A LEGAL PERSPECTIVE ON ARTIFICIAL INSEMINATION

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INTRODUCTION

Medical science is continually discovering new methods and techniques. Legal rules do not generally anticipate scientific developments. Courts of law are thus often confronted with factual situations for which no definite legal rules apply. The problem is based primarily in a legal system which draws from rules and regulations formulated at a time when future developments in science were not and could not have been foreseen. Inconsistencies therefore result when the courts attempt to fit scientific achievements to a legal framework which, being outmoded, cannot help but be unresponsive to the current needs of society arising from medical and technological advances.

One such medical discovery is artificial insemination. Through artificial insemination human beings can now alter the natural modes of reproduction by stimulating pregnancies.

Artificial insemination is the introduction of seminal fluid with spermatozoa in the generative tract of a woman by means of syringe, pippete, irrigation, etc.[1] It is used when the woman is fertile but for one reason or other it is not possible for her to have children by her husband in the normal way. It is accomplished in two principal ways. Semen may be secured from the husband and injected by instrument into the wife's reproductive tract in order to induce pregnancy. This process is known as homologous insemination or artificial insemination from the husband (A.I.H.). A.I.H. is medically indicated when the husband has live spermatozoa of adequate motility, but for one of a number of possible reasons cannot deposit them so that conception may occur. Principally these are paraplegia (a paralysis resulting from an injury to the spinal column)

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[1] SOLIS, LEGAL MEDICINE 432 (1964).

and hypospadias (the urethral opening occurring in the underside of the penis).[2]

The other process is heterologous insemination or artificial insemination from an anonymous third party donor (hereinafter referred to as A.I.D.). A.I.D. is medically indicated when there is complete absence of live spermatozoa and also when there is clinical sterility, as with a poor sperm count, coupled with a long history of a failure to conceive. A.I.D. is also indicated in some marriages for genetic reasons such as when the husband has a history of serious hereditary disease and in some cases of Rh factor incompatibility between the wife and husband.[3] A.I.D. is the more prevalent of the two procedures and the one which raises the most legal issues.

Artificial insemination has interposed complicated and presently unsolved legal, social, cultural, religious,[4] emotional and psychological problems. The central consideration of this paper is given only to the legal aspect of artificial insemination and the problems connected therewith.

I. History

A) *Past* —

Artificial insemination (hereinafter referred to as A.I.) was used before only with animals. It appears to have occurred as early as 1322 when Arab horsemen attempted to breed selectively the mares of their enemies through a process which would be referred to today as "negative artificial insemination." The mares were artificially impregnated with the sperm of weak and inferior stallions, thereby introducing an impure breeding strain into the line.[5] The scientific experimentation with animals continued through the 18th and 19th century. In 1907 Iwanoff published a work concluding that there were real advantages in large scale use of A.I. in animal husbandry.[6]

The first reported case of A.I. of a human being occurred in 1799 when a husband's sperm was used to impregnate his wife. This A.I.H.

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[2] Wellens, *Human Artificial Insemination: An Analysis and Proposal for Florida*, 22 U. MIAMI L. REV. 954 (1968).

[3] *Ibid.*

[4] The Catholic decision was made as long ago as 1897 when, to the question whether A.I. of women is permissible, the cardinals with the approval of Pope Leo XII replied "Non Licere." Later Pope Pius XII on Sept. 29, 1949 in his address to Catholic doctors condemned A.I. as entirely illicit and immoral, with the sole exception where it serves "as an auxiliary to the natural union of the spouses and of fecundation." For more discussion on the religious aspect refer to WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW (1957).

[5] Smith II, *Through a Test Tube Darkly: Artificial Insemination and the Law*, 67 MICH. L. REV. 128 (1968).

[6] Sergeant, *The Legal Status of Artificial Insemination: A Need for Policy Formulation*, 19 DRAKE L. REV. 410 (1970).

was performed by John Hunter in London. In 1865 the first work on A.I. was published by De Haut but due to public indignation he discontinued his experimentation. In 1909 the first account of A.I.D. appeared, but again there was immediate public reaction. Since then, the medical profession began to take interest in A.I.D. Continuous interest and discussions have survived and increased to the present.[7]

B) *Present* —

It is only in our times that A.I.D. and A.I.H. has at all become common. The great human and social potentialities of A.I. can be seen from the calculation that in both the United States and Great Britain, at least one out of every ten married couples is involuntarily sterile.[8] The actual extent to which A.I. is used remains unknown due to the secrecy insisted in by the parties and carried out by the medical profession. Thus, only estimates are available. Some authorities estimate that from 5,000 to 20,000 births occur annually in the United States as a result of A.I.D. As to the number of people born and living through A.I. figures range from 50,000 to 250,000.[9]

A.I.D. has in fact become so prevalent in the United States that it is big business. While in England no compensation is offered to donors, in the U.S. donors are actually encouraged by the view that a donor of semen has the same rights as a donor of blood. Fees range from five dollars to fifty dollars per ejaculation with an average range of 15$ to 25$.[10]

C) *Artificial Insemination in Philippine Setting* —

In the Philippines, A.I. is still merely talked about, even debated upon. If it is practised here at all it is probably only by an insignificant few and not even openly. This "timidity" can be attributed to unfounded fears and shame arising out of social and moral pressures, imagined or otherwise.[11] Also, we are a basically Catholic nation and thus are of the belief that any interference with the natural modes of reproduction is sinful.

Artificial insemination was, however, publicly discussed here recently when medical and legal experts from thirty-two countries, including the Philippines, attended the World Congress on Medical Law in Manila last July 16-19, 1976. Of thirty-two position papers, five were about A.I. (the rest were related topics like family planning, sterilization, abortion,

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[7] *Ibid.*

[8] WILLIAMS, *op. cit., supra,* note 4 at 113.

[9] Sergeant, *op. cit., supra,* note 6 at 410.

[10] Smith II, *op. cit., supra,* note 5 at 133.

[11] Priscilla Mijares, *What Women Should Know About Artificial Insemination,* Mod Magazine, September 10, 1976, p. 10.

euthanasia, etc.). The contents of the position papers on A.I. will be discussed elsewhere in this paper.

Nowhere in our Philippine laws is A.I. mentioned. The Revised Penal Code is devoid of any penalty on a person who performs or submits to A.I. Neither does the New Civil Code deal squarely with artificial insemination.

II. Legal Problems

Although the practise of A.I. is not yet widespread and is generally limited to the better educated, these factors do not mean that the problems dealing with A.I are negligible. Already we have an increase in the legal problems in this area. The primary and potential problems pertaining to A.I. deal with A.I.D. Such issues have been answered in various and confused ways by the courts and by scholars.

This paper is an attempt at pinpointing the legal issues and at finding workable solutions. In some instances where possible, we will apply the provisions of our own laws. In most instances, we will have to resort to foreign court rulings to elucidate on the subject matter.

A) *The Marital Relationship* —

1. *Adultery* —

Does a female who consents to A.I.D. commit adultery? In this jurisdiction adultery is a criminal act and "is committed by any married woman who shall have sexual intercourse with a man not her husband and by the man who has carnal knowledge of her, knowing her to be married, even if the marriage be subsequently void."[12] From this provision it can be gathered that sexual intercourse is an essential element of the crime of adultery. Sexual intercourse is a physical act which involves penetration of a female by a male. Accordingly, it would appear that artificial insemination should not constitute adultery since there is no sexual act of penetration.

Actually, there are two conflicting theories on the nature of the crime of adultery. One, that adultery is necessarily and can only be committed by actual contact of sex organs, and the other, that the true essence of the crime is voluntary surrender of reproductive organs facilitating the introduction of spurious heirs into the family.[13] The latter which obviates

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[12] Rev. Pen. Code, art. 333.

[13] Perello & Salvador, *Legal Aspects of Artificial Insemination in the Philippine Laws*, 6 Far East L. Rev. 47 (1958).

the actual contact of sex organs was espoused in the case of *Oxford v. Oxford*.[14]

The Oxfords had been married in Canada in 1913 and honeymooned in England. The marriage was never consummated due to the great pain that attempts at intercourse caused the bride. Mr. Oxford returned to Canada alone, his wife remaining in England for six years until 1919 when she also returned. In the interlude she had given birth to a child as a result of A.I.D. administered, allegedly, as a "medical cure" to enable her to enjoy normal sexual relations with her husband. When Mr. Oxford refused to receive her, she filed the suit for alimony.

The court rejected the "therapeutic" argument and held that she had committed adultery. It held that *impregnation per se is the test of adultery* and that sexual union of the bodies or moral turpitude is of no consequence. The discussion of A.I.D. in Oxford is dictum since the Court disbelieved that the child was born as a result of A.I.D., basing its actual decision on a finding that it was the offspring of an adulterous relationship with another man.[15] In a famous dictum that has since plagued proponents of A.I.D., Justice Orde stated:

> "In my judgment, the essence of the offense of adultery consists not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive process or faculties of the guilty person; and any submission of those persons to the service or enjoyment of any person other than the husband or the wife comes within the definition of "adultery." Sexual intercourse is adulterous because in the case of the woman it involves the possibility of introducing into the family of the husband a false strain of blood. Any act on the part of the wife which does that would therefore be adulterous."

This definition is significant because it shifts the essence of adultery from the sexual act of penetration to ANY act which might introduce a false strain of blood into the family of the husband. It is completely at variance with the well recognized common law and statutory definition which require physical connection. If the *Oxford* test were used to determine adultery, a married woman could swallow a contraceptive pill, have complete sexual intercourse with a man other than her husband, and no adultery would be committed. Such conclusion is absurd.[16]

There are four cases, three American and one Scottish which have dealt squarely with A.I.D. as adultery since the dictum of *Oxford v. Oxford*. In

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[14] 49 Ont. L.R. 15, 58 D.L.R. 251 (1921) as cited by Wangard, *Artificial Insemination and the Law*, 1968 U. ILL. L. FORUM 215.

[15] *Ibid.*

[16] Wellens, *op. cit., supra*, note 2 at 959.

Hock v. Hock,[17] a soldier sued for divorce after returning from military duty to find his wife pregnant. The husband alleged adultery and the wife responded that she had utilized A.I.D. Although the Court found that the wife had in fact illicit intercourse, it stated that had she proved A.I.D. there would have been no adultery. However, nine years later, the Court in *Doornbos v. Doornbos,*[18] though being in the same county as the Court which decided *Hock,* stated that while A.I.H. is acceptable A.I.D. is adultery by the wife regardless of whether or not the husband consented.

In the Scottish case of *MacLennan v. MacLennan,*[19] the Court carefully analyzed the English law on adultery and arrived at a different conclusion. Lord Wheatley found that adultery required two parties physically present and engaging in the sexual act at the same time, with some degree of penetration of the female organ. Noting that these requirements are not fulfilled by A.I.D. he held that the practise does not constitute adultery, whether the husband consents or not. He stated "x x x the idea that a woman is committing adultery when alone in the privacy of her bedroom she injects into her ovum by means of a syringe the seed of a man she does not know and has never seen is one which I am afraid I cannot accept."

Lord Wheatley's reasoning follows the modern definition of adultery which includes voluntary sexual intercourse and thus there should be no adultery with or without the husband's consent. There can be no destruction of faith in chastity or loyalty of one's spouse since there is no sexual intercourse to destroy the chastity.

This rationale has been continued by the 1968 California decision of *People v. Sorensen,*[20] the nation's first criminal case on A.I.D. In this case the defendant had consented, after 15 years of marriage and a medical determination of his sterility, to allow his wife to be artificially inseminated. He and his wife executed an agreement to that effect with a local physician, and A.I.D. was administered. When a child was born as a result of this process, the mother named the defendant as the father in the child's birth certificate. For approximately four years prior to their separation, the couple experienced a normal family relationship. Later the couple separated, and upon separation, Mrs. Sorensen told defendant that she wanted no support for the child. Divorce was subsequently granted. Later Mrs. Sorensen

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[17] [Unreported] No. 44-C-9307 (Cir. Ct. Cook County, Ill. 1945), cited by Chandler, *Legislative Approach to Artificial Insemination,* 53 CORNELL L. REV. 500 (1968).

[18] [Unreported] No. 54-S-14981 (Super Ct. Cook County, Ill. 1954) as discussed in Gursky v. Gursky, 39 Misc. 2d 1083, 1088, 242 N.Y.S. 2d 406, 411 (1963).

[19] [1958] Sess. Cas. 105, (Scot), 1958 Scots L.T.R. 12, as cited by Chandler, *op. cit., supra,* note 17 at 500.

[20] 68 Cal. 2d 280, 437 P. 2d 495, 66 Cal. Rptr. 7 (1968).

fell ill and her illness necessitated public assistance under the state's aid-to-needy children program. The District Attorney instituted a criminal action alleging defendant's guilt under Section 270 of the California Penal Code. The Court stated that in the absence of legislation prohibiting A.I.D. a child so conceived is not the result of an adulterous affair since adultery is, by California statute, defined as voluntary sexual intercourse of a married person with one not a husband or wife.

Whether artificial insemination constitutes sexual intercourse and is thus within the contemplation of Article 333 of the Revised Penal Code is yet a matter to be decided locally. The possibility, however, of it falling within the statutory purview is quite remote, since in our jurisdiction all criminal cases requiring sexual intercourse as an essential element as in rape, seduction, abduction, have all involved physical contact of the actors and courts in all these cases assumed and looked upon sexual intercourse as "an actual contact of the sex organs of a man and woman and the actual penetration of the body of the latter."[21]

In the case of *U.S. v. Mata,*[22] however, our Supreme Court stated in a dictum that "the gist of the crime of adultery under the Spanish law, as under the common law in force in England and the United States in the absence of statutory enactments, is the danger of introducing spurious heirs into the family, whereby the rights of the real heirs may be impaired and a man may be charged with the maintenance of a family not his own." In this case Jacinta Mata, the defendant, and Marcial Tanedo Liu Chiu were married. The former had alleged carnal relations with the co-defendant Quiterio Sarmiento. The Court convicted them of the crime of adultery then defined by Article 433 of the Old Penal Code as "committed by the married woman who *lies* with a man not her husband and by him who *lies* with her knowing that she is married, although the marriage be afterwards declared void."

It should be noted that this case was decided under the Penal Code of 1870. From the peculiar phrasing of the provision the lawmakers intended to declare adulterous the infidelity of a married woman to her marital vows. Our Revised Penal Code precisely changed the wording of this provision and used the term sexual intercourse implying therefore that not any mere act of infidelity can be held to be adultery. Besides, the *U.S. v. Mata* case was decided without awareness of artificial insemination and therefore cannot be used as authority for determining whether artificial insemination is adultery under Philippine laws.

We feel that there is an obvious difference between A.I.D. and the clandestine physical relationship which usually accompanies adultery. The

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[21] Perello & Salvador, *op. cit., supra,* note 13 at 48.
[22] 18 Phil. 490 (1911).

moral turpitude incident to an illicit sexual affair is simply not present. A wife is not being unfaithful to her spouse by attempting artificial impregnation. In fact she is bolstering another commonly held moral value — the stability of the family unit. As of yet, our courts have not been faced with a case on A.I. and have had no occasion to rule on this issue.

2. *Legal Separation* —

Article 97 of the Civil Code[23] lists adultery as one of the grounds for legal separation. Would A.I.D. constitute adultery as defined in the Revised Penal Code to entitle the husband to sue for legal separation? If we adopt the strict meaning of adultery, the answer would obviously be NO. Granting, however, that A.I.D. is adultery and thus a ground for legal separation, it should be noted that if the husband consents to A.I.D. then he should be precluded for suing for legal separation pursuant to Article 100 of the Civil Code[24] which provides that the legal separation may be claimed only by the innocent spouse provided there has been no condonation or consent to the adultery or concubinage x x x. The consent or connivance on the part of the plaintiff to the marital offense is a cause for denial of legal separation. Thus, if the husband consents or connives with the wife in obtaining A.I.D. the action for legal separation may be dismissed.

Connivance has been generally defined as "consent by one spouse that the other shall commit adultery." If the wife can prove that her husband consented to A.I.D. and A.I.D. is recognized as adultery, the husband may be held to have connived in the adultery with the result that the action for legal separation would fail. Condonation on the other hand means forgiveness, express or implied by one spouse of another for a breach of marital duty, with an implied condition that the offense will not be repeated. Thus, condonation applies only to conduct subsequent to the event, in this case the performance of A.I.D. With the husband giving consent and his continued recognition of his consent, condonation may be proved. However, this is on the premise that A.I.D. is a valid ground for legal separation.[25]

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[23] Article 97 — "A petition for legal separation may be filed:
1) For adultery on the part of the wife and for concubinage on the part of the husband as defined in the Penal Code; or
2) An attempt by one spouse against the life of the other."

[24] Article 100 — "The legal separation may be claimed only by the innocent spouse, provided there has been no condonation of or consent to the adultery or concubinage. Where both spouses are offenders, a legal separation cannot be claimed by either of them. Collusion between the parties to obtain legal separation shall cause the dismissal of the petition."

[25] Sergeant, *op. cit., supra,* note 6 at 422.

3. *Annulment of the Marriage* —

A marriage may be terminated by annulment. Article 85 of the New Civil Code provides that marriage may be annulled for certain grounds existing at the time of the marriage. One ground is that "either party was, at the time of marriage, physically incapable of entering into the married state, and such incapacity continues and appears to be incurable."

The physical incapacity referred to by the law as a ground for annulment of marriage, is impotence, or that physical condition of the husband (or the wife) in which sexual intercourse with a normal person of the opposite sex is impossible.[26] Impotence refers to the lack of power to copulate, the absence of the functional capacity for the sexual act and not mere sterility.[27]

Since an impotent husband can father a child by A.I.H. the question is whether or not the wife can subsequently annul the marriage after A.I.H. has been utilized. The English case of *L. v. L.*[28] answered in the affirmative. In that case the marriage was never consummated due to the husband's impotency. The couple therefore utilized A.I.H. and the wife became pregnant. The wife later petitioned for a declaration of nullity and the husband defended that annulment should not be granted because the wife has approbated the marriage by use of A.I.H. The court held that the wife's conduct in using A.I.H. showed a determination and dominant intention to establish a normal relationship rather than an acquiescence or approbation of an abnormal marriage. Since there was no consummation of the marriage the court allowed annulment for the wife.

Two cases have dealt with A.I.D. and annulment. In both the wife obtained an annulment for failure of the husband to consummate the marriage. In *Slater v. Slater,*[29] A.I.D. was used but no child was conceived. The English court based its decision primarily on the fact that had the wife known that prior to the use of A.I.D. the marriage could have been annulled due to her husband's impotence, such conduct would have amounted to approbation of the marriage. In *Gursky v. Gursky,*[30] the wife was allowed an annulment based on the ground that the marriage was not consummated even though she had given birth to a child conceived by A.I.D. with the husband's consent.

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[26] 1 TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 256 (1953).

[27] *Ibid.*

[28] [1949] 1 A.E.R. 141 (1949) as cited by Sergeant, *op. cit., supra,* note 6 at 417.

[29] [1953] 1 A.E.R. 246 (1953) as cited by Sergeant, *op. cit., supra,* note 6 at 417.

[30] 39 Misc. 2d 1083, 242 N.Y.S. 2d 406 (Sup. Ct. 1963) as cited by Sergeant, *op. cit.*

B) *Legal Status and Rights of the Child —*

1. *Legitimacy —*

Universally, a child which is born in lawful wedlock is presumed legitimate. Our New Civil Code even goes further by considering children born outside lawful wedlock but during a definite period of time as legitimate. For instance, Article 255 of the New Civil Code provides that children born after one hundred and eighty days following the celebration of marriage, and before three hundred days following the dissolution or the separation of the spouses shall be presumed to be legitimate x x x. In Article 256 the child shall be presumed legitimate although the mother may have declared against its legitimacy or may have been sentenced as an adulteress. And finally, in Article 258 a child is conclusively presumed to be legitimate if the husband, before the marriage, knew of the pregnancy of the wife, or if he consented to the putting of his surname on the record of birth of the child, or if he expressly or tacitly recognized the child as his own.

The presumption of legitimacy is based on the assumption that there is sexual union in marriage particularly during the period of conception.[81] Being merely presumptions they fall before competent and sufficient evidence to the contrary. Hence, proof of physical impossibility of sexual union prevents the application of the presumption. Physical impossibility may be caused by impotence of the husband, by the fact that the husband and wife were living separately in such a way that access was not possible, and by serious illness of the husband.

Do children conceived because of artificial insemination enjoy these presumptions of legitimacy? A distinction should be made between impregnation with the husband's semen (A.I.H.) and that with semen from a third party donor (A.I.D.).

If the husband is impotent and cannot perform the sexual act but is not sterile, semen from him may be artificially introduced with his consent into the wife's genital organs, giving rise to pregnancy. If this child is born after one hundred and eighty days following the celebration of marriage and before three hundred days following its dissolution or the separation of the spouses, does he enjoy the presumption of legitimacy under Article 255 of the New Civil Code?

According to said article, against the presumption of legitimacy no evidence shall be admitted other than that of the physical impossibility of the husband's having access to his wife within the first one hundred twenty days of the three hundred days which preceded the birth of the child. The question therefore boils down to a determination whether artificial

[81] 1 TOLENTINO, *op. cit., supra,* note 26 at 497.

insemination is equivalent to sexual access. Authorities have maintained that artificial insemination is deemed equivalent to sexual access and hence the child will be presumed legitimate. In fact, even if the husband had not consented to artificial insemination (A.I.H.), if it is proved that pregnancy of the wife can be due only to such fact (as when there is no adultery) the presumption of legitimacy will still hold.[32]

Under Article 256 the child shall be presumed legitimate although the mother may have declared against its legitimacy. Under this article, it would seem that even if subsequently the wife shall declare her A.I.H. child as illegitimate, the law protects such child by according it a legitimate status. The reason for this rule is to protect the child from the passions of its parents. The law is not willing that a child be declared illegitimate to suit the whims or purposes of either parent.[33]

Of course if the husband consented to the putting of his own name on the record of birth of the A.I.H. child or if he expressly or tacitly recognized this child as his own, the presumption becomes not merely prima facie but conclusive, pursuant to Article 258 of the New Civil Code.

We thus see that A.I.H. raises no problem. With or without the husband's consent the child is obviously legitimate since impregnation with the husband's semen is deemed to be sexual access.

A.I.D. is more troublesome. It is resorted to when the husband is both impotent and sterile. Since the husbands' sperm even if introduced artificially into the wife cannot impregnate her, semen from a third party donor is utilized. Is the child conceived of A.I.D. legitimate?

Whether a child born of A.I.D. is legitimate depends on whether his mother's impregnation constituted adultery. If so, the child is considered illegitimate. If not, the child's legitimacy cannot be questioned. What is the effect of the husband's consent to A.I.D.? Authorities have maintained that even if the impotent husband consents to the artificial insemination with semen from another man, the result would not be different. The consent of the husband to the artificial insemination can have no bearing on the legitimacy of the child. If, as stated in *Oxford v. Oxford,* the surrender of the reproductive powers of the wife to another is essentially adultery, the husband would have no moral right to consent to artificial insemination than to the commission of adultery by his wife. Even with the best of intentions of the spouses in such case, the child would still be illegitimate.[34]

The *Oxford* case presents the traditional view.

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[32] *Ibid.*, p. 500.
[33] *Ibid.*, p. 503
[34] *Ibid.*, p. 501.

The *Strand v. Strand*[35] ruling is an exception to the views expressed in *Oxford*. In the *Strand* case the parties sought custody of an A.I.D. child born with the consent of the husband. The court said that the child was legitimate by analogizing the situation where a child is born out of wedlock and is legitimized upon the marriage of the interested parties. The Court also stated that the child is considered potentially or semi-adopted by the husband. The husband is entitled to the rights of a foster parent who formally adopts and acquires the rights of a natural parent.

In spite of the *Strand* ruling the *Oxford* reasoning continued to prevail. Thus, in 1954, an Illinois trial court followed the *Oxford* rationale in the case of *Doornbos v. Doornbos*[36] and held that the use of A.I.D. constituted adultery even when the husband had consented, and that a child born as a result of this process was illegitimate.

In 1963, a New York State Supreme Court judge was faced with a similar problem in *Gursky v. Gursky*.[37] In this case there had been a failure of the consummation of marriage and so the couple sought medical advice. As a result of such advice and the husband's physical condition, the couple agreed to resort to A.I.D. with semen from a third party donor. The couple had signed consent papers. A child was later born and the birth certificate listed the defendant as the mother and the plaintiff as the father. The judge ruled that a child born to a married woman through a father not the woman's husband is illegitimate and that the wife's act constitute adultery, notwithstanding the husband's consent. However, the husband's consent did make him liable for the child's support on an implied contract theory, and he was equitably estopped from denying his obligation. The court said further that the view that a child conceived by A.I.D. is legitimate, as stated in *Strand,* is not supported by legal precedent, since historically the concept is deeply rooted in the law that a child begotten by a father not the mother's husband is deemed illegitimate. *Gursky* also rejected the *Strand* theory that this situation is similar to that of a foster parent who formally adopts the child, since adoption proceedings are governed by specific statutes.

In 1964 a case with the same facts arose. In *Anonymous v. Anonymous*[38] a wife sought temporary alimony and attorney's fees from her husband in a divorce action. Although the husband had signed a written agreement consenting to his wife's A.I. he nevertheless maintained that the two daughters so conceived were illegitimate. The Court ordered alimony but noted that the husband's written consent for his wife to undergo A.I.

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[35] 190 Misc. 786, 78 N.Y.S. 2d 390 (1948).

[36] [Unreported] No. 54-S-14981 (Super Ct. Cook County) as cited by Smith II, *op. cit., supra,* note 5 at 136.

[37] 39 Misc. 2d 1083, 242 N.Y.S. 2d 406 (1963).

[38] 41 Misc. 2d 886, 246 N.Y.S. 2d 835 (Sup. Ct. 1964).

implied a promise on his part to support any offspring resulting from the insemination.

The more recent case of *People v. Sorensen*,[39] (already discussed in this paper) may offer new insights for future decisions. The California municipal court judge stated that public policy favors legitimation and no public purpose would be served by stigmatizing such child as illegitimate. The Court was not persuaded by the concept that legitimacy requires a determination that the child is illegitimate if the semen of someone other than the husband is used, because legitimacy is a legal status which can exist despite the fact that the husband is not the natural father of the child. *People v. Sorensen* is a bold judicial step. It seems however that the decision is tied to a single provision in a particular statute, and in fact the Court admitted that it was merely construing Section 270 of the California Penal Code.[40] However, it is hoped that the basic principle enunciated in *Sorensen* — that "no valid purpose is served by stigmatizing an artificially conceived child as illegitimate" — will be persuasive for all courts including our Philippine courts if and when a case of a similar nature will arise.

2. *Rights of Inheritance* —

No court has decided the inheritance rights of an A.I.D. child. The right to succeed of a child born by A.I.D. hinges on the question as to whose child it is, and in what category it is in the legal classification of children, whether legitimate, natural, acknowledged natural, natural by legal fiction, spurious or adopted. In every case they inherit under Philippine laws, but the amount and extent of their successional rights would depend upon the status assigned to them by law.[41]

Inheritance problems are lessened if the husband leaves a will. If the testator bequeaths his property to his "children or issue" the problem that would arise is whether such term include illegitimate children. If the testator has full knowledge that some or all of his children are illegitimate and his intention is not clearly expressed in the will, then the words "children or issue" create an ambiguity allowing the intention of the testator to be ascertained from the words of the will, taking into consideration the circumstances under which it was made, excluding oral declarations.[42] Thus, if the husband had consented to A.I.D. before or con-

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[39] 62 Cal. Rptr. 462 (1967).

[40] Section 270 of the CAL. PEN. CODE reads in part: "A father of either a legitimate or illegitimae minor child . . . who wilfully omits . . . clothing, food, shelter . . . for his child is guilty of a misdemeanor."

[41] Perello & Salvador, *op. cit., supra*, note 13 at 52.

[42] Article 789 — "When there is an imperfect description, or when no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence, excluding the oral declarations of the testator as to his intention; and when an uncertainty arises upon the face of the will, as to the application of

doned the procedure after the child's conception or birth, it may be held that the husband intended the A.I.D. child to be included in the provisions of the will. Consent to A.I.D. may also constitute an acknowledgment by the husband as the father of the child if the husband does so in a general or notorious way, or does so in writing. Also, if it is known that the husband could not conceive his own children and the only children he has are A.I.D. children — it would be obvious that if he uses the word "children or issue" in his will then the only children he can possibly refer to are those conceived by A.I.D.[43]

What are the rights of an A.I.D. child if the husband dies intestate? The answer again hinges on his status. If considered legitimate, he has the same share as that of a legitimate child. If illegitimate, his share is that of an illegitimate child. His share in the former is of course bigger.

Can the A.I.D. child inherit from the donor who sired him? Secrecy would appear to preclude the A.I.D. from attempting to gain inheritance from the donor. The donor's identity is never revealed and the donor is protected by anonymity. Practical considerations dictate this. A donor may have sired a hundred or more children and therefore his theoretical liability is very large.[44]

An effective way of allowing the A.I.D. child to inherit is for the husband to adopt the child. Under Article 341 of the New Civil Code it is provided that the adoption shall "give to the adopted child the same rights and duties as if he were a legitimate child of the adopter." Thus if an A.I.D. child is adopted he can inherit from his adopting father. The adopting parents however cannot inherit from the adopted children. Article 342 of the New Civil Code provides: "the adopter shall not be a legal heir of the adopted person, whose parents by nature shall inherit from him. In view of the anonymity of the donor's identity who is the natural biological father of the A.I.D., it is difficult to imagine how Article 342 can be applied in A.I.D. cases.

Adoption proceedings, however, have certain drawbacks. Since adoption requires the consent of the child's natural parents[45] an inquiry would have to be made into the identity of the donor which is the whole object of medical practise to suppress. Also, adoption proceedings have the drawbacks of some publicity — which is highly undesirable in a small

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any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into consideration the circumstances under which it is made, excluding such oral declarations.

[43] Sergeant, *op. cit., supra,* note 6 at 428.

[44] WILLIAMS, *op. cit., supra,* note 8 at 120.

[45] CIVIL CODE, art. 340 — "The written consent of the following to the adoption shall be necessary:

1) The person to be adopted, if fourteen years of age or over;

2) The parents, guardian or person in charge of the person to be adopted."

town where such things are gosipped about and where some know-alls would be sure to assume that it is not a case of A.I. but actually of concealed adultery.[46] Another drawback is that the husband might refuse adoption after consenting to A.I.D., or he might die before the child's birth or before the adoption is completed. Finally, adoption is a legal formality which as a practical matter, would rarely be used by a husband who has not even drawn a will.

3. *Right of Support* —

The burden of support is normally attributed to the natural parents. A.I.H. presents no problem. The husband is the natural father hence he is liable for support. A.I.D. however presents a problem. If an A.I.D. child is considered illegitimate then the donor, not the husband is responsible for support since as a general rule a husband is not liable to support a child born to his wife but not procreated by him.[47] The donor would however be saved from the duty to give support by the secrecy surrounding A.I.D. since the physician is not required to keep records matching the donors with the recipients.

The husband might however be compelled to support the child by virtue of his standing *in loco parentis* to it.[48] If the husband consents to A.I.D. his purpose is to cause a child to enter into the family unit. He should assume therefore the rights and obligations incident to the parent-child relationship. Even if the husband does not consent to A.I.D. if he accepts the wife's illegitimate child into his family under facts which give rise to a presumption that he intends to assume responsibility for the child's support, he is considered to stand *in looo parentis* and be compelled to fulfill the duties of support as a natural parent.

We have earlier discussed the New York cases of *Gursky v. Gursky* and *Anonymous v. Anonymous* which held the husband liable for support of the A.I.D. child although such child be considered illegitimate. The theory used by the Court was the implied contract theory (promissory estoppel). The Court held in both cases that the consent of the husband to A.I.D. constituted an implied promise that the child could become part of his family, be supported by him and, in addition, by the wife's reliance and action on this promise the husband would then be estopped from refusing to support the child.

The Supreme Court of California took a more definite stand in the case of *People v. Sorensen.* It held that the husband who gives his consent to A.I.D. is guilty of the crime of failing to support a child so conceived within the meaning of the Penal Statute imposing on a father the

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[46] WILLIAMS, *op. cit., supra,* note 8 at 121.
[47] Sergeant, *op. cit., supra,* note 6 at 430.
[48] Wellens, *op. cit., supra,* note 2 at 965.

legal obligation of support. The Court reasoned that the husband was the legal father of the child so conceived because the A.I.D. child does not have a natural father as is generally understood. It further said that a reasonable man who because of his sterile condition consents to A.I.D. should know that his behavior carries with it legal responsibilities for non-support. The consenting husband cannot create a temporary relationship to be assumed at will, but rather the arrangement must be of such character as to impose on him the obligation of supporting those for whose existence he is directly responsible.

4. *Visitation Privilege* —

If the husband is required to support the A.I.D. child as a natural father then he should also have the corresponding privileges of a natural father. Where the husband is the non-custodial parent, the privilege of visitation should be decided by those guidelines applicable to a natural father. Thus, where the husband has not been shown to be an unfit guardian by reason of his moral depravity, habitual drunkenness, incapacity or poverty, and where the best interest of the child indicates that he should be permitted visitation, then the facts surrounding the child's conception should not be regarded as precluding the husband's right to visitation.

5. *Parental Authority* —

Article 311 of the Civil Code speaks of parental authority. It is obvious the framers of our code had not envisioned A.I.D. — otherwise they would have recognized the existence of two sets of parents, the biological parents and the social parents. Nevertheless, it would seem that the husband, not the donor is to exercise parental authority jointly with the mother. The reason is again the fact that the donor's identity is anonymous. Besides the donor might have donated his semen to many hundred others and it is absurd to make him exercise parental authority over all of them.

To have the mother alone exercise parental authority would work against the stability of the family unit. Besides A.I.D. children with the consent of the husband, are more often than not welcomed by the father who, precisely having given up hope of conceiving his own children is anxious to have children in any other way.

6. *Use of Surnames* —

The A.I.H. child, being legitimate, bears the surname of the father. Whose surname does the A.I.D. child bear? The answer again hinges on his status. If he is legitimate he uses the surname of the father.[49] If

[49] CIVIL CODE, art. 364 — "Legitimate and legitimated children shall principally use the surname of the father."

he is subsequently adopted by either, he bears the surname of the adopter.[50] If he is considered illegitimate he bears the surname of the mother.[51]

We feel that this problem as to the use of surname is academic more than anything else. In practice, if the husband consents to A.I.D. it would be reasonable to presume that he is willing to share his surname with the child. Even if the husband had not earlier consented to A.I.D. if subsequently he consents to the putting of his name in the record of birth, or has the child christened with his own surname, or holds out to the community that such child is his, or expressly or tacitly recognizes the child as his own, then it can safely be presumed that the husband has acknowledged his paternity over the child and is therefore willing to share his surname with such child.

C) *Other Legal Problems* —

1. *Responsibility of Physician* —

A physician who performs A.I.D. has certain responsibilities. He has the responsibility of exercising ordinary diligence, otherwise he might be subjected to a malpractise action. For instance, take a situation where the physician negligently inseminates a white woman with a Negro donor's sperm, or a Negro wife with an Oriental donor's sperm or vice versa. Can the doctor be made liable under such a situation?

The doctor to avoid future complications should obtain the husband's consent to A.I.D. If the doctor performed A.I.D. without the husband's consent, he might be liable for "interference with the marital relation by enticing the wife away from home" by adultery or "criminal conversation" with her, or by mere "alienation of her affections."[52]

If such a case were brought before Philippine Courts can the physician be made liable for damages under Article 26, New Civil Code[53] on the ground of "disturbing the private life or family relations of another"?

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[50] CIVIL CODE, art. 365 — "An adopted child shall bear the surname of the adopter."

[51] CIVIL CODE, art. 368 — "Illegitimate children referred to in Article 287 shall bear the surname of the mother."

[52] Sergeant, *op. cit., supra,* note 6 at 434.

[53] CIVIL CODE, art. 26 — "Every person shall respect the dignity, personality, privacy and peace of mind of his neighbors and other persons. The following and similar acts, though they may not constitute a criminal offense, produce a cause of action for damages, prevention and other relief:

(1) Prying into the privacy of another's residence;

(2) Meddling with or disturbing the private life or family relations of another;

(3) Intriguing to cause another to be alienable from his friends.

(4) Vexing or humiliating another on account of his religious beliefs, lowly station in life, place of birth, physical defect or other personal condition."

If the attending physician at birth is the same physician who performed A.I.D., or the doctor knows the child was conceived by A.I.D., he is legally obligated to place in the birth certificate information pertaining to the father. The physician then becomes faced with a dilemma. If he lists the donor as the father, the policy of secrecy will suffer. If he issues a certificate naming the husband as the biological father knowing fully well that he is not, he runs the risk of violating Article 174, Revised Penal Code, which punishes "any physician or surgeon who in connection with the practise of his profession shall issue a false medical certificate."

It would seem that a practical solution to this problem is for the doctor who performs A.I.D. to advise the wife to go to another doctor for delivery. This way the delivering doctor would be ignorant as to the manner of conception of the child and cannot be made liable under the above cited article.

One last question that has to be decided is whether the physician can be made a co-defendant in a case brought for adultery against the wife because he was a party to the act. It would seem absurd to hold the physician an adulterer especially if the physician is a woman. Moreover, if some courts have held that the wife herself who submits to A.I.D. is not an adulteress, then obviously the physician who merely administered the A.I.D. cannot be more guilty than the wife.

2. *Liability of the Donor* —

Can the donor be liable for adultery? Following the *Oxford* ruling, the essence of the offense of adultery is the voluntary surrender to another person of the reproductive powers or faculties of the guilty person. As a logical consequence the donor of semen, if a married man is guilty of adultery by giving his semen (which is tantamount to a voluntary surrender of his reproductive faculties), such that his wife (if she does not consent) can obtain a divorce from him. If this were the case, no man would donate his semen for fear of possible litigations in court. The problem however is highly theoretical, since in practise, as earlier explained, the donor is protected by the precautions taken by the physician to observe secrecy as to the donor's identity.

The donor's identity should be kept secret not only to protect his reputation, but also to eliminate the risk of the donor blackmailing the couple, or of some scheming person blackmailing the donor, as well as the possible risk of the wife transferring her affections to the donor.[54]

3. *Fraud by the Spouses* —

Another offense may arise when the husband shall state or represent in a public or official document that he is the natural father of their issue

[54] WILLIAMS, *op. cit., supra,* note 8 at 120.

when in fact he knows fully well that he is merely its nominal father, or should both husband and wife hold out in the same document that the issue is both their own. Both spouses commit falsification of a public or official document by "making untruthful narrations" punishable under Article 172 (par. 1) of the Revised Penal Code. They could also be held liable under Article 172 (par. 2) for "making untruthful statements in a private document to the damage of a third party." And if by chance the document or private writing mentioned "shall be knowingly introduced in evidence in any judicial proceeding or to the damage of another or with the intent to cause such damage" the person making use of it incurs criminal liability under Article 172 last paragraph.[55]

4. *Incest* —

The increasing production of children by means of artificial insemination from unknown donors enhances the possibilities of incestuous marriages and incentuous relationships. The donor could be the father of an untold number of children. The resulting children would therefore be half-brothers and half-sisters and the intermarriages between such children, if ever, would be prohibited by Article 81, paragraph 3, New Civil Code[56] as marriages contracted "between collateral relatives by blood within the fourth civil degree." The risk of incestuous marriages, however, exists not only in A.I.D. cases but also in cases of foundlings and illegitimate or adopted children whose parents are not known.

Though this problem cannot be eliminated it can at least be minimized by limiting the number of donations of a single donor, and by arrangements for taking donors who live at a distance from the woman inseminated. Such arrangements would be greatly facilitated through the use of refrigeration.[57]

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[55] REV. PEN. CODE, art. 172 — "The penalty of *prision correccional* in its medium and maximum periods and a fine of not more than 5,000 pesos shall be imposed upon:

1. Any private individual who shall commit any of the falsification in any public or official document or letter of exchange or any other kind of commercial document.

2. Any person who, to the damage of a third party or with intent to cause such damage, shall in any private document commit any acts of falsification enumerated in the next preceding article.

Any person who shall knowingly introduce in evidence in any judicial proceeding or to the damage of another or with intent to cause such damage, shall use any of the false documents embraced in the next preceding article, shall be punished by the penalty next lower in degree."

[56] CIVIL CODE, art. 81 — "Marriages between the following are incestuous and void from their performance, whether the relationship between the parties be legitimate or illegitimate:

1) Between ascendants and descendants of any degree;

2) Between brothers and sisters, whether of the full or half blood;

3) Between collateral relatives by blood within the fourth civil degree."

[57] WILLIAMS, *op. cit., supra*, note 8 at 120.

III. RECOMMENDATIONS

We have seen that the courts which have dealt with artificial insemination in one way or another have been unable to arrive at any consistent policy statement. The inconsistency is brought about precisely because of the absence of definite statutes on the matter. The existing statutes we have were formulated when artificial insemination was not contemplated. At this stage, however, it is still possible to avoid future confusions which may arise.

Three alternatives may be taken. The first alternative is to remain passive and let the Courts handle the situation.[58] This however is not really solving the problem. To remain passive is to let a confused situation continue and possibly worsen. Litigation will increase proportionately to the increase in number of A.I.D. children. With increased litigation judicial conflict will grow. A case by case development of this field could easily lead to unprecedented confusion. The types of insemination available and the multitude of problems which could arise would make judicial solution inappropriate. It would force the courts to solve the problem by interpreting stautes which were never meant to deal with it.

The second alternative is to enact legislation prohibiting the practise of A.I.D. Two State Legislatures have considered, without success, the possibility of making A.I.D. criminal.[59] It was believed that by eliminating A.I.D. all troubles would also be eliminated, and that making it a criminal practice would serve to show society's disapproval.

To make A.I.D. criminal would be to disallow the voluntary desire of issueless couples who genuinely desire children, and who for one reason or the other prefer artificial insemination to adoption, to have children of their own. The advantage of A.I.D. over adoption is that in A.I.D. the child is at least the blood of one of the spouses, whereas an adopted child is a child of neither but of an unknown couple. A.I.D. would further satisfy the maternal desire of the wife to bear her own child and share her pregnancy and childbirth with her husband. Furthermore, A.I.D. does not really constitute so serious a threat to the general health and morals of society as would justify its being made criminal.

The third alternative is to enact legislation regulating A.I.D. as a legal practise and declaring the resulting children legitimate. This, we feel, is the most constructive remedy. The legislature with its fact-finding capabilities, is more equipped than the courts at formulating policies which are responsive to the current needs of society.

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[58] Land, Jr., *Cases*, 7 DUQUESNE L. REV. 179 (1968).
[59] Minnesota House Bill 1090 (1949); Ohio Senate Bill 93 (1955)

If legislation is to be enacted a choice has to be made between comprehensive and general legislation.[60] Comprehensive legislation covers each phase of the process from the donation of the sperm to the birth of the child. The comprehensive legislation would have a state agency handle the policy decisions now being made by individual doctors, and a centralized recording facility would be maintained. It would seem that this approach would be disproportionate to the size of the problem. It would create more problem areas than it would solve. Deviations from the statutory norm would require sanctions and a problem of enforcement would arise.

A general statute appears to be the most desirable alternative. Such statute would define the general procedures, establish the participation of the wife, husband and donor as lawful and declare that the child shall be legitimate and entitled to all the rights of a legitimate child. Specific procedure of A.I.D. should be left entirely to the responsibility of the medical profession.

Certain guidelines however should be remembered:[61]

1. *A.I.D. should be permitted to be done only by qualified medical practitioners on an informed written consent from the needy couple.* A consent on file signed by the parties will prevent a husband or wife from disavowing his/her consent to A.I.D. at a later date. Also, requiring the consent of both parties to A.I.D. prevents the wife from having A.I.D. performed without the consent of the husband.

2. *Selection of suitable donor should be the responsibility of the performing physician.* A proposed donor should be given a standard serological test for syphilis and smear for gonorrhea. If said donor is found to be affected with venereal disease, TB, or any congenital disease or defect he should not be used as a donor.

3. *The donor's identity should not be revealed under any circumstance.* This protects the privacy and reputation of the donor. Furthermore, it will encourage semen donation from donors since possibility of litigations, blackmailing, etc. is avoided.

4. *The husband should be designated as the legal father.* This is intended to abolish problems regarding inheritance rights, support, parental authority, use of surnames, etc.

The above requirements are the minimum that the law should provide for. As earlier mentioned, the medical profession is given blanket authority to prescribe other requirements which it deems proper under the

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[60] Wellens, *op. cit., supra,* note 2 at 970-971.

[61] Proposed by the World Congress on Medical Law held in Manila last July 16-19, 1976.

cicumstances. For instance some physicians may require that the husband's semen be mixed with that of the donor in order to give the couple at least the hope that the child is really the husband's. This practise has a legal advantage since it may make more difficult the rebuttal of the presumption of legitimacy. Another far-sighted practice of some physicians is to choose a donor whose blood group is the same as that of the husband — this prevents the child being bastardized by a blood test.[62]

IV. CONCLUSION

To date, three states in the United States have enacted general statutes on the use of A.I.D. — New York in 1947, Georgia in 1964, and Oklahoma in 1967. Other states have proposed bills concerning A.I.D. but failed to pass legislation — Illinois, Indiana, Minnesota, Ohio, Virginia, Wisconsin.[63]

In the Philippines, definite legislation would have to be enacted. The fact that there are few (if at all) cases of artificial insemination in the country is no assurance that our Courts will not be confronted with A.I. problems in the near future.

Our law making body must be re-evaluate existing outmoded rules and definitions so as to fit new medical and technological advances such as artificial insemination. Since little guidance is available from foreign court decisions which have been nothing but a broad spectrum of inconsistent results, the law making body will have to sift through varying attitudes of today's society to evolve a consistent policy statement. For it is only in being responsive to existing realities that the law can march forward with science!

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[62] WILLIAMS, *op. cit., supra,* note 8 at 119.

[63] Dean, *Artificial Insemination in New Mexico,* 10 NATURAL RESOURCES J. 357 (1970).