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INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA
بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

AN ETHICO-LEGAL ANALYSIS OF
ASSISTED REPRODUCTIVE
TECHNOLOGIES IN MALAYSIA:
BALANCING RIGHTS AND
RESPONSIBILITIES

BY

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A thesis submitted in fulfilment of the
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ABSTRACT

The availability of various assisted reproductive technologies (ART) provides better solutions to the problem of infertility. These technologies have been welcomed in Malaysia as it allows infertile couples to fulfil their wishes of becoming parents. However, in allowing fertilisation to occur outside the womb, practitioners are able to introduce third party materials and services into the reproductive process. This introduction leads to practices which are legally and ethically questionable such as using donated sperm, eggs, embryos and surrogacy. Many countries around the world have accepted these practices to be necessary in order to respect the reproductive rights and choices of infertile couples. In order to facilitate the changes that are brought by the introduction of a third party, legislations in many countries have changed the concept of parent-child relationship which is in fact a major change in the traditional concept of the family. Aside from that, these laws also try to grapple with the legal and ethical status brought about by the existence of frozen embryos. The aim of this study is to analyse, in the Malaysian context, the legal and ethical problems that result from the use of ART involving donated materials and surrogacy. The study also looks at the legal and ethical status of frozen embryos left over from ART treatments. In doing so the study analyses the legislations around the world that have addressed these issues. An analysis of the historical and legal conditions in these countries show that many of these legislations gives primary emphasis in protecting the reproductive rights of the infertile couples. This has resulted in a significant change to the traditional aspects of family law and the legal basis for parental responsibilities. Based on this analysis, the study submits that a total legislative transplantation of a particular Western model of legislation to the Malaysian setting would not be practical due to the legal differences in the concept of legitimacy and legal responsibilities that flow when an individual procreates. Instead, legislating ART in Malaysia could adopt an Islamic framework which respects individual reproductive rights whilst recognising the responsibilities that come with reproduction.

ملخص البحث

لقى ظهور وسائل التلقيح الصناعي في ماليزيا ترحيبا كثيرا من الزوجين غير المخصبين لأنها أعطتهم فرصة لتحقيق أمنيتهم ليكونوا أبا وأما، غير أنه بالسماح للإخصاب خارج الرحم يتمكن الأطباء من إدخال خدمات طرف ثالث في عملية التلقيح مما يؤدي إلى ممارسة الأعمال التي تثير الشكوك أخلاقا وقانونا. وذلك مثل استخدام السائل المنوي والبويضة والجنين المتبرعة من قبل طرف آخر. وقد وافق كثير من دول العالم على قبول الإجراءات السابق ذكرها من أجل احترام حقوق واختيار الزوجين غير المخصبين. هذا وقد أحدث وجود الطرف الثالث في عملية الإخصاب تغييرا جذريا في تشريعات كثير من الدول بالنسبة لعلاقة الوالدين بالأولاد. وإلى جانب ذلك حاولت هذه التشريعات معالجة الحالة الأخلاقية والقانونية المترتبتين على وجود الأجنة المجمدة. تهدف هذه الدراسة إلى تحليل المسائل القانونية والأخلاقية في ماليزيا بسبب استخدام وسائل التلقيح من غير الزوجين كما تهدف أيضا إلى تحليل المسائل المتعلقة ببقايا الأجنة المجمدة بعد نجاح عملية التلقيح، وذلك عن طريق النظر إلى الدول التي لها تشريع خاص بهذا الشأن. ويفيد البحث عن الوضع التاريخي والقانوني لهذه الدول اهتمامها بحماية حقوق التلقيح والتناسل للزوجين غير المخصبين مما أدى- كما مر- إلى تغيير ملحوظ في جانب كبير من قانون الأسرة بما فيه من الأساس القانوني لمسئولية الوالدين. بناء على هذا التحليل فقد توصلت الدراسة إلى أن الاستيراد الكلي من قوانين الدول الغربية ليقْتَبَس منها القانون الماليزي أمر غير عملي نظرا للاختلاف بينهما فيما يتعلق بالآثار والمسئولية القانونية نتيجة الولادة. كبديل اقترحت هذه الدراسة تبنى القانون الماليزي الخاص بوسائل التلقيح الصناعي ما قدمته الشريعة الإسلامية من حلول التي احترمت وضمنت حقوق الأفراد في التناسل والواجبات التابعة له.

APPROVAL PAGE

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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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**AN ETHICO-LEGAL ANALYSIS OF ASSISTED REPRODUCTIVE
TECHNOLOGIES IN MALAYSIA: BALANCING RIGHTS AND
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To my mother Ḥajjah Faridah Ahmad
For bringing me into this world and whose love and encouragement always made
many things possible
And to my father Ḥaji Zawawi Ahmad
For teaching me and helping me believe that
with Allah nothing is impossible.

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United Nations Charter, 1945
Universal Declaration of Human Rights, 1948

Malaysian Statutes

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Islamic Banking Act, 1983 (ACT 276)
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Printing of Qur'anic Texts Act, 1986 (ACT 326)
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Roe v Wade 410 U.S. 113 (1973)
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Sinnakaruppi Pelakaruppan v Bathumalai Krishnan [2001]2 CLJ 435
Skinner v Oklahoma 316 US 535 (1942)
United States v Patrick (1893) 54 Fed. Rep. 338
X v Belgium and Netherlands (6482/74) DR 2, 105
X,Y & Z [1997] 1 FCR, 527

ABBREVIATIONS

AI	Artificial Insemination	WHO	World Health Organisation
ART	assisted reproductive technologies	De Paul LR	De Paul Law Review
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women	AJLM	American Journal of Law and Medicine
CILJ	Cornell International Law J Journal	UKM	University Kebangsaan Malaysia
FLR	Fordham Law Review	STD	Sexually Transmitted Disease
GIFT	Gamete Intra-Fallopian Transfer	ITI	Intra Tubal Insemination
ICSI	Intra-cytoplasmic sperm injection	ROSNI	Round Spermatid nuclei into oocyte
IUI	Intra-Uterine Insemination	PROST	Pronuclear Stage Tubal Transfer
IVF	In Vitro Fertilisation	IUD	Intra Uterine Device
MJIL	Michigan Journal of International Law	AID	Artificial Insemination by Donor
MJM	Medical Journal Malaysia	SUZI	Subzonal insemination
MLJ	Malayan Law Journal	IPPF	International Planned Parenthood Federation
MOH	Ministry of Health	JAKIM	Jabatan Kemajuan Islam Malaysia
NPFDB	National Population and Family Development Board	IKIM	Institut Kefahaman Islam Malaysia (Institute of Islamic Understanding Malaysia)
TMR	Technology mediated reproduction	ACS	Assisted Conception Specialists
UDHR	Universal Declaration of Human Rights	AIH	Artificial Insemination by Husband

TABLE OF TRANSLITERATION

ا a	ز z	
ب b	س s	ق
ت t	ش sh	ك
ث th	ص ş	ل
ج j	ض đ	م
ح ḥ	ط t	ن
خ kh	ظ z	ه
د d	ع ‘	و
ذ dh	غ gh	ء
ر r	ف f	ي

short vowels

ـَ a

ـِ i

ـُ u

long vowels

ـَـ ā

ـِـ ī

ـُـ ū

diphthongs

ـَو aw

ـَي ay

doubled

ـَوـ uww

ـَيـ iyy

INTRODUCTION

BACKGROUND OF THE STUDY

Malaysia aims to be a developed nation by the year 2020. In pursuit of this, the Malaysian government has embraced various technological advancements in many fields. Some of the most welcomed technological advancements are those in the area of medicine. One area in which advances in medicine has received much attention is the treatment of infertility.¹ In Malaysia, it is expected that 10 to 15 percent of couples who have been married and who have had normal, uninterrupted sexual intercourse for a year or more but have not conceived are considered to suffer from infertility.

Although the problem of infertility cannot be totally eliminated, medical technology has been able to come up with various techniques to help childless couples fulfil their dreams of having a child. Moving from the more traditional use of herbal concoctions, mankind can now depend on various forms of assisted reproductive

Further discussion of the definition and causes of infertility is made in Chapter One, 37-44.

This data is obtained from a discussion with Dato' Dr. Hamid Arshat, a leading fertility expert in Malaysia. He estimates that this percentage is inclusive of secondary infertility. Interview by researcher, Kuala Lumpur, 22nd March 2005. See also Sharon Kam, "Infertile by Choice", *Sun2surf*, < <http://www.sun2surf.com/article.cfm?idH4518>> (accessed 8 September 2006). The report quotes Dr. Norliza Ahmad, Acting Director of the Reproductive Health Division of the National Population and Family Development Board. 22 June 2006. However, there are some interesting observations made by some writers such as Gupta and Raymond which highlights the fact that there are several meanings given to the term "infertility". According to them, the reason for the rise in infertility in most countries may be attributed to the fact that there have been changes to the meaning of infertility. In the 1970s, a couple would only be considered as infertile if they could not conceive naturally after five years. The current definition takes only one year of inability to conceive naturally. For further reading see, Jyotsna Agnihotri Gupta, *New Reproductive Technologies, Women's Health and Autonomy*, (New Delhi: Sage Publications, 2000), 339.

technologies or techniques (ART)³ to assist them in their plight against infertility, with a certain degree of accuracy.

The greatest breakthrough in modern reproductive technologies came with the birth of the first 'test tube' baby, Louise Brown in 1978.⁵ Since then, scientists have made tremendous progress in AR Is and have developed various types of procedures to better address the problem of infertility. Assisting human reproduction began with artificial insemination (AI) and a more refined version known as intra uterine insemination (IUI). AI involved the insertion of untreated sperm into the cervical cavity of the woman treated. IUI is a little different in that the sperm is first treated before insertion is made to the uterus. These techniques do not involve the manipulation of the woman's egg. Meanwhile, the term ART specifically refers to techniques which involved the manipulation of gametes and was introduced with in vitro fertilisation (IVF). This was later expanded to other variations such as intra

Assisted reproductive technologies (ART) is used throughout this study although the term "assisted reproductive techniques" has been used by the Ministry of Health in its Code of Practice for Assisted Reproductive Techniques (ART) Centres. The term "assisted reproductive technologies" is commonly used to refer to a host of techniques used to assist infertile couples achieve pregnancy through non-coital method of conceptions. See Lisa C. Ikemoto, "Providing protection for collaborative, non-coital reproduction: surrogate motherhood and other new procreative technologies, and the right of intimate association", *Rutgers Law Review*, Vol.4, (1988): 302. ART has also been termed as "new or assisted reproductive technologies", see for example Gupta, 339. There are also some writers who have used the term "new reproductive technologies", but this term can no longer be used as many of these technologies have been available for more than 30 years, see for example Max Charlesworth, *Bioethics in a Liberal Society*, (Cambridge: Cambridge University Press, 1995), 63. Some literature has used the term "artificial reproduction" to describe procreation achieved by the use of specific technologies. It is submitted here that this term is unsuitable as it creates confusion as scientifically, there is nothing "artificial" about sperm fertilising eggs. See Hamid Arshat, "Ethics in Assisted Human Reproduction", *Medical Journal Malaysia*, March, Vol. 44, No.I (1989):I-2 (Editorial). Another term that has been used, which is rather unique is "technology-mediated reproduction" or TMR which was used by Blank. See Robert Blank, *Regulating Reproduction*, (New York: Columbia University Press, 1990), 11. Although this term may be an accurate representation of these methods of reproduction the term is not common. These terms are not exhaustive but provide the most common terms used to describe the same procedures. Nevertheless, the most common term used to describe reproduction that is assisted by technology is "assisted reproductive technologies" or ART which will be used throughout the thesis.

Nevertheless, it must be noted that ART does not guarantee pregnancy neither does it provide a cure for the problems that cause infertility. It only provides a more scientific approach of dealing with infertility. By way of observation and manual handling of the gametes, doctors have more control over the reproductive process when compared to the use of traditional herbal medicine.

Robert G. Edwards, "An Introduction to Bourn Hall: the biomedical background of Bourn Hall Clinic", in *Textbook of In Vitro Fertilization and Assisted Reproduction. The Bourn Hall Guide to Clinical and Laboratory Practice* edited by Peter R. Brinsden (London: Taylor& Francis, 2005), 6.

cystoplasmic sperm injection (ICSI), gamete intra-fallopian transfer (GIFT), zygote intra-fallopian transfer (ZIFf) and other techniques.⁶ These techniques are not exhaustive and are continuously being developed further by scientists. The variety of treatments provides more choices for infertile couples in dealing with their infertility. Nevertheless, it must be noted that these techniques do not provide a cure for infertility, nor do they necessarily provide a guaranteed success of taking home a baby. ART are primarily used to assist infertile couples to achieve conception without having to depend on sexual acts.

As technology permits the fertilisation of the sperm and the eggs to occur outside the womb, the possibility to procreate is no longer restricted to coital methods of reproduction. In spite of the general importance placed on marriage in many jurisdictions, the fact remains that the possibility to procreate is now available for those who seek it, regardless of their marital status. This possibility has led to the use of ART in cases which have led to ethical and legal debates.

There are a variety of ethical and legal issues that arise when the use of ART is discussed. However, this study does not plan to address all the issues surrounding the use of ART.⁷ Instead, the study concentrates on three central issues, whereby the first issue relates to ART services using donated gametes and embryos. ART has made it possible for doctors to offer the use of donated sperm, ova and embryos as an option for certain types of infertility. The use of donated gametes and embryos has been

A detailed explanation on the workings of these techniques is made in Chapter One, 44-60.

Amongst the issues that have been highlighted includes, who should have access to ART treatments, should it be confined to only those who are infertile, or married, or any individual who wishes to use it as an available option to replace normal sexual reproduction. Another issue also surrounds the use of technologies related to ART. For example, the use of pre-implantation genetic diagnosis as a method of determining the morphology of an embryo, has also been the subject of many discussions. Other technologies include the availability of methods which could determine the sex of a child. This possibility is feared to create the danger of eugenics. Aside from these issues, the possibility of human cloning through somatic cell nuclear transfer as a viable option for ART has also been the subject of discussion. For a review of literature see p.9-28 of this Introduction.

deemed necessary in many countries to help fulfil the reproductive rights of infertile individuals who are plagued either with male or female factor infertility.

The use of donated gametes and embryos bring about the legal issue of paternity, maternity and legitimacy. As an attempt to respect the reproductive rights of individuals, many countries have reformed their laws and even created new laws in order to clarify the new relationships created from these collaborations and how it affects the resulting child. These countries are mainly Western countries.⁸

The second issue relates to surrogacy, which brings about a host of legal and ethical consequences. Issues in surrogacy are even more complex as it introduces a third party directly into the reproductive process. Several legal issues come into play which include, the legal status of the child, who may be considered as the mother of the child, the status of the surrogacy contract and whether or not it is enforceable as well as ethical considerations as to the marketability of human gametes and the human uterus. However, in the context of this study, concentration shall only be made on the ethical and legal position of non-commercial surrogacy. This is because countries that have allowed surrogacy have only permitted the non-commercial type.

The third and final issue that is analysed is the status of embryos that have been cryopreserved. Generally, the creation of more embryos than necessary for implantation into the womb is prevalent among ART clinics. However, what happens when there is divorce? Who has rights over the stored embryos? The study analyses

⁸ The term Western world or the West originally referred to Western Europe. Most modern use of the term refers to societies of Europe and their close genealogical, linguistic, philosophical and cultural descendants, which include those countries whose dominant culture is derived from European culture, and therefore includes countries in North America such as the United States of America and Canada as well as most countries of Oceania which includes Australia and New Zealand. For a detailed look at the various meanings that could be attributed to the term "Western World" see, *Encyclopedia Britannica*, 2006, Encyclopedia Britannica Online, available at <http://search.eb.com/eb/article-232344> accessed on 3.11.2006. In this study, the term 'West' or 'Western' will adopt this general meaning. However, in Chapter One, the term 'Western liberal history' is used to refer to its original meaning, i.e. referring to the historical developments that took place in Western Europe.