DNA TEST TO RESOLVE PATERNITY DISPUTES IN INDIA: A CRITICAL OVERVIEW

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Abstract—Although it was established long before that any human characteristic that is fully expressed at birth remains almost constant throughout life (unless intervened artificially) and is inherited in a regular reproducible manner and can be used to identify parenthood, but prior to the invention of DNA fingerprinting technique it was impossible to decide with certainty the biological paternal relationship between a child and his father. However, because the birth of a child was closely related to inheritance and proper disposition of estate and properties, therefore in the absence of any conclusive mechanism to decide paternity, such matter of inheritance could not be left unattended by the Law. Therefore, in the absence of any conclusive mechanism to decide paternity, a presumption or legal fiction was developed to address such dilemma. It suggested a simple yet practical solution by pronouncing let pater est quem nuptiae demonstrant i.e., 'he is the father whom the marriage indicates.' Such presumption was nothing but a legal fiction and mostly concentrated on social parentage rather on the biological parentage of the child. However, the DNA fingerprinting technique has made it possible to determine the biological paternity of a child with considerable certainty and thus has erased any potential obscurity about his biological lineage. With its overwhelming precision in establishing biological paternity, the DNA testing method has been successful in shifting the Court's attention from the well-established legal presumption of legitimacy to scientifically verified facts. The recent Indian judicial decisions have also followed such trend. In

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the above circumstances, the instant article aspires to critically appraise the application of DNA testing by the Indian Courts in deciding cases involving disputed paternity of a child. In doing so the author also intends to analyse how far its application may prejudice the individual dignity and other interest of the innocent children.

Keywords: DNA test, Presumption, Legitimacy, Paternity, Individual Dignity.

I. INTRODUCTION

The legal fiction of legitimacy has consistently enjoyed judicial protection. Before the innovation of technological paternity test, the existence of wedlock was considered to be sufficient proof of legitimacy of the child. In the absence of any method to establish biological linkage between a child and its father, in order to protect the rightful inheritance and proper disposition of estate and properties, law suggested a simple yet practical solution to the issue of disputed of paternity by pronouncing a legal presumption "pater est quem nuptiae demonstrant" i.e. 'he is the father whom the marriage indicates'. A man was considered to be the father of a child if it was born during the subsistence of his legal marriage with another woman. It was held long ago that the presumption of legitimacy of a child born in wedlock is not a *presumptio juris et de jure* rather it is a question of fact[1] and may be rebutted by circumstances inducing contrary presumption.[2] But the presumption was such immensely strong that in an ordinary case where husband and wife lived together, it could not be rebutted by mere evidence or even with proof that wife was engaged in improper extramarital relationship.[3]

However, once the DNA test has been introduced in deciding paternity disputes, there has been no looking back since. The numbers of judgments where the Courts are frequently resorting to the technology of DNA testing in order find the factual truth is rapidly increasing. The latest trend shows that in doing so the Courts are not even hesitating to disregard the legal presumption of legitimacy for being archaic.

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1 *Gardner* v. *Gardner* (1877) 2 App Cas 723.
2 *Banbury Peerage case* (1811) 1 Sim & St 153.
3 *Yool* v. *Young*, (1904) 1 IR 434, at 440 - 441.

II. PRESUMPTION OF LEGITIMACY IN INDIAN CONTEXT

The present law of legitimacy in India irrespective of the child's religious affiliation, is governed by the provision laid down in Section-112 of the Indian Evidence Act, 1872 (hereinafter Evidence Act). This section postulates a conclusive proof of legitimacy in a manner that 'the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days (280) after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten'.[4] It is to be reminded that Section-112 of the Evidence Act refers to the word 'Legitimate Son' and thus it is based on the concept of 'Legitimacy' and not on the concept of 'Paternity'.It may be noted here that section-112 of Evidence Act, leaves a very narrow scope for a putative father to rebut the presumption of legitimacy only by establishing the factum of 'non-access', which is nothing but a negative fact and therefore is extremely difficult to substantiate. He is obliged under section-103 of the Evidence Act to discharge the burden of proving the existence of the fact of 'non-access' between him and the mother of the child during that period when the child could have been conceived.[5]

III. DNA TEST IN PATERNITY DISPUTE

Even before the discovery of Mendelian inheritence; racial and other anthropological measures such as corporeal features had been used to decide on parentage. Reliance on such physical characteristics however suffers from two drawbacks. Firstly due to complex interaction in genetic level the transmission of these traits is quite unpredictable as well as unquantifiable. Secondly and perhaps most importantly, these traits are readily apparent, therefore hardly distinguishable. Modern parentage testing methods therefore prefer to rely upon chemical characteristics of human cell that are although invisible to naked eyes yet follow the basic rule of paternity inheritance and are uniquely identifiable.[6] Subsequently by 1930s once it was established that blood test could be useful in determining the issue of paternity, attempts were made to rely on the result of such tests as evidence in judicial proceeding to resolve the challenge against paternity. But the blood testing method also had its own

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[4] S. 112, Evidence Act, 1872.

[5] *Madan Lal* v. *Sudesh Kumari*, 1987 SCC OnLine Del 110 : AIR 1988 Del 93, 99. (Confirming that the word "begotten" means "conceived").

[6] Jeffrey W. Morris and David W. Gjertson, *Parentage Testing, Scientific Status*, in *Modern Scientific Evidence, The Law and Science of Expert Testimony* 327 (David Faigman et al. eds., 2002).

limitation since it could only achieve non-identity or exclusions of paternity but could not prove paternity positively.[7]

The scenario however changed when in the year 1984 Prof. Alec Jefrreys invented the revolutionary technique named 'DNA fingerprinting'. During his scientific research in the laboratory when he found on the photographic plate a clear pattern of inheritance between the individuals he was studying, he could immediately foresee the potential application of his technique as a valuable tool for forensic identification and paternity establishment.

In fact, within a year of its invention, the DNA fingerprinting or DNA testing technique was first applied in an immigration case to prove parentage between a Ghanaian child and his mother,[8] and since then this ground-breaking technique has been used in numerous cases all over the world to resolve the issue of disputed paternity.

IV. IMPACT OF DNA TEST ON LEGITIMACY IN INDIA

In India, there is no specific legal provision empowering the court to require a person to undergo blood test or DNA test for resolving dispute in regard to legitimacy of a child. However, for rendering substantial justice to the parties, the Indian courts have been issuing such direction either by exercising their inherent power supervisory power or by issuing a writ.

DNA fingerprinting commenced its voyage in India through a maintenance proceeding initiated in the year 1988. In the said case of *Kunhirman* v. *Manoj*,[9] DNA test was conducted on mutual consent, which established biological fatherhood of Kunhiraman beyond doubt. Although the result of the test was challenged on the ground of the employed technique being underdeveloped and not wholly reliable,[10] yet the court held that the result of DNA test by itself could be taken as conclusive in deciding paternity. It must be noted here that although in that case the ruling was in favour of DNA test yet the Court clarified that it was used as a corroborative evidence *"...only for tilting the balance in accepting the other acceptable evidence"* which may not be otherwise conclusive.

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7 Jaising P. Modi, *A Textbook of Medical Jurisprudence and Toxicology* 679-670 (K. Kannan and Karunakarn Mathiharan eds., 24th edn. 2012). *Also See* I.B. Lyon, *Lyon's Medical Jurisprudence & Toxicology* 639 (T.D. Dogra and Abhijit Rudra eds., 11th edn. 2012).

8 Alec. J. Jeffreys, John. F.Y. Brookfield and Robert Semeonoff, Postive identificatio of an Immigration Test-case Using Human DNA Fingerprints, 317 Nature 818, 818 (1985).

9 *Kunhiraman* v. *Manoj*, 1991 SCC OnLine Ker 357 : (1991) 2 KLT 190.

10 It was almost similar to the argument of *'general acceptance'* as proposed in *Frye* v. *United States* (293 F 1013 (D.C. Cir. 1923).

A. Initial Conformist view

From the very initiation of its journey the potential benefit of the DNA test in the administration of justice was clearly visible. But considering the probable social as well constitutional disruptive effect of the test, the Indian Courts were extremely cautious in its routine acceptance. The Hon'ble Supreme Court in *Goutam Kundu* v. *State of W.B.*[11] had categorically held that blood sampling should not be allowed as a matter of course or for the purpose of having a roving enquiry. Relying upon an earlier decision delivered in *Dukhtar Jahan* v. *Mohd. Faro*,[12] the Supreme Court reflected that Courts have always forbidden rendering verdict on the basis of slender materials showing concern toward the discourteous societal image of the mother and the son. Accordingly issuing direction for undergoing blood test without considering its consequences was strongly depreciated. The opinion of the Court was that there should be a strong prima-facie case in that the husband must establish non-access in order to dispel the presumption arising under Section-112 of the Evidence Act.

Goutam Kundu's observations in respect of blood sample were followed in subsequent paternity dispute cases where collection of DNA sample was an issue. In deciding a maintenance proceeding, the Supreme Court while relaxing the rigour of strict proof of valid marriage held that in proceedings under Section-125 Cr.P.C if a claimant can show that she and the respondent has lived as a husband and wife, it would be sufficient for the Court to presume marital relationship. But even in such situation Court was reluctant to issue compulsory direction for DNA test to determine paternity, although it has held that refusal to undergo DNA test would disentitle the putative father to dispute paternity of the child.[13]

In *Kamti Devi* v. *Poshi Ram*,[14] the Hon'ble Supreme Court, took an extreme conservative stand while observing that the result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section-112 of the Indian Evidence Act, 1872. Accordingly if a husband and wife were living together during the time of conception, but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. Dr. Jyotirmoy Adhikary, on the point of reasonability of that judgment has humbly differed and has opined that the decision has failed to balance between the conflicting interests of the child whose paternity was in question and the husband who proved himself innocent in the paternity dispute. With due respect, he has submitted, in the instant case in the name of social justice and the future of the child the decision was unjust to the husband whose innocence has been proved beyond

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[11] (1993) 3 SCC 418 : AIR 1993 SC 2295.
[12] (1987) 1 SCC 624.
[13] *Dwarika Prasad Satpathy* v. *Bidyut Prava Dixit*, (1999) 7 SCC 675.
[14] (2001) 5 SCC 311 : AIR 2001 SC 2226.

reasonable doubt by the DNA testing.[15] However it may be pointed out here that the Hon'ble Supreme Court in a later judgment of *Banarsi Dass* v. *Teeku Datta*[16] has clarified its standpoint by saying that it "may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception."

In *Ramkanya Bai* v. *Bharatram,*[17] in the absence of any allegation by the husband in his petition for divorce, that the son was born as consequence of an illicit relationship between his wife and another person, the Court was not convinced to issue direction for DNA test only on the ground that positive result of the test could reunite the estranged husband and wife. The Supreme Court reiterated the settled position that the *presumption of legitimacy* was a *presumption of law* and a child born out of a valid marriage enjoyed such presumption in favour of his legitimacy which largely depended on the presumed fact that the parties to a marriage had necessary access to each other.

B. Constitutional challenges

In India the applicability of DNA test in paternity dispute has mainly encountered two-fold constitutional challenges. On one hand it has been criticised for contravening the privilege against self-incrimination under Article 20(3) and on the other hand it has received severe objection for violation of privacy rights under Article 21 of the Constitution of India.

The challenge on the ground of violation of privilege against self-incrimination as enumerated under Article - 20(3) of the Constitution could not gained that much momentum in respect of DNA paternity test as it had accomplished against application of blood test in the early days of paternity disputes in India. The credit may be attributed to the judgment of *State of Bombay* v. *Kathi Kalu Oghad,*[18] in which the Hon'ble Supreme Court has limited the benefit of the privilege only to a person standing *'in the character of an accused person'* and has delineated the scope of the phrase *'to be witness'* so as to keep non-testamentary physical evidences, e.g. blood sample, fingerprint, footprint, mug-shot, DNA sample etc. out of the ambit of the constitutional protection.[19] However since such challenges mostly occurred in respect of criminal cases therefore for brevity that discussion has not been dealt in the instant article.

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[15] Jyotirmoy Adhikary, *DNA Technology in Administration of Justice* 453 (2007).

[16] (2005) 4 SCC 449. It may be noted that in *Banarsi Dass's case* surprisingly did not consider or distinguished the earlier decision of *Sharda* v. *Dharmpal*, (2003) 4 SCC 493.

[17] (2010) 1 SCC 85.

[18] AIR 1961 SC 1808

[19] In *Kathi Kalu's* decision the Supreme Court however did not consider the aspect of personal liberty under Art. 21.

The second type of constitutional challenge against DNA paternity testing was on the ground of violation of personal liberty and privacy rights. A careful analysis may reveal that the constitutional challenge under this heading initially opened two major independent fronts, producing conflicting results, but were later merged with each other.

One front of the challenge was based on the arguments that in absence of any specific legislative enactment, the Courts in India could not order for DNA test particularly in civil and quasi-civil matters and therefore such an order would amount to violation of constitutional rights. The challenge was countered mostly on the basis of principles laid down in *M.P. Sharma* v. *Satish Chandra'*[20], *'Kharak Singh* v. *State of U.P.*[21] and in *Mr 'X'* v. *Hospital 'Z'*,[22] which asserted that the right to privacy although "an essential component of the right to life envisaged by Article-21", however, was not absolute and was subjected to be "lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others." Based on that moral in *Alika Khosla* v. *Thomas Mathew*,[23] which originated from a suit for divorce on the ground of adultery, the Delhi High Court permitted DNA test on a dead foetus alleged to be the result of an extramarital marital affair and which was clinically preserved after being discharged from the body of its mother. The court held that the foetus being already detached from the body of the petitioner would not entitle her to claim privacy rights over it.[24]

Another front of similar constitutional challenge followed the dictum of *Goutam Kundu's* case in which the Hon'ble Supreme Court relying upon earlier decisions rendered by the Madras High Court in *Pollavarapu Venkateswarlu* v. *Pollavarapu Subbayya*[25] and *Subbayya Gounder* v. *Bhoopala Subramanian*,[26] acknowledged that although the Court might direct a party to undergo blood test *ex debitojustitae* but compelling a party to take the test would tantamount to constraint on the personal liberty.[27] Accordingly the Supreme Court not only ruled out forceful collection of blood sample but also warned against drawing any adverse inference against refusal to give such sample. The view has been reconfirmed by the Supreme Court in many later cases e.g. in *Amarjit Kaur* v. *Harbhajan Singh,*[28] the order disentitling a mother from claiming maintenance

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[20] AIR 1954 SC 300.
[21] AIR 1963 SC 1295.
[22] (1998) 8 SCC 296.
[23] 2001 SCC OnLine Del 1364 : (2002) 62 DRJ 851.
[24] The Court however affirmed that the petitioner / mother had the right to decline for compulsory blood test, in respect of the criminal investigation of adultery.
[25] 1951 SCC OnLine Mad 21 : AIR 1951 Mad 910.
[26] 1957 SCC OnLine Mad 192 : AIR 1959 Mad 396.
[27] It may be noted that *Goutam Kundu's* decision however did not consider the view *Kathi Kalu Oghad's* case.
[28] (2003) 10 SCC 228.

pendente-lite in default of demonstrating a favourable DNA test result was set aside.

Although the subsequent decisions illustrate a common pattern of consistency yet the intrinsic duality in the *Goutam Kundu's* doctrine had generated much discomfort in adjudication of similar type of cases. The Bombay High Court in *Sadashiv Mallikarjun Kheradkar* v. *Nandini Sadashiv Kheradkar,*[29] had even sought for intervention by the Law Commission *"for considering the question of amendment of S. 112 of the Evidence Act and for amending the Evidence Act to provide the circumstances under which blood samples can be taken from the spouses and their child or others to decide the disputed parentage or for any other test like DNA or any other scientific test and the circumstances under which such tests can be taken and other details as mentioned in the above judgment."*

Such discomfort was however later subsided to a great extent when in *Sharda* v. *Dharmpal*[30] the Supreme Court clarified its earlier doctrine of *Goutam Kundu's* case and affirmed that such doctrine never forbade a Court form ordering blood test rather considering the best interest of a child it had only restrained indiscriminate passing of such order. In this judgment both the fronts of challenge as stated above were merged and it was held that 'personal liberty' got an expansive interpretation in Article-21, through the evolution of 'the right to privacy'. The Court opined that since certain laws by Indian Parliament may demand the accused for certain medical tests, similarly, the matrimonial cases too, often involve allegations (impotency, schizophrenia... etc.) that may require to be medically verified. Sheltering behind the defence of right to privacy in such cases would render the grounds of divorce nugatory. Hence considering *"the primary duty of a Court is to see that truth is arrived at",* the Supreme Court observed that the implicit power of a Matrimonial court to direct medical examination of a party to a matrimonial litigation could not be held to violative of once right of privacy. It is however important to note here that even in *Sharda's* case the Supreme Court categorically reiterated judicial incapacity in compelling a person to undergo medical examination in deciding matrimonial cases.

C. Effect of Sharda's decision

Sharda's doctrine has immense bearing on the mooted topic since it was able to supply a much-awaited constitutional stability to the issue of applicability of DNA paternity testing in matrimonial cases and fortified the Courts with necessary basic guidelines to be followed. Following the Sharda's ruling in the year 2008 in *Veeran* v. *Veeravarmalle*[31] the Hon'ble Madras High held

[29] 1995 SCC OnLine Bom 224 : 1995 Cri LJ 4090.
[30] (2003) 4 SCC 493.
[31] 2008 SCC OnLine Mad 312: (2009) 2 Mad LJ 213.

that when a paternity of the child was challenged, there was nothing wrong in ordering a DNA Test for unfolding the truth since such an act was not an interference with the personal liberty of the particular person.

In *Bhabani Prasad Jena* v. *Orissa State Commission for Women*[32] the Hon'ble Supreme Court has observed "when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of *'eminent need'* whether it is not possible for the court to reach the truth without use of such test."

The proposition of *Sharda's* decision recommending drawing adverse inference in case of refusal to obey the order for DNA test held good for about a decade until in *Narayan Dutt Tiwari* v. *Rohit Shekhar*[33] (N.D. Tiwari's case) the Supreme Court refused to be satisfied with just drawing of adverse inference from refusal to comply with the direction for medical examination or DNA test. The Court clarified that a legal fiction under Section-114 of the Evidence Act, was not a reality but merely required the Court to accept it as reality, which however the Court was not obliged to follow. Accordingly, the Supreme Court even permitted using reasonable force upon the parties to make them comply with the order of providing DNA sample for testing. Thus through *N.D. Tiwari's* judgment, the element of compulsion has been introduced in matrimonial disputes.

D. Engaging science to discover truth

Long ago in the year 1968 Lord Denning M.R.[34] opined that "[t]he object of the court always is to find out the truth. When scientific advances give fresh means of ascertaining it, there should not be any hesitations to use those means whenever the occasion requires." Falling in the same line in the year 1977 the erudite Krishna Iyer J. in *Jasraj Inder Singh* v. *Hemraj Multanchand*,[35] had also observed that " ...Truth, like song, is whole, and half-truth can be noise! Justice is truth, is beauty and the strategy of healing injustice is discovery of the whole truth and harmonising human relations. Law's finest hour is not in meditating on abstractions but in being the delivery agent of full fairness." Recognizing the value of truth in matrimonial cases the

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[32] (2010) 8 SCC 633.
[33] (2012) 12 SCC 554 : (2012) 4 SCC (Cri) 148.
[34] *B.(B.R.)* v. *B.(J.)*, (1968) 3 WLR 566 : (1968) 2 All ER 1023.
[35] (1977) 2 SCC 155.

Supreme Court in *Sumitra Devi* v. *Bhikan Choudhary*[36] had recommended that in a case involving maintenance of a neglected wife or a minor child, the court must take genuine interest in arriving at the truth. Later in *Union Carbide Corpn.* v. *Union of India*,[37] the Supreme Court had even equated 'justice' with 'truth'. Sharda's decision too has endorsed that the primary duty of a Court was to ensure that truth was arrived at.

It may be noted here that unlike the fictional legal presumption under Section-112 of the Evidence Act, result of DNA test presents before the Court scientifically endorsed fact which contributes the adjudication process with necessary objectivity and assists the judge to scrutinize the assertions by the parties with required precision. Based on such premise the Supreme Court in *Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik*,[38] preferred 'knowing a fact' over 'raising presumption'. The Court opined that*"[w]hile the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue."* It may be also noted here that in this case also the Supreme Court though has distinguished the ratio of *Kamti Devi* v. *Poshi Ram,* yet it did not consider the decision of *Sharda* v. *Dharmpal.*

E. Receding presumption

The ultimate observation of the Supreme Court in Nandlal's case was that "when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former." The 'search for the truth' principle was reaffirmed in *Dipanwita Roy* v. *Ronobroto Roy*[39] when the Hon'ble Supreme Court had an occasion to preside over a divorce proceeding brought about by the husband/respondent adultery against his wife/appellant on the ground of adultery. He therefore had denied the paternity of his child and in order to prove adultery of his wife had asked for DNA test of the child and himself. The learned counsel for the appellant-wife on the other hand relied on the determination of the Privy Council in *Karapaya Servai* v. *Mayandi*,[40] case which had laid down- "the word 'access' used in Section 112 of the Evidence Act, connoted only the existence of an opportunity for marital intercourse, and in case such an opportunity was shown to have existed during the subsistence of a valid marriage, the provision by a fiction of law, accepted the

[36] (1985) 1 SCC 637 : AIR 1985 SC 765.
[37] (1989) 3 SCC 38.
[38] (2014) 2 SCC 576.
[39] (2015) 1 SCC 365.
[40] 1933 SCC OnLine PC 85 : AIR 1934 PC 49.

same as conclusive proof of the fact that the child born during the subsistence of the valid marriage, was a legitimate child. Such ratio was approved by the Supreme Court in *Chilukuri Venkateswarlu* v. *Chilukuri Venkatanarayana*.[41] Reliance was also made on Goutam Kundu's case and on *Sham Lal* v. *Sanjeev Kumar*.[42] The Supreme Court has elaborately considered and discussed all the relevant issues. While mitigating the apparent conflict between two decisions namely, 'Goutam Kundu v. State of West Bengal' and 'Sharda v. Dharmpal that had created much confusion over the period of two decades, the Hon'ble Court held that "There is no conflict in the two decisions of this Court," since in both the cases the Court has depreciated issuing direction to undergo blood test (or DNA test) as a matter of roving enquiry and suggested that such power should be exercised only"if the applicant has a strong prime facie case and there is sufficient material before the court." The factual matrixof the case reflects that the respondent-husband had not only made clear and categorical assertions in the petition of divorce alleging infidelity but also had gone to the extent of naming the person, who was the father of the male child born to the appellant-wife. Under such circumstances the Court held that DNA testing would be the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. Without the DNA test, it would be impossible for the respondent-husband to establish and confirm the assertions made in the pleadings. The Court also considered that conversely this should also be taken as the most authentic, rightful and correct means for the wife to rebut the assertions made by the respondent-husband, and to establish that she had not been unfaithful, adulterous or disloyal. It is humbly submitted that it seems that in Dipanwita's case the Hon'ble Supreme Court has assumed that the legal fiction of paternity as enumerated in Section-112 of the Indian Evidence Act has been depriving the father a meaningful opportunity to be heard or to rebut the presumption with scientific evidence having much probative value than just a testimonial recollection of last opportunity of 'access'. It may be noted here that the Hon'ble Supreme Court in the end of the judgment has clarified that "By adopting the above course, the issue of infidelity alone would be determined, without expressly disturbing the presumption contemplated under Section 112 of the Indian Evidence Act." It is however respectfully submitted that such a caveat may ultimately become an otiose, since "... undoubtedly the issue of legitimacy would also be incidentally involved", and in the event DNA test fails to provide a match between the child and the father, the child would have to face the risk of being declared as illegitimate.

Recently the Hon'ble Kerala High Court[43] has also strode in the same direction while deliberating on the efficacy of DNA test to prove the adultery of wife in a divorce proceeding has observed that the responsibility of proving

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[41] AIR 1954 SC 176 : (1954) SCR 424.

[42] (2009) 12 SCC 454.

[43] *XXX* v. *XXX*, 2021 SCC OnLine Ker 3458, available at <https://www.livelaw.in/pdf_upload/x-v-x-400592.pdf>. Last visited (Sep. 20, 2021).

the fact is solely with the petitioner. *"DNA test result of the child, no doubt, would be the best piece of evidence to substantiate the said allegation... The Court shall not preclude a party from adducing evidence which may be relevant in accordance with the Evidence Act to prove his case."* The Court further held that *"The illegitimacy or paternity of the child is only incidental to the claim for dissolution of marriage on the ground of adultery or infidelity"* and therefore it is not necessary to array the child as a party to the proceeding. The Court opined, that by this way, if any findings are made as to the child's paternity or legitimacy during a divorce case between the husband and wife, the findings will not affect the child who is not a party to the proceedings and *"[t]he child if it wishes to establish its paternity and its legitimacy may do so by appropriate legal proceedings on attaining majority."* It is respectfully submitted here that the decision seems to have undermined the plight of an illegitimate child prior to attaining majority.

Moreover, it may be noted here that refusal to submit to DNA test has not only lead the Indian Courts to draw inference against the husband, but more recently the Hon'ble Delhi High Court in a proceeding under the 'Protection of Women from Domestic Violence Act, 2005', has upheld the order of the subordinate court, whereby prayer of the wife for maintenance was denied on the ground of her refusal to undergo DNA test to determine the paternity of the child for whom maintenance was sought.[44] In addition to that the Madras High Court has also accepted the establishment of maternity through DNA test.[45]

V. LOOMING DANGER

Legal affair is not a matter of mathematical precision and it involves active engagement of human cognitive faculty evolving numerous factors that are purely subjective and discretionary in nature and hence beyond the realm of objective numerical science. Dias has described that the role of a judge as to determine whether the actual behaviour of one or both of the disputing parties complied with the relevant rule of law. In doing so he has to rely on three types of knowledge, viz. i) knowing the actual fact, ii) knowing the applicable law, and iii) knowing how to give the right decision. He has stated that while the first two aspects are objective, the third is mostly subjective in nature.[46] Therefore arriving at the factual truth should not be treated as the end of the adjudication process. Based on such reasoning whether putting excessive importance on finding the objective truth may ultimately frustrate the concept of justice is a jurisprudential issue that needs to be addressed immediately. Complete erosion of the legal presumption of legitimacy in the hands of

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[44] *Binda Devi* v. *Dabbu Yadav*, CRL.M.C 5620/2014, Delhi High Court, (decided on Jan. 29, 2015), available at http://164.100.69.66/jupload/dhc/SUG/judgement/03-02-2015/SUG29012015CRLMM56202014.pdf (last visited 12/10/2021).

[45] *Minor Siva Kumar v Chandrasekaran*, 2014 SCC OnLine Mad 9588 : (2015) 1 Mad LJ 493.

[46] R.W.M. Dias, Autopoiesis and the Judicial Process, 11 Rechtstheorie 257, 258 (1980).

science would eventually result in indiscriminate use of technology disregarding the risk of casting upon the innocent children the social stigma of illegitimacy and thereby promoting their social insecurity.

The hazard as pointed above is no more a fiction in as much as earlier the Supreme Court in *Renubala Moharana* v. *Mina Mohanty,*[47] while delivering its opinion in respect the power of the Family Courts in granting relief in terms of DNA testing to declare a child illegitimate, had observed that although *"in order to determine the question of guardianship or custody of the minor, if it becomes collaterally necessary to consider the question of status of the minor or the parties to the proceedings..."*, the Family Court may consider the same and give its finding, but *"a declaratory relief as regards the illegitimacy of the child cannot be granted."*But in the backdrop of recent liberal application of DNA testing in matrimonial cases, such view in protecting the interest of innocent child has also experienced a sea change. In a much recent judgment of *Ramnarayan Raje* v. *Vikram Singh*[48] in which the petitioner had filed a civil suit against the respondent seeking declaration that respondent was not the son of the petitioner/plaintiff, the Chattisgarh High Court relying upon decisions rendered by the Supreme Court in *Nandlal's* case and *Dipanwita's* case has directed the Family Court to carry out DNA test to determine the paternity of the respondent. The High Court has also relied upon the observations made in *N.D. Tiwari's* case in which it was held that *"question of paternity cannot be left uncertain, and a DNA test should be permitted based on the facts and circumstances."*

Another sign of public desire for this technology is the proliferation of *Direct to Consumer (DTC)* genetic testing on the web and in neighbourhood drugstores. This should be noted, however, that DTC tests results cannot be relied in the Court of law because there is no way to establish the authenticity in maintaining the chain custody of the biological samples. Because of this, DTC testing is typically utilised to aid in the decision to file a lawsuit or to provide the additional assurance that a parent is the biological parent.[49] Dorothy Nelkin has pointed out a more grimmer side of the subject matter as she argued that the sudden rise of insatiable craving for parental certainty at genetic level is not natural, rather it is artificially generated as now a days *"...public is deluged with the corporate messages and media stories suggesting that there is a burning need to know the biological truth about*

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[47] (2004) 4 SCC 215.

[48] 2021 SCC OnLine Chh 2239.

[49] Jill Adam, "Paternity Testing: Blood Types and DNA", 1(1) Nat. Educ. (2008), <https://www.nature.com/scitable/topicpage/paternity-testing-blood-types-and-dna-374> (last visited Jul 30, 2020). *Also See* J. Scott Roberts and Jenny Ostergren, "Direct-to-Consumer Genetic Testing and Personal Genomics Services: A Review of Recent Empirical Studies", 1 Curr. Genet. Med. Rep. 200 (2013), </pmc/articles/PMC3777821/> (last visited July 10, 2020).

identity."[50] According to Vinopal, this is because, Firstly, it involves monetary interests like the negotiation of maintenance and verification of inheritance claims; Secondly, there has been an increase in adoption narratives, which present the quest for genetic roots as a search for emotional wholeness and self-identity; Thirdly, celebrity obsession plays a significant role here, as people find it extremely entertaining to learn about the private lives of their idols; and Fourthly, the uncanny psychological rewards of exacting revenge on an ex-lover appear to be irresistible to most of the people who had bitter experience in their relationships.[51] Reflecting on the idea that truth can be "an atom bomb" in a family, Dorothy Nelkin has raised serious concern about whether the revelation of paternity testing may ultimately open a Pandora's Box, because the possibility of the biological truth causing more damage than the deception cannot be ruled out.[52]

VI. INDIVIDUAL DIGNITY

There is another important aspect that requires attention. Individual dignity which has a sanctified realm in a civilized society[53] includes the right to develop to the fullest extent of one's potential. After the decision of *K.S. Puttaswamy* v. *Union of India,*[54] it is now trite that *"[b]oth dignity and privacy are intimately intertwined and are natural conditions for the birth and death of individuals, and for many significant events in life between these events".* Concept of legitimacy may well find its support in the right to basic human dignity which is a globally cherished human right and sanctified under various international charters. Imputation of illegitimacy that acts as a social stigma is an insurmountable stumble for a child in his way of achieving his fullest potential and attracts discrimination on various issues and therefore may demand adequate constitutional protection.

The far reaching impact of the *Puttaswamy's* judgment has resulted in a revival of the presumption of legitimacy, which reflects in the decision of *Ashok Kumar* v. *Raj Gupta.* In that case, the Hon'ble Supreme Court while upholding the sanctity of the presumption of legitimacy has rejected the defendant's prayer for subjecting the plaintiff (who was an adult male) to undergo DNA paternity test to prove his illegitimacy. The Apex Court while relying on the principle of proportionality as narrated in the *Puttaswamy's* case

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[50] Dorothy Nelkin, "Paternity Palaver in the Media: Selling Indetity Test", in *Genetic Ties and The Family : The Impact of Paternity Testing on Parents and Children* 3–17 (Mark A. Rothsten et al., eds., 2005).

[51] Lauren Vinopal, "Infidelity Revenge: Why You Want To Get Back At Your Cheating Wife", Fatherly (Jan. 31, 2019 at 2:18 p.m.), <https://www.fatherly.com/health-science/cheating-wife-infidelity-revenge/> (last visited Mar 4, 2020).

[52] Nelkin, *supra* note 51.(Quoting from *DNA should determine support*,St. Louis Post-Dispatch May. 20, 2000)

[53] *Joseph Shine* v. *Union of India*, (2019) 3 SCC 39.

[54] (2018) 4 SCC 651.

Court has painstakingly analysed the predicaments of DNA paternity testing and, in appreciation of the individual dignity and right to privacy, has further cautioned that *"[t]he Court's decision should be rendered only after balancing the interests of the parties, i.e. the quest for truth, and the social and cultural implications involved therein. The possibility of stigmatising a person as a bastard, the ignominy that attaches to an adult who, in the mature years of his life is shown to be not the biological son of his parents may not only be a heavy cross to bear but would also intrude upon his right of privacy.*[55]"

VII. CONCLUSION AND SUGGESTIONS

According to Dias, no society is static and adapting to change is an important achievement of justice whereas resisting the change is a form of abuse of power.[56] Earlier the faith of the Court on the presumption of legitimacy was so strong, that it has even disregarded the efficiency of scientific proof in dislodging the presumption. But the modern society along with its contemporary judicial wisdom has become more techno-compatible. In earlier days lack of opportunity to have sexual intercourse used to be determined by the distance between the couple or other incapacities like imprisonment. But in this 21st century, when it takes only few hours to travel beyond 'four seas'[57] and when it has been judicially settled that right to procreation being a fundamental right survives incarceration and therefore even the convicts or jail inmates have right to conjugal visits, the presumption that relies on the antiquated principle of absence of 'opportunity to have sex' is hardly justified anymore. In this context the arguments that when science can prove or disprove the factum of sexual intercourse with sufficient conviction, the solitary rebuttal of Section-112 of the Indian Evidence Act, 1872, through 'non-access' is not only insufficient but violates the right to fair trial guaranteed under Art-21 of the Constitution of India as it impedes a person from relying on the *best evidence* available to prove his cause of action, seems to be very appealing.

The recent judicial trend over DNA paternity test also appears to be endorsing such argument. But unfortunately such the trend also suggests that by allowing the DNA test the Courts are predominantly interested in finding the erring component within a matrimonial relationship, even at the cost of exposing the child to the risk of bastardization. The paramount consideration of protecting the best interest of a child has thus taken a back seat as the Court became engrossed in adjudicating the competing interests of adults. The incessant desire to find the truth about fidelity in the conjugal relationship sparked

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[55] *Ashok Kumar* v. *Raj Gupta*, (2022) 1 SCC 20, 28.

[56] R.W.M. Dias, *Dias Jurisprudence* 305 (5th edn. 1994).

[57] It was the famous quote by Sir Edward Coke that*"if the Husband be within the four Seas, that is, within the Jurisdiction of the King of England, if the Wife hath issue no proof is to be admitted to prove the child a Bastard," See* Bradin Cormack, *A Power to do Justice : Jurisdiction, English Literature, and the Rise of Common Law* (2008).

by Dipanwita's judgement has even prompted the subsequent decisions to cold-shoulder the question of the legitimacy of a child as a collateral damage. Instead of shielding an innocent child from the social stigma of bastardization, often the Indian judiciary has been surprisingly casual to appreciate the issue of legitimacy of a child as *'incidental'*.

There is a well-known Latin adage "Quando aliquid prohibetur ex directo, prohibetur et per obliquum," which suggests that 'what cannot be done directly cannot be permitted to be done indirectly'. Although the Hon'ble Supreme Court has relied on that principle in a number of landmark decisions, yet the practice of performing DNA tests as a matter of 'roving enquiry,' which was expressly depreciated by the Hon'ble Supreme Court in the *Goutam Kundu's* case, appears to have entered the adjudication process through the back door after *Dipanwita's* judgment. The DNA paternity test, which was not permitted to directly challenge legitimacy of a child, was allowed to prove adultery, which indirectly decided the question of the child's legitimacy.

Indiscriminate application of DNA paternity test in the civil cases arising out of vague suspicion[58] and matrimonial discord, without making a thorough impact assessment of the situation may impute the innocent child with stigma of bastardy ultimately making their life miserable and unbearable.

It is pertinent to consider that unlike some economically developed countries, India does not have apposite legislative protection for the children with disputed paternity. Additionally the personal laws in India are also not homogeneous and as a result concept of legitimacy has multiple facets. Under such disadvantageous circumstances before denying the children their well established protection of legal presumption, it may be imperative for the Indian legislature to devise a customized socio-legal fortification for those innocent souls. In order to achieve such goal, there must be a comprehensive national policy in respect of children with disputed paternity expressly reflecting the country's commitment - i) to increase general awareness for improving their social acceptance in order to integrate them to the main stream of society, ii) to provide them with uniform protection against all discrimination and stigmatization irrespective of their religion, caste and creed, iii) to provide them fullest possible social-cultural and economical support in developing their physical and spiritual well being and in realizing their individual dignity as an important component of the society. Finally, the legislature must also devise a customized legislative framework delineating the scope and permissibility of DNA test in adjudicating paternity disputes.

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[58] Rupsa Chakraborty, "114 Paternity Tests in 5 yrs; Suspicion Proved Wrong in 100 Cases", Mumbai news - Hindustan Times (2019), <https://www.hindustantimes.com/mumbai-news/114-paternity-tests-in-5-yrs-suspicion-proved-wrong-in-100-cases/story-aqcUbZVXb2jLPMo7L-3hHRO.html> (last visited Aug. 2, 2021).

Moreover, law abhors stigmatization and cannot act against public morality. Hence unless it can devise an otherwise suitable method of upholding or protecting the rights of the innocent child it cannot debar the infant from having its protection, lest it would amount to a judicial victimization. Accordingly, the author humbly suggests that until the change in national policy is brought into action, in adjudication proceedings where paternity of a child is a primary or secondary issue -

i. The Court must consider the issue of legitimacy of child with utmost importance, even if such issue is only incidentally involved;

ii. DNA test for deciding paternity of a child must not be ordered as a matter of course;

iii. The Court should consider the factual matrix of each and every case carefully, whenever the DNA paternity test is prayed for;

iv. Prior ordering for DNA test, especially where fidelity and loyalty of a spouse is in question, the Court must employ the test of `eminent need' i.e. whether it is not possible for the Court to reach the truth without taking recourse to such test;

v. The Court before permitting DNA test must conduct a thorough assessment of the possible impact of the test result over all the stakeholders, i.e. the child, the mother, the father and in absence of the parents, the family to which the child belongs;

The necessity of law to manage the impact of science and technology on society cannot be overstated. One of the purposes of law is to prevent the negative consequences of science and technology by assessing its implementation risks, benefit and ethical permissibility. In modern era the rapid advancement of science and technology has been one of the main catalysts in altering the normative framework of various social institutions including marriage and thereby leaving the innocent children potentially exposed to various disadvantageous situations. Similarly, DNA paternity test technology once being invented did not contain itself within the four corners of scientific laboratory, rather transgressing the boundary of scientific arena it has entered into the life of general people and has immensely influenced the society and its traditional values regarding marriage and legitimacy of children. The impact is so profound that it has even compelled the legal system, which is otherwise known to be conventional and conformist, to alter its position to give preference to biological lineage over legitimacy in deciding the cases of disputed paternity. But as it has been discussed above, such rapid modification in judicial attitude without a proper analogous social backup scheme may not be beneficial for the Indian children. Hence in order to cope up with the situation and to protect the interest of the numerous vulnerable children, suitable corresponding changes in the legal scheme is urgently required in India.