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# LEGAL PERCEPTION ON ARTIFICIAL INSEMINATION IN HUMAN BEINGS WITH REFERENCE TO INDIA

AUTHORED BY - HARIPRIYA BHARADWAJ

## INTRODUCTION

The concept of artificial insemination (hereinafter, referred to as AI) in human beings dates back to the 1770's but in India this is an emerging concept. The awareness about this concept is increasing in India in the recent times as the assisted reproductive technology cases are seen on the rise. In this article the history of artificial insemination followed by its current status in the society is discussed in detail. Firstly, the reason why this concept is becoming popular recently is primarily the rise in infertility among both men and women while the gradual acceptance of various forms of marriage as opposed to the previous decades (in India) is also a major contributing factor for rise in AI cases. To support this statement with statistics- according to the World Health Organization, 1 out of 6 people globally face infertility and the scenario in India is as disturbing as this where the Doctors of All India Institute of Medical Sciences (AIIMS) have reported that over 12–18 million couples in India are diagnosed with infertility every year. With the sperm count of a normal Indian adult male reducing to 20 million/ml from over 60 million/ml three decades ago. This is the paramount cause for removal of social stigma associated with artificial insemination in humans while the other formal developments are enumerated in the following pages of the article.

## HISTORY

The concept of AI in humans with regard to official history dates back to the 1770's but unofficial history claims the first case to be as early as the 15<sup>th</sup> century where the first attempts to artificially inseminate a woman, were done by **Henry IV** (1425-1474), **King of Castile**, nicknamed *the Impotent*. In 1455, he married Princess Juana and after six years of marriage, she gave birth to a daughter, Joanna. It was assumed by historians that Henry was impotent. The possibility of artificial insemination was launched. Later on, it was claimed that the princess was not the daughter of the king. In India, the concept of artificial insemination found its existence in the

ancient society as well- there existed a practice called Niyog Pratha followed by young widows who were childless after the death of their husbands but sought motherhood, by infertile women, and women whose husbands were impotent. The first ever documented case of AI in humans was done by John Hunter in London in the 1770's who was called "the founder of scientific surgery". In India the first baby born through assisted reproductive technology (here, in vitro fertilisation) was in the year 1978 in Kolkata.

## **ARTIFICIAL INSEMINATION**

A brief overview on what artificial insemination actually is in the medical sense would be helpful in the further understanding of the article.

The process by which the semen is deposited in vagina, cervical canal or the uterus, by artificial means, for the purpose of bringing pregnancy in a healthy woman, who is unable to conceive a child through sexual intercourse with her husband is artificial insemination in its widest sense.

### **Whether AI is a part of assisted reproductive technology (hereinafter, referred to as ART)?**

Before answering this question, it is important to gain knowledge about the formal developments in the field of AI in India.

- ❑ The Union health ministry and the Indian Society of Assisted Reproduction (ISAR) have set up a registry National ART Registry of India (NARI).
- ❑ The formulation of the Assisted Reproductive Technology Act, 2021<sup>1</sup>(hereinafter, referred to as the said legislation), subsequently the Assisted Reproductive Technology Rules, 2022.

These are the 2 breakthrough developments in the field of ART particularly in respect to AI.

This is because prior to the enactment of this legislation there was no formal body or law governing the same, it was merely governed by certain ICMR (Indian Council for Medical Research) guidelines which led to failure to solve legal disputes consequently arising.

The formal developments are as a result of wide acceptance for this technology- as per the Centre for Disease Control and Prevention about 82% of the clinical pregnancies resulting from ART

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<sup>1</sup> With effect from, 25th January, 2022, vide notification No. S.O. 291(E), dated 20th January, 2022, see Gazette of India, Extraordinary, Part II, sec. 3(ii)

led to live births.<sup>2</sup>

Now, to answer the question of whether AI is a part of ART, the definition of the latter as under the said legislation- Section 2 of the Assisted Reproductive Technology (REGULATION) ACT, 2021 defines “assisted reproductive technology”,

- ❑ All techniques which include an attempt to obtain a pregnancy by handling the sperm or the oocyte outside the human body and
- ❑ Intravenously transferring the gamete or the embryo into the reproductive system of a woman

Thus, it is clear from the definition that artificial insemination is a part of Assisted Reproductive Technology.

There are various types of ART such as Artificial insemination, In Vitro Fertilization(IVF), Surrogacy, Gamete Intra Fallopian Transfer(GIFT) among which the focus of this article is only on Artificial insemination.

### **Types of AI**

There are 2 major types of Artificial Insemination-

1. Artificial Insemination Homologous(AIH)
2. Artificial Insemination Donor/ Heterologous Artificial Insemination (AID)

The former deals with artificial insemination by the sperm of the husband in case of heterosexual couples while the latter is artificial insemination by the sperm of a donor from registered sperm banks. This is the type of AI under which various legal disputes occur.

## **LEGAL ISSUES IN AI**

**Legitimacy of the child:** According to Section 31 of the said legislation<sup>3</sup>, the child born out of ART shall be deemed to be the biological child of the commissioning couple.

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<sup>2</sup> <https://www.cdc.gov/art/reports/2020/summary.html>

<sup>3</sup> Section 31-Rights of child born through assisted reproductive technology. — (1) The child born through assisted reproductive technology shall be deemed to be a biological child of the commissioning couple and the said child shall be entitled to all the rights and privileges available to a natural child only from the commissioning couple under any law for the time being in force.

(2) A donor shall relinquish all parental rights over the child or children which may be born from his or her gamete.

Thus, it will have all the rights of a legitimate child born without the use of any Assisted Reproductive Technology.

**Question of Adultery:** No such question will arise in the case of a commissioning couple as under Section 497 of the Indian Penal Code, sexual intercourse must be present to constitute adultery.

These are the primary areas where the legal problems arise.

The next two sub-topics deal with the most important and relevant provisions of the Assisted Reproductive Technology Act, 2021 with regard to Artificial Insemination classified as under as ELIGIBILITY FOR AI and DONOR ELIGIBILITY.

### **ELIGIBILITY FOR AI-**

This is an area which is entirely based on the said legislation i.e., Assisted Reproductive Technology Act, 2021-

It consists of the inherent requirements for opting for AI:

- Section 2(u), and Section 21 (g)(i)-** Woman above the age of 21yrs and below the age of 50 yrs.-
- Section 21 (g)(ii)-** Man above the age 21 yrs. and below the age of 55 yrs.-
- Section 21(a)** mandates the clinic/bank to ensure the eligibility of the commissioning couple
- Section 2(e)** states that the commissioning couple should be infertile married couple.
- Section 2(j)** states the inability to conceive after 1 year of unprotected coitus or other proven medical condition preventing the couple from conception

### **DONOR ELIGIBILITY-**

- Section 21** describes general duties of assisted reproductive technology clinics and bank to be fulfilled
- Section 22** mandates the written informed consent
- Section 23** mandates the accuracy of the records maintained
- Section 27** states the eligibility criteria of the donor which are
  - The male must be between 21 years of age and 55 years of

age [Section 27 (2)(a)]

- The female must be between 23 years of age and 35 years of age.-[Section 27(2)(b)]

- ❑ **Section 27(2)(c)**-The donor should be examined for diseases mentioned in Rule 19 Assisted Reproductive Technology Rules,2022
- ❑ **Section 27(3)**-A bank shall not supply the sperm or oocyte of a single donor to more than one commissioning couple-
- ❑ **Section 29**-The sale transfer or use of gametes directly or indirectly, inside or outside India is prohibited.

### **OFFENCES AND PENALTIES-**

- ❑ According to this act, all related offences and penalties are detailed under Section 33 of the said legislation:

**33. Offences and penalties** — (1) Any medical geneticist, gynaecologist, registered medical practitioner or any person shall not—

- a) abandon, disown or exploit or cause to be abandoned, disowned or exploited in any form the child or children born through ART;
- b) sell human embryos or gametes, run an agency, a racket or an organisation for selling, purchasing or trading in human embryos or gametes;
- c) import or help in getting imported in whatsoever manner, the human embryos or human gametes;
- d) exploit the commissioning couple, woman or the gamete donor in any form;
- e) transfer a human embryo into a male person or an animal;
- f) sell a human embryo or gamete for the purpose of research; or
- g) use any intermediates to obtain gamete donors or purchase gamete donors.

(2) Whoever contravenes the provisions of clauses (a) to (g) of sub-section (1), shall be punishable with a fine of not less than five lakh rupees which may extend to ten lakh rupees for the first contravention and for any subsequent contravention, it shall be punishable with an imprisonment for a term not less than three years which may extend to eight years and with fine not less than ten lakh rupees which may extend to twenty lakh rupees.

- ❑ The punishment for the offences committed under this act are additionally mentioned under Section 34 of the said legislation:

**34.** Punishment for contravention of provisions of the said Act or rules for which no specific punishment has been provided. — Whoever contravenes any of the provisions of this Act or any rules made thereunder, for which no penalty has been provided in this Act shall be punishable as per sub-section (2) of section 33.

## **REPORTED CASES OF ARTIFICIAL INSEMINATION**

In this field of AI, most of the cases reported have occurred in foreign countries mainly because this concept identifies itself with some social stigma in the Indian society.

### **Foreign Cases-**

The cases reported are highly in the nature of the fertility fraud while carrying out the process of artificial insemination.

1. Case of Dr. Cecil Jacobson<sup>4</sup>

A number of patients were to be artificially inseminated with sperm provided by screened, anonymous donors arranged by Jacobson.

For preserving the anonymity of the donors, Jacobson identified them in records using code numbers; so that only he would know their true identities.

Seven instances were identified in which Jacobson was the biological father of the patients' children, which included one patient who was supposed to be inseminated with her husband's sperm.

DNA tests linked Jacobson to a minimum of 15 children, and allegedly around 75 children to be fathered by Jacobson by impregnating patients with his own sperm.

2. Case of Dr. Phillip M. Milgram<sup>5</sup>

In September 2020, a San Diego woman sued Dr. Phillip M. Milgram for having used his own sperm three decades earlier to inseminate her, instead of an anonymous donor sperm.

The deception was discovered by her adult son who found that Milgram was his biological father from a home DNA test kit.

### **Indian Cases-**

1. Reported on June 23 ,2019

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<sup>4</sup> United States v. Jacobson, [United States. District Court. Eastern District of Virginia](https://pubmed.ncbi.nlm.nih.gov/16372436/)  
<https://pubmed.ncbi.nlm.nih.gov/16372436/>

<sup>5</sup> <https://www.nbcсандiego.com/>

In a case where a 35-year-old woman requested for her estranged husband's sperm for artificial insemination the family court of Maharashtra upheld the request and stated that even when the commissioning couple are separated the wife can opt for AI with the husband's sperm as reproductive right is closely and directly related to women but this does not undermine the necessity to obtain the husband's consent for the procedure.<sup>6</sup>

2. Reported on June 22,2023

On October 15, 2008 an Intra-Cytoplasmic Sperm Injection (ICSI) procedure was performed to transfer the embryo into Ms. Tandon's womb.

When the pregnancy was confirmed after a month, Ms. Tandon delivered twin girls.

The blood group of one of the twins was found to be AB positive. The blood group of Ms. Tandon was B positive while that of her husband was O negative. This raised suspicion about the paternity.

The court observed that the negligence of doctors led to the genetic link between the parents and their children being severed which caused the parental confusion for the children.<sup>7</sup>

## **CONCLUSION**

Thus, the concept of artificial insemination in human beings in India is a developing one i.e., with enormous scope with respect to legal formulations. In India, there is only one governing legislation for artificial insemination and surrogacy put together which is the Assisted Reproductive Technology (Regulation) Act, 2021 read along with the Assisted Reproductive Technology Rules, 2022. This covers the registration of the sperm banks, fertility clinics eligible to carry out this process along with the legal and medical requirements for the AI process. It is observed that the consent of the commissioning couple for use of donor sperm plays the most essential role in this concept and the majority of the white-collar crimes are committed violating this requirement of the law. Therefore, in a nutshell artificial insemination as a part of assisted reproductive technology is seen to be the most advanced scientific advancement as it caters to the need of the changing society by providing options for single unmarried men and women to embrace parenthood while remaining less expensive and less invasive as compared to other forms of Assisted Reproductive Technology.

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<sup>6</sup> <https://timesofindia.indiatimes.com/>

<sup>7</sup> <https://www.thehindu.com/news/cities/Delhi/consumer-panel-slaps-15-crore-fine-on-delhi-hospital-for-sperm-mix-up-during-ivf-procedure/article66997801.ece>

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