THE USE OF BLOOD TEST IN PATERNITY CASES
(A MEDICO-LEGAL STUDY)

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This is to certify that Mr. Irshad Mohammad Khan, has completed this dissertation entitled "The Use of Blood Test in Paternity Cases - A Medico-legal Study" under my supervision.

This is done in partial fulfilment of the requirements for the award of Mater of Laws degree. It is complete and fit to be submitted for evaluation and report.

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The paternity of a child is a biological fact and it does mean that the paternity of a man lie in a man who (bigotten) fathered him, so paternity is a question of fact, on the other hand legitimacy means that a child is born of a legally recognised union and if the child is born of an illicit union or as a result of casual act of intercourse the child would be treated as illegitimate. When the legitimacy of a child/proved the paternity of that child/automatically/proved. But all proved paternities are not legitimacies.

By proof of paternity means, firstly proving the biological father of the child, and secondly, all the biological fathers of a child are not the fathers of that child in law. For example, if A is born to his mother B, the mother conceived by Mr. C and B and C are not husband and wife in law than the A is the son of C in biology, but not in law, or C is the father of A in biology but not in law.

Here in law legitimacy is more important than paternity because all legal consequences i.e. maintenance, inheritance and custody rights etc. of the child are bound by his legitimacy and not by his paternity. The evidence of paternity is a very
important evidence in the proceedings of legitimacy.

In order to define the concept of paternity in a legal system the attempts have been made to critically analyse the concept relating to legitimacy and relations between the two, i.e. paternity and legitimacy. A detailed discussion of the legitimacy will give rise to a clear picture of paternity also. In order to bring the clarity in the concept of paternity, legitimacy is simultaneously discussed.

It is not easy to define legitimacy as an abstract concept without reference to particular legal system. Nevertheless most systems of law have drawn a distinction between the legal position of a child born of legally recognised union or a casual act of sexual intercourse.

The common law rule is that a child is legitimate if his parents lawfully married either at the time of his conception or at the time of the child's birth. In English Law as a matter of social policy law leans heavily in favour of legitimacy of children, born during the subsistence of legal marriage.

Nevertheless while it is unjust and unconscionable to foist paternity and its attendant responsibilities on a man who by all reasons could not have been the father of the child. Hence, while the law should fully protect and safeguard legitimacy, it should also allow proof of facts which render paternity
highly improbable in a particular case.¹

Muslim Law has its own rules relating to the legitimacy, parentage and acknowledgement of paternity and differs from the other legal systems in this respect.

In Muslim Law parentage is established either -

i) By birth during a regular (also irregular not void) marriage, or

ii) By acknowledgement

It must be noted that western system of legitimation has no place and recognition under this system. Acknowledgement of paternity is quite different from the doctrine of legitimation.

Legitimacy is a status which results from certain facts, legitimation is a proceeding which creates a status, which did not exist before. In the proper sense there is no legitimation under Islamic Law.² On the other hand the Evidence Act has recognized the western concept of legitimation. Section 112 of the Indian Evidence Act 1872, raised a legal presumption of legitimacy applicable to the off-spring of all married couples in India. It laid down that a child would be deemed to be legitimate if it was born,

i) either 'during the continuance of a valid marriage' between its parents, or

¹ V.N. Nageshwara Rao, Conclusive Proof of Legitimacy U/s 112, Evidence Act, V. 94 Cr.L.J. 1988, p.36
ii) within 280 days after its dissolution the mother remaining unmarried.

The fact of a child's birth in either of these two circumstances would, according to the Section be a conclusive proof of its legitimacy, unless it could be shown that the persons stated to be its parents never has 'access' to each other at a time when it 'could have been bigotten'. The legal presumption raised by the Section had the effect of the burden of proving the illegitimacy of a child satisfying on the person interested in making it out. The presumptions is never a final truth, they are prone to rebuttals. The presumption of legitimacy largely depends upon the presumed fact that the parties to a marriage have necessary access to each other. That is why the presumption is allowed to be overthrown by proving that there was no access of husband and to his wife at about the time when the child could have been bigotten.

The word 'access' can be explained as an indicia of opportunity for marital intercourse. An 'access' and 'non-access' cannot exist and non-existence for marital intercourse.

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The demand of justice and truth is that the father of a child in law shall be the same who is the biological father of that child. The presumptions are never final truth so every presumption howsoever strong it may be rebutted by any other more convincing and direct evidence so the presumption of legitimacy and paternity can validly be rebutted or corroborated by the modern scientific techniques specially those techniques which are being developed as branches of science i.e. pathology, forensic and genetics. These developments can very well be used and utilized to find out more specific and reliable conclusion. The considerable advance in the science of blood grouping has provided the courts of law an improved means of proof of special value where the question of paternity arise. It is for the legislature and the courts to fit and utilize such evidence into the existing legal framework.

Barbara E. Dodd in his paper "The Scope of Blood Grouping in the elucidation of Problems of Paternity" describes the scientific aspect of paternity testing in terms, understandable by those who are neither scientist nor blood group specialists and he had particularly in mind the legal practitioner.

Scientifically, father is the person whose sperm has fertilized ovum of child's mother. During fertilization both father and mother contributes 23 chromosomes each. The chromosomes carry genes on them, which are responsible for
hereditary traits. So far maternity is concerned, it can be proved by proof of delivery. Scientific principles are made use of mainly in disputed paternity. It is an invariable principle of human biology that blood of a child must inherit its characteristics from either of the parents.

If blood of a child constituents which are neither available in the husband nor in the wife, paternity of the husband becomes doubtful. Blood groups can be used as aid in the elucidation of problems of doubtful paternity because they are characters which obey Mandelian Laws of inheritance. Moreover, they can be investigated by means of a clear-cut objective tests.

Prof. Chandrasekaran of Disputed Paternity Centre, Madras, said "we test about ten systems". The deciding factor was the S.L.A. typing of blood group. The population could be divided into 300 million groups and if all these tests were conducted, it almost reaches individualisation of blood. In these instances, he said, "we can say cent per cent whether a particular child is not a child of X and Y, but we can say that 99.9 per cent that the child is born to a person. Referring to the Disputed Maternity case of Mary, Prof. Chandrasekaran stated that eight persons in all were tested and they were the Mary and

7. Vidya Sagar, Presumption of Legitimacy, 1986(3) SSC 11.
other family members of both sides. We, then found that the first couple was not the biological parents and the latter Perumal and Kaliyammal were 99.9 per cent the real parents.

The arrival of DNA finger printing particularly as developed by Alec Jefferys and colleagues at Leicester University is a big step towards a forensic scientist's goal in this area i.e. pin-pointing the real parents in the disputed paternity case. This technique has the potential to exceed the efficiency of conventional systems (blood group test system) because there are good grounds for anticipating that definite answers not only those, excluding paternity but also for pin-pointing the true father, will be obtained in every case.

The gene is the unit of inheritance. Genes are made of deoxiribo-nuclic acid (DNA). DNA polymers are differentiable not on the basis of physical or chemical properties of molecular size, geometry or substituents groups, but rather by difference in information contents (i.e. genetic code). The genetic imprint is a basis of criminal investigations ...... and in solving disputed questions of paternity. 9

The most problematic field of the determination of paternity comes when the concerned parties decline their consent for blood test. In the absence of any legislation on the subject, the courts have to look into the stray statutes to find out the

base to order for compulsory blood test. Lacking legislation the courts had not found it easy to fit such blood test evidence into the legal framework and the process of doing so was continued till 1969. The chronology of judicial pronouncements is reflecting a systematic picture that how the law developed in England by the courts in this respect.

In W.V.W. (1964), the court decided it had no power under any statute, rule of court, or any inherent power to order to blood test. In H.V.H. (1966) the Court held that it had power to order a child's blood to be tested but would never do so where the result might be against the child's interest. The courts when exercising their inherent powers to order blood tests, will refuse it which may prejudice the infant's interest. Section 20 of Part-III of the Family Law Reform Act 1969 confirms the power of the court to require the use of blood tests, however, it retains the courts discretionary powers to refuse to make an order. This legislation has not introduced any new principle it what did was that it legitimize the course which British judiciary has taken by granting it the discretion, which can be exercised by the courts both positively and negatively in appropriate cases.

"Section 20(1) provides that the court 'may' give direction for the use of blood tests. I do not think that the provision can possibly be intend to confirm an unfettered discretion on these courts .... the Act gives no guidance as to the circumstance in which blood tests should be ordered and I think that this mean
that superior courts are to settle principles in so far as it is necessary to disturb existing law in order to comply with the Act, and thereafter the lower courts are to apply those principles to cases which came before them." 10

"I think that the final abolition of the old strong presumption of legitimacy by Section 26 of the 1969 Act shows that in the view of Parliament, public policy no longer requires that special protection should be given by the law to the status of legitimacy. ..... the truth must come out, and, indeed that truth should out ruat collum". 11

In W.V. Official Solicitor, he said: In my opinion when a court is asked to decide a paternity issue, it is in the best interests of every-one that it should do it on the best evidence available. The issue of such importance affects so many people that it should be decided on all evidence and not half of it. 12

The position in India relating to the power of the courts 'in paternity proceedings' is similar to that of England, and very rightly we can say that the India's position can be tallied with pre-1969 British position. The Indian judiciary is passing through the same track, which the British judiciary has passed. When the chronology of judicial pronouncements in India, where the courts confronted with the problem of ordering compulsory

11. Ibid.
12. (1970) 1 All.E.R. 1159
blood test. They justified their orders one way or the other. The result being no uniform and certain law is developed. Their reasons were based more on common sense and sociology of interests of the parties than on strict legal principles.

In those cases where one party is interested in blood test evidence but the other party refused to submit for the test. The interested parties always tried to convince the courts that the courts in India have power to order for the test and the court can draw this power from the various provisions of Indian Statutory Laws e.g., in State of Bombay v. Kathi Kalu, the court observed that what is forbidden under Article 20(3) is to compel a person to say something from his personal knowledge relating to charge against him. The person submitting for blood test is not giving any personal testimony that is why not hit by Article 20(3).

In P. Venkataswaralu v. P. Subbaya, the learned judge below ordered to appear for blood test on the application by plaintiff under Section 151 C.P.C. But the High Court reversed the order and said: "Section 151 has been introduced into the code to give effect to inherent powers of the courts. Such powers can only be exercised exdebitio justiae and not on the mere volition of courts or invocation of parties.

In Subbaya Gounder v. Bhoopala Subramanium, the court observed that in India there is no provision either in C.P.C.,

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14. AIR (38) 1951 Madras 910 (1).
15. AIR 1959 Madras 396.
Cr.P.C. or Evidence Act, empowering courts to direct such a test to be made.

In *Lokamma v. Sundara Sapalva*, acting under Section 401 read with Section 397 and also with Section 482, Cr.P.C. the court directed the Magistrate to have the petitioner and the respondent examined. Justice Noronha observed that: "It is an important test and would go a long way in the ends of justice".

An attempt has been made with a view to give a brief survey of the various judicial verdicts in their chronology and to observe the systematic development of the law in this respect, first in England leading to the enactment of two legislation i.e. Part-III of the Family Law Reform Act, 1969, and the blood test (evidence of paternity) Regulations Act 1971. Secondly, how judiciary tried and failed to adjust the blood test evidence into the existing legal framework and how the legislative inaction is proved to be the fore-runner of judicial failure, and why the judiciary is in want of legislative clarity in this respect.

**PLAN OF STUDY**

The present work is all about this concept of paternity in various legal systems, blood test evidence, DNA imprinting and the power of the courts to order compulsory blood test, is divided

into three chapters.

The first chapter deals with the concepts of paternity in English, Islamic and Indian Law and the points of similarities are highlighted and a critical evaluation of the points of difference has been tried in all the three systems. The second chapter examines the blood test techniques to procure the scientific evidence of paternity in the disputed cases and this chapter also deals with the study of D.N.A. imprinting techniques and its application in the determination of paternity and its relevance in the paternity suits. The third chapter examines the power of the courts to order compulsory blood tests in English, American and Indian legal systems, the relevant constitutional provisions, statutory provisions and the judicial pronouncements in the landmark decisions. The order of the development of the law is tried to be present. The important legislative enactments are also discussed at the right places.

It has been tried to present the development of law on the point in the same order as it is being developed by the different legal systems.
PART - A : ENGLISH LAW

Policy of Law

The paternity of a child is a biological fact and it does mean that the paternity of a man lie in a man who fathered (begotted) him so paternity is a question of fact. On the other hand legitimacy means that a child is born of legally recognised union and if the child is born of an illicit union or as a result of casual act of intercourse the child would be illegitimate. When the legitimacy of a child proved the paternity of that child is automatically proved. But all proved paternities are not legitimacies.

By proof of paternity means, we are proving the biological father of the child. And all biological fathers of a child are not the fathers of that child in law. For example, if A is born to his mother B, the mother conceived by Mr. C and B and C are not husband and wife in law then the A is the son of C in biology but not in law, or C is the father of A in biology but not in law. Here in law legitimacy is more important than paternity.
because all legal consequences i.e. maintenance and inheritance etc. of the child are bound by his legitimacy not of his paternity. But the evidence of paternity is a very important evidence in the proceedings of legitimacy, adultery.

In order to define the concept of paternity in a legal system we have to go in deep in its concept relating to legitimacy and the relation between the two i.e. paternity and legitimacy which has been discussed above in short, but a detailed discussion of the legitimacy will give rise a clear picture of paternity also. So here we will discuss the paternity and legitimacy simultaneously.

It is not easy to define legitimacy as an abstract concept without reference to a particular legal system. Nevertheless most systems of law have drawn a distinction between the legal position of a child born of a legally recognised union and that of a child born of an illicit union or a casual act of sexual intercourse. The Common Law, like Roman and modern system based upon it, adopted the rule that no child could be legitimate unless it was either born or conceived in wedlock.

To a student of Comparative Law, western family laws relating to legitimacy and parentage reflects certain interesting antimonies which creates tension between the law and the life. On the one hand he noticed the influence of philosophy of original sin and fall from grace and the policy of
maintaining the stability and integrity of the family unit that can justify the counting discrimination against the illegitimate child. On the other hand, there is a philosophy that the law should not discriminate against any child or impose disabilities on him by reason of the accident of his birth.¹

This cleavage of philosophy is noticeable in the majority and minority opinion contained in the report of the Royal Commission on Marriage and Divorce in England.²

Despite the fact that our general social attitudes have become increasingly more relaxed and tolerant towards individual shortcomings and illegitimacy today does not subject a bastard to the severe disabilities of the past, the legal relationship between a child and his parents still depends to a large extent upon whether or not he is legitimate. Parentage and filiation have very important legal effects on inheritance, maintenance, marriage and guardianship of person and property.

2. Report of the Royal Commission on Marriage and Divorce, 1956, Section 1180 –

A minority of seven members took the view that the differentiation between legitimate and illegitimate children, stigmatised children for the shortcomings of their parents and socially it was justifiable to legitimate any children, born at any time to a man and woman who, subsequently, become husband and wife. A majority of the Commission, however, deplored and held that so long as marriage was held to be voluntary union for life of one man with one woman, subsequent legitimation of children conceived by some other person would be wholly incompatiable. This would lead to blurring of moral values in the public mind and "a powerful deterrent to illicit relations ......."
The Common Law rule is that a child is legitimate if his parents were lawfully married either at the time of his conception or at the time of the child's birth. A child will be legitimate if his parents were married at the time of his conception, even though the marriage was terminated before his birth. Consequently a posthumous child will be legitimate, as will be one whose parents marriage was terminated by divorce between the time of his conception and his birth.  

There may be one case where he will be legitimate although his parents were married neither when he was conceived nor he was born. If he is conceived as the result of premarital intercourse and his parents then marry, but his father dies before his birth, he will presumably be legitimate. It is, thus, obvious that legitimacy is basically a question of fact.

Here respectfully I submit that legitimacy is not always essentially a matter of fact. But paternity is always a matter of fact, which can not be assigned by the operation of any law unless it is proved that the father has really begotten the mother of the child either by pre or post marital intercourse or even after the termination of their marital tie. The paternity does never depend on marital status of the parents but it is a biological fact i.e. by whose sperm the ovum of child's mother is got fertilised which resulted in the birth of the child.

As a matter of social policy law leans heavily in favour of legitimacy of children born during the subsistence of a valid wedlock. Bastardizing the children without clinching proof of legitimacy is brought with serious disadvantage to the children in particular and evil consequences to the society in general. The sanctity of marriage as a social institution must be given a cover of protection by law. As is often said maternity is of fact but paternity is of opinion and surmise. Hence married mothers must be protected from being dragged to courts of law to defend their virtue in suit cooked up by greedy and troublesome litigent relatives. Nevertheless, while it is unjust and unconscionable to foist paternity and its attendant responsibilities on a man who by all reasons could not have been the father of the child. Hence, while the law should fully protect and safeguard legitimacy, it should also allow proof of facts which render paternity highly improbable in a particular case.  

In England the aforesaid policy and the objective of the fact of paternity were achieved legally by the device of a presumption. Originally a conclusive presumption in favour of legitimacy exist in certain cases. Thus, where a husband and wife have cohabited together and no impotancy is proved the issue is conclusively presumed to be legitimate though the wife is known to have been at the same time the guilty of infidelity.  

6. (1833) 5 C. and p. 604
This legal presumption that he is the father whom the nuptial show to be so is the foundation of every man's birth and status. It is plain and sensible maxim which is the cornerstone, the very foundation, on which rest the whole fabric of society and if it is allowed once to be shaken there is no saying what consequence may follow. A child born of a married woman is to be presumed to be the child of the husband, unless there is evidence which excludes all doubts that the husband could not be the father. The presumption of legitimacy places the burden of proving the illegitimacy of a child to a married woman or whoever asserts that he/illegalimate. The presumption can be rebutted by proving that no sexual intercourse took place between the husband and the wife during the possible period within which the child must have been conceived or that despite such intercourse, the husband was not the father as the mother had other lovers at the same time. In the latter case it was almost impossible for a husband to dispute the paternity of a child born to his wife.

The presumption of legitimacy continues if the wife is shown to have committed adultery with any number of men, the law will not permit an enquiry whether the husband or some other man is more likely to the father of the child, and it must be

affirmatively proved before the child can be bastardized that the husband did not have sexual intercourse with his wife at the time when it was conceived. 9

In Francis v. Francis, 10 where a husband failed to rebut the presumption that he was the father of his wife's child even though she admitted commission of adultery at the time of conception and he proved that he was habitually wearing a contraceptive sheath for sexual intercourse during the relevant period.

**Presumption of Legitimacy and Gestation Period**

The presumption of legitimacy equally applies where the child is born within the possible period of gestation after the marriage has been terminated by the husband's death or by final decree of divorce or nullity. It has been said that the average period of gestation is 280 days, the court cannot accept this as a fact without expert evidence and medical witnesses have proved difficult to tie down to either a minimum or a maximum period.

The shortest period of gestation which has been accepted by English Courts is 174 days. 11 But no specific maximum and minimum periods of gestation are judicially recognised.

The House of Lords refused to hold that the birth of a child 360 days after the last possible date of matrimonial intercourse was of itself proof of adultery. It was also cited the precedents to remark that even the normal period of human gestation has from time to time been differently stated, e.g. 270-275 days, 173-280 days.\(^\text{12}\)

In Goskil v. Goskil\(^\text{13}\), on the basis of medical testimony it has been held that a period of 331 days was quite possible. But when M.T.V.M.T. and Official Solicitor cited in the Preston Jones case, the expert testimony was laid to show that the interval of 21 days between coitus and fertilization as had been suggested in Goskil's case, was not authentic, it was held that a lapse of 349 days between coitus and the birth of a normal baby was impossible.

Lord Mac Permott observed: The Law of England has not fixed limits of deviation from the normal period in the sense that more than a certain period or less than a certain period is to be deemed impossible, possible unless the contrary is proved. He then proceeded to observe that a time must come when with the period far in excess of the normal the court may properly regard its length as proving the wife's adultery beyond reasonable doubt.


\(^{13}\) (1921) p. 425
Legitimation Per Subsequence Matrimonium

Legitimation by subsequent marriage, this doctrine is now widely recognised in Common Law world. The Legitimacy Act 1926 introduced the principle of legitimation into English Law. This principle render an illegitimate child legitimate whose parents marry after any time after his birth. Section 8 of the Act has provided that a person shall be regarded as legitimated for the purpose of English Law if the father was domiciled in a country recognising 'legitimation per subsequent matrimoniun' at the time of the marriage ......

Section 1 of the Legitimacy Act 1926 has provided "where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of illegitimate person was or is at the date of marriage domiciled in England or Wales, render that person, if living, legitimate from the commencement of this Act, or from the date of the marriage, whichever last happens".

In C. v. C. 14, the Judge Romer observed that the legitimacy is a question of status. This status of legitimacy can be obtained by being born legitimate or by being legitimated by virtue of the provision of the Act. The plaintiff had attained that status and it is an irrelevant consideration whether she attained it in one way or the other.

14. (1947) 2 All. E.R. 50
PART-B: ISLAMIC LAW

Purity of Conception

The Islamic Law has its own rules relating to the legitimacy, parentage and acknowledgement of paternity, and differs from the other legal systems in this respect. Due to strict adherence to the strict principles of purity with regard to conception, the concept of paternity and the legitimacy of child is distinguishable from other legal systems i.e. English legal system and Indian secular legal system.

The Islamic Law embodies the principle of strict enforcement of sexual morality by prohibiting at the pain of various punishments sexual relationship except when it is between husband and wife. Under several western systems, sexual relationship outside wedlock is not a legal offence unless it is aggravated by circumstances such as lack of consent, the younger age of the girl, the blood relationship of the person concerned or unnatural behaviour which will give rise to criminal offence of rape, unnatural carnal, incest, bestiality or sodomy. Under Islamic Law, parentage is established either -

i) by birth during a regular (also irregular, not void) marriage, or
ii) by acknowledgement, but it must be noted that adoption is not recognised under Islamic system. The western system of legitimation has no place and recognition in it.

Establishment of Maternity:

Under Sunni Law – The maternity of a child is established in the woman who gave birth to the child irrespective of whether the birth was the result of a wedlock or zina and if a child produced of a zina than he inherits from mother alone and not from the father.

Under Shia Law – Mere birth is not sufficient to establish maternity. It has to be also proved that the birth was a result of a lawful marriage. And an illegitimate child has neither maternity in the woman who gave birth to the child nor paternity in the father who begot it. The illegitimate child can neither inherit from father nor mother.

Establishment of Paternity:

Paternity is established in the person said to be father by legal presumption or by proof, that the child was begotten by him on a woman who at the time of conception was his lawful wife. The western doctrine of legitimation of paternity is different from the doctrine of acknowledgement of paternity in Islam. Acknowledgement of paternity by father may arise only:

i) where the paternity of a child is not known or established beyond the doubt,

ii) it is not proved that the claimant is the off-spring of Zina,

iii) the circumstances are such that they do not rebut the

16. Supra n. 15.
presumption of paternity.  

Justice Mahmood in Muhammad Allahadad's case observed: "Where a legitimation proceeds upon the principles of legitimating children, whose legitimacy is proved and admitted, the rule of acknowledgement proceeds upon the assumption that the acknowledged child is not only the offspring of the acknowledger by blood, but also the issue of a lawful union between the acknowledger and the mother of the child".  

Legitimacy is a status which results from certain facts, legitimation is a proceeding which creates a status which did not exist before. In the proper sense there is no legitimation under Islamic Law.  

Recently, in S.A. Hussain v. Rajamma, the Andhra High Court held that where the paternity of a child can not be proved by establishing a marriage between the parents. Islamic Law recognises 'Acknowledgement' as a method, where by such marriage and legitimate decent can be established as a matter of substantive law for purposes of inheritance. This doctrine does not apply to a case where illegitimacy of the child is proved and established either because the lawful marriage between the parents of the child is impossible or the marriage itself being disproved.  

17. Supra n. 15.  
The doctrine applies only in cases of uncertainty.

**Qura'nic Sanctions**

There is no specific Ayat in the Holy Qura'n which deals with paternity and legitimacy. There are two Ayats - one in 'Surah-al-Baqarah' and other in 'Surah-al-Talaq' from which guidance relating to rules of paternity and legitimacy may be inferred. The basis of the concept of 'Iddat' is to be found in the following Qura'nic Ayats.

"Divorced women shall wait concerning themselves for three monthly periods. Nor it is lawful for them to hide what Allah hatched created in their wombs".  

"O Prophet(SAW)! When you divorce women, divorce them at their prescribed periods, and count (accurately) their prescribed periods".  

"Such of your women as have passed the age of monthly courses, for them the prescribed period, if ye have doubts, is three months, and for those who have no courses (it is the same).  

"For those carry (life within their wombs) their period is until they deliver their burden".  

Islamic Family Law prescribes the menstrual yardstick of 'Iddat', the waiting period that must elapse before a woman or a

22. Id. (65:1)  
23. Id. (65:4)
widow can seek remarriage since a pregnant woman ceases to menstruate for the remaining duration of her pregnancy. The 'Iddat' is a safeguard to determine whether or not she is carrying a child from her previous husband. This also means that outcome of 'Iddat' should diagnose the legitimacy of the off-spring with ramification for muslim legal provisions for inheritance.24

Sanction of Hadith

The establishment of parentage is based on the Prophet's (SAW) saying, the issue belongs to the bad and for the adulterer there is stoning.25

The period of gestation, therefore, assumes importance in determining legitimacy.

The Hanafis cite the tradition of Hazrat Ayesha in support of their argument that 'the child does not remain a moment longer than two years in the womb of its mother'.26

The Hanafis say that the said opinion of Hazrat Ayesha could only be based on hearing it from Prophet(SAW). According to the well known dicta of Imam Malik, Shafi'i and Ahmad Ibn Hanble, the longest period of pregnancy is four years.

25.
It is reported from Walid b. Muslim that he said: "I mentioned before Imam Malik the tradition warranted by Jamila Bint Saad as stated from Ayesha that no woman can remain pregnant for more than two years". Imam Malik said, good God: who can say this? The wife of Muhammad b. Ajlah, in my neighbourhood, remained pregnant for four years and the wife of Ajlah gave birth to three children and each child remained in the womb for four years. Similarly, Muhammad b. Abd Allah b. Hasan b. Ali remained in the womb of her mother for four years. 27

Legitimacy and Gestation Period

The period from conception up to the delivery of the child is gestation period. In the normal natural courses the gestation period is generally nine lunar months with some fluctuations. Due to this fluctuation the exact time period of gestation as a rule can not be laid down, instead a range from minimum to maximum time period of gestation is tried to laid down under various legal systems. Islamic law relating to the gestation period also laid down the minimum and maximum period of gestation.

Minimum period of gestation -

All the schools of Islamic Jurisprudence agreed upon the shortest, six months period of gestation fixed by the Holy Qura'n. Radd-ul-Mukhtar says, that the shortest period of gestation is six

months, according to all four Imams without difference. According to Islamic Law,

i) A child born within six months of marriage is illegitimate, unless the father acknowledges it. In other words, a child born after at least six months from the date of marriage is presumed to be legitimate, unless the putative father disclaims it. The shortest period of gestation has been accepted by the English Court is 174 days.\(^{28}\)

**Maximum period of gestation**

The perusal of relevant Qura'nic provisions reveals that thirty months time is needed for gestation and suckling the milk of mother. The time of thirty months is bifurcated into two parts: two years for breast feeding and six months for gestation of the child. On this analogical deduction of the Qura'nic provisions, Islamic Jurists have unanimity.\(^{29}\) Under Islamic Law, a child born after the termination of marriage is legitimate, if born:\(^{30}\)

i) within 10 lunar months in Shia Law,

ii) within 2 lunar years in Hanafi Law, and

iii) within 4 lunar years in Shafi'i, or Maliki and Hanafi Law.

Hanafi Jurists rely on Qura'nic provisions and Hadith reported by

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30. A.A.A. Fyzee, Outlines of Mohammadan Law, 181 (ed. 1964)
Hazrat Ayesha: 31

".... Regarding the longest period of gestation, Jung is of the view that 10 months is the period fixed by the Shia Jurists and also accepted by many of the Sunni Jurists. The period of the two years as the maximum was assigned by the Imam Abu Hanifa on the authority of Hazrat Ayesha, who is reported to have said as having received it from the Prophet (SAW) himself, that a child remains no longer than 2 years in the womb of its mother, even so much as the turn of a wheel".

The maximum period of gestation fixed by the Muslim Jurists have been criticized on the ground that they are not born out by the modern scientific knowledge of gestation and pregnancy. Therefore, the 10 months of longest period of gestation is fixed by the Shia Jurists also accepted by the Sunni Jurists. According to Imam Abu Hanifa, birth must take place within the two years of divorce or dissolution of marriage, the dictum of Abu Hanifa is based on the authority of Hazrat Ayesha's instance, and the muslim texts refer to stories about the 'sleeping factus'. 32

The main focus of the criticism is directed against the longest period of gestation, which in itself so divergent.

Before the enactment of Evidence Act, the Calcutta had declined

to apply the Muslim Personal Law relating to Legitimacy to a case in which the child was born nineteen months after the date of divorce, on the ground that to hold that such a child was legitimate would be 'contrary to the course of nature and impossible'.

The question as to why some of the Muslim exponents of law stretched the length of the period of gestation to two and four years have been posed by several commentators, notably Western scholars, and they have come out with their own explanations. Some have attributed this to the imperfect knowledge of gestation prevalent in early time. Baillie points out that the Sunnite doctors in laying down such long period had in view those abnormal conditions which 'sometime preplex the most skillful of medical faculty in Europe'. On this aspect the observation of Prof. Tahir Mahmood is pertinent to be quoted:

"We, however, submit that this is not the true basis of classical verdicts. The fact is that in view of the legal disabilities and social sufferings of illegitimate children and the criminal liability of their parents at Islamic Law, and in accordance with Islam's expectation on a very high standard of sexual morality from the followers, the policy of Muslim Law to regard every child as legitimate as far as possible. It is out of anxiety to keep children away from the stigma of illegitimacy

that Muslim Law prescribes unduly long periods as maximum period of gestation. In doing so Muslim Law does not worry whether the periods so prescribed by it agree or do not agree with the parallel rules of obstetrics.\textsuperscript{35}

In \textit{Umar Hayat v. Misri Khan},\textsuperscript{36} the Lahore High Court observed that:

"It is obvious that the varying periods of pregnancy given in books of medical jurisprudence and the maximum periods fixed by the Muslim Law relates to abnormal cases, and in each case it is for the plaintiff, who alleges that there were abnormal circumstances attending his birth to show that they existed".

Referring to the dictum of Abu Hanifa, M.U.S. Jung says, "We cannot argue that the great Imam has fixed 2 years as the longest period of gestation, because this rule is to be read together with the provisions that while observing the period of 'Iddat' the woman must declare that she is pregnant. This fact is to be decided within period of Iddat. And if declaration to woman were to continue and exceed the natural maximum limit of gestation, the case then would be fully covered by the 2 years rule of Imam Abu Hanifa".\textsuperscript{37}


\textsuperscript{36} A.I.R. (1924) Lahore 477.

\textsuperscript{37} Supra n. 32.
Prof. Coulson has some apprehension in his mind regarding the period of gestation fixed by sunnite doctors may give to various abuses are not well founded". Modern scientific researches show that the period of gestation is always subject to doubt. It is not in our power to fix limit to gestation.  

The House of Lord in *Preston Jones v. Preston Jones*, observed that if judicial notice was taken of normal period of gestation (which is variably given as 270 to 280 days or as 9 months), judicial notice should also be taken by the Court of the fact that the normal period is not always followed.

According to the thesis of N.J. Coulson that the Sunni Jurists stretched the period of gestation too much, to avoid the effects of illegitimacy, may give rise to the impression that these maximum limits were devised to soften the vigour of Islamic Law principles of strict enforcement of sexual morality through severe punishment prescribed for the offence of Zina. After referring to the Egyptian Reform of 1929, Coulson proceeds to show that tension exist between idealism and realism in Islamic Law leading to a gap between legal doctrine and legal practice. There could be a gape between theory and practice of law; and this characterises all legal systems, but if Coulson

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38. Taylor, Medical Jurisprudence, 63 (1905)
39. (1951) 1 All. E.R. 124 (H.L.)
40. Coulson, Conflict and Tension in Islamic Jurisprudence, pp. 75-76.
presses into service these presumptions limits of gestation to demonstrate the inefficacy of the Islamic Law rule of strict sexual morality then, it is submitted that he is unwarrantedly reading too much in these presumptions.41

PART-C: INDIAN LAW

Rebuttal of Legitimacy by the Establishment of Paternity

The general principle of law of Evidence is that one who asserts must prove in the court of law but there are certain facts which are presumed by the court for certain reasons of policy as well as of principles, presumptions fall in this category. The effect of a presumption is that a party in whose favour a fact is presumed is relieved of the initial burden of proof. The court presumes the existence of the fact in his favour and may act on it unless contrary is shown. The presumption is never a final truth they are prone to rebuttals.

For example, the court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.42 The court may presume the existence of any fact which it think likely to have happened, regard being had to the common course of natural events, human conduct and public and private

42. Section 114, Illustration (a), The Indian Evidence Act, 1872
business, in their relation to the facts of a particular case.43

Presumptions are the results of legal reasoning, argumen-tation, enquiry, general experiences, probability of any kind or a matter of policy or convenience in their application to particular subject. Section 114 of the Indian Evidence Act classified the presumptions into presumptions of fact are inference drawn from experience of daily life. Presumption of law, on the other hand, are the artificial rules of substantive or procedural law directing the courts to make certain mandatory assumptions. For example, the presumptions of innocence drawn in criminal proceedings requires that the court shall presume that the accused is innocent until his guilt is proved by the prosecution beyond all reasonable doubts.

The classification of presumptions into presumption of fact and of law coincides with another classification has based on whether the direction to the court to presume certain facts is recommendatory or mandatory. All presumptions of fact are merely recommendatory and the court may or may not draw the presumption depending upon the circumstances of a particular case. Presumptions of law, are, however, mandatory and the court must draw the presumptions as indicated and has no discretion in the matter.44 (Præsumptiones juris sed non de jure) or

43. Supra p. 42.
44. V.N. Nageshwara Rao, Conclusive Proof of Legitimacy Under Section 112 of Evidence Act, Cr.L.J. 1988, p. 34.
Presumptions of law either rebuttable or irrebuttable and these are rebuttable by proof of contrary evidence by party against whom the presumption is drawn. All the presumptions of facts are rebuttable. For example, under Section 82 of the Indian Penal Code, "nothing is an offence which is done by a child under seven years of age" and this is an irrebuttable presumption formulated as substantive principle of law. On the other hand, Section 43 of I.P.C. is an example of a rebuttable presumption of law and declares that "nothing 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 the nature and consequences of his conduct on that occasion."

While under Section 82 the prosecution is debarred from adducing evidence that, in the particular case, the child below the age of seven has the requisite maturity to commit the offence, under Section 83 the prosecution can rebut the presumption of immunity of a child aged between seven and twelve by showing that the particular child possesses sufficient maturity of understanding of the nature and consequence of the act concerned. Thus, presumptions may be either directory or mandatory and either rebuttable or irrebuttable, and they are defined in both these senses in Section 4 of the Indian Evidence Act 1872 as follows:
"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.

Example - The genuineness of a document purporting to be the Gazette of India shall be presumed and a document called for and not produced shall be presumed to be duly executed and attested.

"Conclusive Proof" : When one fact is declared by this Act to be conclusive proof of another the court shall on proof of one fact regard the other as proved and shall not allow evidence to be given for the purpose of disproving it. An artificial probative effect is given by the law to certain facts and no evidence is allowed to be produced with a view to combatting that effect.

These cases generally occur when it is against the policy of the government, or the interest of society, that a matter should be further opened to dispute. It is important to note that in the case of "shall presume" the party against whom the presumption is necessarily drawn must be given an opportunity to disprove the fact presumed and if he fails to disprove those facts the presumption stands. On the other hand,
in the case of conclusive proof the court must not only draw the presumption but what is more important and crucial is that it should not allow the other party any opportunity to adduce evidence in disproof of the facts presumed.

Presumption of Legitimacy under Indian Law -

Section 112 of the Evidence Act 1872, raised a legal presumption of legitimacy applicable to the off-spring of all married couples in India. It lay down that a child would be deemed to be legitimate if it was born -

i) either 'during the continuance of a valid marriage' between its parents, or

ii) within 280 days after its dissolution the mother remaining unmarried.

The fact of a child's birth in either of these two circumstances would, according to the section be, a conclusive proof of its legitimacy, unless it could be shown that the persons stated to be its parents never has access to each other at a time when it 'could have been begotten'. The legal presumption raised by the section had the effect of throwing the burden of proving the illegitimacy of a child satisfying its requirement on the person interested in making it out.45

When a child is born in wedlock, there is a presumption

45. Tahir Mahmood, Presumption of Legitimacy under Evidence Act, A century of Action and Reaction, Special Issue, 1973, p. 79.
in favour of its legitimacy. As legitimacy involves sexual intercourse between husband and wife, there is, therefore, a presumption when a child is conceived and born during marriage that such intercourse took place at a time when, according to the law of nature, the husband could be the father of the child.

The provision has since been treated by the courts in India as a general law determining legitimacy in the questions involving rights of inheritance and maintenance etc. under all civil, criminal and revenue cases.\textsuperscript{47}

The essential condition for the presumption in favour of the legitimacy of the child is that, that parties to the marriage should have had access to each other at any time when the child could have been begotten.

The presumption of legitimacy largely depends upon the presumed fact that the parties to a marriage have necessary access to each other. That is why the presumption is allowed to be overthrown by proving that there was no access of husband to his wife at about the time when the child could have been begotten.\textsuperscript{48}

\begin{itemize}
\item \textit{Subunna v. Venkataredle}, AIR 1950 Mad. 394.
\item See for example, \textit{Raj Bangi v. Dy. Director Consolidation}, AIR 1982 All. 335, where the evidence was that after the marriage but before Gauna the parents confined their daughter which forced the husband to marry another woman, the child born to first marriage was not regarded as his legitimate child.
\end{itemize}
The divorce was obtained by the husband after three years of dissertation by his wife, while she was living in her village a child born to her during this period was held not to be his child. 49

The cardinal rule of presumption is that the child shall be presumed to have been born out of the valid wedlock if both were having access with each other. In this situation neither the husband nor the wife shall be allowed to the birth of the child. This could further facilitate the child to enjoy the fruit of paternity. Further, the presumption would not cover a case of a child who has not been begotten at a time by husband and wife when he should have been. In this situation the burden of proving of non-accessibility with a wife falls upon the father. This is because no legitimate child should suffer illegally nor an illegitimate child should get advantage otherwise.

Access

The word 'access' used in the Indian Evidence Act, 1972 is of much importance and significance in corroborating and rebutting the presumption of legitimacy under Section 112.

Section 112 - Birth during marriage conclusive proof of legitimacy -

The fact that any person was born during the continuance of valid marriage between his mother and any man, or within

280 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.

The word 'access' can be explained as an indicia of opportunity for marital intercourse. Access and non-access cannot exist but the non-existence for marital intercourse. In B.B. Singh v. Mahesh Singh, the Privy Council held that the 'access' means effective access and physical incapacity to procreate, if established amount to 'non-access' within the meaning of this section.

It was observed in Siva Kani Ammal v. Koolyandi Chelliar, that when once access of, or intercourse by, the husband is proved, no evidence will be allowed to prove that the child is not the child of husband, and is to say, the presumption to be drawn becomes an irrebuttable one.

The presumption of legitimacy arising in favour of a child born during the continuance of a valid marriage, when the parties to the marriage could have access to each other at any time when the parties to the marriage could have access to each other at

50. **Supra** n. 49.
52. (1953) P.C. 199.
53. (1934) Mad. 318.
any time when the child could have been begotten, cannot be rebutted.  

It is to be noted that mere opportunities and not actual intercourse are sufficient to satisfy the 'access' test. The weakness of 'non-excess' test is exposed when we consider the example of a husband who suffer from spermia and is, therefore, not capable of producing a child. If such husbands wife begots a child from another man, Indian Law will even then conclusively presume the husband to be the father because he has access to his wife.

Non-Access

The presumption of legitimacy arising in favour of a child born during the continuance of a valid marriage, when the parties to the marriage could have access to each other at any time when the child could have been begotten, cannot be rebutted. The presumption contemplated under this section is a conclusive proof of law. It can be displaced only by proof of non-access. The person alleging illegitimacy must conclusively establish that the husband had no opportunity of intercourse with the wife at the time when, according to ordinary course of nature, the child could have been begotten. Non-access may be proved by means of such legal evidence as is admissible to prove a physical fact.

55. Vidya Sagar, Presumption of Legitimacy, 1986(3) SCC 111
The Supreme Court held that the law requires positive proof of 'non-access', a negative fact. The mere fact that the parties were living apart in different house is insufficient to establish non-access. The non-access has to be proved like any other physical fact and may be established both by direct and circumstantial evidence of an unambiguous character, but unless such evidence is forthcoming, it will not be possible for a court 'to believe it to probable that there was no access'.

In Vasu v. Shanta, was dealt what constitute access and non-access. The conclusive presumption of law can be displaced by proof of the particular fact mentioned in section namely 'non-access' between the parties to the marriage at any time according to ordinary course of nature he could have been the father of the children. Access and non-access only cannot exist of opportunities for marital intercourse. As special protection is given by law to the status of legitimacy in India. The law is very strict regarding the type of the evidence which can be let to rebut the presumption of legitimacy. Even proof that the mother continued adultery with any number of men will not be itself sufficient for proving the illegitimacy of the children. The presumption of law of legitimacy of a child will not be lightly repelled. It will not be allowed to be broken or shaken by a mere

balance of probability. The evidence of non-access for the purpose of repelling it must be strong, distinct, satisfactory and conclusive. The standard of proof in this regard is similar to the standard of proof of guilt in criminal cases. These rigours are justified by considering of public policy for true a variety of reasons why a child's status is not to be trifled with. The stigma of illegitimacy is very severe and we have not any of the protective legislation as in England to protect illegitimate children.

In Padmanabhan v. Bhurghavi, it was held that the access and non-access cannot only the existence and non-existence of opportunity for marital intercourse, the burden of proving which entirely rest upon the person disclaiming it, even when it is shown that the wife is living in adultery it is insufficient of access or non-access. The question of access and non-access must be considered with reference to the time, when the child has been begotten. As to when a child could have been conceived is a matter which may be decided on the facts and circumstances of each case and in the light of common course of events and medical possibilities.

The principal purpose of Section 112 is to impose the burden of proof on those who allege illegitimacy and absence of access between married persons. The court shall draw the

presumption not only on the satisfaction of the condition of birth during marriage but also on satisfying itself that no convincing proof of non-access is adduced by other party which is inconsistent with the hypothesis of legitimacy. Thus, the initial burden of proof lies on the party claiming legitimacy and that is discharged by proof of birth during the continuance of valid wedlock, and no proof of access is required. Then the burden shifts to the other party and it is for him to render legitimacy highly improbable by proof of one fact i.e. non-access between the parties to the marriage. If he succeeds in proof of non-access, the presumption is not drawn at all by court. If, on the other hand he fails to discharge this burden, the court must draw the conclusive presumption of legitimacy at this stage only and not earlier.
CHAPTER II

TECHNIQUES OF BLOOD TESTS AND DNA IMPRINTING

RELEVANCY OF BLOOD TEST EVIDENCE IN THE DETERMINATION OF PATERNITY PROCEEDINGS

The laws dealing with the legal presumptions of legitimacy and paternity in English Islamic and Indian legal systems are laid down in detail, which have been discussed in the previous chapters. The intention of the legislatures and the demand of justice and truth is that the father of a child in law shall be the same, who is the biological father of that child. The presumptions are never final truth, so every presumption howsoever strong it may be, rebutted by any other more convincing and direct evidence. The presumptions of legitimacy and paternity can validly be rebutted or corroborated by the modern scientific techniques specially those techniques which are being developed as branches of science i.e. pathology, forensic and genetics. These developments can very well be used and utilized to find a more specific and reliable conclusion. The considerable advance in the science of blood grouping has provided the courts of law an improved means of proof of special value where the question c
paternity arise. It is for the legislature and the courts to fit and utilize such evidence into the existing legal framework.

Barbara E. Dodd in his paper describes the scientific aspect of paternity testing in terms which will be clear to those neither scientist nor blood group specialist and he had particularly in mind the legal practitioner, as he has pointed out in this paper.

By the knowledge of manner in which the blood groups are inherited (the blood group inheritance obey the Mendalian Laws of Inheritance), the disputed paternity can be determined if the blood of mother and child and putative father is tested. The evidence that is to be found is negative only, that is, that a particular child is not produced by a particular father. When allegations are made against two different persons, it may be possible to exclude one of them.

Discussing the question of scope and value of blood group tests Modi in his book on Medical Jurisprudence\(^2\), states as under:

"In such cases it cannot be said by the determination of the blood groups of the parties concerned that a particular man is the father of a given child; but it may be possible to affirm by a process of exclusion that he cannot be the father of the child. The importance of this means of establishing non-paternity is

\(^1\) Barbara E. Dodd 'The Scope of Blood Grouping in the Elucidation of Problems of Paternity'

\(^2\) 1965 ed. p. 108.
obvious and has its application in suits of maintenance of illegitimate children and in suits of nullity, alleged adultery and blackmailing. The blood grouping tests have been accepted as evidence in India, England and other European countries. As the determination of various Rh. subgroups may now be carried out accurately with the help of antisera which have lately become more readily available. The tests are likely to be less fallacious and acceptable in our courts in India.  

Taylor has formulated the determination of the blood group of the child (the antigens are present at birth) and the alleged parents may provide evidence about the possibility of a certain person being the father of a child, or of deciding, when two persons are involved which of the two, if either could be the father. For some years now, evidence of (non-access, which can not be given by either of the spouses) has been provided indirectly by blood test.

To a common man illegitimate child means a child born out of an unlawful wedlock. Scientifically, father is the person whose sperm has fertilized ovum of child's mother. During fertilization both father and mother contributes 23 chromosomes each. The chromosomes carry genes on them, which are responsible for hereditary traits. So far maternity is concerned, it can be proved by proof of a delivery. Scientific principles are made use of mainly in disputed paternity. It is

an invariable principle of human biology that blood of a child
must inherit its characteristics from either of the parents.
If blood of a child contains constituents which are neither
available in the husband nor in the wife, paternity of the
husband becomes doubtful. 4

Blood groups can be used as aid in the elucidation of
problems of doubtful paternity because they are characters which
obey Mendalian Laws of Inheritance. Moreover, they can be
investigated by means of clear-cut objective tests. 5 Blood
group substances or antigens are situated in the outer envelope
of the red cells of the blood. Their presence is revealed by a
clumping or agglutination of the red cells when they are mixed
with appropriate antisera. The antisera are prepared from
human, or occasionally, animal sources and they contain agglu-
tinating substances called antibodies which will detect the
corresponding antigen on the red cell. The formations of the
antigens are controlled by entities called genes which are
present in the nuclei of all cells of the body. The genes are
situated on the thread like structure called chromosomes of
which in man there 23 pairs in each cell. The position occupied
by a gene on the chromosome is termed as its locus. Anyone of
several alternative genes may occupy a particular locus but it
is not possible for more than one of them at a time to be present

4. Vidya Sagar, Presumption of Legitimacy, 1986 (3) SCC 11.
5. Supra n. 1.
The genes such as these are termed allomorphs or alleles.

It is important to realise that each parent contributes a gene toward a particular blood group in a child. If the genes contributed in each parent are the same the individual is said to be homozygous for the particular gene and, if differs he heterozygous. The consideration of a hypothetical blood group system may make the position clear. Let us suppose that there are two alternative genes (alleles) Y and Z, which occupy a particular locus. Three types of individuals are possible, namely homozygous YY, homozygous ZZ, and heterozygous YZ. In the mating of YY with a YY female, all the children must receive Y from each parent, and themselves by YY. The appearance Z in a child, providing the mother-child relationship was not in doubt, would indicate non-paternity. The mating of YY male with a YZ female can give rise to children of two types. A Y gene from the father can pair with a Y gene from the mother, giving a homozygous YY child, or Y from the father can pair with Z from the mother giving a heterozygous YZ child. The appearance of ZZ child would again indicate non-paternity since a YY father can only give Y to his off-spring.

A study of blood group in many thousands of families has justified the confidence in the above statements, which can be condensed into the following two laws of inheritance:

1. A blood group gene cannot appear in a child unless present in one or other (or both) parents.
2. If an individual is homozygous for a blood group gene, it must appear in the blood of all his children.

The blood groups systems listed in table 1 are those in the current use in the investigation of the cases of doubtful paternity. Naturally the greater the number of groups included in the tests, the greater the chance of revealing non-paternity, if this is the true situation. The first eight systems mentioned in table 1 are systems in which the end product of the genes are the antigens on on the red cell surface. These give a combined chance of making of exclusion of about 60 per cent.

The most recent systems have not been the systems of genes given rise to antigen on the red cell, but genetically controlled serum components, Gm, haptoglobin and Gc groups. The combined exclusion rate, if these tests are used is raised from 60 per cent to 72 per cent. There is no doubt that other systems will be gradually added to these. In fact phosphogluco mutase (PGM), a red cell enzyme is already began to be used. Most of the groups are independent to each other and are based on different chromosomes.

The recently developed human leucocytes antigine (HLA) system alone is capable of demonstrating non-paternity in 90 per cent of cases but in combination of other grouping system it can raise 'non-father' exclusion upto 98 per cent.6

Table-1: Blood group systems used in cases of doubtful Paternity

<table>
<thead>
<tr>
<th>Name of System</th>
<th>Red cell antigen or serum factors tested for</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABO</td>
<td>A, A2, B and O</td>
</tr>
<tr>
<td>MNSs</td>
<td>M, N, S (S)</td>
</tr>
<tr>
<td>Rh</td>
<td>D, C,E, C, C(^W), e</td>
</tr>
<tr>
<td>Duffy</td>
<td>Fy(^a) (Fy(^a))</td>
</tr>
<tr>
<td>Kidd</td>
<td>(Jk(^a)) (Jk(^b))</td>
</tr>
<tr>
<td>Lutheren</td>
<td>(Lu(^a)) (Lu(^b))</td>
</tr>
<tr>
<td>Kell</td>
<td>K (k)</td>
</tr>
<tr>
<td>P</td>
<td>P(^1)</td>
</tr>
<tr>
<td>Haptoglobins</td>
<td>Hp(^1) and Hp(^2)</td>
</tr>
<tr>
<td>Gm</td>
<td>Gm(^1)</td>
</tr>
<tr>
<td>Gc</td>
<td>Gc(^1) and Gc(^2)</td>
</tr>
</tbody>
</table>

However, an investigation which does not include ABO, MNS, Rh (D,C,E,e,C\(^W\),e) and at least three or four of the other systems cannot be considered adequate).

Different blood group systems may be discussed separately in somewhat detail —

Blood grouping based on Red cell Antigens —

Depending upon the various types of red cell antigens and their hereditary transmission blood groups are classified into mainly three most important systems i.e. ABO, MN and Rh systems. The red cell antigens are identified by simple

---

Objective tests. A person's red cells are mixed with antiserum specified for a given blood group antigens. If the red cells contain the antigens, they are agglutinoted by the antiserum. The antigen present on the red cells and belonging to one and the same blood group system are determined by a pair of genes, are inherited from the mother, and the other from the father. For some groups, their testing sera that identify the products of both genes, and in this case the full composition of the person's blood group and his genotype can be determined. Where antisera are available for only one of the pairs of the genes, the phenotype alone can be identified i.e. the test will not distinguish between individual homozygous for the detectable products of the genes and heterozygous individuals who have inherited the detectable genes from one parent and non-detectable from the other one. Thus, for such groups, there are only distinguishable phenotypic classes, the positive who have detectable gene group products, and the negative who have not. In such instance the genotypes of individuals can be deduced from family studies, when the blood group of at least two generations are known.

**ABO System**

The ABO system divide mankind into four main blood groups as defined by the presence or absence in the RBC or individuals of two specific agglutinable substances known as A and B. The corpuscles of group A contains A agglutinogen; those of group B,
B agglutinogen; those of group AB contains both A and B agglutinogens, while those of group O contain neither A nor B. It is now known that there are two important A sub-groups, namely A and A₂. These are also found in group AB giving rise to sub-group A, B and A₂B.

i) Agglutinogen A or B cannot appear in the child unless it is present in one or both parents.

ii) Agglutinogen A, cannot appear in the child unless it is present in one or both parents.

iii) An O parent cannot have an AB child an AB an O child.

iv) If two parents are of the genotype AO and AO, a child OO may be born.

v) Parents of AA or AO genotype may have an A child, and

vi) The combination of AB parent with A₂ child and vice-versa cannot occur. The genetical law governing inheritance of ABC blood groups are illustrated in Table number 2.

**MN System**

In addition to the ABO system of blood groups other agglutinogens M and N exist in RBC. Human blood can thus, be divided into types, M, N and MN. In type M, the RBC possesses the agglutinogen M but not N. In type N the agglutinogen N is present but not M. In MN type blood possesses both M and N agglutinogen.

i) Agglutinogen M or N always appear in the blood of child as it is always present in the blood of the parents.
Table-2: Inheritance of ABO Blood Groups

<table>
<thead>
<tr>
<th>Blood Group of Parent-1</th>
<th>Blood Group of Parent-2</th>
<th>Possible</th>
<th>Not Possible</th>
</tr>
</thead>
<tbody>
<tr>
<td>C</td>
<td>C</td>
<td>O</td>
<td>A, B, AB</td>
</tr>
<tr>
<td>O</td>
<td>A</td>
<td>O, A</td>
<td>B, AB</td>
</tr>
<tr>
<td>A</td>
<td>A</td>
<td>O, A</td>
<td>B, AB</td>
</tr>
<tr>
<td>O</td>
<td>B</td>
<td>O, B</td>
<td>A, AB</td>
</tr>
<tr>
<td>B</td>
<td>B</td>
<td>O, B</td>
<td>A, AB</td>
</tr>
<tr>
<td>A</td>
<td>B</td>
<td>O, A, B, AB</td>
<td>None</td>
</tr>
<tr>
<td>O</td>
<td>AB</td>
<td>A, B</td>
<td>O, AB</td>
</tr>
<tr>
<td>A</td>
<td>AB</td>
<td>A, B, AB</td>
<td>O</td>
</tr>
<tr>
<td>B</td>
<td>AB</td>
<td>A, B, AB</td>
<td>O</td>
</tr>
<tr>
<td>AB</td>
<td>AB</td>
<td>A, B, AB</td>
<td>O</td>
</tr>
</tbody>
</table>

ii) Both M parents cannot have and N child and vice-versa.

iii) In matings where both parents are either type of M or N, the child always of the same type as the parent.

iv) In the mating where one parent is type M, and other type N, the children are type MN.

v) In the mating where one parent is homozygous (M or N) and other heterozygous (MN), all children are of parental type in a 50 to 50 ratio, and

vi) In mating where the parents are both MN children are three types possible.

S. Supra n. 6, p. 600
Table-3: Inheritance of MN, blood groups

<table>
<thead>
<tr>
<th>Blood Group of Parent-1</th>
<th>Blood Group of Parent-2</th>
<th>Blood Group of Children Possible</th>
<th>Not Possible</th>
</tr>
</thead>
<tbody>
<tr>
<td>M</td>
<td>M</td>
<td>M</td>
<td>N,MN</td>
</tr>
<tr>
<td>M</td>
<td>MN</td>
<td>M,MN</td>
<td>N</td>
</tr>
<tr>
<td>M</td>
<td>N</td>
<td>MN</td>
<td>M,N</td>
</tr>
<tr>
<td>N</td>
<td>N</td>
<td>N</td>
<td>M,MN</td>
</tr>
<tr>
<td>N</td>
<td>MN</td>
<td>N,MN</td>
<td>M</td>
</tr>
<tr>
<td>MN</td>
<td>MN</td>
<td>M,N,MN</td>
<td>None</td>
</tr>
</tbody>
</table>

Rh System

Another blood group system, independent of ABO and MN blood groups, is called the Rh blood group system. The Rh system is characterised by a set of antigens, determined by a series of allelic genes, and identified by symbols: R_1, R_2, R_0, R_2', r', r'', r^V, r. By permutation and combination of these alleles there various blood groups in this system.

i) Rh negative parents cannot produce an Rh positive child, and

ii) Rh positive homozygous parents cannot produce Rh negative children while Rh positive homozygous parents can produce Rh positive and Rh negative children.

A typical protocol of results in a case in which there was an exclusion of paternity is shown in table 5 and considered

9. Id. at p. 601.
Table 4: Distribution Percentage of Expected Frequencies of different Blood-group Systems for typical Indian Population

<table>
<thead>
<tr>
<th></th>
<th>A</th>
<th>B</th>
<th>AB</th>
<th>O</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABO</td>
<td>22.0</td>
<td>33.0</td>
<td>5.0</td>
<td>40.0</td>
</tr>
<tr>
<td>MN</td>
<td>39.57</td>
<td>46.67</td>
<td>13.76</td>
<td></td>
</tr>
<tr>
<td>Rh</td>
<td>R R_1</td>
<td>R R_2</td>
<td>R_1^r</td>
<td>R_2^r</td>
</tr>
<tr>
<td></td>
<td>43.61</td>
<td>11.84</td>
<td>31.77</td>
<td>4.16</td>
</tr>
<tr>
<td>Gm</td>
<td>(1-2)</td>
<td>(1-2)</td>
<td>(-1,-2)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>52.37</td>
<td>17.24</td>
<td>29.88</td>
<td></td>
</tr>
<tr>
<td>PGM</td>
<td>1</td>
<td>2-1</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td></td>
<td>44.30</td>
<td>40.51</td>
<td>15.19</td>
<td></td>
</tr>
<tr>
<td>EAP</td>
<td>A</td>
<td>B</td>
<td>B</td>
<td></td>
</tr>
<tr>
<td></td>
<td>7.50</td>
<td>28.75</td>
<td>63.75</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1</td>
<td>2-1</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td></td>
<td>4.35</td>
<td>48.91</td>
<td>46</td>
<td></td>
</tr>
<tr>
<td></td>
<td>63.1</td>
<td>32.1</td>
<td>4.2</td>
<td></td>
</tr>
<tr>
<td>ADA</td>
<td>1</td>
<td>2-1</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td></td>
<td>75.31</td>
<td>22.68</td>
<td>2.05</td>
<td></td>
</tr>
<tr>
<td>AK</td>
<td>1</td>
<td>2-1</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td></td>
<td>80.69</td>
<td>17.78</td>
<td>1.53</td>
<td></td>
</tr>
</tbody>
</table>

below:

Of cases tested in the Department of Forensic Medicine at the London Hospital, about one in five results in an exclusion of the paternity of the father. This is, of course, does not

10. Supra n. 6
mean that the 'non-father' rate is one in five. Not only as discussed earlier it is not possible to detect all non-fathers by means of blood groups, but there is considerable prior selection of cases submitted for testing.

So far we have been considering the scope of blood grouping test in establishing non-paternity. Proof of paternity (i.e. determining that only one particular man can be the father of a particular child) is, at least at the present time, based on mathematical probability. The usual procedure is as follows: If after completion of a blood group investigation upon putative father, mother and child no exclusion of paternity is evident, the blood group genes which must be of paternal origin are noted. The chance of putative father has of passing on these genes all together in one single sperm (since they are independent of each other) is compared with the chance of obtaining such a sperm from a man in the random pollution (for if the putative father is not the true father, he is randomly selected man from the blood group point of view).

A whole range of results is obtained. If in, testing a family, only common blood group combinations are encountered, or if only one or two genes are known with certainty to originate from the father, the odds in favour of paternity would not be significant. The statistical significance begins at the 19 to 1 level.
As more and more genetically controlled characters are added to the list of those applied to the paternity problem, so the number of genes known to be of paternal origin will increase and the odds in favour of the putative father being the true father, if he possesses them, will increase too.

Table 5 presents the results of an actual case. It is of interest to note that two putative fathers were tested. One of them clearly excluded from paternity of his wife's child on two independent systems, Kell (K) and MN. He cannot contribute either N or K, both of which have to be genes of paternal origin (as the wife lacks them). The total number of known antigens possessed by the child and absent from the mother which must therefore, be of paternal origin for four, A₁, N, C and K. In addition it is known that the father must contribute haptoglobin 2 since the child is homozygous for this gene. It must be appreciated that if the child has a blood group gene which is present also in mother, it will not be known (unless the mother is homozygous for the particular gene) whether the gene in child is of maternal origin or paternal. In the case shown in table 5 the S gene is an example. Both mother and child have S and therefore, the S gene could be of maternal origin but equally it could be of paternal origin, thus, it is not possible to include the S gene in the calculation for probable paternity.

Mr. R has the genes A₁, N, C and K and it is possible to workout mathematically his chance of contributing a combination
of all four of these in a single sperm. By reference to the
description of the hypothetical blood group system, YZ given
earlier it can be seen that if he is homozygous for a particular
gene his chance of passing it on to off-spring is 100. (or 1)
and if hetrozygous, 50 per cent (or 0.5). Therefore, if a
number of characters (in this example five) have to be consi-
dered, his chance of passing on all five is arrived at by
multiplication of the individual, chances of which, in this
case is $0.5^4 \times 1$ since he is hetrozygous for four of the blood
groups genes and homozygous for one of them. Where homozygosity
or hetrozygosity cannot be determined from the tests, it
is considered fair to regard him as hetrozygous for that parti-
cular gene. In this particular instance it is not known
whether Mr. R, is AA or AO.

As mentioned above, the figure obtained for of Mr. H's
chance of contributing the necessary characters has to be related
to the chances of obtaining such a sperm from the random male
population. This figure is obtained by multiplication of the
known genes frequencies in the population of relevant characters,
e.g. $A_1 (0.21) \times N(0.46) \times C(0.4) \times XP^2 (0.58) \times K(0.05)$. The
balance of probabilities work out 60 to 1 in favour of a sperm
from Mr. R. In the light of the above discussion it is crystal
clear that the mathematical probability based on these calcula-
tions, not in the strict sense, a probability of paternity of
the alleged father. It is rather the chance the named man
has of producing a sperm with the requisite characters compared
with the chance of obtaining a suitable sperm from the random population; since if the putative father is not the true father he is, as far as blood groups are concerned, randomly selected.

Table 5.11: Family showing an exclusion of paternity of one putative father (Mr. W) and a significant probability of paternity of the other (Mr. R)

<table>
<thead>
<tr>
<th>Name</th>
<th>ABO</th>
<th>MNS</th>
<th>D</th>
<th>C</th>
<th>E</th>
<th>C</th>
<th>Cw</th>
<th>K</th>
<th>Kyα</th>
<th>HP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mr. R</td>
<td>A1</td>
<td>MNS+</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>2-2</td>
</tr>
<tr>
<td>Mr. W</td>
<td>A1B</td>
<td>MNS+</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>2-1</td>
</tr>
<tr>
<td>Mrs. W</td>
<td>A2</td>
<td>MNS+</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>2-2</td>
<td></td>
</tr>
<tr>
<td>Baby W</td>
<td>A1</td>
<td>MNS+</td>
<td>+</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>2-2</td>
<td></td>
</tr>
</tbody>
</table>

In India, the Madras High Court has directed the parties for blood test. Justice T.S. Arunachalam sought the scientific opinion of the State Forensic Science Department and also the Post-graduate Institute of Basic Medical Sciences, Taramani, to decide on the paternity dispute, the first of its kind in recent time in India.

The Disputed Paternity Centre, the first and only Centre of its kind in the country, was established as the Department in 1985, following the decision taken in the first national seminar on Disputed Paternity and Surrogate Motherhood.

conducted in Madras by the Forensic Science Society of India of which Prof. Chandrasekaran is the President. Prof. Chandrasekaran said "we test about ten systems". The deciding factor was the SLA typing of blood. The population could be dividing into 300 million groups and if all these tests were conducted, it almost reaches individualisation of blood. In these instances, he said, "We can say cent per cent whether a particular child is not a child of 'X' and 'Y' but we can say that 99.9 per cent that the child is born to a person. Referring to the disputed paternity case of Mary, Prof. Chandrasekaran stated that eight persons in all were tested and they were the Adiveerarama Pandian - Kanniammal and Perumal and Kaliammal Couples, their three children besides the disputed Mary. We then found that the first couple was not the biological parents and the latter, Perumal and Kaliammal, were 99.9 per cent the real parents. The tests that took nearly three weeks to determine the paternity were rather costly - Rs. 3,000 for four persons he said.

The Post-graduate Institute for Basic Medical Sciences, Taramani, also submitted its report to the Madras High Court to determine the paternity of Mary, and Prof. T.N. Gopinath of the Genetics Department of Institute told this correspondent that "we suggested to the court that from our tests it may not be possible to completely rule out either of the couple as parents". Therefore, he conceded that it was only by the
technique used by the Forensic Science Laboratory, it was possible to determine the real parents”.  

In Dr. (Mrs.) Bharti Raj v. Sumesh Sachdeo, the medical report of the child as well as the family members of both the claimants, declaring that the petitioners, Mr. Baldeo Raj and his wife Dr. (Mrs.) Bharti Raj, are excluded as the real parents of the disputed child, Neel Goomer. The report says 'it is most likely that Mr. Sumesh Sachdeo and his wife, Mrs. Alka Sachdeo, are the real parents of Neel Goomer. The medical report was placed before Mr. Justice M.L. Bhat of the Allahabad High Court, his Lordship ordered that the medical report submitted by the All-India Institute of Medical Sciences, New Delhi, where the blood test was conducted be placed on record and that the case listed on February 5, 1991.

Lastly, it is clear that in 99.9% cases courts can relied upon the blood test in disputed cases. In another words, the blood test is one of the methods to determine the paternity and in 99.9% cases the blood test is reliable evidence.

DNA IMPRINTING, A CONCLUSIVE TEST TO DETERMINE THE PATERNITY

In America and Europe it has long been the ambition of the Forensic Scientists to be able to identify the real biological

father in the cases of paternity disputes and to settle the cases of doubtful paternity with absolute certainty. The arrival of DNA finger printing — particularly as developed by Alec Jeffereys and colleagues at Leicester University is a big step towards a forensic scientist’s goal in this area. The numerous blood-group polymorphism that are currently applied to cases of doubtful parentage (usually doubtful paternity) already go far towards excluding everyman wrongly named as father of the child. Exclusion of paternity established by showing the absence in the putative father of one or more blood-group gene products, which, in the child are seen to be paternally inherited. A range of polymorphic systems are investigated independently of each other by relatively simple procedure in which the gene products are disclosed by agglutination. The table no. 5 in the previous chapter shows that how a combination of polymorphism can approach the ability to exclude all false fathers. Moreover, the calculated probability of paternity for excluded man, virtually all of whom will be true fathers, is likely to be significantly in favour of their paternity.  

Even so DNA finger printing with the probes developed by Jeffereys has the potential to exceed the efficiency of conventional systems because there are good grounds for anticipating that definite answers not only those, excluding paternity but also for pinpointing the true father, will be

obtained in every case. But it is in resolving problems of family relationship in which putative parents are closely related to each other that DNA finger-printing has particular advantages over presently used system.\textsuperscript{15}

The gene is the unit of inheritance. Genes are made of deoxiribonulic acid (DNA). DNA polymers are differentiable not on the basis of physical or chemical properties of molecular size, geometry or substituent groups, but rather by difference in information contents (i.e. genetic code). The genetic imprint is a basis of criminal investigation, and in solving disputed questions of paternity.\textsuperscript{16}

The identification of a living being presupposes that he must be different from every living being. All living beings of the same species are genetically quite different from one another except for identical twins. The usual test to determine the blood group, Rh factor and other marker in the blood did not provide any conclusive evidence as to whether the child was the son or nephew of the lady who claimed to be his mother. Only the direct analysis of the genetic information in the DNA molecules of both these individuals could establish their relationship without any ambiguity.\textsuperscript{17}

\textsuperscript{15} \textit{Supra} n. 14.


\textsuperscript{17} \textit{Ibid}.
In 1935, a Ghanaian boy born in the U.K., immigrated to join his father in Ghana, but, subsequently, he decided to return to the U.K. to join his mother and family members. Immigration authorities, however, suspected that a substitution had been made as the woman had several sisters living in Ghana and they felt that one of their sons had returned instead. The usual tests to determine the blood groups, Rh factor and other makers in the blood did not provide any conclusive evidence as to whether he was the son or nephew of the lady who claimed to be his mother. The Immigration authorities of the U.K. entrusted the work of genetic imprinting to Alec Jefferys of Leicester University who had developed this technique of DNA finger-printing. In this case Jefferys had taken blood samples from the mother, the boy, his brother and his two sisters. He prepared DNA imprints from these samples. The mother displayed about 80 bands representing 80 fragments. He, then found out how many of these fragments the three children shared. He found that those fragments which did not match with disputed boy, obviously came from the father. He also found that there were 39 paternal fragments among the three children. He found that 20 fragments out of 39 were found in the DNA finger-prints of the disputed boy. He found that the boy had 40 other fragments which tallied with the mother. Thus, he concluded that in all probability the boy was the woman's son beyond any reasonable doubt.

18. Lex Et Juris., July 1988, p. 50
19. Ibid.
In genetic finger-printing, scientist extracted genetic material, DNA from the sample of blood. They add enzymes to the DNA that chop it into tiny pieces of unequal sizes. They then put the fragments into a gel and an electric field separates the larger DNA fragments from the smaller ones. The scientist then transferred the DNA from the gel to a nylone membrane by a process called 'souther blotting'—the fragments of DNA move from the gel to the membrane as the solution of DNA is drawn up by capillary forces created by blotting paper placed on top of the nylone membrane. The position of DNA fragments in the nylone membrane exactly matches their position in the gel.

The next step is to add tiny pieces of DNA that are radioactively labelled. The DNA probes are built to identify regions of DNA, known as hypervariables. Alec Jeffery of the University of Leicester found that peoples are unique in terms of distribution of hypervariables in their DNA. A child will share some of his hypervariables with his biological mother and some with its biological father.

After washing the nylone membrane, the only radioactivity left will be the probes that have stuck to hypovariable regions. Put the membrane next to an X-ray film and dark bands will appear where the probe have stuck to these regions. The
distribution of the bands is unique to an individual and a child's 'genetic finger-prints' will be an amalgamation of finger-prints of its two parents.
PART-A : ENGLISH SYSTEM

The British Courts have recognised that the liberty of the subject cannot be infringed except under the due process of law, and that the privileges against self-incrimination, and against unreasonable search and seizures, are protected by the law unless there is specific statutory provisions denying these privileges in particular circumstances.

The British Constitution does not contain specific provisions dealing with the above said privileges. But the American Constitution do have the specific provisions guaranteeing the privileges i.e. in Amendment XIV, Amendment V and Amendment IV. But England has a history of privileges upon which the existing super structure of English justice is based. Now the important question is whether the court has power to order the compulsory blood tests, which violate the privileges against self incrimination, unreasonable search and seizure? In this regard Wigmore has made a significant observation and
said that:

"Looking back at the history of privilege and the spirit of struggle by which its establishment came about the object of the protection seems plain. It is the employment of legal process to extract from the person's own lips and admission of his guilt, which will, thus, take the place of other evidence such was the process of ecclesiastical court, as approved through two centuries, inquisitorial method of putting the accused upon his oath in order to supply the lack of the required two witnesses. Such was the complaint of Liburn and his fellow objectors, that accused ought to be convicted by the other evidence and not by own forced confession upon oath.

Such, too, is the inference from the policy of the privilege as a defensible institution .... that is to say, it exist mainly in order to stimulate prosecution to a full and fair search for evidence procurable by their own exertion, and to deter them from a lazy and pernicious reliance upon the accused's testimony extracted by force of law.

Such finally, is a practical requirement that follows from the necessity of recognising other unquestioned methods of procuring evidence, for if the privilege extended beyond these limits, and protected an accused otherwise than in his strictly testimonial status, if, in other words, it created inviability not only for his physical control of his own vocal
utterances, but also for his physical control in whatever from exercise, than it would be possible for a guilty person to shut himself up in his house, with all the tools and indicia of his crime, and the authority of the two employees in evidence anything that might be obtained by forcibly over throwing possession and compelling the surrender of the evidential articles, a clear reduction and absurdum.

In other words it is not merely any and every compul-
sion"that is the kernel of the privilege, in history and in the constitutional definitions but testimonial compulsion. The one idea is as essential as other. The general principle, therefore, in regard to form the protected disclosure, may be said to be this : the privilege protect a person from any discloser sought by legal process against him as a witness".

"If an accused person were to refuse to be removed from the jail to court room for trial claiming that he was privi-
leged not to expose his features to the witnesses for identi-
fication, it is not difficult to conceive the judicial deception which would be given to such a claim. And yet no less a claim is the logical consequence of the argument that has been frequently offered and occasionally sanctioned in applying the privilege to proof of the bodily features of the accused.

The limit of the privilege is a plain one. From the general principle .... it results that an inspection of bodily
feature by the tribunal or by the witnesses cannot violate the privilege, because it does not call upon the accused as a witness, i.e., upon his testimonial responsibility. That he may in such cases be required some time to exercise muscular action – as when he is required to take off his shows or roll up his sleeve – immaterial, unless all bodily action were synonymous with testimonial utterance; for, as already observed .... not compulsion alone is the component idea of the privilege, but testimonial compulsion. What is obtained from the accused by such action is not testimony about his body, but his body, itself .... unless same attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and operations of his mind in expressing it, the demand made upon him is not a testimonial one. Moreover, the main object of the privilege is to force prosecuting officers to go out and search and obtained all extrinsic available evidence of an offence with relying upon the accused's admission. Now in the case of the persons body, it marks and traits, itself is the main evidence; there is ordinarily no other or better evidence available for Prosecutor. Hence, the main reason for the privilege looses its force.¹ The provision against self incrimination (Protection of privilege) has been held to be subject to the following limitation.

(a) It is open to the accused to waive the privilege. But if he waives the privilege and gives testimony on any point, he must give the whole of it.

(b) Where an accused has been pardoned or otherwise given immunity from prosecution, he may be compelled to give evidence. But before the accused may be so compelled, he must be given complete immunity.

(c) The immunity is merely from giving evidence against the consent of the accused. The prosecution not debarred from exhibiting the person of the accused to the jury, comparing this finger-prints, photographs etc. Nor does the immunity prevent production of testimony that blood was discovered on the body of accused after alleged crime or marks and bruises were found upon accused's body, and accused's shirt being taken off his body.

The permissibility of identification by finger, palm, foot-prints and the taking of accused's picture after arrest, blood and urine test, use of emetic stomach pump or similar device for extracting ornaments swolled etc., requiring suspect or accused to wear or trying on particular apparaire or requiring defendant in criminal case to exhibit himself or perform physical act during trial and in the presence of jury are not hit by the immunity conferred by the provisions of self incrimination. It is clear that the accused cannot be compelled to produce any evidence against himself, such evidence can be taken or seized provided of course, such taking or seizure is legally permissible.

The three things are necessary to constitute the requirements of the provisions of rule against self incrimination.
(i) An accused person,
(ii) his being compelled to be a witness and,
(iii) such compulsion being against himself

The prohibition operates only when an accused is sought to be
forced to depose against his innocence.

Bearing these principles in mind, the compulsory direction
by the court in a paternity proceeding to the defendant to give
his blood for blood test being made and can be supported in
paternity disputed cases. Lacking legislation, the courts
have not found it easy to fit blood tests evidence into the
existing legal framework and the process of doing so is still
incomplete. The use of blood tests to determine the child's
paternity has inevitably given rise to conflict between the
courts desire to act in the best interest of the child, and
its intention to ensure that justice is done. In this regard
judiciary had played a vital role and despite of the non-
availability of statutory provisions the court had ordered for
blood test in disputed paternity cases. In some cases the
court had order for blood test but in other similar cases the
court had refused to allow the blood test.

The chronology of judicial pronouncements is reflecting
a systematic picture that how the law developed by the courts
in this respect. In W. v. W. the husband was petitioning to

have the marriage annulled on the ground that his wife was pregnant by another man at the commencement of the marriage. The wife refused blood tests for herself and the child also. Cairus J. decided he had no power under any statute or rule of court to order the wife's or the child's blood to be tested; and said a court of appeal affirming him, neither had the court any inherent power to do so, since the old ecclesiastical court, from whom the modern jurisdiction is inherited, had no such power. Similarly, in Holmes v. Holmes, case raising a dispute as to paternity. The wife allowed the child's blood to be tested before the official solicitor, who interviews in such cases to safeguard the interest of the child, had time to object. The blood group showed that the husband could not be the father, therefore, proved adultery. In a now celebrated dictum Omrod J., pointed out the injustice that would have resulted from a successful objection.

".... had difficulties being put in the way of the child's blood being taken, it is manifest on the facts of this case that a grave injustice might have been done. It would have been virtually impossible upon the evidence, I think, for this man to establish that he was no, prima facie, the father of this child .... I should myself greatly hope that no difficulties will ever be put in the way of a child's blood being supplied for blood grouping .... there is nothing more shocking

than that injustice should be done on the basis of a legal presumption when justice can be done on the basis of facts

In **H. v. H.**, Sir Jocelyne Simon, President of the Divorce Division, was prepared to assume that the court had power to order a child's blood to be tested but would never do so when the result might be against the child's interest. The turning point came in **Re. L.**, where the issue of paternity arose on the question of the custody of the child on dissolution of the marriage. The husband and the wife and the other man all consented to tests but the official solicitor refused on behalf of the child. test it be bastardized, Omrod J. ordered the test finding that as a High Court Judge he had jurisdiction to do so; a judge of the old court of Chancery could have made such an order in relation to a ward of court and, the judge held, this paternal jurisdiction had been conferred by statute on every High Court Judge. The court of appeal upheld the order. Lord Denning asserted the jurisdiction in any case where paternity was in issue and the child's interest would be served.

In **B.R.B. v. J.B.**, the court of appeal laid down that any Judge of the High Court has power in any proceedings to order

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a blood tests on a child if it is in the child's interest. So as the law stand no court can compel an adult to be tested (blood test evidence), but the High Court may order a child to test where it is in his or her interest. The line between adult and child for this purpose still to be authoritatively drawn. The Law Commission published their proposal for reform in which they expressed their view that despite these important developments, the law does not go enough and needs be put on a more secure legislative footing. They propose, inter alia—

1. that the presumption of legitimacy should be rebuttable by proof on a balance of probabilities,

2. that any civil court before which the question of paternity arises should have the power to direct a blood test of the parties, including the child and its mother;

3. that a person refusing to be so tested shall not be forced to, but the court may draw any inference it thinks appropriate from the refusal;

4. that the age of consent to a test shall be 16.

The Family Law Reform Bill embodying these and other proposals, was introduced in the House of Lords on October 31, 1968.

In 1969 two cases were considered by the court of appeal, they are B v. B and E and W v. W. The former was custody

10. Law Commission No. 16 October 1968.
dispute in relation to a child born during a first marriage. The wife had remarried, and alleged that her second husband was the child's father. Initially, all three adults agreed to have their blood tested. But after the official solicitor had been to represent the child, the first husband consent on behalf of the child. Baker J. at first instance ordered the child's blood to be tested.

In *W. v. W.* a husband sought to have ordered to establish her adultery. Here husband and wife were willing to be tested and for the child to be tested, but the alleged adulterer could no longer be traced. The official solicitor refused to consent on behalf of the child, and his refusal was upheld by Simon P. The court of appeal unanimously allowed the first husband's appeal in the former case; and, Lord Denning M.R. dissenting, dissolved the husband's appeal in the latter. Thus, in neither case was the court prepared to allow the test. 13

It seems than that as the law stands after *B. v. B. & E.* that courts, when exercising their inherent powers to order blood tests, will refuse it which may prejudice the custody rights of a father who is relying a presumption of legitimacy. Section 20 of Part-III of the Family Law Reform Act, 1969 confirms the power of the court to require the use of blood tests, however, it retains the courts discretionary powers to refuse to make an order. Only if an application has been granted

can the provisions of Section 23(2) be invoked.\textsuperscript{15}

In \textit{S. v. Mec} there is no guidance in it as to the principles which the courts are to adopt in these circumstances. The court will no doubt apply the same principles after the Act as we now apply before it.\textsuperscript{16}

Section 23(2) of the Family Law Reform Act, 1969 states: "Where in any proceedings in which the paternity of any person falls to be determined by the Court hearing the proceedings there is a presumption of law that that person is legitimate, than if -

(a) a direction is given under Section 20 of this Act in those proceedings, and

(b) any party who is claiming any relief in the proceedings and who for the purpose of obtaining that relief is entitled to rely on the presumption fails to take any step required to him for the purpose of giving effect to the direction, the court may adjourn the hearing for such period as it thinks fit to enable that party to take that step, and if at the end of that period he has failed without reasonable cause to take it the court may, without prejudice to Sub-section (1) of this Section, dismiss his claim for relief notwithstanding the absence of evidence to rebut the presumption.\textsuperscript{17}

\begin{flushleft}
\textsuperscript{17} Use of blood tests in pursuit of truth by Mary Heyes - The Law Quarterly Review, Vol. 87, Jan. 1971.
\end{flushleft}
Section 20(1) provides that the court 'may' give direction for the use of blood tests. I do not think that can possibly be intended to confer an unfettered discretion on these courts .... the Act gives no guidance as to the circumstances in which blood tests should be ordered, and I think that this must mean that superior courts are to settle principles in so far as it is necessary to disturb existing law in order to comply with that Act, and thereafter the lower courts are to apply those principles to cases which come before them.\textsuperscript{18}

In \textit{W. v. Official Solicitor}\textsuperscript{19}, the husband had obtained a decree nisi on the ground of wife's adultery with a named co-respondant, a coloured man. However, the coloured man disappeared before the divorce petition was heard. This meant that a blood test might well have shown that the husband was not the child's father, but would not have given the child any indication of the identity of his father. For this reason the trial judge and the court of appeal, Lord Denning M.R. dissenting, refused to order that the child be tested. Contrary in \textit{S. v. S.}, the husband had been granted a divorce on the grounds of his wife's adultery with the co-respondant. The wife had applied to the Magistrate for an affiliation order against the co-respondant, and her application had been adjourned pending the trial of the legitimacy issue. In these circumstances it was held right by the trial judge and the

\textsuperscript{18} \textit{S. v. S.} (1970) 3 All.E.R. 107, 113.  
\textsuperscript{19} (1970) 3 All.E.R. 107.
court of appeal, Sachs L.J. dissenting, to order that a blood test be taken as it could help to establish which of two identifiable men was father of the child.

These decisions were consistence with earlier case law, but the House of Lords refused to countenance such a distinction it was of the opinion that while the court must protect the interest of the child it was entitled to look at all the evidences available including that of a blood test, and it need not be satisfied when ordering a test that the infant would be benefitted from its outcome.

"But here there is or may be a conflict between the interests of the child and the general requirement of the justice. Justice requires that available evidence should not be suppressed but it may be against the interest of the child to produce it". 20

".... the question whether the High Court should exercise its discretion in favour of ordering the blood testing of a child lies outside the custodial jurisdiction and within what I have termed the protective and ancillary jurisdiction of the court .... if what I have called the ancillary jurisdiction - the inherent jurisdiction of the High Court to provide in its discretion for a fair and satisfactory trial - were to give place to the suppression for the benefit of the infant of a means of

finding the truth, the conflict between the interests of justice and the advantage of the infact would become too acute to be tolerable" (emphasis). Consequently, the decision of the court of appeal in S. v. S. was affirmed in that of W. v. Official Solicitor was reversed by the unanimous judgment of the house. It is, therefore, no longer tenable to assert that a blood test will be refused merely because there is only one identifiable father, should considerations of justice dictate otherwise. In each of these cases the ultimate objective was to determine who should bear responsibility for the child's maintenance, justice demanded that only the true father should be required to support the child.

In S. v. S. it was suggested that they did not have this type of action in mind when they decided that in paternity dispute the interest of the child are best served, if the truth is ascertained. Lord Mac Dermatt was the only member of the house to touch upon this specific issue when he came to consider the High Court's jurisdiction and observed:-

"And again, if the court had reason to believe that the application for a blood test was of a fishing nature designed for some ulterior motive to call in question the legitimacy, otherwise unimpeached, of a child who had enjoyed legitimate status, it may well be that the court, acting under its protection rather than its ancilliary jurisdiction, would be justified

in refusing the application". 22

Lord Reid, in his separate opinion, has formulated the following principle -

"I think that the final abolition of the old strong presumption of legitimacy by Section 26 of the 1969 Act shows that in the view of the Parliament, public policy no longer requires that special protection should be given by the law to the status of legitimacy". 23

In S. v. S., Lord Denning M.R. "put forward the proposition that truth must out, and, indeed, that truth should out ruat coelum". 24

In W. v. Official Solicitor, it is said:

"In my opinion, when a court is asked to decide a paternity issue, it is in the best interests of everyone that it should do it on the best evidence available. The issue of such importance affects so many people that it should be decided on all evidences and not half of it". 25

In S. v. S., 26, the House of Lords held that in exercising its jurisdiction to make a direction for a blood test on a child, the child's interest were not the sole considerations: While the court must protect the interests of the child, it must also

take into account the public interest that evidence should not be suppressed and that the truth should be known.

The decision of the Inner House of the Court of Session in Docherty v. Mc Glynn,27 it was held that the husband's prima facie right to consent to permit child's blood test, were not suspended merely because his paternity was challenged by a third party : unless and until the presumption pater est was rebutted, the presumptive father's "legal rights and powers exist unaffected, in the exercise of that protective power which the court of session possesses to intervene when the interests of justice or of pupil concerned may require and warrant such intervention. In fact in this (Docherty once), the court placed reliance on the English case of S. v. J. (1972) A.C. 24.

PART-B : AMERICAN SYSTEM

For the first time, in the history of Supreme Court of United States, the petitioner challenged the constitutional validity of compulsory blood tests in Schembet v. State of California28. The petitioner had been convicted in a California Court of driving an automobile while under the influence of intoxicating liquor. In the hospital, to which he had been taken after the accident in which he had been involved, a

blood sample was taken by a physician, at the request of a Police Officer, although the petitioner had refused, on the advise of his Counsel, to consent to the test. The analysis of this sample indicated that he had been intoxicated. It was admitted in evidence at the trial. The petitioner appealed to the Supreme Court of the United States after the appellate department of the California Superior Court had affirmed the conviction. His appeal was based on three grounds -

(a) The first was that a compulsory blood test violated Amendment XIV of the Constitution which provides in part that "not shall any state deprive any person of life, liberty or property, without due process of law;"

(b) That it violated Amendment V which provides that no person "shall be compelled in any criminal case to be a witness against himself", and

(c) That it violated Amendment IV which protects the people "against unreasonable searches and seizure".

In the previous of Breivthaupt v. Abram, the Supreme Court had held that the extraction of a sample of blood while the Driver was unconscious did not violate the due process close. The majority of the Supreme Court speaking in an opinion delivered by Brennan J., said: "We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the state with

29. 352 U.S. 432.
evidence of a testimonial or communative nature, and the withdrawal of blood, and use of the analysis in question, in this case did not involve compulsions to these ends". It was true that the compulsion had been used against the petitioner to obtain the sample, but this did not mean that the petitioner was compelled to be a witness against himself. In another case Holt v. United States\(^3\), where the accused was forced to put on a blouse to determine whether it fitted him. Mr. Justice Holmes, speaking for the court said: The prohibition of compelling a man in criminal case to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at prisoner and compare his features with a photograph in proof".

It has also been held in other cases both by federal and states courts that the taking of finger-prints did not constitute a breach of fifth amendment. The court in the instant case, however, seemed to feel that the lie detector tests, which measures bodily reactions during interrogation, might violate the spirit and history of privilege against incrimination. It may be suggested that such tests should be rejected on the ground of their uncertainty rather than on the ground of self incrimination. If the result they gave was conclusive it would

\(^3\) 218 U.S. 245
seem unreasonable to reject them. At one time it was regarded as legitimate to use as evidence the reactions that a person suspected of murder showed when brought into the presence of the corpse, but it was realised in time that such evidence was completely unreliable as proof that the accused person had committed the murder. It was argued in one case that the refusal of the accused person to be confronted in such a way was tantamount to a confession on his part, but, here again there might be other rational reasons why the accused person refused to submit to such a test. On the other hand in the case of blood tests no action on the part of the accused is required the test will be the same whether he is conscious or unconscious.

The next objection to a compulsory blood test, based on the ground that it is in violation of the IVth Amendment prohibiting unlawful search and seizure is strong one. In Wolf v. Colorado, the court said that: "the security of ones privacy against arbitrary intrusion by the police is at the core of the IVth Amendment and basic to a free society". In the present case the court did not dispute the argument that taking a blood test constituted a search of person, but it is held that all such searches are not forbidden. The privilege apply only to those that are unreasonable in the circumstances. The early cases suggested that there was an unrestricted right for a

33. 338 U.S. 25.
Police Officer to search the person of an accused person. When legally arrested, to discover and seize fruits, or evidence of crime.

In the present case, however, the court felt that these statements might be too wide, and that, a blood test could not be taken with a search warrant unless there was a danger that the evidence might disappear.

Harlan J. and Stewart J. concurred adding that "The case in no way implicates the fifth Amendment".

**PART-C : INDIAN LAW**

In India -

- When proper consent is obtained
- Inferences can be drawn from a refusal to give consent
- Power of the court to order blood tests without consent
  - Constitutional Provisions
  - Statutory Provisions
  - Judicial View-point

The blood tests are very important in assisting the court to determine the question of fact. As already has been discussed in the previous chapters blood tests are indispensable in various types of criminal investigations, criminal proceedings, civil proceedings and are particularly important in the cases where a child's paternity is in issue, whether in legitimacy, affiliation proceedings or divorce proceedings on the ground of adultery.
It is clear that the court can order blood tests if all parties concerned, are consented to submit themselves for the same. The need of law is there where the party or parties to the proceeding are declined to consent. Lacking legislation the court do not find it easy to fit blood test evidence into the existing legal framework. What course can be taken if the parties to the proceeding refuses consent to a blood test? It is with this problem that the present chapter is mainly concerned

i) whether a sample of blood and if this is done without consent or other lawful authority the taking of blood will be a trespass to the person;

ii) whether the proper consent is obtained.

There can be no question of proceedings against the person performing the test, if the person upon whom the test is to be made is an adult and of sound mind. The problem is presented when the subject is incompetent to give consent. Capacity to consent in this respect is a debatable point. On the one hand it looks almost to be a matter where the law should attach the same incapacities, as for the law of contract and fix the age of consent at twenty-one. On the other hand very young children are able to give evidence provided they understand the importance of telling the truth. The question regarding infants is the meaning of the word 'guardian'. Guardianship is somewhat a complex subject and family law text-books should be consulted for

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34. Latter v. Baradell (1881) 50 L.J.Q.B. 448.
Inferences can be drawn from a refusal to give consent. In H. v. S., the wife of a sample of blood from the child. It can be explained to her that if she is in fact innocent of adultery the blood test in no way harm her case. Only if she is guilty is there a chance that the blood test will be against her. Would it not be a natural inference from this that she had something to hid if she than refused to give consent? Of course, if she could show that she had strong religious objections to the blood test, this inference could not be drawn. In addition there would be other cases where the inference could not be drawn, e.g., where in an adultery case the child is old enough himself to refuse consent, no inference could be drawn against the wife. Allowing for these cases, there will be occasionally circumstances in which as a matter of common sense, an inference can be made.35

Under Section 114 of Indian Evidence Act, 1872, court may presume existence of certain facts, illustration (g) state that the court may presume –

(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

The person with-hold the evidence in the form of blood in his body, which he can produced for the purpose of comparison

and if he refuse to submit for blood test than on the basis of the analogy from the above stated provisions the court may draw an unfavourable inference under the Family Law Reform Act, 1969, in England. Section 20 provides that in any civil proceeding in which paternity of any person falls to be determined by the court, it may give a direction for the use of blood tests to ascertain whether such test show that a party to the proceedings is or is not thereby excluded from being the father of that person. If a person fails to comply with instructions of the court to provide a blood sample, the court may draw such inference from this fact as appears proper in the circumstances (S. 23).

There are than the blood test (evidence of paternity) Regulation Act, 1971, which provide inter alia that where the person having the care and control of a disabled subject, does not consent to the taking of a sample, he may record on the direction his reason and there can be no compulsion in this behalf. No such specific statutory provision exist in our country. However, in an appropriate case presumption is available under S. 114 of the Evidence Act.

**Constitutional Provisions**

Article 20(3) of the Constitution of India enacts that no person accused of any offence shall be compelled to be a witness against himself.
The present clause (3) of Article 20 follows the language of the Vth Amendment of the American Constitution. Three things are necessary to constitute the requirements of this clause viz -

i) an accused person,
ii) his being compelled to be a witness, and
iii) such compulsion being against himself. In other words the prohibition operates only when an accused is sought to be forced to depose against his innocence.

The permissibility of identification by finger, palm and foot-prints and the taking of accused's picture after arrest, blood and urine tests, use of emetic stomach pump or similar device for extracting ornaments swallowed etc., requiring suspect or accused to wear or trying on particular apparel or requiring defendant in criminal case to exhibit himself or perform physical act during trial and in presence of jury do not offend the due process clause. 36

Self incrimination can only mean conveying information based upon personal knowledge of the person giving information and cannot include merely the mechanical process of producing documents in court which may throw light on any point in controversy, but which do not contain any statement of the accused based on his personal knowledge. Thus, when a person gives his

36. Annotation 64 ALR 1089 and 31 ALR 204; Shaffer v. United States (1904) 49 LAW ed. 361; Novak v. Dt. of Columbia 49 A. 2d. 88.
finger impression or specimen writing or signature, though it may amount to furnishing evidence in the large sense is not included within the expression "to be a witness". In these cases he is not giving any personal testimony. They are merely materials for comparison. Hence these things would not come within the prohibition of Article 20(3). What is forbidden under Article 20(3) is to compel a person to say something from his personal knowledge relating to charge against him. When we draw the analogy from these decisions by the American Courts and the Indian Supreme Court we come to the conclusion that compulsory order for test does not offend the Article 20(3) of the Constitution of India.

In P. Venkataswaralu v. P. Subbaya, the defendant applies under Section 151, C.P.C. for a direction from the Court to the plaintiff his mother, and his next friend, to appear in person before the court to enable medical expert to take samples of their blood. The learned Judge ordered to appear before the Court for blood test, but the High Court reversed the order, and said -

"Section 151 has been introduced into the Code to give effect to the inherent powers of courts. Such powers can only be exercised ex debito justitiae and not on the mere invocation

38. A.I.R. (38) 1951 Madras 910 (1).
of parties or on mere volition of courts. Thus, where the defendant applies for the direction from the court to the plaintiff a minor child, and his mother, his next friend, to appear in person before the court to enable a medical expert to take sample of their blood and the plaintiff his mother are unwilling to offer their blood for the test to recognise the paternity of the child, there is no procedure either in civil procedure code or the evidence act which empowers the court to force them to do so."

Subayya Gounder v. Bhoopala Subramanium,39 case there is no special statute and there is no provision either in Cr.P.C. or in Evidence Act empowering courts to direct such a test to be made. Similarly, there is no procedure either in C.P.C. or Evidence Act which provides for a blood test being made of a minor and his mother when the father is disputing the legitimacy of the minor and hold that if the parties are unwilling to submit to such a test the court has no power to direct them to submit themselves to such a test (Para 7).

Article 20(3) enacts ...... (Para 8). Bearing these principles in mind provisions of C.P.C., Cr.P.C., Evidence Act and provision of Article 20(3), the compulsory direction by the Magistrate in a proceeding (civil or quasi civil) to the defendant to give his blood for blood test being made cannot be

supported.

"There is hardly any provision of law whether in Code of Civil Procedure, Indian Evidence Act, or elsewhere under which an application can be made or granted compelling a party to submit to blood test or which compels a person to give a sample of his blood for analysis of blood grouping test or even. Warrants adverse inference to be drawn against him if he refuses to give such sample." 40

In *Nishit Kumar Biswas v. Anjali Biswas*, application and counter application were made requiring the court's direction for the blood test and accept the report, thereby as the way of additional evidence. On either version I remain on the same opinion that in such cases the court should not authorise any interference like taking of blood from any person's body, more so when it could not extend to establish the scientific impossibility of husband being the father of the child. These would be nothing to prevent such cases becoming the battle group of experts with bloody hands. The voluntary donation of blood for testing and the courts drawing of presumptions on proper materials in appropriate cases is however, is a different matter.

41. A.I.R. 1968, Cal. 105 (Para 13).
In *Lokamma v. Sundara Sapalya*, while dealing with Section 401 read with Section 397 and also with Section 482, Cr.P.C., the court directed the Magistrate to have the petitioner (child) and the respondent (father) examined for blood grouping test and to submit a report to this court. In this case father disallowed the paternity of the child. On the other hand the parties agreed to go to the blood test and the mother would produce the child for the examination. Justice D. Noronha observed that, "It is an important test and would go a long way in the ends of justice".

In *Dr.(Smt.) Bharti Raj v. Sumesh Sachdeo*, where the petition under Guardian and Wards Act, the District Judge made an interim order on an application of Shri Baldeo Raj for comparison of blood of the child with the blood of the parents of both sides. The order provides, "This is an application by the petitioner for comparison of the blood of the child with the blood of the parents on both sides. The counsel for the opposite parties have objected this application on the ground that today is the date fixed for evidence and the petitioner must lead evidence available with him and the court should pass suitable orders on this application thereafter. This appears to be proper. The petitioner shall adduce evidence available with him, today and after the close of such evidence, suitable orders shall be passed about the blood test".

43. A.I.R. 1986 All. 259.
B.D. Agarwal J. said: "I do not think that there was anything wrong on the part of the District Judge calling upon the petitioner first to produce evidence to afford prima facie satisfaction of the fact that the disputed child was born to the petitioner's wife. It deserves consideration in this context that, according to the petitioner, his wife gave birth to a male and female child as twins while respondent 3 gave birth to a female child, but as a result of collusion between the respondent and the hospital authorities, the male child of the petitioner was substituted with the female child of respondent 3. According to District Judge this fact was not apparent on a bare perusal of the hospital records that the respondent alleged that respondent 3 gave birth to a male child, a fact supported by hospital records. In the context of these circumstances it was a proper exercise of discretion on the part of the District Judge to ask the petitioner to produce to afford at least a prima facie satisfaction that the story put forward by him has some substance. The order passed by the District Judge, was therefore, a sound order and calls for no interference ..... Further, I am in agreement with the District Judge that an order should not be passed directing a couple to submit for paternity test (of) a child in their custody and claimed by them as their own child, merely because another person suspects that the child belongs to him. As already pointed out, the District Judge in this case has
called upon the petitioner to first adduce prima facie evidence, but that evidence has not been adduced yet. The petitioner cannot claim relief (order for blood test) by this writ petition. Justice Aggarwal further stated that it would be hazardous, in my view, if on a mere expression of doubt that a subjective level, the court were to require a child and those claiming to be his parents to submit themselves to blood test. The dominant factor after all is not the rights of the warring parties but the protection of the rights of a child as a human being. Their Lordships of the Supreme Court in Rosy Jacob v. Jackob A. Chakramakkal, expressed their entire agreement with Maharajan J. (Madras High Court) in his view that in proceedings under the Guardian and Wards Act, "the controlling consideration governing the custody of the children is the welfare of the children concerned and not the right of their parents".

In Dr. (Mrs.) Bharti Raj case, 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 finishing nature or designed for some ulterior motive.

44. (1973) 1 SCC 840, (AIR 1973 SC 2090)
45. Supra n. 43.
It would be unjustified in not acceding to such a prayer.

It is obvious that in a case such as the present where the other side relies strongly on the material available on the record and the petitioner has dispute repeated directions refrained from giving evidence in proof her right to the child, there can be no blood test directed on the authority aforesaid side-tracking the facts and circumstances thereof. The decision is not the authority for the proposition that the considerations which have impelled in the present refusal to accede to the prayer of the petitioner, thus far are irrelevant or of no consequence.

In Km. Manju v. Mohammad Yasin, the question considered was whether Km. Manju alias Shahnaz Begum aged between 6 to 8 years had to be given in the custody of Dina Nath during the pendency of the trial of Kamla and Smt. Shyampati under Section 363A the penal code in the exercise of inherent powers of this court. The learned Judge observed that "as it was not possible for Km. Manju alias Shahnaz Begum to state correctly whether Dina Nath and Smt. Phoola Devi were parents or Mohammad Yasin and his wife Smt. Noorjahan were her parents it was considered necessary to determine her parentage by the performance of blood test.

A careful perusal shows that the direction given for the blood test proceeded on its own facts and there is no principle as such laid down for general application.
Every system of law has drawn a distinction between the legal and social status of a child born of an illicit union and a child who is an outcome of a valid wedlock. The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the hands of marriage. But condemning an infant for the fault which is not even known to him is illogical and unjust. No child is responsible for his birth, and penalizing the illegitimate child is an ineffectual as well as an unjust way of deterring erring parents.

To avoid the social stigma of illegitimacy the English Law leans heavily in favour of the child born during the subsistence of a valid wedlock. Bastardizing the child without clinching proof of illegitimacy is brought with severe disadvantage to the child in particular and evil consequences to the society in general. To achieve the said policy the English legal system has developed some inbuilt mechanism. Firstly, by the strong presumption in favour of the legitimacy and secondly by the application of maxim legitimatio per subsequence matrimonium. The married mothers are protected from being dragged to courts of law to defend their virtue in suits cooked
up by the greedy and troublesome litigant relatives. Nevertheless, while it is unjust and inconceivable to foist paternity and its attendant responsibilities on a man who by all reasons could not have been the father of the child. Hence the law fully protects and safeguards the legitimacy, it also allow proof of facts which render paternity highly improbable in a particular case.

Islamic Law which is a divinely ordained law seeks to establish a justly balanced society transcending the limitation of space and time. So it tries to achieve the above goal by drawing a fine balance between different interests. On the one hand it is the spirit of the Shariah to do the justice to all its creation, on the other hand it does not turn a blind eye to the interest of an innocent child. It has evolved its principles relating to legitimacy and gestation with all care and caution. Islamic Law does not allow the society to have the interest of a particular individual at the cost of the truth. It does not go too far in zeal of protecting the interest of the child the way other man made legal systems do.

English Law is more based on social policy than truth but the Islamic Law due to strict adherence to the purity of conception is solely based on truth and legitimation per subsequence matrimonium has no place in it. That is why the Islamic Law allows proof of facts to rebut the presumption of legitimacy.
The maximum period of gestation fixed by the Muslim jurists has been criticised on the ground that they are not borne out by modern scientific knowledge of gestation and pregnancy. This maximum period was also subjected to severe criticism on the assumption that Islamic Law protects illegitimacy under the cover of legitimacy. But it was overlooked by these critics that this maximum period is a result of mere analogy and not of a clear-cut injunction of a Qur'anic Ayat. Even in modern science no one can say conclusively that the child would be born within 280 days of the dissolution of marriage. Despite its all amazing achievements the medical science has failed to correctly spell out the exact period of gestation. Therefore, what our legal doctors did, is nothing more than devising a safety valve, to cope with a situation which due to some biological defects may occur. Hence the criticism of Islamic Law of legitimacy is unfounded and therefore, untenable on this count.

The minimum period of gestation under Islamic Law is six months, which is more sound in comparison to the common law principle, which is also embodied under Section 112 of the Indian Evidence Act, 1872. The Medical testimony would generally approve this minimum limits of Muslim Law.

Again it is the unique feature of Islamic Law on the point which is not found in any other legal systems of the world, that it confers the right of inheritance on an illegitimate
child from its mother side.

The policy of Indian Law is to protect the legitimacy of the child when he is really a off-spring of legally married couple and born during the continuance of marriage, i.e., the Indian Law is tried to be based on truth. That is why the presumption of legitimacy is allowed to be rebutted by the proof of non-access. When the presumption of legitimacy can be rebutted by a loose evidence like 'non-access' than the logic suggests that a scientific evidence of paternity can very well rebut or corroborate the presumption of legitimacy.

The laws dealing with the legal presumption of legitimacy and paternity in English, Islamic and Indian legal systems are laid down in detail. The intention of legislature and the demand of the justice and truth is that the father of a child in law should be the same, who is the biological father of that child. The presumptions are never final truths, so every presumption howsoever strong it may be can be rebutted by any other more convincing and direct evidence. The presumption and paternity can validly be rebutted or corroborated by the modern scientific techniques specially those techniques which are being developed as branches of science i.e., pathology, forensic and genetics. These developments can very well be used and utilized to find out more specific and reliable conclusion. The considerable advancement in the science of blood grouping has provided the courts of an improved means of proof of special
value, where the question of paternity arises. The legislatures and courts in England are utilizing and fitting such evidence into the existing legal framework. The Indian courts have also successfully used such evidences into the appropriate cases of paternity.

The courts in Soviet Russia have allowed blood tests since 1927, and today positive results are regarded as absolutely conclusive proof of a non-paternity. In Sweden blood tests are compulsory as routine matter in all affiliation cases. It is strange that the Indian courts in most of the cases declared that the Section 112 of Evidence Act does not allow admission of blood test evidence, though it is most objective and foolproof evidence.

The Law Commission in its 69th Report considered relevancy of blood tests but rejected the suggestion of admitting it in evidence. A careful analysis of decided cases on Section 112 established the fact that in majority of the cases the presumption can, at present, be rebutted only by proof of 'non-access'. This approach creates anomalies, and the result out position is an artificial one, particularly in view of scientific developments which can now furnish very reliable evidence.

In a recent case Prof. Chandrashekharan said "We test about ten systems of blood testings". The deciding factor was the SLA typing of blood. If all these tests were conducted the population could be divided into 300 million groups, it almost
reaches individualisation of blood. In these instances he said "we can say cent per cent whether a particular child is not a child of 'X' and 'Y' but we can say 99.9 per cent that the child is born to a person. The arrival of DNA imprinting is a big step towards a forensic scientist's goal in this area. The D.N.A. finger-printing has the potential to exceed the efficiency of conventional systems (blood-group tests) because these are good grounds for anticipating the definite answers not only those, excluding paternity but also for pin-pointing the true father.

The chronology of judicial pronouncements is reflecting a systematic picture that how the law is developed by the courts in England in this respect. These judicial pronouncements made mature the condition which resulted in the enactment of two legislations, one in 1969 the part-III of Family Law Reform Act and the second in 1971, The Blood Test (Evidence of Paternity) Regulation Act, 1971. India is passing through Pre-1969 era of England and the situation is matured rather it is demand of time and justice that England like legislations should also be enacted here, and the English Acts can provide an excellent blue print to propose the legislations in our country.

As it is clear from the various judicial decisions of various High Courts that the Indian constitutional provisions are not violated if the courts ordered for the blood tests and
even the provisions of Evidence Act and other relevant Acts also permit the courts if not expressly then impliedly to order for the test in the disputed paternity cases. But the courts have not found it easy to adjust this power into the existing legal framework and the courts are in want of a legislative clarity. The express provisions through the legislation of granting the power to the courts to order compulsory blood tests will make the picture clear and all ambiguities will come to an end.

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S. Jafi

(The Justice S. J. Tariq)
Judge High Court, Abbott.
4-10-1991

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