
Posthumous Use of Sperm: Legal and Bioethical Reflections on Israeli Policy

Roy Gilbar¹

1: NETANYA ACADEMIC COLLEGE, NETANYA, ISRAEL.

Keywords: Posthumous Assisted Reproduction, Israeli Law, Bioethical Principles, Reproductive Autonomy, Policy-Making

Introduction

Bassan's article on the posthumous use of sperm presents a complicated picture of Israeli law.¹ On the one hand, as previous reviews show,² Israel is unique in terms of the extent of this phenomenon. The number of applications to the courts to approve the use of sperm posthumously is substantial and has been increasing since the outbreak of the war on October 7. On the other hand, there is no clear legal policy in this area. In other words, Bassan's article shows that the rights of relevant parties in this context are not adequately regulated. This, as elaborated below, is the result of a lack of primary legislation, together with disagreement among relevant policymakers. The outcome is feelings of frustration, confusion, and even anger among the deceased's close relatives.³

Commenting on Bassan's article, I would: (1) describe the current legal position, focusing on issues that remain unclear; (2) analyze why the legal position is unclear; and (3) analyze the bioethical messages sent by the current legal position in light of the scholarly discourse articulated by Bassan.

Roy Gilbar, Ph.D., is a professor at the School of Law, Netanya Academic College, Netanya, Israel. He holds a Ph.D. in law and medical ethics from Queen Mary University of London, and his areas of expertise are medical/health law, bioethics, and tort law.

The Legal Position

A reader who is less familiar with the subject matter of posthumous use of sperm and/or with the legal position in Israel might feel puzzled when reading the legal review provided by Bassan. It is indeed complicated. I will try and highlight the most important points, particularly those that remain open and undecided by Parliament and the Supreme Court.

Broadly speaking, the deceased's partner has no problem obtaining judicial approval for using her dead partner's sperm. There is consensus among the relevant actors — the Attorney General of Israel (A-G), who issued his guidelines 20 years ago,⁴ the Supreme Court in its seminal case from 2016⁵ and legislators, who have been trying to pass a law in Parliament for the last several years that the deceased's partner can use the sperm.⁶ As Bassan noted, the main justification provided by these actors is that a child is an expression of the couple's intimate relationship, so not only should the partner's personal wish be considered by the courts, but her testimony regarding the wishes of her dead partner should also be taken into account. Another situation which is not problematic (whether there is a partner or not) is when the deceased clearly and explicitly expressed his wish to have a child after death.⁷

The most complicated situation concerns the bereaved parents when the deceased either leaves no partner or no advance directives regarding having a child after death. So far, no Act of Parliament, governmental regulations, or Supreme Court's judgment has provided them with independent status to fulfil their aim of having a grandchild from their dead son's sperm. More explicitly, the Supreme Court held that there is no right to grandparenthood in Israeli law,

which means that people cannot ask the state to help them become grandparents.⁸ This stands in contrast to the right of parenthood (through assisted reproduction) which is recognized as a fundamental right in Israeli law.⁹

However, in the context of bereaved parents' requests, the Israeli judicial system speaks in two voices. First, the judges in the Supreme Court left the door open that the option of allowing bereaved parents to have an agreement with a single woman who will use their son's sperm and have a child would be legally recognized in the future.¹⁰ Second, and this actually happened in the lower courts in the last few

wish/consent of the deceased before his death. Therefore, these actors limit the right to autonomy of the bereaved parents (or at least their interest in having a grandchild) as well as the reproductive autonomy of single women who, instead of approaching sperm banks and receiving anonymous donations, want their future child to have a paternal family.

On the other hand, lower court judges allowed bereaved parents and single women to come to an agreement and use the deceased's sperm to have a child. Moreover, judging by the discussions in the Israeli media,¹³ and in the Knesset (the Israeli Parliament),¹⁴ it seems that the sentiment in Israeli society

First, the judges in the Supreme Court left the door open that the option of allowing bereaved parents to have an agreement with a single woman who will use their son's sperm and have a child would be legally recognized in the future. Second, and this actually happened in the lower courts in the last few years, agreements between bereaved parents and single women were approved, and children were born as a result.

years, agreements between bereaved parents and single women were approved, and children were born as a result.¹¹ As Bassan rightfully stressed, this situation is the outcome of the following: (1) The lower courts are not obliged to apply and follow the A-G's guidelines, which do not allow it. The A-G guidelines must be followed by governmental and public bodies, but judges are free to deviate from them. (2) The judges in the lower court who allowed requests by bereaved parents relied heavily on the deceased's "presumed wish." From a procedural perspective, they must rely on evidence provided by the bereaved parents and other family members that convinced them that the deceased indeed wished to have a child after death.¹²

The Uncertainty of the Legal Position

The complicated position regarding the legal status of bereaved parents has become more problematic, for obvious reasons, following the outbreak of the war on October 7. From a legal perspective, this position is the result of different views held by policymakers and other relevant parties. On the one hand, it seems that the A-G, the majority of judges in the Supreme Court (or at least those who sat in all the cases that reached this court so far), and the senior officials who drafted the government's bill are of the view that posthumous use of sperm can be approved only in two cases: (1) a request by the deceased's partner and (2) an explicit

is that bereaved parents' wish to use their dead son's sperm can be recognized, particularly after the outbreak of the war on October 7. However, recent empirical studies have indicated that the level of public support is not high.¹⁵ In addition, media reports indicate that the rabbinical establishment in Israel prevents legislation on the use of sperm in the Knesset.¹⁶ So, in short, the political and public discussions add another layer of complexity and may explain the current legal position.

Bioethical perspectives

The current legal position provides the following insights from a bioethical perspective.

First, a question arises regarding the process of regulating sensitive issues in the realms of medical/health law and bioethics. More specifically, it is interesting to examine, although no definite and clear answer is guaranteed, the interplay between the relevant policymakers and actors involved in formulating legal policy in this field of posthumous use of sperm. In the context of medical/health law, Israeli scholars argue that the process of formulating legal policy is dominated by two actors who have no legal power and authority to regulate: the medical profession and the rabbinical establishment.¹⁷

Thus, if the reports in the Israeli media are accurate, and legislation is prevented due to lack of approval

of the rabbinical establishment, it would suggest that the process of formulating legal policy in Israel is inadequate in the sense that it is not comprehensive, balanced, and ethically justifiable. In other words, it might mean that the process that led to the existing legal policy in this context does not reflect the idea of deliberative democracy which is defined as follows: “a form of government in which free and equal citizens (and their representatives) justify decisions in a process where they provide one another with reasons that are mutually acceptable and generally accessible, aiming to reach conclusions that are binding for all citizens in the present but can be challenged in the future.”¹⁸

The second perspective relates to autonomy. It seems that each side, those who limit the use of sperm only to the female partner, and those who support the bereaved parents’ independent status, perceive autonomy differently. Arguably, they both perceive the right to autonomy in a relational manner,¹⁹ or, more accurately, they both highlight the relational aspects of autonomy rather than individualistic ones.

However, those who limit the use of sperm to only the deceased’s partner express a relatively narrow approach of relational autonomy. They perceive the deceased as an inherent part of his close and intimate relationship with his female partner. In other words, they emphasize the importance of the deceased’s relationship with his partner and rely on it to justify the use of sperm.²⁰ They imply that being in an intimate and permanent relationship makes the wish to have children and create a family, even after death, as reflecting a uniform expression, as if the deceased and the partner are one.²¹

However, those who support requests from bereaved parents when there is no partner perceive the deceased as first and foremost members of their family. They reflect the point made by ethics-of-care scholars that an individual is defined by his/her relationships with significant others.²² They are also supported by communitarians, who define the individual by their membership in several communities; the most significant is the family.²³ Relational autonomy scholars thus argue that, in some contexts, decisions that promote the common good of the family should be preferred to those that promote the personal interests of the individual.²⁴ Although this argument was promoted in the context of medical decisionmaking, it is arguably relevant in our context as it may explain the view that supports an independent status of the bereaved parents, particularly when the deceased left no female partner. Such an argument can justify requests made by bereaved parents to use their son’s sperm and have a grandchild, even when the deceased does not leave

advance directives. As argued elsewhere, solidarity and moral commitment to the family as a community and to its members can be the guiding values in situations where the deceased did not express his wishes on the subject before his death.²⁵

The final point concerns the interests of the other relevant parties: the future child and the intended mother. Bassan rightfully describes the relevant, although slightly dated, bioethical discourse regarding the best interests of the future child. She refers to the argument opponents of the posthumous use of sperm raises, that of “planned orphanhood.”²⁶ There is no need to discuss it in detail here since there are at least two convincing arguments which may refute it: (1) there can be no rights or interests of the child who has not been born. In this context, Heyd asserts that a fetus is a *potential* person; therefore, it does not qualify as a person to have moral interests or rights.²⁷ Arguably, the case for negating embryos’ moral interests and rights, or even gametes, would be even more compelling. (2) Nevertheless, if we conduct a best-interests discussion, then arguably it would probably be better to have a paternal family, or even just grandparents, who can provide love and support (economic, moral, psychological, functional) to the child.

I would like to focus on the intended mother or a single woman who would like to have a child through an agreement with the bereaved parents. Creating a legal policy that prohibits or prevents this sort of agreement would limit the reproductive autonomy of single women. It is correct that even if we do not allow this option, single women would still be able to bring children into the world with the assistance of medical reproductive technologies. In Israel, they can approach a sperm bank and have *in vitro* fertilization treatments in the same manner as heterosexual couples,²⁸ and they can also have access to surrogacy services.²⁹ So it is possible to argue that prohibiting single women from reaching an agreement with bereaved parents reflects a limitation in the periphery of this right. Arguably, such limitation can be, and should be, tolerated by Israeli law, which, as we saw, defines the right to parenthood as constitutional.

However, it is possible to argue that there is no sense of prohibiting agreements between single women and bereaved parents, because similar agreements whose purpose is to bring a child into the world are recognized by Israeli law between single women and single men who do not live as partners.³⁰ These agreements are the product of meeting the parties’ interests: (1) women who prefer that their child would have a known father and paternal family even when they do not have an intimate relationship with the child’s

father, and (2) men who would like to have a child, but they either do not live in a heterosexual relationship (i.e., they are single) or live in same-sex relationships. Since this kind of agreement, namely shared and joint parenthood, is legally recognized in Israeli law, one can argue that agreements between single women and bereaved parents should also be legally approved.

These agreements bring back to the discussion the principle of autonomy and one's right to become a parent. In Israel, many families have been created through contractual agreements between individuals. They are not limited to the agreements of shared or joint parenthood described above, but also to other types of agreements, for example, between the parties of same-sex couples. As Margalit stresses, contract law can resolve tensions and conflicts over parental and children rights.³¹

However, opponents of the agreement between bereaved parents and single women would stress that, although it is ethically justifiable to respect an agreement between two adults who want to have a child (as long as they are committed to promoting and preserving their welfare), using the sperm of a deceased is different, as it is unclear whether he would have wanted to have a child after his death. The response reverts to the bioethical discussion above: the relevant policy-makers would have to decide eventually the bioethical approach and values they adopt, namely whether they prefer familial solidarity and communitarian values and provide bereaved parents independent status, or whether they go for a narrower approach of relational autonomy and provide only the female partner the final say regarding the fate of the deceased's sperm.

Conclusions

The posthumous use of sperm is one of the issues that has caught the attention of medical law and bioethics in Israel as well as in other jurisdictions.³² The attitude of Israeli law, as described and analyzed here and by Bassan, reflects its complexities. It remains to be seen whether a comprehensive, balanced, and ethically justifiable policy would be formulated, but even if not, perhaps the unclarity regarding the independent status of bereaved parents in Israeli law sends the message that even in a highly pro-natalist society (and after the war on October 7), reproductive autonomy is limited.

Disclosures

The author reports no relevant disclosures.

References

1. S. Bassan, "Posthumous Sperm Use in Times of War: Ethics, Law and Society," *Journal of Law, Medicine and Ethics* 52 no. 4 (2024): 866–875.

2. S. Simana, "Creating life after death: Should posthumous reproduction be legally permissible without the deceased's prior consent?" *Journal of Law and the Biosciences*, 5 (2018): 329–354; R. Gilbar, E. Ram-Tiktin "It takes a village to raise a child: Solidarity in the courts — Judicial justification for posthumous use of sperm by bereaved parents," *Medical Law Review* 28 no. 2 (2020): 317–341.
3. "A heated discussion in the Health Committee between widows and bereaved parents: Who will make a decision about the use of the deceased's sperm?" *The Knesset*, July 2, 2004, (In Hebrew) <https://main.knesset.gov.il/news/pressreleases/pages/press07.-2.24w.aspx>.
4. *Guidelines on harvesting sperm after death and its use* (Attorney General of Israel, 2003) (In Hebrew) https://fs.knesset.gov.il/25/Committees/25_cs_bg_3564413.pdf.
5. *Jane Doe v. Jane Doe, Case number 7141/15*, Nevo Legal Database (December 22, 2016) (In Hebrew).
6. Use of a deceased's sperm for reproductive purposes Bill 2023, March 20, 2023 (In Hebrew), <https://main.knesset.gov.il/Activity/Legislation/Laws/pages/lawbill.aspx?t=lawsuggestionsearch&lawitemid=2202920>.
7. See Gilbar & Ram-Tiktin, *supra* note 2.
8. See *Jane Doe v. Jane Doe, supra* note 5, per Chief Justice Hayut.
9. *Arad-Pinkas v. The committee for approving agreements for carrying embryos according to the Embryo Carrying Agreement Act (Agreement Approval and Status of the Newborn) 1996, Case number 781/15* Nevo Legal Database (February 27, 2020) (In Hebrew).
10. See *Jane Doe v. Jane Doe, supra* note 5.
11. *Jane Doe v. Ministry of Health, Case number 12977-01-14* (Kiryat Shmona Family Court), Nevo Legal Database (January 6, 2015) (In Hebrew).
12. *Jane Doe v. Assaf Harofe Hospital, Case number 378/20*, Nevo Legal Database (June 3, 2020), (In Hebrew).
13. A. Libsker, "A non-empty space," *Calcalist daily*, November 9, 2023 (In Hebrew), <https://newmedia.calcalist.co.il/magazine-09-11-23/m03.html>.
14. The Knesset, *supra* note 3.
15. B. Savitsky, T. Eldar-Geva, and R. Shvartsur, "Israeli men's attitudes toward posthumous reproduction and prior consent amid ongoing armed conflict," *Andrology* (2024), <https://doi.org/10.1111/andr.13757>. Epub ahead of print; A. Stein et al., "Single men's attitudes towards posthumous use of their sperm cryopreserved due to illness in Israel," *Andrology* 12 no. 2 (2024): 380–384.
16. N. Spigel, "Promoting the Bill which regulates use of sperm posthumously awaits the Chief Rabi's position," *Haaretz*, February 7, 2024, (In Hebrew) <https://www.haaretz.co.il/news/politi/2024-02-07/ty-article/0000018d-8374-dfd5-adff-dbf52c220000>; MK Merav Ben-Ari, "Constitutional and ethical aspects of preserving the deceased's sperm," Reichman University, YouTube, May 9, 2024, 8 minutes 53 seconds (In Hebrew), <https://youtu.be/1xLIDXR0lf8?si=1Us1PR-zV-Z6PMPi>.
17. Z. Triger, "On the regulation of fertility services in Israel," in *Law, Society and Culture*, ed. I. Blank, D. Levi-Faor, R. Kreitner (Tel-Aviv University Press), 269–309 (In Hebrew); S. Noy (Kenyon), D. Mishori, and Y. Hashash "Geese that produce golden eggs: Eggs Donation Bill 2007," *Medicine and Law* 36 (2007): 161–179 (In Hebrew).
18. A. Gutmann, D. Thompson, *Why deliberative democracy?* (Princeton University Press, 2004).
19. *Relational autonomy: Feminist perspectives on autonomy, agency and the social self*, ed. C. Mackenzie, and N. Stoljar (Oxford University Press, 2000).
20. E. Ram-Tiktin, R. Gilbar, "Solidarity as a theoretical framework for posthumous assisted reproduction and the case of bereaved parents." *Ethical Theory and Moral Practice*, 22 (2019): 501–517.
21. See A-G guidelines, *supra* note 4.

22. H. Lindemann-Nelson, J. Lindeman-Nelson, *The patient in the family* (Routledge, 1995).
 23. D. Bell, *Communitarianism and its critics* (Oxford University Press, 1993).
 24. J. Hardwig "What about the family?" in *Is there a duty to die and other essays in bioethics*, ed. J. Hardwig (Routledge, 2000): 29–45.
 25. See Gilbar & Ram-Tiktin, *supra* note 2.
 26. R. Landau, "Planned Orphanhood," in *Dilemmas in Ethics* 220 (Raphael Cohen-Almagor ed., 2002) (In Hebrew); R. Landau, "Posthumous sperm retrieval for the purpose of later insemination or IVF in Israel: An ethical and psychosocial critique," *Human Reproduction* 19 no. 9 (2004): 1952, 1953.
 27. D. Heyd, "Embryonic injuries: Can you sue if you wouldn't have been born, or born different?," *Chicago-Kent Law Review* 96 no. 1 (2021): 145–171.
 28. Public Health (In Vitro Fertilization) Regulations 1986, Nevo Legal Database (In Hebrew).
 29. Embryo Carrying Agreement (Agreement Approval and Status of the Newborn) Act 1996, Nevo Legal Database (In Hebrew).
 30. See Arad-Pinkas, *supra* note 9.
 31. Y. Margalit, *Determining legal parentage* (Cambridge University Press, 2019).
 32. See Simana, *supra* note 2.
-