

# HALACHIC AND HASHKAFIC ISSUES IN CONTEMPORARY SOCIETY

## SERIES 3: 38 - POSTHUMOUS PARENTHOOD - PART 2

OU ISRAEL/BEIT KNESSET HANASI - FALL 2025

- In Part 1 we began to look at the issue of posthumous sperm retrieval from fallen soldiers and the possibility of using that sperm to produce children.
- We looked at some of the possible halachic problems in removing the sperm, including delaying burial of parts of the body, the prohibition of *nivul hamet* and also the prohibition to receive any benefit from a corpse. We also discussed the question of halachic ownership of body parts and the extent to which the wishes of the deceased and his families are necessary and relevant.
- In this shiur we will examine the following issues:
  - whether the sperm donor is halachically the father of those children<sup>1</sup> and fulfills through them the mitzva of *peru u'revu*.
  - whether posthumous insemination can in some sense fulfil the spirit of the mitzva of *yibum* and the concept of *hakamat shem met*.
  - whether such children, conceived and born after the death of the father, exempt the mother in the mitzva of *yibum/chalitza*.
  - whether there is a halachic, hashkafic, ethical or social problem in producing children who will be 'planned orphans' who will never know their father. Is there an intrinsic benefit to the child in being alive, despite his challenges?

### A] IS THE CHILD HALACHICALLY RELATED TO THE DONOR

#### A1] ARTIFICIAL CONCEPTION

- Clearly, there is no other candidate as to who is considered the halachic father of the child. The question is whether a physical act of intimacy between the parents is required to create the halachic connection to the child.

1. שאלו את בן זומא: בתולה שעברה מהו לכהן גדול? מי חיישין לדשמואל? דאמר שמואל: יכול אני לבעול כמה בעילות בלא דם. או דלמא דשמואל לא שכיחא? אמר לה: דשמואל לא שכיח, וחיישין שמא באמבטי עברה. (רש"י - ... ויש לומר שהכתיב שם אדם שכבת זרע ונכנס צמיעה). והאמר שמואל: כל שכבת זרע שאינו יורה כחץ אינו מזרע! מעיקרא נמי יורה כחץ הוה.

חגיגה יד:

*According to the Torah, a Cohen Gadol may only marry a virgin, which normally means a woman who has not previously had sexual relations. The Gemara raises the possibility of a pregnant virgin who is clearly bearing a child but nevertheless maintains her signs of virginity. How can this happen? The Gemara suggests two options and ultimately concludes that the pregnancy was due to the presence of semen in a bath that she used<sup>2</sup>. In this case, she may be permitted to marry the Cohen Gadol since she had not in fact engaged in a sexual relationship.*

2. מצאתי בהגהות סמ"ק ישן מה"ר פרץ שכתב אשה נדה יכולה לשכב אסדיני בעלה, ונהרות מסדינים ששכב עליהן איש אחר פן תתעבר משכבת זרע של אחר. ואמאי אינה חוששת פן תתעבר בנדותה משכבת זרע של בעלה ויהא הולד בן הנדה? והשיב כיון דאין כאן ביאת איסור הולד כשר לגמרי אפילו תתעבר משכבת זרע של אחר כי הלא בן סירא כשר היה. אלא דמשכבת זרע של איש אחר קפדינן אהבחנה גזירה שמא ישא אחרות מאביו כדאיתא ביבמות (לא) עכ"ל:

ב"ח יורה דעה סימן קצה

*The early poskim discuss the permissibility of a woman who is nidda sleeping on used bedsheets on which there could be traces sperm from her husband or from another man. This is permitted this since, even if she becomes pregnant, the child will not bear any stigma (as in the case of Ben Sira - see below) and it seems that the child WOULD be considered the halachic child of the husband.*

1. The position in UK law (under the Human Fertilisation and Embryology Act 1990) was originally that a posthumous sperm provider was NOT considered the legal father of the child. This was subsequently amended (under the Human Fertilisation and Embryology (Deceased Fathers) Act 2003) following the Diane Blood case in the mid 1990s and the sperm provider can now be legal registered as the father.
2. This is physically extremely unlikely but not completely impossible. The case of pregnancy caused by semen on a bedsheet is even less likely but, again, not impossible.

However, a married woman should not sleep on sheets on which another man has slept in case there is semen on the sheets and she become pregnant from this sperm. The baby would be the halachic child of the sperm provider and we are concerned that they may one day unintentionally marry their half sibling!

3. היה הבן ממזר .... קיים המצוה. (חלקת מחוקק - יש להסתפק אשה שנתעברה באמצעי אם קיים האב פ"ו ואם מקרי צנו לכל דבר. ובלקוטי מהרי"ל נמלא שכן סירא היה צנו של ירמיה שרחן באמצעי כי סירא בגי' ירמיה"ו)

רמ"א שולחן ערוך אבן העזר הלכות פריה ורביה סימן א חלקת מחוקק שם ס"ק ח

The commentaries on Shulchan Aruch discuss whether a child born following insemination from a bath would fulfill the man's obligation of pru u'rvu (see below). The Chelkat Mechoke<sup>3</sup> also invokes the midrashic story<sup>4</sup> of the virgin birth<sup>5</sup> of Ben Sira<sup>6</sup> who was apparently the son of Yirmiyahu HaNavi.<sup>7</sup>

4. כתב בחלקת מחוקק יש להסתפק אשה שנתעברה באמצעי אם האב קיים פ"ו ואם נקרי צנו לכל דבר. ויש להביא ראיה ממה שכתב צהבת סמ"ק והצ"ח הביאו ציו"ד קנ"ה 'אשה מוזכרת שלא תשכב על סדין ששכב עליו איש אחר פן תעבר משה"ל של אחר גזירה שמה ישא אחרתו מאצו' - נשמע דכוי צנו לכל דבר.

בית שמואל אבן העזר סימן א ס"ק י

The Beit Shmuel<sup>8</sup> concludes from the halacha concerning a woman sleeping on the sheets of another man that artificial insemination of this type WOULD create halachic paternity.

5. בליקוטי מהרי"ל כתוב שכן סירא היה צנו של ירמיה שרחן באמצעי וכו'. והחכם בעל חלקת מחוקק סימן א' ס"ק ח' נסתפק באשה שנתעברה באמצעי אם קיים האב פריה ורביה ואי מיקרי צנו לכל דבר יע"ש. ואין ספק דלא נאסרה לבעול משום דאין כאן ביאה איסור ....

משנה למלך הלכות אישות פרק טו הלכה ד

The Mishne LeMelech<sup>9</sup> rules definitively that there is no doubt that artificial insemination does not constitute a prohibited relationship<sup>10</sup>. However, he goes on to question if bathhouse insemination is in fact naturally possible or halachically relevant.<sup>11</sup>

6. וזה מעשה נסים הוא ואינה טמאה לידה שאין אני קורא בה אשה כי תזרע

רבינו חננאל מסכת חגיגה טז.

Rabbeinu Chananel rules that a bathhouse conception is in fact 'ma'ase nisim' and does not count as a normal conception. Therefore the woman would not become tamei yoledet when she eventually gives birth<sup>12</sup>!

3. R. Moshe Lima, 17C Lithuania.

4. There are some suggestions that the entire story is a parody on the Christian virgin birth narrative, and is part of the same genre of literature as Toldot Yeshu.

5. The concepts of the Virgin Birth and Immaculate Conception are often confused with each other. They are in fact entirely different. Virgin birth is a general Christian belief which relates to the alleged conception and birth of Jesus while his mother was still a virgin. The Immaculate Conception is a Catholic only doctrine relating to the special status of the conception of Mary, which they consider not to have been tainted by Original Sin.

6. The book of Ben Sira is a book of the Apocrypha, sometimes quoted by Chazal and other mefarshim. It is attributed to Shimon ben Yeshua (also known as Jesus) ben Elazar ben Sira, who lived and wrote in the 2nd Century BCE.

7. The source for this story is The Alef Bet of Ben Sirach, a work of questionable date and authorship, some dating it to the period of the Geonim. According to that source Ben Sira was born in the following way. Yirmiyahu HaNavi was forced by others to leave his semen in a bathhouse. His own daughter subsequently visited the bathhouse and became pregnant from it and the resulting child (being both the son and grandson of Yirmiyahu) was Ben Sira. Importantly, he is not given the status of a mamzer, indicating that conception resulting from artificial insemination does not constitute a prohibited relationship. Although the story is doubted by some later sources since it is not found in Chazal (see Zemach David 1:13a of R. David Ganz), other mefarshim quote it authoritatively. The Alef Bet of Ben Sira also suggests that R. Zeira and R. Pappa were products of artificial insemination.

8. R. Shmuel ben R. Uri Shraga Feivish of Vidislav, Poland (1640- 1698).

9. R. Yehuda Rosens - 17C Turkey

10. The poskim go on to rule based on this that a wife is permitted to sleep on sheets which may have on them semen from her husband, even if she is nidda (see Taz YD 195:7). Even if she became pregnant, this would not constitute a prohibited act.

11. Most poskim reject this and claim that it is possible. In scientific terms it is exceptionally unlikely, but not impossible. One of the proofs cited by the Mishne LeMelech is the halacha that where a betrothed woman (arusa) becomes pregnant and the husband insists that he did not have relationship with her, the child is considered a mamzer who is permitted to marry a mamzeret. Apparently, we do not even consider the possibility in that case that she became pregnant in a bath!

12. This is relevant to the halachic question of whether a baby boy conceived through IVF can have a brit mila on Shabbat. The early psak of R. Shlomo Zalman Auerbach was that it could not, on the basis that the conception was not natural. However, as IVF became far more widespread, he changed his psak and permitted this, as do most poskim. For more on this see <https://rabbimanning.com/brit-milah/Shiur 2>.

## A2] CONCEPTION AFTER THE DEATH OF THE FATHER

• The above discussion pertains to artificial conception from sperm that came out of a living father and conception occurred while the father was still alive. But can there be any halachic parenthood where the father is already dead before conception and, even more of a question, where the sperm was extracted from a dead father?

7. תשובה על דבר האשה בק"ק גידונג אשר שהתה עם בעלה שבע שנים ולא ילדה. ויהי כאשר חלה בעלה חליו אשר מת בו ..... ואשתו טבלה לנדתה ג' ימים לפני מותו וכבר הכביד החולי מאד וגם דעתו לא היתה מיושבת כל כך מרוב החולי. ובערב ר"ח סיון מת הבעל וחיים לכל חי שבק והניח אח קטן בן שלש שנים ובעת מותו היתה האשה בחזקת זקוקה ליבם קטן הזה. וכמו שני שבועות אחר מותו פירסה נדה. ובט"ו אדר ילדה בת והבת חיתה יותר משלשים יום ועל ידי לידת הבת הזו האלמנה מחזקת עצמה בחזקת היתר לשוק.

נודע ביהודה שם במהדורא קמא - אבן העזר סימן סט

*The Node Beyehuda brings a case in which a couple had been married for 7 years with no children. The husband died, leaving a brother aged 3 and it seemed clear that the woman was a Yevama who would have to wait 10 years until her brother-in-law reached bar mitzva and could perform chalitza. However, around 9 months after the husband's death the wife gave birth to a child which would ostensibly exempt her from yibum/chalitza. She claimed to have had relations with her husband on 28 Iyar and that her husband died the following day.*

8. היבמה לא תחלוץ ולא תתייבם עד שיהיו תשעים יום ממיתת הבעל, חוץ מיום המיתה ויום יבום או החליצה

שולחן ערוך אבן העזר הלכות יבום סימן קסד סעיף א

*In a normal situation yibum/chalitza may not take place until 90 days after the death of the husband. This is to ensure that the widow is not pregnant, in which case they would wait until the child was born to see if the child was viable and exempted the widow from yibum/chalitza.*

9. היאך מתיבמת אחר שלש חדשים מיום המיתה? ודלמא לא נקלט הזרע עד יום שלישי ועדיין לא שלמו שלשה חדשים שלמים מזמן עבודה ולא הוכר עוברה. ואיך פוגע בספק אשת אח דשמא מעוברת היא, והיה לו להמתין צ"ג יום. וקושיא זו חמורה מאד!

נודע ביהודה שם במהדורא קמא - אבן העזר סימן סט

*The Node Beyehuda asks a strong question on this halacha that had, apparently, never been asked before<sup>13</sup>. How can 90 days after the death of the husband be enough. Maybe the couple had sexual relations on the day he died and, since the sperm remains (according to halacha) viable inside the wife for up to 3 days, conception could have occurred up to 3 days AFTER the death of the husband. (Her ovulation may also have occurred after his death). As such they should have to wait 93 days!*

10. ואמרתי בלבי הן אמת שבתורה כתיב ומת אחד מהם וכן אין לו מ"מ אם הניח אשתו מעוברת מקרי יש לו' אף שעדיין לא נולד - אם נולד אח"כ מקרי למפרע יש לו בן. אבל אם בשעת מותו לא היתה אפילו מעוברת בודאי אם היה באותה שעה אצל הנביא ואומר שאינה מעוברת היתה מותרת באותה שעה ליבם ולא הוה אסרינן אותה מטעם הריון שתקבל אח"כ אי לאו איסורא דרבנן שאסרו תוך ג'. וא"כ אני אומר אשה שלא קלטה הזרע קודם מיתת בעלה אף שקלטה אחר מותו ובנו הוא לכל דבר מ"מ לענין יבום כבר קרינן בה 'ובן אין לו' בשעת מיתה ובת יבום היא. .... ולפ"ז אם הולד נולד אחר תשעה היה לנו לחוש שמא נקלט הזרע אחר מותו ולא יפטר את אמו מחליצה אלא דלא שכיח שימש ביום מותו. ואפילו שימש בו ביום או ביום הקודם מ"מ גם קודם לכן שימש ותולין ברוב בעילות הקודמות. אבל זו ששימשה כ"ח אייר וכ"ט אייר מת וקודם כ"ח אייר לא שימשה י"ד יום והלידה היתה ט"ו אדר א"כ יותר תלינן ההריון קרוב ללידה. וא"כ יש לחוש שמא נקלט הזרע אחר מותו של הבעל וא"כ צריכה חליצה. אלא שלפי שדבר זה דבר חדש ולא מצינו בשום פוסק ולכן אני אומר וכי בשביל שאנו מדמין נעשה מעשה להמציא חומרא חדשה? .... וגם ע"פ הרוב הזרע נקלט בשעת עיקר התשמיש ולהכי לא חיישינן לזה. סוף דבר האשה הזאת מותרת בלי חליצה אפילו לכהונה ואין לחוש כלל.

נודע ביהודה שם במהדורא קמא - אבן העזר סימן סט

*The Node Beyehuda suggests that, where conception occurred AFTER the death of the husband, although the baby is certainly the halachic child of this father (and would inherit from him), for technical reasons it may not qualify as a child that exempts the widow from yibum/chalitza. This is because, at the time he died, he had no child. However, in the end, the Node Beyehuda rejects this as a new chumra<sup>14</sup> which, if relevant, would have been raised previously and he rejects it.*

13. In fact, the question is raised earlier by the Maharsha - see his comments to Yevamot 37a s.v. בא"ד וי"ל דכ"כ לא היה משתתה הכרת עובר של ראשון עכ"ל. The Maharsha also rejects the suggestion that we would need to wait 3 extra days due to the concern of delayed conception.

14. In this case it would have been a very significant chumra since the widow would have to wait 10 years as an aguna waiting for her young brother-in-law to grow up and perform chalitza.

11. ויקח בועז את רות - אמרו אותה הלילה שבא עליה מת

ילקוט שמעוני רות רמז תרח

Chazal explain that Boaz died immediately after his first sexual relations with Ruth and no question is ever raised as to the status of David HaMelech on the grounds that the conception may have been after Boaz's death<sup>15</sup>.

12. עיין צנודע זיכודק מהדורא קמא אכן העזר סימן ס"ט שרולא לחדש דכיכא שמת קודם קליעת הזרע אף שחשבו הולד כצנו לכל דבר מכל מקום אינו פוטר היצמח מן החלילה דקריין ככי האי גוונא 'וצן אין לו', דזשטעט שמת עדיין לא היה לו צן יעו"ש. והנה זה דבר זר ורחוק מאוד! .... וכיון דככי האי גוונא הוא צנו לכל דבר הרי אין שמו מחויי והקים שם לעצמו.

חידושי ר' שמעון שקופ יבמות סימן לג

R. Shimon Shkop questions the chidush of the Node Beyehuda<sup>16</sup> and asks how a child conceived after a man's death can be considered the halachic child of the dead husband and yet not exempt his widow from yibum. At the end of the day, the man has children who will continue his name and therefore should not be subject to the mitzva of yibum.

• Can events which occur after a persons death still change their halachic status or is death the end of all new potential halachic realities?

13. אמר אביי: בא עליה ומתה - פטור, שנאמר: (דברים כב:ט) וְנָתַן [הָאִישׁ הַשֹּׂכֵךְ עִמָּהּ] לְאִבִּי הַנֶּעֱרָה - ולא לאבי מתה. מלתא דפשיטא ליה לאביי מיבעיא ליה לרבא. דבעי רבא: יש בגר בקבר או אין בגר בקבר? יש בגר בקבר ודבנה הוי, או דלמא אין בגר בקבר ודאביה הוי?

כתובות לח:ב

If a man raped a women the Torah requires him to pay a fine of 50 shekels. If the girl is below 12½ the fine is paid to her father and if she is over 12½ it is paid directly to her. Abaya rules that if the girl dies before the rapist is convicted, there is no fine. Rava raises the question of 'yesh beger bekever' - do we give halachic relevance to the date that the deceased girl would have reached 12½ had she live - i.e. can she achieve that status while already in the grave. If we do say that, and the rapist is convicted after the girl would have reach majority, the fine must be paid to her estate eg a child if she had one.

14. דילמא אין צגר צקצר ודאצור הוי - כלומר דדוקא צגרות דמחיים מויליחא מרשות אב ו מפקעא זכותא מרשות אב. אצל צגרות דקצר לא חשבינן ליה צגרות, ודאצור הוי הקנס אחר שהיא מתה.

חידושי הר"ן כתובות לח:ב

The Ran explains the two sides of this chakira - does she acquire halachic maturity after death or does her death before majority mean that she remains in the 'domain' of her father and the fine will go to him?

15. והאמר שמואל: כל שכבת זרע שאינו יורה כחץ אינו מזרעת! מעיקרא נמי יורה כחץ הוה.

חגיגה יד:

The Gemara questions the halachic relevance of sperm in a bathtub since the halacha assumes that pregnancy cannot occur unless the sperm was 'yore kechetz' - ejaculated in the normal manner. It concludes that this requirement is not about the method of conception but the viability and vitality of the sperm. If it was originally 'yore kechetz' then it can cause impregnation, even if it was picked up from the bath.

- Does this impact our case of PSR where the sperm did not emerge in the normal manner - 'yore kechetz', but was surgically removed from a dead body.
- If the sperm provider is NOT the halachic father, does the baby have a father?

15. In fact, this is not really such a relevant precedent since the Node Beyehuda did not doubt that a child conceived after the father's death was halachically meyuchas to that father. His question was only on the mother's status as a yevama.

16. Many other poskim also question this chidush of the Node Beyehuda (see R' Tzvi Ryzman, Sefer Ratz kaTzvi - Inyanei Even haEzer). The Keren Ora (Yevamot 87a s.v. *Gemara veHalak*) rejects the self-contradictory notion that a man can leave a son who inherits him, yet also a widow who is a yevama who must perform yibum/chalitza; surely yibum and inheritance are mutually exclusive. Rav Shlomo Zalman Auerbach (No'am 1, p. 150) notes that, according to this chidush, if a married woman had relations with another man and her husband died before she conceived, according to the Node Beyehuda, would the child be a mamzer? Although the child would be the son of the adulterer - who had relations with the woman while she was still married - she was not married at the time of conception and the act of intercourse alone is not sufficient to make the child a mamzer. Rather R. Auerbach clearly rules that the only relevant halachic moment is when the sperm enters the woman's body and not when the conception occurs. However, he does agree that, in a case of PSR, although the woman WOULD have to perform chalitzah, if she were later impregnated by the retrieved sperm, this would be the full halachic child of the donor. Thus, disagreeing with the Keren Ora, there COULD be a case of chalitzah where there was also a child.

16. Another argument against post-mortem sperm retrieval is that the child's paternity is uncertain. In the case of artificial insemination performed after the father's death, there is legal and halakhic disagreement over whether the child is considered the deceased's son. The same disagreement exists with post-mortem sperm retrieval. In halakha, it is very important to know who the father is. A divorced or widowed woman, for example, must wait three months before she can remarry because, should she be pregnant with her first husband's child or become pregnant with the second husband's child soon after her remarriage, paternity would be uncertain, and this could lead to the forbidden marriage of a brother to his sister.

However, there is a clear halakhic difference between unknown and uncertain paternity. An illegitimate child whose father is unknown - the child of a prostitute, for example - is called a *shetug'i*, but with post-mortem insemination using frozen sperm or with post-mortem sperm retrieval, the biological father is known and the controversy over paternity is strictly legal. Paternity is uncertain, which from the halakhic perspective is totally different from unknown as it cannot accidentally lead to the forbidden marriage of a brother to his sister.

R. Mordechai Halperin, M.D., Post-Mortem Sperm Retrieval, ASSAI - Vol IV, No 1 February 2001<sup>17</sup>

### A3] YIBUM IMPLICATIONS

17. הכונס את יבמתו - זכה בנכסים של אחיו

משנה יבמות ד:ז

*The brother-in-law who performs yibum inherits the property of the dead husband.*

18. הכונס את יבמתו וכו'. מ"ט? יקום על שם אחיו אמר רחמנא, והרי קם.

יבמות מ.

*The Gemara understand that this is because he has stepped into the place of the dead husband to perpetuate his name beyond death.*

19. החולץ ליבמתו ונמצאת מעוברת וילדה - בימן שהולד של קיימא הוא מותר בקרובותיה והיא מותרת בקרוביו ולא פסלה מן הכהונה. אין הולד של קיימא הוא אסור בקרובותיה והיא אסורה בקרוביו ופסלה מן הכהונה:

משנה יבמות ד:א

*The Mishna rules that if a man dies with no children but leaving his wife pregnant, we do not yet know if there will be a child to continue his name. So we must wait until the child has been born and shown itself to be viable. If the brother-in-law performed chalitzah before we have that clarity (eg when the woman is still pregnant) we only know if the chalitzah was valid once the child has been born and proven to be viable.*

20. איתמר: החולץ למעוברת והפילה - ..... ריש לקיש אמר: צריכה חליצה מן האחין. .... וריש לקיש סבר: ו (דברים כה:ה) וְגַם אֵין לוֹ - 'עין עליו'.

יבמות לה:

*The Gemara darshens the expression - 'u'ben ein lo' [he has no son] to say 'ayin alav' - there must be a proper investigation to ascertain if he does (or will) indeed have one*

21. וריש לקיש סבר בן אין לו עין עליו ..... שלא תחלוץ ולא תנשא כל זמן שעומדת בספק.

תוספות יבמות לה:ב ד"ה וריש לקיש

*Tosafot understand this to mean that we cannot allow a yibum/chalitzah while there is still a safek - a question as to whether there will be a child.*

22. אלא עיין עליו בעיונה בעלמא אמר רחמנא - לומר שלא תחלוץ ולא תניבם ולא תנשא עד שדע מה יבא בסופה.

חדושי הרמב"ן יבמות לה:

*Ramban understands that we cannot allow a yibum/chalitzah until we know whether this woman will have a child 'in the end'.*

17. [https://www.daat.ac.il/daat/kitveyet/assai\\_english/halperin1-1.htm](https://www.daat.ac.il/daat/kitveyet/assai_english/halperin1-1.htm)

- In a case where there are frozen sperm samples which could be used to produce a child, all the time that these samples are viable there is the possibility that there could be a viable child. Does this mean that the woman remains in a constant state of 'potential yevama' (and therefore effectively an aguna unable to marry anyone else) until a child is eventually born or the samples are destroyed? This is indeed the psak of R. Yosef Shalom Eliyashiv who rules that the woman may not marry until the sperm sample is destroyed and she then performs chalitza<sup>18</sup>.
- The Gemara raised the opposite question - what if the deceased husband already DID have a child at his death and the widow remarried without yibum/chalitza, but that child subsequently died years later. Do we retroactively say that there were no children and the woman must now perform a yibum/chalitza years later, rendering her interim marriage halachically prohibited?

23. אמר ליה רב יהודה מדאסקרתא לרבא - לא נעשה מתים כחיים לענין יבום? (רש"י - ותחזור לזיקא אם ימות בנה לאחר זמן). ....  
 ת"ל: (משלי ג:יז) דַּךְ כִּי תֵּיךְ דְּרִיגָתָא וְכִלְיֵי תִּיבְתִּינָה שְׁלֹמֹה: (רש"י - וזו שכיב לה בן ולא נקקק ליבם וניסת לשוק ומת בנה, אם תאמר תחלוץ  
 הרי היא מתגנה על צעלה. הילכך על כרחך 'בן אין לו' בשעת מיתת קאמר וברי יס לו.)

יבמות פז:

*The Gemara rules that we would not say that the future death of a child could 'resurrect' the obligations of yibum/chalitza since this would be contrary to the principle of 'darchei noam' - the Torah's approach is one of pleasantness not pain. To leave the second marriage constantly in question in case the earlier child dies is impossible as this would undermine the stability of the marriage.*

- Would we apply this principle of *darchei noam* to our (opposite) case? As such, if there are no children at the death of the soldier the woman WOULD be required to perform yibum/chalitza, even if there were frozen sperm samples which could be used many years in the future to produce a child which would retroactively remove her status as a yevama and render any yibum a prohibited incestuous marriage and any chalitza unnecessary and invalid.

#### A4] INHERITANCE IMPLICATIONS

- If there are frozen sperm samples which could produce future sons many years later, will they inherit retroactively from the deceased's estate? For example, a man died leaving 1 million dollars at the moment of death to his one brother. Sperm was then retrieved from the deceased which was used 5 years later to produce two sons. Can these later children claim the full million dollars back from the brother? Similarly, if there were existing children at the time of death<sup>19</sup>, can future children from PSR claim back some of the inheritance from the other siblings.

#### A5] DIFFERENT APPROACHES IN THE POSKIM

24. נראה במי שהוציא את זרעו לתוך כלי ומת בלא בנים לפני שהכניסו את הזרע לתוך רחם האשה דאע"ג שנתעברה אח"כ וילדה ולד של קיימא אפילו הכי חייבת ביבום. משום דאף שהולד מתיחס אחריו והוא בנו לכל דבר מ"מ כיון דבשעה שמת בעלה עדיין מחוסר מעשה של הכנסת הזרע לגופה מיד כבר חל עלי' חובת יבום. ואף שלענין ירושה שפיר נקרא יורש, היינו מפני שדין ירושה לא תלוי דוקא בשעת מיתה ויכול שפיר לחול עליו שם יורש גם זמן רב לאחר מיתת המוריש, כמו למ"ד שאין זכיה לעובר.

שו"ת מנחת שלמה תניינא (ב - ג) סימן קכד

25. מסתבר כדעת הרב ש"ז אויערבאך שהנולד מהזרעה לאחר מיתה נחשב בנו של המת לכל דבר, הן לענין איסורי קורבה, הן לענין יוחסין והן לענין ירושה, למרות שלא יבטל חובת יבום.

הרב ד"ר מרדכי הלפרין - הנולד מהזרעה מלאכותית אחר מות אביו - דברים שיש להם שיעור (הוצאת צמת):

*R. Shlomo Zalman Auerbach ruled that:*

- (i) Babies produce from PSR were certainly the halachic children of the deceased, even though the sperm was removed and the conception occurred post mortem.
- (ii) These children also inherited as relatives together with other family members.
- (iii) However, notwithstanding the extraction of sperm postmortem and the possibility of future children, the widow WAS considered to be a Yevama at that time and was required to perform chalitza.

18. Kovetz Teshuvot 3:190 and He'arot on Berachot 20a.

19. This is a less likely scenario since PSR will not normally be permitted if there are already existing children

26. ראיתי 'פסק הלכה של גדולי הרבנים' שנאמר בו: ילד שיוולד מזרע מוקפא לאחר מות אביו יהיה זכאי לקבל את ירושת האב, גם אם יחלפו עשרות שנים והירושה כבר חולקה בין אחרים – על שאר היורשים יהי' להתחלק עמו בירושה. אין הבדל בין ילד שנולד כתוצאה מיחסים נורמליים לבין ילד שנולד מהקפאת זרע. מבחינה תורשתית, הילד הוא צאצאו הישיר והטבעי של אביו.

איני יודע מי הם שפסקו כזאת! ולענ"ד זוהי טעות בהוראה, שאף אם אמנם אין שום יסוד להבחין בין זרע טרי לבין זרע מוקפא, אולם נ"ל שגם אם ייפסק כמסקנת הב"ש שיש לו ייחוס לאב, גם אם לא הי' כדרך כל הארץ, מ"מ משמת בעל הזרע שוב נקטע היחס עמו ולא יתייחס הולד אחרי הבעל הזה ... דאי אפשר לומר, שבכה"ג ייחשב כבן המת, ויפקע אז ממנה דין יבום מאחר שבשעת מות הבעל לא הי' לו בן, ולא הי' עומד להיות לו בן (אם לא יעשה מעשה) שממילא חל עליו דין יבום, כשעברו על האשה צ' יום של הבחנה. אם איתא שאם אח"כ יעשה מעשה בזרע המוקפא ויוכנס למעי אשה ויתפתח לולד, דאז יפקע למפרע זיקת היבום ויהיו הבנים ממזרים והאשה תצא מהיבם כדן מיובמת בטעות... כשם שמסיק בגמרא שאם במות הבעל הי' בן קיים ומכוח זה הותרה לשוק שאם אח"כ מת הבן אין זה דרכי נועם שתצטרך להזקק אז ליבום ... וא"כ אם אינו "בן" לענין יבום אינו בן לשום דבר אחר, ואינו נחשב קרוב לענין שום דבר, כולל דיני עריות. כי אין לו שייכות לאב ולא למשפחתו לשום ענין. שכן דיני משפחה למדים מדיני יבום, ולא ניתן להפריד בין זה לזה. וממילא ברור שוולד שנולד מזרע מוקפא אחרי מות בעל הזרע אין לו שום יחס קרבה למשפחת האיש שממנו בא הזרע המוקפא. ואין הולד יכול לתבוע חלקו בירושה.

הרב שאול ישראלי חוות בנימין קז

However, R. Shaul Yisraeli ruled differently. Even though we may treat artificial insemination the same way as natural fertilization, once the father has died he ceases to have any halachic connection to extracted sperm<sup>20</sup>. R. Yisraeli rules, like R. Auerbach, that it's impossible (due to the principle of darchei noam - see above) that the application of yibum could be retroactively changed years later if a new child were created. But, unlike R. Auerbach, he is unwilling to separate between the different areas of halacha which he understands to be interconnected. As such, if subsequent progeny from PSR are not children for the laws of yibum, they are also not children in terms of yichus to the deceased, or for inheritance or even for arayot<sup>21</sup>.

27. מ"מ בנד"ד שהפרו מזרעו לאחר מיתתו יש לחשוש שאין הולד הנוצר נחשב בנו. דשמה כל המושגים שקבעה התורה באדם - כאבא ואמא יהודי ונכרי וכו', קבעה כן התורה רק באדם החי בגוף. אבל כשאנו חי בגוף אינו בכלל אדם ולא שייך בו כל השמות שקבעה התורה באדם. ולכן בנד"ד שהולד נוצר מזרע לאחר מיתת בעל הזרע אין בעל הזרע יכול להיעשות אביו, שלא שייך שאדם מת נעשה אב.

תשובות והנהגות כרך ו סימן רמד

R. Moshe Sternbuch rules that only a living person can acquire a new halachic status - as a father, Jew etc. After a person's death the halacha no longer grants them a new status. As such, the sperm provider in PSR cannot be the father.

## B] DOES THE DONOR FULFIL THE MITZVA OF P'RU U'REVU

• This question is, of course, closely related to the discussion in the previous section. If a baby produced after PSR is not halachically considered to be the child of the sperm provider, how could he possibly fulfil through them the mitzva of p'ru u'revu? However, the position is actually a little more complicated ....

28. היו לו בנים בהיותו עובד כוכבים ונתגייר, ר' יוחנן אמר: קיים פריה ורביה, וריש לקיש אמר: לא קיים פריה ורביה. רבי יוחנן אמר קיים פריה ורביה, דהא הוא ליה; וריש לקיש אמר לא קיים פריה ורביה, גר שנתגייר - כקטן שנולד דמי.

יבמות סב.

The Gemara asks if a non-Jew who has children and subsequently converts has fulfilled through these children his halachic obligation of p'ru u'revu? R. Yochanan says that he had fulfilled the mitzva since he left physical human beings in the world. Reish Lakish says he did not, since these people are not considered his halachic children after he converts as he is halachically considered to be a newborn child and an entirely new person with no familial connections.

29. רבי יוחנן אמר קיים פריה ורביה - אף על גז דלענין כמה דברים אמרינן 'גר שנתגייר כקטן שנולד דמי', מכל מקום מסתברא ליה לר' יוחנן הכא כיון דנכריותו קיים דזרעו מיוחס אחריו צאותה שעה מפטר נמי כשנתגייר.

תוספות יבמות סבא ד"ה רבי יוחנן

Tosafot understands R. Yochanan to hold that since the non-Jew was connected to his children at that stage, this already satisfied his obligation even after he converts.

20. This would seem to be the case EVEN if the sperm were extracted while the father was still alive, all the more so after his death.

21. Rav Yisraeli also extended this ruling to frozen embryos implanted after the genetic father had died.

30. היו לו בנים בגיותו ונתגייר הוא והם הרי זה קיים מצוה זו ... (מגיד משנה - .... וידוע שהלכה כרבי יוחנן. ופירש רבינו שרשונים נתגיירו גם כן ונכון הוא, שאם לא כן היה מחוייב לישא כדי להיות לו צנים ישראלים ולא יאמר ר"י דצנים עכו"ם די לו).

רמב"ם אישות טו: ומגיד משנה שם

*The Rambam rules like R. Yochanan - he can fulfil the mitzva of p'ru u'revu with children born to him while he was non-Jewish, but ONLY if those children also convert<sup>22</sup>. Even though these children will technically not be related to him, his obligation is to leave behind JEWISH people.*

31. .... דקיימא לן כרבי יוחנן דאמר קיים אפילו לא נתגיירו בניו עמו, דאין חילוק כדמוכח התם ....

שו"ת מהר"ל סימן קצו

*However, other commentators rule that he fulfills the mitzva even where the the children remain non-Jewish.*

• Does an unmarried man have an ACTIVE obligation of p'ru u'revu? R. Eliyahu Bakshi Doron only permitted using sperm postmortem if the man had been married and therefore was actively obligated in the mitzva which he had not yet performed. An unmarried man technically has a mitzva from the age of 13, but we do not help or even encourage him to fulfil it<sup>23</sup>!

• Is the mitzva to actually HAVE children or to TRY to have children?

32. .... דהא בהיו לו בנים בהיותו עכו"ם ונתגייר דלר' יוחנן קיים פו"ר (ביבמות דף סב) ואיפסק כן בש"ע (סימן א' סעיף ז') אף שבהיותו עכו"ם לא היה מחוייב. שהקשה ע"ז הטו"א בר"ה דף כ"ח מהא דאכל מצה בהיותו שוטה לא יצא ואם נשתפה צריך לאכול מצה אחרת משום דכיון דלא היה מחוייב בעת שעשה המצוה לא שייך לומר שיקיים המצוה בזה. ועיין במנ"ח מצוה א' שתירץ מחמת זה דמצות פו"ר אינו על המעשה אלא על היות הבנים דלכן אם מתו לא קיים פו"ר, וא"כ גם ע"י אמבטי אף שהוא שלא במעשה נמי יצא. ולע"ד יש לתרץ בפשיטות דאף שלא מסתבר לומר כהמנ"ח שהמצוה לא תהיה על המעשה, אבל המעשה שנצטוו בפו"ר אינה הולדת הבנים דזה אינו בידו אלא המצוה וחיוב שעליו הוא לבעול אשתו ביאה גמורה שיהיה אפשר מזה להוליד. .... דמצות פו"ר שעליו הוא הבעילה שרק זה הוא בידו ואין לו לבטל מזה עד שיהיו לו בנים. ....

שו"ת אגרות משה אבן העזר חלק ב סימן יח

*One of the questions on the mitzva of p'ru u'revu is whether the mitzva depends on a halachic 'ma'ase' - the action of a person who is obligated in the mitzva. Most mitzvot DO require a halachically relevant ma'ase. For instance, someone who ate matza while in a state of mental incapacity (shoteh) is required to eat again once he becomes lucid again. The Minchat Chinuch explains that p'ru u'revu does not work in the same way<sup>24</sup>. The obligation is fulfilled not by a 'ma'ase' but by the fact of leaving physical descendents in the world upon one's death. For this reason, if a person had children who r'l predecease him leaving no grandchildren, the person has ultimately NOT performed the mitzva. So too, if a person had children when they were not Jewish, these DO count to fulfil his mitzva, even though there was no 'ma'ase mitzva' of an obligated person. According to this approach, why would there be any difference if the children were produced after the death of the father<sup>25</sup>.*

*However, R. Feinstein fundamentally disagrees with this approach. In his view, the obligation of p'ru u'revu is not to actually bear children, but to engage in a marital relationship in order to TRY to have children. One does not necessarily need to go to extreme lengths to fulfill this<sup>26</sup>.*

33. אמר רבא: בשעה שמכניסין אדם לדין אומרים לו: .... עסקת בפריה ורביה?

שבת לא.

*This seems clear from the Gemara which informs us what we will be asked on entering Olam Haba. One of these questions is 'asakta b'priya verivya' - did you to TRY to have children, even if there were ultimately no children left?*

22. This is also the psak of the Shulchan Aruch - EH 1:7.

23. R. Dr. Abraham Abraham quotes R. Shlomo Zalman Auerbach as seeing no basis in principle for a halachic distinction between married and unmarried men. Nevertheless, although he did not regard the procedure as prohibited for unmarried men, he considered it to run counter to general halachic ethics.

24. This was already the subject of a debate around the case of a woman who became pregnant from a bath or sheets on which she slept. Does the sperm provider fulfil the mitzva of p'ru u'revu? In this case there was no specific ma'ase by the father. (A similar case would be where semen was taken from a man when he was sleeping and used through artificial insemination to create a child). Beit Shmuel EH 1:10 rules that he DOES fulfil the mitzva. Taz (EH 1:8) questions this. The Minchat Chinuch brings a proof from the Talmud Yerushalmi that no intentional act is required to fulfil the mitzva of p'ru u'revu: a man who fathered a child through a prohibited act (such as an adulterous relationship) is still considered as having fulfilled p'ru u'revu. However, why is this not considered a mitzva haba'a b'aveira - a mitzva which was performed through a forbidden action, which is usually invalid. According to the Minchat Chinuch, the answer is that the essence of p'ru u'revu is not the ma'ase, it is the existence of the children.

25. This is the position of R. Mordechai Halperin who rules that children produced after PSR DO fulfill the mitzva of p'ru u'revu

- [https://www.daat.ac.il/daat/kitveyet/assia\\_english/halperin1-1.htm](https://www.daat.ac.il/daat/kitveyet/assia_english/halperin1-1.htm).

26. This was also the position of R. Shlomo Zalman Auerbach, who understood the halachic obligation to be for the couple to engage in regular sexual relations but not to require them to pursue "heroic" actions to assure a pregnancy.



34. דאמר רבי אבא בר פפא: לא נענש יהושע אלא בשביל שביטל את ישראל לילה אחת מפריה ורביה.

עירובין סג:

*Yehoshua was punished by remaining childless because he needlessly prevented the Jewish people from fulfilling the mitzva of p'ru u'revu for one night<sup>27</sup>! The mitzva here appears clearly to be that of relations between the couple, rather than the actual production of a child.*

• On that basis, EVEN if the sperm provider will be the halachic father of the child, is this really the fulfillment of the mitzva of p'ru u'revu if there was no closeness and marital relationship leading to the conception of the child? Does it make a difference if the mother is a wife with whom the deceased had been trying to produce a child such that the PSR is an extension of this process, as opposed to a girlfriend or even an unconnected woman who agrees to bear the child?

35. 3.3.3 Insemination as part of the covenant of relationship – the covenant that the deceased made with his widow when they married includes his commitment to bring children into the world with her. This aspect of the brit (as the Torah describes the marital relationship) is described in the verse 'and he will cling to his wife and they will be of one flesh' – which, according to some of the commentaries, describes the partnership that is created by having children. Therefore, when the deceased freezes their sperm for future use, or when the widow is interested in PSR, using the sperm is considered part of the covenant of their marriage and not taking advantage of a technical resource. This aspect of the covenant is only relevant when discussing inseminating the widow, and if she is not interested in this, she has in essence 'annulled the covenant' and therefore she has no status in dealing with the insemination of other women from the semen of her late husband.

3.3.4 Priority of the wife over the parents regarding these issues – .... in issues concerning having children, the wife has priority over the parents, and she is permitted to veto their wishes regarding insemination using their child's sperm – even if we were to rule that when dealing with a single person, the parents could offer the use of his sperm to a single woman.

4. Conclusion - 4.4 When the deceased is not married, one should not utilize their sperm. 4.5 Other family members of the deceased, including his parents, have no jurisdiction in this topic.

Rabbi Yuval Cherlow, Position Paper – Insemination with Sperm of the Deceased, Dec 2023<sup>28</sup>

36. דבר השאלה בבחור שהוציאו ממנו זרע לפני שעבר טיפול כימותרפיה ולדאבון לב הטיפול לא עלה יפה ולפני מותו ביקש שישתמשו בזרעו להפרות אשה פנויה או נשואה כדי שישאר לו שם ושארית בארץ. האם ראוי למלאות מבוקשו? הנה זה פשוט כביעתא בכותחא שאין הנפטר מקיים בזה מצות פרו ורבו. דכיון שמת אדם נעשה חפשי מן המצוות ואין אדם מקיים מצוה לאחר מותו. ואין זה תלוי כלל במה שנחלקו האחרונים בדבר מצוה זו אם היא במעשה הביאה או בעצם היות לו בנים. מכל מקום ברור ופשוט דאף אם המצוה מתקיימת במה שיש לו בנים אין זה אלא בחייו, ולא לאחר מותו, ומתוך פשיטות אין צריך להאריך בזה כלל.

רבי אשר וייס שליט"א קובץ בית הלל כרך י דף עג

*Rav Asher Weiss rules that the sperm provider definitely does NOT fulfil the mitzva of p'ru u'revu<sup>29</sup> since one cannot fulfil any mitzva after one dies.*

• As such, some poskim rule that the mitzva of p'ru u'revu can be fulfilled through PSR and some rule that it cannot<sup>30</sup>. But this is NOT necessarily connected to the question of whether the sperm provider is the halachic father<sup>31</sup>!

27. This is learnt from the angel who came to Yehoshua (Yehoshua 5:13-14) with an outstretched sword, informing him 'now, I have come' - ie for a transgression which had just occurred.

28. <https://ad120.tzohar.org.il/en/articles/position-paper-insemination-with-sperm-of-the-deceased/>

29. Rav Weiss (Minchat Asher, Bereishit 3) also cites Rav Tzvi Pesach Frank (Har Tzvi E.H. 1) who rules that the primary expression of the mitzva of p'ru u'revu is the act of intercourse.

30. This is the position of R. Yosef Shalom Eliyashiv and R. Shlomo Dichovsky.

31. It is possible that someone is NOT a halachic father yet still fulfills the mitzva (such as the convert) or that someone IS the halachic father but does not fulfil the mitzva as in the case of a pregnancy from a bath (according to the Taz).

## C] PREGNANCIES OF SINGLE WOMEN - CHASHAD & OTHER ISSUES

• Some poskim have prohibited pregnancies following the death of the father since these will lead to suspicion<sup>32</sup> of infidelity or immorality<sup>33</sup> by the woman and stigma for the child<sup>34</sup>. However, beyond the specific cases raised in the Gemara, there is no general halachic ban that prohibits situations which could lead to potential stigma.

## D] THE MOTHER'S STATE OF MIND

- Some argue that a recent widow who wishes to have PSR performed on her deceased husband is in a state of emotional distress and her decision might be against her long-term interests; in the future she may deeply regret her decision. This could also apply to older grieving grandparents who are initially insistent that they wish to produce offspring from their son, but may regret this in years to come<sup>35</sup>.
- There is some legal precedent for ignoring the immediate wishes of a person in the expectation that these will not reflect their long-term position<sup>36</sup>.
- However, it is not clear that this would apply to reasonable decisions<sup>37</sup> made after careful consideration.
- In order to avoid hasty decisions there could be a provision whereby PSR could only be done after a minimum period (eg 6 months) following the death. However, the longer the wait the more uncertainty, causing other halachic challenges.

## E] PLANNED ORPHANHOOD

- Many poskim<sup>38</sup> have ruled that it should be prohibited to intentionally create orphans (or even fatherless children) through PSR<sup>39</sup> on the basis that the Jewish family should, where possible, be comprised of a living father and mother. Although they would permit a husband and wife to conceive a child when the husband was terminally ill and the child would almost certainly be raised as an orphan, this case is significantly different in a number of respects.

37. כָּל-אֶלְמָנָה וְיָתוֹם לֹא תַעֲנֹן: (רש"י .... לפי שהם תשושי כח ודבר מלוי לענותם)

שמות כב:כא ורש"י שם

*The Torah commands us not to oppress the widow or orphan. Rashi explains that they are singled out since they generally lack strength in society and are liable to be oppressed.*

38. עם כל הרגישות שבדבר ורצון הורי הנפטר או אלמנתו, טובת הילד שיוולד ללא אב, מחייבת להימנע ממעשה זה.

הרב יעקב אריאל, שו"ת פועה פוריות יוחסין וגנטיקה עמ' 140 והלאה

39. שאין זו רוח היהדות שאישה תיכנס להיריון באמצעים כאלה, ויגדלו ילדים ללא אב.

רב דב ליאור שם

32. R. Shlomo Zalman Auerbach ruled that a single woman may not become impregnated artificially due to the concern of chashad. See Nishmat Avraham 4 EH 1:3, based on Yevamot 24b and Ketubot 22b. See also Tehumin 44 p. 379 fn 39.

33. R. Yosef Henkin ruled that artificial insemination of a single woman was prohibited due to the Torah prohibition of kadesha (Kitvei R. Y.E. Henkin 2 Teshuvot Ibra 73.) Some poskim have raised the precedent of Ketubot 3b concerning the Roman decree of *prima nocta* whereby the local governor would have the right to sleep with new brides before their husbands. Many women were moser nefesh and died rather than submit to this, even though, in halachic terms, this was considered rape and the woman bore no responsibility. Nevertheless, the Rabbis did not publicize this 'heter' in case other women abused it and had voluntary relations claiming that they had been forced.

34. See for example: Mishlei 4:24; Yevamot 24b and Gittin 79b. Beit Hillel rules there that a husband may not have relations with his wife after he has written her a get. The Gemara explains that Beit Hillel is concerned that the wife may become pregnant and there could be a significant delay between the dating and the delivery of the get. People may then assume that date on the get is correct and that the child is born outside marriage. Although it would not be a mamzer Rashi notes that it would bear a stigma. This is the position of Nishmat Avraham (Second Edition), volume 3, pages 49 (in the name of Rabbi Shlomo Zalman Auerbach) and Rabbi Yitzchak Zilberstein, Shiurei Torah for Doctors 4, Bnei Brak 5772, page 317.

35. See Tehumin 44 p 378 fn 34 which brings an account by R. Menachem Borstein of Machon Puah that R. Mordechai Eliyahu advised a widow whose husband had died young from cancer not to use his sperm that had been frozen to produce another child for at least 2 years in order that her decision should be made with appropriate consideration.

36. See the example brought in the Tosefta (Shekalim 1:2) of a person who has gangrene in his leg and the only way to save his life is to amputate, but he refuses. The physician ties him up, cuts off part of his leg and cures him. Retrospectively, he is considered to have consented to the amputation.

37. Unlike the decision to die rather than undergo an amputation.

38. This is the position of R. Hershel Schachter and R. Mordechai Willig.

39. This is usually also reflected in their prohibitive approach to older single women having children through sperm donation when it seem clear that they will not be able to have children otherwise.

40. לכתחילה להביא ילד שאין לו אבא זהו עוול גדול. לפעמים קורה שאבא נהרג, רחמנא ליצלן ויש הרבה יתומים. זה לא בידינו, אבל לכתחילה להביא ילד יתום זה קיפוח שאין לעשותו

רב נחום רבינוביץ שם

*Many senior poskim, including these from the Dati Leumi community, have ruled that it is inappropriate to bring orphans into the world in a planned manner.*<sup>40</sup>

- However, these concerns are more policy driven than strictly halachic and other poskim<sup>41</sup> have ruled that these considerations are overridden by other factors weighing in favor of permitted PSR and subsequent pregnancy in the case of fallen soldiers.

## **F] THE SPIRIT OF YIBUM OR A DEPARTURE FROM JEWISH FAMILY VALUES?**

- We saw in Part 1 that some poskim (most notably R. Zalman Nechemia Goldberg) saw this procedure as consonant with the spirit of Yibum - to enable the dead soldier to have progeny who will perpetuate his name and memory.
- However we also saw that other poskim (including R. Asher Weiss) reject this out of hand as an inappropriate application of 'ta'amei hamitzvot' - speculating the underlying reasons for and spirit of a mitzva and applying those speculations in practical halacha. In general, this is an approach which is clearly prohibited.
- There are a number of important differences between PSR/impregnation and a regular case of Yibum
  - (i) In Yibum the child will grow up with two biological parents, aside from the spiritual connection to the dead uncle. With PSR the child will never have a living biological father.
  - (ii) In Yibum the widow is able to marry and gain the support of a new husband from her deceased husband's family, providing on-going emotion and material support as well as maintaining connection with her previous in-laws (the child's grandparents) and giving some consolation for her loss. With PSR the woman may be alone with no support<sup>42</sup>.
  - (iii) In Yibum there is a real and ongoing connection with the deceased since the child is raised by his brother and widow. With PSR of an unmarried soldier, the child is simply a biological offspring with no practical family connection to the deceased (and perhaps also no halachic or spiritual connection either - see above).
  - (iv) In Yibum the child is born *b'kedusha* through an intimate relationship between husband and wife. With PSR this is lacking.
  - (v) In Yibum the new child is mystically seen as a reincarnation of the deceased brother to enable him to fulfil other mitzvot and gain atonement for his sins. With PSR the baby is NOT a reincarnation of the deceased but a biological (and perhaps not halachic) child. Also, the deceased need no further atonement since they died as *kedoshim al kiddush Hashem*.

## **G] SHOULD SOLDIERS GIVE CONSENT IN ADVANCE FOR PSR OR EVEN SPERM SAMPLES?**

- Some are in favor of soldiers giving explicit consent in advance for PSR to avoid any uncertainty as to their views.
- What about soldiers giving sperm samples in advance so that PSR could be carried out?

41. Q: .... I wanted to ask: is there room to ask every soldier who drafts if he is interested in this, and then there would be no doubt as to his wishes? Perhaps we could even let them freeze their sperm for this purpose?

A: This truly is a dilemma. A similar dilemma faced Rabbi Goren zt"l, who was the IDF Chief Rabbi at the time, and he discusses the question of whether to reestablish that which was accepted according to the Gemara regarding the army of King David, where anyone who went to war would write a get for his wife. The motivation to do this is to prevent a situation of agunah for the wives of married soldiers who are missing, which is an incredibly painful and sensitive situation. At the end of the day, it was decided not to do this for a number of reasons, from lowering the morale of those who sign this kind of document, to doubts regarding the proper intentions and if the various soldiers could qualify for the criteria to make such a get, to weakening the sanctity of marriage and its appeal .....

I estimate that even those who supported this, such as Rabbi Ariel, may he live long, would not support taking sperm from the onset, and the difference is clear: writing a get is designed to prevent a tragic and disastrous situation; taking sperm from the onset comes to create an initial situation that is not positive in its foundations – the birth of an “orphan” child to the deceased (this is different than a living single woman who genuinely wishes to be a mother in her life), and therefore I estimate that everyone would reject this institutionalized proposal.

R. Yuval Cherlow<sup>43</sup>

40. These quotes (which relate more generally to the question of planned pregnancies for older single women who have not been able to marry) are cited in an article by R. Roi Zaga which is generally negative on the issue of producing children from PSR (see Tehumin 44 p.378).

41. Including R. Zalman Nechemia Goldberg and ybcl'a R. Zev Weitman who do not take this position and are more permissive on the issue of pregnancy after PSR.

42. This is of course case specific. In some cases of PRS for the widow or long-term girlfriend, the woman is strongly supported by her late husband's parents. However, she remains without a husband unless she subsequently remarries.

43. <https://ad120.tzohar.org.il/en/faq/responsa-insemination-with-sperm-from-a-killed-soldier-follow-up/>

## H] CONCLUSIONS?

42. יש מקום להתיר לקחת זרע מאדם לאחר מותו בתנאים הבאים:
- א. הזרע מיועד להפריית אלמנתו, שהיה נשוי לה, ובפרט אם ההורים מסכימים לכך. זאת בהתחשב בעובדה שיש מקום נרחב לדחיית החששות ההלכתיים השונים, ויש להניח שניחא לו למת שיוציאו מזרעו כדי שישאר לו שם וזכר בעולם, וכן במקום צער רב של האלמנה הרוצה להביא צאצא לעולם שעל ידו ייזכר שם בעלה.
  - ב. ההיתר מוגבל למקרים שהמת טרם זכה לזרע של קיימא כלשהו, אבל אם כבר יש לו ילדים לפני שמת, אין להתיר הוצאת זרעו להפריית אלמנתו, כי לא ברור שבמקרה כזה היה רוצה לעשות זאת.
  - ג. כמו כן אין להתיר לקחת זרע ממת רווק רק לפי דרישת הוריו.
  - ד. וכל זה דווקא אם הסכים לכך בחייו, או שיש אומדן ברור שזה היה רצונו.

הרב אברהם שטיינברג, מיהו אב בימינו – תחומין לב: (2012)

Rav Avraham Steinberg ruled in 2012 that PSR should be permitted ONLY:

- for the insemination of a widow (who was married to the deceased) since we can assume that he would want to leave children through her, and only where the deceased's parents agreed.
- if the deceased had no other children.
- for a single man where the parents requested this.
- where the deceased explicitly requested this or we can reasonably assume that he would have.

43. 4. Conclusion: 4.1 If the deceased leaves a clear directive regarding using his sperm, one should fulfill it, aside from cases of significant logical error.
- 4.2 It is important to clarify precisely what the true wishes of the deceased and his partner are. The attorney general regulated this via an investigation of a social worker, and this seems like proper and fitting procedure.
- 4.3 If the deceased did not leave instructions and was married, the widow is the decider; on condition that she has not married again, and that a significant amount of time has not passed from the moment she could have used the sperm. The widow's wishes have no impact, positive or negative, on the insemination of other women.
- 4.4 When the deceased is not married, one should not utilize their sperm.
- 4.5 Other family members of the deceased, including his parents, have no jurisdiction in this topic.
- 4.6 The principles stipulated here allow the sperm retrieval from the outset, as long as it is not done in a way that desecrates the body

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44.

1. **חלל נשוי שיש לו ילדים** - ואשתו מבקשת זרע ללדת ילד נוסף, אם יש אומדן ברור שהמת רצה בכך, לדעת הר"י גולדברג מותר, ולדעת הר"א וייס אסור. אך אם לא הביע את רצונו, לכאורה לא מצאנו היתר להפריה, בפרט לאור השיקול של טובת הילד.
2. **חלל נשוי ללא ילדים** - ואשתו מבקשת ללדת ממנו ילד משותף. מלבד המחלוקת הניל, מאחר שאשתו חייבת בחליצה כדי להתיר לה להינשא, לדעת הר"י אלשיך לא ניתן לחלוץ לה כל זמן שהזרע קיים בעולם, ורק לאחר שיוולד תוכל לקבל חליצה ולהינשא.
3. **חלל רווק** - וחוריו מבקשים לשאוב ממנו זרע. אם לא הביע את רצונו, לכאורה אין כל היתר להפריה. אם השאיר צוואה, הרב מרדכי הלפרין התיר לקיים את רצונו, אולם לדעת שאר הפוסקים אין לכך היתר מאחר שההפריה תיעשה באשה פנויה.

לקחת זרע ממת לצורך הפריה, וייחוס הוולד לעניין ייבום וירשה, רב צבי רייזמן, תחומין מד עמ' 391

- R. Zev Weitman ruled that the PSR was permitted in a case in Alon Shevut in which Netanel Silberg Hy'd fell in battle leaving a long-term girlfriend whom he had intended to soon marry. She has since born a child from Netanel - the first to be born in this manner since the war. However, R. Weitman is quick to point out that MANY poskim remain opposed to this and the halachic matter is not as simple as has sometimes been portrayed in the press.

45. (ז) כִּי יֵשׁ לְעֵץ תִּקְוָה אִם יִכָּרֵת וְעֵדוּ יִחְלֶיף וְיִנְקֹתוֹ לֹא תִחְדָּל: (ח) אִם יִזְקֶיךָ בְּאֶרֶץ שְׂרָשׁוֹ וּבְעֶפֶר יָמוּת גִּזְעוֹ: (ט) מִרְיַח מֵיִם יִפְרֹחַ וְעֵשֶׂה קִצְיָר כְּמוֹ-נֹטֶעַ: (י) וְגֵבֶר יָמוּת וְיִחְלֹשׁ וְיִגָּזֵעַ אִדָּם וְאִיָּהּ: (יא) אֲזוּלֵ-מֵיִם מִיָּיִם וְנִהָר יִחָרֵב וְיִבֶּשׁ: (יב) וְאִישׁ שֹׁכֵב וְלֹא-לָקוּם עַד-בִּלְתִּי שְׁמֵיִם לֹא יִקְצוּ וְלֹא-יִעָרֻ מִשְׁנֵתָם: (יג) מִי יִתֵּן בְּשֹׁאֵל תִּצְפְּנִי תִסְתִּירֵנִי עַד-שׁוּב אֶפְדָּ תִשִּׁית לִי חֵק וְתִזְכְּרֵנִי: (יד) אִם-יָמוּת גִּבֹּר הִלְחִיָּה כָּל-יָמַי צָבָאִי אֵיחָל עַד-בֹּא חֲלִיפָתִי:

איוב יד-ז-יד

For a tree has hope; if it is cut it will again renew itself, and its bough will not cease. If its root ages in the earth, and in the dust its trunk dies, from the smell of water it will blossom, and it will produce a branch like a sapling. But a man will die and he is weakened; man perishes and where is he? As the waters fail from the sea, and the river is drained dry. So does a man lie down and not rise; until the heavens are no more, they will not awaken, nor will they be aroused from their sleep. Would that You hide me in the grave, that You would keep me secret, until Your wrath has subsided; give me a set time and remember me. If a man dies, will he live? All the days of my lifespan, I will hope, until the coming of my passing.