

GOVERNING DNA PATERNITY TESTING IN INDIA

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Abstract

DNA testing has revolutionized human identification and is used extensively for crime investigation, paternity confirmation and immigration checking. This paper delves on the specific ways in which the use of DNA technology for paternity testing has affected law and society in India. I argue that the sociological phenomenon of increasing acceptance and use of private DNA testing laboratories by men to confirm the biological relationship with their children is leading to increase in paternity disputes in the courts. The legal position on the applicability of using DNA evidence in civil cases in India is highlighted here, noting the fine balance that the courts have to strike between use of scientific evidence to settle disputes versus the need to protect the interests of the wife and child in the pursuit of justice. Greater regulation and control over private DNA laboratories in India is needed to ensure that easy and cheap availability of DNA testing does not harm the privacy and autonomy of individuals.

Keywords:

DNA testing;

Governance;

Law;

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Regulation.

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1. Introduction:

The invention of DNA testing technology by Alec Jeffreys at the University of Leichester in 1984 has revolutionized human identification. Right from the beginning, this technology's application for use in paternity disputes, forensic analysis and immigration confirmation has been acknowledged. The first case involved paternity testing of a woman of Ghanian origin and her child to confirm the biological relationship between them for immigration verification in the United Kingdom. DNA testing confirmed that the woman was the biological mother, as she had claimed to be [1]. In India, DNA testing was first used in 1989 for fatherhood confirmation in a paternity dispute in Kerala where a young woman had delivered a child and the alleged father had refused to accept the child due to societal pressure. Lalji Singh at the Centre for Cellular and Molecular Biology, Hyderabad conducted the DNA tests and established that the accused man was indeed the biological father of the child [2]. From then onwards, DNA technology has been used for conclusively establishing biological relationships in paternity disputes. This paper delves on the complex social and legal dimensions of the use of this identification technology in the Indian terroir.

2.Social dimensions of DNA paternity testing:

Newspaper reports have indicated that doubting fathers are using easily available DNA testing services from unregulated private laboratories in India to conduct DNA paternity testing of their child in order to ensure that they are biologically related. DNA paternity testing is thus being used as a certificate of the woman's loyalty. In those cases where the tests confirm that the man is indeed the biological father, the doubting husband's fear and suspicion is finally dissolved. The issue of consent to this genetic surveillance is not even acknowledged by the curious husband; nor the invasion of privacy that the child and mother are subjected to. Mostly, these tests are conducted without the knowledge of the wife. It is only when the DNA tests prove that the child is not biologically related to the man that the woman is accused of infidelity and adultery. Hence, we can say that DNA testing has opened up women's bodies and reproductive choices to increased policing from their husband and his family members. In this deeply patriarchal society, the abuse of DNA testing technology to verify parentage is subjecting women to new forms of surveillance, control and social discrimination. DNA tests are becoming an

examination which will decide the woman and child's acceptance within the family and failing to pass this genetic test can result in severe penalties leading to separation and divorce.

In order to validate my argument, I present several news items available online which show that this trend is rising in Indian society. A 2009 news item reports pre-natal DNA testing by 'doubting dads' in Delhi followed by reports in 2010 and 2011 that DNA paternity are rising in Mumbai and Pune too, with average cost of one DNA paternity test being around 11,000 rupees [3]–[5]. In 2012, it was reported from Hyderabad that "doubting parents can buy 'peace' for Rs 10K" [6]. The clients are not required to visit the laboratory in person, rather they courier the biological samples and receive the results online. *The New York Times* reported in 2013 that India's doubting fathers and sons are embracing DNA paternity tests when highlighting the infamous case in 2012 which proved through DNA testing that Congress politician N.D. Tiwari was the biological father of Rohit Shekhar [7]. The use of pre-natal tests has also been reported wherein women want to first confirm who the biological father of the foetus is before deciding whether to keep the pregnancy or go for an abortion [8]. The abuse of prenatal DNA testing for sex selection and abortion of 'defective' foetuses has not been adequately documented nor discussed in India. Couples who conceive through fertility clinics are also using this test to verify that the child conceived through artificial insemination is their biological offspring [9]. In 2016 it was reported that private DNA laboratories are mushrooming in Gujarat [10]. DNA paternity testing services are also required during immigration checks by western countries leading to its increasing demand [11]. What we see on the basis of these reports in the news media, is that the euphemistically termed 'peace of mind' tests have now become accepted in urban and middle-class India as a cheap, accurate and easy method of confirming biological parentage.

A web search shows the following commercial laboratories providing DNA paternity testing services for an average fee of around 13000 rupees:

- 1) Indian Biosciences (<http://inbdna.com/>)
- 2) DNA Labs India (<https://www.dnalabsindia.com/>)
- 3) DNA Forensics Laboratory (<https://www.dnaforensics.in/>)
- 4) GeneTrack Biolabs (<https://www.genetrack.in/>)
- 5) DNA Diagnostics Center (DDC) (<https://dnacenter.com/india/>)
- 6) EasyDNA (<https://easydna.in/>)

7) BioAxis (<http://www.dnares.in/>)

8) Dr. Lal Pathlabs (<https://www.lalpathlabs.com/>)

It is not clear which government agency or department is responsible for the regulation and oversight of these private DNA testing laboratories in India. The DNA Bill which would have regulated these private laboratories has not been passed yet and the Indian Council of Medical Research (ICMR) ‘has not developed any guidelines to regulate genetic testing laboratories’ [12].

3. Legal dimensions of DNA paternity testing:

Without doubt, the forcible collection of DNA evidence from N.D. Tiwari by order of the honourable Delhi High Court was a landmark in Indian jurisprudence on the use of DNA evidence in civil disputes. The right to defend oneself against self-incrimination, preserve bodily integrity and protect individual privacy were set aside for truth to prevail on the question of whether Rohit Shekhar was the biological offspring of N.D. Tiwari or not? The DNA test confirmed the accusation forcing Tiwari to accept Shekhar as his son, thereby further legitimizing the use of DNA evidence in civil disputes related to paternity in India [13].

However, the courts have been very clear in stressing that DNA testing in paternity disputes cannot be used as a matter of course in order to protect the interests of the mother and the child. The courts have noted that DNA tests cannot be used to conduct a ‘roving enquiry’. The law follows the dictum *pater est quem nuptiae demonstrant* (he is the father whom the marriage indicates) [14].

According to the Section 112 of the Indian Evidence Act, 1872

Birth during marriage, conclusive proof of legitimacy.—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 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.

However, although only court directed DNA tests from government laboratories are accepted as evidence in the courtroom there is no stopping disgruntled and suspicious men from conducting a

private DNA test on the child before proceeding to the court contesting the paternity. This trend is reportedly leading to increasing cases of paternity disputes landing up in the courts. The man does not want to be liable for offspring that is not biologically related to him, thereby exposing the woman to social ostracism and being labelled as ‘unchaste’ and their children as ‘bastards’. The judge has to thread a fine line here between truth and justice. Although in science, truth is the ultimate goal; in law, justice is paramount. The jurisprudence on DNA testing in India is well developed now and the courts use two main criteria in evaluating cases involving use of DNA testing for paternity disputes. These are the ‘no access’ criteria and the ‘eminent need’ criteria. The legal position is based on the acknowledgement that the husband needs to prove that there was no access to his wife during a certain period, thus the child cannot be his. And the judge has to decide, based on legal precedence and his wisdom, that DNA evidence is ‘eminently needed’ in the particular case for justice to be delivered. However, the presumption of the legality of marriage and thus, of the children born out of the marriage in Section 112 of the Indian Evidence Act can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities or on the basis of slender material. The courts in India have set strict guidelines as to when DNA evidence can be accepted in disputes related to paternity. In 2014, the Supreme Court acknowledged that DNA testing was the most legitimate and scientifically perfect means which the husband can use to establish his assertion of the infidelity of the wife however, leaving to the wife the choice to accept or decline permission for the DNA test [15]. In 2016, the Delhi High Court stated that DNA testing cannot be used for proving ‘bald allegations of infidelity’ and elucidated key principles and precedence to be followed before the courts allow DNA evidence [16]. In 2018, the Kerala High Court dismissed the plea made by a 77-year-old husband seeking divorce from his wife alleging that three children born to them were not his biological children. The court dismissed his plea for conducting DNA testing on the adult offspring to prove infidelity of the wife [17]. Hence, what is clear is that on the one hand, the legal system in India has acknowledged the accuracy of DNA evidence in proving kinship and on the other hand, the application of DNA testing in civil disputes is tempered with the underlying principle of the sanctity of legal marriage and the protection of the rights of the women and children against whom this technology can be used detrimentally.

4. Conclusion:

The easy and cheap availability of private DNA paternity testing in India has created a trend wherein doubting fathers are using ‘peace of mind’ tests to verify the biological relationship with their wife’s children. This has led to increasing technological policing and the normalization of the genetic surveillance of women’s sexual and reproductive autonomy in the patriarchal Indian family. The use of DNA paternity testing has gained popularity and social sanction mostly among the urban middle-class population leading to increasing disputes over parentage, which ultimately land up in the courts. The law in India has acknowledged the power of DNA evidence in ascertaining biological kinship however, the use of this evidence is carefully and strictly demarcated so that the women and children can be protected by the state. While the principle of free, prior and informed consent is foregone when private companies conduct DNA tests; the law allows DNA testing only under strict legal criteria when it feels that the husband has proven that he did not have any opportunity for ‘access’ and also that in the particular case, DNA testing is eminently needed. However, there is a strong need for greater control and regulation of private DNA testing laboratories in India, which is lacking at the moment, wherein they are made to comply with strict ethical guidelines so that the legal protection against DNA snooping is extended to social protection against any illegally acquired ‘peace of mind’ DNA reports.

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