Presumably Right - The Legislative Policy[†]

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> *'If we all worked on the assumption that what is accepted as true is really true, there would be little hope of advance.'*
>
> *- Orville Wright*

The doctrine of Separation of Powers has been largely accepted by countries across the globe. The functions of the three chief organs of the State - the executive, the legislature and the judiciary - are largely well defined. The legislature is not only the ultimate authority so far as framing of the laws is concerned, but the supremacy of the legislative wing of the State is also peerless when it comes to defining "policy". Even the highest judiciary is forbidden from interfering with it unless the policy is *ex facie* arbitrary and/or discriminatory. This inherent limitation on the Court's power to adjudicate on matters relating to legislative policy is forcefully summed up by Justice Frankfurter of the US Supreme Court in *Trop* v. *Dulles* as:

> *'… [i]t is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the executive branch do.'*[1]

A similar view has been expressed by the Indian Supreme Court in the landmark case of *Shri Ram Krishna Dalmia* v. *Shri Justice S.R. Tendolkar*[2] and has been consistently reiterated thereafter.[3] While most legislative policies are closely linked to matters relating to the integrity and security of the nation or for maintaining law and order, some others are based on the principles of morality and ethics. One policy which seems to have been embraced by legislatures all over the world is the 'presumption of legitimacy of a child born during a lawful wedlock'. In India, this presumption has been incorporated in Section 112 of the Indian Evidence Act, 1872 (hereafter "the Act") and its retention is now supported by certain provisions of the Indian Constitution. The presumption under this section is a conclusive presumption of law which can be displaced only by proof of non-access between the parties to the marriage at a time when according to the ordinary course of nature the husband could have been the father of the child.[4] This is the case in spite of the availability of other superior and conclusive scientific evidence. There were several reasons for the conception, necessity and continued existence of this presumption but as Constitutional Law developed, this presumption met with constitutional challenges in

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[1] (1958) 356 U.S. 86.

[2] AIR 1958 SC 538.

[3] *Premium Granites* v. *State of Tamil Nadu*, (1994) 2 SCC 691.

[4] *Banarasi Dass v. Teeku Datta*, 2005(4) SCC 449, *Amarjeet Kaur v Harbhajan Singh*, 2003(10) SCC 228, *Ajaya Kumar Nayak v. State of Orissa*, 1995 CrLJ 82 (para. 6).

various countries across the world. Yet, it has been retained in its most traditional form by the Indian Evidence Act and is also endorsed by the Indian Supreme Court.[5]
This article aims to examine the origin, necessity and application of the legitimacy presumption in India and other countries, such as the US and UK, with the purpose of assessing its legal sustainability. This article is divided into eight sections. The first Section deals with the philosophy of *presumption in the law* in the abstract. Sections II, III and IV discuss the necessity of legal presumptions and, in particular, the application and administration of the legitimacy presumption in India. Sections V and VI discuss the global factors which militate against it, whereas Section VII strikes a contrast between the two extreme views concerning the validity of the continued existence of this presumption. Section VIII discusses the inferences which may be drawn from the discussion in the previous sections.

I. The Philosophy of Presumptions in the Law

To presume means to accept something as true in the absence of evidence to the contrary. The term has been derived from the Latin word—*praesumere* —to take before or to take for granted. Lalande's philosophical dictionary expounds the meaning of the word presumption as: 'Presumption, speaking strictly and precisely, is an anticipation of something yet unproved.'[6] The term presumption may be defined to be an inference, affirmative or disaffirmative, of the truth or falsehood of a doubtful fact or proposition drawn by a process of probable reasoning from something proved or taken for granted.[7] Human beings have a natural instinct to *presume* on the basis of past experience or knowledge. Sometimes certain facts are difficult or even impossible to prove and to test the veracity or otherwise of these facts, one often infers from experiences and knowledge. This logical deduction being inherent in the nature of human beings, has found its way into every facet of human behaviour including the administration of justice. The philosophy of *presumption* is far deeper rooted in judicial proceedings than most of us may have anticipated. While one would have imagined that all judicial proceedings aim at *truth* so that justice is done, it is a misconception to think that every judicial proceeding meets its end only when the truth or otherwise of a matter is reached. At best, most judicial proceedings can only presume the truth or falsity of the matter at hand. In law, 'proving' a fact essentially means 'presuming' based on quantum and credibility of the evidence produced before the court. In fact the same is expressed by the definition of the word '*proved*' in Section 3 of the Act, which itself sates that a fact is said to be proved when after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the *supposition* that it exists. Thus, the object of any judicial proceeding is achieved once the truth or falsity of a matter is *presumed beyond reasonable doubt*.
Therefore, it can be safely concluded that the thread of *presumption* runs through the entire law of evidence which governs judicial proceedings.

[5] *Ibid.*
[6] Andr´e Lalande, Vocabulaire de la philosophie, 9th ed. (Paris: Presses Universitaires de France, 1962), s.v. "pr´esomption": "La pr´esomption est proprement et d'une mani`ere plus pr´ecise une anticipation sur ce qui n'est pas prouv´e."
[7] *Izhar Ahmed* v. *Union of India,* AIR 1962 SC 1052.

II. Introduction – Legal Presumptions

Apart from the all-embracing principle of presumption which forms the substratum of the law of evidence, there are certain 'legal presumptions' (*presumptio juris*) which have been evolved over a period of time by legislatures all over the world to help judges conduct judicial proceedings efficiently, having regard to the policies adopted by the legislature. These are rules of evidence which are used as authoritative guidelines in legal proceedings and as a body of law belong to the law of procedure.[8] This procedural or adjectival law deals with the method and means by which substantive law is made and administered. There are various reasons why the invention of legal presumptions became a *sine qua non*. No one puts the reasons for the necessity of legal presumptions in a more succinct manner than W.S. Holdsworth who observes that:

> *'The difficulty of proving the facts needed to establish legal liability under the older modes of trial, the slow growth of our modern mode of trial, the same difficulties even under our modern procedure, and sometimes the wish to modify an inconvenient law, have all at different periods led both the legislators and Courts to adopt the expedient of inventing a presumption of law which is sometimes rebuttable and sometimes irrebuttable.'*[9]

Today, legal presumptions have found a paradigm role in the context of the law. These presumptions require the judge to accept a particular fact as being established once another specific correlative fact has been proved. A legal presumption is an inference from a fact that, by legal prescription, stands, until refuted. Generally, legal presumptions are defeasible or rebuttable. The idea of a potential rebuttal is extremely crucial to the theory of presumptions and is an inherent and peculiar characteristic of legal presumptions.[10] However, there is a special category of legal presumptions which are indefeasible and these are known as 'conclusive presumptions' or 'irrefutable/irrebuttable presumptions'. 'Strictly speaking, an idea of a 'conclusive presumption' is a contradiction in terms.'[11] A rule of 'conclusive presumption' goes much beyond presuming a certain fact. In fact, such a rule conclusively establishes a certain fact which cannot be challenged and/or disproved on any ground whatsoever. Wigmore explains this as, '[c]onclusive presumptions or irrebuttable presumptions are usually fictions, to disguise a rule of substantive law and when they are not fictions they are usually repudiated in modern courts.'[12] It is in this sense that the rule of conclusive legal presumptions displays characteristics of substantive law. However, there continues to be a conflict between various authors, some of whom regard conclusive legal presumptions as rules of substantive law,[13] whereas others refer to them as rules of procedure.

It is interesting to note the trend taken by the doctrine of 'irrebutable presumptions' in the US. In the US, even more than a hundred and sixty years ago, although the rule of irrebuttable presumptions was stronger, the Courts were reluctant to recognise

[8] *Ibid*.
[9] WS Holdsworth, *A History of English Law* (London: Methuen, 1926, vol IX) 1.
[10] Nischolas Rescher, 'Presumption and the Practices of Tentative Cognition' (June 2006) *Cambridge University Press, available at* http://www.cambridge.org/us/catalogue/catalogue.asp?isbn=9780521864749 (last visited 15 May 2007).
[11] *Ibid.*
[12] John H Wigmore, *A Students Textbook of the law of Evidence* (1935) 454.
[13] Such authors include the likes of Salmond and Jeremy Smith.

presumptions as irrebuttable, thus restricting their number. Mr. Best in his treatise observes that:

> *'[m]any presumptions which in earlier times, were deemed absolute and irrebuttable, have, by the opinion of later judges, acting on more enlarged experience, either been ranged among* presumptions juris tantum*, or considered as presumptions of fact, to be made at the discretion of a jury. ... By an arbitrary rule, to preclude a party from adducing evidence which, if received, would compel a decision in his favour, is an act which can only be justified by the clearest expediency and soundest policy; and it must be confessed that there are several presumptions still retained in this class which never ought to have found their way into it, and which, it is to be feared, often operate seriously to the defeat of justice.'*[14]

In *United States* v. *Provident Trust Co.*, the US Supreme Court stated that: '[t]he rule in respect to irrebuttable presumptions rests upon grounds of expediency or policy so compelling in character as to override the generally fundamental requirement of our system of law that questions of fact must be resolved according to the proof.'[15] Thereafter, the US Supreme Court in *Vlandis v. Kline*[16] observed that: '[p]ermanent irrebuttable presumptions have long been disfavoured under the Due Process Clauses[17] of the Fifth and Fourteenth Amendments.'[18]

In India, the law of evidence recognises two types of legal presumptions - presumptions of fact and presumptions of law.[19] Section 4[20] of the Act provides the scaffold for the presumptions cast in Sections 79 to 90-A and Sections 111-A to 114-A of the Act.[21]

In India, the irrebutable legitimacy presumption is embodied in Section 112 of the Act as:

> *'Birth during marriage, conclusive proof of legitimacy - 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*

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[14] W.M. Best , '*A treatise on presumptions of law and fact, with the theory and rules of presumptive or circumstantial proof in criminal cases.*'

[15] 291 U.S. 272 (1934).

[16] 412 U.S. 441, 446 (1973).

[17] The *Black's Law Dictionary* defines 'due process' as, 'The Conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case.' – Also termed as due process of law; due course or law.

[18] In this case the Court held that the Due Process Clause of the Fourteenth Amendment does not permit Connecticut to deny an individual the opportunity to present evidence that he is a *bona fide* resident entitled to in-state rates, on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination.

[19] A presumption of fact is a logical inference of a particular fact, drawn from another fact which has already been established; presumptions of fact are therefore always rebuttable. Conversely, a presumption of law is either rebuttable or irrebuttable.

[20] Section 4: "May presume" - Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it. "Shall presume" - Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.
"Conclusive proof" - Where one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

[21] The leading Indian case on the subject is *Izhar Ahmed Khan* v. *Union of India* [See Note 7 above] in which the Supreme Court examined the views of several jurists like Holdsworth, Wigmore, Phipson, Stephen and Dicey.

> *that the parties to the marriage had no access to each other at any time when he could have been begotten.'*

In *Weinberger v. Salfi*, the US Supreme Court held that a conclusive presumption that does not abridge a fundamental right nor discriminate against a suspect class will be upheld if it 'bears … [a] ***rational relation*** to a ***legitimate*** legislative goal.'[22] Therefore, the issue is whether the conclusive legitimacy presumption is justified by its '*legitimate legislative goal'* when tested at the altar of rational relation to its goal and considering the change in moral norms in industrialised nations.[23] To test the reasonableness, and consequently, the validity of the presumption of legitimacy in India, the first step, necessarily, is to examine the reasons for the legislature adopting this presumption in light of the circumstances which existed at the time of its adoption and those that exist today.

III. Factors which justify the existence of the Paternity Presumption

A. The Logic Behind Such A Presumption

It is of the utmost importance to investigate the necessity of the legitimacy presumption. This legal presumption is based on the principle, '*odiosa et inhonesta non sunt in lege prae sumenda*', which means that nothing odious or dishonourable will be presumed by the law. It is also based on the well known maxim '*pater est quem nuptioe demonstrant*'[24] and is also known as Lord Mansfield's Rule, named after the English noble who articulated it in the name of 'decency, morality, and policy' to prevent husband and wife from bastardizing the children of their marriage.[25] This legal presumption has found its way into statutes all over the world, indicating that States assumed the responsibility to protect the dignity of the family as a social unit and to protect the child from being branded a "bastard". The adoption of the presumption was certainly an expression of the will of the 'State' after its transformation from a "laissez faire" to a "welfare state". The Indian Supreme Court has also recognised that the object of Section 112 of the Act was to overcome the evil of illegitimacy and save blameless children from being 'bastardized'.[26] Such a presumption was also necessary as there was no other way to establish the legitimacy of a child. In India, this presumption found its roots in a conservative society that sanctioned 'access' only between husband and wife and presumed against concubinage. Thus, the section only reiterates the age-old fundamental proposition that: *Semper praesumitur pro legitimatione puerorum, et filiatio non potest probari*.[27]

[22] 422 U.S. 749, 772 (1975).
[23] According to the National Centre for Health Statistics, in U.S., the proportion of all children born outside marriage had reached 30% in 1992 - a rate four times as high as just 25 years earlier and by 1996, the rate had edged up to 32.4% of all births, http://www.ancpr.org/.
[24] He is the father whom the marriage indicates.
[25] *Stevens* v. *Moss*, 98 Eng Rep 1257 (KB 1777), at 1258.
[26] *Gautam Kundu* v. *State of West Bengal*, AIR 1993 SC 2295.
[27] The presumption is always in favour of legitimacy and filiations cannot be proved.

B. The requisite Constitutional Sanction in India

The legal presumption in Section 112 is an expression of the legislative intent embodied in Article 15(3)[28] of the Constitution of India, which enables the state to take proactive measures and make special provisions for the benefit of women and children. This public policy principle also finds its basis in the Directive Principles of State Policy contained in Part IV of the Indian Constitution. Article 39(f)[29] of the Constitution encourages the State to legislate in favour of children, especially to secure their childhood and safeguard their interests.

The constitutional mandate for this presumption being indisputable, its continued existence can only be debated after fully understanding its facets and scope, which have been the subject matter of considerable judicial discourse.

IV. Judicial Interpretation Of Section 112

Interestingly, the word "access" in Section 112 has been interpreted to mean only "opportunity of sexual intercourse"[30] and not effective access. Furthermore, the legitimacy presumption in Section 112 has been interpreted to be so strong that it is conclusive no matter how soon the birth of the child occurs after marriage.[31] The question raised is that if an alternative method of conclusively determining the paternity of a child is available, should it be ignored in light of the conclusive presumption cast by Section 112 of the Act. So far as the admissibility of scientific evidence is concerned, the Indian Supreme Court in the case of *Gautam Kundu* v. *State of West Bengal* laid down the following principles:

> *(1) That Courts in India cannot order blood tests as a matter of course.*
> *(2) Wherever applications are made for 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 consider 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.*[32]

It is interesting to note that this ratio may be justified on the ground that blood group typing can only exclude a potential father and unlike DNA[33] evidence, it cannot be used to prove paternity. However, the Indian Supreme Court further went on to hold in the case of *Kamti Devi* v. *Poshi Ram*[34] that the presumption in Section 112 is so strong that even if DNA evidence shows that the husband is not the father of the child in question, the presumption will not be displaced. The Indian Supreme Court has chosen not to read DNA evidence into the term "non-access", as it may dilute the efficacy of the legitimacy presumption and a

[28] Art 15(3): 'Nothing in this article shall prevent the State from making any special provision for women and children.'
[29] Art 39(f): 'The State shall in particular, direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.'
[30] *Krishnappa* v. *Vennkatappa,* AIR 1943 Mad 632.
[31] *Umra* v. *Muhammad Hayat,* (1907) PR No. 79 of 1907 (Civil).
[32] See Note 26 above.
[33] Deoxyribo Nucleic Acid.
[34] AIR 2001 SC 2226.

different construction of the term "non-access" may result in altering the legislative policy in that regard. But it is of paramount importance to keep in mind that in this case the Supreme Court was merely interpreting the section and that the question of its constitutional validity and continued sustainability had not arisen. Thus, the Indian Supreme Court has strictly adhered to the doctrine of Separation of Powers, considered as a part of the "basic structure"[35] of the Indian Constitution, by refraining from reading into the express words of the statute so as to avoid any confrontation with the legislature. Treating the view of the judiciary with due deference, it is important to examine the merits of the current state of the law related to the presumption of paternity, considering the frequency in policy change.

V. Looming challenge to the Paternity Presumption

While it may generally be accepted that the existence of the legitimacy presumption is a necessity, certain important questions which are germane to its continued existence are as follows:

- Can such a legal presumption be called a good presumption and one which remains essential in the interest of the society?
- Should this legal presumption be allowed to remain conclusive and outweigh the monumental scientific progress which enables one to determine accurately the paternity of the child in question?
- Has this legal presumption outlived its utility considering the extensive change which society has undergone in terms of accepting new rules of morality and ethics?
- Can such a presumption be sustainable in law when conclusive scientific methods to prove the paternity of the child are available?
- Does this legal presumption satisfy the test of reasonableness required to be complied with after the decision in the case of *Maneka Gandhi* v. *Union of India*[36] (which imported the "Due Process clause" into Indian Constitutional Law for the first time)?

While the first two questions are for society to answer, the last three questions are the constitutional challenges which confront Section 112 of the Act. Although the questions identified raise distinct issues, they are inextricably related. These issues can be critically examined under three broad heads:

a) the social transformation;
b) the scientific advancement; and
c) the strict constitutional challenge.

An attempt to do the same has been made hereinbelow.

A. The Social Transformation and Scientific Advancement

It may be contended that the Act was enacted in 1872 and that Section 112 of the Act never contemplated the momentous scientific advancement which has taken place in the recent

[35] The doctrine of 'Basic Structure' was propounded in the case of *Keshavananda Bharati v The State of Kerala,* AIR 1973 SC 1461, Chief Justice S.M. Sikri observed that *Separation of Powers* comes within the purview of the "basic structure" of the Indian Constitution. Also see, *Bommai SR* v. *Union of India,* (1994) 3 SCC 1 (9 Judge Bench), *State of Bihar* v. *Bal Mukund Sah,* (2000) 4 SCC (para 32).
[36] AIR 1978 SC 597.

past. Moreover, it may be contested that the section did not propose to impose fictitious liability on any person, but in fact relieved him of liability if 'non access'[37], the best, the only and the most scientific defence available at that time, was proved, notwithstanding the fact that it might have led to the 'bastardization' of the child. Today, science has taken giant leaps and made tremendous progress: DNA evidence can now conclusively determine the paternity of a child.[38]

It may further be argued that the social system has undergone an extensive change since the enactment of the Act. Societal norms have now restructured themselves. In England, this social transformation led to the passing of the Family Reforms Act 1969, later replaced by the Family Reforms Act 1987, which enabled the judiciary to determine the parentage rather than paternity and empowered the Courts to conduct paternity tests to determine the biological father of the child. In fact, the Indian Courts even as early as 1960 had held that such a presumption ought not to exist in a society where illegitimacy is as common as legitimacy.[39] Views on illegitimacy are now changing, and it no longer generally entails the serious social consequences that previously had resulted from its discovery. The various advantages of the modern technological and scientific advancements, especially DNA technology, should be taken into consideration by the legal system, and suitable modifications and amendments should be brought about to keep the law attuned to the changing socio-cultural scenario. The change in social perceptions has also manifested itself in judicial pronouncements all over the world. In *Re*: *Le*[40] it was held that the Court had the power to order an infant to be subjected to a blood group test notwithstanding that the guardian *ad litem* did not consent. In the case of *Daubert* v. *Merrell Dow Pharmaceuticals Inc*.,[41] the US Supreme Court upheld that the Frye rule[42] of 'general acceptance' should not be a necessary precondition for the admissibility of scientific evidence. It was held that in order to determine whether scientific evidence is admissible, the Court may consider (i) whether the theory or technique has been or can be reliably tested; (ii) whether it has been subjected to peer review and publication; (iii) its known or potential error rate; (iv) whether there are recognised standards that control the procedure of the implementation of the technique; (v) whether it is generally accepted by the relevant scientific community; and (vi) whether the technique was introduced or conducted independently of the litigation. The '*general acceptance*' standard of the *Frye* case is still valid, but the *Daubert* case allows recourse to DNA technology for resolving legal disputes in light of the above principles. In the Indian context, such a change in scientific temper and social outlook is manifest in the Justice Malimath Committee's deliberations which submitted a Report on Reforms of the Criminal Justice System[43] that recommended that

[37] *Krishnappa* v. *Vennkatappa*, [See Note 30 above] has interpreted non-access as 'no opportunity of sexual intercourse.'

[38] *DNA science establishes that the pattern of chemical signals i.e. the genetic structure which may be discovered with the DNA molecule in the cells of each individual is unique and different in every individual. As such, the chemical structure of the DNA in the cells of each individual is the sole determining factor to identify one separately from another, except in the case of "genetically identical twins."*

[39] *Lal Haribansha* v. *Nikunja Behari*, ILR 1960 Cut 230.

[40] [1968] 1 All ER 20; *See also BRB v. JB* [1968] 2 All ER 1023.

[41] 509 US 579: 113 SCt 2786: 125 LEd 2d 469 (1993). (The case was not related to DNA typing and involved a drug meant to relieve pregnant women of morning sickness).

[42] *Frye* v. *United States*, 54 App DC 46, wherein the Court announced that 'to be admissible, scientific testimony must be based on a technique that has 'gained general acceptance in the particular field in which it belongs.'

[43] Malimath Committee Report, '*Report of the Committee on Reforms of the Criminal Justice System*' (March 2003), *available at* http://mha.nic.in/criminal_justice_system.pdf (last visited 14 May 2007).

Section 112 of the Act should incorporate DNA testing as a scientific means to resolve any dispute pertaining to paternity.

However, there is a certain amount of scepticism about this proposal, because of the concerns of an increase of paternity disputes to the detriment of the society. A way to prevent this would be to provide for an exception where multiple access is contended. Once strong evidence of multiple accesses is treated as a pre-condition to challenge paternity, the number of cases in which recourse to DNA evidence can be preferred will automatically decrease. The degree of evidence required could be the same as required in establishing a *prima facie* case of adultery while seeking divorce under Section 13(1) (i) of the Hindu Marriage Act 1955.[44] This means that mere suspicion or general evidence of ill repute does not prove adultery[45], but circumstantial evidence and strong probabilities corroborating each other are valid grounds[46]. The degree of proof ought to be strict to ensure that, as far as possible, the provision is incapable of being misused. This will also infuse the much needed balance required in the section.

B. Strict Constitutional Challenge

When examined with regard to constitutional sustainability, a threefold challenge to Section 112 emerges.

(i) Arbitrary- No intelligible differential[47]

It is trite law that in order to pass the test of permissible classification two conditions must be fulfilled, namely:

> *(i) that the classification must be founded on an intelligible differential which distinguishes persons or things that are grouped together from others left out of the group; and*
> *(ii) that the differential must have a rational relation to the object sought to be achieved by the statute in question.*[48]

There is no legitimate reason why Section 112 of the Act should allow a defence of non-access to a man but at the same time bar his recourse to other defences under the guise of pursuing a public policy against 'bastardization' of children, which is likely to be shredded by the operation of the same section in a slightly tailored situation. The irrationality lies in the fact that while the section allows a person to lead evidence to show non-access, it does not allow a person to adduce DNA evidence, thus implying that absence of sexual intercourse with the husband is a ground to disclaim paternity, but adultery of the wife is not, so long as it is accompanied by relatively concurrent intercourse with the husband!

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[44] Section 13(1)(i): 'Any marriage solemnized, whether before or after the commencement of the Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-
(i) has, after the solemnization of the marriage had voluntary sexual intercourse with any person other than his or her spouse; or …'

[45] *D. Handerson* v. *D. Henderson*, AIR 1970 Mad 104.

[46] *Mani Shankar* v. *Radha Devi*, AIR 1992 Raj 33 ; *Somsekharan Nair* v. *Thankamma*, AIR 1988 Ker 308.

[47] Article 14 of the Constitution of India provides for *equality before the law* and the *equal protection of the laws* and the same has been interpreted to preclude arbitrariness and unreasonable classification.

[48] *Budhan Chowdhry* v. *State of Bihar*, 1955 (1) SCR 1045 (1049), *State of W.B.* v. *Anwar Ali Sarkar*, AIR 1952 SC 75.

It may therefore be argued that there exists no '*intelligible differential*' distinguishing the defence of DNA evidence from the currently available defence of 'non-access'.
The Supreme Court in the case of *Motor General Traders* v. *State of Andhra Pradesh* observed that:

> *A provision which was perfectly valid at the commencement of the Act could be challenged later on the ground of unconstitutionality and struck down on that basis. What was once a perfectly valid legislation, may in course of time become discriminatory and liable to challenge on the ground of it being violative of Article 14.*[49]

(ii) The Constitutional Mandate contained in the Directive Principles of State Policy[50]

The Constitution of India, in Article 51-A (*h*) and (*j*), declares that it shall be the duty of every citizen of India 'to develop the scientific temper, humanism and the spirit of inquiry and reform' and 'to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.' In light of this constitutional directive, one would expect the law to evolve with the times and, in this case, account for the new developments in the field of DNA testing.

(iii) Violation of the Due Process Clause

It may also be contended that Section 112 does not conform with the procedure required to be complied with to deprive a person of his right to life or personal liberty under Article 21 of the Constitution, as it does not give any chance to dispel the conclusive presumption cast by it to the detriment of the husband. This argument may be analysed as follows:
Article 21 reads: 'No person shall be deprived of his life or personal liberty except according to the procedure established by law.'
It is edifying to refer to the principle in the case of *Maneka Gandhi* v. *Union of India*,[51] where it was held that the procedure to deprive a person of his right to life and personal liberty cannot be whimsical, fanciful or arbitrary. It may be suggested that a provision of law *disallowing a person to adduce evidence* to prove or disprove paternity is arbitrary, unreasonable and harsh and therefore unconstitutional. A three judge bench of the Indian Supreme Court in *Malpe Vishwanath Acharya* v. *State of Maharashtra* has held that:

> *It is true whenever a special provision is made for a section of the society it may be at the cost of another section and the making of such a provision or enactment may be necessary in the larger interest of the society as a whole, but the benefit which is given initially if continued, results in increasing injustice to one section of the society and an unwarranted windfall to another without any corresponding relief….the continuation of such a law can no longer be regarded as reasonable. Its continuance becomes arbitrary.*[52]

It may be argued that the principle of *Cessante Ratione Legis Cessat Ipsa Lex*,[53] that is to say, *reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself*, is applicable to the present state of affairs.
As stated in Section II above, even in the US, the issue of irrebuttable presumptions being unconstitutional as being violative of the Due Process clause has been contested. The

[49] AIR 1984 SC 12 at page 130.
[50] Articles 36 to 51 of the Constitution of India, 1950.
[51] See Note 36 above.
[52] AIR 1998 SC 602.
[53] *Broom's Legal Maxim* (1939 Edition, page 97).

American Courts have held that so long as a presumption is not unreasonable and does not conclusively determine the rights of the person against whom it is raised, it does not violate the Due Process clause, and that the legislature must not *determine a fact*, especially one which relates to life, liberty and freedom. Thus, a statute creating a presumption which is entirely arbitrary and/or which denies a fair opportunity to challenge it or present facts pertinent to one's defence is void.[54] As such the American Courts have generally frowned upon irrebuttable legal presumptions. For example:

1. *In Bailey* v. *Alabama*,[55] a presumption that each person who breached contract for personal services was guilty of fraud was held to be unconstitutional;
2. *In Manley* v. *Georgia*,[56] a presumption to the effect that every bank insolvency is fraudulent was avoided;
3. *In Western & Atlantic RR* v. *Henderson*,[57] a provision which presumed negligence on the part of the railway company in any collision between a train and an auto at grade crossing was not upheld;
4. *In Carella* v. *California*,[58] a conclusive presumption of theft and embezzlement upon proof of failure to return a rental vehicle was held to be invalid.

Similarly even in the case of *Stanley* v. *Illionois*,[59] the Court found it compelling to invalidate a State Act (which was a so called 'social legislation') that conclusively presumed men who fathered illegitimate children to be unfit parents and prevented them from even objecting to state wardship. Nonetheless, it is also relevant to mention that in the US certain rebuttable as well as irrebuttable presumptions have been sustained on the principle of public policy and the competence of a legislature to invent the same has been recognised if there is a rational connection between the fact and the inference.[60]

This is exemplified by certain presumptions that have been litigated upon in the past but were eventually sustained:

1. In *Hawker* v. *New York*,[61] the presumption that a person convicted of felony is unfit to practice medicine was upheld;
2. *Hawes* v. *Georgia*[62] upheld that a person occupying property is presumed to have knowledge of still, an apparatus for distilling and manufacturing prohibited liquors and beverages, found on those premises;
3. As per *Bandini Co.* v. *Superior Court*,[63] a release of natural gas into the air from a well was allowed to be presumed wasteful;
4. *Atlantic Coast Line R.R.* v. *Ford*[64] upheld a rebuttable presumption of railroad negligence for an accident at a grade crossing;
5. In *Morrison* v. *California*,[65] a prima facie presumption of the ineligibility for citizenship under certain circumstances was upheld.

[54] www.law.cornell.edu.
[55] 219 US 219 (1911).
[56] 279 US 1 (1929).
[57] 279 US 639 (1929).
[58] 491 US 263 (1989).
[59] 405 US 465 1972.
[60] See Note 54 above.
[61] 170 US 189 (1898).
[62] 258 US 1 (1922).
[63] 284 US 8 (1931).
[64] 287 US 502 (1933).
[65] 288 U.S. 591, 53 S.Ct. 401,2.

Thus, while certain irrebuttable presumptions are sustainable in law, others may not be. It has been repeatedly endorsed by the Indian Supreme Court[66] that the procedure established by law to deprive a person of his right to life or personal liberty must now satisfy all the tests of the principle laid down in *Maneka's* case. However, as mentioned hereinabove in Section IV, the question regarding the constitutionality of Section 112 of the Act has never been contested before the Supreme Court of India and therefore the same is still *res integra*. The positivists justify the challenge to the legitimacy presumption by stating that since presumptions belong to the law of evidence, the facet of objectivity must not be lost. According to them, the Law of Evidence is not about determining the consequences of facts but about establishing those facts.[67] This positivist view is dealt with in the following section.

VI. The Positivist View

The object in adducing evidence is to find out the truth or otherwise of the disputed facts.[68] One of the main principles of the Law of Evidence is that the best evidence must be given in all cases.[69] As Lord Denning MR said: 'The object of the Court is always to find out the truth. When scientific advances give us fresh means of ascertaining it, we should not hesitate to use those means whenever the occasion requires.'[70] In the case of *Sharda* v. *Dharmpal*,[71] the Supreme Court took an optimistic view regarding the admissibility of DNA tests in a court of law. It is not only profitable but also appropriate to bear in mind that Section 45[72] of the Indian Evidence Act empowers the 'Courts' as defined under Section 3[73] to appreciate scientific evidence. In the case of *Pantangi Balarama Venkata Ganesh* v. *State of AP*,[74] it was categorically held that a DNA test can perfectly identify a person and that the evidence of a DNA expert is admissible in evidence, as it is a perfect science. It is imperative to note that the Supreme Court has also held that the refusal by a party to give a sample of blood for conducting a DNA test will draw a strong adverse inference against that party.[75] These judicial pronouncements establish the veracity and importance of the science of DNA evidence but at the same time the stern refusal of the judiciary to admit DNA evidence in a case under Section 112 of the Act is conspicuous. The trite understanding that the value and the utility of presumptions diminishes in the presence of patent facts capable of being established in a court of law is beautifully

[66] *See SunilBatra* v.*Delhi Administration and Ors*, AIR 1978 SC 1675 and *Francis Coralie Mullin* v.*Administrator, Union Territory of Delhi and Ors.*, 1891 1 SCC 608.
[67] Ratanlal and Dhirajlal, *The Law of Evidence* (22nd enlarged edition 2006) 1.
[68] *Siris Chandra Nandy* v *Rakhalananda*, AIR 1941 PC 16, page 18; *Hales* v *Kerr*, (1908) 2 KB 601 and *Butterly Co.* v. *New Hacknall Colliery Co*., 1909 1 Ch 37.
[69] Object and Reasons of the *Indian Evidence Act, 1872.*
[70] *BRB* v. *JB*, [1968] 2 All ER 1023.
[71] 2003 4 SCC 493.
[72] Section 45 of the *Indian Evidence Act, 1872* reads as follows: 'Opinions of experts: When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts.'
[73] Section 3: 'Court' – 'Court' includes all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence.
[74] 2003 CrLJ (AP) 4508, 4518, para. 8.
[75] See Note 71 above.

summed up by Cochran J. in *Stumpf* v. *Montgomery* as: 'presumptions…may be looked on as the bats of law, flitting in the twilight, but disappearing in the sunshine of facts.'[76]
The extreme positivist view on the one hand and the protection afforded by the Due Process clause on the other hand give rise to an uneasy conflict which is dealt with in the following section.

VII. Fundamental Rights v. Fundamental Rights – A Conflict which exists across Jurisdictions

Section 112 is a classic example of a conflict between competing fundamental rights. On the one hand, there is the right of the child to be recognised as a legitimate relation of his father, as well as his right to be protected against exploitation and against moral and material abandonment; while on the other hand there is the right of the husband to be able to disown the fictitious liability imposed upon him and the right to refuse to be burdened with the responsibility of a child whom he has not biologically fathered. The question is whether a delicate balance between these conflicting fundamental rights is struck by the section. The presumption of legitimacy and the web of relationships between the presumptive father, the biological father, the biological mother and the child concerned raise a number of issues stemming from entwined rights and duties.
When the presumption operates in its most traditional form, the following unfairness is rendered:

- The right of the presumptive father to refuse to be burdened with the responsibility of a stranger's child is waived.
- The mother's right to confess and see that filial relations between her child and his biological father are established is not given deference.
- This paternity presumption unfortunately leads to waiver of the biological father's duty towards his offspring and operates as a licence for men to be careless when dealing with married women's lives.
- The biological father's right to establish a legal relationship with his offspring, if he wishes to do so, becomes impossible. In a US Supreme Court Case,[77] a biological father was not only barred from rebutting the marital presumption and establishing his paternity in Court, but was also denied visitation with his child notwithstanding substantial past contact. The Court held that the child already had a presumed natural father due to the mother's existing marriage with another man.
- The child's right to be aware of his biological parentage, which apart from emotional purposes may also be important from the point of view of family medical history, remains unenforceable. Even the United Nations Convention on the Rights of the Child[78] recognises a child's right to know about his parentage.

[76] (1924) 101 OKL 256 Pac 58, as quoted in G. *Vasu* v *Syed Yaseen Sifuddin Quadri,* AIR 1987 AP 139.
[77] *Michael H.* v. *Gerald D.*, 491 U.S. 110 (1989).
[78] *Article 7:*
"1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."

Another way of approaching the situation is to accept the fact that a child's relationship with his biological father may be established but outside the realm of the Court, as law and legislative policy demand that the presumptive father be vested with the duty of ensuring a healthy childhood for the child. The question that needs to be answered is how just the current approach is.

Per Contra, if the presumption ceases to operate, certain other issues, which presently justify the continued existence of the presumption, would arise:

- The right of the (presumptive) father by marriage to continue giving the child love and support which flows from the emotional bond formed as a result of earlier contact, stands violated.
- The mother's right to be spared from unwanted social stigma is abridged.
- The fact that children may be left abandoned and rendered "children of no one" (*filii nullius*) is disconcerting. One needs to understand that DNA testing can only establish that a particular person is not the father of the child but at the same time locating the real father of the child might be impossible and the consequences disastrous.

However, it is imperative to note that a child's bond with his 'parents' is actually a result of the care and love of the individuals whom he has called his parents rather than the act of giving birth. Thereby, 'family relationships do not rest exclusively on shared genes and it is unwise to set up a court process in order to undo a recognised family structure. Even the biological father, who is after all an outsider to the family, should not be allowed to invade it.'[79]

Illustrative Judicial Decisions

A paradigm case which depicts the aforementioned dilemma is *Miscovich* v. *Miscovich*,[80] decided by the Superior Court of Pennsylvania in 1997. Gerald and Elizabeth Miscovich got married in 1986. In 1987, Elizabeth gave birth to a son and they divorced four years later. The divorce decree declared and regulated the terms of payment for the maintenance of the child. Later, Gerald observed that inspite of him and Elizabeth having blue eyes, the eyes of the child were brown. Thereafter, Gerald got DNA tests performed which conclusively established that he was not the child's father. Subsequently, Gerald discontinued all contact with the child. In an action for the child's maintenance filed by Elizabeth, the Court applied the conclusive presumption of legitimacy and found that Gerald had not rebutted it with proof of impotency, sterility, or non-access.[81] The Court ruled that Elizabeth's deception, the termination of the family unit, and the strained father-child relationship was immaterial and cannot displace the legitimacy presumption. As a result, Gerald could not dispute his financial and legal obligations to the child and the DNA tests that disproved his paternity were rendered inconsequential. Though the Court ruled in favour of Elizabeth and the child, one cannot help but stop and wonder why Gerald was forced to legally parent a child whom he knew to be somebody else's offspring. On the other hand, the Courts of Massachusetts have taken a completely different approach in trying to balance the conflicting fundamental rights. There, the father-child relationship is

[79] Harris, Justice, dissenting in *Charles E. Callender* v. *Rebecca D. Skiles and Rick L. Skiles*, Supreme Court of Iowa, No. 276 / 98-308.

[80] (1997) 455 Pa. Super. 437.

[81] The defences of impotency and sterility have also been recognised as valid defences against the legitimacy presumption as they rebut effective access.

strictly biological. In *KB* v. *DB,* the Appeals Court of Massachusetts held that, '[a] married man should have no duty to support a child born to his wife during their marriage but fathered by another man, any more than a wife should have a duty to support a child fathered by her husband during their marriage but born of another woman.'[82] The Courts in New York adopt a more reasonable approach. The Courts in New York[83] allow DNA evidence to rebut the presumption of legitimacy but at the same time consider the child's interest as being paramount. Some may argue that even this method is not the most appropriate, as it does not provide any respite for the husband. Recently, a decision handed down by the Michigan Supreme Court in *Barnes* v. *Jeudevine,*[84] has re-ignited the conflicting fundamental rights debate. There the Court defined the position with regard to rebuttal of the marital presumption after considerable deliberation of the provisions of the Paternity Act. The Court in its decision[85] held that only the legal mother or the legal (marital) father would have a right to rebut the presumption in order for there to be a conclusive determination that the child is not the issue of the marriage. Thus in that case, Barnes, who tried to determine the paternity of the child who he co-parented for about four and a half years, was denied the right to establish legal parentage because the child's mother was married to another man, notwithstanding the fact that even the child believed him to be his father. This judgement is as such contrary to the principle laid down in *Brian C. v. Ginger K.,*[86] which recognised rights of 'men' other than the husband to establish legal parentage owing to the personal bond and relationship which they shared with the child. Similarly, *R.A.J.* v. *L.B.V.*[87] interpreted the word 'father', in a statute listing individuals permitted to commence a paternity action, to include 'putative father'.

Thus, different states in America have set different standards to determine legal parentage. For instance, in the States of Alabama, North Dakota, Wyoming, Tennessee and Wisconsin, the biological father of the child enjoys no legal standing and the marital presumption has been upheld as constitutional. On the other hand, States of Arizona, Arkansas, Colorado, Indiana, Kansas, Maryland, Minnesota, Mississippi, Montana, New Jersey, New York and Washington provide a standing to the biological father and permit the litigation of a child's paternity irrespective of his mother's marital status. However, while most of these states have a Paternity Act, in some states case law developed over the years provides backing to the historical presumption of legitimacy.

VIII. Conclusion

The presumption of legitimacy under Section 112 operates as a conclusive presumption of law, but it ought to operate as a rebuttable presumption of fact whereby once the fact of valid marriage is established, legitimacy is presumed until rebutted, the onus resting on the party challenging it. The only logical conclusion which can be drawn after a perusal of the judicial decisions referred to in Part VII above is that it is not in the best interest of anybody to have a blanket provision under which a husband is completely barred from leading any

[82] 639 NE 2d 725, 730 (Mass App Ct 1994). *See also CC* v. *AB* 550 NE 2d 365 (Mass 1990).
[83] *See Robert LA* v. *Sharon, AR* 185 AD 2d 977 (NY App. Div. 1992) and *Queal* v. *Queal,* 179 AD2d 1070 (NY App. Div. 1992) (holding blood tests admissible to determine if former husband is child's biological father).
[84] Docket No. 129606, released on July 26, 2006.
[85] By a narrow majority of 4:3.
[86] (2000) 77 Cal. App.4th 1198 [92 Cal.Rptr.2d 294]. Court of Appeal, Fourth District, Division 3.
[87] 817 P.2d 37, 40 (Ariz. Ct. App. 1991).

evidence to disprove paternity. This is not to say that the interests of the child and the mother must suffer. It only means that the Courts must be empowered with appropriate discretion to determine the matter on merits. As stated earlier, an instance where such discretion may be exercised is where one may be allowed to adduce DNA evidence to disprove paternity subject to it being corroborated with proof of multiple access.

Further, the modern 'family unit' may not be one as conventionally envisaged, having due regard to the fact that same-sex relationships are also being recognised and in such a scenario, the debate regarding the operation of the presumption opens up a whole vista of likely problems.

In short, the Courts must be empowered to take such decisions as are in the interest of the entire family as well as considering the interests of the society at large. The presumption exists to keep the family unit intact, but when there is either a formal divorce or a doubt regarding the child's paternity thereby causing marital disharmony, the purpose of the presumption must automatically fail. No law can force an estranged couple to live a healthy married life and neither can law elicit affection for a stranger's child.

It is an accepted position of law that it is not in the domain of the Court to embark upon uncharted oceans of public policy in an exercise to consider as to whether a particular public policy is wise or whether a better public policy can be evolved.[88] It must also be presumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.[89] But it is also imperative that the law changes with the change in circumstances. The observation of Bhagwati J in the case of *Motilal Padmapatar Sugar Mills Co. Ltd*. critically and suitably explains the need for the change in law with a change in circumstances:

> *It must be remembered that law is not a mausoleum. It is not an antique to be taken down, dusted, admired and put back on the shelf. It is like an old but vigorous tree, having roots in history, yet continuously taking new grafts and putting out new sprouts and occasionally dropping dead wood. It is essentially a social process, the end product of which is justice and hence it must change with changing social values. Otherwise there will be estrangement between law and justice and law will cease to have legitimacy.*[90]

Science and technology have made a huge invasion in our lives. Some scientific inventions have proved a boon while others a bane. The question that remains is whether it is fair that the legitimacy presumption finds its justification in the protection of social values that sustain order and regularity and also whether the same is deemed to be more important than truth.

[88] See Notes 1 to 3 above.

[89] *Shri Ram Krishna Dalmia* v. *Shri Justice SR. Tendolkar,* AIR 1958 SC 538. *See also Ashutosh Gupta* v. *State of Rajasthan,* (2002) 4 SCC 41.

[90] *Motilal Padmapatar v. State of Uttar Pradesh,* AIR 1979 SC 621; 118 ITR 326.