

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary
Peer Reviewed

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume II Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner what sever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

EDITORIALTEAM

EDITORS

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board



Dr. Namita Jain



Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC-NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrish Bharat Foundation, New Delhi. (2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpna

Assistant professor of Law

Mrs.S.Kalpna, presently Assistant professor of Law, VelTech Rangarajan Dr.Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law,Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted 1Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration.10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN- 2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

“DNA, DIGNITY AND DISBELIEF: THE CRISIS OF PRESUMPTION OF PATERNITY”

AUTHORED BY - PRAKRITI SHUKLA & ABHAI RAJ SHUKLA

1. INTRODUCTION

“The child of a married woman is presumed to be the child of her husband; and this presumption is not to be rebutted by any proof less than that of the impossibility of the husband being the father.”¹

-Lord Mansfield, Goodright v. Moss (1777)

Presumption of legitimacy is one of the oldest doctrines flowing through the common law. The doctrine encapsulates the presumption that a child born during the subsistence of a valid marriage is a legitimate child to the parents and this could only be rebutted if the parties prove absolute impossibility of them having access of one another. This rule of law finds its place under Indian jurisprudence in the form of Section 112 of the now repealed Indian Evidence Act, 1872 and its successor Bharatiya Sakshya Sanhita, 2023 under Section 116. Both these sections cumulatively state:

“The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty 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.”²

The presumption was created at a time when establishing paternity was a strenuous task relying only on circumstantial and testimonial evidences. In an illustrative case of **Chilukuri Venkateswarlu v. Chilukuri Venkatanarayana**³, the paternity was denied to the petitioner only on the testimonials of non-access from the defendant only. Later, Hon’ble Supreme Court, holding out the err in judgment of the High Court, allowed appeal in favor of the plaintiff.

¹ Goodright v. Moss, 2 Cowp. 591

² Sec 112 of Indian Evidence Act, 1872, now Sec 116 of Bharatiya Sakshya Adhinyam, 2023

³ AIR 1954 Supreme Court 176

Paternity and legitimacy are intricately woven through the strands of public morality and societal obligations. An illegitimate child though howsoever meritorious has no name of his own, no family to associate to and certainly no rights in the eyes of law. Illegitimacy is looked down upon and the desolate conditions that a bastard child is raised in is nothing short of wretched and pitiful. *The bastard was filius nullius, and was denied a name unless he acquired one by reputation; having no family recognized by the law, he was incapable of inheriting property.*⁴

To prevent the children from being thrown into the trenches of illegitimacy, the courts had three ways to rule the paternity:

1. By raising a presumption that was to be the conclusive proof of legitimacy if the child were born out of subsisting lawful wedlock, or,
2. By allowing admission or denial by the alleged father, or,
3. By adjudicating with respect to the circumstances and testimonials of each party.⁵

While the latter two provided some semblance of court authored legal relief fueled by proof and testimonials, the presumption was absolute. In the Common Law courts of England, the presumption was absolute and conclusive proof of the legitimacy. Although, this provision translated to colonial era legislation of Indian Evidence Act, Indian Courts reiterated sternly that there was a single respite to the presumption in the form of non-access.

*The principle of English common law according to which neither a husband nor a wife is permitted to give evidence of non-access after marriage to bastardize a child born in lawful wedlock, does not apply to legitimacy proceedings in India as no such rule is to be found anywhere in the Indian Evidence Act and the old common law doctrine itself has been abrogated in England by the provisions of section 7 of the Matrimonial Cause Act, 1950.*⁶

The legal sphere did not remain untouched by the storm of technological advancements. While the techniques of DNA fingerprinting, forensic evidencing and narco-analysis were accepted and even applauded as technological feats in legal fraternity, there were also some of these methods that stirred conflicts among the pre-existing laws and presumptions. One such is the advent of DNA profiling, which could conclusively determine the parentage, heredity and even

⁴ Frankfurter, J., concurring in *Levy v. Louisiana*, 391 US 68, at 72–73 (1968).

⁵ Munonyedi Ugboke, *Who's Your Daddy?: Why the Presumption of Legitimacy Should Be Abandoned in Vermont*, 34 VERMONT LAW REVIEW 683 (2009).

⁶ *Id.*, at no 3

trace the generations back. This created a tussle between the biological truth and legal legitimacy. The courts, more or less, relied on the legal text carved in stone and this innovation could take away the legal roof that protected the hut of legitimacy.

However, in a series of conflicting judgments, various courts, though acknowledged the advancement and its benefits, they refuse to leave the straight letter of law.

"We are bound by the law. However, we cannot ignore the fact that modern science with the help of DNA now provides infallible evidence. When there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail."⁷

This creates a double faceted issue. From the point of view of a father who has been given the reigns of paternity of a child, that is not actually his own biologically, would be burdened with maintaining the same due to this irrebuttable presumption, while on the other hand, the child who is the actual biological offspring may be denied paternity if non-access is duly proved or if the mother married a different individual during the time-frame of two hundred and eighty days. Both of these consequences could have dastardly effects on individuals.

The time that this presumption belongs to was unbeknown to this facet of technology and hence, it stood firm and fair in protecting familial stability and social morality. However, in modern times with evolved notions of same-sex couples, artificial insemination, surrogacy, live-in relationships, and ART (Assisted Reproductive Technology) bring the colonial era presumption under intense scrutiny in the light of genetic testing. Retaining of this rule of law under home-grown Bharatiya Sakshya Adhinyam feels devoid of dynamic elasticity that legal letters often boast of. The matter cannot simply be addressed by allowing genetic testing of parentage in each and every case. This would fuel the violations of rights of privacy and dignity that the Indian Constitution garners on its subjects, leading to humiliations and social discomfort.

The paper addresses this very legal conundrum- ***Whether social presumption should yield to the scientific certainty and if yes, to what extent?***

⁷ Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik, (2014) 2 SCC 576, at 582.

2. DOCTRINAL FOUNDATION: PRESUMPTION OF LEGITIMACY

*"The law of England upon the subject is well known. It is founded in decency, morality, and policy. The child, who is born after lawful wedlock, is presumed to be legitimate, and this presumption can only be rebutted by circumstances which show that the husband had no access to the wife. To bastardize a child is a grave and odious imputation. It strips him of all rights of inheritance, and casts a stigma upon him and his posterity. The law, therefore, with scrupulous delicacy, requires the clearest proof, and will not allow that proof to rest in loose and unguarded declarations."*⁸

Stevenson's Heirs v. Sullivant, 18 U.S. (5 Wheat.) 207, 225 (1820)

In the earliest times of common law, the presumption of legitimacy was absolute and could only be refuted if the husband was impotent, overseas or imprisoned with proved impossibility of access to the mother. The doctrine of presumption of legitimacy finds its roots in a 18th century judgement by **Lord Mansfield** where he popularly theorized the presumption as- *presumption of legitimacy of a child born in wedlock could only be rebutted by evidence that the husband was not "within the four seas" during the time of conception.*⁹ The term "within four seas" was diluted in the later judgments and though a legal defence in the form of non-access was provided, neither the husband nor the wife could raise it or give evidence of the same. The legitimacy could only be challenged by the parents or descendant of one or both of them.

It is well-settled principle of law that *odiosa et inhonesta non sunt in lege praesumenda* which translates to nothing odious or dishonourable will be presumed by the law. The law presumes against vice and immorality. In a civilised society it is imperative to presume the legitimacy of a child born during continuation of a valid marriage and whose parents had "access" to each other.¹⁰

Based on the refusal of the Earls and Barons in 1235 to provide for legitimation of a child born out of wedlock, **Lord Chief Justice Tindal** was able to state in **Birtwhistle v. Vardill** that: *"... the rule of descent to English land is, that the heir must be born after the actual marriage of his father and mother . . . and . . . this is a rule of a positive inflexible nature, applying to*

⁸ Stevenson's Heirs v. Sullivant, 18 U.S. (5 Wheat.) 207, 225 (1820)

⁹ Supra at note 1

¹⁰ Ratanlal & Dhirajlal, The Law of Evidence 27th ed. (Bharat Law House, 2020)

and inherent in the land itself which is the subject of descent."¹¹

The benefits of the presumption were also extended to the children born after divorce or the death of the husband, granted there was sufficient means and time to conceive while marriage subsisted. This is reflected from the wordings of Section 112 of The Indian Evidence Act and now Section 116 of the Bharatiya Sakshya Adhiniyam- "*or within two hundred and eighty days after its dissolution.*"¹²

WHY THE NEED TO PRESUME LEGITIMACY?

Man is social animal. His existence depends on the virtues established by his fellow humans and is governed on the scales of social purity and morality. The civilizations have always been rooted in patriarchy. The child takes his father's name, adorns his father's status and passes this very connection along to his future generations. The motherhood needs nothing to be ascertained, the delivery of a living human from a woman's body leaves no room for doubt as to who the mother could be. It is always the paternity that needs to be investigated and proved. Paternity always finds itself in conflict and circus of proof and speculations.

The concept is not entirely western or ingrained by the English jurists. In the mythological representations of *Mahabharata*, *Kunti*, a maiden princess, is depicted as placing her child *Karna*, in a basket and floating it downstream. Despite being a princess from a powerful clan and the child being a divine boon from *Surya* or the Sun Lord, she takes this harsh measure to avoid being privy to disgrace and humiliation. The social stigma attached to the concept bastardness has deep roots in the society and mirrors the social reality in both ancient and colonial India, where legitimacy is the cornerstone to determine the social standing, status and respect provided to an individual.

Today, the courts grapple to reconcile scientific evidence against legal presumption, the shadow of illegitimacy casts emotional and legal burdens, especially upon the child, who is the least heard party despite being the most affected. Legislative intent behind presumption of legitimacy is concerned with both the social norms and morality and the ease of justice.

The courts have created this presumption to preserve the familial sanctity and stability. The

¹¹ Birtwhistle v Vardill (1826) 5B&C 438

¹² Supra at note 2

times required the child to have both of his parents to have a strong nurturing and social prospects. Laws of inheritance required a child to have a father from whom the inheritance would flow. Moreover, the presumption protected the emotional security of the child as well. From the perspective of the courts, the presumption made it easier to determine parentage, prevent the children from being wards of state and impose a financial obligation upon the state to nurture them.

3. SECTION 112 OF THE INDIAN EVIDENCE ACT AND ITS COUNTERPART

Maternity admits of positive proof, but paternity is a matter of inferences. The connection of a child with his father is secret but it may be ascertained by the subsisting facts. It is a legally constituted relation between him and the mother of child. To be clear it is known to everybody that maternity is a fact and paternity is a surmise. It can be said with certainty as to which woman gave birth to a particular individual but it is impossible to say as to who was that man from n w whom the mother begot the child.

Section 112 of the **Indian Evidence Act** directly coincides with **Section 116** of the **Bharatiya Sakshya Adhinyam**. It lays down the rule for the proof of the paternity of an individual. This section lays down that if child is born during the continuance of valid marriage between the mother and a man or within 280 days after the dissolution of the marriage, the mother remaining unmarried it shall be presumed that the child is a legitimate son of that man unless and until it shown that the parties to the marriage had no access ach other any time when the child would have been begotten.¹³

In **Shyam Lal v. Sanjeev Kumar**, the plaintiff and the defendant, were born during continuance of valid marriage of her mother with the deceased. There was no evidence on record that the deceased at any point of time did not have access to her. It was held that there was strong presumption about the legitimacy of children.

Justice Dalveer Bhandari of the Supreme Court held-

"On the proof of legitimacy of marriage, there is strong presumption about can only the legitimacy of marriage born out of that wedlock. The presumption can be rebutted by a strong,

¹³ Supra at note 2

clear, satisfying and conclusive evidence. The presumption cannot be displaced by mere balance of probabilities or any circumstance creating doubt."¹⁴

In **Narendra Nath Pahari v. Ramgovind Pahari**, according to the evidence, the wife of the deceased conceived at the time of illness of deceased from carbuncle. He died within fourteen days. The child born within 280 days of his death was held to be legitimate in the absence of any evidence to prove that the deceased could not have connection with his wife due to serious illness.¹⁵

A. FACTUM OF MARRIAGE TO BE PROVED

Before the presumption of legitimacy is to be raised it is necessary that the marriage is to be proven as valid. In the case of **P.V. Shahu v. Maiakutty**¹⁶, the court held that it is mandatory for the application of Section 112 that the marriage is valid.

In an interesting case where the wife had deserted her earlier husband and was cohabiting for a long time with another man, there would arise a presumption in favour dissolution of the earlier marriage and the child born would be legitimate. The Supreme Court held that, woman deserting her husband and living with another man, child born from that relationship, where the paternity has been acknowledged by relatives will be legitimate child. According to the opinion expressed by Supreme Court in instant case, a woman abandoning her husband and not brought back by her erstwhile husband as wife, would be deemed to be divorced according to Hindu Law. Here the woman had deserted her earlier husband, the husband did not bring her back. The woman was living with another person for long time. In these circumstances, it will be presumed that the marriage between the woman and her earlier husband had been dissolved because taking caste into consideration it was customary in Sudras, that each spouse is entitled to rearrange his or her life in marriage with other marrying partner. The child will be deemed to be legitimate child.¹⁷

Even in the case where the continuous cohabitation of woman with a man and a child is born out of long periods of cohabitation, would give rise to presumption of legitimacy.¹⁸

¹⁴ Shyam Lal v. Sanjeev Kumar AIR 2009 SC 3115

¹⁵ Narendra Nath Pahari v. Ramgovind Pahari, 1901, 29 IA 17

¹⁶ . DNA Technology (Use and Application) Regulation Bill, 2019 (Bill No. 52 of 2019).

¹⁷ M.Govindraju v. K. Muniswami Gounder, AIR 1997 SC 10

¹⁸ S. Ajamma B Bibi alias S. Hajaram Bibi v. S. Khursheed Begum AIR 1996 SC 1663

B. ACCESS AND BURDEN OF LEGITIMACY

The term “access” here contemplates the opportunity of marital intercourse. Non-access does not necessarily mean that the parties must be so far apart physically but it may also include any such condition that may prevent effective access. This may include physical incapacity, impotency, psychological impotency. It is not necessary in all cases to prove that the man and woman could not be together as for example one was at Calcutta and other Madras. If it is established that the husband was physically incapable of procreating it will mean non-access within the meaning of this section. If it is proved that the man is impotent the non-access will be proved. But to stamp a child born to a wife in lawful wedlock with illegitimacy on the ground of incapacity of procreation, it will be necessary to prove:

- (1) the precise age of the husband at the date of conception;
- (2) to negative the possibility of premature vitality at that age owing to precocious development.

In this section as it has been said above it should be remembered that the word 'access' and 'non-access' mean the access and non-access of sexual intercourse.

The presumption of legitimacy is a conclusive proof that entails that no further proof can be given once the same is raised. However, legislation provides for a limited relief in the form of “proving non-access at the time of conception.” The defence is limited in its nature as the courts have time and time again, favoured the presumption over this defence plea.

“Access” and “non-access” mean the existence or non existence of opportunities for sexual intercourse; it does not mean actual “cohabitation”.¹⁹ The party who wants to dislodge the conclusiveness has the burden to show a negative, not merely that he did not have the opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time.²⁰

The courts must be inclined towards upholding the legitimacy of the child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimization of the child would result in rank

¹⁹ Karapaya Servai v. Mayandi, AIR 1934 PC 49.

²⁰ Supra at note 11

injustice to the father.²¹

4. STATUTORY MISMATCHES

Indian Parliament in the year 2023 brought major change to its criminal jurisprudence with enacting three new criminal laws, repealing the colonial era Indian Evidence Act, Indian Penal Code and Criminal Procedure Code. The new laws were brought to modernize, simplify and streamline the presentation of evidences and their interpretation in the courts. Most of these changes are with respect to the admissibility and access to the electronic and forensic evidences, it crucially leaves out the untapped realm of the genetic profiling. It feels bizarre that such an important aspect was left untouched as the law makers verbatim retained Section 112 of the Indian Evidence Act under Section 116 of the Bharatiya Sakshya Sanhita. There is not an ounce of change, no guidelines to accommodate the controversial yet effective and certain biological truth. This creates a tear in the facade of “modernizing” the legal system of fair trials without involving the recent developments. This begs the question- are the legal reforms merely limited to including digital and electronic records? The legislature had the opportunity to settle the conflict between science and law that has arisen due to varying judgements across the country and also to reach an amicable settlement of the extent to which the mother, the child and the father could be exposed to the DNA identification process. With a suitable wording, the presumption could have been evolved to suit the natures of changing needs of modern day society. Yet, it retains the common law defence of no access that, in all its applicability, proves to be redundant in several cases, including the ones of and in the nature of adultery.

Not only the Evidence Act or the Sanhita, the **Hindu Marriage Act, 1955** also exhibits the tension between statutory presumptions and biological reality. The complication arises when the Act intersects with the concept of presumption. **Section 12(1)(d)** of the Act allows the marriage to be annulled if *"the respondent was at the time of the marriage pregnant by some person other than the petitioner"*²² This clause realizes the formidable possibility of a woman entering into wedlock carrying another person's child. It provides a very limited window to the husband to get the marriage declared as void. If he fails to do so and the marriage is consummated, the child, once being born during the continuance of a lawful wedlock would automatically enjoy the absolute protection of the presumption of legitimacy. This creates a

²¹ Dukhtar Jahan v. Mohd. Farooq, (1987) 1 SCC 624

²² Hindu Marriage Act, 1955, s. 12(1)(d).

desolate legal fiction on account of the father who would now be burdened with the legal responsibility of a child that he knows not be his own. The statutory mismatch creates a storm of unknown parentage, broken relations and compromised dignity.

In the case of **Kamti Devi v. Poshi Ram** the court has strictly stated that *the verdict of displacement of the presumption shall not be rendered on the basis of slender materials. If a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable.*²³

The Mohammedan Law too finds itself in contradiction to the presumption under the evidence laws. A valid marriage is essential for the child conceived to be considered legitimate, quite contrary to the rule under the presumption wherein if the child is born even a day later after the marriage the legitimacy is to be presumed. If a child is born within six months of marriage, under Muslim law, the child will be considered to be illegitimate unless and until the father acknowledges it as his own and confers legitimacy.

Another facet of the Muslim law with regards to the fact that a child born after two lunar years, extendable upto four years in certain cases, after dissolution of marriage, can be conferred with legitimacy whereas the time period is restricted to 280 days after dissolution of marriage under Section 112.

In the era where biological evidence could easily remedy the statutory mismatches of this kind, the reluctance on the part of both, the legislature and the judiciary stir up a whirlwind of unnecessary and unwanted legal obligations that instead of protecting the familial sanctity, expose the relations to brazen and charged emotions.

5. SCIENTIFIC ADVANCEMENT AND LEGAL TRUTH

DNA profiling is a evolving and new concept in criminal justice systems all across the world. DNA is the genetic xerox or building block to an individual's body. It is mostly found in blood, hair, skin. These are admissible in courts and are applauded for accuracy and efficiency. The technology became popular in India in the 1990s, however a certain hesitance is seen when it

²³ Kamti Devi v. Poshi Ram, (2001) 5 SCC 311 paras 11 & 12

comes to applying the same in civil matters like the ones relating to paternity. The lack of uniform code to prescribe and regulate admissibility of DNA evidence is a reason behind such reluctance. The pending legislation in the form of **DNA Regulation Bill, 2019** tries to establish a uniform network for these scientific evidences alongside the need to take consent of the individuals.

Referring to the U.S. Supreme Court decision rendered in the case of **R. v. Watters**,²⁴ the Supreme Court of India has ruled that the DNA evidence may have a great significance where there is supporting evidence, dependent of course, on the strength of that evidence. In every case one has to put the DNA evidence in the context of the rest of the evidence and decide whether taken as a whole, it does amount to a prima facie case.²⁵

Analysing the English judgment in the case of **B.R.B. v. J.B**²⁶ in which blood test of the child was permitted for determining paternity, **Gitesh Ranjan Bhattacharjee, J.** beautifully illustrated that contrary to the conclusive presumption of law, the husband is not allowed to directly prove first that he is not the father of the child born during the wedlock and then to say that since he is not the father therefore he did not have access (to the wife) in the sense of sexual intercourse with the wife at least at the time when the child was actually begotten and therefore the presumption of legitimacy stands rebutted. The question of blood test is not a question of effect of the evidence that may or may not be projected by such test, but it is rather the threshold question of admissibility of evidence in the context of the provision of Section 112 of the Evidence Act.²⁷

In **Dipanwita Roy v. Ronobroto Roy**, the Supreme Court had held that, *“DNA testing is the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the assertions made by the respondent husband, and to establish that she had not been unfaithful, adulterous or disloyal. If the appellant-wife is right, she shall be proved to be so.”*²⁸

²⁴ R. vs. Watters, (2000) All.E.R. (D) 1469

²⁵ Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra, 2005 CrLJ 2533 (SC)

²⁶ (1968) 2 All ER 1023

²⁷ Tushar Roy vs Sukla Roy 1993 CRILJ 1659

²⁸ Dipanwita Roy v. Ronobroto Roy, (2015) 1 SCC 365

Similarly, in **Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik**, the Supreme Court took the view that the result of a genuine DNA test is scientifically accurate and when there is conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.²⁹

In the case of **Amarjit Kaur v. Harbhajan Singh and Anr**, the court observed that at the time when Section 112 was brought there was no such concept of DNA technology. It further held that although the accuracy of DNA test i.e 99.9 % is totally genuine it still lacks in discarding the strong presumption of paternity as provided under section 112 of the Evidence act.³⁰

DNA testing, while potent, must not become a tool to override human rights. It is upon courts to ensure that consent is meaningful, measures are proportionate, ethical considerations take precedence over legal strategy and that biological evidence does not become a routine tool in disputes involving allegations of adultery, maintenance, divorce or inheritance.

SAME SEX COUPLES AND REAWAKENING OF THE PRESUMPTION

Former Chief Justice of India Justice D.Y. Chandrachud while discussing same-sex unions in the case of **Supriyo v. Union of India**, opined that queer is a natural phenomenon known for ages. Homosexuality or queerness is not an urban concept or restricted to the upper classes of the society. Our ability to feel love and connection with one another makes us feel human. We have an innate need to be seen and see. The need to share our emotions make us who we are. These relationships may take many forms, natal families, romantic relationships.³¹

The recognition of homosexual relationships has transformed the family law debates worldwide. It represents a seminal intervention in existing family law notions. Amongst this whirlwind, the presumption of legitimacy that places paternity on the husband, occupies a particularly contested space. Designed in an era where marriage was exclusively heterosexual and parentage was presumed to align with sexual reproduction within the marital home, the doctrine needs a scientific revamp.

²⁹ Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik, (2014) 2 SCC 576

³⁰ Amarjit Kaur v. Harbhajan Singh and Anr, 2003 (1) AWC 344 SC

³¹ W.P.(C) No. 1011/2022

India is far behind its global counterparts in recognising the homosexual unions as legal marriages. In American cases like **Miller-Jenkins v. Miller-Jenkins**³² and **Elisa B. v. Superior Court**³³, the courts have held that union between two women entitled the non-birthing partner to parental recognition equivalent to that of a heterosexual husband. A gender neutral interpretation of the paternity statute was given so as to mandate the lesbian co-partner to pay child-support. Thus, extending the benefit of the presumption even to the lesbian couples.

It gets even trickier when the parties involved are two men. In case of two women one of them has to have a gestational link, which is prominently absent in a man and man relationship. The courts face a challenge as to who exactly is the “mother”?³⁴ The biological stance would put the surrogate as the mother but this unravels the inadequacy of biological evidences when utilised without a functional or intent based approach. There is a need for the law to incorporate functional approach wherein the paternal rights are devolved upon individuals not only through biology or legal presumptions but also based on pre-conception intent, care-giving conduct and co-parenting commitments.

In India, though courts have reiterated the right of self-identity and gender in cases like **Navtej Singh Johar v. Union of India**³⁵ and **NALSA v. Union of India**³⁶, same-sex marriages have not been recognised. Consequently the presumption of legitimacy does not extend to same-sex couples as there is no marital framework to trigger it. Even where a homosexual couple raises a child through adoption or surrogacy, the biological or legal parent is recognised. The non-biological partner remains a legal stranger to the child. This legal vacuum jeopardizes the child’s rights and undermines family security. **The Assisted Reproductive Technology (Regulation) Act, 2021**³⁷ and **Surrogacy (Regulation) Act, 2021**³⁸ explicitly limit access to married heterosexual couples thus widening the trench of state-sanctioned parenthood pathways for the homosexuals.

³² Miller-Jenkins v. Miller-Jenkins, No. 454-11-03, 2004 WL 3020779

³³ Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005).

³⁴ Susan Frelich Appleton, Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era, 86 BOSTON UNIVERSITY LAW REVIEW 227 (2006).

³⁵ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

³⁶ National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

³⁷ The Assisted Reproductive Technology (Regulation) Act, No. 42 of 2021, Acts of Parliament, 2021.

³⁸ The Surrogacy (Regulation) Act, No. 47 of 2021, Acts of Parliament, 2021.

Merely acknowledging non-traditional families³⁹, though progressive, does nothing unless and until statutory changes occur, the presumption of legitimacy remains tethered to a narrow, exclusionary vision of family.

6. PRESUMPTION OVER PROOF: COURTS PRIORITIZING LEGITIMACY OVER DNA

While the scientific triumph in the form of DNA and forensic testing has revolutionized the legal arena, it has not remained untouched by the judicial hesitation. Guided by the presumption under Section 112 Indian Evidence Act or its contemporary counterpart Section 116 of the Bharatiya Sakshya Adhinyam, the courts seem to have favoured the conclusive proof of legitimacy over scientifically backed biological evidence. They have stayed within the confines of legal jurisprudence to safeguard the social stability, honour and a child's welfare from the disruptive potential of the biological evidence. They have either outright refused the biological evidence or in some cases, have disregarded the results.

As held in the case of **Banarsi Dass v. Teeku Datta**⁴⁰, *a rebuttable presumption of legitimacy is attached to a child born of a married woman during a subsistence of marriage or within 280 days of its severance.*

The court cautioning upon the discretion to allow the test held in the case of **Bhabani Prasad Jena v. Orissa State Commission for Women**, *the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed.*⁴¹

The presumption can only be rebutted by a strong, clear, satisfying and conclusive evidence. The presumption cannot be displaced by mere balance of probabilities or any circumstance creating doubt.⁴² The standard of proof in such cases must be of a degree in between the preponderance of probability and proof beyond reasonable doubt by way of abundant caution and has a matter of public policy.⁴³

³⁹ Deepika Singh v. Central Administrative Tribunal

⁴⁰ Banarsi Dass v. Teeku Datta, (2005) 4 SCC 449 para 10

⁴¹ Bhabani Prasad Jena v. Orissa State Commission for Women, (2010) 8 SCC 633

⁴² Sham Lal v. Sanjeev Kumar, (2009) 12 SCC 454 para 39.

⁴³ Supra at note 11

As regards the scientific test of blood or DNA Test for determining the paternity or legitimacy of a child, the Supreme Court in the case of **Goutam Kundu vs. State of W.B.** has laid down following guidelines for the purpose :

- 1) That courts in India cannot order blood test as a matter of course;
- 2) Wherever applications are made with such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
- 3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.
- 4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.
- 5) No one can be compelled to give sample of blood for analysis.⁴⁴

Where a person is compelled by the Court under inherent power to undergo medical or blood test for determining paternity of the child, it is violative of Fundamental Right to life and personal liberty of the Constitution. Such order by the Court would create doubt about the chastity of his wife and paternity of the child.⁴⁵

In a very recent judgment by a Division Bench of **Gita Mittal** and **I.S. Mehta JJ**, evaluating the plea of legitimacy, held that mere allegations of infidelity by the husband against the wife alone could not call the legitimacy of the child in question. The Court held that *the standard of proof required to satisfy Section 112 of the Evidence Act, was very high and that DNA test could not be ordered on a mere allegation by one of the spouses.*⁴⁶

THE CONCERN OF CHILD'S WELFARE

“In all actions concerning children... the best interests of the child shall be a primary consideration.”⁴⁷

-Article 3(1), United Nations Convention on the Rights of the Child (UNCRC)

In a recent case from 2023, the husband sought to use a 9 year old child to prove the allegation of adultery against the wife. The court denied the genetic probe and upheld the right to privacy

⁴⁴ Goutam Kundu vs. State of W.B., (1993) 3 SCC 418

⁴⁵ Ningamma v. Chikkaiyah, AIR 2000 Kar 50

⁴⁶ W v. H, 2016 SCC OnLine Del 4786.

⁴⁷ United Nations Convention on the Rights of the Child, art. 3(1), Nov. 20, 1989, 1577 U.N.T.S. 3.

of the child. It raised concerns over the child being used as a pawn in the battle between the parents and directed that no minor child should be directed to being subjected to DNA test mechanically in each and every case. **Justice BV Nagarathna**, stated “*Illegitimate a term that brands an individual with the shame of being born outside wedlock, casts a shadow on one’s identity. “Times change and attitudes may change, but the impact of growing up with the social stigma of being illegitimate, does not.”*⁴⁸ PRAKRITI SHUKLA

Hence, the Courts must be inclined towards upholding the legitimacy of the child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimization of the child would result in rank injustice to the father. Adding onto this **Justice V Ramasubramanian** stressed that *the child cannot be used as a pawn to show that the mother of the child was living in adultery. It is always open to the husband to prove by other evidence, the adulterous conduct of the wife, but the child’s right to identity should not be allowed to be sacrificed. “To enable one of the parties to the marriage to have the benefit of fair trial, the Court cannot sacrifice the rights and best interests of a third party to the lis, namely, the child.”*⁴⁹

In another case with same dilemma, the husband had filed an application for conducting DNA test of the child upon doubting the chastity of his wife. It was granted by the family court. **Justice R.M. Joshi** while setting aside this order, held that *if there was an allegation against the wife that she lived an adulterous life, the said fact could be proved by any other evidence than calling upon the child to undergo the paternity test. The Court observed that it was obligatory for the Court to consider the best interests of the child as he or she was not capable of making the decision in respect of the test. The Court opined that the child was only a tool in the fight between the parents, and therefore the Court should become the custodian of the rights of such minor child.*⁵⁰

This leads to a legitimate question about whether or not the child could be left out of the dirty and damaging divorce proceedings. In the case where the husband showed definitive proof of being infertile, the Family Court denied the DNA test on the ground that the child was a necessary party and without him being array, the paternity cannot be determined. The Supreme Court overturning this order, held that *it would be permissible for a court to direct the holding*

⁴⁸ Aparna Ajinkya Firodia v. Ajinkya Firodia, 2023 SCC OnLine SC 161

⁴⁹ ibid

⁵⁰ Shalini/Rohini v. Kumarkartik, 2025 SCC OnLine Bom 2623

of a DNA examination, to determine the veracity of the allegations constituting the grounds for divorce if a strong prima facie case is made out. The illegitimacy or paternity of the child is only incidental to the claim for dissolution of marriage on the ground of adultery or infidelity. The child's presence is not necessary to adjudicate the relief claimed.⁵¹

The Court observed in the case of **Deepak Soni v. Anamika Soni**, that *DNA Paternity Test cannot be conducted or ordered to be conducted in a routine and mechanical manner, because it would certainly adversely affect the very mental health of the child. the DNA Test is invading upon the rights of a child, which may range from affecting his property rights, right to lead a dignified life, right to privacy and right to have the confidence and happiness of being showered with love and affection by both parents. The Court also said that **the pain of winning or losing a battle of divorce amongst the contesting spouses is much trivial when compared with the rights of the child to have dignity and parenthood.**⁵²*

6. RECOMMENDATIONS

Section 112 of the Evidence Act and Section 116 of the Bharatiya Sakshya Sanhita aim to protect legitimacy of a child born within wedlock. However, it can be misapplied to suppress biological truth and end up entrapping someone in a fraudulent paternity.

1. Introduction of a statutory standard or judicial guidelines involving the necessity for adjudication, will it affect child's best interests or privacy and whether alternate evidence is available.
2. The presumption should be allowed to be challenged on the additional ground of scientific evidence in cases where it proves non-paternity beyond reasonable doubt and does not adversely affect the welfare of the child.
3. Utmost importance to child's welfare and consideration of child's physical, psychological and legal welfare before allowing the DNA test.
4. Harmonizing the personal laws to end the conflict with the presumption.
5. Passage of **DNA Technology (Use and Application) Regulation Bill** ⁵³ and mandate consent, data confidentiality and involvement of child welfare experts.
6. Recognition of intent-based parenting in cases of surrogacy and assisted reproductive technology.

⁵¹ XXX v. XXX, 2021 SCC OnLine Ker 3458.

⁵² Deepak Soni v. Anamika Soni, (2023) 4 RLW 2829

⁵³ DNA Technology (Use and Application) Regulation Bill, 2019 (Bill No. 52 of 2019).

7. Creating a gender neutral parental framework to afford protection to same-sex households and families.
8. Efforts to mandate psychological counselling for the child to ascertain and avert mental and emotional distress.
9. Inclusion of child rights, DNA science and sensitive adjudication in judicial training.

7. CONCLUSION

*“The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty and we must rise with the occasion. As our case is new, so we must think anew and act anew.”*⁵⁴

-Abraham Lincoln

The tension between the scientific certainty of DNA evidence and legal presumption of legitimacy is that of biology and law and individual interest versus societal interests. The dilemma is not purely academic but it is deeply rooted in the society and humanity. To preserve and protect the welfare of child, family integrity and welfare of child, the presumption has been provided under Section 112 of the Indian Evidence Act, and now its updated counterpart Section 116 of the Bharatiya Sakshya Adhiniyam. However the growing advancements in technology has given rise to existential questions on the presumption. While the law favors presumption of legitimacy over bastardization, biological evidences strike truth in black and white terms. For a country like India that is so rooted in culture and societal norms, it is a herculean task to envisage a system that adapts beautifully and amalgamates technology with existing morality. Where family honour, chastity and illegitimacy are still taboo topics, it is indeed challenging to adopt such whirlwind of a process.

The courts, therefore, have been extremely cautious of the situations. They have allowed DNA testing in cases where there is a strong prima facie case of impossibility of access. But we cannot deny the profound consequences of implementing this technology without safeguards. Whenever something is left to the discretion, it has chances of falling into misfortune of arbitrariness.

⁵⁴ Joel Parker, The Three Powers Of Government. The Origin Of The United States; And The Status Of The Southern States, On The Suppression Of The Rebellion. The Three Dangers Of The Republic 32 (1869) (quoting Abraham Lincoln).

The advent of DNA testing based in scientifically sound principles has introduced a complex dimension to the legal discourse surrounding paternity and legitimacy. While it is and should be applauded for concise and precise certain results, it often disproportionately affects women and children involved. It also leads to reinforce the age old social stigmas. When such a biological test is ordered, more often than not, the social discourse revolves around the chastity and sexual conduct of the woman. The public scrutiny has a long-lasting and traumatic effect on the psyche of the woman and even to a certain extent the child involved. For instance, the court ordered DNA test on application from the husband and it comes back confirming his paternity, it would still tatter the cloth of trust in the matrimonial relationship. Even the child would be stigmatized of having to undergo such an invasive procedure that could have turned its world upside down. If the process is allowed in routine manner, it would be nothing but a tool in the hands of the husband to test the fidelity of the wife upon his whims and fancies. It would the woman that would have to undergo the invasive cross-examination and social humiliation. While in the case of proving “access” the burden lies upon both the parties to affirm or deny, in cases of fidelity, the wife would be left alone to fend herself, compromising her right to dignity and privacy.

Media trials being more common than we think would let this test become nothing more than a tool for patriarchy to flourish and moral police the women.

Therefore, to conclude it can be stated that while such tests and processes are inevitably growing important in jurisprudence with each passing day, courts should try and walk on a careful tight rope. The presumption is not a titan that is to be defeated, it is a jurisprudential shield to protect and safeguard child welfare, familial bonds, constitutional virtues of privacy and dignity and societal morality. A balance must be struck while implementing these procedures with utmost importance being given to consent of individuals, their rights, dignity and privacy intact, a case-specific assessment to avoid routine ordering of DNA tests and finally utilising them only as a last resort when alternative evidences have failed or are not available.

Law must learn to coexist with science, not completely yielding to it but absorbing its values in its own framework of justice, compassion and equity.