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+91 70421 48991
editor@ijlar.com
www.ijlar.com

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Introduction

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Preface

The Indian Journal of Legal Affairs and Research is a testament to our unwavering commitment to excellence in legal scholarship. This volume presents a curated selection of articles that reflect the diverse and dynamic nature of legal studies today. Our contributors, ranging from esteemed legal scholars to emerging academics, bring forward a rich tapestry of insights that address critical legal issues and offer novel contributions to the field. We are grateful to our editorial board, reviewers, and authors for their dedication and hard work, which have made this publication possible. It is our hope that this journal will serve as a valuable resource for researchers, practitioners, and policymakers, and will inspire further inquiry and debate within the legal community.

Description

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**DNA EVIDENCE AND CONCLUSIVE PRESUMPTION OF
LEGITIMACY: A CRITICAL EXAMINATION OF SECTION 116
OF THE BHARATIYA SAKSHYA ADHINIYAM, 2023**

AUTHORED BY - ABHINAV SHUKLA

Abstract

Section 116 of the Bharatiya Sakshya Adhiniyam, 2023 (BSA) retains almost verbatim the rule earlier contained in Section 112 of the Indian Evidence Act, 1872: a child born during a valid marriage (or within 280 days after its dissolution, the mother remaining unmarried) is conclusively presumed to be the legitimate child of the husband. The presumption may be displaced only by proving “non-access” between spouses at the relevant time. This article critically examines whether a conclusive presumption designed to protect children and marital stability can remain normatively justified in an era where DNA testing determines biological paternity with near certainty. The analysis highlights a persistent tension in Indian jurisprudence: courts often accept scientific evidence to evaluate allegations such as adultery or to resolve collateral issues, but remain cautious sometimes reluctant to let the same evidence unsettle legitimacy, given the statutory command of conclusiveness. The article frames this tension through constitutional and rights-based concerns, including dignity, privacy, equality, and what may be termed “forced fatherhood,” where men may be legally bound to paternal status despite biological exclusion. Drawing on doctrinal analysis of statutes and case law, and a comparative review of approaches in the United Kingdom, the United States, Germany, and France, this article argues for reform that retains a strong presumption but replaces conclusiveness with a carefully safeguarded rebuttable model, anchored in child welfare and procedural limits.

Keywords

Legitimacy; Section 116 BSA; DNA evidence; non-access; paternity; forced fatherhood

Introduction

The presumption that a child born within a lawful marriage is the child of the husband is among the oldest tools used by legal systems to preserve family stability. In a deeply practical sense, it was a solution to a problem earlier society could not solve: paternity was uncertain, but social order demanded that families, inheritance, and status not be perpetually open to dispute. The law, therefore, chose a rule of attribution. It preferred stability over biological doubt, and it insulated children who had no role in adult choices from the harsh consequences that historically followed a declaration of “illegitimacy.”¹

Indian evidence law has carried this legacy for over a century and a half. Section 112 of the Indian Evidence Act, 1872, and now Section 116 of the Bharatiya Sakshya Adhiniyam, 2023 (BSA), embody this approach in especially strong terms. The provision does not merely raise a presumption; it declares legitimacy to be “conclusive proof,” rebuttable only by showing that the spouses had “no access” to each other at any relevant time when conception could have occurred.² In other words, once the basic conditions are met (valid marriage and birth during its continuance (or within 280 days of dissolution with the mother unmarried)) the court is directed to treat legitimacy as legally settled unless non-access is established.

This design made sense in a world without reliable scientific tools. Today, however, DNA profiling can exclude paternity with near certainty and can establish probability of parentage at extremely high confidence levels when proper laboratory protocols and chain-of-custody safeguards are followed.³ The clash between a conclusive legal fiction and scientific determinacy is no longer theoretical; it reaches courts in disputes involving maintenance, succession, legitimacy, matrimonial litigation, and, at times, allegations of fraud within intimate relationships.

The legal and moral difficulty is easy to state but hard to resolve. If the law allows DNA evidence to override legitimacy too easily, it risks turning children into the casualties of adult conflict, destabilising settled families, and reopening questions of status whenever relationships deteriorate. If the law refuses to consider DNA evidence even when it reliably excludes paternity, it risks perpetuating outcomes that feel profoundly unfair particularly to men who may be compelled to

accept legal fatherhood despite biological impossibility. This outcome is often described (with growing frequency in scholarship and courtroom argument) as “forced fatherhood.”

This article examines that tension through the lens of Section 116 BSA. It asks whether the policy goals of child protection, dignity of women, and marital stability can justify a conclusive presumption that does not meaningfully adapt to modern science. It also asks whether the present approach produces internal inconsistencies especially when courts admit DNA evidence to assess adultery or other matrimonial issues but refuse to let it unsettle legitimacy. Finally, it explores constitutional concerns implicated by compelled testing, privacy, dignity, equality, and the child’s interests in identity and stable relationships.

Literature Review

The presumption of legitimacy is rooted in a long legal tradition expressed through the maxim *pater est quem nuptial demonstrat* father is he whom the marriage points out. Wigmore traces its evolution as a rule that hardened over time because the alternative was to expose children to social and legal penalties for circumstances beyond their control.⁴ English common law strengthened this presumption to the point where it became exceptionally difficult to rebut, reflecting public policy, decency, and the perceived need to preserve the peace of families. Landmark historical references such as *Good right v Moss* and the *Banbury Peerage Case* illustrate how legitimacy disputes were once treated with extraordinary caution and high thresholds of proof.⁵

In India, the presumption reached statutory form in Section 112 of the Indian Evidence Act, 1872. As commentators have often noted, “conclusive proof” provisions are not neutral evidentiary tools; they function as rules of substantive policy. Ratanlal and Dhirajlal explains that the objective is protective: to save children from stigma and preserve the integrity of the marital family.⁶ Sarathi similarly underscores that conclusive presumptions are effectively commands to courts, limiting fact-finding in service of policy goals though he also questions whether such inflexibility is always justified.⁷

Judicial interpretation has oscillated between strict adherence and carefully carved exceptions. Early decisions treated non-access as the only gateway through which legitimacy could be challenged. In *Chilukuri Venkateswarlu v Chilukuri Venkatanarayana*, the Supreme Court clarified that “access” concerns opportunity for intercourse, not proof of intercourse itself, which made rebuttal difficult but not impossible.⁸

With the rise of scientific tools first blood group testing, then DNA profiling the legal conversation changed. Blood group tests could sometimes exclude paternity, yet courts largely held that such evidence could not displace the statutory conclusiveness unless it established non-access. *Sham Lal v Sanjeev Kumar* reflects this resistance to letting scientific exclusion substitute the statutory language.⁹

DNA testing intensified the conflict. In *Goutam Kundu v State of West Bengal*, the Supreme Court acknowledged the value of scientific tests but warned against routine orders and emphasised the weight of Section 112’s conclusiveness.¹⁰ The Court’s guidelines attempted to balance privacy, dignity, and the child’s welfare against the desire for truth. Yet, these guidelines also left open interpretive gaps, resulting in inconsistent application by lower courts.

A notable shift appears in *Nandlal Wasudeo Badwaik v Lata Nandlal Badwaik*, where the Court indicated that when DNA results conclusively exclude the husband, courts should not shut their eyes to truth especially where fraud is alleged and where the child’s interests may also be served by clarity about biological identity.¹¹ Still, the jurisprudence does not settle into a single rule. In some disputes, courts allow DNA testing for collateral purposes, including adultery in matrimonial proceedings, but remain wary of using it to “bastardise” a child for legitimacy determinations. This creates a persistent doctrinal tension: DNA evidence is simultaneously treated as reliable and yet, for legitimacy, sometimes treated as legally irrelevant.

From a rights perspective, scholars and constitutional commentators have raised concerns that the old framework sits uneasily with modern understandings of dignity and privacy. After *K.S. Puttaswamy v Union of India*, privacy is not merely a statutory interest but a fundamental right, which complicates compelled collection of biological samples and the disclosure of intimate

facts.¹² At the same time, feminist legal scholarship cautions against reforms that would make women vulnerable to coercion, surveillance, and harassment through repeated paternity challenges masked as “truth-seeking.”¹³

Comparative literature provides additional frameworks. The UK empowers courts to order scientific testing under the Family Law Reform Act 1969, but judicial discretion and child welfare considerations remain central.¹⁴ In parts of the US, time limits and doctrines like paternity by estoppel aim to prevent late disruptions to stable parent-child relationships.¹⁵ Germany allows paternity challenges based on DNA evidence but restricts secret testing to protect informational self-determination.¹⁶ France is comparatively cautious, prioritising family peace though facing human-rights criticism when truth is suppressed too strongly.¹⁷

Against this legal and scholarly background, Section 116 BSA’s retention of near-verbatim language from Section 112 IEA becomes especially significant. The legislature had an opportunity to modernise the balance but chose continuity. The question, therefore, is not simply what courts “can” do under the provision, but whether the provision’s structure still serves justice in its present form.

Methodology

This article adopts a doctrinal legal research methodology grounded in the interpretation of statutory text, judicial precedents, and established commentaries on evidence and family law. Primary materials include the Bharatiya Sakshya Adhiniyam, 2023, the Indian Evidence Act, 1872, constitutional provisions (especially Articles 14 and 21), and leading Supreme Court and High Court decisions addressing legitimacy presumptions and scientific testing. Secondary materials include treatises (notably Ratanlal and Dhirajlal; Sarathi; Wigmore), peer-reviewed articles on DNA evidence and legitimacy, and comparative legal instruments such as the UK Family Law Reform Act 1969, the Uniform Parentage Act (US), and relevant provisions of the German Civil Code.

The analytical framework is structured around four axes. First, the article traces the historical and doctrinal foundations of legitimacy presumptions to clarify the policy interests the law intended to serve. Second, it undertakes a close reading of Section 116 BSA as a legislative choice, including the consequences of categorising legitimacy as “conclusive proof.” Third, it analyses Indian judicial treatment of DNA evidence to identify patterns, tensions, and inconsistencies especially the difference between using DNA to assess adultery or matrimonial fault versus using DNA to unsettle legitimacy. Fourth, it situates the debate within constitutional norms and comparative experiences, to evaluate whether a more proportionate and rights-consistent framework is feasible without sacrificing child welfare.

As a doctrinal study, this article does not claim to present empirical prevalence data on paternity disputes in India, nor does it quantitatively measure outcomes for children. It instead focuses on the architecture of the rule, the coherence of its application, and the normative implications that arise when law and science point in different directions.

Discussion and Analysis

Historical Evolution of the Presumption and the Logic of “Conclusive Proof”

The presumption of legitimacy was never only about biology; it was about social order. In societies where lineage determined property, rank, inheritance, and belonging, destabilising parentage was destabilising society itself. Roman and common law traditions treated legitimacy as a stabilising device, and as the consequences of illegitimacy became harsher, the presumption became harder to rebut.⁴

When the Indian Evidence Act was drafted, it absorbed these inherited anxieties. The shift from a strong presumption to “conclusive proof” is particularly important. Conclusive proof provisions tell courts to stop asking certain factual questions once threshold facts are shown. This is law’s deliberate refusal to chase truth in a narrow domain because another value here, child protection and family stability is deemed higher.

The problem in the DNA era is that the “truth” being refused is no longer uncertain. The law is not choosing stability over doubt; it is choosing stability over demonstrated biological exclusion. That makes the moral burden heavier. The stronger the scientific certainty, the harder it becomes to justify a legal rule that acts as if such certainty is irrelevant.

Section 116 BSA: Continuity, Scope, and the Non-Access Standard

Section 116 BSA provides that a child born during a valid marriage, or within 280 days after dissolution (with the mother remaining unmarried), is conclusively proved to be the legitimate child of the husband unless non-access is shown.²

Three features deserve emphasis. First, the presumption is triggered by marriage validity and the timing of birth. Second, the rebuttal route is narrow: non-access must be shown “at any time” when conception could have occurred. Courts have interpreted access as opportunity, not confirmed intercourse, meaning even sporadic cohabitation can defeat claims of non-access unless the husband proves impossibility or complete separation.⁸ Third, the language forecloses alternative rebuttal methods: even convincing evidence of adultery, even blood group exclusion, and arguably even DNA exclusion do not, by themselves, satisfy “non-access.”

As a practical matter, this creates a mismatch between lived experience and legal proof. Many marital relationships involve partial separation, informal breakdown, or uncertain periods of contact. In such cases, DNA evidence could provide clarity, but the statute’s structure pushes parties into the difficult task of proving non-access in a strict sense often requiring intimate testimony, travel records, incarceration proof, or other circumstances demonstrating no opportunity at all.

The continuity of language from Section 112 IEA to Section 116 BSA suggests that the legislature was content to preserve the traditional policy choice. But continuity does not resolve the friction. Instead, it relocates the pressure onto courts, which must decide how to treat DNA evidence in cases where truth appears to contradict conclusiveness.

Indian Jurisprudence on DNA Testing: A Pattern of Caution and Exceptions

Indian courts have consistently stated that legitimacy presumptions exist to protect children. In *Chilukuri Venkateswarlu*, the Supreme Court treated the presumption as strong and clarified that access is about opportunity.⁸ In *Goutam Kundu*, the Court recognised scientific tests but cautioned that they should not be ordered as a matter of course, and it stressed that Section 112's presumption must be given due weight.¹⁰ The Court's broader concern was that easy testing would open floodgates of suspicion, expose women to harassment, and risk branding children as illegitimate.

At the same time, *Goutam Kundu* did not fully close the door. By acknowledging that tests may be ordered when strong prima facie reasons exist, it implicitly recognised that there are cases where truth-seeking cannot be dismissed. The ambiguity lies in what counts as "strong" and how that interacts with a conclusive proof provision.

Nandlal Wasudeo Badwaik represents a moment where the Court leaned more openly toward scientific truth, especially where DNA testing was already conducted and exclusion was clear.¹¹ The Court's reasoning also invoked the child's interest in knowing biological fatherhood and criticised any attempt to allow fraud to prevail. Yet, the judgment does not rewrite the statutory text; it instead signals that courts should not ignore compelling scientific material when it is already on record, particularly where justice and welfare concerns intersect.

This is where the inconsistency becomes visible. Courts sometimes permit DNA evidence to prove adultery or to assess matrimonial fault, but simultaneously resist using it to directly rebut legitimacy because Section 116's predecessor declares legitimacy conclusive absent non-access. The outcome can be paradoxical: a husband may succeed in demonstrating adultery through DNA-linked inference, yet remain the legal father for maintenance and status purposes. This split treatment weakens doctrinal coherence because it treats the same scientific fact as both meaningful and legally irrelevant depending on the relief sought.

DNA Technology as Evidence: Reliability, Limits, and the Real Legal Question

From a forensic standpoint, DNA paternity testing is widely regarded as the gold standard when performed properly. A correctly conducted exclusion is decisive: the tested man cannot be the biological father.³ The reliability question, therefore, is not the main obstacle; the legal obstacle is policy.

The real question is what the law is trying to achieve in legitimacy disputes. If legitimacy is purely a biological concept, then DNA should dominate. If legitimacy is a social status designed to protect children's welfare and family stability, then biology may be only one factor sometimes decisive, sometimes not. Indian law, through Section 116, takes a strongly status-protective stance by declaring legitimacy conclusive. But modern child welfare is not reducible to "legitimate" versus "illegitimate." Many legal disabilities of illegitimacy have been reduced over time, at least in formal doctrine, and courts increasingly recognise that children's interests include psychological stability, identity, and freedom from adult conflict.

This means that both sides of the DNA debate can claim to speak for children. On one view, maintaining legal fatherhood regardless of biology protects the child's social security and avoids stigma. On another view, forcing a false legal identity on a child may deprive the child of truth, medical history, genetic identity, and potential relationships, and it may also seed emotional harm if the attributed father resents imposed obligations.

So the legal design challenge is not simply "DNA yes or no." It is whether the presumption should remain conclusive, or whether it should become rebuttable with safeguards that protect children and prevent misuse.

Forced Fatherhood and Constitutional Concerns (Articles 14 and 21)

The phrase "forced fatherhood" is not a term of art in Indian statutes, but it captures a lived constitutional anxiety: the law may compel a man to bear lifelong paternal responsibilities despite

biological exclusion, purely because a legal fiction is insulated from scientific rebuttal. The question is whether such compulsion is constitutionally tolerable, and if so, under what conditions.

Under Article 21, the Supreme Court has long interpreted “life” to include living with dignity. In *Francis Coralie Mullin*, dignity is treated as integral to life and liberty.¹⁸ If a man is compelled to accept fatherhood because the law refuses to consider decisive evidence of non-paternity, the harm is not only financial. It can include reputational injury, emotional coercion, and an enduring legal identity that he experiences as imposed and false especially in cases involving deception.

Privacy concerns also cut both ways after *Puttaswamy*.¹² Compelling DNA samples intrudes upon bodily autonomy and informational privacy; disclosing the results exposes intimate sexual histories and potentially harms the child’s privacy. Yet, privacy cannot function as a blanket shield for fraud, nor can it automatically defeat the child’s interest in identity in every case. The constitutional question becomes one of proportionality: is an absolute bar on rebuttal (other than non-access) a proportionate way to protect family peace, or does it impose unnecessary and excessive burdens where scientific evidence is clear and where child welfare could be addressed through other safeguards?

Article 14 adds another layer. A rigid rule treats all births during marriage alike even when facts differ dramatically faithful marital conception and conception through adultery are both treated identically because the policy is to protect children. This uniformity may be defensible as classification serving a legitimate purpose. But when the law simultaneously allows DNA evidence for some purposes and refuses it for legitimacy, it risks arbitrary line-drawing. The system begins to look less like principled protection and more like selective truth.

None of this implies that men’s interests should trump child welfare. Rather, it suggests that a constitutional order committed to dignity, equality, and privacy should be cautious about absolute rules that produce severe hardship without room for calibrated discretion.

Comparative Approaches: How Other Jurisdictions Manage the Same Conflict

Comparative law does not supply a ready-made transplant for India, but it helps clarify the menu of options.

The United Kingdom allows courts to direct scientific testing under the Family Law Reform Act 1969, but child welfare and judicial discretion remain central.¹⁴ In *Re H (A Minor)*, the court recognised a general inclination toward truth but allowed refusal where exceptional harm could occur.¹⁹ This model accepts science but places it inside a welfare-oriented judicial balancing process.

In the United States, many jurisdictions permit challenges but impose strict time limits and apply doctrines such as paternity by estoppel.¹⁵ The underlying insight is that parentage can be both biological and social: if a man has acted as father for years, the law may treat that relationship as worth protecting even if biology is later disproved. This reduces the risk of late-stage abandonment and protects children from abrupt identity disruption.

Germany permits challenges but safeguards privacy and prohibits surreptitious testing in ways that violate informational self-determination.¹⁶ The German approach highlights that “truth” should be pursued through lawful procedures, not private coercion, and that children’s privacy rights are not incidental.

France, with its emphasis on family peace, remains cautious about destabilising parentage status, though European human-rights jurisprudence has criticised excessive restrictions that prevent individuals from establishing biological truth.¹⁷

A consistent pattern emerges: most modern systems have shifted away from absolute conclusiveness. They preserve a presumption, but they make room through time limits, discretion, child welfare tests, privacy safeguards, and estoppel doctrines for cases where biology and justice demand attention.

Balancing Competing Interests: What a Coherent Indian

Framework Should Aim For

A workable Indian framework must begin by admitting a difficult truth: child welfare is not served by a single mechanical outcome in every case. Some children are protected by maintaining the presumption; others are harmed by forcing a legal fiction. Women's dignity is protected by preventing harassment and fishing expeditions; it is not served by granting immunity to deliberate deception. Men's dignity is not served by imposing irreversible status regardless of truth; it is also not served by permitting opportunistic late denials after years of parenting.

From this perspective, Section 116's "conclusive proof" structure is less a balance and more a lock. It prevents courts from openly performing the welfare-and-rights balancing that modern constitutional adjudication expects. Courts sometimes attempt to do it indirectly through discretionary decisions on whether to order tests, or through welfare language after results are available but this produces inconsistent outcomes and doctrinal strain.

A coherent framework would likely keep three core commitments intact: (i) legitimacy should be strongly presumed for children born within marriage; (ii) DNA testing should not become routine or vindictive; and (iii) child welfare should remain central. Yet it should also incorporate two modern commitments: (iv) science cannot be ignored when exclusion is clear and justice demands a remedy; and (v) privacy and dignity require strict procedural controls and confidentiality.

Findings and Conclusion

First, Section 116 BSA represents legislative continuity rather than modernisation. It retains the colonial-era structure of conclusiveness despite the transformative impact of DNA science on paternity certainty.²

Second, Indian judicial practice shows an unresolved inconsistency: DNA evidence is sometimes accepted to evaluate adultery or matrimonial fault, yet it is often treated as legally insufficient to rebut legitimacy because the statutory rebuttal pathway is limited to non-access.^{10–11} This produces outcomes that can appear logically incoherent and practically unjust.

Third, the present approach creates genuine constitutional pressure points. Article 21's dignity and privacy dimensions, reinforced by Puttaswamy, complicate compelled testing and also complicate blanket refusals to consider scientific truth.¹² Meanwhile, Article 14 concerns arise where similarly situated litigants experience different treatment depending on the procedural posture of the dispute (divorce versus legitimacy/maintenance), even when the underlying scientific fact is the same.

Fourth, child welfare often invoked to justify conclusiveness is not a one-dimensional interest. In some situations, maintaining the legal fiction protects stability; in others, it entrenches deception, undermines identity interests, and produces emotionally corrosive family dynamics.

Fifth, comparative experience suggests that strong but rebuttable presumptions, combined with time limits, judicial discretion, welfare analysis, privacy safeguards, and recognition of social parenthood, can reduce harm while still protecting children.¹⁴⁻¹⁷

Conclusion

Section 116 BSA protects legitimacy, but in hard cases it can also manufacture forced fatherhood. The legal system should not pretend that only one of these descriptions is true. The more honest position is that the provision sometimes secures child welfare and sometimes imposes injustice depending on the facts. The real task is to design a rule that keeps the protective core while allowing proportionate correction in exceptional cases.

A balanced reform direction would be to retain a strong presumption of legitimacy but remove the label of "conclusive proof," making the presumption rebuttable under carefully defined conditions. DNA evidence should be admissible to rebut the presumption, but only through court-supervised procedures. Challenges should be subject to limitation periods (for example, within a defined time from birth or from discovery of serious doubt). Courts should be required to consider the best interests of the child as a central factor, including the child's age, existing bonds, psychological stability, and identity interests. Finally, doctrines recognising social parenthood (akin to estoppel) can prevent opportunistic denials by men who have long acted as fathers.

If the law continues as it stands, courts will likely keep improvising around Section 116 through discretionary test orders and welfare reasoning, producing uncertainty and uneven outcomes. Clear legislative reform would be the more transparent and principled route: one that respects child welfare, women's dignity, men's rights, and the integrity of truth-seeking in an age where science has changed what courts can know.

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