

**A CRITICAL ANALYSIS OF ARTIFICIAL HUMAN REPRODUCTION:
AN ISLAMIC LAW PERSPECTIVE**

BY

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**BEING A DISSERTATION SUBMITTED TO THE SCHOOL OF
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March, 2016

DECLARATION

I declare that the work in this dissertation entitled “*A Critical Analysis of Artificial Human Reproduction: An Islamic Law Perspective*” has been carried out by me in the Department of Islamic Law. The information derived from the literature has been duly acknowledged in the text and a list of references provided. To the best of my knowledge, no part of this dissertation was previously presented for another degree or diploma at this or any other institution.

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CERTIFICATION

This dissertation entitled: “*A Critical Analysis of Artificial Human Reproduction: An Islamic Law Perspective*” by Nasirudeen MOHAMMED meets the regulations governing the award of the degree of Master of Laws - LL.M of the Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This dissertation is solely dedicated to my parents: Muhammadu Bello Adamu and Late Maimunatu Muh'd Sambo.

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In the name of Allah, the Beneficent, the Merciful. Thanks be to Him for sparing my life and bringing my plan to fruition. I pray for His continuing protection and guidance throughout my life. However, the successful completion of this work would surely have not been possible without the scholarly guidance of Prof. Ibrahim Ahmad Aliyu and Dr. A. M. Madaki, who supervised and guided me thoroughly throughout this research work. I am indebted to both of them and I must confess that, I really enjoyed working under their supervision. May Allah bless them and their progenies.

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TABLE OF ABBREVIATIONS

AI	Artificial Insemination
ACHR	American Convention on Human Right
ART	Assisted Reproduction/Reproductive Technology
CEDAW	Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
CRA	Child's Right Act 2003
GE	Genetic Engineering
GIFT	Gamete intra fallopian transfer
ICPD	International Conference on Population and Development
IPPF	International Planned Parenthood Federation
IVF-ET	In-Vitro Fertilization and Embryo Transfer
PGD	pre-implantation genetic diagnosis
STIs	Sexually Transmissible Infections
UDHR	Universal Declaration of Human Rights
UNO	United Nations Organization
UTI	urinary tract infection
ZIFT	Zygote intra fallopian transfer

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ABSTRACT

Reproductive rights attained recognition at the 1994 Cairo International Conference on Population and Development (ICPD) with the proclamation that reproductive rights embraces “the right to attain the highest standard of sexual and reproductive health and the right to make decisions on reproduction free from discrimination, coercion or violence”¹⁰ the effect that women should be free to decide whether and when to have children, exercise their choices without coercion, and be able to obtain the best reproductive health care available, regardless of their personal circumstances. Reproductive rights therefore, has generated intense discourse and ignited controversies that really seem to dissect all human endeavours. Muslim as an integral part of this discourse have had recourse to Islamic Law to show how it differs from these so-called reproductive rights as enshrined in the various conventions especially the use of artificial methods in human reproduction as they affect the rights and responsibilities between the parents and the resulting child. This research work is particularly concerned with the right to reproductive self-determination especially as represented by the concept of Assisted Reproductive Technology (ART) which is methods used via scientifically assisted means of possessing progeny. However, the principal aim of this study is to analyze the Islamic perspective to ART and doctrinal methodology was adopted in the study. Thus, study has attempted an analysis on the concept of Artificial Human Reproduction (AHR) with particular reference to its legal position in Islamic law. It has been highlighted that only certain artificial human reproduction methods can lawfully stand under Islamic law, i.e., artificial insemination and in-vitro fertilization on condition that they are to be used as a form of infertility treatment. Thus, Islamic law has provided for the need as well as the legality of employing ART to cure infertility ailment. The study found that ART methods have challenged the traditional notion of the family. They assault the meaning of parenthood by transforming procreation into reproduction and manufacturing of children. These techniques bring about the problem of legitimacy (Nasaba) of the resulting child, right to inheritance (waratha) and maintenance (nafqa), custody (hadhana) and fosterage (radha'a) - all of which arise out of kinship or legitimate relations. In view of the legal challenges posed by ART, it has been opined that certain methods such as surrogacy could cause confusion under Islamic law as to the determination of the rights of the child towards its parent and the corresponding responsibilities of the parents towards their children respectively. Consequently, it has been amply recommended that as far Islamic law is concerned, couples are not on a freelance of their own to seek to alleviate their infertility problem by all means possible through surrogacy but regard must be heard to the established principles of the sharia on the integrity of the institution of marriage. Thus, neither the contractual agreement of the couples nor the wishes of the parties to procreate artificially could be allowed to alter the established principles of the sharia on the preservation of lineage just to satisfy infertility grief.

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CHAPTER ONE: GENERAL INTRODUCTION

1.1 Background of the Study

The coming into being of the United Nations Organization (UNO)¹ as ushered in the UN Charter considers men and women to have equal rights.² It also brought the UN's Universal Declaration of Human Rights (UDHR)³ as the pioneer international instrument to out rightly forbid discrimination against women. However, the concept of reproductive rights was initiated at the international conference on human right in Tehran.⁴ It was at this very conference that parents were said to have a basic human right to determine freely the number and spacing of their children.

It was in the year 1979 that, the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* was adopted by the UN⁵ and it constituted a committee on CEDAW to ensure compliance with the provisions of the Convention. This committee in its year 2000 reproductive rights report, while making a general recommendation on women and health, declares that state parties should ensure universal access for all women to a high quality and affordable health care including sexual and reproductive health services.

Moreover, the International Planned Parenthood Federation (IPPF) Charter elaborated the above to mean infertility treatment and quality contraceptive among other things. Article I and 16 of CEDAW and the provisions of the IPPF and International Convention on Population and Development (ICPD) provide that, women are to enjoy these rights irrespective of their marital status. Article 2 requires state parties to abolish existing laws, regulations, customs and practices that discriminate against women.

¹That was in 1945.

² Refer to the preamble to the Charter of the UN

³ UDHR 1948

⁴ Tehran Proclamation of 1968

⁵ The proclamation on the convention came into force in 1981

This, by necessary implication, means that even religious injunctions that are considered “*discriminating*” by the western standard should as well be abolished. Hence, reproductive rights attained its peak at the 1994 Cairo International Conference on Population and Development (ICPD) with the proclamation that, reproductive rights embraces certain human rights already recognised in both national and international human rights instruments.

The conference further opines that, the concept further includes “*the right to attain the highest standard of sexual and reproductive health and the right to make decisions on reproduction free from discrimination, coercion or violence*”.⁶ Reproductive rights encompass two key ideals – the right to reproductive health care and the right to reproductive self-determination.

These principles extend far beyond a woman’s right to choose and obtain an abortion. They cut to the core of a woman’s fundamental well-being and place in the world. Gender inequality and discrimination harm girls’ and women’s health directly and indirectly, and neglect of their reproductive health needs prevents them from participating fully and equally in society. Without access to quality reproductive health care – including contraception, pre-natal care, and abortion – women are at needless risk of unwanted pregnancy, sexually transmissible infections (STIs), and even death or injury from pregnancy and childbirth.

Women should be free to decide whether and when to have children, exercise their choices without coercion, and be able to obtain the best reproductive health care available, regardless of their personal circumstances. Full citizenship for women can only be realized when women participate with dignity as equal members of society with the autonomy to determine the course of their own lives. This is a fundamental truth for women in the United States and around the globe.⁷

⁶ ICPD 1994 held in Cairo proclamation among other things

⁷ REPRODUCTIVE RIGHTS: Advancing What’s Right for Women and the Nation, Center for Reproductive Rights / Fall 2008, p. 4

Reproductive right therefore, has generated intense discourse and ignited controversies that really seem to dissect all human endeavours. Muslim as an integral part of this discourse have had recourse to Islamic Law to show how it differs from these so-called rights enshrined in the various conventions, especially the use of artificial methods in human reproduction as they affect the rights and responsibilities of the resulting child with its parents.

Islamic law does not, in principle, disapprove of medical remedies to infertility. Nevertheless, the processes involved in assisted reproductive techniques often breed controversy, not only among scholars or experts in Islamic law, but even among the rank and file of any Muslim community. Many questions bordering, mainly on ethical, legal and psychological issues have also been raised. Any objection to a process, technique or procedure of ART must therefore not be interpreted as Islam's opposition to technological advancement. Rather, it is an attempt to put every issue discussed in the right perspective, and to ensure uncorrupted compliance with the dictates of the Shariah in search for remedies to human predicaments.⁸

Moreover, the Islamic law's position on ART is informed by its perception of the cause of the usage itself. Thus, if the cause for using any assisted reproductive technique is to cure the couple's infertility, the act is utterly permissible, provided that no other law of Islam is contravened in so doing. Muslims are allowed and even encouraged to seek lawful cure of any form of illness or disorder they may have. The hadith narrated on the authority of Usamah bin Shuraik succinctly put it as follows, "The Prophet (*salla Allah alai wa sallam*) said, "Seek remedy (of your illnesses), for Allah has never created an illness unless He has

⁸ Abdul-Razzaq, A. A. *Assisted Reproductive Technology (ART): The Islamic Law Perspective*, Berna Arda & Vardit Rispler-Chaim (eds.), *Islam and Bioethics*, Ankara University, Turkey, (nd) pp. 85-97

also created a cure for it, save the (illness of) old age".⁹ With the exception of surrogacy, all other known Assisted Reproductive Techniques are, in principle, in keeping with the Shariah norms; as they all constitute one form of medical intervention or another, to cure a barren woman of her infertility.¹⁰

This research work is particularly more concerned with the right to reproductive self-determination especially as represented by the concept of Assisted Reproductive Technology. The IPPF¹¹ Charter clearly itemises reproductive self determination to cover such rights as:

1. The right to plan one's family.
2. The right to freedom from interference in reproductive decision making.
3. The right to be free from all forms of violence and coercion that affect a woman's sexual or reproductive life.

These rights were accorded recognition by United Nation Conferences on women (e.g., the 1994 International Conference on Population and Development, and the 1995 Beijing Conference). Both the 1994 International Conference on Population Development and the 1995 Beijing World Conference on Women Declaration¹² have held non-coercion to be fundamental to population and reproductive health programmes and *"coercion in any form is unacceptable"*¹³; under CEDAW¹⁴ especially in the preamble and Article 1 and 16; the United Nations Convention on the Rights of the Child (CRC), which recognizes adolescents' right to reproductive health and their "evolving capacities" to make decisions in matters affecting their lives, as well as that adolescents who are sexually active and seek

⁹ An authentic hadith narrated by Tirmidhi, vol. iv p. 383; Abu Dawud , vol. ii p. 396; and Ibn Mājah, vol. ii p. 1137.

¹⁰ Ibid

¹¹ IPPF Charter, pp. 15-16

¹² U.N. Doc. A/CONF.177/20 (1995)

¹³ Diana Babor *"Population Growth and Reproductive Rights in International Human Rights Law"*, 14

Conn. J. Int'l L. 83, 1999, p.118

¹⁴ Article 1 and 16

information and services to protect themselves from unwanted pregnancy and STIs should have access to a full range of reproductive health care services; the practice of sterilization of indigenous peoples could be more straightforwardly challenged as a breach of article II of the Genocide Convention,¹⁵ which prohibits “*measures intended to prevent births within a group*” with “*intent to destroy, in whole or in part, a national, ethnical, racial or religious group*”; under the African Charter on Human and People’s Rights (Banjul Charter)¹⁶ especially under Article 4; and the American Convention on Human Right (ACHR) especially Article 5.¹⁷

This research work therefore focuses on reproductive self-determination as a concept and its development as an internationally recognized human right. The research work attempts to finally juxtaposition these artificial methods of human reproduction with the provision of Islamic law vis-à-vis the rights of the children related thereto.

1.2 Statement of the Research Problem

The exercise of the right to reproductive self-determination or reproductive freedom more especially through the use of Artificial Human Reproduction Technologies has generated controversies particularly from Islamic Law perspective. These methods are considered to have challenged the traditional notion of the family. They assault the meaning of parenthood by transforming procreation or reproduction into manufacturing of children. These techniques bring about the problem of legitimacy (*Nasaba*) of the resulting child, the issue of the right to inheritance (*waratha*), the issue of the right to maintenance (*nafaqa*), the issue of the right to custody (*hadhana*) and fosterage (*radha’a*) - all of which arise out of kinship or legitimate relations.

¹⁵ UN Convention on the Prevention and Prohibition of the Crime of Genocide, adopted by Resolution 260

(III) A of the U.N. General Assembly on 9 December 1948

¹⁶ Article 4

¹⁷ Article 5

In view of the above legal issues, artificial human reproduction methods raises the legal issue of conjugation of sexual material of persons who may not necessarily be married, i.e., it calls for procreation outside the bond of marriage. It also causes uncertainty as to the determination of whether the child begotten out of ART owes certain legal rights towards its parent and whether its parents owes a corresponding legal responsibility towards their ART begotten children. The same thing applies to the issue of prohibited degrees of marriage on the basis of fosterage, affinity and consanguinity which is also determined by Islamic law, i.e., the practice of surrogacy undermines the determination of kinship for the purposes of identifying prohibited degrees of marriage.

The problem of artificial methods of human reproduction as an exercise of one's reproductive freedom is not because of its being an unnatural way of having a child, but because of its negative impact on the concept of child-parent relationship as Andrea Stump posits that traditionally, the mother of a child "*was the one from whose womb the child came*"¹⁸ and traditionally, this was an unshakeable presumption¹⁹.

These legal issues cumulatively constitute a research problem which this study intends to address. However, the above examined legal issues raises the following research questions:

- a) Is artificial human reproduction permissible under Islamic law?
- b) What necessity impels the practice of artificial human reproduction?
- c) What are the adverse implications of artificial human reproduction to the traditional institutional of the family under Islamic law?
- d) Does a child begotten out of artificial human reproduction possess any legal right against their parents?

¹⁸ Andrea Stump, "Redefining Motherhood: A Legal Matrix for New Reproductive Technologies", *The Yale Law Journal* (1986) 96:167 p.187

¹⁹ Ibid

- e) Does Nigeria have the required facilities and adequate legal backing for the practice of artificial human reproduction?

1.3 Aim and Objectives of the Study

The principal aim of this research work is to critically analyse artificial human reproduction focussing on Islamic law perspective. However, the work intends to achieve the following specific objectives:

1. To identify and discuss the contemporary legal issues pertaining to artificial human reproduction and the perspective of Islamic Law thereto.
2. To examine and analyze the legality of artificial human reproduction under Islamic law.
3. To critically examine and analyze the impact of ART on the rights and responsibilities of parents towards their children begotten out of artificial human reproduction.
4. To critically examine and analyze the rights of children begotten out of artificial human reproduction under Islamic law.

1.4 Significance of the Study

This research work would be beneficial to all those involved in child rights protection such as the government in the formulation of law and policy on child rights in Nigeria; to Sharia Courts Judges in their application of Islamic Family Law; to Lawyers in handling briefs on reproductive rights and freedom; to parents and guardians as well as families in determining their rights and responsibilities towards their children begotten out of artificial human reproduction; to lecturers and students of law who desire to pursue a career in this field, etc.

Moreover, this study is justifiable as the area of research raises legal and ethical questions about whether or not these innovative scientific methods of human reproduction are inimical to Islamic law especially the institution of the family formation and whether it

contravenes the basic notion of lineage and child legitimacy in Islamic Law. Thus, the study would be of benefit to medical practitioners who engage in these unorthodox ways of artificial human reproduction, legal practitioners who defend and prosecute cases bordering on rights of the child, and judges who determine the claims on such a child. Other targeted beneficiaries are the child himself, the couples, the third parties that are usually involved in claims on who bears, owns, and probably will be in custody of the child.

1.5 Scope of the Study

This research work essentially examines artificial human reproduction methods such as surrogacy, artificial insemination, *in-vitro* fertilization, sperm/ova bank, egg transfer, embryo-adoption/embryonation, etc., from Islamic law perspective. The scope of this research work is therefore limited to an analysis of artificial or scientific method of human reproduction as a right to reproductive freedom vis-à-vis its Islamic law position.

1.6 Methodology

The methodology adopted in this research is doctrinal legal research. Recourse was had to legal documents and materials, i.e., text books, journals, articles, conference and seminar papers, statutes, case law, internet materials, etc., which were duly acknowledged.

1.7 Literature Review

A review of the available literatures on the subject of this research work is highlighted hereunder.

Abul Fadl²⁰ Mohsin Ebrahim in a book titled “*Biomedical Issues: Islamic Perspective*”, this author had examined the Islamic perspective to modern biomedical issues and he had highlighted reproductive control under the sharia in terms of the established purpose of marriage, legality of contraception and its methods, the problem of infertility, abortion and the attendant punishment of foeticide. Thus, the work focuses more on how

²⁰ Abul Fadl, M. E. *Biomedical Issues: Islamic Perspective*, A. S. Noordeen Publishers, Kuala Lumpur, Malaysia (1988) pp. 47-63; 85-93; 121-161

family planning, contraception or birth control is viewed from Islamic law whereas this study looks at the perspective of Islamic law on ART and reproductive rights generally.

Aliyu,²¹ I. A. in an article titled “*In-Vitro Fertilization and Artificial Insemination Under Islamic Law*,” this author have discussed the position of Islamic law on in-vitro fertilization and artificial insemination highlighting classical and contemporary views on the subject. He had however argued in favour of protection of lineage as one of the utmost five values of the sharia;²² and accordingly, the author emphasizes that such ART procedures should only be employed in a manner that does not negate the preservation of lineage, i.e., where the parenthood of the baby would be certain.²³ But where the process is employed between man and a woman who are not tied by marriage, it is unlawful totally. However, while the work of the author focuses on in-vitro fertilization, this study goes further to examine the Islamic position on other modes of ART such as human cloning, surrogate parenting, sperm/ova bank, genetic engineering, ectogenesis, artificial embryonation, etc.

B. Babaji, in an article titled “*Harmonizing the Child Rights Act 2003 With Cultural and Religious Values in Nigeria: A Muslim Perspective*”,²⁴ and similarly in his paper titled “*An Overview of the Child’s Right Act 2003 and its Impact on Muslims in Nigeria*,” the author had offered an articulated critique on the Nigerian *Child Rights Act 2003* particularly in terms of: (a) its conflict with the socio-religious background of Muslims in Nigeria; (b) its unconstitutionality as regards the breach of the requisite procedure to be employed in its enactment, i.e., breach of the principles established under section 12(3) of the 1999 Constitution; (c) its encroachment on the jurisdiction of the Sharia Court of Appeal through the introduction of Family Courts, etc. While he remained opposed to the onward acceptance

²¹ Aliyu, I. A. *In-Vitro Fertilization and Artificial Insemination Under Islamic Law*, A.B.U.L.J. (1999-2000) Vols. 17-18, pp. 135-143

²² Ibid, pp. 136-138

²³ Ibid, p. 138

²⁴ Babaji, B. (2005) *Harmonizing the Child Rights Act 2003 With Cultural and Religious Values in Nigeria: A Muslim Perspective*, Journal of Islamic and Comparative Law, Vol. 24, pp. 14-21

of the novel provision of the CRA on use of scientific tests in determining paternity or maternity of a child,²⁵ he argues that this provision requires harmonization in the light of what Islamic law injunctions and values provide because in his view, Islamic law has provided enough methods of determining paternity and/or legitimacy of a child and it has not expressly authorized the use of scientific tests.²⁶ However, this study would further assess the position of Islamic law on paternity/maternity of a child begotten out of ART.

Azizah Mohd,²⁷ in a paper titled “*Breastfeeding (Rada’ah) under Islamic Law and its Promotion towards Sustaining Mother’s and Children’s Health*”, this author had examined the concept of *rada’ah* (breastfeeding) under Islamic law highlighting its legal basis and the way it serve as one of the parental duties towards children it being for the mother preferably to breastfed her child and for the father to undertake the financial responsibility of maintaining the mother. However, our concern in this study is not the classical exposition of the sharia on breastfeeding (*rada’ah*) but to assess the way it act as one of the legal consequences or legal issues arising out of ART. Thus, this study goes further to examine right of the child begotten out of ART to *rada’ah* and the duty of parents thereto under Islamic law.

Abdul-Razzaq Abdul-Majeed Alaro²⁸ assess certain processes involved in Assisted Reproductive Techniques (ART) which often raise questions bordering essentially on moral, ethical and legal issues. His work provides an Islamic law perspective on issues relating to the use of ART. These include, the use of ART by lesbians and choice mothers to reproduce without conventional sex; gender selection through ART; sperm and egg donation, and the

²⁵ See section 63, Child Rights Act 2003

²⁶ Babaji, B. “*An Overview of the Child’s Right Act 2003 and its Impact on Muslims in Nigeria*,” an unpublished paper, (nd), pp. 26-28

²⁷ Azizah Mohd, *Breastfeeding (Rada’ah) under Islamic Law and its Promotion towards Sustaining Mother’s and Children’s Health*, Asian Conference on the Social Sciences, Official Conference Proceedings 2011, pp. 656-665

²⁸ Abdul-Razzaq, A. A. *Assisted Reproductive Technology (ART): The Islamic Law Perspective*, Berna Arda & Vardit Rispler-Chaim (eds.), *Islam and Bioethics*, Ankara University, Turkey, (nd) pp. 85-97

Islamic view of third party reproduction; the Islamic perspective on parenthood vis-à-vis surrogate parenting; sperm retrieval by masturbation for the purpose of assisted reproduction; and the use of cryo-preserved sperm of an ex-husband or a jailed spouse. The author firmly submit that there is nothing wrong in seeking lawful means of having children as long as nothing forbidden is involved in the process. That it is of importance for those who practice assisted reproduction of any form to learn about the religious and legal issues related to the problem of infertility and its therapeutic approach. Thus, the work of this author has amply shed light on some of the raging debate surrounding ART from Islamic law perspective. However, our concern in this study is to further assess the legal implications of the practice of ART to the institution of marriage under Islamic law more particularly its attendant consequences like procreation, paternity of children, inheritance, and demarcation of clear prohibited degrees of marriage, etc.

Bilal Philips,²⁹ had examined some of the contemporary issues that bedevilled Islam in the world today, and he had discussed issues related to abortion, contraception, population control,³⁰ cloning, test-tube babies, organ donation,³¹ but while he is concerned with repelling the western misconception of the position of Islam on these reproductive issues, our focus in this study is an examination of the implication of ART to classical conception of family under Islamic law especially the rights and responsibilities of parents towards children begotten out of ART.

In a publication by Hizbut-Tahrir Organization,³² the Islamic verdict on cloning, human organ transplantation, abortion, test-tube babies, life support systems, life and death were discussed. These reproductive rights issues have been canvassed and contrasted with

²⁹ Bilal Philips, *Contemporary Issues*, Ajman University of Science and Technology, United Arab Emirate (2002), pp. 1-45

³⁰ Ibid, pp. 11-16

³¹ Ibid, pp. 36-38

³² Islamic Verdict on: Cloning - Human Organ Transplantation- Abortion - Test-tube Babies -Life Support Systems - Life and Death, Al-Khilafa Publication, London (1999). Available online at: <http://www.mykhilafah.com/hizib-ebook/IslamicVerdictOnCloning.pdf>

Islamic law. However, in their view, it seems not surprising the level of technological advancement in terms of ART as far as Islamic law is concerned. They states:

These immense scientific developments and their applications, which were achieved through advanced technology, point to the greatness of Allah, His Might, His Wisdom, and the perfection of His creation. These things indicate that Allah is their Creator. They also indicate that they were not created by mere coincidence, because they follow a precise order and specific laws that control and regulate them. In addition, they have characteristics that fit their use and the purpose of their creation. All of this shows that these things could not have been created by coincidence because coincidence does not bring about such concise laws and such precise system.³³

Michele Weckerly,³⁴ in a paper titled “*The Islamic View on Stem Cell Research*”, the author while making a case for the use of human embryo in stem cell research, the author submits that the Shari’ah makes a distinction between actual life and potential life, determining that actual life should be afforded more protection than potential life. Thus, under most interpretations of Islamic law, the embryo is not considered a person and the use of it for stem cell research does not violate Islamic law.³⁵ Also, by this same line of analysis, stem cells from aborted fetuses would also be permitted if the abortion was performed before the fourth month of pregnancy. This author further points out that “*Islamic law prohibits surrogate parenting, adoption and the adoption of human embryos due to the importance of determining a child’s true parentage and inheritance rights. This would free up any excess embryos for research purposes since under Islamic law, they could not be used by anyone but the couple who created them*”.³⁶

³³ Ibid, p. 5

³⁴ Michele Weckerly, “*The Islamic View on Stem Cell Research*”, available online at: http://org.law.rutgers.edu/publications/law-religion/new_devs/RJLR_ND_56.pdf (accessed on 13/08/2014)

³⁵ Ibid, pp. 2-3

³⁶ Ibid, p. 3

Afroz Ali,³⁷ in a paper titled “*Conditional Permissibility of In-Vitro Fertilization under Islamic Jurisprudence*”, this author examines the acceptability of *In-Vitro Fertilization* under Islamic law and he opines that this matter is considered to be in the *Mutaghayyirat* category of *fiqh*, i.e., the matter is not static over time but arises due to changes, advances and newer contexts in human existence.³⁸ Hence, scholars considered this matter beyond a particular school of Islamic jurisprudence and that this demonstrates that Islamic legal system is not a static one but continues to engage with the changing times and reflecting on the primary sources of the sharia for guidance.³⁹ The author further states that Islam is for human benefit and as such, the basic reason to consider IVF for legally married couples is when they have attempted natural means to conceive but have failed due to infertility.⁴⁰ The author went ahead to consider the legality of treating infertility through IVF in the light of the five basic criterion of the Shari’ah, i.e., *wajib* (obligatory), *mandoub* (recommended), *mubah* (permissible), *makruh* (reprehensible) and *haram* (prohibited). In essence, the author emphasizes that whenever necessity calls for the treatment of infertility, the persons that participate in the donation of their sperm/ova must be legitimately married under Islamic law.⁴¹

Adewumi Afosade in an article titled “*The Need for Reproductive Technology Law in Nigeria*,”⁴² traces the antecedent and the attendant legal issues that permeate ART with concern placed on the need for safety and regulation of this technology so as to guard against abuse. The author identifies treatment of infertility as becoming a highly competitive

³⁷ Afroz Ali, *Conditional Permissibility of In-Vitro Fertilization under Islamic Jurisprudence*, Al-Ghazzali Centre For Islamic Sciences and Human Development, Australia (2004)

³⁸ *Ibid*, p. 4

³⁹ *Ibid*

⁴⁰ *Ibid*, p. 6

⁴¹ *Ibid*, p. 8

⁴² Adewumi, A. A. *The Need for Reproductive Technology Law in Nigeria*, *A Journal of Contemporary Legal Issues*, (2012) Vol. 4, pp. 69-92

business with the field itself notoriously under-regulated.⁴³ The author further examines the various modes of regulating ART. However, although the author calls for the adoption of mixed approach to the regulation of ART in Nigeria in view of the cultural, economic, social, religious and legal contexts of Nigeria,⁴⁴ it would on the other hand be the effort of this study to dig further the perspective of Islamic law on ART and the possibility of gaining legislative regulation thereby in the light of Islamic law principles.

Deena Al-Hilli,⁴⁵ in an article titled “*Cloning: A Dilemma Practiced But Not Solved*”, had examined the Islamic arguments surrounding human cloning and she states that the Holy Qur’an governs every aspect of Muslim life and is believed to contain the words of God. It covers a wide range of issues including law, ethics, genesis, and instruction into everyday life. The author further states that there are several interpretations regarding human cloning and this include the view that it affects kinship, a major concept in Islamic Law. As such, cloning would result in loss of kinship since created children may not have either a mother or a father and this is contrary to Islamic laws. Loss of kinship will also affect identity of the clones and therefore their dignity. The consequences here are looked upon as to what happen when the clones want to marry or how and what they are going to inherit from their mothers or fathers. So also, it is noteworthy that Islam recognizes that human conception can only take place after sex and that “semen” (i.e. sperms) is involved in the processes. As such, cloning is looked at as a departure from instructions of God. Furthermore, the moral status of the life of the embryo must also be respected and that cloning is against social and family life since a birth of a child will be outside “the recognition of marriage” as a basis and nucleus for growth of families and societies.⁴⁶

⁴³ Ibid, p. 69

⁴⁴ Ibid, p. 79

⁴⁵ Deena Al-Hilli, *Cloning: A Dilemma Practiced But Not Solved*, *Bahrain Medical Bulletin*, Vol.28, No.1, March 2006

⁴⁶ Ibid, pp. 6-7

Marcia C. Inhorn,⁴⁷ in an article titled “*Making Muslim Babies: IVF and Gamete Donation in Sunni Versus Shi’a Islam*”, states that non-binding but authoritative Islamic religious proclamations called fatwas have profoundly affected the practice of IVF in ways that are not commonly seen in the West.⁴⁸ However, the work of the author concentrates on the major divergences that have occurred between Sunni and Shi’ite religious authorities regarding the permissibility of third-party gamete donation, e.g., his work has spelled out the main points of the Sunni Islamic position on medically assisted conception.

1.8 Organizational Layout

This research work is divided into five chapters. Chapter one covers the general introduction highlighting the background of the study, statement of research problem, aim and objectives, significance of the study, scope of the research, methodology, literature review and organizational layout. Chapter two focuses on the nature, application, philosophy and different views on the concept of artificial human reproduction. Chapter three discusses the position of the various artificial human reproductive methods in Islamic law. Chapter four concentrates on the rights of the child begotten out of artificial human reproduction and the responsibilities of parents thereby under Islamic Law. Chapter five serves as conclusion and it highlights the summary, observations and recommendations.

⁴⁷ Marcia C. Inhorn, *Making Muslim Babies: IVF and Gamete Donation in Sunni Versus Shi’a Islam*, Journal of Culture, Medicine and Psychiatry 30: 427–450, 2006. Available online at: <http://www.marciainhorn.com/olwp/wp-content/uploads/Globalization-and-Gametes1.pdf> (accessed on the 13/8/14)

⁴⁸ Ibid, p. 431

CHAPTER TWO: NATURE AND PHILOSOPHY OF ARTIFICIAL HUMAN REPRODUCTION

2.1 Introduction

This chapter is particularly more concerned with the right to reproductive self-determination as represented by the concept of artificial reproduction or scientifically assisted human reproduction. Article 16 (e) of CEDAW¹ established that, state parties should without discrimination grant right to women to decide freely and responsibly the number and spacing of their children and to have access to the information, education and means (methods) to enable them exercise these rights.

From this provision, it is implicitly clear that this right includes not only the right to have what number of children but also by which method and also the right not to have any children at all. A reading of article 9 (1)² implicitly shows also that state parties are prevented from interfering in an individual pursuit of means to limit or promote fertility.

The above provisions in the various conventions go to show that women in Equality with men enjoy the use of artificial method as of rights. It is their right to reproductive self-determination and reproductive freedom. It is not that the right is to be enjoyed when they are infertile, have a medical condition that can prevent child birth or limit fertility, but, they simply enjoy it as a human rights.

2.2 Meaning and Nature of Artificial Reproduction

Artificial reproductions are methods used via scientifically assisted means of possessing progeny. It is not the conventional or natural ways of acquiring children, yet is under the reproductive rights. Reproductive rights encompass two broad principles, i.e. the right to reproductive health and the right to reproductive self-determination.

1 Convention on the Elimination of all Forms of Discrimination Against Women (1979)

2 International Covenant on Civil and Political Rights

Artificial human reproduction is the general concept of technologically assisted human reproduction. It comprises of the followings:-

1). Artificial Insemination (AI), (2). *In-vitro* fertilisation (IVF), 3). Sperm donor/ova bank, 4). Embryo adoption, 5). Egg transfer, 6). Surrogate parenting, 7). Human cloning, (8) genetic engineering among others. The above methods of artificial reproduction or scientifically assisted human reproduction though not exhaustive shall now be discussed in turn with a view to seeing their respective nature.

2.2.1 Artificial Insemination

According to Osborn's Concise Law Dictionary, artificial insemination is defined as the "placing of sperm inside the woman's vagina or uterus by means other than sexual intercourse. The sperm may be that of woman's husband (artificial insemination by husband), partner (AIP) or third party donor (AID)"³. While according to Black's Law Dictionary, artificial insemination is a "method by which a female is impregnated through injection of semen from a donor other than her husband and other than through sexual intercourse"⁴. From these two definitions, it may therefore be noted that artificial insemination is an unnatural method of conceiving a baby which involves the use of scientific means of retrieving genetic materials from a particular man and woman, whether they be husband and wife or simply third party donors in order to cure infertility and satisfy the condition of childlessness.

Artificial insemination is, however, the practice of encouraging pregnancy by medical means, in women who have had difficulty in becoming pregnant⁵. It was revealed that it has been in use since the 1940s, though the procedures have become more sophisticated.

3 Osborn's Concise Law Dictionary, Edited by Sheila Bone: Sweet and Maxwell, 2001, 9th ed., p. 38

4 Black M.A, Black's Law Dictionary, 5th ed. (1979), p. 103

5 Dontigney E., *Process of Artificial Insemination*, available online at: www.ehow.com, (accessed on 1st June 2013)

Artificial insemination is also defined by I. A. Aliyu as: “*a process through which female ova is fertilised with male sperm and then the resultant embryo is planted into the uterus of a woman who will carry the pregnancy and deliver the baby*”⁶.

It can also be said to be a procedure whereby a semen specimen is placed in a syringe attached to a narrow tube or catheter is inserted with great care into the cervical canal and semen is slowly injected into the uterus⁷. Hence, it is a process whereby semen is taken from the man and injected in the uterus of the woman. Sperm is usually obtained for this procedure through either of the two ways:

- i. By inserting the penis inside a special sheath (condom like) prior to intercourse, or
- ii. By masturbation.

2.2.2 *In-vitro* Fertilisation (IVF)

In-vitro is a Latin phrase which means “in glass”; in embryology, it is used in contrast with *in-utero* meaning in the uterus. While under normal circumstance, the natural process of human procreation involves the fertilisation of sperm and egg which takes place in the woman’s uterus, strictly speaking, in the fallopian tubes when a sperm cell unites with an ovum. In contrast, *in-vitro* fertilisation (IVF) is fertilisation that is artificially performed outside the woman’s body, that is, in a test tube⁸. So simply put, IVF is a medical technique through which a woman’s egg is combined with the husband’s sperm in a laboratory environment to promote fertilisation.⁹

2.2.3 Sperm Donor/Ova Bank

In some cases the husband may be unable to produce any sperm at all (a condition called azospermia) or he may be suffering from neurological condition that makes it

⁶ Aliyu, I. A. *In-vitro Fertilization and Artificial Insemination in Islamic Law*, A.B.U.L.J. (1999-2000) p. 135

⁷ Ebrahim, A.M. *Biomedical Issues: Islamic Perspective*, A.S. NOORDEEN, Kuala Lumpur, Malaysia (1988), p. 101.

⁸ Ibid

⁹ Aliyu, I. A. *In-vitro Fertilization and Artificial Insemination in Islamic Law*, A.B.U.L.J (1999-2000) p. 135

impossible for him to ejaculate or he may be suffering from certain diseases like diabetes, which renders him impotent. Or he may be a carrier of a dominant gene for a genetic disorder. If any of such condition prevails, then it is still possible to have one's wife inseminated with the sperm of a donor. This accounts for the existence of a sperm bank in certain advanced countries¹⁰.

Scientifically, the term pregnancy is only said to result when the sperm from the man fertilises the female ovum. The foetus or finally child resulting is said to be a product of the union of the man and woman whose sperm and ovum coupled and fertilised. The husband either produces no sperm or in some instance he produces sperm but not viable. It could also be that the woman produces no egg but has all features that can carry pregnancy to maturity.

Therefore, the whole of this process can occur in the other way with the woman donating her eggs (ovum).

2.2.4 Artificial Embryonation/Embryo Adoption

This involves the transfer of an already fertilised egg from another woman and placing it in the uterus of one's wife. If attachment to the uterine wall will be successful then development of the embryo would take place in the normal fashion¹¹.

- i. **Artificial Embryonation** requires fleshing an embryo from a woman who has artificially been inseminated by a donor's sperm, then implanting the embryo in the womb of the donor's wife.
- ii. While in **embryo adoption** or prenatal adoption involves both donor sperm and donor egg but they would be transferred to the womb of the recipient and she would bring the foetus to birth.
- iii. **Egg transfer:** This technique involves the transfer of an egg of another woman into the uterus of a man's wife.

¹⁰ Ebrahim, A. M., Op cit., p. 104

¹¹ Ibid

These techniques are opted for in the event that one's wife may not be in a position to ovulate. Or perhaps she has no fallopian tubes at all. Or there may be something abnormal causing blockage of the fallopian tubes or her tubes may be damaged.

It cannot be denied that these three techniques can positively assist an infertile woman to bear a child and even give birth to it. But the problem is that in the case of egg transfer, the woman will bear a child who would have half of the genetic identity of her husband and none of her own. While in the case of embryonation or embryo adoption (EA) the child would have neither the genetic compliments of her husband nor of herself¹².

2.2.5 Surrogate Parenting

Surrogate Parenting refers to a situation where a woman bears a child for another woman who is not in a position to bear children as a result of either a blocked fallopian tube or a complete absence of a uterus. It is sometimes referred to as womb leasing. Originally two types of surrogacy existed as follows:¹³

- a) **Classical Surrogacy:** This was the first and original form of surrogacy. It is a process whereby the surrogate is inseminated with the sperm of the father to be. In this situation, the surrogate automatically becomes both the genetic and biological mother of the child (who is then given to the intended parent after delivery) this is because it was the surrogate that contributed the genetic egg. This type of surrogacy was widely used before the discovery of in-vitro fertilisation technology. It is now very rarely used as it is outdated.
- b) **Gestational Surrogacy:** This is now viewed as the most appropriate and acceptable type of surrogacy. Here the surrogate is not the genetic mother of the child. This type involves certain process. First, the genetic mother is made to undergo in-vitro fertilisation to

¹² Ibid

¹³ 'Assisted Reproduction', retrieved on August 26, 2009 from: www.yourdictionary.com/medical/assistedreproduction, for a detailed discussion of these concepts and surrogacy generally. Last visited 02-06-2013

collect egg. The eggs are collected and fertilised in a laboratory with her partner's (whether husband or not) sperm. At the time this is going on, the surrogate is having her uterus artificially prepared with hormones. The fertilised egg develops into an embryo, which is usually cultured in the laboratory for 3 – 5 days. At the end of these days, the ensuing embryo or embryos are then selected and inserted into the prepared uterus of the gestational carrier. At the birth the surrogate transfers the child to the intended parents.

2.2.5.1 Juridical Views on Surrogacy

Surrogacy as a concept is viewed from various perspectives. The views of the proponent's, opponents, liberal and feminist will be discussed as follows:

- a) The Views of the Proponents:** They submit that there is an eminent need to construe the intention of the parties from the contract, which they had signed¹⁴. Both parties entered into the agreement with knowledge and precise information on the nature of the contract. The surrogate mother was not forced to do anything that she did not want. Therefore, she should not be allowed to back off from her promise when the baby is later born.
- b) The Views of the Opponents:** They are against surrogacy arrangement as it is a form of exploitation of women¹⁵. Objections towards surrogacy have similar under tones with the objection towards prostitution since is for financial profits and treat her uterus as mere incubator for someone else's child. It would also leave a very unhealthy impact on the resulting child. Once born, he is already the subject of a legal dispute and should he be unfortunate enough to find out later in his life that the person

14 Posner, Richard A. (1989) *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, Journal of Contemporary Health Law and Policy, p. 23.

15 Freeman, Micheal. (1989) Is Surrogacy Exploitative? In: Shela McLean's Legal Issues in Reproduction, Cover Publishing Co. Ltd., Aldershot, p. 166.

who had carried him had done so for purely economic reasons would certainly bleak his future¹⁶.

c) The Views of the Liberal

They opine that altruistic reasons for surrogacy should be allowed to help alleviate the sufferings of childlessness for some couples. Whatever the justification, some countries like the United States and the United Kingdom have seen it fit to consider surrogacy as a valid form of treatment for infertile couples.¹⁷

d) The Feminists Views

They argue that a woman should be allowed to do whatever she wishes with her body. After all, if a man could sell his sperm, why should a woman be stopped from using her reproductive organs for a certain fee¹⁸. She is after all, helping unfortunate couples and not causing any difficulty to anyone but herself. Feminists are faced with a difficult position in determining the status of surrogacy contracts. The view mentioned here is one that is brought by the more liberal sets of feminists. Whilst another set believes that surrogacy is a clear form of exploitation of women¹⁹.

However, on assessment of the above views on surrogacy, it may be submitted that as far Islamic law is concerned, couples are not on a freelance of their own to seek to alleviate their infertility problem by all means possible through surrogacy but that regard must be had to the established principles of the sharia on the integrity of the institution of marriage. Thus, neither the contractual agreement of the couples nor the wishes of the parties could be allowed to alter the established principles of the sharia on the preservation of lineage just to satisfy infertility grief.

16 Posner, *"The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood"*, op cit., p. 23

17 Ibid

18 Ibid

19 For interesting account of these differences, see Mahoney, Joan. "An Essay on Surrogacy and Feminist Thought", (1988) 16 Law, Medicine and Health Care Journal, p. 81.

2.2.5.2 Ethical Issues on Surrogacy

Ethical debate on surrogacy becomes an issue when something goes wrong with the pregnancy. What happens if the baby is born with a defect and the commissioning parents refuse to accept him and neither does the surrogate? If precedence is to be taken from the Stivers Mallahoff case, then there can be no denying the fact that surrogacy arrangements are nothing more than contracts for the hiring of a womb and for the purchase of the resulting child.²⁰

It has been suggested that, where the baby is born less than perfect, the parties should go back to the terms of the contract. As in defective goods, similarly a defective baby would have to be kept by the surrogate, as it did not fulfil the determined specifications²¹.

Some writers suggested that although the child will remain with the surrogate, the commissioning parents must still be responsible for payment of the agreed amount to the surrogate, as the whole set up was initiated by them. But the commissioning parents cannot claim for damages from the surrogate as pregnancy is not a situation which is totally controllable by her.

There has also been suggestion that, should the surrogate mother not want the care and responsibilities of the baby, she should be allowed to offer it for adoption as she did not have the intention to keep in the beginning anyway.

Due to the ethical and moral issues involved in surrogacy arrangements, many still frown at it especially if it has commercial motivation. However, according to them, in extreme circumstances, surrogacy should be allowed if purely done for altruistic reasons.

This is noticeable in the United Kingdom where commercial surrogacy has been declared illegal but surrogacy is still allowed if it is not done for commercial purposes.

²⁰ Leon Speroff, et al., *Clinical Gynaecology, Endocrinology and Infertility*, Maryland, Williams & Wilkins, (1989), pp. 611-617

²¹ Ibid

Therefore, there is a middle view that opines that altruistic reasons for surrogacy should be allowed to help alleviate the sufferings of childlessness for some couples. Whatever be the justification, some countries like United States and the United Kingdom have seen it fit to consider surrogacy as a valid form of treatment for infertile couples.²²

2.2.5.3 The Legal Position of Surrogacy in Other Jurisdictions

The law with regard to surrogacy varies across jurisdictions but the position in the UK and US is of particular importance and is examined below.

I. The Legal Position in the United States

The law with regard to surrogacy in the United States began to develop when the case of Baby M²³ was brought to court. In that case, the court decided that although the contract must be considered unenforceable, it was in the best interest of the child that the baby be given to the commissioning father and not the surrogate mother²⁴. See the judgement of Wilentz C.J. who also commented that if state laws prohibit monetary inducement to adoption then similar prohibitions would make paid surrogacy illegal. This set the judicial tendency in the United States courts whereby, although the surrogacy agreement in itself is considered as void and unenforceable, the custody of the child will usually be awarded to the commissioning parents and not the surrogate.

Judicial decisions from the United States courts tend to take the position of considering the best interest of the child resulting from a surrogacy arrangement rather than delving into the moral and ethical status of the act. A number of the decision tend to point to a pattern of recognising the rights of the commissioning parents to the neglect and/or subversion of the interest of the surrogate mother, regardless of her participation in the

²² Vayena, Effy et al., *Current Practices and Controversies in Assisted Reproduction*, Report of a meeting on “Medical, Ethical and Social Aspects of Assisted Reproduction”, Geneva: World Health Organization, (2002), p. ix

²³ In the matter of Baby M (1988) 109 N.J., 396, 537 A.2d 1227.

²⁴ See comments on this issue in Charo, R. A. “*United States: Surrogacy*” as edited in Mclean, Sheila (1992) *Law Reform and Human Reproduction*, Dartmouth, Aldershot, p. 227.

surrogacy arrangement. The case of Baby M²⁵ for example reflected this attitude. In that case, the Supreme Court of New Jersey had invalidated the surrogacy agreement and had held that the best interest of the child was best served if placed in the custody of the commissioning father.

Although the court acknowledges that, the consent given by the surrogate mother at the time of entering into the contract could have been full and informed consent, they merely restored her parental rights but not the custody of the child.

The decision in Baby M²⁶ was, however, criticised as being callous and unfeeling towards the surrogate mother. Wilentz C.J. in that case while holding that surrogacy contracts are invalid and unenforceable due to the lack of informed consent on the part of surrogate mother, nevertheless conveniently awarded custody of the child to the commissioning parents instead of the surrogate mother.

The court even suggested that, the surrogate mother cannot be considered to have given full informed consent before she delivers, as at that time the feelings which developed between her and the baby was yet to be formed. As such, for a surrogacy contract to be binding on her, her consent to part with the baby must be considered only after the baby has been born and she has had time to consider her feelings towards the baby thereafter, if she still decides to continue with the surrogacy agreement, only then can the agreement be enforced against her.

Although the intention of the court for awarding the custody of the baby to the commissioning parents is to deter women intending to venture into such commercial transaction from doing so, the end result is severe injustice caused to the surrogate mother. This was commented by a surrogate mother. *“Surrogacy is transferring the pain from one*

²⁵ In the matter of Baby M (1988) 109 N.J., 396, 537 A.2d 1227.

²⁶ Ibid

woman to another, from a woman who is in pain from her infertility to a woman who has given up her baby”²⁷.

To further illustrate the nonchalant attitude towards the plights of the surrogates and the general willingness to accept surrogacy arrangements as a valid subject matter for commercial transaction, it would be interesting to look into Stivers Mallahoff case²⁸.

In that case Mr Alexander Mallahoff of Queens, New York had contracted with Mrs. Judy Stivers to have her artificially inseminated with his sperm and the child to be delivered to him after it was born. In January, 1983, a baby boy was born with mental retardation²⁹. Both parties rejected the unfortunate baby and announced that it would be put up for adoption. While in the hospital, the baby developed infection and it was reported to Mr Mallahoff, who commissioned for the pregnancy had instructed the hospital not to treat the baby³⁰.

Treatment to the baby was however, given at the initiative of the hospital after obtaining the necessary court order.

It was further contended by the Stivers that not, only did Mallahoff refuse to pay her/them, but he had also asked Mrs Stivers to “start over and make a new one for him”³¹. Clearly the child was treated like a defective merchandise that did not fit the specification for the goods, could therefore be replaceable.

Regardless of the outcome of the case, the issue to be pointed out here is that if the practice of surrogacy was to be accepted as a form of treatment for infertility, no matter how far the denial goes, the child remains to be perceived as the subject matter of the contract.

²⁷ Macphee & Forest, “*Surrogacy: Programme Comparisons and Policy Implications*,” op cit., p. 308.

²⁸ Corea, G. *The Mother Machine*, op cit., p. 219; Shaler, C. (1989) *Birth Power? The Case for Surrogacy*, Yale University Press, New Haven, p. 97.

²⁹ This was indicated by the baby’s small head

³⁰ Op cit note 28.

³¹ Ibid

According to some American writers, this is just a risk that the contracting parties would have to take, as in the risk of surrogate mothers changing their minds when the child is born³². The case then took an unexpected turn when Mr. Mallahoff was proven not be the genetic father of the child. Apparently, although abstaining from having sexual intercourse with her husband after the treatment, she had not done so just before the treatment was carried out on her. The Stivers then decided to keep the child.

To date, there is no federal legislation in America governing surrogacy arrangements and not all states have specific legislations governing surrogacy arrangements. Thus, the legal position in America on surrogacy is largely dependent on the states. Some states have specific legislation making commercial surrogacy unenforceable for example Indiana, Kientucky, Louisiana, Michigan, Nebraska, and Utah³³. Whilst other states such as New Jersey tend to rely on existing legislations which govern the adoption cases. One example of such laws is the prohibition of baby selling in adoption cases and the best interest of the child when deciding to award custody.

II. The Legal Position in the United Kingdom

Initial reaction to surrogacy opened in 1978 when the case of A v C was brought to court. However, legislation only came into being approximately ten years later, after the baby cotton case. In 1985, the Surrogacy Arrangement Act was enacted and later on in 1990, the Human Fertilisation and Embryology Act came into being.

These legislations make the surrogacy arrangement unlawful and any such contract are considered as void. The effect of considering a contract as void is that the court will take the position as if the contract had never happened. As a result, the commissioning parents will not get their baby and surrogate will not get her payment. The resulting child will be

³² Stumpf, “*Redefining Motherhood*”, Op cit, p. 204.

³³ Charo, R. Alta. (1992) “*United State: Surrogacy*” in Shiela MC Lean’s Law Reform and Human Reproduction, Dart Mouth Publishing Company, Aldershot, p. 231.

regarded as the child of the surrogate and she will be entitled to keep it. Therefore, this is the direct opposite of the legal situation in the United State.

Commercial surrogacy solely for material gain other than for the attainment of infertility relief has also been declared as unlawful under the Surrogacy Arrangement Act, 1985. However, it only awards criminal punishment to agencies or middlemen who take profit from the surrogacy transactions. No similar laws exist in the United States. The surrogate mother and commissioning parents, however will not be punished for any offence. Although the intention of the legislation is to curb surrogacy arrangement, the leniency given to the commissioning parents and surrogate is a matter to be criticised.

It is submitted that, in order to ensure childless couples do not resort to this practice some form of deterrence must be provided and punitive punishment could be one way of doing so. As a result of the laxity of the treatment towards the commissioning parents and the surrogate mother, non-commercial is still being practiced in the United Kingdom. The Surrogacy Arrangement Act 1985, for example is directed towards commercial agencies which recruit surrogate mothers³⁴.

The Human Fertilisation and Embryology Act, 1990 in turn tries to regulate altruistic surrogacy whereby the Act provides the procedure to be taken by the commissioning parents in order to ensure that the resulting child is legally placed with them after he is born.

Accordingly, the child must be registered as the child of the commissioning parent, and if she is married, her husband or partner will be treated as the father. Once this has been done and once a parental order has been granted the commissioning parent under section 30 of the Human Fertilisation and Embryology Act 1990, the registrar general will make a separate parental order register, registering the child and cross referencing to the entry in the

³⁴ Section 2(1) and (4) of the 1985 Act.

existing register of birth³⁵. It is therefore, not possible to “pretend” that the resulting child is the “natural” child of the commissioning parents. The record will stand and at the age of eighteen, the child may be supplied with information enabling him or her to obtain information pertaining to their history.

2.2.6 Human Cloning

It is a procedure which is different from the normal Assisted Reproductive Technology techniques. It is in fact asexual form of reproduction which does not involve the use of a male sperm through what is known as nuclear transfer technology, a somatic cell is taken from any part of the body which will then be fused with enucleated ova by administering determined amount of electric pulse³⁶.

It consists of removing the nucleus of an egg and replacing this with nucleus of a donated unfertilised egg or the nucleus of a body cell. The re-nucleated cell is then implanted and brought to term in the womb.

The child has only genetic material of the donor of the nucleus. Since only a male or female seed is used, this is a process without conception. It is artificial virgin birth a child with the same DNA as the (one) parent.

2.2.7 Ectogenesis

This technique involves the nurture of a foetus from fertilisation to viability in an artificial placenta or glass womb.³⁷

2.2.8 Genetic Engineering

The concept of genetic engineering (GE), is motivated more by scientific arrogance of saying that science can achieve anything.

35 Lee, R. G. and Morgan, D. (2001) *Human Fertilisation and Embryology: Regulating the Reproductive Revolution*, Blackstone Press Ltd, London, p. 200

36 Ibid

37 Ebrahim, A. M., Op cit, p. 111

Genetic engineering is more centrally concerned with the process of taking the genes and segments of DNA from one specie, e.g., from human and putting them into another specie, e.g., pig so as to notice their effect or produce an improved variety of a particular specie.³⁸ Genetic engineering makes it possible to break through the species barrier and to shuttle information between completely different and unrelated species. Genetic engineering has been used in plants and animals to produce improved seeds or variety.

Hence, what is of particular concern with the employment of genetic engineering in the domain of human procreation is that it raises the issue of ethical and legal permissibility of admixture of human and non-human genetic material. The more human genes are being inserted into non-human organism to create new forms of life that are genetically apart from the human race, the ethical questions are asked, what percentage of human genes does an organism need to contain before it is considered human? Where an agro fertilizer contains human gene, how many percentages of such human genes will, for example, a pepper, mango or onion have before you consider it fit for human consumption legally and ethically?

The Chinese are now known to put human genes into tomatoes and peppers to make them grow faster. One can therefore be both a vegetarian and a cannibalist at the same time. Pork is now being stuffed with human gene and also mice genetically engineered to produce human sperm; from here the rest can be predicted.

Although genetic engineering is said to be used to benefit the expression and function of the 'new' and enhanced gene into receiving higher organism is rather crude, seriously lacking both in precision and predictability. The new gene can end up anywhere, next to any gene or even within another gene thereby disturbing its functions or regulation³⁹.

³⁸ Inhorn, Marcia C. (2006), *Making Muslim Babies: IVF and Gamete Donation in Sunni Versus Shi'a Islam*. Available at <https://www.ethicshare.org/node/473123> (Last visited 5-6-2013)

³⁹ Ibid

The foregoing methods of Artificial Reproduction or Assisted Human Reproduction or in other words biotechnical innovations are the famous ones hence not exhaustive.

2.3 Causes of Infertility and the Philosophy of Artificial Reproduction

Primarily artificial or scientific Assisted Human Reproduction as represented by these methods viz:- artificial insemination, *in-vitro* fertilisation, sperm donor/ova bank, embryo adoption/artificial embryo donation, surrogate parenting have all been evolved to cure infertility or combat it.

2.3.1 The Causes of Infertility

Infertility simply denotes a clear failure to conceive within a year of regular sexual intercourse⁴⁰. The problem of infertility is nothing new to mankind; it has been with him since the dawn of creation. Every generation of mankind has experienced it and tried combating it in their various ways.

Infertility therefore, may be due to uncured or improperly cured urinary tract infection (UTI), low sperm count or poor sperm mobility, undescended testes, blocked duct, reverse ejaculation, and damaged prostate. All these deformities may constitute or result in infertility in male. Whereas infertility in female may be due to the complete absence of a uterus, absence of or a blocked fallopian tube due to infection, failure to ovulate, and semen protein allergy, etc. Infertility could also be as a result of sexual dysfunction which denotes sexual problem in the concept of ejaculation disorder, impotence, loss of libido, inhibitions in sexual desire and any other psycho-physiologic changes that characterises the sexual response cycle.⁴¹

⁴⁰ Natallie Evans" in: Journal of Experimental & Clinical Assisted Reproduction. Available at: <http://www.pubmedcentral.nih.gov/tocrender.fcgi?journal=274> (accessed on 10th September, 2013).

⁴¹ Vayena, Effy et al., *Current Practices and Controversies in Assisted Reproduction*, Report of a meeting on "Medical, Ethical and Social Aspects of Assisted Reproduction", Geneva:World Health Organization, (2002), p.ix

2.3.2 The Philosophy of Artificial Reproduction Methods

All the methods are essentially resorted to or employed to cure or combat infertility, and in some instances especially surrogacy is resorted to by women in order to relieve themselves of the agony of going through the pain of pregnancy and child birth⁴². Other reasons for resorting to surrogacy as a scientifically assisted method or artificial method of reproduction include health or career impediments on certain women. Example, a woman's life may be put in danger if she was to carry the child herself⁴³ or she might want a child but does not want the inconveniences of pregnancy due to her career.

Another reason for surrogacy comes with possibilities created by the latest cloning technology⁴⁴. Cloning is a procedure which is different from normal assisted reproductive technique. It is in fact an asexual form of reproduction which does not involve the use of a male sperm. It is done through what is known as nuclear transfer technology. In cloning, the need for surrogate mothers could indeed be real in order to perfect cloning techniques; scientist would need real women to carry the clones to term in order to ensure that the resulting clone child is normal⁴⁵.

2.4. An Examination of the Procedures Involved in ART

There are various medical procedures that when employed would accomplish a particular ART method and these procedures in themselves raises ethical and legal issues on ART. Below is an examination of some of these procedures.

2.4.1 The Processes of In-Vitro Fertilization (IVF)

The in-vitro fertilization is a process which allows the union of the egg from the female and the sperm from the male for successful fertilization of the embryo to occur in the

⁴² Ibid

⁴³ Macphee, Larid and Forest, Kathy "Surrogacy: Programme Comparison and Policy Considerations," 4 (1990) International Journal of Law and Family, pp. 308-317 at p. 309

⁴⁴ Ibid

⁴⁵ Corea, G. *The Mother Machine*, p. 213 In: Eubios, Bioethics in the 21st Century

laboratory. IVF is achieved in a petri dish where the eggs and sperm are mixed.⁴⁶ Multiple fertilizations may occur since more than one egg and more than one sperm are placed together.⁴⁷ Once fertilization occurs within the petri dish, the pre-embryos begin development.

When the pre-embryos reach the eight-cell stage, one or more of them are introduced into the woman's uterus.⁴⁸ In order to increase success, several pre-embryos are introduced into the uterus.⁴⁹ This often results in the development of multiple embryos which leads to multiple pregnancies and births unless selective abortion is performed.⁵⁰ Further, the technology is now available for pre-implantation genetic diagnosis ("PGD") of these embryos, allowing for gender and other genetic selections prior to insertion of the pre-embryo.⁵¹

For a pregnancy to result through IVF based on current medical advances in this field, there are essentially four steps that needs to be successfully achieved. For, pregnancy cannot be achieved where even one of these steps is defied. The four steps in a successful procedure are as follows:

- a) **Retrieval of the Mature Egg:** There would be retrieval of an egg for the purpose of IVF and this may involve the use of fertility drugs (like hMG, Follistim, Gonal-F or Humagon) which are used to ripen more than one egg. This process is called controlled ovarian hyperstimulation. Eggs are recovered by transvaginal ultrasound directed aspiration of the follicles. Intravenous sedation is used because timing of the

⁴⁶ Ibid at 868

⁴⁷ Ibid at 865

⁴⁸ Ibid

⁴⁹ Ibid at 866

⁵⁰ Sutton, *op cit.*, at 865.

⁵¹ See Paul Lauritzen, Richer Views of the Ethics of Reproduction, 32 THE HASTINGS CENTER REPORT 43 (Sept/Oct 2002).

egg collection is critical, ultrasound monitoring and hormone tests are done in egg retrieval.

- b) Sperm Collection, Fertilization and Embryo Development:** A semen specimen is obtained and prepared at the appropriate time in relationship to the egg recovery. Meanwhile, the eggs are placed in culture medium to incubate and mature until timing is optional for fertilization by the sperm. The resulting zygote is called a pre-embryo. In nature as well as in the laboratory, fertilization may not occur, nor does development always continue once the egg is penetrated by sperm.
- c) Transfer of the Developing Embryo(s) into the Uterus:** on the third or fifth day after egg recovery, the embryo(s) are transferred into a small tube through the cervix into the uterus. This process is technically much simpler than the egg retrieval in that it does not require anaesthesia and is like a regular pelvic exam.
- d) Implantation and Growth of the Embryo(s):** after fertilization and transfer, further development and implantation of the embryo(s) in the uterine lining is governed by hormones, receptors on the uterine lining, and other unknown factors. Blood tests will be taken to detect pregnancy. Additional hormones are given to support the early pregnancy.⁵²

2.4.2 The Procedures of Artificial Insemination (AI)

Artificial Insemination (AI) is the oldest and most widely used form of ART. Successful AI is documented as far back as the fourteenth century where the Arabs conducted it on horses.⁵³ In humans, it is primarily utilized in cases of male infertility, though it may be

⁵² Afroz Ali, *Conditional Permissibility of In-Vitro Fertilization under Islamic Jurisprudence*, Al-Ghazzali Centre For Islamic Sciences and Human Development, Australia (2004), p. 67

⁵³ Sheri Gilbert, *Fatherhood from the Grave: An Analysis of Postmortem Insemination*, 22 HOFSTRA L. REV. 521, 524 (1993).

used for other reasons (*e.g.*, to prevent passage of a genetic disease, single woman desiring parenthood, and lesbian couples).⁵⁴

It is a relatively simple technique that involves injection of a sperm sample into the female reproductive tract to cause pregnancy.⁵⁵ There are three sources of sperm for insemination; sperm from a donor (“AID”), sperm from the husband (“AIH”), or a combination of donor plus husband’s sperm (“AIC”). The injected sperm is deposited near the cervix, but outside the uterus. The sperm can be either fresh or frozen.⁵⁶

AI is both simple and inexpensive and may actually be achieved without the assistance of a physician.⁵⁷ However, a genuine risk remains regarding the transmission of communicable or inheritable diseases. A variant of AI is a process known as intrauterine insemination (“IUI”), where the sperm is deposited inside the uterus.⁵⁸

2.4.3 Intracytoplasmic Sperm Injection

ICSI involves selecting a specific sperm for injection directly into an egg thereby instantly achieving fertilization. It is most commonly employed when the male’s sperm is of abnormal morphology, poor mobility, or insufficient in number, resulting in the inability to accomplish fertilization in a natural way.⁵⁹ The resulting fertilized egg is then either introduced into the woman’s uterus or the fallopian tube. This creates a way for defective sperm to fertilize an egg.⁶⁰

⁵⁴ Ibid at 548

⁵⁵ Amy L. Komoroski, *After Woodard v. Commissioner of Social Services: Where Do Posthumously Conceived Children Stand in the Line of Descent?*, 11 B.U. PUB. INT. L.J. 297, 302 n.35 (2002).

⁵⁶ Karin Mika & Bonnie Hurst, *One Way to Be Born? Legislative Inaction and the Posthumous Child*, 79 MARQ. L. REV. 993, 996 (1996).

⁵⁷ See Brenwald & Redeker, *op cit*, at 612.

⁵⁸ Komoroski, *op cit*.

⁵⁹ Sutton, *op cit*, at 867

⁶⁰ Ibid

2.4.4 Gamete or Zygote Intrafallopian Transfer

These two procedures involve placement of the genetic material directly inside the fallopian tube.⁶¹ The fallopian tube is the normal anatomic location of fertilization in the human body.⁶² A gamete refers to the male or female reproductive cell before fertilization - the egg or the sperm.⁶³ GIFT is the process where an egg and sperm are inserted together inside the fallopian tube where fertilization then follows naturally.⁶⁴ In GIFT, fertilization is intended to occur *inside* the body.⁶⁵ However, with ZIFT, the fertilization takes place *outside* the body.⁶⁶ A zygote is an egg that has been fertilized by a sperm.⁶⁷ With ZIFT, an egg is fertilized in a petri dish, then that zygote (fertilized egg) is introduced into the fallopian tube where the process can continue.⁶⁸

2.4.5 Surrogacy

The hallmark of this form of assisted reproduction is that a woman bears a child for someone else. This woman is called the surrogate mother. There are two forms of surrogacy, partial and complete. In “partial” surrogacy, the surrogate mother supplies the egg and the sperm is supplied by the soliciting couple.⁶⁹ In “complete” or “full” surrogacy, the surrogate mother has no genetic connection to the fetus.⁷⁰ This is also sometimes referred to as “gestational” surrogacy since the surrogate mother only gestates the fetus.

⁶¹ Sutton, *op cit*, at 868.

⁶² Ibid.

⁶³ AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2004) (2000), available at <http://www.answers.com/gamete&r=67> (last visited November 20, 2005).

⁶⁴ Sutton, *op cit*, at 868.

⁶⁵ Ibid.

⁶⁶ Ibid at 868

⁶⁷ AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2004) (2000), available at <http://www.answers.com/zygote> (last visited November 20, 2005).

⁶⁸ See Sutton, *op cit*, at 868

⁶⁹ Ibid at 871-872

⁷⁰ Ibid at 871

It is possible for a baby born via surrogacy to have *six* different parents; the genetic mother and father; the social rearing mother and father; and the birth mother (surrogate) and, if she is married, her husband could be considered a father.⁷¹

2.4.6 Post-Humous Conception (PHC)

Posthumous conception (PHC) must be distinguished from posthumous birth/child. The distinction between the two terms can be legally dispositive.⁷² Posthumous births have been around since time immemorial.⁷³ They are births resulting from conceptions that occur *prior* to the death of the father or mother, but are not born until after the death of the father or mother.⁷⁴ However, PHC refers to conceptions that take place *after* the death of one or both biological parents.⁷⁵ PHC may be accomplished by using genetic material stored by either one, or both, of the parents prior to their death or by post-mortem gamete retrieval, where the genetic material is removed after death.⁷⁶

Retrieval of viable sperm after death was first described in 1980 by C. M. Rotham.⁷⁷ It is also now possible to preserve a woman's eggs and ovarian tissue shortly after death or during a persistent vegetative state⁷⁸ and to harvest "eggs from aborted females who were never born."⁷⁹ AI, IVF, and other forms of ART, "have made the creation of posthumously

⁷¹ See *ibid* at 866; Brenwald & Redeker, *op cit.*, at 646 n.230 (discussing a 1997 California trial court's pronouncement of an ART child as "parentless" because six people were involved in the conception).

⁷² See Brenwald & Redeker, *op cit.*, at 600 n.2.

⁷³ Soules, *op cit.*, at 362.

⁷⁴ Evelyne Shuster, The Posthumous Gift of Life: The World According to Kane, 15 J. CONTEMP. HEALTH L. & POL'Y 401, 416 (1999) ("Decisions to sustain a dead pregnant woman for the sake of her fetus have been ethically justified on utilitarian grounds.").

⁷⁵ *Ibid* at 402

⁷⁶ *Ibid*

⁷⁷ R.D. Orr & M Siegler, Is Posthumous Semen Retrieval Ethically Permissible?, 28 J. MED. ETHICS 299 (Oct. 2002).

⁷⁸ Soules, *op cit.*, at 363.

⁷⁹ Brenwald & Redeker, *op cit.*, at 601.

conceived children a widespread social reality.”⁸⁰ In fact, IVF combined with surrogacy makes possible the birth of a child after the death of *both* its genetic parents.

2.4.7 Cryogenic Preservation

Cryogenic preservation is the technology that allows for the freezing and preservation of biological materials.⁸¹ The gametes are placed in a protective solution and frozen according to a specific protocol, then stored in liquid nitrogen at -196° C (-328° F).⁸² The exact duration of storage without damage is unknown for eggs, but it is believed that egg tissue “should survive indefinitely in liquid nitrogen.”⁸³ Sperm cryogenically preserved can remain viable up to ten years,⁸⁴ in fact it has been posited that spermatological stem cells may be preserved for “more than one hundred years after the death of the genetic parent.”⁸⁵ The embryo has proven to be extremely durable genetic material throughout the process of freezing, storage and thawing, and is reported viable after *600 years* of storage!⁸⁶

The preservation of all human gametes, including eggs, sperm, and embryos, is possible and harvesting could occur after death.⁸⁷ It is this technology, cryopreservation and storage, which allows for the use of one’s human genetic material for reproduction at virtually any point in time (with gestation and rearing occurring by persons never known to the genetic parents).

It may be pertinent to state that these ART procedures taken as a whole raises certain ethical issues that seem to contradict the teachings of Islamic law. In that, it involves unnecessary exposure of private parts to those who are not the couple’s *Mahram* which is unethical and prohibited act that decreases one’s faith (*Iman*) and degrades humanity; for

⁸⁰ Komoroski, *op cit*, at 315.

⁸¹ Sutton, *op cit*, at 869.

⁸² Soules, *op cit*, at 363; Mika & Hurst, *op cit*, at 996.

⁸³ Soules, *op cit*, at 363.

⁸⁴ Mika & Hurst, *op cit*, at 996.

⁸⁵ Komoroski, *op cit*, at 301.

⁸⁶ Sutton, *op cit*, at 869 n.74; Mika & Hurst, *op cit*, at 996.

⁸⁷ Soules, *op cit*, at 363.

instance, in an IVF process, retrieval of the egg from the woman requires series of trans-virginal ultrasound. Similarly, the transfer of the developing embryo(s) into the uterus after egg recovery through the cervix exposes the woman's private part unnecessarily to gynecologists that are persons other than her *Mahram*. So also, retrieval of the sperm from the male donor involves exposure of one's private part to persons other than one's *Mahram* which is also an unethical practice.

Moreover, as ART procedures often results in the development of multiple embryos which leads to multiple pregnancies and births and to prevent such occurrence, selective abortion is performed including for the sole purpose of determining the child's gender. This is but tantamount to infanticide and obsessive interference with the natural order established by the Almighty in the process of His creation. For one to undertake decision to wilfully determine the number of embryos to fertilize and as well wilfully undertake to abort particular embryos especially on gender preference is no doubt an ungodly practice that is against the teaching of Islam for the responsibility of human creation rests with Almighty Allah and the ultimate decision as to the number of embryos fertilizable and the particular kind of gender to procreate is the domain of the Almighty Allah out of whose wishes bestow to certain people ability to conceive single or multiple embryos be it male or female child or both.

2.5 The Legal Position of ART in Nigeria

There is no clear and specific local legislation dealing with or regulating the practice of scientifically assisted reproduction (SAR) in Nigeria in general or surrogacy in particular or any other methods. There is no judicial authorities either ever decided on any legal tussle or contest over any matter in respect of artificial reproduction or any way of achieving it. This is largely because the technology is still new in Nigeria hence lacks acceptability and legitimacy, not to talk of recording or reporting any judicial precedence on it.

However, it is worth noting that Nigeria is a signatory to many international treaties having direct bearing on children, and the method through which they are reproduced. These include: the United Nations Convention on the Rights of the Child (herein after referred to as CRC)⁸⁸. The United Nation Convention on the Elimination of all forms of Discrimination Against Women (herein after called CEDAW)⁸⁹. The African Charter on the Right and Welfare of the Child (herein after referred to as ACRWC)⁹⁰. No reservation was entered by Nigeria with respect to any of these instruments, thus making it duty bound to observe them.

The position of Nigeria being a party to a treaty is one thing, and application of the treaty is another thing as it has to cross the hurdle of the Constitution which is largely predicated on federal structure reflecting unity in diversity. This is why section 12(3) requires that unless an Act is ratified by a majority of all the Houses of Assembly in the Federation, it may not be applicable. Some State Assemblies may ratify while others may not, just as what obtains in the case of the Child's Right Act 2003, a by-product of the United Nation Convention on the Right of the Child⁹¹.

2.5.1 The Constitutional Requirements for Implementing International Treaty Obligations Inrespect of Reproductive Rights in Nigeria

Depending on the constitutional arrangement of a state party, a treaty shall not have the force of law unless the constitutional requirement for its implementation is observed. In Nigeria, international treaties require domestication in accordance with section 12 of the 1999 constitution of Federal Republic of Nigeria. The section reads:

- 1 No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.
- 2 The National Assembly may make laws for the federation or any part thereof with respect to matters not included in the

88 Ratified by Nigeria in 1991, adopted 20 November 1989, entered into force 2nd September 1980.

89 Adopted and opened for signature, by UN General Assembly resolution 34/180 of 18 December, 1989; entered into force on September 3, 1981 in accordance with article 27(i). Nigeria is a signatory to CEDAW, which was signed in 1985 and ratified in 1989 and the optional protocol in 1999.

90 African Charter on the Right and Welfare of the Child.

91 Ibid

exclusive legislative list for the purposes of implementing the treaty.

- ³ A bill for an Act of National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the president for assent unless it is ratified by a majority of all the House of Assembly in the Federation ⁶⁴

It is not in doubt that, a treaty or treaties dealing with artificial reproduction do(es) not fall within the exclusive list to warrant its domestication by the National Assembly without the blessing of state legislature. As such, for any treaty to transform into an Act to have general application in the federation, section 12(3) of the constitution must be satisfied.

This is largely because of the heterogeneity and diversity of the Nigerian Federation. For instance, here in the Northern Part of the federation, assuming the treaties legalising the practice of any method of artificial reproduction is to be re-enacted locally, the northern state assemblies would naturally decline to bless any purported Act of National assembly in that regard.

This is because Islamic law does not recognize it as a lawful natural method of procreation, as it tends to mix up and confuse genealogy. This point shall be discussed critically in the next chapter.

Even in the southern part of the country that is predominantly Christians, Artificial Human Reproduction is seen with tremendous ethical suspicions. In an interview with Daily Trust⁹² captioned “most people are ignorant about IVF service”. Dr. Abayomi, Managing Director, Nordica Fertility Centre posited that:

... there are Christians in the country who believed IVF (In-vitro Fertilization) is antichrist. That is quite sad. I am a Christian and i know that the knowledge of science and faith go side by side”. He continued “... someone was accusing me sometimes ago that even though i am a deacon, i am not speaking like one because I seemed to have forgotten what the scripture says about human reproduction.

64. Section 12 of 1999 Constitution of the Federal Republic of Nigeria
65 Tuesday, April 16, 2013, p.35

Therefore, Scientifically Assisted Reproduction remains questionable even among the Christians in Nigeria not to talk of their Muslims counterpart, even though some Islamic jurists are of the view that, there are situations that it may be allowed in Islamic law depending on the method used and parties involved.

It is at this juncture that this research work intends to posit that, the Child's Right Act⁹³ only seeks to domesticate the Child's Right Convention and the African Union (AU) Charter on Rights and Welfare of the Child, it provided for the use of scientific test in determining paternity or maternity of a child (Scientifically Assisted Reproduction inclusive). Part VII contains provisions affecting the judicial and evidential system operating in this country⁹⁴. It deals with the use of scientific tests in determining the paternity and or maternity of a child.⁹⁵ Section 63 of the Act clearly empowers court to require the use of scientific test to determine the paternity of a child. However, care must be taken in applying this provision as it can be abused by impersonators.⁹⁶

Provisions for the use of scientific test or evidence in determining the paternity or maternity of a child under the Act would not be easily acceptable and so may require harmonisation in the light of what Islamic law injunctions and values provides⁹⁷.

Section 63(i) of the Child's Right Act (CRA) states that *"in any civil proceedings the paternity or legitimacy of a child under this Act in addition to any other ordinary means of proof, can be determined by use of scientific test"*. It must be noted that the Act was careful to confine the application of the use of scientific test to proving paternity of a child in civil proceedings only. Thus, scientific test cannot be used to prove commission of adultery in criminal proceedings.

93 CRC 2003

94 Babaji, B., *An Overview of the Child's Right Act and Its Impacts on Muslim in Nigeria*, p. 45.

95 Ibid

96 Ibid

97 Ibid at p.26

The problem is that the use of scientific evidence or test as proof of paternity and or legitimacy of a child, not only in the Nigerian judicial system but also in the judicial system of some developed countries remain unsettled and therefore, in countries like Britain, this method is not acceptable as conclusive proof of paternity but it is rather to be used corroboratively only⁹⁸.

It follows that where comes a dispute on paternity or maternity of a child reproduced through scientifically assisted method, scientific test can be used in Nigeria to settle the tussle particularly in states that adopted the Child's Right Act 2003 without modification as an Act of the National Assembly. Whereas in state like Jigawa that passed it as a state law with tremendous modification, fine-tuned it in accordance with their yearnings and aspiration against the Child's Right Act.

Part VII sections 54 - 58⁹⁹ permits the use of scientific tests in determining the paternity and maternity of a child. The only difference between the CRA and Jigawa State Child Rights Law is that when compared with the CRA, it authorises the use of scientific tests subjects to the personal law of the parties. This is an attempt to take care of concerns of some Muslims that, the use of scientific tests may violate provisions of the Quran and Islamic law principles on how paternity of a party is established.

Treating infertility has become a highly competitive business, and the field itself is notoriously under regulated.

Along with advances in technology comes the need for government guidelines and laws to ensure that those technologies are used safely and responsibly¹⁰⁰. Even though this area of technology is still undeveloped all over the world. Law makers and policy makers should start thinking along the line of regulating this field.

98 Ibid

99 CRA 2003

¹⁰⁰ Adewumi, A. A. *The Need for Assisted Reproductive Technology Law in Nigeria*, A Journal of Contemporary Legal Issues, Vol. 4, (2012), p. 69

In Nigeria, Assisted Reproductive Technology is absolutely uncontrolled unregulated even though there are a number of recognised fertility clinics in the country¹⁰¹. There is no legal regulation of ART despite the fact that the awareness about ART is increasing and Nigerians are benefiting from the technology. The different centres are affiliated to different hospitals abroad based in different countries and each centre makes use of the guidelines and follow the procedures of the foreign hospitals they are affiliated to¹⁰².

This has brought about a situation in Nigeria where Nigerians have access to fertility treatment procedures of different countries without travelling out of their country.

This kind of practice is not healthy for a developing country like Nigeria and it can be said that one of the factors responsible for this practice is that ART and infertility are not priority health issues hence the lack of government policy in this area of health care practice.

In Nigeria and other developing countries, there is no state regulations of ART even though we have several centres in Nigeria¹⁰³. ART practitioners in Nigeria and other developing African countries have voluntary adherence to guidelines set by the American society of Reproductive Medicine, the British Human Fertilisation and Embryology Authority or the equivalent body in France or Germany. Due to the interaction and collaboration of the ART centres in African with scientists in Europe, South Africa, Australia and America, the centres voluntarily abide by accepted guidelines from those countries.

In Nigeria, the various ART centres are self-regulated, there is no national body that oversees the affairs of these centres. Considering the current status of ART in Nigeria, one may be tempted to think that the following reasons are contributing factors:

1. Infertility treatment and ART are not priority health issues.
2. Ignorance and lack of interest by politicians and health authorities

¹⁰¹ Ibid p.79

¹⁰² Ibid p.88

¹⁰³ Oyeade, N. Why Most Nigerian Men Have Low Sperm Count, Saturday Punch, 2nd May 2009, p. 89

3. Apathy, inertia, lack of interest and commitment by professional peer body
4. Multi-ethnic and multi-religious composition of the population in the country makes it difficult to implement and regulate uniform ART practice guidelines.
5. ART is not recognised as a sub speciality of gynaecological practice. Hence no structured training for clinicians and embryologists exist for ART practice.
6. Most ART practice is set up in non-government medical centres in the private sector, without proper supervision and licensing. Governmental intervention has never occurred in running of ART centres in private hospitals centres in the country¹⁰⁴.

However, infertility should be seen and handled as a public health issue and not mainly as an individual or social issue in Nigeria. Therefore, all Artificial Reproductive Technology Practitioners should come together and form a national body that would come out with a standard practice suitable for the Nigerian society and also create a supervisory body for the centres¹⁰⁵. This will go a long way in setting a good foundation for the future of Assisted Reproductive Technology Practice in the country and even prevent a situation where quakes will hold themselves out as Assisted Reproductive Technology practitioners and commit atrocities that would scare the people from having confidence in the technology and its practitioners.

Non-regulation of Assisted Reproductive Technology may cause more harm than public good. Nigeria has no legal regulations for ART. Federal agencies, professionals and consumer organisations, the scientific community, the health care community and other stakeholders should participate in the development of a National Public Health Plan for the prevention, detection and management of infertility. A public health symposium on infertility should be organized where working groups will be formed and a draft national action plan will be made.

¹⁰⁴ Ibid

¹⁰⁵ Ibid

The involvement of the Nigerian government in assisted reproduction should therefore include, reduction in the cost of ART by subsidy through the National Health Insurance scheme so as to enable the poor benefit from such service, prevention of indiscriminate springing up of fertility clinics the control of standards for clinical procedure and the regulation of professional practice.

This marks the end of this chapter and leads to the next, that is chapter three. It analyses each artificial methods of reproduction from Islamic Law perspective vis-à-vis reproductive rights. However, while this chapter had discussed the nature and philosophy of ART generally, the next chapter examines the Islamic law perspective on the various techniques of ART.

CHAPTER THREE:

ARTIFICIAL HUMAN REPRODUCTION: AN ISLAMIC LAW PERSPECTIVE

3.1 Introduction

The use of medical techniques to enhance fertility is a topical issue. Islam acknowledges that infertility is a disease. The pursuit by barren spouses of the remedy to infertility should therefore, not be seen as a rebellion against the fate decreed by Allah (SWT). Nevertheless, for the Islamic law tolerance not to be misconstrued as *carte blanche* (complete freedom or authority to do whatever one likes) for indiscriminate adoption of any method or technique of reproduction, there is a pressing need to appraise certain processes involved in assisted reproductive techniques which often raise questions bordering fundamentally on moral, ethical and legal issues. This chapter provides an Islamic law perspective on issues relating to the use of Assisted Reproductive Technology (ART) without conventional sex, with a view to clearing the legal status of the child, the father, mother and the third party where he/she is involved.

3.2 General Overview on the Perspective of Islamic Law on ART

Assisted Reproductive Technology today is being used for two different objectives. First is the employment of ART as a succour to childless/infertile couples, through this technologically advanced medical intervention to assist them have issues of their own. However, other classes of people who may not necessarily be barren are also availing themselves of the ART opportunity.¹

The Islamic law's position on ART is informed by its perception of the cause of the usage itself. Thus, if the cause for using any assisted reproductive technique is to cure the couple's infertility, the act is utterly permissible, provided that no other law of Islam is

¹ Abdul-Razzaq, A. A. *Assisted Reproductive Technology (ART): The Islamic Law Perspective*, Berna Arda & Vardit Rispler-Chaim (eds.), *Islam and Bioethics*, Ankara University, Turkey, (nd) pp. 85-97

contravened in so doing. The Noble Qur'an attests to the curability of infertility when it states:

And (remember) Zakariya, when he cried to his Lord: "O my Lord! leave me not without offspring, though You are the best of inheritors. So We answered his call, and We granted him Yahya (his son). We cured his wife's (infertility) for him."²

Furthermore, Muslims are allowed and even encouraged to seek lawful cure of any form of illness or disorder they may have. The hadith narrated on the authority of Usamah bin Shuraik succinctly put it as follows, "The Prophet (*salla Allah alai wa sallam*) said, "Seek remedy (of your illnesses), for Allah has never created an illness unless He has also created a cure for it, save the (illness of) old age".³ With the exception of surrogacy, all other known Assisted Reproductive Techniques are, in principle, in keeping with the Shariah norms; as they all constitute one form of medical intervention or another, to cure a barren woman of her infertility. The early quoted hadith of Usāmah bin Shuraik clearly establishes that 'For every illness there is a cure', and taking advantage of such a cure, which is not in itself forbidden, is in total keeping with the law of Islam'. Based on this premise, Artificial Insemination (AI) and *In-Vitro* Fertilization (IVF) as remedies to infertility are adjudged by Muslim jurists as permissible, provided these are not predicated on frivolous medical reasons, and are devoid of any introduction of a third party donor.⁴

However, as indicated by Marcia C. Inhorn,⁵ non-binding but authoritative Islamic religious proclamations (*fatwas*) have profoundly affected the practice of IVF in ways that

² Qur'an 21: 89-90

³ An authentic hadith narrated by Tirmidhi vol. iv p. 383; Abu Dawud vol. ii p. 396; and Ibn Mājah vol. ii p. 1137.

⁴ Journal of International Islamic Fiqh Academy, Jeddah, 1987, vol. iii, part 1 pp. 515-516; Jayzani, Muhammad, *Fiqh al-Nawazil*, Dammam, Ibn al-Jawzi Publishers, 2005, vol. iv, pp. 85-87

⁵ Marcia C. Inhorn, *Making Muslim Babies: IVF and Gamete Donation in Sunni Versus Shi'a Islam*, Journal of Culture, Medicine and Psychiatry 30: 427-450, 2006. Available online at: <http://www.marciainhorn.com/olwp/wp-content/uploads/Globalization-and-Gametes1.pdf> (accessed on the 13/8/14)

are not commonly seen in the West. Indeed, in the Muslim world, infertile couples are usually extremely concerned about making their test-tube babies in the religiously correct fashion. To that end, they seek out the “official” Islamic opinion on the practice of IVF in the form of a *fatwa*.

In recent years, many such *fatwas* on a wide variety of reproductive health issues have been issued in Egypt and other Muslim countries.⁶ Thus, the major divergences that have occurred between Sunni and Shi’ite religious authorities regarding the permissibility of ART may be summed up as follows. The main points of the Sunni Islamic position on medically assisted conception, is as follows:

1. Artificial insemination with the husband’s semen is allowed, and the resulting child is the legal offspring of the couple.
2. In vitro fertilization of an egg from the wife with the sperm of her husband followed by the transfer of the fertilized embryo(s) back to the uterus of the wife is allowed, provided that the procedure is indicated for a medical reason and is carried out by an expert physician.
3. No third party should intrude into the marital functions of sex and procreation, because marriage is a contract between the wife and husband during the span of their marriage. This means that a third party donor is not allowed, whether he or she is providing sperm, eggs, embryos, or a uterus. The use of a third party is tantamount to *zina*, or adultery.
4. Adoption of a donor child from an illegitimate form of medically assisted conception is not allowed. The child who results from a forbidden method belongs to the mother who delivered him/her. He or she is considered to be a *laqit*, or an illegitimate child.

⁶ Ibid, p. 431

5. If the marriage contract has come to an end because of divorce or death of the husband, medically assisted conception cannot be performed on the ex-wife even if the sperm comes from the former husband.
6. An excess number of fertilized embryos can be preserved by cryopreservation. The frozen embryos are the property of the couple alone and may be transferred to the same wife in a successive cycle, but only during the duration of the marriage contract.
7. Multifetal pregnancy reduction (or so-called selective abortion) is only allowed if the prospect of carrying a high-order pregnancy (i.e., twins, triplets, or more) to viability is very small. It is also allowed if the health or life of the mother is in jeopardy.
8. All forms of surrogacy are forbidden.
9. Establishment of sperm banks is strictly forbidden, for such a practice threatens the existence of the family and the “race” and should be prevented.
10. The physician is the only qualified person to practice medically assisted conception in all its permitted varieties. If he performs any of the forbidden techniques, he is guilty, his earnings are forbidden, and he must be stopped from his morally illicit practice.⁷

On the other hand, for Shi’ite Muslims, attitudes toward gamete donation have changed considerably since the late 1990s. Until recently, most Shi’ite religious authorities have supported the majority Sunni view: namely, they have agreed with Sunni clerics who say that third-party donation should be strictly prohibited. In the late 1990s, however, the Supreme Jurisprudent of the Shi’a branch of Islam, Ayatollah Ali Hussein Khamanei, the handpicked successor to Iran’s Ayatollah Khomeini, issued a fatwa effectively permitting donor technologies to be used. This fatwa has proved to be very significant for those Shi’a who follow the lead of Ayatollah Khamanei in Iran. This would include Lebanon’s Hizbullah leaders, who consider Ayatollah Khamanei to be their marja’ taqlid, or spiritual reference

⁷ Ibid, pp. 432-433

(literally, source of emulation). With regard to egg donation, Ayatollah Khamanei stated in his initial fatwa that egg donation “is not in and of itself legally forbidden.” But he stated that both the egg donor and the infertile mother must abide by the religious codes regarding parenting. Thus, the child of the egg donor has the right to inherit from her, as the infertile woman who received the eggs is considered to be like an adoptive mother.

Shi’a religious authorities who now accept the idea of donation, but are strict in their interpretation of how donation should be practiced, argue that:

1. when a couple needs a donor, they should go to a Shi’ite religious court, where a decision can be made on a case-by-case basis;
2. there should be a determination about which religious “reference” (i.e., source of spiritual emulation) the infertile couple follows;
3. the decision should be made in the presence of witnesses, the IVF doctor, and with the agreement of both parties (the infertile couple and the donor);
4. the husband should do a *mut’a* marriage with the egg donor for the period of time in which the whole procedure (egg retrieval to embryo transfer) is taking place, because polygyny is legal in Islam and avoids the implications of *zina*, or adultery;
5. but because a married Shi’ite Muslim woman cannot marry another man other than her husband (since polyandry is illegal in Islam), she cannot do a *mut’a* marriage with a sperm donor. Technically, the child born of a sperm donor would be a *laqit*, or out-of-wedlock child, without a family name and without a father. Thus, in theory, only widowed or otherwise single women should be able to accept donor sperm, in order to avoid the implications of *zina*. However, in the Muslim countries, single motherhood of a donor child is unlikely to be socially acceptable.⁸

⁸ Ibid, pp. 434-436

3.3 Islamic Position on the Use of ART by Fertile Men and Women

Apart from using ART as a cure of infertility, it is also increasingly used to enable women without a male partner (single women/choice mothers and single or coupled lesbians) to have children by using sperm provided by a donor.⁹ Furthermore, assisted reproduction is equally being employed for baby gender selection and the quest for a particular sex (male or female) by fertile couples who resort to IVF just to be able to have a preferred gender.

Islamic law frowns on any use of ART with no medical justification.¹⁰ As explained above, the only legal ground for permissibility of ART procedures is when they are resorted to as a therapeutic approach to assist couples with one form of reproductive disorder or another. Any ART process predicated on superfluous reasons is therefore an illegality in the eyes of the law. Self-imposed single motherhood or fatherhood, as with lesbians or gays longing for children, is a sharp negation of Islamic law provisions, as contained in many statutory authorities. Thus, a Muslim, male or female, cannot refused to get married and choose for himself/herself single motherhood or fatherhood by undergoing ART as an alternative way to have children irrespective of his/her defiance of marital status. In fact, in two separate authentic hadiths, the Prophet (SAW) declared that refusal to enter into a union through a valid marriage contract, despite ability to do so, is defiance of a divine order and a show of contempt for the Prophetic *Sunnah*. The hadiths have been narrated on the authority of Ibn mas'ud and Anas bin Malik respectively.¹¹

Moreover, the Noble Qur'an unequivocally affirms that, "*He (Allah) creates what He wills. He bestows female upon whom He wills, and bestows male upon whom He wills*".¹²

⁹ "Sex Selection Clinics Engender Controversy" in *The Egyptian Gazette* of April 2, 2010, p. 1 cited in Abdul-Razzaq, A. A. *Assisted Reproductive Technology (ART): The Islamic Law Perspective*, op cit., pp. 85-97

¹⁰ Aliyu, I. A. *In-vitro Fertilization and Artificial Insemination in Islamic Law*, A.B.U.L.J (1999-2000) p. 137

¹¹ *Sunan Abu Dawud*, Dar al-Fikr Publishers, Beirut, Vol. I, p. 624; *Sahih al-Bukhari*, Dar Ibn Kathir, Beirut, 3rd edition, (1987), Vol. V, p. 1949.

¹² Qur'an 42: 49

Hence, it could be safely argued that gender selection on its own constitutes unacceptable interference in the divine demographic order and, ipso facto, a nullity under the law of Islam. In addition, Muslim jurists are of the opinion that ART procedures are occasionally accompanied by some psychologically devastating practices with far reaching consequences; hence, they should remain a closed gate, accessible only on the grounds of unavoidable necessity (*al-darurah al-quswa*).¹³ An example of such practices is the possible mixing up of sperms, eggs or embryos, which is sometimes detected only after delivery of the ART baby.¹⁴

3.4 Surrogacy in Islamic Law Perspective

Surrogate parenting involves a woman bearing the child of another woman who is not in a position to bear children as a result of her fallopian tube being blocked or her not having a uterus.¹⁵ A surrogate mother would, in effect be leasing her womb for the child that one gives birth to, that does not legally become one's own, but is the child of the couple who pays the surrogate mother for that particular purpose. In some of the states in America it is a legal venture. But in England it has not yet been legalized¹⁶.

This procedure allows an infertile couple to have a child who would have the genetic compliment of say the husband, if the husband sperm is used to fertilize the ovum of the surrogate woman¹⁷. But here, the major problem or objection from Islamic law perspective is that fertilizing the ovum of another woman by the sperm of a man not her husband is to be regarded as an adulterous union.

It may also happen that the sperm and ovum of the married couple be fertilized *in vitro* and placed in the womb of the surrogate mother who would be paid for giving birth to the child who would in that respect bear the genetic compliment of the contracting couple.

¹³ *Resolutions of Islamic Fiqh Council*, Makkah, p. 151

¹⁴ Abdul-Razzaq, A. A. *Assisted Reproductive Technology (ART): The Islamic Law Perspective*, op cit., pp. 85-97

¹⁵ Ebrahim, A.M. *Biomedical Issues: Islamic Perspective*, A.S. Noordeen, Kuala Lumpur, Malaysia (1988), p. 112

¹⁶ Ibid

¹⁷ Ibid

Here, it may be pointed out that, Islam permits Muslims to have their children breastfed by other women. If that is done, then the child would be like the child of the wet nurse. This means that, if the wet nurse has her own biological children, then the child she breastfed would not legally be permitted to marry any of her own biological children¹⁸. But, it is to be emphasized that, this can in no way serve as justification for the surrogate mother of the fertilized egg of the married couple. The wet nurse provides the basic essential nourishment to the already born child, while the surrogate mother carries the unformed child to term and literally gives birth to it.

In surrogacy contract, the child delivered is said to be that of the couple that contract the surrogate mother for that purpose. Though the infertile couple now has a child having the genetic compliment of the husband, it should be noted that, the ovum is that of the surrogate mother and not the wife's. What Islamic law is looking at is the fertilization of the ovum of a woman by the sperm of a man not her husband. This is clearly wrong in Islamic law and is even considered as indirect adulterous union¹⁹. However, some contemporary jurists are of the opinion that, surrogate parenting will be lawful where the surrogate mother is the second wife of the same husband with the woman whose ovum is used. But this writer differs on this based on the role of fertilization in the procreation process as enumerated by *Imamul Ghazali* who is of the opinion that, fertilization is the essential factor in procreation and as such disturbing it will be a crime. He said in his book *Ihya'ulum al-Din*:

... Human existence has stages. The first stage of existence is the settling of the semen in the womb and its mixing with the secretion of the woman. It is then ready to receive life. Disturbing it is a crime. When it develops further and becomes a lump, aborting it is a greater crime.²⁰

¹⁸ Ibid, p. 113

¹⁹ Qardawi, Y. (1989) *The Lawful and the Prohibited in Islam*, Al-Tauheed Publishing Company Ltd, Lagos, Nigeria, p. 28

²⁰ Al-Ghazali, *Ihya'ulum al-Din*, vol. 2, p. 51 cited in: Ebraheem, A.M. op cit., p. 109

Another issue that raises a lot of controversy among jurists, is where the sperm and ovum of a married couple are fertilized *in-vitro* and placed in the womb of another woman who will be paid for carrying the pregnancy and giving birth to the child. Here, it is accepted argument that, the child will bear the full genetic composition of the contracting couple. But the questions here, are the legality of the contract between the couple and the surrogate mother on the one hand, and of course the issue of genealogy (*nasaba*) on the other hand. This leads this topic to the next one that is the legality of the contract.

In Islamic law, contract of whatever nature must be lawful in its essence and content. It must involve only things recognized as legal and of value by Islamic law. In Islamic law surrogate parenting contract is essentially and originally illegal and void.

The contract which the surrogate mother and the married couple entered into will be considered as an invalid contract.²¹ This position may be clarified by pointing out that; a sale contract would be legal only if it involves such transaction that is permissible in terms of Islamic law.²² For example, no transaction involving the sale or purchase of alcohol would be lawful. In the same manner, the contract between the married couple and the surrogate mother is invalid in the sense that firstly, it is a contract which stipulates the sale of a free person and the body womb of the surrogate mother and secondly, it involves an element of adulterous implantation of the fertilized egg of the wife. The *Illah* (cause) of this implantation will be impregnation of the surrogate mother and the *Ma'alul* (effect) will be her given birth to the child. Islamic law justifies only the woman who has entered into the contract of marriage to fall pregnant and give birth to children.²³

Procreation is only allowed within a lawful marriage. The reason for such an approach to intimate sexual relation is to ensure the protection of the five essential values of the sharia

²¹ Ibid

²² Ibid

²³ This is clear from the prohibition of having sexual intercourse outside marriage and extra marital affairs from Qur'an 17:32 and 24:2.

which encompasses preservation of human life, intellect, faith, property and progeny; primarily in this case, his faith and progenies.

It is not lawful to fertilize the sperm and ova of the spouses and plant it in another woman's uterus who will deliver the resultant embryo for the spouses. It is also not allowed to get another man's sperm or another woman's ova and get it fertilized with the wife's ova or husband's sperm, as the case may be, and then plant the resultant embryo in the wife's uterus who will now deliver a baby for them²⁴. Where the process is employed between man and woman who are not tied together by marriage, it is unlawful totally. This may be in a situation whereby a man and a woman known to each other, may agree to have their sperm and ova fertilized and then the resultant embryo planted in the woman's uterus or another woman's uterus with or without consideration who will deliver the surrogate baby for them or where a man gets the ova of a woman from ova bank or donor which is fertilized with his sperm and planted the resultant embryo into the uterus of a woman who carries and then delivers it with or without consideration²⁵. Or where a woman gets sperm of a donor or from sperm bank and her ova is fertilized with the sperm and then the resultant embryo planted into the uterus of a woman who carries and delivers it. Similarly, it may be that a man or a woman gets the sperm and ova of a man and a woman who carries and delivers the embryo.²⁶

Artificial reproduction in all the above instances is unlawful in Islam. Some jurists are of the view that, it is adultery or fornication which leads to loss of genealogy against which Muslims have been warned not even to come near to. In Qur'an²⁷ it says "*nor come near to Zina (adultery or fornication) for it is shameful deed and an evil opening (the road to other*

²⁴ Aliyu, I. A. *In-Vitro Fertilization and Artificial Insemination in Islamic Law*, A.B.U.L.J (1999 – 2000) p. 138. Decision of the Committee of Jurists of the World Muslim League (Al-Majma'ul Fiqh Li-Rabitatil Alamil Islamiy), Makkah, January 1985, third edition, p. 112.

²⁵ Ibid p.139

²⁶ Ibid p.139

²⁷ Chapter 17:32

evils).”²⁸ Another reason for the prohibition of artificial reproduction with particular reference to surrogacy in the above mentioned cases is that according to some jurists, the Qur’an in chapter 24:30 provides that “*enjoin the believing women to restrain their gaze and guard their private parts*”²⁹.

In view of the above, surrogacy arrangement would not only destroy the very notion of family relations, but it could also cause chaos to the determination of rights and responsibilities in Islamic law.

3.5 The Position of Islamic Law on Artificial Insemination

Artificial insemination is a process whereby semen specimen is taken from the husband and injected into the uterus of the wife. Sperm is usually obtained for this procedure via one of the two ways: (a) by inserting the penis inside a special sheath (condom) prior to intercourse and (b) by masturbation. These two modes of obtaining semen for the purpose of artificial human reproduction is discussed below.

Sheikh *Abdurrahman Al-Juzayri*,³⁰ quoted³¹ an opinion of the Hambali jurists and that of the *Hanafi* School to the effect that, it (masturbation) could be said to be permissible in the event one fears that by not engaging in it, will lead him to adultery or fornication. He however, stated that the jurist’s view here is very weak and as such unreliable.

Contemporary jurists such as Abu Muhsin³² are of the view that permission for masturbation in this case could come from what they termed: “as the purpose oriented concept” of the higher goals contained in the juristic principles: “*necessity renders the forbidden permissible*” based on the following verse “*But whoever is compelled by necessity*

²⁸ Ali, A.Y. (1977) *Translation of the Glorious Qur’an and Commentary in English Language*, Islamic Foundation London, p. 708

²⁹ Ali, A.Y. (1977) *Translation of the Glorious Qur’an and Commentary in English Language*, Islamic Foundation London, p. 913

³⁰ He is said to be of the Hanbali school

³¹ Sa’ani, I. M. (1988) *Subulu Salam Sharhi Bulugul Maram*, Maktabatil Islamiyya, Beirut, Lebanon, Vol. 2, p. 59

³² Abu Mohsin, *Biomedical Issues: Islamic Perspective*, op cit., p. 37

without wilful disobedience not transgressing due limits thy Lord is forgiving and merciful".³³

Abu Muhsin further argues that, permitting it should be argued on the basis that engaging in the act in this situation is not to derive pleasure but to obtain fertility.³⁴

The jurists of the world Muslims league held that, even if a man has more than one wife, the ova of one of them may be fertilized with the sperm of the husband and then the same be planted in the uterus of the other wife, who carries and delivers the baby, where there is need to do so. That is if there is any defect that hinders procreation in the normal process³⁵. This is so because the prime objective of marriage can only be achieved in the circumstances through this unnatural process.³⁶ Putting forth the opinion of the *Shafi'i* jurists on the issue, B.F. Musalam writes:

Still others such as the strict *Shafi'i* jurist Nawawi, whose opinion is typical of the *Shafi'i* jurists as a whole said that masturbation was absolutely forbidden (Haram). But then we find that he as well as the other *Shafii's* permitted masturbation when it was performed by the hand of a man's wife or concubine, for he has a right to the enjoyment of her hand as he has to the rest of her body.³⁷

Abdul-Rahman Al-Juzayri, the author of *Subul-us-Salam* says that some of the *Hanbali* and *Hanafi* jurists are of the opinion that, masturbation may be permissible in the event one fears (that his not engaging in it) would lead to his committing adultery or fornication. But cautions that such a view is weak and is not to be relied upon³⁸.

Support for permitting it should be argued on the basis that engaging in the act is not to derive pleasure but, rather, to obtain the semen for the specific purpose of trying to resolve

³³ Qur'an 6:145

³⁴ Abu Mohsin, Biomedical Issues: Islamic Perspective, op cit., pp. 39-44

³⁵ Aliyu, I. A. op cit., p. 138

³⁶ Ibid

³⁷ Musallam, B.F. op cit, p.34

³⁸ Al-Juzayri, op cit., Vol. 5, p. 137

infertility. Hence, the juristic principle is “*necessity renders the forbidden permissible*”³⁹ and the Qur’anic verse which provides thus:

“*But whoever is compelled (therefore) by necessity, without wilful dis-obedience not transgressing due limits, thy Lord is forgiving, most merciful*”⁴⁰. Could be used to justify the act of masturbation in the sense that it is not being done in order to disobey Allah’s commandment but simply on the ground of necessity. There is no explicit prohibition from the primary sources, either the Quran or prophetic tradition.

3.6 The Position of Islamic Law on Procedures of *In-vitro* Fertilization

In-vitro fertilization is a Latin phrase which means in glass. In embryology it is used in contrast with in utero or in the uterus. In normal circumstances, fertilization takes place in utero (in fallopian tube) when sperm unites with an ovum. So it is a fertilization that takes place artificially outside the woman’s body.⁴¹

There are four basic steps involved in the process of *in vitro* fertilization. Firstly, the woman concerned is given a reproductive hormone in order to cause ova ripen few hours before ovulation can be expected to occur, a small incision is made in the abdomen just below the navel. A laparoscope (an instrument with an inbuilt lens and light source) is inserted through the incision and the ovaries are examined directly. When mature eggs are found that are about to break free from thin walls of the ovarian follicle, the walls are punctured and the contents are removed by a vacuum aspirator. Several eggs may be removed⁴².

Secondly, the eggs are transferred to a nutrient solution that is biochemically similar to that found in the fallopian tubes. Sperm cell penetrates the ovum, the ovum is fertilized⁴³.

³⁹ Ramadan, S. *Islamic Law: Its Scope and Equity*, Geneva, (1970, 2nd edition) p. 71. In: Ebrahim A.M. Op cit., p. 53

⁴⁰ Qur’an 6:145

⁴¹ Ebrahim, A. M. Op cit., p.108

⁴² Ibid

⁴³ Ibid at p.8

Thirdly, the fertilized egg is transferred into nutrient solution where, after about a day, it begins to undergo cell division. When the ovum reaches the eight-cell stage, it is ready to be returned to the uterus. The woman concerned is then given injection of hormones so as to prepare her uterus to receive the fertilized egg⁴⁴. Fourthly, the small ball of cell is placed in the uterus through the cervix (the opening that leads to the vagina) by means of a hollow plastic tube called a cannula. The fertilized egg continues to divide, and somewhere between the thirty two and sixty four cell stage, it attaches itself to the uterine wall. If the attachment is successful then from that time onwards development takes place as though fertilization had occurred in the normal fashion⁴⁵.

It is however, true that *in vitro* fertilization may help a woman to beget offspring and thereby cure her of her infertility. But there are two issues involved in this procedure which makes its legality questionable. Firstly, only a single fertilized ovum is selected for implantation, while all the other fertilized ova are simply discarded. Secondly, it may happen that while monitoring the development of the fertilized ovum after implantation had taken place certain abnormalities may be detected which could tempt one to terminate the pregnancy. Discarding the fertilized ova and terminating the pregnancy on the ground of abnormality would be questionable in Islamic law.

Thus, it seems that, the only way IVF could be acceptable in Islamic law as a means to overcome infertility is if the fertilization process outside the uterus is restricted to a single ovum that would solve the problem of discarding other fertilized ova. But, it may be argued that in normal circumstances, if more than one ovum are fertilized, nature takes care of that by expelling the other fertilized ova. Therefore, would it not be equally justified to discard other fertilized ova and use only one of them for implantation?

⁴⁴ Ibid p.8

⁴⁵ Ibid p.109

However, it seems a majority view of the jurists opined to the effect that the issue of nature in these circumstances is a reference to Allah Who creates what He wills and takes over what He wills. As such, the natural position could not be equated with the position in IVF.

3.7 The Position of Islamic Law on Sperm Donor/Ova Bank

Sperm/ova donation for the purpose of undergoing artificial reproduction no doubt involves a third party's genetic material (sperm/ovum) by way of donation or outright sale as the case maybe. It is a situation where the wife is artificially inseminated with the sperm of another man other than her husband - called a sperm donor or where she donates her egg (ovum) to a man other than her husband.

Sperm or egg donation happens when due to certain diseases, the husband is unable to produce sperm or the wife is unable to produce an egg for fertilization. When both the husband and wife are suffering from fertility problems, then an already fertilized egg (embryo) from another woman could be transferred to the uterus of the wife. The implications of all these are that:

- a) In the case of sperm donation, the woman will bear a child with half of the genetic identity of herself , but none of her husband;
- b) in the instance of an egg donation, she bears a child with half of the genetic identity of her husband, but none of her own!; while
- c) in the case of an embryo donation, the child would have the genetic complements of neither herself nor her husband!.⁴⁶

The common factor among the three cases is the involvement of a third party in the ART procedures, and this brings us to researching the Islamic law's position on third party reproductive techniques generally. Under Islamic law, marriage is a contract between a

⁴⁶ Ebrahim, A. M. op. cit., p. 60

woman and her husband, and throughout the span of their matrimonial life no third party should intrude into the marital functions of sex and procreation of a married couple. Hence, the unmistakable provision of this law is that a third party donor is not allowed in reproduction, whether he or she is providing sperm, egg or embryo. This is the position of mainstream jurists from different schools of Islamic law.⁴⁷

Although third-party donation neither involves the sexual “body contact” of adulterous relations, nor, presumably, the desire to engage in an extramarital affair, it is nonetheless considered by many Shari’ah scholars to be a form of adultery, by virtue of introducing a third party into the sacred bond of husband and wife.⁴⁸ According to them, it is the very fact that another man’s sperm or another woman’s egg enter a place where they do not belong that makes donation of any kind in procreation inherently wrong.⁴⁹

While the unacceptability of sperm, egg or embryo donation from the Shariah viewpoint is incontrovertible, equating same with the crime of *zina*, as posited by those scholars, is devoid of any decisive authority. Many jurists, especially from the Shafii school, stipulate natural lust for the opposite sex as a condition for application of *zina* punishment on the culprit. Hence, according to this school of Islamic law a culprit of *zina* crime would not be subjected to the statutory punishment if the other party is either a dead human being or a non-human being, on the grounds of lack of natural lust for such an opposite sex.⁵⁰ The element of sexual sensuality is undeniably missing in any ART procedure. This is perhaps the

⁴⁷ Journal of Int. Islamic Fiqh Academy, vol. iii, part 1 pp. 515 & 516; Resolutions of Islamic Fiqh Council, Makkah, pp. 146-151; and the *fatwa* of Sheikh Mahmoud Shaltut, a former Head (Sheikh) of Al-Azhar, Cairo at: www.islamonline.com. Accessed on 25th August, 2009

⁴⁸ Norhayati, Haji Ahmad, "Assisted Reproduction - Islamic Views on the Science of Procreation", in *Eubios Journal of Asian and International Bioethics* 13 (2003), 59-60; Ebrahim, A. M. op. cit., p. 57

⁴⁹ Abdul-Razzaq, A. A. *Assisted Reproductive Technology (ART): The Islamic Law Perspective*, op cit., pp. 85-97

⁵⁰ Ghazali, *al-Wasit* vol. vi, p. 441; *Al-Majmu'*, vol. xx, p. 31; *Mughni al-Muhtaj* vol. iv, p. 144

reason why even those scholars who see in third party donation an analogue of *zina* are silent on whether the involved parties would be liable for punishment or not.⁵¹

What further aggravates the issue of third-party reproduction from Islamic law perspective is the fact that the so-called donors may be either anonymous or non-anonymous, and in most cases, they choose to remain anonymous. Thus, when a donor's sperm is repeatedly used for impregnating one or more women, numbers of siblings and half-siblings are produced, and that suggests strongly the potential for incest among the offspring of unknown donors. It equally constitutes an affront to human dignity and disrespect of lineage, the preservation of which is a fundamental objective of Sharī'ah (*Maqāsid al-Sharī'ah*).⁵²

Another important legal question in respect of third party donation in ART is the legitimacy of the child. In other words, could the sperm donor, despite being the genetic or biological father of the child, stand as a legitimate father? The answer to this is an emphatic NO; any child resulting from intercourse or insemination outside the bond of valid marriage contract is an illegitimate child (*walad al-zinā*) who is ascribed only to his/her mother.⁵³ This exposes further the illicit nature of such a practice that is capable of inflicting permanent psychological damage on an innocent child.⁵⁴

Moreover, scientifically, the term pregnancy is only said to result when the sperm from the man fertilizes the female ovum. The foetus or finally child resulting is said to be a product of the union of the man and woman whose sperm and ovum coupled and fertilized. As regards the position of this sperm Allah says: “Now let man but think from what he is

⁵¹ Abdul-Razzaq, A. A. *Assisted Reproductive Technology (ART): The Islamic Law Perspective*, op cit., pp. 85-97

⁵² Ibid

⁵³ *Al mawsuat al-Fiqhiyyah*, Kuwait, Ministry of Endowments and Islamic Affairs, 2003, vol. 40, pp. 237 & 255

⁵⁴ Abdul-Razzaq, A. A. *Assisted Reproductive Technology (ART): The Islamic Law Perspective*, op cit., pp. 85-97

*created. He is created from a drop, emitted (i.e. sperm) proceeding from between the backbone and ribs*⁵⁵.

In an infertile couple, it may be that, it is the husband who is suffering from a disease condition e.g. inability to produce any sperm at all-medically referred to as *Azospermia*, or he may be a carrier of a genetic disorder called *Huntington's* chorea, or suffering from a *neurological* disorder that makes ejaculation impossible or he may be outrightly impotent due to certain disease. In all these conditions, he either produces no sperm or not viable sperm. It could also be that the woman produces no egg but have all features that can carry pregnancy to maturity⁵⁶.

Where any of the above condition is obtained, modern medical intervention came up with a biotechnical idea of sperm or ova donation. This is clearly objectionable, forbidden, and unacceptable in Islamic law. Therefore, the existence of sperm banks and ova banks is clearly unlawful in Islamic law.

Islamic law establishes that, sperm emissions could only occur in permissible sexual union with one's wife or slave. So the use of sperm of anyone other than that of the husband is clearly forbidden. A former head of the Al-Azhar University issued the following religious decree condemning it and equating it to an adulterous act:

Artificial insemination with the sperm of foreign person is in the shariah, a grievous crime and a great sin and is tantamount to adultery for their essence is the same and the result is also the same. For, it is the insertion of the sperm of a foreign person intentionally into a tilth which has not been legally tied to him through the bond of marriage. The legal verdict for artificial insemination in that way is the same as that of adultery which has been condemned and prohibited by the divine shariah⁵⁷.

⁵⁵ Qur'an 86:5-7.

⁵⁶ Ebrahim, A.M. Op cit, p. 112

⁵⁷ Shaltut, M. Al-Fatwa (*Matbu'at al Idarat al Ammat li al-Thaqafah of al-Azhar, Cairo, Dec. 1959*) p. 300 In: Ebrahim, A.M. op cit., p. 115

Yusuf Al Qardawi, addressing himself to the question of donor artificial insemination state:

Islam safeguards lineage by prohibiting Zina (adultery and fornication) and legal adoption. Thus keeping the family line unambiguously defined without any foreign element entering into it. It likewise prohibits what is known as artificial insemination if the donor of the sperm is other than the husband⁵⁸.

So, from what has been said above, sperm banks is condemned by Islamic law in view of the fact that, using the sperm other than that of the husband to impregnate one's wife with it, is considered an unlawful act. It would also be unlawful in Islamic law for a husband to have his sperm stored in a sperm bank with the intention that if he dies, his sperm could be used to impregnate his wife. Because death renders the marriage union void, in the sense that, a woman can marry someone else after certain specified period (i.e., after four month and ten days).⁵⁹ So for a wife to be impregnated after her husband's death with his sperm would be categorized as an illegitimate act⁶⁰.

Considering the juristic views above, the writer is of the view that two things emerge in respect of Islamic Law position on sperm donor/ova bank biz: (a) first, it may be posited that Islam may condone and accept artificial insemination where the reason is very clear, i.e., the sperm comes from none other than the husband. Secondly, it would be unlawful to use any sperm from a third party to impregnate one's wife and as such sperm/ova bank are clearly condemned by Islamic law.

3.8 The Position of Islamic Law on Ectogenesis

This technique involves the nurture of foetus from fertilization to viability in an artificial placenta or glass womb. If the sperm and ovum used in this process is that of the

⁵⁸ Al Qardawi, Y. *Al Halal wal Haram fil al-Islam, Eng. Trans*, American Trust Publishers, Indianapolis (nd.) p. 227 In: Ebrahim A.M. p. 118

⁵⁹ Qur'an 2:34

⁶⁰ Ebrahim, A.M. *Biomedical Issues: Islamic Law Perspective*, Op. cit, p. 106

legal husband and wife then it appears it would not be unlawful in Islamic law, especially if undertaking such a step is motivated by the simple reason that one's wife may have been born without uterus⁶¹.

But, if the sperm and ovum in use are from the legally married couple, then it can be condoned in Islamic law, otherwise it is also unlawful as per the authorities enumerated in the foregoing techniques that involve third parties.

Paul D. Simon posited that such a technology could even lead:

To the suggestion that, human embryos might be nurtured in the uterus of cows so as to relieve women of the maternal burden. Non-human environment ought not to be used for human subjects. The development during gestation is important in caring for humanity of the foetus. The idea of this embryologist make its legality in Islam questionable⁶².

The foregoing proposition though by a non-Muslim professional embryologist, yet it goes to further support the Islamic law position by coincidence. This is because he posited it not based on any theological idea, but since it is a fact, it can still be accepted as being an unlawful act in Islamic law.

3.9 The Position of Islamic Law on Artificial Embryonation/Embryo Adoption

Artificial embryonation/embryo adoptions are both the same involving the transfer of an already fertilized egg from one woman and placing it in the uterus of one's wife. If the attachment to the uterine wall be successful then development of the embryo would take place in the normal fashion. These techniques are opted for in the event that one's wife may not be in a position to ovulate, or she has no fallopian tubes at all, or there may be something abnormal causing blockage of the fallopian tubes or her tubes may be damaged. In the case of egg transfer, the woman will bear a child who would have half of the genetic identity of her

⁶¹ Ibid, p. 111

⁶² Ibid

husband and none of her own. While in the case of artificial embryonation or embryo adoption, the child would have neither the genetic complement of her husband nor of herself.

Now, the Qur'an maintains that in the creation of mankind the roles of the males and female in the process are recognized. For example it says "*O mankind! We created you from a single (pair) of male and female ...*" ⁶³ but the union should be legitimized through the marriage bond.

Thus, using the ovum or egg or an embryo of another woman and be transferred into the uterus of one's own wife would be questionable in Islamic law and the religious decree (*fatwa*) of *Shaykh Shaltut* above against artificial insemination with the sperm of a donor could on the basis of analogy equally apply against the adoption of such techniques to resolve infertility ⁶⁴

3.10 The Position of Islamic Law on Egg Transfer

From the name, it is the transfer of an egg from one woman into the uterus of one's wife. Thus, this will go contrary to the provision of the Qur'an: ⁶⁵ "*O mankind, We created you from a single pair of a male and female.*" ⁶⁶

The concept of artificial human reproduction is motivated more by scientific arrogance of saying that science can achieve anything. It is clearly un-Islamic, an interference with the prerogative work of Allah, and a clear act of transgression. Allah says: "*I will mislead them and I will create in them false desires, I will order them to slit the ears of cattle, and to deface the (fair) nature created by Allah, whoever forsakes Allah and takes Satan for a friend, has surely suffered a loss that is manifest*" ⁶⁷.

⁶³ Qur'an 49-13

⁶⁴ Ebrahim, A.M., op cit, p 111

⁶⁵ Ibid, p.110

⁶⁶ Qur'an 23:5-6; 49:13

⁶⁷ Quran 4:119

3.11 Islamic Perspective on the Procedures of ART

There are a many methods undergone medically to achieve ART depending on the needs and wishes of the parities as well as the viability of the particular procedure to successfully satisfy the party's infertility grief. However, in 1989, there was a special meeting of the Islamic legal scholars and medical experts to define and discuss the purposes ART and its Islamic perspective.

In that, decision no (4) dated 03/07/1986 on test tube babies by the Committee of Islamic Conference in its third sitting in Amman, from 8-13 Safar 1407H (11-16 October 1989) after deliberation on the topic of artificial insemination (tube babies) and while reviewing the research papers presented and listening to explanation from experts and doctors and after much deliberation arrived at the following conclusion:⁶⁸

- 1) Where fertilization takes place between the sperm of a man and from another woman nor his wife then the latter (the fertilized egg) is planted in the womb of the man's wife.
- 2) Where the fertilization is done between the sperm of a man other than the husband and the egg of the woman and then later the (the fertilized egg) is planted in the womb of the wife.
- 3) Where the fertilization takes place between the seeds of a couple then the latter (the fertilized egg) is planted in the womb of a woman volunteer to carry it.
- 4) Where the fertilization will happen between the sperm of alien man (means not of the husband) and wife's egg, then the embryo is grown in the womb of the wife.
- 5) Where the fertilization takes place externally between the seeds of a couple then the latter (the fertilized egg) planted in womb of man's other wife.

⁶⁸ Sayyid Mohamed Muhsin, *Children By IVF and Surrogacy: A Juristic Study on their Laws of Inheritance*, The Muslim World league Journal, Jumad-1&2 1435/April-May 2013, Vol. 42, Nos. 5 & 6, pp. 29-38 at p. 33

- 6) Where the sperm and egg are taken from a couple fertilized externally and then the latter (the fertilized egg) planted in the womb of the wife.
- 7) Where the seed of the man is taken from in a syringe and placed within the correct position in the vagina of his wife or her womb as an internal fertilization.⁶⁹

Given the above methods and procedures of ART, which are being applied all over the world, we have to go through each and every type of this method scrutinizing the Islamic rulings thereby and examining the divergent opinions of contemporary scholars on them.

I. The First Method: Uterus of Alien Woman

In this method, it is the sperm of the husband and the egg of the wife that would be fertilized externally and the embryo would be placed in the womb of a woman who is rented as a volunteer. Here, it is noted that the uterus belongs to an alien woman. In this case, even though the group who consider the purity of semen in both of ejaculation and insemination deny the relationship of father, the second group establishes the owner of the semen is father and his wife, the owner of an egg, is mother. According to this group, the child will inherit from both of them as usual. According to Ali Shibramullaisi (R): “If a woman dropped out *Alaqa* (chew) or *Mudhga* (leech) because of a natural abortion later another woman took it and inserted it in her womb afterwards that *Alaqa* or *Mudga* began to grow again. Hence, she delivered a child. This child will not be this second woman’s but to the husband and wife who are owners of the semen and egg.

The researcher sees this opinion of erudite scholar, Ali Shibramullasi, to opine that the surrogacy of this type is not adverse to the Islamic rulings and define the relation by surrogacy is similar to the relation of breast feeding. The surrogate mother would not be the mother in lineage and inheritance but would be established, a relation of mother on breast

⁶⁹ Sayyid Mohamed Muhsin, *Children By IVF and Surrogacy: A Juristic Study on their Laws of Inheritance*, op cit, pp. 32-33

feeding if she fed him. Once she didn't feed him, then, also, there will be a noble relationship as this surrogacy is much stronger than breast feeding.

Moreover, if the owners of sperm and egg are unknown, then the child will be considered among those who have no father or mother and a *Qadi* (judge) will be the *waliyy* (guardian) of the child. There is a different view by a Shafii scholar from Kerala, India; Swadakathullah Musliyar who replied to question related to the surrogacy. He says: "the one who gave birth to a baby is the mother of child and her husband is the father. The child will inherit both of them while nobody else that has no any influence on a child as father or mother". He stated this *fatwa* on the light of proof from *Thuhfa*, "if a wife delivered a child over six months of marriage then the child is related to husband if there is a chance of sexual intercourse."⁷⁰

But some modern Islamic scholars look at this case like the view of Ali Shibramullasi. In that, such scholars like Prof. Musthafa Azzarqa', Dr. Muhammed Naeen Yaseen, Dr. Zakariyya Albarri, Prof. Muhammed Abbasi, Dr, Wahba al-Zuheili, Dr. Hashim Jameel and so on, clarify that the mother of child who born by this method would be the owner of the egg not of the uterus. The woman of the uterus will be in the position of a mother by breastfeeding. But she does not have the right of lineage to the child. The father of the child is the husband of one whose egg is used for insemination.⁷¹

Additionally, some other scholars like Yusuf Al-Qaradawi, Ashaikh Thanthawi, Abdul Hameed Thahmaz come to a different opinion that the mother of this child will be a woman of the uterus and father is her husband while the woman of egg will be considered as the mother of breastfeeding. So, in this method, as we mentioned, the scholars are divided into three groups. The first group denies the legitimacy of a child. The second group verifies

^{70 70} Sayyid Mohamed Muhsin, *Children By IVF and Surrogacy: A Juristic Study on their Laws of Inheritance*, op cit., at p. 33

⁷¹ Ibid

that the owners of sperm and egg are the parents of a child, so he will inherit them. The third group says the owner of the uterus and her husband are the parents of a child, so he will inherit them.⁷²

II. The Second Method: Egg of Alien Woman

The first method will be applied by the vaccination between the sperm of husband and an egg taken from the alien woman (not his wife) and the embryo is placed in the womb of his wife. In this case, it is noteworthy that the egg belongs to a foreign woman and sperm and uterus come under the normal way, i.e., of husband and wife. As far as the Committee of Islamic Conference is concerned, this method is forbidden under the Shari'a and the child will be illegal on account of alien egg being used here. Some modern Islamic scholars also mentioned in their *Fatwa*, this method is illegal because it causes the mixture of different hereditary and absence of mothers and the wife lack any biological relation to the baby.

That notwithstanding, a certain jurisprudential scholar from Kerala, India, Najeeb Moulavi came up with a different opinion to legalize this process considering it as a treatment for the illness of women. They clarify that, "it is accessible legally since this process is supposed as a treatment to the infertile ovum of a wife. We don't get any proof to prohibit this method. There is nothing as illegitimate in the introduction of alien's egg but the semen should be her husband's."⁷³ The Qur'anic verse '*your mother is one who delivered you*' is also applicable in this situation and taking as the treatment the child would be legitimate and he can claim the rights from his parents like others.

By this view, the child by this method can claim the right of inheritance from the one who delivered him, as his mother, and from her husband as his father like usual. According to Sufiane Omar Barega, this child will be entitled to the owner of egg and sperm while the owner of uterus will be considered in the position of mother of breastfeeding.

⁷² Ibid

⁷³ Ibid

III. The Third Method: Alien Embryo

This method involves fertilization done externally between the sperm of alien man (not husband) and the egg of alien woman (not wife), then it is planted in the womb of the wife. Here, it is noteworthy that embryo only belongs to the wife, sperm and egg belong to foreigners. In this case, the wife will be the mother of that child but only like the relation of mother of breastfeeding while her husband has no any connection to this child because of absence of any biological interruption in this child, i.e., in embryo. The owner of the sperm will be the father and the owner of the egg will be the mother, if they are known. The child will inherit the owner of the sperm and owner of the egg in this condition with the proof mentioned in the first method. If the owners of sperm and egg are unknown, then the child would be counted among the children who have no parents and the *Qadi* will be his *waliyy*.⁷⁴

IV. The Fourth Method: Another Wife's Uterus

This method is that, it being vaccinated between the sperm of the husband and the egg of the woman externally and the embryo is placed in the womb of other spouse of that husband. Here, it is important to note that the embryo is placed in a space of husband's own. In case of using this method, some of the modern Islamic scholars like Dr. Arif Ali Arif verified that there is no problem to use this with some conditions and some others like Abdul Azeez bin Baaz, Muhammed bin Abdullah Assubaeel, Musthafa Azzarqa' expressed disapproval of this method.⁷⁵

Hence, in this case, the father of the child will be the owner of sperm and the mother the owner of the egg. The wife whose uterus was used will be considered as the mother like breast feeding. In the specialty of human beings that their hereditary qualities are depending on the sperm and egg while the owner of uterus has not been different from the third method, the husband can approach to his second wife but in the third method, the husband of that

⁷⁴ Ibid

⁷⁵ Ibid

woman whose uterus was used has no any relation to the child, so he cannot approach her that time. It is also noteworthy here to denote that Ashaikh Badrul Muthawalli Abdul Basith considers the woman of the uterus is the real mother in all cases of surrogacy and her husband would be the father of that child even the sperm is not of him, if she married. If she does not marry, then the child is hers and the child will be in a stand of child of prostitution.⁷⁶

V. The Fifth Method: Sperm of Alien Man

This method is just the opposite of the first case, the fertilization would happen between the sperm of alien man (meaning not of the husband) and the wife's egg, and then the embryo is grown in the womb of the wife. Here, it is noticed that the sperm belongs not to her husband while the egg and womb are of the wife. Firstly, there is an observation of some scholars that it is illegal and immoral to introduce into a woman the sperm of any man other than her husband. The formation of the embryo outside the human body will only be permitted subject to certain strict conditions. It will be *Haram* (forbidden) to form the embryo by the fusion of a woman's ovum with a sperm of a man other than her husband. It is also not lawful to implant into a woman an embryo developed in *Haram* way.

Consequently, it will be quite obvious that it is *Haram* to introduce sperm or embryo into an unmarried woman. In this case, the husband is not considered as the father of the child, while to the wife, i.e., the owner of the egg in case of confirming the child is from her. At the same time, according to the certain group of scholars who put forth the condition of purity of semen only at the time of ejaculation, this man is the father of this child and the wife of this man has no motherhood because there is no any conjugal tie on this child by egg, uterus or both. So, this child can claim inheritance from the man of sperm and his wife (owner of egg and uterus).⁷⁷

⁷⁶ Ibid

⁷⁷ Ibid

VI. The Sixth Method: External Insemination

The sixth method is that which involve the process of insemination of the sperm of the husband and the egg of a wife will be done externally, and then the embryo is placed in the womb of his wife. The external insemination is only strange from normal deliveries. This method is approved as legal in Islamic law in the very necessary conditions by the Committee of the Islamic Conference. Due to the lack of sexual interference by a foreigner in this method, it would be as usual and the child will be considered to belong to them. In this method, because of its approval as legitimate, no chance of doubt in the case of the inheritance of the child born by this method. As usual, the child will inherit the father and mother (owner of sperm and egg).⁷⁸

VII. The Seventh Method: Introduction by Injection

The seventh method is to take the sperm of the husband and inject this to the appropriate location of his wife's vagina or uterus. This method also is considered as legal and the child as legitimate by the Committee of the Islamic Conference. That is, because the child will inherit the parents as usual.

VIII. The Eighth Method: The Alien Egg And Uterus

In this method, the sperm of a husband would be inseminated by the egg of alien woman and later the embryo would be introduced to another woman's uterus. In this case, it is noticed that the sperm of the husband has no legal relation or tie with the egg and the uterus. According to Sufiane Omer Barega, it is totally a prohibited way in Islam and stands like prostitution. Here, the father of this child is a husband who gave sperm and the mother is a woman whose egg was used, while the husband of the owner of uterus and husband of the owner of the egg have no any right on the resulting child due to the lack of any biological relation.

⁷⁸ Ibid

However, while this chapter had discussed the position of Islamic law on ART, the next chapter will examine the rights of children begotten out of ART.

CHAPTER FOUR:
THE RIGHTS OF CHILDREN VIS-À-VIS PARENTS IN RELATION TO
ARTIFICIAL HUMAN REPRODUCTION UNDER ISLAMIC LAW

4.1 Introduction

This chapter focuses primarily on the consequences of Assisted Reproductive Technology on the redefinition of parental relations towards their children under Islamic law. The chapter now looks at the relationship between children produced through Assisted Reproductive Technology and the people involved from Islamic law perspective. Whether children begotten artificially have some inalienable right from their so called parents as if they were born naturally.

Marriage is an institution in which a man and a woman are permitted conjugal relation or comfort, happiness and for the procreation of children with a view to preserving the human species and their true genealogy.¹ It is the right channel through which paternity may be established. If a child is begotten outside wedlock, it is not considered legitimate and should not be imputed to that man who had relation with its mother. But if it is begotten through wedlock then it will be attributed to that man, named after him and shall have the right of fosterage (*Radha'a*), maintenance (*Nafaqa*), custody (*Hadhana*) Lineage (*Nasaba*), and Inheritance (*Waratha*), etc., upon his parents.

It is noteworthy that one of the fruits of marriage is to get children and to this effect, Allah says in the Holy Quran: *"Wealth and Sons are the allurements of the life of this world and the things that endure good deeds are best in the sight of your lord. as reward and best as (the foundation for) hopes"*²

¹ El-Imairi, M. T. (nd) Personal Status in Islamic Law According to the Maliki System, Unpublished Manuscript, Centre for Islamic Legal Studies, Institute of Administration, Ahmadu Bello University Zaria, p. 1

² Translation taken from Ali, Y. A. *The Holy Quran, Text Translation and Commentary*, Published in the U.K by Islamic Foundation, p. 742

Again, in another verse, Allah says: “*Fair in the eyes of men is the love of things, they covet women and sons, heaped up hoard of gold and silver, horses branded (for blood and excellence and wealth of cattle and well tilled land. Such are the “possession of this worlds life, but in nearness to God is the best of the goals (to return to)*”³

Islamic law therefore, legislates certain rules and regulations for the protection of the rights of children and their parent. The parents-children relationship is reciprocal. The duties of one side are the rights of the other side. So, on parent-children relationship, the rights of the children from their parent are the obligation (duties) of the parents.

It may however, be asked where do children’ rights begin? To this effect, the Prophet (peace and blessing of Allah be upon him) cautions us to be careful in our choices of spouses. It is therefore, the right of the children to have loving and caring parents who are of noble and righteous characters. After conception and delivery, the rights that Allah (SWT) prescribed for the children in Islamic law are discussed as follows.

4.2 Right to Lineage (*Nasab*)

Lineage (*al-Nasab* and *al-Nasl*): *al-Nasab* is a noun formed from the Arabic verbal root *nasaba*, which means to relate, to trace ancestry or to attribute. The other word *al-Nasl* is also a noun, formed from Arabic verbal root *nasala*, meaning to procreate or beget. It means descendants, offspring and progenies.⁴ Lineage is an expression referring to the mixture of fluids between male and female from a legal point of view. However, if this union between male and female occurs through disobedience such as fornication and adultery, then the resulting child is not considered as part of a person’s true lineage.⁵

There is only one significant reference to lineage in the Quran: “*It is He who has created man from water, then has he established relationships of lineage and marriage: for*

³Qur’an 18:46

⁴ Ibn Manzur, *Lisan al-Arab*, Dar al-Maarif, Cairo (nd) pp. 1650; Ibn Abidin, *Radd al-Mukhtar ala al-Darr al-Mukhtar*, Dar al-Fikr, Beirut (1992) vol. 3, p. 198

⁵ Aliyu, I. A. *In-Vitro Fertilization and Artificial Insemination Under Islamic Law*, A.B.U.L.J. (1999-2000) Vols. 17-18, pp. 135-143

your lord has power (over all things)” The concept of lineage therefore, is a social one rather than spiritual stipulation of divine revelations. The relationship of lineage is basically enforced to avoid wrongful marriage between brother and sister or close relatives known as incest.

Artificial insemination and surrogacy for example challenge the classical definition of both paternity and maternity. Parentage is no longer confined to the relationship between a child and his genetic parents, regardless whether pregnancy results from licit or illicit relationship.⁶

Surrogacy arrangement not only seem to necessitate the legal redefinition of paternity but is also transforms the standard biological foundation of maternity with the availability of different types of mothers (genetic, gestational and social) competing maternity claims call for clear criteria for the legal definition of motherhood.⁷

The Islamic law ban of a third party reproductive process for example is hinged on Islamic law principles on the importance of marriage as the general framework within which human reproduction should occur. Surrogacy arrangements are usually discussed within the larger framework of Modern Reproductive Technology in general and artificial insemination in particular.⁸ The question therefore, is can there be said to be lineage between a child reproduced by way of Artificial Reproductive Technology under Islamic law?

The solution to this poser can be viewed from for instance surrogacy arrangement within the framework of artificial insemination which is divided into seven types, two through internal insemination and five through external insemination.

The internal artificial insemination types are:

⁶ Ibid

⁷ Afroz Ali, *Conditional Permissibility of In-Vitro Fertilization under Islamic Jurisprudence*, Al-Ghazzali Centre For Islamic Sciences and Human Development, Australia (2004), p. 67

⁸ Abdul-Razzaq, A. A. *Assisted Reproductive Technology (ART): The Islamic Law Perspective*, Berna Arda & Vardit Rispler-Chaim (eds.), *Islam and Bioethics*, Ankara University, Turkey, (nd) pp. 85-97

1. Direct injection of a husband sperms into his wife's womb to facilitate natural conception; and
2. Direct injection of a stranger sperm into the womb of another's wife to facilitate natural conceptions mainly due to male factor infertility.⁹

The external artificial insemination types are:

1. Fertilizing the egg of a wife by the sperm of her husband *in vitro* and then re implanting the embryo into the wife's womb in due time to develop naturally.
2. Fertilizing the egg of a woman by the sperm of a man *in vitro* and then implanting the embryo into the womb of the man's wife in due time to develop naturally.
3. Fertilizing the egg of a woman by the sperm of a man *in vitro* and then implanting the embryo into the womb of another married woman.
4. Fertilizing the egg of a woman by the sperm of her husband *in vitro* and then implanting the embryo into the womb of a volunteering surrogate: and
5. Fertilizing the egg of a woman by the sperm of her husband *in vitro* and then implanting the embryo into the womb of a volunteering surrogate, who is another wife of the same man.¹⁰

Out of these seven types of internal and external insemination methods, only three can be said to be permissible under Islamic law and these are:¹¹

- a) Direct injection of a husband sperms into his wife's womb to facilitate natural conception;
- b) Fertilizing the egg of a wife by the sperm of her husband *in vitro* and then re implanting the embryo into the wife's womb in due time to develop naturally.

⁹ Marcia C. Inhorn, *Making Muslim Babies: IVF and Gamete Donation in Sunni Versus Shi'a Islam*, Journal of Culture, Medicine and Psychiatry 30: 427–450, 2006. Available online at: <http://www.marciainhorn.com/olwp/wp-content/uploads/Globalization-and-Gametes1.pdf> (accessed on the 13/8/14)

¹⁰ Ibid

¹¹ Qurarat Majmu al-fiqhi Al-Islami Bi-Makka Al-Mukarramah (2004), p. 97

- c) Fertilizing the egg of a woman by the sperm of her husband *in vitro* and then implanting the embryo into the womb of a volunteering surrogate, who is another wife of the same man.

The permissibility of the first type is on the ground that artificial insemination satisfies a legitimate need on the part of infertile spouses to have children. But depending on the availability of competent physicians, priority will be for a Muslim female physician, and non-Muslim female physician, Muslim male physician, and then non-Muslim male physician.¹² In all circumstances, the woman undergoing the procedure should not be left alone with the treating physician, but should be accompanied by the husband or by another woman. The second permissible type, although deemed acceptable in principle and in itself from the Islamic law perspective, is questionable in view of the many risks that it involves. Therefore it should be resorted to only in cases of extreme necessity¹³. The third permissible type is deemed permissible in case the second wife chooses to bear the embryo voluntarily. And again, it should be resorted to in cases of urgent need and within the general parameters that determine permissibility in comparable situations.¹⁴

This indicates that, in these three cases, maternal lineage shall be determined on the basis of genetic connection. Accordingly, the legal mother will be the genetic mother who provides the ovum. The volunteering surrogate will be treated like a milk mother, because similar to the latter, if not to a larger extent, the gestational mother provides necessary and indispensable nourishment to the baby.

As for the other four types, they are not permissible by Islamic law due to the involvement of a third party other than the married couple and therefore, no lineage (*nasaba*).

¹² Ibid

¹³ Ibid

¹⁴ Abdul-Razzaq, A. A. *Assisted Reproductive Technology (ART): The Islamic Law Perspective*, Berna Arda & Vardit Rispler-Chaim (eds.), *Islam and Bioethics*, Ankara University, Turkey, (nd) pp. 85-97

The problems of artificial insemination and surrogacy arrangements are based on legal and ethical concerns over negative implications of these reproductive technologies. The legal concerns that artificial insemination and surrogacy arrangement raise pertain to two main issues, and that is adultery and genetic connection (lineage).

The most important legal concern that artificial insemination and surrogacy arrangement raise is the mixing up of genealogies because it raises the problems of unknown parenthood.¹⁵

In addition to the legal issue, there is also the ethical one such as the uncovering of private part, disposal of surplus embryos, gender selection and selective abortion etc¹⁶. Unlike natural insemination, artificial insemination violates the privacy of married couples, and even when extreme precaution are taken, it leaves room for doubt over actual genealogical connections.¹⁷

Looking at the foregoing, it can be rightly posited that, a child born through Assisted Reproductive Technology especially where there is a third party involvement cannot be attributed to anybody but to his genetic mother. The child's paternal genealogy remains obscure because of the intervention of a stranger. The child's right to his paternal lineage/genealogy, is said to be marred with uncertainties.

4.3 Rada'ah (Suckling)

Rada'ah is an Arabic word rooted from *rada'a*, which literally means 'sucking the breast and drinking its milk'.¹⁸ Generally, it is an act of sucking milk from the breast.

¹⁵ Muhd al-Barr, *Al-Talqih al-Sinai wa-Atfal al-Annabi*, Majallat Majama' al-Figh al-Islam, Vol. 2, No. 1 (1986) p. 290

¹⁶ Ibid, pp. 269-290; pp. 296-8

¹⁷ Afroz Ali, *Conditional Permissibility of In-Vitro Fertilization under Islamic Jurisprudence*, Al-Ghazzali Centre For Islamic Sciences and Human Development, Australia (2004), p. 69

¹⁸ Ibn Manzur, *Lisan al-Arab*, Dar al-Maarif, Cairo (nd) pp. 1660-1, in Azizah Mohd, *Breastfeeding (Rada'ah) under Islamic Law and its Promotion towards Sustaining Mother's and Children's Health*, Asian Conference on the Social Sciences, Official Conference Proceedings 2011, p. 656

According to Ibn Abidin, it is an act of drinking milk from the udder or (human) breast.¹⁹ Legally, breastfeeding is generally affected when woman's milk or anything that is originated from human milk reached the baby's stomach or his brain by means of mouth or nose after fulfillment of certain conditions.²⁰

Once the parentage of a child become known, it follows that fosterage is one of the right of the child and the father becomes duty bound to honour the child's right to maintenance. It also becomes the duty of the mother to provide fosterage (i.e., suckling) and custody until the end of the child's infancy. As a right of the child, fosterage then creates an obligation on both parents.²¹

4.3.1 The Mother's Obligation to Breastfed her Baby

An infant requires feeding through suckling during the first stage of its life, and in the first instance, it is the mother's duty to provide it under the Qur'anic ruling: "*The mothers shall give suck to their children for two whole years, [that is] for those [parents] who desire to complete the term of suckling . . .*"²² All Muslim jurists agree that this ruling is imperative and sets a religious duty on the mother to feed the baby whether she is married to its father, or has completed her *iddah* following divorce.

According to Islamic Law, the divorced mother is entitled to be paid specifically for suckling the child of a husband who divorces her. Allah says: "... *and if they [divorced wives] suckle your offspring, give them their recompense. And take mutual counsel together, according to what is just and reasonable. And if you find yourselves in difficulties, let another woman suckle the child on the father's behalf.*"²³

¹⁹ Ibn Abidin, *Radd al-Mukhtar ala al-Darr al-Mukhtar*, Dar al-Fikr, Beirut (1992) vol. 3, p. 209

²⁰ Ibn Arafah, *Hashiyah al-Dasuqi ala Sharh al-Kabir*, Dar al-Kutub al-Ilmiyyah, Beirut (2003) vol. 3, p. 467-8

²¹ Jamal J. A. Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation*, Brill's Arab and Islamic Laws Series, Leiden (2009) Vol. 1, p. 183

²² Qur'an 2:233

²³ Qur'an 65:6

However, there is a difference of opinion regarding whether she should be ordered by the court to actually breast feed the baby. The Hanafis maintain that the father should compel the mother to breast feed their child in the event that it refuses to suckle from any other breast, or in the event that a suitable wet nurse cannot be found, or in the event that neither he nor the child has sufficient property or funds from which to pay a wet nurse. The Malikis hold that if a woman is married to the baby's father or revocably divorced from him, then she is under a legal and religious obligation to feed the baby, without any recompense for doing so, unless it is not the custom of her class to breast feed. If, however, a child refuses any breast other than its mother's, and she is of a class where it is not the custom to breast feed, then she is entitled to a wage for feeding the child, as, indeed, is an irrevocably divorced mother. The Hanbalis maintain that it is the sole duty of the father to provide for the child to be fed. Some Zahiris rule that whether she or the father like it or not, the mother shall be compelled to breast feed her baby, unless she is divorced, has no milk, or her milk is not wholesome for the child.²⁴

4.3.2 The Father's Obligation in Breastfeeding

If the mother has no obligation to breast feed her child, and refuses to do so, or if the mother has died and there is no woman prepared to breast feed the child voluntarily, then the father must hire a wet nurse for the baby. Unless there are express stipulations in the contract between the father and the wet nurse as to where the suckling will take place, then she is not obliged to stay at the home of the female custodian (*hadina*) of the child to do this. The custodian will be the child's mother if she is living.²⁵

If there is no agreement, such as that the baby should be taken to the home of the wet nurse for feeding and returned to the home of the custodian afterwards, the baby will be

²⁴ Jamal J. A. Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation*, *op cit.*, pp. 183-184

²⁵ Ibid

suckled at the home of its mother, or other female custodian if the mother has died. This is because the two rights of fosterage (suckling) and custody are distinct legal rights and that notwithstanding, the child's mother is not deprived of her right to custody because she has refused to breast feed it herself. This position is generally held by the Sunni sect but not by the Shi'ah, who maintain that if a mother refuses to suckle her baby when she is under no obligation to do so, then she will lose her right to custody. The father then must hire a wet nurse who does not have to feed the infant at the home of its mother. If the original duration of the hire of the wet nurse is not sufficient to meet the needs of the baby, and the baby still needs to suckle, then the wet nurse will be compelled to extend the period of suckling until the child is weaned.²⁶

The father is liable for the wages for suckling the infant, whether they are due to its mother or to a wet nurse, unless the child has property of its own. If the father is dead, or is destitute and unable to earn a living, then the obligation to pay the wages for the suckling of the infant falls upon the person whose duty it is to provide its maintenance.²⁷

However, one of the legal implications of suckling is that it acts as an impediment to marriage under Islamic law. Among those whom Muslims are not permitted to marry are the prohibited degrees of relationship in marriage arising out of fosterage. In the Islamic legal tradition, where a woman breast feeds a child other than her own biological offspring, she becomes the foster mother, and her husband the foster father and their children becomes the foster siblings. The relationship created is akin to a biological one in so far as it places the fostered child in a similar position in relation to prohibition to inter-marry as if the child were actually a biological child of the "foster" mother/father.²⁸

²⁶ *ibid*

²⁷ *Ibid*, p. 185

²⁸ Shaheen Sardar Ali, Ayesha Shahid and Mamman Lawan, *An Introduction to Islamic Family Law: A Teaching and Learning Manual*, UK Centre for Legal Education (2010) p. 18

Now, does it hold that a child begotten out of ART also acquires same right to *rada'ah* (suckling) as does a child born naturally? As one of the legal issues or challenge posed by ART, confusion exists as to the identification of parentage of the offspring especially where surrogacy and sperm/ova donation is involved. In that can a person who volunteers his gamete be considered legally to take responsibility for the suckling of the children and does a surrogate mother bear the burden of suckling an ART child? Or does ART procedures calls for mandatory alternative feeding of children begotten out of ART? A consideration of these legal issues will require a balance of interest between the desire to procreate on the part of infertile couples as well as the welfare of the ART begotten child so as not to deprive it of proper nourishment at the onset of its life.

Thus, in our view, where any of the permissible ART procedure is undertaken and a child is eventually begotten thereby, the responsibility of suckling should be undertaken by the biological parent that are tied matrimonially. In that, the classical principles of Islamic on suckling would apply in respect of the mother to give such to the child and for the father to undertake the upkeep of the mother during such period of suckling. This is because, a wife is under an obligation and as part of her marital role to breastfeed the children of the marriage if she is still married to the father of the child. This is in compliance with the provisions of the Holy Qur'an: *"And mothers shall suckle their children for two whole years for him who desires to complete the time of suckling..."*²⁹

Moreover, as the duty of breastfeeding under Islamic law is not completely binding on the mother in all circumstances, e.g., it depends on the wife's ability, status, sickness, shortage of milk in her breast, etc. In case of any of these factors, a wife may not breastfeed the child and the husband may employ the services of breast-feeder. It may therefore follow that a child begotten by ART may not necessarily also enjoy the right to suckling in view of it

²⁹ Qur'an 2:223

lacking natural or biological mother. Hence, an alternative feeding that may nourish the child to its weaning would be acceptable.

4.4 Child's Right to Inheritance (*Waratha*)

Inheritance is defined as *“legal transfer of control of the estate from the deceased to his heirs whether the estate is material wealth, landed property or legal rights or obligation”*³⁰ Under Islamic law, inheritance is usually referred to as *“mirath”* which denotes the law of succession. This word is said to have been derived from its verbal form, *“Waratha”* which means to inherit something or to step into ones predecessor's shoes concerning the ownership of the properties, rights and liabilities.³¹

But in legal terminology, it is the law of succession which regulates and guides the distribution of estate of a deceased person among his eligible heirs. It also spelt out classes of heirs, conditions of their inheritance and the circumstances that operate to bar the right of an heir to inherit.

The position of inheritance as part of Islamic law cannot be overemphasized. It is no doubt that it is an instrument used by Islam to break the monopoly of wealth in the society. Legacy distribution strengthens brotherhood ties among relatives because once a member dies, the position of the other relative is thus recognized. It is an open secret that people struggle in life to acquire wealth not just for the fun of it, but to better the position of their humble selves, family and their offspring's. It will be sad therefore, to find the fruit of one's effort being taken over by undeserving elements, as this gives priority and epitomizes the grounds of inheritance under Islamic law.³²

However, it is against this background that the inheritance law was revealed by Allah (S.W.T.) to enforce the smooth transition of one's wealth to the rightful but legal beneficiary

³⁰ Hussain, A. (2005) *The Islamic Law of Succession*, Darussalam, Riyadh, p. 11

³¹ Coulson, N. J. (1971) *Succession in the Muslim Family*, Cambridge University Press, London, pp. 18-25

³² Ibid

i.e. those who are closer to the deceased person either by blood affinity e.g. a child or children, father, mother, a sister or sisters, a brother or brothers, a wife or wives, etc.³³

Under Islamic law, nobody is legally empowered to allot any portion of legacy to any one without going by the divine instruction of the Glorious Quran or the *Hadith* as to who takes what, the neglect of which renders the whole action null and void for the reason of its inconsistency with both primary sources of Islamic law.³⁴

This denotes the basis on which the property or the estate of the deceased person is transferred to the legal heirs that survived him. These grounds are fundamentally three under Islamic law of inheritance, the relevant one here is *Nasab* (blood relation). The Arabic word *An-Nasab*, as a ground of inheritance was derived from the word *Nasab* which means “blood relationship”.³⁵ Technically, the word *Nasab* is used under Islamic law of inheritance of the deceased person who are entitled to take a share in his estate. These relations could be classified into ascendants, descendant and collaterals. They include offspring both male and female, parents, brothers and uncles. However, for a blood relationship to serve as a ground for inheritance, such a relationship must have been strongly established to have emanated from a legitimate link.³⁶

Legitimacy in this respect is established when the descendant as the legal heir, was not a product of adultery (*zina*) or artificially conceived with the third party involvement. However, the claimants pregnancy must have been conceived in a lawful wedlock and given

³³ Hussain, A. (2005) *The Islamic Law of Succession*, op cit., p. 39

³⁴ Ibid

³⁵ Ibid

³⁶ Gurin, A. M. (2007) *Legal Impediments of Succession under Islamic Law (al-Mawani al-Mirath)*, *Journal of Islamic and Comparative Law*, Vol. 28, pp. 1-11.

birth to, beyond the minimum period of gestations and of which the paternity was not denied by the father³⁷.

The soundness of legitimacy is largely based and determined by valid or regular marriage³⁸ before both the parents and the children can be said to be bloodily related having corresponding rights and obligations such as that of inheritance.

Children have well defined rights in respect of inheritance. Provisions have been made, in the glorious Quran for the rights of inheritance of both female and male children. Under Islamic law male offspring's inherit two times the value that female inherit.

Allah says: God directs you as regard to your children inheritance to the male, a portion equal to that of two females, if only daughters, two or more their share is two third of the inheritance if, only one, her share is a half. For parent, a sixth share of inheritance to each, if the deceased left children, if no children, and the parents are the only heirs, the mother has a third, if the deceased left brother, or sister, the mother a sixth. The distribution in all case is after the payment of legacies and debt. You know not whether your parent or your children are nearest to you in benefit. These are settled, portions ordained by God, and God is all knowing, all wise³⁹

In the next consecutive verse, Allah says: *"In what your wives leave, your share is a half if they leave no child, but if they leave a child, you get a fourth, after payment of legacies and debts, in what you leave"*.⁴⁰

Their share is a fourth, if you leave no child. But if you leave a child, they get an eighth, after payment of legacies and debt. If the man or woman whose inheritance is in question, has left neither ascendants nor descendants, but has left a brother or a sister, each one the two gets a sixth, but if more than two, they share in a third after payment of legacies and debt so that no loss is caused to anyone. Thus

³⁷ Sulaiman I. N and Samaila A. M., *Islamic Personal Law and Practice in Nigeria*, Oracle Publishing Company Ltd., Makurdi, (nd) pp. 117-119

³⁸ Ibid, p. 118

³⁹ Qur'an 4:11

⁴⁰ Qur'an 4:12

it is ordained by God and God is All knowing and most for bearing.⁴¹

Therefore, any child begotten out of wedlock, or whose paternity is denied followed by a judicial pronouncement to that effect and born through a suspicious or doubtful circumstances such as through Assisted Human Reproductive Technologies, especially those that are not accepted by Islamic law shall be deprived of his right to inheritance. Consequently, the laws and rights of inheritance can be determined only when the legality of that specific method of ART and its Islamic ruling on it are fixed. As far as the committee of Islamic conference is concerned, the last two methods are allowed, i.e., where the sperm and egg are taken from a couple fertilized externally and then the latter (the fertilized egg) planted in the womb of the wife and where the seed of the man is taken from in a syringe and placed within the correct position in the vagina of his wife or her womb as an internal fertilization. The Scholars that attended the conferences see nothing wrong in resorting to them when necessary after precautions.⁴²

4.4 Child's Right to Custody (*Hadana*)

The advent of human reproductive technology, while reflecting the importance of biological parenthood on the one hand, have diminished the importance of gestation in child bearing on the other hand. It has seriously undermined our perceptions of who is truly the parent of a child. It used to be taken for granted who a child's parents were and who had claims to its rearing and obligations for its nurture.⁴³

However, scientific advances have abstracted the genetic and gestational components in child bearing and added complications to what was previously obvious. In Islamic

⁴¹ Qur'an 12:12

⁴² Sayyid Mohamed Muhsin, *Children By IVF and Surrogacy: A Juristic Study on their Laws of Inheritance*, The Muslim World league Journal, Jumad-1&2 1435/April-May 2013, Vol. 42, Nos. 5 & 6, pp. 29-38 at p. 33

⁴³ Khalid, S. R. (1985-1987), Certain Aspects of Children's Rights in Islamic Law, *Journal of Islamic and Comparative Law*, Vol. 15-17, pp. 4 -16

bioethics, there appears to be little or no room for confusion as to who has the rights of parenthood in case of competing claims. This lack of ambiguity is mainly because Quran has clearly spelt out who is considered a parent to a child. It says: *“And we have enjoined on man (To be good) to his parents. in travail upon travail, did his mother bear him, And in years twain was his weaning, (hear the command), show gratitude to me and to your parents. To me is your final goal”*.⁴⁴

The mother shall give suck to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear, no mother shall be treated unfairly on account of her child. Nor father on account of his child, an heir shall be chargeable in the same way. If they both decide on weaning, by mutual consent, and after due consultation, there is no blame on them if you decide on a foster mother for your offspring, there is no blame on you, provided you pay (the mother) what you offered on equitable terms. But fear God and know that God sees well what you do.⁴⁵

In another verse, Allah says:

We have enjoined on man kindness to his parent: in pain did his mother bear him, and in pain did she give him birth. The carrying of the child to his weaning is a period of thirty months. At length, when he reaches the age of full strength and affairs forth years, He says, “O my lord! Grant me that I may be grateful for your favour which thou hast bestowed upon me, and upon both my parents, and that I may work righteousness such as thou may approve: And be gracious to me in my issue. Truly have I turned to thee and truly do I bow to thee in Islam)⁴⁶.

The foregoing three verses of the Holy Qur'an clearly determines who is a parent, mother or father hence who qualifies to be a guardian and be in custody of the child? The conditions for determining paternity are different from those for determining maternity. In Islamic law the moral questions in case of competing claims over a child is not who will best

⁴⁴ Qur'an 31:14

⁴⁵ Qur'an 2:333

⁴⁶ Qur'an 46:15

look after the interest of the child, but who has the duty to rear and nurture the child? Put another way, whom does the child have a right to be reared and nurtured by? Parenthood in Islamic bioethics, as stated earlier, is an attribute and an inherent quality in relation to the child. The parent is the person whom the child has an intrinsic and natural right to be reared and nurtured by. Furthermore the parent also has an intrinsic and natural duty to rear and nurture the child. Parenthood, thus implies that parents, and children have rights and duties that are mutual, interdependent, and complimentary. These rights and duties are sacred and have legal implications imposed by Islam. Provisions were made that remove ambiguities as to who is a parent. There are four basic principles in Islamic law by which paternity may be established.

- There must be a valid marriage contract between the mother and father of the child.
- Jurists consider that the minimum duration from the existence of a valid marriage contract to the birth of the child is six months.
- Attribution is based on the principles that “the child belongs to the bed (where he ‘ or she was born) referred to as *al-walad lii firash* in other words to the apparent father.
- Acknowledgement (*Iqrar*) by a husband that a child born to his wife is his, even if the child’s genetic paternity is in doubt.⁴⁷

Any child born that satisfies all the above can be said to belong to the parents and therefore, is entitled to custody by either parents depending on the situation. A child born via Assisted Human Reproductive Technology especially the accepted methods can be treated same way. Otherwise, is treated as an illegitimate hence, his right of custody can only be imputed to his mother. The general rule is that the child belongs to the lawful husband and

⁴⁷ Babaji, B. (2005) *Harmonizing the Child Rights Act 2003 With Cultural and Religious Values in Nigeria: A Muslim Perspective*, Journal of Islamic and Comparative Law, Vol. 24, pp. 14-21

father, except where there is a competing claim or the husband rejected the child. Therefore, a child born through sperm foreign to its mother is illegitimate according to most scholars.⁴⁸

Assigning child custody and determining the rights and privileges of the disputing parents in marital breakdowns is complicated, with factors such as finance, educations and the moral fitness of each parents bearing on the decisions.

The welfare of the child or the best interests of the child has become the governing legal standard for determining child custody cases in many countries around the world. Despite difficulty in the objective definition of welfare, it might be appropriate for a custody dispute between a married couple. It would be misdirected if it were used to resolve a dispute between a genetic and gestational claim to a child, particularly in the absence of other mitigating circumstances such as marriage.

Therefore, what needs to be determine primarily, in an Artificial Human Reproductive technology mix up, is the legitimacy of each claim to the child and the child's rights to rearing and nurturing as interdependent and complementary moral and ethical issues before the issues of custody is addressed.

In Islamic law, however, the concept of child custody has a different meaning, both in context and in real terms from its meaning in the West⁴⁹. Custody in the west is assumed to be the complete legal guardianship of a minor, including its upbringing, education and general control and care such as feeding and clothing. The task is usually to the maternal parent, with the father being responsible for the cost of maintenance. In Islamic law, there are three types of custody as applied to minors which are fixed from birth. These are;

- Its general care and upbringing (*Tarbiyyah*);

⁴⁸Marcia C. Inhorn, *Making Muslim Babies: IVF and Gamete Donation in Sunni Versus Shi'a Islam*, op cit., pp. 427–450; Afroz Ali, *Conditional Permissibility of In-Vitro Fertilization under Islamic Jurisprudence*, op cit., p. 72

⁴⁹ Chelby, K.S. *Forensic Psychiatry in Islamic Jurisprudence*, International Institute of Islamic Thought, Herndon VA (2002) pp. 63-76

- Its education, religious and secular; and
- The child's property.⁵⁰

In an Artificial Human Reproductive technology dispute, however, it is mainly the first and second type that are in connection, and these can be determined only in relation to, the validity and strength of the parental claims to the child. If the child's welfare were to be a factor, the issue of genetic or gestational link would first have to be resolved, as the resolution of that link is more profoundly bound to the welfare of the child than any economic or social parameter. A woman's link can be through genetics, gestation, fostering or all the three. Islamic law therefore treats competing claims for parenthood between women and men differently.⁵¹

The child in Islamic bioethics always belongs to its birth mother, but not necessarily to the person alleging fatherhood, if he was not the genetic father or because the child's association to the *firash* (matrimonial bed) of its alleged father is questionable. *Firash* in this context implies being both the genetic father and lawfully wedded to the gestational mother. Thus, according to Islamic law a child resulting from an artificial human reproduction mix up where sperm other than that of the husband's was used to fertilize a woman's ovum belongs to the mother but not to the woman's husband if he was not the genetic father. It follows that the father is not entitled to or the child does not have the right to custody from the father but from the mother.⁵²

4.5 Child's Right to Maintenance (*Nafaqa*)

Islamic law agrees to the right of maintenance to "Descendants" and "Ascendants" but the jurists differed as to what degree downward or upward among one's relations are entitled to maintenance. The following is an authority as to the right of descendants.

⁵⁰ Ibid

⁵¹ Doha, Ayman Shabana, *Lineage between Law and Biology: The Reconstruction of Islamic Boundaries of Parentage in Surrogacy Arrangements*, Islamic Bioethics Project, Georgetown University's School of Foreign Service in Qatar (nd) pp. 43-52

⁵² Ibid

The mother shall give suck to their offspring for two whole years. If the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child and no father on account of his child. An heir shall be chargeable.⁵³

By virtue of the foregoing authority, a child is entitled to maintenance from his direct father on condition that he has no property to expend on himself and that he is under the age of maturity and is not earning his living. When he attains maturity or earns his living he loses his right to maintenance unless he attains maturity, or he has some bodily defects which render him unable to earn his living. But if he attains maturity in normal condition, he loses his right for maintenance over his father but if he later becomes disabled he will not restore that right.⁵⁴

On the other hand, the daughter is entitled to maintenance from her direct father until she marries and consummates. By then her husband will be liable to maintain her. If she is divorced she will not restore that right of maintenance unless she was still not mature or virgin or that she was disabled.⁵⁵

In situations where divorce or separation had taken place between the father and the mother, basically breast feeding is optional and not compulsory. The mother will be entitled to payment if she is willing to breast feed. If she refuses, the father may hire a wet nurse. A father owes a duty to provide maintenance (*nafaqah*) to his children. He must provide all expenses involved in breastfeeding⁵⁶ subject to his capability.

The entire responsibility of maintaining a child essentially lies on his genetic father. For this right to be enjoyed by the child, he must have been born out of marriage or where the

⁵³ Qur'an 2:233

⁵⁴ Khalid, S. R. (1985-1987), *Certain Aspects of Children's Rights in Islamic Law*, op cit., pp. 4 -16

⁵⁵ Ibid

⁵⁶ Muhammad, A .Z. *Al-Ahwal Ash-Shakhsiyya*, Dar al-Arabi, al-Qaherah (1957), p. 415

child is reproduced through Assisted Reproductive Technology, the sperm and ovum must both be from couples whose marriage is recognized by Islamic law. A child reproduced through third party involvement is regarded as an illegitimate child hence will only be attributed to his mother who shall shoulder the task of his maintenance, custody, fosterage and shall inherit her only.

For a child to enjoy all the foregone discussed rights, his status must be a legitimate one. The Prophet (SAW) says: *“legitimacy emanates from lawful marriage, but adulterer be stoned (to death)”?*⁵⁷ This tradition according to Ibn Rushd is recognized by all Jurists⁵⁸. Some contemporary jurists relied on the provision of this tradition and opined that children born out of artificial reproduction conducted between lawfully married couples are legitimate provided it is done during the subsistence of the marriage and paternity was neither denied nor disputed by the father. Consequently, such children will enjoy all the rights and privileges of a legitimate child including the right to inherit both parents and their relations and visa-versa. While on the other hand, artificial insemination by donor semen is disallowed by Islamic law as the children begotten thereof share same status with children of adultery. They can only inherit their mothers and her relation and not the father.

⁵⁷ Khan, M. M., The Translation of the Meaning of Sahih al-Bukhari, Vol. 8, p. 422, Hadith No. 6750

⁵⁸ Ibn Rushd, *Bidayatul Mujtahid*, Cairo, (nd) Vol. II, p. 326

CHAPTER FIVE:

SUMMARY AND CONCLUSION

5.1 Summary

This study has attempted an analysis on the concept of Artificial Human Reproduction (ART) with particular reference to its legal position in Islamic law. In chapter one, the background of the study along with statement of the research problems as well as the aim and objectives of the study were discussed. So also, a discussion on the significance of the study, its scope, methodology and literature review were among the rudiments that encompasses chapter one of this study. It was aptly examined in this chapter that only certain artificial human reproduction methods can lawfully stand under Islamic law (that is where they are to be used as a form of infertility treatment).

It has been highlighted that Islamic law does not, in principle, disapprove of medical remedies to infertility. Nevertheless, the processes involved in assisted reproductive techniques often breed controversy, not only among scholars or experts in Islamic law, but even among the rank and file of any Muslim community. Many questions bordering, mainly on ethical, legal and psychological issues have also been raised. Any objection to a process, technique or procedure of ART must therefore not be interpreted as Islam's opposition to technological advancement. Rather, it is an attempt to put every issue discussed in the right perspective, and to ensure uncorrupted compliance with the dictates of the Shariah in search for remedies to human predicaments.¹

Moreover, the Islamic law's position on ART is informed by its perception of the cause of the usage itself. Thus, if the cause for using any assisted reproductive technique is to cure the couple's infertility, the act is utterly permissible, provided that no other law of Islam

¹ Abdul-Razzaq, A. A. *Assisted Reproductive Technology (ART): The Islamic Law Perspective*, Berna Arda & Vardit Rispler-Chaim (eds.), *Islam and Bioethics*, Ankara University, Turkey, (nd) pp. 85-97

is contravened in so doing. Muslims are allowed and even encouraged to seek lawful cure of any form of illness or disorder they may have. The hadith narrated on the authority of Usamah bin Shuraik succinctly put it as follows, "The Prophet (*salla Allah alai wa sallam*) said, "Seek remedy (of your illnesses), for Allah has never created an illness unless He has also created a cure for it, save the (illness of) old age".² With the exception of surrogacy, all other known Assisted Reproductive Techniques are, in principle, in keeping with the Shariah norms; as they all constitute one form of medical intervention or another, to cure a barren woman of her infertility.³ Thus, Islamic law has provided for the need as well as the legality of employing ART to cure infertility ailment.

In chapter two, we have discussed what the concept of Artificial Human Reproduction (ART) entails and the various techniques employed to effect ART has been discussed. It has been amply canvassed that as far as Islamic law is concerned, couples are not on a freelance of their own to seek to alleviate their infertility problem by all means possible through surrogacy but that regard must be heard to the established principles of the sharia on the integrity of the institution of marriage. Thus, neither the contractual agreement of the couples nor the wishes of the parties could be allowed to alter the established principles of the sharia on the preservation of lineage just to satisfy infertility grief.

In chapter three, this study discusses the legal position of the various artificial human reproductive methods in Islamic law and it encompasses an analysis on the legal ruling derived from juristic views on its legality as well as an analysis on the wisdom (*hikmah*) and significance of procreation in Islamic law. It has been discussed that Islamic law considers infertility to be a disease or defect, and like in any other disease, allows the patient to seek medical care. Therefore, it is not the use of biomedical science that Islamic law condemns,

² An authentic hadith narrated by Tirmidhi, vol. iv p. 383; Abu Dawud , vol. ii p. 396; and Ibn Mājah, vol. ii p. 1137.

³ Ibid

but the fact that, all of these Assisted Human Reproduction methods raise moral and legal issues. Even where the methods can be said to be lawful, it must be for a clear medical reason, but not as an exercise of a right permitted by the so-called “reproductive freedom” under international human rights law, to be enjoyed even by individuals or couples that are fertile and healthy or gays and lesbians who fully know that it is not possible to reproduce through same sex relation.

In chapter four of this study, the rights of the child begotten out of artificial human reproduction and the responsibilities of parents thereby under Islamic Law has been discussed. We have examined and analyzed the legal consequences of ART in terms of the extent of legal rights to which the child begotten out of ART owes to its parent in Islamic law, i.e., legal issues pertaining to the paternity and maternity of the child, custody, suckling, maintenance and inheritance rights among other things.

The present chapter five has provided the summary and conclusion of the research work. That is to say, chapter five is the last chapter that provides a brief summary on what the research work encompasses as well as the findings and recommendations of the study.

5.2 Findings

This research work observes the following:

1. It is observed that Artificial Human Reproduction has inherent problems that are associated with it generally and specifically with some methods or techniques which renders certain aspect of it permissible under Islamic law and some other methods contrary to the teachings of the sharia. in that, it is observed that although ART from Islamic law perspective is not indiscreetly avowed, yet only certain aspect of it are in line with the teachings of Islamic law. Hence, certain modes of ART are permissible in Islamic law while others are not. In short, the following ART methods and procedures are permissible:

- a) Artificial insemination with the husband's semen is allowed, and the resulting child is the legal offspring of the couple.
- b) In vitro fertilization of an egg from the wife with the sperm of her husband followed by the transfer of the fertilized embryo(s) back to the uterus of the wife is allowed, provided that the procedure is indicated for a medical reason and is carried out by an expert physician.
- c) An excess number of fertilized embryos can be preserved by cryopreservation. The frozen embryos are the property of the couple alone and may be transferred to the same wife in a successive cycle, but only during the duration of the marriage contract.
- d) Selective abortion is only allowed if the prospect of carrying a high-order pregnancy (i.e., twins, triplets, or more) to viability is very small. It is also allowed if the health or life of the mother is in jeopardy.

Similarly, it is also observed that the following ART methods and procedures are not permissible from Islamic law perspective:

- a) Only the participation of the husband and wife and their genetic material is permissible and as such, third party involvement in the procreation process is not allowed. No third party should intrude into the marital functions of sex and procreation, because marriage is a contract between the wife and husband during the span of their marriage. This means that a third party donor is not allowed, whether he or she is providing sperm, eggs, embryos, or a uterus. The use of a third party is tantamount to *zina*, or adultery.
- b) Adoption of a donor child out of surrogacy or from an illegitimate form of medically assisted conception is not allowed. The child who results from a

forbidden method belongs to the mother who delivered him/her. He or she is considered to be a *laqit*, or an illegitimate child.

- c) If the marriage contract has come to an end because of divorce or death of the husband, medically assisted conception cannot be performed on the ex-wife even if the sperm comes from the former husband.
 - d) All forms of surrogacy are forbidden.
 - e) Establishment of sperm banks is strictly forbidden, for such a practice threatens the existence of the family and the “race” and should be prevented.
2. It is observed that the families created or expanded by, e.g., Artificial Insemination are faced with the social problem of stigmatization as they are somehow abnormal or unnatural and that persons that undergoes artificial insemination may experience infection as chances for sexually transmitted diseases (STD) are slightly higher and since the procedure involves the use of catheter (rubber tube). Similarly, there is also the risk of complication like reproducing a deformed or defective child⁴ e.g. in In-vitro fertilization (IVF) conceived children.
 3. It is observed that in many jurisdictions, the parental rights of any non-biological parent may be unclear as there is the problem of clear-cut lineage of the child, custody in case of surrogacy arrangement, especially between the genetic mother and the surrogate, the issue of inheritance, etc.
 4. It is observed that there is lack of regulatory guideline for accreditation and supervision of infertility clinics or local legislation to control the practice in Nigeria. It affects or betrays the observance of the immutable principles of the sharia on prohibition of marriage on the basis of consanguinity and fosterage as a clone baby of the husband would be genealogically his brother and of the wife her sister. In fact,

⁴ Mr. Alexndra Mallahoff of Queens v. Mrs., Judy Stiver Yale University Press, New Haven p. 97

situations exist where mothers have given birth to their daughter's children, sisters have delivered children for their sisters and even daughters have delivered children for their mothers. The implication is that ART promotes conception of babies by gametes not united by marriage since the sperm and the ovum belongs to the donor and not the recipient.

5. ART procedures creates obvious confusion in genealogy (*nasab*) and as such it acts counter to the realization of one of the ultimate goals of the sharia, i.e., preservation of lineage (*nasl*) of which the relaxation of this goal of the sharia would directly or indirectly lead to legalization of adulterous relationship and an adjustment of the establishment principles of the sharia on legitimacy of children on the basis of paternity of the offspring.

5.3 Recommendations

1. It is further recommended that the problem of risk associated with ART can be overcome/or circumvented by way of resigning to fate or avoiding any attempt to defy destiny having destined one by God to be infertile. That is to say, Muslim couples should be bold enough to content with their barren nature without stressing themselves to undergo risky and irreversible ART procedure.
2. It is recommended that the government and social philanthropists concerned with reproductive rights should come to the aid of childless couples to finance their infertility treatment through the accepted technique by Islamic Law. In that, it is suggested that the facility of artificial human reproduction techniques **should** be made accessible to married couples only, as against gays and lesbians that are taking advantage of it, though in Nigeria same sex marriage is prohibited⁵.

⁵ Same Sex Marriage (Prohibition Act) 2013, section 1(1) and (2) and Section 5(1)

3. It is also recommended that there is need for a comprehensive National Artificial Reproductive Technology Act which should be a legislation and a body to be licensing Assisted Human Reproductive clinics, accreditation and general regulation of the practice and that the legislation should be under the state legislative list in the Constitution so that each state shall make its legislation in tandem with its religious and cultural values.
4. It is further recommended that Muslim couples suffering from infertility have the option of resorting to polygamy where the problem is from the wife, hence the rigor, risk and waste of wealth and time in ART may be saved.
5. It is recommended that where the husband happens to be the victim of infertility, the wife may choose to stay with him or seek divorce based on the defect in the husband.

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