



ASSISTED REPRODUCTIVE TECHNOLOGIES AND LEGITIMACY OF CHILD UNDER INDIAN LEGAL SYSTEM

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ABSTRACT

Every human being desires to procreate and have one's own offspring. This right is very well protected under various human rights instruments at international, as well as, municipal levels. Only fortunate persons get to fulfill this desire by way of natural copulation while the less fortunate ones opt for other available alternatives like Adoption of children. The drawback of this method, however, is that the person's innate desire to have one's own biologically related child remains unfulfilled. This desire, to have one's own genetically related children, led to experimentation and advancements in the fields of medicine and technology. Advent of Assisted Reproductive Technologies (ARTs) is also a response to provide solutions to problem of infertility. Although these technologies have been instrumental in providing a solution to infertility, their usage has given rise to a number of legal, ethical, social and human rights issues. Use of such techniques has created complexity in the existing family laws as well as in the related provisions of various secular laws. Except Artificial Insemination by Husband (AIH), majority of these technologies involve more than two persons for achieving conception of child. Thus, the use of these technologies has changed the notion of parenthood. Resultantly, the very concept of legitimacy of children also becomes difficult to determine in the light of prevailing personal as well as secular laws on legitimacy. This paper attempts to highlight the laws relating to legitimacy of children in India and point out the potential legal complications regarding legitimacy, which will be encountered by children born with the aid of ARTs in the absence of laws on the subject in India.

KEYWORDS: Legitimacy, Assisted Reproductive Technologies, Child

INTRODUCTION

Every human being has an innate desire to procreate. This basic and fundamental right is protected under various human rights instruments, and has been adopted in the municipal laws of many jurisdictions, including India. However, everyone is not fortunate enough to replenish and reproduce by way of natural copulation and due to medical or social reasons they remain infertile, which in turn affects their personal and social life. Since time immemorial people from different communities, living in different parts of the world, have tried to find ways out of curing infertility by performance or non-performance of various types of rituals. Institution of Adoption also emerged as a response to provide an alternative solution to cure infertility. The

drawback of this method, however, is that the person's innate desire to have one's own biologically related child remains unfulfilled. This desire, to have one's own genetically related children, led to experimentation and advancements in the fields of medicine and technology. Advent of Assisted Reproductive Technologies (ARTs), too, is a response to provide solutions to problem of infertility. Artificial insemination, surrogacy, cryopreservation, IVF etc. are the most commonly used Assisted Reproductive Technologies. Though these technologies have been instrumental in providing a solution to infertility, there usage has given rise to number of number of legal, ethical, social and human rights issues.

Usage of Assisted Reproductive Technologies (ARTs) for the purpose of having a child has challenged the family law principles in all jurisdictions, especially in determining who all are to be considered as part of the family. These techniques have complicated the legal significance of parenthood, as more than two individuals are normally associated in the procreative process. This very fact raises concerns about the divisibility of rights and obligations of parenthood. India is a secular country, where people of different religions are treated at par under law. Use of such techniques has created complexity in the existing family law as well as in the related provisions of various secular laws. The existing personal laws in India do not provide for any specific provisions to deal with the situation where a child is conceived as a result of ARTs. Hence, they fail to accommodate the complications associated with parenthood and legitimacy of the child born with the aid of these technologies.

A very pertinent question that needs to be answered is how a child born as a result of Assisted Human Reproduction (AHR) will fit into the traditional legally structured family and what is the impact of these technologies on our traditional concept of family law? The objective of this research is to highlight the law relating to legitimacy of children in India and point out the potential legal complications, regarding legitimacy, which will be encountered by children born with the aid of ARTs. In India, personal laws as well as secular laws have certain differences in their approach, so these complexities are to be viewed accordingly. Moreover, the issues that arises in context of the intervention of these technologies vis a vis family matters, are not confined to particular jurisdictions as they have a global significance.

ASSISTED REPRODUCTIVE TECHNOLOGIES AND RELATED PROCEDURES

Assisted Reproductive Technologies (ARTs) encompass all procedures that endeavor to achieve pregnancy by handling male reproductive material and/or female reproductive material, outside the human body (in vitro), in a laboratory under controlled environment, under the supervision of experts and later on transporting the gamete or the resulting embryo to the expected mother's uterus. These techniques, which have helped the childless persons to conceive and bear progenies, are ordinarily congregated under the broad caption of "Assisted Reproductive Technologies" (ARTs). The terminology related to ARTs have been provided in *National Guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technology Clinics in India* adopted by ICMR in 2005. (These guidelines have been referred to as

the ICMR Guidelines, 2005, for reference). There are a number of procedures grouped under ARTs and the important ones are explained as under:

(i) **Artificial insemination (AI)**: “It is a technique whereby a man’s semen is mechanically introduced into a woman’s vagina with the intention that conception takes place. AIH is the least controversial of the available artificial techniques as there is no ambiguity with the resulting child’s status and the issue of parenthood is not in question.”¹

(ii) **AID (Artificial insemination by donor)**: “In this procedure insemination of the woman (usually married) is done by a donor because the husband has (a) defective semen; (b) a hereditary disease likely to be transmitted to his children; or (c) an abnormal sperm which may cause spontaneous abortion; (d) where a single woman wants a child but is unwilling to conceive by conventional methods.”

(iii) **AIH (Artificial insemination by husband)**: “It is done using husband’s semen to inseminate the wife.”

(iv) **Cryopreservation**: “Freezing and storage of gametes, zygotes or embryos.”²

(v) **Donation of Gametes**: “Donation of gametes is a process by which a person voluntarily offers his or her gametes for the process of procreation.”³

(vi) **Embryo donation**: “The transfer of an embryo resulting from gametes that did not originate from the recipient and/or her partner.”⁴

(vii) **Fertilization**: “The penetration of the ovum by the spermatozoon and fusion of genetic materials resulting in the development of a zygote.”⁵

(viii) **Foetus**: “The product of conception starting from completion of embryonic development (at eight completed weeks after fertilization), until birth or abortion.”⁶

(ix) **Foetal Reduction**: “Foetal reduction is an invasive/interventional process by which a higher order multiple pregnancy is reduced to a single or twin pregnancy in order to improve the prenatal outcome.”⁷

(x) **Gamete**: “Oocytes and sperm are called gametes.”⁸

(xi) **ICSI (Intracytoplasmic Sperm Injection)**: “In ICSI, a single sperm is injected into the cytoplasm of the ovum to effect fertilization, before the fertilized ovum is transferred to the uterus of the woman.”⁹

(xii) **Infertility**: “Failure to conceive after at least one year of unprotected coitus.”¹⁰

(xiii) **Intrauterine Insemination (IUI)**: “Intrauterine Insemination involves the introduction of sperm into the uterus of the woman. In IUI, specially prepared

¹ The ICMR Guidelines, 2005, Para 1.2.1.

² The ICMR Guidelines, 2005, Para 1.2.7.

³ The ICMR Guidelines, 2005, Para 1.2.8.

⁴ The ICMR Guidelines, 2005, Para 1.2.11.

⁵ The ICMR Guidelines, 2005, Para 1.2.13.

⁶ The ICMR Guidelines, 2005, Para 1.2.14.

⁷ The ICMR Guidelines, 2005, Para 1.2.15.

⁸ The ICMR Guidelines, 2005, Para 1.2.16.

⁹ The ICMR Guidelines, 2005, Para 1.2.18.

¹⁰ The ICMR Guidelines, 2005, Para 1.2.20.

sperm are injected into the uterine cavity via a fine cannula passed through the cervix. At this site, the sperm are near the uterine entrance of each of the two fallopian tubes and thus have a shorter distance to swim in order to reach the oocyte(s) released at the time of ovulation."¹¹

(xiv) **IVF-ET (In vitro Fertilization-Embryo Transfer)**: *"In vitro Fertilization-Embryo Transfer (IVF-ET) is the fertilization of an ovum outside the body and the transfer of the fertilized ovum to the uterus of a woman."*¹²

(xv) **Oocyte donation**: *"An ART procedure performed with third-party oocytes."*¹³

(xvi) **Ovum/Oocyte**: *"Ovum/oocyte is the female gamete produced in the ovary."*¹⁴

(xvii) **Pre-implantation Genetic Diagnosis (PGD)**: *"Pre-implantation Genetic Diagnosis is a technique in which an embryo formed through IVF is tested for specific genetic disorders (e.g. cystic fibrosis) or other characteristics prior to implantation."*¹⁵

(xviii) **Semen Donor**: *"Semen obtained from third party for purpose of inseminating the wife in cases where husband is unable to produce healthy semen."*¹⁶

(xix) **Surrogacy**: *"Surrogacy is an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry it to term and hand over the child to the genetic parents for whom she is acting as a surrogate."*¹⁷

(xx) **Surrogacy with Oocyte Donation**: *"Surrogacy with oocyte donation is a process in which a woman allows insemination by the sperm/semens of the male partner of a couple with a view to carry the pregnancy to term and hand over the child to the couple."*¹⁸

WHAT IS FAMILY LAW?

Family law is concerned with the establishment or termination of familial relations, which ultimately govern the rights and duties, both personal as well as relating to property with respect to the members of the family.¹⁹ This law standardizes many features of a family, for example the institution of marriage, adoption of children, parameters of guardianship and proprietary rights of members of the family, and by doing so, the very progression of human life is determined. The foundations of family life are based on the love, cohesiveness and care, and that is why at times it becomes difficult to find an impeccable solution to these family problems from a defined legal mechanism²⁰. Certain things are beyond the ambit of law, e.g. it cannot force a spouse to have love and affection for his or her spouse or towards other members of

¹¹ The ICMR Guidelines, 2005, Para 1.2.21.

¹² The ICMR Guidelines, 2005, Para 1.2.22.

¹³ The ICMR Guidelines, 2005, Para 1.2.24.

¹⁴ The ICMR Guidelines, 2005, Para 1.2.25.

¹⁵ The ICMR Guidelines, 2005, Para 1.2.27.

¹⁶ The ICMR Guidelines, 2005, Para 1.2.30.

¹⁷ The ICMR Guidelines, 2005, Para 1.2.33.

¹⁸ The ICMR Guidelines, 2005, Para 1.2.34.

¹⁹ Judith Areen, *Cases and Materials on Family Law*, Foundation Press, New York, 2006.

²⁰ William Seagle, *Family Law*, *Encyclopedia of Social Science*, 5-6, 84.

the family, but unquestionably it can help by providing solutions for any kind of exploitations or wrongs that take place within the family. Although family law does not provide for perfect solutions for all the matters relating to family, its importance cannot be overlooked in keeping family edifice together and familial relations impartial, which in turn is very important from the societal point of view. Despite being a very small setup, family is an inimitable social establishment which is universal and indispensable by its very nature. This tiny but important unit of the society, which has a strong cultural and moral base, involves different dimensions of human rights, societal utility and economic security.

JURISDICTION WITH RESPECT TO FAMILY MATTERS IN INDIA

India has a federal constitution, with distribution of legislative powers between the Centre and the States. An independent judiciary being another characteristic feature of the same, Supreme Court is empowered to decide the disputes between the Centre and the States. Constitution of India was adopted on 26th January, 1950, and has an incorporated directive to the State to “Secure for the citizen a uniform civil code, throughout the territory of India.”²¹ It also specifies, under one or the other Legislative Lists, matters traditionally regulated by personal laws. The Indian Constitution provides three lists, Centre list, State list and Concurrent list²². The central government can make laws on subjects provided under the union list that is List I. State can legislate on matters provided under the State List. The state legislatures can make laws on the subjects enumerated under the state list. As far as concurrent list is concerned, both Parliament and the State legislatures can make laws. Before the coming-into-force of the Constitution, all kinds of family matters such as marriage, divorce, adoption, guardianship, testamentary and intestate succession, coparcenary and partition etc. were governed by personal laws.²³ It means both Parliament and State legislatures can make the law on the subject of family and succession.

Article 372 of the Constitution holds a lot of importance with regard to legislative powers where personal law is concerned. Language of Article 372(1) is similar to section 292 of the *Government of India Act, 1935*, which provided the continued application of “all law in force” then. List III of the *Constitution of India*, provides the subjects on which both Parliament and the State Legislatures have power to legislate. It specifies the following subjects:

- (a) Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.²⁴
- (b) Transfer of property other than agricultural land; registration of deeds and documents.²⁵

²¹The *Constitution of India*, 1950, Article 44

²² The *Constitution of India*, 1950, Schedule 7

²³ The *Constitution of India*, 1950, Schedule Entry 5, List III, Schedule VII

²⁴ The *Constitution of India*, 1950, Schedule Entry 5, List III, Schedule VII

²⁵ The *Constitution of India*, 1950, Schedule Entry 6, List III, Schedule VII

(c) Charities and charitable institutions, charitable and religious endowments and religious institutions.²⁶

List II specifies the subjects on which state legislature can legislate, it includes burial and burial grounds²⁷, “right in and over land”²⁸ (covering succession of agricultural lands) and administration of justice and organization of courts at the district level²⁹. List I pertains to Muslim law and provides for “Pilgrimage to places outside India.”³⁰ Parliament can make laws to regulate Haj and Ziyarat under this heading.

LEGITIMACY UNDER INDIAN EVIDENCE ACT, 1872

In India, legitimacy of the child generally speaking, falls within the wider ambit of personal law. However, legitimacy is also dealt under Indian Evidence Act, 1872, which is a secular legislation on the subject. Section 112 of *The Indian Evidence Act, 1872*, deals with the conclusive proof of legitimacy of child born during the subsistence of a valid marriage. Section 112 was enacted in that era, when the present day scientific advancements such as in vitro fertilization, surrogacy, sperm banks or cryopreservation banks etc. were not even contemplated by the drafters of this legislation. The biggest drawback of this section is the presumption of sexual intercourse. For the application of this section, sexual intercourse is an absolute essential ingredient. This presumption is clearly mentioned in the non-access clause of this section, which says that any child born during the continuance of the marriage will be the conclusive proof of the legitimacy of the child, unless they had non-access to each other at any time when he could have been begotten. The word “access” means “opportunity of intercourse” and not actual co-habitation, and the burden is on the party disputing legitimacy of the child, to prove that the parties lacked this opportunity.³¹

Now if we apply section 112 of IEA, 1872, to modern Assisted Reproductive Technologies, the provision stands outdated. In case of surrogacy, a female agrees to act as a surrogate mother and agrees to deliver a child for the commissioning parents as a gestational carrier to deliver, after having been implanted with the embryo. In that situation according to section 112, the child born out of such an arrangement, would be considered to be the legitimate child of the husband of such a surrogate, who is nowhere in picture in this whole arrangement, the reason being that the child was born during the continuance of a valid marriage between the surrogate and her husband. Although, on the ground of non-access to each other (husband and wife), the same can be rebutted.

In present times, there are varieties of choices in assisted reproductive techniques, like surrogacy, sperm donation, in vitro fertilization, embryo donation, cryopreservation etc., which can be accessed by persons for having a child. In these situations how can

²⁶ The *Constitution of India*, 1950, Schedule Entry 28, List III, Schedule VII

²⁷ The *Constitution of India*, 1950, Schedule Entry 10, List III, Schedule VII

²⁸ The *Constitution of India*, 1950, Schedule Entry 18, List III, Schedule VII

²⁹ The *Constitution of India*, 1950, Schedule Entry 5, List III, Schedule VII

³⁰ The *Constitution of India*, 1950, Schedule Entry 20, List III, Schedule VII

³¹ *Karapaya Servai vs. Mayandi*, A.I.R., 1934, P.C. 49.

section 112 be considered viable or suitable to deal with these situations? In cases where the child is born as a result of the cryopreserved embryos, long after the death of either of the spouses or after the death of the father and since the pregnancy is achieved long after the dissolution of marriage in such situation, whether the child born as result of such conception by cryopreserved embryos, will be the legitimate child of such a couple or not? That is a real big question. Section 112 of the *Indian Evidence Act 1872*, consists of two parts, and according to this section, the fact that any person was born:

- 1) *during the continuance of a valid marriage between his mother and any man, or*
- 2) *within two hundred and eighty days (gestation period) after its dissolution, the mother remaining unmarried shall be conclusive proof that he is the legitimate son of that man unless the parties had no access to each other, at any time when he could have been begotten.*

The combined *result* of these two parts is, a child born during either of those periods, must be presumed to be the child of that man, unless and until the husband proves that he had no access to his wife at the time of the conception of that child.

It is important to note here, that *The Indian Evidence Act* was enacted way back in 1872, when the advent of ARTs could not have been imagined by humans. With the advancements in science, relevant changes should be brought in the laws to equip them to address the changes brought by such advances. Thus, a child born to a woman, long after the death of the husband, through artificial insemination with the stored sperms of her deceased husband, must be considered to be their legitimate child, notwithstanding the existing presumptions related to legitimacy provided under the law of Evidence. Law needs to keep pace with the advancements in the medical technologies and amend accordingly, in order to avoid dilemmas or any uncalled-for harsh circumstances.³²

LEGITIMACY OF CHILD UNDER PERSONAL LAWS

In India, legitimacy of children is governed by the personal laws. There is no provision for legitimating under the Indian legal system. The Hindu Marriage Act, 1955, and Special Marriage Act, 1954 confer legitimacy on children of void marriages enumerated under those Acts alone and deny legitimacy to children of other void marriages which fall outside the purview of these Acts. An ART child will not come under the provisions enumerated under any of the Acts mentioned above. Hence they will be illegitimate in the absence of any legislation legitimizing the ART children. Historically speaking, the rights to which a child was entitled, was dependent on the nature of relationship enjoyed between the parents of such a child at the time of his birth, i.e. if they were married to each other, then he was considered as legitimate offspring of such couple, if not then he was considered as illegitimate child of the couple. Such illegitimate child was deprived of all the rights which were otherwise enjoyed by a legitimate child. The reason for such deprivation was the fact that the

³²The *ICMR Guidelines*, 2005 Para 3.16.5.

birth took place outside the traditional setup or model of family, where the bond of marriage linked the parents.

LEGITIMACY UNDER HINDU LAW

“Section 16 of the Hindu Marriage Act 1955 provides that

- (1) Notwithstanding that a marriage is null and void under Section II, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of Marriage Law (Amendment) Act 1976 & whether or not decree of nullity is granted in respect of that marriage under this Act and whether or not marriage is held to be void otherwise than on petition under this Act.*
- (2) Where a decree of nullity is granted in respect of voidable marriage under Section 12, any child begotten or conceived before the decree is made who would have been legitimate child if the parties to the marriage if at the date of decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.*
- (3) Nothing contained in Sub Section (1) & (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12 any right in or to the property of any person other than parents, in any case where but for passing of this Act. Such child would have been incapable of possessing or requiring any such right by reason of his not legitimate child of his parents.”*

So the objective of section 16 of HMA, 1955, is to confer the status of legitimacy by way of legal fiction to children born out of void and voidable marriages. But the only difference with respect to legitimate children born out of valid marriage is that children born out of void and voidable marriages are debarred from inheriting to property of any person other than his or her own parents. In the case of *Rameshwari Devi v. State of Bihar*³³ it was observed by Supreme Court that marriage of parties may be void by reason of contravention of section 5 clause (i) of *The Hindu Marriage Act, 1955*, but the children of such marriages will be considered as legitimate under Section 16 of the said Act for the purposes of succession to the property of father.

The law in India recognizes relationships by blood (adoption is included in the category by legal presumptions of the adopted child being at par with the natural born child) or marriage. Children are said to be related to each other by full, half and uterine blood. The status of children in a family is established by reference to the marital status of their parents. They are classified as legitimate when either conceived or born during the subsistence of marriage. Children born outside the wedlock are illegitimate. Surrogacy challenges both the principles as far as legal problems are concerned, the major one relates to legitimacy of the child so born. For legal purposes, paternity is a question based on the genetic factor. Use of the husband's sperm for inseminating the wife's either *in vitro* or in uterus does not pose any problem to the question of paternity of the offspring. However, the use of donated sperm in Artificial Insemination Donor (AID) inevitably creates conflict with the

³³ *Rameshwari Devi v. State of Bihar*, AIR 2000 SC 735.

social reality and genetic truth. In the absence of statutory intervention, the child is illegitimate, his rights being those enforceable against his genetic father, i.e. the anonymous and his social father is a legal stranger to him. The state of affairs created problems in his inheritance rights.

LEGITIMACY OF THE CHILD UNDER MUSLIM LAW

In Muslim law, the Hanafi school of thought classifies marriages into *sahih* (valid), *batil* (void) and *fasid* (irregular). As far as children born out of *batil* marriages are concerned, they are considered to be illegitimate, however children born out *fasid* marriages have been recognised as legitimate. As far as Shia law is concerned, marriages can be either *shaih* or *batil*, there is no concept of *fasid* marriages under this school of thought. As far as Muslim personal law is concerned, legitimacy of child is dependent on the child being conceived after the contracting of a valid marriage. Minimum gestation period recognized under Muslim law is six months. Any child born within six months of contracting a valid marriage is considered to be illegitimate.

³⁴ In other words, a child born after six months from the date of its parents' marriage is presumed to be legitimate. However, the rules of li'an (imprecation) and iqrar (acknowledgement) are also well recognized under Muslim law, which can actually affect the aforesaid presumption of law.³⁵ A child, who according to the said presumption will ordinarily be legitimate in Muslim law, may be disowned by his/her father under the principle of li'an (imprecation).³⁶ Similarly, a child who is in ordinary course considered as an illegitimate child, on account of being born during the first six months of his/her parents' marriage may be acknowledged by the father as his child.³⁷ Under Muslim Law, a child who is born after six months from the date of contracting where there is a confusion with respect to the date or time of Nikah, it can be cleared by acknowledgement of paternity by the father. There is a consensus on this issue under Sunni and Shia. Upon the dissolution of the marriage, child born after the termination of its parents' marriage (whether by husband's death or by divorce) is legitimate in classical Muslim law if born³⁸:

- (a) within 10 lunar months in Shia law;
- (b) within 2 lunar years in Hanafi law;
- (c) within 4 lunar years in Shafei or Maliki law.

So, even the Muslim personal law is not open enough to accommodate the changes which have come and might come in future due to the intervention of these reproductive technologies.

³⁴ Mulla, Principles of Mahomedan Law, 323 (1972)

³⁵ Mulla, Principles of Mahomedan Law, 323 (1972)

³⁶ S.N.Jain, LEGITIMACY THE TERM "illegitimate child" is one which is being14.139.60.114:8080/jspui/bitstream/123456789/684/16/Legitimacy.pdf, visited on 9th august, 11.48 p.m

³⁷ S.N.Jain, LEGITIMACY THE TERM "illegitimate child" is one which is being14.139.60.114:8080/jspui/bitstream/123456789/684/16/Legitimacy.pdf, visited on 9th august, 11.48 p.m

³⁸ Poonam Pradhan Saxena, *Family Law Lectures, Family Law II*, Lexis Nexis, Nagpur, 2011, p. 511.

LAW OF OTHER COMMUNITIES: PARSI & CHRISTIAN

Under Parsi Law, a marriage, unless solemnized in accordance with rules relating to prohibited degrees, guardian's consent where required and monogamy, is void.³⁹ The law doesn't say anything about the status of children born off such marriages. The Christian Law, too, doesn't provide for the legitimacy of children born out of void marriages.⁴⁰ As per Christian Law, the status of an illegitimate child is that of "*fillius nullius*", which means child of no one. Indian Succession Act, 1925, governs the property rights of Christians and the term 'Child' used in this Act does not include illegitimate children. It specifically precludes illegitimate children from inheriting property of the father.⁴¹ The custody of such a child remains solely with the mother and her relatives while the putative father has no such right.⁴²

LEGITIMACY UNDER ICMR GUIDELINES

In India till date there is no legislation to regulate the use of ARTs. *National Guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technology Clinics in India* were adopted by ICMR in 2005. These guidelines are the very first step in the direction of regulating surrogacy in India, and to ensure that international standards are followed and there are no malpractices. However, these guidelines are not binding in nature. As per the Indian Council of Medical Research Guidelines of 2005, on use of ARTs, it is provided that a child born through ART shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both the spouses.⁴³ Therefore, the child shall have a legal right to parental support, inheritance, and all other privileges of a child born to couples through sexual intercourse.⁴⁴ It further states that a child born through surrogacy must be adopted by the genetic (biological) parents unless they can establish through genetic (DNA) fingerprinting (of which the records will be maintained in the clinic) that the child is theirs.⁴⁵ Thus it can be conveniently said that the commissioning parents or the intending parents have the right to the custody and parentage of the child. Reason behind the same is that the intending parents in the very first place intended to have a child by such arrangements, and the sole purpose of entering in such agreement is to have a child.

Thus, if after undergoing all the formalities and technicalities of surrogacy process, the intended parents are deprived of the custodial rights and legal parentage of the child, it will be a cause of mental agony as well as injustice to such parents. Hence, in the interest of the intended parents and child, it is necessary that a uniform approach is adopted and the intended parents be given the right to custody and parentage of the child. It can be made mandatory that every surrogate mother shall hand over the child

³⁹ *Parsi Marriage & Divorce Act, 1956*

⁴⁰ *Christian Marriage Act, 1872*

⁴¹ Section 37, *Indian Succession Act, 1925*

⁴² Archana Mishra, *Adopted & Illegitimate Child under Indian Christian Law: Revisiting Inheritance Rights*, available at SSRN, <http://ssrn.com/abstract=2551287>

⁴³ The *ICMR Guidelines, 2005*, para 3.12.1.

⁴⁴ The *ICMR Guidelines, 2005*, para 3.12.1.

⁴⁵ The *ICMR Guidelines, 2005*, para 3.10.1.

within 72 hours of the birth of such child and the intended parent/parents should be treated as the legal parent/parents of the child.

It is pertinent to mention here that the legitimacy of the child born out of surrogate arrangements will ultimately determine the share of such a child in the property of the parents. Guardianship rights under different personal laws will also accrue only, once the legitimacy of the child born out of such arrangements is conclusively determined by relevant and appropriate changes in different personal law.

CONCLUSION AND SUGGESTIONS

It is a proven fact that over the last decade, the number of children conceived through the use of Assisted Reproductive Technologies (ARTs) has doubled. The use of these advanced technologies, that has made the conception of these children possible, has challenged many aspects of family law. Legal complications relating to the legitimacy, legal parentage, custody guardianship, inheritance rights etc. have arisen, especially in circumstances when a child is conceived after the death of a parent with the aid of other reproductive technologies. Legitimacy is determined in accordance with the personal laws and law of Evidence in Indian context. Legitimacy of the child determines number of rights to which a child is entitled in the family, e.g. right to property. On analyzing the provisions of law under different personal laws and law of evidence, a conclusion is drawn that the prevailing laws are not apt with respect to their adaptability towards use of Assisted Reproductive Technologies. Specific Legislation should be enacted at the earliest in India to regulate the use of ARTs in India, and that statute should provide for these specific legal concerns like legitimacy of children and many more. It is thereby suggested that requisite amendments should also be made in personal laws as well as secular laws to cater to the changes brought in by their use, so that children born with the aid of ARTs are not placed at a disadvantageous position as compared to children born by way of natural copulation.