

## A Sociolegal Analysis of DNA Paternity Testing in India

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### Introduction

DNA fingerprinting technology has revolutionized crime investigation across the globe. The ability of DNA evidence to pinpoint, with a tremendously high degree of accuracy, the genetic fingerprint of an individual has allowed for its use in forensic crime investigations wherein we can now pinpoint an individual to their unique DNA profile and prove with a very significant level of probability that the biological material under review matches or does not match. This *positive identification* is a paradigm leap ahead from the earlier blood profiling technologies which only had the power to give a *negative identification*, i.e. whether a person's blood sample does not match. Criminal justice systems all over the world have allowed DNA evidence to be used in court cases. The tremendous growth of forensic sciences in the last few decades have been buffered through the increasing use and acceptance of DNA evidence in crime investigations and court cases. The creation of DNA databanks in many countries worldwide

allowed law enforcement authorities to run the DNA profile under investigation with those already in the database thereby enabling investigators to get crucial leads in their pursuit of criminals and consequently increasing the conviction rate. India is also in the process of setting up a DNA databank which, when passed by the Parliament, will give the government the legislative authority to create and maintain a national DNA databank. Although the use or abuse of DNA profiling and databasing in the criminal justice system are hotly debated between civil rights activists/organizations and the law enforcement authorities in different countries including India, the application of DNA profiling for ascertaining the parentage of a child has been comparatively uncontroversial. It is accepted that DNA tests can confirm whether a person is the biological parent of a child or not. In this paper, I focus on the use of DNA in paternity cases to argue that this field of law and life adapted to DNA technologies to re-fashion kinship and marriage, with the effect of normalising the use of this technology in most intimate and affective ways. I argue that the use of DNA testing is linked



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with the medicalization of patrilineal reproduction and the social reproduction of patriarchy in India. I shift my focus to the use of DNA profiling in landmark paternity cases involving mainly civil disputes related to marriage and maintenance. The movement in the field of criminal law through the use of DNA tests to confirm paternity in sexual violence re-constitutes how the rape law regulates kinship and marriage by appealing to scientific facticity. I gesture towards the narratives of truth claims of DNA testing that are embedded and plotted in appellate judgments in this paper.

### Patrilineal Reproduction

In India, the family occupies a prominent place in the construction of a person's social reality. The family system in India has also been a site of much contestation and changes, with the move away from the traditional joint family system to a modern nuclear family system. The social bonds engendered by the family system, however, remains very strong for most Indians. It is their primary support system and crucial for their positions in the social hierarchy. Young men and women are pushed to 'settle down' and start a family; single women especially, are ostracized and treated as an ever-present threat to the social fabric of society. Getting married, for most adults in India, is not a choice but a requirement if they want to access social privileges. Not only in India, but all over the world, the importance of family and marriage in defining the relationship of the citizen with the state is central. The ideal-typical family in this case is a patriarchal heterosexual family unit composed of a male and a female in a monogamous relationship with a maximum of two children (girl child is encouraged but still largely undesired in India). However, the complexity of social reality in India related to family, kinship and marriage makes this a difficult norm to set in place. This heteronormative model also pathologizes queer sexuality. The difficulty of the state and society in accepting the decriminalizing of same-sex relationships is a good indicator of the iron grip of a singular understanding of marriage and romantic liaisons in India through the dominant model of a patriarchal heterosexual family.

Marriage is a social institution legitimated by social norms and values and is also the primary site where structural violence over the bodies of women is exercised in India and worldwide, therefore it comes as no surprise when it is reported that one out of every five suicides is committed by a desperate

and depressed housewife [1]. Reproductive choices are strictly regimented and policed by various caste, ethnic and religious groups in India. The law might be secular but social identities are still based on ascriptive status that need to be controlled by following strict norms of marriage alliances. Although legally men and women have the right to chose their partners at majority, however in social practice, A citizen does not have the liberty to marry whomever she wants across caste and religious boundaries without incurring severe social ostracism and risking their lives sometimes.

Feminist thinkers have shown how the social reproduction of a heterosexual family through the institution of marriage perpetuates the patriarchal ordering of society and the nation-state wherein law is the apparatus that normalizes these patriarchal values by 'buttressing the structures of power, codes of behavior, and forms of prejudice' to generate the category of 'unchaste woman' and 'bastard', besides constructing what Ratna Kapur [2] terms 'sexual subalterns'. Further, the instrument of law has chiseled a model of the family which is hetero-normative and reasserts the hegemony of the state over society. As Jacqueline Stevens asserts that, 'the juridical privileging of a certain kinship structure marked by marriage - in tax law, welfare policy, educational policy, and immigration law - continues to render the married couple the ultimate unit worthy of full political rights' [3].

We may argue that when a woman marries a man in India, she submits to a 'sexual contract' wherein the exclusive sexual rights to her body becomes the property of her husband and any deviation from this norm is intolerable to certain groups in society. The same sexual contract is not enforced upon men who are not considered as the exclusive sexual partners of their wives and can and do end up having extra-marital sexual relations with other women without suffering the same consequences that any other woman with similar behaviour will be subjected to. The control over women's sexual choices and reproductive autonomy is an inherent part of the social reproduction of a patriarchal society and this can be seen being played out in India through the negation of numerous women's right in deciding whether they want to continuously be engaged in reproductive labour. This patriarchal social ordering is also an indication as to why the figure of a single unmarried female mothering and raising a child out of her own choice without a husband is an anathema to the existing social order. The adultery laws in India were a testament and validation to

this unequal power relationship between the sexes in India wherein only a husband could file a case against another man for committing adultery with his wife; the husband could not file a case against the wife herself as she is considered to be the 'victim'. The agency of the wife was silenced as the law would only mediate in a dispute between two men, the aggrieved party always being the husband. There was no question of a woman being able to file a case of adultery against her husband. If her husband was having a sexual relationship with another married woman, in that case the husband of the married woman could file a case of adultery against him. If her husband were having an extra marital affair with an unmarried woman, then no case of adultery could be filed by the wife against her husband because there is no other 'aggrieved man'.

The long and tumultuous debate led to the change and reform of adultery laws in India wherein the act of adultery was decriminalised with the Supreme Court noting that women cannot be treated as 'chattel' in *Joseph Shine v. Union of India* on September 27, 2018.

Justice D.Y. Chandrachud notes in *Joseph Shine v. Union of India*, that, 'The object of adultery laws was not to protect the bodily integrity of a woman, but to allow her husband to exercise control over her sexuality, in order to ensure the purity of his own bloodline. The killing of a man engaged in an adulterous act with one's wife was considered to be manslaughter, not murder'. The desire for a biological progeny is very strong in Indian society especially for a boy child. The metaphor of the *beej* powerfully captures the desire for reproduction of the patrilineage, as the child is considered the seed of the man who will grow up to propagate his hereditary lineage further down the generations.

The concept of the bloodline (*jus sanguinis*) is a crucial marker in including or excluding certain individuals from citizenship rights, and hence, political and civic participation. Blood, or heredity of the *father* becomes an essential marker that gives rights to children. Hence, the biological link between the father and the child needs to be confirmed. It is no wonder then that sex-selection abortion is rampant in India and the gender ratio is skewed due to female infanticide. The use of ultrasound technology in ascertaining the sex of the foetus has led to millions of females being aborted leading to the government criminalising its misuse.

### DNA as Arbiter of Biological Parentage

So, how could it be ensured that the child was sired by only one particular man? And what is the mechanism through which we can find this truth? The oldest way for doing this was through the effective policing of married women's interaction with men. No other person except for the husband would have access to the woman. This was usually done by enclosing the woman in the four corners of the house, and in situations where it was necessary for her to go out, then she must be accompanied by a guardian and be protected from the *gaze* of strangers. This greatly minimised the probability of giving birth to another man's child but was not fool-proof. Phenotypic differences based on race and heredity like skin colour, height, hair colour et cetera would incite suspicion in cases of adultery and would be used as 'evidence' that the child did not belong to the husband biologically. Another method was to prove that the husband was impotent.

However, there are many problems related to proving impotency and erectile dysfunction, both medical and psychological. Temporary erectile dysfunction can be induced medically too. The discovery of blood groups by Karl Landsteiner and the application of this technology by Reuben Ottenberg revolutionized paternity disputes. The serological analysis was further refined with the MN system and the Rh system [4]. This led to a much greater certainty in judging the relationship between child and biological father.

The coming of DNA testing has made the task of deciding parentage extremely precise [5] and the sociological effects from the opening of the Pandora's box of DNA profiling technology has also reverberated throughout Indian society. The easy availability of DNA testing kits in an unregulated genetic testing free market in India has resulted in a situation where doubting men are increasingly demanding a DNA test confirmation as a certificate of fidelity from their partners and on the other hand, pregnant women are getting tested for pre-natal paternity testing in private clinics to confirm whether the child they are carrying is their husband's or their lover's [6], to be able to decide whether to abort or keep the foetus [7]. Genetic testing of the foetal matter from the pregnant women's womb called non-invasive pre-natal paternity (NIPP) testing can also reveal the sex of the unborn child, leading to abortion of female foetuses circumnavigating the governmental ban on sex testing using ultrasound machines [8].

Very little bodily sample is required for a DNA analysis of parentage and one can get the testing done even without the knowledge of the concerned partners. Private DNA laboratories provide services where they can collect the samples from an address or one can even courier the samples to their offices. Once the analysis is completed, the laboratory can e-mail the results to the client much like a normal blood test. Besides providing paternity confirmation services these laboratories also provide genetic testing for disease risk. The cost of doing these tests is affordable for middle class Indians and is predicted to get cheaper in the future. The easy access to these laboratory tests opens up women's sexual and reproductive choices to genetic surveillance and policing [9]. If the test result shows that the child is genetically related to the father, then the matter rests but if it shows that the child is not genetically related to him then the woman is considered adulterous and promiscuous. As per news reports forensic laboratories in India (both government and private) are piling up with demands for DNA paternity analysis from doubting husbands [10]. The emerging motto for men seems to be, 'When in doubt, do a DNA test!'. Hence, we find that new genetic testing technologies latch on to gendered social prejudices leading to discrimination and exploitation of vulnerable women and children.

### Conclusion

The discovery and introduction of DNA fingerprinting in the Indian Legal System has taken two different routes according to my analysis. On the one hand, forensic DNA analysis has been fairly straightforward in the criminal justice system to ensure that the criminals do not get away with rape/murder. This is because DNA can positively identify the biological sample as belonging to a particular person and this scientific evidence has been instrumental in bending the scales of justice against the criminal and away from the innocent. On the other hand, the introduction of DNA evidence in cases involving civil paternity disputes has underlined the necessity to use this technology with wisdom and caution. This is because the technology interacts with social systems and the law is the guardian of the marginalised in society, in this case, the women and their children.

Lastly, the changing nature of the family across the world and in India will create novel issues

for the judiciary to intervene upon. Same-sex parenthood, surrogacy claims, increasing use of sperm donors and increasing infertility all have the potential to require the intervention of the judiciary to mediate an increasingly complex techno-legal landscape. The increasing popularity of low-cost genetic genealogy products will also put demands on the courts to mediate disputes related to paternity in the future. We have entered a brave new world of private genetic testing and genetic surveillance in India, which is currently in need of stringent regulatory oversight by the government. Thus, judges and the legal system can look forward to many more cases involving the questioning of paternity where, once again, they will have to rely on their wisdom and constitutional morality as guides to ensure that the law bends towards justice by using technology as a tool to serve humanity while protecting the rights of the vulnerable in a society where social norms are still defined by the hegemony of patriarchy.

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