

# The Current Status and Enlightenment of Legal Regulation of Artificial Reproduction After Death in China and Foreign Countries

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## ABSTRACT

Artificial reproduction after death is a special social phenomenon with the development of modern assisted reproductive technology. It not only changed the traditional mode of birth, but also had a great impact on the modern legal system and social ethics. By using comparative research method and case study method, this paper makes a comparative study on the legal regulation of artificial reproduction after death in China and foreign countries, collects and sorts out relevant cases in China and abroad, and analyzes the judgment. On this basis, it is proposed that China should adopt the mode of limited opening and set up strict implementation conditions and complete supporting system.

**Keywords:** China and foreign countries, artificial reproduction after death, legal regulation, enlightenment

## I. INTRODUCTION

Artificial reproduction after death refers to when one or both providers of the reproductive gametes of both sexes die before the reproductive gametes combine to form a fertilized egg, or the fertilized egg or embryo produced by in vitro fertilization dies before one or both of the source of the embryo's genes before transfer, the reproductive gametes or fertilized eggs or embryos stored by the deceased will be used to complete reproduction, or gametes will be extracted from the dying or just deceased person to complete reproduction in the future. After the rapid development of artificial reproductive technology after death, various countries have formulated laws to regulate it. Due to differences in specific national conditions and systems, there are also significant differences in legislative perspectives. Based on the comparative research on the legal system of artificial reproduction after death in China and foreign countries, this paper explores the possibility of conditional opening of artificial reproductive technology after death in China, and finds an appropriate boundary between medical behaviors and dream-realizing behaviors.[1]

## II. LEGAL REGULATION ON ARTIFICIAL REPRODUCTION AFTER DEATH OUTSIDE THE TERRITORY OF CHINA

### A. Being fully open

1) *Israel:* In Israel, test tube baby technology is a topic that almost all classes will fully support. Because after the massacre and the millennial tribulation, most Jews have a stronger desire to give birth and have a high acceptance of birth after death, so the policy is relatively loose. Men who have passed away do not need to leave written consent, and as long as their widows and even their parents believe that they can represent the wishes of the deceased, they can perform post-mortem semen extraction. The government will even provide financial assistance to the parties, and the national health insurance can cover all aspects of IVF (In Vitro Fertilization).

Israel's slack policy is also facing a difficult situation. Once a reservist was killed in training. Although his parents were granted the right to use his sperm, his widow was unwilling to conceive his children after her husband died and opposed the use of these sperm by his parents. What should it does with these sperm in this situation? No feasible solution has been found yet.

2) *Belgium:* Belgium is a high-welfare country with very high welfare subsidies for childbirth. Therefore,

the assisted reproduction policy there is relatively open. Many people go to Belgium for artificial insemination due to restrictions in their own policies. The world's first case of using sperm for artificial reproduction after death was in Belgium. The husband of Mrs. Blood in the United Kingdom suddenly fell ill and died in 1995. Soon after his death, the doctor took out sperm from Mr. Blood's remains at Mrs. Blood's request. However, when Mrs. Blood wanted to use these sperm, the British Court of Appeal pointed out that Mr. Blood didn't leave written consent to artificial insemination in the United Kingdom, but it would be possible to obtain artificial insemination in other countries that allow post-mortem reproduction. Finally, Mrs. Blood successfully obtained artificial insemination in Belgium and gave birth to two sons.

3) *Vietnam*: Vietnam's concept of family and childbirth is similar to China's. However, due to long-term French colonization, the eastern and western cultures collide fiercely, the society is more tolerant, and its policies on artificial reproduction after death are also more open and active. According to the provisions of Article 21, paragraph 1, of the Vietnamese Government's Decree No. 10/2015/ND-CP, after the husband's death, the wife still has the right to use the sperm or embryo deposited by the husband for artificial assisted reproduction. Even if he doesn't express his consent during his lifetime, the children conceived as a result are illegitimate children.[2] It can be seen that artificial reproduction after death in Vietnam only requires the consent of the spouse, and doesn't require the consent of the husband before his death or other requirements such as time and form. Compared with the conditional open model, its policy is looser. In addition, Vietnam has not made clear regulations on whether the parents can use left-over embryos for artificial reproduction after death of the couple.

#### *B. Being strictly prohibited*

1) *Germany*: Germany, out of "rethinking the various racial discriminatory behaviors brought about by the eugenics policy during the Nazi regime, it is extremely cautious about the openness of artificial reproductive technology." [3] Although the "Embryo Protection Law" promulgated in 1991 stipulates that embryos can be used for medical purposes, it clearly declares that embryos already possess human status when they are combined with sperm and eggs. At the same time, it also stipulates that artificial reproduction should be performed within marriage, and it prohibits the abuse of reproductive technology, the abuse of human embryos, gender selection, as well as the unauthorized artificial insemination and embryo

transfer. Article 4 of the "Embryo Protection Law" clearly prohibits artificial reproduction after death. Violation of this article shall be punished with imprisonment of not more than 3 years and a fine.[4] In addition, the intentional use of semen from a dead man is illegal and should be punished. In a case in New Brandenburg, a young couple underwent artificial reproduction surgery. The husband died suddenly before his wife was implanted with sperm. The wife asked the reproductive agency to return the fertilized eggs, but the agency refused and sued to the court. The court held that the defendant's return of fertilized eggs didn't violate the provisions of Article 4, Paragraph 1, Subparagraph 3 of the "Embryo Protection Law", because this item mainly prohibits the use of deceased frozen sperm for artificial reproduction. In this case, the plaintiff was an unfertilized egg that was frozen without expecting the husband's death in order to achieve the plaintiff's main purpose of pregnancy in the future. Therefore, for the frozen sperm that has been used before death, although the artificial breeding was not successfully completed, it was not prohibited in Article 4. In the end, the court decided to return all 9 fertilized eggs to the plaintiff. Even though the court in this case decided to return the frozen fertilized eggs, considering the balance between the reproductive rights of surviving spouses, the personal rights of deceased spouses and the interests of artificial reproduction, Germany still thinks that artificial reproduction after death should not be open.[5]

2) *France*: Article 152 of the French "Public Health Code" in 1953 clearly prohibits any post-mortem human assisted reproduction. The legislative purpose of this article is mainly to prevent the birth of human assisted reproduction children in single-parent families, but there are no corresponding regulations on how the legal fathers of children born in violation of the provisions of this law should be determined.

The 2004 French "Bioethics Law" stipulates that human assisted reproductive technology is designed to meet the needs of heterosexual couples who desire to become parents, and this couple "should be living persons".[6] Since then, the revision of the "Bioethics Law" retains this provision. France's prohibition of artificial reproduction after death is mainly considered from the following aspects: (1) children's perspective: a child who is artificially reproduced after his or her parent(s) dies faces a single parent family as soon as he is born. Even if his mother can take care of him, it can't change the fact that he lacks the father's love; children born under artificial reproduction after death are not legitimate children, and the determination of the kinship and inheritance qualifications of the children is also a practical issue. (2) Mother's perspective: it's unknown

that whether the fertility behavior of a widowed woman is an impulse or a deliberate free decision. (3) Social perspective: single mothers face enormous difficulties and pressures in childbirth and raising children. Whether the state should provide policy of the law, and financial and material assistance to families in this situation is also a question.

### *C. Being conditionally open*

1) *The United States:* The United States is a typical country with conditional permission to reproduce after death. The United States attaches great importance to artificial assisted reproductive technology, and its legal regulations on artificial reproduction after death are relatively complete.

a) *The level of unified legislation:* The 2002 amendment to the "Uniform Parentage Act" (U.P.A) added a provision on the legal status of reproductive children after death: "If one spouse dies before the gamete or embryo's implantation, unless there is a record that he or she agrees to be the parent or mother of the child born after death in this case, the deceased is not the parent or mother of the child."

The 2008 amendment of the "Uniform Parentage Code" (U.P.C) stipulates that: "If there is definite evidence that the deceased expressed the intention to become the father of the child who is reproduced after death, it can be determined that there is a parent-child relationship between the deceased and the child born after his death". "If a child is conceived in the mother's womb within 36 months after the death of the deceased or is born within 45 months after the death of the deceased, the child can be presumed to have been conceived at the time of the death of the deceased."

The "Restatement of Property" provides more forgiving protection for children who are reproduced after their parent(s)' death: "If a child who uses the genetic material of the deceased and is born within a reasonable period of time after the death of the deceased can show that the deceased agrees to his right to inherit the inheritance, the child has the right to inherit the inheritance."

b) *State legislation:* Most states in the United States have no regulations on reproduction after death, and a total of 12 states have enacted legislation on reproduction after death. Eight of these states (Wyoming, New Mexico, Delaware, Colorado, Tennessee, Washington, North Dakota, and Utah) have adopted the above-mentioned U.P.A. Section 707 on reproduction after death.

Florida, Virginia, California, and Louisiana have different laws on post-mortem reproduction than those in the eight states. According to California regulations, the deceased's written statement is to use his genetic

material for post-mortem reproduction, and the child born is deemed to be born before the deceased's death if the following conditions are met: 1. The statement was signed by the deceased and by more than one witness; 2. The statement can only be changed or revoked in written form, and must be signed by the deceased and by more than one witness; 3. The person designated by the deceased who has the right to use his genetic material can only be one of the following persons: a. The spouse or registered domestic partner of the deceased. b. Other people who are designated to use their genetic material for post-mortem reproduction. In addition, the child born must be conceived within two years from the date of issuance of the death certificate or the date of the judgment of death. This provision doesn't apply to human cloning. Louisiana legislation provides: As long as the deceased gives a written consent to his spouse to use his gamete, the child born within 3 years after his death by his spouse using his gametes has a parent-child relationship with the deceased, which can be used for any purpose including inheritance. Virginia stipulates that as long as the deceased agrees in writing to become the parent of the child born after his death, the parent-child relationship can be determined; the child is only eligible for inheritance if he or she is mentioned in the will of the deceased.

2) *Australia:* Australia's states have different attitudes towards artificial reproduction after death. In the State of Victoria, a person's gametes can only be used under certain circumstances after his death, including the person's written consent.[7] However, the subject is limited to the legal spouse, and when requesting artificial reproduction after death, the spouse must submit the proof of the husband and wife's fertility planning before his or her death and the spouse needs to receive psychological assistance counseling. The health and welfare department will also set up an evaluation team to evaluate the spouse's childrearing capacity and the impact on children. Assisted reproduction can only be implemented after psychological consultation and social evaluation. Western Australia prohibits the use of gametes from the deceased for artificial reproduction.[8] South Australia has not commented on artificial reproduction after death.[9] In other areas where there is no legislation, such as Queensland, the courts usually operate in accordance with the "Ethical Code of Assisted Reproductive Technology Clinical Practice and Research" ("Code")[10] issued by the Australian National Health and Medical Research Council. The "Code" also allows reproduction after death but requires the consent of the deceased to reproduce after death. And the extraction of gametes requires the consent of the person before death, and the spouse also needs psychological counseling. If the deceased doesn't

leave clear instructions, his gametes can be used for artificial reproduction after death only at the request of the spouse and if there is evidence that the deceased will support the procedure.

3) *Spain*: Relevant Spanish laws stipulate that within 6 months after the husband's death, the spouse can use the husband's germ cells for artificial reproduction after death, but the husband's notarized certificate or will must be provided.[11] It can be seen that Spain's post-mortem reproduction needs to meet the subject element of the legal spouse, the substantive element of the husband's consent before his death, the formal element of written consent, and the time element within 6 months before it can be implemented. However, post-mortem reproduction is still possible for more than 6 months, but children born out of wedlock do not have the right to inheritance.

### **III. THE LEGAL REGULATION OF ARTIFICIAL REPRODUCTION AFTER DEATH IN CHINA**

#### *A. Mainland China*

There are four departmental regulations related to artificial assisted reproduction in mainland China, namely the "Management Measures for Human Assisted Reproductive Technology", "Human Assisted Reproductive Technology Specifications", "Management Measures for Human Sperm Banks" and "Basic Standards and Technical Specifications for Human Sperm Banks". However, there is no corresponding regulation on artificial reproduction after death. In 2014, a man in Shandong drowned and died. Because he had not conceived any children before his death, his family strongly requested doctors to extract germ cells from the remains for artificial assisted reproduction and leave offspring. Since China's legislation on artificial reproduction after death is still blank and there is no clear legal rule to apply, the doctor finally rejected the request as violating the ethical principle of informed consent by arbitrarily disposing of the remains.[12] In the second instance of Yixing Frozen Embryo Case, Jiangsu, two pairs of parents who lost their only child had the right to supervise and dispose of the embryos involved. The parents who lost their only child transferred four frozen embryos to Laos. In December 2017, a Lao "surrogate mother" gave birth to their lives.[13]

Article 8 of the "Civil Code of the People's Republic of China" stipulates: "Civil subjects engaged in civil activities shall not violate the law or violate public order and good customs". Article 1009 stipulates that "medical and scientific research activities related to human genes, human embryos, etc., shall abide by laws, administrative regulations and relevant national regulations, and shall not endanger human health,

violate ethics and morals, and shall not harm public interests." Among them, Article 1009 provides a unified standard for judging the legitimacy of medical and scientific research involving human genes and human embryos, and the insurmountable red line drawn for it has positive practical significance. In specific cases, it can realize the system docking with Article 8, thus expanding the judgment standard of "ethics" of medical and scientific research, providing direct normative support for the determination of anti-ethical behavior in cases that violate the life, health, and dignity of natural persons, and also providing strong legal support for further regulating the application and implementation of assisted reproductive technology in China.

#### *B. Taiwan*

After Sun's death in an accident in 2005, his fiancée Li immediately sought to obtain sperm from her husband's remains for artificial assisted reproduction. Although the health department agreed to extract germ cells from the remains for cryopreservation, in the end, when Sun's parents objected to post-mortem reproduction, the department rejected Li's request and destroyed the relevant germ cells on the grounds that the law did not allow post-mortem assisted reproduction.[14] The "Act on Artificial Procreation" was promulgated in 2007. The implementation of artificial reproduction in this law is limited to infertile couples. Germ cells should be destroyed or donated according to their wishes before death, eliminating the possibility of reproduction after death.

#### *C. Hong Kong and Macao*

The Item 7, Article 10 of Hong Kong's "Parents and Children Ordinance" stipulates that in the meaning of inheritance law, there are two situations where the man should not be regarded as the father of the child: first, if a man's sperm is used after his death; second, the in vitro early embryos produced by a man's sperm were used after the man's death.

Article 1782 of the "Macao Civil Code" stipulates that for the effect of inheritance, if a deceased person's fertility material is used to cause a child to be born, the person who dies shall not be regarded as the father or mother.

### **IV. THE ENLIGHTENMENT ON THE LEGAL REGULATION OF ARTIFICIAL REPRODUCTION AFTER DEATH OUTSIDE THE TERRITORY OF CHINA**

#### *A. Conditionally opening post-mortem artificial reproduction*

In recent years, the emergence of case related to artificial reproduction after death has also triggered a

change in public perceptions. It is necessary and urgent to solve the problem of artificial reproduction after death. "Only specific laws can be bred and grown in a specific region, economic environment and social consciousness; once the law grows up, it must adapt to and serve this specific region, economic environment and social consciousness, otherwise, it will gradually lose its support for its existence and die".[15] The formulation and selection of legal rules for a certain social phenomenon must be deeply rooted in a specific time and space. The existence of the need for artificial reproduction after death will not only subvert the natural reproduction law of the traditional parent-child relationship in civil law, but also threaten the stability of the inheritance law system and the legal order between family members. Based on this, the law must respond to and take into account the people's special legitimate reproductive needs. Based on the background of China's specific era, reproductive culture and family culture are still influencing society in a subtle way. For artificial reproduction after death, the author believes that China should adopt a limited open model and set strict implementation conditions.

#### *B. Introducing specific and unified laws and regulations*

At present, there are only 4 regulations regulating artificial assisted reproduction activities in China, all of which are administrative regulations without effect of mandatory laws and regulations, and can't meet the actual needs of today's rapid development of science and technology. And these regulations are even more at a loss for artificial reproduction after death. Many foreign countries have begun to actively legislate, using laws to regulate and guide the application and development of life science technology. The author thinks that China should learn from the legislative experience of other countries, and the National People's Congress and its Standing Committee should formulate a law regulating the application and implementation of assisted artificial reproduction technology, clarify the legal attitude of limited openness to artificial reproduction after death, and strictly stipulate legal conditions and legal responsibilities. At the same time, it is necessary to make corresponding adjustments and regulations in legal systems such as identity rights, inheritance rights, and protection of minors.

#### *C. Improving related supporting systems*

Artificial reproduction after death involves multiple interests and can't be simply permitted or rejected as unqualified. Corresponding supporting measures should be established to assist in implementation. The author believes that it's necessary to learn from the practice of Australia's childrearing capacity assessment team and psychological service team.

Psychological service group serves mainly the following two groups: (1) widowed women. Women may feel guilty about the death of their spouse, so reproduction after death is probably an irrational decision made by the death of their spouse. It is necessary to provide them with psychological services when making a decision; (2) children born after their parent(s) dies. Since artificial reproduction after death is a conscious creation of children with incomplete or no parents, in this situation, single parent upbringing is different from ordinary single parenting after childbirth. Children's mental health faces greater challenges, and it is necessary to provide comprehensive and long-term mental health services for them.

The support ability assessment team should form a certain index system to assess the applicant's spouse's childrearing capacity and family environment that may affect children, etc., and make an assessment report on whether it is passed. And the application for reproduction after death shall be rejected for those who don't pass the assessment.

## **V. CONCLUSION**

"In order to be able to grasp the future tasks, people must remain open attitude to new things. This kind of open attitude in principle to different things and new things, as well as the open attitude of studying unknown things, is called tolerance."[16] The behavior of artificial reproduction after death contains the deep meaning of jurisprudence, ethics, and reason. In the process of regulating the law, the demands of certain special groups and the value and meaning behind them can't be ignored. Therefore, at the legal level, it's needed to respond positively and adopt a relatively tolerant attitude. Relevant departments should base themselves on the reality of social development, by setting reasonable and strict legal conditions and including artificial reproduction after death within the scope of existing legal adjustments, in order to achieve as much as possible the balance of personal demands, family needs and social interests.

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