

### Posthumous Assisted Reproduction from Islamic Perspective

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#### Abstract

Rapid development in assisted reproductive techniques along with relieving the pain of childlessness has brought new ethical and policy dilemmas. Posthumous assisted reproduction is the most challenging, difficult and sensitive issue to be discussed ethically and religiously. In this paper the acceptability of the posthumous reproduction in Islamic contexts is evaluated and major concerns like Consent and ownership of the gametes after death, Family and Marriage vision and Welfare of the child are discussed together with some international legislation. We can conclude that upon Islamic vision to assisted reproductive techniques as treatment of families and relieving the serious problem of childlessness, posthumous assisted reproduction is unacceptable even with previously frozen gametes or embryos. Also, Islamic vision to marriage, consent and welfare of the child confirms the unacceptability. There must be some law or legislation to ban this procedure in Islamic contexts.

**Keywords:** Posthumous, Reproduction, Islam

#### Introduction

Rapid development in reproductive technology have shattered many biological barriers and also relieved the pain of childlessness. In line with these developments, new ethical and policy dilemmas have arisen. Possibility to freeze sperm, oocyte and embryos with continuous technique optimization, brought hope for men and women who receive cancer therapy, the option of storing gametes for use later in life. Stored gametes and embryos have also led to situations where the surviving spouse has created offspring after person's death making even news headlines (1). The possibility of retrieving gametes from dead body or aborted fetus made more complex situations.

The topic of posthumous assisted reproduction is the most challenging, difficult and sensitive issue to be discussed ethically and more difficult when thinking religiously.

#### History

The first posthumous sperm retrieval was reported by Rothman in 1980 (2), and then followed by several case reports (3-5). A report from USA showed that between 1980 and 1995, 40 centers reported about 82 requests for post mortem sperm retrieval

(6, 7).

The first living child born from a dead father was the case of Diane Blood in UK. In 1997, a woman requested the sperm retrieval from her brain dead husband, and for using it, got the permission from British Court to export the sperm to Belgium and do the insemination resulting to the born of a male infant (8). This case made a lot of arguments and discussions between ethical, law and medical experts (9-11). Also, it brought the controversy about sperm retrieval from dead people or people in vegetative state (12-16). The second child born by posthumous gamete was in USA. In 1999, Ms. Vernoff obtained sperm from her dead husband 30 hours after his death and later, by ICSI, she gave birth to a female infant (17). From this time, several case reports about successful posthumous sperm retrieval were published (18, 19). In September 30, 2004, BBC news reported that a woman managed to have her dead husband's child after one and half year from the husband's death. They used frozen sperm taken from the husband when he was alive together with a consent in which he permitted his wife to continue the fertility treatment even though he dies. (1). Denial of access to the fiancé's sperm is also reported

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and naturally brought arguments and controversies (20-22). Also, it was reported that one Russian woman tried to use her dead son's frozen sperm to fertilize a donor egg and used a surrogate mother to give birth to the child, but Russian officials said: "this child has no legal mother and father, so does not officially exist!" (23).

Here also we present two cases specially happened in Iran and in our institute: a man came to our institute requesting embryo transfer from frozen embryos made when his son was alive. This was the first case in this regard, so we referred them to the court to get the permission. The court stated that because the embryos were made before the father's death, it is OK to transfer it to the woman as surrogate mother and the custody and guardianship of the child will be the grandfather's duty. The treatment is undergoing.

Another case was a woman whose husband had end stage cancer that physicians predicted a few months life for him. For this case, the ethical committee had a special meeting in which the committee stated: "by the consent of the live husband, nobody can stop the treatment because of his end stage illness or even knowing that when the child is born, most probably there is no live father".

#### ***Islamic perspective of marriage***

According to Islam, there can be some differences between Islamic definitions and ideas among clerics, but all of the definitions are basis for the followers. We call it *Ejtehad*. It means that although the decree of one clergy leader can differ to the others, but is document for his followers.

There are two major Islamic ideas about death and marriage: some clergy leaders believe that after death, the marriage is ended and even they prevent a man to wash his wife's body after death (a Muslim tradition for burring dead bodies), and some others believe that after death during a certain time of 4 months and 10 days (called *Edda*) this couple are husband and wife. *Edda* is the time that during it after husband's death or divorce no woman can marry again and if she gets pregnant during this time, the child belongs to the dead or divorced father. At first, maybe *Edda* was because of possibility of the pregnancy while at that time there was no lab test to check early pregnancy. Some others believe that it is the time for a divorced couple to think and rejoin each other. However, *Edda* is an Islamic rule and must be followed by everyone even though we have tests to check early pregnancy now. (24)

According to the presented major ideas that both of them have believers among Shia' and Sunni clerics, there can be two ideas about the posthumous sperm

usage: a. It is OK within the *Edda* time (four months and 10 days) and b. It is forbidden after death of husband.

#### ***Fertility treatment and definition of the family***

It is well known that the aim of fertility treatment in Islamic contexts is to help families and relieve the pain of childlessness. According to Article 10 of Iran's constitution, every program must safeguard the family, so, in Iran and to our knowledge in every Islamic country, fertility treatment is just offered to legal married couples (25). Also, as we reported before, Islamic vision to the infertility is a "serious disease" and "a threat for families", so, fertility treatment and its necessary procedures on women which are normally forbidden, become OK. If safeguarding a family is not the issue, treatment procedures requiring look and touch of female genitalia are forbidden (25).

If the fertility treatment is just offered to a legal married family, using the sperm of a dead husband for a "widow" cannot be considered as treatment of the "family" even though the procedure itself is OK "halal" by Islamic law. So, in the Islamic vision of fertility treatment (saving families), posthumous assisted reproduction is under question and most probably unacceptable.

Who is authorized to give the permission?

Using frozen gametes and embryos after death brings another debate: who is the owner of the frozen gametes or embryos after the death of a partner? Who can give the permission to use them? Is consent from a live person enough to cover the use of his gametes or embryos after death?

In Islamic contexts like Iran, people can make a will for 1/3 of their properties, but body parts cannot be considered as properties. So, nobody can give a consent for using his own body parts after death, unless for altruistic donation to the others.

In Iran we have organ donation from brain dead people. According to the guideline of organ donation in brain death, produced by ministry of health (article no. 5), with or without consent or will from the brain dead person before the accident, the permission from their guardian, parent or adult child is necessary to do the donation. If we look to posthumous use of gamete and embryo same as organ donation, it seems that consent alone cannot be enough.

For frozen embryos it is different, embryo is made from gametes of a couple and both of them are the owner of the embryo. In case of the death of one partner, the other one cannot decide for the fate of their embryos alone. So according to international guidelines, the embryos will be discarded unless a

proper consent about the use of the embryo is gotten from the partner before death (26). If we can consider an embryo, a baby, then according to Iran's civil law, after the death of the father, grandfather or uncle is responsible for the child. But can we consider a preimplantation embryo a child with full rights of a human? If we consider an embryo a human, then we cannot use them for research. Also discarding of surplus embryos that happens every day in IVF centers, can be considered as murder. If we don't consider the embryo as a human, then we cannot refer to our civil law about custody and guardianship of it, and so, the right to decide about the fate of it.

### ***Welfare of the child***

Another important issue in posthumous reproduction is welfare of the child (27). It is obvious that every child need rearing parents. Human Fertility and Embryology Authority (HFEA act 1990) insisted that IVF providers must take into account the welfare of the child including "need of that child for a father" (28). Although, how the posthumous reproduction diminish the welfare of the child is in controversy (29). This controversy probably arises from the good state of social security in European countries. Nowadays, the fertility treatment is offered to single mothers or homosexuals in many parts of the world without argument about the welfare of the resulting child (25), so, the father maybe not needed any more! "The birth is a choice for the parents but an obligation for the child" this sentence from a lecture by Bahman Omani Samani in 1985 clearly shows the fact that unfortunately we cannot ask the unborn child about what he wants. Again unfortunately it is too difficult to measure the welfare of the child or evaluate the couples (30), even with defined minimal criteria (31, 32) in this regard. Such criteria vary in different countries with different social security and economical states, but almost always are difficult to judge a person or couple whether can be good parents or not. In International guidelines, it has been mentioned that welfare of the child is physician's responsibility in the case of assisted reproduction (33-35). Considering this responsibility, in countries with low social security of children and families like Iran and most of the Middle East countries, need for a supportive father for protecting the family seems to be necessary, so, accepting the posthumous assisted reproduction and making fatherless children in this situation seems to be unethical.

### ***International views***

In 1990, the Human Fertilization and Embryology Act stated: "The posthumous use of gametes is a practice which we feel should be actively discour-

aged", but on September 18, 2003 changed the position. It has been mentioned that: "a deceased man can now be registered as the father of a child born as a result of fertility treatment undertaken after his death" means that with a proper consent, posthumous assisted reproduction is acceptable (36).

In 2005 Dostal et al, reported that in some eastern European countries there is no law or legislation about using posthumous sperm retrieval and assisted reproduction. These countries are: Cyprus, Czech Republic, Latvia, Lithuania, Malta, Poland and Slovakia and is prohibited in Hungary and Slovenia (37). In this report it is mentioned that between these countries, posthumous reproduction is only practiced in Czech Republic.

In Japan also, consent and blood relation are necessary for posthumous assisted reproduction (38).

In 2003, Australia's National Health and Medical Research Council Guidelines on Assisted Reproductive Technology considered the use of gametes or embryos harvested from cadavers "unethical" (29), but in version 2007 of the guideline, posthumous use of gametes is acceptable if a proper consent is gotten and counseling with the widow is done after an appropriate period of time (grief),(39).

In Malaysia, according to the Malaysian medical council guideline of assisted reproduction 2006, the use of gametes or embryos harvested from cadavers in ART programs is prohibited (40).

European society for human reproduction and embryology (ESHRE) published its 11th task force on the subject of posthumous reproduction in 2006. In this task force three major points are mentioned: 1. 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. 2. Thorough counseling of the surviving partner during the decision-making period is necessary. 3. A minimum waiting period of 1 year after the death should be imposed before treatment can be started. Within the mentioned criteria, there is nothing against posthumous assisted reproduction (41).

American Society of Reproductive Medicine (ASRM) also released a guideline in 2004 mentioning the possibility of posthumous assisted reproduction with full counseling, screening and consent. (42).

### **Conclusion**

In Islamic contexts that infertility is considered a serious disease and a threat for a family, posthumous reproduction cannot be offered to the people because it is not relieving a family. Also, considering welfare of the child, consent and marriage definition, it is totally unacceptable. There must be a

law or legislation about banning this kind of treatment in Iran and other Islamic contexts.

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