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A TRUE VISIONARY

"You see things and you say Why? But I dream of things that never were and say Why not?"

- George Bernard Shaw



Shri Jagannath Gupta
(1950 - 1980)

*Also a true visionary...who dared to dream!
He lives no more but his dreams live on....and on!*

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And more dreams to come!

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From The Desk of Editor

It gives us great pleasure to release JIMS Journal of Law, Volume 6 Issue 1. The Editorial Board expresses its gratitude to all the authors for their contributions of academic research articles on contemporary legal and socio-legal issues.

We are living in the era of skyscrapers but it isn't unusual to witness their downfalls due to less profit or disbalance in audit. An article of the said journal touches on the insolvency of companies in tune with arbitration. Next article in line will be a treat to read since it beautifully discusses how the rope of drug availability is in hands of legislations like Narcotic Drugs and Psychotropic Substances Act, 1985 and invading Right to Health. One of the authors has underlined the importance of Freedom of Press and why independent journalism is the strongest pillar of Indian Democracy. Another write up is an impressive attempt to discuss the jurisprudential value of Artificial Intelligence. One article revolves around the statute of Uruguay and its long standing dispute with Argentina giving insights of international commercial law. The last in queue is an excellent work explaining forensic law in India and abroad.

With great hope that this edition of the JIMS Journal of Law will bring about social reforms by increasing legal awareness and ensuring access to justice for all, I have the utmost pleasure in presenting it to the bar, bench, and academic community.



Prof.(Dr.) Pallavi Gupta
Thanking You

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RECONCILING ARBITRATION WITH INSOLVENCY PROCEEDINGS

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Introduction

With the development of a new insolvency law in India, the relationship between arbitration and insolvency has recently taken on significant relevance.¹ Numerous arbitral cases have halted as a result of the initiation of bankruptcy proceedings since there is no regulatory guidance on the matter. India is comparatively a newcomer to the list, despite the fact that certain nations have established the legal stance in this respect.

With the passage of the Code, India's approach to insolvency experienced a radical transformation. Other than the implementation of a moratorium, there are no provisions in the Code that specify how the insolvency procedures may affect an arbitration. The Corporate Insolvency Resolution Process (CIRP) or liquidation under the Code are not specifically mentioned in the Indian Arbitration and Conciliation Act, 1996 (the "Arbitration Act").² These challenges will become increasingly more important as the globe struggles to deal with the rise of new business conflicts in the post-covid age.³

The ability to participate in the insolvency resolution process, the impact of insolvency proceedings on a foreign seated arbitration, and the enforcement of an arbitral award in light of such proceedings are just a few of the many issues that parties are facing due to the lack of clarity regarding laws and judicial precedents. Both rules appear to be at odds with one another, and the point of junction is unclear. The conflict between these two approaches to dispute resolution has been succinctly described in a US court decision as "a conflict of near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralised approach to dispute resolution."⁴

¹ Alipak Bannerjee & Payel Chatterjee, The arbitration and insolvency collision: the Indian Perspective, International Bar Association Blog, (Aug 30th 2022, 3:04 PM) https://www.ibanet.org/arb-insol-india#_ednref6

² Yasachandra Devarakonda, Sushmit Mandal, Insolvency Arbitration : Dawn of a New Era in India, The Indian Review of Corporate and Commercial Law (Aug 30th, 2022, 3:05 PM) <https://www.ircl.in/post/insolvency-arbitration-dawn-of-a-new-era-in-india>

³ Alipak, Supra note 1.

⁴ In Re United States Lines Inc. 197 F.3d 631 (2nd Cir. 1999).

Insolvency's implications on ongoing arbitration processes fully halt them in India, although they may also cause modifications in other countries.

A. Code on Arbitration

The Code was developed to consolidate and modernise the laws relevant to company reorganisation and bankruptcy resolution in a time-bound way to maximise the value of people's assets, foster entrepreneurship, and balance the interests of all stakeholders.⁵ A corporate debtor that hasn't paid its creditors or a financial or operational creditor with unpaid debts of at least INR 1 crore⁶, or USD 137,300, can start a CIRP.⁷ CIRP is initiated by filing an insolvency application before a National Company Law Tribunal ('NCLT')⁸, also known as the Adjudicating Authority (AA) under the Code.

If the NCLT finds a debt default, an Interim Resolution Professional (later replaced by Resolution Professional) will oversee the corporate debtor's operations throughout the CIRP period. After the declaration of a default, a public announcement⁹ is made under the Code. Once a petition under the IBC is admitted against the Corporate Debtor, a moratorium follows in favour of Corporate Debtor.¹⁰ The moratorium under IBC kicks in on the Insolvency Commencement date and is in force till the Corporate Insolvency Resolution Process ('CIRP') period and during such period no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets, or termination of essential contracts can take place against the Corporate Debtor. In *A. Ayyasamy vs. A. Paramasivam & Ors.*¹¹, India's Supreme Court ruled that "insolvency and winding-up issues" cannot be arbitrated. Moratorium will persist till CIRP is complete.¹²

B. Moratorium and Arbitration

The execution of any judgement, decision, or order in any court of law, tribunal, arbitration panel, or other authority is expressly prohibited by the moratorium, as is the creation of new lawsuits or the continuing of existing lawsuits or processes against the corporate debtor.¹³ In

⁵ Insolvency and Bankruptcy Code, 2016, Preamble, No.31, Acts of Parliament, 2016, (India).

⁶ Notification under section 4 of the Insolvency and Bankruptcy Code, 2016.

⁷ Insolvency and Bankruptcy Code, 2016, § 4, No.31, Acts of Parliament, 2016, (India).

⁸ Insolvency and Bankruptcy Code, 2016, § 7, § 9, § 10, No.31, Acts of Parliament, 2016, (India).

⁹ Insolvency and Bankruptcy Code, 2016, § 13(1)(b), No. 31, Acts of Parliament, 2016, (India).

¹⁰ Insolvency and Bankruptcy Code, 2016, § 14, No.31, Acts of Parliament, 2016, (India).

¹¹ *A. Ayyasamy vs. A. Paramasivam & Ors.* (2016) 10 SCC 386.

¹² Insolvency and Bankruptcy Code, 2016, § 14(4), No.31, Acts of Parliament, 2016, (India)

¹³ *K.S. Oils Ltd v. The State Trade Corporation of India Ltd & Anr.*, Company Appeal (AT) (Insolvency) No. 284 of 2017.

India, the beginning of an insolvency case also precludes taking enforcement action. The legal rulings have made it clearer what is covered by the moratorium, including

- (i) maximising assets
- (ii) protecting the corporate debtor's assets from damage.

Indeed, the Supreme Court ruled in *Alchemist Asset Reconstruction Company*¹⁴ held that any arbitrations or comparable actions that are started after the CIRP has been initiated are deemed non-est in law. Despite the fact that there are no statutory exclusions, numerous exceptions to the general rule have been established by court decisions. The arbitration procedures may continue under the following conditions:

- (i) they maximise the value of the corporate borrowers' assets; and
- (ii) they are advantageous to the corporate debtor and have no negative effects on its assets¹⁵,
or
- (iii) even if the case is allowed to go forward, no recovery can be made against the corporate debtor while the moratorium is in effect.¹⁶

Additionally, where it was shown that a corporate debtor did not experience any difficulties prior to the claims or counterclaims being decided, courts have declined to order a stay of the claims or counterclaims.¹⁷ Once the CIRP is successfully finished, the moratorium is lifted, as well as on the start of liquidation procedures, allowing pending legal processes that had been stopped due to the operation of the moratorium order to resume.

In the event that a liquidation is started, the legal situation changes somewhat. A corporate debtor is prohibited from starting a lawsuit or other legal action while the liquidation process is ongoing once a liquidator has been appointed. However, with previous NCLT clearance, the liquidator may start a lawsuit or other legal actions on behalf of the corporate debtor.¹⁸ Therefore, in the case of the corporate debtor's liquidation, ongoing legal actions (which would include arbitration proceedings) are technically not blocked.

The legislation does not distinguish between ongoing arbitration procedures and those that were started after the start of insolvency proceedings. It does not outline a precise legal process for

¹⁴ *Alchemist Asset Reconstruction Company Ltd v. Hotel Gaudayan Pvt Ltd*. AIR 2017 SC 5124.

¹⁵ *Power Grid Corporation of India Ltd. v. Jyoti Structures Ltd*. 246 (2018) DLT 485.

¹⁶ *Jharkhand Bijli Vitran Nigam Limited v. IVRCL Ltd. (Corporate Debtor) & Anr.* [Company Appeal (AT)(Insolvency) No. 285 of 2018.

¹⁷ *SSMP Industries Ltd. v. Perkan Food Processors Pvt. Ltd.*, CS (COMM) 470/2016 & CC(COMM) 73/2017.

¹⁸ *Insolvency and Bankruptcy Code, 2016*, § 33(5), No.31, Acts of Parliament, 2016, (India).

getting beyond the moratorium the Code imposes on starting or continuing arbitration. However, an arbitrating party may be allowed to request continuation of the arbitration procedures if they can show that the arbitration was started to benefit the corporate debtor, to maximise the business debtor's assets, or in a way that would not adversely affect the corporate debtor's assets. Clarity in this regard would be provided by an NCLT decision.

All India-seated arbitrations must follow the NCLT's moratorium judgement. An Indian party in bankruptcy may petition a foreign-seated arbitral panel to suspend an arbitration. A wide reading of Section 14 of the Code, which states "the establishment of actions or continuation of current suits or processes against the corporate debtor, including enforcement of any verdict, judgement, or order," would apply even in an arbitration with a foreign seat.

Since the award need not be tied to Indian law, it may not be harmful if it is applied to foreign assets (outside India) in a foreign arbitration. Therefore, such arbitral procedures may continue until the courts in the arbitration's seat accept insolvency proceedings. Section 234 of the Code requires India to inform territories that must reciprocate. If the tribunal disregards the NCLT's moratorium order, executing the judgement may be difficult, at least in India, because of public policy.

C. CIRP and Arbitration

A debt as defined by the Code does not immediately apply to a claim that has been arbitrated in accordance with the arbitration agreement. However, the creditor may submit the claim to the interim resolution professional if it independently fulfils the criteria of "financial debt" or "operational debt" under the Code. The creditor retains the right to pursue legal action before the NCLT and challenge to the claims' exclusion in the event that such claims are not included in the settlement. It is possible that the NCLT will decide to either accept the claim as a credit or refuse to accept the plea. In the event that the NCLT maintains its stance that the claim is invalid, the information memorandum will reflect this as an ongoing disagreement. Claims of this nature are also referred to as pending litigation or disputes, and the investor has complete autonomy in determining how to deal with them (Resolution Applicant). The Resolution Plan may contain language stating that, following completion of the CIRP, any ongoing litigation or conflict resolution claims will be cancelled, or in most cases, a value of zero will be given to such claims. This type of wording is not uncommon. According to the ruling that was handed

down by the Supreme Court in the matter of Essar Steel, the successful Resolution Applicant is required to acquire control of the corporate debtor without having made any prior promises.¹⁹

D. Debt and Arbitration Award

Insolvency procedures may be started using an arbitral award, but the credit included within must be uncontested. In *K. Kishan v. M/s Vijay Nirman Company*²⁰, the Supreme Court reaffirmed that although arbitral decisions are legitimate records of an operational debt, they must be uncontested in order for operational creditors to be allowed to initiate the CIRP. The Supreme Court declined to hear the case involving a corporate insolvency resolution process on the grounds that (a) a counterclaim that exceeded the amount awarded had been rejected on the merits by the arbitral tribunal, and that this rejection was subject to judicial review; and (b) a challenge had also been made to the arbitral award.

A foreign award must pass both the recognition and enforcement requirements under Part II of the Arbitration Act. The Indian Supreme Court has acknowledged in a number of judgments that there are many phases to a foreign award. In the first stage, the Court will assess whether the judgement is enforceable in light of Sections 47 and 48 of the Arbitration Act. After the foreign award is acknowledged, it may be handled as an operational debt if it is not contested throughout the enforcement process (if the award is contested during the enforcement process, it would become disputed). It would then move forward with taking additional effective procedures for the award's implementation after the enforceability of the foreign award had been determined.²¹

However, the Mumbai bench of the NCLT took a different stance and held that enforcement of a foreign award is not necessary for successfully maintaining an insolvency claim against the corporate debtor in *Agrocorp International Private (PTE) Limited v. National Steel and Agro Industries Limited*²². In this instance, the bankruptcy petition was admitted on the grounds that the foreign award was not contested. According to the NCLT's reasoning, a foreign judgement is legitimate evidence of debt as long as it has reached finality in the place of arbitration. As a result, a foreign creditor may utilise a foreign award to start insolvency proceedings in India. A

¹⁹ *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors*, (2019) SCC OnLine SC 1478.

²⁰ *K. Kishan v. M/s Vijay Nirman Company Pvt. Ltd and M/s Ksheerabad Constructions Pvt. Ltd*. Civil Appeal No. 21825 of 2017.

²¹ *Fuerst Day Lawson Ltd v. Jindal Exports (2001) 6 SCC 356*; *Government of India v. Vedanta Limited & Ors*, SLP (Civil) No. 7172 of 2020.

²² CP (IB) No. 798/MB/C-IV/2019.

foreign award is a genuine proof of debt that can be utilised by a foreign creditor to start insolvency proceedings in India as long as it has reached finality at the place of arbitration, according to one argument in favour of the ruling. It would be interesting to watch whether and how the National Company Law Appellate Tribunal (NCLAT) handles any appeals against the NCLT's ruling.

E. Code and Arbitration Act

In a recent judgement, *Indus Biotech Private Limited v. Kotak India Venture Fund-I*²³, the NCLT directed parties to arbitration while insolvency proceedings were pending and addressed the crucial question of which legislation would take precedence in a disagreement. The NCLT held that in the event of a contractual dispute between parties with an arbitration clause, arbitration would prevail over insolvency proceedings and prevent solvent companies from being subject to CIRP. The NCLT based this decision on the age-old principle of special law superseding general law. It has been common practise to file feigned insolvency petitions in order to delay arbitration procedures, hinder parties from deciding the issue, or as a pressure technique, however doing so consistently may not always be effective. Due to conflicting decisions and the absence of a Supreme Court decision on the subject, the arbitrability of insolvency petitions continues to be a murky subject in India.

Although in this case the NCLT, the adjudicating authority, ordered the parties to arbitrate their problems, it is significant that the adjudicating authority did not rule that the Arbitration Act would take precedence over the IBC and noted that the law on this topic is res integra. The Arbitration Act could not take precedence over the IBC in the event of a conflict between the two Acts' provisions.

In the event of a controversy, the provisions of the IBC would take precedence over those of the Arbitration Act. The NCLT's decision in *ABG Shipyard Ltd v/s ICICI Bank Ltd*²⁴, which was rendered in Ahmedabad, supports this viewpoint. The adjudicating authority in that instance had to decide whether section 56 of the Electricity Act, 2003 would take precedence over section 14 of the IBC. Because both statutes are special laws and the IBC was passed later in time than the Electricity Act, the Adjudicating Authority determined that the IBC will take precedence over the 2003 Electricity Act. The Adjudicating Authority had relied on the Supreme Court's ruling in

²³ *Indus Biotech Private Limited v. Kotak India Venture Fund*, 2021 SCC Online SC 268.

²⁴ *ABG Shipyard Ltd v/s ICICI Bank Ltd*, 2017 SCC Online NCLT 12031.

*KSL And Industries Ltd v/s Arihant Threads Ltd*²⁵ to reach its conclusion. The Supreme Court had ruled in that case that "it is settled law that where there are two enactments approved by the Parliament, and if there is any provision in such Acts which is opposed to another, the provisions included in the Act which is later in point of time should prevail".

In the case of *Shalby v. Dr. Pranav Shah*²⁶, a similar request for the NCLT Ahmedabad Bench to submit an ongoing bankruptcy petition to arbitration was denied, incurring significant fees for the petitioner. The arbitrator lacks jurisdiction over the subject matter of an insolvency petition, regardless of whether there is an arbitration clause in the parties' contract. The NCLT Ahmedabad rejected the argument that the insolvency resolution procedure is not a right in rem.

The Adjudicating Authority would not be prevented from starting CIRP against the corporate debtor if there was an arbitration agreement between the parties if it was determined that there was a "default" as defined by section 7 of the IBC. Section 7 of the IBC would therefore take precedence over Section 8 of the Arbitration Act.

Arbitration and UK Insolvency

The connection between bankruptcy and commercial arbitration is important since the two fields seek two distinct, occasionally incompatible policy goals. Private contractual ties, party autonomy, and to a considerable extent, privacy and secrecy are all issues that come up in commercial arbitration. Contrarily, insolvency is characterised by openness, binding law, and the concentration of conflicting claims.

Therefore, prospective or ongoing arbitration procedures may be affected by insolvency proceedings in a variety of ways. This covers matters such as the insolvent party's ability to arbitrate disputes, the legality of the arbitration agreement, and the acceptance of arbitral rulings by national courts. Depending on the law of the contract, the location of the arbitration, and the regulations that apply to the insolvency of the distressed or insolvent party, an insolvency will have a specific impact on arbitration proceedings.

The insolvency of a business partner remains a concern even in normal times, despite the coronavirus pandemic having a large negative impact on businesses in a variety of industries, both in the UK and abroad. Many nations have enacted fresh regulations designed to support companies in surviving the epidemic. The *Corporate Insolvency and Governance Act 2020*

²⁵ *KSL And Industries Ltd v/s Arihant Threads Ltd*, (2008) 9 SCC 763.

²⁶ *Shalby v. Dr. Pranav Shah*, 2018 SCC OnLine NCLT 137.

(CIGA 2020)²⁷ and government financial aid to businesses are two examples of this in the UK. Due to the temporary nature of some of these measures, such as the current limitations on filing winding-up petitions and statutory demands that are set to expire on December 31, 2020, there are currently a number of businesses that are still operating but are in danger of going out of business once these restrictions end.

As arbitration has become more and more popular as a method of resolving disputes, creditors have begun to wonder how they can assert claims against financially troubled and insolvent business partners in contracts that contain arbitration clauses. This is especially true in cross-border situations where the jurisdiction of the arbitral tribunal and the jurisdiction of the local courts overseeing the insolvency process may not be the same.

A. Insolvency before and during arbitration

According to the regulations of the country where the bankruptcy procedures have been initiated, the precise repercussions of a party joining an insolvency process would differ. The Insolvency Act of 1986 (IA 1986), which is governed by English law, controls insolvency and its connection to arbitration and other forms of dispute resolution.

An insolvent corporation may be the subject of the initiation or continuation of arbitration proceedings, subject to certain legislative limitations. For instance, when a party enters administration, a moratorium is automatically imposed that forbids the start or continuation of "legal proceedings" (which includes arbitration) against the firm without the administrator's or the court's approval (IA1986, Sch B1, para 43(6)). In forced liquidation, a similar stay is applicable (IA 1986, s. 130(2)). A corporation may request an independent moratorium under IA 1986, Part A1 (added by CIGA 2020), which has a similar impact to the administrative moratorium, if certain requirements are satisfied. Once more, the court's approval is necessary for the start or continuation of any "legal proceeding" against the firm. Contrary to administration, however, if a creditor is attempting to collect on a debt for which the firm has a payment holiday during the moratorium, the court cannot approve the start or continuation of a procedure.

However, in the event of a members' voluntary liquidation or creditors' voluntary liquidation, there is no automatic suspension on arbitration procedures. On a party's request, the court has the option to issue a stay in respect to certain proceedings (IA 1986, s 112).

²⁷ *Corporate Insolvency and Governance Act 2020*.

However, decisions made by national courts located outside of the arbitration venue are often not binding on arbitrators. They have the option to carry on with arbitration procedures elsewhere even if the national court in charge of the party's insolvency has ruled for a stay or one has already been imposed automatically. It is true that this was a problem in *Syska (Elektrim SA) v. Vivendi Universal SA and others*²⁸.

The specific set of factual and legal circumstances will have a significant impact on the outcome of the question of whether or not another party can take the place of an insolvent party in an arbitration case that has already begun. This is due to the fact that these aspects will play a role in determining whether or not this is feasible. After one party in a dispute merged with another company and ceased to exist as a result of a reorganisation plan, for example, the Indian High Court upheld the decision of an arbitral tribunal to replace one claimant with another. This decision was made in the case of *A v. B*²⁹. The decision was supported by the Indian High Court. The decision reached by the arbitral tribunal to substitute one claimant for another was made in this particular instance. The court came to the conclusion that the other company may participate in the arbitration in lieu of the original party since it had lawfully acquired the responsibilities that were outlined in the contract that contained the clause requiring the parties to submit to arbitration.

substitute one claimant for another when the original party amalgamated with another firm and ceased to exist as a result of a reorganisation plan in India. The court determined that because the other firm had legitimately acquired the original party's duties under the contract that contained the arbitration provision, it may participate in the arbitration in place of that party.

Arbitration and US Insolvency

US federal courts must reconcile bankruptcy and arbitration legislation. Section 362 of the US Bankruptcy Code immediately stops pre-bankruptcy claims, including litigation. The bankruptcy court has wide estate authority. The FAA protects valid arbitration agreements (FAA). The US Supreme Court has repeatedly affirmed the FAA's underlying principle, but it hasn't addressed the possible conflict between the two pieces of legislation if a party forms a legal and enforceable arbitration agreement and subsequently wants to reorganise under Chapter 11 of the US Bankruptcy Code.

²⁸ *Syska (Elektrim SA) v. Vivendi Universal SA and others* [2009] EWCA Civ 677.

²⁹ *A v. B* [2016] EWHC 3003 (Comm).

Due to the automatic stay's applicability to all claims in a Chapter 11 bankruptcy process, a party wishing to begin arbitration procedures against a debtor must get judicial relief. A US bankruptcy court must decide whether a dispute is "fundamental" under US bankruptcy law before allowing arbitration under a valid and enforceable arbitration agreement. A case is sometimes considered "core" if it involves rights under the US Bankruptcy Code. The Act's "core" items include orders to sell property or recover fraudulent conveyances. If the issue is "non-core," focusing on the parties' business before bankruptcy, bankruptcy courts may lack the jurisdiction to prohibit arbitration under legitimate and enforceable arbitration agreements.

A 2017 bankruptcy court judgement in the case of insolvent brokerage company MF Global Holdings highlights this disparity.

The bankruptcy plan administrator sued Bermuda-based insurer Allied World Assurance Company for excess errors and omissions coverage. Allied World asked Bermuda to arbitrate the issue under the insurance conditions. First, the bankruptcy court noted that the imprecise policy reflected the parties' desire to arbitrate policy-related conflicts. After determining that the clause was valid and enforceable, the bankruptcy court considered whether Congress intended for disputed claims to be arbitrable. To harmonise the FAA and US Bankruptcy Code, the court decided whether the issue included a "fundamental" problem. Despite involving the administration of estate assets and perhaps prior bankruptcy court judgments, the bankruptcy court ruled that the matter was "non-core," noting that the monies at issue were tiny and the dispute related almost completely to the parties' pre-petition relationship. It will be difficult for a party to arbitrate claims against a debtor in a US bankruptcy court, despite Allied World's victory. The bankruptcy court ordered MF Global Holdings to visit Bermuda to handle an insurance problem.

Allied World requested arbitration against MF Global Holdings after the main bankruptcy concerns were addressed, and the claims were quite modest. Arbitration isn't necessary because the US Bankruptcy Code gives the debtor a grace period. More stakes makes it less likely to enforce an arbitration agreement. In this situation, parties must consider filing an adversary process in bankruptcy court to enforce claims.

Arbitration and Cross Border Insolvency

Insolvency law tends to intrude on other areas of law, both nationally and globally, based on the "asset value maximisation" policy. In relation to the resolution of claims through arbitration with an insolvent business, this contribution examines the effectiveness of creditor protection.

In contrast to international arbitration, which is founded on the principles of "party autonomy" and "privity of contract," bankruptcy has local pull and a single jurisdiction (with the exception of situations of cross-border insolvency).

According to this proposal, the arbitration agreement at such intersections should only be deemed unlawful when it is unavoidably endangered by the bankruptcy proceedings.

A. International perspective

Whether insolvency came before arbitration or the other way around determines the jurisdiction and maintainability of claims before an arbitral panel.

a) Situation 1: When the insolvency process started while the arbitration case was still pending:
In such a scenario, an examination of the economic laws of a number of states reveals that the arbitration processes are halted, and the arbitration agreement is rendered unlawful and invalid. However, the legislation at the national level in a number of different national legal systems has been updated in this area (Poland and Latvia).

The section of the Polish Bankruptcy Code that had previously prohibited the continuation of arbitration procedures has been made useless by the new restructuring law that has been passed in the nation (Act of May 5, 2015).

If a party to an arbitration agreement filed for bankruptcy before the modification, the arbitration agreement was dissolved on the day the bankruptcy was proclaimed in accordance with the provisions of Articles 142 and 147 of the Bankruptcy and Reorganization Law. This was the case even if the other party to the arbitration agreement did not file for bankruptcy. The arbitration processes in their entirety were likewise finished.

Arbitration procedures are required to be ex officio postponed once the bankruptcy petition has been filed or up to the appointment of the trustee of the bankrupt estate, whichever comes later. After that, the court continues the proceedings from the point where it left off and formally resumes them. The requirement that a creditor must first exhaust all available avenues before having their claim included on the list of claims prepared by the bankruptcy trustee has the potential to have an impact on the arbitration procedures that are initiated in such a scenario. The creditor is allowed to move on with the arbitration process if the claim is not listed on the list of claims that is maintained by the trustee of the bankruptcy.

b) Scenario 2: When the arbitration procedures began while the insolvency processes were ongoing.

The arbitration agreement specifies the arbitral tribunal's subject-matter authority. When international arbitration procedures are commenced for a party who is experiencing insolvency, public policy considerations come into play. Due to the fact that all procedures often halt at the start of insolvency in most national systems, such circumstances seldom arise in domestic arbitrations. In systems where arbitration comes before bankruptcy, the tribunal's authority to decide the case brought before it is greater. In such cases, the tribunal's function and the trustee's/interdependence administrators are essential.

To this situation, the Elektrim/Vivendi story³⁰ is relevant. In the aforementioned instance, an LCIA Tribunal continued the arbitration against Elektrim even though a Swiss Tribunal declined to do so. Elektrim was at the time the subject of insolvency proceedings in Poland. Also upheld were both prizes.

B. Indian perspective

The Code of 2016 makes no distinction between arbitration cases that have already commenced and those that begin after the insolvency processes have begun. Rather, it treats both types of cases in the same manner. The courts have stated that in order to avoid confusion, an arbitrating party may be able to successfully argue for the continuation of arbitration proceedings if it can be demonstrated that arbitration is initiated for the benefit of the corporate debtor, to maximise the debtor's assets, or that the arbitration proceedings will not adversely affect the corporate debtor's assets. In other words, the arbitrating party must be able to show that the continuation of the arbitration proceedings will not have an impact on the corporate debtor's assets. In other words, the courts have ruled that an arbitrating party may have a chance to successfully argue for the continuation of arbitration proceedings if it can be shown that arbitration was initiated for the purpose of resolving a dispute. This can be demonstrated by showing that arbitration was initiated to resolve a dispute.

a) Scenario 1 Insolvency is undergoing in India by one of the arbitrating parties, who is Indian and having foreign-seated arbitration:

In such a case, the insolvent Indian party may petition to the arbitral tribunal with a foreign seat and ask for a suspension of the arbitration. However, while a foreign award may not be related to Indian law and may be enforced against foreign assets, there is no prejudice against a foreign

³⁰ Vivendi vs. Elektrim decision, Nathalie Voser (Schellenberg Wittmer Ltd, Switzerland), December 5, 2012.

award that is. This is predicated on the fact that India has not declared any reciprocating territories in accordance with section 234 of the IBC.

b) *Scenario 2. Claims filed in CIRP while concurrent arbitrations are ongoing:*

No express prohibition against this exists. The concept of debt (financial or operational) under the Code does not apply to a claim made pursuant to an arbitration agreement. However, the claim might be presented to the resolution professional if it comes within the category of financial or operational debt on its own (or IRP as the case may be). If the IRP declines to include the claim, the creditor may appeal to the NCLT; if the NCLT likewise declines to include the claim, the claim will be listed in the information memorandum as a pending dispute. In such cases, the Resolution Applicant shall have sole discretion over the determination and handling of such claims. Such claims are often given no value, or the resolution plan will include a provision stating that following the conclusion of an insolvency, all pending claims must be extinguished.

In this regard, the Hon'ble Court recently granted permission to an operational creditor of the corporate debtor to continue arbitration proceedings despite approval of the corporate insolvency resolution plan by the Committee of Creditors and the Apex Court in the case of *Fourth Dimension Solution Solutions Ltd. v. Ricoh India Ltd.*³¹, which was decided on January 21, 2022 by the Apex Court. The operational creditor's acknowledged claims were listed by the court as "Nil" with the following comment attached: "The FDSL claims have been contested and are currently being heard by the arbitrators or appellate authority. The obligation is related to the outcome of these procedures". Arbitral Award: A 2016 code's proof of debt?

In the matter of *K. Kishan v. M/s. Vijay Nirman Company*³², the Hon'ble Apex Court ruled that arbitral judgments constitute legitimate records of operational debt. The credit therein must be uncontested, nevertheless. The counterclaim that exceeded the claim awarded was rejected by the arbitral tribunal and was a subject of a challenge before the Courts in this instance, and a challenge was also made against the arbitral verdict, therefore the court declined to initiate CIRP. As a result, the CIRP was not started since the award was subject to challenge. Foreign awards may be considered operational debt once their enforceability has been determined (in accordance with sections 47 and 48 of the 1996 Act) and there has been no resistance to their execution.

³¹ *Fourth Dimension Solution Solutions Ltd. v. Ricoh India Ltd.*, Civil Appeal No. 5908 of 2021.

³² *Supra* Note 12.

It is a legal axiom that in the absence of effective enforcement, debt does not serve as a liquid asset. Domestic creditors should treat the entity as they found it, with a range of rights and responsibilities, including the duty to arbitrate, in order to manage debt effectively. However, it is a subject for domestic deliberation to object to the continuance or execution of arbitral rulings on the basis of public policy.

The unwillingness to commence or continue arbitration procedures in this situation might be viewed as a breach of the *pacta sunt servanda* norm of international law. This is not only unfriendly to arbitration, but it can also be problematic because it has an impact on the arbitration agreement's validity, which blocks not only future arbitration proceedings but also ongoing arbitrations and post-arbitration actions for the recognition and enforcement of arbitral awards made in accordance with invalid arbitration clauses. The determination of the parties' rights, which occurs in arbitration processes, cannot possibly be replaced by the proceedings before the IRP because they are essentially summary in nature. It is nonsensical to hold up arbitration proceedings against a bankrupt corporation unless the arbitration agreement's legality on its face is in doubt.

Suggestions and Road Ahead

Arbitration is a complex and extremely subtle method of conflict resolution. Insolvency arbitration will eventually develop into its own niche, enjoying the rewards of the arbitral system, much like other types of arbitration such as commercial, investment, marine, and sports arbitrations. It would also become a popular method of recovery for financially troubled corporations as a result, a specific effect that is made worse in the wake of COVID-19.

Unquestionably, the current CIRP under the Code lacks the convenience of control over the nomination of the arbitral tribunal through party-appointed arbitrators who would then designate a chair arbitrator. Furthermore, arbitration is practical for scheduling hearings at any location and on any day agreed upon by the parties. Unlike CIRP, which has a deadline, arbitration offers a flexible approach. According to this framework, the date the award is rendered must be taken into account for the 330-day deadline set forth in the Code for the completion of the CIRP, which is comparable to the time-bound requirement that an arbitral award be rendered within a year under Section 29A of the Arbitration Act. Thus, the framework doesn't openly interfere with India's insolvency deadlines.

Confidentiality of the arbitral procedure is one key issue that requires in-depth study. While it is undeniable that maintaining confidentiality helps debt-ridden companies prevent further declines

in market value, the requirement for mandatory public disclosure for the invitation to submit claims and the subsequent invitation to submit an expression of interest (EOI) appears to outweigh company preference. First, arbitral proceedings can be placed behind closed doors with a shroud of secrecy safeguarding the insolvent firm and its image from public focus and examination, which might lead to a two-pronged resolution of these ostensibly conflicting interests. Second, a well-known idea of redacted arbitral awards and arbitral papers would come to the rescue with regard to the documents and, most importantly, the award itself. Importantly, rigorous secrecy terms pertaining to the corporate debtor's financials must be included in the arbitration agreement for respondents to EOIs.

Even though it might seem like the confidentiality of the arbitration alone would be a deal-breaker to persuade businesses to choose an arbitration-led CIRP over the one that is currently governed by the Code, it is important to keep in mind that the fundamental tenet of the entire framework is a very liberal interpretation of who gets to decide which in rem rights are covered by the CIRP. Indus Biotech shook up the conventional wisdom about the scope of arbitrability in insolvency in several ways. Therefore, while ambitious and liberal, the understanding that in rem rights are solely decided by the CoC, with little to no intervention by the NCLT except in the most extreme cases of irregularities, is quite necessary for arbitration to deal with insolvency in light of the rise in corporate insolvencies.

The Code was put on hold for a year starting on March 25, 2020 due to the introduction of Covid-19. With the suspension set to be removed, it will be fascinating to see how the bankruptcy process after COVID-19 develops and how it affects arbitration cases. Despite the corporate debtor being saved, the arbitral proceedings' parties were effectively awarded nothing, leaving them with little recourse. If the law is not properly addressed, the number of cases where arbitral proceedings are compromised by the initiation of insolvency proceedings against the corporate debtor will rise as businesses fail as a result of the pandemic's effects. This will have an adverse effect on investor confidence in the ability to enforce contracts and the convenience of conducting business in India.

OVERREACHING PENALTIES AND OVERSIGHTS IN NDPSA, 1985 IN LIGHT OF THE MENTAL HEALTH ACT, 2017: ON HOW LEGISLATIVE DEMONISATION OF DRUG DEPENDENCE OVERSHADOWS DRUG- ASSOCIATED MENTAL HEALTH ISSUES

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Introduction

Over the time, legal ramifications of drug dependence have had slight shifts towards a more reformative approach but the Narcotic Drugs and Psychotropic Substances Act, 1985 (the Act or NDPSA) still continues to reinforce the structural stigma surrounding PWUD (persons who use drugs) that not only holds them back from seeking help but also results in substandard treatment and care as professionals are insufficiently trained. For instance, in Punjab which is worst affected, the necessity for rehabilitation facilities is equated barely with basic dispensaries.¹

Moreover, public perceptions about mental and substance use disorders are influenced by knowledge, the degree of contact with people affected, and media coverage of violent events. The Punjab government advocated exemplary punishment of the death penalty even for first-time drug peddling/ smuggling offenders.² This stigmatization of dangerousness manifests in public policy and legislation relating to mental health and substance abuse. According to the findings of a report, despite provisions in the NDPSA for people to be directed to de-addiction centers, the courts in Punjab were sending them to jail.³ Through the course of this paper in two main parts, the author shall argue that the crucial problem is how lawmakers, law enforcement, and courts continue to view PWUD as criminals failing to categorize the plight of substance abuse as a public health issue. Part one of the paper talks about the

¹ Chirathar Palli, Abhilaksh Grover "Punish them softly", *Telegraph India*, 24 September 2020, available at <<https://www.telegraphindia.com/opinion/punish-them-softly/cid/1453338>> (last visited 29 September 2020)

² Saurav Dutta "Punjab's Recommendation of Mandatory Death Penalty for Drug Smuggling Is Problematic", *The Wire*, 1 August 2018, available at <<https://thewire.in/law/mandatory-death-penalty-for-drug-smuggling-why-punjab-governments-recommendation-is-problematic>> (last visited 29 September 2020)

³ Vidhi Centre for Legal Policy, "From Addict to Convict: The Working of the NDPS Act in Punjab" (April 2018).

criminal jurisprudence of NDPSA, counter-productive conditional safeguards, its (un)constitutionality, drawbacks, and deficiencies when compared with international conventions and protocols. The Act violates universally accepted principles like 'Bail is the rule, jail an exception,' Presumption of innocence, and 'mandate against self-incrimination', also incorporated in Articles 21 and 22 of the Indian Constitution. Conditional immunity, probation and other safeguards in the act are subject to withdrawal, and subsequent conviction and are largely incoherent of medical complications related to substance abuse. A majority of these provisions fail to match the international standards. In part two of the paper, it is stated that stringent drug laws also set back the de-stigmatization of rhetoric around mental illnesses. Although the Mental Healthcare Act, 2017 (hereinafter, MHCA) creates a rights-based approach to mental health care, it still does a fair amount of disservice to PWUD when read with NDPSA. The Act has included drug dependence within the definition of mental illness insinuating that it is a disorder beyond the realm of self-control but the same can prove counterproductive making MHCA a double-edged sword. Further, it is critiqued how punitive provisions of NDPSA don't reconcile with reformative provisions of MHCA while contradicting a deterrence-oriented structure of NDPSA with that of treatment-oriented MHCA. It also explains how the two statutes bear an inadequate understanding of addiction, which exposes PWUD to multiple menaces. In this regard, Justice Mudgal commented over addicts being made "scapegoats" in the drug trafficking menace as commercial drug dealers are hardly convicted and disparaged as deficient.⁴ Advocate Salman Khurshid termed deterrence as a "misplaced aspiration".⁵

II. CRIMINAL JURISPRUDENCE OF THE CODE

Possession of drugs is itself an offense under the NDPSA as much as sale, purchase, production, etc. The punishment does not depend on purpose (personal use/ resale etc.) but the quantity of the drug. The Act fails to account for an additional examination of circumstances, historical background of the accused, and other aggravating or mitigating factors. There have also been controversies around whether the total weight of the seized product or pure drug content should be considered for the calculation of contraband in some

⁴ Outlook Web Bureau, "Courts Sending Drug Addicts In Punjab To Jails Instead Of Rehabs, Finds Study", *The Outlook*, 26 August 2018, available at < <https://www.outlookindia.com/website/story/courts-sending-drug-addicts-in-punjab-to-jails-instead-of-rehabs-finds-study/315565> > (last visited 29 September, 2020)
⁵ *Ibid.*

neutral substance. The government declared it is the total weight that must be considered.⁶ This change has proved to be extremely damaging for people who use drugs (PWUD) and other low-level offenders. Several people arrested for possessing minor quantities of drugs intended for personal use languish in jail for over a decade.⁷ There exist graded penalties based on quantitative categorization subject to certain procedural safeguards:

Probation on reasonable grounds

Section 39 empowers the court to release certain offenders on probation for medical treatment instead of prosecution, if in the respective court's opinion there exist "reasonable grounds". However, this is a once-in-lifetime available provision requiring the persons out on probation to remain completely drug-free, not only exposing them to a threat of subsequent conviction but also being unmindful of relapses i.e., triggers to reuse. According to several studies, relapses may or may not be part of recovery but aren't uncommon or signs of failure.⁸ Relapse as a byproduct of addiction is discussed later.

Immunity from prosecution

Section 64A is relatively more significant to see for this paper as it renders the "addicts" immunity from prosecution, provided they "voluntarily" agree and seek to undergo medical treatment, but if they fail to complete the treatment term, this immunity may also be withdrawn and criminal proceedings reinstated. It is to be noted that this safeguard is contingent upon prior admission to possession of contraband, which in itself is a crime under the Act.

The landmark judgment available shows how provision is merely an embellishment for the restorative theory of justice in an otherwise retributive statute.⁹ The Bombay High Court, in *Fardeen Feroz Khan vs UOI*¹⁰, refused to grant the petitioner immunity under Section 64A for the reason that nine grams of cocaine did not constitute a small quantity and merely a statement of the petitioner to the effect that he was an "addict" was not enough to qualify him for immunity.¹¹ It was further observed that immunity is available only for drug-dependent

⁶ Notification through S.O.2941 (E), dated 18 November 2009

⁷ See: *Raju v. State of Kerala AIR 1999 SC 2139*

⁸ David Saek "Why Relapse Isn't a Sign of Failure", *Psychology Today*, Oct 19 2012, available at < <https://www.psychologytoday.com/us/blog/where-science-meets-the-steps/201210/why-relapse-isnt-sign-failure> > (last visited 20 October, 2020)

⁹ *Supra* note 1

¹⁰ 2007 (109) Bom L R 358.

¹¹ *Supra* note 1

individuals, not occasional users.¹² The court also held that drug dependence must be "proved by the production of sufficient evidence by the person concerned."¹³ Being beneficent in nature, the provision ought to be construed liberally and not strictly as per the well-settled principle of law that welfare provisions are to be interpreted widely in favor of the class of people for whose benefit the statute is enacted, as opposed to criminal provisions. The Courts, by giving such rulings, on the contrary, have tended to restrict its scope.

Search and seizure

Section 50 of NDPSA guarantees a person being searched the right to be searched before a Gazetted Officer or a Magistrate and directs the officer to explain this right to the person. However, the officers can search if they have a reason to believe that compliance to the provision could give the person a chance to part with the contraband. The search and seizure safeguard is the only one that has a bearing on the appreciation of evidence regarding arrest or seizure as well as on the merits of the case and its non-compliance can even result in vitiating the trial of the accused. It thus forms a relatively strong safeguard amongst other execrable weak ones. NDPSA, being a *sui generis* code, Code of Criminal Procedure, 1973 (CrPC) applies to it, in so far as CrPC provisions are not inconsistent with its provisions. Also, after a series of conflicting opinions, the Supreme Court has observed that the Act doesn't warrant or justify any extended meaning to the word "Person" occurring in section 50, so as to include even some bag, article or container or some other baggage being carried by him,¹⁴ which has further strengthened the safeguard.

A. (Un)Constitutionality of the Code and the International Approach

NDPSA is a *sui generis* code i.e. specific criminal legislation with an overriding effect over the general criminal procedure. Section 37 is such a *non-obstante* clause that declares all offenses listed in the Act as cognizable and non-bailable¹⁵ but provides for conditional bail.¹⁶ This means, that even for a minor offense, a person can be placed under police custody

without a warrant. The sections also make getting bail a more stringent process than it already is, compromising the legal principle laid by the SC that 'Bail is rule, jail is an exception.'¹⁷

Presumption of Guilt

Section 35 violates the principle of 'Presumption of Innocence, which is fundamental to criminal jurisprudence. It is a universal legal right¹⁸ of an accused, being *sine qua non* to a fair trial. Lord Sankey famously described the prosecution's duty to prove guilt beyond doubt as the "golden thread" running throughout English criminal law.¹⁹ The reverse burden of proof is, however, compatible with the principle of presumption of innocence considering the seriousness of a crime. They aim to achieve a "fair balance between the general interest of the community and the personal rights of the individual"²⁰. Globally, violent crimes in nature of murder, assault, rape, etc. are categorized as 'serious crimes.' In this light, overburdening a drug dependent for proving just personal consumption seems disproportionate. Though in a recent SC judgment, the Court reiterated that because there is a reverse burden of proof, the prosecution shall be put to a stricter test and the accused will naturally get the benefit of defense of reasonable doubt at any stage,²¹ it is still very cumbersome for the accused to disprove the presence of "culpable mental state" (*mens rea*), and it still favors law enforcement. Once possession is proved, then it is for the accused to establish that he was not in "conscious possession" of the contraband.²²

Possibility of Self-Incrimination

Section 67 r.w. Section 42 and 53 confers the power on certain state/ central government officers to call any person for the information or document delivery during the inquiry. The questions of whether the officers authorized to investigate be deemed "police officers" and whether statements made by the accused or anyone else under this section are confessional in nature carrying the evidentiary value before a court of law, have been contentious. Indian courts have taken divergent viewpoints over time but the position that stayed inconclusive for decades has recently been determined in *Tofan Singh v. State of Tamil Nadu*.²³ The Supreme Court held by a 2:1 majority that officers of the Central & State agencies appointed under NDPSA are "police officers" within the meaning of section 25 of the Evidence Act, as a

¹² *Supra* note 10

¹³ *Shaji vs. State of Kerala* 2004(3) KLT270

¹⁴ *State of Himachal Pradesh v. Pawan Kumar* (2005) 4 SCC 350

¹⁵ Narcotic Drugs & Psychotropic Substances Act 1985, (Act 61 of 1985), s. 37(a)

¹⁶ Narcotic Drugs & Psychotropic Substances Act 1985, (Act 61 of 1985), s. 37(b)

¹⁷ *State of Rajasthan v. Balchand@Baliy* AIR 1977 SC 2447.

¹⁸ UN's Universal Declaration of Human Rights, art.11

¹⁹ *Woolmington v. DPP* AC 1935 HL 462

²⁰ *Brown v. Stott* AC 2003 US 681

²¹ *Hanif Khan @ Annu Khan v. Central Bureau of Narcotics* (4) RCR (Criminal) 250

²² *Baldev Singh v. State of Haryana* [2015] (4) RCR (Criminal) 1014

²³ T [2013] 16 SCC 31 (SC)

result of which any confessional statement made to them would be barred under the provisions of section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act. The Court also observed that using statements made under section 67 as the basis to convict a person would be "a direct infringement" of constitutional guarantees.²⁴ This decision shall have an impact on all ongoing cases, appeals and future cases but the general principle is that judicial decisions do not have a retrospective effect on decided cases.

Decades of indecision

After over 30 years of indetermination, it was only in 2013 that the Supreme Court in *Tofan Singh* considered arguments on these aforementioned points and referred the case to a larger bench for consideration. The Court has eventually rightly held that the provision not only infringing upon the constitutional mandate against making self-incriminating statements but didn't fall in line with the universally accepted Latin maxim '*Nemo debet prodere se ipsum*' (no man is bound to betray himself).²⁵ In *State of Bombay v. Kathi Kalu Oghad*²⁶, Supreme Court highlighted as to what qualifies as 'tendency to self-incriminate' and differentiated between statements that might lead to "cremation" and "confession".²⁷ The former means "the potency to make crime conclusive" whereas the latter "tendency to make guilt probable.". The Court primarily relied on two American judgments where it was held that a person might not answer questions that'd lead to a subsequent possibility of self-incrimination and that answering a question depends upon 'careful consideration of all the circumstances.'²⁸

The Supreme Court has issued guidelines for recording confessions maintaining that voluntary statements regarding admission of offense would be a "valid confession" if made under a "free atmosphere".²⁹ In *Mohammed Fasin v. State [Cri. Appeal No.296 of 2014]*, SC set aside the conviction of the accused and categorically opined that a confession is admissible if the Court is satisfied that it is a voluntary statement and the accused was apprised of his rights before recording it. However, given the absence of any checkpoints, it would be difficult to ascertain the authenticity of the confessional statement. Despite being

²⁴ *Ibid.*

²⁵ The Constitution of India, art. 20(3)

²⁶ AIR 1961 SC 1808

²⁷ *Ibid.*

²⁸ *Hoffman v. United States* 341 US 479, Malloy v. Bogan 12 L.Ed. 2d 653

²⁹ *Kartar Singh v. State of Punjab* AIR 1961 SC 1787

theoretically fair, this makes an awfully weak safeguard as investigating officers being persons of great authority can very easily coerce or threaten a person to elicit confession, also compromising a diligent investigation. The Supreme Court has observed how absence of rights against self-incrimination would incentivize investigating agencies 'to sit comfortably in the shade rubbing red pepper into the devil's eye rather than go about in the sun hunting up evidence.'³⁰

Although, the Supreme Court's recent interpretation of the statute pertaining to statements recorded by officers doesn't undo years of injustice but finally upholds the rights and dignity-based approach enshrined in the Indian Constitution and international conventions.

3. International Call for Restorative Drug Policy

India is a party to the three United Nations drug conventions – the 1961 Single Convention on Narcotic Drugs (1961 Convention), the 1971 Convention on Psychotropic Substances (1971 Convention), and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Convention). In light of these conventions, anti-drug legislation NDPSA was hastily passed in the Indian Parliament. UNODC is the United Nations agency with a mandate to support countries in the implementation of these three UN conventions. UNODC has declared that its approach to the drugs issue encompasses the most diverse aspects of the subject, with orchestrated and specific actions in the areas of health, education, and public safety, among others. It promotes strategies based on knowledge, sensitization prioritizing respect for human rights and the real needs of the affected people in their clinical, motivational and social aspects. Countries like the USA, Canada, and New Zealand have formed and implemented their drug prohibition legislations and policy from this perspective of seeing substance addiction as a public health issue. This is further discussed in a more detailed manner in the second part of the paper.

On one hand, there is international advocacy for restorative and rehabilitative legislation as opposed to deterrence through heavy criminalization while on the other hand, extreme capital punishments like the death penalty are invoked for drug-related crimes. They are associated with organized crimes and viewed in the likes of heinous crimes like murder instead.

If it were not for this demonization, reformative drug policy with a public health enhancement and harm reduction approach could progress in India, as it did with AIDS. In early 2012, UNODC in partnership with the NDDTC started a pilot program for methadone

³⁰ *Supra* note 26

maintenance treatment (MMT) for opioid dependence. Encouraged by the effective results, the Ministry of Health has shown willingness to offer MMT as part of its Drug De-addiction Program as well as under the National AIDS Control Program.³¹ But when it comes to drug-issuе, the government's understanding of harm reduction narrowed even further in 2012, when the National Policy on Narcotic Drugs and Psychotropic Substances was introduced. The policy casts harm reduction in very negative and incorrect terms. Besides derogatory and pejorative references – such as “shooting galleries”, “weaning from drugs” and “supporting or incentivizing the drug-using habit”.³²

Law of the land on the dual diagnosis question

Gone are the days when substance use disorders (SUDs) were seen exclusively through the moral lens of society and thought to be a disease of character.³³ The outcome document of the United Nations (UN) General Assembly Special Session on drug abuse, ratified by 193 member states, collectively expressed, “drug addiction is a complex multifactorial health disorder characterized by chronic and relapsing nature.” It also advocated for the elimination of stigma attached to substance abuse and for it to come within the purview of the public health system rather than the criminal justice system.³⁴ Mental Healthcare Act 2017 which governs mental health care laws in India includes “mental conditions associated with the abuse of alcohol and drugs” in the definition of mental illness.³⁵ This can prove to be counterproductive, as MHCA, just like NDPSA, fails to differentiate between a recreational user and an addict. The term ‘abuse’ then seems vague as to what it constitutes. It is ironic if the term “abuse” has been used in the Act as a lay, nontechnical, nondiagnostic term, as this would then constitute offensive, pejorative, and

³¹ Tandon T. “Drug Policy in India” *International Drug Policy Consortium*, February, 2015. available at <https://idhdp.com/media/400258/idpc-briefing-paper_drug-policy-in-india.pdf> (last visited November 16, 2020)

³² *Ibid*
³³ Ghosh A, Sarkar S. “Current legislation governing the care of individuals with substance use disorders in India: Rationale and implications” 34 *Indian J Soc Psychiatry* 189-92 (2018) <http://www.indjsp.org/temp/IndianJ SocPsychiatry.34.189-6099134_165631.pdf> accessed 20 September, 2020

³⁴ *Ibid*.

³⁵ Mental Healthcare Act 2017, (Act 10 of 2017), chapter 1(2) (s)

stigmatizing language something the Act purports to address.³⁶ The use of such moralistic phraseology in the law meant for people suffering from SUDs becomes questionable. The current version of the International Classification of Diseases (ICD) of the World Health Organization (WHO) too, does not have any diagnostic category termed “abuse”.³⁷ Furthermore, the definition of mental illness in the Act includes only those illnesses in which there is a “gross impairment of judgment, behavior, or capacity to recognize reality or ability to meet the ordinary demands of life.”³⁸ So, provisions like ‘supported admission’ meant for treating people with severe mental illnesses with gross impairment may become applicable to all types of SUD, consequently exposing them to involuntary or coerced treatment as discussed in the next section.

A. Right to Refuse Treatment and Self-Determination

Mostly, PWUD (persons who use drugs) are only treated with consent but if they don't have “capacity” as per MHCA's criteria and are deemed unfit for voluntary admission to DACs (de-addiction centers), their decisional and bodily integrity can be gravely undermined. Decision-making capacity is derived from the doctrine of informed consent, which means that consent to be informed, free and capable to be deemed valid.³⁹ Charland has argued that besides medical factors, the personal -social circumstances; type of substances; the manner of metabolization; nature, duration, and severity of addiction; profiles of action; levels of intoxication or withdrawal; the presence of concurrent psychiatric or medical conditions; and degree of cognitive impairment, all have a bearing on determining capacity.⁴⁰ The clinical impact of cognitive impairment on judgment and decision-making power due to drugs, being an emerging area of neuroscientific research, is yet to be characterized.⁴¹ In this light, the option of choosing a “nominated representative” with decisional authority, under the Act may prove counterproductive too as it becomes complicated to assess (in)capacity. The provision empowers the state and the service providers to forcefully admit

³⁶ Rao R, Varshney M, Singh S, Agrawal A, Ambekar A. “Mental Healthcare Act, 2017, and addiction treatment: Potential pitfalls and trepidations” 61 *Indian J Psychiatry* 208-12 (2019) <<https://www.indianjpsychiatry.org/text.asp?2019/61/2/208/253834>> accessed 10 November, 2020

³⁷ *Ibid*.

³⁸ Mental Healthcare Act 2017, (Act 10 of 2017), section 2(s)

³⁹ Mohan A, Math SB. “Mental Healthcare Act 2017: Impact on addiction and addiction services” 61 *Indian J Psychiatry* (2019) <http://www.indianjpsychiatry.org/temp/IndianPsychiatry6110744-606915_165131.pdf> accessed 28 September, 2020

⁴⁰ Louis C. Charland, ‘Decision making capacity and responsibility in addiction’ in George Graham, Jeffrey Poland (eds), *Addiction and Responsibility* (Cambridge: MIT 2011)

⁴¹ *Ibid*.

patients against their explicit consent, which is not only against human rights laid down internationally but also against the principles of effective treatment laid down in most guidelines like drug dependence treatment document UNODC and WHO (2008) that state "As any other medical procedure, in general conditions drug dependence treatment, be it psychosocial or pharmacological, should not be forced on patients."⁴² The Committee on Economic, Social and Cultural Rights, the UN body monitoring compliance with the covenant, has also emphasized the state's obligation to refrain from applying coercive medical treatments, unless on an "exceptional basis".⁴³ However, India has been largely lagging behind in the implementation of policy on international lines, let alone their execution. MHCA lays down rights for the mentally ill (including PWUD) against protection from cruel, inhuman, or degrading treatment in any mental health establishment but such inhuman treatment in "rehabilitation centers" is a common practice throughout the country. In this regard, the High Court of Delhi issued an order to the Delhi State Legal Services Authority for conducting inspections of DACs in Delhi in response to petitions against these centers, from where even deaths due to torture are reported.⁴⁴ Also, while out of the few state governments that have notified rules under the NDPSA for licensing and regulation of DACs⁴⁵ most have not utilized this provision.

B. Inadequate understanding of 'addiction' in NDPSA

Drugs and addiction are entwined and yet what 'addiction' actually means isn't dealt with in the Act. Countries like the USA and Canada have distinct laws to acknowledge addiction for what it is that lay down treatment protocols accordingly. In the US, the treatment of opioid dependence with opioid medication is governed by federal regulations, under the Substance Abuse and Mental Health Services Administration, which acknowledges that 'addiction is a medical disorder that may require different treatment protocols for different patients.'⁴⁶ The

Supreme Court of Canada recognizes addiction as 'a primary, chronic disease, characterized by impaired control over the use of a psychoactive substance and/or behavior.'⁴⁷ Indian anti-addiction laws continue to reflect a skewed and stereotyped understanding of substance abuse. NDPSA only defines an addict in an oversimplified way - a person who is chemically dependent on a certain substance at a given point might quit on their own, while an addict in sobriety for decades could easily relapse. The definition overlooks an obsessive-compulsive behavior pattern as a precondition to addiction.⁴⁸ Moreover, as already discussed, MHCA lists SUD as a mental illness intermixing the two and lays down treatment guidelines accordingly. This lack of separation might result in involuntary treatment of PWUD even where the capacity for taking decisions is preserved, like in most cases of SUD (even in those with dependence syndrome) except for periods of intoxication or during severe withdrawals.⁴⁹ So, the advance directive provision serves its purpose well in cases of people with severe mental illnesses but works to the detriment of people suffering from SUDs when applied without any gradation. A gradation model is followed by New Zealand via enactment of a separate statute for admission and treatment regarding substance addiction that clearly lays down the process of assessment of severe substance dependence and procedures to assess capacity to make decisions.⁵⁰ Such criteria can be effective in India to determine admissions on an involuntary basis. MHCA has succeeded, even if partially, in acknowledging drug dependence as a public health issue rather than a law-and-order issue, and amendments like that of New Zealand could prove path-breaking in a country like ours.

NDPSA, *inter alia*, disables and decelerates the de-stigmatization process initiated by MHCA. The former treats every illicit possession criminally with mandatory sentencing depending on the quantity possessed; while the latter provides for treatment of all persons with any kind of drug dependence. NDPSA also has no mention of 'withdrawal' and 'relapse'. Though it empowers the government to supply drugs to addicts under any 'medical necessity, but fails to recognize the withdrawal as one. In fact, a person can be charged twice if subsequently arrested on the seizure of contraband after once being sent to or released for

⁴² UNODC, *UNODC-WHO Principles of Drug Dependence Treatment*, (08 March, 2008) <<https://www.unodc.org/documents/drug-treatment/UNODC-WHO-Principles-of-Drug-Dependence-Treatment-March08.pdf>> accessed 10 November, 2020

⁴³ United Nations Human Rights Website – Treaty Bodies Database – Document – General Comments. available at: http://www.unhcr.org/refugees/refugees/13849_files/o/UN_human_rights.htm (last visited November 12, 2020)

⁴⁴ Abhishek Angad, "Report Uncovers Torture, Abuse and Deaths in de-Addiction Centres in Delhi" *Indian Express*, June 25, 2018, available at <<https://indianexpress.com/article/india/report-uncovers-torture-abuse-and-deaths-in-delhi-de-addiction-centres-523202/>> (last visited November 12, 2020).

⁴⁵ *Supra* note 31

⁴⁶ Ronny Sen "What We Get Wrong About Drug Abuse" *The Akademi Mag*, September 6 2020, available at <<https://www.akademimag.com/what-we-get-wrong-about-drug-abuse>> (last visited 16th October 2020)

⁴⁷ *Ibid.*

⁴⁸ Ronny Sen, "Rhea Chakraborty arrest shows how India sees drug addiction as a moral crisis – not the illness it is." *Scroll.in*, September 9, 2020, available at <<https://scroll.in/article/972593/rhea-chakraborty-arrest-shows-how-india-sees-drug-addiction-as-moral-failing-not-the-illness-it-is>> (last visited 20th October, 2020)

⁴⁹ Ian Freckleton "Choice, Rationality, and Substance Dependence" 2 *The American Journal of Bioethics* 60-1 (2002)

⁵⁰ Soosay I, Kydd R "Mental health law in New Zealand" 13 *BJPsyech Int* 43-5 (2016)

de-addiction treatment. NDPSA safeguards operate on an abstinence-based model, absolutely oblivious to the chronic relapsing nature of drug addiction.

It is for this moralist approach to substance abuse that even the death penalty on judicial discretion is provided for repeat offenders (drug peddlers and smugglers) even though according to international conventions, a sentence to death should only be awarded for the 'most serious crimes' and narcotics offenses do not fall within them.⁵¹

IV. Conclusion and the way forward

Legislations related to substance abuse and mental healthcare in India, have been striving to be more progressive than their antecedents but still stand exposed to a number of inconsistencies with international protocols and domestic law. The structural stigma around both stiffens it for the people already suffering to seek help, as well as overburdens them with the threat of tedious trials and prosecution.

NDPSA operates essentially on the theory of deterrence and thus is predominantly retributive. However, both retributive and reformatory provisions infringe constitutional values, fundamental principles of criminal jurisprudence, and international protocols on the prevention of drug abuse. Even the safeguards provided under the act prove to be counterproductive when read between the lines.

MHCA tries to de-stigmatize substance abuse disorders and redirects the prosecutorial approach to the rehabilitative approach but fails to do justice to PWUD (people who use drugs), for the lack of India's commitment to mental health issues and its own policy fallacies. Both acts are inconsistent with each other and NDPSA proves to be a hindrance in the way of a treatment-oriented approach. De-addiction facilities and efficient professional training are still desired in the country.

The cumulative effect is that PWUD continue to be viewed as criminals and inherently dangerous, rather than a victim or a patient in dire need of appropriate healthcare. The responsibility now lies with the institutions as well as us as a society, who need to harbor and

⁵¹ International Convention on Human Rights, art. 6(2)

foster a community-based outlook towards drug dependents for their reintegration into mainstream society with deserved care and respect.

A few out of the numerous ways to realize this responsibility can be showing solidarity individually, through institutional reforms by improving coordination between government departments, and encouraging self-help groups. Representatives of PWUD and medical professionals or academics working for the cause should be consulted while formulating drug policy.

A more reformatory response to the drug question can be reviewing the stringent and disproportionate sentencing structure under NDPSA and replacing punitive sanctions with legal provisions that enable an evidence-based treatment model. It must be ensured in theory and more so practically that no human-rights violations are done through the course of treatment programs. A harm-reduction based system can also be introduced to drug policy with a welfare objective of reducing drug-related harms rather than struggling to achieve a utopian drug-free society.

Lights, Camera, Order!

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Introduction

The concept of freedom can refer to impartiality, the absence of control, or the lack of interference by any authority, whether sovereign or not. However, liberty and responsibility go hand in hand. There are, therefore, certain 'reasonable restrictions' in every case.

Our freedom of speech and expression is derived from the constitution of India. Among other things India's democratic nature comes from the right to express emotions, opinions, and other forms of expression freely into the open spaces. There is no denying the significance of mass media in our lives both in terms of how we express ourselves and how we are influenced.

Despite being regarded as the mirror of the society, Indian journalism is still considered to be a carnival. Media is a vital part of the global community, and it carries a huge responsibility to spread awareness. *"The strength of a democracy depends upon the strength of each pillar and the way the pillars complement each other. Any shaky pillar weakens the democratic structure."*¹

Jurisprudence of Freedom of Press

The struggle for independence led to the establishment of freedom of the press in India. As part of its mission to spread Christianity in the subcontinent, Europeans brought press culture to India.² In 1780, James Augustus Hickey started the first newsletter.³ Newspapers in India were the catalysts that brought out the souls of Indians and coordinated them for an aggregate interest for freedom. Because it was in English, the British government was not interested in

¹ Press Information Bureau, Government of India (8 December 2019) <<https://pib.gov.in/newsite/PrintRelease.aspx?relid=195595#:~:text=Mentioning%20the%20four%20pillars%20of way%20pillars%20complement%20each%20other.>> accessed 19 August 2022

² Primrose, J.B., *The library*, Dec. 1939, vol XX, No.3, p. 245.

³ Hickey, William, *The memoirs of William Hickey Vol II (1775-1782)*, Hurst and Blackett, London, 1918, p.175

it, but Hickey was stopped anyway for defamation charges. The Press Regulations of Lord Wellesly in 1799 attempted to control the press.⁴ However, Under Lord Hastings these regulations were eased. From 1828 the press began to enjoy substantial freedom under Lord Bentinck.

Lord Metcalfe, hailed as the Champion of press opportunity in India liberated further the press rights through the Press Act - 1835. The Sepoy Mutiny 1857 changed the circumstance. The press was seen to have fuelled the mutiny. Master Canning introduced what is known as "Gagging Act" on 13th June, 1857. As per the Act, the press needed to get a permit to work, couldn't reprimand the public authority, needed to work under an apprehension of sanction, and was required to maintain discipline. As the mutiny subsided fast, and press found to be adhering to the dictations of the government, the Act was permitted to abolish on 12th June 1858.

Sir John Lawrence in 1867 enacted 'The Press and Registration of Books Act' which is applicable even today. As part of the Indian Penal Code, the law of sedition (1970) prohibits inciting people to take action against the government.

Following the founding of the Indian National Congress, the press began to function even more freely and clashed with the government. Through the Official Secrets Act 1899, Lord Curzon attempted to control the press in 1899, by restricting access to information about the army and certain administration matters. And such acts were non-bailable offence.

Later, Gandhi's civil disobedience movement ignited press attacks on government. Government in 1930 brought in the Indian Press Ordinance.⁵ Though the disobedience movement and ordinance were both withdrawn as a result of Gandhi Irwin Pact. Through the Emergency Power Act - 1931, and the Foreign Relations Act - 1932, the government attempted to control the mounting criticism by the press.

During the Second World War, things started to change in India. It was clear that the country would become an independent nation. The laws that restricted the press' freedom of expression eventually started to fall. In 1947, India became an independent country. Its constitution also supports a free press, but additionally requires that the media is responsible.

⁴ Metcalf's Act IX, 1835.

⁵ Meikle, G., n.d. *The Routledge companion to media and activism*.

India's first Prime Minister, who was known for his support for a free press, believed that a free press was needed for the country's development. He once stated that he would rather have a free press than a regulated one. He did not foresee the possibility of a loose press getting carried away by something that was beyond the ethical limits. The media is regarded as the fourth pillar of democracy and has numerous immunities and freedoms.

Journalism is incorporated under the freedom speech and expression, assured under article 19(1) of the constitution. However, the freedom is not absolute, unlimited, or unfettered as it is far constrained by means of the sub clause (2) of the same article.

Following a series of high-profile cases swept across the media, the debate between freedom of expression and the right to a fair trial was targeted. Beginning in 1807, it started in the US with the Aron Burr case,⁶ progressed to England, and finally reached India. Relying on a verdict from the media, an opinion regarding the guilt of the accused is formed even before trial through courtroom and public bureaucracy. In addition to ignoring the fact that accused are different from convicts, it also ignores the golden rule that a suspect is innocent until proven guilty and guilty beyond a reasonable doubt. The media's excessive exposure of suspects or accused before trial prejudices a fair trial and even at times characterizes them as those who have definitely committed the crime, thus constituting an undue interference with the administration of justice, resulting in lawsuits against the media for contempt of court.

Freedom of Press v. Fair Trial

"The press is commercialized to a large extent. In this business, profits and social responsibility need to be balanced and if that does not happen, society will not accept the media for long. As an independent and statutory body, the PCI shall ensure that a balance is struck between profit-making and social responsibility, profit-making tendency of some media owners and contractual-basis hiring of journalists are hampering quality of journalism." – Justice Markandey Katju, (former Judge, Supreme Court of India), Former Chairman, Press Council of India

It can be rightfully said that the media has started a tug of war between the freedom of press and a fair trial. Media outlets contend that there cannot be a democracy without a free press

or media, which is a right that comes out of the right of citizens to understand the day-to-day affairs of their elected government. By manipulating facts and twisting them to their convenience, the media often leads to deviations from the judicial system for justice due to their desire to increase their viewership. Overstepping into the judicial domain, deviates and crushes the right of the people to fair trial. Prejudicing facts violates citizens' rights, which is why it is crucial to strike a balance between the right to free speech of the press and the right to fair trial for citizens. The guarantee to a fair trial⁷ is of utmost importance in a democratic society just like the freedom of press. A media trial can crumble the entire foundation of democracy if it were to plant a seed in the minds of the public that the judiciary lacks the competence to deliver justice, which would lead to further distrust in the justice system.

There have been cases in which media interference has brought justice to victims and accused, but the question remains whether free speech can be extended in such a way as to undermine the right to a fair trial. Audi alteram partem gets compromised because the media seldom distinguishes between a person who is an accused and a convict, resulting in the media declaring the accused a convict even before the verdict is rendered. This leads to public hysteria that destroys the accused's life even if he is acquitted in the end. The media has assumed the role of a Court of Public⁸ which manipulates facts and provides biased opinions while simultaneously pressing the courts to act in accordance with their reports and opinions.

As part of our Constitution⁹ the right to a fair trial includes several other rights, such as the right to be presumed innocent until proven guilty, the right to legal representation, and the right to a speedy trial. In addition to benefiting the accused, this right is important for preserving the integrity of the judiciary and maintaining the confidence of the public in it.¹⁰

In cases of sexual offenses, the media frequently divulges the victim's sexual history and publishes it as part of the story. This is a worst portrayal of such cases as it results in deep social stigma and might drive the victim to commit suicide. In many cases, both victims and accused are treated like news items, compromising their reputations.

⁷ Article 14(2) UDHR

⁸ Tripathi, Devesh, — Trial by Media: Prejudicing the Sub Judicial, RMLNLU Journal, Lucknow, 2015, p.1.

⁹ Article 21, The Constitution of India, 1950

¹⁰ K.D. Gaur, "Constitutional rights and freedom of Media in India" (1994) Journal of the Indian Law Institute- JSTOR <<https://www.jstor.org/stable/43952367>> accessed 20 August 2022

⁶ *United States v. Burr*, 25 F Cas 55 (D Va 1807)

The use of electronic media and the decline in surveillance has resulted in a rise in such media trials. It is difficult for a judge to decide matters neutrally on the merits of the case when parallel trials are conducted by the media, especially in sub-judice cases. As a result of the judge's decision or verdict, the judge will be portrayed as biased and corrupt, incapable of discharging his/her duties. The constant scrutiny in sub-judice matters has resulted in a very hazardous situation. Despite the fact that the media possesses enormous power and influence over the people, this power can be misapplied when it is misused under the guise of participative journalism. The media have tried the matter before the Court decided, so subconsciously influencing the judge's judgment affects the case.

Media Trial v. Jury Trial

Media trial defeats the entire purpose of abolishing the jury system in India.¹¹ The decline of the jury system in India and around the world is largely due to biases and partiality. The jury tends to decide in favor of a certain party regardless of the relevance of the facts and evidence presented. There are a number of factors that may contribute to these things, such as the bias of the majority of the jury, the emotional correlation between the jury and the case facts, threats or bribes by the parties to force the jury to decide in their favor, or external pressures such as the media and political forces. We can see a similar trend is now followed by media outlets how they, without considering the evidence on record, portray the accused as guilty or innocent or due to TRP, political pressure and other external factors.

Critical Evaluation of Indian and American Media, UK Laws

Indian Media Law

In India, the media performance is governed by several regulations. The laws governing the media were initially introduced. There have been several modifications performed during the British era. Following that, Indian governments passed numerous media legislation.

The Indian Constitution doesn't explicitly mention media freedom. However, there are numerous laws that are referred to in Article 19(1)(a) of the Indian Constitution. The topic of freedom of speech and expression is covered in this article, along with a list of each individual's rights to that freedom.

¹¹ *KM Nanavati vs State of Maharashtra* (AIR 1962 SC 605)

- The Indian Constitution's Article 19

All Indian citizens are entitled to freedom of speech and expression, the ability to peacefully assemble without the use of force, the ability to organize into associations, unions, or cooperative societies, the freedom to move around the country without restriction, the ability to live and work anywhere on the country's territory, and the ability to engage in any occupation or business.

American media laws

The broadcasting service act of 1992, which addresses matters linked to content regulation and media ownership, continues to be the dominating law in broadcast media. In order to update this law to reflect the changing political atmosphere, several changes were made.

- Press freedom

The first amendment guarantees freedom of the press. The First Amendment, like all other constitutional amendments, exclusively applied to the federal government and not to state governments. The U.S. Supreme Court had to interpret the constitutional amendment such that it applied to the states rather than the state.

Religious freedom, freedom of speech, freedom of assembly, and the right to petition are all protected under the First Amendment. It prohibits Congress from endorsing one religion above others and from limiting a person's ability to follow their religion. It protects the right to free speech by forbidding Congress from limiting the press or people's freedom of speech. Additionally, it protects citizens' rights to peacefully assemble and to petition their government.

One of the fundamental personal rights and privileges protected by the due process clause by the fourteen amendments is freedom of the press and of speech, which are both guaranteed by the first amendment but are restricted by Congress.¹²

¹² *Gillow v. New York*, 268 U.S. 652 (1925) 268 U.S. 652 (1925)

The government must classify all the information that has been released by the media. The government may ask that particular information be deleted from an article if a newspaper or other media outlet publishes something that it deems to be clandestine.

- FCC regulations and the media

In all 50 states, the District of Columbia, and U.S. territories, the Federal Communication Commission governs interstate and international radio, television, wire, satellite, and cable communication.

Agency makes use of its abilities in:

1. encouraging investment, innovation, and competition for broadcast services and equipment
2. fostering the economy of the country by establishing a competitive environment that is suitable for the development of the communication revolution
3. encouraging the most effective and efficient use of spectrum both home and abroad.
4. Media legislation should be updated to allow new technologies to thrive with diversity and localism
5. assuming a leadership role in enhancing the defense of the communication infrastructure of the country.

- US judiciary cases

The Pentagon Papers Case¹³, in which the US Government sued the New York Times and the Washington Post to prevent the disclosure of material from the confidential study on the Vietnam War, was heard by the Supreme Court in 1971.

The court agreed with the related idea that the government has little authority to force the press to publish information that it would prefer to leave on the metaphorical "cutting room floor" in the Miami Herald Publishing Co. v. Tornillo¹⁴ case.

¹³ 403 U.S. 713 (1971)

In Smith v. Daily Mail Publishing Company¹⁵, the court determined that a newspaper could not be held responsible for breaking the West Virginia statute that declares such information to be private by publishing the identity of a juvenile delinquent.

Comparison of Media law in India and the USA.

People must be allowed to say, feel, and form their own opinions in order to maintain the democratic way of life. The press is the most effective mass communication medium, hence it should be allowed to report on any news it chooses and assist in informing the public.

Article 19 of the 1948 Universal Declaration of Human Rights, Article 19 of the 1946 International Covenant on Civil and Political Rights, and Article 10 of the European Convention on Human Rights all respect the freedom of the press.

Media Trial- Comparative Analysis

The disagreement between the right to free speech and expression—as declared by the media—and the right to a fair trial—as proclaimed by the judiciary—has been brought into sharp focus by a number of high-profile cases that have been sensationalized by the media. With the Aron Burr case¹⁶, it started in the United States of America in 1807; it then broke out in England; and it has now reached the Indian subcontinent. The Indian court is at a crossroads since the debate is recent in India. The job facing the Indian court is to strike a balance between the conflicting basic rights of the media and of the accused, which is similar to the challenges confronted by the American and English judiciaries.

The media and the court have a similar link and complement each other in that they both view man as the center of the world. While the media investigates, unearths, and exposes the human triumphs and follies, the judiciary deals with the legal issues that man has brought about. The judiciary and the media have a same goal: to seek the truth, defend democratic ideals, and address social, political, and economic issues. In reality, the judiciary has been referred to as the distributor of justice and the engine for social changes, while the media has been described as the watchdog of society and the handmaiden of justice. Consequently, both are necessary for the development of a civic society.

¹⁴ 418 U.S. 241 (1974)

¹⁵ 443 U.S. 97 (1979)

¹⁶ United States v. Burr, 25 F Cas 55 (D Va 1807)

These two cornerstones of democracy can clash, though. The media asserts the right to look into, uncover, expose, and emphasize the criminal cases under the basic right to freedom of speech and expression. It asserts that in a democracy, the people have a right to information. As a result, it is the responsibility of the media to inform the public about crime and criminals. Therefore, it wants the ability to continue pre-trial publicity. The judiciary is, nevertheless, acutely conscious of the fundamental rights of the accused to a fair trial and to due process of law. The judge must strike a compromise between the conflicting basic rights since trial publicity might scupper a fair and quick trial.

The right to a fair trial for the accused must be safeguarded and guaranteed, while the freedom of speech and expression of the media, the public's right to know, and the protection and promotion of these rights must also be prioritized.

Publicity before a trial is harmful to the integrity of a fair trial. Before the accused is even taken into custody and put on trial, the media clamor declares them to be guilty. It could present irrelevant and inadmissible evidence as absolute truth, persuading the public of the accuser's guilt. As a result, it violates the common law tenet that "every man is assumed innocent unless proven guilty." In some cases, the Bar may decline to represent the accused after painting him as a despicably evil person. As a result, the accused is deprived of his fundamental right to self-defense. Additionally, such exposure persuades the witnesses to modify their evidence to support the prosecution's case. The public's assessment of the evidence is crucial.

Despite the fact that the majority of the populace believes the accused is guilty, the court may choose to exonerate him after carefully examining the facts. These discrepancies in perception erode the public's confidence in the criminal justice system. Pre-trial publicity ultimately destabilizes the criminal justice system and challenges the rule of law.

Within a country, the rights to a free press and a fair trial must dwell in harmony. The trailblazers of democracy are the United States of America, England, and India. We are the offspring of common law. As a result, we have a similar political philosophy and legal history. The First Amendment of the American Constitution and Article 19(1)(a) of the Indian Constitution both guarantee the freedom of speech and expression. Regardless of whether our constitutions are written or unwritten, they declare, preserve, and advance the same set of fundamental rights.

The American Constitution's Fifth Amendment guarantees "the right to life, liberty, and the pursuit of happiness," while Article 21 of our document guarantees "life and personal liberty." The latter calls for "procedure established by law," whilst the former refers to "due process of law." In a similar vein, the American Constitution's Sixth Amendment guarantees "the right to a prompt and public trial, by an unbiased jury." Despite the fact that we do not have jury trials, Article 21 of our Constitution guarantees the same right to a fair trial. Even though it has an unwritten Constitution, England upholds the same unalienable rights. As a result, the three nations are united by this ongoing conflict between the rights to free expression and to a fair trial.

The imputed bias test was established by the American Supreme Court in *Rideau v. Louisiana*¹⁷. In the case, a bank was robbed, three bank employees were abducted, and one of them was killed. In a three-day interview that was shown on television, the accused, Rideau, admitted his guilt while being presented with the sheriff in the jail. The attorney representing Rideau asked for a change in the trial's location on the grounds that the interview that was televised had harmed his right to a fair trial. The request was rejected by the trial court.

The Indian courts have just lightly addressed this subject, whereas the American and English courts have wrestled with it. Finding the cause is simple: trial by media is a relatively new phenomenon. As a result, there are few obiter, but no clear ratio decidendi. The problem of press freedom and the administration of justice was partially addressed by the Honble Supreme Court in *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers, Bombay (P) Ltd.*¹⁸

The Supreme Court had prohibited "all six respondents... from publishing any article, comment, report, or editorial in any of the issues of the Indian Express or their related publications questioning the legality or validity of any of the consents, approvals, or permissions to the [said issue of debentures]" in response to an unfavorable article about Reliance Petrochemicals' public issues that had been published in the Indian Express.¹⁹ The concern voiced was the maintenance of such an injunction, particularly where the shares had been oversubscribed even though the day of allotment had not yet passed and subscribers had the option to cancel their subscriptions prior to the allotment. The Supreme Court decided:

¹⁷ 10 L Ed 2d 663 : 373 US 723 (1962).

¹⁸ (1988) 4 SCC 592.

¹⁹ (1988) 4 SCC 592, 600, para 7.

There must be a good cause to think that the threat to the injunction's continuation is genuine and immediate. Based on a convenience balance, this test is acceptable.²⁰

Unfortunately, the Supreme Court has not yet devised a mechanism or criteria to decide how to weigh convenience in a scenario of this nature or how to assess the genuine and immediate risk in the event that publication of an item in a pending issue is prohibited by an injunction. The Court did, however, issue a warning, stating that it is in the public interest for there to be no interference with the legal process and that public agitation or publications should not preempt or work around the effect of the court ruling.

In *State of Maharashtra v. Rajendra Jawanmal Gandhi*²¹, the Supreme Court made the following observation on an alleged attempt to rape a minor:

"37. The absolute opposite of the rule of law is a trial by the press, electronic media, or public agitation. It may result in a justice system error. A judge is required to protect himself from any such pressure and to follow the law strictly."

The subject of "Trial by Media: Free Speech and Fair Trial under Criminal Procedure Code, 1973" has been taken up by the 17th Law Commission on its own initiative.²² The Law Commission stated in its 200th Report that there is a perception that, given the widespread use of television and cable services, the pattern of news publication has changed and that several such publications are likely to have a negative effect on suspects, accused, witnesses, even judges, as well as on the administration of justice in general. According to the Contempt of Courts Act of 1971, materials that impeded or had the potential to impede the administration of justice would be considered criminally contemptuous.

The conflict between the right to press freedom and the right to a fair trial has not received much attention from the Indian judiciary. But this topic has strained the media's creativity, both internationally and in India. 39 eminent legal experts and media professionals gathered in Madrid for three days in 1994. In the Madrid Principles on the Relationship Between the Media and Judicial Independence, one of the fundamental tenets is that:

"The media has a responsibility and a right to inform the public and to comment on how justice is administered, including cases before, during, and after trials, without undermining the presumption of innocence."²³

Therefore, the media are subject to restrictions set by the Madrid Principles, including a prohibition on "violating the assumption of innocence."

Similar to this, "The Norms of Journalistic Conduct" have been established by the Press Council of India in India.

The conflict between freedom of the press and the right of those accused to a fair trial would end if these standards were upheld in text and spirit. However, there have been more violations of these standards than adherence to them.

It also implied that reasonable limits on free speech might be acceptable if they were imposed by the Contempt of Courts Act in order to prevent such interference. The Law Commission has suggested that Section 3(2) of the Contempt of Court Act be changed to state that the criminal proceeding is said to begin at the time the offender is arrested because Section 3(2) states that a criminal proceeding is said to be pending when the charge-sheet or challan is filed when it relates to the commission of an offense.

In addition, it has been said that publications that discuss the character of the accused, prior convictions, confessions, determining the guilt or innocence of the accused, or discrediting witnesses may also be viewed as criminal contempt.

It further stated that the High Courts should have the authority to prevent the press from publishing, transmitting, or televising negative news about a criminal case. Despite the fact that the aforementioned Report was not approved by Parliament, its recommendations may serve as a guide for future events regarding press freedom.

The House of Lords in England also ruled in the well-known *Attorney General vs. British*

"Despite the assertion that judges are above human weakness, Broadcasting Corporation (BBC)²⁴ has acknowledged that media trials influence judges. It was noted that a man may not be able to completely block out what he has seen, heard, or read and that he may still be unconsciously impacted by it. The Courts and Tribunals have been specifically constituted to

²⁰ (1988) 4 SCC 592, 593.

²¹ (1997) 8 SCC 386; 1998 SCC (Cri) 76

²² *Universal's Compendium. Reports of the Law Commission of India*, Vol. 17 (Universal Law Publishing Co., New Delhi 2010) 200.11.

²³ *Universal's Compendium. Reports of the Law Commission of India*, Vol. 17 (Universal Law Publishing Co., New Delhi 2010) 200.11.

²⁴ [1981] AC 303

handle cases, and they are qualified to provide decisions in accordance with the legal process. The media trial is similar to when the judge hands down the punishment before announcing the decision. The court ruled that it's crucial to comprehend that in a civilized society, no other authority may assume the powers of the courts."

International Conventions on Fair Trial

In a global environment, the judiciary is obligated and entitled, according to Article 6 of the UN Basic Principles on the Independence of the Judiciary, "to guarantee that judicial procedures are handled fairly and that the rights of the parties are respected."²⁵ The International Covenant on Civil and Political Rights (ICCPR)²⁶, which states that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal" in the decision of any criminal charge or in a lawsuit at law, makes similar statements about the principles outlined in this Article.²⁷

The ICCPR admits that there are some restrictions on the public's ability to see a trial and that the right to a public trial is not absolute.

The ICCPR's Article 19 affirms that a democratic society's core component also includes freedom of expression. According to the article, "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. It further explains that this right includes freedom of the press."²⁸

The freedom of the press is fundamental according to Article 10 of the European Convention on Human Rights, to which the UK and its other members are ethically bound. Only those exceptions to that freedom that are "essential in a democratic society," "permissible only to the degree that they are consistent with a compelling societal necessity," and "proportionate to the aim to be attained" may be made.

²⁵ UN Basic Principles on the Independence of the Judiciary, G.A. Res.146, U.N. GAOR, 40thSess.(1985) art.6.

²⁶ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966. Entered into force on 23 March 1976 in accordance with article 49.

²⁷ Art. 14(1), ICCPR, (1966) 999 UNTS 171, 1976 Can. T.S. No. 47, in force, including Canada, 1976.

²⁸ According to Article 14(1) of the ICCPR, the public and the press may be excluded from all or part of a trial for moral, public order (ordre public), or national security reasons in a democracy, or when the interests of the Parties' private lives require it, or to the extent the court deems necessary in unique situations where publicity would jeopardize the interests of justice.

Is the Media Prosecution a Contempt of Court?

Trial by Media is contempt of court and requires retribution. The Contempt of Court Act distinguishes between civil and criminal contempt.

The three categories of criminal contempt are: Prejudicing a trial; Scandalizing; and impeding the administration of justice.

The idea of natural justice is the source of this requirement. The right to a fair trial for every accused person is paired with the idea that justice must appear to have been done as well. There are several ways that attempts are made to sway a trial. The majority of people will be found guilty of crimes they did not commit if cases involving prejudice are allowed to proceed, as was the case with Pradyum Thakur, where the bus driver was initially found guilty but later it was discovered that the real offender was the boy's senior in his own school.

In an effort to stop these unfair and unjust trials, contempt of court has been instituted. Contempt is demonstrated by the dissemination of news with the goal to influence the jury, witnesses, or defendants or to foster an environment that makes it difficult or impossible for justice to be administered. Commenting on ongoing cases or engaging in party abuse that is only possible when a judge may decide the matter is also considered contempt of court. In any instance, the media has no authority to assume the role of an investigator in an effort to sway the court's decision.

The Security of the Lawyer's and their right to be represented?

The accused's right to have the attorney of his choice defend him in court has been violated as a result of the media's campaign to persuade attorneys not to take the accused's case. The system of natural justice is therefore harmed by the media trials. Similar to how the well-known attorney late Ram Jethmalani encountered opposition from the public when he chose to represent Manu Sharma, the first accused in the Jessica Lal murder case. In another case, Kamini Jaiswal was referred to as "an anti-national" since she was defending SAR Geelani, a Delhi University professor convicted of carrying out the 2001 Parliament assault.

In such situations, the attorneys' safety is put in jeopardy, making it impossible for them to carry out their ethical duties to give legal assistance in criminal issues. Media trials consequently have an impact on the idea of natural justice.

A Requisite EVIL: Media trials?

Our nation has a long history of fiercely independent media. In actuality, the media exposed the majority of major frauds. Law enforcement simply followed them. The underpaid journalist deserves praise for finding material that the highest security teams in the nation believed was unreachable. That is how the Bofors and HDW(Howaldswerske) naval case made news. That is how we learned that Satish Sharma and Buta Singh mediated the agreement and that Narasimha Rao had bought off the MPs of the Jharkhand Mukti Morcha.

At every turning point in our political history, the media has done us proud. The public is paying increasingly close attention to courts and the matters that are brought before them. The Courts will probably always be scrutinized by the media because they have already done so. More Indians than ever before are aware of their constitutional rights as a result of the developments sparked by the media and handled by the courts. The media greatly disagrees with this "sub judice" norm and claims that courts during hearings often interpret it very rigorously to forbid any discussion of the matters before the court, even if they are attracting public interest.

Therefore, it is urgently necessary to loosen the sub judice rule, applying it only where there is a clear intention to sway the outcome of the trial and not to any action that even remotely has the potential to do so. The public interest is yet another significant barrier to media stings and trials. The media loses its credibility and risks the anger of the court if there is a lack of public interest and the appearance of self- or manipulative interests.

Conclusion

The court and the press play a fundamental and important role in a developing democracy like ours. The rule of law and the constitutional principle must be upheld by both. The judiciary and the media must complement rather than replace one another. While the general public has a right to information, a criminal defendant also has a right to protection and defense. Although it is often stated that an individual's rights should take a backseat to the rights of the community, under the criminal justice system, the accused's rights come first. The right to free speech and expression cannot be sacrificed on the altar of his assumption of innocent.

This would be a violation of Article 21, the core provision of our Constitution, which would throw the entire criminal justice system on its head. The administration of justice must be prioritized over journalistic freedom of speech and expression if the rule of law is to be safeguarded and fostered.

On various occasions, the media has been held accountable and accused of conducting the trial of the accused by announcing the "Verdict" based on their investigation prior to the Court's decision. It is crucial that the court conduct the trial rather than the media. Unreasonable interference in the process of delivering justice is undoubtedly occurring throughout the media trial.

When creating legislation governing the media, the legislature must take great care to ensure that their independence is not restricted. However, the media does not have the freedom or right to begin a trial on things that are now under judicial review. Before the trial of a pending case begins, the accused's right to a fair trial is always more significant than media freedom. The goal of justice is hampered by media trial.

It becomes evident that the media's influence has more adverse effects than advantageous effects (except for a few exceptions). The judiciary should effectively control the media. Since court procedures are not a sporting event, the courts shouldn't provide the media unrestricted access to them.

The most effective method for regulating the media is to use the contempt of court statute to punish those who violate the fundamental code of behavior. The use of contempt powers by the courts against publications and media outlets has been authorized by the Supreme Court in a number of cases. Media freedom of speech and expression must be permitted to the point that it jeopardizes the actual trial.

The best method to control the media will be to use the court's contempt power to penalize those who go against the fundamental code of behavior. As was already mentioned, the Supreme Court has sanctioned the use of contempt powers by courts against media outlets and publications in a number of cases. Freedom of speech and expression cannot be granted to the media to the point that it prejudices the actual trial.

The police are not even permitted to take the suspects or accused from their transport vehicles into the courts or vice versa due to the print and electronic media's fierce and ruthless

competition, which we refer to as "aggressive journalism," where a multitude of cameras are flashed at the suspects or accused. In the past, there was no pressure on journalism to increase TRP ratings or revenue. Thus, the journalists carried out their duties with courage and honesty, as well as with serious intent and conviction. They did not convict anyone without making a sincere effort to research the allegations, look into them, and reach their own unbiased judgments free from bias. They didn't just print what the government said, the bureaucracy claimed, or politicians smeared on them. They were trusted because of this. However, we are already witnessing a new, self-acquired function of the media in the shape of "media trial."

Everybody uses media manipulation to further their own agendas or harm rivals. The issue is not when the media calls attention to a police investigation's flaws or when government workers fail to carry out their obligations; the issue arises when the media oversteps its bounds and does something it is not allowed to do. Be it bringing the matters under consideration before the public while maintaining the integrity of the legal system and the accused and suspected "right to live with dignity." As of right now, the media trial has progressed to include a media judgment and media punishment, which is undoubtedly an illegal use of freedom and goes beyond the sensible lines that should demarcate legal restrictions.

What can we learn from the Jessica Lall scandal? There is unquestionably a reason for stepping up efforts to improve policing standards. The performance of the judiciary must also be improved. For instance, it took over seven years to finish the Jessica trial. Not many people have commented on this. Is it fair to ask that the Delhi High Court investigate this as a sort of case study to determine why there was such a delay? The public would prefer to be

certain that the failure was not due to judicial laziness but rather to a number of unrelated reasons, such as police disinterest and the defense's willful delay tactics. The general consensus today is that judicial accountability is a pipe dream. The legal system must disprove this assumption.

The severity of the situation as it exists in India is made clear to us by the analysis above. An ideal argument would be that neither the Indian press nor the Indian people are now democratic enough to permit press interference in the judicial process. Allowing restricted media coverage of instances after the media is supposed to get past profit and sensational

concerns is undoubtedly a good concept. Instead of tipping the scales in favor of one side or the other, the media must act as a facilitator.

The media would be legitimate in demanding that those who commit heinous acts be punished legally. Heinous actions must be denounced. But the media cannot supplant the judiciary's role and stray from neutral, objective reporting.

While government censorship of the media is bad for democracy, the effects of ongoing impunity are considerably more harmful. It is necessary to take action to stop media trials from undermining citizen civil rights by giving the media a better description of their obligations and giving the courts the authority to penalize those who blatantly violate them.

The Delhi High Court's use of Andrew Belsey's findings from his work "Journalism and Ethics, Can They Co-Exist?" in *Mother Dairy Foods & Processing Ltd v. Zee Telefilms*²⁹ accurately summarizes the current status of the media. He asserts that ethics and journalism are distinct. The media must uphold the principles of "accuracy, honesty, truth, objectivity, fairness, balanced reporting, respect or autonomy of ordinary people" even if journalists are unique facilitators of the democratic process. These all fall under the umbrella of democracy. However, practical issues, such as the desire to advance professionally, the need to meet deadlines, and the need to appease media managers by exceeding growth objectives, are acknowledged as contributing to the "temptation to print insignificant items salaciously portrayed."

Unbiased, impartial reporting is the foundation of news organizations' reputation. It is in the media's best interest to prevent any interference with the administration of justice.

²⁹ IA 8185/2003 Suit No. 1543/2003 dated 24.1.2005

DEFINING LEGAL PERSONALITY OF ARTIFICIAL INTELLIGENCE: IS IT A POSSIBILITY OR A FAR-FETCHED DREAM?

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Introduction

In simple terms, a legal personality is considered to be associated with someone or something against whom a legal action cannot be brought since it is not a living entity. Thereby, a legal personhood is ushered so as to bring it under the contours of law and regulatory framework. AI is generally regarded as a non-living entity but in recent times, the discussion is also adamant to consider animals¹ within the domain and even robots like Sophia, having gained citizenship in Saudi Arabia². The major development in legal personality took place when companies, businesses, etc.³ were given legal personhood and consequently, the disputing parties can bring a case before the court to sue the entity or it can be sued by the entity or enter into a contract or hold property in the name of the entity; among other things that are done by a natural person. An artificial intelligence or AI is one such example of a non-living entity that has gained momentum in present times through technological advancements. As its progress and usage is accelerating in various fields and arenas, so the discussion on defining the legal personality to an AI is presented profusely.

Jurisprudence on legal personhood

Legal personhood is established on something that is not there by natural affliction (like human being). Salmond has propounded that legal personhood or personality is given to some

¹ Karmail Singh and ors. v. State of Haryana, 2019 SCC OnLine P&H 704; Narayan Dutt Bhatt v. Union of India and ors., 2018 SCC OnLine Utt 645. Also see, Jane Dalton, "US court recognises animals as legal persons for first time in wrangle over Pablo Escobar's hippos", Independent UK, 22 October 2021, <https://www.independent.co.uk/news/world/americas/animals-legal-status-hippos-pablo-escobar-b1943851.html>

² "Sophia the robot gets Saudi Arabian citizenship", The Economic Times, 6th November, 2017, <https://economictimes.indiatimes.com/news/science/sophia-the-robot-gets-a-saudi-arabian-citizenship/tell-me-about-sophia/slideshow/61355632.cms>

³ The Companies Act, 2013, § 9; The Companies Act, 1956, § 34.

so as to establish legal relations.⁴ Thereby, it is a form of fiction created so as to bring it within domains of legal phenomenon or legal system. The society functions with defined rights and reciprocated duties attached with it. So, to put an entity within the domain of legal personhood is to further this ideology of defining the rights and duties, and obligations within the legal parameters. Austin putting it in his words defined a person as a natural person as well as a deemed person⁵. Thus, a person will include even a deemed person or an artificial person considered as a person within the legal domain.

Essentially, the jurisprudence of legal personality establishes that the purpose of giving a non-natural person the identity of legal personality is to give rise to rights and duties and to establish legal relationships. There is seen that the capacity is inflicted on non-natural entity at the juncture where dealings with them forego individual capacity⁶ like in a company⁷ obligations cannot move with multiple natural persons and in convenience, an entity is given the legal personality. This is because it can then move in perpetual succession without worrying about its members, shareholders, promoters, etc.

But even with looking at those phenomena of convenience for avoiding individual capacity, there have been instances of inflicting the legal personalities on idols and rivers⁸ as well. This shows that the domain legal personality has expanded itself so as to bring within its purview different non-natural entities so as to serve the basic purpose of attaching rights and duties to it which is basically responsibility and obligations within the legal framework. Legal rights are essential in any society because it correlates with duties to be performed as well. As a matter of fact, legal rights explicitly provide many rights like right to hold property, right to sue or be sued. The corporate legal identity has functioned immensely over the decades with helping in the functioning of corporations.⁹ The legal personality brings with it to enter into legal relationships and to perform day-to-day activities¹⁰ like a natural performer would perform. An 'artificial person' or a 'juristic person' or a 'legal person' is someone on whom

⁴ Salmond, JURISPRUDENCE, (5th ed, 1916) 272.

⁵ Austin, THE PROVINCE OF JURISPRUDENCE DETERMINED 1832.

⁶ B. Smith, LEGAL PERSONALITY, (1927) 37 Yale LJ.

⁷ John Dewey, "The historic background of corporate personality", 35, Yale Law Journal, 655, (1925)

⁸ S. M. Solaiman, "Legal personality of robots, corporations, idols and champagne: a question for legitimacy", 25 (2), Faculty of Law, Humanities and the Arts, (2017); Also, see, Visa AJ Karki, "Who or What Can be a Legal Person?", Oxford Academic, p. 127, August 2019

⁹ Supra note 7.

¹⁰ Viony Kresna Sumantri, "Legal Responsibility on Errors of the Artificial Intelligence-based Robots", 6, Lentera Hukum, p. 337, (2019).

such a persona is conferred to establish legal relationships and to perform the tasks, obligations and in turn it gives rise to rights and duties.

Need for defining the legal personality of an AI

Artificial intelligence works on algorithms where the human element is minimally required. Its functionality is based on the task of analysing the data, processing the collected data, sensing the pattern in the data and providing an appropriate and optimal result.¹¹ It is termed as such (artificial intelligence) because a machine is to perform a task at par with what a human does. An example of artificial intelligence is Siri (by Apple) or Alexa (by Amazon) that processes the data like the input of 'set an alarm' and completes that function. The technicality is that it works on speech or voice recognition¹² and text recognition whereby it has pre-defined algorithms set up. AI exhibits an 'intelligence' which is generally shown by humans, for example when an AI plays a game of chess¹³ against a human and defeats him/her; this is what differentiates AI from general machines or technology. The ingenuity developed in machines or technology by processing the information and producing suitable outcomes is the basic nature of AI.

As more and more development in the technology has taken place, there is now a greater 'intelligence' being designated to AI with lesser involvement of human beings. The example can be seen in the form of automated or self-driving cars¹⁴. At this juncture, the regulatory system is what is put forth¹⁵ since a case may arise whereby accidents can happen on road like the one in Arizona, US¹⁶. This will put the question and conundrum on the forefront as to who will be held responsible for the accident and how will an AI operated vehicle be brought within the legal domain. This is more so, because AI interacts continuously with humans by

entering in different transactions, arrangements and thereby, creating "contractual rights"¹⁷ that simultaneously confers liabilities and obligations. The essential thing is that when an AI will be put within the domain of legal personhood, the responsibility will be clearly defined and how to operate in cases of accidents, breaches, etc. will be accurately codified. This will ensure that a correct legal action or procedure is followed.

Even without any breach or mis-happening, the legal personhood gives AI much freedom to operate within the sphere with likelihood of having the rights associated with that of a natural person. It can operate individually having a distinct identity and to expand, much like a business entity or a company operates. Since the development is continuously taking place in AI with dynamics of computer science and robotics unfolding at a rapid pace, there is no doubt that the need for better defining¹⁸ as well as putting AI within the contours of the legal framework is essential with the first of defining its 'legal personhood'.

At the end of the day, it comes down to the ideology of establishing a legal relation between AI and the corresponding party. This will define the rights like right to sue, to hold property by the AI but corresponding responsibility in cases of breach, accidents. Moreover, it will differentiate AI from its owner having perpetual succession since AI is a developing technology with the ever-changing dynamic environment. As the attribution of legal relation will be lucid, it will construct efficient functioning of AI and to have a better grip over the legal domain concerning the same.

This will ensure that the steps of AI does not go unattended where there is a breach or violation and they are not allowed to function in arbitrary manner without any regulatory framework because that will lead to major violations at a later stage with minimal remedy for the victim. The compensation or remedy to be given for the violations by AI is an essential factor. The Turing Test of AI¹⁹ in this regard is essential since that technology that can surpass human intellect has not yet been devised²⁰ (strong AI) but the machine learning phenomena is what is at present the functionality. It functions on the basis of algorithms and

¹¹ Minal Dhankar and Nipun Walia, 'An Introduction to Artificial Intelligence', in Mr. Manoj Kumar and Ms. Rhythm Choudhary (eds), *Emerging Trends in Big Data, IoT and Cyber Security* (Maharaja Surajmal Institute, Excellent Publishing House 2020).

¹² Andreas Kaplan and Michael Haenlein, "Siri, Siri, in my hand: Who's the fairest in the land? On the interpretations, illustrations, and implications of artificial intelligence", 62, *Business Horizons*, (2019).

¹³ Sebastian Risi and Mike Preuss, "From Chess and Atari to StarCraft and Beyond: How Game AI is Driving the World of AI", 34 (1), *KI-Künstliche Intelligenz*, (2020).

¹⁴ Sergio M. C. Avila Negri, "Robots as Legal Person: Electronic Personhood in Robotics and Artificial Intelligence", *Ethics in Robotics and Artificial Intelligence*, *Frontiers*, 23 December 2021, DOI: <https://doi.org/10.3389/frobt.2021.789327>

¹⁵ Joo-Wha Hong, Ignacio Cruz and Dmitri Williams, "AI, you can drive my car: How we evaluate human drivers vs. self-driving cars", (2021) 125 *Computers in Human Behaviour*, <https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=Hong%2C+Joo-Wha%2C+Ignacio+Cruz%2C+and+Dmitri+Williams.+&btnG=> accessed 25 February 2022.

¹⁶ Matt McFarland, "Uber self-driving car operator charged in pedestrian death", *CNN Business*, (US, 18 September 2020) <<https://edition.cnn.com/2020/09/18/cars/uber-vasquez-charged/index.html>> accessed 25 July 2022.

¹⁷ Claudio Novelli, Giorgio Bongiovanni and Giovanni Sartor, "A conceptual framework for legal personality and its application on AI", 13 (2), *Jurisprudence*, pp. 194-219, (2022), DOI: <https://doi.org/10.1080/20403313.2021.2010936>

¹⁸ *Supra* note 14.

¹⁹ Dr. Lance B. Eliot, "The Turing Test Amid AI and The Law", AI & Law, The Master Class Series, (November 2, 2021), available at SSRN: <https://ssrn.com/abstract=3955360>

²⁰ *Ibid*.

sets up definitions or programs. Even then, the liability is there when there is a breach which occurs even at a normal working.

Views favouring legal personality for AI

The views in favour of the legal personality of AI argue that the fault theory propagates that in cases of disturbances to the natural phenomena liability needs to be established. In a society when this disturbance is caused, a natural tendency is to define the liability be it civil or criminal. At the forefront, the need arises to award the compensation or damages²¹. In order to that, what is required is collection of funds²² like in case a company collects capital or a State (as an artificial person) has a fund or a temple has a trust or a society. In similar fashion, AI needs to have some monetary system established for it to perform its obligations and consequent liabilities. Through that fund, will it be able to perform its daily functions as well as to have a compensatory mechanism in cases of breaches.

Secondly, with the contractual obligations in regard to emergence of smart contracts and block chain technology, there is much discussion on fixing the liability clearly for the involvement of AI and in cases of breach. Since, a contract is between private individuals and there is may be involvement of a human party and AI; the first step arises with the fulfilling of the obligations²³ and then, enforcement of the contract and lastly, if there is any breach; how to conduct the same. Even at the instances of tort law like the road accident by self-driving car, the responsibility needs to clearly define since liability has to be conferred at the end of the day.

The most basic ideological thought is that when one brings regulatory framework to deal with AI, it opens the doorway to deal with the loopholes, the gaps and to stop the misuse of it at the earliest. In the simplest example of an automated pilot mode of flying an aeroplane²⁴ through AI, the liability will be differentiated when legal personality of AI is defined since it will not lead to holding accountable a particular person but the liability will fall on AI; like in

a corporate entity. As a result, a distinction will happen with the identity of the AI and that of a natural person.

Moreover, there are also the phenomena of accountability and transparency to be ensured in the working of the AI and its functionality since it works in the society. The major view in favour of legal personhood of AI remains in the domain of property ownership of AI, i.e. to hold the property. What is argued is that someone who owns a property must have a legal personality²⁵ and capacity to do the same. It is through this transition of possession, acquiring, and owning the property rights in a land or a building (immovable property) or a movable property is what brings the legal personality of an AI at forefront and of paramount significance in the society.

Concerns related to attributing legal personality to AI

It has been argued against attributing legal personality to AI because of the issue of cognitive ability attached to AI. Cognitive ability is the mental ability which is there in every human due to which the 'intelligence' is exhibited. But in regard to AI, it functions on the basis of algorithms. It is argued that AI operates on algorithms and functions on the inputs that are pre-defined and pre-applied and there are minimal chances of error. Even to bring it within the domain of legal personality, it has to have some superior intelligence to operate on its own. It is definitely difficult to bring the liability for fraud in contract or cheating by AI²⁶ and to entrust that obligation on it.

Another constraint in regard to infliction of legal personality to AI is the issue of 'inventors' and 'inventions'. Inventions are filed by a natural person who is the inventor and it is often rejected that a machine is given the ownership rights since it involves the process of thinking and higher intelligence. Furthermore, similar stance is there throughout the intellectual property rights law from copyright or patent whereby it is argued that human creativity is subjected to protection and not AI²⁷. Thereby, this is one arena where it is argued that

²¹ Karolina Ziemianin, "Civil legal personality of artificial intelligence, Future or utopia?" (2021), 10 (2), *Internet Policy Review*, <<https://policyreview.info/articles/analysis/civil-legal-personality-artificial-intelligence-future-or-utopia>> accessed 25 July 2022.

²² *Id.*

²³ Beverly Rich, "How AI is changing Contracts", *Harvard Business Review*, February 12, 2018, <<https://hbr.org/2018/02/how-ai-is-changing-contracts>> accessed August 6th, 2022.

²⁴ Shubham Singh, "Attribution of Legal Personality to Artificially Intelligent Beings", (2017), *Bharati Law Review*, <<http://docs.manupatra.in/newslines/articles/Upload/7E399602-D4A0-4364-BE11-F451330BFDB5.pdf>>, accessed 25 July 2022

²⁵ Rafael Dean Brown, "Property Ownership and the legal personhood of artificial intelligence", (2021), 30 (2), *Information and Communications Technology Law*, <<https://www.tandfonline.com/doi/full/10.1080/13600834.2020.1861714>>, accessed 25 July 2022

²⁶ John Linarelli, "Advanced Artificial Intelligence and Contract", (2019), 24 (2), *Uniform Law Review*, <[>, accessed 25 July 2022](https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=Linarelli%2C+John+%22Artificial-general-intelligence+and+contract.%22+Uniform+Law+Review+24%2C+no.+2+%282019%29%3A+330-347.&btnG=)

²⁷ Simon Chesterman, "Artificial Intelligence and the Limits of Legal Personality", (2020), 69 (4), *International & Comparative Law Quarterly*, <<https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/artificial-intelligence-and-the-limits-of-legal-personality/1859C6E12F75046309C60C150AB31A29>>, accessed 25 July 2022

artificial intelligence cannot encroach at a point when there is no higher degree of intelligence exhibited by AI.

Implication with legal personality of an AI

At the very forefront, the necessity of AI is felt to cross the obstacle of uncertainty of liability to be imposed on the AI induced breach or accident or violations. Furthermore, in regard to intellectual property right laws, there is definitely a momentum of ideology that AI induced independent work cannot form part of creative work and be protected as such through AI. There are issues related to contractual obligations with terms and conditions attached to it. Lastly, the property ownership by AI is also the element of dilemma which poses a serious question on the legal personality of AI.

With all the varying views on the legal personality of an artificial intelligence, the question arises what will the implication of attributing the legal personality to an AI. Will it benefit the society and the legal regime?

As a matter of fact, the corporate entities operate through capital formation whether through private offerings or through public offerings. Commercial law operate with aid from the ability to enter into legal relationships. The basis of this is that the AI has the ability to enter into legal relationships and can be made accountable for their breach. This stems from the legal fiction to be created for making AI buy, sell or both of any property²⁸, whether movable or immovable. This implies that the AI can have three different arenas whereby, it can either be independently responsible or partially responsible or it cannot be separated from its owners.²⁹

In the first instance, the issue arises like in a company where when a company becomes bankrupt, it moves through its capital or funds by repaying the liabilities by selling them off. In that situation, AI needs to work in the similar fashion of a corporate entity. In the second instance and third instance, where it will be partially responsible, then a tortuous or vicarious liability will arise and the attribution will go directly towards the owner for the errors of the

AI. In that situation, there might a relationship of principal and agent, or representative and principal³⁰.

As the element goes beyond that, the issue arises of the rights and duties associated with a legal personality. This includes the right to sue, right to hold property, among other rights. With automated AI usage, the element of looking at these rights and duties are also pertinent. For example; in a situation where AI is employed in a company or any entity; what are the rights that it can claim or how it can act when these rights are not given to AI?³¹ Will the scale or parameter for adjudicating these rights will be the same as that of other natural persons or will it be different? This is where the differentiation between the legal personality of an AI and that of a company or an entity arises. Since, it goes a step further by presenting new challenges in this regard of rights related to usage of AI in employment, in workplaces and when the breach occurs in that situation or the duties to be performed.

In particularly India, AI is recently being awarded recognition in intellectual property rights with the copyrighted work of AI RAGHAV³² and deeming it to be the author of the work. This paved the way for new discussion on the matter with the AI being given the recognition as that of legal personhood. Since the rights under the intellectual property rights are given specifically to juristic persons and such a step puts the question of AI being ushered in a favourable way towards legal personality, especially in India. On the other hand, the question further is broadened the possibilities of situations like licensing or selling of IP solely owned by AI³³ or if that even is a possibility of AI being the sole owner of intellectual property. The challenge in the form of infringement of intellectual property right of another by the AI and how should it be dealt with in regard to criminal and civil remedies³⁴ is again a question whereby, the legal implication needs to be clearly defined for AI to be held responsible and in what manner.

²⁸ *Id.*

²⁹ Huzefa Tavawalla, "India: Can Artificial Intelligence be given Legal Rights and Duties?", Mondaq, (June 25th, 2018). <<https://www.mondaq.com/india/new-technology/712308/can-artificial-intelligence-be-given-legal-rights-and-duties#:~:text=Legal%20personality%20of%20AI,AI%20as%20n%20legal%20person.>>, accessed July 21st, 2022.

³⁰ Sukanya Sarkar, "Exclusive: India recognises AI as co-author of copyrighted artwork", Managing IP, (August 5th, 2021). <<https://www.managingip.com/article/b10hfz2bytx4/exclusive-india-recognises-ai-as-co-author-of-copyrighted-artwork>>, accessed on July 21st, 2022.

³¹ Vaishali Mittal and Siddhant Chamola "AI's right to legal identity in India" Asia Business Law Journal, (September 3rd, 2021). <<https://law.asia-ai-right-legal-identity-india-2/>>, accessed March 21st, 2022

³² *Id.*

²⁸ Visa A. J. Kurki, "A Theory of Legal Personhood", Oxford Scholarship Online, (2019), <<https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198844037.001.0001/oso-9780198844037-chapter-7>> accessed July 21st, 2022.

²⁹ *Id.*

Lastly, the issue of implicating a criminal liability is also up for debate since under Indian Penal Code, 1860, only a person³⁵ who is a natural or a legal person can be held liable for criminal offences. That is where the situation of shielding through AI³⁶ arises because when AI is not given legal personality, the fictitious veil cannot be lifted in situations of criminal liability and the criminal punishment is avoided. For example, in situations of corporate criminal liability, the corporate veil is lifted and the key managerial persons are held liable as per the Companies Act, 2013 and that is due to the legal personality being inflicted to a company. But when there isn't such a situation with AI, the criminal liability and its infliction on AI becomes an hindrance whereby it can be avoided. In regard to legal liability for AI, much deeper discussion is in regard to attributing of culpability³⁷ or the concept of *mens rea* on the accused, which is AI in the present case. In such situations, the AI not at present to an extent, cannot be said to have the *mens rea* but the programmer³⁸ may have such an intention of criminal act. The real dilemma arises in attributing the liability on the person and the infliction of punishment in situations of criminal act through/ by AI.

Conclusion

Thus, at the end it can be concluded that legal personality is an artificial identity given to a non-natural person so as to bring it within the domains of legal parameters and to inflict rights and duties to it. This is essential in regard to establishing their rights on one hand like dealing with contractual obligations, to sue or be sued; and on the other hand to hold it responsible in cases of breach, accidents, liabilities, etc. With the AI developing at an accelerating pace, it is crucial to look at the regulatory framework to deal with it. At the very start is the need to establish legal relations by the AI. The need for defining legal personality of AI is, thus, of paramount significance and importance since it will ensure that AI is brought within the domains of rights, duties and obligations of legal arena and is not working without any functionary and in an arbitrary fashion. With this, what is to be considered is whether AI will have a recognition system like registration of AI³⁹ with/ without its developer or should it have citizenship as in the case of Sophia, the AI robot⁴⁰. The legal parameters are

wide, undefined and ambiguous at present.

With artificial intelligence at the forefront in present times, the issue arises whether to give it a legal personality or not. When a legal personality is inflicted on artificial intelligence, it gives it the right to hold the property and property ownership through AI becomes significant at a stage since it will ensure further that AI can be sued or can sue as well. Moreover, there are contractual obligations with block chain technology, electronic smart contracts and crypto currency emerging and developing at a faster pace, there is definitely a need for attending to the dilemma of giving legal personality to AI since it will regulate the terms and conditions of the contract, will aid in cases of liability, in situations of breach, in cases of compensatory mechanism or damages to be inflicted. Thereby, it goes a long way to put AI within the microscope of legal personality.

AI within the domain of legal personality will not take away its autonomy but will surely regulate the way it functions and all the way giving it legal rights. Since intellectual property rights for creative work is given to natural persons, the ideology for adoption of AI for its creative work or like for cloning can be attributed to AI with the rights conferred as that of a natural person. Therefore, to conclude, the legal personality of an AI is to be considered crucially and is not a far-fetched dream but has a real possibility in near future due to rampant development in AI.

³⁵ The Indian Penal Code, 1860; Section 11

³⁶ Shakuntla Sangam, "Legal Personality for Artificial Intelligence with Special Reference to Robot: A Critical Appraisal", (2020), 6 (1), Indian Journal of Law and Human Behaviour, pp. 15-22, <<https://journals.indiacopernicus.com/api/file/viewByFileId/1173348.pdf>>, accessed March 21st, 2022

³⁷ Jigyasa Sharma and Tanisha Kaushal, "Recognising Legal Personality of Artificially Intelligent Entities – A Liability Analysis Under the Law of Crimes", 4 (1), NLUO Student Law Journal (SLJ), p. 16, (2019).

³⁸ *Id.*

³⁹ Ayush Pokhriyal and Vasu Gupta, "Artificial Intelligence Generated Works under Copyright Law", 6 (2), NLUJ Law Review, p. 93, (2020)

⁴⁰ *Supra* note 2.

A LEGAL ANALYSIS: CONVICTION THROUGH EXCLUSIVE FORENSIC EVIDENCE IS ADMISSIBLE?

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Introduction

It's tempting to think that in the era of films, tv shows and series showcasing science, all scenes of crime have forensic evidence. No prosecutor would even believe that without a bulky dossier of laboratory data they would put the case before the court, would they? That's how important and significant the role forensic evidence is playing in the criminal justice system. In the decision-making process of criminal cases, the development of forensic technologies led to remarkable scientific advancement, but the study was necessary to assess the accurate influence of forensic evidence on the rate of conviction and acquittal.

"A person can be convicted on the evidence of a single witness"¹ is a general maxim of law. But it has been established that the traditional technique of eyewitness-oriented criminal justice basically makes successful criminal investigations impossible. This technique reduces the quality of the criminal justice system. The courts are having difficulty deciding a criminal case or confirming the fact simply on the basis of evidence from witnesses who may or may not be trustworthy. Substantial evidence uncovered on a crime scene is forensic evidence. They are considered secondary evidence, whereas papers and eyewitnesses are considered the primary evidence². In a court of law, main evidence along with secondary evidence is given, assisting the judge in understanding the facts and delivering the verdict.

Many times, offenses are committed in such conditions where it's impossible to get single witnesses i.e., in case of rape which is committed in a private place it's hard to get any witnesses most of the time. In such circumstances evidence through DNA³ (Although no

¹ HT Correspondent, *Courts can convict on testimony of solitary witness: SC*, HINDUSTAN TIMES (Oct. 30, 2011), <https://www.hindustantimes.com/delhi/courts-can-convict-on-testimony-of-solitary-witness-sc/story-SczC5zrTCT9XMNi0WFEBzJ.html>

² N.V. Krishna Kumar, *Prudent to Use Forensic Evidence, to Decide Cases Justly and Conclusively*, THE LEAFLET (Nov. 18, 2020), <https://www.theleaflet.in/prudent-to-use-forensic-evidence-to-decide-cases-justly-and-conclusively/>

³ Dr. Nirpat Patel, Vidhwansh K Gautaman, ShyamSundar Jangir, *The Role of DNA in Criminal Investigation – Admissibility in Indian Legal System and Future Perspectives*, 2 Issue 7 DHSI REV.15-21 (2013).

explicit provision has been made to address forensic science problems under the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872), ballistic reports, Fingerprints, internal injuries, semen collection, and reports of chemical examination all of which are forensic evidence becomes essential. As times changed conventional crimes are being committed with the highest precision, therefore such criminals cannot be sufficed without the aid of forensic science or new technology. The advancement of forensic science has supplied law enforcement and judicial authorities with a strong weapon⁴.

Despite the efforts made by the authorities, there are more and more examples of persons condemned on the grounds of single forensic evidence in multiple jurisdictions⁵. Insignificant part, due to lack of sufficient scientific confirmation of forensic evidence⁶ Several of the convictions have been shown to be incorrect and wrongful. Based on the Innocence Project, we can know that misapplication of forensic science was responsible for 52% of erroneous convictions⁷, the implications for exonerated individuals, initial victims of crime, and families are immense⁸.

For instance, consider the case of *State v. Krone*⁹ Krone on the basis of testimony, was found guilty by a forensic dentist who indicated that the morsel on the flesh of the victim matched the alignment with the teeth of Krone, but that Krone had been exonerated after 10 years of DNA analysis. In 2019 the Indian Apex Court (SC) exempted six persons, wrongly condemned, from Indian crime in Maharashtra. After over 16 years in prison, the Supreme Court found that the prosecution did not establish the crime with reliable forensic evidence.¹⁰ In multiple appellate court processes, the apparent inconsistencies of the DNA

⁴ B. S. NABAR, FORENSIC SCIENCE IN CRIME INVESTIGATION 1 (Asia Law House Hyderabad, 3rd edn., 2002).

⁵ S. Irazola, E. Williamson, J. Stricker, E. Niedzwiecki, *Addressing the Impact of Wrongful Convictions on Crime Victims*, NJ JOURNAL, 274 (Oct. 2014)

, L. Scott, *It Never, Ever Ends: The Psychological Impact of Wrongful Conviction*, 5(2) AMERICAN UNIVERSITY CRIMINAL LAW BRIEF Rev.10-22 (2010), and S. Armour, *Wrongly Convicted Walk Away With Scars*, USA TODAY, Oct. 13 2004, at 1A.

⁶ A Olaborede, L Meintjes-van der Walt, *The Dangers of Convictions Based on a Single Piece of Forensic Evidence*, 23 POTCHEFSTROOM ELECTRONIC LAW JOURNAL REV., (2020), http://www.scielo.org.za/scielo.php?pid=S1727-37812020000100015&script=sci_arttext&lng=en#back_fn3

⁷ Overturning Wrongful Convictions Involving Misapplied Forensics, INNOCENCE PROJECT, (Unknown date and time), <https://innocenceproject.org/overturning-wrongful-convictions-involving-flawed-forensics/>

⁸ Kate King, *For Victims' Families, the Torment of Exoneration*, THE WALL STREET JOURNAL (Nov. 7, 2016), <https://www.wsj.com/articles/for-victims-families-the-torment-of-exoneration-1478482579>

⁹ *State v. Krone*, 182 Ariz 319 (1995).

¹⁰ Ankush Maruti Shinde v. State of Maharashtra 2019 SCC OnLine SC 317; Mansi Thapliyal, *Five Murders, Six Men and 16 years of Stolen Lives*, BBC NEWS (June. 23, 2019), <https://www.bbc.com/news/world-asia-india-48578767>

samples and their fingerprint evidence cannot be divulged. The basic reason for this quandary may be traced back to a court's inclination to regard science as a symbol of definitive thought and, as a result, to give indisputable weight to scientific (forensic) evidence that is scrutinized in court. The courts prefer to overlook forensic evidence's flaws and treat it as an exact science as a result of this.¹¹ And in the case of *Commonwealth v. Cowans*¹², When proof of identification in fingerprints led to the wrongful conviction of the accused, but DNA evidence exonerated them afterward.

According to researchers, such as Jay Jarvis and John Collins, "the discrepancy in the percentages of exonerations, forensic science is a contributing factor"¹³The analysis showed that many situations in which forensic specialists testified unfairly in trials were based on findings with erroneous empirical data or completely unbacked by empirical evidence.¹⁴

This dilemma has its roots in the courts' inclination to see science as a symbol of irrefutable rationale, and hence to attribute the scientific evidence examined in the courtroom unquestionable importance to this. In consequence, courts are prone to remove forensic evidence defects and to regard them as an exact science.¹⁵ Taking consideration of all the above-stated factors, now the question of admissibility and scientific validity of forensics is into question.

Admissibility of Forensic Evidence

There have been high levels of forensic evidence in the legal system across the world, however, in the Indian judiciary, we can notice a limited application. In criminal proceedings, basic procedural law requires that the prosecution bear the burden of evidence, and the level

of evidence of culpability of the accused must be 'beyond a reasonable doubt'.¹⁶ Forensic research has historically been utilized in the following phases: (1) an inquiry that is intended to detect the suspected criminal offender and (2) a prosecution that aims to establish beyond a reasonable doubt the guilt of the defendant. Forensic science, especially DNA analysis is very famous and has also been widely used in recent years to challenge earlier convictions.

If we look into the rule globally, In 1975 the Federal Evidence Regulations were adopted in Federal Court for the purpose of guiding criminal and civil disputes and rule 702 provides that:

*"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."*¹⁷

With the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc*¹⁸, the rule was revised to include the case of *Kumho Tire Co. v. Carmichael*¹⁹, where the Daubert case was applicable. The court said that a trial judge must verify, in addition to being relevant but credible, that any scientific testimony or evidence is. The trial court judges must act as gatekeepers to ensure the reliability of the forensic evidence on scientific expertise.

According to the report, the factors that Judges must look into to evaluate the scientific process that underpins it is legitimate are:

- the possibility of (and have been) tested for the theory or technique;
- if peer review or publishing of the theory or practice has been carried out;
- the known or prospective error rate of a certain scientific technology;
- the preservation and maintenance of technical operation control standards;

¹¹ Eadaoin O'Brien and others, *Science in the Court: Pitfalls, Challenges and Solutions*, 370 PHILOSOPHICAL TRANSACTIONS OF THE ROYAL SOCIETY REV., 1, 2 (2015); Mukesh and Another v. State (NCT of Delhi) and Ors (2017) 6 SCC 1; Santosh Kumar Singh v. State through Central Bureau of Investigation (2010) 9 SCC 747; Re Assessment of the Criminal Justice System in Response to Sexual Offences Suo Moto Writ (Criminal) No 04 of 2019.

¹² *Commonwealth v. Stephan Cowans*, 756 NE 2D 622. (Mass App Ct 2001).

¹³ J.M. Collins and J. Jarvis, *The Wrongful Conviction of Forensic Science*, 1 FORENSIC SCIENCE POLICY & MANAGEMENT 1 REV. 17-31, (2009).

¹⁴ Brandon L. Garrett, Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VIRGINIA LAW REVIEW REV. 1-97 (2009).

¹⁵ Eadaoin O'Brien and others, *Science in the Court: Pitfalls, Challenges and Solutions* (2015) 370 Philosophical Transactions of the Royal Society B 1, 2; Mukesh and Another v State (NCT of Delhi) and Ors (2017) 6 SCC 1; Santosh Kumar Singh v State through Central Bureau of Investigation (2010) 9 SCC 747; Re Assessment of the Criminal Justice System in Response to Sexual Offences Suo Moto Writ (Criminal) No 04 of 2019.

¹⁶ P.J. Schwikkard, S.E. Van Der Merwe, *Principles of Evidence*, 17 JOURNAL OF SOUTH AFRICAN LAW 2 (2017).

¹⁷ Unknown, *Federal Rules of Evidence*, CORNELL LAW SCHOOL (unknown date and time) https://www.law.cornell.edu/rules/fre/rule_702

¹⁸ *Daubert v. Merrell Dow Pharmaceuticals, Inc* 509 U.S. 579 (1993)

¹⁹ *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999).

- the degree of acceptability of a scientific technology among a scientific community of concern.²⁰

In 2003, the Justice Malimath Committee on Criminal Justice System Reforms noted the country's poor degree of use of forensic science in criminal investigations. According to the report "Only around 5-6% of all recorded cases were forwarded to the Forensic Science Laboratory and the Fingerprint Bureau combined"²¹. This Urgent situation needs to bring quantum improvement as the conviction rate is falling over the past few years due to the lack of eyewitnesses and physical evidence and forensic evidence can reverse this trend to some extent. The number of Forensic laboratories is grossly inadequate and needs facilities. The Committee firmly believed that India's forensic science facilities require significant expansion. The report proposes, among other things, improved training for police officers and forensic specialists in court depositions. The need for forensic evidence in criminal trials is major²² but at the same time loopholes such as at the level of the investigating agency, the evidence was not transmitted to the Forensic Science Laboratory in good time, the defective sealing of samples, transmitted samples without correct cases and no substantial evidence were collected²³ leads to failure of the justice system.

The committee's report also supports the notion of teaching the country's forensic scientists and proposes that the National Institute of Criminology & Forensic Science (NICFS) expand and developed in new fields, such as forensic explosives, computer forensics, and forensic DNA enhance their fundamental competencies. A national authority should be created in that state, such as the Indian Council of Medical Research, to set Forensic Science Laboratory Division (FSL) test standards and forensic scientist ethics guidelines. It proposes that the UGC examine the establishment in at least all major institutions of the forensic sciences departments. Later, forensics might be offered as subjects for school. The report strongly recommends usage of forensic evidence should be justly and conclusively.²⁴

²⁰ REPORT TO THE PRESIDENT, FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS, September, 2016, https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf

²¹ COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM GOVERNMENT OF INDIA, MINISTRY OF HOME AFFAIRS, Vol 1 March, 2003, https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf

²² Dhavarde, Adarsh, *Forensic Evidences in Criminal Trial: Need of the Hour*, SSRN ELECTRONIC JOURNAL, (July.19, 2012), <https://ssrn.com/abstract=2111995>.

²³ Patel, Ankita Sureshkumar, *Fidelity of forensic evidence in criminal trials in India*, (2017).

²⁴ N.V. Krishna Kumar, *supra* note 2 at 2.

The Reason for the lower use of Forensics comes with an argument due to 20(3) of the Indian constitution²⁵, as many people find themselves taking fingerprints, DNA verification, and collecting various samples are violating Art 20(3). Therefore, the Apex court of India in the said case of *State of Bombay v. Kathu*²⁶ held that Constitution has the job that it is just as important to prevent the accused from being forced to incriminate himself as it is to empower law enforcement and courts with lawful authorities to bring criminals to justice.

It further stated that:

*"that giving of finger impression or specimen signature or handwriting strictly speaking is not to be a witness. To be a witness means imparting knowledge in respect of relevant facts by means of oral statements or in writing by a person who has personal knowledge of the facts to be communicated to a court or person holding an enquiry or investigation"*²⁷

Thus, it doesn't violate 20(3). It was Reiterated in the Indian Evidence Act, which states that anyone can be requested to provide their fingerprints or DNA²⁸. In the infamous case of Selvi, the Supreme court held that the compulsory administration of Forensic technology, such as Polygraphy, Narcoanalysis, and Brain-Mapping, shall not be constituted unless it has been carried out without the consent of the accused, since it is contrary to Article 20(3) of the Indian Constitution which prohibits self-incrimination and the right to life and liberty enshrined in Article 21 of the constitution²⁹.

Eyewitness Vs Medical Evidence

The weighting to be given to forensic evidence in criminal trials has not been explicitly set forth by Indian courts over the years.³⁰ There has always been confusion about the relevancy and the differences between eyewitnesses and medical evidence given by an expert. Forensics are always invited in manslaughter or offenses causing grievous hurt/ injury to the human body. The opinions of medical experts are always having greatly welcomed injuries whether the probability of the weapon used in the case, injuries effect, medication, poisoning, antemortem post-mortem injuries, wounds impact whether or whether they are sufficient to

²⁵ INDIA CONST. art. 20, cl. 3.

²⁶ State of Bombay v. Kathu, A.I.R 1961 S.C.1808.

²⁷ *Ibid*.

²⁸ Indian Evidence Act, 1872, No. 1, § 73.

²⁹ Smt. Selvi v. State of Karnataka, 2010 (7) SCC 263.

³⁰ Dr. Ambily P, Ashna D, *Faulty Foundations: A Socio-legal Critique of the Regulation of Forensic Science Laboratories in India*, 7(2) NLUJ L Rev 191 (2021).

facts of the case in *Maghar Singh v. the State of Punjab*⁴⁴, are as follows, the medical officer noted that the damage observed on the deceased's body might have been caused by two or possibly more rounds, although eyewitness testimony indicated that there were 2 shots. The Apex Court found that the medical and the visual evidence did not contradict and that the incoherence of the medical officer was simply a chance and not a deadly one in the prosecution.

The Supreme Court has frequently maintained that if it is intended to rely on a particular position expressed by writers of medical-jurisprudence books, the opinion indicated shall be provided to the doctor in order to evaluate to whatever extent the views of the experts apply to the individual case conditions⁴⁵. Exceptional examples alluded to in *Medical Jurisprudence* texts cannot be relied on in the face of positive and unambiguous evidence in the matter before the Court⁴⁶ and in case of conflicting views, the more specialized book on the said subject should be taken into consideration.

Oral evidence takes precedence over medical data because witnesses are the eyes and ears of the law. If the witnesses' oral testimony is determined to be fair, credible, and reliable, it should be believed that the oral evidence cannot be rejected on hypothetical medical evidence. There can be no conclusion that the medical opinion points to alternate options. Oral testimony cannot be refused if the medical evidence does not completely disprove the prosecution's story. Medical opinions are, in a number of respects, direct proof of the wounds' color, the presence/lack of rigor in the bodies, the presence of tattoo markings, the nature of the food that was digested / semi-digested / or not, seen immediately after the incident by the medical officer. It determines the time of the occurrence.

The failure of the courts to regulate forensic evidence can be clearly seen. Further, the provisions under the Indian laws are antiquated and obsolete in comparison with the fast evolution of forensics. The courts were also reluctant to aggressively rely on and interpret such restrictions on forensic evidence.⁴⁷ The courts' unwillingness to reject and to use forensic evidence is all the more concerning. For example, if we take Section 45 of the Indian Evidence Act which clearly determines '*the admissibility of scientific evidence provided by*

⁴⁴ *Maghar Singh v. State of Punjab*, (1987) 2 SCC 642.

⁴⁵ *Kusa v. State of Orissa*, AIR 1980 SC 559; *Bhagwandas v. State of 4 Rajasthan*, AIR 1957 SC 589; *Sunder Lal v. State of M.P.*, AIR 1954 SC 28, *Pratap Misra v. State of Orissa*, AIR 1977 SC 1307.

⁴⁶ *Baldev Raj v. Smt. Urmila Kumari Miglani*, AIR 1979 SC 879.

⁴⁷ *Subhash Chandra Singh, DNA Profiling and the Forensic Use of DNA Evidence in Criminal Proceedings* 53 (2) *Journal of the Indian Law Institute* 195, 217 (2011).

experts'⁴⁸. This provision was set up at a time when the area of forensic science was not well established, and the courts do not enable parties to produce body samples, such as blood, semen, saliva, and hair for scientific examination.⁴⁹ In addition, section 45 does not offer courts direction on how the scientific validity of forensic evidence provided by specialists might be assessed⁵⁰. Now the question of the Scientific Validity of forensics comes into existence. Let's find out more in detail in the next section.

The Scientific Validity and Reliability of Forensics

PCAST is a group of the world's best scientists and professionals selected by the US President to augment science and technology, who provide him with advice from the White House, the cabinet departments, and other federal agencies ('*the President's Advisory Council on Science and Technology*'). The report by PCAST on '*Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*' is a recent study on the subject matter that provided a detailed analysis of the scientific validity. Two major gaps exist: (1) the necessity to examine specific forensic methodologies to determine whether the scientific evidence is valid and reliable and (2) clarity on scientific standards about the validity and reliability of forensics. According to the report we talk about two types i.e., 'Foundational validity' and 'validity as applied'⁵¹, where the former needs to be based on empirical studies, repeatability, reproducibility, and accuracy and the latter should be corresponsive to legal requirements.

Another study by NRC ('*the National Research Council*') in 2009 titled '*Strengthening Forensic Science in the United States: A Path Forward*' is the most comprehensive review to date in United nations. As an attempt to recognize the significant improvements in the field of Forensics, the National Research Council was directed to go on with the study. The research indicates clearly that some types of issues, inconsistencies, and abuse of the justice systematic and generic are not simply ascribed to circumstances such as excessive fragmentation including disparate, often insufficient training, education requirements, laboratory resources, and capabilities. Absence of disciplinary norms, poor research and training of quality, and lack of peer review, a scientific foundation developed and the validity

⁴⁸ The Indian Evidence Act 1872, s 45.

⁴⁹ MALIMATH COMMITTEE REPORT (n 57) 123.

⁵⁰ Shreya Rastogi, Devina Malaviya & Devina Sikdar, *Forensic Science In The Dock: The Questions We Are Not Asking* LIVE LAW (August. 12, 2020), <https://www.livelaw.in/columns/forensic-science-in-the-dock-the-questions-we-are-not-asking-161313>

⁵¹ REPORT TO THE PRESIDENT, supra note 20 at 5.

of many popular forensic methods. Specific examinees exhibited instances of low performance where proficiency testing had been done. The report is briefed :

*"much forensic evidence: including, for example, bitemarks and firearm and tool mark identifications, is introduced in criminal trials without any meaningful scientific validation, determination of error rates, or reliability testing to explain the limits of the discipline."*⁵²

In the case of the Indian scenario, the lack of information at the micro-level concerns forensic procedures, quality assurance studies, quality infrastructure, and professionally and ethically practiced norms. The deficit of information is related to the type of laboratory methods. The available study from Uttar Pradesh showed concerns, such as the underutilization of purchased equipment and the difficulties in obtaining mobile forensic vehicles to supplement district forensic services.⁵³ On the macro level, knowledge gaps have an effect on legislative and political issues related to the population distribution in forensic laboratories around the country, the types of services provided, the rate of case dependence, and budgetary concerns. A lack of appropriate data at both levels jeopardizes the public's confidence in criminal investigation reports as well as the future development of the Indian forensics sector.⁵⁴ Indian forensic specialists have increased awareness of the differing quality of services provided by forensic laboratories depending on regional considerations, many of them such as disparities in education, infrastructure, availability of resources, etc....⁵⁵ When these seemingly small errors become engaged in the trial process and are relied on by judges in adjudicative procedures, they become obvious. This is especially disturbing when judges depend on the controversial evidence of specialists to decide on a matter which is essential. In the *Arushi Talwar case*, for example, the investigative officers blatantly mismanaged important crime scene evidence. The SC has drawn inferences from a government geneticist's poor forensic testimony⁵⁶. A request for new evidence to be collected and analyzed was denied due to the SC's and the expert's lack of awareness of the rather uncommon technology involved.⁵⁷

⁵² NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, 107-8 (The National Academies Press, Washington DC, 2009) <https://doi.org/10.17226/12589>

⁵³ Government of Uttar Pradesh Report, *Modernisation of Forensic Science Laboratories*, (Report No 3 of 2017 - Office of the Comptroller and Auditor General of India, 31 March 2016).

⁵⁴ Dr. Ambily Petal, supra note 30 at 7.

⁵⁵ Ibid.

⁵⁶ Case citation.

⁵⁷ PTI, *Need of the hour: Stepping up DNA technology in India to combat surge in rape cases* ECONOMIC TIMES (June 2, 2020), <https://economictimes.indiatimes.com/news/science/need-of-the-hour-stepping-up-dna-technology-in-india-to-combat-surge-in-rape-cases/role-of-forensic-dna-technology-in-fighting-crime/slideshow/76151396.cms> ;

The logical Indian Crew, *Samples Taken After 11 Days: Experts Question State Forensic Lab's "No Rape" Claim In Hathras Case* THE LOGICAL INDIAN (Uttar Pradesh, October 5, 2020), <https://thelogicalindian.com/humaninterest/hathras-forensic-report-24152> .

Scientific validity is stated as a procedure, which shows reliability with levels of reproductivity and accuracy acceptable for a planned application on the basis of empirical investigations. That is to say, A method is valid if it can distinguish between a culpable and an irreprehensible person in an experiment, such as dactylogram identification or bitemark analysis. On the other hand, scientific dependability indicates that a method is consistent with differing experts, who each time an approach is conducted in another situation, achieve the same conclusion for the same.⁵⁸ Furthermore, an expert's suitable empirical test cannot be replaced by training, personal experience, professional practice, or casework deduction. As there is advancement in technology, today, the reliability of the existing forensic practices depend more and more on laboratories and this makes it essential to perform empirical tests as it aids in determining the authenticity and accuracy of forensic procedures, as well as identifying erroneous and outmoded evidence.⁵⁹ The use of empirical data to differentiate hunches, anecdotes, and practices backed by a wide range of scientific evidence can test existing forensic research techniques.⁶⁰

In addition, an absence of empirical research affects the standardization of forensic methods. A setup study can provide practical data on how these techniques are performed and whether there are procedural issues in lieu of analyzing forensic techniques from a broad standpoint. Updated empirical data can help practitioners avoid focusing on biased forensic evidence that confirms their previous notions.⁶¹ For example, forensic odontology research shows that bite mark evidence fluctuates with time and is ficklely manipulated, implicatively insinuating a substantial risk of equitableness on the component of professionals convinced to match the teeth of a kenneled suspect with a bite wound⁶². If forensic scientists are trained in up-to-date empirical research, they are far less likely. In India, there is a dearth of factual evidence on how forensic science laboratories operate, except a few relevant studies by specialists in the

⁵⁸ Overturning Wrongful Convictions Involving Misapplied Forensics, supra note 7 at 3.

⁵⁹ Suzanne Bell and others, *A call for more science in forensic science*, 115 (18) NATIONAL ACADEMY OF SCIENCES: USA REV 4541-4544 (2018).

⁶⁰ Ibid.

⁶¹ Dr. Ambily P et al, supra note 30 at 7.

⁶² Erik Eckholm, *Mississippi Death Row Case Faults Bite-Mark Forensics*, THE NEW YORK TIMES (September 15, 2014), <https://www.nytimes.com/2014/09/16/us/mississippi-death-row-appeal-highlights-shortcomings-of-bite-mark-identifications.html>

past.⁶³ This challenges the trustworthiness of the results they generate and if laboratory methods are based on recent discoveries or obsolete research. This raises numerous problems. The reasons for such absences of empirical research are lack of advancement in the past was one of the reasons and also the frequent dependence on forensic evidence is a reason why no one questioned its credibility.⁶⁴ Reports submitted by labs were anecdotal and were not scientific.⁶⁵ The majority of laboratories are unable to invest in high-quality empirical research due to the time and money required.⁶⁶ While even judges and courts do not question the validity of the forensic techniques due to the impulse, they are seen often accepting all the kind of techniques as valid.⁶⁷ The lack of adequate information is detrimental to public confidence in reports of crimes and the development of forensics in the future.

Currently, both public and private laboratories offer various quality services in the Indian forensic science environment, albeit they are subject to minimal control and supervision. This public-private split, along with the legal vacuum, made developing a coordinated industry regulation plan exceedingly difficult. Moreover, the increasing demand for forensic services leads to the hasty development of self-claimed private sector forensic specialists who may be hired at a price.⁶⁸ This is quite troublesome since increasing the number of forensic laboratories inside a laboratory framework, which is already fragmented, might result in higher backlogs, widespread failures, and quality control failures.⁶⁹

A medical crisis like the COVID-19 pandemic has exacerbated the issue further since sporadic lock-downs are hindering operations and as a consequence of laboratory positive testing for the virus, several laboratories have been closed.⁷⁰ Almost 61,000 cases are

⁶³ National Human Rights Commission, *Annual Report 1999-2000* (NHRC, 2000).

⁶⁴ Dr. Ambily P et al, *supra* note 30 at 7.

⁶⁵ Paul C Giannelli, *Forensic Science: Why No Research*, 38 FORDHAM URB L J 506 (2010).

⁶⁶ *Id.* 508.

⁶⁷ *Id.* 509.

⁶⁸ Dr Gopal J Mishra and Dr C Damodaran, *Perspective Plan for Indian Forensics*, MINISTRY OF HOME AFFAIRS, GOVERNMENT OF INDIA, (July, 2010) https://www.mha.gov.in/sites/default/files/IPS%282010%29-FinalRpt_0.pdf.

⁶⁹ Brandon L. Garrett, *The Costs and Benefits of Forensics*, 57 HOUSTON LAW REVIEW 593, REV 600-602 (2020).

⁷⁰ Dhaval Kulkarni, *Coronavirus impact in Maharashtra: Forensic science department says 61,000 pending cases remain*, FREE PRESS JOURNAL (Mumbai, 25 July 2020), <https://www.freepressjournal.in/mumbai/coronavirus-impact-in-maharashtra-forensic-science-department-says-61000-pending-cases-remain>; HM Chaitanya Swamy, *Forensic lab sealed after staff tests Covid-19 positive*, DECCAN HERALD (Bengaluru, 9 July 2020) <https://www.deccanherald.com/city/life-in-bengaluru/forensic-lab-sealed-after-staff-tests-covid-19-positive-858784.html>; Ashish Bhosale, *Central Forensic Science Lab in Hyderabad closed after 3 of its employees test +ve*, NEWS METER (Hyderabad, 4 August 2020) <https://newsmeter.in/central-forensic-science-lab-in-hyd-closed-for-two-days-after-3-of-its-employees-test-ve/#:~:text=Hyderabad%3A%20The%20Central%20Forensic%20Science.showing%20symptoms%20of%20Covid%2D19>.

outstanding in Maharashtra and smaller personnel is left to deal with critical matters as a matter of priority. The absence of operational principles and processes for standardization in forensic laboratories complements regulatory and functional deficiencies. It is also evident that forensic laboratories in India face a number of structural and implementation challenges in their day-to-day operations. The fundamental basis of our criminal justice system is threatened by the failure to address these problems quickly.

Wrongful convictions cost Justice: Jeopardy of innocent through exclusive Forensic Evidence

Forensic evidence is ultimately one piece of a bigger puzzle, but when we talk exclusively about conviction through forensic evidence, we're talking about the most dangerous risk presented to both the victim and society as a whole. It is on the verge of changing the nature of justice and fundamental rights such as the right to human dignity, the right to liberty and security, and the right to life.⁷¹

When we talk about the side effects of the victim due to wrongful convictions, from facing the conviction to defamation there are many factors involved. The real perpetrator of the crime may also remain inside society, posing a substantial risk of the crime repeating.⁷² Despite improved investigative instruments, it is obvious that incidents of unlawful conviction resulting in a miscarriage of justice have been documented in the Western world.⁷³

As explained by the PCAST and NRC reports on the serious flaws and also by Professor Boaz Sangero in his Journal show that wrongful convictions of innocent based on exclusive forensic evidence or a single piece of evidence is dangerous. Despite this, Professor Mnookin says

*"Judges today are tremendously reluctant to exclude from trials long-familiar forms of forensic science evidence even when... the scientific foundation is weak, and the evidence has played an established role in numerous proven wrongful convictions."*⁷⁴

⁷¹ INDIA CONST. art. 19.

⁷² Boaz Sangero, *Safety from Flawed Forensic Sciences Evidence*, 34 GA. ST. U. L. REV. 1129 (2018), <https://readingroom.law.gsu.edu/gslr/vol34/iss4/8>

⁷³ Edward Connors, Thomas Lundregan, Neal Miller and Tom McEwen, *Convicted by Juries. Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, U.S. DEPARTMENT OF JUSTICE (June, 1996).

⁷⁴ Mnookin, Jennifer L., *The Uncertain Future of Forensic Science*, 147 DAEDALUS 99 (Fall 2018), UCLA SCHOOL OF LAW, PUBLIC LAW RESEARCH PAPER No 18-42, (December 12, 2018), <https://srn.com/abstract=3300354>.

In its historic decision in *Justice KS Puttaswamy v. Union of India*⁷⁵, Concerns were expressed by the Supreme Court concerning the storage and misuse of DNA profiles, which might lead to intrusions into people's personal lives.⁷⁶ Forensic methods of pattern-matching are not error-free and the fact that innocent people are wrongly convicted is prevalent.⁷⁷ For a better understanding if you take in the case of *Rajiv Singh v. the State of Bihar*⁷⁸ talked about another famous case of *OJ Simpson*⁷⁹ and clearly said that potential mistakes at many stages of the DNA synthesis are recognized and further also added that,

*"Although, there is a common consensus within the scientific community that DNA profiling can yield results with a very high probability, the complex procedure of DNA profiling is not without problems. At every phase of the seven-step procedure just described, mistakes and improper handling of the DNA probe can produce false results which in some cases can lead to a life sentence or even death-penalty judgment. Therefore, the adequacy of laboratory procedures and the competence of the experts who testify should remain open to inquiry."*⁸⁰

When we talk about the dangers of conviction based on forensic evidence, the problem doesn't only surround the laboratories and with the medical experts, even dangers of handling the evidence from the crime scene by the Investigating officers (IO) is also a major issue. The quality of investigation also plays a major role in the outcome of forensic evidence. Reports from the Hathras gang rape show how the gross abuse of crime scene evidence is routinely disregarded by courts, attempting to stymie the forensic investigation.⁸¹

In *Md. Idris Ansari v. the State of Jharkhand*⁸², the High court of Jharkhand held that the principal secretary is to ensure that the Jharkhand Police officers are intensively trained to find out how scientific research is to be conducted and how fingerprints, bloodstain, and other

⁷⁵ *Justice KS Puttaswamy v. Union of India*, (2017) 10 SCC 1.

⁷⁶ *Dr. Ambily P et al*, supra note 30 at 7.

⁷⁷ *Boaz Sangero and Mordechai Halpert, Why a Conviction Should Not Be Based on a Single Piece of Evidence: A Proposal for Reform*, 48 *JURIMETRICS J.* 43- 94 (2007).<http://sangero.co.il/wp-content/uploads/2017/11/Sangero-5-Single-Piece-Jurimetrics.pdf>

⁷⁸ *Rajiv Singh v. the state of Bihar*, 2014 SCC Online Pat 392 : MANU/BH/0143/2014

⁷⁹ *People of the State of California v. Orenthal James Simpson*, 28 *Loy. U. Chi. L. J.* 461 (1997).

⁸⁰ *Goswami, G. K., Forensic laws, ANNUAL SURVEY OF INDIAN LAW* 2014, REV. 649-672 (2015).

⁸¹ *The Wire Staff, Hathras Case: PIL Seeks Action Against Government Officials for "Destroying Evidence"*,

THE WIRE (Oct. 14 2020) <https://thewire.in/law/hathras-gangrape-pil-sc-evidence-destruction>

⁸² *Md. Idris Ansari v. State of Jharkhand*, 2014 SCC Online Jhar 595.

incriminating articles are collected to help them to find the truth and understand the actual guilty party. In this way, a scientific inquiry is undertaken. And when we talk about imparting training is also the responsibility of the forensic science labs. Even the apex court categorically stressed the training of Investigators in handling a sensitive matter.⁸³

Recommendations & Conclusion

This article has endeavored to highlight some of the challenges and dangers of conviction on the based of Forensic Evidence. The arguments made in this article argue that courts should exercise caution when relying on and dealing with forensic evidence whose scientific validity is in doubt and requires substantial verification with other types of evidence. As sangero says "the 'aura' of science can be expected to blind judges and jurors and lead them to overestimate the real probative strength of scientific evidence"⁸⁴ in case of lack of other evidence, reliability on Forensic evidence is not advised. The courts should first understand the following reasons:

Being with Forensic evidence is not error-free and there is a high probability of wrongful convictions of innocent persons. As our Indian system strongly believes and relies on the maxim "*Let Hundred Guilty Be Acquitted but One Innocent Should Not Be Convicted*"⁸⁵. In addition, We must prohibit the abuse of the clause that allows for the conviction of an accused solely on the testimony of a single competent witness⁸⁶. Furthermore, Also due to the inability of the State to sometimes provide accessible evidence, the necessity of prudence is also encouraged. The Court thus must urge the State to make additional material proof accessible to verify the factual proof like forensic evidence, in order to strengthen its case. In reality, the courts rely on Forensic evidence for better functioning of the judicial system. But when you talk about the Indian courts there has been a substantial lack of up-to-date empirical study on the operation of forensic science laboratories due to governments' continuous inability to regulate the forensic science discipline. It is necessary to have a robust research culture. Extensive data collection studies or expertise tests are often conducted in

⁸³ *State of Gujarat v. Kishanbahi*, (2014) 5 SCC 108.

⁸⁴ *Boaz Sangero et al.*, Supra note 57 at 13.

⁸⁵ *Jain, Tarun, Let Hundred Guilty Be Acquitted But One Innocent Should Not Be Convicted: Tracing the Origin and the Implications of the Maxim, PRESUMPTIONS: DOCTRINES & APPLICATIONS*, ICAI UNIVERSITY PUBLICATIONS, 2008, (December 31, 2007), <https://srn.com/abstract=1133070>

⁸⁶ *Indian Evidence Act, 1872*, No. 1, § 133.

countries with significantly more advanced forensic research, in order to uncover limits in their laboratories, particularly with regard to quality assurance.⁸⁷ Upgraded empirical data can prevent practitioners' propensity to focus on preconception predefined forensic data.⁸⁸

The recommendations by Malimath committee reports suggest that the country needs to strengthen the Application of forensics at all levels and set of forensic units at the district level. By creating laboratories and sufficient financial resources, well-trained staff in sufficient numbers is necessary. For efficient investigations, medical-legal services should be reinforced by providing training in contemporary forensic disciplines, including facilities for investigators, forensic specialists, and prosecutors. PCAST and NCR's reports recommend encourage in the discipline of forensic science, vigorous academic competitive peer-reviewed research initiatives are required to improve the validity, reliability and understand the loopholes. Studies on feature comparison methods and new approaches. Developing objective methods like latent fingerprint methods, firearm methods, and DNA methods in complex mixtures. Proficiency testing of laboratories should be increased. Improving quality and promoting transparency while testing plus mandatory accreditation for forensic laboratories by providing a certificate for the workers following the code of ethics.⁸⁹ Basic education should also extend to law students, law practitioners, and judges.⁹⁰

In conclusion, different proposals and recommendations mentioned in the article for reforms in the forensic discipline will ensure improvement from the present scenario. However, implementation is gradual and so the courts must be cautious, especially if the conviction is predicated on a single piece of evidence. From a crumbling criminal justice point of view. It is without a doubt a step in the right path, system.

⁸⁷ Andrea M Burch and others, *Publicly Funded Forensic Crime Laboratories: Quality Assurance Practices*, 2014 BUREAU OF JUSTICE STATISTICS (Nov. 22, 2016), <https://bjs.ojp.gov/content/pub/pdf/pffclgap14.pdf>.

⁸⁸ Eric H Holder Jr and others, *The Impact of Forensic Science Research and Development*, NATIONAL INSTITUTE OF JUSTICE (April, 2015), <https://www.ojp.gov/pdffiles1/nij/248572.pdf>.

⁸⁹ NAS-2009 Report, *supra* note 46, at 11.

⁹⁰ NAT'L ASS'N OF CRIMINAL DEF. LAW. (NACDL), PRINCIPLES AND RECOMMENDATIONS TO STRENGTHEN FORENSIC EVIDENCE AND ITS PRESENTATION IN THE COURTROOM 1 (2010), www.nacdl.org/WorkArea/DownloadAsset.aspx?id=17775.

APPLICATION AND ANALYSIS OF 'LIBERTY LIMITING PRINCIPLES OF CRIMINALIZATION' IN INTER-FAITH MARRIAGES IN THE LIGHT OF "UTTAR PRADESH PROHIBITION OF UNLAWFUL RELIGIOUS CONVERSION ORDINANCE, 2020"

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Introduction to the Concept of Liberty Limiting Principle

Which activities does the state have moral authority over, and why? These, I feel, are the most important questions in criminal law. It's also critical to recognize exactly what's at risk. The criminal law is the most significant tool in the state's arsenal. The principle of self-direction is known as liberty. Liberals think that people should have the freedom to do pretty much whatever they desire. Many philosophers believe that utility and liberty are mutually supportive ideas, as proposed by John Stuart Mill. After all, if a healthy society must be made up of happy individuals, and if we as individuals know what makes us happy but other people and the government do not, then civilized society must safeguard a person's right to pursue the things that make her or him happy. However, as we've seen, the pursuit of pleasure by some individuals can occasionally clash with the pursuit of pleasure by others. There is, of course, a "range of tension" here. After all, in today's culture, it's nearly hard to behave without interfering with another person's personal enjoyment. Let us for example consider that my elderly neighbor, enjoys working in her garden because it is peaceful and pleasant. My old neighbor says that my guitar playing is both physically and visually distressing to her, despite the fact that I like playing electric guitar at near-deafening noise levels. Another neighbor enjoys rearing violent pit dogs, but my children like roaming around the neighborhood on sunny summer afternoons playing "Capture the Flag." Any society dedicated to the individual pursuit of pleasure or happiness, as well as the freedoms required to maintain it,

must address the inevitable contradiction between private and public objectives. So, over the years, philosophers have proposed a variety of liberty limiting principles.¹

Libertarians recognize only one liberty limiting principle, harm to others. Their strategy is to distinguish between self-regarding acts that do not harm or violate the rights of others and other-regarding acts that do. They argue that a liberal society may regulate other-regarding acts which violate the rights of others, but not purely self-regarding acts. Of course, it takes "thick skin" to live under a libertarian regime. My children and I "must tolerate my neighbor's vicious barking dogs, unless I can prove that it is probable that they might escape and harm my children. My elderly neighbor might occasionally have to wear earplugs to blot out my loud guitar playing, barking dogs, and screaming kids. At any rate, unless there is harm to others involved, these kinds of disputes are to be resolved by the individuals involved and not by the coercive power of the state. Of course, if my dog-loving neighbor's pit bulls periodically escape and bite my kids, then the government could justify regulating his actions""(or the actions of his dogs).²

Speech, according to libertarians, is virtually always self-regarding, in the sense that words seldom "hurt" other people. (Remember how we used to say when we were kids, "Sticks and stones may break my bones, but names will never hurt me!") Some libertarians, such as John Stewart Mill, promote free speech on utilitarian grounds, claiming that if communication is unrestricted, we are more likely to uncover truth in a range of articulated ideas.

However, it is certain that some types of communication are harmful to others. If I falsely cry "FIRE!" in a packed theater, knowing that there is no fire, my words may cause unnecessary injury to others, as Mill stated. We may do harm to others in the name of free speech by making false disparaging accusations or supporting violence against them. Other types of expression may endanger public institutions. For instance, I may give a public speech in which I support tax cheating as a method of opposing US tax policies. However, if harm to public

institutions were used to limit free speech, many morally repugnant institutions (such as slavery) might never have been repealed.³

Theorists have advocated a number of liberty-limiting concepts over the years, including harm to others, self-harm, offense, and legal moralism. Of course, Mill saw "harm to others" as the most important, and possibly the only valid, reason for restricting liberty. Many contend that "harm to self" can be used as a liberty-limiting concept in specific cases. Paternalism is defined as the violation of a moral ideal, most commonly liberty, in order to deliver an unwelcome advantage or protect someone from injuring oneself. When you deliver an unwelcome advantage or eliminate a harm from a sensible individual, you are practicing hard paternalism. Soft paternalism is when the unwilling target of our beneficent acts is irrational. Paternalism can be exercised by either individuals, groups, or even the government. Of course, not all acts of paternalism can be morally justified.

The offense principle, which asserts that I am free to pursue my own private interests as long as I do not "offend" others in the process, is another frequently advocated liberty-limiting premise. The fact that we all have various levels of perception makes it difficult to implement this theory. Some individuals are easily offended. Some people with thin skin, for example, get outraged when moms breastfeed their infants in public. They say that it should only be conducted in privacy. However, if we manage public spaces to eliminate all potential sources of offense, our collective liberty would be severely limited, and our public spaces will be less enjoyable for everyone. What I deem objectionable to others may not be offensive to me. Rap music, public nudity, the burning of the American flag, Rush Limbaugh's radio show, and pink-painted houses upset at least some individuals. As a result, the broad application of the offense principle as a liberty-limiting concept may result in a quite mundane existence. That is why the offense principle necessitates a public norm that is objective and jointly agreed upon. The notion of voluntariness is one that all libertarians agree on. As a result, we may contend that public behaviors that upset a huge number of people should only be prohibited if they are imposed on others without their agreement. For example, you cannot claim to be offended if

White, R., 2021. LIBERTY PRINCIPLE. Faculty.msj.edu. Available at: <https://faculty.msj.edu/whiter/liberty.htm> [Accessed 1 November 2021].

³ Gibney E and Wyatt T (2020) Rebuilding the harm principle: Using an evolutionary perspective to provide a new foundation for justice. *International Journal for Crime, Justice and Social Democracy* 9(3): 100-115

you knowingly visit an art display knowing that it contains homo-erotic elements . You can't be insulted voluntarily, right? However, voluntarism alone does not appear to solve anything.

Legal Moralism, a liberty-limiting philosophy, asserts that a civilized society can lawfully apply morality laws. In Haridwar city of Uttarakhand, for example, I am unable to purchase beer or wine on a Sunday morning . The city cannot explain the rule by claiming that purchasing alcohol is harmful to others, harmful to myself, or offensive to others. The ordinance appears to exist because the city feels it is unethical to purchase beer at a time when you should be attending church. Legal moralism infiltrates the private, self-regarding domain in some ways. Laws prohibiting polygamy, adultery, and sodomy are possible instances. The fundamental issue with utilizing government authority to regulate morality is deciding which moral ideals to enforce. Given the wide range of moral values expressed by the many religious organizations that practice in India, legal moralism might lead to a profoundly restricted public and private life.⁴

In conclusion, several potential liberty-limiting ideas have been offered. The more the government restricts liberty in both the public and private domains, the less freedom individuals and organizations have to pursue pleasure in their own way.

The next part of the Article deals with the Judicial approach towards interfaith marriages which will tell the importance and recognition of individual freedom and autonomy in the light of the constitution of India.

Judicial Approach towards Interfaith Marriages

In the case of *Shafin Jahan v. Ashokan K.M.*⁵, the Supreme Court declared that: Article 21 of the Constitution of India guarantees the freedom to marry the person of one's choice. The right to life is guaranteed by the Constitution. This privilege may only be taken away by a legislation that is substantively and procedurally fair, just, and reasonable. The power of each individual to make judgments on subjects vital to the pursuit of happiness is intrinsic to the liberty guaranteed by the Constitution as a basic right.

⁴ Ibid

⁵ AIR 2018 SC 357.

The present "Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020" (hereinafter called as "Ordinance") by involving provisions like pre-post conversion declaration, putting burden of proof on accused and allowing provisions even related by blood, marriage and adoption apart from parents and brother/sisters to file FIR allows an element of unreasonableness to creep in. Given the Supreme Court's emphasis on freedom to choose a life partner⁶, it will be interesting to see the Court's Reaction on the Ordinance which has been challenged before it. Further, in *Justice K.S. Puttaswamy (Retd) v. Union of India*⁷, the Apex while stated that the right to choose a life partner was a facet of right to privacy, it went on to state that any invasion of right to privacy by State must meet a threefold requirement:

- 1) Legality, which postulates the existence of law.
- 2) Need, defined in terms of legitimate social need.
- 3) Proportionality,

which ensures a rational nexus between the objects and the means adopted to achieve them. The law may be legal, but its need and proportionality are dubious, especially because it renders every conversion per se unlawful and requires the converted individual to not only make a statement, but also to establish that the conversion was not unlawful. Further, the Ordinance also seems to be at loggerheads with the recent Allahabad High Court judgment in *Salamat Ansari v. State of UP*⁸ case wherein the court stated that :

"We fail to see that if the law allows two people of the same gender to live happily together, then no individual, family, or state can object to a relationship between two significant individuals who are living together of their own free choosing. The right of an adult to live with the person of his or her choice is strictly a personal right, and when this right is violated, it is a violation of his or her fundamental right to life and personal liberty, which includes the right to freedom of choice, the right to choose a partner, and the right to live with dignity, as enshrined in Article 21 of the Indian Constitution."

Despite the fact that the ruling is from a High Court, it will have a high persuasive value because it is from the same state as the Ordinance.

⁶ *Soni Gerry v. Gerry Douglas*, (2018) 2 SCC 197, *Shakti Vahini v. Union of India*, (2018) 7 SCC 192 and *Lata Singh v. State of Uttar Pradesh*, (2006) 5 SCC 475.

⁷ AIR 2017 SC 4161

⁸ 2020 SCC OnLine All 1382.

In the recent case of *Smt. Safiya Sultana v. State of Uttar Pradesh*⁹, the Lucknow bench of the Allahabad High Court, holding that laws should adapt with time and circumstances, made the publication of a public notice under the Special Marriage Act, 1954¹⁰ as a directory. The court noted, "The procedure for publishing notice and seeking objections to a proposed marriage must be such that basic rights are upheld and not violated."

As a result, the court required that the parties to the proposed marriage may submit a written request to the Marriage Officer to publish or not publish a notice and pursue the objections procedure. If they do not submit a written request for publishing of notice upon providing notice, the Marriage Officer will not publish any such notice or entertain any objections to the proposed marriage and will proceed with the solemnization of the marriage .

As a result, the clause of the Special Marriage Act of 1954 requiring the publication of notification of marriage was found to be infringing on rights to liberty and privacy. The UP Ordinance includes a method that is comparable, if not more sophisticated. The decision will very certainly be appealed to the Supreme Court, which will have to rule on both the Special Marriage Act's procedure and the Ordinance's .

According to the *Rev Stanislaus v. State of Madhya Pradesh* case¹¹, there is no basic right to convert, which the Uttar Pradesh government has vigorously upheld. Furthermore, this Ordinance does not prohibit interfaith marriage; rather, it attempts to control the illegal component of it for the sake of public order. Furthermore, it is argued that only marriages that are exploited as a deception to achieve a conversion objective or vice versa are criminal. Furthermore, the Ordinance's requirements are totally secular and will apply equally to all communities. Also, the argument of several anti-conversion laws already present is made

⁹ HABEAS CORPUS No. - 16907 of 2020.

¹⁰ The Special Marriage Act, 1954 (Act No. 43 of 1954) .

¹¹ 1977 SCR (2) 611. It was a unanimous opinion of the constitution bench where two laws viz, the Madhya Pradesh Dharma Swatantraya Adhiniyam, 1968 and the Orissa Freedom of Religion Act, 1967 was under question. Both were declared valid.

Tejaswi Surya & Suyash Pande, "UP Ordinance On Religious Conversion Is Being Misconstrued: Here's Why It Will Pass Judicial Scrutiny", *Swarajya*, Dec. 21, 2020, available at: <https://swarajyamag.com/politics/upordinance-on-religious-conversion-is-being-misconstrued-heres-why-it-will-pass-judicial-scrutiny> (last visited on Dec. 30, 2020) .

stating that the Uttar Pradesh government is not the first to legislate on conversion.¹² Thus, the Ordinance merely tries to regulate the freedom of religion which it can on the ground of public order.

Justification of provisions of the Ordinance¹³ in the light of Liberty Limiting Principles:

In section 3 of the Ordinance it is alleged that use of the word marriage without any qualification leaves a serious scope of mischief on the part of the executive.¹⁴ It makes each and every marriage in which conversion is done illegal and punishable. However, if we read the section in totality, it appears that the word marriage is not unqualified. The word 'marriage' has to be read with the primary clause that is "No person shall convert or attempt to convert either directly or otherwise any other person from one religion to another by use or practice of", thus, the whole sentence meaning that, "No person shall convert or attempt to convert any person by use or practice of marriage." Any conversion only for the sake of marriage is already acknowledged to be null and invalid. As a result, the provision produces no harm, but it does condemn marriage only for the goal of conversion. Considering that every other term in the section has a negative connotation, such as *deception, force, undue influence, coercion, allurement, or fraudulent* methods, it's safe to assume that marriage will as well. This is also stated in the ejusdem generis rule.

Section 3 of the Ordinance, on the other hand, does not consider reconversion to a previously held faith to be conversion. The moot point, in light of this exemption, is what happens if the reconversion is influenced by deception, force, undue influence, compulsion, allurement, or any other fraudulent methods, or by marriage. As a result, the Ordinance allows for harm to be perpetrated under the guise of conversion.¹⁵

¹² Poojisri Ganesan, "UP not first to target 'love jihad', 2 states have law against forced conversions for marriage", *The Print*, Nov. 26, 2020, available at: <https://theprint.in/judiciary/up-not-first-to-target-love-jihad-2-states-have-law-against-forced-conversions-for-marriage/552033/> (last visited on Dec. 30, 2020) .

¹³ Uttar Pradesh Prohibition of Unlawful Religious Conversion Ordinance, 2020 - "hereinafter will be referred as Ordinance"

¹⁴ Chittarvu Raghu, "Checks and balances needed", *The Pioneer*, Dec. 12, 2020, available at: <https://www.dailypioneer.com/2020/columnists/checks-and-balances-needed.html> (last visited on Dec. 29, 2020)"

¹⁵ Abhinav Chnadrachud, "UP's 'love jihad' ordinance has chilling effect on freedom of conscience", *The Indian Express*, Dec. 3, 2020, available at: <https://indianexpress.com/article/opinion/columns/up-love-jihad-law-religious-conversion-anti-conversion-law-7078370/> (last visited on Dec. 30, 2020) .

Section 5 specifies the penalties for violating section 3. In situations of violations against minors, women, or anyone from a scheduled caste or community, the punishment is harsh. It has been claimed that the section looks to contravene article 14, the Right to Equality, by establishing such a provision. Everyone must be treated equally under the law.¹⁶ However, when making this argument, one tends to overlook Articles 15(3) and 15(4) of the Indian Constitution, which allow the government to establish specific provisions for women, children, and scheduled caste and scheduled tribes. Furthermore, it is not uncommon for fringe members from other religions to target scheduled caste and scheduled tribe individuals because of their socioeconomic standing in society. A comparable clause can also be found in other states' anti-conversion legislation. As a result, offending against certain groups of individuals has a harsh penalty.¹⁷

Courts will deem a marriage only for the purpose of conversion or vice versa invalid under **Section 6**. The clause only restates the Supreme Court's rulings in the cases of *Sarla Mudgal v. Union of India*¹⁸ and *Lily Thomas v. Union of India*¹⁹. The caveat is that the marriage may only be canceled through a petition filed by the parties, not by relatives.

Section 8 is once again one of the Act's most contentious clauses. It requires a sixty-day pre-conversion statement to be made to the District Magistrate or Additional District Magistrate, stating that the conversion is devoid of fraud, coercion, undue influence, or allurement. It's worth noting that 'marriage' isn't on the list of things that might lead to consent. Furthermore, the person performing the religious ceremony for conversion must send a comparable one-month notice to the District Magistrate or Additional District Magistrate of the location where the conversion is scheduled.²⁰ The District Magistrate after receiving information about conversion shall get an enquiry conducted through police as to the real intention,

¹⁶ Surbhi Karwa & Prannv Dhawan, "Uttar Pradesh's 'Love Jihad' Law Is Sexist, Unconstitutional", *article14*, Dec. 3, 2020, available at: <https://www.article-14.com/post/uttar-pradesh-s-love-jihad-law-is-sexist-unconstitutional> (last visited on Dec, 29, 2020).

¹⁷ Laura Dudley Jenkins, "Legal Limits on Religious Conversion in India" 71:109 *Law and contemporary problems* 109 (2008).

¹⁸ AIR 1995 SC 1531

¹⁹ (2000) 6 SCC 224.

²⁰ Uttar Pradesh Prohibition of Unlawful Religious Conversion Ordinance, 2020. s.8(2)

purpose, and cause of the proposed conversion.²¹ Non-observance of this provision is made punishable and will also render such conversion void and illegal.²² The rule has been criticized since it makes conversion declaration required in all cases. As a result of this rule, conversion is regarded to be without free permission by default, and the person must prove his conversion is voluntary by a statement. Furthermore, a mandated police inquiry into the true motive, reason, and cause of conversion might result in the converted individual being harassed. In our traditional society, police involvement has long been regarded as a source of embarrassment; hence, such a provision is likely to raise multiple eyebrows in society, resulting in unneeded stigmatization of the converted individual. These measures have the ability to lend official approval and administrative backing to the societal hostility that interfaith couples confront. Interfaith couples confront a high level of communal danger and social ostracism, as evidenced by several petitions filed in High Courts demanding police protection.²³

This conventional burden of proof is only moved to the accused when the accused seems to be guilty or when the criminal conduct occurs within the four walls of the house, and it is never unqualified. There are several circumstances where the burden of proof is on the accused like cases of Dowry death²⁴, custodial rape²⁵, suicide of a married woman²⁶ etc. In each of these cases, the shifted burden of proof on the accused is accompanied by specific circumstances, such as dowry death, where it must be shown that the woman was subjected to cruelty or harassment in connection with a dowry demand shortly before her death, and the marriage was solemnized within seven years of her death. Furthermore, in cases of rape committed while in the custody of a police officer, it must be demonstrated that where sexual intercourse is proven and the woman agrees that she did not consent, there was no consent; also, in cases of abetment of suicide by a married woman, it must be demonstrated that the

²¹ Uttar Pradesh Prohibition of Unlawful Religious Conversion Ordinance, 2020. s.8(3)

²² *Id.*, s.8(4).

²³ Manu Sebastian, "UP Ordinance Criminalizing Religious Conversion on Marriage is an Assault on Personal Liberty", *Live Law*, Nov. 30, 2020, available at: <https://www.livelaw.in/columns/up-ordinance-criminalizing-conversion-for-marriage-is-an-assault-on-personal-liberty-166575> (last visited on Dec. 30, 2020).

²⁴ The Indian Evidence Act, 1872 (Act No. 1 of 1872). s.113(b)

²⁵ The Indian Evidence Act, 1872 (Act No. 1 of 1872). s.114(a)

²⁶ The Indian Evidence Act, 1872 (Act No. 1 of 1872). s.113(a)

Conclusion

The UP Ordinance, 2020 has sparked a lot of debate. Some are well-placed, while others are misplaced. There is little doubt that the Ordinance imposes a number of restrictions on persons who convert to another faith, but whether this amounts to regulation or an unwarranted interference into people's lives is a topic that will be resolved by the courts. Furthermore, the provisions of the Ordinance must be viewed in light of the Puttaswamy case's triple test, which states that any rule affecting the Right to Privacy must fulfil three criteria: it must be legitimate, necessary, and proportional. Also, the impact of the Ordinance on the freedom of religion guaranteed by Articles 25 to 28 of the Constitution must be assessed to see if it violates or merely regulates that freedom. Furthermore, the Ordinance appears to be at conflicts with recent Supreme Court decisions declaring that the ability to select one's spouse is a fundamental right guaranteed by Article 21 of the Constitution. Despite the fact that the Ordinance forbids and penalize conversion and marriage without free consent, article 21 is attracted by the procedural necessity to notify the administration. The law, however, does not apply to those couples married under the Special Marriage Act, 1954 since it has its own procedure to verify the circumstances. People of different faiths wanting to marry each other can follow the procedure laid down by the Special Marriage Act, 1954 and that does not involve any pre-marriage enquiry by the district magistrate.²⁷ If the couple marry under the Special Marriage Act, 1954, they just have to inform the marriage officer about the same, who shall get it published at any conspicuous place in his office and if no objection is received, the marriage can be solemnized at the end of thirty days period. But, the recent decision of High Court of Allahabad has made the mandatory public notice of marriage under the Special Marriage Act, 1954 as directory i.e., only if the couple wants to make a public notice of marriage, then only the Marriage Officer can do the same. The judgment is certain to be appealed and the decision of the Supreme Court is awaited in this regard.

On the other hand, the UP government has placed its reliance on the judgment of *Rev Stanislaus v. State of MP* wherein the Apex Court ruled that there was no fundamental right

²⁷ Subramaniam Swami, "Not just UP, other states too have 'love jihad' laws", *Sunday Guardian*, Dec. 5, 2020, available at: <https://www.sundayguardianlive.com/news/not-just-states-love-jihad-laws> (last visited on Jan. 08, 2021).

to convert and the fundamental right to profess, practice and propagate a religion can be reasonably restricted on the grounds of public order, morality, health and other provisions of Part III²⁸. The judgment also mentions that unlawful conversion can create law and order problems. The Ordinance is the culmination of the same reasonable restriction on the ground of public order. Furthermore, the Ordinance is not the first law to regulate conversion: the same has already been done in many states. In the Ordinance nowhere it is mentioned that it only applies to Hindus or Muslims or any specific community, even if a Hindu guy marries a Muslim lady, the legislation will be the same. He also added that the law was enacted to guarantee security to women across the state, and that no one will be able to abuse the law and in the light of this argument it can be concluded that this Ordinance is in line of Criminalization Principles as discussed above and also in consonance with the Indian Constitution. The Uttar Pradesh administration appears to be confident in the Ordinance and is considering enacting legislation to manage religious places in the state. In fact, the State Law Commission has already begun its investigation into it.²⁹

Although the Ordinance appears to be in violation of some fundamental legal principles and court precedents, this does not make it invalid. It will be judged in light of the reasonable constraints it seeks to impose. It has been seen before, when the Supreme Court supported the legality of laws passed by the states of Odisha and Madhya Pradesh after being vigorously contested. However, the current ordinance is a significant improvement over the previous laws. Furthermore, these legislations have been found constitutional under Article 25. The UP ordinance will also have to satisfy the article 14 and article 21 tests. Stanislaus³⁰ precedent can be useful, but it is not a binding precedent. Furthermore, the Allahabad High Court's ruling is a shock to the Ordinance's legitimacy in that it declares the procedure of public notice of marriage under the Special Marriage Act, 1954 to be in violation of the rights to liberty and private. The Ordinance has a comparable, though not more sophisticated, provision. Though the decision is from the High Court and will not be binding, it will have significant persuasive power because it is from the same state as the UP Ordinance.

²⁸ The Constitution of India, art.25.

²⁹ Atul Chandra, "SC Rebuke has its Effect: UP Mulls Law to Regulate Religious Places", *The Leaflet*, Jan. 9, 2021, available at: <https://www.theleaflet.in/sc-rebuke-has-its-effect-up-mulls-law-to-regulate-religiousplaces/#> (last visited on Jan. 10, 2021).

³⁰ 1977 SCR (2) 611. It was a unanimous opinion of the constitution bench where two laws viz, the Madhya Pradesh Dharma Swatantraya Adhiniyam, 1968 and the Orissa Freedom of Religion Act, 1967 were under question. Both were declared valid.

ARGENTINA V. URUGUAY

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Introduction

Statute of River Uruguay

The statute of Uruguay has been the longest-standing point of dispute between Argentina and Uruguay. Ever since the past, when Portugal and Spain were in control of the territory to modern-day Uruguay and Argentina the river has played a crucial role in the sour relationship between the two parties. The voices to negotiate on a final contention began in 1910, however, it was only in 1975 that a final treaty was agreed upon.¹ Both the parties agreed to sign the treaty for their benefit, that is so that each of them could use the resources of the river amicably.² This Statute also resolved the long-standing boundary dispute by stating in clear terms that no such boundary exists.³

One of the key provisions of this Statute was to set up a dispute redressal mechanism that would deal with studies and disputes related to the river. This commission would consist of an equal number of people from both sides.⁴ It was decided that whenever any country decided to build anything on their side of the river, prior approval from the Commission must be taken to avoid any future dispute. The statute also made it clear that in case the Commission fails to agree on a decision, either of the parties could approach the ICJ for redressal. The Commission is also charged with regulating and maintaining the ecological balance of the river, including pollution in the river.⁵

The purpose of the statute is pretty clear and it does provide a good explanation for the procedures which deal with Environmental issues which might arise alongside the river. However, what both the countries failed to realize is how these regulations would be implemented. It is clear from the timing of the statute that both countries wanted a peaceful relationship considering the situation around the world.

Argentina's Application to the International Court of Justice

In May 2006, Argentina formally issued a complaint with the International Court of Justice to institute a proceeding against its neighboring country Uruguay for a clear non-compliance of procedural and substantial violations of the 1975 Statute. Here it is important to note, that several European corporations were trying to build a second mill on the coast of the river, yet Argentina somehow claimed that it is the building of mills that jeopardized the environment on their side of the "non-existent" border.

The CMB(ENCE) Project

Celulosas de M'BopicuA, a Spanish company planned to build the first pulp mill in Fray Bentos, Uruguay.⁶ The Commission set up by the 1975 statute, the Administrative Commission of the River Uruguay (CARU) attended a public meeting to study the EIA aspect of the proposed construction. Late in 2003, Uruguay openly declared that CARU had issued an initial environmental approval for the construction of the CMB Mill. The then President of Argentina denied any such approval being given by the Commission until Argentina's concerns were addressed.⁷

The CARU Subcommittee on Water Quality and Pollution Control met on May 5th 2004 to create a plan for monitoring the area which surrounds the pulp mills and the possible environmental damage caused. The CMB stopped construction of the mill in 2005 and officially announced their intention not to construct the mill. Since the mill was never built, it fell out of concern for Argentina.⁸

¹ Jose Mujica, Argentina, Uruguay mull removing pockets from bridge- UPI (Jun 04, 2010), https://www.upi.com/Top_News/Special/2010/06/04/Argentina-Uruguay-mull-removing-pickets-from-bridge/74901275686748/?ur3=1.

² Statute of the River Uruguay, Uru. -Arg., Feb. 26, 1975, 1295 U.N.T.S. 340

³ Maria Alenjdra Del-Cerro, *Paper battle on the river Uruguay: The International dispute surrounding the construction of pulp mills*, GEO INTERNATIONAL REVIEW, Pg 170(2007-2008).

⁴ Statute of the River Uruguay, Uru. -Arg., Feb. 26, 1975, 1295 U.N.T.S. 345

⁵ Maria Alenjdra Del-Cerro, *Paper battle on the river Uruguay: The International dispute surrounding the construction of pulp mills*, GEO INTERNATIONAL REVIEW, Pg 171(2007-2008).

⁶ Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, Pg 182 (Apr. 10, 2010), <http://www.icj-cij.org/docket/files/135/15877.pdf>.

⁷ Helsingin Sanomat, Pulp mill dispute between Argentina and Uruguay intensifies-HELSINGIN SANOMAT BLOG (Apr 12 2006), <https://www.hs.fi/english/article/Pulp+mill+dispute+between+Argentina+and+Uruguay+intensifies/1135219507760/>.

⁸ Nelson Fernandez, Diplomatic conflict: With negotiation for two paper mills underway, Botnia announces that it suspends the work- THE NATION (Mar. 27, 2006), <https://www.lanacion.com.ar/politica/botnia-anuncio-que-suspende-las-obras-nid792196/>.

At this point, Uruguay should have realized such a stance poses a direct risk to their economy since it is their immediate neighbor which will be at the suffering end. Turning to the ICJ could have been well avoided by involving Argentina in the decision-making process and resolving the dispute amicably. By keeping Argentina in the loop, Uruguay could have avoided the loss in business to the CMB, which they absolved in this situation.

The Orion (Botnia Mill)

There was a second mill in dispute named the Orion Mill, an Uruguayan company hired for being run by Metsa-Botnia a Finnish company, that had built the mill which had been functioning and operating ever since late 2007. This was not taken well by Argentina which voiced its objections for what is termed as carelessness on the side of Uruguay to ignore all environmental consequences which would be due to the mill. On the other hand, Uruguay maintained its position that it had complied with the obligations of the 1975 statute and had gone through all the procedural formalities, including getting approvals for the construction of the mill. There was a clear disagreement between the two countries as regards the levels of pollution, but actions need to be taken if such pollution was being caused at all by the said mills.⁹

In early 2005, Uruguay also permitted Botnia to build a port adjacent to their mill on the banks of the river. Since the port was also on the mills, Uruguay was under obligation to submit its plans to the CARU and began the construction work of their mills. Argentina, being outraged, sent a diplomatic note to Uruguay to halt the construction of the mills until they could agree about the environmental impact. This was when CMB stopped the construction of the mills, Botnia on the other hand halted its construction only for 10 days.¹⁰ This was a cause of concern for Argentina since the National Directorate for the Environment of the Uruguayan Government (DINAMA), had raised red flags against the mills highlighting that it would cause pollution to the surrounding areas.¹¹

⁹ Anonymous, *Arm Twisting- THE ECONOMIST*(Oct 5 2006), <https://www.economist.com/the-americas/2006/10/05/arm-twisting>.

¹⁰ Anonymous, *Metsae-Botnia Gets Permit From Uruguay to Start Pulp Production- BLOOMBERG* (Nov. 9 2007), https://www.bloomberg.com/politics/?pid=newsarchive&sid=4skXHg_WRvQ.

¹¹ Leo La Valle, *Argentina threatens legal action over UPM pulp mill- YLE* (Oct 13, 2013), https://yle.fi/uutiset/osasto/news/argentina_threatens_legal_action_over_upm_pulp_mill/6862607.

The Alleged Procedural and Substantive Violations

The application filed by Argentina sought that Uruguay had breached both the procedural and substantive measures of the 1975 Statute. It argued that "procedural violations were intrinsically linked with substantive obligations".¹²

Procedural Violations

- The latter failed to refer the plan of the pulp mills to the CARU immediately.
- The latter also did not formally notify the former of its plans to approve the plans of the CMB and Botnia pulp mills which it claimed was in contravention of Article 7 of the 1975 Statute.
- By failing to comply with the regulation of not notifying CARU and Argentina of its plans to build the mills, Argentina claimed Uruguay "breached all of its obligations under the terms of Articles 7 to 12 of the 1975 Statute."¹³

Substantive Violations

- Failing to coordinate with Argentina on measures necessary to avoid ecological change, and by failing to take the measures necessary to prevent pollution.¹⁴
- Ensure that the management of the soil and woodland did not impair the regime of the river or the quality of its waters.¹⁵
- To coordinate measures to avoid changes in the ecological balance of the river and surrounding land.
- Argentina claimed that the Botnia mill discharged certain materials and nutrients into the river that constituted pollution under international environmental standards.¹⁶

Meanwhile, Uruguay rejected all these allegations claiming its sovereignty, and Argentina was justified in making its objections. Uruguay had kept Argentina out of the loop by not consulting them during the planning and consultation process of the mill. There is no doubt that Uruguay has its sovereignty and authority in providing permission to build the mills.

¹² Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, Pg 30 (Apr. 10, 2010), <http://www.icj-cij.org/docket/files/135/15877.pdf>

¹³ Maria Alejandra Del-Cerro, *Paper battle on the river Uruguay: The International dispute surrounding the construction of pulp mills*, GEO INTERNATIONAL REVIEW, Pg 21(2007-2008).

¹⁴ Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, Pg 52 (Apr. 10, 2010), <http://www.icj-cij.org/docket/files/135/15877.pdf>

¹⁵ Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, Pg 54 (Apr. 10, 2010), <http://www.icj-cij.org/docket/files/135/15877.pdf>

¹⁶ Statute of the River Uruguay, Uru.-Arg., Art 41A, Feb. 26, 1975, 1295 U.N.T.S. 340.

However, that sovereignty comes to question with the incorporation of the 1975 statute. It should have been recognized that due to the activities of the mill, the surrounding areas especially Argentina would be at the suffering end and face adverse effects of pollution.

Provisional Measures Filed by Argentina

Besides the application, Argentina filed for provisional measures to be granted by the ICJ since it had an idea that it could take the court about three to four years to reach a verdict.¹⁷ Argentina argued that an interim decision was necessary "to preserve the rights of the parties pending a final decision on the merits of [the] case". Argentina wanted the court to halt all activities in the mill including construction and production. In its application for an interim decision that Uruguay was liable for all the damages caused to Argentina including Damages to its economy. Argentina was worried that the Environment Degradation could cause a loss in the tourism sector of the country. Uruguay on the other hand maintained its position denying that the 1975 Statute did not cover any provision for economic damages, but only those covering damages to the ecosystem and the environment.¹⁸

Since the construction and activities of the mill had already begun, Argentina was furious with its neighbor for not involving it in the decision and ignoring the harmful environmental impacts that could be caused due to the mill. Argentina moved to quickly halt the construction of the activities at least until a time EIA had been conducted by the CARU, a non-partisan commission established by the 1975 Statute. Argentina's argument was simple, the construction of the mill should not have begun in the first place without a prior notification given to both parties. The country claimed an emergency and requested the court to stay in all the activities of the mill since it would cause irreparable damage to the aquatic ecosystem.¹⁹

Uruguay, while denying all such allegations, claimed that it had the sovereign authority to build the mills on its side of the river. It claimed that the mills are going to have one of the best tech and infrastructure in the world. In its highest level of diplomatic communication, the

¹⁷ Pieter Bekker, *Introductory Note to Pulp Mills on the River Uruguay* (Argentina v. Uruguay), 46 I.L.M. 311 (2007).

¹⁸ *Statute of the River Uruguay*, Uru.-Arg., Art 1 Feb. 26, 1975, 1295 U.N.T.S. 340.

¹⁹ Meghna Becker, *Argentines protest Uruguayan paper mills- GLOBAL NONVIOLENT ACTION DATABASE* (Feb. 28 2010), <https://nvdatabase.swarthmore.edu/content/argentines-protest-uruguayan-paper-mills-2005-2008>.

Foreign Ministers of both countries agreed to permit the project to go forward subject to a joint agreement.

In July 2006, the court ruled on the provisional measures requested by Argentina in which it recognized that it had an undisputable jurisdiction in the matter. In the judgment, the court recognized that the planning and construction of mills on the river did not pose an imminent threat to the River as claimed by Argentina.²⁰ The court did not see the harm in pronouncing the decision later since the pulp mills were not operational yet. It moved on to suggest the parties settle the disputes amicably amongst themselves to carry on a peaceful relationship.

Blocking of the Fray Bentos bridge

In November 2006, Argentinian protestors, to register their protest, blocked the Fray Bentos Bridge, severing transportation and communication between the two countries.²¹ Within 10 days Uruguay filed for provisional measures with the ICJ seeking interim measures to stop the protestors from blocking the Fray Bentos Bridge. The bridge was important since it "forms a major artery for Uruguayan exports to Argentina and tourist traffic into Uruguay".

Uruguay asserted that the blockades were encouraged by the government so that the impending construction of the mills was not completed. Argentina denied these allegations by placing it on record that the bridge was blocked by civic protestors and also underlined that no delay was made in the construction of the mill since one of them was already operational.²²

The court delivered its verdict in January 2007, rejecting provisional measures filed by Uruguay. The court in its decision emphasized the fact that there was no immediate harm caused to the blockade of roads and that such a situation had not arisen where the court thought it was appropriate for it to intervene.²³

²⁰ *Pulp Mills on the River Uruguay* (Arg. v. Ur.), Order, (July 13, 2006), Pgs 5-6, <http://www.icj-cij.org/docket/files/135/11235.pdf>

²¹ Wayback Machine, *Argentina Blockades irks neighbors- MWC NEWS* (Feb 04 2008), <https://web.archive.org/web/20080204014510/http://mwnews.net/content/view/12009/194/>

²² Pieter Bekker, *Introductory Note to Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Pg 312 I.L.M. 311 (2007).

²³ *Pulp Mills on the River Uruguay* (Arg. v. Ur.), Order, Pg 6-8 (Jan. 23, 2007), <http://www.icj-cij.org/docket/files/135/13615.pdf>.

The ICJ renders its final opinion

As Argentina expected, four years later the ICJ delivered its verdict on the issue. The ICJ opined that Uruguay indeed violated the procedural obligations as required in the 1975 Statute, but there was little evidence about the substantive obligations as alleged by Argentina.²⁴ On very clear terms, the court rejected Argentina's view that breach of procedural violations automatically violates the substantive obligations as well.²⁵

To examine whether Uruguay breached procedural violations of the 1975 Statute, the court looked at the role played by CARU in the said dispute. Due to the scale and diversity of the work assigned to the commission, it was clear that the international organization had a definite say in the matter. The Court concluded that by failing to inform CARU of the planned pulp mills before they granted the environmental authorizations to build the pulp mills and the port at the Botnia mill, Uruguay failed to comply with Article 7 of the 1975 Statute.²⁶

In its observation, the court stated that Argentina was not notified about the environmental assessments through the CARU, besides authorization of construction was already given. Uruguay countered that it had not sought prior permission for the same, since they were following its internal laws. But the rule in Vienna Convention is clear, Article 27 highlights that "failure to abide by a treaty cannot be justified by citing internal law."²⁷

The court then evaluated the negotiations of the 2004 Summit, between the foreign ministers of both of the courts. The court, after careful evaluation of the negotiations of 2004, determined that the objective of the summit was to negotiate to exempt Uruguay from the 1975 statute, so long it followed the measures in the understanding.²⁸ However, Uruguay has failed to comply with this understanding, the court reiterated its position that Procedural Obligations were violated.

²⁴ Anonymous, *Uruguayan mill can operate despite breach of treaty*, UN World Court rules- UN WORLD NEWS (Apr. 20, 2010), <https://news.un.org/en/story/2010/04/335952-uruguayan-mill-can-operate-despite-breach-treaty-un-world-court-rules>.

²⁵ *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, Pgs. 3-4 (Apr. 10, 2010), <http://www.icj-cij.org/docket/files/135/15877.pdf>

²⁶ *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, Pgs. 132 (Apr. 10, 2010), <http://www.icj-cij.org/docket/files/135/15877.pdf>

²⁷ *Vienna Convention on the Law of Treaties* art. 27, May 23, 1969, 1155 U.N.T.S. 331

²⁸ *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, Pgs. 98 (Apr. 10, 2010), <http://www.icj-cij.org/docket/files/135/15877.pdf>

The court rendered its justification as to why it thought that the Substantive obligations were not violated.²⁹ This is discussed as under:

- **Obligation to contribute to optimum and rational utilization of the river:** The court noted that Uruguay has fulfilled its obligations in this regard because of the economic benefits that Uruguay can obtain from the pulp mill. The court also ruled that optimum and rational utilization of the river does not necessarily have to apply to both sides.
- **Obligation to ensure the management of the soil and woodland:** The court observed that Argentina did not provide sufficient evidence to prove its point that planting trees for the mill would cause damage to the soil. The change in the quality of soil had had a direct effect on the river and Argentina had no evidence that the plantation of Eucalyptus trees would cause an impact on the mainland.
- **As for the discharge of effluents from the Botnia Mill,** the court reaffirmed through the evidence provided by Uruguay that it had taken appropriate measures so that the discharge from the mills did not conflict with the Argentinian side of the river.
- **Obligation to Prevent Pollution:** Argentina has argued that Uruguay has contaminated its rivers and could dump nutrients into rivers that are already experiencing reflux and stagnation. To investigate this further, the court first turned to an environmental impact assessment on the plant. "The court concluded that the location of the Fray Bentos plant did not contribute to the infringement of the crime, as CARU had to take into account all possible emissions before carrying out accident testing and environmental permits were issued.
- **Impact of the discharges made by the Botnia mill on the quality of the waters in the river:** In the assessment, the court examined all the different substances that Argentina claimed to have damaged the river, including dissolved oxygen, phosphorus, and various other substances. The court did not find any clear evidence that these substances were directly related to the Botnia plant.

The court did not find any significant corruption and concluded by suggesting that CARU regularly monitors Botnia's plant and suggested that the two countries seek cooperation to

²⁹ *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, Pgs. 159 (Apr. 10, 2010), <http://www.icj-cij.org/docket/files/135/15877.pdf>

minimize the plant's impact on the river. Following the final decision on procedural and substantive matters, the International Court of Justice put the matter to rest.³⁰

From the very beginning, the court had made it clear that Argentina and Uruguay must solve this problem together. Argentina won procedural matters, but the court did no harm since the charter in 1975 was not greatly violated. Overall, Uruguay won because it was still able to push pulp mills along the river. However, Argentina has not opened the bridge for 5 months. This shows that, even after waiting five years for the decision of the International Court of Justice, the issue has not been resolved. The courts can comment, but they cannot correct the damage that years of tension have done to relations between neighboring countries.

Closing arguments- Evidentiary Issues

There are two questions here.

The first question concerns the rules for submitting evidence to the International Court of Justice. During the case's interim action, Argentina provided video evidence for presentation at the hearing. Uruguay appealed, but the grounds for this objection were not decided by the court. Also, the court ruled that it would generally not allow the video to appear at hearings for temporary action. The court did not ask for statutes, rules, or other powers to support the decision. It would be better if the court justified why video evidence was not allowed. Argentina can then correct future deficiencies and complaints before the court better meets the court's expectations for evidence. This seems particularly important in a legal system with little or no formal testing rules.

Second, more importantly, it is a matter of receiving complex expert evidence. Argentina and Uruguay submitted a wealth of scientific and technical evidence to the courts in the form of reports. Some of these reports were written by experts who gave the court an expert opinion and acted as the party's attorney. This method of presentation makes it impossible for the opponent to cross-examine the evidence and the court's ability to question the expert in the expert role. Most members of the court have highlighted these deficiencies in their judgments (paragraph 167), and in future cases, it will be interesting to ascertain whether the court will require testimony rather than acting as a lawyer for those who are considered expert witnesses. This second paragraph is the fact that some judges who disagree with individual

³⁰ Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, Pg 178(Apr. 10, 2010), <http://www.icj-cij.org/docket/files/135/15877.pdf>

statements or opinions consider the court's opportunity to apply Article 50 of the International Court of Justice Regulations as missed. As mentioned at the outset, Article 50 allows courts to use evidence from outside experts in complex and difficult cases, rather than relying solely on the evidence presented by the parties. These judges thought that the decision-making process, in this case, could be improved through consultation with experts selected by the court.

Conclusion

Pulp Mills is the latest environmental case to find its way before the ICJ. Picking up on the discussion about complexity, evidence, and expert witnesses, one wonders if it might not be appropriate for the Court to be holding elections again for the Chamber for Environmental Matters (discontinued in 2006). Although the decision to use the Environmental Chamber rests with the parties, a habitual use could see the ICJ develop specialist environmental expertise essential to justly resolving cases like Pulp Mills involving difficult balancing between the environment, human health, and economic development.

About the contribution of pulp and paper mills to the development of international environmental law, it is now clear that cross-border environmental impact assessment is an integral part of general international law. Defects indeed remain due to the nature, scope, and content of the EIA (including public consultations). However, project plans that pose a risk of significant cross-border environmental damage (or threaten shared natural resources) point to an important obligation to undertake due diligence to ensure that the environment or resources are protected.



