

## **Philosophical Ruminations about Embryo Experimentation with Reference to Reproductive Technologies in Jewish “Halakhah”**

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### **Abstract**

The use of modern medical technologies and interventions involves ethical and legal dilemmas which are yet to be solved. For the religious Jews the answer lies in Halakhah.

The objective of this paper is to unscramble the difficult conundrum possessed by the halakhalic standing concerning the use of human embryonic cell for research. It also aims to take contemporary ethical issues arising from the use of technologies and medical advances made in human reproduction and study them from an abstract philosophical perspective. Instead of providing any Jewish practical ruling the paper have tried to incite, stimulate and encourage philosophical thoughts about the issue through the intensive understanding of traditional Jewish thoughts.

In this paper, an objective as well as a deep-rooted study has been adopted about the use of human embryos for research and the Jewish adoption of assisted reproductive technologies through the prism of the knowledge of Halakhah, Torah and Talmud.

The paper finds that the embryo research sits at the crossroads of many halakhalic issues. Judaism adopts the belief that God has created man in his own image. The Jews not being dogmatic decipher “the image” of the creator as the ability to discern and reason. It follows that Judaism does not subscribe to the notion that tampering with nature is prohibited. To the Jews the mitzvah for procreation is so great that they are open to reason and adopt newer medical advancement in procreation. The Jewish laws are not only for engagement in intellectual exercise or academic pursuit but subscribe to a higher order of moral conduct. The Jewish approach is not situational but also casuistic in resolving conflicting medical issues.

**Keywords:** embryo experimentation, Judaism, human assisted reproductive technologies, philosophical considerations, theology, Halakhah

## Introduction

Embryo Experimentation involves a cluster of reproductive technologies. Advances in reproductive technologies have spawned a very polarised public debate concerning these technologies. Religion has a considerable influence over the public's attitudes towards reproductive technologies. The views of active and influential religious adherents have a prominent role to play in public policy decision making procedure about this research. Looking back on the early works concerning Assisted Reproductive Technologies, henceforth ARTs we would be struck by how far our reactions to these technologies have come since the decades leading to the birth of the first test tube baby in the year 1978. IVF is no longer shrouded in the “doom-laden scenarios” as was represented in the texts concerning reproductive technology of the 1920s and 1930s. Aldous Huxley had anticipated the impending “Brave New World” resulting from the development of more precise methods and techniques of Eugenic intervention and reproductive technologies of human species.

These technologies have been the subject of extensive normative debates in Bioethics, Philosophy and Religion. This paper seeks to explain our preliminary reflections on how religious communities respond to and assess the ethics of reproductive technologies. Arguably, the advancement of science in the human reproduction especially the ARTs are to be met with resistance from religion. Religious doctrines are likely to collide with the rapidly advancing capability for science to make such interventions in human reproductions. If religious belief is supposed to be the counter factor in the path of the development of ARTs, the crucial ingredient for acceptance of such scientific technologies are prototypically supposed to be scientific literacy—that is familiarity and proper understanding of the critical facts concerning these technologies. So, proper medical awareness and scientific knowledge would put to rest the opposition being met out to these medical technologies. This paper aims to make a critical review of the Jewish insight into medical development concerning reproductive technologies. The paper also takes up the issue about the status of incest or mamzerim in the Jewish philosophical discussion resulting due to the artificial insemination of a woman by a donor other than that of her husband. The matter at stake here is that the application of artificial insemination by donor (AID) leads to a whole range of problems in the areas of family and succession law due to the fact that the origination of an AID child might not be a matter of public knowledge. At the same time AID may be the only hope for an infertility problem. This paper is divided into three sections. In the first section we would explore the Jewish view on Medical Ethics. The second section would provide an insight into the moral status of “embryo” in the Jewish philosophy. In the third section we will explore the Jewish take on the modern reproductive technologies discussing whether reproductive technologies with the use of embryo finds acceptance in Jewish religion. It also tries to find the halakhic answer to the question whether or not reproductive technologies constitute adultery.

## Jewish Religion and its Ideas about Medical Ethics

Judaism is divided into three main branches: “Orthodox”, “Conservative” and “Reformed”. The Orthodox Judaism maintains that they are more religious in comparison to the Conservative and Reformed. Orthodox Judaism claims to follow the traditional Jewish religion unlike the Conservative and Reformed. The basic tenets of Judaism are the revealed words of God which have been passed down at Mount Sinai and witnessed by large number of people. These divine revelations were referred to as “*Torah*”. The “*Torah*” consists of the classical “written” and “oral” rules. The written “*Torah*” comprised of the five books of

Moses and the oral *Torah*. The oral “*Torah*” is the “*Talmud*” which amounts to the divine revelations given on Mount Sinai to the Jews as discussed by Jewish sages. The oral *Torah* is cumbersome and is subject to constant expansion made by religious scholars, rabbis in the form of legal views and counter-opinions regarding the interpretation of the *Torah*. So the *Talmud* comprises laws or rules subject to commentary, clarification and expansion of the written *Torah* comprising of the agreements and interpretations or disagreement of views and opinions of the religious scholars, rabbis down through the centuries. The Orthodox Jews call “*Halakhah*”<sup>1</sup> the whole legal system of Judaism encompassing all the laws, practices and observances of Judaism. So the “*Halakhah*” finds its source in the written law, comprising of both positive and negative commandments of Sinaitic origin as included in the books of the Pentateuch. The other source includes the oral law comprising of the detailed explanations and elucidation transmitted in its entirety at Sinai, and is also comprised of rabbinical decrees, customs with both positive and negative enactments, and so forth. The law that has Sinaitic origination is called *de-oryata*, which is different from laws of rabbinical source, called *de-rabbanam*.

Jewish Medical Ethics is founded upon the Sinaic revelation. Some of the fundamental principles the Jewish medical ethics are based upon are:

Firstly, Judaism is grounded upon obligations, duties and commitments. It relies on commandments, rather than on rights and pure hedonism. Beneficence and altruism are more important than mere non-maleficence.

Secondly, Judaism does not adopt any single precept. It advocates the middle path or golden means.

Thirdly, within Jewish sources, progeny is considered as precious. Judaism understands propagation not only as a blessing, but a commandment. The Jewish principles stresses in the supremacy of life. However when there is any conflicting situation Judaism in general prefers the casuistic approach to resolve halakhik questions. It believes in examining each situation according to individual circumstances and develops response according to details and characteristics of situation.

In fact, Judaism recognises absolutism with respect to eternity of *Torah*. At the same time for Judaism there is no definitive value that may be absolute so that it takes precedence in every circumstance.

Jewish laws are not only for engagement in intellectual exercise or academic analysis. They subscribe to a higher order of moral conduct, obligating the individual and society to act accordingly. They highly value the principle of autonomy as a concept of respect for others. However, autonomous decisions which are not in accordance with the required moral standards are overridden by higher moral values, as determined by Halakhah, which overrules the life of each individual, inclusive of those of patient and physician. Where conflicting values arise, individual action is to be governed by the required normative moral conduct (Steinberg, 1998, pp. 624–645).

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<sup>1</sup> “Halakhah” is usually translated as Jewish Law, although a literal and appropriate translation means “the path that one walks”. The word is derived from the Hebrew root Hei-Lamed-Kaf, meaning to go or to walk. (Cohn-Sherbok, 2005) and (Jastrow, 1903)

## **Jewish Standing on Embryo's "Sanctity of Life"**

Reviewing the Jewish standpoint about experimentation with embryo for procreative or therapeutic ends, the question that might gain significance is whether embryos are susceptible to the sanctity of life as preordained to any sentient human being. This discussion will be restricted to the Halakhah issues related to the use of embryo for research. The discussion concerns the status of pre-implantation embryos or pre-embryo and their use for research.

Some rabbis may question whether pre-embryo be upgraded to be foetus in-utero. If that be so, then the discussion of the status of pre-embryo would be within the parameter of the abortion debate. Accordingly, the use of embryo research would be tantamount to killing, if abortion is held as akin to homicide. Judaism has always glorified and exalted the value of "life" and placed it at the highest echelon. In fact Torah is not only a Jewish philosophical system but is called a "tree of life" (Unterman, 1971, p. 125) (Proverbs 3:17–18). Judaism celebrates "life" and the loss of a single life tantamount to the loss of whole world; equally, saving one life would lead to saving the world. If abortion is debarred on the charge of it being life-annihilating, perhaps by extension human embryo research would be disallowed. Those against advocating abortion would justify the prohibition of abortion or embryo research on the grounds of it being destruction of future life. Thus, performing abortion amounts to homicide. To this charge of murder raised against abortion some Jewish scholars quote the Exodus 21:22-23 (King James Version) which reads: "If men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow: he shall be surely punished, according as the woman's husband will lay upon him; and he shall pay as the judge determine. And if any mischief follows, then thou shalt give life for life." (Norton, 2006) As Shalom Paul (Paul, 1970, p. 71) asserts, the loss of embryo is entailed by pecuniary settlement. One thing is clear both from the critical and historical dogmatic aspects: abortion is not homicide; the embryos death does not carry the death penalty, rather the mother's death entails the giving "life for life". So the Jewish faith agrees on the foetus having no independent life; it is under the parent custody, otherwise its loss or damage would not have led to a claim for monetary compensation.

There are again pro-life forces that are against the ethical permissibility of the taking of the embryo at its earliest stage for it involves killing a future human life. Charles Krauthammer (Krauthammer, 2001, p. 201) reacts by stating that the pro-life argument fails. The research using human embryos is either produced from in-vitro fertilisation or from aborted foetuses. Also, if we are to delve we may find the fallacy of ambiguity of language for the verb "killing" is not synonymous to "to taking". The embryonic cells are taken or find their source either in IVF or foetal tissue, which is spare or aborted. There is the incorrect semantic use of the verb "take" with respect to "kill". As Krauthammer (Krauthammer, 2001, p. 202) summarises, what is of importance is not the origin but the destiny of embryo research.

Drawing upon the wealth of divergent philosophical and theological reflections and situating ourselves relative to it, the divergent views highlight the ambiguity inherent in the moral status of "embryo". According to Judaism, saving life pushes aside all other values and commandments, yet it holds there is no reason to save one life for the sake of another. According to Jewish law, the life of the foetus becomes inconsequential, as aborting them becomes necessary to save the mothers' lives (Maimonides, 1992). The Halakhah does not assign relative values to different lives. Now, while evaluating whether pre-embryos are subjected to the same prohibition as abortion one takes into consideration the laws assigned

for abortion. To quote Genesis 9:6 – “Whoever sheds the blood of man, by man shall his blood be shed”. The Jubilee Bible 2000 translates the Genesis as “Whoever sheds man’s blood in man, his blood shall be shed”. In the Sanhedrin, Rabbi Yishmael states that to say “man by man” literally is “in man” and this can refer to a foetus in its mother’s womb. Therefore, the loss of a foetus within the mother’s womb would amount to killing.

Based on this, the prohibition of abortion is not covered by the laws about pre-embryos. A pre-embryo is not potential life until it is implanted in an environment conducive for maturation. Rabbinic authorities do not consider the pre-embryo akin to a foetus in-utero as it is placed outside the womb and requires implantation (Rosner & Reichman, 2002, p. 57). Pre-embryos may be considered by some Jewish law as emitted reproductive seeds. Considerably, if embryos be relegated to the status of reproductive seed, then they would be subjected to the laws of hash’chatat zera (destruction of the “seeds” of life). The alternative hypothesis is; if the sperm has been deposited in the woman, the primary forbiddance of hash’chatat zera becomes ineffective.<sup>2</sup> Also the laws of hash’chatat zera apply to wasteful emission of seeds and not destruction of seeds. Then the problem at stake is about the destruction of seeds. Strikingly, the embryo prior to birth is not a “nefesh” or “human being” according to the Halakhic interpretation.

The major rabbinic authorities consider the embryo prior to 40 days of conception as merely water (Bleich, 1977, pp. 339–347) and lacks moral and legal consideration. We quote from the Babylonian Talmud, Mas Yevamoth 69b: “For if she is not found pregnant she never was pregnant, and if she is found pregnant the semen, until the fortieth day, is only a mere fluid.” (Yevamoth, pp. 2931–3529; Jakobovits, 1959, p. 275) The embryo within the first days being mere water, its removal would not amount to destruction of life.

Questions may arise on whether the prohibition against infanticide at the early stage stands ineffectual. The forty days marker becomes a debatable issue at times. Rabbi Wosner argues the violation for pre-forty day foetus would not be applicable to a pre-embryo (Rosner & Reichman, Embryonic Stem Cell Research in Jewish Law, 2002, p. 58). As Rabbi Elyashiv rules, pre-embryo is not a foetus and is not covered by prohibition so is discarded. Rabbi Halperin (Halperin, pp. 55–62) adds that to save a mother’s life, if one dismembers a foetus in-utero, and then there may be no harm to consent to the usage of pre-embryo which is less than the foetus for life-saving purposes. Instead of discarding embryos, they could be used for meaningful purposes. From the testimony of Rabbi Elliot N. Dorff mentioned in the NBAC (Dorff, 2000, pp. C–4) we may conclude that an embryo bereft of the status of full-fledged human be allowed for research. Since organ transplant is allowed for others to live, we may also allow a part of a human body, in this case the embryo, for benefitting others. Jewish tradition views health care as a communal responsibility. Thus research with embryo for purposeful reasons would be permitted keeping at bay the enhancement issue concerning embryonic research.

## **Judaism and Reproductive Technologies**

According to Judaism, procreation is viewed as a positive duty (mitzvah) and a sign of prosperity. The Biblical commandment to “be fruitful and multiply” finds expression in Jewish thought. However the reformed Jewish law exempts women in general from the obligation to “be fruitful and multiply”. Despite the reformed outlook of Jewish tradition,

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<sup>2</sup> Nida 13b and Responsa Chavot Yair, no. 31. Responsa Sheilot Yaavetz, no. 43

“barrenness” has been viewed as a curse. So the uses of new reproductive technologies are permitted in Jewish tradition. Medical technologies designed to treat infertility are acceptable by the Jewish law or Halakhah. The Rabbis, the religious leaders of the Jewish tradition, rule that artificial insemination using husband sperm is permissible, provided that natural way of reproduction between couples have failed in every other way (Sinclair, 2002, pp. 71–106). Judaism maintains that God created nature for man’s advantage and benefit, and this action is viewed as a positive partnership between man and God to improve nature for man’s benefit. There is no definite law in the Jewish tradition to prohibit performing such reproductive technologies so we argue that man is free to use scientific knowledge to overcome and face the difficulties of nature. Thus, performing IVF or other related assisted reproductive technologies would not be considered as an interference with and intrusion into God’s will and acts. Rather, these technologies would help and enable a human being to overcome the problem of infertility. Furthermore, reproductive technologies do not create a basic change or solve the mystery of life; an action which Judaism believes is made possible by the Creator. Thus IVF would not be tampering with the mysteries of life. Based on the medico-psychological reasons of couples requesting IVF, it may be considered as a legitimate medical intervention.

An objection is raised against artificial insemination for the performance of IVF within the Jewish tradition. The Halakhic problem arises with regard to the means of the procurement of semen for the purpose of IVF. There would be no Jewish legal objection against IVF, if the husband’s sperm is used for inseminating women. The Halakhic law prohibits ejaculation of semen’s of men other than that of husband into women’s reproductive tract. There is a minority opposition that artificial insemination done without using husband’s sperm would be tantamount to seed destruction and hence must be avoided. A minor group Jewish scholarship may argue against the collection of semen for the purpose of artificial insemination on the charge of seed destruction. This has evolved from the mystical belief of the kabbalist, R. Ovadyah Hadaya who believed that any seminal fluid not passing to the female vagina gives rise to demon of the night that may plague the semen-emitter and his children until the moment of death.

Another objection raised against the artificial insemination is that instead of inseminating with the husband’s sperm, the wife may be inseminated with that of a stranger’s sperm accidentally or purposefully resulting into the birth of a child whose legal status may be compromised.

Regarding, the first objection of seed destruction raised against the artificial insemination, it may be argued that the main purpose of artificial insemination is bringing a child into the world and it would be insignificant according to the Jewish law while fulfilling this goal of child birth, whether there is a break in the ejaculation of the semen and its insemination in the female reproductive organ. In fact, many a semen gets wasted in the natural sexual intercourse.

Also the second objection of deliberate or mistakenly sperm replacement does not hold good, because the mere fear of such a scenario is not a sufficient reason to prohibit an otherwise well accepted procedure according to the Halakhic laws where the main purpose of procreation has been fulfilled. The Biblical commandment of procreation and establishment of family is fulfilled through IVF with the aid of artificial insemination. So these reproductive technologies are halakhically permitted procedure. Also it is to be noted that measures could have been endorsed to prevent the insemination by stranger’s semen.

One of the most important facts with regard to artificial insemination is that AIH (artificial insemination with the aid of husband) is permitted provided it is the only remaining halakhically acceptable method of procreation. That is to say the artificial insemination is permissible provided that there is no other alternative available for the couples to have their own child. Jewish law may also require that insemination is permissible during the menstrual period of the woman, when the woman is considered ritually unclean (*niddah*) and she is forbidden to cohabit with her husband. Some authorities question whether AIH at all fulfils the biblical commandment to “be fruitful and multiply”. This is because some of the authorities maintain that cohabitation between couples is essential in the fulfilment of this commandment, but procreation through artificial insemination is bereft of such copulation and hence does not fulfil the commandment. However, the opposite view is that the essence of the commandment is to produce live progeny which the process of artificial insemination enables. The process adopted for procreation becomes irrelevant. Rabbi Auerbach opines that though AIH may not completely fulfil the biblical commandment to fruitful and multiply, yet it fulfils the rabbinic or Jewish obligations to procreate and populate the Earth without leaving the earth desolate. AIH may lack the full normative force of a biblical precept; still it is endowed with religious significance. It fulfils the *mitzvah*.<sup>3</sup>

The acceptance of AIH in the Jewish society reflects the significance of infertility problem in the Jewish tradition. Children occupy an important place in this religious practise as well in this social scenario. Having children is important according to the Jewish tradition and artificial insemination contributes to the resolving of fertility problems and that holds significance to the Halakhic authorities. So there is no significant prohibition against the use of assisted reproduction on the basis that it is not a natural process. Whatever objections are raised it concern specific legal prohibitions and reservations concerning the fulfilment of the positive commandment to reproduce. It may be unanimously agreed that reproduction according to the Jewish laws may not take place in a purely natural manner.

Rabbi Jakobovits notes that though there is nothing intrinsically illegal about artificial insemination, these artificial reproductive methods have made child birth a mechanical act lacking the mystical and intimately human qualities that enable man to rank with God in the creative propagation of the life. There may be Halakhic reservation about assisted reproductive technologies on the grounds of them not being a natural method of reproduction. That is to say, moral reservation may arise if the rabbi scholars resort to a naturalist discourse. The minor objections or reservation may introduce in this sense a note of caution. But these reservations regarding reproductive technologies and embryo experimentation do not close off the technological option to couples who seek reproductive assistance. Artificial insemination by husband provides a solution to the fertility problem, and with the production of a child the couples would fulfil a *Mitzvah*. However, it must be ensured that a technology of hope does not turn into a tool of abuse in the hands of unscrupulous partners.

From the Jewish legal point of view, artificial insemination using the husband’s sperm is not so much a problem as insemination done using donor’s sperm. The main objection raised against the use of donor sperm in artificial insemination (AID) is that it leads to birth of a bastard or commit adultery or *mamzerut*. A *mamzer* according to the Jewish religious law is a person born from forbidden relationships (Taylor & Robinson, 1837, p. 151). There is a possibility that a child born due to the insemination of the sperm from a donor other than that of a husband may be called a product of an incestuous union. Simultaneously artificial

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<sup>3</sup> *mitzvah* is a precept or commandment. It is a good deed done from religious duty

insemination using donor's sperm is an answer to many a fertility problems like male infertility, low sperm counts, or lack of sperm, problems with ejaculation, inflammation of the testicles, abnormally developed testicles, swollen veins of the scrotum. Artificial insemination with the aid of donor's sperm (AID) may be the only hope for couple's yearning for a child who is genetically connected to the mother and who is the gestating mother and the one to give birth to the child.

The question whether AID leads to the birth of a child from an incestuous union is an important issue in the Jewish legal system. For this we need to turn our attention to a Talmudic passage concerning the feasibility of a marriage between a high priest and a "pregnant virgin". A woman can get pregnant even if there had been no penetrative intercourse, as a consequence of her entering a bath into which a man had immediately discharged his semen. The sperm may get on the vagina and swim up there, impregnating the women. Our discussion is concentrated not on the physiology of virgin conception but on the legal definition and status of the sexual offenses pertaining to the Jewish law. The question that is of importance here to the Talmud is when does a woman after having got married to a high priest ceases to be a virgin – is it when a woman enters into a conjugal relation with a man or is it when a woman becomes pregnant though she may not have had any intercourse. The doubt that the Talmud is trying to clear is whether, in respect of marriage to a high priest, a woman loses virginity just because of having had copulated with a man, or to become pregnant is sufficient to deprive her of her virginal status, even there have been absence of any act of intercourse? If the answer is that virginity is lost as a consequence of intercourse then the pregnant virgin would very much be allowed to marry the high priest. That what may be concluded as a general notion is: in all sexual offenses, the physical act of the crime is in intercourse and not in impregnation. So a married Jewish woman impregnated by the sperm of a man other than of her husband without having any conjugal relationship with the man is not incestuous or adulteress.

It is to be noted that a Jewish single woman is forbidden to conceive by artificial insemination irrespective of whether the sperm is donated by a Jew or a non-Jew. The issue here is if a married woman is permitted to access artificial insemination by donors other than her husband for begetting and conceiving a child genetically related with the mother.

As Talmud Bavli Shabbat Rashi and Talmud Bavli Ketubot Tosafot deciphered, it is not pregnancy but intercourse which makes a virgin unsuitable to marry a high priest. Rabbi Perez or Perez ben Elijah of Corbeil, a French Tosafist (Singer, 2003, pp. 1901–1906), rules that a married woman should not lie in the sheet or enter into the bath where a man other than her husband had left his semen. The prohibition is so incurred because Perez fears that the woman if becomes pregnant and gives birth to a child, that child may one day marry the progeny of his biological father and thus would be committing incest. Any child out of this union would be bastard (mamzer). Now, what R. Perez mentioned and worried about is the impregnation of woman who had lied in the semen-covered sheet of man other than her husband. His worries are based only upon the fear of possible incest. In the absence of sexual intercourse between the woman and the man other than her husband, mere lying on the semen covered sheet does not lead to mamzerut. This viewpoint is further certified from the principle implicit in the discussion cited from the Talmud concerning the feasibility of marriage between the high priest and pregnant virgin, where sexual intercourse and not impregnation is the decisive factor of the physical element of sexual crime under Jewish law. It is fear of committing possible incest that R. Perez takes as the restrictive factor on a married woman lying down on a semen covered sheet of a man other than her husband.

This goes on to show that intercourse and not impregnation constitutes the physical element of sexual offenses in the Jewish law or Halakhah. And this conclusion provides the primary supporting source for the ruling that artificial insemination of a married woman by a donor other than her husband does not lead to committing of incest or adultery.

It is to be noted that prior to the advent of the technology of artificial insemination; pregnancy brought about means other than sexual intercourse was prohibited according to the Halakhic laws. With the onset or prevalence of artificial insemination things began in the Jewish tradition. The issue of conception without sexual intercourse became highly relevant and debatable in the Halakhic law. Following the position in the Talmud, Rabbi Moses Feinstein's practical decision was that infertile couples to have their children may undergo artificial insemination using donor's sperm and that action would not amount to committing adultery.

R. Perez's prohibition concerning the married woman lying on the semen covered sheet of another man other than her husband is due to his fear of possible incest. Such probable incest may be said to arise if there is artificial insemination from a donor's sperm other than the husband. According to the Jewish law, artificial insemination using the husband's sperm is permissible but it is forbidden to inseminate a woman with sperm from a Jewish donor. Jewish children whose biological father is a non-Jew shares no significant legal relationship and thus the progeny of such a father can marry the Jewish child without the fear of committing possible incest. R. Feinstein states that there is no question of incest or mamzerut in respect of AID, even if the donation is made by Jewish donor. It is the mere apprehension of committing probable incest between the AID child and other progeny of the same sperm donor that his permissive ruling remains confined to non-Jewish donor.

R. Feinstein rules that insemination using the sperm of a Jewish donor would also not lead to adultery. So to him artificial insemination does not invoke any prohibition. AID is thus acceptable to him (Rosner & Bleich, 1979, p. 116, notes 4–7). Rabbi Moshe Feinstein also bases his permission to use donor insemination on this source, noting that it specifically classifies the child as legitimate. [see *Iggrot Moshe*, (Feinstein, 1959) 4 Even Ha'ezer 1:10, 2:11, 3:11]

The ruling of Rabbi Moshe Feinstein was met with severe backlash from staunch traditionalist exponents of Jewish laws, and Rabbi Yoel Teitelbaum is one such important protagonist in this context. Teitelbaum states that adultery is prohibited. Adultery is wrong because it results in lineage confusion, that is, there would be confusion about who is the father and also it involves forbidden mating. This concept is deduced from Nahmanides' observation made to the effect, derived from Biblical views on adultery. There is prohibition in the Bible about a person carnally lying with a neighbour's wife *for seed*. Rabbi Moses ben Nahman, also known by the Hebrew acronym "Ramban" and the Latin designation "Nahmanides" was a prolific author, producing significant Talmudic commentaries. Nahmanides in his "*Commentary on the Torah*" (Ramban, 1974) mentions that the word "to seed" in the Biblical prohibition on adultery implies that the offense concerns the children of the adulterous relationship in the sense when the child's true ancestry remains in the dark (Sinclair, 2003).

Based on Biblical law, R. Teitelbaum mentions that donor insemination bereft of sexual coupling would be committing adultery as it raises doubt about the father of the child. It is not possible to remove the doubt in an empirical way, that is, by keeping a track of

insemination by donors, because the issue involves principality and not of practice. According to Jewish law any method of reproduction that happens to blur the identity of the father would be an adulterous method. In the artificial insemination the identity of the sperm donor (AID) includes adultery and the child born out of it would be a mamzer.

In response to R. Teitelbaum's criticism with regard to AID in the context of Jewish law, R. Feinstein opines that a sharp and clear demarcation be drawn between sexual cohabitation, that is the physical element involved in the felony of adultery and the confusion associated with lineage. R. Feinstein while clarifying the definition of the concept of adultery observed that to take lineage confusion as the main legal issue in the lapse of adultery may result into perceptibly false argument where adultery with an infertile woman is not illegal, as there is no fear of lineage confusion where a woman is infertile. So, sexual union is the sole factor that constitutes the core element in the crime of infidelity or adultery. On the other hand, lineage confusion is a peripheral offense of the adultery issue. Beside this R. Teitelbaum has based his argument on the Nahmanides's "*Commentary on the Torah*" which is strictly speaking not an authoritative work on Halakhical matters. R. Feinstein claims R. Teitelbaum's main legal argument consisting of lineage confusion in the Biblical misdemeanour of adultery has no genuine normative basis. R. Feinstein's opinion is that there is no Halakhic hindrance to artificial insemination by donor only that non- Jewish sperm be used. If the progeny of AID be female, even she has no bar in marrying a Jewish priest. Though by Halakhic laws artificial insemination is not a compulsory method as this method per se may not be a valid procedure for fulfilling the Biblical commandment to procreate – to be fruitful and multiply. R. Feinstein thus reiterates his original response that a couple in "dire need" may proceed with the procedure of artificial insemination using sperm from non-Jewish donors. The donor being not Jewish, there is no chance that a Jewish child conceived from his sperm will marry a Jewish progeny sired by the same AID donor though with a different Jewish mother. This is the case since two children procreated by different Jewish mothers but sired by the same non-Jewish father, naturally or by AID, are not halakhically brother and sister (Lasker, 1988, p. 6). R. Auerbach seconds the fact that there are no visible Jewish legal impediments in the use of the method of artificial insemination with the aid of non- Jewish donor for procreation. Even they claim the child is eligible to marry a kohen (priest). So, a couple who's other method of procreation have not succeeded and in dire need then they may avail of the sperm from sperm bank, where there is every chance that the majority of donors would be non-Jews. The Torah does not explicitly mention of conferring Jewish status through matrilineality. But in Mishnah, which serves as the Jewish law we find a basic shift in Rabbinic Judaism from patrilineal to matrilineal descent. The central Rabbinic text concerning the matrilineal principle finds mention in the Mishnah (Kiddushin 3:12) (Susan, 2002; Danby, 1933, p. 327). The final clause of the Mishnah states that the Jewishness of the child follows the mother and not the father. Any [woman] who cannot contract kiddushin with this man or with other particular man, the child follows her status. A lot of controversy continued concerning the status of children born of a Jewish mother and non-Jewish father, some regarded the offspring of such unions as Jewish but blemished. At the same time others supported R. Simeon and declared the offspring to be *kasher* (fit) and legitimate (Cohen, 1999, p. 280).

Thus most of the Halakhic or Jewish authorities unanimously agree that the technique of AID does not result into adultery under Jewish law. The main opposition against AID is based on morality. As Rabbi Jakobovits states that the prime objection to AID is that it is a mechanical act which lacks the human sentiment that is found to be profoundly connected with conjugal love and emotion. This is one of the moral discomfort aspects raised against the use of AID.

There are others like Rabbi Yehiel Weinberg who point out that the act of insemination of a stranger's sperm like that of a non-Jew's into the womb of a married woman is considered as an ugly act which is an act of abomination. It is to be noted that Rabbis like Yaakov Breisch, Weinberg opines that AID is opposed to religious sensibility.

Maternal identity is an issue with regard to IVF where the genetic mother and the birth mother is not same, thus engaging a surrogate mother in this regard. Rabbi Auerbach dismisses the technique of surrogacy a priori. In the Jewish tradition in case of surrogacy, the birth mother and the egg donor who is the genetic mother is regarded as mother of the impending child. Surrogacy is considered as morally offensive in the contemporary Jewish thought especially when one resort to this technique for convenience so as to avoid the encumbrance of pregnancy. Using another person as "incubator" or "substratum" for carrying a baby and delivering the baby for monetary benefit is a revolting degradation of maternity and an insult to human dignity. In the context of using donor's womb and donor's egg questions arise about the determination of the maternity of the birth child in the Jewish tradition. As far as Jewish law is concerned, based on Talmudic analogies some rabbis consider it is the nurturing and the birth giving mother and not the biological mother who is the legal mother of the child. A handful of rabbis hold the genetic mother to be the legal mother. There are still others who opine that both the biological or genetic mother and the gestating mother hold the maternity of the child.

Those who consider the birth giving mother the Halakhic mother of the child have based their opinion on the following arguments.

Those mothers who converted to Judaism during pregnancy are not subjected to law of levirate marriage and halitzah yet the sons of such mothers would be restricted from marrying each other's wives. The law of levirate union is not applicable because the brothers are not connected from their father's side and, as when non-Jewish sperm is used for insemination, the non-Jewish paternity remains unrecognisable according to the Jewish law. Levirate law is applicable to brothers begotten from the same father. Though any biological relationship of a child with non-Jewish father is bereft of legal significance yet the sons would be prohibited to marry their brother's widow. The prohibition is so applicable because they are considered brothers from the maternal side.

A question may arise that a mother who has got converted to Judaism and adopted Jewish culture during her gestation period are supposed to put an end to every pre-existing legal ties with family members of the same genetic constituent, then how come the above stated two males are considered brothers from the mother's side? It may be stated that it is true a convert has to terminate every link with members of the same biological family and that a convert is legally permitted to be in a marriage union with any converted relative, this is so as all converted are believed to be born anew. But rabbinic law forbids marriage between biological relatives. It is not biological or genetic connection with mothers that make the two males as brothers, but the fact that they are brothers as they are born out of the same womb of a Jewish mother. So these brothers of the same mother are legally bounded and prohibited by law to be in conjugal union with each other's wives. It shows that maternity is established through birth giving and not through genetic makeup.

There are other Jewish authorities who consider both the genetic and birth giving mother as the legal mother of the child. As Rabbi Avraham Steinberg concurred with Rabbi J. David Bleich concludes that a child born out of surrogacy has two mothers – from the ovum donor

and the surrogate mother (Bleich, 1983, pp. 91–93). Rabbi Yekutiel Kamelhar, while discussing about maternity in the case of ovary implantation in a woman's body, has drawn parallel with plant transplantation (Skolnik, 1972, pp. 1467–1468). According to the Halakhic laws encompassing the agricultural area, one is strictly prohibited to consume the fruit of an orlah branch during the first three years after planting. The Hebrew word “*orlah*” means foreskin or uncircumcised. After three years plantation of trees the fruits of such a tree is not forbidden to be consumed. In the fourth year the fruits are valued as holy and are to be offered in praise of the Lord. It is from fifth year onwards the fruits of such a tree can be consumed. It takes time for the grafted branch to get one with the main tree. So by fifth year the transplant becomes an integral part of the tree on to which it was grafted and its fruit would be ready for consumption. Similarly, in the case of ovary implantation or donor insemination, the transplant for the sake of safety needs to be handled as if they were the outcome of both the donor and the done. Thus a child of surrogate mother, according to the Halakhic command is forbidden to be in conjugal union both into the families of egg donor and into the families of birth giving mother. Though the concept of the double mother looks promising from a scientific standpoint yet modern genetics strongly favour the biological mother, who is the donor, from the birth-giving mother. However most of the Rabbis opine that a woman may be termed “*mother*” only upon parturition. As Rabbi Mackler states that an embryo is part of the mother rather than an independent entity. So to them the surrogate mother is the mother (Mackler, 2000, pp. 179–181).

It is natural to presume that traditional Jewish law lacks clarity about the concept of the role of female eggs in human reproduction and so it would be unlikely that Jewish law developed with prominence of maternity based on conception alone. There is a clear lack of a genetically friendly approach to maternity in the Jewish law.

Thus, it may be deduced that there are no exact precedents that may help in defining motherhood in the case of surrogacy. Beside this, if a Jewish woman decides to donate her surplus ova or egg to a gentile woman, in that scenario one may wonder whether her Jewish religion is a constituent part of her genetics. Or, do we infer that ova donated to a gentile by a Jewish woman carry the religion. Are we to assume it to be true that with the ova donation one would be guilty of turning a Jewish child over to a non-Jew? This situation is viewed as an uncommon scenario in association with the potential problem connected with ova donation. There are those who feel maternity does not inherit in ova. Those women would have undergone successful IVF treatment with surplus ova which she decides to donate to other infertile women or to a clinic for experiments. Civil law of Israel requires the consent of parents before the disposal of the ova. Halakhic law is not in favour of seed wastage. Instead of active destruction of ova Halakhic law is in favor of passive treatment of ova which allows it to die by itself. If ova become non-viable, Halakhic law is liberal enough to allow the use of embryo for experimentation. Thus by Halakhic law Judaism is determined by parturiency or gravidity and not by considering women as donors of Jewish genetic materials or rather as carrier of female seed.

## **Conclusion**

Jewish law which has a long history in the medical arena, constitutes a vast store house of primary and secondary principles with a solution based approach to problems in this area. It is worth mentioning that rational decisions are always difficult and involve hard ethical choices. In spite of reservations, reproductive technologies and experimentation with embryos are being permitted by Jewish law. The Mitzvah of having one's own children is so

great that couples readily avail this opportunity to procreate their offspring. Critics may opine that these processes involve some thorny questions and situations. There is no harm in admitting that every technology has its advantages and disadvantages. But with explicit rationing of the reproductive technologies, ARTs would find its proper usage.

It is to be noted that the most fundamentalist branch of the orthodox Jewry maintains that the Jewish law or Halakhic law also called the Torah is not in conflict with Science. Rabbis opine that the human mind with its creative intelligence can resolve conflict and should be never blinded by dogma. One should be guided by the principles of the Torah and based on these principles and individuals should figure out what is right and required. Thus the most orthodox of rabbinic minds maintain that “Torah should be a window to view the universe with an open mind and should not be a wooden shutter” (Silber, 2010, pp. 471–480).

Thus, it may be concluded that the strictest and most orthodox of Jewish theological scholarship finds that the Torah and Halakhic rule is not in conflict with reproductive technologies. In fact it is a religious obligation for Jews to preserve the possibility of future parenthood, safeguard fertility and to “be fruitful and multiply”.

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