
THE DOCTRINE OF LEGITIMACY UNDER SECTION 116 OF THE BHARATIYA SAKSHYA ADHINIYAM, 2023: A MISSED REFORM OPPORTUNITY AND A COMPARATIVE STUDY OF THE UNITED KINGDOM AND THE UNITED STATES

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ABSTRACT

The presumption of legitimacy is among the oldest fictions in the law of evidence. In India it found statutory form in Section 112 of the Indian Evidence Act, 1872, and has now been re-enacted, almost verbatim, as Section 116 of the Bharatiya Sakshya Adhiniyam, 2023. The provision deems a child born during a valid marriage, or within 280 days of its dissolution, to be the legitimate child of the husband, rebuttable only by proof of non-access. Conceived in an era without scientific means of establishing parentage, the rule prioritised social stability and the protection of children from the stigma of illegitimacy over biological truth. This article argues that the 2023 recodification of India's evidence law — undertaken expressly to shed its colonial inheritance — was a singular opportunity to modernise this provision, and that the opportunity was missed. Through an analysis of the governing jurisprudence, from Goutam Kundu to the recent decisions in Aparna Ajinkya Firodia and Ivan Rathinam, it identifies the structural gaps that persist under Section 116: the rigidity of the conclusive presumption, the uneasy status of DNA evidence, the unresolved tension between legitimacy and paternity, and the exclusion of children born of assisted reproduction and non-marital unions. It then undertakes a comparative study of the United Kingdom and the United States, both of which have reframed the presumption as rebuttable and integrated scientific proof, before proposing a calibrated path for reform.

Keywords: Section 116 BSA; Doctrine of Legitimacy; Presumption of Paternity; DNA Evidence; Bharatiya Sakshya Adhiniyam; Comparative Family Law.

I. Introduction

On 1 July 2024, the Bharatiya Sakshya Adhiniyam, 2023¹ (BSA) replaced the colonial-era Indian Evidence Act, 1872 as India's primary law of evidence. The reform formed part of a trilogy of new codes — alongside the Bharatiya Nyaya Sanhita and the Bharatiya Nagarik Suraksha Sanhita — marketed as a decisive break from the colonial legal inheritance. Yet on the question of who, in the eyes of the law, is the father of a child, almost nothing has changed.

Section 116 of the BSA² reproduces the old Section 112 of the Indian Evidence Act³ word for word. A child born during the continuance of a valid marriage, or within 280 days of its dissolution if the mother has not remarried, is conclusively presumed to be the legitimate child of the husband. The only escape is proof that the spouses had no access to each other when the child could have been conceived. The rule descends from the Roman maxim *pater est quem nuptiae demonstrant* — “he is the father whom the marriage indicates.”

In 1872, when paternity could not be tested, the fiction served a humane purpose: it shielded children from the stigma of illegitimacy and protected mothers from accusations of unchastity. In 2024, with DNA profiling accurate to 99.99 per cent, the calculus is different. Retaining this provision unchanged in a statute that claimed to decolonise Indian evidentiary law was a conscious legislative choice — and, this article argues, a missed opportunity for reform. Part II sets out the current Indian position; Part III examines the reform opportunity that was foregone in 2023; Part IV identifies the remaining structural gaps; Parts V and VI compare the positions in the United Kingdom and the United States; Part VII offers a comparative snapshot; and Part VIII concludes with proposals for reform.

II. The current Indian position under Section 116 BSA

Section 116 BSA protects the child, not the truth. Its logic is social, not scientific: a child born within a lawful marriage should not be branded illegitimate on suspicion or even strong circumstantial evidence. Because the text is identical to its predecessor, the body of case law developed under Section 112 of the Indian Evidence Act continues to govern.

¹The Bharatiya Sakshya Adhiniyam, 2023 (Act 47 of 2023). The Act came into force on July 1, 2024, replacing the Indian Evidence Act, 1872.

²The Bharatiya Sakshya Adhiniyam, 2023 (Act 47 of 2023), s. 116.

³The Indian Evidence Act, 1872 (Act 1 of 1872), s. 112.

In *Goutam Kundu v. State of West Bengal*⁴, the Supreme Court held that courts cannot order blood tests as a matter of routine merely to dislodge the presumption, and that the presumption can be displaced only by a strong preponderance of evidence of non-access. This was reinforced in *Kamti Devi v. Posh Ram*⁵, where the Court stressed that the party seeking to rebut the presumption must prove a negative — the absence of any opportunity of access — and in *Sham Lal v. Sanjeev Kumar*⁶, where the presumption was described as resting on public morality and public policy.

The Court has not been wholly resistant to science. In *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik*⁷, it held that where a DNA test and the statutory presumption are in conflict, scientifically accurate evidence must prevail, observing that truth must triumph in the administration of justice. A year later, in *Dipanwita Roy v. Ronobroto Roy*⁸, the Court charted an intermediate course, holding that a party who refuses to comply with a court-ordered DNA test may have an adverse inference drawn against them — an improvised middle path that pressed science into service without disturbing the statutory text. Yet in *Aparna Ajinkya Firodia v. Ajinkya Arun Firodia*⁹, the Court refused a DNA test sought merely to substantiate adultery allegations, anchoring the refusal in the child's right to privacy, bodily integrity, and welfare. Most recently, in *Ivan Rathinam v. Milan Joseph*¹⁰, the Court engaged squarely with the relationship between legitimacy (a legal status) and paternity (a biological fact), holding that the presumption of legitimacy is determinative of paternity in law unless rebutted by proof of non-access. The jurisprudence thus oscillates between scientific truth and social legitimacy, with no settled rule of priority.

III. A missed reform opportunity

The transition from the Indian Evidence Act to the Bharatiya Sakshya Adhiniyam was not a routine amendment. It was a once-in-a-century overhaul of the country's evidentiary framework, undertaken with the avowed object of "Indianising" the justice system and shedding its colonial

⁴Goutam Kundu v. State of West Bengal, (1993) 3 SCC 418.

⁵Kamti Devi v. Posh Ram, (2001) 5 SCC 311.

⁶Sham Lal v. Sanjeev Kumar, (2009) 12 SCC 454.

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

⁸Dipanwita Roy v. Ronobroto Roy, (2015) 1 SCC 365.

⁹Aparna Ajinkya Firodia v. Ajinkya Arun Firodia, (2024) 7 SCC 773 : 2023 INSC 146.

¹⁰Ivan Rathinam v. Milan Joseph, 2025 INSC 115.

character. Within that broad reform, the legislature had every reason to revisit a 150-year-old provision that predates modern genetics, rests on a social rationale that constitutional courts have since reframed through the lenses of privacy and the child's best interests, excludes by design children born of live-in relationships, surrogacy, and assisted reproductive technology, and has generated decades of inconsistent jurisprudence on the admissibility of DNA evidence.

Parliament also had concrete reform proposals before it. The Law Commission of India, in its 185th Report on the Review of the Indian Evidence Act¹¹, had recommended introducing exceptions to the conclusive presumption — to accommodate impotency and the results of blood and DNA tests — while preserving the protective framework for children. As a recent analysis observes, these recommendations were not incorporated into Section 116 BSA, leaving the dilemma of “forced fatherhood” unresolved.¹²

In short, the 2023 transition was the rare legislative moment when this rule could have been rewritten from first principles, without disturbing settled law in other areas. Parliament chose continuity. Section 116 BSA is, in substance, Section 112 IEA in a new statute book — the same maxim, the same conclusive presumption, the same 280-day rule, and the same narrow “non-access” escape.

IV. Other gaps in the framework

Beyond the foregone reform moment, the provision carries structural weaknesses:

1. **Conclusive proof is too rigid.** The BSA, like its predecessor, treats conclusive proof as practically irrebuttable. The only escape — “non-access” — is narrow, factually difficult to establish, and often intrusive of marital privacy.
2. **Science is sidelined.** DNA evidence, though admitted in some cases, sits uneasily with the statutory text, producing inconsistent outcomes as courts oscillate between deference to the presumption and the search for truth.
3. **The legitimacy–paternity tension.** A man may be the legal father under Section 116 yet not the biological father; Indian jurisprudence has not cleanly separated the two concepts, leaving inheritance, maintenance, and identity questions in flux.

¹¹Law Commission of India, “185th Report on Review of the Indian Evidence Act, 1872” (2003).

¹²Sahil Najar, “Section 116 in the DNA Era: Protection of Legitimacy or Forced Fatherhood?”, available at: <https://www.livelaw.in/lawschool/articles/dna-forced-fatherhood-legitimacy-521857> (last visited on June 9, 2026).

4. **No standing for the putative biological father.** A genetic father outside marriage has no statutory standing to claim parentage where the mother is married to another.
5. **Modern families excluded.** Children born of live-in relationships, surrogacy, and assisted reproductive technology fall outside the section's narrow assumptions about a "valid marriage."
6. **Constitutional concerns.** Court-ordered DNA tests raise unresolved questions under Article 21 (privacy, post *K.S. Puttaswamy v. Union of India*¹³) and Article 20(3) (self-incrimination).

The exclusion of non-traditional families is no longer a hypothetical concern. The Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021¹⁴ now lay down their own rules of parentage — a child born through surrogacy, for instance, is deemed the biological child of the intending couple — yet these regimes operate in a silo, wholly disconnected from the presumption in Section 116. The result is a fragmented framework in which a child's legal parentage may turn on which statute happens to apply, with no governing principle reconciling the conclusive marital presumption of the BSA with the consent- and intention-based parentage of the 2021 Acts. A recodification alert to contemporary family formation would have harmonised these regimes; Section 116, frozen in the assumptions of 1872, does not even acknowledge them.

V. The United Kingdom

England moved on from the rigidity of the common-law presumption decades ago. Under Section 26 of the Family Law Reform Act 1969¹⁵, any presumption of legitimacy or illegitimacy may be rebutted in civil proceedings on the balance of probabilities, dispensing with the requirement of proof beyond reasonable doubt. Section 20 of the same Act¹⁶ empowers courts to direct scientific (now DNA) tests to determine parentage. The Family Law Reform Act 1987¹⁷ went further, abolishing for most legal purposes the distinction between children born to married

¹³*K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

¹⁴The Surrogacy (Regulation) Act, 2021; The Assisted Reproductive Technology (Regulation) Act, 2021. Under the former, a child born through surrogacy is deemed to be the biological child of the intending couple.

¹⁵The Family Law Reform Act, 1969 (UK), s. 26.

¹⁶*Id.*, s. 20.

¹⁷The Family Law Reform Act, 1987 (UK).

and unmarried parents, so that the status of “illegitimacy” effectively disappeared from English law. The presumption survives as a starting point, but yields to scientific proof.

VI. The United States

The United States has moved furthest toward a rebuttable, science-based model, though not without hesitation. The high-water mark of the older approach was *Michael H. v. Gerald D.*¹⁸, where a sharply divided Supreme Court upheld a California statute conclusively presuming a child born to a married woman to be her husband’s, notwithstanding blood tests showing a 98 per cent probability that another man was the father; the plurality reasoned that protecting the integrity of the marital family was a legitimate state interest. That rationale is strikingly close to the one underlying Section 116. The American trajectory since, however, has moved decisively away from it. The Uniform Parentage Act¹⁹, first promulgated in 1973 and revised in 2002 and 2017, has been adopted in whole or part by most states. It abandons the labels “legitimate” and “illegitimate,” treating all children equally regardless of the marital status of their parents, and recognises multiple *rebuttable* presumptions of parentage — including birth within marriage, holding out, voluntary acknowledgment, and genetic testing. In *N.A.H. v. S.L.S.*²⁰, the Colorado Supreme Court held that a husband’s marital presumption could be overcome by DNA evidence that he was not the biological father. At the constitutional level, the United States Supreme Court in *Trimble v. Gordon*²¹ struck down arbitrary distinctions burdening non-marital children, anchoring the reform in equal-protection doctrine.

VII. Comparative snapshot

Feature	India (S. 116 BSA, 2023)	United Kingdom	United States (UPA)
Nature of presumption	Conclusive proof	Rebuttable	Rebuttable

¹⁸*Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

¹⁹Uniform Parentage Act, 2017 (USA). First promulgated in 1973 and revised in 2002 and 2017.

²⁰*N.A.H. v. S.L.S.*, 9 P.3d 354 (Colo. 2000).

²¹*Trimble v. Gordon*, 430 U.S. 762 (1977).

Feature	India (S. 116 BSA, 2023)	United Kingdom	United States (UPA)
Standard of rebuttal	Proof of non-access only	Balance of probabilities	Clear and convincing / genetic test
Role of DNA evidence	Restricted; judicial discretion	Statutorily authorised (s. 20, FLRA 1969)	Central to parentage determination
Status of “illegitimacy”	Retained in concept	Largely abolished (FLRA 1987)	Abolished (UPA)
Legitimacy vs. paternity	Treated as linked; under active debate	Treated as separate	Replaced by unified “parentage”
Non-marital / ART children	Inadequately covered	Covered by separate statutes	Comprehensively covered

VIII. Conclusion

Section 116 BSA is a child of the Indian Evidence Act — a humane fiction designed to protect children from social stigma in an age that could not test biology. Copied unchanged into a statute that claimed to decolonise Indian evidentiary law, it now functions both as a shield and a straitjacket. It guards children from frivolous paternity challenges, but it also compels courts to subordinate evidence that can establish parentage with near-mathematical certainty. The competing pulls visible across *Goutam Kundu*, *Nandlal Badwaik*, *Dipanwita Roy*, *Aparna Firodia*, and *Ivan Rathinam* reflect a doctrine in search of equilibrium.

The experience of the United Kingdom and the United States suggests a workable middle path for any future amendment to the BSA:

- convert the presumption from conclusive to rebuttable on a high standard, such as clear and convincing evidence;

- expressly permit DNA testing where the child's welfare so requires, subject to constitutional safeguards;
- decouple legitimacy from paternity, so that a child's legal status does not collapse the moment biology is established; and
- bring children of live-in relationships, surrogacy, and assisted reproduction within the legitimacy framework.

The 2023 reform was the rare moment when Parliament could have rewritten this rule from first principles without disturbing settled law elsewhere. That window has, for now, closed. Until the legislature acts, the task of reconciling a nineteenth-century fiction with twenty-first-century science falls to the courts — and to the gradual constitutional reinterpretation that the case law has already begun.

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