

ISSN: 2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

www.ijlra.com

DISCLAIMER

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

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis



IJLRA

EDITORIAL TEAM

EDITORS

Megha Middha



Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmanagarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmanagarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

Dr. Samrat Datta

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



Dr. Namita Jain



Head & Associate Professor

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

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

Mrs.S.Kalpna

Assistant professor of Law

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



Avinash Kumar



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

ABOUT US

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

IJLRA

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

Authored By-Divyansha Goswami

Indisputably, there exists a massive taboo around substance abuse in India, as mental illness and an inextricable nexus between the two is incontrovertible. This collective ignorance and stigmatization aren't just a social problem but a legal one as evident in our legal framework which is more inclined towards a retributive approach than a reformative approach to the drug question. A close reading of the statute shows the legislative perception of drug dependents as criminals rather than victims or patients. The primary focus of the NDPSA has been on curbing illicit drug trafficking, consumption, etc., and not rehabilitation and reintegration into society. The constitutionality of some of the stringent provisions is also questionable, with divergent judicial opinions. The MHA is like a sister act to NDPSA but is more contradictory than complementary to understanding addiction. MHA substantially tries to de-stigmatize the rhetoric around mental health and substance abuse but both statutes, in one way or another, do a disservice to people who use drugs, despite providing a handful of conditional safeguards. This paper is an attempt at addressing these oversights and looking for inconsistencies in domestic law with international standards on drug abuse control.

I. 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 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 incognizant of medical complications related to substance abuse. A majority of these provisions fail to match the international standards.

¹ Chritarth 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).

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 reformatory 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 deterrence 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 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

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.*

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

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

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 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

⁸ David Sack "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

¹² *Supra* note 10

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

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 execrably 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

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@Baliay AIR 1977 SC 2447.

1. 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

2. 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 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.

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)

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 guarantees²⁴. 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.

(i) Decades of indecision

After over 30 years of indeterminacy, 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 infringed 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 "crimination" 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 Fasrin 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 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.

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

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 maintenance treatment (MMT) for opioid dependence.

³⁰ *Supra* note 26

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-issue, 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

III. 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 stigmatizing language something the Act purports to address.³⁶

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.indjps.org/temp/IndianJSocPsychiatry343189-6099134_165631.pdf> accessed 20 September,2020

³⁴ *Ibid*.

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

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

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 patients against their explicit consent, which is not only against human rights laid down internationally but also against

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/IndianJPsychiatry6110744-606915_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.*

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

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-5232022/>> (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)

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

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 Freckelton “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 *BJPsych Int* 43-5 (2016)

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 wanting 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 foster a community-based

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

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 reformative 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 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.

