



Artificial Insemination and Surrogate Motherhood

A Halakhic Perspective

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The United Nations Universal Declaration of Human Rights declares a basic right of every person to found a family.¹ In the Jewish tradition, this and similar values are primarily expressed not in terms of "rights," but in terms of obligation, duty, and commandment. The very obligation to perform *mitzvot* is understood not as an irksome burden, but as a sacred blessing for which we are grateful to God "who has sanctified us with His commandments."² It is therefore not surprising that in halakhic discussions of the wishes of men and women to procreate, arguments involving personal interest and arguments relating to the commandment to "be fruitful and multiply" combine and overlap.³

Our accepted framework for procreation is the marriage bond, built upon the expectation of and commitment to exclusivity in sex-

ual relations and in reproduction. The marriage bond today thus entails a restriction upon the freedom of each of the partners to procreate. But when one of the marriage partners is unable to procreate, the other is barred from exercising the right to fulfill the duty of bringing a child into the world.

Artificial insemination creates the technical possibility for the fertile partner, without violating accepted norms of sexual fidelity. There is of course a certain asymmetry between the man and the woman: a fertile woman only requires a sperm donor, while the fertile man needs, not only the donation of a healthy ovum *per se*, but also a "surrogate mother," who will carry the developing fetus in her womb and give birth to it. Under certain circumstances newer technologies facilitate the implanting of the fetus in the wife's womb, in which case all that is required is indeed the donation of an ovum.

Despite differences of method, the question remains whether we should approve of these departures from the conventional pattern of parenthood. The predominant tendency among those who have written about this matter from a halakhic viewpoint is to forbid both artificial insemination and surrogacy. Regarding the latter, the rejection is almost universal; regarding donor artificial

¹Article 16, adopted December 10, 1948.

²David Hartman provides an illuminating exposition of this consciousness in his *Joy and Responsibility* (Jerusalem: Ben-Zvi Posner & Shalom Hartman Inst., 1978), pp. 15-37; seen in this light, the dichotomy between duties and rights is not as sharp as some believe (e.g., Haim Cohn, *Human Rights in Jewish Law* [New York: KTAV, 1984], pp. 18-19.)

³For the talmudic discussion, see *Yevamot* 65b. For a comprehensive history of this verse from Genesis in Jewish and Christian interpretation, see Jeremy Cohn, *Be Fertile and Increase* (Indianapolis, 1989).

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insemination, opinions vary, and there are those who allow it under certain conditions.⁴

The price of these prohibitions is not only the limitation of freedom, but also an emphasis upon and strengthening of the suffering of childless couples. We should, therefore, examine closely the fundamental values underlying this position, if only to appreciate why we might demand this sacrifice.

Among modern fertility technologies, the oldest and simplest is that of artificial insemination. At times it is used to overcome sexual dysfunction or to facilitate conception with the sperm of the husband. In most cases, however, it is used to solve the difficulty of childless couples when the problem has specifically been diagnosed as the husband's infertility. This solution has been practiced in various countries for more than half a century. It is possible to use the sperm of the "donor" for a particular woman or—as is more widely practiced—to use sperm from a "sperm bank" that stores donations not pre-designated and thereby protects the anonymity of the donor.

In the framework of a halakhic discussion, the main problem is the pedigree of the child. The dominant halakhic position champions "biological parentage": the exclusive father is the man from whose sperm the woman was fertilized. The result is that one man's wife

can bear another man's child—a phenomenon that is, of course, opposed in the practice of Jews from time immemorial. Moreover, if the sperm donor's paternity is kept confidential, incest becomes a danger. A son and daughter could be born from the same donor; they could be raised, in all innocence, in separate homes, meet as strangers and, although brother and sister, end up marrying. Further, and more seriously, it might seem that the offspring of a married woman, born to her from another man's sperm, could be considered illegitimate, a *mamzer*, and hence be barred from marrying within the community.

Both of these problems appear in the words of a contemporary leading halakhic judge, Rabbi Eliezer Waldenberg of Jerusalem, who concluded that this practice was forbidden. Concerning the loss of control over the pedigree of those born of artificial insemination, he writes:

Our sages forbid bringing about the birth of children such that one does not know who their father is, both because of the very fact that it is obligatory that the seed of Israel know their pedigree, for otherwise the *Shekhina* [the Divine Presence] does not rest upon them, and because of the grievous possibility that at times this might lead to a situation where a brother marries his paternal half-sister....

And how much moreso are we to beware of this in the case of artificial insemination....According to the estimate, one fertile man alone can under certain circumstances sire four hundred children a week, or twenty thousand children over the course of a year! In such an astonishing situation, do we not fear that one might very likely come to marry his paternal sister? Then the earth would be filled, Heaven forbid, with lewdness.⁵

Such a wide dissemination of the sperm cells of a single man might well arouse genetic and medical concerns about the mar-

⁴A selected bibliography: The halakhic data themselves are well-surveyed and documented in a number of places. Regarding artificial insemination, see, e.g.,: Abraham Steinberg, *Sefer Asya*, 4, 1989, pp. 121ff.; M. Drori, "Artificial Insemination—Is it Adultery?", in Nahum Rakover (ed.) *Jewish Law and Current Legal Problems* (Jerusalem: Jewish Legal Heritage Society, 1984), pp. 203–213. For a general legal survey and analysis accompanied by bibliographic references, see Pinhas Schiffman, *Dinei HaMishpachah b'Yisra'el: Vol. II*, (Jerusalem: Hebrew U, 1989), pp. 101–170 [hereinafter SCHIFFMAN] and Noam Zohar, "Ad Kama Kenuya Ha'isha Leva'ala," *Sh'demot*, 110, 1989, pp. 91–99. An analysis of the very same positions discussed below, on rather different (and to my mind complementary) lines, was offered by Daniel J. Lasker, "Kabbalah, Halakhah, and Modern Medicine: The Case of Artificial Insemination," *Modern Judaism*, 8(1), 1988, pp. 1–14.

⁵Tzitz Eliezer, IX. 51. iv. ii. 1: pp. 246–247.

riage of close relatives. Accordingly, it is a generally accepted practice to limit the number of inseminations performed from the sperm of any one donor. But according to Rabbi Waldenberg, the fear of incest is particularly severe, and requires that one take steps even against a possibility the probability of which is slight. This degree of caution regarding matters of marriage and "pedigree" is an accepted norm in the world of Halakha, as expressed in the statement: "[T]hey set up a higher standard in matters of pedigree." But were this the only problem, one could suggest a solution based upon a further limitation—namely, that only one woman be fertilized from any one donor. Alternatively, one might decide not to conceal the identity of the donor and thus exclude the danger of marriage between close relatives resulting from misinformation.

But a clear and open solution of the problem of paternity only exacerbates the more difficult problem inherent in this situation, in which one man's wife bears another man's child. Preventing these births is one of the main reasons posited for the adultery prohibition. In Leviticus 18:20, one finds: "Do not have carnal relations with (literally: 'lie with...for seed') your neighbor's wife and defile yourself with her." Nachmanides explains the use of "seed" as follows: "It may be that the Torah says 'for seed,' to indicate the reason for the prohibition, for [otherwise] it would not be known of whom the seed is."

Rabbi Waldenberg cites the remarks of those teachers who treat a woman who had received artificial insemination as an adulteress, and therefore concludes that the taint of illegitimacy attached itself to the child. Unlike more extreme writers (whose opinions he quotes with sympathy), Rabbi Waldenberg

admits that the letter of the law runs to the contrary, because in the case of artificial insemination there is no prohibited sexual contact. Yet he clearly believes that this formal exclusion does not reflect the relevant value judgment:

The very essence of this matter—namely, the placing in the womb of a married woman the seed another man—is a great abomination of the tent of Jacob, and there is no greater profanation of the family than this in the dwelling places of Israel. This destroys all the sublime concepts of purity and holiness of Jewish family life, for which our people has been so noted since it became a nation.⁶

No considerations of "compassion" come into place here, because in R. Waldenberg's opinion this child will not bring true happiness to the home. On the contrary, its development will be a source of division and mental suffering. In his view:

For in the final analysis, this will bring about the destruction of the family, in such a way that they will cry out in their physical and spiritual pains as one, and none can save them.⁷

The husband, it is assumed, adheres to an exclusively biological concept of parenthood and thus increasingly resents the growth of a stranger's child within his own wife's body. Even if, as an act of love toward his wife, he consented to the fertilization (pictured here as the unilateral initiative of the wife), this is apparently insufficient to overcome the cloud over his relations with the child. In the final analysis, the wife herself will suffer from her husband's estrangement. The sense of compassion, which brings itself to seek some

⁶*Ibid.*, Chap. 5, sec. 1, p. 251

⁷For a similar argument, attacking AID as "self-contradictory," see Ruth Chadwick, *Ethics, Reproduction and Genetic Control* (Kent: Croom Helm, 1987), p. 36. The psychological assessment expressed here turns out, however, to be empirically quite dubious; see Robert Snowden et al., *Artificial Reproduction: A Social Investigation* (London: Allen & Unwin, 1983).

kind of leniency, is exposed in this argument as utterly futile. R. Waldenberg summarizes his position in the following statement:

It is forbidden to fertilize a married woman with the seed of another man by means of artificial insemination, and this matter is a great abomination and very evil. And there are those who tend toward the view that a married woman who does so is also forbidden to her husband.

Let us turn to the opposing position, notably of the late Rabbi Moses Feinstein, which allows artificial insemination. His legal arguments explicitly take heed of the shared distress of the childless couple. There is no problem here of adultery or of illegitimacy, for there is no suggestion of forbidden intercourse. Unlike R. Waldenberg, R. Feinstein does not see a gap between the letter of the law and a deeper prohibition in principle. The determinative question is simply whether artificial insemination constitutes sexual relations with a third party. Like R. Waldenberg, R. Feinstein views the donor and not the woman's husband as the child's father⁸; yet he believes this has nothing to do with adultery or indeed with sexual impropriety. He quotes the contrary views of Menachem Meshiv: "Heaven forbid that a daughter of Israel should abandon herself to the artificial harlotry invented by the physicians." The artificial character of this "harlotry" mitigates against applying the severest sanctions (*i.e.*, the woman being forbidden to her husband and the tainting of the child with the label of illegitimacy), but does not suffice

to prevent branching the activity itself as sexually improper. It is clear to R. Feinstein however, that this act has nothing whatever to do with "harlotry." The halakhic controversy turns, in sum, on the implications of treating the artificially inseminated child as the offspring of the sperm's donor. The problem is not imposing sanctions for adultery, but the danger of incest between a half-brother and sister.

How should we understand this dispute? Is the position articulated by R. Waldenberg merely a conservative stance against technological innovation? Does he not share in the compassionate feelings that motivate R. Feinstein to take a more lenient path? One familiar with the writings of R. Waldenberg could not fault him with either of these two motivations. We need, therefore, a deeper explanation of his stance.

Rather, the argument appears to center on the question of the degree of "ownership" (*kinyan*) implicated by the marriage bond. In R. Waldenberg's eyes, the "acquisition" of a woman by her husband not only implies exclusive rights to sexual intimacy, but also (and perhaps even more) his exclusive right to control the activation of her reproductive capacity.⁹ If the boundaries of this control

⁸The concept of *kinyan* (literally: "acquisition") is the halakhic term used for defining the obligations entailed in marriage. This of course does not refer to property acquisition in the raw material sense. Indeed, Jewish law served as part of the basis for the ruling of the Israeli court which convicted a man of rape, rejecting the claim that the victim was his wife. Unlike precedents from English law, Jewish law determines that the marriage bond does not give the husband the right to intercourse with his wife against her will (see SCHIFFMAN, pp. 101–108). The *kinyan* entailed by marriage is limited in scope to certain specific things alone; only regarding those matters is the wife bound to her husband. I have attempted elsewhere to characterize the difference in status between the sexes reflected in the first chapter of the Mishnaic tractate of *Kiddushin* ("a wife is acquired..."), and even to allude to some possible ways of rectifying this situation. See Noam Zohar, "What is [the Difference] between Man and Woman: Editing and Values in Mishnah Kiddushin Chapter 1" (in Hebrew), *Et la'Asot*, 1, 1988, pp. 103–112.

⁹R. Feinstein formally solves the problem of possible incest by adopting the Halakha's position on the paternity of a non-Jewish man toward his offspring from a Jewish woman. Technically, the child of a Jewish woman and a non-Jewish man is fatherless. This being so, there is no problem of consanguinity with other children from the seed of the same father: none of them are his sons or daughters, and therefore they are not brothers or sisters. Thus the way is open to a nonbiological definition of parenthood, one determined not by the genetic link, but by legal norms.

are breached, this violates the value embodied in the prohibition of adultery with a "married woman."

According to this view, artificial insemination from the sperm of a stranger is a violation of the very essence of the marriage bond. It would be comparable to the proposal within a conventional marriage that, if one of the partners were to lose his or her ability to function sexually, the other party would be allowed to seek his or her satisfaction with another partner. It is arguably not less a violation for a husband to remain married to his wife and to consent to her impregnation by the seed of another man.

Were R. Feinstein, on the other hand, to have seen insemination from donor sperm as a fundamental breach of the marriage bond, he would surely not have allowed it under any circumstances. First and foremost, he believes that the marital "acquisition" only concerns sexual fidelity, and that "this [artificial insemination] does not pertain to harlotry at all," the only problem being that of the possible marriage of close relatives.

This basic difference in the understanding of the very essence of the marriage bond is clearly expressed in the very different reasons given by each one of these teachers for their statements—which *prima facie* seem very similar—that a woman has no right to receive artificial insemination without her husband's consent. R. Waldenberg played a central role in formulating the ruling of the Jerusalem Rabbinic Court, which imposed severe sanctions upon a wife after it was determined that she had been artificially inseminated without her husband's consent. He wrote there:

The woman, in agreeing to the introduction of the sperm of another man, performed a trespass both

against God and her husband. She is therefore required to receive a divorce writ from her husband, and is not allowed to make any financial conditions for the granting of the divorce.

The phrase "she performed a trespass against God and her husband," is taken from the biblical description of the unfaithful wife (Numbers 5:12), and is intended to characterize her act as one of infidelity and adultery. The vice does not merely lie in the absence of agreement on the part of the husband (which, even if it were given, would be worthless), but in the "trespass against God." The performance of the action without the husband's consent merely adds another shocking dimension to her transgression:

I have interpreted and explained this great abomination, and the severe prohibitions which are entailed in the performance of artificial insemination. How much more so that a woman, who goes and performs such an abomination without her husband's knowledge, [has performed] a sin too great to be born. She has done twice as great a sin—she has trespassed against God, and trespassed against her husband; therefore her judgment is to be banned, "a fugitive and a wanderer" from her husband—and to be divorced from him with a divorce writ, without *ketuva* [i.e., the customary monetary settlement].

The double allusion to Genesis is clearly intended to place upon the forehead of this woman the mark of Cain, "a fugitive and a wanderer."

In contrast, R. Feinstein regards the wife as (only) sexually bound to her husband. This bond is not breached by her entering pregnancy without his permission *per se*, but only by the restriction of his opportunities for sexual satisfaction in light of her pregnancy. Thus, had the two sides involved agreed upon separation for a period of a year (e.g., in order to earn a living, an arrangement that is permissible by mutual agreement), the husband could no longer object to his wife's pregnancy

(by artificial insemination) during the course of that year. The wife's fertility *per se* is not bound to the husband's person in any way whatsoever.

We can now summarize the dispute as an issue of the wife's reproductive autonomy. The halakhic marriage connection is asymmetrical in terms of the bond—that is, the restriction of autonomy—imposed upon each of the partners. The central question is whether the marriage bond entails a commitment not only of sexual fidelity, but of exclusive access to reproductive capacities.

An analogous problem arises in considering whether a wife should have exclusive control over the reproductive potential of her husband's sperm; this is the problem of surrogate motherhood. If the wife of a fertile man is unable to bear him children, is there any reason to limit his right to procreate his seed with another woman? The basis for such a restriction seems weak. Judaism was not originally monogamous, and even today there is no concern with illegitimacy if a married man procreates children with another woman (provided that she is not married to another man). Furthermore, there is no parallel to the concern about the multiplication of fantastic numbers of children from one "donor."

In practice, however, we find widespread Jewish opposition to surrogacy arrangements.¹⁰ This may be seen as a sign of a

deeper tendency towards equality, expressing an internalization of the values implicit in the monogamous revolution of Rabbenu Gershom. The man, no less than the woman, is restricted to his spouse alone with regard to his opportunities for realizing his fertility.

On another level, it might be claimed that the relationships of a surrogate mother to her offspring cannot be compared to that of sperm donor to his progeny. In artificial insemination from a donor, a basic consensus confirms biological parenthood; the resulting difficulties are overcome—according to the lenient opinions—by invoking legal norms that sever the natural biological relationship. However, no legal ruse can bypass the physical and emotional relationship involved in pregnancy and birth. It is no coincidence that the closest biblical model to surrogate arrangements deal with a servantwoman intended to give birth on behalf of her mistress. The denial of cutting off a woman's relationship to the fruit of the womb is seemingly understood as so fundamental an injury to her status as a free person, that its validity is likely to be denied even if she agreed to this in a written contract.

However, if we allow artificial insemination from a donor in cases of male infertility, then we must put our minds to the parallel dilemma of a couple which is childless due to the woman's infertility. If bearing children is not only a right but also a duty, the implication of prohibiting a surrogate arrangement is forcing men into the tragic choice of foregoing children and failing to perform the

¹⁰Regarding surrogacy, the main halakhic discussions I have found revolve not around the problem of its permissibility *per se*, but upon the determination of maternity, *i.e.*, which woman is considered the mother—the egg donor or the one who bears the child? One can only indirectly derive from this conclusions regarding the legitimacy of surrogacy arrangements: if the one who gives birth is considered the "true" mother of the child, it may be difficult to accept forced separation (even on the basis of prior agreement) between her and the child of her womb. See *Tehumin*, 5, 1984, pp. 248–274; *ibid.*, 7, 1986, pp. 266–270. For an intense opposition to surrogacy—albeit lacking clearly defined reasons—see Moshe Tendler, "Infertility Manage-

ment: Cure or Ill," *Sh'ma*, 17(334), 1987 (May 15), pp. 109–110. For an interesting study of the substance of the issue, see D.H. Gordis, "Give Me Progeny...": Jewish Ethics and the Economics of Surrogate Motherhood," *University of Judaism Papers*, VIII(1), 1988; cf. American Jewish Congress: Commission on Law and Social Action, Report: Surrogate Parenting Agreements (March 1989).

mitzva, on the one hand, and divorce, on the other. Moreover, forbidding or voiding surrogacy contracts flouts not only the autonomy of the married man, but also the autonomy of the woman contracting to bear the child.¹¹

Hopefully, this brief exercise has demonstrated how halakhic positions can be prop-

erly appreciated when their arguments are analyzed through a philosophical exposition of their basic concepts. These concepts include both those collected in terms used explicitly (such as "pedigree" or "harlotry") and those unexpressed notions (such as "autonomy") found to lie at the heart of the rabbis' arguments.¹²

¹¹This approach was recently championed forcefully by C. Shalev, *Birth Power* (New Haven: Yale University Press, 1989).