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Artificial Insemination and Its Legal Challenges: Need for Law in India

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ABSTRACT

Infertility may be caused due to many factors, including problems with egg or sperm production, genetic factors, age, exposure to chemicals and toxins, etc. Statistics show that infertility has skyrocketed in the past few years, thereby making it difficult for couples to conceive naturally. This has led to an increase in the need for Assisted Reproductive Technologies (ART), one of which is Artificial Insemination (AI). Artificial Insemination is the deliberate introduction of sperm into a woman's cervix to attain pregnancy by means other than sexual intercourse. There are different types of AI. Internationally it can be seen that different countries have enacted various legislations guiding the technique of AI and laying down the rights and duties of the couple, the donor, and the doctor assisting the procedure.

Many issues arise due to AI, the prominent ones being the determination of the legitimacy of the child, rights of the child, consent of the parties to the procedure, payment of fees to the donor, and the like. In India, the Assisted Reproductive Technology (Regulation) Act of 2021 lays down blanket legislation for the regulation and supervision of ART clinics, banks etc.; however, it does not specify the requirements for each type of ART method. Feminist principles, which claim that a person alone can parent a child, and the act of the Supreme Court legalising homosexuality have only added to the complications which may arise. There are various societal and religious restrictions as well when it comes to procreation through any means other than natural procreation.

Reproductive rights have been recognised as fundamental rights under the Constitution of India. However, not many can avail of these rights due to exclusion from the present legal framework. There is a need to regulate not only the parties involved in the process but also the Medical Institutions providing AI to prevent it from becoming a profession or a commercialised business done for profit. This paper emphasises the various hurdles that AI poses and the need for a Statute regulating the same. Suggestions for a conclusive and definite enactment have also been discussed in the paper.

Keywords: *Artificial Insemination, law.*

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I. INTRODUCTION

"God values every human life. He creates and plans for every birth."

The birth of a child brings diverse emotions to the parents, relatives, and whomever the child is connected to. In general, it is believed that the most satisfying thing you can do with your life is to take care of a child. However, owing to certain factors many are deprived of the joy of having a child due to various inefficiencies. This deprivation causes more psychological and emotional trauma when it comes to a married couple who are unable to produce off-springs naturally even after many years of marriage.

Infertility is "a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse."[3] Infertility may have many causes and can also be related to various factors in the male, female, or both. Low sperm count, low sperm motility, abnormal sperm, ejaculation disorders, hormonal imbalance, etc. are some of the causes of infertility in men. Whereas ovulation disorders, mental stress, obesity, polycystic ovary syndrome, etc. are some of the causes of infertility in women.

Infertility treatments can include medications and Assisted Reproductive Technologies (ART).

II. ASSISTED REPRODUCTIVE TECHNOLOGY

Assisted Reproductive Treatment, often referred to as Assisted Reproductive Technology refers to treatments and procedures used to assist people in attaining pregnancy. ART includes all fertility treatments in which both eggs and embryos are handled. In general, ART procedures involve surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body or donating them to another woman[4].

Depending on the cause of infertility, ART covers a rather wide spectrum of treatments which includes

- **Ovulation Induction (OI):** This treatment focuses on anovulation (Irregular ovulation) which is an infertility condition in which follicles in a women's ovary do not ovulate. It can be caused by reproductive disorders such as polycystic ovary syndrome (PCOS), nutritional problems, etc. OI stimulates the ovary to produce and release eggs[5].

[3] WHO – ICMART Glossary

[4] This definition is used by The Centers for Disease Control and Prevention based on the 1992 Fertility Clinic Success Rate and Certification Act.
Assisted Reproductive Technology (ART), Centers for Disease Control and Prevention, (Feb. 02, 2023, 10:04 AM), https://www.cdc.gov/art/whatis.html.

[5] Fertility Center, Women & Infants, (Jan. 29, 2023, 05:00 PM), https://fertility.womenandinfants.org/treatment/ovulation-induction.

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- **Artificial Insemination (AI):** This technique is used to treat infertility in both men and women. Under this procedure, sperm are inserted directly into a woman's cervix, fallopian tubes, or uterus which helps to make the trip shorter for the sperm and bypasses any possible obstructions[6].
- **Donor Conception:** In case of one or both partners of the heterosexual couple being infertile, sperm or embryos or both eggs and sperm (double donation) from donors are used to help with conception[7].
- **In-vitro Fertilization (IVF):** It is the joining of a woman's egg and a man's sperm in a laboratory dish. In vitro means outside the body. Fertilization is when the sperm is attached to and entered into the egg[8].
- **Gamete Intrafallopian transfer (GIFT):** A woman's eggs are removed and mixed with sperm and are immediately placed inside the fallopian tube. This process takes place inside the fallopian tube rather than in a laboratory as in the case of IVF[9].
- **Intracytoplasmic Sperm Injection (ICSI):** ICSI refers to the laboratory procedure where a single sperm is picked up with a fine glass needle and is injected directly into each egg and is carried out in the laboratory by experienced embryologists using special equipment[10].
- **Preimplantation Genetic Testing (PGT):** The embryos can be tested for abnormal chromosomes before they are transferred to the uterus, which is done in a lab, using IVF[11].
- **Surrogacy:** Through IVF, embryos are created in a lab at a fertility clinic. Sometimes the intended parents use their genetic material and at times an egg donor is required. 1-2 embryos are implanted into a gestational carrier at the fertility clinic, which carries the

[6] Artificial Conception: Artificial Insemination and In Vitro Fertilization, FindLaw, (Jan. 15, 2023, 10:15 AM), https://family.findlaw.com/surrogacy-artificial-conception/artificial-conception-artificial-insemination-and-in-vitro.html.

[7] What is Donor Conception? Donor Conception Network, (Jan. 07, 2023, 60:35 PM), https://www.dcnetwork.org/what-donor-conception.

[8] In Vitro fertilization (IVF), Medline Plus, U.S. National Library of Medicine, (Feb. 05, 2023, 11:16 AM), https://medlineplus.gov/ency/article/007279.htm.

[9] Gamete Intrafallopian Transfer: GIFT, American Pregnancy Association, (Jan. 16, 2023, 07:14 PM), https://americanpregnancy.org/getting-pregnant/gamete-intrafallopian-transfer/.

[10] Intracytoplasmic Sperm Injection (ICSI), SIMS IVF, (Jan. 08, 2023, 12:15 PM), https://www.sims.ie/fertility-treatments-services/fertility-treatments/intracytoplasmic-sperm-injection-icsi.

[11] Preimplantation Genetic Testing, ReproductiveFacts.org, (Jan. 14, 2023, 10:00 AM), https://www.reproductivefacts.org/news-and-publications/patient-fact-sheets-and-booklets/documents/fact-sheets-and-info-booklets/preimplantation-genetic-testing/.

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baby (ies) to term[12].

Each of these techniques has its advantages and disadvantages. However, many legal, moral, ethical, and societal paradigms affect the outcome of these procedures and the importance of each of these aspects cannot be overlooked.

III. ARTIFICIAL INSEMINATION (AI): CONCEPT AND MEANING

Artificial insemination (AI) is one of the most popular methods used to treat infertility. The meaning of the word "Insemination" is to sow seeds or to introduce semen into the genital tracts of a female and "Artificial" refers to something produced by human efforts rather than occurring naturally. Therefore, artificial insemination is the technique in which semen with living sperm is collected from the male and introduced into the female reproductive tract at the proper time with the help of instruments[13].

Artificial insemination helps a couple conceive in the following circumstances[14]:

- If there is a problem with the man's sperm or he has erectile dysfunction or premature ejaculation.
- In case of unexplained infertility where there is no obvious or apparent reason as to why the couple is unable to conceive.
- When the woman suffers from mild endometriosis or has ovulation problems.
- When the woman suffers from cervical mucus insufficiency or in case of hostile cervical mucus.

(A) Types of Artificial Insemination

Artificial insemination can be classified on two grounds

1. Based on the procedure used
2. Based on a sperm donor.

- Based on the procedure used, artificial insemination can be classified into the following:

1. **Intracervical Insemination (ICI):** This is the most common process used for artificial insemination. In this process, the sperm from the partner or donor is placed in the cervix

[12] What is Surrogacy? Circles Surrogacy, (Jan. 07, 2023, 05:00 PM), https://www.circlesurrogacy.com/about/what-is-surrogacy.
[13] Artificial Insemination, Vikaspedia, (Feb. 15, 2023, 03:40 PM), http://vikaspedia.in/agriculture/livestock/cattle-buffalo/breeding-management-1/artificial-insemination.
[14] Artificial Insemination, Health Service Executive, (Jan. 12, 2023, 10:45 AM), https://www.hse.ie/eng/health/az/a/artificial-insemination/risks-of-artificial-insemination.html.

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of the woman. From there the sperm travels into the uterus and fallopian tubes. This technique is preferred for those couples where the partner has problems ejaculating during intercourse. However, this process is not advised for those women who have cervical mucus hostility or men with poor sperm count[15].

2. **Intrauterine Insemination (IUI):** The procedure for intrauterine insemination involves the injection of sperm into the uterus[16]. This procedure is carried out when the man is found to have poor sperm count or quality, the woman suffers from cervical factor infertility, or either of the partners suffers from an unexplained infertility issue.
3. **Intratubal Insemination (ITI):** Under this process, the sperm from the partner or donor are placed directly in both the fallopian tubes and is most useful as this process does not require the sperm to swim towards the egg. This method is most preferred in cases where other methods of insemination have failed or in those circumstances where the sperm is not able to reach the fallopian tubes due to obstacles present within the uterus[17].
4. **Intravaginal Insemination (IVI):** This process is much similar to natural intercourse as the sperms are placed in the vagina near the cervix. It is often referred to as self-insemination where the man collects his sperms in a sterile syringe and the woman herself, or with the help of her partner, deposits the sperms into the vagina as close as possible to the cervix. This method is most preferred by same-sex couples trying to conceive or by those couples who have ejaculation problems[18].
5. **Intrafollicular Insemination (IFI):** In this process, the sperm is injected into the ovarian follicle. Data indicate that in comparison with other assisted reproductive technologies, IFI is inefficacious for treating non-tubal infertility.

- Based on a sperm donor, artificial insemination can be classified into the following:

1. **Homologous Insemination:** In this process, the husband of the woman himself acts as the sperm donor. It is often referred to as Artificial Insemination by Husband (AIH). An AIH child raises no question of surrogate parenthood being a product of its own parents' seeds[19].

[15] Batul Nafisa Baxamusa, Types of Artificial Insemination, iBuzzle, (Feb. 01, 2023, 12:15 PM), https://www.ibuzzle.com/articles/types-of-artificial-insemination.html.
[16] Dr. Reeja Tharu, Types of Artificial Insemination, Medi India, (Feb. 02, 2023, 09:17 AM), https://www.medindia.net/patients/patientinfo/artificialinsemination_types.htm.
[17] Batul Nafisa Baxamusa, Types of Artificial Insemination, iBuzzle,(Feb. 02, 2023, 10:20 AM), https://www.ibuzzle.com/articles/types-of-artificial-insemination.html
[18] Ibid.
[19] Vidhya Shenoy, Assisted Reproductive Technology, Legal Services India.com, (Feb. 05, 2023, 11:18 AM), http://www.legalserviceindia.com/articles/art_ins.htm.

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2. **Heterologous Insemination:** This process involves a person other than the woman's husband acting as the sperm donor. It is commonly referred to as Artificial Insemination by Donor (AID).
3. **Confused Artificial Insemination (CAI):** In this process, the sperm of the husband and a donor are mixed and inserted into the uterus of the wife. This was important in an age where AI was considered to be immoral and equivalent to adultery with the resulting child being considered illegitimate and having no inheritance rights. With the acceptance of AI in society, the popularity of CAI diminished[20].

(B) Advantages of Artificial Insemination

- **Remedy for male infertility:** It helps the couple to conceive a baby when the man is infertile by taking genetic material from a donor chosen in a way to resemble the husband. It is most beneficial in case the husband suffers from any genetic disease or is a carrier of genetic disease and he desires to not pass this on to the future child.
- **An efficient solution in case of impotency:** Impotency may make it impossible for the man or woman to have sexual intercourse thus making it difficult for the woman to conceive. AI proves to be useful in this situation as the issue of impotency may need a lengthy treatment which may consume a lot of time.
- **Solution for low sperm count issue:** In cases where natural conception is unlikely, AI comes in as a timely intervention where it allows men with low sperm count to fertilize their wives.
- **Safe:** Before inserting the sperm into the woman's womb, the doctor is required to examine the sperm to ensure that the material is healthy and unhealthy material is discarded thereby considerably reducing the possibility of giving birth to a child with health complications.
- **Affordable:** In comparison to other assisted reproductive techniques, AI is found to be highly affordable.
- **Solution for Cervical Issues:** The woman's cervix may have a condition in which it cannot produce enough mucus that assists the sperms in climbing to the womb, i.e., the cervix acts hostile to the sperm thereby hindering the cells from making a smooth transition to the uterus. In this situation, AI is helpful as the sperm can swim directly

[20] Ibid

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into the uterus bypassing the cervix.

- **Relief from sperm allergy:** Some women suffer from a condition called sperm allergy due to which the woman finds it necessary to avoid contacting sperm during sexual intercourse thereby making it impossible for the couple to conceive naturally. Here, AI can increase their conception chances.
- **Higher success rates:** Various studies indicate that the success rate of AI in comparison with other assisted reproductive techniques is higher.
- **Allows for genetic preservation:** This method is useful as it helps to preserve genetic material in advance for a future day when it may become impossible for the male to produce sperm and it has been proven that frozen sperm is more secure, safe, and effective when compared to fresh sperm.

(C) Disadvantages of Artificial Insemination

- AI calls for an expensive treatment which may also be time-consuming as it usually requires more than one cycle.
- Hormonal imbalances are caused in the female body due to the injection of hormonal drugs for ovarian stimulation. This may result in Ovarian Hyper Stimulation Syndrome (OHSS).
- Occasionally, the sperm may cause an infection of the uterus of the woman leading to a condition called endometriosis.
- IUI causes vaginal bleeding because of a catheter placed in the uterus.
- Multiple pregnancies may lead to the risk of ectopic pregnancy development. Multiple births can increase the risk of having miscarriages, low birth weights, and premature birth of the child.
- Children born as a result of AI treatment have an increased risk of birth defects.
- AI always carries the risk of the inseminated egg not turning into an embryo.
- Children conceived through intracytoplasmic sperm injection tend to be born more often with infantile cerebral paralysis than those conceived through IVF.
- There is a high possibility that the baby born may inherit male infertility.
- Often many genetic diseases of the donor are not detected during screening which may cause the child to inherit specific traits of the random donor.

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- AI in the form of IUI can cause severe cramps and pains.
- Overuse of the same anonymous sperm donors may lead to siblings forming incestuous relations with one another.

Despite the presence of these disadvantages, the advantages of AI significantly outweigh the disadvantages.

IV. HISTORICAL DEVELOPMENT AND GLOBAL PERSPECTIVE

Artificial Insemination is not a new concept as perceived by many. The earliest references to artificial insemination can be traced back to 1322 A.D. during which the Arabs for the first time successfully used AI on mares. History claims that during 1425-1474 A.D. the first attempt at artificial insemination on a woman was done by Henry IV who was also nicknamed "The Impotent".

In 1678 Antoni van Leeuwenhoek and his assistant Johannes Ham described and witnessed Spermatozoa for the first time. Showing a picture of sperm cells of a dog and a human, he further described the spermatozoa as "zaaddiertjes" or "living animalcules in human semen less than a millionth the size of a coarse grain of sand and with thin, undulating transparent tails"[21] and concluded that the tails of the sperm must be operated by meanings, tendons, and joints.

Lazzaro Spallanzani, an Italian physiologist 1784 reported the first artificial insemination in a dog which resulted in the birth of three puppies some 62 days later. Lazzaro is also called the 'Father of Artificial Insemination' and it was he who was the first to report the effects of cooling on human sperm in 1776 when he discovered that sperm cooled by snow became motionless.

John Hunter, a Scottish surgeon is credited with what has been called in medical history as "the founder of scientific surgery" when he for the first time documented and proved the possibility of the application of AI in humans which was done in London in the 1770s. Hunter also wrote the first report on AI in medical literature in 1790. Following in his footsteps, Dr. J Marion Sims helped spread the practice to the United States in 1866. The earliest recorded AI in a medical institution took place at the Jefferson Medical College in Philadelphia by Dr. William Pancoast in 1884[22]. The techniques of AI gained acceptance and popularity in Europe and Russia between 1890-1910.

In 1899 Ilya Ivanovich Ivanoff made the first attempts to develop practical methods for AI and

[21] W. Ombelet and J. Van Robays, Artificial Insemination history: Hurdles and milestones, PMC, (Jan. 18, 2023, 03:14 PM), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4498171/.
[22] Wendy Kramer, A Brief history of Donor Conception, Huffpost, (Jan. 13, 2023, 06:45 PM), https://www.huffpost.com/entry/a-brief-history-of-donor-conception_b_9814184.

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he was the first to develop methods that are now commonly used in human medicine. The work of Ivanoff was taken over by another Russian scientist Milovanov who designed the first artificial vaginas which are very similar to those used today.

The practice of AI in humans gained popularity only after the introduction and availability of sperm donors and the first reports on human artificial insemination originated from Guttmacher (1943), Stoughton (1948), and Kohlberg (1953). The year 1953 holds a milestone as Dr. Jerome K Sherman, an American pioneer in sperm freezing introduced a simple method of preserving human sperm using glycerol and also demonstrated for the first time that frozen sperms were able to fertilize an egg and induce its normal development. As a result of this extensive research, the first successful human pregnancy with frozen spermatozoa was reported in 1953[23]. With these scientifically new developments coming into play the sperm bank industry gained acceptance and popularity and became commercialized in the 1970s.

In the Indian scenario, AI in animals started as early as 1939 and its use at a mass scale was also recommended. With further developments and researches these AI techniques were also introduced into the world of human medicine.

The aforementioned developments led to the need to regulate the process of AI. Some of the major enactments around the world include:

- Human Fertilization and Embryology Act, 1990 of United Kingdom.
- Artificial Insemination and Embryo Protection Act, 1997 of the Republic of Estonia.
- Artificial Insemination Act, 1988 of Canada.
- Congenital Disabilities (Civil Liability) Act, 1976 of United Kingdom.
- The existing legal systems in countries like Sweden, Switzerland, and France, etc. also have certain guidelines and principles which govern AI.

In India, the only existing enactment which envisages AI in humans is the Delhi Artificial Insemination (Human) Act, of 1995. Various attempts have been made by the legislature to bring about umbrella legislation governing ART as a whole. Various draft Bills were introduced to bring about a proper legal framework for surrogacy and other ART methods but these were largely unsuccessful. The Assisted Reproductive Technologies (Regulation) Rules, 2010 introduced by the Indian Council of Medical Research (ICMR) was the only successful attempt in bringing a framework to govern ART in India. These collective efforts led to the enactment

[23] W. Ombelet and J. Van Robays, Artificial Insemination history: Hurdles and milestones, PMC, (Jan. 16, 2023, 05:50 PM), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4498171/.

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of the Assisted Reproductive Technology (Regulation) Act, of 2021.

V. ARTIFICIAL INSEMINATION: THE CHALLENGES

In the Indian scenario, being childless or not having the capacity to procreate is considered a curse, and society views the institution of marriage solely to legalize intercourse and produce offspring. This kind of stigma leads to the couple having various psychological and emotional breakdowns, thereby making it difficult to conceive and peacefully carry forward their marital relationship. It is in such situations that various ART procedures like AI, Surrogacy, IVF, etc. come in handy. However, the use of these techniques is also not appreciated and accepted in society, because it brings about a differentiation between the act of sexual intercourse and the reproduction of a child. Thus, there is a dire need to legalize these procedures so that not only can the couples avail it, but also deal with complications that may arise before, during, or after the procedure.

When a child is conceived with the help of artificial reproduction, there are possibilities that a child would have up to five parents: An egg donor, a sperm donor, a surrogate mother who gestates the foetus, and the couple who raises the child[24]. Therefore, there is an urgent need to determine the status of such children as well as the rights and duties of each of the parties involved in this. However, it can be seen that only 3 of the above-mentioned parties are involved in the process of AI i.e., the sperm donor and the couple. And when we think of bringing forth legislation that governs AI it is necessary to contain provisions regarding not only these three parties but also the physician assisting the procedure and the medical institution in which it is carried out. With technological developments more and more complications are bound to arise and as such the need for this legislation cannot be overlooked.

In the first instance, AI gave rise to the question of whether the wife who partakes in the process commits adultery with the donor. However, through various judicial decisions it can now conclusively be stated that AI does not amount to adultery and neither can the husband or wife claim dissolution of marriage on the ground of no consummation of marriage when the wife has conceived through AI with the consent of the husband. In India, it was seen that AI did not satisfy any of the ingredients of adultery and as such, it would not amount to adultery.

One of the other prominent issues which arose due to AI was whether the child born out of this was legitimate or not. Internationally, various States have enacted legislation granting legitimacy to the child born out of AI during the subsistence of a marriage, with or without the

[24] Ethical Dilemmas and Legal Issues in Case of Reproductive Rights, Shodhganga, (Feb. 01, 2023, 08:15 PM), http://shodhganga.inflibnet.ac.in/bitstream/10603/150188/8/08_chapter_03.pdf.

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consent of the husband. Though the provisions may vary depending on the consent, the courts have always emphasized the need to legitimize the child rather than have him termed as a bastard. In India, the legitimacy of children is governed by the personal provision for legitimation under the Indian legal system. The Hindu Marriage Act, 1955[25] and Special Marriage Act, 1954[26] confer legitimacy on children of void marriages enumerated under those Acts alone and deny legitimacy to children of other void marriages which fall outside the purview of these Acts. An AID child will not come under the provisions enumerated under any of the Acts mentioned above. Hence they will be illegitimate in the absence of any legislation legitimizing AID children. The same is the condition under the existing Muslim law, where parentage is established only on biological parents and the child is born out of wedlock. Legitimacy cannot be conferred on an illegitimate child[27].

In India, the legitimacy of a child born during the subsistence of a valid marriage is presumed under Section 112 of the Indian Evidence Act, of 1872[28]. For all legal and practical purposes, the husband can be regarded as the father of an AID child, unless he proves his non-access and absence of consent to his wife for AID. However, whether these provisions can be extended to children born with AID without the consent of the husband is not certain[29].

Before divulging the need for legislation governing AI, it is pertinent to look into whether reproductive rights have been recognized in India. Reproductive Rights entail rights to make sexual and reproductive decisions, as recognized by the 1994 United Nations International Conference on Population and Development (UNPIN 1994). These rights have been elaborated to include access to contraception, the right to legal and safe abortion, the right to make decisions concerning reproduction free of discrimination, coercion, and violence, the right to not be subject to harmful practices such as coerced bearing of children (including with their spouse); and equal entitlement of LGBTQ persons to the same sexual and reproductive health services as all other groups[30].

Over the last decade, Indian courts have issued several notable decisions recognizing women's

[25] Paras Diwan, Family Law, (10th ed., Allahabad Law Agency 2013).
[26] Ibid
[27] K. R Mythili, Artificial Insemination – Legal Issues, Volume 39, Journal of the Indian Law Institute, pp. 348-358, (1997), https://www.jstor.org/stable/43953280
[28] Section 112 - The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.
[29] Ateeque Khan, Artificial Insemination and Surrogate Parenthood: An Indian Socio-Legal Perspective, Vol. 31, No. 3, Journal of the Indian Law Institute, pp. 394-407, (1989), https://www.jstor.org/stable/4395125
[30] Arijeet Ghosh and Nitika Khaitan, A Womb of One's Own: Privacy and Reproductive Rights, EPW Engage, (Feb. 14, 2023, 05:05 PM), https://www.epw.in/engage/article/womb-ones-own-privacy-and-reproductive-rights

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reproductive rights as part of the "inalienable survival rights" implicitly protected under the fundamental right to life. In cases spanning maternal health, contraception, abortion, and child marriage, Indian courts have adopted robust definitions of "reproductive rights" that reflect human rights standards[31]. In *Devika Biswas* v. *Union of India & Ors.*[32], the Supreme Court unequivocally held that Article 21 includes the "reproductive rights of a person." The Supreme Court recognized reproductive rights as both parts of the right to health as well as an aspect of personal liberty under Article 21 and defined such rights to include the right to "access a range of reproductive health information, goods, facilities, and services to enable individuals to make informed, free, and responsible decisions about their reproductive behaviour[33].

Reproductive rights are not exclusive to women alone but men too can avail of this right. Reproductive rights of women bestow upon them the right to adoption, abortion, and parenthood. It can be argued that the same set of rights are to be given to men as well, as the Constitution of India ensures equality[34] and prohibits discrimination on the ground of sex[35]. Thus it can be conclusively stated that both men and women enjoy reproductive rights in India and as such if they face any obstacles in exercising this right, they should be allowed to benefit from techniques like AI.

VI. WHO IS ENTITLED TO USE ARTIFICIAL INSEMINATION?

No doubt married sexual couples should be given the right to avail of AI. However, problems may arise when same-sex couples or single parents wish to use AI to conceive a child. Reproductive rights are available for both men and women, they should not be denied the opportunity to have a child simply because they are homosexual. This will be violative of their constitutional rights. Now that homosexuality has been recognized[36] in India it won't be long before adoption and such other activities by homosexuals are recognized. In this context, it is these techniques must be available to same-sex couples as well so that they can lead as normal a married life as heterosexual couples. Similar provisions will apply to couples in live-in

[31] Reproductive Rights in Indian Courts, Center for Reproductive Rights, (Feb. 14, 2023, 06:00 PM), https://reproductiverights.org/sites/default/files/documents/Reproductive-Rights-In-Indian-Courts.pdf.
[32] *Devika Biswas* v. *Union of India*, 14th September 2016.
[33] Mahendra Pal Singh, V. N Shukla's Constitution of India, (12th edn., Eastern Book Company, Lucknow 2013)
[34] Article 14 – The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
[35] Article 15 – The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, or place of birth of any of them.
[36] Section 377 - Unnatural offenses - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section.
The Supreme Court of India ruled that the application of Section 377 to consensual homosexual sex between adults was unconstitutional,

relationships or relationships in the linkage.

When it comes to single parents however the situation is different as one person alone has to take care of all necessities to ensure the welfare of the child. With the growing expenses, this may be difficult for one person alone. The Courts have always placed emphasis on the benefit of the child and as such, it cannot be positively said that single parenthood is in the best interest of the child. There should be a mechanism using which single persons can avail of AI only if the Court is satisfied that they have cared for the child and the said child would not become a burden for the State in a future period. Another question that needs to be determined is how many children single parents can be allowed to conceive through AI. The said mechanism should also provide for this.

Some other factors that have to be kept in mind while determining who can avail AI are of as follows:

- **Age:** India is a country where child marriage is still widely practiced in society. The act of marriage alone does not imply that the couple is mature enough to take care of a child and provide for him. The legal age for marriage in India is 18 for girls and 21 for boys. Therefore, no couple below this age should be allowed to conceive through AI as it would prove to be not in the best interest of the child. A maximum age limit considering the mortality rate of the country should be prescribed by the government.

- **Existing Children:** India continues to be the second most populated country in the world. Problems of population explosion can also be seen in different facets of our economy. On account of this, both the Central and State governments have launched programs for family planning, the primary objectives of which were to lower fertility rates and slow population growth as a means to boost economic development. This factor should also be considered when allowing couples or single parents to avail of AI. It is not only the rights of the person that is to be given importance but also the economic development and growth of the State as a whole should also be given significant consideration. Therefore, those couples who at present have children born naturally, adapted, or otherwise should not be allowed to have more children through this mechanism. Exceptions can be granted in situations where the couple only has a single child and is unable to reproduce further or in similar situations keeping in mind the economical and other aspects of the couple to provide for the child.

- **Disability:** Disability can be either mental or physical and this plays a vital role when it comes to taking care of a child. A yardstick should be fixed by the government based on the different types of disabilities and the extent to which the person suffers from such disabilities.

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This should also be done in the best interest of the child.

Other factors like job security, and the physical, emotional, and mental ability of the couple or single parent not only towards the child but also towards the process of AI should also be deliberated.

VII. WHO IS THE PARENT OF THE CHILD?

For all practical purposes, the parents or the couple who opts for AI will be considered as the legal parents of the child so born[37]. At the same time, a question arises as to whether the donor should also be considered a parent and enjoy rights such as custodial rights and visitation rights. If the donor too was considered as a parent, this would confuse the child and will lead to imbalances in the family life. Therefore, until the situation warrants, the identity of the donor should be kept confidential and should not be disclosed to the child. The constant presence of the donor in the life of the child will also lead to psychological complications for the parents as they would not be able to accept the child as their own. Similarly, disclosure of the donor can also lead to hitches when it comes to inheritance and succession. Conflicts may arise between the donor's natural children and the child born by using his sperm. Therefore, it is all the more necessary to keep the identity of the donor concealed from the child. Thus, the donor should not be considered a parent.

Considering the donor as a parent will also lead to conflicts when it comes to the maintenance of the child. In the event the recipient couple divorces or separates, the child would be entitled to claim maintenance from the donor and this would be unfair upon him as he would have to maintain a child that is not his own. Therefore, confidentiality becomes one of the most important aspects of AI.

VIII. RIGHT TO KNOW

Every child has a right to know his origin. In AI it can be seen that the biological father is kept out of the picture as it is necessary to keep the identity of the donor secret. The right to know may be necessitated in certain circumstances like when the child wants to marry or has a need to detect genetic diseases. So, whether the right to know can be given to an AID child and under what circumstances it can be given has to be determined by the legal system. For this purpose, an adopted child cannot be considered at par with an AID child[38]. Certain jobs may require the child to disclose the details of his biological father specifically. The personal laws in India lay

[37] Section 31 of the Assisted Reproductive Technology (Regulation) Act, 2021 is a welcome step in this aspect.
[38] K. R Mythili, Artificial Insemination – Legal Issues, Volume 39, No. 2/4, Journal of the Indian Law Institute, pp. 348-358, (1997), https://www.jstor.org/stable/43953280

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down the degrees of prohibited relationships[39] according to which any person who falls under that degree is not allowed to marry another to the same degree. If the parties to the marriage fall within the degrees of prohibited relationship that marriage would not be considered a valid one[40]. At present, there is no law governing this area and as such, it cannot be decided whether the child should be given the details of the donor in case of medical needs or to prevent him from entering into an incestuous relationship.

Legislation empowering a statutory body with the maintenance of records of the donors of sperm and the children conceived as a result of it is necessary[41]. The authority should provide information on an application being made, either by the child or any person who is related to the child for justifiable reasons[42].

(A) Rights and Duties of Donors

- **Payment of Fees:** The donor is generally required to give the sperms free of charge and not demand a fee for the donation. This is because the aspect of a fee will lead to the commercialization of this. On the other hand, non-payment of any gratification may lead to no availability of people. As such it is suggested that the recipients pay for all the medical expenses and other expenses that the donor is likely to incur rather than pay for the donation.
- **Disclosure of Personal Information:** The donor is required to divulge all such information to the doctor/medical practitioner to access whether or not he is a suitable donor. These details should include his family history including that of any genetic diseases.
- **Medical Examination:** The donor is required to undergo a medical examination as the doctor suggests. The examination may also include counselling to determine his psychological and emotional readiness for the process.
- **Confidentiality:** The donor has a right to be protected against intrusion into his personal life or affairs by direct physical means or by the publication of information. This would lead to a violation of the right to privacy.
- **Age:** The donor should have attained the age of majority.

[39] Section 5 of Hindu Marriage Act, 1955- Conditions for a Hindu Marriage. States that for a valid marriage the parties should not be within the degrees of prohibited relationships.
[40] Ibid.
[41] Section 23 of the Assisted Reproductive Technology (Regulation) Act, 2021 lays down some criteria for this.
[42] Supra Note 34.

- **Liability towards the Child:** The donor has the right to be exempt from all liabilities towards the child which includes parental responsibility, maintenance, the claim of inheritance rights by the child, etc.
- **Spouse of the Donor:** In case the donation is made by a married man it is his spouse who must give to the same.
- **Duty towards the Recipient:** The donor has a duty to surrender all of his rights about the child conceived as a result of the use of his gamete. Further, he should also not make any attempts to gain knowledge about the identity of the recipient or their child.

(B) Duties of the Physician

- **Duty of Care:** Every doctor owes a duty of care toward their patients and a failure to take reasonable care can make the doctors liable.
- **Confirming the Information:** The doctor should confirm that necessary consent has been obtained from the husband of the receiving wife.
- **Examination of Donor:** The doctor should conduct all necessary examinations to determine the suitability of the donor for the recipient. He should also conduct a complete mental and physical examination of the husband, wife, and donor and certify that they have sufficient emotional and mental stability to safeguard their well-being and that of the child.
- **Protection against Liability:** The doctor has the right to be protected against suits for negligence that may arise due to non-disclosure by the donor or some fault by the AI technique used, thereby causing a handicap to the child.
- **Frozen Sperm:** The physician or the doctor should ensure the suitability and worthiness of the frozen sperm taken from the sperm banks before insemination.

(C) Duties of the Medical Institutions

- **Maintenance of Records:** The medical institution should properly maintain all records concerning the donors including specifications that may be required.
- **Confidentiality:** All records and the information contained therein should be kept confidential and should not be disclosed without due process of law.
- **Practitioners:** Only qualified doctors/practitioners should be allowed to conduct the procedure of AI.
- **Safe Equipment:** The equipment used for the procedure should be safe and properly

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sterilized to ensure that infections and other diseases do not spread. They should not be reused as well.

- **Sperm Banks:** The institution should ensure that the sperm banks are well kept and maintained and that faulty sperm are disposed of promptly.

IX. SUGGESTIONS FOR LEGISLATION GOVERNING AI

As the procedure of AI is gaining widespread acknowledgment throughout the country and more and more people are keen to perform the various techniques mentioned under ART, there is a dire need of legislating these procedures specifically and exclusively. In the absence of the same, the enactment of a bill or statute, providing the above-mentioned rules, regulations, and suggestions would legalize the whole procedure thereby helping the parties of AI to not fall into any kind of deception. The bill allowing both A.I.D. and A.I.H. would require:

- Consent of both husband and wife;
- Donor certification by the Registrar of Vital Statistics;
- Performance of the operation by a qualified medical practitioner. The qualification should be mentioned by the Indian Medical Association and the doctors should abide by the Code of Conduct laid down by ICMR[43].
- Complete mental and physical examinations of the husband, wife, and donor; and
- Certification by the physician that the blood of the donor and the recipient is in all respects compatible and suitable and that an erythroblastic child is unlikely to result from such insemination[44].

The doctor will also be required to certify that the couple has sufficient emotional and mental stability to safeguard their well-being and that of the child and that both are otherwise in sound mental condition[45]. The Bill would require the donor to be free from communicable or inheritable diseases and the doctor will have to file the required consents with the State.

The technique of AI should be required to be performed by persons duly authorized and the legislation should prescribe qualifications for the same. No person shall perform AI unless he is currently licensed to practice medicine. The Bill shall also provide that any child born as a result of AI shall be considered to be a naturally conceived legitimate child of the person or

[43] Indian Council of Medical Research – Code of Practice, Ethical Considerations and Legal Issues: Assisted Reproductive Technologies.
[44] Neal Weinstoc, Family Law Quarterly, Vol. 5, No. pp. 369-402, American Bar Association, 3 (1971), https://www.jstor.org/stable/25738990
[45] Ibid.

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couple so consenting to AI. Also, the husband of the woman shall be liable for the support of the child as if he were the natural father.

The optimum conditions under which the semen used for AID has to be maintained are also to be provided. The physician should ensure the psychological and emotional stability of the parties involved in the process. That the couple will be able to provide sufficient financial security for the child should also be considered and established.

The doctor should not conduct the process haphazardly or quickly and should properly understand the couple and their marriage before the request for AI is entertained. He should also disclose to the recipients that success is not guaranteed. Proper counselling and therapy sessions are also to be recommended.

The Statute will require that the consent of the husband and wife to the act be given voluntarily and in the presence of the Doctor to avoid any kind of forgery or other legal conflicts. If it is later discovered that the consent was obtained by coercion or undue influence of a person in a fiduciary relationship the same should be made punishable under the Statute.

Measures should be taken to reduce the possibility of various kinds of liability falling upon the doctor. This is to ensure a better relationship between the parties as fear of being penalized may in the long run affect the result of the treatment as well. It is preferred that the donor shall be over 28 years of age as this will better insure against the possibility of latent hereditary defects.

There should be a registry that contains all records of AID births and their results which will enable doctors to select donors in such a manner that incest will remain a remote possibility. This can also be ensured by limiting the number of inseminations that can be performed from the sperms of a single donor.

Before AIH is performed it is recommended that every effort should be made to correct the condition of infertility so that the couple can conceive naturally. The statute should also provide that institutions that store and distributes semen are not privatized. As far as possible these institutions must be public.

These guidelines would be useful only in cases where AI is done with medical assistance. Provisions should also be made to regulate AI without such medical assistance. The enactment of such legislation will be a welcome step and prove to be most useful for the present scenario in India.

X. CONCLUSION AND LACUNAE IN THE PRESENT LEGISLATION

While the Assisted Reproductive Technology (Regulation) Act, of 2021 is a landmark move,

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there is still a long way to go before AI specifically, and ART, in general, has a proper legal framework. The title of the Act in itself is misleading as it only deals with the supervision and regulation of the ART clinics and the ART banks, prevention of misuse, safe and ethical practice of ART services for addressing the issues of reproductive health, and the like. It largely turns a blind eye towards the process before and after the service is given to the people availing the same. Many factors have to go into consideration while selecting who can avail of these services and who can be a donor. Utmost importance is to be given to the welfare and future of the child and his or her rights. The Act does not include any such things as has been mentioned in this paper. The Act focuses entirely on the cause of infertility and does not divulge further into the physical, emotional, and mental capabilities and capacities of the couple which in the long run is essential. Therefore, it is not only medical doctors who are important to the process, but duly qualified counsellors and therapists as well. The Act also does not give any mention as to whether there are any criteria to determine the physical health of the couple and their ability to provide for the child. We are also left in blind about what steps are taken to ensure that the donors are in prime health. The exclusion of certain categories of people like unmarried yet cohabiting heterosexual couples, widowed or divorced men, etc in both the ART Act and the Surrogacy Act is a glaring defect of the present legislation. Thus, it is limited in its application and significantly reduces the reproductive choices of those excluded[46]. Lastly, it will be more conducive if each method of ART was separately legislated and each had its structures and requirements (both legal, moral, and ethical) laid down conclusively rather than an umbrella legislation governing all as the intrinsic details, individual procedures, equipment requirements and skills required by practitioners for each of these techniques vary largely.

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[46] Assisted Reproductive Technology (Regulation) Act, 2021: A Timely Legislation for a Timeless Problem, Mehaak Jaggi and Vishavajeeth Chaudhary, Bar, and Bench, (Feb. 15, 2023, 07:20 PM), https://www.barandbench.com/columns/assisted-reproductive-technology-act-a-timely-legislation-for-a-timeless-problem

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