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A Human Rights Analysis of Posthumous Reproduction in South Africa

A dissertation submitted in partial fulfilment of the requirements for the degree of Master of Laws (LLM) in Constitutional Law, Theory and Human Rights Litigation at the University of KwaZulu-Natal, School of Law

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DECLARATION

I, Bonginkosi Shozi, hereby declare that except where specified otherwise this project is an original piece of work by me which is made available for photocopying and for inter-library loan.

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ABSTRACT

Advances in the field of medicine are consistently posing difficult questions to the law and society. This is because of the propensity of these medical advances to alter the limits of what is and is not possible, and when this happens we are forced to decide on how these new medical technologies will be used. It has been said that no use of medical technology poses more challenging questions than posthumous reproduction. This is because in the past, the act of reproduction was limited to living persons. However, now persons can become parents long after they die. This study was prompted by a case that recently came before the High Court, in which a widow sought to use her dead husband's sperm in order to have a child. The court granted her order, but did not give reasons – thus leaving the rationale behind the decision unknown. This case came before the court because, in the relevant laws, what happens to gametes and embryos after the death of the gamete provider is largely unaddressed.

This study looks at the law relating to posthumous reproduction in 30 foreign jurisdictions. This investigation reveals that there is no consensus on regulating posthumous reproduction, and state positions range from highly permissive regulation based on voluntary guidelines, to highly restrictive positions enforced by statutes.

In analysing how South African law regards posthumous reproduction, the study finds there are no legal barriers to posthumous reproduction in South Africa, and that human rights related to procreative liberty support posthumous reproduction. The study concludes there is a right to posthumous reproduction, based on the freedom of testation in relation to reproductive material – which our law conceives as property – and reproductive autonomy. However, there are significant gaps in the law in South Africa that ought to be addressed by legislative reform in order to accommodate the exercising of this right.

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1. CHAPTER ONE: INTRODUCTION TO POSTHUMOUS REPRODUCTION

1.1 General Background

Much of life revolves around reproduction; the desire to reproduce has made the existence of children one of the most common parts of human life. Ever since the first child was conceived via artificial means, lawyers, lawmakers and humanity as a whole have had to grapple with the issue of how to deal with artificial means of reproduction.[1] As such, our minds and our statute books have adapted to provide for procedures now made available by advances in medical technology, such as artificial insemination and surrogacy, but this adaptation has been slow, and the law always seems a step behind medical technology.[2] This dissertation will discuss a relatively recent advance in medically assisted reproduction (MAR) that has been gaining popularity internationally and is once again challenging our traditional paradigms and is requiring us to answer many new questions posed by technologies that alter the barriers of what is possible: posthumous reproduction. This refers to the use of the reproductive material of a deceased person for procreative purposes.[3]

Posthumous reproduction (PR) as a concept goes back as far as 1954 when it was first described by Bunge, who showed that it was theoretically possible to freeze and thaw human spermatozoa for later use.[4] It was not until Bunge's theory became a reality in the 1980s, with the first reports of the successful creation of pregnancies resulting from cryopreserved reproductive material (i.e.

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[1] The first documented application of artificial insemination in a human was done in London in the 1770s by John Hunter. See, W Ombelet, J Van Robays 'Artificial Insemination History: Hurdles and Milestones' (2015) 7(2) *Facts Views Vis Obgyn* 137-143.

[2] Even though there is evidence of MAR being practiced as early as the 1700s, the first law on MAR only came into existence in 1984 with the Infertility Act of the Australian state of Victoria. See, U Ahluwalia, M Arora 'Posthumous Reproduction and its Legal Perspective' (2011) 2(1) *Am.Int'LJ. Infertiility & Fetal Med* 9.

[3] R Collins 'Posthumous Reproduction and the Presumption Against Consent in Cases of Death Caused by Sudden Trauma' (2005) 30 *Journal of Medicine and Philosophy* 431.

[4] A Nienaber 'The Grave's a Fine and Private Place' (2010) 25 *Southern African Public Law* 2.

gametes and embryos), that the possibility of PR truly became a reality.[5] This is because it is now possible to freeze gametes or embryos such that they can be used for reproduction at any point while they are still viable. Which creates the possibility of reproduction occurring after one parent is deceased.

The concept of a parent dying before their child is born is not unheard of. But posthumous reproduction is to be differentiated from instances where a parent unexpectedly dies after a child is conceived through coital reproduction, in that it involves using medical technology to utilise a person's reproductive material for reproduction *after* that person is already dead.

1.2 Forms of Posthumous Reproduction

The term 'posthumous reproduction' as used in this dissertation is an umbrella phrase that encapsulates three different methods by which a deceased person can have their reproductive material used for reproductive purposes after their death. The first method is posthumous conception (PC) – where gametes removed and stored before a person's death are used to conceive a child after he or she dies.[6] The second method, similar to the first, is posthumous embryo implantation (PEI). Here male and female gametes are combined to create the embryo while both parents are still alive and the embryos are stored; then they are implanted in a woman's womb after the death of one parent.[7] The third method is posthumous gamete retrieval (PGR), where the gametes of deceased persons are removed from their bodies after they die and these are stored and later used to conceive a child.[8] In the past, PGR was limited to

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[5] For information on the first reported pregnancies through the assistance of cryopreservation, see, generally, A Trounson, L Mohr 'Human Pregnancy Following Cryopreservation, Thawing and Transfer of an Eight-Cell Embryo' (1983) 305 *Nature* 707-709.

[6] D Teitelbaum 'Be Fruitful and Multiply After Death, But at Whose Expense? Survivor Benefits for the Posthumously Conceived Children of Fallen Soldiers' (2016) 14(425) *Cardozo Public Law, Policy & Ethics Journal* 427.

[7] G Bahadur 'Death and Conception' (2002) 17 *Human Reproduction* 2769.

[8] H Kruuse 'From the Grave to the Cradle: The Possibility of Post-Mortem Gamete Retrieval and Reproduction in South Africa?' (2012) *South African Journal on Human Rights* 532.

sperm – but now the removal of a female ovum is technically possible.[9] Each of these methods is unique in its own right and they have different medical, ethical and potentially legal implications, but they also raise common issues that any discussion of posthumous reproduction must take into consideration. This dissertation will focus on these common issues.

The topic of PR is controversial, stemming from the various interests that must be taken into account, which were described by Collins as follows:

> "[PR's] controversial status derives from the plethora of conflicting interests which need to be factored into the ethical calculus including: the wishes and right to bodily integrity of the deceased, the procreative liberty of the surviving partner, the welfare of the potential child, the interests other members of the family have in emotional and financial relationships with the deceased, and, finally, the state's interest in both protecting the basic unit of society, namely the family and maintaining stable land titles and the orderly distribution of property in the succession context."[10]

This passage serves to illustrate that there are five stakeholders whose interests are of significance in PR: the deceased, the surviving partner, the potential children (or, to make the term more specific, 'posthumous children'), the deceased's family, and the state. Posthumous reproduction poses a wide range of ethical and legal issues that could not be discussed comprehensively within the confines of this work. As such, this study will focus primarily on a single stakeholder: the individual from whom reproductive material is drawn and who is deceased at the time of conception. In this study, I will analyse the legal entitlement of individuals in determining the destiny of their reproductive material after they die, and whether there is a constitutionally protected right to posthumous reproduction in South Africa.

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[9] N Peart 'Life beyond Death: Regulating Posthumous Reproduction in New Zealand' (2015) 46 *Victoria University Wellington Law Review* 7272.

[10] Collins op cit note 3 at 432.

1.3 Posthumous Reproduction Internationally

Internationally, various jurisdictions have taken different approaches in determining if this practice should be permitted or not. Where it is permitted, varying approaches have been undertaken to deal with the complex issues associated with PR. Some states have elected to prohibit posthumous reproduction altogether,[11] others have opted to allow it under a strict regulative scheme,[12] while still others have taken a less strict approach and have permitted the practice and also issued voluntary guidelines.[13]

Studies have been conducted to provide a broad overview of the varying approaches taken in the area of posthumous reproduction, but these studies have largely focused on the European position. In 2008, the European Society of Human Reproduction and Embryology published a report ('ESHRE report') on the status of medically assisted reproduction in the European Union (EU), which dealt in part with posthumous reproduction[14] The ESHRE report identified 12 EU member states[15] that prohibited the use of gametes and embryos for the purposes of posthumous reproduction, 15 EU member states[16] that allow the practice – and among this latter group 6 EU member states[17] that prescribe legal restrictions.

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[11] See, for example, Germany in KD Katz 'Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying' (2006) 1(11) *University of Chicago Legal Forum* 304.

[12] See, for example, the United Kingdom in Katz ibid 304.

[13] See, for example, India in V Bardle, PG Dixit 'Birth After Death: Questions About Posthumous Sperm Retrieval' (2006) 3(4) *Indian Journal of Medical Ethics* 122-123.

[14] ESHRE *Comparative Analysis of Medically Assisted Reproduction in the EU: Regulation and Technologies* (2008) 19.

[15] These states include Austria, Bulgaria, Denmark, Finland, France, Germany, Greece, Italy, Lativia, Portugal, Slovenia, Sweden.

[16] These states include Belgium, Cyprus, the Czech Republic, Hungary, Ireland, Lithuania, the Netherlands, Poland, Romania, Spain, and the United Kingdom.

[17] These states are Belgium, the Czech Republic, Hungary, the Netherlands, Spain, and the United Kingdom.

Another study among new EU nations ('New EU study') and which focused on posthumous gamete retrieval was published in 2005.[18] The New EU Study found that PGR is allowed by legislation or guidelines only in Estonia, is prohibited in 2 EU member states,[19] and is not mentioned in 7 EU member states.[20] Despite discussing some of the same states, these two sources contradict one another in some cases. This may be because both studies based their information on answers to questions sent by the authors to designated persons – rather than analyses of law.[21]

A 2007 report conducted by the journal *Fertility and Sterility* on PGR in 57 nations, purports to deal with the South African position (FS Report).[22] According to the FS Report, South Africa is among 11 countries[23] that allow posthumous gamete retrieval and written consent by the deceased is required.[24] The report also states that the practice is prohibited in 19 countries.[25] Like the ESHRE report and the New EU study, the FS report relied on responses to questionnaires. For this reason, the basis upon which the designated person stated South African law allowed posthumous gamete retrieval is unclear, and there is no authority cited to support this statement.

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[18] J Dostal, R Utrata, S Loyka, J Brezinova, M Svobodova, F Shenfield 'Post-Mortem Sperm Retrieval In New European Union Countries: Case Report' (2005) 20(8) *Human Reproduction* 2359-2361.

[19] These states are Hungary and Slovenia.

[20] These states are Cyprus, the Czech Republic, Latvia, Lithuania, Malta, Poland and Slovakia.

[21] ESHRE Report op cit note 14 at 2, New EU Study op cit note 18 at 2360.

[22] I Cooke 'Posthumous Insemination' (2007) 87 (4) *Fertility and Sterility* 27. This work forms part of a chapter of the IFFS Surveillance 07 published by *Fertility and Sterility.*

[23] The other states are Australia, Austria, Belgium, Greece, India, Israel, the Netherlands, New Zealand, Spain, and the United Kingdom.

[24] Cooke op cit note 22 at 26.

[25] These states are Argentina, Bulgaria, Denmark, Egypt, France, Germany, Hong Kong, Italy, Japan, Korea, Morocco, Norway, the Philippines, Singapore, Slovenia, Sweden, Switzerland, Taiwan, and Tunisia.

The challenge with these studies is that they are based on responses by medical practitioners, and there is no way to be certain about their accuracy in law. It is possible that medical practitioners may be misinformed as to what the applicable law on PR is. Furthermore, these authorities are over a decade old and therefore may no longer be relevant. There is thus a need for an investigation into the accuracy of these claims, based on current legal authorities in order to ascertain the true state of PR around the world.

1.4 Posthumous Reproduction in South Africa

Until recently, nowhere in our law had it been specifically addressed that PR is legally permitted. This however changed with the recent case of *NC v Drs Aevitas Inc t/a Aevitas Fertility Clinic*,[26] where the High Court granted an order permitting the posthumous use of a deceased man's sperm by his wife for reproductive purposes. Pursuant to this order, PR is, in principle, legal in South Africa – at least in the case posthumous conception. That said, many questions remain unanswered, which are material because of the potential impact on the living, children, and the dead.

The literature on posthumous reproduction in South Africa is scarce and primarily focused on posthumous gamete retrieval. In specific reference to PGR, Helen Kruuse argues in favour of legislation to regulate it, with certain legal restrictions being implemented – including a "quarantine period" that requires a surviving spouse to wait a particular period before he or she can use gametes extracted from the deceased spouse.[27] Kruuse notably objects to foreign legal systems that allow posthumous gamete retrieval and also insist on some form of consent from the deceased before death, on the basis that the dead have no rights – thus their consent is unnecessary.[28] Kruuse states that the existing legal framework in South Africa, including the National Health

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[26] (23236/2017) [2018] ZAWCHC.

[27] Kruuse op cit note 8 at 551.

[28] Ibid 534.

Act,[29] neglects to address the issue of posthumous gamete retrieval. She regards the specific reference to "living persons" in the Regulations Relating to Artificial Fertilisation of Persons[30] as not dealing with extracting gametes from deceased persons, as opposed to outlawing it.[31] This is questionable, as regulation 2 provides that, "these regulations only apply to the withdrawal of gametes from and for use in living persons", and regulation 10 stipulates that no gamete "that has not been imported, removed or withdrawn in terms of the provisions of the [National Health Act] or these regulations … may be used for artificial fertilisation".

Another South African author, Annelize Nienaber, considers posthumous gamete retrieval.[32] She comments that a variety of legal issues arise when considering posthumous gamete retrieval in South Africa – including individual autonomy regarding reproductive choice arising from section 12 of the Constitution, which provides that "Everyone has the right to bodily and psychological integrity, which includes the right … to make decisions concerning reproduction."

In engaging with whether a deceased person may be the bearer of a human right, such as reproductive autonomy, Nienaber argues that what we are dealing with is not whether the deceased has a choice about whether to procreate – but rather if we choose to honour their choices regarding procreation that were made while they were still alive.[33] Nienaber remarks: "[S]ection 12(2)(b) does not necessarily literally bestow a deceased person with a right to autonomy … it merely respects his right to autonomy or self-determination to decide whether to have a child while still alive".[34] Her

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[29] National Health Act 61 of 2003.

[30] Regulations Relating to the Artificial Fertilisation of Persons (Government Gazette 35099 GN R175 2 March 2012).

[31] Kruuse op cit note 8 at 535.

[32] Nienaber op cit note 4 at 1.

[33] Ibid 7.

[34] Ibid.

conclusion seems to be that a deceased person cannot be a holder of rights and therefore the question in posthumous reproduction is not whether the deceased has a right to it – but whether we should respect the wishes of the deceased. Nienaber does not engage with why we ought to give effect to the wishes of the deceased.

Nienaber opines that whether or not to honour the wishes of the deceased is not the only potential ethical or legal problem raised by posthumous sperm retrieval for procreation, and consideration must be given to other issues and challenges. These include the best interests and welfare of the child resulting from such sperm retrieval, the right to bodily integrity of the deceased, and the interests of other members of the deceased's family.[35] Nienaber's statement that deceased persons can be holders of a right to bodily integrity, seems to contradict her conclusion that deceased persons cannot be holders of a right to reproductive autonomy.

Nienaber raises the potential claim by a person requesting the retrieval of a partner's sperm for procreation, that any statutory prohibition against such removal is a violation of their right of access to reproductive health care services in terms of section 27(1)(a) of the Constitution. However, Nienaber also expresses doubt that the right to reproductive health care services could be stretched to entitle one to reproduce using the gametes of a deceased spouse or partner.[36] Nienaber's article raises some important issues on the potential implications of human rights for posthumous reproduction. However, this is a preliminary investigation, and, accordingly, does not advance beyond raising them as challenges to be addressed. As such, deeper analysis is required.

Against the backdrop of the court order in *Aevitas,* while this study will endeavour to canvas the broad array of issues in this controversial area, this investigation into the legal status of posthumous reproduction in South Africa will focus primarily on instances of PR – where partners intended to have

[35] Ibid 2.

[36] Ibid 6.

children together. The significance of this study is that it will an in-depth analysis of a relatively new area of law in South Africa and will be the first of its kind. This work will explore different approaches taken by foreign jurisdictions and will ultimately suggest which direction would be best suited for the South African context, as it relates to whether individuals ought to be permitted to engage in posthumous reproduction. The study will also engage with key constitutional issues related to making the decision to reproduce posthumously, including the right to reproductive freedom in section 12 of the Constitution, and the right to access medical care. In so doing, this study aims to broaden the current limited discussion of this topic in the South African context, and will encourage further debate.

1.5 Research Objectives and Methodology

The purpose of this research is to respond to the main question: from a human rights perspective, what should be the legal position regarding posthumous reproduction in South Africa? The methodology is a policy analysis. The study will be an applied comparison of the law in multiple jurisdictions and the merits of these approaches will be critically assessed to determine their potential application in the South African context. This information will be sourced from the electronic and print literature.

In responding to the main research question, the following sub-questions must be addressed:

- How have the various types of posthumous reproduction been dealt with in other legal systems?
- What are the human rights applicable to posthumous reproduction?
- Are the various types of posthumous reproduction legal in South Africa?
- Are there any reasons, based on possible legitimate government purposes, for posthumous reproduction to be subject to limitation?
- All considered, how should posthumous reproduction be regulated in South Africa, and is there a need for legal reform?

The study will be structured as follows: the first chapter was an introduction to the dissertation and presented a brief history on posthumous reproduction, introduced key terms, and highlighted the focus of the dissertation.

The second chapter will be an analysis of the law regarding posthumous reproduction in foreign jurisdictions. The position in 30 states, where primary or secondary sources of data are available, will be presented in the form of a table. The data in the table will be discussed and trends will be highlighted. This chapter will expand on this data by providing a deeper discussion on the legal position in five states of significant interest in the area of posthumous reproduction: The United States of America, The United Kingdom, France, Israel, and Spain.

The third chapter will focus on reproductive rights in the South African Constitution and their application to MAR. In doing so, this chapter will analyse how reproductive choices are protected in MAR and how these rights apply to non-coital reproduction by looking at applicable case law.

Chapter four will discuss the various legal and ethical issues raised by posthumous reproduction, as well as the various approaches that can be taken in addressing these issues. In light of these issues, the legality of posthumous reproduction in the South African context will be considered.

Chapter five will discuss possible limitations to posthumous reproduction – particularly relating to the interests of children. This chapter will assess the possible impact of PR on the rights and interests of other stakeholders, primarily resultant children, and whether there is sufficient reason for the state to outlaw or limit posthumous reproduction when the deceased has expressed a willingness to allow their reproductive material to be used after he or she dies.

Chapter six will be the conclusion. It shall restate the core findings of this dissertation and will outline considerations to be taken if policy reform in this area is contemplated. With these considerations in mind, recommendations will be made regarding the regulation of PR in South Africa.

2. CHAPTER TWO: ANALYSIS OF LAW ON POSTHUMOUS REPRODUCTION IN MULTIPLE JURISDICTIONS

The purpose of this chapter is to provide clarity on an otherwise unclear area of law: What is the state of PR around the world? This information is valuable to any state seeking to break new ground in confronting PR and how the law should deal with it. An analysis of how other states have interpreted and balanced the various rights and interests of stakeholders is beneficial, as it allows us to learn lessons from other jurisdictions where there is a richer jurisprudence on these issues than in South Africa.

The practice of benefiting from comparative analysis, in South African constitutional law, is well established. The Constitution provides for the influence of foreign law on our courts[37] and the Constitutional Court has often looked to foreign sources in resolving difficult disputes on novel areas of law.[38] The benefit of comparative analysis is self-evident: it allows one to look at various approaches that have been taken, what their impact has been, and then ask what would be the best way forward in the particular circumstances.

This chapter will be divided into two parts. The first part will focus on giving a broad overview of the state of the law on PR in countries that have law dealing with this area of MAR. The second part will then seek to move beyond a superficial glance at the world's law and engage in a deeper analysis of the law on PR in five countries that are prominent in the literature: The United States, the United Kingdom, France, Israel, and Spain.

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[37] Section 39(1) of the Constitution states: "When interpreting the Bill of Rights, a court, tribunal or forum-

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(c) may consider foreign law".

[38] See, for example, *Minister of Health and Others v Treatment Action Campaign and Others* (1) 2002 (10) BCLR 1033 (CC) para 107; *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 33.

PART I

2.1 Jurisdictional Study of Posthumous Reproduction Regulation

The information in this part represents the results of desktop research on the state of the law on PR in 30 different states, that to some degree deals with PR. These countries were chosen based on their inclusion in works discussing state law on PR, such as the ESHRE Report, the New EU Study and the FS Report,[39] as well as other studies that deal with MAR generally that touched on PR.[40]

Based on the claims made on the legal positions stated in these works, research was conducted via online search for authority that corroborated these statements. The goal was to identify primary sources such as state law, court judgments or published guidelines. However, there were barriers to achieving this such as access to databases being restricted and language barriers. As such, where primary sources were unavailable, reliance was placed on reliable secondary sources, particularly journal articles from reputable sources – which were recent and made direct reference to primary sources. Once all this information was accumulated, I selected the 30 states which best fitted the parameters of the study – namely that there was some reliable authority for the existence of law, court judgments or guidelines (binding or not) that related to at least one of the types of PR. The results are presented in a table as Figure 1.

The table is divided into 3 sections – one each for PC, PEI and PGR. Each of the sections states whether the practice is permitted or prohibited in that country. While for most states there was some form of authority in the form of statutes, in some states there were only guidelines and these states are

[39] See, also, AK Sikary, OP Murty, RV Bardale 'Postmortem Sperm Retrieval in Context of Developing Countries of Indian Subcontinent' (2016) 9(2) *J Hum Reprod Sci* 82-85; E Aziza-Shuster 'A child at all costs: Posthumous reproduction and the meaning of parenthood' (1994) 9 *Human Reproduction* 2182-2185.

[40] FP Busardò, M Gulino, S Napoletano, S Zaami, P Frati 'The Evolution of Legislation in the Field of Medically Assisted Reproduction and Embryo Stem Cell Research in European Union Members' (2014) *BioMed Research International* 1-15; A Minieri 'Assisted Reproductive Technologies: A State Matter' (2013) *Vilniaus Univ. Press* 214-223.

indicated with an asterisk. In these cases, the positions in terms of the guidelines were reflected in Figure 1. It is necessary to note that since guidelines are voluntary, the actual practice in these states may differ. Where there was no information to draw a conclusion on what the legal position is, this was indicated by “N/A”. The table further reflects if there are any conditions applicable where PR is permitted. The conditions indicated are whether the deceased is required to have given consent while still alive, if that consent needed to be in writing, and if there are any applicable use restrictions post-death (“p/d”) of the gamete provider – either in the form of waiting periods or time limits. The results of the findings on what the global trends are in regulating PR law, are discussed below.

Figure 1: Table of the Regulation of Posthumous Reproduction Law in 30 Jurisdictions Identified as Having Some Degree of Related Regulation

STATE	PC	PEI	PGR
*Australia[41]	Permitted. Written consent required	Permitted. Written consent required	Permitted. Written consent required
Austria[42]	Prohibited	Prohibited	Prohibited
Belgium[43]	Permitted	Permitted. Written consent required; only after 6 months p/d and before 2 years p/d	N/A
Canada[44]	Permitted. Written consent required	Permitted. Written consent required	Permitted. Written consent required
Croatia[45]	Prohibited	Permitted	Prohibited
Cyprus[46]	N/A	Permitted. Written consent required; only after 6 months p/d and before 18 months p/d	N/A
Denmark[47]	Prohibited	Prohibited	Prohibited
Egypt[48]	Prohibited	Prohibited	N/A
Estonia[49]	Permitted. Only before 1 month p/d	N/A	N/A
Finland[50]	Permitted. Consent required	Permitted. Consent required.	N/A
France[51]	Prohibited	Prohibited	Prohibited
Germany[52]	Prohibited	Prohibited	Prohibited
Greece[53]	Permitted. Only after 6 months p/d and before 2 years p/d	N/A	N/A
Hungary[54]	Prohibited	Permitted	Prohibited
*India[55]	Permitted	Prohibited	N/A
*Israel[56]	Permitted	Permitted	Permitted
Italy[57]	Prohibited	Prohibited	Prohibited
*Japan[58]	Permitted	Permitted	Permitted
Latvia[59]	Permitted. Written consent required	N/A	N/A
Macedonia[60]	Permitted. Written consent required	N/A	N/A
Malta[61]	N/A	Permitted	N/A
Netherlands[62]	Permitted. Written consent required	Permitted. Written consent required	N/A
New Zealand[63]	Permitted. Written consent required	Permitted. Written consent required	Permitted. Written consent required
Portugal[64]	Prohibited	Permitted	Prohibited
Slovenia[65]	Prohibited	Prohibited	Prohibited
Spain[66]	Permitted. Written consent required. Only before 1 year p/d	Permitted	Permitted. Written consent required

Sweden[67]	Prohibited	Prohibited	Prohibited
United Arab Emirates[68]	Prohibited	Prohibited	Prohibited
United Kingdom[69]	Permitted. Written consent required	Permitted. Written consent required	Permitted. Written consent required
*United States[70]	Permitted	Permitted	Permitted

[41] Australian Government, National Health and Medical Research Council, Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research (2017).
[42] Fortpflanzungsmedizingesetz Reproduction Law (2004).
[43] Law on Medically Assisted Procreation and The Destination of Surplus Embryos and Gametes (Loi Relative `A La Procreationm´Edicalement Assist´Ee Et `A La Destination Des Embryons Surnum´Eraires Et Des Gametes) (2007).
[44] Assisted Human Reproduction Act S.C. 2004, c.2, and the regulations in terms of this Act: The Assisted Human Reproduction Regulations (2007) and the All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment) (2016).
[45] Law on Medical Assisted Reproduction OG 86/2012.
[46] The Implementation of The Medically Supported Reproduction Law of 2015.
[47] Act on Artificial Fertilization in Medical Treatment, Diagnosis and Research, etc. LBK No. 923 of 04/09/2006.
[48] Professional Ethics Regulations of the Egyptian Medical Syndicate, issued by Decree No. 238/2003 of the Ministry of Health and Population (Ministry of Health Decree 238/2003).
[49] Artificial Insemination and Embryo Protection Act (1997), as amended in 2011.
[50] Act on Assisted Fertility Treatments (1237/2006).
[51] Law on the Donation and Use of Elements and Products of the Human Body, Medically Assisted Procreation, and Prenatal Diagnosis, No. 94-654 (LOI no 94-654 du 29 juillet 1994 relative au don et à l'utilisation des éléments et produits du corps humain, à l'assistance médicale à la procréation et au diagnostic prénatal) (29 July 1994)).
[52] Embryo Protection Act of 13 December 1990.
[53] Law number 3305/2005.
[54] Law No. 154, 1997, 30/1998. (VI.24.) NM Regulation, Act on Health, Chapter IX, 20/2007.
[55] See proposed voluntary guidelines: Indian Council of Medical Research and National Academy of Medical Sciences. National guidelines for accreditation, supervision and regulation of ART clinics (draft). New Delhi: ICMR/NAMS; 2002.
[56] Ministry of Justice Guidelines of the Attorney General of the Government, guideline number 1.2202, 27 October 2003.
[57] Rules on Medically Assisted Procreation 40 of 2004.
[58] M Mayeda 'Present State of Reproductive Medicine In Japan – Ethical Issues With a Focus on Those Seen In Court Cases' (2006) 7(3) *BMC Medical Ethics* 7.
[59] Sexual and Reproductive Health Law of 2004.
[60] Law of Biomedical Assisted Fertilization (2008).
[61] Embryo Protection Act XXI of 2012.
[62] Embryo Act (20.06.2002).
[63] Human Assisted Reproductive Technology Act 2004.
[64] Law 32/2006.
[65] Act on Infertility Treatment and Procedures of Biomedical Assisted Procreation (28.07.2000).
[66] Law 14/2006 of 26th May, on Human Assisted Reproduction Technologies.
[67] See Aziza-Shuster note 39 supra at 2185.
[68] Federal Law No. 11 of 2008 Concerning Licencing Fertility Centres in the State (Fertility Centres Law).
[69] Human Fertilisation and Embryology Act 1990.
[70] Uniform Parentage Act 2000, Uniform Probate Code of 2008.

2.2 Trends in Posthumous Reproduction Law

Of the 30 countries researched, the vast majority have chosen to create legislation to regulate MAR practices to some degree. Only India, Israel, Japan and certain states of Australia and the United States have systems where PR is regulated by guidelines or other non-binding instruments at a national level. Overall, there is no discernible trend for or against PR. Just over half of the states (16 of 30) have laws either completely prohibiting or completely permitting PR practices. Significantly more states have chosen to completely outlaw PR than those who have permitted: Austria, Denmark, France, Germany, Italy, Sweden, Slovenia and the United Arab Emirates all have complete prohibitions on PR. On the other hand, only Australia, Canada, Israel, Japan, New Zealand, Spain, the United Kingdom and the United States are completely permissive in respect of all forms PR.

The remainder of states either only prohibit or permit certain practices of PR, and the relationship between each of these practices reveals a difference in attitudes on the treatment of gametes, embryos and dead bodies, within these states. While there appears to be consistency in approaches in the case of PC and PGR, with every state that prohibits PGR also prohibiting PC, there is less consistency in the relationship between state positions on PC and PEI. Not all states that prohibit PC also prohibit PEI – with Croatia, Hungary and Portugal permitting it. The inverse is also true, although to a lesser extent, of the states that permit PC – India is the only one of these states that prohibits PEI.

More states have laws in favour of PC than those that are against it, with 16 states permitting PC[71] and 12[72] prohibiting the practice. Of the states that permit PC, 10 require some form of consent by the deceased to have their gametes used after they die[73] – with Australia, Canada, Latvia, Macedonia,

[71] Australia, Belgium, Canada, Estonia, Finland, Greece, India, Israel, Japan, Latvia, Macedonia, the Netherlands, New Zealand, and Spain.

[72] Austria, Croatia, Denmark, Egypt, France, Germany, Hungary, Italy, Portugal, Slovenia, Sweden, and the United Arab Emirates.

[73] Australia, Canada, Croatia, Finland, Latvia, Macedonia, the Netherlands, New Zealand, Spain, and the United Kingdom.

Spain and the UK specifying that this consent must be in writing. Only Greece and Spain prescribe time conditions on PC.

With PEI, as with PC, 16 states are in favour of the practice,[74] while 10 prohibit it.[75] Of those that permit PEI, most require the deceased to have consented to the use of an embryo he or she contributed a gamete to while alive to be used after he or she dies.[76] Australia, Belgium, Canada, Cyprus, Netherlands, New Zealand, and the United Kingdom require this consent to be in writing. Belgium and Cyprus both impose time limits on the use of embryos posthumously.

No state imposes time restrictions on PGR. Of the 6 states that impose some manner of time restriction, only Spain and Estonia opt for the use of strict time limits – and in both cases this for 1 year. The remainder of states enforce a 'window period' for the use of gametes and embryos, in terms of which the surviving partner must wait a short period before he can choose to undergo PR, and once this time has passed he has a limited time period within which to do so.

PGR is the only type of PR for which more states are against than in favour. Eleven states prohibit it,[77] while only 8 permit it.[78] The prior consent of the person from whom the gametes are to be removed is required for PGR in Australia, Canada, New Zealand, Spain, the United Kingdom and the United States – with only the United States not requiring the said consent to be in writing. Notably, PGR has been given the least amount of attention by the

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[74] Australia, Belgium, Canada, Croatia, Cyprus, Finland, Hungary, Israel, Japan, Malta, the Netherlands, New Zealand, Portugal, Spain, the United Kingdom, and the United States.

[75] Austria, Denmark, Egypt, France, Germany, India, Italy, Slovenia, Sweden, and the United Arab Emirates.

[76] Australia, Belgium, Canada, Croatia, Cyprus, Finland, Israel, the Netherlands, New Zealand, and the United Kingdom.

[77] Austria, Croatia, Denmark, France, Germany, Hungary, Italy, Portugal, Slovenia, Sweden, and the United Arab Emirates.

[78] Australia, Canada, Israel, Japan, New Zealand, Spain, the United Kingdom, and the United States.

states researched. Even among these states who were chosen on the basis of their dealing with PR to some degree, 11 states do not address PGR at all.

While certain practices have received widespread acceptance, such as PR and PEI, PGR is clearly a highly polarising topic. Even where states all agree on a practice as being permissible there is still a fair amount of deviation on the issue of under what circumstances it may be allowed and the type of measure which ought to be used to control the practice. In order to gain further understanding of why and how laws on key issues relating to PR vary from state to state, Part II will outline the legal history, key case law, and current legal position in certain states.

PART II

2.3 Posthumous Reproduction in the United States of America

MAR law regulation occurs at three levels in the United States of America: at state level in the form of non-binding uniform laws, at federal level in the form of state-specific laws, and at the professional self-regulations level in the form of guidelines and policies followed by medical practitioners.[79] The US has a permissive approach to PR, and there are no laws in place in any state that prohibit it.[80] However, the level and nature of how it is regulated varies significantly from state to state since each state has the discretion on whether or not to adopt uniform laws and may create their own law or leave the regulation of MAR practices up to professional associations of practitioners or health care institutions.[81]

Arguably the US has had the most opportunity to engage with the issues surrounding PR, considering it is the source of many of the key medical

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[79] Minieri op cit note 40 at 220.

[80] Teitelbaum op cit note 6 at 431

[81] There are two professional associations that oversee MAR in the US – The American Society for Reproductive Medicine and the Society for Assisted Reproductive Technology. See, Minieri op cit note 40 at 200.

advances in this area. For instance, the US was the site of the first ever case of successful conception from PGR in 1995.[82] However, yet very few states have comprehensive statutes in place to address PR and the legal status of resultant children,[83] which has led to persons who have disputes relating to PR having to turn to the courts in order to get clarity. This is what happened in *Hecht v Superior Court of California*[84] which led to the state of California becoming the first legal forum to deal with PR and children resulting therefrom.[85]

In *Hecht* the deceased had been a divorcee with two children resulting from his marriage who, after his divorce, cohabited with one Deborah Hecht for a period of five years before committing suicide.[86] Prior to taking his own life, the deceased had his sperm stored, intending for it to be used by Hecht to have children. This was expressed in a testamentary donation bequeathing his sperm to her and in a letter he wrote to his children intimating his hopes that Hecht would have his child after his death. However, when she sought to use the stored sperm, the deceased's children objected and sought to have the sperm destroyed.[87]

The application by the children to have the sperm destroyed was initially successful in the trial court, but the California Court of Appeal ultimately reversed the order.[88] The court's finding was that it was not contrary to public policy to allow PR in this manner – basing its decision on Hecht's fundamental right to procreative liberty overriding any possible psychological harm to

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[82] JM Hurwitz, FR Batzer 'Posthumous Sperm Procurement: Demand and Concerns' (2004) 59(12) *Soundings* 806.

[83] KS Knaplund 'Children of Assisted Reproduction' (2012) 45 *University of Michigan Journal of Law Reform* 900.

[84] *Hecht v Superior Court of Los Angeles*, 59 Cal Rptr 2d 222 (Cal Ct App 1996).

[85] BM Starr 'A Matter of Life and Death: Posthumous Conception' (2004) 64 *Louisiana Law Review* 631.

[86] Ibid.

[87] Ibid.

[88] Ibid.

existing children, which was what their application had been based on.[89] The court noted that since the deceased had expressed a desire to have children, there was no state interest justifying interfering with his decision to donate his sperm to Hecht. Hecht's victory was not absolute however, as the court found that resultant children in these circumstances could not inherit from the deceased's estate – an issue which has been central to the law on PR in America.[90]

Rather than regulating PR itself and when it would be appropriate to grant requests for it, the law in the US has largely focused on the issue of the legal status of posthumous children and whether they are entitled to benefits from the deceased's estate or the state, on the basis of being recognised as the legal offspring of the deceased. This is reflected in the first state effort in the US in terms of addressing PR, the Uniform Status of Children of Assisted Conception Act (USCACA) – which barred posthumous children from being legally recognised as the children of the deceased.[91] This uniform law has since been repealed and was re-codified in 2000 with the promulgation of the Uniform Parentage Act (UPA).[92]

The UPA was passed by the National Conference of Commissioners on Uniform State Law, in order to create some consistency on survivor benefits and has since been adopted in 12 states.[93] The UPA, unlike the USCACA, creates circumstances in which posthumously conceived children can be granted legal recognition as the child of the deceased, if the deceased consented in writing to be recognised as the child's father.[94] The UPA did not establish any time limits in this regard, and has been criticised for allowing disturbance of a deceased's estate years after the deceased's death if the

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[89] Ibid.

[90] Ibid.

[91] Starr op cit note 85 at 636.

[92] Ibid.

[93] Teitelbaum op cit note 6 at 436. This Act applies to both PC and PEI – see section 707.

[94] Starr op cit note 85 at 637.

surviving spouse elects to wait before exercising the choice of using PR.[95] Why this is undesirable is because PR allows for the delays almost indefinitely the existence a person who, once born, would have legal claim to the estate. Cryopreserved sperm or embryos may stay that way for years and potentially decades, and this creates practical issues since the deceased's estate can never truly be finalised if a surviving partner has access to their gametes or an embryo the deceased contributed a gamete to, which could result in a child who would have a claim to the estate if that genetic material was used for reproductive purposes.

The UPA was the precursor to the most recent uniform law to deal with PR – the Uniform Probate Code of 2008, which deals with the parentage and inheritance of children resulting from MAR.[96] While the content of the UPC is in many ways a duplication of the UPA, there are important differences between the two statutes, particularly relating to the parentage of posthumous children as a result of the two amendments to the UPC in 2011. The first of these amendments, section 2-120, applies to children born via artificial fertilisation (AF) where the gestational mother is the intended parent, and the second, section 2-121, applies to children born from AF where the gestational mother is not the intended parent, regardless of whether she is also the genetic mother – otherwise known as a surrogacy arrangement.

The primary distinction between the UPA and the UPC is that while the UPA limited itself to married couples, the UPC includes all persons who might make use of MAR – including the unmarried, same-sex couples and single persons.[97] In providing for PR after the death of one parent, section 2-120 goes further than the UPA in that it is not subject to written prior consent of the deceased, but may also be allowed if the surviving partner adduces proof of the deceased having wanted to function as a parent no later than 2 years after

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[95] Starr op cit note 85 at 636.

[96] Knaplund op cit note 83 at 901.

[97] Ibid.

the child's birth.[98] Alternatively, the surviving partner must show clear and convincing evidence of wanting to be a parent to a posthumous child.[99] There is a presumption that the deceased consented to PR, if the deceased man was married to the surviving mother of a posthumous child – provided there was no divorce pending at the time of his death.[100] Another key distinction is that the UPC provides a time limit; the posthumous child must be in utero within 36 months of the death or born within 45 months of the death. This prevents the problem of deceased estates being open to claims by posthumous children indefinitely that the UPA was criticised for. Knaplund praises this provision, claiming it allows for finality in winding up estates in a timely manner, while also allowing space for the spouse to grieve.[101]

In section 2-121 surrogacy arrangements, the UPC also allows for a deceased person to be recognised as the parent of a child born through surrogacy – provided there is either a written record of their consent or the existence of other facts and circumstances establishing the individual's intent by clear and convincing evidence.[102] The marital presumption of consent also applies here, provided the deceased's gametes were used and the surviving spouse functions as a parent of the child within two years of the child's birth.[103]

Uniform laws in the US have had limited success in creating a national standard for the regulation of MAR. As alluded to above, few states have enacted the UPA or comparable provisions, and it is anticipated that the UPC will have similarly low popularity.[104] Many states have opted to create their own laws to provide for the legal status of posthumous children, and whether they can benefit from being legally recognised as the offspring of deceased

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[98] Ibid.

[99] Ibid.

[100] Knaplund op cit note 83 at 910.

[101] Ibid.

[102] Knaplund op cit note 83 at 913.

[103] Ibid.

[104] Knaplund op cit note 83 at 901.

persons. Some states provide for children born within nine months of their parent's death to be able to inherit from them – but this only applies to cases where they were naturally conceived before death and not by AF.[105] Others have opted to specifically exclude posthumous children from inheriting from their deceased parent, such as New York, Virginia and Georgia,[106] while in other cases where no laws regulating the legal status of posthumous children exist, the courts have excluded them from inheriting.[107] In the 14 states that have enacted laws providing for the legal recognition of posthumous children, most require the written consent of the deceased.[108]

The one area for which there is clarity throughout the US on whether posthumous children may benefit, is social security survivor benefits. This was settled by the Supreme Court in *Astrue v Capato ex rel. B.N.C.*[109] In this case, a married couple decided to have the husband's sperm cryopreserved after he was diagnosed with oesophageal cancer, because of the possibility of his chemotherapy rendering him sterile.[110] The husband died, and the wife used his sperm to impregnate herself – giving birth to twins 18 months after his death. She then applied for the children's social security insurance benefits due to them as the children of deceased, on their behalf, but the Social Security Administration denied her request – reasoning that children conceived after the death of a parent were only eligible for benefits if they were eligible to inherit the wage earner's property through intestate succession[111] The widow then appealed the decision to the United States District Court, but was unsuccessful there as well. In her appeal to the Circuit Court of Appeals, the

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[105] Knaplund op cit note 83 at 919.

[106] Ibid.

[107] Ibid.

[108] Ibid.

[109] 132 S. Ct. 2021, 2026 (2012), as cited in K Christian 'It's Not My Fault: Inequality Among Posthumously Conceived Children and Why Limiting the Degree of Benefits to Innocent Babies is a No-No' (2017) 36 *Mississippi College Law Review* 196.

[110] Christian op cit note 109 at 196

[111] Ibid.

courts were divided in their interpretation of the relevant statutes. As such, the Social Security Administration petitioned the Supreme Court for a writ of certiorari to provide clarity on this issue. The Supreme Court held that posthumous children could not obtain social security survivor benefits, because the wording of the laws was not inclusive of posthumous children.[112]

Because the national and state law relating to PR has focused on issues relating to the legal status of resultant children, the actual practice of PR in the US has been regulated largely through guidelines drafted by specialist institutions and implemented by individual hospitals.[113] For instance, Cornell University was tasked with developing guidelines for several New York hospitals on PGR; these guidelines propose allowing sperm retrieval and presuming the consent of the deceased for this procedure, provided the wife consents in writing.[114] This is subject to the death having been sudden or due to some incommunicable disease nor any diseases that is known to affect sperm validity. Retrieval must take place within 24 hours of the husband's death, and sperm must be stored for a minimum of 1 year thereafter. The American Society for Reproductive Medicine, one of the bodies that oversees MAR in the US, published a committee opinion on when to honour requests for sperm retrieval.[115] They recommend that PGR must only be done if the deceased consented to it. In the absence of a written consent document, requests for sperm retrieval should only be granted if the surviving wife or life partner makes the request.

2.4 Posthumous Reproduction in the United Kingdom

Unlike the US, the UK has opted for a system that places strict control on PR through state legislation. MAR in the UK is regulated primarily by the Human

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[112] Ibid.

[113] Teitelbaum op cit note 6 at 431.

[114] Ibid.

[115] Ibid.

Fertilization and Embryology Act (HFEA). The HFEA came into existence in 1990 after extensive public consultation, and a report by a government-appointed committee called the Committee of Inquiry into Human Fertilization and Embryology.[116] The report expressed apprehensions about PR, which were based on the possibility of it giving rise to psychological problems for mothers and children.[117] Despite this, the UK legislature opted to allow PR in the HFEA, subject to certain conditions.

In terms of HFEA, persons storing their gametes must consent to doing so in writing, and this consent must be inclusive of how the sperm will be used.[118] In other words, in order for PR to be possible, the deceased must have consented to the PR procedure contemplated – be it PC, PEI or PGR. This is provided for in Schedule 3 of the HFEA, which prescribes that when consent is being obtained from persons storing gametes or embryos, the consent document must specify what purposes the reproductive material may be used for and what is to be done with it if the gamete provider loses the capacity to vary the terms of consent or withdraws their consent. Prior to a gamete provider giving consent, he must have all relevant information communicated to him and must receive counselling. The gamete provider must also be made aware that he is free to vary the terms of consent or withdraw consent at any time prior their reproductive material being used.

The UK also has a statute that deals specifically with PGR, the Human Fertilization and Embryology (Deceased Fathers) Act of 2003, which permits the practice and allows for the deceased to be recognised as the child's father. This is provided the deceased consented in writing both to the removal of his sperm after his death, and to it being used as well as to registered as the father of the posthumous child.[119] A widow using PR who wants to have her

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[116] C Cameron, E Blyth 'An Emerging Issue in the Regulation of Assisted Conception' (1998) 13(9) *Human Reproduction* 2339.

[117] Ibid.

[118] Bahadur op cit note 7 at 2771.

[119] Peart op cit note 9 at 750.

deceased husband recognised as the child's father, where there is effective consent, must elect to do so in writing within 42 days of the posthumous child's birth – failing which the child is regarded as having no father. If the woman entered into a relationship with a new partner, that man will be regarded as the posthumous child's father, unless he did not consent to the PR procedure.[120]

The HFEA established an institution responsible for receiving and deciding on requests for PR – the Human Fertilization and Embryology Authority. This Authority is responsible for applying HFEA and its regulations, as well as for licensing fertility clinics and scientists carrying out research on embryos.[121] If the appropriate consent has been acquired from them the posthumous use of gametes or embryos is allowed. However, the HFEA Code of Practice 1995 states that certain factors must be taken into account before acting in accordance with a request for PR.[122] These factors include the ability of those making the request to provide a stable and supportive environment for the child, and their likely ability to provide for the child's needs. These provisions appear to be in place to respond to the concerns raised about the welfare of resultant children in the Committee of Inquiry into Human Fertilization and Embryology's report.

Although the UK has been progressive in creating law to deal with PR fairly early on, thus preventing extensive litigation that can result from a lack of clarity as was the case in the US, the UK courts have still had to confront complex legal issues relating to PR – most notably in the case of *Regina v Human Fertilization and Embryology Authority Ex Parte Blood.*[123] The *Blood* case is one that was not only famous at the time,[124] but has also received significant attention in the academic literature since and is arguably the most

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[120] Ibid.

[121] Busardò et al. op cit note 40 at 9.

[122] S Webb 'Raising Sperm from the Dead' (1996) 17(4) *Journal of Anthology* 326.

[123] 2 ALL ER 687 (CA. 1997).

[124] Cameron and Blyth op cit note 116 at 2339.

famous case on PR.[125] This case relates to a refusal by the Human Fertilization and Embryology Authority of Mrs Blood's application to use her deceased husband's sperm to have a child. The couple had wanted to have children and had discussed this at great length, as well as how they would go about it; the deceased allegedly had expressed that he had no objection to PR. Before they could act on their desire, however, the husband suddenly died while in hospital. Shortly after the man's death, at Blood's request, the hospital staff removed sperm from him – which was then stored. As there was no written consent to the procedure as required by the HFEA, the removal of the sperm was unlawful, and, as such, Blood was unable to access the sperm and use it to have a child.[126] After her requests to the authority were denied, she appealed the decision and the court, while unable to grant her permission to use her husband's sperm in the UK, gave her permission to export the sperm to Belgium, where the laws allowed her to be inseminated by her deceased husband's sperm.[127] The court upheld her appeal, despite her contravention of HFEA, stating: "Mrs Blood has the right to receive treatment in Belgium with her husband's sperm unless there are good public policy reasons for not allowing this to happen."[128]

The court's comments and its order illustrate that it believed that there was no good reason to bar Blood from fulfilling her desire to have a child with her husband's sperm in another country – even though it was acquired unlawfully under UK law. In doing so, the court provided relief to Blood and those who sympathised with her case, allowing her to avoid being deprived of the chance to fulfil her desire to have her husband's child, because unexpected events had prevented them from recording their desires in writing. So great was the

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[125] This is indicated by how often the case is cited. See, generally, Katz op cit note 11; Nienaber op cit note 4 at 2; M Parker 'Response to Orr and Siegler – Collective Intentionality and Procreative Desires: The Permissible View on Consent to Posthumous Conception' (2004) 30 *Journal of Medical Ethics* 390; A Brewaeys 'How to Care for the Children? The Need for Large Scale Follow-Up Studies' (1998) 13(9) *Human Reproduction* 2349.

[126] Cameron and Blyth op cit note 116 at 2339.

[127] Cameron and Blyth op cit note 116 at 2340.

[128] Nienaber op cit note 4 at 3.

outcry resulting from the Blood case, however, that it spawned a proposal for legislative reform of the HFEA, in the form of an amendment bill.[129] This Bill proposed to give the Authority the discretion to waive the requirement for the written consent of the deceased in appropriate circumstances, but ultimately this never came to fruition because the Bill could not get sufficient government support. The rigid approach taken by the HFEA and the Authority in dealing with requests for PR on the issue of prior written consent, has been criticised by medical practitioners[130] and academics.[131]

2.5 Posthumous Reproduction in France

France has the distinction of having the most judicial rulings on PR,[132] and as a result of this extensive litigation their jurisprudence has been influential in Europe and globally.[133] The most notable example of this is the case of *Parpalaix c. Centre d'Etude Creteil Concervation de Supreme Humain*,[134] which came before the High Court of Creteil.

In this case, the widow of one Alain Parpalaix obtained a court's approval to be inseminated with the sperm of her deceased husband who had died of cancer.[135] The significance of the *Parpalaix* case is that it was the first case to deal with the issue of whether, posthumously, children are the legal heirs of their deceased fathers.[136] At the time, France had no law relating to PR, and,

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[129] Cameron and Blyth op cit note 116 at 2341.

[130] Cameron and Blyth op cit note 116 at 2340.

[131] See, for example, Brewaeys op cit note 125 at 2349.

[132] D Eduardo, VL Raposo 'Legal Aspects of Post-Mortem Reproduction: A Comparative Perspective of French, Brazilian and Portuguese Legal Systems' (2012) 31 *Medicine and Law* 186.

[133] Ibid.

[134] *Parpalaix v. Centre d'Etude et de Conservation du Sperme*, Gaz. Pal. (1984), Trib. gr. inst. Cretail.

[135] Bahadur op cit note 7 at 2771.

[136] Ibid.

as such, the court had to take the initiative in determining whether the practice was lawful and how it ought to be regulated. The widow argued she was entitled to her husband's sperm as the natural heir under the law of contract; further she contended that although it was not expressly written, her husband had intended her to use the sperm to conceive a child after his death.[137] Since there was no written record of the deceased's wishes, the court held that his wife and parents were in the best position to articulate what his intention was, and they had expressed that the deceased had wanted children.

The court only inquired into what the deceased's intention was in terms of making its decision – as their reasoning was based on the husband's fundamental right to procreate.[138] In reaching this conclusion, the court rejected the widow's argument based on contract, instead reasoning that the "fate of the sperm must be decided by the person from whom it is drawn".[139] The court found that the husband's act of storing his sperm after discovering he had cancer could be taken as tacit consent for its use after his death.[140]

While the widow was successful, the court held that the posthumous child could not inherit from Alain Parpalaix's estate.[141] The laws of inheritance in France at the time provided that any child born more than 300 days after the death of the mother's husband, is not presumed to be child of the husband.[142] However, the court found that even if they fell under the presumption of paternity, posthumous children are barred from inheriting, because a child must exist at the time of death in order to have capacity to inherit either testate or intestate.[143]

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[137] Starr op cit note 85 at 630.

[138] Starr op cit note 85 at 630.

[139] Ibid.

[140] Eduardo and Raposo op cit note 132 at 186.

[141] Starr op cit note 85 at 630.

[142] Ibid.

[143] Ibid.

The court's decision in *Parpalaix* received attention internationally and appears to have influenced the court's decision in the US case of *Hecht.*[144] In the aftermath of *Parpalaix*, the Centre d'Etude Creteil Concervation de Supreme Humain, which is a government-run sperm bank in Paris where Alain Parpalaix's sperm had been stored, adopted a policy of not permitting PR – which was upheld by the French courts.[145] This decision by the sperm bank was a foreshadowing of the government's decision in 1994 to pass a law specifically forbidding PR – Law 94-654. The state prohibition occurred because the government believed that uses such as PR would strain social resources and discourage the traditional nuclear family.[146]

2.6 Posthumous Reproduction in Israel

Israel has been described as being at the forefront of countries that have embraced artificial reproduction; however, as far as PR goes, it has yet to establish laws specifically addressing it.[147] Instead, medical practitioners in Israel find guidance in the 2003 Attorney General of the Government of Israel guidelines – which address PR.[148]

These guidelines were formulated after discussions held at Israel's Ministry of Justice with the participation of state authorities and relevant experts, and so, while they are not binding, they carry significant weight.[149] These guidelines focus on giving respect to the will of the deceased, and, as such, propose that PR is permissible for married persons where the husband specifically and explicitly consented to it.[150] While the guidelines also acknowledge that if the

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[144] Ibid.

[145] Bahadur op cit note 7 at 2771.

[146] Starr op cit note 85 at 631.

[147] Teitelbaum op cit note 6 at 430.

[148] Ministry of Justice Guidelines of the Attorney General of the Government, Guideline 1.2202, 27 October 2003.

[149] Ibid para 2.

[150] Ibid para 9.

husband specifically refused, it would not be appropriate to carry out a request for PR,[151] and the Attorney General proposes a presumption of consent to PR if the deceased's wishes are unclear.[152] This is based on the view that, as the person requesting PR, the wife is the most reliable source of the deceased's wishes, and there is no societal interest that can justify interference with these wishes.[153] The guidelines specifically reject as permissible the practice of unmarried partners using PR, as well as parents using their deceased child's gametes.[154]

In the case of PEI, Israeli law treats embryos differently depending on which spouse of a married couple is the surviving spouse. If the surviving spouse is the wife, she is allowed to use the embryo for the purposes of MAR reproduction within one year of the husband's death – even if he did not consent to it in writing. On the other hand, if the surviving spouse is the husband, then the embryos cannot be used.[155]

As it relates specifically to the process of PGR, Landau describes the provisions of the guidelines as prescribing a two-step procedure.[156] The first step is the actual sperm retrieval from the deceased, which is permissible whether they are married or unmarried, and even if they did not consent. The second step is the authorisation for the use of the sperm, and here each request is to be determined on a case-by-case basis by the courts, in keeping with the man's dignity and his presumed wishes.[157] If the sperm's use is

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[151] Ibid para 10.

[152] Ibid para 11.

[153] Ibid para 17.

[154] Ibid para 19.

[155] A Benshushan, J Schenker 'The Right to an Heir in the Era of Assisted Reproduction' (1998) 13(5) *Human Reproduction* 1410.

[156] R Landau 'Posthumous Sperm Retrieval for the Purpose of Later Insemination or IVF in Israel: An Ethical and Psychosocial Critique' (2004) 19(9) *Human Reproduction* 1952.

[157] Ibid.

authorised, the court is then to instruct that the deceased be registered as the child's father.[158]

While the above provisions illustrate what the guidelines perceive as being permissible in keeping with the values of Israeli law, in practice many judgments of the courts relating to PR have granted orders contrary to these guideline provisions. In the case of PGR, the jurisprudence of Israeli courts has been the most liberal of the five states examined in Part II of this chapter. The courts have on numerous occasions permitted PGR, without the husband's explicit consent.[159] However, what is most noteworthy, is that the courts have not limited granting requests to surviving spouses or partners and have permitted the parents of deceased men to use the deceased's posthumously removed sperm to impregnate a female of their choosing.[160]

The seminal case on this issue in Israel, is that of Staff Sergeant Keivan Cohen, who was killed in action in 2002 at the age of 19.[161] After his death, his parents had his sperm removed and stored and later successfully petitioned the courts for approval to use the sperm to inseminate a female of their choice.[162] The courts approved the request based on the family's testimonies that he had wanted to become a father.[163] The woman who was the recipient of Keivan Cohen's sperm was someone he had never met, and the parents selected her from a number respondents who responded to a newspaper appeal.[164] The courts have since received numerous requests by parents seeking to use their deceased child's sperm to have their own grandchildren, and the precedent set by the Cohen case has been followed by the courts.[165]

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[158] Ibid.

[159] Teitelbaum op cit note 6 at 430.

[160] Ibid.

[161] Teitelbaum op cit note 6 at 439.

[162] Ibid.

[163] Teitelbaum op cit note 6 at 440.

[164] Ibid.

[165] Teitelbaum op cit note 6 at 440.

The law in this area is yet to be settled. This is because the courts have neglected to address under what circumstances the posthumous child would be entitled to survivor benefits.[166]

There is an inconsistency in Israel between the guidelines on PR in the case law, and it may be that the guidelines have had no real impact on the state of PR in Israel. In some instances (as with PR by parents using the gametes of their children), the practice of courts is directly contrary to the guidelines. As such, the values espoused in the guidelines are not given effect and PR in Israel is for all intents and purposes controlled by the courts.

2.7 Posthumous Reproduction in Spain

Spain was a pioneer in the area of PR, by being one of the first states to enact legislation on PR with Law 35 of 1988, which was permissive of the practice. In terms of article 2 of section 2 of this statute, PR was allowed subject to the deceased signing a consent document allowing it.

The 1988 law has since been repealed and replaced with the Law on Assisted Human Reproduction Technologies (LAHRT) – a comprehensive health law that regulates all of MAR in Spain. In many ways, this law simply subsumed the provisions of the old law into article 9 of the LAHRT, which regulates PR. In terms of this provision, the use of a person's gametes after his or her death is allowed provided the person requesting their use was the deceased's spouse or partner. As was the position in the old law, the deceased must have consented in writing. While these provisions are ostensibly fairly common in states that regulate PR, Spain is one of the few states that also prescribes a time limit to PR; stored gametes must be used within 12 months of the death of gamete provider. This means that the surviving partner must act quickly in order to be permitted to use the deceased's gametes, and this provision facilitates posthumous children being born shortly after the death of the

[166] Teitelbaum op cit note 6 at 441.

gamete provider, in a manner similar to where conception occurs non-coitally and where one parent dies during pregnancy.

PEI is also specifically addressed in article 9; not only is it allowed, but there is a presumption that the deceased authorised the embryo implantation after his death. The effect of this provision is that embryos that would otherwise have been destroyed because consent had not been given by the deceased will not be destroyed – but rather used for reproductive purposes.

2.8 Conclusion

The complexity of balancing all the competing interests relevant to PR is reflected in the broad array of approaches that have been taken by states to address it. What is clear is that which approach a particular state will take is shaped entirely by which of the competing interests it regards as being most significant and which steps it perceives as necessary in giving respect to or promoting that particular interest. The balancing of interests is relevant to every major choice relating to PR, beginning with whether it should be permitted or prohibited as a whole or if one particular type of PR merits different treatment, and is further relevant to whether it should be regulated by laws or guidelines, whether consent is required, if such consent needs to be explicit, can be proven or is presumed, whether there should be applicable time conditions, and if posthumous children should be allowed to inherit.

It seems that the first step a state seeking to decide on what measures to address PR must take, is to consider the relevant interests and make a determination on which of these it gives recognition to and regards as being most important. Thereafter, the next step would be to make decisions on how best to give effect to those interests. An important consideration at that stage would be whether a particular measure will achieve the desired result. For instance, if a state regards PR as so offensive to the dignity of the deceased that it should not be occur at all, the best way to ensure this, would be through a prohibition in the form of legislation as opposed to guidelines that might not be followed by medical practitioners. I suggest that there needs to be some

consistency between the interests a state desires to achieve and the measures it takes to give recognition to those interests.

3. CHAPTER THREE: HUMAN RIGHTS AND MEDICALLY ASSISTED REPRODUCTION

How one responds to the various questions posed by PR depends on how one perceives the legal status of deceased persons. As illustrated in the previous chapter, how state regulation in relation to PR practices depends significantly on the issue of respect of the deceased's wishes and bodily integrity – but this raises the question of on what basis we do so: is it because the living after death have some right/s that entitle them to participate in artificial reproduction or is there some other basis for respecting the deceased's wishes. In order to investigate whether the dead have a right to reproduce, this chapter will engage with the preliminary issue of what reproductive rights are and how procreative liberty is given effect in South Africa – specifically in relation to MAR.

3.1 Procreative Liberty and the Meaning of Reproductive Rights

The phrase "procreative liberty", as coined by Robertson in his book *Children of Choice: Freedom and the New Reproductive Technologies*,[167] is the freedom of an individual to choose whether or not to have children and to control the use of one's own reproductive capacity.[168] Like all liberties, procreative liberty is not conceived as creating a positive duty on the state in the way of providing resources to reproduce – but rather it creates a negative duty on it to refrain from interference with it being exercised. Also, like all liberties, Robertson argues in favour of it being treated with "presumptive respect because of its central importance to individual meaning, dignity, and identity".[169] When applied to law, what the nomenclature advanced by

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[167] JA Robertson *Children of Choice: Freedom and the New Reproductive Technologies* (1994).

[168] Robertson op cit note 167 at 16.

[169] Ibid.

Robertson discloses, is that the rights relating to choices about human reproduction are not to be perceived as self-standing individual reproductive rights, but rather when one engages with rights and reproduction, one must view procreative liberty as inclusive of all the rights implicated when exercising the choice to have children.

Procreative liberty in South Africa is protected in the Bill of Rights, primarily through section 12 of the Constitution, which deals with the freedom and security of the person. In terms of subsection 2:

> "Everyone has the right to bodily and psychological integrity, which includes the right-
>
> (a) to make decisions concerning reproduction; …"

What can be gleaned from this section, is that all persons have the right to bodily and psychological integrity and part of that right includes certain freedoms including the freedom to make decisions relating to reproduction. This section thus goes beyond simply saying persons have the freedom to choose to reproduce, it also recognises that persons have rights in making all decisions concerning reproduction. It further indicates that the freedom to make these choices is regarded as an integral aspect of an individual's bodily and psychological integrity.

This provision must be read in conjunction with section 27, which is the right to health care, food, water and social security. This section specifically refers to reproductive health in section 27(1)(a), which states:

> "Everyone has the right to have access to-
>
> (a) health care services, including reproductive health care; …"

Section 27(1)(a) places a duty on the state to "take reasonable legislative and other measures" to ensure the realisation of the right to reproductive health care.[170] This might be interpreted as affirming procreative liberty by requiring

[170] Constitution, section 27(2).

the state to make law that facilitates health care – including access to technology required for MAR.[171]

The application of reproductive rights in South Africa has traditionally focused on access to contraceptives, access to sterilisation procedures and termination of pregnancy.[172] These are all instances where individuals, primarily women, sought recognition in the law of their procreative liberty to abstain from procreation. However, more recently, those who are desiring to procreate have been seeking to enforce their procreative liberty to do so through the use of medical technology.[173]

3.2 Procreative Liberty and Medically Assisted Reproduction

The seminal case on reproductive rights in the use of MAR in South Africa is *AB and Another v Minister of Social Development*, in which the majority of the Constitutional Court held that the reproductive right in section 12(2)(a) of the Constitution pertains to an individual's own body and does not extend to the body of another; and on this basis found a limitation on the use of surrogacy by infertile persons was not an infringement of section 12(2)(a) or any other related right, ergo it was justified.[174]

The applicant in *AB* sought to have section 294 of the Children's Act[175] declared unconstitutional on the basis that the requirement in this section that single commissioning parents seeking to undergo surrogacy must contribute one of the gametes used in the artificial fertilisation process – excluded her

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[171] Nienaber op cit note 4 at 8. Nienaber is of the view that one may assume that the reproductive health care services referred to in section 27(1) include the right of women to access artificial reproduction. While I agree with this argument – as will be discussed later in this dissertation – I see no reason for Nienaber's limitation of this right to women only and this dissertation takes the position that both men and women enjoy the same reproductive rights.

[172] C Van Niekerk 'Assisted Reproductive Technologies and the Right to Reproduce Under South African Law' (2017) 20 *PER / PELJ* 2.

[173] Ibid.

[174] [2016] ZACC 43.

[175] Children's Act 38 of 2005.

from using surrogacy, since she was infertile and that in doing so this provision violated her rights to privacy, reproductive autonomy, dignity, equality and access to health care.[176] The High Court found in the applicant's favour,[177] and the matter was then sent to the Constitutional Court to confirm the declaration of invalidity in terms of section 167(5) of the Constitution.[178] The judgment in the Constitutional Court was a divided one,[179] which led to two extensive judgments; one being the minority supporting the High Court's decision [180] and the other being the majority, that found against the applicant.[181]

Nkabinde J, writing for the majority, disagreed with the minority on the basis that the finding of constitutional invalidity ought not to be upheld, reasoning that none of the impugned rights had been infringed. While the majority acknowledged the existence and significance of the rights the applicant sought to rely upon, the court and found the limitation in section 294 was justified. This was on the basis of there being a rational connection between the differentiation in this section and the "public good" of creating a bond between a child and a commissioning parent.[182] In considering the interpretation of section 12(2)(a), the majority pointed out that this provision has primarily been interpreted to relate to people's ability to make decisions about their own bodies,[183] and on this basis Nkabinde J states that:

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[176] *AB* supra para 12.

[177] 2016 2 SA 27 (GP).

[178] *AB* supra para 16. Section 167(5) provides that: "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force."

[179] Of the 11 Justices who heard this case, a minority of 4 supported Khampepe J's judgment, while the remaining 7 supported Nkabinde J's judgment.

[180] *AB* supra para 236.

[181] *AB* supra para 330.

[182] *AB* supra para 287.

[183] *AB* supra para 312.

> "I acknowledge the need to respect the autonomy of commissioning parents in relation to the choices they make, for purposes of concluding surrogacy agreements. However, section 12(2)(a) does not give anyone the right to bodily integrity in respect of someone else's body".[184] [own underlining]

The proper interpretation of section 12(2)(a) was the key issue upon which the minority and majority judgments differed. Khampepe J, writing for the minority, interpreted this provision as protecting the right of individuals to make decisions concerning reproduction.[185] Concluding that the freedom to make the decision itself is what is protected rather than any particular choice, and, as such, a person need only show an inability to make a decision resultant of some law or state conduct and that this caused at least psychological harm.[186] In this way, Khampepe J differed from Nkabinde J's view that an infringement of section 12 was conditioned upon there being physical and psychological consequences for the person claiming such a violation – meaning that reproductive choices were not limited to choices involving one's own body.

The difference in these two judgments can be attributed to the different points of departure the justices took in viewing the meaning and scope of section 12. While Nkabinde J interpreted section 12 as an instance of the protection of bodily integrity, thus necessitating that bodies be implicated for a violation to occur, Khampepe J took the view that one of the core values of the Constitution is that of autonomy, as enshrined in section 1, and this value is one of great significance to our society because of its history.[187] Khampepe J interprets section 12 as a whole under the aegis of the value of autonomy, finding that this section "vivifies" the value of autonomy – especially in the case of section 12(2)(a) that guards an individual's autonomy in making decisions.[188] The justice states that "[t]he emphasis in section 12(2) is thus on

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[184] *AB* supra para 315.

[185] AB supra para 70.

[186] Ibid.

[187] *AB* supra para 50-51.

[188] *AB* supra para 53.

whether a law or conduct deprives a person of freedom or security, broadly understood".[189] The fact that a deprivation of one's freedom has purely psychological ramifications, is sufficient for there to have been an infringement of their rights[190] – as section 12(2)(a) protects both psychological and physical integrity as two separate rights.[191]

In applying this reasoning to the facts, the minority judgment noted that infertility impacts a person's psychological state in a harmful manner, and found that the state has a negative duty to avoid placing barriers in front of infertile persons which prevent them from alleviating the effects of this harm.[192] Where the state fails to do so through conduct or law like section 294 of the Children's Act, as it did in AB's instance, the state is causing harm by depriving people like AB of choices to decide whether or not to reproduce.[193] In my view, the minority's conception of the meaning and application of section 12 is correct – for the reasons stated below.

Based on the majority's finding in *AB* on the limitation of reproductive rights to one's own body, it can be argued that as it stands in South Africa the freedoms of persons to use MAR is only protected through section 12(2)(a) insofar as the procedure in question involves their body or some part of it. The interpretation of section 12(2) given in *AB* has been criticised, and justifiably so, for conflating the protection of bodily and psychological integrity, and Van Niekerk submits there is reason to interpret psychological integrity as a self-standing right and not as dependent on bodily integrity as it was interpreted to be in this case.[194] To interpret the section in this manner would provide a basis for persons like the applicant in *AB* to challenge limitations on the exercise of their reproductive choices where they negatively impact on their psychological

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[189] *AB* supra para 66.

[190] *AB* supra para 69.

[191] *AB* supra para 70.

[192] *AB* supra para 86.

[193] Ibid.

[194] Van Niekerk op cit note 172 at 15.

integrity – even though their bodies (specifically their reproductive material) are not involved in the reproductive act. In my view, this interpretation of the section is correct, in that it fully embraces MAR under the protection of section 12(2) – thereby giving respect to procreative liberty in acknowledging that exercising reproductive choices has to do with more than just controlling your body. To a significant extent, the act of reproduction is about fulfilling the personal desire to have a child and to be denied the fulfilment of this desire undoubtedly has a detrimental psychological impact on a person.

As discussed above, procreative liberty enjoins the state not to create barriers to exercising reproductive choices, and Robertson would likely object to the ruling in *AB.* He observes, correctly in my view, that while the value of procreative liberty is widely acknowledged in the case of coital reproduction, the same is not the case with MAR, and he argues that "it should be equally honored when reproduction requires technological assistance".[195] The majority judgement in *AB* has the effect of giving constitutional protection to all reproductive choices in relation to coital reproduction, while only giving protection to some reproductive choices in relation to non-coital reproduction. While Robertson's argument appears to be consistent with the Constitution's commitment to the equal treatment of all persons,[196] the finding in *AB* still stands as the most authoritative interpretation of section 12(2), and, as such, persons who either choose or need medical assistance in having children, do not enjoy the same protections as those who do not. It has, however, been argued that MAR might find further protection elsewhere, in section 14 of the Constitution – the right to privacy, on the basis that this right has been

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[195] Robertson op cit note 167 at 4.

[196] The achievement of equality is part of one of the Founding Provisions of the Constitution in section 1(a). It is also described as one of the democratic values that the Bill of Rights is based upon and is further included in the Bill of Rights itself in section 9 – which in subsection 1 states that "Everyone is equal before the law and has the right to equal protection and benefit of the law."

interpreted as including the liberty to live life as one pleases without being interfered with.[197]

Procreative liberty is rooted in the protection of individual liberties, and, as such, human dignity is necessarily implicated by its promotion or limitation. The Constitutional Court acknowledges in *AB* the relationship between the freedom to make choices concerning reproduction as per section 12(2), as well as equality in sections 9 and 10 of the Constitution where it states "It cannot be gainsaid that inherent human dignity is at the heart of individual rights, including the right to equality."[198] It follows from this that the various rights that constitute an individual's procreative liberty are supported by section 10 and any infringement of these rights would also be an infringement of the right to dignity.

3.3 Concluding Remarks on Procreative Liberty

The concept of procreative liberty provides a framework within which to understand the freedom to make choices relating to human reproduction, as protected not only in provisions which grant persons the freedom to exercise the choice to have children or to abstain from doing so, but also through the web of interrelated and mutually reinforcing human rights that reaffirm human liberties in exercising decisions relating to procreation. Based on the above, procreative liberty in South Africa is inclusive of the right to reproductive autonomy is section 12(2)(a), the right to reproductive health care services in section 27(1)(a), privacy in section 14, equality in section 9, and dignity in

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[197] Van Niekerk op cit note 172 at 17. The argument of the infringement of the right to privacy by section 294 was made in *AB* and the court referred to it at para 323. The majority made reference to the fact that while in a previous case the case the court had stated, "the right to make autonomous decisions in respect of intensely significant aspects of one's personal life" falls into the right to privacy, it did not create an independent right to autonomy. The court concluded that like the other impugned rights, this provision was not infringed by section 294. Regrettably, the court does not expand on why this is the case, but it is presumably because as with section 12(2)(a) at para 313-314, the majority regarded this right as limited to making decisions regarding one's own body.

[198] *AB* note 12 supra para 300.

section 10. However, inasmuch as South African law gives effect to procreative liberty in the case of coital conception, it appears that an individual's procreative liberty is not regarded as being equally significant in the case of MAR.

3.4 New Frontiers for Procreative Liberty: *NC v Aevitas Fertility Clinic*

While the application of procreative liberty to certain reproductive choices is clear, the question remains if this right extends to PR in South Africa. PR was addressed for the first time in South African case law in the case of *NC v Drs Aevitas Inc t/a Aevitas Fertility Clinic.*[199] The applicant, NC, sought an order declaring that she was entitled to use her deceased husband's sperm in order to have a child.[200] NC is the widow of MC, having married him in 2008 after a lengthy relationship.[201] Prior to their marriage, MC was diagnosed with lung cancer in 2003. The couple desired to have children of their own. However, even after MC's cancer was no longer an obstacle – these plans were set back by NC being diagnosed with kidney disease that made it life threatening for her to fall pregnant.[202]

The desire to have their own child compelled the couple to explore other avenues and they looked into taking the route of surrogacy; however, before they could act on this, MC's cancer reoccurred in 2012.[203] As part of his treatment, MC had to undergo chemotherapy and since this carries the risk of rendering a man infertile, the couple chose to have his sperm cryopreserved in order to preserve their dream of having children of their own.[204] MC's sperm was stored at Aevitas Fertility Clinic, and when MC went to have his sperm removed, he filled out their standard form which contained a section where the

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[199] *Aevitas* note 26 supra.

[200] *Aevitas* supra: Notice of Motion para 1.

[201] *Aevitas* supra: Applicant's Affidavit para 4.2.

[202] *Aevitas* supra: Applicant's Affidavit para 4.3

[203] *Aevitas* supra: Applicant's Affidavit para 4.5

[204] *Aevitas* supra: Applicant's Affidavit para 4.6

patient may choose what is to happen to their sperm after their death.[205] MC made the election in this section that, in the event that he dies, his sperm should be assigned to the care of his wife.[206]

In the years after the sperm was stored at Aevitas Fertility Clinic, the couple continued to pay the annual fee to keep the sperm cryopreserved on the basis that their desire to have children of their own persisted.[207] Despite treatment, MC's health deteriorated, and eventually he died in January 2017.[208] In July 2017, six months later, NC felt she had overcome her grief at her husband's death, and was ready to proceed to have the child the couple had always wanted.

Upon discovering, however, that the legality of PR in South Africa is unclear, she brought an application before the High Court to confirm her right to use her husband's sperm.[209] In concluding her affidavit in support of this application, NC highlights that she based the crux of her claim on the recognition of the autonomy of her now-deceased husband to choose to assign his sperm to her and intending that she use it:

> "In our society, persons' reproductive choices are deeply respected. I am requesting the court to extend this respect to the reproductive choice that my deceased husband made – and recording in writing – while he was still alive".[210]

This was reflected in the arguments made before the court. Counsel for the applicant argued that part of the deceased's right to reproductive autonomy while alive was the right to determine the fate of one's own body – which includes gametes.[211] Counsel further submitted that NC also potentially had a

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[205] *Aevitas* supra: Applicant's Affidavit para 4.10

[206] Ibid.

[207] *Aevitas* supra: Applicant's Affidavit para 4.16

[208] Ibid.

[209] *Aevitas* supra: Applicant's Affidavit para 5.3–5.5.

[210] *Aevitas* supra: Applicant's Affidavit para 8.1

[211] *Aevitas* supra: Applicant's Heads of Argument para 15.

legal claim here, since the decision to have a child through PC is an exercise of both the deceased husband's autonomy and that of the surviving wife who was assigned his sperm.[212]

Notably, counsel for NC did not place reliance on constitutional rights and instead based his arguments on the common law right to autonomy that all patients engaged in medical procedures have, and that their medical practitioners are obliged to give respect to.[213] The significance of this is that, unlike reproductive autonomy as interpreted in *AB,* autonomy under the common law is not limited to the body and can also apply to patient autonomy for purely psychological treatment. Patient autonomy in the context of human reproduction is of particular importance to MAR, because these procedures necessarily require medical procedures carried about by a medical professional. The patient's right to autonomy stems from the doctor–patient relationship, a contractual relationship that comes into existence the moment the patient places themselves in the doctor's care.[214] The duty on doctors to respect a patient's autonomy is one of the fundamental ethical duties on doctors,[215] and failing to respect patient autonomy can have serious implications.[216] In respecting patient autonomy, it is of fundamental importance that a doctor obtain full and proper consent to perform a procedure such as the removal of gametes.[217]

The High Court granted the relief sought and held that NC had the right to use her deceased husband's sperm.[218] While this judgment ostensibly confirms the legality of PC, the fact that the court did not give reasons for its decisions

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[212] Ibid para 18.

[213] *Aevitas*: Applicant's Heads of Argument para 14.

[214] MA Dada, DJ McQuoid-Mason *Introduction to Medico-Legal Practice* (2001) 5.

[215] D Giesen 'From Paternalism to Self-Determination and Shared Decision Making' 1988 *Acta Juridica* 114.

[216] A Dhai, DJ McQuoid-Mason *Bioethics, Human Rights and Health Law* (2011) 64.

[217] Giesen op cit note 215 at 118.

[218] *Aevitas* supra: Court Order.

leaves various pertinent issues unaddressed. For instance, it is unclear if this judgment is to be viewed as indicating that in light of all the applicable laws and regulations, PC, in particular, is lawful or whether the same can also be said of PEI and PGR. While these PR procedures are also unregulated in South African law and similar considerations apply, there are important distinctions between them that might merit a different outcome in terms of questions regarding their legality.

Another issue relates to the basis upon which the court found in the applicant's favour. Procreative liberty was evidently a driving force of the arguments advanced by NC and her legal counsel, but while it is clear this would apply to the husband's choice to have the sperm removed and stored, it is not as clear that procreative liberty includes the freedom to decide what happens to your reproductive material after you die. If the court based its finding on the deceased's rights, then that would mean that the rights included in procreative liberty survive death – even though many would argue that the dead do not have legal rights.[219]

If instead the court's judgment is to be seen as a recognition of the surviving spouse's rights, this raises the question of whether this is based on contractual rights over the property that is the deceased's reproductive material or whether the rights to use a deceased's gametes can be said to be part of one's procreative liberty. If the latter is the case, this raises the possibility that the decision in *Aevitas* is inconsistent with the ruling in *AB*, which seemingly established that procreative liberty is limited to your own reproductive material (as part of your body) and not that of another – ergo NC did not have a constitutionally recognised right to use her husband's sperm. It is clear that the judgment in *Aevitas*, while giving a preliminary answer to the question of whether PR is legal in South Africa, raised a plethora of complex questions that need to be addressed. In seeking to respond to some of these questions, the following chapter discusses the ethical and legal issues relating to PR.

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[219] Katz op cit note 11 at 300 references this, where she states "One could argue that the dead have no rights or interests … since the dead cannot be harmed." The various arguments around this point will be discussed in Chapter 4.

4. CHAPTER FOUR: LEGAL AND ETHICAL ISSUES IN POSTHUMOUS REPRODUCTION

This chapter will outline the legal and ethical issues relating to PR, by looking at the relationship between persons and their reproductive material while alive and how this relationship is impacted by death. The issues identified will be applied to the South African context with reference to the applicable laws and regulations relating to MAR. Based on the analysis in this chapter, it will conclude with arguments on the legal position in South Africa regarding PR.

4.1 The Relationship Between People and Reproductive Material

At the core of it, PR is about the nature of the legal bond between persons and their gametes and embryos, and whether this relationship includes the right to dispose of your reproductive material as you wish – even after you die. In order to conclude how reproductive material is to be treated after death, it is first necessary to understand the nature of a person's interest in their reproductive material while alive.[220] This is the subject of significant debate, as there are various ways in which this dynamic is conceptualised. One position is that we may regard reproductive material as property, in which case property rights generally give broad decision-making authority to individuals from whom the reproductive material originates; the owner of property has extensive powers in controlling property, its use and how it is disposed of to the exclusion of others.[221] Alternatively, gametes might be regarded as part of one's personhood, and regard embryos as full persons. In that case there is reason for greater restrictions being placed on how reproductive material is used to ensure respect for the "special significance" of gametes and embryos.[222] This

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[220] AR Schiff 'Arising from the Dead: Challenges of Posthumous Procreation' (1997*) North Carolina Law Review* 908.

[221] Schiff op cit note 220 at 914.

[222] Ibid.

is of relevance to MAR, because, historically, reproductive material could easily be classified as part of your body by virtue of gametes and embryos being unable to survive for very long outside of the body. However, now they can exist outside the body for extended periods of time and can be transferred to others and used by persons other than the individual from whom they originate – for reproductive purposes.

Schiff, in his analysis of how the nature of the human reproductive material in the case of MAR has been debated, identifies three major ethical positions that emerge in debates about the status of the human embryo.[223] The first view is that embryos are persons from the moment of conception, and, as such, are deserving of the full respect given to all human beings.[224] This view is used as a basis to argue against any practices that are perceived as harming the embryo and to support embryos that have been created for reproductive purposes being implanted.[225] This view has been challenged by those who perceive human personhood as beginning at birth and who argue that embryos do not contain the characteristics that are necessary for a human being to have legal recognition.[226] The second view on the status of embryos is one in which they are regarded as property – ergo their owners have sole rights as to their disposition.[227] This view is criticised for not recognising that unlike other human tissue that is often treated in this manner, an embryo deserves greater respect because of its potential for life.[228]

In-between these two diametrically opposed views is a third, intermediate position, in terms of which embryos are seen as more than human tissue but at the same time not as a person.[229] In terms of this view, while not considered

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[223] Schiff op cit note 220 at 917.

[224] Ibid.

[225] Ibid.

[226] Ibid.

[227] Schiff op cit note 220 at 918.

[228] Ibid.

[229] Ibid.

as having a claim to the same entitlements as a person, the embryo is regarded as being entitled to special respect due to its potential to become a person, and it has powerful symbolic meaning. As such, those who have created embryos have an ownership interest in embryos; however, this authority is limited within the scope set by the law.[230] In Schiff's view, the case law in the US affirms the concept of embryos as this intermediate class of property and this can be extended to gametes, and further opines that while gametes are properly characterised as property rather than as persons, they are distinguishable from ordinary property because of the close relationship they bear with the personhood of the gamete provider.[231] Due to their life-carrying potential and the fact that they carry non-replicable characteristics, he states that gametes are to be regarded as intrinsically and vitally connected to the personhood of the person from whom they originate.[232]

4.2 Do the Dead Have Rights?

The response to this question from most persons with a legal training would likely be to reject the idea that the dead have rights;[233] however, upon closer inspection, this matter is not as clear-cut as it seems. There are legal rules that suggest that the dead do not have legal rights. For instance it is common to find in various state laws that the dead cannot marry, divorce, or vote.[234] Conversely, other legal rules seem to indicate that the dead have rights, because they call for the deceased's rights to be respected even after they die – such as how testamentary distributions may be dictated by wills, the honouring of burial requests, and organ donation designations.[235]

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[230] Ibid.

[231] Schiff op cit note 220 at 921.

[232] Ibid.

[233] See, for example, Katz op cit note 11 at 300.

[234] KR Smolensky 'Rights of the Dead' (2009) 37 *Hofstra Law Review* 763.

[235] Ibid.

At this point it is important to clarify that when we speak of the dead having rights, this is not a reference to dead bodies as being regarded as legal subjects. Rather, the dead having rights refers to legal subjectivity not terminating with death, and the rights a person had while living have legal force even after they are dead.[236] Smolensky points out that, in concluding whether rights survive death, one must consider what rights are and whether the end of one's life is also fatal to a person's capacity as a legal subject.[237]

Proponents of posthumous rights favour the Interest Theory of rights, as this theory best accommodates the concept.[238] The Interest Theory, as propounded by Joseph Raz, reasons that a legal right comes into existence where an individual holds a sufficiently strong or important interest that it is justifiable that the said interest imposes a duty on another person.[239] Interest Theory prescribes that legal subjectivity is based on whether or not the individual has interests, even if he cannot express them.[240] Arguments for the existence of posthumous rights are usually based on two points: the first is that, deriving from Interest Theory, some interests may survive death and these interests are those that are legally protected in the form of rights, and secondly that the law commonly already recognises that individuals are free to make decisions while alive as to certain posthumous events such as what happens to their property or their bodies after death.

Feinberg, one of the main proponents of the concept of posthumous interests, suggests that some of a man's interests survive death, "just as some of the debts and claims of his estate", and, accordingly, we can think of a person as

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[236] H Young 'The Right to Posthumous Bodily Integrity and Implications of Whose Right it is' (2013) 14 *Marquette Elder's Advisor* 203.

[237] Smolensky op cit note 234 at 768.

[238] See, generally, J Feinberg *Harm to others* (1984) 18 *Oxford University Press* 18-66 or FH Cate 'Posthumous Autonomy Revisited' (1994) 69(4) *Indiana Law Journal* 1067-1073.

[239] Kruuse op cit note 8 at 544.

[240] Smolensky op cit note 234 at 770.

harmed by posthumous events.[241] This is based on the idea that not all interests are conditioned upon subjective experience, and one may have an interest in knowing a particular event will happen – even if that event occurs after death.

The concept of posthumous interests is often used to support the need for explicit prior consent for PR by the deceased, and the objection to consent being presumed because it may be inconsistent with the deceased's wishes.[242] The reasoning behind this, as described by Bahadur, is that certain acts committed after a person's death can harm or promote a person's interests.[243] Without a person having consented to PR, it deprives an individual of the opportunity to be the conclusive author of a highly significant chapter of his life. Therefore, Bahadur submits that only if there is clear evidence of a desire to reproduce posthumously, is PR respectful to the deceased's posthumous interests.[244] In supporting these claims it is stated that:

> "By honouring the decedent's wishes, even to the detriment of living persons, the law is respecting the ability of people to make autonomous decisions that extend beyond the grave. In recognising these interests and giving the estate claim rights, privileges, powers and immunities, the law [i]s recognising that the dead have legal rights."[245]

Without seeking to accept or reject the idea of posthumous interests, I suggest that the existence of posthumous interests does not necessarily lead to the conclusion that the dead retain the rights they had while living. There are reasons to believe that they do not – including the practical implications of this concept. Any argument in favour of posthumous rights must account for the

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[241] Feinberg op cit note 19 at 83.

[242] See, for example, Landau op cit note 156 at 1953, who objects to the presumption of consent in Israel, because consent to PR is an essential element of freedom of choice.

[243] Bahadur op cit note 7 at 2773.

[244] Bahadur op cit note 7 at 2773.

[245] Smolensky op cit note 234 at 799

challenge that, even if one might say rights can survive death, there are some rights that clearly are not appropriate to apply to the dead.[246] And if we say some rights survive death and some do not – how do we determine the ones that do?

Smolensky, who argues in favour of posthumous rights as the basis of PR, in analysing how the wishes of the deceased have been given legal recognition in the USA, states that this turns on whether a record exists of the particular interest in question – as only interests capable of being known by the living, left behind by the deceased, are capable of being protected by law.[247] While this would account for things such as wills and organ designations, as well as accommodating reproductive autonomy as surviving death – if there exists a record of the deceased's wishes – it would raise the question of whether other rights such as the right to vote or marry ought to survive as well. The deceased are not generally regarded as being capable of voting or marrying, even if they left a written record of their desire to do so.[248] The reason for this is because of the absence of a legal subject to exercise the rights in question. Once we die, we are incapable of going to cast a ballot or attending a wedding ceremony, but the same can be said about exercising reproductive autonomy. And, as such, if we do not give legal recognition to a written record on how one would like to vote or one's desire to be married, based on posthumous rights, then it should follow that we do not give legal recognition to a deceased's wishes to reproduce after death on the basis of posthumous rights.[249]

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[246] The most obvious example of this would be the right to life, and other instances would be any of the socio-economic rights.

[247] Smolensky op cit note 234 at 772. Smolensky's analysis looks at the legal recognition of the deceased's wishes in American case law.

[248] While this is generally the case, there are exceptions - for example France allows deceased persons to get married. See, Smolensky op cit note 234 at 763.

[249] Smolensky op cit note 234 at 778, refers to this as the limitation of impossibility, and recognises that in the USA not all constitutional rights survive death, including the right to vote. However, she can find no clear reason for this distinction beyond that there might be some objections by the living to doing so, stating "If the law honours other pre-mortem preferences after death, then perhaps it should also honour a decedent's voting preferences as well".

One possible response to why certain rights might survive death, would be that human rights only survive death insofar as they protect a person's right to make decisions regarding things he or she owned or had a similar proprietary interest in. In these terms, your will is honoured, because your right to own and control property survives death and your decisions regarding what happens to your body (including your organs and your reproductive material) ought to be honoured – because your right to bodily integrity survives death. This would resolve the issues relating to why some rights survive death and others do not, but this argument does not respond to all the pertinent issues. Other issues related to posthumous rights include whether posthumous rights are to be treated the same as the rights of the living, and, if not, on what basis,[250] and what is to happen when the rights of the living conflict with those of the dead.[251]

Clearly there are challenges to conceptualising the deceased as having rights in the sense that we perceive the living to have rights. These challenges to the legal recognition of the deceased's wishes may be resolved by acknowledging that while the deceased's wishes do have certain legal recognition in law, this does not stem from the ongoing legal subjectivity of the deceased.

4.3 An Alternative to Posthumous Rights: Social Utility

The notion that rules respecting the deceased's wishes give support to the concept of posthumous rights, is based on the assumption that the primary reason why lawmakers might recognise the wishes of deceased persons as

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[250] Smolensky op cit note 234 at 781 qualifies posthumous rights as being treated as less significant than the rights of the living, because the limitation of posthumous rights is a less significant harm than the limitations of the rights of the living. Why such a distinction would exist is unclear, since all human rights ought to be given equal significance. Amongst the living we do not value respect for human rights based on which legal subjects would be most harmed by not having their rights respected.

[251] In her analysis, Smolensky op cit note 234 at 791 observes that in the US if there is a conflict of interest between the living and the those of the living only take precedence where the living are suffering great hardship, or the granting of posthumous rights seems extraordinarily wasteful.

worthy of being given legal protection, is that the dead have an ongoing interest in their bodies and property being treated with respect for their dignity and in accordance with their autonomy. Slabbert argues that there are at least two other reasons lawmakers might potentially recognise the wishes of the deceased. The first is that living people care about what happens to their bodies after death and the state may want to give them confidence that their wishes will be respected after death; and the second is that the society within which one lives wishes to see itself as a society that treats the dead with respect, and this desire is of sufficient import that it has been given effect to in law.[252] These two reasons form the foundation for the idea that the wishes of the dead are honoured through legal rules, not because the law seeks to protect the interests of the deceased but rather the interests of society and the state - and this is the concept of social utility.

Robertson recognises that the wishes of the deceased are given legal recognition, and in places such as the US are even constitutionally protected. However, in justifying why this is the case, Robertson states that this is done because they serve socially important purposes rather than being an instance of rights surviving death: "[W]ills provide incentives to work and acquire property ... [and] enable one to care for family and relatives".[253] As such, under the concept of social utility the wishes of the dead are honoured because there are significant goals of social importance served by doing so. This illustrates the social utility of giving legal protection to things like the wishes of the of the dead, but this is always subject to the limitation that it does not directly harm or infringe the rights of the living or have some significant negative impact on society based on societal values or state interests. Robertson takes the view that social utility does not provide a basis for PR since, unlike in the case of wills, "[s]ocial goals of equivalent importance are not present in directions for posthumous reproduction".[254] It is submitted that

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[252] M Slabbert 'Burial or Cremation - Who Decides?' (2016) *De Jure* 200.

[253] Robertson op cit note 167 at 1033.

[254] Ibid.

this is not necessarily the case, and on the reasons put forward by Slabbert the state might permit directives for PR in order to give people, while alive, confidence that their wishes will be respected after death or society might perceive it is consistent with the respectful treatment of the dead, because it is giving effect to the deceased's wishes regarding his or her reproductive material as part of his or her body.

Cate finds the idea of social utility accounting for legal rules that give respect to the wishes of the deceased unconvincing. In his view the fact that these laws often allow things like testamentary provisions that are not rational nor socially constructive, indicates that the focus of these legal rules is the autonomy of the now-deceased, expressed while alive.[255] In rejecting social utility he refers to organ donation, where common legal rules insist on the deceased's consent for his organs to be harvested after death. As Cate sees it, if laws relating to the dead are based on the benefit to surviving persons, how is it then that we as a society, "tolerate the burying every year of the very organs and tissues that could save the lives of thousands of identified people on the transplant waiting lists".[256] On this account, society ostensibly gives significant weight to the individual's autonomy, even after death, and this indicates that autonomy is a right that survives death.

I suggest that objections such as these do not indicate that the deceased are bearers of rights and can be accounted for on the basis that respect for the dead is something socially regarded as being very important, and, as such, a significant amount of value is placed on this by law makers. To illustrate this, one can consider legal rules that protect dead human bodies. These may be justified on the basis that the dead enjoy some form of bodily integrity – as some who object to PGR do.[257] However, as Young points out, the fact that corpses are legally protected does not mean that corpses have legal rights any more than the fact that heritage buildings are legally protected means that

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[255] Cate op cit note 238 at 1071.

[256] Cate op cit note 238 at 1072.

[257] See, Katz op cit note 238 at 300.

those buildings have legal rights.[258] The same could be said of the deceased's wishes. The fact that we protect them does not mean we regard the dead as having rights. Under the concept of social utility, we give legal recognition to the deceased's wishes, not because there is a posthumous right in property, for example, but because the interests of the living in what happens to their assets is highly significant, and providing for the distribution of property through wills provides for an orderly system of dealing with assets of deceased persons, while also allowing living persons the security of knowing that their wishes will be respected.

4.4 Approaches to Posthumous Reproduction: Posthumous Rights vs Social Utility

PR raises multiple issues regarding our relationship with our reproductive material and how our entitlement to control our reproductive material is affected by death, and there are no simple answers to these questions. The significant debate over ethical and legal issues relating to PR is reflected in the myriad of different approaches taken by states that address PR, as is indicated in Chapter 2. This dissension is reflected even among states that permit some or all PR procedure. However, certain common approaches can be identified based on the way a state views the dead, the significance of their wishes and what the best way to respect them may be. In outlining the various ethical positions that inform policy on PR in jurisdictions that are permissive of it, three approaches are described by Katz: the Permissive Approach, the Restrictive Approach and the Hybrid Approach. While Katz categorises these approaches in the context of PGR, it is suggested that they are reflected when one looks at PR as a whole.

Proponents of restrictive legislation or standards regarding PR frame their arguments in support of PR in terms of individual autonomy and procreative

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[258] Young op cit note 236 at 206.

liberty; however, they also express concern over the respectful treatment of the deceased's body.[259] Under the restrictive view, PR is permissible but all procedures relating to the deceased's own body (including their reproductive material) are subject to consent having been obtained from the deceased before their death.[260] This view is supported by the concept of posthumous rights, as such respect for the autonomy and bodily integrity of the deceased is regarded as the most important consideration in deciding whether PR is permissible.

With the Permissive Approach, respect for the dead is argued to be best served by allowing PR, thereby satisfying the deceased's interests in parenthood, which he or she was unable to fulfil while alive, and based on a general desire deemed to be held by individuals to have children.[261] Ergo, PR ought to be allowed whenever a request is made, unless the deceased explicitly refused PR or there is no meaningful evidence that the deceased desired to be a parent.[262] This approach defends arguments about the reproductive autonomy of the deceased not being respected, with the retort that a mere lack of contemplation by the deceased of a particular use of his or her body or gametes is not a necessary nor sufficient condition for the disrespectful use of the deceased's body.[263] In other words, the deceased's body is not disrespected nor are his or her wishes thwarted, because there no consent was given for the PR procedure. Under the permissive approach consent is not required for PR and may even be presumed. This approach is supported by the concept of social utility in honouring the deceased's wishes, and, as such, the main consideration is not the deceased's 'rights', but whether PR is consistent with the social value of the respectful treatment of the dead.

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[259] Katz op cit note 11 at 301.

[260] Katz opt cit note 11 at 302.

[261] Ibid.

[262] Katz op cit note 11 at 303

[263] Katz op cit note 11 at 304

The Hybrid Approach takes a stance between the two approaches above, as it relates to how best to respect the wishes of the now-deceased individual. Under this approach, some affirmative proof or evidence of the deceased's wish to procreate after death for PR is to be allowed, in the form of the reasonably informed consent of the deceased.[264] As such, consent by the deceased may be proven in court and need not be in writing. It is suggested that this approach may also be supported by social utility, albeit it gives greater weight to the need for consent in giving respect for the deceased's wishes than the Permissive Approach.

Evidently, the legal status of PR will depend on the particular approach taken by a state regarding reproductive material and whether individuals have a say in what happens to it after death. In order to determine where South Africa falls in this debate, consideration must be given to the existing legal framework regarding reproductive material and how rights are affected by death in our law.

4.5 The Law Relating to Posthumous Reproduction in South Africa

Reproductive material in South Africa is provided for primarily in Chapter 8 of the National Health Act (NHA),[265] as well as in related regulations including the Regulations Relating to Artificial Fertilization of Persons (RRAFP).[266] In Chapter 8 – entitled "Control of Use of Blood, Blood Products, Tissue and Gametes in Humans" – the NHA places strict controls on the procedures relating to the removal of reproductive material from living persons. For instance, only specified persons may remove sperm from a man for the purposes of MAR, and the sperm must be stored in a frozen state or

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[264] Ibid.

[265] National Health Act op cit note 29.

[266] GN 175 of GG35099, 2/3/2012.

cryopreserved immediately upon removal,[267] while sperm removal must be done with the written consent of the man it is being removed from.[268]

Whether the NHA and its regulations apply to PR, particularly PGR, is however unclear. In terms of section 56(1) of the NHA: "A person may use tissue or gametes removed or blood or a blood product withdrawn from a living person only for such medical or dental purposes as may be prescribed." Van Niekerk interprets this section as excluding PGR, because it indicates only the gametes of *living* persons can be used.[269] In my view the unlawfulness of PGR cannot be inferred merely because the provisions of the NHA and its regulations specifically refer to gamete removal from living persons, and not the dead. This interpretation, I suggest, misconstrues this provision as stating that *only* gametes removed from the living can be used when, instead, on a plain reading, section 56(1) prescribes *how* gametes removed from living persons may be used. The interpretation for which I argue is reinforced by regulation 2 of the RRAFP, which states that "These regulations only apply to the withdrawal of gametes from and for use in living persons." What this indicates is that the current law in South Africa only addresses gamete removal from the living, and there is a lacuna in the law as it pertains to gamete withdrawal from the dead. If it is true that by virtue of being omitted from the terms of section 56(1), PGR is unlawful, it would follow that all PR is unlawful by virtue of omission from the terms of the NHA. In my view, this conclusion is incorrect, and this work shall proceed on this basis.

Regulation 10 of the RRAFP also potentially excludes PGR in that it stipulates that no gamete, "that has not been imported, removed or withdrawn in terms of the provisions of the [National Health Act] or these regulations … may be used for artificial fertilisation". This provision could be interpreted as excluding gamete removal, since none of the provisions in the NHA provide for it specifically. I suggest that the proper interpretation of this regulation requires

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[267] Regulations Relating to Artificial Fertilisation of Persons regulation 3.

[268] National Health Act section 55(a).

[269] Van Niekerk op cit note 172 at 19.

that it be read with regulation 2, which provides that the RRAFP "only apply to the withdrawal of gametes from and for use in living persons." Thus, the exclusion of the use of gametes contemplated in regulation 10, is limited to excluding the use of gametes withdrawn from *living* persons for reproductive purposes, where this was not done in accordance with the NHA and the RRAFP. As such, this provision could be reformulated as saying "no gamete withdrawn from living persons may be used for artificial fertilization if it was not so withdrawn in terms of the National Health Act and its Regulations". When interpreted in this way, regulation 10 can be seen to compel compliance with the standards set by the RRAFP and the NHA, in prohibiting the use of gametes for MAR, where they were not withdrawn by a specified person, at a specified institution, with the written consent of the gamete provider, and in accordance with all the prescribed conditions. It is suggested that this was the purpose the legislature sought to achieve here, and not the exclusion of PGR, which was likely not contemplated in the drafting of this provision.

4.6 The Legal Status of Reproductive Material

MAR is directly addressed in the RRAFP, which regulates the use of both artificial fertilisation and embryo transfer technologies.[270] The RRAFP addresses artificial fertilisation in regulation 2. However, it does so only in relation to the removal of gametes from living persons as discussed above, and the law is silent on the removal of gametes from deceased persons. Persons from whom gametes are removed are referred to as "gamete donors" under the RRAFP,[271] and the regulations provide for two categories of gamete donor: general donors, who are generally persons who have their gametes

[270] Artificial fertilisation in the regulations is defined as "the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of a female person for the purpose of human reproduction and includes artificial insemination, in vitro fertilisation, gamete intrafallopian tube transfer, embryo intrafallopian transfer or intracytoplasmic sperm injection" and embryo transfer is defined as "the placing of the embryo into the uterus or fallopian tube of the recipient."

[271] Regulation 1 provides that gamete donors are "a living person from whose body a gamete or gametes are removed or withdrawn, for the purpose of artificial fertilisation".

removed and stored at an authorised institution (such as a sperm or egg bank) for the purposes of acting as an anonymous donor for the artificial fertilisation of persons unknown to them;[272] and spousal donors, who are persons who have their gametes removed for the purposes of engaging in artificial reproduction with their partner. Whether one is a general donor or a spousal donor has an impact on the legal relationship between that person and their reproductive material once it is removed.

In terms of the RRAFP, reproductive material is capable of being owned by both natural and juristic persons. In the case of a male general donor, before gametes have been removed and received by an authorised institution, they are owned by the general donor.[273] After the gametes have been received, but before artificial fertilisation occurs, ownership vests in the authorised institution.[274] With a female general donor, prior to artificial fertilisation both before and after removal and receipt by an authorised institution, she is the owner of the gametes.[275] In the case of a male spousal donor, the ownership of the husband's gametes vests in him both before and after they have been withdrawn and received by the authorised institution.[276] As with female general donors, female spousal donors are the owners of gametes removed from them both before and after removal and receipt by an authorised institution.[277]As for embryos, the RRAFP provide that once conception occurs via artificial insemination, ownership of the resultant embryo vests in the

[272] The identity of general donors is usually kept a secret, as authorised persons are prohibited from disclosing their particulars, except pursuant to a court order or where some other law provides otherwise, see, Regulations Relating to Artificial Fertilisation of Persons regulation 19.

[273] Regulations Relating to Artificial Fertilisation of Persons regulation 18(1)(a)(i).

[274] Regulations Relating to Artificial Fertilisation of Persons regulation 18(1)(a)(ii).

[275] Regulations Relating to Artificial Fertilisation of Persons regulation 18(1)(a)(i).

[276] Regulations Relating to Artificial Fertilisation of Persons regulation 18(1)(b).

[277] Regulations Relating to Artificial Fertilisation of Persons regulation 18(1)(c).

woman in whose reproductive organs the embryo is to be transferred, who is referred to as the intended recipient.[278]

In order to better illustrate the impact of these regulations, they shall be applied to the factual scenario in *Aevitas*, with modifications where necessary. In this scenario, where a married couple undergoes the process of using MAR to have children, the provisions relating to spousal donors will apply. As such, where MC had his sperm stored for future use at Aevitas Fertility Clinic, up until his death he would have been the owner of the cryopreserved sperm. Had the roles been reversed and NC had been the one who had stored her eggs, up until her death she too would have been the owner. If NC and MC were not a married couple, then the provisions as to general donors would apply, in which case Aevitas Fertility Clinic would have been the owners of MC's sperm. However, if it was NC who had donated her eggs, then she would retain ownership over them. From this, it seems that the RRAFP only intended for married couples to be able to donate sperm for the purposes of undergoing MAR with their partner.

In the case of embryos, had MC and NC planned at the time of the removal of his sperm, to have NC be the person who would carry the child, then she would have had ownership over the embryo. If, however, at the time of artificial fertilisation they intended to use a surrogate, then the surrogate mother would seemingly be the owner of the embryo. While the RRAFP provide for how ownership in relation to reproductive material operates in some instances, the ownership regime prescribed in the RRAFP has been described as being "incomplete" for failing to address important questions relating to PR, including what becomes of reproductive material when the person who owns it dies.[279] As such, it is necessary to investigate further the nature of ownership rights

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[278] Regulations Relating to Artificial Fertilisation of Persons regulation 18(2).

[279] A Martin 'Embryo and Gamete Disposition – Who Owns My Embryos and Gametes and What Happens to Them Should Something Happen to Me?' 17 February 2018. Available at https://ifaasa.co.za/newsletter/embryo-and-gamete-disposition-who-owns-my-embryos-and-gametes-and-what-happens-to-them-should-something-happen-t0-me (accessed on 17 August 2018)

and how they ought to apply to reproductive material within the limitations placed on that ownership within the extant law.

4.7 What it Means to Own Reproductive Material

The fact that reproductive material is regarded as owned, implies that gametes and embryos are property. The ownership envisioned in the RRAFP is, however, significantly restricted. Ownership is defined as the most complete real right, and it gives the owner the most complete and absolute entitlements toward a thing.[280] This liberty is protected in section 25(1) of the Constitution, which provides that "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." As such, persons who own property are generally free to use it as they wish, free of state interference, except where this is a well justified. This level of freedom does not however appear to exist in relation to the authority an individual has over their reproductive material. In terms of the NHA, the use of gametes is limited to it being for "only for such medical or dental purposes as may be prescribed" in section 56(1).[281]

In discussing the scope of section 56(1) in controlling the use of reproductive material, Jordaan points out that the common law rules for statutory interpretation require that the most beneficial interpretation of a law be preferred, and a restrictive interpretation of this section is beneficial as the court has stated that legislative provisions that are ambiguous should be given a meaning that least interferes with individual liberty.[282] This is reinforced by the fact that to interpret it otherwise creates the potential that it may infringe on

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[280] S Mahomed, M Nöthling-Slabbert, MS Pepper 'The Legal Position on the Classification of Human Tissue in South Africa: Can Tissues Be Owned?' (2013) 6(1) *SAJBL* 4.

[281] National Health Act section 56(1).

[282] DW Jordaan 'The Boy and His Microscope: Interpreting Section 56(1) of the National Health Act' (2009) 2(1) *SAJBL* 14. In supporting this point, Jordaan refers to *Rossouw v. Sachs* 1964 2 SA 551 (A) where the court stated at 562D "If a statute is couched in ambiguous language, the court will give it the meaning which least interferes with the liberty of the individual". This principle was endorsed by the Supreme Court of Appeal in *Moodley v Umzinto North Town Board* 1998 (2) SA 188 (SCA) at 194D.

constitutionally protected rights such as privacy in an unjustified manner.[283] Respect for constitutionally protected rights mandates that where ambiguity in a statute exists, if that provision is capable of being interpreted in a way that does not infringe on liberty, such an interpretation is to be preferred.

Ownership grants the legal subject certain entitlements in relation to a thing, including the freedom to control, use, encumber, alienate, transfer and vindicate their property.[284] In light of the various rights contained in procreative liberty at stake, I submit that section 56(1), and any other provision in the NHA and its regulations, should not be interpreted as limiting ownership rights in reproductive material – unless such an outcome is clearly and explicitly the intention of the legislature. Since the use of reproductive material for reproductive purposes is clearly limited, in order to ascertain to what extent – if any – this may be done posthumously, I will now look to how the law generally controls how a person may choose to control what happens to his body and property after death.

4.8 Honouring the Wishes of the Deceased

South African law gives recognition to the wishes of the deceased by giving effect to the right to freedom of testation, as long as the provisions of a person's will are not, inter alia, contra bonos mores – i.e. against good morals.[285] This stems from common law jurisprudence. Common law writers were unanimous in supporting giving legal recognition to the deceased's wishes as expressed in a will.[286] The current governing statute on wills is the Wills Act,[287] which reflects the high premium that South African law places on

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[283] Jordaan op cit note 282 at 15.

[284] Mahomed et al op cit note 280 at 5.

[285] Slabbert op cit note 252 at 232.

[286] Ibid.

[287] Act 7 of 1953.

freedom of testation.[288] While there are strict criteria on how one makes a will, "its contents are left mainly to the discretion of the individual testator".[289] De Waal and Schoeman-Malan argue that section 25(1) of the Constitution guarantees and supports freedom of testation,[290] and this approach was accepted in *Minister of Education v Syfrets Trust Ltd.*[291] If freedom of testation applies to reproductive material, this would be a strong basis for arguing in favour of the honouring a deceased person's request for PR.

Under section 62 of the NHA, one who is competent to make a will is empowered to donate his or her body and tissue through his or her will.[292] This can also be done through a written, signed and witnessed document or an oral statement made in the presence of witnesses.[293] In terms of the NHA, one can donate bodies, tissues, blood, blood products or gametes – but only to prescribed institutions or persons and only for the purposes prescribed in the NHA.[294] These include: the training of students in the health sciences, health research, the advancement of health sciences or therapeutic purposes including use in a living person or the production of a therapeutic, diagnostic or prophylactic substance.[295] This implies that after death, the human body and its components are property and can be treated in much the same way as other property. However, there are some limitations to this and one's freedom of testation is limited only to circumstances where the body will be used in a manner that is beneficial to society. This affirms the existence of a "special

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[288] MJ De Waal and MC Schoeman-Malan *Law of Succession* 4 ed (2008) 4.

[289] De Waal and Schoeman-Malan op cit note 288 at 4.

[290] De Waal and Schoeman-Malan op cit note 288 at 5.

[291] 2006 (4) SA 205 (c) para 18 as cited in De Waal and Schoeman-Malan op cit note 288 at 5.

[292] National Health Act section 62(1)(a) provides "A person who is competent to make a will may –

(i) in the will; …donate his or her body or any specified tissue thereof to be used after his or her death".

[293] National Health Act section 62(1)(a)(ii) and (iii).

[294] National Health Act section 63.

[295] National Health Act section 64(1).

status" of property rights in dead bodies in South African law, similar to the English common law view which does not recognise property rights in dead bodies as property to be owned – but rather as property to be taken care of.[296]

If reproductive material is to be regarded in the same way as the human body and its components, it follows that freedom of testation includes the right of an individual to provide for what happens to their reproductive material after death in their will. In this sense, section 25 of the Constitution would protect a person's desire to reproduce posthumously. This could potentially be facilitated through section 62 posthumous donations, but this seemingly does not apply to gametes and embryos. This is because the section refers to the donation of one's "body or any specified tissue", and the definition of tissue in the NHA specifically excludes gametes.[297] One could, however, argue that the provision indirectly does allow for the removal of gametes after death. It stands to reason that if you can donate your whole body under section 62, this would include the donation of your gametes as they are still part of your body at death. The authorised institution or person to whom you donated your body would arguably be entitled to extract your gametes for the purpose of them being used in a living person in terms of section 64(1)(d), in order to facilitate artificial fertilisation. While such an interpretation would allow for the application of this provision to PR, it does seem at odds with the purpose of the provision. As it stands, it would appear that it was specifically intended that section 62 of the NHA does not apply to the donation of reproductive material after one dies.

This is, however, not fatal to the argument that reproductive material may be donated after death in one's will. While section 62 is apparently based on the application of the right of freedom of testation to the body and some of its components, it is not exhaustive of this right. Put differently, section 62 is simply a mechanism put in place to regulate only the donation of the body and specified tissue thereof and therefore not reproductive material, but one still

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[296] Slabbert op cit note 252 at 232.

[297] In terms of section 1 of the National Health Act tissue means human tissue, and includes flesh, bone, a gland, an organ, skin, bone marrow or body fluid, but excludes blood or a gamete.

has a right of freedom of testation over reproductive material which may be exercised through the ordinary mechanisms of freedom of testation. This is based on a restrictive interpretation of the scope of section 62, which gives expression to the principle established in the preceding section that legislative provisions are not to be interpreted as interfering with ownership rights in relation to reproductive material – unless it is clear the legislature intended to do so. It is submitted that the exclusion of reproductive material from the mechanisms of posthumous donation in section 62, is not such a clear indication of a desire to exclude reproductive material from being donated posthumously

Beyond testamentary provisions relating to property, there are also specific provisions in the law that allow for one to dictate what happens to one's body after death. The Regulations Relating to the Use of Human Biological Material[298] provide for the removal of human tissue from deceased persons, but prescribes that this must be done with the consent of the deceased.[299] If the deceased did not give consent, removal may still be done, but consent must be obtained from a member of the deceased's family – with the caveat that this can only occur "where there is no evidence that the removal of the tissue or cells would be contrary to a direction given by the deceased before his or her death".[300] These regulations give effect to section 62 (ii) and (iii) of the NHA alluded to above – the other methods besides wills through which an individual can donate their bodies and specified tissues thereof. Substantially the same requirements relating to obtaining consent for use of a corpse apply

[298] GN 177 of GG 35099, 2/3/2012.

[299] Regulations Relating to the Use of Human Biological Material regulation 3(1), read with regulation 4(1).

[300] These regulations, as with the NHA, impose a hierarchy of persons who may give consent on behalf of the deceased. At the top of the hierarchy is the deceased's spouse or partner, followed by their major child, parent, guardian, major brother or major sister in that order. The implications of this hierarchical structure is that giving consent is not a communal decision, but rather all power to give or withhold consent is given to the person to whom making that decision vests. As such, if an individual higher up on the hierarchy gives consent, those below them cannot object and vice versa.

to post-mortem examinations.[301] In all cases, where there is no consent or a contrary directive and all reasonable steps have been taken to contact surviving family members, application may be made to the Director General to authorise use of that body or authorise removal of body tissue. With specific reference to tissue, the Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes,[302] provide that after death, the donee may collect the tissue that has been donated to them within 24 hours – failing which the family is entitled to claim the body for burial.[303]

Certain common factors can be identified in all these cases. First, the role of the deceased's consent is central to all uses of his or her corpse or the parts thereof. It is only if no particular preference has been expressed that the law then looks to surviving family – and eventually to the Director General if no family can be located. Proponents of posthumous rights would argue that this is an instance of South African law giving recognition to the surviving rights of autonomy and dignity of the deceased. This, however, is countered by the fact that the posthumous use of bodies or their parts is restricted to instances where there is some clear benefit to society, whether it be to allow a dying person to save another person's life with their organs, to facilitate the advancement of scientific research, or to promote medical education. This would indicate that the focal point is not the ongoing right to autonomy of the deceased, but rather the facilitation of a process by which the living can benefit from the dead – an approach that is in line with social utility. The central focus on social utility in relation to respect of the deceased's wishes in our law, can better be observed when one assesses how the law as a whole regards corpses, and how legal rules relating to the dead are primarily concerned with the conduct of the living.

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[301] National Health Act section 66.

[302] GN 180 of GG 35099, 2/3/2012.

[303] Regulations 8(1) and 8(2). The regulations are unclear on whether, if the body is unclaimed by this point whether a donee is still entitled to remove tissue donated to them. I submit this is permissible, as it seems the point of this provision was to prevent families from being unreasonably delayed in burying the deceased because the donee delays in removing the tissue donated to them.

4.9 The 'Rights' of the Dead in South African Law

South African law grants certain legal protections to deceased bodies through various means – including the common law crimes of violation of a dead body and violation of a grave.[304] The former is of direct relevance to PR, specifically PGR, which has been criticised as being contrary to the respectful treatment of a deceased person's body.[305] The crime of violating a corpse is defined as the unlawful and intentional violation of a dead human body, but what constitutes a violation has historically not been well defined by authorities.[306] Dutch legal writers describe the violation of a corpse as entailing some interference with or indignity towards a dead body, and from the case law it is apparent that "violation" includes the cutting or otherwise dismembering of a corpse, as well as using a corpse for any acts that can be seen as indecent.[307]

The crime of violating a corpse was recognised as part of modern South African law in 1993, in *S v Coetzee*[308] – but dates as far back as 1918 with the case of *R v Kunene and Mazibuko*,[309] where the accused was convicted of violating a dead body by removing part of a corpse for use in medicine.[310] The criminalisation of this act has been justified broadly on the basis of there being some societal benefit in treating dead bodies with respect.[311] Christison and

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[304] A Christinson, S Hoctor 'Criminalisation of the Violation of a Grave and the Violation of a Dead Body' (2007) *Obiter* 23. The influence of these common law crimes has resulted in the statutory prohibition of certain acts in relation to corpses, such as section 14 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 which prohibits sexual acts with a corpse.

[305] RD Orr and M Siegler 'Is Posthumous Sperm Retrieval Ethically Permissible? (2002) 28 *Journal of Medical Ethics* 300.

[306] Christinson and Hoctor op cit note 304 at 23.

[307] Christinson and Hoctor op cit note 304 at 23.

[308] 1993 (2) SACR 191 (T) as cited in Christinson and Hoctor op cit note 304 at 23.

[309] 1918 JS 321 (NNHC) as cited in Christinson and Hoctor op cit note 304 at 33.

[310] Christinson and Hoctor op cit note 304 at 33.

[311] The public interest dimension of the crime of violating a corpse is mentioned in the Digest by the jurist Macer, as quoted in Christinson and Hocter op cit note 304 at 27, where he states, "The offence of violating a tomb can be said to come under the lex Julia de vi publica (law against public disorder)". This sentiment is echoed by Milton in 'South African Criminal Law and Procedure' (1982) 2 ed 283 also quoted in Christinson and Hoctor who remarks that, "The

Hoctor submit that the basis of these crimes is not the rights of the dead per se, but rather support the view that, "the protected interest is the deep respect and value accorded to a person's life that survives beyond their death".[312] According to these authors, since the promulgation of the Constitution, implicit in the boni mores of society is the recognition that respect for the rights associated with individual autonomy survive death, particularly the rights to dignity and bodily integrity. In regard to the issue of dignity, the authors remark that:

> "Although a corpse has no legal personality in our law, to contend that protection of a person's dignity is extinguished by the mere fact of death is to diminish the content of the right, and to undermine the normative framework embodied in the Constitution. Although the dead are incapable of enforcing their right to dignity (and in a technical legal sense, of possessing it), it is submitted that society as a whole has an interest in the preservation of dead persons' dignity and the State a role as custodian of this right. Criminalising the act of violation of a corpse (or a grave, for that matter) can thus be justified on the basis of this need to recognise the possibility of injury to a deceased person's dignity."[313]

While I agree with Christinson and Hoctor's remarks relating to the reasoning behind laws protecting deceased bodies, it seems that the authors are inconsistent in their application of the understanding that the rights of the living are what are protected by these laws, and not the rights of the deceased. The fact that the deceased have no right to dignity was established in *Spendiff v East London Daily Dispatch, Ltd*[314] in which the court made it clear that no action exists on the basis of an injuria to the dignity of a deceased person under South African law, and found that any action for slanderous comments

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sanctity of human life and the respect for the dignity and integrity of the person compound to create a sense of respect for the bodily remains of dead persons".

[312] Christinson and Hoctor op cit note 304 at 34. This argument is based on the one progressed by a German writer, commenting on a similar law in that country, see Labuschagne 1991 *De Jure* 147-148: "Die beskermde regsgoed is die algemene piëteitsgevoel en die waardigheid van die mens wat na sy dood voortbestaan".

[313] Christinson and Hoctor op cit note 304 at 35.

[314] 1929 EDL 113.

against a dead person brought by a surviving family member would have to be based on the impugned comments having some measurable impact on them rather than the rights of the deceased.[315]

The *Spendiff* case arose from an action brought against the *Daily Dispatch* newspaper, because it published an article in which a certain deceased person was referred to as a convicted murderer who had been executed for crimes he had committed.[316] In truth, the deceased had been killed during violent strike action, and the article itself was a criticism of the fact that the labour party that had been protesting was now to pay money into a fund, through a compulsory levy on its members, for a "murderer's dependents".[317] The deceased's widow and children brought claims against the newspaper, claiming, inter alia, that the contents of the article not only defamed them, but that the words published about the deceased falsely and maliciously alleged that he had been convicted of murder and executed, and so his family had suffered injury to their honour, dignity and reputation by their publication.[318] In essence, the deceased's widow and children sought to claim damages on the basis that these comments infringed the dignity of the deceased. However, as the deceased could not bring an action personally, they sought to bring a claim on the grounds that because of their close relationship with the deceased, the defamatory statements against him were a defamation to them. The *Daily Dispatch* took exception to the declarations by the widow and children, mainly on the basis that, in relation to the comments regarding the deceased, no cause of action had been disclosed, since it was not them the comments made reference to, and further that the words used in their ordinary meaning were not defamatory.[319]

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[315] *Spendiff* supra 129.

[316] *Spendiff* supra 116.

[317] *Spendiff* supra 116.

[318] *Spendiff* supra 117.

[319] *Spendiff* supra 118.

In arguing that the comments made about the deceased were injurious to them, counsel for the deceased's widow and children placed reliance on certain passages relating to posthumous legal injuries by the Roman-Dutch jurist Voet, referred to in the textbook *Institute of Cape Law*, in which it was stated:

> "According to Voet, an action will even lie for injuries done to a deceased person, as where his corpse is wrongfully detained, or his funeral interrupted, or his grave desecrated, or where a libel is published of the deceased after his death, such action to be instituted by the executor or children, or heir, of the deceased. In the case of a posthumous libel, the children will be entitled to sue for the injury done to themselves through such libel".[320]

These claims by Voet would indicate that under Roman-Dutch law, it was possible to cause legal injuries to the dead – implying that they had some posthumous interests, and thus undignified acts to corpses or graves were an injury to the deceased person who somehow retained some measure of legal personality. And it was the executor of his estate, his children or heirs who could sue for these injuries, and in the particular case of defamatory statements regarding deceased persons, that person's children could also bring a claim for the injury to their own personality rights which occurred as a consequence of their father or mother being libelled. Again, the implication here is that it is possible to defame a deceased person, because the deceased retains some interest in his reputation. Voet also makes similar comments to the effect that wives may have a claim for defamation for spurious publications made about their deceased husbands. This is in as far as such publications also make reference to the wife or their marriage relationship, differentiating this from the rule established in precedent that a widow had no cause of action where persons had committed an injury against her husband after his death.[321]

In his judgment, Van Der Riet J considered the comments by Voet in context and concluded that Voet's comments were not a true reflection of the Roman-Dutch law position. In relation to the claim of children for posthumous

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[320] Maarsdop in Institute of Cape Law vol.4 as quoted in *Spendiff* supra 120.

[321] *Spendiff* supra 124.

libel, the court noted that there is little in the authorities to support the contentions by Voet and that there were in fact authorities directly disputing the existence of any such claim by the child.[322] What was held to have been clear, was that the heir would have a right of action for defamatory statements against the deceased which affected the estate in a material or pecuniary manner.[323] Similarly, in relation to the claim of the deceased's widow, Van Der Riet J found Voet's comments as extending to the widow a right not afforded to her under Roman-Dutch law.[324]

In relation to the application of these contentions to South African law, Van Der Riet J held that there is no record of any reported cases in the superior courts of actions brought by children for defamatory statements about their deceased fathers.[325] In making its judgment, the court considered how the Roman-Dutch law had been interpreted in other jurisdictions – referring extensively to the Scottish case of *Broom v Richie & Co*.[326] In discussing this judgment, the judge expressed agreement with the comments of Lord Justice Clerk, which he summarised as follows:

> "Lord Justice CLERK held while no action lay where the reputation of the deceased only was affected and solatium to the living is the only question, for that would be giving a third party the right to recover damages as for a wrong done to the deceased, an action did lie in regard to the statements concerning a deceased person from which it is a necessary implication that others are directly injured as for wrong although indirectly done through aspersion of the deceased."[327] [own underlining]

What these comments illustrate, is that under Roman-Dutch law, the true position was that there was no action arising out of comments made about

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[322] *Spendiff* supra 123-124

[323] *Spendiff* supra 124.

[324] *Spendiff* supra 125.

[325] *Spendiff* supra 125.

[326] [1905] 6 F., Ct. of Sess. 942 as cited in *Spendiff* supra 126.

[327] *Spendiff* supra 128.

deceased persons, and the dead could not – in the legal sense – be defamed as they had no dignity and to allow any such claim by executors, heirs, wives or children, would be to allow them to claim for wrongs done to the deceased, which was impermissible. The only claim that could arise out of libellous remarks about deceased persons would be in circumstances where living relatives were also *directly* implicated by these statements. It is thus apparent that this rule was not a recognition of an interest of the deceased in their reputation, but rather it was an instance of a protection of a living person's personality rights, by not allowing defamatory statements about that person cloaked in references to the dead in order to escape legal action. As such, Van Der Riet J concludes that the correct position in our law is that,

> "the wife and sons of a deceased party who has been slanderously aspersed, have a right of action only if the nature of the aspersion be such that they themselves are directly affected in status or patrimonial interest, and that I should not hold that mere hurt to their feelings of regard for the deceased man should entitle them to such an action".[328]

Per the *Spendiff* judgment, it is the position in South African law that the dead have no personality rights, from which it follows that they cannot be posthumously defamed. Nor is the protection of the deceased's corpse or grave in any way a recognition of rights in bodily integrity or dignity held by the deceased person. In each case where their exists laws relating to the affairs of people after death, these rules might seem to be based on respect for the dignity or other rights of the deceased – but on a closer analysis, this is not the case, and rather they are concerned with the interests of the living.[329] What is apparent from this, is that rights are bound to human personhood in South Africa, which is conditioned upon life. The laws relating to the respectful

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[328] *Spendiff* supra 129.

[329] Another instance of this can be seen in the case of *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 254 (C) in relation to the right to privacy. In this case, it was held that while disclosing private information about a now deceased person may be unlawful, it is not an invasion of the right to privacy and surviving family may not bring such a claim on behalf of the deceased. They are however permitted to bring a claim in their own capacity if the unlawful disclosure of the deceased's information breaches their own right to privacy.

treatment of graves and dead bodies are not to be construed as giving to the dead the rights of the living, and such rules are better understood through the paradigm of social utility. While the deceased themselves no longer have rights, rules protecting the deceased exist to protect society's interest in the respectful treatment of the dead.

4.10 Procreative Liberty as a Basis for Posthumous Reproduction in South Africa

The fact that the deceased do not retain rights posthumously does not mean that no rights can be said to apply to and protect an individual's capacity to choose to allow their reproductive material to be used after death. In this, the final section of this chapter, I will attempt to formulate an argument in favour of a right to PR, founded upon the individual procreative liberty possessed by the living, which provides a basis for permitting PR after death.

The crux of the argument is this: While alive, a legal subject is vested with the rights to, in terms of section 12(2)(a), make reproductive choices, and one such choice a person is empowered to make is the choice to participate in PR. This is based on the wide range of choices protected by reproductive autonomy, although the extent of this is yet to be explored in the South African context. International legal instruments make clear that there is more to this right than simply allowing an individual the freedom to choose to engage in reproductive activity. This is evident when one considers South Africa's own international commitments, such as The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). CEDAW was adopted by the United Nations General Assembly and entered into force as an international treaty on the 3rd of September 1981, and which South Africa – as a member of the United Nations – ratified on 15th December 1995.[330] While the focus of this instrument was, as the name indicates, eliminating

[330] Available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (accessed 25 October 2018).

discrimination against women, CEDAW also sheds light on the scope of reproductive choices a person is entitled to in article 16:

> "1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: …
>
> (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights" (own underlining)

What can be taken from CEDAW, is that section 12(2)(a), read together with article 16, protects not only an individual's right to choose whether or not to have children, but also how many children to have, and when to have them. Moreover, this places a positive duty on the state to take measures to ensure that individuals have all the means they require to exercise these choices, which goes beyond just medical technologies – but also includes information and education. This is reinforced at a regional level by the Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa (the Protocol), at article 14, which states:

> "1. States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:
>
> a) the right to control their fertility;
>
> b) the right to decide whether to have children, the number of children and the spacing of children;
>
> c) the right to choose any method of contraception;
>
> d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;
>
> e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognized standards and best practices;
>
> g) the right to have family planning education.
>
> 2. States Parties shall take all appropriate measures to:

a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas."

What one can draw from this is, firstly, that access to reproductive choices is essentially underpinned by the right to have access to medical and other resources to facilitate making reproductive choices. This undoubtedly would include access to medical technology in the case of MAR, where medical technology is essential to exercising reproductive choices. Not only is the government duty bound to make access to MAR technology possible, they are further obligated by the Protocol to take measures to ensure access to MAR, particularly for women. As such, it is submitted that the freedom to make reproductive choices, as protected in section 12, includes the right to access to MAR technologies. PR is an instance of MAR, and, as such, if MAR is regarded as a right, this would indicate that one has a right to make reproductive choices in the use of one's gametes or an embryo one contributed a gamete to after he or she dies. One could even argue that PR is included in the terms of the right to choose when to have children referred to in both CEDAW and the Protocol.

This has application to both the deceased and surviving partner – the deceased while alive has the right to make the choice to choose to participate in PR, and the surviving spouse has the right to choose to undergo PR with the reproductive material of the deceased. This interpretation of procreative autonomy provides a strong reason in law, based on fundamental rights, to give effect to an expressed desire to participate in PR. As such, if a court were to be faced with a situation where a partner makes a request to use a deceased person's reproductive material, if there is some indication that the deceased was willing to allow for their reproductive material to be used for posthumous reproduction, the court ought to grant such a request.

It must be emphasised, however, that the argument here is not that the right to make reproductive choices continues to exist after death. As I have indicated in the preceding discussion, I believe that the law does not recognise posthumous rights. Rather this argument is in the same vein as the one advanced by counsel for *NC* in *Aevitas*, that *living* persons have a right to

determine the fate of their reproductive material should they die.[331] The distinction between these two conceptions, while seemingly nuanced, is fundamentally important.

On the one hand, if we say that even after death one has rights to things such as dignity and reproductive autonomy, this statement conflicts with the most fundamental aspects of our understandings of rights, and we encounter challenges such as having to account for how the deceased is harmed if these rights are not given effect to, why the deceased have some rights and not others, why we ought to give effect to these particular rights, and in what sense deceased persons are legal subjects. On the other hand, if we say the living have a right to make reproductive choices, including what happens to their gametes after they die, none of these challenges arise. In this case, we recognise the living person as a having a right, and if that right were to be limited by legislation during his or her lifetime, it would have to be reasonable and justifiable in terms of section 36 of the Constitution. If, however, the deceased's choice to participate in or abstain from PR is expressed to those who survive him or her, and was not adhered to after death, this would not be a violation of the deceased's right (as he no longer has any) – but would arguably be contrary to the respectful treatment of deceased persons, and ergo contrary to public policy and potentially unlawful.[332]

If we take it to be true that a right to the choice to reproduce posthumously exists, whether or not the deceased's wishes are to be respected would have to find support in social utility, as the concept within which South African law provides for legal rules relating to the dead. In the South African context, what this means is that the various PR practices must be beneficial to the living and should also not amount to undignified treatment of the dead. The benefit to the living of PR is self-evident, and the reason surviving spouses such as Mrs

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[331] Aevitas: Applicants Heads of Argument para 15

[332] CE Pienaar 'Is it Unlawful to Treat the Dead Without Respect and Dignity?' (2018) 22(1) *Prof Nurs Today* 50. Pienaar argues that where corpses are treated in contravention of applicable legislation, such as the rules relating to the transportation of deceased persons in the NHA, the deceased's family and members of the public would be able to bring civil claims for emotional harm suffered by them as a result of this unlawful act.

Blood[333] or NC[334] make a request to use the reproductive material of their deceased spouse and willingly undergo litigation (which in Blood's case was quite lengthy) – is because it was important to them to be able to have a child genetically related to their deceased partner. Kruuse, in discussing the value of procreation in the context of PR, highlights that this extends beyond just respect for the autonomy of the deceased.[335] Procreation also possesses value for the living that is worthy of protection because of the relations it creates,[336] and the value in the act of defining one's self and life narrative.[337] The significance of the latter reason in creating a genetic link to future generations, is discussed as resonating with the traditional Zulu custom of *ukungena*, where a surviving male relative of a married man has children with the widow of the deceased, and these children are regarded as the children of the deceased.[338] The value in this practice is that a man, while alive, has a certain sense of security in knowing that even if he dies before he is able to have children, this is not necessarily the end of his life narrative as long as he has brothers and has taken a wife, because through *ukungena* he may become a father even after he dies. Fatherhood is something that Zulu men regard as highly significant in terms of their social standing and which has a meaningful impact on their legacy. PR has a similar value to all who wish to make use of it.

Procreative liberty provides a clear justification for the courts to give effect to requests by surviving partners, where there is evidence of the deceased partner's desire to make their reproductive material available to the surviving spouse – as the court did in *Aevitas*. It is my view that granting such a request is the correct approach, because it gives effect to procreative liberty, is

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[333] See discussion of *Blood* in Chapter 2.

[334] See discussion of *Aevitas* in Chapter 3.

[335] Kruuse op cit note 8 at 545.

[336] Kruuse op cit note 8 at 546.

[337] Ibid.

[338] Ibid.

respectful to the deceased's wishes, and serves socially important goals in procreation for both the deceased partner and the surviving partner.

4.11 Conclusion

In discussing the controversial 'Body World' exhibits, in which human corpses are presented as pieces of art, Young points out that one of the main reasons people object to such a display is that some regard it as an undignified use and portrayal of the human body – especially because it is done for profit.[339] Treating the body of the deceased, their wishes and even their legacy with respect, is clearly something many people regard as being important. So much so, that legal rules have developed around the respectful treatment of the dead. However, these rules which exist for the sake of the living should not be confused as granting legal recognition to deceased persons. The dead have no right to dignity; instead the law prescribes that the dead must be treated in a dignified manner, because of the social utility in doing so. The dignified treatment of the dead in South Africa includes giving respect to the wishes of the dead regarding what happens to their property and their bodies after they die.

It is submitted that PR in no way offends the principle of the respectful treatment of the dead, as it is apparent with the various forms of posthumous donation of tissue made possible in the NHA and its regulations, that the posthumous use of tissue is permissible. Even with PGR, the medical operation associated with this practice requires significantly less interference with the corpse than autopsies, and yet these are permissible in certain circumstances. In light of this, I cannot see how PGR could be regarded as the mutilation or otherwise improper use of a corpse.

It has been shown that there is no current legal barrier to PR. A proper interpretation of the relevant provisions that might be seen to prohibit PR rather show that the extant law simply does not address PR, and the

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[339] Young op cit note 236 at 198.

disposition of reproductive material after death was clearly not contemplated. PR is, however, permissible because individuals enjoy freedom of testation in relation to their reproductive material, and further there is an argument in support of individuals having a right to reproduce posthumously protected by the Bill of Rights.

This chapter discussed the application of human rights to PR, but there remains one more major human rights issue to be considered in relation to PR, and that is whether PR, in its use of reproductive material, somehow negatively impacts the rights of the child.

5. CHAPTER FIVE: POSSIBLE LIMITATIONS TO POSTHUMOUS REPRODUCTION

Having established that PR is permissible in South African law and that individuals have a right to reproduce posthumously, I now consider whether there are any justified reasons that our law ought to prohibit PR or otherwise place restrictions on it – as other states discussed in Chapter 2 have. Because the choice to reproduce posthumously is an instance of one's constitutionally protected procreative liberty, any limitation in the exercise of this choice would be unconstitutional, unless it can be shown that, "the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" – taking into account the nature of the right, the importance of the nature of the limitation, the limitation's nature and extent, whether there is a relation between the limitation and its importance, and whether there are means less restrictive than the limitation in question that can achieve the intended purpose.[340] In this chapter, I attempt to identify any such limitation by looking at the common objections to PR that underlie the various limitations to the practice, and critically analyse the validity of these objections by investigating whether there is any credible evidence to support them.

5.1 But What About the Children? Procreative Liberty and the Child's Best Interests

In the area of MAR, the most common justification given in support of limiting reproductive rights, are the interests of the resultant children. South Africa is no exception; the application of section 28 of the Constitution which provides that "[a] child's best interests are of paramount importance in every matter concerning the child" has proven to be central to the determination of South African cases concerning reproductive choices. What is actually in the child's

[340] Constitution of the Republic of South Africa section 36.

best interests is, however, a contentions point, and the meaning of this phrase in our law has not been determined with any certainty.[341]

The principle of the best interests of the child (BIOC) as being paramount first emerged in South Africa in the common law and was applied by the courts when determining familial disputes over custody and access to children.[342] The court would determine what was in the child's best interests by engaging in an enquiry as to which parent would be better able to ensure and promote the child's wellbeing holistically, taking into account a variety of considerations.[343] Since then, the scope of this principle has been expanded and, consequently, its application has become more complex, under the influence of growing international emphasis on protecting the interests of children as a vulnerable group through provisions committing states to make the welfare of children paramount.[344] This led to the inclusion of the principle of the BIOC in our Bill of Rights in a form very similar to those seen in prominent international instruments.[345]

What it is important to consider for the purposes of this chapter is not so much the direct application of the BIOC, but rather the extent to which limitations to procreative liberty by the state are permissible under the justification that doing so is in the child's best interests. In doing so, we return once again to the case of *AB v Minister of Social Development*.[346] One of the core issues in this case was the biological link requirement in section 294 of the Children's Act, and

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[341] *Minister of Welfare and Population Development v Fitzpatrick* 2000 7 BCLR 713 (CC) para 18.

[342] R Malherbe 'The Constitutional Dimension of the Best Interests of the Child as Applied in Education' (2008) *Journal of South African Law* 267.

[343] Ibid.

[344] See, generally, TJ Walsh 'Advancing the Interests of South Africa's Children: A Look at the Best Interests of Children Under South Africa's Children's Act' (2011) 19 (2) *Michigan State Journal of International Law* 202-249.

[345] Walsh op cit note 5 at 344, notes that many of the provisions of The UN Convention on the Rights of the Child, which South Africa ratified shortly before the promulgation of the Constitution, appear in the text of the Constitution.

[346] For a discussion of the factual background and legal issues in *AB* see Chapter 3.

whether this limitation on who may access surrogacy was justified, in that it was rationally connected to a legitimate government purpose. What the purpose of section 294 was, however, was a contested point between the minority and majority. Nkabinde J endorsed the interpretation of section 294 as protecting the entitlement of children to know their genetic origin and found that this purpose was rationally connected to section 294.[347] In reaching this conclusion, the judge held:

> "Is there a rational connection between the differentiation in question and the legitimate governmental purpose that differentiation is designed to achieve? YES: The requirement of donor gamete(s) within the context of surrogacy indeed serves a rational purpose – the public good chosen by the lawgiver – of creating a bond between the child and the commissioning parents or parent. The creation of a bond is designed to protect the best interests of the child-to-be born so that the child has a genetic link with its parent(s). Therefore, a rational connection exists".[348] [own underlining]

Khampepe J pointed out that there is a contradiction in the Children's Act between section 41, which protects the anonymity of general gamete donors, and the majority's interpretation of section 294.[349] The minority took the view that knowledge of genetic origin is a purely coincidental effect of section 294, rather than its purpose. Instead, it was stated that the purpose of section 294 was to prevent the circumvention of the adoption process, and there was no evidence that this was an important purpose to be achieved, nor was there evidence that the provision results in the prevention of harm, making it in the best interests of the child. Instead what it does do, the minority held, is elevate the biological link requirement above court determination, ostensibly because it can never be in the child's best interests to be born in such a scenario, and in doing so it contradicts the factors the Children's Act mandates the court to consider in terms of section 7(1), whenever the best interests of the child are to

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[347] *AB* supra para 287.

[348] Ibid.

[349] *AB* supra para 194.

be considered.[350] Because of this, Khampepe J states that the essential question is not whether there is a rational connection between section 294 and its purpose, but rather whether section 294 serves a purpose so fundamental as to outweigh and justify the limitation of AB's rights.[351] Ultimately, the minority's conclusion was that it was not, and it was stated that section 294 was an extensive and unjustifiable intrusion into a central part of the lives of AB and all women who are both conception and pregnancy infertile.

As is apparent from the above discussion, the rationality of the biological link requirement was key to the outcome of this judgment. Implicit in the statement by Nkabinde J quoted above, is the court's acceptance that the creation of a biological link was a "public good", and that that this provision promotes the best interests of the child. The court accepted this to be true, without any evidence, since it declined to take into account the extensive evidence before it that had been central to the High Court's judgement,[352] stating that:

> "The High Court's approach, suggesting the need for credible data to demonstrate that the presence or absence of a genetic link in the context of surrogacy will have adverse effects on the child, is wrong. That approach elevates the importance of empirical research above the purposive construction of the challenged provision, to establish a legitimate governmental purpose. In

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[350] Section 7 of the Children's Act provides that, "(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration…" and then proceeds to list of 9 factors.

[351] *AB* supra para 213.

[352] See para 269 footnote 245, where the court states: "As in the High Court, the parties relied on the opinion by experts in support of their perspectives. I will not place reliance on the divergent opinions of the experts in deciding the issues because this Court, as the ultimate authority on the questions regarding the validity of legislation and violation of rights, should arrive at its own independent evaluation". DW Thaldar 'Post-Truth Jurisprudence: The Case of *AB v Minister of Social Development*' (2018) *SAJHR* 19-20 points out that the courts statements here are unfounded firstly because it is untrue that both parties had relied on expert evidence before the Constitutional Court, only AB did. Secondly the evidence was in no way divergent and was in fact uncontroverted. And thirdly, the courts position as final arbiter does not entitle it to simply ignore evidence relevant to the determination of core issues in the case before it.

any case, courts do not rely on the opinions or 'credible data' by experts when determining the constitutionality of legislation."[353]

What the majority of the Constitutional Court was in effect saying, was that the expert evidence in this case, and all cases, was entirely irrelevant to the determination of the rationality of provisions in constitutional challenges. I suggest that such a view is incorrect and contrary to the spirit and purport of the Constitution – particularly section 36 which binds the power of the state to limit rights to instances where it is reasonable and justifiable in an open and democratic society. My suggestion is based on the strength of the evidence provided by the experts for AB showing there was no factual basis for the assumption that children conceived through MAR are harmed by not having a genetic link to their parents. AB's submissions included a total of 14 expert opinions, including 2 opinions from experts relating to the connection between the best interests of the child and the establishment of a genetic link.[354] One of these opinions was by Susan Golombok, a leading international expert, which concluded, based on empirical research, that the "presence or absence of a genetic link between a parent and child in the context of surrogacy does not appear to have an effect on the child's psychological well-being".[355] This was corroborated by another opinion by an experienced South African practitioner who said that even in the absence of a genetic link, the process of selecting a donor establishes a bond between the commissioning parent and the resultant child.[356] The High Court accepted and relied on this evidence, while dismissing the submissions by the state's expert, because of well-founded criticism of the content and qualifications of the expert to make some of the averments – therein rendering them such that little or no reliance could be placed on them.[357]

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[353] *AB* supra para 291.

[354] Thaldar op cit note 352 at 4.

[355] Thaldar op cit note 352 at 6.

[356] Ibid.

[357] Thaldar op cit note 352 at 16.

Thaldar opines that had the Constitutional Court considered the expert evidence – as the High Court did – it would have concluded that no rational nexus existed between the legitimate government purpose of establishing a biological link between commissioning parents and surrogate children and section 294, and I concur.[358] As Nkabinde J herself noted, "[r]ationality is an incident of the rule of law. When enacting laws, the Legislature is constrained to act rationally and not capriciously or arbitrarily". A legislative provision based on a purpose for which there is not only no evidence, but a significant amount of credible evidence that refutes it, is the height of capriciousness and arbitrariness. In this regard, the court failed in its duty to guard against irrational derogation from the rights protected in the Bill of Rights. What this case illustrates, is the importance of considering credible data in protecting rationality and guarding against the arbitrary infringement of procreative liberty.

5.2 Applying the Best Interests of the Child to Prospective Children

What is clear from the Khampepe judgment and the Nkabinde judgment in *AB* considered together, is that, in principle, the BIOC standard can be used to limit an individual's procreative liberty in the name of protecting future children. The judgments simply differed regarding what the content of the BIOC was in the context of the *AB* case. This highlights the concern that the application of the BIOC standard – which is supposed to protect the future child's interests – is invoked and used to unduly limit the autonomy of individuals who choose MAR.

The case of surrogacy serves to illustrate how section 28(3) of the Constitution is applied to MAR in determining the best interests of a resultant child. Surrogacy is dealt with in chapter 9 of the Children's Act. In order for one to engage in MAR for the purposes of surrogacy, one must first enter into a surrogate motherhood agreement – the requirements for which are set out section 292(1) of the Children's Act. The agreement must be confirmed by the

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[358] Thaldar op cit note 352 at 21.

court through an ex parte application and thereafter insemination must take place within 18 months of confirmation of the agreement.[359]

Confirmation of surrogate motherhood agreements is the duty of the High Court as the upper guardian of children.[360] The criteria the court must take into account when determining whether to confirm a surrogacy agreement were set out in *Ex parte WH*,[361] which was an application for the confirmation of a surrogate motherhood agreement in terms of section 295 of the Children's Act by an all-male couple.[362]

In its discussion of the BIOC, the court here stated that it is best that this principle be given application through a flexible enquiry, in terms of which "individual circumstances will determine the best interests of the child".[363] The flexible enquiry called for by Kollapen J and Tolmay J in their joint judgment, requires that judges approach each case with an open mind rather than apply a strict set of rules; however, the judges also caution against the use of this discretion held by judges as a means to impose their own personal views under the guise of sound legal principles. A similar concern was raised by the court in *Fitzpatrick*, where the court noted that the indeterminate nature of the BIOC has led to its application often devolving into a moral issue, and the perceived majority view of society is erroneously taken to be equal to the child's best interests.[364] In discussing the significance of surrogacy being accessible to same sex couples, the judges remarked on the need to avoid discriminatory practices by excluding from parenthood family forms that would deprive the child of one parent (i.e. a mother or a father).[365] Commenting on

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[359] Children's Act section 296.

[360] J Heaton 'The Pitfalls of International Surrogacy: A South African Family Law Perspective' (2015) 78 *THRHR* 567.

[361] 2011 6 SA 514 (GNP).

[362] *Ex Parte WH* supra para 14.

[363] *Ex Parte WH* supra para 61.

[364] *Fitzpatrick* supra para 18.

[365] *Ex Parte WH* supra para 54.2.

how same sex couples having children is commonly objected to because the child will not have a parent of a particular gender, the court stated: “Many children grow up without a father or mother and the court should safeguard that it does not try to create a utopia for children born from surrogacy that is far removed from the social reality of society.”[366]

This remark elucidates a very important dimension that must be considered when determining the BIOC in MAR – this principle must not be applied in a way in which barriers to MAR exist for all, except those who will be capable of providing an idealistic environment for the resultant child. This is supported by the Constitutional Court’s statement in *AD v DW* that “[c]hild law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case”.[367]

In considering what is in the best interests of a prospective child, one must be cognisant of the present realities of society and the ever-changing family form, so as not to unfairly limit the reproductive autonomy of those capable of providing what is likely to be a healthy upbringing – simply because it will be in circumstances other than the traditional nuclear family. The court expands on this in its discussion of the determination of a ‘suitable parent’ in terms of the Children’s Act. The court pointed out that as there are no restrictions to the ability to procreate for most people, setting unreasonably high standards that are not justifiable for those who choose surrogacy, would be a contravention of the spirit of equality enshrined in the Constitution.[368] In this statement, the court makes clear that those who exercise their right to make the choice to reproduce are not to have their choices given lesser or greater respect because of how they choose to procreate; people who choose non-coital reproduction are entitled to have their procreative autonomy respected in the same way as those who reproduce coitally, and their exercise of these choices should not be interfered with without good justification. According to the

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366 Ibid.

367 *AD v DW* [2007] ZACC 27 at para 55.

368 *Ex Parte WH* supra para 70.

majority in *AB*, however, this is limited to circumstances where the MAR procedure in question involves one's own body.

The dangers of the arbitrary application of BIOC, is that, unchecked, it can be used as a basis for discriminatory policies, such as the exclusion of certain societal groups or the prohibition of legitimate medical treatments for infertility.[369] The effective application of the BIOC requires a thorough investigation of the relevant facts and evidence regarding the impact of a particular state action on child welfare.

5.3 Objections to Posthumous Reproduction

In Chapter 2, we saw that limitation to PR can include complete prohibitions, requirements of prior consent (in writing or otherwise), waiting periods, and time limits. Limitations to PR are all based, in the main, on the reasoning that one or all forms of PR are objectionable because they cause harm to the resultant child, as well as because of the impact on surviving spouses and family members, and, as such, it is in the best interests of the prospective child that PR be limited.[370] The objections to PR can be broadly summed up in these four statements:

1. PR is harmful to children because children are harmed by being born into a single parent household.
2. PR is harmful to children because being deprived of knowing one's parent is psychologically harmful to a child.
3. PR is harmful to children because children are harmed by not being able to inherit from the deceased's estate or collect survivor benefits.
4. PR is potentially harmful to children if permitted shortly after the death of the deceased, because the surviving partner is not psychologically fit to

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[369] Cameron and Blyth op cit note 116 at 2341.

[370] See for example, Ahluwalia and Arora op cit note 2 at 12 who object to PR, stating that it "serves neither the woman's interests nor the interests of the children they bear".

make a sound decision regarding having the child – because of the grief of losing their partner.

Bahadur finds these contentions about the harm to children unconvincing and argues that the impact on children caused by PR should be minimal, and no greater than the impact on children in similar situations.[371] I suggest that Bahadur is correct. There has been no empirical study documenting the impacts on children caused by PR. However, we can draw inferences on whether there is going to be any harm of a sufficient severity as to merit limitation of the parent's procreative liberty caused by PR, by looking at the outcomes of children in situations similar to those that posthumous children will find themselves in. In the next section, I discuss each of the objections and how they relate to PR, describe how they are used to justify the various limitations on PR, and, where possible, show whether the apprehensions of harm to children are legitimate – by looking at empirical research on children in similar circumstances.

Objection 1: Single Parent Households

The first, and probably the main concern with PR raised by authors in this area, is that it involves knowingly and intentionally bringing the resultant child into a single parent household, which is often used to support PR being prohibited entirely or in support of any of the other limitations.[372] This objection emerges from the fact that usually, as it was for NC in *Aevitas*, the surviving partner will request PR shortly after the death, with the intention of raising the resultant child on their own. It should be pointed out that this eventuality need not necessarily come to pass as surviving partners may enter into new relationships. However, for those who raise this objection, it seems to be assumed that children will be born into single parent households that will remain single parent households throughout the children's lives.

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[371] Bahadur op cit note 7 at 2772.

[372] Ibid.

This objection is founded on the assumption that single parent households are in some way inherently inferior to households with two parents, and, as such, the welfare of children in single parent homes is likely to be significantly lower than it would be in a two-parent household. On the face of it, this objection stands to be rejected for applying a clearly maximalist conception of the BIOC, as its proponents are effectively taking the view that two parent families are ideal for a child's welfare, and therefore persons in family forms other than two parent families are to be denied their procreative liberties. Furthermore, on a deeper analysis, the assumption of the inherent superiority of two parent families for ensuring healthy child development, is unjustified and irrational.

The view that single parent family forms are less than ideal is not entirely without basis. Based on empirical research, it has been established that children of single parent families do not fare as well generally as those from families with two parents – for instance, being a child of a single parent household has been shown to be associated with socio-economic disadvantage throughout life.[373] This might lead one to conclude, as many do, that the experience of children in single parent households is somehow inherently deficient, but a close analysis of the reasons for the negative outcomes of children from single parent households paints a different picture. In a 25-year New Zealand longitudinal study of children on the impact of single parenthood on the later outcomes of children, associations were found between single parenthood and anxiety, poorer performance in higher education, challenges with financial independence, and criminal activity initially, but the researchers also found most of these outcomes could be explained by confounding factors.[374] This led the researches to conclude that these associations could be accounted for by taking into consideration the social and

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[373] HM Mikkonen, MK Salonen, A Häkkinen, M Olkkola, AK Pesonen, K Räikkönen, C Osmond, JG Eriksson, E Kajantie 'The Lifelong Socioeconomic Disadvantage of Single-Mother Background - the Helsinki Birth Cohort study 1934–1944' (2016) 16 *BMC Public Health* 817.

[374] DM Fergusson, JM Boden, LJ Horwood 'Exposure to Single Parenthood in Childhood and Later Mental Health, Educational, Economic, and Criminal Behavior Outcomes' (2009) 64(9) *Arch Gen Psychiatry* 1089.

contextual factors associated with single parenthood.[375] Some of these confounding factors include the generally lower maternal age of single parent mothers, lower levels of parental education, poorer socio-economic status, greater family conflict, exposure to childhood abuse by parents, involvement in criminal activity, and a generally lower IQ.[376] Taking these disadvantages into account, the researchers ultimately concluded that exposure to single parenthood was largely unrelated to healthy adjustment in adulthood.

The findings of the above study indicate that being born in a single parent household does not necessarily cause any kind of disadvantage to children, and rather single parenthood tends to occur in disadvantaged circumstances and these circumstances lead to negative outcomes in children. Similar conclusions have been reached by other researchers in this area. Studies attempting to explain why children from two parent families outperform in educational contexts those from single parent families, show that the former group benefits from the greater economic benefit of having two parents and are not exposed to the same disadvantages.[377] As stated by Susan Golombok:

> "… [I]t is not simply being raised by a single parent that leads to these outcomes. Children in single parent families are more likely to suffer economic hardship, and many will have been exposed to the conflict, distress and family disruption that is commonly associated with their parents' separation or divorce … It is these factors that accompany single parenthood, rather than single parenthood itself, that are largely responsible for the disadvantages experienced by children in one-parent homes".[378]

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[375] Ibid.

[376] Fergusson et al op cit note 374 at 1094.

[377] J Radl, L Salazar, H Cebolla-Boado 'Does Living in a Fatherless Household Compromise Educational Success? A Comparative Study of Cognitive and Non-Cognitive Skills' (2017) 33 *Eur J Population* 530.

[378] S Golombok 'New Families, Old Values: Considerations Regarding the Welfare of the Child' (1998) 13(9) *Human Reproduction* 2344.

I suggest that this phenomenon is the reason for the apparent stigma concerning single parent households. The negative outcomes of children from single parent homes prima facie supports the idea that single parent households are always more dangerous to a child's wellbeing. The reality, however, is that these negative outcomes are because children from single parent families tend to face greater challenges in life than those born of two parent households. In this case, it is instructive to bear in mind the oft repeated scientific principle: correlation does not imply causation.

The case of posthumous children is in not comparable to children in single parent households where the one parent dies after the child is born as some have contended[379] – because at no point do they experience the loss of a parent. There is thus no way in which the death of a parent could adversely affect them, as can be the case where the parent dies after the child's birth. Nor are surviving partners prone to being exposed to the same socio-economic challenges arising from the surviving parent suddenly having to raise a child alone, parents of posthumous children will be willingly entering into single parenthood and will have time to ensure they can provide for a child and prepare themselves for it. As such, none of the sources of negative outcomes in children related to single parenthood appear to apply when we consider single parent households created as a result of PR.

A fairer comparison can perhaps be made by comparing PR to the newly emerging family form described as "single mothers by choice" or "solo mothers", which was the subject of a recent study by Golombok and her team at the University of Cambridge.[380] Solo mothers are, "single heterosexual women who have chosen to parent alone and have had children through donor insemination".[381]

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[379] Landau op cit note 156 at 1953.

[380] S Golombok, S Zadeh, S Imrie, V Smith, T Freeman 'Single Mothers by Choice: Mother–Child Relationships and Children's Psychological Adjustment' (2016) 30 (4) *Journal of Family Psychology* 409-418.

[381] Golombok et al op cit note 380 at 409.

In this study, many of the hardships ordinarily related to negative outcomes for children of single parent homes, were not a factor as these women were single since the child's conception, and, as such, the resultant child was not exposed to any traumatic experiences related to separation and divorce. Furthermore, solo mothers are primarily older professionals who can afford the financial cost of raising a child, and, as such, the children were not disadvantaged by a lack of economic resources.[382] The research on solo mothers has found no differences in parenting quality when compared to two parent homes.[383] Quite to the contrary of what proponents of limiting PR because of the danger of harm caused to resultant children might assume to be true – there is evidence that solo parents have better relationships with their children, as this group recorded fewer instances of mother–child conflict.[384] The study by Golombok et al could find no evidence of any differences in child adjustment.[385]

These conclusions expose the assumptions underlying this objection as being baseless. When it comes to ensuring the healthy development of a child it seems two is not better than one, the welfare of children in single parent households is by no means necessarily lower than the perceived ideal of a two-parent household. In fact this family form may even be superior. In the absence of any evidence to show that single parent households in some other way endanger child welfare, any limitations based on this objection are not a justified limitation on the right to reproduce posthumously.

Objection 2: Psychological Harm to Child

This objection is based on several claims regarding the psychological impact of PR on resultant children. One of the hallmarks of a restrictive regime in regulating PR, which either outlaws the practice or places significant limitations

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[382] Ibid.

[383] Golombok et al op cit note 380 at 415.

[384] Ibid.

[385] Golombok et al op cit note 380 at 413

on it, is apprehension about the welfare of any resultant children who will be denied the opportunity of knowing one of their parents.[386] Proponents of this restrictive view of PR rationalise their view on the basis of a maximalist view on the BIOC – as illustrated by the words of Landau: "If the child is important in and of itself, then one must consider the pain and suffering of an orphan who is conceived without ever knowing his or her father."[387]

The argument here is based on the assumption that not knowing one's parents is harmful and will cause pain and suffering. It is also argued that children are psychologically harmed by knowing that they were conceived as orphans, and would not have any chance of knowing anything about one of their parents, except that they died before they were born.[388] Arguments in this vein have been rightly criticised because while oft stated, little to no justification for these concerns are ever given.[389] It is seemingly assumed that the harm suffered by children is self-evident. However, there is no evidence to support this.

Furthermore, proponents of this view often fail to differentiate between *knowing about a genetic parent* – which refers to the children having access to information about their genetic parents – and *knowing a genetic parent*, which refers to having first-hand knowledge of one parent by personally meeting and having a relationship with a genetic parent. Posthumous children are, for obvious reasons, always denied the latter of these two experiences, but as shown in discussing objection 1, this does not necessarily lead to any psychological harm to the child. As to the former experience, while it is true that not knowing information about one's genetic parent can lead to psychological difficulties for the child, it is not an essential nor common feature of PR to withhold knowledge regarding the child's genetic origins from them.

Research on knowing about one's genetic parents and its impact on child welfare has established that the development of adopted children who know of

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386 Katz op cit note 11 at 302

387 Landau op cit note 156 at 1953

388 Ahluwalia and Arora op cit note 2 at 12.

389 Starr op cit note 85 at 624.

their genetic parents, when compared to those children who do not, benefitted by this knowledge.[390] Where information about the identity of an adopted child's biological parents is withheld, it has been shown that this may lead to the child being confused about their identity, and at risk of developing emotional problems.[391]

While there might be good reasons to withhold the identity of a genetic parent, in cases such as adoption or where donor gametes are used no similar reasons exist with PR. As such, in light of the importance of this information, and that there is ostensibly no reason to withhold it, posthumous children ought not to be deprived of knowledge about the deceased gamete provider. This would not be a challenge for PR in South Africa, because while the RRAFP do have provisions for protecting the identity of gamete donors, these do not prohibit surviving partners sharing information with the resultant child – regarding the spousal donor. In conclusion, there is no evidence for the claim that PR results in psychological harm to children, and thus this objection cannot serve as a basis to limit the right to reproduction.

Objection 3: Inheritance and Survivor Benefits

This objection is premised on the idea that the posthumous child being denied certain benefits that would otherwise accrue to the child were he or she not a posthumous child, is a harm to the posthumous child.[392] This objection stems from the existence of rules stating that only living children may inherit from a deceased person's estate, or those children born soon afterward (usually within 9 months of death). In South African law, the laws of testation presently exclude posthumous children from inheriting in this way.[393]

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[390] Golombok op cit note 378 at 2343.

[391] Ibid.

[392] Landau op cit note 156 at 1953.

[393] See, Wills Amendment Act 41 of 1965 section 2D (C). In terms of intestate succession, since an intestate heir's rights to the state vest at death, the posthumous children will not be able to benefit because at death they were not legal subjects, such that a right could vest in

Because of this, it is argued that PR ought to be subject to conditions or there being some other legal mechanism that facilitates posthumous children benefitting to prevent this perceived harm. The argument in favour of posthumous children benefitting from the deceased estate, is based on equality. It is argued that posthumous children are entitled to equal protection before the law, which includes the right to be legally recognised as the child of the deceased and to inherit from their estate as other children born pursuant to means other than PR.[394] There is, however, a good reason for why these rules exist, that also provides a reason why they should remain the same which was highlighted in the discussion of the UPA and the UPC in Chapter 2. This being that estates cannot be allowed to remain open indefinitely where the deceased had stored reproductive material, out of consideration for the posthumous child benefitting from it. The state has an interest in ensuring matters concerning deceased estates are settled without extensive delays – to ensure stable land titles and an orderly distribution of property after death.[395]

It is uncontroversial to say that it is in the posthumous child's best interests to benefit from the estate of a deceased parent. However, PR itself is not the reason why children are deprived of their opportunity to inherit. Rather, this evidently is a consequence of laws that have failed to develop and keep up with contemporary realities, and, as such, I submit that it makes little sense to limit procreative liberty because of archaic laws. Instead, measures need to be taken to compensate for these deficiencies in the law, until legislative reform takes place – as has happened in in certain US states. Where the law in US states has failed to address the legal position of posthumous children, some courts have opted to simply ignore the application of the relevant laws concerning inheritance in order to avoid potentially harsh consequence on

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them nor will the nasciturus fiction apply since at death the posthumous child will not have been conceived and in the mother's womb.

[394] AC Aniţei 'Post Mortem Assisted Reproductive Technology (ART) and The Particular Case of The Will in Romania' (2014) 6(1) *Contemporary Legal Institutions: Romanian American University* 137.

[395] Starr op cit note 85 at 623.

children.[396] For our law to go the same way would be undesirable, and as such I submit the law ought to provide for these situations to avoid individuals having to have recourse to courts.

One solution posited for how regulation of PR can ensure the timely disposition of estates, without prejudicing the posthumous child, is requiring a limited time period within which an action may be brought on the child's behalf.[397] This provides justification for the limitation of PR via a time restriction, as is seen in states such as Spain. This, however, should not be in terms that prohibit PR, unless it is done within a particular time period. In this case what is at stake is whether the posthumous child may collect a benefit, and in my view if the child is in some circumstances not permitted to claim this benefit because the surviving partner chose to delay exercising their right to PR, the child is not harmed in a legally significant way if he or she will still be born into a family where they will have their needs provided for. I reiterate, once again, that when considering the limitations of procreative liberty, the BIOC must not be interpreted as requiring that children must be born into the most advantageous circumstances possible – only that they are not born into circumstances where there is justifiable reason to believe that they will suffer material negative consequences as a result of the parent's reproductive choices. There is no evidence to show that posthumous children not born within the prescribed time period, such that they would not inherit, would have any such negative outcome.

As to survivor benefits, these are particularly an issue in countries like the US, where, because the mortality in the military is high, soldiers commonly store their reproductive material.[398] Survivor benefits refers to financial support given by the state to the surviving family of fallen soldiers, including their spouses and children. However, these benefits generally only accrue to children alive at the time of the soldier's death. Because of this, authors such

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[396] Starr op cit note 85 at 613.

[397] Starr op cit note 85 at 632.

[398] See, generally, Teitelbaum op cit note 6.

as Tietelbaum argue that posthumous children should also be allowed to claim survivor benefits.[399] The issue of survivor benefits is comparatively less prevalent in the South African context; however, our state does provide for survivor benefits and these are indeed limited to the living children of the soldier at the time of their death.[400] Seema notes that survivor benefits in South Africa exclude posthumous children, and is of the view that this is a violation of their right to equality, in that it is discrimination against posthumous children on the grounds of birth (a listed ground in section 9(3)), and that this is a discriminatory practice not dissimilar to the way our law used to discriminate against illegitimate children.[401] I submit that the same policy referred to above as to estate benefits should apply to survivor benefits; there ought to be a limited time frame within which the posthumous children of fallen soldiers can claim benefits.

In conclusion, the concerns raised in this objection relate to children being able to obtain an economic benefit. While there is evidence to support negative outcomes arising from economic disadvantage, as discussed on objection 1, it cannot be assumed that just because a child cannot claim an inheritance or survivor benefits, the surviving spouse cannot provide adequately for the child. It cannot be considered a justifiable interference with procreative liberty if a person making a request for PR should be barred from having that request fulfilled, when it best suits them just to make sure that posthumous children will inherit a benefit.

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[399] Teitelbaum op cit note 6 at 426.

[400] Government Employees Pension Fund 'Death Benefits' www.gepf.gov.za/index.php/our_benefits/article/death-benefits&hl=en-ZA (accessed 14 November 2018).

[401] R Seema 'Social Security Survivors' Benefits in South Africa: Towards Legislative Reform Concerning Posthumously Conceived Children' (2017) *Obiter* 96.

Objection 4: Surviving Spouse's Psychological State

This objection varies from the others, in that it is not focused solely on the harm to the posthumous child – but also considers harm to the surviving partner. The concern about the psychological state of the surviving partner underlies states such as Greece's imposition of a specified waiting period after the death of the person whose reproductive material is to be used, before a request for PR may be fulfilled. The rationale behind this waiting period is that it supposedly allows surviving partners time to undergo psychological adjustment and to grieve the loss of their partner, in order to ensure that when making the decision to undergo PR – they do so on a rational basis.[402] During this period, it is generally expected that the surviving partner will undergo some kind of counselling or psychological treatment before making his or her decision.

The waiting period limitation has been criticised for being paternalistic, as it assumes that all surviving partners will grieve in the same way, and that at some point grief ends – at which point a person becomes better equipped to make important decisions.[403] It also proves to be a barrier to people with medical issues relating to fertility, either because of illness or their age, such that a delay in beginning the MAR process would materially decrease their chances of a successful pregnancy.[404] As alluded to earlier, this objection can also be conceived in a way that does not involve children, but focuses on the wellbeing of the partner themselves. In this way PR is seen as objectionable, because of the pressure it might impose on the surviving partner who may feel obligated to honour the deceased's wishes.[405] In responding to these issues on the psychological state of the surviving partner, the Ethics Committee of the

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[402] Katz op cit note 11 at 309.

[403] Katz op cit note 11 at 310.

[404] Ibid.

[405] Ethics Committee of the American Society for Reproductive Medicine 'Posthumous Collection and Use of Reproductive Tissue: A Committee Opinion' (2013) *Fertility and Sterility* 2.

American Society for Reproductive Medicine, in their opinion on PR, suggest that surviving partners undergo mandatory counselling.[406]

On this point, the actual views of surviving partners are instructive. In a study done on the perceptions of PR by women whose husbands had died while undergoing treatment for cancer, 52.5% of eligible women wished to keep the stored gametes of their husband, but subsequently over half never followed up with the PR.[407] Bahadur attributes these results to the mandatory counselling undertaken by the widows. In four reported cases the mourning process, according to the widows, was aided by the knowledge that a part of the deceased still existed, and that the widow still had a chance to have a child with them.[408]

Limitations on a surviving partner's use of reproductive material, where that use has been consented to by the deceased, are potentially an unjust inroad into their autonomy. To prescribe waiting periods and counselling seems to be unwarranted. However, these options should certainly be made available to those making the decision to undergo MAR with the reproductive material of a deceased spouse. Surviving partners ought to be encouraged to undergo counselling, and they should be given the liberty to decide on their own with regard to how long to wait and when to undergo PR.

It is practically impossible to measure the nature and impact of grief on one's capacity to be a parent. Therefore, it is difficult to determine if a mandatory waiting period and counselling is justified. I submit, however, that in the absence of evidence that grief of the surviving partner does somehow impair the welfare of the posthumous child, we should respect his or her autonomy. It is important to keep in mind that experiencing the loss of a loved one does not in legal terms result in diminished legal capacity, and, as such, if the surviving partner believes he/she is ready and capable of undertaking the role of being a

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406 Ibid.

407 Bahadur op cit note 7 at 2573.

408 Ibid.

parent to a deceased person's child, we have no reason to doubt that – even if it is shortly after their partner's death.

Golombok argues that based on her study of relationships between mothers and children who conceived via MAR, the strong desire for parenthood results in these children having a stronger bond with their parents than children conceived via coital reproduction.[409] What this indicates is that people who have a strong desire to become parents tend to be better parents, and, as such I suggest that it is in a child's best interest that a surviving spouse's request for PR be permitted – since not only do the surviving spouses possess a strong desire to be a parent, but they specifically have a strong desire to parent a child with a genetic link with their deceased partner, which will likely have a similarly positive impact on the relationship between the surviving partner and the posthumous child.

5.4 Conclusion

Human reproduction inherently is a matter relating to children, and, as such, procreative liberty often intersects with the state's interests in protecting the child's best interests. Where this happens, how far the state may go in limiting procreative liberty depends on how one applies the BIOC. In his analysis of the majority judgement of *AB,* Thaldar concludes:

> "When judges fail to uphold the rule of law, the 'law' becomes nothing more than the particular judges' personal beliefs. What transpired in AB was not the rule of law but that of judges' personal beliefs regarding the importance of blood-ties, with a transparent veneer of human-rights language".[410]

This comment outlines that the Constitutional Court's judgement in *AB* serves as a perfect example of the kind of discrimination based on personal preferences that can happen when maximalist conceptions of the BIOC based on unsubstantiated assumptions, are allowed to triumph. Our state's

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[409] Golombok op cit note 378 at 2343.

[410] Thaldar op cit note 352 at 23.

commitment to the rule of law as a fundamental value in the Constitution demands an interpretation of the BIOC as only justifying the limitation of reproductive choices, where there is some rational basis for doing so. This does not, as the majority seemed to believe, place upon the state the burden to provide empirical evidence for every position in provision it creates. What this does mean, however, is that where provisions are tested for their constitutionality, clear evidence that the purported public good sought to be achieved by the state is without any evidentiary support, means that provision is irrational.

Moving forward, South Africa in formulating its own position on PR must be mindful of avoiding arbitrary and capricious limitations of the right to reproduce posthumously. The many objections to PR are, for the most part, baseless and reflect stigmas against single parent households and orphans that should not be allowed to influence law. Golombok points out that MAR has long been the subject of irrationally extensive regulation, and observes that this is a product of its deviation from the 'norm' of the nuclear family, which is commonly regarded as highly valuable to society.[411] Limitations of rights should not be based on popular norms but on evidence, and, in my view, the only evidence that could truly base a limitation of PR is the risk of the child being exposed to socio-economic challenges because the parent requesting PR is unable to support the child and provide them with an environment conducive to healthy development. As such PR, as with surrogacy, ought to be subject to the condition that the parent has the financial and other means needed to raise the posthumous child.

[411] Golombok op cit note 378 at 2343.

CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

In this study it has been highlighted that PR is a controversial issue that poses many challenging questions. As Bahadur remarks, "the issues raised by it are the most challenging, difficult and sensitive that are likely to be encountered in the field of medicine, let alone reproductive medicine".[412] Nowhere is this more apparent than in the vast disparity in approaches on the regulation of PR – ranging from states such as France that have made laws specifically to outlaw the practice,[413] to the United States that has limited itself to non-binding model laws to accommodate PR.[414] The research has shown that states have chosen a variety of methods to deal with PR in all its forms, and many states have regarded the issues raised by PR as something that needs to be addressed in legislation. Where states have chosen not to take this course and have relied on voluntarily compliance, this results in instances where the courts and practitioners disregard state guidelines, and thus these guidelines fail to provide the clarity they were often endeavouring to achieve. I suggest that providing clarity on controversial issues is best achieved through legally binding legislation, which resolves the uncertainty that arises when there are gaps in the law, and avoids individual litigants having to approach the courts – sometimes at significant expense.

In the *Aevitas* judgment, the High Court made its decision based on arguments relating to the common law principle of autonomy.[415] There are, however, a number of constitutional rights at play when determining the legality of PR. Primarily there is section 12(2)(a), which protects an individual's autonomy in making decisions concerning reproduction, and I have argued that it is not limited to only a person's ability to make decisions concerning their own body, but also those reproductive decisions that would have an impact on their

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[412] Bahadur op cit note 7 at 2769.

[413] French Law 94-654.

[414] Uniform Parentage Act 2000; Uniform Probate Code of 2008

[415] *Aevitas* supra: Applicant's Heads of Argument para 14.

psychological wellbeing. This is reinforced by the right to health care services in section 27(2), which I submit includes the right to access reproductive technologies necessary for MAR. Both these rights are an instance of procreative liberty, the proverbial bundle of rights underlying the exercising of reproductive rights including through MAR, and by extension PR.

The application of the NHA and its regulations to PR is made unclear by the ambiguity in the provisions. It has been shown that a proper interpretation of the relevant sections and regulations require that ambiguous provisions be interpreted in a way that does infringe procreative liberty, if such an interpretation is reasonably tenable. In applying this interpretation to the impugned provisions, it has been shown that nothing in the extant law prohibits PR. Furthermore, an analysis of the application of procreative liberty to PR and the nature of reproductive material as property, reveals that there are several reasons based on human rights that it may be argued that one is entitled to engage in PR.

Procreative liberty applies to all decisions concerning reproduction. However, what qualifies as a decision concerning reproduction has yet to receive much consideration in our law. I suggest, based on the broad scope of choices given to reproductive rights in international law, that procreative liberty in South Africa should be interpreted as including a right to make the choice to make reproductive material available for use after death. Procreative liberty also underscores the right of the surviving partner to make the choice to use the deceased's reproductive material to have a child. South African law prescribes that reproductive material is capable of being owned, which leads to the conclusion that it is property, and, as such, it is submitted that the laws of testation can be applied to reproductive material – such that a person may transfer his or her rights in reproductive material to their partner after death through their will.

The consequences of conceiving reproductive material as property to which the full extent of ownership rights applies unless specifically excluded, has a varying impact for the various forms of PR. In the case of PC, because the deceased is the owner of the reproductive material at death, he or she is

entitled to transfer control thereof to the surviving partner through a will or a written directive. With PEI, if the surviving partner is the woman who is the intended recipient, then she will have been the owner of the embryo, and, as such, there will be no legal obstacle to her using it. If, however, the surviving partner was not the intended recipient, she could obtain rights to the embryo through a will or written directive transferring ownership rights to her. This creates an apparent disparity on the basis of gender, since men can never be intended recipients and that could be challenged as unfair discrimination. The Infertility Awareness Association of South Africa (IFAASA) suggests preventing potential issues and conflicts arising regarding the ownership of embryos by having both gamete donors agree to co-ownership of the embryo, which can be canvassed in the consent to treatment form or a separate embryo disposition agreement.[416] The benefit of such an approach to PR is that if either partner dies, sole ownership of the embryo will automatically vest in the surviving partner and he or shemay elect to use it or not. Alternatively, couples may choose to address PR directly in the terms of the embryo disposition agreement. Finally, in the case of PGR the use of gametes is permitted in the same was as with PC. However, here there is an added issue for consideration – that being the withdrawal of the reproductive material. I have suggested that the removal of gametes from a deceased person is not prohibited by the RRAFP, which only deals with the removal of tissue from living persons.

The strength of the rights supporting PR are not to be limited arbitrarily. The use of MAR has long been subject to capricious circumspection, because of suspicions regarding the impact on children:

> "In spite of the changes that have taken place to the structure of the family in the latter part of this century, it remains the case that a family headed by two heterosexual married parents who are genetically related to their children represents the ideal, and that deviations from this pattern are commonly assumed to result in negative outcomes for the child."[417] [own underlining]

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[416] Martin op cit note 279.

[417] Golombok op cit note 378 at 2343.

PR poses some new and challenging questions that serve to test our country's commitment to the constitutional values of freedom, equality, and respect for dignity.[418] It has been shown that maximalist conceptions of protecting the child's best interests that are based on personal beliefs or perceptions on what the majority view is, are an affront to South Africa's hard-fought battle for liberty and individual autonomy. While there are many objections to PR, these have largely been shown to be the kind of baseless assumptions referred to by Golombok in the above quotation. In light of the absence of any definitive evidence of harm posed to resultant children, and the constitutionally protected right PR established above, PR must be permitted.

In our law, the wishes of the deceased are honoured not because of posthumous rights held by the deceased, but because of the social value in treating the dead in a manner that is perceived to be respectful. In light of these conclusions, it is submitted that South Africa law on PR can best find expression in the Hybrid Approach to PR, in terms of which some affirmative proof or evidence of the deceased's wish to procreate after death is required for PR to be allowed, in the form of the reasonably informed consent of the deceased. As such, consent by the deceased may be proven and need not be in writing; however, where a written record of the deceased's wishes does exist, it ought to be honoured.[419]

It is recommended that legislative reform should be undertaken to provide for PR. Such legislative reform should firstly provide for posthumous children by allowing these children to be legally recognised as the child of the deceased and allowing them to claim both estate and survivor benefits if they are conceived within a year of the deceased parent's death. Legislative reform should also provide for the circumstances within which PR may be allowed. I suggest PR ought to be subject to an individual making a request to a court or a similar forum for authorisation to use a deceased person's reproductive material, and whether such a request is granted should not be based on

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[418] Jordaan op cit note 282 at 18.

[419] Katz op cit note 11 at 304.

compliance with strict criteria, but rather the court should have the discretion to permit or deny requests based on a 3-stage enquiry:

1. Does the requesting party have a claim to the reproductive material?
2. Will granting the request be contrary to the deceased's wishes?
3. Will granting the request be in the prospective child's best interests?

The first stage of the enquiry serves to limit who may undergo PR, based on who has a right to use the reproductive material of the deceased. Only those persons who have a claim to ownership rights in relation to the reproductive material ought to be allowed to have such a request granted. Ownership rights in the reproductive material will arise automatically to spouses – in the case of gametes the surviving spouse will have a claim to the deceased's sperm or eggs, by virtue of being the deceased's heir in terms of intestate succession. A claim to ownership rights in gametes may also arise out of the deceased bequeathing to the requesting party in his or her will or indicating their desire to transfer the gametes into their care after death in a written directive (such as the consent form signed upon storing the gametes). In the case of embryos, as the joint property of the partners, the surviving partner will have an automatic claim to ownership. In the case of PGR, it is suggested that where there is prima facie proof of such a claim, this is a sufficient basis for removal from the deceased to be authorised on an urgent basis and for the gametes to be stored pending the outcome of a full application on whether or not the gametes may be used.

The second stage of the enquiry serves to ensure that PR does not occur in a way that is contrary to the respectful treatment of the dead. The law protects the wishes of the deceased where they have been clearly expressed as such, and any clear indication that the deceased did not want to have his or her reproductive material used for PR will defeat any rights the requesting party may have to use the reproductive material. This is a non-issue if deceased persons made their desire to reproduce posthumously clear – in such a case there can be no basis for state interference with this desire. Where the deceased's wishes have not been made clear, however, evidence may be brought by the requesting party to show that the deceased would not have opposed PR. It is important to recall that respect for the deceased's wishes in

South Africa is not based on respect for the deceased's' autonomy (as they no longer have any autonomy rights), but rather on the social value in not treating the deceased's remains in a disrespectful manner, and, as such, the test here is not 'what would the deceased have wanted?', but rather 'is it appropriate in the circumstance to allow the request?' – and the answer to this question will be 'no' for the purposes of this enquiry, only if it would contrary to the deceased's wishes.

The final step of the enquiry is ascertaining whether the requesting party is competent and capable of providing for the posthumous child, in that he or she can provide the child with a healthy upbringing – even if this will not be in ideal circumstances. If the court, having undergone this enquiry, is of the view that the request ought to be granted, then the requesting party may exercise this choice immediately or choose to wait. Ultimately, PR is the choice of the people who will raise the posthumous children, and they ought to have the freedom to make the final decision on when they want to become a parent without state interference. This is at the very heart of procreative liberty.

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3 September 2018

Mr Bonginkosi Shozi 214511633
School of Law
Howard Campus

Dear Mr Shozi

Protocol reference number: HSS/1368/018M
Project title: A human rights analysis of posthumous reproduction in South Africa

FULL APPROVAL – No Risk/Exemption Application

In response to your application received 2 August 2018, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL.**

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

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Professor Shenuka Singh (Chair)
Humanities & Social Sciences Research Ethics Committee

/pm

cc Supervisor: Dr Dondrich Thaldar
cc. Academic Leader Research: Dr Shannon Bosch
cc. School Administrator: Ms Robynne Louw/Mr P Ramsewak