The Legal Regulation of Assisted Reproductive Technology in Iraq - Lessons From the Australian Approach

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Dedication

I dedicate my thesis to my loving mother with special feeling of gratitude for her prayers and caring.
Acknowledgements

I would like to express my appreciation for all people who supported me in fulfilling the successful completion of my thesis for their moral and logistical support.

Foremost, I am very grateful to my supervisory panel team, Professor Carolyn Sappideen and associate professor Scott Mann, for your efforts and valuable guidance and advice that you provided me and for your patience during entire process of my research.

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Statement of authenticity

The presented thesis is original work and hereby I declare that I have not submitted materials of this work as in full or in part for a degree at any institution.

Khaled Fayadh
Abstract

This thesis is concerned with the legal regulation of assisted reproductive technology (ART) in Iraq. ART has become widespread throughout the world including the Middle Eastern region but there is no specific legislation in Iraq that addresses ART. ART represents a problem for Iraqi law because the technology, particularly procedures that use donor genetic material, challenge the Iraqi social, Sharia and legal conceptions of what is a family, the status of children born using ART and legal parentage. The thesis examines the current Iraqi law in relation to ART, and argues that Iraqi laws are inadequate to regulate ART. This thesis argues that a legislative solution for ART is required for Iraq. The Australian experience, with particular emphasis on New South Wales, is used to inform the type and content of the legislative solution and the balance between formal statute based regulation and industry based regulation.

But the thesis argues that Iraq cannot automatically adopt the Australian social and legal approaches relating to the formation and legal recognition of what is a family, the status of children, and access to ART by single persons and same sex couples. It is argued that the Australian approach cannot be transplanted into the Iraqi legal system because of the very different conceptions of family, inheritance, lineage and status of children according to Iraqi law, Sharia law, and existing social and legal norms. In the light of this, the thesis argues that, at a minimum, ART should be approved for married couples using their own gametes.
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Chapter 1 Introduction

The thesis is an examination of the legal regulation of artificial reproductive technologies (ART) in Iraq. It explores how Iraqi law based on Sharia law responds to these new technologies and whether Iraq should formally regulate ART. The legal position in Australia, with a focus on New South Wales, will be used to highlight possible different approaches to a model for regulating ART in Iraq. The thesis does not undertake a detailed examination of the range of techniques that are available; the focus is on the use of Artificial Insemination (AI) and In Vitro Fertilisation (IVF) as the principal methods. The thesis examines the principal methods of ART as a means of overcoming infertility for couples, consequently it does not examine those cases where ART might be employed for personal preference, sex selection, posthumous reproduction, or to diminish the risk of genetic disability or for other reasons, nor is the very large topic of surrogacy considered. Each one of these would be a thesis in itself.

1.1 Background of the Study

Since the birth of Louise Brown, the first test-tube child, using in vitro fertilisation (IVF) in Britain in 1978,\(^1\) assisted reproductive technologies have caused interest and concern from religious, legal and ethical perspectives. ART as an artificial means of human reproduction was basically developed in order to help infertile couples to have children who are genetically

linked to them.\footnote{Lewis Vaughn, \textit{Bioethics: Principles, Issues, and Cases} (Oxford University Press, 2\textsuperscript{nd} ed, 2013) 392.} The ART process might involve and require donated gametes or embryos so that a subsequent child may not be the genetic offspring of the putative parents.\footnote{Angela Cameron, Vanessa Gruben and Fiona Kelly, ‘De-Anonymising Sperm Donors in Canada: Some Doubts and Directions’ (2010) 26 \textit{Canadian Journal of Family Law} 95, 96.} In Iraq, ART represents a challenge to basic religious, legal concepts and social norms. Early objections to ART in Australia have currency in Iraq. ART is seen as divorcing conception from intimate personal relationships which leads to procreation and fertilisation processes being conducted in clinics. The critical issue is where donor’s gametes or embryos are used so that a child born utilizing ART is not the genetic child of the couple. This causes particular difficulties in Iraq as it conflicts with traditional notions of what is a family recognised in law and Sharia, see chapter 4 at (4.4 and 4.5).

ART might require rethinking family relationships and the linkages to filiation and kinship as well as paternity and maternity.\footnote{Roxanne Mykitiuk, ‘Beyond Conception: Legal Determination of Filiation in the Context of Assisted Reproductive Technologies’ (2001) 39 (4) \textit{Osgoode Hall Law Journal} 771,772. These issues will be examined in chapter 4.} In relation to the Middle East,\footnote{The term (Middle East Region) refers to Arabian countries, Turkey and Iran. In this region religion, particular Islam plays a significant role in the Middle Eastern communities and their behaviour.} there are high levels of infertility. This is discussed in detail in the following chapter. Infertility can have serious social consequences as a wife’s infertility may result in divorce.\footnote{Jamila Hussain, \textit{Islam, Its Law and Society} (Federation Press, 2011) 158.} As a result, ART clinics flourish throughout the Middle East and have become widespread in the recent time. In 2013 in the nearby country of Lebanon, with a population just under 4.5 million, there were reported to be 20 infertility clinics assisting infertile couples locally and from neighbouring regions in which ART is effectively prohibited,\footnote{Beckie Strum, ‘Fertility treatments in Lebanon regular but unregulated’, \textit{The Daily Star Lebanon} (online) 28 August 2013 <http://www.dailystar.com.lb/News/Lebanon-News/2013/Aug-28/228955-fertility-treatments-in-lebanon-regular-but-unregulated.ashx#axzz3EJPaDBfI>}. and there are approximately sixty clinics in
Egypt. However, there is no formal legal regulation of ART in most of the Middle Eastern countries including Iraq.

Many developed countries around the world realised the importance of regulating ART and have enacted legislation to regulate ART, with considerable variation in the legislation in countries such as Australia, UK, US, and Canada. Currently, there is no specific legislation in Iraq (or the region) regulating ART so that clinics across the Middle East are operating in a legal vacuum. The thesis first examines how existing Iraqi law might apply to ART and children born as a consequence and whether or not the existing provisions are sufficient. It then considers whether the limitations of existing Iraqi law require specific legislation regulating ART in Iraq and if so what type of legal regulation should apply in the light of the civil code system and Sharia. A restricted view suggests that ART should only be available to married couples using their own genetic material. The thesis considers whether this view should prevail. It considers eligibility criteria to access this technology, as well as activities which should be regulated and the reach of regulation which may be required if some forms of ART are permitted. It examines the future role for regulation of ART in Iraq in the light of existing Iraqi laws as well as principles of Sharia law. This will be contrasted with the regulation of ART in Australia; the state of New South Wales will be taken as broadly representative of the regulatory approach in Australia.

The thesis is not a religious studies thesis but it will highlight some the key differences between Muslim scholars’ views including Sunni and Shia sects. It will explore how Sharia

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9 For example, the Act which regulates ART in Canada is called Assisted Human Reproduction Act 2004.
10 It will discuss in particular the Assisted Reproductive Technology Act 2007 (NSW), with some references to legislation in other Australian states. It also considers other relevant legislation which can be affected by ART including legislation dealing with the status of children, human tissue, adoption, and succession.
and Iraqi law deal with ART and how far the limitations suggested by some Sharia scholars are underpinned by particular views about the concept and structure of family, maternity and paternity, as well as legal parentage and inheritance. It also examines general legal principles of Islamic Sharia in relation to human reproduction, as well as Islamic jurisprudence, Islamic doctrines and the opinions of modern Muslim scholars about extent of legitimacy of different activities of ART. The review of Iraqi laws may assist in assessing whether or not the existing provisions in Iraqi laws are sufficient to regulate ART.

If specific regulation is required, it is necessary to consider what matters should be formally regulated and what matters should be the subject of non-mandatory guidelines or medical judgment. The thesis will argue in chapter 3 that a legislative solution is required. Without regulation there is a significant risk that ART may be subject to ad hoc solutions and varying views of religious scholars. This is likely to generate variable responses and no coherent approach to dealing with ART. There is the further problem that without formal regulation of ART, practices may develop which are not medically appropriate and with serious risks to participants and subsequent children; for example the failure to screen gametes prior to use with resultant risk of inheritable diseases. Moreover, legislative solutions will provide clear rules for dealing with conflicts of interest between the parties as well as issues relating to the status of children born as a consequence of ART. So, the question is whether a legislative solution is appropriate for Iraq. If Iraq were to formally regulate ART, there is further issue of how to evaluate proposed legislative frameworks. In this respect, the three approaches of Sharia law scholars and also Western solutions are examined. Proposals do not exist in a social or legal vacuum so that regulatory proposals need to be evaluated in the light of the interaction between marriage, and the legal recognition of families, legal parentage and inheritance.
This thesis discusses western approaches represented by Australian law, and approaches of Islamic Sharia in order to reveal intersection points and to develop modern and suitable rules for ART in Iraq. As the law reflects societal needs, it is necessary to also consider the culture, structure of family and related family law issues. This comparison will contribute to a new understanding of what regulation is needed in Iraq that is consistent with the fundamental principles of Sharia. Finally, the thesis concludes with recommendations about a proposed model for regulating ART in Iraq and the required reforms to Iraqi law. This approach could be a mixture of Islamic and Australian approaches.

The thesis argues that the legislative solution for ART is required in Iraq in order to control uses of ART in a way which provides advantages and avoid disadvantages. It will be argued that Iraqi law could benefit from the regulatory experience of Australia as a pioneer in IVF and regulatory responses. The lessons that could be learnt and adopted from Australian are those that may assist in formulating a regulatory response which does not conflict with cultural and legal traditions in Iraq that are compatible with freedom and human rights.

1.2 Structure of the Thesis

The thesis deals with two main issues. The first is the impact of existing Iraqi law on ART. The second is whether ART should be regulated in Iraq and if so, the nature and extent of the regulation. In order to set the context for the discussion, chapter 2 includes an overview of ART. It discusses medical aspects, clinical procedures and principal methods involved in

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11 As to the comparative law approach; see, Mary Ann Glendon, Michael W. Gordon and Paolo G. Carozza, *Comparative Legal Traditions in a Nutshell* (West Group, 2nd ed, 1999) 9.
ART. The focus is on ART as an artificial means of overcoming infertility. It will also point to potential risks and benefits involved with ART.

Chapter 3 examines the principal arguments for the regulation of ART. It first considers the general issue whether regulation is always the appropriate solution to dealing with social issues or whether Iraq should allow a free market to prevail. It sets out effects of regulation and deregulation. This chapter then discusses theories for and against regulation. It will then give particular consideration to the need to regulate ART for the protection of health and welfare of children and individuals as well as safety and stability of society.

Chapters 4 and 5 examine how the existing Iraqi law and Islamic Sharia apply to ART in the absence of specific legislative provision.

Chapter four considers the current legal situation applying to ART in Iraq. It first sets out the constitutional framework, including an overview of the Iraqi legal system as well as constitutional provisions and rights and freedoms that might be related to ART. It then reviews Iraqi legislation that could apply; this requires discussion of whether existing laws that regulate similar activities could be adequate to deal with the special problems arising out of the use of ART. It also highlights how ART may challenge the law relating to the formation of family and marriage as an essential element in establishing a family as well as issues relating to legal parentage and inheritance.

Chapter five explores ART from the perspective of Sharia. It will be argued that there is no direct provision in sources of Sharia law dealing with ART nor is there consensus among
opinions of Muslim scholars on ART. The chapter provides a brief background to Islamic Sharia, and the different views of Muslim scholars about ART. Islamic Sharia is considered a main source of legislation in most Middle Eastern communities including Iraq and plays a significant role in Middle Eastern communities as well as on the lawmaking process. Lawmakers in many Middle Eastern countries are compelled by law to consider principles of Sharia in issuing legislation which should not contradict principles of Islamic Sharia. This discussion is important in determining whether or not there should be limitations imposed on carrying out ART procedures.

Chapters 6 and 7 deals with Australian law in relation to family recognition and ART regulation.

Chapter six sets the context for a detailed examination of the regulation of ART in Australia with a particular focus on the state of New South Wales (NSW). Australia is considered a pioneer in developing ART techniques and regulating ART. The chapter starts by providing a brief overview of the Australian legal system. It then considers the forms and structure of the family under Australian law and how the current law relating to ART affects the status of children, parentage and succession. The Australian experience provides a comparator for determining what regulatory approach would be suitable for Iraq.

Chapter seven reviews the current regulatory framework of ART in Australia generally and in NSW in particular. This may assist in understanding why regulation may be necessary and the benefits and negative aspects of regulation. It also reviews legislative and non-legislative provisions in relation to ART in Australia focusing on regulations applying in NSW. It
consider eligibility criteria for ART and legal requirements for ART. This includes such matters as registration, eligibility, donation of gametes and embryos and genetic contribution by a third-party in the ART process. The Australian experience may inform Iraqi legislators as to the benefits and negatives related to regulating ART.

Chapter 8 provides recommendations for a suitable model of ART regulation for Iraq and establishing guiding principles for future regulation. Especially, this chapter will consider divergence and similarities between Islamic law and Australian law and how the broader context of the family, marriage, the status of children and inheritance influence potential models. The model which will be proposed could be a mixture of Islamic and Australian approaches. It will include recommendations to reform the Iraqi legal system. The chapter concludes with recommending a staged approach to reform which takes into account the difficulties of legislating for ART, the unstable political situation and the need to modernize Iraqi law in order to adapt to technological and cultural changes relating to human reproduction.
Chapter 2 Overview of ART

2.1 Introduction

The purpose of this chapter is to provide an overview of the medical procedures relating to assisted human reproduction. This discussion is important in order to understand the main arguments about whether ART should be regulated, and if so the extent of the regulation and limitations which might be imposed on the uses of ART. This chapter first begins with a brief explanation of human reproduction and infertility. It then provides a description of ART and the principal methods of ART, artificial insemination and in vitro fertilisation. It also refers to cryopreservation of gametes and embryos. It will refer to the advantages and disadvantages from using ART. It then will discuss genetic contribution where couples use their own gametes or embryos or where there is a genetic donor.

2.2 Human Reproduction and Infertility

Pregnancy naturally occurs in approximately 85-90 per cent of healthy couples during the first year of a sexual relationship; 10-15 per cent of couples are affected by infertility.¹ This section provides background information about barriers to human conception. This is important in order to examine how far assisted reproductive technology can overcome these barriers. This section includes basic information about infertility, and causes of infertility.

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2.2.1 Description and Definition

Human procreation and pregnancy occurs naturally as a result of sexual intercourse between male and female. Ovum once produced can survive for 24-28 hours, whilst sperm can survive for a couple of days. In the normal situation, ejaculatory fluid contains approximately 40-80 million sperm; sperm swim through the womb toward fallopian tube, where usually a single sperm successfully penetrates the ovum and fertilises it naturally. The fertilised ovum before cleavage begins is called a zygote. It contains both male and female pronuclei. Then, the division stage of fertilised ovum begins, where zygote divides into a number of cells, and division or cleavage of the oocyte leads to the formation of an embryo.

The inability of a couple to conceive children might be because of sterility or infertility. Sterility refers to the physical incapacity to have children. For example, a couple may be unable to have children because of the absence of reproductive organs or it could be as result of inability of couples to produce reproductive cells, ova and sperm. This contrasts with infertility. The standard definition of infertility is ‘the inability of a couple to achieve conception after 12 months period of unprotected intercourse, or the inability to carry a

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3 Ibid 56.
pregnancy to live birth. The Canadian Royal Commission on New Reproductive Technologies defines infertility as ‘the absence of pregnancy in a couple who have been cohabitating for at least the past two years and who have not used contraception during that period.’ A more expansive definition is ‘an inability to conceive for one or two years by a couple who are having acts of unprotected sexual intercourse during the woman’s fertile period.’ In this thesis, the term “infertility” will be used as a generic term to cover both sterility as defined above and infertility.

2.2.2 The Statistics and Causes of Infertility

A principal reason for resort to assisted reproductive technology is the inability to have children because of infertility problems. It is estimated by the World Health Organization that more than 80 million people worldwide are affected by infertility. The rate of infertility can vary from 5 percent in some countries to 30 per cent in others. The rate of infertility is higher amongst people who live in developing countries as a result of lack of fertility services. It is estimated that total rate of infertility worldwide is between 10-15 per cent. The infertility rate in the US is about 10 per cent of couples (6.1 million couples). In relation to married couples in the US, infertility affects about 2.1 million married couples; this represents 7.1 per cent of married couples. The rate of infertility could be higher in the

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9 This is the definition which established by the World Health Organization. See. Victoria Breidahl, ‘The Art of Fertility Nursing in Australia’ (2005) 13(4) Australian Nursing Journal 1,1.
11 Ford, above n 7, 100.
12 Ibid 100.
14 Fritz and Speroff, above n 1, 1137.
15 Sangha, above n 8, 807.
developing world compared with developed world, so infertility may represent a bigger problem in the Middle Eastern region. The high stress caused by conflict and war in the Middle Eastern region is particular factor which contributes to the high infertility rate in that region.17

Infertility may be caused by a variety of factors. It is usual to classify the causes as either female infertility, male infertility or unexplained infertility. A range of factors affect female fertility. A significant factor that may lead to increase infertility is age especially for women. The peak age for fertility of females is between the ages of 20-24; fertility decreases with age.18 This is a common problem in western countries where women delay child bearing until later in life, and even with assisted means of fertilisation, fertility diminishes with age.19 The common medical problems causing female infertility include problems related to ovulation (20 per cent of total cases of infertility),20 including the absence of ovulation.21 There are also factors related to the fallopian tubes (30-35 per cent)22 and endometriosis23 which is related to infertility in 20-40 per cent of infertile women.24 Male factors are also a common factor in infertility contributing roughly 35 per cent of total cases of infertility.25

18 Comparing with the fertility of females at age 20-24, it decrease about 4-8per cent at age 25-29, and 15-19 percent at age 30-34; declining fertility increases progressively at age 35-39 about 26-46per cent, and it reaches 95per cent at age 40-45. The fertility of a female at age 20 is about double that of a female over 40 years old. See, Fritz and Speroff, above n 1, 1140.
19 Statistics in Australia and New Zealand show that highest delivery rate is in women who are under 30. See, table 9 of Alan Macaldowie et al, ‘Assisted Reproductive Technology in Australia and New Zealand 2011’ (Sydney National Perinatal Epidemiology and Statistics Unit, the University of New South Wales, 2013) 11
20 Fritz and Speroff, above n 1, 1160.
22 Fritz and Speroff, above n 1, 1177.
23 Endometriosis refers to the presence of tissue similar to the lining of the uterus at other sides in the pelvis; it is thought to be caused by retrograde menstruation. See, Martin, above n5, 244.
24 Fritz and Speroff, above n 1, 1335.
25 Ibid 1160.
Infertility may be also caused due to incapacity to conceive or the inability to produce viable or sufficient sperm. There a variety of other factors which may affect fertility such and smoking, and stress.

The Australian and New Zealand figures for IVF recipients for 2011 were as follows; 22.5 per cent of infertility cases are related to male infertility factors as the only cause of infertility; 28.5 per cent are reported as female only infertility factors, while about 14.3 per cent reported combined male-female factors; 22.7 per cent were reported as unexplained infertility; and 11.7 per cent were not reported. Beside the classical methods of treating infertility such as drugs or surgery, infertility might be treated or minimised through assisted reproduction (ART). The section below includes details about ART.

2.3 ART: Principal Techniques

This section provides basic information about ART and its principal methods including a description of clinical procedures beginning with gamete collection, fertilisation, and embryo transfer. ART refers to several clinical procedures whose purpose is to assist infertile

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27 Smoking may affect fertility, causing ovum damage and reduction in the quality of sperm. See, Boomsma and Macklon, above n 21, 350.
28 Ford, above n 7, 101.
29 Macaldowie et al, above n 19, 7
30 Vaughn, above n 4, 392.
31 Gametes refer to the mature sexual reproductive cells of the male (sperm) and female (ovum); gametes are haploid, containing half number of chromosomes. See Martin, above n 5, 295.
individuals and couples to have children.\textsuperscript{32} ART is defined in the NSW legislation as follows:

ART treatment means assisted reproductive technology treatment being any medical treatment or procedure that procures or attempts to procure pregnancy in a woman by means other than sexual intercourse, and include artificial insemination, in-vitro fertilisation, gamete intrafallopian transfer and any related treatment or procedure that is prescribed by the regulations.\textsuperscript{33}

The definition is expansive so that new techniques such as ovarian tissue transplantation could be prescribed by the regulations and covered by the legislation.\textsuperscript{34}

The principal methods of ART are; artificial insemination (AI) and in vitro fertilisation (IVF). Frequently, the use of these techniques might also involve cryopreservation of gametes and embryos referred to below. As explained in chapter one, the thesis does not discuss related issues such as sex selection, pre-implantation diagnosis, reproductive cloning or surrogacy.

The principal methods of ART are as follows.

\textbf{2.3.1 Artificial Insemination (AI)}

Artificial insemination was first used to improve animal breeding stock\textsuperscript{35} with evidence of its use by Arabs in the 14\textsuperscript{th} century to improve the breeding of horses.\textsuperscript{36} The first evidence of using AI in human reproduction was in the 18\textsuperscript{th} century where John Hunter used AI to assist

\begin{flushright}
\textsuperscript{32} Belinda Bennett and Malcolm Smith ‘Assisted Reproductive Technology’ in Ben White, Fiona McDonald and Lindy Willmott (eds), \textit{Health Law in Australia} (Thomson Reuters, 2\textsuperscript{nd} ed, 2014) 413, 414.
\textsuperscript{33} See, \textit{Assisted Reproductive Technology Act 2007} (NSW) s 4 (1) (Definition of ‘ART treatment’).
\textsuperscript{34} These techniques will be set out with detail later in this chapter.
\end{flushright}
an infertile couple to have a child by using reproductive cells of the couple.\textsuperscript{37} There is also evidence of its use in humans in the second half of the 18\textsuperscript{th} century.\textsuperscript{38} The first reported case of artificial insemination involving a donor occurred in 1884 in the United States.\textsuperscript{39}

Artificial insemination refers to process of injection of semen into a woman’s vagina; the semen could be that of the male partner or donor.\textsuperscript{40} This technique is simple and cheap,\textsuperscript{41} as it does not need professional assistance although it usually carried out in clinics and hospitals.\textsuperscript{42} This technique is a useful procedure where physical intercourse is not effective or possible, for example, if there is premature ejaculation or inability of the female to engage in intercourse. It could also be employed for the benefit of same-sex couples or single women. The artificial insemination also might require participation of a third-party where the third-party is a sperm donor or a surrogate mother.\textsuperscript{43} AI can be utilized using fresh\textsuperscript{44} or frozen semen and is administered at the time of ovulation.\textsuperscript{45} After collection of sperm, impregnation is usually via transfer into the woman’s uterus, which means that fertilisation occurs and embryo develops inside woman’s uterus.

Where AI is ineffective to achieving pregnancy, then in vitro fertilisation procedures may be used.

\textsuperscript{37} Ruth Deech and Anna Smajdor, \textit{From IVF to Immorality: Controversy in the Era of Reproductive Technology} (Oxford University Press, 2007) 15.
\textsuperscript{38} Rachel Simpson, above n 36, 2.
\textsuperscript{40} Ibid 615.
\textsuperscript{41} Financial cost of artificial insemination in United States is between 500 and 1000$ US for first insemination, and the cost for next insemination is from 300 to 700$ US. Ibid 620.
\textsuperscript{42} Simpson, above n 36, 5.
\textsuperscript{43} Marcia Boumil, \textit{Law, Ethics and Reproductive Choice} (Rothman, 1994) 5.
\textsuperscript{45} Deech and Smajdor, above n 37, 17.
2.3.2 In Vitro Fertilisation (IVF)

Whilst artificial insemination (AI) requires little in the way of technical expertise, in vitro fertilisation (IVF) requires significant medical and clinical knowledge and expertise, see below. The technique was imagined as far back as Aldous Huxley’s in his book *Brave New World* in 1932.\(^{46}\) Despite many unsuccessful attempts to conceive and generate a child artificially, these attempts helped in developing the IVF procedure to achieve pregnancy.\(^{47}\) The first test-tube baby was Louise Brown, who was born in England in 1978 through IVF.\(^{48}\) Following the birth of Louise Brown in 1978, the use of IVF has become widespread.

There are now millions of children who are born through the use of IVF and related procedures.\(^{49}\) In Australia for the year 2010, it was estimated that 4.1 per cent of Australian women received some form of ART.\(^{50}\) In Australia the first reported live IVF birth occurred July 1980,\(^{51}\) followed by the US in 1981,\(^{52}\) and Canada in 1983.\(^{53}\) ART has become widespread. It is estimated that 1-3 per cent of total births in U.S and Europe utilize the different procedures of ART.\(^{54}\) Globally, ART in the period 1978 to 2012 has resulted in the

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\(^{46}\) Lyria Bennett Moses, ‘Understanding Legal Responses to Technological Change of In Vitro Fertilisation’ (2005) 6 (2) *Minnesota Journal of Law, Science & Technology* 505, 509.

\(^{47}\) Gabor T. Kovacs, ‘What is New in IVF?’ (2014) 201 (5) *Medical Journal of Australia* 244, 244

\(^{48}\) Where, this first birth of baby in the world through IVF was carried out by Patrick Steptoe and Robert Edwards. See, Davies, Webber and Overton, above n 2, 89.

\(^{49}\) Fritz and Speroff, above n 1, 1331.


\(^{51}\) Moses, above n46, 509-510.

\(^{52}\) In US, IVF had become available in Virginia after government approval was obtained in 1980. See, Mary Moriarty, ‘Addressing in Vitro Fertilisation and the problem of Multiple Gestations’ (1999) 18 *Saint Louis University Public Law Review* 503, 505.

\(^{53}\) Rivard and Hunter, above n 10, 15.

\(^{54}\) Fritz and Speroff, above n 1, 1331.
birth of millions of children. In Australia and New Zealand, numbers of children born through ART during the last three decades, exceed 100,000. On the negative side, IVF is not always successful. In a recent Australian study significant numbers used a surrogate in order to have a child after failed IVF attempts.

The IVF technique involves complex procedures undertaken in a clinical setting. The typical process involves the following where the woman uses her own ovum/egg/oocyte (autologous):

1. Controlled ovarian hyperstimulation during which an ovarian stimulation regimen, typically follicle stimulating hormone (FSH) is administered to a woman over a number of days to induce the maturation of multiple oocytes.
2. Oocyte pick-up (OPU) where mature oocytes are aspirated from ovarian follicles.
3. Fertilisation of the collected oocytes by incubating them with sperm (from the woman’s partner or donor) over a few hours in the laboratory.
4. Embryo maturation during which a fertilised oocyte is cultured for 2–3 days to form a cleavage embryo (6–8 cells) or 5–6 days to create a blastocyst (60–100 cells).
5. Transfer of one or more fresh embryos into the uterus in order for a pregnancy to occur.

There are also a range of variations in the procedures which are collectively related to ART. These include:

- intracytoplasmic sperm injection (ICSI), when a single sperm is injected directly into the oocyte.

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57 For more details about figures in this context, see, Sam G Everingham, Martyn A Stafford-Bell and Karin Hammarberg, ‘Australians’ Use of Surrogacy’ (2014) 201 (2) Medical Journal of Australia 1.
58 It is still referred to as autologous in the medical literature even if donor sperm is used; see Macaldowie et al, above n 19, 1.
59 Ibid 1.
60 Ibid 1-2.
• assisted hatching, when the outer layer of the embryo, the zona pellucida, is either thinned or perforated in the laboratory to aid ‘hatching’ of the embryo
• gamete intrafallopian transfer (GIFT), when mature oocytes and sperm are placed directly into a woman’s fallopian tubes so that fertilisation may take place in vivo (inside the body).\textsuperscript{62}
• preimplantation genetic diagnosis (PGD), when one or more cells are removed from the embryo and analysed for chromosomal disorders or genetic diseases before embryo transfer
• donor/recipient arrangements, when donor oocytes from a woman are used to create embryos for transfer to another (recipient) woman
• cryopreservation and storage of embryos that are not transferred in the initial fresh treatment cycle. Once thawed or warmed, the embryos can be transferred in subsequent treatment cycles. Cryopreservation techniques include both the traditional slow freezing method and a newer technique called ‘vitrification’.
• surrogacy arrangements

The GIFT procedure is not in current use in Australia but ICSI (where a single sperm is directly injected into the oocyte) is used more extensively than the earlier IVF procedure of combining gametes in a tube or petri dish.\textsuperscript{63} In this section, no further mention will be made to GIFT, assisted hatching or surrogacy transfer. The success rate is measured by reference to live births. But this tells only part of the story. IVF may require multiple cycles of treatment. A cycle may result in a clinical pregnancy but not proceed to live birth as can be seen from the statistics from the Australian and New Zealand clinics set out below. Factors affecting the success rate include the woman’s age, reproductive age, diagnosis, and ovarian reserve and whether fresh or frozen embryos are used.\textsuperscript{64} There has been a gradual improvement over time and with a level of variation depending on the expertise of the particular clinic. The most important factor is age with higher success rates for women under

\textsuperscript{61} This is the more common approach in Australia rather than IVF; see table 5, Ibid 8.
\textsuperscript{62} This method now is uncommon in Australia. Ibid 2.
\textsuperscript{63} This is common approach in Australia, see table 5. Ibid 8.
\textsuperscript{64} Fritz and Speroff, above n 8, 1337.
30 years of age; this rate declines with advancing age of women until it becomes very low for women age 45 and over.\textsuperscript{65}

In the most recent available Australian and New Zealand statistics for 2011, involving the woman’s use of her own fresh (not thawed) ova/eggs/oocytes (autologous) are set out in the table below.\textsuperscript{66}

<table>
<thead>
<tr>
<th>Stage of treatment</th>
<th>Age group (years)</th>
<th>(&lt; 30)</th>
<th>(30-34)</th>
<th>(35-39)</th>
<th>(40-44)</th>
<th>(\geq 45)</th>
<th>All</th>
</tr>
</thead>
<tbody>
<tr>
<td>Initiated cycles</td>
<td></td>
<td>4,262</td>
<td>10,285</td>
<td>14,641</td>
<td>10,599</td>
<td>509</td>
<td>40,686</td>
</tr>
<tr>
<td>Cycles with OPU</td>
<td></td>
<td>3,334</td>
<td>9,577</td>
<td>13,508</td>
<td>9,448</td>
<td>792</td>
<td>37,259</td>
</tr>
<tr>
<td>Embryo transfer cycles</td>
<td></td>
<td>3,275</td>
<td>8,259</td>
<td>11,413</td>
<td>7,541</td>
<td>565</td>
<td>31,033</td>
</tr>
<tr>
<td>Clinical pregnancies</td>
<td></td>
<td>1,361</td>
<td>3,191</td>
<td>3,225</td>
<td>1,197</td>
<td>26</td>
<td>9,100</td>
</tr>
<tr>
<td>Live deliveries</td>
<td></td>
<td>1,133</td>
<td>2,607</td>
<td>2,478</td>
<td>699</td>
<td>11</td>
<td>6,928</td>
</tr>
<tr>
<td>Live deliveries per initiated cycle (%)</td>
<td></td>
<td>29.6</td>
<td>25.3</td>
<td>16.9</td>
<td>6.6</td>
<td>1.2</td>
<td>17.0</td>
</tr>
<tr>
<td>Live deliveries per embryo transfer cycle (%)</td>
<td></td>
<td>34.8</td>
<td>31.6</td>
<td>21.7</td>
<td>9.3</td>
<td>1.9</td>
<td>22.3</td>
</tr>
<tr>
<td>Live deliveries per clinical pregnancy (%)</td>
<td></td>
<td>63.2</td>
<td>51.7</td>
<td>74.5</td>
<td>58.4</td>
<td>42.3</td>
<td>76.1</td>
</tr>
</tbody>
</table>

(a) Age at start of a treatment cycle.

What is important is the cumulative live birth rate achieved after multiple cycles of treatment. The Australian and New Zealand clinics in 2011 had a live birth rate above 50 per cent for women up to age 34, 40.7 per cent up to age 39, 16.4 per cent for the age group 40-44 and just 1.7 per cent for women 45 and over.\textsuperscript{67} The rate of live births is higher as a proportion of clinical pregnancy rates (71.6 per cent) than the rate for live deliveries per cycle (17 per cent) or live deliveries per embryo transfer cycle (22.3 per cent).

\textsuperscript{65} Macaldowie et al, above n 19, 11.
\textsuperscript{66} Cycles with OPU refers to retrieval of fresh oocytes.
\textsuperscript{67} See, Table 49, Macaldowie et al, above n 19, 11. Note the lower figure on the table refers to the live birth rate per clinical pregnancy not per treatment cycle.
The number of transferred embryos might also affect success rates. The most recent evidence is that a single embryo transfer is more likely to result in a live birth.\textsuperscript{68} In Australian and New Zealand, the percentage of single embryo transfers in 2011 was about 73.2 per cent; multiple embryo transfer was 26.8 per cent.\textsuperscript{69} The outcomes were; about 93.1 per cent of babies born using IVF in 2011 were singletons at full term with normal birth weight, while the rate of multiple-delivery was 6.9 per cent.\textsuperscript{70} But it is likely that the practice varies in other countries. A further factor relates to the number of cycles (repeat procedures). Although repeat attempts may increase the success rate, recent evidence suggests that there is no significant improvement in success rates after the fourth cycle.\textsuperscript{71} This means that there might be an optimum number, fourth attempt, beyond which the chances of live birth remains small, so it is virtually pointless to repeat cycles after the fourth cycle.

IVF requires the collection of gametes, followed by fertilisation and transfer. The collection of oocytes (ova) requires hormonal stimulation to promote the collection of multiple mature ova.\textsuperscript{72} The collection of multiple oocytes is necessary to facilitate the IVF process and increase chances of success rate of fertilisation and to maximise IVF outcomes.\textsuperscript{73} Where several ova, usually 5 to 9 are collected,\textsuperscript{74} only some oocytes (ova) might be suitable for fertilisation.\textsuperscript{75} Although collection involves hormonal preparation\textsuperscript{76} and is considered a minor procedure, it is not without risks, so that the collection of multiple ova reduces the need for drugs and the stress of multiple collections. It also allows discarding of oocytes or

\textsuperscript{68} Kovacs, above n 47, 244.
\textsuperscript{69} Macaldowie et al, above n 19, 8.
\textsuperscript{70} See, Table 30; Ibid 36.
\textsuperscript{72} Adam Balen, Infertility in Practice (Informa Healthcare, 3\textsuperscript{rd} ed, 2008) 297.
\textsuperscript{73} Boomsma and Macklon, above n 21, 351.
\textsuperscript{74} The figures for oocyte retrieval in Australia and New Zealand in 2011 are set out in Table 37. Macaldowie et al, above n 19, 45.
\textsuperscript{75} Parsons, above n 44, 21.
\textsuperscript{76} Rivard and Hunter, above n 10, 7.
embryos that might not be viable, and permits multiple attempts of fertilisation over several cycles.

The older and now uncommon method of collection of oocytes was through surgical extraction, (laparoscopy) under a general anesthetic. This surgical procedure involved the risk of injury to organs and excessive bleeding. It is not known how far this older procedure is used in clinics outside Australia and New Zealand. The current method used to collect oocytes is by using transvaginal ultrasound aspiration. Under this procedure ultrasound is used to retrieve and locate ovum which is retrieved by needle through the bladder. This procedure is performed under a local anesthetic. This method is considered safer than laparoscopic surgery, and may assist in greater numbers of oocytes being collected. However, these procedures are not risk free, as discussed below.

After oocytes are retrieved, clinicians prepare the sperm and oocytes for fertilisation. In the early stages of IVF this involved combining the gametes in a test tube or dish in the clinic. The currently preferred technique is ICSI; inserting a single sperm into the cytoplasm of ovum by micro-injection. After 16-18 hours, clinicians examine the fertilised oocyte to

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77 Parsons, above n 44, 21.
78 This process is essential for performing IVF; see Fiandaca, above n 35, 342-343.
79 Davies, Webber and Overton, above n 2, 94.
80 A small cut is made inside the navel to permit collection from the ovaries. Ibid 41.
81 Fiandaca, above n 35, 343.
83 Ibid 277.
84 The Australian and New Zealand figures for oocyte pick up are referred to below.
85 Risks which might be involved are discussed below.
86 Balen, above n 72, 307.
87 Ford, above n 7, 103.
ensure that fertilisation has occurred.\textsuperscript{88} After fertilisation occurs, zygotes begin to divide (the cleavage stage). The earlier practice had been to transfer embryos 2-3 days following fertilisation. The current practice (which more closely mirrors naturally processes) is to transfer the embryo at the blastocyst stage, day 5.\textsuperscript{89} This has improved the IVF success rate. Physicians usually select one or two of the healthiest embryos to be transferred.\textsuperscript{90} The IVF technique might need several cycles in which procedures are repeated until pregnancy is achieved; it might also involve multiple collections of ova. There is significant variability in the number of oocytes collected.\textsuperscript{91} Usually excess gametes and embryos are stored using cryopreservation.

### 2.3.3 Cryopreservation Techniques

Cryopreservation (freezing) allows storage of gametes and excess embryos for future implantation or other uses. It either involves slow freezing or rapid freezing (vitrification). The vitrification is the method of choice by Australian and New Zealand clinics in 2011.\textsuperscript{92} Using this technique, blastocysts have the highest survival rate at over 95 percent.\textsuperscript{93} Cryopreservation of excess embryos allows couples the option to decide about future uses of excess embryos and gametes. It is usual that couples provide directions concerning the use and storage of embryos prior to embarking on ART procedures. Cryopreservation helps to avoid repeating gametes collection where pregnancy has not been achieved at first or

\textsuperscript{88} Balen, above n 72, 307.
\textsuperscript{89} Kovacs above n 47, 244. The majority of Australian and New Zealand clinics in 2011 transferred at the blastocyst stage. See, Tables 7, 12 (autologous- couples own gametes) transfers), Macaldowie et al, above n 19, 9 and 15.
\textsuperscript{90} Jeffrey Persson, ‘The Art of Assisted Reproductive Technology’ (2005) 34 (3) \textit{Australian Family Physician} 119,120, Also, Deech and Smajdor, above n 37, 19.
\textsuperscript{91} For example, it is indicated above that commonly five to nine oocytes are collected for ART in Australia and New Zealand.
\textsuperscript{92} See, Table 8 (woman’s own fresh oocytes, autologous transfer). Macaldowie et al, above n 19, 9.
\textsuperscript{93} Autologous transfers (woman’s own oocytes). See, table 18. Ibid 24. Also, Kovacs, above n 47, 244.
subsequent attempts thus reducing medical costs and the physical burden of collecting and extracting several oocytes multiple times.\footnote{Gunnison, above n 81, 278.}

The ability to freeze embryos through cryopreservation may assist in increasing efficiency of artificial fertilisation and improving the pregnancy success rate.\footnote{Elenora Porcu et al ‘Oocyte and Embryo Freezing’ in Botros Rizk et al (eds), \textit{Infertility and Assisted Reproduction} (Cambridge University Press, 2008) 456, 456.} There is the other advantage that cryopreservation could be beneficial for women and men who delay having children for example, following cancer therapy and for those people who are concerned about their ability to produce reproductive cells in future, because of several factors such as the age or any expected future damage to their reproductive capacity.\footnote{John Parsons, above n 44, 18.} The cryopreservation technique involving the freezing of sperm can be traced to the 19th century.\footnote{Les McCrimmon, ‘Gametes, Embryos and the Life in Being: the Impact of Reproductive Technologies on the Rule against Perpetuities’ (2000) 34 \textit{Real Property, Probate and Trust Journal} 697, 700.} In recent times, cryopreservation techniques were developed in Australia in early 1980s, and these technologies spread rapidly to the United States.\footnote{Moses, above n 46, 510.}

The cryopreservation technique requires before freezing that water inside gamete to be removed or reduced in order to minimise damage which might occur as a result of ice formation.\footnote{Amjad Hossain and Manubai Nagamani, ‘Cryopreservation of Male Gametes’ in Botros Rizk et al (eds.), \textit{Infertility and Assisted Reproduction} (Cambridge University Press, 2008) 466, 468.} The gametes and embryos are then frozen under very low temperatures (minus 196 Celsius); the materials are then stored in tubes of fluid nitrogen for future use.\footnote{Ibid 473.} In relation to mature oocytes,\footnote{Immature ova might have greater resistance to damage. See, John, above n 44, 18.} until recently cryopreservation was not as successful as the
freezing of sperm or embryos\textsuperscript{102} because of the higher risks of damage from freezing and thawing.\textsuperscript{103} Recently, oocyte cryopreservation has improved rapidly with approximately 92 per cent of stored oocytes surviving freezing and thawing; there are also increased success rates of fertilisation and pregnancy using thawed oocytes.\textsuperscript{104}

Generally, human embryos at all development stages, from zygote to blastocyst,\textsuperscript{105} are able to be frozen through cryopreservation techniques.\textsuperscript{106} In some jurisdictions special banks may be established for the purpose. The permitted period for gamete and embryo storage varies from country to another. There is no universal consensus on this issue.\textsuperscript{107} In New South Wales, recent legislative changes have extended the period for storage; this is discussed further in chapter 7 at (7.4.3).

2.4 ART: Benefits and Risks

This section sets out and examines the consequences of carrying out ART, including advantages and disadvantages.

\textsuperscript{102} This is because of the larger size, and liquid content may cause liquid to expand and develop it into crystals which can damage the oocyte.
\textsuperscript{103} Deech and Smajdor, above n 37, 24. And, Fritz and Speroff, above n 1, 1380.
\textsuperscript{104} Fritz and Speroff, above n 1, 1380.
\textsuperscript{105} Blastocyst refers to an early stage of embryonic development that consists of a hollow ball of cells with a localized thickening (the inner cell mass). See, Martin, above n 5, 85.
\textsuperscript{106} Fritz and Speroff, above n 1, 1369.
\textsuperscript{107} McCrimmon, above n 97, 701.
2.4.1 Benefits of ART

The principal benefit of ART is to assist infertile couples to have children. ART might assist in reducing rate of divorce which may occur as a result of inability to have children. ART can also be used for same sex couples, single women and women beyond reproductive age who wish to have offspring. ART could also be used to avoid transmission of genetically based diseases or conditions. ART techniques allow pre-implantation diagnosis to determine whether an embryo is affected by a particular gene mutation.\(^{108}\) ART therefore could assist in reducing or avoiding transmission of genetic diseases from genetic parents to offspring. ART might be utilized to reduce the risk of transferring such genetic diseases, through sperm and ova selection and donor screening. It also allows testing gamete providers for HIV AIDS.

2.4.2 Risks of ART

ART, particularly IVF procedures, are not risk free for women and children born using ART. There are a number of risks. The first is the problem of multiple births where more than one embryo is transferred.\(^{109}\) It was common until recently for more than one embryo (usually two) to be transferred so as to increase the chances of a pregnancy resulting in a live birth. The evidence suggests greater success rates with a single embryo transfer and this is close to the universal practice in Australia and New Zealand.\(^{110}\) This is, however, not necessarily the practice at all clinics. Multiple pregnancies might lead to health problems such as high blood pressure and diabetes for the woman.\(^{111}\) It is also more likely to lead to caesarean sections for

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\(^{109}\) Single embryo transfer can result in twins; some 6.9 per cent of single embryo transfers result in twins. See Table 30, Macaldowie et al, above n 19, 36.

\(^{110}\) See, In vitro Fertilisation (IVF) at section (2.3.2).

\(^{111}\) Davies, Webber and Overton, above n 2, 96.
multiple births.\footnote{Table 32, see, Macaldowie et al, above n 19, 38.} It can also be associated with higher maternal risks such as miscarriage and premature births.\footnote{Deech and Smajdor, above n 37, 20.} For ART children the risks of premature birth, low birth weight and other physical deficits increase with multiple births.\footnote{Davies, Webber and Overton, above in 2, 96.}

Furthermore, there are some diseases which might be transmitted from parents to offspring such as genetic diseases and disorders. ART may increase risk of transmission of diseases.\footnote{Robertson, above n 108, 10.} In the case of donated gametes or embryos, there might be risks of the transmission of genetic defects as well as such conditions such as AIDS.\footnote{Deech and Smajdor, above n 37, 16.} However, transmission of infectious and genetic diseases is a normal risk of any pregnancy and not exclusively an issue for ART.\footnote{Ibid 9.}

In addition, the risks associated with ART generally, and IVF in particular, are relative to risk associated with natural reproduction.\footnote{Benefits of ART are discussed in the previous point at (2.4.1).} ART may have the advantage of being able to select healthy embryos and to screen out embryos that may be affected by any genetic problems.\footnote{Table 36, see, Macaldowie et al, above n 19, 45.}

So, there is possibility that ART can assist in reducing the risk of disease transmission through scanning and pre-implantation diagnosis. The experience in Australia and New Zealand is that only in a small number of ART procedures, about (2 per cent of total cycles), is pre-implantation genetic diagnosis undertaken.\footnote{Davies, Webber and Overton, above n 2, 96.}

In addition, the drugs used for stimulating ovaries to produce multiple oocytes may increase the risks of cancer although this is disputed.\footnote{Hormones which are used for ovarian
stimulation can have side effects such as swelling, nausea, abdominal pain, vomiting, dehydration, liver and kidney problems, blood clots and kidney failure. ART procedures might also cause ovarian hyper-stimulation syndrome. There are also psychological risks associated with IVF such as emotional pressure on each of the partners to undergo IVF, stress and anxiety and high financial costs. IVF may require multiple procedures with no guarantee of success. There are also higher risk of the baby dying before birth or shortly afterwards, premature births, lower birth weights and caesareans for women using IVF and related procedures.

2.5 ART: Genetic Contribution

The usual practice is that couples provide their own gametes for use in ART so that any child born is genetically the child of the couple. The most recently available statistics in 2011 from Australia and New Zealand indicate that oocyte (ovum) rather than embryo donation is more likely. Where the couples are unable to use their own gametes, donated gametes or embryos may be used. A third-party involvement in ART could be a donor of sperm, ovum or embryo. Sperm banks are considered a resource of providing reproductive cells

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122 Deech and Smajdor, above n 37, 21.
124 Such disease may occur in 1-2 per cent of women who undergo IVF treatment. See, Davies, Webber, and Overton, above n 2, 96.
125 Deech and Smajdor, above n 37, 20.
127 Balen, above n 72, 292.
128 Embryo donation is just on 20 per cent of total of donations of embryo and oocytes use of donor embryo or oocyte increased with age, where the age of the donor is also important. See, Tables 21, 22, 23; Macaldowie et al, above n 19, 29-30.
especially for couples affected by male infertility, single women, and same sex couples. In clinical practices, recipients might choose to use donated gametes or embryos. Information available to recipients includes the donor’s profile and medical information; donors also may select recipients who can use their gamete or embryos, or the clinic may select recipients based on general criteria provided by donors.

There is a very slightly reduced live birth rate where donor oocytes or embryos are used. The number of cases of donated oocyte or embryo is very small in comparison to cases where the woman uses her own oocytes. Embryo and egg (oocyte) donation is relatively rare for a number of reasons. Couples on IVF programs may be reluctant to donate spare embryos. Due to, donors may be concerned about the status and welfare of future children. Where, the donors may be concerned that the future children might be raised in an unhappy, abusive or uncaring family and the donors would not be able to provide protection for their potential children. Donors are also concerned that the donation of embryos can result in unknown siblings to the donors existing children. This is not necessarily the views of all donors who may regard the donation as impersonal with no emotional attachment to children who born from the donation.

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132 See, Table 29; Macaldowie above n 19, 36.
133 In Australia and New Zealand in 2011, using donated embryo or ovum in ART represented only 4.7 per cent of total ART cycles. Ibid 19, 27.
134 Millbank et al, above n 131, 794.
135 Ibid 792.
136 Ibid 797.
Where donations are made, it is often made to known recipients. Donation could also be limited by clinics and donor preference for potential recipients.\textsuperscript{137} A very small number of excess embryos in Australia are donated to couples in IVF programs.\textsuperscript{138} Similarly, if the Australian and New Zealand practice is indicative of what occurs elsewhere, the use of donor sperm in ART clinics appears to be an extremely small component of ART procedures.\textsuperscript{139} This does not discount that AID might occur outside clinical settings.\textsuperscript{140} Even individuals who express their intention to donate frozen embryos might not donate for varied reasons relating to relationships between the donor and their existing children from one side and potential children from another side.\textsuperscript{141} Moreover, a clinic may refuse to receive and use gametes or embryos from donors based on medical checks, physical and psychological factors.\textsuperscript{142}

\textbf{2.6 Conclusion}

ART is important to allow couples to overcome infertility in order to be able to conceive and have children. ART, particularly IVF and associated procedures, is now part of mainstream treatment for infertility with over 4 per cent of Australian births in 2011, and millions of children globally born as a result of using ART. It is a field where there are rapid advances in technology and knowledge so that now, at least for younger women, the success rate leading to live birth is over 50 per cent. Although there are many benefits that could be offered by

\textsuperscript{138} About 10-15 per cent of excess embryos are donated. See, Millbank et al, above n 131, 789. This might be reduced by the lifting of limitations on storage periods. The Australian State, NSW has conducted amendment which increased storage period of gametes and embryos to 15 years, see, \textit{Assisted Reproductive Technology Amendment (Exemptions) Regulation 2015} (NSW).
\textsuperscript{139} Reporting just 2538 cycles of AID, see table 38; Macaldowie et al, above n 19, 46.
\textsuperscript{140} There are no separate Australian statistics on donor sperm used with IVF and related procedures although it might be assumed that if only male infertility was the problem, artificial insemination would have been used, see table 10; Ibid 13.
\textsuperscript{141} Millbank et al, above n 131, 792.
\textsuperscript{142} Ibid 795.
ART, there are some risks involved with using such technology. Over time the risks have been minimised although not altogether eliminated. The statistics referred to suggest that the procedure is overwhelmingly used by couples using their own gametes; donated oocytes, sperm and embryos are involved in an extremely small percentage of ART procedures.

In Iraq, ART procedures are not the subject of specific legislation. The next chapter will discuss the general arguments for and against regulating ART.
Chapter 3 Regulating ART

3.1 Introduction

Technological changes in assisted human reproduction generally outpace changes to legal regulation. In countries such as Australia, which is one of the pioneers in reproductive technologies, legislation and regulations which control ART have been proactive in keeping pace with change. The difficulty is that where advances in medical science are rapid, legislation struggles to keep up. For this reason, regulators often prefer more flexible approaches rather than mandatory legislation.\(^1\) In the Middle Eastern region including Iraq, existing laws do not specifically address issues arising out of the use of ART. This section explores whether regulation of ART is necessary for Iraq. Chapter 5 deals with the position under Sharia law.

It begins with the more general arguments about whether regulation is the best approach to dealing with rapidly changing technology and medical practice. It is frequently pointed out that a strong regulatory approach is unlikely to be effective where ART services are readily available in a nearby unregulated or loosely regulated environment. For example, the restrictions on donation of ova in the UK have led to well to do couples going to the US for ART where there are no restrictions. This leaves couples and others without sufficient resources subject to the restrictions.\(^2\) Likewise, Australian couples including homosexual

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\(^1\) Countries might for example leave medical practice issues to guidelines rather than mandatory legislation. In Australia early federal responses to ART were guidelines.

couples with sufficient resources are resorting to unregulated jurisdictions such as India and Thailand in order to avoid restrictions.³

This chapter first explores general issues of free market versus formal regulation, as well as strategies for securing compliance with law and enforcing law. After that, the chapter sets out to discuss arguments for and against regulating ART, as well as discussing optimal regulation models for ART in a federated system. It then discusses some considerations in relation to ART regulation, including issues of health and welfare of children as well as those related to safety of society. After that, it includes evaluation of regulatory frameworks relating to ART. The chapter concludes with a summary of the preceding arguments and a case for legal regulation.

3.2 Free Market and Formal Regulation

The main issue which may be raised in regard with any new socially significant technology such as ART is whether the state should take action to regulate its use or leave it to free market forces to develop it and make it available to the public. And if its use is regulated by the state, how it should be regulated and how such regulation should be enforced. Free market regulation amounts to a degree of self-regulation by private providers, moderated by considerations of competition and supply and demand. Those with the money to purchase the relevant good or service make their desires known through their purchasing decisions. In a competitive situation, private suppliers have to recognise and adapt to this if they are going to stay in business. Formal regulation by the state involves a greater or lesser degree of

intervention in such free market operations, based upon pre-established legal principles. In addition, various strategies are available for securing compliance with, and enforcing, the relevant laws.

This section provides basic information about these options available for regulating any social action and the consequences likely to be associated with each one, and the sorts of considerations relevant to determining the optimum method of regulation in the circumstances. This section focuses upon two main issues; that of the benefits and problems of regulation, and that of appropriate and effective strategies of regulation, in terms of compliance and law enforcement.

3.2.1 Regulation or Deregulation

What has been called ‘internal’ market regulation refers to regulation of provision of a good or service by the interplay of supply and demand. Producers offer goods they hope to sell at prices that give them an acceptable return. Consumers buy goods that they want, in amounts they want, for prices they are prepared to offer. The interplay of supply and demand shapes the nature of the goods in question, the amounts offered and the prices charged. Some corporations have proclaimed their commitment to CSR, meaning a voluntary commitment to self-regulation, in the interests of sustainability and protection of the environment. Moreover, some industry associations are publicly committed to regulation of the activities of member corporations by reference to industry wide codes of the ethical conduct. Where the good is a professional service, supply can also be influenced by codes of ethics of the profession in question. The relevant professional associations or registration bodies can
enforce such codes by threat or actuality of disciplinary action, with more or less legal regulation or support.

What has been called external market regulation refers to the intervention of the state in exerting control of the market through official regulation. Government can seek to regulate the nature or quality of the good or service offered, who has access to it, the amount offered, the price. They can intervene directly, though, for instance, establishing price ceilings, or less directly, through several factors such as offering subsidies or tax advantages to particular producers or consumers. All three forms of regulation can and do co-exist, with different forces playing a greater or lesser role in different situations. There are advantages and disadvantages associated with all of them. Insofar as professionals can be expected to have high levels of knowledge and understanding of issues relating to their area of special competence, and are often heirs to long established traditions of responsible service to clients and to the community, self-regulation through a relevant professional body, can be principled and effective.

Free markets respond quickly and flexibly to changes in demand. In contrast, regulatory rules are usually complex and inflexible as it is hard for law-makers to enact precise rules to regulate a certain issue, therefore such regulation might unnecessarily reduce effective access or fail to respond quickly and flexibly to changes of demand. Orthodox economic theory sees the effective competition of genuinely free markets as keeping prices down and quality of goods up, as producers compete for market share. Producers rapidly develop and apply

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5 Ibid 126.
6 Ibid 37.
new productive technologies to gain advantages in productivity or catch up with those who have already done so. Competition sees such productivity increases reflected in reduced prices to consumers. So this does ensure the flexible and speedy response to changes in demand.\textsuperscript{7}

Increased regulation, up to the point of total government control of production and distribution, is likely to lead to wastage, inefficiency and monopoly. For example, orthodox theory says that price ceilings lead to worsening shortages of goods, and the emergence of black markets, hurting the worse off people such ceilings were supposed to assist. Subsidies lead to overproduction and wastage of resources. In addition, research suggests that the level of voluntary compliance with the law in case of formal regulation is frequently low, and the cost of enforcement is typically high, which impacts negatively upon taxpayers.\textsuperscript{8} In particular, procedures that might be instituted by government in order to enforce regulation such as enforcement and inspection are usually complex and expensive.\textsuperscript{9} So that, a mix of free market and professional self-regulation can appears to be defensible.

However, there are many disadvantages associated with free markets. A primary focus upon profit maximization on the part of providers is not necessarily compatible with a high quality of service to consumers, insofar as profits can be maximised through misleading advertising, reduced quality of product and cost externalisation.\textsuperscript{10} As Braithwaite observes, ‘there are many examples where therapeutic goods companies have placed their desire for profits ahead

\textsuperscript{7} Ibid 210.
\textsuperscript{8} Ibid 127.
\textsuperscript{9} Ibid 38.
\textsuperscript{10} Ian Ayres and John Braithwaite, \textit{Responsive Regulation: Transcending the Deregulation Debate} (Oxford University Press, 1995) 22.
of ethical behaviour.\textsuperscript{11} The swings of the business cycle favour the pursuit of oligopoly and monopoly super profits through concentration and centralisation within particular branches of production; unregulated free markets become increasingly less free.\textsuperscript{12} Increasing numbers of consumers and patients may then be unable to access the goods and services in question because they cannot pay the monopoly price mark-ups.\textsuperscript{13} Even without monopoly pricing the market still rations goods in terms of ability to pay, rather than need. Markets can encourage high priced luxury versions of the goods, rather than low price basic services, where profits are maximised by the former approach.

The second option of regulation is formal governmental regulation, based upon fixed standards of behaviour for private providers, with the force of law, so that punishments may be imposed in case of any breach of regulatory rules.\textsuperscript{14} Such standards can relate to quality and price of product or service, and to those permitted to access it. Actions or products potentially harmful to consumers or to others can simply be outlawed, or restricted in various ways, with imprisonment or fines imposed on those who break such rules.\textsuperscript{15} An important consideration here is the fact that legal regulation, in theory, offers scope for democratic input into the conduct of the relevant practices. People can choose (within the limits of practicality), through the ballot box, through public debate and lobbying, the kind of service they want.

\textsuperscript{12} Baldwin and Cave, above n 4, 10.
\textsuperscript{13} Ibid 211.
\textsuperscript{14} Ibid 35.
\textsuperscript{15} Ibid 107.
3.2.2 Regulation Enforcement Strategies

In relation to enforcement of regulation and compliance models, there is hard strategy which is based on the idea that imposing punishments is necessary to enforce regulation, and a soft strategy which depends upon policies of persuasion. The hard strategy centres upon a hierarchy of increasingly punitive legal sanctions imposed upon corporations and individuals, moving from civil to criminal penalties for increasingly serious or prolonged breaches of regulation. The soft strategy rather focuses upon formal and informal methods of positive encouragement, acknowledgement and support, persuasion, education, and negotiation. It has been argued that the soft strategy respects the autonomy of the individuals and corporations concerned, it supports, rather than alienates those seeking to behave responsibly, it is typically much cheaper and easier to apply than the hard strategy, and can be effective in ensuring compliance with the law.

As a leading contemporary theorist of regulatory strategy, John Braithwaite rejects total reliance upon one strategy, with no involvement of the other. He argues that optimal strategy typically involves a mixture of persuasion and prosecution, with both playing a part in securing compliance with law. This still leaves the practical questions of when, where and how the government should follow particular strategies of persuasion and prosecution in any particular case. Braithwaite and other proponents of responsive regulation argue that appropriate regulation is determined by the relevant industry structure, with different structures conducive to different types and different degrees of regulation. But he also argues for the widespread applicability of a pyramid of forms of regulatory intervention, starting out

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16 Ibid 96-97.
17 Ayres and Braithwaite, above n 10, 20.
with less intrusive and more persuasion oriented approaches and moving, moving through warnings and civil actions, on to increasingly intrusive and punitive ones. He suggests that recognition on the real possibility of the latter allows for a primary practical focus on the former. As he says, ‘this model achieves compliance cheaply at the base…while freeing up resources to confront more intractable problems higher up the pyramid.’

Available evidence suggests that this regulatory pyramid approach can be effective in sustaining continuous improvement in regulatory compliance, with strategies of persuasion pursued prior to adversarial and punitive approaches. But this approach does not need to be seen as counter-posed to self-regulation through industry associations and professional associations. Governments should be responsive to professional organizations that seek to regulate the actions of their members, and should seek to involve them in the formulation and implementation of ‘external’ regulation.

3.3 Arguments about Regulating ART

This section explores the question of whether or not regulation of ART is required. It looks at arguments for and against formal regulation, as well as arguments about the optimal type of regulation. The chapter first looks at arguments against regulation, then at arguments in favour of a responsive form of regulation, and finally arguments concerning the optimal form of regulation.

18 John Braithwaite, Restorative Justice & Responsive Regulation (Oxford University Press, 2002) 30
19 Braithwaite, Submission on the Position Paper, above n 11.
21 Everingham, Stafford-Bell and Hammarberg, above n 3, 1.
22 Braithwaite, Restorative Justice & Responsive Regulation, above n 18, 29.
of such responsive regulation of the fertility market in a federated legal system, such as prevails in Iraq.

### 3.3.1 Arguments for Not Regulating ART

There is support for the view that ART should not be regulated. There are two completely opposing views as to why ART should not be regulated. The arguments take the opposing positions of absolute prohibition and absolute freedom. The argument for prohibition is that ART interferes with natural reproduction and has serious negative consequences. Since ART may be in breach of existing legal principles relating to human reproduction, legislation should not interfere or regulate ART as this legitimizes an illegal practice. ART is not considered a new situation which requires new regulations. The legal system needs to be stable and it should consist of general and flexible rules to be expanded and applied to new situations. Thus, ART could be considered as a medical action which should not be governed differently from any other medical action. Therefore, ART could be regulated and governed according to the current legislation relating to health, family, civil and penal legislation, especially those provisions which are related to human reproduction and dealing with legal effects of human conception.

The opposing argument against regulation is based on personal freedom of reproductive choice. The law should not interfere with it as reproductive choices using ART are a

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23 See the narrow view which represents opinions of some scholars in section of Debates and arguments over ART in the Middle East, at chapter 5 (5.3.1).
personal matter. In the absence of societal consensus on ART there is no agreement about ethical or moral legitimacy or what principles which should be applied on ART. So, there should be a right of individuals to undergo ART procedures in accordance with individual belief.

The argument for absolute freedom is put by Robertson: [the] bearing, begetting, or parenting children is protected as part of personal privacy or liberty, those experiences should be protected whether they are achieved coitally or non-coitally. In either case they satisfy the basic biologic, social, and psychological drive to have a biologically related family. In addition, regulation of ART might affect negatively on practicing ART. For example, regulation which requires donor identity disclosure may discourage donors of donating their gamete and participating in ART process. However, without formal regulation there is not enough protection to the interests of consumers, due to the main interest of ART providers is achieving and maximising the profit. So, regulation of ART might be necessary to protect interests of consumers.

3.3.2 Arguments for Regulating ART

The first argument is that regulation is required to protect participants in the reproductive process. This includes those undertaking ART, donors of gametes and embryos, and children

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25 Ibid 45.
26 Chapter 5 section (5.3) will set out various debates and arguments of Muslim Scholars over ART.
born as a consequence of ART. Secondly, regulation should specifically prohibit some ART activities such as cloning, designer embryos and sale of reproductive tissue as contrary to the public interest. Such prohibition may be required for public interest through avoiding harm to society. Whilst conduct contrary to the public interest may be unlawful according to Sharia law, because the Law applies to all Iraqi citizens (Muslims, Christians and other non-Muslims), the thesis argues that this should be made clear in the statute laws of the Iraqi State in much the same way as has occurred in Australia. (The relevant Australian laws will be set out and considered in chapter 6 and 7). Generally, enacting legislation for ART might assist in ensuring optimal interests for families through imposing some requirements such as record keeping, and providing counselling for patients who resort to ART service, as well as some restriction in relation to using donated gametes.

Regulating ART is required in order to assess and monitor ART technology and protect individuals who are affected by the practice of ART, as well as employing ART in the way which may ensure obtaining benefits and protecting health of ART parties. Regulation could also strengthen the bargaining position of less well-off or powerful patients in their dealings with ART providers. Thus, regulating ART might be required in order to control ART Activities, where ART techniques are not totally prohibited, where ART should be allowed in some circumstances and with some limitations in order to gain the social and individual benefits of it and avoid bad practices. In particular, clear and enforceable legal

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31 Moses, above n 29, 527.
32 Ibid 568.
33 Such view is consistent with the middle view of scholars in the Middle East which allows conducting assisted conception in some condition; it will be set out in chapter 5 at section (5.3.2).
regulation of ART is probably necessary in order to maintain the safety of society and avoid any harm to individuals or communities.\textsuperscript{34}

Without regulation, fertility clinics offering ART may engage in practices such as commercial trade in reproductive tissues, and proper procedures may not be used to protect rights of donors, couples and subsequent children. In addition, regulation of ART is essential to avoid a legal vacuum. Regulation is important because without it infertile couples in Iraq will be left to struggle with the varying and sometimes extreme views of religious scholars. This occurs because the existing provisions of the Iraqi law were designed to govern natural reproduction and not ART.

In addition to regulation of provision of access to ART, there are further issues of legal regulation of related issues of the use, storage, control and disposal of gametes, fertilised ova and frozen embryos. Regulation may also be required in order to deal with problems relating to the status of children born using ART and consequent issues relating to legal parentage, inheritance and maintenance. Regulation of ART is required for ensuring the welfare of children, where a main function of ART regulation is to protect the best interest of children.\textsuperscript{35} Regulation may be necessary to protect of status and best interests of children, where rights of children are considered essential rights which are protected and guaranteed by the law as well as the best interest of children. For example, right to life, legal parentage, inheritance and health care as well as parental care towards children.

\textsuperscript{35} Ibid 425.
Some activities and procedures of assisted conception might affect these rights and interests of children. Thus, regulating ART could protect the best interest of children. Furthermore, regulating ART is necessary in order to ensure that ART practice is consistent with international standards. For example, determining the maximum numbers of embryos which could be implanted at single cycle in order to avoid the dangers of multiple pregnancies. Beside required legislative provision for ART, technical matters such as the transplantation of single embryo, the techniques and procedures for storage, mode of storage etc, could be regulated through non-legislative provisions which have flexibility to deal with any rapid changes in knowledge and practice.  

3.3.3 Optimal Regulation for Fertility markets

Although market forces and professional self-regulation probably have a part to play in efficient provision of ART services, it seems clear that a foundation of effective legislative regulation is required, given the potential dangers and problems involved. Governmental regulation could be through a federal or state based system of regulation. Prof. Judith Daar suggests two important areas of regulation for the fertility market; first, focusing on ART providers and the eligibility for practicing ART and related issues such as registration and granting of licences, as well as reporting requirements in relation to clinical procedures and success rate of pregnancy. Second, regulating the relationship between ART providers and their patients; this could be done by state regulation which may include some requirements

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36 In Australia the Ethical Guidelines of the National Health and Medical Research Council as well as the Code of Practice for Assisted Reproductive Technology apply beside State legislation on ART in different Australian states and territories. This will be set out with details in chapter 7.
37 Moses, above n 29, 576.
such as written consents for carrying out ART procedures, as well as criminal penalties for any unlawful practices of ART.\textsuperscript{39}

So, fertility market regulation could involve a range of components, including federal regulation aiming to control the fertility market and imposing some requirements such as collecting information about donors whose identity should be known, as well as determining numbers of children who might be generated by using donated gametes of a single donor. Other related issues such as determination of parentage could be regulated at state level. Industry regulation may regulate other actual clinical procedures.\textsuperscript{40} Federal legislation is the optimal paradigm for regulating ART because of its potential for providing adequate protection for parties to the ART process, through imposing requirements that clinics should meet and achieve before carrying out ART procedures. Conduct of genetic testing and reporting of pregnancy success rates, along with requirements for properly informed and written consent, collection of information about donors and number of embryos that can be transplanted per cycle, are all important areas for regulation at this level.\textsuperscript{41}

All such legislation would work alongside of medical professional self-regulation by those involved in provision of the services in question. As noted above, such professional regulation is more responsive to rapid technological changes, and channels need to be provided for input of such professional expertise in updating governmental regulation.\textsuperscript{42} At

\textsuperscript{39} Ibid 189-190.  
\textsuperscript{40} Ibid 191-192.  
\textsuperscript{41} Ibid 194.  
\textsuperscript{42} Moses, Above n 29, 577.
the same time, such external regulation, with the force of law, has a role to play in encouraging compliance with such professional regulation.\textsuperscript{43}

\section*{3.4 Regulating ART and Considerations of Health and Safety}

ART regulation may be required in order to ensure proper medical practice which may protect patients and avoid unwanted consequences of ART. For example, regulation of ART may prevent fertility clinics from promoting false advertise\textsuperscript{ments}.\textsuperscript{44} Considerations that should be taken into account in this context will be classified into three points; protection of the health of patients and children, legal dilemmas involved with ART, and donor anonymity and gamete donation.

\subsection*{3.4.1 Protecting Health of Patient and Children}

Regulation may be necessary in order to provide protection for participants in the reproductive process, especially for women who undergo ART and children who might be born as a result of ART. Unborn children can also be protected through ensuring appropriate procedures are followed.\textsuperscript{45} Effective procedures need to be followed to address the higher risks of prematurity and of birth defects associated with ART.\textsuperscript{46} A worrying US report by the Centre for Disease Control in 1999 indicated that many clinics did not carry out basic tests on sperm for sexually transmitted diseases, Hepatitis B and C and HIV.\textsuperscript{47} Mandatory medical

\begin{footnotesize}
\begin{enumerate}
\item Ibid 576-577.
\item Cahn, The New Kinship, above n 28, 154.
\item Moses, above n 29, 528.
\item From 232 embryo laboratories, it has been reported 59% on them tested sperm for syphilis; and about 50% tested for Hepatitis B; 44% tested for HIV I and 29% HIV II; 41% tested for Hepatitis C; and 27% to as few as
\end{enumerate}
\end{footnotesize}
and genetic testing could go a long way towards addressing these problems, testing for disease and genetic abnormality, and allowing for an effective balancing of the benefits of ART against the negative consequences.\textsuperscript{48} Risks which are associated with ART in general and multiple gestations in particular,\textsuperscript{49} point to a necessity for regulation of different practices of ART. Lawmakers should consider and regulate ART to ensure safe practices of assisted reproduction. Procedure of screening could be regulated and available for couples who undergo ART.

### 3.4.2 Legal Dilemmas Involved with ART

There are serious difficulties where countries, such as Iraq, do not have specific legislation governing ART. There is uncertainty as to how existing rules could apply to ART, whether or not it is lawful, allowed or prohibited. Classical legal provisions that address issue of natural human reproduction and other related issues may be insufficient to deal with issues arising out of ART. The issues include the right to access assisted reproductive services by infertile married or unmarried couples, same sex couples or single individuals; the involvement of third-party donors in ART.

There are serious legal issues relating to the use of donor gametes or embryos such as the right of legal parentage and inheritance. For example, in the Iraqi legal system, these rights attach to children born naturally to a married couple. So, existing law recognises only parentage of children who are linked genetically to their parents and born within the marriage

\begin{itemize}
\item[48] Moses, above n 29, 528.
\item[49] For more details about risks of ART; See, chapter 2 at section (2.4.2).
\end{itemize}
relationship. The existing rules also do not recognise children born outside the normal period of pregnancy following the death of the husband using stored sperm.\textsuperscript{50} In addition, there are also legal problems related to stored frozen and surplus embryos. The problems include the fate of surplus embryos and the use and disposal of frozen embryos after the marriage relationship has ended because of divorce of death of partner,\textsuperscript{51} and the length of time an embryo may be stored, and most importantly the rights and status of a child who is conceived as result of implantation of frozen embryos when marriage relationship is over.

There are particular problems relating to the status of children born to unmarried women. Where, the Iraqi law does not penalize or prohibit sexual relationships by single women, but in relation to children born to an unmarried woman, a subsequently born child is considered only the lawful child of the mother and not of the biological father. The same would be the position of ART children born to an unmarried woman. This may affect negatively on the status and level of children who may be born out of marriage relationship, who deserve more legal protection in order to be treated equality with other children, specifically in relation to recognition their lineage to both parents basing on biological link or social nurture regardless any other consideration relating whether their parents are married or not.

### 3.4.3 Gamete Donation and Donor Anonymity

The previous chapter 2 referred to children born as a consequence of donation of gametes or embryos. Using donated gametes or embryos might be an option for infertile couples as well

\textsuperscript{50} These issues will be examined in chapter 4 dealing with position of ART in the light of existing Iraqi laws, and in chapter 5 examining the perspective of Islamic Sharia.

\textsuperscript{51} This thesis does not consider issues relating to the disposal of frozen embryos.
as for those individuals who carry hereditary diseases or genetic defects.\textsuperscript{52} As will be discussed in detail in chapter 4, the use of gametes or embryos by third parties raises issues of filiation and parental rights and obligations.\textsuperscript{53} In some, but not all countries, the identity of the gamete or embryo donors is not disclosed.\textsuperscript{54} Where the donor/s are anonymous, this affects children’s rights in know their genetic parents and may be important in some rare cases where health issues are involved. There is very small risk of incest where donated gametes from anonymous donors are used to generate a child through ART especially if a single donor is used multiple times.

Regulating ART by legislation might control and minimise risk of incest by limiting the number of children who can be born through using the gametes of a single donor.\textsuperscript{55} In the UK, the Warnock Report recommended as limit of 10 donations by a single sperm donor.\textsuperscript{56} In the US there are no legislated limits with a recent report of a single sperm donor responsible for 150 births.\textsuperscript{57} According to some sperm donors, they were advised that donation would lead only to a small number of children but some ART clinics disregarded this advice.\textsuperscript{58} The availability of a donor registry and identification of the donor may help reduce the risk of accidental incest.\textsuperscript{59} Regulation of ART can assist in avoiding or minimising the negative effects and potential disadvantages of ART.

\textsuperscript{52} Michelle Anderson, ‘Are You my Mommy? A Call for Regulation of Embryo Donation’ (2006) 35 Capital University Law Review 589, 598
\textsuperscript{54} Anderson, above n 50, 598-599.
\textsuperscript{55} Naomi Cahn, The New Kinship, above n 28, 158.
\textsuperscript{56} Dame Mary Warnock, ‘Report of the Committee of inquiry into Human Fertilisation and Embryonic’ (Department of Health and Social Security, 1984) 27.
\textsuperscript{58} Ibid.
\textsuperscript{59} Ibid.
3.5 Regulatory Framework Relating to ART Regulation

Absence of specific provisions in relation to ART does not mean that ART should be prohibited because current rules cannot govern and control it. There is a problem that without formal regulation of ART, practices may develop which are not medically appropriate and with serious risks to participants and subsequent children, for example the failure to screen gametes prior to use with resultant risk of inheritable diseases, as well as practicing some negative forms of ART. Moreover, legislative solutions will provide clear rules for dealing with conflicts of interest between the parties, children and parents, as well as issues relating to the status of children born as a consequence of ART. Therefore, law in Iraq should have a role and clear attitude in regard with regulating ART, in order to control this important activity, and consequently to encourage and allow positive practices and avoid other negative activities of ART.

With the general question of the need for legal regulation of ART answered in the affirmative, the issue arises of evaluation of proposed legislative frameworks. Subsequent chapters consider issues of the shape, nature and extent of any future regulation of ART in the Middle East and in Iraq as a model; whether ART should be prohibited regardless of the advantages of such technology; whether regulation should be restrictive, allowing ART procedures only under very strict conditions; or whether facilitative regulation should be applied, supporting greater use of ART. Such chapters also examine whether the provisions of proposed regulation should be legislative provisions or non-legislative provisions. As argued earlier, there is a strong case to be made for responsive regulation, employing a range of different procedures, persuasive and punitive, adapted to specific situation, specific
organisations, and specific individuals. Issues are also addressed of precisely what sorts of ART activities should be allowed and under what circumstances.

In this respect, the current Iraqi legal system in regard with ART will be examined, as well as the perspective of Islamic law, and the approach taken by Australian law. One approach is to view the proposals in the light of the interaction between marriage, genetic contribution and inheritance. In addition the proposed solutions could be viewed with reference to the protection of human rights, in particular the right to found a family and rights of children. So, the thesis will explore these issues in order to reach a suitable model for Iraq to adopt in regard with regulating ART, through considering legal issues related to ART as well as comparing the approaches of different legal systems. These issues are taken up in the next chapters of the thesis.

### 3.6 Conclusion

Without the development of effective and informed legal regulation, based upon understanding of the risks and possibilities of the new technologies involved, there is a significant risk that issues raised by ART may be subject to ad hoc solutions and varying views of religious Scholars. This is likely to generate variable responses and no coherent approach to dealing with ART. There is the further problem that without formal regulation of ART, practices may develop which are not medically appropriate and with serious risks to participants and subsequent children, for example the failure to screen gametes prior to using

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them to generate a child with resultant risk of inheritable diseases, along with others negative practices of ART.

It is argued that regulation of ART may be required and necessary for the protection of the health and best interests of children born as a consequence of ART. Regulation of ART is necessary and required in order to control ART practices and govern legal issues arise on it. The production of children outside of marriage and the use of third part genetic materials raise particular issues and problems in Islamic society, requiring careful and well thought out regulatory responses. These considerations provide the context and background for considering the current Iraqi legal system in regard with ART, the perspective of Islamic law, and the approach of Australia law, in the following chapters. One approach is to view specific regulatory proposals in the light of the interaction between marriage, genetic contribution and inheritance. Later chapters of the thesis explore this approach to developing a suitable program of regulation of ART for Iraq. The next chapter considers the current legal position of ART in Iraq.
Chapter 4 The Current Legal Position of ART in Iraq

4.1 Introduction

This chapter examines the application of current Iraqi laws to ART. There is no specific legislation regulating ART in Iraq. There is, however, a complex of general Iraqi laws that can apply to ART. This examination is important in determining the principal issue for this thesis, that is, whether Iraq should by special legislation regulates ART. Existing legislation may also highlight factors which will be important for future regulation of ART.

This chapter starts by outlining the Iraqi Constitution 2005, the federation of Iraq, the legal hierarchy of rules in Iraq, the sources of Iraqi law, and the constitutional protection of human rights that could relate to ART. It will set out relevant legislation, general legal provisions, principles and rules of Iraqi laws which could be relevant to ART. It also sets out differences and similarities between ART and other similar regulated practices such as medical treatment, human organ transplantation, and medical experimentation. The second part of the chapter will then discuss how Iraqi laws underpin the structure of family, marriage and human procreation and effect of ART. It sets out and examines rules of legal parentage and inheritance and the issues raised by ART in relation to these. The perspective of Sharia law will be examined in chapter 5. Finally, the conclusion provides a summary.
4.2 The Iraqi Constitution

The *Iraqi Constitution 2005* is the supreme law in Iraq. The *Constitution* is the preeminent and the supreme law in Iraq and is binding in all parts of Iraq without exception.¹ The *Constitution* includes provisions about the form of the Iraqi State and legislative process, the hierarchy of rules in the Iraqi legal system, sources of Iraqi law, and the constitutional protection of fundamental human rights.

4.2.1 Iraq as a Federated State

The *Iraqi Constitution* establishes federation as the form of the Iraqi state.² The *Constitution* stipulates in section 1 that:

> The republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic, and this Constitution is a guarantor of the unity of Iraq.

In addition, section 116 stipulates that:

> The federal system in the republic of Iraq is made up of a decentralized capital, regions, and governorates, as well as local administrations.

In this context, the *Constitution* grants the right of establishing territories to all provinces of Iraq;³ every province has the right to form a territory individually or collectively with others.⁴

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¹ The *Constitution* states in s 13 (1) that: ‘This Constitution is the sublime and supreme law in Iraq and shall be binding in all parts of Iraq without exception.’

² Federation was first established in the *Iraqi Constitution 2005*.

³ The *Iraqi Constitution* in s 117 (2) asserts this constitutional right of governorates of Iraq, it provides that: ‘this constitution shall affirm new regions established in accordance with its provisions.’ However, Baghdad is excluded from this right of establishing or joining a territory, this is stated in s 124 (3) which provides that: ‘The capital may not merge with a region.’

⁴ The *Constitution* in s 119 states that: ‘One or more governorates shall have the right to organize into a region based on a request to be voted on in referendum submitted in one of the following two methods; First: a request by one-third of the council members of each governorate intending to form a region. Second: a request by one-tenth of voters in each of the governorates intending to form a region.’
Executive, legislative and judicial authorities exist at both federal and regional levels in accordance with the Constitution. The Iraqi Constitution grants each territory and region the right to establish a constitution for that territory. Section 120 states that:

Each region shall adopt a constitution of its own that defines the structure of the powers of the region, its authorities, and the mechanisms for exercising such authorities, provided that it does not contradict this constitution.

The Iraqi Constitution grants territories/regions all executive, legislative and judicial power except in relation to the exclusive powers of the federal authority.\(^5\) The Iraqi Constitution in regard with the executive powers of the federal government provides in section 110 that specific powers are allocated to the federal authority such as external affairs, defence, fiscal and customs policy, and matters of immigration and citizenship.

The Iraqi Constitution also sets out the legislative process.\(^6\) The Iraqi parliament has the power to legislate and establish federal laws.\(^7\) Therefore, under the constitution each territory/region has the right to enact legislation which could be applied within the lands of that territory/region.\(^8\) This might mean that the regional authority of each territory is constitutionally able to legislate on ART. Accordingly, there is potential for dual laws that could be applied in the territories. The Iraqi Constitution indicates in section 121(2) refers that if there is a contradiction between provincial/regional and federal legislation in relation

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\(^5\) The Iraqi Constitution stipulates in s 121 (1) that: ‘The regional powers shall have the right to exercise executive, legislative, and judicial powers in accordance with this constitution, except for those authorities stipulated in the exclusive authorities of the federal government.’

\(^6\) The Iraqi Constitution states in s 60 authorities which have the right to submit bills to parliament, it stipulates: ‘First: draft laws shall be presented by the president of the republic and the council of minister, second: proposed laws shall be presented by ten members of the council of representatives or by one of its specialized committees.’

\(^7\) The Iraqi Constitution in s 61 provides: ‘The council of representatives shall competent in the following: First: Enacting federal laws.’

\(^8\) The Constitution in s 121 states: ‘The regional powers shall have the right to exercise executive, legislative, and judicial powers in accordance with this constitution, except for those authorities stipulated in the exclusive authorities of the federal government.’
to matters which are not stipulated within the exclusive authority of the federal government, priority is given to regional legislation. This means that both federal and regional authorities can enact legislation in relation to ART with priority given to regional legislation in case there is conflict. This dual capacity may lead to the confusion and uncertainty.

For example, the federal Personal Status Law Act 1959 should apply to the whole of Iraq, but this would require constitutional amendment to override any laws on this issue by a regional government. An illustration of the problem occurs for example in relation to marriage. The federal law provides a minimum marriage age of 18 years old, in some region the age for marriage could be legislated at less than 18 and this regional law would prevail over federal legislation.

4.2.2 Hierarchy of Rules in Iraqi Law

The legal rules can be classified into three categories (a) constitutional provisions, (b) legislative rules, and (c) guidelines. Constitutional provisions are the superior source of law which overrides other laws inconsistent with the Constitution. In Iraq the Iraqi Constitution was approved by the Iraqi people by vote directly in 2005. The second level of laws is legislation by Parliament. Legislation may regulate specific legal areas, such as the civil code, penal legislation, and legislation relating to personal status (family law). The third

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9 The Iraqi Constitution states in s 121 (2) that: ‘In case of a contradiction between regional and national legislation in respect to a matter outside the exclusive authorizes of the federal government, the regional power shall have the right to amend the application of the national legislation within that region.’

10 The Personal Status Law Act 1959 s 7 (1).

11 The Jaafari Personal Status Bill 2013 which has not been enacted included a section reducing the marriage age based on the statutory age of of puberty, which it set it as 15 years old for boys and 9 years old for girls. See, the Jaafari Personal Status Act Bill 2013 16 (1).

12 For more details about these categories; see, Abas Al-Saraf and George Hazbon, Introduction to the jurisprudence (Arabic Version) (Dar al-Thakafa, 2011) 56-57. [Author’s Trans]
level of laws is represented in regulations and lastly guidelines. These rules are established by executive authority. The *Iraqi Constitution* in section 80 authorizes the Council of Ministers to issue such rules.\(^{13}\) Where there is conflict between legal rules, the *Iraqi Constitution* indicates that any rule in any provincial constitution or legislation which contradicts rules of the *Constitution* is invalid. Section 13 (2) states that:

No law that contradicts this constitution shall be enacted. Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void. This does not override regional laws where the federal government has non-exclusive powers.

### 4.2.3 Sources of Iraqi Law

The current *Iraqi Constitution 2005* sets out principles which determine the sources of legislation. The *Iraqi Constitution*, s 2 indicates that Islam is the official religion and a main source of legislation in Iraq and no law may be enacted that contradicts the established provisions of Islam. Sections 2 (2) stipulates that:

Islam is the official religion of the State and is a foundation source of legislation:

A. No law that contradicts the established provisions of Islam may be established.

The effect is that the *Iraqi Constitution* prohibits issuing any provisions which conflict with Islamic Sharia. This is important to the discussion of the importance of Sharia in determining whether and how Iraq should or should not regulate ART, (see 5.2.1). However, the *Iraqi Constitution* indicates in section 2 (B) and (C) that legislation should be consistent with

\(^{13}\) The *Iraqi Constitution* in s 80 (3) provides that: ‘The council of ministers shall exercise the following powers; third: to issue rules, instructions, and decisions for purpose of implementing the law.’
principles of democracy and freedoms and rights contained in the Constitution. It stipulates that:  

B. No law may be enacted that contradicts the principles of democracy.  
C. No law may be enacted that contradicts the rights and basic freedoms stipulated in this constitution.

Based on that, it could be deduced that in any future legislation, the legislative authority must consider principles of Islamic Sharia as well as principles of democracy and human rights and freedoms indicated in the Iraqi Constitution. This is considered below and will be the subject of further discussion in chapter 8 in considering whether Iraq should legislate on ART. Finally, the *Iraqi Constitution* prohibits any customs and traditions which are inconsistent with human rights.  

### 4.2.4 Constitutional Protection of Fundamental Human Rights

The *Iraqi Constitution* does not include particular provisions relating to ART nor refer to the right of marriage and founding a family. These are considered universal rights under the *Universal Declaration of Human Rights 1948*, Article 16 (1) which provides that:

> Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.

This universal provision might justify uses of ART to assist infertile couples. In this context, the *Iraqi Constitution* guarantees and protects personal liberty. The *Constitution* also

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14 The *Iraqi Constitution 2005* s 2 (B) (C).  
15 Ibid s 45 (2).
provides protection for the liberty and dignity of man. So, liberty may embrace liberty of choice including choices relating to marriage and founding a family. This, it might be argued, could provide the foundation for the argument that ART is lawful and should be permitted.

The *Constitution* also declares the general equality of all Iraqis regardless of gender, race, and religion. It also confirms the essential rights of people to life, security and freedom. The Constitution also affirms equality of opportunities for all Iraqis. In addition, the *Iraqi Constitution* asserts the right of personal privacy for all individuals. In this context, reproductive rights and the right to access assisted human technology services it could be argued are protected as an essential constitutional right for Iraqi people. The right of medical and ART treatment might be considered an expression of the principle of equality and equal opportunity. These principles are considered constitutional rights which are granted and guaranteed by the constitution to all Iraqis.

Furthermore, the *Iraqi Constitution* includes provisions which refer to the importance of family and confirm the personal freedom, welfare and human rights, including the rights of children. This could be interpreted as granting rights and freedom of all individuals to marry and have a family. The *Constitution* asserts the importance and value of the family in

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16 Ibid s 37 (1)
17 The *Constitution* in s 14 stipulates that: ‘Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, colour, religion, sect, belief or opinion, or economic or social status.’
18 The *Constitution* in s15 states: ‘Every individual has the right to enjoy life, security and liberty.’
19 The *Constitution* in s 16 provides: ‘equal opportunity shall be guaranteed to all Iraqis, and the state shall ensure that the necessary measures to achieve this are taken.’
20 The *Constitution*, s 17 stipulates that: ‘every individual shall have the right to personal privacy so long as it does not contradict the right of others and public morals.’
community. It also declares that the State is responsible for protecting the family. Section 29 (1) states that:

   The family is the foundation of society; the state shall preserve it and its religious, moral, and national values.

Although the Constitution asserts the importance and role of the family in the community, it does not elaborate on the definition and structure of the family or the means or method of founding a family. This section also emphasizes the duty of the State to protect and care for mothers and children as well as duty of the State to provide the suitable environment for children to develop their capacities and endowments. This duty may require the State to legislate to ensure that ART does not cause harm to society, the family or children born as a consequence of ART. In addition, the Constitution prohibits any tribal traditions which might conflict with human rights. Section 45 (2), in the last phrase, states that:

   The State shall prohibit the tribal traditions that are in contradiction with human rights.

Moreover, the Constitution provides for rights and responsibilities of children and parents towards each other. Section 29 (2) provides that:

   Children have the right to upbringing, care and education from their parents. Parents have the right to respect and care from their children, especially in times of need, disability and old age.

The Iraqi Constitution 2005 also imposes a duty on the State to provide and ensure the health and social security protection for individuals especially for women and children.\(^{21}\) Although the constitutional provisions do not specifically address issue of ART, they could be

\(^{21}\) Responsibility of the State is stated in the Constitution which stipulates that: ‘The State shall guarantee to the individuals and the family- especially children and women- social and health security, the basic requirements for living a free and decent life, and shall secure for them suitable income and appropriate housing.’ See, the Iraqi Constitution 2005 s 30 (1).
considered a basis for future regulation of ART. The crucial question is whether or not these constitutional principles and rights affect the use of ART.

The *Iraqi Constitution* also asserts the right of individuals to live in safety and in a suitable and healthy environment.\(^\text{22}\) In addition, the *Iraqi Constitution* includes texts which confirm freedoms and dignity of individuals, and contain an absolute prohibition on any kind of physical or psychological torture.\(^\text{23}\) In addition, section 19 (2) provides that:

> There is no crime or punishment except by law. The punishment shall only be for an act that the law considers a crime when perpetrated.

This might imply that ART is not unlawful as long as there is no legal provision which prohibits it directly. This may mean that objectionable practices related to ART which may cause harm to individuals and community cannot be penalized. This may be an important reason to consider regulation of ART. The general constitutional rights in the *Iraqi Constitution* can provide principles underpinning regulation for ART. The next section examines existing Iraqi legislation and its potential to apply to ART.

### 4.3 Iraqi Legislation and its Application to ART

This section examines how the existing Iraqi law may apply to ART. It reviews and examines existing rules that could be relevant to ART and whether they are sufficient to regulate ART. It will also examine whether ART contradicts existing legal rules. This will provide a basis for deciding whether ART should be regulated in Iraq. This section first sets

\(^{22}\) Ibid s 33.  
\(^{23}\) Ibid s 37(1).
out legislation which might be relevant to ART. It then considers whether ART should be regarded as medical treatment, then whether it could be regarded as organ transplantation. Finally, it considers whether ART could be regarded as medical experimentation. This can assist in deciding whether existing law sufficiently regulates ART.

4.3.1 Relevant Iraqi Legislation


This section commences with the Civil Law Act 1951 of Iraq. This Act sets out rules which regulate legal personality, personal rights and property, as well as civil liability for damages and compensation. Section 1(2) of this Act indicates that if there is no legislative provision that applies, the court may refer to custom, then principles of Islamic Sharia. However, this legislative text must yield to the Iraqi Constitution which grants priority to Islamic Sharia.24 Section 5, provides that judgments or rules can be adapted in response to change of situation or time. In addition, section 8, establishes the principle that laws should give priority to remedying significant disadvantages rather than one that provides advantage. So that, avoiding harm is more important than obtaining a benefit. Although, different activities of ART might provide benefits as well as detriments, it does not mean that all activities of ART should be prohibited because of potential disadvantages involved with these technologies. It would permit approval of ART, but restrict some practices of ART to avoid negative effects which might be associated with some activities of ART such as trading in reproductive gametes, tissues or embryos. In this way the benefits of ART can be retained to assist

24 See, the Iraqi Constitution 2005 s 2.
infertile couples. The second aspect relates to family law legislation dealing with personal status.

The Personal Statuses Law Act 1959 (Iraq) regulates family issues such as marriage and divorce, legal parentage, alimony and inheritance. This legislation has no specific provisions dealing with ART although the general principles may affect the use of ART. Section 1(2) and (3) provides that in the absence of legislative provision, decisions are to be based on those principles of Sharia which are relevant and consistent with this legislation, as well as considering decisions of courts and Islamic jurisprudence in Iraq and other Muslim countries which have similar laws to Iraq. Islamic Sharia could be considered and applied in the absence of legislation. This is in addition to other relevant rules which regulate marriage, its legal effects and human reproduction.25

The third legislation is the Punishments Law Act 1969 of Iraq. This Act deals with criminal matters and punishment. There are no specific references to ART in the legislation. The Act imposes penalties for terminations of pregnancy,26 as well as punishment for rape.27 Sexual relationships between single people are not penalized by Iraqi Penal Law Act 1969, unless the sexual relationship involves a married person so constituting adultery.28 Some contemporary Muslim scholars argue that where ART involves gamete, embryo or reproductive tissue of persons other than the married couple, this is equivalent to adultery. If this were the case, it

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25 The impact of ART on marriage will be discussed later in this chapter.
26 The Punishments Law Act 1969 of Iraq, ss 417 and 418 impose different penalties on actions which lead to an abortion; these vary from maximum of one year in prison for a pregnant woman and maximum seven years prison for others who participate in abortion such as doctor who carries out abortion with her consent, and ten years prison who deliberately aborts a pregnant woman without her consent. However, these sections impose lighter penalties if an abortion of pregnant woman is carried out where there is incest.
28 It is considered marital betrayal. The penalty which could be imposed on married person and adulterous partner is short term imprisonment; such penalty requires complaint from another married partner. The Punishments Law Act 1969 of Iraq ss 377-380.
would be subject to penalty under Iraqi criminal law.\textsuperscript{29} It will be argued in chapter 5, that use of donor gametes, tissue or embryos does not constitute adultery.

Other legislation which should be considered is the \textit{Public Health Act 1981} in Iraq. The purpose of this legislation is to provide medical services especially for children, mothers and families. This Act gives a right to health care and treatment including physical, psychological and social aspects for individuals.\textsuperscript{30} In relation to ART, this Act confirms the right of a pregnant woman and children as well as unborn children to health care.\textsuperscript{31} Such provision could apply to enable screening of embryos and gametes to detect transmitted diseases and genetic disorders.

\textbf{4.3.2 ART and Medical Treatment}

ART might be considered as a form of medical treatment or procedure and therefore governed by the same law.\textsuperscript{32} On this approach, there is no need to establish new legislation to regulate ART if the existing law is sufficient. Conduct which is a violation of the human body is penalized unless it involves necessary medical treatment.\textsuperscript{33} The characterization of ART as medical treatment ignores the special aspects and consequences of ART particularly artificial fertilisation, the creation of human embryos, the donation of genetic material and the potential for genetic screening and manipulation. In general terms medical treatment has as its purpose to manage or cure illness and disease and although ART has as its purpose to cure infertility, its effects are much broader and not limited to the individual but extend to all

\textsuperscript{29} This argument will be set out and discussed in chapter five which is allocated for examining perspective of Islamic law about assisted human conception.
\textsuperscript{31} Ibid ss 6, 7.
\textsuperscript{32} Saadi Ismail Al-Barazanji, \textit{Legal Problems of Recent Reproductive Technologies} (Arabic Version) (Selah Al-Deen, 2002) 37. [Author’s Trans]
\textsuperscript{33} It is stated in the \textit{Punishments Law Act 1969} (Iraq) s 2.
participants in the process. If ART were simply considered medical treatment, it would mean that the legislature would see no purpose in introducing legislation to prohibit improper practices involving donors, embryos and ART processes nor the impacts that ART have on children.

In terms of the prohibition of violation of the human body, this principle holds that the human body is legally protected, so any violation of the human body without consent is considered unlawful. This principle is found in all legal systems including ancient legislation. In the Iraqi legal system, there are several rules which are underpinned by this principle. The *Iraqi Constitution 2005* in section 37 (1) (a) states that:

The liberty and dignity of man shall be protected.

The *Punishments Law Act 1969* provides that actions which represent violations of the human body, a person’s reputation or freedom are unlawful. This legislation penalizes those who commit this kind of violation. This is also reflected in the *Civil Law Act 1951* of Iraq section 202 indicates that any action which causes damage to the human body such as murdering, injuring, hitting or any kind of offensive action requires compensation from the person who wrongfully caused the harm. There are exceptions based on personal and public benefit. Exceptions under the *Iraqi Penal Law Act* include execution of duty, the execution right and legitimate self-defence. Section 2 of the *Punishments Law Act 1969* in Iraq provides that an action is not considered a crime if it was the result of a right which is determined by law such as surgical operations and medical treatment, when it occurs with the consent of the patient or his/her legitimate representative and without their consent in emergency. If ART is

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34 For example, *Hammurabi Code* included provisions which aim to protect human body against any violation. See, sections from 196 to 204.
considered a medical procedure, then it would not be unlawful within section 2. In this context, some surgical operations such as tubal repair with the person’s consent to overcome infertility would not be considered a violation.

In relation to ART, the issue which arises here is examining whether or not different activities of assisted human reproduction is a violation to the human body. If the answer is affirmative then it would be regarded as unlawful. Otherwise, reproductive technologies might be regarded as having a special status which legalizes these technologies. This is because ART is carried out for purposes of treatment in order to overcome infertility and with the consent of the relevant couple. If clinical procedures include extracting oocytes (eggs) and sperm and following fertilisation the transfer to the woman, it might be argued that this constitutes a violation. But viewed in the light of its purpose and the consent of the participants, it is argued that ART is unlikely to be a breach of this principle. Therefore, absence of specific provisions concerning regulation of ART does not necessarily mean that these technologies and operations are unlawful because they conflict with legal principles. ART is not incompatible with the current legal principles.

### 4.3.3 ART and Transplantation of Human Organs

There are some aspects of ART that bear features of organ or tissue transplantation. Most Middle Eastern countries, including Iraq, have legislation addressing and regulating human organ transplants. In Iraq, the *Transplantation Operations of Human Organs Act 1986* regulates the removal and implantation of human organs, such as the heart, liver and lungs for
the purpose of preserving the patient’s life.\textsuperscript{36} It forbids any commercial trading in human organs,\textsuperscript{37} but it allows the acquisition by donation or bequests.\textsuperscript{38} There are penalties for breach of this legislation.\textsuperscript{39} In relation to ART, the issue is whether these technologies involving extraction of gametes and using donor gametes and embryos for reproductive purposes could be considered implantation of human organs.

Although the legislation does not include a definition of an organ, it is intended to deal with organ transplants and may not provide an appropriate mechanism for regulating ART. The purpose and aim of the legislation is very different from purpose of ART. In addition, reproductive cells which are used in ART have a special and unique nature involving the transfer of genetic material. This Act does not make any direct reference to ART. The issue which is raised in this context is whether it is possible to consider ART as organ or tissue transplantation. There are some elements of the ART, particularly IVF involving third party gametes or embryos, could be considered a form of tissue transplantation although ART does not involve implantation, see chapter 2. Both techniques involve extracting and transferring human tissue to another person. In determining how far legislation dealing with organ or tissue transplants could apply to ART, it is first necessary to determine the reach of the existing legislation. If it is limited to the transfer and implantation of human “organs” this may be too narrow to cover the transfer of embryos or sperm.

In the absence of a legislative definition of an organ, its definition depends on everyday usage. The classical definition of human organs usually refers to the main organs of human

\textsuperscript{36} The Transplantation Operations of Human Organs Act 1986 s 1.
\textsuperscript{37} Ibid s 3.
\textsuperscript{38} The transplantation states two sources for obtaining human organs; first, written consent of the person during his/her life including donation or bequest. Second, a person who is dying, brain death, with consent of a close relative of the person and approval of medical committee consisted of three doctors. Ibid s 2.
\textsuperscript{39} The penalty could be one year or less in prison and fine or one of them. See, Ibid s 4.
body such as, lung, eye and liver. There is, however, a more expansive view that human organs refer also to other tissues including reproductive cells such as gametes and presumably also embryos. An organ is defined in the medical dictionary as ‘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.’ Consequently since sperm, ova and embryos do not satisfy that definition, they may not be covered by the legislation. So, the Iraqi Act relating to transplantation of organs which permits removal and extract human organs cannot be applied on gametes.

There are several differences between ART techniques and organ transplantation. As mentioned above, the purposes and consequences of ART are different. Human Organ transplantation has a remedial purpose to preserve life, while the main purpose behind carrying out ART process is to enable infertile couple to have children. Secondly, there are significant differences between the main organs of the human body and other human tissues and reproductive cells. The main organs are unique and incapable of regeneration, while human tissues including reproductive cells have the ability to multiply and to be renewed. Moreover, reproductive tissues have the unique feature that they contain genetic materials. Thus, the law should deal with ART differently from process of transfer and implantation of human organs. This means that ART cannot be regulated by these rules of the transplantation Act in Iraq.

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40 The Iraqi legal system does not include a definition of human organ.
41 This view is adopted by Islamic jurisprudence council in Saudi Arabia in 1988, whereby it defined a human organ as part of human including tissues, cells, blood etc. Munther Al-Fadhel, Legal Development in Human Organs (Arabic Version) (Dar Al-Shaon Al-Thakafia, 1990) 16-17. [Author’s Trans]
43 The purpose of ART which is to enable infertile individuals to generate and conceive offspring might be available in case of transplantation of ovaries and testes, which means that reproductive organs cannot be caught by those legal provisions relating to organs transplantation.
In relation to the prohibition of trading in human organs, the human body generally cannot be the subject of property rights and cannot be an object of trading. Section 61 of Civil Law Act stipulates that anything which is not excluded from trading by nature or law is appropriate to be a subject of financial rights. Moreover, section 62 of Iraqi Civil Law Act 1951 refers to objects which can be appropriated and that can be the subject of trading and financial rights.\(^{44}\) In relation to the Transplantation Operations of Human Organs Act 1986, it prohibits in section 3 all kinds of commercial trading with human organs such as selling and purchasing of human organs and prevents a doctor doing the transplant operation if the doctor is undertaking this for the purpose of commercial trading in human organs.

There are several exceptions which make dealing with human organs legitimate. For example, it is permissible to donate human organs for treatment purposes under a condition that the operation should not cause damage to the organ donor greater than the damage which is avoided for the patient who needs that organ. Thus, it is forbidden to donate essential and non-generative organs such as the heart and liver that prohibition is because donation of essential organs means that donor will die. But it is allowed according to Iraqi law for the person to donate his/her dead body by bequest.\(^{45}\)

This principle of no harm might also inform the regulation of ART. ART should be permitted where it does not involve or require trading in organs such as where the gametes of the infertile couple are used. Where there is participation of a third-party donor of sperm, oocyte, embryo or reproductive tissue in the reproductive process, this may be subject to the

\(^{44}\) The Civil Law Act 1951 s 62 does not include any reference to the human body, it is only stating two categories of objects; real estate such as houses and lands and chattels such as furniture and animals.

\(^{45}\) This is stated in the Transplantation Operations of Human Organs Act 1986 s 2.
prohibition on trading. If the legislation applies to gametes and embryos, then trading, sale and purchase is prohibited.

The important point which might arise in this context is the donation of gametes or embryos for benefit of couples who are unable to have children. Provided the donation is provided without payment, and with fully informed consent, it would not be prohibited. The issue which needs to be examined is whether or not donation of gametes is excluded from this principle. The logical response would be that it is not prohibited as long as donation of gametes is for overcoming infertility and to assist infertile couples to have children. There are some arguments which consider this unlawful because it conflicts with legal parentage rules, or because it is considered alike to adultery.\(^{46}\) This apart the practices of assisted conception generally do not contradict this principle as long as there is no sale, purchase or payment involved in ART procedures.

4.3.4 ART and Medical Experimentation

Some aspects of ART might be considered as medical experimentation. In Iraqi law, there is no specific definition of a medical experiment. However, the term medical experiment in relation to a human being refers to any action which aims to cure, or to discover and understand the natural processes.\(^{47}\) What were previously described as medical experiments in the past are now established evidence based medical practice. A common distinction is between therapeutic and scientific experiments. A therapeutic experiment aims to cure the patient with a new method not previously used on humans while scientific experiments aim to

\(^{46}\) These arguments will be discussed in chapter 5 at section (5.3).

examine a scientific theory or observing the impact of new drug on human beings. It could be argued that this classical division is imprecise; scientific experiments might include therapeutic aspects and lead to produce medications and drugs for treatment purposes. Therapeutic experiments could also be described as scientific experiments.

In relation to the main areas of ART that are considered in this thesis, AI and IVF and related technologies, these are no longer regarded as medical experimentation. The practices are evidence based standard medical procedures as described in chapter 2. As with any other treatment, there are likely to be advances in knowledge, skills and techniques but they are no longer to be regarded as medical experiments. This section therefore deduces that the existing provisions and legal principles in relation to medical action, process of transfer and implantation of human organs, and medical experiments on the human body might be insufficient and inappropriate to regulate ART. This is because although ART involves medical treatment and some variation of transfer of human tissues and gametes, the unique aspects of ART are not sufficiently dealt with by taking that approach.

However, it might be argued that the underpinning principles may have value in determining the principles guiding the regulation of ART. These would include the importance of medical treatment providing benefit to the patient and the importance of autonomy and consent; the importance of having in place special provisions where the transfer of human tissue is involved more particularly where there are donors of gametes and embryos. Especially ART techniques may include activities some of them might be harmful. Thus, it is necessary to distinguish between such these techniques and control different practices of

48 Shawqi Zakaria Al-Salihi, Artificial Fertilizing Between Islamic Sharia and Positive Laws (Arabic Version) (Dar Al-Nahda Al-Arabia, 2001) 274. [Author’s Trans]
ART as well as legal effects and consequences, especially those pertaining to personal rights and freedom.

_The Transplantation Operations of Human Organs Act 1986_, section 1 makes lawful organ transplantation operations which are conducted for treatment purposes and saving life, if they are done by a specialized surgeon in an authorized medical centre with the condition that the centre is constructed for the purposes of human organ transplant operations. This suggests that similar protective measures ought to apply to ART procedures. Although operations for transplanting human organs might include a violation to the human body, Iraqi legislation provides that these operations do not constitute a violation of the human body because these operations are conducted to save human life and for medical purposes. So, for the legality of such surgical operations, it is necessary for the following legal conditions to be imposed which are represented in operations should be carried out for treatment purpose, and to be carried out by a specialized surgeon, as well as the operations should be conducted in a medical centre which is specialized and authorized. These three requirements may inform the regulation of ART in Iraq so as to require specialized clinicians with ART services offered in authorized clinics. This is discussed further in chapter 8.

### 4.4 Formation of Family and Status of Children- Relevant legislation

This section set out legislation regulating to the issue of establishing of the family and the status of children. This section aims to explore how far ART is affected by the existing laws

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49 These requirements are stated in _The Transplantation Operations of Human Organs Act 1986 s 1_.

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relating to formation of the family, including marriage as well as the legal status of children in Iraq.

**4.4.1 Formation of a Family in Iraq**

This section first discusses the legal recognition of family in Iraq and the legal rules relating to marriage and the status of children and how this is important in considering the regulation of ART. In Iraqi law, marriage is considered as the foundation for establishing a family. The legal rights and obligations of parents and children towards each other such as maintenance, legal parentage and inheritance are governed by laws relating to the family. The Iraqi family law assumes that a family comprises a married couple and their genetic children. The provisions of the Iraqi law do not include a specific definition of what constitutes a family. The *Iraqi Constitution 2005* includes a reference to the family in section 29 (1) (A), which provides that:

> The family is the foundation of society; the State shall preserve it and its religious, moral, and national values.

This section of the *Iraqi Constitution* asserts the importance of the family in the society and imposes a duty on the State to preserve and take care of families.\(^50\) In Iraq, issues which are related to the family such as marriage, divorce, legal parentage and inheritance are regulated by the *Personal Status Law Act 1959*. Marriage is considered an essential element for the founding of families in Iraq. The classical and common family normally consists of a husband and wife and, if they have children, their genetic children. Although the natural human reproduction may occur within the marriage relationship, there are some cases and

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\(^{50}\) The *Iraqi Constitution 2005* ss 29 and 30.
circumstances where children may be born outside marriage. Islamic Sharia prohibits any sexual intercourse outside marriage, and this is also the social norm in Iraq and the Middle East. So far, sexual relationships outside marriage may bring shame to the participants in such relationships and to their families in the Middle East, and this can lead to social ostracisation of the woman.

The common types of family in Iraq and the Middle East could be classified as first, the classical family consisting of parents (male and female), who are married and their genetic children. The second type is single parent families consisting of a single parent (father or mother) and children. The parent may be single as a result of divorce or the death of a parent; this has become common recently in Iraq because of wars and violence. The third type of family is blended and step-families where a person after divorce or death of his/her partner remarries. Each of these families is initially based on a marriage relationship in which the children are the genetic children of the couple. In this context, the Iraqi law does not recognise adoption as way of establishing a family and adopted children are not entitled to filial rights or inheritance.

New reproductive technologies challenge the traditional notions of family in Iraq. This is because children born as a consequence of ART might not have a genetic relationship to their parents where donor gametes or embryos are used. Where an unmarried couple, or a single woman, are recipients of ART, subsequent children are treated as illegitimate and consequently not entitled to inheritance or legal parentage in relation to the genetic father. Same sex couples can have children who are genetically related to one of them. Chapter 8

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will argue that children are innocent outcomes of ART and since the Iraqi Constitution recognises that all children have human rights; these should include the right to support, maintenance, legal parentage and inheritance in relation to both parents. The use of ART is not necessarily limited to the genetic contributions of a married couple. They could involve donated gametes, embryos or reproductive tissues. The issue is whether the laws relating to marriage may have some impact on the lawfulness of ART in Iraq.

Marriage determines legal rights and duties arising out of the marriage relationship. In Iraq, marriage is governed by the Personal Status Law Act 1959. Section 3 of this Act refers that marriage is a contract between a man and a woman in order to construct a relationship for mutual life and offspring. Under Iraqi law, the marriage of a child’s parents is essential to confirm legal parentage of a child to his/her parents and other rights and duties to the child. Socially, the inability of a marriage partner to have children may lead to annulment of the marriage relationship; ART could be employed in order to avoid this negative consequence. The definition of marriage does not expressly prohibit the use of ART in fulfilling the purposes of marriage especially where couples are unable to have children.

Iraqi law does not indicate that the natural reproduction is required in order for children to be recognised as children of the marriage. So, it is argued, that children born using ART using a married couple’s own genetic material would be recognised as lawful children of the parents. However, employing and using ART as an alternative way to found a family might not mean

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52 In terms of marriage bond’s conditions, the required substantial condition is agreement of partners; Muslim jurisprudence has different views on whether other conditions are required in marriage bond or not such as witnesses and approval of parents of partners. Ata Al-Senbati, Banks of Sperm and Embryos: Comparative Study Under Islamic Jurisprudence and Law (Arabic Version) (Maktab Zainab, 2001) 43. [Author’s Trans]

53 Al-Barazanji, above n 32, 42.
that all activities of assisted human conception are lawful and should be allowed. For example, consent of the couple may be necessary for using ART to assist an infertile married couple to have children; this would not be inconsistent with general legal principles of Islamic Sharia and Iraqi law.

Another issue is polygamy in the *Personal Status Law Act 1959*. Section 3 (4) prohibits polygamy unless there is a legitimate interest which requires it.\(^{54}\) So, as long as the main purpose of marriage is often to found a family and have children, this might represent a legitimate reason for a husband to marry another woman where his wife is unable to have children. Iraqi law also allows annulment of the marriage, and it also allows a wife to request annulment if her husband is infertile.\(^{55}\) It might be argued, however, that female infertility is not necessarily a legitimate ground for polygamy or divorce by the male partner, where polygamy as an option in order to have children might not be sufficient and justified where ART is available and capable of assisting infertile wives to have children. Moreover, with the availability of ART, male infertility should not be a ground for annulment for the wife.

Finally, in relation to incest, the *Personal Status Law Act 1959*, sections 12 to 16 and Islamic Sharia restricts and make unlawful marriage of close relations.\(^{56}\) Some practices of ART when a third-party is involved may carry a risk of incest because of the lack of identity of donors of gametes, embryos or reproductive material. In practice, however, sperm donation is the most common compared with embryo or oocyte donations which are small in number.

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\(^{54}\) Marriage of more than one wife requires approval of a judge, the conditions which are required for granting this permission are; financial ability of husband to support more than one wife and there should be a legitimate interest. See, the *Personal Status Law Act 1959* s 3 (4).

\(^{55}\) Ibid s 43 (5).

\(^{56}\) For example, Marriages are unlawful between a man and his mother, grandmother, sister, niece, daughter of brother, and similarly for women. Ibid s 14.
This is discussed at (2.5). The risk of incest may be involved with ART. This could be overcome where the identity of the donor was known or required by law and reduced where a limit is imposed on the number of children that can be created using a particular donor. Moreover, the risk of incest could be quite small, and reduced even further by imposing some restrictions and safeguards in order to avoid negative consequences and insure safe practice of ART. For example, Australian regulations of ART limit numbers of families that can use donated gamete of a single donor, as well as requiring clinics to keep records which include information about donors.57 This is further discussed in chapter 8.

4.4.2 Status of Children in Iraq

The status and rights of children will be examined under the following headings; first, children born to a married couple born using the couple’s gametes; second, ex-nuptial children, third, children born using donated gametes of a third-party. The legal status of a child and other legal rights such as legal parentage and inheritance are decided according to the genetic linkage with married parents.58

Married Couples Using Their Own Genetic Material

Under Iraqi law the status of children is directly linked to the marriage of their genetic parents. This status is important for purposes such as legal parentage and inheritance, as well as other paternal rights and responsibilities.59 A married couple using their own genetic material may have a child using ART. The existing provisions in the Iraqi law regulate status

57 These regulations will be set out and discussed with details in chapter 7.
58 Existing rules of Iraqi law relating to legal parentage and inheritance as well as impact of ART of these rules will be detailed in section below.
59 Husaini Haikal, Legal System of Artificial Procreating: Between Positive Law and Islamic Sharia (Arabic Version) (Dar Al-kutub Al-Kanonia, 2007) 37 [Author’s Trans].
of children and assume that they are born through the natural process of reproduction. However, there is no significant legal difference between ART being used by a married couple using their own gametes and children conceived and born naturally to married parents. In both cases, children are linked genetically to their married parents. Consequently, the use of ART by a married couple using their own gametes is compatible with the existing provisions in Iraqi and Sharia law.

Because the narrowest view of Sharia scholars (see chapter 5) does not permit ART even in this situation, in order to avoid any doubt and to provide assurance to married couples, legislation should make it clear that a child born using ART by a married couple using their own gametes is the lawful child of those parents. If the legislation confirms legal parentage of a child to its both parents only where there is sexual intercourse, it might require amendment to allow ART not involving intercourse where children are the genetic children of the couple.

Where, the child is linked genetically to the couple, mother and her partner, the child should be considered the lawful child of the couple. This is discussed further below at (4.5.1).

**Genetic Children of Unmarried Couples**

The status of a child is raised also in relation to ex-nuptial children born to genetic parents who are not married. This may result from natural conception through intercourse or from artificial conception utilizing the couple’s own genetic material. If it is argued that an ex-

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60 The *Personal Status Law Act 1959* s 51.
nuptial\textsuperscript{61} (illegitimate) child should be regarded as the lawful child of the genetic parents both father and mother,\textsuperscript{62} this is inconsistent with the rules relating to legal parentage, existing inheritance law, and legal responsibility for maintenance.

Under Iraqi law, a child born to an unmarried woman or as a consequence of an adulterous relationship is recognised as the child of the birth mother, but is not regarded as the lawful child of the father.\textsuperscript{63} Consequently, the child has rights of legal parentage and inheritance only in relation to the mother. Although Iraqi law does not prohibit or penalize sexual relationships out of marriage among single persons, it does not legislatively provide full protection for the status and rights of children who might be born as result of sexual relationship outside marriage. Children born outside a marriage relationship are considered legal persons but not entitled to the same legal rights as children born within a marriage relationship. For instance, legal parentage of a child who might be born out of the marriage relationship cannot be confirmed to father, and consequently there is no right of inheritance in relation to father. The children do, however, have rights of inheritance in relation to their mother. There is, however, a pragmatic solution to this difficulty which superficially conforms to existing social norms. A couple may declare the child as their own child through confession, as will be discussed later.\textsuperscript{64}

It will be argued in chapter 8, that the failure to recognise the genetic father as the lawful parent discriminates against innocent children and may represent a shortcoming in the Iraqi

\textsuperscript{61} This is the preferred term in Australian legislation.
\textsuperscript{62} The genetic relationship can be confirmed through DNA testing where there is a dispute.
\textsuperscript{63} Ahmed Al-Kubaisi, \textit{Succinct in Interpretation of Iraqi Personal Status Law- Part 1} (Arabic Version) (Al-Ateeq, 2\textsuperscript{nd} ed, 2006) 201 [Author's Trans].
\textsuperscript{64} See, chapter 4 section (4.5.1).
legal system. Arguably it is also inconsistent with the *Iraqi Constitution* which grants equal protection to children, see (4.2.4). Where donor gametes or embryos are used, in Iraqi law, a subsequent child could be regarded as being in the same position as a child born as a consequence of an extramarital relationship. This is dealt with separately in (4) below.

*Children Born Using Donated Gametes or Embryos*

Children born to a married or unmarried couple or a single female whom they are not genetically related are in law is a similar position to ex-nuptial children referred to in the previous paragraph. The argument for recognition of the equal status of these children rests on the right to equal protection under the law. However, using donated gametes/embryos to generate a child through the ART process is not recognised by Iraqi law, as it may conflict with cultural traditions as well as principles of Sharia and Iraqi law relating to legal parentage and inheritance, specifically because it causes legal parentage confusion.

Presumably, the legal parentage of the child born using donated gametes may be confirmed if the husband admits that child as his child where there is no dispute over the child. 65 So, confirming legal parentage through confession might be applied in ART especially if the donor was anonymous. Where there is no requirement that a married couple should prove that the child is their genetic child, unless there is dispute over the child, in which case DNA testing would conclude the issue.66

65 This is consistent with the *Personal Status Law Act 1959*, which provides in s 52 that declaration by a parent is a method for confirming parentage.

66 This will be discussed more with recommendation for Iraqi law in relation to legal status of children and parentage in chapter 8.
4.5 Impact of ART on Parentage and Inheritance in Iraqi Law

Under Iraqi law, the status of a child and its rights to legal parentage and inheritance is directly based on the genetic relationship between children and their married parents. The genetic relationship between parents is assumed where the parents are married. However, this assumption is rebuttable by DNA evidence. This section will discuss existing rules of legal parentage and inheritance in Iraqi law and impact of ART on these issues.

4.5.1 Legal Parentage in Iraqi Law

In Iraq, the parent-child relationship in law depends upon confirming the legal parentage of the child. Legal parentage in Iraq exists where the genetic parents of the child are married to each other. Confirming legal parentage of a child is the basis of legal rights, including the right to carry the name of the parents, the right to maintenance and care as well as rights to inheritance. In the Iraqi legal system, legal parentage is governed by the Personal Status Law Act 1959, which is based on Islamic Sharia. Islamic Sharia prohibits the legal adoption of children. So, an adopted child is not the lawful child of the adopting parents and cannot adopt the family name of the adopter. Underpinning this view is that adoption leads to legal parentage confusion. Primacy is given to genetic parentage over social parenting. Under the Iraqi Personal Status law Act 1959, there are two ways to verify and confirm legal parentage

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67 Lineage matters are governed by ss 51,52,53,54 of the Personal Status Law Act 1959 (Iraq).
68 The Quran proclaims that: ‘those among you who make their wives unlawful to them by Zihar, they cannot be their mothers. None can be their mothers except those who gave them birth.’ The Quran, chapter 58, verse 2, translated by Muhammad Taqi-ud-Din Al-Hilali, and Muhammad Muhsin Khan (Darussalam, 1997).
of a child to his/her parents: confirmation of legal parentage based on a marriage relationship and confession of the parents.\textsuperscript{69}

Section 51 of the \textit{Personal Status Law Act 1959} provides that to confirm legal parentage of a child to husband and wife, the birth must occur after a minimum period of pregnancy has passed from the time of the marriage contract. Although the Iraqi legislation does not specify the minimum period of pregnancy which is legally required, there is general acceptance that the minimum period is six months after the marriage commences.\textsuperscript{70} This contrasts with the former position under many legal systems that the child is the legitimate child if parents were married at the time of the birth of the child. The Iraqi legislation does not have any provision in relation to the maximum period of pregnancy, where a child is born after the marriage relationship ends. There is no consensus among scholars of Islamic law about this issue.\textsuperscript{71} However, there is general acceptance in the Middle Eastern region that the maximum period of pregnancy is one year.\textsuperscript{72} Although this appears to be longer than would be regarded as necessary having regard to the usual gestation period, presumably it pragmatically manages a temporary reconciliation and sexual relations following divorce.

As is the usual pattern in most countries, this is a rebuttable presumption so that evidence could be brought, in case there is dispute that pregnancy was not possible because of lack of

\textsuperscript{69} If lineage of a child to parents is confirmed, it assumes that there is genetic relationship between a child and parents.

\textsuperscript{70} Ahmed Al-Kubaisi, \textit{Succinct in Interpretation of Iraqi Personal Status Law-Part2} (Arabic Version) (Al-Ateek, 2\textsuperscript{nd} ed, 2006) (Arabic Version) 198 [Author’s Trans].

\textsuperscript{71} Amira Adli Amir, \textit{Penal Protection of the Embryo in the Light of Contemporary Techniques} (Arabic Version) (Dar Al-fiker Al-Jamie, 2008) 197 [Author’s Trans].

\textsuperscript{72} For example; see, \textit{Personal Status Law Act 1929} of Egypt s 15; and \textit{in Personal Status Law Act 1953} of Syria s 128.
access or infertility or based on DNA evidence. This means that a child born during the marriage or within a period after the marriage ends is regarded a lawful child of the married couple. This assumption reflects cultural traditions and norms in the Middle Eastern region, that children should only be conceived during a marriage relationship. It assumes that the child is the genetic child of both parents. This assumption that the husband is the genetic and therefore lawful parent is rebuttable by DNA evidence. In relation to the birth mother, it also assumes that she is the genetic parent of the child. But with ART this case is no longer necessarily so, where there is possibility that a child has two mothers, the genetic mother and the birth mother.

In relation to a child born outside the marriage relationship, there is acceptance among Muslim scholars of Islamic Sharia that parentage and inheritance cannot be verified between a child and his/her father where the father is not married to the birth mother. This might, partially, be overcome by the parents claiming they are married and confession confirming parentage; this is discussed in the paragraphs following. Chapter 8 argues that there is scope for arguing that law might accept that a person may be a parent outside a marriage relationship where there is a genetic relationship between the parent and the child and this should apply to both parents not just the mother. It supports the view that parentage of children should be verified to both genetic parents if they are known. If this argument is accepted, the child could be regarded the lawful child of the couple, as long as genetic relationship is available between the child to his/ her parents.

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73 Personal Status Law Act 1959 (Iraq) s 51
74 Amir, above n 72, 46.
75 The Quran provides that: ‘Call them (adopted sons) by (the names of) their fathers, that is more just with Allah, but if you know not their father’s (names, call them) your brothers in Faith and Mawalikum (your freed slaves).’ The Quran, above n 69, Chapter 33: verse 5.
The second way of confirming legal parentage is confession. A parent may make a declaration that an unnamed/anonymous person, whose legal parentage is unknown, is his child. Section 52 of the *Iraqi Personal Status Law Act 1959*, provides that a declaration which is issued by a parent (male or female) that an unnamed person is his/her child can confirm the legal parentage of that person to the parent.\(^76\) If such declaration is made by a married female parent, it would also be required that her husband makes a similar declaration or there is evidence to confirm legal parentage of a child to the father. These principles have developed independently of ART. Where a married couple provides their own gametes/embryos resulting in the birth of a child during the period of the marriage, the normal presumptions that the child is the lawful child of the parents apply. It is arguable that in these circumstances there should be no need for formal acknowledgement (confession) by the parents in relation to the child.

Under the current provisions of Iraqi law, the legal parentage of a child is verified to both married parents. Legal parentage can also be verified to both parents if the parents proclaim that they were married and the child is a fruit of the marriage relationship. This pragmatic response can be used by an unmarried couple with a child who later marry so as to confirm legal parentage of child. This method of verifying parentage of a child to parents under Iraqi law does not require a marriage relationship in order to verify legal parentage of a child to parent. This might support the argument that legal parentage of children should be verified to their genetic parents regardless of whether parents are married or not. Where donor gametes/embryos are used so that one or both of the parents do not have a genetic relationship to the child, married parents may acknowledge the child as their lawful child so that legal parentage can be confirmed to both parents.

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\(^76\) Unnamed person refers to person whose lineage is anonymous.
Under the existing law, legal parentage of a child is confirmed to the birth mother without any requirement or condition even if she were not the genetic parent. One issue is whether the accepted methods of confirming legal parentage, birth during marriage of the couple and confession could be set aside by DNA testing. The usual practice is that DNA evidence is only resorted to in the cases where there is a dispute about the legal parentage of the child. The consequence is in relation to ART, legal parentage may be confirmed where donor gametes or embryos have been utilized. In relation to unmarried women, a child conceived using ART and donor gametes/embryos is the lawful child of the birth mother it being assumed that she is also the genetic parent. Chapter 5 and 7 examines the issue whether an unmarried woman should have the right to access reproductive services and entitled to reproductive freedom.

Therefore, it could be concluded that rules regulating parentage of children to their parents who are unmarried may be decided based on the availability of a genetic relationship between children and parents. This genetic relationship could be actual or assumed. Where there are disputes over parentage of a child, this could be resolved by medical evidence. However, the existing provisions of parentage do not include responses to new legal issues arising out of the use of ART. The changes that should be considered are discussed in chapter 8.

77 Existing rules regulating lineage assume children are born naturally not utilizing ART or donated gametes or embryos.
78 Recommendations for reforming and updating Iraqi law will be introduced in chapter 8.
4.5.2 Inheritance in Iraqi Law

Inheritance in Iraq is regulated by the *Personal Status Law Act 1959*.\(^{79}\) This legislation establishes rules and conditions for inheritance, as well as allocating shares to each eligible heir. Under section 86B kinship and marriage are the two grounds for inheritance. Section 86C sets out the conditions for eligibility: death of a person whose estate will be distributed, and an heir living at the date of the death. In addition, testator can leave one-third of his/her estate to someone by bequest.\(^{80}\) Heirs must be lawful children of the deceased parent. Generally this requires that the child is the genetic child of the deceased who was married at the time of conception, or a child of parent by confession.\(^{81}\) It has previously been argued that no distinction should be drawn between children genetically linked to the deceased who were conceived naturally or through ART. So, a child who is born to married couples during marriage relationship is eligible for inheritance in estate of his/her deceased’s parent, as the child is regarded a lawful child.

In relation to impact of ART on inheritance, under Iraqi law, an issue arises where the parents of a child were divorced at the time of the ART procedure. The child is linked genetically to both parents but the parents were not married at the time of conception. Cryopreservation makes it possible for an embryo or gametes to be stored and be used in the future. Under Iraqi law, it is an unresolved issue whether children subsequently born can share in the inheritance as heirs. But by analogy with the period prior to remarriage, iddat, following divorce, the likely outcome is that the child would not be considered the lawful child of the father in the same way as a child born prior to the marriage is not so considered. This result

\(^{79}\) Inheritance is regulated in the *Personal Status Law Act 1959* ss 86 - 91.

\(^{80}\) Where testamentary is limited in Iraqi law with one-third of the estate unless heirs approve more. See, the *Personal Status Law Act 1959* s 70.

\(^{81}\) The *Personal Status Law Act 1959* s 82 (2).
may be avoided if the father confesses that it is his child. It could be argued that lineage of child in this case should be confirmed to both parents as long as there is a genetic relationship between the child and his/her parents, 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.

4.6 Conclusion

This chapter has considered how existing Iraqi law applies to ART. Whilst Iraqi laws regulate the status of children born naturally, it does not deal with issues arising out of ART. General principles, existing rules and provisions of the Iraqi Constitution and other relevant legislation such as, the Civil Code and Personal Status Act, might be related indirectly to issue of assisted conception. Areas where ART causes difficulties in which reform might be required are legal parentage and inheritance. If ART is regulated and lawful, it may require rethinking what constitutes a family under Iraqi law. The current law in this context might be considered inappropriate to regulate uses of ART as the law assumes natural reproduction. It is arguable that the existing Iraqi law is neutral neither prohibiting nor permitting ART. Different responses may apply to type and consequence of each use of ART.

In order to determine the shape and extent of any future regulation for ART in Iraq, and determining which uses should be allowed or prohibited and any limits might be imposed, it is necessary to examine the perspective of Islamic Sharia, as it is a main source of the Iraqi legal system. It must be considered for any future regulation as well as its application in the
absence of legislation. The next chapter will discuss the perspectives of Islamic Sharia concerning ART.
Chapter 5 ART and the Islamic Sharia Perspective

5.1 Introduction

Human reproduction is one of the most important subjects in Islamic Sharia, particularly because of legal parentage and inheritance. Principles of Islamic Sharia were not designed to deal with ART as they assume that children are born through natural human reproduction. As indicated in chapter 2, ART has become widespread in Muslim countries, including the Middle Eastern region. The creation of human life by artificial means has aroused controversy among Muslim scholars for over three decades. The early great Muslim jurists from the principal schools of Islamic jurisprudence discussed hypothetically the issue of reproduction and fecundation by non-natural methods. The modern equivalent is artificial insemination. Although Muslim scholars depend on sources of Islamic law to deduce and reach their opinions, these opinions can vary from scholar to scholar, especially regarding the legitimacy of each activity of ART as well as the legal effects of ART.

This chapter explores the perspectives of Islamic Sharia with regard to ART. It examines whether different activities of ART could be considered legitimate procedures according to the rules of Islamic Sharia. This is important because of the enormous importance of Islamic principles underpinning both existing and future laws and consequently the regulation of ART and how far it should be permitted or prohibited. It is especially important for infertile couples who are contemplating ART to be assured that the procedures conform to Sharia law.

1 There are other terms which refer to Sharia such as Islamic law, Sharia law, and Islamic Sharia. These terms are common and are used interchangeably in this thesis.
Generally, the rules and principles of Islamic Sharia are considered by legislators in Muslim countries, specifically Iraq as a main source of legislation. Because legislation in Iraq must be consistent with Sharia law, secular opinion is restricted in its ability to play a significant role in determining whether ART should be implemented in Iraq.

This chapter starts by setting the context by providing a background to Islamic law in relation to human conception. It includes a brief description of Islamic Sharia, as well as explanation of the sources of rules in Islamic Sharia as background to the arguments and opinions of Muslim scholars about assisted conception. It also outlines the conception of Islamic jurisprudence as a means to derive and apply rules of Islamic law. It refers to the major schools of Islamic jurisprudence. This chapter will also set out different views of Muslim scholars with regard to ART in light of principles and rules of Sharia law. The varying views of scholars are discussed as three approaches: narrow, moderate and liberal. This is followed by the conclusion.

5.2 Background of Islamic Sharia in Relation to ART

Although assisted human conception is considered a contemporary achievement and rules of Islamic law came into existence long ago, it is possible to derive the attitude of Islamic Sharia with regard to ART. This is through reviewing Islamic law and understanding its features and purposes. This section provides a brief background of Islamic Sharia. It will set out concept of Islamic law, the sources of Islamic law, the concepts of Islamic jurisprudence and the major schools of Islamic thought.
5.2.1 Description of Islamic Sharia

This section gives a general description of Islamic Sharia and its importance in the life of individuals and the community, as the religion and law for Muslims.

**Definition and Objectives of Islamic Sharia**

The term Sharia is defined generally as the path or way to follow to the watering-place,\(^2\) the clear path to be followed by the believer in order to obtain guidance in this world and deliverance in the next.\(^3\) Islamic Sharia (Islamic law), broadly refers to the whole legal system consisting of Islamic principles and jurisprudence, and including the primary and secondary sources as well as providing a methodology for applying the law.\(^4\) Sharia specifically refers to the rules,\(^5\) which are included in the Quran and prophetic Sunna.\(^6\) The rules regulate and cover different aspects of life. Sharia law consists of injunctions and guiding principles established for humankind associated with this life and thereafter.\(^7\) Rules of Islamic law can exist in specific or general texts; the general text could be interpreted and understood differently by Muslim scholars.

In terms of objectives of Islamic Sharia, recognising and obtaining legitimate advantages is the principal purpose of Islamic Sharia. This objective reflects two main elements:

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\(^5\) There are two major categories of rules in Islamic Sharia; devotional matters (*Ibadat*) and civil transactions (*Mu’amalat*). Kamali, above n 3, 17.


\(^7\) Kamali, above n 3, 14. Also, Abdal-Haqq, above n 4, 4.
promoting human welfare and preventing harm. The advantages could be classified in three types: essentials, complementary and embellishments. The priority of Sharia is to safeguard the first type, the essential interests, as this kind of interest touches the lives of all human beings and neglecting it might cause chaos in the community. The purpose of the principles of Sharia is to protect the interests of humankind. The essential interests which have priority in Islamic Sharia are represented in preserving human life, faith, intellect, property and legal parentage. Considering these objectives, Sharia can provide principles for determining the legitimacy of the various aspects of ART. If its primary principle is, in some sense utilitarian in nature, then the balancing of advantages and disadvantages of ART are relevant to determining legitimacy. Reflecting a human rights approach, Sharia rules are compulsory for essential needs. It may be arguable that the need of an infertile married couple to have children might be considered an essential need and ART should be utilized to assist couple to have children.

**Significance and Influence of Islamic Sharia**

Islam is complete system for humankind, and Islamic law is considered one part of Islamic religion; it is linked to, and inseparable from, other unities of Islam such as doctrine, value and beliefs. According to the common view amongst Muslim scholars, principles of Sharia are meant to have the flexibility to adapt to changing circumstances and to apply in

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8 Baderin, above n 6, 40.
9 Kamali, above n 3, 33.
10 Ibid 33.
11 Baderin, above n 6, 40.
12 Kamali, above n 3, 33.
13 Ibid 14.
different times and places. Adaptability could be accomplished through re-interpretation of general principles of Sharia and new understanding of Islamic provisions according to time and place to enable it to deal with new issues and resolve them in accordance with contemporary changes and needs. Islamic Sharia includes religious matters, moral values and regulatory principles for humankind. In terms of regulatory provisions of Islam, Islamic Sharia contains two categories of rules; the first category is those provisions which regulate specific matters, and secondly general principles that are able to be applied universally.

A variety of opinions about an issue is acceptable as long as they are not conflicting with the spirit and purpose of principles which are established in the primary sources of Sharia. Justice in Islamic Sharia is the principle that should be applied on all individuals’ without regard to religion, race or colour. Applying those provisions of Sharia which regulate some legal issues should be consistent with purpose of principles of Islam, specifically those aiming to obtain advantages and avoiding disadvantages, as well as achieving social justice. This may mean that provisions of Islam should not be considered or applied whenever they may conflict with this main purpose of Sharia. Changing circumstances and situation might require enacting modern provisions in order to regulate legal issues provided it is compatible with purpose and core of Islamic principles. Islamic Sharia is considered a powerful influence on all aspects of life, policies, practices and behaviors in the Muslim community. So, generally Muslim people consider Islamic Sharia in all matters to make sure that any practice they may take should not conflict with Islamic Sharia. For example, infertile Muslim

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16 Kamali, above n 3, 18.
17 Ibid 15.
18 Moinifar and Vaghefi, above n 15, 248.
couples who resort ART seek Islamic opinion about ART before undergoing ART, to make sure that reproductive process is legitimate according to Sharia.

5.2.2 Sources of Islamic Sharia

In discussing whether and how far ART is legitimate under Sharia law, it is necessary to set out sources of Sharia law. These sources are considered fundamental to deriving any rule of Sharia about any issue or action in Islam. Opinions and thoughts of Muslim scholars are based on sources of Sharia and general principles. There are two categories of sources of Sharia; the primary sources and the secondary sources. The primary sources have priority. In the absence of an applicable rule in the primary sources, secondary sources which are based on general principles and purposes of Sharia are relevant. The principal source of rules of the Islamic Sharia, are considered sacred for Muslims and to be obeyed and followed.

Primary Sources of Islamic Sharia

The primary sources are recognised and admitted by all Islamic schools and Muslim scholars and jurists. It includes the Quran and prophetic Sunna. In Islamic doctrine, the Quran is the complete book and guidance for mankind. It covers both the temporal and spiritual aspects of life and thereafter, such as religious and devotional matters, moral guidelines, legal rules

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19 In Islamic Sharia, human actions are classified into five categories of judgment; obligation (wajib), recommended (Mustahab), permissible (Mubah), reprehensible (Makruh) and forbidden (Haram). Kamali, above n 3, 18.
20 Views of Muslim scholars about ART could be different because of different understanding and interpretation of texts of Sharia, this is acceptable and usual.
21 Baderin, above n 6, 34.
22 The original text of Quran is in Arabic language and it has been translated into many languages. Jamila Hussain, Islam, Its Law and Society (Federation Press, 2011) 32-33.
23 Baderin, above n 6, 35.
as well as matters of universe and historical stories.\textsuperscript{24} With regard to the regulatory principles of the Quran, there could be detailed provisions on some issues such as marriage, inheritance, commerce, and crimes. General principles represent a response to the then contemporary events and problems.\textsuperscript{25} In addition, fundamental principles such as those related to freedom, equality, public interest, and justice could be understood and interpreted by specialized scholars in order to adapt to new situations.\textsuperscript{26}

The Prophetic Sunna is the second main source of Islamic Sharia.\textsuperscript{27} It refers to traditions of Prophet Mohammad including his sayings and deeds,\textsuperscript{28} as well as his implicit approval on some issues.\textsuperscript{29} Some prophetic \textit{Sunna} is a divine source of Islamic Sharia and could have a significant role interpreting the Quran.\textsuperscript{30} Not all narrations of Sunna are considered as part of Sharia but only those which have a legal nature.\textsuperscript{31} Some \textit{Sunna} explains and clarifies rules and principles which are mentioned in the Quran;\textsuperscript{32} other \textit{Sunna} contains rules and regulations pertaining to specific conditions which are not stated in the Quran.\textsuperscript{33}

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\textsuperscript{24} Kamali, above n 3, 19. \\
\textsuperscript{25} Ibid 19. \\
\textsuperscript{26} Hussain, above n 22, 36. \\
\textsuperscript{27} Following and obeying prophetic Sunna is commanded in many verses of the Quran, for example; ‘He who obeys the Messenger (Muhammad), has indeed obeyed Allah, but he who turns away, then we have not sent you (O Muhammad) as a watcher over them.’ Chapter 4: verse 80. The Quran, translated by Muhammad Taqi-ud-Din Al-Hilali, and Muhammad Muhsin Khan (Darussalam, 1997). \\
\textsuperscript{28} Abdal-Haqq, above n 4, 4. \\
\textsuperscript{29} Baderin, above n 6, 35. \\
\textsuperscript{31} Hussain, above n 22, 36. \\
\textsuperscript{32} Ibid 37. \\
\textsuperscript{33} In this context, imam Al-Shafai (the founder of one of major schools of Islamic jurisprudence) says ‘the Sunna of the prophet is of three types: first is the Sunna which prescribes the like of what God has revealed in His Book; next in the Sunna which explains the general principles of the Quran and clarifies the will of God; and last is the Sunna where the messenger of God has ruled on matters on which nothing can be found in the Book of God.’ Baderin, above n 6, 35.
\end{flushright}
In addition, the Consensus (Ijma) might be considered a source in this context; the consensus refers to unanimous opinion by Muslim scholars on a particular issue.\textsuperscript{34} The consensus of Muslim scholars about a specific issue usually is difficult to be established, where debate and discussion relying on individual reasoning might lead to various opinions.\textsuperscript{35} Relying on individual reasoning is a secondary source.\textsuperscript{36}

It is accepted that such principles and legal provisions of Sharia could be expanded and applied to other circumstances allowing scope for a new understanding in order to regulate specific and modern issues. It could be deduced that although the primary sources of Islamic law do not include any text about the creation of human life by artificial means, the examination of secondary sources may allow the development of provisions of Islamic Sharia with new and modern understanding of it which is consistent with changes in the situation and needs of people.

There are some indications in the primary source of Sharia, the Quran, about the creation of human life and the importance of offspring and human reproduction. Texts which are indicated in the main sources of Islamic Sharia could be considered legal texts in the context of examining the perspective of Islamic Sharia with regard to ART. The Quran refers the natural desire of having offspring and importance of offspring.\textsuperscript{37} In addition, there are some indications in the Quran in relation to the infertility. The Quran in some verses relates the

\begin{footnotesize}
\begin{enumerate}
\item Arif Khan, \textit{Concept of Islamic Law} (Pentagon Press, 2007) 86.
\item Glenn, above n 2, 185.
\item The secondary sources will be set out and discussed in the next section.
\item It states: ‘Wealth and children are the adornment of the life of this world.’ The Quran, above n 27, chapter 18: Verses 46.
\end{enumerate}
\end{footnotesize}
story of prophet “Ibrahim” who was infertile and his wife “Sarah” and how God granted them offspring.\textsuperscript{38}

The Quran refers to the grant of offspring as God’s will.\textsuperscript{39} This was subject of controversy among contemporary Muslim scholars in determining whether or not artificial human reproduction conflicts with God’s will.\textsuperscript{40} The Quran asserts that everything is controlled by the almighty Lord including infertility and the method by which God granted offspring to his infertile messengers is considered a miracle. Indeed in the early days of ART in western countries, ART was described as “playing God” for similar reasons. However, it should not be understood that infertile couples can only invoke God to assist them to conceive children by natural means, they are also ordered to take legitimate means to cure illness including overcoming infertility; they should have a true belief that God will cure and help them.\textsuperscript{41} Especially, Islam stresses the importance of knowledge.\textsuperscript{42} Accordingly, humankind according to Islamic Sharia should seek treatment for infertility problems as well as treatment for other diseases.

\textsuperscript{38} It states: ‘And they gave him glad tidings of a son having knowledge (about Allah and His religious of True Monotheism. Then his wife came forward with a loud voice: she smote her face and said: A barren old woman! They said, even so says your Lord spoken. Verily, He is the All-Wise, the All-Knower.’ Ibid chapter 51: verses 28-30.

\textsuperscript{39} It says: ‘To Allah belongs the kingdom of the heavens and the earth. He creates what He wills. He bestows a female (offspring) upon who He wills, and bestows both male (offspring) upon whom He wills. Or He bestows both males and females, and He renders barren whom He wills. Verily, He is All-Knower and is Able to do all things.’ Ibid chapter 42: verses 49-50.

\textsuperscript{40} This controversy among Muslim scholars will be set out late in this chapter at section (5.3).


\textsuperscript{42} There is verse in the Quran asserts this fact: ‘and say: My Lord! Increase me in knowledge.’ The Quran, above n 27, chapter 20: verse 114.
In relation to the creation of human life, the Quran includes verses which refer to the creation of human life and developmental stages of the human embryo.\textsuperscript{43} In this context, changing the creation of God is described in the Quran as a prohibited practice; it is a false hope of the devil to mislead and deceive people.\textsuperscript{44} The issue here is whether or not ART could be classified as interfering with God’s plan by changing the method of creation. The Quran in making the above statement is describing a particular practice by Arabs pre-Islam: ears of cattle were cut off and allocated to pagan Gods as a sign that the cattle belonged to the pagan deity.\textsuperscript{45} Therefore, the context is different and the prohibition should not be applied to using ART in human reproduction.

\textit{Secondary Sources of Islamic Sharia}

There are also secondary sources derived through examining rules and principles of the primary sources of Sharia and recognising the purpose and spirit of rules of Islamic law, by following human reasoning as well as considering the consequences of the examined matter. Secondary sources basically can be utilized to cover new circumstances and solve issues which are not addressed in Quranic or prophetic texts.\textsuperscript{46} There is considerable disagreement

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\textsuperscript{43} The Quran States: ‘And indeed we created man (Adam) out of an extract of clay (water and earth). Thereafter We made him (the offspring of Adam) as a Nutfah (mixed drops of the male and female sexual discharge and lodged it) in a safe lodging (womb of the woman). Then We made the Nutfah into a clot (a piece of thick coagulated blood), then We made the clot into a little lump of flesh, then We made out of that little lump of flesh bones, the We clothed the bones with flesh, and then We brought it forth as another creation. So Blessed is Allah, the Best of creators.’ Ibid chapter 23: verses 12-14.

\textsuperscript{44} The Quran recites a conversation between God and devil about changing God’s creation, representing threat of the devil and comment of Allah; it says ‘Allah cursed him. And he (: Shaitan: Satan) said: I will take an appointed portion of your slaves. Verily, I will mislead them, and surely, I will arouse in them false desires; and certainly, I will order them to slit the ears of cattle, and indeed I will order them to change the nature created by Allah. And whoever takes Shaitan (Satan) as a Wali (protector or helper) instead of Allah, has surely, suffered a manifest loss.’ Ibid chapter 4: verses 118-119.


\textsuperscript{46} Whereby, the primary sources were revealed during the life of Prophet Mohammad, so rules of Sharia about new cases and events could be revealed through the secondary sources. Baderin, above n 6, 37.
between scholars and different schools of Islamic jurisprudence about the authority of some of these sources and extent and range of reliance on different secondary sources.\textsuperscript{47}

There are many important secondary sources of Sharia which might assist in deriving rules and decision making through examining and considering principles and existing rules of Sharia. The first source is Analogy (Qiyas) which refers to the use of analogical reasoning to derive a rule.\textsuperscript{48} It involves examining issues in the light of the reason and intention of the rule about a specific case, in order to expand and apply the same rule on other similar unstated cases. This method considers similarities between a ruled case and another case not stated in the primary sources.

The second secondary source is Public interest (Al-Masleha) which is related to the principal objectives in Islam. The primary purpose of Islamic Sharia is to attain benefits for people in this world and thereafter.\textsuperscript{49} Therefore, a rule of Sharia can be ascertained through examining and considering consequences of any unstated matter in order to determine whether it provides a legitimate advantage for decision making. If so, then it could be considered acceptable. This method could assist in revealing rules which are adapted with modern changes in social life and needs of society.\textsuperscript{50} Thus, in case of absence of a rule in the primary sources about a certain issue, legitimate community interest and advantages to the community could be considered in deciding whether ART should be allowed.

\textsuperscript{47} Kamali, above n 3, 19.
\textsuperscript{48} Ibid 27.
\textsuperscript{49} Ibid 32.
\textsuperscript{50} Hussain, above n 22, 45.
The third basis is blocking the Means (Sadd al-Dharai). This refers to closing off those activities which could cause evil or disadvantage in order to prevent and avoid any potential damage.\textsuperscript{51} It aims to prevent any means that might lead to illegitimate results and actions; illegitimate means leads to illegitimate action.\textsuperscript{52}

The fourth source is Juristic preference (Istihsan) which is defined as selecting a solution which is more suitable and convenient for the situation.\textsuperscript{53} This source could be applied on some issues which are not stated in the primary sources, through interpretation of texts of the primary sources to allow for something which is good and useful for the community according to the spirit of the law.\textsuperscript{54}

These interpretative sources may be relied upon in recommending that practices that bring significant disadvantage are not in the public interest be prohibited but that the advantages to infertile couples from the use of ART be permitted.

\textbf{5.2.3 Description of Islamic Jurisprudence}

This section discusses Islamic jurisprudence to distinguish it from Islamic Sharia. It also provides brief information about the major schools of Islamic jurisprudence and methodology

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\textsuperscript{51} Dien, above n 30, 62.
\textsuperscript{52} Hossam Fadel, above n 41, 150.
\textsuperscript{53} Abdal-Haqq, above n 4, 18.
\textsuperscript{54} Hossam Fadel, above n 41, 150.
of each school used to derive rules of Sharia about matters which are not stated in Islamic Sharia.

**Islamic Jurisprudence**

Jurisprudence refers to the process which is utilized to derive rules and apply principles of Sharia in real or hypothetical situations. Islamic jurisprudence (*figha*) was developed by the early great Muslim jurists, in order to reach the real understanding of Islamic Sharia rules, and sources of Sharia. Where matters are not regulated or stated in the original sources, a process called *Ijtihad* (personal reasoning) can be used in interpreting Sharia materials or reaching an opinion about particular issues. The process of personal reasoning can assist in developing a modern understanding of Sharia in the light of contemporary changes and developments of society, specifically about legal matters.

So, personal reasoning can be used to reveal the Sharia perspective through examining and realising the reason and spirit of rules of Islamic Sharia in light of general principles of Sharia. Islamic jurisprudence includes different legal subjects of law and is not limited to civil or criminal matters. The jurisprudence covers only legal and juridical aspects of

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55 Abdal-Haqq, above n 4, 5.
56 Kamali, above n 3, 16.
57 In this context, the principal theme of Islamic jurisprudence is based on saying that God has revealed his revelation and has given us a brain to understand it, so understanding and applying Sharia should be through using our brains and thought. Baderin, above n 6, 37.
58 Kamali, above n 3, 25.
59 Hussain, above n 22, 42.
60 Abdal-Haqq, above n 4, 5.
Islamic Sharia. So, it provides a method to understand and apply rules of Sharia which can be changed in accordance with time and circumstance.61

The primary sources of Sharia are recognised by all schools of Islamic jurisprudence, but the interpretative method and application of the original sources of Sharia (especially general principles) may vary depending upon the particular school.62 This can result in different interpretations of the primary source texts.63 In the Shiite tenet, a qualified Scholar can decide about new matters which are not stated in the original sources of Sharia according to their personal interpretation.

In the Sunni sect generally decision making is restricted in the scope of understanding and interpretation of the principal sources of Sharia.64 Some scholars of the Sunni sect reject personal reasoning in religious and legal matters of Islam.65 Sunni scholars are restricted to consideration and decisions based on the major schools.66 This may limit the capacity to respond to contemporary changes in society. Therefore, the Shiite sect could be more flexible as there is more scope for variable opinion of scholars about new issues including ART.

61 Baderin, above n 6, 34.
62 Abdal-Haqq, above n 4, 6.
63 Baderin, above n 6, 37
64 Dariusch Atighetchi, above n 14, 6.
65 Hussain, above n 22, 46.
66 Influence of this thought will be revealed and later in section of views of Muslim schools about ART, it will be noticed that some Shiite scholars’ opinions reply on personal understanding, while Sunni scholars reply on the main or secondary sources of Islamic Sharia.
The Major Schools of Islamic Jurisprudence

Muslims are divided into two main tenets, the Sunni and Shiite sects. The Sunni sect represents approximately 90 per cent of the Muslim population; the remaining 10 percent are from the Shiite sect.\(^{67}\) Both Muslim sects exist in Iraq, 99% of the total population in Iraq is Muslim. The Shiite sect is approximately 60-65% of the Muslim population, and 33-37% follows the Sunni sect. Christians are approximately 0.8% of the population.\(^{68}\) No pronouncement about ART has been made by Christian religious authorities in Iraq. Within the two sects of Muslims, there are five principal Schools which represent Islamic jurisprudence.\(^{69}\) The four schools of jurisprudence for the Sunni sect are: \textit{Hanafite}, \textit{Malikite}, \textit{Shafite} and \textit{Hanbalite}, and for the Shiite sect, the \textit{Jafarite School}.\(^{70}\) These schools were established in the early centuries of Islam (during the eighth century AD), and continue today.\(^{71}\)

Different schools of Islamic jurisprudence consider and recognise the main sources of Islamic Sharia in decisions making. However, the methodology of interpretation, and the understanding of sources of Sharia used for decision making is different from one school to another.\(^{72}\) This may translate into different rules among Muslim scholars on a specific issue. Before turning to how Sharia law may apply to ART, it is useful to briefly review the methodology of each of the schools of Islamic jurisprudence.


\(^{69}\) Abdal-Haqq, above n 4, 6.

\(^{70}\) Atighetchi, above n 14, 6. Also, Abdal-Haqq, above n 4, 7.

\(^{71}\) Kamali, above n 3, 16. Also, Atighetchi, above n 14, 6.

\(^{72}\) Abdal-Haqq, above n 4, 38.
It begins with the Hanafi School.\textsuperscript{73} The Hanafi School is the most widely followed in Muslim world.\textsuperscript{74} It is dominant among Sunnis in Iraq and many countries such as Turkey, Syria and Pakistan.\textsuperscript{75} The research methodology of this school is based on consultation, discussion and analysis before reaching a decision.\textsuperscript{76} This school adopts individual freedom in order to reach a decision with reliance on personal opinions and analogy, as well as discussion and research on actual as well as theoretical problems and hypothetical issues.\textsuperscript{77} The method of decision making in this school could be described as a rational method based on reasoning and analysis of provisions of Sharia.

The second school is the Maliki School\textsuperscript{78} which is located largely in North and West Africa.\textsuperscript{79} This school, unlike other schools, considers that customary practices of the people of Medina,\textsuperscript{80} as a source of evidence after the main sources of Islamic Sharia as a basis for applying and revealing rules of Islamic Sharia.\textsuperscript{81} This is based on assumption or belief that people who lived in city of Prophet Mohammad realise and understand rules of Sharia rules better than other societies do. Thus, the scope for this school for using analysis and rational reasoning is very limited.

The third school is the Shafia School.\textsuperscript{82} This is prevalent in southern Egypt, east Africa, southern Arabia, Malaysia and Indonesia, and has many followers in Syria and Jordan.\textsuperscript{83} The

\begin{thebibliography}{99}
\bibitem{73} Abu Hanifa is founder of this school; he was born in Iraq (702-767 CE). Ibid 26.
\bibitem{74} Atighetchi, above n 14, 6.
\bibitem{75} Baderin, above n 6, 37.
\bibitem{76} Abdal-Haqq, above n 4, 26.
\bibitem{77} Kamali, above n 3, 70.
\bibitem{78} The founder of this school is Malik ibn Anas (died 795 CE), who lived in Madinah (Saudi). Ibid 73.
\bibitem{79} Baderin, above n 6, 37.
\bibitem{80} Medina is city where Prophet Mohammad lived and died.
\bibitem{81} Abdal-Haqq, above n 4, 27.
\bibitem{82} Muhammad al-Shafie (d. 820) is founder of this school. Atighetchi, above n 14, 6.
\end{thebibliography}
founder of this school was considered the first to have classified the main principles of jurisprudence, and established principles and criteria for applying analogy. These were later revised in the light of a new environment and circumstances when the author moved from Baghdad to Egypt. Consequently, this school of Islamic jurisprudence takes the approach that rules could be changed in accordance with the different circumstances. Although this school considers tradition, unlike the Maliki School, it examines them critically. So, it provides the middle ground between the Hanafi School, which depends on analysis and examining in understanding and revealing rules of Sharia, and the Maliki School which largely follows custom and traditions.

The fourth school is the Hanbali School, which is predominantly in Saudi Arabia and has followers in neighboring countries such as Kuwait, Oman, Qatar and Bahrain. The methodology of this school is based on personal reasoning and rejecting any opinion which might conflict with the main source of Sharia, specifically the prophetic Sunna. However, this school unlike the Hanafi School limits the use of analogy, it being considered in very limited cases as a last option. The view of the law which is adopted by this school is a strict view.

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83 Kamali, above n 3, 83.
84 Abdal-Haq, above n 4, 27.
85 Kamali, above n 3, 81.
86 Hussain, above n 22, 40.
87 This school was founded by Ahmad ibn Hanbal (died 855). See, Kamali, above n 3, 83.
88 Atighetchi, above n 14, 6.
89 Kamali, above n 3, 84.
90 Ibid 84.
91 Abdal-Haq, above n 4, 28.
92 Hussain, above n 22, 18.
For the Shiite sect, the principal school is the *Jafari School*. It is now prevalent largely in Iran and southern Iraq and with some followers in Lebanon and Syria. The methodology of this school is based on the primary sources and *Ijtihad* (independent reasoning) of the Imam. This provides flexibility in dealing with new issues which are not stated in the main source of Islamic Sharia such as ART.

In relation to ART, the early schools representing the major scholars of Islamic jurisprudence discussed theoretically artificial insemination. The question is crucially important on issues of inheritance, legal parentage and the status of children. Generally, most jurisprudence schools discussed this situation on the assumption and condition that the actual and physical meeting of partners should be possible if this was to be legitimate in order to recognise the legal effects of birth of a child such as parentage and inheritance. However, the *Hanafi* School took a more liberal approach. It did not require a physical meeting between married partners as a condition to confirm legal parentage. Legal parentage of a child could be confirmed to the child’s married parents, even if the partners lived far away from each other and never physically met, after the marriage contract; the marriage relationship is sufficient to confirm the lineage. This view may assist in accepting and recognizing artificial fertilisation where intercourse is not involved or required to conceive a child. This view might also provide the basis for an argument that a child born as a consequence of ART provided to a married couple should be approved and recognised regardless of whether there

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93 Name of this school has taken from name of Shiite imams, Abu Jafar Muhammad Al-Baqir and Jafar Sadiq. Abdal-Haqq, above n 4, 29.
94 Baderin, above n 6, 37. Also, Kamali, above n 3, 92.
95 Abdal-Haqq, above n 4, 29.
96 Views and arguments of Muslim scholars about assisted conception will be set out below.
is a genetic relationship between the child and parent. There is controversy amongst early Islamic jurisprudence schools whether artificial fertilisation is legitimate and lineage and inheritance should be confirmed. This will be discussed in the next section.

5.3 Sharia Law and ART

Due to the importance of ART, there is a vigorous debate among Muslim scholars about the legitimacy of ART in the absence of specific legislation or regulations dealing with ART. Set out below are the different opinions of Muslim scholars and jurists and their arguments about whether or not ART is permissible. Many arguments of Muslim scholars in relation to examining extent of legitimacy of ART focus on external considerations more than on ART process, specifically on procedures such as preparing and obtaining gametes, intimate examination of a woman who undergoes ART process, and legal parentage of a child born through ART. Various opinions of Muslim scholars who belong to both sects, Sunni and Shia, are represented in three approaches narrow, middle, and liberal, there is no consensus by either Sunni or Shia scholars about ART. Thus, these opinions and arguments could be classified into three different approaches; the narrow view which argues that ART is not permitted under rules of Sharia law, the middle view which is represented in large numbers of Muslim scholars and jurists in the Middle East who argue that ART is permitted under strict conditions and requirements, and the liberal view which adopts a facilitative approach.

5.3.1 The Narrow View (Prohibitive Approach)

This view prohibits ART on the ground that artificial means of the creation of human beings is a prohibited practice; fecundation by any means except natural intercourse is illegitimate and legal effects of human reproduction such as legal parentage cannot be applied and confirmed. According to this view, the use of ART to create embryos conflicts with the verse in the Quran which states: ‘Your wives are a tilth, so go to your tilth, when or how you will.’ According to the narrow view, this verse might imply that using artificial means to fertilise the wife’s egg (oocyte) is illegitimate; the creation of embryos should be only through natural human reproduction.

This approach argues that all activities of assisted reproductive technologies contradict God’s will and conflict with Quranic text. The most important fatwa adopting a narrow view includes, Muhammad Motawali Al-Shaarawi who believes that infertility and fertility are God's will and grace, so human beings should not interfere and go beyond God’s will, but they should submit to it. The further objection is that the process involves immodesty which is permitted only in cases of medical necessity. Accordingly, if the means is required to achieve pregnancy are illegitimate, then also the outcome is prohibited.

99 Husaini Haikal, Legal System of Artificial Procreating: Between Positive Law and Islamic Sharia (Arabic Version) (Dar Al-kutub Al-Kanonia, 2007) 272 [Author’s Trans].
100 Husaini Haikal, Legal System of Artificial Procreating: Between Positive Law and Islamic Sharia (Arabic Version) (Dar Al-kutub Al-Kanonia, 2007) 272 [Author’s Trans].
101 This is opinion of Ibn qudama, one of early Muslim scholars. Ibid 163.
102 The Quran, above n 27, chapter 2: verse 223.
103 Shawqi Zakaria Al-Salihi, Artificial Fertilizing Between Islamic Sharia and Positive Laws (Arabic Version) (Dar Al-Nahda Al-Arabia, 2001) 85 [Author’s Trans].
104 The Quran, above n 27, chapter 2: verse 223.
105 Shawqi Zakaria Al-Salihi, Artificial Fertilizing Between Islamic Sharia and Positive Laws (Arabic Version) (Dar Al-Nahda Al-Arabia, 2001) 85 [Author’s Trans].
106 Ziyad Ahmed Salama, Test-tube Children between Science and Sharia (Arabic Version) (Al-Dar Al-Arabiya Lil-Ulum, 1996) 92 [Author’s Trans].
narrow approach also points to the negative aspects of ART which can include gender selection and risks to the health and well-being of the mother and child.

The proponents of prohibition state that if children are born to married parents using ART with their own gametes, parentage cannot be verified. This is largely because of the risk that the wrong gametes/embryos may be used in the procedure where it is proposed to use the couple’s own gametes/embryos. Finally, storage of gametes and embryos by freezing is also illegitimate, because it leads to the suspension of life and prevents development of fertilised oocytes, in the way which may cause damage to ovum as a result of freezing. Establishing sperm banks is prohibited as it may threat existence of the family, and might increase the risk that the wrong gametes or embryos may be used. Additionally the fatwa issued by the Mecca conference 1985, prohibited cryopreservation on the ground that it may encourage illegitimate actions such as human reproduction outside the marriage relationship.

There are a variety of counter arguments. If infertility is considered a disease, it is allowed in Islam to cure it. According to the principles of Islamic Sharia, treating diseases using legitimate means is an obligatory matter, especially if it might lead to the preservation of human life. Although treatment is not for the purpose of preservation of human life, on a broad interpretation ART could be permissible as a solution to infertility as a disease. Using

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107 Ahmed Mohammed Lutfi, Artificial Fertilizing: Between Sayings of Physicians and Opinions of Jurists (Arabic Version) (Dar Al-fiker Al-Jamie, 2006) 124 [Author’s Trans].
108 Haikal, above n 99, 251.
109 Ibid 414.
111 See, Amira Adli Amer, Penal Protection of the embryo in The Light of Contemporary Techniques (Arabic Version) (Dar Al-fiker Al-Jamie, 2008) 197 [Author’s Trans].
112 Al-Salihi, above n 102, 29. Also, Haikal, above n 99, 167.
113 Saadi Ismail Al-Barazanji, Legal Problems of Recent Reproductive Technologies (Arabic Version) (Selah Al-Deen University, 2002) 23 [Author’s Trans].
and employing ART to enable infertile couples to have children is not in conflict with God’s will, the essential elements for pregnancy (sperm and egg “oocyte”) are created by God. So that where infertile couples use their own gametes in an ART procedure to have children they are acting in accordance with God’s will.

As chapter 2 indicated there are very small risks to the mother and child with improved procedures and limiting transfers to a single embryo thus limiting such risks and disadvantages. The more objectionable practices such as cloning and gender selection can be prohibited by legislation. On this approach the benefits of ART in assisting infertile couples to have children outweighs the negative aspects of the procedure that are unavoidable. It could be avoided by mandating strict procedures relating to the use and storage of gametes and embryos.

The risk of fetal damage from stored gametes/embryos is over emphasized in the light of screening procedures and the evidence those gametes and embryos remain viable particularly with the use of new freezing techniques, (see chapter 2). In so far as the proponents of the narrow view rely on risk of harm as a reason for prohibiting ART procedures, the evidence set out in chapter 2 suggests that these risks are extremely small and are outweighed by the benefits to married infertile couples in being able to use their own gametes to have their own children.

114 Haikal, above n 99, 166-167.
115 Lutfi, above n 107, 80.
116 Regarding risks involved with ART, see; chapter 2 at section (2.4.2).
5.3.2 The Middle View (Restricted Approach)

The majority of Muslim scholars and jurists in the Middle East argue that ART is permitted in limited circumstances. It could be permissible to use ART for married couples using their own reproductive materials especially in order to treat infertility and where proper processes and procedures ensure that the couple’s gametes are used. Some of early Muslim scholars indicated that fecundation by a method other than coital, such as artificial insemination, is considered legitimate practice as long as the husband’s sperm is used. Consequently in those circumstances, the legal parentage of a child could be confirmed to her husband and also iddat (period prior to remarriage) could be and applied as required in the case of divorce or death of her husband. Legal parentage of the child to the father might be verified, even if the husband was unaware that his wife has been impregnated and pregnancy occurred, even if the husband’s sperm was used. So, parentage is confirmed as long as the child results from the reproductive cells of the parents.

This approach confirms legal parentage of a child born to a married couple using their own gametes in an ART procedure; it also preserves the genetic identity of the children. However, the lineage of child cannot be verified if the wrong sperm were used even if a

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117 This is view of Al-Bejiri, see, Amir, above n 111, 197. Also, Al-Salihi, above n 102, 81.
118 There are three types of iddat as they are indicated in verses of the Quran, iddat for divorced woman is three menstrual cycles: first is iddat of divorced woman; ‘And divorced women Shall wait (as regards their marriage) for three menstrual periods.’ The Quran, above in 27, chapter 2: verse 228. The second type is iddat for widowed woman is four months and ten days; ‘And those of you who die and leave wives behind them, they (the wives) shall wait (as regards their marriage) for four months and ten days.’ Ibid chapter 2: verse 234. Third type is iddat of pregnant to delivery time; ‘And for those who are pregnant (whether they are divorced or their husbands are dead), their Iddah (prescribed period) is until they lay down their burden.’ Ibid chapter 65: verse 4. However, lineage cannot be confirmed in case if a woman impregnates herself by semen of someone other than her husband.
119 This is opinion of Al-shibramalsi. See, Amir, above n 111, 197. Also, Al-Salihi, above n 102, 81.
120 Early Muslim scholars from Shiite figh, support this attitude; artificial insemination using the husband’s sperm allows confirmation of lineage with no distinction being drawn to naturally conceived children.
121 Ibn hajar al-shafai, one of early Muslim scholars, believes lineage cannot be confirmed in case if a woman impregnates herself by semen of someone else except her husband. See, Al-Salihi, above n 102, 12.
woman thought that semen belongs to her husband.\textsuperscript{123} This middle view states that there is no general prohibition on ART. This would allow artificial insemination or in vitro fertilisation to be used in order to have children.\textsuperscript{124} The benefits of such an approach are that ART increases the population which is advisable in Islam.\textsuperscript{125} It has been also argued that a couple resorting to ART in order to conceive children may represent a solution for social problems which might occur as a result of infertility and inability of a partner to conceive children naturally; so utilizing ART may lead to stability in marital life.\textsuperscript{126}

This middle view does not permit the use of donated gametes or embryos and presumably would not permit the transplant of regenerative reproductive tissues, even if carried out to assist infertile married couples. The participation of a gamete donor in the ART process is forbidden because it leads to legal parentage confusion.\textsuperscript{127} Legal parentage of a child cannot be verified to the husband because the sperm donor is not the husband;\textsuperscript{128} legal parentage also cannot be confirmed to sperm donor because of absence of a legitimate relationship between the donor and the recipient of the gametes.\textsuperscript{129} There is the further difficulty that the involvement of a third-party in the reproductive process is prohibited because this is regarded as tantamount/ similar to adultery which is strictly prohibited in Islamic Sharia.\textsuperscript{130} Fatwas relating to the middle view include, Dar al-Ifta al-Misriyyah (the Egyptian centre for Islamic legal research), using donated gametes or embryos has similar consequences to the position

\textsuperscript{123} This is opinion of Al-bahwati. See, Haikal, above n 99, 161.
\textsuperscript{124} This is pinion of Yusuf Al-Gardhawi. See, Lutfi, above n 107, 80.
\textsuperscript{125} Al-Barazanji, above n 113, 21-22.
\textsuperscript{126} Lutfi, above n 107, 81.
\textsuperscript{127} Al-Salihi, above n 102, 86.
\textsuperscript{128} Ibid 86.
\textsuperscript{129} Ata Al-Sanbat\textsuperscript{130} This is opinion of Mahmud Shaltut. See, Husaini Haikal, above n 99, 177. Amir, above in 111, 197. Hossam Fadel, above n 41, 153.
of a child resulting from adultery where a child is not genetically linked to parents married to each other.\textsuperscript{131}

It is argued that the use of donated gametes/embryos should not be treated as adultery. There are important reasons for distinguishing adultery from ART using donated gametes/embryos. First, adultery can occur without pregnancy. Second, the purpose and intention of ART is to allow an infertile couple to have a child; this is very different to the intention and purposes of adultery. In countries which have legislated to allow donated gametes/embryos, the prior consent of the couple is essential, so that, unlike adultery, there is no betrayal of the marriage relationship. Third, ART, unlike adultery, does not rely on intercourse for pregnancy to occur; ART procedures with the consent of both parties do not involve physical intimacy or betrayal of the marriage relationship.

There are a variety of other arguments against donated gametes or embryos. First it is said it should be prohibited because there is a risk of incest where there are anonymous donors.\textsuperscript{132} The risk is very small where tight controls are kept on the number of children that can be born using the same donor gametes/embryos and even smaller where the donor is identified in a register, see chapters 2 and 8. It also argued that the use of donated sperm is also forbidden because it amounts to adoption which is prohibited in Islam.\textsuperscript{133} There are many Quranic verses which indicate that adoption is prohibited.\textsuperscript{134} It might be argued that in relation to ART procedures, the child is born to the couple. Where oocytes (eggs) or embryos

\textsuperscript{131} See, Al-Salihi, above n 102, 87. Haikal, above n 99, 138
\textsuperscript{132} Inhorn, Fatwas and ARTs, above n 110, 303-305.
\textsuperscript{133} Al-Salihi, above n 102, 87.
\textsuperscript{134} For example: ‘Call them (adopted sons) by (the names of) their fathers: that is more just with Allah.’ The Quran, above n 27, chapter 33: verse 5.
are donated, the mother has a relationship of intimacy involved in giving birth to the child. Where donor sperm is used with the consent of the husband, it is also arguable that this consent prior to the birth of the child is qualitatively different to the adoption of a child after birth. Consent may be extended to confession that the child is the child of the husband, (see 4.5.1).

The use of donated gametes is also not permitted for unmarried couples or single women because of the assumption that it may cause harm to the child and the community. There is also the problem of legal parentage as well as its treatment as similar to adultery which is prohibited in Islam regardless of marital status. In addition, this view does not accept cryopreservation and embryo banking as this might lead to a pregnancy by a woman using a sperm donor or the use of sperm of her deceased husband. These consequences can be avoided by proper identification protocols.

The majority of Muslim scholars that prohibited the use of donated gametes/embryos except for married couples using their own gametes/embryos. Likewise, the fatwa of grand Shaikh of Al-Azhar, which was issued in March 1980, allows assisted conception for married couples using their own gametes. It however forbids involvement of third-party donations as amounting to adultery. It similarly prohibits procreation after divorce. Finally, there is an opinion that embryo banking cannot be continued after divorce. This allows

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135 Haikal, above n 99, 277.
136 Al-Sanbati, above n 129, 236.
138 Details about Al-Azhar’s fatwa, see, Inhorn, ‘Fatwas and ARTs, above n 110, 294.
storing human embryos which are created from gametes belong to married couple for future implantation but only during their marriage relationship.\textsuperscript{139}

### 5.3.3 The Liberal View (Permissive Approach)

The most liberal view argues that ART could be permissible even if it involved donated gametes, eggs (oocytes), and sperm, and presumably also transplanted reproductive tissues. It allows cryopreservation of gametes and embryos for long term.

With regard to using sperm of a man other than husband, some early Muslim scholars argued that artificial insemination using someone else’s sperm could be legally recognised if the wife mistakenly thought that her husband’s sperm was being used; in this case all legal effects including legal parentage could be applied,\textsuperscript{140} and legal parentage of the child could be confirmed to wife and her husband.\textsuperscript{141} Fatwas reflecting the liberal view include that of, the supreme leader of Iran, Ali Khamanei, considers that donation of gametes, embryos and presumably reproductive tissue transplants) could be legitimate. The child born using donated sperm could be regarded a child of wife and her husband not the child of the donor, even though the couple may not be the genetic parents of the child.\textsuperscript{142} This is also supported by the fatwa of the grand Shiite scholar in Iraq, Ali Al-Sistani, who believes that using the husband’s sperm and a donated oocyte (egg) for the benefit of a married couple, is allowed,


\textsuperscript{140} This is view of Ibn abdeen who believes that iddat could be required if a woman was inseminated with someone else’s sperm and she thought it belonged to her husband. See, Hayzoma Shakir Al-Shakhali, Pregnancy and its Rules in Islamic Jurisprudence (Arabic Version) (Markaz al-Boohoth wal-Dirasat Al-Islamiya, 2006) 109 [Author’s Trans].

\textsuperscript{141} This is opinion of Al-beghawi. See, Lutfi, above n 107, 77.

\textsuperscript{142} See, Inhorn, ‘Fatwas and ARTs, above n 110, 304-305.
and fertilised oocyte, zygote, is used and transferred into wife’s uterus. Although, this opinion does not indicate the parentage of the resultant child, this view assumes that the husband and wife are the legal parents of the child; the husband is the genetic father and wife, although not genetically linked to the child, is the birth mother. Where, the birth’s mother not the genetic mother. Finally, this view also supports gamete and embryo cryopreservation to maximise opportunities for the couple to have children.

5.4 Conclusion

This chapter has examined Islamic Sharia perspectives regarding ART. The original sources (Quran and prophetic Sunna) do not include any direct text regarding ART. There is no consensus among Muslim scholars on the various aspects of ART. The narrow view prohibits ART as an unnatural process as it contradicts God’s will. In so far as this view points to that ART lead to confusion of linage, however, such risk extremely small where proper procedures are employed and monitored, see chapters 2 and 8. There are good reasons for rejecting the argument that use of ART is akin to adultery where the procedures are carried out with the husband’s consent. A more moderate approach allows ART to assist infertile married couples to have offspring by using their own reproductive cells during their marriage. This middle ground avoids the confusion of legal parentage by requiring the use of the couple’s own gametes in ART procedures. This, it is argued, provides the minimum basis upon which ART should be permitted. The most liberal view supports the use of ART for

\[143\] His view allows fecundation of a donated egg (oocyte) by the husband’s sperm, but disallows use of donated sperm. See, Atighechi, above n 14, 151.

\[144\] Al-Barazanji, above n 113, 56.

\[145\] Islamic Sharia rules of human reproduction were established in order to regulate the natural way of human reproduction. So, there is no direct reference to ART.
married couples using donor gametes, as well as employ cryopreservation technology largely for reproductive purposes.

It is argued that a mix of the middle and liberal views does not conflict with principles of Islamic Sharia. This view does not rely on personal opinion as Muslim in formulating their opinions rely on primary sources of Sharia. In addition, there is no general prohibition in sharia on the use of using technologies in order to have children. Using married couple's gametes in order to generate a child through ART should be permissible. Employing ART could overcome infertility to achieve a legitimate interest for married couples. In addition, cryopreservation and embryo banking techniques could be permissible as they are useful for achieving reproductive process and for future uses of ART. The perspective of Sharia law represented in opinions of Muslim scholars and jurists, about issues such as status of children, marriage, adoption and inheritance will be compared with perspective of Australian law dealing with ART. The next chapter reviews the Australian approach. It discusses the legal recognition of family in Australia as well as the status of children, marriage, inheritance, adoption and legal parentage. The Australian model for ART could not be adopted without amendment for Iraq because of the conflict with the personal statute law. But some aspects of the Australian approach could be of benefit to Iraq. This will be examined in chapter 8.
Chapter 6 Legal Recognition of Family in Australia

6.1 Introduction

Regulation of ART does not sit in a legal or social vacuum. ART is intimately connected with how society and the law constructs what is a family, and what importance is given to genetic identity in that construction. The legal recognition of what is a family affects the rights and responsibilities of family members as well as rights of children to maintenance and support, and succession and inheritance. This chapter deals with the legal recognition of what is a family in Australia and its importance as the context of ART. It will be argued in chapter 8, that this legal context is crucial to making decisions about whether ART should be regulated in Iraq and if so the limits imposed on ART.

Accordingly, this section provides a general discussion of the recognition of what is a family in the legal system in Australia, including brief reference to the relevant aspects of the Australian legal system in order to provide a comparison with the Iraqi legal system. This chapter also provides basic information about the legal system in Australia, including the federal system of government and legislative power in relation to ART and families. It will begin by providing outline Australian legal system. Then, it discusses family formation in Australia, including different forms of family. After that, it sets out the legal regulation of family’s issues. Finally, there will be conclusion which summarizes the chapter.
6.2 Overview of the Australian Legal System

In order to understand ART laws in Australia, it is necessary first to provide a brief description of the Australian legal system. This includes outlining the nature of the legal system, sources of the Australia law, legislative powers and process of law-making and the court system in Australia.

6.2.1 Nature of the Legal System in Australia (Federalism)

Australia is a federal system comprising the Commonwealth of Australia, six states and territories. The Commonwealth legal system which is set out in a formal written Constitution applies to all Australian residents. There are in addition laws of a state or territory which apply to residents of the relevant state or territory. Unlike Iraq in which Islamic principles are given priority, Australia is formally declared in the Constitution to be a secular state. Clause 116 of the Commonwealth of Australia Constitution Act 1901 provides that:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The Commonwealth (or federal government) has enumerated powers with exclusive legislative powers in areas such as defence, interstate trade and commerce, overseas trade, external affairs, marriage and divorce. States and Territories have legislative power in

1 It also referred to Australian as the federal government.
3 It is indicated in the Commonwealth of Australia Constitution Act 1901 s 52.
relation to other matters. Where there is an overlap, the federal legislation prevails in the case of conflict. Section 109 of the Commonwealth of Australia Constitution Act 1901 provides that:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

The federal government has restricted constitutional powers leaving significant scope for state governments to legislate on a range of matters that would come within the personal law in Iraq. For example, the Federal parliament has an exclusive power to legislate with respect to marriage. But this power does not extend to non-marital relationships. As a consequence most states have referred their power to legislate for non-marital relationships to the federal parliament effectively expanding the power of federal parliament to legislate in relation to unmarried couples and children of those relationships. 6

In relation to ART, although the Constitution authorises the Commonwealth parliament to legislate on specific matters, such as marriage and divorce, it does not specifically cover the regulation of ART, 7 except in so far as it may relate to the status of children of a marriage or under the state referred powers in relation to non-marital relationships. 8 Thus, State and territory governments have the power to regulate ART including such matters as the status of children born as a result of ART, as well as other relevant regulation such as adoption. As will be seen in this chapter, the federal legislation preserves state legislation regulating ART

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5 Commonwealth of Australia Constitution Act 1901, Section 51(xxii) gives the Parliament legislative power with respect to divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants. See, Commonwealth v Australian Capital Territory [2013] HCA 55.
8 The federal government has some indirect authority through the system of universal health insurance whereby Medicare may provide refunds for some payments made related to ART.
but where a state has not legislated, the federal provisions serve to set minimum standards for ART.

The applicable law comprises both legislation and the common law developed by the courts. In contrast to a civil code system such as exists in Iraq and other countries in the Middle East, the legal system in Australia is a common law legal system. The term ‘common law’ has several meanings; it may refer to a legal system or principles and rules of the law created by courts through judicial decisions. In this section, Australia is described as a common law system in which both courts and Parliaments are lawmaking bodies. Legislation overrides law made through judicial decisions. In this chapter, the Australian legal system will be referred to a common law system as a point of distinction from the Iraqi civil code system. The alternative meaning, judge made law, is less important here because the focus of the chapter is the regulatory framework arising through formal regulatory approaches through legislation and guidelines at the Commonwealth (federal) and State levels.

6.2.2 Principal Sources of the Law in Australia

There are multiple sources of Australia law. The primary sources of the Australian law are: the Constitution, laws created by parliament as the legislative authority, and decisions by courts. The Constitution is the main source of Australian law and is highest in the legal hierarchy. It determines powers and authorities of the federal government (the

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9 Chisholm, Nettheim and Chisholm, above n 4, 37.
11 See, the Commonwealth of Australian Constitution Act 1901.
Commonwealth of Australia) as well as states and territories.\(^\text{12}\) In addition, to the federal parliament, there are state and territory parliaments.\(^\text{13}\)

Judicial decisions are also a primary source of law in Australia.\(^\text{14}\) Decisions in particular cases establish principles (precedents) which are binding on courts lower in the hierarchy. So that decisions of the highest court, The High Court of Australia, are binding on lower courts. Lower level courts should apply the same law (precedent) in similar cases in the future.\(^\text{15}\) Common law decisions can be overridden by legislation.\(^\text{16}\) As noted in the previous section the regulation of ART may be governed by both federal and state legislation. In the case of conflict, the federal law prevails.\(^\text{17}\)

### 6.3 The Legal Recognition of Family in Australia

This section provides an overview of the legal recognition of family relationships under the Australian legal system. This is important to the argument whether the New South Wales (NSW)\(^\text{18}\) model dealing with ART can be transplanted into the Iraqi legal system without considering the very different legal recognition of what is a family in the Iraqi legal system. In order to explore the formation of a family under Australian legal system, the following section examines families based on marriage relationships, families based on cohabitation, single parent and same sex partner families.

\(^{12}\) Meek, above n 2, 33.
\(^{13}\) John Carvan, *Understanding the Australian Legal System* (Lawbook, 4\(^{\text{th}}\) ed, 2002) 34
\(^{14}\) Ellis, above n 10, 8.
\(^{15}\) Carvan, above n 13, 35.
\(^{16}\) This includes delegated legislation. See, Meek, above n 2, 33.
\(^{17}\) For more details about Australian legal system; see, Catriona Cook et al, *Laying Down the Law* (LexisNexis Butterworths, 9\(^{\text{th}}\) ed, 2015).
\(^{18}\) New South Wales is the largest of the six Australian States.
6.3.1 Defining the Family

The current legislation in Australia does not include any definition of what constitutes a family.\(^{19}\) The *International Covenant on Civil and Political Rights* 1966,\(^{20}\) (ICCPR) article 23 (1) provides that:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The Commonwealth (federal) Act, the *Family Law Act* 1975, section 43 imposes a duty on government to provide assistance and protection for the family including care and education. But neither of these instruments, ICCPR or the *Family Law Act* defines what constitutes a family. The traditional view of a family is that of a nuclear family which consists of a man and a woman who are married and living together with their children.\(^{21}\) This view is consistent with universal idea about defining the structure of a family.

However, the modern western perception of the family does not require marital status, so that unmarried, same sex couples or a single parent with a child could be considered a family. Australians accept that a couple with children form a family, regardless of the marital status of the couple.\(^{22}\) Such changes in relation to the concept and structure of family have been recognised by laws in Australia at both federal (Commonwealth) and state levels.\(^{23}\) The

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\(^{19}\) Lisa Young et al, *Family Law in Australia* (LexisNexis Butterworths, 8\(^{th}\) ed, 2013) 25.

\(^{20}\) This covenant is adopted and recognised by Australia in the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth), Ibid 25.

\(^{21}\) Young et al, above n 19, 25.


Victorian Law Reform Commission has defined that family is any combination of two or more people living in a domestic household comprising two adults, or one adult and one child.\textsuperscript{24} The \textit{Assisted Reproductive Technology Act 2007} in the state of New South Wales does not restrict the meaning of spouse to married couples; it includes partners in de facto relationships.\textsuperscript{25}

\subsection*{6.3.2 Families Based on Marriage}

Historically, the perception of marriage has been changed from an institution for economic purposes which are represented by the transfer of property and wealth, to an institution providing for a mutual life whose purpose is to raise children and to provide emotional as well as economic support.\textsuperscript{26} Traditionally married couples and children are often considered essential elements for establishing a family. It is clear from Australian research that Australians have a much broader conception of what constitutes a family. The Australian survey of social attitudes reported in 2005 that about 63 percent of respondents agreed that married couples without children are also families.\textsuperscript{27}

Marriage in Australia is governed by federal legislation, the \textit{Family Law Act 1975} and the \textit{Marriage Act 1961} which are based on constitutional powers relating to marriage and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{24} Victorian Law Reform Commission, \textit{Assisted Reproductive Technology and Adoption, Final Report} (2007)
\item \textsuperscript{25} See, \textit{Assisted Reproductive Technology Act 2007 (NSW)} s 4 (1).
\item \textsuperscript{26} Young et al, above n 19, 204.
\item \textsuperscript{27} Evans and Gray, above in 22, 13.
\end{itemize}
\end{footnotesize}
Marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.\textsuperscript{29} From this definition, the characteristics of marriage relationship are the exclusive, voluntary, life-long union of male and female. It does not recognise the marriage of same sex partnerships and state or territory legislation providing for marriage of same sex partners is constitutionally invalid.\textsuperscript{30} Although marriage by same sex couples is not recognised in Australia, this is not the position in the United States or now in the United Kingdom. But in contrast, same sex relationships are recognised and treated equally with heterosexual marriage relationships with regard to social security entitlements and succession as discussed in the next section.

6.3.3 Families Based on Cohabitation (De Facto Relationships)

Couples cohabiting, de facto couples are recognised as being in a relationship which attracts legal rights and duties. The common and usual description of this relationship is a man and a woman cohabiting voluntarily on an intimate and domestic basis.\textsuperscript{31} The \textit{Family Law Act 1975} recognises de facto relationships between unmarried couples that are living together. Section 4 (AA) of the \textit{Family Law Act 1975} (Cth), refers to a de facto relationship as:

\textsuperscript{28} Powers of the federal government of Australia are stated in section 51 of the \textit{Australian Constitution} which provides: 'The parliament shall have power to make laws for the peace, order and good government of the Commonwealth with respect to: (xxi) marriage (xxii) divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.'

\textsuperscript{29} This definition of marriage was added to this \textit{Marriage Act} in 2004, s 5 (1), \textit{Marriage Amendment Act 2004}.

\textsuperscript{30} So, held in the recent decision, \textit{The Commonwealth v the Australian Capital Territory} [2013] HCA 55 (12 December 2013); Also see, \textit{Marriage Act 1961} (Cth) s 88 (EA).

\textsuperscript{31} Geoffrey Monahan, \textit{Family Law} (Thomson Reuters, 4\textsuperscript{th} ed, 2014) 17.
(1) A person is in a de facto relationship with another person if: (a) the persons are not legally married to each other; and (b) the persons are not related by family; and (c) having regard to all the circumstances of their relationship, the have a relationship as a couple living together on a genuine domestic basis.

The law in relation to de facto relationships, unlike marriage, does not require formalities or impose legal requirements for establishing a de facto relationship.32 An individual in a de facto relationship can have more than one relationship at the same time; a person may be both married and living in a separate de facto relationship.33 Under State referred powers, the court has the power to issue a declaration for couples who are in de facto relationship for purposes of the family law.34 For legal purposes, the relationship must be genuine and intended to be permanent, and must continue for at least two years; this is the minimum period of cohabitation required by statutory provisions.35 The current laws in Australia recognise rights of individuals who are in de facto relationships.36 Different States and territories in Australia have enacted special legislation which provides rights for couples living in cohabitation similar to those granted to married couples.37 This includes legal provisions which provide rights in relation to issues of social security, family provision, maintenance, and inheritance.

Australian surveys indicate that one third of respondents agree that de facto couples even without children are a family.38 This rate increases to almost 80 percent if the couple have

32 Courts have the power to issue declaration for couples who are in de facto relationship for purposes of the family law. See, The Family Law Act 1975, s 90RD.
33 Young et al, above n 19, 258.
34 Family Law Act 1975 (Cth) s 90 (RD).
35 Monahan, above n 31, 18.
37 Monahan, above n 31, 18.
38 Evans and Gray, above n 22, 13.
children living with them.\textsuperscript{39} It is observed that there is a higher rate of respondents who believe that an unmarried couple with children form a family than those who believe that married couple without children are family.\textsuperscript{40}

There is also legislative recognition of single parent families.

\textbf{6.3.4 Single Parent Families}

In Australia, a single parent family consists of a parent and one or more children where they are living together. It is estimated that about 11-12 per cent of total births in Australia are to single women,\textsuperscript{41} and 4 per cent of all children were born to separated, divorced and widowed women.\textsuperscript{42} Historically the two main groups comprising single parent families were widowed women and single mothers who never married.\textsuperscript{43} More recently, the numbers of single parent families have increased because of relationship breakdown as a result of some factors such as divorce and separation.\textsuperscript{44}

A single woman with one or more children is largely accepted as a family; about 74 per cent of the respondents in the Australian survey of social attitudes agreed that single parents with children form a family.\textsuperscript{45} In addition, 42 per cent of the respondents believed that single

\textsuperscript{39} In this context, about 31 per cent of respondents agreed that couple in cohabitation form a family, this rate significantly increase if there are children living in couples in de facto relationship to reach about 79 per cent of respondents believe that couple in cohabitation with children considers a family. Ibid 14.

\textsuperscript{40} Ibid 13.

\textsuperscript{41} Patrick Parkinson, \textit{Australian Family Law in Context: Commentary and Materials} (Thomson Reuters, 5\textsuperscript{th} ed, 2012) 61.

\textsuperscript{42} Victorian Law Reform Commission, above n 24, 25.

\textsuperscript{43} Parkinson, above n 41, 60.

\textsuperscript{44} Victorian Law Reform Commission, above n 24, 25.

\textsuperscript{45} With regard to the gender of respondents, 87 per cent were women and 69 per cent were men; women were more likely to consider a single parent with children as a family. Evans and Gray, above n 22, 17.
parents could raise children just as same as couples do.\textsuperscript{46} Beside legislative recognition of single parent families, there is also recognition of same sex relationship families.

### 6.3.5 Same-Sex Relationship Families

There is no precise information about the number of couples living in same-sex relationships in Australia. Although the 2001 Census permitted same sex couples to identify as a same sex couple, less than 0.5 per cent of all couples declared their status as living together in same-sex relationship.\textsuperscript{47} The low rate of identification may result from the fear of discrimination or lack of information that their status has been recognised in the census.\textsuperscript{48} Recent statistics suggest that 2.2 per cent of couples are in a same-sex relationship.\textsuperscript{49}

Community attitudes in Australia regard this kind of relationship as socially acceptable and able to form a family, especially if there are children living with them. In the Australian survey of social attitudes, about 20 per cent of respondents agreed that couples in a same-sex relationship are a family; this rate increases to 42 per cent where there are children living with the couple.\textsuperscript{50} It is estimated that 17 per cent of lesbian couples and 4 per cent of gay male couples have children who are living with them; the majority of children who are living with homosexual couples were born into previous heterosexual relationships.\textsuperscript{51}

\textsuperscript{46} Victorian Law Reform Commission, above n 24, 26.
\textsuperscript{47} Parkinson, above n 41, 61.
\textsuperscript{48} Victorian Law Reform Commission, above n 24, 25.
\textsuperscript{49} Parkinson, above n 41, 62.
\textsuperscript{50} Evans and Gray, above n 22, 18.
\textsuperscript{51} Victorian Law Reform Commission, above n 24, 25.
The attempts to legislate the right of same sex couples to marry in some State and territories of Australia were unsuccessful. This is because the federal parliament has exclusive power to legislate with respect to marriage which is defined in terms of a heterosexual relationship under the *Marriage Act 1961*. The reluctance to extend marriage to same sex couples may be explained by such factors as religion, tradition and history.\(^{52}\) It is apparently out of step with current popular opinion. This contrasts with a number of countries which have extended the right to marry to same sex couples. Although marriage is not yet an option in Australia, same sex couple relationships are recognised by laws in Australia relating to property, inheritance and disputes following separation. The statutory provisions which apply in case of de facto relationships can also apply to same sex relationships.\(^{53}\)

From the forgoing, it is evident that a wide variety of relationships are recognised by law for purposes such as social security, inheritance, and custody and access to children. This is important to the thesis because in Iraq relationships outside formal marriage are not recognised for purposes of rights and duties and inheritance. There is another aspect of family formation which is important in this context. As it has been shown in a previous chapter relating to the Iraqi law, only those children who are the biological children of a married couple are recognised at law.\(^{54}\) In contrast, in most Western societies including Australia, children with whom there is no genetic connection may be formally adopted to become part of a family and are entitled to the same rights as natural born children, see below. This is important to the consideration of whether Iraqi law should recognise children born from ART using third party gametes.

\(^{52}\) Young et al, above n 19, 31-33.  
\(^{53}\) Young et al, above n 19, 31.  
\(^{54}\) See, chapter 4, (4.4.2) and (4.5.1).
6.4 Legal Regulation of Family Issues in Australia

This section explores the legal implications of formation of a family in the light of legal recognition of single parents, de facto heterosexual and same sex couples in Australia. The legal effects which will be discussed are the status of children, legal parentage, inheritance, and adoption. It does not consider surrogacy arrangements.

6.4.1 Status of Children

Historically, the common law distinguished between legitimate children who were born within a marriage relationship and illegitimate children who were not. In this context, the only relationship which was recognised by law was the marriage relationship. Accordingly, illegitimate children legally and socially did not enjoy similar rights as those enjoyed by children who were born within the marriage relationship. Illegitimate children were considered second-class citizens; they were also not entitled to legal rights which resulted from legal parentage between parents and their children such as inheritance. Such distinction between children on basis of marriage relationship of their parents is no longer legally relevant in Australia.

Federal law of Australia as well as all jurisdictions in Australia now grant similar status for children in context of legal parentage rights, regardless of whether they are born to a married couple or not. The Family Law Act 1975 (Cth) stipulates in section 60B (2) (a) that:

55 Monahan, above n 31, 37.
56 Young et al, above n 19, 353-354.
Children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together.

The *Status of Children Act 1996* in NSW declares that all children are of equal status before the law, and the relationship between children and parents is determined regardless of whether their parents are married or not.\(^57\) This includes parental responsibility which is defined in the *Family Law Act 1975* of Australia, section 61B stipulates that:

parental responsibly of parents arises in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

There is no similar legislation in Iraq as only children born within a marriage relationship are considered to be the legal children of both their biological parents.\(^58\) Chapter 8 will consider whether Iraqi law should adopt a similar approach to Australia in relation to the status of children.

### 6.4.2 Legal Parentage

Determining legal parentage is a significant matter in Australian law because of the legal rights and responsibilities which flow from it. The parent of a child is defined in NSW the *Assisted Reproductive Technology Act 2007* as a person who has parental responsibilities in relationship to the child.\(^59\) Legal parentage might be decided as a result of birth of a child through the natural conception or using ART. Determination of the legal parentage where donor gametes or embryos are used involves different considerations. A distinction is drawn between the biological parent, who is the gamete/embryo donor, and the social parent who

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\(^{57}\) *Status of Children Act 1996* (NSW) s 5.

\(^{58}\) See, chapter 4, section (4.5.1).

\(^{59}\) *Assisted Reproductive Technology Act 2007* (NSW) s 4(1).
raises the child.\textsuperscript{60} Federal law formally recognises legal parentage where the recipients of donor gametes and their partner consent to their use (see below). This emphasises social parenting rather than genetic identity in determining rights and responsibilities of parents towards children.\textsuperscript{61} The distinction between the biological parent and social parent is also drawn in the case of adoption where the adopting parents are by law the lawful parents of the child. This is discussed below. Legal parentage of children generally, and for those children conceived through ART in particular, is regulated at both federal and State levels. At on the federal level, this is governed by the \textit{Family Law Act 1975} relying on state referred powers referred to above. The thesis focuses on the position in NSW and Federally.\textsuperscript{62}

Independently of special provisions relating to ART, there are general presumptions relating to legal parentage.\textsuperscript{63} The \textit{Family Law Act 1975} (Cth) in section 69 sets out presumptions of parentage that may arise on marriage or cohabitation. Section 69P indicates that a child who is born to a married woman is presumed to be a child of the woman and her husband if the child was born during this marriage relationship or within a maximum of 44 weeks after the end or annulment of the marriage. Section 69Q similarly includes in relation to parties in a cohabiting relationship, that a child born to woman who is in a cohabitation relationship, during period of 20 weeks from beginning of relationship and 44 weeks or less after cohabitation ends that child is considered a child of woman and her cohabiting partner.\textsuperscript{64} In addition, there are other presumptions of parentage such as registration of the record of birth,

\textsuperscript{60} Belinda Bennett and Malcolm Smith ‘Assisted Reproductive Technology’ in Ben White, Fiona McDonald and Lindy Willmott (eds), \textit{Health Law in Australia} (Thomson Reuters, 2\textsuperscript{nd} ed, 2014) 413, 420.


\textsuperscript{62} Examples of some legislation addressing legal parentage across Australia; \textit{Parentage Act 2004} (ACT), \textit{Artificial Conception Act 1974} (Tas), \textit{Status of Children Act 1996} (NSW), and \textit{Status of Children Act 1974} (Vic).

\textsuperscript{63} According to the \textit{Status of Children Act 1996} (NSW) s 18, Parentage presumptions cannot be relied on by prosecutors in any criminal proceedings.

\textsuperscript{64} There are other presumptions which may verify parentage such acknowledgment of parentage.
court findings, and acknowledgment. Such presumptions of parentage are stated also in Status of Children Act 1996 of NSW, which contains similar provisions.

Legal presumptions have a significant role in the determination of legal parentage where there is no medical evidence. The presumptions referred to above (except the presumption from court findings) are rebuttable by medical evidence. Legal presumptions presume genetic parentage, but this could be rebutted if the parent of a child is not genetic parent. It could also be rebutted by DNA medical evidence which determines precisely the biological parentage of a child. The court has the power to issue an order that a child undergo DNA or other testing in order to determine the parents of a child. Finally, the court has the power to issue a conclusive declaration about parentage which is considered legal evidence of parentage and could be used for purpose of legal proceedings under federal law.

In relation to children born as a consequence of ART procedures, both federal and State law declare that a child who is born using ART is considered the child of woman who undergoes ART and her husband if she is married or her partner is she is in cohabitation, as long as they have consented to the ART procedures. The federal law does not extend to same sex relationships or unmarried couples. In this respect, the NSW Act, Status of Children Act 1996 in section 14 (1) (A) provides that in relation to a child born to women in a same sex

65 Family Law Act 1975 (Cth) ss 69 (R),(S),(T).
66 Presumptions of parentage according to Status of Children 1996 of NSW are those presumptions arising from marriage, cohabitation, birth registration, court’s findings and acknowledgement. Status of Children 1996 (NSW) ss 9,10,11,12,13.
67 Patrick Parkinson, above n 41, 727.
68 Young et al, above n 19, 356.
69 Status of Children Act 1996 (NSW) in s 15 holds that such presumptions are rebuttable by proof on the balance of probabilities.
71 Ibid s 69VA.
72 Ibid s 60H. Status of Children Act 1996 (NSW) s 14 (1).
relationship, the woman who undergoes ART and gives birth to a child is the mother and her female partner is also considered the parent of the child.

The statutory provisions recognise social parenting rather than genetic parentage where donor gametes/embryos are used. So, gamete/embryo donors are declared not to be legal parents of a child who is born by using donated gametes/embryos.\(^73\) Couples who consent to the use of donated gametes or embryos to have a child are the legal parents of the child. They have legal rights and responsibilities such as supporting and taking care of the child. The donor who is the biological parent is declared not to be a legal parent of the child and does not have legal rights or responsibilities to the child.\(^74\) Presumptions of parentage arising from assisted fertilisation are conclusive and irrebuttable.\(^75\)

### 6.4.3 Adoption

Adoption is a legal process which extinguishes the legal relationship, including rights and liabilities, between an adopted child and his/her biological parents and transfers those rights and duties to the adopting parents.\(^76\) The effect is that by adoption parents assume all rights and duties in relation to the child as if it were their own genetic child.\(^77\) Consequently, an adopted child is entitled to all parental rights towards his/her adoptive parents, including material and non-material rights. For example, an adopted child is entitled for a share in

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\(^73\) *Status of Children Act 1996* (NSW) ss 14(2)(3).

\(^74\) Bennett and Smith, above n 60, 420.

\(^75\) *Status of Children Act 1996* (NSW) s 14(4).

\(^76\) Parkinson, above n 41, 718.

\(^77\) With regard to the age of adopted children, it is usually between two months to one year. Victorian Law Reform Commission, above n 24, 104.
distribution of the estate of the deceased parent;\textsuperscript{78} as well as entitlement to a claim for compensation where the parent is wrongfully killed against the responsible person for a death of parent.\textsuperscript{79} Moreover, an adopted child is also entitled for further rights such as rights of maintenance and support just like other children of the adoptive parent who are genetically linked to their parents.

There is special state based legislation regulating adoption in all states and territories in Australia.\textsuperscript{80} In NSW, the legislation is the Adoption Act 2000. This Act states in section 7 (a) that the interest of a child is the paramount factor to be considered in relation to adoption.\textsuperscript{81} The main purpose of adoption is to provide children who are in need, a stable family, care and support, rather than desire of parents to have a child.\textsuperscript{82} Section 8 (2) sets out several factors for consideration such as the wishes of a child, age, gender, family background and characteristics. Adoption requires consent of relevant parties and court approval.\textsuperscript{83} There are also other requirements that applicants for adoption\textsuperscript{84} should be of good fame and character and able to undertake responsibilities as parents.\textsuperscript{85}

The legislation recognises two classes of adoptions; adoption of a child within a family of a child by a relative, and adoption of a child by strangers, who might be a person or a couple.\textsuperscript{86}

This is important for this thesis as NSW law recognises that the formal legal relationship of

\textsuperscript{78} Succession Act 2006 (NSW) s 109.
\textsuperscript{79} Claim for Wrongful death Compensation is accordance with Civil Liability Act 2002 (NSW).
\textsuperscript{80} Although adoption in Australia in allowed, it is rare particularly following the availability of social security to single mothers and foster care arrangements. Victorian Law Reform Commission, above n 24, 104.
\textsuperscript{81} Adoption Act 2000 (NSW) ss 8 (1) (a)-(b).
\textsuperscript{82} Victorian Law Reform Commission, above n 24, 19.
\textsuperscript{83} Victorian Law Reform Commission, above n 24, 104.
\textsuperscript{84} Adoption could be by one person, couples, relative or step parent. Adoption Act 2000 (NSW) ss 27,28,29,30
\textsuperscript{85} Ibid s 27 (1).
\textsuperscript{86} Ibid ss 27,28,29.
parent and child can be established by the adoption of a child to whom the applicants have no genetic relationship. One of the important effects in relation to the determination of the legal parentage is the financial rights of the child in relation to inheritance.

6.4.4 Inheritance

Inheritance in Australia is regulated in all States and Territories by specific legislation which governs the distribution of the deceased person’s estate after their death. As there is some variation in legislation in the states, this section will use the NSW, the Succession Act 2006 as generally illustrative. Unlike Iraq, in Australia there is testamentary freedom. The testator can leave his or her whole estate to anyone. If, however, the testator fails to make adequate provision for dependants, an application may be made to the Court to make an order for suitable provision out of the deceased’s estate. This is discussed in further detail below. If the person dies without leaving a will, (intestate), statutory provisions set out how the estate is to be distributed. A person dies intestate if they do not leave a will or the will does not dispose of all the deceased’s property.

Where a person dies intestate, the legislation sets out entitlements to the estate. The surviving partner of the deceased is entitled under the distribution. Marriage is not a condition for that partner to participate in distribution of intestate’s estate. The surviving

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87 However, adoption of a child within his/her family such as a child might be adopted by a sister or grandparent is not advisable, because it may cause confusion of relationships inside family of the adopted child. Victorian Law Reform Commission, above n 24, 104.
88 Part four of the Succession Act 2006 (NSW) governs system of distribution of deceased estate.
90 Succession Act 2006 (NSW) s 102.
91 Ibid s 104.
partner of a domestic partnership or de facto relationship is entitled for inheritance. Section 105 of the *Succession Act 2006* (NSW) defines the relationships as follows:

A domestic partnership is a relationship between the intestate and another person that is a registered relationship, or interstate registered relationship, within the meaning of the *Relationships Register Act 2010*, or a de facto relationship that: (a) has been in existence for a continuous period of 2 years, or (b) has resulted in the birth of a child.

The surviving husband, wife and partners in de facto relationship, including same sex partners, are eligible beneficiaries from the deceased estate. A de facto relationship is recognised for inheritance purposes regardless of the gender of the parties; the surviving partner in a same-sex relationship is entitled to participate in the estate of the deceased partner.

Children of the deceased are also entitled to participate in the distribution of the intestate estate. If there is more than one child, they are entitled to the estate in equal shares. This does not depend upon the marital status of the child’s parents nor whether the child is born during the marriage. Usually, children are linked genetically to parents, so determining this issue could be depend on legal presumptions of the parentage stated in the legislation. For example, the birth of a child within the prescribed period of marriage or de facto relationship is presumed to be a child of the parents. But these are rebuttable presumptions in relation to children born naturally. A child of a person who died intestate who is entitled for inheritance does not have to be linked genetically to the deceased person. A child born using donated

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93 Mackie, above 89, 268.
95 Ibid s 127(3) (a).
96 Leonie Englefield, above n 92, 42.
gametes/embryo is entitled to inherit from his/her lawful social parent.\textsuperscript{97} An adopted child also is entitled to benefit from the estate of his/her adoptive parent although they are not genetically related to each other.\textsuperscript{98} Section 109 of *Succession Act 2006* (NSW) provides:

An adopted child is to be regarded, for the purposes of distribution on an intestacy, as a child of the adoptive parent or parents and: (a) the child’s family relationships are to be determined accordingly, and (b) family relationships that exist as a matter of biological fact, and are not consistent with the relationship created by adoption, are to be ignored.

In addition, a child who is born as a result of a lawful surrogacy arrangement may also be entitled for inheritance. Section 109A of the *Succession Act* (under the title surrogacy arrangement) provides that:

(1) A child of a surrogacy arrangement in respect of whom a parentage order is made is to be regarded, for the purposes of distribution on an intestacy, as a child of the intended parent or parents named in the parentage order and: (a) the child’s family relationships are to be determined accordingly, and (b) family relationships that exist as a matter of biological fact, and are not consistent with the relationship created by parentage order, are to be ignored. (2) In this section, a "parentage order" means a parentage order, or an Interstate parentage order, within the meaning of the *Surrogacy Act 2010*.

Section 107 (1) (a) of *Succession Act 2006* (NSW) requires that a person survive the deceased by at least 30 days in order to participate in inheritance. Section 107 (1) (b) in relation to an unborn child requires that conception/pregnancy occur before the death of the intestate and that the child survive for at least 30 days after delivery. Other categories who may participate

\textsuperscript{97} For more details see (6.4.2).
\textsuperscript{98} Englefield, above n 92, 46.
in distribution of intestate’s estate are: parents, sisters and brothers, grandparents, and aunts and uncles.\footnote{Succession Act 2006 (NSW) ss 128,129,130,131.}

Where the deceased leaves a will but does not make sufficient provision for dependants, an application may be made for the court to make suitable provision. In NSW, there are six categories of eligible persons who may make an application for provision to be made from the estate.\footnote{These categories of eligible persons who are entitled to make an application for provision under the will are stated in this Act. Ibid s 57 (1).} These are: the spouse of deceased or partner in a de facto relationship, children of the deceased,\footnote{There is reference to a child of deceased in Succession Act 2006 (NSW) s 57 (2); it includes also children of deceased from domestic or de facto relationships at the time of death.} former spouse, grandchild of decedent or member of household of deceased who was at some time dependent on the decedent, persons who were living with deceased in a close personal relationship at the moment of death of testator. Parents and siblings might be entitled to apply for provision as they could be considered as members of household of deceased or in close personal relationship with deceased.\footnote{Englefield, above n 92, 44.} Close personal relationships may include relationships such as between deceased and invalid mother, as well as relationship between aunt and, for example, a supportive nephew.\footnote{Giuseppe Leroy Certoma, Succession: Commentary and Materials (Thomson Reuters, 6th ed, 2011) 394.}

Finally, there are several factors which should be taken in the account in order to determine eligibility of person for inheritance.\footnote{Such matters and factors which could be considered by the court are stated in the Succession Act 2006 (NSW) s 60.} These factors include the nature of relationship
between the deceased and applicant, and nature of obligations and responsibilities of the deceased towards the applicant as well as the size of the estate of the deceased.\textsuperscript{105}

The consequence is that in NSW, children who are not genetically related to the deceased or those who are born outside a marriage relationship may be entitled to share the estate. This contrasts with the position in Iraq which is discussed in chapter 4 of the thesis. This sets the background to the regulatory framework for ART in Australia in which it is clear that legal parentage is no longer exclusively determined by genetic contribution, and in which marriage is not required in order to impose legal rights and responsibilities in relation to a child born using ART.

\textbf{6.5 Conclusion}

This chapter has discussed the legal recognition of the family in the Australian legal system. In Australia, as a federated system, legislative powers are distributed between the federal government and State or territory government according to the Constitution. The federal government has power to legislate in areas such as marriage and divorce with State (and Territory) governments having power to legislate in relation to the regulation of ART, adoption and the status of children. This chapter has also shown that in Australia the conception of family is much broader than a married couple with children. Australian law recognises relationships based on cohabitation, de facto relationships. Except in relation to marriage, same sex couples have equal rights without discrimination. Australian law also recognises single parent families.

\textsuperscript{105} These factors are stated in \textit{Succession Act 2006 (NSW) s 60(2) (a)}. 

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Children in Australia have equal status regardless of whether they are born to a married couple or not. Parental rights and liabilities as well as inheritance are decided based on the legal parentage. A person may be a legal parent without the need to prove a genetic link to the child. Adoption is allowed in Australian law, which establishes parental rights and duties between the adoptive parent and adopted child and declares that the former parents of the child are no longer the lawful parents. Similarly with ART, where the couple consent to the use of ART whether it involves donor gametes/embryos or not, the couple are, by statute, the legal parents of a child subsequently born using ART. It will be argued in chapter 8, that the different Australian legal and social context makes it inadvisable to try and transplant the Australian ART regulation to Iraq. The legal regulation of ART in Australia will be examined in the next chapter.
Chapter 7 Legal Regulation of ART in Australia

7.1 Introduction

Australia is one of the pioneering countries in the medical and legal aspects of ART. Three decades ago, there was little formal regulation of ART in Australia. It was not dissimilar to the current legal situation the Middle East in general and in Iraq in particular. Consequently, the development of Australia’s regulation of ART provides a useful model for deciding how to regulate ART, and whether regulation of ART may be beneficial for Iraq to adopt. This chapter examines the legal regulation of ART in Australia with a particular focus on the State of NSW.

This chapter will first set out regulatory framework of ART in Australia. It begins with the position at the federal level and then examines the position in the various states with particular emphasis on NSW. The chapter then turns to discuss how particular aspects of ART are regulated. It begins with reference to registration and inspection procedures for ART clinics. It will then examine eligibility for ART treatment. This will include discussion on ART using a couple’s own gametes, and where there are donated gametes or embryos as well as a brief reference to regulating cryopreservation technique. This is followed by the conclusion.
7.2 ART Regulation in Australia

The regulatory framework involves both state and federal governments. This section discusses the regulatory framework for ART at both levels. It starts with regulation at the federal level, followed by regulation at the State level with particular focus on New South Wales (NSW).

7.2.1 Federal Regulation of ART in Australia

This section deals with the federal level regulation. The first steps at the federal level did not involve formal regulation of ART. The first steps were taken by the development of ethical guidelines for ART by the National Health and Medical Research Council (NHMRC). The Guidelines were first issued in 1996, and subsequently revised with the most recent 2007 revision. These guidelines set standards for acceptable practices of ART. The Guidelines deal with a range of issues which raise ethical concerns. The Guidelines require consent of relevant participants in order to carry out ART. The guidelines also regulate donated gametes and embryos. In order to reduce the risk of incest and latent genetic conditions, the Guidelines restrict the number of children who are allowed to be born using the gametes of a single donor; the guidelines do not stipulate a specific number.

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2 National Health and Medical Research Council, Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research (NHMRC, 2007) Clause 5.5.
3 Donation of gametes and embryos is stated in parts 6 and 7 of the ethical guidelines. Ibid.
4 Ibid Clause 6.3.1.
However, the guidelines do not regulate all aspects of ART such as eligibility criteria to access ART treatment; this is left to each state or territory.\textsuperscript{5} The ethical guidelines although are not enforceable as legislation, are important in regulating ART. This is because they operate as de facto regulation and are usually taken in account by legislatures and recognised by state based legislation on ART. Although, there is no system or basis for imposing criminal penalties which might be imposed in case of any breach for guidelines, failure to comply with these guidelines may result in loss of accreditation for ART (discussed below) and ineligibility for research funding.\textsuperscript{6} Compliance by ART clinics with the NHMRC ethics guidelines is an essential requirement in order to obtain accreditation and offer and provide ART services.

Although the NHMRC Guidelines are not directly enforceable, they are effectively enforced through accreditation processes, see below. Initially, the failure of the federal government to enact formal regulation may have been explained by uncertainty about the reach of federal power to legislate in the field. But where the issue was regarded as sufficiently important, the federal government has been prepared to take the necessary steps to give itself legislative authority. So, in order to recognise the status of children born outside a marriage relationship or children born using ART, the federal government was able to obtain a referral of powers from states to expand the reach of the \textit{Family Law Act 1975} (Cth). Similarly, in order to prohibit procedures such as cloning and restrict research on embryos, the federal government drew on its legislative powers over corporations and interstate trade. It is interesting that the first legislative steps regularized the status of children and prohibited practices which were


\textsuperscript{6} Smith, Reviewing Regulation of Assisted Reproductive Technology, above n 1, 123.
unacceptable to the community. A minimalist model for Iraq might consider these as initial steps in regulating ART.

It will be argued, that regularizing the status of children is a powerful reason for some level of legislative intervention. Initially, in 1983, the federal government of Australia amended the Family Law Act 1975 (Cth) by providing that a child born to a married woman using donated sperm, is the lawful child of the woman and her husband provided that the process is carried out with the husband’s consent. The provision was initially limited to children of married couples because it depended upon the Marriage power in the federal (Commonwealth) Constitution. Subsequently, under powers referred from States to the federal government, a child is treated as the lawful child of a person undergoing ART if so provided under Commonwealth or State law.

This can extend to ART children of unmarried and de facto couples and single persons; de facto couples include same sex couples. The key provision is the Family Law Act 1975 (Cth) s 60H which provides that under these provisions a biological relationship is not critical for determining whether a person is a parent of a child at law. It is also apparent that parentage is no longer limited to a married couple who are the biological parents of a child. These developments have accompanied changes in the communities conception of what is a

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7 This amendment was first inserted as s 5 (A) of the Family Law Act 1975 (Cth) s 60 (H).
8 See the Family Law Act 1975 (Cth) Part VII, Subdivision D, in particular s 60 (H) dealing with children born using ART procedures.
9 The Family Law Act 1975 Cth) s 60 (EA) provides ‘For the purposes of this Subdivision, a person is the de facto partner of another person if: (a) a relationship between the person and the other person (whether of the same sex or a different sex) is registered under a law of a State or Territory prescribed for the purposes of section 2 (E) of the Acts Interpretation Act 1901 as a kind of relationship prescribed for the purposes of that section; or (b) the person is in a de facto relationship with the other person.’
family and the human right of a person to found a family without discrimination based on sex or marital status.  

The second area where the federal government has intervened is to pass legislation containing absolute prohibitions on improper procedures such as human cloning, prohibiting research on embryos without a licence and regulating the uses of embryos. Clinics licenced under the *Research Involving Human Embryos Act 2002* are authorized to undertake some types of research on embryos. Most states have similar legislation which is capable of operating concurrently with the federal act. The *Research Involving Human Embryos Act 2002* (Cth) endorses the accreditation process of the Fertility Society of Australia (see below) in relation to the creation and dealing with embryos. Section 11 of the *Research Involving Human Embryos Act 2002* (Cth) deals with embryos which were not created for reproductive purposes; that section makes it an offense penalised by imprisonment for 5 years if:

(a) The person intentionally uses, outside the body of a woman, a human embryo:
   
   (i) That was created by fertilisation of a human egg by a human sperm; and
   
   (ii) That is not an excess ART embryo; and

(b) The use is not for a purpose relating to the assisted reproductive technology treatment of a woman carried out by an accredited ART centre, and the person knows or is reckless as to that fact.

An ART centre is defined in section 8 as:

a person or body accredited to carry out assisted reproductive technology by: (a) the Reproductive Technology Accreditation Committee of the Fertility Society of Australia; or (b) if the regulations prescribe another body or other bodies in addition to, or instead of, the

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11 This is indicated in s 3 which states the object of *Research Involving Human Embryos Act 2002* (Cth).
12 *Research Involving Human Embryos Act 2002* in s 42 provides that: ‘this Act is not intended to exclude the operation of any law of a State, to the extent that the law of the State is capable of operating concurrently with this Act.’
body mentioned in paragraph (a) that other body or any of those other bodies, as the case requires.  

Except for the legislation referred to above, the federal government has largely left formal regulation of ART to state legislatures. In the absence of detailed formal regulation at the federal level, a non-governmental body representing the ART industry, The Fertility Society of Australia has set standards for conducting ART. The Society has established the Reproductive Technology Accreditation Committee (RTAC). The RTAC provides an accreditation process and a code of conduct for ART clinics. This code is considered as setting the national standards which all ART providers must comply. The code deals with clinical procedures and such matters as consent, counselling and storage of human embryo and gametes. Accreditation of a clinic is conditional on compliance with the Code of practice, NHMRC Guidelines, and applicable state and federal legislation; clinics are subject to inspection and audit to ensure compliance.

The detailed regulation of ART has largely been left to state legislation which is dealt with in the next section.

7.2.2 State Regulation of ART

This section first gives a brief introduction to the legal regulation of ART in the various states and territories. The NSW legislation is given detailed attention.

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13 See, Research Involving Human Embryos Act 2002 (Cth) s 8.
14 The Act preserves concurrent state legislation on ART in so far as it is not inconsistent with the federal provisions, Prohibition of Human Cloning for Reproduction 2002 (Cth), s 24. And, Research Involving Human Embryos Act 2002 (Cth) s 42.
16 Fertility Society of Australia, Code of Practice for Assisted Reproductive Technology Units- Reproductive Technology Accreditation Committee (revised March 2014).
Introduction

Specific legislation regulating ART exists in four Australian States: New South Wales,\textsuperscript{17} Victoria,\textsuperscript{18} Western Australia\textsuperscript{19} and South Australia.\textsuperscript{20} In other jurisdictions where ART is still unregulated by legislation, the ethical guidelines are applied.\textsuperscript{21} There is considerable variation in the legislation. In addition to state legislative requirements, ART clinics must also comply with the code of practice of the Reproductive Technology Accreditation Committee (RTAC), as well as the ethical guidelines issued by the National Health and Medical Research Council (NHMRC) unless inconsistent with state legislation. The guidelines, accreditation by RTAC and federal legislation set minimum standards for ART providers in the absence of State legislation. The Iraqi law could benefit from reviewing whether legislative and non-legislative approaches can effectively regulate ART.

With regard to the regulatory experience in NSW, it is important to note that the first steps taken by NSW were to deal with the status of children born as a consequence of ART by enacting the *Artificial Conception Act 1984*. From the 1980s until late 2000s, most Australian states, including NSW, did not enact specific legislation to deal with ART.\textsuperscript{22} The regulation of ART at that stage was left to NHMRC guidelines rather than mandatory

\textsuperscript{17} Assisted Reproductive Technology Act 2007 (NSW).
\textsuperscript{18} Assisted Reproductive Treatment Act 2008 (VIC).
\textsuperscript{19} Human Reproductive Technology Act 1991 (WA).
\textsuperscript{20} Assisted Reproductive Treatment Act 1988 (SA).
\textsuperscript{21} Kerridge, Ian, Michael Lowe and Cameron Stewart, Ethics and Law for the Health Professions (The Federation Press, 4th ed, 2013) 503.
\textsuperscript{22} In that time, only three states issued legislation for ART which are; South Australia (*Reproductive Technology Act 1988*), Western Australia (*Human Reproductive Technology Act 1991*), Victoria (*Infertility Treatment Act 1995*).
statutory provisions. General legislation was adapted to deal with ART. The Human Tissue Act 1983 (NSW) was amended to redefine human tissue as extending to include ova, sperm and embryos. The general prohibition on trading in human tissue applies also to gametes and embryos. Secondly, legislation was introduced to prohibit unacceptable practices such as cloning and gene technology. But it was not until 2003, some 25 years after the birth of the first IVF baby, that more detailed legislation was proposed for NSW. It took a further 4 years for the Assisted Reproductive Technology Act 2007 (NSW) to be enacted; it came into force January 1, 2010 and is the current legislation.

**Overview of the NSW ART Act 2007**

The ART Act regulates ART procedures, beginning with gamete collection, fertilisation and transfer of the human embryo, as well as other issues in relation to collection, storage and disclosure of information about participants in ART. The status of children born using ART is dealt with in separate legislation, referred to below. The Assisted Reproductive Technology Act 2007 (NSW) established new requirements especially in relation to uses of donated gametes and embryos. It regulates ART procedures including artificial insemination, in vitro fertilisation and other related procedures, cryopreservation and storage, donation of gametes as well as the transfer of embryos. The NSW legislation is complementary to the NHRMC guidelines and RTAC accreditation referred to above. As noted previously, the federal Act of Research on Human Embryos Act 1982 (Cth) permits concurrent state

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23 The next chapter discusses whether ART practices should be subject to formal accreditation, licensing and detailed statutory regulation, and the benefits and detriments of formal regulation.
25 There is an overlap between this act and ART provision.
legislation in relation to those matters. The federal Act is of continuing importance and effectively the default legislation applying where states have not legislated.

The Assisted Reproductive Technology Act 2007 (NSW) has two main objectives; these objectives are set out in section 3 which provides that its purposes are:-

(a) to prevent the commercialisation of human reproduction, and (b) to protect the interests of the following persons: (i) a person born as a result of ART treatment, (ii) a person providing a gamete for use in ART treatment or for research in connection with ART treatment, (iii) a woman undergoing ART treatment.

The guiding principles for ART in NSW are first to protect the interests and health of the parties to the reproductive process, that is, children, gamete and embryo providers and women who undergo ART treatment. Secondly, it requires the informed consent of gamete providers and uses of ART in accordance with this consent. Thirdly, with emphasis on the rights of a child to know its biological parents, participants in ART have a right to access information relating to donors of gametes or embryos and in relation to children born using donors. Additionally, the Act declares explicitly that any commercial trade with gametes and embryos is prohibited. In relation to any future regulation in Iraq, if ART is to be regulated a first step would be to set out the objectives of the legislation. Chapter 8 will discuss how far these principles are capable of adaption to Iraq.

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28 Assisted Reproductive Technology Act 2007 (NSW) s 3 (b).
29 Ibid; Division 3: Use of Gametes.
30 This is discussed with details below in this chapter.
31 See, Assisted Reproductive Technology Act 2007 (NSW) s 3 (a).
Regulatory Requirements for ART

Firstly, the Assisted Reproductive Technology Act 2007 (NSW) in section 4 provides a broad definition of ART treatment in section 4 (1) which provides flexibility in adapting to new technology by permitting expansion through regulations, it states that:

"ART treatment" means assisted reproductive technology treatment being any medical treatment or procedure that procures or attempts to procure pregnancy in a woman by means other than sexual intercourse, and includes artificial insemination, in-vitro fertilisation, gamete intra-fallopian transfer and any related treatment or procedure that is prescribed by the regulations.

It similarly gives a broad definition of an ART service in section 4 (1):

ART service means any one or more of following services; treatments or procedures that is provided for fee or reward or provided in the course of a business (whether or not for profit): (a) an ART treatment, (b) the storage of gametes and embryos for use in ART treatment, (c) the obtaining of a gamete provider for use in ART treatment or for research in connection with ART treatment.

The terms ‘donor’, ‘embryo’ and ‘offspring’ are defined in section 4 (1). A donor is defined in section 4:

Donor means the gamete provider from whom a donated gamete has been obtained. So a donor in context of ART services might refer to sperm or egg (oocyte) donor.  

An embryo is defined in section 4 (1) which provides that:

Embryo means the single entity formed by the combination of a human sperm and a human ovum until the time it is implanted in the body of a woman.

Section 4 (1) also includes definition of the offspring, it states that:

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32 Assisted Reproductive Technology Act 2007 (NSW) s 3 (a), in s 4 (1) defines “gamete” to mean both sperm and ovum.
Offspring of a person is an individual to whom the person is a biological parent and includes an individual born as a result of ART treatment using the person's donated gamete.

The broad application of the Act is intended to allow legislation to readily adapt to new technologies through the use of regulations; this may be a useful approach for Iraq.

Secondly, the NSW Act in sections 6 to 9 requires NSW ART service providers to be registered in order to be able to carry out ART services.\(^{33}\) Sections 10 to 15 of the Act refer to other obligations of ART providers such as supervision and counselling in relation to providing ART services. It is compulsory that ART services should be conducted under supervision of registered medical practitioner,\(^{34}\) as well as providing a counselling service for participants in ART services.\(^{35}\) Such obligations are required in order to assist participants in the reproductive process especially gamete providers and women undergoing ART to ensure that they have the necessary knowledge and information about ART procedures and relevant legal provisions.\(^{36}\) Controversially, the Act allows disclosure of details and medical information about parties to ART especially gamete donors and the child.

Sections 16 to 29 deal with the collection and use of gametes for the ART process. The consent of gamete provider is required for carrying out ART for different approved uses. For example, using the gametes to generate human embryos or for other uses such as using gametes and embryos for ART treatment, scientific research, donation and storage. Thus, the Act permits gametes and embryos to be stored in accordance with the consent of gamete

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\(^{33}\) Requirement of Registration for ART providers will be detailed later; a ‘registered ART provider’ means a person registered by the Director-General under Division 1 of Part 2 as an ART provider and whose registration is in force. These sections also refer to registration process and the required procedures of registration.

\(^{34}\) Assisted Reproductive Technology Act 2007 (NSW) s 11.

\(^{35}\) Ibid s 12.

\(^{36}\) Ibid ss 13-14.
providers and the provisions of the Act. In addition, the Act imposes record keeping obligations on ART providers in sections 30 to 41. According to these sections, central records must be kept and disclosed to a relevant individual in accordance with provisions of the Act. This is important especially for ART children in relation to genetic diseases or health matters, as well as for a child’s need to know its genetic parents as a matter of personal identity. The remaining provisions of the Act deal with inspection and enforcement to ensure compliance.

The following section addresses some specific issues which will be important for Iraq to consider if it is to regulate ART.

### 7.3 Registration and Accreditation of NSW ART Clinics

This section examines the legal requirements for an ART provider to offer and provide ART services in NSW. This includes registration, inspection and enforcement. These are all important components for ensuring lawful and competent clinical practice in providing ART treatment and the safety of ART participants and children who may be born using ART. It is also important to maintain community trust that the use of ART is consistent with community norms and the public interest. In relation to Iraqi law, there is no such system for registration of ART clinics or inspection of ART clinics. There are consequent dangers to participants and the community in the lack of regulation or oversight of ART procedures. The review of the Australian regulatory provisions might be useful for Iraq to consider in regard with any future proposal for regulating ART services. This section first considers registration and then inspection and enforcement.
7.3.1 Registration

In Australia, all ART providers must be registered in order to provide ART treatment. In NSW, the ART provider applies to the Director-General for a licence to provide an ART service.\(^{37}\) Sections 6 to 9 of the *Assisted Reproductive Technology Act 2007* set out the required procedures for registering. Section 6 (1) provides that only registered ART providers can provide ART services.

Section 6 (2) prohibits advertising or holding out as an ART provider without a licence, where imprisonment for a period of up to 2 years may be imposed for breach of this provision. Procedures for registration are set out in section 7 of the Act. Aside from the usual business details, the application also requires information about the registered clinician who will undertake or supervise ART services, details of the counselling services to be provided as well as any other matter required by the regulation.\(^{38}\) The Director General must refuse registration to a prohibited person.\(^{39}\) Registration continues in force until cancelled by the Director-General.\(^{40}\)

Registration can be cancelled by the Director-General if the holder gives a notice that the holder no longer provides ART services;\(^{41}\) failure of an ART provider to pay the annual registration fee might also result in cancellation of registration.\(^{42}\) Registration can also be

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\(^{37}\) The director-General in this legislation refers to the Director-General of the department of health. See, *Assisted Reproductive Technology Act 2007* (NSW) s 4.

\(^{38}\) Ibid s 7 (3).

\(^{39}\) Ibid s 7 (5).

\(^{40}\) Ibid s 7 (6).

\(^{41}\) Ibid s 7 (7) (a).

\(^{42}\) Ibid s 7 (10).
cancelled if the ART provider is prohibited under part 6 from providing ART services.\textsuperscript{43} Section 57 provides details when the Director-General may prohibit ART provider from providing ART services. Section 57 (3) sets out conditions for cancelling registration. The Director General can prohibit the offering of ART services, if it is believed on reasonable grounds that there have been breaches of the ART Act or other legislation affecting ART including prohibition on research on embryos without approval, surrogacy arrangements, and prohibition of cloning and related practices.\textsuperscript{44} It also provides in section 57 (3) (b) that the Director General may prohibit the offering of ART services if:

(b) the person has been refused accreditation by the Reproductive Technology Accreditation Committee of the Fertility Society of Australia (or another prescribed body (as referred to in paragraph (b) of the definition of "accredited ART centre" in section 8 of the Research Involving Human Embryos Act 2002 of the Commonwealth) or has had any such accreditation suspended, cancelled or otherwise revoked.

Any changes in the provision of an ART service must be notified to the Director General.\textsuperscript{45} Regulations can require ART providers to meet infection control standards as it is prescribed by the regulations.\textsuperscript{46} Section 9 requires the Director-General to keep a register of all licenced ART providers; such register includes basic business information available to the public which includes the name of providers of ART services, name of licenced medical practitioners who undertake ART services and names of persons who provide counselling services. In addition to this, section 33 requires the Director General to maintain a central register which contains required information about parties in relation to ART treatment.\textsuperscript{47}

\textsuperscript{43} Ibid s 7(7) (b).
\textsuperscript{44} These are the Human Cloning for Reproduction and Other Prohibited Practices Act 2003 (NSW), the Research Involving Human Embryos Act 2003 (NSW), the Prohibition of Human Cloning for Reproduction Act 2002 (Cth), the Research Involving Human Embryos Act 2002 (Cth), and the Surrogacy Act 2010 (NSW).
\textsuperscript{45} Changes here include ceasing providing ART service, and changes in the persons who undertake or supervise ART service, as well as name of persons provide counselling. See, Assisted Reproductive Technology Act 2007 (NSW) s 8.
\textsuperscript{46} Ibid s 10.
\textsuperscript{47} Ibid s 33.
Under section 33 of the Act the central register must include details of gamete donors, women who undergo ART treatment, children who may be born as a result of ART, and offspring of donors.

Registration requires compliance with relevant statutory provisions prohibiting particular types of conduct which are regarded as contrary to public interest, such as research on embryos, cloning and associated procedures and surrogacy outside the permitted usages. Rather than stipulate particular practice requirements, registration is conditioned on the compliance with the requirements of the RTAC procedure discussed previously. This has the benefit of allowing flexibility and the ability to quickly respond to new practices which are thought not to be in the interests of participants or the public. This model may assist Iraq to decide what, if and how it might regulate ART.

7.3.2 Inspection and Enforcement

Inspection and enforcement is necessary to ensure that ART providers comply with regulatory provisions. Part 5 of the NSW Act, specifically sections 46 to 55, deal with this issue. The Act provides for the appointment of qualified Inspectors with wide ranging authority to inspect without notice, require the production of medical materials, books, documents and other materials for examination or testing where the inspector has reasonable grounds to suspect there is a breach of the ART Act or other regulations. The inspector can compel a person to answer questions related to inspection. Under section 53, it is an offence for a person without reasonable excuse not to comply with any request made by an inspector in relation to inspection functions.

48 Powers of inspector are stated in Assisted Reproductive Technology Act 2007 (NSW) s 47.
49 Ibid s 50.
The NSW Act interacts with RTAC accreditation by providing in section 57, that where there are reasonable grounds to do so, the Director General must cancel registration if the business has been refused registration by RTAC or its registration has been revoked or cancelled. NSW has taken a very strong regulatory approach in relation to licensing clinics that wish to offer ART services. Inspection and enforcement are crucial elements of the regulatory framework; they are necessary to ensure that clinics operate under proper standards for the protection of participants and the public.

The next section considers some particular aspects of regulation which will be important for Iraq to consider. They are; eligibility criteria, gamete and embryo donation, and storage of gametes and embryos.

### 7.4 Eligibility, Donation, and Storage

This section examines three areas that are important to consider in determining any future regulation of ART for Iraq. These are; eligibility criteria, gamete/embryo donation, and gamete/embryo storage.
7.4.1 Eligibility Criteria

Eligibility is intimately connected with the right to have a family. Aside from the issue of high costs preventing access, the issue in Australia is framed by reference to the provisions of the federal *Sex Discrimination Act 1984* (Cth), section 22 (1) which provides:

(1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person’s sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:

(a) By refusing to provide the other person with those goods or services or to make those facilities available to the other person;
(b) In the terms or conditions on which the first-mentioned person provides the other person with those goods or service or makes those facilities available to the other person; or
(c) In the manner in which the first-mentioned person provides the other person with those goods or service or makes those facilities available to the other person.

The federal Act overrides inconsistent state legislation so that it is unlawful to refuse access to ART for medical reasons for unmarried couples, single persons or same sex couples. A series of decisions in state jurisdictions have held that it is a breach of anti-discrimination legislation to refuse access to single persons or lesbian women. It is, however, not discriminatory to require lesbian women to prove medical reasons for ART; it is not discriminatory if this is required for all women.

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50 Malcolm Smith, Regulating Assisted Reproductive Technologies in Victoria, above n 15, 825.
51 This decision has been held by the Queensland Court of Appeal of the Supreme Court of in case of *JM v QFG*. *JM v QFG* [1998] QCA 228 (18 August 1998).
Neither the NHMRC Guidelines, nor the ART Act in NSW, set out eligibility criteria for carrying out an ART service.\textsuperscript{52} In this context, the New South Wales Department of Health commented that:

> The decision not to include eligibility criteria is based on the notion that it is not the role of legislation to screen out “good” prospective parents from “bad” prospective parents. The law does not impose any restrictions upon individuals to be able to have children and from families as they choose... The role of the legislation has not been to make rules regarding classes of persons who may or may not become parents (as this is not necessarily a predictor of harm) but to make rules to safeguard the right of individual children whose welfare has been compromised.\textsuperscript{53}

The absence of statutory provisions about eligibility criteria for access to ART service does not mean that this technology is available for everyone regardless of the circumstances. Fertility clinics could adopt a narrow approach by imposing requirements which are consistent with the law and with the main purpose of ART to overcome infertility problems.\textsuperscript{54}

In the context of whether Iraq should regulate ART, it is of historical interest that under state legislation, ART was initially limited to married heterosexual couples (and later de facto heterosexual couples)\textsuperscript{55} for a medically indicated reason such as infertility or a risk of genetic disease.\textsuperscript{56} The position in NSW contrasts with the approach taken in Victoria in establishing Patient Review Panels to screen potential applicants.

\textsuperscript{52} In respect to determination of eligibility criteria, ART Act in NSW is unlike legislation of ART in other jurisdictions in Australia which determine such criteria.

\textsuperscript{53} Smith, Reviewing Regulation of Assisted Reproductive Technology, above n 1, 127.

\textsuperscript{54} Ibid 128.

\textsuperscript{55} In Victoria the Infertility Treatment Act 1995 was amended in 1997 to allow de facto heterosexual couples to utilize ART following decisions that refusal was in breach of the Sex Discrimination Act 1984 (Cth) s 22.

\textsuperscript{56} For instance, the former legislation of ART in Victoria, Infertility Treatment Act 1995 (Vic) s 8(3) restricted access to ART treatment to heterosexual couples who are married or in de facto relationship who are infertile, or there was a risk that child be affected by genetic condition. See also the Reproductive Technology (Clinical Practice) Act 1988 (SA) s 13(3) (b).
In Victoria, the Assisted Reproductive Treatment Act 2008 does not explicitly limit ART treatment to particular classes of applicants. But the Act requires satisfaction that ART is required for infertility or genetic risks or that the patient review panel decides that there is no barrier to the woman undergoing ART procedure. Such satisfaction should be based on reasonable grounds that the woman is unlikely to become pregnant or is unable to get pregnant or to give birth to a child naturally or there is risk of passing genetic diseases or disorders from the mother to the child. This Act does not criminalize self-insemination which might be carried out by woman herself or with the assistance of others.

The Victorian Act entitles the Patient Review Panel to make decisions about the eligibility for ART treatment in accordance with guiding principles of the Act, as well as the best interests of a child who may be born as a result of ART treatment. In addition, the Victorian ART Act requires child protection and criminal records checks. All applicants for ART services in Victoria are required to complete these kinds of checks. In the decision of the Supreme Court of Victoria in Patient Review Panel v ABY & ABZ, an application by a couple to access ART treatment was refused because the husband had been convicted of a sexual offense. The couple appealed to Victorian Civil Administration Tribunal which rejected the decision of the Patient Review Panel. The panel appealed to the Supreme Court of Victoria against the decision of VCAT which remitted the matter to a different tribunal. It was decided that the husband’s criminal conviction did not pose a barrier to access ART treatment. ART treatment cannot be provided if a child has been removed from the custody

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57 This requirement is stated in the Assisted Reproductive Treatment Act 2008 (Vic) s10.
58 Assisted Reproductive Treatment Act 2008 (Vic) 10(2)-(3).
59 Ibid s 9.
60 Ibid s 15 (3).
or guardianship of the woman or her partner.\textsuperscript{63} Thus, the purpose of this requirement is to protect a child who may be born through ART treatment.\textsuperscript{64}

The Act also requires that neither the woman nor her partner seeking ART treatment have been found guilty of a sexual or violent offence.\textsuperscript{65} Such requirements are required in order to protect interests of a child and safety of the society. The NSW ART Act has as one of its purposes the welfare and best interests of children.\textsuperscript{66} It may be observed that no such limits as imposed in Victoria are capable of applying to natural reproduction or to self-administered artificial insemination. Finally, consent of a woman who undergoes ART and her partner, if she has any, is required as it considered an essential condition for carrying out an ART service.\textsuperscript{67}

Australian legislation, guidelines and accreditation requirements also include special provisions relating to gamete/embryo donation.

\textbf{7.4.2 Gamete Donors}\textsuperscript{68}

ART in Australia is not limited to the use of a partner’s gametes but also permits the use of third party gametes or embryos. Regulatory requirements are imposed to protect the wellbeing and interests of offspring and recipients of gametes as well as donors. The

\begin{itemize}
\item \textsuperscript{63} \textit{Assisted Reproductive Treatment Act 2008} (Vic) ss 12-14.
\item \textsuperscript{64} Ibid s 1(1) (c).
\item \textsuperscript{65} There will be presumption against ART treatment if criminal records show that such offense was committed by the woman or her partner. Ibid s 14(1) (a).
\item \textsuperscript{66} One of objects the Act is to protect interests of children who might be born through use of ART, \textit{Assisted Reproductive Technology Act 2007} (NSW) s (3) (b) (i).
\item \textsuperscript{67} \textit{Assisted Reproductive Treatment 2008} (Vic) s 10.
\item \textsuperscript{68} This includes embryos formed by use of donor gametes. Definitions are stated in \textit{Assisted Reproductive Technology Act 2007} (NSW) s 4.
\end{itemize}
requirements relate to the eligibility of donors, and record keeping and disclosure of information.

**Donor Eligibility**

Although the donation and use of donated gametes is allowed in Australia, it is subject to strict regulation. Under the NSW Act, the minimum age for donors and recipients is 18. There is an exemption which allows a child’s gametes to be stored if there is a medically certified risk that the child may become infertile before becoming an adult; the stored gamete of a child cannot be used to fertilise an egg (oocyte) until the child becomes an adult and gives consent. Further requirements are contained in the NHRMC Guidelines which provide that: ‘Clinics should not use gametes donated by older men and women unless the potential recipient understands the implications and increased risks of such an agreement.’ The NSW ART Act prohibits the use of gametes from close family members to create an embryo. Whilst this provision protects families from undue pressure and potentially reduces latent genetic risks, it is, to some degree, inconsistent with the position in most states allowing altruistic surrogacy by close family members. Consequently its purpose is likely to be more closely aligned to genetic risk rather than disturbing family relationships.

The NHMRC Guidelines provide that: ‘Eggs must not be fertilised with sperm from a close genetic relative (that is, from a person for whom a sexual relationship with the female donor

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69 Ibid s 29.
70 Assisted Reproductive Technology Act 2007 (NSW) ss 29 (1)-(2); Assisted Reproductive Treatment Act 2008 (Vic) ss 26(1)-(2).
71 NHMRC, above n 2, Clause 6.2.2.
72 Assisted Reproductive Technology Act 2007 (NSW) s 28 (1).
73 ‘Definition of a close family member is stated in the Assisted Reproductive Technology Act 2007 (NSW) s 28 (2) which provides ‘close family member means a parent, son, daughter, sibling (including a half-brother or half-sister) grandparent or grandchild being such a family member from birth.’
would legally be considered to be incest).\textsuperscript{74} Although incest normally involves physical intimacy, under the guidelines the fertilisation of women’s egg (oocyte) with sperm from a close relative is considered akin to incest. This might be just a shorthand way of saying that using donated gametes of close family members is prohibited.

The donor’s consent is required for gamete donation and use in ART procedures.\textsuperscript{75} This consent could include other matters such as whether or not gamete is to be stored, exported or supplied to another ART provider. The donor is also able to withdraw or modify the consent at any time.\textsuperscript{76} In order to ensure that the donor is fully informed and genuinely consents to the donation, the NSW Act requires the clinic to provide compulsory counselling. This includes providing information that the donor’s details are recorded on a central register and may be disclosed to relevant participants in accordance with legal provisions.\textsuperscript{77} In context of the donor’s consent, there is the issue of directed donation, that is, whether the donor is able to determine classes of recipients who may benefit and use his/her gamete.

Basically, gamete donation could be directed to be used for the benefit of specific persons, the donor knows personally.\textsuperscript{78} Donation of gametes may also be to unknown recipients. A donor may donate gametes to an ART provider and give consent for the donated gamete to be used for individuals based on need, without any condition with regard with class or status of recipients who may use gamete of the recipients. As indicated in chapter 2, the Australian experience is that there are very small numbers of oocytes (eggs) or embryos that are donated

\textsuperscript{74} NHMRC, above n 2, Clause 6.8.
\textsuperscript{75} Assisted Reproductive Technology Act 2007 (NSW) ss 16 (a)-(b).
\textsuperscript{76} Ibid s 17.
\textsuperscript{77} Ibid ss 14-15.
\textsuperscript{78} NHMRC, above n 2, Clause 6.6.
(see 2.5). A donor may, direct that gametes be used for the benefit of particular class of recipients based on race, social status, religion, etc. Although the ART Act considers that the consent of donor is an essential element in order to carry out ART using donated gametes, the Act does not refer to directed donation or where donors request that gametes be used for benefit of particular group with specific characteristics.

However, the NHMRC ethical guidelines state that directed donation is acceptable unless State legislation provides otherwise. The ethical guidelines state in clause 6.9 that:

Some gamete donors may wish to donate their gametes for use only by certain individuals, such as those from a particular ethnic or social group. This type of directed donation is illegal in some jurisdictions. Clinics in those states must not accept such donations. In the remaining states and territories, clinics must not use the gametes in a way that is contrary to the wishes of the donor.

So that, as long as there is no legislative provision which prohibits directed donation, then this procedure is available to clinics in NSW. Some clinics and researchers believe that directed donation should be allowed as it may encourage individuals to donate their gametes as long as it would be used according to their wishes, while others are concerned that directed donation might be discriminatory.\(^{79}\)

In accordance with usual clinical practice, medical checks are required prior to donation for reproductive purposes. Although the NSW Act does not explicitly provide for this, it would be required as necessary for the protection to the interests of persons who may be born

through ART, gamete providers and women who undergo ART treatment.\textsuperscript{80} This is explicit in the NHMRC guidelines in clause 6.4 which imposes obligations on clinicians to conduct medical tests on all gamete donors and refuse donation from individuals who are at risk of infections such as HIV or genetic problems which may be transmitted to offspring.\textsuperscript{81} Medical tests and the medical history of the donor should be recorded and available for recipients of donated gametes under the NSW Act, section 15. The NHMRC Guidelines confirm the right of recipients to access the medical history of the donor which may include, in relation to the donor, any genetic tests, physical characteristics, as well as the number and sex of persons who are conceived through the donated gametes of that donor.\textsuperscript{82}

In NSW and Victoria there are limits on the maximum number of women who receive donated gametes from a single donor. In NSW, the maximum number is 5 unless the donor stipulates a lesser number;\textsuperscript{83} in Victoria it is 10 or less if the donor stipulate less than that maximum number.\textsuperscript{84} The legal provisions limit the period of preserving and storing gametes.\textsuperscript{85} Legislation in Australia and NSW also includes a prohibition on payment or commercial trade in gametes or embryos.\textsuperscript{86} There is a similar provision in the NHMRC Guidelines.\textsuperscript{87} These restrictions together with the provisions relating to disclosure of the identity of donors assist in reducing the risk of incest.

\begin{itemize}
  \item \textsuperscript{80} Regarding legal protection of interests of those people, see; the Assisted Reproductive Technology Act 2007 (NSW) s 3 (b).
  \item \textsuperscript{81} The ethical guidelines also indicate that the number of families that might use donated gametes of single donor should not be unlimited. The guidelines justify this matter in order to avoid negative consequences which may be raised as a result of having many genetic offspring and siblings. NHMRC, above n 2, Clause 6.3.
  \item \textsuperscript{82} Ibid Clause 6.4.
  \item \textsuperscript{83} Assisted Reproductive Technology Act 2007 (NSW) s 27.
  \item \textsuperscript{84} Assisted Reproductive Treatment Act 2008 (Vic) s 29.
  \item \textsuperscript{85} Storage period of gametes is set out in the next section.
  \item \textsuperscript{86} Assisted Reproductive Technology Act 2007 (NSW) s 3
  \item \textsuperscript{87} NHMRC, above n 2, Clause 6.5.
\end{itemize}
Information Disclosure

Until relatively recently, donor details were not disclosed to ART participants. But this has changed. The emphasis is now on the rights of children born using ART to know their biological parents. There are also good medical reasons for children and participants to have sufficient information to deal with medical conditions where further information is required concerning the donor. The NSW ART, section 30 requires ART providers to collect and record information about relevant persons participating in ART process. The collected information includes information about the gamete provider, the woman who undergoes ART and her partner (if any), as well as a child who is born as a result of ART. Clinics must not carry out ART procedures using donated gametes of anonymous donors. The Act establishes a central register to be kept by the Director-General of Health who is authorised to record required information, and to disclose information in accordance with the Act.

Section 33 refers to information about ART treatment which should be recorded in the central register. It requires information relating to participant parties in ART, including gamete donors, the woman undergoing ART, children who are born through ART using donated gametes, and the offspring of the donor. Section 36 obliges the Director-General to disclose information to the applicant about other participants. This information can be accessed by a gamete donor, an adult born as a result of donated gamete, and a woman who undergoes ART treatment. An adult born through ART using donated gametes is entitled to obtain information about the donor, including the name and identity of the donor. This reflects and the right of a child to know their biological parents. Such information about donor

89 Assisted Reproductive Technology Act 2007 (NSW) ss 32 (A)-(B).
90 Ibid s 36 (1).
91 Ibid s 37.
identity would be also disclosed to the parent, mother of the child and her partner if she has a partner. In addition the donor may be able to obtain information about a child who might be born as a result of using donated gamete.

The NHMRC guidelines also require ART providers to keep a record of participants of ART procedures. These guidelines recognise the right of individuals who are born through ART using donated gamete to know their genetic parents. In this context, clause 6.1 of the ethical guidelines stipulates that:

Persons conceived using ART procedures are entitled to know their genetic parents. Clinics must not use donated gametes in reproductive procedures unless the donor has consented to the release of identifying information about himself or herself to the persons conceived using his or her gametes. Clinics must not mix gametes in a way that confuses the genetic parentage of the persons who are born.

The ethical guidelines in clause 6.1.1 continue:

Clinics should help potential gamete donors to understand and accept the significance of the biological connection that they have with the persons conceived using their gametes. Donors should be advised that the persons conceived are entitled to knowledge of their genetic parents and siblings.

Similar requirements about record keeping and information disclosure apply in legislation in other States such as Victoria and Western Australia. The importance of this for Iraq is discussed in the following chapter.

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92 Ibid s 38.
93 Ibid s 39.
94 Assisted Reproductive Treatment Act 2008 (Vic) ss 49,50,56,58,59,60.
95 Human Reproductive Technology Act 1991 (WA) ss 45,46,49.
7.4.3 Gamete/Embryo Storage

This section discusses the legal regulations in relation to storage of gametes and embryos. The efficient use of ART generally requires the collection and storage of gametes and embryos prior to treatment. The first requirement is that the gamete provider consent to storage.\textsuperscript{96} Legislation also imposes time limits on storage of gametes and embryos. In NSW, the period was limited to 10 years or a shorter period stipulated by the gamete provider.\textsuperscript{97} This period has been recently amended to allow a longer period, where it extended to 15 years instead of 10 years.\textsuperscript{98}

The NHMRC also provides that gametes can be stored based on consent of gamete provider, the period of storage should be within the stated maximum period.\textsuperscript{99} The NHMRC guidelines states that the maximum period which is 5 years, the consent is renewable for a further five year period.\textsuperscript{100} In the case of inconsistency between the Guidelines and the NSW ART, the NSW ART prevails. The storage period is also limited in Victoria where legislation states that maximum period for gamete storage is 10 years, unless the patient review panel approves on reasonable grounds for a specific longer period which may be requested with the written consent of gamete donor.\textsuperscript{101} These limits will inform any legislative reform in Iraq which seems to regulate ART.

\textsuperscript{96} Assisted Reproductive Technology Act 2007 (NSW) s 25 (1).
\textsuperscript{97} The Director General can extend the period, Assisted Reproductive Technology Act 2007 (NSW) s 25 (3).
\textsuperscript{98} Assisted Reproductive Technology Amendment (Exemptions) Regulation 2015 (NSW).
\textsuperscript{99} NHMRC, above n 2, Clause 8.3.
\textsuperscript{100} Ibid Clause 8.8.
\textsuperscript{101} Assisted Reproductive Treatment Act 2008 (Vic) s 31.
7.5 Conclusion

This chapter has examined the legal regulation of ART in Australia with a particular focus on the legislation in NSW. The Australian experience provides an important comparator in discussing possible models for Iraq. First it provides a model for how a federated system may work. It is instructive that federal regulation does not regulate the detailed aspects of ART but largely leaves this detail to state legislation. In Australia, the federal legislation is largely a default system in the absence of specific state legislation and effectively sets minimum standards for ART. At the federal level, regulation takes three forms: first legislation to prohibit improper use of embryos and recognition of the status of families and children born using ART; secondly endorsement of non-statutory accreditation by ARTAC and thirdly by setting ethical principles by the NHMRC. At both federal and state levels, legislation first clarified the status of children born as a consequence of ART. It changed the emphasis from genetic parenthood to that of social parentage.

Reflecting community concerns, specific legislation was introduced at the federal level to prohibit procedures such as cloning and restrict research on embryos, with the legislation restricting research on embryos effectively mandating accreditation by RTAC. In the final stage, regulation of ART clinics in NSW has moved from the exclusive use of NHMRC guidelines and RTAC accreditation to formal regulation of specific issues relating to ART. Thus, in NSW there has been a gradual shift from a non-interventionist model based on NHMRC guidelines to more formal regulation of ART clinics. Access to ART is shaped by the federal anti-discrimination legislation which prohibits discrimination on the basis of sex or marital status thus allowing single persons, same sex couples, unmarried and lesbian women to access ART. As will be seen in the following chapter, this issue causes serious
issues for Iraqi legislators because of social and legal norms relating to the formation and recognition of what constitutes a family, and the determination of lawful parentage.

The next chapter will examine how far the Australian approaches are possible in Iraq having regard to the legal and social environment. Also in this context is the problem of disclosure if Iraq were to accept the use of donor gametes for ART. This review provides a comparator to the discussion on whether Iraq should regulate ART. It is important in two key areas. The first, the following chapter highlights the very different position in Iraq in relation to the recognition of children and non-marriage relationships. Secondly, the Australian experience provides a potential model of how and why ART could be regulated. The issue for Iraq is whether it should similarly regulate ART, and whether the legal and religious environment may dictate a more restrictive response. This is dealt with in the next chapter.
Chapter 8 Recommendations for Iraq and Conclusion

8.1 Introduction

This chapter draws together the arguments on whether Iraq should regulate ART and if so what limitations or restrictions appropriately reflect the Iraqi legislative, Sharia and community values. It makes recommendations on a suitable regulatory model for Iraq. Australian law and experience (with a focus on New South Wales) is used as a comparator to highlight possible models. As will be discussed, the regulation of ART in Iraq cannot be divorced from the cultural, legal norms and Sharia law relating to the family. The chapter begins with the question whether ART should be regulated in Iraq. It then considers whether ART should be approved, and if so how it should be regulated and what aspects of ART should be permitted or prohibited. It also discusses lessons that could be learnt from Australian regulation. It then makes recommendations for Iraq. It ends with conclusion includes a summary and recommendations for a staged approach to reform.

8.2 ART and the Regulatory Solution for Iraq

This section addresses two questions: first, should Iraq regulate ART and second, should ART be approved.
8.2.1 Should ART be regulated?

Chapter 3 discussed the arguments for regulation. The question whether ART should be regulated is closely associated with what and how ART should be regulated. The choices for Iraq are (1) to maintain the status quo in which ART is governed by the current legislation and Sharia law, or (2) approve particular ART practices and leave ART practitioners to self-regulate through non-binding standards or (3) impose a strict regulatory regime. It is argued that maintaining the status quo is not appropriate for Iraq nor is self-regulation a suitable option. The current legislation in Iraq is designed to deal with family’s issues in accordance with the classical norms of family recognition. Under the current law, the status of children as well as parentage and inheritance, are based on a genetic relationship between parents and their children and a marriage relationship between the parents. There is no direct text in the main sources of Islamic Sharia on whether ART is permissible or the legal status of children born using ART, so that these important issues are left to the variable opinions of Sharia scholars.

Specific ART legislation is necessary to protect the public and ART participants. In a free market, unregulated ART clinics can operate without sufficient clinical expertise or safeguards for ART participants. There is no scrutiny or accountability, and there is the risk of clinically unsafe and objectionable practices. Self-regulation through non-binding guidelines (clinical practice excepted) should not be adopted in Iraq because of the serious consequences of the potential abuses of ART and conflict with community values and Sharia law. ART has become widespread in the Middle East including Iraq and without a legislative solution; there will be legal vacuum and chaos that permissibility of ART depends upon the differing opinions of Sharia scholars. There is also the consideration that although Muslims
are the majority of the population, Iraq has also a significant number of non-Muslims who may also be affected by infertility with differing views about the acceptability of ART.

As discussed in chapter 3, enacting legislation for ART is required in order to obtain benefits of such technology to assist infertile couples as well as prohibiting some procedures that may cause disadvantages to the individual and society. In addition, consistently with Sharia principles, ART legislation can assist in protecting the health of patients and the best interests of children, as well as resolving difficulties if ART is practised in a legal vacuum caused by the absence of specific legal provisions. In relation to children, the regulation of ART can ensure that children who are born through ART procedure have rights of maintenance, support, legal parentage and inheritance.

Under a strict regulatory model, ART should be governed by legislation and backed by penalties to enforce compliance. However, the focus should be on the benefits for infertile couples rather than punishment used as a deterrent to force compliance by individuals and clinics. So, responsive regulation for ART which is compatible with legal principles and cultural traditions may be more efficient to ensure compliance of clinics with legal provision. In this context, industry and professional associations may play a role as advisory body in order to improve services system and assist infertile couples to access ART services, (see 3.2.2). Tasks of mandatory inspections may also be to reward for good practice and assistance for people who are in need for ART service prior to prosecution for bad and unlawful practices. This way may assist in ensuring practicing and conducting ART in accordance with the law.
8.2.2 Should ART be approved?

As noted in chapter 2, in the Middle East there are high levels of infertility and as a consequence ART clinics are widespread. There are strong arguments for the approval of, at least, some limited applications of ART. Infertility can be viewed as a condition requiring medical treatment necessary to have a fulfilling life. This recognises the importance of having a family and the human right of individuals to marry and found a family without discrimination.\footnote{This right is stated in Article 16 (1) of \textit{Universal Declaration of Human Rights 1948}, which Iraq has adopted and approved.} From the point of view of Sharia law, it has been argued in this thesis that no distinction should be drawn between natural methods of reproduction and ART where a married couple use their own gametes. As discussed in chapter 5, the narrow view of Sharia which would prohibit ART overemphasises risks which can be minimised where proper clinical procedures are adopted.

It is argued below that Iraq should adopt the middle view of Sharia scholars permitting ART for married couples using their own gametes but with significant qualifications to protect and benefit infertile couples. It also argues that the most liberal views are unlikely to gain acceptance in Iraq as they are inconsistent with the views of the majority of Muslim scholars and the legislative approaches to the formation and recognition of families. Chapter 5 also discussed the importance of Sharia principles as underpinning Iraqi law and legislation and its importance to Muslim communities. Relevant legislation should reflect these principles. First, there is the principle that priority for avoiding disadvantage is more significant than obtaining advantage. This suggests that any legislation for ART should prohibit what are
universally considered unacceptable practices such as cloning and related procedures as well as prohibition of the sale of gametes, embryos and reproductive tissues.\(^2\)

In addition, ART could be approved in a limited range of cases that promote the good of the community without any significant detriment and are consistent with Sharia law and community views of what is a family and confirming parentage and inheritance. This would represent the middle view of Sharia scholars. This approach would permit the use of ART to assist married infertile couples to conceive a child who is genetically related to them based on the benefit principle. The liberal approach permits broader use of ART including involvement of donors and preserving gametes and embryos by cryopreservation. A more radical step would be to approve ART for unmarried women, same sex couples or allowing donated gametes/embryos to be used. In this context and as observed above, the more liberal approach at the present time is unlikely to gain acceptance of Sharia scholars or the community.

The family which is recognised by Iraqi law is based on genetic relationship between children and their married parents. In relation to children born outside a marriage relationship, the current legal position is that these children are not entitled to recognition as lawful children of the father and so not entitled to parentage, inheritance and other rights against the father, (discussed at 4.5.1). There is a strong argument from the human rights perspective that these children should have the same rights against their father as children born within a marriage relationship. Whilst this might fly in the face of traditional views, such traditions breach human rights and the constitutional provisions, where the *Iraqi Constitution 2005* which

\(^2\) For more details about consequences ART, including advantages and disadvantages, see chapter 2 (2.4).
prohibits any traditions and customs which contradicts with human rights, (see 4.2.4). But despite the validity of this view, changes to implement this are unlikely in the light of Sharia law and cultural norms.

There is a risk that if there is a very strict regime this will be avoided by well to do couples going to other countries for ART treatment with little or no regulation. This has been the Australian experience in relation to prohibited forms of surrogacy. If the middle view is approved, the children of couples who go to other countries and use donor gametes or embryos would be considered illegitimate under Iraqi law and forfeit rights against the putative father. Earlier reference was made to confession that a child is the lawful child of the confessor, (discussed 4.5.1). Where a couple undergoes ART outside Iraq, one avenue to legitimate the child is for the couple on their return to Iraq, to confess and acknowledge that the child is their lawful child. Although not an ideal outcome, it provides protection to the child without disturbing accepted social norms. This might suggest that the Iraqi law provisions relating to status of children need to be reconsidered and amended to recognise all children as having equal status, and the terminology of “illegitimate child” should be removed from the Iraqi law, this will be discussed further in section (8.3.3).

8.3 Lessons for Iraq from ART Regulation in Australia

Australian legislation dealing with ART is advanced compared with legislation in the Middle Eastern region including Iraq. Although Iraqi law can benefit from some aspects of ART regulation in Australia, the Australian experience and ART regulatory framework cannot

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simply be transplanted into Iraq as there are very important differences, particularly cultural
traditions, legal, Sharia and community views of what constitutes a family in the Middle East
and Iraq. The first and main lesson that Iraqi law can benefit from the regulatory framework
and historical experience of regulation in Australia, is that special regulation is required for
ART. This following section considers how far the Australian regulatory experience
provides a model for Iraq.

8.3.1 Federal Legislation and National Standards

Australia

As indicated in chapter six, Australia is a federated system, where legislative authority is
shared between the federal government and State and Territory governments. The federal
government has no direct legislative authority over ART, but has legislated to deal with
specific issues involving the status of ART children and the potential abuses of ART, such as
research on embryos and prohibited procedures such as human cloning. It has been able to
indirectly regulate ART by using a related power of interstate trade and commerce. It has
been able though this mechanism to effectively establish default national standards through
the endorsement of accreditation by the Reproductive Technology Accreditation Committee
(RTAC) of the Fertility Society of Australia, and the requirement that ART providers
comply with NHMRC Guidelines. These principles apply if states and territories do not

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4 See, the Australian experience for regulating ART procedure in chapter 7 at (7.2).
5 Research Involving Human Embryos Act 2002 (Cth).
7 Research Involving Human Embryos Act 2002 (Cth) s 8 (a) provides that ART providers should be accredited
   by RTAC.
8 An ART provider should comply with guidelines of NHMRC. See, Fertility Society of Australia, Code of
   Practice for Assisted Reproductive Technology Units- Reproductive Technology Accreditation Committee
   (revised March 2014) 8.
legislate for ART. State and Territory legislation can operate concurrently with the federal legislation provided that the federal provisions prevail in the case of inconsistency.

**Iraq**

Subject to the terms of the *Iraqi Constitution*, the Australian approach could provide a potential model for Iraq with an embryonic federated system. It suggests that the Iraqi federal government establish national standards which apply unless territories enact legislation on ART, (see 4.2.1). Ideally, the Iraqi federal government should have exclusive power to legislate for ART. Currently the federal government does not have exclusive powers to make laws relating to ART, inheritance, the status of children and parentage. Even if the federal government legislates in this field, the law can be overridden by regional legislation, (see 4.2.1). Exclusive powers would require an amendment to the *Iraqi Constitution 2005* to extend the federal governments exclusive legislative powers to include matters directly related to ART, including the status of children for the purposes of inheritance and parentage. This can be achieved either by giving the federal legislature exclusive powers or by amending section 121 (2) of the Constitution to give priority to federal legislation where there is conflict between federal and regional legislation.

One possible approach is the one taken by the Australian federal government in the early years of ART regulation in Australia. The Iraqi federal government, Department of Health, could consider relying on advisory body in relation to health and research which issues ethical guidelines such those promulgated by the Australian National Health and Medical
Research Council (NHMRC). As discussed at (7.2.1), these guidelines together with the industry body accreditation procedure, RTAC provided de facto national standards.

There are both advantages and disadvantages to this approach. The benefit is that guidelines provide a flexible, readily adaptable response to rapidly changing advances in the field. Guidelines might also appear less threatening to those scholars and communities who take a narrow view of the permissibility of ART so that guidelines might be politically more manageable. The disadvantage is that guidelines are not legally binding. If political agreement could be reached, the Iraqi federal parliament could enact legislation as recommended above. But this would be at the risk of regional governments passing inconsistent, overriding legislation. The problem is largely avoided if an amendment to the *Iraqi Constitution* were possible, (see 4.2.1). The second problem is the current state of unrest in Iraq and the problems for government in dealing with matters not involving national security and safety. This might suggest that the first steps should be very modest and where possible rely on mechanisms other than legislation in the first instance.

8.3.2 Registration and Accreditation of ART Clinics

*Australia*

As noted above, the Australian federal government has endorsed a national system for accreditation and registration of ART providers which applies where states have not regulated

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9 It is reported that in Lebanon which also has no specific legislation dealing with ART, the Lebanese Order of Physicians have issued guidelines which include such matters as no insemination of unmarried women. See, Beckie Strum, ‘Fertility treatments in Lebanon regular but unregulated’, *The Daily Star Lebanon* (online) 28 Aug 2013 <http://www.dailystar.com.lb/News/Lebanon-News/2013/Aug-28/228955-fertility-treatments-in-lebanon-regular-but-unregulated.ashx#axzz3EJPaDBrl>.
ART. This approach provides flexibility by relying on an industry body, the Fertility Society of Australia through its Reproductive Technology Accreditation Committee (RTRAC) to set standards for ART clinics, provide accreditation, systems for inspection and audit and to deregister non-compliant providers. Medical and clinical matters are left to be regulated by guidelines which allow flexibility to respond rapidly to new medical advances. For example, it could establish guidelines in relation to the number of embryos transferred in one reproductive circle.

Currently the Australian practice is to transfer just one embryo as this appears to reduce risks of multiple births but produces best opportunities for live birth, see chapter 2. These issues concerning medical practice are best left to guidelines rather than formal legislative provision. This allows a rapid response to new techniques and scientific knowledge in relation to ART. It may also be valuable in removing issues from the political process. The NSW model referred to in chapter 7 does not rely on the federal provisions but sets its own registration and accreditation regime. It sets a strict compliance regime backed by criminal penalties for breach of its provisions. This model is justified with reference to the health and safety of participants to ART and its significance for the status of children, inheritance and rights and duties of parents in relation to their children.

**Iraq**

There may be a distinct advantage for Iraq to consider adopting an approach similar to the Australian federal government on ART particularly where there is a diversity of views on the permissibility of ART. The difficulty for Iraq is that, unlike Australia, there are no industry
bodies that can set standards. This suggests that a preferred approach may be to establish a
government body under the Ministry of Health to provide accreditation and associated
inspection and audit rather than an industry body similar to the Fertility Society in Australia.
A registration system helps to ensure that an ART provider is appropriately licenced and
qualified to practice ART treatment in accordance with the regulation. This could be
enforced by criminal sanction on an unregistered provider offering ART services.¹⁰

8.3.3 Equal Status of Children

Australia

As discussed in chapter six, in Australia what constitutes a family for legal purposes is not
limited to a married couple with children, but extends also to de facto relationships, same sex
relationships and single women. Human rights underpin this equality of treatment under
Australian law. All children are entitled to equal treatment before the law. For the purposes
of imposing legal rights and obligations, rights are not limited to the naturally procreated
children of a married couple but extend to children born as a consequence of ART. There is
no requirement that children are genetically related to the legal parents.

Australian law grants all children similar status and equal rights without any discrimination
based on the marital status of parents or genetic relationship between parents and children.
As observed in chapter 6 at (6.4.1), the terminology of illegitimacy no longer exists in
Australian law. In NSW this legislative step was taken in 1976 and preceded regulation of

¹⁰ As observed in chapter 7, The Assisted Reproductive Technology Act 2007 (NSW) s 6 imposes civil and
criminal penalties such fines and imprisonment on any breach to its provision.
ART. The NSW legislation was based on the view that all children are entitled to protection and should not be discriminated against based on the nature of relationship between parents. Granting equal status and rights for all children ensures the best interests and the protection of children without any discrimination. Unlike the position in Iraq, under NSW adoption law, an adopted child becomes the lawful child of the adopters and the genetic parents no longer has rights or obligations in relation to the child, (see 6.4.3). Similarly, where donor gametes or embryos are used, the consenting couple are the legal parents and the donors are declared not to be the legal parents of any child born as a consequence of ART, (see 6.4.2). So, under Australian law parentage based on a nurturing relationship rather than a genetic relationship is recognised.

**Iraq**

As discussed in chapter 4, in Iraq, children born to married parents are the lawful children of that couple and entitled to parentage and inheritance rights. This of course could be expanded to include those children who born as a result of ART using the married couple’s own gametes/embryos. However, some Islamic scholars are of the view that even where if a married couple use their own gametes/embryos in an ART procedure, the subsequent children are not the lawful children of the parents entitled to parentage and inheritance rights. As a cautionary response to this narrow view (see 5.3.1) and to avoid uncertainty, at the very minimum, legislation in Iraq should confirm that a child born to a married couple using their own gametes/embryos in an ART procedure is the lawful child of that couple.

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This is on the basis that the small level of risk involved in these circumstances is outweighed by the substantial benefits. Such an approach is consistent with the majority views of Islamic scholars (see 5.3.2). The legislation might go further by providing a legal presumption that provided the married couple both consent to ART using their own gametes, the child is conclusively presumed to be the lawful child of that couple. An alternative is for the consent process to be linked to confession and acknowledgement of the child by the husband.

In addition, it has been argued that the existing law in Iraq does not sufficiently protect the rights of illegitimate (exnuptial) children who should be recognised as the lawful children of their genetic parents. This should also apply to children born following the use of ART with the consent of an unmarried couple. It is also argued that equal treatment of exnuptial children is compatible with principles of Islamic Sharia which assert that all human beings are valued and children entitled to care and protection. It is also consistent with the Iraqi Constitution which guarantees the essential rights of all individuals and grants all individuals including children equal opportunities and protection, (see 4.2.4). Constitutional provisions do not distinguish between the legal status of children, where all children are equal before the law.

Thus, Iraqi law needs to reconsider the status and rights of exnuptial children and their rights to legal parentage and inheritance. Legislation of this type would be a radical step not necessarily aligned with current Iraqi norms about what are a family and community values and principles relating to parentage, inheritance and adoption and so might not be possible in the short term. Longer term, this issue should be reconsidered to give equal rights to illegitimate children. As observed in chapter 4, the stigma of an exnuptial child could be
avoided by a couple pretending they are married and confessing that the child is the male partner’s child. Where, it might be possible to align this palliative (confession) with consent to the use of ART by, for example, an unmarried couple.

Different arguments apply where ART utilizes donor gametes/embryos even in relation to a married couple. The dominant, middle view of Sharia scholars is that this is prohibited and any child born utilising donor gametes/embryos is not the lawful child of the couple using ART, (see 5.3.2). There is, however, scope for arguing that the parent-child relationship should not be constructed exclusively as a genetic relationship but based on broader notions of social and nurturing relationships as is the position under Australian law. Australian law recognises persons as legal parents who are the social parents of a child based on a nurturing relationship as is the case of ART using donor gametes/embryos and adoption (see 6.4.3), donors of genetic materials are deemed not to be the lawful parents of a child, (see 6.4.2).

It is argued below that Iraq should consider taking these steps which aim to establish in practice equal status for all children and providing legal protection for all children without any discriminatory consideration. As observed in chapter 4, the stigma of an exnuptial child could be avoided by a couple pretending they are married and confessing that the child is the male partner’s child. The same might be employed where donor gametes/embryos are utilized thus allowing confirmation of legal parentage without the need to prove the genetic link. It might also be possible to require confession as part of the consent process thus avoiding the serious consequences that a child is not recognised as the lawful child of the couple. In relation to a married couple using donated gametes or embryos, there is a
rebuttable presumption that children born to a couple during a marriage relationship are their lawful children.

8.3.4 Eligibility Criteria

Australia

In Australia discrimination on the basis of gender, sexual orientation or marital status is unlawful. So, that infertile single and unmarried women as well as same sex couples are entitled to access ART. No further rules regarding eligibility apply in NSW but in Victoria, the legislation includes specific provisions to protect future born children including a police check. But these provisions cannot discriminate on the basis of sexual preference or marital status (see 7.4.1).

Iraq

The Australian approach of allowing access to ART by unmarried couples, single women and same sex couples is based on the non-discrimination principle referred to above. In Iraq, there is currently no legislation prohibiting discrimination on the grounds of gender, marital status or sexual orientation. Despite the strong arguments from a human rights perspective, community attitudes are likely to be resistant to the introduction of anti-discrimination legislation and the equal treatment of same sex and unmarried couples. The issue of eligibility under proposed legislation for Iraq is discussed at (8.4.4).

12 See on the federal level; Family Law Act 1975 (Cth) s 60C (2) (a). And, in NSW; Status of Children Act 1996 (NSW) s 5.
8.3.5 Cryopreservation

**Australia**

In Australia it is common for gametes/embryos to be frozen and stored until required. This is efficient for infertile couples as it avoids the need for multiple oocyte recovery and avoids the small risks of hyper stimulation for oocyte production and recovery, see chapter 2. Storage can also be provided prior to anticipated use for good medical reasons, for example, that medical procedures or diseases may affect the person’s capacity to have children. The Australian practice is to permit storage for 10 years, (see 7.4.3). Clinics usually require ART participants prior to treatment to give specific directions related to the fate of the excess embryos and gametes which are no longer required.

**Iraq**

The Australian limits on storage provide guidance upon what might be suitable for Iraq. But it would need investigation whether some modification might be needed because of earlier age of marriages and larger families in the Middle East than in Australia. Cryopreservation should be regulated in order to store gamete and embryos even for single person who have medical reason for keeping their reproductive cells frozen for reproductive use in the future. So, cryopreservation should basically be available for those persons permitted access to ART. It should also be available for single persons who have an interest in storing their reproductive cells, for good medical reasons, for example, undergoing cancer treatment which may compromise fertility.
8.4 Recommendations for ART Legislation for Iraq

In the light of above discussion, this section makes specific recommendations for the content of legislation regulating ART in Iraq.

8.4.1 Federal Regulation

Although Iraq has just recently adopted a federated system which grants each territory legislative authority for its own region, the preference is for ART to be regulated by federal regulation which applies to the whole of Iraq to avoid conflicting legislation and legal confusion. This is because of the importance of ART and its influence on significant issues related to founding of a family and issues related to the status of children and the determination of parentage and inheritance. Otherwise ART and related issues such as status of children, parentage and inheritance could be regulated differently from one territory to another. Specific recommendation a federal approach for Iraq to update and amend Iraqi law has been made above at (8.3.1).

8.4.2 Permitted and Prohibited Procedures

The regulation of ART should consider firstly the public interest and safety of community, and desire of couples to have children. It should protect the public against any practices which may cause harm to the community and families. Regulation should indicate clearly which ART practices are allowed and practices that are prohibited. As discussed in chapter 5, there are considerable differences in the views of Muslim scholars about legitimacy of ART. In accord with the moderate view set out in chapter 5, subject to appropriate
registration, inspection and audit, regulation of ART should allow artificial insemination, in vitro fertilisation and its associated procedures as well as cryopreservation for married persons using their own gametes.

Experience suggests that a strict definition of allowable procedures may exclude technological advances which improve success rates for procedures. The definitions used in the Australian regulation such as in NSW legislation, provide exemplars, see (7.2.2). Consistently with Sharia, particular procedures should be prohibited. Legislation should prohibit commercial trade in human sexual materials, including gametes and embryos, as well as prohibition of carrying out ART process which might involve human cloning or mixing sexual cells and genes which are taken from different individuals or species of creatures. This is consistent with the Australian approach.

**8.4.3 Registration, Accreditation and Inspection**

As suggested above, registration, accreditation, inspection and audit of ART providers as well as practice standards should be administered and controlled by a government department, the Department of Health. So, the suggested regulation should include provisions which regulate and establish a registration system for ART providers which would require all ART providers to be registered before offering an ART service. Establishing a system for inspection by the ministry of health is also required in order to ensure that clinics comply with legislative requirements. Inspection should evaluate different activities of a clinic in order to encourage good practice and prevent bad practices. In addition to the threat
of deregistration, legislation might include penalties such as warning letter, withdrawing accreditation, civil penalty, and criminal penalties, (as discussed in chapter 3).

8.4.4 Eligibility to Access ART

At the minimum, a married couple using their own gametes who have interest to obtain ART services, especially in case of infertility, should be permitted to access approved ART procedures. This is subject to the couple providing written consent to the procedure. At this stage and according to the current legal and cultural situation, the donation of gametes cannot be permitted. As discussed in chapter 5, this is because the donation of gametes/embryos is inconsistent with the legal recognition of what is a family, and rights of parentage, support, maintenance and inheritance. However, this issue might be reconsidered in the future if the cultural, social and legal environment accepts that a couple can be parents of a child in relation to whom they are not both genetically linked. This would require changes to the current legal provisions relating to legal parentage, inheritance, status of children and adoption, (see chapter 4).

8.4.5 Cryopreservation

Cryopreservation is an important adjunct to ART and should be regulated by provisions which set rules for storage of gametes and embryos. Cryopreservation should be available for married couples with excess gametes or embryos. It should also be available for single individuals who have an interest in storing their reproductive cells, for good medical reasons, for example, undergoing cancer treatment which may compromise fertility. Gametes and embryos could be preserved for limited periods. It is usual in Australian experience to set a
maximum period for storage of ten years to 15 years, see (7.4.3). Whether, this period is suitable for Iraq needs consideration having regard to the younger age of marriage and larger families. There also should be provisions which regulate the fate of the excess embryos and gametes which are not needed by the couple. Couples could decide to keep their genetic material in storage for the maximum period.

8.5 Conclusion

It is not possible to transplant Australian regulation of ART into Iraq because of differences in the legal system, Sharia law and cultural norms. The central argument of this thesis is that it is necessary to regulate ART in Iraq for the protection of public interests, children and participants in the ART process. But regulation must be sensitive to the legal, social and Sharia law context, particularly the position in relation to what constitutes a family, lineage, inheritance, adoption, maintenance and support of children. The effect is that the Australian legal approach cannot be directly transplanted into Iraq in the short term without breaching existing social, Sharia and legal norms.

It is recommended that the regulation of ART in Iraq should allow ART involving artificial insemination, in vitro fertilisation and related procedures, and cryopreservation for married couples, who have interest in accessing ART services, using their own gametes. At this stage, the argument does not support approval of ART for unmarried couples and single persons; nor does it support the use of donor gametes or embryos as inconsistent with community, legal norms and Sharia law. There are strong human rights arguments that all children should be entitled to have equal status without regard to any other consideration such
as the marital status of their parents or the genetic contribution of third parties. As noted above, this should be considered by Iraqi law and achieved even on a longer term objective considering the cultural norms.

The introduction of legislation in ART should follow a staged approach similar to the approach taken by the Australian federal government in the early years of ART regulation in Australia. That is, to first prohibit universally objectionable practices such as unrestricted research on embryos, cloning, and related procedures. This would prevent clinics engaging in the most objectionable practices related to ART. Because this type of legislation would reflect the most conservative views of Sharia scholars, this may lead to greater acceptance by regional governments. The second stage would be to legislate to allow the use of ART by married couples using their own gametes. This may cover the majority of cases of infertility and it is also consistent with the current approaches of Iraqi law and Sharia governing family’s issues such as inheritance adoption and parentage.

In relation to ART children born to married couples using their own gametes, those children should be regarded as the lawful children of their parents. It has been argued that this should not require formal legislation where a married couple use their own gametes, no distinction being drawn between natural reproduction and ART being used for these purposes. Nor should it require amending or introducing new laws relating to parentage, adoption or inheritance. It is, however, argued that Iraqi law needs to reconsider the status and related rights of children for establishing equal status of children before the law and providing protection for all children.
It would need to be accompanied by legislation and standards established by the Department of Health in establishing a system for registration, accreditation, inspection and enforcement. As a necessary adjunct to the provision of an effective ART service, freezing of gametes/embryos should be permitted subject to conditions such as consent and length of storage. It is concluded that ART for married persons using their own gametes should be approved for Iraq.
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