

## ADOPTED BUT NOT FORGOTTEN: LEGAL DELIBERATIONS ON DNA TESTING OF CHILDREN BORN ‘IN RAPE CASES’

*Tisha Mehta<sup>1</sup> & Urmi Pareshkumar Shah<sup>2</sup>*

### **Abstract**

*DNA testing has revolutionized the field of science, offering a potent tool for individual identification and resolving intricate legal issues. In particular, it has played a pivotal role in rape cases by providing vital evidence leading to the identification and conviction of perpetrators. Nevertheless, recent developments have witnessed accused individuals petitioning the Court to conduct DNA tests on children born due to rape to establish their innocence post their adoption. This paper scrutinizes the ethical and legal dimensions of such requests, considering factors such as the right to privacy, potential harm to the child's mental well-being, the enduring social stigma, the limited probative value of paternity in proving rape, and concerns about the reliability of DNA tests. The paper aims to furnish a comprehensive foundation for the ethical and legal argument against compelling innocent children to undergo DNA testing post-adoption solely at the behest of the accused despite their right to a fair trial.*

**Keywords:** DNA testing, paternity, rape case, adoption, right to privacy

---

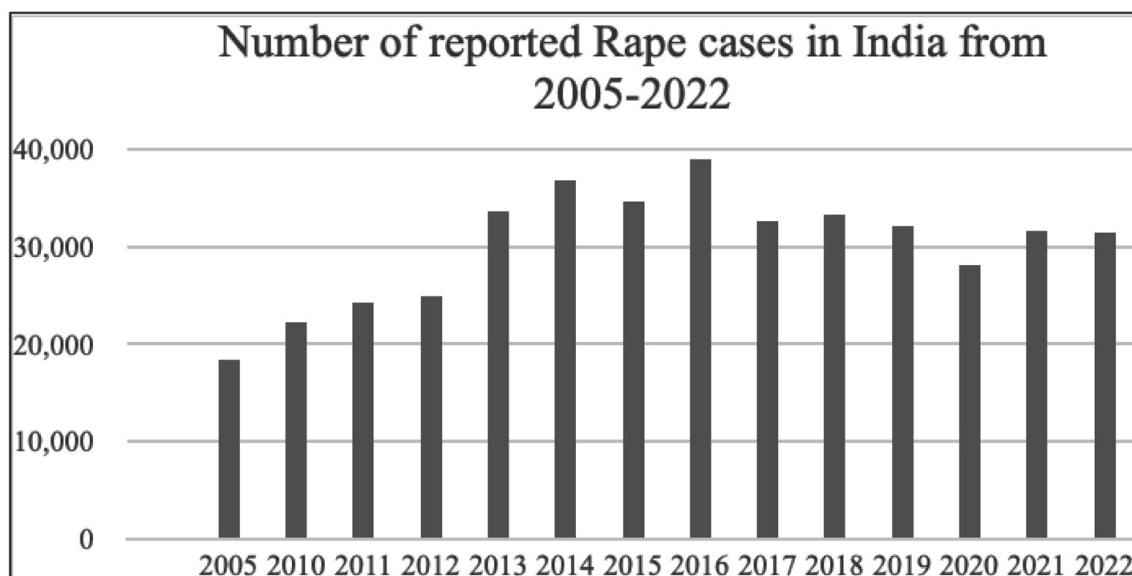
1 Tisha Mehta is a fourth-year student at Gujarat National Law University, Gandhinagar. With a strong focus on family law and constitutional law, She is particularly interested in legal matters such as marriage, divorce, adoption, inheritance, and the application of constitutional principles, safeguarding rights, and maintaining legal frameworks.

2 Urmi Pareshkumar Shah is a fourth-year student at Gujarat National Law University, Gandhinagar. She is passionate about exploring diverse areas of law and has a keen interest in legal research. Her work has been featured in internationally recognized platforms such as the Asian Journal of Law and Economics and various prominent legal blogs.

## Introduction

“Rape is not only a crime against an individual; it is a crime against the whole society.” – Justice Sanjay (Kumar Singh Bhootnath v. State of UP, 2021)

“Section 63 of the Bharatiya Nyaya Sanhita, 2023” defines what rape is and prescribes punishment for the same. Despite multiple efforts by the State, the crime rate is not decreasing, as can be witnessed by the data provided in the latest report by the National Crime Records Bureau (NCRB Report, 2022).



*Chart 1: Number of Reported rape cases in India from 2005-2022*

It is evident from the above chart that there is no significant decrease in the incidence of rape crimes in India. In 2005, the number of reported rape cases was 18,359, while in 2022, the number increased to 31,516 (NCRB Report, 2022).

In cases of rape, gathering evidence against the accused can be challenging, primarily due to the isolated nature of these incidents, which often lack witnesses. In many instances, aside from the statements of the prosecutrix, the sole evidence available is a DNA test that can confirm the occurrence of sexual intercourse. However, a significant obstacle arises when victims approach the court months or even years after the incident, as crucial DNA evidence may no longer be available.

If a woman becomes pregnant due to rape, DNA evidence can be

employed to establish paternity between the child and the accused. While there are no official statistics on the prevalence of pregnancy among rape victims in India, data from developed countries like the USA offers some insights. According to the American Journal of Obstetrics and Gynecology (AJOG), approximately 5% of rape cases result in pregnancy. (Holmes et al., 1996). However, there is a lack of subsequent information regarding the fate of children born from such heinous crimes. These children may either be aborted, put up for adoption, or raised by the victims themselves.

This paper centers on the DNA analysis of children born out of rape, examining its validity and implications, particularly post-adoption. It was inspired by a judgment by the Kerala High Court, where Justice K. Babu in “Suo Moto v State of Kerala (2023)” halted the collection of DNA from adopted children as evidence in rape trials by six lower courts. This article explores such DNA tests’ legal, ethical, and scientific dimensions and whether their court-mandated use is justified. (Benny, 2023).

### **Legal Provisions Dealing with DNA as Evidence**

As rape is an isolated event which lacks eyewitnesses, evidence becomes a crucial part of the prosecution. There are many evidences which are required in rape cases. These are the victim’s clothes, drop sheet, sanitary napkin/tampons, fingernail scrapings, oral swab, head hair, saliva on the skin, semen on the skin, vaginal swab, endocervical swab, anal and rectal swab, victim DNA, etc. (Yadav, 2016). Despite so much evidence, the conviction rate in rape cases in India is just around 30% (“Hyderabad Case: How Effective Is India’s Justice System in Dealing with Rape?,” 2019).

In this paper, emphasis is placed on DNA of an adopted child as an evidence in rape cases. Though not directly dealing with DNA as evidence, the following statutes and provisions still touch upon it. There is, as such, no comprehensive law in India dealing with DNA:

- “Section 116 of Bharatiya Sakshya Adhiniyam, 2023”: Birth During Marriage and Legitimacy - Though not directly linked to DNA evidence, Section 112 applies when DNA testing is employed to resolve matters of paternity and legitimacy.

- “Section 149 of Bharatiya Sakshya Adhiniyam, 2023”: Inquiries During Cross-Examination - This section permits witnesses to be cross-examined on any fact that could impact their credibility, including matters related to DNA evidence if it proves relevant to the case.
- “Section 157 of the Bharatiya Sakshya Adhiniyam, 2023”: Question by Party to his Witness permits a party involved in a proceeding to inquire about their witnesses regarding any prior statements they may have made, including those about DNA evidence.
- “Section 52 of Bharatiya Nagarik Suraksha Sanhita, 2023”: - This section is pertinent as it allows the investigating authorities to seek the help of medical practitioners during investigations. This involves taking DNA from the accused for investigation purposes. However, as per Articles 20(3) and 21, obtaining consent from the accused is essential or will be held as void.

### **Ethical Considerations Surrounding DNA Tests on Children**

The phrase “mankind owes to the child the best it has to give” given by the Geneva Declaration of Rights of the Child (1924) is a deep reminder of the obligations of society toward children, reminding everyone that their interests should always be put first. Ethically, children born through rape are often highly stigmatized because of the criminal status of their biological fathers. This stigma becomes a larger part of the community’s narrative while referring to offender children as the “forgotten victims of crime,” “orphans of justice,” or even “hidden victims of incarceration.” (Ye, 2023) Such nomenclature connotes a complete lack of regard and attention combined with a comparative lack of measures to address difficulties faced by offender children thereby contrasting sharply with the numerous works and support systems related to children affected by divorce in their parents’ lives.

The neglect such children face is a perpetuation of a cycle of marginalization and prevents them from improving their social standing or well-being. When children are made to start a new life by being given for adoption, it is that the decision regarding such a choice has to be based on what best serves those children’s best interests. Enabling DNA testing would resurrect those

connections with past trauma which might even not have any recollections for them or submit them to judgments from their societies against such a new beginning's very intent and hence should not be approved for ethically rightful reasons.

### **Informed Consent**

In any forensic procedure, obtaining informed consent is an ethical imperative. However, ensuring that minor children fully comprehend the implications of DNA testing can be challenging, as they may not have the same level of agency or understanding as adults. In cases involving minors, legal guardians may need to provide consent, emphasizing the need to prioritize the child's best interests, especially in sensitive matters like rape.

### **Privacy and Autonomy**

DNA testing involves analyzing and collecting an individual's material, which contains personal and sensitive information. Especially, Adopted children or children in orphanages have every right to privacy and autonomy over their data. This raises questions regarding who has the authority to consent on behalf of a minor for DNA testing and how we can protect the child's autonomy.

### **Potential Psychological Impact**

DNA testing has the potential to unveil unexpected and possibly distressing information about parentage or familial relationships. It is critical to consider the psychological impact such revelations can have on adopted children, especially in cases involving rape. Throughout this process, it is vital to ensure that mental health support and counselling are readily available for the child.

### **Stigmatization**

DNA testing can inadvertently lead to stigmatization or discrimination based on information. If test results reveal a connection with the accused, it may subject the child to additional social and psychological challenges, potentially affecting the child's maternal relationship. In cases where the child is given up for adoption, it's a well-established rule that adoptive parents are not provided

with the child's background or history. This can also have adverse effects on how adoptive parents perceive and relate to the child. The convict's children are always treated differently, they carry the stigma of having characteristics like violence, impulsive, and cruel behaviour and here the convicted person being a rapist makes it worse (Ye, 2023). Thus, considering these factors, DNA testing merely on the requests of the perpetrator is unethical.

### **Scientific Limitations of the DNA Test**

The significance of DNA in rape trials cannot be overstated. Over the years, numerous reports have explored its applicability and scientific validity. According to a study conducted by Dipa Dube from IIT Kharagpur, DNA tests were relied upon by the Court to exonerate the accused in approximately 42% of cases. By analysing various such cases, they drew the following analogies:

“Cases based on oral evidence, when coupled with the corroborative evidence in the form of DNA, help the Court to reach the definitive conclusion of the guilt of the accused. Cases based entirely on oral evidence and medical evidence but no DNA generates a 50% chance of the accused being convicted or acquitted. The reason is that the courts have to decipher the credibility of the victim and whether her testimony inspires confidence. Cases essentially based on circumstantial evidence greatly rely on DNA for decision-making. In cases of gang rapes, DNA is a crucial piece of evidence to establish the links of the accused to the crime in question. In cases where the offence has led to childbirth, DNA is significant to establish the paternity of the child and, thereby the links of the accused to the alleged crime in question. In rapes of minor girls (or statutory rapes), DNA is the single piece of evidence which can help to establish the violation of the victim by the accused, thereby establishing guilt, in the absence of the requirement of consent on her part.” (Dube, 2014).

Using DNA evidence in cases has its limitations. DNA can confirm the absence of specific materials at a crime scene or on a victim. Still, it cannot



provide insights into the crime's specific circumstances, such as consent or intent. Therefore, while DNA evidence is a powerful tool, it may not always offer a comprehensive understanding of the events.

Another challenge is the potential unavailability or incompleteness of DNA evidence. Factors like the passage of time or evidence contamination can impact the quality and quantity of recovered DNA. In certain situations, a negative DNA test does not necessarily rule out the occurrence of a sexual assault. It's important to recognize that DNA tests are not infallible and may yield false negatives. Consequently, there could be cases where DNA testing fails to detect the presence of the perpetrator's genetic material, even when a rape has occurred.

Several factors can contribute to false negatives, including DNA concentration or degradation. Interpreting complex DNA profiles can also be challenging, and errors during analysis and interpretation can lead to incorrect conclusions. Furthermore, when there are mixtures of DNA from multiple contributors, it further complicates the interpretation process.

It is crucial to consider these limitations of DNA testing when evaluating whether it should be mandated for children, especially in sensitive cases involving rape. The fact that DNA testing may not always be entirely accurate underscores the importance of exercising caution and discretion when deciding whether to compel such tests through legal means on an innocent child.

### **Legal Considerations in Allowing DNA Test of the Child**

The established legal doctrine is clear that courts cannot dictate how to investigate the investigating agency (*Sujith v State of Kerala*, 2013). Therefore, when an accused perpetrator applies to conduct a DNA test on a child who is born to rape victim and is been already given for adoption , the researchers propose that it should be carefully studied by the High Court, taking into consideration two pivotal aspects.

Firstly, the Court should assess how allowing this application may infringe upon a baby's fundamental right to privacy. This is a critical concern, particularly in cases involving sensitive matters like rape, where the privacy and well-being of all parties involved must be safeguarded.

Secondly, the Court should weigh the relevance of paternity in the context of the utterly separate question of rape. It is essential to recognize that establishing paternity does not directly address the issue of whether a rape occurred. However, the same may differ in “Protection of Children from Sexual Offences Act, 2012” (POCSO) as it lays down age of consent as 18. The age of consent is the age at which a person is considered legally capable of agreeing to marriage or sexual intercourse. So in these cases paternity itself is a sufficient proof of the crime.

The paper further emphasizes that current Adoptions Regulation 2022 has a sufficient mechanism to deal with such cases where DNA is very necessary without disturbing the Children’s well being and the accused’s fair trial.

### **Right To Privacy of the Child Born**

In August 2017, the Supreme Court’s Constitution bench, in the case of “K.S. Puttaswamy v Union of India (2017),” established that the right to privacy constitutes a fundamental right within the framework of Article 21 of the Constitution of India. This landmark case underscored that privacy is intrinsically linked to an individual, as it forms an integral component of the dignity inherent in human existence.

The pivotal question is whether children, like all other individuals, possess an inherent and fundamental right to privacy. In the year of 1989, the “Convention on the Rights of the Child” was introduced by the UN organization. Article 19 of this Convention safeguards children from all forms of violence, neglect, and abuse. Article 24(3) protects them from harmful traditional practices affecting their health, while Article 37 protects them from torture and ‘cruel, inhuman, or degrading treatment’. Besides these provisions, a child’s right to privacy comes into the picture, which encompasses the psychological and physiological well-being of the child. Any violation of these rights amounts to torture and cruelty. Degrading treatment to the child is prohibited and can never be justified under any law of the land. In case of any interference with the child’s rights, we should ask whether interference is lawful and non-arbitrary. The Convention also recognizes parental rights in guiding and assisting their children’s upbringing, as outlined in Article 5. Nevertheless, these parental



rights are subject to the condition that any interference with a child's bodily integrity must be supported by objective evidence showing that it benefits the child's health and development. Without such evidence, the interference cannot be justified.

Henceforth, a child's privacy concept may differ from an adult's. The Convention acknowledges the evolving capacity of children and their right to define their personal boundaries and identity. Article 8 of the Convention explicitly grants children the right to preserve their identity, including details of their parentage.

In the current scenario, a critical question arises: Can an innocent child be compelled to undergo a DNA test when, instead of serving the child's best interests, especially when it could potentially affect their future? If the test results indicate that the perpetrator is indeed the father, it could result in the child being treated differently by adopted parents. While times and attitudes may evolve, the enduring impact of growing up with the social taboo of being the child of a rape convict does not fade away. Societal stigma and the child's acceptance level within families and communities remain uncertain. (Ye, 2023). It is well-documented that survivors of sexual violence face significant stigma, and this stigma is believed to be even more pronounced when it comes to children born from such situations. "Regulation 48 of Adoption Regulations 2022" particularly provides for the confidentiality of records to be maintained of children adopted for the same reason.

Thus, when DNA testing of a child born to a rape victim has the potential to irreparably harm the child's future, subjecting them to societal prejudices and discrimination that can persist throughout their life should they be forced to go through the tests. The claims of the author have been recognised by the Kerala High Court in "*Suo Moto v State of Kerala* (2023)" which discussed how at times the adopted parents would not have divulged the fact of adoption to the child. The revelation could lead to an imbalance in the emotional status of the child.

In the current situation, it is imperative to acknowledge that an innocent child should not be coerced into undergoing a DNA test. This practice is not

only ethically questionable but also runs counter to their fundamental right to privacy and, most importantly, does not serve their best interests. Several courts of the nation have taken a similar stance when presented with the issue.

The recent ruling of the Allahabad High Court, drawing upon the Supreme Court's judgments in "Ashok Kumar and Inayath Ali," held that the child of the rape victim, in this case, is not a party in the ongoing criminal appeals. Furthermore, the child's status and paternity are not pertinent issues that need examination in these criminal appeals. The determination of the child's paternity is unnecessary in the context of these criminal appeals. Ordering a DNA test for the victim's baby child would infringe upon the infant's right to privacy, a constitutionally protected right, as affirmed by the Supreme Court in the case of "K.S. Puttaswamy v Union of India (2018)". Highlighting the legal precedents of Ashok Kumar and Inayath Ali, which the Chhattisgarh court cited, is crucial despite the different issues in those cases (Dilesh Nishad and Ors v State of Chhattisgarh, 2019).

In "Ashok Kumar v Raj Gupta (2022)," a Coordinate Bench carefully examined the use of DNA fingerprint tests. This case revolved around a property ownership dispute, where the defendants disputed the plaintiff's legitimacy as the son of the original property owner. During this case, a request for a DNA test was made. The Coordinate Bench emphasized that DNA is unique to an individual (except for identical twins) and can disclose a person's identity, familial connections, and even sensitive health information. When considering whether someone can be compelled to provide a DNA sample in such circumstances, the Court referenced the proportionality test established in the landmark decision of "K.S. Puttaswamy (Aadhaar-5J.) v Union of India (2017)", which constitutionally protected the right to privacy in India. Consequently, the Court emphasized the importance of assessing whether the pursued objectives are proportionate, non-arbitrary, non-discriminatory, whether they might harm the individual, and whether they justify intruding upon the person's privacy and personal autonomy.

In the case of "Inayath Ali," when considering an application for a DNA test to establish infidelity, the Supreme Court made a significant ruling. It held

that it is unjustified and wrong to direct DNA sampling of children who were not parties to the proceedings, especially when their status was not necessary to be examined. Their Lordships further ruled that instructing an examination of a child's paternity would infringe upon the privacy rights of the individuals subjected to such tests and could be detrimental to the children's future (*Inayath Ali v State of Telangana*, 2022).

In the case of “*Subash v State of Kerala* (2018),” The Kerala High Court was presented with a petition by the accused person seeking permission to undergo a DNA test to establish his claimed innocence. The purpose of this request was to prove that he was not the child's biological father. The accused argued that the rape of the victim had resulted in the child's birth, making the child's paternity a relevant factor. The Court, however, held that in this particular case, the child had been given up for adoption, and the child's whereabouts were unknown. It was evident that the child was entitled to maintain anonymity and privacy. Both the child and the adoptive parent may not wish to be entangled in legal proceedings. Moreover, the issue of the child's right to privacy also came into question. Consequently, unilaterally ordering a DNA test against the child was deemed inappropriate. The Court firmly held that DNA tests might potentially violate the child's fundamental right to privacy. It is essential to respect the child's privacy rights in this matter.

In a recent case, “*Aparna Ajinkya Firodia v Ajinkya Arun Firodia*” (2023), the Supreme Court delivered a crucial verdict emphasizing the paramount importance of safeguarding the well-being of children. It highlighted that society owes its best to children and, in doing so, recognized that an innocent child should not be held victim to extreme stress, tension, or trauma only to know its paternity. The Court emphasized that a child's precious childhood and youth should not be sacrificed in a quest to determine paternity, especially in cases involving infidelity. As said by Honourable Justice B.V. Nagarathna “Children of today are citizens and the future of a nation. The confidence and happiness of a child who is showered with love and affection by both parents is totally distinct from that of a child who has no parents or has lost a parent and still worse, is that of a child whose paternity is in question without there being

any cogent reason for the same.” The Court warned that the plight of a child whose paternity and legitimacy are disputed could lead to confusion, which could escalate if courts do not exercise discretion judiciously and responsibly.

Given the Supreme Court’s cautious approach in cases involving infidelity where branding a child as illegitimate is a concern, the same rationale should apply to cases where a child may be branded as the son of a rape convict. Henceforth, the use of DNA tests should be avoided, and requests for the same to be conducted by the accused should not be allowed, as upheld by the High Courts of Chattisgarh and Kerala. In “Narayan Dutt Tiwari v. Rohit Shekhar (2012) 12 SCC 554”, the Supreme Court, upholding the direction of the Delhi High Court, held that where a child himself approaches the Court in a personal application for a DNA test to establish paternity and there is a clear need for the same, the Court may pass a direction for the test. If need be, the direction can be enforced with the help of police and reasonable force.

### **Paternity is Not a Sufficient Proof of Rape**

The accused in rape cases have frequently cited decisions of the Hon’ble Supreme Court, such as “Vijayan v State of Kerala (2008),” “Kaini Rajan v State of Kerala (2013),” and “Krishan Kumar Malik v State of Haryana (2011)”. They argue that the lack of conducting a DNA test on the child born soon after birth is fatal to the prosecution’s case and should lead to their acquittal. However, it’s crucial to consider whether these Supreme Court judgments can be mechanically applied to all cases, particularly when the application of the ratio will lead to the violation of the newly recognized right to privacy in the Constitution. The Supreme Court’s stance on this matter is yet to be definitively answered.

However, when establishing that the rape convict is not the biological father of the child born is generally insufficient to demonstrate their innocence in a rape case, then how can the non-conducting of DNA testing itself be regarded as evidence of accused’s innocence?

Back in 2008, a single learned judge of the Kerala High Court in the case of “Sisu Bhavan v Joy Yohannan (2008)” took a progressive stance by

emphasizing the limited relevance of paternity in cases involving alleged rape offences. Furthermore, the learned judge asserted that by directing the petitioner institution to produce the child, the Sessions Court was effectively contravening the directions of the Apex Court in the *Lakshmi Kant Pandey*. The Apex Court's orders emphasized the absolute necessity of maintaining secrecy regarding the child's whereabouts when given in adoption, not only by the orphanage but also by all relevant parties involved. This confidentiality requirement is of paramount importance.

The Kerala High Court, further recently, in “*Subhash v State of Kerala (2018)*” held that allegations under Section 376 of the Indian Penal Code raised against the petitioner herein had no connection with the child's paternity. It was contended that, even if it is proved that he was not the child's biological father, that does not by itself disprove the allegation of rape which has to be independently evaluated. The victim is a rape survivor who cannot be burdened with the liability to undergo a DNA test (*Gulafsa Begum v State of U.P, 2021*).

In a similar case, the Allahabad High Court, in “*Gulafsa Begum v State of UP (2021)*” held that it did not have to consider the issue of determining the child's paternity. Instead, the central question in the case revolved around whether rape had been committed on the prosecutrix by the opposing party. In such a scenario, there was no valid reason for the prosecutor to subject her child to a DNA test. The Court emphasized that it is essential to note that the commission of offenses under Sections 376, 504, and 506 of the IPC cannot be ascertained through a DNA test, whether conducted with or without the consent of the prosecutrix.

In the case of “*Anandamay Bag v State of West Bengal (2007)*” the Calcutta High Court cited a decision of the Supreme Court in the case of “*State of M.P. v Dayal Sahu (2005)*” where it held that the non-examination of a doctor in a rape case is not always fatal to the prosecution's case, especially when the testimony of the prosecutrix is credible and inspires confidence in the Court. In such instances, the absence of a doctor's report does not undermine the case. The specific case before the High Court involved the rape of a 13-year-old girl. The High Court concluded that if the learned Trial Court deems the prosecutor's



evidence sufficient, conducting a DNA test is unnecessary. However, it is worth noting that at that time, the High Court remarked that the determination of the paternity of the child through a DNA test should be decided in a different forum and not in the case at hand. However, the Calcutta High Court, in the recent case of “Swapan Mondal v State (2021)” has held that paternity is not a relevant issue in that rape case. In this instance, the minor victim established the offense through other evidence. Therefore, her decision to decline a DNA test for the child born is not detrimental, and she is simply safeguarding her child’s best interests as a mother.

This framework, therefore, is what courts should consider in cases where DNA evidence is considered essential: do its aspects serve justice fairly while protecting the welfare of the child and their adoptive family from undue disruption? This approach is more in agreement with the twin objective of fair disposition in the judicial process as well as ethical treatment of children within such cases

### **Paternity as Conclusive Evidence Under POCSO**

The “Protection of Children from Sexual Offences (POCSO) Act” was enacted to bridge critical gaps within the legal structure for the safety and protection of children from sexual abuse and exploitation. It mainly serves two functions: enforcing the rights of all children to safety, security, and protection from such offenses and categorically defining those offenses while providing commensurate penalties as an effective deterrent as per the case of “Attorney General v Salrsi (2022)”. The strict law neglects all technical requirements of consent for minors under 18 since they are not held accountable for giving valid consent. In that regard, the judgment of “Parhlad & Anr. v State of Haryana (2015)” of the Supreme Court sustains that consent has no legal relevance in the case of minors.

Data brings to the forefront the requirement for this kind of stringent legislation. NFHS-5 states that 6.8% of the women within the age bracket of 15-19 years were either mothers or pregnant when conducting the survey. These women stand vulnerable to being sexually assaulted or exploited. (Government



of India Ministry of Health and Family Welfare, 2021). Also, according to NCRB data, the offender was well-known to the victim in around 97% of cases dealt with under sections 4 and 6 of the POCSO Act.(National Crime Records Bureau, 2021). The trend is ominous and threatens to open doors to groomers, traffickers, and offenders getting an easy way out by exploiting a child's consideration of consent, which may give them immunity under the statute.

The age for sexual intercourse with consent has been set at 18 years through the POCSO Act, and if such a situation can be proved as below the set age, questions of consent can be set aside. The above principle has been reiterated in the case of “Ravi Virumandi v State and another (2022)”, wherein the Madras High Court held that the POCSO Act does not attach any importance to the consent of a minor. The Court of law clarified that any sexual act performed against a child is covered by the law irrespective of claims made about consensual engagement.

Even when the female minor clearly states that it was consensual, the male counterpart is convicted under the provisions without compromise. (Age of Consent under the Protection of Children from Sexual Offences Act, 2012, 2023). While such cases bring out the strict application of the law, one should not fail to realize that in cases concerning child rape victims, consent becomes irrelevant, thereby making the DNA of a child born from such an act highly relevant.

### **Mandatory DNA Collection under Adoption Regulations 2022**

However, even in such cases courts need to consider “Regulation 39 of the Adoption Regulations, 2022” in cases related to children born of non-consensual sexual relations and the applicability of DNA tests.

Regulation 39 clarifies that in cases where the biological mother willingly surrenders a child born from non-consensual sexual relations or in instances where cases under POCSO or BNS are registered, the Child Welfare Committee is obligated to complete the DNA sample collection process. This process must be conducted within the stipulated timeline before the child is declared legally free for adoption. The aim is to address the right of the accused to a fair trial without causing undue distress to the adoptive families.

It is judicially recognized, as in “ABC v State of Gujarat, (2024)” and “Gaya Prasad Pal v State (2016)” that DNA tests undertaken by the Child Welfare Committee before the giving of the children for adoption have acted as a landmark before the Court. These cases outline how such efforts may help prove such crucial facts and still keep the best interest of the child and their adopted families. This mandate was recently appreciated in the same context by Justice K. Babu in “Suo Moto v State of Kerala (2023)”.

### **Conclusion**

As a researcher, we propose that the Court should not allow DNA testing of the child at the request of a person accused of rape post-adoption. Even though a child cannot express their will, they have all the fundamental rights, especially the right to privacy and well-being that are available to normal human beings. The child is also eligible for the right to privacy to safeguard his interests. It should be kept in mind that the DNA test result alone could never prove or disprove the sinful act of the accused. Further, the DNA test’s scientific and circumstantial limitations should be considered when making any decision.

However, it is not proposed that never a DNA test of the child should in no circumstances be allowed in rape cases. The courts should also consider certain exceptions, for instance, in cases like “Rajan K.C. v State of Kerala (2021)” where the victim of the rape case, i.e., the mother, had willingly consented to the blood sampling from herself and her child before adoption and mandate of collection under Regulation 39. In the case of abortion and the birth of a deceased child, the test may be allowed on the fetus with the consent of the victim’s mother. This approach is consistent with the Supreme Court’s reliance on DNA tests of the dead fetus in the case of “Kamalanantha v State of T.N. (2005)”

The principle proposed here is that the courts should not exercise discretion in the rest of the cases. After the prosecution has established the rape case accused beyond a reasonable doubt, it is upon the accused to disprove it. No such prayer of mandating DNA tests post-adoption should be entertained

as it interferes with the child's fundamental right to privacy and well-being. The principle proposed to protect the best interests of the child is particularly supported by two High Courts, Bombay High Court in "Surender Vijay Paswan v State of Maharashtra (2023)" and Kerala High Court in "Suo Moto v State of Kerala (2023)".

We conclude the protection of a child's fundamental rights, particularly their right to privacy and well-being, must remain paramount. Allowing post-adoption DNA testing compromises these rights and exposes the child to potential harm. While a fair trial is crucial, the mechanisms to achieve it must not come at the expense of the child's welfare. Narrowly tailored exceptions, supported by consent and necessity, should guide judicial discretion. This balanced approach ensures justice while reaffirming the inviolability of the child's dignity and best interests.

## References

- ABC v. State of Gujarat 2024 SCC OnLine Guj 1520.
- Age of Consent under the Protection of Children from Sexual Offences Act, 2012. (2023). <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2023/09/20230929466194485.pdf>
- Anandamay Bag v State of West Bengal 2007 SCC OnLine Cal 249.
- Aparna Ajinkya Firodia v Ajinkya Arun Firodia 2023 SCC OnLine SC 161.
- Ashok Kumar v Raj Gupta (2022) 1 S.C.C. 20.
- Attorney General v Salrsi (2022) 5 SCC 545.
- Benny, N. (2023). Kerala High Court stays orders for collecting blood samples of children of rape victims for DNA testing. LiveLaw. <https://www-liveland-in.gnlu.remotlog.com/high-court/kerala-high-court/kerala-high-court-rape-victim-children-blood-samples-dna-testing-privacy-adoption-232032?infinitescroll=1>
- Dilesh Nishad and Ors v State of Chhattisgarh Criminal Appeal No. 1400 of 2019.
- Dube, D. (2014). Determining the applicability of DNA evidence in rape trials in India. International Journal of Social Science Research, 2(1), 176. <https://doi.org/10.5296/ijssr.v2i1.4966>
- Gaya Prasad Pal v State 2016 SCC OnLine Del 6214.
- Geneva Declaration of the Rights of the Child, 26 November, 1924, <https://cawtarclearinghouse.org/storage/AttachementGender/DeclarationofgenevaontheRightsoftheChild1924.pdf>
- Government of India, Ministry of Health and Family Welfare. (2021). National Family Health Survey (NFHS-5), 2019-21: Compendium of Fact Sheets India and 14 States/UTs (Phase-11). [https://mohfw.gov.in/sites/default/files/NFHS-5\\_Phase-II\\_0.pdf](https://mohfw.gov.in/sites/default/files/NFHS-5_Phase-II_0.pdf)
- Holmes, M. M., Resnick, H. S., Kilpatrick, D. G., Best, C. L., Moore, J. G., & Moreno, H. (1996). Rape-related pregnancy: Estimates and descriptive characteristics from a national sample of women. American Journal of Obstetrics and Gynecology, 175(2), 320–325. [https://doi.org/10.1016/S0002-9378\(96\)70141-2](https://doi.org/10.1016/S0002-9378(96)70141-2)
- Hyderabad case: How effective is India's justice system in dealing with rape? (2019). BBC News. <https://www.bbc.com/news/world-50688435>
- Inayath Ali v State of Telangana 2022 SCC OnLine SC 1867.
- Kaini Rajan v State of Kerala 2013 9 SCC 113.
- Krishan Kumar Malik v State of Haryana (2011) 7 SCC 130.

- Lakshmi Kant Pande v Union of India AIR 1984 SC 469.
- Narayan Dutt Tiwari v. Rohit Shekhar (2012) 12 SCC 554.
- National Crime Records Bureau. (2021). Crime in India 2021 Volume I. <https://www.ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/1696831798CII2021Volume1.pdf>
- NCRB Report. (2022). Crime in India 2022 report. <https://www.ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/1701607577CrimeinIndia2022Book1.pdf>
- Parhlad & Anr. v State of Haryana (2015) 3 SCC (Cri) 807.
- Rao, V. N. (2019). The Indian Evidence Act: Principles and practice (3rd ed.). LexisNexis.
- Ravi @ Virumandi v State and another 2022 LiveLaw (Mad) 501.
- Sisu Bhavan v Joy Yohannan 2008 (4) KLT 550.
- State of M.P. v Dayal Sahu, (2005) 8 SCC 122.
- Subash v State of Kerala 2018 SCC OnLine Ker 7036.
- Sujith v State of Kerala 2013 SCC OnLine Ker 5758.
- Suo Moto v State of Kerala CRL.MC No. 5136 OF 2023.
- Swapan Mondal v State 2021 SCC OnLine Cal 2007.
- The Adoption Regulations, 2022 (India). [https://cara.wcd.gov.in/PDF/adoption%20regulations%202022%20english\\_27.pdf](https://cara.wcd.gov.in/PDF/adoption%20regulations%202022%20english_27.pdf)
- The Bharatiya Nagarik Suraksha Sanhita, 2023 (India). Retrieved from [https://www.mha.gov.in/sites/default/files/2024-04/250884\\_2\\_english\\_01042024.pdf](https://www.mha.gov.in/sites/default/files/2024-04/250884_2_english_01042024.pdf)
- The Bharatiya Sakshya Adhiniyam, 2023 (India). Retrieved from [https://www.mha.gov.in/sites/default/files/250882\\_english\\_01042024.pdf](https://www.mha.gov.in/sites/default/files/250882_english_01042024.pdf)
- Vijayan v State of Kerala (2008) 14 SCC 763.
- Yadav, D. M. (2016). Legal analysis of collection of rape evidence. Galgotias Journal of Legal Studies, 4. <https://www.galgotiasuniversity.edu.in/pdfs/2-Legal-Analysis-Collection-Rape-Evidence-Manish-Yadav-27218.pdf>
- Ye, X. (2023). Where does the stigma of prisoners' children come from: A sociological discussion based on criminal genes. Journal of Education, Humanities and Social Sciences, 8, 1593–1598. <https://doi.org/10.54097/ehss.v8i.4528>