



Relativity of the Child Born through Artificial Insemination from the viewpoint of Jurisprudence and Islamic Law

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Abstract

Artificial insemination is one of the wonderful phenomena of the modern world. Considering that this discussion has not been specifically discussed in the jurisprudential subjects of the early jurists, it can be the source of various jurisprudential and legal issues. In the beginning, some of the jurists believed in the absolute prohibition of all forms of artificial insemination and some great authorities as sources of imitation considered wife and husband's artificial insemination unlawful. However, with the recognition of this issue by some other sources of imitation and legality of the relativity of the child born by artificial insemination is subject to numerous theoretical disputes that raised new perspectives and led to reconsideration of the religious statements. Therefore, the present paper seeks to investigate, study further jurisprudential and legal sources to clarify the legal provisions related to such persons and while respecting their rights, it would prevent the presence of unidentified and derelict children in the community. Because by careful consideration of children born by artificial insemination and the legitimacy of these children in all forms of inoculation, it is possible to take a major step towards eliminating discrimination and preventing further problems in the Islamic society.

Keyword: Artificial Insemination, Benefit, Relativity of the Child

1. Introduction

Along with the expansion of human knowledge and the emergence of new achievements in the field of empirical sciences, complex legal issues have also emerged that require their own proper solutions. Imamieh jurisprudence with the principle of "ijtihad" has the ability to confront the new issues and provide the best solutions. "Artificial insemination" is one of the emerging issues that the advancement of medical knowledge as brought it into the field of jurisprudence and law. Since the laws and regulations of our country are rooted in religious law, no lawyer and expert in law knowledge can legalize such new issues without the benefit this huge resource. Accordingly, the jurists should confirm its legal license, clarify

its verdict and then turn it into a legal material. Some sources of imitation and scholars of jurisprudence have considered religious and rational clearance in all kinds of artificial insemination and admitted absolute permission with reference to the principle of tolerance. However, other scholars consider this act contrary to the explicit text of some Quranic verses and believe in absolute prohibition of forms of inoculation. Some jurists have distinguished between the inoculation of husband's sperm with the wife's ovum and sperm of an unknown man and the wife's ovum, whose intercourse is not allowed. However, in the case of relativity of the child derived from artificial insemination, there has not been a separate and consolidated research. Therefore, in this study, through detailed studies of jurisprudential and legal texts, efforts

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are being made to permit or deny the transfer of fetus to the womb of an unknown woman that the mostly the uterus is rented in detail based on various articles and books that have permitted it and many of the Imamieh jurisprudence have given a positive opinion regarding its legitimacy. However, this paper does not seek to discuss the legitimacy or unlawfulness of the use of substitute uterus and assuming the accuracy of this problem in terms of the subject, the real rights of the offspring of this type of pregnancy are discussed. Accordingly, considering the social and religious consequences of this discussion and the necessity of providing appropriate solutions regarding the relativity of such people are discussed.

2. Relationship

In order to enter the main discussion of relativity, first it is necessary to examine some of the concepts. Qorb¹ is Arabic word that means the proximity of two things or persons. Qerabat² means kinship and based on the division of philosophers from relativity affairs, there should be an example of it to specify the meaning of the word. The concept of relationship in Iranian civil law means the proximity and relationship of a person to another, and it is divided into three types.

Based on legitimacy of relationship from the legislator's perspective, relationship between two persons is either through relativity, breast-feeding an infant or marriage. Each type of relationship from the legislator's point of view has different sources and judgments.

Therefore, the threefold relationship is known as 1. Relativity (blood), 2. Fosterage and 3. Marriage that the jurists apply the term "Prohibited by marriage" for marriage relationship.

Although the threefold relationship is considered by law, it does not reveal a kind of relationship that by examining the law on the protection of unmarried women and children, this kind of relationship can be added to the threefold relationship as "contractual relationship". Although this kind of relationship has different and distinct effects compared to the threefold relationship, it needs to be discussed in detail. Therefore, this kind of relationship is discussed in detail in the third discussion of types or relationships.

¹Relation

²Relationship

³Foster

⁴Fetwa

3. Relativity

Jurists define relativity as a relationship that has been defined between two individuals from one to another generation or both created by a third person's generation and consider it as blood relationship¹. Based on the review of the legal literature, most jurists agree on the definition of relativity and provide a single definition that, according to a review of the views of jurists, there was no contrast.

Relativity, which is also known as blood relativity, is closely related to the direct lineage and affinity in the surrounding area.

4. Marriage Relationship

Marriage is a kind of kinship created through matrimony such as the kinship of each of the couples with each other's relatives² and given the marriage relativity, such relationship may be due to permanent or temporary marriage. Marriage relationship does not include all legal effects of relativity and the marriage relationship causing more legal effects in the first grade of each couple is less apparent in other grades of these couples. For example, marriage of each of the couples with another's parents is prohibited. The prohibition of judgment: judgment and testimony of each of the couples for first and second grade relatives is prohibited.

5. Fosterage Relationship

The term "Reza"³ means breast-feeding and refers to feeding a baby by a woman who has another newborn and she is not the natural and relative mother of the child. Both Imamieh jurisprudence and civil law consider fosterage as a kind of relationship and the only legal effect of this relationship is the prohibition of child and the mother's marriage with others' relatives³. In terms of fosterage, the jurists consider its marriage prohibition as "What creates marriage prohibition in relativity applied for the fosterage"⁴.

5.1 The Conditions of Fosterage

Article 1046 stipulates that fosterage is similar to relativity in terms of marriage prohibition provided that

1. Woman's milk is through a legitimate pregnancy,
2. She is fed by breast,
3. The child is fed for at least one

day or 15 times without consuming any other food or milk, 4. The baby is fed before the age of 2 and 5. The amount of milk that the child is fed with is provided with a single husband and wife.

6. Artificial Insemination

The term insemination means pregnancy and artificial insemination involves the insertion of male semen by medical instruments or by any means other than intercourse in the womb that causes a woman to become pregnant.

Artificial insemination is a relatively new phenomenon emerged by modern knowledge. Artificial insemination was initially intended for plant and animal proliferation, but recently it has been used for humans who do not become pregnant for some reason such as impuissance or rapid ejaculation.

The possibility of artificial insemination raises the question that if because of the artificial insemination, the woman becomes pregnant by her husband, the child should be considered as their true child or such insemination is illegitimate because of the lack of intercourse.

Therefore, artificial insemination is discussed from two perspectives:

- From the point of view of the imperative rules as permission or prohibition of insemination.
- From the point of view of positive rules regarding the resultant child.

To address these two views, it is necessary to address the civil law, the viewpoints of the jurists and possibly the division of artificial insemination into artificial insemination from the semen of the husband and artificial insemination from the non-husband's semen.

In the Civil Code of Iran, no regulations are foreseen on the artificial insemination, licensing or prohibition of it and the legitimacy of the child resulting from it. However, according to the comment of the jurisprudents and sources of imitation, in the absence of a law, it is addressed in accordance with article 3 of the civil procedure law as one of the sources of private law.

6.1 Artificial Insemination from the Husband's Semen

It can be said that artificial insemination with husband's sperm is permissible in Iranian law and the child resulting there from is subject to all the privileges of a legitimate child.

In addition, there is no legal prohibition on artificial insemination with husband's sperm. Therefore, the child born of such legal insemination receives all rules and effects.

It may be said that according to article 1158 of the Civil Code, a child born during a marriage is attributed to a husband who has an intercourse with the woman in such a way that the child is considered as the offspring of such intercourse. Therefore, if the sexual relationship between the husband and wife does not exist, the child should not be affiliated to the husband. However, this argument seems to be inappropriate, because the law's reference to intercourse suggests a normal way of creating a fetus and it is unlikely that the legislator merely considers intercourse alone as the legitimate way of the legitimacy of the relativity.

According to the Ayatollah Golpayegani's answer to the question in this regard, "In accordance with the Sharia reasons, the male sperm may be placed in ovum in any way and it belongs to spouses and the inheritance is fixed on both sides"⁵.

Imam Khomeini (RA), regarding the artificial insemination with the sperm of husband, states: "insemination of a male sperm in his wife is allowed, however it is necessary to prevent forbidden actions in this procedure"⁶.

Dr. Emami considers the child born by artificial insemination of the husband's sperm legitimate and believes that the offspring is subject to all rules and effects.

Dr. Katoozian in the book Family Rights Volume 2, in addition to legitimizing the practice of inoculation of the husband's sperm in the wife's womb considers the offspring with legitimate lineage and subject to all rules and effects.

According to Imam Khomeini and Ayatollah Golpayegani's legal opinion³ and according to the jurists it is concluded that the artificial insemination of the husband's semen inside the female womb is permissible without any doubt, which is in accordance with the principle of tolerance.

According to the principle of tolerance, when an act is legitimate and correct, the child resulting from that act is legitimate that is entitled to all legal acts and subject to all rules and effects such as legal legitimacy.

6.2 The Child Born of Artificial Insemination of an Unknown Man

If a married or unmarried woman becomes pregnant with an unknown man, the born child will be subject to one of the following cases.

6.2.1 *The ignorance of Men and Women to Insemination*

Sometimes the artificial insemination between man and woman is uncertain and inadvertent. For example, the woman might think that the sperm belongs to her husband and later it turns out that it was not. Regarding the exemption of ignorance, this act is correct and the child will be subject to all rules and effects such as child of mistaken intercourse.

The late Dr. Emami also stipulates that: “The ruling of such a child is based on child of mistaken intercourse and the child belongs to the man and woman who own the semen.

- Artificial insemination with an unknown man’s sperm with the knowledge of

Whenever the husband and wife are such aware of this insemination, whether the male and the female known each other or not, the child of such act is subject to controversy among the jurists.

Some jurists consider such a child as an illegitimate child and argue that what causes the child to be given to the parent is the marriage relationship between them. Therefore, in any case that this main factor does not exist, whether the pregnancy is an illegitimate close relationship (adultery) or other physical contacts (such as artificial insemination), the child is considered illegitimate and vice versa, wherever marital relationship exists that child is legitimate⁷.

The late Ayatollah Golpayegani (RA) also does not allow the artificial insemination between unmarried man and woman with this statement: “It is not permissible to put the male sperm into the womb of a woman with or without husband”.

Some jurists, using the application of Article 864 of the Civil Code and also the appearance of Article 1167, declare that a child born of adultery does not belong to the parents and Article 884 of the Civil Code, which only deprives illegitimate child from inheritance states that every natural child is lawful unless the law stipulates the contradiction and the case where the law does not recognize is the illegitimate child that the child is not affiliated to the one who committed adultery. In the rest of cases, it belongs to the father and mother and the way the sperm enters the womb_ naturally or artificially_ does not matter.

Some jurists have affirmed the issue, referred to lesbianism and with quotation from the fatwa of

jurisprudents such as Sheikh Tusi, Mohaghegh and Sahib Maslak and said “Whenever an unknown man’s sperm is implanted into the womb of the woman and a child emerges, this child belongs to the owner of the ovum”⁸.

In this regard, Dr. Shahidi says: “A child born by artificial insemination will belong to the owner of the ovum because on the one hand the natural relativity is realized and on the other hand the legislator does not require any other characteristic, such as sexual intercourse between men and women to create legitimate relativity. This legal ruling is not only about the existence of a marriage relationship between the two sides of the relationship but also it is likely to be told that it is applied if the sides are not married and the child will have a legal relationship with them. In this case, realization of the natural relativity is certain”⁹.

Imam Khomeini (Rh) on artificial insemination with an unknown man’s sperm says “But if a woman has the knowledge and intention that the sperm of an unknown man is inseminated in her, such pregnancy is prohibited even if it is uncertain.

From the study of the opinions and fatwas of jurisprudents and jurists, it is concluded that most of them tend to consider the relativity of children from artificial insemination as legitimate”¹⁰. In accordance with the provision of Article 3 of the Civil Procedure Code based on referring to the texts of jurisprudence in the absence of the law since Imam Khomeini’s fatwas are essentially a criterion of action, Imam Khomeini has considered this child with legitimate relativity and has only been precautious about inheritance”^{11,12,13}.

The study of the opinions and fatwas of jurists, jurisprudents and authorities indicates that the tendency of the majority of them is to recognize children from artificial insemination legitimate even if such inoculation was carried out between those who are not married. The owners of this view believe that based on social interest, in Iranian law, in the absence of law, it is necessary to refer to credible sources fatwas that the majority of contemporary jurisprudents, especially Imam (PBUH), which is accepted by the majority of the Iranian people, have accepted it”^{15,16}.

Nevertheless, this fatwa has revealed the way of judicial comment. As discussed before, artificial insemination between husband and wife is eligible and the child has religious and legal relativity. Artificial insemination between unrelated man and woman who are ignorant

of this issue results in child of mistaken intercourse. However, insemination between unrelated man and woman intentionally is wrong and it is necessary to be cautious in this regard. However, in case of inheritance, their solutions are moderate. The child is neither deprived nor inherited the full property. Heirs should reconcile with him and because of the novelty of the issue, no comment is provided in the work of the jurists of the past in this regard.

7. Conclusion

According to the analyses and the reflection in the works of the great jurists of Islam and the scholars of Islamic law, regarding artificial insemination and the state of relativity, there are significant differences among them. Some believe in the absolute license. However, other scholars consider this act contrary to the explicit text of some Quranic verses and believe in absolute prohibition of forms of inoculation. Some jurists have distinguished between the inoculation of husband's sperm with the wife's ovum and sperm of an unknown man and the wife's ovum, whose intercourse is not allowed. In the first case, some believe in licensing it conditional on full compliance with the religious principles, avoiding prohibited acts and observance of hardship. In the latter case, most of the authorities and experts have ruled about lack of licensing or observing precaution in abandoning it. Nevertheless, by examining different perspectives and opinions, it seems that the argumentation of the proponents of licensing in all forms artificial insemination as well as their argument to refute the arguments of the opponents is stronger and more justified. This view can greatly help the legislator in correcting and drafting the relevant laws. Hence, the children of such procedure will have legal and religious relativity.

In addition, considering the social interest of such children, this view seems to be defensible because by believing equal rights with other legal children and non-discrimination between them, future problems will be avoided. Accordingly, those who have been born to solve the problems of some other people of the Islamic community, which are mostly infertile couples, should not be subject to hardship according to the wisdom and reason and should enjoy prosperity in their lives along with other citizens of the Islamic system.

Therefore, in the case of relativity, the holy legislator followed the custom. According to the rule, his father is the owner of the sperm and his mother is the owner of the ovum. This issue is consistent with the results of genetic knowledge and the opinion of the specialists in the field of embryology that following the relativity, all rules based of the legal and religious relativity such as the provisions of the alimony of relatives and other rights and duties are applicable. Regarding the relationship of such child with the husband of the pregnant woman, if the child can be related to the mentioned based on the principle of bed, the child will be affiliated to him. Otherwise, the child will join the sperm donor, the woman's husband would not have any genetic and blood relationship with the child, and there will be no relativity between them.

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