

The Ethico-legal Issues of Artificial Conception

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Abstract: Some ten percent of marriages are said to be infertile. As cures for infertility have had very limited success, methods of artificial conception are fast gaining ground. The use of these methods, however, gives rise to legal and moral issues. P. M. Bakshi anticipates these issues and discusses how they have been tackled legally in the West.

The Processes of Artificial Conception

Modern reproductive technology now employs several methods of bringing about artificial conception. These include artificial insemination and in "vitro" fertilization. In artificial insemination, male genetic material (semen) enters the female body through injection. In a high proportion of cases, this results in conception. It is often used in cases of male infertility, but it is not confined to such cases.

In vitro fertilization is a technique, which involves fertilization in the laboratory, in the first instance. It is most often used in cases where the woman's Fallopian tubes are diseased. There are three main stages:-a) collection of female genetic material (ova) from the woman (wife); b) fertilization of the ova (obtained as above) with the husband's genetic material in the laboratory and c) transfer of the resulting embryo into the wife's uterus.

Usually, more than one embryo may have to be transferred into the woman's uterus, as pregnancy rates on transfer of ovum are somewhat low.

Ovum Donation

Sometimes, the wife's ovum may not be suitable for re-implantation into her body. For example, where she is suffering from a genetic disease, her own ovum cannot be used. In such cases, the ovum is obtained from another woman (donor). It is then fertilized in the laboratory with the help of the genetic material obtained from the husband; and if an embryo results, then the embryo is implanted into the body of the wife. This process is called "ovum donation". It will be noted that there are three persons participating in such a process, namely, the wife, the second woman who acts as the donor and the husband.

Participation by Wife

In the three processes described above, the wife who wants to become a mother through artificial conception does perform some part. Thus in artificial insemination, it is she who "carries" the child. The entry of the male material in her body is artificial but the rest of the process of gestation is natural. In "in vitro" transfer, the artificiality is more intensive, because it is the embryo that is implanted. But still, the wife has contributed her own ovum. In "ovum donation", the wife's part declines further. The embryo received by her is one to which she has made no contribution. Her contribution arises only when she receives the embryo. Nevertheless, from that stage, the bond between her and the child in the womb does come into existence.

Surrogate Motherhood

What has come to be known as "surrogate motherhood" is totally different. It involves the active co-operation of another woman, who must agree to become pregnant and to give birth to a child. She becomes pregnant through the male genetic material obtained from a male (not her husband). When the child is born, she will surrender the child to that male and his wife.

In some cases, a variant of the above technique is used. What the surrogate mother receives into her body, is an embryo, which would be the result of the creation in the laboratory through genetic material contributed by a married couple. This has come to be known as "womb-leasing", because the surrogate mother merely allows her womb to be used for carrying further the reproductive process. Of course, in this variant also, the surrogate agrees with the married couple that the child will be surrendered to that couple. How far such an arrangement can be legally recognized, is a topic by itself. In some Western countries, there have been cases where the bond between the surrogate mother and the child carried by her becomes so strong that the surrogate is reluctant to transfer the child on its birth to the couple with whom she had entered into an agreement to do so.

Artificial Insemination

Artificial insemination is the most common type of artificial conception and is now familiar to Indian medical practitioners. Where the male genetic material of the husband is introduced (though artificially) into the woman's body, it is known as AIH (the H stands for husband). Where the material is obtained from a male other than the woman's husband, it is called AID. Here, D stands for Donor. Where only the husband is involved, ethical problems hardly arise. The process is artificial, but substance injected is one that does not deviate from the ordinary

norms of marriage. As far as legal problems are concerned, the major one relates to legitimacy of the child so born. In India, the matter is almost concluded by section 112 of the Evidence Act, where under the child would be legitimate child of the woman and her husband, and the artificiality of the process (in its sexual aspect) would make no difference. Of course, if the marriage was not consummated in the usual sense, it is arguable that a decree of nullity of marriage can still be obtained. But the point is academic if both the parties have agreed. (REL v/s. EL (1949) 1 All E. R. 141.)

Where the woman has received the genetic material from a male who is not her husband, several moral and legal issues are bound to arise. If her husband has not consented to such impregnation, then it is unlikely that society would approve of the practice. Even in the West, there are many who take the view that the basis of the marriage bond is compromised if the woman gets herself impregnated through a male who is not her husband, at least where the husband's consent has not been obtained.

Donor Insemination

Artificial insemination by donor can raise several legal issues. If the impregnation is by another male with the husband's consent, there will be no charge of adultery or cruelty. But if the husband has not given consent, then the conduct is likely to be regarded as an act of cruelty for the purposes of the law of divorce. Whether such conduct becomes "adultery" is, however, doubtful. In the Scottish case of MacLennan v/s. MacLennan, (1958) SC 105, after much debate, it was held that there would be no "adultery" in the legal sense, by a woman getting herself artificially inseminated without her husband's consent, as there is no sexual contact between the woman and the donor. The same view is likely to be taken in India, (if such a question arises) because the Indian Penal Code also lays stress on the physical element. Moreover, the Code specifically provides that the woman shall not be punished for adultery in any case.

Legitimacy of Children

The question of legitimacy of children will arise where a woman conceives through artificial insemination where the donor is a person other than her husband. If the fact that the woman got herself so impregnated becomes known, and if it is further proved that the husband was not capable of consummating the marriage, difficulties may arise. This is so even where the husband consented to the wife's being impregnated artificially by another male. Of course, the identity of the donor is always kept secret as a matter of medical etiquette. There are several reasons for this secrecy, which need not be gone into here. Nevertheless, it is not uncommon for such secrets to be leaked out.

Legislation in Other Countries

In many foreign countries, the matter is regulated by legislation enacted during recent years on the subject. Practically the most recent is the U. K. Act, called the Human Fertilization and Embryology Act, 1990, sections 2 to 30 of which supplement the Family Law Reform Act, 1987. In the United States, the Uniform Parentage Act, 1973, has been adopted in many States. In Western Australia, the Artificial Conception Act 1985 deals with the subject and New South Wales has a similar law of 1984. [See D. J. Cusine, *New Reproductive Techniques: A Legal Perspective* (1988)].

The general thrust of most of these enactment's is two fold:-i) If the impregnation of the wife by donor is with the husband's consent, then the child so born becomes the legitimate child of the woman and her husband. Further, the child shall not be regarded as the donor's child. ii) If the impregnation of the wife is without the husband's consent, then the child is not to be regarded as a child of their marriage.

Single Women

What is to happen if a single woman wishes to be artificially impregnated? Should the doctor assist her? In England the Royal College of Obstetricians and Gynecologists, in the guidelines laid down for its members, recommends that artificial insemination should be performed only on a married woman and only with her husband's consent. Of course, an unmarried woman resorting either to natural or to artificial means of reproduction does not commit any offence as such. But society does not approve of such conduct, at least in India. Besides this, the child would be illegitimate. In that sense, the procedure would be unfair to the child.

Conclusion

Many of the legal issues discussed above are bound to arise in India sooner or later. The reason is that artificial insemination is gradually becoming popular in India. An examination of the related ethical and legal issues will, therefore, soon become a necessity in India also.