

## THE RIGHT TO POSTHUMOUS REPRODUCTION: AN ANALYTICAL JURISPRUDENTIAL PERSPECTIVE

Sanighdha\*  
Prof. Rattan Singh\*\*

### ABSTRACT

*Posthumous reproduction, the conception of a child using the cryopreserved gametes of a deceased individual, has moved from medical possibility to a matter of active constitutional and statutory concern in India following the Delhi High Court's decision permitting the parents of a deceased man to retrieve and use his preserved semen sample. This paper examines the doctrinal basis on which Indian courts have located a right to posthumous reproduction within Article 21 of the Constitution, situating that development within the broader jurisprudence of living constitutionalism through which the Supreme Court has read penumbral rights into the guarantee of life and personal liberty. It surveys the fragmented character of India's statutory framework, under which neither the Assisted Reproductive Technology (Regulation) Act, 2021 nor the Surrogacy (Regulation) Act, 2021 expressly addresses posthumous use of gametes, and compares this regulatory gap against the more developed statutory regimes of France, Germany, Australia, Switzerland and the United Kingdom. Drawing on comparative jurisprudence from Israel, the United Kingdom, Canada, Australia and the United States addressing consent, the proprietary status of reproductive material and the emergent category of posthumous grandparenthood, the paper argues that judicial recognition of the right, while constitutionally sound, has proceeded without the statutory guardrails, particularly around consent, that comparative practice shows to be necessary. The paper concludes that India requires targeted legislative amendment to the ART Act and the Surrogacy Act to codify consent requirements, define the class of persons entitled to seek posthumous use of gametes, and establish time limits for decision-making, so that the right the judiciary has recognised operates within a predictable statutory framework rather than case-by-case constitutional adjudication.*

**KEYWORDS:** *Posthumous Reproduction; Living Constitutionalism; Article 21; Assisted Reproductive Technology; Postmortem Grandparenthood.*

### 1. INTRODUCTION

Continuity of family lineage occupies a place of considerable significance across legal and cultural traditions, and reproductive technology has, in recent decades, extended the means by which that continuity can be pursued beyond the death of a biological parent. Posthumous reproduction, the use of a deceased individual's cryopreserved gametes or embryos to conceive a child after that individual's death, exemplifies this extension. Cryopreservation, the process of preserving gametes and embryos at extremely low temperatures, has become integral to modern reproductive medicine, supporting fertility preservation for patients undergoing chemotherapy or other treatments that risk impairing reproductive capacity.<sup>1</sup>

---

\* Research Scholar, Department of Laws, Panjab University, Chandigarh

\*\* Professor & Vice Chancellor, Jagat Guru Nanak Dev Punjab State Open University (JGND PSOU) in Patiala, Punjab.

<sup>1</sup> Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. Rev. 901, 943 (1997).

The legal questions posthumous reproduction raises, concerning consent, inheritance, and the legal status of the resulting child, have prompted differing statutory responses across jurisdictions. Victoria, Australia enacted the first legislation to regulate assisted reproduction, the Infertility (Medical Procedures) Act, 1984, and was followed by Western Australia's Human Reproductive Technology Act, 1991, South Africa's Human Tissue Act, 1988, and the United Kingdom's Human Fertilisation and Embryology Act, 1990.<sup>2</sup> France's bioethics legislation addresses sperm cryopreservation, donor anonymity and eligibility, and the regulation of fertility clinics in comprehensive detail, and comparable regimes exist under the German Embryo Protection Act, the Swiss Federal Act on Medically Assisted Reproduction, the Uruguayan Regulation on Techniques for Human Assisted Reproduction, and the Australian Assisted Reproductive Treatment Act, 2008, together with the European Union's Directive on setting standards for the donation, procurement and testing of human tissues and cells.<sup>3</sup> These regimes, though jurisdiction-specific, substantially mirror the French approach, which remains the most comprehensive statutory treatment of the subject.

India possesses no comparably comprehensive statute. The Assisted Reproductive Technology (Regulation) Act, 2021, read with the Surrogacy (Regulation) Act, 2021, addresses reproductive technology generally but does not expressly regulate posthumous use of gametes, leaving the subject to be worked out through judicial interpretation of Article 21 case by case. This regulatory gap has recently become consequential, as the Delhi High Court, in permitting the parents of a deceased man to retrieve and use his preserved semen sample, has effectively located a right to posthumous reproduction within the constitutional guarantee of life and personal liberty.<sup>4</sup> This paper examines the doctrinal soundness of that development and the adequacy of the statutory framework within which it now operates.

### 1.1 Objectives of the Study

- To examine the concept of posthumous reproduction and the two principal cryopreservation techniques through which it is achieved.
- To analyse the doctrinal connection between posthumous reproduction and living constitutionalism under Article 21 of the Constitution.

---

<sup>2</sup> Infertility (Medical Procedures) Act 1984 (Vic.) (Austl.); Human Reproductive Technology Act 1991 (W.A.) (Austl.); Human Fertilisation and Embryology Act 1990, c. 37 (UK).

<sup>3</sup> German Embryo Protection Act, 1990 (Ger.); Swiss Federal Act on Medically Assisted Reproduction, 1998 (Switz.); Assisted Reproductive Treatment Act 2008 (Vic.) (Austl.); Council Directive 2004/23/EC, 2004 O.J. (L 102) 48 (EC).

<sup>4</sup> Gurminder Singh v. Govt. (NCT of Delhi), W.P. (C) 15159/2021, Delhi High Court, judgment dated Oct. 4, 2024.

- To survey the ethical, moral, technological and societal considerations posthumous reproduction raises, weighing the arguments for and against judicial recognition of the right.
- To undertake a comparative jurisprudential analysis of posthumous reproduction case law across multiple jurisdictions in order to identify the statutory safeguards Indian law presently lacks.

## 1.2 Research Methodology

This study adopts a doctrinal methodology, drawing on statutory text, judicial decisions, academic commentary and case comments from India and comparative common law jurisdictions. Primary reliance is placed on the judgment of the Delhi High Court in *Gurminder Singh*, read alongside Supreme Court authority on the scope of Article 21, and on comparative case law from Israel, the United Kingdom, Canada, Australia and the United States addressing consent and the proprietary status of reproductive material.

Two principal freezing methods are employed in gamete cryopreservation: slow freezing, which lowers sample temperature gradually to minimise ice crystal formation within cells, and vitrification or fast freezing, which cools the sample rapidly enough to prevent crystalline ice structures from forming at all. Both methods are now clinically established, and their reliability over extended storage periods is what has made posthumous use a practical rather than merely theoretical possibility: samples preserved years, and in some documented cases decades, before use have produced viable pregnancies, a technical reality that has outpaced the legal frameworks most jurisdictions, India included, have developed to govern it.<sup>5</sup>

## 1.3 Scope of the Study

This paper confines its analysis to posthumous use of gametes and embryos for reproductive purposes, excluding the related but analytically distinct questions of organ and tissue transplantation, research use of embryonic material, and surrogacy arrangements not connected to a deceased gamete provider. It examines Indian law through August 2026 and draws comparative material from jurisdictions whose case law has directly informed, or closely parallels, the reasoning Indian courts have thus far adopted.

## 2. COMPARATIVE LEGISLATIVE FRAMEWORKS FOR POSTHUMOUS REPRODUCTION

Posthumous reproduction is conventionally classified into four categories: planned posthumous reproduction, where the deceased explicitly consented to future use of preserved gametes; unplanned posthumous reproduction, where

---

<sup>5</sup> John A. Robertson, Posthumous Reproduction, 69(4) Ind. L.J. 1027 (1994).

gametes are retrieved after sudden death without prior preservation arrangement; brain-dead posthumous reproduction, involving retrieval from an individual sustained on life support; and stem-cell posthumous reproduction, a more recent technique involving derived gametes.

## 2.1 Consent Requirements Across Jurisdictions

Jurisdictions diverge considerably on the consent standard required before posthumous retrieval or use of gametes may proceed. French law treats consent as a strict medical necessity and confines the option to surviving spouses, excluding unmarried partners and other family members altogether. German, Pakistani and Swiss law prohibit posthumous reproduction outright, reflecting a policy judgment that the practice cannot be reconciled with the deceased's incapacity to consent to a use of genetic material occurring after death. Uruguay and Belgium, by contrast, permit the practice subject to written consent requirements, while several other jurisdictions impose additional procedural safeguards calibrated to their own bioethical frameworks.

## 2.2 The Regulatory Gap in Indian Law

Indian law occupies none of these settled positions. The Surrogacy (Regulation) Act, 2021 imposes no explicit prohibition on posthumous reproduction, meaning the practice is neither expressly permitted nor expressly barred, and its regulation has consequently devolved to judicial discretion exercised case by case rather than to a codified statutory standard. Section 22 of the Assisted Reproductive Technology (Regulation) Act, 2021 requires written informed consent as a precondition for assisted reproduction generally, and defines the sourcing of gametes and the procedure for assisted pregnancy in some detail,<sup>6</sup> but the Act does not address the specific circumstance in which the gamete provider is deceased at the time consent would otherwise be sought, a gap the Delhi High Court's decision in *Gurminder Singh* has thrown into sharp relief.

| Jurisdiction                   | Consent Standard                                       | Eligible Applicants                                 |
|--------------------------------|--------------------------------------------------------|-----------------------------------------------------|
| France                         | Written consent treated as a strict medical necessity. | Surviving spouse only; unmarried partners excluded. |
| Germany, Pakistan, Switzerland | Posthumous use prohibited outright.                    | Not applicable.                                     |
| Uruguay, Belgium               | Written consent required.                              | Surviving spouse or partner, subject to procedural  |

<sup>6</sup> Assisted Reproductive Technology (Regulation) Act, 2021, § 22, No. 22, Acts of Parliament, 2021 (India).

|                              |                                                                                         |                                                                 |
|------------------------------|-----------------------------------------------------------------------------------------|-----------------------------------------------------------------|
|                              |                                                                                         | conditions.                                                     |
| United Kingdom               | Written consent generally required; inferred consent accepted in defined circumstances. | Surviving spouse or partner; extended in some cases to parents. |
| Australia (NSW)              | Consent inferred from circumstances of retrieval and prior conduct.                     | Spouse first, children second, parents third.                   |
| India (post-Gurminder Singh) | Inferred from documented conduct in the absence of statutory standard.                  | Determined case by case under Hindu Succession Act principles.  |

*Table 1: Comparative Consent Standards for Posthumous Reproduction. Source: Authors' compilation based on comparative statutory and case law surveyed in this paper.*

### 2.3 International Guiding Principles

International medical and bioethical bodies have supplied guidance that most national statutes draw upon even where they do not adopt it wholesale. The World Health Organization's guiding principles on human cell, tissue and organ transplantation, and the European Society of Human Reproduction and Embryology's task force guidance on the ethics and law of posthumous assisted reproduction, both emphasise documented consent, restriction of use to a defined class of applicants, and attention to the welfare of any resulting child as the minimum safeguards a responsible regulatory framework should contain.<sup>7</sup> These principles supply a useful benchmark against which the adequacy of India's own statutory silence on the subject can be measured, and this paper returns to them in framing the recommendations advanced in Section 7 below.

## 3. ARTICLE 21 AND LIVING CONSTITUTIONALISM: THE DOCTRINAL FOUNDATION

Article 21 of the Constitution provides that no person shall be deprived of life or personal liberty except according to procedure established by law, and Indian constitutional jurisprudence has long treated the provision as the fountainhead of numerous penumbral rights rather than a narrow guarantee against physical restraint.<sup>8</sup> Justice Field's formulation, subsequently endorsed by Indian courts, that the term life extends beyond mere animal existence to encompass all

<sup>7</sup> WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation, 332-340; ESHRE Task Force, Ethics and Law 11: Posthumous Assisted Reproduction, Hum. Reprod. 388-391 (2020).

<sup>8</sup> Maneka Gandhi v. Union of India, AIR 1978 SC 597.

faculties by which life is enjoyed, has anchored successive judicial expansions of Article 21 to include the right to live with dignity, the right to privacy, and the right to make reproductive choices.

### 3.1 From Originalism to Living Constitutionalism

The Supreme Court's interpretive method has correspondingly shifted from a textually confined reading of enumerated rights toward what commentators describe as living constitutionalism, an approach that reads the constitutional text in light of contemporary social and technological circumstance rather than confining it to the framers' immediate contemplation. This interpretive shift is significant for posthumous reproduction precisely because the practice, dependent on cryopreservation technology unavailable at the time of the Constitution's drafting, cannot be located within Article 21 through an originalist method; its recognition necessarily depends on the same interpretive dynamism that has previously extended Article 21 to encompass privacy, environmental protection, and the right against custodial violence.

### 3.2 Reading Posthumous Reproduction into Article 21

In *Gurminder Singh v. Government (NCT of Delhi)*, the Delhi High Court, with Justice Pratibha M. Singh presiding, read the right to posthumous reproduction into Article 21 as an extension of the right to make reproductive choices and the penumbral right to privacy, reasoning that no Indian statute expressly prohibits the practice and that the absence of prohibition, combined with the constitutional guarantee of reproductive autonomy, supplied sufficient legal basis for the relief sought.<sup>9</sup> The Kerala High Court had earlier affirmed, in a related context, that the right to procreate is itself a facet of Article 21.<sup>10</sup> Read together, these decisions establish that reproductive autonomy under Article 21 extends not only to the choice to reproduce during one's lifetime but, in appropriately narrow circumstances, to a decision made on one's behalf after death by those entitled to give effect to it.

### 3.3 Comparative Constitutional Grounding of Reproductive Autonomy

India's doctrinal move from originalism toward a living, dynamically interpreted guarantee of reproductive autonomy has close analogues elsewhere. American constitutional jurisprudence located a right to reproductive decision-making within the due process guarantee well before assisted reproductive technology made posthumous use practically significant, treating procreation as one of the basic civil rights of man and extending constitutional protection to reproductive decision-making within marriage and, subsequently, outside it.<sup>11</sup>

<sup>9</sup> *Gurminder Singh v. Govt. (NCT of Delhi)*, W.P. (C) 15159/2021, Delhi High Court, judgment dated Oct. 4, 2024.

<sup>10</sup> *Nandini K. v. Union of India*, Kerala High Court (2021).

<sup>11</sup> *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

Canadian and Israeli courts have each developed comparable doctrine locating reproductive autonomy within broader guarantees of liberty, security of the person, or human dignity, a convergence that lends the Delhi High Court's approach in *Gurminder Singh* considerable comparative legitimacy: courts across markedly different constitutional traditions have independently concluded that reproductive autonomy, once recognised as a facet of a general liberty or dignity guarantee, is not naturally confined to decisions made during the rights-holder's lifetime where clear evidence of intent survives that lifetime.

This comparative convergence does not, however, resolve the institutional question this paper's later sections address: whether the specific content of that right, its consent standard, its eligible claimants, its temporal limits, is best developed through accumulated case law or through legislative codification. The jurisdictions examined in Section 2 that have achieved the greatest regulatory clarity, France, the United Kingdom and Australia among them, did so through legislation enacted after, and in response to, initial judicial recognition of the underlying right, a sequence India's own regulatory development has yet to complete.

#### **4. THE GURMINDER SINGH CASE: FACTS, REASONING AND SIGNIFICANCE**

The Delhi High Court's decision in *Gurminder Singh* arose from a petition filed under Article 226 by the parents of a young man who had cryopreserved his semen before undergoing chemotherapy and subsequently died of his illness. His parents sought a direction permitting retrieval and use of the preserved sample, invoking the intention to continue their son's lineage through what the petition characterised as intended grandparenthood.

##### **4.1 The Four Issues Before the Court**

The Court addressed four distinct issues in reaching its decision: first, whether the Assisted Reproductive Technology Act and the Surrogacy Act applied to the facts before it; second, whether preserved semen could be treated as property capable of devolving to legal heirs; third, whether the petitioners were entitled to the specific relief sought; and fourth, the medico-ethical and legal considerations bearing on the exercise of the Court's discretion.

On the first issue, the Court held that the ART Act did not apply because the semen had been deposited before the Act's commencement and pursuant to a contractual arrangement between the deceased, his family and the hospital concerned, predating the statutory consent framework the Act now prescribes. This threshold finding proved determinative: because the statutory framework did not apply, the Court was required to decide the matter on general constitutional principles rather than by reference to a codified consent standard, a gap this paper's recommendations address below.

## 4.2 Property, Consent and the Absence of Written Authorisation

Notably, the deceased's consent to the preservation of his semen had not been formally recorded by the hospital staff at the time of deposit, reflecting the absence of any statutory requirement compelling such documentation at the relevant time. The Court nonetheless inferred consent from the deceased's own conduct: his decision to preserve the sample before chemotherapy, considered together with the absence of any expressed objection to its future use, was treated as sufficient to establish that the petitioners' request rested on more than speculative or sentimental grounds. The Court drew support from the English decision in *M v. HEFA*<sup>12</sup>, in which the deceased's own recorded wishes, though informal, were treated as probative of intent, and it emphasised that the absence of detailed discussion between the parties as to what should happen if the material were to be used did not, in itself, defeat an inference of consent drawn from the surrounding circumstances.

## 4.3 Weighing Constitutional Values and the Absence of Statutory Guidance

The Court balanced several considerations in reaching its conclusion: the constitutional value of reproductive autonomy, the absence of any statutory prohibition, the family's demonstrated intent, the deceased's own preservation decision, and the medico-ethical propriety of the retrieval and use sought. It held that the parents, as Class I legal heirs under the Hindu Succession Act, 1956 in the absence of a surviving spouse or children, were entitled to request use of their son's gametes for reproductive purposes, treating the biological material of a person who dies intestate as devolving, for this limited purpose, to the heirs entitled to his estate.<sup>13</sup> The Court's exercise of discretion, while carefully reasoned on the facts before it, illustrates precisely the difficulty a purely case-by-case constitutional approach produces: a differently constituted family, or a case lacking comparably clear circumstantial evidence of the deceased's intent, would leave the court with considerably less to work from, in the continued absence of any statutory consent framework governing posthumous use.

## 4.4 The Parens Patriae Dimension and Its Limits

Commentators have noted that courts exercising jurisdiction over posthumous reproduction claims frequently invoke, whether expressly or implicitly, a protective logic resembling *parens patriae* jurisdiction, weighing the interests of a not-yet-conceived child alongside the autonomy interests of the deceased and the surviving family. This is a doctrinally uncomfortable fit: *parens patriae* jurisdiction ordinarily protects the interests of an existing legal person unable to protect themselves, whereas a child who does not yet exist at the time of the

<sup>12</sup> *M v. Human Fertilisation and Embryology Authority*, [2015] EWCA Civ 1289 (Eng.).

<sup>13</sup> Hindu Succession Act, 1956, No. 30, Acts of Parliament, 1956 (India).

court's decision cannot straightforwardly hold interests a court is bound to protect in the conventional sense. The Delhi High Court's approach in *Gurminder Singh*, by treating the deceased's own preservation decision and the family's demonstrated intent as the primary anchors for its reasoning, sidesteps this difficulty, but it does so by relying heavily on the specific facts before it, facts that will not recur identically in every future case. This further underscores why a statutory consent standard, rather than judicial inference calibrated case by case, is the more institutionally appropriate mechanism for resolving the tension between deceased autonomy, family interest and prospective child welfare that posthumous reproduction claims necessarily present.

The Court's reluctance to extend its reasoning beyond the facts before it is itself instructive. It confined relief to the specific request the petitioners had made, retrieval and use of the preserved sample by the parents as legal heirs, without purporting to lay down a general rule governing all future posthumous reproduction claims. This judicial restraint, while methodologically sound as an exercise of writ jurisdiction, leaves the broader legal position considerably less settled than a specialised statute would, and it means that a subsequent bench confronting a materially different fact pattern, an unmarried partner rather than a parent, for instance, or a sample preserved without any accompanying preservation decision by the deceased, would be substantially free to reach a different result.

## 5. COMPARATIVE JURISPRUDENCE: CONSENT, PROPERTY AND POSTMORTEM GRANDPARENTHOOD

### 5.1 Consent: The Elizabeth Warren and K.L.W. Approach

Comparative jurisprudence on consent has developed considerably further than Indian law. In *Elizabeth Warren v. Care Fertility (Northampton) Ltd.*<sup>14</sup>, the English High Court held that strict written consent was not an invariable prerequisite for posthumous use of gametes, emphasising instead the need to balance procedural formality against the dignity and reproductive autonomy of the surviving party. The Supreme Court of British Columbia, in a comparable case,<sup>15</sup> held that denying a widow access to her deceased husband's reproductive material, where his wishes had been at least partially recorded, would constitute an affront to her dignity, and it declared the material her sole property for reproductive purposes while prohibiting any commercial use. In *Monica Zhu & Yongmin Zhu*<sup>16</sup>, the Supreme Court of New York permitted the parents of a deceased unmarried son, as his nearest kin and legal heirs, to

---

<sup>14</sup> *Elizabeth Warren v. Care Fertility (Northampton) Ltd.*, [2014] EWHC 602 (Fam) (Eng.).

<sup>15</sup> *K.L.W. v. Genesis Fertility Centre*, 2016 BCSC 1621 (Can.).

<sup>16</sup> *Monica Zhu & Yongmin Zhu*, Index No. 53327/2010, N.Y. Sup. Ct., decided May 16, 2019.

determine the disposition of his genetic material, a result closely paralleling the Delhi High Court's reasoning in *Gurminder Singh*.

## 5.2 Reproductive Material as Property

A second doctrinal strand treats reproductive material as property capable of ordinary succession. The Australian decision in *Doodeward v. Spence*<sup>17</sup> first established that a body part, once removed from a living or deceased body through the application of work or skill, could become the subject of property rights, a principle the English Court of Appeal extended to reproductive material specifically in *Yearworth v. North Bristol NHS Trust*<sup>18</sup>, holding that sperm remains the property of the man who provided it even after it leaves his body. The Supreme Court of New South Wales, in *Re Application by Vernon*<sup>19</sup>, extended this reasoning to posthumous retrieval, holding that reproductive material could lawfully be retrieved after death, that once removed from a body awaiting burial it constitutes property, and that a hierarchy of legal representatives, spouse first, children second, and parents third, governs entitlement to determine its disposition, while confining permissible uses to implantation in a living person or to research and therapeutic purposes and expressly prohibiting commercial exploitation.

## 5.3 The Israeli Approach and Postmortem Grandparenthood

Israeli jurisprudence has engaged most directly with the specific question of postmortem grandparenthood. In *Cohen v. Attorney General of Israel*<sup>20</sup>, the Family Court in Tel Aviv affirmed a young man's right to father children after death, independent of a surviving female partner, validating what Israeli practice terms a biological will and recognising its benefit to children, parents and grandparents alike. In *Anonymous v. Anonymous*<sup>21</sup>, the Supreme Court of Israel divided on a parental application to use a deceased son's sperm; although the majority declined the application, Justice Hanan Melcer's dissent argued that clear evidence of the deceased's wish to achieve continuity through reproduction obliged the court to protect that interest by permitting the parents' use of the material, a position that anticipates the reasoning the Delhi High Court would later adopt in an Indian context.<sup>22</sup>

Postmortem grandparenthood of this kind is increasingly recognised, particularly among bereaved parents seeking to preserve a connection with a

<sup>17</sup> *Doodeward v. Spence* (1908) 6 CLR 406 (Austl.).

<sup>18</sup> *Yearworth v. North Bristol NHS Trust*, [2009] EWCA Civ 37 (Eng.).

<sup>19</sup> *Re Application by Vernon* (No. 2) [1998] 6 NSWLR 632 (Austl.).

<sup>20</sup> *Cohen v. Attorney General of Israel*, Family Court (Tel Aviv), File No. 4940/05 (Isr.).

<sup>21</sup> *Anonymous v. Anonymous*, File No. 7141/15 (Isr. S. Ct., Jerusalem).

<sup>22</sup> Irit Rosenblum, *Respect the Dead by Creating New Life*, Haaretz (Apr. 23, 2012), available at <https://www.haaretz.com/opinion/2012-04-23/ty-article/respect-the-dead-by-creating-new-life/0000017f-dedf-db22-a17f-feff79aa0000> (last visited Oct. 12, 2024).

deceased child through a grandchild conceived from that child's preserved genetic material. Comparable circumstances have arisen in India, where a mother and sister acted on a deceased son's prior consent to use his cryopreserved sperm to fertilise a surrogate, an arrangement widely reported in the Indian press as an instance of families finding solace through reproductive technology following bereavement.

#### **5.4 Naming, Lineage and the Social Meaning of Continuity**

The comparative case law surveyed above is best understood against a broader social observation courts have repeatedly credited in their reasoning: that a person's identity and legacy persist through mechanisms beyond memory alone, including the fulfilment of testamentary wishes, the practice of naming descendants in a deceased relative's honour, and the intergenerational transmission of a family surname, itself a comparatively modern cultural convention rather than an ancient universal.<sup>23</sup> Posthumous reproduction, on this reading, is a technologically enabled extension of an already well-established set of social practices oriented toward continuity, rather than a wholly novel departure from them, a framing several of the judgments surveyed above expressly or implicitly adopt in reasoning toward permitting the practice.

### **6. ARGUMENTS AND DISCUSSION: BENEFITS, RISKS AND THE CASE FOR REGULATION**

#### **6.1 The Case for Judicial Recognition**

Posthumous reproduction, viewed through the reasoning that has recurred across the comparative case law surveyed above, advances several legitimate constitutional and social interests. It permits individuals facing terminal or fertility-threatening illness to exercise a measure of control over their reproductive legacy, extends reproductive autonomy meaningfully beyond the individual's lifetime, and offers grieving families a legally sanctioned avenue for processing bereavement through the continuation of a family line. Where clear evidence of the deceased's intent exists, whether through prior preservation decisions, informal statements to family members, or documented conduct, courts across the jurisdictions examined have generally treated permitting posthumous use as more consistent with respecting individual autonomy than denying it.

#### **6.2 The Case for Caution**

The practice also raises genuine concerns that the comparative jurisprudence, and the Delhi High Court's own note of caution in *Gurminder Singh*, do not understate. A child conceived through posthumous reproduction will

---

<sup>23</sup> Hayley Davies, Sharing Surnames: Children, Family and Kinship, 45(4) *Sociology* 554, 554-569 (2011).

necessarily be raised without one biological parent from birth, a circumstance that, while not unique to posthumous reproduction, warrants attention to the child's welfare in any framework permitting the practice. The absence of the deceased's contemporaneous, explicit consent in many reported cases raises the risk that surviving family members' own grief and desire for continuity, however sincere, may be substituted for the deceased's actual wishes. Commercialisation of reproductive material, exploitation of vulnerable surviving family members, and the psychological impact on a child conceived under these circumstances are further considerations that a purely case-by-case judicial approach is poorly positioned to address systematically.

### 6.3 The Need for Statutory Guardrails

The comparative survey in Sections 2 and 5 above demonstrates that jurisdictions with more developed regulatory frameworks address these concerns through specific statutory mechanisms: defined consent standards, whether written, inferred, or presumed within defined limits; an explicit hierarchy of persons entitled to seek posthumous use, as *Re Application by Vernon* establishes; time limits within which a decision to use preserved material must be made; and, in some jurisdictions, mandatory counselling for prospective users of the material. Indian law presently possesses none of these mechanisms, leaving each case to be decided on its own facts under the general rubric of Article 21, an approach that has thus far produced sound outcomes but offers little predictability for future cases lacking comparably clear circumstantial evidence of the deceased's intent.

### 6.4 Child Welfare Considerations

The welfare of a child conceived through posthumous reproduction warrants particular attention because that child, unlike a child conceived through ordinary assisted reproduction involving two living intended parents, will be raised knowing that one biological parent had died before conception occurred. Medical ethics literature addressing postmortem sperm retrieval has consistently flagged the child's long-term psychological welfare, and specifically the child's eventual understanding of the circumstances of their own conception, as a consideration meriting structured attention rather than incidental mention in judicial reasoning.<sup>24</sup> A statutory framework that mandates counselling, as several comparative jurisdictions require, is better positioned to ensure this consideration receives sustained attention than a judicial process confined to the specific dispute before it, however carefully that dispute is reasoned.

---

<sup>24</sup> Carson Strong, Jeffrey R. Gingrich et al., Ethics of Postmortem Sperm Retrieval after Death or Persistent Vegetative State, 15(4) Hum. Reprod. 739 (2000).

### 6.5 The Institutional Case for Legislative Standard-Setting

The comparative trajectory traced throughout this paper points toward a consistent institutional lesson: jurisdictions that rely exclusively on judicial development of posthumous reproduction doctrine tend to produce inconsistent outcomes across factually similar cases, since courts inevitably differ in how they weigh incomplete evidence of a deceased person's wishes, whereas jurisdictions that codify a consent standard and an eligibility hierarchy achieve considerably more predictable, and arguably more equitable, results across cases. India is presently in the earlier, judicially driven phase of this trajectory, with *Gurminder Singh* performing much the same doctrinal function that early English and Israeli case law performed before those jurisdictions moved to statutory codification. Nothing in this observation questions the correctness of the Delhi High Court's reasoning on the facts before it; the concern is prospective, directed at the class of future cases in which the same clarity of circumstantial evidence will not be available, and in which courts operating without a codified standard risk producing inconsistent results as between similarly situated families.

A related difficulty concerns the treatment of unmarried surviving partners, a category none of the Indian case law surveyed in this paper has yet directly addressed. Comparative jurisdictions divide sharply on this question: French law confines eligibility to spouses alone, while English and Canadian courts have extended standing to unmarried partners where the relationship and the deceased's intent are adequately evidenced. Indian succession law, oriented as it is around marital and blood relationships rather than domestic partnership generally, would require deliberate statutory attention to this category if Indian law is to avoid the result, difficult to justify on Article 21 principles, that an unmarried partner of many years' standing possesses materially weaker legal standing to seek posthumous use of a deceased partner's gametes than a parent or sibling does.

## 7. TOWARDS A STATUTORY FRAMEWORK: RECOMMENDATIONS

The following reforms would supply the statutory framework Indian posthumous reproduction law presently lacks, while preserving the constitutional right the judiciary has recognised.

- Amend the Assisted Reproductive Technology (Regulation) Act, 2021 to include an express provision addressing posthumous use of gametes, defining the consent standard required, whether express, inferred from documented conduct, or presumed absent contrary evidence within defined limits.
- Codify a hierarchy of persons entitled to seek posthumous use of a deceased individual's gametes, drawing on the spouse-children-

parents hierarchy *Re Application by Vernon* established, adapted to Indian succession law.

- Prescribe a time limit within which an application for posthumous retrieval or use must be made following death, to prevent indefinite uncertainty regarding the disposition of preserved material.
- Mandate counselling for prospective users of posthumously retrieved material, addressing the welfare of any child conceived and the psychological dimensions of the decision for surviving family members.
- Expressly prohibit commercial exploitation of posthumously retrieved reproductive material, consistent with the approach comparative jurisdictions have adopted, while permitting its use for reproductive, research or therapeutic purposes within the statutory framework.

These reforms are deliberately modelled on provisions already tested across the comparative jurisdictions surveyed in this paper, rather than proposed as untried innovations, which should ease their passage through the ordinary legislative process. Enacting them would not displace the judiciary's role in this area; courts would retain the task of applying the codified standard to individual disputes, much as they presently apply the general consent framework the ART Act establishes for assisted reproduction during a person's lifetime. What codification would supply is the predictability that presently distinguishes India's position from the more developed regulatory regimes examined in Section 2, converting a right recognised through a single, carefully reasoned decision into a stable feature of the general law available to every family that may, in future, face the circumstances the Gurminder Singh family faced.

- Extend statutory eligibility to unmarried partners with adequately evidenced relationships and documented intent, rather than confining eligibility to spouses and blood relatives, to avoid the anomaly of according reproductive decision-making authority to distant kin while excluding a long-term partner.

## 8. CONCLUSION AND RECOMMENDATIONS

Posthumous reproduction sits at the intersection of constitutional doctrine, reproductive technology and family law, and the Delhi High Court's decision in *Gurminder Singh v. Government (NCT of Delhi)* has, for the first time in India, located a right to pursue it within Article 21 of the Constitution. That development follows naturally from the living constitutionalism through which Indian courts have progressively read privacy, dignity and reproductive autonomy into the guarantee of life and personal liberty, and it is consistent

with the direction comparative jurisprudence in Israel, the United Kingdom, Canada and Australia has taken over the past three decades.

The comparative survey undertaken in this paper nonetheless demonstrates that judicial recognition of the right, standing alone, is an incomplete response to the concerns posthumous reproduction genuinely raises. Consent, the proprietary status of reproductive material, the entitlement of specific family members to seek its use, and the welfare of any resulting child are all matters comparative statutory regimes address explicitly and that Indian law presently leaves to case-by-case constitutional adjudication. This is workable so long as future cases present the same clarity of circumstantial evidence *Gurminder Singh* did; it is considerably less workable where that clarity is absent.

India should accordingly amend the Assisted Reproductive Technology (Regulation) Act, 2021 to address posthumous use of gametes directly, codifying the consent standard, the hierarchy of eligible applicants, applicable time limits and counselling requirements that comparative practice has shown to be necessary. Such reform would preserve the constitutional right the judiciary has recognised while supplying the predictability and safeguards a matter of this sensitivity requires, allowing families to pursue continuity through reproductive technology within a framework that honours both the deceased's presumed wishes and the welfare of the generation that technology now makes possible to bring into being.

The path this paper charts, judicial recognition followed by legislative codification, is not without precedent in Indian reproductive law more broadly. The Surrogacy (Regulation) Act, 2021 itself followed years of judicially managed surrogacy arrangements that exposed gaps comparable to those this paper identifies in the posthumous reproduction context, gaps Parliament ultimately addressed through comprehensive legislation rather than leaving to indefinite case-by-case development. Posthumous reproduction stands today roughly where surrogacy stood before that legislative intervention, and the same institutional logic that eventually produced the Surrogacy Act counsels a comparable legislative response here, before the number of cases reaching Indian courts grows large enough to produce the kind of doctrinal inconsistency that comparative jurisdictions lacking early codification have experienced.