

Legitimacy and Status of Artificial Human Insemination in Muslim Law

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Abstract

Artificial insemination is a technique in which sperms are placed in the female reproductive tract (uterus) by mechanical methods that precludes sexual ejaculation into the women's vagina. Artificial insemination can be traced back 1832 when mares were successfully bred by the arabs. The superior mares of the enemies were artificially impregnated by the sperms of inferior horses to weaken them. From this time onward, until the middle of the sixteenth century successful experiments were made on fish and other animals. The first successful artificial insemination of a human being is credited to Dr. John Hunter, an English physician who used this device upon a married woman using her husband's semen in the late eighteenth century. Presently it has been accepted by a few European countries and America as an alternative means for procreating children and it is being used there in large scale. The legitimacy can be granted to such children only by legislation. So far the artificial insemination husband (AIH) is concerned, there is no doubt about the legitimacy of the AIH child.

Keywords: Artificial Insemination, Muslim Law, Legitimacy

Introduction

Artificial Human Insemination helps to solve the problem of childlessness. It is, the antithesis to contraceptive measures, a mechanical device whereby male seeds are transmitted into a female's uterus through a test-tube, so as to bring about pregnancy unattained or unattainable by sexual intercourse.

Artificial insemination can be traced back to 1322 when mares were successfully bred by the Arabs. The superior mares of the enemies were artificially impregnated by the sperms of inferior horses to weaken them. From this time onward, until the middle of the sixteenth century successful experiments were made on fish and other animals. The first successful artificial insemination of a human being is credited to Dr. John Hunter, an English Physician who used this device upon a married woman using her husband's semen in the late eighteenth century. In 1890 Dr. Robert L. Dickinson established the practice of artificial insemination using a donor's semen. However, it was not until the twentieth century that recourse was had to artificial insemination for the purpose of procreation.¹ Presently it has been accepted by a few European countries and America as an alternative means for procreating children and it is being used there in large scale. Although the exact figure due to secrecy reason is not known, the estimated number runs into millions. Brent. J. Jensen has given alarming figure of children born each year from artificial insemination.²

Method of Artificial Insemination

Artificial insemination of human is a technique whereby semen is introduced in the vagina, cervical canal or uterus by mechanical means for the purpose of inducing pregnancy.³ It is otherwise called cervical insemination, intra-uterine insemination and intra-tubal insemination. Intracervical insemination is performed by placing an "unprocessed Semen" specimen into the cervical mucus and then placing a cervical cap or specially designed vaginal tampon to hold the semen against the cervix.

Intrauterine insemination was developed to improve the change of pregnancy. It involves both a special processing of semen to maximize number of sperms are placed in close proximity of the egg. Intratubal insemination has been investigated in an attempt to improve upon the success rate already obtained by intrauterine insemination. It involves processing of semen to maximize its fertility and then is placed through the cervix, by the use of specially designed catheter, into the uterine cavity and into the uterine opening of the fallopian tube. The use of hysteroscopy or ultrasound is necessary to guide the catheter appropriately into the fallopian tube.

Kind of Artificial insemination

There are three types of Artificial insemination: (i) Homologous artificial insemination, in which the donor and the woman being inseminated are husband and wife, (ii) Heterologous Artificial Insemination, in which the donor is not the husband of the woman being inseminated and it seems to be more common.⁴ Sterility and infertility are the main reasons for contemplating Artificial insemination Donor (AID), but may also be resorted to when there is a risk that the husband or wife may transmit some genetic defect to the children, (iii) Artificial Insemination mixed, in which the infertile husband's semen is mixed with donor's semen and used to inseminate the wife of the husband. Besides, Artificial insemination has its diversified reflection in other advanced technologies like Test Tube Baby, a Baby with two mothers and surrogate mother.

Legitimacy of the Artificial Insemination Donor(AID) Child

A child is legitimate in common law if its parents were married at the time of his conception or at the time of its birth.⁵ Although in most cases it will be both conceived and born in wedlock, this need not necessarily be true.⁶ For, even though the husband could not have had sexual intercourse, the wife might nevertheless have become pregnant as a result of *fecundation ab extra*⁷ or by artificial insemination with (or without) her husband's seed. A child can be given status of legitimacy also by adoption.

The question whether the legal status of child by AID with consent of the husband is similar to that of an adopted child was raised in *Strand v. Strand*.⁸ In this case the husband had been given visitation rights in a divorce petition, but the wife later tried to have these rights rescinded on the ground that her child was illegitimate. She, however, admitted that she had undergone AID with her husband's consent. The court held that the husband should retain his right and because he had consented for AID the child was not illegitimate. According to the decision of the court, the child had been "potentially adopted or semi-adopted" by the husband, thus, he was entitled to the same rights as those acquired by a foster parent who has formally adopted a child. A little later, in *Dombos v. Dombos*,⁹ on a wife's petition for divorce and custody of the child born to her consequent to AID, consented to by the husband, one of the questions before the court was: whether such a child is legitimate and belongs to the mother only. The Court held that a child so conceived was not a child born in wedlock and therefore illegitimate. As such it was the child of the mother alone and the husband had no right or interest in the child, not even that of visitation. In another case of *Gursky v. Gursky*,¹⁰ the Supreme Court of New York ruled that a child born as a result of AID, consented to in writing by the husband, was legitimate. It held the husband responsible for the support of such child on the basis of an implied contract on his part or the doctrine of equitable-estoppel.¹¹ Similarly, in *Anonymous v. Anonymous*,¹² a husband had consented to his wife's therapeutic impregnation. On the wife's claim for alimony the husband pleaded that the child was illegitimate. Rejecting his plea, the court awarded the alimony on the ground that consent in writing carried with it an implied promise to furnish support for the resulting progeny. In *People v. Sorenson*¹³ a man from California was, convicted of criminal non-support, sentenced to jail for one year on probation with an order to make support payments for a child born to his wife consequent to AID after his written consent during the

wedlock. On appeal however, the court held that for the purpose of the criminal statute, the husband was not the child's father. Consequent to such conflicting judicial decisions, some American states have to deal with the status of the AID child and a section of the Uniform Parentage Act, is devoted to the issue. These provisions vary, but in essence they provide that where a married woman is artificially insemination with her husband's consent, the husband is deemed to be the father of the child. These enactments solve the problem for children born after the passing of the Act, but only in one State (Kansas) the legislation is retrospective. Therefore there continues to be doubt about the status of the children born before the commencement of these Acts. Another problem posed by these provisions (except the legislation in Oregon)¹⁴ is in determining the consequences of the refusal to consent by the husband. A court might decide that the husband is to be deemed as father, even though he has not consented but it would seem rather unfair to saddle a husband with the paternity of, and responsibility for, a child if his wife has been inseminated without his consent and perhaps against his wishes. On the other hand, it would be unfair on the child if the husband sought to deny paternity, when for many years he had brought the child up as his own. In such a case, he might be faced with the doctrine of estoppel (personal bar) which would prevent his claim of absence of consent.¹⁵ Only a few European countries (like Netherlands, Portugal and Switzerland) have legislations, having a bearing on the child's status which prevent the husband from denying paternity of a child if he has consented to his wife being artificially inseminated. Recently the English Law Commission produced a working paper, on "Illegitimacy", a part of which is devoted to the AID child's status. Their recommendation is that statutory provisions should be incorporated deeming the husband of the mother to be the father of her AID child unless it is established that he had not consented to the AID treatment which resulted in the conception of the child.

In India, the legitimacy of a child born during the subsistence of a valid marriage is presumed. Section 112 of the Indian Evidence Act, 1872 provides: The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that parties to the marriage had no access to each other at any time when he could have been begotten. For all legal practical purposes, the husband can be regarded as the father of an AID child, unless he proves his non access and absence of consent to his wife of AID. Some Indian Statutes have conferred legitimacy on the offspring of void or voidable marriages.¹⁶ However, whether these provision can be extended to children born by AID without consent of husband is not certain as these provision have not been drafted keeping in view the issue of artificial insemination.

However, it seems commonly recognized, free consent, of the competent parties involved, is one of the essential basis of most human legal transactions *inter vivos*. If that analogy, for the time being is applied then consent for AID, of the husband to the wife should accord a legitimate status to the resulting progeny, which in turn subjects and entitles itself to the provisions of law, including those of inheritance, maintenance, guardianship and degrees of prohibited relationship, etc., applicable to the adoptive or fostering parents and their kinsmen. Provided of course, they have also, expressly or impliedly, consented to the device whereby the child is born. Being so, the discretion of the courts cannot, probably, be foreclosed, if they equate such a child to an adopted one, until an express legislative provision is made with regard to artificial insemination. To be more specific, when consent to the technique of AID is expressed or may be reasonably implied for the subsequent conduct of the male parent towards the child and in the absence of express objection, the courts should not deny legitimacy.

In India, neither there is statutory law nor case law to determine the legitimacy and the parentage of the AID child. Except the presumption that the child during the subsistence of the marriage will be

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deemed of the legally wedded spouses. Muslim hanafi law thus, says that child taking birth months of the solemnisation of marriage and after two years of the repudiation of the marriage or death of the husband will not be of the husband. There is strong presumption about the parentage of the child. There is also provision for acknowledgment by the father about the legitimacy of the child. But the law does not have provision for legitimation. When the child is proved to be legitimate, law does not provide legitimacy to them. Therefore, the law provides that the above mentioned presumption is rebuttable. The grounds for rebuttal can be impotence, sterility and non-access. In case of AID, there cannot be any presumption, as it would be evident from the facts that the natural father of the child is donor. Therefore, the AID child will be illegitimate.

The Indian Evidence Act, 1872 also provisions for similar presumption. According to it, the child born during the continuance of a valid marriage or within 280 days after the dissolution of the marriage shall be conclusive proof that the child is of the husband. This presumption is also rebuttable on the ground of access. In the light of the existing law, however, if the fact of AID is not known due to extreme secrecy the child would get the protection of the above provisions. But in absence of such secrecy the child will be illegitimate.

Conclusion

Muslim guidelines permit AIH provided that proper precautions are taken so that no foreign element other than the sperm of the husband is used. It prohibits artificial insemination donor (AID) for the greatest welfare of the society. A very coherent and logical form of social justice is reflected here. AID from the Muslim standpoint pre-supposes that goodness is not a narrow concept; the ontology of good bears an all-inclusive character.

The legitimacy can be granted to such children only by legislation. Legislation can be any of two types: First, to make all the child born by way of AID to be legitimate child of the legally wedded spouses during the subsistence of the marriage: Second, to grant legitimacy only when there is consent of the husband for AID. So far the Artificial Insemination Husband (AIH) is concerned, there is no doubt about the legitimacy of the AIH child.

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