

Applicability of Artificial Insemination and Surrogacy Under Islamic Law

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ABSTRACT: Procreation is part of the divine plan, and this is spelt out clearly in the Quran. Although most Muslim couples look forward to having children, not all are blessed with children. Though the invocation of Allah (s.w.t) may be their first response, there are other means by which Muslims in different parts of the world have responded to this problem. While some resort to adoption, others resort to polygamy, and some resort to the use of Assisted Reproductive Technology (ART). This work analyses the ART methods, especially Artificial Insemination and Surrogacy, by explaining the methods, procedures, regulatory framework, and success rates. It also examines ART validity under Islamic law and conditions precedent, if any, that families must satisfy before they can engage in any of the methods of assisted conception. The primary sources of Shari'a law, which are Qur'an and Sunnah, and the secondary sources, which are Ijma and Qiyas, were adopted while discussing the Islamic view on Artificial Insemination and Surrogacy. Works of scholars in this area were also analyzed and juxtaposed in line with Islamic injunctions and textbooks, journal articles, and other relevant literature were utilized in this paper. This paper finds that Artificial Insemination, along with a few assisted reproductive techniques, are permissible as remedies to infertility as long as they are not predicated on frivolous medical reasons and are devoid of any introduction of a third-party donor. Regarding Surrogacy, the paper finds it illegal and not permissible under Islamic Law. This paper recommends that Muslim families who have difficulties conceiving can resort to fostering children or adopting children. It also recommends that where the husband happens to be the victim of infertility, and the legal method of Artificial Insemination and In Vitro Fertilization is impossible because of his infertility, the wife should be allowed to choose to stay with him and accept her fate, or seek divorce based on his defect.

KEYWORDS: Assisted Reproductive Technology (ART), Artificial insemination, Surrogacy, In-vitro fertilization, Islamic law.

1.0 INTRODUCTION

Modern advancements in medical science have come forth with many methods for treating infertility. Infertility is defined as the inability of a couple to conceive after one year of regular, unprotected intercourse¹. The use of medical techniques to enhance fertility is a topical issue that cannot be overlooked, as recent studies show that Assisted Reproductive Technology (ART) is responsible for between 219,000 and 246,000 babies born each year worldwide².

ART today is used for various objectives. First is the employment of ART as a succor to childless/infertile couples. It is also used to enable women without a male partner to have children by using sperm provided by a donor. ART is also employed for baby gender selection. In some cases, it is also used to avoid genetic and chromosomal diseases by pre-implantation genetic diagnosis (PGD)³.

Islamic law does not disapprove of medical remedies for infertility. Nevertheless, the process involved in assisted reproductive techniques often breeds controversy, not only among scholars or experts in Islamic law, but generally in the Muslim community. As such, any objection to a process, technique, or procedure of ART should 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 Shariah in search of remedies to human predicaments⁴.

¹ JF McLaren, 'Infertility evaluation' <<https://pubmed.ncbi.nlm.nih.gov/23182553/>> accessed 19th October, 2022.

² PC Steptoe & RG Edwards, 'Birth after the Re-implantation of a Human Embryo' <<http://thelancet.com>> accessed on 19th October, 2022.

³ Chamsi-Pasha H, 'Contemporary Bioethics: Islamic Perspective' <<https://www.ncbi.nlm.nih.gov/books/NBK500175/>> accessed 19th October, 2022.

⁴ AbdulRazzaq AbdulMajeed Alaro, 'Assisted reproductive Technology (ART): The Islamic Law Perspective' <https://www.academia.edu/8750667/ASSISTED_REPRODUCTIVE_TECHNOLOGY_ART_The_Islamic_Law_Perspective> accessed 20th October, 2022.

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Moreover, the Islamic law position on ART is informed by its perception of the reason for the usage itself. Thus, if the reason for using any ART is to cure the couple's fertility, the act is permissible provided that no other law of Islam is contravened in so doing⁵. Muslims are allowed and encouraged to seek a lawful cure for any form of illness or disorder they may have. The Hadith narrated by Abu Huraira succinctly put it as follows:

“There is no disease that Allah has created, except that He also has created its treatment”⁶.

This paper intends to discover the modes of ART that are permissible under Islamic Law and find out whether there is any limitation to the permissible modes of ART.

2.0 THE CONCEPT AND METHODS OF ASSISTED REPRODUCTIVE TECHNIQUES (ART)

2.1 Artificial Insemination

Artificial insemination (AI) can be defined as a process through which female ova are fertilized with male sperm, and the resultant embryo is implanted into the uterus of a woman who will carry the pregnancy and deliver the baby⁷.

AI is an unnatural way of conceiving a child, 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, to cure infertility and satisfy the condition of childlessness⁸. The semen specimen is usually placed in a syringe attached to a narrow tube or catheter⁹. It is inserted with great care into the uterus of a woman. A pregnancy resulting from AI is no different from a pregnancy achieved through sexual intercourse. There are two main techniques applied in Artificial Insemination. They are Intracervical Insemination and Intrauterine Insemination.

Intracervical Insemination (ICI)

ICI involves the injection of unwashed or raw semen into the cervix of a woman with a syringe¹⁰. Care must be taken while inserting the syringe to ensure that the tip is placed as close to the entrance of the cervix as possible. It is painless, and it is the most common insemination technique. This procedure is commonly used at home¹¹.

Intrauterine Insemination (IUI)

IUI involves the insertion of washed sperm into the uterus with a catheter¹². Unwashed semen is not usually used in IUI because it might cause pain due to the cramping of the uterine¹³. The woman must rest on the table for at least fifteen minutes after an IUI procedure to increase the chance of pregnancy¹⁴.

IUI is a more efficient method of AI than ICI because of its higher success rate. It is usually the insemination procedure of choice for a single woman using donor sperm in a fertility center¹⁵. Unlike ICI, IUI requires a medical practitioner to perform the procedure¹⁶. The success rates for AI are 10% to 15% per menstrual cycle using intracervical insemination¹⁷ and 15% to 20% per cycle for intrauterine insemination¹⁸. It is also observed that about 60% to 70% of women who use the IUI method have achieved pregnancy after six (6) cycles¹⁹.

⁵ *Ibid.*

⁶ Sahih Bukhari, 'Book 71, Number 582: Medicine'

https://www.iium.edu.my/deed/hadith/bukhari/071_sbt.html#:~:text=Volume%207%2C%20Book%2071%2C%20Number,also%20has%20created%20its%20treatment.%22 accessed 20th October, 2022.

⁷ Afolabi Mutiat, 'In Vitro Fertilisation (Ivf) and the Islamic Law Perspective: An Analysis'

https://www.academia.edu/33321675/In_Vitro_Fertilisation_Ivf_and_the_Islamic_Law_Perspective_an_Analysis_Docx accessed 21st October, 2022.

⁸ Samson O Koyonda, 'Assisted reproductive technologies in Nigeria: placing the law above medical technology' <<https://www.jstor.org/stable/23251127>> accessed on 21st October, 2022.

⁹ Catheter is a tubular medical device for insertion into canals, vessels, passageways, or body cavities, usually to permit injection or withdrawal of fluids, or to keep a passage open.

¹⁰ Rachel Gurevich, 'Intravaginal, Intracervical and Intratubal Insemination'

[https://www.verywellfamily.com/what-is-artificial-insemination-1960181#:~:text=With%20intracervical%20insemination%20\(ICI\)%2C.increase%20the%20chances%20of%20success](https://www.verywellfamily.com/what-is-artificial-insemination-1960181#:~:text=With%20intracervical%20insemination%20(ICI)%2C.increase%20the%20chances%20of%20success) accessed 21 October, 2022.

¹¹ *Ibid.*

¹² IVF1, 'Intrauterine Insemination, Artificial insemination, IUI'

<https://www.ivf1.com/iui-intrauterine-insemination/> accessed 21st October, 2022.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ W.Ombelet and J.V Robays, 'The History of Artificial Insemination In Humans' <<https://www.ncbi.nlm.nih.gov>> accessed 24th March, 2023.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

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2.1.2 Ethical and Social Implications of Artificial Insemination

The moral and social implications of artificial insemination have been debated in the medical field in the United States since the 1900s and in Europe since the 1940s²⁰. From the ethical standpoint, the Catholic Church objected to all forms of artificial insemination, saying that it promotes the vice of onanism²¹ and ignores the religious importance of coitus²². One of the criticisms of artificial insemination was that the assistive reproductive technique could lead to adultery if donor semen is used²³, and that it also promotes the vice of masturbation. Other critics were concerned that artificial insemination could encourage eugenic²⁴ governmental policies²⁵.

From the sociocultural viewpoint, there is a concern over the use of artificial insemination with donor semen for single women and lesbian couples²⁶ as there is the worry that the child will lack a father figure. There is also the question as to whether the identity of the sperm donor should be revealed or remain hidden, and the effect of either of the two choices on the child²⁷. In the case of post-mortem insemination²⁸, there are questions as to the legitimacy of the child and whether the child has inheritance rights from such deceased donor, although it has been opined that such a deceased donor must have, before his death, left a written approval for the use of his sperm after death²⁹. There is also the issue of a sperm donor donating sperm to several women, leading to the birth of several half-siblings, which could inadvertently lead to consanguineous marriages³⁰.

However, even with all these concerns, artificial insemination is still widely used throughout the world as it is one of the safest options in procreating artificially³¹.

2.2 Surrogacy

Surrogacy or Surrogate Parenting refers to a situation where a woman bears a child for another woman³². Usually, this is done in a situation where a woman is unable to bear children as a result of either a blocked fallopian tube or a complete absence of a uterus³³. It is sometimes referred to as womb leasing³⁴. Monetary compensation may or may not be involved in a surrogacy arrangement. If the surrogate receives money for the surrogacy, the arrangement is considered Commercial Surrogacy³⁵. If the surrogate does not receive any compensation beyond reimbursement of medical and other reasonable expenses, it is referred to as Altruistic Surrogacy³⁶.

There are two types of surrogacy, which are Traditional Surrogacy and Gestational Surrogacy³⁷. Traditional Surrogacy is also called Classical Surrogacy³⁸. It is the first and original form of surrogacy. It is the process whereby the surrogate is inseminated with the sperm of the father-to-be³⁹. In this situation, the surrogate automatically becomes both the biological and genetic mother of the child (who is given to the intended parents after delivery). This is because it is the surrogate that contributes the egg. This type of surrogacy was widely used before the discovery of in vitro fertilization⁴⁰. It is now rarely used as it is outdated⁴¹. Gestational Surrogacy is

²⁰ *Ibid.*

²¹ Withdrawal of the penis in sexual intercourse so that ejaculation takes place outside the vagina; coitus interruptus.

²² Sexual intercourse, especially between a man and a woman.

²³ K.W. Swanson, 'Adultery by Doctor: Artificial Insemination, 1890–1945' <https://scholarship.kentlaw.iit.edu/cklawreview/vol87/iss2/15> accessed 27th March, 2023.

²⁴ The act of bringing about improvement in the type of offspring produced.

²⁵ Eugenic Artificial Insemination: A Cure for Mediocrity <<https://doi.org/10.2307/1340737>> accessed 27th March, 2023.

²⁶ W.Ombelet and J.V Robays, (n17).

²⁷ *Ibid.*

²⁸ It is the fertilization of stored sperm from a dead person into a woman's ova which will then be implanted into the uterus of the woman.

²⁹ R.E Avila, M.E. Samar, 'Ethical Considerations of Artificial Insemination' <https://www.scielo.br/j/jvatitd/a/BYTZb8hYQJKyWZMLDYQMCsw/?lang=en> accessed 27th March, 2023.

³⁰ *Ibid.*

³¹ W.Ombelet and J.V Robays, (n17).

³² Lisa Feldstein, 'Reproductive Law' <<http://www.familyhealthlaw.ca>> accessed 27th March, 2023.

³³ *Ibid.*

³⁴ Surrogacy.com, 'About Surrogacy' <https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-commercial-surrogacy/#:~:text=Surrogacy%20opponents%20are%20often%20the,poor%20women%20in%20developing%20countries.> accessed 27th March, 2023.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Conceive Abilities, 'The Different Types of Surrogacy' Available at < <https://www.conceiveabilities.com/about/blog/the-different-types-of-surrogacy>> accessed 27th March, 2023.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

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viewed as the most appropriate and acceptable type of surrogacy. This is because, in this type of surrogacy, the surrogate is not the genetic mother of the child⁴². This method involves certain processes. First, the genetic mother is made to undergo In Vitro Fertilization to collect eggs⁴³. The eggs are collected and fertilized in a laboratory with her partner's (whether her husband or not) sperm⁴⁴. At the time this is going on, the surrogate is having her uterus artificially prepared with hormones. The fertilized egg develops into an embryo, which is usually cultured in the laboratory for 3-5 days⁴⁵. The ensuing embryos are then selected and inserted into the prepared uterus of the surrogate⁴⁶. At birth, the surrogate transfers the child to the intended parents.

Gestational Surrogacy may take several forms, but in each form, the resulting child is genetically unrelated to the surrogate⁴⁷. They are:

- a) The embryo is created using the intended father's sperm and the intended mother's eggs. The resulting child is genetically related to both intended parents.
- b) The embryo is created using the intended father's sperm and a donor's egg, where the donor is not the surrogate. The resulting child is genetically related to the intended father.
- c) The embryo is created using the intended mother's egg and a donor's sperm. The resulting child is genetically related to the intended mother.
- d) A donor embryo is implanted in the surrogate. The resulting child is genetically unrelated to the intended parents.

2.2.1 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 the child, and neither does the surrogate? It has been suggested that where the baby is born less than perfect, the parties should go back to the terms of the contract⁴⁸. As with defective goods, a defective baby would have to be kept by the surrogate, as it did not fulfill the determined specifications⁴⁹. Some writers suggest that although the child will remain with the surrogate, the commissioning parents must still be responsible for the payment of the agreed amount to the surrogate, as the whole setup was initiated by them. However, the commissioning parents cannot claim damages from the surrogate as the pregnancy is not a situation that is totally controllable by her⁵⁰. There have also been suggestions that, should the surrogate not want the care and responsibilities of the baby, she should be allowed to offer the child for adoption, as she did not have the intention to keep the child from the beginning⁵¹.

Another main concern of surrogacy is the treatment of children as commodities⁵². Surrogacy can be considered as the act of paying a sum of money for the creation of a child⁵³. This, in turn, makes children a commodity, and the surrogate mothers are the caretakers of that commodity. This creates the problem of the contracting parents viewing the mother as more of an object than a person⁵⁴.

A noticeable trend in surrogate motherhood is that the contracting parents are often upper-middle-class, while the surrogate mother is working-class⁵⁵. This has led many to speculate that this situation is a way that the rich utilize to take advantage of the poor, by using their bodies and offering monetary compensation⁵⁶.

⁴² Cleveland Clinic, 'Gestational Surrogacy'

<https://my.clevelandclinic.org/health/articles/23186-gestational-surrogacy>> accessed 27th March, 2023.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Medline Plus, 'In Vitro Fertilization' <<https://medlineplus.gov/ency/article/007279.htm>> accessed 27th March, 2023.

⁴⁶ *Ibid.*

⁴⁷ New Life Conceptual Limited, 'Become a Gestational Surrogate'

<https://newlifeconceptualoptions.com/become-a-gestational-surrogate/#:~:text=Gestational%20surrogacy%20may%20take%20a,related%20to%20both%20intended%20parents>> accessed 6th September, 2023.

⁴⁸ P.Saxena, A.Mishra, and S.Malik, 'Surrogacy: Ethical and Legal Issues'

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3531011/>> accessed 27th March, 2023.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Katherine Wade, 'The Regulation of Surrogacy: A Children's Rights Perspective'

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5540169/>> accessed 27th March, 2023.

⁵² E.S Anderson, 'Is Women's Labor a Commodity'

https://www.qcc.cuny.edu/socialsciences/ppecorino/medical_ethics_text/Chapter_13_Reproduction/Readings_Anderson_Labor_as_Commodity.htm> accessed 29th March, 2023.

⁵³ *Ibid.*

⁵⁴ M.M. Moody-Adams, 'On Surrogacy: Morality, Markets, And Motherhood' (1991) 5(2) Public Affairs Quarterly 175.

⁵⁵ H.E. Dillaway, 'Mothers For Others: A Race, Class, And Gender Analysis Of Surrogacy' (2008) 34(2) International Journal of Sociology of the Family 303.

⁵⁶ *Ibid.*

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Due to the ethical and moral issues involved in surrogacy arrangements, many still frown at it, especially if it has commercial motivation. However, in extreme circumstances, surrogacy has been opined to be allowed if purely done for altruistic purposes⁵⁷. It is in line with these ethical concerns that Islam is careful in utilizing assisted reproductive techniques in aiding families seeking children. However, Islam provides guidelines on the legality or otherwise of the use of particular assisted reproductive techniques. The focus of this paper is on artificial insemination and surrogacy.

3.0 THE POSITION OF ISLAMIC LAW ON THE USE OF ASSISTED REPRODUCTIVE TECHNIQUES.

Islam means submission to the will of Allah in all aspects of life and is also a complete way of life⁵⁸. The teachings of Islam cover all fields of human activity and regulate the day-to-day activities of Muslims⁵⁹. The sources of Sharia are: the Qur'an, the Sunnah, Ijma, and Qiyas. The basic framework for Islamic jurisprudence is the Qur'an, which is the primary source on all matters of human life⁶⁰.

The Qur'an contains the revelation that Prophet Muhammad (P.B.U.H) received directly from Allah. Accordingly, it is regarded as the most authentic source of religious and moral directives that can be extrapolated to form judicial decisions touching all practical matters in the everyday life of the community⁶¹.

The Sunna contains all the sayings, deeds, and silently approved directives and prescriptions provided by the Prophet⁶². This includes the Hadith, which are reports that describe the context in which certain rulings were made by the Prophet and reported by his contemporaries. After the Qur'an, the Sunnah serves as the most important source for deriving legal and ethical rulings in Islamic jurisprudence.

Ijma is the consensus of the companions of the Prophet after his death on certain issues not found in the Qur'an and Sunna⁶³. In the later period, this consensus included the agreement of the learned scholars (the Ulema), who are regarded as the most learned and most pious, to render their opinions in the form of their collective agreement⁶⁴.

Qiyas is the analogical reasoning that allows the jurists to extrapolate fresh decisions from a case already known through the Qur'an or the Sunnah, which shares similarity with the new case for which the solution is being sought⁶⁵.

When an action is mentioned in the Qur'an or Hadith, the correct action to be taken by a Muslim is considered straightforward⁶⁶. Thus, for example, there is little disagreement among Muslims regarding the prohibition against consuming pork or alcohol⁶⁷. However, where there is no direct mention of an act such as the use of ARTs in the scriptures, contemporary Islamic scholars must arrive at a religious judgment through interpretation, analogy, and personal reasoning, a process known as Ijtihad⁶⁸. As a result, religious scholars offer a fatwa⁶⁹ for the guidance of Muslims.

Given the rapid development of reproductive technologies that were never mentioned in the Islamic scriptures, many fatwas have been issued in recent years to cover a wide range of reproductive technologies, including situations that involve birth control, abortion, female circumcision, artificial insemination, in vitro fertilization, surrogacy, human cloning, and many others⁷⁰.

3.1 The Position of Islamic Law on the Use of Assisted Reproductive Techniques

Islamic law frowns on any use of ART with no medical justification. The only legal ground for the permissibility of ART procedures is when they are resorted to as a therapeutic approach to assist couples with one form of reproductive disorder or another⁷¹.

⁵⁷ P.Saxena, A.Mishra, and S.Malik (n46).

⁵⁸ Khurshid Ahmad, 'Islam: Basic Principles and Characteristics' Available at <https://www.iium.edu.my/deed/articles/bpsc.html#:~:text=The%20Meaning%20of%20Islam&text=As%20a%20religion%2C%20Islam%20stands,submission%20and%20obedience%20to%20Allah.>> accessed on 29th March, 2023.

⁵⁹ *Ibid.*

⁶⁰ M.H Usmani, 'Sources of Islamic Law' Available at <https://www.legalserviceindia.com/article/1302-Sources-of-Islamic-Law.html>> accessed on 29th March, 2023.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Muslim Women's League, Intellectual Background: Islamic Sources of Information and their Development into Islamic Law (September 1995). Available at < <https://www.mwlusa.org/topics/sources/sources.html>> accessed on 13th February, 2024.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Yusuf Al Qardawi, 'The Lawful and the Prohibited in Islam' Available at < <http://www.islamicstudies.info/literature/halal-haram.htm>> accessed on 29th March, 2023.

⁶⁷ *Ibid.*

⁶⁸ Marcia C. Inhorn, 'Fatwas and ARTs: IVF and Gamete Donation in Sunni v Shi'a Islam' (2006) 9 *Journal of Gender, Race and Justice* 291-317.

⁶⁹ It is a legal ruling on a point of Islamic Law.

⁷⁰ Marcia C. Inhorn (n66) 291-317.

⁷¹ Mohammed A. Al-Bar, Hassan Chamsi-Pasha, 'Assisted Reproductive Technology: Islamic Perspective' in Mohammed A. Al-Bar, Hassan Chamsi-Pasha (eds), *Contemporary Bioethics: Islamic Perspective* (Springer Open, 2015) p. 174.

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ARTs have been widely accepted after prestigious scientific and religious bodies and organizations issued guidelines, which were accepted by concerned authorities in various Muslim countries⁷². These guidelines include fatwas from the Islamic Organization for Medical Sciences (IOMS) in Kuwait, 1983, the fatwa of the International Islamic Fiqh Academy in 1986, among others⁷³.

Based on this premise, Artificial Insemination (AI), In-Vitro Fertilization (IVF), Gamete Intra Fallopian Transfer (GIFT), 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 donor⁷⁴.

3.2 Islamic Ruling on Artificial Insemination

Artificial insemination for conceptual purposes in Islam is generally needed in the situation when the husband is unable to deposit his semen into his wife's genital tract.

Islam allows the procedure of artificial insemination as long as it is between legally married couples during the life of the husband⁷⁵. The view that artificial insemination should take place between lawfully married couples is based on the fact that in Islam, sexual intercourse can only take place between married couples. This is because Islam safeguards lineage by prohibiting Zina (adultery/fornication) and legal adoption, thus keeping the family line unambiguously defined without any foreign element entering into it⁷⁶. It is for this reason that Islam prohibits artificial insemination if the donor of the semen is any person other than the husband. In furtherance of this assertion, the late Grand Imam of Azhar, Sheikh Mahmoud Shaltut, stated that donation of semen by any person other than the husband is a despicable crime and a major sin which deserves to be classified in the same category as adultery because both third-party donor and adultery involve that which belongs exclusively to the husband to be intentionally inseminated by a stranger⁷⁷. A prominent Saudi Islamic lecturer and author, Shaikh Muhammad Saleh Al-Munajjid, added that, if a third party is involved in the procreation process, such as when the sperm comes from another man, the fertilization in such a case is unlawful, because it is counted as Zina⁷⁸. With regards to the child born as a result of this, he is to be attributed to the mother who bore him and not to the man who produced the sperm⁷⁹. If said man claims to be the father and no one disputes it, then the child may be attributed to him. This is because the Lawgiver is keen that people should be named after their biological fathers⁸⁰.

Regarding the husband's frozen sperm, Sheikh Abdul-Khaleq Hassan Ash-Shareef, a prominent Muslim scholar, explained that in Islam, it is permissible for a woman to use the frozen sperm of her husband for the fertilization process as long as they both are alive⁸¹. Once the husband dies, it becomes forbidden for the woman to use her deceased husband's frozen sperm for the fertilization process. This also applies where the woman gets divorced from the husband, she can no longer use his frozen sperm⁸².

Although Islamic law is favorably disposed to permitting AI, the question is how the sperm is to be obtained. Generally, the prevalent practice in ART clinics worldwide is to collect the semen through masturbation⁸³. However, masturbation in Islam is forbidden by jurists from various schools of Islamic jurisprudence⁸⁴ although there is the school of thought that posits that masturbation only becomes forbidden in the absence of necessity or genuine reason, such as when one is afraid of committing adultery⁸⁵. However, before a Muslim resorts to masturbation for semen collection for ART purposes, all other possible avenues must have been explored. Two methods which can be explored are:

⁷² *Ibid*, p. 176.

⁷³ *Ibid*.

⁷⁴ HN Sallam, NH Sallam, 'Religious Aspects of Assisted Reproduction' Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5096425/> accessed on 12th April, 2023.

⁷⁵ Al-Islam, 'New Techniques in Human Reproduction', Available at < <https://www.al-islam.org/marriage-and-morals-islam-sayyid-muhammad-rizvi/chapter-five-new-techniques-human-reproduction> > accessed on 25th April, 2023.

⁷⁶ Tajudeen O. Ibraheem, 'Adoption Practice in Nigeria: an Overview' (2013) 19 *Journal of Law, Policy and Globalization* p.11.

⁷⁷ About Islam, 'Artificial Insemination: Islamic Perspective', Available at <<https://aboutislam.net/counseling/ask-the-scholar/acts-of-worship/artificial-insemination-islamic-perspective/>> accessed on 25th April, 2023.

⁷⁸ *Ibid*.

⁷⁹ *Ibid*.

⁸⁰ Quran 33v5.

⁸¹ Islam online, 'Using a Husband's Frozen Sperm' Available at <<https://fiqh.islamonline.net/en/using-a-husbands-frozen-sperm/>> accessed on 25th April, 2023.

⁸² *Ibid*.

⁸³ Inhorn Marcia C., 'Masturbation and Semen Collection', in Inhorn Marcia C. (ed), *The New Arab Man: Emergent Masculinities, Technologies, and Islam in the Middle East* (Princeton University Press, 2012) p. 162. Available at <https://doi.org/10.23943/princeton/9780691148885.003.0006> accessed on 26th April, 2023.

⁸⁴ Islam Online, 'The Rulings of Semen and Masturbation' Available at <<https://fiqh.islamonline.net/en/the-rulings-of-semen-and-masturbation/>> accessed on 26th April, 2023.

⁸⁵ *Ibid*.

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- i. According to Dr. Glass and Ericsson, there is a special sheath that does not contain spermicide, and it can be used for the collection of semen during intercourse⁸⁶. Therefore, Muslims can use this special sheath during intercourse with their lawful wives to collect the semen instead of masturbating.
- ii. Muslim scholars have agreed that masturbation performed by the hand of a man's wife is allowed⁸⁷. This has been unanimously adjudged to be lawful. Jurists have argued this on the premise that the husband has a right to the enjoyment of his wife's hand, just as any other part of her body⁸⁸.

3.3 Islamic Ruling on Surrogacy

Generally, Islamic scholars are against surrogacy because it involves a third party, that is, a surrogate mother. Islam encourages Muslim couples to look for a cure for infertility as long as they do not do anything forbidden (haram). Involvement of a third party, either by donation of eggs, sperm, embryo, or agreeing to bear the child of another couple, is haram in Islam⁸⁹.

Scholars of Islam have pronounced the following fatwa (Islamic verdict) regarding surrogacy⁹⁰:

-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 permissible subject to certain strict conditions; it is haram to form the embryo by the fusion of the woman's ovum with the sperm of a man other than her husband.

- It is haram to introduce sperm or an embryo into an unmarried woman.

The ruling for performing surrogacy is as follows⁹¹:

-If the surrogate mother is married, the resulting child will be legally that of her husband, even if it is confirmed that the sperm used is not that of her husband. This is based on the Hadith that says, "a child is for the matrimonial bed"⁹².

-The same ruling applies if the child results from a haram embryo. Even if the embryo was formed by the fusion of the woman's ovum with the sperm of another man, the child will legally be that of her husband.

-The donor of the sperm has no right whatsoever over the child, even if a prior agreement or contract was entered into to give him the right over the child.

-If the woman is unmarried, the resultant child will be illegitimate and will be regarded as that of the mother.

In the Muslim world, religious leaders' interpretation of the religious texts has not been monolithic. Differences of opinion have emerged among the four Sunni legal schools on basic principles such as what constitutes lineage, who can be the legitimate parent or child in a family. Likewise, Shia scholars have not been unanimous in their views and remain divided in their interpretations and verdicts on the extent to which reproductive technologies can be applied. Certain Shia clerics hold the position that third-party donation is legitimate and does not breach any religious rules⁹³. However, the majority of Sunni scholars follow the fatwas declaring third-party donation, which includes surrogacy, to be religiously forbidden⁹⁴.

As a result, a gap has developed between the main Sunni and Shia interpretations of lineage, kinship, and family relations. Whereas today, the majority of Shia resort to most forms of reproductive technologies, including third-party donation and surrogacy, a religious ban on third-party donation exists for Sunni Muslims⁹⁵.

4.0 FINDINGS

Through this research work, the following has been observed:

- a) In Islam, only a legally married couple can partake in the legally accepted reproductive techniques, and the genetic materials must also be derived from them, not a third party. Therefore, third-party involvement in the fertilization process is not allowed.

⁸⁶ AbdulRazzaq A. Alaro, 'Assisted Reproductive Technology (ART): The Islamic Perspective', Available at < https://www.academia.edu/8750667/Assisted_Reproductive_Technology_Art_The_Islamic_Law_Perspective> accessed on 26th April, 2023.

⁸⁷ *Ibid.*

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⁸⁹ Chamsi-Pasha H n3.

⁹⁰ Yasin Elkhazab, 'Does Islam Allow Surrogacy', Available at < <https://www.linkedin.com/pulse/does-islam-allow-surrogacy-yasin-elkhazab/>> accessed on 27th March, 2023.

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⁹² In a sahih hadith found in Bukhari and Muslim.

⁹³ Shaikh Farid and Paul Schotsmans, 'Gamete Donation: Ethical Divergences in Islamic Religious Thinking', Available at < https://www.researchgate.net/publication/282132292_Gamete_Donation_Ethical_Divergences_in_Islamic_Religious_Thinking> accessed on 27th April, 2023.

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This means that a third-party donor, whether he/she is providing sperm, eggs, an embryo, or a uterus, is unacceptable in Islam as the use of a third-party in the ART process is tantamount to adultery.

- b) Where a marriage comes to an end either because of divorce or the death of the husband, the ex-wife or widow is not permitted to use the frozen sperm of the ex-husband or the dead husband to fertilize her eggs.
- c) All forms of surrogacy are forbidden according to the Sunni Scholars. This is because they derive their rulings from the Qur'an and the Hadith. On the contrary, the Shia scholars approve surrogacy but are divided on whether other third-party ARTs are permissible or not.
- d) It has also been observed that although masturbation is forbidden in Islam, it will be permissible where it is done by the hand of the man's wife, which will enable the husband to provide his sperm for the procedure of AI.
- e) It has been observed that most ART procedures, including third-party donation in artificial insemination and surrogacy, create confusion in genealogy (nasab) and, as such, act counter to the realization of one of the goals of sharia, which is the preservation of lineage.

5.0 RECOMMENDATIONS

1. Legally married Muslim couples who have problems procreating naturally can adopt the Artificial Insemination method to enable them procreate as long as it is between the legally married couple.
2. Furthermore, Muslim couples can also foster orphans. The foster parents are not allowed to legally adopt the orphans, nevertheless, they would provide a home for the orphans and shower them with love, which they would have shown to their own child.
3. It is also recommended that Muslim couples suffering infertility have the option of resorting to polygamy, where the problem is with the wife.
4. Where the husband happens to be the victim of infertility, and the legal method of artificial insemination and in vitro fertilization is impossible because of his infertility, the wife should be allowed to choose either to stay with him and accept her fate or seek divorce based on his defect.

6.0 CONCLUSION

This paper has attempted an analysis of the concept of artificial insemination and surrogacy, which are processes under Assisted Reproductive Techniques (ART), with particular reference to their legal position in Islamic law. It has been highlighted that Islamic law does not, in principle, disapprove of medical remedies to infertility, but ensures that no law of Islam is contravened in the process of seeking progeny. The ethical and moral perspectives of artificial insemination and surrogacy have been observed, and the applicability of both ART procedures in Islam has been explored. It has been observed that Islam permits ART's that do not involve third-party donation in any form. As such, it permits artificial insemination and in-vitro fertilization without third-party involvement, among others, while it prohibits surrogacy. It has also been observed that in the Islamic world, there is a divide between the Sunni school and the Shia school, and that, unlike the Sunni school, which bans surrogacy, the Shia school permits surrogacy.

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