

ARTIFICIAL INSEMINATION: LEGAL AND ETHICAL ISSUES

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Abstract

The advancement of science and technology has impacted our lives in a significant manner. It has not only enabled mankind to control birth rate by using contraceptives, but has also provided opportunities to childless couples to become parents through various techniques. One such technique is Artificial Insemination. The paper aims to examine various legal and ethical issues arise from Artificial insemination donor (“AID”) and the manner the law has dealt with them. First, the paper deals with the question of legitimacy of the child born through AID; Second, the rights and obligations of husband are discussed; Third, the question whether AID would amount to consummation of marriage or not is discussed; and lastly, the anonymity of donor and problems arising out of the same is discussed. For this research paper, researcher has used statutes, case laws and articles.

Introduction

Under the technique of Artificial insemination, semen is deposited in the vagina, uterus or cervical canal by means of instruments.¹ Artificial insemination can be practised in three ways. First, Artificial insemination husband (“AIH”); second, Artificial insemination donor (“AID”); and, third, Combination artificial insemination (CAI).

In AIH, the semen of husband is injected into female body, whereas in AID, semen of third party or donor is injected into female body. In CAI, the seed of husband and third party is mixed.² The technique of AIH is used when husband is fertile but impotent. It didn't pose legal problems as both husband and wife are biological parents of child. The technique of AID is often used when husband is infertile. This technique poses problems, as in this technique, wife is the biological parent of child, but not her husband. CAI is normally used for a psychological benefit to infertile husband. However, this technique did not have medical

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¹ Modi, *Modis Textbook Of Medical Jurisprudence And Toxicology*, (Lexis Nexis 1949) 314.

² Kusum, 'ARTIFICIAL INSEMINATION AND THE LAW' (1977) *Journal of the Indian Law Institute* Vol. 19, No. 3 <<http://www.jstor.com/stable/43950516>> accessed on 4 September 2020 .

superiority over AID.³ AID is the most popular technique and involves complex legal and ethical questions. Hence, the purview of this research paper is limited to AID.

Legitimacy of child born through AID

Legitimacy of the child is depended on the relationship between the mother and father at the time of the child's birth. The rights of a child, to a large extent, is determined by his status. The legitimacy of child is further based on the question, that whether the act of AID amounts to adultery or not. If AID amounts to adultery, the child will be considered illegitimate, as it would mean that child is born out of wedlock. Whereas, if AID did not amount to adultery, child would be considered as legitimate.⁴ Hence, adultery and legitimacy are interlinked subject in family law. The word adultery is derived from the Latin term *adulterare*, meaning 'to defile'. As the AID introduces, 'spurious child'⁵ in the family, the question of adultery arises.

The first reported case, when the question of adultery was raised is the Canadian case *Oxford v. Oxford*⁶. In this case, the court opines that the essence of adultery is the voluntary surrender of reproductive powers to the person other than husband or wife. Hence, court emphasized that essence of adultery is not sexual intercourse but the act that may introduce false strain of blood in the family. Going with this definition, the court held that the technique of AID would amount to adultery and hence child born through this technique would be illegitimate.

Courts in the US have also reached to same conclusion in number of cases.⁷ However, the trend was reversed in *People v. Sorensen*⁸. In this case the court held that the husband who had consented to his wife giving birth to the child through AID, will be considered as lawful father. The court further held that act of AID is not adulterous. Similarly, in *Strand v. Strand*⁹, while deciding on the custody of child born through AID, the court held that the husband had a visitation rights, even though he is not biological father of the child. The court

³ Priyasha Saksena, 'ARTIFICIAL INSEMINATION AND THE FAMILY' (2008) National Law School of India Review, Vol. 20, No. 1 < <https://www.jstor.org/stable/44283673>> accessed on 4 September 2020.

⁴ *Ibid.*

⁵ Kusum (n 2).

⁶ 58 D.L.R. 251 (1921).

⁷ *Doornbos v. Doornbos*, 139 N.E.2d 844; *Gursky v. Gursky* 242 N.Y.S.2d 406.

⁸ 66 Cal. Rptr. 7.

⁹ (1948) 78 N.Y.S. 2d 390.

further held that when husband has consented to the AID, he has potentially *adopted or semi-adopted*¹⁰ the child.

In English common law, the technique of AID had never constituted adultery. As according English law, the requirement for committing adultery was always sexual penetration. In *Maclennan v. Maclennan*¹¹, the court held sexual intercourse in essential element of adultery. And, sexual intercourse was defined as penetration of the female organ by male organ. As AID did not involve sexual intercourse, court held, it can't amount to adulterous act. However, court held that when wife went through AID without consent of husband, will be a heinous offence and could be made as separate ground for divorce.

In India, sexual penetration is considered as a necessary element of adultery.¹² Also, Indian Evidence Act, provides that the legitimacy of child is presumed, if the child is born in marriage or within 288 days after its dissolution, unless it can be shown that the spouses did not have access to each other.¹³ The main problem with this section is that it presumes sexual intercourse as an absolute element for the conception of child. Hence, if a widow uses her dead husband's preserved sperm to get pregnant, the child can easily prove to be illegitimate.¹⁴ Thus, Indian Evidence act would not be appropriate legislation to determine the legitimacy of child born through AID.

Till now, there is no legislation that deals with the question of legitimacy of child born through AID in India. However, supplementary guidelines and pending Bill on Artificial Reproductive technology ("ART") can possibly indicate Indian stance on the issue. According to the Indian Council of Medical Research (ICMR) Guidelines on ART, the child born through assisted conception, can be presumed to have all rights of parentage, inheritance and support.¹⁵ Similarly, ART (regulation) bill, 2014 provides that the child born through AID will be considered to be a legitimate child.¹⁶

¹⁰ *Ibid.*

¹¹ (1958) Sess. Cas. 105.

¹² *In Re Antony* AIR 1960 Mad. 308.

¹³ Indian Evidence Act 1872, s 112.

¹⁴ Sandeep Kulshrestha, 'ARTIFICIAL INSEMINATION AND PRESUMPTION OF PATERNITY IN INDIA' (2018) International Journal of Advance Research and Innovative Ideas In Education Vol. 4 Issue 3 <<https://www.researchgate.net/publication/324942628>> accessed 3 September 2020.

¹⁵ *Laxmi Murthy and Vani Subramanian*, 'ICMR guidelines on Assisted Reproductive Technology: lacking in vision, wrapped in red tape' (2007) Indian Journal of Medical Ethics Vol IV No 3 < <https://doi.org/10.20529/IJME.2007.049>> accessed 3 September 2020.

¹⁶ Assisted Reproductive Technology (Regulation) Bill 2014, s 61(1).

Hence, currently there is no legislation that explicitly take a stance on the legitimacy of child born through AID. However, the position of English law, supplementary ICMR guidelines in India and the essential requirement of sexual penetration for adultery in India, indicates that child born through AID will not be considered an illegitimate child and will enjoy all the rights that a legitimate child does.

Rights and duties of husband

As AID is departure from the traditional understanding of the family, the question related to rights and duties of husband gains significance. Traditionally, there was no involvement of third parties in matters as private as reproduction. However, in AID, third party is deeply involved. As the child born through AID, is biological child of only one of the parents, it raises significant questions on the duties and rights of parties involved.

In the United States, husband is usually liable to maintain child born through AID, if had consented the same. In *Gurshky v Gurshky*¹⁷ the court held that husband is liable to support the child born through AID. Court opined that although conceiving child through the process of AID, is an adulterous act, the husband would be liable to take care of the child as he had consented in the writing. When the husband agreed to the procedure of AID, he impliedly agree to support the child. Similarly, in *Anonymous v. Anonymous*¹⁸, the action of alimony and child support was brought up by a woman against her husband. The court held that when, husband had consented to the AID procedure, he is obliged to maintain the child. The scope of husband duties was further widened in *People v. Sorenson*.¹⁹ In this case, the court held that husband will be criminally liable, for non-payment of support for a child born through AID, if he has given his consent. Additionally, this consent need not to be necessarily in writing. Husband could be held liable to maintain child, if he knew that his wife is going through AID and he didn't protest.²⁰

Apart from the duties to maintain child, husband also have certain rights over the child. In *Strand v. Strand*²¹, after the husband and wife were separated, husband filed a suit for

For the purposes of this research paper ART (Regulation) 2014 Bill has been used. In February 2020, cabinet had passed revised ART (regulation) Bill 2020, however, due to non-accessibility of the same, 2014 bill is used.

¹⁷ 242 N.Y.S.2d 406

¹⁸ 246 N.Y.S.2d. 835

¹⁹ 66 Cal. Rptr. 7.

²⁰ *In Re Baby Doe* 353 S.E.2d. 877

²¹ 78 N.Y.S.2d 390

visitation rights. Wife argued that as child is born through AID, her husband is not a biological father. And thus, he should not have visitation rights. The court held that as husband has consented to the AID procedure, he is entitled to same rights as that of foster father. Further, *In Re Adoption of Anonymous*²², the court held, in case of adoption of child born through AID, the consent of the husband is necessary.

In England, the Human Fertilisation and Embryology Act, is the governing legislation. According to this act, the husband is treated as father of the child born through AID. Hence, the husband enjoys all rights and obligations as enjoyed by natural father.²³ Further, the act explicitly prevents the donor to being treated as the father of child. Hence, donor have no obligations towards the child.²⁴

In India, there is no specific position of law, that deals with the issue. However, ICMR Guidelines on ART, ART (regulation) bill, 2014, and the Delhi Artificial Insemination (Human) Act, 1995 indicates that the husband has rights and duties toward the child. Under the ICMR guidelines on ART, a child born through AID, would be presumed to have all rights of parentage and inheritance.²⁵ Hence, these guidelines indicate that husband will have all the rights and duties as enjoyed by natural father towards their children. Similarly, under the Delhi Artificial Insemination (Human) Act, the consent of both husband and wife is necessary in order to conceive child through AID.²⁶

ART (regulation) bill, 2014, also grants the duties and rights to husband towards the children born through AID. According to ART (regulation) bill, written consent of both the spouses is necessary.²⁷ Hence, both the partners i.e. husband and wife have the right to take decision regarding conceiving child through the procedure of AID. Additionally, both the parents of a minor child have the right to access any information about the donor, except name and address of the donor, to the extent necessary for the welfare of the child.²⁸ Further, all the information of both wife and her husband should be kept confidential. In usual circumstances, the information should not disclose to anyone apart from National Registry of

²² 345 N.Y.S.2d 430.

²³ Human Fertilization and Embryology Act 1990 s 28(2).

²⁴ Human Fertilization and Embryology Act 1990 s 28(6).

²⁵ Mukesh Yadav, 'Medico-Legal & Ethical Aspects of Artificial Insemination' (2006) Journal of Indian Academy of Forensic Medicine Vol.28(4) <<https://www.researchgate.net/publication/287999804>> accessed 5 September 2020.

²⁶ Delhi Artificial Insemination (Human) Act 1995, s 14 (c).

²⁷ Assisted Reproductive Technology (Regulation) Bill 2014, s 58 (1).

²⁸ Assisted Reproductive Technology (Regulation) Bill 2014, s 58 (2).

Assisted Reproductive Technology Clinics and ICMR Banks in India.²⁹ However, in cases of medical emergency, the relevant information of the husband and wife can be disclosed either with the consent of couple or with an order of a court of competent jurisdiction.³⁰ In case of child born through AID, the name of the husband would be registered as father's name.³¹ Thus, this indicates that husband would have all rights and duties towards the child born through AID as exercised by natural father.

Hence, at present, there is no pan-India legislation that determines rights and duties of husband, however, the ART (regulation) bill, ICMR guidelines and Delhi Artificial Insemination (Human) Act indicates that the husband would have rights and duties similar to that of enjoyed by natural father towards his children. Also, the position of English law and the fact that AID is not treated as Adultery in India, further indicates the same.

Consummation of marriage

Another important legal issue that arises from the practice of AID is the question whether AID would amount to consummation of marriage and whether a wife can seek divorce on the ground of impotency or non-consummation of marriage after undergoing to the procedure of AID. Most of the personal laws in India provides non-consummation of marriage³² and impotency of husband³³ as a ground for divorce. Hence, given the fact that both of these situations are grounds of divorce in most personal laws, the question whether AID procedure amount to consummation gains significance.

In *R.E.L. v. E.L.*³⁴ the wife went through the procedure of AIH. Subsequent to the birth of child, the wife filed a suit for nullity of marriage on the ground of non-consummation of marriage. The court held that the conduct of wife going through AIH would not amount to consummation of marriage and hence grant divorce. However, this decision bastardizes the child. Similarly, in *Slater v. Slater*³⁵ attempted Artificial insemination would not amount to consummation of marriage. In this case, the parties tried to conceive child through AID, but they were unsuccessful.

²⁹ Assisted Reproductive Technology (Regulation) Bill 2014, s 58 (4).

³⁰ Assisted Reproductive Technology (Regulation) Bill 2014, s 58 (4).

³¹ Assisted Reproductive Technology (Regulation) Bill 2014, s 61(6).

³² Hindu Marriage Act 1955, s 12(1)(a); Special Marriage Act 1954, s 25(1); Parsi Marriage and Divorce Act 1936, s 32(a).

³³ Hindu Marriage Act 1955, s 12(a); Special Marriage Act 1954, s 24(2).

³⁴ (1949) Probate Division 211.

³⁵ (1953) Probate Division 235.

In India, the question whether Artificial insemination amounts to consummation of marriage and subsequently would be a ground for divorce also depends on personal laws. Personal laws deal with the issue of non-consummation in varied ways. Parsi Marriage and Divorce act, 1936³⁶ provides non-consummation of marriage within one year owing to wilful refusal of parties is a ground for divorce. Special Marriage Act, 1954³⁷ also provides non-consummation of marriage as a ground for divorce but without any specific time limit. Hindu Marriage Act, 1955 also provides for the same.³⁸ However, this issue is complex in Muslim law as there is presumption of consummation of marriage in the presence of valid retirement.³⁹

However, it is argued that artificial insemination in any form, if done with the consent of both the spouses, should amount to constructive consummation of marriage. This position has been argued because it would be in best interest of child.

AID and Anonymity of donor

In the procedure of AID, the child has two fathers. One who is the genetic father of the child and second, the husband of the mother who is recognised as father as he has given his consent. The involvement of two fathers disturbs the traditional structure of family. In certain countries, the adopted child is granted the right to know his biological parents.⁴⁰ Can a child born through AID claim the right to know his biological parents.

English law allows the child born by AID to access information about donor. The person is allowed to access the relevant information in order to determine that whether the person to whom he is going to get married is related or not.⁴¹ Similarly Sweden also allows the same. Whereas in Switzerland, France and Canada, total anonymity of the donor is allowed.⁴²

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³⁶ Parsi Marriage and Divorce Act 1936, s 32(a).

³⁷ Special Marriage Act 1954, s 25(1).

³⁸ Hindu Marriage Act 1955, s 12(1)(a).

³⁹ Ateeque Khan, 'ARTIFICIAL INSEMINATION AND SURROGATE PARENTHOOD: AN INDIAN SOCIO-LEGAL PERSPECTIVE' (1989) *Journal of the Indian Law Institute* Vol. 31, No. <<http://www.jstor.com/stable/43951251>> accessed 3 September 2020.

⁴⁰ Piyansha (n 3).

⁴¹ Human Fertilisation and Embryology Act 1990, s. 31.

⁴² K.R. Mythili, 'ARTIFICIAL INSEMINATION — LEGAL ISSUES' (1997) *Journal of the Indian Law Institute* Vol. 39, No. 2/4 <<http://www.jstor.com/stable/43953280>> pp. 348-358, 351.

In India, the ART (regulation) bill provides that it is the duty of the medical practitioner to maintain all the relevant information, other than the name and address of the person.⁴³ The Bill further provides that revelation of identity of donor would amount to offence except in medical emergency cases.⁴⁴ Similarly, the Delhi Artificial Insemination (Human) Act, provides that medical practitioner should keep the bio-data of the donor.⁴⁵ However this act also provides that the medical practitioner should maintain secrecy about the identity of the donor.⁴⁶ Hence, it is submitted that rights of donor to remain anonymous should be respected and identity of donor should only reveal in case of any medical emergency.

Conclusion

In this paper, researcher has made an honest attempt to address some of the legal and ethical issues related to child born through AID. It is submitted that given the popularity of the techniques of artificial insemination, there is need to bring some changes in current law. Currently, there is no pan India legislation that deals with issues of AID. The changes in society should be reflected in the changes of law, however, this is not the case with family law. Family law has remained static and unresponsive to fast changing society. Similarly, Indian Evidence act also did not take into account the evolution of science and technology and assumes that sexual intercourse as a necessary pre-condition to conceive a child.

Hence, it is submitted that there is a need for a comprehensive legislation in order to deal with the complex legal and ethical issues arise from the procedure of AID. These laws should be made with the primary goal to protect the rights of children and parents. Further these laws should also strictly prohibit any practice that can influence sex or any other trait of child born through AID.

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⁴³ Assisted Reproductive Technology (Regulation) Bill 2014, s 46 (2).

⁴⁴ Assisted Reproductive Technology (Regulation) Bill 2014, s 46 (3).

⁴⁵ Delhi Artificial Insemination (Human) Act 1995, s 14 (a).

⁴⁶ Delhi Artificial Insemination (Human) Act 1995, s 14 (f).

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