

An Examination Of The Use Of Dna Technology In Paternity Disputes

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Abstract

The 21st Century has brought about new advancements in science and technology, especially in DNA Technology. These advancements have found their way into paternity disputes in the form of DNA tests for determining paternity. However, while the science might be precise in its objective, the law regarding the validity and utility of DNA testing is not. DNA tests are not new and are more widely used due to their accuracy and ease of availability. But, the stance of Indian courts on its use and the excessive use of Sec.112 of the Indian Evidence Act has proved to be insufficient in addressing the issue as DNA tests continue to gain momentum. The Indian legal system must cope with the influx of scientific and technological advancements to prevent the misuse of DNA tests.

KEYWORDS

Paternity, DNA Testing, Paternity Law, DNA Technology, Evidence, the Right to Privacy

1. DETERMINATION OF PATERNITY AND RELATED DISPUTES IN INDIA

What does 'Paternity' mean?

The term 'paternal' originates from a French word, with the exact spelling and literally means "of a father." For example, the paternal aunt would mean the father's sister or sister-in-law. The term 'paternity' which we are studying is derived from this very word, and its literal definition is "the fact or state of being a father"¹. The legal definition, although almost the same as the literal definition, also includes the "origin or descent from a father"². The term 'paternity law' is of even more significance here, meaning "a body of law underlying the legal relationship between a father and his biological or adopted children and deals with the rights and obligations of both the father and the child to each other as well as to others"³. It is the application and use of this paternity law that will be further analyzed in this research.

Origins of Paternity Law

It is essential to understand the origins of paternity law, mainly because it originated in England and found its way to its colonies, of which India was one. The English Parliament was the first to recognize such paternity law when they passed the law that empowered the State to collect money from fathers whose biological children were being raised on public money. Several decades later, unwed mothers got the right to sue the biological fathers of their children for financial support.⁴

The Indian Evidence Act, which was inherited from our British colonizers and the Code of Criminal Procedure, together form the basis of any law that governs paternity in India. While

the details of these two legislations will be dealt with later on, it is essential to know that these two legislations form the beginning and the end of any law that concerns paternity disputes in India. Although with the advent of DNA technology, which has been viewed as a reliable method of determining paternity in legal suits, the law has not evolved in the same way.

One of the most infamous cases of a paternity dispute was the N.D Tiwari case⁵. In 2007, a paternity suit was filed in the Delhi High Court by Rohit Shekar, and in 2008, a new lawsuit was filed owing to technical issues. The petitioner claimed that he was the son of N.D Tiwari, a veteran politician from the Congress Party. In 2009, a single judge bench dismissed the suit owing to technical issues; however, in 2010, a division bench overruled the previous dismissal and allowed the case to proceed. Following this, a series of appeals and pleas were filed by N.D Tiwari concerning the DNA test that the Court ordered. In 2012, he finally gave in and accepted that he was indeed the biological father of the petitioner. This was even before the results of the DNA test could be analyzed by the Court. While this case is relatively recent, paternity disputes are not new in the Indian legal system. To understand why they occur at such a frequency, and it is crucial to understand the importance of paternity, both legally and socially.

Significance of Paternity

The absence or presence of a father has wide-ranging social and legal implications. The social significance of paternity has shaped its legal relevance. As most of the laws today still favor only the traditional families, which are confined to two parents, the mother and the father, paternity still finds an important place in legal disputes.⁶ This applies to biological and social paternity, the latter which is often considered a substitution to the former. Social paternity is a "situation in which a man other than the biological father brings up the child"⁷ The legal maxim "*Pater est quem nuptiae demonstrant*" literally means "the father is he whom the nuptials indicate" reflects social paternity. Although most legal disputes arise due to the determination of biological paternity, in the presence of both types of paternity in a case, social paternity is given the preference.⁸

The source of paternity law in India stems from the evolution of the nuclear family as the accepted form of a family. This is purely a product of industrialization and is predominantly based on the European worldview. However, this view has established itself in India, and most paternity disputes arise due to this. This view of fatherhood has cultural significance, and paternity makes its way into various religious rituals too. Although the system that viewed the father as the head of the family and the sole breadwinner is beginning to become irrelevant in cosmopolitan societies, the father's role cannot be discredited. Along with various social obligations, various legal obligations also shape the father's part in a child's life. Perhaps, they are more important than the cultural and social implications.⁹

In a patriarchal society like ours, where men and women still have to adhere to certain stereotypes, the father's prominent role is in providing child support. This would include food, water, housing, education, healthcare, and the mother is expected to meet the child's emotional needs. This is the idea that is recognized in our legal system. One cannot dismiss the fact that most families in India still work on this principle. This is of even more importance to the government because it is the State that will have to meet these legal obligations in the absence of a father. Apart from these, fathers or male guardians are often preferred while filling out the necessary paperwork for the child. But, determining paternity has been proved to be the most important in property disputes, which comprise a large portion of the civil suits.¹⁰

Current Laws About Paternity and DNA Technology

At present, in 2020, there is no specific legislation that deals with paternity disputes and specifically the use as well as the misuse of DNA technology in paternity disputes. Section 112 of the Indian Evidence Act¹¹ comes the closest to a law that governs the determination of paternity and legitimacy. The Section deals with the conclusive proof that is required to prove the legitimacy of the child. According to the Section, if the child is born during the time period of a valid marriage or is born within 280 days from the dissolution of the wedding, then the child would be said to be legitimate unless conclusive proof is provided to prove that there was no relationship between husband and wife during the said period.¹² The underlying legal reasoning for this section lies in the Latin maxim "*pater est quem nuptiae demonstrat*" which means "he is the father whom the marriage indicates." In ***Bhima v. Dhulappa***¹³, the court held that "This Section is based on the principle that when a particular relationship such as marriage is shown to exist, then its continuance must prima facie be presumed."

It is vital to know here that the law tries to determine the exact date of the birth of the child, something which even science can't put an accurate estimate on. 280 days is not based on scientific knowledge but is based on the law's presumption of science. As the Section presumes marriage as the determinant of paternity, the scope of DNA technology remains limited.¹⁴ Considering that the law was drafted almost 140 years ago when science did not provide any conclusive method to determine paternity, the law did not even consider the possibility of DNA technology.

This law is also largely based on what is considered to be public morality. In ***Sham Lal v. Sanjeev Kumar***¹⁵, the court held that "In a civilized society it is imperative to presume the legitimacy of a child born during the continuation of a valid marriage and whose parents have access to each other. The mentioned Section is based on the presumption of public morality and public policy".

In the case of ***Kanti Devi v. Poshi Ram***¹⁶, the Apex Court recognized that the law was drafted at a time when DNA technology or science, in general, was not advanced enough to determine paternity conclusively. However, the Court also gave the upper hand to marriage as the determinant of the legitimacy of a father-child relationship rather than the result of a DNA test. This, according to the court, was done "in favor of the innocent child being bastardized." Hence, irrespective of the DNA test results, paternity will be determined by the existence or non-existence of a valid marriage. In ***Shradha v. Dharmal***¹⁷, the Court held that an order directing a party to undergo a medical test concerning paternity issues is not violative of fundamental rights. If the respondent refuses to experience such a test, then "the Court will be entitled to draw an adverse inference against him."

The Section also states that if the parties can non-access between husband and wife, only then can the child's legitimacy be disproved. In ***Gautam Kundu v. State of West Bengal***¹⁸, the court held that non-access must be proved by a "strong preponderance of evidence and not by a mere balance of probabilities."

Paternity Disputes in India

Although there isn't an exact number as to the frequency of paternity disputes that occur in India, it cannot be ignored. The advent of DNA technology has only fuelled this number, with courts having to deal with the advancements in science that make it easier to determine paternity. This is even more significant because the law hardly places any importance on DNA technology, even though DNA tests are gaining momentum.¹⁹

2. THE ROLE OF DNA TECHNOLOGY IN PATERNITY DISPUTES

The determination of paternity disputes has been provided only in Section 112 of the Indian Evidence Act²⁰, and even this section is outdated. With the advent of science and technology, DNA testing has made its way into paternity matters. Although the benefits that it brings cannot be disputed, it has also allowed for its misuse. New science and technology bring with them new problems and issues such as privacy when it comes to using DNA technology are pertinent for the Indian legal system to solve. However, before we discuss the regulation of DNA technology and paternity disputes, it is essential to understand how exactly it has come to be used in 21st Century paternity disputes.

Collection of DNA Evidence

For the DNA evidence to be admissible in the Court, the particular scientific procedure must be followed. Each individual has unique DNA, which they inherit from their biological parents. Only identical twins are known to have the same DNA, but this scientific anomaly is of no importance in paternity disputes. Firstly, the Court will direct the collection of blood samples from both parties. Blood group studies cannot establish who the father is but can eliminate a specific candidate as the father. This is primarily based on the science that the child inherits his/her blood type from the parents. For example, if the child's blood type is different from both the alleged father and the mother, then there is no possibility that the man is the child's father.²¹ With the passage of time, this blood grouping system for the determination of paternity became more practical and conclusive. However, DNA Profiling is considered too much more effective than blood grouping because it can positively determine the paternity rather than just excluding a candidate. The process for this is also the same, where samples from both parties are collected, and DNA is extracted from these samples. Here the sample is not necessarily the blood of the parties.

Once the court has ordered the collection of DNA samples of the parties, it is usually a third party that is made responsible for its collection. The third-party could either be the investigating officer or a forensic expert.²²

Role of the Investigating Officer in the Collection of DNA Evidence

In most cases, whether criminal or civil, the court would direct the investigating officer to facilitate the process of collecting samples from the parties. A forensic expert could also do it, but the court would require the investigating officer to do so in most cases. A recurring problem is the tampering of DNA evidence. This could be done either during the collection or transportation of the DNA sample or even in the scientific laboratory.²³ While they are most common in criminal investigations, where DNA samples are usually collected from the crime scene, such mistakes could happen in civil disputes. Tampering of evidence must be a significant concern for legal systems, especially the Indian legal system. While the Indian Penal Code deals with the tampering of evidence during the investigation and makes it punishable²⁴, a law that would specify the collection and handling of the DNA sample is yet to be formulated for paternity disputes. The false identification could have lasting effects on both parties.

Case Laws

There have been various cases that have been brought in front of the judiciary to deal with the newfound challenges that DNA technology poses in paternity matters. While some case laws have led to relatively reformist judgments, some case laws have decided to stick to laws given in the book. In *Goutam Kundas case*²⁵ as well as in *Kanti Devi v. Posshiram*²⁶, the court did not resort to a DNA test to determine paternity because of the stigma it would create

for the child upon obtaining the results. In fact, in the latter case, the court held that the burden of proof must lie between "preponderance of possibilities" and "beyond a reasonable doubt"²⁷ However, in *Goutum Kundu v. State of West Bengal*²⁸, the court ruled that the evidence under Section 112 of the Indian Evidence Act must be based on a "strong preponderance of evidence" and must not be based on probabilities.

In *Bommi v. Anr. v. Munirathnam*²⁹, the court touched upon the rights of a minor child in the procedure of determining paternity. The court held that ordering a minor to undergo a DNA test to determine the paternity is not violative of the child's rights and is, in fact, being done for the benefit of the child *in the present and future*.

In *Abdul Salam v. Chalil Sajida and Anr.*,³⁰ the court ruled that there would be no use in conducting the DNA test until the respondent can prove non-access under Section 112 of the Indian Evidence Act. In *Chanderdevi v. State of Tamil Nadu by Inspector of Police, C.B. CID*³¹, the court held that to affirm paternity, the court does not require a DNA data bank.

Even though in the cases of *Kanti Devi v. Poshi Ram*³² and *Shradha v. Dharmal*³³, the courts have held that they can determine paternity through a DNA test, it wouldn't be wrong to conclude that most cases have not favored the use of DNA technology. However, in the light of the two previously mentioned cases, DNA tests are being used more often and are also altering the courts' stance on DNA technology. But there have also been some critical questions raised concerning their legality and their constitutional validity.

3. FUNDAMENTAL RIGHTS AND THE MISUSE OF DNA TECHNOLOGY

Changes in science and technology affect every sphere of civic life. The legal system's role is to effectively embrace the desirable changes while simultaneously adapting to the undesirable ones. The current law that governs paternity disputes³⁴ is not in concurrence with the needs of the 21st Century and does not consider the strides that DNA technology has made in the field. However, specific valid concerns regarding the misuse of DNA technology have been raised, especially with its implications on the Constitutionally guaranteed fundamental rights. It is the fundamental right of the right to privacy that is primarily being discussed in the paper.³⁵

The Right to Privacy

Article 21 of the Indian Constitution guarantees every citizen "the right to life and personal liberty".³⁶ Encompassed within this right, through various judicial pronouncements, is the right to privacy, a dynamic and evolving concept in the Indian legal system.³⁷ The right to privacy is "the right of a person to be free from intrusion into or publicity concerning matters of a personal nature"³⁸. The landmark case of *K.S. Puttaswamy v. Union of India*³⁹ recognized the "right to privacy" as an intrinsic part of Article 21 and made space for it in the Indian legal system. It is to be noted here that while this right had been internationally recognized for many years and was also of deep concern for legal systems worldwide, it was recognized as an enforceable right only in 2017 through the *Puttaswamy judgment*⁴⁰.

In *Kharak Singh v. State of Uttar Pradesh*⁴¹, many years before the *Puttaswamy judgment*, the court addressed the right to privacy; however, a six-judge bench of the apex court did not recognize the right as a fundamental right. Justice Subba Rao, who dissented, said that "the right to privacy is a fundamental part of the right to personal liberty although it was not declared as a fundamental right under the Constitution." Eleven years later, in *Gobind v. State of Madhya Pradesh*⁴², a three-judge bench of the Supreme Court recognized the right to privacy as an essential part of Article 21. Even though the party contending the right to privacy was lost, it was the first time that privacy was considered a necessary part of personal

liberty.

The *Puttaswamy judgment*⁴³ is the most relevant in our discussion of the right to privacy. The petitioner was a 91-year old retired Karnataka High Court judge, and he challenged the Aadhar scheme of the government. Aadhar is a “12-digit unique identity number that can be obtained voluntarily by residents or passport holders of India, based on their biometric and demographic data”⁴⁴. The Aadhar Scheme of the government made it necessary to have an Aadhar card to avail certain benefits from the government. The petitioner contended that the right to privacy is a basic fundamental right, and that the court must recognize this right as a part of the right to personal liberty under Article 21. On the other hand, the respondents contended it was only the right to privacy that was Constitutionally guaranteed. The right to privacy was a part of it only to a certain extent. A Constitution bench was set up by the Supreme Court to decide on the matter. The bench overruled the judgment of *Kharak Singh v. State of Uttar Pradesh*⁴⁵ to the extent that the judgment did not include the right to privacy as a fundamental right. The bench ruled that the right to privacy is a Constitutionally guaranteed fundamental right and is an intrinsic part of the right to life and personal liberty.⁴⁶

DNA Testing and the Right to Privacy

The *Puttaswamy judgment*⁴⁷ deals with people submitting their biometric data in the form of Aadhar to avail certain government benefits. As the apex court rightly held, this is in direct violation of the right to privacy. Biometry or biometrics is “the measurement and analysis of unique physical or behavioral characteristics (such as fingerprint or voice patterns) especially as a means of verifying personal identity”⁴⁸. Similarly, DNA tests are “a test in which someone's DNA is analyzed, for example to see if they have committed a particular crime or are the parent of a particular child”⁴⁹. Both are the collection of private data, while the means of collection may be different. Biometrics, as well as DNA tests, are used to identify individuals.

It is clear that for a DNA test to be conducted, a blood or DNA sample must be obtained from the person who is to be tested. However, the question arises whether the court can compel a person to undergo a DNA test against his will and whether this compulsion would violate his fundamental rights. In *Shradha v. Dharmal*⁵⁰, the court ruled that a court order compelling a person to undergo a DNA test is not violative of fundamental rights, and if he refuses to do so, then the court would conclude otherwise. Hence in the absence of legislation, it is clear that in the case of DNA testing in paternity matters, the court can force a person to undergo a DNA test. On the other hand, in *Gautam Kundu v. Bengal*⁵¹, the division bench of the Supreme Court held that no court in India could order a blood test as a part of standard procedure, and no one can be forced to give their blood samples for analysis. In this case, the court heavily depended on Section 112 of the Indian Evidence Act. Hence, at different points in time, courts have expressed differing opinions on the use of DNA technology in paternity disputes.

The core of the debate between DNA testing and the right to privacy is the right to access personal information about oneself.⁵² The right to privacy also includes anonymity and restrictions on physical access to personal data. This right is also recognized by international human rights law and has also found a place in many human rights instruments like the UDHR.⁵³ However, to what extent does DNA technology conform with these rights, and whether DNA tests are an exception to the right to privacy is an important question to ask. As no legislation in India deals with such problems, most of our understanding is derived from the interpretation of international law. Article 17 of the International Covenant for Civil and Political Rights (ICCPR) provides that no one should be subjected to unlawful interference to privacy. Everyone must be protected by law from such a violation of privacy.⁵⁴ However, Article 21 of the same covenant states that such a right can only be limited if it is necessary to

maintain public order or public morals or if it is required to protect the rights of others.⁵⁵ Hence, it can be said that the right to privacy is not absolute in nature in the context of Indian laws and international human rights.

The right to privacy is often balanced with the interests of society, in which even the person is a stakeholder. The determination of paternity, as mentioned before, has various implications for the father as well as the child. It determines child care, property distribution and also has social consequences for the child. In such cases, DNA testing is in the interest of not just the child but also society. However, the accuracy of DNA tests and private testing has led to the misuse of paternity tests. Due to the occurrence of high-profile cases like that of N.D. Tiwari, DNA technology's role in the determination of paternity has gained momentum. With the inception of private labs, the ease of acquiring paternity tests at a low price has also increased. DNA testing centers that conduct these tests state that most of their customers are doubting husbands and fathers who seek to end their marriage. These tests are also being used to evade the responsibility of providing alimony and child support by seeking divorce on the grounds of adultery. This is in direct contrast to the courts who seldom resort to DNA tests to establish paternity.⁵⁶

The Right Against Self-Incrimination

This right has little to no significance in our discussion of DNA tests and determination of paternity; however, it has wide-ranging consequences in criminal law. The Indian Constitution guarantees this right to all defendants under Article 20(3)⁵⁷ and provides that defendants must be informed of their rights before doing anything that may incriminate them. DNA tests require the defendant to submit his/her own blood samples for the cause of investigation, and it is here that debate about the right against self-incrimination picks up from. However, just like for paternity disputes, the law surrounding DNA technology and criminal law is insufficient.

While the right to privacy has been recognized as a Constitutionally guaranteed fundamental right by Indian courts, its role in paternity disputes has not yet been specified. Indian courts have varying opinions on the issue, which makes it even more ambiguous. Paternity and the determination of paternity have much significance concerning its position in Indian society and its position in the Indian legal system. The right to privacy is a fundamental part of this significance, and any discourse on DNA technology and paternity disputes are complete without the mention of the right to privacy.

4. CONCLUSION AND SUGGESTIONS

Conclusion

Whether in civil disputes or criminal disputes, DNA technology, if misused, poses significant risks to our Constitutionally guaranteed fundamental rights. In our paper, the implication of the use of DNA tests in paternity disputes on the right to privacy has been studied. Like any other fundamental right, the right to privacy also has certain reasonable restrictions placed on it. Paternity, as discussed, has wide-ranging social, legal, and economic implications on the child; hence, the determination of paternity comprises a large portion of civil disputes. With the advent and emergence of science and technology, the scope and reach of DNA technology have also increased. Private DNA tests are cheaper and more readily available, paving the way for its misuse. However, the law has not developed at the same speed and, in several aspects, is still lacking. This has caused a significant gap in the Indian legal system, and if left untreated any longer, it would have vast-ranging implications on Indian society. Hence, to bridge these gaps and keep up with modern-day science and technology, it is essential to bring specific changes in the Indian legal system regarding the use of DNA tests in paternity

disputes.

Suggestions

1. A Comprehensive Law

It is clear that the lack of a law governing DNA technology in paternity disputes has left a massive gap in the system. The only tangible way of bridging this gap is by introducing comprehensive legislation that considers all aspects of the issue. The differing opinions of the judiciary on the use of DNA technology have called for a law that addresses this ambiguity. The law must not only take into account modern-day science and technology but must also consider any new discoveries or changes that DNA technology might undergo.

2. The Right to Privacy

Although the Indian judiciary is still discovering the scope and extent of the right to privacy, the laws and the courts must take it into account whenever they are dealing with DNA testing in paternity disputes. The law must also cover this aspect and ensure that the restrictions placed on this right are reasonable and not arbitrary. Methods to ensure confidentiality and anonymity, wherever possible, must be actively pursued by the Indian legal system.

3. Curbing Private DNA Testing

DNA testing is now much more readily available and has found itself helpful outside of paternity disputes in courts. DNA technology is being used to escape legal obligations, especially by husbands and fathers, who are using it to accuse wives of adultery and trying to escape the legal obligations of alimony and child support. A law curbing the misuse of DNA technology must be brought about to prevent the corruption of DNA testing.

4. Section 112 of the Indian Evidence Act

Section 112 of the Indian Evidence Act is currently the only law in place that puts forward the method of determining paternity. However, this law is in many ways outdated. The law does not take into account the accuracy of DNA Testing and the increase in its usage. The law places extreme importance on marriage and has become irrelevant in cosmopolitan societies as it considers only traditional families. The law must account for changing science and technology and consider the changing landscape of Indian society.

ENDNOTES

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