


THE STATUS OF ASSISTED REPRODUCTIVE TECHNOLOGY CONCEIVED-CHILD IN ISLAMIC INHERITANCE LAW

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Abstract: The paper discussed the status and right of a child born through Assisted Reproductive Technology (ART) to inherit under Islamic Law. The types of ART such as artificial insemination, *in-vitro* fertilisation, sperm donor/ova bank and surrogacy have been examined to discover whether a child born through any of these processes has a legal right to inherit one or both supposed parents under Islamic Law. The paper adopted a doctrinal research method by conducting an in-depth analysis of primary and secondary legal research sources. The paper further examined and analysed the arguments of Muslim scholars on the topic, and it was discovered that the jurists are not unanimous as to whether the contributor of the ovum or the woman who carries the pregnancy and gives birth to the child is the birth mother under the surrogacy arrangement for child right to the inheritance. The writer's primary finding is that where the semen and egg of a consented lawfully married couple are used to conduct the process, such a child is the legal child of that marriage and has full right to inherit both the parents. But where the third party is involved either by artificial insemination or through surrogacy or *in-vitro* fertilisation, the child is *walad al-zina* – (*illegitimate child*), who cannot inherit their father but will only inherit their mother and her relatives. The paper recommended that the practice of ART should be limited to only a legally married couple during their marriage to guarantee their children's inheritance.

Keywords: Artificial Insemination; illegitimacy; inheritance; *in-vitro* fertilization; surrogacy

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Introduction

The institution of inheritance is as old as the world itself. It occupies a vintage position in any given society, whether such society is primitive, developed or developing. Islam gave humanity an ideal code of human rights fourteen centuries ago. These rights aim to confer honour and dignity on humankind and eliminate exploitation, oppression, and injustice. Among these rights is the right of inheritance. Therefore, because of the status of this institution, no society or legal system can afford to close its eyes to the children's right of inheritance of their parents and vice versa.

Marriage(s) conducted following rules and teachings of Islamic Law is the only appropriate way of procreation, which creates a right of inheritance.¹ Therefore, procreation outside lawful marriage will bar a person from inheritance.² In other words, the procreation that takes place between a legally married couple necessitates them to inherit each other in the event one of them dies due to the blood or matrimonial relationship that exists between them. The rules regulating inheritance in *Shari'ah* are based on the principle that property which belonged to the deceased should devolve on those who, because of consanguinity or marital relations, have the most substantial claim to benefit from it and in proportion to the strength of such claim.³ The right of the children to inherit the properties of their deceased parents is provided for in *surah An-Nisa*. Thus: 'There is a share for men and a share for women from what is left by parents and those nearest related, whether the property be small or large – a legal share.'⁴

From the above Qur'anic provision, it is clear that the rights of the children, who are the products of a legally married couple during their marriage, have been recognised and guaranteed under Islamic Law. Under Islamic Law, the only recognised means of obtaining children is by bearing or giving birth to them through a licit sexual relationship between the husband and wife during the subsistence of their legal marriage. However, in recent times, with the advancement of science and technology, the desperate quest for children led to the development of a new process of procreation, which is reproduction by an assisted technology which is known as Assisted Reproductive Technology (ART). This is the medical procedure being used to address the problem of infertility at present. It involves methods such as *in-vitro* fertilisation, sperm injection, the use of fertile drugs, artificial insemination, sperm donation and surrogacy. Assisted Reproductive Technology consists of all fertility treatments that handle both the women's egg and men's sperm. This technology has helped a lot of married couples suffering from infertility to bear or obtain offspring of their own.

¹ Muttalib Ahmad Ambali, *The Practice of the Muslim Family Law in Nigeria*, 3. ed (Lagos: Princeton Publ, 2014), 346.

² Abd Allah al-Maqdisi Ibn Qudamah, *Al-Mughnī Fī Fiqh al-Imām Aḥmad Ibn Ḥanbal al-Shaybānī* (Beirut, Lebanon: Dār al-Fikr, 1984), 65.

³ Abdur Rahman I. Doi, *Shari'ah: The Islamic Law* (Ta Ha Publishers, 1984), 272.

⁴ Qur'an, 4:7, see also Qur'an 4:11, 12 and 176.

This paper discusses Assisted Reproductive Technology, its meaning and its types. In discussing this, the paper will briefly explain the legal meaning and medical procedure of artificial insemination, *in-vitro* fertilisation, sperm donor/ova bank surrogacy and artificial embryonation. The paper critically examines the status and right of a child born through the method or procedure of Assisted Reproductive Technology to inherit under Islamic Law. This will be done using Islamic Law's primary and secondary sources. In addition, the views of jurists of different schools of law will also be considered to arrive at a just conclusion. The paper concludes with suggestions and necessary recommendations.

Methodology

The paper employed a doctrinal research method focusing on a systematic and comprehensive analysis of Islamic legal sources. This approach involved thoroughly examining primary legal sources, such as Al-Qur'an verses, hadith, and various scholarly thoughts, including academic commentaries, legal textbooks, and journal articles. By integrating these sources, the research aimed to interpret, clarify, and evaluate the existing legal framework for the object of this study.

Results and Discussion

Types of Assisted Reproductive Technology

Assisted Reproductive Technologies are methods used via scientifically assisted means of possessing progeny. It is not the conventional or natural way of acquiring children, yet it is under reproductive rights. Artificial human reproduction is the general concept of technologically assisted human reproduction. It comprises the following: Artificial Insemination (AI), In-vitro Fertilisation (IVF), Sperm donation/ overbank, Embryo adoption, Egg transfer, Surrogate parenting, Human cloning, and Genetic engineering, among others.⁵ Some of the above methods of assisted or scientifically assisted human reproduction, though not exhaustive, shall now be discussed to see their respective nature.

Artificial Insemination

According to Black's Law Dictionary, artificial insemination is defined as a process for achieving conception whereby semen is inserted into a woman's vagina by some means other than intercourse.⁶ Webster's Ninth New Collegiate Dictionary defines it as the introduction of semen into the uterus or oviduct by other than natural means.⁷ I. A. Aliyu defines it as a process through which female ova is

⁵ Anthony W. Norman and Helen L. Henry, 'Hormones of Pregnancy, Parturition and Lactation', in *Hormones* (Elsevier, 2015), 297–320, <https://doi.org/10.1016/B978-0-08-091906-5.00014-8>.

⁶ Henry Campbell Black and Bryan A. Garner, eds., *Black's Law Dictionary*, 8. ed., 2. repr (St. Paul, Minn: Thomson/West, 2007), 121.

⁷ Merriam-Webster, Inc, ed., *Webster's Ninth New Collegiate Dictionary* (Springfield, Mass., U.S.A: Merriam-Webster, 1991), 106.

fertilised with male sperm. Then, the resultant embryo is planted into the uterus of a woman who will carry the pregnancy and deliver the baby.⁸

From the above definitions, it is understood that artificial insemination is the process of placing sperm inside the woman's vagina or uterus by means other than sexual intercourse. It is also a procedure by which sperm is inserted directly into a woman's cervix, fallopian tubes, or uterus in the hope of getting pregnant. The most common method is called 'intrauterine insemination (IUI).⁹ By this process, semen is used to make a woman pregnant without sexual intercourse. It is to be observed that the semen to be injected into the woman's uterus may be donated by the recipient's husband or someone other than the woman's husbands and wife.¹⁰ Sperm is usually obtained for this procedure through either of the two ways: most commonly, the man masturbates into a sterile glass or plastic cup provided by the doctor or andrology laboratory and by inserting the penis inside a special sheath (condom-like) before intercourse.¹¹

In-vitro Fertilisation (IVF)

In-vitro is a Latin phrase that means "in glass" in embryology. It is used in contrast with *in-utero*, which means in the uterus. Under normal circumstances, 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 tube. *In vitro* fertilisation (IVF) is a laboratory procedure in which sperm are placed with an unfertilised egg in a Petri dish to achieve fertilisation.¹² It is also the process by which an egg is fertilised outside a woman's body and then inserted into the woman's womb forestation.¹³

It is understood from the above different definitions that *in-vitro* fertilisation may be explained as a form of Assisted Reproductive Technology (ART) involving the joining of a man's sperm and a woman's egg together in a laboratory to produce an embryo resulting in a test tube baby. It is used to treat infertility in both males and females and also serves as an avenue for lesbians or single mothers to have babies.¹⁴

⁸ I. A. Aliyu, 'In-Vitro Fertilization and Artificial Insemination Under Islamic Law', *Ahmadu Bello University Law Journal (A.B.U.L.J.)* 17–18 (1999): 135.

⁹ WebMD, 2022, <https://www.webmd.com>.

¹⁰ Black and Garner, *Black's Law Dictionary*, 121.

¹¹ Reproductive Facts, 2022, <https://www.reproductivefacts.org>.

¹² MedTerms, 'Online Medical Dictionary', 2022, <https://www.medterms.com/script/main/art.asp?articlekey=7222>.

¹³ *Webster's Universal Dictionary & Thesaurus* (Glassgow: Geddes & Grosset, 2003), 1263; Black and Garner, *Black's Law Dictionary*, 1582–83.

¹⁴ F. A. R. Adeleke, 'Examining the Legal Status of Embryo Used in Reproductive Technology (IVF and ES) in Some Selected Jurisdictions', *Journal of Islamic and Comparative Law (UDUSJICL)* 1 (2010): 83.

Sperm Donor/Ova Bank

In some cases, the husband may be unable to produce any sperm at all (a condition called azoospermia), or he may be suffering from a neurological condition that makes it impossible for him to ejaculate, or he may be suffering from certain diseases like diabetes, which renders him impotent. He may also carry a dominant gene for a genetic disorder. If any of such conditions exist, it is still possible for such a man to have his wife inseminated with the sperm of a donor. This explains the reason for the existence of a sperm bank in some advanced countries.¹⁵ An ova bank, cryobank or egg cell bank is a facility that collects and stores human ova, mainly from ova donors, primarily to achieve pregnancies of either the donor at a later time (that is, to overcome issues of infertility) or through a third party reproduction, notably artificial insemination. Ova donated in this way is known as donor ova.¹⁶

It is to be observed that scientifically, the term pregnancy is only said to result when the sperm from the man fertilises the female ovum. The fetus or child resulting is said to be a product of the union of the man and woman whose sperm and ovum are coupled and fertilised. The husband either produces no sperm or, in some instances, he produces sperm, but it is not viable. It could also be that the woman produces no egg but has all the features to carry a pregnancy to maturity. Therefore, the whole process can occur another way, with the woman donating her eggs (ovum).¹⁷

Artificial Embryonation/Embryo Adoption

Embryo adoption allows the family with remaining embryos to select a recipient family for their embryo gift. The adopting family can use the donated embryos to achieve a pregnancy and give birth to their adopted child.¹⁸ This method 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 urine is successful, embryo development will occur in a typical fashion.¹⁹

Artificial embryonation requires fleshing an embryo from a woman who a donor's sperm have artificially inseminated, then implanting the embryo in the womb of the donor's wife. While embryo adoption, or parental adoption, involves both donor sperm and donor egg, they would be transferred to the womb of the recipient, and she would bring the fetus to both. Egg transfer is a kind of technique which involves the transfer of an egg of another woman into the uterus of a man's wife.²⁰

¹⁵ Abul Faḍl Moḥsin Ebrāhīm, *Abortion, Birth Control and Surrogate Parenting: An Islamic Perspective* (Kuala Lumpur: American Trust Publications, 1989), 34.

¹⁶ Wikipedia, 'Wikipedia Article', 2022, <https://en.m.wikipedia.org>.

¹⁷ Ebrāhīm, *Abortion, Birth Control and Surrogate Parenting*, 34.

¹⁸ Nightlight, 'Embryo Adoption Information', 2022, <https://nightlight.org/embryo-adop>.

¹⁹ Ebrāhīm, *Abortion, Birth Control and Surrogate Parenting*, 34.

²⁰ Ebrāhīm, 34.

It is submitted that the above techniques are opted for if one's wife may not be in a position to ovulate or perhaps she has no fallopian tubes at all. These techniques may also result in something abnormal, causing blockage of the fallopian tubes or where one's tubes may be damaged.

Surrogacy

Another form of Assisted Reproductive Technology is surrogacy. According to Black's Law Dictionary, surrogacy is the act of performing some functions in the place of someone else.²¹ Webster's New Collegiate Dictionary defines a surrogate as one appointed to act in the place of another.²² Black's Law Dictionary has also defined a surrogate mother as a woman who carries out the gestational function and gives birth to a child for another, especially a woman who agrees to provide her uterus to carry an embryo throughout pregnancy, typically on behalf of an infertile couple, and who relinquishes any parental rights she may have upon the birth of the child. A surrogate mother may or may not be the genetic mother of a child.²³

It is understood from the definitions above that surrogating parenting exists in a situation where a woman bears a child for another woman who cannot bear children of her own due to either a blocked fallopian tube or a complete absence of a uterus. There are two types of surrogacy: partial and complete. In partial surrogacy, a couple will solicit or commission a woman to be artificially impregnated by the "husband" semen. The surrogate will then carry the pregnancy to term and, upon birth, hand the baby over to the soliciting couple. In this case, the child will have the rearing father as the biological father, a rearing mother, and a biological birth mother. In a complete surrogacy, the commissioning couple will undergo *In-vitro* fertilisation (IVF), and the embryo produced by IVF is transferred then to a surrogate woman. The surrogate gives the baby to the soliciting/rearing couple at birth. In this case, the biological parents are the rearing couple, and the surrogate is the birth mother. In this type, the genetic mother is made to undergo *in-vitro* fertilisation so that her egg will be collected. The eggs collected will be fertilised in a laboratory with her partner's (whether husband or not) sperm. The fertilised egg develops into an embryo. The selected embryo will be inserted into the prepared uterus of the gestational carrier. At birth, the surrogate hands the child over to the couple.

Conditions of Succession Under Islamic Law

Three conditions of inheritance must be fulfilled before there can be a valid right of inheritance under Islamic Law. No succession in law can exist without one of the conditions or elements.²⁴ There must be a deceased person. There will never be a valid right of inheritance without a person being deceased.²⁵ The property of a

²¹ Black and Garner, *Black's Law Dictionary*, 1485.

²² Merriam-Webster, Inc, *Webster's Ninth New Collegiate Dictionary*, 1188.

²³ Black and Garner, *Black's Law Dictionary*, 1036.

²⁴ Uthman Danladi Keffi, *Some Aspects of Islamic Law of Succession* (Kano: Centre for Islamic Legal Studies, Institute of Administration, Ahmadu Bello University, Kongo Campus, 1990), 1.

²⁵ Keffi, *Some Aspects of Islamic Law of Succession*.

Muslim should not be subjected to inheritance unless his death is confirmed or a competent court declares him as a missing person (*Mafqood*).²⁶ Another condition is the estate left behind by the deceased. Even where there is a deceased person, there must be properties left by such deceased that are capable of being inherited. Therefore, there can be no succession without the deceased and the estate.²⁷ The third condition is the heir or the survival of heirs (*Warithun*), who will inherit the property left by the deceased. These are those to whom the property of a deceased person is transferred. They are the beneficiaries of the estate.²⁸

It is submitted that it is trite in *Jatau v. Mailafia*,²⁹ under Islamic Law, the door of inheritance only opens on the fulfilment of 3 (three) fundamental conditions: proof of death of the praepositus, proof of the survival of an heir, and evidence that the praepositus leaves behind an inheritable estate.³⁰ The import of the above decision is that it has to be proved that the heir or heirs are surviving at the time of the death of the deceased person (Maoruth), even if by breathing for a few seconds or a brief period with evidence of life after the death of the deceased before he or they can be allowed to inherit.³¹ These beneficiaries are categorised into heirs by blood, heirs by marriage, clientage, and the Muslim Public Treasury, sometimes designated as the remarkable heir.³² These four relationship categories will be better discussed or examined under succession grounds.

Grounds of Succession

To determine whether the child born through Assisted Reproductive Technology has the right to inherit either his biological or legal parents under Islamic Law, recourse shall first be had to the grounds of succession known in Islamic terminology as *Asbabul Mirath*.³³ These are the legal bases on which a prospective heir may be legally justified to benefit from the hereditaments on the deceased's death.³⁴ If an heir inherits as a widow or widower, he or she is inheriting on the grounds of marriage. Where the heir is a child, parent, uncle, aunt, or any member of the outer family, they are said to be inherited as a blood relative, in which case, the

²⁶ Ambali, *The Practice of the Muslim Family Law in Nigeria*, 342; Doi, *Shari'ah*, 273.

²⁷ Keffi, *Some Aspects of Islamic Law of Succession*, 1.

²⁸ Keffi, 10.

²⁹ (1998) 1 NWLR (Pt 535) 176 CA.

³⁰ See also the cases of *Ahmed v. Jibrin* (1982) 1 Sh. LRN 69; *Maiwarwaro v. Gara* (2001) 7 NWLR (Pt. 711) 40; *Muhammadu v. Muhammadu* (2001) 6 NWLR (Pt. 708) 104 CA and *Jiddan v. Abuna* (2000) All FWLR (24) 1402 CA.

³¹ Gestures like crying, breathing, kicking, coughing, seeing, urinating, yawning and other significant gestures of life are individually and collectively material in this regard, particularly in view of Al-Hadith of the Holy Prophet Muhammad narrated by Abu Hurayrah, where the Holy Prophet was quoted to have emphasized that 'if a new born baby cries, it can inherit.' Yusuf Abdulrasheed and Sheriff E. Okoh, 'Legal Challenges of In-Vitro Fertilisation (IVF) Under English and Islamic Law', *Unilorin Shari'ah Journal* 3, no. 1 (2016): 76; Doi, *Shari'ah*, 273; Ambali, *The Practice of the Muslim Family Law in Nigeria*, 342.

³² Keffi, *Some Aspects of Islamic Law of Succession*, 10.

³³ Keffi, 19.

³⁴ Keffi, *Some Aspects of Islamic Law of Succession*.

blood relationship is the ground.³⁵ In other words, a special relationship between the deceased and the legal heirs must exist, which qualifies and entitles the heir to inherit the deceased. The special relationship may be blood, matrimony or clientage.³⁶ These grounds of succession will be briefly discussed hereunder.

Marriage - An-Nikah

Marriage is one of the grounds or bases that qualifies the surviving spouse to inherit the deceased spouse.³⁷ But, for the marriage to create a right of intestate succession between spouses in a Muslim family, it must be valid and must exist actually or constructively at the time of death of a spouse.³⁸ A marriage is said to be valid when it conforms with all the requirements of validity, such as a marriage guardian³⁹ (*wali*), witnesses⁴⁰ (*shuhud*), dowry⁴¹ (*sadaq* or *Mahr* or *Nihlah*) and the⁴² declaration or offer and acceptance (*seegah*) and that none of the spouses shall fall within a prohibited degree of marriage.⁴³ Non-compliance of the marriage with one

³⁵ Keffi.

³⁶ Keffi, 1.

³⁷ Ambali, *The Practice of the Muslim Family Law in Nigeria*, 346.

³⁸ Keffi, *Some Aspects of Islamic Law of Succession*, 19.

³⁹ Marriage guardianship is the legal authority invested in a person who is fully qualified and competent to safeguard the interest and rights of another who is incapable of doing so independently. It is the authority of a father or nearest male relative over minors, insane, or inexperienced persons, who need protection and guardianship. Hammudah Abd al'Ati, *The Family Structure in Islam* (Lagos: Islamic Publications Bureau, 1970), 70; A guardian (*waliy*) should be a *Mukallaf*, that is, a person who can be held responsible for all his deeds by virtue of his age and state of mind. Ambali, *The Practice of the Muslim Family Law in Nigeria*, 190; The Qur'an provides for the authority of the *Waliy* when it says: 'Wed/Marry them with the leave of their owners', see Qur'an 4:20. The Prophet (SAW) was reported to have said: 'And there is no marriage except with the permission of guardian and payment of dowry and two reliable witnesses'. Doi, *Shari'ah*, 161; Aminu Muhammad Gurin, *An Introduction to Islamic Family Law*, 2, ed, Malthouse Law Books (Lagos: Malthouse Press, 2014), 42, 61–80.

⁴⁰ There must be at least two competent witnesses to witness the offer and acceptance between the contracting parties and their guardians so that the progeny's right of legitimacy will be safeguard. al'Ati, *The Family Structure in Islam*, 60; The Qur'an testifies to this in Surah Al-Baqarah, Chapter 2: 228 thus: And get two witnesses out of your own men. And if there are not two men (available), then, a man and two women, such as you agree for witnesses...' Qur'an 2:282. The Prophet was reported to have said: 'And there is no marriage except with the permission of guardian and payment of dower and two reliable witnesses.' Gurin, *An Introduction to Islamic Family Law*, 42–44.

⁴¹ Dowry (*Mahr*) is a marriage gift from the bridegroom to his bride and becomes her exclusive property. Islam has elevated the status of women as *Mahr* is given as a mark of respect for her. Doi, *Shari'ah*, 158 Allah says in Surah an-Nissah thus: 'And give the women (on marriage) their dower as a free gift but, if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer.' Qur'an 4:4. He said again, 'wed/marry them with the leave of their owners and give them their dowers according to what is reasonable.' Qur'an 4:20. See also Qur'an 33:50.

⁴² *Seegah* refers to the expression of offer of marriage by the *Waliy* of marriage and its acceptance by the prospective husband. Ambali, *The Practice of the Muslim Family Law in Nigeria*, 208; There must be a direct, unequivocal proposal followed by a corresponding acceptance thereof. Both proposal and acceptance must be explicit and oral if the contracting parties are present in person. Otherwise, a written form may substitute for the oral. al'Ati, *The Family Structure in Islam*, 60; Gurin, *An Introduction to Islamic Family Law*, 33.

⁴³ See Qur'an 4, 22 and 23.

or more of these requirements may, in some cases, render it void (*batil*) or irregular (*fasid*) depending on how adversely the marriage is legally affected.⁴⁴ Elementally, a valid marriage contract makes the spouses eligible to inherit each other. The Qur'an has established this right thus: In what your wives leave, your share is a half if they have no child; but, if they leave a child, you get a fourth of that which they leave after payment of legacies that may have been bequeathed or debts. In that which you leave, their (your wives) share is a fourth if you leave no child, but if you leave a child, they get an eighth of that which you leave...⁴⁵

It is understood from the above Quranic provision that either of the spouses is a legal heir to the other so long their marriage subsists at the time when one of them dies. The right of the surviving spouse to inherit their late partner remains in force if they separate in a manner that she can be recalled and one of them dies before the expiration of the stipulated waiting period called *Iddah*. This principle of law applies when the two parties are in good health during the process of *talaq* (dissolution of marriage). But, if the *talaq* is pronounced when the husband is sick, and sickness eventually leads to death, the surviving partner is qualified to share in the estate even if she has re-married after the end of the *Iddah*.⁴⁶

Blood Relationship (Nasab)

Another source of inheritance is the blood relationship. Where the heir inherits either as a child, parent, collateral, uncle or any member of the outer family, they are said to be inherited as a blood relative, in which case blood relationship is the ground.⁴⁷ Thus, the right of inheritance through blood relationship exists between father and sons/daughters, son's son, son's daughter, father, grandfather full brother, full sister, consanguine, uterine brother, consanguine sister, uterine sister, mother, etc.⁴⁸ In other words, it is a kind of blood relationship between relatives of the deceased. According to Coulson, the family group knitted together by the web of social rights and obligations was the extended aquatic family of males linked through males to a common ancestor. Hence, although maternal relatives have rights of inheritance, the main emphasis lies on the paternal connection and the primary significance of *nasab* (blood relationship) in terms of paternity.⁴⁹ It is understood that blood relations are the descendants and ascendants of the deceased person, including the offspring, both male and female, parents, brothers and uncles.

Chapter 4, verse 7 of the Qur'an gives an insight into this thus: 'There is a share for men and a share for women from what is left by parents and those nearest related whether the property be small or large – a large share.'⁵⁰

⁴⁴ Keffi, *Some Aspects of Islamic Law of Succession*, 19.

⁴⁵ Qur'an 4:12.

⁴⁶ Ambali, *The Practice of the Muslim Family Law in Nigeria*, 346.

⁴⁷ Keffi, *Some Aspects of Islamic Law of Succession*, 19.

⁴⁸ Ambali, *The Practice of the Muslim Family Law in Nigeria*, 346.

⁴⁹ N. J. Coulson, *Succession in the Muslim Family*, 1st ed. (London: Cambridge University Press, 1971), 10, <https://doi.org/10.1017/CBO9780511557965>.

⁵⁰ Qur'an 4:7, see generally Qur'an 4:11, 4:12 and 4:176.

Guardianship (Wila or Al-Walaa')

Al-Walaa' is one of the bases or grounds of inheritance. It is a slave-master relationship in which the deceased has been a slave of the heir, but the latter sets him free, and the former dies without surviving by an heir. A person who sets a slave free is entitled to inherit all his estates by right of *Ta'sab* if he does not survive by any other heir(s).⁵¹ The Prophet was reported to have said that: 'A person who sets a slave free is entitled to his inheritance.'⁵² The import of this hadith is that the master or his child is eligible or entitled to inherit his freed slave if an heir or relation does not survive the latter. However, where the shares of other heirs are given, the master takes the balance.⁵³ For example, suppose he is survived by only one wife, by only a daughter, or by only two daughters, who are given the maximum of $\frac{1}{4}$ or $\frac{1}{2}$ or $\frac{2}{3}$ of the estate, respectively. In that case, the balance of $\frac{3}{4}$ or $\frac{1}{2}$ or $\frac{1}{3}$, respectively, goes to the master in his capacity as *Asib*, agnate.⁵⁴ However, the master will not inherit anything from his freed slave if the latter is survived by other heirs, such as a son and a wife who exhaust the whole estate.⁵⁵ Muslim Jurists are unanimous that the right is not reciprocal. A freed slave cannot inherit his master even if he dies without heirs.⁵⁶

It is trite under Islamic Law that to qualify as a descendant of any person, the person claiming such a relationship must be related to the other by blood,⁵⁷ as the relationship by adoption is impermissible.⁵⁸ In the case of *Hamza v. Yusuf*⁵⁹ The Court of Appeal held that '*Shari'ah* requires that a party claiming to inherit a deceased person has to establish to the court that he is related to the deceased person either by blood – *Nasab/Qaraba*; marriage – *Nikkah/Zawaj* or emancipation – *Itaq/Walaa'*. These are known in Islamic terminology as *Asbabul Mirath*, which refers to grounds of succession.

Public/Muslim Treasury (Baitul Mal)

The schools of Imam Malik and Shafi'i considered *baitul mal* (Muslim/Public treasury) as an institution that can inherit the estate of a Muslim in certain circumstances. This can only be a ground where a Muslim dies, and he is not survived by any person who is entitled to inherit him by marriage, blood relation or being his former master; then, the whole of his estate will go to the public/Muslim

⁵¹ Ambali, *The Practice of the Muslim Family Law in Nigeria*, 345; Keffi, *Some Aspects of Islamic Law of Succession*, 41.

⁵² Mas'ud Adebayo Oniye, *The Distribution of Estate in Islam (The Law and Practice)* (Ilorin: Centre for Arabic Manuscript Publication, n.d.), 7.

⁵³ Ambali, *The Practice of the Muslim Family Law in Nigeria*, 345.

⁵⁴ Ambali, 345.

⁵⁵ Ambali, 345.

⁵⁶ Ambali, 345.

⁵⁷ Known in Arabic as *Nasab* or *Qarabah*; see the cases of *Garba v. Abdul* (2002) FWLR (94) 185 CA; *Karimatu v. Idi* (2006) 25 WRN 129 CA; *Hamza v. Yusuf* (2007) 46 WRN 137.

⁵⁸ Abdurrasheed and Okoh, 'Legal Challenges of In-Vitro Fertilisation (IVF) Under English and Islamic Law', 57.

⁵⁹ (2007) 4 WRN 137/

treasury for the benefit of the Muslim *Ummah*.⁶⁰ Another situation is where certain heirs survive the late Muslim, but none of them is in the category of Al-‘Asib residuary; the balance goes to the public treasury after having given the heirs their respective dues.⁶¹

Examining the Status and Right of a Child Born Through Assisted Reproductive Technology to Inherit Under Islamic Law

The science of *Mirah* – inheritance in *Shari’ah* gives rules that guide who inherits, who is to be inherited and what shares go to the heirs. The death of a person brings about the transfer of most of his rights and obligations to persons who survive him, known as *wuratha*, that is, heirs and representatives.⁶² The deceased may, however, leave more than one person so related to or connected with him that it would be difficult to determine whose claim supersedes that of the others.⁶³ The elaborate provisions are made under Islamic Law, which states that relations are entitled to inherit, and the shares due to them have been categorically specified in the Glorious Qur’an.⁶⁴

No doubt, given relevant Qur’anic provisions,⁶⁵ a child has a right to inherit his parents, especially born out of lawful wedlock. However, whether the word child covers and includes a child born through Assisted Reproductive Technology and whether the interpretation of these Qur’anic provisions relating to inheritance permits such a designer baby or child to have a right to inherit his supposed parents is a question of fact and law which will be critically examined.

Status and Right of a Child Born Through Surrogacy Arrangement/Process to Inherit Under Islamic Law

Assisted Reproductive Technologies (ARTs) have introduced many new challenges to the inherited structure of Islamic lineage regulations. Most importantly, surrogacy arrangements defy the classical definition of both paternity and maternity. 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 being blocked or her not having a uterus. It is sometimes referred to as womb leasing.⁶⁶ It has to be quickly pointed out here that all forms of surrogacy are forbidden in Islam because the contract itself is unlawful. In Islamic Law, a contract of whatever nature must be lawful in its essence, content and nature. It must involve only things recognised as

⁶⁰ Ambali, *The Practice of the Muslim Family Law in Nigeria*, 347.

⁶¹ Ambali, 347.

⁶² Doi, *Shari’ah*, 271–72.

⁶³ Doi, 272.

⁶⁴ See Qur’an 4:11, 12 and 176.

⁶⁵ Qur’an 4:11, 12 and 176.

⁶⁶ Abul Faḍl Moḥsin Ebrāhīm, *Biomedical Issues: Islamic Perspective*, Revised edition (Kuala Lumpur: A.S. Noordeen, 2005), 112.

legal and of value by Islamic Law.⁶⁷ It is not lawful to fertilise the sperm and ova of the spouses and plant it in another woman's uterus, which will deliver the resultant embryo for the spouses. It is also not allowed to obtain another man's sperm or another woman's ova and get it fertilised with the wife's ova or husband's sperm, as the case may be, and then plant the resultant embryo in the woman's uterus who, will now deliver a baby for them.⁶⁸

In partial or classical surrogacy, a couple will solicit or commission a woman to be artificially impregnated by the 'husband' semen, or the surrogate will be inseminated with the sperm of the father-to-be. The surrogate will then carry the pregnancy to term and, upon birth, hand the baby over to the soliciting couple. In this situation, the surrogate automatically becomes the child's genetic and biological mother because the surrogate contributed the genetic egg, carried the pregnancy, and delivered the baby. In this case, the child will have the rearing father as the biological father, a rearing mother and a biological mother.⁶⁹

However, in complete or gestational surrogacy, the surrogate is not the genetic mother because her egg is not collected. The fertilised egg developed into an embryo produced by IVF is then transferred to a surrogate woman who will carry the pregnancy. The surrogate will give the baby to the soliciting/rearing couple at birth. In this case, the biological parents are the rearing couple, and the surrogate is the birth mother.⁷⁰

Our primary concern here is not to examine the legality or otherwise of the surrogacy arrangement under Islamic Law; instead, it is to investigate the status of a child born through the process and whether such a child has a right to inherit the supposed parents under Islamic Law. It has been observed that surrogacy arrangements have created new types of maternity claims, subject to the role of the surrogate mother and the scope of her contribution, whether it is gestational or genetic. These latest developments in the area of family law pose a set of new questions and challenges which legal systems are trying to cope with these important changes.⁷¹

It is submitted that based on these legal opinions, three main questions have often been raised in connection with the issue of surrogacy: (1) the criteria based on which the maternity relationship should be defined; (2) how can this new type of maternity be integrated; and (3) how can this procedure be regulated under Islamic Law. With regard to the first question, the scholars disagreed on whether maternity

⁶⁷ Yahaya Yunusa Bambale, *Islamic Law of Commercial and Industrial Transactions* (Lagos: Malthouse Press Limited, 2007), 36; Mansur Ibrahim Sa'id and Kabiru G. Muhammad, *An Introduction to Islamic Law of Contract* (Sokoto: Usman Danfodiyo University Press Limited, 2019), 37.

⁶⁸ Aliyu, 'In-Vitro Fertilization and Artificial Insemination Under Islamic Law', 135.

⁶⁹ Available at <https://www.ncbi.nlm.nih.gov/books> accessed on 22nd January, 2022 at 5:50 p.m.

⁷⁰ Ibid.

⁷¹ Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization*, Public Worlds, v. 1 (Minneapolis, Minn: University of Minnesota Press, 1996).

should be defined primarily based on the genetic structure, in which case the contributor of the ovum should be the mother.⁷²

This set of scholars argues that the genetic mother (whether the main wife or the surrogate) whose eggs or ovum is fertilised with the husband's sperm is a real mother as long as she is the one who owns or provides the ovum or the eggs used. On the other hand, some scholars argued that maternity should be defined in terms of the relationship emanating from pregnancy and childbirth. This set of scholars argued that linguistically and Islamically, the Arabic word for "to give birth" is *Walada*, and for "mother", it is *Walidah* or the "one who gives birth." They argued that the woman who delivers the baby is the birth mother of the baby, especially in the light of the Qur'anic provision, which refers to them as their real mother. In *Surah Al-Mijadalah*, the Qur'an says: 'None can be their mothers except those who gave birth to them.'⁷³

Concerning the second question, some scholars made an analogy between the gestational and breastfeeding mothers.⁷⁴ While this analogy is invoked frequently, critics find significant differences between these two relationship types. The third question is not restricted to elucidating whether surrogacy is permitted under Islamic Law. However, it has to do with regulating actual cases if the procedure is implemented, regardless of whether it is allowed. So, under Islamic Law of inheritance (even with the surrogacy arrangement, which is forbidden), the child is only related to the paternity and maternity involved in surrogacy. The child will inherit the woman who gave birth to him, the uterus owner who carries the pregnancy and delivers the baby in the light of the above Qur'an provision.⁷⁵ It has been observed that Islamic Law prohibits surrogacy; however, if the practice is still done despite the prohibition, it is the consensus of Islamic scholars that the birth mother is the 'real' mother. Such a child has a legal right to inherit such a mother.⁷⁶ Surrogacy is prohibited in Islamic law because of the involvement of a third party, a neutral party to the marriage contract. However, surrogacy between the wives of the same husband is allowed by Ali Khamenei of Iran.⁷⁷ What, then, is that child's status regarding his right of inheritance? Some scholars like Arif Ali Arif allow such a method between the wives of the same husband. In contrast, scholars like Badrul Muthawalli Abdul Basith consider the woman of the uterus to be the birth mother in all cases of surrogacy, and her husband would be the father of that child even if the sperm is not his, so long the woman marries him.⁷⁸ This is in the light of the Hadith of the Prophet, which says: 'The child belongs to one on whose bed it is born.'⁷⁹ If she does not marry, then

⁷² Appadurai.

⁷³ Qur'an 58:2.

⁷⁴ Al-Mirath fi al-Shari'at al-Islamiyyah of al-Ustadh' Ali-Hasb Allah, 2nd ed. 94, Ibn 'Abidun, and Ibn Qudamah in al-Mughni, Chapter on Inheritance, fasi al-'asabat (male relatives).

⁷⁵ Qur'an 58:2.

⁷⁶ Available at <https://www.ncbi.nlm.nih.gov/books>, accessed on 22nd January, 2022 at 5.50 p.m.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Doi, *Shari'ah*, 188.

the child is hers, and he will be in the position of a child of prostitution who will inherit only his mother.⁸⁰

Yusuf Qardawi also believes that the mother of the child will be a woman of the uterus, the father will be her husband, and the mother of the egg will be considered the breastfeeding mother.⁸¹ In this case, the child has the right to inherit according to Islamic Law of inheritance rules. That is, the child will inherit the woman who gave birth to him and the father who is the husband and owner of the sperm. The rule of distribution and the share due to each are outside this work's scope.

Status and Right of a Child Born Through Artificial Insemination Process to Inherit Under Islamic Law

The phrase artificial insemination has been defined somewhere in this work as the process of placing sperm inside the woman's vagina or uterus by means other than sexual intercourse. The sperm may be the woman's husband or a third-party donor. It is also a method by which a female is impregnated through injection of semen from a donor who may be the husband or the third party other than through sexual intercourse.⁸² It has also been pointed out in this work that 'artificial insemination with the sperm of foreign person is, in the *Shari'ah*, a grievous crime and a great sin and is tantamount to adultery.

It has been rightly argued that artificial insemination is not *haram* (prohibited) under Islamic Law so long as the sperm used to inject the woman is that of her husband; in this case, the child born out of the process is the legal child of the couple and he has the full rights to inherit the parents following the rules of Islam.⁸³ Yusuf Al-Qardawi gave an insight to this thus:

Islam safeguards lineage by prohibiting *zina* (adultery and fornication) and legal adoption. Thus keeping the family line unambiguously defined without any foreign element entering it. It likewise prohibits what is known as artificial insemination if the donor sperm is other than the husband.⁸⁴

Where a child is born as a result of artificial insemination with the sperm of a man other than the husband, will he be a legitimate child, and to whom will he be attributed? As regards the sterile husband, it has been argued that the child cannot be attributed to him under any circumstances.⁸⁵ Although the author did not state or give the reason for this conclusion, the reason may be because the sterile husband is infertile and is unable to impregnate a woman. Nonetheless, this writer is of the view that such a child cannot still be attributed to the third person whose sperm was used to impregnate the woman who is not his wife. This child, in our view, is nothing but an illegitimate child. Illegitimate children are children who have

⁸⁰ Sayyid Muhammed Mushin.

⁸¹ *Ibid*, 31.

⁸² Black and Garner, *Black's Law Dictionary*, 121.

⁸³ Ebrāhīm, *Abortion, Birth Control and Surrogate Parenting*, 115.

⁸⁴ Al-Trans American Trust Publishers, Indiana Polis (nd)

⁸⁵ Ebrāhīm, *Abortion, Birth Control and Surrogate Parenting*, 112.

been born as a result of prohibited sexual intercourse between non-intimate men and women.⁸⁶ Although the process of artificial insemination does not involve the actual sexual ‘body contact’ of adulterous relations, or presumably the desire to engage in an extramarital affair, it is nonetheless considered by most Muslim scholars to be a form of adultery by introducing a third party into the sacred dyad of the husband and wife.⁸⁷

Under the *Shari’ah*, the biological relationship between *walad al-zina* and his supposed father would be automatically severed.⁸⁸ It has been argued that Islam does not impose the duty of fathering the child on the man who impregnated the child’s mother even if he acknowledged the pregnancy.⁸⁹ The legal support for this position is the hadith of the Prophet, which says that ‘If a man commits fornication with a free woman or a slave woman, the child is the product of fornication he neither inherits nor may anyone inherit from him.’⁹⁰ Therefore, a child who is the product of the artificial insemination between his mother and a third party is *walad al zina*, and will not be entitled to inherit such a supposed father.

As to the woman who bears the child through the process of artificial insemination, some legal schools attribute the child to her because an illegitimate child inherits from his mother and her relatives, and they inherit from him, too.⁹¹ Therefore, it has been rightly argued that if an illegitimate child can be attributed to his mother, a child born by artificial insemination is better entitled to be similarly attributed.⁹² But as regards the man whose sperm is inseminated, al-Sayyid al-Hakim was of the view that the child should not be attributed to him because in order for a child to be attributed to a person, it requires that such a person should have had intercourse with the woman irrespective of whether he performs it or he is unable to perform it, but, has his sperm reach her reproductive organ during his effort.⁹³ Although this reason, too, cannot be disregarded, the better reason for not attributing the child to the man is that there was no legal marriage between him and the woman who was inseminated with his sperm.

⁸⁶ Mohamad Hadi Mahdavi Ardakani and Arezo Rashidi, ‘Status of Guardianship, Alimony and Inheritance of Illegitimate Children in Islam’, *World Scientific News* 44 (2016), <http://agro.icm.edu.pl/agro/element/bwmeta1.element.agro-af19b121-f6f4-44c8-b959-5fff836334ce>.

⁸⁷ Meerah Deiwi Raja Gopal, ‘Does Illegitimacy Status of Children Matter? A Review on Malaysian Perspectives’, *International Journal of Applied Psychology* 5, no. 4 (2014): 110, <http://article.sapub.org/10.5923/j.jiap.20150504.05.html>.

⁸⁸ Raja Gopal, 110.

⁸⁹ Imam Tamim, Muhammad Kamaldeen, and Wardah Itannaola Abbas, ‘Exploratory Study of Rights of Illegitimate Child Under the Shari’ah and International Child Rights Instruments’, *Unilorin Shari’ah Journal* 3, no. 1 (2016): 102.

⁹⁰ Tamim, Kamaldeen, and Abbas.

⁹¹ Sayyid Mohammed Mushin, ‘Children by IVF and Surrogacy: A Juristic Study on Their Laws of Inheritance’, *The Muslim World League Journal* 42, no. 5 & 6 (2013): 33.

⁹² Mushin, 33.

⁹³ Mushin, 33.

Status and Right of Child Born Through *In-vitro* Fertilisation Procedure to Inherit under Islamic Law

In-vitro fertilisation (IVF) is a laboratory procedure in which sperm are placed with an unfertilised egg in a Petri dish to achieve fertilisation.⁹⁴ IVF may be explained as a form of Assisted Reproductive Technology (ART) involving the joining of a man's sperm and a woman's egg together in a laboratory to produce an embryo resulting in a test tube baby. It is used to treat infertility in both males and females and also serves as an avenue for lesbians or single mothers to have babies.⁹⁵ 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.⁹⁶

Our concern here is not to examine the legality or otherwise of the process but, instead, to find out and discuss the status of the child born through the process and whether such a child is entitled to inherit the owner of the sperm and egg as his parents. However, before embarking on this effort, it is pertinent to briefly distinguish between *in-vitro* fertilisation by the husband and one by a donor other than the husband. The IVF by the husband covers all forms and techniques of *In-vitro* fertilisation in which the semen donor is the recipient's husband.⁹⁷ In other words, where the sperm and egg of a lawfully married couple are used to conduct this process, with the consent of both the husband and the wife sought and obtained before the process of IVF is performed, such a child is the legal child of that marriage and has full rights to inherit both parents.⁹⁸

In-vitro fertilisation by the donor is a type of assisted reproductive technology where fertilisation is performed with sperm taken from the husband and an egg taken from a woman who is my not wife, then, the embryo is placed in his wife's womb; or when fertilisation takes place between sperm taken from a man who is not the husband, and an egg taken from the wife, then the embryo is placed in the womb of the wife.⁹⁹ In both situations, donors are not a legal couple to each other. Therefore, the involvement of a third person in this situation is unacceptable and impermissible in Islamic Law. Hence, the widespread practice in Assisted Reproduction Technology facilities of sperm, ovum and embryo donation and the "rental" of the uterus is incompatible with the Islamic injunctions related to human reproduction.¹⁰⁰

⁹⁴ MedTerms Medical Dictionary, 'Online Medical Dictionary', 2022, <http://www.medterms.com/script/main/art.asp?articlekey=7222>.

⁹⁵ Adeleke, 'Examining the Legal Status of Embryo Used in Reproductive Technology (IVF and ES) in Some Selected Jurisdictions', 83.

⁹⁶ Aliyu, 'In-Vitro Fertilization and Artificial Insemination Under Islamic Law'.

⁹⁷ Abdulrasheed and Okoh, 'Legal Challenges of In-Vitro Fertilisation (IVF) Under English and Islamic Law', 38–39.

⁹⁸ Abdulrasheed and Okoh, 'Legal Challenges of In-Vitro Fertilisation (IVF) Under English and Islamic Law'.

⁹⁹ Abdulrasheed and Okoh, 45–46.

¹⁰⁰ Available at <https://www.ncbi.nlm.nih.gov/books> accessed on 22nd January, 2022 at 5.50 p.m.

The idea of third-party gamete donation is not acceptable to the vast majority of Muslims, both Shi'ite and Sunni, because of the moral implications of third-party donation for marriage, the potential for incest and the ethical consequences of donation for kinship and family life.¹⁰¹ The major problem with third party donation is that it destroys a child lineage, confuses issues of kinship and inheritance and makes it difficult for a child to trace or know his biological mother and father.

Another crucial legal question concerning third-party donations is the legitimacy of the child. In other words, could the sperm donor, despite being the genetic or biological father of the child, legitimately claim the paternity of the child? The answer is negative.¹⁰² The reason is that such a process is haram, and any child resulting from such intercourse or insemination outside the bond of the valid marriage contract is an illegitimate child – *Walid al-Zina* who is ascribed only to their mother and, as such, can only inherit this woman who gave birth to them.¹⁰³ Oniye gave an insight into this as follows:

The product of illegal intercourse between a man and a woman is, under the law, regarded as an illegitimate child. Therefore, such a child cannot inherit his father, for he is a by-product of *zina*. Likewise, the father cannot inherit that *Walad-zina*. The Prophet (SAW) said: 'The child belongs to one on whose lawful bed it is born.'¹⁰⁴

It is submitted that the import of the above quotation and the cited authority is that the child who is the product of the sperm used to fertilise the egg of his mother, which resulted in childbirth, cannot, under Islamic Law, inherit the donor of the sperm because there was no legal marriage between the donor and the mother. Therefore, he is *Walad-zina*, who can only inherit his mother. Equally, such a father, the donor of the sperm, cannot inherit such an illegitimate child because the latter is not his legal child.

This principle applies to other types of Assisted Reproductive Technology known as sperm/ova donation, which also involves a third party's genetic material (sperm/ovum) by way of donation or outright sale, as the case may be. This 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. The position of jurists of all schools of Islamic Law is that the source of the sperm, ovum and uterus must come from a legally married couple during the subsistence of their marriage. Therefore, a third-party donor is not allowed in reproduction, whether they are providing sperm, egg or embryo.¹⁰⁵

¹⁰¹ Clarke Morgan, 'Shi'ite Perspective on Kinship and New Reproductive Technologies', *ISIM Review* 17 (2006): 26.

¹⁰² *al-Mawsu'ah al-fiqhiyyah* (Wizarat al-Awqaf wa al-Shu'un al-Islamiyah, 1982), 237, 255.

¹⁰³ Mushin, 'Children by IVF and Surrogacy: A Juristic Study on Their Laws of Inheritance'.

¹⁰⁴ Oniye, *The Distribution of Estate in Islam (The Law and Practice)*, 9.

¹⁰⁵ Resolutions of Islamic Fiqh Council, Makkah, *Journal of International Islamic Fiqh Academy*, vol. iii, Part 1, 515 & 516, and the Fatwa of Sheikh Mahmood Shaltut, a former Head (Sheikh) of Al-Azhar, Cairo al;www.islamonline.com.Last visited on 20th January, 2022 at about 4.40 p.m.

Conclusion and Recommendations

Islamic law grants children the right to inherit from their parents, provided they are born within a lawful marriage. Any child born outside wedlock is considered illegitimate (*walad al-zina*) and can inherit only from their mother and her relatives. Assisted Reproductive Technology (ART), including procedures like artificial insemination and in-vitro fertilization, is permissible under Islamic law when involving only a legally married couple's genetic material. However, the use of third-party donors or surrogacy is prohibited, rendering resulting children illegitimate with restricted inheritance rights.

To preserve Islamic inheritance principles and avoid lineage confusion, ART should be strictly limited to legally married couples during their marriage. A collaborative fatwa by Islamic scholars is recommended to regulate ART practices, endorsing permissible methods while prohibiting third-party involvement and surrogacy.

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