

التلقيح الصناعي بعد الوفاة في العراق
واستراتيجيا: دروس للقانون العراقي

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Posthumous Reproduction in Iraq and
Australia :Lessons for Iraqi Law

الكلمات الافتتاحية : التكاثر بعد الوفاة ، الأجنة المحفوظة بالتبريد ،
الزرع ، العقم ، الأنسجة البشرية ، استرجاع الأمشاج ،

Keywords: posthumous reproduction, cryopreserved embryos,
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Abstract

The contemporary achievements in the domain of human reproductive technology have opened the door for possibility of conducting artificial fertilization after death of a partner, which is known as posthumous reproduction. This matter may raise several legal issues in different countries around the world. The principal issue is represented in the determination of whether or not posthumous reproduction process should be permissible. The other related issues are represented in determining the status and lineage of children born through posthumous reproduction, and their legal rights in inheritance. The article examines perspective of Iraqi law about posthumous reproduction, as well as setting out the Australian approach for Iraqi law to benefit and learn from it. The article shows that there is no general prohibition under Iraqi law for carrying out posthumous reproduction, which means that this process is legally permissible. The Iraqi legislatures should, however, interfere to set some restrictions and disciplines which limit applying this process, such conditions that should be taken into account in order to carry out posthumous reproduction

الملخص

إنّ التطورات الحديثة في ميدان تكنولوجيا الاجاب قد
ادت الى امكانية اجراء التلقيح الصناعي بعد وفاة
الشريك. هذا الموضوع يثير عدة قضايا قانونية في
مختلف الدول حول العالم. القضية الاساسية
تتمثل في تحديد مدى شرعية اجراء التلقيح

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الصناعي بعد الوفاة. وهناك قضايا قانونية اخرى مرتبطة بهذا الاجراء والتي تتمثل بالوضع القانوني للاطفال المولودين نتيجة تطبيق هذا الاجراء وامكانية ثبوت نسبهم لابيهم المتوفي وتحديد مدى استحقاقهم للميراث. هذا البحث يتناول موضوع اجراء التلقيح الصناعي بعد الوفاة وفقا للقواعد التقليدية في القانون العراقي. ويعرض التجربة الاسترالية حول هذا الموضوع. إذ يوضح هذا البحث بانه ليس هنالك منع عام لاجراء التلقيح الصناعي بعد الوفاة في القانون العراقي. والذي يعني بأن هذا الاجراء مسموح قانوناً. على أي حال فان المشرع العراقي يجب ان يتدخل في تنظيم هذا الموضوع من خلال وضع ضوابط وشروط لاجراء التلقيح الصناعي بعد الوفاة

I: Introduction

In the recent time, assisted reproductive technology (ART) has become widespread across the world. In the light of this technology, it has become scientifically possible to carry out assisted reproductive technology through extracting the sexual cells and fertilizing them at laboratory, as well as storing the excess embryos and gamete. This means that generating and conceiving human embryos became possible in absence of parent, as long as embryos or gamete are cryopreserved. Generating a child through posthumous use could be by transplantation of a frozen embryo after death of partner, or using deceased's sperm for creating and conceiving human embryo. The used gamete for posthumous reproduction could be extracted from individual prior to death or immediately after that. Posthumous reproduction has aroused a significant controversy. Where this process leads to legal complex issues in determining whether it is permissible or not, as well as organizing and regulating the main legal issues surrounding posthumous reproduction, such as rights of children who are born as a result of posthumous reproduction such as lineage and inheritance.

This article examines the legal perspective of posthumous reproduction in Iraq and Australia, in order to check whether or not such process is lawful. It, consequently, provides a response on whether or not legislatures should permit carrying out posthumous reproduction in Iraq. For that, this article explores the related legal rules in Iraqi law, and sets out the Australian experience in regard with regulating posthumous reproduction. It would be useful for Iraqi law to benefit from the Australian approach, in the way which does not contradict with essential principles of Iraqi law and traditional values in Iraq. After this introduction, the article will provide a general overview of posthumous reproduction. It then discusses posthumous reproduction in Iraqi law. After that, it reviews posthumous reproduction under Australian law. In the light of that, it includes a discussion and recommendation for Iraqi law. The article ends with a conclusion.

II: Posthumous Use of Embryos and Gametes

Generating and conceiving a child after death of parent is process achieved through utilizing assisted reproductive technology. Where reproductive cells, gametes,¹ are often collected from couple who would like to undergo assisted reproduction. The collection of gametes may have been achieved prior to death or, in some cases, after the death of partner. The modern method for collecting ova is through transvaginal ultrasound aspiration, where ova are retrieved and collected by a special needle inserted into the woman's bladder while the woman is under local anesthesia.² While, collection of sperms is usually achieved through masturbation, or a rectal electro ejaculation may be needed in

case of a man with spinal injury.³ After collection of gamete, fertilization is achieved either through artificial insemination or in vitro fertilization. Fresh or frozen semen can be used in artificial insemination procedures.⁴ A fertilized ovum may be transplanted into a woman's uterus once its division reaches 4-8 cells.⁵

Fertilization of couple's sexual materials usually occurs during their life. However, there is a possibility of posthumous reproduction, where fertilization of gamete and implantation of embryos to be carried out after death of the partner. This could occur in situation when the male partner dies and the female partner wishes to utilize sperm or an embryo utilizing the sperm of the deceased partner. This could be collected prior to death or, in some cases, after the death of partner. Posthumous reproduction is traditionally refer to "the case when a birth occurs after death of a woman's partner, and it has recently used to refer carrying out assisted reproduction in order to conceive a human embryo after death of the partner by using stored embryos or sexual materials".⁶ The usual use of posthumous reproduction is utilizing cryopreserved embryos or gamete of a deceased individual that had been extracted prior to his death. However, posthumous gamete retrieval might occur following death of partner, where gamete is retrieved urgently in short time immediately after the death.⁷

III: Posthumous reproduction in Iraqi law

In Iraq, there is no special legislation that addresses issue of posthumous reproduction nor assisted human reproduction. So, examining issue of posthumous reproduction requires exploring legal provisions in Iraqi law, especially those that regulate status of children; children born following the death of the husband and their inheritance right, and extract human tissues, as well as discussing posthumous reproduction in Islamic jurisprudence as Sharia is a main source of Iraqi law.

A: Status of posthumous children in Iraqi law

Posthumous ART using the deceased's husband gametes or transplantation a frozen embryo formed using the husband's gametes raises issues relating to the status of children. Generally, and under provisions of Iraqi law, a child born after the marriage relationship has ended, after death of the husband or as a result of divorce, is not recognized by Iraqi law as the lawful child of the husband. Where, Iraqi law requires that pregnancy to occur during the marriage relationship for confirming lineage of a child to its parents.⁸ So, for confirming the legal parentage, it is required the birth to occur after passing a minimum period of pregnancy from the time of the marriage contract,⁹ or before the maximum period of pregnancy has passed.¹⁰ Otherwise, children are not considered the lawful children of the marriage and ineligible to share in inheritance from the father's estate, or in relation to the father's obligation towards his children, and there are no responsibilities on him for care and maintenance of the child. This is because of the assumption that, when a child born after death of husband, is not linked genetically to the husband, and legal parentage cannot be confirmed. But if the wife is pregnant at the time of her husband's death, then the newborn is presumed to be a child of the marriage, and legal parentage is conformed.

This assumption does not necessarily apply in case of children conceived through ART procedures using the married couples' genetic material after the partner's death, due to the fact in this case is the conceived children are biologically linked to wife and her deceased husband. Furthermore, children born to a married or unmarried couple or a single female whom they are not genetically related are in law are a similar position to

ex-nuptial children who born out of marriage relationship. This may require to reconsider the classic legal provisions of confirming lineage of children, in the light of new change brought as a result of assisted reproduction in general and posthumous use in particular.

B: Inheritance

Iraqi law does not deal with a child that has been conceived but not born at the time of the father's death. Where, provisions of the succession in Iraq require actual existence of heir at the moment of parent for confirming inheritance right.¹¹ In the absence of legislative provisions, Sharia is considered a main source of Iraqi law and part of it.¹² The right of unborn child is confirmed in Islamic Sharia which considers an unborn child as an heir entitled to inheritance. This is subject to the qualification that the child is born alive before the child can inherit. Distribution of an estate may need to be delayed in these circumstances.¹³ In regard with rights of posthumous children who may be conceived and born through ART after the death of parent, it is an unresolved issue whether children subsequently born can share in the inheritance as heirs. This may depend upon whether posthumous use of the deceased's gametes or an embryo formed using his gamete is lawful under Iraqi law. However, as long as the genetic relationship is available between posthumous child and his/her deceased's parent, then the child might be eligible to share in inheritance. This matter may require amendment on existing rules of Iraqi law, as well as enacting legislation which regulates clearly this issue. This article includes some recommendations to reforming and modernizing Iraqi law in relation to regulating posthumous reproduction.

C: Extracting and transplantation of human tissues

Transplanting human organs and tissues is regulated in Iraq by the *Transplantation Operations of Human Organs and prohibition of commercialization Act 2016*. This Act regulates such procedures including the removal human tissues and organs from alive or deceased individuals and transplanting them for purpose of treatment to save patient's life or providing treatment from dangerous disease.¹⁴ In regard with posthumous reproduction which includes extraction and transplantation of human sexual materials prior to death or at the death moment them after death, the issue which raised is whether or not the Iraqi Act of transplantation of human organs could apply on this process, as well as whether or not it is permissible to extract human sexual tissues from deceased person.

In response to this issue, the Iraq Act firstly prohibits in section 5 (4) extracting and transplanting human tissues and organs except for remedial purpose, or for scientific purposes,¹⁵ while the main purpose of posthumous reproduction is to generate and conceive a human embryo. So, the purpose and aim of transplanting human organs and tissues is very different from purpose of posthumous use. Secondly; the concept of human organs and tissue is deferent from reproductive cells that might be extracted for posthumous. Where, the Act defines human organ as it is every part of human alive or deceased body,¹⁶ and refers that human tissues are parts of human organs extracted from alive or deceased body.¹⁷ So, human organs usually refers to the main organs of human body such as, heart, liver, eye and lung. This legislative definition of a human organ is supported by the medical definition referred in a dictionary as it is (a part of the body, composed of tissue that forms a structural unit responsible for a particular function or functions. Examples are the heart, lung, and liver).¹⁸ Human tissues include parts of any human organ. While, the reproductive cells, sperms and ova, that are used in posthumous reproduction have a special and unique nature as they are renewal and may lead to create

human embryo, as well as they involve the transfer of genetic material from parents to children.

Finally, In terms of extracting human organs or tissues from deceased's body, this Act refers that an individual can, during his/her life, to bequest by writing to donate his body after death in order to transplantation purpose into alive body.¹⁹ This means that a writing consent of individual prior to his death is required in order to extract organs or tissues from his body after death. Thus, the Iraqi Act of transplantation of human organs and tissues is insufficient to be applied on posthumous reproduction.

D: Posthumous reproduction in the Islamic jurisprudence

There is no consensus among Muslim scholars in regard with posthumous reproduction, where there are different opinions within the Islamic jurisprudence about it. These opinions could be classified in two views; the first view which prohibits carrying out reproduction after death of partner, while the second view allows it.

Firstly: Prohibitive view:- Although the view with the majority of Muslim scholar might admit the benefits of using modern assisted technologies in the domain of human reproduction, it forbids the harvesting of sperm from a deceased husband after his death or even the use of sperm collected whilst the husband was alive but used after his death.²⁰ This is because the marriage relationship according to this approach ends at moment of death of a partner or divorce,²¹ sperm from the deceased husband is considered an 'alien' element,²² and legal parentage of the child cannot be verified and confirmed in this case to the child's biological father. So ART in this case is unlawful because it is used after the end of the marriage relationship.²³

It is true that rules of the legal parentage in Islamic Sharia indicate that occurrence of pregnancy after the waiting period "*iddat*" could be illegitimate.²⁴ It is, however, important to notice that pregnancy after *iddat* is evidence that the embryo is not linked genetically to the deceased, and this may explain why legal parentage cannot be confirmed according to the classical rules of legal parentage in Islamic Sharia. In relation to ART, a child born using the deceased husband's gametes is linked genetically to the father, and this provides a distinction from the previous situation and a basis for confirming legal parentage.

Secondly: Permissive View: - On this more liberal view, ART after the death of the husband could be acceptable in some circumstances during the prescribed time "*iddat*". This is based on the view that carrying out ART immediately after death of husband could be acceptable, because marital life does not finish at the moment of death.²⁵ The effects of marriage relationship would continue even after death of husband at least until end of "*iddat*" time,²⁶ or even further unless the wife remarries.²⁷ Thus, artificial insemination using the husband's sperm is permissible if it occurs within a short period after the husband death, which could be similar to the position when the wife is pregnant at the time of her husband's death.²⁸ This is conditional upon sperm collection prior to death with the husband's consent for use for this purpose.²⁹

Such permission in this view may be expanded to include transfer of embryos after death of husband as long as the frozen embryo resulted from the married couple's gametes. This is also subject to being able to verify the legal parentage of the child to the child's deceased biological father.³⁰ This can be confirmed with the use of DNA testing. So, the child born following the use of ART using the married couple's gametes is the genetic child of both parents.³¹

IV: Posthumous reproduction in Australian law

This section deals with the legal regulation relating to posthumous reproduction in Australia. There are various approaches in dealing with posthumous reproduction in different States of Australia. It sets out the statutory provisions of posthumous use, and it then considers some cases relating to posthumous use and decisions of courts in different Australian States.

A: Legislation (statutory provisions)

In New South Wales, the *Assisted Reproductive Technology Act 2007* (NSW), refers in section 23 that clinics (ART provider) should not use gametes of a deceased person to create embryos unless the gamete provider has given consent prior to death to use his/her reproductive cells after death, and the woman who undergoes ART treatment has been notified about the death of gamete provider, and have given her consent.³² This indicates that conducting posthumous ART is prohibited unless required consents have been given. The *Human Tissue Act 1983* (NSW) in section 23 requires a written consent from the person prior to death, for removal tissue from deceased's body for transplantation or therapeutic purposes.³³ The same section of the Act permits removal bodily tissue from deceased when there is no consent, with condition that deceased during his life had not expressed objection on such removal, next kin of the deceased has given written consent, and there is no objection to such removal by the next of kin.³⁴

Victoria has similar provisions but with a further limitation in section 46 of *Assisted Reproductive Treatment Act 2008*. It requires for posthumous use of gamete and embryos, in addition, that the gamete must belong to a partner, husband, wife, or partner in de facto relationship, and that it is subject to approval of the Patient Review Panel, and the woman who undergoes ART has received counselling. In making this determination under section 47, the Panel must consider interest of a child who may be born as result of posthumous reproduction. The legislation in the Western Australian³⁵ does not refer to posthumous use of gametes but the directions which have been issued under this Act prohibit use for posthumous reproduction.³⁶

In South Australia, gametes should be extracted and collected before the death of the partner, and there must be consent by the gamete provider and the person undergoing ART as a condition for posthumous ART.³⁷ In addition, the NHRMC Guidelines indicate that using gametes in ART procedures should be in accordance with the consent of gamete provider.³⁸ So, clinics must not use gametes of the deceased, and his/her gamete should be disposed of, unless there is express consent from gamete providers that gametes can be used in ART after their death.

B: Case Law (court cases)

The issue of posthumous reproduction has been the subject of judicial decisions, where a partner has sought permission to collect and use sperm after the death of their partner in circumstances, where the deceased person had not given consent prior to death for its posthumous use. There appears to be inconsistent approaches to this issue in Queensland, Victoria and New South Wales. The subject includes two separate issues; extraction of sperm after partner's death without consent, and use of that sperm. In terms of extracting sperm from deceased's body, this issue was heard in some cases as it was urgent case.

In Queensland, in an urgent application, the Supreme Court of Queensland in *Re Gray*,³⁹ Chesterman J. refused an application of a widow for collection of sperm from her

deceased husband to conceive a child, although deceased's father, his next of kin, gave his consent on the proposed procedure, and the deceased had previously given consent, recorded on driving license, on removal organs in the event of his death. There was no discussion between the applicant and her deceased's husband about possibility of using ART after death. Chesterman J. held that there was no common law power to remove and extract any part from dead body. His honour further found that, the proposed procedure was unlawful as it was intended to conceive a child not for purposes of transplantation, treatment or scientific research as required under the *Transplantation and Anatomy Act 1979* (Qld). Moreover, there were also important policy issues where the widow in her application is affected by grief and shock. The interests of any children also need to be considered, where the court not certain about circumstances of the resulted child who will be born without father. This is not universal view. It has been pointed out that no one knows whether absence of a father will affect subsequent children.⁴⁰

In contrast, Atkinson J. in *Re Denman*,⁴¹ a Queensland case, approved an application by a widow for removal sperm from her deceased husband. The judge held that gametes of deceased could be collected and preserved as there was no statutory prohibition on such procedure, and as it was urgent matter. Likewise, In New South Wales, the Supreme Court, in *Re Estate of Edwards*,⁴² approved an application by a widow for possession of her deceased husband's sperm which had been extracted post mortem. This approval was based on section 23 of the *Human Tissue Act 1983* (NSW), which permits removal of tissues after death with the consent of the next of kin. Similarly, the collection of gametes of a deceased partner was also considered and approved by the Supreme Court of Victoria. In *AB v Attorney-General (Vic)*,⁴³ in 1998 a widow requested the extraction and storing of her deceased husband semen immediately after his death, by car accident. Gillard J. approved the wife's application for collection and storage of her deceased husband gametes. As the matter was urgent, approval was given based on the view that there was no statutory prohibition on the extraction and preservation of the deceased partner's gametes. However, no detailed consideration was given to issues concerning lawfulness and whether use is permitted under the relevant legislation. In NSW the *Human Tissue Act 1983* allows the removal of tissues after death with the consent of the next of kin.

If the extraction of sperm is permitted after death, the next issue is whether that sperm can be used in a reproductive procedure where the deceased had not consented to its use for ART purposes after his death. In regard with considering posthumous use, there is a particular concern for the well-being of a child born without a living parent.⁴⁴ In the second of the decisions concerning AB, an application was made to the Court for permission to use the deceased's sperm. In *AB v Attorney-General (Vic)*⁴⁵ the widow requested approval to transfer her deceased husband's sperm to the Australian Capital Territory (where she normally resided). The request was initially refused by the Infertility Treatment Authority. The reason for refusal was the potential for breach of section 43 of the *Infertility Treatment Act 1995* (Vic), as it was in force at that time.⁴⁶ The Supreme Court of Victoria found that the proposed procedure was not a breach of section 43 based on the detailed reading of that section. It was, however, a breach of section 12 of the *Infertility Treatment Act 1995* (Vic), which prohibited using the procedure because of absence of written consent of the deceased.⁴⁷ The Court did not object to the applicant lodging an application for transferring the gametes out of Victoria. The subsequent

application for transfer of gametes out of Victoria was approved by VCAT.⁴⁸ These decisions held by the court were under the previous Act in Victoria 1995.⁴⁹ The current Act requires written consent of the deceased, given prior to death, for posthumous use.⁵⁰

In contrast, the widow in *Re Estate of Edwards*,⁵¹ in relation to use of posthumous reproduction, was granted a declaration by the Supreme Court in NSW, where Hulme J held that she was entitled to possession of her deceased husband's gamete which enabled her to obtain IVF treatment using the deceased's sperm; the applicant widow was the administrator of her deceased husband estate. The trial judge considered whether there were property rights in the sperm. The Judge considered precedents relating to consideration of proprietary right claims on body and bodily tissues needed to determine to property right in the sperm. Granting such declaration by the Supreme Court in NSW for the widow, was based on a precedent that human body can be a subject of possession for purposes other than immediate burial.⁵² It held that dead body it is possible to be a subject of property. Where, using sperm of deceased to conceive a child in NSW case required determination as to who had the property in the sperm.⁵³ ART Act 2007 in the section 21 prohibits ART providers in NSW to carry out ART treatment for the widow in this case due to there is no written consent from the deceased, so the widow cannot obtain such treatment in NSW. However, according to that declaration which was granted to widow over estate of her deceased's husband, the widow is entitled to transfer and use the sperm somewhere else, especially the prohibition on supply or export gamete of deceased in the Act 2007 sections 21 and 22 is applied on clinics not on the widow basing on the possession declaration was granted by the court to the widow.⁵⁴

V: Standard for regulating posthumous reproduction in Iraq

This section provides standards for regulating posthumous reproduction in Iraq. It includes comparative analysis with the Australian approach, and recommendations for Iraq to regulate posthumous reproduction, as well as recognition of the legal effects of this process for best interest of children born through assisted reproduction after death of their parents.

A: Lessons from Australia

There is some variability between Australian jurisdictions in relation to some matters such as posthumous reproduction. There are two issues; first, the collection of sperm posthumously, and secondly the use of gametes after the gamete provider's death. The first issue depends upon legislation allowing the removal of tissues or organs after death. The second issue whether it serves the public interest, that gametes be used after the provider's death. In some Australian states,⁵⁵ it is permissible for clinics to use a male partner's gametes after his death, if the deceased gave prior consent as well as consent of woman who undergoes ART.⁵⁶ This does not necessarily prevent collection of gamete after death.

B: Regulating posthumous reproduction in Iraq

It is recommended that the Iraqi law should allow posthumous reproduction. But, there should be some conditions that limit carrying out posthumous reproduction, and, set some requirements and limited periods and for it. Where, allowing posthumous reproduction should be restricted and permissible in limited circumstances, including marital status, collection of gamete, required consent and limited period.

For that, posthumous reproduction could be in Iraq allowed for a widow who wishes to have a child using her deceased husband stored gametes or embryos that were extracted

and stored before death event with husband's consent prior to death on such use. As mentioned in above, there is no permission in Iraqi law to extract sperm after death, and the Iraqi Act relating to transplantation of human tissues and organs cannot be applied on ART. Where, with the provider's consent, gametes should be extracted and preserved prior to death. In this context, it is suggested that Iraqi law could adopt similar Victorian approach that consent of male partner prior to death is required for use after the partner's death, with approval of the public authority, represented in a specialized panel is established for this purpose, the panel should consider public interest and interest of children who may be born as a result of using deceased gamete, in giving consent to carrying out posthumous reproduction.

In terms of period when the widow can request to undergo posthumous reproduction, the period of time available for us following the husband's death should be limited. limiting the period for conducting posthumous reproduction is necessary to avoid the disadvantage that the estate cannot be distributed or finalised, as well as serving other social objectives such as confirming legal parentage. It is suggested that the period of 3 months after the death of the husband might be appropriate. As the marriage relationship continues after death of husband, during waiting period "*iddat*", carrying out posthumous reproduction should be permitted in the minimum period for use after death. So, the period for carrying out posthumous reproduction could be set at the *iddat* period (3 months), which is a suitable limit, as it is consistent with current practices and with liberal view of Muslim scholars which believe that marriage continues until the end of *iddat* time.

C: Recognizing rights of posthumous children

Iraqi law should consider the new change of assisted reproduction and take it in the account, specifically in relation to recognition of right of the child conceived after death of its parent creating through using frozen embryos, or gamete belong to the deceased and extract prior to the death event. In case of allowed posthumous, it should be recognized all other marriage effects that are based on parentage including right in inheritance. The child should be regarded as the lawful child of the wife and the deceased husband, this would be on the ground that the genetic connection between a child and the deceased parent exists. Thus, confirming lineage of posthumous children conceived through assisted reproduction should be recognized legally as long as they are linked genetically to their parents, and the sexual materials collected and fertilized prior to death event, and there is consent and approval for carrying out transplantation process. Especially, a child who is born within one year of death of parent is recognized as a lawful child of the deceased parent.

VI: Conclusion

This article has argued that carrying out posthumous reproduction is not prohibited by the legal provisions of the Iraqi law. As discussed, the classic provisions regulating related issues such as parentage and inheritance do not include any prohibition against conducting reproductive process after death of partner. Moreover, such provisions are design to regulate the legal effects of natural human reproduction, so they are insufficient to deal with the new changes in human reproduction brought as a result of different activities of ART and the legal issues and problems raised on it. So that, there is need to regulate posthumous reproduction issue and its effects. It has been suggested that Iraqi law should regulate this issue by imposing limitations on carrying out posthumous

reproduction, as similar as the Australian approach which allows conducting posthumous reproduction under limited circumstances, where several factors should be considered such as marital status, parties' consents and interests of posthumous children.

The article presented a model standard to regulate posthumous reproduction for Iraq, where there are considerations should be taken into account in order to conduct posthumous reproduction, considerations represent in marital status, parents' wishes, consents, and interest of the conceived child. Where, carrying out this process should be in accordance with wish and consent of the woman who is receiving ART treatment, and extracting reproductive cells of male for reproductive purpose should be with consent of husband prior to his death. In addition, carrying out posthumous reproduction should be approved by the public authority, given by a specialized panel that is constituted for this purpose. The panel should consider, in granting approval, interests of the children who may be born as a result of carrying out posthumous reproduction. Moreover, the reproductive materials used for posthumous reproduction should be extracted and stored prior to death event. In addition, permissible posthumous reproduction should be requested and carried out during three months after death of husband, this may assist in insuring the stability and legal rights of individuals. Finally, it has been suggested that there is a need to amend the classic provisions in Iraqi law related to confirming parentage and right to inherit, in the light of assisted human reproduction, in order to confirm lineage of posthumous children to their biological parents.

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- 2- *The Syrian Personal Status Law Act 1953.*
- 3- *The Iraqi Personal Status Law Act 1959.*
- 4- *Transplantation and Anatomy Act 1979 (Queensland).*
- 5- *Human Tissue Act 1983 (New South Wales).*
- 6- *Assisted Reproductive Treatment Act 1988 (South Australia).*
- 7- *Human Reproductive Technology Act 1991 (Western Australia).*
- 8- *Infertility Treatment Act 1995 (Victoria).*
- 9- *the Assisted Reproductive Technology Act 2007 (New South Wales)*
- 10- *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research (NHMRC, 2007) Australia.*
- 11- *Assisted Reproductive Treatment Act 2008 (Victoria).*
- 12- *The Transplantation Operations of Human Organs and Tissues and Prohibition of Commercialization Act 2016 (Iraq).*

Fourth: Court Cases

- 1- *Doodeward v. Spence* (1908) 6 CLR 406.
- 2- *Re Gray* [2000] QSC 390 (12 October 2000).
- 3- *Re Denman* [2004] QSC 070 (12 February 2004).
- 4- *AB v. Attorney-General (Vic)* [2005] VSC 180 (27 May 2005).
- 5- *YZ v. Infertility Treatment Authority* [2005] VCAT 2655 (20 December 2005).
- 6- *Re the Estate of the Late Mark Edwards* [2011] NSWSC 478 (25 July 2011).

Endnotes

- 1 Gamete in oxford English dictionary is (a mature haploid male or female germ cell which is able to unite with another of the opposite sex in sexual reproduction to form a zygote), i.e. sperm and ova. Catherine Soanes and Angus Stevenson, *Concise Oxford English Dictionary*, (Oxford University Press 11th ed., 2008) p 584.
- 2 Katherine Gunnison, 'Poaching the Eggs: Courts and the Custody Battles over Frozen Embryos' (2006) 8 *Journal of Law & Family Studies* 275, p 277.
- 3 Ejaculated and collected semen comprise seminal liquid, sperms, debris and white cells. John Parsons, 'Assisted Conception: the state of the ART', cited in Donald Evans, *Creating the Child: the Ethics, Law and Practice of Assisted Procreation*, (Martinus Nijhoff Publishers, 1996) p 17.
- 4 Anastasia Grammaticaki-alexioiu, 'Artificial Reproduction and Conflict of Laws: An Initial Approach' (2000) 60 *Louisiana Law Review* 1113, 1114.
- 5 Hossam Fadel, 'the Islamic Viewpoint on New Assisted Reproductive Technologies' (2002) 30 *Fordham Urban Law Journal* 147, p152.
- 6 Sara E. Barton et al, Population-based Study of Attitudes Toward Posthumous Reproduction, *Fertility and Sterility Journal*, vol. 98 no. 3, Sept. 2012, 735-740: p735.
- 7 Jason D. Hans & Brigitte Dooley, Attitudes Toward Making Babies With a Deceased Partner's Cryopreserved Gametes, *Death Studies Journal*, 38:9, 2014, 571-581: p 572. And, Sara E. Barton et al, Population-based study of attitudes toward posthumous reproduction, *fertility and sterility journal*, vol. 98 no. 3, sept. 2012, 735-740: p 736.
- 8 The *Personal Status Law Act 1959* section 51.
- 9 The Iraqi law does not refer to the period of pregnancy. there is, however, consensus that the minimum period of pregnancy is six months. Ahmed Al-Kubaisi, *Succinct in Interpretation of Iraqi Personal Status Law-Part2* (Arabic Version) (Al-Ateek, 2nd ed, 2006) P 198. [Author's Trans].
- 10 In relation to the maximum period of the pregnancy, the Iraqi law does specify it, but other regional legislation specified it with one year. See section 15 of *Egyptian Personal Status Law Act 1929*, and section 128 of the *Syrian Personal Status Law Act 1953*.
- 11 The *Personal Status Law Act 1959* section 86/c.
- 12 The *Personal Status Law Act 1959* section 1 (2) indicates that if there is no applicable legislative provision, the principles of sharia that are most relevant to this Act should be considered.
- 13 Ahmed Al-Kubaisi, *Succinct in Interpretation of Iraqi Personal Status Law-Part2* (Arabic Version) (Al-Ateeq, 2nd ed, 2006) 92.

- 14 The *Transplantation Operations of Human Organs and Tissues and Prohibition of Commercialization Act 2016*, s 2, and 5 (1).
- 15 *Ibids* s 5 (4)
- 16 *Ibids* s 5 (5)
- 17 *Ibids* s 5 (6)
- 18 See, Elizabeth A Martin (ed), *Concise Medical Dictionary* (Oxford University Press, 8th ed, 2010) 523.
- 19 *Ibid* s 12.
- 20 Husaini Haikal, *Legal System of Artificial Procreation: Between Positive Law and Islamic Sharia* (Arabic Version) (Dar Al-kutub Al-Kanonia, 2007) 132.
- 21 Saadi Ismail Al-Barazanji, *Legal Problems of Recent Reproductive Technologies* (Arabic Version) (Selah Al-Deen University, 2002) 70.
- 22 This is view of Mustafa Al-Zarga. See, Amira Adli Amir Khaled, *The Penal Protection of the Embryo in The Light of Contemporary Techniques* (Arabic Version) (Dar Al-fiker Al-Jamie, 2008) 197.
- 23 Saadi Ismail Al-Barazanji, *Legal Problems of Recent Reproductive Technologies* (Arabic Version) (Selah Al-Deen University, 2002) 69-70.
- 24 *Iddat* is an arabic word refers to a waiting period that a woman should wait a specific period of time after her marriage relationship is over until she can remarry again.
- 25 The evidence which supports this argument, it is allowed in Islam for the partner to bathe body of his/her deceased partner. Shawqi Zakaria Al-Salihi, *Artificial Fertilizing Between Islamic Sharia and Positive Laws* (Arabic Version) (Dar Al-Nahda Al-Arabia, 2001) 50.
- 26 Husaini Haikal, *Legal System of Artificial Procreating: Between Positive Law and Islamic* (Arabic Version) *Sharia* (Dar Al-kutub Al-Kanonia, 2007) 133.
- 27 Saadi Ismail Al-Barazanji, *Legal Problems of Recent Reproductive Technologies* (Arabic Version) (Selah Al-Deen University, 2002) 70-71.
- 28 This is opinion of Jad Al-Haq Ali Jad Al-Haq. See, Ahmed Mohammed Lutfi, *Artificial Fertilizing: Between Sayings of Physicians and Opinions of Jurists* (Arabic Version) (Dar Al-fiker Al-Jamie, 2006) 103.
- 29 Shawqi Zakaria Al-Salihi, *Artificial Fertilizing Between Islamic Sharia and Positive Laws* (Arabic Version) (Dar Al-Nahda Al-Arabia, 2001) 49-52.

30 This is opinion of Ayatollah Ali Husseini Khamanei (the Supreme Leader of Iran). See, Marcia Inhorn, 'Fatwas and ARTs: IVF and Gamete Donation in Sunni v. Shi'a Islam' (2005) 9 *The Journal of Gender, Race and Justice* 291, 305.

31 Shawqi Zakaria Al-Salihi, *Artificial Fertilizing Between Islamic Sharia and Positive Laws* (Arabic Version) (Dar Al-Nahda Al-Arabia, 2001) 51.

32 ART provider is defined in section 4 (1) of the *Assisted Reproductive Technology Act 2007* (NSW), which states that 'ART provider means a person who provides ART services and includes a registered ART provider, but does not include a person who provides ART services on behalf of a registered ART provider either under contract or in the course of the person's employment by the registered ART provider.'

33 *Human Tissue Act 1983* (NSW) section 23 (1) (a).

34 Ibid section 23 (3).

35 The Act requires consent of gamete provider in order to use his/her gamete in ART procedures, including using them to generate and conceive offspring or for storage of gametes/embryos. Such procedures cannot be done without consent. See, *Human Reproductive Technology Act 1991* (WA) section 22.

36 *Human Reproductive Technology Act 1991* (WA) sections 8-9.

37 *Assisted Reproductive Treatment Act 1988* (SA) section 9 (c) (iv).

38 More details about obtaining consent are stated in part 9 of the ethical guidelines. National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (NHMRC, 2007)

39 *Re Gray* [2000] QSC 390 (12 October 2000).

40 Marett Leiboff, 'Post-Mortem Sperm Harvesting, Conception and the Law: Rationality or Religiosity?' (2006) 6 (2) *Queensland University of Technology Law and Justice Journal* 193, 204.

41 *Re Denman* [2004] QSC 070 (12 February 2004).

42 *Re the Estate of the Late Mark Edwards* [2011] NSWSC 478 (25 July 2011).

43 *AB v. Attorney-General (Vic)* [2005] VSC 180 (27 May 2005).

44 Belinda Bennett and Malcolm Smith '*Assisted Reproductive Technology*' in Ben White, Fiona McDonald and Lindy Willmott (eds), *Health Law in Australia* (Thomson Reuters, 2nd ed, 2014) 413- 439. Also, Ian Kerridge, Michael Lowe, and Cameron Stewart, *Ethics and Law for the Health Professions* (The Federation Press, 4th ed, 2013) 532.

45 *AB v Attorney-General (Vic)* [2005] VSC 180 (27 May 2005).

46 Section 43 stipulates that (A person must not- (a) inseminate a woman with sperm from a man known to be dead; or (b) transfer to a woman a gamete from a person known to be dead; or (c) transfer to a woman a zygote or an embryo formed from a gamete from a person known to be dead; or (d) form a zygote with sperm from a man known to be dead; or (e) form a zygote, if the woman who produced the oocyte used to form the zygote is known to be dead).

47 The *Infertility Treatment Act 1995* (Vic) section 12 relating donation of gametes or embryos provides:

(1) Sperm is not to be used in a treatment procedure to be carried out on a woman who is not the wife of the man who produced the sperm, unless, before the sperm is used, that man consented to the use of the sperm in the kind of procedure proposed... (3) An embryo must not be used in a treatment procedure to be carried out on a woman, if the sperm used to form the embryo is not the sperm of the husband of that woman, unless: (a) before the embryo is formed, the man who produced the sperm consented to the use of the sperm to form an embryo to be used in the kind of procedure proposed.

48 *Y Z v. Infertility Treatment Authority* [2005] VCAT 2655 (20 December 2005).

49 The *Infertility Treatment Act 1995* (Vic).

50 See, *Assisted Reproductive Treatment Act 2008* (Vic) section 46 (b).

51 *Re the Estate of the Late Mark Edwards* [2011] NSWSC 478 (25 July 2011).

52 Where there is decision made by High Court of Australia confirmed that dead human body can be subject of possession. *Doodeward v. Spence* (1908) 6 CLR 406.

53 For more details, see, Thomas Faunce and Jatine Patel 'Re Edwards: Who Owns a Dead Man's Sperm?' (2012) 19 (3) *Journal of Law and Medicine* 479, 480.

54 The *Assisted Reproductive Technology Act 2007* (NSW) in section 21 stipulates that 'An ART provider must not supply a gamete or an embryo to another person (including another ART provider) except with the consent of the gamete provider and in a manner that is consistent with the gamete provider's consent.' Section 22 provides that 'An ART provider must not export, or cause to be exported, a gamete or an embryo from this State except with the consent of the gamete provider and in a manner that is consistent with the gamete provider's consent.'

55 Such as in New South Wales and Victoria as discussed above.

56 See for example, *Assisted Reproductive Technology Act 2007* (NSW), section 23.