CONCLUSIVE PROOF OF LEGITIMACY OF CHILD: SILENTLY WIPING AGE-OLD LAW – LEGAL ANALYSIS AND JUSTIFICATION

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Abstract

Newly articulated dichotomy by virtue of judicial acumen in Dipanwita Roy, a recent decision of the Supreme Court, a distinction is made in two categories of cases, viz., where divorce is sought by the husband on the ground of infidelity of the wife and the cases where the legitimacy of the child is in issue. What has have been done by the Supreme Court in the afore-stated pronouncement is that though it may not be permissible to subject a child to DNA test for the purpose of ascertaining his legitimacy due to embargo as envisaged under section 112 of the Evidence Act, the same may, however, be justified in cases of divorce based on infidelity of wife. By so doing, the court did exactly that what was explicitly forbidden by age-old classic law. By means of this paper an analysis of law and precedent is carried out to see legal basis and justification of such dictum.

I. Introduction

Section 112 of the Evidence Act, 1872 lays down that the birth of a child during marriage is to be taken as a conclusive proof of legitimacy till 280 days after dissolution of marriage and the mother remaining unmarried, unless no access is proved by the husband to his wife at the relevant time. However, there are a few judgments[1] pouring in where the courts are tilting their

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[1] *Nandlal Wasudeo Badwaik* v. *Lata Nanlal Badwaik* (2014) 2 SCC 576; *Dipanwita Roy* v. *Ronobroto Roy,* AIR 2015 SC 418.

decisions by placing reliance on DNA[2] tests giving a go-bye to this age-old law of conclusive proof[3] of legitimacy of children. In its recent decision, the Supreme Court[4] has held that it would not be incorrect to issue direction to the wife to undergo DNA test over the child to determine his parentage in the case of challenge by her husband with respect to her infidelity, and in case she refuses to undergo the test of the child, an adverse presumption can be drawn against such wife. In the present paper, the endeavour shall be to find out legal justification of such judicial thought.

II. Defining 'Child': Law in India

The word 'child' may have different meanings and connotations in different fact situations. However, for the present purpose, it needs necessary to understand that if a child attains majority, it would be his right and discretion alone to put himself to such DNA test and in case of his refusal to do so, negative inference under no circumstances can be allowed to be drawn against his mother about paternity of such child. Therefore, for all just reasons, it would make sense only when it would involve the legitimacy of a "child" alone as against a "major" person.

Below 18 years

Domestic Violence Act, 2005 defines "child" to mean:[5]

> any person below the age of eighteen years and includes any adopted, step or foster child.[6]

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[2] Dr. Himanshu Pandey and Anhita Tiwari, "Evidential Value of DNA: A Judicial Approach", *Bharti Law Review*, 2017: DNA stands for Deoxy Ribonucleic Acid.DNA is a hereditary material found in all living organisms and is essentially made up of amino acids and it is matched with the so-called bases which provide the key to determining the genetic blueprint.

[3] The Indian Evidence Act, 1872 , s.4 reads as under:

> "May presume.—Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.
>
> Shall presume.—Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.
>
> Conclusive proof.—When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it."

[4] *Dipanwita Roy* v *Ronobroto Roy, supra* note 1.

[5] Protection of Women from Domestic Violence Act, 2005, s. 2(b).

The expression 'child' has also been defined under the Protection of Children from Sexual Offences Act (POCSO) to be a person below the age of eighteen years.[7] Similar is the import of Juvenile Justice Act[8] where it plainly puts that a child shall be a person who has not completed the age of eighteen years.

Explanation (a) to section 125(1) of the Code of Criminal Procedure, 1973, for the purpose of the very same provision says "minor" means a person who, under the provisions of Indian Majority Act, 1875[9] is deemed not to have attained his majority.

For additional reference in this context, it would be apposite to mention section 82 of the Indian Penal Code that reads:[10]

> ...[n]othing is an offence which is done by a child under seven years of age;" whereas section 83 of the Code reads "[n]othing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.[11]

The definition given under the said provisions under the Domestic Violence Act, 2005 makes it clear, a person who attains the age of 18 years will cease to be a child for the reason that far calling a person to be a child, he needs to be '*under'* eighteen years of age and not '*equal'* to eighteen years. A person born on 8th June of the year 2000 will complete the age of eighteen years on only at mid-night falling between June 7& 8, 2018. However, the birthday should not be confused with attaining the age in years for the reason that the birthdays are mostly celebrated

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[6] *Ibid.*

[7] Protection of Children from Sexual Offences Act, 2012, s. 2(d).

[8] Juvenile Justice (Care and Protection of Children) Act, 2000, s.2(k).

[9] Indian Majority Act, 1875 (9 of 1875), S.3 reads as under:

> "Age of majority of persons domiciled in India. —
>
> (1) Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before.
>
> (2) In computing the age of any person, the day on which he was born is to be included as a whole day and he shall be deemed to have attained majority at the beginning of the eighteenth anniversary of that day."

[10] Indian Penal Code, 1860, s.82.

[11] *Ibid.*

only on the last day of the year from next day to the date of his birth;[12] whereas, new year day is celebrated on the first of the day of a new year as against the last day of a year. However, for the reason of definition as given by the Majority Act, 1875, on the next birthday the said person shall be taken to have completed his age of majority. Thus, in the opinion of the present author, for the present purposes, the child shall be called to have completed that year of his age after first moment when the day as per English Calendar starts of his birthday.

However, cardinal rule of limitation as contained under Limitation Act, 1963 is that the day on which the cause of action accrues shall be liable to be excluded from limitation for all purposes![13] This rule does not seem to be applicable for the purpose of determination of age of attaining majority of a person.

III. Medical Examination in the nature of DNA *w.r.t.* paternity

When we discuss legal position with regard to conducting medical examination in the nature of DNA etc., the statutory law as adumbrated under section112 of the Evidence Act, 1872[14] would assume great significance to advance the subject for further deliberation and debate.

The rule enshrined under the said provision is a rule against imputing the child with illegitimacy. In other words, the rule says that during the subsistence of marriage between a man and a woman and even up to 280 days after dissolution of marriage, if the marriage dissolved, whenever a child is born to such woman, the same shall be conclusive proof to the effect that the child so born is legitimate child of such man. There is only one exception to the said rule, that is, if the

[12] Under law of limitation, fractions of a day are not supposed to be kept an account of and therefore the day on which cause of action accrues, the entire day is excluded from limitation and for the purpose of calculation of limitation, counting will start from the next day on which cause of action accrue.

[13] Reference in this connection may be made to s. 12 of the Limitation Act, 1963.

[14] Supra note 3,s. 112 reads:

"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."

man proves that he had no access to the woman at such time when such child could have been conceived.

Thus, in case where a man disputes to be the biological father of the child, in the absence of any plausible theory being advanced regarding non-access, the child shall be assumed conclusively to be the legitimate child of such man and prayer for serological examination or conducting of DNA test would be liable to be rejected. However, when a plausible theory is advanced in such a case by the man about non-access, in that situation it may be possible for the court to refer to any such test for real determination of legitimacy or paternity of the child by means of available scientific tests. The rule is primarily for the benefit of the child.

In *Gautam Kundu* v *State of West Bengal*[15] when with a view to avoid maintenance the father of the child was disputing paternity of the child and sought blood test in the nature of DNA with the only intention of avoiding payment of maintenance, the court held that the presumption as ordained under section 112 of the Evidence Act, 1872 can only be displaced by 'strong preponderance of evidence' and not by mere 'balance of probabilities as there is no statute governing this, neither Code of Criminal Procedure, nor the Evidence Act.[16]

Supreme Court in *Gautam Kundu* v *State of West Bengal*[17] raised a doubt with respect to court directing blood test of a person against his consent even if there was a law permitting so for

[15] AIR 1993 SC 2295: 1993 SCR (3) 917.

Per contra. Reference may be made to 1968 (1) All England Reports 20, where it was held that even without the consent of the guardian *ad litem*, the court had power to order an infant be subjected to a blood group test.

[16] Madras High Court in *Polavarapu Venkteswarlu* v *Polavarapu Subbayya*, 1951 (1) Madras Law Journal 580, held that in exercise of powers under section 151 of the Code of Civil Procedure, 1908 the court is not in any event satisfied that if the parties are unwilling to offer their blood for a test of this kind, the court can force them to do so.

Kerala High Court in *Vasu* v. *Santha*, 1975 Kerala Law Times p. 533, also took the same view and went to the extent to observe that even proof that the mother committed adultery with any number of men will not by itself be sufficient to prove the illegitimacy of child in the absence of establishment of the factum of non-access. Mere balance of probability will not be sufficient to shake the law in this regard.

In *Morris* v. *Davies*, (1837) 5 Cl. & Fin. 163 it was observed that the evidence of non-access must be strong, distinct, satisfactory and conclusive as that of in a criminal case. It was held in the said case that stigma of illegitimacy being very severe against the child and on the other hand a father is forced to take care of a child of whom actually he is not the son; and there being no law in England governing this aspect of the matter, only the legislature could have done the needful in the matter and not the courts!

[17] AIR 1993 SC 2295: 1993 SCR (3) 917.

the reason of infringement of right to personal liberty, right to privacy and right to dignity of the mother and also of the child. However, if otherwise a strong *prima facie* case of non-access is made out, in terms of *Gautam Kundu,*[18] in case of denial of the party to give blood sample, the court would be entitled to draw adverse inference.[19]

The court in *Gautam Kundu* therefore, summed up the matter by giving the following directions:

From the above discussion it emerges: -

Per contra. Reference may be made to 1968 (1) All England Reports 20, where it was held that even without the consent of the guardian *ad litem*, the court had power to order an infant be subjected to a blood group test.

[18] *Supra* note 15.

[19] However, High Court of Madhya Pradesh in *Hargavind Soni* v. *Ramdulari,* AIR 1986 MP at 57 held to the contrary, that is, even when blood grouping test is a perfect test to determine questions of disputed paternity of a child and can be relied upon by Courts as a circumstantial evidence, no person can be compelled to give a sample of blood for blood grouping test against his will and no adverse inference can be drawn against him for this refusal. Whereas Bombay High Court in *Raghunath v. Shardabai*, 1986 AIR Bombay 388 was of the view that blood grouping test have their own limitation as they cannot possibly establish paternity, they can only indicate its possibilities.

Reliance was further placed on *Bhartiraj* v. *Sumesh Sachdeo* 1986 AIR Allahabad 2591 and *Rayden on Divorce,* (1983) Vol. 1) at 1054 that "[m]edical [s]cience is able to analyse the blood of individuals into definite groups: and by examining the blood of a given man and a child to determine whether the man could or could not be the father. Blood tests cannot show positively that any man is father, but they can show positively that a given man could or could not be the father."

The position which emerges on reference to these authoritative texts, in terms of *Gautam Kundu case, supra.* Note 15, is that "depending on the type of litigation, samples of blood, when subjected to skilled scientific examination, can sometimes supply helpful evidence on various issues, to exclude a particular parentage set up in the case. But the consideration remains that the party asserting the claim to have a child and the rival set of parents put to blood test must establish his right so to do. The court exercises protective jurisdiction on behalf of an infant. In my considered opinion it would be unjust and not fair either to direct a test for a collateral reason to assist a litigant in his or her claim. The child cannot be allowed to suffer because of his incapacity; the aim is to ensure that he gets his rights. If in a case the court has reason to believe that the application for blood test is of a fishing nature or designed for some ulterior motive, it would be justified in not acceding to such a prayer. The above is the dicta laid down by the various high courts. In matters of this kind the court must have regard to s. 112 of the Evidence Act. This section is based on the well-known maxim *pater est quem nuptioe demonstrant* (he is the father whom the marriage indicates). The presumption of legitimacy is this, that a child born of a married woman is deemed to be legitimate, it throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid, any that every person is legitimate. Marriage or filiation (parentage) may be presumed, the law in general presuming against vice and immorality."

Per contra. Reference may be made to 1968 (1) All England Reports 20, where it was held that even without the consent of the guardian *ad litem*, the court had power to order an infant be subjected to a blood group test.

However, it needs no clarification that there is a difference between DNA test and Blood test simplicitor inasmuch the former is almost conclusive for its accuracy, the later can be found to be correct based on probabilities.

(i) that courts in India cannot order blood test as matter of course;

(ii) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(iii) There must 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.

(iv) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(v) No one can be compelled to give sample of blood for analysis.

By way of abundant caution, it needs special reminder that on perusal of law contained from section 101 to 114 of the Indian Evidence Act, 1872 with respect to law relating to burden of proof and presumptions, it can safely be said that when in a case direction is given by the court for giving blood sample to carry out its serological analysis and that party refuse, court will be left with no option except to draw adverse presumption to the effect that if such sample had been given, the report would have come against such party.

In *Nandlal Wasudeo Badwaik* v. *Lata Nanlal Badwaik*[20] the facts of the case were that, rightly or wrongly or due to non-opposition of the counsel for the wife, the serological test was conducted and the report came on record and the plea with regard to applicability of section 112 of the Evidence Act was taken later, the Supreme Court held that no precedent being available on record to show that a situation in which DNA test report, in fact, was available on record and was in conflict with the presumption of conclusive proof of legitimacy of the child, the factual serological report could still have been ignored. [Emphasis]. The court had to look into the report in the matter and placed reliance thereon.

Last in the series of such cases that tilt more towards resorting to such medical tests is the judgment of the Supreme Court in *Dipanwita Roy* v. *Ronobroto Roy*[21] arising out of a divorce

[20] The Supreme Court in *Nandlal case, supra* note 1, placed due reliance on *Gautam Kundu* v *State of West Bengal, supra* note 15; *Banarsi Das* v. *Teeku Dutta,* (2005) 4 SCC 449; *Kamti Devi* v. *Poshi Ram,* 2001 (5) SCC 311; *Bhabani Prasad Jena* v. *Orissa State Commission for Woman*, (2010) 8 SCC 633. The court basically upheld the ratio of the *Gautam Kundu case, supra* note 15.

[21] *Dipanwita Roy* , s*upra* note1.

case filed by the husband on the ground of adultery and infidelity. While placing reliance on its earlier recent decision[22]on the very same issued in *Nandlal Wasudeo Badaik case*[23] surprisingly held as follows:[24]

> "It is borne from the decisions rendered by this Court in *Bhabani Prasad Jena*, and *Nandlal Wasudeo Badwaik*, that depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination, to determine the veracity of the allegation(s), which constitute one of the grounds, on which the concerned party would either succeed or lose. There can be no dispute, that if the direction to hold such a test can be avoided, it should be so avoided. The reason, as already recorded in various judgments by this Court, is that the legitimacy of a child should not be put to peril."[25]
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> "The question that has to be answered in this case, is in respect of the alleged infidelity of the appellant-wife. The respondent-husband has made clear and categorical assertions in the petition filed by him under Section 13 of the Hindu Marriage Act, alleging infidelity. He has gone to the extent of naming the person, who was the father of the male child born to the appellant-wife. It is in the process of substantiating his allegation of infidelity, that the respondent-husband had made an application before the Family Court for conducting a DNA test, which would establish whether or not, he had fathered the male child born to the appellant-wife. The respondent feels that it is only possible for him to substantiate the allegations levelled by him (of the appellant-wife's infidelity) through a DNA test. We agree with him. In our view, but for the DNA test, it would be impossible for the respondent-husband to establish and confirm the assertions made in the pleadings. We are therefore satisfied, that the direction issued by the High Court, as has been extracted hereinabove, was fully justified. DNA testing is the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the

[22] *Ibid.*

[23] *Nandlal Wasudeo Badwaik* v. *Lata Nanlal Badwaik, supra* note 1,

[24] *Dipanwita Roy*, *supra* note1.

[25] *Id.* at 378.

> assertions made by the respondent-husband, and to establish that she had not been unfaithful, adulterous or disloyal. If the appellant-wife is right, she shall be proved to be so."[26]

In case, she declines to comply with the direction issued by the high court, the allegation would be determined by the concerned court, by drawing a presumption of the nature contemplated in section 114 of the Indian Evidence Act, especially, in terms of illustration (h) thereof.

DNA Test on behalf of child to determine parentage – A totally different scenario

However, where the facts are totally different in equity such that an adult grown up son seeks a declaration that the respondent is his biological father, the theory of stigma being cast on the child would not be in issue in that case, the protection given by virtue of section 112 of the Evidence Act, 1872 would not be applicable. In *N.D. Tiwari case*[27] it was held that when the right of a son is affected and he comes to the court for his declaration of character as biological son of the respondent, even resorting to the law of adverse presumption would not be sufficient in case of non-compliance with directions of the court to give blood sample, and appropriate course would be even to resort to coercive process for collection of such sample. The judgment was challenged before the Supreme Court and no stay was granted by the court against directions

[26] *Ibid.*

[27] *Rohit Shekhar* v *Narayan Dutt Tiwari* AIR 2012 Del. 151 (order dated April, 2012)*:* The High Delhi Court at para 34 observed:

> As far back as in *Damisetti Ramchendrudu* v. *Damisetti Janakiramanna* AIR 1920 PC 84 it was held that presumption cannot displace adequate evidence. The Supreme Court also in *Mohanlal Shamji Soni v. Union of India* 1991 Supp (1) SCC 271 held that it is the rule of law in evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue and the Court ought to take an active role in the proceedings in finding the truth and administering justice. Recently in *Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria (Dead)* 2012 (3) SCALE 550 it was reiterated that the truth is the guiding star and the quest in the judicial process and the voyage of trial. The trend world over of full disclosure by the parties and deployment of powers to ensure that the scope of factual controversy is minimized was noticed. We are therefore of the opinion that adverse inference from non-compliance cannot be a substitute to the enforceability of a direction for DNA testing. The valuable right of the appellant under the said direction, to prove his paternity through such DNA testing cannot be taken away by asking the appellant to be satisfied with the comparatively weak 'adverse inference'.

for use of force towards collection of samples. The present author records his full approval to such view for the reason that in spirit such course in fact advance the purpose for which section 112 of Evidence Act, 1872 was enacted, that is, protecting the interests of the son (including 'daughter' as well, of course)!

IV. Law in England and US on blood test to determine paternity

By 1930s some other immunological test became available. As a result, the possibility of establishing paternity increased. An attempt by way of statutory provision to make blood test compulsory in England failed in 1938. However, in 1957 the Affiliation Proceedings Act was passed. Under that Act, it was assumed that a man was the father once a sexual relationship with the mother at the time of conception was proven unless he could show another man had intercourse with her at that time. Failing the father's attempt, the mother's evidence had to be corroborated by facts such as blood test *etc*.[28] Under the Act either party could ask for a blood test and either was entitled to refuse to take part, although only the mother can apply for maintenance.[29]

The Family Reforms Act, 1969 conferred powers on the court to direct taking blood test in civil proceedings in paternity cases. Courts were able to give directions for the use of the blood test and taking blood samples from the child, the mother and any person alleged to be the father. Since the passing of 1969 Act the general practice has been to use blood tests when paternity is in issue. However, it is to be stated the court cannot order a person to submit to tests but can draw adverse inferences from a refusal to do so. Now under the Family Reforms Act, 1987 in keeping with modern thinking on the continuing and shared responsibility of parenthood, 'parentage' rather than paternity has to be determined before the court. Fathers as well as mothers can apply for maintenance. Therefore, contests can include mother's denial of paternity. This Act finally removed the legal aid for corroboration of mother's statement of paternity.[30]

Two cases maybe usefully referred to: Re Lord Denning M.R. stated thus:[31]

[28] *Supra* note 15 at para 9.
[29] *Supra* note 15 at para 10.
[30] *Supra* note 15 at para 11.

[31] [1968] 2 All England Reports at. 20.

> "but they can say positively that a given man cannot be the father, because the blood groups of his and the child are so different." [32](emphasis supplied).

In *B.R.B.* v. *J. B.*[33] Lord Denning M.R applied this dictum and held as under:[34]

> "The Country court judge will refer it to a High Court Judge as a matter suitable for ancillary relief, and the High Court Judge can order the blood test. Likewise, of course, a magistrate's court has no power to order a blood test against the will of the parties. The magistrate can only do it by consent of those concerned, namely, the grown-ups and the mother on behalf of the child; but, nevertheless, if any of them does not consent, the magistrate can take that refusal into account to adhere to the view which I expressed in *Re L*.[35] that "If an adult unreasonably refuses to have a blood test, or to allow a child to have one, I think that it is open to the court in any civil proceedings (no matter whether it be a paternity issue or an affiliation summons, or a custody proceedings) to take his refusal as evidence against him, and may draw an inference there from adverse to him. This is simple common sense.[36]
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> "The conclusion of the whole matter is that a judge of the high court has power to order a blood test whenever it is in the best interests of the child. The judges can be trusted to exercise this discretion wisely. I would set no limit, condition or bounds to the way in which judges exercise their discretion. The object of the court always is to find out the truth. When scientific advances give us fresh means of ascertaining it, we should not hesitate to use those means whenever the occasion requires."[37]
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> "Having heard full argument on the case, l am satisfied beyond any reasonable doubt (to use the expression used in rebutting the presumption as to legitimacy) that LORD DENNING, M.R., was right in saying that such an order may be made in any case where the child is made a party to the proceedings and in the opinion of the judge of the High Court it is in the child's best interests that it should be made."[38]

[32] *Supra* note 15 at para 12.

[33] [1968] 2 All England Reports 1023.

[34] *Id.* at p.1025 F-G to 1025 I.

[35] (1968) 1 All England Reports 20.

[36] *Ibid.*

[37] *Ibid.*

[38] *Ibid.*

As regard United States the law as stated in Forensic Sciences edited by Cyril H. Wecht[39] is as under:[40]

> "Parentage testing is the major (but not the exclusive) involvement of forensic serology in civil cases. The majority of disputed parentage cases involve disputed paternity, although an occasional disputed maternity, or baby mix-up case does arise, and can be solved using the tools of forensic serology described in this chapter. Blood typing has been used to help resolve paternity cases since the mid-1920's. According to Latters, there were 3,000 cases tested in Berlin in 1924, and Schiff and Boyd said that the first case went to court in Berlin in 1924. Ottenberg, in this country published paternity exclusion tables in 1921, as did Dyke in England in 1922. It took somewhat longer to satisfy the courts, both in Europe and in country, that parentage exclusions based upon blood grouping were completely valid. Wiener said that he had obtained an exclusion in a paternity case in this country which reached the courts early in 1933. In January of 1934, Justice Steinbrink of the New York Supreme Court in Brooklyn ordered that blood tests be performed in a disputed paternity action, using as precedent a decision by the Italian Supreme Court of Cassation, but his order was reversed upon appeal. Soon afterward, however, laws were passed in a number of states providing the courts with statutory authority to order blood testing in disputed paternity cases.[41]
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> Paternity testing has developed somewhat more slowly in the United States than in certain of the European countries, but today the differences in the number of systems employed, and judicial acceptance of the results, are no longer that great. A number of authorities have recently reviewed the subject of paternity testing in some detail, and in some cases have summarized the results of large number of cases that they have investigated. [42]
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> Walker points out that failure to exclude a man, even at the 95 percent level of paternity exclusion does not mean that the alleged father is proven to be biologic father, because absolute proof of paternity cannot be established by any known blood test available.

[39] *Ibid.*
[40] *Ibid.*
[41] *Ibid.*
[42] *Ibid.*

> Although this fact is well known and appreciated by workers in the field of blood grouping and by attorneys active in this area, it is not generally understood by the lay public. However, blood group serology, using proven genetic marker systems, represents the most accurate scientific information concerning paternity and is so recognized in the United States, as well as in a number of countries abroad."[43]

V. Need to uphold right to privacy and dignity of women and child

Right to privacy essentially is to ensure right to liberty and dignity as held by a recent decision of the nine judges' bench of the Supreme Court in re. *Puttaswamy case*.[44]

It is difficult to see how dignity — whose constitutional significance is acknowledged both by the Preamble and by the Supreme Court in its exposition of article 21, among other rights — can be assured to the individual without privacy. Both 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. Necessarily, then, the right to privacy is an integral part of both "life" and "personal liberty" under article 21, and is intended to enable the rights bearer to develop her potential to the fullest extent made possible only in consonance with the constitutional values expressed in the Preamble as well as across part III.[45]

The dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy over fundamental personal choices and control over dissemination of personal information which may be infringed through an unauthorized use of such information.[46]

Another judgment in this context delivered recently by the Supreme Court in *Joseph Shine* v *Union of India,*[47] struck down Section 497 Indian Penal Code, 1860 as unconstitutional being violative of articles 14, 15 and 21 of the Constitution, overruling its earlier decisions in

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[43] *Ibid.*

[44] *K.S. Puttaswamy (Retd.)* v. *Union of India,* (2018) 4 SCC 651.

[45] *Id.* at 411.

[46] *Id.* At 525.

[47](2019) 3 SCC 39 (decision dated 27-09-2018, Division Bench decision comprising of five judges of the Supreme Court).

Sowmithri Vishnu v. Union of India ,[48] *V. Revathi v. Union of India* [49] and *W. Kalyani* v. *State Through Inspector of Police*.[50] It was held that section 497 lacks an adequately determining principle to criminalize consensual sexual activity and is manifestly arbitrary. Section 497 is a denial of substantive equality as it perpetuates the subordinate status ascribed to women in marriage and society. Section 497 violates Article 14 of the Constitution. It was further observed that the principle on which section 497 rests is the preservation of the sexual exclusivity of a married woman – for the benefit of her husband, the owner of her sexuality. Significantly, the criminal provision exempts from sanction if the sexual act was with the consent and connivance of the husband. The patriarchal underpinnings of section 497 render the provision manifestly arbitrary. The basis of the said dictum essentially was that the women is taken as an object under the said provision, whereas the complainant and culprit were two men who fought for the woman without, however, giving any say to such woman whatsoever, which is unreasonable and unconstitutional. Thus, the core of the judgment is that two men cannot be inimical or envy each other for a woman as an object without such woman being given a say in the matter, and if there is any legislative scheme as such, the same would find foul of the basic soul of the Constitution.

Thus, if right to dignity and right to privacy are indefeasible rights as recognized explicitly by the Supreme Court now, by any stretch of imagination it would not be appropriate to say dignity of woman can be taken away by directing her to take her child through DNA test to prove her chastity particularly when there is an age-old law standing to her favor to safeguard her interest. Similarly, right to privacy of the child also would be infringed with respect to his paternity once during the period of his minority he is passed through such serological tests against his interests. If nine judges bench decision of the Supreme Court in *K.S. Puttaswamy*[51] is to be accepted, how the decision of the Supreme Court in *Dipanwita Roy*[52] can be justified, the present author fails to understand!

[48] (1985) Supp SCC 137.

[49] (1988) 2 SCC 72.

[50](2012) 1 SCC 358.

[51] *Supra.* note 44.

[52] *Supra.* note 1.

VI. Conclusion

In the opinion of the present author the judgment of the Supreme Court in *Dipanwita Roy*[53] seems to be articulating a new line of theory in the area of legitimacy of child during marriage in terms of section 112 of the Evidence Act, 1872 inasmuch as the court failed to understand the cardinal rule of construction that 'what in law is not allowed to be done directly, the judicial courts cannot be allowed to do the same indirectly, except by giving a explicit declaration to the piece of law as unconstitutional!'

In the considered opinion of the present author, carving out a distinction between two situations, namely, one for establishing paternity and the other one for proving adultery or infidelity as a ground for divorce, does not seem to be in good taste! In both situations, in the case of negative DNA report, the stigma that is bound to cause to the child would be of the same magnitude which cannot be totally ignored. If as a matter of policy and taking present day time in view, had the court taken a clear view to the effect that it would not be possible to ignore the facility of DNA test altogether that offers almost hundred percent accuracy, there would not have been much problem. In this view of the matter, it would not be appropriate for the court to take the case to the same destination though from different route which was totally forbidden in law! In all litigations between the parties in such matters, the husband necessarily would file his divorce case as a leading case on the ground of infidelity thereby defeating the explicit rigors of section 112 of the Evidence Act, 1872. It would have been even better if such contentious issue had been left to be decided by due process of law making rather than allowing one or two persons acting as custodian of the Constitution to take a policy decision on such sensitive issue. [Emphasis].

The present researcher records her inability to understand the difference in two classes of cases for the present purpose, namely, the one that involves declaration of legitimacy of a child simplicitor and another that involves grant of divorce on the ground of adultery or infidelity, inasmuch as in both cases, if so established on record, it is the child alone who is going to be the sufferer throughout his life. It is not understandable as to why would the father seek such a declaration that the child is not his biological child as such cases in courts are not seen in practice, and such issues are raised in divorce cases only.

[53] *Supra*. note 1.

Even otherwise, with the pronouncement of the nine judges' bench decision of the Supreme Court in *re. Puttaswamy*[54] 'right to privacy' that includes within its sweep the 'right to live with dignity' has now been explicitly held to be indefeasible fundamental right; and also, in view of another judgment in re. *Joseph* case[55] whereby section 497 of the Indian Penal Code has been held to be unconstitutional; and therefore, it would not be inappropriate if the dignity and privacy of the child is not allowed to be so impaired by any such inimical interpretation of law in cases between his parents where he has no say whatsoever. If so allowed by the judicial courts to let his vegetable body to exploitation for his blood during the course of his minority or slap on his face a judicial certificate of illegitimacy, it would tantamount to be a mockery of equitable justice on the anvil of fundamental rights ordained in part III of the Constitution which is of serious concern for the present researcher!

[54] . *Supra* note 44.
[55] *Supra* note 47.