

**NASAB (FILIACTION) OF CHILDREN IN ASSISTED
REPRODUCTIVE TECHNOLOGY (ART) UNDER THE
SHARĪ'AH DISCOURSE**

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ABSTRACT

Sharī'ah emphasises safeguarding *nasab* (filiation) because all other rights and responsibilities rely on the legitimacy of the children. Biotechnological human procreation creates several ethico-legal challenges, including the filiation of ART-resulting children and threats to the concept of family in Islam. To protect children's rights, this paper conducts a textual study on *Sharī'ah* sources and their application by Muslim jurists to deal with issues of filiation in ART-births, particularly those involving controversial events. Significantly, it analyses how maternal and paternal relationships are established in various scenarios, including assistance from co-wives, the use of preserved embryos in cases of divorce, death, or *mafquod-ul-khabar* (a missing person without news), and donation practices (sperm, eggs, or uteri). Essentially, the research examines the question of whether the *nasab* determining *Sharī'ah* principles are sufficient to overcome filiation issues in ART or not. Utilising a qualitative research paradigm, this study employs a library-based methodology to conduct a thorough analysis of primary sources, comprising the Qur'ān, Sunnah, subsidiary sources, and relevant literature. Notably, the article highlights the position of Muslim countries practicing *Sharī'ah* in addressing ART-related issues. The study concludes by putting forward a novel approach to the ongoing

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discourse on the harmonising of *Sharī'ah*, family law, and emerging reproductive technologies.

Keywords: Assisted Reproductive Technology (ART), Children's Rights, Family Law, *Nasab* (Filiation), *Sharī'ah* (Islamic Law).

NASAB ANAK-ANAK DALAM TEKNOLOGI PEMBANTUAN PEMBIAKAN (ART) DALAM WACANA SYARIAH

ABSTRAK

Syariah menekankan perlindungan nasab kerana semua hak dan tanggungjawab lain bergantung pada status kesahatarafan anak-anak. Pembrokian manusia menggunakan bioteknologi mencipta beberapa cabaran etika undang-undang, termasuk status nasab anak-anak yang dihasilkan daripada ART dan ancaman terhadap konsep keluarga dalam Islam. Bagi melindungi hak-hak kanak-kanak, kertas kerja ini menjalankan kajian teks ke atas sumber-sumber undang-undang Syariah serta aplikasinya oleh para fuqaha undang-undang Islam untuk menangani isu-isu nasab dalam kelahiran ART, terutamanya yang melibatkan peristiwa kontroversial. Secara signifikan, ia menganalisis bagaimana hubungan keibuan dan kebapaan ditetapkan dalam pelbagai senario, termasuk bantuan dari isteri sedia ada, penggunaan embrio yang disimpan dalam kes perceraian, kematian, atau mafqood-ul-khabar (orang yang hilang tanpa berita), dan amalan derma (sperma, telur, atau rahim). Pada dasarnya, kajian ini mengkaji persoalan sama ada prinsip-prinsip Syariah yang menentukan nasab adalah mencukupi untuk mengatasi isu-isu nasab dalam ART atau tidak. Dengan menggunakan paradigma penyelidikan kualitatif, kajian ini menggunakan metodologi berasaskan perpustakaan untuk menjalankan analisis menyeluruh terhadap sumber-sumber utama, termasuk al-Qur'an, Sunnah, sumber-sumber subsidiari, dan literatur yang berkaitan. Secara jelasnya, artikel ini menyoroti kedudukan negara-negara Islam yang mengamalkan Syariah dalam menangani isu-isu yang berkaitan dengan ART. Kajian ini diakhiri dengan mengemukakan pendekatan baharu kepada wacana berterusan mengenai pengharmonian antara Syariah, undang-undang keluarga, dan teknologi pembiakan yang sedang berkembang.

Kata Kunci: Teknologi Pembantu Pembangunan (ART), Hak Kanak-Kanak, Undang-Undang Keluarga, Nasab, Syariah (Undang-Undang Islam).

INTRODUCTION

Sharī'ah puts special attention on the formation of the family institution, which begins with marriage. Marital relationships have some fundamental objectives, including maintaining human reproduction. In fact, human procreation through natural processes has no problem, but using advanced technological (ART) may pose challenges, including the determination of the *nasab* of children. After birth, the immediate and foremost right of children and parents is filiation.¹ Abandoning ART-children² without attribution such as to declare them illegitimate would lead to humiliation and social ill-treatment.³

Notably, the maternal or paternal attribution of children defines familial roles and responsibilities encompassing custodianship, guardianship, inheritance, and others.⁴ Under the *Sharī'ah*, determination of filiation is associated with the right of Allah the Almighty, the right of the children, and the right of the father. Therefore, unfair attribution of a child to someone other than the real parents is strictly prohibited.⁵ Indeed, all family ties depend on the establishment of legitimacy of the child and protecting the sanctity of family lineage is listed in the *Maqāṣid al-Sharī'ah* (primary objective of *Sharī'ah*). Henceforth, the right of filiation for the ART children needs to be protected and justified in the context of Islamic law.

Essentially, a marital bond has been referred to as a method of determining the affiliation of the children and preventing any doubt in

¹ Zuryati Mohamed Yusoff, *Issues on Parentage in Human Assisted Reproduction Cases and Its Implications on The Status of The Child: A Comparative Overview*, in *Islamic Family Law: New Challenges in the 21st Century*, (ed. Zaleha Kamaruddin, Kuala Lumpur: Research Centre, IIUM, 2004), 17.

² Those children that are born as a result of using assisted reproductive technology (ART).

³ Javaid Rehman, "The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq," *International Journal of Law, Policy and the Family* 21, no. 1 (2007): 108-127.

⁴ Tanzil-ul-Rahman, *A Code of Muslim Personal Law*, (Karachi: Islamic Publishers, 1980), Vol.1, 689.

⁵ Mulla Ali al-Qārī, *Mirqāt al-Mafāṭīh Sharhu al-Mishkāt al-Masābīh*, (Beirut: Dar-Alfikir, 2010), Vol. 6, 320.

genealogy issues. Nevertheless, the ART treatments deviate from this normal position where babies were born in controversial scenarios such as using frozen embryos after the divorce or death of the parties. Similarly, when a wife utilises preserved reproductive material during the absence of her husband (*mafqood-ul-khabar*), or when donated reproductive material is employed, it poses a risk to the attribution of children. The current study is limited to discussing the issue of *nasab* in these events.

While scholars have discussed the broader issue of legitimacy under the *Sharī'ah*, there is a gap in addressing the specific legitimacy concerns related to ART-children. For instance, Masum⁶ focuses on the legitimacy of children born via artificial insemination but limits the discussion to the Malaysian legal perspective, omitting the *Sharī'ah* views. Similarly, Banu⁷ and Yassari⁸, emphasise the significance of the attribution of children in contemporary society, highlighting issues of denial of attribution, but they do not cover the ART-related issues. Sudirman's⁹ discourse covers surrogacy-related issues, excluding discussions on children born through ART techniques. Yusoff,¹⁰ to some extent, vents into examining parentage in assisted reproduction, yet the pertinent issues central to this study are not examined. Hence, this paper aims to fill discernible legal gaps in the objective discourse.

This study aligns with its title by utilising qualitative research, analysing the Islamic jurisprudential literature on this subject. It also utilises a library-based approach that enables comprehensive analysis of texts of the Qur'ān and Sunnah, subsidiary sources, and

⁶ Ahmad Masum, Nehaluddin Ahmad, and Nuarrual Hilal Md Dahlan. "Legitimacy Of Children Born by Artificial Insemination in Malaysia: A Legal Analysis of Section 112 Of the Evidence Act 1950." *LNS (A) cxiii Legal Network Series 2* (2021): 1-18.

⁷M. Kabir and Banu az-Zubair, "Who is a Parent? Parenthood in Islamic Ethics," *Journal of medical ethics* 33, no. 10 (2007): 605-609.

⁸Nadjma Yassari, Lena-Maria Möller, and Marie-Claude Najm, eds. *Filiation and the Protection of Parentless Children: Towards a Social Definition of the Family in Muslim Jurisdictions*. Springer, 2019.

⁹ Muh. Sudirman et al, "Children Resulting from Insemination Through the Surrogate Mother Process (Substitute Mother) and Their Instruction Rights Islamic Law Perspective," In *SHS Web of Conferences*, vol. 149. EDP Sciences, 2022.

¹⁰Yusoff, *Issues on Parentage in Human Assisted Reproduction Cases and Its Implications on The Status of The Child: A Comparative Overview*, 17.

jurisprudentially pertinent literature. The study is supported by the underlining practices of the Muslim countries to deal with the above-mentioned ART issues. Ultimately, this paper contributes to the ongoing debate to harmonise Muslim family law with Islamic bioethics in the context of ART.

To simplify, this paper has been structured into three parts. The first part is on terminological discourse, revealing the meanings of *nasab* and ART in this study. The subsequent part gets into the details of the *Sharī'ah* principles and the views of experts on determination of *nasab*. It looks closely at filiation issues arises in using frozen reproductive material in situations like divorce, death, *mafqood-ul-khabar*, assisted birth between co-wives, and the use of donated reproductive materials. The final section concludes by exploring the approaches adopted by Muslim countries, including but not limited to Turkey, Malaysia, Iran, and Pakistan, in addressing issues related to ART.

TERMINOLOGICAL DISCOURSE OF NASAB (FILIACTION)

Factually, *nasab* upholds the purity of family lineage which can be traced to the maternal or paternal side. In public, it specifically denotes a close family relationship, with a particular emphasis on the connection with parents, especially the male parent. It is rooted in the Arabic word *na-sa-ba*, which means 'to relate', 'to trace ancestry', or 'to attribute'. To be simple, it refers to genealogy or extraction and one's ancestors, from parents to grandparents, great-grandparents, and so on. Another word opposite to *nasab* is *al-nasal*, meaning to 'procreate', 'to sire', and 'to beget'. It refers to descendants, from children to grandchildren, and so on. Notably, the English term lineage covers both of these terms.¹¹

In its literal sense, *nasab* encompasses the concept of kinship, or blood relationship, between one person and another, whether they are far away or near.¹² Technically, *nasab* is characterised as a hereditary

¹¹ Bitesize Islam. "MS09.4 – Protection of Lineage," March 18, 2008. <https://bitesizeislam.wordpress.com/2008/03/18/ms094-protection-of-lineage/>.

¹² Muhammad ibn Ya'qūb Al-Fayrūzabādī, *Al-Qamūs al-muḥīṭ*, (Beirut: Mu'assasah al-Risālah, 2005), see also: Muhammad ibn Mukarram ibn

connection that establishes familial ties through relationships originating from marriage.¹³ Shāh Walī Allāh explained the significance of *nasab*:

*“The preservation of nasab establishes the marital credibility of the husband and wife through the protection of genealogy. Through their mutual relationship, the continuum of reproduction and family formation unfolds. This leads to the existence of a family, the recognition of parents and children, and the determination of rights and responsibilities towards each other. Issues such as upbringing rights, maintenance, sanctity of marriage, propriety of relations, and inheritance are also intricately linked with lineage. He further said that nasab is one of the matters sought after, and it is pursued by the wise. It is among the distinctive features of the human species, setting it apart from other animals.”*¹⁴

Primarily, the issue of *nasab* is regulated under the Islamic family laws, which is commonly known as personal status law (*qānūn al-aḥwāl al-shakḥīyyah*). This law governs marriage, divorce, custody, guardianship, and filiation issues, particularly in Muslim society. Often, this law is also spoken of as Islamic law by ordinary citizens, which is not truly equal to Islamic law. Nevertheless, generally Muslim countries practice the combined nature of family law, including *Sharī‘ah*, customary law, and Western legal concepts.¹⁵ To sort out child issues, the principle of the best interest of the child is recognised by Islamic law.¹⁶

Alī ibn Ahmad ibn Manzūr, *Lisān al-‘Arab* (Beirut: Dār Šādir, n.d.), 4, 118.

¹³Uswatun Hasanah Sampuju, Muhammad Akbar, and Muhammad Syarif Hidayatullah, "The Lineage of Children Out of Wedlock According to Islamic Law." *In Proceeding of International Conference on Islamic and Interdisciplinary Studies*, vol. 1, pp. 170-175. 2022.

¹⁴Abd ar-Raḥīm Walī Allāh Shāh, *Hujjatullah al-Balighah*, (Karachi: Nur Muhammad, 1953), 2, 220-222.

¹⁵Shaheen S. Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man?*, (The Hague: Kluwer Law International, 2000), 90–91.

¹⁶Muhammad Amin ibn ‘Umar ibn ‘Abidin, *Radd al-Muhtar ‘ala al-Durr al-Mukhtar alMa’ruf bi Hashiyah Ibn ‘Abidin*, (Beirut: Dar al-‘Ihya’ al-Turath al-‘Arabi, 1998) Vol. 4; also: Muhammad ‘Abd Allah ibn Ahmad ibn Qudamah, *Al-Mughni*, (Cairo: Dar alHadith, 2004), Vol. 3.

In practice, various terms including legitimacy, lineages, and genealogy, are employed to convey this nuanced meaning. Different jurisdictions might use different words, but many countries, like those where Arabic is spoken, use the term '*nasab*'. Countries such as Indonesia, Malaysia, Iran, and Pakistan also use this term. In this study, *nasab* is taken as filiation; however, it goes beyond that, denoting a person's lineage and his or her belonging in society.¹⁷ The study discusses both maternal and paternal filiations in ART cases under the *Sharī'ah*.¹⁸

ASSISTED REPRODUCTIVE TECHNOLOGY (ART)

To overcome infertility issues and facilitate human reproduction, medical science introduced ART. Over time, this technology evolved and developed several procedures, including approaches used between legally married couples and techniques that require a third-party involvement. To define ART, the latest definition was revealed by the Malaysian Ministry of Health, which is in the context of WHO:

“ART is all interventions that include the in vitro handling of both human oocytes and sperm or embryos for the purpose of reproduction. This includes, but is not limited to, in vitro fertilisation (IVF), embryo transfer (ET), intracytoplasmic sperm injection (ICSI), embryo biopsy, preimplantation genetic testing (PGT), assisted hatching, gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), gamete and embryo

¹⁷Yassari, Möller, and Najm, eds. *Filiation and the Protection of Parentless Children: Towards a Social Definition of the Family in Muslim Jurisdictions*.

¹⁸Often, the word *Sharī'ah* is used interchangeably with 'Islamic law,' or *fiqh*. However, this interchangeability can create confusion. See: Y. Al-Qaradawi, *Approaching the Sunnah: Comprehension and Controversy*, (Herndon, VA: International Institute of Islamic Thought, 2007), x. In this study, *Sharī'ah* has been employed in broad meanings, benefiting from primary and secondary sources, interpretations by classical and contemporary scholars, and a focus on legal perspectives. In other words, the study adopts *Sharī'ah* as Islamic law for the purpose of the titled discourse.

cryopreservation, semen, oocytes and embryo donation, and gestational carrier cycles."¹⁹

In fact, human procreation by natural process or using ART between legally married couples within the continuation of marital bond creates no problem. Ethico-legal challenges regarding child filiation arise when there is a third-party involvement or uncertain circumstances are attached to ART. This study aims to investigate how the principles of *Sharī'ah*, specifically those determining *nasab*, address the filiation of ART-children.

DISCUSSION ON NASAB UNDER THE SHARĪ'AH CONCEPT OF NASAB IN THE QUR'ĀN AND SUNNAH

Islam seeks to form a virtuous and responsible society, emphasising the protection of lineage, descent, and family. The entire structure of relationships, rights, and the familial framework revolves around this concept. As a result, the *Sharī'ah* lists down the preservation of lineage and descent as one of the *Maqāṣid al-Sharī'ah* (fundamental objectives of *Sharī'ah*).²⁰ On the topic of filiation, the Holy verse is reported:

*“And it is He who has created from water a human being and made him [a relative by] lineage and marriage. And ever is your Lord competent [concerning creation].”*²¹

In this verse, *nasab* means kinship of blood which means that relationship which emanates from either parent. Mufti Shāfi'ī stated that this relation is granted by the Almighty Allah to mankind for a pleasant and tranquil life. If these relations are taken away from someone's life it will be impossible for him to live by himself.²² Further

¹⁹Malaysian Ministry of Health, National Assisted Reproductive Technology (ART) Policy 2021, available at: https://www.moh.gov.my/index.php/database_stores/store_view_page/70/189

²⁰Ibn 'Ashur, *Kitab Maqāṣid al-Syariah al-Islāmiyyah*, (Damascus: Dar ul Qalam, 2021), 302-305.

²¹The Qur'ān, 25:54

²² Mufti Muhammad Shāfi, *Ma'ariful Qur'an*, (Karachi: Maktaba Darul Uloom, 2011) Vol. 6, 456.

to this, al-Qurṭubī stated that Allah has favoured legitimate lineage and lawful marriage, elevating the status of people. Nasab is the first relationship, title, or right that is granted to the child after procreation and all other relationships are determined by this relation.²³ Apparently, this text grants this right to all human reproduction either done by natural process or using technological assistance like ART.

Another Quranic text is mentioned on this subject:

“And he has not made your adopted sons your [true] sons. That is [merely] your saying by your mouths, but Allah says the truth, and He guides to the [right] way. Call them by [the names of] their fathers; it is more just in the sight of Allah. But if you do not know their fathers - then they are [still] your brothers in religion and those entrusted to you. And there is no blame upon you for that in which you have erred but [only for] what your hearts intended. And ever is Allah Forgiving and Merciful.”²⁴

This Quranic text expressly states the ruling on determination of *nasab* of a child as Allah instructed to attribute children to their actual fathers and not otherwise. Also, this verse prohibits the intentional attribution of unlawful filiation. Because this type of practice violates the rights and responsibilities of the parties such as right of child to know his real parents as well as infringes on the rights of parents. In fact, safeguarding the *nasab* is a communal duty, as it involves the rights of the child, parents, and Allah.²⁵

²³ Ahmad ibn Abī Bakr al-Anṣārī Al-Qurṭubī, *Tafsīr of al-Qurṭubī*, (Tafsir Al-Jāmi' Li Ahkām Al-Qur'ān/The Compendium of Legal Rulings of the Qur'ān), (London: Dar Al Taqwa Ltd, 2003), Vol.19, 364.

²⁴ The Qur'ān, 33:4-5

²⁵ Islamic law emphasizes safeguarding *nasab* through prohibitions on tampering with lineages, disowning children, false attribution, affiliating without legitimate heirs, denying adoption, adultery, and false accusation, alongside regulations on iddah periods and the process of *li'an*. Moreover, *nasab*, as a non-transferable and non-financial right, is vested in Allah, the child, the mother, and the father. The right of the child and the mother precedes the right of the father because they are more in need of this right. See discussion: Mansur Yahya Abdullah Muhammad. "*Ahkām al-Nasab fī al-Fiqh al-Islāmī wa Madā Ta'thurihā bi al-Mustajadāt al-Mu'āṣirah: Dirāsah Fiqhiyyah, Qānūniyyah, Muqāranah.*" (Unpublished PhD thesis, Department of Islamic Law, University of Assiut, 2013).

The Quranic textual study reveals the duration of pregnancy and the period of breastfeeding as thirty months in one verse, and in another verse, the duration of breastfeeding is as two years. The text is “*their mothers are none but those who gave birth to them.*”²⁶ Another phrase is, “*His mother carried him with hardship and gave birth to him with hardship, and his gestation and weaning period is thirty months.*”²⁷ In another verse, it is texted as “*And Allah brought you out from the wombs of your mothers*”.²⁸ In addition, the holy Quran also states “*He creates you in the wombs of your mothers*”.²⁹ Ultimately, these Quranic texts help to determine maternal attribution of a child in controversial cases of ART.

Similarly, there is a *ahādīth* that emphasises the significance of a valid *nasab*. The Prophet said that a person who knows that his father is someone else and yet attributes himself to someone else, Paradise is forbidden to him.³⁰ Another prophetic statement warned that a person who attributes himself to someone other than his real father, or a slave who claims to belong to someone other than his master, upon such an individual, the curse of Allah, the angels, and all the people is incumbent and on the Day of Judgment, Allah will not accept any obligatory or voluntary acts from him³¹ Under these *aḥādīth*, it is prohibited to claim or attribute someone by themselves or by anyone to any other person other than real parents in any way.

In another *hadith*, the Prophet stated that if a woman admits into her family those children who are not biologically related to them have no share in the favour of Allah, and Allah will not admit her into His Paradise.³² Similarly, a person who denies his own son, even though he knows him to be his offspring, on the Day of Judgment, Allah will veil Himself from him and expose him to disgrace among both the

²⁶The Qur’ān, 58:2

²⁷The Qur’ān, 46:15

²⁸The Qur’ān, 78:16

²⁹The Qur’ān, 6:38

³⁰Muḥammad ibn Ismā’īl Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, (Beirut, Damascus: Dar Ibn Kathir, 1981), Kitāb Al-Fareez, Chapter Man-Ida’i-il-Ghir-Abiyyah, 4/326, Ḥadīth: 6766.

³¹Muslim ibn al-Ḥajjāj, *Ṣaḥīḥ Muslim*, (Cairo: Dār al-Fikr, 1974), Book of Pilgrimage, Chapter: The Merits of Madinah and the Supplication the Prophet (PBUH) used to make for it, Ḥadīth, 467

³²Al-Qārī, *Mirqāt al-Mafātīḥ Sharḥu al-Mishkāt al-Masābīḥ*, 3316.

preceding and succeeding generations.³³ By words or actions, accepting or neglecting a child, which leads to wrong attribution, is prohibited under the *Sharī'ah*.

On the significance of filiation, the Prophet (PBUH) encourages people to learn their lineages so that they can maintain ties of kinship. The Prophet said, by Allah, if there are some bad feelings between a man and his brother and he knows that there is kinship between him and that man that will prevent him from breaking with him.³⁴ In ART cases where the donor is kept secret and not shown to the resulting child, this practice deprives the child of knowing his or her lineage, which is significant for him or her. As a result, this practice infringes on the principle of the best interest of the child.

Significantly, the Prophet mentioned basic rulings for the determination of *nasab* in doubt as he said that whoever claims a child without legitimacy; he neither inherits nor is inherited from.³⁵ Moreover, he advised that there is no unlawful claiming of paternity in Islam. What was done in pre-Islamic times has been annulled. The Holy Prophet said *Al-walad li al-firāsh wa li al-'āhir al-ḥajar* (the child is attributed to the one on whose bed it is born, and the fornicator is deprived of any right).³⁶ This is the foundational principle in determining filiation of a child under *Sharī'ah* and all jurists rely on it.³⁷

³³ Abū Dāwūd Sulaymān ibn al-Ash'ath ibn Ishāq, *Sunan Abī Dāwūd*, (London: Darussalam Publishers and distributors, 2008), Kitāb al-Talaq, chapter al-Taghleez fi al-Antifah, Ḥadīth, 2263

³⁴ Al-Bukhārī, *Al-Adab Al-Mufrad*, Ḥadīth , 72

³⁵ Abū Dāwūd, *Sunan Abī Dāwūd*, Kitāb al-Talaq chapter on the claim of son of al-Zina Ḥadīth, 2264

³⁶ Muḥammad ibn Yazīd Ibn Mājah, *Sunan Ibn Mājah*, The Chapters on Marriage, bab al-Walad lil-firash wa lil-aahir al-hajr, (UK: Darussalam Publishers & Distributors, 2007), Hadith 163; see more: Abū Dāwūd, *Sunan Abī Dāwūd*, Kitāb Al-Talaq, Chapter Al-Walad-Lil-Firash, Ḥadīth, 2274

³⁷ See discussion: Azziz Raouane, Ruhi Fadzlyana Jailani, and Muallimin Mochammad Sahid, "Awlād al-Zinā wa Ḥaythiyyat al-I'tirāf bi Ḥaquhim fi al-Nasab wa al-Mirāth: Dirāsah Taḥlīliyyah min al-Manzūr al-Shar'ī wa Qānūn al-Usrah al-Mālīzī [Children of Zina and the Consideration for Recognition of Their Right to Lineage and Inheritance: An Analytical

JURISTIC VIEWS ON THE DETERMINATION OF *NASAB*

In the pre-Islamic era, Arab society was accustomed to the generation of illegitimate children through the exploitation of slave girls.³⁸ In contemporary times, there are reported cases involving human reproduction through ART, donation practices, and the occurrence of trafficking and abuse of such children. This underscores the urgent need for a comprehensive solution to address this emerging issue. Notably, the *nasab* determining rules in the pre-Islamic period were elastic, often favouring men and neglecting the role of mothers.³⁹ Islam, however, changed this perspective by advocating a balanced approach for couples in establishing parentage relationships, with marriage being the focal point. While maternal filiation is determined by biology, paternal filiation is established through various methods, including marriage, self-acknowledgment (*iqrār*), means of evidence (*bayyinah*), and scientifically conclusive methods, all within the framework of a valid marriage.⁴⁰ Another approach is *qiyāfah*, which entails the recognition by experts possessing expertise in determining descent based on physical characteristics and likeness.⁴¹ Additionally, some incorporate deoxyribonucleic acid (DNA) sampling, utilising substances like blood, hair, bone, saliva, etc. Moreover, laboratory testing, boasting a 99.99% accuracy rate in determining descent, can also be employed to discern hereditary genealogy for inheritance purposes.⁴²

study from the Shariah perspective and Malaysian family law].” *Ulum Islamiyyah* 33, no. 2 (2021): 109-124.

³⁸Ismā‘īl ibn ‘Umar Ibn Kathīr, *Tafsīr al-Qur’ān*, (Riyād: Dar al-Taibah li al-Nashr wa al-Tawzī‘, 1999), vol. 2, 42.

³⁹M. Farhani, *Manual of Family Laws in Pakistan on Parent and Child*, (Lahore: Lahore Law Times Publications, 1980), 291.

⁴⁰Raouane, Jailani, and Sahid, “Awlād al-Zinā wa Ḥaythiyyat al-I’tirāf bi Ḥaḡuḡim fi al-Nasab wa al-Mīrāth: Dirāsah Taḡlīliyyah min al-Manzūr al-Shar‘ī wa Qānūn al-Ushrah al-Mālīzī.”

⁴¹ In situations where controversies arise in determining filiation, physiognomists often serve as arbiters. see details. Muhammad & Umar Salihu. "An Analysis of the Means of Proof under Islamic Law." *Phd Diss.*, (Zaria, Nigeria: Ahmadu Bello University, 2011) 135. See also: Wahbah Al-Zuhayli, *al-Fiqh al-Islami wa-Adillatuh*.

⁴²Raouane, Jailani, and Sahid, “Awlād al-Zinā wa Ḥaythiyyat al-I’tirāf bi Ḥaḡuḡim fi al-Nasab wa al-Mīrāth: Dirāsah Taḡlīliyyah min al-Manzūr al-Shar‘ī wa Qānūn al-Ushrah al-Mālīzī.”

Where a marriage contract is present, lineage is established. Hence, for the proof of *nasab*, the occurrence of a marriage contract is sufficient. Al-Kasānī, stated that marriage serves as the public manifestation to prove lineage. if someone from the East marries a woman from the West, and they have a child that confirms the *nasab*, even if actual consummation is not evident, the legal ruling is based on its cause, which is marriage.⁴³ Indeed, the Hanafī,⁴⁴ Shāfi'ī,⁴⁵ Mālikī,⁴⁶ and Hanbalī⁴⁷ schools unanimously hold that the *nasab* of a child born out of adultery is attributed to the owner (husband) of *firāsh* (wife). They rely on the tradition "*Al-walad li al-firāsh wa li al-'āhir al-ḥajar*" to determine the *nasab* of a child in disputed cases.⁴⁸

Al-'Asqalānī, explained the term *firāsh* which means a woman with whom *Sharī'ah* has permitted conjugal relations for a man, who is either his lawfully wedded wife or a bonded woman (slave).⁴⁹ Al-'Aynī said that the prophetic statement indicates the fact that mere claims of paternity are not sufficient to establish lineage; instead, it is established through the bed (marriage). Scholars unanimously agree that the free woman's ownership of a bed is proven through marriage. If the possibility of consummation and pregnancy exists, and a valid marriage has taken place, the child will be attributed to the owner of the bed. The child's filiation will not be interrupted by any claims or

⁴³Abubakr ibn Mas'ūd Al-Kasānī, *Badāi'u al-Sanāi'u fi tartīb al-Sharai'u*, (Beirut: Dar al-Kutub al-Ilmiyyah, 1976), vol. 2, 331

⁴⁴Uthmān ibn 'Alī, Zayla'ī, *Tabyīn al-ḥaqā'iq sharḥ Kanz al-daqa'iq, wa ma'ahu Ḥāshiyat al-Imām al-'Allāmah al-Shaykh al-Shalabī 'alā ḥādth al-Sharḥ*, (Bayrūt : Dār al-Kutub al-'Ilmiyyah, 2010), Vol.6, 241.

⁴⁵Ahmed Salama Al-Qalyubi, and Ahmed al-Barlisi Umaira, *Hāsiyyah Al-Qalyūbī 'alā Kanz Ar-Rāghibīn 'alā Minhāj Ath-Thālibīn*, (Beirut: Dar al-Fikr, 1995), Vol.3, 241.

⁴⁶Ahmed bin Muhammad al-Khuluti al-Maliki Al-Ṣawī, "*Al-sharḥ al-ṣaghir (al-Sharḥ al-ṣaghir 'alā Aqrab al-masālik ilā madhhab al-Imām Mālik)*", (Cairo: Dar al-Fazila, 1972), Vol.3, 540.

⁴⁷Manṣūr ibn Yūnus Buhūtī, "*Kashshāf al-qinā' 'an Matn al-Iqnā'*", (Bayrūt : Dār al-Fikr lil-Ṭibā'ah wa-al-Nashr wa-al-Tawzī', 1982), Vol.4, 424.

⁴⁸This tradition is reported with different words. This hadith needs to be revised in present medico-legal perspectives of reproductive technology.

⁴⁹Nūr al-Dīn 'Alī b. Muḥammad b Ḥajar Al-'Asqalānī, *Fath al-Bārī fi Sharḥ Ṣaḥīḥ al-Bukhārī*, (Riyāḍ: Maktabat dār al-Salām, 2000), Vol. 1, 221.

other reasons besides cursing.⁵⁰ Saedi stated that it is clear that the Prophet knew that this child was not conceived from Zam'a's semen, yet he attributed the child to Zam'a. This proves that the proof of lineage is not contingent upon the man's fluids or his impregnation but is associated with the bed. This is the reason why Imam Abu Hanīfa did not place the condition of the possibility of impregnation for being the owner of the bed.⁵¹ So, it is evident that the child's lineage is established through the owner of the bed, i.e., the woman with whom the man is lawfully married, regardless of whether consummation has occurred or not. This principle ensures that the child's *nasab* is attributed to the legitimate marital relationship, and other relationships are also established accordingly.

Generally, Muslim Jurists give priority to marital ground on other methods to establish *nasab*, however, they outlined three key points: the condition of *dukhul* (penetration) or *imkan al-dukhul* (intercourse), the husband's capability to impregnate, and the duration of pregnancy or conception. Hanafī considers marital contracts as sufficient to establish the *nasab* while the majority (*Jumhur*) assert on *dukhul* or *imkan al-dukhul*.⁵² As a result, if evidence proves the incapacity of a married couple to ensure sexual intercourse, such as residing in distant locations, lineage may not be established according to *Jumhur*.⁵³ However, Hanafī considers that the only method to deny *nasab* is *li'ān* (disclaim) by the husband while the *Jumhur* acknowledges other ways also.⁵⁴

⁵⁰Badr al-Dīn Maḥmūd ibn Aḥmad Aynī, *Umdat al-qārī sharḥ Ṣaḥīḥ al-Bukhārī*, (Bayrūt: Dār al-Fikr lil-Ṭibā'ah wa-al-Nashr wa-al-Tawzī', 2016), , Vol. 11, 168.

⁵¹Gulam Rasool Saedi, *Sharah Sahih Muslim*, (Lahore: Farid Book Stall, 2002), Vol.3, 934.

⁵²See discussion: 'Abd al-Qādir Ḥirz Allāh, *Al-Khalasah fi Ahkam al-Zawaj wa al-Talaq*, (Algeria: Dar al-Khaldūnīyah lil-Nashr wa-al-Tawzī', 2007).

⁵³See details: Bassam Muhammad Al-Qawasmi, *Athar al-Dam wa al-Baṣmah al-Warathīyah fi al-Ithbāt fi al-Fiḥ al-Islāmī wa al-Qānūn*, (Jordan: Dār al-Nafā'is, 2010), p. 92.

⁵⁴Muhammad Ibn Idris Al-Shāfi'i, *Al-Umm*, (Beirut: Dar al-M'arifah, 1393), vol. 5, 2294-311. See also Yasir Billoo, "Change and Authority in Islamic Law: The Islamic Law of Inheritance in Modern Muslim States." *U. Det. Mercy L. Rev.* 84 (2006): 637.

Factually, scholars unanimously concur on the validity of establishing lineage through self-acknowledgment. However, they diverge on its validity when the acknowledging party is a female and whether she is married or unmarried. Regarding acknowledgment by a third party during an individual's lifetime, scholars agree on its validity if confirmed by the individual; otherwise, it's deemed invalid. Yet, when the acknowledging party is deceased, scholars present three opinions. The Hanafī school asserts that lineage is affirmed if a qualified heir acknowledges paternity, using "acknowledgment" rather than "testimony."⁵⁵ The Mālikī⁵⁶ and Zaydī⁵⁷ schools maintain that lineage is established through testimony, irrespective of the testifier's status. Conversely, the Shāfi'ī⁵⁸ and Hanbalī⁵⁹ schools advocate confirming lineage through acknowledgment by the inheritor of all wealth or by acknowledgment before the Muslim community if not all wealth is held. Finally, the Dhahīrī⁶⁰ school and a faction of the Zaydī school⁶¹ oppose establishing lineage through acknowledgment made by a third party.

Furthermore, the *fuqaha* unanimously agree that lineage can be established through the testimony of two men, but they differ on whether one man's testimony alongside two women is sufficient. The Hanafī,⁶² Zaydī,⁶³ and Dhahīrī⁶⁴ schools accept it, while the Mālikī,⁶⁵

⁵⁵ Shams al-Dīn Muḥammad ibn Aḥmad al-Sarakhsī, *Kitāb al-mabsūt* (Bayrūt: Dār al-Kitāb al-'Alamiyah, 2001), Vol.8, 119.

⁵⁶ Muḥammad ibn Aḥmad ibn 'Arafah Dasūqī, *Hāshiyat al-Dasūqī 'alā al-Sharḥ al-kabīr*, (cairo: Dār Iḥyā' al-Kutub al-'Arabīyah, 1980), Vol.3, 412.

⁵⁷ Abū al-Walīd Ahmad Ibn Rushd, *Bidāyatul-Mujtahid wa. Nihāyatul-Muqtaṣid*, (Cairo: Dār alḤadīth, 2004), Vol.2, 328

⁵⁸ Shams Al-Din Muhammad Ibn A. Al-Khatib Al-Shirbini, *Mughni al-muhtaj ila ma'rifah ma'ani al-faz al-minhaj*, (London: Turath For Solutions, 2013), Vol. 2, 259.

⁵⁹ Ibn Qudamah, *Al-Mughni*, Vol. 5, 119.

⁶⁰ Alī ibn Aḥmad Ibn Ḥazm, *Marātīb al-ijmā'*, ('Ammān : Dār al-Fath lil-Dirāsāt wa-al-Nashr, 2021), 94

⁶¹ Ibn Rushd, *Bidāyatul-Mujtahid wa. Nihāyatul-Muqtaṣid*, Vol.2, 328

⁶² Muḥammad ibn 'Abd al-Wāhid, *Ibn al-Humām, Sharḥ Faṭḥ al-qadīr*, (Bayrūt: Dār Ṣādir, 1972), Vol.6, 907

⁶³ Ibn Rushd, *Bidāyatul-Mujtahid wa. Nihāyatul-Muqtaṣid*, Vol.2, 328.

⁶⁴ Ibn Ḥazm, *Marātīb al-ijmā'*, 94.

⁶⁵ Dasūqī, *Hāshiyat al-Dasūqī 'alā al-Sharḥ al-kabīr*, Vol.5, 117.

Shāfi'ī,⁶⁶ and Hanbalī⁶⁷ schools do not. They also disagree on whether lineage can be established through the testimony of women alone, with the Dhahīrī⁶⁸ school accepting it but others not. Scholars concur on the validity of establishing lineage through hearsay testimony, known as "*istifadah*" or public knowledge if the information is collectively agreed upon. Some Hanafī and Hanbalī scholars extend this to include testimony from two men or one man and two women, and a *qadi*. However, the preference is for collective hearsay rather than individual testimony. There is a disagreement on whether a witness needs to explicitly state that their testimony is based on hearsay. The Hanafī and Mālikī schools require this, while the Shāfi'ī, Hanbalī, and some Zaydī scholars do not.⁶⁹

Jamhur resorts to *qiyāfah* (resemblance) to establish lineage in cases of conflict or lack of stronger evidence; relying on the Prophet's happiness upon hearing the words of *qiyāfah* could mean he accepted them as valid proof of lineage, as seen in the stories of Zaid ibn Harīthah and Osama ibn Zaid. According to the Hanafī⁷⁰ school, lineage cannot be proven through resemblance alone because Islamic law specifies proof of lineage through marital relations. Resemblance only indicates biological parentage, not marital status, so it cannot establish lineage. Therefore, lineage is established only through marriage or acknowledgment. Notably, the Hanafī school permits attribution of the child to multiple individuals if the evidence is equal or inconclusive and they do not rely solely on *qiyāfah*. The Hanbalī⁷¹ school follows a similar approach but requires the involvement of *qiyāfah*. The Mālikī⁷² and Shāfi'ī⁷³ schools do not endorse affiliating the child with multiple individuals under any circumstance.

⁶⁶Al-Khatib, *Mughni al-muhtaj ila ma'rifah ma'ani al-faz al-minhaj*, Vol. 4, 461.

⁶⁷Ibn Qudamah, *Al-Mughni*, Vol. 6, 12.

⁶⁸Ibn Ḥazm, *Marātib al-ijmā'*, 94.

⁶⁹See details: Mansur Yahya Abdullah Muhammad. "*Aḥkām al-Nasab fī al-Fiqh al-Islāmī wa Madā Ta'thurihā bi al-Mustajadāt al-Mu'āṣirah: Dirāsah Fiqhiyyah, Qānūniyyah, Muqāranah.*"

⁷⁰Al-Kasānī, *Badā'ī'u al-Sanā'ī'u fī tartīb al-Sharai'u*, vol. 2, 331

⁷¹Ibn Qudamah, *Al-Mughni*, (Cairo: Dar alHadith, 2004), Vol. 7, 483

⁷²Al-Qarāfī, *Kitāb al-furūq*, Vol.4, 99.

⁷³Al-Ramli, *nihayah al-muhtaj ila syarh al-minhaj*, Vol. 8, 375

The Qur'ān and Sunnah, the primary sources of *Sharī'ah*, have not given direct responses to ART cases but give general principles to determine the filiation of children. However, classical and contemporary jurists detailed this discussion, interpreting the primary sources according to societal needs.

NASAB OF ART-BIRTHS

Muslim jurists unanimously establish the maternal *nasab* of a child with a gestational mother, whether she is married or unmarried. However, there were debates on the paternal attribution of the child to the putative father. The majority agree that in a dispute of *nasab* between a legitimate husband (owner of *firāsh*) and others, priority goes to marriage (*firāsh*), and the other would be subjected to the prescribed punishment (had).⁷⁴ Al-Jassas and al-Kâsani explain that the *hadīth* “*Al-walad li al-firāsh wa li al-'āhir al-ḥajar*” includes every situation, whether a child is born by a married or unmarried woman.⁷⁵ According to Al-Jassas, the term “*al-firāsh*” is specific, indicated by the definite article (*alif* and *lām*), suggesting that filiation is confined within the marital bond. Consequently, a fundamental principle is established, asserting that anyone who does not possess a *firash* (wife) cannot claim for paternity.⁷⁶

The above *hadīth* is specific to a situation where the owner of *firāsh* is involved. In situations where there is no conflict involving the owner of *firāsh*, scholars deliberate on whether *nasab* can be attributed to a putative father. Scholars attribute the *nasab* of the child to a putative father, subject to his claim for paternity, and the birth-giving woman is unmarried. Different scholars hold varying opinions on establishing *nasab* with a putative father. Some assert that the putative

⁷⁴Ibn Qudamah, *al-Mughni*, vol.7, 477, Muḥammad ibn Abī Bakr ibn Ayyūb Ibn Qayyim al-Jawziyyah, *Zād al-Ma'ād*, (Cairo: Al-Matba'ah al-Misriyah, n.d.), vol. 5, 381. vol. 7, 129. See also: Al-Kasâni, *Badāi'u al-Sanāi'u fi tartīb al-Sharai'u*, vol. 6, 242

⁷⁵Delfina Serrano, “Paternity and Filiation According to the Jurists of Al-Andalus: Legal Doctrines on Transgression of the Islamic Social Order.” *Imago Temporis: Medium Aevum* (2013): 59-75

⁷⁶Abubakar Al-Jassa, *Ahkam al-Qur'an*, (Beirut: Dar al-Kutub al-Ilmiyyah, 1994), vol. 3, 396; see also: Abubakr ibn Mas'ūd Al-Kasâni, *Badāi'u al-Sanāi'u fi tartīb al-Sharai'u*, vol. 6, 242

father will be lashed but still have the *nasab* attributed to him.⁷⁷ Others argue that the attribution of *nasab* is valid if the putative father marries the woman, even if it occurs just a day before the child's birth. Additionally, there is a viewpoint suggesting that the determination of *nasab* in such cases ultimately depends on the verdict issued by a judge.⁷⁸ Notably, the Prophet (PBUH) advised that where a child, claimed by heirs after the father's death, could be attributed.⁷⁹ Additionally, according to Sulyman Ibn Yasār, if a man claims paternity after engaging in illegal intercourse with the child's mother, the child is attributed to him, and he can inherit, provided no one else claims paternity.⁸⁰

It has resulted that the matter of *nasab* surrounds the marital relationship and diverse opinions in ending marriage in cases of divorce and death lead to the dissention of *nasab* in ART-birth using reproductive material after divorce or death. Notably, the Muslim jurists rely on prophet *hadīth* '*alwalad lil firāsh*' for this discussion, dissenting on establishing and denying *nasab* of ART-Child born out of wedlock. Admittedly, this tradition is authenticated by the Muslim jurists but interpreted by different approaches and it facilitates only when the owner of the *firāsh* is involved or a woman is married.

⁷⁷Abd Allāh ibn 'Abd al-Raḥmān Al-Dārimī, *Sunan al-Dārimī*, (al-Riyād: Dār Al-Mughnī, 2000), ḥadīth, 3106. Sarumi stated that this view is reported by several scholars including Ishāq Ibn Rāhawaih, al-Hasan al-Basriyy, „Urwah Ibn al-Zubair, Ibn al-Taymiyyah and Ibn Qayyim. And among contemporary scholars: Sheikh, Uthaimain, S'ad Ibn Nāsir al-Khaslān, Khalid al-Muslih, Yusuf al-Shabīli, al-Qadāghi, al-Nāyf al-„Ajamī, Khalid al-Muqtari, Haniyy al-Jubairi, Nuruddīn al-Khādīmi al-Zawādi Quwaimidi. See details: Sarumi, et, al., "A Polemical Discourse over the Legitimation of Illegitimate Children under Islamic Law." *IIUMLJ* 27 (2019): 151. cited: Nuruddeen Mukhtar al-Khādīmi, *Nasab al-mawlūd Kharija Rābitah al-Zawāj*, 4.

⁷⁸See: Ibn „Abd al-Barr, *Al-istidhkār al-Jāmiu li Fuqahāh al-Amsār*, (Beirut: Dar al-Kutub al-Ilmiyyah, 2000), vol. 7, 172. See also: Ahmad Yahya Ibn al-Murtadha, *al-Bahr al-Zakhār*, (Beirut: Mus-sat al-Risalah, 1975), vol. 4, 141. See more: Ali ibn Sulayman Al-Mardāwī, *al-Insāf fi M'arifāt al-Rāhjih mina al-Khilāf*, (Beirut: Dar Ihyai al-Turāth, n.d.), vol. 9, 269

⁷⁹Ibn Qayyim *Zād al-Ma'ād*, vol. 5, 427. See also *Nail al-Awtār*, vol. 6, 184.

⁸⁰Sarumi, et al, "A Polemical Discourse over the Legitimation of Illegitimate Children under Islamic Law." *IIUMLJ* 27 (2019): 151.

Furthermore, the prevention of *nasab* by the putative father serves as punishment and deterrence.

Indeed, the three crucial elements—sperm, oocytes, and uterus—play a fundamental role in human reproduction. Disruptions in any of these components often necessitate medical intervention. ART procedures, ranging from artificial insemination to the donation of reproductive organs or materials, address these challenges. This study discussed the matter of *nasab* of a child conceived through ART practiced by a couple. Various scenarios are considered, such as the use of frozen reproductive material (sperm, egg, or embryo) in cases of divorce, death, or prolonged absence of the husband. Additionally, the study delves into the complex issue of the donation of uterine or reproductive material to a second wife or other individuals. Before discussing controversial ART events for *nasab*, it is essential to know the potential jurisprudential points which need to be considered to determine the *nasab* of a child born as the result of ART.

POTENTIAL JURISPRUDENTIAL RULES

Marital Relationship: The *Shari'ah* gives marriage as a Grund norm for determining the *nasab* of a child. By this norm, it is examined that children resulting from ART are born within a valid wedlock or out of wedlock. In the case of wedlock, any type of *nasab* of child can be established.

Respectful Conception and Birth: To ascertain *nasab*, Islamic law considers the timing of conception and birth. Regarding birth, a minimum duration of six months after marriage is considered, with variations in time calculation.⁸¹ Likewise, scholars debate the maximum gestational period, ranging from nine to ten months, two years, four years, and nine to ten years.⁸² In cases involving ART, where conception or birth occurs through preserved reproductive

⁸¹There are views on it since the contract of marriage, the consummation of marriage, or having a possible time for physical access for conception. See discussion: N.J. Coulson, *Succession the Muslim Family*, (London: Cambridge University Press, 2009), 23.

⁸² N.J. Coulson, *Succession the Muslim Family*, (London: Cambridge University Press, 2009), 23.

material, analysing the filiation of the resulting child may be assessed within these parameters. For conception, there are two stages: ejaculation and insertion. Thus, these two stages must be respected and not violated during conception. The use of frozen material in cases of divorce, death, or other such scenarios should be considered.⁸³

Distinct Rules for Maternal and Paternal Filiation: Paternal *nasab* is determined through *Sharī'ah* methods.⁸⁴ In Contrast, Maternal *nasab* is a matter of biology, and this jurisprudential ground is extracted from the holy verse and prophetic hadith. The holy verse reveals the roles of mothers, whereby maternal filiation can be understood: “*their mothers are none but those who gave birth to them.*”⁸⁵ Another verse states, “*His mother carried him with hardship and gave birth to him with hardship, and his gestation and weaning period is thirty months.*”⁸⁶ Also, it is stated “*And Allah brought you out from the wombs of your mothers*”.⁸⁷ Furthermore, the holy text revealed “*He creates you in the wombs of your mothers*”.⁸⁸

In ART procedures, both paternal and maternal lineage is scrutinised, especially in situations where a child is born with the assistance of multiple women, such as one providing the uterus, another donating gamete, and yet another birthing the baby. In such cases, the attribution of parental roles becomes challenging.

***Nasab* is a Fundamental Right of Children:** The attribute of *nasab* is the foremost right of the children, and other rights rely on its determination. Indeed, its denial or misapplication leads to socio-economic discrimination and legal deprivation of rights in human society. Particularly in contemporary states, birth certificates, citizenship or nationality, immigration, and travel issues arise in the

⁸³ See discussion: Abbas Ahmed Al-baz, " Oocyte and Sperm - Embryo Cryopreservation (Sperm and Egg Freezing) Between Medicine and Islamic Jurisprudence." *Dirasat: Sharī'ah & Law Sciences* 41, no. 1 (2014): 215-234.

⁸⁴The Qur'ān, 46:15

⁸⁵The Qur'ān, 58:2

⁸⁶The Qur'ān, 46:15

⁸⁷The Qur'ān, 78:16

⁸⁸The Qur'ān, 6:38

absence or doubtful attribution of a child. Thus, the immediate and right determination of *nasab* should be understood as a fundamental right of a child.

Maṣlaḥat Al-Tifl (Best Interest of the Child): Islamic law applies legal maxims to realise public policy and ward off evils in controversial issues.⁸⁹ In Muslim countries, the rule of best interest of the child is applied in cases of abortion, custody, maintenance, and even the inheritance of a grandfather to grandchildren when the child's father has died.⁹⁰ This concept is also evident when Muslim jurists establish the *nasab* of children born out of all kinds of doubtful sexual intercourse (*watu al-shubhah*). This understanding should extend to the *nasab* cases of ART births.

Child Care and Protection: The next point is child care and protection that should be considered for ART cases. Many states⁹¹ attempt to establish relationships between a child and others with different labels. However, limited rights are granted to the child, excluding the right of inheritance. In fact, this is an effort to ensure the safety of a child without terming it as *nasab*, which violates Islamic law.⁹² According to Islamic law, Muslim jurists must acknowledge the discretion of courts in disputed issues, terming it *Waqā'i'u al-ahwāl* (a ruling giving a certain person or group differs from others).⁹³ Henceforth, the courts

⁸⁹See details: Ibn Abdul al-Salām Izz al-Dīn, *al-Fawā'id fi ikhtisār al-Maqāsid*, (Damascus: Dar al-Fikr, 1995), 50.

⁹⁰See guardianship laws of the countries including Malaysia and Pakistan. see details: Such as Rhona, and Ayelet Blecher-Prigat. "Israel: Dynamism and Schizophrenia." Chapter. In *The Future of Child and Family Law: International Predictions*, edited by Elaine E. Sutherland, (Cambridge: Cambridge University Press, 2012.), 175–204.

⁹¹Indonesia, Algeria, Malaysia, and India see: Engelcke, Dörthe. "Establishing Filiation (Nasab) And the Placement of Destitute Children into New Families: What Role Does the State Play?" *Journal of law and religion* 34, no. 3 (2019): 408-432.

⁹²Dörthe. "Establishing Filiation (Nasab) And the Placement of Destitute Children", 408-432.

⁹³Isa Abdur-Razaq, Sarumi and Taofik Abolaji, Critical Analysis of *Waqā'i'u Al-Ayān* and Its Implication on Jurist's Dissent, *Journal of Islamic Law Journal*, Maiduguri State University, Nigeria, 8

should consider child care and protection in establishing the attribution of ART children born out of doubtful events.

Compensation or Punishment: The rights and responsibilities should be considered for donors' efforts, and some reward should be given for their participation, particularly when commercial benefits are not allowed. Similarly, the *Sunnī* Muslims declare donation practices akin to adultery, but they do not impose adultery punishment for such cases as there is no fulfilment of elements of zina.⁹⁴

In the context of the above considerations, the issue of the *nasab* of a child born using ART procedures can be analysed.

CONTROVERSIAL EVENTS FOR ART-BIRTHS AND DETERMINATION OF NASAB ART-BIRTH AFTER DIVORCE

The majority opinion suggests that in cases of divorce and death, frozen embryos should automatically be destroyed, while the minority perspective advocates for their use until the expiration of the waiting period.⁹⁵ For instance, if a wife impregnates as a result of using a frozen embryo after divorce within the waiting period, the *nasab* establishes a relationship with her ex-husband.⁹⁶ In fact, marital relationships continue in the waiting period that leads to establishing filiation with the husband. And, the use of a frozen embryo even after the waiting period does not constitute a denial of *nasab* because freezing receipt proves that the gamete relates to the ex-husband. Furthermore, while insemination occurs after a marital relationship, in this case, the ejaculation and fertilisation stages were completed within the marital bond.⁹⁷ Additionally, freezing and fertilisation of gametes by joint consent denote that the husband was willing to accept the birth

⁹⁴H. Chamsi-Pasha and M. A. Albar, "Assisted Reproductive Technology: Islamic Sunni Perspective," *Human Fertility* 18:2 (2015), 107–112.

⁹⁵Al-baz, "Oocyte and Sperm - Embryo Cryopreservation (Sperm and Egg Freezing). 215-234.

⁹⁶ Abbas Ahmed Al-baz, "Freezing Sperm and Ovums, Medical Jurisprudence." *Dirasat: Shari'ah & Law Sciences* 41, no. 1 (2014).

⁹⁷See discussion: Al-baz, "Oocyte and Sperm - Embryo Cryopreservation (Sperm and Egg Freezing). 215-234.

of the child, leading to his acknowledgment. Notably, absolute denial of *nasab* derivates the rights of the child and is against his best interest, public policy, and maxims of warding evils. Additionally, denial of *nasab* derivates the rights of the child and is against his best interest, public policy, and maxims of warding evils.⁹⁸ It is true that using of preserved gamete or embryo after divorce can be discouraged on the basis of precautions or leading to *mafsadah*, but it is considered for determining *nasab*. Nevertheless, this issue calls for a healthy discussion among medical, legal, and religious experts. Nevertheless, this issue calls for a healthy discussion among medical, legal, and religious experts.

POSTHUMOUS ART-BIRTH

Another controversy is whether the usage of frozen embryos after the deaths of any or both parties is permitted. The notable point is that the status of frozen embryos is acknowledged as a valuable joint asset of the parties having priority over other human organs because it is created as a result of joint effort and it holds human reproductive ability that other organs do not have.⁹⁹ Furthermore, the maximum limit for conception is different even up to 10 years.¹⁰⁰ So, the question is whether the freezing and fertilizing of embryo is equal to a stage of conception or not because the initial process is taken outside of the body, which is the same as happens on the inner side of the uterus. Probably, that is why the freezing limit cannot exceed 10 years in several ART laws in Muslim countries.¹⁰¹ While using frozen embryos after death is not encouraged due to the end of marital relationship, if a wife impregnates through their use within *`iddah* (waiting period),

⁹⁸ Ibn Abdul al-Salām Izz al-Dīn, *al-Fawā'id fī ikhtiṣār al-Maqāṣid*, (Damascus: Dar al-Fikr, 1995), 50.

⁹⁹ Al-baz, "Freezing Sperm and Ovums, Medical Jurisprudence." *Dirasat: Shari'ah & Law Sciences* 41, no. 1 (2014).

¹⁰⁰ N.J. Coulson, *Succession the Muslim Family*, (London: Cambridge University Press, 2009), 23.

¹⁰¹ Turkey, Bahrain, Malaysia and Tunisia etc. see details: Kooli Chokri, "Review of Assisted Reproduction Techniques, Laws, and Regulations in Muslim Countries." *Middle East Fertility Society Journal* 24, no. 1 (2020): 1-15.

the *nasab* can be established.¹⁰² It seems acceptable that after the *'iddah* period where she impregnates from frozen embryos, the *nasab* can be attributed to the deceased father because he already consented to accepting future birth at the time of making embryos. Moreover, this is why ejaculation and fertilisation stages were done under a marital relationship and other stages of conception remained to be fulfilled. In this case, insertion is made after the end of the marital bond, which is a disrespectful activity that can be counted as a sin but is not equal to adultery, which constitutes a denial of *nasab*. This is also a medico-jurisprudential question that needs medico-legal discourse.

ART-BIRTH IN CASES OF *MAFQUD UL KHABR*

Mafqood is a person whose whereabouts are not known and his life or death is not known. In this case, for a particular period of time, the person is declared to be living, as his death is not known by any source.¹⁰³ The prisoner is also included under this scope, as it is stated that the prisoner, whose whereabouts are unknown and it is not possible to ascertain his news, is considered missing.¹⁰⁴ The marital relationship remains in these events,¹⁰⁵ preventing the wife from remarrying and distributing inheritance.¹⁰⁶ In this context, the use of preserved gametes or embryos where a husband travels abroad and stays missing without any information or gets imprisoned for years or life poses the question of the affiliation of the resulting child. The question is whether the

¹⁰²Al-baz, "Freezing Sperm and Ovums, Medical Jurisprudence." *Dirasat: Shari'ah & Law Sciences* 41, no. 1 (2014).

¹⁰³See: Syed Sābiq, *Fiqh ul-Sunnah*, (Beirūt: Dār al-Kutub al-Arbī, 1977), 3, 651.

¹⁰⁴See details: Ahmad Alī Ṭāhā Riyān, *Fiqh ul-Ussrah, Al-Mabhath al-Thānī: Ahkām Zoaj al-Mafqūd*, 300.

¹⁰⁵See discussion: Hay'at al-Sham al-Islamiyyah. "Aḥkām zawjat al-ghā'ib wal-mafqūd." Accessed April 4, 2024. <https://islamicsham.org/fatawa/1705>.

¹⁰⁶There is rich debate on *mafqood* and his rulings such as he is missing in Muslim territories or otherwise and how much time is required to determine his status of life or death. See: Abul Walīd Muhammad bin Ahmad al-Qurṭabī, *al-Muqaddamāt al-Mahdāt* (Labnān: Dār al-‘Arab al-Islāmī), 533/1. This research centers on only establishing the lineage (*nasab*) of a child conceived through ART in cases where the husband is unknown.

conception in the absence of a husband is applied or not because such conception is declared evidence for *zina*.¹⁰⁷ Besides, joint consent is required to use joint asset (frozen embryo)¹⁰⁸ that not possible in cases of missing persons. Furthermore, it is evident that many Muslim territories including Malaysia and Pakistan lack guidance on determination of *nasab* in such events.¹⁰⁹ Additionally, the courts have had limited opportunities to establish case law precedent in such matters. For instance, in Pakistan, the Federal Sharī'at Court discussed the contractual status and potential offenses related to surrogacy but avoided debating the legitimacy of the child.¹¹⁰ The sole guidance available for establishing the lineage (*nasab*) of such children is religious *fatwas*. In situations where legal frameworks are lacking, courts interpret and apply *Sharī'ah* law, although judges often lack expertise in applying the *Sharī'ah* to biotechnological human reproduction. Similarly, private ART clinics utilises these rulings as a basis for their ART practices.¹¹¹ Thus, in such cases, *nasab* determination is at risk, so there is need of expressed provisions to govern these matters; otherwise, private clinics may misuse and misapply the *fatwas* as per their understandings.

ART-BIRTH: HAVING A THIRD-PARTY ROLE FOR CO-WIVES

This is a debateable situation among scholars. The majority view¹¹² prohibits the practice of human reproduction through the assistance of

¹⁰⁷ Jad Ahmed Jad Al Kareem, "Jurisprudential Rulings Relating to The Fertilized Eggs." *Journal of Al-Sharia and Law in Asyut* 31, no. 2 (2019): 1164-1283

¹⁰⁸ Al-baz, " Oocyte and Sperm - Embryo Cryopreservation (Sperm and Egg Freezing). 215-234.

¹⁰⁹ See: Islamic Family Law (Federal Territories) Act 1984; see also: Muslim Family Laws Ordinance, 1961

¹¹⁰ See: Farooq Siddiqui v Farzana Naheed, PLD-2017 FSC-78

¹¹¹ See websites of ART clinics: Federal Shariat Court Declares Test Tube | IVF Legal. (2023, December 23). Australian Concept Infertility Medical Center. accessed April 3, 2024., <https://acimc.org/federal-shariat-court-declares-test-tube-ivf-legal/>.

¹¹² See: Jād al-Haqq 'Alī Jād al-Haqq (Sābik Shaykh al-Azhar Miṣr), Muḥammad Sayyid Ṭantāwī (Sābik Shaykh al-Azhar), Yūsuf al-Qardāwī (Qaṭar), and Muṣṭafā Zirqā' (Shām) see: Dāktar Hind al-Khulī, maqālah:

co-wives as they declare it equal to the involvement of third parties.¹¹³ Some others including Javid Ahmed Ghamdi hold the view that assistance in human reproduction between co-wives is not equal to the involvement of an absolute third party, which is prohibited. Even this view finds some place among the Sunnī scholars. They stipulate this practice with some conditions, but the question is that paternal *nasab* clearly goes to the husband; what happens in maternal *nasab*?¹¹⁴ The birthing wife has maternal filiation according to the majority,¹¹⁵ and the donor wife holds the suckling status or otherwise.¹¹⁶ In fact, the prohibitive view argues that fertility, stabilisation of pregnancy, and nurturing of embryos are pre-birth practices, while breastfeeding after birth is an extraneous matter. Likewise, suckling is proven by textual studies of the Quran and Sunnah and it is not correct to justify the tenancy of the womb of a non-woman by speculating on it. Furthermore, the wives have separate marital contracts with the husband which has different consequences. In contrast, the minority argument is that co-wives' assistance is not equal to absolute third-party as prohibited but these share the same husband.¹¹⁷

Rationally, in this situation, the child's *nasab* may be established with the husband, as both women are his wives, and the child is borned through his seminal fluid. Regarding the determination of which woman is the biological mother of the child, it may be established based on the woman through whom the pregnancy and childbirth occurred. As for the other wife, whose ovum was used in the fertility process, rulings of *Musāharah* will be applied based on the partial

Tajrīr al-arḥām fī al-fiqh al-Islāmī, majallah Jāmi'at Dimashq lil-'Ulūm al-Iqtisādīyah wa al-Qānūnīyah, jild 27, shumārah 3, 2011, ṣafah 282-283.

¹¹³ See: Jād al-Haqq 'Alī Jād al-Haqq (Sābik Shaykh al-Azhar Miṣr), Muḥammad Sayyid Ṭantāwī (Sābik Shaykh al-Azhar), Yūsuf al-Qarḍāwī (Qaṭar), and Muṣṭafā Zirqā' (Shām) see: Dākṭar Hind al-Khūlī, maqālah: Tajrīr al-arḥām fī al-fiqh al-Islāmī, majallah Jāmi'at Dimashq lil-'Ulūm al-Iqtisādīyah wa al-Qānūnīyah, jild 27, shumārah 3, 2011, ṣafah 282-283.

¹¹⁴ Mofti Manib al-Rahman and Muhammad Razi al-Islam Nudvi. "Kirāyē kī mān' kī shar'ī ḥaṣṣīt?." Maahnama Targheeman al-Quran, November 2020, pp. 43-46. Accessed April 4, 2024.

<https://www.tarjumanulquran.org/articles/nov-2020-kirae-ki-maa-ki-shari-hasiyat>

¹¹⁵ Al-Kasānī, *Badā'ī'u al-Sanāi'u fī tartīb al-Sharai'u*, vol. 14, 262/

¹¹⁶ Mofti Manib et al. "Kirāyē kī mān' kī shar'ī ḥaṣṣīt?."

¹¹⁷ Ibid.

relationship with her.¹¹⁸ Then a new medico-legal question arises: genetical transformation lies with gametes; what is in nurturing by blood? Does it hold some genetic transformation or not? Whether suckling by milk, by blood, or by gametes is equal, it needs some scientific study.

ART-BIRTH HAVING AN ABSOLUTE THIRD-PARTY ROLE¹¹⁹

Third-party involvement is found in every human procreation process, even in natural processes, for instance getting help from professionals (doctors, nurses, *dai* (local experts' women) to ease the reproductive process. This involvement is also evident in cesarean birth (delivery by operation). In this study, third-party involvement has two meanings: human reproduction is done with assistance from a second wife or assisted reproduction between co-wives. The second meaning is assisted in human reproduction using donated material or the practice of surrogacy; this later meaning may be termed third-party absolute involvement. The challenge of multi-parenthood occurs when an absolute third party is involved in ART procedures. For instance, if more than three parties are involved in ART procedures when one woman gives uteri, second donates egg, and the third gives birth. is this transformation equal to the transformation of other organs or not? This is a jurisprudential-medical question that needs to be co-examined. In cases of using donated reproductive material, maternal *nasab* will be attributed to the birthing woman, as the Quranic texts endorse birthing women as mothers.¹²⁰ The question is on paternal *nasab* whether it

¹¹⁸See details: Zayn al-Dīn ibn Ibrāhīm Ibn Nujaym, *Baḥr al-rā'iq sharḥ Kanz al-daqa'iq*, (Bayrūt : Dār al-Ma'rifah lil-Ṭibā'ah wa-al-Nashr wa-al-Tawzī', 1993), vol. 8, 36-

¹¹⁹Third-party involvement is found in every human procreation process, even in natural processes, for instance getting help from professionals (doctors, nurses, *dai* (local experts' women) to ease the reproductive process. This involvement is also evident in caesarean birth (delivery by operation). In this study, third-party involvement has two meanings: human reproduction is done with assistance from a second wife or assisted reproduction between co-wives. The second meaning is assisted in human reproduction using donated material or the practice of surrogacy; this later meaning may be termed third-party absolute involvement.

¹²⁰See: The Qur'ān, 6:38, 46:15, 58:2, 78:16

goes to the husband of the birthing woman or the donor. In such cases, the husband of the birthing woman is treated as the father of the resulting child because through pregnancy and childbirth, is the mother of the child, and through the *firāsh*, the child will be affiliated with her husband.¹²¹

In light of medical and biological experiences, gametes are origin and foundation of a fetus. Not only does it determine the biological details of the offspring, it also imparts similarities and all characteristics and qualities are obtained from them.¹²² Therefore, the contribution of donors to ART cannot be entirely ignored. Based on the genetic role, the possibilities of uncertainty and remote probabilities have been considered effective in parental relations, and rulings of *Musāharah* are applied.¹²³ When third-party involvement in ART does not equate to adultery, it becomes essential to honour the rights and responsibilities of all parties involved.

ART-BIRTH AND ISSUE OF NASAB IN THE MUSLIM COUNTRIES

Among the Muslim countries, Turkey and Iran have ART laws, but they do not address the issue of *nasab* directly. Turkish laws prefer not to use reproductive material after divorce or death,¹²⁴ but Iranian provisions facilitate the donation of this material to another couple. The Iranian law creates rights and responsibilities for the recipient couple, not for the donors.¹²⁵ Similarly, Malaysia has no certain legal

¹²¹Sometimes more than three parties are involved in ART procedures as one woman gives uteri, second donates egg, and third gives birth. is this transformation equal to the transformation of other organs or not? This is a jurisprudential-medical question that needs to be co-examined.

¹²²See: Giannubilo, et al, "The "Bad Father": Paternal Role in Biology of Pregnancy and in Birth Outcome" *Biology* 2024, 13(3), 165; <https://doi.org/10.3390/biology13030165>

¹²³See details: Ibn Nujaym, *Baḥr al-rā'iq sharḥ Kanz al-daqa'iq*, vol. 8, 36-

¹²⁴See: Article 12-18, Regulation of Assisted Reproductive Treatment Centers Act (RAPTCA) 1987

¹²⁵ See more: Zohreh Behjati-Ardakani, al., "Embryo Donation in Iranian Legal System: A Critical Review." *Journal of reproduction & infertility* 16, no. 3 (2015): 130.; see also: Kooli Chokri, "Review of Assisted Reproduction Techniques, Laws, and Regulations in Muslim Countries." *Middle East Fertility Society Journal* 24, no. 1 (2020): 1-15.

provisions to deal with the issue of *nasab* for ART-children. Even though some policies¹²⁶, religious fatwas¹²⁷, or indirect laws exist¹²⁸ that may extend to this problem, these are not sufficient.¹²⁹ Significantly, most of the Muslim world practices family law with *Shari'ah* and a civil law mixture, particularly in Pakistan. The determination of *nasab* depends on the *Shari'ah* texts, as the courts are advised by the constitution to apply juristic interpretation to the respective sect.¹³⁰ Further, the Council of Islamic Ideology attempted to discuss ART-related issues, including the *nasab* of children. But this discussion focused on the maternal *nasab* to the birthing woman, and no other sides were discussed.¹³¹ Similarly, the above mentioned issues of paternal *nasab* are not examined by the council. The lack of a law on the determination of *nasab* poses challenges, especially in ART-related births. After the rapid advancement of biotechnology, family law is challenged by multi-dimensions; even its cornerstone, marriage, and process of human procreation are at risk.¹³² Henceforth, the

¹²⁶See: Guideline Of the Malaysian Medical Council (MMC) on Assisted Reproduction 003/2006, Standards for Assisted Reproductive Technology Facility - Embryology Laboratory and Operation Theatre 2012, MOH / P / PAK / 204.10 (GU), and National Assisted Reproductive Technology (ART) Policy 2021, MOH/P/PAK/459.21(BP)

¹²⁷See: The 5th Muzakarah (Conference) of the Fatwa Committee and National Council of Islamic Religious Affairs Malaysia held on 16-17th November 1982, The 55th Muzakarah Conference of the Fatwa Committee and National Council of Islamic Religious Affairs Malaysia held on 8th April 2003, The 56th Muzakarah Conference of the Fatwa Committee and National Council for Islamic Religious Affairs held on 7th May 2003, The 80th Muzakarah Conference of the Fatwa Committee and National Council of Islamic Religious Affairs Malaysia held on 1-3rd February 2008.

¹²⁸See: section 112, the Evidence Act 1950, section 110, Islamic Family Law (Federal Territories) Act 1984

¹²⁹ For information: Yassari, Möller, and Najm, eds. *Filiation and the Protection of Parentless Children: Towards a Social Definition of the Family in Muslim Jurisdictions*.

¹³⁰See: Article 227, the Constitution of Islamic Republic of Pakistan

¹³¹See: Islāmī Nazariyātī Kaunsil, Sālānah Report, 1988-89, 129, Sālānah Report, 2013-14, 227, Sālānah Report, 2014-15, 205-6, Sālānah Report, 2019-20, 282.

¹³²For details: Bilal Hussain, et. al., "Advancement of Biotechnology and Family Laws in Pakistan: An Analytical Study." *Multicultural Education* 8, no. 6 (2022).

protection of the *nasab* of children is indispensable, which calls for immediate legislation to overcome this problem.

CONCLUSION

This study brings up issues on the determining the *nasab* of a child that is born through ART. It also examines juristic basic reliance upon the *hadīth Al-walad li al-firāsh* principle to decide *nasab* issues. Notably, this hadīth gives the principle that it is allowed to give *nasab* to the owner of *firāsh* in cases where *firāsh* is involved. To follow this principle, ART-births using reproductive material in divorce or death have a link to *firāsh*, which either ended but can be traced and is not equal to adultery. Muslim jurists apply various methods to decide *nasab* disputes among the children, putting a burden on the putative father, protecting public policy, and protecting the best interests of the child.

In addition, the attribution of the child leads to maximising the interest of humanity, while the denial or misattribution of *nasab* leads to creating evils in society. The *Sharī'ah* has some flexibilities according to societal needs, so other methods for determining a *nasab* should be considered in cases of ART births. Hence, the Courts may adopt a judicious approach in handling the ART cases, evaluating each situation individually. The states ought to address and discourage the use of ART in controversial events while ensuring the protection of the *nasab* of the resulting children. Where full *nasab* is not recognised, specific rights and obligations such as providing financial support for maintenance and expenses, excluding inheritance, may be employed. This approach may serve to acknowledge, compensate for, and impose a burden on the donor's role. Likewise, imposing a burden on the donor can be implemented as a deterrent to discourage such practices in society. This article encourages conducting a medico-jurisprudential study in the domain of ART. Contemporary Muslim jurists should revisit and arrange a legal discourse on this matter, considering classical jurisprudential literature, primary, secondary, and subsidiary sources of *Sharī'ah*, in light of the present needs of society.

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