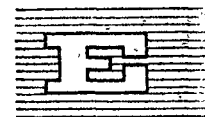


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HUMAN RIGHTS AND SCIENTIFIC AND TECHNOLOGICAL DEVELOPMENTS

Protection of the human personality and its physical and
intellectual integrity, in the light of advances in biology,
medicine and biochemistry.

Report of the Secretary-General

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* Part Two will be issued as document E/CN.4/1172/Add.1

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** Parts Three and Four will be issued as document E/CN.4/1172/Add.2.

INTRODUCTION

1. In paragraph 1 of its resolution 2450 (XXIII) of 19 December 1968, on human rights and scientific and technological developments, the General Assembly invited the Secretary-General to undertake, with the assistance of the Advisory Committee on the Application of Science and Technology to Development, among others, and in co-operation with the executive heads of the competent specialized agencies, a study of the problems in connexion with human rights arising from developments in science and technology, in particular from the following standpoints:

"(a) Respect for the privacy of individuals and the integrity and sovereignty of nations in the light of advances in recording and other techniques;

"(b) Protection of the human personality and its physical and intellectual integrity, in the light of advances in biology, medicine and biochemistry;

"(c) Uses of electronics which may affect the rights of the person and the limits which should be placed on such uses in a democratic society;

"(d) More generally, the balance which should be established between scientific and technological progress and the intellectual, spiritual, cultural and moral advancement of humanity."

2. The Assembly requested the Secretary-General to prepare, on a preliminary basis, a report comprising a summary account of studies already made or in progress on the aforementioned subjects, emanating in particular from governmental and intergovernmental sources, the specialized agencies and the competent non-governmental organizations; and a draft programme of work to be undertaken in fields in which subsequent surveys would be necessary for the attainment of the objectives of the resolution; and to submit that report to the Commission on Human Rights for consideration and transmittal, through the Economic and Social Council, to the General Assembly.

3. At its twenty-seventh session, the Commission considered the preliminary report (E/CN.4/1028 and Add.1-6 and Add.3/Corr.1 and 2)^{1/} and adopted, on 18 March 1971, resolution 10 (XXVII).^{2/} The Commission recognized the need during the Second United Nations Development Decade to concentrate its attention on the most important and basic problems of protecting human rights and fundamental freedoms in the context of scientific and technological progress, and in particular, on, inter alia, "prevention of the use of scientific and technological achievements

^{1/} The Commission also had before it a preliminary memorandum by the World Health Organization on health aspects of human rights and scientific and technological developments (A/8055/Add.1).

^{2/} A more complete reference to resolution 10 (XXVII) than the one here presented appears in paragraphs 3 - 8 of document E/CN.4/1142, which is before the Commission at its thirty-first session.

to restrict fundamental democratic rights and freedoms." The Commission requested the Secretary-General to continue his study of the consequences, for the observance of human rights, of current developments in science and technology, and to submit to the Commission one or more reports, in fields where sufficient documentation and studies were available, which could be used "as a basis for exploring the possibility of preparing international instruments designed to strengthen the protection of the human rights proclaimed in the Universal Declaration of Human Rights".

4. The first report in a series relating to the subjects mentioned in paragraph 1 of General Assembly resolution 2450 (XXIII) (E/CN.4/1116 and Add.1-4 and Add.3/Corr.1) dealt with "respect for the privacy of individuals and the integrity and sovereignty of nations in the light of advances in recording and other techniques" (paragraph 1 (a) of Assembly resolution 2450 (XXIII)).

5. The second report in the same series (E/CN.4/1142 and Add.1-2 and Corr.1-4) deals with "uses of electronics which may affect the rights of the person and the limits which should be placed on such uses in a democratic society" (paragraph 1 (c) of Assembly resolution 2450 (XXIII)).^{3/}

6. The present report, the third in the series, has been prepared in implementation of paragraph 1 (b), on protection of the human personality and its physical and intellectual integrity, in the light of advances in biology, medicine and biochemistry, of Assembly resolution 2450 (XXIII), keeping in mind Commission resolution 10 (XXVII).

7. By a note verbale dated 23 November 1973, the Governments of States Members of the United Nations and of the specialized agencies were invited to supply information and views concerning the protection of the human personality and its physical and intellectual integrity in the light of advances in biology, medicine and biochemistry, including certain specified problems which had been raised in the relevant parts of the preliminary report referred to in paragraphs 2-3 above,^{4/} and actual or possible solutions to these problems.

8. As of 21 December 1974, substantive replies had been received from the Governments of Argentina, Australia, Austria, Barbados, Belgium, Denmark, Finland, Ghana, Iraq, Japan, Khmer Republic, Luxembourg, Malaysia, Morocco, Norway, Republic of Viet-Nam, Romania, Singapore, Sri Lanka, Sweden, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics and United Kingdom of Great Britain and Northern Ireland.

^{3/} This report is before the Commission at its thirty-first session.

^{4/} Namely document E/CN.4/1028/Add.2 and paragraphs 62-84 and 29-44 respectively of documents E/CN.4/1028/Add.5 and 6.

9. Requests for information and views were also sent, on 16 November 1973, to the United Nations Educational, Scientific and Cultural Organization, the Food and Agriculture Organization and the World Health Organization and, on 14 December 1973, to a number of non-governmental organizations in consultative status with the Economic and Social Council. As of 21 December 1974, substantive replies had been received from UNESCO and the following non-governmental organizations: Category II: Commission of the Churches on International Affairs, International Association of Democratic Lawyers, International Association of Lawyers; Roster: Council for International Organizations of Medical Sciences (CIOMS), International Association of Gerontology, International Pharmaceutical Federation, International Society of Cardiology, International Union of Psychological Science, World Federation of Neurosurgical Societies, World Federation of Scientific Workers, World Medical Association and World Psychiatric Association.

10. Further material was collected for the present report by research independent of these requests, and information was contributed by a number of other organizations and institutes and by individual scholars. Account was also taken of the material contributed to or gathered for the relevant parts of the preliminary report (see the footnote to paragraph 7 above). A statement of the governments, specialized agencies, regional intergovernmental organizations and non-governmental organizations which contributed to the preliminary report as a whole may be found in documents E/CN.4/1028, para.6, and E/CN.4/1028/Add.5, para.3.

11. At the request of the Executive Board of the World Health Organization, the Director-General of that Organization has transmitted to the Secretary-General a document on health aspects of human rights in the light of scientific and technological developments.^{5/} The Executive Board further requested the Director-General of WHO to draw attention to the fact that the document "is of an informative character since the subjects treated therein are under continuing study by the Organization". The document is being circulated to the Commission as document E/CN.4/1173.

12. An examination of those parts of the preliminary report which are specified in the footnote to paragraph 7 above will reveal that the subject defined in paragraph 1 (b) of Assembly resolution 2450 (XXIII) (see para.1 above) raises many and varied issues. In the time available it has not been possible for all these issues to be covered in the present document or in the separate report of WHO. The remainder will be the subject of addendum 3 to the present document. It will be recalled that the preliminary report, as is stated in paragraph 9 of document E/CN.4/1028, speaks of threats and dangers to human rights. The present document deals also (as will the addendum just mentioned) with measures suggested and action taken to protect those concerned against such threats and dangers. These measures, suggested or actual, may form a basis for exploring the possibility of preparing international instruments designed to strengthen the protection of the human rights proclaimed in the Universal Declaration of Human Rights, as envisaged in paragraph 10 of Commission resolution 10 (XXVII).

^{5/} World Health Organization, Executive Board, Fifty-fifth session, Health Aspects of Human Rights in the Light of Scientific and Technological Developments, document EB55/41 of 5 December 1974.

PART ONE: DEVELOPMENTS IN BIOLOGY

I. PRELIMINARY REMARKS

13. Knowledge in the area of biology has increased rapidly in recent years, and writers have discussed the possible implications for the human race of this increased knowledge, including its possible impact on human rights. The same issues have engaged the attention of governmental and non-governmental bodies and meetings, both international and national.

14. Most of the discussion of the possible impact upon human beings of recent developments in biology concerns the future. The Secretary-General's preliminary report on his study of human rights and scientific and technological developments observed that: "Possibilities discussed by writers include: artificial inovation; in vitro fertilization; parthenogenesis; choice of sex of offspring; creation of human beings by an a-sexual process called cloning; manipulation of the D.N.A. molecule so as to interfere with the processes of heredity ("genetic surgery"); the improvement, by procedures adopted before birth, of the future intelligence of a child, and the creation of part-human chimeras."6/

15. Writers vary in the extent to which they probe into the future in this connexion. In addition, much of the speculation in question is based upon the assumption that procedures which have proved possible in relation to other forms of life will eventually also prove possible in relation to man. The Secretary-General's preliminary report stated that: "Having referred to certain current speculation concerning the possible future abuse of 'genetic engineering', an editorial in Nature, vol.224 (27 December 1969), p.1242, recalls that 'there can be no simple assurance that the rudimentary manipulations with bacteria and viruses which are now possible or within sight will certainly be applicable to mammalian systems'. "7/

16. For these reasons, the Secretary-General found it difficult, at the time of the writing of the preliminary report, to indicate precisely which problems fell within the scope of the study required by resolution 2450 (XXIII). He has decided to deal in his study with the following two topics:

- (i) legal and other problems arising from the development of artificial insemination; this question is dealt with in the present report, paragraphs 18-111.
- (ii) the question of the "genetic burden" placed upon mankind by the fact that increasing numbers of persons suffering from genetically transmissible diseases can be kept alive until they are able to procreate; the human rights problems raised in this connexion were referred to in the Secretary-General's preliminary report 8/ and the topic as a whole will be dealt with in an addendum to the present document.

6/ Document E/CN.4/1028/Add.2, para.187, footnote 146.

7/ Ibid., para.187, footnote 147.

8/ Document E/CN.4/1028/Add.2, para.186(i), and document E/CN.4/1028/Add.6, paras.30-31.

17. One of the subjects listed in paragraph 14 above as being of uncertain relevance at the time of the writing of the preliminary report is "genetic surgery". In the above-mentioned WHO report one reads the following:

"The considerable advances that have been made in medical genetics in recent years have given rise to much speculative discussion and writing on the ethical and social implications of 'genetic manipulation' or 'genetic engineering' as applied to human beings. However, any human applications of such techniques are so far removed from current practical possibilities that it is doubtful whether they can yet be regarded as a matter of legitimate concern at the levels of public health authorities, national legislative bodies, or intergovernmental organizations."^{9/}

^{9/} WHO, doc. EB55.R65, op.cit., Annex, p. 13-14.

II. LEGAL AND OTHER PROBLEMS ARISING FROM THE DEVELOPMENT OF ARTIFICIAL INSEMINATION

18. One author has raised, and offered a reply to, a question relating to the desirability of artificial insemination in the light of the expanding world population: "At this point we may ask, what is the point of bothering with artificial insemination ..., and indeed with the alleviation of infertility in general, when the world is suffering from too many babies and there exists the obvious alternative of adoption? One answer is that medical ethics demands that the doctor do whatever he considers is in the best interests of the individual patient, whether or not it is in the best interest of society." ^{10/} The question is to be pondered in the light of the right of "men and women of full age ... to marry and to found a family" (article 16, paragraph 2 of the Universal Declaration of Human Rights).

The Government of Austria has expressed the following opinion: "If the right to a family is recognized in the sense that couples have a right to have children it is understood that in that case artificial insemination can be deemed compatible with human rights." ^{11/}

19. In the process of artificial insemination the semen may be provided by the husband (A.I.H.) or by another donor (A.I.D.). ^{12/} The present report is primarily, but not exclusively, concerned with A.I.D. and the resulting ethical, legal, social and psychological problems posed, to the extent that they may be regarded as effecting human rights.

20. For decades the laws of most jurisdictions ignored the practice of artificial insemination, few controls existed and the procedure was by and large dictated by the individual medical practitioner in agreement with his patients. In general, only since the Second World War has artificial insemination come to the attention of legislators, the public, the courts, and social scientists and religious leaders. Its practice is at present largely confined to the technologically more highly developed countries, although even in those countries only rough and inconsistent estimates of the incidence of the practice are available. In France, the number of births resulting from artificial insemination is estimated to be between 1,000 and 2,000 per year at present. ^{13/} "About 100 children are born in Sweden annually as a

^{10/} Anne McLaren, "Biological regulation of reproduction", The Family and its Future: A Ciba Foundation Symposium (London, J. & A. Churchill, 1970), p.105.

^{11/} Information furnished by the Government of Austria on 21 November 1974.

^{12/} Anne McLaren, "Biological aspects of A.I.D.", Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (new series). (Amsterdam, Associated Scientific Publishers, 1973), p.4.

^{13/} Mariel Revillard, "Legal aspects of artificial insemination and embryo transfer in French domestic law and private international law", Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (new series). (Amsterdam, Associated Scientific Publishers, 1973) p.80; Dr. E. Mollet, "Fécondation naturelle, insémination artificielle et fécondation in vitro et le droit à la vie", Ive Colloque de Besançon, Les Droits de l'Homme en France (Fourth Besançon Symposium, Human Rights in France), Programme on Human Rights in Life and Death, Besançon, 17-19 January, p.3.

result of artificial insemination," it has been reported.^{14/} An estimate of "a few hundred" per year in the United Kingdom has been made.^{15/} On the other hand, the figure for all of Europe has been estimated at 1,000 per year.^{16/} The estimates for the United States of America range from 10,000 births per year,^{17/} to as high as 150,000.^{18/} In 1970, Dr. Roberic Gorney of UCLA School of Medicine, the United States of America, estimated that donor insemination had up to that time produced 1,000,000 babies.^{19/} The procedure is also used in Australia, Belgium, Federal Republic of Germany, Israel, Netherlands and South Africa,^{20/} Argentina,^{21/} Finland,^{22/} Norway,^{23/} and Romania.^{24/} From information received from governments it has been determined that artificial insemination is not presently practised in Singapore,^{25/} Sri Lanka ^{26/} or the Republic of Viet-Nam.^{27/}

21. Due to factors mentioned in the following paragraphs 22-25, there seems reason to suppose that the practice is likely to become more widespread, and it is the more important, therefore, to study the human rights problems involved.

^{14/} Information furnished by the Government of Sweden on 12 March 1974.

^{15/} Bernard Dickens, "Biological timebombs under the law", New Scientist, 14 March 1974, p.681.

^{16/} Gerald Leach, The Biocrats: Implications of Medical Progress, Revised edition, (Middlesex, England, Penguin Books Ltd., 1972), p.86.

^{17/} R. Michael Davidson, Avant Guard post anniversary issue, p.10.

^{18/} Hilda Harris, "Advances in medicine and biology: some implications", Soroptimist, September 1969 (vol. 40, No. 5), p.65.

^{19/} Paul Ramsey, Fabricated Man: The Ethics of Genetic Control, (New Haven and London, Yale University Press 1970), p.128.

^{20/} Report of the Departmental Committee on Human Artificial Insemination, Home Office Scottish Home Department (London, Her Majesty's Stationery Office, July 1960, Cmmd. 1105), p.4.

^{21/} Information furnished by the Government of Argentina on 30 May 1974.

^{22/} Information furnished by the Government of Finland on 25 February 1974.

^{23/} Information furnished by the Government of Norway on 15 April 1974.

^{24/} Information furnished by the Government of Romania on 29 April 1974.

^{25/} Information furnished by the Government of Singapore on 13 March 1974.

^{26/} Information furnished by the Government of Sri Lanka on 5 March 1974.

^{27/} Information furnished by the Government of Viet-Nam on 27 March 1974.

22. In the United Kingdom and the United States, some 12 per cent of couples have an infertility problem, and it is estimated that in 10-15 per cent of these it is the man who is infertile.^{28/} It has been said that, in France, "as about 1 couple out of 8 is sterile, it can be estimated that the man is sterile in at least 1 couple out of 20".^{29/}

23. Apart from the problem of infertility, A.I.D. is sometimes used where there is a severe rhesus incompatibility between the spouses or where the husband is known to suffer from or carry a serious genetically transmissible disease, such as Huntington's chorea or haemophilia. Where, for example through genetic counselling, a couple has learned that they share the potential for a recessive genetic disorder which might affect their offspring, A.I.D. is sometimes resorted to.^{30/} It has been said that "the couple with sickle cell trait can only be certain of avoiding the birth of a child with sickle cell anemia by not having natural children."^{31/}

24. Most married couples want children and will continue to do so in the foreseeable future. The increased use of more effective methods of contraception, the relaxation of laws and attitudes toward abortion, and changes in the attitudes of women in society are likely to diminish the availability of children for adoption. It is estimated that in the United States there is only one baby available for every 10 childless couple applying for adoption.^{32/}

25. Where there is any interference in the natural reproductive process the fear exists that damage may be done to the offspring. The authorities are in agreement that with artificial insemination this anxiety appears to be groundless.^{33/} In follow-up studies made, no increase is shown in neo-natal mortality or in congenital defects; the physical and mental development of the children involved is in no way inferior to those of children conceived naturally. Furthermore, due to the synchronization of ovulation and fertilization that is possible with professional artificial insemination, it is believed that the risk of chromosome abnormalities is reduced.^{34/}

^{28/} Anne McLaren, "Biological Aspects of A.I.D.", Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (new series). (Amsterdam, Associated Scientific Publishers, 1973), p.4.

^{29/} Dr. E. Mollet, op.cit., p.5.

^{30/} Anne McLaren, "Biological aspects of A.I.D.", Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (new series). (Amsterdam, Associated Scientific Publishers, 1973), p.4.

^{31/} Gerald Leach, op.cit., p.137.

^{32/} Anne McLaren, "Biological regulation of reproduction", The Family and its Future: A Ciba Foundation Symposium, (London, J. & A. Churchill, 1970), p.105.

^{33/} Anne McLaren, "Biological aspects of A.I.D.", Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (new series). (Amsterdam, Associated Scientific Publishers, 1973), p.4.

^{34/} Anne McLaren, "Biological aspects of A.I.D.", Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (new series). (Amsterdam, Associated Scientific Publishers, 1973), p.5.

26. A.I.H. is used generally where the husband's fertility or sperm motility is low, and sperm collected on various occasions and frozen is used to inseminate the wife during periods of expected peak fertility. The success of A.I.H. has been barely 20 per cent, on contrast with a 70 - 75 per cent success rate for A.I.D. However, an effort at A.I.H. is generally made before A.I.D. is undertaken.^{35/}

1. Medical and psychological problems

27. A husband has the right to father his own child where that is possible. He may be deprived of this right if his wife is counselled to submit to A.I.D. without his infertility having been properly established. Concern has been expressed, therefore, about the exhaustiveness of the investigation of the infertility of the husband before A.I.D. is initiated.^{36/} The Government of Ghana has expressed an opinion on the conditions to be met: "Where a husband is proven to be sterile or incapable of normal sexual intercourse and it is impossible to obtain seminal fluid with viable spermatozoa from him, artificial insemination performed under proper supervision and conditions may be permissible."^{37/}

28. Concern has also been expressed about the possibility of half-brothers and half-sisters, as a result of their having been conceived through artificial insemination, unwittingly marrying and having children. Mr. Nigel Calder has pointed out that critics of artificial insemination are concerned about the risk of accidental incest and inbreeding following large-scale fatherhood by anonymous donors.^{38/} While not minimizing the higher than normal risk of mortality and malformation when parents are genetically closely related, one writer offers a statistical perspective of the problem when fresh sperm is employed: "For instance, if there were 2,000 A.I.D. births in Britain each year, (roughly ten times more than now) and each donor is used 5 times (which is roughly how often they are used now), an unwitting incestuous marriage would occur only once every 50 to 100 years."^{39/}

^{35/} Gerald Leach, *op.cit.*, p.82; Anne McLaren, "Biological aspects of A.I.D.", Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (new series). (Amsterdam, Associated Scientific Publishers, 1973), p.3.

^{36/} Anne McLaren, "Biological aspects of A.I.D.", Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (new series). (Amsterdam, Associated Scientific Publishers, 1973), pp.27-28.

^{37/} Information furnished by the Government of Ghana on 21 March 1974.

^{38/} Nigel Calder, Technopolis: Social Control of the Uses of Science (London, 1969), pp.229-230.

^{39/} Gerald Leach, *op.cit.*, p.94; see also Anne McLaren, "Biological aspects of A.I.D.", Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (new series). (Amsterdam, Associated Scientific Publishers, 1973), p.7.

29. One of the most important A.I.D. medical problems is the psychological impact of the procedure. Despite many thousands of A.I.D.'s, there are little reliable data on how the procedure affects the persons most intimately involved - the mother, the husband and the child. This is primarily due to the belief of most A.I.D. practitioners that the families should not be kept under observation, reminding them that they are "different". Gerald Leach sums up this attitude in the statement of one doctor: "Never sacrifice human happiness for scientific results".^{40/}

30. The evidence that does exist on the question seems to indicate that A.I.D. has not been psychologically disastrous; but the question has been raised whether a psychiatric assessment of a potential A.I.D. recipient and her husband should be compulsory. Some authorities urge that the potential mother and her husband should undergo psychiatric examination prior to the procedure to determine if they are emotionally fit to handle the experience.^{41/} Others argue that, since potential natural parents are not psychologically screened, and since A.I.D. is as close as some couples can come to exercising their right to natural parentage, it is difficult to condemn it on psychological grounds.^{42/} Many naturally conceived children start life unwanted, and the A.I.D. child is spared the problems that may arise from this situation.

31. To ameliorate some possible psychological problems of the husband many practitioners counsel the married couple, even if the husband is clinically infertile, to continue sexual intercourse even though the wife is receiving A.I.D. Natural fertilization may occur, and the couple is comforted, if they need be, by the possibility that conception may have occurred normally.^{43/} To the same end some practitioners mix some of the husband's semen with that of the donor (A.I.H.D.)^{44/}.

^{40/} Gerald Leach, op.cit., p.92.

^{41/} New York Times, 25 May 1969, p.10, reporting on an article appearing in Literaturnaya Gazeta.

^{42/} Gerald Leach, op.cit., p.93.

^{43/} Gerald Leach, op.cit.; p.88, see also E.E. Philipp speaking at Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (new series), (Amsterdam, Associated Scientific Publishers, 1973), p.29; and Report of the Departmental Committee on Human Artificial Insemination, Home Office Scottish Home Department. (London, Her Majesty's Stationery Office, July 1960, Cmd.1105), p.9.

^{44/} Report of the Departmental Committee on Human Artificial Insemination, op.cit., p.9.

32. According to one authority; "... several surveys have shown that more than 50 per cent of infertile couples would choose A.I.D. rather than adoption ..."45/. A primary advantage of A.I.D. over adoption is that the woman has the fulfilling experience of motherhood. Similarly, the husband can enjoy the experience of becoming a "father". Furthermore, the process is usually simpler and more "private" than adoption; and the "parents" are spared the anxiety of the possibility that the natural mother of an adopted child will come forward to reclaim her child. Also, with multiple successive A.I.D. births in a family, the donors having been matched to the husband's overt characteristics, and sharing the mother's genetic make-up, the mother, her husband and the children tend to look like a "natural" family.46/

33. So far, few studies have been made of the specific psychological problems, if any, of the infant issue of artificial insemination.47/ Nevertheless, it is frequently urged that such a child "should not know the circumstances of his conception, and the husband and wife are advised to keep the insemination a secret from both their families. The husband and wife should be left free to inform the child at their discretion that he is the descendant of only one of them".48/

34. There is, however, a diversity of opinion as to whether the child should ever be told of the circumstances of his conception and, if not, what the effect may be of his finding it out by accident. If the child is to be told, the main difficulty arises in deciding when is the most suitable age. "A.I.D. is a technical matter which a child cannot be expected to understand at an early age, as he can adoption, and which he cannot fully comprehend until he knows, in some detail, what happens in sexual intercourse."49/ Deferring the explanation extends the period during which a deception is practiced on the child, and makes it harder for him eventually to accept the position. It also increases the risk of his getting to know by accident.50/

45/ Gerald Leach, op.cit., p.86.

46/ Ibid., p.87.

47/ Dr. E. Mollet, "Fécondation naturelle, insémination artificielle et fécondation in vitro et le droit à la vie", IVe Colloque de Besançon, Les Droits de l'Homme en France (Fourth Besançon Symposium, Human Rights in France), Programme on Human Rights in Life and Death, Besançon, 17-19 January, p.11.

48/ Mariel Revillard, "Legal aspects of artificial insemination and embryo transfer in French domestic law and private international law". Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (New series). (Amsterdam, Associated Scientific Publishers, 1973), p.82; Report of the Departmental Committee on Human Artificial Insemination, Home Office Scottish Home Department. (London, Her Majesty's Stationery Office, July 1960, Cmnd.1105), p.16.

49/ Report of the Departmental Committee on Human Artificial Insemination, Home Office Scottish Home Department, (London, Her Majesty's Stationery Office, July 1960, Cmnd.1105), p.45.

50/ Ibid.

35. The possible advantages of concealment must be weighed against the proposition 51/ "that every child has a right to know who his real father is". Of course, when the A.I.D. donor is anonymous, all the child may learn is who is not his father.

36. In the rare circumstances where A.I.D. is performed because of the existence in the husband of a hereditary disease which might be transmitted by him, and the child becomes aware of the existence of that disease, it has been recommended that he be told that he is not related genetically to his supposed father. 52/

37. Where A.I.D. is used the family relationship is often analogized with that in which a child is adopted; however, when the child is born as a result of A.I.D., one of the parents is the biological ancestor of the child, while, as Doctor Mollet has stated: "Adoption may appear to establish a measure of equality between husband and wife, at least as far as paternity and maternity are concerned ...". 53/

38. It has been maintained that the ability of the couple successfully to deal with this parental inequality as a consequence of A.I.D. is a matter that should be considered in determining the advisability of A.I.D. for that family. 54/

39. With respect to A.I.H. a question of psychological fitness presents itself to the medical practitioner. One writer states the problem as follows: "Perhaps the most important A.I.H. topic that needs airing is the doctor's right to turn applicants away. This arises because most A.I.H. husbands have fairly serious psycho-sexual difficulties and nearly all A.I.H. practitioners, because they feel very responsible for the child they are helping to produce, also feel they must act as judges of the marriage in case it goes badly wrong and ~~threatens~~ the security of the child. So in many cases they refuse A.I.H. This is a unique, almost god-like position for doctors to put themselves in, yet it is strongly defended by most A.I.H. practitioners. Though there are many medical precedents for this kind of attitude - elective rather than emergency operations are often very much the doctor's choice - none are as extreme." 55/

40. The same writer continues: "If we, as a society, believe that people have the right to assistance in conceiving children, ... it is clearly intolerable that doctors should act in this way ... But we cannot avoid the insistent question: is the 'right' of a childless, though disturbed couple to have children, when that is possible, stronger or weaker than the doctor's 'right' to decide they are not fit to have them?" 56/

51/ Discussed in ibid., p.45.

52/ Ibid., p.46.

53/ Dr. E. Mollet, op.cit., p.11.

54/ Ibid., p.11.

55/ Ibid., pp.84-85.

56/ Ibid., p.85.

2. Donor Selection

41. The standards for selection of the donor in A.I.D. raise a number of human rights problems for all the parties concerned.

42. As regards the criteria for donor selection which should prevail to ensure that the child will be born free of avoidable physical defects, the only existing regulatory legislation appears to be the Sanitary Code of New York City 57/.... specifically requiring that the donor be free of syphilis, gonorrhoea, tuberculosis, or genetic defect. It also required that the donor and the recipient be Rh-compatible".58/ The setting of standards for donor selection rests primarily with that segment of the medical profession administering the procedure; and the standards applied vary among practitioners.59/

43. Generally the donor is physically examined and his family history is taken, the latter procedure being intended to uncover recessive genetic traits which the donor might pass on to his offspring. Some authorities recommend that only donors who have fathered at least one, and if possible two, healthy children should be selected.60/ It has been said that: "It is the practitioner's duty to choose a donor who is mentally and physically sound and who has procreated only healthy children."61/

57/ Professor Michael Lerner, notes from a lecture on Human Population Biology given at Stanford University, USA, 1973, provided by the World Council of Churches, p.4., see also Report of the Departmental Committee on Human Artificial Insemination, Home Office Scottish Home Department (London, Her Majesty's Stationery Office, July 1960, Cmd.1105) p.5.

58/ WHO, doc. EB55.R65, op.cit., Annex, pp.14-15.

59/ Dr. E. Mollet, "Fécondation naturelle, insémination artificielle et fécondation in vitro et le droit à la vie", IVe Colloque de Besançon, Les Droits de l'Homme en France (Fourth Besançon Symposium, Human Rights in France), Programme on Human Rights in Life and Death, Besançon, 17-19 January, p.12.

60/ Ibid., p.13.

61/ Mariel Revillard, "Legal aspects of artificial insemination and embryo transfer in French domestic law and private international law", Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (new series). (Amsterdam, Associated Scientific Publishers, 1973), p.82.

44. The use of married donors, while offering some genetic safeguard to the A.I.D. child, creates social and legal problems for the donor, his spouse and their children. It is the practice to require the agreement of the married donor's wife as a condition of his use as a donor, 62/ but this does not obviate a number of legal problems which will be discussed hereafter.

45. In the United States and to some extent in the United Kingdom, where medical students are generally used as donors, a fee is paid for the donation.63/ This practice is opposed by some authorities on biological and social grounds: "remuneration has some intrinsic drawbacks, since the potential donor may deliberately conceal some history of illness which, if known, would rule him out. Above all, we believe that anonymity is less likely to be well kept by men who have entered into a purely commercial transaction (especially when they come from the same social class)".64/

46. Another authority submits that "...[t]he question whether donors of semen should be paid or not has clear moral implications - in relation specially to motive - and even clearer scientific implications highly relevant to medical practice".65/ The writer analogizes the practice to the unsatisfactory situation created by the payment for donations of blood. "By a parity of reasoning, payment of donors of semen, with no evidence of genetic suitability other than unverified assurances about parenthood and medical record, suggests the taking of highly unethical risks from which the patient to be inseminated, her husband and the child to be conceived might prove the victims. Reluctant as we are to extend statutory regulation of medical practice, a minimum requirement, if A.I.D. is to continue, should either be a legal prohibition of the payment of semen donors, or an authoritative act by the appropriate professional body to eliminate the payment as an unethical practice."66/

62/ Dr. E. Mollet, "Fécondation naturelle, insémination artificielle et fécondation in vitro et le droit à la vie", IVe Colloque de Besançon, Les Droits de l'Homme en France (Fourth Besançon Symposium, Human Rights in France), Programme on Human Rights in Life and Death, Besançon, 17-19 January, p.13.

63/ Gerald Leach, The Biocrats: Implications of Medical Progress, Revised Edition, (Middlesex, England, Penguin Books Ltd. 1972), p.87.

64/ Dr. E. Mollet, op.cit., p.12.

65/ G.R. Dunstan, "Moral and social issues arising from A.I.D." Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (new series). (Amsterdam, Associated Scientific Publishers, 1973), p.53.

66/ Ibid., p.53.

47. Certain fears of critics of artificial insemination have been described and replied to as follows:

"The problem of donor selection is an important one, which has given rise to some anxiety on various biological grounds. Fears have been expressed that willingness to become a donor might indicate some undesirable personality trait which would then be handed on to a disproportionate number of progeny. This seems an unreal cause for anxiety: leaving aside the nature of such traits and their hereditability, most donors are in fact either impecunious medical students who receive a financial inducement, or the husbands of patients at a fertility clinic, who agree to act as donors out of gratitude." 67/

48. Another problem posed by donor selection is the extent to which the recipient and her husband have the right to expect the medical practitioner to satisfy their wishes for particular characteristics in the donor. While most doctors seek to match the donor's overt physical characteristics to that of the husband and "... make certain that he is of the same race and colour ... some try to ensure that he is also of the same religion ... [S]ome ... of the practitioners go to considerable trouble to find persons who are similar to the couple in intellectual background and general outlook".68/ The husband, wife and offspring may thereby be furnished with the semblance of a familial relationship. Another source, expressing a different attitude, suggests that if the desire to have a child is strong enough one might bear "... a child of a different race ..." and goes on to suggest that such an approach might lead "little by little to the end of racial segregation".69/ In the absence of uniform standards for donor selection, the determination of the appropriateness of a donor rests with the individual practitioner. Some leave the selection to chance by mixing the sperm of a number of donors.70/

49. The issue of whether donor and recipient identification or anonymity is desirable has social ramifications. The report of the United Kingdom Departmental Committee on Human Artificial Insemination sets forth what seems to be the prevalent attitude: "We understand that when A.I.D. was first beginning in this country persons such as the husband's brother or best friend were occasionally used as donors, but that it soon became apparent that there would be a danger to the marriage unless the donor was anonymous. Since then the principle that the donor must not know the couple and

67/ Anne McLaren, "Biological aspects of A.I.D.", Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (new series). (Amsterdam, Associated Scientific Publishers, 1973), p.6.

68/ Report of the Departmental Committee on Human Artificial Insemination, op.cit., p.11.

69/ Remarks of "The Association of Free Licensed Medical Practitioners of Madagascar", furnished by the World Federation of Scientific Workers on 5 March 1974.

70/ Anne McLaren, "Biological aspects of A.I.D.", Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (new series). (Amsterdam, Associated Scientific Publishers, 1973), p.7.

that they must not know him has, so far as we are aware, been rigidly maintained".^{71/} This position is set forth as a positive duty of the medical practitioner by another authority: "The practitioner is bound to professional secrecy about the identity of the donor and clearly must refuse members of the husband's family as donors".^{72/} The desirability of total anonymity is stressed by the Government of Argentina: "It is highly desirable that both recipient and donor should be unaware of each other's identity and, if possible, that the practitioner who performs the insemination should be unknown to the donor".^{73/} The Government of Ghana is similarly of the opinion that "... the donor should be anonymous".^{74/}

50. It has been suggested that the centralization of the collection of semen would not only make appropriate donations more readily available, but would enhance the anonymity of the procedure: "Large central sperm banks would help enormously. They could store a wide variety of 'sperm types', including unusual ones (as regards race, blood groups, height and so on). All donors could be rigorously screened - as blood is, in the best blood banks. There could also be a high 'secrecy factor'. The artificial-insemination doctor would ask the bank for so many cubic centimeters of semen of such-and-such donor characteristics, and the only clue to the donor's identity would be a tube with a serial number on it. Of course, there would have to be fool-proof secrecy codes at the bank, but these are easy to devise. Such banks, though on a less grandiose scale, have been established. The first two, set up in 1964, were in Iowa City and Tokyo." ^{75/}

3. Special problems connected with the storage of sperm for use at a later date

51. A technique has been developed whereby it is possible to preserve human sperm for future use. For sperm bank storage, the semen is sealed in capsules, and frozen in a canister of liquid hydrogen. When it is to be administered, the semen is thawed and used for artificial insemination in the same manner as fresh semen.

52. The first child conceived of sperm previously frozen was born in the United States of America in 1953 and was "perfectly normal".^{76/} Although the

^{71/} Report of the Departmental Committee on Human Artificial Insemination, op.cit., p.11.

^{72/} Mariel Revillard, "Legal aspects of artificial insemination and embryo transfer in French domestic law and private international law", Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (new series). (Amsterdam, Associated Scientific Publishers, 1973), p.82.

^{73/} Information furnished by the Government of Argentina on 30 May 1974.

^{74/} Information furnished by the Government of Ghana on 21 March 1974.

^{75/} Gerald Leach, op.cit., p.94.

^{76/} Gerald Leach, op.cit., p.95.

procedure has been practised on humans for only the past 20 years,^{77/} it has been estimated that by 1972 some 400 children had been born as a result of artificial insemination by semen which had been preserved by frozen storage.^{78/} A number of sperm banks have been established in connexion with medical facilities, and the first commercial sperm banks have opened, principally in the United States of America, since 1970.^{79/} It is predicted that "... [s]perm conservation by deep-freezing will ... be widely used ..." ^{80/} in the future. The use of frozen sperm for artificial insemination offers solutions to some special problems but poses others.

53. While the incidence of birth defects is 2 per cent or possibly slightly more on an average in naturally induced pregnancies, follow-up observation of over 300 children born of artificial insemination with frozen semen showed no apparent defects except for one child born missing a finger. Spontaneous abortions and birth complications were also lower than average, but may be accounted for by better-than-average pre-natal care. Proponents of the procedure see as yet no time limits for storage of semen. One child has been born from sperm stored for 10 years.^{81/}

54. Private individuals use the facilities of commercial sperm banks for storage of semen for a variety of reasons, but the overwhelming majority of depositors are men about to undergo sterilization by vasectomy who store their semen for use if they change their minds about wishing to father children in the future. It is believed by some proponents of the procedure that the current upward trend in male sterilization will increase as men learn that there is a method by which they may nevertheless have children.^{82/}

55. Various other reasons for semen deposits are given. A small number of users deposit semen to ensure the continuity of the family lineage in the event of sterility of their male offspring; others are men with low levels of fertility whose semen is to be consolidated and concentrated to increase the possibility of conception. Further uses of frozen sperm banks are expected to be by men working with radioactive material where fertility and genetic dangers exist.^{83/} Another

^{77/} New York Post, 16 November 1972.

^{78/} New York Times, 16 February 1972.

^{79/} New York Times, 22 August 1971.

^{80/} United Nations Seminar on Human Rights and Scientific, Technological Developments, held in Vienna, Austria, 19 June - 1 July 1972. Background paper prepared by Willibald P. Pahr, Head, International Department Constitutional Service, Austrian Federal Chancellery, p.9.

^{81/} New York Post, 6 November 1971.

^{82/} Boyer Rensberger, "Sperm banks: from the day of deposit - a lien on the future", New York Times, 22 August 1971.

^{83/} Newsweek, 30 August 1971; New York Times, 3 January 1972.

aspect of storage of germinal material was set forth in a paper presented at the United Nations Seminar on Human Rights and Science and Technological Developments, Vienna 1972: "An entirely real possibility is the preservation by deep freezing of human sperm and eggs in radiation-proof containers, so that undamaged genetic material would be available after a nuclear war".84/

56. One writer characterizes the use of aged frozen donor semen for insemination "... as unethical human experimentation", and contends that the practitioners, and the mothers (if they understood the nature of the procedure) "... were guilty of deliberately exposing the child ... to unknown hazards".85/

57. Another writer characterizes the sperm bank as

"... [A] kind of evolutionary forcing ground in miniature. There is a very intense selection of sperm for freezability. Sperm samples from different donors vary enormously in their ability to withstand the freeze-store-thaw process. There is also intense selection within any one sperm sample from whatever donor. Since 'freezability' must in some way be a genetic trait it is extremely likely that it is connected with other genetic traits that matter - like disease resistance, stature, intelligence and so on. So sperm with these traits will tend to survive and the traits to be passed on".86/

58. Although hundreds of children are known to have been born of semen preserved by frozen storage there is still concern about the possible false assurance of future fertility by means of sperm deposits.87/

59. As discussed earlier, the use of A.I.D. presents the risk of accidental incest. While with the use of fresh sperm the risk is minimal, it rises sharply with the use of frozen semen. In the use of fresh sperm the donor's delivery of semen has to be timed to within an hour of the insemination, which is in turn timed to the recipient's peak period of fertility. Rarely is a donor's fresh semen used on one occasion for insemination of more than one woman. With the use of frozen

84/ United Nations Seminar on Human Rights and Scientific and Technological Developments, held Vienna, Austria, 19 June - 1 July 1972, op.cit., p.9.

85/ Paul Ramsey, The Fabricated Man: The Ethics of Genetic Control (New Haven and London, Yale University Press, 1970), p.133.

86/ Gerald Leach, op.cit., p.95.

87/ New York Times, 16 February 1972.

semen, however, a single ejaculation can be split up for use in numerous inseminations: "... 20-40 smears are obtained from a single ejaculation ..."88/ Furthermore, since donations to a sperm bank can be made at the donor's convenience, he may be able to contribute far more frequently. Consequently, it has been suggested that "there might have to be legal limits on how often each donor is used, or even a law that [a] central donor register must be consulted secretly before every marriage".89/

60. One authority urges a specific limitation for both genetic and social reasons:

"It must be recognized, on the other hand, that to impose these conditions makes recruitment much more difficult especially in view of the desire to limit the number of pregnancies achieved with the same donor. The maximum number proposed is three but it may be two or even one, if the donor insists on this. This precaution seems to us important for several reasons. To begin with, it limits the danger of a "genetic mix", i.e. the danger that two children of the same father may meet by chance when grown up and the consanguineous couple may produce a child. Furthermore, it ensures that the donor's action retains an element of the personal, whereas he might regard the possibility of fathering a large number of unknown children as psychologically and morally unacceptable."90/

61. Sperm banks permit the "traditional space-time lock of sexual reproduction to be broken".91/ A woman is able to bear a child of her husband or another man even though he is long dead. Emotionally, such a child would be entirely the woman's, and the situation would be similar to that of illegitimate children whose fathers are unadmitted.92/

88/ Dr. E. Mollet, "Fécondation naturelle, insémination artificielle et fécondation in vitro et le droit à la vie", IVe Colloque de Besançon, Les Droits de l'Homme en France (Fourth Besançon Symposium, Human Rights in France), Programme on Human Rights in Life and Death, Besançon, 17-19 January, p.7.

89/ Gerald Leach, op.cit., p.94.

90/ Dr. E. Mollet, "Fécondation naturelle, insémination artificielle et fécondation in vitro et le droit à la vie", IVe Colloque de Besançon, Les Droits de l'Homme en France (Fourth Besançon Symposium, Human Rights in France), Programme on Human Rights in Life and Death, Besançon, 17-19 January, p.3.

91/ Gerald Leach, op.cit., p.97.

92/ Ibid., p.97.

62. The storage of sperm through freezing has opened up the possibility of banking sperm in pursuance of positive eugenics, i.e. "the science of improving offspring." 93/ Such a scheme was first proposed by Dr. Hermann Muller, 94/ Nobel prize winner in physiology and medicine, who called it eugenics by "germinal choice". Herbert Brewer and Sir Julian Huxley espoused the concept, giving it other names.95/

63. A writer has summarized the proposal of Dr. Muller as follows: "Briefly the idea is to use today's donor insemination practices as the thin end of a wedge in a deliberate, widespread eugenic programme by voluntary choice. Instead of pretending that A.I.D. is natural by matching the husband and donor so that everyone thinks that the husband is the real father, seize this golden opportunity and try to create 'an especially worthy human being'".96/

64. The proposal is not limited to couples with infertility or genetic problems but as a procedure for the general population. Dr. Muller believed that, although his plan might not gain immediate general acceptance, its popularity would spread rapidly as it became apparent that children born by "germinal choice" were outstanding.97/

65. One writer questions initially the feasibility of the plan on biological grounds: "... it is impossible to estimate an individual's genetic values, since his hereditary qualities are transmitted by hundreds of thousands of genes and we know the favourable or unfavourable effects of only a small number of them".98/ He goes on to express doubts as to "whether people would accept a scheme which threatens to abolish family ties, when the family gives them so much emotional satisfaction and such a feeling of security".99/

66. Harriet Pilpel expressed the following concern: "If it is possible to store sperm which possesses desirable characteristics, there is of course a tremendous power in the state to decide which characteristics are desirable and which are not".100/

93/ The American College Dictionary. Random House, New York, 1947.

94/ David Klein. "Genetic manipulations", Impact of Science on Society, Vol. XXIII, No.1 (January-March 1973) (UNESCO SC.72/I.85/A, 1973), p.22.

95/ Gerald Leach, op.cit., p.122.

96/ Gerald Leach, op.cit., pp.122-123.

97/ David Klein, op.cit., pp.22-23.

98/ Ibid., p.23.

99/ Ibid., p.23.

100/ Quoted by Mike McGrady in "Family Banking", New York, 12 June 1972.

67. The "specter of a genetically controlled society", has led one writer to offer a possible solution: "As long as sperm regulation remains a technical possibility, its disturbing implications must be faced. One solution might be to place frozen sperm banks under the control of an international agency specially formed to oversee use of this and other far-reaching scientific discoveries. A commission of this type, probably associated with the United Nations, would have the responsibility for guaranteeing that withdrawals from the bank be completely voluntary."101/

68. The storage of semen can, however, offer the geneticist a wide range of germinal material for selection during an indefinitely long period. Dr. J.K. Sherman of the University of Arkansas, United States of America, who attained the first human conceptions by sperm frozen by the method currently in use, explained that "... [f]rozen semen banks, perhaps for the first time, will permit scientists to evaluate genetics in man on an experimentally controlled basis from generation to generation".102/

69. Another writer points out, however, that frozen storage of semen could be advantageous even without limiting the selection to outstanding human specimens; he writes:

"The sperm of men free of hereditary disease and possessing desirable traits of mind and body could be frozen. Information about the capacities of each donor would be fed into a computer and retained.

"Unfrozen sperm deteriorates in a short time, and a couple wishing artificial insemination must accept whatever donor is immediately available. Long-term storage could change all that. A man and wife would be able to make an intelligent and informed selection of donor."103/

70. However, there is no unanimity of opinion even on the biological aspects of the procedure. When discussing the genetic value of preserving the semen of men of genius Mort David points out a "common mistake": "It is not the famous man's semen we want. It is the famous man's father's semen". 104/

71. At present no laws appear specifically to regulate sperm bank facilities and directors of commercial sperm banks in the United States of America indicate that they intend to exercise no control over the use of the semen further than that it shall remain the property of the depositor to use as he sees fit.105/ In this absence of legal regulation, the possibility exists for private individuals to initiate their own programmes of germinal choice.

101/ Lucy Kavalier, "Sperm in the Deep Freeze", New York Times, 26 January 1971.

102/ J.K. Sherman quoted by Mike McGrady in "Family Banking", New York, 12 June 1972.

103/ Lucy Kavalier, op.cit.

104/ Mort David quoted by Mike McGrady in "Family Banking", New York, 12 June 1972.

105/ Boyer Rensberger, op.cit.

4. The legal consequences of artificial insemination

72. Although artificial insemination is not a new procedure, the legal issues which it raises are only now becoming apparent. 106/ Only a few jurisdictions have legislated on the subject; 107/ they have been concerned primarily with the legitimacy of the offspring of A.I.D. In addition, there exists in the New York City Sanitary Code a provision dealing with donor selection, referred to previously (see paragraph 42). A small body of case law has developed, but most of the legal issues concerning the right and duties of parties remain open questions. It has been said that: "[M]any artificial insemination doctors insist that the law's failure to act has been one of the major deterrents to the widespread use of A.I.D." 108/

73. The medical profession itself has generally regulated the practice in conformity with the applicable codes of medical ethics and general legal principles. According to information gathered in the United Kingdom, "[m]ost practitioners find it necessary to give guidance to the husband and wife on the legal implications of A.I.D." 109/ One authority has concluded that "in law, it is not at all clear that A.I.D. is licit". 110/

74. It has been said that: "[t]he problems of artificial insemination are predominantly legal rather than medical, but it is incumbent on the physician who performs this procedure to assure himself that both spouses are fully aware of the legal implications of their decision, which may vary from country to country". 111/

75. One of the legal problems involved concerns the issue of consent. In the opinion of the Government of Austria, "artificial insemination should not, on principle ... be considered incompatible with the dignity of man. The decisive criterion is free consent". 112/ Assuming consent by the woman to be inseminated, 113/

106/ Professor Michael Lerner, notes from a lecture on Human Population Biology given at Stanford University, USA 1973, provided by the World Council of Churches, p.3.

107/ Including California and New York State, U.S.A.

108/ Gerald Leach, The Biocrats: Implications of Medical Progress, Revised Edition, (Middlesex, England, Penguin Books Ltd., 1972), p.91.

109/ Report of the Departmental Committee on Human Artificial Insemination, Home Office Scottish Home Department. (London, Her Majesty's Stationery Office, July 1960, Cmmd.1105), p.16.

110/ Professor Michael Lerner, op.cit., p.4.

111/ WHO, doc. EB55.R65 op.cit., Annex, p.14.

112/ Information furnished by the Government of Austria on 21 November 1974.

113/ Without the woman's consent the insemination may constitute a trespass to her person, but probably not rape. "[S]exual conjunction, which is the material element of rape is absent ... Such action is ... indecent behaviour with constraint or voluntary constraint with malice aforethought". (Mariel Revillard, "Legal aspects of artificial insemination and embryo transfer in French domestic law and private international law", Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (New Series). Amsterdam, Associated Scientific Publishers, 1973, p.80.)

the question remains of the consent of her husband. In practice, most medical practitioners will not perform the procedure without the consent of both spouses, 114/ and generally obtain such consent in writing - for evidentiary reasons. The written consent of the donor for his semen to be used for artificial insemination is also generally obtained. 115/ In the form of donor consent recommended by the Medical Defence Union in the United Kingdom, one of the conditions of the donor's consent is that, "(b) the written consent of the woman and ~~the~~ husband to the procedure be obtained". 116/

76. The Government of Argentina has taken the following position on this issue: "In cases of artificial insemination involving human beings, preference should always be given to sperm from the husband or common law spouse of the woman to be inseminated. Otherwise, the explicit consent of the husband or common law spouse must be sought before the insemination takes place". 117/ The Government of Romania has addressed itself specifically to the requirement of consent of both spouses: "Legally it is indeed necessary to have the woman's consent and, in case of wedded females, the husband's consent". 118/ The United Kingdom Government submits that "it would be highly desirable if the husband's consent in writing were a sine qua non for A.I.D." 119/

77. The opinion that a husband's consent to artificial insemination should be required is not universally held and such consent does not appear to be a legal requirement in any jurisdiction. Experts preparing a report on this subject for the Swedish Ministry of Justice 1953 "were of the opinion that if insemination was carried out with the consent of the woman and the semen donor concerned, such a procedure was, in principle, permissible". 120/

78. One writer poses the following questions: "Does artificial insemination of a consenting married woman without her husband's knowledge or consent constitute adultery? Would the doctor be an accessory?" 121/

114/ Report of the Departmental Committee on Human Artificial Insemination, op.cit., p.15. See also Dr. E. Mollet, "Fecondation naturelle, insemination artificielle et fecondation in vitro et le droit à la vie", IVe Colloque de Besançon, Les Droits de l'Homme en France (Fourth Besançon Symposium, Human Rights in France), Programme on Human Rights in Life and Death, Besançon, 17-19 January, pp.81-82.

115/ Report of the Departmental Committee on Human Artificial Insemination, op.cit., p.12.

116/ Ibid., p.12.

117/ Information furnished by the Government of Argentina on 30 May 1974.

118/ Information furnished by the Government of the Socialist Republic of Romania on 29 April 1974.

119/ Information furnished by the Government of the United Kingdom on 8 August 1974.

120/ Information furnished by the Government of Sweden on 12 March 1974.

121/ Mariel Revillard, op.cit., pp.80-81.

79. It has been adjudicated in a number of jurisdictions 122/ that even in the absence of the husband's consent, the treatment does not constitute adultery by the wife. However, where the question has not been directly adjudicated, as for example in England, extra-judicial opinion is divided on the question: 123/ Nevertheless, the opinion is held that such behaviour may serve as grounds for divorce. In the United Kingdom, "in an appropriate case a court might hold that A.I.D. without the husband's consent might amount to conduct entitling the husband to a decree ... on the concept of behaviour on the part of the Respondent of such a kind that the Petitioner cannot reasonably be expected to live with ... her." 124/ Mariel Revillard writes that in France, as in the Federal Republic of Germany and Italy, the jurisprudential premise of the physical conjunction of the woman and her lover excludes the possibility of the doctor's or the donor's being an accessory to adultery. She continues, however: "clandestine insemination certainly constitutes serious injury to the husband and forms grounds for a divorce suit". 125/ According to the same jurisprudential premise, the writer also concludes that use of a donor's semen for a woman other than his wife would not be deemed adultery on his part. The British Medical Association's Panel on Human Artificial Insemination supported a recommendation of the Faversham Committee of 1960 that the law should not be amended to enable a wife to take proceedings for divorce on the grounds that her husband had without her consent donated semen for A.I.D. The Panel went on to suggest, however, that before proceeding with the use of married donors, it would be wise for the medical practitioner to obtain the wife's consent to the donation of the husband's semen for the purpose of artificial insemination.

80. When A.I.H. or A.I.D. is performed because of the incapacity of one of the parties to perform normal sexual relations a question is raised as to whether the insemination bars a later suit for nullification of the marriage on the basis of non-consummation. Artificial insemination, even with the husband's seed, is not deemed consummation in the jurisdictions studied. However, the question of approbation of the marriage becomes an issue: does the wife's conduct in submitting to artificial insemination disentitle her to relief? The English cases have generally been decided on the facts germane to the issue of approbation; even where a child has been born as a result of A.I.D. the wife may obtain a decree of nullity where it is found that she had not been previously aware of the legal remedy available to her. 126/

122/ Olive M. Stone, "English law in relation to A.I.D. and embryo transfer", Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (New Series), (Amsterdam, Associated Scientific Publishers, 1973), p.69, citing McLennan v. McLennan [1958] Scots Law Times 12; Doornbos v. Doornbos (1956) 12 Ill. App.2d 473 (Illinois, U.S.A.); Oxford v. Oxford (1921) 58 Dominion Law Reports 251 (Ontario, Canada).

123/ Report of the Departmental Committee on Human Artificial Insemination, op.cit., pp.22-23.

124/ Information furnished by the Government of the United Kingdom on 8 August 1974. See also Olive M. Stone, op.cit., p.69; cf. Lord Kilbrandon Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (New Series), (Amsterdam, Associated Scientific Publishers, 1973), p.91.

125/ Mariel Revillard, op.cit., p.81.

126/ Report of the Departmental Committee on Human Artificial Insemination, op.cit., pp.21-22.

81. While many of the legal problems posed in connexion with artificial insemination arise only in occasional cases, one issue affects every birth obtained by this means: the legal status of the offspring. This question has not been definitively resolved by application of conventional rules of law and remains the subject of discussion by jurists. As one writer states: "The technique of artificial insemination entails the revision of one of the postulates on which the law of affiliation in the French Civil Code rests: it is no longer true to say that a birth is necessarily the result of the father and the mother coming together physically." 127/

82. In the absence of specific legislation to the contrary, under the laws of most jurisdictions children conceived by A.I.D. are illegitimate. The question of the husband's consent to the insemination is immaterial. 128/

83. However, in Anglo-American law a presumption of legitimacy arises where a child is born during wedlock - "pater est quem nuptiae demonstrant" - 129/ and this presumption may be rebutted only by "strong, distinct, satisfactory and conclusive" 130/ evidence. Therefore, it is quite difficult in many cases to arrive at determination of illegitimacy. Evidence of incapacity or non-access may be produced, but if the couple had sexual intercourse during the period when A.I.D. was being administered, or if the husband's semen had been mixed with the donor's (A.I.H.D.), it cannot be said that the husband did not have access to his wife during the relevant time-period. 131/

84. One writer describes as an "obvious solution" the legislation enacted in several states of the United States of America which declares legitimate children conceived by A.I.D., providing the husband has given his written consent to the procedure. 132/

127/ Mariel Revillard, op.cit., p.78.

128/ Leila Obier Schroeder, "New Life: Person or Property", a paper presented at the third World Congress on Medical Law, Ghent, Belgium, 19-23 August 1973, pp.2-3. See also Report of the Departmental Committee on Human Artificial Insemination, op.cit., pp.24-25, and information furnished by the Government of the United Kingdom on 8 August 1974.

129/ Report of the Departmental Committee on Human Artificial Insemination, op.cit., p.24.

130/ Ibid., p.24 citing Lord Lyndhurst in Morris v. Davies [1837] 51 Cl. and Fin. 215, at p.265.

131/ Report of the Departmental Committee on Human Artificial Insemination, op.cit., p.25

132/ Leila Obier Schroeder, op.cit., p.3. See also Olive M. Stone, op.cit., p.72 referring to the States of California, Georgia and Oklahoma, United States of America.

On the other hand, at least five other States of the United States of America have considered and rejected similar legitimatizing legislation. 133/ Nevertheless, in one of those States (New York), a court decided that a child born of A.I.D., to which the husband had given his written consent, was not illegitimate; but "was in the position of an adopted child or a child born out of wedlock and legitimized by the marriage of his parents." 134/

85. Mariel Revillard submits that "the particular conditions of a child's conception should be no concern of the law, and that is why the confidentiality of [artificial insemination] should be maintained in all cases." 135/ It is the opinion of the Government of Austria that "artificial insemination should be deemed an aspect of the respect for family life and that, if only for this reason, there cannot be the question of an interference by public authorities ... [P]rovision should be made to protect and ensure secrecy of the fact of an artificial insemination as a matter of no concern to the public (or more precisely, as a right of privacy)." 136/

86. Although paternity may be denied, "... because of the rules of medical secrecy a successful end to such an action is hypothetical." 137/ Mariel Revillard compares jurisdictions on this point:

"According to German law, affiliation can be contested after A.I.D. even if the husband has given his consent. A.I.D. is forbidden under Swiss law as being incompatible with the institution of marriage: Swiss doctrine concludes that a child born as a result of A.I.D. can be disavowed (Art. 254 Swiss Civil Code). Only Portuguese law expressly considers artificial insemination: article 1799 of the Portuguese Civil Code provides that artificial fertilization is not a sufficient proof by itself in discussing affiliation." 138/

87. As a general rule, births are recorded, and the birth registry usually requires entry of data with respect to the father. There is undoubtedly some degree of falsification in birth registers with respect to children born as a result of A.I.D. While it is not known how many children born as a result of A.I.D. have been registered as legitimate, with the husband's name appearing as that of the father, it is suspected that the law is broken regularly; it is not part of the registrar's duty to ask whether the birth was a result of A.I.D. 139/

133/ Olive M. Stone, op.cit., p.72.

134/ Olive M. Stone, op.cit., pp.72-73 citing Strnod v. Strnod 190 Misc. 786, 78 N.Y.S. 2d 390 (1948).

135/ Mariel Revillard, op.cit., p.84.

136/ Information furnished by the Government of Austria on 21 November 1974.

137/ Mariel Revillard, op.cit., p.84.

138/ Ibid., p.84.

139/ British Medical Journal Supplement, 7 April 1973, "Appendix V: Report of panel on human artificial insemination" British Medical Association, p.3.

88. Adoption of the child by the husband, or by both parents, has been a suggested alternative, but in most jurisdictions this can be a complicated and time-consuming proceeding. Another suggested solution would be to permit both mother and husband to adopt the child while en ventre sa mère - thereby avoiding falsification of registration (which can carry criminal penalties) and the difficulties, delay and disadvantages of the usual adoption procedures. 140/

89. Another viewpoint has been expressed by Lord Kilbrandon:

"We must not make too much of the registration of the birth. We cannot say that a child born of A.I.D. is legitimate within the meaning of the word now. We must simply change the meaning of the word 'legitimate', if we want to turn this child into a legitimate child - and a great deal is to be said for changing the meaning. After all, the child is legitimate in that it was borne by the wife, in fulfilment of the wishes of the husband, and, in that sense, to call it illegitimate is a misuse of language. When it comes to registration, no question of principle is involved. It is sometimes overlooked that maternity is a question of fact, but paternity is only an inference. No one can prove paternity, whereas maternity can be proved by the evidence of witnesses. So that the decision about what goes into the register in the 'father' column is in that sense always a matter of opinion." 141/

90. The opinion of the Government of Argentina is that the child born as a result of artificial insemination should be subject "to the laws and customs of the country, and be a legitimate, recognized or adopted child, whichever is appropriate". 142/

91. The United Kingdom Faversham Report of 1960 made the recommendation, that there be no change in the laws relating to legitimacy or registration of births, as they relate to A.I.D. At the time a Memorandum of Dissent was filed. In 1973, the British Medical Association Panel on Human Artificial Insemination gave unanimous support to two recommendations contained in the Memorandum of Dissent: "(i) the definition of legitimacy should be extended to include a child born as a result of A.I.D. to which the husband of the mother has consented, and (ii) for the purposes of registration of birth of such a child the husband should be deemed to be the father of the child." 143/ The Panel further suggested that the two recommendations reflect the current trend in judicial thinking.

140/ Olive M. Stone, op.cit., p.72.

141/ Lord Kilbrandon, Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (New Series), (Amsterdam, Associated Scientific Publishers, 1973), p.92.

142/ Information furnished by the Government of Argentina on 30 May 1974.

143/ British Medical Journal Supplement, op.cit., p.4.

92. At the 1973 Ciba Foundation Symposium on Law and Ethics of A.I.D. and Embryo Transfer it was suggested that the registration of births be changed so that "children are registered in the name of 'father or accepting husband'. It would not matter then whether the conception was normal or as a result of A.I.D." 144/

93. In the World Council of Churches Report of a consultation on "Genetics and the Quality of Life" in June 1973, the following opinion was expressed: "When the male parent is known to carry a defective gene causing a serious condition, artificial insemination using semen from a donor (AID) is sometimes employed. Some of us consider the use of AID for this purpose as ethically acceptable provided the legitimate status of the offspring can be guaranteed, and laws should be modified, if necessary, to meet this situation". 145/

94. It has been noted that: "When a marriage has been dissolved after successful A.I.D., the question of the 'father's' right to access to the child or obligation to contribute to its maintenance may arise". 146/

95. One writer discussed a case which arose in California, United States of America, where the ex-husband of the mother of a child conceived through A.I.D., to which the husband had consented, was found guilty of criminal non-support of the child. The language of the court was quoted: "The determinative factor is whether the legal relationship of father and child exists. A child conceived through heterologous artificial insemination does not have a 'natural father' as the term [sic] is commonly used. The anonymous donor of the sperm cannot be considered the 'natural father', as he is no more responsible for the use of his sperm than is the donor of blood or a kidney ... Since there is no 'natural father', we can only look for a lawful father". 147/

96. Another court in the United States of America while finding illegitimate a child conceived by A.I.D., to which the husband had consented, nevertheless required the husband to provide support. The theory of the case was a contractual one: the husband's written consent to the procedure "implied a promise on his part to furnish support for any offspring resulting from the insemination". 148/

97. In the United Kingdom, under the concept of "a child of the family", the husband may be liable for the support of a child born to his wife and "accepted" by him as one of the family. In the opinion of the Government of the United Kingdom, "[t]his

144/ Lord Kilbrandon, op.cit., p.93.

145/ Genetics and the Quality of Life, report of a consultation "Church and Society", Christian Medical Commission, Zurich, June 1973, World Council of Churches, Geneva, Switzerland.

146/ WHO, doc. EB55.R65, op.cit., Annex, p.15.

147/ Leila Obier Schroeder, op.cit., p.3.

148/ Ibid., p.3.

would most certainly cover every case of a child born as a result of A.I.D. with the husband's consent but not the case where the husband did not consent, unless he accepts the child after having learnt of the true facts." 149/ However, the reply of the Government of the United Kingdom qualifies this statement, citing examples, and concludes that "...[t]he position may not always be so clear". 150/

98. Where it was the husband of the A.I.D. recipient who initiated a court action in Oklahoma, United States of America, the court granted custody to the mother and refused the husband the right of visitation, on the grounds that he was not the biological father, despite the fact that he was the only father the child had ever known. 151/

99. Another aspect to be considered is the legal responsibility of the semen donor to the child born as a result of A.I.D.:

"... Donors and recipients are prevented from identifying each other and donors are required to sign a declaration of disclaimer regarding the child. But the effectiveness of the disclaimer has never been tested, and because records exist which, under judicial compulsion, may have to be produced, the donor may claim the same rights, and be made to bear the same obligations, as any other father of an illegitimate child. It would be an advantage if the legal position were regularized according to coherently thought-out principles." 152/

100. Even in those jurisdictions where some legislation exists on the status of A.I.D., not all of the issues are resolved. In California, United States of America, a 1970 statute provides: "'The husband of a woman who bears a child as a result of artificial insemination shall be considered the father of that child ..., if he consented in writing to the artificial insemination'". The same chapter of the California Penal Code also makes it a misdemeanor for an adult child not to provide for an indigent parent. Professor Michael Lerner asks "[w]hat parent?". 153/

101. At a 1973 Ciba Foundation Symposium the question was asked whether an A.I.D. child would technically have a claim on the estate of the sperm donor if the donor died intestate or made a bequest to his "children". 154/ The answer given was that "in theory, if the child could prove [his descent] ... to the satisfaction of the court, he would have the right to succession". 155/

149/ Information furnished by the Government of the United Kingdom on 8 August 1974.

150/ Ibid.

151/ R. Michael Davidson, Avant Guard post anniversary issue pp.9-10.

152/ Bernard Dickens, "Biological timebombs under the law", New Scientist, 14 March 1974, p.682.

153/ Michael Lerner, op.cit., p.4.

154/ Anne McLaren, "Biological aspects of A.I.D.", Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (New Series). (Amsterdam, Associated Scientific Publishers, 1973), p.98.

155/ Olive M. Stone, op.cit., p.99.

102. Only in those few jurisdictions where an A.I.D. child is "legitimized" by statute, or where the circumstances of conception have been successfully concealed, has the child any assurance of his inheritance rights. In other circumstances, some degree of protection has been afforded in jurisdictions, such as the United Kingdom, where illegitimate children have been given greater rights in this area. 156/

103. At the 1973 Ciba Foundation symposium the following view of these problems was taken: "In relation to the A.I.D. child, the father becomes the joint head of the family, whether or not he is the actual father of the child. The family as an entity is concentrated on, rather than the actual paternity or maternity; physical paternity is seen to take second place to some kind of a community relation. ... the pater familias is much more important than the actual genetic father." 157/

104. However, even this extension of the concept of paternity does not cover the situation which arises when semen that has been preserved by frozen storage is used for A.I.H. after the husband's death. One writer urges that "[t]he problem must be faced, because a sensible couple might make a sperm-bank deposit to ensure that in the event of the husband's later death or incapacity the wife might still bear his child". 158/

105. Mariel Revillard asks whether "legitimate children can be conceived post mortem?" 159/ She then cites the French Civil Code (Articles 212 and 315) to answer in the negative, and explains that "[a]lthough the father of a child born during wedlock is presumed to be the husband, the presumption of paternity is not applicable to a child born more than 300 days after the husband's death or disappearance and an action for affiliation would not be allowed (Code Civil, Art.340)". She then submits that "the use of sperm from a sperm bank for A.I.H. must be limited to medical procedures, the performance of which is subject to the agreement of the two living parents capable of bringing up a child together". 160/ But there appear to be no statutes specifically governing the use of frozen semen. Another writer suggests that:

"The status and rights of inheritance of a child born to a widow several years after her husband's death will have to be defined under new law, because present tests of paternity obviously require conception during the father's lifetime. A child of the marriage born over a year after his father's death might claim inheritance rights in his father's estate conflicting with the interests of those to whom it had already been lawfully distributed." 161/

156/ Information furnished by the Government of the United Kingdom on 8 August 1974. See also Report of the Departmental Committee on Human Artificial Insemination, op.cit., pp.24-26; Family Law Reform Act 1969, Chapter 46, Part II, Section 14 (U.K.).

157/ Lord Kilbrandon, op.cit., p.91.

158/ Bernard Dickens, op.cit., p.681.

159/ Mariel Revillard, op.cit., p.83.

160/ Mariel Revillard, op.cit., p.83.

161/ Bernard Dickens, op.cit., p.681.

106. In addition to the rights between the parties directly concerned with artificial insemination - the mother, her husband, the child, and the donor - there exists the question of their rights as against the practitioner of the procedure. The doctor's duty has been stated: "It is the practitioner's duty to choose a donor who is mentally and physically sound and who has procreated only healthy children". 162/ Normal intercourse between husband and wife may result in an abnormal fetus and the technique of artificial insemination does not necessarily enable the doctor to guard against this possibility; however it has been stated that "[t]he doctor must exercise due care to ensure that the donor was not likely to produce sperm which would transmit any ... disease". 163/

107. One authority sees a still broader scope of responsibility on the part of the practitioner:

"... If it should transpire that the child born has traits not anticipated by the practitioner or desired by the mother (e.g. if the child is of greatly different racial origin or is born with a disease such as syphilis inherited and not from the mother, or if the sperm used could not have emanated from the reputed donor) the mother might be able to sustain an action for damages for negligence or misrepresentation against the medical practitioner. There is also the possibility of an action for damages by the child against the medical practitioner for birth with some physical defect. This could not be barred by any consent given by the mother or any other person. Actions against the suppliers of thalidomide by those born with physical defects as a result of the use of the drug by the mother during pregnancy are still pending in the courts." 164/

108. In the Report of the British Medical Association's Panel on Human Artificial Insemination, the duty of the practitioner is seen as extending beyond the technical application of the procedure, and to include the psychological effect of the undertaking: "The effect of A.I.D. on the patient and her husband must be considered carefully and the practitioner must exercise a proper degree of care and skill in ensuring that the patient and her husband fully understand the nature of the procedure and are given adequate warning of possible emotional troubles which might arise following the birth of a child. Should legal proceedings arise in circumstances where a couple are not capable of acquiring sufficient insight to cope with these problems it might be that a court would find a practitioner negligent in having failed to consider and deal with the possibility of these problems in advance". 165/

162/ Mariel Revillard, op.cit., p.82.

163/ British Medical Journal Supplement 7 April 1973, op.cit., p.4.

164/ Olive M. Stone, op.cit., p.70; see also Mariel Revillard, op.cit., p.82.

165/ British Medical Journal Supplement 7 April 1973, op.cit., p.4.

109. Lord Kilbrandon stated that the child could hold the doctor and perhaps the / hospital services liable for a neglect of duty which was owed to it, and characterizes this right as "truly a fundamental civil rights aspect of the matter". 166/

110. The duty of care demanded of the practitioner, and the right of the parties to the best possible result obtainable through the exercise of current medical and genetic skills are regarded as arguments for regulation of the practice of artificial insemination. Although the procedure of A.I.D. is so simple that it could be carried out by any competent midwife, a number of authorities urge that legislation be enacted requiring that only a doctor should perform A.I.D. This would presumably ensure that the procedure was performed in accordance with medical professional ethics and was protected by medical secrecy, and that the donor was properly screened as to suitability. 167/

111. According to Bernard Dickens, "The law is quite unprepared for AID being undertaken by fringe practitioners, medically qualified or not, and for donors being found in the hazardous way the late Professor Titmuss described the finding of blood donors ... It may already be desirable to legislate against backstreet AID as the law now proscribes backstreet abortion. Although the motivations are diametrically opposed, the analogy is close". 168/

166/ Lord Kilbrandon, op.cit., p.92.

167/ Anne McLaren, "Biological aspects of A.I.D.", Law and Ethics of A.I.D. and Embryo Transfer: Ciba Foundation Symposium 17 (New Series). (Amsterdam, Associated Scientific Publishers, 1973), pp.101-102.

168/ Bernard Dickens, op.cit., p.681.