In-Vitro Fertilization (IVF), Insemination and Egg-Donation[1]

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Apart from intense public interest in the rapid developments of research and technology which have made possible in-vitro fertilization (IVF) and ovum donation, these procedures pose ethical, legal and halachic problems. Practical questions in these new fields are being put to experts in Jewish law, who must find answers on the basis of established halachic principles.

In this essay we shall look into some halachic principles which respond to modern problems in general, and to IVF, insemination and ovum donation in particular.

Novel Procedures – General Principles

1. The "**default**": Prohibition or Permissibility?
2. Who decides?
3. Issues without clear precedents.

1. The "*default*": Prohibition or Permissibility?

The Mishna[2] emphasizes that only *prohibitive*, strict decisions require juridical substantiation while *permissibility* or leniency needs no supportive precedent. The absence of a prohibitive substantiation is to be equated with halachic permissibility.[3] This implies that any technological innovation is permissible unless there is a halachic reason for prohibiting it. If in the ***broad range of halachic sources*** no reason is found for their prohibition, Jewish law permits the use of such technologies.

We may therefore conclude: The absence of a prohibitive substantiation is to be equated with halachic permissibility.

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1. Presented at the International Congress on Medicine Ethics & Jewish Law, Copenhagen Denmark, January 1996.
2. *Yadayim*, 4,3
3. Rabbi E. Wassermann, *Kovetz He'arot Yevamot* 87b, sect. 67, (550).

2. Who Decides?

In order to be sure that there is no halachic prohibition against a new procedure, an accepted halachic authority must be consulted. Jewish law differentiates between the authority to abrogate a temporary prohibition and the authority to determine permanent permissibility. Faced with uncertainty or insufficient information, one is entitled to be strict with oneself; no special authority is needed for prohibition by the individual. On the other hand, in order to ***establish*** permissibility, there must be unequivocal information.[4] When there is no clear precedent in halacha to decide the issue at hand, one must be thoroughly versed in all halachic sources before definitely confirming that no halachic reason for prohibition exists.

We may therefore conclude: An accepted halachic authority must be consulted.

3. Issues without Clear Precedents

Step I: An attempt is made to find related precedents in halachic literature.

A possible result: no precedent.

Step II: Halachic study of conceptually connected rulings.

A possible result: differences of opinion among the accepted authorities.

If there are no related precedents, halachic study is made of conceptually connected rulings. In examining these, we attempt to infer the reasons upon which they are based. If these reasons are confirmed, or at least not contradicted, by other halachic sources, they could be accepted for drawing conclusions regarding new issues under consideration. Because of the vast range of halachic material, there often arises differences of opinion among the accepted authorities, though these differences are usually of short duration. Consensus is finally achieved and an unequivocal decision is reached.

Step III: Using special halachic rulings for controversial issues.

There are well-known halachic rules for deciding controversial issues. If, for example, there is a doubt in a matter prohibited by the Torah (דאורייתא — *D'orayta*), the ruling is prohibitive; if the

4. Rashi, *Beitza* 2b.

doubt is related to a rabbinical ruling (דרבנן — *D'rabbanan*), the decision is usually permissive.[5]

Assisted Reproduction – Specific Principles

There are three basic principles which, with certain restrictions, favor the permissibility of fertility-increasing manipulation:

1. *The commandment "Be fruitful and multiply".*
2. *The mitzvah of loving kindness (*גמילות חסדים — *G'miluth hassadim).*
3. *Family integrity*

1. The Commandment "Be fruitful and multiply" (פרו ורבו — *P'ru urvu*)

This commandment, the first in the Torah, is based on the verse: "Be fruitful and multiply and replenish the earth."[6] In halachic literature the fulfillment of the command is considered of greatest importance[7] because the fulfillment of all other commandments depends on it. One of the reasons behind it is "God's will that the world be populated," as Isaiah said: "He did not create it as a waste, but formed it for habitation."[8]

Despite the importance of this commandment, halacha does not permit *indiscriminate* multiplication of genetic offspring to enhance the biological efficiency of natural increase. On the contrary, a system of laws and marital restrictions (laws of incest)[9] limiting sexual activity to a closed family framework emphasizes not only the dissemination of biological genes, but also the equally important transmission of cultural and moral traditions[10] from generation to generation.[11]

Thus any increase in fertility is evaluated not only by its capacity to increase the number of offspring, but also by the effect it may have on the continued existence and adequate functioning

5. Talmud *Bavli Beitza* 3b.
6. *Genesis* 1:18
7. *Sefer Hachinnuch*, Mitzvah 1; *Tosafot, Bava Batra* 13a.
8. *Isaiah* 45:18
9. *Leviticus* 18:1-30
10. *Genesis* 18:19, *Deuteronomy* 6:7. 11:19. This principle is repeated many times in biblical and halachic literature.
11. Compare Julian Huxley, *Evolution in Action* (New York: Harper & Brothers, 1953), p. 149.

of the family nucleus that hands down cultural content to following generations.

2. The Commandment of Charity (*G'milut hasadim)*

In the cases of personal suffering we are duty bound to practice the *mitzvah* of *G'milut hasadim* which originates in the verse "Love thy neighbor as thyself."[12] Accordingly, one must use one's possessions,[13] physical strength[14] and talents[15] in order to lessen the suffering of one's fellow man.

Obviously, a childless couple is within this category and there exists a clear obligation to assist them in every permissible way, as long as no one else is thereby harmed.[16] Therefore, if manipulation of fertility brings into the world offspring which may be legally or otherwise seriously handicapped, such foreseeable harm and suffering of the progeny stands in contradiction to the *G'milut hasadim* that may be relevant to the parents.

3. Family Integrity

Domestic peace and the integrity of the family are extremely important in Jewish law. In order to restore good relations and mutual trust in the event of serious marital difficulties, the Torah sometimes permits the actual erasure of the holy name of God.[17]

This may tip the scales in favor of leniency[18] when there is halachic uncertainty constituting a real obstacle to permissibility. [19]

Some Halachic Principles Concerning IVF Procedures

In the light of the three principles elaborated in the previous section we shall examine halachic attitudes towards:

1. IVF as a solution to the problem of infertility in lawfully wedded couples.

12. *Leviticus* 19:18
13. *Leviticus* 25:35, *Deuteronomy* 14:7-12.
14. Talmud *Bavli, Sukkah* 49b.
15. Rabbenu Yonah Girondi, *Sha'are T'shuvah* 3:13.
16. Hillel the First in Talmud *Bavli*, *Shabbat* 31a: "What is abhorrent to you, do not unto others."
17. Talmud *Bavli, Hullin* 141a according to *Numbers* 5:23.
18. Rabbi Ovadiah Yosef, Responsa *Yabbia Omer* 2:12 (cf. note 17).
19. Rabbi A. Nebenzahl, *Assia* 34 (1982), p.5.

2. IVF with sperm donated by a third party to a married woman. (IVF-Ds)
3. IVF with an oocyte donated from a third party donor (IVF-Do).

1. IVF for Lawfully Wedded Couples

Jewish law deals with both the permissibility of the procedure itself and the legal status of the IVF offspring. Although these are separate issues, there is a close connection between the legal status of the offspring and the attitude towards the procedure as such. Artificial insemination using the husband's semen (AIH), an issue which has been dealt with at length in recent responsa literature,[20] is also relevant to this discussion.

Is a child born as a result of technical manipulation (without normal sexual relations) recognized by Jewish law as the child of his biological parents? This question is important in many legal systems, because genetic kinship and legal kinship do not always correspond.

Although experts in Jewish law are divided in their attitude toward the paternity of offspring resulting from AIH, the majority would concede legal paternity to the biological father.[21]

Nevertheless, even among those who recognize the paternity of AIH offspring, there are some who reject this legal relationship in the case of an IVF offspring.[22] The lack of recognized paternity not only affects laws of inheritance, lineage, and support, but also bears directly on the genetic father's fulfilling the commandment to be "fruitful and multiply." Noncompliance with this commandment nullifies one of the important principles which favor IVF. For this reason Rabbi E. Waldenberg totally forbids IVF, though he approves AIH under certain conditions.

On the other hand, Rabbi Ovadiah Yosef, as well as the majority of Jewish experts, do permit IVF when there is no other way of fulfilling the commandment to be "fruitful and multiply."[23]

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20. A. Steinberg, "Artificial Insemination in the Light of Halacha" *Sefer Assia* 1 (Jerusalem: Schlesinger Institute, 1982), pp. 128-141.
21. Steinberg (cf. note 20 above), notes 24 and 25.
22. Rabbi E. Waldenberg, "In-Vitro Fertilization: a Medical-Halachic Discussion", *Assia 33* (1982), pp. 5-13.
23. Unpublished responsum. Parts of this responsum are cited in M. Drori, "Genetic Engineering — Preliminary Discussion of Its Legal and Halachic Aspects", *Techumim* 1 (1980), p. 287; the halachic conclusion was published in Abraham S. Abraham, *Lev Avraham 1* 3rd ed. (Jerusalem, 1977), chapter 30, section C, note 8.

The late Rabbi Shlomo Goren agrees with this statement in an unpublished letter[24] as well as in a published essay[25], and Rabbi Avigdor Nebenzahl is of a similar opinion. Domestic happiness and integrity of the family were weighty factors in favor of this procedure.

The Problem of the Reliability of the Medical Establishment

Even those who sanction IVF-H (husband) stress the problem of the trustworthiness of the medical establishment. Basing themselves on their own experience, some claim that the medical establishment is not to be trusted, and that the more IVF-H is performed, the greater the likelihood of IVF-D (foreign donor), as was the case in artificial insemination, which began as AIH and led to AID. One of the most outspoken authorities on this subject is Rabbi Eliezer Yehuda Waldenberg[26] who is today held to be one of the leading halachic experts on issues of modern medicine.

2. IVF using Sperm Donor (IVF-Ds)

In recent years many lengthy discussions have been devoted to the ethical and legal aspects related to AID for childless couples. The discussions focus on two issues:

I. Is AID halachically permissible, or is it adultery?

II. What is the status of AID offspring?

All halachic experts agree that artificial insemination using the semen of a Jewish donor (other than the woman's husband) is forbidden; it is only the severity of the prohibition which is debated. Some hold that AID constitutes adultery and is thus strictly forbidden by the Torah.[27] Most experts, however, hold that the prohibition is based primarily on legal ramifications relating to the birth of an AID offspring, when the genetic father is unknown.

Some authorities would permit AID if the donor is not anonymous or were he is a gentile, thereby eliminating some of the most

24. Rabbi Shlomo Goren, in an unpublished response to S. Mashiah dated 10th November 1982.25. *Ha-Tsofe*, *Adar* A 14, 1984.
25. *Ha-Tsofe*, Adar A 14, 1984.
26. Waldenberg (cf. note 23 above), p.7.
27. Rabbi Y. L. Zirelson, Responsa *Ma'arche Lev*, *Even Ha'ezer* 73 (Kishinev, 1932), p. 138. Further sources in Steinberg (cf. note 21 above), note 39 and *Tzitz Eli'ezer* 13:97.

important legal complications concerning the personal status of the offspring.[28,29]

The personal status of the AID offspring presents a serious problem, even for the majority who hold that AID does not constitute adultery and that the debatable issue is whether the AID offspring is a *mamzer* (ממזר) according to the criteria of Jewish law.

Jewish law severely restricts the prospects of marriage of a *mamzer*.[30] This is a serious functional handicap from social and judicial points of view. At the root of this debate is the determination of which of the following two factors created the *mamzer* status referred to in the Torah:[31]

1. The act of *prohibited intercourse* that leads to the birth of the child.[32]
2. The *birth* of a child sired by a genetic father who is other than the mother's husband,[33] so that the child is a product of a prohibited[34] genetic union.

According to the first proposition, the AID offspring is not a *mamzer* if there was no act of *prohibited intercourse*, while on the basis of the second proposition the AID offspring is a *mamzer*. This halachic dispute creates a situation of "doubtful *mamzer.*"[35] Hence the accepted halachic prohibition of AID in Israel.

Compared with the complex legal status of AID offspring, the IVF offspring is in a better position. The reason for this is the clear distinction between donor *sperm* being injected into the uterus and an embryo being implanted there (IVF-D). Some halachists hold that AID is included in the prohibition "Thou shalt not lie carnally with thy neighbor's wife to defile thyself with her."[36] However, IVF-D involves the implantation of an embryo, which is nowhere cited as forbidden. But there are still two questions which must be answered:

1. Is fertilization by the semen of a third-party donor permitted?

28. Rabbi Shlomo Z. Auerbach, "Artificial Insemination", *Noam* 1, (1958), pp. 145-166.
29. R. M. Feinstein, Responsa *Iggerot Moshe, Even Ha'ezer* 2:11, pp.322-324.
30. *Mishna Kiddushin* 4: 1-3
31. *Deuteronomy* 23:3
32. Steinberg (cf. note 20 above), note 62.
33. See *Mishna Kiddushin* 3:12.
34. According to the Talmud the Hebrew term *mamzer* (bastard) is derived from two words: *mum* (defect) and *zar* (foreign) (cf. *Yevamot* 76b).
35. *Shulchan Aruch, Even Ha'ezer* 4:24.
36. *Leviticus* 18:20

2. What is the personal status of the IVF-D offspring?

Although it is difficult to equate test-tube fertilization with an act of adultery (even if this involves IVF-D), there may still be legal prohibition against in-vitro fertilization of the oocyte of a married woman with a third-party's sperm.[37] This implies that even if it be forbidden to perform IVF-D on an oocyte of a married woman, the same prohibition would not affect an unmarried woman.

Once fertilization has taken place, there is no reason not to implant the embryo, as long as the possibility of *mamzer* status in excluded. Obviously, if the offspring would be a *mamzer* (e.g. if the oocyte were fertilized by sperm of an incestuous relative), it would be morally and legally unjustifiable to perform IVF-D, as the embryo carried in the womb for nine months would be born an unfortunate creature.

Halacha so far has not reached definitive conclusions on these fundamental issues. Arguments can be found for both sides, so that for the time being they still remain open question.

3. IVF with Ovum Donation (IVF-Do)

There is a fundamental distinction between paternity and maternity. While paternity is based on the genetic and only on the genetic function, maternity normally has **two** functions:

I. A **genetic** function — ovulating the oocyte.

II. A **physiologic** function — nine months of pregnancy and the parturition.

The new technology of IVF and ovum donation or surrogacy, made it possible to break up and to divide these two functions between two women.

The donation of an oocyte raises two problems:

I. The fundamental problem is that of establishing who, according to halacha, is the mother. Is it the genetic mother or the nutritional physiological (surrogate) mother? Or, perhaps, there is no legal mother in such cases. Or, perhaps, both are considered to be legal mothers. (The possibility of two legal mothers for one child need not be related to the halachic rules of IVF-Do. There can even be two genetic mothers if two

37. M. Drori, "Artificial Insemination and the Law of Adultery: Halachic Viewpoints", *Torah u-Madda* 10 (1984), pp. 28-36, note 50.

fertilized oocytes of two different women are joined, and the resulting chimera combines the *genetic* components of both.)

II. If the donor is a married woman (which is more practical for the gynecologist, because when a married woman is treated with drugs to stimulate ovulation preceding IVF-H, there is usually a surplus of oocytes available for fertilization, without the need for further operative procedure), is it permitted to fertilize **her** oocyte with sperm other than that of **her** husband, as discussed in the previous chapter?

The Babylonian Talmud[38] discussed the firstborn of a kosher animal: "Two wombs were combined and [the embryo] left one and entered another." The question whether the offspring is considered the firstborn only of its genetic mother, or whether it is also considered the firstborn of the host mother, remains unsolved in the Talmud. This might mean that the genetic mother is surely to be considered the legal mother and that the Talmud expresses doubt only concerning the status of the host mother. On the other hand, the talmudic discussion could be dealing with a specific issue of *bechorot* (firstborn) without relation to the issue of motherhood that concerns us here.

Among present day halachists, too, there is a bitter controversy. Some tends to regard the genetic mother as the only legal mother for all intents and purposes, but most Jewish scholars tend to accept the physiologic mother as the only legal mother.[39] This creates serious problems, especially if the genetic mother and host mother are of different religions. Since halacha must prohibit IVF-Do in cases of doubt, no oocyte may be donated when the physiologic and genetic mothers belong to different religions,[40] even if the oocyte donor is an unmarried woman.

A detailed discussion of the outcome of IVF-Do by a donor of another religion would require the analysis of talmudic texts beyond the scope of this article.

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38. Talmud *Bavli, Hullin* 70a.
39. Rabbi E. Waldenberg, *Tzitz Eli'ezer*, 20, 49; R. Y. Sh. Elyashiv, in *Nishmat Avraham* 4, (*Even Haezer*), 2, 2; R. Z. N. Goldberg, "Fetal Implant", *Techumim* 5 (1984), pp. 248-259; 269-274; R. A. Kilav, "Test-tube Babies", ibid. pp. 260-267; R. Y. M. Ben-Meir, "In-Vitro Fertilization: the Legal Relationships of the Embryo and the Surrogate Mother", *Assia* 41 (1986), pp.25-40.
40. Rabbi Shlomo Goren (cf. note 24 & 25 above).

Conclusion

Jewish law contains much material directly related to the newer gynecologic technologies of AIH, AID, IVF-H, IVF-Ds, and IVF-Do. Some of these issues are still being debated by various halachic experts.

Mutual trust between gynecologists and halachic experts is of utmost importance in order to carry out procedures which are permissible to the religious. Mistrust not only impedes the research but may even result in demands for major histocompatibility complex (HLA) tests to ascertain paternity prior to sanctioning marriage. The halachic validity of this test is dealt with elsewhere.[41,42]

Source: The Schlesinger Institute for Jewish Medical Ethics

41. D. Frimer, "Establishing Paternity by Means of Blood Type Testing in Jewish Law and Israeli Legislation", *Sefer Assia* 5 (1986), pp. 209-185; M. Halperin, C. Brautbar and D. Nelken, "The Basis for Halachic Discussion on Determination of Paternity by means of MHC (HLA)", *Torah u-Madda* 10 (1984), pp. 6-27.
42. Rabbi S. Deichowsky, "Proof of Non-Paternity by Means of HLA (MHC) in relation to Halacha: A Ruling of the Rabbinical Court", *Assia* 35 (1983), pp. 10-31.