

# Drug Control Policy in India: A Socio-Legal Analysis

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## Abstract:

NDPS Act, exercising control over narcotics and psychotropic substances, is a response to the International commitments to which India is a party. It also reflects the sincerity to the constitutional mandate provided under Article 47. The objective of the Act is to control the supply and eradicate problematic drug use while widening its scope by promoting it for “*scientific and medical purpose*”. To achieve the objectives, the Act is predominantly penal with reverse onus principle. The Act also provides for the reformatory approach towards the consumers of drugs, but, their interaction with the criminal justice system is inevitable, as possession is a *sine qua non* for consumption. Thus, the journey towards reformation starts through the criminal justice system and in the way they come in contact with different actors of law enforcement- the police, judiciary and correctional personnel. The enforcement of narcotic and psychotropic laws leads to criminalisation of drug users and ultimately, treatment, rehabilitation and the goal of good health and wellbeing remain unrealised. In view of the theme “Better Knowledge for Better Care”,<sup>2</sup> this paper is an attempt to observe how criminal justice system approaches the “Crime” of drug use. To this end, the decisions of apex court will be taken into account to improve understanding of the problem for countering its negative impacts.

**Keywords:** Addicts, Drugs, Drug Policy, Harm Reduction, Narcotics and Psychotropic Substances.

## Introduction:

Explosive increase in drug production, trafficking and use of almost all types of illicit drugs is an ever-growing international issue. Despite enormous efforts of international and national institutions to counter the problem, the drug markets have proved to be resilient. The scale of the problem can be gauged from the fact that prevalence of drug use has increased by 30% from what it was in 2009, with around 269 million people aged 15 to 64 years or 5.3% of the population having engaged in such behaviour during the last year.<sup>3</sup> The estimated statistics also points to 167,000 deaths related to drug use over the same period. The prevalence varies among the countries but does not show any sign that countries with stringent policies have lower rates of use than those having liberal regimes.<sup>4</sup> In spite of

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<sup>2</sup> World Drug Report, 2020, UNODC.

<sup>3</sup> Executive Summary Impact of Covid-19 Policy Implications, World Drug Report 2020, UNODC, UN.

<sup>4</sup> Ibid.

the fact that we lack proper evidence regarding effectiveness of punitive drug laws to significantly deter drug use, criminalisation remains the main weapon in the 'war on drugs.'

### Indian Position on Drug Control:

Relying on its international commitments<sup>5</sup> and constitutional mandates<sup>6</sup> that put forward the objectives of making narcotics and psychotropic substances available for medical and scientific use and also restricting the availability and use for non-medicinal and non-scientific purpose,<sup>7</sup> NDPS Act, 1986 was enacted with the two-pronged objectives. This purpose is ruminated in the NDPS Act, 1986, which enacted a policy of "prohibition, control and regulation" over narcotic and psychotropic substances. This is reflected in Section 8 of the Act that criminalises production, manufacture, possession, sale,<sup>8</sup> purchase, transport, use, consumption, import, export etc. There are two exceptions provided to the general rule:

- a). If they are carried out for medical and scientific purposes in manner and extent as provided in the Act, and;
- b). In case where license, permit or authorisation is needed, then, in accordance with terms and conditions of such license, permit or authorisation.<sup>9</sup>

Thus, implying that possession of contraband drugs is not *ipsofacto* illegal but, its legality is determined at the anvil, whether it is permitted and also within the set limits as provided under the law. In other words, two stipulations are necessary to prove the legitimacy of the drug-related activity:

- a). Legality of purpose for the drug is sought<sup>10</sup>, and;

<sup>5</sup> India is party to International Drug Conventions namely, Single Convention on Narcotic Drugs, 1961; The Convention of Psychotropic Substances, 1971, and; The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

<sup>6</sup> Article: 47 of the Constitution of India: Duty of State to Raise the Level of Nutrition and the Standard of Living and to Improve Public Health: "... to bring about prohibition of the consumption, except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health".

<sup>7</sup> Despite the strong support to the limitation of drug use to medical and scientific purpose they are not defined in the Conventions.

<sup>8</sup> Clause 4(1) of the principle order which prohibits manufacture, trade and commerce, possession and consumption of controlled substance in Schedule A has been amended to include online sale. No person can mediate in the sale/purchase through website, social media or in any other manner of any controlled substance included in Schedule-A, without a unique registration number in Form-A, issued by the Zonal Director of the Narcotics Control Bureau. The Ministry of Finance in its notification dated 14th October 2019, has issued Narcotic Drugs and Psychotropic Substances (Regulation of Controlled Substances) Amendment Order, 2019 to further amend the Narcotic Drugs and Psychotropic Substances (Regulation of Controlled Substances) Order, 2013.

<sup>9</sup> See Section: 8 of the NDPS Act, 1986.

<sup>10</sup> Like medical and scientific purpose and also for additional purposes in cannabis and coca, see Section: 13 and Section: 14, NDPS Act.

b). Confirmation with the standards and manner provided in the Act and other corresponding rules provided thereunder.

So, it can be concluded that, it is not the drug but the related activity that determines its legality.

The Court in the case of, *Union of India vs Sanjeev Deshpande*<sup>11</sup> stated that “legitimate purpose alone cannot be enough to legitimise the activity.”

### **Sentencing under the NDPS Act:**

The NDPS Act, that provides for stringent provisions for control and regulation of narcotic and psychotropic substances came to much public eye after narcotic angle to Sushant Singh Rajput’s death resulted in Actor Rhea Chakraborty’s arrest by NCB for allegedly procuring drugs for the late actor. In case of *Rhea Chakraborty vs The Union of India (Through) (1) Intelligence Officer, Narcotics Control Bureau, Mumbai (2). State of Maharashtra*<sup>12</sup>, the bail of the actor was initially rejected prima facie on the ground that the NDPS Act incorporates stringent provisions through strict liability which means no intention is required to commit the crime.

However, the strict liability principle as articulated in *Rayland vs Fletcher*<sup>13</sup> is not supported by the provisions of the NDPS law<sup>14</sup> or by the judicial pronouncements. In the case of *Mohan Lal vs State of Rajasthan*<sup>15</sup>, the court said that possession could mean physical possession with animus for the purpose of Section 18. Thus, stating that mental intent is the preliminary and important element to show and establish possession.

In yet another case of, *Manzoor vs State of Jammu and Kashmir*<sup>16</sup> the court stated that to attract punishment under NDPS Act, the possession of drugs must be a *conscious possession*.<sup>17</sup>

Thus, from the above cases and law it can be said that the results would have differed had the offences been the ones requiring no fault liability.

This assumption of requirement of intention or *mens rea* can be gathered from Section 35 of the NDPS Act which provides for “*presumption of mental state*”. Thus, when a person is in possession of contraband articles, *mens rea* is presumed which can be rebutted by the accused by proving lack of intention for committing the offence. The Supreme Court in case of *Mohan Lal vs State of*

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<sup>11</sup> (2014) 13 SCC 1

<sup>12</sup> Criminal Bail Application (Stamp) No. 2386 of 2020 Pronounced on: 07.10.2020, Bombay HC.

<sup>13</sup> *Rayland v Fletcher* L.R. 3H. L. 330.

<sup>14</sup> Exception under Section 8 and number of activities regulated by Central or State NDPS Rules under Section: 9 and 10 of the NDPS Act, supports the argument.

<sup>15</sup> (2015) 6 SCC 222

<sup>16</sup> Criminal appeal number 9/2011, IA (Cr) No 352/2011, decided on June 28, 2013 J &K HC. <https://www.casemine.com/judgement/in/56b48ccb607dba348ffede9>

<sup>17</sup> For Similar celebrated cases on the issue see, *Ram Singh vs Central Bureau of Narcotics*, (2011) SCC (cri) 181; *Alakh Ram vs State of UP* (2004)1 SCC 766.

Rajasthan<sup>18</sup> stated that, “conscious mental state is necessary and that is the reason for enacting Section 35 of the NDPS Act.”

The principle of *onus probandi* which as a general rule is on the prosecution, but, in case of NDPS Act, Section 54 provides for reverse burden on the accused. It states that, “*the presumption is that the person has committed an offence when he is found in possession of the contraband substance unless it is otherwise proved by the accused*”. So, it can be said that legality or illegality is determined by the activity related to the drug. In court’s dicta as stated in *Radhakishan Parashar vs State*,<sup>19</sup> it is said that, “*The prosecution has to prove that that accused was in possession of the substance not about the illegality of it.*”

In the case of *Noor Aga vs State of Punjab*<sup>20</sup>, the ratio decidendi is reflected as, “*The accused has the option of proving that he has no mental intent for the offences charged as per Section 35. Further, according to Section 54 NDPS Act the burden to proving he was not in possession of the drugs is upon the accused.*”

In *Madan Lal vs State of HP*<sup>21</sup>, the court held, “*under NDPS Act, once possession is established, the person who claims that it was not a conscious, has to establish it as recognised under Section 35 and Section 54 of the Act which gives a statutory recognition of this position because of the presumption available in law.*”

Thus, the accused in case of drug-related offences is presumed guilty if accused cannot provide sufficient evidence to counter prosecution’s case of illegal possession. In addition, drawing attention towards non confirmation of the mandatory provisions that provide procedural safeguard to the accused under the Act can be damaging to the prosecution case.<sup>22</sup> Thus, providing for reverse burden of proof does not leave the accused defenceless in the court of law.

In, *Toofan Singh vs State of Tamil Nadu*<sup>23</sup> the apex court held, “*In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice*”.

### **“Crime” of Narcotic and Psychotropic Substance Use:**

<sup>18</sup> (2015) 6 SCC 222.

<sup>19</sup> 1988 Cri. L. J. 17,18

<sup>20</sup> (2008) 16 SCC 417

<sup>21</sup> (2003) 7 SCC 645 at 472, paras 26-27.

<sup>22</sup> Baldev Singh vs State of Punjab (2015) 17 SCC 554; Vijaysinh Chandubha Jadeja vs state of Gujrat AIR 2011 SC 77; Arif Khan @ Agha Khan vs The State of Uttarakhand 2018 18 SCC 380.

<sup>23</sup> SLP (Cri) No 1202 of 2017 decided on October 2020.

Returning to set of established NDPS law as it stood in 1986, punishments of minimum of 10 years RI and fine were prescribed for most of the offences except for:

- a). Offences involving ganja and cultivation of the cannabis plant (5years imprisonment and 50,000 fine);
- b). Section 27 that prescribed punishment for 6 months to 1 year of fine or both for consumption (depending on drug) or illegal possession of small quantity of the drugs, in which case proof for intended personal use and not for sale or distribution was required.

Despite predominantly penal approach, the beneficial provision imposing lesser penalty, the persons caught with possession of small quantity hardly benefited from it as the requirement for the proof of personal use would amount to admitting the guilt of possession and risking conviction.

In some cases, though delayed, but some relief was provided by the courts raising doubt regarding sale of drug recovered in small quantity. One of such case is *Raju vs State of Kerala*<sup>24</sup> in which the court questioned whether small quantity of drug worth Rs 25 found in possession of the accused could have been intended for sale or distribution. Similarly, in *P.P Beeran vs State of Kerala*<sup>25</sup> court expressed its anguish that accused suffered long period of incarceration for possession of small quantity while granting relief in the case.

Taking note of these harmful consequences, the legislature decided to put an end to the requirement of proof of personal use for lesser punishment, thus extending protection of law. The NDPS (amendment) Act 2001, provided for graded punishments based on the quantity of drug seized from the possession of the person. Lenient sentencing under the Act provided:

- a). “Imprisonment up to 6 months and or fine of Rs 10,000”, and;
- b). “Diversion to treatment under Section 39 and Section 64A to anyone caught with small quantity of drugs.”

The amendment provided that range of punishment varies according to quantity of drug seized but without providing the criteria to determine the amount. In case of *Ouseph vs State of Kerala*<sup>26</sup> and *E. Michael Raj vs Intelligence Officer Narcotic Control Bureau*<sup>27</sup>, the court put forth the rule that it should be the purity of the drug and not the whole content seized that should determine the quantity of substance for fixing of punishment.

Thus, it gave courts a wide discretion to punish offenders in possession of intermediate drug quantity. However, this was not digested very easily by the government and a notification was issued so as to take the total amount of drug seized into consideration (actual drug+ inert material)<sup>28</sup> while dealing

<sup>24</sup> *Raju @ Salam vs State of Kerala* (1999)4 SCC 725

<sup>25</sup> 2001 cri. L. J 3281

<sup>26</sup> (2004) 4 SCC 446

<sup>27</sup> (2008) 5 SCC 161

<sup>28</sup> Notification through SO 2941 (E), dated 18 Nov 2009,

with the quantity involved in the case. The cases that followed, took total amount into consideration.<sup>29</sup>

In NDPS (Amendment) Act, 2014 did not allow to incorporate the provision for the drug quantity to be measured by the total weight of the drug seized.<sup>30</sup> However, the Supreme Court recently in *Hira Singh and Anr v Union of India and Anr*<sup>31</sup> relied on previous decisions and notification of 2009, but did not consider the reasons stated in parliamentary debate for not incorporating it in 2014 Amendment, settled the law by stating that while deciding on whether the seized substance amounts to “small quantity” or “commercial quantity”. “the weight of the neutral material should be taken into consideration along with the weight of the offending drug.”

Following the ratio of this case may curtail the discretion of the courts in sentencing but, on the other hand, it may lead to making more potent drugs follow in the market.

On the manifesto of reducing the sentence for drug users under Section 27 of the Act<sup>32</sup>, the punishment under the NDPS (Amendment) Act, 2014 stood enhanced for the small quantity of drug involved from 6 months to one year RI. Thus, violating the principle of ultima ratio and principle of proportionality, a complete misturn.

### Protection from Prosecution:

As a measure to reduce demand of drugs, NDPS Act supports treatment and rehabilitation of drug users as an alternative for imprisonment<sup>33</sup>. So, the people who are charged for consumption of drugs can claim immunity from prosecution and instead undergo treatment. Needless to say, that it being a beneficial provision, must be interpreted liberally. However, the court in, *Shaji vs Kerala State*<sup>34</sup> stated that for claiming the benefit under Section 64A, the user has to establish as an addict rather than an occasional user and the quantity in question must be small quantity. In *Farden Khan vs Union of India*,<sup>35</sup> the court denied immunity as the applicant did not fall under the definition of “Addict” as defined under Section 2 (i) of the NDPS Act.

Thus, there seems to be no concern to encourage people who use drugs to come forward for treatment, instead they have to face hardship of long trials.

### Conclusion:

<sup>29</sup> Harjit Singh vs State of Punjab 2016(1) SCC 315.

<sup>30</sup> Recommendation in favour of total drug content were not accepted and were not included in the Amendment Act of 2014.

<sup>31</sup> Criminal appeal number 722 of 2017 decided on 22-april 2020. [https://main.sci.gov.in/supremecourt/2014/6909/6909\\_2014\\_31\\_1505\\_21810\\_Judgement\\_22-Apr-2020.pdf](https://main.sci.gov.in/supremecourt/2014/6909/6909_2014_31_1505_21810_Judgement_22-Apr-2020.pdf)

<sup>32</sup> NDPS (Amendment) Bill 2011.

<sup>33</sup> Section: 64 A of the NDPS Act, 1986.

<sup>34</sup> 2004 (3) Kerala Law Times (KLT) 270

<sup>35</sup> 2007(109) Bom LR 358

Drug control policy implies the notion that demand for drugs is stamped out permanently. In reality, the success of current state of drug control is measured by number of seizures and arrests rather than trying to limit harm caused by drug use. Though NDPS Act provides for the treatment of drug “addicts” which is consistent with health and human rights standards yet the coercive and punitive arm is required to achieve it. Evidences suggest that ‘drug use is not responsive to coercion and penalties and criminalisation brings its own pathologies.’<sup>36</sup> Prosecution and criminalisation is not applied equally to all those who use drugs. These disparities challenge the notion of equality before the law and fosters a sense of alienation, and may undermine the respect for the law. The need is to develop a strategy which is problem oriented rather than focusing on symptoms of the disease by placing considerable value on preventive measures that are independent of criminal justice system. One of the ways can be by reducing the harm that users experience per unit consumption as its legitimacy for the medical and scientific purpose cannot be understated.

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<sup>36</sup> D. Garland, *The Culture of Control*, Oxford: Oxford University, 2001; M. Shiner, *British Drug Control Policy and the Modern State: Reconsidering the Criminalisation Thesis*, *Journal of Social Policy* 42(3), 623-643, 2013.