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SCOPE

Islamic University in Uganda Journal of Comparative Law is the official journal of the Faculty of Law, Islamic University in Uganda. It is a peer reviewed journal providing an objective and industry focus and analysis of national and international legal, policy and ethical issues from Islamic and Classical perspectives. The Journal publishes articles that combine academic excellence with professional relevance on legal, ethical and policy issues concerning common and Islamic law.

It is devoted to the publication of faculty legal and interdisciplinary research and it publishes studies that contribute to the understanding of legal concepts from both classical and Islamic law perspectives. It is informed by a wide array of theoretical perspectives, innovative in form and content, and focused on both traditional and emerging topics. It provides in-depth analysis of legal concepts, institutions and topical and contemporary legal issues of fundamental importance.

IUIUJCL offers reference materials to practitioners, members of the academia, governmental and non-governmental organisations. The journal publishes two issues per year and welcomes articles concerned with theoretical and practical issues from classical and Islamic perspectives. All articles are subjected to double-blind review process to ensure objectivity, quality, and relevance. The journal is published in both print and electronic formats accessible from the Faculty of Law page of the University website. All correspondences are to be addressed to:

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FROM THE EDITORIAL SUITE

On behalf of the Editorial Board, Islamic University in Uganda, I present to you Volume 7 Issue 1 of Journal of Comparative Law of Faculty of Law, Islamic University in Uganda.

As in previous editions, this edition include scholarly articles, some doctrinal, some conceptual. The articles cover a wide range of themes of legal scholarship such as Public International Law, Environmental Law, Human Rights Law, and Family Law among others. A common thread in all the articles is that they deal with issues in a way that helps in part to fill the gap of scholarship in legal research on, the African continent.

Contributions are welcome for future editions from any one wish to contribute on various aspects of the law. The journal particularly welcomes scholarly articles that explore new horizons in legal development and help Uganda, African countries and other developing countries appreciate jurisprudential dynamics required for sustainable development in all aspects of human endeavours. It is noteworthy that many developing countries still operate within the ambit of colonial legal structure. Law played a role in colonialism and will play a role in decolonization. Laws inherited during colonial eras continue to be the fulcrum of socio-economic and political organization directly or indirectly in a number of former colonies including Uganda.

It is well known that colonial laws were made on the basis of exploitation, technological/ scientific development of that time and the conception of jurisprudence of governance operative at that time. Therefore, scholarly articles which explore this theme or have it in background in any area of law will better align to the journal's vision of contributing to the legal development of the society. The journal is also quite interested in comparative law not only for the normative advantage inherent in same but as an expression of promoting intellectual dialogues across jurisdictions and within different traditions of Law. Contributions in different aspects of Islamic Law in sundry areas such as Banking and Finance, rights of religious minorities among others are also most particularly welcome. Such contributions may treat the subject matter either on their own or in comparison with other legal traditions.

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DERIVATIVES OF MODERN REPRODUCTIVE TECHNOLOGY AND THE SHARIAH: SYNTHESIS OR ANTITHESIS

OLAGUNJU-IBRAHIM, R.O (Ph.D.)*, FOLORUNSHO A. HUSSEIN (Ph.D.)** & ABDULRAHEEM T. ABOLAJI, (Ph.D.)[‡]

Abstract

Shariah (Islamic law) is a living law. Although its tenets and rules have for long been established and perfected, its applicability to realities of modern times in all spheres of human endeavor is not in contest. One of these vast modern areas is the complexity attached to the technology of human reproductive system where a man or woman remains infertile after lawful marriage. In a bid to proffer cure for such infertility, which is plaguing a number of couples, medics have discovered and introduced a manifold of devices such as artificial insemination, surrogacy and gamete intra fallopian transfer (GIFT) among others. A convenient phrase which is constitutive of all these methods is Assisted Reproductive Technology (ART). The paper examines the position of Islam on the permissibility or otherwise of each of the new reproductive technologies. The inherent benefit in this is to afford a practicing Muslim, bedeviled by the problem of infertility, an opportunity to identify the particular one(s) to opt for in the list of the ART methods.

Keywords: lawful marriage, infertility, Reproductive system, reproductive technology

Introduction

Procreation, no doubt, is one of the anticipated fruits of a valid marriage in Islam. The teachings of the Quran and Hadith have emphasized the important role of the institution of marriage and the family structure. Procreation has

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been portrayed to be inseparable from this institution.¹ Other Quranic verses² abound on the essence of procreation. Despite this, a number of couples in almost all areas in the globe have remained infertile, thereby finding it difficult if not impossible to attain their desire of having offsprings. This has over the years prompted medics to introduce various methods of assisted retroductive technology as a means of overcoming this challenge.

Dr. Edwards, an embryologist and Dr. Steptoe, a gynaecologist in the United Kingdom pioneered the fertility technique called In Vitro Fertilisation Pre-Embryo Transfer (IVF-ET). In July 1978, they announced to the world the birth of the first test-tube baby, Louise Brown, which was a landmark achievement in the science of reproductive medicine.³ In Turkey, the first IVF baby was born in 1989 but it was not until the new millennium that the ARTS experienced a rapid expansion throughout the country.⁴ In her own case, Egypt was one of the first three Middle Eastern countries (along with Saudi Arabia and Jordan) to introduce ARTS in 1986. Since then, Egypt has developed a thriving IVF sector, with more than 50 IVF clinics serving an infertile population estimated at 15% of all married couples (among a total population of nearly 80 million).⁵

Islam is not against taking permissible steps to offer cure for infertility. The Noble Quran attests to the curability of infertility when it states;

And (remember) Zakariyya, 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."*⁶

¹ Quran 16 v. 72

² Such as Quran 25 v. 74 and Quran 21 vs.89-90

³ Nordin M. M., 'An Islamic Perspective of Assisted Reproductive Technologies in Bangladesh Journal of Medical Science, (Vol. 11, No. 04, October, 2012) p252

⁴ Gurtin Z.B., 'Assisted Reproduction in Secular Turkey: Regulation, Rhetoric and the Role of Religion in Inhom MC and Tremayne S. (eds.) Islam and Assisted Reproductive Technologies: Sunni and Shia Perspectives (Berghahn, New York, 2012)

⁵ Inhom MC., Local Babies, Global Science: Gender, Religion, and In Vitro Fertilization in Egypt. (Routledge, New York, 2003)

⁶ Quran 21 vs. 89—90

Since the United Kingdom debut experience in the fertility techniques of July 1978 earlier referred to, a myriad of assisted reproductive techniques have surfaced, further refining and superseding earlier technologies. These new technologies in assisted reproduction have provoked considerable discussions and debates across all segments of human society. The Islamic Organization for Medical Sciences (IOMS) first addressed this issue on human reproduction in May 1983. Human reproductive cloning, an offshoot of ART, which is currently attracting a lot of public and media attention was similarly addressed at this 1983 seminar. Since the IOMS seminar, there has been a multitude of medico-Islamic jurisprudence seminars to discuss various contemporary issues related to ART.

This write-up discusses the concept of ART and the various modes of the modern technology involved in it. This is done in a detail of some sort with an exposition of the position of Islam on the permissibility or otherwise of each of the discussed modes.

Conceptualization of ART

Assisted Reproductive Technology (ART) is any technological procedure that helps infertile women to conceive.⁷ Put in another form, Assisted Reproductive Technology (ART) refers to all the techniques involved in the management of infertility that require the handling and manipulation of gametes and embryos and treatment modalities to induce ovulation or spermatogenesis. Techniques of invivo assisted reproduction facilitate the fertilization of the gametes within the reproductive tract of the wife.

The Rise of Modern Reproductive Technology

Until recently, the treatment for fertility was mainly by medications to correct hormonal deficiency, or by surgery to correct anatomical defects. These treatments were mostly non-controversial from an ethical or religious point of view. The recent advent of assisted reproductive technologies ("ARTS"), however, changed this situation dramatically. These technologies transferred

⁷ [http://www.ivfsurrogacy.com/ivf/assisted reproduction.htm](http://www.ivfsurrogacy.com/ivf/assisted%20reproduction.htm), & The American Heritage Medical Dictionary.

'Assisted Reproduction', retrieved on August 26, 2009 from:
www.yourdictionary.com/medical/assistedreproduction;

the process of procreation from a private personal relation between husband and wife, into artificial means in a lab, and, in many instances, involving a third or fourth party in the process. These changes in the procreative process challenge basic religious and ethical concepts.⁸

On the typologies of this newly invented reproductive technology, it is instructive to state that the procedures of intrauterine insemination (IUT), intratubal insemination (ITI) and gamete intra fallopian transfer (GIFT)⁹ are among the available options. Mating of the gametes occur extra corporeally during invitro assisted conception. The modalities to facilitate the fertilization invitro followed by transfer into the reproductive tract include a vitro fertilization and embryo transfer (IVF - ET), pronuclear stage tubal transfer (PROST), zygote intrafallopian transfer (ZIFT) and tubal embryo stage transfer (TEST). More radical forms of micro-manipulation techniques have been recently developed to assist fertilization of men with severe infertility. These include intracytoplasmic sperm injection (ICSI) and micro injection of round spermatid nuclei into oocytes (ROSNI).¹⁰ Even though reported success rate from ART programs can be very confusing and misleading, the probability of a successful outcome has improved from virtually zero to 30-50% at ART centers worldwide)¹¹

However, before delving into a more detailed analysis of the specific reproductive procedures and the exposition of the Islamic law position on them, it is of interest to discuss briefly how Muslim jurists derive religious opinions on whether a certain procedure is permissible or not.

Background of Islamic Law

The primary sources of Islamic law are the Quran and the Prophet's traditions and sayings constituting his sunnah. A distinct process of legal reasoning (*Ijtihad*) is employed to determine applicable Islamic laws to govern situations that are not directly covered by the *Quran and Hadith*. The rules of if tihad are

⁸ Hossam E. F., Assisted Reproductive Technologies: An Islamic Perspective, Journal of Islamic Medical Association (Vol. 25 No. 14, 1993) p. 17

⁹ For this and other ART techniques, see: Morshedi M., 'Artificial insemination : Using a Donor's Sperm' in Acosta, A.A. & Kruger, T.F., (eds.) Human Spermatozoa in Assisted Reproduction (The Parthenon Publishing Group, New York, 2006) pp. 347 — 348 & 367- 368

¹⁰ Nordin M.M., p.252

¹¹ Ibid

stipulated in a well- established methodology called *Usul-al-Fiqh*.¹² This process of *Ijtihad* takes into consideration *Qiyas* (analogical reasoning),¹³ *Istihsan* (juristic preference),¹⁴ *Masalih Mursalah* (unrestricted public interest),¹⁵ *Sadd al-Dhari'ah* (blocking the means)¹⁶ etc.

Preservation of Posterity: Family and Blood Relations

Preservation of posterity is one the five fundamental objectives of shariah in Islam.¹⁷ The family and blood relations in Islam have very important legal implications. The Quran emphasizes the centrality of the family unit.¹⁸ The mutual decision of males and females to marry and have children is considered one of God's bounties. God swears by the "parents and their progeny."¹⁹ The duties of parents towards their children and the children towards their parents are emphasized. Blood relations have a special status in legal matters. "And those related by arham (kindred by wombs) have prior rights against each other in the book of Allah."²⁰

Laws of marriage and inheritance are well defined and based on these family relationships.²¹ So it is essential, from an Islamic point of view, for every child to know the identity of his father and mother.²² This is a concern that is similar to the importance modern laws give the biological father and mother in contemporary parlance. The strict moral laws and the prohibition of fornication and adultery are part of the stress on the preservation of progeny (lineage).

¹² i.e. Islamic Jurisprudence

¹³ The Encyclopedia of Islam (1978) pp. 235 —236

¹⁴ By this principle, jurists are allowed some leeway in interpreting a particular law for something that is useful. This principle makes it permissible to allow the spirit of the law to supersede the letter of the law.

¹⁵ Relating this principle to the topic of this paper, the jurists are charged to weigh the benefit that may accrue to an infertile couple by having a child, against the harm that may cause to the resulting child and any harm to society as a whole. In so doing, where the harm outweighs the benefits, the particular procedure becomes impermissible

¹⁶ One of the two situations where this principle can occur is when a lawful means is expected to lead to an unlawful (or harmful) result. The second situation is when a lawful means, which normally leads to a lawful result, is used to procure an unlawful end. In these cases, the means itself becomes unlawful.

¹⁷ The four other objectives are: faith (Deen), Life (Nafs), Intellect ('Aql) and property (Mal)

¹⁸ See: Quran 25 v. 74 and Quran 42 vs. 49-50

¹⁹ Quran 14 v. 46 and Quran 90 v. 3

²⁰ Quran 8 v. 75

²¹ Hossam E.F., p. 17

²² Maher M. H., Surogacy: An Islamic Perspective, Journal of Islamic Medical Association (Vol. 21 No. 105, 1989)

In Islam, the family is based on marriage. The marriage is controlled by rules. The marriage contract has legal consequence of mutual rights and responsibilities of husband and wife vis-a-vis one another and vis-a-vis their progeny. It is under this protective umbrella that children are to be born. In Islam, the right of legitimacy is a basic right, and every person has the right to be the legitimate child of his parents. "And out of your 'spouses' He created children and grandchildren and provided for you out of His bounty."²³ Violation of this closely-knit arrangement can run amok with society. This explains the need to research into the permissibility or otherwise of certain modes of assisted reproductive technology.

An Overview of the Islamic Law Position on some ART Modes

Assisted Reproductive Technology today is being used for two different objectives. First is the employment of ART as a succour to childless/ infertile couples. Other classes of people who may not necessarily be barren are also availing themselves of the ART opportunity. A clear example of this is the use of ART for baby gender selection.

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. Reference has earlier been made to the Noble Quran on this.²⁴

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 hadith narrated on the authority of Usamah bin Shuraik succinctly puts it as follows, "The prophet (May Allah be pleased with him) said, Seek remedy (of your illness), for Allah has never created an illness unless He has also created a cure for it, save the (illness of) old age."²⁵ Based on this premise, Artificial Insemination (AI), In-Vitro Fertilization (IVF),

²³ Quran 16 v. 72

²⁴ Quran 21 vs. 89-90

²⁵ An authentic Hadith narrated by Tirmidhi, (Vol. 4), p. 383, Abu Dawud (vol. ii) p. 396 and Ibn Majah (vol. ii) P. 1137

GIFT, ZIFT, JCSI etc. 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.

It should be noted that even in the cases of those methods considered permissible, there are always some conditions upon which this permissibility is predicated for instance artificial insemination has been used for a long time.²⁶ As long as it is the husband's semen that is used to impregnate the wife, intrauterine insemination ("JUI") is permissible. This permissibility, however, is conditioned upon insemination occurring while the marriage remains intact. Thus, the husband's frozen semen cannot be used after divorce, or after the husband's death.²⁷

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. 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 at the use of any of the ART modes with no medical justification. 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. In two separate authentic Hadiths, the Prophet (Salla Allah alayhi wasallam) 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

²⁶ Hossam E. F., pp. 14-15

²⁷ Ibid. p. 17

have been narrated on the authority of Ibu mas'ud and Anas bin Malik respectively.²⁸

Moreover, the Noble Quran unequivocally affirms that, "He (Allah) creates what He wills. He bestows female upon whom He wills, and bestows male upon whom He wills."²⁹ 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*).³⁰ 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.³¹

Conclusion

So far, the topic of assisted reproductive technology in the perspective of Islamic law has been subjected to discussion. Its concept and some of its derivatives have been highlighted. In the course of doing this, it has been established that Islamic law allows and even encourages taking steps towards finding cure for infertility but with extreme caution. One needs to caution where there is involvement of a third party who may be solicited to either donate semen, egg or embryo. Islamic law frowns at this as it opens unacceptable windows for possible mixing of blood.

²⁸ Sunnan Abu Dawud (Vol. 1, Dar al-Fikr Publishers, Beirut) p. 624 and Sahih al-Bukhari (Vol. 3rd ed., Dar Ibn Kathir, Beirut 1987) p. 1949

²⁹ Quran 42 v.49

³⁰ Resolutions of Islamic Fiqh Council, Makkah, p. 151

³¹ A very pathetic case of a woman has been recorded. She wrote to Iftaah authorities asking for the way out as she and her husband got to know, after delivery, that another mans semen was mistakenly used to fertilize her egg in an IVF clinic. See the story at: www.islamonline.com accessed on 26th August 2009.