

ARTIFICIAL INSEMINATION IN SHARI'AH: A CASE OF TEST-TUBE BABY IN SHARI'AH AND ITS LEGAL STATUS IN PAKISTAN

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Abstract

Artificial Insemination (AI) is the process of reproduction in which sperms are placed in the female reproductive tract (uterus) by medical method without sexual intercourse. There is no clear verse in the Qur'an and saying of the prophet (Hadith) on the issue of AI. Because of this reason, Islamic jurists are divided based on their opinions. According to the 'fatwas' of majority of jurists, AI is legal and complies with Shari'ah if the process is conducted among wedded couples. Although, the process of AI, according to Islamic jurist, is allowed; however, there are many issues of controversy which have arisen as the medical viewpoint through this method of reproduction is not clear. The legal issue starts if the sperm is taken from a third party. Pakistan Islamic Ideology Council is competent to issue 'fatwas' on different controversial matters. As an Islamic country, another decision-making body is Federal Shari'ah court can also Islamize the existing laws and makes legislation on different current issues. Similarly, the issue of Test Tube baby is explained in detail in the decision of Federal Shari'ah Court of Pakistan. This paper seeks to examine the issue of AI from Shari'ah perspective, the opinion of Islamic jurists (fatwas), and legal status of Test Tube Baby in Pakistani law.

Key words

Artificial Insemination (AI), Artificial Insemination by Husband (AIH), Artificial insemination by Donor (AIH), Adultery (Zina), Islamic Law (Shari'ah), Opinion of Islamic Jurist (Fatwa)

Introduction

All human beings have a limited life period. Allah created human from the same species through reproduction. The creation of

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Prophet Adam (AS) and his wife Hauwa are marked as the first pair and beginning of human being.¹ Artificial insemination is the process of reproduction of human in which the sperm of male is injected into female's uterus by following a systematic process other than sexual intercourse. It is a fertility treatment of human and a common practice in animal breeding. The baby produced through this process is named Test Tube baby. The process of reproduction of the first Test Tube baby was conducted in 1978. The issue which arose was the legality and acceptance of Test Tube baby. The Catholic Church condemned the Test Tube baby and pronounced it illegal. On the other hand, libertarian allows Test Tube baby. Islam allows the new reproduction technologies and for that reason, Islam stands in the middle of the two extremes.

There are two kinds of artificial insemination. Firstly, the sperm of a husband is used for reproduction, which is named as Artificial Insemination by husband (AIH). In *shari'ah* there is no problem in artificial insemination by the husband as it is done between a lawfully wedded couple. In this process, husband conducts the process of artificial insemination through masturbation. Here question arises that whether masturbation is allowed in Islam or not? Masturbation is a sin in Islam but the Islamic jurists permit it on the condition if the wife conducts it. Secondly, the Catholic Church permits the artificial insemination if the process is conducted among the spouses without masturbation. In this case, the sperm of male is injected in someone else's wife, which is strongly prohibited in Islam. In Pakistan, Federal Shari'at Court had legalized reproduction of a child through AI (Test Tube baby), if a third party is not involved. For comprehension of this matter, it is important to have a discussion on the existence of any specific law and whether it is introduced in Pakistan for the validation of Test Tube baby.

AIH in Qur'an and Sunnah

Every human has the desire to have offsprings. This concept is sanctioned for the Muslims from their holy book, the Qur'an.² It is stated in the Qur'an that, "Wealth and Progeny are the allurements of this world".³ In another verse of the Qur'an, it is said that, new offspring is entitled as the comfort of the eyes for the humans. The verse elaborates that, "And those who pray, Our Lord, grant unto us spouses and offspring who will be the comfort of our eyes".⁴ Sarah, the wife of Ibrahim said, "Alas for me! Shall I bear a child seeming I am an old woman, and my husband here is an old man? That would indeed a wonderful thing".⁵ At the same time, Allah also mentioned in

the Qur'an that, it is His choice to give birth to new progeny and to let some spouses infertile.⁶ "He creates what He wills. He bestows male and female children to whom He wills. He bestows both male and female children (to some) and He leaves barren whom He wills".⁷

Infertility is being considered extremely hardship for the spouses in Islam. There are two examples of Prophets, mentioned in the Qur'an, Ibrahim (AS) and Zakariya (AS), who were not blessed with children from a long time. It is narrated in the Qur'an that, they were grown old without children. Then Zakariya (AS) prayed to Allah the almighty and said, "O my Lord! Grant unto me from You a progeny that is pure, for You are He that hears the Prayers".⁸ They requested from Allah in pious manner and Allah Almighty accepted his prayers. "And the Angels gave Ibrahim glad tiding of a son endowed with knowledge!"⁹ It is clear from above-mentioned examples that, Allah can bless the spouses to have children at any time He wants.

As we have discussed before that in artificial insemination the sperms are collected through masturbation. The masturbation is declared unlawful based on the verse of the holy Qur'an, "[the successful believers] who obtain from sex, except with those joined to them in marriage bond, or (the captives) whom their right hands possess, for (in their case) they are free from blame, but those whose desires exceed those limits are transgressors....".¹⁰ However, masturbation is permitted if it is conducted based on necessity. It is general principle of Shariah that some actions become permissible in necessity.

In Islamic Law, Qur'an is the Book of guidance for the Muslims but some rules are not clearly elaborated in Qur'an. For cases, which are not explicitly mentioned in Qur'an, Muslims have to approach to *Sunnah* (tradition) of the Prophet (s.a.w).¹¹ The tradition of the Prophet (s.a.w) also encouraged the Muslim to have children. In this regard, the Prophet (s.a.w) was reported to have said: "Marry women who will love you and give birth to many children for I shall take pride in the great number of my *ummah* on the day of resurrection".¹² In case of infertility, the Prophet (s.a.w) encouraged the Muslims to have treatment. It is reported that the Prophet (s.a.w) said, "God has created diseases and cures, and He made cure for each disease, so seek cure, and don't seek cure through prohibited actions".¹³ Therefore, the couples can try to overcome their infertility through treatment if it does not violate the principles of *Shariah*.

AID in Qur'an and Sunnah

AID process is similar to the AIH but the sperms used for reproduction are collected from third person. This process is common in western society but Islam forbids reproduction through AID. It is clearly mentioned in the Qur'an that, "Say to the believing woman that they should guard their private parts".¹⁴ This verse not only enjoins the safety of their parts from sexual intercourse but also ordained to guard their body except from the husband. In another verse, it is stated that, "Those who protect their private parts except from their spouses... therefore, whosoever seeks more beyond that then they are the transgressors".¹⁵ In the process of AID, the sperm of third person is injected which is considered as transgressor for the Muslim wives.

In another verse, it is stated that, "Then has He established relationship of lineage and marriage...".¹⁶ The use of donor sperm will create the legality of both father and mother. In Islamic law, it is similar to the adultery in confusion of the origin. This will lead to the misconception of child blood relations and in future, it will be difficult to clarify his/her brothers and sisters. Another issue arises if marriage is conducted with AID then there will be misconception whether his wife or her husband is in blood relation. Based on the Islamic concept, in the case of donated sperm, the husband would be considered the legal father, although he is not the biological father.

Fatwas (Rulings) On Artificial Insemination

In Islamic Law (*shariah*) if the *Sunnah* of the Prophet (s.a.w) leaves some questions open for interpretation, Muslims have to look for guidance from learned Islamic jurists (*ulama*) in the form of consensus (*ijma*). This would be in the form of *fatwa* (ruling), through which the issue is being resolved.¹⁷ A *fatwa* is defined as a formal legal opinion issued by a jurist in response to a question submitted to him by a private individual or judges.¹⁸ It is a non-binding but authoritative religious proclamation issued by an esteemed religious scholar. In recent years, many *fatwas* are being issued on reproductive health matters in Egypt and other Muslim countries.¹⁹

On the issue of artificial insemination, the grand Sheikh of Egypt from al Azhar University issued the first *fatwa* in 1980. This initial *fatwa* was distributed after the birth of the first Test Tube baby in England. There are different conditions for the reproduction of child in artificial insemination. The main point of *fatwa* on artificial insemination is categorized in different conditions. Firstly, artificial

insemination with husband's sperm is allowed, and the resulting child is the legal offspring of the couple.²⁰ Secondly, if an egg from a wife and the sperm of her husband are taken and being transferred to the uterus of the wife, the same action is also allowed, on condition that it is conducted for medical reason and carried out by the expert physician. Thirdly, if the sperm is taken from third party, the action is forbidden. A marriage is a contract between husband and wife as marital function of sex and reproduction is allowed only between them. The use of third party is tantamount to adultery.²¹ Fourthly, the adoption of a child from an illegitimate process of medically assisted way is not allowed. The child born through this way will be considered *laqith*, that is, an illegitimate child.²² Fifthly, if the marriage contract has come to an end because of divorce or death of the husband or wife, then the process of insemination is forbidden.²³ Yousaf Al-Qaradawi, a prominent Islamic scholar opined that:

“Islam safeguards lineage by prohibiting adultery and fornication (*zina*) and legal adoption, Thus keeping the family line unambiguously defined without any foreign element entering into it. It likewise prohibits what is known artificial insemination if the donor of the semen is other than the husband.”²⁴

He clearly stated that the process of artificial insemination through donor's sperm is not allowed and constitutes as adultery.

The Islamic seminary Darul Uloom Deoband in India also issued a fatwa on artificial insemination and declared it illegal. The Islamic Jurists from the said institution interpreted the matter of artificial insemination differently and pronounced it debatable. The *fatwa* states, “It is not allowed to masturbate in order to get children by artificial insemination. Muslim couples should avoid it”. Jalaludin Umri a renowned Islamic scholar from India said that, the *fatwa* is correct from Islamic perspective but there should be changes in different laws according to the needs and situation of society. Muslim scholars should sit to discuss this matter and issue their opinion according to the situation. Another Muslim organization, Jamiat-Ulema-e-Hind, issued another *fatwa* against Deoband saying that there is no need for the seminary to issue strict guidelines on the prescribed issue and it should be legalized if couples are not left with any other choice.²⁵

Muhammad Ibn Saalih al-uthaymeen, a renowned Islamic scholar from Saudi Arabia, issued a *fatwa* on the matter of AI. He said the process of AI is not permissible if the reproduction of a child can be done through natural process. In case there is a necessity and

the reproduction cannot be done by natural way, then it is allowed, under three conditions;

- 1- "Fertilization needs to be done with the husband's sperm. It is not permissible to use the sperm of anyone but the husband for this fertilization.
- 2- Collection of sperm from the man should be done in a permissible manner, such as by the husband being intimate with his wife, and ejaculating between her thighs or in her hands, so that the semen may be emitted, then the egg may be fertilized with it.
- 3- After fertilization, the egg should be placed in the wife's uterus. It is not permissible to place it in the uterus of any other woman under any circumstances whatsoever, because that involves inserting the sperm of the man into the uterus of a woman who is not permissible for him."²⁶

Ayatullah Ali Hussein Khamenei, from Iran, belongs to *Shia* sect issued a *fatwa* effectively in permitting donor technologies which can be used. He added that, both the donor and the infertile parents must abide by the religious codes regarding parenting.²⁷ According to the *fatwa*, the donor child can inherit only from the sperm or egg of donor, as the infertile parents are considered to be adoptive parents. However, the situation for *Shia* Muslims is more complicated and various religious experts have come to their own conclusions about sperms and egg donation.

Ayatollah Jannati, another *Shia* cleric from Iran, said, "Fertilizing a woman with her husband's sperm is permissible but one has to avoid illegitimate means for that. He added that it is not permissible to fertilize a woman with the sperm of someone else other than her husband. While it is permissible to infertile a woman with the sperm of someone other than her husband if the husband is infertile, has consent, and this is not associated with other prohibited things. If a woman is fertilized with the sperm of someone other than her husband, the father will be the sperm donor and the woman who gives birth is the mother".²⁸ The concept and interpretation of artificial insemination is very different among *Sunni* Muslims. The *Sunni* sect is followed rarely in the following Muslim countries i.e. Iran, Iraq and Lebanon, while it is administered in majority Muslim countries.

Legal Status of AID Child in *Shari'ah*

It is the desire of every Muslim to have legitimate child and if the father knows that the child does not belong to him, he may be

reluctant regarding his duties and responsibilities. Children are blessing but in order to have a child, the limits prescribed by Allah Almighty should not be crossed. The western concept of procreative liberty makes it easy for the childless couple to have children and there is no strictness. While, in Islam, the concept of artificial insemination is restricted to some limits. It is observed that the procreative liberty has created significant problems for the new offsprings.

In *Shari'ah*, using donor eggs or donor sperm is prohibited as it obliterates the lineage. Islam makes adultery a punishable crime in order to preserve the lineage. The child born from AID is considered *laqit*, an illegitimate child.

However there is another school of thought who does not consider AI as adultery.

A renowned Islamic jurist, Mustafa al-Zarqa said, "The AID does not fulfill the prerequisites of adultery and therefore, the punishment of adultery is not applicable to it". The penalty will be minor and it will be adjudicated on the discretion of government.²⁹ Therefore, AID is not categorized as adultery but it is forbidden based on ethics in Islam. In marriage contract, the spouses are liable to safeguard their private parts from any third person, and in AID the third parties breach the trust (*amanah*), that is why it is responsible for punishment.

Moreover, although the child produced through AID is illegitimate child in *Shari'ah*, the husband may nevertheless be considered the legal father. In this situation, the child will have right of inheritance from both father and mother, based on the Hadith, "The child belongs to the [marriage] bed."³⁰ If the process of AID is conducted through biological method, the birth mother will be considered real mother and her husband as real father. The AID creates hardships among the spouses and destroys the nucleus of the family. That is the reason AID is not allowed in *Shari'ah*.³¹

Legal Status of AIH and Aid in Pakistani Law

Pakistan is an Islamic country, which has inherited most of the laws from British India. After independence, the state has made a body in the form of Federal *Shari'at* court to Islamize the existing laws. There was another body established in the name of Council Islamic Ideology (CII), which gives opinion according to Islamic law in different issues. Most of the members of CII are Islamic jurists. Legal status of Test Tube baby is an important issue that is discussed in CII, 2013; the council approved the practice of Test Tube babies

among the spouses.³² The issue of Test Tube baby has been analyzed in Federal Shari'at Court in detail.

The issue of test tube baby was brought before the Federal Shari'at Court in the case of Farooq Siddiqui.³³ Farooq Saddiqui was a doctor by profession and his wife was unable to bear child. He hired another woman named Farzana to be a surrogate mother and a false statement of marriage was pronounced because of the reaction from society. After the birth of the child, Mrs. Farzana refused to hand over the baby to Farooq Siddiqui. He filed a case for the custody in the court of Guardian Senior Civil Rawalpindi. The case was dismissed and the custody was not given to him. He filed another petition of surrogacy and claimed that the respondent is the surrogate mother and she was paid for the process. The contract between the parties was made oral, so the petitioner had no legal document to present before the case. The case was admitted by Federal Shari'at Court on the bases of the following issues;

The questions involved in the case are: (i) As to whether the agreement executed between the parties for producing a child as a surrogate mother is in accordance with the Injunctions of Qur'an and Sunnah? (ii) If it is presumed that the agreement is lawful contract under the Contract Act, whether the same would also be in accordance with the Injunctions of Qur'an and Sunnah? (iii) In absence of any law if a child is produced by a surrogate mother under which law the custody of that minor is to be governed? (iv) If there is any other question raised by the parties."³⁴

The court declared that, "if a baby is born through mechanical/medical process, where the sperm belongs to the actual father and the egg to the actual mother and the child is born by the actual mother...the procedure would be legal and lawful". It clarified, however, that in all other cases, "the surrogacy procedure would be unlawful and against the injunctions of the Qur'an and *sunnah*". The court also directed for appropriate amendments in Section 2 of the Contract Act, 1872 and in Pakistan Penal Code (PPC). The court suggested for addition of clauses in the PPC regarding the definition of surrogacy, and punishments with imprisonment and fine. There shall be punishments for the couple that arranges a surrogate, the surrogate herself, as well as the doctor who maintains the sperm bank or egg bank, and those who carry on the surrogacy procedure. The court ordered that license of any doctor

involved in the un-Islamic procedure of surrogacy should also be cancelled.³⁵

Recommendations

This paper recommends the following considerations.

- 1- The parliament of Pakistan should make the laws to stop the cases of surrogacy and recommend medical ethics for the doctors to stop AID.
- 2- The Council of Islamic Ideology should clearly give decision regarding Artificial Insemination and medical treatment.
- 3- The Judiciary should clearly state the issue of inheritance for the child born through AIH.
- 4- The government should ensure proactive role by the Council of Islamic Ideology in this regards.

Conclusion

AI is the new process of reproduction of a child that turns controversial in Islamic law. It is elaborated in our research that in Islamic law, the practice of AIH is permissible while the process of AID is prohibited. There are many reasons prescribed by Islamic Jurists to pronounce the way of AID as unlawful. The contract of marriage (*nikah*) is conducted between the spouses and there is no right for the third person to come between them. In *shari'ah*, the AID is considered as breaching the trust of *nikah*. Another reason is the originality of parents. The child produced through AID is not the real blood of the husband. It creates many discrepancies on the issue of its legality and thus the attachment which is love for the child from the real father cannot be obtained. The Islamic Jurists have issued '*fatwas*' regarding the real status of AIH and AID.

In Pakistan, the Council of Islamic Ideology has elaborated the issue of AI and the Chairman of the council issued a *fatwa* on the issue of Test Tube baby. According to the said '*Fatwa*', a Test Tube baby is considered to be legal, if the sperm or egg or both are taken from the legal husband and wife respectively, and there is no interference of a third party. The Judges of Federal Shari'ah Court argued on this '*fatwa*' and decided that AID is prohibited. They added that surrogacy is also illegal according to *shari'ah* and Pakistani Law. The Court also recommended with the statement that there should be some changes in section 2 of the Contract Act and Pakistan Penal Code.

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