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## Posthumous Reproduction In India: A Legal Vacuum In The Assisted Reproductive Technology (Regulation) Act, 2021.

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### Abstract

Assisted reproductive technologies have posed legal and ethical questions, especially in the realm of posthumous reproduction, i.e., using a deceased male's gamete for procreation. In India, the Assisted Reproductive Technology (Regulation) Act, 2021, was passed to provide a legal framework for the regulation of fertility clinics and procedures; however, it conspicuously remains silent on the posthumous use of gametes, especially in the case of unmarried persons. In the recent petition before the Bombay High Court, a mother pleaded for granting her access to her deceased 21-year-old unmarried son's frozen semen to continue the family lineage, thus highlighting the lacunae in the Indian statute. This raises adamant questions: the issue of consent, ownership of biological material, and the treatment of gametes as property.

The study critically examines and explores gaps within the ART Act, 2021 regarding such sensitive matters and analyzes whether the existing legal framework in India is able to deal with the fine nuances of posthumous reproductive rights. It further analyzes the intersection between reproductive autonomy and family rights with cultural values regarding lineage. Using comparisons with global legislative responses and judicial trends, the paper calls for an ethically grounded and rights-based reconstruction of reproductive laws in India that bring about clarity and consent whilst ensuring dignity in these very personal decisions.

**Keywords** - Posthumous Reproduction, Assisted Reproductive Technology (ART) Act, 2021, Frozen Gametes, Reproductive Rights.

## Introduction

Posthumous reproduction, wherein the gametes or embryos of a deceased person are used for procreation, has become a swiftly evolving bioethical and legal frontier across jurisdictions. Whereas medically it is possible to preserve and even use gametes after death, the law lags far behind in tackling the thorny ethical, legal, and familial problems thrown up by such use. Subsequently, the Assisted Reproductive Technology (Regulation) Act<sup>1</sup>, was brought in to regulate fertility treatments and lay down ethical and legal safeguards in conversion with ART procedures. However, posthumous reproduction, i.e., the rights and procedures thereof, find no mention in the Act.

This concrete void in legislation finds a glaring example in recent proceedings in the Bombay High Court wherein the said mother, in her great grief, seeks to get a hold of her deceased son's—who was unmarried—semen that had been preserved for continuing the family line. Neither the ART Act nor the rules thereunder deal with the question of what happens in relation to consent, ownership, transfer, etc., of gametes after a person's death, especially if the deceased was unmarried and had neither left a will nor any instructions as to the disposition of his gametes.

Furthermore, this paper seeks to determine the lacunae in the ART Act, 2021 concerning posthumous reproductive rights, particularly in the area of parental claims, succession law, and reproductive autonomy. It investigates the burgeoning demand for a legal structure that addresses the ethical issues pertaining to bodily autonomy in juxtaposition with culturally laid emphasis on lineage and continued family life, mainly in Indian society. Through comparative analyses of respective jurisprudence and recent judicial responses, this research intends to feed into the discourse on reproductive rights in the setting of death and inheritance.

## Methodology-

The research adopts a doctrinal legal methodology, with a chief concern for issues of statutes, judicial decisions, legal commentaries, and scholarly writings on the lacunae in Indian law with reference to posthumous reproduction. Based on the recent Bombay High Court decision affecting the posthumous use of frozen semen, the study analyzes the provisions of the Assisted Reproductive Technology (Regulation) Act of 2021 and rules relating thereto.

## The Assisted Reproductive Technology (Regulation) Act, 2021: Silence on Posthumous Use.

The Assisted Reproductive Technology (Regulation) Act of 2021 (hereinafter referred to as the ART Act) was promulgated to regulate and standardize assisted reproductive practices in India. Its main objectives are to prevent exploitation of donors and commissioning couples, ensure ART clinics work ethically, and erect a

<sup>1</sup> Act No. 42 of 2021 (enacted 18 Dec. 2021; commenced 25 Jan. 2022)

statutory framework to handle gametes, embryos, and ART procedures. One glaring omission, however, is the question of posthumous reproduction - conception using the gametes or embryos of a person after their demise.

There shall be storage, collection, and use of gametes only after explicit informed consent in accordance with the ART Act. The National Board is empowered by the Act to lay down conditions for the storage and handling of gametes and embryos; however, it goes on to say nothing as to the status of or the permissible use of gametes after the donor's death<sup>2</sup>.

The ART (Regulation) Rules, 2022, require donation or preservation and maintain that gametes should be underwritten consent, but this consent is applicable for living donors only. The clinics-in general-simply follow the norms laid down in their consent forms, giving the donor options upon death: destruction or release to spouse<sup>3</sup>. However, if the individual has no spouse, has not executed a will, or has otherwise not given clear posthumous directions, then no legal procedure exists under which a parent or a third party could apply for permission to secure access to the preserved reproductive material.

In the Bombay High Court case of 2025, the petitioner, being the mother of a deceased unmarried man, drew attention to the limitations of the existing order of legal consent. Sperm of her son was preserved before he went for chemotherapy and was under legal contract only to be disposed of or handed over to a spouse after death. Since he died unmarried and intestate, the clinic withheld delivery of the sample citing a mere lack of authority to do otherwise under law<sup>4</sup>. The ART Act simply does not consider a situation where parents or legal heirs may have the right to use or even claim possession of such reproductive material.

The lacuna in the Assisted Reproductive Technology (Regulation) Act, 2021<sup>5</sup> opens up a number of legal and ethical questions that require immediate solution. The foremost-being- should parental rights or cultural imperatives related to lineage outweigh the dead individual's silence in respect of posthumous reproductive use. In the Indian sociocultural setting, much emphasis is laid on family lineage. The absence of a spouse or will marks the situation in a legal grey area, particularly when surviving family, such as parents, assert reproductive claims over the gametes of the deceased. Further complicated are cases wherein alleged oral statements by the deceased prior to death are cited as consent. This sets the question of whether such dying declarations are admissible in law as equivalent to formalized written-instrument consent in a field that is highly ethically sensitive, that is, assisted reproduction.

Several potential unresolved legal and ethical questions arise in the wake of this legislative omission under the Assisted Reproductive Technology (Regulation) Act, 2021, which demands immediate attention. One of the

<sup>2</sup> The Assisted Reproductive Technology (Regulation) Act, 2021, Section 21(2), Gazette of India, Ministry of Law and Justice (2021).

<sup>3</sup> Ministry of Health and Family Welfare, *ART (Regulation) Rules, 2022*, Rule 7(3), Form 5 – “Consent for Cryopreservation of Gametes”.

<sup>4</sup> <https://www.thehindu.com/news/cities/mumbai/bombay-high-court-orders-fertility-clinic-to-preserve-deceased-mans-sperm-in-landmark-art-act-case/article69745442.ece>

<sup>5</sup> Act No. 42 of 2021 (enacted 18 Dec. 2021; commenced 25 Jan. 2022)

foremost questions is whether a claim on parental rights or cultural imperatives relating to lineage may stand against the silence of the deceased individual regarding posthumous reproductive use. Considering that the whole Indian sociocultural milieu attaches extreme importance to continuation of the family lineage, a vacuum has been created in law, more so when there is no spouse and will, but surviving family members like parents assert a reproductive claim over gametes of the deceased. The scenario becomes even more muddled in instances whereby oral statements—said to be made before death by the deceased—are called in as evidence of consent. This raises the question of whether such dying declarations could be validly accepted in law in lieu of actual written consent, especially in so ethically touchy a subject as assisted reproduction<sup>6</sup>.

In addition, there is a pressing need to determine the legal nature of preserved gametes: whether they are to be considered part of a person's estate, capable of inheritance and transfer, or whether they remain personal biological material subject to strict privacy and autonomy protections. The ambiguity surrounding this status places fertility clinics in a precarious legal position. Without statutory backing, clinics may be held liable for either wrongful disposal of gametes in the face of familial objections or unlawful release of the material in the absence of legal authority or express consent. This uncertainty not only disrupts clinical decision-making but also undermines ethical safeguards and erodes trust between families and medical institutions.

Comparatively, jurisdictions such as the United Kingdom provide a clearer framework. Under the Human Fertilization and Embryology Act, 1990<sup>7</sup>, posthumous reproduction is permitted only where there is explicit, written consent by the deceased before death<sup>8</sup>. This statutory model emphasizes respect for individual autonomy and reduces the scope for familial disputes or speculative interpretations of intent. In contrast, India currently offers no equivalent legal standard, leaving the judiciary as the sole forum for adjudicating such complex issues<sup>9</sup>. This reliance on judicial discretion, in the absence of legislative guidance, renders the process both unpredictable and emotionally taxing for all parties involved.

### Constitutional and Ethical Dimensions

The debate around posthumous reproduction in India touches upon some fundamental constitutional rights guaranteed under Article 21 of the Constitution, namely the right to privacy, dignity, and autonomy. The Supreme Court, in the historic decision of Justice K.S. Puttaswamy v. Union of India, held that the right to privacy is an integral part of the right to life and personal liberty<sup>10</sup>. Privacy, therefore, means that one has control over decisions made during one's life but also entails a few safeguards after one's death concerning the human body, identity, and choices. Reproductive technologies stand as a perfect example of this; one should be able to

<sup>6</sup> Section 32 of the Indian Evidence Act, 1872, permits admissibility of dying declarations, but its application to reproductive consent remains legally unsettled.

<sup>7</sup> Human Fertilisation and Embryology Act 1990, c. 37 (UK), available at <https://www.legislation.gov.uk/ukpga/1990/37>.

<sup>8</sup> Human Fertilization and Embryology Act, 1990 (UK), Sections 3 and 4, as amended by the Human Fertilization and Embryology Act 2008.

<sup>9</sup> "Bombay HC orders preservation of dead man's semen on mother's plea," *The Times of India*, 28 June 2025, <https://timesofindia.indiatimes.com>.

<sup>10</sup> *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

determine what happens to one's gametes after death. The contrary would infringe on constitutional rights if the use is encompassed with neither consent nor an express directive. Further, the use of reproductive material without affirmative and informed consent raises serious ethical and legal concerns. The right to bodily autonomy, as cited by the Court in *Common Cause v. Union of India*<sup>11</sup>, retains individuals as controllers of their body, including their reproductive decisions. Ethical and, therefore, constitutional questions may arise when, without documented consent, gametes of a deceased person are used for reproductive purposes even if such acts are justified on familial or cultural grounds. It effectively diminishes the deceased's autonomy, thereby risking the establishment of a precedent where implied or oral claims may prevail over concrete consent.

Furthermore, these acts implicitly address ethical matters that surface with assisted reproduction, especially in the posthumous situation: Posthumously, fertility clinics can be an ethically delicate situation, balancing family grief and legal uncertainty. Without legal certainty, the tide toward choices might be influenced by emotional victim narratives or sociocultural pressures rather than patient autonomy and, even more so, ethical best practices<sup>12</sup>. Additional complexity may arise when the rights of the child born following posthumous reproduction are considered. This child may face uncertainties in law concerning legitimacy, inheritance rights, and social identity, especially under those personal laws that barely envisage the notion of childbirth after a parent's death<sup>13</sup>. There is also the psychological trauma affecting the child born from the deceased biological parent- the one so ethically important that it has to be considered in formulating policy. Without safeguards, such children may find themselves legally and socially isolated.

Hence, with the birth of a child from posthumous reproduction, the intersection with constitutional rights and ethical principles clearly reveals the already inadequate ART framework. Any legislative reform must, therefore, be founded upon the spirit of Article 21, which ensures informed consent and protection of the autonomy of individuals, giving balanced regard to ethical obligations owed to the deceased and to the child yet to embrace life.

### Suggestion

With the growing complexities of posthumous reproduction in India, it is highly indispensable for revisiting and amending the Assisted Reproductive Technology (Regulation) Act, 2021. Since posthumous reproduction remains an inchoate concept in Indian law, it should be clearly defined and legislated to address all aspects of posthumous reproduction, including such issues as the status of gametes after death and a legally recognized list of claimants, such as the spouse, parents, or nominated legal representative. A statutory framework should require written advance consent for use of gametes after death, disallowing oral claims or dying declarations, unless

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<sup>11</sup> (2018) 5 SCC 1.

<sup>12</sup> S. Gupta, "Ethics and Law in Assisted Reproduction in India: Gaps and Challenges," *Indian Journal of Medical Ethics*, Vol. 6, No. 1 (2020), pp. 12–18.

<sup>13</sup> *Indian Succession Act, 1925, Sections 5–8; Smt. Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav*, AIR 1988 SC 644.

judicially verified. The law should also clarify the issue of whether preserved gametes are inheritable property and if so, under what circumstances they could be inherited or passed on as part of an individual's estate.

To avoid potential abuses and safeguard ethical considerations, it is further suggested that adjudicating bodies be constituted to oversee all cases of posthumous reproduction providing for a mixture of legal, medical, and ethical experts who shall consider the deceased's intent, familial claims, and wider societal impact. Moreover, ART clinics will have to ensure that their consent forms are updated; to clarify donors on post-death scenarios; and to maintain secure auditable records of all consent communications. India will have to draw from comparative jurisdictions such as the United Kingdom and Australia in designing a comprehensive yet culturally contextualized legal framework that strikes a balance between reproductive autonomy, familial aspiration, and ethical safeguards.

Thus, it is imperative that campaigns and initiatives for awareness creation, professional training, and inter-ministerial collaborations be set forth in view of the ethical practice of ART, with the interests of donors protected in view, and the legal arena braced to metamorphose alongside these changes in the bio-social landscape. A strong, rights-based, and inclusive paradigm is what the hour demands to shield against judicial uncertainty and safeguard the dignity of both the deceased and the being that can potentially be brought into existence.

## Conclusion

Posthumous reproduction in India with regard to the law reveals a difficult and quite under-regulated area of ART. In other words, the Assisted Reproductive Technology (Regulation) Act, 2021 lays down a much-needed framework for ART in India; however, by remaining silent on the posthumous use of gametes, particularly from unmarried parties or intestates, the Act has rather created a massive legislative lacuna. The absence of legislations on consent after death, legal ownership of gametes, or the rights of families surviving after death does not just cause interpretative problems but places further dilemmas of an ethical and legal kind on the grieving families and fertility clinics. Any posthumous use of biological material must receive informed and affirmative consent on account of the constitutional principles of autonomy, privacy, and dignity as laid down in Article 21 and interpreted by the Supreme Court. At the same time, the socio-cultural emphasis in India on lineage and family continuity places competing interests in the foreground. The not-so-clear status of gametes-as property or as mere personal biological material-raises layers of conundrums, and the absence of mechanisms to claim posthumous rights further irritates the situation. Reviewing the comparative legal frameworks of jurisdictions such as the United Kingdom, United States, and Australia brings to light important aspects of avowed consent regimes, judicial oversight and eligibility criteria. India can best apply its own nuances of cultural and family dynamics as guided by these models toward creating a legal framework that remains both technocratic and ethical in outlook.

In conclusion, urgent and comprehensive legislative reform is needed to address the ART Act's legal and ethical deficiencies. The law needs to come into possession of eventuality through the advances of science and societal realities, considered with dignity, justice, and clarity to protect the reproductive rights of both the living and the dead. Until such reforms are actualized, the judiciary will have to be responsible for deciding these intensely personal yet publicly significant questions in an ambiguous jurisprudential environment.

