

Artificial Insemination in Israel – A Legal View

The Position of the Israeli Judicial System Regarding Artificial Insemination of a Married Woman

Joseph Green

Introduction

At present artificial insemination is regarded as an acceptable means of affording infertile women with certain biological difficulties the opportunity of conceiving children.¹ Furthermore, more advanced practices, such as in-vitro fertilization and embryo-transfer, are becoming perfected to allow women with serious fertility problems to bear children.² The personal question as to whether one should employ such means of procreation is to be decided by each individual according to one's own moral and religious standards. However, while these individual decisions are being made, the judicial system of the country, both civil and religious, must deal with the legal implications of these modern medical techniques.³

-
1. Concerning the medical techniques used in artificial insemination see: A. Steinberg, "Artificial Insemination According to halacha," (Hebrew) in *Sefer Assia*, ed. A. Steinberg, Jerusalem 1976, p. 128.
 2. Concerning the regulation governing in-vitro fertilization and embryo transfer, see: J.G. Schenker and D. Norst, "Regulations for practice of Human In-Vitro Fertilization and Embryo Transfer," in *Harefuah*, vol. 108, no. 3, February 1985, p. 153.
 3. This text only deals with the legal and halachic problems that have been tried in court. In addition, there are many other halachic questions raised by artificial insemination, among them:
 - a. Is the child considered the donor's son? Included in this question are a number of sub-questions: • Is the donor considered to have fulfilled the mitzvah of procreation? • Is the donor responsible for the maintenance of the child? • Is the child entitled to a share in the donor's inheritance? • Does the child free the donor's wife from the obligation of levirate marriage (*Yibbum*)?
 - b. Is the child considered a "mamzer"?

So far, the Israeli legislative system has not taken on the challenge of dealing with artificial insemination.⁴ It has not enacted legislation that might possibly change the existing legal definition of parenthood (which is related to biological origin only),⁵ nor has it questioned the definition of parenthood as it applies to relevant laws.⁶

In contrast, Jewish and Israeli judicial systems have confronted two of the major problems that are raised by artificial insemination:

a. Should a husband divorce his wife on the grounds of her having employed artificial insemination without his knowledge?

b. Is a husband who consents to his wife's conceiving a child by artificial insemination by a foreign donor⁷ financially responsible for the support of the child?

At the time of the drafting of this paper, five cases of these types have been tried in Israel, four in the Rabbinic courts, and one in a regional civil court. It is doubtful whether so few cases can give us a clear and definitive perspective as to the position the judicial systems are likely to take in the future. Moreover, with regard to

c. Is the act of artificial insemination considered as a sexual relation? Would the mother be prohibited from further cohabitation with her husband and the donor?

d. What steps can be taken to ensure that a child conceived from artificial insemination does not marry paternal incestuous relations? In-vitro fertilization and embryo transfer, if the ovum were taken from another woman, raises an additional halachic questions:

- Is the child considered the woman's child?
- Is it the child of the woman who bore it, or is it the child of the woman whose ovum was used, or what else?

4. Regulations were drawn up by the General Director of the Ministry of Health and sent to the directors of all the hospitals in Israel to define "general principles governing the control of the sperm bank and directions for performing artificial insemination." These came as a result of the publication of "Centralizing Control of the Resources and Services (of the Sperm Bank and Artificial Insemination), 1979," and "Regulations governing the Health of the Nation (regarding the Sperm Bank), 1979." However, the judicial basis for the regulations (and its authority over artificial insemination performed outside hospital premises) raise many doubts. See P. Shipman, "The Determination of the Parenthood of a Child Born through Artificial Insemination," *Mishpatim* (1980), vol. 10, pp. 63,85. 5.

5. P.D.E. Zafdi v. Binyamin – (1963) 17: 1419, 1425.

6. Among the laws which deal with the relationship between parents and children and use the terms "parents," "father" and "mother," are:

- a. Names Law, No.54 of 5716/1956, paragraph 13a,
- b. Citizenship Law, 5712/1952, paragraph 4,
- c. Capacity & Guardianship Law, 5722/1962, paragraph 13a,
- d. Women's Equal Rights Law, 5711/1951, paragraph 3,
- e. Criminal Law, 5737/1977, sec. 300 al, 362-365.

7. Unless otherwise specified, in this text the word "donor" refers to a donor of sperm other than the husband.

this matter we should be wary about applying such court decisions for definitivity. Even those who generally prefer that law be established by judicial precedent rather than by legislative decree would agree that this matter is exceptional for the following reasons:

a. The development of legal precedent is a lengthy process, sometimes a matter of years. On the other hand, answers to the questions raised by artificial insemination are often urgent and require rapid decision.

b. It is undesirable to use the approach of legal precedent with regard to issues that are likely to cause division and fragmentation within the population, or which are essentially related to moral and ideological principles.⁸

Nevertheless, such decisions may be useful in providing directives for the judicial system, and for the approaches to the problems which both halacha and Israeli civil law will have to face, in view of the changes that science has introduced into contemporary life.

The Decisions of the Rabbinic Courts

The first decision in a case related to artificial insemination was rendered by the Rabbinic court of Jerusalem.⁹ The background of the case was as follows: A wife who did not conceive after many years of marriage, underwent artificial insemination without her husband's knowledge, and successfully conceived from a donor's semen. When her husband learned of the matter, he initiated divorce proceedings. In the Rabbinic court, the woman explained her great desire for children. She stated how medical tests had proven that her husband was sterile and that his semen was incapable of fertilizing her ovum. Furthermore, though she desired to adopt children, he refused to agree.

Two halachic questions were raised by this case:

a. Though there is no definitive halachic decision as to whether artificial insemination is considered a form of adultery, is its use by

8. Prof. A. Barak, "Judicial Law Making," *Mishpatim* (1983), vol. 13, p. 196.

9. The decision was rendered in 1975. It was later publicized by the Chief Justice of that court, Rabbi E. Waldenberg in his responsa *Tzitz Eliezer*, Vol. 13, section 97. It is referred to later as the Rabbinic decision. Also serving on that Rabbinic court were the judges Rabbi Y. Cohen and Rabbi Y. Atia.

the woman without her husband's knowledge in itself sufficient grounds¹⁰ for divorce?¹¹

b. Does the husband's refusal to adopt a child have any halachic relevance here?

The court ruled in favor of the husband and the woman was to accept a divorce. Furthermore, the court freed the husband from the obligations of the prenuptial contract (*ketubbah*). To quote the Rabbinic decision:

By agreeing to artificial insemination, using the semen from a foreign donor, the woman has transgressed against God and her husband. Therefore, she is obliged to accept a divorce. Moreover, she has no right to demand financial consideration in return for acceptance of the divorce. Nor can she demand that her husband transfer the ownership of their apartment (presently registered in the name of both husband and wife) to her single ownership.

The Chief Justice, Rav Eliezer Y. Waldenberg explained the decision in a lengthy treatise discussing the halachic ramifications of artificial insemination. He concluded: "There is no greater abomination that artificial insemination with a foreign donor's seed!"¹²

However, this conclusion is not accepted by all authorities. Many maintain that a woman may continue marital relations with her husband if he had consented to the use of artificial insemination.¹³ (Nevertheless, even according to these authorities,

10. Since the decree of Rabbenu Gershom, circa 1000 C.E., a husband is not permitted to divorce his wife without her consent, unless there are exceptional circumstances to be decided by Rabbinic authorities.

11. The halachic basis for the decision that artificial insemination using a foreign donor's semen is not considered adultery (and hence the couple may continue marital relations) is discussed by: a. Rabbi B. M. Uziel, Responsa – *Mishpete Uziel*, *Even ha-Ezer*, sect.19;

b. Rabbi M. Feinstein, Responsa – *Iggerot Moshe*, *Even ha-Ezer*, vol.1, sect. 10; vol. 2, section 11, 71;

c. Rabbi Y. Breisch, Responsa – *Chelkat Ya'akov*, vol.1, sect. 24;

d. Rabbi E. Y. Waldenberg, Responsa – *Tzitz Eliezer*, vol. 3, sect. 24;

e. Rabbi Y. Weinberg, Responsa – *Seride Esh*, section 5; and others.

The opinion which considers artificial insemination as adultery is based on the biblical verse in Leviticus 18:20. See Rabbi Yonathan Eibeshutz, *Bene Ahavah*, *Ishut* Section 15; Rabbi Y.L. Zeirelson, *Ma'arche Lev*, section 73; Rabbi Y. Teitelbaum, "Responsa Concerning Artificial Insemination Using a Foreign Donor's Seed," in *Hamaor*, vol. 16, no. 9-10, Ellul 5724.

12. Responsa *Tzitz Eliezer*, Vol. 9, section 51, part 4.

13. It is important to note that in the above-mentioned responsum Rabbi Waldenberg differentiates between artificial insemination as practised today and the two cases

artificial insemination without the consent of the husband is grounds for divorce.¹⁴) Furthermore, the court totally rejected the argument raised by the woman in defense of her position: that her husband's sterility had been proven, and that he refused to adopt a child. They explained that Jewish law respects a woman's desire for children:

There were no obstacles to prevent her from approaching the Rabbinic Court and expressing this desire,¹⁵ and to ask the court to obligate her husband to grant her a divorce. Had she done so, she would have found a responsive ear.

Nevertheless, though her desire for children has halachic significance, there is a great difference between the solution proposed by the Sages, to obtain a divorce, and her action which undermined the very basis of the marital relationship. Hence the court permitted the husband to divorce his wife, even if it be against her will, and freed him of the obligation of the prenuptial contract (*ketubbah*).¹⁶

mentioned by the Rabbis and used as a basis for the halachic analysis of the question. See note 12.

14. As will be explained, the Rabbinic courts placed much emphasis on the husband's consent. However, according to the opinion that artificial insemination is considered a form of adultery, the husband's consent is immaterial. Would one permit adultery even with the husband's consent? B. Schereschewsky, *Family Law in Israel*, 2nd edition, Jerusalem 1974, p.312. In that text (p.288) Schereschewsky raises a pertinent question to those authorities that permit artificial insemination. Our Sages hold that a woman may demand a divorce from her husband on the grounds of his sterility. Can the husband's consent to artificial insemination be considered sufficient basis to satisfy his wife's desire for children, or may the woman demand that a child be fathered by her husband?
15. It is important to note that the husband's sterility is by itself not sufficient grounds for divorce. Rather the woman must explain that she desires children so that she will have "a staff to lean on" in her old age. See Schereschewsky, *ibid.*, p. 289.
16. *Kim Li* – literally: "I am certain." The principle associated with this contention is as follows: in all claims it is the plaintiff who must vindicate his claim against the defendant. Otherwise, the money in question cannot be expropriated from the latter. Should there be an unresolved question of Jewish law, where certain authoritative opinions would support the plaintiff, and others the defendant, the defendant may claim "*Kim Li*," namely, "I am of the opinion that the decision should be rendered according to the halachic authorities which support my position. The burden of the proof is, therefore, upon you." Since the plaintiff cannot counter such an argument, the money in question remains in the defendant's possession. Thus, regarding the matter at hand, though the woman (the plaintiff in the financial aspect of the suit) demands that her husband pay her according to the prenuptial contract (*ketubbah*), the husband may claim that according to the principles of the "violation of the law of Moses and the Jewish people" (see notes 17 and 18) he is free of financial obligation to his wife. Though the wife may contend that many authorities would not place her in such a category, her husband can argue "*kim li*,"

In this decision, Rabbi Waldenberg paid special attention to the fact that the woman employed artificial insemination without her husband's consent. The court considered the fact that she underwent such a procedure without the husband's approval sufficient grounds for divorce by itself, regardless of the success or failure of this procedure:

The physical participation of the woman in such an abominable act without the husband's knowledge likens her to a woman who has violated the law of Moses¹⁷ and the Jewish people.¹⁸ Hence there are grounds to judge her accordingly.¹⁹ Furthermore, there is a possibility that further marital relations with her husband are forbidden. Thus, the husband may claim "*kim li*," and he would therefore not be obligated to pay her the prenuptial contract, "*ketubbah*."²⁰

* _ * _ * _ * _ * _ * _ * _ * _ *

Another decision on the question of artificial insemination was rendered by the Rabbinic Court of Haifa.²¹ The circumstances connected with this case make it doubtful whether it should be used to establish a precedent with regard to the question of artificial insemination. Nevertheless, the decision is worthy of study, and it may be useful, as will be explained.

"I am of the opinion that the decision should be rendered according to the authorities who support my position." For a more detailed explanation of the concept see Schereschewsky, *ibid.*, p.178.

17. According to Rambam, *Ishut* 24:11, the term "violates the law of Moses" refers to a woman who: (a) is extremely immodest in her behavior; (b) willfully causes her husband to transgress Torah prohibitions by (1) feeding him non-kosher food under the guise of its being kosher; (2) engaging in sexual relations while a *niddah*, without informing her husband of her condition. For a detailed explanation of this term, note Schereschewsky, *ibid.*, p.305-6, in particular footnote 28.
18. The term "violates the law of the Jewish people" refers to a woman who displays immodest and suggestive behavior despite her husband's protests. Though there is no proof or even weighty suspicion of adultery, her immodesty reaches the point where the husband cannot be required to continue the marriage relationship. Thus it is the result of her behavior which affects her relationship with her husband, and not the spiritual seriousness of her actions itself, that caused her to be placed in that category. Note Schereschewsky, *ibid.*, p.307.
19. Note the responsa *Chelkat Ya'akov*, vol. 1, section 24; *Minchat Yizchak*, vol. 4, section 5; *Sheivet Halevi*, vol. 3, section 175.
20. Note the commentary *Beit Meir, Even ha-Ezer*, section 154, note 1.
21. The decision was rendered in 1972. The Chief Justice was Rabbi N. Rosenthal, and judges Rabbi B. Rakover and Rabbi E. Hadaya took part in the decision.

The following describes the situation of the case: The couple had been married for six years before the woman conceived. During this period, the husband had undergone treatment because he suspected that he was sterile. Simultaneous with the treatment the doctor suggested artificial insemination of the woman. After being injected with donor's sperm mixed with her husband's semen on a number of occasions, the woman conceived and gave birth to triplets. The husband initiated divorce proceedings arguing that he was forbidden to continue sexual relations with his wife, while the woman filed a claim, demanding financial support for herself and the children. The husband denied that he had fathered the children. He therefore claimed that he was under no obligation to the children of their mother. Both claims were held to be joined as one. Thus, the court had to decide two questions:

a. Should marital relations between the woman and her husband be prohibited?

b. Can the woman prove her claim that her husband, in fact, fathered the children.

In its verdict, the court rejected the husband's claim and obligated him to support his wife and the children. The court did not explain its decision. However, a review of the proceeding leads to the conclusion that it was based on the following factors:

1. The husband did not deny his wife's contention that he consented to her being treated by artificial insemination.

2. The woman was also injected with her husband's semen. Since there is no definite proof that he was sterile, it is possible that the children were, in fact, his.²²

3. Throughout the time that the woman was treated by artificial insemination, she and her husband continued to engage in normal marital relations. Since the husband's sterility was not definitely proven, the possibility existed that the children were born from these unions.

4. The husband also claimed that his wife engaged in intimate relations with a Druze watchman employed near their residence. The court ruled that there was insufficient evidence to prove this claim.

22. Needless to say, if the husband could prove his sterility, the fact that his semen was used in artificial insemination would be of no significance.

Thus, it appears that the court's decision was primarily based on the fact that the husband's sterility had not been definitely established. Since the couple continued intimate relations, the husband was held to be the likely father of the children. This conclusion is derived from the halachic principle: "The majority [of a woman's] sexual unions are with her husband."²³ Based on this principle, a husband is considered the father of a child born to his wife, even though it has been proven that she committed adultery. Similarly, in this case, though the woman was treated with artificial insemination, since she simultaneously engaged in sexual relations with her husband, he is held to be the father of the children. On this basis, the court vindicated the woman's claim.

The husband appealed the decision to the Supreme Rabbinic Court. These are some of the reasons given for the appeal:²⁴

1. The accusation of intimate relationship between the wife and the Druze watchman mentioned earlier.

2. The woman admitted the possibility that in the process of artificial insemination she was injected with semen other than from her husband.

3. The principle "The majority of [a woman's] sexual unions are with her husband" does not apply if artificial insemination has been used. Therefore, rather than ascribe the children to the husband based on that principle, it should be the woman's responsibility to prove that the husband fathered the children. And, until she does do, she is held responsible for their support.

4. There is no definitive halachic decision which considers a donor of semen for artificial insemination as the father of the children conceived.²⁵ Hence, even if the husband's semen might

23. The presumption that "the majority of [a woman's] sexual unions are with her husband" and, hence, the husband is held to be the father of the children, does not apply if sufficient evidence is presented to reduce the effect of such legal presumption, e.g. in the case of a woman known for her wanton behavior. A detailed discussion of this principle can be found in Schereschewsky, *ibid.*, p.352-3. On this basis a question may be asked: if it could be statistically proven that the probability of the woman's conceiving through artificial insemination were greater than that of conceiving through relations with her husband, would the court have made the same decision?

24. These arguments were taken from the decision rendered by the Supreme Court on *Tammuz 28, 5732*.

25. This question was dealt with in depth by the Supreme Rabbinic Court in their decision. There were three basic halachic opinions on this matter:

a. The donor of the semen is considered the child's father. This opinion is based on the notes to *Sefer Mizvot Katan*, mentioned earlier; the commentary of the *Chelkat*

have been successfully used for artificial insemination, he is not thereby necessarily considered as the legal “father” of the children according to halacha. Therefore, he should not be obliged for their financial support.

In their decision, rendered on *Tammuz* 28, 5732, The Supreme Rabbinic Court²⁶ rejected the husband’s appeal and sustained the lower court’s original ruling. They explained their decision as follows:

There is no doubt that a number of points raised by the husband have a basis in halacha as prescribed by the *Shulchan Aruch*. Nevertheless, such arguments would be applicable if the husband had clearly proven that he was sterile, and therefore unable to fertilize his wife. Until this had been proven, there is no reason to consider the husband as different from normal. Therefore, in accordance with the general rule, the woman’s children are considered to have been fathered by the husband.

Thus the court sustained the original decision on the basis of two points:

- a. No proof of the husband’s sterility was produced.
- b. The couple continued to engage in marital relations simultaneously with the woman’s artificial inseminations.

Should this decision be used as a precedent in deciding questions relating to artificial insemination? Superficially, the answer would appear to be in the negative. Moreover, the court clearly avoided the issue of artificial insemination and focussed on the sterility of the husband. By so doing it decided the case according to established legal precedent.

Mechokek and the *Beit Shemuel*, on *Even ha-Ezer*, section 1, & 6; the responsa of the *Tashbaz*, vol. 3, section 263; *Zekan Aaron*, vol. 2, section 93; *Tzitz Eliezer*, vol. 9, sect.51.

- b. The matter is still one of doubt. Hence, with regards to questions of marriage, the child is considered the donor’s child and is prohibited from marrying his “paternal” relations. However, with regard to other questions, e.g. whether the donor has fulfilled the *mizvah* of procreation, the child is not considered the progeny of the donor, and the latter would be obliged to father other children in order to fulfill the *mizvah* of “*peru urevu*.” This opinion is mentioned by the *Turei Zahav* in his commentary on *Even ha-Ezer*, and in the responsa *Mishpete Uziel*, *Even ha-Ezer* section 19.
- c. Unless a child is conceived by natural means, the donor of the seed is not considered the child’s father. Note the responsa *Bar Livai*, vol. 2, section 1; *Emek Halacha*, section 68; *Chelkat Ya’akov*, vol. 1 section 22.
26. The court was composed of Rabbi B. Zolte, Rabbi Y.S. Elyashiv and Rabbi M. Eliyahu.

However, a closer analysis of their decision leads to the following conclusions:

a. The High Court offered the husband the opportunity of appealing the decision if he could definitely prove his sterility. Were he in fact able to do so, it would appear from the wording of the court's decision that his claim would be vindicated. Thus, it would seem that conceiving a child by artificial insemination from a foreign donor is sufficient grounds for divorce and for releasing the husband from responsibility for the children's financial support. Is such a decision justified if the husband originally consented to his wife's undergoing such treatments?

b. It appears that the court did not seriously consider the possibility, albeit of low probability, that the woman conceived by artificial insemination of her husband's semen. Though the decision reached by the court would have remained the same (for it makes no difference whether the woman was impregnated by artificial insemination by her husband's sperm or by normal sexual relations), the very mention of that possibility seems to imply acceptance of the donor of sperm used for artificial insemination as the child's real father.

c. A leading Israeli gynecologist who desires to remain anonymous, states: "From a strictly medical perspective it is impossible definitely to prove absolute sterility in a man. On many occasions, women who conceived by artificial insemination, or who adopted children, conceived naturally through normal relations with their husband." If this statement is correct, the husband would be held to be the father of the child whenever a couple continue to engage in marital relations while the woman is treated by artificial insemination. Even if a couple were childless for many years, the fundamental principle "The majority of [a woman's] sexual unions are with her husband" would be used to recognize the child as his. (Furthermore, the same decision might be made if the husband's semen was mixed with a foreign donor's sperm and this mixture used for artificial insemination.) Thus, it would appear that regardless of the low probability of conception by the husband's sperm, he would be considered the father of the child with all the resultant legal and halachic ramifications. Is this decision logically acceptable?

* _ * _ * _ * _ * _ * _ * _ * _ *

Another decision, also rendered by the Rabbinic court in Haifa,²⁷ provides an even clearer approach to the question as to whether a husband is held responsible for the support of a child conceived by artificial insemination from a foreign donor.

In the case in question, a woman sued her husband for the support of a child conceived by artificial insemination from a foreign donor. The husband admitted his inability to impregnate his wife, and consented to artificial insemination. The woman conceived and gave birth to a child with Down Syndrome.²⁸ The husband argued that artificial insemination (AID) was sufficient grounds for divorce,²⁹ and that he was free of any maintenance obligations to his wife and child. The woman maintained that her husband earned a salary sufficient to provide her with a high standard of living³⁰ and to pay for the care of the child. It is worthy to note that in this case the maintenance of the child required a considerable sum of money.

The court ruled on favor of the woman, obligating the husband to pay for the support of the woman and the child. The court gave the reasoning for their decision as follows:

Artificial insemination is in no way to be considered as an adulterous act. Therefore, it cannot serve as grounds for divorce or as a reason for woman to forfeit her right to be supported by her husband. A similar ruling was reached by the outstanding halachic

27. The decision was rendered on *Av* 6, 5737. The court was made up of Chief Justice Rabbi A. Shear-Yashuv, Rabbi L. Shinaan and Rabbi A. Uriah.

28. See Rabbi S. Halberstam, "An Article Presented to Maintain the Sanctity of the Family of Israel," in *Hamaor*, vol. 16, issue 1, Tishrei-Cheshvan 5725. There the Rabbi strongly opposes artificial insemination. One of his major arguments is that a child conceived by artificial insemination, born with a defect such as mongoloidism, tends to disrupt family unity and cause friction between husband and wife. He held that this factor is as significant as the other halachic aspects involved. The same argument was offered by a secular hospital director.

29. To give a complete picture of the case, it must be added that the husband claimed that the wife's promiscuous behavior would serve as grounds for divorce. The court rejected this claim, but advised the woman to improve her behavior, noting that her conduct did not contribute to family harmony.

30. The extent of a husband's financial obligations to his wife are governed by the general principle: "Her standing rises with his, but does not decline with his," i.e., a husband who is wealthier than his wife is required to maintain her according to the standards of his income group; but should she come from a higher socioeconomic group than he, the husband must if possible maintain her previous standard of living. See: Tractate *Ketubbot* 48a, 61a; the commentary of *Rosh*, section 22; *Rambam*, *Hilchot Ishut*, ch. 21, section 14; *Tur* and *Shulchan Aruch*, *Even ha-Ezer*, section 70; note also the commentary of *Turei Zahav*, paragraph 1. This principle applies only to a husband's obligations to his wife, but not to his children.

authorities of our generation and is dealt with at length by Rabbi Moshe Feinstein in his *Iggrot Moshe, Even ha-Ezer*, vol. I, section 10, and vol. II, Section 10...

In vol. I, section 10, [Rabbi Feinstein] releases a husband from financial responsibility to his wife if artificial insemination (AID) is performed without the husband's knowledge and consent. From this the inference is clear that should the process be carried out with the husband's knowledge and consent, he would then be under obligation for the child's maintenance.

The court also added another reason for obligating the husband to support the wife and child:

Since he agreed to this act, all the financial obligations resulting therefrom apply to him, on the basis of the principle governing guarantors (*"din arev"*). There is no doubt that in this instance all the factors obligating a guarantor would apply.³¹ Though one might argue that the husband's unstated intention was to commit himself to support a normal child, which would imply that his commitment should not be further extended, he did in fact not restrict or limit that commitment... he would be under the obligation to pay the substantial expenses involved in the maintenance of a child with Down Syndrome.³²

31. It is possible that the obligation of a "guarantor" referred to by the court is that mentioned by the Talmud in *Kiddushin 7a*. In that context, a guarantor is defined as one who expresses his willingness to accept the financial responsibility that results from carrying out a particular action. There is a debate among the Rabbis as to whether a person can or cannot accept a commitment for an unspecified sum (as in this case, where the exact amount required for the child's support cannot be established at the time of commitment). Note: *Choshen Hamishpat*, section 40, & 2; and the commentary of the *Siftei Kohan*; note also the *Rambam, Hilchot Milvah*, ch. 11, sec. 15. From the court's decision it would appear that they accepted the validity of an undetermined commitment. Also note: Y. Indig, "The Problem of Support of a Child Born of Artificial Insemination," *Dine Yisrael*, vol. 2, 1970, p. 83. It must be noted that by investing him with the quality of a guarantor, the court avoided a legal difficulty. A guarantor's commitment is binding even though it was not confirmed by a formal act of contract (*Choshen Mishpat* 129:2). However, even within this context, counterarguments may be raised, because for a guarantor's commitment to be binding an explicit statement to that effect must be made.

32. The court itself took note of the fact that this approach changed the nature of the claim. Generally, when a mother sues for support of a child, the claim centers upon the father's obligation because he fathered the child. In this case, the father is obliged because of his commitment as a guarantor. There is a parallel to this concept: the *Shulchan Aruch, Even ha-Ezer*, section 114, mentions the case of a father who committed himself to support his wife's child from a previous marriage. It is there explained that the obligation for his wife's child established by such a commitment is in certain aspects more binding than the obligation that he has to his own children.

The husband appealed the case before the Supreme Rabbinic court. The appeal has not yet been tried. However, from the decision by the Rabbinic court in Haifa, one conclusion is clear. Artificial insemination (AID) carried out with the husband's consent is not considered to be adultery. Marital relations between the woman and her husband are not forbidden because of artificial insemination, nor is it grounds for divorce. The court's position on artificial insemination, (AID) as adultery, grounds for divorce, etc., when carried out without the husband's consent, is not dealt with in this case. However, it would appear that the court's decision would not have been different even if the husband's consent were not given.³³ Furthermore, the fact that the court did not obligate the husband for maintenance of the child was based on generally accepted rules for support of children, but was held responsible only on the basis of his commitment as a "guarantor," is also significant.³⁴ Consequently, it would appear that a husband's consent to artificial insemination does not mean that the child is held to be his son and therefore should receive support on those grounds. Rather, it establishes a new commitment unrelated to the marital relationship between the couple. A further case related to artificial insemination was brought before the Rabbinic court of Tel Aviv. A woman sued her husband for divorce and maintenance on the grounds of his sterility. The husband denied her claim and claimed that it was the woman who was sterile. Physicians consulted on the matter suggested in-vitro fertilization. However, the woman refused, arguing that she desired to conceive naturally. The court

33. This principle is further emphasized by the fact that the court's decision relied mainly on the opinion of Rabbi Moshe Feinstein. In his responsum the latter clearly states that the woman is not to be considered adulterous. Hence, she may continue to engage in marital relations with her husband, unless she actually subsequently engaged in sexual relations with another partner. In that responsum, Rabbi Feinstein explains that, nevertheless, in artificial insemination without husband's consent, he is under no obligation for maintenance of the child. Since the court's decision was based on the latter section of Rabbi Feinstein responsum, it follows that it accepted his opinion with regard to the former question as well.

34. There is another halachic principle related to this. Halacha rules that husband's word be accepted without question if he denies any relation to the child conceived by his wife ("Yakkir"). However, if he should initially relate to the child as his son, and later deny parenthood only after being sued for maintenance of the child, his word is not accepted. In this case, during the first four years of the child's life, the husband acknowledged his obligation to the child and supported him, hence, if he later denied such consent and claimed that the insemination procedure was undertaken against his will, the fact that he did support the child for four years would serve as ample proof of consent to such a procedure.

accepted the woman's claim and obligated the husband to grant her a divorce.

This decision was based on three reasons:

1. The woman desired to conceive naturally;
2. The probability of successful in-vitro fertilization was low (approximately 10%), mainly because of the low potency of the husband's sperm;
3. Ten years had already passed since the marriage. According to Jewish law, if a couple is childless after 10 years of marriage, either spouse may demand and be granted a right to divorce.

Therefore, the court ruled that whenever the evidence indicates that the husband is sterile, the wife is under no obligation to continue with further marital endeavors to him, if there is little chance of success. This latter decision raises the question: where the probability of success by in-vitro fertilization or other means of conception surpass 50%, may the husband demand that the wife undergo such procedures, or does the wife have the right to insist on natural conception? However, the court did not touch on this issue directly, and we must wait until such a case arises before a definite answer can be given.

Cases Decided in Israeli Civil Courts

At present, only one decision concerning artificial insemination has been published by the Israeli Civil Courts.³⁵ It concerns a claim

35. A further relevant case was tried in the regional court of Tel Aviv in June, 1983. The court's decision has not yet been published. Nevertheless, the circumstances involving the case, and its importance in defining possible criminal aspects associated with artificial insemination, make it worthy of mention. The case involved a director of the division which dealt with pregnancy difficulties in one of Israel's major hospitals. He was responsible for the artificial insemination of women, using sperm from both their husbands and from donors. He was accused of using the sperm which men had submitted for analysis for actual treatments by artificial insemination. Likewise, he was accused of using a woman's husband's sperm (brought to be used for the wife's own treatment) for the artificial insemination of other women. The court convicted the accused because "by submitting sperm for analysis, the donor implies that it should not be used to impregnate a foreign woman. The same applies to sperm submitted for personal use... Thus, using a man's sperm for conception without his consent violates medical ethics... When a doctor of the accused's standing and position so drastically violates medical ethics, he betrays the trust, as defines by the Criminal Law, 5731/1973." The court's decision continues, "It is fitting to convict the accused of betrayal of trust, a violation of section 425 of the Criminal Law for not asking permission from a donor of sperm given to be used to impregnate his wife to use part of the sperm for the treatment of other women."

made by a woman to the regional court of Be'er Sheva for alimony and maintenance of her child, conceived by artificial insemination by a foreign donor's sperm. The husband had originally consented to artificial insemination. About one year after the child's birth, marital problems arose between the couple, and the husband then decided to withhold support from both mother and child. During the course of the case, the couple divorced and reached a property settlement. The court was then confronted with the question of maintenance of the child.

The court ruled in favor of the child and obligated the husband to support it.³⁶ Justice Y. Cohen, who wrote the decision, explained:³⁷

When the defendant consented to his wife's undergoing artificial insemination, he accepted the addition of another person to his family... Thus, his consent can be seen as an implicit commitment to sustain the child so conceived... When a person consents that his wife undergo artificial insemination, he consents and implicitly obligates himself to his wife and to the child...³⁸

Thus, two principles are to be derived from this decision:

1. The husband's consent to artificial insemination implies a commitment to support the child conceived;
2. The husband's obligation towards the child is not dependent upon the legal relationship between the husband and the child's mother at the time the case is brought to court.

Analysis of these Decisions

Though the sparsity of relevant cases requires that an analysis be made with extreme care, certain basic attitudes can be seen in the decision of the Rabbinic and civil courts in this matter.

First, if the husband consents³⁹ to artificial insemination of his wife by a foreign donor's sperm, his consent obligates him to bear

36. *P.M. Arony vs. Arony* (1980), pp. 2,390.

37. *P.P. Salame vs. Salame* (1980), pp. 2,779.

38. Justice Kahan based his ruling on decisions rendered in the US, *People vs. Soremson*, Cal RPTS, 68; and *Gursky vs. Gursky*, NYS 201, 406. In the latter case, the New York Supreme Court ruled that a child conceived by artificial insemination is not the legal son of the husband. Nevertheless, the latter is financially responsible for his support even after he divorces his wife, if he had agreed originally to the foreign donor insemination.

39. Exactly what was meant by the husband's consent, and how that consent must be formalized were not mentioned by either the Rabbinic or secular courts. On the contrary, both systems seemed to imply that the husband's knowledge and

responsibility for maintenance of the child conceived. From this one may conclude that even though the husband did not biologically father the child, his “conception” of the child in the realm of thought is sufficient to obligate him to care for it.

Furthermore, this obligation results from a personal commitment by the husband to the child,⁴⁰ and continues even after the marriage between the husband and the wife has been terminated.

It also appears that as a consequence of the husband’s consent, a woman’s use of artificial insemination is not to be considered as grounds for divorce. There are opinions which view artificial insemination as tantamount to adultery, and therefore would prohibit the woman from engaging in sexual relations with her husband or the donor.⁴¹ Accordingly, the husband’s consent is irrelevant.⁴² However, according to those who do not regard artificial insemination as adultery,⁴³ the husband’s consent would be very important. Undergoing artificial insemination without the husband’s knowledge is a betrayal of trust that disturbs the marriage relationship, and may by itself be considered grounds for divorce. Furthermore, according to the opinion that by such a procedure the woman is held to have violated the “*Dat Yehudi*.” This may surely be considered grounds for divorce.

However, if the husband consents to artificial insemination, this no longer is considered grounds for divorce, even if at a later date the husband includes this as one of the reasons for his request for a divorce. This conclusion is clear from the decision of the Haifa court.⁴⁴ Though there is an apparent contradiction between this

acceptance of the treatment undergone by his wife are sufficient to be considered as consent. (In halacha, we find a parallel principle: “silence is equivalent to acceptance.”) In no case was formal consent required. On this basis the secular court considered the case to be governed by sections 23 and 25 of the Contracts (General Pacts) Law, 1975. As of now, both the husband and the wife must sign a formal document of consent to artificial insemination. The husband must also affirm that he desires the baby to be considered as his natural child. However, the legal power of these documents has not yet been tested.

40. It must be noted that though the Rabbinic court viewed the husband as a “guarantor,” the secular court maintained the his consent implied a commitment to accept full responsibility for maintenance of the child.

41. See note 13.

42. See note 14.

43. See note 11.

44. It must be noted that the court in Haifa relied heavily on the decisions of Rabbi Moshe Feinstein. Rabbi Feinstein forbids artificial insemination from a foreign donor without the husband’s consent and would permit it with the husband’s

conclusion and the rationale employed by the Rabbinic court in Jerusalem, it is possible to reconcile the two decisions. The decision of the Jerusalem court declared: The woman transgressed against God and her husband, therefore she is obliged to accept a divorce.”

In explaining that decision, the court declared, “*The very physical participation of the woman in such an abominable act without the husband’s knowledge⁴⁵ likens her to a woman who violates the faith.*”⁴⁶ Thus, it might be argued that even according to the strict perspective of the Jerusalem court, the husband’s consent would alter the legal consequences of artificial insemination with regard to divorce.

The Israeli secular legal system has not taken a position on this matter. Nevertheless, it is very unlikely to presume that it would depart from the approach taken by the legal systems in other countries⁴⁷ which place no moral objection to the use of a donor’s sperm in artificial insemination.

Nevertheless, the sensitive moral and ideological issues associated with artificial insemination are likely, by some authorities, totally to forbid insemination by a foreign donor’s sperm. Furthermore, it is possible that they would ask the judiciary to rule as to whether consent to an amoral act has legal significance. Nevertheless, even if artificial insemination were to be considered adultery despite the husband’s consent, it is likely that such consent might still create a binding financial obligation.

consent, provided the sperm were taken from a gentile. The use of a gentile’s sperm minimizes the problems involved in the marriage problems such as progeny.

45. The emphasis was added by the author.

46. It appears that there is an implied contradiction between the decision reached by the Rabbinic court and their explanation of the decision. The decision itself declared the act of artificial insemination as a “transgression against God and the husband,” while the explanation “likened” the woman to one who violated the faith. There is a basic difference between the two concepts. A woman who “transgresses against God and her husband” may no longer engage in marital relations with her husband. In contrast, a husband may, under certain circumstances, continue marriage relationship with a woman who “violates the faith.” Furthermore, if the husband is willing to continue these relations, the woman’s previous behavior is no longer considered grounds for divorce. Perhaps, for this reason, the decision was worded with the expression “likened the woman.”

47. A discussion of these issues in relation to American law can be found in Shepard’s, *Harding: Pregnancy and Birth Cases*, Family Law Series (McGraw-Hill, 1982), pp. 216-224; in relation to other legal systems see Shipman, *ibid.*, notes 21, 46 and E. Kaplan, “Artificial Insemination,” *Tel Aviv University Law Review*, 1972, Vol. 21, p. 110.

Conclusion

It is difficult to establish a clear perspective of the Rabbinic and civil courts in Israel regarding artificial insemination because of the sparsity of decisions rendered on the question and the apparent contradictions between those decisions. Furthermore, such decisions required certain medical testimony regarding, for example, proof of a husband's absolute sterility, which is difficult to ascertain. Nevertheless, a number of conclusions may be reached:

1. If the husband had consented to the procedure, such consent implies a willingness to accept responsibility for the maintenance of a child so conceived.
2. Nevertheless, the husband is not considered the child's legal father.
3. The husband's commitment for the maintenance of the child is not connected with the relationship between him and his wife. Even if the couple were divorced, the husband must continue to support the child.
4. There is no clear decision as to whether artificial insemination is to be considered as adultery and therefore serve as grounds for divorce.

*Source: ASSIA – Jewish Medical Ethics,
Vol. II, No. 1, January 1991, pp. 21-28*