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Burden Shifted: NDPS Act, Anti-Conversion Laws, and the Nexus Between Sections 112 & 114 of the IEA

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This article analyzes the concept of the ‘reverse onus clause’ within the NDPS Act, anti-conversion laws and sections 112¹ & 114² of the IEA. Traditionally, innocence is presumed over guilt but this clause changes such presumption and also changes the side that needs to prove itself, unlike the usual dogma. The main aim of including the interplay between s. 112 & 114 were to understand the nuances of the sections and to determine whether the legislators left a deliberate loophole or not. The NDPS Act³ on the other hand has the clause to curb one of the biggest cartels in the world. On the contrary, the UP Bill⁴ seems to face high criticism and is a clear epitome of the clause, but the bill threatens to infringe various personal freedoms when not necessary as it doesn’t cause harm to most of society. The article stands firm on the idea that while the reverse onus clause is legally justifiable, its application must be balanced against the fundamental rights of the people.

Keywords: *reverse onus clauses, presumption of innocence, legitimacy, narcotic substances.*

¹ Narcotic Drugs and Psychotropic Substances Act 1985, s 12

² Narcotic Drugs and Psychotropic Substances Act 1985, s 14

³ Narcotic Drugs and Psychotropic Substances Act 1985

⁴ The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance 2020

INTRODUCTION

'Innocent until proven guilty' is the fundamental tenet of criminal legislation.⁵ It is predicated on the idea that it is preferable to forgive the guilty than to unfairly punish the accused. The principles of equity and social justice form the foundation of this idea. Also, even if an accusation was merely fabricated, it preserves the accused's freedom and dignity because they frequently endure shame and socio-legal repercussions. Due to the 'presumption of innocence,' the obligation of proving the guilt is always upon the prosecution⁶, who need to demonstrate the same beyond reasonable doubt and the accused rebuts that by merely raising a doubt i.e. a preponderance of possibilities or an exception to dismantle the entire case of the prosecution, thereby shifting the burden of rebutting such doubt on the prosecution. Here the prosecution must prove both '*mens rea*' and '*actus reus*' to relieve itself of the burden.⁷ There is an exception that exists which is against the fundamental rule, the 'reverse onus clause' or the 'reverse burden of proof', it is enumerated in sections 111A, 113A, 113B, 114, 114A of the IEA etc. and in certain special statutes.⁸ This exception strips the immunity that the accused gets usually and runs on the concept of guilty until proven innocent. In this case, finding the accused guilty merely requires the prosecution to lay the foundation of the *actus reus*. Conversely, the accused must demonstrate his innocence in order to avoid being found guilty. The prosecution's involvement comes to an end when the accused bears the burden of proof, but before that can happen, it must institute a *prima facie* case by proving a foundational fact.

NEXUS BETWEEN SECTIONS 112 & 114

Section 112⁹ deals with the presumption of legitimacy, it says that unless it can be demonstrated that the couple was not in contact with one another during a period when the child could have been conceived, it is assumed that an infant born during the continuation of matrimony or within 280 days of its dissolution is the rightful progeny of the man.

⁵ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, Oxford University Press 2013)

⁶ Indian Evidence Act 1872, s 102

⁷ Vadros Tadros and Stephen Tierney, 'The Presumption of Innocence and the Human Rights Act' (2004) 67(4) *Modern Law Review* <<https://doi.org/10.1111/j.1468-2230.2004.00493.x>> accessed 20 June 2024

⁸ *Hasmuddeen v State of Rajasthan* (2024) MANU/RH/0158/2024

⁹ Indian Evidence Act 1872, s 112

Section 114¹⁰ deals with the presumption of the existence of facts, it says that any fact that the court determines to be true may be presumed to exist, taking into account human behaviour, natural phenomena, and public and private business. As per S. 114(h)¹¹, in the event that an individual declines to respond to a query that he is not legally required to answer, the court may presume that the reason for his refusal is that the query is not in his best interest. This clause does not need the presumption; it is only optional.

A landmark case¹² must be taken into consideration in order to comprehend how these provisions interact. In this instance, the respondent claimed that the child was not his because the couple had not been in contact with one another at the time the infant was conceived and he requested a DNA test of the child to prove that the Appellant-wife was in an extra-marital affair. Since the foundational fact of non-access was proved by the husband, the court directed the wife to let the child get a DNA test, here as soon as the foundational fact was established the presumption of legitimacy was lost and now if the appellant-wife refused to follow the orders of the court then under s.114 (h)¹³ the court may presume that she refused to follow the order because it can be unfavourable to her. Here the direction of the DNA test was justified as it was the only way to prove the infidelity and it didn't affect the assumption under s.112.¹⁴

But in another instant case¹⁵, the respondent-husband alleged that his wife was having an extramarital affair and that the second child born to them was from that relationship, here his only proof against his wife's infidelity was that he had call recordings and transcripts which prove that she was in an extra-marital affair, he made no plea of no-access which removed the presumption of legitimacy. Thus, if an order to conduct a DNA test is directed and the wife refuses to comply, then the court may presume that she was in an adulterous relationship but such a case cannot become a precedent. Presumptions made under the section are from the facts, so the facts must be compelling enough to order a DNA test as was in the case of Dipanwita Roy, but in this case, the foundational fact of non-access itself cannot be established as the child

¹⁰ Indian Evidence Act 1872, s 114

¹¹ Indian Evidence Act 1872, s 114(h)

¹² *Dipanwita Roy v Ronobroto Roy* (2015) 1 SCC 365

¹³ Indian Evidence Act 1872, s 114(h)

¹⁴ Indian Evidence Act 1872, s 112

¹⁵ *Aparna Ajinkya Firodia v Ajinkya Arun Firodia* (2023) MANU/SC/0148/2023

was born in 2016 and the couple stayed together after that for 3 years and later on in 2020, the respondent sought a divorce based on adultery.

A concurring opinion was also given in this case by Justice V. Ramasubramanian who held that the Indian Evidence Act under s.4¹⁶ defines the words may presume wherein the court has the discretion to presume or disregard a fact, shall presume where the court is mandated to assume a fact and conclusive proof where the court is obligated to take a fact as being conclusive proof and a chance to rebut the same is not provided. S.112¹⁷ is not under the category of may/shall presume but it places the legitimacy of a child as conclusive proof however, this is defensible if non-access is proved when the child is conceived. Once the party is able to prove non-access then the immunity under s.112 vanishes. Now coming to the part as to why there can't be an interplay between s.112 and 114¹⁸ is that, under s.114¹⁹, if a person refuses to follow an order, it is assumed they did so because it's unfavorable on their part, but the unfavourability could be connected to the case which causes loss to them or because it is nowhere connected to their case. In the current case, if the wife refuses to follow the direction of the court in case a DNA test is ordered then that cannot be used against her by taking s.114 into account as the appellant here has the role of a mother as well as a wife, as a wife to prove her fidelity she should let the child take the DNA test but as a mother to protect her child she may refuse to carry on with the test and such a decision must not backfire at her. Thus, the court refused to give out an order directing a DNA test as the respondent had never proved the foundational fact to vanquish the benefit under s.112²⁰.

OFFENCES UNDER NDPS

India is surrounded by the 'Golden Crescent' and the 'Golden Triangle' which are the world's largest suppliers of 'narcotic and psychotropic substances'. After India acceded to the

¹⁶ Indian Evidence Act 1872, s 4

¹⁷ Indian Evidence Act 1872, s 112

¹⁸ Indian Evidence Act

¹⁹ Indian Evidence Act, s 114

²⁰ Indian Evidence Act, s 112

Convention on Psychotropic Substances, 1971²¹ the NDPS Act²² was implemented to deal with drug abuse and trafficking in a stricter manner. S. 54 of the Narcotic Drugs and Psychotropic Substances Act, 1985²³ contains the reverse onus clause.²³ The change in the burden only happens after foundational facts have been proved by the prosecution. The foundational facts in this context would be proving possession of the narcotic substance or having the apparatus required to produce such substance. The search for such possession when done must be legal and according to the tenets of s. 42²⁴ and 50²⁵ of the Act, illegal searches do not bring in the presumption of guilt, thus the ‘burden of proof’ does not change for an accused person just because their case is registered under this Act.

In a landmark case²⁶, the legality of s.54²⁷ was challenged, here the accused an Afghan national alleged that the clause was against the usual tenet of criminal law and that the ‘presumption of innocence’ is a basic human right. The court’s point of view was that where necessary such burden can be shifted and it wouldn’t violate ‘Articles 14 and 21 of the Constitution²⁸’ as it’s the State’s accountability to protect its public. The ‘reverse onus clause’ is not only present in special acts but is there even in the Penal Code under sections 113-A and 113-B²⁹. Moreover, the burden only shifts if the prosecution is able to prove the possession of the contraband ‘beyond reasonable doubt’, so the burden of proof upon the accused is not as strict as it is upon the prosecution, all that the accused has to prove is that there is a preponderance of possibilities of his innocence. Additionally, it is an onerous task to combat the illegal trade of narcotic substances and in such cases, if such a burden didn’t lie upon the accused then they would all

²¹ Law Commission of India, *One Hundred Fifty-fifth Report on Narcotic Drugs and Psychotropic Substances Act, 1985* (1997)

²² Narcotic Drugs and Psychotropic Substances Act 1985

²³ Narcotic Drugs and Psychotropic Substances Act 1985, s 54

²⁴ Narcotic Drugs and Psychotropic Substances Act 1985, s 42

²⁵ Narcotic Drugs and Psychotropic Substances Act 1985, s 50

²⁶ *Noor Aga v State of Punjab* (2008) 16 SCC 417

²⁷ Narcotic Drugs and Psychotropic Substances Act 1985, s 54

²⁸ Constitution of India 1950

²⁹ Indian Evidence Act, s 113

walk free. Thus, both sections 35³⁰ and 54 of the NDPS act³¹ are not ultra vires in the Constitution of India.³²

ANTI-CONVERSION LAWS

Anti-conversion laws pertaining to Madhya Pradesh, Uttar Pradesh and Uttarakhand are analyzed to know if the provision under these laws requires a reverse onus clause or not. Since the laws in all three states are similar in nature only the UP Prohibition of Unlawful Conversion of Religion Bill 2021³³ is scrutinized. The intention behind this law seems to be the fear of Indian culture getting eradicated, the fear mainly exists to impede the conversion of Hindus to other religions. The bill was passed in the Uttar Pradesh Assembly amid protests and the UP Government defended its act by stating that community interest prevails over an individual's right to choose a life partner.³⁴

Section 12³⁵ of the bill states the following, The burden of proof as to whether a religious conversion was not effected through misinterpretation, force, undue influence, coercion, allurements or by any fraudulent means or by marriage, lies on the person who has caused the conversion and, where such conversion has been facilitated by any person, on such other person³⁶. For the burden of proof to shift onto the accused, certain foundational facts must be corroborated by the prosecution, but a plain reading of s.12 of the bill indicates that such foundational facts are immaterial. Here the accused is left to defend himself by providing negative evidence that he did not commit the crime. The provision creates a situation wherein a mere allegation of conversion by the means mentioned in the section would change the burden of proving otherwise onto the accused.³⁷

³⁰ Narcotic Drugs and Psychotropic Substances Act 1985, s 35

³¹ Narcotic Drugs and Psychotropic Substances Act 1985, s 54

³² *Noor Aga v State of Punjab* (2008) 16 SCC 417

³³ The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance 2020

³⁴ Pankaj Shah, 'Unlawful conversion bill passed in UP assembly by voice vote amid protest' *The Times of India* (25 February 2021) <<https://timesofindia.indiatimes.com/city/lucknow/unlawful-conversion-bill-passed-in-assembly-by-voice-vote-amid-protest/articleshow/81199678.cms>> accessed 10 March 2024

³⁵ The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance 2020, s 12

³⁶ The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance 2020

³⁷ Juhi Gupta, 'Interpretation Of Reverse Onus Clauses' (2012) 5(49) NUJS Law Review <<https://docs.manupatra.in/newslines/articles/Upload/9B9D0261-BB3F-477F-AB44-08FE66780A93.pdf>> accessed 20 June 2024

The reverse onus clause can be justified in the interests of the public if the offence impacts the society at large but a person giving up his birth religion to convert to another doesn't seem so grave an offence that it affects the societal norms. India indeed has seen several mass conversions and there were temporary measures taken in the form of the Public Safety Act in 1947³⁸ to curb that but it was dropped once the need was exhausted. Such special and temporary measures are justified but the current bill tends to infringe the privacy and liberty of the citizens which cannot be justified. There is also no tangible evidence that there are conversions that are affecting society so gravely that the fundamental criminal law principle can be let go.

According to research conducted by the Pew Research Center report³⁹, religious conversions are rare in India which proves that there was no requirement of the clause in the provision, which was required in the case of NDPS and Dowry death offences as these are cases where special knowledge is present which is only known to the accused and it is near to impossible for the prosecution to prove such knowledge. Moreover, the charges under this bill are cognizable and non-bailable and thus the need for proving the foundational facts must be a requirement before the burden of proof passes on to the accused.

CONCLUSION

Reverse onus clauses have been challenged on multiple occasions, claiming that they violate the accused's inherent human rights and freedoms. Criminal trials are rigorous in India and the odds here are already against the accused, hence it would only be fair if the presumption of innocence prevails to provide the accused a fair trial.⁴⁰ Notably, though, is that the presumption of guilt is never endorsed in the Evidence Act or any other penal statute.⁴¹ Based on the fact that the prosecution must first construct the foundational facts, which constitute the prima facie case, before the burden of proof shifts to the accused, it can be deduced that the reverse onus clause

³⁸ Public Safety Act 1947

³⁹ Jonathan Evans and Neha Sahgal, 'Key findings about religion in India' (*Pew Research Centre*, 29 June, 2021) <<https://www.pewresearch.org/short-reads/2021/06/29/key-findings-about-religion-in-india/>> accessed 20 June 2024

⁴⁰ Gupta (n 37)

⁴¹ *Hasmuddeen v State of Rajasthan* (2024) MANU/RH/0158/2024

is justified by law and does not appear to violate Articles 14⁴² and 21 of the Constitution⁴³. Thus, sometimes for the greater good, the rights of an individual can be foregone.

⁴² Constitution of India 1950, art 14

⁴³ Constitution of India 1950, art 21