**Title: Regulation of Posthumous Assisted Reproduction in India: Legal-Ethical Challenges**

**Author: Dr. Sufiya Ahmed, Assistant Professor, Department of Law, School for Legal Studies, Babasaheb Bhimrao Ambedkar University, Lucknow.**

**Address: Department of Law, School for Legal Studies, Babasaheb Bhimrao Ambedkar University, Lucknow, 226025**

**Email:** [**sufi.bbau@gmail.com**](mailto:sufi.bbau@gmail.com)

**Mobile: 8765584209**

**Regulation of Posthumous Assisted Reproduction in India: Legal-Ethical Challenges**

**Abstract**

Technology has made tremendous changes in the field of science. One of the fastest growing technologies is Assisted Reproductive Technology (ART) which has made it possible to make a sperm or embryos cryopreserved and use it to conceive a child even after the death of one of biological parents. This sperm can be frozen for later use by his wife or partner to produce his biological child. Posthumous sperm retrieval and reproduction is not a new issue in India as the ART treatments are available throughout the country yet the procedure is still unregulated as there is no law to regulate the ART. Simultaneously, there have been no laws or cases in India which give clear guidance about posthumous assisted reproduction (PAR). The issues related to PAR are not only critical but also challenges the established laws and policies related to legitimacy, inheritance, parentage and consent. The time has come that we should have a proper guideline on PAR. Any guideline related to PAR should consider the socio-ethical, legal, medical and health related issues related to it. This paper is an attempt to discuss the ethical-legal challenges related to PAR and also try to suggest for a legal framework for regulating PAR in India.

**Keywords:** posthumous assisted reproduction, post-mortem sperm retrieval,ethical-legal issues, India.

**Introduction**

**ART is not a new concept in India. Since last three decades the ART treatment is available in the clinics across the country and now it has become a huge industry driven by market forces. Posthumous sperm retrieval (PSR) and reproduction is relatively a recent phenomenon in India. Perhaps first time in 2006 it was observed that** although a case of posthumous retrieval of sperm has not been reported in India, such a request may soon arise and it was time to start discussing on these issues.[[1]](#endnote-1) In 2016, **All India Institute of Medical Sciences (**AIIMS**) has turned down a request by a Delhi woman to help her become a mother with the help of In Vitro Fertilization (IVF) technique. The woman in question had asked doctors to retrieve the sperm cells of her husband who died while being brought to the hospital.** However, the doctors had to decline the request as Indian law prohibits such an act and there are no clear guidelines on PSR in our country. In India, there are guidelines for ART clinics which only allow insemination of a woman with husband's semen only when the husband is alive and in sound mind.[[2]](#endnote-2) Soon after the above incident, AIIMS doctors have sought clarifications on the guidelines for such retrieval, to avoid ambiguity, if such a case happens to come to them again.[[3]](#endnote-3) They also suggested that time has come to have guidelines about the issues related to PSR as well as about the procedures to collect the sperm posthumously, to preserve them and to effectively use them with maximum benefits to the individual as well as to the society.[[4]](#endnote-4) This paper tries to examine the legal ethical issues related to PAR and the also suggest policy framework to regulate PAR in India.

**Assisted reproductive Technology**

**With each passing year, medical and reproductive technologies may advance far beyond our wildest dreams.**[[5]](#endnote-5)ART has changed the rules of who can become a parent, and when. In 2008, for instance, a seventy years old woman in India set a new age record for successfully carrying a pregnancy to birth.[[6]](#endnote-6) The issues for a child born from partially or fully ‘orphaned embryos’ in posthumous assisted reproduction attracted much debate in 1983 when Mario and Elsa Rios died in a plane crash, leaving behind two frozen pre-embryos in an IVF clinic in Melbourne, Australia. There was a suggestion that the embryos should be made available to another infertile couple.[[7]](#endnote-7)

Since the first test tube baby Louise Brown was born in 1978, tremendous advances have been made in the science of assisted reproduction. Thousands of infants are born each year as a result of assisted reproductive technology (ART) and artificial insemination (AI). But even though the Pandora’s Box has been open for almost 30 years and ART is rapidly becoming commonplace, state legislatures have only recently begun to answer some of the thorny legal issues regarding children who are posthumously conceived.[[8]](#endnote-8) A child can be conceived long after the father has died. The implications of this simple dislocation of reproductive events are profound. The detachment of reproduction from sexual intercourse opens up a range of possibilities for the ways in which relationships mediated by sperm might be dispersed across space and time.[[9]](#endnote-9) Sperm and embryos are routinely frozen cryogenically and stored for extended periods of time, making it possible for both men and women to have genetic offspring conceived after their death. Advances in technology may soon make egg freezing just as routine. Nonetheless, the phenomenon of posthumous reproduction is unique among those new technologies. It does suggest some sort of continuation of the traditional family structure of a husband and wife (and increasingly, also of other unmarried heterosexual couples) even if one party to the relationship is no longer alive.[[10]](#endnote-10) Reproduction after the death of the gamete provider is distinguishable from creation of embryo through in vitro fertilization during the lifetime of a gamete provider. Arguably, whenever sperm and egg create an embryo, reproduction occurs. But if reproduction occurs during the lifetime of the gamete provider, but implantation does not occur until after the death of one or both of the providers, then the birth of the resulting child would not be provided protection or eligibility under almost all existing statutes. This is the focus of posthumous assisted reproduction.[[11]](#endnote-11)

**Posthumous birth vs. posthumous reproduction**

Posthumous reproduction has been defined as the beginning of human gestational process after the death of one or both biological parents. It has defined as "the transfer of an embryo or gametes with the intent to reproduce a live birth after a gamete provider has died.[[12]](#endnote-12) The procedure is a form of ART that encompasses any scientific intervention to bring about a human live birth but is now meant to apply only to reproduction leading to birth *after the* *death* of the gamete provider. The use of artificial insemination to reproduce after the death of one or both of the parents is often called “posthumous reproduction”.[[13]](#endnote-13)

Posthumous births have been recognized since antiquity when a husband or male partner died from illness, from accident, or in war after reproduction and pregnancy had been achieved, but before the resulting birth has occurred. Legally and socially, the ensuing child has been usually considered the rightful heir of the deceased father. As an “act of fate,” there are few ethical or legal problems raised by posthumous births except the question of whether starting a family was prudent if death could reasonably have been anticipated. A pregnancy may be planned as an act of love or memorial in the face of death.[[14]](#endnote-14) Posthumous birth has long been recognized by both the common and civil law and occurs when a husband dies after the reproduction of a child, but before its birth. Due to the long-established presumption that a child born to a mother within two eighty days of her husband's death is the legitimate child of the husband,[[15]](#endnote-15) a posthumous child is legally and socially recognized as the offspring of the father and receives the benefits flowing from that recognition.[[16]](#endnote-16) Posthumous reproduction, on the other hand, became possible only after semen could be frozen and used for artificial insemination after the donor was deceased. In contrast to the ancient phenomenon of posthumous birth, the recent possibility of posthumous reproduction raises more ethical, practical, and legal questions for physicians practicing reproductive medicine and the public concerning the interests and rights of the donor(s), the gestating woman, the prospective rearing parent(s), and any children that may result.[[17]](#endnote-17) In the case of posthumous reproduction, the problem is one of a man who is truly absent but who can be made biogenetically present through the use of his gametes and whose social presence, as a father and a husband, must be actively made through the creation of contexts and connections. In short, a 'bad' death might be made 'good' by making kinship possible, which in this instance necessarily means making it 'differently visible'.[[18]](#endnote-18)

**Posthumous Sperm retrieval**

Retrieval of viable sperm after death was first described by Rothman in 1980. Dr. Rothman performed the first recorded posthumous sperm retrieval in 1980[[19]](#endnote-19) though several case reports involving post-mortem sperm retrieval have since been published.[[20]](#endnote-20) The first pregnancy after post-mortem retrieval of sperm was reported in 1998 and the subsequent birth was reported in March 1999.[[21]](#endnote-21) PSR and the use of posthumously procured sperm in IVF involve the collection of sperm from a recently deceased male and its use for the purpose of posthumous reproduction.[[22]](#endnote-22) Various methods for retrieving spermatozoa have been described, including surgical excision of the epididymis, irrigation or aspiration of the vas deferens, and rectal probe electro ejaculation.[[23]](#endnote-23) Requests for retrieval of sperm are infrequent; 82 were reported in a 1997 study in the US, of which about one-third were met.[[24]](#endnote-24) Although PSR is a worldwide, death-defying occurrence, it lacks a legal backbone. For this reason, hospitals have been forced to draft their own rules regarding the procedure.[[25]](#endnote-25) The advent of ICSI and the potential for cryopreservation of ova may extend the options for posthumous reproduction to the use of the cryopreserved ovum, much as for using sperm for posthumous reproduction but with the added requirement of a ‘surrogate’ uterus for gestation to achieve a pregnancy.[[26]](#endnote-26) The guidelines for assisted reproductive technology (ART) clinics in India allow insemination of a woman with a dead husband's semen. However, the sperm must be collected while the husband is alive and in sound mind.[[27]](#endnote-27)

**Posthumous Assisted Reproduction (PAR) in other Countries**

In Western society, there is no universal prohibition of posthumous gamete retrieval or posthumous IVF. There are several countries having liberal laws as far as storing dead people’s sperms are concerned. Israel allows removal of sperm from a dead man’s body at the request of his wife or common law wife and allows transfer of the sperm to the wife within one year of the husband’s death, even in the absence of his consent. If the wife dies, the sperm cannot be used. Belgium and the USA permit post-mortem insemination without the man’s prior written consent.[[28]](#endnote-28) In France, after the widow of a cancer patient received consent for sperm to be extracted from her husband and used for insemination, a policy was adopted and upheld by French courts forbidding postmortem insemination. Similarly, Germany, Sweden, and Canada all have laws that prohibit posthumous reproduction.[[29]](#endnote-29) No jurisdiction in the United States, however, has enacted such a ban, and courts have generally ruled in favor of posthumous reproduction, at least when specific intent is present. In contrast to several Western countries Canada, France, Germany, Norway, Sweden, among others where posthumous conception has been banned due to ethical and legal concerns, the United States has taken a relatively laissez-faire approach to the posthumous reproduction and Israel has taken a decidedly progressive stance. One fundamental distinction that sets Israel apart is a presumption of consent from the deceased when a widowed spouse requests posthumous sperm retrieval.[[30]](#endnote-30) Under the Human Fertilisation and Embryology Act of 1990 in the UK, it is illegal to take a man's sperm without his consent, but once consent has been given, the Act does not govern under what circumstances a widow is allowed to use the sperm, leaving it up to individual clinics.[[31]](#endnote-31)

**Ethical –Legal Issues**

The advent of the capability for posthumous reproduction and post mortem gamete retrieval has puzzled many in the field of ethics due to the uncertain nature of posthumous reproduction interests and rights.[[32]](#endnote-32) Multiple commentators have defended different positions on the moral status of this practice.[[33]](#endnote-33) The science is evolving and simultaneously it raised legal challenges related to inheritance rights, legitimacy of child born through PAR etc.[[34]](#endnote-34)It is possible to retrieve viable sperm from a dying man or from a recently dead body. This sperm can be frozen for later use by his wife or partner to produce his genetic offspring. But the technical feasibility alone does not morally justify such an endeavour. PAR raises questions about consent, the respectful treatment of the dead body, and the welfare of the child to be.[[35]](#endnote-35) It raises a lot of ethical-legal issues which are needed to be discussed.

**Respect for the deceased person**

Metaphysically, the person disappears from his or her body at death, but the dead body continues to command respect.[[36]](#endnote-36) Post mortem examination has been practised at least since the time of Julius Caesar in order to learn the cause of death, to further understand the pathology or pathophysiology of disease, or for medico legal reasons.[[37]](#endnote-37) For over 30 years, after informed consent by all parties, organs and tissue have been retrieved from recently dead bodies and have been used to save thousands of lives.[[38]](#endnote-38) In the narrow context of posthumous gamete retrieval involving spouses and a sudden death, the deceased's autonomy is better protected by a presumption of consent than by the existing presumption of non-consent. The crux of this argument is that detractors of presumed consent fail to acknowledge that autonomy is protected in different ways according to different contexts.[[39]](#endnote-39)

**Consent**

The ethical concept of valid consent and the legal doctrine of informed consent have become firmly established as foundational in the practice of modern medicine. Without proper consent, any procedure could be viewed as an assault on an individual. The moral basis of the importance of consent is respect for patient autonomy.

Prospective, written consent for PSR is rare due to the nature of the cases involving the request. Many requestors of PSR are the surviving spouse or intimate partner of a young patient who died unexpectedly after a sudden and unexpected catastrophic illness or injury. Nearly all couples in this situation have not anticipated, discussed, or made any provision for reproduction after the sudden death of one partner. Thus, these critics argue that, in most cases, PSR should not take place, because explicit prospective consent has not been given. The proper guidelines may be frames by the legislatures for presumption of implied consent of the deceased spouse by taking into consideration the family background, the bona fide intention of the surviving wife and the socio-economic condition of the family.

The existing legal position on posthumous sperm reproduction in most parts of the world is that explicit (written) consent from a man must be obtained in order for his sperm to be collected and used following his death to create a child.[[40]](#endnote-40) This principle was established in *Schloendroff[[41]](#endnote-41)* case where the court stated that essentially every person, whether dead or alive, has a right to determine what is to be done with his own body and that therefore any doctor commits assault, if she/he performs a procedure without the patient’s consent. The landmark *Blood[[42]](#endnote-42)* case made it clear that explicit written informed consent is necessary. Lord Woolf stated in this judgment that:

There is a clear requirement for the written and effective consent of a man, after he has had the opportunity to receive counseling and after he has had a proper opportunity to consider the implication of posthumous birth….any consent should be given in clear and formal terms by the person himself….the authority is reluctant to seek to identify a person’s wishes from the evidence of another person.

Given that posthumous procreation, unlike organ donation, entails significant and permanent implications for the deceased’s family, the potential for a serious conflict of interest justifies a far more limited decision-making role for the family. Obviously, difficulties could arise in estate distribution after PAR, although no cases appear documented.[[43]](#endnote-43) The ambiguity of unwritten consent poses the biggest problem on the threshold of PAR—granting the initial request to extract sperm from the husband. Because the law has been mute on whether it is legal and ethical to extract sperm from a corpse, hospitals have had to depend upon their own guidelines in making that decision.[[44]](#endnote-44) One particular sperm retrieval guideline from the New York Hospital provides that a deceased’s consent to post-mortem sperm retrieval can be “reasonably inferred” in the absence of express consent.[[45]](#endnote-45) In India there are neither any guidelines nor any judicial interpretation regarding consent of the deceased spouse however the proposed ART Bill discusses various ART treatments without mentioning of PAR.

**Welfare of the child**

The request for PSR result in creation of a child and so raises questions about the welfare of that future child. Commentators have expressed several concerns regarding the welfare of the future child. One argument is the perceived harm of bringing a child into a single parent family. Bringing a child into a single parent family could put the child at a disadvantage compared with those who have both parents. A child born via posthumous reproduction may experience a feeling of incompleteness due to not having a personal relationship with his or her biological father. One of the most-cited arguments against post-mortem reproduction using PSR is that a child born posthumously without a living father and raised by only one parent will be adversely affected.[[46]](#endnote-46) The gist of the single parent hypothesis is this: “Children who spend their entire childhood living with their married, biological parents experience, on average, fewer academic, behavioral and social problems during both childhood and adulthood than those who spend time in other family types.”[[47]](#endnote-47)

The Human Embryology and Fertilisation Authority of Great Britain requires physicians who provide ART services to consider the welfare of the potential child before making a decision to proceed.[[48]](#endnote-48)A decision to participate (or not) in helping a woman achieve a pregnancy using the semen of her deceased partner, whether voluntarily frozen for that purpose before death or retrieved posthumously, should consider the welfare of the future child. This calculation is exceedingly difficult, and the conclusion may vary depending on the social circumstances and on personal values. But the issue of the child’s welfare cannot be overlooked.[[49]](#endnote-49) In contrast, posthumous reproduction is a matter of choice and raises more ethical, practical and legal questions for physicians, policy makers, society and those involved in the practice of reproductive medicine. Equally, there is a need to balance a range of interests and concerns, which extend from the fabric of society, religion, interests and rights of the deceased donor(s), the gestating woman, the prospective rearing parent(s) and, above all, to any children that may result.[[50]](#endnote-50)

**Rational Decision Making**

Another challenge which is faced by hospitals in making the decision to grant or deny a request to PSR is the fleeting time period during which the sperm can be extracted, frozen, and remain viable. Usually, the procedure must occur within twenty-four hours after death. Experiencing the loss of a loved one can make it difficult for a grieving widow to fully understand whether PSR is what her deceased husband truly desired. Due to the limited time frame within which a doctor can successfully extract viable sperm, the widow’s statements that her deceased husband would have wanted PSR are both self-serving and clouded by grief. For that reason, some believe the widow cannot be trusted automatically.[[51]](#endnote-51) A proper counselling regarding the aftermath of PSR and the future challenges of single parenting must be done by the doctors. The death of a husband is a difficult time for a widow to make a rational decision about whether or not she wants the sperm of a dead husband to be harvested. Because illnesses in the deceased partner are often unanticipated, the patient typically has not given prior written or verbal consent for sperm retrieval. In these situations, physicians who are asked to perform sperm retrieval, sperm storage, and artificial insemination face an array of difficult ethical issues.[[52]](#endnote-52)

**Status of child born out of posthumous reproduction**

The legal and social status of a child born from PAR has been ambiguous, even if the pregnancy occurs with the wife of the dead husband. Children conceived after the death of their biological father may also be legally disadvantaged in several ways. Conventional family and inheritance laws deny a posthumously conceived child legal status as the child of its biological father. The result is not often intentional, but occurs because the law did not consider the possibility of a medical phenomenon such as posthumous reproduction. Although it may be possible for a posthumously conceived child to inherit a *mortis causa* donation from its father in common law states, the child is nonetheless denied intestate inheritance and other benefits.[[53]](#endnote-53) Because posthumously conceived children are born after the death of a parent and thus outside marriage as the death of one partner is considered as the automatic dissolution of marriage, many commentators refer to them as illegitimate.[[54]](#endnote-54) In India, as per the draft ART Bill the child born out of any ART procedure is to be considered as legitimate child of the spouse however there are conflict of laws regarding inheritance and succession in absence of uniform law because personal laws are religion specific. Regarding posthumously conceived child the ICMR guidelines in India[[55]](#endnote-55) states that-

Though the Indian Evidence Act 1872, says that a child born within 280 days after dissolution of marriage (by death or divorce) is a legitimate child since that is considered to be the gestation period, it is pertinent to note that this Act was enacted as far back as 1872 when one could not even visualize ART. The law needs to take note of the scientific advancements since that time. Thus, a child born to a woman artificially inseminated with the stored sperms of her deceased husband must be considered to be a legitimate child notwithstanding the existing law of presumptions under Evidence Act. The law needs to move along with medical advancements and suitably amended so that it does not give rise to dilemma or unwarranted harsh situations.

**Sperm as a property**

The courts of common-law countries such as Australia and the United Kingdom have held that once organs or tissues are separated from a person that person (if alive, or that person's estate if dead) has little or no right of ownership or legally-enforceable control over the separated parts. Human body parts in law appear simply to be incapable of being owned.[[56]](#endnote-56)

**Rights of succession**

The issues related to succession and inheritance is highly debatable in posthumous reproduction because of the assumption that a child born during marriage is only considered to be a legitimate child. Law regards the death of a partner in a marriage as automatic dissolution of marriage. The child born after the dissolution as in posthumous reproduction after the death of father ceases to be a legitimate child therefore is not entitled to inherit the father’s property. In USA, some of the states allow the child born through PAR to inherit the father’s property as well as to get social security benefits in cases where express written consent of the father is available subject to a certain time limit in which the child must have be born.

**Legal consequences of posthumous reproduction**

Naturally, the legal consequences of posthumous reproduction are far reaching, and affect not just the right to procreate or not to procreate, but also the legal parentage relationship and rights between a posthumously conceived child and the deceased parent. Whether to apply existing law to new situations involving procreation and parentage, or to tread a new path entirely, is a choice that both legislatures and the judiciary have and will continue to confront.[[57]](#endnote-57) While it is possible to leave the decision of granting or denying PSR requests to the hospital, a Statute of Formalities for PSR should be developed to aid hospitals in making such decisions and to resolve the uncertain legal status of posthumously conceived children.[[58]](#endnote-58)

Developments in reproductive technology continue to generate new and difficult moral questions for those drafting public policy. Judges often have to interpret the law in relation to new circumstances where there may be ambiguity, and posthumous reproduction can present an array of dilemmas arising from the nature of consent and the process of decision making.[[59]](#endnote-59) The main issues are; first, who has the right to decide whether to proceed with posthumous reproduction, especially in cases where the deceased man left no wish? Second, since the surviving wife is the one who will bear risks of assisted reproduction and who will take care of the child, if any, how can the medical system help her to make an informed decision? Third, for a posthumously conceived child, how shall the law provide protection in terms of parentage and rights for succession? Are posthumously conceived children harmed by being born? What rights do posthumously conceived children have—or should they have? How can their interests be protected? And importantly, how do children conceptualize the related rights and interests for themselves?[[60]](#endnote-60)

In *Hecht v. Superior Court*, a California appellate court permits the deceased’s girlfriend to use semen that he had willed to her.[[61]](#endnote-61) The court concluded that it was not against public policy for Hecht, as an unmarried woman, to be inseminated with Kane’s sperm, and post-mortem reproduction was not against public policy. The court refused to consider whether a child brought into the world without ever knowing his father would be adversely affected or whether a posthumously born child would disrupt the family dynamic and be a burden on society.[[62]](#endnote-62) These public policy arguments have been the subject of an endless debate on PSR.

The Hecht case was significant in that it provided a multitude of concepts that was subsequently followed. Firstly, the court held that the gametes could be deemed to be property and could be willed to another, and as such are protected under the US constitution. Secondly, the decision also provided that the deceased’s wishes would be upheld, even if it is goes against public policy, on the condition that the consent was expressly granted. Finally, the court distinguished the general ability of conceiving posthumously from the guarantee that a child born under PAR procedures automatically in entitled to inheritance.[[63]](#endnote-63)

*AB v. Attorney-General[[64]](#endnote-64)*in 1999 was the first case in which the Australian courts faced the issue of posthumous reproduction, but it was not decided until 2005 where the wife was finally allowed to export her deceased husband’s sperm to the Australian Capital Territory for the purpose of insemination.

In *Woodward v. Commissioner of Social Security*,[[65]](#endnote-65) Lauren Woodward applied for social security benefits for herself and her twin daughters. Woodward’s twin daughters were conceived with her husband’s cryopreserved sperm, and born almost exactly two years after Mr. Woodward had passed away. The Social Security Administration (SSA) denied Mrs. Woodward’s claim, and she appealed. The Supreme Judicial Court of Massachusetts held that the posthumously conceived twins could inherit from their deceased genetic father if Mrs. Woodward could prove the following: (1) the genetic relationship between Mr. Woodward and the twins, (2) that Mr. Woodward had consented before his death to Mrs. Woodward using his stored sperm to reproduce posthumously, and (3) that Mr. Woodward had consented before his death to support any posthumously born children. The court, however, suggested that even if these conditions were satisfied, a time limit might preclude qualifying for inheritance rights.

In 1997, Diane Blood famously won a court case allowing her to export the sperm of her dead husband from England to Belgium with the goal of conceiving a child with the assistance of medical technology.[[66]](#endnote-66) In 2004, a federal appellate court ruled that twins conceived from frozen semen after their father’s death was eligible for Social Security.[[67]](#endnote-67) In *Gillett-Netting v. Barnhart*[[68]](#endnote-68), the federal government denied Social Security benefits to children conceived by IVF after their father’s death because they were not his dependents at the time of his death. The Ninth Circuit, however, found that they were considered legitimate children under Arizona law. Hence, they could be deemed his dependents and did not have to demonstrate actual dependency.

Similarly, in *Stephen ex rel. Stephen v. Barnhart*, a child was conceived after his father’s death and again was denied Social Security benefits because he was not a dependent child at the time of the parent’s death. The District Court applied the Florida law that says a child conceived after a parent’s death is not eligible for a claim against the estate unless provided for in the will. Because the child in this case was not included in his father’s will, he had no claim to the Social Security benefits. The court distinguished the case from Gillett-Netting because Florida had a statute that specifically deals with posthumous fertilization while Arizona did not.

**Conclusion**

There is no legislation or statutory law in India for PAR. However, the Indian Council of Medical Research and the National Academy of Medical Sciences have proposed guidelines for regulation of assisted reproductive technology.[[69]](#endnote-69) As there is no national legislation on the subject, the issue has been tackled by professional guidelines, hospital-regulation and jurisprudence. So, there is an urgent need for legislation on the topic in order to protect the interest of all parties involved. Furthermore, legislation is needed to resolve what happens to a child conceived and born from post mortem sperm retrieval as it relates to probate, class gifts, social security, and legal status in general.[[70]](#endnote-70) It is suggested that spousal requests for sperm retrieval after death should be declined unless there is prior consent or known wishes of the decedent.[[71]](#endnote-71) A request for sperm retrieval after death should not be honoured unless there is convincing evidence that the dead man would want his widow to carry and bear his posthumously conceived offspring. Even when consent is available, professionals should also consider the welfare of the potential child. The evidentiary standards for such a decision are difficult to define and far from clear.[[72]](#endnote-72) Written consent should have been given by the deceased person before the use of the gametes or embryos. Consent should be obtained at the time of storage or before the start of the IVF cycle.[[73]](#endnote-73) One Authors proposed that institutional policies should permit posthumous sperm recovery based on careful consideration of the specific circumstances of the situation, including the reasoning of the stakeholders.[[74]](#endnote-74) A person’s ability to reproduce will continue to expand significantly beyond his or her lifetime—whether it be to provide genetic material to a significant other for future children, or to donate to unknown persons for reproductive purposes.[[75]](#endnote-75) Well-drafted legislation needs to be established to protect the posthumously born child, the decedent’s estate, and all other individuals involved. Without meeting the Statute of Formalities for PSR, a child would not be able to inherit from his or her genetic father in the same way a child conceived from an anonymous sperm donor cannot inherit from the donor.[[76]](#endnote-76) If posthumous reproduction is legalised, thorough counselling of the surviving partner during the decision-making period is necessary. Furthermore, a minimum waiting period of 1 year after the death should be imposed before treatment can be started.[[77]](#endnote-77) The policy makers should take into consideration the following points:

1. The policy on PAR should indicate a clear cut objective about denying or allowing PAR in India as there is no guideline whether it is illegal or lawful to deny a request for PSR.
2. The request made by a legally wedded wife to retrieve sperm from the dead husband may be taken into consideration provided that there is a proper evidence of the consent of deceased husband.
3. The time limit to use frozen sperm of the dead husband should be specifically mentioned.
4. A proper counselling of the surviving wife should be done by the doctors regarding the cost of PAR and future challenges of single parenting.
5. PAR includes various ARTs, therefore proper information about the procedure should be provided by the medical professionals.
6. The child born from PAR should be declared as a legitimate child of the deceased father and the inheritance rights should be provided specifically.
7. The fertility treatment in India is now a huge industry but still it is unregulated. The ART Bill is still pending and yet to be passed. It is a high time to have a proper legislation relating to ART and PAR in India.
8. PAR and PSR includes various sensitive issues which should be dealt very carefully. It involves the formation of family beyond death of a spouse. Consideration for the welfare of the unborn child should be maintained in a balanced, pragmatic and sensible manner.[[78]](#endnote-78)

1. Rajesh V Bardale, P G Dixit, Birth after Death: questions about posthumous sperm retrieval, *Indian Journal of Medical Ethics* Vol III No 4 October-December 2006 at 122 [↑](#endnote-ref-1)
2. The Times of India, <http://timesofindia.indiatimes.com/city/delhi/Widow-asks-doctors-for-dead-hubbys-sperm-to-have-baby/articleshow/53145982.cms> [↑](#endnote-ref-2)
3. AK Sikary, OP Murty, RV Bardale. Postmortem sperm retrieval in context of developing countries of Indian subcontinen. *J Hum Reprod Sci* 2016;9:82-5. [↑](#endnote-ref-3)
4. AK Sikary, et al. [↑](#endnote-ref-4)
5. Devon D. Williams, Over My Dead Body: The Legal Nightmare and Medical Phenomenon of Posthumous Reproduction Through Postmortem Sperm Retrieval, *Campbell Law Review* (Vol. 34:181, 2011) at 203 [↑](#endnote-ref-5)
6. Ellen Trachman & William E. Trachman, The Walking Dead: Reproductive Rights for the Dead, Savannah Law Review [Vol. 3:1, 2016] at 92 [↑](#endnote-ref-6)
7. Smith, G.P., III (1985–86) Australia’s frozen ‘orphan’ embryos: a medical, legal, and ethical dilemma. J. Family Law, 24, 27–41 as cited in G.Bahadur, Death and Conception, *Human Reproduction* Vol.17, No.10 pp. 2769–2775, 2002 at 2770 [↑](#endnote-ref-7)
8. Carole M. Bass, What If You Die, And Then Have Children? Know how to plan for offspring who are born—sometimes even conceived—posthumously. A state-by-state guide, *Trusts & Estates ,* APRIL 2006, at 20 available at trustsandestates.com [↑](#endnote-ref-8)
9. S Franklin,. *Making representations: The parliamentary debate on the Human Fertilisation and Embryology Act. In Techologies of procreation: kinship in the age of assisted reproduction* (eds.) 1993, J. Edwards, E. Hirsch, F Price, & M. Strathern, 96-131. Manchester: University Press cited in Bob Simpson, Making 'Bad' Deaths 'Good': The Kinship Consequences of Posthumous Reproduction, *The Journal of the Royal Anthropological Institute*, Vol. 7, No. 1 (Mar., 2001), pp.1-18 [↑](#endnote-ref-9)
10. Bob Simpson, Making ‘Bad’ Deaths ‘Good’: the Kinship Consequences of Posthumous Reproduction, 7 *Royal Anthropological Inst*. 1, 3 (2001). [↑](#endnote-ref-10)
11. Raymond C. O'Brien, the Momentum of Posthumous Reproduction: A Model Act, 25 *J. Contemp. Health L. & Pol’y* 332 (2009) at 334. [↑](#endnote-ref-11)
12. Id at 333 [↑](#endnote-ref-12)
13. Brianne M. Star, A Matter of Life And Death: Posthumous Reproduction, 64 *La. L. Rev.* (2004) at 613

    Available at: <http://digitalcommons.law.lsu.edu/lalrev/vol64/iss3/9> [↑](#endnote-ref-13)
14. Posthumous reproduction, The Ethics Committee of the American Society for Reproductive Medicine, *American Society for Reproductive Medicine*, Birmingham, Alabama [↑](#endnote-ref-14)
15. Under Indian Evidence Act 1872, a child born within 280 days of dissolution of marriage is considered legitimate child. [↑](#endnote-ref-15)
16. Supra note 13 at 615 [↑](#endnote-ref-16)
17. “Posthumous reproduction, The Ethics Committee of the American Society for Reproductive Medicine , Fertility and Sterility”, Vol. 82, Suppl. 1, September (2004), available at *http://www.asrm.org/uploadedFiles/ASRM\_Content/News\_and\_Publications/Ethics\_Committee\_Reports\_and\_Statements/posthumous.pdf*  [↑](#endnote-ref-17)
18. 18 supra note 10 at 3 [↑](#endnote-ref-18)
19. CM Rothman, A method for obtaining viable sperm in the post-mortem state. *Fertility and Sterility* 1980;34:512. Cited in R D Orr, M Siegler, Is posthumous semen retrieval ethically permissible?, *J Med Ethics* 2002;28:299–303 also cited in JD Hans, EL Yelland (2013) American Attitudes in Context: Posthumous Sperm Retrieval and Reproduction. *J Clinic Res Bio eth* S1: 008. [↑](#endnote-ref-19)
20. G.Bahadur, Death and Conception, *Human Reproduction* Vol.17, No.10 pp. 2769–2775, 2002 at 2769 [↑](#endnote-ref-20)
21. C Strong, J R Gingrich and W H Kutteh, Ethics of post-mortem sperm retrieval, *Hum Reprod* 2000; 15(4): 739-745. cited in supra note 1. [↑](#endnote-ref-21)
22. Frederick Kroon, Presuming Consent in the Ethics of Posthumous Sperm Procurement and Reproduction, *Reproductive Bio Medicine and Society Online* (2016) 1, 123–130 [↑](#endnote-ref-22)
23. Supra note 20 at 2769 [↑](#endnote-ref-23)
24. R D Orr and M Siegler, Is posthumous semen retrieval ethically permissible?, *J Med Ethics* 2002; 28: 299-303 cited in supra note 1 [↑](#endnote-ref-24)
25. Supra note 5 at 182 [↑](#endnote-ref-25)
26. Supra note 20 at 2770 [↑](#endnote-ref-26)
27. Supra note 2 [↑](#endnote-ref-27)
28. Supra note 1. [↑](#endnote-ref-28)
29. Supra note 6 at 99. [↑](#endnote-ref-29)
30. M. Goldberg, Made in Heaven*. Tablet 2011*. Retrieved from: <http://www.tabletmag.com/jewish-news-and-politics/61835/made-in-heaven>, cited in Jason D. Hans, Posthumous gamete retrieval and reproduction: Would the deceased spouse consent? *Social Science & Medicine* 119 (2014) 10-17 at 10 [↑](#endnote-ref-30)
31. Reproductive Health Matters, Controversy over Posthumous Reproduction of Children, Vol. 8, No. 15, *Reproductive Rights, Human Rights and Ethics* (May, 2000), pp. 173-174 [↑](#endnote-ref-31)
32. On one side of the ethics debate, it is argued that posthumous gamete retrieval is a major violation of patient autonomy, due to the lack of consent by the gamete donor. Proponents of this argument include physicians Robert D. Orr and Mark Siegler, who state that “a request for sperm retrieval after death should not be honoured unless there is convincing evidence that the dead man would want his widow to carry and bear his posthumously conceived offspring”. The opposing side argues that granting grieving families the hope of continuing the genetic legacy of a lost loved one is ethically permissible or even required, in an attempt to alleviate suffering. Dr. Cappy Rothman stands firmly by this view, stating that “it could actually be unethical to deny the hope and help available through sperm retrieval to a grief-stricken wife”. See infra 29 [↑](#endnote-ref-32)
33. Catherine Robey , *posthumous semen retrieval and reproduction: an ethical, legal, and religious analysis*, a thesis submitted to the graduate faculty of wake forest university graduate school of arts and sciences, May, 2015 at vi-vii [↑](#endnote-ref-33)
34. Carole M. Bass, What If You Die, And Then Have Children? Know how to plan for offspring who are born—sometimes even conceived—posthumously. A state-by-state guide, *Trusts & Estates* , APRIL 2006, at 31available at trustsandestates.com [↑](#endnote-ref-34)
35. R D Orr, M Siegler, Is posthumous semen retrieval ethically permissible?, *J Med Ethics* 2002;28:299–303 [↑](#endnote-ref-35)
36. Andrews LB. The sperminator. The New York Times Magazine 1999 Mar 28: 62–5. [↑](#endnote-ref-36)
37. Supra note 31 at 300 [↑](#endnote-ref-37)
38. Supra note 31 at 300 [↑](#endnote-ref-38)
39. Jason D. Hans, Posthumous gamete retrieval and reproduction: Would the deceased spouse consent? *Social Science & Medicine* 119 (2014) 10-17 at 14 [↑](#endnote-ref-39)
40. Kelton Tremellen, Julian Savulescu, Posthumous reproduction by presumed consent. A pragmatic position for a rare but ethically challenging dilemma, *Reproductive Bio Medicine and Society Online* (2016) 3, 26–29 [↑](#endnote-ref-40)
41. Schloendroff v Society of New York Hospital, (1914) 105 NE 92, 93 [↑](#endnote-ref-41)
42. *R. v Human Fertilisation & Embryology Authority, ex parte Blood*, [1997] EWCA (Civ) 4003, [70], [1997] 2 WLR 806 (Q.B.D.) (Eng.). [↑](#endnote-ref-42)
43. Supra note 20 at 2773 [↑](#endnote-ref-43)
44. Supra note 5 at 191 [↑](#endnote-ref-44)
45. New York Hospital Guidelines for Consideration of Requests for Postmortem Sperm Retrieval, cornellurology.com, http://www.cornellurology.com/ [↑](#endnote-ref-45)
46. Sorin Hostiuc & Cristian George Curca, Informed Consent in Posthumous Sperm Procurement, 282 Archives of Gynecology & Obstetrics 433, 436 (2010) cited in Devon D. Williams, Over My Dead Body: The Legal Nightmare and Medical Phenomenon of Posthumous Reproduction Through Postmortem Sperm Retrieval, *Campbell Law Review* (Vol. 34:181, 2011) at 194 [↑](#endnote-ref-46)
47. Katherine Magnuson & Lawrence M. Berger, Family Structure States and Transitions: Associations with Children’s Wellbeing During Middle Childhood, 71 *J. Marriage & Fam*. 575, 575 (2009). ) cited in supra note 5 at 195 [↑](#endnote-ref-47)
48. The Human Fertilisation and Embryology Act 1990 (England): ch 37, [↑](#endnote-ref-48)
49. Supra note 31 [↑](#endnote-ref-49)
50. Supra note 20 at 2770 [↑](#endnote-ref-50)
51. Supra note 35 [↑](#endnote-ref-51)
52. Supra note 20 at 2769 [↑](#endnote-ref-52)
53. Supra note 12 at 615 [↑](#endnote-ref-53)
54. Ellen J. Garside, Posthumous Progeny. A Proposed Resolution to the Dilemma of the Posthumously Conceived Child, 41 *Loy. L. Rev*. 713, 719 (1996). Cited in id at 616 [↑](#endnote-ref-54)
55. Section 3.16.5, ICMR/NAMS Guidelines, http://www.icmr.nic.in/art/ Chapter\_3.pdf. [↑](#endnote-ref-55)
56. Scott R. The body as property. London: Allen Lane, 1981: 6-7, 186-197. Cited in R P Jansen, Sperm and ova as property*, J Med Ethics* 1985 11: 123-126 Available at http://jme.bmj.com/content/11/3/123 [↑](#endnote-ref-56)
57. Supra note 26 at 91. [↑](#endnote-ref-57)
58. Supra note 5 at 182 [↑](#endnote-ref-58)
59. Supra note 20 at 2770 [↑](#endnote-ref-59)
60. Maya Sabatello, Posthumously Conceived Children: An International and Human Rights Perspective , 27 *J.L. & Health* 29 (2014) available at http://engagedscholarship.csuohio.edu/jlh/vol27/iss1/5 [↑](#endnote-ref-60)
61. *Hecht v. Superior Court*, 16 Cal. App. 4th 836, 20 Cal. Rptr.2d 275 (2d Dist. 1993) [↑](#endnote-ref-61)
62. *Hecht*, 20 Cal. Rptr. 2d at 291 [↑](#endnote-ref-62)
63. Raymond C. O'Brien, the Momentum of Posthumous Reproduction: A Model Act, 25 *J. Contemp. Health L. & Pol’y* 332 (2009), cited in Shalini Wurzberger, *Posthumous Reproduction: Legal Issues and Possible Refinements: An Analysis of the Australian and US-American Laws Governing Post Mortem Reproduction*, at 37, AV Akademikerverlag, (2013) [↑](#endnote-ref-63)
64. (2005) VSC 180. [↑](#endnote-ref-64)
65. *Woodward v. Comm’r of Soc. Sec*., 760 N.E.2d 257 (Mass. 2002). [↑](#endnote-ref-65)
66. *R. v Human Fertilisation & Embryology Authority, ex parte Blood,* [1997] EWCA (Civ) 4003, [70], [1997] 2 WLR 806 (Q.B.D.) (Eng.). cited in Maya Sabatello, Posthumously Conceived Children: An International and Human Rights Perspective, 27 *J.L. & Health* 29 (2014) *available at* http://engagedscholarship.csuohio.edu/jlh/vol27/iss1/5 [↑](#endnote-ref-66)
67. *Gillett-Netting v.Barnhart*,371 F.3d 593 (9th Cir. 2004). [↑](#endnote-ref-67)
68. 371 F.3d 595 (9th Cir. 2004) [↑](#endnote-ref-68)
69. Supra note 1. [↑](#endnote-ref-69)
70. Katheryn D. Katz, Parenthood From the Grave: Protocols for Retrieving and Utilizing Gametes From the Dead or Dying, 2006 *U. CHI. LEGAL F*. 289, 300–01 (2006) cited by supra note 5 at 182 [↑](#endnote-ref-70)
71. Supra note 31 at 301 [↑](#endnote-ref-71)
72. Supra note 31 at 302 [↑](#endnote-ref-72)
73. G.Pennings1, G.de Wert, F.Shenfield, J.Cohen, P.Devroey and B.Tarlatzis, ESHRE Task Force on Ethics and Law 11: Posthumous assisted reproduction, *Human Reproduction* Vol.21, No.12 pp. 3050–3053, (2006) [↑](#endnote-ref-73)
74. Supra note 29 at 58. [↑](#endnote-ref-74)
75. Supra note 29 at 114 [↑](#endnote-ref-75)
76. UNIF. PROBATE CODE § 2-120(b) cited in supra note 5 [↑](#endnote-ref-76)
77. G.Pennings1, G.de Wert, F.Shenfield, J.Cohen, P.Devroey and B.Tarlatzis, ESHRE Task Force on Ethics and Law 11: Posthumous assisted reproduction, Human Reproduction Vol.21, No.12 pp. 3050–3053, 2006 [↑](#endnote-ref-77)
78. Supra note 20 at 2775 [↑](#endnote-ref-78)