# THE INDIAN CHAPTER: POSTHUMOUS CONCEPTION - RIGHTS & ISSUES

- *Shubangi G*[*]

## ABSTRACT

One of the most defining factors of civilised humankind is the preservation and sustenance of one's lineage, along with the appropriate accordance of rights and si▪gnificance. During preceding centuries, the decease of a person without birthing a child would have been considered a tragedy due to the impossibility of the continuance of their lineage. However, through the development of modern technology, such as Assisted Reproduction through artificial insemination, this impossibility has been redressed, allowing couples who were conventionally not able to birth children to have them and preventing any possible transmission of undesirable genetic traits. In light of the novel health conditions plaguing the world, such as the COVID-19 pandemic, the future is predicted to witness increased demand for such Assisted Reproductive Technologies (hereinafter 'ARTs'). However, unlike other developed and developing countries, India, though allowing legal ART, has no provisions regarding posthumous conception and the legal rights of such conceived children, which is a huge lacuna in the legal system and structure for the future. The lack of such legislation and the dearth of research and opinions on the same has left a gaping hole that must be redressed swiftly and succinctly for a better future, which is the main objective of this research paper.

**Keywords:** posthumously conceived children, legal rights, post-mortem gamete retrieval, consent, intestate succession, Assisted Reproductive Technologies, inheritance issues.

## INTRODUCTION

"*Of all the social groups within the State, the family is at once the most closely knit, the smallest and the most enduring. It has always been recognised by philosophers, jurists and political scientists, that the closeness and intimacy of family ties make the relationship between State and family a problem of special importance*." One of the major defining traits of a family unit amongst humans is the concept of inheritance and legal heirs to continue one's lineage and legacy. The case of *Baldev Sahai Bangia v. R. C. Bhasin* holds that the term 'family' is not to be associated with a confined meaning but a broader one, such that it

[*] The author is a law student at the Symbiosis Law School, Hyderabad.

includes not only the patriarch or matriarch but also the lineal descendants of a common ancestor and other members living under said head.

It is not inconceivable for offspring(s) to be posthumously conceived, that is, after the decease of one or both of their biological parents, thanks to breakthroughs in assisted reproductive technologies. The development of cryopreservation (the utilisation of cryogenic science to store singular gametes and embryos) has opened the door to non-coital, posthumous child conception, with Montegazza having called for cryopreservation sperm banks as early as 1866 for widows of husbands killed in action. Posthumous conception entails the implantation and gestation of artificially fertilised embryos following the death of the genetic parent(s) and the natural conception, posthumous to either or both of the gamete donors.

'Posthumous Reproduction' refers to the conception, gestation and birth of the child after the death of either or both of the genetic parents. This is inclusive of gestation and consequent birth by a pregnant, brain-dead or comatose woman who is provided life-support until the completion of the development of the foetus. Though the concept and practice of ARTs, such as In-Vitro Fertilization (IVF), Gamete Intra-Fallopian Transfer (GIFT), Embryo Transfer (ET), Artificial Insemination (AI), etc., are relatively new in India, the sector is booming, particularly due to the rise in health problems such as PCOS, among others.

However, it is only during the period of the COVID pandemic that clear signs of demand, such as the sudden deaths of healthy persons and their bereft partners wishing for closure, for posthumous conception have been witnessed and acted upon in India, though a relatively common concept in the West. Yet, there are different takes on the concept and practice of posthumous conception; Israel has the most liberal legislation regarding posthumous reproduction, followed by the United States of America with less restrictive but varied stances, the United Kingdom mandating *antemortem* consent, while Sweden, France, Canada and Germany prohibit the practice in absolute.

A primary ethical debate surrounding posthumous reproduction is whether the reproductive material of a person could be considered property and the dubiety of a person owning their reproductive material, as, on no account can one be said to *own* their children. However, as Nedelsky posits, rather than thinking of "ownership" as the underlying concept, "authority" must be considered.

Despite the increasing demand for such ARTs and the probability of their prevalence in the future, the legal regime governing the same stands flimsy, with the Assisted Reproductive Technology (Regulation) Act (ART Bill), 2021, having only been nascently passed before the Parliament. However, not just the ARTs that deserve legal clarity, but also the procedures surrounding Post-Mortem Gamete Retrieval (PMGR) and reproduction, as well as the legitimacy and stance of those children conceived and born posthumously.

In '*Post-mortem Sperm Retrieval in Context of Developing Countries of Indian Subcontinent*', perhaps the leading source of literature on the practice of post-mortem sperm retrieval (PMSR) in India, despite the depth of the research, there was a failure to provide comprehensive and relevant solutions and suggestions to tackle the situation at hand, cognisant of the needs of the dynamic society.

Even '*Posthumous Reproduction and Its Legal Perspective*',[1] one of the few legal analyses on posthumous conception and reproduction in India with impressive international assessment, provides a bleak picture lacking in cognisance of national needs and applications. Thus, it is evident that the current legal stance on the consent for posthumous gamete retrieval, conception and reproduction, not extending to conception from pre-embryos, and the rights of thus conceived children is dismal, almost next to non-existent, which this research paper aims to remedy.

## INDIA'S DISMAL LEGISLATION ON LEGAL RIGHTS

### 1.1 Silent Laws and Unforgiving Provisions on Posthumously Conceived Children

As per Section 3(f) of the Hindu Succession Act of 1956, an heir means 'any person, male or female, who is entitled to succeed to the property' of their ancestor or ancestress, the latter being their mother or father.[2] Though the concept of 'succession' is not defined under Indian

[1] John A. Robertson, *Posthumous Reproduction*, 69(4) Ind. L.J 1027 (1994). Law Commission of India Rep. No. 228, Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy (August, 2009).

[2] Sanchita Sharma & Anonna Dutt, *40 Years of IVF: How Fertility Tech has Changed the World, and India*, THE HINDUSTAN TIMES (July 21, 2018), https://www.hindustantimes.com/india-news/40-years-of-ivf-see-how-fertility-tech-has-changed-the-world-and-india/story-ow9SKhft9Z9ZUJXo9jTtvO.html. The Assisted Reproductive Technology (Regulation) Bill, 2010, Indian Council of Medical Research.

law, an inference can be drawn from the Louisiana Civil Code, which defines succession as "*the transmission of the estate of the deceased to his successors. The successors thus have the right to take possession of the estate of the deceased after complying with applicable provisions of law*."[3] Succession in India is mainly of two kinds, 'Testamentary' or 'Intestate'.

In the testamentary form of succession, the testament or will the dead person leaves behind will take precedence over any inheritance laws, though subject to legal redressal.[4] However, in intestate circumstances, wherein the deceased has not left behind a will, the rules of inheritance take precedence, and the property is devolved to the legal heirs.[5] As per the Indian Succession Act, as well as the respective Hindu, Christian and Muslim inheritance laws, a posthumous child who has been conceived *ante-mortem* but born after the death of the father shall be considered a fully valid legal heir and is accorded a right to inheritance.[6] Though the probability of 'posthumously conceived' children is on the rise, it is an unfortunate truth that the Indian legal system is yet to factor in the legal rights of such children, with the existing statutes proving to be inadequate.

According to Section 27(c) of the Indian Succession Act of 1956, to succeed the deceased, there ought not to be any distinction between those who were born during the lifetime of a person deceased and those who, at the date of their death were only conceived in the womb, but who have been subsequently born alive.[7] This clause specifies that only those children conceived while the father was still alive but born after the father's death may be considered legal heirs for succession. Thus, as under the ambit of the Indian Succession Act of 1956, posthumously conceived children will be excluded as legal heirs from succession, the current legislative framework does not possess clarity on the legitimacy of children who are posthumously conceived via ARTs.

A child born after 280 days after dissolution of marriage is deemed illegitimate as per the Indian Evidence Act of 1872.[8] However, sperm must be cryopreserved for 180 days

[3] European Society of Human Reproduction and Embryology, July 3, 2018.
[4] Kelton Tremellen & Julian Savulescu, *A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception*, 30 REPROD BIOMED ONLINE 6 (2015).
[5] Christopher A. Scharman, *Not Without My Father: The Legal Status of the Posthumously Conceived Child*, 55(3) VANDERBILT LAW REV. 1001 (2002).
[6] Hall v. Fertility Institute of New Orleans, 647 So. 2d 1348 (La. App. 4th Cir, 1994).
[7] Katherine Dwyer, Inheritance Rights or Posthumously Concieved Children in Other States, OLR RESEARCH REPORT, 2012-R-0319.
[8] Restatement (Third) of the Law of Property, § 2.1, Comment (1999).

before insemination, according to ICMR recommendations.[9] To avoid donors with venereal diseases, a donor's sperm should be isolated for six months, as per the rules. Thus, any child produced through ART is illegitimate under the law by the number of days from conception. Thus, the current legislative framework does not possess clarity on the legitimacy of children born through ART and are thus posthumously conceived.

### 1.2 Lack of Guidelines and Legal Safeguards – Detriment to Development

Ever since the birth of the 'first test tube baby' Louise Brown in 1978 in the United Kingdom, science has reached a new frontier, not just in its development but also for the future of mankind.[10] Thenceforth, the practice of Assisted Reproductive Technologies (ARTs) has provided hope to millions of people, with varying legal receptions worldwide. However, in India, there is an increasing necessity for not just legal guidelines but safeguards and remedies, and this gaping vacuum remains unaddressed to satisfaction despite the current IVF centres in the country being over 570 in number, with many more unregistered under the Indian Council for Medical Research, the monitoring body for the same.[11]

The 228th Law Commission report calls for comprehensive legislation to regulate such complex procedures.[12] The only legal structure in India that marginally addresses the need is the Assisted Reproductive Technology (Regulation) Act, which was belatedly passed in 2021 after long periods of deliberation; however, it did not mention post-mortem reproduction. Though the Indian Council for Medical Research allows for women to be inseminated with their deceased husband's sperm, the sperm must have been gathered while the husband was still alive, who may or may not be near death but should have been in good health.[13] The Act, therefore, does not provide guidelines for Post Mortem Sperm Retrieval (PMSR) and only conveys ambiguity regarding the status and rights of posthumously conceived children.

### INTERNATIONAL STANDING AND PERSPECTIVE

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[9] Goodwin v. Turner, 908 F.2d 1395 (8th Cir. 1990).
[10] Katherine Bishop, *Prisoners Sue to be Allowed to be Fathers*, NY TIMES, Jan. 5, 1992.
[11] Astrue v. Capato, 566 U.S. 541 (2012).
[12] United States Code: Social Security Act, 42 U.S.C. § 301-1305 (Suppl. 4 1934).
[13] Nikita Doval, *Life Uninterrupted*, THE OPEN (Aug. 6, 2021), https://openthemagazine.com/feature/life-uninterrupted/. See Astrue 566 U.S. 541.

Despite there being nearly 8 million babies born from IVF and other ARTs since the first test tube baby in 1978,[14] posthumous conception continues to be controversial ethically in several countries and has even been banned outright in some such as Sweden, Canada, Germany and France. Other countries, such as the UK, mandate explicit *ante-mortem* consent to the procedure of posthumous conception or Post-Mortem Sperm Retrieval.[15] Therefore, to understand and implement progressive changes and vital legal structure in India, it is first important to comprehend the international standing.

**2.1 United States of America**

In the United States of America, the rights of posthumously conceived children are not unequivocally recognised in all the states besides Louisiana, California, North Dakota, Colorado, Virginia, Iowa, and Texas, that too, with varying legal provisions and requirements for intestate succession.[16] Some States demand formal consent from the deceased parent *antemortem*, approving the post-mortem use of the genetic material. As held in Hall v. Fertility Institute of New Orleans, the donor's consent must have been provided when he/she was not subjugated to undue influence and was competent to issue consent.[17]

Texas and Virginia limit intestacy rights to children who were already gestating during the period or who were born within a particular time frame following the parent's death.[18] Most other states do not expressly restrict or award posthumously conceived children intestacy succession rights, and a child born after a parent's death is not considered an heir under the law of inheritance unless the conception of the child was via natural intercourse.[19] It has also been judicially held that prisoners have no right to provide sperm to inseminate their wives while living artificially,[20] and prisoners on death row wishing to store their sperm so that it may be used for posthumous conception have no right to reproduce.[21]

The landmark case of *Astrue v. Capato* is a prime example of the intestacy laws of the States being questioned when the posthumously conceived children were denied the survivors'

[14] FLS § 742.17 FLA. STAT. § 742.17 (YEAR).
[15] Infertility (Medical Procedures) Act 1984, No. 10163 (Austl.).
[16] *Supra*, note 11; Benjamin Kroon et al., *Post-Mortem Sperm Retrieval in Australasia*, 52(5) AUST NZ J OBSTET GYNAECOL 487 (2012).
[17] *Id.*
[18] R v. Human Fertilisation and Embryology Authority; Ex parte Blood [1997] 2 All ER 687.
[19] *Supra*, note 12.
[20] Laurence C. Nolan, *Posthumous Conception: A Private or Public Matter*, 11(1) Byu J. Pub. L. (1997).
[21] Human Fertilisation and Embryology Act, 1990, c. 37, § 5, sch. 3, Acts of Parliament, 1990 (UK).

insurance benefits under the Social Security Act.[22] This Act mandates posthumously conceived descendants to receive survivor insurance benefits if they were eligible to inherit from the deceased parent under the relevant state intestacy law.[23] The children[24] were denied benefits as they were citizens of Florida, wherein the intestacy law states that a child conceived after a parent's death is not eligible to inherit unless the child is named in the parent's testament.[25]

### 2.2 Australia

The Infertility Act of 1984 of Australia[26] was the first legal provision in the international community to regulate ART.[27] Certain states in Australia legitimise the use of the gametes of the dead parent for posthumous conception, provided the deceased had expressed their consent for the same.[28] However, there have been recent instances[29] where the Court had actively called for reformation of the Act to allow and provide guidelines for posthumously conceived children, as it is apparent that there will be a necessity for the same in the future.[30]

### 2.3 United Kingdom

Common law acknowledges the legitimacy of children born after the decease of either or both of the parents, provided they are born 300 days after the death of the parent(s). Such posthumously born children are considered '*en ventre sa mere*'. In nearly every case, the father is the deceased parent.[31] The primary regulatory legislation in the UK is the Human

[22] R v. Human Fertilisation and Embryology Authority, ex parte Blood, [1996] 3 WLR 1176.
[23] R v. Human Fertilisation and Embryology Authority, ex parte Blood, [1997] 2 All ER 687.
[24] Margaret Brazier, Hard Cases make Bad Law?, 23(6) J Med Ethics 341 (1997).
[25] Clare Dyer, *Diane Blood Law Victory Gives her sons their 'Legal' Father*, THE GUARDIAN (Sept. 19 2003), https://www.theguardian.com/science/2003/sep/19/genetics.uknews.
[26] Linda Choe, *What in the Name of Conception? A Comparative Analysis of the Inheritance Rights of Posthumously Conceived Children in the United States and the United Kingdom*, SYRACUSE SCI. & TECH. (2011).
[27] Parpalaix v. CECOS (1984) Trib. Gr. Inst. De. Creteil, 1 August, 104 Gaz. Pal. II 560.
[28] Aziza-Shuster E, *A Child at all Costs: Posthumous Reproduction and the Meaning of Parenthood*, 9 HUM REPROD (1994).
[29] Lansac J, *French Law Concerning Medically-Assisted Reproduction*, 11 HUM REPROD. (1996).
[30] Insemination post-mortem: la France autorise l'exportation de gametes vers l'Espagne, LE MONDE (May 31, 2019), https://www.lemonde.fr/societe/article/2016/05/31/insemination-post-mortem-la-france-autorise-l-exportation-de-gametes-vers-l-espagne_4929713_3224.html.
[31] Kelton Tremellen & Julian Savulescu, *A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception*, 30(1) REPROD Biomed ONLINE 6 (2015). See Parpalaix 104 Gaz. Pal. II 560.

Fertilisation and Embryology Act of 1990, which legally allows not just posthumous storage and use of sperm post-mortem but also PMSR and insemination with valid written authorisation.[32]

### 2.3.1 Regina v. Human Fertilisation and Embryology Authority, ex parte Blood, (1996)

In the Diane Blood Case, the sperm was retrieved from the father, who was in a coma but was not yet clinically declared dead. While Mrs Blood did not encounter any legal hurdles in the stage of gamete retrieval from the husband, obstacles were faced in the utilisation of the sperm for fertilisation concerning the lack of written consent from the dead husband and the status of the children born of such union as legal heirs of the deceased husband,

The Trial Court held that written consent *antemortem* was essential not only for the use of gametes in the UK but also for their storage and preservation.[33] This was in corollary to the then-harsh provisions of the Human Fertilisation and Embryology Act 1999, which mandated formal consent. However, the Court of Appeal held in the landmark judgment[34] that Diane Blood could transport the gamete from the deceased husband to a country in the European Union wherein she may be lawfully treated without need of any proof of formal consent (written) on the part of the donor of the sperm (deceased husband). The Appellate Court unequivocally held that retrieval of the sperm from the deceased husband with his prior formal consent and the treatment of Diane Blood with such gametes in the UK were unlawful.[35]

The Act of 1990 did not allow posthumously conceived children to be considered the legal heirs of their deceased father. However, reformation post the Diane Blood case allowed the 2008 version of the Act to declare that if the conception was carried out with the consent of the father *antemortem*, and that the sperm handling must be and was subject to certain restrictions, then the children would be considered legal heirs.[36] Thus, the above legislation not only helped legalise the rights of posthumously conceived children with only one

[32] V. Rozee & E. de la Rochebrochard, *Assisted Human Reproduction outside the French Legal and Medical Framework: Issues and Challenges*, 593(9) POPULATION & SOCIETIES (2021).
[33] G.A. Katz, *Parpalaix v. CECOS: Protecting Intent in Reproductive Technology*, 11(3) HARV J LAW TECHNOL 683 (1998).
[34] C. Civ., art. 340 (Fr.).
[35] Neil Maddox, *Inheritance & the Posthumously Conceived Child*, CONVEYANCING & PROP. LAWYER (2017).
[36] Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 289 (Cal. Ct. App. 2d 1993).

deceased parent but also enabled the children conceived for same-sex couples to be accorded their rights.[37]

**2.4 France**

France, contrary to Belgium, does not allow post-mortem insemination; thus, the possibility of posthumously conceived children is improbable. In light of the Parpalaix Case,[38] an unambiguous mandate was invoked by the Center d'Etude et de Conservation du Sperme Humain (CECOS), which was enforced by the French Courts of disallowing insemination posthumously.[39] A law banning post-mortem insemination was upheld in 1994.[40]

While the French legislation as a whole is not compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Medically Assisted Reproduction (MAR), to the extent of posthumous conception through artificial insemination is only permitted through the exportation of gametes retrieved and stored in France to a reciprocating territory in the EU, as was held in a 2016 case.[41]

**2.4.1 Parpalaix v. CECOS, (1984)**

The Parpalaix Case[42] was groundbreaking for the legal issues raised and the ratio passed by France, one of the more rigid European nations, about artificial insemination and posthumous conception.[43]

Parpalaix deposited his gametes at the government-based research centre and sperm bank (CECOS) with no instructions for the prospective use of such sperm in light of his mortality owing to testicular cancer. While in a relationship with Corinne Richard during the deposit, the union was formalised later, only days before the death of Parpalaix. Post-mortem, the request for the deposited gametes to be returned to the wife for prospective fertilisation was denied by CECOS on the grounds of lack of legislative backing as well as enunciated consent and instructions on behalf of the deceased Parpalaix.

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[37] Jesse Wall, *The Trespasses of Property Law*, 1 J. MED ETHICS (2013).
[38] G. Bahadur, *Death and Conception*, 17(10) HUM. REPROD. (2002).
[39] Tom BEAUCHAMP & James CHILDRESS, Principles of Biomedical Ethics (7th Ed. 2012).
[40] F. Kroon, *Presuming Consent in the Ethics of Posthumous Sperm Procurement and Conception*, 1(2) REPROD. BIOMED. & SOC. ONL. (2016).
[41] *Id.*
[42] S. Jones & G. Gillett, *Posthumous Reproduction: Consent and its Limitations*, 16 J. LAW MED. (2008).
[43] *Supra*, note 61.

However, the Court, while rejecting that the sperm is an ordinary moveable property, held that despite the lack of written consent on the part of the donor, the intentions for procreating were conclusive.[44] The Court further held that despite the Civil Code (as it existed then) mandating a child to be deemed illegitimate if born post the 300-day window of the father's death, the same rationale cannot be applied in the case of sperm.[45] The pioneer Court ultimately concluded that the absence of written consent is not evidence of negation of consent for a posthumous child.

**PROBLEMS ENTAILING THE RIGHTS OF POSTHUMOUSLY CONCEIVED CHILDREN**

Primarily, because of its complexity and the need for comprehensive and unambiguous laws, which are still not prevalent, many problems and legal controversies surround the rights of children conceived posthumously. Filiation (would the deceased genetic father be considered the legal parent?) and inheritance entitlements regarding the deceased parent's property are among the conflicts that arise post-conception. The two issues are similar but are not the same. Though conceivable that the deceased can be considered the child's legal parent, the child can still be disentitled to inherit from the parent.[46] Further legal concerns that come up during pre-conception may be regarding the extent to which the sperm of a deceased parent can be considered the 'lawfully due property' of the inheritor not yet posthumously conceived.[47]

A major global legal controversy revolves around whether the sperm of the deceased partner could be considered as part of the 'property' and if the widow has the rights for the same in cases where there is no expressed consent provided before death.[48] However, the larger issue lies post-birth regarding the inheritance rights of the posthumously conceived child. Even if there are specific legal provisions for the same, problems would yet arise from intestate

[44] Human Tissue and Transplant Act 1982 (WA) § 22 (Austl.); Transplantation and Anatomy Act 1979 (Qld) § 22 (Austl.); Transplantation and Anatomy Act 1983 (SA) § 21 (Austl.).

[45] K. Tremellen & J. Savulescu, *A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception*, 30 REPROD. BIOMED. & SOC. ONL. (2015).

[46] *Id.*

[47] Jennifer Nedelsky, *Property in Potential Life? A Relational Approach to Choosing Legal Categories*, 6 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 343 (1993). Supra, note 61; Frances R. Batzer et al., Postmortem Parenthood and the Need for a Protocol with Posthumous Sperm Procurement, 79(6) FERTIL STERIL (2003).

[48] Hilary Young, *Presuming Consent to Posthumous Reproduction*, 27(1) J. L. & HEALTH (2014).

deaths, with regards to the deceased being considered as the legal parent. As there is a distinct absence of such comprehensive legislation in India, the problems will be multitudinous.

### THE ESSENCE OF CONSENT

Perhaps the most deliberated and impugned among the various factors under the procedures of Post Mortem Reproductive Material Retrieval and Conception is the validity and nature of the consent of the deceased and the desire of the surviving partner. The personal will for an action to be or not to be, independent of coercion or undue influence, may be considered consent. The legal concept of consent has always been a venerable precept; however, it is all the more so regarding actions involving the birth of an issue with biological connections. The issue of consent is perhaps the most extensively debated ethical controversy[49] regarding posthumous reproduction, as the global community is yet a novitiate to this neoteric form of technology, with conflicting ethos and dynamism.

### 4.1 Classes of Consent and Their Validity

Although certain countries have stepped up to meet this burgeoning field, legal and moral certitude is still ambivalent. Nonetheless, it is of absolute conviction that the requirement of 'consent' for the post-mortem reproductive material and, thereby reproduction is *sine qua non*. However, the jury is still out on the validity of the different forms of acceptable consent. Countries such as the United Kingdom, certain states of the United States of America, and Australia mandate the express consent of the deceased in writing in the form of informed, competent and voluntary writing.[50] Though this form of consent is the most prevalent and preferred, it is not invulnerable, as the test for explicit consent is onerous and highly circumstantial.

This possibility of vacillation led to accepting inferred or implied consent in certain countries.[51] Israel, perhaps the most liberal with laws surrounding posthumous reproductive material retrieval and conception, acquiesces to implied consent.[52] The issue with the fulfilment of the tenets of implied consent is the difficulty in determining, with surety, the

[49] In re Daniel Thomas Christy, No. EQVO68545 (Johnson Cnty., Sept. 14, 2007).
[50] Uniform Anatomical Gift Act (UAGA), Iowa Code § 142C.1. et seq. (2018).
[51] B. Spielman, *Pushing the Dead into the Next Reproductive Frontier: Post Mortem Gamete Retrieval Under the Uniform Anatomical Gift Act*, 37 J.L. MED. & ETHICS (2009).
[52] J. FEINBERG, Harm to Others: The Moral Limits of the Criminal Law (1984).

desire of the deceased, extending to not just the process of begetting the child post their death but also in their contribution to the posthumously conceived child's upbringing.[53]

Inferred consent raises another concern, suggesting that the Act of implying consent for a procedure doesn't necessarily reflect actual agreement. Instead, it contends that the absence of explicit dissent is taken as an indication of agreement.[54] This is apparent in the States of Western Australia, Queensland, and South Australia, legislating that post-mortem retrieval of reproductive material can be carried out even in the absence of express or implied consent as long as express or implied dissent to the action is absent and is evinced in the determinative capacity of an executive official's satisfaction that the deceased would not have objected to the removal of their reproductive material.[55]

**4.2 The Controversial Presumed Consent**

Though these two forms of consent have been widely acknowledged to be the most accepted, there is yet another presumable form of consent, as argued by Tremellan and Savulescu.[56] The justification for such consent is multifaceted, commencing with the analogy of the acceptance of organ donation without the deceased's express consent and, in some circumstances, even without the family's consent as a proxy, so long as the deceased did not explicitly express their disapproval for such an action.[57] The argument that post-mortem gamete retrieval and conception cannot be equated to organ donation is valid, with several scholars in agreement,[58] yet as an aberration to the common law stance on the rejection of presumed consent for organ donation.[59]

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[53] *Supra*, note 67.
[54] *Supra*, note 61.
[55] B Björkman & S O Hansson, *Bodily Rights and Property Rights*, 32 J. MED. ETHICS (2006).
[56] *Supra*, note 70.
[57] Woodward v. Comm'r Soc. Sec., 760 N.E.2d 257 (2002).
[58] Assisted Reproductive Technology (Regulation) Act, 2021, No. 42, Acts of Parliament, 2021 (India). . Alberta Family Law Act, S.A.2003, c.F-4.5. (Can.).

[59] Wendi. P. Crowe & Tyson Wagner, *Canada: After-born Children: Succession Law and Posthumous Conception*, MONDAQ (Nov. 23, 2015), HYPERLINK "https://www.mondaq.com/canada/wills-intestacy-estate-planning/445542/after-born-children-succession-law-and-posthumous-conception"https://www.mondaq.com/canada/wills-intestacy-estate-planning/445542/after-born-children-succession-law-and-posthumous-conception.

The case of *Daniel Thomas Christy* had held for sperm donation to count as an "anatomical gift"[60] under the statute governing organ donation[61] and accepted the consent of the parents of the deceased for the retrieval of the sperm in the absence of the express consent of the deceased.[62] The secondary justification for presumed consent is the duty of 'easy rescue' the deceased owes to the surviving partner, as the former has no interests that could be harmed. This argument is tenuous as best as it directly contradicts the Feinberg School of the *ante-mortem* approach - even after their passing, people continue to possess personal interests, which will be subject to consequences if their wishes are not fulfilled.[63] This is the crux of testamentary succession and the validation of the deceased's will.

Kroon, in his scathing criticism of the arguments for presumed consent postulated by Tremellan and Savulescu,[64] draws attention to the neglect of the body of autonomy of the deceased and the fallibility of gamete donation equating to organ donation.[65] A reference is made to the 'First Principle of Bodily Right', which asserts that a person's informed consent must be obtained before any material from their body is collected.[66] These criticisms all stand valid, especially the dubious imbalance between the accordance of importance to the desire of the deceased and the wills of the surviving. However, the author opines that as long as express dissent of the deceased to their posthumous gamete retrieval is absent and can be proven so beyond a reasonable doubt, presumed consent is to be accepted as the reproductive desires of the surviving partner are acknowledged along with the maintenance of the autonomy of the deceased and their posthumous affairs.

However, the retrieval of gametes posthumously can only be viable for a very short window of time; thus, the probability of proving the presumed consent of the deceased is implausible. Thus, it is of consequence that in a nation such as India with as nascent an introduction of posthumous gamete retrieval and reproduction as well as the legal implications of the same, the applicability of presumed consent would be highly idealistic and utopian.

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60 Andras Z. Szell et al., *Live Births from Frozen Human Semen Stored for 40 Years*, 30(6) JOURNAL OF ASSISTED REPRODUCTION AND GENETICS (2013).
61 *Supra*, note 57.
62 Bindu Vijay, *Posthumous Reproduction: Issues and Challenges*, 8(2) ASIAN RESONANCE (2019).
63 Asit Kumar Sikary, O. P. Murty & Rajesh V. Bardale, *Postmortem Sperm Retrieval in Context of Developing Countries of Indian Subcontinent*, 9(2) J. HUM. REPROD. SCI. 82 (2016). Iowa Code § 633.220A

64 Brianne M. Star, *A Matter of Life and Death: Posthumous Conception*, 64(3) LouisianA. L. REV. (2004).
65 Maya Sabatello, *Posthumously Conceived Children: An International and Human Rights Perspective*, 27(1) J. L. & HEALTH 29 (2014).
66 Jason D. Hans, *Attitudes toward Posthumous Harvesting and Reproduction*, 32 DEATH STUD. (2008).

Instead, documented express consent must be legislated with the importance of a mandate for the sanction of post-mortem gamete retrieval, followed by the permissibility of implied consent since the contrary cannot be proven. Even if the adjudicatory authority, as affixed by the legislation, might be satisfied for retrieving the gametes, a tentative period for the absolute confirmation of the absence of dissent of the deceased ought to be instituted before the assent of posthumous conception. Contingent to any issue raised on the validity of the documented express consent or the claim of inferred consent, the recollections of a near friend(s) of the deceased, not extending to a direct heir, on any notion of dissent from the deceased or the allusion to experiential views,[67] might be referred to.

## UNSATISFACTORY PRESENT AND HOPEFUL FUTURE

As was succinctly held in *Woodward v. Commissioner of Social Security*, though posthumously conceived children may not come into the world the way the majority of children do, they are children nonetheless and are entitled to the same rights and protections of law accorded to children born before parental death.[68] In India, there is a dire need for comprehensive legislation that clearly defines and demarcates consent and will, also making provisions for every contingency relevant to the same. This legislation must provide that the posthumously conceived child's parents shall possess a genetic link to the child and have consented to be the child's parents.[69] The legislation must also seek to provide that the explicit consent of the deceased parent is primary, susceptible to circumstantial changes. However, if such a child is conceived without explicit consent, then the child ought to be treated as the child/heir of the deceased, subject to limitations concerning succession to the property of the deceased.

Provisions must also be instituted for safeguards from unsolicited parentage that does not come under the permissible conditions and procedures. Though it is fair to treat posthumously conceived and born children as heirs of the deceased, there is yet a debate on the same in those countries that have legislations for such children, as it would create hassles in the administration of estates, distribution of government death benefits, insurances, etc.[70]

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[67] Stuti Rakesh Painter v. State of Gujarat, 2021 SCC OnLine Guj 1085.
[68] Usha Ahluwalia & Mala Arora, *Posthumous Reproduction and Its Legal Perspective*, 2(1) INT J INFERTIL FETAL MED 9 (2011).
[69] The Hindu Succession Act, 1956, §3(f), No. 38, Acts of Parliament, 1956 (India).
[70] La. Civ. Code, art. 871, §1, (1982).

This may be redressed in two ways: firstly, by evolving insurances and other benefits to stipulate that children conceived within a particular time period of the parent's decease shall be considered beneficiaries, or create all comprehensive legislation to tackle all these contingencies in detail. If a time limit for conception is not affixed, and if the widow gains full ownership of her husband's sperm, which ordinarily has decades of vitality,[71] and if there is a situation of intestacy, then the inordinate and unlimited time span in the era of surrogacy and other ARTs would cause chaos amongst the stances of inheritance.

Both Maddox[72] and Vijay[73] have held that affixing a time limit for the birth of a posthumously conceived child is essential; however, neither had elaborated on the span of such a time limit, resulting in ambiguity and cause for misinterpretation. The time limit set by the State of Iowa is 2 years after the death of the parent,[74] while the State of Louisiana considers children posthumously conceived and born within 3 years of the death of their parent.[75] Thus, a time limit until when posthumously conceived children's legitimacy shall be decided based on their birth is vital.

The stance in the US is such that, irrespective of the particular laws of the states legitimising posthumous conception and the rights of such children, the posthumous child will possess inheritance rights only if the surviving parent proves the deceased's intent of the same. However, the problem arises concerning intestate deaths, especially due to the circumstantial nature of such situations.

An important conjecture is the consent of the deceased parent, both about the use of their reproductive material for posthumous conception as well as the consent for inheritance of said posthumously conceived child. However, the paramount question would be the validity of the consent of the deceased as well as the inheritance rights of the surviving spouse to utilise the reproductive material of the deceased.

While multinational perspectives and stances guide, questions are unanswered even in those. One example is how only the sperm preservation (Post Mortem Sperm Retrieval and

[71] The Indian Succession Act, 1925, pt. IV, No. 39, Acts of Parliament, 1925 (India).
[72] The Indian Succession Act, 1925, §30, No. 39, Acts of Parliament, 1925 (India).
[73] Charles P. Kindregan Jr. & Maureen McBrien, *Posthumous Reproduction*, 39(3) FAMILY LAW QUARTERLY 579 (2005). The Indian Succession Act, 1925, §26, No. 39, Acts of Parliament, 1925 (India).

[74] The Indian Succession Act, 1925, §27(c), No. 39, Acts of Parliament, 1925 (India).
[75] The Indian Evidence Act, 1872, §112, No. 01, Acts of Parliament, 1872 (India).

Preservation) of the deceased male parent is discussed, but not the preservation of the ovum of the female parent (oocyte cryopreservation). The retrieval and preservation of reproductive material from a woman is comparatively medically complicated in comparison to retrieval from a man, with more barriers arising post-mortem[76] as weeks of hormonal ovarian stimulation are necessary before egg harvest.[77] These aspects must be very well fleshed out in future laws to prevent malpractice and injustice and maintain the fundamental rights of life and equality.

India is currently at a crossroads – though there is still a group of archaic and cloistered-minded people, there is significant change in society, with many liberal and open-minded citizens. Thus, there is much more of an inclination towards A and the reduction of the view that illegitimacy is a stigma. However, the lack of comprehensive legislation providing detailed provisions regarding the rights and legitimacy of posthumously conceived children is perhaps the largest lacunae in the legal structure of India for the future.[78]

With the many problems, there is still a long way to go for redressal. The Assisted Reproductive Technology (Regulation) Act does not provide adequate provisions for this matter, being silent on the status of the legitimacy of the child born to a woman through artificial insemination of the sperm of her deceased husband, let alone the rights of children conceived via ARTs without deceased parents.

There are several needs for review of the existing Act as it takes only married heterosexual couples into cognisance and not LGBTQ+ couples. Though the Act proves to be a shoddy attempt, it is India's first and most necessary step in resolving the gaping black hole regarding ART, monitoring authorities, and regulatory and grievance mechanisms.

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[76] Wolfgang Friedman, Law In A Changing Society 205 (1959) Baldev Sahai Bangia v. R. C. Bhasin, (1982) 2 SCC 210.

E Donald Shapiro & Benedene Sonnenblick, *Widow and the Sperm: The Law of Post-Mortem Insemination*, 1(2) J.L. & Health 229 (1986).

Indian Council of Medical Research: National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005, 3.9 (1)(6), National Academy of Medical Sciences (India) (2005).

[77] MARGARET MARSH & WANDA RONNER, The Pursuit of Parenthood, Reproductive Technology: From Test-Tube Babies to Uterus Transplants (2019); Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29(1) REAL PROP PROB & TR J. (1994).

[78] *List of Enrolled Assisted Reproductive Technology (ART) Clinics* under *National Registry of ART Clinics and Banks in India*, Indian Council of Medical Research (2021), https://main.icmr.nic.in/sites/default/files/art/Updated_list_of_Approved_ART_Clinics04082021.pdf.

## CONCLUSION

Assisted Reproductive Technologies (ART) are the future, given the multitude of novel health issues and increasingly liberal behaviour. In light of such dynamic social change for a better future, the world's legal systems must take cognisance of the same and operate at total capacity to serve the people. India, in particular, has to operate in such a dynamic fashion, not just for future development but also to revamp its colonial close-minded behaviour for the betterment of its future generations.

Such change can be achieved only through a review of one's existing legal structure and by incorporating the developments of the international community whilst still staying true to the essence of the democracy that India is. Absolute gravitas must be accorded to the wishes of the deceased, and on no account can explicit dissent be outweighed in favour of the desires of the living.

It is time that shall prove to be the supreme determinant in the authorities adjudging the legitimacy of such documented consent must ensure its validity and maintain a window after the permitted gamete retrieval for the shedding of any doubt as to the credibility of such consent, the period until when posthumously conceived children's legitimacy shall be decided based on the time of birth, as well as the dynamic development of the field of ARTs and science. This encompasses taking into account the choices and wishes of its citizens, along with maintaining the true ethos of the Constitution and the sanctity of the many calls from the courts and legislature for true development and progress.