

DNA TESTS STILL FALL UNDER A GREY AREA

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But the issue is problematised by the varying stances of both the apex court and High Courts that tend to focus on the particularities of each case. Women's rights activists, however, hold that a DNA test is the only tool which can deliver justice in cases of abandonment of mothers and children. Take the example of Keerti (name changed) from Delhi, who asked for a DNA test to determine the paternity of her child after her husband deserted her making claims of infidelity. Left to fend for herself with a six-month-old child, she knocked on judicial doors after the husband's family denied the request; the case is pending before the family court.

"Is physical autonomy above justice to the child?" asks Brinda Adige of Global Concerns India, an organisation working for human rights and gender equality. "The woman can establish the paternity of the child only if the DNA of the man matches." While determining paternity goes a long way towards securing financial support from an estranged partner, lawyer Sumithra Acharya says it is not so much about women's rights as child rights. "DNA tests may not be conclusive proof in cases of heinous crimes like rape but for paternity, protection has always been towards the children."

Precedents set by the Supreme Court through the years show that judges cannot order genetic tests as a "roving enquiry" (*Bhabani Prasad Jena, 2010*) and they must balance "the interests of the parties" (*Banarsi Dass, 2005*); DNA tests should also not be ordered if there was other material evidence at hand to prove the case. In its *Ashok Kumar* judgment last year, the court said judges, before ordering a genetic test, should examine "proportionality of the legitimate aims" being pursued. But seven years ago, the court heard a man's plea for a DNA test to prove his wife's infidelity and the parentage of their child and sought a test to be done on himself and the child in the presence of his wife. The court agreed reasoning there was no other way for him to know. It said the wife could refuse but would risk presumptions being drawn against her. Then again, as the 'XX' case demonstrates, there are no easy answers or legal certitudes.

While dealing with claims of infidelity, a request for DNA test also competes with the conclusiveness of Section 112 of the Indian Evidence Act, which presumes that a child born to a married woman is legitimate — the burden of proof is on the person claiming illegitimacy of the child. While the imperative of justice jostles with that of bodily autonomy, the Constitution Bench judgment in the *K.S. Puttaswamy* case (2017) recognising privacy as part of the fundamental right to life (Article 21) has only buttressed the privacy argument as the government's bid to pilot the DNA Technology (Use and Application) Regulation Bill, 2019 through Parliament hangs fire.

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