for infertile couples, and they would not have to resort to other means such as going abroad for entering into surrogacy arrangements. Through these regulations, the social problems faced by infertile couples, such as marital conflicts and other forms of psychological abuse, can also be addressed more effectively.

The process of positive regulation in Pakistan regarding third-party surrogacy can be better appreciated if all the ethical aspects, legal consequences, and elements of public interest and social desirability are taken into account. The most important considerations in the decision-making process should be human safety and welfare, coupled with eliminating any limitations in emergency situations. Under the Islamic law, the importance of marriage and family as God-ordained institutions cannot be denied. Therefore, it is necessary to encourage, preserve, support, and brace family relationships; the sanctity of marriage and the decision of the couple should be respected; and any attempt at the breakdown of marriage should be avoided. The stability and welfare of everyone at community level and the well-being of an individual at a personal level should guide the decision-making process. Based on these principles, regulations to support third-party surrogacy must be embraced to preserve the institution of family and marriage.⁷⁶

Given the FSC judgment on surrogacy, strict religious interpretation of Islamic law, and cultural barriers; a positive regulation of surrogacy will prove to be challenging. Therefore, Islamic scholars/*muftis* should first conduct a

⁷⁵ Hari G Ramasubramanian, 'Pakistan Requires Legislation on Surrogacy' (*Indian Surrogacy Law Centre*, 30 November 2012) <<http://blog.indiansurrogacylaw.com/surrogacy-in-pakistan/>> accessed 11 May 2019.

⁷⁶ Bagher Larijani and Farzaneh Zahedi, 'Ethical and Religious Aspects of Gamete and Embryo Donation and Legislation in Iran' (2007) 46 *Journal of Religion and Health* 402.

thorough *ijtihad* to substantively explore the issue of surrogacy while keeping in view the problems casted by infertility, deprivation of human rights, and violation of international obligations of Pakistan. The doctrine of *masalah* may be employed to generate a nuanced understanding of Islamic law on surrogacy. Once a religious consensus and solution is found, it should be widely publicised to seek public approval.

Secondly, State intervention is necessary to formalise the whole procedure. The State should limit the scope of surrogacy to infertile, heterosexual couples who are lawfully bonded in a matrimonial tie. All forms of commercial surrogacy may be prohibited, thus, limiting the threat of commodifying a woman's body. Surrogacy may be declared as the last means which can be resorted to for reproducing a child. Legal and authorised infertility clinics should be established, operating under an effective legal framework. The infertility clinics should confirm the eligibility and qualifications of the couples who want to pursue surrogacy. It should be made sure that there is free and informed consent of all parties involved in a surrogacy arrangement. All parties should go through an intensive procedure involving medical and psychological tests. The intending couple and the surrogate mother should meet beforehand to reach a fully informed decision. For the protection of surrogate mothers, the law should make it the responsibility of the intending couples to provide all medical and psychological care required by a pregnant woman during the entire process. The legal rights of the surrogate child should also be ensured, who must be rightfully owned by the intending couple after birth.

To further strengthen the rights and obligations of each party, a surrogacy contract can be designed and entered into between the parties. Through a surrogacy contract, the intending couple and the surrogate mother will be aware of and bound by all the terms and conditions of the surrogacy procedure. A formal surrogacy procedure will allay the difficulties and ambiguities caused by an unregulated surrogacy treatment. This will also make the rights and duties of each party recognisable in a court of law. Under the contract, it will be incumbent upon the surrogate mother to relinquish her rights over the surrogate child. The protection of a surrogate child born with any disability will also be guaranteed. The compensation, if any, to the surrogate mother will also be provided. The surrogacy contract will stipulate remedies in case of breach of contractual obligations by either party.

Conclusion

The purpose of positive surrogacy regulation in Pakistan should be the protection of rights and interests of infertile couples. The legislature and the judiciary should follow an approach which provides an opportunity for infertile couples to take advantage of modern techniques of surrogacy. The regulations should strike a balance by promoting and recognising the rights of the surrogate child, the surrogate mother, and the intending infertile couple. An appropriate measure would be to conduct extensive religious and legal research in this area by legal experts and religious scholars. In doing so, the textual sources should be interpreted in accordance with, *inter alia*, the objective of preserving the marriage and the need to have one's own child. It will also be useful to look at the framework adopted by other countries such as Iran. Iran has been successful in limiting the drawbacks of surrogacy through a broader framework of effective regulation. Positive regulation of surrogacy needs backup from both the religious authorities and the state functionaries in Pakistan. Islamic law is not against seeking cure for ailments; hence, the issue of surrogacy should be interpreted in light of the broader principles of Islam. It is also the need of the hour due to a significant percentage of infertile couples in Pakistan, and the severe social and psychological consequences borne by infertile women. The needs and legal rights of all parties can be protected through a positive legislation regulating surrogacy. These recommendations may provide useful guidelines for religious scholars and policymakers to carry out positive regulation of surrogacy in Pakistan.