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LEXKHOJ PUBLICATIONS

EDITORIAL NOTE

LEXKHOJ is delighted to announce its first edition of the *Lexkhoj Research Journal of Law and Socio-Economic Issues* which is an international journal, publishing critical approaches to socio-legal study and multi-disciplinary analysis of issues related to law and socio-economic. The journal will strive to combine academic excellence with professional relevance and a practical focus by publishing wide varieties of research papers, insightful reviews, essays and articles by students, established scholars and professionals as well as by both domestic and international authors. Authors should confirm that the manuscript has not been, and will not be, submitted elsewhere at the same time.

The Journal provides a forum for in-depth analysis of problems of legal, social, economic, cultural and environmental transformation taking place in the country and world-wide. It welcomes articles with rigorous reasoning, supported by proper documentation. The Journal would particularly encourage inter-disciplinary articles that are accessible to a wider group of Social activist, economist, Researcher, policy makers, Professionals and students.

This quarterly issue of the journal would like to encourage and welcome more and more writers to get their work published. The papers will be selected by our editorial board that would rely upon the vibrant skills and knowledge immersed in the paper.

Needless to say, any papers that you wish to submit, either individually or collaboratively, are much appreciated and will make a substantial contribution to the early development and success of the journal. Best wishes and thank you in advance for your contribution to the Lexkhoj Research Journal of Law and Socio-Economic Issues.

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DNA TESTING: WHETHER IT CAN BE USED AS AN EVIDENCE OR NOT?

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INTRODUCTION

In this paper we would be dealing with DNA testing and how it has been useful as an evidence against any crime done. DNA testing, widely available for over twenty-five years, has revolutionized the way local, state, and federal governments understand identity by making it inexpensive to obtain a person's genetic profile and link people to biological evidence and to each other. With the benefit of different types of DNA testing, the state can now say with greater certainty whether a particular suspect was the culprit of a crime or whether a particular person is the biological parent of a child etc. DNA testing has been embraced with enthusiasm by courts, legislatures, and agencies, state and federal, across areas of law ranging from criminal law, employment law, family law, and health law because it is easy to obtain and offers apparent certainty. This paper critically assesses these developments, focusing on the seemingly unobtrusive collection of genetic data, and argues that heightened legal scrutiny of genetic regulation is needed.

DNA testing, like blood-typing, fingerprinting, or any other means of biometric identification, is a scientific method for identifying personal characteristics of a living being. Unlike some of these earlier forms of biological testing, however, DNA testing provides the opportunity to both identify a particular person with near certainty and to predict characteristics as well as propensities that may be associated with that person's genetic makeup. The nuclear DNA of a person contains twenty-three pairs of chromosomes, and that DNA sequence is found in almost all of our cells. That nuclear DNA contains genes that provide important instructions for the functioning of each cell, but it acts along with other proteins, enzymes and ribonucleic acid (RNA), in complex ways that are still being studied. This genetic code can be used for many purposes. It can, for example, constitute proof that a particular person's genetic material was deposited, through blood, semen, or hair, in a particular place.

ELABORATION ON THE TOPIC

Analysis of Legal permissibility of DNA test as an evidence in India

This section will analyze various important decisions of the Supreme Court of India in order to provide a comprehensive understanding of the application of the DNA technique in matters of evidence and the law in its present scenario in India.

In *Goutam Kundu v. State of West Bengal*¹ the appellant claimed a DNA test in order to establish that he was not the father of the child in order to consequently absolve him of paying maintenance to mother and child under Section 125 of the Criminal Procedure Code. The Court held:

- That Courts in India cannot order blood tests as a matter of course;
- Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
- 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.
- 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 the child illegitimate and the mother an unchaste woman?
- No one can be compelled to give a sample of blood for analysis.

In a very important and recent judgment delivered by the Hon'ble Supreme court of India in the case of *Sharda v. Dharampal*,² where the core question was, whether a party to a divorce proceeding can be compelled to a medical examination. In this case the Respondent on the ground that such an order violates his right to privacy opposed an order for DNA test. The three Judge Bench of the Hon'ble Supreme court held that:

“If for arriving at the satisfaction of the Court and to protect the right of a party who may otherwise be found to be incapable of protecting his own interest, the court passes an appropriate order, the question of such action being violative of Art. 21 of the Constitution of

¹AIR 1993 SC 2295, 1993 Cri. LJ 3233, 1993 SCC 418

² AIR 2003 SC 3450.

India would not arise. The court having regard to Art, 21 of the Constitution of India must also see to it that the right of a person to defend himself must be adequately protected.”

DECIDING WHEN DNA ALONE IS ENOUGH TO CONVICT

The application of DNA testing has been used in India for a long period of time. Sometimes, it has been used to resolve certain question which sometimes becomes very difficult to resolve such as:-

- Has the crime been committed?
- How and when was the crime committed?
- Who committed the crime?

For example, we watch the incidents of the movies when an inspector finds something at the crime spot i.e. blood, hair etc. Now what is the use of these material evidences in the investigation? The answer is very simple, that these material evidences help them in determining as to who was actually present at the place where the incident happened. DNA technology has also been used in the civil cases, to determine the biological relationship between a two or sometimes three individual. Usually, it has been used to determine the paternity of a person, where a person denies being the biological parent of a person. DNA parentage testing may help a person in absolving him from the charge of being the biological parent of a person, but it cannot be trusted to prove absolutely that a person is the child's biological parent; however it can provide a probability.

The admissibility of the DNA evidence before the court always depends on its accurate and proper collection, preservation and documentation which can satisfy the court that the evidence which has been put in front it is reliable.

There is no specific legislation which is present in Indian which can provide specific guidelines to the investigating agencies and the court, and the procedure to be adopted in the cases involving DNA as its evidence. Moreover, there is no such specific provision under Indian Evidence Act, 1872 and Code of Criminal Procedure 1973 to manage science and technology issues. Due to lack of having any such provision, an investigation officer has to face much trouble in collecting evidences which involves modern mechanism to prove the accused person guilty.

Section 53 of Code of Criminal Procedure 1973 authorizes a police officer to get the assistance of a medical practitioner in good faith for the purpose of the investigation. But, it doesn't enable a complainant to collect blood, semen etc for bringing the criminal charges against the accused. The amendment of CrPC by the CrPC (Amendment) Act, 2005 has brought two new sections which authorizes the investigating officer to collect DNA sample from the body of the accused and the victim with the help of medical practitioner. These sections allow examination of person accused of rape by medical practitioner and the medical examination of the rape victim respectively. But the admissibility of these evidences has remained in a state of doubt as the opinion of the Supreme Court and various High Courts in various decisions remained conflicting. Judges do not deny the scientific accuracy and conclusiveness of DNA testing, but in some cases they do not admit these evidences on the ground of legal or Constitutional Prohibition and sometimes for the public policy. There is an urgent need to re-examine these sections and laws as there is no rule present in the Indian Evidence Act, 1872 and Code of Criminal Procedure, 1973 to manage science and technology issues.

Many developed countries have been forced to change their legislations after the introduction of the DNA testing in the legal system. There are certain provisions which are present in the Indian Evidence Act, 1872 such as section 112 which determine child's parentage and states that a child born in a valid marriage between a mother and a man within 280 days of the dissolution of the marriage, and the mother remaining unmarried shows that the child belongs to the man, unless proved otherwise but again no specific provision which would cover modern scientific techniques. DNA analysis is of utmost importance in determining the paternity of a child in the cases of civil disputes. Need of this evidence is most significant in the criminal cases, civil cases, and in the maintenance proceeding in the criminal courts under section 125 of thr CrPC.

The introduction of the DNA Technology has posed serious challenge to some legal and fundamental rights of an individual such as 'Right to Privacy', 'Right against self-incrimination'. And this is the most important reason why courts sometimes are reluctant in accepting the evidences based on DNA Technology. Right to Privacy has been included under Right to Life and Personal Liberty or Article 21 of the Indian Constitution, and Article 20(3) provides Right against Self-Incrimination which protects an accused person in criminal cases from providing evidence against himself or evidences which can make him guilty. But it has been held by the Supreme Court on several occasions that Right to Life and Personal

Liberty is not an absolute Right. In *Govind Singh v. State of Madhya Pradesh*³, Supreme Court held that a fundamental right must be subject to restriction on the basis of compelling public interest. In another case *Kharak Singh v. State of Uttar Pradesh*⁴, Supreme held that Right to Privacy is not a guaranteed right under our Constitution. It is clear from various decisions which have been delivered by the Supreme Court from time to time that the Right to Life and Personal Liberty which has been guaranteed under our Indian Constitution is not an absolute one and it can be subject to some restrictions. And it is on this basis that the constitutionality of the laws affecting Right to Life and Personal Liberty are upheld by the Supreme Court which includes medical examination. And it is on this basis that various courts in the Country have allowed DNA technology to be used in the investigation and in producing evidence. To make sure that modern technologies can be used effectively, there is an urgent need of a specific legislation which would provide the guidelines regulating DNA Testing in India.

The use of DNA Technology is very frequent in the cases related to paternity issues. It was the Delhi High Court which set the precedent in 2008 for determining paternity in the case of child maintenance suit. In this case a man filed a suit claiming that he was not the father of the child for whom his wife was maintenance. The suit was dismissed by the Trial Court, but it was allowed by the High Court and held that “The parentage of the child can only be determined by a DNA test. The liability to pay maintenance under section 125 CrPC can be avoided by the petitioner with respect to this child only if it is established that he is not the biological son of the petitioner”. The decision was on the one hand was criticized by one group of the society stating that it would harm the child in the question psychologically, while on the other hand it has been supported by other group of the society stating that DNA Testing should be allowed in the cases involving child maintenance. Admissibility of DNA technology in civil or criminal suit would remain in question and these evidences should be examined by the courts very carefully.

The recent refusal of the Supreme Court to dismiss the Delhi High Court’s decision ordering Veteran Congress Leader *N.D. Tiwari* to undergo the DNA test is very important from the viewpoint of the admissibility of such evidence. In this case, Rohit Shekar has claimed to be the biological son of N.D. Tiwari, but N.D. Tiwari is reluctant to undergo such test stating that it would be the violation of his Right to Privacy and it would cause him public humiliation. But Supreme Court rejected this point stating when the result of the test would not be revealed to anyone and it would under a sealed envelope, there is no point of getting

³1975 AIR 1378, 1975 SCR (3) 946

⁴1963 AIR 1295

humiliated. Supreme Court further stated that we want young man to get justice; he should not left without any remedy. It would be very interesting to see that how courts in India would allow the admissibility of DNA technology in the future.

CONCLUSION

Given the astronomically high source probabilities in some DNA cases, it may seem “as though ‘DNA’ has transcended the mortal realm and moral certainty of criminal evidence and taken its place in a dream world of unassailable scientific evidence and mathematical certainty.” On the contrary, DNA match statistics begin as purely probabilistic evidence incapable of inspiring moral certainty, yet transcend that realm at a certain point to take their place among other assertions of certainty that, while fallible, are capable of inspiring an actual belief in, and thus moral certainty of, guilt. Society’s recognition of match statistics’ ability to fully convince jurors of guilt is just as important as its recognition that such statistics fall far short of absolute, metaphysical certainty. This project has posited and confirmed the former proposition—match statistics’ ability, under certain conditions, to fully convince jurors of the defendant’s guilt—and has offered courts a guide in determining when, in a case that turns entirely on a DNA match statistic, the numbers are compelling enough to send to the jury. The question of the lay jury’s role in the coming era of technologically advanced prosecutions remains to be answered. Some have warned that “with the advent and rapid advancement of DNA technology, there is a danger that juries will be viewed as virtually dispensable in cases in which there is overwhelming scientific evidence of guilt. At first glance, pure cold hit cases seem to require the jury to perform only two tasks: number-crunching and deciding whether the source probability given the evidence is high enough to justify conviction. The first is not one that would seem to call for resolution by trial, much less trial by lay jury. Rote mathematical operations, if all the necessary quantities were at hand, could just as easily and more accurately be performed by a non-adjudicative board of scientists. The second task also does not involve traditional jury functions. Rather, it is a moral or political line-drawing that society could remove from the purview of the jury and relegate to other institutional actors, such as the legislature or the scientific community, arguably without upsetting the jury’s familiar role as factfinder or as a check on unjust laws or prosecutions. But as this project has indicated, the mathematical evidence in even the “purest” cold hit case does not simply involve number-crunching. Even in a pure cold hit case, the “DNA evidence is meaningful only when it is embedded in stories that mention other evidence, possible suspects, and how the evidence itself was handled and interpreted.”

And while there are important systemic reasons for disposing of certain cases on sufficiency grounds, the defendant ultimately cannot be convicted unless each juror actually reaches a state of moral certainty of, or actual belief in, the defendant's guilt. In ensuring fair trials in pure cold hit cases, courts will have to grapple with jurors' inability to understand statistics, and with the compounding concern that, because of DNA's near-mythical status in modern culture, some jurors may not understand that they can still acquit in the face of astronomically high source probabilities. Further challenges arise given the line between rational mistrust of certain futuristic evidence and fear-based nullification, on the one hand, and the line between being fully convinced and unduly mesmerized by scientific evidence, on the other. As DNA "becomes reified as a machinery of truth for determining guilt and innocence," the legal community must ensure that both courts and juries understand the types of certainties and uncertainties such evidence entails when it is the sole proof of guilt.